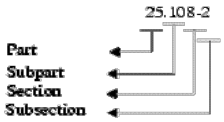
DOE Acquisition Guide FY2017 Version 3

FAR ARRANGEMENT OF REGULATIONS.
(a) General. The FAR is divided into subchapters, parts (each of which covers a separate aspect of acquisition), subparts, sections, and subsections.



The Guide is intended to serve as a primer on various acquisition issues, and may not present lengthy discussion on every subject. Users are encouraged to consult other material that is referenced in each section of the Guide for supplemental information.

NOTE: "Senior Procurement Executive" as used in the Acquisition Guide refers to the Director, Office of Acquisition Management. DOE, for non-National Nuclear Security Administration (NNSA) activities, and to the Administrator, National Nuclear Security Administration for NNSA activities. In most cases the Senior Procurement Executive-related authorities of the Administrator, NNSA have been delegated to the Director, Acquisition Management, NNSA.

The Acquisition Guide will be issued and maintained by the Office of Policy and will be amended to add material or to revise existing material as necessary. The DOE Acquisition Guide is updated on a quarterly basis - suggestions for additional topics and revisions to the Guide should be directed to DOE_OAPMPolicy.

ACQUSITION GUIDE - CHANGE LOG FY 2017 Version 3- *Updated September 28, 2017 (Page 1)*			
Chapter	Last Updated	Subject	Summary
48.102	August 2017	Value Engineering In M&O Contracts	This update: (1) revises the chapter number from 48 to 48.102 to align with the FAR, and (2) includes administrative changes.
6.502	September 2017	Competition Advocate Responsibilities	This update: (1) updates the dollar thresholds for Justifications for Other than Full and Open Competition in accordance with FAR 6.304, (2) deletes the Federal Procurement Data System-New Generation (FPDS-NG) coding assistance sheet and screen shots for the FPDS-NG Competition Report, and (3) includes administrative changes.
16.5	September 2017	Multiple-Award Contracts and Governmentwide Acquisition Contracts Including Delivery Orders and Task Orders	This update: (1) deletes information that repeats the FAR or other guidance, and (2) includes administrative changes.
16.102	September 2017	General Guide to Contract Types	This update: (1) deletes information that repeats the FAR or other guidance, and (2) includes administrative changes.
39.203	September 2017	Section 508 Accessibility Program	This update: (1) revises the chapter number from 39.2 to 39.203 to align with the FAR, (2) reorganizes, updates, and streamlines the guidance, and (3) includes administrative changes.
71.3	September 2017	Data Reporting – Quality Management	This update: Modified to include the importance of accurate data reporting quality, meeting Federal & Departmental reporting requirements, ensuring data quality, and reviewing and certifying reported data. DOE Data Quality Plan updated to include DATA Act certification requirements.

ACQUSITION GUIDE - CHANGE LOG FY 2017 Version 3- Updated September 28, 2017 (Page 2)			
Chapter	Last Updated	Subject	Summary
42.703-1	September 2017	Indirect Cost Rate Administration	This update: (1) changes the chapter number from 42.7 to 42.703-1 to align with the FAR, (2) removes references to financial assistance, and (3) includes administrative changes.
19.2	September 2017	Small Business Programs	This update: (1) removes content duplicative of primary references, (2) adds, deletes, streamlines and consolidates content, and (3) includes administrative changes.
13.301	September 2017	Purchase Card Policy and Operating Procedures	This update: (1) changes the chapter number from 13.1 to 13.301 to align with the Federal Acquisition Regulation (FAR), (2) adjusts the dollar threshold to reflect the recent FAR increase to the micro-purchase threshold and (3) includes administrative changes.
71.1	September 2017	Headquarters Business Clearance Review Process	This update: (1) restructures and reformats the document, (2) removes redundant and unnecessary information, and (3) provides renewed emphasis on up-front and early collaboration between field sites and headquarters in order to expedite the Business Clearance Review (BCR) process.
7.0	August 2006	Intergrating Acquisition Planning Processes — An Overview	These chapters have been removed
70.3270	April 2007	Alternative Financing	
39.1	January 2005	Acquisition of Information Resources	

b e te t

CHAPTER 1 - ACQUISITION REGULATIONS SYSTEMS

1 1 t e t S tem r 200

1 102 2 e S re r er rm e e me t r r m 201

1 2 e tr t t t t r t t e p b t e r 2007

tt me t b e September 200

1 S r e t r S Se ret r t e e er September 201

Acquisition Regulations System

Guiding Principles

- Authority is delegated to the maximum practical extent.
- Reviews and approvals are minimized and the layering of review is avoided.
- Participants in the acquisition process work together as a team and are empowered to make decisions in their areas of responsibility.

[Reference: FAR 1; DEAR 901; DOE O 541.1]

Overview

This section discusses the Civilian Agency Acquisition Council, agency acquisition regulations, deviations from the FAR and DEAR, ratification of unauthorized commitments, and Contracting Officers and their representatives.

The Civilian Agency Acquisition Council

The DOE representative to the Civilian Agency Acquisition Council is a staff member of the Office of Procurement and Assistance Policy, within the Headquarters procurement organization, and is appointed by the Procurement Executive. The Office of Procurement and Assistance Policy coordinates with all interested Departmental elements regarding proposed FAR revisions and advocates revisions sought by DOE.

Agency Acquisition Regulations

Acquisition policies and procedures appropriate for regulation are issued in the DEAR by the Procurement Executive. Rulemakings are developed by, or with the concurrence of, the Office of Procurement and Assistance Policy and issued by the Procurement Executive.

Other Directives/Information Vehicles

Implementing procedures, instructions, and guides which are necessary to clarify, implement, or provide supplementary information to the DEAR may be issued by the Procurement Executive and Heads of Contracting Activities (HCA).

The Procurement Executive uses the following vehicles to provide additional acquisition information:

The Acquisition Guide
Acquisition Letters
DOE Orders

Any implementing procedures, instructions, or guides must:

Be consistent with the policies and procedures contained in the FAR and the DEAR.

Not contain material that duplicates, paraphrases, or is inconsistent with the contents of the FAR or the DEAR.

Deviations from the FAR or the DEAR

(This guidance applies to any deviation from the FAR or the DEAR for any contractual action, either M&O or non-M&O.)

What is a deviation to the FAR or the DEAR?

A deviation to the FAR or the DEAR is any change to FAR or DEAR that meets the criteria spelled out at FAR 1.401 (for DEAR deviations, substitute "DEAR" for "FAR" when reading FAR 1.401).

The baseline for determining deviations is the FAR or DEAR, for example, the version of a provision that is prescribed in the FAR or the DEAR at the time the solicitation is issued.

What is not a deviation to the FAR or the DEAR?

The following are not deviations to the FAR or the DEAR.

Local policies and procedures, for example, local clauses, as long as they are not inconsistent with the FAR or the DEAR.

FAR or DEAR provisions and clauses, or modifications thereto, that are otherwise not prescribed for the particular solicitation or contract in which the provisions or clauses will be used, as long as they are not inconsistent with prescribed FAR or DEAR provisions, clauses, or policies. Provisions and clauses prescribed in the FAR that have been modified in accordance with FAR 52.104.

Provisions and clauses prescribed in the FAR with their alternate(s) in accordance with FAR 52.105.

What is the Department's policy for FAR and DEAR deviations?

While the Department must treat all its contractors consistently and fairly--creating a bias for uniformity in solicitations and contracts--it cannot ignore special needs or innovations that bring greater effectiveness to the acquisition process.

To strengthen the deviation process and provide uniform and consistent application of DOE policies and procedures, the guidance below constitutes our internal Departmental procedures for obtaining approval of FAR or DEAR deviation requests.

Previous approval of the same, or a similar, deviation request remains effective only for the period identified in the approval of the deviation request. Each new request for deviation must be supported by the facts of the instant acquisition.

Who can authorize FAR and DEAR deviations?

The Procurement Executive.

The general rule is that the Procurement Executive or his or her designee must approve any request to deviate from the FAR or the DEAR.

The Head of a Contracting Activity.

One exception to the general rule is that the Head of a Contracting Activity may approve a request to deviate from the DEAR, but only if it is:

• not for a facility management contract, that is, a M&O or M&I contract.
• not a deviation from cost principles or cost accounting standards.
• not a deviation from contract reform clauses (See Attachment A to this Guide chapter).
• within the Head of a Contracting Activity's delegated dollar authority (which is based on the value of the contract, <u>not</u> the value of the instant acquisition).
• a deviation involving patents, data, and copyrights for which the Field Patent Counsel has obtained the concurrence of the Department's Patent Counsel (this approval authority applies without regard to either the Head of Contracting Activity's delegated authority or whether the deviation is to a facility management contract).
• a deviation from standard financial management clauses for which the Field Chief Financial Officer has obtained the concurrence of the Department's Chief Financial Officer (this approval authority applies without regard to either the Head of Contracting Activity's delegated authority or whether the deviation is to a facility management contract; see Attachment B to this Guide chapter for the list of standard financial management clauses).
• an administrative deviation; that is, a non-substantive change that does not alter the obligations or requirements of either the contractor or the Government in any way such as correcting a typographical error, an improper punctuation mark, an incorrect cross reference, or an outdated citation; an example would be replacing that part of a DEAR clause that cites an executive order

that has just been replaced with a new executive order cite (this approval authority applies without regard to either the Head of Contracting Activity's delegated authority or whether the deviation is to a facility management contract).

The Director of the Office of Procurement and Assistance Policy.

Both the Director of the Office of Procurement and Assistance Policy, for non-NNSA activities, and the Director of the Office of Procurement and Assistance Policy, NNSA, for NNSA activities, may authorize administrative deviations to the DEAR.

How are deviations that the HCA can approve processed?

Follow the substance of this guidance for deviations submitted to the Procurement Executive, utilizing similar justification and documentation.

Provide to the Office of Procurement and Assistance Policy a copy of each approved deviation and supporting information.

How are deviations that must be submitted to the Procurement Executive processed?

Submit a complete deviation request package to the Office of Contract Management. Include the signature of your HCA and the concurrence of your Field Counsel.

Include the concurrence of your Field Chief Financial Officer for deviations from standard financial management clauses (See Attachment B).

Include the concurrence of your Field Patent Counsel for deviations involving patents, data, or copyrights.

Submit the package well in advance to allow for an appropriate amount of time for the Headquarters review. This also will allow sufficient time for you to negotiate an alternative position with the contractor if your request is not approved.

The time required to obtain approval of deviations depends on such factors as the number of deviations requested, the complexity of the issues, and specific circumstances (new contract award, annual fee negotiation, contract change order, etc.). You should submit deviation requests as soon as possible after identifying a need, but at least 120 days (60 days for a DEAR deviation request) before the planned execution date of the affected contract or modification. If your request will require expedited review, contact the Office of Contract Management as soon as possible so that Office can assist you in obtaining the extra support you need in a timely manner. Submit supplemental information in writing. (Oral communications are permitted and encouraged, but the decision to approve or disapprove will rest primarily on the written record.)

What information is included in the request package?

• An executive summary of the rationale for each requested deviation. (For a deviation with an extremely brief rationale, you do not need to prepare an executive summary.)

• Identification of all approved deviations included in the package (for example, those authorized by the Director of the Office of Procurement and Assistance Policy through Acquisition Letters or other forms of communication).

• Identification of all clauses affected by the deviation request.

• A statement that, other than the identified approved deviations and the identified requested deviations, there are no other deviations relating to the contractual action (i.e., no local clause included in the contractual action should meet the criteria at FAR 1.401 for a deviation).

• Period of time each deviation is needed.

• Solicitation, contract, offeror, contractor, etc., affected by the deviation.

• Specific FAR or DEAR policy, procedure, provision, clause, etc. from which each deviation is desired (include number, title, alternate, etc.).

• For each requested deviation, identification of the specific words to be deleted or added by a line-in/line-out comparison of the policy, procedure, provision, clause, etc. prescribed by the FAR or DEAR to the proposed language.

• For each requested deviation, whether the deviation was requested before. If it was, provide the complete history of the prior request, including past approvals and uses of the deviation. For each requested deviation, a complete justification for using the proposed policy, procedure, provision, clause, etc. instead of the standard policy, procedure, provision, clause, etc.; include an explanation of the problem the deviation would solve, the benefit the Government would gain, and any cost the Government would incur (if no explanation applies, list "N/A").

What is the role of the Office of Contract Management?

Provides assistance to contracting activities before they initiate the formal deviation approval process and throughout the deviation approval process.

Assesses the merit of any deviation request and recommends appropriate action to the Procurement Executive.

Consults with the Office of Procurement and Assistance Policy on issues related to cost accounting standards, cost principles, and other policy areas.

Provides technical assistance to the Office of Procurement and Assistance Policy during consultations with the chairperson of the Civilian Agency Acquisition Council on class deviations to the FAR.

Obtains the concurrence of the Department's Chief Financial Officer before recommending approval of a deviation to a financial management policy, procedure, solicitation provision, or contract clause.

Obtains the concurrence of the Department's Patent Counsel before recommending approval of a deviation from the FAR or the DEAR involving patents, data, or copyrights.

Obtains the concurrence of the Department's Headquarters Procurement Counsel, as appropriate, before recommending approval of a significant, substantial deviation.

Provides the Office of Procurement and Assistance Policy a copy of each approved deviation request.

What is the role of the Office of Procurement and Assistance Policy?

Aids the Office of Contract Management in providing assistance to contracting activities before they initiate the formal deviation approval process.

Supports the Office of Contract Management throughout the deviation approval process, providing assistance in determining whether requests for deviations are appropriate.

Issues, on the behalf of the Procurement Executive, administrative deviations to the DEAR pending appropriate rulemakings.

Consults with the chairperson of the Civilian Agency Acquisition Council on class deviations to the FAR.

Analyzes all approved deviation requests provided by the Office of Contract Management or Contracting Activities, collects data, monitors trends, determines when changes to the FAR or DEAR are appropriate, and initiates actions for FAR and DEAR changes when necessary.

Ratification of Unauthorized Commitments

The following procedures are used for ratification of any unauthorized commitment:

Whenever it is discovered that any person is performing or has performed work as a result of an unauthorized commitment, the contracting officer advises that person that the work is unauthorized and performance is at the person's own risk.

The Government representative who made the unauthorized commitment furnishes the contracting officer, through the Director of the cognizant Program Office at the contracting activity, or comparable official, all records and documents concerning the commitment and a complete, written statement of facts, including, but not limited to, a statement as to why authorized procurement procedures were not used, why the contractor was selected, a list of other sources considered, description of work to be performed or products to be furnished, estimated or agreed upon contract price, citation of available appropriations, a statement as to whether the contractor has commenced performance, and status of work. To preclude recurrence, the Director of the Program Office includes in the package recommendations for corrective action. If the Government representative who made the unauthorized commitment is no longer available, appropriate program personnel provide this information to the contracting officer, along with the name of the employee who made the commitment.

The contracting officer evaluates this information, makes a determination with respect to reasonableness of price and recommends whether payment should be made, and forwards the documentation to the HCA.

The HCA is responsible for assuring the implementation and monitoring of a corrective action plan. A copy of each ratification action approved by an HCA, along with supporting documentation, is provided to the Headquarters Office of Contract Management.

For individual unauthorized commitments involving amounts in excess of $25,000, the HCA evaluates the supporting information and, if the HCA concurs, forwards the package to the Procurement Executive.

The Procurement Executive may ratify the unauthorized commitment. When appropriate, concurrence of the Senior Program Official is obtained. The Procurement Executive monitors the implementation of the corrective action plan.

If the Procurement Executive does not ratify the action, the file will be returned to the HCA with an explanation of the decision not to ratify.

If an unauthorized commitment is ratified, the supporting documentation is included as part of the official contract file. If an unauthorized commitment is not ratified, the documentation is maintained for audit purposes as a separate file by the cognizant contracting office.

Selection, Appointment and Termination of Appointment

The DOE system for the selection, appointment, and termination of appointment of contracting officers is established in DOE O 541.1, *Appointment of Contracting Officers and Contracting Officer Representatives*.

Contracting Officer's Representatives

A contracting officer may designate other qualified personnel to be the Contracting Officer's Representative (COR) for the purpose of performing certain technical functions in administering a contract. These functions include, but are not limited to, technical monitoring, inspection, approval of shop drawings, testing, approval of samples, and other functions of a technical nature.

The COR acts solely as a technical representative of the contracting officer and is not authorized to perform any function that results in a change in the scope, price, terms or conditions of the contract.

Under limited conditions, non-Government personnel may be appointed CORs. These appointments would be made on an as-needed basis and would not allow the performance of inherently Governmental functions by the COR. The Procurement Executive's approval to appoint non-Government personnel as a COR must be obtained in advance of the designation. DOE O 541.1, *Appointment of Contracting Officers and Contracting Officer Representatives*, establishes the procedures for the appointment of CORs. An individual designated by a contracting officer to be a COR must have completed a minimum of 24 hours of formal education in basic Government procurement or contract administration or have at least one year's experience as a COR at a Federal agency.

All COR designations are to be by name and position title and made in writing by the contracting officer. The COR designation letter also identifies the responsibilities and limitations of the designation. A copy of the COR designation is furnished to the contractor and the contract administration office.

Attachment C is a model COR designation letter for use by contracting officers and may be tailored as appropriate for local use.

Uniform Contract Format

What is the Uniform Contract Format?

The Uniform Contract Format (UCF) is the standard contract format identified in FAR Part 14.201 for Sealed Bidding and FAR Part 15.204 for Negotiation that is required in the generation of solicitations and contracts. The UCF organizes contractual material into four separate parts.

Part I--The Schedule

A ..... Solicitation/contract form.
B ..... Supplies or services and prices/costs.
C ..... Description/specifications/statement of work.
D ..... Packaging and marking.
E ..... Inspection and acceptance.
F ..... Deliveries or performance.
G ..... Contract administration data.
H ..... Special contract requirements.

Part II--Contract Clauses

I ..... Contract clauses.

Part III--List of Documents, Exhibits, and Other Attachments

J ..... List of attachments.

Part IV--Representations and Instructions.

K ..... Representations, certifications, and other statements of offerors or respondents.
L ..... Instructions, conditions, and notices to offerors or respondents.
M ..... Evaluation factors for award.

The FAR exempts several types of contracts from the requirement to use the UCF, including construction, architect-engineer services, subsistence, letter requests for proposals, and contracts specifically exempted by the agency head or designee.

Does the Uniform Contract Format apply to the Department's M&O contracts?

Yes. The Department of Energy has not made a determination to specifically exempt its M&O contracts from the FAR requirement to use the Uniform Contract Format. During its review of existing M&O contracts, the Office of Procurement and Assistance Policy found that the majority of DOE's procurement offices were using the UCF. However, several offices were administering active contracts that have not yet been converted to the UCF. Converting these remaining contracts to the UCF will conform the Department's contracts to FAR practices and will facilitate a more consistent approach in the organization and structure of M&O contracts.

What do DOE Procurement Offices need to do?

All M&O contracts must be converted to the Uniform Contract Format. This may be accomplished at different occasions - such as contract renewal, modification, or re-competition.

Each DOE field office that still has contracts not following the UCF must identify the most opportune time to convert them to the UCF.

Attachment A - DEAR Contract Reform Clauses

Integration of Environment, Safety, and Health into Work Planning and Execution.
Preservation of Individual Occupational Radiation Exposure Records.
Displaced Employee Hiring Preference.
Allowable Costs and Fixed-Fee (Management and Operating Contracts).
Allowable Costs and Fixed-Fee (Support Contracts).
Property.
Insurance--Litigation and Claims.
Cost Prohibitions Related to Legal and Other Proceedings.
Preexisting Conditions.
Make-or-Buy Plan.
Workforce Restructuring Under Section 3161 of the National Defense Authorization Act for Fiscal Year 1993.
Laws, Regulations, and DOE Directives.
Access to and Ownership of Records.
Overtime Management.

Attachment B - Standard Financial Management Clauses

DEAR Clauses:
Accounts, Records, and Inspection.
Obligation of Funds.
Payments and Advances.
Management Controls.
Liability with Respect to Cost Accounting Standards.
Work for Others Funding Authorization.
Financial Management.
Integrated Accounting.

FAR Clauses:

Cost Accounting Standards.
Administration of Cost Accounting Standards.

Attachment C -Model COR Designation Letter

Designation of Contracting Officer's Representative for Contract No. DE-AC-_____ with _____

To: _____

Pursuant to DOE Order O 541.1, *Appointment of Contracting Officers and Contracting Officer Representatives*, and in accordance with the Technical Direction clause contained in the subject contract, you are hereby designated to act as the Contracting Officer's Representative (COR) in relation to the supplies and/or services to be provided under the subject contract. You must, therefore, familiarize yourself with the requirements of the contract and your responsibilities relative to these requirements. Your duties will consist of the following:

A. Monitor Contract Compliance. Ensure that the Contractor complies with all technical requirements of the work defined in the scope of work, including reports, documentation, data, work products, milestone schedules, and deliverables. In this connection, you should:

1. Inform the Contracting Officer (CO) in writing of any performance failure by the Contractor.

2. Inform the CO if you foresee that the contract or any task order will not be completed according to schedule. Your written notice should include your recommendations for resolving the schedule problem.

3. Ensure that the government meets its contractual obligations to the Contractor. This includes, but is not limited to, furnishing any government property and services specified in the contract, and providing timely Government comment on or approval of draft contract deliverables as may be required by the contract.

4. Inform the CO in writing of any necessary changes to the contract or task orders, as applicable, giving a full explanation of the proposed changes. A written request must be processed through the CO to effect any changes in the scope of work, task order, reporting requirements, or any other part of the contract. If the Contractor proposes a change, you are to obtain a written statement to that effect and forward that statement along with your recommendations to the CO. Your request should include the estimated cost of any proposed increase or decrease in the scope of work and the availability of funds. You should ensure that changes in the scope of work, including delivery schedule, are issued by written contract modification by the CO before the Contractor proceeds with the changes.
5. Issue technical direction within the limitations set forth in this designation and in accordance with the Technical Direction clause of the contract. Such technical direction should be in writing. A copy of all technical direction sent to the Contractor will be provided to the CO.

6. Assist the Contractor in interpreting the technical requirements of the contract. Immediately report to the CO in writing all technical issues which cannot be resolved without increasing costs or changing the contract. Also immediately report in writing any issues that cannot be mutually agreed to so that the CO can take action to resolve the issues. Such reports must include the facts pertinent to the issues and the recommended action.

7. Inspect and accept all deliverables within the scope of the contract. Review contract deliverables for unauthorized work.

8. If the contract contains a task ordering clause, recommend approval of task orders to the CO.

9. Inform the CO, in writing, of the need to exercise the contract option, if any, for additional time and/or quantities of units acquired.

10. Complete and return the past performance Contractor Performance Report when requested.

11. Ensure that requirements and policies of FAR 37.104, Personal Services Contracts, are adhered to and that no employer-employee relationship between Government and Contractor employees is created. [Note: The DOE Acquisition Guide, Part 37, provides guidance on support service contracting, a copy of which is available from the CO.]

12. Inform the CO of any potential or evidence of organizational conflict of interest (OCI) problems. [OCI means that because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the Government, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.]

B. Monitor Administrative and Funds Aspects of Contract.

1. Notify the CO immediately of any indication that the cost to the government for completing performance under the contract will exceed the amount stated in the contract or task orders, as applicable.

2. Report any indication that costs are being incurred which are not appropriately chargeable to the contract.

3. Monitor travel under the contract to assure the necessity, number of travelers, and duration are appropriate.

4. Review and certify Contractor's periodic vouchers or invoices for payments in relation to the contract and progress reports to determine whether work accomplished is commensurate to payment requested. Questionable costs should be reported promptly to the CO for appropriate resolution.

C. Property Management (as applicable).

1. Review and comment on the Contractor's request for government-furnished facilities, supplies, materials, and equipment and forward the request to the CO for disposition.

2. Review and comment on the Contractor's request for consent to the purchase of supplies, materials, and equipment, and forward the request to the CO for disposition.

3. Review and comment on the Contractor's lease-purchase analysis or make-buy decisions.

4. Review and comment on the Contractor's submitted property management reports.

D. Assist in Close-out of Contract.

1. Forward a written statement to the CO attesting to the Contractor's completion of technical performance, delivery, and acceptance of all goods and services for which inspection and acceptance are delegated.

2. In accordance with DOE policies and procedures existing upon close-out, provide any required close-out information to the CO; and make disposition of all records and documents pertinent to the administration of the contract which you retained in your capacity as COR during the period of performance.

As a matter of practice, the COR should prepare a written record of meetings, trips, and telephone conversations relating to the contract. Each record and all correspondence relating to the contract should cite the contract number. It is requested that a copy of records or correspondence that you generate or receive relating to the contract be furnished to the CO and all other interested parties having a need to know. The utmost care must be given to restrictions regarding proprietary data, as well as classified and business-sensitive information.

In performing these responsibilities, you are not authorized to redelegate any COR responsibility to others; or negotiate terms or make any agreements or commitments with the Contractor which involve a change in the scope, price/cost, terms, or conditions of the contract. Only the CO is authorized to modify any term or condition of the contract, waive any requirement of the contract, or approve the payment of vouchers.

Please acknowledge acceptance of the COR designation and return one copy to the CO identified below.

ACCEPTANCE OF COR DESIGNATION

_____	_____	_____
Contracting Officer	Name	Date

Guiding Principle

- The Balanced Scorecard (BSC) program ensures that there is an established and consistent approach utilized by Departmental procurement and purchasing organizations in assessing accomplishments, and managing performance of its Management and Operating contracts.

Balanced Scorecard Performance Assessment Program

[References: FAR Subpart 17.6, DEAR 970.0370-1, DEAR 970.4401-1, DEAR 970.4402-2]

1. Summary of Latest Changes

This update revises the applicability of the Balanced Scorecard Program to DOE management and operating (M&O) contracts. Federal procurement offices are encouraged to continue their use of the BSC, however, The Critical Few Program has replaced the BSC for purposes of corporate wide performance assessment of DOE Federal procurement offices.

2. Overview

This section provides guidance and instruction to Departmental contracting personnel regarding the implementation and administration of the Balanced Scorecard procurement performance assessment programs. This program was established in 1998 (Acquisition Letter 98-10, December 8, 1998). Initially, it was used by the Department's federal procurement offices, subsequently expanded to M&O contracts, and recently revised to include only the and M&O contractors since, the federal procurement offices have transitioned to the Critical Few Program.

Under the M&O BSC, contractor peer review teams are utilized. This program was established by a Procurement Evaluation and Re-engineering Team and represents a partnering of Federal and contractor personnel in evaluating the efficiency and effectiveness of contractor purchasing systems. This independent peer review program the most acceptable alternative to the Contractor Purchasing System Reviews for M&O contracts. Contracting Officers, as part of their overall responsibility for oversight of the performance of M&O contractors, including their purchasing activities, are to encourage their contractors to implement the Balanced Scorecard methodology described herein. Use of the Balanced Scorecard is consistent with the contractor's responsibility for developing management control systems that meet the requirements of DEAR 970.0370-1.

3. Understanding the BSC

A complete description of the Balanced Scorecard program can be found in the document entitled "*Balanced Scorecard Performance Measurement and Performance Management Program.*" This document is located at:

http://www.energy.gov/management/downloads/balanced-scorecard-program

Among other business systems, this document explains the business systems assessment program applicable to purchasing offices. It was developed to assist all Department and contractor personnel involved with assessing performance of the Department's M&O contractor purchasing systems. It describes the implementation procedures, evaluation standards, reporting process, and other administrative issues.

4. Responsibility of the Heads of Contracting Activities (HCAs)

As part of the DOE review of contractor management control systems described at DEAR 970.0370-1, the Department's HCAs are responsible for promoting acceptance of the described assessment methodology by their M&O contractors when the contractor purchasing systems are covered by DEAR 970.4402-2.

This guidance will be maintained and updated by the Office of Field Assistance and Oversight Division, MA-621.

Head of Contracting Activity (HCA) Authority, Functions, and Responsibilities

Guiding Principles

- HCA authority creates a fiduciary responsibility on the designee.
- The HCA, as the senior contracting official has ultimate responsibility for ensuring that contract management systems, awards, and administration of contracts and financial assistance are in accordance with laws, regulations, and DOE policies.
- HCA's, in re-delegating authorities, must ensure that individuals are qualified to act on the HCA's behalf.

[Reference: FAR 1.601]

Overview

This chapter provides a summary of HCA authorities based on statute, FAR, DEAR, and DOE Orders. It serves as a general guide to the authorities that may be conferred via a formal delegation of HCA authority from the Department of Energy Senior Procurement Executive. This formal delegation prescribes the specific source and scope of the HCA's authority with respect to that individual's contracting actions. HCA delegations are unique and specific to the individual program or field activity, based on mission, workload, performance and other factors considered by the DOE Senior Procurement Executive.

Objective

The attached tables provide a digest of the responsibilities that accompany the delegation/designation and provide an understanding of the roles, responsibilities, and authorities of the HCA within the overall acquisition framework.

Guidance

Authority delegated to an HCA may be either non-delegable or delegable. Non-delegable authority is one that cannot be re-delegated by the HCA to someone else, e.g., authorities which are deemed of such importance or sensitivity that the personal attention, expertise, or involvement of the HCA is considered necessary. A list of non-delegable authority and references are provided in Table-1.

A delegable authority is one that may be conferred or re-delegated to another individual. When such authority is re-delegated, it does not imply that the delegated authority is relinquished by the HCA. Although certain authorities may be re-delegated, the HCA retains full responsibility and accountability for ensuring compliance with applicable law, regulation, policy and

procedures. Before re-delegating any authorities, the HCA must understand the extent to which such re-delegation is permissible. These limitations and conditions are prescribed in the HCA's specific delegation/designation letter. (A list of potentially delegable HCA authorities and references are summarized or listed in Table-2.)

Although certain statutes, the FAR, DEAR, and DOE Orders provide for the delegation of certain procurement authorities and functions to the HCA, some have been retained by the Senior Procurement Executive. These authorities are listed under Table-3.

References to authorities pertaining to sales contacts may be delegated to an HCA are listed in Table-4.

Table I. Non-Delegable HCA Functions and Responsibilities

A non-delegable authority is one that cannot be transferred by the HCA to another. Typically, the types of authority that cannot be delegated are those which are deemed of such importance or sensitivity that the personal attention, expertise, or involvement of the HCA are considered necessary.

Ratification of Unauthorized Commitments	1. Ratify unauthorized commitments in accordance with FAR 1.602-3(b)(2). Note: DEAR 901.602-3(b)(3) limits the HCA ratification authority only to individual unauthorized commitments of $25,000 or less and states that HCA ratification authority is nondelegable.
Appointment of Contracting Officers	2. As stipulated in DEAR 901.601(a), the HCA is responsible for making formal contracting officer appointments within their respective contracting activity.
Improper Business Practices and Conflicts of Interest	3. Approve the waiver of any general rule or procedure of FAR Subpart 9.5, Organizational and Consultant Conflicts of Interest, if in the Government's best interest in accordance with FAR 9.503 as authorized by DEAR 909.503. Note: This authority may not be delegated below the level of HCA in accordance with FAR 9.503.
	4. FAR Subpart 3.7—Voiding and Rescinding Contract, states that the Government has authority to void and rescind contracts involving criminal or ethical violations related to the acquisition process, specifically, where (1) A final conviction for bribery, conflict of interest, disclosure or receipt of contractor bid or proposal information or source selection information in exchange for a thing of value or to give anyone a competitive advantage in the award of a Federal agency procurement; or (2) the Agency head or designee determined that contractor bid or proposal information or source selection information has been disclosed or received in exchange for a thing of value, or for the purpose of obtaining or giving anyone a competitive advantage in the award of a Federal Agency procurement (18 U.S.C. 218 and 41 U.S.C 423)
	5. FAR clause 52.203-8, subparagraph (a)(2)(ii) stipulates that the Government may rescind a contract with respect to which the HCA has determined, based on a preponderance of the evidence, that a Contractor or someone acting for a Contractor has engaged in conduct constituting an offense punishable under Section 27(e)(1) of the Office of Federal Procurement Policy Act (41 U.S.C. 423). See FAR 3.704, however, which provides that the HCA may consider voiding or rescinding a contract if the Agency Head or designee determines, based upon the preponderance of the evidence, that a Contractor or someone acting for a Contractor has violated Section 27(e) of the Act.
Contract Type	6. FAR 16.601(d)(1)(ii) requires that prior to executing a T&M or Labor Hour contract a determination and finding must be made that no other contract type is appropriate. Approval of the HCA is required when the base plus option periods exceeds three years.
Cancellation of Invitation For Bids (IFBs)	7. Approve a determination to cancel an IFB and reject all bids before award but after opening in accordance with FAR 14.404-1(c) and optionally to approve the completion of the acquisition through negotiation in accordance with FAR 14.404-1(e). These authorities are delegated without power of further delegation by DEAR 914.404-1.

Table I. Non-Delegable HCA Functions and Responsibilities

Mistake In Bids	8. Approve a determination in cases of mistakes in bids alleged after opening of bids and before award and make all administrative determinations regarding withdrawal of bids in accordance with FAR 14.407-3 as authorized without power of further delegation by DEAR 914.407-3.
Waiver of Cost or Pricing Data	9. Waive the requirement for submission of cost or pricing data without power of further delegation in accordance with FAR 15.403-1(c)(4).
Toxic Chemical Reporting	10. Approve a determination that it is not practicable to include the solicitation provision FAR 52.223-13, "Certification of Toxic Chemical Reporting," in a solicitation or class of solicitations without power of further delegation in accordance with FAR 23.905(b).
Protest	11. Provide corrective relief in response to a protest for a procurement with a total value within the HCA's delegated authority, without power of further delegation in accordance with DEAR 933.102(b).
	12. For agency level protest, if FAR 33.103(f) requires that award bewithheld or performance be suspended or the awarded contract be terminated pending resolution of an agency protest, authority to award and/or continue performance of the protested contract may be requested by the Head of the Contracting Activity (HCA), concurred in by counsel, and approved by the Procurement Executive.
	13. In accordance with DEAR 933.103(i), the HCA shall decide agency level protests filed with the contracting officer before or after award shall be decided by the Head of the Contracting Activity except for the following, which shall be decided by the Procurement Executive: (i) the protester requests that the protest be decided by the Procurement Executive, (ii) the HCA is the contracting officer of record at the time the protest is filed, having signed either the solicitation where the award has not been made, or the contract, where the award or nomination of the apparent successful offeror has been made, (iii) the HCA concludes that one or more of the issues raised in the protest have the potential for significant impact on DOE acquisition policy.
	12. As set forth in DEAR 933.103(k), agency level protests shall be decided within 35 days of receipt of the protest with DOE unless a longer period of time is determined to be needed.
	14. Authorize award of a contract after receiving notice from the GAO of a protest being filed directly with the GAO without power of further delegation in accordance with FAR 33.104(b). Prior to issuing such authorization, the HCA shall obtain concurrence from the DOE counsel handling the protest, obtain endorsement from the Senior Program Official, and the approval of the Procurement Executive in accordance with DEAR 933.104(b).
	15. Authorize continuation of contract performance after receiving notice of a GAO protest received after contract award without the power of further delegation in accordance with FAR 33.104(c). Prior to issuing such authorization, the HCA shall obtain concurrence from the DOE counsel handling the protest, obtain endorsement from the Senior Program Official, and the approval of the Procurement Executive in accordance with DEAR 933.104(c).
Labor Standards for M&O Contracts Involving construction	16. Approve a determination that operational or maintenance contracts or work items are "non-covered" by the Davis-Bacon Act as authorized without power of further delegation by DEAR 970.2204-1-1(a)(2).

Table II. Delegable HCA Functions and Responsibilities

A delegable authority is an authority that is able to transfer from one individual. The term does not imply a giving up of authority but, rather, the conferring of authority to another individual to do things that otherwise must be done by the HCA. When a delegation occurs, it does not free the HCA from his or her duty to see to it that performance is properly complied with.

Identified below are functions that the HCA has the authority to delegate, but the level to which it is re-delegated may be limited as is the nature of the re-delegation.

Improper Business Practices and Conflicts of Interest	1. Authorize an individual disqualified from participation on a procurement, due to discussions with an offeror regarding possible employment, to resume participation in the procurement or determine a period of disqualification for that individual in accordance with FAR 3.104-5(c)(2).
	2. Investigate and resolve possible violations of procurement integrity rules in accordance with FAR 3.104-7. The HCA may delegate this authority only in accordance with FAR 3.104-7(g).
	3. Evaluate reports of suspected violations of the "Gratuities" clause, FAR 52.203-3, and report positive findings to the Procurement Executive for disposition in accordance with DEAR 903.203(a).
	4. Where there has been a final conviction for procurement integrity offenses punishable under Subsection 27(e) of the Office of Federal Procurement Policy Act, or if the Agency head or designee has determined that such an offense has occurred, the HCA shall consider declaring void or rescinding a contract, recover the amounts expended under the contract, and recommend the initiation of suspension or debarment proceedings as authorized by, and in accordance with the requirements of, FAR 3.704(c). Note that DEAR 949.101 also requires the HCA to notify the Procurement Executive prior to taking any action to terminate contracts for the operation of Government-owned facilities, any prime contract or subcontract in excess of $10 million, and any contract termination which is likely to provoke unusual interest.
	5. Concur with a Contracting Officer's (CO) determination to reduce fee or amounts payable to a contractor based on a violation by the contractor or any of its employees of a rule, regulation, or order relating to the safeguarding or security of Restricted Data or other classified information, or concur with a CO's determination that no fee reduction is warranted for a particular performance failure(s) that would otherwise warrant a reduction, in accordance with DEAR 904.401(c)(3) and 923.7002(a)(3).
	6. Approve CO conflict of interest plans in accordance with FAR 9.504(c).
	7. Approve resolution of conflict or potential conflict of interest issues in accordance with FAR 9.506(d)(3).

Competition	8. Authorize the use of paid advertisements in newspapers and trade journals in accordance with DEAR 905.502(a).
	9. Approve class justifications for other than full and open competition that are within the HCA's level of delegated authority for certain types of contracts listed at DEAR 906.304.
	10. Appoint a contracting activity competition advocate in accordance with DEAR 906.501.
	11. Appoint a Contracting Activity Ombudsman for task and delivery order contracts in accordance with FAR 16.505(b)(5) as authorized by DEAR 16.505(b)(5). The FAR requires that the person be a senior agency official who is independent of the CO and the DEAR requires that the person appointed be a senior manager.

Table II. Delegable HCA Functions and Responsibilities

Special Items	12. Approve the direct purchase of "special purpose vehicles" for use by DOE and its authorized contractors in accordance with DEAR 908.7101-3.
	13. Arrange to sell, as exchange sales, used motor vehicles being replaced and to apply the proceeds to the purchase of similar new vehicles in accordance with DEAR 908.7101-4(b).
	14. Authorize the purchase of used vehicles based on "special circumstances" in accordance with DEAR 908.7101-5.
	15. Authorize the replacement of materials handling equipment earlier than the date specified in FPMR 41 CFR 101-25.405 and DOE-PMR 41 CFP 109-25.4 in accordance with DEAR 908.7112.
	16. Authorize contractors to obtain electronic data processing tape from sources other than those specified in FPMR 41 CFR 101-26.508-1 in accordance with DEAR 908.7116(b).

Cost and Price	17. Waive the requirement for inclusion of clause 52.214-27, "Price Reduction for Defective Cost or Pricing Data – Modifications – Sealed Bidding," in a contract with a foreign government or agency in accordance with FAR 14.201-7(b)(2).
	18. Waive the requirement for inclusion of clause 52.214-28, "Subcontractor Cost or Pricing Data – Modifications – Sealed Bidding," in a contract with a foreign government or agency in accordance with FAR 14.201-7(c)(2).
	19. Approve a determination that it is in the best interest of the Government to make award to an offeror that did not comply with the requirement to submit cost or pricing data or information other than cost or pricing data in accordance with FAR 15.403-3(a)(4).
	20. Approve a determination that the weighted guidelines method for computing fee is unsuitable and therefore not required for a procurement given "unusual pricing situations" in accordance with DEAR 915.404-4-70-4(c).
	21. Approve a CO's unilateral determination of reasonable price and fee in the definitization of a letter contract in accordance with FAR 16.603-2(c).

Precontract Costs	22. Approve a finding authorizing precontract costs for a period greater than 15 days in accordance with DEAR 931.205-32(b)(1).

Contract Type	23. Approve the use of two-step sealed bidding in accordance with DEAR 914.502(c).
	24. Approve the use of a clause providing price adjustments based on cost indexes of labor or materials in accordance with FAR 16.203-4(d)(2) as authorized by DEAR 916.203-4(d)(2).
	25. Authorize the use of a fixed-ceiling-price contract with retroactive price redetermination in accordance with FAR 16.206-3(d).
	26. Authorize the use of a letter contract in accordance with FAR 16.603-3.
	27. Authorize the use of a multi-year contract in accordance with FAR 17.105-1(a).

Table II. Delegable HCA Functions and Responsibilities

Socio-Economic Issues	28. Appoint a small business specialist for the contracting activity in accordance with DEAR 919.201(c).
	29. Issue a decision in response to an appeal of a CO's rejection of a Small Business Administration recommendation to set aside a procurement for small businesses in accordance with FAR 19.505(b).
	30. Approve a determination to continue a procurement action following receipt of an appeal of a CO's rejection of a Small Business Administration recommendation to set aside a procurement for HUBZone small businesses in accordance FAR 19.1305(e).
	31. Issue a decision in response to an appeal of a CO's rejection of a Small Business Administration recommendation to set aside a procurement for HUBZone small businesses in accordance with FAR 19.1305(e).
	32. Approve a determination to continue a procurement action following receipt of an appeal of a CO's rejection of a Small Business Administration recommendation to set aside a procurement for Service-Disabled Veteran-Owned small businesses in accordance FAR 19.1405(d).
	33. Issue a decision in response to an appeal of a CO's rejection of a Small Business Administration recommendation to set aside a procurement for Service-Disabled Veteran-Owned small businesses in accordance with FAR 19.1405(d).

Labor	34. Designate programs or requirements for which it is necessary that contractors be required to notify the Government of actual or potential labor disputes that are delaying or threaten to delay timely contract performance in accordance with FAR 22.101-1(e).
	35. Approve the award of a contract that will be subject to the Walsh-Healey Public Contract Act in accordance with DEAR 922.608-4(a).
	36. Approve the award of a contract in the absence of a pre-award clearance from the Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) when OFCCP has notified DOE that a pre-award evaluation cannot be completed by the required date, as authorized by, and accordance with the requirements of FAR 22.805(a)(8).
	37. Approve straight time wage rates and overtime rates for laborers and mechanics engaged in work under cost-reimbursement construction contracts performed within the United States in accordance with FAR clause 52.222-16.

Buy American Act	38. Approve a determination that the Buy American Act is not applicable because an article, material, or supply is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality in accordance with FAR 25.103(b)(2). Note: DEAR 925.102 authorizes CO's to make this determination for procurements valued at $1 million and less.
	39. Approve a determination that the Buy American Act is not applicable because a particular construction material is not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality in accordance with FAR 25.202(a)(2). Note: DEAR 925.202 authorizes CO's to make this determination for materials valued at $100K and less.

Table II. Delegable HCA Functions and Responsibilities

Bonds and Insurance	40. Approve the use of bonds in connection with acquiring supplies and services other than those types of bonds recognized under FAR 28.1, in accordance with FAR 28.105.
	41. Approve the substitution of a new surety bond covering all or part of the obligations on a bond previously approved in accordance with FAR 28.106-2.

Contract Financing	42. Approve a determination authorizing the use of advance payments in accordance with FAR 32.202-1 as authorized by, and in accordance with the further requirements of, DEAR 32.402(e)(1).
	43. Authorize the use of progress payments based on a percentage or stage of completion in accordance with FAR 32.102(e)(2) as authorized by, and in accordance with the further requirements of, DEAR 932.102(e)(2).
	44. Requests for "unusual progress payments" pursuant to FAR 32.501-2, which are considered favorable, shall be forwarded by the HCA, in accordance with DEAR 932.501-2(a)(3), with supporting information, to the Procurement Executive, who, after coordination with the Chief Financial Officer, Headquarters, will approve or deny the request.
	45. Approve the use of "unusual" contract financing for commercial item purchases in accordance with FAR 32.202-1(d).

Construction and A&E	46. Approve performance of cost-plus-fixed-fee, price-incentive, or other contracts with cost variation or cost adjustment features concurrently at the same construction work site with fixed-price, lump sum, or unit price contracts in accordance with FAR 36.208.
	47. Waive the requirement to issue presolicitation notices on construction requirements expected to equal or exceed $100,000 that will be awarded using sealed bidding procedures in accordance with FAR 36.213-2(a).
	48. Establish criteria to be considered by the CO when deciding to use two-phase design-build selection procedures, in accordance with FAR 36.301(b)(3)(vi).
	49. Provide general direction to the evaluation board when acquiring architect-engineering services in accordance with FAR 36.602-3.
	50. Establish procedures which ensure that fully qualified personnel prepare and review performance reports when acquiring architect-engineering services in accordance with FAR 36.604(a)(5).
	51. Approve a determination applicable to a fixed-price architect-engineer contract that cost limitations are secondary to performance considerations and additional funding can be expected in accordance with FAR 36.609-1(c)(1).

Property (Including Nuclear Material)	52. Approve an exception allowing the use of cost-reimbursement contracts, or subcontracts, for the fabrication of end items using special nuclear material in accordance with DEAR 945.303-1(b).
	53. Approve an exception allowing the use of cost-reimbursement contracts, or subcontracts, for the conversion or scrap recovery of special nuclear material in accordance with DEAR 945.303-1(c).
	54. Approve a determination that it is necessary to install Government production and research property on land not owned by the Government in such a way as to be nonseverable in accordance with FAR 45.309(a).
	55. Determine the type of plant equipment and dollar threshold for non-Government use of DOE plant equipment and authorize non-Government use exceeding 25% of operational use in accordance with DEAR 945.407.

Table II. Delegable HCA Functions and Responsibilities

Acquisition Planning & Source Selection	56. Approve the use of solicitations for information or planning purposes in accordance with DEAR 915.201(e).
	57. Concur with a Source Selection Official's decision to employ non-Federal evaluators or advisors, including employees of DOE M&O contractors in Source Evaluation Boards, in accordance with DEAR 915.207-70(f)(3).
Data Rights	58. Concur with a CO determination that contractor restrictive markings of data under a contract are not authorized in accordance with FAR 27.404(h).
Protests	59. Review a CO final decision to demand reimbursement of Government costs in a case where a post-award protest is sustained as the direct result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification in accordance with FAR 33.102(b)(3)(ii).
Utilities	60. Approve a determination that a written contract cannot be obtained and that issuance of a purchase order is not feasible for ordering utility services in accordance with FAR 41.202(c)(2).
	61. Approve a determination that use of a GSA area-wide utility contract is not advantageous to the Government in accordance with FAR 41.204(c)(1)(ii).
Contract Administration	62. Approve the delegation of authority to a contract administration office authorizing it to issue orders under provisioning procedures in existing contracts and under basic ordering agreements for items and services identified in the schedule in accordance with FAR 42.202(c)(2).
Value Engineering	63. Approve a determination for the Government not to share collateral savings derived from a value engineering change proposal given that the cost of calculating and tracking the collateral savings will exceed the benefits to be derived in accordance with FAR 48.104-3(a).
Contract Termination	64. Establish settlement review boards for contract terminations as authorized by, and in accordance with the requirements of, DEAR 949.111.
Contractor Use of Government Sources	65. Authorize contractors performing under cost-reimbursement contracts and subcontractors performing under cost-reimbursement subcontracts, where all higher tier contracts and subcontracts are cost-type, to use Government supply sources in accordance with the requirements and procedures in FAR Part 51, as authorized by DEAR 951.102.

Table II. Delegable HCA Functions and Responsibilities

M&O Contracts	66. Authorize a Management and Operating (M&O) contract employee to assume a position requiring DOE access authorization prior to the access authorization being granted in accordance with DEAR 970.2201-1-2(a)(1)(ii).
	67. Prescribe classes of work to which applicability or non-applicability of the Davis-Bacon Act are clear for which the HCA will require no further DOE determination on coverage in advance of the work, as authorized by, and in accordance with the requirements of, DEAR 970.2204-1-1(b)(3).
	68. Determine the period of time which an M&O contract employee must have been separated from work under a DOE contract prior to being eligible to assist in the preparation of a proposal or bid for services which are similar or related to those being performed under the DOE contract, which are to be performed by the contractor or its parent or affiliate organization for commercial customers in accordance with DEAR 970.2704-1(b).
	69. Authorize the direct acquisition and furnishing to M&O contractors of Government furnished property, equipment, material, or services in accordance with DEAR 970.2903-1(b).
	70. Authorize a CO to consider an M&O contractor's request for additional compensation, requesting fee in addition to its normal fee (in the case of a contractor managing and operating a laboratory) or compensation based on actual cost, in accordance with DEAR 970.3102-3-70(a)(3).
	71. Authorize advance payments without interest and approve the findings, determinations and contract terms and conditions concerning advance payments in accordance with DEAR 970.3204-1(a).
	72. Approve a deviation from the requirements of DEAR 970.3204-1(c) pertaining to the Government's contract with an M&O contractor and the financial institution where advance payments will be deposited, in accordance with DEAR 970.3204-1(d).
	73. Approve deviations from the standard financial management clauses specified in paragraphs (a) and (b) of DEAR 970.3270 in accordance with DEAR 970.3270(c).
	74. Waive the requirement for an M&O contractor to certify that its submission for settlement of costs contains only allowable costs in accordance with DEAR 970.4207-03-02(e).
	75. Establish thresholds within the HCA's delegated authority, by subcontract type and dollar level, for the review and approval of proposed subcontracting actions by M&O contractors in accordance with DEAR 970.4401-2(a).
	76. Pursuant to DEAR 970.4401-2(a), the Heads of the Contracting Activities shall take such action as may be required to insure compliance with the procedure for purchasing from contractor-affiliated sources or the purchase of specific items, or classes of items, which by the terms of the contract may require DOE approval
	77. Pursuant to DEAR 970.4401-2(h), the Heads of the Contracting Activities shall assure that the contracting activity establishes and maintains files of the documents associated with the review and approval of subcontract actions subject to DOE review and approval. Those files shall include, among other necessary documentation, an appraisal of the proposed action by the contracting activity and a copy of the approving or disapproving document forwarded to the management and operating contractor, including a listing of any deficiencies, a listing of any required corrective actions, any suggestions, or other relevant comments.
	78. Establish the value threshold for Government review of M&O contractor purchases from contractor-affiliate sources in accordance with DEAR 970.4401-3(a)(2).
	79. Approve M&O contractor determinations that the Buy American Act does not apply because of "nonavailability" for items in excess of $100,000 in accordance with DEAR clause 970.5244-1, "Contractor Purchasing System."
	80. Authorize M&O contractors with approved purchasing systems to make determinations that the Buy American Act is not applicable because of "nonavailability" for items valued at $100,000 or less in accordance with DEAR clause 970.5244-1, "Contractor Purchasing System."

Table III. Authorities Not Delegated to DOE HCAs.

While the FAR allows the delegation of the functions identified below, DOE has established that the authority will not be delegated to the HCAs.

1. A Government official no lower than the HCA may authorize an exception to the prohibition from awarding contracts to Government employees or to firms owned by Government employees in accordance with FAR 3.602. Note: DEAR 903.603 designates the Procurement Executive as the deciding official for this issue
2. FAR 32.501-2 authorizes the HCA to approve the provision of "unusual" progress payments, however, DEAR 932.501-2 reserves this approval for the Procurement Executive.

Table IV. HCA Authority With Respect To Sales

The following are synopses of specific authorities granted to an HCA pertaining to sales. The list does not address specific responsibilities.

1. Work for Others: DOE Order 481.1B authorizes the Heads of DOE and NNSA Field Elements to: "Assess and where appropriate approve delegations of authority to the contractor for executing bilateral sales contracts with non-Federal entities that are consistent with DOE-approved standard terms and conditions and satisfy the requirements of DOE M 481.1-1A and DOE O 481.1B."
2. Disposal of Property: DOE Order 580.1, entitled, "Department of Energy Personal Property Management Program," requires DOE organizations to establish surplus personal property operations when heads of field organizations determine sales operations are in the best interest of the Government.

Source Evaluation Board (SEB) Secretariat and Knowledge Manager

Guiding Principles

Establishment of a SEB Secretariat and Knowledge Management position will improve both the Department's procurement system and its management of knowledge attained by the Department's procurement personnel.

REFERENCES

Department of Energy (DOE) report on "Report on Reengineering the Business Clearance Process" issued November 2007

National Academy of Public Administration report on "Managing at the Speed of Light - Improving Mission Support Performance" issued July 2009

Government Accountability Office (GAO) report on "Better Performance Measures and Management Needed to Address Delays in Awarding Contracts (GA0-06-722)" issued June 2006

OVERVIEW

This chapter provides guidance and instruction to DOE procurement personnel regarding the establishment of a Source Evaluation Board (SEB) Secretariat and Knowledge Manager position.

BACKGROUND

The DOE report titled "Report on Reengineering the Business Clearance Process contained recommendations for improving the procurement system and knowledge management.
To improve the procurement system, the recommendation was made that "The DOE Senior Procurement Executive should establish an SEB Secretariat function to ensure proper composition of SEB membership and the timely provision of training of SEB members. The SEB Secretariat could perfonn status tracking of SEB activities against established milestones, collect/disseminate lessons learned resulting from completed SEBs, and coordinate the development/issuance of source selection templates."

To improve knowledge management, the recommendation was made that "The DOE Senior Procurement Executive should establish a stronger functional link between the [Office of Policy] and the [Field Assistance and Oversight Division] to ensure the appropriate and timely identification of issues resulting from business clearance reviews that may require the development by [the Office of Policy] of new or amended policies and guidance. Such policies and guidance should include periodic dissemination of best practices and lessons learned."

The National Academy of Public Administration Report titled "Department of Energy - Managing at the Speed of Light - Improving Mission-Support Perfonnance" recommends that DOE "promote greater consistency in acquisition practices by establishing guidance and related templates that could be accessed by procurement staffs and promote increased sharing of best practices and lessons learned."

The GAO Report (GA0-06-722) titled "Better Perfonnance Measures and Management Needed to Address Delays in Awarding Contracts" states that "federal agencies should use knowledge from prior contract awards to assess the effectiveness of the contracting process and, in the interest of continuous improvement, have a systematic means for instituting best practices and lessons learned."

Based upon the aforementioned recommendations, a SEB Secretariat and Knowledge Manager position has been established in the Field Assistance and Oversight Division. The duties and responsibilities of this position include the following:

1. Assisting in the delegation of Source Selection Official (SSO) Authority
2. Conducting training for SEB's and SSO's
3. Ensuring proper composition of SEB membership
4. Establishing SEB reporting requirements and tracking status of SEB activities against established milestones
5. Collecting and disseminating lessons learned
6. Developing and maintaining source selection templates and forms
7. Establishing, maintaining and disseminating Departmental SSO and SEB policy, procedures and guidance
8. Establishing and maintaining a library of acquisition documents
9. Assisting SEB’s in identifying and resolving problems

Point of Contact

Questions may be directed to the SEB Secretariat and Knowledge Manager, Sangok Shin, in the Office of Field Assistance and Oversight (MA-621) by e-mail at sangok.shin@hq.doe.gov.

b e te t

CHAPTER 3 - IMPROPER BUSINESS PRACTICES and PERSONAL CONFLICTS OF INTEREST

10 r reme t te r t e ember 201

1 r reme t te r t r re

Procurement Integrity

Guiding Principles

The Procurement Integrity Act prohibits certain activities by personnel involved in the procurement process.

Procurement Integrity statutes and regulations govern the procurement process and the manner in which government and contractor personnel conduct business with each other.

[Reference: 41 U.S.C. 423, FAR 3.104, DEAR 903.104]

Overview

This section discusses the requirements of the Procurement Integrity Act and its impact on Federal employees.

Background

The Department of Energy (DOE), like most federal agencies, purchases many products and services from the private sector.

To preserve the integrity of the Federal procurement process and assure fair treatment of bidders, offerors and contractors, laws govern the procurement process and the manner in which federal and offeror personnel conduct business with each other. One of these statutes is Section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423), often referred to as the Procurement Integrity Act. This Act prohibits certain activities by personnel involved in the procurement process. The Federal Acquisition Regulation, at Section 3.104, sets forth the regulations that implement the provisions of the Procurement Integrity Act.

The Procurement Integrity Act addresses various activities by:

- Current Federal employees.
- Certain former Federal employees.
- Bidders and Offerors.
- Other personnel involved in agency procurements and contracts.

Significant revisions to the Procurement Integrity Act were effective on January 1, 1997, as a result of the Clinger-Cohen Act of 1996. The Procurement Integrity Act reflects procurement activities in four major areas:

- Disclosing bid, proposal or source selection information.
- Obtaining bid, proposal or source selection information.
- Accepting compensation from certain contractors after leaving the Government.
- Discussing non-federal employment with certain bidders or offerors.

This chapter is intended to act as a primer for all DOE employees on issues related to procurement integrity. As such, not all statutory or regulatory details are included here. Employees should consult their procurement counsel to discuss detailed information and procedures in those areas that may affect them personally in procurements, such as:

- Avoiding making Government decisions without authority;
- Inappropriate disclosure of information at any point in the acquisition process.

In addition to the Procurement Integrity Act requirements, all federal employees also should be familiar with other statutes and regulations that set forth the standards of conduct for all Federal employees, including those involved in procurements. The Office of the Assistant General Counsel for General Law at Headquarters, or the local ethics official in the field, can provide further information addressing standards of conduct, including information on:

- Avoiding personal conflicts of interest;
- Taking bribes or accepting certain gratuities;
- Using an official Government position to advance personal interest;
- Maintaining inappropriate financial interests;
- Discussing non-federal employment with bidders or offerors;
- Accepting compensation from certain contractors after leaving the Government

Key Provisions

I. Disclosing Procurement Information

For competitive procurements, the personnel identified below shall not, other than as permitted by law, knowingly disclose proposal or bid information or source selection information, before the award of a contract to which the information relates.

- A current or former official of the United States;
- A person who is acting for, or has acted for or on behalf of, the United States with respect to a Federal agency procurement; or
- A person who is advising, or has advised, the United States with respect to a Federal agency procurement.

The following information may not be disclosed if it has not previously been made public:

Proposal or bid information, including:

- Cost or pricing data, including indirect costs and direct labor rates.
- Proprietary information about manufacturing process, operations, or techniques identified as such by any contractor.

  Information identified by any contractor as "contractor bid or proposal information."

Source selection information, which is information that is prepared for use by a Federal agency for the purpose of evaluating a bid or proposal, including:

- Bid prices.
- Proposed costs or prices.
- Source selection plans.
- Technical evaluation plans.
- Technical and cost or price evaluations of proposals.
- Competitive range determinations.
- Rankings of bids, proposals, or competitors.
- Reports and evaluations of source selection panels, boards, or advisory councils.
- Other "source selection information."

II. Obtaining Procurement Information

For competitive procurements, a person shall not, other than as permitted by law, knowingly obtain bid or proposal information or source selection information, before the award of a contract to which the information relates. This prohibition applies to the same type of proposal or bid information or source selection information identified above.

III. Discussing Employment With Contractors

If you are a DOE employee who is participating personally and substantially in a competitive procurement valued in excess of the simplified acquisition threshold (see FAR 2.101(b)(2)), and you contact or are contacted by a bidder or offeror in that procurement regarding possible non-Federal employment, you are required to:

- Promptly report the contact in writing to your supervisor and your agency ethics official, and
- Either reject the possibility of non-Federal employment or disqualify yourself in writing from further involvement in that procurement, until authorized to resume participation.

IV. Accepting Compensation From a Contractor

A former DOE employee may not accept compensation from a contractor as an employee, officer, director, or consultant of the contractor for a period of one year from the date that the former DOE employee:

- Served, at the time of selection of the contractor or the award of the contract, as the procuring contracting officer, the source selection authority, a member of a source selection evaluation board, or the chief of a financial or technical evaluation team. This applies to contracts over $10,000,000.
- Served as the program manager, deputy program manager, or administrative contracting officer for a contract in excess of $10,000,000.
- Personally made any of the following decisions on behalf of the Federal agency:
  - To award a contract, subcontract, modification of a contract or subcontract, or a task order or delivery order over $10,000,000.

- To establish overhead or other rates for a contractor on a contract or contracts valued in excess of $10,000,000.
- To approve a contract payment or payments over $10,000,000.
- To pay or settle a claim in excess of $10,000,000.

This post-employment prohibition does not apply to divisions or affiliates of a contractor that do not produce the same or similar products or services as the entity of the contractor referred to above.

Program Managers

For purposes of the prohibition described in Section III above, a Program Manager is the DOE individual who is designated by his or her supervisor or higher authority as Program Manager and exercises authority on a day-to-day basis to manage an acquisition program for a system obtained through the acquisition process that has one or more contracts, at least one of which has a value exceeding $10 million. The Program Manager is generally the person at the lowest organizational level who has the authority to make technical and budgetary decisions on behalf of the Department.

The post-employment restriction also applies to each Deputy Program Manager, who is defined as the individual who normally acts as the Program Manager in the absence of the Program Manager. A system is a combination of elements that function together to produce the capabilities required to fulfill a mission need. The elements may include hardware, equipment, software, or any combination thereof. An acquisition program has only one Program Manager and one Deputy Program Manager. An individual who acts in the absence of the Program Manager and Deputy Program Manager is not considered to be within this definition.

What are the Penalties for Violations?

The following **Criminal Penalties** apply to knowingly (1) disclosing or (2) obtaining proposal or bid information or source selection information:

- Imprisonment of not more than 5 years and/or a fine.

The following **Civil Penalties** apply to knowingly (1) disclosing or (2) obtaining proposal or bid information or source selection information, (3) discussing non-Federal employment with contractors, or (4) accepting compensation from contractors:

- Each knowing violation of any of the four key provisions of the Procurement Integrity Act may result in civil penalties up to $50,000 per violation and administration actions.
- Up to $50,000 per violation plus twice the amount of compensation an individual received or offered for the prohibited conduct.

- Up to $500,000 per violation plus twice the amount of compensation an organization received or offered for the prohibited conduct.

The following **Administrative Actions** apply to knowingly (1) disclosing or (2) obtaining proposal or bid information or source selection information, (3) discussing non-Federal employment with contractors, or (4) accepting compensation from contractors:

- Cancellation of the procurement.
- Disqualification of an offeror.
- Rescission of the contract.
- Suspension or debarment of the contractor.
- Initiation of an adverse personnel action.
- Any other action in the best interest of the Government.

Related Prohibited Conduct

All federal employees also should be familiar with other statutory and regulatory prohibitions, such as:

- The offer or acceptance of a bribe or gratuity is prohibited. The acceptance of a gift, under certain circumstances, is also prohibited.
- Contacts with an offeror during the conduct of an acquisition may constitute "seeking employment." Government officers and employees are prohibited, and must disqualify themselves, from participating personally and substantially in any particular matter that would affect the financial interests of any person with whom the employee is seeking employment.
- Post-employment restrictions prohibit certain activities by former Government employees, including representation of a contractor before the Government in relation to any contract or other particular matter involving specific parties on which the former employee participated personally and substantially while employed by the Government. Additional restrictions apply to certain senior Government employees and for particular matters under an employee's official responsibility.
- The FAR places restrictions on the release of information related to procurements and other contractor information that must be protected, e.g., FAR Part 14 states that information concerning proposed acquisitions shall not be released outside the Government before solicitation except for presolicitation notices, or long-range acquisition estimates, or synopses. Within the Government, such information shall be restricted to those having a legitimate interest. Releases of information shall be made (1) to all prospective bidders, and (2) as nearly as possible at the same time, so that one prospective bidder shall not be given unfair advantage over another. FAR Part 15 states that, before proposals are received, any exchange of information among all interested

parties must be consistent with procurement integrity requirements. Interested parties include potential offerors, end users, Government acquisition and supporting personnel, and others involved in the conduct or outcome of the acquisition.

- Other laws may prohibit release of information both before and after award.
- Using nonpublic information to further an employee's private interest or that of another and engaging in a financial transaction using nonpublic information are prohibited.

Going Beyond the Procurement Integrity Act

FAR Part 14 states that, before solicitation, information concerning proposed acquisitions shall be restricted to those having a legitimate interest within the Government. Releases of information shall be made (1) to all prospective bidders, and (2) as nearly as possible at the same time, so that one prospective bidder shall not be given unfair advantage over another. FAR Part 15 states that, before proposals are received, any exchange of information among all interested parties must be consistent with procurement integrity requirements.

It's never too early in the acquisition process to avoid prejudicial release of information and potential conflicts of interest. It is worthy to note that the acquisition process begins at the point when agency needs are established. All Government employees should understand the adverse impact of inappropriate disclosure of sensitive information regarding future procurements. Early in the acquisition planning process and throughout the development of the Government's requirements, Contracting Officers will advise the program offices and other acquisition personnel of the negative consequences and prejudicial impact of improperly releasing information to potential future offerors. Program offices should make an effort to coordinate with the Contracting Officer early in the acquisition planning stage in order to avoid any procurement integrity violations.

Receiving Information on Procurement Integrity Issues

The Human Resources Office provides new employees written information on ethical conduct when they first come on board.

Procurement offices can provide guidance for specific acquisitions in which DOE personnel are involved.

The Assistant General Counsel for Procurement and Financial Assistance at Headquarters and local procurement Counsel at field offices provide advice on questions addressing disclosure of contractor bid or proposal information or source selection information.

The Assistant General Counsel for General Law at Headquarters and local ethics Counsel at field offices provide ethics advice on the Standards of Conduct for Employees of the Executive Branch, as well as conduct covered by the Procurement Integrity Act.

The Office of Acquisition Management published a brochure entitled "Procurement Integrity" that summarizes the responsibilities and restrictions associated with procurement integrity. The brochure may be viewed on the DOE homepage at:

http://energy.gov/sites/prod/files/3.1_attachment_Procurement_Integrity_Brochure.pdf

Procurement Integrity Brochure

What is Procurement Integrity?

The Department of Energy, like most federal agencies, purchases many products and services from the private sector. To preserve the integrity of the Federal procurement process and assure fair treatment of bidders, offerors, and contractors, laws govern the procurement process and the manner in which federal and contractor personnel conduct business with each other. One of these statutes is Section 27 of the Office of Federal Procurement Policy Act (41 U.S.C. 423), often referred to as the Procurement Integrity Act. This Act prohibits certain activities by personnel involved in the procurement process. The Federal Acquisition Regulation (FAR), at Section 3.104, sets forth the regulations that implement the provisions of the Procurement Integrity Act.

The Procurement Integrity Act addresses various activities by:

• Current Federal employees

• Certain former Federal Employees.

• Bidders and Offerors.

• Other personnel involved in agency procurements and contracts.

This brochure is intended to act as a primer for all DOE employees on issues related to procurement integrity. As such, not all statutory or regulatory details are included here. Employees should consult their procurement counsel to discuss detailed information and procedures in those areas that may affect them personally in procurements:

• Inappropriate disclosure of information at any point in the acquisition process, beginning when agency needs are established.

• Avoiding making Government decisions without authority.

All DOE employees should also be familiar with other statutes and regulations that set forth the standards of conduct for all Federal employees, including those involved in procurements. The Office of the Assistant General Counsel for General Law at Headquarters or the local ethics official in the field can provide further information addressing standards of conduct, including information on:

• Avoiding personal conflicts of interest.

• Taking bribes or accepting certain gratuities.

• Using an official Government position to advance personal interests.

• Maintaining inappropriate financial interests.

• Discussing non-federal employment with bidders or offerors

• Accepting compensation from certain contractors after leaving the Government

Key Provisions

I. Disclosing Procurement Information

For competitive procurements, the personnel identified below shall not, other than permitted by law, knowingly disclose proposal or bid information or source selection information, before the award of a contract to which the information relates.

• A current or former official of the United States.

• A person who is acting for, or has acted for or on behalf of, the United States with respect to a Federal agency procurement.

• A person who is advising, or has advised, the United States with respect to a Federal agency procurement.

Proposal or bid information submitted in connection with a solicitation may not be disclosed if it hasn't already been disclosed to the public, including:

• Cost or pricing data, including indirect costs and direct labor rates.
• Proprietary information about manufacturing processes, operations, or techniques identified as such by any contractor.
• Information identified by any contractor as "contractor bid or proposed information."

Source selection information, which is information that is prepared for use by a Federal agency for the purpose of evaluating a bid or proposal, may not be disclosed, including:

• Bid prices.
• Proposed costs or prices.
• Source selection plans.
• Technical evaluation plans.
• Technical and cost or price evaluation of proposals.
• Competitive range determinations.
• Rankings of bids, proposals, or competitors.
• Reports and evaluations of source selection panels, boards, or advisory councils.
• Other "source selection information."

II. Obtaining Procurement Information

For competitive procurements, a person shall not, other than as permitted by law, knowingly obtain proposal or bid information or source selection information, before the award of a contract to which the information relates. This prohibition applies to the same type of information identified above.

III. Discussing Employment with Contractors

If you are a DOE employee who is participating personally and substantially in a competitive procurement valued in excess of the simplified acquisition threshold of $150,000, and you contact or are contacted by a bidder or offeror in that procurement regarding possible non-Federal employment, you are required to:

• Promptly report the contact in writing to your supervisor and your agency ethics official, and

• Either reject the possibility of non-Federal employment or disqualify yourself in writing from further involvement in that procurement, until
authorized to resume participation.

IV. Accepting Compensation from a Contractor

A former DOE employee may not accept compensation from a contractor as an employee, officer, director, or consultant of the contractor for a period of one year after the date that the former DOE employee:

• Served, at the time of selection of the contractor or the award of the contract, as the procuring contracting officer, the source selection authority, a member of a source selection evaluation board, or the chief of a financial or technical evaluation team. This applies to contracts over $10,000,000.

• Served as the program manager, deputy program manager, or administrative contracting officer for a contract in excess of $10,000,000.

• Personally made any of the following decisions on behalf of the Federal agency:

To award a contract, subcontract, modification of a contract or subcontract, or a task order or delivery order over $10,000,000.

To establish overhead or other rates for a contractor on a contract or contracts valued in excess of $10,000,000.

To approve a contract payment or payments over $10,000,000.

To pay or settle a claim in excess of $10,000,000.

This post-employment prohibition does not apply to divisions or affiliates of a contractor that do not produce the same or similar products or services as the entity of the contractor referred to above.

Illustrations

• Two DOE employees who have been friends for many years are talking about their work assignments over lunch. One of the employees is a Contracting Officer's Representative (COR) who is participating in the selection process on a competitive procurement. When asked how the evaluations are proceeding, the COR knows not to discuss the subject since disclosure of source selection information is prohibited.

• A DOE Engineer responsible for drafting a statement of work on a competitive solicitation receives a telephone call from a contractor's business manager who asks when the solicitation will be released. During the conversation, the business manager mentions that a position will be opening in his firm for a Project Engineer and that the DOE employee would be highly qualified for the job. The DOE employee realizes that a Procurement Integrity issue has been raised, rejects the overture, and immediately notifies her supervisor and agency ethics official in writing of the contact with the contractor.

• An environmental engineer served on a source selection board that evaluated competitive proposals for a recently awarded contract totaling $11M. The engineer is considering retiring from the Government to do consulting work for environmental contractors. Under the Procurement Integrity Act, he is barred from accepting any compensation from the contractor who was awarded that particular contract for a period of 1 year after his work ended on the evaluation board.

What are the Penalties for Violations?

The following criminal penalty applies to knowingly (1) disclosing or (2) obtaining proposal or bid information or source selection information:

• Imprisonment of not more than 5 years and/or a fine.

The following civil penalties apply to knowingly (1) disclosing or (2) obtaining proposal or bid information or source selection information, (3) discussing non-Federal employment with contractors, or (4) accepting compensation from contractors:

• Each knowing violation of any of the four key provisions of the Procurement Integrity Act may result in civil penalties up to $50,000 per violation and administration actions.

• Up to $50,000 per violation plus twice the amount of compensation an individual received or offered for the prohibited conduct.

• Up to $500,000 per violation plus twice the amount of compensation an organization received or offered for the prohibited conduct.

The following administrative actions apply to knowingly (1) disclosing or (2) obtaining proposal or bid information or source selection information, (3) discussing non-Federal employment with contractors, or (4) accepting compensation from contractors

• Cancellation of the procurement.
• Disqualification of an offeror.
• Rescission of the contract.
• Suspension or debarment of the contractor.
• Initiation of an adverse personnel action.
• Any other action in the best interest of the Government.

Going Beyond the Procurement Integrity Act

FAR Part 14 states that, before the procurement solicitation, information concerning proposed acquisitions shall be restricted to those having a legitimate interest within the Government. Releases of information shall be made (1) to all prospective bidders, and (2) as nearly as possible at the same time, so that one prospective bidder shall not be given unfair advantage over another. FAR Part 15 states that, before proposals are received, any exchange of information among all interested parties must be consistent with procurement integrity requirements.

It's never too early in the acquisition process to avoid prejudicial release of information and potential conflicts of interest. Acquisition begins at the point when agency needs are established. All Government employees should understand the adverse impact of inappropriate disclosure of sensitive information regarding future procurements. Early in the acquisition planning process and throughout the development of the Government's requirements, Contracting Officers will advise the program offices and other acquisition personnel of the negative consequences and prejudicial impact of improperly releasing information to potential future offerors. Program offices should make an effort to coordinate with the Contracting Officer early in the acquisition planning stage in order to avoid any procurement integrity violations.

Who Can You Contact for More Information on Procurement Integrity?

• The Office of Personnel provides new employees written information on ethical conduct when they first come on board.

• Procurement offices provide guidance for any acquisitions in which DOE personnel are involved.

• The Assistant General Counsel for Procurement and Financial Assistance, GC-61, (or local procurement Counsel at field offices) provides advice on questions addressing disclosure of contractor bid or proposal information or source selection information.

• The Assistant General Counsel for General Law, GC-77, (or local ethics Counsel at field offices) provides ethics advice on the Standards of Conduct for Employees of the Executive Branch, as well as conduct covered by the Procurement Integrity Act.

Where Can You Read More About Procurement Integrity?

• Title 41 of the United States Code, Chapter 423.
• The Federal Acquisition regulation (FAR), Section 3.104.
• The Department of Energy Acquisition Regulation (DEAR), Section 903.104.
• The Department of Energy Acquisition Guide, Chapter 3, Part (1)

Contact: Office of Procurement and Assistance Policy, 202-287-1330.

b e te t

CHAPTER 4 - ADMINISTRATIVE MATTERS

mber t e t e Str te te r te r reme t terpr e S tem Sept 2012

0 tr t e t r e re t 201

170 Ser e tr t ep rt t 2017

Assigning Identifying Numbers Outside of the Strategic Integrated Procurement Enterprise System (STRIPES)

Guiding Principles:

- **Follow the procedures outlined in AL 2010-03 covering waivers and exceptions before proceeding with issuing requisitions, solicitations and business instruments outside of STRIPES.**
- **Do not duplicate the numbering format in STRIPES when issuing instrument numbers outside of STRIPES.**

[References: DOE O 540.1B, AL 2010-03, AL 2011-30, Cancellation Notice]

I. Overview

This section provides guidance on the DOE's procedures for assigning identifying numbers to all new requisitions, solicitations and business instruments processed outside of STRIPES. This Guide Chapter does not apply to instrument numbers issued and business instruments awarded prior to the deployment of STRIPES at the DOE.

II. Definitions

"Business instrument" means a legal document resulting from a requisition or solicitation that defines an agreement between the DOE and a company, individual, another Government agency, or public or private institution. Business instruments include DOE contracts/awards, Federal Supply Schedule (FSS) orders, purchase card transactions, Interagency Agreements (IA), financial assistance agreements and Technology Investment Agreements (TIA).

"DOE" means the U.S. Department of Energy, including the National Nuclear Security Administration (NNSA).

"Instrument number" means a number associated with a requisition, solicitation or business instrument. The instrument number remains unchanged throughout the procurement process, even if the instrument fails to be executed. The number may not be reused until after the business instrument file has been destroyed.

"Requisition" means a document used to commit funding, leading to a new contract/award or a modification of an existing contract/award. The requisition document is also used for financial assistance actions.

"Solicitation" means a method used by the DOE to request applications, proposals, or quotations and invite bids.

III. Background

In 2007, the DOE launched STRIPES to be used as the Agency's acquisition and financial assistance official system of record. On May 23, 2008, the Department issued DOE O 540.1B, Departmental Business Instrument Numbering System for Actions Conducted Outside of the Strategic Integrated Procurement Enterprise System (STRIPES), to prescribe procedures for assigning identifying numbers to business instruments processed outside of STRIPES. Because STRIPES provides for the automatic numbering of acquisition and financial assistance actions, and because the majority of such actions are created and stored in STRIPES, the Department found little utility in maintaining DOE O 540.1B, and subsequently cancelled the Order on May 12, 2011.

Acquisition Letter (AL) 2010-03, issued on January 8, 2010, made the use of STRIPES for the awarding and administering of all acquisition and financial assistance actions by the Department's procurement offices, mandatory. The AL required that exceptions to, or waivers on, the use of STRIPES be issued on a case-by-case basis and be approved by the Senior Procurement Executive (SPE). Exceptions include awards identified as being excluded from STRIPES, via a formal policy, by the Office of Procurement and Assistance Management.

When an exception to the use of STRIPES is approved or a waiver is granted, these procedures should be used for assigning identifying numbers to new requisitions, solicitations and business instruments processed outside of STRIPES.

IV. Numbering Format

The numbering format of requisitions, solicitations and business instruments processed outside of STRIPES has been designed to prevent the duplication of numbers issued by STRIPES. Therefore, the instrument numbering format outlined by this Guide does not match the format used for instruments processed within STRIPES.

Instrument numbers are created and formatted as follows:

A. Requisition Numbering

1. Requisition numbers contain the document type, the Fiscal Year (FY) in which the requisition was initiated, the office symbol for the Program Office initiating the request and a unique five-character serial number.

Example:

REQ-11XX12345

REQ – Represents that the document is a Requisition
11 – Represents the FY the Requisition was Initiated
XX – Represents the Program Office Initiating the Requisition
12345 – Represents a Unique Five-Character Serial Number

2. Supplementary requisition numbers must be sequential, beginning with 000 for the New Award initiative. Examples of supplementary requisition numbering are as follows:

a. REQ-11XX12345.000—New award initiative

b. REQ-11XX12345.001—First subsequent action in FY 2011

c. REQ-11XX12345.002—Second subsequent action in FY 2011

d. REQ-**12**XX12345.001—The first subsequent action of this series to be issued in a new FY (Note that the FY in this example changed from FY 2011 to FY 2012)

e. REQ-12XX12345.002—Second subsequent action in FY 2012

B. Solicitation Numbering

1. Solicitation numbers contain the issuing Agency, the document type, the Program Office initiating the request and the same five-character serial number that was assigned to the requisition in part A.

Example:

DE-SOL-XX12345

DE – Represents the Department of Energy
SOL – Identifies the document as a Solicitation
XX – Represents the Program Office
12345 – Represents the Unique Five-Character Serial Number Assigned to the Requisition in Part A

2. Amendment numbers to solicitations must be sequential, beginning with 001, and are three digits. Examples of amendments to a solicitation are as follows:

a. DE-SOL-XX12345, Amendment 00**1**—First subsequent action

b. DE-SOL-XX12345, Amendment 00**2**—Second subsequent action

c. DE-SOL-XX12345, Amendment 00**3**—Third subsequent action

C. Business Instrument Numbering

1. Business Instrument numbers contain the issuing Agency, the Contracting Office initiating the award and the same five-character serial number that was assigned to the requisition and solicitation in parts A and B.

Example:

DE-XY12345

DE – Represents the Department of Energy
XY – Represents the Contracting Office Initiating the Award
12345 – Represents the Unique Five-Character Serial Number Assigned to the Requisition and Solicitation in Parts A and B

2. Modification numbers to business instruments must be sequential, beginning with 001, and are three digits. Examples of modification numbers to an award are as follows:

a. DE-XY12345, Modification 00**1**—First subsequent action

b. DE-XY12345, Modification 00**2**—Second subsequent action

c. DE-XY12345, Modification 00**3**—Third subsequent action

V. Responsibilities

A. Director, Office of Procurement and Assistance Management

1. Define responsibilities in the use of instrument numbers.

2. Assist Program Offices in resolving conflicts and problems associated with the establishment, assignment or use of instrument numbers.

B. Contracting Office

1. Establish registers for controlling the issuance of unique requisition numbers required for the preparation of solicitations and business instruments (see Appendix A for a sample register).

2. When requested by the Program Office, develop a unique requisition number, in accordance with the instructions herein.

3. Ensure that the Program Office provides the Contracting Office with a complete requisition package that includes the requisition document containing the unique requisition number that was previously assigned to it by the Contracting Office.

4. Develop solicitation and business instrument numbers and record them in the registers with the unique requisition numbers from which they were derived (see Appendix A for sample entries in a register).

5. For actions over the micro-purchase threshold, enter award details directly into FPDS-NG after the award has been signed by the Contracting Officer.

VI. Points of Contact

For further information relating to the guidance contained herein, contact the Contract and Financial Assistance Division at (202) 287-1330.

Contract Closeout Procedures

Guiding Principles:

- Contract closeout can protect the government's interests and free up significant dollars for current-year program priorities.
- Closeout is completed when all administrative actions have been completed, all disputes settled, and final payment has been made. The process can be simple or complex depending on the contract type.

[References: FAR 4.805; FAR 42.705; FAR 42.708; and FAR 45.]

1.0 Summary of Latest Changes

This update: (1) considers Final Rule June 2011 which amended the Federal Acquisition Regulation (FAR) procedures for closing out contract files and revised procedures for clearing final patent reports and quick-closeout procedure (from unsettled indirect rates on the contract as a percentage of total unsettled indirect costs, to both unsettled direct and indirect contract costs as a percentage of total claimed contract costs), and (2) stresses the importance of releasing dormant funds and excess funds.

2.0 Discussion

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. This process requires close coordination between the contracting office, the finance office, the program office, and the contractor. Contract closeout is an important aspect of contract administration.

FAR 4.804 and the DEAR 904.804 both provide summary level closeout coverage. This 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.

Contract closeout refers to the process of verifying that all the administrative actions have been taken on a contract that is physically complete. A contract is physically complete when either all

required supplies or services have been delivered or performed, inspected, and accepted or all existing options have been exercised or expired; or, a contract termination notice has been issued to the contractor.

Contract closeout is critical to the Department meeting its acquisition and fiscal responsibilities and requires coordination with program and finance. The closeout process is a process to finish or resolve all contractual requirements for a physically complete contract. Closeout is completed when all administrative actions have been completed, all disputes settled, and final payment has been made.

The requirements and procedures for contract closeout are established by the Federal Acquisition Regulation (FAR) 4.804-5, "Procedures for closing out contract files." FAR 4.804-1 establishes specific time frames for closing out contract files, depending on the contract type.

To ensure the timely closeout of contracts by the office administering the contract, FAR 4.804-1 provides the closeout lead time standards. Quick closeout procedures (see FAR 42.708) should be used, when appropriate, to reduce administrative costs and to enable deobligation of excess funds.

Following contract closeout, the contracting staff must follow up with the contractor past performance evaluation and with records retention and disposition, in accordance with FAR 4.805. The Office of Federal Procurement Policy has issued guidance in a Contract Administration Guide that includes best practices regarding closeout issues.

Heads of Contracting Activities' must follow Departmental regulations at DEAR 904.804-1 and ensure timely closeout of all contract files which are physically completed or otherwise eligible for closeout action.

2.1 Applicability. This chapter applies to all contracts and orders, including orders exceeding the micro-purchase threshold that are placed using a Government purchase card. These procedures may be supplemented by contracting activities to meet specific organizational or mission needs.

NOTE: A completed contract should not be closed if the contract is in litigation, under investigation, pending a termination action or if there is an outstanding claim.

2.2 Responsibilities. The Contracting Officer (CO) is responsible for overseeing the contract close out with assistance from the Contracting Officer's Representative (COR). Except for those actions which require a contracting officer's warrant, the CO or HCA may delegate any of the duties of contract closeout to other procurement personnel such as contract specialists, purchasing agents or procurement clerks. Refer to FAR 4.804-5 for the CO's responsibilities.

2.2.1 Contracting Officer's Representative (COR). The COR is responsible for:

- Assisting the CO in the settlement of any outstanding claims, change orders, or value engineering change proposals;
- Ensure that all technical requirements of the contract have been met and that the contract has been satisfactorily completed;
- Certify that all deliverable items, including the final report, if applicable, were delivered and accepted, and that all services were performed and accepted;
- If Government property is involved, review and verify that the contractor's inventory of residual Government property is accurate. Coordinate with the Government property manager and provide instructions to the CO for the disposition of all residual Government property; and
- For cost-reimbursable contracts, review the completion voucher to ensure that costs claimed are reasonable and consistent with the work performed.

2.2.2 Contractor. The contractor is responsible for the following actions, as appropriate:

- Submit a contractor's release of claims;
- Prepare and submit a final invoice or completion voucher with request for final payment;
- Settle all subcontract costs and any subcontract issues and submit subcontracting compliance reports for all years to the electronic subcontract reporting system at http://www.esrs.gov (formerly Standard Forms 294 and 295);
- Submit the final patent and royalty reports and a final property inventory; and
- For cost–reimbursement contracts, submit indirect cost rate proposals for all years in which a proposal was not previously submitted.

2.3 Actions. The following procedures shall be used following contract completion, the end of contract performance or contract termination.

- Contract Closeout Checklist. The Contract Closeout Checklist (Appendix A**) shall be included in the contract file and reviewed in the pre-award stage in order to ensure that all applicable contract award and administration actions are included;

- The closeout checklist is not all-inclusive. The CO must also refer to the FAR and, following its being updated, to ensure that actions are completed and properly documented in the contract file; and
- COs and closeout staff shall also refer to the specific procedure for their pursuant to FAR 4.804-1.

**Note: The attached Appendices are recommended for use.

2.3.1 Commencing Closeout. Following completion of the contract or order, the CO or closeout staff shall proceed with closeout using the appropriate checklist (available in STRIPES or the attached checklists in the Appendices).

2.3.2 File Review. The CO shall assemble all elements of the contract file and review its contents against the requirements contained in FAR 4.803, using the Contract Closeout Checklist (Appendix A).

Any missing documents should be obtained and placed in the file. Otherwise, if documents are unobtainable, the file should be notated regarding the circumstances of why documents are unavailable.

2.3.3 COR Memorandum. The CO shall send a memorandum to the COR requesting that the COR complete the closeout certification (Appendix B).

2.3.4 COR Certification. The COR, or accepting personnel, shall certify to the CO in writing that all deliverables/services have been received (Appendix C).

2.3.5 Notification to the Contractor. When appropriate, after final payment is processed, the CO shall prepare a letter of release of claims (contractor closing statement) notifying the contractor and surety, if any, that the contractor has no further obligation under the contract except for guarantees, warranties, or latent defects. The contractor shall sign and return the release (Appendix D).

The FAR states that the release of claims is required for the following kinds of contracts:

- Non-commercial cost reimbursable (in accordance with FAR 52.216-7 (h));
- Fixed price construction and architect – engineer [FAR 52.232-5(h)(3) and 52.232-10(d)]; and
- Time-and-material and labor-hour (FAR 52.212-4, Alternate 1 (c)(7))

2.3.6 Completion Statement. The CO shall prepare and sign a statement that all required contractual actions have been completed and that the contract is ready for closeout (Appendix E).

If another office administers the contract, that administrative office is responsible for closing out the contract in accordance with FAR 4.804-2(b).

2.3.7 De-obligation of Funds. The CO shall ensure that any remaining funds on the contract are de-obligated as follows:

- Contract Review. Review the contract to see if any unliquidated funds remain under the contract and confirm that the contractor has been paid for all work accepted;
- Unliquidated Obligation (ULO) Report. Review the quarterly unliquidated obligations report issued by the Office of the Chief Financial Officer (OCFO) to assist in determining if there are still funds unobligated funds on the contract; and
- De-obligation.
  - Determination to De-obligate. If a determination has been made to de-obligate the funds, the CO will notify the OCFO generally within 14 days following review of the ULO report, or the contract review, that a de-obligation will be processed. See De-obligation Memorandum to Office of the Chief Financial Officer (Appendix F).
  - Determination Not to De-obligate. If a determination has been made not to de-obligate the funds, the CO will notify the OCFO generally within 14 days following review of the ULO report, or the contract review, with the reason why the de-obligation will not occur. If applicable, the CO, aided by the COR, will make a determination as to whether delivery of services, goods, or performance is expected to occur at a later date. See De-obligation Memorandum to Office of the Chief Financial Officer (Appendix F).

2.3.8 Quick Closeout. COs may utilize the quick closeout procedures for cost reimbursement contracts meeting the conditions of FAR 42.708(a).

2.3.9 Financial Management System. In the future, when the discoverer tool is fully implemented in the Integrated Acquisition System (IAS), the CO shall print a report from the Financial Management Modernization Initiative (FMMI) financial management system, showing the contract obligation amount and amount paid, and retain that report in the contract file.

2.3.10 Past Performance Evaluation. The COR and the CO are required enter the past performance evaluation for the contractor into the Contractor Performance Assessment Reporting System (CPARS) in accordance with Acquisition Guide Chapter 42.15. CPARS is now part of the System for Award Management (SAM). The SAM User Guide is available at https://www.sam.gov/sam/transcript/System_for_Award_Managementv4.0.pdf

2.3.11 Records Retention and Disposition. Refer to the table in FAR 4.805 and to the National Archives website, at http://www.archives.gov/records-mgmt/publications/disposition-of-federal-records/chapter-4.html, to properly retain and dispose of contract files.

2.4 Records Retention Procedures. The CO or contracting staff shall consult with the appropriate agency document management personnel for filing and storage and shall also coordinate with the Federal Records Center (FRC) of the National Archives and Records Administration. See the FRC Toolkit accessible at http://www.archives.gov/frc/toolkit.html for more instructions.

- The CO shall provide the closed contract files to the appropriate agency personnel to be appropriately boxed and stored at the appropriate agency facility;
- Period of Retention. FAR 4.805 Storage, Handling, and Disposal of Contract Files, lists the period of records retention for all contract documents and files;
- Closed contract files that are two years or older may be shipped to the FRC;
- Appropriate boxes for shipping may be available from the cognizant DOE agency records manager;
- A completed form SF 135, Records Transmittal and Receipt, must be sent to the records center for approval prior to shipping the closed contracts. A list of contracts to be sent shall also be included in accordance with FRC instructions (See http://www.archives.gov/frc/toolkit.html);
- Separate contract files by year using the final payment date. Each year shall have a separate accession number, which is the number assigned by the FRC in order to locate it for later destruction or retrieval. Contract files should be boxed in numerical order. Task orders should follow the main contract;
- The CO or staff will notify the records manager if there is a long warranty period involved in any contract going to FRC. Such contracts shall have a separate accession number so the destruction date will occur after the warranty period. This is done in the event there is a warranty action against the Contractor during the warranty period; and
- The CO or contracting staff will contact the agency records manager for arrangements to transport boxes to FRC.
- Retrieval of Records. If a record needs to be retrieved from the FRC, complete Form OF-11, Reference Request - Federal Records Center, and forward to the cognizant DOE records manager.
- Notification of Final Destruction.
- When records become eligible for destruction, the FRC will contact the records manager, who, in turn, will contact the agency to obtain permission to dispose of them.

2.4 Expiration Date: Effective upon issue date until superseded or canceled.

3.1 Attachments: List of Appendices

Appendix	Document Title
A	Contract Closeout Checklist
B	COR Closeout Memorandum
C	COR Certification
D	Notification of Contractor and Release of Claims
E	Contract Completion Statement
F	De-obligation Memorandum to Office of the Chief Financial Officer

CONTRACT CLOSEOUT CHECKLIST Appendix A

Contract Number: _____
Contractor: _____

ITEM	Yes	No	N/A	COMMENTS
1. Contract file contains **all required and relevant documents** (see FAR 4.803) including the following items, when applicable:				
a. Purchase request and evidence of availability of funds				
b. Synopsis or reference to synopsis				
c. List of sources solicited				
d. Set-aside decision; Form AD-1205, Market Research				
e. Government estimate of contract price				
f. Solicitation & all amendments				
g. Copy of each offer or quotation				
h. Negotiation documentation				
i. Contractor's representations & certifications				
j. Determination of contractor responsibility				
k. Other determinations, or justifications & approvals				
l. Delegations of Authority, COR Memorandum				
m. Signed contract, modifications & supporting documents				
2. **All financial matters** have been resolved and documents included in file, as applicable:				
a. Disputes, refunds or credits				
b. Final invoice processed for payment				Date paid:

c. De-obligation of excess funds				
3. Subcontracts are settled by the prime contractor				
4. Closeout Letters/Memoranda from COR, To Payment Office				Date signed:
5. Reports and documentation related to patents, royalties, warranties, and inventions (FAR 4.804-5(2), 12.404, 27.3, 27.4 and 46.7)				Date signed:
6. Reports, actions, and documentation for government-furnished equipment (GFE)/ government-furnished property (GFP) (FAR 45)				
7. Audit Information or reports are completed				
8. "**Release of Claims**" sent to and executed by contractor and included in file [FAR 52.232-5 (h)]				
9. Contract completion statement and checklist [FAR 4.804-5 (b)] and IAS closeout report completed and included in file. **(Closeout Date)**				Date statement signed:
10. Contractor Performance Assessment Reporting System (CPARS) information entered				
11. Records retention & disposition completed (See table in FAR 4.805. See also http://www.archives.gov/frc/toolkit.html				Date sent:

COR Closeout Memorandum

Appendix B

DATE: _____

TO: (Name)_____
Contracting Officer's Representative

FROM: (Name)_____
[Insert Title: Contracting Officer or Contract Specialist]

SUBJECT: **Contract Closeout**
Contract number: _____
Contractor: _____
Project Title: _____

This office is currently in the process of closing out the above referenced contract.

Enclosed is the **COR Closeout Certification** form. Your completion of this form is required for our office to closeout the contract.

Please complete the enclosed document and return it to the following address within a suggested **14 calendar days**:

(Agency Name) _____
(CO/Specialist Name) ATTN: _____
(Address) _____

_____

In addition, please complete the contractor past performance evaluation in the Contractor Performance Assessment System (CPARS.

If you have any questions, please contact me by phone at _____
_____ (Phone number)

or by email at _____
_____ (Email address) .

Attachment

COR Certification

Appendix C

TO: (Name) [Insert Title: Contracting Officer or Contract Specialist]

FROM: (Name) Contracting Officer's Representative (COR)

SUBJECT: **Contract Closeout** Contract number: _____
Contractor: _____
Project Title: _____

The contractor's performance under the subject contract has been evaluated and the following information pertinent to the closing of the contract file is noted below:

1. All deliverables including all items, supplies, services and/or reports required by the terms of the contract: ☐ have been furnished; ☐ have **not** been furnished and the list of exclusions is attached.
2. **Government furnished property (GFP):** Was GFP provided or acquired under the subject contract. If GFP is involved, the disposition instructions will be provided under separate correspondence. ☐ was provided or acquired; ☐ was **not** provided or acquired;
3. **Warranties.** Are there any extended warranties? If so, please list the equipment description, serial number and warranty duration. ☐ There are extended warranties; ☐ There are **no** extended warranties; If there are warranties, attach a list including equipment description, serial numbers and warranty duration.
4. All deliverables items/services required by the terms of the contract ☐ have been received and accepted; ☐ have **not** been received; ☐ have been received but **not** accepted;

COR Certification

I hereby recommend that the following action be taken:

☐ Contract requirements have been met satisfactorily and are accepted; closeout action is appropriate.

☐ Delay closeout and final payment (Include reasons in attached statement).

_____ _____

Contracting Officer's Technical Representative Date

Contractor Notification Letter & Release of Claims

Appendix D

Date_____

(Company Name) _____

ATTN: _____

(Address) _____

_____

Subject: (Contract No. & Project Title) _____.

Dear (Name) _____,

Performance of the referenced contract was completed on ___(Insert Completion Date)____. To officially close this contract, please forward the following items to the undersigned within (insert "14 to 30" days depending on the complexity of the request) calendar days following receipt of this letter.
Contractor's Release of Claims (form enclosed);

[As applicable, add or edit the following only as they may apply to this contract:]

Any outstanding reports or data items such as technical manuals or instruction manuals in accordance with (reference contract line item number or paragraph citation);

1. Government property;
2. Final patent report, royalty report;
3. Final invoice;

[If a warranty applies, add the following paragraph:]

Under the terms of the contract, a warranty is still in effect. ___[Describe the warranty]___. Final payment and contract closeout do not relieve you of your obligations to the government under the warranty clause.
As a reminder, your contract records must be preserved for possible access by the Comptroller General in accordance with the "Examination of Records" clause for a period of three (3) years (FAR 4.703) after receipt of final payment.

If you have any questions, please contact me by telephone at _____(phone no.) or email at _____(email address).

Sincerely,

(Signature)_____

(Typed or Printed Name) Contracting Officer
Enclosure

RELEASE OF CLAIMS

Contract Number: _____

For and in consideration of payment and pursuant to the terms of the contract cited above, the government of the United States, its officers, agents, and employees are hereby released and discharged from all liabilities, demands, obligations, and claims arising under or by virtue of said contract.

Signature: _____

Printed Name: _____

Title: _____

Company: _____

Date: _____

Contract Completion Statement Appendix E

In accordance with FAR 4.804-5(b), the following closeout information is provided:

1. Contract Administration Office* (* only if different from the contracting office, below)	Complete Name & Address
2. Contracting Office	Complete Name & Address
3. Contract Number	
4. Last Modification Number	
5. Last Call or Order Number	
6. Contractor Name and Address	Complete Name & Address DUNS: TIN:
7. Dollar Amount of Excess Funds	
8. Voucher No. & Date (Cost Re-imbursement Contract)	
9. a. Final Invoice Number (Fixed Price Contract)	
9. b. Final Invoice Date	

10. All contract administration functions have been fully and satisfactorily completed.

As a result of a final review of the contract file, it is determined that, to the best of my knowledge, all terms and conditions of the subject contract have been met and the file so documented. The COR's checklist has been completed indicating that all requested deliverables, as modified, have been received and are acceptable, and all services have been satisfactorily performed. Actions relating to the settlement and to the disposition of the Government property have been documented. The final invoice has been received and processed, giving consideration for any adjustments, which may be necessary as a result of the above. Consequently, all necessary actions required to close the subject contract are hereby considered complete as evidenced by the closeout checklist contained in this file.

As a result of a final review of the contract file, it is determined that, to the best of my knowledge, all terms and conditions of the subject contract have been met and the file so documented. The COR's checklist has been completed indicating that all requested deliverables, as modified, have been received and are acceptable, and all services have been satisfactorily performed. Actions relating to the settlement and to the disposition of the Government property have been documented. The final invoice has been received and processed, giving consideration for any adjustments, which may be necessary as a result of the above. Consequently, all necessary actions required to close the subject contract are hereby considered complete as evidenced by the closeout checklist contained in this file.

_____ _____

Signature Date
Contracting Officer

_____

_____

Type or Print Name
Email Address

Deobligation Memorandum to OCFO

Appendix F

DATE: _____

TO: (Name)_____
Office of the Chief Financial Officer

FROM: (Name)_____
Contracting Officer

SUBJECT: **Contract Closeout and Deobligation of Funds**
Contract number: _____
Contractor: _____
Project Title: _____

This office is considering closing out the above referenced contract. Please note that the condition checked below applies:

□ **Determination to Deobligate.** A determination has been made to deobligate the remaining funds on the subject contract and a de-obligation is being processed.

□ **Determination Not to Deobligate.** A determination has been made **not** to deobligate the remaining funds on the subject contract at this time. Deobligation is not currently appropriate because of the following reason:

[Include reason why closeout and deobligation is not appropriate at this time.]

When the closeout requirements are met, the contracting officer will deobligation the funds.

If you have any questions, please contact me by phone at_____(Phone number)__or by email at_____(Email address)__.

Service Contract Report

Guiding Principles

- Understanding how contracted services are being used to support mission and operations.
- Gain insight into where, and the extent to which, contractors are being used to perform activities by analyzing how contracted resources are distributed by function and location across the Department and within its components.
- Help the Department determine if its practices are creating an over-reliance that requires increased contract management or rebalancing to ensure the Department is effectively managing risks and getting the best results for the taxpayer.

[References: Section 743 of Division C of the Fiscal Year (FY) 2010 Consolidated Appropriations Act P.L. 111-117; GAO-12·1007; FAR 4.17; and SAM Quick Start Guide for Service Contract Reporting]

1.0 Summary of Latest Changes

This update (1) updated the timeline, and (2) adds the special interest functions Product and Service Code (PSC) list.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references.

2.1 Overview. Section 743(a) of Division C of the Consolidated Appropriations Act, 2010 (Pub. L. 111–117) requires executive agencies covered by the Federal Activities Inventory Reform (FAIR) Act (Pub. L. 105-270), except for the Department of Defense, to prepare an annual inventory of their service contracts and to analyze that inventory to determine if the mix of Federal employees and contractors is effective or if rebalancing may be required. Service contract inventories can assist agencies in better understanding how contractors are being used to support their mission and operations and whether contractors are being used appropriately.

Contractors are required to enter the amount invoiced and the direct labor hours expended on covered contracts in the SAM.

2.2 Background. The DOE approach will be performed in accordance with the criteria set out in Section 743 and OMB guidance with the help of the Heads of Contracting Activity (HCA), and will ultimately identify contracts for a more in-depth review.

The DOE will take the following steps in the process of its analysis:

- **Step 1:** The Office of Acquisition Management (OAM) has identified the list of special interest functions by Product and Service Code (PSC) for contracts to be reviewed (see Attachment 1 - Special Interest Functions by Product and Service Code (PSC)).

- **Step 2:** HCAs identify contracts with the identified special interest function PSCs for in-depth review.

- **Step 3:** HCAs evaluate contracts in accordance with policy and guidance.

- **Step 4:** HCAs report results of evaluation to OAM for consolidation (see Attachment 2 - Sample Report).

- **Step 5:** OAM reports consolidated results of analysis to OMB.

2.3 GAO Recommendations. In its report, GAO reviewed a sample of agencies' analyses of their FY 2010 inventories and identified several practices that could help to improve the quality of analyses in determining the effective and appropriate use of contractors. Specifically, GAO recommended –

- **Fully describe the scope** of the inventory reviews, including information such as the number of contracts and the percentage of contracts reviewed for each PSC selected and the total universe of contracts;

- **Report on the number of contractor personnel and functions** that were involved with the workforce issues identified during their inventory reviews; and

- **Include the status of efforts to resolve findings** identified in previous reviews until they are resolved.

- **OMB work with agencies** to monitor and improve compliance with the Act and to clarify guidance for compiling and reporting their inventory.

2.4 **Requirements**. In accordance with section 743(e), the inventory analyses shall include a review of the contracts and information in the inventory for the purpose of ensuring that --

- Each contract in the inventory that is a personal services contract has been entered into, and is being performed, in accordance with applicable laws and regulations;

- The activity is giving special management attention, as set forth in FAR 37.114, to functions that are closely associated with inherently governmental functions;

- The activity is not using contractor employees to perform inherently governmental functions;

- The activity has specific safeguards and monitoring systems in place to ensure that work being performed by contractors has not changed or expanded during performance to become an inherently governmental function;

- The activity is not using contractor employees to perform critical functions in such a way that could affect the ability of the agency to maintain control of its mission and operations;

- There are sufficient internal agency resources to manage and oversee contracts effectively;

- Activities must also identify contracts that have been poorly performed, because of excessive cost or inferior quality, and contracts that should be considered for conversion to performance by federal employees, also known as in-sourcing; and

- Each HCA must certify that their Contracting Officers (CO) have taken the appropriate steps to ensure compliance with FAR 4.17.

2.4.1 HCA Report. Each HCA must prepare a report (see Attachment 2 - Sample Report) suitable for public disclosure that discusses the analysis of the annual service contract inventory and the use of contractors for the special interest functions that have been selected to study. The report should address –

- Scope. Describe the special interest functions studied by the activity, the dollars obligated to those specific PSCs and the rationale for focusing on the identified functions. The report should also describe how many contracts were reviewed, how the contracts were selected for review, and the percentage of obligations the contracts covered for the PSCs on which the review focused.

- Methodology. Discuss the methodology used by the HCA to support the analysis (e.g., sampled contract files, conducted interviews of members of the acquisition workforce working on specific contracts of interest).

- Findings. Summarize the findings, including a brief discussion of the extent to which the desired outcomes described in section 743(e)(2) are being met (e.g., the activity is not using contractor employees to perform critical functions in such a way that could affect the ability of the activity to maintain control of its mission and operations). Where workforce issues are identified, the report should identify the estimated number of contractor personnel and/or labor resources involved (e.g., in "full-time equivalents").

- Actions Taken or Planned. Explain the steps the HCA has taken or plans to take to address any identified weaknesses or challenges. In addition, the report should describe follow up steps on actions in the previous inventory that were identified as pending or planned.

2.4.2 Timeline. As specified in the FAR Subpart 4.17, the following summary timeline is specified. OMB may modify the specific dates as required.

October 1	SAM opens for supplemental reporting
October 15 – November 15	Interim supplemental reports provided to HCA to access progress in SAM
November 15	Contractors complete initial data entry for inventory supplement reporting
November 15 - January 15	Activities review contractor reported data and work with contractors to make revisions as necessary.
Dec 1 - Jan 15	Activities prepare a draft report suitable for public disclosure that discusses its analysis of and the use of contractors for the special interest functions that were identified (see Attachment 1 - Special Interest Functions by Product and Service Code (PSC)) for study. The report should address {1) the scope of review, {2) the methodology used, {3) findings, and {4) actions taken or planned.

January 15	Activities submit a draft report to the DOE OAM.
January 31	SAM closes for reporting
January 20	DOE submits draft Agency report to OMB for review
January 31	OMB completes review of agency inventory reports, agencies post the documents on their public website and announce the availability of the inventories in the Federal Register.

2.5 Frequently Asked Questions

On December 31, 2013, the FAR Council issued a rule, effective January 30, 2014, requiring contractors to begin reporting the total amount invoiced and the direct labor hours expended on the services performed under certain contracts. These changes are required by section 743 of Division C of the FY 2010 Consolidated Appropriations Act (P.L. 111-117).

The information is collected through the SAM and included in the Department's service contract inventory. The information below should be provided to the contractors, who are encouraged to review the information and to make note of reporting dates and deliverables to ensure their compliance with the law and regulation.

What contracts are covered by the new Federal Acquisition Regulation (FAR) rule?

FAR 37.1 -- Service Contracts - Definitions - "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.

Policy Flash 2015-17 Class Deviation - FAR subpart 4.17 is not applicable to DOE M&O contracts as they are not considered "service contracts." However, both the SCA and the newly effective service contract reporting and contractor minimum wage requirements are applicable to M&O subcontracts for services.

For Fiscal Year (FY) 2016 onwards, reporting is required according to the following thresholds (see FAR 4.1703).

- All cost-reimbursement, time-and-materials, and labor-hour service contracts and orders with an estimated total value above the simplified acquisition threshold.

- All fixed-price service contracts awarded or issued with an estimated total value of $500,000 or greater.

Are subcontractors required to report?

First-tier subcontracts for services will be reported using the same thresholds (see FAR 4.1703).

How are indefinite-delivery contracts handled?

For indefinite-delivery contracts, reporting requirements will be determined based on the expected dollar amount and type of orders issued under the contracts. Indefinite delivery contracts include, but are not limited to, indefinite-delivery, indefinite-quantity (IDIQ) contracts, Federal Supply Schedule (FSS) contracts, Government-wide Acquisition Contracts (GWACs), and multi-agency contracts.

What is the purpose of collecting the information, including the invoiced amounts and direct labor hours?

Service contract inventories are a management tool that are designed to help agencies better understand how contractors are being used to support the mission and whether contractors' skills are being used appropriately. The agencies analyze the data to determine if the mix of Federal employees and contractors is effective or if rebalancing is needed. Information on the total amount invoiced and the direct labor hours expended, when combined with other market research information and, where available, benchmarking data, can help to support agency efforts to eliminate costly duplicative service contracts in favor of more affordable solutions by providing insight into the relative cost-effectiveness and efficiency of contracted work.

Will the information on amount invoiced and direct labor hours be made public?

Yes. Consistent with section 743, agencies will include this information in their annual inventories, which also include a description of the work performed, the name of the vendor and the total dollar value of the contract.

What are the Contracting Officers responsibilities?

Per FAR 4.1704, for other than indefinite-delivery contracts, ensure the clause 52.204-14, Service Reporting Requirements, is included in solicitations, contracts, and orders. For indefinite-delivery contracts, ensure that clause 52.204-15, Service Contract Reporting Requirements for Indefinite-Delivery Contracts, is included in solicitations and contracts. The contracting officer at the order level shall verify the clause's inclusion in the contract.

When must contractors provide their data on amount invoiced and direct labor hours?

In accordance with the new rule, contractors performing on covered contracts must report their information between October 1 and October 31. Agencies are required to review contractor input and work with them to make revisions, if and as necessary, by November 30.

What happens if a contractor fails to work with the agency to provide the required data in a timely manner?

The contracting officer is expected to make the contractor's failure to comply with the reporting requirements a part of the contractor's performance information under FAR Subpart 42.15.

Where can I find the complete text of the rule for reporting on amount invoiced and direct labor hours?

The Federal Register notice was published on December 31, 2013. The link to the notice is *https://www.federalregister.gov/articles/2013/12/31/2013-31148/federal-acquisition-regulation-service-contracts-reporting-requirements*.

Point of Contact

For further information relating to the guidance contained herein, contact the Strategic Programs Division at (202) 287-1877.

3.0. Attachments

Attachment 1 - Special Interest Functions by Product and Service Code (PSC)
Attachment 2 - Sample Report

Attachment 1

Special Interest Functions by Product and Service Code (PSC)

PSC	PSC Description
D302	IT and Telecom- Systems Development
D307	IT and Telecom- IT Strategy and Architecture
D310	IT and Telecom- Cyber Security and Data Backup
D314	IT and Telecom- System Acquisition Support
D399	Other IT & Telecommunications Services
F999	Other Environmental Services/Studies/Support
R408	Support - Professional: Program Management/Support
R413	Support - Professional: Intelligence
R414	Systems Engineering Services
R421	Technical Assistance
R423	Support - Intelligence Services
R425	Support - Professional: Engineering/Technical
R499	Other Professional Services
R699	Other Administrative Support Services
R707	Support- Management: Contract/Procurement/Acquisition Support
S206	Guard Services
U099	Other Ed & Training Services
Y153	Construct/Production Buildings
Y199	Construct/Misc Buildings
Y299	Construct/All Other Non-Bldg Facilities

Attachment 2

Sample Report

Office Name

Development and Analysis of Service Contract Inventories - Fiscal Year 20XX Report

Scope:

The special interest functions considered included Product and Service Codes (PSC) D302, D314, D399, R408, R423, R425, R499 and R699 totaling approximately $319 million or 80% of total Fiscal Year 2015 obligations. Seven contracts and eight delivery orders were reviewed based on the extent of services type efforts performed and the highest probability for an adverse finding, if any, should occur.

Award Number	Vendor Name	PSC	Obligated Amount
DT0003143	ACTIONET, INC.	R499	$175,137,317.02
AU0000014	GOLDEN SVCS, LL.C.	R499	$19,626,600.54
IN0000069	SYSTEMATIC MANAGEMENT SERVICES, INC.	R423	$17,124,852.96
DT0002463	VALUE RECOVERY HOLDING, LIMITED LIABILITY COMPANY	R408	$16,999,531.65
DT0003246	INSCOPE INTERNATIONAL, INC.	D302	$12,092,545.00
EE0000002	NEW WEST-ENERGETICS JOINT VENTURE, LLC	R425	$11,956,225.95
DT0002457	CRI ADVANTAGE, INC.	D314	$10,911,351.56
EI0000515	IMG-CROWN ENERGY SERVICES JOINT VENTURE	R408	$9,318,708.88
HS0000018	PARAGON TECHNICAL SERVICES, INC.	R499	$8,563,358.25
HS0000088	GET-NSA	R699	$8,484,899.09
DT0002641	HIGHLAND TECHNOLOGY SERVICES INC.	R499	$7,435,000.19
EI0000567	Z INC	R408	$6,739,201.92
EI0000664	CHENEGA GOVERNMENT CONSULTING, LLC	D302	$5,365,000.00
DT0001916	DELTA RESEARCH ASSOCIATES, INC	R423	$5,258,783.82
DT0000088	PROJECT ENHANCEMENT CORPORATION	R499	$4,971,751.74
		Total	**$319,985,128.57**

Methodology:

Office conducted its analysis against the criteria required by Public Law 111-117, Section 743. An inventory of contracts was established based on the designated special interest functions identified in Attachment 2 of the DOE Memorandum for Heads of Contract Activity, Development and Analysis of Service Contract Inventories - 2015, dated November 9, 2015. Discussions were held with the cognizant ***Office*** contracting officer personnel regarding the management and oversight of the work performed under their respective contracts, as well as the current segregation of duties and responsibilities and direct interaction of participating Federal and contractor personnel.

Findings:

The outcome of the service contract inventory analysis resulted in the following findings:

1. None of the contracts are characterized as "personal services" as defined by the Federal Acquisition Regulation (FAR);

2. Contractor employees do not perform any inherently governmental functions;

3. Ongoing comprehensive monitoring and evaluations are performed by Government personnel and the contractor performance requirements have not changed or been expanded to be classified as inherently governmental type functions;

4. Contractor employees are not performing critical functions that would affect the program's ability to maintain control of its missions and operations; and

5. Sufficient government personnel are available and assigned to manage and oversee contracts effectively without the need to rebalance the mix of Federal and contractor employees.

Actions taken or planned:

Office does not believe any further action or a more in-depth review is needed at this time based on the above noted Findings. Also, no weaknesses were identified during the analysis review of ***Office***'s service contract inventories. However, ***Office*** will continue to guard against any expansion of contractor work activities into inherently governmental and critical work functions.

Certification:

After considering the above, I hereby certify that the responsible Office Contracting Officers have taken the appropriate steps to ensure compliance with FAR 4.17, as applicable.

b e te t

CHAPTER 5 - PUBLICIZING CONTRACT ACTIONS

201 S p r p e mpet t e tr t t t t e t r t 02 1 ebr r 2017
0 re t t 201
tt me t 1 S2 em e

Synopsizing Proposed Non-Competitive Contract Actions Citing the Authority of FAR 6.302-1

Guiding Principles

- Full and open competition is required in Government contracting; however, there are exceptions such as only one responsible source and no other supplies or services will satisfy agency requirements, FAR 6.302-1.

[References: FAR 5, DEAR 905]

1.0 Summary of Latest Changes

This update: (1) revises paragraph 2.3 to address FedBizOpps interface with DOE's Strategic Integrated Procurement Enterprise System (STRIPES) and (2) includes administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references.

2.1 Overview. This section discusses publicizing sole source actions as part of the approval of a Justification for Other than Full and Open Competition (JOFOC) using the authority of FAR 6.302-1.

2.2 Background. The Competition in Contracting Act (CICA) of 1984 requires that all acquisitions be made using full and open competition. Seven exceptions to using full and open competition are specifically identified in FAR Part 6. One exception permits contracting without full and open competition when the required supplies or services are available from only one responsible source (FAR 6.302-1). This exception is supported by a written JOFOC and the publication of the notice required by FAR 5.201. FAR 5.201 requires the publication of a notice of a proposed contract action for acquisition of supplies and services, other than those covered by the list of exceptions in FAR 5.202 and the special situations in FAR 5.205, exceeding $25,000.

2.3 Notice. When required by FAR 5.201, Contracting Officers will publicize a notice in FedBizOpps (through DOE's STRIPES), stating it is DOE's intent to award a contract or modification to an existing contract on a sole source basis. The notice should include:

- a statement identifying sole source authority permitted under FAR 6.302;
- the information required by FAR 5.207(a);
- a complete and accurate description of the supplies or services as required by FAR 5.207(c); and
- the classification code required by FAR 5.207(e).

This notice should be published prior to the preparation of the JOFOC. The responses to the notice and DOE reviews of the responses are to be included in the JOFOC. If no responses are received, this should be noted in the JOFOC. The notice should be in addition to other forms of market research conducted for the requirement. The notice must be current and publicized for the requirement at hand, not for previous or other requirements.

Congressional Notifications

Guiding Principles

- Congressional notifications inform members of Congress of significant contract actions in their districts.
- DOE uses automated or manual reporting based on the characteristics of the instant action.

[References: FAR 5.403 and "Guide for Congressional and Intergovernmental Notifications" (Sep 2014), issued via DOE Deputy Secretary Memorandum (Oct 1, 2014)]

1.0 Summary of Latest Changes

This update: (1) deletes the requirement for separate reporting of the final Request for Proposal (RFP) over $25 million via a "Solicitation Notification" form, (2) establishes that RFPs over $25 million are reported via "Priority Congressional & Intergovernmental Notifications," and (3) includes administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. This chapter discusses the requirements and procedures for providing Congressional notice for certain solicitation or contract actions. Advance notifications of contract actions, issuances of a final Requests for Proposal (RFP), and contract terminations are required at specific dollar thresholds.

2.1 Office of Primary Responsibility. Congressional notifications are overseen and issued by the DOE Office of Congressional and Intergovernmental Affairs (CI) to Members of Congress when DOE activities will likely affect their constituents. Contract Specialists and Contracting Officers (CS/COs) should refer to the CI "Guide for Congressional and Intergovernmental Notifications" attached to this chapter for specific thresholds, requirements and procedures.

2.2 Special Notifications. This chapter does not address special notifications required by fiscal year appropriations commonly referred to by the department as "Section 301b and 311 Congressional Notifications." For the latest requirements of these notifications see the DOE Acquisition Letter webpage http://energy.gov/management/listings/active-acquisition-letters. Please be aware that notifications under Sections 301b and 311 do not exclude the notifications covered in this chapter. In other words…you may have to report more than once for the same

action! This situation is primarily due to overlapping dollar thresholds, but also may arise under circumstances requiring special notification.

2.3 Advance Notification of Award System (ANA).

ANA is an automated DOE system used to process Congressional notifications of routine contract actions (award or modification) of $4 million or more. This process utilizes the existing data in the Strategic Integrated Procurement Enterprise System (STRIPES) which provides the data to ANA as a part of the iPortal (https://iportal.doe.gov). The iManage ANA User Guide is at the iPortal website. The ANA system can be accessed directly at https://iportalwc.doe.gov/pls/apex/f?p=ANA. The previous two websites are only accessible from a DOE authorized account.

Note: All CS/COs will need a user identification (userid) and password to access the DOE iPortal to approve or reject notifications in ANA. If you do not currently have access to iPortal, please follow the instructions at http://energy.gov/management/downloads/request-iportal-account. If you need any assistance with the iPortal, please contact the iManage help desk at 301-903-2500.

2.3.1 Automated Reporting. The Congressional notification process begins when award information is entered into STRIPES. ANA electronically extracts the required information from STRIPES and routes it for approval, in-turn, to the applicable Procurement Office, Program Office, and finally CI. CI then coordinates with Public Affairs, the Office of the Chief Financial Officer, and the Office of the Secretary of Energy before reporting this information to Members of Congress.

2.3.2 DATA Input. Automated notification will occur based on the dollar threshold of the award and the proper completion of data in STRIPES. In ANA the CS/CO will:

- Review the award information for accuracy and completeness.
- Complete block 4 – **place of performance**. The data to complete this block is contained in the place of performance fields on the FPDS-NG data entry screen.
- Review block 6 – **type of action** to determine if modification type is correct and whether or not this is a reportable action. If it isn't a reportable ANA action, then the CO/CS will reject it. If it is a contract termination action of $4 million or more (based on original contract value), the CS/CO should reject the action in ANA and then manually complete and submit DOE Form 4220.10, "Office of Congressional and Intergovernmental Affairs (CI) Congressional Grant/Contract Notification" at http://energy.gov/cio/downloads/doe-f-422010. See section 4.0, Manual Reporting, for further information.
- Review block 9 – **brief description** - include enough information to describe the effort to be performed and its purpose. It is imperative that a complete description be provided that is sufficient for preparing a press release and/or

providing a meaningful description when notifying interested parties. Use non-technical plain English language - no acronyms. This description is generated from the description under the text tab in STRIPES.

- Approve or reject the action. In the event changes need to be made to any of the data fields in the form, the CS/CO can reject the notification, complete the information in the reason for rejection section in the workflow, and correct the data in STRIPES as explained in the iManage ANA User Guide. Once the CS/CO approves the notification, it will automatically be transmitted to the Program Office and then CI who will route it within Headquarters for concurrences. After CI receives the concurrences, they will approve and transmit the notification to the appropriate Members of Congress.
- Award the approved action on the STRIPES proposed award date. CS/COs should be aware that ANA as configured, bases release dates on calendar days, while most notification requirements are now based on business days. Award dates should be adjusted accordingly based on the specific notification requirements that apply to the action.

2.3.3 DATA Source. The below table contains information on the source of data used by ANA to populate DOE F 4220.10. These data fields must be entered correctly in STRIPES. Reporting actions are based on the pre-defined reporting and dollar thresholds in the CI guide. Instructions for specific fields are printed on the back of DOE F 4220.10.

DOE F 4220.10, "Office of Congressional and Intergovernmental Affairs (CI) Congressional Grant/Contract Notification."		**System of Record**
Block #	**Field Name**	
1	Procuring Office	STRIPES
	Procuring Office Representative (CS/CO)	STRIPES
	Procuring Office Representative Telephone (CS/CO)	STRIPES
2	Program Office/Project Office Name (COR/COTR)	STRIPES
	Program Office/Project Office Telephone	STRIPES
3	Contractor, Grantee, or Offeror Name	SAM/STRIPES
	Contractor, Grantee, or Offeror Street Address	SAM/STRIPES
	Contractor, Grantee, or Offeror City	SAM/STRIPES
	Contractor, Grantee, or Offeror State	SAM/STRIPES
	Contractor, Grantee, or Offeror Zip Code	SAM/STRIPES
4	Place of Performance Street Address (The data to complete this block is contained in the place of performance fields on the FPDS-NG data entry screen.)	CS/CO fill-in
	Place of Performance City	CS/CO fill-in
	Place of Performance State	CS/CO fill-in
	Place of Performance Zip	CS/CO fill-in

DOE F 4220.10, "Office of Congressional and Intergovernmental Affairs (CI) Congressional Grant/Contract Notification."		System of Record
Block #	**Field Name**	
5	ANA Anticipated Award Date	STRIPES
	Date of Public Announcement (if any)	NOT ACTIVE
6	Contract, Grant or Other Agreement Number	STRIPES
	Type of Action (New/Renewal/Modification)	STRIPES
	Total to Date	STRIPES
7	Obligated Cost or Price of this Action	STRIPES
	$ Federal Cost or Price of Total Award	STRIPES
	$ Modification to Federal Cost or Price of Total Award	STRIPES
	$ Recipient Cost Sharing (if applicable)	STRIPES
8	Duration of Contract, Grant, or Other Agreement (These will be generated from the "Period of Performance" start and end dates in STRIPES)	STRIPES
9	Brief Description - Please provide meaningful details. See Instructions. (This description is generated from the description under the text tab in STRIPES.)	STRIPES

2.4 Manual Reporting.

Manual reporting is done in special circumstances when it would not be appropriate to use ANA. In these circumstances, the CS/CO will complete and submit a DOE Form 4220.10, "Office of Congressional and Intergovernmental Affairs (CI) Congressional Grant/Contract Notification" or a Priority Congressional & Intergovernmental Notification."

2.4.1 DOE Form 4220.10. Examples of when to use the form are provided below. The form is located at http://energy.gov/cio/downloads/doe-f-422010 and instructions for filling it out are on its second page.

2.4.1.1 Terminations. Manual reporting is required for termination actions, regardless of type, based on an original contract value of $4 million or more. The completed form must be submitted 3 business days before issuing a contract termination.

2.4.1.2 Other Actions. Manual reporting may be required at times for other actions. Unless the CS/CO is otherwise informed that a specific action, excluding a termination action, requires manual reporting, the Program Office will notify the CS/CO when a manual report is necessary. Manual reporting is required when the action:

- Falls outside the normal reportable actions and dollar thresholds;
- Is a subcontract level action and a press release is to be issued by DOE; or

- Is a subcontract level action which is known to have been the subject of a Congressional inquiry.

2.4.1.3 Submission Requirements. Complete the form and submit it as follows:

- Print and sign the completed form;
- Scan the form and create an Adobe PDF file. Name the file according to the following convention: <Program Office Code> <Contract requirement, grantee or offeror> <Contract, grant, or other agreement number>. Example: EE University of Utah DE-EE0001234; and
- Email the completed document to the ANA System Coordinator at CI-ANA@hq.doe.gov.

2.4.2 Priority Congressional & Intergovernmental Notification (PCN). The Program Office is responsible for preparing and submitting the PCN form required by CI for specific program actions requiring special attention or additional information not provided in the DOE F 4220.10. In the event the Program Office decides to submit a PCN, the CS/CO should be available to coordinate any necessary information requested by the applicable Program Office. CS/COs should refer to the CI "Guide for Congressional and Intergovernmental Notifications," attached to this chapter, for further guidance on the PCN requirements and process. Some of the actions that would be reportable via a PCN are:

- Awards below established thresholds of significant stakeholder interest;
- Contract award/modification greater than $4 million that need more extensive congressional or intergovernmental notification;
- Fee determinations, fines or penalties; and
- Final Request for Proposal greater than $25 million

3.0 Attachment

"Guide for Congressional and Intergovernmental Notifications" (Sep 2014), issued via DOE Deputy Secretary Memorandum (Oct 1, 2014)

The Deputy Secretary of Energy
Washington, DC 20585

October 1, 2014

MEMORANDUM FOR HEADS OF DEPARTMENTAL ELEMENTS

FROM: DANIEL B. PONEMAN

SUBJECT: Congressional and Intergovernmental Coordination and Notification Requirements

Effective communication with congressional and intergovernmental stakeholders is essential to advance the priorities of the Department. Well-planned and -executed notifications provide the best chance at a program's success; poorly-executed notifications jeopardize the effectiveness of the program and the Department as a whole. To that end, this memo streamlines the prior notification processes and reiterates the coordination requirements for the Department. This memo rescinds and replaces the Memorandum for the Heads of Energy, Science, and Environment Departmental Elements from David K. Garman, dated January 20, 2006 as well as the Memorandum to Departmental Elements from Daniel Poneman dated June 10, 2010.

Congressional & Intergovernmental Coordination

The Office of Congressional and Intergovernmental Affairs (CI), has responsibility for managing the Department's relationships with Members of Congress and their staff, as well as intergovernmental officials (Mayors, State Legislatures, Governors, Tribal Leaders, etc.), and other key stakeholders. CI is the principal point of contact for all these interactions. The singular exception is the House and Senate Appropriations Chairmen and Ranking Member or their staff on budgetary and appropriation matters, for which the Office of the Chief Financial Officer (CFO) is the principal point of contact in coordination with CI.

The objective of the coordination and notification process is to provide congressional and intergovernmental stakeholders with information on DOE activities that are likely to have an effect on their constituents or the legislative work before Congress. Program Offices are responsible for making CI aware of certain Departmental actions or events described below. Notifications require varied timing and tempo, modes of communication, and levels of engagement by Departmental leadership. Partnership with CI will facilitate coordination and ensure cross-cutting Departmental interests are identified. It is vital that information about these actions be provided in advance so there is sufficient time to work with the Program Office and other offices to establish and execute an appropriate outreach strategy.

Upon receiving an invitation or request for information from a congressional or intergovernmental stakeholder, you must notify CI. Furthermore, prior to accepting an

Printed with soy ink on recycled paper

invitation, responding to an information request, or initiating a contact with a congressional or intergovernmental office, you must have received CI clearance; further, if the congressional interaction is with the leadership or staff of the Congressional Appropriations Committees, please also notify CFO's Office of External Affairs. The appropriate staff CI or CFO staff will provide clearance and coordinate the response with your office. This process is important to ensure all equities across the Department are properly taken into account and balanced to reflect the broad vision of the Secretary. The notifications described in this memo do not supplant the proper communication of program activities through appropriate channels to your respective Under Secretary, Senior Advisor, General Counsel and Public Affairs.

Congressional & Intergovernmental Notifications

Specific processes for notifications are included in the attached Guide for Congressional & Intergovernmental Notifications. A brief summary of the notification types follow below:

1. **Advance Notification of Awards (ANA):** Formerly known as 48-Hour Notifications, this notification supports routine email notifications to Members of Congress related to entities in their States and Districts that receive contract awards $4 million or greater and financial assistance awards of $2 million or greater. These notifications have been phased into a relatively automated process that supports a standard email notification to congressional stakeholders. The Program Office is expected to inform CI of ANA notifications that may require more extensive outreach, such as a special event or media release. Whenever special outreach is planned, the routine ANA process will be suspended.

2. **Priority Congressional Notifications (PCN):** This process replaces the previous 72-Hour Prior Notification. The PCN applies to matters of likely interest to Congress, Governors, local and Tribal governments and significant contract or financial awards or selections for award. Some specific examples include funding opportunity announcements, requests for proposal, achievements of significant milestones or discovery, significant programmatic changes, NEPA announcements, workforce impacts, fee determinations, and appointment of senior officials. Additionally, if a notification normally handled through the ANA process is suspended, it will follow the PCN process. In preparation for a PCN announcement, as much advanced notice as possible should be provided to allow for appropriate internal coordination.

3. **Security Incidents (Including Cybersecurity)**: Due to the nature of security incidents which may unfold quickly and without notice, a separate notification process was established in a Memorandum for Heads of Departmental Elements, dated August 23, 2013, "Security Incidents (Including Cybersecurity) Notification Protocol." Continue to follow this guidance for all incidents described in the memorandum.

4. **Other Congressional Notifications:** Section 301and Section 311 notifications, to the Appropriations Committees, are mandated by statute and are not modified by this

memo. Section 301 and 311 notifications may be required in addition to ANA or PCN and should be coordinated in tandem.

CI will look to the Program Offices to take the lead in directing information from your laboratories, headquarters, and field offices to CI in order to keep Congress and intergovernmental stakeholders informed. Accordingly, it is important that your lines of communication with these offices support the exchange of information necessary to carry out these requirements. In particular, there should be clear procedures and channels of communication that will result in timely and accurate notifications. ***Please amend your internal communications process to reflect these changes.*** I also ask that you distribute this memo to the senior leadership in your headquarters, field offices, laboratory directors, and their staff.

Attachment
Guide for Congressional & Intergovernmental Notifications

cc:
Barb Stone, EA
Peder Maarbjerg, ARPA-E
Steve Kirchoff, AU
Joseph Levin, CF
Theresa Wykpisz-Lee, CIO
Mekell Mikell, ED
Russell "Rusty" Perrin, OE
Derrick Ramos, EE
Greg Gershuny, EPSA
Colin Jones, EM
Candice Trummell, EM
Jenny Hakun, FE
Catherine Goshe, GC
Terri Heinicke, HC
Damian Bednarz, IA
Tony Carter, LM
Brendan Bell, LPO
Les Novitsky, MA
Liz Ramsay, NE
Jed D'Ercole, NNSA
Aoife McCarthy, PA
Julie Carruthers, SC
Shirley Neff, EIA
Sonja Baskerville , BPA
Michael McElhany, WAPA
Kathy Tyer, SWPA
Barbara Smith, SEPA

Guide for Congressional and Intergovernmental Notifications

Office of Congressional and Intergovernmental Affairs
U.S. Department of Energy

September 2014

Guide for Congressional and Intergovernmental Notifications

Office of Congressional and Intergovernmental Affairs
U.S. Department of Energy

September 2014

THIS PAGE INTENTIONALLY LEFT BLANK

Guide to Congressional & Intergovernmental Notifications

Table of Contents

Overview....1

Congressional Notifications—Summary of Categories....2

Chart of Congressional & Intergovernmental Notification Categories....3

Advance Notification of Awards (ANA)/Congressional Grant-Contract Notification....4

Priority Congressional & Intergovernmental Notifications (PCIN)....5

Other Congressional Notifications....7

Security Incidents (Including Cybersecurity) Notification Protocol....8

Appendix

DOE Form 4220.10.... Appendix A

Guide to Completing the Priority Congressional & Intergovernmental Notification Form.... Appendix B

Priority Congressional & Intergovernmental Notification Form (PCIN).... Appendix C

Congressional & Intergovernmental Points of Contact.... Appendix D

Resource Information.... Appendix E

Memorandum on "Security Incident (Including Cybersecurity) Notification Protocol".... Appendix F

THIS PAGE INTENTIONALLY LEFT BLANK

Overview of CI
Notifications & Communications

The Office of Congressional and Intergovernmental Affairs (CI), is responsible for working with Departmental officials to promote the Administration's, Secretary's, and Department's policies, legislative initiatives and budget requests; and managing and overseeing engagement activities with Members of Congress and their staff, as well as intergovernmental stakeholders (Mayors, State Legislatures, Governors, etc.).

An important part of this effort is end-to-end coordination within the Department to provide accurate and timely information to our stakeholders. The office is committed to supporting the Department's leadership and program officials to keep stakeholders informed of the key activities, accomplishments and activities within their programs. The Department is a multifaceted organization with varied stakeholder interests where it is essential that our interactions are managed cohesively. Depending on the nature of a Departmental engagement or announcement, coordination across the Department will help identify different levels of engagement that might be needed by our leadership, principals and/or staff and cross-cutting Departmental interests.

CI also works in close partnership with the Chief Financial Officer's External Coordination Office (CF-ExCo) and the National Nuclear Security Administrations' Office of External Affairs (NNSA-EA). CF-ExCo is responsible for coordinating activities with the House and Senate Appropriations Chair and Ranking Member or their staff on budgetary matters. NNSA-EA is the lead on all congressional and intergovernmental activities for NNSA.

Program Offices are responsible for making CI aware of certain communications, Departmental actions or events described in this guide. It is vital that information about these actions be provided in advance so that CI may establish and execute an appropriate outreach strategy in coordination with your office.

While this guide primarily focuses on notifications, the notification process frequently runs in tandem with other stakeholder communications. Please keep in mind that upon receiving an invitation or request for information from a congressional or intergovernmental office, you must notify CI. Furthermore, prior to accepting an invitation, responding to an information request, or initiating a contact with a congressional or intergovernmental office, you must have received CI clearance; further, if the congressional interaction is with the leadership or staff of the congressional appropriations committees, please also notify CF-ExCo. The appropriate CI or CFO staff will provide clearance and coordinate the response with your office.

The CI Liaison for your Program Office is a resource in coordinating all notifications and communications. Should you ever have any questions, please do not hesitate to engage your Liaison. You can also reach the CI Office at (202) 586-5450 or your can identify specific staff contacts on our website.

Congressional & Intergovernmental Notifications
Summary of Categories

1. **Advance Notification of Awards (ANA):** Formerly known as 48-Hour Notifications, this notification supports **routine** email notifications to Members of Congress related to entities in their States and Districts that receive contract awards of $4 million or greater and financial assistance awards of $2 million or greater. These notifications have been phased into a relatively automated process that supports a standard email notification to congressional stakeholders. The Program Office is expected to inform CI of ANA notifications that may require more extensive outreach, such as a special event or media release. Whenever special outreach is planned, the routine ANA process will be suspended and the Priority Congressional Notification process should be utilized.

2. **Priority Congressional & Intergovernmental Notifications (PCIN):** The PCIN is the primary tool for Program Offices to inform CI of upcoming program announcements that may need more extensive congressional or intergovernmental notification. This process replaces the previous 72-Hour Prior Notification. The PCIN applies to **all matters of likely interest** to Congress, Governors, local and Tribal governments and contract or financial awards of significant interest. Unless handled through the ANA process, program issues and announcements that might require stakeholder engagement should be communicated from the program office to CI through the PCIN.

   Please note the PCIN is a notification to CI and CF-ExCo only. It is not a notification to the specific stakeholder. CI will use this information and work with program officials to determine whether additional information is need and also assess timing, content and format for the actual stakeholder notification.

3. **Other Congressional Notifications:** Certain notifications [Section 311; 301(c); 301(b)(1); 301(c)], to the Appropriations Committees, are mandated by statute. These notifications are initiated by the contracting offices and only pertain to contract awards and modifications or financial assistance awards or modifications. These may be required in addition to ANA or PCIN and should be coordinated in tandem. The ANA and PCIN process will ensure any additional congressional or intergovernmental stakeholders are notified as appropriate.

4. **Security Incidents (Including Cybersecurity):** Due to the nature of security incidents which may unfold quickly and without notice, a separate notification process was established in a Memorandum for Heads of Departmental Elements, dated August 23, 2013, "Security Incidents (Including Cybersecurity) Notification Protocol." Continue to follow this guidance for all incidents described in the memorandum.

ADVANCE CONGRESSIONAL & INTERGOVERNMENTAL NOTIFICATIONS CATEGORIES

Type of Notification	Financial Reporting Threshold	Advance Time	Originator	Notification By	Notification To	Form
Priority Congressional & Intergovernmental Notification (PCIN)						
Any known significant issue of interest to stakeholders Achieving a Major Milestone/Discovery Draft or Final EIS/ Record of Decision Workforce Restructuring/Reduction In Force Contractor Fee Determination or other fines or penalties Appointment of Senior Lab or Field Officials Opening or Closing of a Facility Significant Awards • Awards of significant stakeholder interest, below thresholds • Due to significant stakeholder interest, suspended ANAs ○ Contract Award/Modification ○ Financial Assistance Award/Modification • Final Request for Proposal (RFP) • Final Funding Opportunity Announcement (FOA)	NA NA NA NA NA NA NA Any amount, as relevant ≥$4 Million ≥$2 Million ≥$25 Million ≥ $50 Million	3 Business Day minimum NOTE: Many important announcements require far more than 3 days advance notification. Accordingly, the 3 day timeframe should be considered a minimum requirement.	Program Office (PO)	CI	Congress • Specific Member(s) • Authorizing Committees • Appropriations Committees Intergovernmental stakeholders	PCIN
Advanced Notification of Awards (ANA) or Manual 4220.10						
Contract Award/Modification	≥$4 Million	3 Business Days	Contracting Office	CI	Congress—Specific Member(s) Intergovernmental stakeholders	ANA or 4220.10
Financial Assistance Award/Modification	≥$2 Million	3 Business Days	Contracting Office	CI	Congress—Specific Member(s) Intergovernmental stakeholders	ANA or 4220.10
Termination of DOE Financial Assistance	≥$2 Million (Based on Original Value)	3 Business Days	Contracting Office with PO	CI	Congress—Specific Member(s) Intergovernmental stakeholders	4220.10 Manual
Termination of DOE Contract Award	≥$4 Million (Based on Original Value)	3 Business Days	Contracting Office with PO	CI	Congress—Specific Member(s) Intergovernmental stakeholders	4220.10 Manual
Section 301(b)/301(c)—*NOTE: PCIN or ANA may also be required*						
Multiyear Contract Award as defined at FAR 17.103, or Multiyear Financial Assistance Award	FY 2012-13: All multi-year awards FY 2014: Multi-year awards not fully funded	FY 2012-13: 14-Calendar Days FY 2014: 3 business days	Contracting Office	Contracting Office	Congress—Appropriations Committees	Form Letter
Section 311/301(b)(1)—*NOTE: PCIN or ANA may also be required*						
Contract Award/Modification or Financial Assistance Award/Modification	>$1 Million	3 Full Business Days	Contracting Office	Contracting Office	Congress—Appropriations Committees	Form Letter

Advanced Notification of Awards (ANA)
Congressional Grant/Contract Notification

The automated ANA system facilitates routine notifications to congressional stakeholders regarding Departments financial assistance awards/terminations and contract award/terminations. This process replaces the former "48-hour notice" which had lower reporting thresholds.

The automated ANA system allows the Contracting Officer, Program Office, and CI to review, update, approve, or reject notifications using an electronic DOE Form 4220.10, "Congressional Grant/Contract Notification" (Appendix A). The ANA system automatically generates notification forms based on the STRIPES procurement database. Once all coordination is complete, CI will transmit the DOE Form 4220.10 to relevant stakeholders via email.

If the Program Office believes additional outreach beyond the emailed DOE Form 4220.10 is needed, the ANA process should be suspended and the Program Office should follow the Priority Congressional Notification(PCIN) process. The ANA process should not be used if there is specific timing associated with the public announcement, a DOE press release will be issued, or targeted congressional outreach (emails, phone, meetings, conference calls, etc.) is required.

An ANA notification is required for the following actions:

- Financial assistance awards valued at or above $2 million
- Contract awards valued at or above $4 million
- Increasing or decreasing the value of a financial assistance award by $2 million or more
- Increasing or decreasing the value of a contract by $4 million or more, to include exercising an option
- Termination of Financial Assistance based on original financial assistance value of $2 million or more
- Termination of Contract based on original contract value of $4 million or more

The ANA process consists of the following steps:

(1) Based on the anticipated award date in STRIPES, the ANA system will send an email to the Contracting Officer (CO) with an automatically-generated DOE Form 4220.10 for actions that meet the reporting thresholds. This will occur 3 days prior to the expected award date.

(2) The CO receives the form and reviews the award information for accuracy, including the award description, the type of action, and place of performance. The CO then approves or rejects the notification.

(3) The ANA system transmits the form to the Program Office's designated representative, who either approves the award information within the ANA system or notifies CI and the CO the award requires a PCIN. In the event of a PCIN, the ANA process will be suspended and the Program Office will provide CI with PCIN materials.

(4) The ANA system notifies CI of the need for approval. CI approves and verifies the report for release to appropriate Members of Congress or conveys to the Program Office that a PCIN should be utilized and notifies the CO of a delayed implementation date.

Additional details are provided in the ANA User Guide, which describes the roles and responsibilities of CI, the Program Office, and CO. For technical question contact iPortal Support at (301) 903-2500.

Priority Congressional & Intergovernmental Notifications (PCIN)

The Priority Congressional & Intergovernmental Notification Form (Appendix C), is the primary tool for Program Offices to inform CI of upcoming program announcements that may need congressional or intergovernmental notification. In general, the PCIN process facilitates the exchange of information to prepare for upcoming announcements and serves as a recommendation from the program to CI on the execution of the notification.

As relevant, the Program Office is also responsible for coordinating with their respective Under Secretary, Senior Advisor, and Public Affairs on the subject matter of the notifications. Further, should S1 or S2 engagement be required for any portion of the congressional notification process, the program should ensure relevant subject matter updates have been provided unless, otherwise advised by CI.

The PCIN process applies to the following actions:

- Any Known Significant Issue of Interest to Congress, state, local or Tribal governments
- Significant Contract or Financial Assistance Award:
    - Awards of interest to Congress, state, local or Tribal officials that particularly highlight programmatic priorities, prime small business awards, or those that generally merit press attention
    - Announcement of significant selections prior to award, including those that individually or as a group fall below normal reporting criteria, but merit special outreach
    - Awards of significant stakeholder interest, suspended ANAs (Contract Award/Modification or Financial Assistance Award/Modification)
- Final Request for Proposal (RFP) of $25 million or more or lower thresholds as appropriate
- Final Request for Proposal (RFP) of $50 million or more or lower thresholds as appropriate
- Achieving a Major Milestone/Discovery (DOE or Contractor)
- Draft, Final EIS or Record of Decision (ROD)
- Workforce Restructuring/Reduction in Force (DOE or Contractor, greater than 25 workers)
- Contractor Fee Determination or other fines or penalties
- Appointment of Senior Official
- Opening or Closing of Facility (DOE or Contractor)

To inform CI of an upcoming program announcement, Program Offices should complete a PCIN form and provide it to their CI Liaison for the program no later than 3 days in advance of the ***proposed*** announcement date. Programs are encouraged to be forward thinking in bringing information to CI's attention as early as possible. As a practical matter, there are many important announcements that require far more than 3 days advance notification. Accordingly, the 3 day timeframe should be considered a minimum requirement. CI will work with program officials to determine sensitivities, timing, notification method (phone, emails, conference calls, etc.).

Keep in mind, the more information provided, the more effective DOE will be in our relationship with Congress. The "Guide to Completing the Priority Congressional & Intergovernmental Notification Form," (Appendix B) provides additional tips, but generally each PCIN should include:

- Talking points and/or background information;
- A draft paragraph briefly summarizing the issue, which may be provided to Congress;
- A draft press release (if applicable);
- 9-Digit Zip Codes and project descriptions for each awardee, including Place of Performance, for contract and financial assistance notifications; and

The CI Liaison staff for your program is a resource to Program Offices in coordinating all notifications. Should you ever have any questions regarding the need to complete a PCIN or the process, please do not hesitate to engage your Liaison.

Other Congressional Notifications

There are currently two types of Congressional notifications that are legislatively required by the FY 2012 and FY 2014 appropriations acts. These notifications are made exclusively to the Appropriations Committees and are executed directly by the Contracting Officers. Please note, these notifications are triggered at much lower thresholds than the ANA or PCIN notifications. However, should the ANA or PCIN be triggered those respective notification processes should be followed in addition to the execution of these notifications.

- **Notices for Financial Assistance or Contracts of $1 Million or More:** Section 311 of Division B of the Consolidated Appropriations Act, 2012, and Section 301(b)(1) of Division D of the Consolidated Appropriations Act, 2014 require advance notification to the Committees on Appropriations 3 full business days prior to contract and financial assistance actions of $1 million or more. Specific requirements are prescribed in Policy Flash 2014-02.

- **Notices for Multi-Year Financial Assistance or Contracts:** Section 301(b) of Division B of the Consolidated Appropriations Act, 2012 and Section 301(c) of Division D the Consolidated Appropriations Act, 2014 require advance notification to the Committees on Appropriations prior to multi-year financial assistance actions.

    - ***FY2012 or FY2013 funds:***
      The notification must be made calendar 14 days in advance.

    - ***FY2014 funds and not funded for the full period of performance:***
      The notification must be made 3 calendar days in advance.

  Multiyear contract means a contract for the purchase of supplies or services for more than 1, but not more than 5, program years. A multiyear contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds, and (if it does so provide) may provide for a cancellation payment to be made to the contractor if appropriations are not made. It does not apply to indefinite delivery/ indefinite quantity (IDIQ) contracts. Nor, does it apply to construction contracts with a performance period covering two or more years that is incrementally funded. The Congressional Notification of multi-year actions is prescribed in Acquisition Letter 2012-08.

To determine if reporting is necessary for these awards, consult with local contracting staff or counsel.

Security Incidents (Including Cybersecurity) Notification Protocol

Due to the nature of security incidents which may unfold quickly and without notice, a separate notification process was established in a Memorandum for Heads of Departmental Elements, dated August 23, 2013, "Security Incidents (Including Cybersecurity) Notification Protocol,"(Appendix F). Please refer to the memorandum for the all guidance parameters associate with security incident notifications. In general these notifications are required with respect to six types of incidents:

1) Significant physical security breaches at DOE facilities;
2) Actual or suspected penetration of an unclassified network where the theft, loss, compromise or suspected compromise of a significant amount of controlled unclassified information (i.e., Official Use Only [OUO], or Unclassified Controlled Nuclear Information [UCNI]) is determined;
3) Theft, loss, compromise, or suspected compromise of personally identifiable information (PII) for 100 or more individuals;
4) Theft, loss, compromise, or suspected compromise of classified matter (information or material);
5) Actual or suspected penetration of a classified network; and
6) Select intelligence and counterintelligence incidents.

Even for incidents not specified above, the protocols contained within the memorandum should be utilized for any security event that may result in significant external attention. In the event of an applicable security incident, the cognizant program office (in coordination with other Department elements that have relevant programmatic responsibility) is responsible for notifying the Department offices and officials *as soon as practical, including — when appropriate — as events are unfolding*.

To ensure Department-wide consistency, external notifications will be overseen by DOE's Assistant Secretary for Congressional and Intergovernmental Affairs.

- **Inter-agency Notification**: Executive Branch stakeholders will be notified as appropriate which may include but are not limited to White House Office of Communications, White House Office of Legislative Affairs, White House Office of Public Engagement and Intergovernmental Affairs, the National Security Staff, and the leadership of other affected Departments and Agencies.

- **Congressional and Intergovernmental Notification:** CI, after consultation and in coordination with other Departmental offices, will inform the appropriate congressional committees as soon as practicable, as well as make any notifications to state, local, and tribal officials as warranted. For purposes of notification, the appropriate congressional committees may include the staffs of the Armed Services and Energy Committees, the Appropriations Subcommittees on Energy and Water Development, and (for intelligence or counterintelligence issues) the House and Senate Intelligence Committees.

  For incidents involving only NNSA, the notification may be made by NNSA's Office of External Affairs after consultation with NNSA's Office of the General Counsel and DOE's Office of Congressional and Intergovernmental Affairs.

THIS PAGE INTENTIONALLY LEFT BLANK

DOE F 4220.10
(03-2013) Previous editions are obsolete.

U.S. DEPARTMENT OF ENERGY

Office of Congressional and Intergovernmental Affairs (CI)

CONGRESSIONAL GRANT/CONTRACT NOTIFICATION

TO: Office of Congressional & Intergovernmental Affairs
ATTN: Contract Notification Coordinator
U.S. Department of Energy
1000 Independence Avenue, SW
Washington, D. C. 20585

Telephone: 202-586-5450
Fax: 202-586-5497
Email: CI-ANA@hq.doe.gov

1. Procuring Office: _____
Name: _____
(Procurement Office Representative – CS/CO)
Telephone: (____) _____

2. Program Office/Project Office:
Name: _____
Telephone: (____) _____

3. Contractor, Grantee or Offeror:
Name: _____
Street: _____
City: _____ State _____ Zip _____

4. Place of Performance: (Required if different from #3)
Street: _____
City: _____ State _____ Zip _____

5. ANA Anticipated Award Date: _____
Date of Public Announcement: _____
(If any)

6. Contract, Grant, or Other Agreement No.:
_____
(Specify Type of Instrument)
☐ New ☐ Renewal ☐ Termination (See Inst)
☐ Modification (Total to date: $_____)
Does this award result from an Invitation For Bid?
☐ Yes ☐ No

7. Obligated Cost or Price of this Action: _____
$ Estimate Cost or Price of Total Award: _____
$ Recipient Cost Sharing (if applicable): _____
(For incrementally funded awards only. Report the initial obligation and total estimated award value.)

8. Duration of Contract, Grant, or Other Agreement:
From: _____ To: _____

9. Brief Description. (Please provide meaningful details. See instructions.)

TO BE COMPLETED BY OFFICIAL RESPONSIBLE FOR SUBMISSION

10. Method of Submission: ☐ Email ☐ Fax
Date: _____ Time: _____ ☐ A.M. ☐ P.M.

Name: _____ Title: _____

Signature: _____ Office: _____

APPENDIX A

THIS PAGE INTENTIONALLY LEFT BLANK

Guide to Completing the Priority Congressional & Intergovernmental Notification Form

The Priority Congressional & Intergovernmental Notification (PCIN) process is to be used by Program Offices to inform the Office of Congressional and Intergovernmental Affairs (CI) of matters likely of significant interest to Congress, Governors, and local and Tribal governments. The PCIN Form enumerates certain major items that should be brought to CI's attention through the PCIN process; programs are encouraged to also notify CI of any other noteworthy or sensitive issues that may prompt congressional or intergovernmental interest.

The PCIN package should be submitted to CI NO LATER THAN 3 BUSINESS DAYS in advance of an announcement.

GENERAL INFORMATION

- **Submitting Office:** Use standard office code, e.g. EE, FE, etc.
- **Contact Person:** List the person who can answer questions about the announcement being proposed
- **Phone:** Direct number for the contact person or a number that will facilitate prompt contact
- **Email:** Email address of the Contact Person
- **Date Submitted:** As appropriate

TYPE OF NOTIFICATION

- Check the box that describes the type of notification being submitted

DATE AND TIME OF PROPOSED ANNOUNCEMENT

- Provide a fixed day and time the program proposes for the announcement, otherwise indicate a timeframe

KNOWN CONGRESSIONAL/INTERGOVERNMENTAL INTERESTS

- List names, <u>including State or District represented</u>, of any congressional or intergovernmental stakeholders known to have an interest or might have an interest in the subject of the notification

BRIEF DESCRIPTION OF NOTIFICATION FOR PUBLIC DISTRIBUTION

- Provide a concise, nontechnical (plain language) description that can be publicly distributed without editing.

ATTACHMENTS

- Attachments may not be needed depending on the complexity of the announcement being made. Only include attachments that provide additional information beyond what is already provided on the first page of the PCIN.

Guide to Completing the Priority Congressional Notification Form—page 2

- Types of attachments
  - ***Talking Points:***
    - Strongly recommended if notifications should be made via telephone.
  - ***Background Materials:***
    - ONLY INCLUDE if the brief description section is insufficient to adequately convey the action being taken or if additional inquiries would be anticipated once the announcement is made (history, sensitivities, anticipated questions).
    - Proposed schedule/sequence of events if timing crucial or coordination is extensive.
    - Full documents in a transmittable format (PDF copies or web links). This is particularly relevant for RFPs, FOAs, RODs, Reports, EIS, etc.
    - Advanced Notification of Awards (ANA) notification document (DOE F 4220.10 or equivalent).

      NOTE: CI should be informed when the notification will be handled by the PCIN process in lieu of ANA. The Program Office should coordinate as necessary with the Contracting Office.
  - ***Contract or Financial Assistance:*** Provide 9-digit zip codes for each awardee/selectee, including place of performance and project descriptions.
  - ***Draft Press Release:*** Press releases are for information only and should be coordinated with Public Affairs. If you intend to issue a release, but it is not available at the time the PCIN is submitted, please note that additional materials will be forthcoming.

Emailing PCIN Package

- Email to: Your CI and CF-ExCo Liaison
  - If you are unsure of who covers your program, please call CI's main number (202) 586-5450
  - The subject line should include the following information: "ACTION: PCIN—Insert "Program Symbol"—Insert "Brief Description"

    EXAMPLE—**ACTION: PCIN—EERE, Biofuels Grant Award**

Office of Congressional and Intergovernmental Affairs

PRIORITY CONGRESSIONAL & INTERGOVERNMENTAL NOTIFICATION FORM

(To be submitted no later than 3 business days in advance announcement)

Submitting Office: _____ **Contact Person:** _____

Phone: _____ **Email:** _____ **Date Submitted:** _____

TYPE OF NOTIFICATION:

- ☐ **Significant issue of interest** (for Congress, state, local or Tribal governments)
- ☐ **Significant contract or financial assistance award:** This should include announcements of interest to stakeholders; that particularly highlights programmatic priorities, prime small business /SBIR-STTR awards; or those that generally merit press attention. *—May be in lieu of ANA or below reporting thresholds—*
- ☐ **Final RFP of $25 Million or More**
- ☐ **Final FOA of $50 Million or More**
- ☐ **Draft, Final EIS or Record of Decision (ROD)** (Coordinate with NEPA Office)
- ☐ **Workforce Restructuring/Reduction in Force** (DOE or Contractor, greater than 25 workers)
- ☐ **Contractor Fee Determination or other fines or penalties**
- ☐ **Appointment of Senior Official**
- ☐ **Opening or Closing of Facility** (DOE or Contractor)
- ☐ **Achieving a Major Milestone/Discovery** (DOE or Contractor)
- ☐ **Other**

DATE AND TIME OF PROPOSED ANNOUNCEMENT: _____

KNOWN CONGRESSIONAL/INTERGOVERNMENTAL INTERESTS:

BRIEF DESCRIPTION OF NOTIFICATION FOR PUBLIC DISTRIBUTION (Provide enough information to describe the effort to be performed and its purpose in non-technical plain English):

FOR ANNOUNCEMENTS OF AVAILABILITY OF FUNDS OR SOLICITATIONS (FOAs) ANSWER THE FOLLOWING:

How much funding will be made available and from what fiscal year (s) _____

Where is the activity funded in the budget request or applicable appropriations bill(s)? _____

Are there any legislative or report language prohibitions against this funding ? Yes ☐ No ☐

PLEASE ATTACH THE FOLLOWING TYPES OF SUPPORTING MATERIALS *ONLY AS NEEDED OR APPLICABLE*:

- **Talking Points and/or Background Materials**
- **For Contract Award or Financial Assistance:** Project descriptions; names of selectees/awardees with 9-digit zip codes
- **Draft Press Release**—this is for information only. Releases should be coordinated directly with Public Affairs.

Please email PCIN materials NO LATER THAN 3 FULL BUSINESS DAYS in advance of the proposed announcement to your CI and CF-ExCo Program Liaisons

If you have any questions; please call (202) 586-5450

Rev. 1-2014

THIS PAGE INTENTIONALLY LEFT BLANK

Congressional & Intergovernmental Points of Contact

Department of Energy Programs	Congressional Affairs & CF-ExCo Contact	Phone
Advanced Research Projects Agency -Energy	Kathy Peery Julie Middleton	202-586-2794 202-586-0673
Chief Financial Officer	Kathy Peery Casey Pearce	202-586-2794 202-287-5810
Chief Information Officer	Lil Owen Casey Pearce	202-586-2031 202-287-5810
Economic Impact and Diversity	Kathy Peery Casey Pearce	202-586-2794 202-287-5810
Electricity Delivery and Energy Reliability	Robert Tuttle Casey Pearce	202-586-4298 202-287-5810
Energy Efficiency and Renewable Energy	Martha Oliver Casey Pearce	202-586-2229 202-287-5810
Energy Information Administration	Kathy Peery Casey Pearce	202-586-2794 202-287-5810
Energy Policy & Systems Analysis	Kathy Peery Casey Pearce	202-586-2794 202-287-5810
Environment, Health, Safety and Security	Pat Temple Julie Middleton	202-586-4220 202-586-0673
Environment Management	Pat Temple Julie Middleton	202-586-4220 202-586-0673
Fossil Energy	Robert Tuttle Casey Pearce	202-586-4298 202-287-5810
General Counsel	Lil Owen Casey Pearce	202-586-2031 202-287-5810
Human Capital	Lil Owen Casey Pearce	202-586-2031 202-287-5810
Independent Enterprise Assessments	Pat Temple Julie Middleton	202-586-4220 202-586-0673
International Affairs	Kathy Peery Casey Pearce	202-586-2794 202-287-5810
Legacy Management	Pat Temple Julie Middleton	202-586-4220 202-586-0673
Loan Guarantee Program Office	Kathy Peery Julie Middleton	202-586-2794 202-586-0673
Management	Lil Owen Casey Pearce	202-586-2031 202-287-5810
National Nuclear Security Administration	Pat Temple Julie Middleton	202-586-4220 202-586-0673
Nuclear Energy	Pat Temple Casey Pearce	202-586-4220 202-287-5810
Power Marketing Administration	Robert Tuttle Julie Middleton	202-586-4298 202-586-0673
Science	Robert Tuttle Casey Pearce	202-586-4298 202-287-5810
Small and Disadvantaged Business Utilization	Kathy Peery Casey Pearce	202-586-2794 202-287-5810

THIS PAGE INTENTIONALLY LEFT BLANK

Resource Information

All resources and information including this guide can be found on Powerpedia at:

https://powerpedia.energy.gov/wiki/Congressional_%26_Intergovernmental_Affairs

For Program Offices:

- **General Resources:**
  https://powerpedia.energy.gov/wiki/Congressional_Notifications_Resources

- **Priority Congress Notification Form (fillable):**
  https://powerpedia.energy.gov/wiki/File:PCIN_Form_PDF_Fillable_9-25-14.pdf

- **CI Contacts:**
  http://www.energy.gov/congressional/about-us/congressional-and-intergovernmental-affairs-staff

For Contracting Officials:

- **Congressional Grant/Award Notifications Form (DOE F 4220.10)**
  http://www.energy.gov/sites/prod/files/2013/04/f0/4220-10%20Rev%20Last%20Edits%2003-20-2013%20FINAL.pdf

- **ANA User Guide**
  https://powerpedia.energy.gov/wiki/File:ANA_User_Guide_4-14-14.pdf

- **Acquisitions Guide Chapter 5**
  http://www.energy.gov/sites/prod/files/5.1%20Congressional%20Notification%20March%202013.pdf

- **Notifications to Appropriations Committees:**

  Financial Assistance or Contracts of $1 Million or More
  http://www.energy.gov/management/downloads/policy-flash-20-acquisition-letter-2014-05financial-acquisition-letter-2014-02

  Multi-Year Financial Assistance or Contracts
  http://energy.gov/sites/prod/files/AL%202012-%20%20FY%202012%20approrpiations%20-%2004182012%20FINAL_0.pdf

THIS PAGE INTENTIONALLY LEFT BLANK

The Deputy Secretary of Energy
Washington, DC 20585

August 23, 2013

MEMORANDUM FOR HEADS OF DEPARTMENTAL ELEMENTS

FROM: DANIEL B. PONEMAN

SUBJECT: Security Incident (Including Cybersecurity) Notification Protocol

In the event of security incidents — including cybersecurity incidents — at the Department of Energy (DOE) and its facilities, DOE must make notifications to assure appropriate awareness and response. Depending on the nature of the incident, these notifications may include (1) officials within DOE, (2) other interagency stakeholders, (3) congressional offices, and (4) the public; made in that order, absent extraordinary circumstances. It is important for internal DOE notifications to be made in an efficient, timely manner to maximize situational awareness within the Department prior to engaging parties outside of the Department.

This memorandum describes the process for notification of certain types of security incidents. These notification protocols do not supersede or replace DOE policy on Incidents of Security Concern found in DOE Order 470.4B, administrative change 1, dated 7-21-11, or any other incident management and reporting requirements contained in DOE directives. This memo creates no new requirements, but clarifies roles, responsibilities and expectations during a security incident.

This memorandum provides direction for Departmental Elements in carrying out their reporting responsibilities with respect to six types of incidents:

1) Significant physical security breaches at DOE facilities;
2) Actual or suspected penetration of an unclassified network where the theft, loss, compromise or suspected compromise of a significant amount of controlled unclassified information (i.e., Official Use Only [OUO], or Unclassified Controlled Nuclear Information [UCNI]) is determined;
3) Theft, loss, compromise, or suspected compromise of personally identifiable information (PII) for 100 or more individuals;
4) Theft, loss, compromise, or suspected compromise of classified matter (information or material);
5) Actual or suspected penetration of a classified network; and
6) Select intelligence and counterintelligence incidents.

Additional guidance associated with incident types 1, 3, and 4 is provided at the end of this memorandum.

Printed with soy ink on recycled paper

Even for incidents not specified above, the protocols contained within this memorandum should be utilized for any security event that may result in significant external attention.

DEPARTMENTAL NOTIFICATIONS

Departmental notifications will be made as delineated. In determining whether Departmental elements should be notified of a security incident, close calls should be resolved in favor of notification, with the understanding that further scrutiny will be applied before broader notification is initiated.

In the event of an applicable security incident, the cognizant program office (in coordination with other Departmental elements that have relevant programmatic responsibility) is responsible for notifying the following Department offices and officials ***as soon as practical, including — when appropriate — as events are unfolding***:

1. The Secretary, the Deputy Secretary, their senior staff, appropriate Program Secretarial Officers, the Office of Health, Safety and Security, and the Office of Intelligence and Counterintelligence. In the case of a National Nuclear Security Administration (NNSA) incident, the program must also notify the Administrator, Principal Deputy Administrator, Chief Information Officer, and the Chief of Defense Nuclear Security;

2. The DOE Office of Congressional and Intergovernmental Affairs and the Office of the General Counsel. In the case of an NNSA incident, the program must also notify the NNSA Office of External Affairs and the Office of the NNSA General Counsel;

3. Concurrently with notifications to DOE's Office of Congressional and Intergovernmental Affairs, all Departmental Elements except for the Office of Intelligence and Counterintelligence shall simultaneously notify the DOE Office of Public Affairs for the appropriate determination of disclosure to media. In the case of an NNSA incident, the program must also notify the NNSA public affairs officer.

In the event of a cybersecurity or PII incident (incident types 2, 3, and 5), the cognizant program office shall notify the DOE Office of the Chief Information Officer, who will make the internal notifications as described above.

Updated information should be provided as it becomes available until the immediate response and recovery actions are complete. Afterwards, regular updates should be provided according to the urgency of the situation and the pace of new developments. As a general rule, all internal notifications should precede external notifications.

EXTERNAL NOTIFICATIONS

To ensure Department-wide consistency, external notifications will be overseen by DOE's Assistant Secretary for Congressional and Intergovernmental Affairs.

Inter-agency Notification:

Following the Departmental notifications described above, DOE officials should notify other Executive Branch stakeholders as appropriate. Program offices should work closely with the Office of Public Affairs, the Office of Congressional and Intergovernmental Affairs, and the Office of the General Counsel to ensure all relevant Executive Branch stakeholders are identified and notified. Notifications may include but are not limited to White House Office of Communications, White House Office of Legislative Affairs, White House Office of Public Engagement and Intergovernmental Affairs, the National Security Staff, and the leadership of other affected Departments and Agencies.

In matters of potential foreign intelligence involvement, or under active criminal investigation, DOE's Office of Intelligence and Counterintelligence will consult with the Federal Bureau of Investigation, the Office of the Director of National Intelligence (DNI), the Department of Justice, or other appropriate intelligence organizations.

Congressional and Intergovernmental Notification:

DOE's Office of Congressional and Intergovernmental Affairs (after consultation and in coordination with other Departmental offices) will inform the appropriate congressional committees as soon as practicable, as well as make any notifications to state, local, and tribal officials as warranted.

For purposes of notification, the appropriate congressional committees may include the staffs of the Armed Services and Energy Committees, the Appropriations Subcommittees on Energy and Water Development, and (for intelligence or counterintelligence issues) the House and Senate Intelligence Committees.

For incidents involving only NNSA, the notification may be made by NNSA's Office of External Affairs after consultation with NNSA's Office of the General Counsel and DOE's Office of Congressional and Intergovernmental Affairs.

For security incidents that involve classified matter or intelligence and counterintelligence matters (incident types 4, 5, and 6), as specified in 50 U.S.C. 2656 (Notice to Congressional Committees of Certain Security and Counterintelligence Failures within Nuclear Energy Defense Programs), the Department must, after consultation with the DNI and the FBI Director, as appropriate, provide notification to Congress within 30 days after the date on which the Department determines a reportable incident has taken place.

For significant incidents for which there is also a foreign intelligence nexus, reporting responsibility resides with DOE's Office of Intelligence and Counterintelligence, under Director of National Intelligence guidelines.

Public Disclosure:

DOE's Office of Public Affairs (after consultation and in coordination with other Departmental offices) will determine whether any public disclosure is warranted. In the case of an NNSA incident, the Office of Public Affairs will consult with the NNSA Office of External Affairs.

FURTHER GUIDANCE FOR SPECIFIC INCIDENT TYPES

Significant physical security breaches at DOE facilities. Notifications will be made when there is a significant breach of security, regardless of whether the breach is determined to have malicious intent.

Loss of personally identifiable information (PII) in electronic form or hardcopy for 100 or more individuals. "Loss" means disclosure outside of the Federal Government or its contractors. Inadvertent access by a Federal or contractor employee to PII to which he or she would not normally be authorized access, or the unencrypted emailing of PII that does not suggest any possibility of compromise, will not be considered "loss" for purposes of this protocol and need not be reported. Unless the incident involves members of the Intelligence Community, notifications to the Office of Intelligence and Counterintelligence are not required.

Theft, loss, compromise, or suspected compromise of classified matter (information or material). Incidents involving the theft, loss, compromise, or suspected compromise of Top Secret, Sensitive Compartmented Information, Special Access Program, or Restricted Data (weapons data) information must be reviewed by the office with programmatic responsibility for the information. This review is to determine the significance of the incident (i.e., likely to cause serious harm or damage to the national security interest of the United States as defined in Executive Order 13526, *Classified National Security Information*) per DOE Order 470.4B, Attachment 5, *Incidents of Security Concern.*

Incidents requiring the notification of Federal line management that involve the theft or loss of physical assets (e.g., special nuclear material, classified weapons components/parts, etc.) must be assessed by the cognizant program office to determine if the details of the incident constitute a risk or threat to national security.

This policy supersedes my memorandum of June 24, 2011, *Security Incident (Including Cyber) Congressional Notification Protocol.*

b e te t

CHAPTER 6 - COMPETITION REQUIREMENTS

1 mpet t e reme t 20111

mpet t te e p b t e r 2011

Competition Requirements

[Reference: FAR 6 and DEAR 906]

Overview

This section discusses competition requirements and provides a model Justification for Other than Full and Open Competition (JOFOC).

Background

The Competition in Contracting Act (CICA) of 1984 requires that all acquisitions be made using full and open competition. Seven exceptions to using full and open competition are specifically identified in Federal Acquisition Regulation (FAR) Subpart 6.3. Documentation justifying the use of any of these exceptions is required. The exception, with supporting documentation, must be certified and approved at certain levels that vary according to the dollar value of the acquisition. The information that must be included in each justification is identified in FAR Sections 6.303-1 and 6.303-2.

Authority

The Secretary of Energy has designated and delegated certain authorities and responsibilities to the Senior Procurement Executive(s) (SPE) pertaining to implementing and executing statutory and regulatory competition requirements. For DOE contracting activities, the SPE is the Director, Office of Procurement and Assistance Management. For National Nuclear Security Administration (NNSA) contracting activities, it is the Director, Office of Acquisition and Supply Management.

In addition to the authorities in FAR Part 6, DOE has two other authorities that provide for other than full and open competition. These authorities are:

- The Federal Property and Administrative Services Act (40 U.S.C. 474(13)), which provides that nothing in this Act shall impair or affect any authority or programs authorized under the Atomic Energy Act of 1954, as amended.

- The Atomic Energy Act of 1954, as amended, which provides that the President may exempt any specific action of DOE in a particular matter carried out under the authority of this Act from the provisions of law relating to contracts whenever it is determined that such action is essential in the interest of common defense and security.

Competition Advocates

To implement FAR 6.501, the Secretary of Energy has delegated the authority for appointment of agency and contracting activity competition advocates to the SPEs, DOE and NNSA. The SPEs have delegated to their respective Head of Contracting Activities (HCA) the authority to appoint contracting activity competition advocates. In addition, the HCA's approval for JOFOCs is in accordance with the HCA Delegation of Authority/Designation memorandum.

Justification

Contracting officers certify that the JOFOC is complete and accurate and also require the acquisition initiator to furnish and certify that the supporting data (e.g., verification of the government's minimum needs and schedule requirements, efforts to find additional sources, rationale for limiting sources, or other information that forms the basis for other than full and open competition) is complete, current, and accurate.

A complete JOFOC must include the results of market research and, if applicable, the sources sought synopsis (see Chapter 5.2) as part of the main body of the justification and not as an addendum. An attachment may be used to provide detailed reviews of responses to the synopsis and companies reviewed during the market research, but the results of market research and a summary of responses received must be included in the main body of the JOFOC.

Contracting officers must obtain legal review from the contracting activity legal counsel office in a JOFOC with an estimated amount of more than $1 million or such lower threshold as the contracting activity legal counsel office may establish.

Each contracting activity should issue local implementing procedures that define the appropriate processing of JOFOCs at their locale. These procedures should specifically address the responsibilities of the program manager and contracting activity legal counsel.

Dollar thresholds for JOFOC approvals are subject to change. See the applicable HCA Delegation of Authority/Designation and FAR 6.304(a) for the current dollar thresholds.
For actions less than $650,000, the Contracting Officer should include the Competition Advocate in the review of the JOFOC before signing it.

Use of the attached model JOFOC, in conjunction with FAR 6.303-2, Content, will ensure consistency with FAR requirements.

Use of "Unusual and Compelling Urgency" Exception (FAR 6.302-2)

All requirements citing urgency as the exception should receive careful scrutiny to assure that the reason for the urgency is valid. The urgency exception contained in FAR Part 6 is not acceptable if there is evidence of poor planning and if the action cannot pass the test of a valid noncompetitive action. The Government Accountability Office and other reviewing organizations have held that the lack of planning or the delaying of a requirement to use the urgency exception is viewed as an attempt to circumvent CICA requirements.

Section 862 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110-417) amended the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(d)) to include a limit on the period of performance of contracts awarded noncompetitively under unusual and compelling urgency circumstances. This requirement is prescribed at FAR 6.302-2.

The total period of performance may not exceed the time necessary to meet the unusual and compelling requirements of the work to be performed under the contract and award of another contract for the required goods or services through the use of competitive procedures. The period of performance may not exceed one year unless the head of the agency determines that exceptional circumstances apply. The Secretary has delegated to the SPEs the authority to make this determination.

When the contracting activity believes that exceptional circumstances may exist for a contract period to be longer than one year, the contracting activity must prepare a "Determination of Exceptional Circumstances" (DEC) for approval by the appropriate SPE. The DEC, along with a copy of the draft JOFOC, shall be submitted to either of the following: for DOE procurements to the Office of Contract Management (MA-62) or for NNSA procurements to the Director, Office of Acquisition and Supply Management, in accordance with Acquisition Chapter 71.1and local review procedures. Ensure that you have provided a notice/coordination to these offices that this action will be coming for review and approval.

- When the contract will be awarded <u>after</u> the approval of the DEC, the contract may be for a period greater than one year.
    - The DEC and the JOFOC must justify the period of performance.

- When the contract must be awarded <u>prior</u> to the approval of the DEC, the contract may only be awarded for a period of up to one year.
    - If the item(s) being acquired requires a period of performance of greater than one year, the DEC and JOFOC should justify this need and the contract may be modified to include the additional time after the DEC and JOFOC are approved.

Use the attached DEC determination and findings (D&F) template. See STRIPES library.

Public Interest (FAR 6.302-7)

A particular acquisition may state that there is an exception to public interest for other than full and open competition. This acquisition should receive careful scrutiny to assure that there is reason to support that it is not in the public interest to compete. This exception requires a determination by either the Secretary of Energy or the Administrator, National Nuclear Security Administration that it is not in the public interest in the particular acquisition concerned to seek full and open competition. This authority may not be delegated. The use of this exception is extremely rare and may only be used when no other authorities in FAR 6.302 apply. The Public Interest exception will be documented in a Public Interest Determinations and Findings (D&F). No class Public Interest D&Fs are permitted. This authority is prescribed at FAR 6.302-7.

Regardless of dollar value, the contracting activity must prepare two documents: the "Public Interest Determinations and Findings" and the Congressional notification letter. The Public Interest D&F will be approved by either the Secretary of Energy or the Administrator, National Nuclear Security Administration. The Congressional notification letter will be signed by either the Secretary or the Administrator.

The contracting activity shall submit the D&F and the Congressional notification letter to either one of the following: for DOE procurements to the Office of Contract Management (MA-62) or for NNSA procurements to the Director, Office of Acquisition Management, in accordance with Acquisition Chapter 71.1and local review procedures.

Once the Secretary of Energy or the Administrator, National Nuclear Security Administration has approved the Public Interest D&F and signed the Congressional notification, be certain to place these documents in the contract file. Do not award the contract until at least 30 days after the Congressional notification was sent.

Use the attached model Public Interest Determinations and Findings, in conjunction with FAR 1.7, Determinations and Findings, and FAR 6.302-7.

Use the attached model Congressional notification letter. See STRIPES library.

Work Direction

Under no circumstance shall Department of Energy personnel direct work to a particular source through, or accept work for (e.g. from other Federal agencies via an interagency agreement) any of the Department's contractors or their subcontractors for the purpose of avoiding the requirements of the Competition in Contracting Act, or as a means of satisfying a requirement that should be contracted for by the Department.

Work assignments to any contractor in which the Department requires performance by a specific subcontractor(s) must be supported by a JOFOC, in accordance with FAR Part 6, as if the work were being contracted directly by the Department. In addition to satisfying the requirements of FAR 6.303, the justification shall include a determination that such work is consistent with the scope of the prime contractor's assigned program responsibilities and that the directed

subcontractor has the technical capability to perform the work assigned. Consideration should be given to preparing the justification to contract directly with the subcontractor as the prime contractor.

DOE employees shall not initiate an interagency agreement under the Economy Act to another Federal agency to circumvent Federal or DOE regulations, or in the belief that an outside agency will permit a lesser standard of adherence to Federal and Departmental procurement regulations or policies than that expected of DOE contracting officers.

Public Availability of the Justification for Other than Full and Open Competition (JOFOC) documents

FAR 6.305 requires agencies to make JOFOC documents available for public inspection within 14 days after contract award on the agency website and at the Governmentwide Point of Entry Federal Business Opportunities at *www.fedbizopps.gov*. FAR 6.305(f) provides exceptions to posting the JOFOC. In the case of a contract award authorized pursuant to FAR 6.302–2, the rule requires that the JOFOC be posted within 30 days after contract award. For FAR 6.302-7 Public Interest exceptions, the approved D&F does not get posted or otherwise made publically available. The DOE link to www.fedbizopps.gov is at http://management.energy.gov/business_DOE.htm.

In order to post a JOFOC on the www.fedbizopps.gov website, this website has a notice type called "Justification & Approval (J&A)" at the Opportunities section. Within DOE only the designated contracting activity personnel are allowed to post to the www.fedbizopps.gov website the standalone J&A Notices (JOFOC Notices), as well as associate a JOFOC Notice to existing notices, such as an award, if applicable. Note: The designated DOE personnel are not allowed to delete/modify a posted JOFOC Notice type. The Information Management Systems Division, MA-623, should be contacted for assistance.

The HCA shall ensure that each JOFOC document is redacted, as appropriate, and posted to the website at www.fedbizopps.gov. The contracting officer shall carefully screen a JOFOC for all contractor proprietary and other sensitive data and remove it if such data exists, including such references and citations as are necessary to protect the proprietary data, before making the justifications available for public inspection. Also, the contracting officer shall be guided by the exemptions to disclosure of information contained in the Freedom of Information Act (5 U.S.C. 552) and the prohibitions against disclosure in FAR 24.202 in determining whether other data should be removed. Before posting the JOFOC, the contracting officer shall coordinate the redacted JOFOC as needed with the local Counsel's Office and the local FOIA officer.

Best Practices

When unsolicited proposals are considered, the unique or innovative method, approach, or idea contained in the proposal must be described in the JOFOC. Any unique, innovative, or

proprietary features that might be compromised if publicly disclosed in FedBizOpps must also be identified in the JOFOC.

For a JOFOC advocating limited competition, the circumstances surrounding the limitation, including how the number of firms in the competition was determined, must be described.

Negotiations of a sole source contract should not begin before the JOFOC has been approved.

Justification for Other than Full and Open Competition
Contracting Activity Processing the Requirement
Name of Organization Originating the Requirement
Identification Number (purchase request/solicitation number)

---

1. Identification of the agency and the contracting activity, and specific identification of the document as a "Justification for Other than Full and Open Competition".

2. The nature and/or description of the action being approved, i.e. sole source, limited competition, establishment of a new source, etc.

3. A description of the supplies or services required to meet the agency's needs.

4. The statutory authority permitting other than full and open competition.

5. A statement demonstrating the unique qualifications of the proposed contractor or the nature of the action requiring the use of the authority.

6. A description of efforts to ensure that offers were solicited from as many potential sources as is practicable. Include whether or not a FedBizOpps announcement was made and what response, if any, was received, and include the exception under FAR 5.202 when not synopsizing. Describe whether any additional or similar requirements are anticipated in the future. (This may not be included as an addendum. It must be in the body of the JOFOC.)

7. Cite the anticipated dollar value of the proposed acquisition including options if applicable and a determination by the Contracting Officer that the anticipated cost to the Government will be fair and reasonable. When exceptional circumstances exist that require the period of performance to exceed one year, the JOFOC shall state priced option period(s) will be included and that a determination and findings is being prepared for the Senior Procurement Executive's approval.

8. A description of the market research conducted and the results or a statement of the reason market research was not conducted. Do not simply refer to the sources sought synopsis.

9. Any other facts supporting the use of other than full and open competition, such as:

a. Explanation of why technical data packages, specifications, engineering descriptions, statements of work or purchase descriptions suitable for full and open competition have not been developed or are not available.

b. When FAR Subpart 6.302-2 is cited for follow-on acquisition as described in FAR 6.302-1(a)(2)(ii), an estimate of cost to the Government that would be duplicated and how the estimate was derived.

c. When FAR 6.302-2 is cited, data, estimated cost, or other rationale as to the extent and nature of the harm to the Government.

10. A listing of the sources, if any, that expressed a written interest in the acquisition.

11. A statement of actions the agency may take to remove or overcome any barriers to competition if subsequent acquisitions are anticipated.

Certification

The information contained in this Justification for Other than Full and Open Competition is certified accurate and complete to the best of my knowledge and belief.

Acquisition Initiator _____ _____ Contracting Officer _____ _____
Signature Date Signature Date

(See FAR 6.2, 6.3, and 6.5, and DEAR 906.202, 906.304 and 906.501 for review and approval requirements under specific circumstances.)

Reviews

Program Senior Official
(or designee) _____ _____
Signature Date

Contracting Activity
Legal Counsel
(if > $1 million) _____ _____
Signature Date

Approvals

Contracting Activity
Competition Advocate _____ _____
(if > $650,000* & **) Signature Date

Head of the Contracting
Activity _____ _____
(if > $12.5 million*+) Signature Date

Senior Procurement
Executive
(if > $50 million[+]) _____ _____
Signature Date

*Dollar thresholds are subject to change; see FAR 6.304(a) for the current dollar thresholds.
**For actions less than $650,000, the Contracting Officer should include the Competition Advocate in the review of the JOFOC before signing it.
[+] Dollar threshold is in accordance with the HCA Delegation of Authority/Designation.

Determination of Exceptional Circumstances

Determination and Findings: To exceed period of performance beyond one year for unusual and compelling urgency exception for other than full and open competition

Based upon the following determination and findings, the proposed procurement described below may extend beyond one year.

Findings

1. The *(contracting activity processing the requirement)* proposes to acquire under solicitation or contract *(number), (title and description of service)*. The estimated value is $ *(amount*) for a XX month.

2. *The documentation shall explain why there is a need to exceed one year. Discuss items such as the severability of services, why the requirement cannot be competitively competed within one year, etc. Enclose a copy of the Justification for Other than Full and Open Competition (JOFOC) reviewed and signed by the appropriate officials except for the approving official signature on the JOFOC.*

3. *A statement ensuring that any follow-on requirements will be solicited as a full and open competition procurement.*

Determination

Based upon the above findings and as authorized by Federal Acquisition Regulation 6.302-2(d)(2), I have determined that the exceptional circumstance to exceed the period of performance beyond one year for *(title of service)* is appropriate and is in the Government's best interest. I approve the exceptional circumstances.

_____ _____
Senior Procurement Executive Signature Date

(This is a D&F template. – Tailor the D&F to the specific action See STRIPES library. .)

Determination for Public Interest Exception for *(title of procurement)*

Determination and Findings: To procure the requirement under Public Interest exception for other than full and open competition

Based upon the following determination and findings, the proposed procurement described below is not in the public interest to use full and open competition.

Findings

1. The *(contracting activity processing the requirement)* proposes to acquire under solicitation or contract *(number), (title and description of service)*. The estimated value is $ *(amount*) for a XX month *(include any options both in dollar value and/or state what are the periods of performance.)*

2. *The documentation shall explain why it is not in the public interest to use full and open competition. Discuss, at a minimum, why none of the other exceptions to full and open competition apply and the rationale to support this exception.*

3. Authority for this exception is 41 U.S.C. 253(c)(7) as implemented at Federal Acquisition Regulation 6.302-7.

Determination

Based upon the above findings and as authorized by 41 U.S.C. 253(c)(7), I have determined that it is not in the public interest to use full and open competition for *(title of procurement)*. I approve this Public Interest exception to full and open competition. Expiration of this Determination and Findings is up completion of contract *(number)*.

_____ _____
Secretary of Energy Signature Date

_____ _____
Administrator National Nuclear
Security Administration
Signature Date

(Select the appropriate approving official and delete the other signature block.)
(This is a D&F template. – Tailor the D&F to the specific action. See STRIPES library.)

Reviews for Determination for Public Interest Exception for *(title of procurement)*

Acquisition Initiator _____ _____ Contracting Officer _____ _____
Signature Date Signature Date

Program Senior Official
(or designee) _____ _____
Signature Date

Contracting Activity
Legal Counsel
_____ _____
Signature Date

Contracting Activity
Competition Advocate _____ _____
Signature Date

Head of the Contracting
Activity _____ _____
Signature Date

Senior Procurement
Executive _____ _____
Signature Date

SAMPLE CONGRESSIONAL NOTIFICATION LETTER FOR PUBLIC INTERST EXCEPTION

The President of the Senate
U.S. Senate
Washington, DC 20510

The Speaker of the House
U.S. House of Representatives
Washington, DC 20515

Subject: Public Interest Exception Notification of Pending Contract Action

Dear President and Speaker:

No earlier than thirty days from the date of this notification, the Department of Energy (*National Nuclear Security Administration)* intends to award an action for *(title of procurement)* pursuant to 41 U.S.C. 253(c)(7). I have determined that it is not in the public interest to use full and open competition

If you have any questions, please contact *(insert the program office name and phone number.)*

Sincerely,

Name of Secretary or Administrator
Title

Competition Advocate Responsibilities

Guiding Principle

Agency Competition Advocates and Activity Competition Advocates have various duties and responsibilities that help safeguard full and open competition.

[References: FAR 6.5, FAR 7 and DEAR 906.501]

1.0 Summary of Latest Changes

This update: (1) updates the dollar thresholds for Justifications for Other than Full and Open Competition in accordance with FAR 6.304, (2) deletes the Federal Procurement Data System-New Generation (FPDS-NG) coding assistance sheet and screen shots for the FPDS-NG Competition Report, and (3) includes administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. This chapter discusses the competition advocate requirements and responsibilities for the Department of Energy.

FAR Subpart 6.5, "Advocates for Competition," implements section 20 of the Office of Federal Procurement Policy Act, which requires the head of each executive agency to designate an Agency Competition Advocate and Procuring Activity Advocates (hereafter referred to as Activity Competition Advocates). In accordance with DEAR 906.501, the Secretary of Energy has delegated this authority for the appointment of the agency and contracting activity Advocates to the SPEs. The duties and responsibilities of agency and procuring activity competition advocates are prescribed by FAR 6.502. Additionally, FAR 6.502(b)(2) requires agency and procuring activity competition advocates to prepare and submit an Annual Competition Report to the Senior Procurement Executive (SPE) and the Chief Acquisition Officer. The minimum annual reporting requirements are defined in FAR 6.502(b)(2) and shall be included in both the Agency and Activity Competition Reports. If additional reporting requirements are required, the Agency Competition Advocate will notify the Activity Competition Advocates via email. DOE Acquisition Guide Chapter 6.1 requires the Activity Competition Advocate review and approval on all Justifications for Other than Full and Open Competition (JOFOCs) pursuant to FAR

Subpart 6.3. FAR Part 7 requires any acquisition plan that proposes using other than full and open competition to be coordinated with the cognizant Competition Advocate.

2.1 Authority. As mentioned, the Office of Federal Procurement Policy Act requires the head of each executive agency to designate a competition advocate for the agency and for each procuring activity of the agency. The Secretary of Energy has designated two SPEs that are responsible for the portions of the Department for which they have been assigned.

2.1.1 Agency Competition Advocate. The DOE SPE is the Director, Office of Acquisition Management and shall designate the Agency Competition Advocate for DOE. The NNSA SPE is the Director of the Office of Acquisition Management and shall designate the Competition Advocate for NNSA. The Agency Competition Advocates are responsible for the following:

- Ensure the Annual Competition Report is completed by the Activity Competition Advocate and submitted to their SPE by the required due date.

- Periodically monitor competition results throughout the fiscal year and provide feedback directly to the Activity Competition Advocates, if needed.

- Approve all JOFOCs that exceed the Head of the Contracting Activity (HCA) approval level. After approval, the Agency Competition Advocate will forward the JOFOC to the appropriate SPE (DOE or NNSA) for approval.

- Coordinate on any acquisition plan that proposes using other than full and open competition when awarding a contract in accordance with FAR Part 7, which exceeds the HCA's approval level.

- The NNSA SPE shall provide an informational copy of the NNSA Annual Competition Report to the DOE SPE. The DOE SPE shall retain the DOE and NNSA reports and make them available to the OFPP, upon request.

- Determine and notify each Activity Competition Advocate of their competition goal for the next fiscal year no later than October 31.

2.1.2 Heads of Contracting Activity. The SPEs have delegated the authority to appoint Contracting Activity Competition Advocates to the HCAs. Each HCA shall designate an Activity Competition Advocate for each activity in accordance with their delegation letter and ensure the Agency Competition Advocate is copied on each delegation letter. If a delegation requires a waiver (employee is not a GS/GM-15 and/or not a GS-1102), the HCA shall submit a waiver request, proposed delegation letter, and the individual's resume for Agency Competition Advocate approval. The Agency Competition Advocate shall forward the waiver request to the

cognizant SPE, with an approval recommendation. The HCA shall ensure the Activity Competition Report is submitted timely.

2.1.3 Activity Competition Advocate. Each Activity Competition Advocate is responsible for the following:

- Submit the reporting requirements required by FAR Part 6 in addition to any other reporting requirements the Agency Competition Advocate requires. The Activity Competition Advocate shall utilize the information contained within the competition report tab of the FPDS-NG system for all statistical data contained within the Activity Competition Report. The Activity Competition Report shall be submitted to the Agency Competition Advocate no later than November 1st of each calendar year (or next duty day if the 1st falls on a weekend).

- Review the Federal FPDS-NG on a quarterly basis to ensure proper coding. If discrepancies are encountered, they shall notify their respective Contracting Officer and ensure all corrective actions are tracked and rectified within 30 calendar days.

- Coordinate and maintain a copy of any acquisition plan that proposes using other than full and open competition when awarding a contract in accordance with FAR Part 7.

- Review, approve and maintain a copy of all Justifications for Other than Full and Open Competition (JOFOCs) greater than $700,000 but not exceeding $13.5M (dollar thresholds are subject to change, see FAR 6.304(a) for the current dollar threshold), and review all JOFOCs exceeding $13.5M. Please refer to DOE Acquisition Guide Chapter 6.1 for detailed guidance on JOFOCs.

2.2 Electronic Posting. The Agency Competition Advocate shall ensure the names and phone numbers of the Competition Advocates are electronically posted. The electronic posting shall be updated quarterly.

b e te t

CHAPTER 7 - ACQUISITION PLANNING

7 1 t ebr r 201
7 2 Str te S r e reme t 201

ACQUISITION PLANNING

Guiding Principles

Sound acquisition planning ensures that the contracting process is conducted in a timely manner, in accordance with statutory, regulatory, and policy requirements, and reflects the mission needs of the program.

An integrated team approach that includes appropriate representation from all organizations having an interest in the requirement will benefit the acquisition planning process.

Contracting professionals play a key role in ensuring that acquisition planning is accomplished for each requirement and that the acquisition plan reflects appropriate acquisition streamlining techniques and a sound business approach to buying the needed goods and services.

REFERENCES

1. FAR 4.803(a)(1)	**Contents of Contract Files**
2. FAR 5.405(a)	**Exchange of Acquisition Information**
3. FAR Part 6	**Competition Requirements**
4. FAR Part 7	**Acquisition Planning**
5. FAR Part 8	**Required Sources of Supply**
6. FAR Part 9	**Contractor Qualifications**
7. FAR Part 10	**Market Research**
8. FAR Part 11	**Describing Agency Needs**
9. FAR 15.201(c)	**Exchanges with Industry Before Receipt of Proposals**
10. FAR Subpart 16.1	**Selecting Contract Types**
11. FAR 16.504(c)	**Indefinite-Quantity Contracts - Multiple Award Preference**
12. FAR 17	**Special Contracting Methods**
13. FAR Part 19	**Small Business Programs**
14. FAR 25.802(a)(2)	**Other International Agreements and Coordination**
15. FAR 34.004	**Acquisition Strategy**

16. FAR 36.301(a)	**Two-Phase Design-Build Selection Procedures**
17. FAR 37.6	**Performance-Based Contracting**
18. FAR 38.101(c)	**Federal Supply Schedule Program**
19. FAR 39.101(b) 39.102(c)	**Acquisition of Information Technology**
20. FAR 41.202	**Acquiring Utility Services**
21. DEAR Part 908	**Required Sources of Supply**
22. DOE O 413.3B	**Program and Project Management for the Acquisition of Capital Assets, November 29, 2010**
23. DOE O 436.1	**Departmental Energy Sustainability, May 2, 2011**
24. DOE G 413.3-13	**U.S. Department of Energy Acquisition Strategy Guide for Capital Assets Projects, July 22, 2008**
25. DOE O 580.1	**Department of Energy Property Management Program**
26. DOE Acquisition Guide, Chapter 17.1	**Interagency Acquisitions, Interagency Transactions and Interagency Agreements**
27. DOE Acquisition Guide, Chapter 42	**Contract Administration**

OVERVIEW

This chapter discusses the requirements for acquisition planning, provides guidance on plan preparation, and provides a template for use in plan development.

DEFINITIONS

Acquisition: The acquiring by contract with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when agency needs are established and includes the description of requirements to satisfy agency needs, solicitation and selection of sources, award of contracts, contract financing, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling agency needs by contract.

Acquisition Planning: 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.

BACKGROUND

The Federal Acquisition Regulation (FAR) Part 7 requires agencies to perform acquisition planning and conduct market research (see FAR Part 10) for all acquisitions. This planning is to promote and provide for the acquisition of commercial items and to obtain full and open competition whenever possible.

While FAR Part 7 is the principal part of the FAR that covers acquisition planning, various other parts of the FAR also contain references to specific aspects of the acquisition planning process (See references at the beginning of this chapter). In addition, DOE Order 413.3B, Program and Project Management for the Acquisition of Capital Assets, addresses acquisition planning for projects and major systems acquisitions.

This chapter aims to provide guidance on what the various acquisition regulations are and to highlight some less well known requirements. Additionally, this chapter addresses the procedures required by FAR 7.103. This chapter does not try to duplicate the guidance on how to perform acquisition planning or what the documentation requirements are as these are contained in the referenced regulations. However, to aid in the preparation of acquisition plans, an Acquisition Plan Preparation Guide, and Acquisition Plan Template are included as attachments to this Chapter.

POLICY

Competition

Acquisition planners shall address the requirement to specify needs, develop specifications, and to solicit offers in a manner that promotes and provides for full and open competition in accordance with FAR Part 6, as supplemented by Part 906 of the Department of Energy Regulation (DEAR), and Chapter 6 of this guide.

Written Plans

Written acquisition plans are required for cost reimbursement contracts, and for all other acquisitions estimated to exceed $5.5 million except for the following classes of acquisitions:

- Architect-engineering services
- Broad agency announcements or unsolicited proposals
- Basic research from non-profit organizations
- Competitive procurement of commercial items
- Interagency agreements (IA) (applies only to the IA and not to any Contracts issued pursuant to an IA)

Written acquisition plans shall be prepared in accordance with FAR 7.105. The Acquisition Plan Template (Attachment 2) should be used in the preparation of written acquisition plans. If the Alternate Approval Process discussed in Chapter 9 of the Acquisition Plan Preparation Guide (Attachment 1) is used, briefing charts may serve as the written Acquisition Plan, provided that each of the required areas listed by FAR 7.105 are addressed and appropriate approvals are obtained. Acquisition planners should use the principles of FAR Part 7 in performing acquisition planning for all acquisitions whether or not a written plan is required.

Acquisition Value

The estimated value of an acquisition is the total potential value of a procurement including the sum value of the basic period of performance, all options, and all phases of all possible awards.

Period of Performance

Pursuant to DOE policy, the 5-year limitation (basic plus option periods) described at FAR 17.204(e) applies to all DOE contracts including those for information technology regardless of type and other procurement award instruments. This includes agreements (e.g. basic ordering agreements, blanket purchase agreements), interagency acquisitions, and orders placed under

agreements or awarded under a Federal Supply Schedule or other indefinite delivery/indefinite quantity contracts awarded by other agencies.

Requests for deviations from the 5-year limitation policy shall be addressed in the acquisition plan. The acquisition plan shall include justification for exceeding five years and discuss planned future assessment of continued performance either prior to exercise of options or at the mid-term of a basic contract with no options. Evidence shall also be included showing that the extended years can be reasonably priced. If an acquisition plan is not required, then the pre-award file shall document the information described above.

Task or Delivery Orders

For the purposes of acquisition planning, orders placed under a Federal Supply Schedule contract, task order or delivery order contracts awarded by another agency (for example a Government-wide acquisition contract (GWAC) or multi-agency contract (MAC)) will be considered the same as separate contracts. When the order exceeds $500,000, a determination of best procurement approach is required to be performed and documented for the file. (See FAR 17.502 and Acquisition Guide Chapter 17.2.) Review and approval levels for each order shall be the same as an equivalent contract action. (See FAR 16.505(a)(8).)

Attachments

Attachment 1 — Acquisition Plan Preparation Guide
Attachment 2 — Acquisition Plan Template

Acquisition Plan Preparation Guide

April 2012

Chapter 1

Preface

This guide was written to help you prepare and process written acquisition plans (APs) as required by Federal Acquisition Regulation (FAR) Part 7 and the Department of Energy Acquisition Regulation (DEAR) Acquisition Guide Chapter 7.1. This guide provides advice on content and coordination, answering such questions as: When is an acquisition plan required? What information is required? Who approves it? How is it processed? How long does it take? The aim is to consolidate multiple levels of regulations into an easy-to-use guide which translates the regulatory requirements into commonly understood terms, provides references to facilitate further research on acquisition requirements, and provides practical lessons learned from those who have gone before you. The requirement for preparation of written acquisition plans is defined in the Federal Acquisition Regulation (FAR) Part 7 and internal DOE Orders and guidance. **This guide is not intended to serve as a substitute for these regulations; therefore, as each topic is discussed, specific regulatory citations are provided to facilitate your reference.**

Although this guide contains references to terms such as program office, program manager, etc., the guide applies to any appropriate acquisition.

This guide is consistent with the FAR and its supplements as of the date of publication. References to other internal DOE Orders and guidance are provided to facilitate further research only and are current as of the publication date of this guide. Reasonable efforts will be made to maintain the currency of regulatory and other references. However, contracting staff should verify that references used herein are current at the time of acquisition plan development.

Acquisition plans are distinct from, and in addition to the Acquisition Strategy required by DOE Order 413.3B.

Chapter 2

What Is An Acquisition Plan?

- STRATEGY PLAN FOR ACTION AND ACQUISITION MANAGEMENT
- ANSWERS WHO, WHAT, WHEN, WHERE, AND HOW
- CONCISE AND FLEXIBLE, YET COMPREHENSIVE
- RESPONSIVE TO KEY ACQUISITION POLICY PRIORITIES

An acquisition plan is a document which provides the overall strategy for accomplishing and managing an acquisition. The plan formally documents the approach to fill the need, optimize resources, and satisfy policy requirements for a proposed acquisition. It answers the "who-what-when-where-why-how" of the acquisition strategy planning process.

The plan should provide sufficient information so that someone unfamiliar with the program will understand what is being proposed. However, the plan need not be lengthy. A concise, clear statement of the facts and rationale supporting the technical and business judgments may be all that is necessary.

An acquisition plan should be general enough to allow some detailed program management flexibility, but be specific enough to give coordinating and approving officials adequate information on the technical and business aspects of the acquisition upon which to base their decisions. Toward this end, the plan should clearly demonstrate that those responsible for an acquisition have ensured the following key elements are addressed (in addition to the requirements of FAR 7.103):

The government will get what it needs, when it is needed, within established cost objectives;

Sufficient and appropriate funds are available/obtainable;

A sound and equitable business arrangement is planned;

Risks due to concurrent development/production are managed;

The systems/equipment will be supportable when fielded;

The national goals of competition and small business utilization are supported;

Commercial items or non-developmental items are encouraged wherever possible; and

DOE has sufficient resources or can obtain the necessary resources to award and

administer the contract.

Chapter 3

Why An Acquisition Plan?

- PLANNING IS THE KEY TO SUCCESS
- CHECKLIST OF POTENTIAL CONSIDERATIONS
- COMMUNICATES PLAN TO SENIOR MANAGEMENT
- GENERATES STAKEHOLDER COMMITMENT
- RECORDS DECISIONS FOR THE FUTURE
- REQUIRED BY POLICY AND REGULATION

It has been said that, "failing to plan is planning to fail." Given the complexity of the acquisition business, this seems particularly true for the work we do. The acquisition plan is a valuable tool because it allows all participants in the planning of an acquisition to establish logically and systematically an approach for meeting a Government need. It also provides the impetus for stakeholders interested in an acquisition to review regulatory requirements in advance. This review process allows participants to anticipate problems which may arise and to formulate plans to avoid them, as well as to anticipate required approvals, waivers, etc., that may be necessary.

The acquisition plan serves many other related purposes. It is used to communicate the program office's approach to senior management. These senior personnel are focused on very high level questions, such as, is the plan consistent with current DOE policies and strategic goals, is the plan executable, and are the top level objectives appropriate and in the best interest of the Department and the United States? On a more fundamental basis, the plan helps to generate commitment by all stakeholders to support the plan's execution, and it serves as a permanent record of decisions made regarding the acquisition strategy which can be referenced by those who become involved in the program in the future.

In addition to being a valuable tool in the acquisition process, an acquisition plan is required by Part 7 of the FAR, "Acquisition Planning."

Chapter 4

When Is An Acquisition Plan Required?

Acquisition planning is required by FAR Part 7 for all acquisitions. Written acquisition plans are required for cost reimbursement contracts, and for all other acquisitions where the total estimated contract cost is $5.5 million and above except the following:

- Architect-engineer services
- Broad agency announcements or unsolicited proposals
- Basic research from non-profit organizations
- Competitive procurement of commercial items
- Interagency agreements (IA) (applies only to the IA and not to any contracts issued pursuant to an IA)

A head of contracting activity (HCA) may require written acquisition plans for procurements below the $5.5 million level. In considering whether or not a written acquisition plan is needed, the total estimated cost of the contract should be used. The total estimated contract cost is the estimated value of the contract(s) and all options and all phases covered by the acquisition plan.

Program and Phased Acquisition Plans

Acquisition plans may be prepared on a system or individual contract basis depending on the acquisition. If the plan is developed on a system basis, the plan should fully address all component acquisitions of the program or system. A single acquisition plan may be used for all phases of a phased acquisition provided the plan fully addresses each phase, and no significant changes occur after plan approval to invalidate the description of the phases. If such significant changes do occur, the plan should be amended and approved at the same level as the original plan.

Urgent Requirements

For acquisitions having compressed delivery or performance schedules because of the urgency of the need, the approving authority may waive the acquisition planning formality and detail.

Contract Bundling

The bundling of contracts occurs when two or more requirements previously provided under separate smaller contracts are consolidated into a single requirement that is likely to be unsuitable for award to a small business concern. During the acquisition planning phase, planners should be aware of the benefits of and restrictions on bundling. If a bundled acquisition is planned, additional approvals may be required depending on the dollar value. FAR 7.107 provides guidance on acquisitions involving bundling.

References: FAR 7.103, the DEAR Acquisition Guide Chapter 7.1, Acquisition Planning.

Chapter 5

Who Writes The Plan?

- IT IS A PROGRAM MANAGEMENT RESPONSIBILITY
- DON'T GO IT ALONE; USE YOUR PROGRAM OFFICE TEAM
- USE THE EXPERTISE OF FUNCTIONAL STAFF OFFICES AND/OR THE IPT

The program manager (this guide uses the term "program manager" throughout but "Federal project director" may be the correct term if a Federal project director has been so designated by the Department) has primary responsibility for preparation of the acquisition plan. However, the program manager must rely on the expertise and input from the various functional activities involved in the acquisition process for assistance in the preparation of the plan. In this regard, close coordination with the assigned contracting officer is particularly important in developing an appropriate contracting strategy and business approach. Others who should participate as appropriate for the acquisition include representatives from General Counsel (including procurement, program, and patent counsel), Office of Chief Financial Officer, Office of Health, Safety and Security, Office of Economic Impact and Diversity, Office of Legacy Management, Office of the Chief Information Officer, and Office of Acquisition and Project Management. See Chapter 8 of this guide for a suggested process to accomplish the drafting phase.

The most effective plans are the result of a true team-effort process of planning. Poor plans are produced when planning is the by-product of the necessity of having to prepare a written plan. In other words, the key to success is to plan first, then document the plan. The process of planning involves lots of dialog with the user, the supporter, and the various functional experts assigned to the program management office and field staff organizations. In addition to using the team of specialists within the program office, you should use representatives from the functional staff offices to discuss and refine all planning issues. If the acquisition is subject to DOE Order 413.3B, the order requires the use of an Integrated Project Team (IPT) in developing the acquisition strategies. It is recommended that the IPT be used to develop contract specific acquisition plans which should naturally flow from acquisition strategies. An early exchange of information among industry and the program manager, contracting officer, and other participants in the acquisition process can help identify and resolve concerns regarding the acquisition strategy, including proposed contract type, terms and conditions, and acquisition planning schedules; the feasibility of the requirement, including performance requirements, statements of work, and data requirements; the suitability of the proposal instruction and evaluation criteria, including the approach for assessing past performance information; the

availability of reference documents; and any other industry concerns or questions. Techniques for sharing this information are listed in FAR 15.201 and include draft RFPs, small business conferences and budget information.

Remember, an acquisition plan serves to generate commitment by all stakeholders to support execution of the plan. The best way to achieve this commitment by all stakeholders is to have them participate actively and early in the planning process. In order for the government to successfully meet its overall program objectives, everyone involved in planning and executing the program must feel some ownership.

> ***Reference:*** FAR 7.104; the DEAR Acquisition Guide Chapter 7.1, Acquisition Planning; DOE Order 413.3B, Program and Project Management For the Acquisition of Capital Assets; and DOE Guide 413-3-13, U.S. Department of Energy Acquisition Strategy Guide for Capital Assets Projects.

Chapter 6

Who Approves The Plan?

Chapter 7.1, Acquisition Planning, of the DOE Acquisition Guide, contains the review and approval authorities for acquisition plans.

Review and Approval Levels

Acquisitions subject to DOE Order 413.3B: DOE Order 413.3B, Program and Project Management For the Acquisition of Capital Assets, establishes levels for both the review and approval of acquisition strategies (formerly called acquisition execution plans, see DOE Manual 413.3-1) for requirements subject to the order.

Acquisitions subject to DOE Order 436.1: DOE Order 436.1, Departmental Sustainability, establishes the requirement for the review of utility procurement actions. (NOTE: NNSA utility actions are approved by NNSA based on review recommendations from FEMP)

Acquisitions subject to Chapter 71 of this Guide: For all acquisitions that require the review and approval in accordance with Chapter 71, Review and Approval of Contract Actions, of this guide, the acquisition plan for actions that have been selected for review should be submitted to the Office of Contract Management (MA-62) for review and approval prior to the solicitation being issued.

All Other Acquisitions: Acquisitions plans for requirements not subject to either DOE Orders 413.3B, 436.1 , or Chapter 71, Review and Approval of Contract Actions, of this guide, are to be reviewed and approved in accordance with local procedures established by the HCA.

Local Procedures

The head of the contracting activity (HCA) or designee should establish the local procedures for acquisition planning for all acquisitions consistent with FAR Part 7, DOE Order 413.3B, this Chapter, and other applicable regulations.

Changes

The acquisition plan may be changed or amended if circumstances, facts or assumptions of the original plan have changed or if it makes good business sense to do so. Material or significant amendments to the acquisition plan such as changes in contract type, competition, method of

solicitation, funding, or major milestones should be approved at the same level as the original plan and be properly documented.

Chapter 7

Preparation and Approval Process

I. Introduction

Acquisition plan approval is obtained using a five-phase preparation process. The phases are drafting, consultation, resolution, local signature, and external approval, as required. The process and the estimated time required to accomplish each phase depends on the complexity of each acquisition.

II. Drafting Phase

The first step is to figure out your plan, then document the plan using the format and content assistance provided in this guide. Bring together your team -- those who will play a part in carrying out the acquisition, to discuss the issues to be addressed in the acquisition plan. This should be done early in the process. Remember, an IPT must be assembled for all actions which require an acquisition strategy plan in accordance with DOE Order 413.3B and DOE Guide 413.3-13. Use the IPT to help refine difficult strategy issues and consult the Field and Headquarters' staffs to answer specific questions or to discuss feasible alternatives within their area of expertise.

One way to begin drafting the acquisition plan is to assign certain sections of the plan to the team member who provides your expertise in that area. For example, you may ask the contracting officer to draft the contracting area and the patent attorney to draft the patent section. If you use this approach, the program manager or other assigned project officer will need to draft the general areas and integrate the inputs from the other team members. The alternative is to assign one individual to draft the entire plan, contacting other team members as necessary to obtain the required assistance and comment.

It is important that all of the team members contribute their expertise to the plan. Therefore, regardless of the technique used, it is recommended that every team member review and comment on the completed plan before you proceed to the next phase. Your program office may require other in-house reviews such as by the contracting director, other managers, and/or user liaisons.

The time required to accomplish the drafting phase will vary depending on program complexity and dollar value. If the major strategy questions were resolved in the team

planning process, it is normally possible to draft the plan and complete in-house reviews in a relatively short timeframe.

Market Research

One of the first considerations must be market research. This is a significant requirement that needs to be addressed before you can properly draft an acquisition plan. Questions such as, what the market place offers, **are there small business sources capable of satisfying the agency's requirement**, whether or not the requirement is overstated in a way that might preclude commercial items, and what the customary commercial practices for buying the item might be are all questions that need to be answered before you can draft a plan. **The Small Business Specialist should be invited to participate in market research. They are an excellent source for aiding in the construction and conduct of market research particularly if emphasis is to be placed on locating and using capable small business sources.**

Acquisition planners should:

- Specify needs for printing and writing paper consistent with the minimum content standards specified in section 2 of Executive Order 13423 of January 26, 2007, Strengthening Federal Environmental, Energy, and Transportation Management (see FAR 11.303);

- Comply with the policy in FAR 11.002(d) regarding procurement of products containing recovered materials, and environmentally preferable and energy-efficient products and services;

- Specify needs and develop plans, drawings, work statements, specifications, or other product descriptions that address Electronic and Information Technology Accessibility Standards (see 36 CFR part 1194) in proposed acquisitions (see FAR 11.002(e)) and that these standards are included in requirements planning, as appropriate (see FAR Subpart 39.2);

- Ensure that knowledge gained from prior acquisitions is used to further refine requirements and acquisition strategies. For services, greater use of performance-based contracting methods and, therefore, fixed-priced contracts (see FAR 37.602-5) should occur for follow-on acquisitions to the maximum extent practical and where appropriate;

- Structure contract requirements to facilitate competition by and among small

business concerns; and

- Avoid unnecessary and unjustified bundling that precludes small business participation as contractors (see FAR 7-107)(15 U.S.C. 631(j)).

Contracting officers should:

- Make a determination, in accordance with FAR 37.205, prior to issuance of a solicitation for advisory and assistance services involving the analysis and evaluation of proposals submitted in response to a solicitation, that a sufficient number of covered personnel with the training and capability to perform an evaluation and analysis of proposals submitted in response to a solicitation are not readily available within the agency or from another Federal agency in accordance with the guidelines at FAR 37.204; and

- Ensure that no purchase request is initiated or contract entered into that would result in the performance of an inherently governmental function by a contractor and that all contracts or orders are adequately managed so as to ensure effective official control over contract or order performance. (See Chapter 37, Service Contracting, of the Acquisition guide.)

- For direct or assisted interagency acquisitions, ensure the determination of best procurement approach, the business case analysis (as applicable), and the Economy Act determinations and findings (as applicable), are performed and documented in accordance with FAR 17.502 and Acquisition Guide Chapter 17.1, Interagency Acquisitions, Interagency Transactions, and Interagency Agreements.

- Determine, in accordance with FAR 16.504(c), whether multiple awards are appropriate as part of acquisition planning for IDIQ contracts and document the decision in the acquisition plan or contract file. For indefinite-quantity contracts for advisory and assistance services exceeding three years and $12.5 million, including all options, the contracting officer must make multiple awards unless the contracting officer or other official designated by the Head of the Agency determines in writing as part acquisition planning, that multiple awards are not practicable. (See FAR 16.504(c)(2)). This requirement does not apply if a determination is made that the advisory and assistance services are incidental and not a significant component of the contract. (See FAR 16.504(c)(2)(ii)).

- Consider contracting or subcontracting opportunities for small businesses, small disadvantaged businesses, women-owned small business concerns, historically underutilized business zones, and other socioeconomic programs. FAR 19.501(c)

requires contracting officers to review acquisitions to determine if they can be set aside for small businesses. If the requirement cannot be set aside, the acquisition plan for a negotiated procurement should consider including incentives for the selected contractor to meeting small business subcontracting goals. (See FAR 19.705-1, General Support of the Program.)

Acquisition Milestones

- Determine the Milestones Necessary to Complete the Acquisition

  Acquisition planning starts with formulating an acquisition strategy. Acquisition planners, with the support of the contacting officer, must identify, as early as possible, all the milestones in the acquisition process for the specific acquisition contemplated. It is impossible to plan an acquisition intelligently if every milestone specific to that acquisition is not identified.

- Identification of an Official/Office Responsible for Completing each Milestone

  Each milestone must have an official/office that unambiguously accepts the responsibility to complete it.

- Establishing A Lead Time For Each Milestone

  After the acquisition planner has identified each milestone in the acquisition process and the official/office to complete it, the next step is for the acquisition planner and each official/office responsible for a milestone to establish, collaboratively where other offices' support is needed, a realistic lead time to complete it. Collaboration must be among all the parties that will be involved in the milestone. The parties involved with vary depending, among other things, on the size, sensitivity, and importance of the acquisition. Some of the potential parties include the program office, contracting officer, senior program officials, the Office of Procurement and Assistance Management, the Office of the General Counsel, the Office of the Chief Financial Officer, and the Office of Small and Disadvantaged Business Utilization.

  The acquisition planner and the responsible official/office cannot establish a realistic lead time for a milestone without obtaining the agreement of every party involved in completing the milestone. For any review associated with a milestone, for example, the acquisition planner and the official/office responsible must identify the reviewers and obtain a commitment from them to complete their initial reviews in an agreed to time

period. Then the acquisition planner and the official/office must take into account the time it will need to resolve every comment the reviewers may have. The acquisition planner and official/office must recognize that review times vary depending on the complexity, size, and sensitivity of the acquisition. Extremely complex, sensitive issues will likely require considerable interchange between the official/office attempting to obtain the reviewer's approval and the reviewer. Using a standard lead time, such as one from the Department's Stripes system, for a difficult and complex acquisition is neither realistic nor productive. Every acquisition has unique aspects. The bottom line is the acquisition planner and the official/office responsible for a milestone must meet with all of the parties that have a role in completing the milestone, for example, the associated reviewer at the field office or the headquarters office, and negotiate a lead time congruent with the nature of the acquisition.

- Firm Commitment to Meet Each Milestone

  In addition to establishing realistic milestones and a realistic lead time for each milestone, acquisition planners must ensure they obtain from each official/office clear assurance of acceptance of the responsibility for completing its milestone.

III. Consultation Phase

FAR 7.104(c), DOE Acquisition Guide Chapter 7.1, and/or HCA procedures require that certain offices coordinate and/or sign the acquisition plan. Those who review the plan **should,** to the maximum extent practicable, provide appropriate comments and are encouraged to provide specific alternative wording if they find the original wording vague or unclear. Reviewers are also strongly encouraged to call the program manager if they have questions regarding the plan, so that they may provide only meaningful and constructive comments.

IV. Resolution Phase

The goal of the resolution phase is to resolve all significant content comments. There are normally three ways in which a comment may be resolved. First, the program office may concur with the comment and make the recommended change. Second, the reviewer may agree with the program office position and withdraw the comment. Lastly, the parties may agree to disagree and the issue is elevated to the appropriate level for resolution.

The time required to accomplish the resolution phase will vary depending on the scope of comments and the aggressiveness of the program office in accomplishing the resolution and making required changes.

V. Local Signature Phase

The program manager is responsible for adequate resolution of all comments. The names and signatures of the required signers are added to the cover page in accordance with the local procedures established by the HCA.

VI. External Approval Phase

Unless otherwise designated by the HCA, the program manager will act as the field focal point for the resolution of any comments. Within headquarters, the headquarters' focal point will be the assigned analyst in the Field Assistance and Oversight Division which is located in the Office of Contract Management. The headquarters' focal point will be responsible for tracking the document through the review and approval process. Once the acquisition plan is approved, the plan is returned to the field focal point or the contracting officer for incorporation in the official contract file.

VIII. Processing Change Pages, Updates, and Amendments

When the acquisition plan is being reviewed for approval by headquarters and changes are requested, these changes are accomplished through the incorporation of "change pages." These change pages should be marked with a bar in the margin identifying the changed portion(s) and a revision number and date in the lower right hand corner of the page. The field focal point will forward change pages to the Headquarters' focal point as appropriate. Normally, change pages are not reviewed by the functional field offices; however, the field focal point should advise the applicable functional staff offices of the change being submitted, if appropriate.

If a change occurs to the program which significantly affects the acquisition plan, the contracting officer shall submit a revised acquisition plan to the approval authority with a statement summarizing the changes. Examples of changes which might warrant a plan revision are scope, dollar value, or contract type changes. The revised acquisition plan should reflect the current status of the action(s) described.

Acquisition plan amendments shall be processed after acquisition approval when significant program changes occur. Examples include but are not limited to changes in contract type, significant changes in quantity, changes in scope of work required, period of performance, or funding requirements. Acquisition plan amendments must contain a signed cover sheet with the basic acquisition plan number and sequential amendment number designation. For minor revisions, acquisition plan amendments must contain a clear description of each changed sentence or paragraph, an explanation of the reason for and significance of the changes, and acquisition plan replacement pages. For major revisions, acquisition plan amendments must contain an entire amended acquisition plan and a "Changes Made by Amendment X to Acquisition plan Y" document summarizing the changes.

Processing of amendments should be managed through the same five phase preparation process used to approve new acquisition plans.

Chapter 8

Preparer's and Reviewer's Checklist for Success

FOR PREPARERS:

• DO HOLD A KICKOFF MEETING WITH THE PROGRAM OFFICE TEAM

• DO PLAN FIRST, AND THEN DOCUMENT THE PLAN -- THE LITTLE STUFF IS EASY WHEN YOU FIGURE OUT THE BIG STRATEGY ISSUES:

• What are your performance, cost, and schedule objectives?
• What are the user's requirements? Have they been addressed?
• What are the risks of not achieving them?
• What contract type is appropriate given the risks?
• What metrics will be used to accept the deliverables(s)?
• How will the user maintain the items?
• How will the user keep the items operational?
• What kinds of data do we, the user, and supporter need?
• Is there a competitive market for the effort
• Does the market research indicate that this acquisition should be set-aside for small business?
• How can we develop/sustain competition through follow-on and support efforts?
• Do we need a warranty?
• What does the market place offer?
• Is my requirement overstated in a way that might preclude commercial items?
• What are the customary commercial practices for buying the item?

• For environmental cleanup or remediation requirements, what characterization data is available and what are the end point criteria?

•What are unknowns and what are the risks associated with those unknowns?

• What Government Furnished property, services, and data will be required and what are the risks associated with providing that data regarding quality and timeliness

• DO GET THE HELP OF THE FUNCTIONAL "EXPERTS" AND THE IPT WHEN YOU NEED IT.

• DO GIVE A CLEAR OVERALL NON-TECHNICAL DESCRIPTION OF YOUR PROGRAM. EXPECT THOSE WHO READ THE PLAN TO BE TOTALLY UNFAMILIAR WITH YOUR PROGRAM

- DO ENSURE THE PLAN IS CONSISTENT WITH THE STRATEGY DISCUSSED BY THE IPT -- HIGHLIGHT AND EXPLAIN DIFFERENCES

- DO INCLUDE THE DISPOSITION OF IPT RECOMMENDATIONS IN APPROPRIATE PORTIONS OF THE PLAN

- DO USE SPELL CHECK PROGRAMS AND HAVE YOUR TEAM PERFORM A THROUGH QUALITY CHECK

- DO USE THIS GUIDE IN PREPARING THE PLAN

- DO USE YOUR TEAM TO ACCOMPLISH REGULATORY RESEARCH NEEDED TO FULLY UNDERSTAND THE ACQUISITION PLANNING ISSUES TO BE INCLUDED IN THE PLAN

- DO EXPLAIN IN SUFFICIENT DETAIL ANY PROGRAM OR CONTRACT FUNDING

- DON'T LEAVE OUT DISCUSSION OF CONTRACT OPTIONS

- DON'T FORGET AAMFTWDKWTM (Acronyms Are Meaningless For Those Who Don't Know What They Mean)

- DON'T SIMPLY INDICATE A TOPIC IS NON-APPLICABLE WITHOUT SAYING WHY. (This will save you many comments from future reviewers.)

- DON'T START THE CONSULTATION PHASE UNTIL YOU AND YOUR TEAM FEEL THE PLAN IS TRULY COMPLETE

FOR REVIEWERS:

- DO PROVIDE COMMENTS WHICH ARE SPECIFIC AND CAN BE ACTED UPON (DON'T JUST ASK QUESTIONS)

- DO CALL THE PROGRAM MANAGER, CONTRACTING OFFICER, OR THE FIELD FOCAL POINT FOR ACQUISITION PLANS IF YOU HAVE QUESTIONS DURING YOUR REVIEW

- DO CLEARLY IDENTIFY THE PAGE, SECTION, PARAGRAPH, AND LINE TO WHICH YOUR COMMENT APPLIES

- DO GIVE COMPLETE REGULATION CITES WHEN APPLICABLE

- DO PROVIDE SPECIFIC ALTERNATIVE WORDING IF ORIGINAL WORDING IS UNCLEAR OR AMBIGUOUS

- DO REMEMBER THIS GUIDE IS NOT DIRECTIVE. PLAN CONTENTS ARE PRESCRIBED BY THE FAR AND FAR SUPPLEMENTS

- DO REMEMBER, YOUR GOAL IS TO HELP THE PROGRAM MANAGER PUT TOGETHER A SUCCESSFUL ACQUISITION PROGRAM PLAN

OTHER CONSIDERATIONS:

Information Technology (IT)

Acquisition planners for IT acquisitions shall comply with the capital planning, and investment control requirements in 40 U.S.C. 11312 and OMB Circular A-130 (See FAR 7.103(v) and 7.105(b)(4)(ii)(A) and (B)). In addition, contracting officers should consider the rapidly changing nature of IT through market research and the application of technology refreshment techniques. The acquisition plans should analyze risks, benefits and costs in accordance with FAR Subpart 39.1. (See FAR 16.505(a)(8) in regards to task or delivery orders for IT requirements.) The 5-year limitation for period of performance applies to all DOE contracts including IT contracts. See Policy section of Acquisition Guide Chapter 7.1 for details.

Contract Management Planning

It is vitally important to commence planning for the management of the contract during the formation of the acquisition plan because many of the potential issues and risks that could cause significant problems during the performance of the contract can either be eliminated or mitigated at this stage by sound analysis and planning. During the planning of the acquisition, the team should identify critical areas of contract performance, Government obligations and responsibilities that may arise during contract performance, and key assumptions and risks associated with the contract.

Guidance on Contract Management Planning and the requirement to create a formal Contract Management Plan for DOE elements is provided in Chapter 42 of the DOE Acquisition Guide. NNSA guidance is contained in a "Guide to Creating a Contract Management Plan," March 2002. Submittal requirements for Headquarters review and approval of Contract Management Plans are provided in Chapter 71 of the DOE Acquisition Guide.

Two Phase Design-Build Method

Acquisition planning using two phase design-build selection procedures (not to be confused

with FAR Part 14 Two-Step Sealed Bidding) should include the considerations of FAR 36.301.

International Agreements

When placing contracts with contractors located outside the United States, for performance outside the United States, contracting officers, in accordance with FAR 25.802, must:

- Determine the existence and applicability of any international agreements and ensure compliance with these agreements; and

- Conduct the necessary advance acquisition planning and coordination between the appropriate U.S. executive agencies and foreign interests as required by these agreements.

Utility Services

Prior to executing a utility service contract, the contracting officer shall conduct market surveys and perform acquisition planning in order to promote and provide for full and open competition provided that any resultant contract would not be inconsistent with applicable state law governing the provision of electric utility services. (See FAR 41.202).

All contracts, contract modifications (excluding administrative or incremental funding modifications) or other arrangements for the acquisition and/or sale of utility services should be submitted to the Office of Federal Energy Management Programs (FEMP) in accordance with DOE Order 436.1, Departmental Sustainability. (NOTE: NNSA utility actions are submitted through the Office of Procurement and Assistance Management, NNSA) These utility services include energy conservation measures or demand-side management services or other utilities incentives programs. Submission of a utility procurement plan is considered the functional equivalent of an acquisition plan. Therefore, an approved utility procurement plan will satisfy the FAR requirement for acquisition planning.

All planned acquisitions that are in excess of the HCA's delegated procurement authority should be identified in the annual projected actions in accordance with Chapter 71, Review of Contract Actions, of this guide.

Chapter 9

Alternate Approval Process: Procurement Strategy Panel Briefing

The following alternate approval process for acquisition plans can be utilized only when the procurement is expected to exceed $100 M. The primary purpose of the PSP process is to ensure that Senior Management is briefed on the major aspects of the Procurement Strategy so that the Integrated Procurement Team (IPT)/Source Evaluation Board (SEB) is ensured of support by Senior Management in its approach. The PSP briefing charts, as approved by Business Clearance, shall constitute the Acquisition Plan. Minutes and notes are not considered part of the Acquisition Plan, shall not be an attachment to the briefing charts, and shall not be used to supplement omissions in the briefing charts. Therefore, the briefing charts should be comprehensive, accurate, and self-explanatory. Business Clearance approval will not be rendered for PSP briefing charts that are incomplete or contain inaccuracies.

HCAs are strongly encouraged to establish written guidelines and procedures before proposing the use of this alternate approval process.

Pre-PSP Briefing

While the PSP is the major decision point for approval of the Procurement Strategy, the success of the formal PSP briefing is dependent on effective advance coordination with subject matter experts and reviewers. Therefore, at least 5 business days before the formal PSP, a pre-PSP, similar to the "Pre-ESAAB" review function under the Energy System Acquisition Advisory Board (ESAAB) process for major projects, is required.

The role of the pre-PSP subject matter experts (SMEs) and reviewers is to serve as objective advisors on the Procurement Strategy to both the IPT/SEB and the HCA. The pre-PSP helps ensure compliance with policies, procedures, and best practices, identifies important issues that require resolution, and advises whether the IPT/SEB is ready to proceed to the PSP. While there may be issues that are not resolved at the conclusion of the pre-PSP IPT/SEB briefing, fundamentally, the PSP process is most effective when resolution of issues and concerns are accomplished at the lowest level possible so that only the most important issues are presented for consideration to the PSP. Approval of the procurement strategy may be delayed when there are unresolved issues, additional conditions of approval, or general quality control concerns. A pre-PSP meeting materially increases the likelihood of securing Business Clearance Approval after completion of the PSP. Therefore, every effort should be made to resolve issues and concerns before to proceeding to the PSP.

In preparation for the pre-PSP, the IPT/SEB must provide the SME/reviewers an advance draft of the PSP charts for comment along with a pre-PSP meeting invitation. The PSP charts should be complete, accurate, and self-explanatory. The briefing charts and the briefing itself must fully address all the acquisition planning elements in FAR subpart 7.1 and use the prescribed sections and elements in 7.1 for purposes of structuring, formatting, and organizing the briefing. The briefing charts must show evidence of review in accordance with Acquisition Guide 71.1 before dissemination to MA-621, the Field Assistance and Oversight Division and other SMEs and reviewers. Reviewers must be provided a minimum of 5 business days prior to the pre-PSP to review the briefing charts.

Because the pre-PSP and the PSP involve Source Selection Information, the IPT/SEB should ensure files are properly encrypted and participants and reviewers understand the procedures regarding the nondisclosure and protection of sensitive data. The pre-PSP and PSP briefing charts should also be marked with an appropriate legend indicating that they contain Source Selection Information

The SME/reviewers should also be advised:

- That the material and the briefing are conducted in lieu of an approved written Acquisition Plan pursuant to Chapter 9 of Acquisition Guide 7.1.
- When and to whom comments and questions are to be submitted (a minimum of 5 business days must be provided to SMEs and reviewers).
- The date and time of the pre-PSP briefing.

The IPT/SEB are responsible for ensuring full coordination with all subject matter experts (SMEs) and reviewers including but not limited to the offices and functional areas identified below and ensuring that a pre-PSP is conducted for the SMEs and reviewers.

- GC-61 Office of the Assistant General Counsel for Procurement and Financial Assistance
- GC-62 Office of Assistant General Counsel Technology Transfer and Intellectual Property
- GC-63 Office of General Counsel for Labor & Pension Law
- MA-612 Contractor Human Resources Policy Division
- MA-613 Personal Property Policy Division
- MA-611 Contract & Financial Assistance Policy Division
- MA-621 Field Assistance and Oversight Division
- MA-63 Office of Project Management
- HS-42 Office of Nuclear Safety Enforcement
- EM-1 Chief of Nuclear Safety
- CF-50 Office of Financial Risk, Policy , and Controls

- LM-1 Office of Legacy Management
- ED-3 Office of Small and Disadvantaged Business Utilization (OSDBU)

Once the comments from the SMEs and reviewers are received, the following briefing package must be provided to SME/reviewers at the pre-PSP meeting:

- SME/reviewer comment matrix (including proposed resolution)
- Draft PSP briefing charts that have been updated in "track changes" to identify modifications resulting from SME/reviewer comments

PSP/SEB Briefing

Upon completion of the pre-PSP and adequate resolution of SME and reviewer concerns, the PSP briefing will be conducted. The HCA is responsible for ensuring that:

- The PSP charts are current, accurate, and responsive to SME/reviewer recommendations and comments before distribution to the PSP participants
- The briefing charts have been signed and concurred in by the following:
    - Contracting Officer
    - IPT Lead
    - Site Counsel
    - Independent Reviewer (signature on the briefing charts is not required if separate evidence of Independent Review is provided)
    - Competition Advocate (signature is only required when award will be on other than a full and open basis (FAR subpart 6.3))
    - Field/Site Office Manager
    - Senior Program Official
    - Source Selection Official
    - Head of the Contracting Activity
- If there are changes from the briefing charts presented at the pre-PSP or where there are unresolved issues, the PSP participants must be provided briefing charts at least 5 business days in advance of the PSP briefing. The number of days may be reduced to 3 business days when the SMEs and reviewers concur that the briefing charts presented by the IPT are complete, accurate, and all issues are fully resolved with no further edits to be made to the briefing charts.

The PSP briefing need not cover every briefing chart. That level of briefing occurs at the pre-PSP level. For purposes of the Senior Procurement Executive and other senior management, the PSP briefing should focus on the scope of work, the history of the procurement, market research, socioeconomic considerations, areas of risk and risk mitigation, acquisition

alternatives, contract type and contract incentives, the source selection process, and the basis of recommendation.

If the PSP is successfully concluded with no further conditions required for approval, typically, the Business Clearance approval memorandum of the Acquisition Plan, i.e., the briefing charts, will be issued within three business days. When there are further concerns or conditions that must be addressed and/or further coordinated for resolution, the revised package must be submitted through the HCA for Business Clearance approval. It should also be noted that the IPT/SEB is required to separately process any deviations, waivers, or special approvals required by the FAR or Agency policies and procedures (e.g., Justification for Other Than Full and Open Competition, period of performance exceeding 5 years, incremental funding of firm-fixed-price requirements, etc.). Disclosure of such actions in the briefing chart does not relieve the IPT/SEB of its responsibility to properly coordinate and process such actions.

Chapter 10

The Acquisition Plan Template

- FORMAT AND STRUCTURE PRESENTED ARE FOR GUIDANCE ONLY
- TOPICS ARE PRESCRIBED BY THE FAR AND DOE ORDER 413.3B
- ENSURE REVIEWER ACCESS TO ALL DOCUMENTS REFERENCED
- INCLUDE ALL RELATED CONTRACT ACTIONS
- BE CONSISTENT WITH IPT DISCUSSIONS/RECOMMENDATIONS
- INCLUDE AP CHANGES, AMENDMENTS, AND UPDATES

The requirement for preparation of the written acquisition plan is defined in the Federal Acquisition Regulation (FAR) Part 7 as supplemented by Department of Energy Acquisition Regulation (DEAR) Acquisition Guide Chapter 7.1. This template is not intended to serve as a substitute for these regulations; therefore, as each topic is discussed, specific regulatory citations are provided to facilitate your reference.

Template

NOTE: Instructional information in this template appears in italics.

This template describes the required contents and provides a recommended format and structure for acquisition plans, including the cover page and table of contents. Following the description of each paragraph, the appropriate FAR or FAR supplement citation is provided to facilitate your reference to the specific requirements of the regulation. Although any format which meets the requirements of the FAR and supplements is acceptable, it is recommended that you follow the suggested paragraph structure in this guide to ensure that all required information is included. If a topic or sub-topic does not apply to your acquisition, you should state that it does not apply and, if appropriate, explain the reason. This avoids questions as to whether the topic does not apply or was just overlooked. You may add sub-paragraphs as necessary to clearly present the unique aspects of your program.

The Acquisition plan preparer shall ensure that reviewers at all management levels have access to documents referenced in the Acquisition plan. Accomplish this by providing the document, reproducing and attaching pertinent extracts, or quoting the reference within the body of the plan, whichever is the most practical. Documents may be referenced provided they can be made available for immediate use if needed by the reviewing officials.

The requirements for written acquisition plans are detailed in FAR Part 7 and Department of Energy Acquisition Guide Chapter 7.1. If multiple contract actions are required to satisfy the program objectives, the plan should address all of these required contracts and show how the

actions are integrated to achieve the objectives.

Acquisition plans which do not contain classified information shall be marked “PROCUREMENT SENSITIVE” and be handled accordingly. For classified procurements, the appropriate classification guides and regulations for classified acquisition plan procedures should be consulted.

If a change occurs to the program which significantly affects the acquisition plan, the contracting officer shall submit a revised acquisition plan to the approval authority with a statement summarizing the changes. Changes which might warrant a revision include scope, dollar value, or contract type changes. The revised acquisition plan should reflect the current status of the action(s) described. Changes in the acquisition plan shall be identified by a vertical bar in the right margin.

Acquisition plan amendments shall be processed after acquisition plan approval when significant program changes occur. Examples include but are not limited to changes in contract type, significant changes in quantity, changes in scope or work required, period of performance, or funding requirements. Acquisition plan amendments must contain a signed cover sheet with the basic acquisition plan title and sequential amendment number designation. For minor revisions, acquisition plan amendments must contain a clear description of each changed sentence or paragraph, an explanation of the reason for and significance of the changes, and acquisition plan replacement pages. For major revisions, acquisition plan amendments must contain an entire amended acquisition plan and a “Changes Made by Amendment X to Acquisition plan Y” document summarizing the changes.

ACQUISITION PLAN TEMPLATE

Insert Month and Year

ACQUISITION PLAN COVER SHEET

CONTRACTING ACTIVITY NAME
ACQUISITION PLAN TITLE
AMENDMENT NUMBER

PROGRAM NAME

Prepared By: _____

Name
Title
Position
Office, Telephone
Date Completed

Coordinations: _____ _____

Name
Contracting Officer
Office, Telephone
Date

Name
Contracting Activity
Competition Advocate
Office, Telephone
Date

_____

Name
Head of Contracting Activity (HCA)
Office, Telephone
Date

ACQUISITION PLAN

TABLE OF CONTENTS

A. ACQUISITION BACKGROUND AND OBJECTIVES

1.1 Program Description
1.2 Program Authority and Identification
1.3 Background
1.4 Statement of Need
1.5 Acquisition Alternatives
1.6 Program Direction Documents
1.7 Applicable Statutes
1.8 Energy Systems Acquisition Advisory Board Schedule and Approvals
1.9 Advanced Planning Acquisition Team Review and Approval
1.10 Milestone Chart Depicting the Objectives of the Acquisition
2.0 Applicable Conditions
3.1 Cost.
3.2 Life-Cycle Cost.
3.3 Design-To-Cost.
3.4 Application of Should Cost.
3.5 Contract Pricing
4.0 Capability or Performance
5.0 Delivery or Performance-Period Requirements
6.0 Trade-Offs
7.0 Risks.
8.0 Acquisition Streamlining

B. PLAN OF ACTION

1.1 Market Research
1.2 Sources
1.3 Small Business Opportunities
2.1 Competition (or other than full and open competition)
2.2 Competition, Major Components and Subsystems
2.3 Competition, Spares, and Repair Parts
2.4 Competition, Subcontracts
2.5 Multiple Sourcing
3.0 Source Selection Procedures
4.1 Acquisition Considerations
4.2 Contract Type

4.3 Warranties
5.1 Budgeting and Funding
5.2 Program Funding
5.3 Contract Funding
6.0 Product or Service Descriptions
7.0 Priorities, Allocations, and Allotments
8.0 Contractor Versus Government Performance
9.0 Inherently Governmental Functions
10.0 Management Information Requirements
11.0 Make or Buy
12.0 Test and Evaluation
13.1 Logistics Considerations
13.2 Assumptions Concerning Contractor or Agency Support
13.3 Quality Assurance, Reliability, Maintainability, Warranties
13.4 Requirements for Contractor Data
13.5 Standardization Concepts
14.0 Government Furnished Property
15.0 Government Furnished Information
16.0 Environmental and Energy Conservation Considerations
17.0 Security Considerations
18.0 Contract Administration
19.0 Other Considerations
20.0 Milestones for the Acquisition Cycle
21.1 Identification of Participants in Acquisition Plan Preparation.

Attachment 1	Program Schedule
Attachment 2	IPT Meeting Minutes
Attachment 3	Funding Milestones
Attachment 4	Justification For Other Than Full and Open Competition (if applicable) (Do not include this attachment if the acquisition is competitive.)
Attachment 5	Others, As Required

A. ACQUISITION BACKGROUND AND OBJECTIVES

1.1 PROGRAM DESCRIPTION

1.2 PROGRAM AUTHORITY AND IDENTIFICATION

1.3 BACKGROUND - FAR 7.105(a)

Summarize the technical and contractual history of the acquisition

1.4 STATEMENT OF NEED - FAR 7.105(a)

1.5 ACQUISITION ALTERNATIVES - FAR 7.105(a)

1.6 PROGRAM DIRECTION DOCUMENTS
Identify any relevant program documents

1.7 APPLICABLE STATUTES

1.8 ENERGY SYSTEMS ACQUISITION ADVISORY BOARD SCHEDULE AND APPROVALS -DOE O 413-.3B

1.9 ADVANCED PLANNING ACQUISITION TEAM (APAT) REVIEW AND APPROVAL – DOE Acquisition Guide Chapter 19.0

1.10 MILESTONE CHART DEPICTING THE OBJECTIVES OF THE ACQUISITION

2.0 APPLICABLE CONDITIONS - FAR 7.105(a)(2)

3.0 COST FAR 7.105(a)(3)

The total estimated cost of the contract(s) covered by this acquisition plan, including all contract options, is $____. This total includes the following appropriation types:

The total required contract funding by fiscal year and appropriation is presented in greater detail in section B.5.2 of this acquisition plan.

This cost estimate is based upon

3.1 LIFE-CYCLE COST (LCC) - FAR 7.105(a)(3)(i)

Discuss as applicable.

3.2 DESIGN-TO-COST (DTC) - FAR 7.105(a)(3)(ii)

Discuss as applicable.

3.3 APPLICATION OF SHOULD COST - FAR 7.105(a)(3)(iii)

3.4 CONTRACT PRICING - FAR 15

4.0 CAPABILITY OR PERFORMANCE - FAR 7.105(a)(4)

5.0 DELIVERY OR PERFORMANCE - PERIOD REQUIREMENTS – FAR 7.105(a)(5)

6.0 TRADE-OFFS – FAR 7.107(a)(6)

7.0 RISKS – FAR 7.105(a)(7)

8.0 ACQUISITION STREAMLINING – FAR 7.105(a)(7)

B. PLAN OF ACTION

1.1 MARKET RESEARCH – FAR 10.002

1.2 SOURCES – FAR 7.105(b)(1) The following potential sources have been identified for this acquisition:

NAME LOCATION TYPE

The above sources responded to a sources sought synopsis issued on_____. Based upon initial screening, the following sources are considered capable of performing the proposed contract:_____. [Identify sources.] A small business set-aside (is/is not) considered appropriate. There are/are not at least two small business sources capable of meeting the government's requirement. A Notice of Contract Action will be published in the FedBizOpps on or about_____. A copy of the solicitation will be provided to any firm which requests one.

1.3 SMALL BUSINESS OPPORTUNITIES

2.1 COMPETITION (or other than full and open competition) – FAR 7.105(b)(2)(i) and FAR 7.104

2.2 COMPETITION, MAJOR COMPONENTS AND SUBSYSTEMS – FAR7.105(b)(2)(ii)

2.3 COMPETITION, SPARES, AND REPAIR PARTS – FAR 7.105(b)(2)(iii)

2.4 COMPETITION, SUBCONTRACTS – FAR 7.105(b)(2)(iv)

2.5 MULTIPLE SOURCING

Discuss the potential for multiple awards.

3.0 SOURCE SELECTION PROCEDURES – FAR 7.105(b)(4)

4.1 ACQUISITION CONSIDERATIONS – FAR 7.105(b)(5)

4.2 CONTRACT TYPE – FAR 7.105(b)(3)

4.3 WARRANTIES – FAR 7.105(b)(14)(ii)

4.4 CONTRACT ADMINISTRATION/MANAGEMENT

5.1 BUDGETING AND FUNDING – FAR 7.105(b)(5)

5.2 PROGRAM FUNDING

5.3 CONTRACT FUNDING

6.0 PRODUCT OR SERVICE DESCRIPTIONS – FAR 7.105(b)(7)

7.0 PRIORITIES, ALLOCATIONS, AND ALLOTMENTS - FAR 7.105(b)(8)

8.0 CONTRACTOR VERSUS GOVERNMENT PERFORMANCE – FAR 7.105(b)(9)

9.0 INHERENTLY GOVERNMENTAL FUNCTIONS – FAR 7.105(b)(10)

10.0 MANAGEMENT INFORMATION REQUIREMENTS – FAR 7.105(b)(11)

11.0 MAKE OR BUY – FAR 7.105(b)(12)

12.0 TEST AND EVALUATION – FAR 7.105(b)(13)

13.1 LOGISTICS CONSIDERATIONS – FAR 7.105(b)(14)

13.2 ASSUMPTIONS CONCERNING CONTRACTOR OR AGENCY SUPPORT – FAR 7.105(b)(14)(i)

13.3 QUALITY ASSURANCE, RELIABILITY, MAINTAINABILITY, WARRANTIES – FAR 7.105(b)(14)(ii)

13.4 REQUIREMENTS FOR CONTRACTOR DATA – FAR 7.105(b)(14)(iii)

13.5 STANDARDIZATION CONCEPTS – FAR 7.105(b)(14)(iv)

14.0 GOVERNMENT FURNISHED PROPERTY (GFP) – FAR 7.105(b)(15)

15.0 GOVERNMENT FURNISHED INFORMATION – FAR 7.105(b)(16)

16.0 ENVIRONMENTAL AND ENERGY CONSERVATION CONSIDERATIONS – FAR 7.105(b)(17) and Acquisition Guide Chapter 23

17.0 SECURITY CONSIDERATIONS – FAR 7.105(b)(18) and DEAR 904.4, 904.70 and 904.71

18.0 CONTRACT ADMINISTRATION – FAR 7.105(b)(19) and Acquisition Guide Chapter 42

19.0 OTHER CONSIDERATIONS – FAR 7.105(b)(20)

20.0 MILESTONES FOR THE ACQUISITION CYCLE – FAR 7.105(b)(21)

MILESTONE SCHEDULE	DATE:
Program Approval	
Statement of Work Complete	
Specifications	
Data Requirements	
SEB Established	
APAT Review Initiated	
APAT Approval	
Issuance of Synopsis (Sources Sought)	
Acquisition Plan Completed	
Acquisition Plan Approved	
Purchase Request	
Justification for Other than Full & Open Competition	
Draft RFP Completed	
Draft RFP Approved	

Draft RFP Issued
Source Selection Plan/Rating Plan Completed
Final RFP Completed
Final RFP Approved
Final RFP Issued
Proposals Received
Audits Received
Technical Evaluation of Technical Proposals Completed
Technical Evaluation of Cost Proposals Completed
Cost Evaluation of Proposals Completed
Initial SEB Report Approved
SSO Briefing
Competitive Range Established
Discussion Questions to Offerors
Discussions Completed
Final Proposals Requested
Final Proposals Received
Technical Evaluation of Final Technical Proposals Completed
Technical Evaluation of Final Cost Proposals Completed
Cost Evaluation of Final Proposals Completed
Draft Final SEB Report Forwarded to MA-621
Final SEB Report Approved
SSO Briefing
Contract Award
SEB Lessons Learned Completed

21.0 IDENTIFICATION OF PARTICIPANTS IN ACQUISITION PLAN PREPARATION – FAR 7.105(b)(22)

The following personnel have been consulted in the preparation of this acquisition plan:

Name	Title	Office	Phone

Strategic Sourcing Requirements

Guiding Principles

- Improving acquisition through strategic sourcing.
- Taking advantage of purchasing opportunities by continually reviewing current needs against market conditions.
- Requiring vendors to provide sufficient pricing usage, and performance data to enable the government to ensure we are receiving the best prices for commonly used goods and services.
- Ensuring that the Government gets credit for all activities executed against each strategic sourcing vehicle.
- Ensuring that strategic sourcing vehicles offer tiered pricing or other appropriate strategies, to reduce prices as cumulative volume increases.
- Ensuring that Department of Energy (DOE) cost savings and cost avoidance data from strategic sourcing activities are recorded correctly.

Applicable References

Federal Acquisition Regulation (FAR) Parts

- Part 8 Required Sources of Supplies and Services
- Part 16 Types of Contracts
- Part 19 Small Business Programs

DOE Acquisition Guide Chapter

- Part 16 Types of Contracts

Office of Management and Budget (OMB)

- OMB Memorandum M-13-02 dated December 5, 2012, Improving Acquisition through Strategic Sourcing
- OMB Memorandum M-09-25 dated July 29, 2009, Improving Government Acquisition
- OMB Memorandum dated May 20, 2005, Implementing Strategic Sourcing

Additional DOE guidance

- Policy Flash 2014-18 dated February 26, 2014, Complex-Wide Strategic Sourcing – Update
- Policy Flash 2014-16 dated February 12, 2014, Standardized Cost Savings Definitions and Reporting Template – Update
- Memorandum from Patrick M. Ferraro dated October 31, 2013, Revised Fiscal Year (FY) 2014 Critical Few Performance Measures
- Policy Flash 2013-73 dated August 7, 2013, Utilization of General Services

Administration Federal Strategic Sourcing Initiative Blanket Purchase Agreements for Office Supplies

- Memorandum from Daniel B. Poneman dated July 25, 2013, Utilization of General Services Administration Federal Strategic Sourcing Initiative Blanket Purchase Agreements for Office Supplies
- Policy Flash 2012-67 dated September 21, 2012 and Memorandum from Paul Bosco dated September 20, 2012, Acquisition Savings Reporting Template Guidance
- Memorandum from Paul Bosco and Joe Waddell dated May 29, 2012, Utilization of the General Services Administration's Federal Strategic Sourcing Initiative Blanket Purchase Agreements
- Memorandum from Patrick M. Ferraro dated September 9, 2011, Sources for Office Supplies
- Memorandum from Daniel B. Poneman dated August 27, 2010, Strategic Business Initiatives
- Policy Flash 2010-42 dated April 8, 2010, Use of New Strategically Sourced Blanket Purchase Agreement for Domestic Delivery Services with United Parcel Services

Purpose

This document defines the Energy-Wide Strategic Sourcing (EWSS) Program, its features, functions, and objectives, and the steps necessary to institutionalize the Program within the DOE. The EWSS will build on the existing capabilities, activities, and organizations already in place at DOE whenever possible.

Overview

Strategic sourcing is a structured data driven way to buy goods and services. Strategic sourcing is a branch and tenet of Supply Chain Management; strategic sourcing represents a shift from buying tactically, on an as-needed basis, to buying collaboratively, with well-planned service and supply acquisitions that consider spending trends and future requirements of the entire enterprise as opposed to those of a single entity. Strategic sourcing solutions can range from implementing supplier partnerships, to establishing centers of excellence (based on region or core competencies), to leveraging strategic business arrangements that garner results for the enterprise. By creating an environment of data transparency and instilling a culture of strategic decision-making and collaboration, DOE can acquire strategically sourced goods and services that maximize procurement dollars and program support. Strategic sourcing is not simply about reducing the number of DOE contracts or reallocating spending; it is about working collectively and operating as a single, unified acquisition workforce.

Instead of purchasing something whenever a need arises, "strategic sourcing" means taking a step back and determining the best way to purchase a good or service on an ongoing basis. For common goods and services purchased across an agency or across the government (such as security guard services or express shipping), it entails working with other offices to share knowledge, understand suppliers, and determine a coordinated purchasing approach. Strategic sourcing often means pooling multiple purchases to leverage the purchasing power of an agency and "going to market" as a single buyer. Even in cases where it makes sense to

purchase as independent buyers, sharing knowledge and resources often generates enormous efficiencies.

Background

Given the nature of the Department's business model, the opportunities for strategic sourcing are different at the Federal and contractor levels. DOE, at the Federal level, spends approximately $24-$25 billion on the acquisition of goods and services with close to 80-85% of those dollars obligated for site and facility management contractor (FMCs) services. The FMCs, in turn, sub-contract a large portion of those dollars for a wide-range of commercial goods and services to fulfill their contractual responsibilities. At the Federal level, many of the largest opportunities relate to strategic purchasing of commodities with fewer opportunities for strategic sourcing of commodities. Accordingly, within DOE, there are substantially greater opportunities to leverage the acquisition of commonly used goods and services at the contractor level than at the Federal level.

In 1995, DOE's Senior Procurement Executive (SPE) facilitated the establishment of a strategic sourcing program at the contractor level, known as the Integrated Contractor Purchasing Team (ICPT) on a test basis to leverage the buying power of the FMCs. This effort was expanded with the establishment of the Supply Chain Management Center within NNSA and EM. The strategic sourcing pilot program was successful and was officially chartered by the SPE in 1997. In recognizing the success of the NNSA's SCMC, the Office of Science (SC) stood up an Operations Improvement Council (OIC) in 2011. The OIC capitalizes on processes already in place, like the ICPT and the SC Contractors' Purchasing Council strategic sourcing efforts, while expanding cost improvement opportunities beyond acquisition to areas including human resources, facilities operations and information technology.

With the issuance of the May 20, 2005 memorandum from the OMB (Memorandum from OMB dated May 20, 2005, Implementing Strategic Sourcing), federal agencies were directed to establish formal strategic sourcing programs. The Chief Acquisition Officer (CAO), Chief Financial Officer (CFO), and Chief Information Officer (CIO) are responsible for the overall development and implementation of the agency's strategic sourcing programs with the CAO designated as the lead for this initiative. In addition, OMB Circular A-123, Appendix B, prescribes requirements pertaining to strategic sourcing and the Government-wide Purchase Card Program.

The Deputy Secretary re-emphasized the importance of strategic sourcing, especially Supply Chain Management (Memorandum from Daniel B. Poneman dated August 27, 2010, Strategic Business Initiatives). He noted NNSA's successful implementation of Supply Chain Management Center's strategies and the potential benefit of expanding this initiative across the Department by continuing to look at areas for improvements.

The Deputy Secretary also issued a Memorandum on July 25, 2013 that requires all office supplies available under GSA contracts to be purchased through the GSA, unless it can

be demonstrated that doing so would not be cost-effective or efficient. This mandate does not require the termination of existing orders for office supplies nor does it preclude the use of DOE's AbilityOne Supply Stores, Paperclips, Etc.., (Forrestal Building and Germantown).

A new OMB initiative on Improving Acquisition through Strategic Sourcing was established through the OMB Memorandum M-13-02 dated December 5, 2012. This memorandum required the designation of Strategic Sourcing Accountable Official (SSAO), authorized to act on the agency head's behalf, to coordinate internal strategic sourcing activities and participation in government-wide efforts.

The OMB memo M-13-02 also established a Strategic Sourcing Leadership Council (SSLC) that is chaired by the Administrator for the Office of Federal Procurement Policy (OFPP). The SSLC is leading the government's efforts to increase the use of strategic sourcing by developing and promoting a commodity management approach to the government's acquisition of goods and services. The SSLC is tasked with recommending to OMB commodity- specific management strategies that ensure the Government gets the best deal possible.

Additionally, the OMB Memorandum M-13-02 requires each agency to promote, to the maximum extent practicable, sound strategic sourcing practices within their agencies. For example, each SSLC agency shall establish an internal cross-functional strategic sourcing council to oversee the agency's related activities. These efforts include, but are not limited to; issuing and enforcing mandatory use policies for government wide and agency wide strategic sourcing solutions to the extent appropriate, providing acquisition and management data to the General Services Administration (GSA) and other executive agents in support of the development of new solutions, and tracking spending and savings information for use by OMB, as further directed by the OFPP.

Characteristics of Strategic Sourcing Acquisition Vehicles

Strategic sourcing is the process of reviewing requirements to determine if an existing strategic agreement is available for use or if one should be put in place. The specific characteristics of strategic sourcing contractual vehicles will vary according to the product or service being sourced. At a minimum, government-wide vehicles should:

- Reflect input from a large number of potential agency users – especially the largest likely users – regarding customer demand for the goods and services being considered, the acquisition strategy (including contract pricing, delivery and other terms and conditions, and performance requirements), and the commodity management approach;
- Ensure that the Federal government gets credit for all activities provided under that vehicle, regardless of payment method, unless the activities are identified with other government contracts, so that volume-based pricing discounts can be applied;
- Include tiered pricing, or other appropriate strategies, to reduce prices as

cumulative volume increases;

- Require vendors to provide sufficient pricing, usage, and performance data to enable the government to improve its commodity management practices on an ongoing basis; and
- Be supported by a contract administration plan that demonstrates commitment by the executive agent to perform active commodity management and monitor vendor performance and pricing changes throughout the life of the contract to ensure the benefits of strategic sourcing are maintained.

In order for an acquisition activity to be considered "Strategic Sourcing", it must follow the basic steps as outlined in Policy Flash 2012-67 dated September 21, 2012 and Memorandum from Paul Bosco dated September 20, 2012, Acquisition Savings Reporting Template Guidance.

Requirements

As a contracting officer/specialist/business advisor, you are responsible for:

- determining the best alternative for meeting your customer's mission needs;
- ensuring purchased supplies or services meet your customer's minimum quality requirements;
- ensuring that supplies or services are received in time to fulfill those needs;
- ensuring that all items are purchased at a fair and reasonable price; and
- selecting contractors that have track records of successful past performance.

While it is imperative the supplies and services you purchase satisfy your customer's requirement, you must also:

- develop a business arrangement that makes good business sense;
- promote competition;
- minimize the administrative costs associated with the purchases that you make;
- conduct business with integrity, fairness, and openness; and
- fulfill public policy objectives.

One key step in the contracting process is market research. Part of the market research

will be looking for existing vehicles that may be used to satisfy the requirements. One potential solution is strategic sourcing vehicles. More information on Federal Government Strategic Sourcing can be found at https://www.strategicsourcing.gov.

The Department strongly supports utilization of: (1) the GSA Blanket Purchase Agreements (BPAs) under the Federal Strategic Sourcing Initiative (FSSI) and (2) the DOE's Ability One Supply Stores, Paperclips, ETC. (Forrestal Building and Germantown). More information on the FSSI can be found at http://www.gsa.gov/portal/content/112561.

The Department also utilizes the GSA SmartPay2 Purchase Card Program. Cardholders are encouraged to use GSA Advantage (http://www.gsaadvantage.gov) to conduct quick and easy market research, review delivery options, and order already negotiated low-price items. GSA Advantage allows customers access to millions of commercial products and services and thousands of approved commercial vendors, including green products, small businesses, AbilityOne, National Industries for the Blind, and Federal Prison Industries (also referred to as UNICOR), before placing an order on-line.

The Department also strongly encourages the use of GSA Global Supply, a GSA wholesale supply source. GSA Global Supply is a one-stop source for many support needs. When ordering through GSA Global Supply, the cardholder is assured of regulatory compliance, one bill, and global delivery from a reliable government source. There is no need to comparison shop thanks to requisition-based ordering. GSA provides full accountability from order placement through delivery and billing. The website for GSA Global Supply is https://www.gsaglobalsupply.gsa.gov/advantage/main/start_page.do?store=FSS.

To see a complete listing of strategic sourcing vehicles currently in place at DOE, please go to the following link: http://energy.gov/management/office-management/operational-management/procurement-and-acquisition/strategic-sourcing.

Strategic Sourcing Reporting Procedures and Processes

As part of the OMB Acquisition Savings Initiative and the DOE Strategic Sourcing Program, a key challenge has been to address the requirement of reporting cost savings and cost avoidance data. In order for DOE to fully comply with reporting requirements, the SPE has directed the mandatory use of the reporting template outlined in Policy Flash 2012-67 dated September 21, 2013 and Memorandum from Paul Bosco dated September 20, 2012, Acquisition Savings Reporting Template Guidance to report cost savings and cost avoidance data.

The report is a three step process; 1) Select a saving type, 2) Select Savings Methodology (In Order of Preference), and 3) Enter into Report. A key element in Step 2 is that the savings methodology is listed in order of preference. When you move down in the order of preference you are acknowledging the inability to identify savings in any higher ranked methodology for the transaction(s) being recorded. Lower-priority savings methodologies should not be used merely to maximize reported savings, if a higher-ranked savings method applies.

Policy Flash 2014-16 dated February 12, 2014, Standardized Cost Savings Definitions and Reporting Template – Update provided the following additional guidance to further clarify strategic sourcing guidance:

- All Government purchase card rebates and transactions are considered strategic sourcing savings.
- If a credit card is issued as part of the agreement under the NNSA Supply Chain Management Center (SCMC) or other programs use a corporate credit card and it applies to more than one site, all rebates and transactions are considered strategic sourcing savings.
- The savings associated with utilizing all existing Federal Strategic Sourcing Initiatives (FSSI) Blanket Purchase Agreements (BPA) count toward strategic sourcing savings.
- The savings associated with utilizing all other existing GSA or NASA schedules (e.g., FSS, GWAC, MAS, and NASA-SEWP) delivery and task orders (IDIQs, BPAs) count toward strategic sourcing savings.

Setting Strategic Sourcing Spend and Savings Goals

Beginning of each fiscal year, a goal for strategic sourcing savings (cost avoidance) is established for each of the major programs (NNSA, SC, EM, Other) Federal Procurement Operations Offices and M&O/FMC Contractor Sites. The process requires each location to develop a projection of their upcoming annual procurement budget and to then decrement this anticipated spend by any potential purchases that will not be applicable as procurement actions. This provides the Federal and Contractor Sites with what is referred to as Actionable Spend, or the amount that can be targeted towards Strategic Sourcing efforts.

The current strategic sourcing savings goal of 4% is applied to the Actionable Spend to calculate the strategic sourcing cost savings target amount. Heads of Contracting Activities (HCAs) and Procurement Directors (PDs), in collaboration with their Contractor Supply Chain Council (CSCC) representative, provide on a yearly basis an estimate of their total actionable spend and savings target amounts for the coming fiscal year. At this time they would provide justification for any mitigating circumstances on why they believe they cannot achieve the 4%, if applicable. Achievement against the goal is reported to CFO/PA&E in the Performance Measures Management system on a quarterly basis as well as to OMB/OFPP in the annual AcqStat report.

Critical Few Performance Measures

In accordance with Memorandum from Patrick M. Ferraro dated October 31, 2013, Revised Fiscal Year (FY) 2014 Critical Few Performance Measures, each Procurement Office is required to report their Strategic Sourcing Savings as a percentage of total spend on a semiannual basis. This reporting requirement is in addition to the above mentioned strategic sourcing reporting procedures.

Increasing Small Business Opportunities

To the maximum extent practicable, all strategic sourcing opportunities shall seek to increase participation by small businesses. To that end, all proposed strategic sourcing agreements must baseline small business use under current strategies and set goals to meet or exceed that baseline under the new strategic sourcing vehicles.

b e te t

CHAPTER 8 - REQUIRED SOURCES OF SUPPLIES AND SERVICES

e er S pp S e e e 2011

Federal Supply Schedules

Guiding Principles

- Recent FAR subpart 8.4 changes strengthen the competition requirements for placing orders under Federal Supply Schedule (FSS) to include blanket purchase agreements (BPAs).
- There are 3 categories of orders:
  - At or below the micro-purchase threshold;
  - Exceeding micro-purchase threshold but not exceeding the simplified acquisition threshold (SAT); and
  - Exceeding the SAT.
- There are new competition procedures for creating multiple-award BPAs under FSS contracts and placing orders under the BPAs.
- FAR subpart 17.5 – Interagency Acquisitions apply to FSS orders in excess of $500,000.

References

Federal Acquisition Regulation (FAR) Subparts

- 1.1 Purpose, Authority, Issuance – 1.108 FAR conventions
- 2.1 Definitions
- 5.3 Synopses of Contract Awards
- 5.4 Release of Information
- 6 Competition Requirements
- 8.4 Federal Supply Schedules
- 9.1 Responsible Prospective Contractors – 9.105 Procedures
- 9.4 Debarment, Suspension and Ineligibility – 9.406 Debarment and 9.407 Suspension
- 12 Acquisition of Commercial Items
- 12.4 Unique Requirements Regarding Terms and Conditions for Commercial Items - 12.403 Termination
- 13 Simplified Acquisition Procedures
- 14 Sealed Bidding
- 15 Contracting by Negotiation
- 15.4 Contract Pricing – 15.407 Special cost or pricing areas
- 16.5 Indefinite-Delivery Contracts–16.505 Ordering
- 17.5 Interagency Acquisitions
- 19 Small Business Programs
- 33.1 Protests
- 38 Federal Supply Schedule Contracting
- 42.15 Contractor Performance Information – 42.1503 Procedures
- 49.4 Termination for Default – 49.401-8 Reporting information

- 49.4 Termination for Default – 49.402 Termination of fixed-price contracts for default

Acquisition Guide and Acquisition Letter

- Chapter 1.2 Head of Contracting Activity (HCA) Authority, Functions, and Responsibilities
- Chapter 6.1 Competition Requirements
- Chapter 19 Small Business Programs
- Chapter 42.15 Contractor Performance Information
- Chapter 42.16 Reporting Other Contractor Information into Federal Awardee Performance and Integrity Information System
- Acquisition Letter 2011-03 – Interagency Acquisitions

This chapter has two sections. Section I provides an overview of the following – (1) Federal Supply Schedules (FSS); (2) two statutory requirements from Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417); (3) the executive policy for acquisitions pursuant to multiple-award contracts to include FSS; (4) a summary of Federal Acquisition Circular (FAC) 2005-50 revisions; and (5) a summary of blanket purchase agreements against the GSA Schedule contracts. Section II is the FSS questions and answers from Acquisition Guide Chapter 38.1 revised to incorporate interim rule 2007-012, changes published in FAC 2005-50.

Section I.

Overview

The Federal Acquisition Regulation (FAR) subpart 8.4- Federal Supply Schedules regulates the use of the Federal Supply Schedule (FSS) Program. The FSS Program is also known as the General Services Administration Schedules Program or the Multiple Award Schedules Program. General Services Administration (GSA) establishes long-term government-wide contracts with commercial firms for commercial supplies or services. These schedules are available to Federal agencies and provide a simplified process for obtaining commercial supplies and services at prices associated with volume buying.

There are schedules that allow procuring activities to focus their selection of contractors to special areas of interest, such as the Management, Organizational and Business Improvement Services (MOBIS) Schedule; the Professional Engineering Services Schedule; the Information Technology Schedule; the Environmental Services; and products.

In a competitive procurement process, the GSA awards schedule contracts 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 schedules. This program mirrors commercial buying practices more than any other procurement process in the Federal Government.

For an overview and complete details about the GSA Schedules Program, go to the GSA website at http://www.gsa.gov/portal/content/197989.

Statutory Requirements and Executive Policy for Acquisitions Pursuant to Multiple-Award Contracts to include FSS

Effective May 16, 2011, Federal Acquisition Circular (FAC) 2005-50 amends FAR Parts 5, 8, 16, 18, and 38 to implement sections 863 and 865 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Pub. L. 110–417) enacted on October 14, 2008, and Executive Policy for multiple-award contracts to include its orders.

➢ ***Statutory Requirements***

Section 863 mandated the development and publication of regulations in the FAR to enhance competition for the award of orders placed under multiple-award contracts to include FSS. Section 863 specified enhancements included —

- Strengthening competition rules for placing orders under FSS and other multiple-award contracts to ensure both the provision of fair notice to contract holders and the opportunity for contract holders to respond (similar to the procedures implemented for section 803 of the National Defense Authorization Act for Fiscal Year 2002 (Pub. L. 107–107)); and

- Providing notice in FedBizOpps of certain orders placed under multiple-award contracts, including FSS.

Section 865 expanded requirements for all interagency acquisitions to support the decision to use an interagency acquisition with a determination that such action is the "best procurement approach" and requires written agreements to assign contract administration and management responsibilities. FAR Subpart 17.5 – Interagency Acquisitions implements this statute which includes FSS orders in excess of $500,000.

➢ ***Executive Policy***

In considering regulatory changes to strengthen the use of competition in task- and delivery-order contracts, the FAR Council implemented FAR changes that take increased and more effective advantage of competition, consistent with the general competition principles addressed in the President's March 4, 2009, Memorandum on Government Contracting (available at *http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-Subject-Government*), while still preserving the efficiencies of these contract vehicles. For this reason, the FAR addresses several issues that are not expressly addressed in section 863, such as competition for the establishment and placement of orders under FSS blanket purchase agreements (BPAs). The changes, however, are not applicable to BPAs awarded pursuant to FAR part 13 or to orders awarded under FAR procedures other than those in FAR subparts 8.4 and 16.5.

Summary of FAC 2005-50 Revisions to the FAR that Affect FSS

Specifically, FAR subpart 8.4, interim rule 2007-012 published in FAC 2005-50 —

- Amends the procedures for ordering supplies and services under FSS contracts at FAR 8.405–1 and 8.405–2, when the order is above the SAT, to require that ordering activities —
  - Receive at least three quotes, as a general matter, that can fulfill the requirement and fairly consider all quotes received; and
  - Document the file to explain efforts made to obtain quotes from at least three FSS contractors that can fulfill the requirements if fewer than three quotes were received and e-Buy, an electronic FSS requirements posting tool, was not used.
- Establishes new competition procedures at FAR 8.405–3 for creating BPAs under FSS contracts and placing orders under the BPAs that —
  - Create a preference for multiple-award BPAs, rather than single-award BPAs, generally modeled after the preference for multiple-award task and delivery-order contracts in FAR 16.505;
  - Allow single-award BPAs if
    - The agency considered multiple awards and the decision to make a single award is explained and documented in the acquisition plan and contract file,
    - The estimated value of the BPA does not exceed $103 million (including any options), with limited exception, and
    - The ordering activity prepares a written determination before exercising an option and secures the approval of its competition advocate.
  - Establish competition requirements for placing orders under multiple-award BPAs that require the ordering activity to —
    - Provide a Request for Quotation (RFQ) to all BPA holders offering the required supplies or services under the BPA for orders over the SAT that includes a description of the supplies to be delivered or the services to be performed and the basis upon which the selection will be made;
    - Afford all BPA holders an opportunity to submit a quote;
    - Fairly consider all responses received; and
    - Make award in accordance with the selection procedures.

- Restrict the circumstances when a BPA may be established based on a limited-source justification (*see also* FAR 8.405–6(a)(1)(i)).

- Amends the contract award synopsis provisions at FAR 5.301 (with conforming changes at FAR 5.406, 8.405–6(a)(2), and 16.505(b)(2)(ii)(D)) to require publication and posting of actions supported by exceptions to fair opportunity at FAR 16.505(b)(2) for non-FSS task- and delivery-order contracts and for limited-sources justifications at FAR 8.405–6 for FSS contracts, except when disclosure would compromise national security or create other security risks;

- Clarifies that ordering activities may seek a price reduction under FSS contracts at any time and that they shall seek a price reduction when placing an order or establishing a BPA that exceeds the SAT (*see* FAR 8.405–4); and

- Adds language explaining that the protest procedures found at FAR subpart 33.1 are applicable to the issuance of an order or the establishment of a BPA against an FSS contract.

Blanket Purchase Agreements under GSA Schedule Contracts

In accordance with FAR 8.405-3, ordering activities may establish Blanket Purchase Agreements (BPAs) under any Federal Supply Schedule (GSA Schedule) contract. These schedule contracts simplify the filling of recurring needs for supplies and services, while leveraging ordering activities' buying power by taking advantage of quantity discounts, saving administrative time, and reducing paperwork.

BPAs offer an excellent option for federal agencies and schedule contractors alike, providing convenience, efficiency, and reduced costs. Contractual terms and conditions are contained in GSA Schedule contracts and are not to be re-negotiated for GSA Schedule BPAs. Therefore, as a purchasing option, BPAs eliminate such contracting and open market costs as the search for sources; the need to prepare solicitations; and the requirement to synopsize the acquisition.

BPAs also:

- Provide opportunities to negotiate improved discounts;
- Satisfy recurring requirements;
- Reduce administrative costs by eliminating repetitive acquisition efforts;
- Permit ordering activities to leverage buying power through volume purchasing;
- Enable ordering activities streamlined ordering procedures;
- Permit ordering activities to incorporate Contractor Team Arrangements (CTAs);
- Reduce procurement lead time; and
- Permit ordering activities the ability to incorporate terms and conditions not in conflict with the underlying contract.

A BPA can be set up for field offices across the nation, thus allowing them to participate in a customer's BPA and place orders directly with GSA schedule contractors. In doing so, the entire agency reaps the benefits of additional discounts negotiated into the BPA.

Important factors to consider before applying for a BPA are: (1) the costs of the purchases; (2) the administrative and processing costs; and (3) the qualifications of the respective agency and the vendors from whom the agency anticipates it will purchase products and services. Accurate and detailed record keeping is also required. Agencies that do not have the staff or skill to maintain organized records for all orders placed to the BPA account might not be best suited for the BPA.

For an overview and complete details about the use of BPAs under the GSA Schedules Program, go to the GSA website at http://www.gsa.gov/portal/content/199353.

Section II.

Federal Supply Schedules Contracts

Table of Questions

General

Why should you use the FSS?[1] Page 12

What FAR changes are made by Interim Rule FAR 2007-012, Requirements for Acquisitions Pursuant to Multiple-award Contracts, published in Federal Acquisition Circular (FAC) 2005-50 that affect FSS actions? Page 12

When is Interim Rule FAR 2007-012, Requirements for Acquisitions Pursuant to Multiple-Award Contracts, published in FAC 2005-50 applicable and effective? Page 13

Are FSS orders in excess of $500,000 considered interagency acquisitions? Page 13

When ordering supplies and services, that do not require a statement of work, what are the 3 categories of purchase? Page 13

When ordering services that require a statement of work, what are the 3 categories of purchase? Page 14

Must an agency conduct acquisition planning and market research before using an FSS contract (schedule contract)? Page 14

Can you obtain additional price reductions (discounts) from the established FSS pricing when acquiring supplies and/or services? Page 15

When an order exceeds the SAT, what are the additional documentation requirements? Page 15

Can e-Buy be used to satisfy the fair notice requirement? Page 15

How do I issue a RFQ and receive quotes when using e-Buy? Page 16

How do you ensure that fair notice is provided to all schedule contractors? Page 16

[1] Gray shading throughout this section indicates this information is transferred from Guide Chapter 38.1.

Do you need to get representations and certifications from FSS contractors? Page 18

Procuring Services

What services are available through the FSS? Page 17

How do you place orders for services under the FSS and document the order? Page 17

What is "Scope Creep?" Page 21

What supports a best value determination for a service order not requiring a statement of work? Page 21

Procuring Supplies

What supplies are available on the FSS? Page 21

How do you place orders for supplies under the FSS? Page 21

Are there special posting requirements when an order contains brand-name specifications? Page 23

Do orders for supplies require a statement of work? Page 23

What supports a best value determination for a supply order? Page 23

Blanket Purchase Agreements

Can you establish blanket purchase agreements (BPAs) under the FSS? Page 24

Procedures for establishing BPAs

How do you plan and establish multiple-award BPAs and document the BPA file? Page 25

When establishing BPAs what should you consider when determining best value? Page 26

What are the competitive procedures to establish multiple-award BPAs? Page 26

What are the requirements to justify a decision to establish a single-award BPA? Page 29

Ordering from BPAs

When do the ordering procedures for multiple-award BPAs described in this guide chapter apply? Page 30

What are the ordering procedures for a single-award BPA under FSS? Page 30

What are the ordering procedures for multiple-award BPAs for supplies, services, that do not require an hourly-rate? Page 31

What are the ordering procedures for single-award or multiple-award BPAs for hourly-rate? Page 31

What are the documentation requirements for limiting sources when ordering against a BPA? Page 31

Limiting sources

What is a limited-source order or a limited-source Blanket Purchase Agreement (BPA)? Page 31

Can you award an order (to include BPA orders) or establish a BPA exceeding the mirco-purchase threshold based on a sole source or limiting sources under the FSS Program? Page 32

What is the documentation requirement for a limiting sources justification for an order (to include BPA orders) or to establish a BPA exceeding the simplified acquisition threshold based on a sole source or limiting sources under the FSS Program? Page 33

What are the posting requirements for item(s) peculiar to one manufacturer? Page 34

What are the posting requirements for limited-sources justifications, other than item(s) peculiar to one manufacturer? Page 35

Other Procedures, Issues and Concerns

Special ordering procedures and FAR part 15

Are there any other special ordering procedures? Page 36

Are teaming partners all required to be FSS contractors (schedule contractors)? Page 36

Do FAR Part 15 requirements apply to FSS orders? Page 37

Open market requirements

Can you buy supplies or services that are not identified on a particular schedule? Page 37

Must agencies consider alternative offers from schedule contractors that do not have an FSS contract (schedule contract) for a specific RFQ? Page 37

Do you need to "equalize" information gathering, or be concerned with equal treatment of schedule contractors being considered for FSS orders (schedule orders)? Page 38

Small business

Can an agency count awards under the FSS to small business concerns toward agency socioeconomic goals? Page 38

How can you maximize opportunities for small businesses under the FSS? Page 38

Is it appropriate to set-aside an order under the FSS for small businesses? Page 39

When placing a FSS order, what should you consider to help support DOE's small business goals? Page 40

How can you ensure that an order placed with a small business prime is not a "pass-through" for large business subcontractors? Page 40

Evaluation criteria and best value

What evaluation criteria can you use when ordering services? Page 41

Should "Key Personnel" be evaluated when placing an order for services? Page 41

How does a best value selection work under the FSS order to include BPAs for supplies or for service not requirement a statement of work? Page 41

What is evaluated when ordering services requiring a statement of work? Page 42

What are other considerations for time and material (T&M) pricing of services requiring a statement of work (SOW)? Page 42

What level of detail is required to document a best value selection under the FSS Program? Page 43

Debriefing and protests

For services requiring a SOW under the FSS program as a competitive order, Page 43

to include a BPA order, or the establishment of a multiple-award BPA, can an unsuccessful schedule contractor require a debriefing after award?

Can companies without a FSS contract protest an agency's decision to use the FSS Program? Page 45

Can an incumbent contractor, previously awarded an order under the FSS program, protest its exclusion from a follow-on competition? Page 45

Contractor performance information

What happens if the FSS contractor (schedule contractor) doesn't perform adequately? Page 45

Is a termination for cause for a FSS order reported into the Federal Awardee Performance and Integrity Information System (FAPIIS)? Page 45

Is a contractor performance evaluation required for an FSS order? Page 46

Why should you use the FSS?

Advantages of using the GSA Schedules Program include:

- It significantly reduces the acquisition time.
- The Service Contract Act review, the small business set-aside review, and the Equal Employment Opportunity review have already been performed by GSA.
- GSA has determined prices under FSS to be fair and reasonable; volume purchasing allows the buyer to seek additional price reductions at any time.
- Synopses are not required for schedule purchases under the simplified acquisition threshold. Unless it is for item(s) peculiar to one manufacturer, there is a posting requirement with the request for quotation.
- There is quick delivery.
- The schedule orders count towards small business goals.
- There is access to state-of-the-art commercial technology and quality services and supplies.
- There is compliance with environmental requirements for applicable services and supplies.
- An agency can establish blanket purchase agreements (BPA) for recurring needs.

What FAR changes are made by Interim Rule FAR 2007-012, Requirements for Acquisitions Pursuant to Multiple-Award Contracts, under Federal Acquisition Circular (FAC) 2005-50 that affect FSS actions?

Section I of this chapter provides a summary of the FAC. In short, for FSS actions FAR subpart 8.4, FAC 2005-50 —

- Amends the procedures for ordering supplies and services under FSS contracts at FAR 8.405–1 and 8.405–2, when the order is above the simplified acquisition threshold (SAT);

- Establishes new competition procedures at FAR 8.405–3 for creating BPAs under FSS contracts and placing orders under the BPAs;

- Amends the contract award synopsis provisions at FAR 5.301 (with conforming changes at FAR 5.406, 8.405–6(a)(2), and 16.505(b)(2)(ii)(D)) to require publication and posting of actions supported by exceptions to fair opportunity at FAR 16.505(b)(2) for non-FSS task- and delivery-order contracts and limited-sources justifications at FAR 8.405–6 for FSS contracts, except when disclosure would compromise national security or create other security risks;

- Clarifies that ordering activities may seek a price reduction under FSS contracts at any time and that they shall seek a price reduction when placing an order or establishing a BPA that exceeds the SAT (*see* FAR 8.405–4); and

- Adds language explaining that the protest procedures found at FAR subpart 33.1 are applicable to the issuance of an order or the establishment of a BPA against an FSS contract.

When is Interim Rule FAR 2007-012, Requirements for Acquisitions Pursuant to Multiple-Award Contracts, published in Federal Acquisition Circular 2005-50 applicable and effective?

Interim rule FAR 2007-012 is applicable and effective as follows:

- The changes apply to solicitations issued and contracts awarded on or after May 16, 2011 (*see* FAR 1.108(d)(1)).

- The changes also apply to orders issued on or after the effective date of this regulation, without regard to whether the underlying contracts were awarded before May 16, 2011.

- The changes apply to Blanket Purchase Agreements (BPAs) established under FSS contracts on or after May 16, 2011.

- The ordering procedures for BPAs in FAR 8.405–3(c) are mandatory for BPAs established under FSS contracts on or after May 16, 2011 and discretionary for BPAs established under FSS contracts prior to the effective date.

Are FSS orders in excess of $500,000 considered interagency acquisitions?

Yes. FAR Subpart 17.5 – Interagency Acquisitions provides the policies and procedures applicable to all interagency acquisitions to include FSS orders in excess of $500,000. As part of the acquisition planning for an FSS order, the procedures at FAR subpart 17.5 must be complied with and documented accordingly. In addition to the FAR, follow the guidance in Acquisition Letter 2011-03 – Interagency Acquisitions.

When ordering supplies, and services that do not require a statement of work, what are the 3 categories of purchase?

Based on FAC 2005-50, FAR 8.405-1 retains three categories of purchases but no longer employs the maximum-order threshold limitation as a point of reference to define the boundaries of the categories. Instead, the second and third categories are bounded by the simplified acquisition threshold (SAT). With respect to the competition requirements, existing requirements are retained in some instances and changed in others, as follows:

- *Orders at or below the micro-purchase threshold.* Because the competition standards under section 863 begin at the SAT, there are no changes needed to the procedures for orders at or below the micro-purchase threshold, *i.e.,* orders may be placed with any FSS contractor that can meet the agency's needs.

- *Orders exceeding the micro-purchase threshold but not exceeding the SAT.* In this category, an ordering activity may place an order with the FSS contractor that represents the best value after surveying at least three FSS contractors through GSA Advantage! by reviewing the catalogs or price lists of at least three FSS contractors, or by requesting quotations from at least three schedule contractors.

- *Orders exceeding the SAT.* The competition requirements in this category conform to the section 863 competition standards. The ordering activity must provide the RFQ to as many FSS contractors as practicable, consistent with market research appropriate to the circumstances, **to reasonably ensure that quotes will be received from at least three contractors that can fulfill the requirement and further ensure that all quotes received are fairly considered and award is made in accordance with the basis for selection in the RFQ.**

When ordering services that require a statement of work, what are the 3 categories of purchase?

Based on FAC 2005-50, FAR 8.405-2 retains three categories of purchases but no longer employs the maximum-order threshold limitation as a point of reference to define the boundaries of the categories. Instead, the second and third categories are bounded by the simplified acquisition threshold (SAT). With respect to the competition requirements, existing requirements are retained in some instances and changed in others, as follows:

- *Orders at or below the micro-purchase threshold.* There are no changes needed to the procedures for orders at or below the micro-purchase threshold, *i.e.,* orders may be placed with any FSS contractor that can meet the agency's needs.

- *Orders exceeding the micro-purchase threshold but not exceeding the SAT.* In this category, an ordering activity must provide the request for quotation (RFQ), including the statement of work (SOW) and evaluation criteria) to at least three FSS contractors that offer services that will meet the agency's needs. Otherwise, it is necessary to document the circumstances for restricting consideration of fewer than 3 schedule contractors.

- *Orders exceeding the SAT.* The ordering activity must provide the RFQ to include the SOW and evaluation criteria (e.g., experience and past performance) to FSS contractors that offer services that will meet the agency's needs or posting the RFQ on e-Buy.

Must an agency conduct acquisition planning and market research before using a FSS contract (schedule contract)?

The agency should perform acquisition planning and conduct market research as is appropriate to the circumstances. As a general rule, obtaining information from the FSS Program and schedule contractors themselves may be sufficient to satisfy the agency's obligations to perform acquisition planning and to conduct market research. However, be sure you select the most appropriate schedule for your program's requirement. For instance, don't use the consolidated schedule if professional engineering services are required.

Ordering activities may consider socioeconomic status when identifying contractors for consideration or competition for award of an order or a BPA. At a minimum, ordering activities should consider, if available, at least one small business, veteran-owned small business, service-disabled veteran-owned small business, HUBZone small business, woman-owned small business, or small disadvantaged business schedule contractor.

Can you obtain additional price reductions (discounts) from the established FSS pricing when acquiring supplies and/or services?

Yes. Always attempt to obtain additional price reductions.[2] When the order or BPA exceeds the SAT, you shall seek price reductions from the schedule contractors. [3]

When acquiring services via the issuance of a RFQ, rather than requesting one discount rate for all labor categories, you should request the schedule contractors to propose discounts by individual labor category. This will allow schedule contractors the opportunity to propose varying discounts across the different labor categories. Frequently, you can obtain larger price discounts on the higher priced labor categories.

When teaming arrangements are proposed, each schedule contractor should be required to propose their individual labor category rates and individual discount rates. Quotes that offer an average discount rate for all team members may not result in the greatest savings for the Government. Additionally, FSS contracts require team members to propose only their own rates and, therefore, may discount only their own prices.

When an order exceeds the SAT, what are the additional documentation requirements?

When an order exceeds the SAT, the documentation must show the evidence of compliance with the applicable ordering procedures.[4] For example, there should be documentation to show whether at least three quotes were received. If fewer than three quotes were received, and e-Buy was not used, then the contracting officer must clearly explain, in the file documentation, the efforts made to obtain quotes from at least three FSS contractors that can fulfill the requirement.

Can e-Buy be used to satisfy the fair notice requirement?

Yes. E-Buy is one of the mediums available to provide fair notice. E-Buy allows all FSS holders with the referenced FSS Special Item Number (SIN) to view the notice, thus satisfying the requirements for fair notice when placing an order or establishing a BPA under FAR subpart 8.4. For **DOE** instead of posting the RFQ on e-Buy, you must post a link on e-Buy to FedConnect. See next question and response for more details on posting RFQ. [5]

[2] FAR 8.404(d) and 8.405-4
[3] FAR 8.405-4
[4] FAR 8.405-1(g)(4) or FAR 8.405-2(e)(8)
[5] FAR 8.402(d)(1)

How do I issue a RFQ and receive quotes when using e-Buy?

STRIPES is DOE's repository for all acquisition and financial assistance actions. As such, all RFQs should be issued and quotes received through STRIPES/FedConnect and not e-Buy. In lieu of uploading the RFQ to e-Buy, contracting officers will post a file that instructs FSS holders to go to www.FedConnect.net to locate the RFQ. A sample page is in the STRIPES Library, look for "ACQ e-Buy Template". See sample below:

REQUEST FOR QUOTATIONS

U.S. Department of Energy
[Insert Office Name]

RFQ Title: [Insert FOA Title]
RFQ Number: [Insert FOA Number]

Instructions for completing the quote are contained in the full text of the RFQ which can be obtained at:

https://www.fedconnect.net/FedConnect/

To find this information, click on Search Public Opportunities and Awards and enter the RFQ title or number in the search field.

In order to be considered for award, you MUST follow the instructions contained in the RFQ.

How do you ensure that fair notice is provided to all schedule contractors?

A contracting officer can ensure that fair notice is provided to all schedule contractors offering the required supplies and/or services and still keep the process simple and streamlined by following these guidelines:

- Ensure that requiring program customers fully understand the concept of fair notice and their role in ensuring that it is achieved for each order (supply or service).
- Use e-Buy to provide fair notice.
- Avoid using ordering practices that preclude fair notice - such as the *allocation of orders among schedule contractors,* and the *direction of orders to preferred schedule contractors.* These practices are prohibited and result in less than fair consideration.
- Document the file for each order to evidence that your ordering practices adhere to the ordering procedures set forth at FAR subpart 8.4.
- Maximize the use of firm-fixed-price orders.

- Keep in mind that the placement of an order may be protested in accordance with the procedures under subpart 33.1[6]

Do you need to get representations and certifications from FSS contractors?

No. Schedule contractor representations and certifications have already been received and reviewed by GSA during the competitive process prior to awarding FSS contracts. However, agency-specific representations and certifications may need to be obtained for agency-specific requirements such as Facility Clearance/Foreign Ownership, Control or Influence over Contractors, and Organizational Conflicts of Interest.

Procuring Services

What services are available through the FSS?

The FSS offers many categories of services. Some of the services available are --

- Engineering services - including planning, design, integration and testing;
- Financial services - including auditing, management and reporting;
- Environmental advisory services - including planning, compliance, and waste management;
- Energy management services;
- Management and organizational improvement services;
- Document and records management services;
- Personal property management services;
- Information technology services;
- Travel and transportation services;
- Marketing, media, and public information services;
- Laboratory, scientific and medical services and products;
- Language services; and
- Vehicle acquisition and leasing services.

How do you place orders for services under the FSS and document the order?

The ordering procedure that you use depends on whether or not the type of services requires a statement of work (SOW) and the dollar value of the order. All services ordered shall be within the scope of the GSA schedule contract.

- *Procedures for services that **do not** require a SOW*[7] (e.g., services that are priced on a firm-fixed-price basis for a specific task, such as installation, maintenance, repair, transcription services, printing and binding services) -

  - For services at or below the micro-purchase threshold of $3,000, you can place orders directly with any schedule contractor that best meets your needs. Attempt to distribute

[6] FAR 8.404(e)
[7] FAR 8.405-1

the orders among the schedule contractors.

- For services over the micro-purchase threshold, but not exceeding the SAT, you need to:
  - Consider reasonably available information about the service offered under the schedule contracts by:
    - Surveying at least three schedule contractors through the GSA *Advantage!*® online shopping service;
    - Reviewing the catalogs or pricelists of at least three schedule contractors; or
    - Requesting quotations from at least three schedule contractors to include small business.
  - When an order contains brand-name specifications, the ordering activity shall post the RFQ on e-Buy along with the justification or documentation required by FAR 8.405-6;
  - Seek additional price reductions, where appropriate;
  - Evaluate the order to conclude that the order represents the best value and results in the lowest overall costs alternative (considering price, special features, past performance, trade-in considerations, administrative costs, etc.) to meet the Government's needs; and
  - Place the order directly with the schedule contractor.
- For a service order exceeding the SAT or when establishing a BPA, follow the same procedures for orders exceeding the micro-purchase threshold, except:
  - Transmit the RFQ package, which includes a description of the services to be performed and the basis upon which the selection will be made:
    - By posting RFQ on e-Buy to afford all schedule contractors offering the required services under the appropriate schedule an opportunity to submit a response; ***OR***
    - By providing the RFQ to as many schedule contractors as practicable that offer services that will meet the needs of the ordering activity consistent with the market research appropriate to the circumstances; (If less than three quotes are received, the contracting officer shall prepare a written determination explaining the efforts made to obtain quotes.);
    - When an order contains brand-name specification post the RFQ on e-Buy along with justification or required documentation;

- Ensure all responses received are fairly considered;
- Evaluate responses using the selection basis described in the RFQ to conclude that the order represents the best value and results in the lowest overall costs alternative (considering price, special features, administrative costs, etc.) to meet the Government's needs;
- Seek price reductions before placing the order; and
- Place the order with the schedule contractor that represents the best value. The GSA schedule contract number shall be cited on each order.

Documentation -- At a minimum, the ordering activity shall document the schedule contracts considered; identify the successful contractor; include a description of the service purchased; the price; if applicable, if less than three quotes are received, the contracting officer shall prepare a written determination explaining the efforts made to obtain quotes; and if applicable, the circumstances and rationale for limiting sources of schedule contractors to fewer than three based on one of the reasons at FAR 8.405-6; and the basis for the award decision. See limiting sources questions and responses for additional guidance.

❖ *Procedures for services that require a SOW*[8] (e.g., professional services based on hourly rates) -

For professional services based on hourly rates, you must prepare a Request for Quotation (RFQ) that includes a *performance-based* description of the work you want performed.

- For services at or below the micro-purchase threshold of $3,000, you can place orders directly with any schedule contractor that best meets your needs. The micro-purchase threshold for construction is $2,000 subject to the Davis-Bacon Act and the threshold for services is $2,500 subject to the Service Contract Act. See FAR 2.101 for the micro-purchase threshold definition for other exceptions. Attempt to distribute orders among the schedule contractors.
- For services over the micro-purchase threshold, but not exceeding the simplified acquisition threshold (SAT), you need to send a RFQ, including the SOW and evaluation criteria, to a minimum of three schedule contractors that offer services that will meet the agency's needs or document the circumstances for restricting consideration to fewer than 3 schedule contractors in accordance with FAR 8.405-6; the RFQ should specify the type of order (i.e., firm-fixed price, labor-hour) for the services and request that contractors submit firm-fixed prices; conduct an evaluation of responses using the evaluation criteria; and evaluate the order to conclude that the order represents the best value and results in the lowest overall costs alternative (considering price, special features, administrative costs, etc.) to meet the agency's needs.

[8] FAR 8.405-2

- For a service order exceeding the SAT or when establishing a BPA, follow the same procedures for orders exceeding the micro-purchase threshold, except:

  - Transmit the RFQ package, which includes the SOW and evaluation criteria which should consider the level of effort and mix of labor proposed to perform a specific task being ordered:

    - By posting on e-Buy to afford all schedule contractors offering the required services an opportunity to submit a response; (Posting an RFQ on e-Buy satisfies the requirement to provide fair notice.); **OR**

    - By providing the RFQ to as many schedule contractors as practicable that offer services that will meet the needs of the ordering activity consistent with the market research appropriate to the circumstances; (If less than three quotes are received, the contracting officer shall prepare a written determination explaining the efforts made to obtain quotes.);

  - Ensure all responses received are fairly considered;

  - Evaluate responses using the evaluation criteria to conclude that the order represents the best value and results in the lowest overall costs alternative (considering price, special features, administrative costs, etc.) to meet the Government's needs;

  - Seek price reductions before placing the order; and

  - Place the order with the schedule contractor that represents the best value. The GSA schedule contract number shall be cited on each order.

For services requiring a SOW, a firm-fixed price order shall be requested, unless the ordering activity makes a determination that it is not possible at the time of placing the order to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence. When such a determination is made, a labor-hour or time-and-materials quotation may be requested. The firm-fixed price of the order should also include any travel costs or other direct charges related to performance of the services ordered, unless the order provides for reimbursement of travel costs at the rates provided in the Federal Travel or Joint Travel Regulations. A ceiling price must be established for labor-hour and time-and-material orders.

You may use incentive or award fee arrangements only if the schedule's terms allow it and a fixed-price order is issued.

Documentation -- At a minimum, the ordering activity shall document the schedule contracts considered; identify the successful contractor; include a description of the service purchased; the price; the evaluation methodology used in selecting the successful contractor; the rationale for any tradeoffs in making the selection; the fair and reasonable price determination; if applicable, if less than three quotes are received, the contracting officer shall prepare a written determination explaining the efforts made to obtain quotes; if applicable, the circumstances and rationale for

limiting sources of schedule contractors to fewer than three based on one of the reasons at FAR 8.405-6; and the rationale for using other than a firm-fixed price order or a performance-based order. See limiting sources questions and responses for additional guidance.

What is "Scope Creep?"

An order is issued for a specific pre-determined and authorized effort to be performed by the contractor. "*Scope creep*" refers to an undesired and unauthorized expansion of the scope of work under an order. For example, if the scope of work for an order were for environmental restoration work, expanding the work to include fossil energy support services would be considered scope creep, and not authorized.

What supports a best value determination for a service order not requiring a statement of work?

For orders to procure services not requiring a statement of work, a selection based on the best value means that you consider factors other than price in determining which schedule contractor receives the order. These other factors may include criteria such as past performance, special features of the service required for effective program performance, warranty, environmental and energy efficiency considerations, maintenance availability, technical qualifications, and socioeconomic status.[9] For more information on best value, see evaluation criteria and best value questions and responses.

Procuring Supplies

What supplies are available on the FSS?

The FSS offers many categories of products. Some of the products available are –

- Office supplies;
- Paper products;
- Furniture;
- Office equipment;
- Scientific equipment;
- Hardware, tools and appliances;
- Information technology products;
- Software;
- Copying equipment and supplies; and
- Telecommunications equipment.

How do you place orders for supplies under the FSS?

All supplies ordered shall be within the scope of the GSA schedule contract. In repetitive buys, you should attempt to vary the schedule contractor and price lists selected.

[9] FAR 8.405-1(f)

The ordering procedures that you use under the schedule depend on the dollar value of the supplies you are acquiring. The ordering procedures are as follows: [10]

- For a supply order at or below the micro-purchase threshold of $3,000, you can place orders directly with any schedule contractor that best meets your needs. Attempt to distribute the orders among the schedule contractors.

- For supply orders over the micro-purchase threshold, but not exceeding the SAT, you need to:

  - Consider reasonably available information about the supply offered under the schedule contracts by:

    - Surveying at least three schedule contractors through the GSA *Advantage!*® online shopping service;

    - Reviewing the catalogs or pricelists of at least three schedule contractors; or

    - Requesting quotations from at least three schedule contractors to include small business.

  - When an order contains brand-name specifications, the ordering activity shall post the RFQ on e-Buy along with the justification or documentation required by FAR 8.405-6;

  - Seek additional price reductions, where appropriate;

  - Evaluate the order to conclude that the order represents the best value and results in the lowest overall costs alternative (considering price, special features, past performance, trade-in considerations, administrative costs, etc.) to meet the Government's needs; and

  - Place the order directly with the schedule contractor.

- For a supply order exceeding the SAT or when establishing a BPA, follow the same procedures for orders exceeding the micro-purchase threshold, except:

  - Transmit the RFQ package with a description of the supplies to be delivered and basis upon which selection will be made:

    - By posting on e-Buy to afford all schedule contractors offering the required supply an opportunity to submit a response; (Posting an RFQ on e-Buy satisfies the requirement to provide fair notice.); ***OR***

[10] FAR 8.405-1

  - By providing the RFQ to as many schedule contractors as practicable that offer the supply that will meet the needs of the ordering activity consistent with the market research appropriate to the circumstances; (If less than three quotes are received, the contracting officer shall prepare a written determination explaining the efforts made to obtain quotes.);

- Ensure all responses received are fairly considered;

- Evaluate responses using the evaluation criteria to conclude that the order represents the best value and results in the lowest overall costs alternative (considering price, special features, administrative costs, etc.) to meet the Government's needs;

- Seek price reductions before placing the order; and

- Place the order with the schedule contractor that represents the best value. The GSA schedule contract number shall be cited on each order.

Documentation -- At a minimum, the ordering activity shall document the schedule contracts considered; identify the successful contractor; include a description of the supply purchased; the price; if applicable, if less than three quotes are received, the contracting officer shall prepare a written determination explaining the efforts made to obtain quotes; and if applicable, the circumstances and rationale for limiting sources of schedule contractors to fewer than three based on one of the reasons at FAR 8.405-6; and the basis for the award decision. See limiting sources questions and responses for additional guidance.

Are there special posting requirements when an order contains brand-name specifications?

Yes. When an order contains brand-name specifications, the ordering activity shall post the RFQ on e-Buy along with the justification or documentation required by FAR 8.405-6.

Do orders for supplies require a statement of work (SOW)?

No. SOWs are not required for the purchase of supplies.

What supports a best value determination for a supply order?

A selection based on the best value means that you consider factors other than price in determining which schedule contractor receives the order. These other factors may include criteria such as past performance, special features of the supply, probable life, warranty, environmental and energy efficiency considerations, maintenance availability, technical qualifications, delivery terms, and trade-in considerations. [11] For more information on best value, see evaluation criteria and best value questions and responses.

[11] FAR 8.405-1(f)

Blanket Purchase Agreements

Can you establish blanket purchase agreements (BPA) under the FSS?

Yes. GSA encourages agencies to establish blanket purchase agreements (BPA) (multiple-award BPAs are preferred over single-award BPA) under FSS schedules when an agency needs a simplified method for filling anticipated repetitive needs for services or supplies.[12] BPAs are actually a type of an account established with schedule contractors to allow agencies to leverage their buying power. Based upon the potential volume of sales, schedule contractors may offer increased discounts over the prices identified in their FSS contracts. If you do pursue establishing a BPA, remember to:

- Give preference to establishing multiple-award BPAs, to the maximum extent practicable.[13]
- Have head of agency determination, or as delegated, for any single-award BPA with an estimated value exceeding $103 million including any options.[14] Plus need to comply with limited-source justification.
- Establish the BPA through competitive procedures for supplies and services with or without a statement of work.[15]
- Consider scope and complexity of requirements, benefits of on-going competition along with the need to periodically compare multiple technical approaches or prices, administrative costs and technical qualifications of the schedule contractors. Document the decision in the acquisition plan or the BPA file.[16]
- Address the frequency of ordering, invoicing, discounts, requirements, delivery locations and time.[17]
- For multiple-award BPAs, the agreement shall specify the procedures for placing orders.[18]
- BPAs generally should not exceed five years in length, but may do so to meet program requirements. Contractors may be awarded BPAs that extend beyond the current term of their GSA Schedule contract, so long as there are option periods in their GSA Schedule contract that, if exercised, will cover the BPA's period of performance.[19]

---

[12] FAR 8.405-3
[13] FAR 8.405-3(a)(3)(i)
[14] FAR 8.405-3(a)(3)(ii)
[15] FAR 8.405-3(b)
[16] FAR 8.405-3(a)(3)(iv)
[17] FAR 8.405-3(a)(4)
[18] FAR 8.405-3(a)(5)
[19] FAR 8.405-3(d)

- At least once a year, the ordering activity shall review the BPA and document the results of the review. The review shall determine, among other factors, the following: [20]

    - Is the schedule contract still in effect?
    - Does the BPA still represent the best value?
    - Have the estimated quantities or amounts been exceeded?
    - Can additional price reductions be obtained?
    - If a single-award BPA, the determination must be approved by the competition advocate prior to exercising the option to extend the term.

You can find a sample BPA on the GSA website http://www.gsa.gov/portal/content/199353.

Procedures for establishing BPA(s)

How do you plan and establish multiple-award BPAs and document the BPA file?

As you plan, establish, and compete multiple-award BPAs, you must consider and document the decision in the acquisition plan or BPA file for the following:

- Dollar value of the requirement(s);

- Scope and complexity of the requirement(s); all supplies or services within the scope of the GSA schedule contracts;
- Frequency of ordering, invoicing, discounts, requirements, delivery locations and time
- Benefits of on-going competition and the need to periodically compare multiple technical approaches or prices;
- Administrative cost of the BPAs;
- Technical qualifications of the schedule contractors;
- Whether the requirement is for supplies or services not requiring a statement of work (SOW) or for service requiring a SOW;
- Use the competitive procedures to establish the BPA;
- Specify the procedures for placing orders; and
- Basis for award decision – include evaluation methodology for selecting the contractor, the rationale for any tradeoffs, and price reasonableness determination for services requiring a SOW.

Documentation -- At a minimum, the BPA file shall document the following: schedule contracts considered; identify the successful contractor(s); include a description of the supply or service purchased; the price; if applicable, required justification for limited-source BPA, decision to establish multiple-award BPAs, evidence of compliance with competitive procedures to establish a BPA, and the basis for the award decision.[21] See limiting sources questions and responses for additional guidance.

When establishing BPAs what should you consider when determining best value?

[20] FAR 8.405-3(e)
[21] FAR 8.405-3(a)(7)

When determining best value for BPAs, you should consider the following:[22]

- Price to include seeking price reductions;
- Past performance;
- Special features of the supply or service required for effective program performance;
- Trade-in considerations;
- Probable life of the item selected as compared with that of a comparable item;
- Warranty considerations;
- Maintenance availability;
- Environmental and energy efficiency considerations;
- Delivery terms; and
- Other factors.

What are the competitive procedures to establish multiple-award BPAs?

The competitive procedure that you use depends on the dollar value of the requirement, if the requirement is for supplies, or whether or not the type of services require a statement of work (SOW).

❖ *Procedures for supplies or services that* ***do not*** *require a SOW.*[23] It is for supplies and services that are listed in the schedule contract at a fixed price for performance of a specific task (e.g., services that are priced on a firm-fixed-price basis for a specific task, such as installation, maintenance, repair, transcription services, printing and binding services).

➢ Estimated value of the BPA does not exceed the SAT, you need to:

- Consider reasonably available information about the supply or service offered under the schedule contracts by:

  - Surveying at least three schedule contractors through the GSA *Advantage!*® online shopping service;

  - Reviewing the catalogs or pricelists of at least three schedule contractors; or

  - Requesting quotations from at least three schedule contractors to include small business; **OR**

  - When the requirement is limiting sources, document the circumstances for restricting consideration to fewer than three schedule contractors based on one of the reasons at FAR 8.405-6(a).

- When the requirement contains brand-name specifications, post the RFQ on e-Buy

[22] FAR 8.405-3(a)(2)
[23] FAR 8.405-3(b)

along with the justification or documentation required by FAR 8.405-6;

- Establish the BPAs with the schedule contractors that can provide the best value.
- Seek additional price reductions, where appropriate.

➢ For requirements exceeding the SAT, you need to:

- Provide the RFQ package that includes a description of the supplies to be delivered or the services to be performed and the basis upon which the selection will be made, as follows:
  - By posting on e-Buy to provide afford all schedule contractors offering the required supplies or services under the appropriate schedules an opportunity to submit a response; ***OR***
  - By providing the RFQ to as many schedule contractors as practicable that offer supplies or services that will meet the needs of the ordering activity consistent with the market research appropriate to the circumstances; (If less than three quotes are received, the contracting officer shall prepare a written determination explaining the efforts made to obtain quotes.); ***OR***
  - If any of the above requirements to post or provide the RFQ are waived, the basis of the justification shall be prepared and approved in accordance with FAR 8.405-6;
- Ensure all responses received are fairly considered;
- After seeking price reductions, establish the BPAs with the schedule contractors that provide the best value. The GSA schedule contract number shall be cited on each BPA.

❖ *Procedures for services that require a SOW.*[24] These procedures apply when establishing a BPA that require services priced at hourly rates which are identified in the FSS publications and the contractor's pricelists. You must prepare a SOW to include, to the maximum extent practicable, a *performance-based* description of the work to be performed; specify the order type (i.e., firm-fixed price, labor-hour) for the services; location of work; period of performance; deliverable schedule; applicable performance standards; and any special requirements. You must provide the RFQ package that includes the SOW and evaluation criteria (e.g., experience and past performance, to schedule contractors that offer services that will meet the agency's needs. The RFQ may be posted to e-Buy.

➢ Estimated value of the BPA does not exceed the SAT, you need to:

[24] FAR 8.405-3(b)(2)

- Provide the RFQ to at least three schedule contractors that offer services that will meet the agency's needs. If the RFQ is not provided to at least three schedule contracts, the requirement must be waived on the basis of a justification that is prepared and approved in accordance with FAR 8.405-6;

- Ensure all responses received are fairly considered;

- Consider the level of effort and the mix of labor proposed to perform, and for determining that the proposed price is reasonable.

- Ensure award is made on the basis for selection in the RFQ.

- Establish the BPAs with the schedule contractors that provide the best value. The GSA schedule contract number shall be cited on each BPA.

➢ Estimated value of the BPA exceeds the SAT, you need to:

- Provide the RFQ package that includes a description of the supplies to be delivered or the services to be performed and the basis upon which the selection will be made, as follows:

  - By posting on e-Buy to provide afford all schedule contractors offering the required supplies or services under the appropriate schedules an opportunity to submit a response; ***OR***

  - By providing the RFQ to as many schedule contractors as practicable that offer supplies or services that will meet the needs of the ordering activity consistent with the market research appropriate to the circumstances; (If less than three quotes are received, the contracting officer shall prepare a written determination explaining the efforts made to obtain quotes.); **OR**

  - If any of the above requirements to post or provide the RFQ are waived, the basis of the justification shall be prepared and approved in accordance with FAR 8.405-6;

- Ensure all responses received are fairly considered;

- Consider the level of effort and the mix of labor proposed to perform, and for determining that the proposed price is reasonable.

- Ensure award is made on the basis for selection in the RFQ. The GSA schedule contract number shall be cited on each BPA.

What are the requirements to justify a decision to establish a single-award BPA?

The preference is to establish multiple-award BPAs. The ordering activity should consider the factors at FAR 8.405-3(a)(3)(iv) and document the decision in the acquisition plan or BPA file to support a multiple-award BPAs or a single-award BPA. When it has been determined that a single-award BPA is required to fulfill the agency's needs, the ordering activity must:

- For single-award BPAs with an estimated value exceeding the micro-purchase threshold but not exceeding $103 million including options, prepare the limited sources justification which addresses:
    - One of the following circumstances that justify the action –
        - An urgent and compelling need exists, and following the procedures at FAR 8.405-3 would result in unacceptable delays;
        - Only one source is capable of providing the supplies or services required at the level of quality required because the supplies or services are unique or highly specialized; or
        - In the interest of economy and efficiency, the new work is a logical follow-on to an original FSS BPA provided that the original BPA was placed in accordance with the applicable FAR 8.405-3 and FSS ordering procedures. The original BPA must not have been previously issued under sole-source or limited-sources procedures.
- For single-award BPAs with an estimated value exceeding $103 million including any options, in addition, to the limited sources justification described above, the requirement for a head of agency written determination is required.[25] The head of agency determination addresses:
    - The orders expected under the BPA are so integrally related that only a single source can reasonably perform the work;
    - The BPA provides only for firm-fixed priced orders for—
        - Products with unit prices established in the BPA; or
        - Services with prices established in the BPA for specific tasks to be performed;
    - Only one source is qualified and capable of performing the work at a reasonable price to the Government; or
    - It is necessary in the public interest to award the BPA to a single source for exceptional circumstances.

See limiting sources questions and responses for additional guidance.

[25] FAR 8.405-3(a)(3)(ii)

Ordering from BPAs

When do the ordering procedures for multiple-award BPAs described in this guide chapter apply?

The BPA ordering procedures applies to BPAs established on or after May 16, 2011. Before this date, ordering activities are encouraged to use the procedures for multiple-award BPAs.

What are the ordering procedures for a single-award BPA under FSS?

If the ordering activity establishes a single-award BPA, authorized users may place the order directly under the established BPA when the need for the supply or service arises.

What are the ordering procedures for multiple-award BPAs for supplies or services, that do not require an hourly-rate?

The ordering procedure that you use depends on what you are ordering and the dollar value of the order. All orders shall be within the scope of the GSA schedule contract.

- For orders for supplies or services, that do not require an hourly-rate, at or below the micro-purchase threshold of $3,000, you can place orders directly with any schedule contractor that best meets your needs. Attempt to distribute the orders among the schedule contractors.

- For orders for supplies or services, that do not require an hourly-rate, over the micro-purchase threshold, but not exceeding the SAT:
    - You need to provide each multiple-award BPA holder a fair opportunity to be considered for each order, unless an exception at FAR 8.405-6(a)(1)(i) applies and is documented.
    - You do not need to contact each of the multiple-award BPA holder before placing an order if information is available to ensure that each holder is provided a fair opportunity to be considered for each order.
    - When restricting consideration to less than all multiple-award BPA holders offering the required supplies and services, you need to document the circumstances.

- For orders for supplies or services, that do not require an hourly-rate, exceeding the SAT:
    - Follow the order procedures for orders that are over the micro-purchase threshold, unless the requirement is waived on the basis of a limiting sources justification that is prepared and approved in accordance with FAR 8.405-6. See limiting sources questions and responses for additional guidance.

- For limiting sources requirements, you need to:
  - Prepare and approve the limiting sources justification in accordance with 8.405–6.
  - Provide an RFQ to all BPA holders offering the required supplies or services under the multiple-award BPAs, to include a description of the supplies to be delivered or the services to be performed and the basis upon which the selection will be made;
  - Afford all BPA holders responding to the RFQ an opportunity to submit a quote; and
  - Fairly consider all responses received and make award in accordance with the selection procedures.
  - Document evidence of compliance with these procedures and the basis for the award decision.

What are the ordering procedures for single-award or multiple-award BPAs for hourly-rate?

If the BPA is for hourly-rate services, the ordering activity shall develop a statement of work for each order covered by the BPA. Ordering activities should place these orders on a firm-fixed price basis to the maximum extent practicable. All orders under the BPA shall specify a price for the performance of the tasks identified in the statement of work.

For orders requiring hourly-rate services under a multiple-award BPAs, apply the same dollar thresholds to seek competition or to limit sources.

What are the documentation requirements for limiting sources when ordering against a BPA?

See the limiting sources section for documentation requirements for orders.

<u>Limiting Sources</u>

What is a limited-source order or a limited-source blanket purchase agreement (BPA)?

A limited-source order or limited-source BPA occurs when an ordering activity is restricting consideration of schedule contractors to fewer than required under the applicable ordering procedures, applicable BPA establishment procedures, or restricting the order or BPA to an item peculiar to one manufacturer, including brand-name items, regardless if the item is available from one or more schedule contracts. The ordering activity must justify in writing and approve this type of order or BPA. When an order or BPA contains brand-name specifications, there are posting requirements along with the RFQ to e-Buy. The documentation requirement depends on whether the order or BPA exceeds the micro-purchase threshold or whether it exceeds the

simplified acquisition threshold. See FAR 8.405-6 for preparing the limited-sources justification and approval documentation and the posting requirements. See questions and responses below for more information on this topic and approval thresholds for limited-sources justification.

Can you award an order (to include BPA orders) or establish a BPA exceeding the micro-purchase threshold based on a sole source or limiting sources under the FSS Program?

Yes. Orders placed or BPAs established under FSS are exempt from the requirements in FAR Part 6. However, when the proposed order or BPA is neither placed nor established in accordance with FAR 8.405-1, 8.405-2, or 8.405-3; the ordering activity must prepare a limited-sources justification to justify its action when restricting consideration of schedule contractors to fewer than the number required or to a brand-name specification (item peculiar to one manufacturer). Depending whether the order or BPA is limited-sources and/or item peculiar to one manufacturer and the dollar amount, FAR 8.405-6 describes the required level of documentation. There are two separate posting requirements for the justifications (1) to support items peculiar to one manufacturer, and (2) when restricting consideration of schedule contractors. These posting requirements are discussed in two questions and responses later in this section.

- For proposed orders or BPAs based upon circumstances justifying limiting the source and exceeding the micro-purchase threshold, the ordering activity prepares the limited-sources justification which addresses one of the following circumstances that justify the action –
    - An urgent and compelling need exists, and following the procedures at FAR 8.405-3 would result in unacceptable delays;
    - Only one source is capable of providing the supplies or services required at the level of quality required because the supplies or services are unique or highly specialized; or
    - In the interest of economy and efficiency, the new work is a logical follow-on to an original FSS BPA provided that the original BPA was placed in accordance with the applicable FAR 8.405-3 and FSS ordering procedures. The original BPA must not have been previously issued under sole-source or limited-sources procedures.
- Item(s) peculiar to one manufacturer.[26] Although the products/services that are available under the FSS program are considered commercial, you must ensure that the Government's requirements are not unduly restrictive and that the minimum salient characteristics of the products/services being acquired are necessary and justified. Brand-name specifications shall not be used unless the particular brand-name, product, or feature is essential to the Government's requirements and market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or cannot be modified to meet, the agency's needs.
    - For proposed orders or BPAs based upon item(s) peculiar to one manufacturer

[26] FAR 8.405-6(b)

circumstances justify limiting the source and exceeding the micro-purchase threshold but not the exceeding the simplified acquisition threshold, the ordering activity prepares the limited-sources justification to address the basis for restricting consideration to an item peculiar to one manufacturer.

- For proposed orders or BPAs based upon item(s) peculiar to one manufacturer circumstances justify limiting the source and exceeding the simplified acquisition threshold, the ordering activity prepares the limited-sources justification to address the basis for restricting consideration to an item peculiar to one manufacturer with one of the following circumstances that justify the action –

  - An urgent and compelling need exists, and following the procedures at FAR 8.405-3 would result in unacceptable delays;

  - Only one source is capable of providing the supplies or services required at the level of quality required because the supplies or services are unique or highly specialized; or

  - In the interest of economy and efficiency, the new work is a logical follow-on to an original FSS BPA provided that the original BPA was placed in accordance with the applicable FAR 8.405-3 and FSS ordering procedures. The original BPA must not have been previously issued under sole-source or limited-sources procedures.

What is the documentation requirement for a limiting sources justification for an order (to include BPA orders) or to establish a BPA exceeding the simplified acquisition threshold based on a sole source or limiting sources under the FSS Program?

In addition to the above response for proposed orders or BPAs over the micro-purchase threshold and exceeding the simplified acquisition threshold, at a minimum, the limited-sources justification must: [27]

- Cite that the acquisition is conducted under the authority of the Multiple-Award Schedule Program;

- Identify the agency and the contracting activity, and specific identification of the document as a Limited-Sources Justification;

- State the nature and/or description of the action to include the supplies or services required to meet the agency's needs including the estimated value being approved;

- State the authority and supporting rationale to justify when restricting consideration of schedule contractors to fewer than the number required or to a brand-name specification (item peculiar to one manufacturer) and, if applicable, a demonstration of the proposed contractor's unique qualifications to provide the required supply or service;

[27] FAR 8.405-6(c)

- Determine that the order or BPA represents the best value consistent with FAR 8.404(d);
- Describe the market research conducted among schedule holders and the results or a statement of the reason market research was not conducted;
- Present any other facts supporting the justification;
- State what action(s), if any, the agency may take to remove or overcome any barriers that led to the restricted consideration before any subsequent acquisition for the supplies or services is made;
- Certify that the justification is accurate and complete to the best of the contracting officer's knowledge and belief; and
- Provide evidence that any supporting data that is the responsibility of technical or requirements personnel (*e.g.,* verifying the Government's minimum needs or requirements or other rationale for limited sources) and which form a basis for the justification have been certified as complete and accurate by the technical or requirements personnel.

For justifications under 8.405–6(a)(1), based on limiting the source, a written determination by the approving official identifying the circumstance that applies must be in writing and approved in accordance with FAR 8.405-6(d). The approval levels are based on the following dollar thresholds[28]:

- If the action is less than $650,000, the Contracting Officer;
- Between $650,000 but less than $12,500,000, the Contracting Activity Competition Advocate;
- If the action is $12,500,000 or greater but not exceeding $50,000,000, the Head of the Contracting Activity (HCA), in accordance with the HCA's Delegation of Authority/Designation memorandum; and
- If the action is $50,000,000 or greater, the Senior Procurement Executive.

What are the posting requirements for items peculiar to one manufacturer?

For items peculiar to one manufacturer justification, the ordering activity shall post the following information along with the RFQ to e-Buy (*http://www.ebuy.gsa.gov*):

- For proposed orders or BPAs with an estimated value exceeding $25,000, but not exceeding the simplified acquisition threshold, the documentation that addresses the basis for restricting consideration to an item peculiar to one manufacturer.

[28]Acquisition Guide Chapter 6.1 and HCA's Delegation of Authority/Designation memorandum

- For proposed orders or BPAs with an estimated value exceeding the simplified acquisition threshold, the limited-sources justification required at FAR 8.405-6(c) which is summarized in the above response on limiting sources justification documentation requirement.

There are circumstances when the posting requirement does not apply when:

- Disclosure would compromise the national security (*e.g.,* would result in disclosure of classified information) or create other security risks. The fact that access to classified matter may be necessary to submit a proposal or perform the contract does not, in itself, justify use of this exception;

- The nature of the file (*e.g.,* size, format) does not make it cost-effective or practicable for contracting officers to provide access through e-Buy; or

- The agency's senior procurement executive makes a written determination that access through e-Buy is not in the Government's interest.

What are the posting requirements for limited-sources justifications, other than items peculiar to one manufacturer?

For limited-sources orders or BPAs exceeding the simplified acquisition threshold, there is a posting requirement for a minimum of 30 days at the GPE http://www.fedbizopps.gov*;* and on the Web site of the ordering activity agency, which may provide access to the justification by linking to the GPE. The DOE link to www.fedbizopps.gov is at http://management.energy.gov/business_DOE.htm.

Depending on the circumstances for limited-sources justifications, there are two posting timeline. These two timelines are as follows:

- To support circumstances described at FAR 8.405-6(a)(1)(i)(B) or (C) for either only one source is capable of providing the required supplies or services, or new work is a logical follow-on to an original FSS order, respectively, the ordering activity shall post the justification within 14 days after placing an order or establishing a BPA in accordance with FAR 5.301.

- To support circumstances described at FAR 8.405-6(a)(1)(i)(A) an urgent and compelling need exists and would result in unacceptable delay, the ordering activity shall post the justification within 30 days after placing an order or establishing a BPA in accordance with FAR 5.301.

In order to post a limited-source justification on the www.fedbizopps.gov website, this website has a notice type called "Justification & Approval (J&A)" at the Opportunities section. Within DOE only the designated contracting activity personnel are allowed to post to the www.fedbizopps.gov website the standalone limited-source justification. Note: The designated DOE personnel are not allowed to delete/modify a posted limited-source justification. The Office of Management Systems, MA-623, should be contacted for assistance.

The HCA shall ensure that each limited-sources justification document is redacted, as appropriate, and posted to the website at www.fedbizopps.gov. The contracting officer shall carefully screen a limited-sources justification for all contractor proprietary and other sensitive data and remove it if such data exists, including such references and citations as are necessary to protect the proprietary data, before making the justifications available for public inspection. Also, the contracting officer shall be guided by the exemptions to disclosure of information contained in the Freedom of Information Act (5 U.S.C. 552) and the prohibitions against disclosure in FAR 24.202 in determining whether other data should be removed. Before posting the justification, the contracting officer shall coordinate the redacted justification as needed with the local Counsel's Office and the local FOIA officer.

The posting requirement does not apply when disclosure would compromise the national security (e.g., would result in disclosure of classified information) or create other security risks. The fact that access to classified matter may be necessary to submit a proposal or perform the contract does not, in itself, justify use of this exception.

Other Procedures, Issues and Concerns

Special ordering procedures, representations and certifications, FAR Part 15, and open market requirements

Are there any other special ordering procedures?

Yes. FAR 8.402 contemplates that GSA may occasionally find it necessary to establish special ordering procedures for individual schedules, or, for some Special Item Numbers (SINs) within a schedule. You can find these special ordering procedures in the individual affected schedules.

One example of a schedule that contains unique ordering procedures is Schedule #70 for General Purpose Commercial Information Technology Equipment, Software, and Services. When procuring information technology services under SIN 132-51 for Information Technology Services, for instance, you are allowed to reserve the order for award to only small business concerns.

As previously addressed, GSA has also established special order procedures for service that require a statement of work. These special ordering procedures are found at FAR 8.405-2. A contracting officer placing an order on another agency's behalf is responsible for applying that agency' regulatory and statutory requirements and the requiring activity is required to provide information on the applicable regulatory and statutory requirements to the contracting officer.

Are teaming partners all required to be FSS contractors (schedule contractors)?

Yes. To ensure that an agency receives the streamlining advantages of a FSS Contractor Team Arrangements, all team partners must be schedule contractors. For more information on Contractor Team Arrangements, go to the GSA website www.gsa.gov/contractorteamarrangements.

Do FAR Part 15 requirements apply to FSS orders?

No. But the Government Accountability Office (GAO) has stated that where an agency conducts a competition under the FSS Program, GAO will review the agency's actions to ensure that the evaluation was reasonable and consistent with the terms of the solicitation (i.e., the RFQ). When GAO does review an agency's actions, it tends to look at the agency's use of competitive procedures, and whether the agency's evaluation and award process is consistent with the RFQ.

The simple rule is - *you should not use the formal FAR Part 15 competitive negotiated process, or anything similar to it, when buying under the FSS program.*

If you do adopt FAR Part 15 procedures when placing an FSS order, GAO will likely consider any protest actions under the FAR Part 15 requirements, as well as its own previous decisions on competitive negotiated acquisitions.

Open market actions

Can you buy supplies or services that are not identified on a particular schedule?

Yes, but only with certain restrictions. According to FAR 8.402(f), you may add items that are not included on the schedule contract, called *open market items*, to a FSS BPA or an individual order only if --

- All applicable FAR regulations pertaining to the purchase of the items that are not on the schedule have been followed, including publicizing (FAR Part 5), competition (FAR Part 6), commercial items (FAR Part 12), contracting methods (FAR Parts 13, 14, and 15), and small business programs (FAR Part 19);

- The contracting officer has determined the price for the items that are not on the FSS is fair and reasonable;

- The items are clearly labeled on the order as items that are not on the FSS; and

- All clauses that are applicable to the items that are not on the FSS are included in the order.

Must agencies consider alternative offers from schedule contractors that do not have an FSS contract (schedule contract) for a specific RFQ?

No. The GAO has repeatedly found that, when an agency intends to acquire products or services under the FSS Program, that agency is not required to consider products or services that are offered by contractors that are not available under a schedule contract.

Do you need to "equalize" information gathering, or be concerned with equal treatment of

schedule contractors being considered for FSS orders (schedule orders)?

No. While all potential offerors should certainly be treated fairly, the GAO has found that agencies may properly place an order under the FSS Program without meeting any of the statutory and regulatory requirements associated with conducting a negotiated, competitive procurement. So, you need not engage in "equal exchanges" with schedule contractors, nor must you equalize the information gathering process among schedule contractors.

You may have further "exchanges" with offerors prior to award of a schedule order to solicit clarifying information from one or more schedule contractors. You can also solicit such information from only one schedule contractor without affording another schedule contractor a similar opportunity if there is no basis to do so.

You should, however, be careful to ensure that such further exchanges do not enter the realm of holding "discussions," as that term is used in FAR 15.306(d). Such exchanges should not be undertaken with the intent of allowing offerors to revise their proposals (e.g. do not advise contractors of weaknesses in their technical proposal or enter into negotiations that would result in revisions of its proposals, permitting an offeror to improve its standing in the evaluation).

Further exchanges with schedule contractors should be conducted for the purposes of permitting schedule contractors an opportunity to clarify any ambiguities or inconsistencies found in one or more parts of its response to the RFQ, so that the agency can make a clear and objective evaluation.

Small Business

Can an agency count awards under the FSS to small business concerns toward agency socioeconomic goals?

Yes. Awards to schedule contractors which fall into the various socioeconomic groups may be reported against an agency's annual socioeconomic accomplishments. However, for purposes of reporting an order placed with a small business schedule contractor, an ordering agency may only take credit if the awardee meets a size standard that corresponds to the work performed. Ordering activities should rely on the small business representations made by schedule contractors at the contract level.

How can you maximize opportunities for small businesses under the FSS?

FAR Parts 8 and 38 prescribe that small businesses holding contracts under the FSS program are to be afforded the maximum practicable opportunity to compete for and receive orders. This FAR guidance encourages contracting officers to consider the availability of small business concerns when planning for FSS acquisitions and placing FSS orders.

The DOE Acquisition Guide, Chapter 19, sets forth Departmental policy addressing small business programs and strategies for maximizing contracting opportunities for small business. FAR 8.405-5(b) states that ordering activities should consider, if available, at least one small

business, veteran-owned small business, service disabled veteran-owned small business, HUBZone small business, women-owned small business, or small disadvantaged business schedule contractor. In addition, if no small businesses are identified for a proposed order against a schedule contract exceeding $3 Million, then DOE Acquisition Guide Chapter 19, requires that the Small Business Review Form, DOE F 4220.2 (May 2006), shall be reviewed and concurred by DOE's Office of Small and Disadvantaged Business Utilization (OSDBU) under the Office of Economic Impact and Diversity. Despite the fact that orders against schedules are not subject to Federal Socio-Economic regulations, at DOE, the OSDBU review is Departmental policy.

The request for OSDBU review will include the following: requisition with the statement of work, the list of schedule contractors to be solicited, and a statement of the reason(s) that no small business has been identified. The contracting officer shall submit the request for review to the OSDBU allowing 10 business days for the review process. This requirement does not apply to the National Nuclear Security Administration.

When necessary, program and procurement personnel should coordinate with OSDBU and the Small Business Administration (SBA) representatives to identify responsible and qualified small businesses for their services and supplies requirements.

The SBA and GSA have teamed to further help small businesses participating in SBA's 8(a) Business Development program to become more competitive and more profitable. This partnership agreement, originally signed in June 2000, is a joint effort by both SBA and the GSA to increase participation of 8(a) firms in the FSS program, boost the number of contract dollars awarded to 8(a) firms, and allow Federal agencies to count the awards given to 8(a) firms toward their own 8(a) goals.

Orders placed under GSA's FSS to small businesses are counted as DOE accomplishments for its socioeconomic contract goals. Contracting officers should actively assist their program customers in identifying schedule contractors that will help meet the program's procurement requirements.

Is it appropriate to set-aside an order under the FSS for small businesses?

No, it is not necessary. FAR Part 19 does not apply to FSS orders, therefore set-aside requirements are not appropriate.

However, you may consider socio-economic status when identifying contractors for consideration or competition for award of an order or a BPA in the best value determination. See the GSA Small Business website at http://www/gsa/gov/portal/content/202261 for details. This site also provides sample RFQ language. At a minimum, you should consider, if available, at least one small business, veteran-owned small business, service disable veteran-owned small business, HUBZone small business, women-owned small business, or small disadvantaged business schedule contractors.

Furthermore, for orders exceeding the micro-purchase threshold, ordering activities should

give preference to the items of small business concerns when two or more items at the same delivered price will satisfy the requirement.

When placing a FSS order, what should you consider to help support DOE's small business goals?

When the estimated value of the order exceeds the micro-purchase threshold consider the following to help support DOE's small business goals:

- Use an evaluation factor to consider socio-economic status for the order. See the GSA Small Business website at http://www/gsa/gov/portal/content/202261 for details. This site also provides sample RFQ language.

- Award all requirements to small businesses, unless the contracting officer determines there will be no acceptable offer from two or more small businesses, provided that the award will be considered fair and reasonable in terms of price, quality and delivery, available from any schedule small business.

How can you ensure that an order placed with a small business prime is not a "pass-through" for large business subcontractors?

GSA is responsible for administering the FSS contracts (schedule contracts) to ensure that the majority of the work that is performed by a small business schedule contractor is accomplished over all of their orders, not just a single order.

Notwithstanding that neither GSA's procedures nor a schedule contract require that an FSS small business contractor perform 51% of the work on individual orders to preclude a pass through of funds from small business contractors to large business contractors, you may include a requirement that the small business prime contractor make its best effort to accomplish the majority of the work on individual orders. A valuable tool would be the use of an evaluation criterion defining the amount of small business participation that the schedule contractor must commit to.

A model clause you may use to accomplish this is:

> Principal Performance of the Effort
>
> To ensure technical efficiency and accountability in the performance of this order, at least fifty-one percent of the total price paid under this order (excluding the amount paid for other direct costs) shall be paid for work performed by the employees of the prime contractor.
>
> [Note: In lieu of specifying a minimum percentage, you may wish to adjectivally describe a minimal level of performance by the prime (e.g., ...a majority of the total price...).]

Evaluation criteria and best value selection

What evaluation criteria can you use when ordering services?

The following are sample evaluation criteria which may be used for ordering services off the FSS:

- *Understanding the requirement* - To what extent does the contractor's technical approach demonstrate full understanding of the effort to be performed under the task?

- *Quality of performance/past performance* – To what extent did the contractor demonstrate compliance with prior contract requirements for similar work and scope, accuracy of reports, timely delivery, and technical excellence?

- *Cost performance* – To what extent did the contractor perform within or below cost on past similar requirements?

- *Schedule performance* – To what extent did the contractor meet milestones, was responsive to technical direction, and completed services on time and in accordance with established schedules?

- *Business relations* – To what extent is the contractor flexible, cooperative, proactive, and committed to customer satisfaction?

Should "Key Personnel" be evaluated when placing an order for services?

Yes, key personnel should be evaluated when certain personnel are considered critical to the success of the project; key personnel may be evaluated, for both the prime contractor and subcontractors/team members. Examples of efforts requiring the identification of key personnel may include: the Program Manager and the Quality Assurance Engineer developing the Environmental Impact Statements or the Senior Nuclear Engineer conducting and managing research studies.

How does a best value selection work for FSS orders to include BPAs for supplies or for services not requiring a statement of work?

A best value selection is a process used to select services or supplies (products) that best meet the buyer's need. A best value selection trades off price and other evaluation factors such as past performance, understanding the requirement, technical qualifications, trade-in considerations, warranty, and environmental and energy efficient considerations, if applicable. [29] In a best value selection, low price does not necessarily assure selection.

When determining best value, in addition to price, the ordering activity may consider the factors in addition to schedule-specific ordering procedures and the following factors.

[29] FAR 8.405-1(f), FAR 8.405-3(a)(2)

- Evaluation criteria should be kept to the minimum necessary to objectively evaluate a contractor's ability to successfully fulfill the government's stated requirements.

- Formal rating plans are not required, but in certain circumstances may be helpful to ensure consistency with the evaluation factors for award that are stated in the RFQ.

- Contractor quotations need not be point scored.

What is evaluated when ordering services requiring a statement of work (SOW)?

In addition to the best value selection considerations addressed in the above question, for service orders requiring a SOW in excess of the micro-purchase threshold, the contracting officer should document the evaluation of the schedule contractor's pricing that formed the basis for the selection, and document the rationale for any trade-offs in making the selection.

When using a performance-based SOW, you should generally avoid dictating the number of labor hours and skill mix that the schedule contractor should propose. Rather, the schedule contractor should be permitted to propose the labor skill mix and the level of effort it considers necessary against the performance-based SOW.

While you may rely on GSA's determination that the fixed hourly rates on a schedule contract are fair and reasonable, GSA has not determined that the level of effort or mix of labor proposed in response to a specific requirement are adequate and appropriate, nor that they represent the best value.

Relying on the predetermined reasonableness of a schedule contractor's labor rates alone does not provide an adequate basis for determining which schedule contractor is the most competitive. Since the schedule contract does not reflect the full cost of the potential order, or critical aspects of the services offered, such as the level of effort and the skill mix of labor required to complete the work, the contracting officer is responsible for considering the level of effort and the mix of labor proposed to perform a specific task being order and for determining that the total price for the proposed work on the instance order is reasonable.

What are other considerations for time and material (T&M) pricing of services requiring a statement of work?

With the growing use of service contracts under the General Services Administration's (GSA) FSS by government agencies, both the GAO and the Office of the Inspector General continuously identify risks in implementing commercial practices for contract pricing.

When ordering services requiring a SOW, GSA has determined that the fixed hourly rates on a T&M schedule contract are fair and reasonable. FAR 8.405-2(d) states that "the ordering activity is responsible for considering the level of effort and the mix of labor proposed to perform a specific task being ordered, and for determining that the total price is reasonable."

To ensure that the price evaluation complies with FAR 8.405-2(d), the contracting officer should consider if the proposed labor categories correspond with the work to be accomplished, including an assessment of the proposed hours as well as the proper experience levels and education.

To help with assessing the reasonableness of the total proposed amount, the contracting officer should consider answering the questions below:

- Are there other contractual vehicles providing similar supplies or services that may be used as a basis of comparison?
- Do the proposed labor skill levels correspond to the work required by the SOW?
- Are the labor rates reasonable given the skill level and the geographic location of the performance?
- Will the performance occur in a location other than the one in the contractor's office or plant?
- Is the proposed material quantity reasonable and consistent with the technical proposal?
- Are the proposed material costs reasonable and realistic?

What level of detail is required to document a best value selection under the FSS Program?

In addition to the minimum documentation required by FAR 8.405-1(f), 8.405-2(d), and 8.405-3(a)(2), you should document the files sufficiently to demonstrate that your evaluation of the schedule contractor's response to a RFQ was reasonable and in accordance with the criteria outlined in the RFQ. The extent of the documentation is largely dependent upon the size, scope and complexity of the acquisition. There is no requirement that you quantify a cost/technical tradeoff in dollars.

Agencies should use whatever evaluation approach, such as narrative or adjectival ratings, which are appropriate to the acquisition bearing in mind the intended streamlined nature of the FSS process.

Debriefing and protests

For services requiring a SOW under the FSS program as a competitive order, to include a BPA order, or the establishment of a multiple-award BPA, can an unsuccessful schedule contractor request a debriefing after award?

Yes. The statutory and regulatory requirements associated with competitive negotiated acquisitions in FAR Part 15, do not apply to orders placed against an FSS contract. However after award, the ordering activity should provide timely notification to unsuccessful offerors. If an unsuccessful offeror requests information on an award that was based on factors other than

price alone, a brief explanation of the basis for the award decision shall be provided. It may be in the Department's best interest to provide an unsuccessful FSS schedule contractor information about the evaluation of the schedule contractor's response to the RFQ (e.g., to provide the schedule contractor relevant information that may improve its competitive capabilities for future DOE requirements).

While not required, the contracting officer may elect to provide additional information to an unsuccessful schedule contractor. When electing to do so, the contracting officer should consider the following:

- The timing for conducting such interactions are at the convenience of the ordering activity, but should be conducted after the award of the BPAs.
- Such post-award interactions may be conducted in whatever format is considered appropriate by the contracting officer (i.e., in writing, face-to-face, or via telephone).
- The level of information conveyed is at the discretion of the contracting officer and should be limited to that necessary for the schedule contractor to understand why it wasn't selected for the order. As stated above, such interactions need not comply with the requirements set forth in FAR Part 15 pertaining to the debriefing of unsuccessful offerors. You should consult with your procurement attorney about your planned approach.

When the award was based on factors other than price alone, a best practice that has been successful on prior FSS acquisitions has been to communicate relevant information regarding the Government's evaluation of an unsuccessful schedule contractor's response to the RFQ, in writing, when providing notice to a schedule contractor that it was not the successful offeror. Information may include the following:

- Name and address of the successful schedule contractor(s).
- Estimated total award value.
- The basis for award to the successful schedule contractor(s) (e.g., lowest priced-technically acceptable offer).
- Although not required, if quotes are rated during the evaluation, include the unsuccessful offeror's rating.
- A summary of the unsuccessful schedule contractor's evaluated strengths and weaknesses.

Information that is provided should relate only to the successful schedule contractor(s) and the unsuccessful schedule contractor receiving the notice. That is, do not include technical ratings or evaluated prices for any other unsuccessful schedule contractor(s). However, you may elect to identify the relative ranking of the unsuccessful schedule contractor's evaluated technical

rating and price (e.g., third highest technical score and highest evaluated price).

Can companies without a FSS contract protest an agency's decision to use the FSS Program ?

No. GAO has held that a protestor who does not have an FSS contract is not an interested party, and therefore, does not have standing to challenge an agency's determination to use the FSS program.

Can an incumbent contractor, previously awarded an order under the FSS program, protest its exclusion from a follow-on competition?

No. The ordering agency determines which schedule contracts are solicited. In a U.S. Court of Federal Claims decision (48 Fed. Cl. 638, filed February 14, 2001, Cybertech Group, Inc. v. the U.S. and Intellidyne), the court concluded that the Government was under no obligation to solicit an incumbent contractor. The court's decision states, in part, *"plaintiff has been unable to cite any regulation, statutory provision, or applicable precedent requiring an incumbent to be solicited on delivery orders from an FSS schedule contract."*

Contractor performance information

What happens if the FSS contractor (schedule contractor) doesn't perform adequately?

The FSS contract includes the same termination provisions that are prescribed in FAR Part 12. If a schedule contractor delivers a supply or performs a service, but it does not conform to the order requirements, the ordering activity shall take appropriate action in accordance with the inspection and acceptance clause of the contract, as supplemented by the order. If the schedule contractor fails to deliver or perform an order, or take appropriate corrective action, the ordering activity may terminate the order for cause or modify the order to establish a new delivery date (after obtaining consideration as appropriate).

As an alternative to terminating an order, the contracting officer may elect to not exercise any remaining options under the order.

When the ordering activity contracting officer has terminated for cause an individual order to a FSS schedule contractor, or if fraud is suspected, the GSA Schedule contracting officer shall be notified of all instances by the ordering activity. See FAR 8.406-4.

Is a termination for cause for a FSS order reported into the Federal Awardee Performance and Integrity Information System (FAPIIS)?

Yes. In accordance with FAR 8.406-4 and Acquisition Guide Chapter 42.16, the contracting officer shall ensure that information related to termination for cause notices and any amendments are reported within 3 business days into FAPIIS. This includes reporting any subsequent notice of the conversion to a termination for convenience or withdrawal.

Is a contractor performance evaluation required for an FSS order?

Yes. For each order exceeding the simplified acquisition threshold, the ordering activity prepares an evaluation of the contractor's performance using the Contractor Performance Assessment Reporting System (CPARS). This evaluation does not include an assessment of the contractor's performance against the contractor's small business subcontracting plan. See FAR 8.406-7 and FAR 42.1502(c).

b e te t

CHAPTER 9 - CONTRACTING QUALIFICATIONS

tr t r e p b t eterm t r 2012
0 r t t t t tere t September 201
0 tt me t S S pp eme t

Contractor Responsibility Determinations

Guiding Principles

Contracting Officers are responsible for ensuring that contract awards are made only to responsible prospective contractors. This requirement applies to both competitive and non-competitive awards.

Contracting Officers must ensure that contractor past performance evaluations in CPARS are completed in a timely manner to allow for appropriate contractor responsibility determinations.

References

FAR 9.1, Responsible Prospective Contractors
FAR 9.4, Debarment, Suspension, and Ineligibility
FAR 42.15, Contractor Performance Information
FAR 52.209-5, Certification Regarding Responsibility Matters
DEAR 909.1, Responsible Prospective Contractors
DEAR 909.4, Debarment, Suspension, and Ineligibility
DOE Acquisition Guide Chapter 42.15, Contractor Performance Information

Overview

The purpose of this Chapter is to provide a general overview of Contracting Officer responsibilities for making responsibility determinations of prospective contractors before awarding a contract. Applicable Federal Acquisition Regulation (FAR) coverage is found in Subpart 9.1, which prescribes the policies, standards, and procedures for determining whether prospective contractors and subcontractors are responsible.

Affirmative responsibility determinations are an important part of safeguarding agency interests by ensuring awards are made to contractors capable of performing the requirements and taxpayer dollars are used effectively. Awarding a contract to a supplier based on lowest evaluated price alone can be false economy if there is subsequent default, late deliveries, or other unsatisfactory performance resulting in additional contractual or administrative costs. While it is important that

Government purchases be made at the lowest price, this does not require an award to a supplier solely because that supplier submits the lowest offer. A prospective contractor must affirmatively demonstrate its responsibility, including, when necessary, the responsibility of its proposed subcontractors.

What does FAR require?

In accordance with FAR 9.103(b), no contract award shall be made unless the Contracting Officer makes an affirmative determination of the prospective contractor's responsibility. In the absence of information clearly indicating that the prospective contractor is responsible, the Contracting Officer shall make a determination of nonresponsibility. If the prospective contractor is a small business concern, the Contracting Officer shall comply with FAR Subpart 19.6, Certificates of Competency and Determinations of Responsibility. If Section 8(a) of the Small Business Act applies, see FAR Subpart 19.8.

What Makes a Contractor Responsible?

The standards of contractor responsibility and the requirement for the Contracting Officer to make and document a responsibility determination are set forth in FAR 9.104 and 9.105. To be determined responsible, a prospective contractor must -

- Have adequate financial resources to perform the contract, or the ability to obtain them.
- Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments.
- Have a satisfactory performance record. A prospective contractor shall not be determined responsible or nonresponsible solely on the basis of a lack of relevant performance history, except as provided in FAR 9.104-2.
- Have a satisfactory record of integrity and business ethics.
- Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them (including, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors).
- Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them.

Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

What About Reviewing Past Performance Information?

Before awarding a contract in excess of the simplified acquisition threshold, the Contracting Officer must review information included in the Federal Awardee Performance and Integrity Information System (FAPIIS), which is available at *www.ppirs.gov.*

The Contracting Officer must consider all of the information in FAPIIS, and any other past performance information, when making the responsibility determination. Contracting Officers shall use sound judgment in determining the weight and relevance of the information contained in FAPIIS and how it relates to the present acquisition. Since FAPIIS may contain information on any of the offeror's previous contracts, and information covering a five-year period, some of that information may not be relevant to a determination of present responsibility, *e.g.,* a prior administrative action such as debarment or suspension that has expired or otherwise been resolved, or information relating to contracts for completely different products or services.

If the Contracting Officer obtains relevant information from FAPIIS regarding criminal, civil, or administrative proceedings in connection with the award or performance of a Government contract; terminations for default or cause; determinations of nonresponsibility because the contractor does not have a satisfactory performance record, or a satisfactory record of integrity and business ethics; or comparable information relating to a grant, the Contracting Officer shall, unless the contractor has already been debarred or suspended -

Promptly request such additional information from the offeror as the offeror deems necessary in order to demonstrate the offeror's responsibility to the Contracting Officer, and -

Notify, prior to proceeding with the award, the agency official responsible for initiating debarment or suspension action, if the information appears appropriate for the official's consideration.

The Contracting Officer must document the contract file for each contract in excess of the simplified acquisition threshold to indicate how the information in FAPIIS was considered in any responsibility determination, as well as the action that was taken as a result of the information. A Contracting Officer who makes a nonresponsibility determination is required to document that information in FAPIIS.

What Other Information Must Contracting Officers Obtain?

Before making a determination of responsibility, the Contracting Officer is required to obtain information sufficient to be satisfied that a prospective contractor currently meets the applicable standards in FAR 9.104 (listed above).

Generally, the Contracting Officer must obtain information regarding the responsibility of prospective contractors, including requesting preaward surveys when necessary (see FAR 9.106), promptly after a bid opening or receipt of offers. However, in negotiated contracts, especially when research and development is involved, the Contracting Officer may obtain this information before issuing the request for proposals. Requests for information shall ordinarily be limited to information concerning either the low bidder or those offerors within the range for award.

FAR 9.106 provides direction on when Contracting Officers should conduct preaward surveys. A preaward survey is normally required only when the information on hand or readily available to the Contracting Officer, including information from commercial sources, is not sufficient to make a determination regarding responsibility. Additionally, if the contemplated contract will have a fixed price at or below the simplified acquisition threshold or will involve the acquisition of commercial items, the Contracting Officer should not request a preaward survey unless circumstances justify its cost.

Information on financial resources and performance capability should be obtained or updated on as current a basis as is feasible up to the date of award.

As discussed above, in making the determination of responsibility, the Contracting Officer must consider information in FAPIIS, including information that is linked to FAPIIS, such as data from the Excluded Parties List System (EPLS) and the Past Performance Information Retrieval System (PPIRS), and any other relevant past performance information. The Contracting Officer should use the following sources of information to support past performance determinations -

- Records and experience data, including verifiable knowledge of personnel within the contracting office, audit offices, contract administration offices, and other contracting offices.

- The prospective contractor-including bid or proposal information including self-certifications included in the proposal, questionnaire replies, financial data, information on production equipment, and personnel information.

- Commercial sources of supplier information of a type offered to buyers in the private sector.

- Preaward survey reports.
- Other sources such as publications; suppliers, subcontractors, and customers of the prospective contractor; financial institutions; Government agencies; and business and trade associations.
- Contracting offices and cognizant contract administration offices that become aware of circumstances casting doubt on a contractor's ability to perform contracts successfully shall promptly exchange relevant information.

How Should Contracting Officer Determinations be Documented?

Per FAR 9.105-2(a)(l), the Contracting Officer's signing of a contract constitutes a determination that the prospective contractor is responsible with respect to that contract. When an offer on which an award would otherwise be made is rejected because the prospective contractor is found to be nonresponsible, the Contracting Officer shall make, sign, and place in the contract file a determination of nonresponsibility, which shall state the basis for the determination.

If the Contracting Officer determines that a responsive small business lacks certain elements of responsibility, the Contracting Officer shall comply with the procedures in FAR Subpart 19.6. When a Certificate of Competency is issued for a small business concern, the Contracting Officer shall accept the Small Business Administration's decision to issue a Certificate of Competency and award the contract to the small business concern.

Documents and reports supportng a determination of responsibility or nonresponsibility, including any preaward survey reports, the use of FAPIIS information, and any applicable Certificate of Competency, must be included in the contract file.

What Applies to Subcontractors?

Generally, prospective prime contractors are responsible for determining the responsibility of their prospective subcontractors (but see FAR 9.405 and 9.405-2 regarding debarred, ineligible, or suspended firms). Determinations of prospective subcontractor responsibility may affect the Government's determination of the prospective prime contractor's responsibility. A prospective contractor may be required to provide written evidence of a proposed subcontractor's responsibility .

When it is in the Government's interest to do so, the Contracting Officer may directly determine a prospective subcontractor's responsibility *(e.g.,* when the prospective contract involves medical supplies, urgent requirements, or substantial subcontracting). In this case, the same standards used to determine a prime contractor's responsibility shall be used by the Government to determine subcontractor responsibility.

What Past Performance Evaluations are Required?

The Contractor Performance Assessment Reporting System (CPARS) is the mandatory DOE system used to report contractor performance into PPIRS, which is the official Government source to retrieve contractor performance information.

The primary purpose of past performance evaluations is to ensure the contractor is held accountable for its performance, and that accurate data on contractor performance is current and available for use in source selections. Performance evaluations are used as a resource in awarding best value contracts and orders to contractors that consistently provide quality, on-time products and services that conform to contractual requirements. Evaluations can be used to effectively communicate a contractor's strengths and weaknesses to source selection officials.

DOE Acquisition Guide Chapter 42.15, Contractor Performance Information, provides detailed guidance for completing and submitting CPARS evaluations in a timely manner.

What are the Required FAR Solicitation Provisions and Contract Clauses?

The Contracting Officer must use the provision at FAR 52.209-5, Certification Regarding Responsibility Matters, in solicitations where the contract value is expected to exceed the simplified acquisition threshold.

The Contracting Officer must use the provision at FAR 52.209-7, Information Regarding Responsibility Matters, in solicitations where the resultant contract value is expected to exceed $500,000.

The Contracting Officer must use the clause at FAR 52.209-9, Updates of Publicly Available Information Regarding Responsibility Matters in –

- Solicitations where the resultant contract value is expected to exceed $500,000; and
- Contracts in which the offeror checked "has" in paragraph (b) of the provision at FAR 52-209-7.

Organizational and Consultant Conflicts of Interest

Guiding Principle

- Contracting Officers are responsible for performing a thorough analysis of potential offeror conflicts of interest to ensure impartiality and objectivity in the performance of the Government's contractual objectives.

[References: FAR 9.5, DEAR 909.5, DEAR 952.209-8, DEAR 952.209-72, DEAR 970.0905, NNSA Supplement for Organizational Conflicts of Interest]

1.0 Summary of Latest Changes

This update: (1) elaborates on existing OCI guidance for Contracting Officers, (2) updates relevant references, and (3) includes administrative changes.

2.1 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. This chapter provides a general overview of Contracting Officer (CO) responsibilities for identifying, analyzing, and resolving Organizational Conflicts of Interest (OCI) issues. Currently, Federal Acquisition Regulation (FAR) coverage of OCI is found in Subpart 9.5. This coverage provides the foundational principles and processes for identifying and addressing OCI issues. The existing FAR coverage relies primarily upon examples to describe OCI circumstances. This coverage, however, does not provide the entire universe of potential situations needing OCI analysis, and does not provide any Government-wide standard OCI solicitation provisions or contract clauses. DOE-specific OCI guidance is included in the Department of Energy Acquisition Regulation (DEAR) at 909.5, and does include relevant OCI solicitation provisions and contract clauses.

FAR 9.5 is essentially unchanged from the OCI coverage included in the FAR when it was first published. Since that time there have been numerous interpretations of OCI issues in case law and GAO decisions, none of which have been incorporated into the FAR. Given this outdated OCI coverage, the General Services Administration, which administers the FAR, has initiated a comprehensive FAR case to update the FAR OCI coverage. A proposed rule was issued and the FAR staff is presently addressing and responding to public comments that were received in response to the proposed rule. When the FAR rule is published in its final form, the DEAR and this Guide chapter will be updated to comport with the new FAR coverage. Until that time, this Guide chapter re-states and elaborates on existing OCI policy and procedures; no new guidance is being issued in this update.

2.1 **Types of OCI**. Organizational conflicts of interest generally fall into the following three categories.

2.1.1 Unequal Access to Information. An OCI due to unequal access to information is created when a contractor has access to nonpublic information, which may provide the firm an unfair competitive advantage in a later competition for a Government contract. In these cases, the concern is the risk of the firm gaining a competitive advantage. There is no issue of bias. An OCI based on unequal access to information is discussed at FAR 9.505-4, which specifically addresses a contractor that obtains access to proprietary information. This type of OCI may also involve other nonpublic Government data, such as source selection information, or other nonpublic Government data that would be useful in a future competition.

2.1.2 Impaired Objectivity. An OCI due to impaired objectivity is created when a contractor's judgment and objectivity in performing the contract requirements may be impaired because the substance of the contractor's performance has the potential to affect other interests of the contractor. The OCI principle involved here is bias due to the existence of conflicting roles that might influence the contractor's judgment. Conflicts based upon impaired objectivity most closely correlate to the discussion at FAR 9.505-3 regarding the providing of evaluation services.

2.1.3 Biased Ground Rules. An OCI due to biased ground rules is created when a firm, as part of its performance of a Government contract, has in some sense set the ground rules for another Government contract by, for example, writing the statement of work or the specifications. In these biased ground rules cases, the primary concern is that the firm could skew the future competition, whether intentionally or not, in favor of itself. These situations also involve concerns that a firm, by virtue of its special knowledge of the agency's future requirements, would have an unfair advantage in the competition for those requirements. In these situations, both of the principles of bias and unfair competitive advantage exist. Conflicts based on biased ground rules best correlate to the discussion at FAR 9.505-2 regarding the preparation of specifications or work statements. In that example, a contractor prepares and furnishes complete specifications covering nondevelopmental items, to be used in a competitive acquisition.

2.2 **Addressing and Resolving OCI Issues**.

2.2.1 Avoiding OCI's. This involves preventing the occurrence of an actual or potential OCI through actions taken early in the acquisition process, such as excluding sources from competition, or eliminating a segment of work from a contract or task.

2.2.2 Neutralizing OCI's. This involves negating a potential or an actual OCI through specific actions taken by the Contracting Officer and the Government, such as invoking a limitation on a contractor's future competition or contracting.

2.2.3 Mitigating OCI's. This involves reducing or alleviating the impact of unavoidable OCIs to an acceptable level of risk to the Government, such as the inclusion of a contractor's OCI mitigation plan in a contract award.

Each individual contracting situation should be examined on the basis of its particular facts and the nature of the proposed contract. The exercise of common sense, good judgment, and sound discretion is required in both the decision on whether a significant potential conflict exists and, if it does, the development of an appropriate means for resolving it.

2.3 **FAR Requirements for the Contracting Officer**.

Contracting Officers shall analyze planned acquisitions in order to identify and evaluate potential organizational conflicts of interest as early in the acquisition process as possible, and avoid, neutralize, or mitigate significant potential conflicts before contract award.

Contracting Officers should obtain the advice of counsel and the assistance of appropriate technical specialists in evaluating potential conflicts and in developing and using any necessary solicitation provisions and contract clauses.

Before issuing a solicitation for a contract that may involve a significant potential conflict, the Contracting Officer shall recommend to the Head of the Contracting Activity a course of action for resolving the conflict.

If the Contracting Officer decides that a particular acquisition involves a significant potential organizational conflict of interest, the Contracting Officer shall, before issuing the solicitation, submit for approval to the Procurement Director:

- A written analysis, including a recommended course of action for avoiding, neutralizing, or mitigating the conflict.
- A draft solicitation provision.
- If needed, a proposed contract clause.

Once approval to proceed is received, the Contracting Officer shall:

- Include the provision and any clause in the solicitation and contract.
- Consider additional information provided by prospective contractors in response to the solicitation or during negotiations.
- Before awarding the contract, resolve the conflict or the potential conflict, consistent with the approval and direction of the Head of the Contracting Activity.

2.4 **DEAR Requirements for the Contracting Officer**.

The Contracting Officer shall insert the DEAR solicitation provision at 952.209-8, Organizational Conflicts of Interest Disclosure - Advisory and Assistance Services, in solicitations for advisory and assistance services that are expected to exceed the simplified acquisition threshold. This provision notifies potential offerors that OCI procedures apply to the acquisition, and requires the apparent successful offeror, or all offerors determined to be in the competitive range, to submit relevant and comprehensive OCI information to the Government for evaluation prior to award.

The Contracting Officer shall evaluate the information provided by the apparent successful offeror, or by all firms in the competitive range, for interests relating to a potential organizational conflict of interest in the performance of the proposed contract. Using that information and any other credible information, the Contracting Officer shall make a written determination of whether those interests create an actual or significant potential organizational conflict of interest, and identify any actions that may be taken to avoid, neutralize, or mitigate such conflict. In fulfilling their responsibilities for identifying and resolving potential conflicts, Contracting Officers should avoid creating unnecessary delays, burdensome information requirements, and excessive documentation.

As required by FAR 9.504 and DEAR 909.504, the Contracting Officer shall award the contract to the apparent successful offeror, unless a conflict of interest is determined to exist that cannot be avoided, neutralized, or mitigated. Before determining to withhold award based on organizational conflict of interest considerations, the Contracting Officer shall notify the offeror, provide the reasons therefore, and allow the offeror a reasonable opportunity to respond. If the conflict cannot be avoided, neutralized, or mitigated to the Contracting Officer's satisfaction, the Contracting Officer may disqualify the offeror from award and undertake the disclosure, evaluation, and determination process with the firm next in line for award. If the Contracting Officer finds that it is in the best interest of the Government to award the contract notwithstanding a conflict of interest, a request for waiver shall be submitted in accordance with DEAR 909.503. The waiver request and decisions shall be documented in the contract file.

The Contracting Officer shall insert the clause at 952.209-72, Organizational Conflicts of Interest, in each solicitation and contract for advisory and assistance services that is expected to

exceed the simplified acquisition threshold. The Contracting Officer shall include this clause's Alternate I in contracts when a meaningful amount of subcontracting is expected for advisory and assistance services. The purpose of this clause is to ensure that adequate OCI protections exist during the term of the contract. The clause places relevant restrictions on the contractor during contract performance, requires the contractor to monitor OCI issues, requires the contractor to report new OCI issues to the Contracting Officer, and requires the contractor to flow-down to appropriate subcontractors relevant OCI requirements. Contracting Officers may modify the clause as necessary to address the potential for OCI in individual contracts.

Contracts that are not subject to DEAR Part 970, but provide for the operation of a DOE site or facility or environmental remediation of a specific DOE site or sites, shall contain the organizational conflict of interest clause at 952.209-72. The organizational conflicts of interest clause in such contracts shall include Alternate I to that clause.

Pursuant to DEAR 970.0905, Management and Operating (M&O) contracts shall contain an OCI clause substantially similar to the clause at 952.209-72, and which is appropriate to the statement of work of the individual contract. Alternate I to the clause shall be included to ensure that M&O contractors adopt OCI policies and procedures in the award of subcontracts.

2.5 **Best Practices**.

2.5.1 FAR Examples. FAR 9.505 provides the general rules regarding OCIs, and FAR 9.505-1 through 9.505-4 illustrate the numerous situations where conflicts may arise. FAR 9.508 provides several more detailed examples of situations where OCIs may arise, and states that these examples are not all-inclusive but are intended to help the Contracting Officer apply the general rules to individual contract situations.

2.5.2 NNSA OCI Supplement. The National Nuclear Security Administration (NNSA) has published the *NNSA Supplement to the DOE Acquisition Guide - Pre and Post Award Guidance for Identifying and Documenting Contractor Organizational Conflict of Interest and Personal Conflicts of Interest*. Although this Supplement is intended to address NNSA contracting situations, it reflects the basic FAR and DEAR OCI guidance and can be referenced as a best practices guide by all DOE contracting and program staff. The Supplement elaborates on OCI regulatory coverage and provides additional detailed examples of situations in which OCIs may arise.

NNSA Supplement to the DOE Acquisition Guide

Pre and Post Award Guidance for Identifying and Documenting Contractor Organizational Conflict of Interest and Personal Conflicts of Interest

Overview:

This document supplements Chapter 9.1, Organizational Conflicts of Interest, of the DOE Acquisition Guide. It provides NNSA Contracting Officers (COs) with additional guidance for the avoidance, identification, and neutralization/resolution of actual or potential Organizational Conflicts of Interest (OCI) prior to and after contract award and for documenting the resulting decisions. In addition, this document provides guidance for identifying and preventing personal conflicts of interest involving contractor employees.

References:

This document is based on authority of FAR subpart 9.5, Organizational and Consultant Conflicts of Interest, and corresponding sections of the DEAR.

Background:

NNSA's mission is to "strengthen national security through the military application of nuclear energy and by reducing the global threat from terrorism and weapons of mass destruction." To accomplish this mission, NNSA needs contractors and contractor personnel providing services free from bias caused by other conflicting interests.

Over the past several years, OCI has become an issue of increasing concern at NNSA. Through competition, the profile of contractors providing support to NNSA is changing. Recently, FFRDC contracts have been awarded to Limited Liability Companies (LLC) made up of consortiums of separate companies including for-profit private firms. Because of the more complicated teaming arrangements, the shrinking industrial base, and the acknowledged concern in having many of the same contractors operating both our laboratories and plants, the NNSA is focusing increased attention on OCI as a contract management issue.

Definitions:

An Organizational OCI is the existence of a set of circumstances in which a contractor may be unable to render impartial advice to the government, or might have impaired objectivity in performing contracted work, or may obtain an unfair competitive advantage in the marketplace when competing for government work where that unfair advantage is obtained performing a government contract. This unfair advantage can be introduced when the contractor sets the ground rules of procurement, thereby biasing a future competition. The essence of OCI is divided loyalty between the best interests of a particular contractor and the best interests of the government. It is the government professional's duty to ensure that such divided loyalty is not permitted to occur or to continue when discovered. There are three broad categories of OCI: Unequal Access, Impaired Objectivity, and Biased Ground Rules. Each of these terms is defined as follows:

Unequal Access - An unfair competitive advantage typically surfaces when a contractor obtains information not generally available to competitors where such information would assist the contractor in winning the contract award. An unfair competitive advantage exists where a contractor competing for award of any federal contract possesses:

- Proprietary information that was obtained from a government official without proper authorization;
- Source selection information that is relevant to the contract but is not available to all competitors; or
- Any substantive information regarding the acquisition not equally available or provided to other potential offerors when such information would assist that contractor in obtaining the contract.

Impaired Objectivity - This may happen when a support contractor is performing duties that involve assessing or evaluating itself or a related entity. Examples include:

- Providing Proposal Evaluation Services as discussed in FAR 9.505-2;
- Reviewing the contractor's own or an affiliate's work product, or reviewing a competitor's work product as discussed in FAR 9.505-3;
- Providing advice in supporting the Government's decision making process; or
- Evaluating the contractor's own, an affiliate's, or a competitor's compliance with regulatory requirements.

Biased Ground Rules - This most often occurs when the contractor is writing the Statement of Work, performing systems engineering, or providing technical direction efforts. Examples include:

- Providing systems engineering as discussed in the Federal Acquisition Regulation (FAR) 9.505-1
- Preparing specifications and statements of work (SOW) as discussed in FAR 9.505-2

OCI may be either potential or real. The following definitions explain the difference:

Potential OCI – A contractor has a *potential* conflict of interest if the work to be performed under the contract places the contractor in a position where its objectivity might be called into question, however, no information has as yet come to light indicating that an actual motive for bias exists.

Actual OCI – A contractor has an *actual* conflict of interest if information has come to light that would cause a reasonable person to question the contractor's objectivity. The term "actual OCI" is synonymous with the terms "real or apparent OCI."

Example: A contractor employee will have access to source selection sensitive information because he is assisting the Agency in evaluating competitive proposals. As discussed previously, this work creates a potential for impaired objectivity based solely on the nature of the work to be performed. The *potential* OCI would become an *actual* OCI if one of the offerors submitting a proposal turned out to be either an affiliate or competitor of the contractor employee's firm.

There are three basic approaches available to contractors and the Agency for dealing with OCI issues, as follows:

Avoid - Prevent the occurrence of an actual or potential OCI through actions such as excluding sources from competition or eliminating a segment of work from a contract or task.

Neutralize - Negate, through a specific action, potential or actual OCI related to either a contractor's objectivity during contract performance, or an unfair competitive advantage. Specific actions could include encouraging and facilitating support contractor recusal, excluding or severely limiting support contractor participation in source selection activities, and/or otherwise barring access to competition sensitive data.

Mitigate - Reduce or alleviate the impact of unavoidable OCIs to an acceptable level of risk so that the government's interests with regard to fair competition and contract performance are not prejudiced. This is facilitated in developing an OCI mitigation plan and may include developing a firewall. An example of a firewall would be a contractor setting up divisions within a company that would isolate a certain sector technologically or geographically to avoid conflicts.

General Guidance:

1. Examples of OCI Situations.

The following paragraphs provide specific examples of OCI situations that could occur with contractors performing work for the NNSA:

Impaired Objectivity:

• An FFRDC, under a Work for Others (WFO) project, is providing technical oversight of work performed by one of the client agency's other contractors. A *potential* OCI exists because of the nature of the work being performed. The FFRDC would have an *actual* OCI if the contractor being overseen is an affiliate of one of the FFRDC's LLC members. In this case, the impartiality of the FFRDC can reasonably be questioned because it has a financial interest and can be biased in its oversight, favoring its affiliate. NNSA personnel have a duty to ensure that the contractor satisfactorily avoids, neutralizes, or mitigates the conflict.

Note: FAR 35.017(a)(2) states, "The FFRDC is required to conduct its business in a manner befitting its special relationship with the Government, to operate in the public interest with objectivity and independence, to be free from OCI, and to have full disclosure of its affairs to the sponsoring agency." This passage makes clear a FFRDC's responsibility for demonstrating that it is actively avoiding, neutralizing or mitigating potential or apparent OCI. The passage should not be construed as conferring a presumption that FFRDC's by definition operate in the Government's best interest and are therefore free from conflict.

• An NNSA contractor is tasked with providing support in evaluating proposals under a prime contract procurement. The contractor has a potential OCI based solely on the nature of work to be performed. As discussed previously, the contractor would have an actual OCI if one of its competitors or affiliates submitted a proposal. The impartiality of the contractor providing proposal evaluation services may reasonably be questioned because it has a financial interest in the outcome of the competition. In such a case, the NNSA personnel have a duty to ensure that the contractor satisfactorily avoids, neutralizes, or mitigates the conflict.

Biased Ground Rules:

The following examples of a contractor developing a specification or a statement of work, activities frequently performed by M&O contractors, are provided for illustration purposes.

• NNSA M&O contractor is tasked with designing a system. The NNSA will use the contractor's system design to award a prime contract for production of the system. If one of M&O contractor's affiliates will compete for the work manufacturing the system, the M&O contractor would have an unfair competitive advantage because the M&O

contractor (and therefore its affiliate) has unequal access to system design information, proprietary information or other non-public information. In such a case, the NNSA personnel have a duty to ensure that the contractor satisfactorily avoids, neutralizes or mitigates the conflict.

• The NNSA M&O contractor is tasked with *both* designing and manufacturing the system. The contractor chooses to have one of its affiliates manufacture the system based on the affiliate's unique capabilities as documented in a make/buy decision. In this case there is no OCI so long as the affiliate does not receive fee beyond sharing a portion of fee already contemplated under the M&O prime contract. Such a subcontract would be viewed as an intra-organizational transfer.

• A NNSA M&O contractor is tasked with designing and manufacturing a system. This time, the contractor competes the manufacturing effort as a subcontract opportunity. In such as case, the M&O contractor would have a potential OCI (unfair competitive advantage) should one of its affiliates compete for the work and that affiliate is entitled to fee beyond sharing a portion of fee already contemplated under the M&O prime contract. In such a case, the NNSA personnel have a duty to ensure that the contractor satisfactorily avoids, neutralizes or mitigates the conflict.

Note: While firewalls between affiliates within the same corporate entity are sometimes sufficient to mitigate OCIs associated with unequal access, the Government Accountability Office (GAO) has consistently held that firewalls cannot mitigate OCIs associated with impaired objectivity and biased ground rules.

2. <u>Handling OCIs Prior to Contract Award</u>.

The Federal Acquisition Regulation (FAR) Subpart 9.5 requires COs to analyze planned acquisitions in order to: 1) identify and evaluate potential organizational conflicts of interest (OCIs) as early in the acquisition process as possible; and 2) avoid, neutralize, or mitigate significant potential conflicts before contract award.

A. <u>Contracting Officer's OCI Course of Action Memorandum</u>. COs should evaluate potential OCI issues early in the acquisition process to avoid having offerors unnecessarily incur proposal costs only to later be determined to be ineligible for award. In the event that the Contracting Officer (CO) does identify a substantive potential OCI based on the work to be performed, the CO is required to draft an action plan for resolving the potential conflict in accordance with FAR 9.504(c). A CO's evaluation should include potential OCIs at the subcontractor level as well as the prime contractor level. A sample Contracting Officer's OCI Action Plan Memorandum format can be found in the Attachment 1, entitled, "OCI Contracting Officer's Course of Action for Resolving Conflict Memorandum." An example of an actual Contracting Officer's OCI Action Plan Memorandum can be found at http://scweb.na.gov/procurement/TAB9.shtm. The format of the example varies slightly from the format contained in Attachment 1.

B. Early Agency Disclosure. Once the CO's OCI Course of Action Memorandum has been approved, the essential OCI requirements should be shared with industry. When an Agency's final OCI strategy is not disclosed early in the procurement process, contractors are disadvantaged when assessing their eligibility for award and in preparing competitive proposals. The Agency's OCI requirements can significantly impact contractor teaming arrangements. Late disclosure of the OCI requirements may leave insufficient time for prospective offerors to reform teams if an original team member will no longer be eligible for award. To ensure NNSA maximizes competition, COs are encouraged to share OCI issues with potential offers at the earliest opportunity.

C. DOE Acquisition Forecast Database Notices. For solicitations where no OCI issues have been identified, CO's should include this information in the Acquisition Forecast Database. For requirements involving potential OCI, all pertinent OCI information should be posted to or linked from the Acquisition Forecast Database.

D. DOE Solicitation Webpage. When the OCI strategy for applicable solicitations is known or when it changes after initial or subsequent announcements, all "pertinent and appropriate" conflict of interest information should be posted on the DOE webpage for Solicitations and Amendments.

E. Contractor's Mitigation Plan. Whenever the CO has determined that a substantive potential OCI exists, the solicitation should require each offeror to propose an OCI mitigation plan. Acceptability of the mitigation plan should be a special responsibility criteria. The mitigation plan details how the contractor will identify and resolve OCI issues. The Contracting Officer determines whether the proposed mitigation plan is sufficient to protect the government's interest. The mitigation plan should be included in the contract file and a copy should be provided to the contracting officer's representative (COR). A contractor's mitigation plan should include the elements listed in Attachment 2.

F. Contractor Disclosure. Prospective NNSA Contractors responding to solicitations or submitting unsolicited proposals should be required to provide information to the Contracting Officer for use in identifying, evaluating, or resolving potential organizational OCI . See DEAR 909.507 for appropriate use of OCI solicitation provisions and contract clause. The solicitations should contain:

- OCI Certification Requirements - A provision requiring offerors to certify whether they are or are not aware of information bearing on the existence of a potential, real or apparent OCI.

- Contractor OCI Disclosure - A provision requiring offerors, who certify they are aware of an OCI, to disclose all relevant facts concerning any past, present, or planned interests relating to the work to be performed of a potentially conflicting nature. As stated in FAR 9.507-1, the provision should be tailored to

describe the specific potential conflicts identified in the CO's OCI Action Plan. DEAR 909.507-2 requires the contracting officer to insert the clause at DEAR 952.209-72, Organizational Conflicts of Interest, in each solicitation and contract for advisory and assistance services expected to exceed the simplified acquisition threshold ($100,000). Contracting officers may tailor the clause to address potential OCIs in individual contracts and determine the appropriate term which the contractor will be ineligible to participate in any capacity in NNSA contracts, subcontracts or proposals. In the usual case of a contract for advisory and assistance services, for example, a period of three, four, or five years is appropriate. However, in individual cases the contracting officer may insert a term of greater or lesser duration. The following is an example of a possible description of the potential conflict:

> *The company performing work under this contract will provide Resource Conservation and Recovery Act (RCRA) environmental remediation services. The contractor may have an OCI if it or its affiliate(s) provide regulatory development support to the Environmental Protection Agency (EPA) or to the State Government in promulgating RCRA regulations.*

Based on this information, offerors would know to disclose any financial relationships that they may have with organizations providing RCRA regulatory development support to either the EPA or the State government where the site is located. The CO would then have information to judge the nature and extent of the relationships.

Offerors failing to provide full disclosure, certification, or other required information may be determined by the Contracting Officer to be ineligible for award. Nondisclosure or misrepresentation of any relevant information may also result in disqualification from award, termination of the contract for default, or debarment from Government contracts, as well as other legal action or prosecution. In response to solicitations, the CO may consider an inadvertent failure to provide disclosure certification as a "minor informality" (as explained in FAR 14.405); however, the CO should consult GC and require offerors to promptly correct the omissions. This may generally be done without establishing a competitive range and entering discussions because OCI is a contractor responsibility issue per FAR 9.5.

G. Consideration on a Case-by-Case Basis. When a contractor discloses OCI issues prior to award, each individual contracting situation should be examined on a *case-by-case basis*, taking into consideration the particular facts and the nature of the proposed contract. Common sense, good judgment, and sound discretion are required to determine whether a significant potential or actual conflict exists and, if it does, an appropriate solution for resolving it. The two underlying principles are:

- Preventing the existence of conflicting roles that might bias a contractor's judgment; and
- Preventing unfair competitive advantage.

The CO should make every attempt to resolve potential OCIs through steps to neutralize or mitigate potential OCIs without excluding offerors from competition. Offerors will be required to address issues related to OCIs in their proposals. In some situations, and after consultation with General Counsel (GC), potential offerors may be required to address safeguards against OCIs prior to submitting their proposals.

H. Elimination of Offerors from Award. The Contracting Officer may eliminate an offeror from consideration for award based either on significant potential OCI issues or significant actual OCI issues. The following example serves to illustrate this point:

- The NNSA has issued a solicitation which contemplates awarding a task order contract for Environmental Impact Statement (EIS) support. The OCI provisions of the solicitation advised prospective offerors that NNSA may order EIS support at up to 25 named locations. An offeror discloses in its proposal that it has a financial relationship with companies working at three of the 25 locations. If the Agency has a current need for EIS support at one or more of the three sites, then the offeror has an actual OCI and the CO might reasonably disqualify the offeror. If the Agency does not have an current need for EIS support at any of the three sites, then the offeror has only a potential OCI. Nevertheless, the CO might disqualify the offeror judging that the Government would be harmed by the inability to obtain timely support should a need materialize for support at one of the three sites. Thus, an offeror may be eliminated from consideration for award based on either a potential or an actual OCI. Please note, however, how the above analysis might change if the solicitation contemplated multiple awards. In such a case, the CO might reasonably judge that the offeror's OCI at just three sites does not pose an unacceptable risk to the Government given redundant contractor capability.

2. Handling Post Award Organizational Conflicts of Interest

At the pre-award stage, it may be difficult to identify OCI issues. Also, although no conflicts may have been present at time of award, contractors' financial and business relationships are constantly changing and a potential conflict may subsequently develop. This section provides NNSA Contracting Officers and program personnel with guidance for handling organizational and contractor personnel OCI issues arising after contract award.

A. Basic Steps in Evaluating a Post-Award Organization Conflict of Interest Issue.

1) The Contractor discloses to the CO a potential or actual OCI resulting from a new business interest. (The CO should emphasize to the contractor that the CO is the sole NNSA point of contact regarding specific OCI issues.) It concerns

existing or planned work that is generally related to the work performed under the contract. The Contractor provides a plan as to how it proposes to avoid, neutralize or mitigate the conflict. Post award mitigation strategies could include:

- A contractor declines to seek award of a particular task order;

- If the OCI involves an affiliate, the prime contractor divesting itself of the financial relationship, e.g., selling a subsidiary; or

- In a case where a subcontractor has an OCI but the prime contractor does not, the prime contractor limiting the subcontractor to performing only those tasks under the contract not involving conflict.

Note: A prime contractor should never be allowed to implement a strategy to avoid its own conflicts by having a subcontractor perform its work. A subcontractor has a significant financial relationship with the prime contractor and is subordinate, being dependent on the prime contractor for obtaining contract work. Given this relationship, a reasonable person would question the subcontractor's objectivity when providing advice to the Government that might significantly harm the prime contractor's (including its parent company and affiliate) interests.

2) The CO evaluates the Contractor's disclosure and plan:

- CO conducts fact-finding, requests more information from the contractor if necessary

- CO evaluates new information

- CO requests evaluation of OCI information from program office. Generally, the program should always be consulted.

- CO requests assistance from OASM and GC whenever the CO determines assistance is needed and always when the CO has preliminarily decided an OCI cannot be avoided, neutralized, or mitigated. Further, the contractor must be notified and given a reasonable opportunity to respond.

3) CO makes final OCI decision and documents decision taking into consideration all information and recommendations.

4) CO issues final OCI decision in writing to the contractor.

B. Roles and Responsibilities in Post Award OCI Decisional Process.

1) Contracting Officers. The FAR and the DEAR clearly state that an OCI determination is the Contracting Officer's responsibility. However, all NNSA employees should be sensitive to identifying and avoiding OCIs.

The CO should evaluate OCIs on a case by case basis. Before making a determination regarding whether a potential OCI exists, the CO must thoroughly evaluate the facts based on program, legal, and public interest concerns, taking into consideration the best interest of the Government. In evaluating a potential OCI, the CO performs a risk analysis to determine whether a significant potential OCI exists. If one exists, the CO evaluates whether and how the OCI can be avoided, neutralized or mitigated and may request supplemental information from the contractor to aid in making a determination. The exercise of common sense, good judgment, and sound discretion is required to make a determination and to develop an appropriate means for resolving the issue. Some cases may be clear cut allowing the CO to evaluate the facts and make a quick decision based on common sense and knowledge. However, the majority of OCI determinations are more complex. Often, a CO does not initially have enough information to make an informed decision.

2) Program Offices**.** As part of the CO's decision-making process, COs should coordinate with the program and seek Program Office advice. Program personnel are in the best position to provide technical advice regarding the nature and relationships of the applicable work. Also, they may be aware of other issues the CO should consider in evaluating whether an actual or potential OCI exists.

3) Office of Acquisition and Supply Management (NA-63) and General Counsel. The Office of Acquisition and Supply Management (OASM) NA-63 and General Counsel are available to provide advice and assistance to the CO in evaluating and making OCI determinations. When an ordering document has been issued to a contractor and an OCI is later identified which cannot be avoided, neutralized, or mitigated, the CO should consult with the Office of Acquisition and Supply Management and General Counsel before canceling the work and issuing it to another contractor. This does not apply to situations where contractors have been issued an ordering document which is specifically for preliminary OCI screening only. The recommendation to consult with OASM is not necessary in any other post award OCI determinations.

Contracting Officers may find it helpful to obtain advice from OASM regarding remedies when an OCI exists. General Counsel review should be required if legal issues are raised by the CO, the contractor or the contractor's attorney.

C. Examples of OCI Information to Request from the Contractor.

The following are examples of information a CO may find helpful to evaluate a post-award OCI issue. There may be new information to consider in evaluating an OCI situation. The purpose of this type of information is to assess the magnitude of a contractor's relationship with another party when evaluating potential OCI.

- Is the work to be performed for NNSA similar or related to the work performed, being performed/to be performed by the contractor for a commercial client?

- Could the contractor intentionally or inadvertently use the work under an existing contract to benefit and profit under another contract and thus impair its ability to perform without bias in the NNSA's or its WFO clients' best interest?

- Does the contractor have any contracts to perform work, as a subcontractor, for its parent, subsidiary, or affiliates?

- How much work (i.e., in dollars, percentage of business, and /or gross revenue) has the contractor performed or is in the process of performing for the commercial client(s)? What is the contractor's gross revenue for each of the past three years?

- When did the contractor perform the applicable work for the commercial client(s)?

- Is the work currently being performed for commercial clients? If yes, what work and how long is the work expected to continue?

- If the work in question involves an organizational relationship, what is the relationship between the parties? Does the work involve a parent, subsidiary, affiliate, etc?

- Is the contractor under contract or does it have some other arrangement with any relevant public or private clients to begin providing services/work efforts that may represent a potential OCI?

- Does the contractor (including its affiliates) own or have any financial interest in a specific technology, equipment, system, or software which will be evaluated under this contract?

- Request that the contractor provide any other pertinent information bearing on the OCI of which the contractor may be aware that has not been specifically requested by NNSA.

D. Examples of Basic OCI Information Available Within NNSA.

What is the value of the ordering document (work authorization, task order, task assignment, etc.)? Is it a significant amount of the contractor's business base? While this is useful information, often the dollar value is not as relevant to OCI decisions as the type of work to be performed.

Does the work relate to an existing NNSA contract?

Is the work objective and impartial in nature or does it involve some degree of judgment or discretion on the contractor's part?

E. Time Frame for Evaluating Post Award Conflicts. The Agency is committed to providing timely responses on OCI issues to contractors. Failure to deal with OCIs in a timely manner could cause contractors to lose business and delay implementation and work on NNSA programs and projects. As a general rule, COs should strive to resolve OCI issues within 20 working days of receipt of all relevant information. COs should coordinate with contractors and programs to establish specific response/decision timeframes for individual OCI issues.

F. Documenting OCI Decisions. COs should maintain records of OCI decisions and related correspondence in the official contract file. COs should forward an information copy of all OCI decisions to OASM. In turn, OASM will analyze OCI decisions to ensure consistency across the Agency and as a basis for developing additional guidance.

G. Waiver Procedures**.** In accordance with FAR 9.504(e) and DEAR 909.504(e), if a determination is made that a conflict cannot be avoided, neutralized, or mitigated but it is in the best interest of the Government to award or continue the authorized ongoing work, a request for waiver must be approved by the Head of the Contracting Activity (HCA). See FAR 9.503; DEAR 909.503; and NNSA Policy Letter: BOP-003.0334R5, Rev. 5, dated 08/08/2007. The waiver request and decision shall be included in the contract file.

3. Personal Conflicts of Interest.

A personal conflict of interest can be defined as a contractor employee, subcontractor employee, or consultant who is in a position to materially influence recommendations and/or decisions and, because of his/her personal activities, relationships, or financial interests, his/her objectivity may be impaired in performing contract work. A contractor employee may have a personal conflict of interest with respect to work he/she is performing even though the employing firm itself does not.

Unlike federal employees, there are few policies or laws in place to prevent contractor personnel personal conflicts of interest. Personal COIs are typically covered under ethics rules and prohibitions instituted by government agencies and contractors. Currently, the FAR does not address such conflicts. For this reason, it is prudent to include conflict of interest provisions or clauses in solicitations and contracts that require employees to

identify potential conflicts of interests and report them to their employer so they can be mitigated. Attachment 2, entitled, "Notification of Conflicts of Interest Regarding Personnel" contains some suggested language which could be used in a clause to address contract personal conflicts of interest.

Note: When a contractor employee's personal COI directly impacts work it is performing on a federal government contract, that conflict could result in an OCI for the contractor company because the contractor employee is acting as agent for that contractor company.

Attachment 1

Organization Conflict of Interest
Contracting Officers Course of Action for Resolving Conflict
Memorandum
FAR 9.504(c)

1. Requirement.

The purpose of the CO's memo is to fulfill the requirements of FAR 9.504 (c) which states, "Before issuing a solicitation for a contract that may involve a significant potential conflict, the contracting offer shall recommend to the head of the contracting activity course of action for resolving the conflict."

2. Memorandum Format

A. Introduction. Briefly introduce the document and what it is about.

B. Background. Briefly state procurement information (competitive or sole source, dollar value, statement of work).

C. Objective. State the objective or purpose of the document.

D. Analysis. Provide a detailed analysis of the SOW requirements in relation to the actual or potential OCIs it may present. While stating what the actual and/or potential conflicts are that could evolve, also indicate what the ramifications will be if these conflicts are left unaddressed.

E. Course of Action. Describe the actions planned to address the OCI.

1. Solicitation Provisions. List and briefly describe the OCI related special solicitation provisions that are contemplated. Include clauses that restrict competition.

2. Contract Clauses. List and briefly describe the OCI related special contract clauses that are contemplated.

3. Contracting Officer's Evaluation. Provide a statement that the CO is making these determinations and state the basic steps that will be taken by the CO to address OCI during the pre and post award phases.

4. Post Award Actions. List the post award actions that will be taken to prevent OCI situations, such as:

a. Post award conference – At the post award conference the Contracting Officer will emphasize the sensitivity of the organizational conflict of interest issue and stress the importance of addressing actual or potential conflicts of interest prior to initiation of work on the contract.

b. Meeting with Project Officer – The Project Officer assigned to the contract will be advised by the Contracting Officer to be alert and sensitive to organizational conflict of interest issues when reviewing the work plan.

c. Periodic reminders to contractor -

F. Recommendation. Summarize the overall recommendation of the plan.

G. Signature Page. Include signature blocks for all required reviews/approvals.

H. Attachments. Attach the statement of work and clauses in full text.

Attachment 2

MINIMUM STANDARDS FOR CONTRACTORS' COI PLANS

A. Corporate Structure

The COI Plan shall describe any parent relationship and list all affiliates, subsidiaries, and sister companies, etc. Generally, this need not exceed three corporate tiers, unless a relationship exists beyond three tiers that would potentially create a conflict. In such a case, relationships beyond three tiers should also be included in the COI Plan. Contractors should report changes in its corporate structure to the Agency throughout contract performance. Contractors are invited to include under this section, a company profile. The profile should discuss all pertinent information relevant to COI including a summary of a contractor's primary business functions and activities. This background information will potentially be very useful to contracting officers and the Agency when evaluating whether or not a contractor has a COI.

B. **Searching and Identifying COI**

The COI Plan shall include a requirement describing when a COI search must be performed by company personnel and clearly identify the procedures to be followed. The searching requirement shall encompass all work related to all clients for whom work was performed over the past three years, all current work, all sites (if applicable), and any future work reflected in marketing proposals. Contractors must search their records over the past 36 months from time of receipt of the work from NNSA. However, NNSA encourages contractors to search back as far as a company's records cover.

C. Data Base

The COI Plan shall require a data base that includes all necessary information for a contractor to review its past work (at a minimum over the past 36 months), work in progress, and work the company may be pursuing under any marketing proposals. This requirement does not establish any particular type or kind of retrieval system, however, the data base shall contain, at a minimum, the following information and capabilities. (1) a list of the company's past and public clients; (2) a description of the type(s) of work that was performed and any other pertinent information; (3) a list of the past sites (when applicable) a contractor has worked on; (4) a list of site name(s) (when applicable) related to any work performed; and (5) the ability to search and retrieve the information in the data base. If applicable, the COI Plan shall include provisions for supplemental searches of a parents, affiliates, subsidiaries, or sister company’s records. The COI Plan shall also describe any cross-checks used by the company when searching COI issues.

D. Personal Certification

At a minimum, the COI Plan shall require ALL employees of the company performing work under an NNSA contract, to sign a personal certification. It should be noted

however, that it is the preference of NNSA that ALL employees of the company be required to sign such a certification rather than only those employees working under an NNSA contract. The certification shall require at a minimum, that the individual agrees to report to the proper company authority any personal COI the individual may have on any work that may result in an actual or potential COI. The certification shall also state the individual has read and understands the company's COI Plan and procedures. The employee certifications shall be retained by the company.

E. Work Authorization Notification and Certification

The COI Plan shall describe the process the company requires for notifying the Agency prior to beginning work, and for submission of its' Work Authorization certification within 20 days of receipt of the work from NNSA. NOTE: Work Authorization certifications are NOT required if the contract contains an annual certification requirement. Nevertheless, the contractor's COI Plan should address the procedures to be followed for Work Authorization certifications.

F. Annual Certification

The COI Plan shall describe the process the company requires for submission of its annual certification. NOTE: Annual certification is NOT required if the contract contains a work authorization certification requirement. Nevertheless, the contractor's COI Plan should address the procedures to be followed for annual certifications.

G. Notification and Documentation

The COI Plan shall clearly delineate who is the responsible official for making COI determinations within the company. Generally, this would be someone at a middle to upper level of management. The responsible official shall be free of any personal conflicts for the purpose of making COI determinations, e.g., a program manager who receives bonuses based on the total amount of sales may not be free of conflicts.

The plan shall clearly identify the process that is required when notifying the NNSA of any actual or potential COI and the actions that the company has taken or will take to avoid, neutralize or mitigate the conflict. In addition, a contractor shall document all COI searches related to NNSA work, whether or NOT an actual or potential COI has been identified.

H. Training

The COI Plan shall require all employees of the company to receive basic COI training, and that each employee receives COI awareness training, at least, on an annual basis. The company's COI Plan shall be available for all employees to review. Annual awareness training shall include, at a minimum, a review of the certification language and any change that may have occurred in the company's COI Plan. In addition, companies are encouraged to routinely disseminate to their employees current COI information.

I. Subcontractor's COI Plans

The COI Plan shall describe the process and mechanism by which the company will monitor its subcontractors to ensure all subcontractors are complying with the COI provisions in their contracts. It is important that subcontractors identify and report COI as well as submit Limitation of Future Contracting (LOFC) requests for approval.

Attachment 3

NOTIFICATION OF CONFLICTS OF INTEREST REGARDING PERSONNEL

a) In addition to the requirements of the contract clause entitled "Organizational Conflicts of Interest," the following provisions with regard to employee personnel performing under this contract shall apply until the earlier of the following two dates: the termination date of the affected employee(s) or the expiration date of the contract.

b) The Contractor agrees to notify immediately the NNSA Project Officer and the Contracting Officer of (1) any actual or potential personal conflict of interest with regard to any of its employees working on or having access to information regarding this contract, or (2) any such conflicts concerning subcontractor employees or consultants working on or having access to information regarding this contract, when such conflicts have been reported to the Contractor. A personal conflict of interest is defined as a relationship of an employee, subcontractor employee, or consultant with an entity that may impair the objectivity of the employee, subcontractor employee, or consultant in performing the contract work.

(c) The Contractor agrees to notify each Project Officer and Contracting Officer prior to incurring costs for that employee's work when an employee may have a personal conflict of interest. In the event that the personal conflict of interest does not become known until after performance on the contract begins, the Contractor shall immediately notify the Contracting Officer of the personal conflict of interest. The Contractor shall continue performance of this contract until notified by the Contracting Officer of the appropriate action to be taken.

(d) The Contractor agrees to insert in any subcontract or consultant agreement placed hereunder, except for subcontracts or consultant agreements for_____(fill in)_____, provisions which shall conform substantially to the language of this clause, including this paragraph (d), unless otherwise authorized by the Contracting Officer.

b e te t

CHAPTER 13 - SIMPLIFIED ACQUISITION PROCEDURES

1 1 per t r e re r t e e t e S Sm rt 2 r e r t 2012
1 02 r e r er t 2017
1 S mp e t r e re r 201

Purchase Card Policy and Operating Procedures

Guiding Principles

- The purchase card must be the preferred method to purchase and to pay for micro-purchases.
- The purchase card may be used only for purchases that are otherwise authorized by law or regulation.

[References: FAR 8; FAR 12; FAR 13; FAR 23; OMB Circular A-123 Appendix B – Improving the Management of Government Charge Card Programs; General Service Administration Worldwide Federal Supply Service Contract GS-23FT0002]

1.0 Summary of Latest Changes

This update: (1) changes the chapter number from 13.1 to 13.301 to align with the Federal Acquisition Regulation (FAR), (2) adjusts the dollar threshold to reflect the recent FAR increase to the micro-purchase threshold and (3) includes administrative changes.

2.0 Discussion

The purpose of this document is to establish Department of Energy (DOE) policy for the use of the purchase card. These procedures supplement and implement procedural aspects of the U.S. General Services Administration (GSA) Worldwide Federal Supply Service Contract for Purchase, Travel, Fleet, and Integrated Card Services GS-23FT0002. In the event of any inconsistencies between these Procedures, the terms and conditions of the Contract, Office of Management and Budget (OMB) Guidelines or FAR, the inconsistency will be resolved in the following order of precedence (1) the FAR, (2) Office of Management and Budget (OMB) Guidelines, (3) the terms and conditions of the GSA Master Contract, and (4) these Procedures.

Purchase card services provide DOE with a means to simplify its micro-purchase procedures and improve its cash management by:

- offering an alternative to the use of purchase orders and blanket purchase agreements (BPAs);
- streamlining the acquisition process by reducing paperwork, improving lead times, and expediting contractor payments;
- reducing the administrative costs associated with micro-purchases and BPAs; and

- providing greater and more detailed statistical data and an audit trail as an aid in managing purchasing activities.

2.1 Applicability. These Procedures must be used by DOE and authorized contractor personnel using the GSA SmartPay purchase cards.

2.2 Program Features. The purchase card is a VISA commercial purchase card that has a unique numbering system which identifies J.P. Morgan Chase Bank (JPMChase Bank), is a Government tax exempt card, and includes the cardholder name and number. Purchase cards must be mailed to the cardholder's office. JPMChase Bank will have no record of the cardholder's home address, personal credit history, or social security number. The purchase card is not to be used by anyone other than the employee whose name appears on it and must only be used for official business purposes. JPMChase Bank must be paid the actual cost of transactions and in accordance with the Prompt Payment Act. JPMChase Bank provides program services support, full reporting, purchase authorization, customer service, and account setup services. Refer to Section 2.20 for additional information.

2.3 Purchasing Authority. Each cardholder must have purchasing authority evidenced by either a Delegation of Authority or a SF-1402. This authority allows the cardholders to use the purchase card to purchase goods and services within established single purchase and monthly spending limits. The single purchase and monthly or cycle dollar limitation delegated to the purchase cardholder must accurately reflect the dollar levels of purchases that the cardholder will be making as part of their official duties. The SF-1402 must be used to evidence the Contracting Officer (CO) appointment for delegation of purchase cardholders exceeding micro-purchase authority (i.e. above $3,500). A SF-1402 is not required for cardholders exercising only micro-purchase authority or using the purchase card as a method of payment for an issued contract signed by a warranted Contracting Officer. A Delegation of Purchasing Authority will evidence this appointment. A cardholder must not be given purchasing authority until they have taken the required training and have a designated Approving Official (AO) assigned to them who has also taken the required training. Refer to Attachment 11 for a Sample Delegation of Purchasing Authority for Purchase Cardholders.

2.4 Program Support. The procurement and finance offices will provide full program support and assistance to cardholders and AOs. Each of these offices will identify staff members who can assist cardholders and resolve problems which may be encountered. This should be included in the local guidance (Refer to Attachment 6 for more information.)

2.5 Authorized Contractors. Purchase card use by Government cost-reimbursable contractors must be authorized, in writing, by a federal agency CO pursuant to FAR Subpart 51.1. The contractor will have a centrally billed account/card. If the card is used to make unauthorized purchases, the cost-reimbursable contractor is liable for the charges.

Contractors who use the Federal Government's GSA SmartPay Program must comply with the terms and conditions of the GSA SmartPay contract, these DOE Procedures and develop,

implement and maintain local purchase card procedures which reflect the policies and principles set forth in these DOE Procedures. (Refer to Attachment 6 for more information.)

The Federal COs should ensure that the contractor's purchase card policies, procedures, and management controls are implemented. The Federal CO should also ensure they have access to the contractor's list of purchase card users and associated single purchase or other card use restrictions or limitations.

2.6 Guidelines for Determining if a Purchase Card Should Be Issued. For the security and integrity of the purchase card program specific guidelines must be met prior to delegating purchasing authority to a cardholder. Refer to Attachment 3 for specific guidelines. Additional guidelines may be added; however, the guidelines, as written, cannot be removed.

2.7 Responsibilities.

2.7.1 Head of the Contracting Activity (HCA): The official in charge of the purchasing function for a contracting activity.

Responsibilities include, but are not limited to, the following:

1. Designating an Organizational Program Coordinator (OPC).
2. Determine who the AOs and cardholders will be (refer to Attachments 3 and 4 for sample letters) and ensure that purchasing authority is delegated to cardholders and AOs, by the OPC or designee, in writing. Issuing Delegation of Purchasing Authority (refer to Attachment 11 for a sample letter) or SF-1402 to cardholders, as applicable. This should include single purchase limit, cycle spending limit, and if applicable monthly spending limit. Convenience check writing authority must also be delegated in writing.
3. Develop, maintain, and implement written local procedures for use of the purchase card consistent with procurement regulations, OMB Guidelines, the GSA Contract Guide terms and conditions, and this document. The procedures should include, but not be limited to, receiving and logging property, local prohibitions of supplies/services and identification of internal staff members who can assist cardholders. (Refer to Attachment 6 for more information.)
4. Ensure completion of the following for all OPCs, cardholders and AOs:
    a. Mandatory initial cardholder training.
    b. Refresher training, every two years.
    c. Proper maintenance of training records.
5. Authorize purchase cards to the minimum extent necessary to carry out the contracting activity's mission. No more than one purchase card should be authorized to an individual cardholder unless the HCA, or designee, determines that a cardholder has a need for more than one card. Refer to Section 2.6 for additional information.

6. Ensure that personnel procedures include return of the card in the departing employee's checklist. The procedures should ensure that the card and convenience checks, if applicable, are returned to the OPC, or designee, who will deactivate the cardholder account and dispose of the purchase card and convenience checks.
7. Ensure that departing employees leave their log and records with the AO, or another designated employee, for appropriate retention.
8. Consider suspending or terminating cardholder accounts if the cardholder violates regulations, policies, procedures, or does not submit monthly account reconciliations in a timely manner. Refer to DOE Order 333.1, Administering Workforce Discipline, Appendix C, for a list of purchase card penalties.
9. Counsel and, if necessary, replace AOs who are not properly reconciling or does not submit monthly account reconciliations in a timely manner. Refer to DOE Order 333.1, Administering Workforce Discipline, Appendix C, for a list of purchase card penalties.

2.7.2 Organizational Program Coordinator: The individual responsible for managing the purchase card program at the contracting activity or contractor organization.

Responsibilities include, but are not limited to, the following:

1. Completing initial and refresher training, every two years, prescribed at Section 2.8 and file as appropriate.
2. Adhering to the rules in 2.7.3, if authorized to be a cardholder. Note: Federal and cost-reimbursement contractors must take the GSA cardholder training and submit it to the Agency Program Coordinator (APC) along with their Delegation of Purchasing Authority or SF-1402 and AO information.
3. Establishing local policy and guidance; (Refer to Attachment 6 for more information.)
4. Monitoring purchase card usage for the contracting activity;
5. Managing accounts including, processing purchase card applications; maintaining a current listing of all cardholders and AOs; and closing accounts upon abuse or misuse of card privileges, compromise of account information, card loss, or cardholder departure.
6. Reviewing and coordinating the approval of Delegations of Purchasing Authority or SF-1402s.
7. Managing cardholder accounts through JPMChase Bank. This includes ensuring account profiles properly reflect single purchase, monthly, and cycle spending limits, email addresses, phone numbers, Merchant Category Codes (MCC) (Refer to Attachment 1 for the definition) inclusions, and processing name changes and password resets for cardholders.
8. Maintaining an appropriate span of control between the cardholders and the AO (no more than five cardholders, or 500 transactions per month, except with the approval of the HCA, or designee). For National Nuclear Security Administration (NNSA) contracting activities, an AO should be responsible

for no more than a reasonable number of cardholders consistent with the activity's normal span of supervisory control except with the approval of the HCA, or designee.

9. Assisting cardholders and AOs in fulfilling their responsibilities.
10. Monitoring bank transaction declination reports to identify potential fraudulent activity.
11. Monitoring convenience check usage to ensure cardholders are not violating the rules set forth in Section 2.22.
12. Monitoring transaction reports during the billing cycles to disclose potential prohibited or improper use, and taking immediate action to address suspected legal or policy violations.
13. Reviewing transactions, purchasing logs and supporting documentation of newly appointed cardholders within three months of their appointment.
14. Maintaining a roster (spreadsheet, work file, database, etc.). The roster should track the AO's name, appointment date, initial and refresher training dates, date of AO termination and which the cardholders they have purview. For the cardholder, the roster should include the cardholder's name, appointment date initial and refresher training dates, single and monthly purchase limits, the date of the cardholder termination and who is their Approving Official. Refer to Attachments 9 and 10 for sample.
15. Referring cardholders and AOs to the HCA, or designee, for disciplinary actions when regulations, policies, or procedures are violated, and if monthly account reconciliations are not submitted during the required time frames of 5 and 15 working days, respectively. Refer to DOE Order 333.1, Administering Workforce Discipline, Appendix C, for a list of purchase card penalties.
16. Closing purchase card accounts of past employees and deactivating purchase card accounts for those out of the office for extended time periods.
17. Responding to data mining inquiries within 15 calendar days of notification and ensuring cardholders are responsive.
18. Ensuring key duties are separated, such as making purchases, authorizing purchases, and reviewing and auditing purchase documents. Not one individual should control all key aspects of a transaction or event.
19. Periodically, but not less than annually, review number of purchase cards and credit limits. Credit limits must be decreased if a cardholder's historical spending level does not meet 75% of the credit limit in the past year. Unless there is written justification for the variance from the AO, the OPC must lower the credit limits. If a purchase card is unused for at least six months the card must be deactivated, unless being held for emergency situations (e.g., Continuity of Operations purposes (COOP)). Local COOP plans should identify the individuals with cards being held for emergency situations.
20. Ensuring that proper procedures are in place to adequately safeguard and control those items that are pilferable and sensitive.

21. Contacting the APC for additions/modifications to Verification Identification Numbers (VID), hierarchies, MCC Groups, permanent opening/removing of a MCC, centrally billed accounts, and rebate-related information.

2.7.3 Cardholder: A DOE employee, or authorized contractor, with purchasing authority who:

1. Is issued the 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.

Responsibilities include, but are not limited to, the following:

1. Maintaining physical custody of the purchase card and convenience checks, if applicable, to avoid unauthorized use. 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.
2. Completing the required GSA initial and refresher training prescribed at Sections 9, and provide proof of training to the OPC.
3. Using the purchase card to purchase and/or pay only for official supplies and services in support of the cardholder's agency's mission.
4. Making purchases only in accordance with the requirements of these Procedures and its references.
5. Understanding what restrictions may be placed on purchases by the funds allotted to the card.
6. Complying with the requirements of FAR Part 8, Required Sources of Supplies and Services, FAR Part 12, Acquisition of Commercial Items, FAR Part 13, Simplified Acquisition Procedures, and FAR Part 23, Environmental, Energy and Water Efficiency, Renewable Energy Technology, Occupational Safety, and Drug Free Workplace, of the FAR when making purchases using the purchase card as well as these Procedures.
7. Considering small businesses, to the maximum extent practicable.
8. Obtaining all required pre-purchase approvals unless the transaction is a purchase covered by a blanket letter of approval issued by the AO or the cardholder has a SF-1402. Before certifying the purchase of items, the AO should have a detailed description of the items being purchased.
9. Ensuring that funds are reserved prior to the items being purchased. A cardholder may not delegate their authority or sign (ratify) after someone else has made a purchase. Note: The concept of the purchase card program is "just-in-time" which entails monitoring funds availability at all times.

10. Not "splitting" 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. (Refer to the split purchases definition in Attachment 1 for more information.)
11. Recording all transactions in a document or electronic system similar to the Purchase Card Log, Attachment 7, or Convenience Check Log, Attachment 8. The use of the Strategic Integrated Procurement Enterprise System (STRIPES) is not required for federal sites; however, if used, it will fulfill this requirement.
12. Informing the merchant that the purchase is tax exempt to prevent being charged with taxes (Refer to Section 2.20).
13. Maintaining receipts and other supporting documentation for purchases. Cardholders must provide receipts/invoices and sufficient documentation to the AO for review monthly and must maintain the records. (Refer to Section 2.31 for retentions guidelines.)
14. Reviewing, reconciling, and approving transactions.
    a. Resolving unauthorized, erroneous, or questionable transactions with merchants.
    b. Tracking any purchases billed but not received.
    c. Review, complete, sign and date the Statement of Account. (Refer to Section 2.25).
    d. Submit completed Statement of Account and customer receipts to AO within 5 working days of receipt, or sooner if required by local policies and procedures.
15. Disputing with the merchant immediately any unresolved transaction for which a charge occurred during the prior billing cycle(s) but the item(s) have not been received, and tracking the dispute to completion. Cardholders with access to PaymentNet must submit disputes electronically. Cardholders without access to PaymentNet must use JPMChase Bank's dispute form in Attachment 12 of these Procedures.
16. Notifying the Finance Office and/or OPC of unusual/questionable requests and disputable transactions.
17. Immediately report lost or stolen cards to JPMChase Bank, to the AO, and to the OPC.
18. Contacting JPMChase Bank (phone number on back of your card) if your purchase card is declined when making a transaction. Do not continue to have the merchant swipe your card.

    To determine the reason:
    a. Verify that the merchant used the correct account number, expiration date, and transaction amount.
    b. Verify that the transaction amount does not exceed the cardholder's single purchase limit.

c. Verify that the sum of all transactions charged to the card, billed or unbilled, does not exceed the monthly limit.
d. Contact the bank at the number shown on the charge card if the transaction information is correct and the amount is within the account limits. Provide the transaction date, the amount, and the merchant name. The bank may not be able to identify the transaction immediately, but the information should be available by the next business day.

19. Ensuring purchased items are received by the requiring activity.
20. Responding to data mining inquiries promptly.
21. Relinquishing purchase card, and convenience checks, if applicable, to the AO or OPC when no longer employed with DOE, taking a temporary leave, or transferring to another DOE office and it has been determined that the card is no longer needed.
22. Informing the OPC if the AO approves any purchases that the AO personally requested.

2.7.4 Approving Official: The individual delegated approving authority by the HCA or designee. The AO is usually the cardholder's supervisor, or a person independent of the cardholder, and is at least one level above the cardholder.

The AO must not approve any purchases that they personally requested. Further specific responsibilities include, but are not limited to, the following:

1. Completing the GSA training prescribed at Section 2.8 and provide proof of training to the OPC.
2. Ensuring each cardholder has access to these Procedures and understands the requirements for use of the purchase card and fulfills his or her responsibilities related to the purchase card program.
3. Reviewing and approving, prior to purchase, purchase card purchases, except those cardholders having blanket letters of approval or a SF-1402.
4. Reviewing and approving, by the 15th of each month, cardholder monthly Statement of Account ensuring that the statement has supporting documentation and complete, accurate, and reflect only authorized purchases. This entails:
    a. verifying that all of the assigned cardholder's transactions were necessary to support their supported work area and permitted government purchases;
    b. verifying that the cardholder complied with independent receipt and acceptance procedures for all accountable property (pilferable and sensitive) acquired with the purchase card;
    c. questioning the cardholder about suspicious transactions and resolving those transactions with the cardholder; and
    d. promptly signing, dating, and forwarding the cardholder's Statement of Account and any dispute forms to the Finance Office so that the

statement is received by the Finance Office not later than the 15th of each month, or earlier, if required by local procedures. If the cardholder has access to PaymentNet, the dispute process must be completed electronically. In accordance with local procedures notification e-mails should be sent to appropriate parties. (Refer to Section 2.34 and Attachment 6 for more information.)

5. Notifying the OPC if monthly account reconciliations are not submitted in a timely manner, and if there are suspected cases of fraudulent, improper, abusive, or questionable purchases by the cardholder.
6. Notifying the OPC as soon as possible (in most cases prior to the event) to close any cardholder accounts for individuals who have transferred, been terminated, are in "absent without leave" (AWOL) status, retired or have otherwise no further need for use of the purchase card. Departing cardholder's purchase cards, and convenience checks, if applicable, should be destroyed.
7. Notifying the OPC of any lost, stolen or compromised cards (in addition to the cardholder's immediate notification of the JPMChase Bank) and submitting a report to the OPC within five business days to detail the circumstances of the lost, stolen or compromised card.

2.7.5 Finance Office: Certifying Officers are financially responsible for any illegal, improper, or incorrect payment as a result of an inaccurate or misleading invoice.

Responsibilities include, but are not limited to, the following:

1. Coordinating with their budget officer and/or resource management to ensure accuracy of payments, including designation of the proper appropriations or other funds, certified to the paying office.
2. Reviewing and reconciling all Statements of Account to the invoice submitted from the JPMChase Bank. This includes distributing purchase card charges and credits to the appropriate accounts.
3. Ensuring that payments to the JPMChase Bank are made in accordance with the Prompt Payment Act.
4. Ensuring all payments meet the requirements of applicable law and regulations, including determining the availability of appropriations as to purpose for items purchased.
5. Establishing procedures for receiving and verifying the amount of rebates received from JPMChase Bank.
6. Notifying the OPC of any problems with individual cardholder accounts.
7. Ensuring 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 OPC; and,
    c. program accounts are only charged in accordance with the funding direction provided on approved cardholder statements.

8. Determining whether to pursue faster payment of official invoices in order to take advantage of the productivity rebates, if in the best interest of the Government, and making payment on the proper date.

Note: It is suggested that the invoice be paid in full each month, even if the finance office believes the cardholder will file a dispute. This will prevent interest charges from being assessed if there is no dispute (i.e., no credit assessed). JPMChase Bank will apply the funds to the following Statement of Account, if applicable.

2.8 Nominations and Training Requirements for Purchase Cardholders and Approving Officials. A Delegation of Purchasing Authority will evidence a cardholder's appointment. If the cardholder will have convenience check writing authority this must also be evidenced in writing. A cardholder may not receive a purchase card until their AO has taken the training. The cardholder must certify, by whatever method deemed appropriate by the local office, that they have received the training, understand the regulations and procedures, and know the consequences of inappropriate actions. Contractor personnel, while not held to Federal training standards, should possess equivalent training and experience while serving in purchase cardholder positions

Minimum Initial Cardholder and AO Training Requirements:

1. All Federal cardholders and Federal Approving Officials must take the GSA SmartPay Purchase Card Program online training course addressing responsible use of the purchase card at https://training.smartpay.gsa.gov/. Registration is required prior to taking the quiz and receiving the training certificate.
2. Contractor cardholders and AOs are not required to take the GSA training and may develop their own training. However, initial and local training must not remove any requirement set forth in the FAR, OMB Guidelines, GSA training, or this document. Furthermore, GSA's training should be reviewed annually for possible updates.
3. For audit purposes, upon completion of any initial or refresher training listed above, a certificate or other confirmation must be sent to the OPC.

The training must be retaken no less than every two years.

2.9 Organizational Program Coordinator Training. Individuals appointed as OPCs must be experienced contracting personnel. All OPCs, including contractor personnel, must complete the SmartPay online training available at: https://training.smartpay.gsa.gov/. Registration is required prior to taking the quiz and receiving the training certificate. OPCs will not receive access to any HQ or JPMChase Bank system until the training has been completed. The training must be retaken no less than every two years and submitted to the APC. OPC's that do not retake the training, upon receiving three reminders from the APC, may have all access rights revoked until the training is completed.

Contractor personnel serving in these positions should have course work equivalent to that associated with the DOE Certification levels.

OPCs are also expected to participate in conference calls which will be scheduled by the APC. All OPCs are encouraged to attend the Annual Purchase Card Training Conference sponsored by the JPMChase Bank and the GSA.

2.10 Purchases. FAR 13.301, Government wide commercial purchase card, states the card may be used to (1) make micro-purchases; (2) place a task or delivery order (if authorized); or (3) make payments, when the contractor agrees to accept payment by the card. Agency procedures should encourage use of the card in greater dollar amounts by COs to place orders and to pay for purchases against contracts established under Part 8 procedures, when authorized; and to place orders and/or make payment under other contractual instruments, when agreed to by the contractor. Pursuant to FAR 32.1108, the purchase card may 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, Payment by Third Party.

Purchases of supplies and services should be made based upon proper authorization. Proper authorization includes requisitions from a responsible official (independent of the purchase cardholder), emails, and other documents that identify an official Government need, including blanket authorizations for routine purchases. The authorization must describe the supplies or services to be purchased, quantity, estimated cost, delivery requirements, potential sources, if known, and document that funds are available for the purchase. In limited circumstances, as provided by the AO, purchases may be authorized without prior review, if a blanket letter of authority (sample letter in Attachment 5) has been provided to the cardholder or a SF-1402. The cost of the supplies or services to be purchased must be determined to be fair and reasonable. If it is not possible for the requester to make the request in writing, the purchase cardholder should document in their file the requester's name, item description, quantity, estimated costs, and date of the request. The purchase cardholder should also document availability of funds at the time of each purchase and obtain prior approval before making self-generated purchases.

Purchases must only be shipped to the office's business address. Personal addresses must never be used to receive shipments. Cardholders that have items shipped to a personal address will lose their purchasing authority.

Purchases of services may be made with the purchase card. A fixed price must be agreed to prior to services starting or there must be a fixed hourly rate established along with a not to exceed amount. Services must not be paid until after services have been performed. Additionally, the card should not be used to acquire services greater than $2,500 subject to the Service Contract Labor Standards as formal wage determinations are required above that amount. Service Contracts Labor Standards was enacted to ensure that Government contractors compensate their blue-collar service workers and some white-collar service workers fairly, but it does not cover bona fide executive, administrative or professional employees. Training classes are not subject to the Service Contract Labor Standards and may be paid in advance, if required by the merchant to ensure a seat in the class.

A purchase order, or other contracting method, must be used by the procurement office if acquisitions require multiple, separate deliveries or performance of multiple tasks with multiple invoices/payments over 2 or more months (excluding annual service plans with fixed monthly charges), and/or the total will exceed $3,500. This requirement does not apply to purchase cardholders using the card as a method of payment for issued purchase orders, or other contracting method, signed by warranted a CO. (Refer to Acquisition Guide Chapter 13.302, Purchase Orders.)

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 as a formal contract is required above that amount.

A determination must be made as to which items are best handled with the purchase card, and decide when to actually buy the supply or service. When purchases are planned the requirements should be combined in order to qualify for volume discounts. Similarly, small-scale purchases can be made to avoid wasteful stockpiling. Planning ensures that the mission of the office is effectively accomplished by purchasing higher priority items before lower priority items.

The amount of available funds must be established prior to making any purchases.

2.11 Reservation/Certification of Funds. The use of STRIPES will fulfill this requirement. If STRIPES is not being used within your office then local procedures must be established to reserve and certify funds.

Purchases must be tracked to ensure that there are sufficient funds available, including the 1.5% convenience check fee, to make all required purchases. Cardholders should use a log system to record purchases and the dollar amounts committed. Refer to the sample Purchase Card Log, Attachment 9.

Obligations will be recorded when transactions are passed from STRIPES to Standard Accounting and Reporting System (STARS) via an electronic interface process. STRIPES will assign a purchase card order number to each order. The interface will convert this number to a STARS purchase card order number when the obligation is made in STARS.

When the funds are obligated in STARS, the interface process will cause the status in STRIPES to change from “Pending Financial Approval” to “Released”. Within two business days following entry of the purchase into STRIPES, the program office can also generate a report from the Integrated Data Warehouse (IDW) to determine whether the obligation was successfully made in STARS. For more information regarding IDW, contact the I-MANAGE helpline at 301-903-2500, or visit https://iportal.doe.gov/.

2.12 Oral Purchases Procedure (including Telephone Orders). A procedure where 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 merchant supplies the items or

services requested by the cardholder, and payment is made to the merchant using the purchase card.

1. Oral purchases to acquire supplies or services may be accomplished using the Purchase Card provided that:
    a. the supplies or services can be described in sufficient detail so that the parties have a clear understanding of what is required;
    b. the amount of the purchase is at or below the micro-purchase threshold; and
    c. a purchase order or contract is not required by either the merchant, DOE, or the FAR.
2. When an order is placed via telephone using the purchase card, the cardholder will:
    a. Notify the merchant that the purchase is tax exempt. Should a merchant refuse to acknowledge the tax exempt status of the purchase, the ultimate recourse for the cardholder is to inform the merchant that the Government's purchase will be taken elsewhere. Contractors may or may not be tax exempt depending on the contractor’s own tax exempt status. Tax exemption is guaranteed to contractors via GSA Advantage.
    b. Ensure that the supplies or services acquired will be received prior to the end of the billing cycle. Supplies or services not received prior to the end of the billing cycle may not be approved for payment by the cardholder and AO on the monthly Statement of Account. Therefore, the cardholder should confirm that the merchant 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. (NOTE: Subscriptions and classes may be ordered and payment authorized even though the subscription or class has not been received by the end of the billing cycle. (Refer to Section 2.17 for additional information.)
    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. It should be noted that the FAR preference is F.o.b. destination, whenever possible. This means the merchant should be responsible for the cost of shipping and risk of loss.
    d. Instruct the merchant to include the following information on the shipping document or packing slip. 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.
3. The cardholder will execute and maintain appropriate records of each transaction.

Note: Cardholders should use caution when giving out their purchase card account number. Cardholders should not include their purchase card account number when faxing orders. It is highly recommended that the fax requests the merchant contact the cardholder for account information.

2.13 Competition. Purchases not exceeding the micro-purchase threshold may be made without securing competitive quotations if the cardholder considers the prices obtained from a single source to be fair and reasonable. Purchases made without securing competition will be distributed among qualified suppliers by means of rotating recurring purchases among merchants. If a purchase recurs frequently, consideration should be given to consolidating the requirements to obtain quantity discounts. Refer such matters to your OPC.

2.14 Micro-Purchases under the Purchase Card Program. Per FAR 13.201, simplified acquisition procedures are to be used for acquiring products and services valued at or below the micro-purchase threshold.

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. Cost is important but quality, availability, and reliability of the merchant and product are also important.

Key streamlining features of the micro-purchase program are noted in the chart below.

UP TO MICROPURCHASE THRESHOLD	**ABOVE MICROPURCHASE THRESHOLD**
Allows delegation to nonprocurement cardholders	Requires a Contracting Officer warrant
Purchase and payment method	Place task or deliver order (if authorized in the basic contract, basic ordering agreement, or blanket purchase agreement); or make payments when the contractor agrees to accept payment by the card
FAR Subparts 23.1, 23.2, 23.4 and 23.7 applies	FAR Part 23 applies
Requires rotation of merchants (i.e., if there are multiple merchants and a recurring requirement, rotate the award among the	Small business restrictions apply

merchants) – small business restrictions do not apply, but are strongly encouraged	
No competition required, if price considered reasonable	Competition and price reasonableness applies
No contract clauses, provisions, or certifications required, except as provided at FAR Subpart 13.202 and 32.1110	Contract clauses, provisions, and certifications are required
No System for Award Management (SAM) (FAR 4.1102)	SAM required
No contract reporting	Contract Reporting applies
Exempt from provisions of Buy American	Buy American applies

In addition, all other requirements contained in these Procedures apply to micro-purchases.

2.15 Mandatory Sources. Cardholders are subject to the regulatory requirements contained in FAR Part 8, "Required Sources of Supplies and Services."

(Listed in Descending Order of Priority)

SOURCES	SUPPLIES	SERVICES
Inventories of the requiring agency	X	
Excess from the other agencies	X	
Federal Prison Industries (FPI)	X	
Procurement List maintained by the Committee for Purchase From People Who Are Blind or Severely Disabled	X	X
Wholesale supply sources, such as stock programs of GSA, DLA, VA	X	
Commercial Sources	X	X

2.16 Prohibitions and Restriction. Purchase card purchases are subject to the following restrictions and prohibitions:-

1. Cash advances: Money orders, traveler's checks and convenience checks, to federal employees.
2. Rental or lease of land or buildings: Land and/or buildings, for a term longer than one month is prohibited.
3. Purchase of software requiring a negotiated license agreement between DOE and the contractor (excludes "shrink wrap" license affixed to commercially available software).
4. Purchase of supplies or services for GSA fleet operated vehicles and DOE owned vehicles.
5. Purchases of food, beverages and entertainment, except under very limited circumstances generally associated with away from work place training that must be approved, by the OPC, in advance in all cases.
6. Purchases that are taste-specific or displays character-centric brands, logos or insignia is not allowed, unless of an official nature. (When property/assets are procured using government funds, the purchaser has a fiduciary responsibility to procure only those items that are a right representation of the DOE, and in no way detracts from or compromises the seriousness with which we hold our mission and the taxpayer trust.)
7. The purchase card must not be used in lieu of the Government authorized travel charge card. Travel or travel-related expenses are not allowed. However, short term conference/meeting spaces, local transportation services, and shuttle services can be properly acquired on a purchase card.
8. Purchases that utilize third party payment merchants (e.g., PayPal iBill and MyPay) are prohibited except with written approval of OPC. When making this determination the OPC should consider if there is another merchant available to provide the supply or service at a reasonable price and within the necessary timeframe. Where it is identified that the purchase will be processed via a third-party merchant, the cardholder must make every attempt to choose another merchant from which to procure the goods and/or services. If it is still found necessary to procure using a third-party payment merchant, the AO must ensure there is adequate supporting documentation showing that there was a detailed review of the purchase and that the use of the third-party payment merchant was unavoidable. In the event the cardholder was unaware the merchant used a third-party merchant until the Statement of Account revealed this information, the cardholder should not use that merchant for future purchases unless the aforementioned steps are followed. Note that transactions made with a third-party payment merchants are considered high-risk transactions for both subsequent audit and data mining screening. Third party payment merchants are considered high risk for the following reasons:
    a. **Account Establishment Requirement -** In some instances, the cardholder may be required to establish an account in order to make a purchase through a third party payment processor. The individual may be asked to provide detailed information and also to agree to commercial terms and conditions

provided by the processor. Cardholders are prohibited to establish accounts and agree to commercial terms and conditions without consent from their legal counsel. Cardholders that agree to commercial terms and conditions without the proper authority or approval may be in violation of the Anti-Deficiency Act.

b. **Account Verification Limits -** In many instances, third party payment processors require account verification after a certain dollar threshold has been reached during an established period of time (e.g. one month, one year). These limits vary depending on the merchant and the type of products being purchased. For example, a cardholder has reached a monthly transactional limit of $5,000. The third party payment processor will not continue to process payments above that threshold until the cardholder provides the payment processor with a bank account number to verify that the cardholder is the actual owner of the card. This feature is in place to help prevent and detect fraud, however, GSA SmartPay Government charge cards are not linked to commercial or individual bank accounts. Therefore, it is impossible for cardholders to provide this information. This could result in a limitation on cardholders' abilities to make timely purchases.

c. **Disputes -** In a typical dispute process, the issuing bank works with the merchant directly to resolve a disputed transaction. The merchant is directly responsible for dispute resolution and any associated payments. When a third party payment processor has been utilized, however, the processor works with the issuing bank as an intermediary on behalf of the merchant. In some instances, when using a third party payment process the dispute process may differ greatly from that of the issuing bank dispute process. Cardholders should be instructed to read and thoroughly understand the third party payment processors dispute policy prior to making the purchase.

d. **Merchant Name -** When a third party payment system is used to pay a merchant for supplies or service, the merchant name is sometimes "truncated" and includes the payment processor name in the merchant field. This may create difficulty and inaccuracy for reporting, reconciliation, and oversight purposes.

e. **Data -** There is often less transactional data available when utilizing a third party payment processor. The cardholder may only receive the merchant name and dollar amount of the transaction when making a purchase with a third party payment processor.

9. Purchases by federal employees for contractor personnel, unless the contract states that DOE is responsible for providing the service or supplies.
10. 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, which require compliance with Government Printing Office regulations and guidelines; and
i. Photocopier equipment.

This list is not intended to be comprehensive and may be further supplemented with local prohibited items. Local procedures must not remove any of the prohibitions from this list.

Banks group merchants within merchant categories based on their type of business. Purchases from the following MCCs have been blocked. Should a cardholder need to make a valid purchase from a merchant in one of these category codes, their OPC will need to clear the purchase with the JPMChase Bank. If recurring transactions need to be made from blocked MCC's the OPC must submit a request, with justification, to the APC for approval.

MCC	DESCRIPTION
3000 - 3299	AIRLINES
3351 - 3441	CAR RENTAL AGENCIES
4112	PASSENGER RAILWAYS
4119	AMBULANCE SERVICE
4411	STEAMSHIP/CRUISE LINES
4511	AIRLINES, AIR CARRIERS
4722	TRAVEL AGENCIES
4723	TUI TRAVEL AGENCY
4829	WIRE TRANSFER MONEY ORDER
5309	DUTY FREE STORES
5422	FREEZER/MEAT LOCKERS
5441	CANDY/NUT/CONFECTION STORES
5451	DAIRY PRODUCT STORES
5571	MOTORCYCLE DEALERS
5641	CHILDREN/INFANTS WEAR STORES
5681	FURRIERS AND FUR SHOPS
5698	WIG AND TOUPEE STORES
5718	FIREPLACES & ACCESSORIES
5733	MUSIC STORES/PIANOS
5813	BARS/TAVERNS/LOUNGES/DISCOS
5814	FAST FOOD RESTAURANTS
5816	DIGITAL GOODS GAMES
5921	PKG STORES/BEER/WINE/LIQUOR
5932	ANTIQUE SHOPS
5933	PAWN SHOPS

5937	ANTIQUE REPRODUCTION STORES
5944	JEWELRY STORES
5949	FABRIC STORES
5960	DIRECT MARKETING INSURANCE SVC
5962	DIRECT MKTG-TRAVEL RELATED ARR
5963	DIRECT SELL/DOOR-TO-DOOR
5972	STAMP & COIN STORES
5973	RELIGIOUS GOODS STORES
5977	COSMETIC STORES
5993	CIGAR STORES/STANDS
5996	SWIMMING POOLS/SALES/SERV
5997	ELEC RAZOR STORES/SALE/SERV
6010	FINANCIAL INST/MANUAL CASH
6011	FINANCIAL INST/AUTO CASH
6012	FINANCIAL INST/MERCHANDISE
6051	NON-FIN INST/FC/MO/TC
6211	SECURITIES BROKERS/DEALERS
6300	INSURANCE SALES/UNDERWRITE
6381	INSURANCE PREMIUMS
6399	INSURANCE - DEFAULT
6513	REAL EST AGNTS & MGRS RENTALS
6536	VISA MOBILE MONEY TRANSFER
7012	TIMESHARES
7032	SPORTING/RECREATIONAL CAMPS
7033	TRAILER PARKS/CAMPGROUNDS
7261	FUNERAL SERVICE/CREMATORIES
7273	DATING & ESCORT SERVICES
7276	TAX PREPARATION SERVICE
7277	COUNSELING SERVICE - ALL
7297	MASSAGE PARLORS
7511	TRUCK STOP
7512	AUTOMOBILE RENTAL AGENCY
7531	AUTO BODY REPAIR SHOPS
7535	AUTO PAINT SHOPS
7542	CAR WASHES
7549	TOWING SERVICES
7800	GOVERNMENT OWNED LOTTERIES
7801	GOVT LICENSED ONLINE CASINOS
7802	GOV LICENSED HORSE/DOG RACING
7832	MOTION PICTURE THEATRES
7841	DVD/VIDEO TAPE RENTAL STORES
7911	DANCE HALLS/STUDIOS/SCHOOLS
7922	THEATRICAL PRODUCERS

7932	BILLIARD/POOL ESTABLISHMENT
7933	BOWLING ALLEYS
7941	COMMERCIAL/PRO SPORTS
7992	PUBLIC GOLF COURSES
7993	VIDEO AMUSEMENT GAME SUPPLY
7994	VIDEO GAME ARCADES/ESTABLISH
7995	BETTING/TRACK/CASINO/LOTTO
7996	AMUSEMENT PARKS/CIRCUS
7998	AQUARIUMS/SEAQUARIUMS
8211	ELEMENTARY/SECONDARY SCHOOLS
8351	CHILD CARE SERVICES
8651	POLITICAL ORGANIZATIONS
8661	RELIGIOUS ORGANIZATIONS
8675	AUTO ASSOCIATIONS
9090	UNKNOWN MERCHANT
9211	COURT COSTS/ALIMONY/SUPPORT
9222	FINES
9223	BAIL AND BOND PAYMENTS
9311	TAX PAYMENTS
9700	AUTOMATED REFERRAL SVC

2.17 Other Purchases.

2.17.1 Subscriptions. Cardholders must place subscription orders in the name of an organization or a position title (i.e., Building Manager or Director, XXX Division) rather than in the name of an employee. Cardholders must keep the renewal notice or a statement that reflects the beginning and ending date of the service. Subscriptions are allowed to be pre-paid.

2.17.2 Memberships. In accordance with 5 U.S.C. § 5946, agency funds cannot be used to pay for individual membership fees of DOE employees to join non-Federal entities, e.g., societies or associations. This prohibition does not apply if an appropriation is expressly available for that purpose, or if the fee is authorized under the Government Employee Training Act. Cardholders may purchase organizational memberships in the name of DOE if the membership will provide a benefit to DOE and further authorized activities of the agency. The organization's membership may authorize any designated employee to attend functions as DOE's representative.

2.17.3 Advertisements. Cardholders must obtain a copy of the advertisement or an affidavit of publication from the publisher, radio or television station or the advertising agency and keep this proof of advertising for reconciliation and payment purposes.

2.17.4 Training Registration. Once a training request is approved, cardholders may provide their purchase card account number to the training vendor by phone or on a registration form. Cardholder must log the training and attach the training approval and/or training related documents. Purchases for two or more individuals are considered separate and

distinct transactions. For example, a micro-purchase cardholder may pay registration fees for each individual up to their single transaction limit, not to exceed the monthly cycle limit.

2.17.5 Gift Cards. If there is an official Employee Incentive/Awards Program then gift cards may be purchased. The recipient of the gift card is required to pay taxes as it is considered additional income. Additionally, the gift cards must be logged and stored in a locked compartment by an authorized person, other than the cardholder.

2.17.6 Stamps. Stamps must be logged and stored in a locked compartment by an authorized person, other than the cardholder.

2.18 Merchant Surcharges. Fees, up to 4%, that a retailer adds to the cost of a purchase when a customer uses a charge/credit card. It is important to note that not all merchants will impose a surcharge. Surcharges may not be added to debit, prepaid or cash purchases and cardholders are required to be notified in advance of making the purchase if a merchant will impose a surcharge. Merchants must notify customers of this charge at the store entrance and at the point of sale. Merchants must also include the surcharge fee on any receipt(s) provided to the cardholder. For online purchases, this surcharge must be on the first page that references credit card brands. If a merchant is imposing a surcharge, the cardholder must consider another merchant that offers the same or similar item(s) to avoid paying the surcharge. In addition, some states have laws which do not allow or limit surcharges. Refer to GSA Smart Bulletin No. 017 for additional information.

2.19 Government and Higher Education Fees. Certain government entities and institutions of higher education are permitted to assess variable (percentage of the transaction) service fees on charge card transactions. If it's determined a service fee has been improperly assessed, the cardholder should dispute the charge with the contractor bank. When faced with a merchant intending on assessing a service fee for a transaction, cardholders should use other sources of similar supplies/services, if available, which do not to assess a fee. Refer to GSA Smart Bulletin No. 018 for additional information.

2.20 U.S. Government Tax Exempt Purchases. This section is applicable to Federal employees using the purchase card. The U.S. Government's tax exempt status does not extend to contractors even when they are operating a Government facility. Depending on an organization's ownership type, the contractor may be tax exempt in its own right.

Each 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. The SmartPay Card is viewed as a Government card and a determination has been made that it would be inappropriate to emboss any other tax exempt representation on the card. When a contractor is authorized use of the SmartPay card, JPMChase Bank will furnish a card without the U.S. Government Tax Exempt logo.

If the merchant does not initially acknowledge that purchase card purchases are exempt from state and local taxes, the cardholder will specifically inform the merchant that the government wide card provides that all card purchases will be exempt from state and local taxes. In addition, FAR 29.302, "Application of state and local taxes to the government contractors and subcontractors," states that purchases and leases made by the Federal Government are immune from state and local taxation. FAR 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.

U.S. Tax Exemption Certificate (SF-1094) is no longer used for micro-purchases. The Internal Revenue Service suggests that Federal agencies instead furnish merchants their Employer Identification Number as evidence of tax exemption.

A tax exemption map is available at: https://smartpay.gsa.gov/about-gsa-smartpay/tax-information/state-response-letter. Refer to GSA Smart Bulletin No. 019 for additional information.

Please note that DOE contractors are guaranteed tax exemption when using all GSA systems (e.g. Advantage, FSSI, Supply Store, etc.). Therefore, use of these systems are highly encouraged.

2.21 Amazon Tax Exemption. The Supremacy Clause of the Constitution does not permit States to levy taxes directly on the Federal Government when the Federal Government is directly responsible for paying the bill. Therefore, the purchase card is exempt from sales tax in every state and U.S. Territory. However, in order to obtain tax exemption, companies such as Amazon have set up a Tax Exemption Program, in which you must enroll, in order to receive tax exemption at the point of sale. Refer to GSA Smart Bulletin No. 019 for additional information.

2.22 Convenience Checks. Convenience checks can be written in lieu of using the purchase card for purchases from merchants who do not accept the purchase card and are limited to the threshold as established in FAR 13.305-3(b), which is currently $2,500. This convenience check transaction will appear on the cardholder's monthly Statement of Account. There is a service charge equal to 1.5% of the face value of the check for each check written.

The purchase card is the preferred method for completion of micro-purchases. Public Law 104-134, The Debt Collection Improvement Act of 1996, requires that, with limited exceptions, federal payments be made through electronic means. The Department of the Treasury has ruled that checks are not electronic funds transfer (EFT) compliant. Convenience checks are a payment and/or procurement tool intended only for use with merchants that do not accept purchase cards and for other authorized purposes where charge cards are not accepted. Convenience checks should be used as a payment method of last resort, only when no reasonable alternative merchant is available who accepts the charge card. 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, especially since a convenience check cannot be disputed. Additionally, repetitive purchases should not be made from the same merchant via convenience checks. A purchase order, or other contracting method, must be used by the procurement office if acquisitions require multiple, separate deliveries or performance of multiple tasks with multiple invoices/payments over 2 or more months (excluding annual service plans with fixed monthly charges), and the total will exceed $2,500. (Refer to Acquisition Guide Chapter 13.302, Purchase Orders.) A merchant locator tool is available at http://www.visa.com/supplierlocator/.

Convenience checks must not be written to:

- Merchants who accept the purchase card;
- Merchant transactions already under another method of acquisition, e.g., purchase orders, contracts, etc. (Refer to FAR 32.1103 for permissible exceptions);
- Cash;
- To the account holder;
- To other employees for reimbursements;
- Salary payments, cash awards, or any transaction processed through the payroll system;
- Travel related transportation tickets; and
- Meals or lodging related to employee travel except as related to emergency incident response.

Cardholders must maintain a Convenience Check Log which must include the check number, merchant name, business address, merchant TIN or SSN, the description of the purchase, the dollar amount of the purchase, the dollar amount of the check fee, and the total cost.

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 1.5% of the face value of each check processed. If the check exceeds $2,500 due to the convenience fee being added, the purchase does not have to be entered into FPDS-NG. Cardholders are to manage such checks in the same manner as they do card purchases, i.e. reservation of funds, AO coordination, documentation, maintenance of receipts, and reconciliation. Convenience checks may not be written above the $2,500 for supplies, $2,500 for services, and $2,000 for construction.

Cardholders authorized to use convenience checks must contact the OPC via e-mail to reorder convenience checks.

Elements of a properly written convenience check

Checks must be used in sequential order. Each convenience check must be entered in a check register or log for tracking purposes. The check fee must also be deducted in the register or log, if applicable. At a minimum, the following information must be entered on each check:

- DATE: Enter the date on which the check is being issued. Spell out the date (e.g., October 30, 2009). Do not predate or postdate a convenience check;

- PAY TO THE ORDER OF: Enter the name of the payee. To ensure the merchant's name is legible to JPMC, the payee's name should be clearly printed, and not written in cursive. Under no circumstances may convenience checks be issued to "cash" or the payee line left blank. Checks may not be issued to "self";
- AMOUNT: Write the amount of the convenience check in the spaces provided in numbers and words; e.g., one hundred twenty-six dollars and 39/100 in the applicable space; and
- An original signature.

Convenience checks should be written only for the exact amount of the purchase.

2.23 Internal Revenue Service Data for Convenience Check Transactions. Internal Revenue Service (IRS) 1099 data is required to be sent to every merchant whom DOE paid at least $600 with a convenience check. The $600 is a cumulative amount across the DOE, meaning that all payments to a single merchant are added together to determine if they meet the $600 limit. Generally, payments to a corporation are exempt from 1099 reporting. However, federal executive agencies are required to report all convenience check payments made to corporations for services.

Exceptions: Some payments are not required to be reported and include:

- Payments for merchandise, telegrams, telephone, freight storage and similar items; and
- Payments to a tax-exempt organization, Government Agencies, states (including state universities), the District of Columbia, U.S. possessions, or a foreign government.

To comply with the reporting requirements, prior to issuing a convenience check, cardholders must obtain the Taxpayer Identification Number (TIN) or Social Security Number (SSN), if applicable, and business address when making convenience check purchases for services. A TIN is a nine-digit number required by the IRS to be used by merchants in reporting income tax and other returns. For some small businesses, the TIN may be a social security number.

Offices using Oak Ridge Payment Services Team (ORPST) as a payment center and making purchases via Convenience Check should follow the steps outlined below.

Purchases of supplies and services may be bulk funded and paid under a blanket purchase agreement.

When ORPST receives the electronic invoice file from JPMChase Bank, all convenience checks will be identified by the cardholder. An email will be automatically generated to the cardholder when the file is processed. The email will state that a convenience check was used and will give the check number, merchant name, date of purchase, and amount. The email will also contain a link to the Financial Accounting Support Tool (FAST). Once the cardholder logs into FAST, click on the Convenience Check tile and fill out the requested information as follows:

- Merchant TIN or Individual SSN;
- Merchant Legal Business Name and Doing Business As (DBA) Name if different (Please note that handwritten convenience checks are scanned by JPMChase and information entered into their database that is then transmitted to the ORPST. Many times the vendor names do not translate correctly. It is very important to make sure the vendor names are corrected in the log.);
- Business address; and
- Description of purchase (this will be used to determine if the purchase is 1099 reportable).
- If travel reimbursement is included, please break out the amount of travel from the payment for services as travel is not reportable.

Responses will be due within 7 business days from the date of the email and will be required for all convenience check purchases. ORPST will determine if the purchase is reportable or not based on the description provided by the cardholder. ORPST personnel will also follow-up with any cardholder that has not responded within the required timeframe. If a cardholder is no longer with the Department at the time the email is sent, ORPST will receive a rejected email and will work with the site office to obtain the required information.

Note: A report will be added to FAST that provides a list of all convenience checks recorded for the current calendar year. The report allows cardholders to view merchants that have cashed their checks as to determine which checks are still outstanding. This report will be available by clicking on the FAST Reporting Module tile and then the report entitled "Convenience Checks Issued This Calendar Year".

If you have any questions about the information required for reporting or any of the requirements stated in this document, please call the ORFSC's toll free number at 1-888-251-3557 or email orpstpayments@science.doe.gov.

2.24 Personal Property Management and Accountability.

2.24.1 Accountable Property. All personal property considered nonexpendable whose expected useful life is two years or longer and whose acquisition value warrants tracking in the agency's property records, including capitalized and sensitive property.

2.24.2 Personal Property. Property of any kind except real property. It may be tangible, having physical existence, or intangible, having no physical existence, such as copyrights, patents, or securities.

2.24.3 Sensitive Property. Items, regardless of value, that require special control and accountability because of susceptibility to unusual rates of loss, theft, or misuse or due to national security and export control considerations. Examples include: fire arms/ammunition,

desktop and laptop computer equipment, readily portable computer peripheral devices, iPads, iPods, cellular phones, televisions, DVD players, and digital cameras.

2.24.4 Receipted. Written acknowledgment of having received an item and accepted accountable and custodial ownership.

2.24.5 Received. Having taken physical possession of item purchased.

Personal Property Management

1. DOE administers a personal property management program to maintain sound and proper accountability and control of the personal property procured and managed for DOE (reference 41 CFR 109). Regardless of how the property item is acquired and brought into the DOE inventory (i.e.: transfer, donation, major acquisition, or purchase card, etc.), a critical element of this program is the timely and proper recordation of the property upon its receipt in the appropriate property management system of record.
2. Property is generally received at a central receiving office and issued to the end-user to be placed in service. The receipt documentation associated with this purchase must be forwarded to the applicable property management office for recordation in the property management system of record as accepted into the DOE inventory. When property is acquired using a purchase card, and the end-user is both the cardholder and receiving entity, the cardholder is responsible for ensuring that the item is identified as accepted DOE property.

Property Accountability

1. Purchases Shipped or Receipted by Central Receiving: Personal property acquired using the purchase card and delivered by the merchant are to be processed by the receiving office and upon acceptance, reported in the appropriate property management system of record.
2. Purchases Receipted by the Cardholder: Personal property purchased and receipted by the cardholder is to be reported to the property management office, in writing (i.e., via E-mail or facsimile), requesting that the equipment/property be reported in the appropriate property management system of record. Written notification/confirmation of property receipt should include the following:
    a. Cardholder name, office symbol, telephone number, building and room number;
    b. Nomenclature (item description);
    c. Model No. and Serial No. of the personal property;
    d. Original acquisition cost;
    e. Delivery or acceptance date; and
    f. Receipt verification witness name, office symbol, telephone number, building and room number.

3. Cardholder Accountability: Abuse or repeated non-compliance with property accountability requirements will be grounds to suspend the purchase card accounts until such time as cardholder refresher training has been completed and there is sufficient assurance that property accountability documents are made current and correct.
4. As is true for Government purchased supplies and services, personal property is *for official use only*. For example, an iPod purchased to view podcasts of work-related presentations and lectures should not also be used to store personal music and photos, nor should it be engraved with the user's name.

Local Procedures

Local policies and procedures must be established for the accountability and management of personal property procured using a purchase card. At a minimum, the guidance should include:

1. A process of notifying the office property management activity of property receipt, including situations where property is delivered at locations other than a central receiving facility;
2. A process for the office to record property in the agency property tracking system and financial systems, including the designation of property as sensitive or accountable, when applicable;
3. Documentation of independent receipt and acceptance, when appropriate, to ensure that items purchased were actually received, including procedures addressing remote locations and emergency/urgent purchases where independent acceptance may be difficult or impossible; and
4. Procedures for cardholders and/or custodians of the property to follow when property is determined to be missing, stolen, or damaged.

These policies and procedures must be implemented as not to unnecessarily disrupt the streamlined benefits associated with the use of the purchase card. Offices should ensure that controls of property are consistent with agency standards for property purchased through other methods. In addition, local policies and procedures for property management and control are to be consistent with agency standards for property purchased through other methods.

Note: When property/assets are procured using government funds, the purchaser has a fiduciary responsibility to procure only those items that are a right representation of the DOE, and in no way detracts from or compromises the seriousness with which we hold our mission and the taxpayer trust. Procurement of Government personal property that is taste-specific or displays character-centric brands, logos or insignia is not allowed, unless of an official nature.

2.25 Reconciliation Process. Each monthly Statement of Account must be reviewed and approved, in a timely manner, by both the cardholder and an AO. An AO 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 National Nuclear Security Administration (NNSA) contracting activities, an AO 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. The AO must not approve any purchases that they personally requested.

Upon receipt of the statements from JPMChase Bank, either electronically or in hard copy, the following actions must be performed:

1. Cardholders must:
    a. Reconcile the Statement of Account with their Purchase Card Log, Convenience Check Log, if applicable, 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. Annotate any receipts that are too general in the product description area so that it is clear what item was purchased. (In the applicable log, the description of the purchase should never be left blank and should be specific enough for the AO to ascertain if the purchase was a business necessity.)

        At a minimum, the purchase card log must have the following information:
        - The item purchased (including a detailed description, unit number and quantity)
        - The amount of the purchase and availability of funds
        - The name of the merchant
        - The date the supplies or services were received
        - If a convenience check, the TIN and business address of the merchant must be identified
    b. Retain any charge/credit slips and customer receipts for purchases not listed on the Statement of Account for the next billing cycle.
    c. Document statement errors with an explanation using the JPMChase Bank cardholder dispute form and forward a copy to JPMChase Bank. If the cardholder has access to PaymentNet, the dispute process must be completed electronically. (Refer to Section 2.27 for additional information.)
    d. Certify the receipt and accuracy of all purchases by signing and dating the Statement of Account, and cite proper accounting codes, as necessary.
    e. Forward the reconciled Statement of Account, charge/credit slips, other customer receipts and, if applicable, the completed dispute form (if using PaymentNet a copy should be printed), to the AO within five working days, or sooner if required by local procedures, of receipt of the Statement of Account.
    f. If the cardholder does not have a customer copy of the receipt, the cardholder should request a copy from the merchant. If a copy of the receipt cannot be obtained, the cardholder will mark the word "lost" over in the date of purchase column on the Statement of Account and attach an explanation.
    g. 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 AO with the charge/credit slips.

h. If a credit is received several months after the original purchase, it should be reconciled back to the original purchase documentation and note that the credit was received.

Cardholders should not wait until the end of the cycle to accomplish the reconciliation. Cardholders that have PaymentNet access have the ability to review their transactions as they post to their Statements of Account. Frequent review of the transactions by the cardholders should help to eliminate disputes at the end of the cycle, as it will allow merchants time to apply credits for improper charges.

2. Approving Officials must:
    a. Not review any purchases that they personally requested.
    b. Review the individual cardholder's Statement of Account for accurate reconciliations, applicable logs, supporting documents (e.g., receipts, explanations), independent property received and tagging, if necessary, authorized purchases, credits, budget and cost classifications, and other related information.
    c. Obtain any other necessary information in a timely manner from the cardholders within their jurisdiction.
    d. Approve by signing and dating the reconciled Statements of Account and forward them to the Finance Office by the 15th day of each month, or earlier if required by local procedures. Return receipts and other supporting documentation to the cardholder for record maintenance unless local procedures provide for Finance Office maintenance of records.

The AO's signature and date on the cover page of the cardholder's monthly Statement of Account implies a number of things, including but not limited to,

- all purchases were authorized,
- the cardholder conducted market research, as applicable,
- the cardholder did not make repetitive purchases for the same item from one merchant,
- requirements were not split,
- documentation for the purchase transaction is complete,
- documentation and invoice dates match purchase dates, and
- and property was received and tagged, if applicable.

If the AO is not approving the Statement of Account within the reconciliation time period, there is a risk that the aforementioned areas could be violated.

If the AO will be out of the office, then the OPC must review/approve the cardholders Statement of Account, unless the local procedures designates another official that has completed the GSA cardholder training.

3. Finance Offices must:
    a. Review Statements of Account and any dispute forms for accurate reconciliations.
    b. Account for all purchase card transactions.
    c. Reconcile the consolidated statement with cardholders' Statements of Account.
    d. Reconcile the JPMChase Bank's invoice with the consolidated report.
    e. Make payment to JPMChase Bank in accordance with the Prompt Payment Act.
    f. Ensure all payments meet the requirements of applicable law and regulations, including determining the availability of appropriations as to purpose for items purchased.

Note: It is suggested that the invoice be paid in full each month, even if the finance office believes the cardholder will file a dispute. This will prevent interest charges from being assessed if there is no dispute (i.e., no credit assessed). The bank will apply the funds to the following Statement of Account, if applicable.

2.26 Credits and Rebates. Purchase cardholders are frequently using sources like eBay, Amazon.com and others to meet DOE requirements. Many of these on-line merchants have implemented incentive programs such as such as “rewards points/dollars” to further attract additional business.

It is important to note that these rewards or incentives are property of the Federal government and may only be used for official business purposes. These rewards are not for personal use or private gain. The Standards of Ethical Conduct for Employees of the Executive Branch (5 CFR 2635) states: “an employee must not use his public office for his own private gain.” The purchase card is used to acquire products and services intended for the government’s use, and charges made with the card are paid for with government funds. Purchase cardholders who register their purchase cards with these merchants must be aware that any reward points or other incentives are not for personal use. The points or incentives must be used for future government purchases or to benefit the cardholder’s agency/organization in some way.

- Cardholders should take advantage of any savings, such as rebates, incentives, and any discounts offered by the merchant. Cardholders are encouraged to seek a price reduction, rather than rebates, but may accept and use rebates, for official business, if a price reduction cannot be obtained. All reimbursements, rebates, or discounts, if received by check, must be made payable or endorsed to the U.S. Treasury, not to the cardholder. Checks should be forwarded to the OPC or the Finance Office for deposit. The cardholder’s records should reflect specific details of all such transactions. If reimbursements, rebates, or discounts are received by gift card, the gift card should be forwarded to the OPC or the Finance Office for safekeeping until it is needed by any cardholder for official business.

- Federal law prohibits cardholders from accepting or soliciting cash or merchandise from merchants.
- Under no circumstances is a cardholder permitted to solicit or accept merchandise store credit or cash for returned goods or services bought with the purchase card. Any credit must be documented in the cardholder's records.
- The cardholder must monitor their statement for the proper amount of credit expected from the merchant.

If an item is returned, a credit will appear on the cardholder's Statement of Account. Return and exchange policies are merchant specific. The cardholder is responsible for noting the merchant's policy and adhering to them. 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 goods or services purchased. The cardholder is required to save the charge slip and any other receipt for forwarding to the cognizant AO along with the monthly Statement of Account and purchase card log. 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 reflects the credit.

2.27 Disputes. A disagreement between a cardholder and a merchant regarding items appearing on the cardholder's monthly Statement of Account, which is presented to JPMChase Bank for resolution. Disputes could be the result of supplies/services billed to the Statement of Account but not received; the purchase card was not credited for merchandise returned; or an unauthorized charge from the merchant.

If a cardholder receives a Statement of Account that lists a transaction for an item or service that has not been received, or represents an unauthorized charge, the cardholder or AO will make a concerted effort to resolve the charge with the merchant. If unable to resolve the charge with the merchant a dispute should be initiated with JPMChase Bank.

If the cardholder does not have access to PaymentNet, complete the cardholder dispute form (Attachment 12) and forward a copy of the form to JPMChase Bank and the original to the Finance Office with the cardholder's reconciled monthly Statement of Account and supporting documentation.

If the cardholder has access to PaymentNet, this process must be completed electronically. When a cardholder files a dispute, there is a field to enter additional e-mail addresses for notification that a dispute has been submitted. In accordance with local policy, notification e-mails should be sent to appropriate parties. Check your office's local policy to identify any individuals the cardholder must add in the notifications section.

JPMChase Bank will credit the transaction until the dispute is resolved. JPMChase Bank will assist in reconciling the questioned item only if the dispute is filed within 90 calendar days from

the date that transaction has posted to the Statement of Account. However, it is the responsibility of the cardholder to make every effort to resolve errors, discrepancies and disputes.

Maximum efforts should be made to initiate a transaction dispute (when needed) with JPMChase Bank as soon as possible. Merchants will only be charged back for a disputed transaction within 120 calendar days from the transaction date. If the full 90 calendar days expires before filing a dispute, only 30 days remain for JPMChase Bank to investigate the dispute and charge back the merchant if necessary. The less time allowed for thorough investigation of the dispute, the greater the potential for fewer disputes being ruled in favor of the Government/cardholder. Cardholders who fail to timely dispute erroneous or incorrect purchases may become personally liable for that purchase.

NOTE: Taxes, shipping charges, E-bay transactions, and convenience check transactions are not disputable.

2.28 Lost, Stolen, or Breached Cards.

2.28.1 Telephone Notification. If the purchase card is lost, stolen or breached, it is the responsibility of the cardholder to notify their OPC and the JPMChase Bank within one work day after discovering the card missing at the following telephone numbers 24 hours/day:

- Inside the continental United States - 1-888-297-0781
- Outside the continental United States - call collect 1-847-488-4441

2.28.2 Written Notification. The cardholder will also notify the AO and the OPC of the lost, stolen or breached card within one work day after discovering the card missing. The AO will submit a written report to the OPC within 5 work days. The report will include the following information:

- Card number
- Cardholder's complete name;
- Date and location of the loss;
- Date and time JPMChase Bank was notified;
- Any purchases made on the day the card was lost/stolen, or the last known purchase before the card was lost/stolen; and
- Any other pertinent information.

2.28.3 Card Replacement. JPMChase Bank will mail a new card within 2 business days of the loss or theft. Please remind the JPMC customer service representation to overnight the card, unless your office has a PO Box on file, as cards cannot be overnighted to a PO Box. A card that is subsequently found should be cut in half and given to the AO.

2.28.4 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, or penalty under 18 U.S.C § 287, *False, fictitious or fraudulent claims*. The liability of centrally billed accounts, for purchase card transactions and lost or stolen checks, must not exceed the lesser of $50 or the amount of money, property, labor, or services obtained before notification to JPMChase Bank. Unauthorized transactions should not appear on the cardholder Statement of Account. If unauthorized transactions appear on a Statement of Account, the cardholder should contact customer service and file the appropriate forms.

If JPMC detects suspicious activity on a card, a temporary hold will be placed on the card until JPMChase Bank can confirm with the cardholder whether or not the purchase was legitimate. If there was fraudulent activity the cardholder may be requested to complete an Affidavit.

2.29 Departure of Cardholders.

2.29.1 Cardholders Leaving the Agency. If a cardholder's employment is ending (e.g., resignation, retirement), the purchase card and convenience checks, if applicable, should be destroyed, prior to the release date, by giving them to the AO for destruction. The AO must notify the OPC of the departing employee so the cardholder’s access to PaymentNet can be terminated and the account can be closed. The Cardholder’s Delegation of Purchasing Authority or SF-1402 will be cancelled at the same time. The OPC should check the list of separated employees to ensure all PaymentNet access was removed, cards were destroyed, etc.

2.29.2 Transferring Cardholders. If a cardholder is transferring to another position, which will also require use of the purchase card and unused convenience checks, if applicable, the cardholder will notify the OPC. The OPCs, in consultation with the losing and gaining AOs will arrange for transfer of the cardholder to the gaining office. The gaining and losing offices will cancel and reissue the cardholder’s Delegation of Purchasing Authority or SF-1402. If it is determined that the purchase card should not be retained by the cardholder, the notification procedures outlined above should be followed. In PaymentNet, the cardholder's account should be closed from the losing office’s hierarchy and a new account created in the acquiring office’s hierarchy.

2.30 Reporting. At the end of the billing cycle, JPMChase Bank will issue detailed statements as follows:

- Cardholders will receive a Statement of Account showing all purchases and credits processed by JPMChase Bank during the billing cycle. Note: Some offices have elected to access the Statement of Account on-line and requested not to receive hard copies, so check your local guidance.

- The Finance Office will receive a consolidated statement of all purchases and credits applicable to all cardholders.

2.31 Record Retention. FAR 4.805 requires the retention of purchase card transaction records for six years after final payment. Central filing of such documentation is acceptable. Automated systems are acceptable provided they provide equivalent documentation.

All cardholders must keep complete and accurate records of their purchases in accordance with the instructions included in Section 2.25 of these Procedures. This must include evidence of receipt of any property or supplies purchased using the purchase card.

The OPC must retain records and related documents, including letters and forms relating to designations of AOs and Letters of Appointment/Contracting Officer Warrants of cardholders.

The OPC, or designee must retain records of departing employees.

2.32 End of Fiscal Year Spending Cut Off Dates. OPCs should coordinate with their Finance Office to establish a cut-off date for purchases to be made at the end of the fiscal year. Local guidance should include a cut-off date, the steps the cardholder should follow in an emergency situation after the cut-off date, and what steps should be taken in the event of DOE being under a continuing resolution where funds are not readily available.

2.33 Card Abuse.

2.33.1 Abuse. Use of a government charge card to buy authorized items, but at terms (e.g., price, quantity) that are excessive, for questionable government need, or both. An example of such a transaction would include the purchase of a day planner costing $300 rather than one costing $45.

2.33.2 Fraud. Any felonious act of corruption, attempt to cheat the government or corrupt the government's agents. Fraud may be committed either by government employees or by merchants. Indicators of potential fraud by government employees include: acquiring goods or services that are unauthorized and intended for personal use or gain; splitting a single requirement into multiple purchases in order to make it appear to be under the micro-purchase threshold; making false statements about what was purchased or how the purchase card was used; and using the purchase card for prohibited purchases. Indicators of merchant fraud include: false charges/transactions, mischarging, bribes and gratuities, kickbacks and purchases of goods or services that are unauthorized or acquired for personal use.

2.33.3 Improper Purchases. Purchases of goods or services intended for government use but not permitted by law or regulation.

2.33.4 Misuse. Use of a Federal purchase card for other than the official government purpose(s) for which it is intended.

CATEGORIES OF FRAUD		
Cardholder	Non-Cardholder	Merchant
Directly by the cardholder themselves	By third party without knowledge or consent of the cardholder • Never received • Lost/stolen • Counterfeit • Identity theft	Directly by merchant with or without knowledge or consent of the cardholder • False charges • Mischarges • Bribes/gratuities

Use of the card for other than official 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 OPC. The cardholder will be personally liable to the Government for the amount of any non-approved purchases and possible subjection to a penalty under 18 U.S.C. 287. The cardholder must reimburse the government for the cost of the purchase and be subject to disciplinary action.

If an official directs an erroneous purchase to be made by a cardholder or directs a cardholder to purchase items or services that are subsequently determined to be improper, the official who directed the purchase must, in accordance with agency policy, reimburse the government and be subject to disciplinary action.

Please refer to DOE Order 333.1, Administering Workforce Discipline, Appendix C, for a list of purchase card penalties.

2.34 Category Management and Strategic Sourcing. DOE spends millions of dollars each year through the SmartPay purchase program (as well as other contract mechanisms) and each transaction has the potential to increase the sourcing power of the government. Offices should be aware of any agency-specific requirements to ensure compliance. Offices should work to ensure they are leveraging Best-in-Class solutions that will yield better pricing.

Local offices are strongly encouraged to analyze and evaluate purchasing patterns and assess if there are opportunities to better leverage DOE's buying power through the use of "Best-in-Class" solutions so designated by OMB. Often, these contracts or ordering vehicles can include use of the purchase card to streamline the acquisition process and add further value through the generation of refunds.

Reports are available in PaymentNet and Intellilink that can be utilized as a starting point for analysis. The Parent Merchant Ranking report and Summary Quarterly Vendor Analysis by Parent Merchant report in PaymentNet identify the merchant where accounts are being used and the dollar amount spent per merchant. OPCs can use the Intellilink dashboard which provides an overview of several performance trends including Spend by Top 10 MCG, Spend by Top 10 MCC and Spend by Top 10 Merchant. The information in these reports can be used for identification of merchants that are utilized by cardholders in a regular or recurring basis and for negotiation of ordering agreements or other strategic acquisitions with these merchants.

The results, if any, should be sent to the APC so it can be reviewed on a larger scale (i.e., DOE wide).

Refer to Acquisition Guide Chapter 7.2, Category Management and Strategic Sourcing, for further information.

2.35 Buy Green. Both Congress and the President have directed federal agencies to be good stewards of the environment by conserving energy and other precious natural resources. One way that we can be good stewards is to buy products and services that conserve resources. This is generally referred to as "green" purchasing or sustainable acquisition.

The first principle of green purchasing is to reduce purchasing where possible (install no-wax flooring to avoid the purchase of wax and wax stripper). The second principle of green purchasing is reuse (reprocessing water-soluble cutting oil or anti-freeze for reuse). The third principle is buying green.

There are three tiers to the Federal green purchasing program:

Statutory Mandates

- Alternative fuel vehicles/alternative fuels
- BioPreferred and biobased products designated by the USDA
- ENERGY STAR certified, FEMP-designated, and low standby power energy efficient products identified by EPA and DOE
- Renewable energy
- Recycled content products designated by the EPA

Products and Services Identified by U.S. Environmental Protection Agency Programs

- Significant New Alternative Policy (SNAP) chemicals or other alternatives to ozone depleting substances and high global warming potential hydrofluorocarbons
- WaterSense certified products or services (water efficient products)
- Safer Choice labeled products (chemically intensive products that contain safer ingredients)

- SmartWay Transport partners and SmartWay products (fuel efficient products and services)

Non-Federal Specifications, Labels, and Standards

- Products or services that meet or exceed specifications, standards, or labels recommended by EPA (refer to "Recommendations of Specifications, Standards, and Ecolabels for Federal Purchasing")

The purchase of these products is required by law or executive order unless the products do not meet your performance needs, are not reasonably available, or are only available at an unreasonable price. Exceptions should be recorded in the purchasing file; refer to the DOE template on FedCenter – DOE Sustainable Acquisition – Tracking – "document those exceptions."

Many of these products are commercially available off-the-shelf items or are available through GSA stock and schedule programs, the Defense Logistics Agency, mandatory sources such as the National Industries for the Blind, and commercial open market sources.

Further guidance is available in the DOE Acquisition Guide Chapter 23.0 (Executive Order 13693 — Planning for Federal Sustainability in the Next Decade and Implementing Instructions , and in FAR Part 23, Environment, Energy and Water Efficiency, Renewable Energy Technologies, Occupational Safety, and Drug-Free Workplace.

GSA has a comprehensive Green Procurement Compilation of all designated products. Cardholders are encouraged to use GSA's Environmental Aisle to procure green products and services.

DOE has a Sustainable Acquisition website on FedCenter that can help you find answers to frequently asked questions, sustainable products other sites are successfully using, and web-based training and other learning resources. DOE holds Sustainable Acquisition Working Group (SAWG) teleconferences on the 4th Thursday of odd numbered months.

Please contact Shab Fardanesh (shabnam.fardanesh@hq.doe.gov, 202-586-7011) to be added to the DOE Sustainable Acquisition contact list.

2.36 Electronic and Information Technology (EIT).

References:

- Section 508 of the Rehabilitation Act of 1973, and the Architectural and Transportation Barriers Compliance Board Electronic and Information Technology (EIT) Accessibility Standards.
- Further information on section 508 is available via the Internet at http://www.section508.gov.

1. When acquiring EIT, agencies must ensure that –
    a. 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
    b. 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.
2. Unless an exception at FAR 39.204 applies, acquisitions of EIT supplies and services must meet the applicable accessibility standards at 36 CFR 1194. When cardholders acquire EIT, they should ask whether the equipment users may have disabilities such that special features may be required and ask the merchant if the equipment they plan to provide will afford equal access for those with disabilities.

2.37 Phishing Attempts. Phishing is a criminally fraudulent attempt to acquire sensitive information (user IDs, passwords, credit card details, etc.) by masquerading as a trustworthy source such as a financial institution. Cardholders should report any phishing scams or any other activity that appears to be fraudulent in nature to their OPC and JPMChase Bank (abuse@chase.com). When JPMChase Bank confirms that it is or is not phishing, the OPC should forward the final email to the APC to share with the other offices.

It is JPMChase Bank's policy not to solicit information via email, phone call, or text message. To prevent fraudulent charges, employees should never respond or reply to an e-mail, phone call, or text message requesting personal or account information. Common tactics to get this information are:

- threatening to close or suspend an account if immediate action is not taken by providing personal information;
- soliciting participation in a survey requiring entry of personal information;
- stating that an account has been compromised and requesting entry or confirmation of account information;
- stating that there are unauthorized charges on an account and requesting account information; or
- stating that an account has to be refreshed and asking for verification of credit card or billing information.

If a contact is questionable or an employee thinks their account information may have been compromised, they should call JPMChase Bank at 1-888-297-0781.

If the cardholder receives a phone call or email that appears to be from JPMChase Bank requesting financial information or any other personal data:

- Treat the call/email with suspicion.
- Do not give out/enter ANY personal or charge card information over the phone, Internet or mail.

- For emails- Do not reply to the email or respond by clicking on a link within the email message.
- Contact JPMChase Bank as soon as possible to report the suspicious email. Use the number or Web site address on the back of your card or on the Statement of Account.
- If you think the request is valid, always contact the bank using the number on the back of your card.
- If anyone ever gives out information, they should immediately call JPMChase Bank.

You should be suspicious of any unsolicited phone call that asks for charge card/personal information OR email that request the cardholder click a link and provide personal or financial information.

2.38 Foreign Currency Conversion Fees. JPMChase Bank must ensure that charges made in a foreign currency are converted into U.S. Dollars on the statement of account, invoice, and related reports using a favorable conversion rate established by an interbank rate or, where required by law, an official rate. This rate must be the one in existence at the time the transaction is processed. JPMChase Bank must identify the conversion rate and any other third party fees related to foreign purchases charged on the statement of account, invoice, and related reports, unless otherwise specified at the task order level. Refer to Smart Bulletin No. 007 for additional information.

2.39 Emergency Situations. In the event of an emergency (e.g., natural disaster), and immediate access to all MCCs is required, contact the APC immediately for coordination. JPMChase Bank will only grant full MCC access at the direction of the APC. Refer to FAR Part 18, Emergency Acquisitions, for further guidance on emergency procedures.

3.0 Attachments

Attachment 1 – Definitions and Acronyms
Attachment 2 – Purchase Card Quotation Worksheet
Attachment 3 – Recommendation for Appointment Purchase Cardholders (Sample)
Attachment 4 – Appointment as Purchase Card Approving Official Letter (Sample)
Attachment 5 –Blanket Approval Authority (Sample)
Attachment 6 – Requirements for Local Procedures
Attachment 7 – Purchase Card Log (Sample)
Attachment 8 – Convenience Check Log (Sample)
Attachment 9 – Approving Official Roster
Attachment 10 – Cardholder Training Roster
Attachment 11 – Sample Delegation of Purchasing Authority for Purchase Cardholders
Attachment 12 – Dispute Form

Attachment 1 – Definitions

Agency Program Coordinator (APC): 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 JPMorgan Chase Bank at the Agency level.

Blanket Letter of Approval: A written approval issued by an AO identifying certain types of purchases that cardholders under their purview can make without seeking their AO's approval prior to the transaction.

Bulk funding: A system whereby the CO receives authorization from finance to obligate a specified lump sum of funds and reserves for a specified period of time rather than obtaining individual obligation authority on each purchase document. Bulk funding is particularly appropriate if numerous purchases, using the same type of funds, are to be made during a given period.

Certificate of Appointment (SF-1402): A formal written CO warrant that is issued by the HCA to a cardholder which states any limitations on the scope of authority to be exercised. The SF-1402 must be used to evidence the CO appointment for delegation of purchase cardholders exceeding micro-purchase authority.

Competition: When at least three responsible offerors, independently competing, provide quotations that can satisfy the Government's requirement, considering market price, quality and delivery.

Consolidated Statement: A monthly statement sent by JPMChase Bank to the Finance Office which lists purchases and credits issued to all the cardholders under their purview.

Data Mining: An automated process used to scan databases to detect patterns, trends and/or anomalies for use in risk management or other areas of analysis.

Delegation of Purchasing Authority: A formal written delegation of purchase card purchasing authority that is issued by the HCA, or designee, to a cardholder with single purchase limit authority up to the micro-purchase threshold. This purchasing authority is not evidenced by a SF-1402. This delegation specifies the single purchase and monthly dollar limitations and any other conditions applicable to purchases made by that individual, including identification of their AO. If an office determines that the cardholder's total number of transactions will be limited, the written delegation should reflect that number. Additionally, if the cardholder will have convenience check writing authority this should also be reflected. Please take into consideration that if the cardholder's single purchase limit is at the micro-purchase threshold to simply state "micro-purchase limit" so an update to the letter is not necessary in the event the micro-purchase threshold is changed in the FAR. Refer to Attachment 10 for a Sample Delegation of Purchasing Authority for Purchase Cardholders.

Declined Transactions: Transactions where authorization has been refused by JPMChase Bank's transaction authorization system.

Fair and Reasonable: A determination that the price is what a prudent person in the ordinary course of business would pay without any undue influence.

File Turn: The average number of calendar days between the time a charge (purchase) is posted and payment is received by JPMChase Bank.

Purchase Card: A distinctly designed VISA purchase card issued by JPMChase Bank under the GSA SmartPay Program. The purchase card is embossed with the employee's name and can only be used by the employee. "U.S. Government Tax Exempt" is embossed on the card, except for cards issued to contractors. The card is uniquely designed so that it will not be easily confused with other cards.

In 2006, based on DOE legal advice, cards issued to cost reimbursement contractors began using generic cards that were not embossed with "U.S. Government Tax Exempt".

Hierarchy: The foundation on which an agency's reporting structure is based. It is integral to the way the agency views and accesses card transaction data. The hierarchy has been developed based on the individuals or groups within each office who need access to reports, monitor cardholder activity, and access transactions for edit, review, and approval.

Limits:

- Single Purchase Limit: The maximum dollar limit for an individual purchase card transaction.
- Monthly Spending Limit: The maximum dollar amount authorized to be spent by the cardholder within a 30 day period.
- Cycle limit: The maximum dollar amount authorized to be spent by a cardholder within the billing cycle.

Merchant Category Codes (MCC): MCC's are established by the bankcard association or banks to identify different types of businesses. Merchants select the codes best describing their business. Refer to Section 2.16 for a list of blocked MCCs.

Micro-purchase: An acquisition of supplies or services using simplified acquisition procedures, the aggregate amount of which does not exceed the micro-purchase threshold of $3,500, except for acquisitions of construction subject to the Wage Rate Requirements (Construction), the threshold is $2,000 and for acquisitions of services subject to the Service Contract Labor Standards, the threshold is $2,500. (Refer to FAR Subpart 2.101, Definitions, for less commonly used thresholds.)

Prompt Payment Act: Public Law 97-177 (96 Stat 85, U.S.C. Title 31, Section 1801) requires prompt payment of invoices (billing statements) within 30 days of receipt (FAR Subpart 52.232-25, Prompt Payment). An automatic interest penalty is required if payment is not timely.

Purchase Card Log: A manual or automated log in which the cardholder documents his/her individual transactions and screening for mandatory sources when using the purchase card and/or convenience checks. Entries in the purchase log may be supported by internal agency documentation (e.g., request for procurement document or e-mail request). The purchase card documentation should provide an audit trail supporting the decision to use the card and any required special approvals that were obtained. At a minimum, the log will contain the date on which the item or service was ordered, the merchant's name, the dollar amount of the transaction, a description of the item or service ordered, and an indication of whether the item was received. In addition to this information, if a convenience check is used the log must also contain the merchant's business address and Tax Identification Number (TIN).

Split Purchase: Deliberately 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 and accomplished by the local purchasing staff. Examples include:

- A cardholder receives a total purchase requirement that exceeds their single purchase limit of $3,500 for supplies, $2,500 for services, or $2,000 for construction. The purchase may not be split to make two or more purchases within the limit.
- A cardholder receives a total purchase requirement of $3,500 for supplies, $2,500 for services, or $2,000 for construction and makes that purchase. Within hours, the same day, or next day, the cardholder receives another purchase requirement for another of the same, for $3,500 supplies, $2,500 for services, or $2,000 for construction. Both purchases stand-alone and are individually within the cardholder's single purchase limit. They are each allowable because they were the known need at the time of purchase. However, the cardholder should question whether this is all of the requirements and be alert to whether they are being given a requirement in increments to stay within the threshold. Files should be documented when purchases have the appearance of being split.

30 Day Cycle: A monthly reporting/billing cycle which begins on the 28th of one month and ends on the 27th of the following month.

Attachment 2 – Purchase Card Quotation Worksheet

CARDHOLDER NAME: _____

PRICE ESTIMATE: _____

Accounting and Appropriation Data:

Fund	Year	Allotee	Reporting Entity	SGL	Program Project	$ Value

Description:_____
_____
_____

Merchant Quotations:

	Merchant 1	Merchant 2	Merchant 3
Merchant Name			
Point of Contact			
Telephone #			
Price Quote			
Delivery Date			

DOE Approving Official:

Signature: _____

Name: _____

Date: _____

Attachment 3 – Recommendation for Appointment Purchase Cardholders

The following findings and determinations are made pursuant to applicable laws and regulations.

1. There is a clear and convincing need to appoint a cardholder for the following reason (quantify where practicable).

2. _____[insert cardholder name], the nominated purchase cardholder, is an employee of or detailed to the U.S. Department of Energy. The proposed single purchase limit for the nominated cardholder is _____.

   _____[insert contractor name], the nominated purchase cardholder, is an employee of _____[insert cost-reimbursement contractors legal name]. The proposed single purchase limit for the nominated cardholder is _____.

3. Time will be allotted to the cardholder to perform their cardholder responsibilities.

4. _____ will be responsible for purchasing the following types of supplies/services _____.

5. The GSA Online SmartPay training course found at https://training.smartpay.gsa.gov/ has been completed. (Attach a copy of the SmartPay Training Certificate.)

   [Contractor's with their own training course]
   The online training course has been completed. (Attach a copy of the training certificate.)

6. Refresher training will be completed no less than every two years.

7. The cardholder has read and certified that they understand the guiding policies on purchase card usage.

8. The nominee's business acumen, judgment, character, reputation, and ethics are sound, all while being an effective steward of taxpayer dollars.

9. The nominee is well qualified for the appointment.

10. Are there are at least two cardholders purchasing the same types of supplies/services in this office? ☐ Yes ☐ No. If yes, provide an explanation why the other cardholders cannot meet the purchasing requirement.

The primary and alternate approving officials are listed below:

Primary Approving Official Name: _____
Primary Approving Official Office Symbol: _____
Primary Approving Official Telephone No.: _____

Alternate Approving Official Name: _____
Alternate Approving Official Office Symbol: _____
Alternate Approving Official Telephone Number: _____

(FOR FEDERAL EMPLOYEES ONLY)

The nominee has proposed convenience check authority of _____[insert $2,500 or less as a single purchase limit].

Supervisor:

_____ _____
Signature of supervisor of the nominee cardholder Date

_____
Typed/Printed Name

Concur:

_____ _____
Signature of Designated Official or Head of Contracting Activity Date

_____
Typed/Printed Name

Attachment 4 – Appointment as Purchase Card Approving Official

DOE-XXXX DATE:

MEMORANDUM FOR JOHN SMITH

FROM: ORGANIZATIONAL PROGRAM COORDINATOR

SUBJECT: APPOINTMENT AS PURCHASE CARD APPROVING OFFICIAL

Reference: DOE Purchase Card Policy and Operating Procedures, September 2017

In accordance with the referenced Procedures, you are hereby appointed as an Approving Official for _____ [insert cardholder's name]
Your responsibilities include but are not limited to the following:

(1) Ensure that each cardholder has received training, maintains copies of referenced document and any applicable local procedures, and understands the requirements for use of the purchase card.

(2) Pre-approve all your cardholders' purchases unless you authorize blanket purchase authority in writing or the cardholder has a SF-1402. Ensure that the requested items are for official government use and that the items are authorized for purchase in accordance with the referenced Procedures.

(3) Review and approve cardholders monthly Statement of Account ensuring that the statements have supporting documentation and are complete, accurate, and reflect only authorized purchases.

(4) Verify the validity of all purchases listed on the cardholders' monthly Statements of Account prior to certification. Reconcile approving official consolidated monthly Statement of Account with cardholders' monthly Statement of Account.

(5) Promptly sign and date and forward all cardholders Statements of Account to the responsible financial office in a timely manner.

This appointment is automatically terminated upon the Approving Official's employment ending (e.g., resignation, retirement, reassignment).

You are required to sign, date, and return a copy of this appointment letter to the undersigned. Should you have any questions concerning these instructions or the level of your authority, please contact me at XXX-XXX-XXXX.

APPROVING OFFICIAL ACKNOWLEDGEMENT

In accordance with DOE Purchase Card Policy and Operating Procedures, I have reviewed, understand, and acknowledge my responsibilities as a Purchase Card Approving Official. I have completed the required Approving Official training as recommended by the Organizational Program Coordinator.

_____ _____

(Signature) Approving Official Date

Attachment 5 –Blanket Approval Authority

DATE:

MEMORANDUM FOR JANE DOE

FROM: APPROVING OFFICIAL

SUBJECT: BLANKET APPROVAL AUTHORITY

The purpose of this memorandum is to authorize "blanket approval authority" to Jane Doe, purchase cardholder for the Department of Energy, for certain Government-wide Commercial Purchase Card purchases, described herein.

As your Approving Official, I hereby authorize to you approval authority to use the purchase card to procure routine office supplies and services only, up to $XXX.XX per single transaction. You are required to adhere to the policy and responsibilities outlined in the DOE Policy and Operating Procedures.

This Memorandum must be filed and maintained with your account records to support approval authority in an audit/compliance review.

This authorization is effective immediately and is valid until my appointment as your approving official is terminated.

Attachment 6 – Requirements for Local Procedures

General:

At a minimum, local procedures must include:

- Local prohibitions of supplies/services.
- How to reserve and certify funds.
- Identification of internal staff members who can assist cardholders.
- If purchases of construction may be made. Purchase card purchases of construction may not exceed $2,000 as a formal contract is required above that amount.
- Establish end of the year cut off purchasing procedures, the steps the cardholder should follow in an emergency situation after the cut-off date and what steps should be taken in the event of DOE being under a continuing resolution where funds are not readily available.
- If Statements of Account must be forwarding to the Finance Office before the 15th day of each month.

Property:

At a minimum, the guidance should include:

- A process of notifying the office property management activity of property receipt, including situations where property is delivered at locations other than a central receiving facility;
- A process for the office to record property in the agency property tracking system and financial systems, including the designation of property as sensitive or accountable, when applicable;
- Documentation of independent receipt and acceptance, when appropriate, to ensure that items purchased were actually received, including procedures addressing remote locations and emergency/urgent purchases where independent acceptance may be difficult or impossible; and
- Procedures for cardholders and/or custodians of the property to follow when property is determined to be missing, stolen, or damaged.

These policies and procedures must be implemented as not to unnecessarily disrupt the streamlined benefits associated with the use of the purchase card. Offices should ensure that controls of property are consistent with agency standards for property purchased through other methods. In addition, local policies and procedures for property management and control are to be consistent with agency standards for property purchased through other methods.

Attachment 7 – Purchase Card Log

Page: _____of_____
Statement Date: _____

CARDHOLER NAME: _____
STARTING BALANCE: $_____

REQUESTOR	ORDER DATE	MERCHANT NAME	DESCRIPTION OF PURCHASE	TOTAL PRICE	DELIVERY DATE	PROPERTY ID NO.#

Attachment 8 – Convenience Check Log

Page: _____of_____
Statement Date: _____

CARDHOLER NAME: _____
STARTING BALANCE: $_____

REQUESTOR	ORDER DATE	CHECK NUMBER	MERCHANT NAME, TIN, & BUSINESS ADDRESS	DESCRIPTION OF PURCHASE	TOTAL PRICE	DELIVERY DATE	PROPERTY ID NO.#

Attachment 9 – Approving Official Training Roster

NAME	APPOINTMENT DATE	INITIAL TRAINING	REFRESHER DATE	TERMINATION DATE

Attachment 10 – Cardholder Training Roster

NAME	SINGLE PURCHASE LIMIT	MONTHLY PURCHASE LIMIT	APPOINTMENT DATE	INITIAL TRAINING	REFRESHER DATE	TERMINATION DATE	APPROVING OFFICIAL

Attachment 11 – Sample Delegation of Purchasing Authority for Purchase Cardholders

DATE:

SUBJECT: Delegation of Purchasing Authority for Purchase Cardholders for Government Employee

Delegation of Purchasing Authority for Purchase Cardholders for Contractor Employee
(Cost Reimbursement Contractor's Legal name)
(Contract Number)

TO: Employee Name, Office

Pursuant to DOE Acquisition Guide Chapter 13.301, you are hereby delegated as a Purchase Cardholder with a single purchase limited of _____ and a monthly purchase limit of _____. This formal Purchase Cardholder delegation is personal to you and may not be re-delegated to others.

The Purchase Cardholder will be responsible for purchasing the following types of supplies/services:
_____
_____.

In accordance with DOE Acquisition Guide Chapter 13.301, you are required to complete the GSA Online SmartPay training course found at https://training.smartpay.gsa.gov/. Attached is a copy of the SmartPay Training Certificate. In addition, you are required retake this training every two (2) years and to maintain a record of these activities. **Note: If contractor employee, include contractor's training course.**

The attached procedures entitled: _____ are included as part of this delegation memorandum. Your acknowledgement is requested below.

(FOR FEDERAL EMPLOYEES ONLY)
The delegated Purchase Cardholder has proposed convenience check authority of _____[insert $2,500 or less as a single purchase limit].

_____ _____
Purchase Cardholder Date

_____
Typed/Printed Name

Approval:

_____ _____
Signature of Designated Official or Head of Contracting Activity Date

_____
Typed/Printed Name

Attachment 12

J.P.Morgan

Dispute Form:

Dear Cardholder,
This form has been provided for your convenience. If you believe that a transaction on your statement is in error you can use this form to contact us. You must notify us within 90 days from the statement billing date of the disputed charge. Any notification received after this time frame may result in our inability to assist you with your dispute. **Please be advised that MasterCard & Visa require that cardholders attempt to resolve the dispute with the merchant before initiating dispute.** Please complete and send to:

Fax: Commercial Card Services, ATTN: Dispute Dept., Fax to: (866) 865-2298,
Mail: Commercial Card Disputes Chase, OH1-0553, PO BOX 182918, Columbus, OH 43272-5543
Email: CCSColumbusDisputes@chase.com

Name: _____

Account #: _____

Merchant Name: _____

Transaction Date: _____

Posting Date: _____

Reference #: _____

Transaction Amount: $_____

Please Circle <u>one</u> of the following choices applicable to your dispute. Include <u>all</u> necessary information/documentation.

1. I do not recognize the above-mentioned charge. I have attempted to contact the merchant to obtain further information.

2. I have been billed more than once by the same merchant. I authorized only one charge with this merchant. My card was in my possession at the time of the transaction.

   Valid Charge $_____ Reference #_____ Transaction Date _____

   Invalid Charge $_____ Reference #_____ Transaction Date _____

3. I canceled: Service / Airline Ticket / Hotel Reservation on _____(date). Cancellation #_____

4. I have not received the merchandise that was to be shipped to me on _____(date). I have requested credit.

5. Merchandise that was shipped to me arrived damaged or not as described. I returned it on _____(date) and asked the merchant to credit my account. I am providing a copy of my returned mail receipt.

6. Merchant was to issue credit for merchandise I returned to the store. I have enclosed a copy of my credit receipt.

7. I have been charged for a purchase that was paid for by other means. I am providing a copy of the documentation showing the other method of payment.

8. I have been billed for an incorrect amount. My receipt shows $_____, however, I was billed $_____. I am providing a copy of my receipt showing the correct amount.

9. I did not authorize the above-mentioned charge. I have attempted to contact the merchant to resolve dispute.

10. Other: I am attaching detailed information that describes the dispute.

Work Phone _____

Email_____

Signature _____

Date _____

Purchase Orders

Guiding Principles

- Purchase Orders typically should be issued on a fixed-price basis.
- Purchase orders cannot exceed the simplified acquisition threshold.
- Purchase Orders may be modified to definitize unpriced orders, increase funding, or make administrative or other changes.

[References: FAR 13.302, DEAR 913.307, and 40 U.S.C. Chapter 31, Subchapter IV]

1.0 Summary of Latest Changes

This update: (1) changes the chapter number from 13.2 to 13.302 to align with the FAR, (2) adjusts the dollar threshold for purchase orders to reflect the recent FAR increase to the micro-purchase threshold, and (3) includes administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. This chapter provides additional guidance on DOE's use of purchase orders as described in FAR 13.302 and DEAR 913.307. Only contracting officers acting within the scope of their authority are empowered to execute purchase orders on behalf of DOE.

2.1 When to Issue Purchase Orders. Due to the administrative cost of preparing and handling the purchase order document, purchase orders for less than $3,500 should be used only when the commodity or conditions of the procurement preclude use of a simpler award method, such as the DOE Purchase Card or Blanket Purchase Agreement call.

Acquisitions that must be made by written purchase orders are:

(1) All open market purchases over $3,500;

(2) Acquisitions that require multiple, separate deliveries or performance of multiple tasks with multiple invoices/payments over 2 or more months (excluding annual service plans with fixed monthly charges);

(3) Construction of $2,000 or more subject to 40 U.S.C chapter 31, subchapter IV, formerly known as the Davis-Bacon Act; and

(4) Unpriced orders (FAR 13.302-2).

2.2 Purchase Order Types. Except as provided under FAR 13.302-2 concerning unpriced purchase orders and FAR 12.207, maximum effort should be made to award purchase orders on a fixed-price basis including a firm price for shipping, handling and other ancillary changes.

2.3 Maximum Value. A single purchase order value shall not exceed the simplified acquisition threshold (SAT). Contracting Officers shall not "split" requirements into multiple orders to avoid thresholds for a General Services Administration (GSA) Federal Supply Schedule, Blanket Purchase Agreement, or other more appropriate contracting vehicle.

2.4 Options. Even when purchases are below the SAT, a purchase order should not include options (see FAR 17.2). If the use of options is contemplated for purchases under the SAT, and if inclusion of options would be in the best interest of the government, then the Contracting Officer should consider placing an order against a more appropriate contracting instrument such as a GSA Federal Supply Schedule, Blanket Purchase Agreement, or other Government-wide Acquisition Contract.

2.5 Forms. See DEAR 913.307.

2.6 Modifications. In the event that it becomes necessary to modify or cancel a purchase order, use Standard Form 30, Amendment of Solicitation/Modification of Contract. The quantity and amount shown for the amendment line items and total should be the amount of the increase or decrease, not the revised total for the order. The SF 30, Block 14, Description of Amendment/Modification, must contain a summary of the adjustment (original quantity, increase or decrease, and new total).

Modifications to purchase orders should be kept to a minimum. Prior to any modification, the Contracting Officer must ensure that the changes do not affect the scope of work and that funding is available. Some particular examples follow:

- **Unpriced Orders:** When the price of a product or service is not established at the time of issuance of the order, in accordance with FAR 13.302-2, an unpriced purchase order may be executed. However, a bilateral modification must be executed to definitize the unpriced order.

- **Administrative:** In certain circumstances, a modification may be issued to make a correction or to change administrative information contained within the original purchase order, such as an inadvertent spelling or address error. All administrative

changes are limited to specific changes that do not have a material impact on the substance of the contract.

- **Increase Funding:** If a modification is being contemplated for the purposes of increasing funding, or if additional work is required, the Contracting Officer must consider all applicable procurement guidance and regulations to ensure that the changes do not affect the scope of work, unfairly restrict competition, or otherwise circumvent acquisition planning for a new requirement.

  For example, if a purchase order was issued for a particular product and the delivery charge was unintentionally omitted at the time of issuance, the purchase order would require a modification to increase the funding by an amount equal to the previously quoted delivery charge. *This would not be an opportunity to order additional products and services on that same purchase order, as those changes would likely result in a prohibited practice such as an out-of-scope modification.*

Simplified Acquisition Procedures

Guiding Principles

Simplified Acquisition Procedures (SAP) are streamlined techniques and guiding principles designed to reduce the administrative burden of awarding the lower dollar value procurements . They allow informal quoting and competition procedures, encourage accepting oral quotes vice written quotations, prefer comparing quoted prices vice conducting negotiations, and provide streamlined clauses to support the award document.

[Reference: FAR Subpart 13. 3 and FAR Subpart 13.5]

1. Introduction

Simplified Acquisition Procedures (SAP) are contracting methods designed to streamline the acquisition process and facilitate the procurement of goods and services. The results include less paperwork and lower costs for both the contractor and the Government.

FAR 13.003(a) states, "Agencies ***shall*** use simplified acquisition procedures to the maximum extent practicable for all purchases of supplies or services not exceeding the simplified acquisition threshold [SAT]." Acquisition reform, including [SAP], resulted from the following legislation:

- Federal Acquisition Streamlining Act of 1994 (FASA) authorizes the use of SAP for purchases not exceeding the SAT
- Clinger Cohen Act of 1996 changes the standard of competition from "full and open" to the "maximum extent practicable" for purchases under the SAT

Definition:

SAP (commonly referred to as "Small Purchases") are the methods prescribed in Part 13 of the Federal Acquisition Regulations (FAR) for the acquisition of supplies and services, including construction, research and development, and commercial items, the aggregate amount of which does not exceed the SAT. They are designed for relatively simple Government requirements, and their use is subject to designated dollar thresholds. (Examples of items commonly purchased using SAP includes office supplies, computer software, and grounds keeping services).

Thresholds:

- SAP are those procedures prescribed in FAR Part 13 for making purchases of supplies and services – the aggregate of which does not exceed the SAT (currently $150,000[1] -- including purchases at or below the micro-purchase threshold[2], full definition of SAT is FAR Part 2 Definitions),
- The procedures may also be used for commercial items acquisitions that do not exceed $6.5 million (pursuant to the Clinger Cohen Act of 1996) (or $12 million for acquisitions described in 13.500(e)) - FAR Subpart 13.5, "Test Program for Certain Commercial Items[3]". This sub-part allows agencies to use any SAP in FAR Part 13 for commercial items subject to specific dollar limitations. It incorporates the requirements of FAR Part 12 (Acquisition of Commercial Items). This is very important since FAR Part 12 relaxes many of the requirements that must be followed for larger dollar buys when bought using the authority of other parts of the FAR.

FAR 13.106 emphasizes the requirement to solicit requirements to the maximum extent practicable. FAR 13.501 discusses the special documentation requirements should the contracting officer determine that the circumstances of the contract action deem only one source reasonably available.

2. Utilization

SAP should be used for all purchases of supplies or services not exceeding the SAT (including purchases below the micro-purchase threshold), unless requirements can be met by using required sources of supply under FAR Part 8. (*e.g.*, Federal Prison Industries, Committee for Purchase from People Who are Blind or Severely Disabled, and Federal Supply Schedule contracts), or using existing indefinite delivery/indefinite quantity contracts, or other established contracts.

SAP emphasizes the "Keep it Simple" approach. FAR Subpart 13.106-2(b)(3) emphasizes the flexibility offered by utilizing SAP ***by not requiring*** formal procedures such as: formal evaluation plans, submission of detailed technical/management plans with quotes or offers, establishing a competitive range, conducting discussions, and scoring offers. Use of such formal procedures defeats the purpose of using SAP.

Use one of the below acquisition methods prescribed in FAR Part 13 as long as the amount of the acquisition does not exceed the SAT, except for those acquisitions that fall under commercial items test program.

- Government-Wide Purchase Card (FAR 13.301)

---

[1] 41 USC 431a requires the FAR Council to periodically adjust some of the acquisition statutory thresholds every 5 years starting in October 2005.

[2] See FAR part 2.101 for thresholds and limitations

[3] This authority expires January 1, 2015 unless extended by Congress.

- Purchase Orders (FAR 13.302)
- Blanket Purchase Agreements (FAR 13.303)
- Imprest Funds & Third Party Drafts (13.305)
- SF44, Purchase Order-Invoice-Voucher (FAR 13.306)

3. Advantages

Use of such procedures:

- reduces the administrative costs
- improves opportunities for small business and small disadvantaged business concerns to obtain a fair proportion of Government contracts
- promotes efficiency and economy in contracting
- avoids unnecessary burdens for agencies and contractors
- allows shorter solicitations and faster turnaround times
- saves money for Government and Contractor with less paperwork and personnel needed for the process
- acquisitions exceeding Micro-purchase threshold but not over SAT are set-aside for Small Businesses[4]

4. Defining Requirements and Conducting Market Research

FAR Subpart 11.002(a) states that requirements should be stated in terms of:

- Function to be performed;
- Performance required; or
- Essential physical characteristics--but not so excessive that they decrease competition
- In a manner that promotes competition by opening the purchase to a wider variety of vendors

Market Research Requirements

- **Why conduct market research?**
    - FAR 7.102 states that agencies ***shall*** perform acquisition planning ***and*** conduct market research for ***all acquisitions*** in order to promote and provide for:
        - Acquisition of commercial items and non-developmental items.
        - Competition to the *maximum extent practicable*.

[4] FAR 19.502-2 requires that a contracting officer must have a reasonable expectation that the agency will receive offers from two or more small business concerns that are competitive in terms of price, quality, and delivery. If not, the acquisition may not be set aside for small business concerns and the file should be documented accordingly.

- Market research also provides information that may help:
  - Refine the requirements
  - Build source lists
  - Develop evaluation factors
  - Evaluate past performance of offerors

- **Why should market research be conducted?**
  - To determine if products or services are available in the commercial marketplace that satisfy the requirements
  - To determine if the requirement needs modification (if necessary and appropriate) so it can be satisfied with commercial or non-developmental items

- **How is market research conducted?**
  - FAR 10.002(b)(2) provides some techniques for conducting market research to determine if commercial items or non-developmental items are available to meet the Government's needs or could be modified to meet the Government's needs.

- **How much market research is enough?**
  - It varies based on urgency, dollar value, complexity, and past experience with the requirement or similar requirements
  - Conduct a cost-benefit evaluation, i.e. if the level of research conducted is more than the value of the item or service, you may be doing too much
  - If the contracting officer is familiar with an item and its marketplace, minimal research is necessary; however, be sure the knowledge is current and the contract file is documented accordingly
  - Market research conducted ***within 18 months before the award*** of any task or delivery order if still current, accurate, and relevant may be used

- **Common sources of market research:**
  - If you or other acquisition professionals have recently researched a similar or identical requirement, you may not need to conduct any additional market research. Even if you have not researched a similar or identical requirement, your files may contain supporting documentation such as:
    - Vendors, experts, or other contacts that may be able to provide you with current and relevant market information
    - Journals, catalogs, or websites where you found useful technical or product information
    - Notes about resources that were not useful.

- Federal supply schedules
- Internet searches (GSA Advantage, Thomas Register of American manufacturers, Switchboard internet directory, etc.)
- Government Point of Entry (GPE) sources sought synopsis

5. Synopsis and Posting Requirements

Introduction

Agencies shall maximize the use of Electronic Commerce (EC) when practicable and cost-effective (see Subpart 4.5 and Section 30 of the OFPP Act: 41 U.S.C. 426). (Note: EC means electronic techniques for accomplishing business transactions including electronic mail or messaging, World Wide Web technology, electronic bulletin boards, purchase cards, electronic funds transfer, and electronic data interchange.)

Government point of entry (GPE) means the single point where Government business opportunities greater than $25,000, including synopsis of proposed contract actions, solicitations, and associated information can be accessed electronically by the public. The GPE is located at http://www.fedbizopps.gov.

Application

EC may be used for soliciting all contract actions regardless of dollar value when ***practicable and cost effective***.

- EC method may not be practicable or cost effective in the following situations (document the contract file accordingly):
  - Purchases utilizing the Government-Wide Commercial Purchase Card
  - History and market research shows EC was not effective:
    - Insufficient competition obtained
    - Better value received from local suppliers
  - Oral solicitation is more efficient, the requirement does not exceed the SAT, and notice is not required under FAR 5.101.
- If the EC method is not practicable, then Oral or Paper methods are allowable.
  - Oral Solicitations shall be used for the maximum extent practicable provided that :
    - The acquisition does not exceed the simplified acquisition threshold;
    - Oral solicitation is more efficient than soliciting through available electronic commerce alternatives; and
    - Notice is not required under FAR 5.101.

Note: An oral solicitation may not be practicable for contract actions exceeding $30,000 unless covered by an exception in 5.202 (d) *Written solicitations.*

- Additional Conditions of Oral Solicitations:

  - If a synopsis required by FAR 5.101 and an exception under FAR 5.202 is not applicable, solicit at least three sources to promote competition to the maximum extent practicable
  - Request quotations/offers from at least two new sources for each solicitation
  - Cannot be used for construction requirements over $2,000
  - Should not be used for complex specifications

- Written Solicitations (as required by the Small Business Act (15 U.S.C. 637(e) and the Office of Federal Procurement Policy Act (41 U.S.C. 416)

  - If obtaining electronic or oral quotations is uneconomical or impracticable, the contracting officer should issue paper solicitations for contract actions likely to exceed $30,000
  - The contracting officer shall issue a written solicitation for construction requirements exceeding $2,000
  - Are synopsized on the GPE for purchases exceeding $25,000 (unless excepted pursuant to FAR Part 5)
  - Are competed to the maximum extent practicable (see FAR 13.104)

- Combined Synopses/Solicitation for Commercial Items FAR 12.603)

  - Used to reduce the solicitation to award timeline
  - Single document for synopsis and solicitation meets FAR 5.203 publicizing requirements
  - FAR 13.104 provides guidance on competition requirements

6. <u>Information on Competition</u>:

The Acquisition Official shall follow the priority of sourcing stipulated in FAR 8.001. Requirements shall be filled at the highest priority source for which the requirement is reasonably available. The Acquisition Official shall use the optional Federal Supply Schedules (also known as the General Services Administration/GSA Schedules Program or the Multiple Award Schedule Program) (e.g., GSA Advantage! , e-buy-a component of GSA Advantage!-online quotation system, GSA eLibrary):, over open market, commercial sources as listed in FAR Part 8.001. The Ability One Program (for the purchasing from blind persons and persons with severe disabilities) remains applicable under the SAT. The Ability One Program is not waived, superseded or bypassed by micropurchasing authority or buying commercial items to substitute.

- Applicable FAR Site (Part 5.002):
    - Publicized contract actions are required in order to—
        - Increase competition
        - Meet socioeconomic policies
        - Broaden industry participation in meeting Government requirements; and
        - Assist the full spectrum of small business concerns in obtaining contracts and subcontracts

7. SAP Methods of Purchase

Purchase Orders *when issued* *by the Government*, means *an* ***offer*** by the Government to buy supplies or services, at the stated price in the order and upon specified terms and conditions contained in the order **(FAR 13.302).**

- Award amount is >Micro-purchase Threshold and ≤ $150K (SAT)
    - Unless commercial items > Micro-purchase Threshold to <=$6.5M
- Purchase Order itself shall contain at minimum
    - Quantities of supplies or scope of services
    - Place of performance/delivery location
    - Delivery date or period of performance
    - F.O.B. destination unless valid reason otherwise
- Usually awarded unilaterally (only CO signs)
- Becomes a ***binding Contract*** versus offer when contractor performs or if contractor signs the order

Blanket Purchase Agreement (BPA) is a simplified method of filling anticipated ***repetitive needs*** for supplies or services by establishing "charge accounts" with qualified sources of supply. BPAs are appropriate when:

- Requirements exist for a wide variety of items within a broad class of goods, but the exact items, quantities, and delivery requirements are not known in advance;
- There is a need to provide commercial sources of supply for one or more offices in a given area that do not have or need authority to purchase otherwise;
- The writing of numerous purchase orders can be avoided through the use of this procedure; or
- There is no existing requirements contract for the same supply or service that the contracting activity is required to use. **(FAR 13.303-2)**
- Two types of BPAs:
    - "Traditional" BPA subject to FAR Part 13

  - GSA Schedule BPAs, aka Multiple Award Schedule (MAS) BPAs which are subject to FAR 8.405-3

- Some unique facts:

  - BPAs ***are not*** contracts, the subsequent orders against them are the contracts
  - BPAs are "established" vs. awarded with no minimum amount required
  - BPAs contain the framework (clauses and prices) for incorporation in future orders
  - BPAs can be centralized and "decentralized" with "ordering offices" under specific limitations

After determining that a BPA would be advantageous, contracting officers should establish the parameters to limit purchases to individual items or commodity groups or classes, or permit the supplier to furnish unlimited supplies or services. Contracting officers should consider suppliers whose past performance has shown them to be dependable, who offer quality supplies or services at consistently lower prices, and who have provided numerous purchases at or below the SAT.

BPAs may be established with-

- more than one vendor for supplies or services of the same type to provide maximum practicable competition;
- a single firm from which numerous individual purchases at or below the SAT will likely be made in a given period; or
- Federal Supply Schedule contractors, if not inconsistent with the terms of the applicable schedule contract.

BPAs include a description of the agreement, the extent of obligation, pricing, purchase limitations, notice of individuals authorized to place orders, delivery tickets, and invoices. They are considered complete when the purchases under them equal their total dollar limitation, if any, or when their stated time period expires.

Consistent with the approval levels established in Acquisition Chapter Guide 8.4, approval levels for "Traditional" BPA subject to FAR Part 13 are:

- If the action is less than $650,000, the Contracting Officer; Between $650,000 but less than $12,500,000, the Contracting Activity Competition Advocate;
- If the action is $12,500,000 or greater but not exceeding $50,000,000, the Head of the Contracting Activity (HCA), in accordance with the HCA's Delegation of Authority/Designation memorandum; and
- If the action is $50,000,000 or greater, the Senior Procurement Executive.

8. Supplemental Information:

- The contracting officer is forbidden to request or obtain certified cost or pricing data when the acquisition is at or below the SAT currently at $150,000 (unless deemed necessary). (Reference FAR 15.403-1 (a))

- The contracting officer must not solicit quotations based on personal preference, or restrict solicitation to suppliers of well-known and widely distributed makes or brands.

- The contracting officer must clearly articulate the basis-price alone or price and other factors (e.g. past performance and quality) upon which award will be made. It is not, however, necessary to state the relative importance assigned to each evaluation factor.

- Solicitation from one source is authorized if the contracting officer determines in writing that the circumstances of the contract action deem only one source reasonably available (e.g., urgency, exclusive licensing agreement).

- Options may be included in solicitations provided the requirements of FAR 17.2 are met and the aggregate value of the acquisition and all options does not exceed the dollar threshold for use of simplified acquisition procedures.

- The contracting officer has broad discretion in fashioning suitable evaluation procedures. Those described in FAR Parts 14 and 15 are not mandatory; however, at the contracting officer's discretion, one or more, but not necessarily all, of the evaluation procedures in FAR Parts 14 and 15 may be used.

- If using price and other factors, ensure that quotations or offers can be evaluated in efficient and minimally burdensome fashion. Formal evaluation plans and establishing a competitive range, conducting discussions, and scoring quotations or offers are not required. Rather, contracting officers are encouraged to comparatively evaluate offers and to evaluate other factors (e.g., past performance) based on information such as knowledge of and previous experience with the supply or service being acquired.

- Prior to establishment of an award, the contracting officer must determine that the proposed price(s) is/are fair and reasonable. Whenever possible, base price reasonableness on competitive quotations or offers. However, when this is not possible, the determination may be based on market research; comparison of the proposed price with prices found reasonable on previous purchases; current price lists, catalogs, or advertisements; a comparison with similar items in a related industry; value analysis; personal knowledge of the item being purchased; comparison to an independent Government estimate; or any other reasonable basis.

- **SAP Sole Source Information:**
    - For SAP acquisitions equal to or less than SAT, adhere to the requirement to document the Contracting Officer's determination as described in FAR 13.106.
    - For SAP acquisitions greater than SAT, Justifications and Approvals under acquisitions made using FAR 13.5, Test Program for Certain Commercial Items, shall be prepared using the format identified in FAR Subpart 13.501 to reflect an acquisition under the authority of the test program for commercial items.

	Contracting methods	
Procedures	**Contracting by simplified acquisition procedures** **FAR Part 13**	**Contracting by negotiated procedures** **FAR Part 15**
Solicitation	All commercial item acquisitions exceeding $25,000 may use streamlined posting and solicitation procedures to reduce the time needed to advertise and solicit offers, respectively, as described in FAR Part 12.	
Evaluation / source selection	• The contracting officer has broad discretion in fashioning suitable evaluation procedures. • If using price and other factors, contracting officers should ensure that quotations or offers can be evaluated in an efficient and minimally burdensome fashion. Formal evaluation plans and establishing a competitive range, conducting discussions, and scoring quotations or offers are not required. • Evaluation of past performance can be based on, among other things, the contracting officer's knowledge of and previous experience with the supply or service being acquired, or any other reasonable basis.	• A formal source selection is required, including an evaluation team with expertise tailored for the particular acquisition, which will generally evaluate cost or price, technical factors, and past performance. • The evaluation factors and significant subfactors that apply to an acquisition and their relative importance are within the broad discretion of agency acquisition officials, subject to certain requirements.
Award	• The contracting officer must determine that the proposed price is fair and reasonable. • Whenever possible, price reasonableness should be based on competitive quotations or offers. If only one response is received, the contracting officer must include in the contract file a statement of price reasonableness. • Contracts must be competed to the maximum extent practicable. Contracting officers can post proposed contract actions over $25,000 to the government-wide point of entry, located at Federal Business Opportunities (FedBizOpps) or solicit sources from the local trade area. Noncompetitive awards using simplified procedures under the test program are permissible if justification, approval, and notice are provided when required.	• Source selection decisions are to be based on a comparative assessment of proposals against source selection criteria. • After identifying the most highly rated proposals, the contracting officer must generally establish a competitive range, notify unsuccessful offerors, and conduct discussions with offerors in the competitive range. • Full and open competition is generally required which means that all responsible sources are permitted to compete. The law allows for full and open competition after exclusion of sources, and noncompetitive awards are permissible under certain circumstances.

Table 1: Comparison of Simplified Acquisition and Negotiated Procedures for Acquiring Commercial Items

SIMPLIFIED ACQUISITION DOCUMENTATION RECORD *(Required for acquisitions greater than the micro-purchase threshold up to $150K)*	***REQUISITION NO.*** **PURCHASE ORDER NO.**

Note: *Enter an "X" in the box to the left of all applicable items and complete any additional information*

1. Sources Screened

(SUPPLIES)

☐ Agency Inventories

☐ Excess from other Agencies (FAR 8.1)

____Not available

☐ Federal Prison Industries (FAR 8.6)

____Not comparable to commercial industry

____FPI waiver attached

____Meets authorized exception (FAR 8.605)

☐ AbilityOne/JWOD (FAR 8.7)

____Not offered

☐ Federal Supply Schedule (FAR 8.4)

____Items not available under FSS

____Items available under GSA FSS number:

_____

Expires _____

☐ Commercial or /Local

____Contract _____

____Expires _____

(SERVICES)

☐ AbilityOne/JWOD

____Not offered

____Waiver attached for services

☐ Federal Supply Schedule

☐ Federal Prison Industries (UNICOR)

____Not offered/not required for services

____Not comparable to commercial industry

____FPI waiver attached

____Meets authorized exception (FAR 8.605)

☐ Commercial

2. Market Research

Market research was conducted with the following results (e.g., number of companies contacted and when, resources used):

_____

_____

_____

3. Commercial Determination: The supplies/services have been determined to be commercial per the definition in FAR 2.101 and in accordance with FAR Part 12, Enclosure 1: ☐ Yes ☐ No Briefly describe basis:

_____

_____

_____

Simplified Acquisition Documentation Record

4. Synopsis

☐ Requirement was synopsized (required for buys >$25K including options) ☐ Requirement posted or disseminated (required for buys $10K–$25K)

☐ Combined synopsis/solicitation ☐ Requirement was not synopsized; the following FAR 5.202 exception applies: _____

5. Basis for Award

☐ Sole/proprietary source

____Sole Source Justification signed by the Contracting Officer in the file.

____Only known source of supply

____Utility services available from only one source/educational services from nonprofit institution

___Other (if greater than the micro-purchase threshold, state reasons for noncompetitive action)

_____

_____

☐ Low quote/offer/GSA FSS price

☐ Mandatory Source of Supply per FAR 8.002

☐ Best value (identify the factors considered in making this determination)

____Special features (salient characteristics) ____Trade-in considerations ____Warranty provisions ____Maintenance availability

____Probable life of the item selected as compared with comparable item ____Environmental and energy efficiency considerations

____Past performance ____Transportation factors (total cost to destination) ____Other (explain)

_____

_____

_____

6. Basis for Determining Price Reasonableness

☐ Adequate price competition

_____Vendors solicited (enter number) _____ Quotes received (enter

☐ number) Historical comparison for the same or similar items

Prior Contractor:_____ Order No.:_____ Date Purchased: _____

Quantity and Unit of Issue:_____Unit Price Previously Paid: _____

Simplified Acquisition Documentation Record

6. Basis for Determining Price Reasonableness (cont)

Basis for determining prior price fair and reasonable: _____

If the items are not identical, explain why the comparison is considered valid: _____

☐ Parametric Estimate. Explain:_____

☐ Comparison with published price lists, catalogs, or advertisements. (*Note: Inclusion of price in a price list, catalog, or advertisement does not, in and of itself, establish fair and reasonableness of the price.)* Specify source(s):

Manufacturer/vendor name:_____ Catalog/List title or number:_____

Effective date(s)_____ Page number(s):_____

☐ Independent Government Cost Estimate. Provide detail:_____

☐ Comparison with prices for same or similar items. Specify source(s):_____

☐ Other Price Analysis or Comments:

_____

_____

7. System for Award Management (SAM)

☐ Contractor/vendor is registered with the SAM and are not excluded from receiving federal awards (Entity block is green). (Attach printout from www.sam.gov and retain in the Supporting Documents)

☐ Contractor/vendor is not registered with the SAM but a waiver has been made due to urgency

8. Contractor Responsibility Determination: The prospective contractor has been determined to be responsible as prescribed by FAR 9.104

The contractor —

☐ Has satisfactory performance record (i.e., personal knowledge, reports, or other. Explain:
_____)

☐ Has ability to meet the delivery/performance schedule

9. Small Business

☐ Small Business- Small Purchase Set-Aside FAR 13.003(b)

This procurement has been set-aside exclusively for: ☐ Small Businesses ☐ Woman-Owned Businesses ☐ Disadvantaged Businesses ☐ Other

Provide Contracting Officer's rationale for awarding to other than a small business (FAR 19.502).

_____

_____

Simplified Acquisition Documentation Record

11. Additional Remarks for Block No(s). _____

PREPARED BY (SPECIALIST/BUYER):	**DATE:**

b e te t

CHAPTER 15 - CONTRACTING BY NEGOTIATION

1 1 S r e Se e t e pr 201

1 2 te r p t 201

1 0 t b t r ter r 2017

1 02 r tr t t r 2017

1 0 e te e e 2017

1 e t t me t t re e t t t e r e e t t em r m September 201

1 0 1 e t r p t 2017

Source Selection

Overview

This chapter provides guidance to the acquisition team on conducting source selection in accordance with Part 15 of the Federal Acquisition Regulation (FAR).

Background

The mid 1990's was a time of 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 Streamlining Act in 1994 and the Federal Acquisition Reform Act in 1995 , coupled with Government-wide and Department of Energy (DOE) contract reform efforts not only changed traditional procurement processes but 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 received considerable attention in most of the reform initiatives was source selection, as set forth in Part 15 of the 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 final proposal revisions. 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 on time 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 marketing areas. The procurement professional is now an integral part of a team that manages all phases of the acquisition process, from requirements definition to contract close-out. This is reinforced in guiding principles for the Federal Acquisition System (see FAR 1.102).

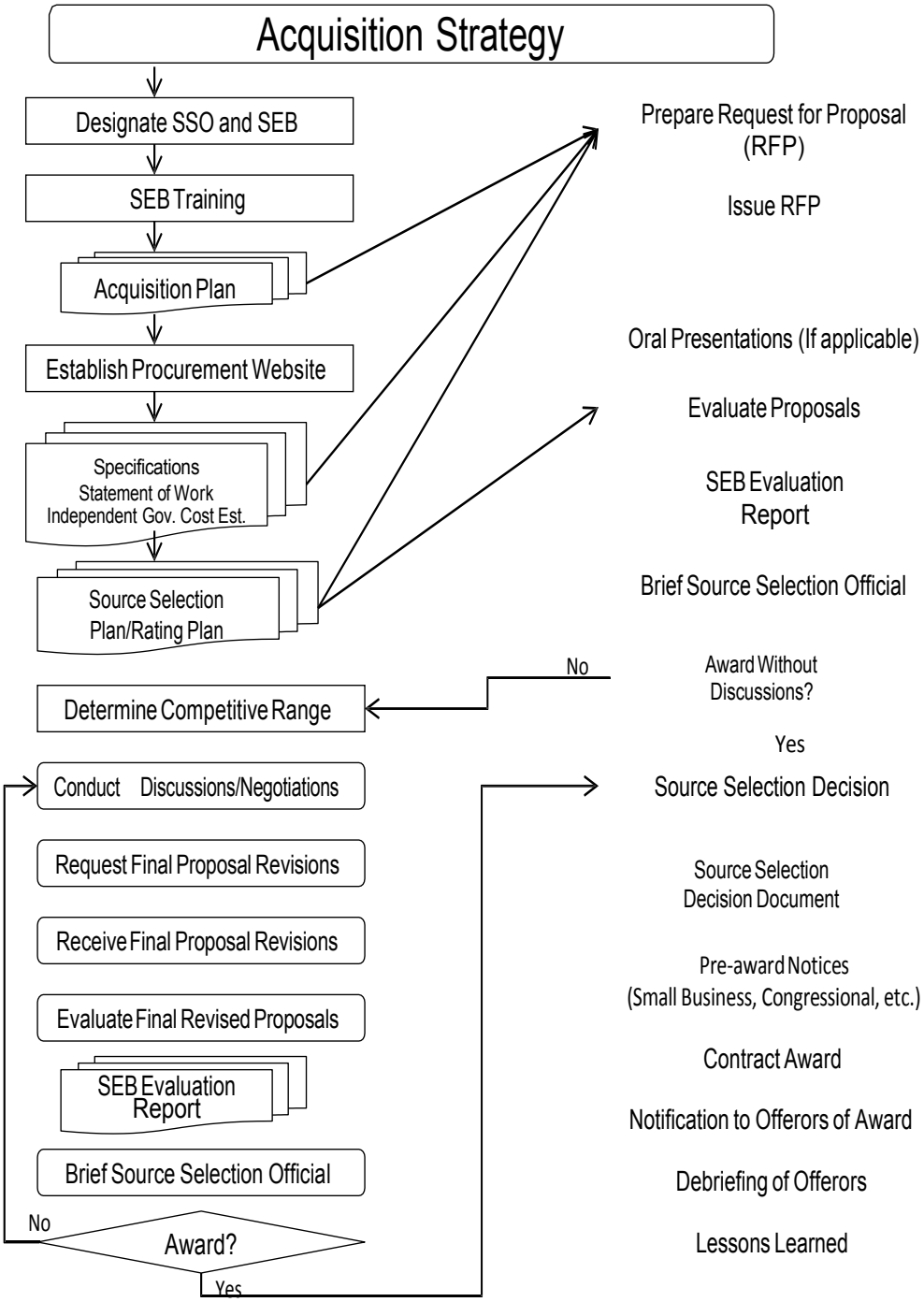
This Chapter provides a series of topics on key areas of the source selection process. The intent is to present DOE procurement professionals with useful "hands-on" information on key principles and practices that will enhance the effectiveness of the source selection process.
For FAR Part 15 procurements, DOE usually utilizes the Source Evaluation Board (SEB) process which is addressed in the Chapter. However, in some situations, in particular those involving lower dollar values and minimal complexity, a less formalized approach referred to as Technical Evaluation Committee (TEC) may be appropriate. In this approach, the technical evaluation of proposals is performed exclusively by program personnel without the involvement of the Contracting Officer. Most of the information in this Chapter is applicable to TEC's. Questions may be referred to the SEB Secretariat and Knowledge Manager.

Table of Contents

TOPIC I FLOW OF THE SOURCE SELECTION PROCESS 4
TOPIC II SOURCE SELECTION OFFICIAL DESIGNATION 5
TOPIC III SOURCE EVALUATION BOARD COMPOSITION AND DESIGNATION 5
TOPIC IV CONFIDENTIALITY AND CONFLICT OF INTEREST CERTIFICATIONS ... 6
TOPIC V SEB LOGISTICS 7
TOPIC VI ACQUISITION WEBSITE 7
TOPIC VII SOURCE SELECTION TRAINING 8
TOPIC VIII ROLES AND RESPONSIBILITIES 8
TOPIC IX SOURCE EVALUATION BOARD (SEB) REPORTING 14
TOPIC X DRAFT REQUEST FOR PROPOSAL (DRFP) 14
TOPIC XI EXCHANGES WITH INDUSTRY BEFORE RECEIPT OF PROPOSALS 17
TOPIC XII SCORING METHODOLOGIES AND SOURCE SELECTION PLANS (RATING PLANS) 20
TOPIC XIII GUIDANCE TO THE SEB 24
TOPIC XIV PAST PERFORMANCE AS AN EVALUATION FACTOR 30
TOPIC XV ORAL PRESENTATIONS 37
TOPIC XVI EXCHANGES WITH OFFERORS AFTER RECEIPT OF PROPOSALS 43
TOPIC XVII PRICING, ANALYSIS AND COST REALISM 49
TOPIC XVIII COST / TECH TRADEOFFS UNDER "BEST VALUE" PROCUREMENTS .. 53
TOPIC XIX AWARD WITHOUT DISCUSSIONS 56
TOPIC XX CONTENTS OF AN EVALUATION REPORT 58
TOPIC XXI SOURCE SELECTION OFFICIAL (SSO) DECISION DOCUMENTATION .. 63
TOPIC XXII FOREIGN OWNERSHIP, CONTROL OR INFLUENCE (FOCI) 66
TOPIC XXIII DEBRIEFINGS 69
TOPIC XXIV SEB LESSONS LEARNED 76
TOPIC XXV LIBRARY DOCUMENTS 77

TOPIC I FLOW OF THE SOURCE SELECTION PROCESS

The FAR Part 15 competitive source selection process has a typical flow to it. The process starts with the acquisition strategy and culminates with lessons learned. The diagram below depicts the typical flow of the source selection process.



Within each step of this process, a number of different activities occur. For example, part of developing the acquisition strategy includes defining the requirements, part of developing an acquisition plan usually includes the issuance of a sources sought synopsis, while preparation of the RFP may include the preparation and issuance of a draft RFP, as well as conducting industry day, pre-solicitation, and/or one-on-one meetings. Each procurement is unique, and the Source Evaluation Board (SEB) will determine which activities associated with the steps in the process are necessary for their particular procurement.

TOPIC II SOURCE SELECTION OFFICIAL DESIGNATION

The Secretary of Energy designated the Director, Office of Acquisition and Project Management (OAPM) as the Senior Procurement Executive (SPE) for DOE. This designation includes delegations of authority for contracting and financial assistance. The SPE re-delegates specific contracting authority to a senior management official for each contracting activity, referred to under government-wide acquisition regulations as the Head of the Contracting Activity (HCA). HCAs in DOE have cognizance over one or more procurement offices. Each HCA is delegated specific dollar authority in a memo signed by the SPE. HCA's for Non-Power Marketing Administration (PMA) procurement offices have been delegated $50 million of authority.

The SPE has Source Selection Authority for all acquisitions exceeding $50 million and the Non-PMA HCA has Source Selection Authority for all actions valued at $50 million or less. This authority is re-delegable.

To obtain an SSO designation for actions exceeding $50 million, the HCA should submit a memo requesting the designation of an individual as the SSO to the SPE, with a copy to the Director, Field Assistance and Oversight Division, MA-621. For actions valued at $50 million or less, the Field Office Manager should submit the request to the HCA. The request should include a resume or curriculum vitae with the following information:

> Name:
> Title:
> Background and Experience: Discuss your background and experience, specifically identifying any SEB, contracting, COR, and technical/program experience. Include a discussion of involvement in contract related matters.
> Training: Identify any procurement related training.

For actions exceeding $50 million, the SEB Secretariat (see Acquisition Guide Chapter 1.4) will prepare the SSO designation memo, obtain the SPE's signature and distribute the signed memo.

TOPIC III SOURCE EVALUATION BOARD COMPOSITION AND DESIGNATION

The composition of a SEB should be tailored to the particular acquisition, assuring the ability to comprehensively evaluate proposals. SEB membership consists of a SEB Chairperson, Voting

Members, Contracting Officer, Advisors, Executive Secretary, and Ex-Officio Member(s). The number of voting members usually ranges from three to five people including the SEB chairperson and the Contracting Officer. It is recommended that the Contracting Officer be a voting member. The number of non-voting members, which includes advisors and ex-officio members, varies greatly based upon the complexity, dollar value and number of voting members assigned to the SEB. At a minimum, each SEB shall include a cost advisor and a legal advisor. Other areas where an advisor may be appropriate include: security, health and safety, human resources, finance, accounting, information technology, intellectual property, etc… Each SEB should have an Executive Secretary as a non-voting member of the SEB. The Executive Secretary should be either a contract specialist or a Contracting Officer. This position is an excellent way to prepare an individual for an increased role as a participant in a future SEB.

The SSO is responsible for designating the SEB. The designation of the SEB should be accomplished through a formal written memorandum. For acquisitions with a value greater than $50 million, the composition of the SEB must be coordinated with the SEB Secretariat prior to finalization.

TOPIC IV CONFIDENTIALITY AND CONFLICT OF INTEREST CERTIFICATIONS

Although there is no regulation requiring each Source Evaluation Board (SEB) member to sign a confidentiality certification or a conflict of interest certification, as a safeguard to preserve the integrity of the SEB process, it is DOE's long standing practice for SEB members to do so. Confidentiality Certification and Conflict of Interest Certification templates are available in the STRIPES Library.

Confidentiality

All personnel involved in a Source Selection (e.g., SEB or Technical Evaluation Committee (TEC)) must safeguard source selection information and must not disclose proposal information or source selection information to anyone outside the membership of the SEB.

Specifically, proposals shall be safeguarded from unauthorized disclosure throughout the source selection process. (See 3.104 regarding the disclosure of source selection information (41 U.S.C. 2101-2107 formerly 41 U.S.C. 423)). Information received in response to a Request for Information (RFI) shall be safeguarded adequately from unauthorized disclosure. [FAR 15.207(b)]

Furthermore, except as specifically provided for in FAR 3.104-4, no person or other entity may disclose contractor bid or proposal information or source selection information to any person other than a person authorized, in accordance with applicable agency regulations or procedures, by the agency head or the contracting officer to receive such information. [FAR 3.104-4(a)]

Any Confidentiality Certification must contain the following language:

"These provisions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by existing statute or Executive order relating to (1) classified information, (2) communications to Congress, (3) the reporting to an Inspector General of a violation of any law, rule, or regulation, or mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety, or (4) any other whistleblower protection. The definitions, requirements, obligations, rights, sanctions, and liabilities created by controlling Executive orders and statutory provisions are incorporated into this agreement and are controlling."

Conflict of Interest

Government procurement matters must be conducted in a manner beyond reproach, with complete impartiality and preferential treatment to none. Impeccable standards of conduct are a must. As such, all personnel involved in an SEB are required to avoid strictly any conflict of interest or even the appearance of a conflict of interest. [FAR 3.101-1]

TOPIC V SEB LOGISTICS

The procurement and program organizations should coordinate the arrangement of adequate space and resources to conduct the SEB. It is recommended that the SEB members all be co-located together and be dedicated full-time to the extent practicable. The space should be large enough to accommodate the entire SEB. It is recommended that the space include at least one conference room or common work area where the SEB can meet and work as a group. It is also recommended that the space be removed from the normal work space to avoid distractions and disruptions. The space and equipment need to be in conformance with the physical security requirements as well as the information technology security requirements. If the SEB membership includes an individual or individuals whose duty location is different from the location the SEB plans to convene, adequate travel funds will be required to ensure the SEB can meet as necessary.

TOPIC VI ACQUISITION WEBSITE

For most competitive acquisitions, a procurement specific Internet website should be created during the acquisition strategy and acquisition planning phases of procurement. The Internet address of the website should be provided to prospective offeror via a pre-solicitation synopsis. This website can be used for posting such things as: procurement schedule, procurement related documents and information, current contract, details about conferences, meetings and tours, various links to important websites, announcements, questions and answers, as well as the solicitation and any amendments. This website is a supplement to and does not replace the Federal Business Opportunities (FedBizOpps.gov) web page where synopses and solicitations are formally issued.

TOPIC VII SOURCE SELECTION TRAINING

The Office of Acquisition and Project Management and the Office of General Counsel (GC) developed a course entitled Source Selection for the Source Evaluation Board (SEB). This course is approximately 12 hours in length and is conducted by OPAM and GC at the various DOE offices. The training can be scheduled by contacting the SEB Secretariat, GC-61, or the Director, Field Assistance and Oversight Division, MA-621. This training covers the complete flow of the source selection process as described in Topic I of this Guide Chapter. The table of contents for the course is shown below:

- Introduction to Source Selection
- Source Evaluation Board
- SSO and SEB Members Roles and Responsibilities
- Procurement Integrity and Unfair Competitive Advantages
- Acquisition Planning
- Small Business
- Schedule for the Acquisition
- RFP Development
- Statement of Work
- Evaluation Factors for Selection
- Evaluation of Experience and Past Performance
- RFP Instructions
- Cost Proposal Instructions
- SEB Preparations Prior to Receipt of Proposals
- The Consensus
- Source Selection Plans
- Key Personnel and Oral Presentations
- Price/Cost Evaluations
- Award With or Without Discussions?
- Guidance to Individual Evaluators
- SEB Report
- SEB Briefing to SSO
- Source Selection Document
- Debriefings
- Lessons Learned
- HQ Business Clearance

TOPIC VIII ROLES AND RESPONSIBILITIES

The composition of an SEB should be tailored to the particular requirement. SEB membership consists of a Source Selection Official, SEB Chairperson, Voting Members, Contracting Officer, Advisors, Executive Secretary, and Ex-Officio Member(s). Listed below are the roles and

responsibilities of the SSO and SEB members.

Source Selection Official (SSO)

The SSO is delegated source selection authority from the Senior Procurement Executive for actions exceeding $50 million and the Head of Contracting Activity (HCA) for actions valued at $50 million or less. The HCA may re-delegate source selection authority. When choosing the individual to serve as SSO, consideration should be given to both the complexity and dollar value of the procurement. The SSO is normally a senior program official at either the field office or headquarters. The SSO will:

1. Appoint SEB Chairperson, SEB members, advisors and ex-officio members;
2. Ensure that the entire source selection process is conducted properly and efficiently;
3. Review and approve the Acquisition Plan, Request for Proposal (RFP) and the Source Selection Plan (SSP);
4. Provide the SEB with appropriate resources, guidance and special instructions as may be necessary for the conduct of the evaluation and selection process;
5. Be briefed on the need to enter into discussions and establish a competitive range, if applicable;
6. Decide policy issues and answer major questions identified by the SEB Chairperson;
7. Request briefings and consultations with the SEB chair as may be required (including updates on all significant issues and the SEB's progress throughout the process);
8. Participate in any aspect of the source selection process, such as reviewing proposals, reviewing draft reports, attending oral presentations, (if you attend one, you must attend all) etc., in order to assist in his/her final independent judgment/decision;
9. Select the apparent successful offeror(s) after an in-depth and independent review and analysis of the SEB's evaluation, and performing a comparative assessment of the offeror; and
10. Document the basis of the selection decision in the Source Selection Decision Document.

Source Evaluation Board Chairperson

The SEB Chairperson has the overall responsibility for the SEB's activities during the source selection process. The SEB Chairperson usually has a technical background. However, a Contracting Officer can serve as SEB Chairperson. The SEB Chairperson will:

1. Ensure all Board members receive SEB training, as well as any other needed training;

2. Lead and formulate the agenda for all SEB meetings;
3. Manage the acquisition against the schedule;
4. Work with the Field Office Management to ensure that sufficient and adequate personnel and other resources are available in a timely manner to meet the needs of the acquisition;
5. Ensure that proper evaluation tools and procedures are available to the evaluators and advisors and that they are sufficiently trained in the proper use of those tools and procedures;
6. Lead the SEB members in the development of the RFP;
7. Lead the SEB members in the proposal evaluation, based on input from the advisors, to support the Contracting Officer's competitive range determination (if applicable);
8. Coach and develop the team and team members, setting goals and offering advice and guidance when needed, and acknowledging high performance and excellence when it occurs;
9. Ensure that all aspects of the evaluations have been conducted properly and in adequate depth;
10. Lead the SEB members in identifying proposed strengths and weaknesses in proposals based upon RFP evaluation criteria, and reaching a consensus on the strengths, weaknesses, and the significance of the strengths and weaknesses, and assigning ratings with supporting rationale;
11. Lead in developing appropriate cost-performance, trade-off studies, as may be requested by the SSO;
12. Attempt to resolve any reservations, concerns, or disagreements of individual SEB members. If resolution cannot be obtained, ensure that any significant reservations, concerns, or disagreements are documented in the SEB report and presentation to the SSO;
13. Provide briefings and consultations as the SSO and ex-officio members may require;
14. Identify policy issues and major questions requiring decision by the SSO;
15. Report any events that affect the procurement schedule as soon as possible to obtain approval for revised milestone schedules as necessary;
16. Lead the SEB members in reviewing and approving all discussion issues, prior to submission to the Contracting Officer for action;
17. Lead in developing the initial and final SEB written reports, as applicable, and schedule and conduct presentations to the SSO;
18. Coordinate the review of procurement documents for HCA review and business clearance review; and
19. Ensure that SEB lessons learned are captured.

<u>Source Evaluation Board Voting Members</u>

The SEB voting members are the primary evaluators and participants in the source selection process. The SEB members will:

1. Assist in the development of the Acquisition Plan unless completed by the Integrated Procurement Team (IPT);
2. Assist in the development of the RFP;
3. Participate in pre-solicitation meetings/conferences, site tours and pre-proposal conferences as applicable;
4. Assist in the development of answers to questions received from interested parties;
5. Independently evaluate each proposal in accordance with the RFP evaluation criteria and the Source Selection Plan, including consideration of input from advisors;
6. Participate in oral presentations if applicable;
7. Deliberate and develop a consensus among the SEB members of the strengths, weaknesses, deficiencies, and rating of each proposal;
8. Assist in the development of questions for Offeror determined to be in the Competitive Range (CR), if a CR is determined, and participate in discussions if they are held face-to-face;
9. Prepare an SEB report for submission to the SSO;
10. Participate , as necessary, in briefing the SSO;
11. Assist in the documentation of lessons learned; and
12. Participate in debriefings.

Source Evaluation Board Advisors

The SEB advisors have subject matter expertise and provide input to the SEB. Advisors are non-voting members. The SEB advisors will:

1. Review designated aspects of proposals and provide advice and assessments in their respective areas of expertise, as requested;
2. Recommend areas of the offeror' proposals that should be further analyzed, evaluated, or studied;
3. Review questions and findings and assist the SEB/Contracting Officer in preparation for discussions and/or responding to questions received on the RFP; and
4. Assist the SEB in the preparation of written reports or other information related to the evaluation.

Contracting Officer

The Contracting Officer serves as the primary procurement authority, advising the SEB and the SSO on procurement matters. The Contracting Officer will:

1. Advise and support the SSO and SEB as needed;
2. Protect integrity of the process;
3. Conduct and control all communication with offerors (FAR 15.303(c));
4. Issue the RFP, as well as any amendments to the RFP;
5. Serve as focal point for inquiries (FAR 15.303(c));
6. Determine the competitive range (FAR 15.306(c)(1)), when award is not based on initial submission, with input from the SEB and concurrence from the SSO, and notify the offerors accordingly;
7. Conduct and lead discussions with offerors in the competitive range ensuring the discussions are meaningful (FAR 15.306(d)(3));
8. Oversee the evaluation of cost.
    - Responsible for obtaining information adequate to establish price reasonableness and/or determine cost realism (FAR 15.403-3).
    - Purchase goods and services only at fair and reasonable price (FAR 15.402(a))
9. Request proposal revisions as appropriate;
10. Perform all the required checks (EEO and FOCI, etc), make the responsibility determination, verify size status and compliance with the limitation of subcontracting when required, make all the necessary notifications (successful, unsuccessful and congressional) and coordinate the press release;
11. Award the contract(s) after receiving all the appropriate reviews and approvals;
12. Lead the debriefings, document the file as required and provide all requested information to legal counsel if a protest is received;
13. Assist in the documentation of lessons learned; and
14. Ensure that all documentation and Source Selection Information is filed appropriately.

<u>SEB Executive Secretary</u>

The Executive Secretary is the principal assistant to the SEB Chairperson. The Executive Secretary will attend all SEB meetings as necessary, and subject to the direction of the SEB Chairperson, will accomplish such tasks as the following:

1. Obtain secure work areas for conduct of SEB activity;
2. Develop and implement procedures to control access to SEB work areas, and the safeguarding of SEB proceedings and data;

3. Obtain material, supplies and equipment needed by the SEB;
4. Obtain a signed confidentiality certificate and conflict of interest certificate and Procurement Integrity Certification for Procurement Officials from all SEB members, advisors and ex-officio members;
5. Prepare and submit to the SEB Secretariat each month the Source Evaluation Board Status Report;
6. Arrange for the preparation, reproduction, control and distribution of all material relating to the activity of the SEB;
7. Obtain and distribute applicable procedures, policies, instruction, etc., to SEB members, advisors and ex-officio members, as directed;
8. Follow-up on action items assigned to SEB members to ensure the procurement schedule is maintained;
9. Prepare minutes of SEB meetings as appropriate, obtain the chairperson's approval and distribute copies to all SEB members and others as directed by the SEB Chairperson;
10. Assist with logistical and administrative matters involving tours, conferences and oral presentations;
11. Assist in preparing and assembling the SEB report and presentation charts and arrange for reproduction and distribution;
12. Schedule debriefings, and dispose of all excess material with concurrence of SEB Chairperson, Contracting Officer and legal advisor;
13. Assist with the filing of all documentation and Source Selection Information. If necessary, forward the complete file to the cognizant procurement office for permanent retention and contract administration; and
14. Survey the area where SEB activity occurred and arrange for the return of equipment and materials as appropriate.

Ex-Officio Member(s)

An ex-officio member is a non-voting participant who is usually in a management position. By virtue of their position, they have a need to know relative to the procurement and can offer advice and guidance to the SEB. Ex-Officio members normally have a very limited role in procurement.

TOPIC IX SOURCE EVALUATION BOARD (SEB) REPORTING

Background

At the December 2009 DOE Procurement Directors meeting, a newly created position called the SEB Secretariat and Knowledge Manager (SKM) was rolled out. The SKM position resides in the Field Assistance and Oversight Division, MA-621. Acquisition Guide Chapter 1.4 provides more details about the establishment of this position, as well as the duties and responsibilities of the position. One of the duties and responsibilities is "establishing SEB reporting requirements and tracking the status of SEB activities against established milestones." The goals of such a SEB reporting requirement are: (1) timely identification and resolution of issues adversely impacting schedule, (2) identification of trends, (3) dissemination of issue and trend information to DOE procurement personnel, and (4) development or revision of policies and/or guidance as appropriate.

Reporting Requirement

On March 26, 2010, a memo was issued by the Director, Office of Contract Management, formally establishing a SEB reporting requirement. For all SEB's whose estimated value exceeds $25 Million, the acquisition schedule shall be submitted to the SKM via e-mail within five days of approval of the Acquisition Plan. After submission of the initial acquisition schedule, SEB's shall submit monthly status updates by the 5th calendar day of the month.

TOPIC X DRAFT REQUEST FOR PROPOSAL (DRFP)

Background

The DRFP is an initial, informal document(s) that communicates the Government's intentions/needs to industry. The DRFP solicits 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. 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) reduced proposal preparation and evaluation time; (3) reduced need for solicitation amendments which preclude other delays that disrupt timely completion of the acquisition; or (4) better proposals, end products and services.

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 incorporation of beneficial comments in the final RFP. The SEB should document all questions and comments received on the draft RFP, as well as the disposition of the questions and comments. It is not necessary to post all questions and answers on the draft RFP.

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)
FAR 5.101(b) (Methods of Disseminating Information)

Issues

When is it appropriate to issue a 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 especially 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. Use of a DRFP is strongly encouraged for requirements that have not previously been procured. In such cases, the Government would be particularly interested in industry comment on proposed contract type. If there are potential human resource issues (pay, pension & benefits, workforce size, etc.), it is both desirable and beneficial to get stakeholder input before finalizing the RFP. DRFP's are not used for noncompetitive procurements.

What should a 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, special contract requirements (Section H), 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 (preferably the Contracting Officer or Contract Specialist), the preferred methods by which contact may be established, i.e., via e-mail, and the date by which all comments are due, etc. The DRFP should be published with a cover letter containing a description of DOE's technical and contracting strategy, identifying those areas where DOE specifically desires comments. The letter should also include a statement to the effect "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 is the process 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. A variety of methods may be used, such as posting announcements to the government Point of Entry, Federal Business Opportunities (FBO) at http://www.fbo.gov and those methods addressed at FAR 15.201(c) and FAR 5.101(b). The FBO announcement is prepared within STRIPES and must be transmitted to Fed Connect, https://www.fedconnect.net/FedConnect/, and FBO. 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. The proposed contract action should be synopsized in accordance with FAR 5.203 prior to issuance of the draft solicitation. In addition, the notice of availability of a DRFP and a future timeframe when the solicitation may be issued may be included in the same synopsis.

How should questions/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 (.e.g., cost price analysts, legal counsel, contractor human resources specialist, small and disadvantaged business specialist) should carefully review each question/comment/suggestion to: (1) determine whether it 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) revise the RFP, as applicable. A record of all questions/comments received and the action taken should be kept in the file. Care must also be taken to ensure that changing the RFP as a result of a question/comment/suggestion does not give an unfair competitive advantage to an individual offeror.

If the nature of a question/comment/suggestion is particularly difficult or complex, it may be beneficial for the government to establish an additional comment period (i.e., float the Government's proposed change past the interested parties/potential offerors). This would be accomplished through use of an acquisition website discussed in Topic It may also be beneficial for the government to convene a pre-solicitation conference. 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 and distributed in the same manner as the DRFP, e.g., through posting on the website. (See Topic XI, Exchanges With Industry Before Receipt of Proposals for additional discussion on the use of pre-solicitation conferences.) One-on-one meetings can also be utilized to obtain very frank feedback on the DRFP.

If the procurement has been selected for Business Clearance Review, following approval of the RFP, the Contracting Officer may post a summary level document to the acquisition website and/or prepare an RFP cover letter that will accompany the final RFP, that discusses the nature

of questions/comments/suggestions received and changes made to the DRFP. The document or cover letter should not attribute comments to any particular firm. DOE is not obligated to post each question or to provide an answer to each question.

It is critical throughout the process 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 one-on-one meetings are utilized, 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 one-on-one meeting is provided to all potential offerors. (See Topic XI, Exchanges With Industry Before Receipt of Proposals for additional discussion on the use of one-on-one meetings.)

TOPIC XI EXCHANGES WITH INDUSTRY BEFORE RECEIPT OF PROPOSALS

Exchanges with industry before receipt of proposals is a technique to promote early exchange of information with industry either: (1) prior to the release of the solicitation or (2) after release of the solicitation but prior to receipt of proposals.

There are a number of techniques to promote exchanges with industry that are identified in FAR 15.201(c). Four of these techniques frequently used are pre-solicitation conferences, one-on-one meetings, pre-proposal conferences, and site tours.

Additionally, in conducting pre-solicitation conferences, one-on-one meetings, pre-proposal conferences, or site tours, 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 conferences and meetings; (3) protect any proprietary information you may be given during this process; and (4) request legal counsel advice if any questions arise about any exchanges.

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)

Issues

When is it appropriate to conduct pre-solicitation conferences, one-on-one meetings, pre-proposal conferences, and site tours?

It is appropriate to conduct pre-solicitation conferences, pre-proposal conferences, one-on-one meetings, and site tours when issues exist which make exchanges between government and

industry beneficial. The following factors often drive a need to conduct such exchanges: (1) the complexity of the project; (2) the desirability of having prospective contractors visually examine Government owned facilities (Site tours are normally conducted in conjunction with such exchanges); (3) the need to disseminate additional background data; (4) exceptional demands on a contractor's capability; (5) unavoidable ambiguities in the SOW/PWS/SOO; or (6) complications involving access to classified material or facilities.

Pre-solicitation conferences are held prior to issuance of the final RFP. If a draft RFP is to be issued, the pre-solicitation conference should be held after the draft RFP is issued. One-on-one meetings with prospective offerors and other stakeholders, as appropriate, may be conducted during the Government's acquisition planning phase, after issuance of a draft RFP, or in conjunction with the pre-solicitation conference. One-on-one meetings should not be held with prospective offerors and other interested parties once the final RFP is issued. Pre-proposal conferences are held after issuance of the RFP. Site tours can be held in conjunction with either a pre-solicitation conference or a pre-proposal conference. If a pre-solicitation conference is held, it may not be necessary to also conduct a pre-proposal conference. The need for this additional conference should consider the following: (1) the significance of the changes between the draft RFP (if issued) and the final RFP, and (2) the potential to generate additional competition.

What should pre-solicitation conferences, one-one-one meetings, pre-proposal conferences, and site tours accomplish?

The pre-solicitation conference should accomplish the following: (1) advise industry of the Government's anticipated requirements, (2) assist the Government in understanding the capabilities of industry and the potential for meeting the Government's requirements, and (3) obtain industry's input on the most effective means of meeting the Government's requirements.

One-on-one meetings have similar objectives to pre-solicitation conferences. However, one-on-one meetings allow for a more open forum for individual companies to provide input that they might not otherwise provide. Some key areas of interest to the Government in one-one-one meetings would be (1) identification of any restrictive specifications, and (2) identification of any barriers to competition. Care must be taken during these one-on-one meetings to not provide information that might give a potential offeror an unfair competitive advantage.

The pre-proposal 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.

Site Tours should familiarize potential offerors with: (1) size of the site and facilities, (2) work conditions at the site, (3) general condition of the facilities, (4) status of ongoing work, (5) complexity of the scope, and (6) general issues related to performance of the work.

How should pre-solicitation conferences, one-on-one meetings, pre-proposal conferences, and site tours be conducted?

The Contracting Officer should publicize the arrangements for pre-solicitation conferences and one-on-one meetings in much the same manner that the RFP would be publicized (See also Topic X, Draft Request for Proposal related to publicizing information). The pre-proposal conference should be publicized in the solicitation and other means as required.

Pre-solicitation Conferences

If a draft RFP is issued, pre-solicitation conferences may be conducted in a similar format to a pre-proposal conference, e.g., dissemination of information, questions and answers, etc. Prospective offerors should be advised that, notwithstanding information provided at the pre-solicitation conference, offerors are to rely solely on the information contained in the final RFP.

One-on-one Meetings

Although it is recommended that one-on-one meetings be held after the release of a draft RFP, if such meetings are held prior to the release of a draft RFP, the Government should provide appropriate and sufficient information to prospective offerors and other interested parties to allow for an effective exchange of information. This information may include, as appropriate, the following: (1) a summary description of the work or a draft statement of work, (2) a description of the anticipated contracting strategy (type contract, fee arrangement, etc.), and (3) questions or specific areas on which the Government desires input. If a draft RFP has been issued, the Government should request feedback on the draft RFP with questions on specific areas of the RFP on which the Government desires input.

Pre-proposal Conferences

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 shall be kept. This record of proceedings, including any new material provided at the conference and questions and answers addressed shall 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 pre-proposal 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.

Site Tours

A site visit/tour is normally conducted as a part of a pre-solicitation conference. Additionally, a site visit/tour should be part of any pre-proposal conference, particularly if a site tour has not been conducted previously, e.g., in conjunction with a pre-solicitation conference. If sufficient site visits/tours have been provided previously, a tour may not be necessary in conjunction with a pre-proposal conference. Site tours may range, depending on the nature of the statement of work and the anticipated proposal submission requirements, from a detailed tour with access to faculties to a "windshield" tour to familiarize prospective offerors with the site.

It is recommended that communications during site tours be closely monitored. To the extent possible, all communications should be conducted by the Contracting Officer. Development of scripted material is also recommended to ensure that all necessary information is effectively and consistently communicated. Scripts are a necessity when the number of attendees dictates that the site visit is conducted by breaking the attendees into groups. All Government personnel participating in the site visit should be cautioned against having side conversations during the site visit. Questions should be collected and answers should made available to all interested parties by either posting them on a designated web site or issuing them via an amendment to the solicitation

TOPIC XII SCORING METHODOLOGIES AND SOURCE SELECTION PLANS (RATING PLANS)

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. The best value process permits tradeoffs among cost or price and non-cost factors and allows the Government to accept other than the lowest priced proposal. FAR Part 15 discusses source selection processes and techniques, including tradeoff processes. FAR 15.305 (a) Proposal Evaluation, states:

> "Proposal evaluation is an assessment of the proposal and the offerors 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."

A Source Selection Plan helps evaluators assess a proposal's merit with respect to the evaluation factors and significant sub-factors. 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 Source Selection Plan is comprised of four basic elements: (1) evaluation factors and sub-factors that are set out in the solicitation; (2) a rating system (e.g., adjectival, color coding, or numerical,); (3) evaluation standards or descriptions which explain the basis for assignment of the various rating system grades/scores, and (4) administrative procedures that guide the evaluation process. The Source Selection Plan should be developed in parallel with the development of the RFP. Parallel development is especially important due to the linkage between the Source Selection Plan and RFP sections L and M. This parallel development helps assure that: (1) there are practical and effective methods for the SEB's evaluation against the evaluation criteria and (2) the RFP instructions in section L will provide the necessary information to the SEB for its evaluation, i.e., what to evaluate and how to evaluate is planned in advance. The Source Selection Plan should be completed prior to completion of the RFP and approved prior to release of the RFP. A model Source Selection Plan which incorporates these four elements is available in the STRIPES Library.

The Source Selection Official (SSO) is required to follow the evaluation criteria and relative weighting factors set forth in the solicitation. How the SSO achieves this objective is not prescribed by Federal Regulations. In fact, the FAR specifically states that the rating method need not be disclosed in the solicitation. While the GAO has repeatedly held that Source Selection Plans are internal documents, and that offerors are not entitled to enforce the provisions of a Source Selection Plan that were not included in the solicitation, the Court of Federal Claims (COFC) has indicated in two recent decisions that failure of evaluators to follow specific procedures and techniques mandated by the Source Selection Plan could be evidence of an erroneous or biased evaluation. The Source Selection Plan should rarely, if ever be changed once the RFP has been issued. Integrity of the procurement process demands that any departures from the Source Selection Plan be documented, coordinated with local counsel, and made know to the SSO.

Applicable statutes, procurement regulations, or small business regulations

FAR 15.305 (Proposal Evaluation)
FAR 15.505 (Pre-award Debriefing of Offerors)
FAR 15.506 (Post-award Debriefing of Offerors)

Issues

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?

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. Frequently used adjectives are: Outstanding, Good, Satisfactory, Marginal, and Unsatisfactory. 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 green, blue, yellow, orange, and red

may indicate outstanding, good, satisfactory, marginal, or unsatisfactory degrees of merit, respectively.

Note: In using either adjectival or color coding rating systems, 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 relate 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 reports.

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 and standards used. 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., 0, 2, 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?

A sample of a rating scale that could be used to evaluate technical and management factors and significant sub-factors is included in the model Source Selection Plan available in the STRIPES Library. 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 according to the chosen scale.

TOPIC XIII GUIDANCE TO THE SEB

Background

The Contracting Officer and Counsel provide business, procurement and legal advice and guidance to the Source Selection Official and Source Evaluation Board Chair. Although SEB training covers the complete flow of the source selection process, 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.

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)
DEAR 903.104-10 (Violations or Possible Violations)

Issues

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, if they have not already done so, evaluators are required to complete confidentiality certificates, conflict of interest certificates, or other required certifications.

Security of proposals

In order to prevent unauthorized disclosure of source selection information per FAR 15.207, proposals and any other proprietary or source selection information must be properly safeguarded. Paper copies need to be kept in locked cabinets or locked rooms. Electronic copies should be closed when individuals are not physically at their computer. Proposals should not be downloaded to thumb drives or other portable media. 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. 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 the source selection official.

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 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, 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 Act provisions 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 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. Either the Contracting Officer or the legal advisor to the SEB/TEC can provide the procurement integrity briefing.

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.

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

An area of concern to evaluators is the disclosure of any proprietary or source selection information during the conduct of 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 Information".

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 information 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 SOW 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 evaluation membership and structure of the evaluation team should be tailored to each acquisition. Ideally the membership should be reasonably diverse, representing different disciplines. 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, SOW, 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 and current customers as supplemented by other information available to the agency.

For each proposal, evaluators shall be instructed to document strengths, weaknesses, and deficiencies for each criterion 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 will identify individual strengths, weaknesses and deficiencies, and then the SEB/TEC meets to discuss and develop consensus strengths and weaknesses prior to assigning scores. This is the preferred method at the Department of Energy.

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 Government Accountability 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.

Is there any training available specifically related to the source selection process available?

The Office of Contract Management (MA-621) in conjunction with the Office of the General Counsel (GC-61) conduct training related to the source selection process (see Topic VII). The audience for the training is the SEB and the SSO.

Headquarters Business Clearance Review and Approval

Each DOE office has been delegated specific procurement authority. If the estimated dollar value of an acquisition exceeds an office's dollar threshold, it is subject to Headquarters review and approval. DOE Acquisition Guide Chapter 71.1 discusses in detail how the Headquarters Business Clearance Review and Approval process works.

TOPIC XIV PAST PERFORMANCE AS AN EVALUATION FACTOR

Background

Past performance is a required evaluation factor. Past performance is most commonly and most effectively evaluated through a specific stand-alone evaluation criterion as part of the evaluation process. Information regarding a contractor's past actions and performance under previously awarded contracts is examined during this process. 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.

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 SOW, RFP Sections L (instructions to offerors) and M (evaluation criteria). The use and evaluation of past performance information for a specific acquisition should be tailored to fit the needs of that acquisition and clearly articulated in section L of the solicitation. The factors chosen for evaluation must represent the key areas of importance and emphasis to be considered in the source selection decision and support meaningful comparison and discrimination between and among competing proposals. They should be reasonable, logical, and coherent.

Evaluating past performance requires going beyond just obtaining performance information from the Past Performance Information Retrieval System (PPIRS). It also requires gathering and evaluating information not found in proposals. The evaluation requires making inquires of third parties about contractor performance on various contracts and evaluating the responses.

FAR 15.304(c)(3)(i), requires that past performance be evaluated in all source selections for negotiated competitive acquisitions, unless the Contracting Officer documents that past performance is not an appropriate evaluation factor. It is up to the Contracting Officer to document the reason(s) 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)
FAR 42.15 (Contractor Performance Information)

Issues

When should past performance be evaluated?

As required by FAR 15.304(c)(3)(i), the use of past performance as an evaluation factor is mandatory in all competitive negotiated acquisitions, unless the Contracting Officer documents in the contract file that it is not considered an appropriate evaluation factor for the acquisition.

What past performance information should be requested?

The solicitation must clearly describe the approach that will be used to evaluate past performance. Information requested from offerors as described in section L of the solicitation should be focused on contracts for similar efforts that have been awarded to the offeror, proposed team members, and proposed major subcontractors, that have been in place for at least three years. Similar efforts should be defined in the solicitation by the size, scope, complexity, contract type, etc. The
Contracting Officer should consider using solicitation language that evokes the phrase "for the same or similar items," which may ensure that the Government does not overly restrict its ability to consider an array of information.

The evaluation team should review and consider the most recent relevant data available. Select similar efforts that are either still in progress or just completed and that have at least one year of performance history. While the actual cut-off time should be determined by the Contracting Officer on a case-by-case basis, the currency of the information requested should be determined by the commodity or service and the specific circumstances of the acquisition.

Information concerning past performance by proposed subcontractors should not be requested unless they are a major or critical subcontractor. Only Past Performance Information (PPI) that relates to that team member's or subcontractor's proposed SOW effort should be requested.

In order to help ensure as much information as possible regarding a firm's past performance on a given contract or subcontract is disclosed, it is recommended that at least two references on each identified contract or subcontract be identified. This also helps to ensure 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?

As required by FAR 15.304(d), the solicitation must describe the general approach that will be used to evaluate past performance. This includes what past performance information will be

evaluated (including the anticipated method of PPI collection), how it will be evaluated, its weight or relative importance to the other evaluation factors and subfactors, the past performance information that is anticipated to be relevant, and how offerors with no past performance will be evaluated. The amount of information requested from offerors should be tailored to the circumstances of the acquisition and should be reasonable so as not to impose excessive burdens on offerors or evaluators.

At a minimum, the solicitation should clearly state that:

> The Government will conduct a performance risk evaluation based upon the past performance of the offerors and their proposed major subcontractors as it relates to the probability of successfully performing the solicitation requirements.
>
> In conducting the performance risk evaluation, the Government may use data provided by the offeror and data obtained from other sources including PPIRS (https://www.ppirs.gov).
>
> The Government may elect to consider data obtained from other sources that it considers current and accurate, but it should ensure the solicitation contains a request for the most recent information available.

The proposal submission instructions must instruct offerors to submit recent and relevant information concerning contracts and subcontracts (including Federal, State, and local government; and private) that demonstrates their ability to perform the proposed effort.

Offerors should be given the opportunity to explain why they consider the contracts they have referenced to be relevant to the proposed acquisition. The instructions should also permit offerors to provide information on problems encountered on such contracts and the actions taken to correct the problems. Also, it is important that the offerors specifically describe the work that proposed major subcontractors will perform so that the evaluation group can conduct a meaningful performance risk evaluation on each proposed major subcontractor.

A major aspect of the evaluation of an offeror's PPI, is to what degree the PPI is relevant. Relevancy is not a separate element of past performance, and therefore should not be described as a subfactor. Relevancy is information that has a logical connection or stark similarities with the solicitation size, scope, and complexity. PPI with limited relevance may be used for evaluation but should receive a lower rating. In cases where an offeror's PPI is not similar or relevant, the PPI should receive a relatively lower rating. If there is no record of past performance or it is not available, the solicitation should explain that the proposal will be evaluated neither favorably nor unfavorably.

PPI based upon previously established companies from which newly formed companies and mergers are formed may be used to mitigate the absence of PPI for a newly-formed company or merger. If this is the case, the RFP Section M must explain that this information will be considered in place of PPI for the offeror. In addition to Federal contract information, past

performance information should be considered from other sources such as state and local government contracts and private sector contracts and subcontracts.

Occasionally, however, an evaluation team may not find any PPI. In this case, an offeror's lack of past performance must be treated as an unknown performance risk, having no positive or negative evaluation significance. This allows the Government to evaluate past performance in a fair manner. The method and criteria for evaluating offerors with no PPI should be constructed for each specific acquisition to ensure that such offerors are not evaluated favorably or unfavorably on past performance. The solicitation must clearly describe the approach that will be used for evaluating offerors with no performance history.
When structuring the solicitation, it is important to distinguish between a contractor's experience and its past performance. Experience reflects **whether** contractors have performed similar work before. Past performance, on the other hand, describes **how well** contractors performed the work – in other words, how well they executed what was promised in the proposal. If experience is to be evaluated, it should be a separate evaluation factor, not combined with evaluation of past performance. The terms "experience" and "past performance" must be clearly defined in the solicitation. This helps to avoid the potential for double counting by asking for the same information under both factors.

Make certain Section L explains the definition of offerors, i.e., does offeror include each firm in the business relationship (e.g., joint venture, teaming partners, and major subcontractors) and who will be evaluated on its past performance. Section L should also include a statement that past performance information will be used for both the responsibility determination and the best value decision.

The source selection official should use the most relevant, recent past performance information available in making the source selection decision. Since past performance evaluation is essentially an informed judgmental decision of the government and 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. The goal of the evaluation report should be to provide clear, reasonable, and rational analysis of the past performance of the offerors. The evaluation team must provide the source selection authority with sufficient information to make informed judgments based on a well-reasoned, well-supported, well-documented rationale of its past performance evaluation. Conclusive statements must be supported by the underlying factual basis. Therefore, state the conclusion and provide specific strengths and weaknesses that support it.

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 should be provided in the RFP (as an attachment Section L) and offerors requested to provide the questionnaire to its references. The questionnaires are returned from the references directly to DOE without going through the offeror. This allows offerors to know what is important to the government under this criterion and assists the government in getting the PPI.

Questionnaires are normally no more than a page to a page and a half of questions. However, the questions must be relevant to the specific acquisition with the objective of providing sufficiently detailed information to the government to allow for a thorough and effective evaluation of past performance.

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.

The evaluation team should consider collecting the list of references and past performance information in advance of the proposal receipt, in order for the Government to commence working with the information. The solicitation can request the offerors to provide a summary past performance early (e.g., in advance of the proposal due date). This allows the Government to begin downloading PPIRS data. To obtain timely completed questionnaires, the contracting officer may have offerors send the Government's questionnaires to all references in advance of submitting their proposals which would allow the completed questionnaires to arrive at the same time as the proposals.

Avoid formula driven past performance ratings, as evaluation of past performance is very much a subjective assessment.

A model of the Section L instructions and the Section M evaluation criteria for both past performance and experience is available in STRIPES. While this Topic is focused on past performance, the experience model is also shown in order to clearly distinguish between experience (what work has been performed) and past performance (how well it was performed).

How much past performance information should be requested?

Source Evaluation Boards (SEBs) may want to limit the information requested to a summary of the offeror's performance for each contract or subcontract. The summary should include contract numbers, contract type, description and relevancy of the work, dollar value, and contract award and completion dates; and names, phone numbers, and e-mail addresses for references in contracting and technical areas. 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. But, it must be sufficient to allow the government to conduct a thorough and effective evaluation of past performance.

Additionally, FAR 42.1503(e) states that agencies shall use past performance information in the PPIRS that is within three years (six years for construction and architect engineering contracts) of the completion of performance of the evaluated contract or subcontract.

How much weight should be placed on past performance information?

Past performance should be given sufficient evaluation weight to ensure that it is meaningfully considered throughout the source selection process and will be a valid discriminator among the

proposals received. There is not necessarily an ideal weight for past performance as compared to the weight of the other evaluation criteria.

What information can be discussed with offerors regarding past performance and when can it be discussed?

In the case of adverse PPI on which offerors had not had a previous opportunity to comment, the Contracting Officer must provide offerors with the opportunity to comment. This practice ensures fairness for the competing offerors. The validation process is particularly important when the adverse information is provided by only one reference or when there is any doubt concerning the accuracy of the information. Usually, adverse information reflects performance that was less than satisfactory, although this is a judgment call that will depend upon the circumstances of the acquisition. Note that while the Government must disclose past performance problems to offerors, including the identity of the contract on which the information is based, it shall not disclose the name of individuals who provided information about an offeror's past performance. The Government can avoid disclosing names of individuals by identifying an office from which the PPI was received.

If the government receives adverse past performance information relating to entities that have formed business arrangements with a proposed prime contractor, such as subcontractors, joint venture members, and teaming partners, the government can only advise the proposed prime contractor that there is a problem with one of the entities it has proposed to perform the requirement. Specifics of the adverse information cannot be provided to the offeror unless the affected entity agrees.

Any questions asked of the offerors' past performance points of contact should be the same. Inconsistency in questions to offerors 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 secure additional information from the point of contact. A model PPI questionnaire is available in the STRIPES Library

Below is a summary of when communications/exchanges with offerors related to PPI are either required or may be conducted:

If award is to be made without conducting discussions, offerors may be given the opportunity to clarify 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.
[FAR 15.306(a) (2)]

If a competitive range is to be established, offerors shall be given the opportunity to address past performance information to which an offeror has not had an opportunity to respond, if the PPI is the determining factor preventing the offeror from being placed within the competitive range.
[FAR 15.306(b) (1) (i) and FAR 15.306(b) (4).

If discussions are held, after establishment of a competitive range, discussion must include adverse past performance information to which the offeror has not yet had an opportunity to respond. [FAR 15.306(d) (3)] While this requirement may appear redundant to the requirements related to establishing the competitive range above, adverse PPI may become known to the Contracting Officer or may occur subsequent to the time of establishment of the competitive range.

What is the Government's past performance information database and how does one go about using it?

The Past Performance Information Retrieval System (PPIRS) is a web-enabled, government-wide application that provides timely and pertinent contractor past performance information to the Federal acquisition community for use in making source selection decisions. PPIRS assists Federal acquisition officials in making source selections by serving as a single source for contractor past performance data. Confidence in a prospective contractor's ability to satisfactorily perform contract requirements is an important factor in making best value decisions in the acquisition of goods and services.

PPIRS provides a query capability for authorized users to retrieve report card information detailing a contractor's past performance. Federal regulations require that report cards be completed annually by customers during the life of the contract. PPIRS functions as the central warehouse for performance assessment reports received from federal performance information collection systems.

Government access to PPIRS is restricted to those individuals who are involved in source selections. Contractors may view only their own data. Contractor access to PPIRS is gained through the Central Contractor Registration (CCR). Access the following internet address to log into PPIRS: https://www.ppirs.gov/.

To what extent are evaluators required to evaluate all relevant past performance, even if such information is not submitted by offerors?

According to the GAO, a common procedural mistake agencies make in evaluating past-performance is failing to consider "super-relevant" information. Generally, agencies are not required to consider all possible past-performance information when conducting an evaluation. Moreover, agencies are not required to contact all of an offeror's references listed in its proposal, and need not contact the same number of references for each offeror. Nevertheless, the GAO often deems some information to be "too close at hand" to be ignored during an evaluation of past-performance. In order to avoid this pitfall, evaluators must be sensitive to the existence of relevant past-performance information, and should err on the side of evaluating past-performance information rather than ignoring it. This applies not only to favorable information, but also to adverse information. If the information is relevant, it will likely be of value in acquiring a more accurate picture of the offeror's past-performance history, thus resulting in better past-performance evaluations. In light of GAO's concern about information that is "close at hand,"

evaluators should assure that adverse PPI for DOE contracts/subcontracts across the DOE complex is considered, regardless of whether the information was submitted by offerors.

TOPIC XV ORAL PRESENTATIONS

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. 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 typically been to permit evaluators to receive information on the key members of the offeror's team, the organizational structure, and how the contract will be managed, etc. 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 and media 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;
- Exchanges between evaluators and presenters should be limited to assure these exchanges do not constitute discussions; 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

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 as to who the offeror is allowed to bring to the presentation;
- 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);
- 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 that the presentation will be recorded (e.g., videotaped which is required by GC).

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. The evaluation team may want to consider requiring offerors to provide such briefing slides as part of their proposal submission. Materials referenced in a presentation, but not an actual part of the presentation, must not be accepted, or used in, evaluations.

Attendance at Oral Presentations

The attendees for oral presentations will vary from procurement to procurement based upon the size, scope and complexity. At a minimum, the SEB Chairperson, Voting Members, Contracting Officer, and Executive Secretary must attend. Although not required to attend, the Legal Advisor usually attends. The SEB Chairperson should determine which, if any, of the various advisors should attend. The Source Selection Official may elect to attend. However, attendees cannot pick and choose which oral presentations to attend. Attendance at one oral presentation, necessitates attendance at all oral presentations.

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.

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, although this is the least preferred option. It could be conducted at a Government facility or a neutral and convenient conference center.

The following considerations should be foremost when selecting a facility for the conduct of oral presentations:

- 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 such as:

- The total amount of time that will be available to make the presentation;
- Any limitations on Government-offeror interaction during the presentation;
- Information disclosure rules; 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 SSO attend the presentation. The GAO stated it was unaware of any requirement that an SSO attend presentation sessions. However, if the SSO attends one oral presentation, the SSO should attend all oral presentations. The SSO should not, however, participate in any clarifications.

Presentations by the offeror should 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. A combination of both a firm time limit and restrictions on information to control the time may be preferable. There is no single or ideal amount of time to be allotted. 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

Open communication and dialog between the offeror and the Government are one of the primary benefits to using oral presentations. However, the nature and extent of information exchanges between the offeror and the Government evaluation team during such presentations is an issue that must be met head on. The rules established in regulation regarding exchanges with offerors during the course of the solicitation process must be watched carefully [FAR 15.306]. This can be especially important if you decide to have your presentations before you establish the competitive range or you are contemplating making an award without discussions. You do not want to inadvertently trigger the rules regarding discussions [FAR 15.306(d)].

The term "oral presentations" is not synonymous with "oral discussions" as defined in FAR 15.306. Oral discussions, as envisioned by the FAR, generally consist of verbal communications between the Government and an offeror following establishment of the competitive range, 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 oral presentation. Such restrictions should be consistent with those prescribed at FAR 15.306.

For the above reasons, establishing the ground rules in the solicitation for exchanges during the presentation and reviewing them before the presentation is a must. However, limiting dialog to questions that merely repeat statements that may not have been heard by the evaluators makes little sense and adds little value in improving the understanding of the offeror's presentation. Evaluators may ask questions relating to understanding the oral presentation, but evaluators need to be very cautious above revealing whether the Government finds the presentation favorable or unfavorable or entering into discussions. A practical technique is for the evaluators to recess after the oral presentation and discuss the questions to be asked in consultation with the Contracting Officer and counsel. On the other hand, if you've already established the competitive range, the oral presentation may be the optimal setting for conducting discussions [FAR 15.306(d) & (e)].

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 video recording, audio recording, a written record, Government notes, and copies of briefing slides or presentation notes. GC-61 is strongly urging COs to video record all oral presentations.

In a GAO case, a protestor claimed that the presentation/discussion sessions had not been recorded. In this case, the contemporaneous record consisted 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 protestor’s complaint provides no basis to challenge the award. In DOE, the use of note-taking as a means of creating a record of the oral presentation is not recommended.

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. In DOE, it is recommended that the oral presentations be evaluated immediately after each presentation is made. This is especially important if there are more than two or three offerors or if the oral presentations will last longer than an hour or two. If the latter approach is chosen, it is recommended that the evaluators caucus following each presentation to exchange reactions, summarize potential strengths and weaknesses, and verify perceptions and understandings.

TOPIC XVI EXCHANGES WITH OFFERORS AFTER RECEIPT OF PROPOSALS

This topic discusses four types of exchanges with offerors: clarifications, communications, discussions, and negotiations. It is important that contracting officers understand the differences in these exchanges.

Clarifications are limited exchanges, between the Government and offerors that may occur when award without discussions is contemplated. 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) or to resolve minor or clerical errors.

Communications are exchanges, between the Government and offerors, after receipt of proposals and before establishment of the competitive range. If a competitive range is to be established, these communications:

(1) Shall be held with offerors whose past performance information is the determining factor preventing them from being placed within the competitive range. Such communications shall address adverse past performance information to which an offeror has not had a prior opportunity to respond; and

(2) May only be held with those offerors whose exclusion from, or inclusion in, the competitive range is uncertain. These communications are for the purpose of addressing issues that must be explored to determine whether a proposal should be placed in the competitive range. Such communications may be conducted to enhance Government understanding of proposals; allow reasonable interpretation of the proposal; or facilitate the Government's evaluation process. Such communications shall not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal.

Negotiations are exchanges, in either a competitive or sole source environment, between the Government and offerors, that are undertaken with the intent of allowing the offeror to revise its proposal. When negotiations are conducted in a competitive acquisition, they take place after establishment of the competitive range and are called discussions (In competitive acquisitions the terms “negotiations” and “discussions” are often used synonymously).

Contracting officers and source evaluation boards have to be careful that clarifications and communications do not rise to level of discussions or negotiations particularly during oral presentations. If clarifications or communications inadvertently become discussions or negotiations, the Contracting Officer should establish the competitive range and conduct discussions with all offerors in order to insure fair treatment of all offerors.

Weaknesses and Deficiencies:

At times there has been some confusion over the difference between a proposal weakness, a significant weakness and a deficiency and whether or not the Contracting Officer was required to discuss all three of them with offerors in the competitive range.

A *deficiency* means a material failure of a proposal to meet a Government requirement or a combination of significant weaknesses in a proposal that significantly increases the risks of unsuccessful contract performance to an unacceptable level (FAR 15.001).

A *weakness* means a flaw in the proposal that increases the risk of unsuccessful contract performance (FAR 15.001).

A *significant* weakness in the proposal is a flaw that appreciably increases the risk of unsuccessful contract performance (FAR 15.001). A number of weaknesses within a criterion, when considered together based on the nature of the weaknesses, may constitute a significant weakness.

FAR 15.306(d)(3) requires the Contracting Officer to indicate to, or discuss with, each offeror still being considered for award, deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond. The Contracting Officer also is encouraged to discuss other aspects of the offeror's proposal that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award. However, the Contracting Officer is not required to discuss every area where the proposal could be improved. In DOE procurements, it is recommended that all weaknesses identified in the competitive range report be discussed with offerors in addition to the FAR requirement to discuss deficiencies, significant weaknesses, and adverse past performance information.

Competitive Discussions/Negotiations

Some contracting officers have restricted discussions with competitive range offerors to deficiencies, significant weaknesses, and adverse past performance information to which the offeror has not yet had an opportunity to respond**.** However the discussions should also be used to make sure that the Government team fully understands what the offeror is proposing to provide and that the offeror fully understands what the Government requirements are. In addition the latest rewrite of FAR 15.306(d)(4) allows negotiations that more closely resemble what private industry can do in acquiring goods and services. The Government may suggest to offerors that have exceeded any mandatory minimums (in ways that are not integral to the design), that their proposals would be more competitive if the excesses were removed and the offered price decreased. In addition, the Government may, in situations where the solicitation stated that evaluation credit would be given for technical solutions exceeding any mandatory minimums, negotiate with offerors for increased performance beyond any mandatory minimums. Negotiations with offerors in the competitive range may include bargaining. Bargaining includes persuasion, alteration of assumptions and positions, give-and-take, and may apply to price,

schedule, technical requirements, type of contract, or other terms of a proposed contract. These negotiations provide offerors more of an opportunity to explain what they can provide and allow the Government to more freely explain what proposal features would better fit its needs. If, as a result of negotiations with one offeror, the Government realizes that a change in the solicitation and contract requirements would lead to more advantageous proposals, the solicitation should be amended to reflect the new or changed requirement(s). It should be noted that there are still certain restrictions on discussions and negotiations as discussed in the next topic, but contracting officers, while complying with these limitations on exchanges, should utilize this expanded authority to negotiate proposals and contracts which are in the best interests of the Government.

A recommended approach to the conduct of discussions is a combination of written and oral discussions as follows:

The Government provides to the offerors in writing (i) the weaknesses, significant weaknesses, and deficiencies of the proposal and (ii) any other questions that might clarify any ambiguities or help the Government in its understanding of the proposal;

The offerors submit a revised, written proposal based on the written weaknesses, significant weaknesses, deficiencies, and questions provided by the Government;

The Government and the offerors conduct oral discussions, as necessary, after the Government reviews the revised proposal; and

The offerors submit a final proposal revisions in accordance with FAR 15.307.

Limits on Exchanges

FAR 15.306(e) states that Government personnel involved in the acquisition shall not engage in conduct that:

(1) Favors one offeror over another;

(2) Reveals an offeror's technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror's intellectual property to another offeror;

(3) Reveals an offeror's price without that offeror's permission;

(4) Reveals the names of individuals providing reference information about an offeror's past performance; or

(5) Knowingly furnishes source selection information in violation of 3.104 and 41 U.S.C. 423(h)(1)(2).

Competitive Cost/Price Discussions/Negotiations

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 (FAR 15.306(e)(3) and 41 U.S.C. 423(h)(1)(2)). However, the release of internal Government documents such as audit reports or independent Government cost estimates is not recommended as good negotiation strategy.

When negotiations are conducted, the Contracting Officer needs to discuss the specific cost or price proposed with the offeror to the extent necessary to determine the reasonableness of the cost or price. FAR 15.404-1(d)(2) requires that cost realism analyses shall be performed on cost reimbursement contracts to determine the probable cost of performance for each offeror. 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)]. If there is a significant cost/price spread in competitive offers, it may be an indication that the offerors may not fully understand the Government's requirements. In these circumstances the Contracting Officer may need to obtain additional information other than cost and pricing data from each offeror, analyze the data, and conduct fact finding with the offerors in order to develop a most probable cost and/or to assure that all offerors understand the requirement and that the proposed cost/price is fair and reasonable. Even in a competitive fixed price environment on a complex or one of kind procurement, if there is a significant price spread in the offerors and all the offerors are proposing the same technology, the Contracting Officer should attempt through discussions to understand what the major cost drivers for the price spread differences are and ascertain whether or not an offeror may be trying to "buy-in" and planning to recover after award.

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

What purpose should clarifications serve?

1. To learn the relevance of past performance information

2. To allow an offeror 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. To 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. This must only occur upon the Contracting Officer’s determination of the competitive range.

What are communications?

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 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 past performance,
- Allow reasonable interpretation of the proposal (but not to enhance or revise it), and

- 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?

Pre-competitive range communications and/or clarifications may not allow the offeror to:

- Cure proposal defects or material omissions.
- Materially alter the technical or cost elements of the proposal.
- Otherwise revise the proposal.

Communications and/or clarifications should not alter the Government evaluators' evaluation of the proposal such that the offeror's proposal has effectively been revised as a result of such communications and/or clarifications.

Should any of the above circumstances occur, discussions have ensued. The Contracting Officer must then establish the competitive range with all offerors and hold meaningful discussions with all offerors. This could lead to holding discussions with offerors that submitted proposals that might have otherwise been excluded from 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. Invoking 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.

When are negotiations/discussions appropriate to be conducted?

In preparing solicitations, a determination must be made as to whether the solicitation will indicate that negotiations/discussions will be held or that award without negotiations/discussions

are intended. In making this determination there are several factors that should be considered. The degree to which the factors below are present may indicate the need for determining in advance of issuing the solicitation that negotiations/discussions should be conducted.

- Complexity of the requirement necessitates assurance that the offeror understands the requirement and the Government understands the proposal,
- Alternative technical approaches/solutions are likely,
- Offerors will propose a Performance Work Statement (PWS),
- Term of the contract,
- Complex cost information is to be provided in the proposal,
- Advance agreement is necessary on certain costs,
- Proprietary processes will likely be proposed that will require agreement on ownership and use,
- Technical information from the offeror's proposal will likely need to be incorporated into the contract, and
- Unique contract provisions are included that will need to be negotiated with individual offerors.

Under certain circumstances negotiations/discussions are appropriate to be conducted even though the solicitation indicated that it was the Government intent to award without discussions. These circumstances are addressed in Part XI, Award Without Discussions.

TOPIC XVII PRICING, ANALYSIS AND COST REALISM

Price means cost plus any fee or profit applicable to contract type. The price or cost to the Government must be evaluated in every source selection [FAR 15.304(c)(1)]. The Contracting Officer must purchase supplies and services at fair and reasonable prices. In all procurements, the Contracting Officer is responsible for evaluating the reasonableness of offered prices [FAR 15.404-1(a)(1)].

To determine the reasonableness of a price, the Contracting Officer may perform either price analysis or cost analysis. If the price is based on adequate price competition, generally no additional data from the offeror is necessary to determine the reasonableness of price, but the Contracting Officer should request data to determine the cost realism of competing offers or to evaluate competing approaches. In cost-reimbursement contract source selections, the Contracting Officer must perform a cost realism analysis to determine the probable cost of performance of each offeror and use it for purposes of evaluation to determine best value. The Contracting Officer must document the evaluation of cost or price [FAR 15.305(a)(1)].

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

Price Analysis

Price analysis is the process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit. The Contracting Officer is required to perform 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. DOD's Contract Pricing Reference Guides available at the following web site are excellent resources for conducing cost and price analysis: http://www.acq.osd.mil/dpap/contractpricing/index.htm

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 may use various price analysis techniques to a proposed price is fair and reasonable. One or more of the following techniques, or other techniques may be used to perform price analysis:

(1) Comparison of proposed prices received in response to the solicitation. Caution should be used when applying this technique, however, as all prices proposed may be unreasonable.

(2) 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.

(3) 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.

(4) Comparison between competitive published price lists, published market prices of commodities, similar indexes, and discount or rebate arrangements.

(5) Comparison of proposed prices with independent Government cost estimates.

Analysis of pricing information provided by the offeror is predicated on having sufficient information 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 needed. Certified cost and pricing data should not be requested unless required by regulation or determined necessary by the contracting officer.

Cost Analysis

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 judgement. 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.

A cost analysis must be performed anytime that cost or pricing data is required [FAR 15.403-(4)(a)(1) and FAR 15.404-1(a)(3)]. Cost or pricing data is not obtained when there is adequate price competition. Cost analysis may also be used to evaluate other than cost or pricing data. [FAR 15.404-1(a)(4)]. When cost analysis is required, the 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 a price analysis should also performed to verify that the overall price is fair and reasonable.

The Contracting Officer may only consider allowable estimated costs in performing cost analyis. There are several requirements for cost allowability: reasonableness; allocability; compliance with Cost Accounting Standards (CAS), if applicable; compliance with the terms of the contract (FAR 31.201-2.), and the limitations of FAR Subpart 31.2. A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. 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.

Below are the various categories of cost generally analyzed in a cost analysis:

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 or quantity 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 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. .

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 many 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.

Cost Realism

Cost realism analysis is the process of independently reviewing and evaluating specific elements of each offeror's proposed cost estimate to determine whether the estimated proposed cost elements (a) are realistic for the work to be performed, (b) reflect a clear understanding of the requirements, and (c) are consistent with the unique methods of performance and materials described in the offeror's technical proposal. The cost realism analysis incorporates the results from the cost analysis and the technical evaluation of cost to determine the probable cost. Cost realism analysis must be performed on all cost-reimbursement contracts to determine the probable cost of performance for each offeror. The probable cost may differ from the proposed cost and should reflect the Government's best estimate of the cost of any contract that is most likely to result from an offeror's proposal. Probable cost is determined by adjusting each offeror's proposed cost, and fee when appropriate, to reflect any additions or reductions in cost elements to realistic levels based on the results of the cost realism analysis. The probable cost is used for the purpose of evaluation to determine the best value. [FAR 15.404-1(d)] Cost realism analysis may be used on competitive fixed-price type contracts, but offered prices may not be adjusted.

Independent Government Cost Estimate (IGCE)

An independent government cost estimate (IGCE) is the Government's estimate of the resources and the projected cost of the resources a contractor will incur in the performance of a contract. These costs include direct costs; such as labor, material, supplies, equipment, or transportation and indirect cost; such as overhead, general and administrative (G&A) expenses, fringe benefits, as well as profit or fee.

An IGCE is required for every procurement action in excess of the simplified acquisition threshold. The IGCE is usually developed by the Program during acquisition planning.. As discussed above, the IGCE can be used by the Contracting Officer when performing price analysis to determine a price fair and reasonable.

Technical Analysis or Evaluation of Cost

A technical analysis or evaluation of the cost proposal must be performed in order to complete a cost realism analysis and determine the probable cost. Personnel having specialized knowledge, skills and experience in engineering, science, or other technical disciplines perform a technical analysis of certain aspects of the cost proposal including: compliance with the delivery schedule, proposed types and quantities of materials, labor, processes, special tooling, facilities, the reasonableness of travel, training, scrap and spoilage, etc. [FAR 15.404-1(e)] DOE Acquisition Guide Chapter 15.4-4 contains a more detailed discussion of technical evaluation of cost.

Fair And Reasonable Price

Fair and reasonable is defined as a conclusion that. a price is fair to both parties to the contract, considering the promised quality and timeliness of contract performance. More specifically, a fair and reasonable price is one that represents the value of the product or service to you, the buyer. To reach that conclusion, you must ask yourself, is it worth this price? If your answer is yes, you have a fair and reasonable price.

TOPIC XVIII COST / TECH TRADEOFFS UNDER "BEST VALUE" PROCUREMENTS

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 can be traded off against other factors such as past performance and technical considerations 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 and other factors such as technical and past performance--For example, if the government's requirement needs are to increase efficiency and thereby reduce the agency's 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 SSO.

Applicable statutes, procurement regulations, or small business regulations

Federal Acquisition Regulation (FAR) 15.101 (Best value continuum)
FAR 15.101-1 (Tradeoff Process) and
FAR 15.308 (Source Selection Decision)

Issues

What are the steps in performing a cost/tech tradeoff?

The 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 must 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 higher rated proposals justifies paying the cost differential between the lower most probable cost/lower technically rated proposals. The ability to differentiate meaningfully among the proposals is very important in making this decision.

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 an RFP 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 or unreasonable, 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 meets 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 SSO include, but are not limited to, the amount of cost differential, project or service criticality, the value to DOE of the higher level of performance, 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.

Cost/technical tradeoff is not based on the % difference in technical scores and probable cost. Rather, it must be based on subjective analysis of the strengths and weaknesses versus the probable cost difference. In the example below when A is selected (as the highest rated proposal), a cost/technical tradeoff must be made between A and B and A and D (B and D being lower cost proposals). If B is selected (as the second highest rated proposal), then a cost/technical tradeoff is made between B and D. If D is selected (as the lowest cost proposal) a cost/technical tradeoff is not necessary since D is the lowest cost proposal. However, in all instances in which the evaluation criteria states that technical is more important than cost and the selected offeror is not the highest rated, the selection decision must document the reasons that the higher technically rated proposal is not worth the cost differential. This is necessary to demonstrate that the selection properly considered the weighting of technical in relation to cost.

	*Offeror Technical Score	Probable Cost
A	875	$76M
B	795	68M
C	635	83M
D	620	58M

* In this example, the technical proposal is significantly more important that cost.

TOPIC XIX AWARD WITHOUT DISCUSSIONS

Part 15 of the FAR allows contract award without discussions with offerors if the solicitation states that the Government intends to evaluate proposals and make award without discussions [FAR 15.306(a)(3)]. 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 Topic XVI, Exchanges with Offeror After Receipt of Proposals.

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

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 such factors as the nature and complexity of the requirement, the evaluation criteria, and the extent of cost or pricing information to be evaluated (See Topic XVI, Exchanges With Offerors After Receipt of Proposals for considerations for discussions).

Why make an award without discussions?

Unnecessary discussions may add weeks to procurement lead time. In addition, conducting unnecessary discussions adds unnecessary time and cost burdens to offerors.

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. Only in good faith should the Government state its intention to award without discussions. 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.

What are the guidelines for conducting discussions?

See Topic XVI Exchanges With Offerors After Receipt of Proposals. Solicitations should not contain provisions that notify offerors that award will be made without discussions when the Government's believes discussions are necessary. However, when solicitations include the provision stating that it is the Government's intent to award without discussions, there are some instances that subsequently cause discussions to be appropriate. After evaluation of proposals, the degree to which the following conditions are present should be considered in determining whether discussions are necessary:

Could the lower-priced proposal become the higher technically rated proposal and provide the best value to the Government (degree to which weaknesses or deficiencies are correctible); if discussions are held, might the result produce a different basis (Government's understanding and evaluation of proposals) upon which the SSO would make a decision; the highest rated technical proposal has deficiencies (either in the offer or the technical proposal) or major weaknesses; significant probable cost adjustments are made which may be evidence that the offeror doesn't understand the requirements, the PWS is not well defined, or the Government's understanding of the work requirements differ from the offeror; the cost proposal contains costs, either allowable or unallowable, that require mutual agreement prior to award, and significant differences exist between the Government's estimate to perform the work and some or all of the offerors' proposals.

TOPIC XX CONTENTS OF AN EVALUATION REPORT

The FAR requires that the evaluation of the relative strengths, deficiencies, and significant weaknesses, and risks of proposals be documented in the contract file, [FAR 15.305(a)]. The content of this evaluation should be in the form of a report that definitively and comprehensively reflects 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 source selection plan

The evaluation report template in the STRIPES Library is the required format for evaluation reports. The selection and use of these areas outlined in the SEB Report template must be consistent with the nature of the specific proposals being evaluated and the particular situation of the individual acquisition. Some of these areas will only be applicable depending on the circumstances of the acquisition, e.g., establishing the competitive range, award without discussions, acquisition strategy, and earned value management system. The subject areas should be used, as appropriate, for both the initial evaluation report (competitive range report) and the final evaluation report. The individual areas should be included in the main body of the report, but some information or reports 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

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. (Depending on the requirements of the Source Selection Plan, the evaluation report should include the significant strengths, strengths, weaknesses, significant weaknesses, and deficiencies.) 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. When composing the text for strengths, weaknesses, and deficiencies, include the following aspects: (1) what is proposed; (2) what is the

Government's assessment, i.e., good or bad/strong or weak; (3) why is it good or bad, i.e., what is the effect of what is proposed; and (4) how does it relate to the evaluation criteria.

The report should reflect the process used to evaluate proposals (consistent with the source selection plan).

The evaluation report should incorporate, attach, or reference all relevant evaluation information upon which the panel or board used to arrive at its consensus evaluation, e.g., audit reports, technical evaluation reports, etc.

If discussions were held, the report should address how proposals changed from initial to final revised proposals and how the evaluations changed – this includes strengths, weaknesses, deficiencies, cost/fee, and most probable cost determination.

The report should provide sufficient information so that the SSO can clearly understand the area being evaluated and how it relates to the stated evaluation criteria. Provide information that helps the SSO 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.

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.

For the complete SEB Report template see the STRIPES Library.

SEB Report Outline

I. EXECUTIVE SUMMARY

a. Description of Acquisition
b. Proposals Received
c. Summary of Evaluation Results
d. Competitive Range Determination or Award Without Discussions
e. Special Considerations

II. SOURCE SELECTION OFFICIAL AND SOURCE EVALUATION BOARD

a. Source Selection Official
b. SEB Voting Members
c. Advisors
d. Ex-officio Members

III. BACKGROUND

a. Acquisition Strategy
    i. Procurement history
    ii. Development of acquisition strategy
    iii. Information exchanges with industry
    iv. Approval of acquisition strategy
b. Funding Profile
c. Acquisition Plan
d. Draft Request for Proposal (RFP)
e. Pre-solicitation Conference and Site Tours
f. One-On-One Meetings
g. Source Selection Plan (SSP)
h. Request for Proposal
i. Pre-proposal Conference and Site Tours
j. Chronology of Major Events

IV. EVALUATION METHODOLOGY

a. Qualification Criteria
b. Evaluation Criteria
c. Overall Relative Importance of Evaluation Criteria
d. Basis For Contract Award
e. Methodology Used to Evaluate Proposals
f. Rating Considerations

V. DISCUSSIONS WITH OFFERORS (if applicable)

a. Discussions and Final Revised Proposals
   i. Offeror A
      1. Conduct of Discussions
      2. Major Issues Discussed
      3. Final Revised Proposal
      4. Resolution of Initial Proposal Weaknesses and Deficiencies
   ii. Offeror B
      [Same format as for offeror A above]

VI. EVALUATION RESULTS – VOLUME I, OFFER AND OTHER DOCUMENTS

a. Completeness of Offer
b. Performance Guarantee
c. Small Business Plan
d. Earned Value Management System (if applicable)
e. Corporate Board of Directors
   i. Offeror A
   ii. Offeror B

VII. EVALUATION RESULTS – VOLUME II, TECHNICAL, MANAGEMENT, AND BUSINESS PROPOSAL

a. TABLE – Summary of Technical, Management, and Business Proposal Evaluation Results
b. Evaluation Criterion 1 – XXXXXX
   i. Criterion
   ii. RFP Proposal Submission Instructions (section L) for Criterion 1
   iii. TABLE – Ratings -
   iv. Offeror A Rating Discussion
      1. Offeror A – Strengths/Weaknesses/Deficiencies
      2. Significant Strengths
      3. Strengths
      4. Weaknesses
      5. Significant Weaknesses
      6. Deficiencies
   v. Offeror B Rating Discussion
      1. Offeror B – Strengths/Weaknesses/Deficiencies
      2. Significant strengths
      3. Strengths
      4. Weaknesses
      5. Significant weaknesses
      6. Deficiencies
c. Evaluation Criterion 2– *XXXXX*

[Repeat same structure of information as Criterion 1 above for all non-cost criteria, e.g., organizational structure and key personnel, ES&H, experience, past performance, etc.]

VIII. EVALUATION RESULTS – VOLUME III, COST AND FEE PROPOSAL

a. TABLE I – Overall Summary of Cost and Fee Proposal Evaluation Results
b. TABLE II – Cost Element Summary of Cost Evaluation Results
c. TABLE III – WBS Summary of Cost Evaluation Results (if applicable)
d. Evaluation Information
    i. Evaluation Criteria
    ii. RFP Instructions for Cost Proposal
    iii. Independent Government Cost Estimate (IGCE)
    iv. Technical Evaluation of Cost
    v. Audit Assistance
    vi. Cost Element Evaluation and Probable Cost Report
e. Evaluation of Cost and Fee – Offeror A
    i. Adequacy of Proposal for Evaluation
    ii. Evaluation of Cost
        1. TABLE - Summary of Cost and Fee Proposal Evaluation by Cost Element
        2. Evaluation of Cost Elements
            a. Direct Labor
                - Amount proposed [hrs/$] and basis of estimate
                - SEB evaluation [hrs/$]
            b. Fringe Benefits
                - Amount proposed and basis of estimate
                - SEB evaluation
            c. Indirect Rates
                - Amount proposed and basis of estimate
                - SEB evaluation
            d. Subcontracts
                - Amount proposed and basis of estimate
                - SEB evaluation
                - Percentage Subcontracting
            e. Other Direct Costs
                - Amount proposed and basis of estimate
                - SEB evaluation
            f. Transition Cost
                - Amount proposed and basis of estimate
                - SEB evaluation
            g. Escalation
                - Amount proposed and basis of estimate
                - SEB evaluation
    iii. Evaluation of Fee

1. TABLE – Fee Proposed and Percentage of Cost
2. Narrative discussion

iv. Funding

1. TABLE – Comparison of Proposed Cost and Fee and Probable Cost and Fee to Funding Profile
2. Narrative discussion

f. Evaluation of Cost and Fee – Offeror B

IX. OTHER CONSIDERATIONS FOR AWARD

a. Organizational Conflicts of Interest
b. Foreign Ownership, Control, and Influence (FOCI)
c. Financial Capability
   i. Offeror A
   ii. Offeror B
d. Contractor Responsibility
e. Inverted Domestic Corporation
f. Equal Employment Opportunity Pre-Award Clearance
g. Excluded Parties List System

X. APPENDICES

a. Technical Approach and Other Technical Areas
b. Organizational Structure
c. Listing of Individual Key Personnel and Summary of Experience and Qualifications
d. Small Business Subcontracting Plan Goals
e. Relevant Experience
f. Past Performance
   i. Past performance questionnaire data.
   ii. ES&H performance indicators in comparison to DOE and industry averages and industry average.
   iii. Accomplishment of small business goals.
g. Cost and Fee
h. Competitive Range Determination (for final SEB Report)

TOPIC XXI SOURCE SELECTION OFFICIAL (SSO) DECISION DOCUMENTATION

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 SSO decision shall be based on a comparative assessment of proposals against all source selection criteria in the solicitation. While the SSO may use reports and analyses prepared by others, the source selection decision shall represent the SSO'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 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 source selection process requires proper documentation. Proper documentation can greatly assist the SSO in understanding the rationale employed by the evaluation team and give confidence to the SSO that the findings of the Source Evaluation Board (SEB) were consistent with the stated evaluation criteria and source selection 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. A Source Selection Decision template is available in the STRIPES Library.

Applicable statutes, procurement regulations, or small business regulations

FAR 15.308 (Source Selection Decision)

Issues

What documentation should be used to support 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 Official], 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 SEB must bear in mind that while the SSO 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 SSO 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 SSO 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 SEB/TEC's assessment.

Proposals receiving the same or similar rating can still have obvious distinctions. These distinctions could have a direct impact on the source selection decision and should be documented by the SEB/TEC or the SSO.

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

The SSO is the contract award decision maker. The SSO's decision must be based on a comparative assessment of proposals against all source selection criteria in the solicitation. While the SSO may use reports and analyses prepared by others, the source selection decision must represent the SSO's independent judgment. The source selection decision is documented, and the documentation includes 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. [FAR Part 15.308].

What documentation is necessary regarding electronic communications?

Electronic Record Documentation

All required pre- and post-award contract and financial assistance documentation shall be maintained in electronic form, shall reside in STRIPES, and shall be considered the official contract file, except for any documents required by regulation to be maintained in paper copy. For actions that were awarded prior to an office's implementation of STRIPES, existing paper files are not required to be transferred into STRIPES. Each office should determine which documents, if any, it requires or suggests to also be maintained in a paper file as a working copy. Such paper files must be marked as "working copy" to avoid confusion regarding which document is the official contract file. E-mail correspondence which is considered source selection information should be saved as an electronic file and added to STRIPES. When transmitting procurement sensitive data electronically, adequate precautions must be taken to ensure data does not end up in the wrong hands. In those cases when sensitive data is transmitted, the use of password protected files or file encryption is required.

TOPIC XXII FOREIGN OWNERSHIP, CONTROL OR INFLUENCE (FOCI)

Before awarding a contract which involves access to classified information or a significant quantity of special nuclear material, 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 (FOCI) that could pose an undue risk to the common defense and security.

DOE is prohibited by statute from awarding a 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 contractor 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 FOCI.

Foreign ownership, control, or influence means a 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 DOE cannot negotiate a plan of action that isolates the offeror from FOCI satisfactory to 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 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. (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 DOE 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); and Standard Form 328, (Certificate Pertaining to Foreign Interests;

Issues

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 Contract Security Classification Specification (CSCS) (DOE F 5634.2) from the program office.

Upon receipt of these forms, the Contracting Officer must include the appropriate terms and conditions in the solicitation [DEAR 952.204-73, Facility Clearance], which states in offerors must submit a Certificate Pertaining to Foreign Interests, SF 328, and all required supporting documents to form a complete FOCI package. Contractors are required to submit the FOCI information online at: https://foci.td.anl.gov. When completed the offeror must print and sign one copy of the SF 328 and submit it to the Contracting Officer

If an offeror possesses either a Department of Defense or Department of Energy Facility Clearance, they should provide their DOE Facility Clearance code or their DOD assigned commercial and government entity (CAGE) code.

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 the 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.

TOPIC XXIII DEBRIEFINGS

In FAR Part 15 procurements, contracting officers are required to provide debriefings to all offerors, if a debriefing is requested. Debriefings may be either preaward debriefings for offerors excluded from the competitive range or postaward debriefings for all offerors. If an offeror receives a preaward debriefing, that offeror is not entitled to a postaward debriefing. Postaward debriefings may be provided to (1) all unsuccessful offerors who didn’t receive a preaward debriefing, and (2) the successful offeror.

The debriefing is the method by which the offerors obtain information about the evaluation of its respective proposal, how the proposal could be improved for the benefit of future procurements,

and the basis for the selection decision and contract award. 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.

Debriefings should be provided as soon as possible and should occur to the maximum extent practicable within 5 days after the offeror requests the debriefing. 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.

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 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

What should be 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. A debriefing script and agenda template is available in the STRIPES library. Contracting Officers should 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 or issues that led to its lack of success were 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. Non-acceptance of a proposal under such circumstances can produce a degree of emotional and professional trauma in 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 might 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 letter template is available in the STRIPES library. 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 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 calendar 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), the executive secretary, 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 Counsel who can draft the appropriate agreements and ensure that all necessary consents are obtained.

What common questions or problems are associated with debriefings?

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 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.

TOPIC XXIV SEB LESSONS LEARNED

As mentioned in Topic I of this Acquisition Guide Chapter, a position called SEB Secretariat and Knowledge Manager (SKM) was established in the Field Assistance and Oversight Division, MA-621. One of the duties and responsibilities of the position is collecting and disseminating SEB lessons learned. A template for documenting SEB lessons learned is available in the STRIPES Library.

Requirement

For acquisitions whose dollar value exceeds $25 million, each SEB shall document lessons learned using the template. The lessons learned should be submitted to the SKM via e-mail within 45 calendar days of the completion of debriefings. For acquisitions whose dollar value is less than $25 million, it is recommended that SEB's document lessons learned using the template, and make them part of the contract file.

Lessons Learned Database

The SKM will maintain a database of all DOE SEB Lessons Learned for acquisitions whose dollar value exceeds $25 million. The database is monitored for trends which develop.

Lessons Learned Dissemination

The SKM will disseminate the lessons learned to each SEB within thirty days of the SEB being formally established. Any trend analysis which exists will accompany the lessons learned.

TOPIC XXV LIBRARY DOCUMENTS

Another duty and responsibility of the SKM position is creating and maintaining a library of acquisition documents.

Requirement

For acquisitions whose dollar value exceeds $25 million, each SEB shall furnish a copy of the following documents to the SKM for inclusion in the MA Library:

Extend/Compete Package
Acquisition Plan
RFP (conformed copy with all changes if available)
Source Selection Plan
Competitive Range Determination
SEB Report (initial and final)
Source Selection Decision Document

Library

The SKM will maintain the library and add acquisition documents as they become available.

Unsolicited Proposals

[Reference: FAR 15.6]

Unsolicited Proposal Coordination

The National Energy Technology Laboratory coordinates the receipt and evaluation of all unsolicited proposals for DOE. Guidance regarding the preparation and evaluation of unsolicited proposals is located at:

http://www.netl.doe.gov/business/unsolicited-proposals

NOTE: For unsolicited proposals related to Energy Savings Performance Contracts, see 10 CFR 436 Subpart B.

Point of Contact:

Unsolicited Proposal Manager, Mail Stop 921-107
U.S. Department of Energy
National Energy Technology Laboratory
626 Cochrans Mill Road
P.O. Box 10940
Pittsburgh, PA 15236-0940

Email: DOEUSP@NETL.DOE.GOV

Establishing Evaluation Criteria

Guiding Principles

- Evaluation criteria must represent the areas of importance.
- Always include cost/price and quality.
- More important criteria should be weighted greater than less important criteria.
- Proposals are to be evaluated solely on the factors and sub-factors stated in the solicitation.

[References: FAR 15.304]

1.0 Summary of Latest Changes

This update makes administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references.

2.1 Overview. This section discusses the development of evaluation criteria for use in best value, competitive source selection.

2.2 Background. The purpose of the proposal evaluation process is to provide a mechanism to determine which offers submitted in response to a solicitation best meet the Government's stated needs. The proposal evaluation results in an assessment of the offeror's ability to successfully accomplish the contract. Because the source selection decision is based on the proposal evaluation, it is important that the evaluation criteria *clearly reflect the Government's need and facilitate preparation of proposals that best satisfy that need; provide for an accurate evaluation of an offeror's proposal; represent key areas of importance and emphasis to be considered in the source selection decision; and support meaningful discrimination and comparison between and among competing proposals*.

2.3 Establishing Evaluation Criteria. Consistent with the FAR, the evaluation criteria and their relative importance shall be expressed in the solicitation and proposals shall be evaluated only on the basis of those criteria. In addition, the solicitation must state the relative importance of price to all of the other evaluation criteria. In doing so, offerors are informed of the factors that the Government will consider in determining which proposal best meets its needs, and may use this information to determine how to best prepare their proposals.

The FAR provides broad guidance on establishing evaluation criteria. In summary, this guidance (see 15.304) provides that:

- Evaluation criteria should be tailored to each acquisition and include only those factors which will have an impact on source selection;
- The nature and types of evaluation criteria to be used for an acquisition are within the broad discretion of the agency;
- Price or cost must be evaluated in every source selection;
- Past performance must be an evaluation factor (in accordance with the FAR criteria in 15.304), unless the contracting officer, *in writing*, determines otherwise; and
- Quality must be addressed in every source selection in "non-cost factors."

As a rule of thumb, evaluation criteria should reflect areas *necessary* to determine the merit of a proposal, *pertinent* to the Government's stated requirements, and *measurable* to permit qualitative and quantitative assessment against the rating plan.

2.3.1 Cost Factors. As previously noted, the FAR requires that cost or price must be evaluated in every selection. Because contracts can only be awarded at costs or prices that have been determined to be reasonable, cost reasonableness must always be evaluated. In addition, cost realism (an assessment of whether the costs proposed by an offeror are realistic, reflect a clear understanding of the work, and are consistent with other parts of the proposal) must be considered when a cost-reimbursement contract is contemplated.

In some instances, the evaluation of cost or price may include not only consideration of the cost or price to be paid to the contractor, but other costs that the Government may incur as a result of awarding the contract. Examples of these latter costs include re-training costs, system or software conversion costs, power consumption, life cycle costs, and transportation costs. In these cases, the solicitation should clearly identify other costs that will be considered in the evaluation.

2.3.2 Non-Cost Factors. Non-cost factors address the evaluation areas associated with technical and business management aspects of the proposal. Examples of non-cost factors include technical and business management related areas such as technical approach and understanding, capabilities and key personnel, transition plans, management plan, management risk, and corporate resources. The level of quality needed by the Government in performance of the contract is an important consideration in structuring non-cost factors.

2.4 Evaluation Standards. The development and use of standards is the key to uniform application of evaluation criteria. Standards establish the minimum level of acceptability for a requirement and provide the basis on which the ratings above and below the minimum level

are set. Stated another way, a standard is the measurement baseline that will be used by the Government evaluator to determine whether a proposal meets, exceeds, or fails to meet a solicitation requirement. Standards, by providing a consistent and uniform measurement target, promote an objective evaluation of proposals.

Standards may be quantitative or qualitative in nature. Regardless of whether a standard is quantitative or qualitative in nature, the standard should be:

- Structured to specify the minimum acceptable level and the levels above and below the minimum that ratings can be assigned;
- Developed using precise language that is clearly and easily understood by the evaluators. Structured to evaluate substance, not form; and
- Consistent with the minimum requirements of the Statement of Work.

In developing standards, there sometimes is a tendency to be overly aggressive by establishing highly detailed, or a large number of, standards under the assumption that this approach will improve the quality of the evaluation. In most cases, the result is just the opposite. Too many, or overly detailed, evaluation standards may lead to a leveling of ratings and thereby result in an inability to meaningfully discriminate among proposals. Conversely, standards that are overly broad also may make differentiation between proposals difficult and frustrate evaluators' efforts to agree on ratings. Likewise, "go/no go" standards are not as effective in best value decisions because they do not adequately identify varying degrees of superiority or inferiority.

2.5 Relative Importance of Evaluation Criteria. After determining the evaluation criteria, their relative importance must be established. The relative importance of the factors and sub-factors that comprise the evaluation criteria must be consistent with the source selection objectives and the solicitation requirements. There are several methods that may be used to establish the relative importance of the evaluation criteria. The first approach involves statements that establish a prioritization or tradeoff between factors. For example, the evaluation scheme may provide that cost is slightly more important than "technical approach" but less important than "key personnel." The relative importance of criteria also may be structured through the use of numerical weights, such as points or percentages. A third way to express the relative importance of evaluation criteria is through the use of decision rules. Essentially, a decision rule is a judgmental statement that is used to determine how a criterion will be treated under certain conditions. One way of expressing a decision rule would be "if the management factor is rated less than satisfactory, then the entire proposal is unacceptable." Of these three possible approaches, the use of a prioritization or trade-off technique provides greatest flexibility for the source selection official when making trade-off decisions between non-cost factors and the evaluated cost/price.

2.6 Rating Mechanisms. The FAR does not prescribe one best approach for rating proposals. Accordingly, agencies are free to design rating plans which best meet their needs in light of the facts, circumstances, and requirements of a particular procurement. Typically, numerical, adjectival, or color coding rating schemes have been relied on for proposal

evaluations. The key in using a rating system is consistent application by the evaluators. Regardless of the approach selected, supporting narrative documentation should be developed which explains the basis for the ratings, and identifies strengths, weaknesses and discriminators.

Pricing Contract Modifications

Guiding Principles

Contracting Officers should ensure that all the considerations the FAR requires are present before concluding that cost analysis is not necessary to price a contract modification.

[References: FAR 15.404-1 and 15.404-4]

1.0 Summary of Latest Changes

This update: (1) changes the chapter number from 15.4-1 to 15.402 to align with the FAR, and (2) includes administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references.

2.1 The general rule for pricing a contract modification is to price it exactly like any other contract action. If cost or pricing data is required, the contracting officer: must obtain it; must use cost analysis to evaluate the reasonableness of individual cost elements; and should use price analysis to verify the overall price is reasonable. If cost or pricing data is not required, the contracting officer must use price analysis to determine the price is fair and reasonable.

2.2 One interesting scenario that arises occasionally is the requirement to price a modification to a contract where the contract was awarded under adequate price competition. Since no cost or pricing data was obtained under the original award and no cost analysis was performed, the contracting officer faces the possible need to obtain cost and pricing data and perform cost analysis for the first time under the contract. As with all pricing actions, however, the FAR encourages the contracting officer to determine if he or she can forego obtaining cost or pricing data and performing cost analysis by using price analysis to determine a fair and reasonable price.

2.3 To justify using only price analysis, the contracting officer must establish the validity of the comparison between the original contract prices and the proposed modification prices. So, if the contracting officer is pricing a modification for a small addition for identical items shortly after a competitive award, for example, he or she could quite possibly use the original award prices for the prices in the modification. On the other hand, if the modification's addition is not small, its items not identical, or the time elapsed since contract award not insignificant, the contacting officer is much more likely to be required by FAR to obtain cost and pricing data and perform cost analysis. Thus, a modification for identical items to be priced shortly after award does not necessarily qualify as a situation where a simple price analysis alone is sufficient. The reason is the quantity of items to be acquired might be large enough to merit a dramatic price decrease from the award prices.

2.4 Finally, with regard to profit or fee for a contract modification, if price analysis alone suffices, profit analysis is not appropriate. If cost analysis is required, the FAR language is particularly clear—if the modification calls for essentially the same type and mix of work as the basic contact and is of relatively small dollar value compared to the total contract value, the contacting officer may use the basic contract's profit or fee rate as the prenegotiation objective for the modification. Otherwise, the contacting officer must adhere to all profit negotiation requirements for sole source pricing actions.

Weighted Guidelines

Guiding Principles

- Profit/fee is a motivator of efficient and effective contract performance.
- Weighted Guidelines are a structured approach to determining fair and reasonable profit/fee.

[References: FAR 15.404-4, DEAR 915.404, DOE Form 4220.23]

1.0 Summary of Latest Changes

This update: (1) reorganizes the discussion points to correspond with the sequencing on the DOE Form 4220.23, (2) clarifies the treatment of indirect cost elements, (3) clarifies the treatment of other direct costs, (4) modifies treatment of the productivity/performance adjustment factor, (5) incorporates changes to the DOE Form 4220.23, and (6) includes editorial changes and technical corrections.

2.0 Discussion

This chapter supplements acquisition regulations and policies contained in the above references, and should be considered in that context. This chapter sets forth procedures (cited at DEAR 915.404–4–70–8) to aid the contracting officer in the application of weighted guidelines and to assure a reasonable degree of uniformity. This chapter is divided into two parts: (1) the Weighted Guidelines Approach and (2) Instructions for Completing DOE Form 4220.23. The first part establishes the profit factors to be considered, the weight ranges for these factors (also displayed at DEAR 915.404-4-70-2(d)), and the analysis needed to determine the appropriate weight for each factor. The latter part conveys instructions for the DOE Form 4220.23, which provides a consistent framework for application of relevant profit factors and determination of fair and reasonable profit/fee.

2.1 No specific procedures prescribed at Government-wide level. Although the Federal Acquisition Regulation (FAR) does not prescribe procedures for profit/fee analysis, it does require consideration of certain factors (described at 15.404-4(d) as "profit-analysis factors" or "common factors") for use in a structured profit/fee approach.

2.2 Actual profit/fee may vary. Regardless of the rigor of your analysis, the contractor's realized profit/fee may vary (see FAR 15.404-4(a) (1)). This is due to such factors as contractor efficiency, contract type, and incurrence of unallowable costs.

2.3 Applicability. DOE's structured approach for determining profit/fee objectives is used when the contracting officer is required to perform a cost analysis (see FAR 15.404-1(a)(3)).

2.4 Weighted Guidelines Approach. This section provides guidance on how to evaluate the profit factors (see DEAR 915.404-4-70-2). In judging the value of each of the seven factors – (a) contractor effort, (b) contract risk, (c) capital investment, (d) independent research and development (IR&D), (e) special programs, (f) productivity/ performance, and (g) other -- the contracting officer uses the definition, description, and purpose of the factors, evaluating them as set forth below.

2.4.1 Contractor Effort**.** This broad factor addresses the resources needed to do the job. Its subfactors – material, labor, overhead, other direct costs (ODCs), and general and administrative (G&A) -- align with the cost elements typically found in proposals (see DEAR 915.404-4-70-2, item I), and are described below.

2.4.1.1 Material Acquisitions. This subfactor accounts for the managerial and technical effort necessary to obtain the required purchased parts, subcontracted services or items, and other materials.

2.4.1.1.1 Maturity of Suppliers. The contracting officer determines whether the contractor will obtain the material and tooling via routine orders from readily available suppliers (a lower rating) or whether the contractor will need to develop new sources (a higher rating). The contracting officer also considers the extent to which the contractor must develop complex specifications, involving creative design or close-tolerance manufacturing requirements (which may justify higher ratings).Supplier maturity is particularly important when orders are of substantial value relative to the total contract.

2.4.1.1.2 Supply Chain Management. The contracting officer considers the managerial and technical efforts necessary for the contractor to award and administer subcontracts, including efforts aimed at increasing competition. In general, supply chains that involve many sources, complex components and instrumentation, sometimes-incomplete specifications, and close surveillance may justify higher ratings.

2.4.1.1.3 Nature of materials. Proposed purchases of raw materials or basic commodities, and of processed material (including components of standard or near-standard characteristics) generally merit a lower rating. Conversely, purchases of parts, assemblies, subassemblies, special tooling, and other products peculiar to the end-item usually warrant a higher rating.

2.4.1.1.4 Intra-organizational transfers (IOTs). The contracting officer considers the nature and difficulty of executing any proposed IOTs, both for as materials and commercial work. IOTs are normally simpler business transactions than subcontracts with outside companies. Again, the more straightforward the transaction, the lower the rating.

2.4.1.2 Labor. This subfactor accounts for the talents, skills, and experience levels of personnel employed for contract performance. In general, more specialized and complex labor mixes will warrant higher ratings.

2.4.1.2.1 Technical and managerial labor. The contracting officer considers the extent of unique scientific, engineering, or management talent needed, the diversity of technical specialties, and the need for coordination. Project management/administration labor, frequently proposed under architect-engineer (A-E) contracts, is that of personnel who oversee and direct the work. Weighting may also take into account the dollar value of projects supervised.

2.4.1.2.2 Manufacturing labor. The contracting officer analyzes the mix of skilled and unskilled labor, as well as the contractor's manpower and supervisory resources.

2.4.1.2.3 Support services are efforts not closely identifiable with the above descriptions and may include labor assigned exclusively for contract performance, such as on-site A-E firm employees performing activities such as accounting, contract administration, cost engineering, and clerical work. The contracting officer reviews the mix of professional services, para-professional services, along with the skill sets required, typically weighting professional services higher than non-professional services.

2.4.1.3 Overhead. This subfactor includes the indirect costs associated with direct labor. The contracting officer looks at the elements of overhead pools (e.g., fringe benefits, utilities, supplies, etc.), and their impact on contract performance.

2.4.1.3.1 Routine vs. significant overhead costs. Routine overhead costs are those that result from little or no effort on the part of the contractor (e.g., utility costs are incurred and paid, software licenses are renewed and paid, etc.); these are given lesser profit consideration. Significant overhead costs, on the other hand, are those that contribute greatly to contract performance (e.g., contractor business systems management). In instances where managerial efforts are proposed as overhead, these are considered significant overhead costs, and the need for problem-solving expertise should be considered. For example, a contract for something unprecedented usually presents problems, so it would warrant a higher profit consideration.

After looking at the key components of the overhead pool, the contracting officer aggregates and weights them proportionally; this produces a composite value for the overhead subfactor. Here the procedure differs from that used in the labor factor (where upper and lower limits are absolute). For indirect costs, individual elements may be assigned values outside the range as long as the *composite value* falls within the range.

2.4.1.3.2 Cost Accounting Standards (CAS)-exempt contracts. Contractors whose accounting systems reflect only one overhead rate need not make changes to reflect more details. The contracting officer can break down the aggregate indirect costs, on a *pro rata* basis, classifying costs as technical, managerial, or engineering overhead, manufacturing overhead, and/or general and administrative (G&A), and then evaluate based

on the considerations listed above.

2.4.1.4 Other Direct Costs (ODCs). This subfactor addresses any direct costs not proposed elsewhere, such as direct material or direct labor. The contracting officer may approve as a direct cost, under certain circumstances (e.g., research and development contracts), certain types of expenses typically treated as indirect costs under other contracts. Examples include travel and subsistence, consultants, telephone costs, computer costs, and reproduction of reports.

2.4.1.5 G&A. This subfactor addresses higher-level indirect activities, such as those conducted at the corporate level. Again, the contracting officer analyzes the composition of G&A pools, as well as how these activities contribute to contract performance. Independent Research & Development (IR&D) efforts are excluded from the analysis of G&A, as IR&D is considered separately.

2.4.1.6 Facilities Capital Cost of Money (COM) is not to be included in any aspect of the Contractor Effort factor, as it is considered separately. See the discussion at 2.4.3, Capital Investment (Facilities).

2.4.2 Contractor Cost Risk. This factor recognizes that certain contracts (and contract types) are more likely to result in financial loss due to cost overruns and unallowable costs. DOE policy maintains that contractors not only bear an equitable share, but are also compensated for, the cost risk. This factor does not include risks associated with loss of reputation, commercial market share, potential profit in other markets, or any risk on the part of the contracting activity (e.g., the risk of not acquiring an effective product or service). Subfactors include contract type, reliability of cost estimate, differing circumstances, nature of the work, and subcontracting.

2.4.2.1 Contract type. Contract type is the most basic manifestation of cost responsibility assumed by the contractor, with extremes ranging from cost-plus-fixed fee (CPFF, lowest cost risk to contractor) to firm-fixed-price contract (FFP, highest cost risk to contractor).

2.4.2.2 Reliability of cost estimate. Estimates upon which contract pricing are based also contribute to the risk of cost overruns. Accordingly, the contracting officer considers the reliability of the cost estimate. For example, estimates reflecting firm vendor quotes are highly reliable, and are therefore lower risk. Estimates based on engineering judgment are less reliable, and are therefore higher risk to the contractor.

2.4.2.3 Differing circumstances. Although Table 1 provides weight ranges for each contract type, the contracting officer must consider contract type in concert with the pricing strategy. 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 (FFP) contract. The converse is also true: A fixed-price incentive (firm target) contract with a high ceiling and low share ratio can resemble a cost-plus-incentive-fee (CPIF) contract. There are many permutations of this theme: A term in a CPIF contract that places unlimited, negative

fee adjustment risk on the contractor would create a contract similar to an FPIF contract.

2.4.2.4 Nature of the work. The contract may not closely 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.

2.4.2.5 Subcontracting. The contractor's subcontracting program may have a significant impact on the contractor's cost risk level. This consideration is a part of the contracting officer's overall evaluation of cost risk.

2.4.3 Capital Investment (Facilities) is an imputed cost (see FAR 31.205-10). Not all offerors include capital investment in their pricing models. When it is proposed, the contracting officer quantifies the investment risk associated with the contractor's facilities. In brief, the following steps occur:

(a) Determine the facilities capital used. Divide the facilities capital cost of money allowed on the contract by the cost of money rate from the U.S. Treasury. https://www.fiscal.treasury.gov/fsservices/gov/pmt/promptPayment/rates.htm

(b) Add the facilities capital employed to the DOE Form 4220-23 ("net book value of Allocated Facilities Cost" block), assign a value to the profit factor, considering:

- General cost-effectiveness of the facilities employed;
- Nature of facilities (general purpose will be rated low; special purpose will be rated high);
- Age of the facilities;
- Relationship of the facilities' remaining useful life to the length of the program(s) or contract(s) to which the facilities are dedicated;
- Special contract provisions that reduce the contractor's risk of recovery of facilities capital investment (termination-protection clauses, multi-year cancellation ceilings, etc.).

For new facilities, the contracting officer requests reasonable evidence that new facilities are part of an approved investment plan, and that benefits to the Government will result. If the new investment replaces existing assets, a lesser weight is assigned. On the other hand, new industrial facilities and equipment receive maximum weight when they:

- Are to be acquired primarily for Government and DOE-related efforts;

Have a long service life, or a limited economic life due to limited alternative uses; or

- Reduce the total life cycle cost of the products or services to DOE.

2.4.4 Independent research and development (IR&D). This factor incentivizes contractors to: (1) invest in a viable IR&D program, considering its quality, scope, resources employed, etc.; and (2) develop items with energy program applications with no direct Government assistance and little or no indirect Government assistance. The weighting is based on the amount of assistance provided by the Government through development cost allowance under previous contracts and the extent to which the contractor already has been compensated

for independent development through prior sales of identical items or services.

2.4.5 Special program participants. This factor incentivizes contractors with outstanding participation in the Government's socioeconomic programs (i.e., small businesses, small disadvantaged businesses, women-owned small businesses, labor surplus, energy conservation, and other special programs). Generally, participation rated merely satisfactory is assigned a weight of zero. Additionally, evidence of poor participation may result in a negative weight.

2.4.5.1 Government small business and small disadvantaged business subcontracting programs. Contractors who expend unusual effort in assisting, and effectively subcontract with small and small disadvantaged concerns (particularly for development-type work likely to result in production opportunities) should be given favorable consideration. Conversely, lower weights will be given to contractors who demonstrate unwillingness to support these Government policies.

2.4.5.2 Labor surplus area program. Contractors who make a significant effort to find jobs and provide training for the unemployed, or who promote subcontractor utilization of certified eligible concerns, should be given favorable consideration.

2.4.5.3 Energy conservation programs. Contractors with accomplishments and initiatives in the arena of energy conservation, as well as the execution of other special Government programs, should be given favorable consideration.

2.4.6 Other considerations**.** Other situations may justify consideration of a profit allowance in addition to what is identified elsewhere in the guidelines. These situations are to be identified, along with the rationale for their use, in the price negotiation memorandum. Within this context, a satisfactory or average effort is accorded a zero weight. An extraordinary effort may increase the pre-negotiation profit objective by an amount not to exceed 4% of the objective costs (see Block 4f of the DOE Form 4220.23). Examples of such considerations are described below.

2.4.6.1 Cost-control measures. This subfactor benefits prospective contractors who have performed similar tasks effectively and economically, or who have taken cost-control measures that benefit Government contracts. Among other things, consideration is given to efforts to improve or develop new product, manufacturing, or performance technologies to reduce production cost.

2.4.6.2 Complexity of R&D or services assignment. This subfactor 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 weight:

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; and

facilities to be used for research, development, experimental, or demonstration purposes, involving advanced or unique design considerations that are peculiar to the purposes for which the facility is built.

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.

Class C—permanent administrative and general service buildings, housing, roads, railroads, grading, sewers, storm drains, and water and power distribution systems.

Class D—Construction camps and facilities and other temporary construction.

2.4.6.3 Operating capital. This subfactor addresses the level of operating or working-capital investment required for effective contract performance. This level will vary depending on such circumstances as the nature of the work, the 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 payments. When contractors invest relatively few dollars for operating capital purposes (due to 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 warranted.

2.4.7 Productivity/Performance. This factor reflects DOE's policy of encouraging contractors to modernize facilities and make other improvements, with the goal of reducing future contract prices. Without consideration of this factor, a cost-plus-award-fee (CPAF) contract might be awarded as the first of multiple contracts, but efforts to increase productivity and reduce cost under the first contract would work against the contractor, as pricing for follow-on contracts would reflect the lower cost baseline. To mitigate potential loss of profit on a follow-on contract when productivity or performance gains have reduced costs under a predecessor contract, an adjustment for productivity may be included in the pre-negotiation profit objective of a follow-on acquisition.

2.4.7.1 Criteria for use of factor. The productivity factor may apply only when the following criteria are met: (a) the pending acquisition is for a follow-on contract; (b) reliable actual cost data relating to the predecessor contract(s) are provided, thus demonstrating benefit to the Government.; and (c) changes in the configuration of the item acquired and/or in the technical aspects of the services performed are not likely to affect price comparability.

2.4.7.2 Basis for amount. The amount for a follow-on contract is based on demonstrated cost savings from predecessor contract(s) that were driven by productivity or other improvements. The following apply to this factor:

- The contractor submits and supports actual data on cost savings derived from

productivity or other improvements.

- The estimated cost reduction for follow-on contract(s) is measured at the unit cost level or equivalent.

- The lowest average unit cost or equivalent (exclusive of profit) for a preceding performance period or production run serves as the unit cost baseline.

- The contractor isolates the portion of the cost decrease attributable to productivity gains (as opposed to other factors, such as the effects of quality differences) between the initial contract and the pending acquisition.

- The additional profit is calculated by adding a percentage, ranging from zero to 4% of the base profit amount. The normal value is zero; for CPFF contracts, the added profit should be zero. For CPAF, CPIF and Fixed Price Incentive contracts, the added profit should range from zero to 2% of base profit. For FFP contracts, the added profit should range from zero to 4% of base profit.

- The degree of review and validation of the data supporting this calculation is commensurate with the materiality of this profit element in relation to the overall price objective.

2.4.7.3 Flexible Methods. Both contracting officers and contractors may use appropriate methods to quantify productivity gains. Any technique may be acceptable, provided it equitably addresses the principles and procedures listed above.

2.4.8 Additional items. Pursuant to FAR 15.404.4, other items must be taken into account when developing profit/fee objectives.

2.4.8.1 Eliminate Facilities Capital Cost of Money from the profit/fee base. Although the pre-negotiation objective for profit/fee is based on the pre-negotiation cost objective, any dollar amount for facilities cost of capital must be excluded from the profit/fee base.

2.4.8.2 Contract modifications. Profit/fee objectives are to be based exclusively on the *contracting action* being negotiated. With contract modifications, the basic-contract profit rate may be used if both of these conditions are met:
(a) the modification involves the same type and mix of work as the contract, and
(b) the modification is of small dollar value relative to the total contract. If the modification does not meet both of these conditions, a separate profit/fee analysis must be conducted in order to establish the appropriate profit/fee objective for the contracting action.

2.4.8.3 Eliminate Government property from the profit/fee base. While the pre-negotiation profit objectives are based on the negotiation cost objective, the contracting officer must exclude the cost of the acquired property (limited to equipment as defined in FAR 45.101) and real property from pre-negotiation cost objective amounts, unless such property

will be a deliverable (or part of a deliverable) under the contract.

Table 1. Risk Considerations by Contract Type

Risk Category	Factors to Consider	Range of Risk Values			
		Contract Type	**Equipment and Supply Contracts**	**Research and Development Contracts**	**Services Contracts**
Contractor Cost Risk	Consider the contract type (CPFF, CPIF, FPI, FPR, FFP, T&M, LH, FPLOE); consider the degree to which risks have been transferred to subcontractor through contract type or terms and conditions; consider whether previous work on undefinitized actions reduce risks. T&M and LH contracts are evaluated as CPFF. Cost risk range for nonprofit organization is -1 to 0.	**Cost Plus Fixed Fee**	0 to 0.5%		
		Cost Plus Incentive			
		w/cost incentives only	1 to 2%		
		w/multiple incentives	1.5 to 3%	1.5 to 3%	1 to 2%
		Fixed Price Incentive			
		w/cost incentives only	3 to 5%	2 to 4%	2 to 3%
		w/multiple incentives	4 to 6%	3 to 5%	2 to 3%
		Prospective Fixed Price Re-Determinable	4 to 6%	3 to 5%	2 to 3%
		Firm Fixed Price	6 to 8%	5 to 7%	3 to 4%
Facilities Invest-ment	Consider the extent to which the facilities used in performing the contract are contractor owned. Consider the extent to which the facilities result in productivity improvements directly benefiting the Government.		5 to 20%		
Productivity/ Performance	Recognize investment in cost-reducing facilities. Applies only to follow-on manufacturing efforts. Actual cost data must be present. **The normal value is 0**, but an amount of up to 4% of the base profit may be added depending on extent of demonstrable savings achieved.		0 to 4%		
IR&D	Consider the extent to which IR&D contributes to the DOE mission.		1 to 4%		
Other	Consider contribution towards goals of socioeconomic programs. Consider contractor's past performance.		-5 to +5%		

2.5 Applying the DOE Weighted Guidelines. This section provides instructions for filling out the DOE Form 4220.23, Weighted Guidelines Profit Objective, as depicted below (also available as a fillable form in the STRIPES Library. DEAR 915.404-4-70-2 provides details on the DOE weighted guidelines system, a structured approach to profit analysis.

2.5.1 Exceptions**.** DEAR 915.404-4-70.4 specifically exempts the contract categories listed below, and states that contracting actions under the threshold at 48 CFR 15.403-4(a)(1) are exempted from the weighted guidelines requirement, unless the contracting officer elects to use the approach.

- Commercialization and demonstration type contracts;
- Management and operating contracts (see DEAR 970.1504-1-1);
- Construction contracts (see DEAR 915.404-4-71);
- Construction management contracts (see DEAR 915.404-4-71);
- Contracts primarily requiring delivery of material supplied by subcontractors;
- Termination settlements; and
- Contracts with educational institutions (see 915.404-4-70-6).

2.5.2 Special considerations. Several other contract categories are accorded special consideration, from a weighted guidelines perspective, in the DEAR. They are:

- CPAF contracts (see DEAR 915.404-4-72); and
- Contracts with nonprofit organizations other than educational institutions (see 915.404-4-70-5).

2.5.3 DOE Form 4220.23. The following illustration shows details of the placement of items on the Weighted Guidelines Profit form.

WEIGHTED GUIDELINES PROFIT OBJECTIVE

1. CONTRACTOR IDENTIFICATION	a. Name		b. Division (if any)	
	c. Street Address	d. City	e. State	f. Zip
2. TYPE OF ACQUISITION ACTION *(REFER TO FEDERAL PROCUREMENT DATA SYSTEMS-PRODUCT AND SERVICE CODES MANUAL, AUG 2015)* a._____Supplies & Equipment b._____Research & Development				
3. ACQUISITION INFORMATION	a. Purchasing Offices	b. Contract Type	c. RFP/RFQ No.	
		d. FY	e. Contract No.	

PROFIT OBJECTIVE COMPUTATION

PROFIT CONSIDERATIONS	MEASUREMENT BASE	PROFIT Ranges	Assigned Weight	Profit Dollars
4. CONTRACTOR EFFORT				
a. MATERIAL ACQUISITIONS:	(Acquisition Costs)			
(1) Purchased Parts		1 to 3		
(2) Subcontracted Items		1 to 4		
(3) Other Materials		1 to 3		
b. LABOR SKILLS:	(Labor Costs)			
(1) Technical & Managerial				
(a)Scientific		10 to 20		
(b)Project management/administration		8 to 20		
(c)Engineering		8 to 14		
(2) Manufacturing		4 to 8		
(3) Support Services		4 to 14		
c. OVERHEAD	(Overhead Costs)			
(1) Technical & Managerial		5 to 8		
(2) Manufacturing		3 to 6		
(3) Support Services		3 to 7		
d. OTHER DIRECT COSTS	(O.D. Costs)	3 to 8		
e. G & A EXPENSE	(G & A Expenses)	5 to 7		
f. TOTAL CONTRACTOR BASE EFFORT BASE COSTS	(Total Lines 4.a. thru 4.e.)			
5. CONTRACT RISK	(Base Costs: Line 4.f., Col. b.)	0 to 8		
6. CAPITAL INVESTMENT (Facilities)	(NBV of Allocated Facilities Costs)	5 to 20		
7. INDEPENDENT RESEARCH & DEVELOPMENT:				
a. PROGRAM INVESTMENT	(Allocated IR &D Costs)	5 to 7		
b. USE OF ITEMS DEVELOPED	(Base Profit $: Line 4.f., Col. e.)	0 to 20		$0
8. SPECIAL PROGRAM PARTICIPATION	(Base Profit $: Line 4.f., Col. e.)	-5 to +5		
9. OTHER CONSIDERATIONS	(Base Profit $: Line 4.f., Col. e.)	-5 to +5		
10. PRODUCTIVITY/PERFORMANCE ADJUSTMENT	(Base Profit $: Line 4.f., Col. e.)	0 to 4		
11. TOTAL PROFIT OBJECTIVE				$0

12. SUMMARY CONTRACT PRICE OBJECTIVE:		13. REMARKS
a. Contractor Effort Base Costs (Line 4.f, Col b.)		
b. IR & D Cost (Line 7.a, Col. B.)		
c. Subtotal of Profit Base		
d. Facilities Capital Cost of Money (CAS 414) (Separately Computed)		
e. Total Prospective Cost		
f. Total Profit Objective (Line 11, Col. E.)		

14. DATE:	15. PREPARED BY:	16. SIGNATURE

DEPARTMENT OF ENERGY

2.5.4 DOE Form 4220.23 Instructions. Instructions for boxes 1 through 16 appear below.

Items 1 thru 3 —Acquisition Identification Information defines basic acquisition information germane to profit analysis. Although these form requirements area are not covered in this chapter, more information can be found in the Federal Procurement Data Systems – Product and Service Codes Manual (August 2015).

Item 4 - Cost Objective by Cost Category details the Government's pre-negotiation objectives by cost category. The measurement base (column b) is the proposed cost or price associated with each category (column a), broken down to the lowest subcategory. For example, Material Acquisitions is broken down into three subcategories. Appropriate weights will be applied to the cost or price of Purchased Parts, Subcontracted Items, and/or Other Materials, rather than to Material Acquisitions as a whole.

- Be sure to *exclude* any facilities capital cost of money included in your cost objectives from this portion of the DOE Form 4220.23.

- Be sure to *exclude* any government property (if applicable) included in your cost objective from this portion of the DOE Form 4220.23.

- Item 4e should include G&A expenses and all IR&D/bid and proposal expenses.

In selecting the appropriate profit range, the factors set forth in the following table are to be used. The factors and weight ranges for each factor shall be used in all instances where weighted guidelines are applied.

Item 5 —Contract Risk focuses on the degree of cost risk associated with the contract type. In selecting the appropriate weight range, the designated weight ranges are described in Table 1, Risk Considerations by Contract Type of the Weighted Guidelines Application Section.

In assigning the appropriate value of each profit factor, use the *normal value* for the proposed contract type, unless you can justify a higher or lower value. The normal value is typically the midpoint of the range, except where otherwise noted (e.g., the normal value for productivity/performance is 0). Elements to consider include:

- Length of contract,
- Adequacy of cost data projections,
- Economic environment,
- Nature and extent of subcontracted activity,
- Contractor protection under contract provisions (e.g., economic price

adjustment clauses),

- Ceilings and share lines contained in incentive provisions, and
- When the contract contains provisions for performance-based payments:
  - The frequency of payments,
  - The total amount of payments compared to the maximum allowable amount specified at FAR 32.1004(b)(2), and
  - The risk of the payment schedule to the contractor.

- When determining the appropriate value to assign, also assess the extent to which **costs have been incurred prior to definitization of the contract action**. Your assessment must consider any reduced risk on both the pre-definitization portion of the contract and the remaining portion of the contract. When costs are incurred prior to definitization, generally regard the contract risk to be at the low end of the range. If a substantial portion of the costs are incurred prior to definitization, you may assign a value as low as 0, regardless of contract type.
- Consider the period of substantive performance that you use to select the length factor:
  - Is based on the time necessary for the contractor to complete the substantive portion of the work.
  - Is not necessarily based on the entire period of time between contract award and final delivery (or final payment). It should exclude any periods of minimal contract performance.
  - Should not be based on periods of performance contained in option provisions.
  - Should not, for multi-year contracts, include periods of performance beyond that required to complete the initial program year's requirements.
  - Should be based on a weighted average contract length when the contract has multiple deliveries.
  - May be estimated using sampling techniques provided the sampling techniques produce a representative result.
- After you determine the period of substantive performance, identify the interest rate determined semi-annually by the Secretary of the Treasury under Public Law 92-41. Calculate the working capital profit objective.

Item 6 —Capital Investment (Facilities) recognizes the contractor's investment in land, buildings, and equipment. To assign the appropriate value to equipment employed:

- Relate the usefulness of the equipment to the goods or services being acquired under the prospective contract.
- Analyze the productivity improvements and other anticipated industrial base enhancing benefits resulting from the investment in equipment, including:
  - The economic value of the equipment, value, idleness, and expected contribution to future energy needs; and
  - The contractor's level of investment in energy-related equipment as compared with the portion of the contractor's total business that is derived from the DOE.
- Consider any contractual provisions that reduce the contractor's risk of

investment recovery (e.g., termination protection clause, capital investment indemnification, and productivity-driven savings).

Item 7 - Independent Research and Development accounts for the extra risk of developing items with energy program applications on the contractor's own initiative. For more details, see paragraph 2.4.4.

Item 8 – Special Program Participation applies to special circumstances relating to rewarding outstanding achievement in contractor participation in the Government's Federal socioeconomic programs. For more details, see paragraph 2.4.5.

Item 9 - Other Considerations are for particular situations that may justify consideration of a profit allowance in addition to those specifically identified elsewhere in the guidelines. It may include a special factor that encourages contractors to reduce costs—the cost efficiency factor. Contracting officers may use this factor only when the contractor can demonstrate cost reduction efforts that benefit the pending contract. The following criteria are helpful with evaluating whether to use the cost efficiency factor:

- Actual cost reductions achieved on prior contracts;
- Reduction or elimination of excess or idle facilities;
- Contractor's cost reduction initiatives (e.g., competition advocate programs, technical insertion programs, obsolete parts control programs, spare parts pricing reform, value engineering, and outsourcing of functions such as information technology). Metrics developed by the contractor such as fully loaded labor hours (i.e., cost per labor hours, including all direct and indirect costs) or other productivity measures may provide the basis for assessing the effectiveness of the contractor's cost reduction initiatives over time;
- Contractor's adoption of process improvements to reduce costs;
- Contractor's effective incorporation of commercial items and processes; or
- Contractor's investment in new facilities when such investments contribute to better asset utilization or improved productivity.

When selecting the percentage to use for this special factor, the contracting officer has maximum flexibility in determining the best way to evaluate the benefit the contractor's cost-reduction efforts will have on the pending contract. However, the contracting officer should consider the impact that quantity differences, learning, changes in scope, and economic factors such as inflation and deflation will on cost reductions.

Item 10 – Productivity/Performance Adjustment. Contracting officers may use this factor *only when the contractor can demonstrate benefit to the Government*. It focuses on the contractor's prior demonstrated ability to perform similar tasks effectively and economically. Paragraph 2.4.7 addresses this factor in more detail.

Item 11—Total Profit Objective is the sum of all profit objectives calculated in Items 4 through 9.

Item 12—Summary Contract Price Objective is a summary of the prospective negotiated contract price objective.

Items 14 thru 16 - Contracting Officer Approval. The DOE Form 4220.23 must be signed and dated by the contracting officer.

Negotiation Documentation: Pre-negotiation Plan & the Price Negotiation Memorandum

[Reference: FAR 15.403-1, 15.403-3, 15.406 and 52.215-2]

Guiding Principles

The primary purpose of a pre-negotiation plan is to ensure that the Government has developed negotiation objectives that will lead to the purchasing of supplies and services at a fair and reasonable price.

In the absence of adequate price competition, the contracting officer must apply and document in the pre-negotiation plan, the analytical techniques used to assess whether a proposed price is fair and reasonable.

Overview

Negotiating any pricing action requires the development of negotiation objectives. The scope and depth of the analysis supporting the objectives should be directly related to the dollar value, importance, and complexity of the pricing action. However, when cost analysis is required, the requirement for formal documentation, i.e., a pre-negotiation plan is much more critical. The development of a pre-negotiation plan that does not reflect a rigorous analysis, evaluation, and examination by element of cost will diminish the achievement of obtaining a fair and reasonable price. Where there is a departure from the established negotiation objective, the price negotiation memorandum should not only identify the negotiated results, but also reflect the same level of rigor in the analysis, evaluation, and basis for its acceptance.

This Acquisition Guide Chapter was developed to provide a formal framework for developing a pre-negotiation plan and price negotiation memorandum that work in tandem to ensure that a fair and reasonable price has been achieved and documented. While the applicability and focus of this guide is to Change Orders and Requests for Equitable Adjustment (REAs), it can also serve as the basis for documenting negotiations in the award of a sole source contract.

The Pre-negotiation Plan

The pre-negotiation plan is an official document of the contracting officer's negotiation objectives relating to pricing, technical, business, and contractual issues. It assists in the contracting officer's determination of a fair and reasonable price. It must document the pertinent issues to be negotiated and the cost objectives and a profit or fee objective. Because it serves as the basis of the negotiation, the pre-negotiation plan should fully explain the contractor and Government positions. The template which is included as Attachment-A, is provided to assist contracting officers in their analysis of their negotiation objectives when cost analysis is required to support negotiations. Contracting activities are encouraged, through implementation level procedures, to establish additional templates that are more aligned with the specific needs of their organization and procurements. However, such templates must always be in conformance with the requirements of FAR 15.406. Additionally, when the procurement action has been

selected by the Acquisition Planning and Liaison Division (MA-621) for business clearance review (Acquisition Guide Chapter 71.1), the use of the attached template is strongly recommended. The pre-negotiation plan should:

- Identify and compare the contractor's proposed cost to the Government position for each individual element of cost. Differences must be explained, including the estimating methodologies and assumptions as well as the projection techniques and historical data used in developing the Government position.
- Fully explain the recommendations and findings of the auditors, evaluators, and others providing advisory assistance, the basis for their recommendations or findings and the extent they were incorporated in the establishment of the negotiation objective. Where they are not fully utilized, the negotiator should identify the extent to which they were not utilized and the basis for this decision including additional facts and circumstances supporting the negotiator's alternate analysis.
- Provide a detailed rationale for the Government's fee/profit objectives.
- Provide full traceability to the proposal data that was relied upon.
- Ensure that the structure and format of the price negotiation memorandum tracks to the pre-negotiation plan so that reviewers can easily cross-reference between the two documents.

The Contractor's Proposal

Where cost analysis is required, the basic requirements that must be satisfied with respect to cost and pricing are set forth in FAR 15.4. Table 15-2 referenced in FAR 15.4 provides instructions that the contractor and subcontractors, should comply with. When submitting a proposal, contractors must be required to provide a breakdown by element of cost. This breakdown by element of cost should be clearly traceable to the Work Breakdown Structure (WBS) of the Statement of Work (SOW) and the individual Contract Line Item Numbers (CLINs), as applicable. It should provide a breakdown for each element of cost, identify the basis of estimate, and provide summary level tabulations.

Failure to ensure that the contractors submit well documented and organized proposals makes the Government negotiator’s analysis of the proposal unnecessarily arduous. Therefore, contractors and subcontractors proposing work on a cost reimbursement basis or in a fixed price environment where cost analysis is required, must be required to comply with the direction provided in Table 15-2 as identified in FAR Clause 52.215-20 – Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data FAR Clause and 52.215-21 – Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data - Modifications. It should be noted that in negotiating change orders and REAs, certified cost and pricing data should be obtained.

Contract Changes and Requests for Equitable Adjustment (REA)

The development of a pre-negotiation plan memorandum to negotiate an REA or definitization of a Change Order requires additional considerations with respect to the underlying analysis. Significant guidance on contract changes and REAs was provided in Policy Flash 2008-39 which

implemented the memorandum dated April 1, 2008, issued by Thomas E. Brown, Director, Office of Contract Management, Office of Procurement and Assistance Management. This Acquisition Guide Chapter must be understood in tandem with the memo when documenting the pre-negotiation objectives for a Change Order REA. Amongst other things, it provides guidance on the evaluation of REAs and the analysis and documentation requirements for establishing negotiation objectives. Some of the key points are identified below:

- The legal concepts of "entitlement" and "quantum" must be individually evaluated and documented for each contract change and REA.
- In evaluating a contractor's "entitlement", the contracting officer must determine the merit of the REA. Is it wholly arising from the "change" to the contract or is some portion resulting from other factors such as excess costs for work that had already been negotiated?
- The "quantum", which is typically the amount that the contractor is entitled, should be determined through the evaluation of the contractors' proposal. Where cost analysis is required, the contractor's proposal must be evaluated, analyzed, and tabulated so that legitimate REA costs are segregated from those costs that are not.
- The pre-negotiation plan must break out the cost of new work, deleted work, and costs in excess of work that had been negotiated. In addition, they must identify the amount incurred for completed work and the amount projected.
- The contractor's project performance measurement baseline is a critical element of an earned value management systems. It is a project management tool and does not satisfy the definition in FAR Part 15 of cost and pricing data. The baseline validation process is not an adequate substitute for cost and price analysis that is the responsibility of the contracting officer.

The Pre-negotiation Plan Template

The content of the pre-negotiation plan memorandum is identified in the template. It consists of five sections: (I) the Background; (II) the Summary of Total Cost and Fee/Profit; (III) The Summary of Key Documents, Approvals, and Compliance; (IV) Status of Contractor's Business Systems; and (V) Negotiation Objectives. However, the reference notes supporting the negotiation objective represent the crux of the cost and price analysis that is conducted and the basis for the government's negotiation objective. Therefore, the reference notes identified for each individual element of cost should, as discussed earlier, provide full traceability to the proposal data that was relied upon; and articulate the recommendations or findings of the auditors, technical evaluators, cost/price analysts, and others providing advisory assistance, the basis for their recommendations or findings, and the extent they were incorporated in the establishment of the negotiation objective. Where they are not fully utilized, the negotiator should identify the extent to which they were not utilized, the basis for this decision including additional facts and circumstances supporting the contracting officer's alternate analysis.

The reference notes are structured so that the cost charts are embedded within the narrative. This was done simply to reduce the illustrative complexity of the template. It is often more effective and practical to incorporate summary level cost and fee/profit data in the narrative with the supporting spreadsheets provided as an attachment to the reference notes. The benefit of only

embedding summary level cost and fee/profit data in the narrative is that the contracting officer will significantly reduce the number of edits that must be made manually when there is a change to a single rate that may flow down and impact multiple cost elements.

The reference notes in the template also include discussions of the type of cost and price analysis that are typically considered when conducting a cost and price analysis for each major element of cost and its associated reference note. However, these are general considerations and points of discussion. The contracting officer in performing the cost and price analysis should rely on the FAR and the detailed guidance on analyzing individual elements of cost that can be found in Volume 3 of the Contract Pricing Reference Guide issued jointly by the Air Force Institute of Technology and the Federal Acquisition Institute.

The Price Negotiation Memorandum

Upon completing negotiations, a price negotiation memorandum must be developed. It should document the purpose and results of the negotiation, the extent to which negotiation objectives were met and the basis for accepting a position that departs from the established objective. To the extent that specific negotiation objectives were met, a statement to this effect is sufficient. A restatement or summary of information and analysis provided in the pre-negotiation is not required. However, where there are differences between the negotiation objectives and the actual negotiated outcome or issues not identified in the pre-negotiation plan, the price negotiation memorandum should provide a full explanation of the agreement reached.

Where there is a deviation from the cost and pricing objectives that were established in the pre-negotiation plan, the price negotiation memorandum should reflect a basis for negotiating an alternate outcome that is consistent with the type of cost and price analysis conducted in establishing the pre-negotiation cost objectives. A template for a price negotiation memorandum is provided as Attachment-B.

ATTACHMENT-A
PRE-NEGOTIATION PLAN TEMPLATE

MEMORANDUM FOR THE RECORD:

SECTION I BACKGROUND

1. Contractor: _____

2. Requisition Number: _____

3. Contract Number/Solicitation Number: _____

4. Contractor's Proposal and Revision Number: _____

5. Contract Type: _____

6. Period of Performance:_____

7. Amount of Funds Available: _____

8. Purpose of Negotiations (e.g., Negotiate a New Contract on a Sole Source Basis, Definitization of a Change Order, Negotiate an Equitable Adjustment, etc.):

_____
_____
_____

7. Description of the Work (Provide a Brief Summary of the General Scope of Work Encompassed by this Action):

_____
_____
_____

8. Contractor's Name and Address/Location(s) Where Work Will be Performed: _____
_____

9. Describe Existing or Previous Contracts that Impact the Programmatic, Schedule, or Cost of the Current Procurement: _____
_____

10. Negotiation Authority: : _____

11. Contractor's Negotiation Team: _____

12. Government's Negotiation Team: _____

13. Date and Negotiation Location: _____

14. Independent Government Cost Estimate: $_____
Prepared by (Analyst/Organization Code): _____

15. Major Procurement Milestones:

SECTION II
SUMMARY OF TOTAL COST AND FEE/PROFIT OBJECTIVE

	Contractor Proposal	**Government Negotiation Objective**	**Difference (Contractor-Gov't Objective)**
Total Cost	$	$	$
Fee/Profit	$	$	$
Total Price	$	$	$

SECTION III
SUMMARY OF KEY DOCUMENTS, APPROVALS, AND COMPLIANCES

Key documents, approvals, and compliances applicable to this action: (check applicable items). Copies of marked documents are maintained in the original contract file.

☐ Acquisition Plan approved on_____/___/_____.

☐ Small Business Set-Aside Review DOE F 4220.2 approved on_____/___/_____.

☐ Synopsized on_____/____/____. If waived, identify the applicable exception pursuant to FAR 5.202:_____.

☐ Representations and Certifications Completed and Acceptable.

☐ Small Business Subcontracting Plan (or Revision) Received Pursuant to FAR 19.702(a)(1) on ___/____/____ . Small Business Subcontracting Plan reviewed by_____, and determined to be acceptable on/_____/____. If determined to be unacceptable, explain the basis for this determination and identify the impact on the Government's negotiation objective. If the subcontracting plan is not required, identify basis for the exception.

☐ EEO Preaward Clearance Requested in Accordance with FAR 22.805.

☐ DCAA Rate Check/Audit Report for Prime Contractor Report No./Date: _____

☐ DCAA Rate Check/Audit Report for Subcontractor(s) Contractor Report No./Date: _____

☐ Pricing Report: Identify by name/position/organization, the cost and price analyst who prepared the pricing report and the date of the report:_____.

☐ Technical Advisory Report/Evaluator/Organization Code/Report Date: _____

☐ Weighted Guidelines (FAR 15.404-4, DEAR 915.404-4-70-2, and Acquisition Guide 15.4-2) or alternate profit and fee technique (DEAR 915.404-4-70-7).

☐ Advance notification provided to the Office of Congressional and Intergovernmental Affairs for solicitations in accordance with Acquisition Guide Chapter 5.1.

SECTION IV
STATUS OF CONTRACTOR'S BUSINESS SYSTEMS

☐ Status of the Contractor/Subcontractor Disclosure Statement(s) (FAR 30.202-6, 7, and 8) are current, accurate and complete, as determined by_____[identify agency] on ___/___/____. If not determined to be adequate, explain why_____.

☐ The contractor/subcontractor has an approved Purchasing System (FAR 44.305) as determined by the DCMA on:_____.

☐ The contractor has an adequate Estimating System as determined by the DCMA on:_____.

☐ The contractor has an adequate Accounting System as determined by the DCAA on (applicable to all cost type contracts):_____.

SECTION V
NEGOTIATION OBJECTIVES

(A) Cost and Pricing Objectives (See Reference Notes for Detailed Analysis): In developing the cost and pricing objectives, the pre-negotiation plan must include a tabulation of each major element of cost and fee/profit at a summary level that is inclusive of the base period and options. Each major element of cost must include an associated reference note. The write up supporting the reference notes should identify: whether the basis of the proposed cost is justified; the basis, methodology, and techniques employed by the contractor in developing its proposed cost; the recommendations or findings of the auditors, evaluators, and others providing advisory assistance for evaluating and assessing the cost element; the basis, methodology, and techniques applied by the subject matter expert in formulating their recommendations and findings; the extent that the recommendations or findings from the advisory reports were incorporated in the establishment of the negotiation objective; if they are not fully utilized, the negotiator should identify the extent to which they were not utilized, the basis for this decision including additional facts and circumstances supporting the negotiator's alternate analysis. The contracting officer should also identify and discuss pricing that appears to be materially unbalanced.

Element of Cost	Contractor Proposed	Government Negotiation Objective	Variance (Proposed - Gov't Objective)	Reference Note
Direct Labor	$	$	$	A
Labor Overhead	$	$	$	B
Equipment	$	$	$	C
Materials	$	$	$	D
Material Overhead	$	$	$	E
Travel	$	$	$	F
Consultants	$	$	$	G
Subcontracts	$	$	$	H
Interorganizational Transfer	$	$	$	I
Other Direct Costs	$	$	$	J
Subtotal	$	$	$	
G&A	$	$	$	K
Subtotal	$	$	$	
Facility Capital Cost of Money	$	$	$	L
Total Cost	$	$	$	
Fee/Profit	$	$	$	M
TOTAL COST AND FEE	$	$	$	N

[The elements of cost represented above are those that are commonly encountered. Contracting officers are likely to encounter some variability in the elements of cost that are proposed by contractors since it will be dependent on the individual contractors accounting structure and the prescribed scope of the effort. However, contracting officers should be mindful that "management reserve" and "contingency" as defined in the DOE 413 series of directives are project and budget management tools. These should not be treated as elements of cost for purposes of establishing a contract or modification value. For detailed guidance, see Acquisition Letter 2009-01.

This summary level tabulation should be supported by a detailed cost element breakout by performance period including a breakout of the base and individual option periods and individual CLINs to the extent that the solicitation requires pricing for separate contract line items. Major subcontracts would need separate spreadsheets with accompanied reference notes.]

(B) Other Negotiation Objectives and Issues

Identify non-pricing related issues that must be addressed as part of the negotiation. Examples include:

1. Delivery or performance issues

2. Proposed special provisions.

3. Any deviations to regulations and the required approvals.

4. Contractor assumptions.

5. Any solicitation provisions that have been challenged by the Offeror or to which they have taken exception.

6. Discussion of unique features of the contract, e.g., pensions, contractor human resource management, transition issues, cost sharing, options, Government furnished facilities, property, or equipment not provided for in the contract.

7. Conflict of interest issues.

Submitted By:

Contract Specialist	Date
Contracting Officer	Date

Concurrence of:

Branch Chief	Date
Procurement Director	Date
Head of Contracting Activity	Date

REFERENCE NOTES

REFERENCE NOTE A: DIRECT LABOR

A.1Productive Direct Labor Hours

The pre-negotiation plan must identify the proposed labor categories; total productive direct labor hours for each labor category, the basis of the estimate, and an assessment of whether the proposed labor hours and skill mix are reasonable for purposes of establishing the negotiation objective.

The technical evaluation should identify the basis and methodology used to determine whether the proposed labor hours and skill mix are reasonable or not. Frequently, the determination regarding the reasonableness is based on experience with previous projects of a similar nature. When this is the case, the technical evaluation should identify the requirements that are the basis for comparison, the degree of comparability, and the analytical techniques that are used to evaluate the contractor's proposal.

The technical evaluation must also address the proposed skill mix and whether the types of labor categories and the hours proposed will be not only adequate to perform the work, but whether the skill mix is properly aligned with the nature of the work and whether the offeror has accounted for all types of labor reasonably required to complete the work. Are senior level personnel being proposed to perform work that can be performed by mid-level personnel? This is sometimes seen where a project manager may be performing multiple functions beyond just being a project manager, they may also, on a particular requirement, function as the lead engineer or serve as a functional specialist, etc. Likewise, when less-qualified or less senior personnel are assigned to tasks requiring higher qualifications, contract performance risk may increase as their inexperience may impair performance. The technical evaluator should address this in their evaluation by identifying who, in terms of functional labor categories, normally performs this work and the labor hours that would normally be expended. If an individual such as a project manager is performing the work of a lead engineer, the Government should not establish its negotiation objective on the individual's organizational position, but rather on the functional labor category for the work performed.

Related to the issue of the proper skill mix is whether the contractor's proposal is appropriately accounting for the attrition and turnover over the life of the negotiated requirement. When a contractor simply straight lines their labor estimate, the technical evaluator should consider whether this is an indication that the contractor has, in fact, not accounted for the effect of attrition and turnover which may impact both the negotiated cost as well as reflect a project management risk that has not been recognized and mitigated.

One area that technical evaluators fail to adequately evaluate is when productive direct labor hours have been incurred. It is often assumed that when hours have been incurred, they are already established and no further analysis is conducted. Productive direct labor hours, whether incurred or projected, must be evaluated to determine whether the skill mix and labor hours were reasonable. Again, even with incurred productive direct labor hours, the technical evaluator must provide the basis for the analysis.

Estimated Productive Labor Hours (Year XXXX)				
Labor Category	Contractor Proposed	Technical Evaluation Recommendation	Government Negotiation Objective	Variance (Proposed - Objective)
Total				

A.2Direct Labor Rates

The pre-negotiation plan should identify the unburdened direct labor rates and the escalation factors proposed by the contractor, the rates recommended by DCAA, and rates used to establish the negotiation objective. The negotiator should identify any variance between the rates proposed by the contractor and those recommended by DCAA. In addition, the negotiator should identify any variance between the DCAA recommendation and those used to establish the negotiation objective, and the rates used.

For evaluating the proposed labor rates and escalation factors, the negotiator should utilize approved forward pricing rate agreements (FPRA) when available. Where a FPRA has not been negotiated, the negotiator may request field pricing support from DCAA or alternatively, obtain information by utilizing data provided under a previous audit report or obtain a rate verification from DCAA. In situations where a functional labor category is proposed for which an individual has to be hired, a survey of salary and compensation data may be used. The negotiator should also verify that the labor rates are in accordance with labor requirements and the terms of applicable collective bargaining agreement and wage determinations.

In establishing the reasonableness of escalation rates, the negotiator may obtain this information from DCAA or utilize forecasts such as those provided by Global Insights to the extent that their organization has an ongoing subscription with the company. The projections obtained through a subscription service may provide a more precise estimating tool reflecting industry specific or region specific data than the aggregate historical data issued by the U.S. Government (e.g., Consumer Price Index).

Unburdened Labor Rates (Year XXXX)			
Labor Category	Contractor Proposed	Government Negotiation Objective	Variance (Proposed-Objective)
	$	$	$
	$	$	$

Escalation Factors (Year XXXX)			
Labor Category	Contractor Proposed	Government Negotiation Objective	Variance (Proposed - Objective)
	$	$	$
	$	$	$

A.3Direct Labor Dollars

This section of the pre-negotiation plan must identify the methodology for calculating the direct labor dollars including identifying what the base of application is and the rates applied to the base. It should identify the direct labor dollars for the base period and individual option periods, and separately calculate the incurred costs and projected costs. Where there is a variance between what is proposed and the negotiation objective, the negotiator should identify the source of the variance, e.g., is it attributable to a difference in the hours, labor rates, or both.

Estimated Direct Labor Dollars (Year XXXX)			
Labor Category	Contractor Proposed	Government Negotiation Objective	Variance (Proposed-Objective)
	$	$	$
	$	$	$

REFERENCE NOTE B: LABOR OVERHEAD

Overhead (O/H) refers to an ongoing expense of operating a business. The term overhead is usually used to group expenses that are necessary to the continued functioning of the business but that do not directly generate profits. Unlike G&A costs that represent indirect costs that are spread out over the entire operation, O/H typically represents indirect costs associated with a specific aspect of a companies operations, e.g., labor, manufacturing, on-site operations, off-site operations, etc.

Labor overhead, for instance, is an indirect element of cost that, depending on the accounting structure of a contractor, may account for indirect labor, fringe benefits such as health insurance, payroll taxes, compensated absences, group insurance, retirement benefits, education reimbursement, etc. It should be noted that large companies will often establish multiple labor overhead pools, e.g., engineering labor overhead pool, manufacturing labor overhead pool, etc., while the accounting structure of a small company may provide for a single overhead pool.

The pre-negotiation plan should identify the methodology for calculating the cost, the proposed overhead rates, and the base of application, whether it is in accordance with DCAA recommendations, and whether it is acceptable for purposes of establishing the Government's negotiation objective.

Labor Overhead Rates (Year XXXX)			
Labor O/H Category	Contractor Proposed	Government Negotiation Objective	Variance (Proposed - Objective)
Off-Site Engineering Labor			
On-Site Engineering Labor			
Manufacturing Labor			

Estimated Labor Overhead Dollars (Year XXXX)

Labor O/H Category	Contractor Proposed	Government Negotiation Objective	Variance (Proposed - Objective)
Off-Site Engineering Labor	$	$	$
On-Site Engineering Labor	$	$	$
Manufacturing Labor	$	$	$
Total	$	$	$

REFERENCE NOTE C: EQUIPMENT

The pre-negotiation plan should identify the contractor's basis of estimate, the technical evaluator's findings about whether the equipment is necessary and appropriate for the type of work to be performed and an evaluation of the proposed cost. In evaluating the proposed cost, the negotiator should consider performing a market survey for the same or similar items priced at the same quantity levels as what is being proposed, requesting copies of quotes received by the prime contractor, or looking at recent prices for similar equipment purchased at similar quantities.

Negotiators should be mindful that incurred costs must also be evaluated and are not presumed to be reasonable and acceptable by virtue of the fact that the cost has already been incurred.

Estimated Equipment Cost (Year XXXX)

Equipment Description	Contractor Proposed	Government Negotiation Objective	Variance (Proposed - Objective)
	$	$	$
	$	$	$
Total	$	$	$

REFERENCE NOTE D: MATERIALS

The pre-negotiation plan should identify the contractor's basis of estimate, the technical evaluator's findings about whether the materials are necessary and appropriate for the type of work to be performed, and an evaluation of the proposed cost. In evaluating the proposed cost, the negotiator should consider performing a market survey for the same or similar items priced at the same quantity levels as what is being proposed, requesting copies of quotes received by the prime contractor, or looking at recent prices for similar materials purchased at similar quantities.

If the estimated cost of some materials is based on a cost estimating relationship (CER) as may be the case with small consumable materials, the pre-negotiation plan should state the basis of the CER and the methodology for its calculation and validate the CER with DCAA. In some instances, the list of materials is extensive and an item by item review of the proposed cost may not be practicable. In such cases, a stratified sampling may be useful.

Again, incurred costs must also be evaluated and are not presumed to be reasonable and acceptable by virtue of the fact that the cost has already been incurred. The incurrence of the costs can be validated

from vendor invoices. However, the invoices only validate the incurrence of the cost, not whether they were necessary for performance or whether the cost was reasonable.

Estimated Material Cost (Year XXXX)

Material Description	Contractor Proposed	Government Negotiation Objective	Variance (Proposed - Objective)
	$	$	$
	$	$	$
Total	$	$	$

REFERENCE NOTE E: MATERIAL OVERHEAD

As discussed under reference note B, O/H typically refers to indirect costs associated with a specific aspect of a company's operations. Material overhead, depending on the accounting structure of a contractor, may be proposed. Material overhead might include the indirect cost associated with procuring, handling, storing, or managing the materials.

The pre-negotiation plan should identify the methodology for calculating the cost, the proposed overhead rates, and the base of application, whether it is in accordance with DCAA recommendations or an approved FPRA and whether it is acceptable for purposes of establishing the Government's negotiation objective.

Material Overhead Rates (Year XXXX)

Material Overhead Category	Contractor Proposed	Government Negotiation Objective	Variance (Proposed - Objective)
Off-site Material Overhead			
On-site Material Overhead			

Estimated Material Overhead Dollars (Year XXXX)

Material Overhead Category	Contractor Proposed	Government Negotiation Objective	Variance (Proposed - Objective)
Off-site Material Overhead	$	$	$
On-site Material Overhead	$	$	$
Total	$	$	$

REFERENCE NOTE F: TRAVEL

The pre-negotiation plan should identify the basis of the contractor's proposed travel costs for both local and non-local travel. For non-local travel, the contractor should identify the origination and destination point for each proposed trip, the number of trips, number of travelers, airfare, car rental, per diem rate, the purpose of the travel, etc. For local travel, the contractor should identify the purpose of the local travel, origin and destination point, frequency of the travel, the number of miles per trip, the reimbursement rate for the local travel, and cost for parking and tolls. A technical evaluation must be conducted to determine whether proposed travel is necessary and appropriate and the negotiator should document the evaluation of the individual travel costs including airfare, per diem, car rental, etc. whether any of the costs appear to be unreasonable, and the basis for establishing the negotiation objective.

Estimated Travel Cost (Year XXXX)

Travel Category	Contractor Proposed	Government Negotiation Objective	Variance (Proposed - Objective)
Non-local Travel	$	$	$
Local Travel	$	$	$
Total	$	$	$

REFERENCE NOTE G: CONSULTANTS

The cost of consultants is often proposed on a labor hour basis. The evaluation of the consultant labor hours should be consistent with the type of analysis performed on the prime contractor labor hours and rates and other direct costs such as travel, per diem, and materials. The pre-negotiation plan should document the results of the technical evaluation as to whether the proposed hours are reasonable and necessary and whether the skills and expertise to be provided are commensurate with what is needed to perform the contract.

Labor Rates (Year XXXX)

Consultants Labor Category	Contractor Proposed	Government Negotiation Objective	Variance (Proposed - Objective)
	$	$	$
	$	$	$
Total	$	$	$

Estimated Labor Hours (Year XXXX)

Consultants Labor Category	Contractor Proposed	Government Negotiation Objective	Variance (Proposed - Objective)
Total			

The analysis of the proposed rate, if proposed on a labor hour basis with fully loaded labor rates, may be validated by performing a survey of fully loaded labor rates for similar positions and work that is often readily available through other contracts and where there is an agreement in place, it should be reviewed and validated against the proposed data. However, the existence of an existing agreement does not in and of itself validate the reasonableness of this cost unless the cost was established through competition or other cost analysis had been conducted through which reasonableness was established. Incurred labor costs and other direct costs should be validated through DCAA or through other invoicing or accounting data. However, this serves to validate the amount identified as incurred. It does not in and of itself serve as a sufficient basis for determining that the incurred cost was reasonable.

Based on the analysis of the consultant labor hours and fully burdened labor rates, the pre-negotiation plan should identify the total consultant labor dollars.

Estimated Consultant Cost (Year XXXX)

Consultant Labor Category	Contractor Proposed	Government Negotiation Objective	Variance (Proposed - Objective)
	$	$	$
	$	$	$
Total	$	$	$

REFERENCE NOTE H: SUBCONTRACTS

The pre-negotiation plan should provide for the same level and type of analysis as would be provided if the costs were proposed by the prime contractor where a subcontract is proposed on a cost reimbursement basis. The pre-negotiation plan should contain a full analysis for each major element of subcontractor cost. Assist audits should be obtained for each subcontractor's proposal where cost analysis is required and a technical analysis of the subcontractor's proposal that provides a commensurate level of evaluation as with a prime contractors cost should be obtained.

Estimated Subcontractor Cost (Year XXXX)

Subcontractor's Elementsof Cost	Contractor Proposed	Government Negotiation Objective	Variance (Proposed - Objective)
	$	$	$
	$	$	$
Total	$	$	$

Where a subcontract is proposed on a cost reimbursement basis, the prime contractor must provide a subcontractor proposal for which a certificate of certified cost is completed unless an exception applies with respect to the certified cost and pricing data.

REFERENCE NOTE I: INTERORGANIZATIONAL TRANSFER

The pre-negotiation plan should provide for the same level and type of analysis as provided by the costs of the prime contractor. Inter-organizational transfers are materials sold or transferred among a prime contractor's divisions, subsidiaries, or affiliates that are under common control. Inter-organizational transfers usually appear in a proposal as part of material costs but may appear as an Other Direct Cost (ODC) or as a distinct cost element.

Inter-organizational Transfer Cost (Year XXXX)			
Description of Transfer	Contractor Proposed	Government Negotiation Objective	Variance (Proposed - Objective)
	$	$	$
	$	$	$
Total	$	$	$

Inter-organizational transfers at cost are considered the Government preferred method, but transfers of commercial work can be at other than cost when it is the contractor's established practice to make transfer at other than cost. The pre-negotiation plan should document the transferred item if it is at other than cost and the price is based on established catalog or market prices of commercial items; or adequate price competition.

REFERENCE NOTE J: OTHER DIRECT COSTS

The pre-negotiation plan should be documented to identify the Other Direct Costs (ODCs), ensure that they are evaluated to determine whether they are programmatically necessary to perform the effort and the basis for determining whether the cost of the individual ODCs are reasonable. To the extent that some of the ODCs are estimated based on a CER, the pre-negotiation plan should state the basis of estimate, the methodology for the calculation, and extent to which the methodology and proposed rates are validated by DCAA. Incurred costs should also be reviewed and validated with DCAA.

Other Direct Costs (Year XXXX)			
Description of ODCs	Contractor Proposed	Government Negotiation Objective	Variance (Proposed - Objective)
	$	$	$
	$	$	$
Total	$	$	$

REFERENCE NOTE K: GENERAL AND ADMINISTRATIVE (G&A)

The pre-negotiation plan should be documented to identify the methodology for calculating the G&A cost including the rates and bases of application, whether the proposed rates are in accordance with DCAA recommendations, and the basis for establishing the negotiation objective.

G&A Rate (Year XXXX)			
	Contractor Proposed	Government Negotiation Objective	Variance (Objective - Negotiated)
G&A Rate			

Estimated G&A Cost (Year XXXX)

	Contractor Proposed	Government Negotiation Objective	Variance (Objective - Negotiated)
G&A Expense	$	$	$
	$	$	$
Total	$	$	$

In many instances, especially where the contract is to acquire support services, the Government will typically apply G&A to total cost. This is referred to as a "total cost input base". However, where inclusion of material and subcontract costs would significantly distort the allocation of the G&A expense pool in relation to the benefits received, and where costs other than direct labor are significant measures of total activity, G&A is calculated on a "value-added cost input base" which is total cost less material and subcontract costs, depending upon the contractor's accounting system.

REFERENCE NOTE L: FACILITIES CAPITAL COST OF MONEY (FCCOM)

The pre-negotiation plan should documents the methodology for calculating the facilities capital cost of money including the rate and base of application, whether the proposed rates are in accordance with DCAA recommendation, and explicitly state that this is a non-fee bearing cost.

FCCOM (Year XXXX)

	Contractor Proposed	Government Negotiation Objective	Variance (Proposed - Objective)
	$	$	$
	$	$	$
Total	$	$	$

However, FCCOM is a cost that is encountered with less frequency than the other major elements of cost identified in this template.

REFERENCE NOTE M: FEE/PROFIT

The pre-negotiation plan should clearly document the contractor's methodology and basis for calculating fee and the Government's methodology for calculating fee for purposes of establishing the negotiation objective for total cost plus fee. The pre-negotiation plan should identify the portion of the cost objective that is non-fee bearing. For those costs that are fee-bearing, the negotiator should identify the cost objective used in calculating the fee and the basis and methodology for calculating fee.

Fee Percentage (Year XXXX)

Type of Fee	Contractor Proposed	Government Negotiation Objective	Variance (Proposed - Objective)
Base Fee	%	%	%
Incentive Fee	%	%	%
Total	%	%	%

Fee Dollars (Year XXXX)

Type of Fee	Contractor Proposed	Government Negotiation Objective	Variance (Proposed - Objective)
Base Fee	$	$	$
Incentive Fee	$	$	$
Total	$	$	$

The negotiator will typically be required to apply the weighted guidelines in establishing a fee level commensurate with the risk and investment of the contractor. There are situations in which the weighted guidelines are not appropriate. Notable exceptions include construction or construction management contracts. DEAR 915.404-4-70-7 provides for alternate profit and fee technique.

ATTACHMENT-B
PRICE NEGOTIATION MEMORANDUM TEMPLATE

MEMORANDUM FOR THE RECORD:

SECTION I
BACKGROUND

1. Requisition Number: _____

2. Contract/Modification Number: _____

3. Contract Type: _____

4. Description of the Work (Provide a brief summary of the general scope of work encompassed by this action): _____
_____
_____

6. Purpose of Negotiation _____

7. Contractor's Negotiation Team (name, position, and organization of each individual): _____
_____
_____

8. Government's Negotiation Team (name, position, and organization of each individual): _____
_____
_____

9. Date and location of negotiation commencement:_____

10. Date and location of negotiation completion:_____

SECTION II
SUMMARY OF TOTAL COST AND FEE/PROFIT OBJECTIVE

	Contractor Proposal	**Government Negotiation Objective**	**Negotiated Amount**
Total Cost	$	$	$
Fee/Profit	$	$	$
Total Price	$	$	$

[*Attach detailed breakdown and discussion of cost elements resulting in the negotiated outcome. Include a statement that based on the analysis and discussion provided in the pre-negotiation plan and the price negotiation memorandum, the total price is considered to be fair and reasonable.*]

SECTION III
SUMMARY OF KEY DOCUMENTS, APPROVALS, AND COMPLIANCES

Key documents, approvals, and compliances applicable to this action: (check applicable items). Copies of marked documents are maintained in the original contract file.

☐ Certified cost and pricing data was required and obtained along with a Certificate of Current Cost and Pricing Data executed by the contractor on_____/____/_____.

☐ The certified cost and pricing data was fully relied on in negotiating the cost/price.

☐ The certified cost and pricing data was not fully relied on. Identify how the data was inaccurate, incomplete, or not current; the actions taken by the contracting officer; and the effect on the negotiated price: _____

☐ Certified Cost and Pricing Data was not obtained based on the following exception in FAR 15.403-1: _____. Where a waiver was granted, identify the date the waiver was granted, the name and position of the individual authorizing the waiver, the contractor or subcontractor to which the waiver applies.

☐ Small Business Subcontracting Plan (or Revision) Received Pursuant to FAR 19.702(a)(1) on /____/____, reviewed by_____, and determined to be acceptable on_____/ /____. If the subcontracting plan is not required, identify basis for the exception _____ ____.

☐ EEO Preaward Clearance Obtained In Accordance with FAR 22.805.

☐ Verified that funds are available for this effort.

☐ Contractor is not debarred, suspended, or ineligible (FAR 9.4 and DEAR 909.4). Identify when this was verified and by whom: _____

☐ Contractor is responsible (FAR 9 and DEAR 909.1).

☐ Negotiated contract pricing is not materially unbalanced (FAR 15.404-1(g)).

☐ Submission of DOE F 4220.10, Congressional Grant/Contract Notification, to the Office of Congressional and Intergovernmental Affairs for contract awards and modifications in accordance with Acquisition Guide Chapter 5.1.

SECTION IV
STATUS OF CONTRACTOR'S BUSINESS SYSTEMS

☐ No change in the status of the business systems identified in the pre-negotiation plan.

☐ The status of the following business systems have changed (identify the business system, the change, and its impact): _____

SECTION V
NEGOTIATED OBJECTIVES

(A) Cost and Pricing Objectives (See Reference Notes for Detailed Analysis): In documenting the results of the negotiation, the contracting officer should identify each major element of cost and state whether the negotiation objectives were achieved. Where they were not achieved, the contracting officer should document the basis for negotiating an alternate cost, identify the basis of the variance from the Government's negotiation objective, the basis for determining that it is fair and reasonable including additional recommendations or findings from the auditors, evaluators, and others providing advisory assistance. In developing the price negotiation memorandum, it is not necessary to redact the analysis provided in establishing negotiation objectives as this documents and the pre-negotiation plan are intended to function as complementary documents. However, it must address each of the cost elements identified in the pre-negotiation plan.

Element of Cost	Contractor Proposed	Government Negotiation Objective	Negotiated	Variance (Negotiated - Gov't Objective)	Reference Note
Direct Labor	$	$	$	$	A
Labor Overhead	$	$	$	$	B
Equipment	$	$	$	$	C
Materials	$	$	$	$	D
Material Overhead	$	$	$	$	E
Travel	$	$	$	$	F
Consultants	$	$	$	$	G
Subcontracts	$	$	$	$	H
Interorganizational Transfer	$	$	$	$	I
Other Direct Costs	$	$	$	$	J
Subtotal	$	$	$	$	
G&A	$	$	$	$	K
Subtotal	$	$	$	$	
Facilities Capital Cost of Money	$	$	$	$	L
Total Cost	$	$	$	$	
Fee/Profit	$	$	$	$	M
TOTAL COST AND FEE	$	$	$	$	N

There should be an explicit determination indicating whether the negotiated price is determined to be fair and reasonable and whether the contract price(s) are materially balanced.

(B) Other Negotiation Objectives and Issues

Identify the non-pricing related objectives established in the pre-negotiation plan. Indicate whether each of the objectives was achieved. Where the negotiation objective was not met, discuss the negotiated outcome, and the basis and rationale for accepting the negotiated outcome. In addition, identify additional issues presented at negotiations that were not originally discussed in the pre-negotiation plan.

Submitted By:

Contract Specialist	Date
Contracting Officer	Date

Concurrence of:

Branch Chief	Date
Procurement Director	Date
Head of Contracting Activity	Date

REFERENCE NOTES

REFERENCE NOTE A: DIRECT LABOR

The price negotiation memorandum should state whether the Government's negotiation objective for direct labor was achieved. Where negotiations resulted in a departure from the established negotiation objective for total direct labor cost, including the constituent elements used in formulating the Government's negotiation objective (e.g., labor hours, labor categories, labor rates, and escalation), the price negotiation memorandum should identify and discuss the variances and the basis for accepting the variances.

A.1Productive Direct Labor Hours

If there is a variance between the productive direct labor hours negotiated and the Government objective, the price negotiation memorandum should identify the labor category and associated labor hours to which the variance is attributed and provide a re-calculation of the productive direct labor hours. In addition, the price negotiation memorandum should indicate that a technical evaluation for this negotiated objective was obtained since changes in labor hours or skill mix may increase or decrease the risk of performance or cost efficiency. The price negotiation memorandum should identify the basis and methodology for determining that the negotiated productive labor hours and skill mix are reasonable including the disclosure of additional data provided by the contractor at negotiations or obtained by the Government through other sources. The technical evaluation must also address whether this negotiated skill mix, labor categories, and the productive hours proposed will be adequate to perform the work, and whether the negotiated skill mix is better aligned with the nature of the work or whether the contractor was able to provide supplemental data and analysis that its estimate was more reliable or accurate.

Estimated Productive Labor Hours (Year XXXX)				
Labor Category	Contractor Proposed	Government Negotiation Objective	Negotiated	Variance (Objective - Negotiated)
Total				

A.2Direct Labor Rates

If there is a variance attributable to the direct labor rates accepted for negotiation purposes, the price negotiation memorandum should identify the labor category and associated labor rate and escalation factors attributing to the variance in the total direct labor cost.

Unburdened Labor Rate (Year XXXX)				
Labor Category	Contractor Proposed	Government Negotiation Objective	Negotiated	Variance (Objective - Negotiated)
	$	$	$	$
	$	$	$	$

Escalation Factor (Year XXXX)

Labor Category	Contractor Proposed	Government Negotiation Objective	Negotiated	Variance (Objective-Negotiated)

The price negotiation memorandum should also document the basis for accepting alternate labor rates and escalation factors, particularly where it deviates from the DCAA recommendation or an approved FPRA. The price negotiation memorandum must document the data, methodology, and analysis used in deriving the alternate labor rates and escalation factors that are negotiated and indicate whether the negotiated labor rates and escalation factors were considered fair and reasonable.

A.3Direct Labor Dollars

If there is a variance in the direct labor dollars, the price negotiation memorandum should state whether the negotiated cost is due to a variance in the labor hours, labor rates, and/or escalation factors and identify the paragraph in which the constituent elements giving rise to the variance are discussed. In addition, the direct labor dollars should be re-calculated and presented in a format similar to the following (as applicable):

Estimated Direct Labor Dollars (Year XXXX)

Labor Category	Contractor Proposed	Government Negotiation	Negotiated	Variance (Objective-Negotiated)
	$	$	$	$
	$	$	$	$
Total	$	$	$	$

The price negotiation memorandum should indicate whether the total negotiated direct labor dollars are considered fair and reasonable.

REFERENCE NOTE B: LABOR OVERHEAD

If there is a variance in the labor overhead, the price negotiation memorandum should state whether the variance is attributable to a change in the labor overhead rates themselves or whether it is a flow down from a change in the base of application, e.g., labor hours. The labor overhead dollars should be re-calculated and presented in a format similar to the following:

Labor Overhead Rates (Year XXXX)

Labor Overhead Category	Contractor Proposed	Government Negotiation Objective	Negotiated	Variance (Objective-Negotiated)
Off-Site Engineering Labor				
On-Site Engineering Labor				
Manufacturing Labor				

Estimated Labor Overhead Dollars (Year XXXX)

Labor Overhead Category	Contractor Proposed	Government Negotiation Objective	Negotiated	Variance (Objective-Negotiated)
Off-Site Engineering Labor	$	$	$	$
On-Site Engineering Labor	$	$	$	$
Manufacturing Labor	$	$	$	$
Total	$	$	$	$

The price negotiation memorandum should indicate whether the total negotiated direct labor dollars are considered fair and reasonable.

REFERENCE NOTE C: EQUIPMENT

The price negotiation memorandum should state whether the Government's negotiation objective for equipment was achieved. Where negotiations resulted in a departure from the established negotiation objective, the price negotiation memorandum should identify, in a format similar to the one presented below, and discuss the variances, the basis for accepting the variances.

Estimated Equipment Cost (Year XXXX)

Equipment	Contractor Proposed	Government Negotiation Objective	Negotiated	Variance (Objective-Negotiated)
	$	$	$	$
	$	$	$	$
Total	$	$	$	$

REFERENCE NOTE D: MATERIALS

The price negotiation memorandum should state whether the Government's negotiation objective for this cost element was achieved. Where negotiations resulted in a departure from the established negotiation objective, the price negotiation memorandum should identify, in a format similar to the one presented below, and discuss the variances, the basis for accepting the variances.

Estimated Material Cost (Year XXXX)

Description of Materials	Contractor Proposed	Government Negotiation Objective	Negotiated	Variance (Objective-Negotiated)
	$	$	$	$
	$	$	$	$
Total	$	$	$	$

REFERENCE NOTE E: MATERIAL OVERHEAD

The price negotiation memorandum should state whether the Government's negotiation objective for this cost element was achieved. Where negotiations resulted in a departure from the established negotiation objective, the price negotiation memorandum should state whether the variance is attributable to a change in the overhead rates themselves, whether it is a flow down from a change in the base of application, e.g., cost of materials, and the basis for accepting the negotiated cost. The material overhead dollars should also be re-calculated and presented in a format similar to the following:

Material Overhead Rates (Year XXXX)

Material Overhead Category	Contractor Proposed	Government Negotiation Objective	Negotiated	Variance (Objective - Negotiated)
Off-site Material Overhead				
On-site Material Overhead				

Estimated Material Overhead Dollars (Year XXXX)

Material Overhead Category	Contractor Proposed	Government Negotiation Objective	Negotiated	Variance (Objective - Negotiated)
Off-site Material Overhead	$	$	$	$
On-site Material Overhead	$	$	$	$
Total	$	$	$	$

REFERENCE NOTE E: TRAVEL

The price negotiation memorandum should state whether the Government's negotiation objective for this cost element was achieved. Where negotiations resulted in a departure from the established negotiation objective, the price negotiation memorandum should state the source of the variance, changes in assumptions about the frequency of travel, origination and destination points, number of travelers, etc. The travel dollars should also be re-calculated and presented in a format similar to the following:

Estimated Travel Cost (Year XXXX)

Travel Category	Contractor Proposed	Government Negotiation Objective	Negotiated	Variance (Objective - Negotiated)
Non-local Travel	$	$	$	$
Local Travel	$	$	$	$
Total	$	$	$	$

REFERENCE NOTE F: CONSULTANTS

The price negotiation memorandum should state whether the Government's negotiation objective for this cost element was achieved. Where negotiations resulted in a departure from the established negotiation objective, the price negotiation memorandum should state the source of the variance, changes in the labor hour, skill mix, labor rates, etc. Where there is a departure from the established negotiation objective, the consultant labor hours, rates, and total costs should be recalculated similar to the format provided below for a labor hour arrangement:

Consultant Labor Rates (Year XXXX)

Consultants Labor Category	Contractor Proposed	Government Negotiation Objective	Negotiated	Variance (Objective - Negotiated)
	$	$	$	$
	$	$	$	$
	$	$	$	$
	$	$	$	$

Estimated Consultant Labor Hours (Year XXXX)

Consultants Labor Category	Contractor Proposed	Government Negotiation Objective	Negotiated	Variance (Objective - Negotiated)
Total				

Estimated Consultant Labor Dollars (Year XXXX)

Consultants Labor Category	Contractor Proposed	Government Negotiation Objective	Negotiated	Variance (Objective - Negotiated)
	$	$	$	$
	$	$	$	$
Total	$	$	$	$

REFERENCE NOTE G: SUBCONTRACTS

The price negotiation memorandum should state whether the Government's negotiation objective for this cost element was achieved. Where negotiations result in a departure from the established negotiation objective, the price negotiation memorandum should, in a cost reimbursement subcontract, identify and discuss the subcontractor's element of cost to which the variance is attributed, the basis for accepting the negotiated values.

Estimated Subcontractor Cost (Year XXXX)

Subcontractor	Contractor Proposed	Government Negotiation Objective	Negotiated	Variance (Objective - Negotiated)
	$	$	$	$
	$	$	$	$
Total	$	$	$	$

REFERENCE NOTE H: OTHER DIRECT COSTS

The price negotiation memorandum should state whether the Government's negotiation objective for this cost element was achieved. Where negotiations resulted in a departure from the established negotiation objective, the price negotiation memorandum should state the source of the variance and the basis for accepting the negotiated outcome. Where the negotiated results depart from the Government's established objective, the variance should be calculated in a format similar to the following:

Estimated Other Direct Costs (Year XXXX)

Description of ODCs	Contractor Proposed	Government Negotiation Objective	Negotiated	Variance (Objective - Negotiated)
	$	$	$	$
	$	$	$	$
Total	$	$	$	$

REFERENCE NOTE I: INTERORGANIZATIONAL TRANSFER

The price negotiation memorandum should state whether the Government's negotiation objective for this cost element was achieved. Where negotiations resulted in a departure from the established negotiation objective, the price negotiation memorandum should state the source of the variance, changes in assumptions.

Interorganization Transfer Cost (Year XXXX)

Description of Transfer	Contractor Proposed	Government Negotiation Objective	Negotiated	Variance (Objective - Negotiated)
	$	$	$	$
	$	$	$	$
Total	$	$	$	$

REFERENCE NOTE J: GENERAL AND ADMINISTRATIVE (G&A)

The price negotiation memorandum should state whether the Government's negotiation objective for this cost element was achieved. If there is a variance in the general and administrative cost, the price negotiation memorandum should state whether the variance is attributable to a change in the rates themselves or whether it is a flow down from a change in the base of application. The labor overhead dollars should be re-calculated and presented in a format similar to the following:

G&A Rate (Year XXXX)

	Contractor Proposed	Government Negotiation Objective	Negotiated	Variance (Objective - Negotiated)
G&A Rate				
Total				

Estimated G&A Cost (Year XXXX)

	Contractor Proposed	Government Negotiation Objective	Negotiated	Variance (Objective - Negotiated)
G&A Cost	$	$	$	$
	$	$	$	$
Total	$	$	$	$

REFERENCE NOTE K: FACILITIES CAPITAL COST OF MONEY (FCCOM)

The price negotiation memorandum should state whether the Government's negotiation objective for this cost element was achieved. If there is a variance in the facilities capital cost of money, the price negotiation memorandum should state whether the variance is attributable to a change in the rate itself or whether it is a flow down from a change in the base of application. The FCCOM dollars should be re-calculated and presented in a format similar to the following:

FCCOM Rate (Year XXXX)

	Contractor Proposed	Government Negotiation Objective	Negotiated	Variance (Objective - Negotiated)
FCCOM Rate				

FCCOM Expense (Year XXXX)

	Contractor Proposed	Government Negotiation Objective	Negotiated	Variance (Objective - Negotiated)
FCCOM Expense	$	$	$	$
Total	$	$	$	$

REFERENCE NOTE L: FEE/PROFIT

The price negotiation memorandum should state whether the Government's negotiation objective for fee was achieved. Where negotiations resulted in a departure from the established negotiation objective, the price negotiation memorandum should state the source of the variance and the basis for accepting the negotiated outcome. Where the negotiated results depart from the Government's established objective, the variance should be calculated in a format similar to the following:

Fee Percentage (Year XXXX)

Type of Fee	Contractor Proposed	Government Negotiation Objective	Negotiated	Variance (Objective - Negotiated)
Base Fee	%	%	%	%
Incentive Fee	%	%	%	%
Total	%	%	%	%

Fee Dollars (Year XXXX)

Type of Fee	Contractor Proposed	Government Negotiation Objective	Negotiated	Variance (Objective - Negotiated)
Base Fee	$	$	$	$
Incentive Fee	$	$	$	$
Total	$	$	$	$

Where there is a variance from the Government objective as a result of differences in the cost elements and risk, the negotiator should re-apply the weighted guidelines (or alternate profit and fee technique in accordance with DEAR 915.404-4-70-7) to ensure that the negotiated fee levels are reasonable and well supported.

Technical Analysis of Cost Proposals

Guiding Principles

- Sound technical analysis is key to successful source selections, as well as to sole-source proposal evaluations.
- Rigorous technical analysis safeguards against contractor performance issues.

References: FAR 15.404-1, DEAR 915.404

1.0 Summary of Latest Changes

This update includes editorial changes and technical corrections.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies, as contained in the references above, and should be considered in the context of those references. Its aim is to enhance the quality of technical analyses of contractor cost proposals, and is written for DOE acquisition professionals involved with cost and price analysis. The chapter is not applicable to management and operating contracts or to financial assistance activities.

The technical analysis is a key source of information for use in contract negotiation: It helps to ensure that the pre-negotiation objective is fair and reasonable. The proposal being evaluated could be for a new contract, as well as for modifications of an existing contract.

2.1 Technical Analysis vs. Cost Estimating.

2.1.1. Technical analysis is not an estimate. Conducted by personnel with specialized knowledge in engineering, science or management, technical analysis is the examination and analysis of all proposed resources to determine whether such resources reflect effectiveness and reasonable economy.

2.1.2 Requirements for cost analysis. Cost analysis is a type of technical analysis required in support of non-competitive actions for non-commercial items/services that exceed $750,000[1] (with limited exceptions), as well as other actions where the quoted prices cannot be determined fair and reasonable through price analysis alone. Cost analysis is used to establish the basis for negotiation of cost-reimbursable contracts where price competition is lacking, and price analysis by itself does not assure the reasonableness of prices.

[1] Dollar thresholds are subject to change. See FAR 15.403-4 for the current dollar threshold.

2.2 Roles and Responsibilities.

2.2.1 Contracting officer (CO) has lead responsibility for the administrative actions necessary for contract awards. Thus, the CO coordinates a team of experts in such fields as contracting, finance, law, contract audit, quality control, engineering, and pricing. The CO utilizes the team's advice, recommendations, and findings to develop a pre-negotiation objective. For more information, see Chapter 15.4-3 of this Guide.

2.2.2 Cost analyst prepares a comprehensive report that synthesizes the results of external evaluations such as those from the cognizant Federal agency (see chapter 42.1), technical analysis, independent government cost estimate, and fact finding.

2.2.3 Technical analyst is responsible for the technical analysis report and plays an integral role on the CO's team of experts. Since technical personnel are generally most familiar with the technical requirements of the contract, their involvement in the preaward process is especially critical. The technical analyst coordinates with the CO to ensure the statement of work (SOW) is clearly written and the negotiated pricing is appropriate. Additionally, if the contract is a set-aside, the analyst needs to help determine how much of the work is proposed for various subcontractor(s).

2.2.4 Prime contractor. The prime is responsible for all matters involving its subcontractors. If certified cost or pricing data are required (pursuant to FAR 15.403-4), the prime is responsible for assuring that subcontract cost or pricing data are accurate, complete, and current as of the date of price agreement. The prime is also responsible for supporting the reasonableness of subcontract pricing. When purchases of specific items exceed $13.5 million, or exceed the threshold set forth in FAR 15.403-4 and exceed 10% of the prime's proposed price, prime contractors are required to submit cost analyses of the subcontracted items.

2.3 Prepare to Evaluate the Proposal.

2.3.1 Establish a review plan that assures necessary proposal elements are evaluated within the time allowed. If the timeline is inadequate, discuss the possibility of an extension with the CO. Explain what can and cannot be achieved in the time given.

2.3.2 Substantiating data. Work through the CO to obtain additional information or clarifications. Do not accept unsupported explanations. Do not merely verify the contractor's calculations, or recommend reductions, without applying independent, fact-based judgment.

- When requesting data, provide a specific list of what is needed.
- Do not ask for information not relevant to the evaluation.
- Request data in a format that supports ease of manipulation and analysis (e.g., Excel).

The contractor is responsible for the accuracy, currency, and completeness of the cost data provided; however, the contractor is not culpable for subjective judgment in the proposal. The distinction between fact and judgment should be clearly understood.

2.4 Conduct the Technical Analysis.

2.4.1 Review the contractor's proposal and supporting documentation. Check on whether the contractor has complied with the technical aspects of the solicitation. Review the SOW in detail, including any specifications. Then compare the SOW to the contractor's proposal to understand what work will be accomplished.

- Locate the various cost elements, the contractor's rationale for those cost elements, and the contractor's labor category and distribution structure. Check the proposed Statement of Work (SOW) and proposed delivery schedules for conformance with the program's delivery schedule.
- Ensure the proposal includes the notional Work Breakdown Structure (WBS), an organized means of logically subdividing projects to lower levels of detail. Take time to understand the WBS, since it often provides the proposal structure.
- Determine which cost categories offer the greatest potential for government savings.
- Identify any missing key documents, such as:
  - Complete breakouts of all subcontractor costs
  - Bill of material (BOM)
  - Details on prior contract performance.

2.4.2 Inadequate proposals. Rarely will offeror proposals be so poor that review and evaluation cannot begin upon receipt. However, should that occur, return the proposal to the CO and work with the CO to obtain additional data.

2.4.3 Estimates and contingencies. Since an estimate is a prediction of the cost of future events, estimates will never be 100 percent accurate. Some events will certainly occur and the contingency costs can be predicted with a great degree of confidence. If there is reasonable certainty that events will occur, the estimate may provide for them. However, there are some contingencies whose costs cannot be reliably estimated, such as:

- Unexpected developments
- Test or production problems
- Changes in manufacturing processes
- Changes in average unit time to produce the end-item.

Contingencies tend to inflate the proposed costs. The technical analyst should identify contingencies when evaluating the proposed costs and should recommend non-acceptance of those that are unreasonable, and for which there are no adequate supporting data. For more information, see FAR 31.205-7 and DOE Acquisition Letter 2009-01, Management Reserve and Contingency.

2.5. Evaluate the Contractor's Cost Estimating Methods.

Contractors typically use several methods to estimate and analyze costs: expert opinion, analogy, parametrics, catalog pricing, and labor standards. The labor standards method is used primarily for manufacturing labor estimates.

2.5.1 Expert opinion estimates involve subject-matter expert analysis and judgment without detailed engineering drawings or a BOM. Expert opinion is also known as "roundtable" or "engineering judgment."

2.5.2 Analogy-based estimates involve comparisons to a similar acquisition situation, and adjustments to account for differences. The rationale for these adjustments should be explained, whether made through quantitative or qualitative analysis. Quantitative techniques are used to identify trends in historical data. Qualitative adjustment factors are commonly known as "plant condition factor" or "complexity factor."

2.5.3 Parametric approaches involve exploiting multiple data points to find cost estimating relationships (CERs). CERs can be as simple as a ratio or factor: A cost-to-cost relationship based on observed relationships between two categories of cost, e.g., supervision costs may equate to 20% of direct labor costs. On the other hand, CERs can be complex non-linear equations, such as those for price improvement curves and learning curves.

2.5.3.1 Ratio of support is used on research and development contracts. It involves estimating man-months for the creative engineering portion of a project and relying on a ratios, based on contractor experience, to develop the estimates for support engineering.

2.5.3.2 Production/engineering ratio should be used only as a test for reasonableness. Generally firms maintain a consistent ratio between production and engineering hours. When this ratio is askew, it may indicate an abnormality in the proposed level of production or engineering costs or a mathematical error.

2.5.3.3 Price improvement curve pertains to recurring materials costs. As production increases, processes may become more efficient, and cost savings may be passed along to the buyer through volume discounts.

2.5.3.4 Learning curve pertains to human cognition. As workers become more familiar with repetitive processes, they are able to perform work more quickly. Factors to consider with respect to a contractor's proposed learning curve are included in Appendix A.

2.5.4 Labor Standard Method. This method utilizes objective labor standards that detail the benchmark or standard time needed for individuals to perform a repetitive function or task. This method is generally applicable only to manufacturing labor, as engineering and support labor is often too complex or unique. By employing labor standards, the contractor produces an "expected" cost that can be applied to activities, services or production on a per-unit basis. The Labor Standards method involves two components: (a) the labor standard, and (b) a realization or an efficiency factor.

2.5.4.1 Labor standards are developed from company data (time-motion studies), data from trade associations, and data gleaned from other sources. Labor standards are expressed as either an output standard or as a time standard. An output standard specifies a production rate, while a time standard includes the basic (leveled) time for a worker to perform a task, plus personal fatigue and delay (PF&D) allowances and special allowances.

2.5.4.2 Realization factors represent the relationship between actual hours and standard hours expended on a task. A factor of one means the contractor expects to achieve the standard; a factor less than one signals an expectation of better-than-standard performance; a factor greater than one indicates an expectation of below-standard performance. The realization factor used is multiplied by the standard to produce the expected actual.

2.5.4.3 Efficiency factors involve measuring the workers' actual performance against the standard. They are calculated by dividing the standard hours by the actual hours.

2.5.4.4 Difference between realization and efficiency factors. The two factors are not exactly reciprocals of each other. Realization factors consider idle time and unmeasured work (i.e., work without a labor standard). Efficiency factors only measure actual work time on a task backed by a labor standard. A contractor normally only uses one of these factors in its estimating system.

2.6 Focus Areas for Technical Analysis.

Topics most frequently analyzed by technical staff are: (a) the contractor's proposed approach to meeting the delivery schedule, which may leverage (b) Direct Labor, (c) Direct Material, (d) Subcontracts or Inter-Organizational Transfers (IOTs), and (e) ODCs. A checklist of evaluation considerations is at Appendix A. Note that indirect rates, travel rates, and profit are typically analyzed by parties other than the technical analyst.

2.6.1 Direct Labor. Examination of proposed labor hours is the first element of direct labor analysis. Consider the quantities and types of labor required to complete the contract. This will vary based on requirements. For a supply contract, the contractor will likely require engineers, manufacturing personnel, and a wide range of support personnel. A service contract might require a variety of personnel. Most contracts will require personnel involved in administration and support of contract operations.

2.6.1.1 Direct versus Indirect Labor**.** Most contracts require both direct and indirect labor. You will find that accounting and estimating treatment will vary from contractor to contractor based on their cost accounting systems.

2.6.1.2 Indirect Labor Cost. An indirect labor cost is any labor cost not directly identified with a single final cost objective, but identified with two or more final cost objectives or an intermediate cost objective. For practical purposes, any direct labor cost of minor dollar amount may be treated as an indirect cost if treatment: (a) is consistently applied to all final objectives, and (b) produces substantially the same results as treating the cost as a direct cost.

2.6.1.3 Direct Labor Mix**.** Determining the proper labor mix is an important component in estimating and analyzing direct labor hours because it is critical to make sure that the type of labor (engineering, manufacturing, services), as the skill level of the workers is appropriate to the work being proposed. For instance, an engineer should not be proposed (and paid) to perform clerical functions or word processing.

2.6.1.4 Service Labor reflects the time and effort of a contractor whose primary purpose is to perform an identifiable task, rather than to furnish an end-item. It can require professional or non-professional personnel on an individual or organizational basis. The classes of labor effort required will vary based on the tasking required under the contract. Tasking might include maintenance, overhaul, repair, servicing, or modification of supplies, systems, or equipment; routine maintenance of real property; housekeeping services; advisory and assistance services; operation of Government-owned equipment, facilities and systems; communication services; architect-engineer services; transportation and related services; research and development; and other services.

2.6.1.5 Uncompensated Overtime. This term relates to any unpaid hours worked in excess of an average 40 hours per week by an employee who is exempt from requirements of the Fair Labor Standards Act. Not all firms treat uncompensated time in the same way; thus, it is important to validate the contractor's calculations.

2.6.2 Direct Material. In addition to raw materials, parts, subassemblies, components, and manufacturing supplies that become part of the product, proposed Direct Material costs may also include: (a) collateral costs, such as freight and insurance; and (b) material that cannot be used for its intended purpose, such as overruns, scrap material, spoilage, and defective parts.

2.6.2.1 Collateral costs are those associated with getting materials into the offeror's plant. Inbound transportation and in-transit insurance are two common examples.

2.6.2.1.1 Inbound Transportation. Also known as freight-in, this cost is allowable as long as it is reasonable, but remember that this cost should already be included in any vendor quote that reflects free on board (FOB) destination.

2.6.2.1.2 In-transit Insurance. The cost of insurance required or approved by the Government and maintained by the contractor under a Government contract is allowable. However, make sure that in-transit insurance costs are not built in to other cost elements, such as overhead or material-handling fees.

2.6.2.2 Other Material Costs. The proposal may include some excess material to ensure sufficient material for production. This may include scrap, spoilage, defective parts, or material overruns. Some such materials, even when not used on the proposed contract, will have some residual value. The contractor might use this material in other products, or sell it for reclamation or reprocessing. Remember to adjust the residual value from the proposed cost if the contractor did not make the adjustment.

2.6.2.2.1 Overages are off-the-shelf material purchased in excess of need. To verify the overage factor, review historical repurchases after initial orders to suppliers.

2.6.2.2.2 Obsolete materials. The proposal should not include an obsolescence factor if the contractor is producing an end-item for which specifications are firm and no further changes are contemplated.

2.6.2.2.3 Residual inventory is surplus material. Material or parts purchased under a contract, but not used on that contract, become Government property. If residual inventory is used on a subsequent contract, its cost should not be proposed for the subsequent contract.

2.6.2.3 Direct versus indirect material costs. Each firm is responsible for determining whether a specific cost will be charged as a direct or indirect cost. The typical accounting treatment is shown below.

Material Type	Description	Accounting Treatment
Raw Materials	Materials that require further processing	Normally direct
Parts	Items when joined together with another item are not normally subject to disassembly without destruction or impairment of use	Normally direct, but possibly indirect if low price
Subassemblies	Self-contained units of an assembly that can be removed, replaced, and repaired separately	Normally direct
Components	Items which generally have the physical characteristics of relatively simple hardware items and which are listed in the specifications for an assembly, subassembly, or end item	Normally direct
Manufacturing Supplies to be allocated to the final product.	Items of supply that are required by a manufacturing process or in support of manufacturing activities	Normally indirect

2.6.2.4 Summary Material Cost Estimates present total material costs without a detailed cost breakdown of units and cost per unit. These summary estimates may be based on expert opinion or analogy.

2.6.2.5 Detailed Estimates, such as a Bill of Materials (BOM), are more costly to develop and analyze. BOMs detail quantities, part numbers, suppliers or vendors, unit costs, and the total cost for materials to be used on the contract.

2.6.2.6 Evaluation of Material Costs. To evaluate the reasonableness of proposed materials, look for indicators of uneconomical or inefficient practices.

2.6.2.6.1 Use a risk-based approach to the analysis, possibly using a sampling method. Items with large dollar values or unusual requirements normally require in-depth analysis. If a proposed item seems questionable, concentrate more analytical effort there on than on less-suspicious items of similar dollar value.

2.6.2.6.2 Stratified sampling. For larger proposals with more items, consider using the stratified sampling procedures that permit you to give more attention to high-value items, but still consider all BOM items. Stratified sampling is appropriate when a small number of elements accounts for a large portion of the overall cost: You consider only the top cost carriers in detail, and then adjust other (smaller cost carriers) estimates based on your analysis of the high-value items. A reduction to proposed costs is commonly called a decrement, and the percentage adjustment a decrement factor.

2.6.2.6.3 Supply and construction contracts. Check material requirements in the BOM against contract drawings and specifications. Proposed materials to compensate for material overruns, scrap, spoilage and defective parts should be based on the contractor's experience and contract requirements.

2.6.2.6.4 Services contracts. Check proposed materials against the requirements and contractor experience, or compare them to material quantities required to complete similar contracts.

2.6.2.7 Inventory Pricing**.** When the contractor proposes the use of existing inventory to perform the contract, there are five acceptable methods of inventory pricing: first-in-first-out (FIFO), last-in-first-out (LIFO), weighted average, moving average, and standard cost. The analyst should check for the contractor's consistent use of only one of those methods.

2.6.3 Subcontract Costs. The subcontractor has privity of contract with the prime, not with the Government. Subcontractors can be questioned directly only with permission with the concurrence of the prime contractor. However, the prime contractor is required to obtain and submit to the Government cost and pricing data from their subcontractors for acquisitions exceeding the cost and pricing threshold set forth in FAR 15.404-3 and not otherwise exempt, in the event the subcontractor refuses to submit cost and pricing data direct to the prime contractor (due to proprietary data restrictions), the information must be submitted directly to the CO under separate cover. Upon receipt of the subcontractor's cost and pricing data, it is typical for the contract specialist or cost/price analyst to contact the subcontractor's cognizant DCAA office to verify the subcontractor's proposed rates and factors.

2.6.4 Inter-Organizational Transfers (IOTs). IOTs are materials, supplies or services sold or transferred between divisions, subsidiaries, or affiliates of the contractor under a common control. They require special analysis because any profit included in the IOT may permit a contractor to pyramid profits. A firm could conceivably create more divisions and transfer material back and forth among those divisions to further increase profit for the total corporate entity. In other words, a firm should not be able to subcontract with itself and obtain a fee both as a prime and as a subcontractor.

2.6.4.1 Transfer at cost. To prevent contractors from pyramiding profits when using an IOT, the Government discourages transfers that include profit. FAR Part 31.205-26(e) states that allowance for all supplies or services sold or transferred between divisions, subs, subdivisions, subsidiaries, or affiliates of the contractor under common control shall, with few exceptions, be on the basis of cost incurred.

2.6.4.2 Transfer at price. An IOT may be made at price when these all the following conditions are met:

- It is the established practice of the transferring organization to price IOT at other than cost for commercial work of the contractor or any division, subsidiary, or affiliate of the contractor under common control;
- The item being transferred qualifies for an exception to statutory requirements for certified cost or pricing data; and
- The CO does not determine that the price is unreasonable.

2.6.5 Other Direct Costs (ODCs). An ODC is a cost that can be identified specifically with a final cost objective that the contractor does not treat as a direct material cost or a direct labor cost. The technical analyst will typically focus on ODCs that are central to the contractor's technical effort, such as special tooling and test equipment, computer services; consulting services, and travel. The CO will evaluate the reasonableness and acceptability of other ODCs, such as Federal excise taxes, royalties, and packaging costs.

2.6.5.1 Proper allocation of ODCs. Costs are identified and treated as ODCs to assure proper allocation and treatment. An ODC is often the type of cost that the firm would normally charge as an indirect cost, but the proposed contract requires a large, unusual, or one-time expenditure (e.g., special tooling) that will benefit only the proposed contract.

2.6.5.2 Proper cost treatment. Costs may be treated as ODCs to assure that they receive proper treatment. For example, special tooling purchased under a specific contract will normally become Government property. That property may then be furnished to aid the performance of similar contracts.

2.7 Documenting the Technical Analysis.

The technical analysis report should clearly express all pertinent observations, conclusions and recommendations, so it can be used to establish and defend the negotiation position. Use plain language whenever possible instead of technical jargon. The technical analysis report should include specific information. The major items to be considered in determining the adequacy of a technical analysis report include:

Responsiveness	Does the technical analysis report address each element of the request?
Timeliness	Is the report submitted on or before the requested date?
Documentation	Is useful information in a prominent part of the report?
Technical Adequacy	Does the report contain adequate substantiation of the analysis?
Format	Is the report in an accepted format to facilitate finding information?

Supervisor Review (if applicable)	Does the analyst's supervisor support the report?
Usefulness to the CO	Does the document support the CO with the information needed to successfully negotiate the contract or contract change?

The analysis documentation should also include:

- Information on the contractor's estimating systems, management systems, organizational structures;
- Information from previous proposals that is relevant to the current contract;
- Technical analysis references such as industry standards used in the review; and
- Discussion of the points in Appendix A.

3.0 List of Appendices

Appendix A - Evaluation of a Cost Proposal: Estimating Methods & Key Cost Elements

APPENDIX A

EVALUATION OF A COST PROPOSAL: ESTIMATING METHODS & KEY COST ELEMENTS

- Did the contractor use a summary-level analysis or a detailed analysis?
- **If summary level…**
  - Is the summary cost estimate appropriate for the situation?
  - What summary estimating techniques are used?
  - Does the item's cost warrant the expense of a detailed estimate?
  - Are there sufficient information and historical data available for use of a more rigorous estimating method?
- **If detailed analysis…**
  - Is a parametric technique (cost estimating relationships) used?
  - Is the estimate based on an analogy?
  - Is the estimate based on expert judgment?
  - Does the estimate extrapolate from actuals?
  - Does the estimate involve catalog pricing, vendor quotes, etc.?

- Is the estimating methodology consistent with estimating assumptions?
- Does the estimate consider economic forecast factors such as exchange rates and inflation? Are those adjustments made properly? (Reference for inflation, currency conversions, etc.)
- Have there been significant changes in technology or methods that would distort the estimate on the new effort?
- Any proposed costs that merit special attention because of high-value or other reasons?
- If the historical costs have been adjusted in any way, are the adjustments reasonable?
- Does the estimate include an adequate description of the process and assumptions used to develop the estimate?
- Are contingencies included? If so, are they acceptable?

If parametric methods are used...

- Are cost estimating relationships (CERS) properly developed and applied?
- How current is the CER?
- Does the CER make logical sense?
- Does the proposed relationship (look at the dataset) really exist? Is the dataset comprised of actual costs or estimated costs? Have any data been eliminated from the calculation? Are the actual values (for the independent variables) in the same range as the attribute for which you're attempting to predict cost?
- Would another independent variable be better for developing and applying a CER?
- Does the proposed relationship seem to be accurate? Run the data analysis toolkit in Excel, checking r-squared values, standard error, coefficient of variation (ratio of the standard deviation to the mean), etc. to determine accuracy.

- Is there any trend in the relationship?
- Is each CER used consistently?
- Has the CER been reasonably accurate in the past?
- Is a CER used to estimate direct material cost or direct labor cost also proposed as an ODC?

If analogy (direct comparison, involving adjustment factors) is used…

- Is the basic nature of the new contract effort similar enough to the historical effort to make a valid comparison?
- Were there significant cost problems or inefficiencies in the historical effort that would distort the estimate on the new effort?
- Are direct comparisons properly developed and applied?
- Are there any significant differences in the material mix between the two efforts?
- Does the contractor use estimating by analogy in similar efforts? How accurately?
- Are the data complete and accurate?

If expert opinion is used…

- Does the contractor commonly use expert opinion-based estimates in similar situations?
- Does the cost involved warrant a more detailed estimate?
- Is the contractor's experience appropriate for this type of estimate? Has the contractor prepared reliable estimates for other contracts?

If catalog pricing is used…

- If pricing is based on catalog prices, are the prices adjusted to reflect any discounts associated with the quantities being acquired?

ELEMENT BY ELEMENT: DIRECT MATERIALS

- Document preliminary concerns about material cost estimates.
- Is the contractor proposing the appropriate kind and quantities of material for this item?
- Does any proposed direct material appear not necessary to the contract effort?
- Check for suitable material on residual inventory lists, Government Furnished Material (GFM) and Government Furnished Equipment (GFE).
- Is any material uniquely critical to contract performance?
- Did the offeror assume any improvements from historical effort to the current effort? If not, why not? If so, does the estimate properly consider improvement curve theory?
- Improvement or learning does not stop when standards are met.
- Are other adjustments to past estimates of direct material quantities appropriate?
- Should the item be purchased, not made (or vice versa)?
- Should any proposed direct material be classified as an indirect cost? This may indicate a "double charge" for materials as both direct and indirect costs.

- Despite what was proposed as an "actual" scrap rate, can a lower scrap rate can be supported through the data? Are improvements to the contractor's approach possible?
- Be sure to consider the lost labor that is invested in a discarded item. Be aware that recommendations to adjust the spoilage rates may also affect the amount of manufacturing labor required.
- If a scrap factor is used to estimate adjustments, did the contractor consider the issues and concerns associated with CER development?
- Do you know what types of material parts are covered by the CER?
- Is the method used to apply the CER in the estimate consistent with the method used in rate calculations?
- Are the materials, tolerances, and processes similar to those used to calculate the CER?
- Are the data used to calculate the CER changing over time?
- Is the adjustment for material overruns, scrap, spoilage and defective parts reasonable from a should-cost viewpoint?
- Does the proposal consider the residual value of the material overruns, scrap, spoilage and defective parts?
- Develop and document your pre-negotiation position with respect to direct material quantities required to complete the contract.

ELEMENT BY ELEMENT: DIRECT LABOR

- Does the estimate adequately describe the task involved?
- Does the estimate reflect a required effort more complex than it really is?
- Does the estimate describe the process and assumptions used to develop the estimate?
- If the estimate assumes a fixed level of effort over a period of time, is that assumption reasonable?
- If the labor-hour estimate includes a subjective adjustment factor, is the factor reasonable?
- Have appropriate quantitative techniques been used to adjust historical data to estimate proposed contract costs?
- Did the contractor apply any non-recurring factors? Do historical hours include the impact of changes or nonrecurring costs ECPs?

Learning Curve (a type of CER)

- Where appropriate, did the contractor perform learning curve analysis?
- What are the bases / sources for the proposed learning curve?
- What types of learning curves were applied?
- Did the contractor use calculations that are applicable to the situation?
- Is the curve based on actual experience with supporting documentation?
- What is the ratio of assembly hours versus machine hours? (This will influence the steepness of the learning curve.)
- Did the contractor include personal time, fatigue, and delay (PF&D), realization or efficiency factors in the actual/historical data?

- The theoretical cost of the first unit (T1) and the slope is based on past production of identical end items. (Unless the contractor can prove that its plant completely lacks experience in making a particular product, do not accept pricing that uses T1 values.)
- If the contractor lacks the data, it may have developed its first unit cost from reasonable standard time and its slope maybe based on published industrial data.
- The analyst should choose other sources for cross-checking if possible.
- If the contractor quotes a steep slope, this means that the contractor will show improvement more rapidly than if it had used a less steep slope (An 80% curve decreases unit cost faster than a 90% curve).
- A steep curve can be offset by a high T1 value. (A steeper slope does not necessarily mean a more efficient producer.)
- Production breaks may cause some loss of experience, but once a company has significant experience producing a product, they will not lose *all* improvement curve efficiencies.
  - What was the learning loss with the duration of the production?
  - Any proposal involving return to T1 as the starting point for a follow-on contract is unreasonable because a company never loses all of its learning.
- In cases where follow-on occurs with no break in production, the first unit of the new buy is actually the next unit (last unit from the previously ordered lot plus one); the Government should not pay for start-up inefficiencies twice.
- Learning does not stop when standards are met.

Analogy Method

- Do historical costs include the cost of change?
- Has the make-or-buy plan changed?
- Is there any labor activity included in the historical costs that is also estimated separately?
- Is there a detailed analysis of work requirements that could be used for estimate development?
- Are the methods to be employed on the proposed contract identical to those used in the historical effort? Look for any significant differences, such as:
  - Specifications [especially those simplified since the last contract]
  - Process steps
  - Equipment and tooling
  - Plant layout
  - Inspection procedures
  - Labor mix
  - Employee skill levels
  - Type of shop [i.e., model versus production]
  - Delivery schedules
  - Production rates and quantities
  - Plant capability [full versus idle]
  - Number of shifts
  - Overtime hours

Historical and engineered labor standards:

- Does the cost involved warrant use of an engineered labor standard?
- How old are the labor standards? How often and what method are the labor standards updated?
- What are the qualifications of the person who developed the labor standards?
- Does the contractor have a written policy on establishing and maintaining its labor standards?
- Were the correct labor categories used?
- Does the contractor commonly use labor standards in similar estimating situations?
- Is the contractor using non-engineering labor standards, or would the projected costs warrant engineered labor standards?
- Did the estimator consider the issues and concerns related to labor standard development and application?
- Were there delays in production or problems which would extend or increase the historical hours per unit and which should not applied without analysis?
- Are some of the direct labor functions that were included in the historical data now being estimated as indirect labor function?
- Is the labor mix proposed the same as that labor mix included in the historical data?
- Is the proposed labor skill mix reasonable for the required work effort?

Overtime, uncompensated overtime, and shift premiums:

- How does the contractor's approach to performing work outside of traditional hours affect labor rates, worker safety, and product quality?
- Does the proposal include paid overtime or shift premiums? If so, are they reasonable?
- Does the proposal include uncompensated overtime? If so, is it reasonable?
- If uncompensated overtime is proposed, are the hourly rates properly adjusted? For example, 5 of uncompensated overtime per week (i.e., working 45 hours per week) at $20 per hour would produce an hourly rate of $17.78 per hour [($20*40)/45 = $17.78].
- Is there historical experience available on the use of uncompensated overtime, overtime and shift premiums?

ELEMENT BY ELEMENT: OTHER DIRECT COSTS

- Does the contractor customarily treat similar costs as indirect costs? Can the accounting system segregate proposed ODCs from similar indirect costs?
- Is the proposed ODC consistent with the contractor's estimating assumptions?
- Should any proposed ODC be classified as an indirect cost? (Will the proposed cost benefit both the proposed contract and other work?)
- Does any proposed ODC appear to duplicate another proposed direct cost?
- Are the proposed ODCs reasonable?
- Has the contractor identified all the ODCs reasonably required to complete the contract?
- Is any ODC critical to contract performance?

Special tooling and test equipment (ST&TE) costs:

- Does the proposal include appropriate quantities of special tooling and test equipment?
- Is the proposed special tooling or test equipment appropriate for the required period of use?
- Is it only usable on the proposed contract or is it general purpose (usable for other products/contracts)?
- Can the task be performed at a lower total cost (equipment plus labor) with general-purpose tooling or test equipment?
- Is any Government-owned tooling or test equipment available that can be used on a rent-free, non-interference basis?
- Is the proposed cost reasonable for the required special tooling?

Computer services costs:

- Is the amount of the proposed computer effort reasonable for the contract?
- Are the proposed costs based on the computer resources that will actually be used to complete the required tasks?
- Does the selected source offer the best value to the contractor and the Government?

Professional and consultant service costs:

- Does the task defined for completion by consultants duplicate a task defined for in-house completion?
- Does a factor or CER used to estimate direct labor cost duplicate consultant task costs?
- Is the proposed cost reasonable in relation to the service required?
- Is the proposed cost necessary and reasonable considering the contractor's capability in a particular area?
- How were similar services procured in the past, and what was the cost?
- Is the service of a type identified as unallowable under Government contracts (e.g., services to improperly obtain, distribute, or use protected information; services to improperly influence the content of solicitations, proposal evaluations, or source selections; services resulting in violation of any law or regulation)?
- Are proposed services consistent with the purpose and scope of the contract?

Travel:

- What's the purpose of the travel? Can multiple tasks be accomplished on the same trip?
- Will the traveler(s) charge to a direct or indirect labor account during travel?
- Are the number and type of personnel traveling appropriate and reasonable for the proposed trip? Is the proposed travel really necessary?
- Is the duration proposed reasonable? Can consolidated longer trips replace multiple short trips on the proposed travel schedule?
- Is the current estimate reasonable when compared to prior trips of a similar nature?
- Are the proposed air fare rates in excess of lowest customary standard, coach, or equivalent fare offered during normal business hours?

- Is the proposed mode of transportation the most likely mode of transportation, with appropriate starting and end points?
- Are the mileage allowances projected in excess of actual needs? Are other ground transportation costs (at destination) reasonable?
- Is proposed travel in accordance with the company policy?
- Do the proposed transportation, lodging, and meal rates comply with FAR travel cost restrictions?

b e te t

CHAPTER 16 - TYPES OF CONTRACTS

1 1 e er e t tr t pe r e reme t ember 20107

1 2 er rm e t e reme t r t e mb r eme t eme t per t tr t e 201

1 t p e r tr t er me t e t tr t e er r er r er 2011

General Guide to Contract Types

Guiding Principles

- No single contract type is right for every contracting situation.
- Selection of contract type must be made on a case-by-case basis, considering programmatic, performance, and financial factors.
- The goal is to select the contract type that will result in an optimal business arrangement between the parties.

[References: FAR 16 and DEAR 916]

1.0 Summary of Latest Changes

This update: (1) deletes information that repeats the FAR or other guidance, and (2) includes administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references.

2.1 Introduction. 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 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 supersede 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 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.

2.2 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 some 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 contract type affects the Government's ability to obtain fair and reasonable prices.

2.3 Contracting Officer Responsibility for Selecting the Contract Type. The contracting officer (CO) 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 CO 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 are 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.

2.4 How the Statement of Work Influences 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. 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 SOW is being prepared include:

- 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 the required equipment and material 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.

2.5 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.

2.6 Contract Type Preference. Generally, a firm-fixed-price contract is the most preferred and cost-reimbursement contracts are the least preferred. However, selecting a contract type 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.

2.7 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.

2.8 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.

2.9 Contract Type Categories.

2.9.1 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)
  - Fixed-Price Incentive (Firm Target) Contracts
  - 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)

2.9.2 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 (BPA)
- Task Orders
- Governmentwide Acquisition Contracts (GWAC)
- Federal Supply Schedule Buys

2.10 Risk Factors Considered in Determining Appropriate Contract Type. 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 achieves 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 contract may be the continued 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. Consideration should be given to the use of economic price adjustment terms or other re-pricing mechanism.

- Technical Capability. Consideration should be given to: "Has this type of effort been 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 of not achieving 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 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 SOW and successful project performance can be 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 CO 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?

2.11 <u>Detailed Information on Each Contract Type</u>. There is no template that can automatically match a contract type to any contracting circumstances and still consistently promote the best interests of the Government. Sound 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 CO 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.

2.12 Contract Type Abstracts. Attachment 1 provides a comparison of major DOE contract types based on categories of contractor compensation.

3.0 Attachments

Attachment 1, Comparison of Major DOE Contract Types

Comparison of Major DOE Contract Types[1]

	Firm-Fixed-Price (FFP)	Cost-Plus-Incentive-Fee (CPIF)	Cost-Plus-Award-Fee (CPAF)	Cost-Plus-Fixed-Fee (CPFF)	Time & Materials (T&M)
Principal Risk to be Mitigated	None. Thus, the contractor assumes all cost risk.	Highly uncertain and speculative labor hours, labor mix, and/or material requirements (and other things) necessary to perform the contract. The Government assumes the risks inherent in the contract, benefiting if the actual cost is lower than the expected cost, or losing if the work cannot be completed within the expected cost of performance.			
Use When . . .	The requirement is well-defined. • Contractors are experienced in meeting it. • Market conditions are stable. • Financial risks are otherwise insignificant.	An objective relationship can be established between the fee and such measures of performance as actual costs, delivery dates, performance benchmarks, and the like.	Objective incentive targets are not feasible for critical aspects of performance. Judgmental standards can be fairly applied. Potential fee would provide a meaningful incentive.	Relating fee to performance (e.g., to actual costs) would be unworkable or of marginal utility.	No other type of contract is suitable (e.g., because costs are too low to justify an audit of the contractor's indirect expenses).
Elements	A firm-fixed-price for each line item or one or more groupings of line items.	• Target cost • A minimum, maximum, and target fee • A formula for adjusting fee based on actual costs and/or performance • Performance targets (optional)	• Estimated cost • Base amount, if applicable, and an award amount • Award fee evaluation criteria and procedures for measuring performance against the criteria	• Estimated cost • Fixed fee	• Ceiling price • A per-hour labor rate that also covers overhead and profit • Provisions for reimbursing direct material costs

[1] Derived from DSMC's "Comparison of Major Contract Types" (April 2016).

Comparison of Major DOE Contract Types (cont'd)

	Firm-Fixed-Price (FFP)	Cost-Plus-Incentive-Fee (CPIF)	Cost-Plus-Award-Fee (CPAF)	Cost-Plus-Fixed-Fee (CPFF)	Time & Materials (T&M)
Contractor is Obliged to:	Provide an acceptable deliverable at the time, place and price specified in the contract.	Make a good faith effort to meet the Government's needs within the estimated cost in the Contract, Part I the Schedule, Section B Supplies or services and prices/costs.			Make a good faith effort to meet the Government's needs within the ceiling price.
Contractor Incentive *(other than maximizing goodwill)*	Generally realizes an additional dollar of profit for every dollar that costs are reduced.	Realizes a higher fee by completing the work at a lower cost and/or by meeting other objective performance targets.	Realizes a higher fee by meeting judgmental performance standards.	Realizes a higher rate of return (i.e., fee divided by total cost) as total cost decreases.	
Typical Application	Commercial supplies and services.	Research and development of the prototype for a major system.	Large scale research study.	Research study.	Emergency repairs to laboratories.
Principal Limitations in FAR/DEAR Parts 16, 32, 35, and 52	Generally NOT appropriate for R&D.	The contractor must have an adequate accounting system. The Government must exercise surveillance during performance to ensure use of efficient methods and cost controls. Must be negotiated. Must be justified. Statutory and regulatory limits on the fees that may be negotiated. Must include the applicable Limitation of Cost clause at FAR 52.232-20 through 23.			D&F required (w/ HCA if over 3 years). Government MUST exercise appropriate surveillance to ensure efficient performance. Document any ceiling increases.
Variants	Firm-Fixed-Price Level-of-Effort.			Completion or Term.	Labor Hour (LH).

Performance Evaluation and Measurement Plans for Cost-Reimbursement, Non-Management and Operating Contracts

Guiding Principles
- Provide the Acquisition Team assistance in utilizing Incentive contracts
- Understanding the difference between a predetermined, formula- type incentive and an award–fee incentive

[Reference: FAR 6, FAR 16, FAR 22, FAR 32, FAR 46, DEAR 915.404-4-72, DEAR 916.405-2, DEAR 970.1504-1, and Acquisition Guide Chapter 16.1]

Overview

The policy of the DOE is to maximize contractor performance and to align costs with performance through the use of performance-based management as a strategic contract management tool to plan for, manage, and evaluate contractor performance.

An important function of contract administration is the ability, or the opportunity, to manage the environment within which the contracted effort is proceeding and, most importantly, to facilitate adjustments to that effort to meet the demand and changes as they occur. Performance Evaluation and Measurement Plans provide a tool or means of evaluating contractor performance.

The purpose of this guide is to provide guidance on PEMPS- the mandatory elements that must be contained in all PEMPS, and to provide the acquisition team assistance in utilizing Incentive contracts to support and implement this policy. Cost-reimbursement, incentive contracts are of two types. Award-Fee contracts are a type of incentive contract that utilizes a subjective method to evaluate performance and the conditions under which it was achieved to determine the award fee earned. Cost-reimbursement, incentive contracts that are not award-fee contracts utilize predetermined, formula-type incentives to measure performance. Under incentive contracts the contractor's profit rate varies based on its performance as measured against cost, technical, and/or schedule metrics.

Award fee criteria should be carefully selected to properly motivate the contractor's management and performance during the award fee period. Qualitative criteria are generally recommended, but clear distinctions should be established between the performance levels to guide the program personnel.

For non-M&O contracts that utilize Earned Value Management System (EVMS)(i.e., contain capital asset projects, major contracts for decontamination and decommissioning, environmental remediation, and other major site and facility contracts, and other contracts as appropriate) the goal should be to motivate effective performance management with EVMS. Award fee criteria should be based on the degree of effective management with EVMS and can be a mix of qualitative and subjective measures. While it seems obvious that earned value metrics, such as variances or indices, seem tailor made to provide incentives to the contractor in an award fee environment, experience shows otherwise. Using metrics such as cost or schedule variances, cost or schedule performance indices or variances at completion (VACs) to measure performance for award fee purposes should be avoided. Use of such metrics may result in overstating of performance or other improper actions that could undermine the objective of evaluation of the contractor's performance. Over reliance on EVMS metrics in contractor performance evaluation may lead to frequent baseline changes for short term profit gain and generally have not resulted in better cost control. The goal should be to reward proactive and effective contractor performance management. Types of information to consider could include:

Management

- EVM is effectively integrated and used for program management
- Prime contractor's management of major subcontractors
- Realistic and current expenditures and schedule forecasts
- Adequacy of cost proposals submitted during award fee period
- Cost control
- Meaningful variance analysis
- Timely incorporation of changes to the PMB
- Accuracy, timeliness, and consistency of billings and cumulative performance data and integration of subcontractor data
- Baseline discipline and system compliance

A fundamental requirement for managing any complex contract is insight into the contractors' performance specifically the program management and control. Proper EVMS implementation ensures that the project personnel are provided contractor performance data that:

- relates time-phased budgets to specific contract tasks and/or statements of work (SOW)
- accurately and objectively measures work progress

- properly relates cost, schedule, and technical accomplishment
- allows for informed decision making and corrective action
- is valid, timely, and able to be audited
- allows for statistical estimation of future costs
- supplies managers at all levels with status information at the appropriate level, and
- is derived from the same EVMS used by the contractor to manage the contract.

Sample criteria and varying levels of performance are shown in Attachment 5. These criteria should be selected and tailored as appropriate to the nature of the contract.

This guidance does not apply to Management and Operating contracts although the general principles herein discussed are applicable.

Chapter 1 - General

1.1 Introduction

FAR 16.401 through FAR 16.402-4 discuss incentive contracts and place incentives in two major categories: award-fee incentives and predetermined, formula-type incentives. This guide chapter addresses both award-fee incentives and predetermined, formula-type incentives. The term Performance Evaluation and Measurement Plan (PEMP) is used to address a fee plan that includes both types of incentives. When using award-fee incentives, Contracting Officers (COs) must use the adjectival ratings, associated descriptions, and award-fee earned percentages prescribed in Table 16.1 in FAR 16.401. For the list of acronyms and definitions, please see Attachment 1.

1.2 Establishing Total Fee for the Contract

The total fee for the contract may include: Base

Amount;
Fee Pool for Award-fee Incentives; and
Fee Pool for Predetermined, Formula-type Incentives (Commonly referred to Performance Based Incentives in DOE)

Establishing the total fee available for the base amount and for all of the incentives in the contract is critical and must be accomplished utilizing a structured approach in accordance with law, regulation, and DOE policy.

For award-fee contracts, FAR uses the terms base amount and award amount/award-fee pool; DEAR uses the terms base amount and award-fee pool. For a contact that includes both award-fee incentives and predetermined, formula-type incentives, it is possible the total available fee would comprise a base amount, an amount for award-fee incentives, and predetermined formula-type incentives.

DEAR 915.404-4-72 applies to cost-plus-award-fee contracts. It contains the DOE approach for determining the base fee and the award-fee pool. The maximum fee permitted for cost-plus-award-fee contracts shall also be the maximum fee permitted for contracts that contain both award-fee incentives and predetermined formula-type incentives.

1.3 Base Fee

There is no requirement that a contract include a base fee, with the exception of award- fee contracts (the base may be zero). If there is a base fee it is often appropriate to allocate it equally among the contract's evaluation periods for the award-fee incentives of the contract.

1.4 Incentive Fee

FAR 16.4 defines predetermined, formula-type incentives differently than award-fee incentives and requires predetermined, formula-type incentives be used in preference to award-fee incentives, which are permitted only if it is neither feasible nor effective to use predetermined, formula-type incentives. Predetermined, formula-type incentives fall into three categories: cost incentives; technical incentives; and schedule incentives. Because these types of incentives are earned based upon meeting objective performance measures, they are evaluated separately from award-fee incentives, which are earned based upon subjective performance measures.

Formula or objective performance measurement standards are based on well-defined parameters for measuring performance. They include customer surveys, inspection reports and test results. Quantitative measures should be used whenever the given performance can be precisely or finitely measured. Sufficient information or experience must be available to permit the identification of realistic standards against which quantitative measurements may be compared.

1.5 Award Fee

Award-fee contracts are appropriate when predetermined, formula-type incentives are not appropriate. Keep in mind that any reasonable assessment of effectiveness when using award-fee incentives requires a judgmental evaluation process that addresses both performance levels and the conditions under which those levels were achieved. The major advantage of the use of award fee from other types of incentives is the Government gives the contractor a detailed evaluation of performance, pointing out deficiencies and weaknesses. Unfortunately, this advantage is often overshadowed due to the substantial costs incurred through the continual evaluations and processing of award fee decisions. From the contractors' point of view, the award fee is typically advantageous in that it usually yields higher fees than other incentives.

Chapter 2 - Performance Evaluation Criteria for Incentive Contracts

The best practice is to tailor performance evaluation plans or Performance Evaluation Management Plans (PEMP) and criteria to fit the goals and objectives of the statement of work, the contractor's internal systems, and the business arrangements within the contract. Since the Government may well have different desired outcomes for individual phases of a contract or project, evaluation criteria may change among the performance periods. The PEMP for the current evaluation period shall include only the criteria that apply to the current evaluation period. Note that the contract permits the CO to make unilateral modifications of the detailed evaluation plan, if the modifications are made in a specified amount of time in advance of the related evaluation period.

It is neither necessary nor desirable to include all processes or functions required by the statement of work as part of the performance evaluation plan (PEMP). The best practice is to focus on desired outcomes that are critical to the mission of the Department, the program, and/or the site. The performance evaluation criteria selected must be balanced so that contractors, when making trade-offs among evaluation criteria, assign the proper importance to each of the critical functions identified and keep the Department's desired outcomes in mind at all times. For example, the PEMP emphasizing technical performance must also address cost considerations, because an evaluation plan limited to technical performance might result in increased costs out of proportion to any benefits gained. To achieve the appropriate balance the criteria must be usually limited to a significant few to focus the contractor's attention in the areas we want to emphasize performance.

Furthermore, spreading the potential fee over a large number of areas in the contract's scope of work or performance evaluation criteria dilutes the impact on each area and individual criterion and can actually reduce the ability of the contractor to achieve world-class results. When using incentives, the effort of tracking a multitude of metrics simply distracts management from focusing on the "big picture" end goals. Predetermined, formula-type incentive fee evaluation criteria should be as specific and focused as possible. Award fee evaluation criteria must often be broad criteria in areas such as technical, project management and cost control, supplemented by a limited number of sub-criteria describing significant evaluation elements over which the contractor has effective management control. Prior experience can be helpful in identifying those key problem or improvement areas that should be subject to fee evaluations.

Basic areas of performance should be evaluated, but not every area evaluated results in earning a fee. However, some areas of performance need to be evaluated on every incentive-type contract, and have a fee associated with that area. Other areas are critical only in certain contracts. For example, all incentive-type contracts (including contracts with award fee only, contracts with only predetermined formula-type incentives, or contracts with both types of incentives) are required to contain a cost incentive or constraint (see FAR 16.402). Therefore, cost control will always be included as an evaluation criterion, if there isn't a separate cost incentive in the contract. In general, cost,

schedule (on time delivery), and performance (technical merit, design innovation, reliability, etc.), will always be important-- although their relative importance and the criteria for determining what constitutes good performance may vary by procurement.

The relative importance of the criteria and the parts of the contract's statement of work to which they apply should be tailored to fit the needs of the procurement. For example, providing a cleaned up area or building, or a system design on time is generally critical to the contract. However, in some instances earlier delivery will also be of benefit to the Government and therefore worth incentivizing if it would reduce costs or allow effort to be redirected to other critical segments of the project without increasing the overall cost. The earlier a site area can be cleaned up, the earlier the Department can begin work on the rest of its cleanup needs. In other instances, early deliveries might be of no benefit, or even cost the Government money. For instance, early delivery of furniture may require the Department to pay storage costs if the facility the furniture is supposed to be used in is still being renovated. In that case, a later "just in time" delivery would result in a lower overall cost to the Government.

2.1 Predetermined, Formula-Type Incentive Criteria

Predetermined formula-type incentive criteria are objective, the least administratively burdensome type of performance evaluation criteria, and, should, provide the best indicator of overall success. Predetermined Formula-type oriented criteria should therefore be the first type of criteria considered for use, and are often ideal for non- routine efforts. Criteria may also include sub-criteria used to evaluate performance.

Types of Criteria for predetermined formula-type incentives:

Range Specific: (e.g., *Target* = 600 barrels of waste; *exceeds Target* = 675 barrels of waste; & *significantly exceeds Target*/excellent= 725 barrels of waste).

Range Specific: (e.g., *below baseline, /unsatisfactory* = 500-599 barrels of waste moved (deduction of Fee); *Target/satisfactory* = 600-674 barrels of waste moved (Target Fee); *exceeds baseline/very good* = 675-724 barrels of waste moved (Target + Fee); *significantly exceeds baseline*/excellent= >725 barrels of waste moved (Target + Fee).

Point Specific: (e.g., *below baseline, unsatisfactory* = 601 milli-roentgen equivalent man (rem) (mrem) of exposure; *baseline* = 600 mrem of exposure; & *exceeds baseline* = 599 mrem of exposure).

2.2 Award-Fee Criteria

Award fee criteria differ from other types of criteria because they are subjective and/or judgmental. The amount of the award fee available to be earned is fixed at inception of the contract and the award fee criteria must be structured to provide the contractor the proper motivation for excellence in such areas as quality, timeliness, technical ingenuity, and cost-

effective management. To be realistic, any standard to measure performance when using award-fee incentives should reflect the nature and difficulty of the work involved (FAR 16.401).

2.3 Structure of Fee Evaluation Criteria

The amount of fee the contractor may earn must be commensurate with the contractor's performance measured against contract requirements and acquisition objectives in accordance with the criteria stated in the fee plan. The areas of evaluation are cost, schedule and technical performance. Several sub- areas should be added to each area to identify in more detail specific criteria that the contractor must meet in order to achieve desired outcomes. Weights assigned to areas and sub-areas should reflect the importance/criticality for the successful program execution, delivery of a product or service.

a. Cost: Each acquisition must be analyzed to ensure that evaluation of cost receives the appropriate attention in determining the amount of available fee. The contractor's ability to control, adjust and accurately project contract costs (estimated contract costs, not budget or operating plan costs) is of key importance. How much weight (emphasis) is to be put on this area will depend on the type of acquisition. A contract awarded for research and development of a product will have less emphasis on cost than a contract for the manufacture and/or delivery of a product or a contract that is for services. Some criteria to consider may be:

    - Control of indirect and overtime costs
    - Control of direct labor costs
    - Economies in use of personnel, energy, materials, computer resources, facilities, etc.
    - Cost reductions through use of cost savings programs, cost avoidance programs, alternate designs and process methods, etc.
    - "Make versus buy" program decisions
    - Reduced purchasing costs through increased use of competition, material inspection, etc.

b. Schedule: Weights assigned to this area should reflect the importance of this area. Sub-areas should be established with criteria focused on getting the contractor to meet or exceed minimum delivery requirements. This can be defined in terms of early delivery, attaining or exceeding milestones, or meeting rapid-response or urgent requirements. Sometimes schedule risks may be very high since the customer requirements may not remain firm and the impact of changes cannot be predicted with reasonable accuracy. As an example pre- production schedule objectives and risks would differ significantly from production schedule objectives and risks. The pre-production challenges usually are unknowns in technology and instability in requirements and funding – placing more risk on the contractor. On the other hand, manufacturing unknowns that drive a production schedule such as

supply of materials/parts and labor represents a greater risk to the customer. Some criteria to consider may be:

- Assignment and utilization of personnel
- Recognition of critical problem areas
- Cooperation and effective working relationships with other contractors and Government personnel to ensure integrated operation efficiency
- Support to interface activities
- Technology utilization
- Effective use of resources
- Planning, organizing and managing all program elements
- Management actions to achieve and sustain a high level of productivity
- Response to emergencies and other unexpected situations
- Compliance with contract provisions
- Effectiveness of property and material control
- Occupational safety and security
- Subcontracting; Subcontract direction and coordination
- Purchase order and subcontractor administration.
- Timely and accurate financial management reporting.

c. Technical performance (Quality of Work): Evaluation criteria should be tied to technical requirements documents, risk reduction plans, applicable test plans and procedures, milestones for completion of reports, testing, product delivery, or other completion of events or deliverables set forth in the contract. Weights assigned should reflect the importance/criticality for successful program execution, design or delivery of a product or the successful performance of a service to ensure that the contractor's performance is measured against mission outcomes and basic requirements of the contract. In order to achieve this, sub- areas should be established to measure different aspects of performance, i.e., program execution, organizational and program management, risk management, logistic support, strategic planning, quality of work/services, etc. Criteria to evaluate these sub-areas should be structured in such a way to evaluate how well the contractor identifies/addresses/mitigates problems and program risks. Some areas to consider may be:

- Design of test models and prototypes
- Conception/execution of manufacturing processes, test plans and techniques
- Effectiveness of proposed hardware changes
- Quality control, e.g., appearance, thoroughness and accuracy, inspections, customer surveys
- Meeting technical requirements for design, performance and processing, e.g., weight control, maintainability, reliability, design reviews, test procedures, equipment, or performance

- Processing documentation timely and efficient preparation, implementation and closeout
- Facilities/GFE/GFM/GFP, operation and maintenance of assigned facilities and Government Furnished Equipment, Material, and/or Property
- Anticipating and resolving problems
- Recovery from delays, reaction time and appropriateness of response to changes
- Providing a safe work environment; timely reporting of mishaps
- Conducting annual inspections of all facilities
- Maintaining accident/incident files
- Management information systems ensures accurate, relevant and timely information
- Efficient and effective processing of requisitions, with emphasis on priority requisitions

For a sample of DOE criteria, please see Attachment 2.

2.4 Mandatory Elements

The contract and the PEMP must give the Government the right to take back any fee paid that was based on erroneous information from the contractor's business systems in accordance with DOE Acquisition Letter AL-2014-02 (issued October 29, 2013).

Fee is earned only when it is based on accurate data provided by the contractor. As such, any fee based on inaccurate data that would otherwise been earned shall be returned to the Department of Energy (DOE) upon notification by the Contracting Officer. Therefore, all payments of fee is provisional or conditional. Among other things, fee must be based on the contractor submitting accurate data through or from its business systems-including, but not limited to: (1) Earned Value Management System, (2) Purchasing System, (3) Property System, and (4) Accounting System.

Consequently, if DOE has paid a contractor a *fee*, whether it was termed provisional or "earned" when it was paid, and either the contractor or DOE subsequently discovers the fee was not earned, the contractor shall return the unearned fee, to DOE.

It is mandatory that all PEMPs include elements that measure whether the contractor has met the overall cost, schedule, and technical performance requirements of the contract. The PEMP's architecture must ensure the planning and controlling of authorized work to achieve cost, schedule, and technical performance objectives is accomplished. Therefore, the PEMP must include elements that monitor contractor performance to meet or exceed performance schedule goals, attain or exceed performance and schedule goals, attain effective cost control, and maintain business systems (refer to Acquisition Letter AL-2013-11 Revised 05/02/2013).

2.4.1 **Mandatory Cost PEMP Element:**

All costs incurred during the performance evaluation period shall not exceed the contract total estimated cost excluding any cost overrun. The Government shall measure contractor cost performance against the total estimated contract cost of the contract, minus any cost overrun and against the Contract Budget Base. The Government shall not measure contractor performance against a total estimated cost that includes cost overrun or measure performance against an over target baseline (see Acquisition Guide Chapter 43.3 for information on over target baselines).

The Government must not provide fee for contractors based on Cost Performance Indices (CPI) without ensuring that the underlying data in the EVMS system is accurate. The EVMS must be certified by DOE (recertified as required). CPI is an indicator of project performance, not necessarily of contract performance.

Cost must be a stand-alone element.

2.4.2 **Mandatory Schedule PEMP Element:**

The Government shall measure contractor schedule performance against the (Performance Based) Statements of Work activities and significant activities in the Project Schedule, which represents an integrated network of tasks, subtasks, activities, and milestones with sufficient logic and durations to perform the SOW. The schedule must be consistent with the evaluation period covered and not outside the evaluation period.

The Government must not provide fee for contractors based on Schedule Performance Indices (SPI) without ensuring that the underlying data in the EVMS system is accurate. The EVMS must be certified by DOE (recertified as required). SPI is an indicator of project performance, not necessarily of contract performance.

Schedule must be a stand-alone element.

EVMS and Award Fee Contracts. EVMS award fee criteria should be carefully selected to properly motivate the contractor's management and performance during the award fee period. Qualitative criteria are generally recommended, but clear distinctions should be established between the performance levels to guide the PMO when evaluating performance. The PMO should establish the criteria to motivate and encourage improved management processes during the period, keeping in mind that recognizing improvements in integrated program management result in more long lasting improvement in cost and schedule performance. If such qualitative criteria are difficult to support during the evaluation process, the PMO should consider using subjective criteria for EVMS performance results.

Avoidance of EVMS Quantitative Metrics. While it seems obvious that earned value metrics, such as variances or indices, seem tailor made to provide incentives to the contractor in an award fee environment, experience shows otherwise. Using metrics such as cost or schedule variances, cost or schedule performance indices or VACs to measure performance for award fee purposes should be avoided. Use of such metrics may result in overstating of performance or other improper actions that could undermine the EVMS. Metrics may lead to frequent baseline changes for short term profit gain and generally have not resulted in better cost control. Cost performance may be more directly incentivized through the use of a CPIF contract rather than an award fee contract.

Avoidance of Contract Management Milestones (such as IBR) as Criteria. The IBR or other management, technical or program milestones should not be used as a basis for award fee. Establishing award fee metrics based on hard dates for either the IBR or other management milestones may force the conduct of these reviews, even though the contractor is not ready for the review. The technical completion of work to established baseline evaluation criteria is one way of objectively evaluating and rewarding the contractor based on success to a baseline plan.

Establishing Qualitative Criteria. The goal should be to motivate effective performance management with EVMS. Award fee criteria should be based on the degree of effective management with EVMS and can be a mix of qualitative and subjective measures. The PMO should aim for 75% of the criteria to focus on effective management with EVM and a 25% focus on discipline/consistency. The goal should be to reward proactive and innovative performance management. This breakout can be seen in the following suggested categories:

Management

- EVM is effectively integrated and used for program management
- Prime contractor's management of major subcontractors
- Realistic and current budgets, expenditures, and schedule forecasts
- Adequacy of cost proposals submitted during award fee period
- Cost control
- Meaningful variance analysis
- Timely incorporation of changes to the PMB

Discipline

- Accuracy, timeliness, and consistency of billings and cumulative performance data and integration of subcontractor data

- Baseline discipline and system compliance

Sample criteria and varying levels of performance are shown in Appendix (atch). These criteria should be selected and tailored as appropriate to the nature of the contract.

Integrated Program Management Report (IPMR). Alternatively, or in conjunction with the aforementioned qualitative criteria, award fee can be tied to the IPMR which contains data for measuring cost and schedule performance on Department of Energy (DOE) acquisition contracts. It is structured around seven formats that contain the content and relationships required for the electronic submissions. The IPMR's primary value to the Government is its utility in reflecting current contract status and projecting future contract performance. It will be used by the DOE component staff, including program managers, engineers, cost estimators, and financial management personnel, as a basis for communicating performance status with the contractor. Format submissions will be assessed for compliance with IPMR requirements. Standards for award fee withhold should be established (e.g., f any report submission is rejected in two successive reporting periods). For additional details, see the IPMR on the DOE website.

APPENDIX

SAMPLE AWARD FEE CRITERIA

MANAGEMENT #1	EVM is effectively integrated and used for program management.
UNSATISFACTORY -	Contractor fails to meet criteria for satisfactory performance.
SATISFACTORY	Contractor team uses earned value performance data to make program decisions as appropriate.
GOOD	**Meets all the SATISFACTORY requirements plus:** Earned value performance is effectively integrated into program management reviews and is a primary tool for program control and decision-making.
VERY GOOD	**Meets all of the GOOD requirements plus:** Contractor team develops and sustains effective communication of performance status on a continual basis with the Government.
EXCELLENT	**Meets all the VERY GOOD requirements plus:** Proactive, innovative use of EVM by entire contractor team. Plans and implements continual process improvement in using EVM.

MANAGEMENT #2	Management of major subcontractors.
UNSATISFACTORY -	Contractor fails to meet criteria for satisfactory performance.
SATISFACTORY	Contractor routinely reviews the subcontractor's performance measurement and baseline.
GOOD	**Meets all the SATISFACTORY requirements plus:** Contractor's management system is structured for oversight of subcontractor performance.
VERY GOOD	**Meets all of the GOOD requirements plus:** Contractor actively reviews and manages subcontractor progress. Clear and accurate status reporting to the Government.
EXCELLENT	**Meets all the VERY GOOD requirements plus:** Effective, timely communication of subcontractor cost and schedule status to the Government. Issues are proactively managed.

MANAGEMENT #3	Realistic and current cost, expenditure, and schedule forecasts.
UNSATISFACTORY -	Contractor fails to meet criteria for satisfactory performance.
SATISFACTORY	Provides procedures for delivering realistic and up-to-date cost, and schedule forecasts as presented in Contract Performance Report, formal estimate at completion, Contract Funds Status Report, Integrated Master Schedule, etc. The forecasts are complete and consistent with program requirements and are reasonably documented.
GOOD	**Meets all of the SATISFACTORY requirements plus:** All requirements for additional funding and schedule changes are thoroughly documented and justified. Expenditure forecasts are consistent and logical and based on program requirements. Contractor acknowledges cost growth (if any) in the current reporting period and provides well documented forecasts.
VERY GOOD	**Meets all of the GOOD requirements plus:** Expenditure forecasts reflect constant scrutiny to ensure accuracy and currency. Contractor prepares and develops program cost and schedule data that provides clear Government visibility into current and forecast program costs and schedule. Schedule milestone tracking and projections are very accurate and reflect true program status. Keeps close and timely communications with the Government.
EXCELLENT	**Meets all of the VERY GOOD requirements plus:** Contractor consistently submits a high quality estimate at completion that is current and realistic. Reported expenditure profiles are accurate. Develops comprehensive, clear schedule data that provides excellent correlation with technical performance measures and cost performance reports and permits early identification of problem areas. Schedule milestone tracking and projections are accurate and recognize potential program impact.

MANAGEMENT #4	Adequacy of cost proposals submitted during award fee period.
UNSATISFACTORY -	Contractor fails to meet criteria for satisfactory performance.
SATISFACTORY	Proposal data, including subcontractor data, is logically organized and provides adequate visibility to the Government to support technical review and cost analysis. A basis of estimate is documented for each element. When insufficient detail is provided, the contractor provides it to the Government on request. Proposal is submitted by mutually agreed to due date.
GOOD	**Meets all of the SATISFACTORY requirements plus:** Detailed analysis is provided for subcontractor and material costs.
VERY GOOD	**Meets all of the GOOD requirements plus:** Proposal data is traceable and provides visibility to the Government to support a detailed technical review and thorough cost analysis. Only minor clarification is required. Potential cost savings are considered and reported in the proposal.
EXCELLENT	**Meets all of the VERY GOOD requirements plus:** Change proposals are stand-alone and require no iteration for Government understanding. Contractor communicates during the proposal preparation phase and effectively resolves issues before submission.

MANAGEMENT #5	Cost control.
UNSATISFACTORY -	Contractor fails to meet criteria for satisfactory performance.
SATISFACTORY	Controls self and subcontractor cost performance to meet program objectives.
GOOD	**Meets all of the SATISFACTORY requirements plus:** Establishes means to stay within target cost. Provides good control of all costs during contract performance.
VERY GOOD	**Meets all of the GOOD requirements plus:** Provides measures for controlling contract cost at or slightly below target cost. Provides suggestions to the program office and implements them when appropriate. Implements some ideas for cost reduction.
EXCELLENT	**Meets all of the VERY GOOD requirements plus:** Provides suggestions and when appropriate, proposals to the program office for initiatives that can reduce future costs. Implements cost reduction ideas across the program and at the subcontract level. Identifies (and when appropriate implements) new technologies, commercial components, and manufacturing processes that can reduce costs.

MANAGEMENT #6	Variance analysis in performance reports.
UNSATISFACTORY -	Contractor fails to meet criteria for satisfactory performance.
SATISFACTORY	Variance analysis is sufficient. Contractor usually keeps the Government informed of problem areas, the causes, and corrective action. When insufficient detail exists, the contractor provides it to the Government promptly upon request.
GOOD	**Meets all of the SATISFACTORY requirements plus:** Contractor routinely keeps the Government informed of problem areas, the causes, and corrective action. Explanations are updated on a monthly basis. Action taken to analyze potential risks for cost and schedule impacts.
VERY GOOD	**Meets all of the GOOD requirements plus:** Contractor always keeps the Government informed of problem areas, the causes, and corrective action. Variance analysis is thorough and is used for internal management to control cost and schedule. Detailed explanations and insight are provided for schedule slips or technical performance that could result in cost growth. The Government rarely requires further clarification of the analysis.
EXCELLENT	**Meets all of the VERY GOOD requirements plus:** Variance analysis is extremely thorough. Contractor proactively keeps the Government informed of all problem areas, the causes, emerging variances, impacts, and corrective action. Contractor keeps the Government informed on progress made in implementing the corrective action plans. Analysis is fully integrated with risk management plans and processes.

DISCIPLINE #1	Accuracy, timeliness, and consistency of billing and cumulative performance data; and integration of subcontractor data.
SATISFACTORY	Billings to the Government may have slight delays and/or minor errors. CPR, CFSR, and IMS reports are complete and consistent with only minor errors. Data can be traced to the WBS with minimum effort. Subcontractor cost and schedule data are integrated into the appropriate reports with some clarification required. Reports are occasionally submitted late. Electronic data is submitted correctly per the ANSI X12 format.
GOOD	**Meets all of the SATISFACTORY requirements plus:** Billings to the Government are accurate though there are slight delays. Data is complete, accurate, consistent, and shows traceability to the WBS, with some clarification required. Subcontractor performance data is fully integrated into the appropriate reports with no clarification required and reports are submitted on time.
VERY GOOD	**Meets all of the GOOD requirements plus:** Data is complete, accurate, and consistent, with little or no clarification required.
EXCELLENT	**Meets all of VERY GOOD requirements plus:** Billings are submitted to the Government on time. Data is complete, accurate, and consistent, with clear traceability to the WBS. Data elements are fully reconcilable between the CPR and the CFSR. Subcontractor schedule performance is vertically and horizontally integrated with the contractor schedule.

DISCIPLINE #2	Baseline discipline and system compliance.
SATISFACTORY	The contractor develops a reliable performance measurement baseline that includes work scope, schedule, and cost. The contractor or Government may discover system deficiencies or baseline planning errors through either routine surveillance or data inaccuracies in the CPRs. Contract changes and UB are normally incorporated into the baseline in a timely manner. MR is tracked and used in proper manner. Elimination of performance variances is limited to correction of errors.
GOOD	**Meets all of the SATISFACTORY requirements plus:** Requirements are addressed up front to minimize changes and future cost and schedule growth. Contract changes and UB are always incorporated into the baseline in a timely manner. System deficiencies or baseline planning errors are quickly assessed and corrected, resulting in minor impact to data accuracy. Provides for the continuous review of the baseline to assure that it is current and accurate thereby maintaining its usefulness to management. Cost and schedule baselines are fully integrated.
VERY GOOD	**Meets all of the GOOD requirements plus:** Builds proper baseline in a timely manner. Provides realistic performance baseline. Ensures work packages are detailed and consistent with scope of contract and planned consistent with schedule. Contractor conducts routine surveillance that reveals minor system deficiencies or minor baseline planning errors, which are quickly assessed and corrected, resulting in little or no impact to data accuracy. Contractor EVMS is effectively integrated with other management processes.
EXCELLENT	**Meets all of the VERY GOOD requirements plus:** Proactively manages baseline. Maintains timely detail planning as far in advance as practical and implements proper baseline controls. Controls and minimizes changes to the baseline particularly in the near term. System deficiencies or planning errors are few and infrequent. Contractor takes initiative to streamline internal processes and maintains high level of EVMS competency and training across organization.

Chapter 3 - Qualitative Standards for Award Fee

Qualitative or subjective evaluation criteria need qualitative or subjective performance standards and rely on evaluator's opinions and impressions of performance quality and the conditions under which it was achieved. Qualitative assessments must be as informed as possible and not rely on personal bias or a purely intuitive (gut) feeling.
There should be a cause and effect relationship among the criterion and its standards, the evaluator's observations, and a distinct reduction or improvement in quality. Some examples are:

> Staffing: Optimal allocation of resources; adequacy of staffing; qualified and trained personnel; identification and effective handling of employee morale problems, etc.
>
> Planning: Adequate, quality, innovative, self-initiated and timely planning of activities; effective utilization of personnel; quality of responses, etc.

Another example of a qualitative standard is a quality review, such as a questionnaire requiring "yes" or "no" answers, with a high proportion of "yes" answers indicative of high quality performance. Note that narrative support for questionnaire answers is required.

When using award-fee incentives, COs must use the adjectival ratings, associated descriptions, and award-fee earned percentages prescribed in Table 16.1 in FAR 16.401 (see Attachment 3). Once evaluation criteria are developed, standards are developed within each evaluation criterion for measuring contractor performance.

Chapter 4 - Weighting of Evaluation Criteria

In addition to identifying how performance will be evaluated, the PEMP will indicate the relative priorities assigned to the various performance areas through its allocation of fee to the areas and its evaluation criteria and sub-criteria. The Fee Determining Official (FDO) is responsible for developing the appropriate criteria for the contract. Only the criteria that apply to a specific period should be included. In an incentive contract using predetermined, formula-type incentives, weighting is generally done by the dollars assigned to each criterion. In an incentive contract using award fee, weighting is generally done by percentages. The following is an example of weighting criteria in an award fee contract *(example is notional):*

Each contract will have specific performance expectations that fall under one of the three performance criteria listed in the paragraph below. Each performance criteria will be assigned a weight to communicate its level of importance. The total weight of the combined criteria must equal 100%.

Criteria		Weight
Technical		55%
Quality of Work Products	40%	
Quality of Work Process	15%	
Schedule		20%
Cost Control		25%
TOTAL		100%

Chapter 5 - Evaluation Periods

Evaluation periods for award fee contracts should be structured to balance the contractors' ability to have enough performance time yet allow the Government to have adequate time to provide timely feedback, yet not be administratively burdensome.
Generally this period is no longer than one year, but should rarely be less than six months. Too short of an evaluation period can prove administratively burdensome and lead to hasty evaluations. Too long of an evaluation period can jeopardize valuable feedback to the contractor regarding their performance. There should always be a continuous on-going two-way conversation with the Contractor about its performance no matter what the length of the evaluation period.

Evaluation periods for contracts with predetermined, formula-type incentives should be structured to balance the timeframe, the targets and fee pool to provide the Contractor with the appropriate focus. A one-year period is appropriate for many incentives, especially when using near-term incentives in combination with contract length or completion incentives.

Chapter 6 - Fee Allocation

Most often, the available award fee is allocated equally over the evaluation periods if the risks and types of work are similar throughout the various evaluation periods. Fee allocations may be tied to accomplishment of milestones. Available predetermined, formula-type incentive fee can also be allocated equally over the evaluation periods, however additional consideration will be required as to whether the targets are equally important in each evaluation period.

6.1 Unequal Allocation of Fee

If appropriate to the contract, the acquisition team may establish key performance events (events on the critical path), and fee amounts should be allocated based upon the criticality of the events. The preferred approach is to give greater weight to performance events that occur toward the end of an evaluation period. If the contract has a short initial evaluation period so the contractor can become familiar with the work, the initial evaluation period may have a smaller allocation while the remaining available fee is divided equally among the remaining evaluation periods. Conversely, if the contract effort requires the contractor to become familiar with the work quickly, the initial evaluation period may have a larger allocation.

EVALUATION PERIODS	1	2	3	4	Total
Allocation (%)	10%	26%	40%	24%	100%
Allocation ($)	$50,000	$130,000	$200,000	$120,000	$500,000

6.2 Reallocation for Incentive Contracts

Reallocation is the process by which the Government moves a portion of the available fee from one evaluation period to another due to such things as Government-caused delays, special emphasis areas, changes to the Performance Work Statement (PWS) or Statement of Objectives (SOO), etc. Reallocation is not normally associated with the contractor's performance. Reallocation may be done unilaterally if projected before the start of the affected fee evaluation period. Under award-fee contracts, unearned fee may not be rolled over to any subsequent evaluation period.

Chapter 7 - Roles and Responsibilities for Incentive Contracts

It is especially important that all personnel involved in contract administration and oversight understand the process for developing the PEMP as it will affect contractor's performance and evaluation of that performance. For the award-fee incentives, fee evaluation team includes the performance monitors as well as the FDO and other award fee board members. The FDO makes the final determination regarding amount of fee earned during the evaluation period and ensures the performance evaluation fee process integrity is maintained. The Award-Fee Board provides an objective, impartial view of the contractor's performance to the overall process.

Early involvement in the development of the PEMP by the Field Assistance and Oversight Division (MA-621) is highly recommended. Any plans selected for review by MA-621 will be submitted for review 2 months (60 days) prior to commencement of the review period.

A sample PEMP is included as Attachment 4.

ATTACHMENT 1: ACRONYMS AND DEFINITIONS

Award-Fee Board (AFB) - Means the team of individuals identified in the award-fee plan who have been designated to assist the Fee-Determining Official in making award- fee determinations. (FAR 16.001)

Award-fee amount - The amount of award fee earned shall be commensurate with the contractor's overall cost, schedule, and technical performance as measured against contract requirements in accordance with the criteria stated in the award-fee plan. (FAR 16.401(e)(2)

Award-Fee Plan - All contracts providing for award fees shall be supported by an award-fee plan that establishes the procedures for evaluating award fee which identifies the evaluation criteria and how they are linked to acquisition objectives which shall be defined in terms of contract cost, schedule, and technical performance. The plan also describes how the contractor's performance will be measured against the award-fee evaluation criteria using the adjectival rating and associated description as well as the award-fee pool earned percentages shown in Table 16-1 (FAR 16.401(e)(3))

Award-fee pool amount – For the contract, the amount of available award fee that can be allocated across all of the contract's evaluation periods; for an evaluation period, the amount of the contract's available award fee that is allocated to the period.

Cost-reimbursement of contracts - Provide for payment of allowable incurred costs, to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor may not exceed (except at its own risk) without the approval of the contracting officer. (FAR 16.301-1)

Cost-Plus-Incentive-Fee contract (CPIF) – Provides for an initially negotiated fee to be adjusted later by a formula based on the relationship of total allowable costs to total target costs (does not apply to Cost-Plus-Award-Fee contracts). (FAR 16.304)

Cost-Plus-Award-Fee contract (CPAF) - A cost-plus-award-fee contract is a cost-reimbursement contract that provides for a fee consisting of a base amount (which may be zero) fixed at inception of the contract and an award amount, based upon a judgmental evaluation by the Government, sufficient to provide motivation for excellence in contract performance. (FAR 16.305)

Delivery incentives - Should be considered when improvement from a required delivery schedule is a significant Government objective. It is important to determine the Government's primary objectives in a given contract (*e.g.*, earliest possible delivery or earliest quantity production). Incentive arrangements on delivery should specify the

application of the reward-penalty structure in the event of Government-caused delays or other delays beyond the control, and without the fault or negligence, of the contractor or subcontractor. (FAR 16.402-3(a))

Earned value management system (EVMS) – A project management tool that effectively integrates the project scope of work with cost, schedule and performance elements for optimum project planning and control. (FAR 2.101(b)(2))

Evaluation period(s) - Stated intervals during the contract period of performance so that the contractor will periodically be informed of the quality of its performance and the areas in which improvement is expected (e.g. six months, nine months, twelve months, or at specific milestones).

Fee-Determining Official (FDO) - The designated Agency official(s) who reviews the recommendations of the Award-Fee Board in determining the amount of award fee to be earned by the contractor for each evaluation period. (FAR 16.001)

Performance Evaluation and Management Plan (PEMP) - Department of Energy's Performance Evaluation Plan. (See Performance Evaluation Plan)

ATTACHMENT 2: DOE SAMPLE CRITERIA

No.	Contract Requirement	Milestone	Completion Criteria	Due Date	Milestone Point Value	Dollar Amount Available
1	Government Furnished Services and Infrastructure, EM.PO.01.03.06 Contract Due Date: *[insert date]*	*Complete the 20XX Biennial Emergency Management Exercise. [Ref: specification section, PWS section, etc.]*	The contractor shall successfully complete the 20XX Biennial Emergency Management Exercise including successful demonstration of requirements of DOE Order 151.1C, Comprehensive Emergency Management System. *Verification of completion shall be accomplished by DOE through the review of contractor submitted documentation verifying that all identified exercise objectives had been successfully completed. This includes resolution of comments and completion of all corrective actions associated with Nuclear Regulatory Commission (NRC) Emergency Management Requirements. In addition, the COR shall submit documentation stating that all work is acceptable to the Contracting Officer.* *In addition, the COR(s) shall submit documentation to the Contracting Officer stating that all the requirements have been fulfilled.* *The Contracting Officer shall submit a letter*	15 Aug 12	15-21	$75,827.00
2	Manage Protective Force scheduling for base mission support in accordance with DOE and NNSA directives Contract Due Date: *[Insert date]*	*Maximize efficiency and cost savings. [Ref. specification section, PWS section, etc.]*	Metric will be averaged per work week, via the Security Policy Officer for base mission utilizing available officers. *Reviews include, but are not limited to violations, contractor response time(s), work hours, etc. Several CORs will submit documentation directly to the Contracting Officer in regards to contractor response, etc.*	28 Aug 12	3-5	$23,000.00
3	Project Management EM.PO.01.03.10 Contract Due Date: *[insert date]*	*Submit FY-XX AWP (Annual Work Plan). [Ref. specification section, PWS*	The contractor shall submit a FY-XX AWP. *Verification of completion shall be accomplished by an internal review by DOE personnel. Acceptance of the plan shall be made by the Contracting Officer.*	12 Jun 12	5% - 9%	$12,000.00

4	Quality and Effectiveness Contract Due Date: *[insert date]*	Quality Control. *[Ref. specification, PWS section, etc.]*	*Contractor shall be evaluated on their ability to perform the DOE D&D mission with little or no Government intervention and maximum effective communication with DOE and interested parties.*	*[Insert last day of evaluation period]*	100% (as broken out below)	$38,000.00
		Operate in a manner conducive to excellence and quality	Delivery of services across the DOE Site: Coordinating and integrating resources, activities, and interfaces; maintaining relationship with DOE, customers, and Stakeholders based on effective communication. *Internal DOE Questionnaires will be forwarded to the respective customers and stakeholders for input in the contractor's services. The Lead DOE COR shall review all questionnaires along with submitting their evaluation to the Contracting Officer.*	*[Insert last day of evaluation period]*	40%-50%	
		Demonstrate operational excellence in business and financial management.	Perform obligations in a fiscally responsible manner to include, but not limited to; the use of a certified Earned Value Management System (EVMS), and an approved accounting system. *The designated DOE personnel shall provide input in regards to the contractor's EVMS status and approval of the accounting system with their cognizant COR(s). The Lead COR obtains all of the evaluations and combines them into one overall evaluation. All evaluations and all of the acquired evaluations shall be submitted directly to the Contracting Officer.*	*[Insert last day of evaluation period]*	35%-50%	

ATTACHMENT 3: AWARD-FEE ADJECTIVAL RATINGS POOL AVAILABLE DESCRIPTIONS

Award-Fee may be earned in accordance with the following guidance (see FAR 16.401). When using award-fee incentives, COs must use the adjectival ratings, associated descriptions, and award-fee earned percentages prescribed in Table 16.1.

Award-Fee Adjectival	Award-Fee Pool Available to be Earned	Description
Excellent	91% – 100%	Contractor has exceeded almost all of the significant award fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period
Very Good	76% – 90%	Contractor has exceeded many of the significant award fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period
Good	51% – 75%	Contractor has exceeded some of the significant award fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period
Satisfactory	No Greater Than 50%	Contractor has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period
Unsatisfactory	0%	Contractor has failed to meet overall cost, schedule, and technical performance requirements of the contract as defined and measured against the criteria in the award- fee plan for the award-fee evaluation period

NOTE: Ratings need to be identified in the fee plan. These mandatory regulatory definitions are to be used in establishing evaluation criteria. The description of what constitutes each level of performance with each award-fee adjectival rating must be included in the award-fee plan. In addition, the contractor is prohibited from earning any award fee when the contractor's overall cost, schedule, and technical performance fails to

meet contract requirements.

ATTACHMENT 4: PEMP TEMPLATE
(Fill-in information shown in bold italics.)

PERFORMANCE EVALUATION MEASUREMENT PLAN

for

(TITLE OF CONTRACT)
(CONTRACT NUMBER)

(DATE OF APPROVAL)
(Contractor's Name)

APPROVED:

_____
Fee Determining Official
(Title)

(Remember, this plan should be tailored to your particular acquisition.

This template only provides an outline of what must be contained within an award-fee plan.)

Table of Contents

Section Title		Page
1.0	Introduction	*XX*
2.0	Organization	*XX*
3.0	Responsibilities	*XX*
4.0	Fee Processes	*XX*
5.0	Fee Plan Change Procedure	*XX*
6.0	Contract Termination	*XX*

Appendix	Title	Page
1	PEMP Fee Organization	*XX*
2	Fee Allocation by Evaluation Periods	*XX*
3	Fee Evaluation	*XX*

1.0 INTRODUCTION

This *(state type of fee(s))* plan *is* the basis for the *(title of the contract)* evaluation of the contractor's performance and for presenting an assessment of that performance to the Fee Determining Official (FDO). It describes specific criteria and procedures used to assess the contractor's performance and to determine the amount of fee earned. Actual award fee determinations and the methodology for determining fee are unilateral decisions made solely at the discretion of the Government.

The fee will be provided to the contractor through contract modifications and is in addition to the *(type contract)* provisions of the contract. The fee earned and payable will be determined by the FDO based upon review of the contractor's performance against the criteria set forth in this plan. The FDO may unilaterally change this plan prior to the beginning of an evaluation period. The contractor will be notified of changes to the plan by the Contracting Officer, in writing, before the start of the affected evaluation period. Changes to this plan that are applicable to a current evaluation period will be incorporated by mutual consent of both parties.

2.0 ORGANIZATION

The award fee organization consists of: the Fee Determining Official (FDO); a Fee Review Board (FRB) which consists of a chairperson, the contracting officer, a recorder, other functional area participants, and advisor members; and the COR. The FDO, FRB members, and COR are listed in Annex 1.

3.1 RESPONSIBILITIES

a. Fee Determining Official. The FDO approves the award fee plan and any significant changes. The FDO reviews the recommendation(s) of the FRB, considers all pertinent data, and determines the earned award fee amount for each evaluation period.

b. Fee Review Board. FRB members review COR(s) evaluation(s) of the contractor's performance, consider all information from pertinent sources, prepare interim performance reports, and arrive at an earned fee recommendation to be presented to the FDO. The FRB may also recommend changes to this plan.

c. FRB Recorder. The FRB recorder is responsible for coordinating the administrative actions required by the COR, the FRB and the FDO, including:

1. receipt, processing and distribution of evaluation reports from all required sources;

2. scheduling and assisting with internal evaluation milestones, such as briefings; and
3. accomplishing other actions required to ensure the smooth operation of the award fee.

d. CO. The CO is the liaison between contractor and Government personnel and shall ensure the incentive process is properly administered in accordance with agency regulations. The CO shall also modify the contract in regards to any contractual issues that may arise during the term of the contract.

e. COR. COR maintain written records of the contractor's performance in their assigned evaluation area(s) so that a fair and accurate evaluation is obtained. Prepare interim and end-of-period evaluation reports as directed by the FRB.

4.1 FEE PROCESSES

(Detail the process used for your acquisition; e.g., interim evaluation periods may or may not be in your acquisition; you have some flexibility in establishing the timetable for certain events; contractor's self-assessments may or may not be used, etc. When using award-fee incentives, COs must use the adjectival ratings, associated descriptions, and award-fee earned percentages prescribed in Table 16.1 in FAR 16.401.)

a. Available Fee Amount. The available fee for each evaluation period is shown in *(insert location)*. The fee earned will be paid based on the contractor's performance during each evaluation period.

b. Evaluation Criteria. If the CO does not give specific notice in writing to the contractor of any change to the evaluation criteria prior to the start of a new evaluation period, then the same criteria listed for the preceding period will be used in the subsequent award fee evaluation period. Any changes to evaluation criteria will be made by revising *Annex 3* and notifying the contractor.

c. Interim Evaluation Process. The FRB Recorder notifies each FRB member and Performance Monitor *(insert number of days)* calendar days before the midpoint of the evaluation period. COR submit their evaluation reports to the FRB *(insert number of days)* calendar days after this notification. The FRB determines the interim evaluation results and notifies the contractor of the strength and weaknesses for the current evaluation period. The CO may also issue letters at any other time when it is deemed necessary to highlight areas of Government concern.

d. End-of-Period Evaluations. The FRB Recorder notifies each FRB member and performance monitor *(insert number of days)* calendar days before the end of the evaluation period. COR submit their evaluation reports to the FRB *(insert*

number of days) calendar days after the end of the evaluation period. The FRB prepares its evaluation report and recommendation of earned fee. The FRB briefs the evaluation report and recommendation to the FDO. At this time, the FRB may also recommend any significant changes to the fee plan for FDO approval. The FDO determines the overall grade and earned fee amount for the evaluation period within *(insert number of days)* calendar days after each evaluation period. The FDO letter informs the contractor of the earned fee amount. The CO issues a contract modification within *(insert number of days)* calendar days after the FDO's decision is made authorizing payment of the earned- award fee amount.

e. Contractor's Self-Assessment. When the contractor chooses to submit a self- evaluation, it must be submitted to the CO within five working days prior to the ending of the current evaluation period being reviewed. This written assessment of the contractor's performance throughout the evaluation period may also contain any information that may be reasonably expected to assist the FRB in evaluating the contractor's performance. The contractor's self-assessment may not exceed *(insert number of pages)* pages.

5.0 FEE PLAN CHANGE PROCEDURE

All significant changes are approved by the FDO; the FRB Chairperson approves other changes. Examples of significant changes include changing evaluation criteria, adjusting weights to redirect contractor's emphasis to areas needing improvement, and revising the distribution of the fee dollars. The contractor may recommend changes to the CO no later than *(insert number of days)* days prior to the beginning of the new evaluation period. After approval, the CO shall notify the contractor in writing of any change(s). Unilateral changes may be made to the fee plan if the contractor is provided written notification by the CO before the start of the upcoming evaluation period.

Changes effecting the current evaluation period must be by mutual agreement of both parties.

6.1 CONTRACT TERMINATION

If the contract is terminated for the convenience of the Government after the start of a fee evaluation period, the fee deemed earned for that period shall be determined by the FDO using the normal fee evaluation process. After termination for convenience, the remaining fee amounts allocated to all subsequent fee evaluation periods cannot be earned by the contractor and, therefore, shall not be paid.

Appendices (3):

Appendix 1: PEMP Organization

Appendix 2: Fee Allocation by Evaluation Periods
Appendix 3: Fee Evaluation

APPENDIX 1: PEMP ORGANIZATION

PEMP ORGANIZATION

Members

Fee Determining Official: *(Position Title)* (Name)

Award Fee Review Board Chairperson: *(Position Title)* (Name)

Award Fee Review Board Members:

	(Name)
Deputy Program Director	(Name)
Program Manager	(Name)
Contracting Officer	(Name)
Recorder	(Name)
Contracting Staff Member	(Name)
Attorney Staff Member	(Name)
Financial Management Staff Member	(Name)
Director of Engineering	(Name)
Director of Contracting	(Name)

Performance Monitors
(Select your monitors based on the needs of your acquisition)

Area of Evaluation	Performance Monitor(s)
Contracting Officer Representative	(Name)
Subcontract Management	(Name)
Quality Assurance*	(Name)

APPENDIX 2: FEE ALLOCATION

FEE ALLOCATION BY EVALUATION PERIODS

The fee earned by the contractor will be determined at the completion of evaluation periods shown below. The percentage and dollars shown corresponding to each period is the maximum available fee amount that can be earned during that particular period.

Evaluation Period *	From	To	Available Fee**
		Total	100%

(If you use milestones, include expected milestone completion dates. Use a table similar to the one below.)

Evaluation Period *	Milestone	To	Available Fee**
First			
through			
Last period			
		Total	100%

* The Government may unilaterally revise the distribution of the remaining fee dollars among subsequent periods. The contractor will be notified of such changes, if any, in writing by the CO before the relevant period is started and the fee plan will be modified accordingly. Subsequent to the commencement of a period, changes may only be made by mutual agreement of the parties.

** Will be computed in and expressed in dollars at conclusion of negotiations (for sole source) or in proposal and Final Price Revision (for competition) using percentage shown.

APPENDIX 3: SAMPLE FEE EVALUATION

FEE EVALUATION

STRUCTURE OF FEE EVALUATION CRITERIA: The plan must describe how the contractor's performance will be measured against the acquisition objectives which must be defined in terms of contract cost, schedule and performance. The plan must define each level of performance (e.g., unsatisfactory, satisfactory, good, very good and excellent) and include a prohibition on earning any fee if the contactor's overall performance is unsatisfactory. When using award-fee incentives, COs must use the adjectival ratings, associated descriptions, and award-fee earned percentages prescribed in Table 16.1 in FAR 16.401.

Areas of evaluation are: Cost, Schedule, and Technical Performance. Several sub-areas should be added to each area to identify in more detail specific criteria that the contractor must meet in order to achieve desired outcomes. Weights assigned to areas and sub- areas should reflect the importance/criticality for the successful program execution, delivery of a product or service.

a. Cost: When determining the amount of fee to be paid a contractor, some questions you may consider:

- How well did the contractor control, meet or exceed established cost goals?
- What caused the over/under-run (is it solely contractor caused or did the Government contribute to the situation)?
- How well does the contractor address cost control by timely development of baseline, undistributed management reserve?
- What is the contractor's performance in using cost control systems to effectively monitor and report cost status in a timely fashion?
- Are variances clearly explained in accordance with contractual reporting requirements?

b. Schedule: When determining the amount of fee to be paid a contractor, some of the questions you may consider:

- Was there a Government-caused delivery slip moving work originally scheduled for this fee period to another period, resulting in a cost under-run?
- How well does the contractor project, report, and mitigate schedule impacts?
- Was there a delay in delivery of a government furnished item that caused the delay and forced overtime to meet the schedule resulting in a cost overrun?

c. Technical performance (Quality of Work): When determining the amount of fee to be paid a contractor, some questions you may consider:

- Were the design concepts and analysis, detailed execution and low cost design?
- Was the quality control plan adhered to?
- Did the contractor exceed the technical requirements for design, performance, test procedures, etc.?
- Was re-work required? If so, was it accomplished timely and in accordance with the contract specifications?

ATTACHMENT 5: Examples

Examples of PEMP Element that are not focused on mission critical accomplishments:

The following are examples of award fee incentives or practices that must not be included in award fee plans. The examples are not focused on mission critical accomplishments or don't reflect proper alignment of contractor and Government risk:

1. Example 1: The contractor is overrunning schedule and cost under a capital asset construction project, and a local community organization votes the contractor "Best Contractor of the Year." The PEMP allocates fee for achievement of a target cost, construction completion, and safety. Question: is it appropriate to take the local community organization "Best Contractor of the Year" designation into account in the contractor performance evaluation.

Answer: No. DOE policy is that the Government shall not structure a PEMP element that would allow for subjective input from a non-federal source on a matter that is not critical for mission completion.

2. Example 2: The contractor is overrunning schedule and cost under a capital asset construction project and DOE is considering re-negotiating the schedule incentives in the contract to re-allocate fee from construction completion to contractor submission of a CD3 documentation package. Question: is this an appropriate alignment of risk between DOE and the contractor?

Answer: No. This is an example of a PEMP element that allows the contractor to earn fee for soft accomplishments instead of accomplishment of the critical mission, that is in this case completion of construction.

ATTACHMENT 5: Examples (cont.)

SAMPLE AWARD FEE CRITERIA

MANAGEMENT #1	EVM is effectively integrated and used for program management.
UNSATISFACTORY -	Contractor fails to meet criteria for satisfactory performance.
SATISFACTORY	Contractor team uses earned value performance data to make program decisions as appropriate.
GOOD	**Meets all the SATISFACTORY requirements plus:** Earned value performance is effectively integrated into program management reviews and is a primary tool for program control and decision-making.
VERY GOOD	**Meets all of the GOOD requirements plus:** Contractor team develops and sustains effective communication of performance status on a continual basis with the Government.
EXCELLENT	**Meets all the VERY GOOD requirements plus:** Proactive, innovative use of EVM by entire contractor team. Plans and implements continual process improvement in using EVM.

MANAGEMENT #2	Management of major subcontractors.
UNSATISFACTORY -	Contractor fails to meet criteria for satisfactory performance.
SATISFACTORY	Contractor routinely reviews the subcontractor's performance measurement and baseline.
GOOD	**Meets all the SATISFACTORY requirements plus:** Contractor's management system is structured for oversight of subcontractor performance.
VERY GOOD	**Meets all of the GOOD requirements plus:** Contractor actively reviews and manages subcontractor progress. Clear and accurate status reporting to the Government.
EXCELLENT	**Meets all the VERY GOOD requirements plus:** Effective, timely communication of subcontractor cost and schedule status to the Government. Issues are proactively managed.

MANAGEMENT #3	Realistic and current cost, expenditure, and schedule forecasts.
UNSATISFACTORY -	Contractor fails to meet criteria for satisfactory performance.

SATISFACTORY	Provides procedures for delivering realistic and up-to-date cost, and schedule forecasts as presented in Contract Performance Report, formal estimate at completion, Contract Funds Status Report, Integrated Master Schedule, etc. The forecasts are complete and consistent with program requirements and are reasonably documented.
GOOD	**Meets all of the SATISFACTORY requirements plus:** All requirements for additional funding and schedule changes are thoroughly documented and justified. Expenditure forecasts are consistent and logical and based on program requirements. Contractor acknowledges cost growth (if any) in the current reporting period and provides well documented forecasts.
VERY GOOD	**Meets all of the GOOD requirements plus:** Expenditure forecasts reflect constant scrutiny to ensure accuracy and currency. Contractor prepares and develops program cost and schedule data that provides clear Government visibility into current and forecast program costs and schedule. Schedule milestone tracking and projections are very accurate and reflect true program status. Keeps close and timely communications with the Government.
EXCELLENT	**Meets all of the VERY GOOD requirements plus:** Contractor consistently submits a high quality estimate at completion that is current and realistic. Reported expenditure profiles are accurate. Develops comprehensive, clear schedule data that provides excellent correlation with technical performance measures and cost performance reports and permits early identification of problem areas. Schedule milestone tracking and projections are accurate and recognize potential program impact.

MANAGEMENT #4	Adequacy of cost proposals submitted during award fee period.
UNSATISFACTORY -	Contractor fails to meet criteria for satisfactory performance.
SATISFACTORY	Proposal data, including subcontractor data, is logically organized and provides adequate visibility to the Government to support technical review and cost analysis. A basis of estimate is documented for each element. When insufficient detail is provided, the contractor provides it to the Government on request. Proposal is submitted by mutually agreed to due date.
GOOD	**Meets all of the SATISFACTORY requirements plus:** Detailed analysis is provided for subcontractor and material costs.
VERY GOOD	**Meets all of the GOOD requirements plus:**

	Proposal data is traceable and provides visibility to the Government to support a detailed technical review and thorough cost analysis. Only minor clarification is required. Potential cost savings are considered and reported in the proposal.
EXCELLENT	**Meets all of the VERY GOOD requirements plus:** Change proposals are stand-alone and require no iteration for Government understanding. Contractor communicates during the proposal preparation phase and effectively resolves issues before submission.

Multiple-Award Contracts and Governmentwide Acquisition Contracts Including Delivery Orders and Task Orders

Guiding Principles

- A multiple-award contract (MAC) is a type of indefinite-quantity contract which is awarded to several contractors from a single solicitation.
- A Governmentwide acquisition contract (GWAC) is a multiple-award contract issued by one host agency that may be used by other Federal agencies to procure information technology supplies and services.
- Contractors receiving awards under a MAC or GWAC are given a fair opportunity to be considered for each task/delivery order issued during the life of the contract.

[References: FAR 16.5 and DEAR 916.5]

1.0 Summary of Latest Changes

This update: (1) deletes information that repeats the FAR or other guidance, and (2) includes administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references.

2.1 Regulations and Other Guidance. Various parts of the FAR, DEAR, and other DOE guidance apply to multiple-award contracts and/or Governmentwide acquisition contracts including, but not limited to, the following:

Reference	Subject Matter
1. FAR 1.1	Purpose, Authority, Issuance – 1.108 FAR conventions
2. FAR 2.1	Definitions
3. FAR 5.3	Synopses of Contract Awards
4. FAR 5.4	Release of Information
5. FAR 5.6	Publicizing Multi-Agency Use Contracts
6. FAR Part 6	Competition Requirements
7. FAR 8.4	Federal Supply Schedules
8. FAR 9.1	Responsible Prospective Contractors – 9.105 Procedures
9. FAR 9.4	Debarment, Suspension and Ineligibility – 9.406 Debarment and 9.407 Suspension
10. FAR Part 12	Acquisition of Commercial Items
11. FAR 12.4	Unique Requirements Regarding Terms and Conditions for Commercial Items - 12.403 Termination
12. FAR Part 13	Simplified Acquisition Procedures
13. FAR Part 14	Sealed Bidding
14. FAR Part 15	Contracting by Negotiation
15. FAR 15.4	Contract Pricing – 15.407 Special cost or pricing areas and 15.408 Solicitation provisions and contract clauses
16. FAR 16.5	Indefinite-Delivery Contracts–16.505 Ordering
17. FAR 17.5	Interagency Acquisitions
18. FAR Part 19	Small Business Programs
19. FAR 33.1	Protests
20. FAR 42.15	Contractor Performance Information – 42.1503 Procedures

Reference	Subject Matter
21. FAR 49.4	Termination for Default – 49.401-8 Reporting information
22. FAR 49.4	Termination for Default – 49.402 Termination of fixed-price contracts for default
23. DEAR 916.5	Indefinite-Delivery Contracts
24. DOE Acquisition Guide, Chapter 1.603	Appointment of Contracting Officers and Contracting Officer Representatives
25. DOE Acquisition Guide, Chapter 6.1	Competition Requirements
26. DOE Acquisition Guide, Chapter 42.1502	Contractor Performance Information
27. DOE Acquisition Guide, Chapter 42.16	Reporting Other Contractor Information into Federal Awardee Performance and Integrity Information System

2.2 Summary. A multiple-award contract (MAC) is a type of indefinite-quantity contract which is awarded to several contractors from a single solicitation. Delivery of supplies, or performance of services, is then made via an individual delivery/task order placed with one of the contractors pursuant to procedures established in the contract. All contractors receiving awards under a solicitation are given a fair opportunity to be considered for each task/delivery order issued during the life of the contract.

FAR Subpart 16.5, Indefinite-Delivery Contracts, provides the regulatory procedures and guidance regarding the award and administration of an indefinite-delivery contract to include the preference for multiple-award contracts.[1]

This chapter includes guidance on Governmentwide acquisition contracts (GWAC) as these pertain to multiple-award contracts. A GWAC is a task-order or delivery-order contract for information technology established by one agency for Governmentwide use that is operated by an executive agent designated by the Office of Management and Budget or under a delegation of procurement authority issued by the General Services Administration (GSA).

2.3 Multiple-Award Contracts (MAC) (Indefinite Quantity). For multiple-award contracts, the contracting officer (CO) should include in the master contract detailed ordering

[1] FAR 16.504(c)

procedures and selection criteria to afford each contractor a "fair opportunity" for orders issued against the contract. The CO should document the selection process for the multiple-award contracts and any subsequent orders in the contract files.

When ordering against multiple-award contracts, each contractor must be given a fair opportunity to be considered for each order that exceeds $3,500 and a fair notice of intent for each order exceeding the simplified acquisition threshold. The file must document that the task/delivery order award decision used the selection criteria established in the contract and that adequate input from the user/customer was included in the decision. Sound business judgment is imperative and documenting the process provides the basis to support the award.

For multiple-award contract orders that take exception to the fair opportunity process, the CO should be familiar with these exceptions described at FAR 16.505(b)(2) and how to properly justify and document these occurrences.

When the multiple-award contract permits decentralized ordering, the CO should establish adequate control procedures that permit oversight of all decentralized orders to ensure that the fair opportunity selection criteria and procedures are applied to all orders.

2.3.1 Benefits of Use. Multiple-award contracts offer many advantages that result in more efficient and effective buying of recurring supplies and services, including:

- Streamlining the awarding and ordering process;
- Ensuring fast delivery of the required supplies or quicker performance of required services;
- Allowing the Government to leverage its buying power to get best value, to receive high quality supplies and services, and to take advantage of latest technological changes in the marketplace; and
- Streamlining the order closeout process.

2.3.2 Checking Availability of Multi-Agency Indefinite Delivery Vehicles for Ordering. The Interagency Contract Directory (ICD) is a central repository of Indefinite Delivery Vehicles (IDV) awarded by the Federal agencies where the IDV is available for use at both the intra-agency and interagency levels. The website is https://www.contractdirectory.gov/contractdirectory/.

2.3.3. When to Use. COs must make multiple awards of indefinite-quantity contracts for recurring supplies and services to the maximum extent practicable.[2]

[2] FAR 16.504(b) and 16.504(c)(1)(i)

For advisory and assistance services, COs must make multiple awards if the amount of the services exceeds $13,500,000, including all options, and the period of performance will exceed three years.[3]

Proper advance planning and market research will help COs make appropriate decisions regarding when to use multiple awards, as well as when multiple awards are not appropriate. FAR 16.504(c) identifies several factors to consider when determining the number of contracts to be awarded, and conditions when COs should not use multiple award contracting methods.

Before pursuing multiple awards, ensure that there are two or more contractors that are capable of performing the required work. If awards were made to contractors that only specialize in certain areas of the requirement, the competitive nature of such contracts in the placement of orders after contract award would be impaired. COs must document the contract file with the rationale for the decisions made in planning for and awarding multiple-award contracts, or, conversely, when multiple awards are determined not to be appropriate.

No indefinite-delivery/indefinite-quantity contract estimated to exceed $112 million, including all options, may be awarded to a single source unless the head of the agency determines in writing that a single award is approved.[4] FAR 16.504(c)(1)(ii)(D) states what needs to be included in the determination and the Congressional notification requirements. This written determination by the head of the agency, unless otherwise delegated, is in addition to the requirements of FAR Subpart 6.3.

2.3.4 Maximizing Opportunities for Small Businesses. Opportunities for maximizing the use of small businesses under multiple-award contracts can be accomplished in several ways:

- A solicitation must be structured as a total set-aside where market research has indicated there will be adequate competition.
- Partial set-asides may also be appropriate.
- Opportunities can also be made available by reserving the issuance of task or delivery orders under specific functional areas of the statement of work exclusively for award to small business concerns.

In an unrestricted competition, small business participation can be maximized by employing several techniques:

[3] FAR 16.504(c)(2)(i)

[4] Dollar threshold is subject to change. See FAR 16.504(c)(ii)(D)(1) for current threshold.

- Issuing a sources sought synopsis in FedBizOpps inviting interested small businesses to submit comprehensive capability statements for specific functional areas of the statement of work.
- Issuing a draft solicitation for industry comment.
- Breaking down functional requirements of the statement of work to their lowest level (e.g., subfunctional elements) to increase small business opportunities to propose against discrete elements of a multiple-award contract.
- Conducting small business outreach conferences to market a program to the small business community.
- Including provisions in the fair opportunity procedures of the solicitation/contract which permit the CO to reserve the issuance of certain task or delivery orders among small businesses.

2.3.5 Evaluating Price. Although final pricing of supplies or services is not determined until orders are issued, COs are still required to consider cost or price to the Government in the initial evaluation of offers leading to the award of multiple-award contracts. The Comptroller General has reiterated that competitive solicitations must include cost or price to the Government as an evaluation factor, and COs must consider cost or price to the Government in evaluating competitive proposals, even for multiple-award contracts.

COs cannot eliminate proposals from consideration for award of a contract without taking into account the relative cost of that proposal to the Government. This is a statutory requirement that is not satisfied by the practice of considering cost or price only after contract award, when an individual task or delivery order is issued.

COs must develop a basis upon which the evaluation of cost/price factors can be considered in the initial award of multiple contracts to assess the Government's best estimate of the likely relative cost to the Government.

For supplies, COs can request offerors to submit fixed prices for the term of the contract, which would allow for an appropriate evaluation.

For services, COs can use a combination of several approaches to provide the most comprehensive way to accomplish the required cost evaluation. Proposed labor rates and mark-up rates can be requested for evaluation purposes. Offerors may also be directed to provide a fully detailed cost proposal for a sample task order for one or more of the services to be performed under the contract. Agency historical information that addresses similar past projects can be used to estimate the labor mix and materials. Offerors' responses to the sample task order can provide insight into their technical and staffing approach and can therefore provide a reasonable basis to assess the relative cost of the competing proposals.

2.3.6 Obligation of Funds. The obligation of funds is against an individual order, not at contract execution. In the event some funds need to be obligated at contract execution, it should be only for the stated minimum quantity of supplies or services designated in the schedule. If minimum funds were obligated at contract execution, the CO shall ensure that the minimum quantity of supplies was delivered or services were performed.

2.3.7 Award and Administration. Be sure to consider bundling issues when planning for a multiple award contract. The Government Accountability Office (GAO) has decided several cases where the agency bundled requirements traditionally acquired from small businesses. Awards were made to only large companies, as small businesses were precluded from proposing effectively.

Be sure to include relevant clauses that address various contract types (i.e., firm-fixed-price, time & material/labor hour, cost reimbursement) in the master contract if you anticipate the issuance of task orders on these bases.

Be proactive. Conduct a postaward meeting with the technical team and a postaward conference with each contractor to communicate to the contractor and technical team the process of how tasks will be awarded and administered.

When key personnel are listed in the contract, be sure to state at the postaward conference that you will only authorize key personnel changes in advance of task proposals being submitted, if applicable.

Brief technical monitors on their roles and responsibilities. Also, make sure the CO's representatives (COR) and technical monitors are informed, in writing, that they are not authorized to have the contractor perform services outside the scope of the task unless it has been priced out and approved by the CO via a task modification in advance of the services being performed. Otherwise, the action is an unauthorized commitment and requires ratification.

Issuance of all task orders must adhere to the ordering procedures set forth in the contract to ensure that fair opportunity is provided to all awardees under the multiple-award contract. There are few exceptions to the fair opportunity process for orders exceeding $3,500. See FAR 16.505(b)(2) for these exceptions. For example, if a contractor has not received tasks sufficient to meet a minimum ordering guarantee of the contract, an order may be placed directly with the contractor without providing a fair opportunity to the other contractors under the multiple-award contracts. Per GAO, this should only be applied at the end of an ordering period and not to the first few orders under the contract.

It should be noted that there is no statutory or regulatory authority which permits the issuance of a sole-source task order under a multiple-award contract on the basis of socioeconomic considerations (e.g., 8(a) concerns).

For an individual task order, COs should include pricing (not funding) for option periods when the initial task order is awarded to help the COR and technical monitors estimate funding requirements in advance. Remember that the task order must be issued during the effective period of the master contract. The task order shall be completed within the period specified in the task order.

2.3.8 Justification for Single-Award. For indefinite-quantity contracts, the preference is to establish multiple-award contracts to the maximum extent practicable. The contracting activity should consider the factors at FAR 16.504(c) and document the decision in the acquisition plan or contract file.

When it has been determined that a single-award contract is required to fulfill the agency's needs, the contracting activity must:

- For a single-award contract with an estimated value exceeding the micro-purchase threshold but not exceeding $112 million including options, prepare the Justification for Other than Full and Open Competition (JOFOC) in accordance with FAR Subpart 6.3, DOE Acquisition Guide Chapter 6.1 Competition Requirements, and the HCA's Delegation of Authority/Designation memorandum which contains additional guidance and approval thresholds.

- For a single-award contract with an estimated value exceeding $112 million including any options, in addition, to the JOFOC described above, obtain a written determination from the head of the agency. Within 30 days after the determination is made, Congressional notification is required. The head of agency determination addresses:

  - The delivery or task orders expected under the contract are so integrally related that only a single source can reasonably perform the work;
  - The contract provides only for firm-fixed-priced delivery or task orders for—
    - Products with unit prices established in the contract; or
    - Services with prices established in the contract for specific tasks to be performed;
  - Only one source is qualified and capable of performing the work at a reasonable price to the Government; or
  - It is necessary in the public interest to award the contract to a single source due to exceptional circumstances.

2.4 Governmentwide Acquisition Contracts (GWAC). A Governmentwide acquisition contract (GWAC) is a multiple-award contract issued by one host agency that may be used by other Federal agencies to procure information technology supplies and services.

GWACs offer total technology solutions including hardware, software, systems integration, asset management, and security and program management.

The use of GWACs is subject to the indefinite-delivery contract requirements and ordering procedures prescribed at FAR Subpart 16.5. Orders issued by an ordering activity against a GWAC are direct acquisitions. Prior to placing an order against the GWAC, the ordering activity shall conduct an analysis and shall make a written determination that the use of the GWAC is the best procurement approach in accordance with FAR 17.502-1(a)(2). GWACs have a specific statutory authority and are not subject to the requirements and limitations of the Economy Act, as specified in FAR Subpart 17.502-2 - The Economy Act. Refer to FAR 17.502 and DOE Acquisition Guide Chapter 17.5[5], Interagency Acquisitions, Interagency Transactions, and Interagency Agreements, for policy and procedures.

Host agencies are designated pursuant to the authority of the Director, Office of Management and Budget (OMB), to establish GWACs. Currently, there are six OMB designated GWAC agencies - GSA, National Institutes of Health, National Aeronautics and Space Administration, Environmental Protection Agency, Department of Defense and Department of Commerce.

Although DOE is not a designated GWAC agency, the Department can fully utilize GWACs that are administered by host agencies.

2.4.1 Limitations on User Agency. Currently, each host agency has established a maximum value for their respective GWAC which is equal to the estimated Government usage for a ten-year period.

Each GWAC has an established limitation on how much of the total contract 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.

2.4.2 Advantages. GWACs offer Federal agencies the advantage of flexibility in meeting their various information technology requirements through one umbrella contract. Specific advantages include –

- 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.

[5] At the time of this posting, Chapter 17.5 is numbered 17.1. This chapter is in the process of being updated and renumbered to 17.5.

- The host agency has already conducted the competition resulting in one or more contract awards to the best-in-class 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, using FAR Part 15 procedures.
- Small, minority and women-owned businesses, as well as large businesses are represented.
- Task orders may be firm-fixed price, time and material, labor-hour, level of effort, or cost reimbursement depending upon the specific GWAC and the nature of the work to be performed.

2.4.3 Total Technology Solutions. Hardware, software, and services can be purchased as a total technology solution. Task orders placed against GWACs may be customized to meet the full range of IT service solutions, including, but not limited to:

- Systems/Product/Service integration;
- Systems operation and management;
- Software/Information Systems engineering and management;
- Cybersecurity;
- Network management/telecommunications; and
- Web-enabled solutions.

2.4.4 Supplies. Many information technology supplies are available on GWACs, including –

- Mainframes;
- Desktop computers;
- Portable computers;
- Hardware;
- Peripherals;
- Software; and
- Bar coding systems.

2.4.5 Services. There are many types of information technology services available on GWACs, including –

- Hardware/Software Maintenance;
- Training;
- Software Application;
- Digitizing; and
- Technical support.

2.4.6 User Fees. User fees are the revenues collected by the host agency to cover the costs associated with awarding and administering the stable of GWAC contracts, as well as the administrative costs of servicing the use of the GWAC contract by other, ordering agencies.

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 that are paid to the host agency normally range between 0.5% and 4%. However, user fees are negotiable. Some GWACs provide for annual ceilings on user fees that can result in greatly reduced aggregate fee percentages. COs should validate that the host agency is providing value commensurate with the fee charged.

2.4.7 IT Integration Service Requirements. For IT integration service requirements, GWACs are preferred over the FSS program. GWACs offer total information technology solutions through performance-based contracts. If agencies and contractors are focused on the desired outcome rather than the individual pieces involved, GWAC contractors can generally deliver better service. GWACs are specifically focused on providing for outcome-oriented solutions.

2.4.8 Host Agency Compliance with Commitments. If the host agency is conducting an assisted acquisition, the agencies shall comply with FAR 17.5 – Interagency Acquisitions and DOE Acquisition Guide Chapter 17.5, Interagency Acquisitions, Interagency Transactions, and Interagency Agreements. An assisted acquisition is a type of interagency acquisition where the servicing agency and requesting agency enter into a written interagency agreement (IA) pursuant to which the servicing agency performs acquisition activities on the requesting agency's behalf, such as the awarding of a contract, task order, or delivery order. The IA should detail the performance expectations of the two agencies including the planning, execution, and administration of the contract. FAR 17.502-1(b) requires a written IA for assisted acquisitions.

2.5 Ordering against MACs and GWACs.

2.5.1 Market Research. Conduct market research before awarding a task or delivery order in excess of the simplified acquisition threshold.[6]

2.5.2 Fair Opportunity. "Fair opportunity" does not mean "competition" as that term is used in FAR Part 6. The concept of providing fair opportunity for all multiple-award contractors refers to the CO's responsibility to ensure that once a multiple-award contract is

[6] FAR 10.001(a)(2)(ii) & (v)

awarded, each contractor is given an opportunity to be considered for each task or delivery order that exceeds $3,500 that is issued under the multiple-award contracts, e.g., multiple delivery-order contracts or multiple task-order contracts.[7] FAR 16.505(b) prescribes requirements and guidelines that COs should follow for orders under multiple-award contracts.

2.5.3 Ordering Procedures for Fair Opportunity. Solicitations and contracts for multiple awards must state the procedures and selection criteria to be used to give awardees a fair opportunity to be considered for each task or delivery order. COs have broad discretion in developing appropriate order placement procedures, and should use streamlined procedures, including oral presentations and minimal information submittal requirements whenever practicable. When developing the procedures, see FAR 16.505(b)(1)(v).

For a task order or delivery order that does not exceed the simplified acquisition threshold (SAT), FAR 16.505(b)(1)(ii) prescribes that the CO need not contact each of the multiple awardees under the contract before selecting an order awardee if the CO has information available to ensure that each awardee is provided a fair opportunity to be considered for each order, e.g, fixed-priced contract line items.

For a task or delivery order that exceeds the SAT, FAR 16.505(b)(1)(iii) prescribes additional requirements.

For a task or delivery order that exceeds $5.5 million, see FAR 16.505(b)(1)(iv).

2.5.4 Ensuring Fair Opportunity for All Contractors. A CO can ensure that fair opportunity exists for all awardees and still keep the multiple award process simple and streamlined by following these guidelines:

- Ensure that requiring program customers fully understand the concept of fair opportunity and their role in ensuring that it is achieved for each task or delivery order, e.g., evaluating contractor capabilities pursuant to the established ordering procedures. This is done through proper advance planning and adequate documentation of the decisions made in the award of multiple contracts and in the issuance of the task or delivery order.

- Avoid using ordering practices that preclude fair opportunity - such as the *allocation of orders among awardees,* and the *direction of orders to preferred awardees.* These practices are prohibited and result in less than fair consideration being given to all awardees under a multiple award contract.

- Clearly spell out the entire ordering process in the solicitation and contract.

[7] FAR 16.505(b)(1)(i)

- Document the file for each task or delivery order that your ordering practices adhere to the ordering procedures set forth in the contract.

- Inform all awardees if you plan to use an exception to fair opportunity that may occur in the placement of a task or delivery order. Prepare the justification for the exception and get approvals as required. Post the justification as required.

- For orders exceeding $3,500 but not exceeding the SAT, issue follow-on orders only when these orders constitute a logical follow-on exception. The rationale shall describe the relationship between initial order and the follow-on, e.g., in terms of scope, period of performance or value.

- Maximize the use of firm-fixed-price orders.

- Consider price or cost under each order as one of the factors in the selection decision.

- Keep in mind that formal evaluation plans and the scoring of quotes/offers are not required. However, for a task or delivery order exceeding $5 million, there are minimum requirements to consider and documentation for each task or delivery order including postaward notices and debriefing of awardees.

- Keep in mind that the placement of a task or delivery order (order) may be protested on the grounds that the order increases the scope, period of performance, maximum value of the contract under which the order is issued; or when an order is valued in excess of $10 million. For an order in excess of $10 million, a protest may only be filed with the Government Accountability Office. See 16.505(a)(10) for authority.

2.5.5 Orders for Services under a MAC. Consider the following when placing an order –

- Each task order must clearly describe all services to be performed so that the total cost or price of performance can be established;

- Use performance-based work statements to the maximum extent practicable;

- Keep contractor submission requirements, e.g., task order proposals, to a minimum;

- Past performance on earlier task orders under the contract, including quality, timeliness, and cost control;

- Potential impact on other task orders placed with the contractor, i.e., potential impacts on the contractor's resources;

- Minimum ordering requirements;

- The amount of time contractors will need to make an informed business decision on whether to respond to potential task orders;

- Whether contractors could be encouraged to respond to potential task orders by performing outreach intended to promote exchanges of information, e.g., request comments on draft work statements;

- Price or cost; and

- Basis for selection of an awardee. It can be based on best value or low cost/technically acceptable depending on the complexity of the requirement and the needs of the program. This basis is usually specified in the order, but could also be specified in the multiple-award contract.

2.5.6 Pricing Orders. Multiple-award contracts usually allow using both fixed price and cost reimbursement type methods, depending on the degree to which the work requirements can be specified. However, COs should use firm-fixed-price orders to the maximum extent practicable.

2.5.7 Limitations on Pass-through Charges on Orders. FAR 15.408(n) implements policy that minimizes excessive pass-through charges by contractors from subcontractors, or of tiers of subcontractors, that add no, or negligible, value. This limitation ensures that neither a contractor nor a subcontractor receives indirect costs or profit/fee (i.e., pass-through charges) on work performed by a lower-tier subcontractor to which the higher-tier contractor or subcontractor adds no, or negligible, value. The master contract shall include the clause 52.215-23, Limitations on Pass-through Charges, when the total estimated value exceeds the simplified acquisition threshold and the contract type is cost reimbursement. When an order exceeds the simplified acquisition threshold, the clause requires the contractor to identify the percentage of work that will be subcontracted. When the subcontract costs will exceed 70 percent of the total cost of the work to be performed, the contractor must provide information on indirect costs, profit/fee and the value added with regard to the subcontract work.

2.5.8 Documentation When Placing Order. For each task or delivery order (order) issued, the file shall contain a record which documents the rationale for placement of the

order and cost/price of the order. Specifically, COs should document the basis for award and the rationale for any tradeoffs among cost or price and noncost considerations in making the award decision. This documentation need not quantify the tradeoffs that led to the decision.

The file shall also identify the basis for using an exception to the fair opportunity process. If the CO uses the logical follow-on exception, the rationale shall describe why the relationship between the initial order and the follow-on is logical, e.g., in terms of scope, period of performance, or value.

2.5.9 Postaward Notices and Debriefings for Orders. If the task or delivery order exceeds $5.5 million, the CO shall notify unsuccessful awardees. FAR 15.503(b)(1) describes the procedures for postaward notification to unsuccessful awardees. FAR 15.506 describes the procedures for postaward debriefing to unsuccessful awardees.

2.5.10 Exceptions to Fair Opportunity.

2.5.10.1 Logical Follow-on. All awardees under the multiple-award contracts must have been provided a fair opportunity to receive the original task order (order) under which the work will be added. If another authority was used to issue the original order on a sole-source basis (e.g., to satisfy a minimum guarantee), then additional work cannot be added to the original order as a logical follow-on.

A new requirement can be added to an existing order, if the requirement is within the scope of the initial task order and the work is not severable. For example, when a contractor is providing administrative support services to an organization and a new sub-organization is formed due to reorganization, an additional contractor employee may be required. It would then be prudent to have the same contractor perform the work, provided the order is modified to add this requirement.

The criteria contained in FAR 6.302-1(a)(2)(ii) can be used as a guide in determining whether additional work constitutes a logical follow-on to a previously issued order. Specifically, if the issuance of a new order would result in a substantial duplication of costs to the Government that is not expected to be recovered through the “fair opportunity” process established for the contract, or in unacceptable delays in fulfilling the agency’s requirements, then such work would be considered as an appropriate logical follow-on to the original order.

2.5.10.2 Statutory Exceptions for Orders. The statutory exceptions to the fair opportunity process for orders placed under multiple-award contracts are described at FAR 16.505(b)(2)(i).

2.5.10.3 Documentation. For an order exceeding $3,500 but not exceeding the simplified acquisition threshold, the ordering activity shall document the statutory basis described at FAR 16.505(b)(2)(i) for using an exception to the fair opportunity process.[8]

For an order exceeding the simplified acquisition threshold, at a minimum, the exception to fair opportunity justification must comply with FAR 16.505(b)(2)(ii)(B).

2.5.10.4 Approval Thresholds for Justification for Orders Exceeding SAT. For an exception to fair opportunity justification under 16.505(b)(2)(ii), the approval levels are based on the following dollar thresholds[9]:

- If the action is $700,000 or less, the CO;
- If the action exceeds $700,000 but does not exceed $13,500,000, the Contracting Activity Competition Advocate;
- If the action exceeds $13,500,000 but does not exceed $68,000,000, the Head of the Contracting Activity (HCA), in accordance with the HCA's Delegation of Authority/Designation memorandum; and
- If the action exceeds $68,000,000, the Senior Procurement Executive.

2.5.10.5 Posting Requirements for the Justification. For exceptions to fair opportunity orders exceeding the simplified acquisition threshold, the justification must be posted for a minimum of 30 days at the Governmentwide point of entry (GPE) https://www.fbo.gov; and on the website of the ordering activity agency, which may provide access to the justification by linking to the GPE. The DOE link to https://www.fbo.gov is at www.energy.gov.

Depending on the circumstances for the exception to fair opportunity order justification, there are two posting timelines:

- To support circumstances described at FAR 16.505(b)(2)(i)(B) or (C) for either only one source is capable of providing the required supplies or services, or new work is a logical follow-on to an original FSS order, respectively, the ordering activity shall post the justification within 14 days after placing an order in accordance with FAR 5.301.

[8] See 16.505(b)(2)(ii)(A).
[9] FAR 16.505(b)(2)(ii)(C).

- To support circumstances described at FAR 16.505(b)(2)(i)(A) an urgent and compelling need exists and would result in unacceptable delay, the ordering activity shall post the justification within 30 days after placing an order in accordance with FAR 5.301.

In order to post an exception to fair opportunity justification on the www.fedbizopps.gov website, this website has a notice type called "Justification & Approval (J&A)" at the Opportunities section. Within DOE only the designated contracting activity personnel are allowed to post to the www.fedbizopps.gov website the standalone exception to fair opportunity justification. Note: The designated DOE personnel are not allowed to delete/modify a posted exception to fair opportunity justification. The Office of Contract Management, Systems Division (MA-623) should be contacted for assistance.

The HCA shall ensure that each exception to fair opportunity justification document is redacted, as appropriate, and posted to the website at www.fedbizopps.gov. The CO shall carefully screen an exception to fair opportunity justification for all contractor proprietary and other sensitive data and remove it if such data exists, including such references and citations as are necessary to protect the proprietary data, before making the justifications available for public inspection. Also, the CO shall be guided by the exemptions to disclosure of information contained in the Freedom of Information Act (5 U.S.C. 552) and the prohibitions against disclosure in FAR 24.202 in determining whether other data should be removed. Before posting the justification, the CO shall coordinate the redacted justification as needed with the local Counsel's Office and the local FOIA officer.

The posting requirement does not apply when disclosure would compromise the national security (e.g., would result in disclosure of classified information) or create other security risks. The fact that access to classified matter may be necessary to submit a proposal or perform the contract does not, in itself, justify use of this exception.

2.5.11 Contractor Performance. A termination for default on a delivery or task order is reported into the Federal Awardee Performance and Integrity Information System (FAPIIS). In accordance with FAR 42.1503(h) and DOE Acquisition Guide Chapter 42.16, the CO shall ensure that information related to termination for default notices and any amendments are reported within 3 business days into FAPIIS. This includes reporting any subsequent notice of the conversion to a termination for convenience or withdrawal.

For each order exceeding the simplified acquisition threshold, the ordering activity must prepare an evaluation of the contractor's performance using the Contractor Performance Assessment Reporting System (CPARS). This evaluation does not include an assessment of the contractor's performance against the contractor's small business subcontracting plan. Consolidation of the evaluation is appropriate if orders are similar in scope. See FAR 42.1502(c).

b e te t

CHAPTER 17 - SPECIAL CONTRACTING METHODS

17 1 ter e t ter e r t ter e reeme t e 2012
17 1 tt me t 1 e ter e t e 200
17 1 tt me t 2 e e e September 2011
17 1 tt me t S te t rt pr 2012
17 1 tt me t S te t rt pr 2012
17 1 tt me t S ter e r t rt pr 2012
17 1 tt me t S ter e r t rt pr 2012
17 1 tt me t S S er rm S mp e
17 02 r r ter t S e eme t per t rm tr t
ebr r 2017

Interagency Acquisitions, Interagency Transactions, and Interagency Agreements

Guiding Principles

This chapter provides guidance on interagency acquisitions, interagency transactions and interagency agreements

In addition to interagency acquisitions authorized by the Economy Act, Federal Acquisition Regulation (FAR) 17.5 is revised to broaden the scope of coverage to address all Interagency Acquisitions to include orders over $500,000 issued against Federal Supply Schedules.

Determination of best procurement approach is required for an assisted acquisition or a direct acquisition. The analysis is different for these two determinations.

An assisted acquisition requires a written interagency agreement to include any agency unique terms, conditions, statutes, regulations directives, etc. The agreement shall include roles and responsibilities for acquisition planning, contract execution, and administration and management of the contract or order(s).

Funds out assisted acquisition or interagency transaction require the approval of the DOE Contracting Officer. Use STRIPES templates for Part A and Part B found in the requisition and clause sections of STRIPES. STRIPES will generate the interagency agreement number.

Funds in assisted acquisition or interagency transaction require the approval of the DOE Contracting Officer.

TABLE OF CONTENTS

A. Purpose

B. Applicability.

C. Exclusions.

D. Overview of Interagency Acquisitions, Interagency Transactions and Interagency Agreements.

1. Interagency Acquisitions.
- a. Acquisition planning.
- b. General.
- c. Types of Interagency Acquisitions.
  - i. Direct acquisition.
  - ii. Assisted acquisition.
- d. Fees.

e. Statutory Changes to Interagency Acquisitions.
f. Business Case Analysis.

2. Interagency Transactions.

3. Interagency Agreements.
a. General.
b. Interagency acquisitions.
c. Interagency transactions.
d. Creation and format for interagency agreement in STRIPES.
i. Funds out.
ii. Funds in.
e. Optional form.
f. Statutory Authorities for Interagency Agreements.
i. Economy Act.
ii. Federal Supply Schedule Program.
iii. Government wide acquisition contracts.
iv. Franchise funds.

E. The Process When DOE is the Requesting Agency Including Funds Out.

1. Identifying the requirement.

2. Initiating the requisition.

3. Processing the requisition for an interagency acquisition or interagency transaction.
a. Interagency Acquisitions – Direct Acquisitions.
i. Direct acquisition.
ii. Additional guidance for direct acquisition.
(1) Contract vehicles under other programs.
(2) Federal Supply Schedules (FSS) Direct Ordering.
(3) Government wide Acquisition Contracts (GWAC) Direct Ordering
b. Interagency Acquisitions – Assisted Acquisitions – Funds Out.
c. Interagency Transactions – Funds Out.

F. The Process When DOE is the Servicing Agency for Funds In.

1. General.

2. Funds in interagency assisted acquisition.

3. Funds in interagency transaction.

G. Interagency Agreements.

1. General information.
a. Part A.
b. Part B.

2. Interagency agreement format and samples.
a. STRIPES IA funds out templates for interagency assisted acquisitions and interagency transactions.
i. Part A, Funds Out, General terms and conditions

ii. Part B, Funds Out, Requirements and funding information.

b. IA funds in for interagency assisted acquisitions and interagency transactions.

c. Other samples and checklist for interagency assisted acquisitions.

3. Preparing the interagency agreement when DOE is the Requesting Agency (funds out).

a. DOE Requisitioner.

b. DOE Contracting Officer.

4. Reviewing the interagency agreement when DOE is the Servicing Agency (funds in).

H. References.

I. Points of Contact.

J. Attachments.

K. Acronyms.

A. Purpose.

1. This chapter provides an overview and guidance on interagency acquisitions, interagency transactions, and interagency agreements. It provides an explanation of each type of interagency action and the process to execute the action appropriately. Acquisition planning will determine whether the requirement will be fulfilled by one of the following actions:

a. A Department of Energy (DOE) existing or new contract vehicle;

b. An interagency acquisition using another agency's contract vehicle either as a direct acquisition or an assisted acquisition; or

c. An interagency business transaction, referred to in this chapter as an interagency transaction, using another agency's internal resources or activities to fulfill the requirement.

2. When acquisition planning determines it is appropriate to support or fulfill the requirement through an interagency acquisition or interagency transaction, then one of the three actions will be used to execute the requirement. The action will be a interagency direct acquisition (herein referred to as a direct acquisition), an interagency assisted acquisition, or an interagency transaction. This chapter describes --

a. The process when DOE is the requesting agency to include funds out;

b. The process when DOE is the servicing agency for funds in; and

c. How to prepare an interagency agreement for an interagency assisted acquisition or an interagency transaction to establish –

i. The general terms and conditions;

ii. Other unique terms and conditions; and

iii. Requirements and funding information.

3. This chapter provides guidance to the DOE and National Nuclear Security Administration (NNSA) Contracting Activities to –

a. Help in the preparation, review, documentation, and management of an interagency acquisition (direct or assisted), interagency transaction, and an interagency agreement; and

b. Assist DOE as the requesting agency or as the servicing agency to manage the shared fiduciary responsibilities for these interagency acquisitions or interagency transactions with another Federal agency.

B. Applicability.

This chapter applies to all DOE and NNSA contracting activities. It provides DOE and NNSA Contracting Officers [herein referred to as DOE Contracting Officers (CO)] guidance on the following--

1. Interagency acquisitions for the primary purpose of obtaining supplies or services through either an interagency assisted acquisition or a direct acquisition conducted through indefinite-delivery contracts to include task- and delivery-orders;

2. Interagency transactions that use another agency's internal resources and is a reimbursable activity; and

3. Interagency agreements that are required for an interagency assisted acquisition or an interagency transaction.

C. Exclusions.

DOE's Work for Others program is excluded from this DOE Acquisition Guide Chapter. DEAR 970.1707-3 states that DOE's internal review and approval procedural requirements for individual work for others agreements are set forth in DOE Order 481.1C (as supplemented by DOE Manual 481.1–1A for agreements with non-Federal entities), its successor, and such other guidance as may be issued by DOE.

Power Marketing Administration's activities performed under its power marketing authority, policies, and procedures are excluded from this DOE Acquisition Guide Chapter.

D. Overview of Interagency Acquisitions, Interagency Transactions and Interagency Agreements.

1. **Interagency Acquisitions.**

a. **Acquisition planning.** Acquisition planning determines how a requirement will be procured. FAR Subpart 7.1 – Acquisition Plans and DOE Acquisition Guide Chapter 7.1 - Acquisition Planning, provide policy, procedures and guidance. Acquisition planning requires market research to identify potential sources for the requirement. This research includes General Services Administration's (GSA) Federal Supply Schedules (FSS), Governmentwide Acquisition Contracts (GWAC), Agency-wide multiple-award contracts, established blanket purchase agreements or basic ordering agreements, governmentwide database of contracts, etc. The pre-award file should document this research and summarize the results. The dollar value of the action will determine the extent of and how this research is documented during acquisition planning.

Whether the procurement is for a funds out or a funds in requirement, acquisition planning needs to be performed. If it is a funds out requirement, DOE performs the initial acquisition planning; later DOE may be involved in the servicing agency's acquisition planning for the DOE

requirement. If it is a funds in requirement, the requesting agency performs the initial acquisition planning; then DOE should request a copy of the requesting agency's acquisition plan to support DOE's acquisition planning.

b. **General.** Interagency acquisitions offer important benefits to DOE, including economies and efficiencies and the ability to leverage resources. Interagency acquisitions will result in a FAR contract action, either as a direct or an assisted acquisition. FAR Subpart 17.5 - Interagency Acquisitions applies to all interagency acquisitions under any authority, except for orders of $500,000 or less issued against FSS. An assisted acquisition requires an interagency agreement. **Note**: *Interagency acquisitions are commonly conducted through indefinite delivery contracts (IDCs) or indefinite delivery vehicles (IDVs), such as task- and delivery- order contracts. Those IDCs or IDVs used most frequently in support of interagency acquisitions are FSS, GWACs, and multi-agency contracts (MACs).*

c. **Types of Interagency Acquisitions.** An interagency acquisition means a procedure by which an agency needing supplies or services (the requesting agency) obtains them from another agency (the servicing agency). These supplies or services may be accomplished either by issuing an order directly against another agency's contract, or by requesting the acquisition assistance of another agency. This interagency relationship involves two Federal agencies that enter into a relationship for the purpose of contracting under an "**assisted**" or "**direct"** acquisition, described as follows:

i. A "**direct acquisition**" is a type of interagency acquisition where the requesting agency places an order directly against the servicing agency's IDC. The servicing agency manages the IDC but does not participate in the placement or administration of an order.

ii. An "**assisted acquisition**" is a type of interagency acquisition where the servicing agency and requesting agency enter into a written interagency agreement pursuant to which the servicing agency performs acquisition activities on the requesting agency's behalf, such as the awarding of a contract, task order, or delivery order.

d. **Fees.** The servicing agency may charge a "fee for service" which may be a percentage of the contract value or itemized charges from a menu of services. Direct acquisitions allow for the requesting agency to order against existing contract vehicles created for government-wide use. Direct orders will have vehicle access fees, sometimes referred to as the industrial funding fee. Industrial funding fees may be incorporated into the contractor's rates under GSA's FSS and Executive Agency GWACs.

e. **Statutory Changes to Interagency Acquisitions**. FAR Subpart 17.5 - Interagency Acquisitions implements Section 865 of the Duncan Hunter National Defense Authorization Act (NDAA) for Fiscal Year 2009, (Pub.L. 110-417). The statute changes FAR Subpart 17.5 - Interagency Acquisitions by:

i. Broadening the scope of coverage to address all interagency acquisitions (with limited exceptions), rather than just those conducted under the Economy Act, in recognition

that an increasing number of interagency acquisitions are conducted under other authorities.

ii. Requiring agencies to support the decision to use an interagency acquisition with a determination that such action is the "best procurement approach."

iii. Directing that assisted acquisitions be accompanied by written agreements between the requesting agency and the servicing agency documenting the roles and responsibilities of the respective parties, including the planning, execution, and administration of the contract.

iv. Requiring the development of a business case to support the creation of a multi-agency or agency specific acquisition vehicle. See D.1.e. for expanded business case analysis requirements for a covered multi-agency contract or multi-agency blanket purchase agreement (BPA) and for a covered agency-specific contract or agency-specific BPA.

v. Requiring the Senior Procurement Executive for each executive agency to submit an annual report on interagency acquisitions to the Director of the Office of Management and Budget, in accordance with Section 865 (c) of Pub. L. 110-417.

f. **Business Case Analysis**.

i. Office of Federal Procurement Policy's (OFPP) memorandum, dated September 29, 2011, *Development, Review and Approval of Business Cases for Certain Interagency and Agency-Specific Acquisitions,* outlines required elements of business case analysis as well as a process for developing, reviewing, and approving business cases to support the establishment and renewal of GWACs, certain multi-agency contracts, certain agency-specific contracts, or agency-specific BPAs. A copy of this OFPP memorandum is available in Section J - attachment 2a of this chapter or at: http://www.whitehouse.gov/omb/procurement_index_interagency_acq/.

ii. A Federal Agency is required to develop a business case and share the draft business case with other agencies and to consider other agency feedback for certain multi-agency and agency-specific acquisition vehicles. The business case analysis applies to certain multi-agency contract or multi-agency BPA and for certain agency-specific contract or agency-specific BPA, when one of these types of actions would create a significant usage or significant overlap between the scope of the proposed acquisition and the scope of existing contracts or agreements established under the Federal Strategic Sourcing Initiative (FSSI), GSA SmartBUY Program, or an existing GWAC. Specifically, a business case is required for --

(1) Multi-agency contracts, as defined in FAR 2.101, or a multi-agency BPA created under the FSS Program, where –

(a) Usage by another agency (i.e., interagency usage) is expected to be significant, (i.e. when obligations by customers outside of the awarding

agency are anticipated to exceed 25% or total obligations over the life of the contract vehicle); or

(b) Interagency usage is not expected to be significant, but where a significant overlap (i.e., obligations for the supplies and/or services are anticipated to exceed 25% of total obligations over the life of the proposed acquisition) would be created between the scope of the proposed acquisition and the scope of existing contracts or agreements established under the FSSI, GSA's SmartBUY Program or an existing GWAC; or

(2) Agency-specific vehicles when the vehicle will create a significant overlap of existing contracts (i.e., obligations for the supplies and/or services are anticipated to exceed 25% of total obligations over the life of the proposed acquisition) would be created between the scope of the proposed acquisition and the scope of existing contracts or agreements established under the FSSI, GSA's SmartBUY Program or an existing GWAC. Agency-specific vehicles are either indefinite-delivery, indefinite quantity contracts, or BPAs intended for the use of your contracting activity, DOE, or another Federal Agency.

iii. When the contracting activity is planning a multi-agency contract or multi-agency BPA or an agency-specific contract or agency-specific BPA, which will create a significant usage or significant overlap of existing contracts (as described above) and will be equal to or greater than the thresholds and within the time periods described below, then a business case analysis is required.

Fiscal Year	Dollar Threshold	Anticipated Solicitation Release Date
2012	$250 million	January 1, 2012
2013	$100 million	October 1, 2012
2014	$ 50 million	October 1, 2013

iv. The business case analysis content shall –

(1) Consider strategies for the effective participation of small businesses during acquisition planning;

(2) Detail the administration of such contract, including an analysis of all direct and indirect costs to the Government of awarding and administering such contract;

(3) Describe the impact such contract will have on the ability of the Government to leverage its purchasing power, e.g., will it have a negative effect because it dilutes other existing contracts;

(4) Include an analysis concluding that there is a need for establishing the contract; and

(5) Document roles and responsibilities in the administration of the contract.

v. MAX Information system.

(1) In order to post a business case or be given an opportunity as a federal stakeholder to comment on another Federal Agency's business case, the contracting office will need at least one person to register for a MAX account. To sign up for alerts about another Federal Agency's business case, at the MAX business case page go to https://max.omb.gov/community/x/b5G8IQ by clicking the **Watchers** button in the upper-right hand corner of the page.

(2) The MAX Information System is used to support OMB's Federal management and budget processes. MAX is a comprehensive collaboration, information sharing, document management, and knowledge management capability that allows registered users to easily create, edit, and share content on web pages using a simplified markup language. To register with MAX, complete the information requested at https://max.omb.gov/maxportal/registrationForm.action. Information about available MAX training can be found at https://max.omb.gov/maxportal/. The MAX technical support team and helpdesk can be reached at MAXSupport@omb.eop.gov or 202-395-6860.

vi. Business case – developing, reviewing and approving.

(1) Follow the OFPP guidance and business case template on the four-step process to develop, review and approve the business case. Step 1 – Prepare a preliminary business case. Step 2 – Post preliminary business case on MAX. Step 3 – Make a determination. Step 4 – Cancel or finalize the business case. Go to page 3 of the OFPP guidance which is Section J - attachment 2a to this chapter or on the web at: http://www.whitehouse.gov/omb/procurement_index_interagency_acq/. Also, to further assist agencies, OFPP developed a set of frequently asked questions (FAQs) regarding the new process outlined in the memorandum. The FAQs are intended to reinforce certain important points (e.g., the ultimate discretion to proceed with a proposed acquisition remains with the servicing agency) and provide additional information on several issues that were raised during the development of the guidance. The FAQs are in Section J - attachment 2b, or on the web at https://max.omb.gov/community/x/b5G8IQ.

(2) Before proceeding to Step 2 – Post preliminary business case on MAX, the Head of the Contracting Activity (HCA) shall review and approve the preliminary business case prior to posting it on MAX.

(3) After reviewing and documenting the feedback, if the decision is to finalize the business case, forward the business case, to include HCA recommendation and contracting activity legal counsel concurrence, and related acquisition documents to either of the following: for DOE procurements to the Office of Contract Management

(MA-62) or for NNSA procurements to the Director, Office of Acquisition and Supply Management (NA-APM-10), in accordance with Acquisition Chapter 71.1 and local review procedures. Ensure that you have provided a notice to these offices that this action will be coming for review and approval. The business case shall be approved by the applicable Senior Procurement Executive and kept in the contract file. Whether the business case has been approved or canceled, the contracting activity shall indicate this status on MAX.

2. **Interagency Transactions.**

An interagency transaction is an intra-governmental transaction when the servicing agency uses internal resources to support the requesting agency requirement and is a reimbursable activity that requires an interagency agreement.

3. **Interagency Agreements.**

a. **General.** The servicing agency and requesting agency enter into an interagency agreement pursuant to the servicing agency performing activities or contracting on behalf of the requesting agency. An interagency agreement must state the specific statutory authority that authorizes the agreement. In accordance with the applicable statutory authority and implementing regulation(s), the head of the requesting agency, or designee, determines and documents in writing that it is in the Government's best interest to do so.

An interagency agreement is required for an interagency assisted acquisition and an interagency transaction. The interagency agreement is very similar to an indefinite-delivery/indefinite-quantity contract vehicle, except it is between two agencies – one is the requesting agency and the other is the servicing agency. The interagency agreement serves as a master agreement with at least one or more orders or actions being issued against the agreement.

Whether the requesting agency's requirement results in an interagency assisted acquisition or an interagency transaction, a written interagency agreement will be required to establish general terms, conditions, fees, administration, management, ordering requirements, and funding information. For interagency assisted acquisitions, these assisted acquisitions will result in awarding a contract, task order, or delivery order. For interagency transactions, these transactions will result in the servicing agency using their internal resources to perform the activity for the requesting agency.

To the extent feasible, electronic media should be used -- (1) in creating and executing the interagency agreement; (2) to notify DOE's Energy Finance and Accounting Service Center or DOE's other Chief Financial Officer Field Offices, as applicable, of the obligation of funds; and (3) by the servicing agency to submit reports. The requirement for a signature on the part of the servicing agency approving official to evidence acceptance may be met using facsimile or electronic systems.

b. **Interagency acquisitions.** For interagency acquisitions, FAR Subpart 17.5 and

the Office of Federal Procurement Policy (OFPP) guidance, "Interagency Acquisitions," provide guidance to DOE COs on how to conduct an interagency acquisition and how to structure and format an interagency agreement for assisted acquisitions. See next paragraph for the White House website address to access OFPP guidance.

All DOE COs must ensure that any direct acquisition or assisted acquisition procurement action in excess of $500,000 is supported with a determination of best procurement approach as prescribed at FAR 17.502-1 and supplemented by the OFPP guidance. The OFPP guidance addresses "best procurement approach" as a "best interest determination." A copy of this OFPP guidance is in Section J - attachment 1 of this guide chapter and is available at: http://georgewbush-whitehouse.archives.gov/omb/procurement/index_interagency_acq.html.

To create the interagency agreement, the Strategic Integrated Procurement Enterprise System (STRIPES**)** has two interagency agreement (IA) templates one for Part A, General Terms and Conditions, and another for Part B, Requirements and Funding Information. Use STRIPES IA templates to prepare an interagency agreement for an interagency assisted acquisition. It is based on the elements enumerated in Appendix 2 of the OFPP guidance. For a sample, Appendix 3 of the OFPP guidance provides a model agreement. See paragraph D.3.d. below for guidance to create and format the interagency agreement.

The Senior Procurement Executive(s) shall submit an annual report on interagency acquisitions to the Director of OMB in accordance with Section 865(c) of Pub.L. 110-417 and FAR 17.504 – Reporting requirements. OMB will provide the details of the annual report. If information is required from the Contracting Activities, a request will be issued.

c. **Interagency transactions.** Interagency transactions are executed in accordance with theTreasury Financial Manual, Intragovernmental Business Rules, Appendix 10 and DOE's Financial Management Handbook. Consult with either DOE's Energy Finance and Accounting Service Center or DOE's other Chief Financial Officer Field Offices, as applicable, to assist in the preparation and execution of an interagency transaction. To find a copy of these references, go to section H - References for website addresses.

d. **Creation and format for interagency agreement in STRIPES.** Creation and format of an interagency agreement will depend on whether the requirement is for DOE's requirement as a requesting agency (funds out), or for another agency's requirement when DOE is the servicing agency (funds in).

i. **Funds out.**

(1) Funds out assisted acquisition or interagency transaction ***must be created in STRIPES*** and requires the approval of the DOE CO. Use STRIPES funds out templates for Part A and Part B found in the requisition and clause sections of STRIPES. When DOE is the requesting agency, there will be an interagency agreement identified by a STRIPES created number. Use the STRIPES interagency agreement number to identify the interagency agreement. There will be ***no*** DOE order number or DOE contract number.

(2) Section G.1 provides general information on preparing an interagency agreement. Section G.2 provides funds out information. Section J attachment 3 has samples of these IA funds out templates.

(3) See STRIPES, User Guide 9, Creating an Interagency Agreement, for details. The user guide is being revised to reflect these changes. When the guide is ready, the STRIPES Training Team will send a notice to the user community. This guide will describe the process for creating an interagency agreement in STRIPES. The guide will explain the specific processing requirement for a funds out assisted acquisition or a funds out interagency transaction.

ii. **Funds in.**

(1) Funds in assisted acquisition or interagency transaction require the approval of the DOE Contracting Officer. When DOE is the servicing agency, the interagency agreement and number is not created in STRIPES. The requesting agency will prepare the interagency agreement and provide the interagency agreement number. If the other agency's requirement will result in the award of a DOE contract, delivery/task order, or purchase order, the requirement will be processed like any other contract, delivery/task order, or purchase order. In the text section of the DOE procurement document, enter the other agency's interagency agreement number in the header text and maintain a copy of the agreement in the contract file.

(2) Section G.1 describes what general information is in an interagency agreement. The requesting agency prepares the agreement. Before accepting the agreement, the DOE CO ensures the agreement is complete and accurate, see Section G.4.

e. **Optional form.** There is an optional Financial Management Service (FMS) form available for a standard Interagency Agreement (IAA). The form numbers are FMS 7600A and FMS 7600B. At this time, an adobe PDF fillable form is available for use at http://www.fms.treas.gov/finstandard/forms.html. The form is optional. If there is any change in the forms use, DOE will issue guidance and update this chapter regarding DOE's implementation and use of the FMS IAA form. For funds out, in the event the other agency insists on using the standard form FMS 7600A and FMS 7600B, the form should be completed outside of STRIPES, then scanned and included as an attachment to the STRIPES award.

f. **Statutory Authorities for Interagency Agreements.** Statutory authority for conducting an interagency acquisition or an interagency transaction can occur under different statutory authorities. The interagency agreement must state the applicable statutory authority. Some of the authorities include, but are not limited to:

i. **Economy Act.** The Economy Act of 1932, 31 U.S.C. 1535, provides general authority for interagency acquisitions or interagency transactions that are available to agencies when more specific statutory authority does not exist.

ii. **Federal Supply Schedule Program.** The Federal Property and Administrative Services Act of 1949, 40 U.S.C. 501, as amended by the Office of Federal Procurement Policy

Act of 1974, underlying the Federal Supply Schedules (FSS), also known as the GSA Schedules or Multiple Award Schedules (MAS), is the primary statutory authority for FSS program. GSA has statutory authority to enter into contracts for government-wide use. GSA is the indefinite-delivery vehicle (IDV) Owner of the FSS contracts. Each schedule in FSS has specific supplies or specialized services that IDV Users can acquire through direct orders.

iii. **Governmentwide acquisition contracts.** The Information Technology Management Reform Act of 1996, 40 U.S.C. 11302(e), also known as the Clinger-Cohen Act, authorizes governmentwide acquisition contracts (GWACs). A GWAC is a multiple-award contract issued by one agency, which may be used by other agencies, to place direct or assisted orders 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 six agencies as executive agents for GWACs: GSA, National Institutes of Health, National Aeronautics and Space Administration, Environmental Protection Agency, Department of Defense, and Department of Commerce.

iv. **Franchise funds**. The Government Management Reform Act of 1994 and other authorities created franchise funds and authorized interagency transactions. Franchise Funds under31 U.S.C. 501are not contracting vehicles; however, such funds play a prominent role in interagency actions. A franchise fund is a type of intragovernmental revolving fund designed to compete with similar funds of other agencies to provide common administrative services, e.g., accounting, financial management, information resources management, personnel, contracting, payroll, security, and training. The agency with the franchise fund is authorized to charge fees for services and retain funds to create an operating reserve.

E. The Process When DOE is the Requesting Agency Including Funds Out.

1. Identifying the requirement.

When DOE is the requesting agency, the project manager (or equivalent) in collaboration with the DOE CO, is the designated planner to identify the requirement and commence acquisition planning. The use of an interagency acquisition is an additional consideration but not a substitute for acquisition planning (see D.1.a above). The DOE CO must work with the requiring program official during the acquisition planning stage in order to determine the best contract vehicle that will satisfy their needs and comply with applicable laws, regulations, policies and procedures. When considering all the alternatives, selecting another agency's contract or going to another agency to award a new contract shall not be used to circumvent DOE policies and procedures (e.g. small business, competition and performance-based acquisition).

DOE Program Officials are prohibited from entering into an interagency acquisition or interagency transaction in any dollar amount without the approval and signature of a DOE CO on the interagency agreement.

When it has been decided to use a franchise fund organization assisted order to provide support for the DOE requirement which may include procurement support services, the franchise fund organization shall not be used to obtain acquisition management services unless approved by the HCA, with notice to the Senior Procurement Executive. As in the case of other non-DOE interagency transactions, franchise fund organizations may not be used to circumvent DOE policies or regulations. If circumstances permit and the proper approval has been granted, an assisted order may be placed using a franchise fund organization. All services to be provided by a franchise fund organization must be obtained through an interagency agreement, comprised of a fully outlined and detailed Part A and Part B.

2. **Initiating the requisition.**

The requisitioner prepares the requisition for an interagency acquisition or an interagency transaction in STRIPES or an approved system. In STRIPES, the requisition type must be "Requisition Package." The requisition document includes the following:

a. Approved requisition.

b. An independent government cost estimate for the total project.

c. A description of the supply, or if it is a service, a statement of work along with delivery or performance schedule (or references thereto).

d. Identification and information for any special requirements, management, administration, technical representative, reporting requirements for scientific and technical information (Guide Chapter 35.1), acceptance and completion as needed.

e. Information to support determination of best procurement approach:

i. For an assisted acquisition, refer to FAR 17.502-1(a)(1).

ii. For a direct acquisition, refer to FAR 17.502-1(a)(2).

f. For Economy Act Authority, provide a justification to support the statutory and regulatory requirements.

i. For a FAR acquisition, provide the information to support the determinations and findings (D&F) required by FAR 17.502-2.

ii. For an interagency transaction, provide the information to support this authority. At a minimum, this information should document the required goods or services to include if — (1) amounts are available; (2) the order is in the best interest of the United States Government; (3) the agency to fill the order is able to provide or get by contract the ordered goods or services; and (4) the ordered goods or services

cannot be provided by contract as conveniently or cheaply by a commercial enterprise.

g. If the requirement is either an interagency assisted acquisition or an interagency transaction, a completed IA part B in STRIPES (prepared with the assistance of the Servicing Agency) and the DOE CO, is needed. For additional guidance to prepare this part, see Section G on preparing an interagency agreement in this chapter.

3. **Processing the requisition for an interagency acquisition or interagency transaction.**

a. **Interagency Acquisitions – Direct Acquisitions.**

i. For a **direct acquisition**, there is no interagency agreement. The **DOE CO** shall:

(1) Review the requisition and related documents.

(2) Based on the results of DOE's acquisition planning, when it has been determined to execute the requisition as a direct acquisition, prepare and approve the determination of best procurement approach in accordance with FAR 17.502-1(a)(2) for the procurement file. At a minimum, this determination must ensure that the action is in the best interests of the government, taking into account suitability, value, and expertise to properly place and to effectively administer the order. For additional information which may be useful in supporting the determination, see Section H – References for the OFPP guidance, go to page 4 of the OFPP document.

(3) Ensure the file documents the statutory authority for the direct acquisition.

(a) FSS or GWAC authorities will mostly like be one of the authorities for the direct acquisition. See paragraph E.3.a.ii in this section for additional guidance for direct acquisition for FSS or GWAC.

(b) If there is no other statutory authority for the direct acquisition, it may be authorized under the Economy Act. If applicable, prepare the D&F required in accordance with FAR 17.502-2.

(4) If the requirement is limiting sources (FAR 8.405-6) or is an exception to fair opportunity (FAR 16.505(b)(2)(i)) and the requirement is waived in accordance with FAR 16.505(b)(2)(ii)(B), prepare the justification to document these circumstances, seek approval at the appropriate dollar threshold, and post the documentation as required.

(5) Place the order as follows:

(a) In accordance with the FAR, specifically FAR 17.503 and all other applicable FAR parts, e.g., FAR Subparts 7.5, 8.4, or 16.5;

(b) In accordance with the identified contract ordering procedures; and

(c) Add any special or unique DOE terms and conditions to include scientific and technical information reporting requirements (Guide Chapter 35.1).

(6) Provide management and administration of the order to include designating a Contracting Officer's Representative (COR), and evaluating and reporting contractor performance information in accordance with FAR Subpart 42.15 and related DOE Acquisition Guide Chapters 42.15 and 42.16.

ii. Additional guidance for direct acquisition.

(1) **Contract vehicles under other programs.** An agency may presume that direct acquisitions made by qualified individuals are in the best interests of the government if the vehicle was established under the Federal Strategic Sourcing Initiative (FSSI), the SmartBuy Program, the Federal Supply Schedules Program (for orders of $500,000 or less), or is a GWAC operating pursuant to Executive Agency designations granted by OMB under the Clinger-Cohen Act. However, documentation in the contract file should still establish that the acquisition vehicle is suitable for the agency's needs. This information could be documented as part of the agency's acquisition planning documents. A formal Determination and Finding (D&F) is not required for the programs described above.

(2) **Federal Supply Schedules (FSS) Direct Ordering.** When placing a direct order in excess of $500,000 under FSS, the DOE CO must comply with the procedures in FAR Part 8.4 – Federal Supply Schedules, DOE Acquisition Guide Chapter 8.4 - Federal Supply Schedule, and the policies in this chapter. All task or delivery orders issued under FSS shall be signed by the DOE CO. Only the DOE CO may place an order against the FSS for supplies or services listed on the vendor's schedule contract. The DOE CO shall not include services or supplies (referred to as "open market") outside the scope of the Schedule contract in the order, until they have complied with the applicable regulations for competition under the FAR. The GSA has additional instructions and information for use of the schedules at www.gsa.gov.

(a) To ensure that FSS orders are issued properly, the DOE CO shall:

(i) Ensure and document that the use of FSS is in conformance with DOE policy and regulation (i.e., socio-economic goals, price reasonableness, etc.).

(ii) Review the schedule contract's statement of work (SOW) and other applicable contractual documents and validate that the supplies or services requested are within the scope of that schedule. Document the review and, if the order is in excess of $500,000, the best procurement approach determination in writing as part of the agency's planning document. A formal D&F format is not required. Supplies or services that are outside of the

vendor's negotiated schedule are "open market" items and cannot be purchased using the FSS procedures; instead, they can only be included on the order after complying with the applicable procurement laws and regulations, including those requiring the use of competitive procedures.

(iii) Review the ordering procedures posted on the schedule website. Seek and document advise from the cognizant GSA CO on proper use of the FSS whenever an issue is in doubt.

(iv) Review follow-on task orders to ensure that they remain within the scope of the schedule.

(v) Comply with the specific requirements of the FSS, including those for competitive tasking, consistent with the scope of work, and use of the instruments for a specific and not overly broad or undefined purpose.

(vi) Ensure that the FSS contract labor categories are the proper equivalent (mapped) for the labor categories required by the Request For Quote (RFQ). "Mapped" is a term that describes the offeror's proposed rates and labor categories derived from an applicable GSA Schedule. Always seek a price reduction from the vendor.

(vii) Designate a DOE COR, as applicable, and verify that the COR is qualified under DOE Order 361.1B - Acquisition Career Management Program.

(viii) Document a price reasonableness determination. It must reflect the exact mix of labor and other elements needed to perform the work or item being procured.

(ix) Report timely and accurate data in connection with the order in Federal Awardee Performance and Integrity Information System (FAPIIS), as applicable, and Federal Procurement Data System (FPDS).

(x) Perform contract administration duties to include quality assurance planning, contract surveillance, voucher examination, and past performance data collection and reporting.

(3) **Governmentwide Acquisition Contracts (GWAC) Direct Ordering.**

(a) When placing a GWAC order, the DOE CO must comply with the procedures in FAR Subpart 16.5 – Indefinite-Delivery Contracts, DOE Acquisition Guide Chapter 16.5 - Multiple-Award Contracts and Governmentwide Acquisition Contracts Including Delivery Orders and Task Orders, and the policies in this chapter. All GWAC task or delivery orders shall be signed by the DOE CO.

(b) The DOE CO is reminded to take the actions listed below when placing a direct order:

(i) Obtain a copy of the SOW and other applicable contractual documents and validate that the services requested are within the scope of that GWAC. Document the review and, if the order is in excess of $500,000, document the best procurement approach determination in writing as part of the agency's planning document. A formal D&F format is not required.

(ii) Review the ordering procedures posted on the agency's website and complete any mandatory training. Follow the instructions for attaining a delegation when it is required.

(iii) Place only orders that comply with all DOE regulations, policies and procedures. The DOE CO must pay particular attention to complying with performance-based and socioeconomic policies, and the procedures prescribed in the GWAC for providing a fair opportunity to all GWAC contractors.

(iv) Designate a DOE COR and verify that the COR is qualified under DOE Order 361.1B - Acquisition Career Management Program.

(v) Document the price reasonableness determination. It must reflect the exact mix of labor and other elements needed to perform the work or item being procured.

(vi) Report timely and accurate data in connection with the order in FAPIIS, as applicable, and FPDS.

(vii) Perform contract administration duties to include quality assurance planning, contract surveillance, voucher examination, and past performance data collection and reporting.

b. **Interagency Acquisitions - Assisted Acquisitions – Funds Out.**

i. For **funds out interagency assisted acquisition**, the DOE CO shall:

(1) Review the requisition, related documents, and draft IA Part B.

(2) Based on the results of DOE's acquisition planning, when it has been determined to execute the requisition as an interagency assisted acquisition, prepare and approve the determination of best procurement approach in accordance with FAR 17.502-1(a)(1) and provide a copy to the servicing agency. OFPP guidance on interagency acquisitions, listed as a reference in Section H, provides additional information useful in supporting the determination. If this is an Economy Act order, prepare and approve the D&F in accordance with FAR 17.502-2.

(3) Ensure DOE provides any information needed to support a justification for other than full and open competition or any other D&F, except for those required by the Economy Act, as stated in E.3.b.i.(2) above, to the Servicing Agency's CO.

(4) Formally request a proposal from the servicing agency, if an acceptable one was not enclosed with the requisition. As needed, the DOE CO coordinates any new proposal or revisions with the program office and pricing staff, to develop a negotiation position and seeks support from the program office, finance office, or local legal counsel as required during the negotiation process. Request that before the servicing agency finalizes its acquisition plan, contract type, the statement of work, statement of objectives, performance work statement or specifications, as applicable that DOE be given an opportunity to concur.

(5) Use STRIPES IA templates to create the interagency agreement. STRIPES will create the interagency agreement number. (See paragraph D.3.d.i. for additional information). Assist in the preparation of the written interagency agreement, in coordination with the requisitioner and the servicing agency, in accordance with FAR 17.502-1(b) and of any special contract terms and conditions that may be needed in order for the servicing agency's contract action to comply with any condition or limitation applicable to the DOE program's funds, or unique DOE terms and conditions to include scientific and technical information reporting requirements (DOE Acquisition Guide Chapter 35.1). Ensure the agreement addresses contract management and administration responsibilities to include designating a COR. For additional guidance to prepare the agreement, see Section G of this chapter.

(6) Negotiations with the servicing agency are documented in the file. The file should also document verification steps taken to assure adequate contract administration (including allowability of contractor costs) in cases where the servicing agency is not subject to the FAR.

c. **Interagency Transactions – Funds Out.**

i. For a **funds out interagency transaction**, the **DOE CO** shall:

(1) Review the requisition, related documents, and the draft IA Part B.

(2) Prepare and approve any other document necessary to support the statutory authority. If the Economy Act is the authority, at a minimum, this document should state the required goods or services to include if: amounts are available; the order is in the best interest of the United States Government; the agency to fill the order is able to provide or get by contract the ordered goods or services; and the ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise. The preference is to follow the FAR D&F format at FAR 1.7.

(3) Formally request a proposal from the servicing agency, if an acceptable one was not enclosed with the requisition. As needed, coordinate any new proposal or revisions with the program office and pricing staff, and when developing a negotiation position, seek support from the program office, finance office, or legal counsel as required during the negotiation process.

(4) Assist in the preparation of the written interagency agreement, in coordination with the requisitioner and the servicing agency and of any special conditions that may be needed in the interagency transaction for the servicing agency to comply with any condition or limitation applicable to the DOE program's funds. Ensure the agreement addresses any management and administration responsibilities. For additional guidance to prepare the agreement, see Section G on preparing an interagency agreement in this chapter.

(5) Document the negotiations with the servicing agency in the file. The file should also document verification steps taken to assure adequate interagency transaction administration.

F. The Process When DOE is the Servicing Agency for Funds In.

1. **General.**

a. DOE is not required to accept a requesting agency's funds in request. Do not accept a funds in request if accepting the request –

i. Will prevent DOE from fulfilling its mission; or

ii. The requesting agency does not provide all appropriate supporting information, such as acquisition planning, market research, determination of best procurement approach, statement of work, an independent government cost estimate, servicing agency's unique terms, conditions, clauses, and information for a justification for other than full and open competition, etc.

b. When DOE accepts a funds in assisted acquisition request, the DOE CO shall process the request in accordance with DOE procurement policies and procedures, which includes complying with the Competition in Contracting Act.

2. For **funds in interagency assisted acquisition**, the **DOE CO** shall:

a. Review the requesting agency's documents to include a copy of their acquisition plan and the draft IA Part B. DOE shall not accept the requesting agency's action when DOE is being used to circumvent the requesting agency's policies and procedures, e.g. small business, competition, performance-based acquisitions, and other requesting agency's unique terms, conditions, clauses. Review the requesting agency's written determination of best procurement

approach showing the concurrence of the requesting agency's responsible contracting office prepared in accordance with FAR 17.502-1(a)(1) and place a copy in the contract file.

b. Ensure the requesting agency provides a copy of any other document or information necessary to support the statutory authority for the funds in assisted acquisition. If applicable, the requesting agency prepares and approves an Economy Act D&F.

c. Ensure the DOE program office provides a proposal to the requesting agency. As needed, the DOE CO coordinates any new proposal or revisions with the program office and pricing staff to develop a negotiation position and seek support from the program office, finance office, or legal counsel as required during the negotiation process.

d. Prepare an acquisition plan as required. Provide the Requesting Agency an opportunity to concur on the contract type, the acquisition plan, the statement of work, statement of objectives, performance work statement or specifications, as applicable, before finalizing. If an order will be issued against an existing DOE contract, then execute the order in accordance with the contract and document the file.

e. Assist in the preparation of the written interagency agreement, in coordination with the program office and the requesting agency, in accordance with FAR 17.502-1(b). If the requesting agency provides any special contract terms and conditions ensure these are included in the procurement. The interagency agreement and interagency agreement number **is not** created in STRIPES. Ensure the agreement addresses contract management and administration responsibilities to include designating a COR. This should be a DOE employee with the requesting agency providing a liaison to represent them. For additional guidance to prepare the interagency agreement, see Section G on reviewing an interagency agreement in this chapter. The requesting agency's interagency agreement will include all the necessary information.

f. Prepare, approve, and post a justification for other than full and open competition in accordance with FAR Part 6 and DOE Acquisition Guide Chapter 6.1 competition requirements, or if applicable, exceptions to competition described in FAR 8.405 or 16.505, to include any justification for item peculiar to one manufacturer (brand name specifications).

g. When the requesting agency's requirement results in the award of a DOE contract, a delivery/task order, or a purchase order, the action will be processed like any other procurement action in STRIPES. In the text section of the contract, purchase order, or the delivery/task order, enter the requesting agency's interagency agreement number in the header information and maintain a copy of the agreement in the contract/order file. Negotiations with the requesting agency are documented in the file. The file should also document verification steps taken to assure adequate contract administration.

3. For a **funds in interagency transaction**, the **DOE CO** shall:

a. Review the requesting agency's documents and draft interagency agreement Part B.

b. Ensure the requesting agency provides a copy of any other document necessary to support the statutory authority for the funds. If applicable, the requesting agency prepares and approves an Economy Act D&F. At a minimum, this document should state the required goods or services to include if — amounts are available; the order is in the best interest of the United States Government; the agency to fill the order is able to provide or get by contract the ordered goods or services; and the ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise.

c. Ensure the DOE program office provides a proposal to the requesting agency. As needed, the DOE CO coordinates any new proposal or revisions with the program office and pricing staff, to develop a negotiation position, seeks support from the program office, finance office, or legal counsel as required during the negotiation process.

d. Assist in the preparation of the written interagency agreement, in coordination with the program office and the requesting agency. The interagency agreement and interagency agreement number **is not** created in STRIPES. The requesting agency's interagency agreement will include all the necessary information. Ensure the agreement addresses transaction management and administration responsibilities to include designating a DOE and requesting agency points of contact. For additional guidance on the required information in the agreement, see the Section G on preparing an interagency agreement in this chapter.

f. Document the negotiations with the requesting agency in the file to include the requesting agency's interagency agreement number.

G. Interagency Agreements

1. General information.

An interagency agreement is required for funds out or funds in assisted acquisitions or interagency transactions. An interagency agreement has two parts, Part A, General Terms and Conditions, and Part B, Requirements and Funding Information. There will be only one Part A. Depending on the interagency agreement, there can be one or more Part Bs under a single Part A. For samples of these parts, see Section J - Attachments in this chapter. Note: for funds out interagency agreements, see paragraph D.3.d.i. regarding mandatory STRIPES templates.

a. **Part A** describes the *general terms and conditions* that will govern the relationship between the requesting agency and the servicing agency. It includes the responsibilities and respective roles that each party must carry out to ensure the effective management and use of an interagency agreement. **For DOE, the CO is the authorizing official.**

b. **Part B:**

i. Includes *financial information* required to authorize the transfer and obligation of funds for both the acquisition and the assistance provided by the Servicing agency.

ii. It provides *specific information on the Requesting agency's requirements* sufficient to demonstrate a "bona fide" need.

iii. There can be one or many Part Bs under a single Part A. Part B becomes effective when it is signed by the authorizing officials of both agencies. When creating Part B, not all the information may be known, therefore, it may be necessary to complete sections in Part B as Part A is being created. Part B must always state that, the terms and conditions in Part A are incorporated by reference or attached to Part B. **For DOE, the CO is the authorizing official.**

iv. Part B must accompany each transfer of funds. If a requirement is being supported with incremental funding, then an addendum to Part B will be required each time funds are transferred. However, a new requirement, even within the scope of Part A, will need a new Part B.

v. Billing instructions. The DOE CO, with the participation of the DOE or NNSA Program Office and Budget Office, must ensure that the funding information includes standard billing instructions to ensure timely and accurate accounting for intra-governmental exchanges of funds. These instructions must be sufficient to facilitate exchange transactions and reporting between agencies and should comply with the billing requirements of the Department of Treasury, Financial Management Service (FMS). For the detailed requirement for billing instructions see the Department of the Treasury, Financial Management Service, Financial Manual, Volume 1, Part 2—Chapter 4700, Agency Reporting Requirements for the Financial Report of the United States Government (Transmittal Letter (T/L) 663), revised by Bulletin No. 2011-08, or it successor version, Appendix 10 Intragovernmental Business Rules at http://www.fms.treas.gov/tfm/vol1/tl.html. In summary these requirements include:

(1) The primary system to settle intra-governmental exchange transactions is the Intra-Governmental Payment and Collection (IPAC) System, see Treasury Financial Manual, Part 6 -- Chapter 4000, Section 4015. DOE should use the IPAC System, whenever possible for processing payments to reimburse the servicing agency. All interagency agreements should include instructions to use the IPAC system for exchange transactions. If IPAC is not an available billing method, a mutually agreeable alternative should be negotiated before acceptance of interagency agreement and documented in Part B of the interagency agreement whether IPAC or an alternative method will be used. If an alternate method is used, the alternate method should be reviewed regularly to ensure the billing method is changed to IPAC when IPAC is available.

(2) For funds out, the interagency agreement should identify the DOE funding codes and obligating document number (also referred to as the IA number) and should instruct the other agency to include the DOE obligating document number on all documentation related to the agreement. The DOE billing address for the interagency agreement is U.S. Department of Energy, P.O. Box 500,

Germantown, MD 20875-0500. For funds in, use the requesting agency funding information.

(3) For funds out, when using IPAC, DOE obligating document number (otherwise may be referred to as common agreement number or interagency agreement number) should be included as the purchase order number or obligating document number of the IPAC.

(4) The DOE obligating number shall serve as the common agreement number required by Department of the Treasury, Financial Management Service, Treasury Financial Manual Volume 1, Part 2 (Transmittal Letter (T/L) 663), revised by Bulletin No. 2011-08, or it successor version, Appendix 10 Intragovernmental Business Rules. See Section H - References for additional information.

(5) The interagency agreement should specify information for all agencies' party to the interagency agreement. If help is needed to complete this information, contact the local Finance office. The information includes:

- Agency Location Code (ALC),
- Treasury Account Symbol (TAS),
- Business Event Type Code (BETC),
- Business Partner Network (BPN) number, usually the Data Universal
- Numbering System (DUNS) number,
- Line of Accounting (LOA), and
- Contracting and accounting points of contact.

2. **Interagency agreement format and samples.**

a. **STRIPES IA funds out templates for interagency assisted acquisitions and interagency transactions.** There are 2 versions of STRIPES IA templates Part A and Part B which are tailored to DOE for both interagency assisted acquisitions and interagency transactions. Select the applicable STRIPES IA template version and follow the editing instructions for completion. For samples of these parts, see Section J – Attachment 3 in this chapter. Using the STRIPES IA templates will significantly streamline the development and execution of the interagency agreement. In STRIPES, the IA form (Guide chapter Section J - attachment 3) can be used as a cover page to summarize and transmit the interagency agreement. The IA Part A template will be pre-populated with DOE model language to the maximum extent practicable; however there are many fields that will need to be completed with the details relating to the particular requirement. IA Part B template provides prescriptions for the Program Office or requisitioner to prepare and attach Part B to the requisition. For DOE, the CO is the authorizing official for interagency agreements.

i. **Part A, Funds Out, General terms and conditions** – Guide chapter Section J - attachment 3 is a copy of the STRIPES IA funds out template for Part A. If necessary for an interagency assisted acquisition, when drafting Part A, you may refer to the

OFPP guidance. In the OFPP guidance, there is a checklist (Attachment 1, Appendix 1) and sample Part A (Attachment 1, Appendix 4).

ii. **Part B, Funds Out, Requirements and funding information –** Guide chapter Section J - attachment 3 is a copy of the rtf file that is in STRIPES which is created in the Requisition Package Document. When drafting IA funds out Part B, the requisitioner has to create a Requisition, then on the Main General page, click on the "Load PPT" and another page will open up. Once Part B is selected, one should go to the Templates folder, open it up and then generate Part B in a manner similar to the clauses. If this requisition is not going to be used to fund the interagency agreement, then the rtf can be saved to the computer and then added as an attachment in the interagency agreement document.

b. **IA funds in for interagency assisted acquisitions and interagency transactions.** Funds in assisted acquisition or interagency transaction require the approval of the DOE CO. When DOE is the servicing agency, the interagency agreement and number is not created in STRIPES. The requesting agency will prepare the interagency agreement and provide the interagency agreement number. If the other agency's requirement will result in the award of a DOE contract, delivery/task order, or purchase order, the requirement will be processed like any other contract, delivery/task order, or purchase order. In the text section of the DOE procurement document, enter the other agency's interagency agreement number in the header information and maintain a copy of the agreement in the contract file.

c. **Other samples and checklist for interagency assisted acquisitions.** When preparing the interagency agreement parts for an interagency assisted acquisition, you may refer to the OFPP guidance. This OFPP guidance provides a checklist (Appendix 1) and a sample Part A and B (Appendix 4). A copy of this guidance is at Section J - attachment 1. There are samples completely filled-in with suggested language and an extensive checklist for use by both agencies to assist in writing the agreement. This model can be found in OFPP Interagency Acquisitions guidance appendices at http://georgewbush-whitehouse.archives.gov/omb/procurement/index_interagency_acq.html.

- The four appendices to the OFPP Interagency Acquisitions guidance are:
  - Appendix 1 – Checklist of Roles and Responsibilities in Assisted Acquisitions
  - Appendix 2 – Elements of a Model Interagency Agreement for an Assisted Acquisition
  - Appendix 3 – Model Interagency Agreement for an Assisted Acquisition
  - Appendix 4 – Example of a Completed Interagency Agreement for an Assisted Acquisition

3. **Preparing the interagency agreement when DOE is the Requesting Agency (funds out).** When DOE is the requesting agency, Part A and Part B will be prepared by DOE. The DOE CO prepares Part A, in coordination with the requisitioner and the servicing agency. The requisitioner prepares Part B, in coordination with the DOE CO and the servicing agency. For an interagency agreement, Part A will be created in support of the initial requisition. If there are

subsequent requisitions for an established interagency agreement, there will be a separate Part B for each requisition. It is important that the requisition reference the original IA number, i.e., STRIPES IA number.

a. **DOE Requisitioner.**

i. As described in initiating the requisition Section E, the requisitioner prepares the requisition and related documentation to include Part B. In STRIPES, IA Part B is accessed by choosing "Load PPT" from within the "Requisition Package." This includes preparing Part B with the assistance of the Servicing Agency and the CO, as needed. Part B is a supporting document to the Requisition. Part B must include detailed information on the supplies or services being ordered, performance/delivery schedules, to include required scientific and technical deliverables along with basic guidelines regarding the submission of electronic Scientific and Technical Information (STI) (Guide Chapter 35.1), and when necessary, the enumerated responsibilities of the servicing agency to ensure compliance with all contractual requirements**.** (STI submission is via the DOE Energy Link (E-Link) system (www.osti.gov/elink). Reference DOE O 241.1B, "Scientific and Technical Information Management" (or future version) for definition of STI, submission requirements, and establishing an STI Point-of-Contact/Technical Information Officer. Contact the Office of Scientific and Technical Information at 865-576-1188 for additional information.)

ii. Part B must include specific, definite and clear requirements information that demonstrates a "bona fide" need in the fiscal year that the funds are available for obligation. The level of detail will vary based on the breadth of acquisition assistance to be provided (e.g., the period over which assistance will be provided or the number of offices requiring assistance) as well as the complexity and dollar value of the requirement. DOE incurs a fiscal obligation when Part B is accepted by the servicing agency.

b. **DOE Contracting Officer.**

i. The DOE CO, with the participation of the DOE or NNSA Program Office, as the preparer of Part B, and applicable Budget Office, must ensure that Part B includes the DOE requesting agency information. Part B becomes effective when it is signed by authorizing officials from both agencies. When STRIPES is used, the DOE interagency agreement transmission constitutes the signature by DOE as the requesting agency. The FedConnect response to the DOE interagency agreement transmission constitutes signature by the other agency as the servicing agency. If FedConnect is not used, then the previous method of a hand signature is required. The hand-signed document must be scanned and uploaded into STRIPES as part of the official IA file. For DOE, the CO is the authorizing official.

(1) Part A, General Terms and Conditions:

(a) *Completion of Part A*. When DOE is the Requesting Agency for an interagency agreement, the DOE CO will complete STRIPES IA Part A, General Terms and Conditions. It will be necessary for the DOE CO to coordinate with the Program Office and the Servicing Agency for completion of IA Part A. When intellectual

property rights are involved, it will be necessary to consult with the local DOE Patent Counsel.

(b) *Maintaining Part A*. Periodic review the performance under the IA to determine if expectations are being met (e.g., is each agency carrying out its respective responsibilities in a timely manner?). Document the summary of this assessment for the IA file. If the agreement period is longer than one year to include any amendments, the terms and conditions should be reviewed annually. Unless otherwise approved by the contracting activity's procurement director, the agreement period cannot exceed five years. If the agreement period is approved to exceed five years during the effective period of the IA, the agreement period will need to be amended to reflect this change. Be sure to document the file that the procurement director approved the agreement period if it exceeds five years.

(2) Part B, Requirements and Funding Information:

(a) *Completion of Part B*. When the Program Office prepares and submits the requisition, the Program Office will prepare Part B with the assistance of the Servicing Agency and the DOE CO, as needed. Part B will be an attachment to the requisition. The DOE CO and the DOE Budget Office will review IA Part B, "Requirements and Funding Information", for accuracy and completeness.

(b) *Maintaining Part B*. When DOE is the Requesting Agency, the DOE Program Office will maintain Part B for DOE. Each procurement action executed in support of the IA must either include or incorporate by reference Part A of the IA and forward a copy of Part B to the applicable financial office.

ii. The DOE CO, with the participation of the DOE or NNSA program office, must ensure that the following items are considered--

(1) Conformance to all DOE regulations, policies and procedures , to include any applicable business clearance review in accordance with DOE HCA approval thresholds or NNSA approval of contract actions process;

(2) That supplies or services obtained are within the authority of the servicing agency;

(3) That services to be provided by the servicing agency are stated in Part A;

(4) That follow-on tasks or amendments will be reviewed by the DOE CO to ensure that they are within the scope of the interagency agreement;

(5) A description of any DOE unique terms, conditions or requirements, to include applicable intellectual property rights, are incorporated into the interagency agreement and/or servicing agency contract/order;

(6) Designation of the servicing agency to perform contract administration that may include: a quality assurance plan, contract surveillance, voucher examination, past performance data collection and recording and reporting data into the Federal Procurement Data System (FPDS). Funds out will be reported into FPDS by the Servicing Agency when the procurement action is issued. For accurate reporting into FPDS of the origin of the funds, instruct the Servicing Agency to report the action citing the funding agency code and/or funding office code;

(7) A statement of any pre-award and/or post award administrative functions that will be retained by DOE. As part of the post award administrative functions, if the DOE CO determines it appropriate to appoint a COR to monitor performance of the work performed under the interagency agreement, then the DOE CO shall appoint an individual qualified and certified under DOE O 361.1B. The COR, in coordination with the DOE CO, shall provide any information required by the servicing agency in order to support the award and administration of their contract or order; and

(8) Compliance with the requirements of FAR Subparts 7.3 and 7.5.

iii. The DOE CO should monitor Part Bs (tasks and funding) provided to the servicing agency to ensure that they are consistent with the scope of the agreement with the servicing agency and with the terms of the servicing agency's contract. Oversight is required by the DOE CO and the designated COR during the period of performance to ensure that the contractor, as well as the servicing agency, complies with all applicable regulations and policies. Review of contract 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. The DOE CO and designated COR and/or Program Official shall review DOE Acquisition Guide Chapter 32.1 - Reviewing and Approving Contract Invoices, for the purpose of understanding their responsibility in this process.

4. **Reviewing the interagency agreement when DOE is the Servicing Agency (funds in).** When DOE is the servicing agency, the requesting agency has the primary responsibility to prepare the agreement. The DOE CO should participate in the drafting of the terms and conditions established under Part A, as necessary. For an interagency assisted acquisition, a checklist (Attachment 1, Appendix 1) and sample Part A (Attachment 1, Appendix 4) are provided in OFPP guidance and should be referred to when drafting Part A. A sample Part B (Attachment 1, Appendix 4) is provided in OFPP guidance and should be referred to when reviewing Part B. A copy of this OFPP guidance is at Section J - attachment 1, of this guide chapter.

a. For Part A of the IA, the **DOE CO**:

i. Should ensure that Part A is clear and complete and includes the following:

(1) The signature of the requesting agency official authorized to approve the IA,

(2) A termination provision for the IA,

(3) Identification of the contractor and contract number (when applicable),

(4) A statement of work and the estimated cost,

(5) Provisions for inspection and acceptance of the contractor's work,

(6) Intellectual property provisions, if applicable,

(7) Unique terms and conditions required by the requesting agency, if applicable,

(8) Unique or specific security requirements, and

(9) A positive affirmation that the requesting agency is not circumventing their own policy, procedures, and/or regulations in contracting with DOE.

ii. Should request a copy of the following documents from the requesting agency:

(1) Requesting agency's D&F for Economy Act actions and the best procurement approach determination for assisted acquisitions for the interagency agreement,

(2) Requesting agency's market research and/or acquisition plan, and

(3) Requesting agency's COR or technical representative designation.

iii. Is responsible for compliance with all legal and regulatory requirements applicable to the procurement action, including--

(1) Performing acquisition planning in accordance with DOE Acquisition Guide Chapter 7.1 - Acquisition Planning to include any applicable business clearance review in accordance with DOE HCA approval thresholds or NNSA approval of contract actions process;

(2) Ensuring proper statutory authority for the contractual action;

(3) Compliance with competition requirements of FAR Part 6;

(4) Compliance with requirements under small business set-asides in FAR Subpart 19.5;

(5) Performing contract administration duties such as preparing a quality assurance plan, voucher examination and past performance data collection and reporting as required by FAR 42.1502;

(6) Appointing a DOE COR when appropriate; and

(7) Ensuring timely and accurate data is reported in FPDS for the contract or the order. FUNDS IN will be reported into FPDS by the DOE CO when the procurement action is issued. For accurate reporting into FPDS of the origin of the funds, cite the Requesting Agency's funding agency code and/or funding office code.

b. For Part B of the IA, the DOE CO should ensure that Part B includes the following--

(i) Billing data with the names and mailing addresses of both agencies' accounting offices,

(ii) A citation of the requesting agency's funding and appropriation data and validation of statutory or regulatory use of the funds, including disclosure of any special restriction, and

(iii) A statement that the terms and conditions in Part A are incorporated by reference or attached to Part B.

(iv) That the reimbursable agreement provides full funding if the work is to be completed in the current fiscal year. For work that transcends fiscal years, full funding for the current fiscal year plus the first 3 months of the following fiscal year is required. This is in accordance with Chapter XIII of DOE's Financial Management Handbook (http://www.mbe.doe.gov/policy/actindex/index.htm).

Note: 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 CO. The authority to authorize reimbursable work under on-going contracts may not be delegated to CORs. The contractor must develop a budget before the authorization to start work and subsequently track the costs associated with the reimbursable work separately.

c. STRIPES is not used to process an interagency agreement when DOE is the servicing agency; however, the interagency agreement becomes a supporting document if the work identified in the IA is accomplished via a DOE contract and must be included in the DOE contract file.

d. Maintaining Part B. When DOE is the Servicing Agency, the DOE CO will maintain Part B. Each procurement action executed in support of the IA must either include or incorporate by reference Part A of the IA and forward a copy of Part B to the applicable DOE financial office. The DOE CO should verify that the Requesting Agency's cognizant program office is also maintaining Part B and forwards a copy to their financial office.

H. References

- Office of Federal Procurement Policy Guidance, Interagency Acquisitions, June 2008

See Section J - attachment 1 for a copy or go to website: http://georgewbush-whitehouse.archives.gov/omb/procurement/index_interagency_acq.html

- Office of Federal Procurement Policy memorandum, dated September 29, 2011, *Development, Review and Approval of Business Cases for Certain Interagency and Agency-Specific Acquisitions*. See Section J - attachment 2a for a copy or go to website: http://www.whitehouse.gov/omb/procurement_index_interagency_acq/

- Office of Federal Procurement Policy Frequently Asked Questions for Interagency and Agency-specific Business Cases. See Section J - attachment 2b for a copy or go to MAX at https://max.omb.gov/community/x/b5G8IQ.

- Treasury Financial Manual, Volume 1, Part 2—Chapter 4700, Agency Reporting Requirements for the Financial Report of the United States Government (Transmittal Letter (T/L) 663), revised by Bulletin No. 2011-08, or it successor version, Appendix 10 Intragovernmental Business Rules
  Website for Appendix 10: http://www.fms.treas.gov/tfm/vol1/v1p2c470.pdf

Federal Acquisition Regulation (FAR) Parts and Subparts

- 6 Competition Requirements
- 7 Acquisition Planning
- 8 Required Sources of Supplies and Services
- 8.4 Federal Supply Schedules – 8.404 Use of Federal Supply Schedules
- 9.1 Responsible Prospective Contractors – 9.106 Preaward surveys
- 10 Market Research
- 16.5 Indefinite-delivery Contracts
- 17.5 Interagency Acquisitions
- 18.113 Interagency Acquisitions
- 35.017 Federally Funded Research and Development Centers
- 38 Federal Supply Schedule Contracting
- 41.206 Interagency Agreements
- 42 Contract Management

DOE Acquisition Guide (AG) Chapters

- Chapter 6.1 Competition Requirements
- Chapter 7.1 Acquisition Planning
- Chapter 8.4 Federal Supply Schedule
- Chapter 16.5 Multiple-Award Contracts and Governmentwide Acquisitions Contracts Including Delivery Orders and Task Orders
- Chapter 32.1 Reviewing and Approving Contract Invoices
- Chapter 35.1 Scientific and Technical Reporting
- Chapter 42.15 Contractor Performance Information
- Chapter 42.16 Reporting Other Contractor Information into Federal Awardee Performance and Integrity Information System

- Chapter 71.1 Headquarters Review of Contract and Financial Assistance Actions

DOE Directives
- DOE Order 241.1A, Scientific and Technical Information Management (or current version)
- DOE Order 361.1B.1, Acquisition Career Development Program (or current version)

DOE Accounting Handbook
- Chapter 5 Accounting for Obligations
- Chapter 13 Reimbursable Work, Revenues, and Other Collections
  Website for handbook chapters: http://www.mbe.doe.gov/policy/actindex/index.htm

STRIPES Quick Guide
- Creating an Interagency Agreement

I. Points of Contact

- For DOE, questions regarding this policy may be directed to the Office of Contract and Financial Assistance Policy, MA-611, at (202) 287-1330.

- For National Nuclear Security Administration (NNSA), questions regarding this policy may be directed to the Procurement and Assistance Support Section, on behalf of NA-APM-10 at (505) 845-4337.

- Questions on how to use the STRIPES system may be directed to the Energy IT Services (EITS) Service Desk at 301-903-2500 or email EITSServiceDesk@hq.doe.gov.

J. Attachments

1 – OFPP Guidance, Interagency Acquisitions, with attachments and appendices, June 2008

2 – OFPP memorandum and frequently asked questions, *Development, Review and Approval of Business Cases for Certain Interagency and Agency-Specific Acquisitions*, September 2011

a. Memorandum *Development, Review and Approval of Business Cases for Certain Interagency and Agency-Specific Acquisitions*
b. Frequently Asked Questions for Interagency and Agency-specific Business Cases

3 – STRIPES Funds Out Templates:

a. Assisted Acquisition
b. Interagency Transaction

K. Acronyms

ALC	Agency Location Code
BETC	Business Event Type Code
BPN	Business Partner Network
CO	Contracting Officer
COR	Contracting Officer's Representative
D&F	Determinations and Findings
DEAR	Department of Energy Acquisition Regulation
DOE	Department of Energy
DUNS	Data Universal Number System
FAPIIS	Federal Awardee Performance and Integrity Information System
FAR	Federal Acquisition Regulation
FMS	Financial Management Service
FPDS	Federal Procurement Data System
FSS	Federal Supply Schedule
FSSI	Federal Strategic Sourcing Initiative
GSA	General Services Administration
GWAC	Governmentwide Acquisition Contract
HCA	Head of the Contracting Activity
IA	Interagency Agreement STRIPES Forms Part A and Part B
IAA	Interagency Agreement FMS Forms 7600A and 7600B
IDC	Indefinite Delivery Contract
IDV	Indefinite Delivery Vehicle
IPAC	Intra-Governmental Payment and Collection System
LOA	Line of Accounting
MAC	Multi-agency Contract
NNSA	National Nuclear Security Administration
OFPP	Office of Federal Procurement Policy
OMB	Office of Management and Budget
RFQ	Request for Quote
SOW	Statement of Work
STI	Scientific and Technical Information
STRIPES	Strategic Integrated Procurement Enterprise System
T/L	Transmittal Letter
TAS	Treasury Account Symbol

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

OFFICE OF FEDERAL
PROCUREMENT POLICY

June 6, 2008

MEMORANDUM FOR CHIEF ACQUISITION OFFICERS
SENIOR PROCUREMENT EXECUTIVES

FROM: Paul A. Denett
Administrator

SUBJECT: Improving the Management and Use of Interagency Acquisitions

Interagency acquisitions offer important benefits to federal agencies, including economies and efficiencies and the ability to leverage resources. The attached guidance is intended to help agencies achieve the greatest value possible from interagency acquisitions.

Effective management and use of interagency acquisitions is a shared responsibility, especially for assisted acquisitions. Lack of clear lines of responsibility between agencies with requirements (requesting agencies) and the agencies which provide acquisition support and award contracts on their behalf (servicing agencies) has contributed to inadequate planning, inconsistent use of competition, weak contract management, and concerns regarding financial controls.

This document provides guidance to help agencies (1) make sound business decisions to support the use of interagency acquisitions and (2) strengthen the management of assisted acquisitions. Particular emphasis is placed on helping requesting agencies and servicing agencies manage their shared fiduciary responsibilities in assisted acquisitions. The guidance includes a checklist of roles for each responsibility in the acquisition lifecycle and a model interagency agreement to reinforce sound contracting and fiscal practices. The guidance reflects comments provided by Chief Acquisition Officers, Senior Procurement Executives, and Chief Financial Officers. The document was also shared with other interested stakeholders, including the Chief Information Officers and the Government Accountability Office (GAO), and reflects comments received from those parties as well.

Beginning on October 1, 2008, and thereafter, agencies shall ensure that decisions to use interagency acquisitions are supported by best interest determinations, as described in the attached guidance. Agencies shall further ensure that new interagency agreements for assisted acquisitions entered on or after November 3, 2008, contain the elements enumerated in Appendix 2 or follow the model agreement in Appendix 3. Agencies shall use the checklist at Appendix 1 to facilitate the clear identification of roles and responsibilities. Agencies shall also consider modifying existing long-term interagency agreements for assisted acquisitions in accordance with this guidance, as appropriate and practicable.

Providing for the sound management and use of interagency acquisitions is a key step for realizing the intended efficiencies of interagency contracts. Improving the governance structure for creating and renewing these vehicles is equally important, especially for multi-agency contracts. We have made important strides to leverage the government's vast buying power under the Federal Strategic Sourcing Initiative (FSSI) and to identify suitable executive agents that can manage government-wide acquisition contracts (GWACs) on behalf of customers across government. We must build on these efforts in order to maximize the contribution of interagency contracts to mission success. I intend to work with members of the Chief Acquisition Officers Council, including its Strategic Sourcing Working Group, to design a business case review process similar to that currently used for the designation of executive agents for GWACs and to define the structure required to support such a process.

Please have your acquisition officials work with program managers, contracting officers technical representatives, finance officers, information technology officers, legal staff and others involved in your agency's interagency acquisitions to ensure the effective implementation of this guidance and compliance with its requirements. Questions may be referred to Mathew Blum at (202) 395-4953 or mblum@omb.eop.gov.

Thank you for your attention to this important subject.

Attachment

cc: Chief Financial Officers
Chief Information Officers
Performance Improvement Officers
Danny Werfel, Acting Controller, Office of Federal Financial Management

INTERAGENCY ACQUISITIONS

June 2008

Executive Office of the President
Office of Management and Budget
Office of Federal Procurement Policy

TABLE OF CONTENTS

Introduction 1

I. Background 2

II. Direct acquisitions 4

A. Best interest determinations 4

B. Executing responsibilities 5

III. Assisted acquisitions 6

A. Best interest determinations 6

B. Interagency agreements 8

C. Executing responsibilities 12

Appendix 1. Checklist of Roles and Responsibilities in Assisted Acquisitions 14

Appendix 2. Elements of a Model Interagency Agreement (IA) for an Assisted Acquisition 32

Appendix 3. Model Interagency Agreement for an Assisted Acquisition 37

Appendix 4. Example of a Completed Interagency Agreement for an Assisted Acquisition 47

Introduction

This guidance is intended to help agencies achieve the greatest value possible from interagency acquisitions. Interagency acquisition is the term used to describe the process by which one agency (requesting agency), uses the contracts and/or contracting services of other agencies (servicing agencies) to obtain supplies and services.

Materials in this document are presented in a question and answer format for easy reference. Both requesting agencies and servicing agencies should review and refer to this guidance with the goal of improving the management and use of interagency acquisitions and mitigating associated risks.

What's in this guidance document . . . .

- Background on the purpose and structure of interagency acquisitions (pp. 2-3).
- Steps for maximizing value from interagency acquisitions (pp. 4-12).
- Supplemental materials to help requesting agencies and servicing agencies manage their shared responsibilities for assisted acquisitions, including:
  - ✓ a checklist for establishing clear lines of responsibility between the agencies (pp. 13-30);
  - ✓ the required elements for an interagency agreement (pp. 31-35);
  - ✓ a model interagency agreement (pp. 36-45); and
  - ✓ an example of a completed interagency agreement (pp. 46-65).

This guidance does not address all interagency business transactions, only those that are undertaken for the primary purpose of obtaining services or products from contractors. Accordingly, this document does not address intragovernmental fiduciary activities, such as those with the Office of Personnel Management (e.g., USAJOBS) or the Department of Labor (e.g., Workers' Compensation), reimbursable work performed by federal employees (other than acquisition assistance), or interagency activities where contracting is incidental to the purpose of the transaction (e.g., activities performed under the Environmental Protection Agency's Cooperation Authority). In addition, assisted acquisitions associated with government-wide programs that are centrally mandated and/or managed (e.g. e-government) are also not addressed.

Interagency acquisitions are a type of intragovernmental transaction. Accordingly, agencies should also refer to the *Business Rules for Intragovernmental Transactions*, found in the Treasury Financial Manual, Volume 1, Bulletin 2007-03 (http://www.fms.treas.gov.tfm.voll/07-03.pdf).

I. Background

What is an interagency acquisition? *Interagency acquisition* is the term used to describe the procedure by which an agency needing supplies or services obtains them using another agency's contract, the acquisition assistance of another agency, or both. Interagency acquisitions typically involve two government agencies: the *requesting agency*, which is the agency with the requirement, and the *servicing agency* which provides acquisition support, administers contracts for other agencies' direct use, or both. In some cases, more than one servicing agency may be involved in an assisted acquisition.

What are the benefits of an interagency acquisition? Both requesting agencies and servicing agencies can benefit from well-executed interagency acquisitions. Requesting agencies benefit from the capabilities or expertise of the servicing agency and the efficiencies and economies associated with leveraging resources and requirements. Servicing agencies benefit from the improved pricing and terms and conditions they can negotiate when consolidating, in a justified manner, other agencies' needs with their own and among requesting agencies.

How are interagency acquisitions formed? Interagency acquisitions are commonly conducted through *indefinite delivery vehicles* (IDVs), such as task and delivery order contracts. The structure of these vehicles is well suited to the efficiencies and economies that agencies seek through interagency acquisitions. IDVs permit the issuance of orders for the performance of tasks or the delivery of supplies against prepositioned contracts and agreements during the term of the vehicle. The IDVs used most frequently to support interagency acquisitions are Multiple Award Schedules (MAS), government-wide acquisition contracts (GWACs), and multi-agency contracts (MACs).

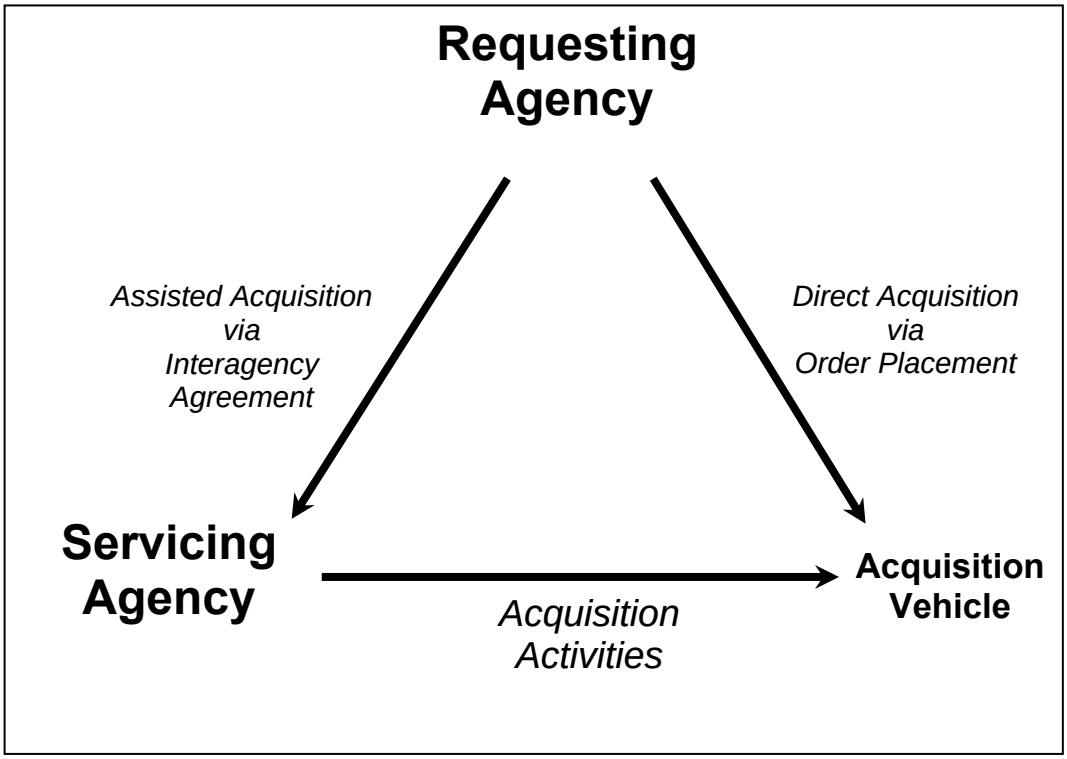
Types of Interagency Acquisitions

There are two types of interagency acquisitions: direct acquisitions and assisted acquisitions.

- In a *direct acquisition,* the requesting agency places an order directly against the servicing agency's IDV. The servicing agency manages the IDV but does not participate in the placement of an order.

- In an *assisted acquisition*, the servicing agency and requesting agency enter into an interagency agreement pursuant to which the servicing agency performs acquisition activities on the requesting agency's behalf, such as awarding a contract, task order, or delivery order. In many assisted acquisitions, the servicing agency also manages the IDV against which orders are placed. For example, the General Services Administration's Federal Acquisition Service will typically place orders against a MAS contract or a GWAC on behalf of its requesting agencies. Sometimes, a servicing agency may find that another agency's IDV can better serve the requesting agency's needs, in which case two servicing agencies would be involved in the interagency acquisition.

Figure. Direct Acquisition vs. Assisted Acquisition



What is the authority for an interagency acquisition? A variety of laws authorize interagency acquisitions. The Economy Act, 31 U.S.C. 1535, provides general authority to undertake interagency acquisitions that is available to agencies when more specific statutory authority does not exist. An increasing number of interagency acquisitions are falling outside the Economy Act because many of interagency contract vehicles that are widely used today, such as the MAS and GWACs, are not governed by the Economy Act. Instead, these vehicles are governed by more specific statutory authority. For example, the MAS is governed by Title III of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 251, et seq.) and Title 40 U.S.C. 501, Services for Executive Agencies. GWACs are authorized by section 5112(e) of the Clinger-Cohen Act (40 U.S.C. 11302(e)).

As a general matter, laws and regulations give agencies the discretion to determine whether to use an interagency acquisition. This guide discusses how agencies can exercise sound business discretion to maximize benefits when using interagency acquisitions to meet their mission needs.[1] Section II describes how agencies can help ensure decisions to use direct acquisitions achieve best value. Section III describes the steps agencies should take to achieve the greatest value from assisted acquisitions.

[1] The guidance in this document applies to both Economy Act and non-Economy Act transactions. It is intended to provide overarching principles for exercising sound judgment irrespective of the particular law governing a given acquisition. Over the years, however, a number of requirements have been developed in the Federal Acquisition Regulation (FAR) to implement the Economy Act. References are made in this guide to these FAR provisions to remind readers of specific additional requirements that must be met where the Economy Act applies.

II. Direct acquisitions

Key Points to Remember About Direct Acquisitions

Description

- A direct acquisition is a type of interagency acquisition where the requesting agency acquires goods or services through another agency's indefinite delivery vehicle (IDV) by placing an order directly against the IDV.

Steps for maximizing value

- Requesting agencies should ensure use of another agency's IDV is in the best interest of the government taking into account factors such as:
  - the suitability of the vehicle,
  - the value of using the vehicle, and
  - the requesting agency's ability to use the vehicle effectively.
- Requesting agencies must be prepared to take on the various responsibilities in the acquisition lifecycle, from acquisition planning and contract execution to contract administration.

A. Best interest determinations

What should a requesting agency consider before entering into a direct acquisition? Before placing an order directly against another agency's IDV, the requesting agency's contracting officer, or other official designated in accordance with agency procedure, should ensure that an interagency acquisition is in the best interest of the government, taking into account factors such as:

- *Suitability* – whether the IDV that would be used can satisfy the agency's schedule, performance, and delivery requirements, including any statutory, regulatory, and policy requirements.
- *Value* – whether the IDV's pricing, including vehicle access fees (sometimes referred to as an "industrial funding fee"), is fair and reasonable and comparable to what the agency is likely to secure by creating its own contract, and structured to allow the agency to obtain the best value for its needs.
- *Expertise* – whether the agency's contracting office personnel have the appropriate experience and training to properly place an order on a timely basis,

take advantage of beneficial features, such as discounts, and effectively administer the order.

What presumptions may be made if using an FSSI vehicle, the SmartBuy Program, the Schedules Program or a GWAC? Agencies may presume that direct acquisitions made by qualified individuals are in the best interest of the government if the vehicle was established under the Federal Strategic Sourcing Initiative, the SmartBuy Program, the Federal Supply Schedules Program, or is a government-wide acquisition contract (GWAC) operating pursuant to Executive Agent designations granted by OMB under the Clinger-Cohen Act. However, documentation in the contract file should still establish that the acquisition vehicle is suitable for the agency's needs. This information could be documented as part of the agency's planning documents. A formal Determination and Finding (D&F) or Justification and Approval (J&A) is not required.

B. Executing responsibilities

How are responsibilities managed in a direct acquisition? In a direct acquisition, the burden falls largely on the *requesting agency* to satisfy the various responsibilities in the acquisition lifecycle, including the determination that the agency's requirement falls within the scope of the IDV. The servicing agency, as the IDV owner, manages the IDV but does not participate in the placement of the order.

Responsible Stewardship in a Direct Acquisition

Requesting agencies should . . .

- review materials about the IDV and contact the servicing agency, as "owner" of the IDV, for any special requirements (e.g., requirements related to appointment of contracting officer technical representatives (COTRs)), training opportunities, and questions about the vehicle, such as scope, terms and conditions, competition requirements, and ordering procedures.

Servicing agencies should . . .

- post information on use of its vehicle, including competition requirements and ordering procedures, make training available to requesting agency users, and provide sufficient points of contact to address questions from users in a timely manner.

III. Assisted acquisitions

Key Points to Remember About Assisted Acquisitions

Description

- An assisted acquisition is a type of interagency acquisition where the parties enter into an interagency agreement pursuant to which the servicing agency performs acquisition activities on the requesting agency's behalf, such as awarding a contract, task order, delivery order, or blanket purchase agreement.

Steps for maximizing value

- Requesting agencies should choose a servicing agency that can provide the necessary assistance by giving consideration to factors such as:
  - the servicing agency's authority, experience, and expertise;
  - the servicing agency's ability to comply with the requesting agency's laws and policies;
  - customer satisfaction with the servicing agency's past performance; and
  - reasonableness of the servicing agency's fees.
- Requesting and servicing agencies need to develop clear and complete interagency agreements that:
  - establish general terms and conditions to govern the relationship between the agencies, including each party's role in carrying out responsibilities in the acquisition lifecyle; and
  - provide information required to demonstrate a bona fide need and authorize the transfer and obligation of funds.

A. Best interest determinations

What should a requesting agency consider before entering into an assisted acquisition? Before requesting the assistance of a servicing agency to perform acquisition activities, the requesting agency should determine that acquisition assistance is needed (e.g., expertise or acquisition resources are not readily available within the agency) and a servicing agency can provide the assistance required.

In choosing an appropriate servicing agency, the requesting agency should give consideration to:

- the servicing agency's authority, experience, and expertise in entering into a contract or order for the required products or services;
- the servicing agency's ability to comply with the requesting agency's statutes, regulations, and policies, including any unique acquisition and fiscal requirements;
- customer satisfaction with the servicing agency's performance, both in terms of responsiveness and results achieved; and
- reasonableness of the servicing agency's fees.

If the assisted acquisition is subject to the Economy Act, a warranted contracting officer or another official designated by the agency head must approve a D&F. See Subpart 17.5 of the Federal Acquisition Regulation.

For assisted acquisitions outside the Economy Act, agencies shall ensure that the individuals who establish the need for assistance and select a servicing agency have the necessary expertise to make these business decisions. Individuals who establish the need for acquisition assistance from an acquisition office outside of their agency must have the necessary expertise to make this business decision. Agencies shall take the following steps to ensure the acquisition office within the requesting agency is appropriately involved in these decisions:

- **Interagency acquisitions over $200,000**. The requiring office (e.g., the program office) shall provide notice of a planned interagency acquisition to the head of the acquisition office within the requesting agency that is responsible for providing assistance to the requiring office. The notice shall include a brief description of the service or product, estimated dollar amount, and the name of the external acquisition organization that will provide acquisition assistance. Notice shall be sent by electronic mail with return receipt to provide a record for management reviews and audits. Before the request is sent to the outside servicing acquisition office, the notifier shall allow its internal acquisition office one week to respond to the notice.
- **Interagency acquisitions over $500,000**. The notifier from the requiring office shall take the same steps as described for interagency acquisitions over $200,000, except that instead of simply requesting a response from the in-house acquisition office, the notifier shall seek its concurrence and allow one week for response. Non-concurrences shall be presented to the requesting agency's Senior Procurement Executive and resolved within one week of the non-concurrence.

Agencies shall not split requirements to avoid carrying out the responsibilities described above. However, they may address multiple orders in one notice if the underlying needs are related, especially if they are of a repetitive nature. Where multiple orders are addressed in one notice, the description should be sufficiently clear so that the in-house contracting office may consider the relative benefits of

having needs met through an interagency acquisition versus through the agency's own support structure and contract vehicles.

B. Interagency agreements

When is an interagency agreement required and what purpose does it serve? All assisted acquisitions must be supported by an interagency agreement (IA). An IA serves two purposes in an interagency acquisition. First, the IA establishes the general terms and conditions that govern the relationship between the requesting agency and the servicing agency. Second, the IA provides information that is required to demonstrate a bona fide need and authorize the transfer and obligation of funds.[2]

How is an IA structured? There are two main parts to an IA for an assisted acquisition, corresponding to each of the purposes described above.

The Key Parts of an Interagency Agreement for an Assisted Acquisition

Part A: General terms and conditions. Part A describes the *general terms and conditions* that will govern the relationship between the requesting agency and the servicing agency. Part A includes the responsibilities and respective roles that each party must carry out to ensure the effective management and use of an interagency contract.

Part B: Requirements and funding information. Part B provides *specific information on the requesting agency's requirements* sufficient to demonstrate a bona fide need. It also includes financial information that is required to authorize the transfer and obligation of funds for both the acquisition and the assistance provided by the servicing agency in connection with the acquisition.

All IAs must have clearly enumerated terms and conditions, requirements information, and funding information. However, the level of detail will vary based on the breadth of acquisition assistance to be provided (e.g., the period over which assistance will be provided, the number of offices requiring assistance) as well as the complexity and dollar value of the requesting agency's individual requirements.

For example, a one-time request for assistance associated with a simple, small dollar acquisition of commercial items would likely have less detail and,

[2] 31 U.S.C. 1502(a), sometimes referred to as the "bona fide needs statute," states that "[t]he balance of an appropriation or fund limited for obligation to a definite period is available only for payment of expenses properly incurred during the period of availability or to complete contracts properly made within that period of availability and obligated consistent with section 1501." To determine whether appropriated funds are being used only for legitimate needs arising during their period of availability requires that the description of goods or services for acquisition be specific, definite, and clear. A description meeting these parameters is required to demonstrate a bona fide need and support a binding agreement that can be recorded as an obligation in the fiscal year that the funds are available for obligation.

perhaps, fewer terms than a request for ongoing assistance to carry out a series of complex acquisitions for services. Unlike a one-time request for assistance, a long-term agreement would require the parties to identify the organizations and types of products and services that could be covered in future requests for assistance and to periodically review terms and conditions.

Each part of the IA is discussed in greater detail below. Agencies should carefully review their IAs for assisted acquisitions in conjunction with the guidance below to ensure they are clear and complete. Agencies are encouraged to use the model IA in Appendix 3 and, at a minimum, should ensure that their IAs contain the elements enumerated in Appendix 2.

1. Part A: General terms and conditions.

What information must be included in Part A of the IA? The individual elements that make up Part A are described in Table A of Appendix 2. Table A identifies the party responsible for providing the necessary information for each element and a cross-reference to language in the model IA in Appendix 3. For an example of how a completed "Part A" of an IA might read, see Appendix 4.

The delineation of roles and responsibilities is a critical component of the terms and conditions in the IA. Subsection III.C, below, and Appendix 1 provide guidance to help requesting agencies and servicing agencies establish clear lines of responsibility.

As explained in subsection C, the checklist in Appendix 1 is designed to help servicing agencies and requesting agencies think about their respective roles for each responsibility in the acquisition lifecycle. The IA must document the understandings reached by the parties after they have reviewed and discussed the checklist. For an example of how such understandings may be documented, see section A.6 of the completed IA in Appendix 4.

The effective execution of an assisted acquisition is the shared responsibility of both the servicing agency and the requesting agency. Accordingly, the parties must work together in developing the terms and conditions that will govern their relationship and ensure their stakeholders – program, acquisition, financial, legal, and other interested personnel – understand how assisted acquisitions will be managed.

Is Part A designed to cover only a single assisted acquisition or may it cover multiple assisted acquisitions? Part A may cover a single assisted acquisition but will more typically serve as an umbrella document to cover multiple assisted acquisitions. If multiple assisted acquisitions are anticipated, Part A should identify the period over which the servicing agency is authorized to provide assistance, the organizations that may request assistance, the organizations that may provide assistance, the general types of services and/or products that the requesting agency may need, unique terms and conditions, and restrictions, if any (e.g., funding restrictions). The scope and performance period may be amended by mutual agreement of the parties.

Describing Products and Services in Part A of the Interagency Agreement

- The purpose of describing products and services in Part A is to establish a general understanding between the agencies, where there will be an ongoing relationship, of the types of services and products that management in the requesting agency is authorizing its personnel to acquire (e.g., information technology but not construction) and the types of needs the servicing agency is prepared to acquire on behalf of the requesting agency.
- The description of products and services in Part A is not intended to establish a bona fide need and therefore may be as general or specific as the parties deem appropriate.
- Individual acquisitions conducted under the IA must fall within this described scope, which may be amended by the parties. In addition, before the servicing agency can undertake an acquisition, the requesting agency must provide information on its requirements in Part B of the IA in a specific, definite, and clear manner.

When does Part A become effective? Part A becomes effective when it is signed by authorizing officials of both agencies or such later date as specified in the agreement. However, a fiscal obligation is not created until the parties execute Part B, which requires the requesting agency to describe a bona fide need and to prepare funding documentation which must then be accepted by the servicing agency.

Responsibilities for Maintaining Part A of the Interagency Agreement

- Part A should be maintained by both the requesting agency and the servicing agency in the offices that signed the document.
- The document should be made available to officials within the agency who may be involved in executing Part B.
- Agencies should review the terms and conditions annually for IAs that are longer than one year in length and execute amendments as necessary. They should also periodically review performance under the IA to determine if expectations are being met (e.g., is each party carrying out its respective responsibilities in a timely manner) and document a summary of their assessment. The assessment should be signed and dated by each agency's reviewing official and maintained in the IA file.

2. <u>Part B: Requirements and funding information</u>.

What is the purpose of Part B of the IA? Part B serves multiple purposes. It is a requirements document to demonstrate a bona fide need. It is also an obligating document. Its execution authorizes the transfer and acceptance of funds for an assisted acquisition.[3]

What information must be included in Part B of the IA? Part B must provide specific information on the requesting agency's requirements sufficient to demonstrate a bona fide need. It also must include financial information that is required to authorize the transfer and obligation of funds for both the acquisition and the assistance provided by the servicing agency in connection with the acquisition.

The individual elements that make up Part B are described in Table B of Appendix 2. Table B identifies the party responsible for providing the necessary information for each element and a cross-reference to language in the model IA in Appendix 3. For an example of how a completed "Part B" of an IA might read, see Appendix 4.

The requesting agency and servicing agency must work together to ensure the IA provides requirements information that is specific, definite, and clear to demonstrate a bona fide need. In addition, the funding information must demonstrate that the amounts being transferred for obligation are for the purpose designated, meet time restrictions, and are legally available.

It is important that the terms and conditions established in Part A either be incorporated by reference or attached to Part B, irrespective of whether the parties use the sample IA or an alternate agency form for interagency transfers, such as DD Form 448, "Military Interdepartmental Purchase Request (MIPR) and DD Form 448-2, "Acceptance of MIPR."

When does Part B become effective? Part B becomes effective when it is signed by authorizing officials of both agencies. The requesting agency incurs a fiscal obligation when Part B is accepted by the servicing agency.

When might an addendum to Part B be appropriate? Appropriate documentation must accompany each transfer of funds. In some cases, the documentation may take the form of an addendum to Part B, as opposed to the issuance of a new Part B. For example, an addendum may be sufficient to address the ongoing transfer of funds in relation to a requirement for which incremental funding has been authorized. The addendum in this circumstance might document purpose, obligation amount, and requesting agency and servicing agency funding information, with signatures of authorized servicing and requesting agency officials (see sections B.1, 11, 12, 13, and 18 of Part B of the model IA). By contrast, an

[3] If the Economy Act is applicable to the transaction, a D&F must be approved by a warranted contracting officer or another official designated by the agency head.

addendum would not be sufficient to support the transfer of funds to cover a new requirement.

Maintaining Part B of the Interagency Agreement

- Part B should be maintained by the contracting office in the servicing agency that is responsible for providing acquisition assistance.
- Each contract or task/delivery order file that is established under the IA must either include or incorporate by reference a copy of the entire IA, including reference numbers, location, and execution dates for Part A and each Part B (including addenda, if any).
- Part B should also be maintained by the cognizant program office in the requesting agency.
- Part B should be forwarded to the financial offices of both the requesting and servicing agencies to ensure the proper transfer, obligation, collection, and accounting of funds.

C. Executing responsibilities

What responsibilities are associated with an assisted acquisition and who is responsible for carrying them out? Achieving success on an assisted acquisition requires effective execution of the same basic responsibilities that must be carried out when an agency acquires a product or service for itself or through a direct acquisition, including acquisition planning, contract execution, and contract administration. However, in an assisted acquisition, most acquisition responsibilities are shared. For this reason, the role each agency plays in meeting these responsibilities must be clearly understood by the respective parties to mitigate risk and achieve the best results possible from the assisted acquisition.

May roles be negotiated between the parties? Most of the roles each agency plays in meeting responsibilities in the acquisition lifecycle may be negotiated, consistent with applicable laws, regulations, and policies. There are some exceptions where certain roles must be performed by the same party in every assisted acquisition. For example, the requesting agency must:

- establish a bona fide need in terms that are specific, definite and clear;
- certify that funds are appropriate for the designated purpose, meet time limitations, and are legally available for the specified acquisition;
- identify any acquisition laws, fiscal laws or related policies that are unique to, or that restrict, the agency; and

- provide the servicing agency with the correct funding agency code needed for accurate reporting to the Federal Procurement Data System (FPDS).

What steps must requesting agencies and servicing agencies take to ensure clear lines of responsibility? Requesting agencies and servicing agencies must carefully delineate their roles and responsibilities in the IA. Appendix 1 provides a checklist of the responsibilities in an interagency acquisition to help requesting agencies and servicing agencies define their respective roles in the IA. For each responsibility, the checklist describes roles for the requesting agency and the servicing agency.

Circumstances underlying individual IAs will vary. For this reason, the description of certain roles has been generalized in the checklist. Accordingly, the parties will need to definitize their respective roles in the IA after reviewing the checklist.

Where can an example be found showing the documentation of roles and responsibilities in an interagency agreement? For an example of how understandings between the parties may be documented, see section A.6 of the completed IA example in Appendix 4.

Appendix 1

Checklist of Roles and Responsibilities in Assisted Acquisitions

To ensure sound management and use of interagency acquisitions and maximize their impact on agency effectiveness, requesting and servicing agencies must establish clear lines of responsibility for each step in the acquisition lifecycle, from planning to contract closeout.

This Appendix is designed to help requesting and servicing agencies define their respective roles in the IA. It identifies *16 basic responsibilities* in an interagency acquisition. For each responsibility, the appendix describes *associated roles* for the requesting agency and the servicing agency.

List of Responsibilities in an Assisted Acquisition

Acquisition Planning

1. Determine needs and develop requirements documents
2. Prepare funding document
3. Develop acquisition strategy
4. Prepare statement of work (SOW) and/or specifications
5. Develop quality assurance requirements
6. Identify official to assist contracting officer with contract administration

Contract Execution

7. Comply with competition requirements
8. Comply with customer-specific laws and policies
9. Ensure price reasonableness
10. Conduct source evaluation and make award

Contract Administration

11. Conduct inspection, acceptance, and surveillance
12. Determine when contract modifications are required
13. Prepare contractor performance evaluations
14. Review and approve invoices and make payment
15. Perform contract closeout & retrieve unexpended funds

Other Responsibilities

16. Track contract activity

This checklist should be used only as a starting point. The description of certain roles has been generalized in the checklist, because the nature and circumstances underlying an IA will vary, as will the needs and internal policies of the agencies involved. For example, IAs will need to establish:

- which agency prepares the statement of work, performance work statement, or statement of objectives;
- the required level of contract administration, the type of official required, and the agency that will provide the official;
- which agency is responsible for establishing acceptance of deliverables; and
- if the requesting agency intends to use direct fund cite.

Accordingly, requesting and servicing agencies should work together to definitize their roles in the IA (see section A.6 of the model IA), so that accountability is effectively established. A sample IA is provided at Appendix 4, using the model IA, so readers may see one example of how roles identified in this appendix might be delineated in the model IA.

General Stewardship

Responsibility: Ensure sound management and use of assisted acquisitions to maximize impact on agency effectiveness.

Requesting Agency	Servicing Agency
• Work closely with the Servicing Agency to establish IAs that are clear and complete. • Be a good steward of the agency's funds by ensuring appropriate internal controls are in place to ensure interagency acquisition activities are consistent with sound project management, contracting, and fiscal practices. • Work in close collaboration with the Servicing Agency throughout the project lifecycle. Make trained and qualified personnel available to support key activities, including the timely preparation and execution of funding documents, compliance with customer-unique laws and policies, acquisition planning, source selection evaluation, and contract administration. • Provide accurate and timely information to support the Servicing Agency in effectively awarding and managing the contract, including evaluation of contractor performance and prompt payment. • Obtain legal review, as needed, for issues related to the development and execution of the IA, in accordance with any agency procedures. • Review the general terms and conditions of the IA with the Servicing Agency no less than annually and make amendments as necessary.	• Work closely with the Requesting Agency to establish IAs that are clear and complete. • Be a good steward of the Requesting Agency's funds by ensuring appropriate internal controls, and applying sound project management, contracting, and fiscal practices. • Manage all phases of the project lifecycle from requirements development through contract closeout, as agreed in the IA. • Work in close collaboration with the Requesting Agency throughout the project lifecycle, responding promptly to inquiries from the Requesting Agency including matters regarding process, project status, and funds balance. • Enforce contractual terms and conditions to ensure the timely delivery of goods and services. • Maintain accurate records and files associated with acquisition assistance activities. • Obtain necessary legal review for issues arising under the IA. • Review the general terms and conditions of the IA with the Requesting Agency no less than annually and make amendments as necessary.

Acquisition Planning

1. Determine needs and develop requirements document

Responsibility: Identify the requirement that must be met to carry out the Requesting Agency's mission and develop the documents that describe the requirement in terms of functions to be performed, performance required, or essential physical characteristics.

a. Requesting Agency	b. Servicing Agency
i. Establish that a requirement exists. ii. Determine that it is in the best interest of the government to pursue an assisted acquisition. iii. Provide documentation to the Servicing Agency, which may be in the form of a statement of work (SOW), statement of objectives (SOO), or performance work statement (PWS), that includes a *specific, definite, and clear* description of a bona fide need in the fiscal year that the funds are available for new obligations. The need must be adequately documented, but may be concise. A solution need not be specified in order to establish a bona fide need. <u>Note</u>: This step is a critical prerequisite to the Servicing Agency being able to accept funding from the Requesting Agency and the Requesting Agency's ability to record an obligation. iv. Initiate acquisition planning as soon as a need is identified and involve the Servicing Agency, as appropriate, in the planning process.	i. Assist the Requesting Agency in refining the requirements document package, including the description of key project objectives, unique project requirements, and performance expectations.

Acquisition Planning

2. Prepare a funding document.

Responsibility: Prepare documentation that identifies both the requesting agency's bona fide need and the information required to authorize the transfer and obligation of funds for acquisition activities. Note: The funding document is the second critical part of an IA (i.e., Part B). The general terms & conditions constitute the first part of the IA (i.e., Part A) and may be negotiated in advance of the identification of a requirement. Part A may cover multiple Part Bs. Part A must be incorporated into all funding documents.

a. Requesting Agency	b. Servicing Agency
i. Work with the Servicing Agency to prepare a funding document (i.e., Part B of the IA). Provide: (i) description of the products or services required and the acquisition activities to be performed by the Servicing Agency that is adequate to demonstrate a bona fide need and can be recorded as an obligation (see 31 U.S.C. 1501, 1502), (ii) information on performance or delivery requirements along with projected milestones, (iii) data required for the proper transfer and obligation of funds, and (iv) information on any agency-unique acquisition restrictions or limitations applicable to the funding being provided. ii. The funds certifying official shall: A. Timely execute all financial documents required for a valid funding request (i.e, to show funding meets purpose, time and amount); and B. Ensure funds are certified and legally available – in terms of purpose, time, and amount -- for the specified acquisition.	i. Work with the Requesting Agency to prepare a funding document (i.e., Part B of the IA). ii. Do not accept the funding document unless it: (i) identifies proper funds -- including the type of funds to be used, their period of availability, and a funds citation – (ii) identifies the funds certifying official and (iii) adequately describes a bona fide need of the Requesting Agency. iii. Help the Requesting Agency comply with the bona fide needs rule by: A. managing funds according to the Requesting Agency's guidance; B. recording transactions in a timely fashion; and C. implementing and exercising controls to ensure compliance with all applicable statutory and regulatory fiscal requirements.

Acquisition Planning

3. Develop acquisition strategy

Responsibility: Establish a strategy to apply acquisition processes (e.g., competition) and tools (e.g., contract type) in the most effective manner possible based on the nature and circumstances surrounding the acquisition.

a. Requesting Agency	b. Servicing Agency
i. Provide the Servicing Agency with information on project objectives, deliverables, and schedule milestones. ii. Work with the Servicing Agency to: A. build on initial acquisition planning and market research that was conducted to develop requirements documents (e.g., share any information gathered on product/service requirements, characteristics, acceptance criteria and any independent cost estimates) and establish a formal acquisition plan, where required; and B. ensure sufficient time has been built into the acquisition schedule to maximize competition and encourage contractors to provide quality proposals.	i. Conduct market research. ii. Depending on the size and complexity of the acquisition, establish a formal acquisition plan addressing technical, business, management and other significant considerations that will control the acquisition. iii. Select an appropriate contract type based on the nature of the requirement and the associated risk. iv. Advise the Requesting Agency of the risk associated with the acquisition strategy and contract type. v. Provide the Requesting Agency with an opportunity to concur on the contract type as well as with acquisition plan, when required.

Acquisition Planning

4. Prepare, or finalize, statement of work (SOW) and/or specifications

Responsibility: Develop SOW, statement of objectives (SOO), or performance work statement (PWS), (or specifications for products) or complete such documents if initially prepared by the Requesting Agency as part of requirements development.

a. Requesting Agency	b. Servicing Agency
i. Work with the Servicing Agency to ensure: A. requirements are clearly defined so offerors may make informed business decisions on whether to respond and perform the due diligence necessary to propose the best solutions; and B. suitable performance standards are established against which results may be effectively measured. ii. For contracts or orders with award fees, work with servicing agency to develop appropriate award fee criteria and composition of the award fee board, if one is to be established.	i. Prepare and/or finalize SOW/SOO/PWS/specs based on requirements documents (or initial SOW/SOO/PWS/specs) provided by the Requesting Agency, discussions with the Requesting Agency stakeholders -- including program and project managers, contracting, fiscal, legal, and others participating in the acquisition process – market research, and other acquisition planning efforts. ii. Ensure requirements are clearly defined and suitable performance standards are established against which results may be effectively measured. iii. Provide the Requesting Agency with opportunity to concur on SOW/SOO/PWS/specs before finalizing. iv. For contracts or orders with award fees, develop award fee criteria that are tied to identifiable acquisition outcomes, defined in terms of cost, schedule, and performance outcomes.

Acquisition Planning

5. Develop quality assurance requirements

Responsibility: Develop quality assurance requirements for the contract. If a quality assurance surveillance plan (QASP) is required, develop the plan that government will use to determine whether supplies or services conform to contract requirements.

a. Requesting Agency	b. Servicing Agency
i. Assist the Servicing Agency in developing the QASP, where required, including identification of the work requiring surveillance and the method of surveillance. ii. Provide trained personnel (e.g., contracting officer's technical representative) to perform monitoring where monitoring is required.	i. Consult with the Requesting Agency to identify work requiring surveillance and the method of surveillance. ii. Ensure the selected surveillance method, including costs and required resources, are appropriate for the risk associated with the acquisition. iii. Consult with the Requesting Agency on the strategy for developing quality assurance (QA) documents (e.g., government develops QA plan (QAP) as part of SOW or QASP as part of PWS; offerors propose QASPs in response to SOO). iv. In preparing QA documents: A. Consider drafts developed by Requesting Agency. B. If offerors are required to submit proposed QASPs, review the proposal to ensure the plan meets the government's surveillance needs. C. Review proposed QASPs with Requesting Agency. v. Provide the Requesting Agency with opportunity to concur on QASP or QAP before finalizing.

Acquisition Planning

6. Identify official to assist contracting officer with contract administration

Responsibility: Appoint an official with appropriate expertise (e.g., technical, acquisition) and training to assist with monitoring contract performance and perform other contract administration responsibilities.

a. Requesting Agency	b. Servicing Agency
i. Based on the level of contract administration required, provide qualified, trained, available, and willing individuals to be appointed by the Servicing Agency Contracting Officer (CO) to serve as the COTR/COR/RO, except where the parties agree that these individuals will be provided by the Servicing Agency. Identify qualified fee determination officials for contracts with award or incentive fees. <u>Note</u>: If the individual who serves as the COTR is not from the Requesting Agency, the Requesting Agency should provide a qualified official to assist the Servicing Agency with contract administration in a timely manner. ii. Provide alternate individuals within reasonable time should the personnel provided by the Requesting Agency be found by the Servicing Agency CO to be unable or unavailable to perform the required duties.	i. For each requirement, determine the required level of contract administration. ii. Identify the following: A. the type of official to be appointed (e.g., COTR, Contracting Officer Representative (COR), Receiving Official (RO)) to assist with contract administration, B. the agency that will provide the official, and C. the applicable training and certification standards. iii. Appoint a qualified and trained COTR/COR/RO and, if the selected contract-type involves a fee or incentive, a fee determination official before contract performance begins. <u>Note</u>: If review of invoices is not identified as a role of the COTR/COR, the IA should identify an appropriate official to review invoices and the Servicing Agency CO should identify the official before submittal of the first invoice.

Contract Execution

7. Comply with competition requirements

Responsibility: Maximize the meaningful use of competition and ensure exceptions to competition are properly documented, justified, and approved.

a. Requesting Agency	b. Servicing Agency
i. Ensure enough time is built into the acquisition strategy to foster competition (e.g., allow the Servicing Agency to develop reasonable response time considering complexity, commerciality, availability, and urgency of need) ii. Participate in the development of technical evaluation criteria ii. If an exception to competition is required and justified (including exceptions to the fair opportunity process for MACs and exceptions recognized under FAR Subpart 8.4 for MAS contracts), develop supporting rationale through market research and due diligence and provide appropriate documentation to the Servicing Agency.	i. Develop technical evaluation criteria in consultation with the Requesting Agency. ii. Seek competition unless an exception is justified. iii. Require the Requesting Agency to furnish supporting rationale and appropriate documentation to support an exception to competition. iv. Review sufficiency of justification and documentation before approving and proceeding with a non-competitive action.

Contract Execution

8. Comply with customer-specific laws and policies

Responsibility: Ensure contracts or orders awarded on behalf of the Requesting Agency adhere to any statutory, regulatory, and policy requirements specifically applicable to the Requesting Agency.

a. Requesting Agency	b. Servicing Agency
i. Apprise the Servicing Agency of all terms, conditions, and requirements to be incorporated into the contract/order as necessary to comply with the statutes, regulations and directives that are specific to the Requesting Agency (e.g., funding restrictions; domestic source restrictions). ii. Provide information and timely clearance on security requirements applicable to the IA.	i. Ensure the Requesting Agency-specific laws or restrictions and data collection and reporting requirements that have been identified by the Requesting Agency are followed. ii. Work with the Requesting Agency to mutually agree to appropriate contract clauses addressing customer-specific laws and policies.

9. Ensure price reasonableness

Responsibility: Determine that prices to be paid for contracted goods or services are fair and reasonable.

a. Requesting Agency	b. Servicing Agency
i. Provide input to the Servicing Agency to assist in determination of whether proposed contract prices are fair and reasonable. <u>Note</u>: The reasonableness of access or service fees charged by the Servicing Agency should have been evaluated by the Requesting Agency as part of its "best interest determination" conducted before entering into an IA.	i. Ensure appropriate price reasonableness and best value determination is conducted and documented at time of award. Consider the agreed-upon terms and conditions, promised quality, and delivery schedule. Request and consider any input from the Requesting Agency, including its independent cost estimate, if one was prepared.

Contract Execution

10. Conduct source evaluation and make award

Responsibility: Appoint source selection authority and source evaluation board, ensure proposals are evaluated in an impartial manner based solely on the factors in the solicitation. Ensure award decisions are properly documented and represent the best value to the government.

a. Requesting Agency	b. Servicing Agency
i. Provide necessary resources for technical evaluation of proposals or quotes and participation in activities that require technical expertise. A. Attend oral presentation and technical evaluation discussions. B. Conduct or assist with technical evaluations of proposals. ii. Review the evaluation plan and generally have representation on the source evaluation board. iii. Provide the correct funding agency code needed for accurate reporting to the Federal Procurement Data System (FPDS).	i. Appoint the source selection authority and the source evaluation board. ii. Ensure source evaluations are conducted fairly and proposals are evaluated based solely on the factors and subfactors in the solicitation. iii. Ensure award decisions are properly documented, including the rationale for any tradeoffs made or relied on by the source selection authority. iv. Consult with the Requesting Agency prior to making a final decision. v. Execute the award decision and debrief offerors as necessary. vi. Ensure the funding agency code provided by the Requesting Agency is entered into FPDS.

Contract Administration

11. Conduct inspection, acceptance, and surveillance

Responsibility: Examine and test supplies or services to determine whether they conform to contract requirements. Assume ownership of supplies tendered and approve the specific services rendered as partial or complete performance of the contract. Monitor the contractor's work to ensure compliance with the contract terms, including the QASP, as applicable.

a. Requesting Agency	b. Servicing Agency
i. Ensure deliverables are received and quality is acceptable. A. Inspect work for compliance with contract requirements. Within 30 days of receipt, or another period as specified in the contract, promptly reject work that does not comply with contract requirements, or accept work that meets the terms of the contract or order, and immediately notify the Servicing Agency's CO. B. If the Servicing Agency has retained responsibility for acceptance, send acceptance paperwork to Servicing Agency to complete the final acceptance of the goods or services. <u>Note</u>: If the individual serving as the COTR is not from the Requesting Agency, the official from the Requesting Agency who is identified to assist with contract administration should provide timely advice to the Servicing Agency CO or COTR for action. ii. Conduct appropriate surveillance, which may include site visits, pre-planned inspections, random unscheduled inspections, review of contractor reporting requirements (e.g., progress reports, shop plans, and blueprints), and periodic meetings with contractor personnel.	i. Ensure that personnel who have been appointed to perform contract administration are carrying out responsibilities related to inspection, acceptance, and surveillance and reporting back in a timely manner. ii. If the Servicing Agency has retained responsibility for acceptance, complete acceptance of goods or services after reviewing the documentation provided by the Requesting Agency official. iii. Ensure appropriate surveillance is conducted. The type and extent of surveillance should be commensurate with the criticality of the service or task and the resources available to accomplish the surveillance. Surveillance should ensure that the government receives the value for which it contracted. iv. Work with Requesting Agency, as necessary, to identify respective roles for other applicable contract administration responsibilities identified in FAR 42.302.

Contract Administration

11. Conduct inspection, acceptance, and surveillance (con't.)

a. Requesting Agency	b. Servicing Agency
iii. Perform duties in a timely manner in accordance with the QASP or QAP. iv. Advise the Servicing Agency's CO immediately of any circumstances that affect performance by the contractor, including failures to comply with technical requirements of the contract or to show a commitment to customer satisfaction, particularly if the contractor does not make corrections.	v. Take appropriate and timely actions to address performance problems. Typically, problems will be identified by a COTR/COR.

12. Determine when contract modifications are required

Responsibility: Evaluate the merits of proposed contract modifications.

a. Requesting Agency	b. Servicing Agency
i. Work with the Servicing Agency to evaluate proposals for changes. If requested by the Servicing Agency's CO, participate in negotiation of changes, modifications, and claims. ii. Ensure the Requesting Agency personnel are not authorizing work (making commitments or promises, issuing instructions to start or stop work, directing changes), changing any contractual documents, modifying the scope of work (including the period of performance), authorizing accrual of costs, or otherwise providing direction to the contractor, except as expressly authorized in the appointment by the Servicing Agency's CO.	i. Work with the Requesting Agency to evaluate proposals for changes. ii. Ensure that any modifications to the requirements or price of the order or contract remain within the overall scope of the contract or order. iii. Work with the Requesting Agency to develop funding document (i.e, Part B of IA), or addendum to existing funding document, to cover contract modification.

Contract Administration

13. Prepare contractor performance evaluations

Responsibility: Evaluate and record the contractor's performance for consideration in future source selections.

a. Requesting Agency	b. Servicing Agency
i. Track, measure, and report to the Servicing Agency CO on the performance of the contractor.	i. Evaluate the contractor's performance, taking into consideration data provided by (a) the COTR/COR and (b) the end users from the Requesting Agency when the appointed COTR/COR is not an end user. ii. Provide evaluations to the contractor as soon as practicable after completion of the evaluation. Review performance with the contractor in accordance with FAR 42.1502. iii. Document performance in the contract file. The ultimate conclusion on the performance evaluation is a responsibility of the Servicing Agency. iv. Input data into the Past Performance Information Retrieval System (PPIRS).

Contract Administration

14. Review and approve invoices and make payment

Responsibility: Examine the contractor's invoices for completeness and accuracy and return improper invoices within time periods specified in the contract and approve proper invoices for payment.

a. Requesting Agency	b. Servicing Agency
i. Review the invoice and advise the Servicing Agency CO whether to approve or disapprove payment. ii. If the Servicing Agency CO does not approve payment, the Requesting Agency payment office should not pay the invoice in the case of direct fund cite (where the Requesting Agency finance office retains funds and pays the contractor directly). iii. If the Requesting Agency uses direct fund cite, the payment office should ensure a copy of each paid invoice is returned to the Servicing Agency contracting office for inclusion in the official contract file.	i. Ensure the contract/order addresses the appropriate processes for invoice submittal and approval and identifies the payment office, which typically is the Servicing Agency. <u>Note</u>: If review of invoices is not identified as a responsibility of the COTR/COR, identify an appropriate official to review invoices before submittal of the first invoice. ii. Work with the appointed COTR/COR, or other official responsible for invoice review, and the payment office in the Requesting Agency in the case of direct fund cite, to facilitate accurate and timely review and payment to the contractor. iii. Approve or disapprove payment after consultation with the Requesting Agency. A. Pay non-disputed invoices and bill the Requesting Agency for reimbursable services. B. Return improper invoices within specified time periods (e.g., in accordance with the Prompt Payment Act where applicable). C. Do not authorize payment if the work being invoiced is disputed or the invoice is otherwise found to be improper. <u>Note</u>: Regardless of the funding source, the Servicing Agency CO retains the authority to stop payment when necessary.

Contract Administration

15. Perform contract closeout

Responsibility: Ensure that all contract requirements and administrative actions have been completed (including resolution and settlement of disputes and final payment) so that the contract files may be properly retired and archived.

a. Requesting Agency	b. Servicing Agency
i. Support contract close-out functions, to include providing appropriate funding to satisfy settlement agreements and/or claims. ii. Take appropriate actions to retrieve unexpended balances.	i. Close out contract/order upon ensuring that all contract/order requirements and administrative actions have been completed. ii. Return unused (unexpended) balance of the funds to the Requesting Agency.

Other Responsibilities

16. Track contract activity

Responsibility: Ensure the accurate and timely collection of data to measure results and plan for future requirements. (See, e.g., the Federal Funding Accountability and Transparency Act)

a. Requesting Agency	b. Servicing Agency
i. Ensure that correct data is provided in a timely manner to the Servicing Agency to facilitate accurate and complete data reporting. ii. Provide the correct funding agency code to the Servicing Agency needed for accurate reporting to FPDS.	i. Ensure accurate contract data reporting into the applicable government-wide database – e.g., report use of competition for placement of task and delivery orders and contract awards in FPDS; and ensure contractor is reporting required subcontracting data into the Electronic Subcontracting Reporting System (ESRS). ii. Confer with the Requesting Agency if funding agency code has not been provided. iii. In accordance with FAR Subpart 34.2, for contracts involving significant development work, provide earned value management report to project manager. iv. Ensure proper socio-economic credit is assigned to the Requesting Agency.

Appendix 2

Elements of a Model Interagency Agreement (IA) for an Assisted Acquisition

Table A. Elements in "Part A" of the IA: General terms & conditions

Element	Description	Party Required to Provide Information for the IA	Reference in Model IA
1. Purpose	Explains that the purpose of Part A is to describe the general terms and conditions governing the provision of acquisition assistance. Clarifies that fiscal obligations are not created through the execution of Part A alone.	Servicing & Requesting Agency	A.1
2. Authority	Identifies the legal authority that the servicing agency will use to conduct interagency acquisitions.	Servicing Agency	A.2
3. Part A identifier	Identifier used on relevant documents, such as funding documents, to provide acquisition assistance.	Servicing Agency	A.3
4. Scope	Identifies the organizations that may request assistance under the IA, the organizations that may provide assistance, general types of services and/or products that the requesting agency may need (e.g., information technology (IT)), and restrictions, if any (e.g., dollar limitations).	Servicing & Requesting Agency	A.4
5. Period of agreement	Identifies period during which assistance may be provided.	Servicing & Requesting Agency	A.5

Table A. Elements in "Part A" of the IA: General terms & conditions (con't.)

Element	Description	Party Required to Provide Information for the IA	Reference in Model IA
6. Roles & responsibilities	Establishes the responsibilities associated with conducting an interagency acquisition and the respective roles of the servicing agency and requesting agency in carrying out each responsibility.	Servicing & Requesting Agency	A.6
7. Billing & payment	Identifies billing and payment terms.	Servicing & Requesting Agency	A.7
8. Small business credit	Establishes that the requesting agency will receive socio-economic credit where applicable.	No information required from the parties	A.8
9. Contract termination, disputes, & protests	Describes each party's responsibilities associated with contract termination, disputes and protests.	Servicing & Requesting Agency	A.9
10. Review of Part A	Identifies the parties' commitment to review Part A at least annually for agreements that exceed one year.	No information required from the parties	A.10
11. Amendments	Describes the process for modifying the terms and conditions in Part A.	Servicing & Requesting Agency	A.11
12. Termination of IA	Describes each party's rights to terminate the IA.	Servicing & Requesting Agency	A.12
13. Interpretation of IA	Describes each party's responsibilities for addressing disputes regarding the interpretation of the IA.	Servicing & Requesting Agency	A.13
14. Signatures	Establishes that appropriate officials of each agency are held accountable to the agreed-upon terms and conditions.	Servicing & Requesting Agency	A.14

Table B. Elements in "Part B" of the IA: Requirements & Funding Information

Element	Description	Party Required to Provide Information for the IA	Reference in Model IA
1. Purpose	Explains that the purpose of Part B is to provide requirements and funding information.	Servicing Agency & Requesting Agency	B.1
2. Authority	Identifies the legal authority that the Servicing Agency is using to conduct the acquisition on behalf of the Requesting Agency.	Servicing Agency	B.2
3. Part B identifier	Provides common agreement number for identifying Part B on relevant documents.	Servicing Agency	B.3
4. General terms & conditions	Describes the terms & conditions applicable to the actions taken under Part B. Terms & conditions either should be incorporated by reference to Part A or attached.	Servicing Agency & Requesting Agency	B.4
5. Project title	Identifies the project in the Requesting Agency whose requirements are being met through the assisted acquisition.	Requesting Agency	B.5
6. Description of products or services	Describes the goods or services that will be acquired from a contractor by the Servicing Agency on behalf of the Requesting Agency. Note: The description must be specific, definite, and clear in order to demonstrate a bona fide need and support a binding agreement that can be recorded as an obligation in the fiscal year that the funds are available for obligation.	Requesting Agency	B.6

Table B. Elements in "Part B" of the IA: Requirements & Funding Information (con't.)

Element	Description		Reference in Model IA
7. Projected milestone	Identifies key project and/or acquisition milestones.	Servicing & Requesting Agency	B.7
8. Payment & billing	Explains the parties' respective obligations for the payment of contractor invoices and servicing agency fees.	Servicing & Requesting Agency	B.8
9. Description of acquisition assistance	Describes the services that the Servicing Agency will provide to the Requesting Agency in connection with planning, executing, and/or managing the acquisition and/or contract oversight and close-out.	Servicing & Requesting Agency	B.9
10. Fees	Describes the fees that will be assessed by the servicing agency.	Servicing Agency	B.10
11. Obligation amount	Provides information related to the obligation of funds for specified bona fide needs.	Servicing & Requesting Agency	B.11
12. Requesting agency funding information	Provides data from the requesting agency required for the proper transfer and obligation of funds (e.g., the period for making obligations for each identified fund citation) and certification of requesting agency official.	Requesting Agency Certifying Official	B.12
13. Servicing agency funding information	Provides data from the servicing agency required for the proper transfer and obligation of funds.	Servicing Agency	B.13

Table B. Elements in "Part B" of the IA: Requirements & Funding Information (con't.)

Element	Description		Reference in Model IA
14. Description of requesting agency unique restrictions	Identifies unique restrictions applicable to the requesting agency related either to the acquisition or the funding to cover the assisted acquisition.	Requesting Agency	B.14
15. Amendments	Describes the process for modifying provisions in Part B.	Servicing & Requesting Agency	B.15
16. Contact information	Identifies a main point of contact (POC) in the servicing agency and the Requesting Agency and a financial POC in each agency.	Servicing & Requesting Agency	B.16
17. Signatures	When required information has been provided, including certification by requesting agency official, signature by the requesting agency establishes that funds are legally available, that all unique procurement and funding requirements have been disclosed and internal reviews have been completed. Signature by both the requesting agency and the servicing Agency creates an obligation for the requesting agency.	Servicing Agency & Requesting Agency	B.18

Appendix 3

Model Interagency Agreement for an Assisted Acquisition

Model Interagency Agreement
PART A – General Terms & Conditions

A.1. Purpose

This Part of the IA (hereinafter "Part A") describes the terms and conditions that govern the provision of acquisition assistance between [**insert the name of agency with a requirement**], hereinafter "the Requesting Agency" and [**insert the name of agency that will provide acquisition services for the Requesting Agency**], hereinafter "the Servicing Agency."

No fiscal obligations are created through the execution of Part A. A fiscal obligation arises when the Requesting Agency demonstrates a bona fide need, provides the necessary requirements and funding information to the Servicing Agency and both parties execute a funding document using Part B of this IA or an alternate funding document.

A.2. Authority

The parties' authority to enter into this interagency agreement is (check applicable box):

☐ The Economy Act (31 U.S.C. 1535)

☐ Franchise Fund (e.g., 31 U.S.C. 501 note) or Revolving Fund (e.g., 40 U.S.C. 321)
Identify specific statutory authority _____

☐ Other (identify specific statutory authority or authorities)

_____

A.3. Part A Identifier

Insert identifier to identify Part A on relevant documents, including requirements and funding information provided through Part B or alternate documents for specific acquisitions.

A.4. Scope

a. Organizations authorized to request acquisition assistance

The following organizations in the Requesting Agency are authorized to obtain assistance from the Servicing Agency. **[insert list of organizations]** Note: The organization(s) identified in Section 1 of Part B must be listed in this section.

b. Organizations authorized to provide acquisition assistance

The organizations in the Servicing Agency are authorized to provide assistance to the Requesting Agency. **[insert list of organizations]** Note: The organization identified in Section 1 of Part B must be listed in this section.

c. Types of products or services that may be acquired

The following types of services or products may be acquired through interagency acquisition pursuant to this IA. Note: The need described in Section 6 of Part B must fall within the scope of products or services described below.

[insert description of services and/or products. The description for this section may be general in nature (e.g., information technology) and is not required to meet the definition of a bona fide need.]

d. Limitations

The following restrictions apply: **[describe any restrictions or indicate "None"]**

A.5. Period of Agreement

The terms and conditions described in Part A of the IA become effective when signed by authorized officials of both agencies and remain effective until [**insert date**], unless amended in accordance with Section 11 or terminated in accordance with Section 12.

A.6. Roles & Responsibilities of Servicing Agency & Requesting Agency

The effective management and use of interagency contracts is a shared responsibility of the Requesting Agency and the Servicing Agency. The parties hereby agree to the following roles and responsibilities, which are derived from the Checklist in Appendix 1 of *Interagency Acquisitions*, guidance issued by the Office of Federal Procurement Policy.

[**For each main responsibility in the acquisition lifecycle, define the respective roles of the requesting agency and servicing agency**.]

A.7. Billing & Payment

The Requesting Agency will pay the Servicing Agency for costs of each contract or task/delivery order. Billings may include the amounts due under the contract or order plus any assisted service fees identified in Part B of this IA. **[insert description of billing and payment procedures]**

Reimbursable billings are delinquent when they are [**insert number**] or more calendar days old (from date of the billing). When billings remain delinquent over [**insert number**] calendar days and the Requesting Agency has not indicated a problem regarding services, the Servicing Agency may choose not to award any new contract/orders or modifications to existing contract/orders for the Requesting Agency (or the client within) and termination of existing services will be considered and negotiated with the Requesting Agency.

The Requesting Agency shall be responsible for interest owed under the Prompt Payment Act except that the Servicing Agency shall be responsible for interest owed to the contractor due to delays created by actions of the Servicing Agency.

A.8. Small Business Credit

Any contract actions executed by the Servicing Agency on behalf of the Requesting Agency will allocate the socio-economic credit to the Requesting Agency at the lowest FIPS 95-2 Agency/Bureau component as identified by the Requesting Agency. If the code is not provided, the Servicing Agency will allocate the credit to the highest Requesting Agency FIPS 95-2 Code.

A.9. Contract Termination, Disputes and Protests

If a contract or order awarded pursuant to this IA is terminated or cancelled or a dispute or protest arises from specifications, solicitation, award, performance or termination of a contract, appropriate action will be taken in accordance with the terms of the contract and applicable laws and regulations. The Requesting Agency shall be responsible for all costs associated with termination, disputes, and protests, including settlement costs, except that the Requesting Agency shall not be responsible to the Servicing Agency for costs associated with actions that stem from errors in performing the responsibilities assigned to the Servicing Agency. The Servicing Agency shall consult with the Requesting Agency before agreeing to a settlement or payments to ensure that the Servicing Agency has adequate time in which to raise or address any fiscal or budgetary concerns arising from the proposed payment or settlement.

A.10. Review of Part A

The parties agree to review jointly the terms and conditions in Part A at least annually if the period of this agreement, as identified in Section 5, exceeds one year. Appropriate changes will be made by amendment to this agreement executed in accordance with Section 11. The parties further agree to review performance under this IA to determine if expectations are being met and document a summary of their assessment. The responsible reviewing official at each agency shall sign and date the assessment.

[insert description of metrics (e.g., the quality of each party's responsiveness; the quality of each party's overall execution of assigned responsibilities) and methods agreed upon to gather performance information (e.g., surveys, interviews, record reviews)]

A.11. Amendments

Any amendments to the terms and conditions in Part A shall be made in writing and signed by both the Servicing Agency and the Requesting Agency.

A.12. IA Termination

This IA may be terminated upon [**insert number**] calendar days written notice by either party. If this agreement is cancelled, any implementing contract/order may also be cancelled. If the IA is terminated, the agencies shall agree the terms of the termination, including costs attributable to each party and the disposition of awarded and pending actions.

If the Servicing Agency incurs costs due to the Requesting Agency's failure to give the requisite notice of its intent to terminate the IA, the Requesting Agency shall pay any actual costs incurred by the Servicing Agency as a result of the delay in notification, provided such costs are directly attributable to the failure to give notice.

A.13. Interpretation of IA

If the Servicing Agency and Requesting Agency are unable to agree about a material aspect of either Part A or Part B of the IA, the parties agree to engage in an effort to reach mutual agreement in the proper interpretation of this IA, including amendment of this IA, as necessary, by escalating the dispute within their respective organizations.

If a dispute related to funding remains unresolved for more than [**insert number**] calendar days after the parties have engaged in an escalation of the dispute, the parties agree to refer the matter to their respective Agency Chief Financial Officers with a recommendation that the parties submit the dispute to the CFO Council Intragovernmental Dispute Resolution Committee for review in accordance with Section VII of Attachment 1 to the Treasury Financial Manual, Volume 1, Bulletin No. 2007-03, Intragovernmental Transactions, Subject: Intragovernmental Business Rules, or subsequent guidance.

A.14. Signatures

REQUESTING AGENCY OFFICIAL:

Signature: _____Date: _____

Name: _____

Title: _____

Agency: _____

Address: _____

Phone: _____

E-mail & fax: _____

SERVICING AGENCY OFFICIAL:

Signature: _____Date: _____

Name: _____

Title: _____

Agency: _____

Address: _____

Phone: _____

E-mail & fax:_____

Model Interagency Agreement
PART B – Requirements & Funding Information

B.1. Purpose

This Part of the IA (hereinafter "Part B") serves as the funding document. It provides specific information on the requirements of [**insert the name of agency/organization with a requirement**], hereinafter "the Requesting Agency" sufficient to demonstrate a bona fide need and identifies funds associated with the requirement to allow [**insert the name of agency/organization that will provide acquisition services for the Requesting Agency]**, hereinafter "the Servicing Agency," to provide acquisition assistance and conduct an interagency acquisition.

B.2. Authority

The parties' authority to enter into this interagency agreement is (check applicable box):

☐ The Economy Act (31 U.S.C. 1535)

☐ Franchise Fund (e.g., 31 U.S.C. 501 note) or Revolving Fund (e.g., 40 U.S.C. 321)
Identify specific statutory authority _____

☐ Other (identify specific statutory authority or authorities)

B.3. Part B Identifier

Insert common agreement number(s) to identify Part B on other documents.

B.4. General Terms & Conditions

Activities undertaken pursuant to this document are subject to the general terms and conditions set forth in Part A, [**insert identifier found in section 3 of Part A**]. Part A is located at (check applicable box):

☐ [**insert location]**

☐ Attached

B.5. Project Title

[insert name of Requesting Agency's project]

B.6. Description of Products or Services / Bona Fide Need

This section describes the goods or services that will be acquired from a contractor by the Servicing Agency on behalf of the Requesting Agency under this IA.

[The Requesting Agency shall insert a specific, definite, and clear description that demonstrates a bona fide need and supports a binding agreement that can be recorded as an obligation in the fiscal year that the funds are available for obligation. This description may, but is not required to, be in the form of a statement of work (SOW), statement of objectives (SOO), performance work statement (PWS), or other requirements document. A specific, definite, and clear description of a current need of the requesting agency that enables the servicing agency to immediately begin work on the IA is sufficient.]

If the goods and/or services to be acquired are described in an attachment, check the box below and describe the attachment.

☐ Description of goods or services is attached. **[insert brief description of attachment]**

B.7. Projected Milestones

[List key project and/or acquisition milestones as planned at time of signing of the agreement.]

B.8. Billing and Payment

The Servicing Agency will pay contractor invoices from amounts identified in section 13 on a reimbursable basis. The Servicing Agency will present an itemized statement to the Requesting Agency for reimbursement of incurred contract costs and assisted services support costs. The Requesting Agency will pay reimbursable billings to the Servicing Agency from funds identified in section 12. See section 7 of Part A for additional terms and conditions addressing billing and payment.

B.9. Description of Acquisition Assistance

The Servicing Agency will provide the following services to the Requesting Agency.

[insert description of services that the Servicing Agency will provide to the Requesting Agency in connection with planning, executing, and/or managing the acquisition.]

B.10. Fees

Services charges will be determined as follows:

[Insert description of how the service charge is determined (e.g., Servicing Agency will provide service as described in this IA at a service charge of [insert number] percent of all amounts obligated on behalf of the Requesting Agency; or fees will be charged at an hourly rate determined on a task by task basis negotiated with the Requesting Agency.)]

B.11. Obligation Information

Servicing Agency and Requesting Agency shall complete the table below.

Common Agreement Number	**Requirement**	**Type of Requirement** (Severable Service / Non-severable service)

B.12. Requesting Agency Funding Information

The Requesting Agency's Certifying Official shall complete the table & certification

Basic appropriation symbol (Treasury account symbol)	
Amount obligated (contract costs plus assisting agency's service fee)	
Fund citation (line of accounting)	
Appropriation expiration date	
Unique restrictions on funding (if any)	
Business event type code	
Agency location code (8-digit) for IPAC	
DUNS/BPN number (Business Partner Network or BPN #)	
Funding agency code	
Funding office code	

Requesting Agency Funds Certifying Official	
I certify that the funds cited above are properly chargeable for the purposes set forth in paragraphs B. 4 and B.11 of this IA	
Signature	**Date**
Printed Name	
Title	
Office	

B.13. Servicing Agency Funding Information

The Servicing Agency shall complete the table below.

Basic appropriation symbol (Treasury account symbol)	
Fund citation (line of accounting)	
Business event type code	
Agency location code (8-digit) for IPAC	
DUNS/BPN number (Business Partner Network or BPN #)	

B.14. Description of Requesting-Agency Specific Restrictions

This section identifies unique restrictions applicable to the Requesting Agency regarding acquisition, other than funding. **[insert description e.g., the Berry Amendment]** Note: unique restrictions on funding should be identified in paragraph B. 12.

B.15. Small Business Credit

The Servicing Agency shall use the following FIPS 95-2 Code to identify the Requesting Agency in FPDS: **[the Requesting Agency should insert the lowest FIPS 95-2 Agecy/Bureau component]**. Note: If the code is not provided, the Servicing Agency will allocate the credit to the highest Requesting Agency FIPS 95-2 Code.

B.16. Amendments

Any amendments to the terms and conditions in Part B shall be made in writing and signed by both the Servicing Agency and the Requesting Agency.

B.17. Contact Information

Servicing Agency Contracting POC	**Requesting Agency Program Office POC**
Name	**Name**
Address	**Address**
Email	**Email**
Phone/Fax	**Phone/Fax**
Servicing Agency Financial POC	**Requesting Agency Financial POC**
Name	**Name**
Address	**Address**
Email	**Email**
Phone/Fax	**Phone/Fax**

B.18. Signatures

By signing this document, the Requesting Agency confirms that a bona fide need exists and that funds are for the designated purpose, meet time limitations, and are legally available for the acquisition described in this document; that all unique funding and procurement requirements, including all statutory and regulatory requirements applicable to the funding being provided, have been disclosed to Servicing Agency; and all internal reviews and approvals required prior to transferring funds to the Servicing Agency have been completed. The Servicing Agency's acceptance of this document creates an obligation on the part of the Requesting Agency.*

Requesting Agency Official		Servicing Agency Official	
_____ **Signature**	_____ **Date**	_____ **Signature**	_____ **Date**
_____ **Printed Name**		_____ **Printed Name**	
_____ **Title**		_____ **Title**	
_____ **Agency**		_____ **Agency**	

*** Note: if the transaction is subject to the Economy Act, a warranted contracting officer or another official designated by the agency head, must approve a Determination and Finding.**

Appendix 4

Example of a Completed Interagency Agreement for an Assisted Acquisition

This appendix provides an example of an IA that has been filled out in accordance with the guidance in this document. This example is offered for illustrative purposes only.

This agreement was developed using the model agreement in Appendix 3. Inserted materials are underlined.

The roles and responsibilities described in paragraph A. 6 of Part A were developed using the checklist in Appendix 1. Most of the inserted language is taken directly from the checklist. The *italicized words* show where the language has been modified from that in the checklist.

Interagency Agreement (with sample information)
PART A – General Terms & Conditions

A.1. Purpose

This Part of the IA (hereinafter "Part A") describes the terms and conditions that govern the provision of acquisition assistance between the Department of Public Service, Bureau of Administrative Operations (Requesting Agency) and the Department of Acquisition (Servicing Agency).

No fiscal obligations are created through the execution of Part A. A fiscal obligation arises when the Requesting Agency demonstrates a bona fide need, provides the necessary requirements and funding information to the Servicing Agency and both parties execute a funding document using Part B of this IA or an alternate funding document.

A.2. Authority

The parties' authority to enter into this interagency agreement is (check applicable box):

[X] The Economy Act (31 U.S.C. 1535)

[ ] Franchise Fund (e.g., 31 U.S.C. 501 note) or Revolving Fund (e.g., 40 U.S.C. 321)
Identify specific statutory authority _____

[ ] Other (identify specific statutory authority or authorities)

_____

A.3. Part A Identifier

Document No. 1234

A.4. Scope

a. Organizations authorized to request acquisition assistance

The following organizations in the Requesting Agency are authorized to obtain assistance from the Servicing Agency.

- The Department of Public Service, Office of the Chief Information Officer
- The Department of Public Service, Financial Management Office
- The Department of Public Service, Office of General Counsel

Note: The organization(s) identified in Section 1 of Part B must be listed in this section.

b. Organizations authorized to provide acquisition assistance

The following organizations in the Servicing Agency are authorized to provide assistance to the Requesting Agency.

- The Office of Assisted Acquisition, Washington,D.C. Branch, Department of Acquisition

Note: The organization identified in Section 1 of Part B must be listed in this section.

c. Types of products or services that may be acquired

The following types of services or products may be acquired through interagency acquisition pursuant to this IA. **Note**: The need described in Section 6 of Part B must fall within the scope of products or services described below.

- Information Technology (IT) products, supplies, or equipment (for example, IT hardware or software licensing).
- Services related to Information Technology (for example, helpdesk services or IT security services).
- Other professional or administrative services (for example, consulting services).

d. Limitations

The following restrictions apply: This IA shall not be used to procure real estate leasing or construction services.

A.5. Period of Agreement

The terms and conditions described in Part A of the IA become effective when signed by authorized officials of both agencies and remain effective for a period of five years, unless amended in accordance with Section 11 or terminated in accordance with Section 12.

A.6. Roles & Responsibilities of Servicing Agency & Requesting Agency

The effective management and use of interagency contracts is a shared responsibility of the Requesting Agency and the Servicing Agency. The parties hereby agree to the following roles and responsibilities, which are derived from the Checklist in Appendix 1 of *Interagency Acquisitions*, guidance issued by the Office of Federal Procurement Policy (OFPP).

1. Determine needs and develop requirements document

a. Requesting Agency

i. Establish that a requirement exists.

ii. Determine that it is in the best interest of the government to pursue an assisted acquisition.

iii. Provide documentation to the Servicing Agency, which may be in the form of a statement of work (SOW), statement of objectives (SOO), or performance work statement (PWS), that includes a specific, definite, and clear description of a bona fide need in the fiscal year that the funds are available for new obligations. The need must be adequately documented, but may be concise. A solution need not be specified in order to establish a bona fide need.

iv. Initiate acquisition planning as soon as a need is identified and involve the Servicing Agency, as appropriate, in the planning process.

b. Servicing Agency

i. Assist the Requesting Agency in refining the requirements document package, including the description of key project objectives, unique project requirements, and performance expectations.

2. Prepare a funding document

a. Requesting Agency

i. Work with the Servicing Agency to prepare a funding document (Part B of the IA). Provide: (i) description of the products or services required and the acquisition activities to be performed by the Servicing Agency that is adequate to demonstrate a bona fide need and can be recorded as an obligation (31 U.S.C. 1501, 1502), (ii) information on performance or delivery requirements along with projected milestones, (iii) data required for the proper transfer and obligation of funds, and (iv) information on any agency-unique acquisition restrictions or limitations applicable to the funding being provided.

ii. *For all funding documents (Part B) executed under this IA, assign a financial point of contact who is a "certifying official" as that term is used in 31 U.S.C. § 3528.* The funds certifying official shall:

A. Timely execute all financial documents required for a valid funding request to show funding meets purpose, time and amount; and

B. Ensure funds are certified and legally available for the specified acquisition.

b. Servicing Agency

i. Work with the Requesting Agency to prepare a funding document (Part B of the IA).

ii. Do not accept the funding document unless it: (i) identifies proper funds, including the type of funds to be used, their period of availability, and a funds citation; (ii) identifies the funds certifying official and (iii) adequately describes a bona fide need of the Requesting Agency.

iii. Help the Requesting Agency comply with the bona fide needs rule by:

A. managing funds according to the Requesting Agency's guidance;

B. recording transactions in a timely fashion; and

C. implementing and exercising controls to ensure compliance with all applicable statutory and regulatory fiscal requirements.

3. Develop acquisition strategy

a. Requesting Agency

i. Provide the Servicing Agency with information on project objectives, deliverables, and schedule milestones.

ii. Work with the Servicing Agency to:

A. Build on initial acquisition planning and market research that was conducted to develop requirements documents (e.g., share any information gathered on product/service requirements, characteristics, acceptance criteria and any independent cost estimates) and establish a formal acquisition plan, where required; and

B. Ensure sufficient time has been built into the acquisition schedule to maximize competition and encourage contractors to provide quality proposals.

b. Servicing Agency

i. Conduct market research.

ii. Depending on the size and complexity of the acquisition, establish a formal acquisition plan addressing technical, business, management and other significant considerations that will control the acquisition.

iii. Select an appropriate contract type based on the nature of the requirement and the associated risk.

iv. Advise the Requesting Agency of the risk associated with the acquisition strategy and contract type.

v. Provide the Requesting Agency with the opportunity to concur on the contract type as well as with the acquisition plan, when required.

4. Prepare, or finalize, statement of work (SOW) and/or specifications

a. Requesting Agency

i. Work with the Servicing Agency to ensure:

A. requirements are clearly defined so offerors may make informed business decisions on whether to respond and perform the due diligence necessary to propose the best solutions; and

B. suitable performance standards are established against which results may be effectively measured.

ii. For contracts or orders with award fees, work with the Servicing Agency to develop appropriate award fee criteria and composition of the award fee board, if one is to be established.

b. Servicing Agency

i. Prepare and/or finalize SOW/SOO/PWS/specs based on requirements documents (or initial SOW/SOO/PWS/specs) provided by the Requesting Agency, discussions with Requesting Agency stakeholders -- including program and project managers, contracting, fiscal, legal, and others participating in the acquisition process – market research, and other acquisition planning efforts.

ii. Ensure requirements are clearly defined and suitable performance standards are established against which results may be effectively measured.

iii. Provide the Requesting Agency with the opportunity to concur on SOW/SOO/PWS/specs before finalizing.

iv. For contracts or orders with award fees, develop award fee criteria that are tied to identifiable acquisition outcomes, defined in terms of cost, schedule, and performance outcomes.

5. Develop quality assurance requirements

a. Requesting Agency

i. Assist the Servicing Agency in developing the QASP, where required, including identification of the work requiring surveillance and the method of surveillance.

ii. Provide trained personnel (e.g., contracting officer's technical representative) to perform monitoring where monitoring is required.

b. Servicing Agency

i. Consult with Requesting Agency to identify work requiring surveillance and the method of surveillance.

ii. Ensure the selected surveillance method, including costs and required resources, are appropriate for the risk associated with the acquisition.

iii. Consult with the Requesting Agency on the strategy for developing quality assurance (QA) documents (e.g., government develops QA plan (QAP) as part of SOW or QASP as part of the PWS; offerors propose QASPs in response to SOO).

iv. In preparing QA documents:

A. Consider drafts developed by the Requesting Agency.

B. If offerors are required to submit proposed QASPs, review the proposal to ensure the plan meets the government's surveillance needs.

C. Review proposed QASPs with the Requesting Agency.

v. Provide the Requesting Agency with an opportunity to concur on the QASP or QAP before finalizing.

6. Identify official to assist contracting officer with contract administration

a. Requesting Agency

i. Provide qualified, trained, available, and willing individuals to be designated or appointed by the Servicing Agency Contracting Officer to serve as the Receiving Official or Contracting Officer's Technical Representative (COTR). *The COTR must be able to provide direct oversight of the work performed by the contractor.* Identify qualified and trained fee determination officials for contracts with award or incentive fees.

ii. *COTRs must be qualified individuals with technical expertise and with appropriate acquisition training in accordance with OFPP Federal Acquisition Certification standards for COTRs. All COTRs must complete 40 hours of initial acquisition training prior to their appointment. This training must have occurred in the two years prior to their appointment. In addition, COTRs must complete at least 40 hours of acquisition training every two years to maintain currency.*

iii. Provide alternate individuals within reasonable time should the appointed personnel provided by the Requesting Agency be found by the Servicing Agency CO to be unable or unavailable to perform the required duties.

b. Servicing Agency

i. For each requirement, determine the required level of contract administration. *For simple acquisitions, designate a Receiving Official from the Requesting Agency to accept delivery and verify invoice payment. For complex acquisitions, appoint a qualified and trained COTR from the Requesting Agency before contract performance begins.*

ii. If the selected contract-type involves a fee or incentive, appoint a fee determination official before contract performance begins.

7. Comply with competition requirements

a. Requesting Agency

i. Ensure enough time is built into the acquisition strategy to foster competition (e.g., allow the Servicing Agency to develop reasonable response time considering the complexity, commerciality, availability, and urgency of the need).

ii. Participate in the development of technical evaluation criteria.

iii. If an exception to competition is required and justified (including exceptions to the fair opportunity process for multiple award contracts and exceptions recognized under FAR Subpart 8.4 for Multiple Award Schedule contracts), develop supporting rationale through market research and due diligence and provide appropriate documentation to the Servicing Agency.

b. Servicing Agency

i. Develop technical evaluation criteria in consultation with Servicing Agency.

ii. Seek competition unless an exception is justified.

iii. Require Requesting Agency to furnish supporting rationale and appropriate documentation to support an exception to competition.

iv. Review sufficiency of justification and documentation before approving and proceeding with a non-competitive action.

8. Comply with customer-unique laws and policies

a. Requesting Agency

i. Apprise the Servicing Agency of all terms, conditions, and requirements to be incorporated into the contract/order as necessary to comply with the statutes, regulations and directives that are unique to the Requesting Agency (e.g., funding restrictions).

ii. Provide information and timely clearance on security requirements applicable to the IA.

b. Servicing Agency

i. Ensure the Requesting Agency-unique laws or restrictions and data collection and reporting requirements that have been identified by the Requesting Agency are followed.

ii. Work with the Requesting Agency to mutually agree to appropriate contract clauses addressing customer-unique laws and policies.

9. Ensure price reasonableness

a. Requesting Agency

i. Provide input to Servicing Agency to assist in determination of whether proposed contract prices are fair and reasonable.

b. Servicing Agency

i. Ensure appropriate price reasonableness and best value determination is conducted and documented at time of award. Consider the agreed-upon terms and conditions, promised quality, and delivery schedule. Request and consider any input from Requesting Agency, including its independent cost estimate, if one was prepared.

10. Conduct source evaluation and make award

a. Requesting Agency

i. Provide necessary resources for technical evaluation of proposals or quotes and participation in activities that require technical expertise.

A. Attend oral presentation and technical evaluation discussions.

B. Conduct or assist with technical evaluations of proposals.

ii. Review the evaluation plan and generally have representation on the source evaluation board.

iii. Provide the correct funding agency code needed for accurate reporting to the Federal Procurement Data System (FPDS).

b. Servicing Agency

i. Appoint the source selection authority and the source evaluation board.

ii. Ensure source evaluations are conducted fairly and proposals are evaluated based solely on the factors and subfactors in the solicitation.

iii. Ensure award decisions are properly documented, including the rationale for any tradeoffs made or relied on by the source selection authority.

iv. Consult with the Requesting Agency prior to making a final decision.

v. Execute the award decision and debrief offerors as necessary.

vi. Ensure the funding agency code provided by the Requesting Agency is entered into FPDS.

11. Conduct inspection, acceptance, and surveillance

a. Requesting Agency

i. Ensure deliverables are received and quality is acceptable. Inspect work for compliance with contract requirements. Within 30 days of receipt, or another period as specified in the contract, promptly reject work that does not comply with contract requirements, or accept work that meets the terms of the contract or order, and immediately notify the Servicing Agency's CO.

ii. Conduct appropriate surveillance, which may include site visits, pre-planned inspections, random unscheduled inspections, review of contractor reporting requirements (e.g., progress reports, shop plans, and blueprints), and periodic meetings with contractor officials.

iii. Perform duties in a timely manner. Advise the Servicing Agency's CO immediately of any circumstances that affect performance by the contractor, including failures to comply with technical requirements of the contract or to show a commitment to customer satisfaction, particularly if the contractor does not make corrections.

b. Servicing Agency

i. Ensure that personnel who have been appointed to perform contract administration are carrying out responsibilities related to inspection, acceptance, and surveillance and reporting back in a timely manner.

ii. Ensure appropriate surveillance is conducted. The type and extent of surveillance should be commensurate with the criticality of the service or task and the resources available to accomplish the surveillance. Surveillance should ensure that the government receives the value for which it contracted.

iii. Work with the Requesting Agency, as necessary, to identify respective roles for other applicable contract administration responsibilities identified in FAR 42.302.

iv. Take appropriate and timely actions to address performance problems. Typically, problems will be identified by the COTR.

12. Determine when contract modifications are required

a. Requesting Agency

i. Work with the Servicing Agency to evaluate proposals for changes. If requested by the Servicing Agency's CO, participate in negotiation of changes, modifications, and claims.

ii. Ensure agency is not authorizing work (making commitments or promises, issuing instructions to start or stop work, directing changes), changing any contractual documents, modifying the scope of work (including the period of performance), authorizing accrual of costs, or otherwise providing direction to the contractor, except as expressly authorized in an appointment by the Servicing Agency's CO.

b. Servicing Agency

i. Work with Requesting Agency to evaluate proposals for changes.

ii. Ensure that any modifications to the requirements or price of the order or contract remain within the overall scope of the contract or order.

iii. Work with Requesting Agency to develop funding document (i.e, Part B of IA), or addendum to existing funding document, to cover contract modification.

13. Prepare contractor performance evaluations

a. Requesting Agency

i. Track, measure, and report to the Servicing Agency CO on the performance of the contractor.

b. Servicing Agency

i. Evaluate the contractor's performance, taking into consideration data provided by (a) the COTR/COR and (b) the end users from the Requesting Agency when the appointed COTR/COR is not an end user.

ii. Provide evaluations to the contractor as soon as practicable after completion of the evaluation. Review performance with the contractor in accordance with FAR 42.1502.

iii. Document performance in the contract file. (The ultimate conclusion on the performance evaluation is a responsibility of the Servicing Agency.)

iv. Input data into the Past Performance Information Retrieval System (PPIRS).

14. Review and approve invoices and make payment

a. Requesting Agency

i. Review the invoice and advise the Servicing Agency CO whether to approve or disapprove payment.

b. Servicing Agency

i. Ensure the contract/order addresses the appropriate processes for invoice submittal and approval and identifies the payment office, which typically is the Servicing Agency.

ii. Work with the appointed COTR, or *Receiving Official* responsible for invoice review, to facilitate accurate and timely review and payment to the contractor.

iii. Approve or disapprove payment after consultation with the Requesting Agency. Regardless of the funding source, the Servicing Agency CO retains the authority to stop payment when necessary.

A. Pay non-disputed invoice and bill the Requesting Agency for reimbursable services.

B. Return improper invoice within specified time periods (e.g., in accordance with the Prompt Payment Act where applicable).

C. Do not authorize payment if the work being invoiced is disputed or the invoice is otherwise found to be improper.

15. Perform contract closeout

a. Requesting Agency

i. Support contract close-out functions, to include providing appropriate funding to satisfy settlement agreements and/or claims.

ii. Take appropriate actions to retrieve unexpended balances.

b. Servicing Agency

i. Close out contract/order upon ensuring that all contract/order requirements and administrative actions have been completed.

ii. Return unused balance of the funds to the Requesting Agency.

16. Track contract activity

a. Requesting Agency

i. Ensure that correct data is provided in a timely manner to the Servicing Agency to facilitate accurate and complete data reporting.

ii. Provide the correct funding agency code to the Servicing Agency needed for accurate reporting to FPDS.

b. Servicing Agency

i. Ensure accurate contract data reporting into the applicable government-wide database – e.g., report use of competition for placement of task and delivery orders and contract awards in FPDS; report contractor performance assessments in PPIRS [consistent with Requesting Agency's threshold for reporting]; and ensure contractor is reporting required subcontracting data into the Electronic Subcontracting Reporting System (ESRS).

ii. Confer with Requesting Agency if funding agency code has not been provided.

iii. In accordance with FAR Subpart 34.2, for contracts involving significant development work, provide earned value management report to project manager.

iv. Ensure proper socio-economic credit is assigned to the requesting agency.

A.7. Billing & Payment

a. Procedures

The Servicing Agency will pay contractor invoices for acquisitions under this IA on a reimbursable basis. The Servicing Agency will present an itemized statement to the Requesting Agency for reimbursement of incurred contract costs and assisted services support costs. The Requesting Agency will pay reimbursable billings to the Servicing Agency.

Reimbursable billings are delinquent when they are 30 or more calendar days old (from date of the billing). When billings remain delinquent over 30 calendar days and the Requesting Agency has not indicated a problem regarding services, the Servicing Agency may choose not to award any new contract/orders or modifications to existing contract/orders for the Requesting Agency (or the client within) and termination of existing services will be considered and negotiated with the Requesting Agency.

b. Service charge

The Servicing Agency shall earn a service charge upon the execution of any contract action under this IA in the amount of three (3) percent of the total funds obligated under that contract action, in consideration of acquisition services rendered by the Servicing Agency on behalf of the Requesting Agency.

c. Prompt payment Interest

The Requesting Agency shall be responsible for interest owed under the Prompt Payment Act except that the Servicing Agency shall be responsible for interest owed to the contractor due to delays created by actions of the Servicing Agency.

A.8. Small Business Credit

Any contract actions executed by the Servicing Agency on behalf of the Requesting Agency will allocate the socio-economic credit to the Requesting Agency at the lowest FIPS 95-2 Agency/Bureau component as identified by the Requesting Agency in Part B of this IA. If the code is not provided, the Servicing Agency will allocate the credit to the highest Requesting Agency FIPS 95-2 Code.

A.9. Contract Termination, Disputes and Protests

If a contract or order awarded pursuant to this IA is terminated or cancelled or a dispute or protest arises from specifications, solicitation, award, performance or termination of a contract, appropriate action will be taken in accordance with the terms of the contract and applicable laws and regulations. The Requesting Agency shall be responsible for all costs associated with termination, disputes, and protests, including settlement costs, except that the Requesting Agency shall not be responsible to the Servicing Agency for costs associated with actions that stem from errors in performing the responsibilities assigned to the Servicing Agency. The Servicing Agency shall consult with the Requesting Agency before agreeing to a settlement or payments to ensure that the Servicing Agency has adequate time in which to raise or address any fiscal or budgetary concerns arising from the proposed payment or settlement.

A.10. Review of Part A

The parties agree to review jointly the terms and conditions in Part A at least annually if the period of this agreement, as identified in Section 5, exceeds one year. Appropriate changes will be made by amendment to this agreement executed in accordance with Section 11. The parties further agree to review performance under this IA to determine if expectations are being met and document a summary of their assessment. The responsible reviewing official at each agency shall sign and date the assessment.

The performance assessment will consider, at a minimum, the quality of each party's overall execution of responsibilities assigned under this IA, including each party's responsiveness to requests made by the other party. Information to be evaluated will be obtained through a sampling of records and interviews.

A.11. Amendments

Any amendments to the terms and conditions in Part A shall be made in writing and signed by both the Servicing Agency and the Requesting Agency.

A.12. IA Termination

This IA may be terminated upon thirty (30) calendar days written notice by either party. If this agreement is cancelled, any implementing contract/order may also be cancelled. If the IA is terminated, the agencies shall specify the terms of the termination, including costs attributable to each party and the disposition of awarded and pending actions.

If the Servicing Agency incurs costs due to the Requesting Agency's failure to give the requisite notice of its intent to terminate the IA, the Requesting Agency shall pay any actual costs incurred by the Servicing Agency as a result of the delay in notification, provided such costs are directly attributable to the failure to give notice.

A.13. Interpretation of IA

If the Servicing Agency and Requesting Agency are unable to agree about a material aspect of either Part A or Part B of the IA, the parties agree to engage in an effort to reach mutual agreement in the proper interpretation of this IA, including amendment of this IA, as necessary, by escalating the dispute within their respective organizations.

If a dispute related to funding remains unresolved for more than sixty (60) calendar days after the parties have engaged in an escalation of the dispute, the parties agree to refer the matter to their respective Agency Chief Financial Officers with a recommendation that the parties submit the dispute to the CFO Council Intragovernmental Dispute Resolution Committee for review in accordance with Section VII of Attachment 1 to the Treasury Financial Manual, Volume 1, Bulletin No. 2007-03, Intragovernmental Transactions, Subject: Intragovernmental Business Rules, or subsequent guidance.

A.14. Signatures

REQUESTING AGENCY OFFICIAL:

Signature: John Doe_____ Date: __1/10/08_

Name: ___John Doe_____

Title: ____Director, Bureau of Administrative Operations_____

Agency: __The Department of Public Service_____

Address: _1234 Main Street, Washington, D.C._____

Phone: ___555-123-4567_____

E-mail & fax: john.doe@dps.gov_555-123-5555_____

SERVICING AGENCY OFFICIAL:

Signature: _Jane Smith_____ Date: _1/10/08_

Name: ____Jane Smith_____

Title: ____Director, Office of Assisted Acquisition_____

Agency: ___The Department of Acquisition_____

Address: ___135 First Avenue, Washington, D.C._____

Phone: ___555-321-9876_____

E-mail & fax: _jane.smith@doa.gov 555-321-5555_____

Interagency Agreement (with sample information)
PART B – Requirements & Funding Information

B.1. Purpose

This Part of the IA (hereinafter "Part B") serves as the funding document. It provides specific information on the requirements of The Department of Public Service, Office of the Chief Information Officer (Requesting Agency), sufficient to demonstrate a bona fide need and identifies funds associated with the requirement to allow The Department of Acquisition, Office of Assisted Acquisition, Washington D.C. Branch (the Servicing Agency), to provide acquisition assistance and conduct an interagency acquisition.

B.2. Authority

The parties' authority to enter into this interagency agreement is (check applicable box):

[X] The Economy Act (31 U.S.C. 1535)

[ ] Franchise Fund (e.g., 31 U.S.C. 501 note) or Revolving Fund (e.g., 40 U.S.C. 321)
Identify specific statutory authority _____

[ ] Other (identify specific statutory authority or authorities)

_____

B.3. Part B Identifier

Insert common agreement number(s) to identify Part B on other documents.

Document Number: ABCD

B.4. General Terms & Conditions

Activities undertaken pursuant to this document are subject to the general terms and conditions set forth in Part A, Document Number 1234. Part A is located at (check applicable box):

[ ] **[insert location]**

[X] Attached

B.5. Project Title

Tier 1 and Tier 2 Helpdesk Support Services for the Department of Public Service

B.6. Description of Products or Services / Bona Fide Need

This section describes the goods or services that will be acquired from a contractor by the Servicing Agency on behalf of the Requesting Agency under this IA.

Funds in the amount of $416,000 are obligated for the purpose of acquiring Tier 1 and Tier 2 Helpdesk Support Services for up to 500 seats of the Department of Public Service's Mid-Atlantic Regional Offices (Region 1). Support shall include, at a minimum, 24/7 access to phone support services and on-site support in each of the building(s) occupied by Region 1 employees and contractors during business hours 8:00 a.m. - 5:00 p.m. M-F. Support will be provided for the Department's financial and contract writing systems, which currently use Brand ABC Operating System. This acquisition shall be a performance-based services acquisition, and the resulting contract award shall have an estimated period of performance of one year plus four option years.

If the goods and/or services to be acquired are described in an attachment, check the box below and describe the attachment.

☐ Description of goods or services is attached. **[insert brief description of attachment]**

B.7. Projected Milestones

Event	**Projected Date**
IA Fully Executed	2/1/2008
Requirements Documents Finalized	2/28/2008
Solicitation Issued	3/14/2008
Award Date	6/30/2008
Delivery Date or Period of Performance	7/15/2008 – 7/14/2009 (Base Period) Plus four 12-month option periods

B.8. Billing and Payment

The Servicing Agency will pay contractor invoices from amounts identified in section 13 on a reimbursable basis. The Servicing Agency will present an itemized statement to the Requesting Agency for reimbursement of incurred contract costs and assisted services support costs. The Requesting Agency will pay reimbursable billings to the Servicing Agency from funds identified in section 13. See section 7 of Part A for additional terms and conditions addressing billing and payment.

B.9. Description of Acquisition Assistance

The Servicing Agency will provide the following services to the Requesting Agency.

The Servicing Agency will provide cradle-to-grave acquisition support services to the Requesting Agency. These services shall include preparing a solicitation, conducting a competition, including evaluation of offers and source selection, and invoice processing and payment. The Servicing Agency's specific roles and responsibilities are delineated in Section A.6 along with the associated roles and responsibilities of the Requesting Agency.

B.10. Fees

Services charges will be determined as follows:

The Servicing Agency shall earn a service charge upon the execution of any contract action under this IA in the amount of 4% of the total funds obligated under that contract action, in consideration of acquisition services rendered by the Servicing Agency on behalf of the Requesting Agency.

B.11. Obligation Information

Servicing Agency and Requesting Agency shall complete the table below.

Common Agreement Number	**Requirement**	**Type of Requirement** (Product / Severable Service / Non-severable service)
1234	Helpdesk Support Services	Severable Service

B.12. Requesting Agency Funding Information

The Requesting Agency's Certifying Official shall complete the table & certification

Basic appropriation symbol (Treasury account symbol)	1481234
Amount obligated (contract costs plus assisting agency's service fee)	$416,000
Fund citation (line of accounting)	09 0441A2212R 01113-0001-0000-0000 OFMD-3030-0020-01000-0000 DDA-001 2610*
Appropriation expiration date	9/30/2008
Unique restrictions on funding (if any)	None
Business event type code	DISB**
Agency location code (8-digit) for IPAC	14-12-3456
DUNS/BPN number (Business Partner Network or BPN #)	123456789
Funding agency code	1400
Funding office code	1425

Requesting Agency Funds Certifying Official	
I certify that the funds cited above are properly chargeable for the purposes set forth in paragraphs B. 4 and B.11 of this IA	
Albert Smart **Signature**	1/30/08 **Date**
Printed Name Albert Smart	
Title Accountant / Budget Officer	
Office Office of Finance & Budget	

**Note: Valid BETC codes can be found at http://www.fms.treas.gov/gwa/factsheet betc.html.

B.13. Servicing Agency Funding Information

The Servicing Agency shall complete the table below.

Basic appropriation symbol (Treasury account symbol)	10X1234
Fund citation (line of accounting)	09 1222447890 7744-3322-1399-4370 4120-0001-0000-0000-0000 2610*
Business event type code	COLL
Agency location code (8-digit) for IPAC	10-01-5678
DUNS/BPN number (Business Partner Network or BPN #)	987654321

*Note: A line of accounting can vary between agencies. The Common Government-wide Accounting Classification (CGAC) standardizes the data elements Government-wide. However, agencies have the flexibility in the sequencing of those data elements, the values for the data elements and the addition of optional or agency-specific data elements. See www.FSIO.gov for further guidance.

B.14. Description of Requesting-Agency Specific Restrictions

This section identifies unique restrictions applicable to the Requesting Agency regarding acquisition, other than funding. **Note**: unique restrictions on funding should be identified in paragraph B. 12.

There are no unique restrictions.

B.15. Small Business Credit

The Servicing Agency shall use the following FIPS 95-2 Code to identify the Requesting Agency in FPDS: 12345

.

B.16. Amendments

Any amendments to the terms and conditions in Part B shall be made in writing and signed by both the Servicing Agency and the Requesting Agency.

B.17. Contact Information

Servicing Agency Contracting POC	**Requesting Agency Program Office POC**
Jim Green	Mary White
123 Agency Avenue, Suite 4000 Washington, DC	789 Government Drive Arlington, VA
jim.green@doa.gov	mary.white@dps.gov
202-555-1234 (p) 202-555-6666 (f)	703-555-4321 (p) 703-555-8888 (f)
Servicing Agency Financial POC	**Requesting Agency Financial POC**
Ted Money	Linda Good
123 Agency Avenue, Suite 4000 Washington, DC	789 Government Drive Arlington, VA
ted.money@doa.gov	linda.good@dps.gov
202-555-5678 (p) 202-555-7777 (f)	703-555-8765 (p) 703-555-9999 (f)
Individual proposed to serve as COTR	
Gene Wright	
789 Government Way, Suite 100 Washington, DC 20000	
Gene.wright@dob.gov	
202-111-4444 (phone) / 202-111-2222 (fax)	

B.17. Signatures

By signing this document, the Requesting Agency confirms that a bona fide need exists and that funds are for the designated purpose, meet time limitations, and are legally available for the acquisition described in this document; that all unique funding and procurement requirements, including all statutory and regulatory requirements applicable to the funding being provided, have been disclosed to Servicing Agency; and all internal reviews and approvals required prior to transferring funds to the Servicing Agency have been completed. The Servicing Agency's acceptance of this document creates an obligation on the part of the Requesting Agency.*

Requesting Agency Official		Servicing Agency Official	
Mark Spotless **Signature**	2/1/08 **Date**	Amy Brown **Signature**	**2/1/08** **Date**
Mark Spotless **Printed Name**		Amy Brown **Printed Name**	
Deputy Chief Information Officer **Title**		Manager, DC Branch, Office of Assisted Acquisition **Title**	
Department of Public Service **Agency**		Department of Acquisition **Agency**	

*** Note: if the transaction is subject to the Economy Act, a warranted contracting officer or another official designated by the agency head, must approve a Determination and Finding** [not shown in this model].

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

September 29, 2011

MEMORANDUM FOR CHIEF ACQUISTION OFFICERS
SENIOR PROCUREMENT EXECUTIVES

FROM: Daniel I. Gordon
Administrator

SUBJECT: Development, Review and Approval of Business Cases for Certain Interagency and Agency-Specific Acquisitions

It is critical that the Federal Government, in its procurement activity, leverage its buying power to the maximum extent as well as achieve administrative efficiencies and cost savings. Too often, however, agencies establish new overlapping and duplicative contracts for supplies or services, because the agencies have not adequately considered the suitability of existing interagency contract vehicles: government-wide acquisition contracts (GWACs), multi-agency contracts, and blanket purchase agreements (BPAs). Similarly, in those situations when a suitable interagency vehicle does not exist, agencies have not adequately considered the opportunity to leverage the agency's own buying power, and achieve administrative efficiencies, through the use of an agency-specific[1] contract. This failure to make maximum appropriate use of interagency vehicles and agency-specific contracts results in higher prices and unnecessary administrative costs.

This memorandum outlines required elements of business case analysis as well as a process for developing, reviewing, and approving business cases to support the establishment and renewal of GWACs, multi-agency contracts, BPAs, and agency-specific contracts. This guidance supports efforts to deliver an efficient, effective, and accountable Government[2] by establishing a framework for addressing unjustified duplication among contracts, which was identified as an area of concern by the General Accountability Office in a recent report.[3] The requirements outlined in this memorandum address section 865(b)(2) of the National Defense Authorization Act for FY 2009 (P.L. 110-417), which requires multi-agency contracts to be supported by a business case analysis detailing the administration of the contract, including an analysis of all direct and indirect costs to the government of awarding and administering the contract and the impact that the contract will have on leveraging purchasing power. This memorandum also addresses the designation, by the Office of Management and Budget (OMB), of executive agents to manage GWACs under the Clinger-Cohen Act (40 U.S.C 11302).

---

[1] For purposes of this guidance, an agency-specific contract is an indefinite-delivery, indefinite quantity contract intended for the sole use of the establishing department or agency. Agency-specific contracts may be agency-wide (sometimes referred to as "enterprise-wide") or limited to one or more specific component organizations within the agency.

[2] See Executive Order--Delivering an Efficient, Effective, and Accountable Government, http://www.whitehouse.gov/the-press-office/2011/06/13/executive-order-delivering-efficient-effective-and-accountable-government

[3] See section 16 entitled, "Collecting improved data on interagency contracting to Governmentwide minimize duplication could help the government leverage its vast buying power", in Government Accountability Office Report GAO-11-318SP, http://www.gao.gov/new.items/d11318sp.pdf

For acquisitions that enter the solicitation phase after December 31, 2011, the agency which is responsible for the acquisition shall develop a business case, using the procedures outlined in this memorandum, to support the establishment or renewal of the following three types of acquisitions vehicles:

- all *GWACs*, as that term is defined in Federal Acquisition Regulation (FAR) 2.101;

- *multi-agency contracts*, as defined in FAR 2.101, or *multi-agency BPAs* created under the Federal Supply Schedules (FSS) Program managed by the General Services Administration (GSA), where:

  (i) usage by another agency (i.e., interagency usage) is expected to be significant[4]; or

  (ii) interagency usage is not expected to be significant but where a significant overlap[5] would be created between the scope of the proposed acquisition and the scope of existing contracts or agreements established under the Federal Strategic Sourcing Initiative (FSSI), the General Services Administration's SmartBUY programs, or an existing GWAC.

- *agency-specific contracts* or *agency-specific BPAs* where either the contract or the BPA would create a significant overlap (See footnote 5) between the scope of the proposed acquisition and the scope of existing contracts or agreements established under FSSI, SmartBUY programs, or an existing GWAC.

Business cases are required in accordance with the following schedule and thresholds:

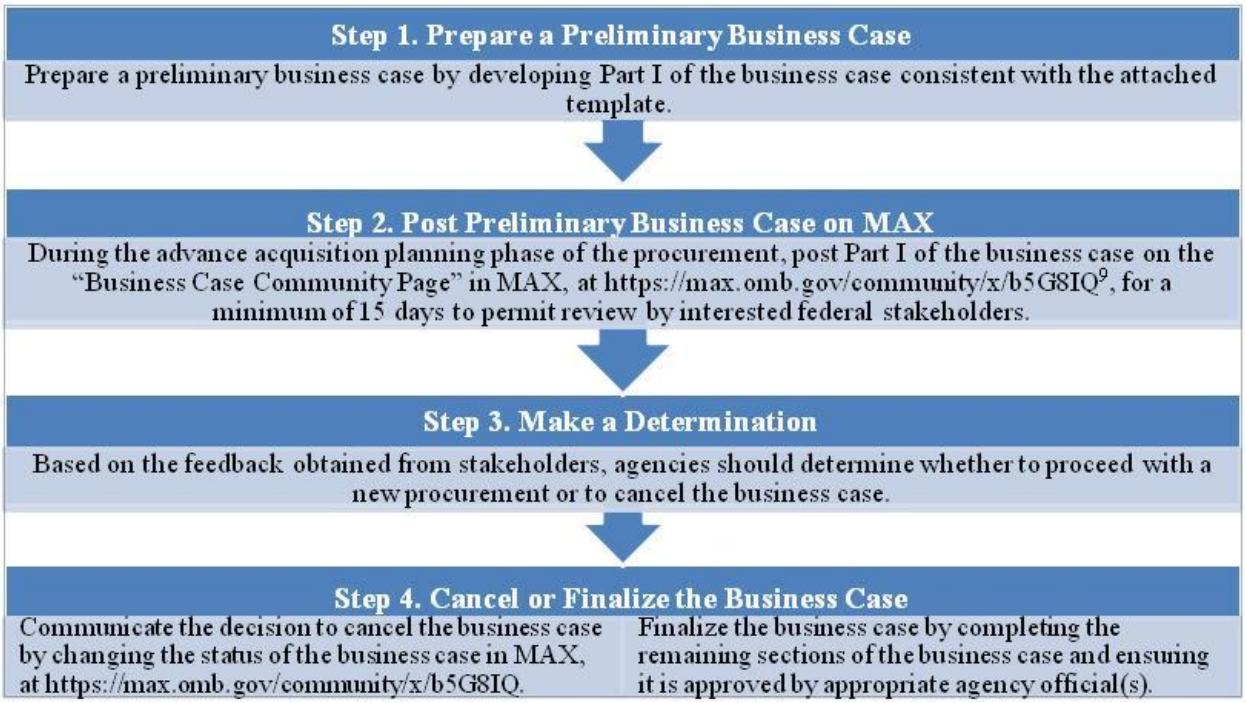
Type of Acquisition Vehicle	Anticipated Solicitation Release Date	Business case is required when the estimated value of the proposed acquisition vehicle is equal to or greater than...
GWAC	After 12/31/2011	All GWACs regardless of estimated value
Covered multi-agency contract or multi-agency BPA Covered agency-specific contract or agency-specific BPA	1/01/2012 - 09/30/2012	$250 million
	FY 13	$100 million
	FY 14	$50 million

[4] As a general guideline, significant usage is expected when obligations by customers outside of the awarding agency are anticipated to exceed 25% of total obligations over the life of the contract vehicle.

[5] As a general rule, significant overlap is created when the scope of the proposed acquisition includes supplies and/or services of existing contracts or agreements established under FSSI, SmartBUY programs, or an existing GWAC and obligations for these supplies and/or services are anticipated to exceed 25% of total obligations over the life of the proposed acquisition.

With good strategic planning, careful evaluation of the current marketplace, and strong contract management, significant value can be generated through the creation and operation of a new interagency or agency-specific contract vehicle.[6] Strategic planning includes both (i) evaluating the suitability of known existing vehicles before creating new interagency or agency-specific vehicles to avoid unhealthy duplication[7] and (ii) determining the best ways to create new vehicles where there is a void or insufficient choice.[8] These actions require an ongoing commitment of time and resources. Accordingly, to ensure that the expected return from investment in a contract or agreement is worth the effort and cost associated with planning, awarding, and managing a new vehicle, business cases for contracts and BPAs meeting the above-described thresholds should address the following required elements of analysis:

Business cases shall be developed, reviewed, and approved using the following four-step process:



[6] Experience has shown, for example, that the benefits of pooling buying power can be significantly enhanced by (i) convening a group of agency experts to better understand agencies' specific requirements, (ii) sharing pricing information and considering the impact a new contract would have on existing contracts, (iii) analyzing spend data, (iv) securing up-front spending commitments from agencies to increase vendor interest in the procurement, (v) maximizing small business participation, and (vi) requiring winning vendors to provide detailed spend data throughout the life of the contract that customers can analyze to improve internal business processes and inform future buying decisions.

[7] Duplication is most likely to occur as a result of multiple agencies creating their own separate contracts for similar products or services. Thus, agencies must be alert to the impact of duplication when creating a new interagency vehicle or a large agency-specific vehicle. The impact of duplication must be assessed when new vehicles overlap with existing interagency vehicles or with other vehicles within the same agency. Duplication is most likely to occur if the new vehicle would serve a narrow customer base, such as a single agency component.

[8] OFPP recognizes, as did the Acquisition Advisory Panel, that "[s]ome competition among vehicles is . . .desirable and even fundamental to maintaining the health of government contracting." – Acquisition Advisory Panel. *Report of the Acquisition Advisory Panel to the Office of Federal Procurement Policy and the United States Congress*: January 2007, p. 251, https://www.acquisition.gov/comp/aap/finalaapreport.html

[9] This site may also be accessed directly through the Chief Financial Officer Virtual Toolbox, available on MAX.

Business cases shall be approved by an authority no lower than the agency's Senior Procurement Executive (SPE) or equivalent official, following coordination with the agency's Director of the Office of Small and Disadvantaged Business Utilization (OSDBU) and – if the acquisition involves IT – the agency's Chief Information Officer. An agency may also choose to require additional approving officials. Agency-approved business cases shall be kept by the agency as part of the acquisition file. Agencies shall also indicate in MAX, https://max.omb.gov/community/x/b5G8IQ, whether the business case has been cancelled or approved by the agency.

Other than draft solicitations, agencies shall not issue solicitations for proposed BPAs, multi-agency contracts, and agency-specific contracts until the business case has been finalized and approved by the appropriate agency official(s). In addition, in the case of those approved business cases for establishing or renewing a GWAC, the agency shall formally submit the approved business case to OMB, as part of the request by the agency head (or deputy) to the OMB Director requesting that the Director grant the agency an executive-agent designation to award and manage the proposed GWAC. While an agency may release a draft solicitation for a proposed GWAC, the agency may not release a final solicitation for a proposed GWAC unless and until the OMB Director has granted the agency's request for an executive-agent designation.

In the case of other types of multi-agency contracts and BPAs as well as agency-specific contracts and BPAs, OMB reserves the discretion to require the agency to submit the approved business case to OMB, for review, prior to the agency releasing a final solicitation.

To improve acquisition planning and agencies' ability to leverage buying power, agencies are required to post on MAX links to web pages containing information about the BPAs and contracts that are covered by this memorandum. Web pages should include the names of vendors, contract terms and conditions, information about pricing, and provide a point of contact for further information. This sharing of information will better position agencies and interagency groups, such as the Strategic Sourcing Working Group (SSWG), which provides governance for FSSI, to assess potential benefits that might be leveraged government-wide. Instructions for posting award information is provided on MAX at https://max.omb.gov/community/x/b5G8IQ.

Thank you for your attention to these important matters. Questions regarding this memorandum should be directed to Curtina Smith at csmith@omb.eop.gov.

Attachment

Attachment

Business Case Template

Business cases for covered contract vehicles (see memorandum) shall address the following elements as described in the chart below: scope, potential duplication, value, interagency demand, and management. Final business cases should also include an executive summary that overviews the key points in each of the required areas and include a signature page with the appropriate agency approval(s) and date(s) approved.

Overview of Business Case Template	
EXECUTIVE SUMMARY PART I. SCOPE AND POTENTIAL DUPLICATION PART II. VALUE PART III. INTERAGENCY DEMAND AND MANAGEMENT SIGNATURE PAGE	
Type of Acquisition Vehicle	**Required Elements of Business Case Analysis**
GWACs	Complete parts 1, 2, and 3
Multi-agency contracts and multi-agency BPAs where interagency usage is anticipated to be significant	
Multi-agency contracts and multi-agency BPAs where interagency usage is not anticipated to be significant	Complete parts 1 and 2
Agency-specific contracts and agency-specific BPAs	Complete parts 1 and 2

BUSINESS CASE ANALYSIS OUTLINE

PART I. SCOPE AND POTENTIAL DUPLICATION

A. SCOPE

1. Describe the purpose of the acquisition and how it supports Presidential, government-wide, and/or agency priorities or initiatives. Describe the types of goods and services to be acquired.
2. Provide the anticipated period of performance as well as any option periods.
3. State the anticipated annual amount of spend over the life of the proposed acquisition and the amount of the contract ceiling.

B. POTENTIAL DUPLICATION

1. Complete the table below for each primary product or service to be offered on the vehicle:

Primary Product or Service		Existing vehicles researched		Uniqueness of Proposed Vehicle
PSC Code	**Description**	**Servicing Agency**	**Name of Contract Vehicle**	

Instructions for completing the table.

Column 1. PSC Code: identify 4-digit code, whenever possible.

Column 2. Description: briefly describe primary product or service to be acquired.

Column 3. Existing vehicles researched: List existing vehicles that agency evaluated for potential suitability. Agencies should always evaluate FSSI or SmartBUY agreements, and GWACs. For proposed GWACs and multi-agency contracts and multi-agency BPAs where interagency usage is expected to be significant, agencies should also consider relevant multi-agency contracts or BPAs, of which they are aware, and any relevant agency-specific contracts or BPAs.

Column 4. Uniqueness: Explain how the proposed vehicle differs from the identified existing vehicles (e.g., in terms of expected pricing, terms and conditions). If an agency-specific vehicle is proposed, note any other reasons for creating the vehicle, such as agency-unique requirements, compliance with agency standards, or simplified contract management (in lieu of having to manage contractors on multiple interagency vehicles, each of which addresses only part of the agency's requirement).

2. State if the agency has identified any overlapping agency-specific vehicles that it intends to phase out.

PART II. VALUE

1. Discuss the benefits expected as a result of the proposed acquisition. Address price, administrative and efficiency improvements as well as intangible benefits. Discuss the impact the proposed acquisition will have on the government's ability to leverage its purchasing power at both the agency-wide and government-wide levels.
2. Describe how the cost of awarding and managing the proposed contract vehicle compares to the amount of fees likely to be incurred if the agency used an existing interagency vehicle or assisted acquisition services.
3. Describe how the acquisition strategy and the resulting procurement will promote maximum opportunities for small businesses at both the prime and subcontracting levels.
4. Briefly describe the extent to which the proposed acquisition has been discussed with key stakeholders, including members of the SSWG, program managers of existing GWACs or multi-agency contracts (as appropriate), officials from GSA or the Small Business Administration, and agency offices with responsibility for small business programs, and the Chief Information Officer, if the acquisition involves IT. Indicate if any key stakeholder concerns or comments remain unresolved and discuss plans to resolve them.

PART III. INTERAGENCY DEMAND AND MANAGEMENT[9]

A. INTERAGENCY DEMAND

1. Identify the anticipated portion of the acquisition that will be used by external customers (expressed as percentage of total obligations). List the agencies that are expected to account for the majority of obligations under the vehicle, include the five largest customers outside the servicing agency and their expected estimated usage.

B. MANAGEMENT

1. Identify the number of FTEs supporting the award and administration of the contract and discuss any relevant specialized experience. For example, if awarding a contract for IT services, does the contracting officer and program manager have specialized experience?
2. Identify all direct and indirect costs to the servicing agency for awarding and administering the proposed contract vehicle.
3. Identify the fund (e.g., working capital fund), if any, that the agency intends to use to fund its work and receive payment from customer agencies.
4. If fees will be assessed, identify the following:
   a. List the amount of proposed fee(s) and briefly describe the methodology used for setting and adjusting fees when necessary. For example, state whether fees differ based on the amount and type of support required.
   b. Indicate if all costs to the agency for awarding and administering the proposed contract vehicle been included in the fee(s). If not, identify any costs not covered.
5. If the servicing agency plans to request any funding to support operation of the contract vehicle, identify the estimated amount of the request and the purpose to be addressed by the funding.
6. Discuss the steps the agency intends to take to ensure that over the life of the vehicle (a) vendor prices remain competitive, (b) regular customer feedback is obtained, and (c) the government maintains a qualified pool of vendors to meet customer needs.
7. Discuss how the agency intends to help ensure customer adherence to the following practices (where applicable, include links to agency reference materials or training materials developed for customers):
   a. Use of fixed-price task orders whenever practicable.
   b. Policies to maximize small business participation.
   c. Consideration of contractor past performance in the evaluation of proposals.
   d. Assessment of contractor performance on awarded tasks.

[9] This section is not required for agency-specific vehicles or for multi-agency vehicles where interagency usage is not expected to be significant.

Frequently Asked Questions (FAQs) for
Interagency and Agency-specific Business Cases

A. General Questions

1. What is the purpose of requiring business cases for interagency contracts?

Preparing a business case helps agencies determine if expected return from investment in an interagency or agency-wide contract or blanket purchase agreement (BPA) is worth the effort. The new process established by the Office of Federal Procurement Policy (OFPP) guidance for business cases is intended to help agencies leverage buying power and administrative efficiency. The business case analysis requires agencies to consider the suitability of existing vehicles and, by doing so, helps agencies avoid overlapping and duplicative contracts that can create inefficiencies and result in higher prices to the government.

The guidance requiring business cases also supports an Executive Order, to deliver an efficient, effective, and accountable Government by establishing a framework for addressing unjustified duplication among contracts, which was identified as an area of concern by the Government Accountability Office (GAO) in GAO Report GAO-11-318SP. (See section 16 entitled, "Collecting improved data on interagency contracting to Governmentwide minimize duplication could help the government leverage its vast buying power" of GAO Report GAO-11-318SP).

2. The guidance uses the terms agency-specific contracts and agency-specific blanket purchase agreements (BPAs). What are agency-specific vehicles?

For purposes of this guidance, agency-specific vehicles are either indefinite-delivery, indefinite quantity contracts or BPAs intended for the sole use of the establishing department or agency. Agency-specific contracts and agency-specific BPAs may be agency-wide (sometimes referred to as "enterprise-wide") or limited to one or more specific component organizations within the agency.

3. Why does the guidance require business cases for agency-specific contracts when the law (Public Law 110-417) focuses only on multi-agency contracts?

This guidance broadens the use of business cases to cover agency-specific contracts that may overlap with existing agreements established under the Federal Strategic Sourcing Initiative (FSSI), the General Services Administration's SmartBUY Program, or an existing government-wide acquisition contract (GWAC). Broadening the use of business cases will help to ensure agencies are giving appropriate consideration of existing vehicles before they create new ones and, where new vehicles make sense, to help the agency leverage its buying power and achieve greater efficiencies.

4. Is the guidance intended to allow an agency to stop another agency's plan to create an interagency or agency-wide contract?

No. The ultimate discretion to proceed with a proposed acquisition remains with the servicing agency, except for government-wide acquisition contracts (GWACs), where the servicing agency must obtain approval from the Director of the Office of Management and

Budget (OMB). We do not expect, nor intend, to eliminate all overlapping and duplicative contracts through the process outlined in the guidance. In fact, some duplication is healthy. That said, sharing of information about proposed acquisitions helps to improve the value of the resultant vehicles and avoid unhealthy duplication. The disciplined steps outlined in the guidance will help to reduce duplication and achieve a more healthy balance in the use of interagency and agency-specific acquisition vehicles.

5. **Must a business case be developed for every contract vehicle?**
The answer depends on the type of contract vehicle the agency is seeking to create. As described in the table below, a business case must be developed whenever an agency seeks to establish or renew a government-wide acquisition contract (GWAC). For multi-agency contracts or multi-agency blanket purchase agreements (BPAs), the answer depends on the size of the proposed vehicle and whether interagency usage is intended to be significant or significant overlap would be created between the scope of the proposed acquisition and the scope of existing agreements established under the Federal Strategic Sourcing Initiative (FSSI), the General Services Administration's SmartBUY Program, or an existing government-wide acquisition contract (GWAC). For agency-specific vehicles, the answer also depends on whether the vehicle would significantly overlap with existing FSSI, SmartBUY, or GWAC vehicles.

Type of Acquisition Vehicle	Anticipated Solicitation Release Date	Business case is required when the estimated value of the proposed acquisition vehicle is equal to or greater than:
➢ Government-wide acquisition contracts (GWACs), as defined in Federal Acquisition Regulation (FAR) 2.101	After 12/31/2011	All GWACs regardless of estimated value
➢ multi-agency contracts, as defined in FAR 2.101, or multi-agency blanket purchase agreements (BPAs) created under the Federal Supply Schedules (FSS) Program managed by the General Services Administration (GSA), where: - usage by another agency (i.e., interagency usage) is expected to be significant ; or - interagency usage is not expected to be significant but where a significant overlap would be created between the scope of the proposed acquisition and the scope of existing contracts or agreements established under the Federal Strategic Sourcing Initiative (FSSI), GSA's SmartBUY Program, or an existing GWAC. ➢ agency-specific contracts or agency-specific BPAs where either the contract or the BPA would create a significant overlap between the scope of the proposed acquisition and the scope of existing contracts or agreements established under FSSI, SmartBUY Program, or an existing GWAC.	1/01/2012 - 09/30/2012	$250 million
	FY 13	$100 million
	FY 14	$50 million

6. **Why does the guidance require sharing of information with other agencies?**
   There are two main reasons agencies are being asked to share information. The first reason is value. Interagency contracts and agency-specific contracts are most effective when the range of customers they are designed to support have an opportunity to provide input when shaping the structure of the vehicle- its scope, terms, and conditions. This sharing of information increases the likelihood that the resultant vehicles will be used to their full capacity and enable the government to realize administrative efficiencies and the benefit of its purchasing scale. The second reason is avoiding duplication. Sharing information is an important part of the acquisition planning and market research process. While the decision to proceed with a proposed acquisition is ultimately left to the servicing agency, sharing information gives agencies greater insight into whether their needs can be met effectively with existing vehicles, which in turn helps to avoid redundant investments. OFPP believes these benefits are well worth the small additional time agencies are being asked to incorporate into their acquisition lead-times, especially given the average size of the investments associated with these vehicles.

7. **Does this guidance require an agency to create a business case if the proposed vehicle overlaps with a General Services Administration (GSA) multiple award schedule (Schedule)?**
   No, but agencies are reminded of their responsibilities under Federal Acquisition Regulation (FAR) Part 8, Priorities for use of Government supply sources, which requires agencies to review the Schedules before creating a new vehicle.

8. **Will this guidance allow agencies the opportunity to comment on business cases for General Services Administration (GSA) multiple award schedules (Schedules)?**
   No. This guidance focuses on business cases for all government-wide acquisition contracts (GWACs) and certain agency-specific contracts, agency-specific blanket purchase agreements (BPAs), multi-agency BPAs, and multi-agency contracts as defined by the Federal Acquisition Regulation 2.101. Agencies seeking to provide input on GSA Schedules should contact GSA.

9. **Does this guidance satisfy Federal Acquisition Regulation (FAR) 17.502-2(d) which requires an agency to prepare a business case before awarding a multi-agency contract?**
   Yes. The requirements of 17.502-2(d) are met by developing the business case in accordance with the guidance.

10. **Does this guidance require business cases for orders placed under existing acquisition vehicles?**
    No. This guidance focuses on the creation or renewal of government-wide acquisition contracts (GWACs) and certain multi-agency and agency-specific contracts and blanket purchase agreements (BPAs). With respect to orders, agencies are reminded that they should follow the acquisition planning guidance in the Federal Acquisition Regulation (FAR) Part 7 as well as any agency guidance specific to the placement of orders.

11. **The guidance refers to MAX. What is MAX and how can I sign up for training on MAX or get help using MAX?**
MAX is a comprehensive collaboration, information sharing, document management, and knowledge management capability that allows that allows registered users to easily create, edit, and share content on web pages using a simplified markup language. To register with MAX complete the information requested at https://max.omb.gov/maxportal/registrationForm.action to register with the MAX. Information about available MAX training can be found at https://max.omb.gov/community/x/SABIBw. The MAX technical support team and helpdesk can be reached at MAXSupport@omb.eop.gov or 202-395-6860.

B. Developing Business Cases

1. **Who is responsible for developing business cases? Who approves them?**
Agencies should designate appropriate acquisition or program person(s) or office(s) to be responsible for developing the business cases. Business cases may be prepared by responsible individuals or by a team. As described in the guidance, business cases must be approved by an authority no lower than the agency's senior procurement executive, or equivalent official, and coordinated with the Director of the Office of Small and Disadvantaged Business Utilization (OSDBU) and the agency's Chief Information Officer, if the acquisition involves information technology. As deemed appropriate by the agency, agencies may also require additional approving officials.

2. **At what point in the procurement lifecycle should a business case be prepared and posted for comment?**
The potential for administrative savings and efficiencies is greatest when existing vehicles are identified early in the acquisition lifecycle. For this reason, agencies should prepare and post the preliminary business case during the advance acquisition planning or other early phase of the acquisition lifecycle.

3. **Are there specific topics that must be addressed in the business case?**
Yes. Business cases for all covered acquisition vehicles must address scope, potential duplication, and value. For government-wide acquisition contracts (GWACs) and for multi-agency vehicles where interagency usage is expected to be significant, the business case must also describe interagency demand, and the agency's management capabilities and strategy.

4. **How much detail should be included in the business case?**
Each section of the business case should be brief, but comprehensive enough to give a full understanding of the all relevant facts and key issues related to the proposed acquisition, including. While the length of the business case is left to the agency, all the relevant topics can probably be adequately addressed in around ten pages.

5. **Must an agency follow the format provided in the guidance for preparing business cases?**

No. The format provided in the guidance is, however, a recommended format that agencies are strongly encouraged to use to ensure that a comprehensive analysis is completed for proposed vehicles.

6. **Does the guidance require any special coordination processes?**
Yes. The guidance requires agencies to post a draft of their business case on MAX, at https://max.omb.gov/community/x/b5G8IQ, to permit review by interested federal stakeholders. This process is designed to increase the likelihood that the resulting vehicles will be used to their full capacity and enable the government to realize administrative efficiencies and the benefit of its purchasing power.

7. **What are the specific steps for developing business cases?**
The guidance lays out a four-step process. First, the agency prepares a preliminary business case discussing scope and potential duplication. Second, the agency posts the preliminary business case on MAX, at https://max.omb.gov/community/x/b5G8IQ, for a minimum of 15 days to permit review by interested federal stakeholders. Third, based on feedback from stakeholders, agencies determine whether to proceed with a new procurement. Fourth, if the agency decides to proceed, it completes its business case by discussing value and, if the vehicle is a government-wide acquisition contract or a multi-agency contract with significant anticipated interagency usage, interagency demand and management considerations.

8. **What if a business case contains information that may not be suitable to share outside the agency?**
Agencies should use their best judgment where there may be concerns or sensitivities with sharing the entire document. In such situations, an agency may provide on MAX a summary of each part of its business case rather than post the entire document.

C. **Determining Scope Overlap**

1. **What steps is an agency expected to take to determine if there is scope overlap?**
As described in the guidance, an agency is expected to take three steps. First, it must conduct reasonable market research. Agencies should always evaluate agreements established under the Federal Strategic Sourcing Initiative (FSSI), the General Services Administration's SmartBUY Program, or an existing government-wide acquisition contract (GWAC). For proposed GWACs and multi-agency contracts and multi-agency blanket purchase agreements (BPAs) where interagency usage is expected to be significant, agencies should also consider relevant multi-agency contracts or BPAs, of which they are aware, and any relevant agency-specific contracts or BPAs. Second, the agency needs to explain in its preliminary business case how the proposed vehicle differs from the identified existing vehicles (e.g., in terms of expected pricing, terms and conditions). Third, the agency must vet its preliminary business case by posting it on MAX so that managers of existing vehicles that may overlap with the proposed vehicle have an opportunity to provide input.

2. **Where can agencies find the scope of government-wide acquisition contracts (GWACs) and agreements established under the Federal Strategic Sourcing Initiative (FSSI) and the General Services Administration's SmartBUY Program?**
   Agencies may refer to the "Links to Contract Vehicles" MAX page, https://max.omb.gov/community/x/tgRwIg, to find links to government-wide acquisition contracts (GWACs) and Federal Strategic Sourcing Initiative (FSSI) vehicles. Agencies may also go to the General Services Administration's FSSI initiatives webpage at http://www.gsa.gov/portal/content/112561 to find more information about each of the FSSI vehicles.

3. **If a proposed acquisition's scope overlaps with an existing vehicle, should the agency assume it would contribute to unproductive duplication and cancel it?**
   No. We recognize, as did the Acquisition Advisory Panel, that some overlap can create healthy choice and "[s]ome competition among vehicles is . . . desirable and even fundamental to maintaining the health of government contracting." When overlap is identified, agencies must carefully consider if there is still a need for moving forward with a new vehicle.

4. **Are there reasons to award a new vehicle even though its scope may overlap an existing vehicle?**
   Yes. For example, an agency may need to establish an agency-wide contract in lieu of using an existing interagency contract in order to negotiate terms and conditions that are tailored to its needs, simplify contract management by bringing contractors together under one contract vehicle (in lieu of having to manage contractors on multiple interagency vehicles, each of which addresses only part of the agency's requirement), or to ensure products are in compliance with agency standards.

5. **Who decides if the scope overlap is healthy or unhealthy?**
   As a general matter the agency seeking to create a new interagency or large agency-specific contract is responsible for determining if any identified scope overlap is healthy or unhealthy.

D. <u>Soliciting Comment on a Preliminary Business Case</u>

1. **How will stakeholders be notified about new business cases available for comment?**
   When an agency posts on MAX a preliminary business case (addressing scope and potential duplication), a message will be sent to federal agency stakeholders including Chief Acquisition Officers (CAOs), Senior Procurement Executives (SPEs), the leadership of the Strategic Sourcing Working Group (SSWG), which provides governance for the Federal Strategic Sourcing Initiative (FSSI), officials of the Federal Acquisition Service (FAS) within the General Services Administration, and managers of franchise funds who support assisted acquisitions. If the vehicle is for information technology (IT), a message will also be sent to Chief Information Officers (CIOs) and program managers for existing GWACs. A message may also be sent to other relevant stakeholders identified by the agency or the Office of Federal Procurement Policy (OFPP). CAOs and SPEs should encourage officials within their agencies who manage large blanket purchase agreements (BPAs), multi-agency contracts,

and agency-specific contracts to sign up for alerts on the MAX business case page, https://max.omb.gov/community/x/b5G8IQ, by clicking the **Watchers** button in the upper-right hand corner of the page.

2. **Does the agency need to accommodate all stakeholder interests before proceeding with the procurement?**
   No. Agencies proposing new vehicles are asked to give appropriate consideration to comments that speak to potential duplication or opportunities to leverage additional demand. Agencies are encouraged to communicate with stakeholders about their comments but are not expected to formally respond to each comment or commenter.

3. **If the Chair of the of the Strategic Sourcing Working Group (SSWG) or a senior agency official, such as a senior procurement executive, raises strong concerns, what is the proposing agency expected to do?**
   Agencies should confer with the Office of Federal Procurement Policy (OFPP) to assist in addressing significant stakeholder comments or concerns, especially those that speak to potential duplication or opportunities to leverage additional demand.

4. **If after 15 days no comments are received, may the agency conclude stakeholders have no objection to the proposed acquisition as explained in the business case?**
   Yes, the agency may proceed with the acquisition. Of course the agency may still wish to seek feedback by contacting key stakeholders, such as the Chair of the Strategic Sourcing Working Group (SSWG) and officials of the Federal Acquisition Service (FAS) within the General Services Administration.

5. **Where can an agency find instructions for posting and commenting on business cases using MAX?**
   Instructions for posting and commenting on business cases using MAX can be found at https://max.omb.gov/community/x/b5G8IQ.

E. **OMB Review of GWAC Business Cases**

1. **Why are business cases for government-wide acquisition contracts (GWACs) submitted to the Office of Management and Budget (OMB) for review when business cases for other proposed acquisitions do not have to be provided to OMB?**
   Section [cite] of the Clinger-Cohen Act authorizes the OMB Director to designate "one or more heads of executive agencies as executive agent for Government-wide acquisitions of information technology." Consistent with its responsibilities under the Clinger Cohen Act for approving executive agents, OMB will review all business cases for proposed government-wide acquisition contracts (GWACs). All other business cases will be reviewed periodically by OFPP to ensure that agency decisions to award new acquisition vehicles are supported by business cases that demonstrate the potential value of the proposed vehicle.

F. Centralized Database

1. Will a centralized database containing interagency contract vehicles be developed?

The Office of Federal Procurement Policy (OFPP) is considering options for providing information on existing interagency contract vehicles, including government-wide acquisition contracts (GWACs), multi-agency contracts, and any other procurement instrument intended for use by multiple agencies including blanket purchase agreements (BPAs). Available information sources indicate that there are a limited number of existing interagency contract vehicles and that the effort to create a new and potentially costly government-run database of interagency contracts may be unnecessary. To assist in the evaluation of options, OFPP is conferring with the Chief Acquisition Officers Council's Acquisition Committee for E-Gov (the "ACE"), which evaluates investments in the government-wide electronic acquisition systems that support common functions performed by all agencies. Until a determination has been made regarding the creation of a centralized database, which is expected by the end of the calendar year, agencies may refer to the "Links to Contract Vehicles" MAX page, https://max.omb.gov/community/x/tgRwIg, to find links to GWACs and other existing interagency contract vehicles.

Section A - General Terms and Conditions 2
A.1. Purpose 2
A.2. Authority 2
A.3. Part A Identifier 2
A.4. Scope 2
A.5. Period of Agreement 3
A.6. Roles & Responsibilities of Servicing Agency & Department of Energy 3
A.7. Billing & Payment 3
A.8. Assisted Acquisition Small Business Credit 4
A.9. Assisted Acquisition Contract Termination, Disputes and Protests 4
A.10. Review of Part A 5
A.11. Amendments 5
A.12. IA Termination 5
A.13. Interpretation of IA 5
A.14. Signatures 6

Gray highlights are instructions. Remove the instructions from the interagency agreement.

Section A - General Terms and Conditions

A.1. Purpose

Part A: When DOE is the Requesting Agency for an Interagency Agreement (IA), the DOE Contracting Officer will complete IA Part A, General Terms and Conditions. It will be necessary for the Contracting Officer to coordinate with the program office and the Servicing Agency for completion of IA Part A.

Part B: When the Program Office prepares and submits the requisition, the Program Office will prepare Part B with the assistance of the Servicing Agency and the Contracting Officer, as needed. Part B will be an attachment to the requisition. The DOE Contracting Officer and the DOE Budget Office will review IA Part B, Requirements and Funding Information, for accuracy and completeness.

This Part of the IA (hereinafter "Part A") describes the terms and conditions that govern the provision of this assisted acquisition between Department of Energy, hereinafter "the Requesting Agency" and Central Intelligence Agency, hereinafter "the Servicing Agency."

No fiscal obligations are created through the execution of Part A. A fiscal obligation arises when the Requesting Agency demonstrates a bona fide need, provides the necessary requirements and funding information to the Servicing Agency and both parties execute a funding document using Part B of this IA or an alternate funding document.

A.2. Authority

Check the applicable box to identify the legal authority.

The parties' authority to enter into this interagency agreement is:

[[*Fill in with X on being needed to complete*]] The Economy Act (31 U.S.C. 1535)

[[*Fill in with X on being needed to complete*]] Franchise Fund (e.g., 31 U.S.C. 501 note) or Revolving Fund (e.g., 40 U.S.C. 321)
[*Insert specific statutory authority*]

[[*Fill in with X on being needed to complete*]] Other [*Insert specific statutory authority or authorities*]

A.3. Part A Identifier

The Requesting Agency and the Servicing Agency will agree to the identifier (otherwise called the interagency agreement number, common agreement number, or obligating document number) that will be used for the IA and on all relevant documents, including requirements and funding information provided through Part B or alternate documents. STRIPES will create the IA identifier number. When STRIPES interfaces with STARS, this number becomes the obligating document number. When using IPAC, the DOE obligating document number (otherwise referred to as the identifier, common agreement number or interagency agreement number) should be included as the purchase order number or obligating document number.

[*Insert number]*

A.4. Scope

For paragraphs a. and b., list the authorized DOE organizations and Servicing Agency organizations, respectively, to include the organizations identified in Section B.1.

For paragraph c., the need described in Section B.6 of Part B must fall within the scope of products or services described in paragraph c.

For paragraph d., describe any DOE terms, conditions, requirements, and restrictions or indicate 'None'. Include applicable intellectual property rights provisions. Include any Scientific and Technical Information reporting requirements.

a. The following organizations in the Department of Energy are authorized to obtain assistance from the Servicing Agency. [*Insert list of organizations*]

b. The organizations in the Servicing Agency are authorized to provide assistance to the Department of Energy. [*Insert list of organizations*]

c. The following types of services or products may be acquired through this assisted acquisition pursuant to this IA.

[*Insert description of services and/or products. The description for this section may be general in nature (e.g., information technology) and is not required to meet the definition of a bona fide need.*]

d. The following DOE terms, conditions, requirements or restrictions apply: [*describe any DOE terms, conditions, requirements , restrictions or indicate 'None'. Include applicable intellectual property rights provisions. Include any scientific and technical information reporting requirements.*]

A.5. Period of Agreement

The terms and conditions described in Part A of the IA become effective when signed by authorized officials of both agencies and remain effective until [*insert date*], unless amended in accordance with Section A.11 or terminated in accordance with Section A.12.

A.6. Roles & Responsibilities of Servicing Agency & Department of Energy

Both Agencies to agree and define for each main responsibility in the acquisition lifecycle, the respective roles of the requesting agency and servicing agency.

The effective management and use of this interagency agreement and related actions is a shared responsibility of the Requesting Agency and the Servicing Agency.

The parties hereby agree to the following Roles and Responsibilities, which are derived from the Checklist in Appendix 1 of Interagency Acquisitions guidance, June 2008, issued by the Office of Federal Procurement Policy, Office of Management and Budget (OMB) or other documents.

[*For each main responsibility in the acquisition lifecycle, as applicable, define the respective roles of the requesting agency and servicing agency.*]

A.7. Billing & Payment

Both Agencies will mutually agree to the reimbursement method for products and/or services to the Servicing Agency, i.e., Intra-Governmental Payment and Collection (IPAC) System or another mutually agreeable alternative. When using IPAC, the DOE obligating number will serve as the common agreement number (interagency agreement (IA)).

The Department of Energy (DOE) will pay the Servicing Agency for costs of each contract or task/delivery order. Billings may include the amounts due under the contract or order plus any assisted service fees identified in Part B of this IA. The DOE obligating document number should be included on all documentation related to the agreement. The DOE obligating number will serve as the common agreement number (interagency agreement (IA)).

The Department of Energy's preferred method for reimbursing the Servicing Agency is via the Intra-Governmental Payment and Collection (IPAC) System. When the reimbursement for products and/or services furnished under this agreement will be effected by means of IPAC, the Servicing Agency shall provide the Department of Energy with the appropriate instructions for transmitting the Agency Location Code (ALC), Treasury Account Symbol (TAS), Business Event Type Code (BETC), Business Partner Network (BPN) number (usually the Data Universal Numbering System (DUNS) number), Line of Accounting (LOA), points of contact, and other information identified in Part B of this IA.

If IPAC is not a satisfactory billing method, a mutually agreeable alternative should be negotiated before acceptance of this agreement and documented in Part B whether IPAC or alternative will be used.

Questions regarding payment should be directed to:

U.S. Department of Energy
PO Box 500
Germantown, MD 20875
Attn: [*insert name*]

Phone: [*insert phone number (xxx) xxx-xxxx*]
Email: [*insert email address for name shown above*]

Reimbursable billings are delinquent when they are [*insert number*] or more calendar days old (from date of the billing). When billings remain delinquent over [*insert number*] calendar days and the Department of Energy has not indicated a problem regarding services, the Servicing Agency may choose not to award any new contract/orders or modifications to existing contract/orders for the Requesting Agency (or the client within) and termination of existing services will be considered and negotiated with the Requesting Agency.

The Department of Energy shall be responsible for interest owed under the Prompt Payment Act except that the Servicing Agency shall be responsible for interest owed to the contractor due to delays created by actions of the Servicing Agency.

A.8. Assisted Acquisition Small Business Credit

Any contract actions executed by the Servicing Agency on behalf of the Department of Energy will allocate the socio-economic credit to the Requesting Agency at the lowest Agency/Bureau component code as identified by the Requesting Agency. If the code is not provided, the Servicing Agency will allocate the credit to the highest Requesting Agency code.

A.9. Assisted Acquisition Contract Termination, Disputes and Protests

If a contract or order awarded pursuant to this IA is terminated or cancelled or a dispute or protest arises

from specifications, solicitation, award, performance or termination of a contract, appropriate action will be taken in accordance with the terms of the contract and applicable laws and regulations. The Department of Energy shall be responsible for all costs associated with termination, disputes, and protests, including settlement costs, except that the Department of Energy shall not be responsible to the Servicing Agency for costs associated with actions that stem from errors in performing the responsibilities assigned to the Servicing Agency. The Servicing Agency shall consult with the Department of Energy before agreeing to a settlement or payments to ensure that the Servicing Agency has adequate time in which to raise or address any fiscal or budgetary concerns arising from the proposed payment or settlement.

A.10. Review of Part A

The parties agree to review jointly the terms and conditions in Part A at least annually if the period of this agreement, as identified in Section 5, exceeds one year. Appropriate changes will be made by amendment to this agreement executed in accordance with Section A.11. The parties further agree to review performance under this IA to determine if expectations are being met and document a summary of their assessment. The responsible reviewing official at each agency shall sign and date the assessment.

[*Insert description of metrics (e.g., the quality of each party's responsiveness; the quality of each party's overall execution of assigned responsibilities) and methods agreed upon to gather performance information (e.g., surveys, interviews, record reviews)*]

A.11. Amendments

Any amendments to the terms and conditions in Part A shall be made in writing and signed by both the Servicing Agency and the Department of Energy.

A.12. IA Termination

This IA may be terminated upon thirty (30) calendar days written notice by either party. If this agreement is cancelled, any implementing contract/order may also be cancelled. If the IA is terminated, the agencies shall specify the terms of the termination, including costs attributable to each party and the disposition of awarded and pending actions.

If the Servicing Agency incurs costs due to the Department of Energy failure to give the requisite notice of its intent to terminate the IA, the Department of Energy shall pay any actual costs incurred by the Servicing Agency as a result of the delay in notification, provided such costs are directly attributable to the failure to give notice.

A.13. Interpretation of IA

If the Servicing Agency and Department of Energy are unable to agree about a material aspect of either Part A or Part B of the IA, the parties agree to engage in an effort to reach mutual agreement in the proper interpretation of this IA, including amendment of this IA, as necessary, by escalating the dispute within their respective organizations.

If a dispute related to funding remains unresolved for more than thirty (30) calendar days after the parties have engaged in an escalation of the dispute, the parties agree to refer the matter to their respective Agency Chief Financial Officers (CFO) with a recommendation that the parties submit the dispute to the CFOs Council's Intragovernmental Dispute Resolution Committee for review in accordance with Treasury Financial Manual (TFM) Volume I, Part 2, Chapter 4700, "Agency Reporting Requirements for the Financial Report of the United States Government;" Appendix 10 - Intragovernmental Business Rules, or

subsequent guidance.

A.14. Signatures

Once the Interagency Agreement (IA) is finalized, you will not be able to make changes or add signatures. In those instances, to add signatures or to make any changes to Part A or Part B, the file needs to be downloaded and saved as a Word document or RTF file to make any changes or to add electronic or manual signatures. When any changes or signatures are added to the IA, upload the document as a supporting document into STRIPES. FedConnect response from the Servicing Agency to DOE Contracting Officer constitutes signatures. If FedConnect is not used, then the previous method of a hand signature is required. The hand signed document must be scanned and uploaded into STRIPES as part of the official IA file.

DEPARTMENT OF ENERGY OFFICIAL:

Signature: [*Signature*] Date: [*Date*]

Name: [*Name*]

Contracting Officer

Agency: [*Agency*]

Address: [*Address*]

Phone: [*Phone*]

E-mail & fax: [*Email and Fax Number*]

SERVICING AGENCY OFFICIAL:

Signature: _____ Date: _____
(FedConnect response to the Department of Energy constitutes signature.)

Name: [*Name*]

Title: [*Title*]

Agency: [*Agency*]

Address: [*Address*]

Phone: [*Phone*]

E-mail & fax: [*Email and Fax Number*]

Part B - Requirements & Funding Information

PART B – Requirements and Funding Information

Gray highlights are instructions. Remove the instructions from the interagency agreement.

PART B - Requirements & Funding Information

B.1. Purpose

This is for an assisted acquisition. An assisted acquisition is a type of interagency acquisition where the servicing agency and requesting agency enter into a written interagency agreement pursuant to which the servicing agency performs acquisition activities on the requesting agency's behalf, such as the awarding of a contract, task order, or delivery order.

This Part of the interagency agreement (IA) (hereinafter 'Part B') serves as the funding document. It provides specific information on the requirements of the Department of Energy, hereinafter 'the Requesting Agency' sufficient to demonstrate a bona fide need and identifies funds associated with the requirement to allow [insert the name of agency/organization], hereinafter 'the Servicing Agency,' to provide assisted acquisition support.

B.2. Authority

Check the applicable box. If the assisted acquisition is subject to the Economy Act, the requisitioner, or designee, should provide the information to support the determinations and findings (D&F) required by FAR 17.502-2 to the contracting officer. Provide this information as an attachment or coordinate with the contracting officer later. A DOE contracting officer must approve a D&F. A copy of the D&F will be attached by DOE contracting officer.

The parties' authority to enter into this interagency agreement is (check applicable box):

[ ] The Economy Act (31 U.S.C. 1535) (Attached.)

[ ] Other (identify specific statutory authority or authorities)

B.3. Part B Identifier

If this is a new IA, then leave this blank. After STRIPES creates the IA identifier number, the number will appear in Part A Section A.3. Identifier. In order to complete B.3., the DOE contracting officer will enter the IA identifier number. If this is a requirement against an approved DOE IA, then indicate the IA identifier number from Part A Section A.3. Identifier, in the proper STRIPES format.

[insert number]

B.4. General Terms & Conditions

Check applicable box. If this is a new IA, then leave this blank. The DOE contracting officer will complete later. If this is a requirement against an approved DOE IA, indicate whether Part A of the IA is attached or the location of Part A. For example, Part A could be located in the master file for IA number xxx at contracting office xxx.

Activities undertaken pursuant to this document are subject to the general terms and conditions set forth in Part A, [insert identifier found in section 3 of Part A]. Part A is located at:

[ ] [insert location of IA Part A]

[ ] Attached

B.5. Project Title
[insert title]

B.6. Description of Products or Services / Bona Fide Need

Describe the goods or services that will be acquired from a contractor by the Servicing Agency on behalf of the Department of Energy under this IA. The Department of Energy shall insert a specific, definite, and clear description that demonstrates a bona fide need and supports a binding agreement that can be recorded as an obligation in the fiscal year that the funds are available for obligation. This description may, but is not required to, be in the form of a statement of work (SOW), statement of objectives (SOO), performance work statement (PWS), or other requirements document. A specific, definite, and clear description of a current need of the requesting agency that enables the servicing agency to immediately begin work on the IA is sufficient. Provide additional information for any special requirements, management, administration, technical representative, reporting requirements for scientific and technical information (Guide Chapter 35.1), acceptance, and completion as needed.

The goods and/or services to be acquired are
[insert description see guidance for details]

The goods and/or services to be acquired are described in an attachment, check the box below and describe the attachment.

[ ] Description of goods or services is attached. [insert brief description of attachment]

B.7. Projected Milestones
[insert projected milestones]

B.8. Billing and Payment
The Servicing Agency will pay invoice(s), or equivalent, e.g., IPAC, from amounts identified in section 13 on a reimbursable basis. The Servicing Agency will present an itemized statement to the Department of Energy for reimbursement of incurred costs. The Department of Energy will pay reimbursable billings to the Servicing Agency from funds identified in section 13. See section 7 of Part A for additional terms and conditions addressing billing and payment.

B.9. Description of Servicing Agency Support

Insert a description of services that the Servicing Agency will provide to DOE in connection with planning, executing, and/or managing the assisted acquisition. Attachments may be referenced and uploaded.]

The Servicing Agency will provide the following services to the Department of Energy:
[insert description see guidance for details]

B.10. Fees

Insert how service charges will be determined or state "not applicable."

Services charges will be determined as follows:
[insert description see guidance for details]

B.11. Obligation Amount

If necessary, the requisitioner, or designee, should coordinate with the local finance office to complete the table below. This information should comply with the billing requirements of the Department of Treasury, Financial Management Service (FMS). If this is a new IA, then leave the common agreement number (IA number) blank. After STRIPES creates the IA number, the DOE contracting officer will enter the IA number. If this is a requirement against an approved DOE IA, then indicate the IA number in the proper STRIPES format.

Servicing Agency and Department of Energy shall complete the table below.

Common Agreement Number (IA number) - [insert]
Requirement Title (Project Title) - [insert]
Type of Requirement (Product / Severable Service / Non-severable service) - [insert]
Fund citation (line of accounting) - [insert]
Appropriation expiration date - [insert]
Amount obligated (costs plus Servicing agency's service costs, as applicable) - [insert]

B.12. Requesting Agency Funding Information

If necessary, the requisitioner, or designee, should coordinate with the local finance office to complete the table below. Once the Interagency Agreement (IA) is finalized, you will not be able to make changes or add signatures. In those instances, to add signatures or to make any changes to Part A or Part B, the file needs to be downloaded and saved as a Word document or RTF file to make any changes or to add electronic or manual signatures. When any changes or signatures are added to the IA, upload the document as a supporting document into STRIPES. FedConnect response from the Servicing Agency to DOE Contracting Officer constitutes signatures. If FedConnect is not used, then the previous method of a hand signature is required. The hand signed document must be scanned and uploaded into STRIPES as part of the official IA file.

The Department of Energy's Certifying Official shall complete the table & certification

Basic appropriation symbol (Treasury account symbol) - [insert]
Fund citation (line of accounting) - [insert]
Fiscal year fund appropriated - [insert]
Appropriation expiration date - [insert]
Other funding limitations - [insert]
Type of funds (e.g., one-year, no-year) - [insert]
Agency location code - [insert]
Federal agency code - [insert]
Funding agency code - [insert]
Funding office code - [insert]
Trading Partner Number - [insert]
DUNS/BPN number (Business Partner Network or BPN #) - [insert]

Department of Energy Funds Certifying Official

_____
Signature

_____
Date

Printed Name - [insert]

Title - [insert]

B.13. Servicing Agency Funding Information

The requisitioner, or designee, should coordinate with the local finance office and/or the applicable Servicing Agency finance office to complete the table below.

The Servicing Agency shall complete the table below.

DUNS/BPN number - [insert]

Location Code - [insert]
Basic Appropriation Symbol - [insert]
Trading Partner Number - [insert]
Receiving Account Number - [insert]

B.14. Description of Requesting-Agency Unique Restrictions

This section identifies unique restrictions applicable to the Department of Energy regarding the action or the funding being provided.

The following unique DOE restriction(s) apply to this action [insert description]

B.15. Amendments
Any amendments to the terms and conditions in Part B shall be made in writing and signed by both the Servicing Agency and the Requesting Agency.

B.16. Contact Information
Servicing Agency Contracting POC
Name - [insert]
Address - [insert]
Email - [insert]
Phone - [insert]
Fax - [insert]
Servicing Agency Financial POC -
Name -[insert]
Address - [insert]
Email - [insert]
Phone - [insert]
Fax - [insert]

Department of Energy Program Office POC
Name - [insert]
Address - [insert]
Email - [insert]
Phone - [insert]
Fax - [insert]
Department of Energy Financial POC -
Name - [insert]
Address - [insert]
Email - [insert]
Phone - [insert]
Fax - [insert]

B.17. Signatures

Once the Interagency Agreement (IA) is finalized, you will not be able to make changes or add signatures. In those instances, to add signatures or to make any changes to Part A or Part B, the file needs to be downloaded and saved as a Word document or RTF file to make any changes or to add electronic or manual signatures. When any changes or signatures are added to the IA, upload the document as a supporting document into STRIPES. FedConnect response from the Servicing Agency to DOE Contracting Officer constitutes signatures. If FedConnect is not used, then the previous method of a hand signature is required. The hand signed document must be scanned and uploaded into STRIPES as part of the official IA file.

By signing this document, the Department of Energy confirms that a bona fide need exists and that funds are for the designated purpose, meet time limitations, and are legally available for the action described in this document; that all unique funding and procurement requirements, if applicable, including all statutory and regulatory requirements applicable to the funding being provided, have been disclosed to Servicing Agency; and all internal reviews and approvals required prior to transferring funds to the Servicing Agency have been completed. The Servicing Agency's acceptance of this document creates an obligation on the part of the Department of Energy.

Department of Energy Official

_____
Signature
Contracting Officer

_____
Date

_____
Printed Name

_____
Title

_____
Agency

Servicing Agency Official

_____
Signature

_____
Date

_____
Printed Name

_____
Title

_____
Agency

Section A - General Terms and Conditions 2
A.1. Purpose 2
A.2. Authority 2
A.3. Part A Identifier 2
A.4. Scope 2
A.5. Period of Agreement 3
A.6. Roles & Responsibilities of Servicing Agency & Department of Energy 3
A.7. Billing & Payment 3
A.8. A.8. Reserved 4
A.9. A.9. Reserved 4
A.10. Review of Part A 4
A.11. Amendments 5
A.12. IA Termination 5
A.13. Interpretation of IA 5
A.14. Signatures 5

Gray highlights are instructions. Remove the instructions from the interagency agreement.

Section A - General Terms and Conditions

A.1. Purpose

Part A: When DOE is the Requesting Agency for an Interagency Agreement (IA), the DOE Contracting Officer will complete IA Part A, General Terms and Conditions. It will be necessary for the Contracting Officer to coordinate with the program office and the Servicing Agency for completion of IA Part A.

Part B: When the Program Office prepares and submits the requisition, the Program Office will prepare Part B with the assistance of the Servicing Agency and the Contracting Officer, as needed. Part B will be an attachment to the requisition. The DOE Contracting Officer and the DOE Budget Office will review IA Part B, Requirements and Funding Information, for accuracy and completeness.

This Part of the IA (hereinafter "Part A") describes the terms and conditions that govern the provision of this interagency transaction between Department of Energy, hereinafter "the Requesting Agency" and Central Intelligence Agency, hereinafter "the Servicing Agency."

No fiscal obligations are created through the execution of Part A. A fiscal obligation arises when the Requesting Agency demonstrates a bona fide need, provides the necessary requirements and funding information to the Servicing Agency and both parties execute a funding document using Part B of this IA or an alternate funding document.

A.2. Authority

Check the applicable box to identify the legal authority.

The parties' authority to enter into this interagency agreement is:

[[*Fill in with X on being needed to complete*]] The Economy Act (31 U.S.C. 1535)

[[*Fill in with X on being needed to complete*]] Franchise Fund (e.g., 31 U.S.C. 501 note) or Revolving Fund (e.g., 40 U.S.C. 321)
[*Insert specific statutory authority*]

[[*Fill in with X on being needed to complete*]] Other [*Insert specific statutory authority or authorities*]

A.3. Part A Identifier

The Requesting Agency and the Servicing Agency will agree to the identifier (otherwise called the interagency agreement number, common agreement number, or obligating document number) that will be used for the IA and on all relevant documents, including requirements and funding information provided through Part B or alternate documents. STRIPES will create the IA identifier number. When STRIPES interfaces with STARS, this number becomes the obligating document number. When using IPAC, the DOE obligating document number (otherwise referred to as the identifier, common agreement number or interagency agreement number) should be included as the purchase order number or obligating document number.

[*Insert number]*

A.4. Scope

For paragraphs a. and b., list the authorized DOE organizations and Servicing Agency organizations, respectively, to include the organizations identified in Section B.1.

For paragraph c., the need described in Section B.6 of Part B must fall within the scope of products or services described in paragraph c.

For paragraph d., describe any DOE terms, conditions, requirements, and restrictions or indicate 'None'. Include applicable intellectual property rights provisions. Include any Scientific and Technical Information reporting requirements.

a. The following organizations in the Department of Energy are authorized to obtain assistance from the Servicing Agency. [*Insert list of organizations*]

b. The organizations in the Servicing Agency are authorized to provide assistance to the Department of Energy. [*Insert list of organizations*]

c. The following types of services or products may be acquired through this interagency transaction pursuant to this IA.

[*Insert description of services and/or products. The description for this section may be general in nature (e.g., information technology) and is not required to meet the definition of a bona fide need.*]

d. The following DOE terms, conditions, requirements or restrictions apply: [*Describe any DOE terms, conditions, requirements, restrictions or indicate None. Include applicable intellectual property rights provisions. Include any scientific and technical information reporting requirements.*]

A.5. Period of Agreement

The terms and conditions described in Part A of the IA become effective when signed by authorized officials of both agencies and remain effective until [*Insert date*], unless amended in accordance with Section A.11 or terminated in accordance with Section A.12.

A.6. Roles & Responsibilities of Servicing Agency & Department of Energy

Both Agencies to agree and define for each main responsibility, the respective roles of the requesting agency and servicing agency to ensure the effective management and fulfillment of the interagency agreement requirements.

The effective management and use of this interagency agreement and related actions is a shared responsibility of the Requesting Agency and the Servicing Agency.

[*For each main responsibility, define the respective roles of the requesting agency and servicing agency*]

A.7. Billing & Payment

Both Agencies will mutually agree to the reimbursement method for products and/or services to the Servicing Agency, i.e., Intra-Governmental Payment and Collection (IPAC) System or another mutually agreeable alternative. When using IPAC, the DOE obligating number will serve as the common agreement number (interagency agreement (IA)).

The Department of Energy (DOE) will pay the Servicing Agency for costs of each interagency transaction. Billings may include the amounts due under the interagency transaction identified in Part B of this IA. The DOE obligating document number should be included on all documentation related to the agreement. The DOE obligating number will serve as the common agreement number (interagency agreement (IA)).

The Department of Energy's preferred method for reimbursing the Servicing Agency is via the Intra-Governmental Payment and Collection (IPAC) System. When the reimbursement for products and/or services furnished under this agreement will be effected by means of IPAC, the Servicing Agency shall provide the Department of Energy with the appropriate instructions for transmitting the Agency Location Code (ALC), Treasury Account Symbol (TAS), Business Event Type Code (BETC), Business Partner Network (BPN) number (usually the Data Universal Numbering System (DUNS) number), Line of Accounting (LOA), points of contact, and other information identified in Part B of this IA.

If IPAC is not a satisfactory billing method, a mutually agreeable alternative should be negotiated before acceptance of this agreement and documented in Part B whether IPAC or alternative will be used.

Questions regarding payment should be directed to:

U.S. Department of Energy
PO Box 500
Germantown, MD 20875
Attn: [*Insert name*]

Phone: [*Insert phone number (xxx) xxx-xxxx*]
Email: [*Insert email address for name shown above*]

Reimbursable billings are delinquent when they are [*Insert number*] or more calendar days old (from date of the billing). When billings remain delinquent over [*Insert number*] calendar days and the Department of Energy has not indicated a problem regarding services, the Servicing Agency may choose not to award any new contract/orders or modifications to existing contract/orders for the Requesting Agency (or the client within) and termination of existing services will be considered and negotiated with the Requesting Agency.

The Department of Energy shall be responsible for interest owed under the Prompt Payment Act except that the Servicing Agency shall be responsible for interest owed to the contractor due to delays created by actions of the Servicing Agency.

A.8. A.8. Reserved

A.9. A.9. Reserved

A.10. Review of Part A

The parties agree to review jointly the terms and conditions in Part A at least annually if the period of this agreement, as identified in Section 5, exceeds one year. Appropriate changes will be made by amendment to this agreement executed in accordance with Section A.11. The parties further agree to review performance under this IA to determine if expectations are being met and document a summary of their assessment. The responsible reviewing official at each agency shall sign and date the assessment.

[*Insert description of metrics (e.g., the quality of each party's responsiveness; the quality of each party's overall execution of assigned responsibilities) and methods agreed upon to gather performance information (e.g., surveys, interviews, record reviews)*]

A.11. Amendments

Any amendments to the terms and conditions in Part A shall be made in writing and signed by both the Servicing Agency and the Department of Energy.

A.12. IA Termination

This IA may be terminated upon thirty (30) calendar days written notice by either party. If this agreement is cancelled, any implementing contract/order may also be cancelled. If the IA is terminated, the agencies shall specify the terms of the termination, including costs attributable to each party and the disposition of awarded and pending actions.

If the Servicing Agency incurs costs due to the Department of Energy failure to give the requisite notice of its intent to terminate the IA, the Department of Energy shall pay any actual costs incurred by the Servicing Agency as a result of the delay in notification, provided such costs are directly attributable to the failure to give notice.

A.13. Interpretation of IA

If the Servicing Agency and Department of Energy are unable to agree about a material aspect of either Part A or Part B of the IA, the parties agree to engage in an effort to reach mutual agreement in the proper interpretation of this IA, including amendment of this IA, as necessary, by escalating the dispute within their respective organizations.

If a dispute related to funding remains unresolved for more than thirty (30) calendar days after the parties have engaged in an escalation of the dispute, the parties agree to refer the matter to their respective Agency Chief Financial Officers with a recommendation that the parties submit the dispute to the CFO Council Intragovernmental Dispute Resolution Committee for review in accordance with Treasury Financial Manual (TFM) Volume I, Part 2, Chapter 4700, "Agency Reporting Requirements for the Financial Report of the United States Government;" Appendix 10 - Intragovernmental Business Rules, or subsequent guidance.

A.14. Signatures

Once the Interagency Agreement (IA) is finalized, you will not be able to make changes or add signatures. In those instances, to add signatures or to make any changes to Part A or Part B, the file needs to be downloaded and saved as a Word document or RTF file to make any changes or to add electronic or manual signatures. When any changes or signatures are added to the IA, upload the document as a supporting document into STRIPES. FedConnect response from the Servicing Agency to DOE Contracting Officer constitutes signatures. If FedConnect is not used, then the previous method of a hand signature is required. The hand signed document must be scanned and uploaded into STRIPES as part of the official IA file.

DEPARTMENT OF ENERGY OFFICIAL:

Signature: [*Signature*] Date:

Name: [*Name*]

Contracting Officer

Agency: [*Agency*]

Address: [*Address*]

Phone: [*Phone*]

E-mail & fax: [*Email and Fax Number*]

SERVICING AGENCY OFFICIAL:

Signature: _____ Date: _____
(FedConnect response to the Department of Energy constitutes signature.)

Name: [*Name*]

Title: [*Title*]

Agency: [*Agency*]

Address: [*Address*]

Phone: [*Phone*]

E-mail & fax: [*Email and Fax Number*]

Part B - Requirements & Funding Information

PART B – Requirements and Funding Information

Gray highlights are instructions. Remove the instructions from the interagency agreement.

PART B - Requirements & Funding Information

B.1. Purpose

This is an interagency transaction. An interagency transaction is an intra-governmental transaction when the servicing agency uses internal resources to support the requesting agency requirement and is a reimbursable activity that requires an interagency agreement.

This Part of the interagency agreement (IA) (hereinafter 'Part B') serves as the funding document. It provides specific information on the requirements of the Department of Energy, hereinafter 'the Requesting Agency' sufficient to demonstrate a bona fide need and identifies funds associated with the requirement to allow [insert the name of agency/organization], hereinafter 'the Servicing Agency,' to provide interagency transaction support.

B.2. Authority

Check the applicable box. If the interagency transaction is subject to the Economy Act, the requisitioner, or designee, should provide the following information to support the D&F. At a minimum, this information should document the required goods or services to include if — (1) amounts are available; (2) the order is in the best interest of the United States Government; (3) the agency to fill the order is able to provide or get by contract the ordered goods or services; and (4) the ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise. Provide this information as an attachment or coordinate with the contracting officer later. A DOE contracting officer must approve the D&F. A copy of the D&F will be attached by DOE contracting officer.

The parties' authority to enter into this interagency agreement is (check applicable box):

[ ] The Economy Act (31 U.S.C. 1535) (Attached.)

[ ] Other [Identify specific statutory authority or authorities]

B.3. Part B Identifier

If this is a new IA, then leave this blank. After STRIPES creates the IA identifier number, the number will appear in Part A Section A.3. Identifier. In order to complete B.3., the DOE contracting officer will enter the IA identifier number. If this is a requirement against an approved DOE IA, then indicate the IA identifier number from Part A Section A.3. Identifier, in the proper STRIPES format.

[Insert number]

B.4. General Terms & Conditions

Check applicable box. If this is a new IA, then leave this blank. The DOE contracting officer will complete later. If this is a requirement against an approved DOE IA, indicate whether Part A of the IA is attached or the location of Part A. For example, Part A could be located in the master file for IA number xxx at contracting office xxx.

Activities undertaken pursuant to this document are subject to the general terms and conditions set forth in Part A, [insert identifier found in section 3 of Part A]. Part A is located at:

[ ] [insert location of IA Part A]

[ ] Attached

B.5. Project Title

[insert title]

B.6. Description of Products or Services / Bona Fide Need

Describe the goods or services that will be either acquired from the Servicing Agency on behalf of the Department of Energy under this IA. The Department of Energy shall insert a specific, definite, and clear description that demonstrates a bona fide need and supports a binding agreement that can be recorded as an obligation in the fiscal year that the funds are available for obligation. This description may, but is not required to, be in the form of a statement of work (SOW), statement of objectives (SOO), performance work statement (PWS), or other requirements document. A specific, definite, and clear description of a current need of the requesting agency that enables the servicing agency to immediately begin work on the IA is sufficient. Provide additional information for any special requirements, management, administration, technical representative, reporting requirements for scientific and technical information (Guide Chapter 35.1), acceptance, and completion as needed.

The goods and/or services to be acquired are
[insert description see guidance for details]

The goods and/or services to be acquired are described in an attachment, check the box below and describe the attachment.

[ ] Description of goods or services is attached. [insert brief description of attachment]

B.7. Projected Milestones
[insert projected milestones]

B.8. Billing and Payment
The Servicing Agency will pay invoice(s), or equivalent, e.g., IPAC, from amounts identified in section 13 on a reimbursable basis. The Servicing Agency will present an itemized statement to the Department of Energy for reimbursement of incurred costs. The Department of Energy will pay reimbursable billings to the Servicing Agency from funds identified in section 13. See section 7 of Part A for additional terms and conditions addressing billing and payment.

B.9. Description of Acquisition Assistance

Insert a description of services that the Servicing Agency will provide to DOE in connection with planning, executing, and/or managing the interagency transaction. Attachments may be referenced and uploaded.]

The Servicing Agency will provide the following services to the Department of Energy:
[insert description see guidance for details]

B.10. Fees

Insert how service charges will be determined or state "not applicable."

Services charges will be determined as follows:
[insert description see guidance for details]

B.11. Obligation Amount

If necessary, the requisitioner, or designee, should coordinate with the local finance office to complete the table below. This information should comply with the billing requirements of the Department of Treasury, Financial Management Service (FMS). If this is a new IA, then leave the common agreement number (IA number) blank. After STRIPES creates the IA number, the DOE contracting officer will enter the IA number. If this is a requirement against an approved DOE IA, then indicate the IA number in the proper STRIPES format.

Servicing Agency and Department of Energy shall complete the table below.

Common Agreement Number (IA number) - [insert]
Requirement Title (Project Title) - [insert]
Type of Requirement (Product / Severable Service / Non-severable service) - [insert]
Fund citation (line of accounting) - [insert]
Appropriation expiration date - [insert]
Amount obligated (costs plus Servicing agency's service costs, as applicable) - [insert]

B.12. Requesting Agency Funding Information

If necessary, the requisitioner, or designee, should coordinate with the local finance office to complete the table below. Once the Interagency Agreement (IA) is finalized, you will not be able to make changes or add signatures. In those instances, to add signatures or to make any changes to Part A or Part B, the file needs to be downloaded and saved as a Word document or RTF file to make any changes or to add electronic or manual signatures. When any changes or signatures are added to the IA, upload the document as a supporting document into STRIPES. FedConnect response from the Servicing Agency to DOE Contracting Officer constitutes signatures. If FedConnect is not used, then the previous method of a hand signature is required. The hand signed document must be scanned and uploaded into STRIPES as part of the official IA file.

The Department of Energy's Certifying Official shall complete the table & certification

Basic appropriation symbol (Treasury account symbol) - [insert]
Fund citation (line of accounting) - [insert]
Fiscal year fund appropriated - [insert]
Appropriation expiration date - [insert]
Other funding limitations - [insert]
Type of funds (e.g., one-year, no-year) - [insert]
Agency location code - [insert]
Federal agency code - [insert]
Funding agency code - [insert]
Funding office code - [insert]
Trading Partner Number - [insert]
DUNS/BPN number (Business Partner Network or BPN #) - [insert]

Department of Energy Funds Certifying Official

_____
Signature

_____
Date

Printed Name - [insert]

Title - [insert]

B.13. Servicing Agency Funding Information

The requisitioner, or designee, should coordinate with the local finance office and/or the applicable Servicing Agency finance office to complete the table below.

The Servicing Agency shall complete the table below.

DUNS/BPN number - [insert]
Location Code - [insert]
Basic Appropriation Symbol - [insert]
Trading Partner Number - [insert]
Receiving Account Number - [insert]

B.14. Description of Requesting-Agency Unique Restrictions

This section identifies unique restrictions applicable to the Department of Energy regarding the action or the funding being provided.

The following unique DOE restriction(s) apply to this action [insert description]

B.15. Amendments
Any amendments to the terms and conditions in Part B shall be made in writing and signed by both the Servicing Agency and the Requesting Agency.

B.16. Contact Information
Servicing Agency Contracting POC
Name - [insert]
Address - [insert]
Email - [insert]
Phone - [insert]
Fax - [insert]
Servicing Agency Financial POC -
Name - [insert]
Address - [insert]
Email - [insert]
Phone - [insert]
Fax - [insert]

Department of Energy Program Office POC
Name - [insert]
Address - [insert]
Email - [insert]
Phone - [insert]
Fax - [insert]
Department of Energy Financial POC -
Name - [insert]
Address - [insert]
Email - [insert]
Phone - [insert]
Fax - [insert]

B.17. Signatures

Once the Interagency Agreement (IA) is finalized, you will not be able to make changes or add signatures. In those instances, to add signatures or to make any changes to Part A or Part B, the file needs to be downloaded and saved as a Word document or RTF file to make any changes or to add electronic or manual signatures. When any changes or signatures are added to the IA, upload the document as a supporting document into STRIPES. FedConnect response from the Servicing Agency to DOE Contracting Officer constitutes signatures. If FedConnect is not used, then the previous method of a hand signature is required. The hand signed document must be scanned and uploaded into STRIPES as part of the official IA

file.

By signing this document, the Department of Energy confirms that a bona fide need exists and that funds are for the designated purpose, meet time limitations, and are legally available for the action described in this document; that all unique funding and procurement requirements, if applicable, including all statutory and regulatory requirements applicable to the funding being provided, have been disclosed to Servicing Agency; and all internal reviews and approvals required prior to transferring funds to the Servicing Agency have been completed. The Servicing Agency's acceptance of this document creates an obligation on the part of the Department of Energy.

Department of Energy Official

_____
Signature
Contracting Officer

_____
Date

_____
Printed Name

_____
Title

_____
Agency

Servicing Agency Official

_____
Signature

_____
Date

_____
Printed Name

_____
Title

_____
Agency

INTERAGENCY AGREEMENT

1. IAA NO.: DE-XZ0011684

PAGE 1 OF 2

2. ORDER NO.:

3. REQUISITION NO.: 12XZ011727

4. SOLICITATION NO.:

5. EFFECTIVE DATE: 01/27/2012

6. AWARD DATE: 01/27/2012

7. PERIOD OF PERFORMANCE: 01/30/2012 TO 01/31/2012

8. SERVICING AGENCY
ENVIRONMENTAL PROTECTION AGENCY
ALC:
DUNS: 179465752 +4:
2223 H ST. NW
FULBRIGHT HALL 309
WASHINGTON DC 200520001

POC: BRENDA YOUNG
TELEPHONE NO.: 2025643989

9. DELIVER TO
Multiple Destinations

10. REQUESTING AGENCY
Headquarters Procurement Services
ALC:
DUNS: +4:
1000 Independence Ave., S.W.
Washington DC 20585

POC
TELEPHONE NO.

11. INVOICE OFFICE

12. ISSUING OFFICE
Office of HQ PS (HQ)
U.S. Department of Energy
Office of Headquarters Procurement Services
MA-64
1000 Independence Ave., S.W.
Washington DC 20585

13. LEGISLATIVE AUTHORITY

14. PROJECT ID

15. PROJECT TITLE

16. ACCOUNTING DATA
See Schedule is replaced with Account Override

17. ITEM NO.	18. SUPPLIES/SERVICES	19. QUANTITY	20. UNIT	21. UNIT PRICE	22. AMOUNT
	Tax ID Number: 02-9742136 DUNS Number: 179465752 Delivery: 1 Days After Award				
00001	Accounting and bookkeeping services	1		100.00	100.00
	Delivery Location Code: 00153 Loading Dock (FORS) U.S. Department of Energy Loading Dock Forrestal Building 1000 Independence Avenue, SW Continued ...				

23. PAYMENT PROVISIONS
Intra-Governmental Payment and Collection

24. TOTAL AMOUNT
$650.00

25a. SIGNATURE OF GOVERNMENT REPRESENTATIVE (SERVICING)

26a. SIGNATURE OF GOVERNMENT REPRESENTATIVE (REQUESTING)

25b. NAME AND TITLE: iPAC govt official

25c. DATE:

26b. CONTRACTING OFFICER: Officer Elle

26c. DATE:

Working Copy

IAA NO	ORDER NO	PAGE	OF
DE-XZ0011684		2	2

	Washington DC 20585 US			
00002	Access management services	1	150.00	150.00
	Delivery Location Code: 00112 Office of HQ PS (HQ) U.S. Department of Energy Office of Headquarters Procurement MA-64 1000 Independence Ave., S.W. Washington DC 20585 US			
00003	Addressing service	2	200.00	400.00
	Delivery Location Code: 00112 Office of HQ PS (HQ) U.S. Department of Energy Office of Headquarters Procurement MA-64 1000 Independence Ave., S.W. Washington DC 20585 US			

The Origin, Characteristics, and Significance of the Department of Energy's Management and Operating (M&O) Form of Contract

Guiding Principles

- The use of the Management and Operating (M&O) form of contract must be authorized by the Secretary of Energy.
- The Federal Acquisition Regulation recognizes the special nature and need for M&O contracts.
- M&O contracts are key to DOE's continued success in carrying out its mission.

[References: FAR 17.6, DEAR 917.6, DEAR 970]

1.0 Summary of Latest Changes

This update makes administrative and formatting changes.

2.1 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references.

2.1 Introduction. "Management and operating" (M&O) contract is a term used to describe the contracts that are central to the Department of Energy's (DOE's) business model. The term was adopted formally in a memorandum from the Secretary of Energy, dated October 5, 1983[1]. However, these contracts predate the inception of the term by more than thirty-five years, dating to contracts awarded by the Corps of Engineers during World War II, and other contracts awarded by the Atomic Energy Commission (AEC) from its creation in the Atomic Energy Act of 1946.

[1] For clarity and convenience, this analysis uses the term "management and operating contract" or "M&O contract" for the contract structure though at times prior to the October, 1983 memorandum were known by such terms as "on-site contracts," "operating contracts," "major cost type contracts," or other comparable terms.

It is well known that the two atomic bombs that ended World War II in the Pacific were manufactured under the contracts awarded by the Corps of Engineers. Neither the scientific expertise responsible for the physics underlying the development of the bombs nor the manufacturing and engineering expertise that produced the bombs existed within the Federal government. The Corps acted as project manager, relying on scientists from academia and the engineering and construction skills of industry. As a result of the speed with which the Corps of Engineers' Manhattan Engineer District successfully concluded the production of the atomic bombs, Congress decided to carry that scientific, technical, and business model forward into the organization of the AEC.

The Energy Research and Development Administration (ERDA) from 1974 to 1977, and, the Department of Energy, from 1977 to the present, successor agencies to the AEC, have carried forward the business and scientific model inherent in management and operating contracts. DOE relies upon the M&O contractors for the performance of the substantial part of the agency's mission. That reliance, among other things, allows DOE's staffing to be a fraction of what would otherwise be necessary to conduct its complex and multi-faceted mission.

The remainder of this discussion is devoted to the presentation of the evolution of the M&O contracting model, external recognition of the M&O contract, the characteristics of such contracts, the terms of such contracts, and decisions to use the contract.

2.2 Original Design of M&O Contracts. What today are known as DOE's Management and Operating contracts began during World War II. The Manhattan Engineer District was the governmental entity responsible for the design, development, and production of the first atomic bombs, an undertaking, to that time, without precedent. This massive effort achieved its challenging objective on a schedule that was almost unimaginable. Over a two year period the theoretical science was advanced, the technology necessary to produce the necessary components was developed and applied, and some of the most complex and largest manufacturing facilities the world had known were designed, constructed, and brought into full operation in remote, and previously undeveloped, locales within the United States. The successful completion of the Manhattan Project resulted from the Government's substantial reliance upon private industry and educational and other nonprofit institutions for the critical scientific and business expertise.

In 1946, following on the success of the Manhattan Project, Congress created the Atomic Energy Commission to design and produce nuclear weapons, to develop nuclear energy as a source of electricity, and to research the use of nuclear energy in medicine. The legislative history of the Atomic Energy Act of 1946 indicates the basic principle that underlies M&O contracts was that the AEC, a predecessor of DOE, was to employ highly capable companies and educational institutions to carry out the actual performance of the agency's mission; that is, these contractors were to perform the agency's mission as opposed to the agency's using civil servants. "Wherever possible, the committee endeavors to reconcile Government monopoly of the production of fissionable material with our traditional free-enterprise system. Thus, the bill permits management contracts for the operation of Government-owned plants so as to gain the full advantage of the skill and

experience of American industry."[2]

The Ninth Semiannual Report to Congress by the Atomic Energy Commission stated a more detailed intention of the Commission:

The firms operating large Government-owned production plants, carrying on extensive development projects, and undertaking urgent construction jobs, work in close day-by-day cooperation with the Commission and its staff. They have been selected for their competence, and the Government is contracting with them not only for technical ability but for managerial ability as well. The working relationship between the Commission and its operating contractors resemble in some respects those between industrial companies and their branch offices. The contractor undertakes to carry on an extensive operation; the Commission establishes the objectives and makes the decisions required to fit the operation into the national program, and exercises the controls necessary to assure security, safety, desirable personnel administration, and prudent use of the public funds.[3]

The report also presented four basic principles relating to the operating contractors:

(a) The contractor recognizes that the AEC is responsible under the law for the conduct of the atomic energy program.

(b) The AEC recognizes that the contractor is an established industrial, business, or academic organization with proved (sic) capabilities, both technical and administrative.

(c) The contractor recognizes that the proper discharge of the AEC responsibilities requires that the AEC shall have full access to information concerning the contractor's performance of the contract work and the power to exercise such control and supervision under the contract as the AEC may find necessary.

(d) Both the AEC and the contractor recognize that the proper discharge of the contractor's responsibilities for management requires that it shall, to the fullest extent compatible with the law, exercise its initiative and ingenuity carrying out the contract work.[4]

The special nature of the work performed by the AEC and its operating contractors was reflected in 1949 when Congress enacted the Federal Property and Administrative Services Act (FPASA) establishing, among other things, an outline for the Federal procurement system. That statute included a provision, referred to as "nonimpairment authority," specifying that nothing in FPASA "shall impair or affect" the authority of the Atomic Energy Commission to perform its missions.[5]

Subsequently, Congress expanded the mission and authorities of the AEC with its enactment of the Atomic Energy Act of 1954. That Act has provisions that recognize the AEC's potential reliance

[2] S.Rept. 1211, 79th Cong. 2d Sess. 15 (1946).
[3] U.S. Atomic Energy Commission, Ninth Semiannual Report 57 (1951).
[4] *Id*. at 61-62.
[5] 40 U.S.C. § 474(d)(17), since recodified at 40 U.S.C. § 113(e)(12)(2000).

upon contractors for performing portions of its mission. In 1958 the Act was amended to provide a system of indemnification of AEC contractors and public utilities against liability for nuclear incidents.[6]

As a result of the enactment in 1974 of the Energy Reorganization Act, the AEC no longer exists. Its nuclear regulatory functions were taken over by the Nuclear Regulatory Commission, and its nuclear research, development, and weapons production were taken over by the Energy Research and Development Administration (ERDA). The "operating contracts" continued to play the same role in ERDA that they had performed in the AEC, that is, to perform the substantial portion of the agency mission. Many pieces of non-nuclear legislation, *e.g.*, the Federal Nonnuclear Energy Research and Development Act of 1974, expanded ERDA's and DOE's missions substantially, resulting in a commensurate expansion of the missions of M&O contracts.

M&O contracts continue to serve their necessary function within the Department of Energy, and more recently, its security component, the National Nuclear Security Administration, since its organization in 1977.[7]

2.3 External Recognition of the Unique Nature of DOE's M&O Contracts. M&O contracts have received special regulatory treatment in the Government-wide Federal Acquisition Regulation (FAR), adopted in 1984, long after the creation of the contracts that have become known as M&O contracts.[8] The FAR, at Subpart 17.6, recognizes and codifies the special identity that M&O contracts have with an authorizing agency. The FAR coverage recognizes the special extend/compete process, it requires special statutory authority for an agency to establish an M&O contract, requires Secretarial designation of the M&O contracts, and authorizes agency acquisition regulations that deal with the special nature of M&O contracts. Under the authority of Subpart 17.6, the Department of Energy Acquisition Regulation (DEAR) has a Part 970 that supplements the FAR and governs the solicitation, award, and administration of DOE's M&O contracts.

Various pieces of legislation enacted by Congress have explicitly dealt with DOE's M&O contracts, recognizing their special relationship with DOE and its predecessor agencies and the special importance of these M&O contracts to the nation. For instance, the Bayh-Dole Act, Pub.L. 96-517, enacted in 1980, reversed the then dominant rule that the Government would take title to inventions first conceived or reduced to practice under Government contracts by granting small businesses, non-profit organizations, and educational institutions the opportunity to elect title to those inventions. The statute recognizes that it would impact title to inventions under DOE's M&O contracts.[9] In doing so, the Act provided authority for DOE to retain title to inventions in DOE's nuclear propulsion and weapons related programs.

[6] Pub.L. 85-256. As a result of subsequent amendments, principally the Price Anderson Amendments Act of 1988, Pub.L.100-408 the Price-Anderson indemnity now applies to DOE contracts under which there is a risk of public liability from a nuclear incident. Congress recently extended the the Price-Anderson Act, among other changes, until December 31, 2025 with enactment of the Price-Anderson Amendments Act of 2005, §§ 601-611 of Pub.L. 109-58.
[7] Congress had opportunities in 1974, at the organization of ERDA, in 1977, at the organization of DOE, and at any time since to enact legislation to alter DOE's business model, but it has not done so, reflecting an understanding of how integral the M&O contract continues to be to DOE's business model.
[8] See further discussion *infra* at 8, subsection 2.5.2 of this analysis.
[9] 35 U.S.C. § 202(a).

The Department of Homeland Security (DHS), by law, has special access to DOE's national laboratories and other DOE facilities that are managed and operated by DOE's M&O contractors in support of its mission.[10] Though generic, NRC has a statutorily based special access to DOE's laboratories.[11]

In addition, various other Federal agencies have at times recognized DOE's "special relationship" with its M&O contractors. Prior to enactment of the Competition in Contracting Act in 1984 and its explicit grant to the General Accounting Office[12] of bid protest authority, the Comptroller General asserted jurisdiction over protests against the award of subcontracts by DOE's M&O contracts, a very limited instance of GAO's assertion of protest jurisdiction over the award of subcontracts under a specific type of contract.[13] Under the Brooks Act, since repealed, governing the acquisition of automatic data processing equipment (ADPE), DOE had a special delegation of procurement authority from the General Services Administration for purchases of ADPE by the M&O contractors. The Department of Labor recognizes the special identity of M&O contracts for the purposes of its administration of the Service Contract Act of 1965, as amended. The U.S. Trade Representative has provided for special treatment for DOE's M&O contractors in its negotiation of the General Agreement on Trade and Tariffs and North American Free Trade Agreement.

Finally, the Supreme Court opined that management and operating contracts are a unique type of contract, in that they have a special identity with DOE and indicia of agency without actually causing the contractors to be agents of the Department. The Court stated:

> [I]n several ways DOE agreements are a unique species of contract, designed to facilitate long-term private management of Government-owned research and development facilities. As the parties to this case acknowledge, the complex and intricate contractual provisions make it virtually impossible to describe the contractual relationship in standard agency terms. . . . While subject to the general direction of the Government, the contractors are vested with substantial autonomy in their operations and procurement practices.
>
> . . .
>
> AEC management contracts were developed in an attempt to secure Government control over the production of fissionable materials, while making use of private industry's expertise and resources[14]

2.4 Historical and Continuing Scientific and Technical Accomplishments Attributable to DOE's M&O Contracts. Over the seventy years since the organization of the AEC and the institution of M&O contracts, the Government has enjoyed remarkable benefits from the world class research and the innovative technical accomplishments of M&O contractors.

[10] Sec. 309 of the Homeland Security Act of 2002, Pub.L. 107-296.
[11] Sec. 205 of the Energy Reorganization Act of 1974, Pub.L. 93-438.
[12] Now the Government Accountability Office.
[13] 54 Comp. Gen. 767, 784 (1975).
[14] United States v. New Mexico, 455 U.S. 720, 723(1982).

For example, the M&O laboratory system has consistently produced Nobel Laureates. R&D Magazine has listed hundreds of DOE or predecessor agency research projects among its annual top 100. The naming of Nobel Laureates and the recognition of DOE laboratory research continues to occur at a relatively constant rate, repeatedly confirming the scientific excellence of DOE laboratories.

Recognition of the quality of science performed by DOE's M&O contractors is illustrated by the number of DOE's M&O laboratories that are identified as Federally Funded Research and Development Centers (FFRDCs). FFRDC status designates a laboratory or facility as a member of a group of unique organizations formed to assist the United States government in addressing specific long-term areas of considerable complexity. FFRDCs assist the United States government with scientific research and analysis, systems development, and systems acquisition in defense, energy, aviation, space, health & human services, and tax administration. FFRDC is an honorific of distinction, expressing the high scientific achievement of the particular laboratory. Sixteen of DOE's laboratories, each operated as M&O contracts, have been so designated. Ten other agencies have designated the twenty-six other FFRDCs. Said another way, DOE is one of eleven agencies that maintain FFRDCs. DOE's laboratories, in contrast, make up more than thirty-eight (38%) of all FFRDCs.

DOE laboratories continue to perform world-class basic research, e.g., they investigate the fundamental constituents of matter and the forces associated with them. They are leaders in research into the incipient research into nanotechnology and its applications. They lead research into scientific computing to aid in the modeling of complex physical and biological systems and supercomputing. They are leaders in efforts to sequence the human genome with all its potential applications. This recitation is merely representative and by no means comprehensive of the scientific research conducted under DOE's M&O contracts.

DOE's M&O contractors continue to play a critical part in national security, e.g., they have designed and produced every nuclear warhead in the arsenal of the United States and maintain that arsenal. Those contractors play critical roles in the dismantlement, pursuant to treaty obligations, of portions of the United States nuclear arsenal. Those M&O contractors play critical roles in the United States efforts in nonproliferation, international nuclear safety, and efforts to identify weapons of mass destruction. In addition, certain of those contractors are responsible for the design and production of the nuclear engines used by the United States' nuclear submarine fleet. This recitation is only exemplar, not comprehensive.

DOE's M&O form of contract began with contracts for the research underlying, the design, and the production of the atomic bombs that hastened the end of World War II and continues today in contracts for world class basic research and national security. That continuing success speaks to the wisdom and significance of the M&O form of contract to the missions of DOE and its predecessor agencies

2.5 Evolution of the M&O Form of Contract.

2.5.1 Formation of Certain M&O Contracts Subsequent to the AEC. The first M&O contract that ERDA awarded was for the operation of the Solar Energy Research Institute

(SERI)[15] in Golden, Colorado. While the contract was not for one of the traditional purposes of a M&O contract (design and production of nuclear weapons, development of nuclear energy as a source of electricity, or research on the use of nuclear energy in medicine), the indicia of an M&O contract, discussed *infra*, were present in the plan for the management and operation of this facility.

The next use of the M&O form of contract was to manage and operate the Naval Petroleum Reserves (NPRs). These three facilities produced oil nominally for use by the U.S. Navy. The NPR functions were brought into ERDA under ERDA's organization act.[16] A legal opinion was written to consider whether the conversion of these contracts to M&O contracts was an appropriate use of such contracts. The conclusion, concurred in by the Judge Advocate General of the Navy, was that the use of ERDA's M&O form of contract was appropriate.

The Strategic Petroleum Reserve (SPR) was established under one of DOE's predecessor agencies, the Federal Energy Administration.[17] The purpose of the SPR was to create a network of facilities to offload, store, and, if called upon, to disgorge oil to protect against any subsequent interruption in the flow of oil into the United States market. A legal opinion, dated November 1, 1984, determined it appropriate for DOE to use the M&O form of contract for the management and operation of the SPR.

The Nuclear Waste Policy Act[18], enacted in 1982, directed DOE to determine the site, plan, construct, and operate a repository for long-term storage of nuclear waste that results from the operation of civilian reactors across the United States. That charter consisted of many disparate functions, including arranging transport of the waste from the site at which it was generated to the repository site. Following its business model, DOE determined to rely on an M&O form of contract for performance of major portions of its mission.

In the late 1980s, the Department of Energy planned to construct a $4 billion superconductor, supercollider facility (SCSC), extending the research into the basic components of matter that took place to that point at DOE's Fermi National Laboratory. The SCSC project was to have been orders of magnitude larger than DOE's Fermi National Accelerator Laboratory. After years of planning in the early 1990s, a site was chosen and, upon appropriations, construction begun by a contractor, a consortium of education institutions chosen through an open competition. Consistent with DOE's experience to that point, DOE chose the M&O form of contract. Shortly after construction began, Congress elected to require DOE to terminate the project.

DOE established what is now known as the Thomas Jefferson National Accelerator Facility in 1994. That facility offers users access to world-class scientific facilities to research and perform experiments on the basic structure of nuclear matter. Though the lab is small in size compared to most other DOE national laboratories, DOE awarded an M&O contract because the most efficient performance of the work required a contractor to manage and operate the facility while assuming

[15] DOE has since renamed the facility the National Renewable Energy Laboratory.
[16] Sec. 307 of the Department of Energy Organization Act, Pub.L. 95-91. Subsequently, due to programmatic and statutory changes to the mission of the NPR, these contracts were either concluded or converted to service contracts.
[17] Sec. 154 of the Energy Policy and Conservation Act, Pub.L. 94-163. The transfer into DOE occurred pursuant to § 301 of Department of Energy Organization Act.
[18] Pub.L. 97-425.

responsibility for integration of all functions at the site.

2.5.2 Regulatory Coverage of the M&O Form of Contract. Following the enactment of the amendment of the Office of Federal Procurement Policy Act[19] and during the resulting creation of the Federal Acquisition Regulation (FAR)[20], DOE sought and received formal regulatory recognition of the M&O form of contract. Subpart 17.6 of the FAR authorizes agencies with sufficient statutory authority and the need for contracts to manage and operate their facilities to use the M&O form of contract. DOE remains the only agency that has exercised this authority.

The FAR at section 17.601 defines a management and operating contract as "an agreement under which the Government contracts for the operation, maintenance, or support, on its behalf, of a Government-owned or -controlled research, development, special production, or testing establishment wholly or principally devoted to one or more major programs of the contracting Federal agency."[21] At section 17.602(a) the FAR requires a written, non-delegable determination by the agency head, where there is sufficient statutory authority, in order to establish and maintain an M&O contract.

Additionally, FAR 17.604 provides a list of basic criteria to be used in identifying a requirement that is appropriate for use of the M&O form of contract. Among the criteria are the use of Government-owned or -controlled facilities, necessity of a special, close relationship with the contractor and the contractor's personnel in important areas, *e.g.,* safety, security, cost control, site conditions, the performance of the contract is substantially separate from the contractor's other business, if any, the work is closely related to the agency's mission and is of a long-term or continuing nature, and for special protection covering the orderly transition of personnel and work in the event of a change in contractors.

FAR 17.603 places certain limitations on the types of functions M&O contractor personnel may perform, e.g., the employees may not supervise or control Government personnel or determine basic Government policies.

Beginning in the late 1980s and continuing today, the GAO and others have criticized the Department for its management of its M&O contracts, in particular for not holding the M&O contractors accountable for their performance. As a result, DOE published an accountability rule intended to hold the contractors liable for negligent acts under the contract.[22] DOE also undertook a "contract reform" initiative in 1994 (Making Contracting Work Better and Cost Less) to improve its management of the M&O contract.[23]

[19] Pub.L. 93-400, Chap. 7of Title 41 U.S.C. (2000).
[20] 48 C.F.R. Chap. 1(2005).
[21] At a result of adoption of the FAR with 17.6, the Secretary made determinations about each then existing M&O contract. The Secretary of Energy has made that determination for each of DOE's current M&O contracts.
[22] Published as an interim final rule at 54 FR 5064 (1991), since substantially modified by subsequent rulemakings, though portions remain. The potential liabilities imposed by the rule were in excess of those to which a cost reimbursement contractor would be subjected. In the intervening years, DOE has adopted a clause for use in M&O contracts, subjecting the contractor to loss of all or a portion of its fees for stated failures in performance of the contract.

[23] "Making Contracting Work Better and Cost Less, Report of the Contract Reform Team" (February 1994).

In this time period, DOE also confronted a significant addition to its mission. Certain facilities were no longer needed in the complex that produced nuclear weapons.[24] Those facilities and other facilities had substantial contamination that had occurred over decades as part of DOE's weapons complex. While the substantive missions were curtailed or done away with, there was a comparable need to clean the site. Rather than rely on a continuation of the M&O form contract at those locations, DOE chose to experiment with contract strategies tailored to the most efficient and effective resolution of the environmental cleanup. These former M&O contract sites now use various contract forms that to varying degrees retain some but not all of the characteristics of M&O contract.[25] Even though the contracts involve Government sites and long term and complex missions, the requirements have been deemed inappropriate for use of M&O form of contracts. In each instance, the requirement is focused on the completion of the clean-up and closure of a site or a portion of a site.

Subsequently, the Department undertook a detailed review of the then existing M&O contracts to determine if the requirements remained appropriate for use of the M&O form of contract. The result of that review was that the M&O list has been reduced from approximately 52 contracts to 29. Among those contracts dropped from the M&O list were many tracing their histories to early in the AEC, *e.g.*, the contract for aviation services connecting Albuquerque to Los Alamos and the Inhalation Toxicology Research Institute.

2.5.3 Other DOE Management Contracts. Over the last three decades the missions at certain nuclear weapon sites and facilities changed or ceased. At these now former M&O contract locations the mission focus shifted to environmental restoration, waste management, and site closure. This shift created a need for a different type of contract and contractor than those DOE traditionally used for management and operating activities.

Notwithstanding this requirement for change, the desire to make expedited progress led predictably to DOE's adoption of contract structures that, while not management and operating contracts, shared some of their characteristics, particularly those related to site and facility stewardship and an overarching emphasis on safety and security. Sometimes described as major site and facility management contracts (sometimes as "other management contracts"[26]), these contracts involve, to various degrees, the control of the site and a large contractor workforce. Therefore, certain of the provisions appropriate to a management and operating contract are appropriate for these contracts.

2.5.4 Special Contractual Features of DOE's M&O Contracts. In recognition of the circumstances consistent with the establishment of a DOE M&O contract, the terms of the contract differentiate it from typical contracts awarded by other agencies and other contracts awarded by DOE under the FAR. These terms, listed below, are indicia of a "special relationship," the M&O contractors share with DOE:

[24] E.g., Rocky Flats, Colorado and Fernald, Ohio.
[25] See *infra* subsection 2.5.3., entitled "Other Management Contracts."
[26] Paragraph (b) of section 6022 of the Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief Act, 2005, Pub.L. 109-13.

- DOE's involvement in M&O contractor labor relations, *e.g.*, DOE's stewardship of M&O contractor pension and post-retirement medical systems, review of contractor executive compensation, and DOE's authorizing certain M&O contractors to enter into Site Stabilization agreements.
- Laws governing contractor wages and working conditions affect DOE's M&O contractors differently than they affect other Federal contractors. For example, M&Os are not subject to the Service Contract Act;[27] however, the M&O contractors must flow down the Act to service subcontracts they award. Generally, DOE prohibits its M&O contractors from performing construction with their own workforces but requires them to apply the Davis-Bacon Act[28] to M&O subcontracts for construction.
- DOE's significant involvement in M&O contractor management controls.
- DOE's involvement with the M&O contractor's purchasing process.
- DOE's application of specific DOE directives to the operations of the M&O contractor.
- DOE's authorizing the M&O contractor to finance contract performance by use of Special Financial Institution Accounts, under which checks written by the contractor one day are covered by the Department of Treasury overnight.
- DOE's requiring the M&O contractor to maintain integrated accounting systems, under which the contractors budgeting and accounting follow DOE's Accounting Handbook.
- DOE's relying on the DOE Inspector General for auditing its M&O contractors. DOE requires the M&O contractor to maintain an internal audit function, which performs critical audit functions under DOE's Cooperative Audit Strategy.
- The M&O contractor's reconciling its accounts annually by use of DOE's Statement of Costs Incurred and Claimed.
- The M&O contractor's accepting no work from entities other than DOE, except as specifically allowed by its contract with DOE. DOE assigns program work to the M&O by means of DOE's work authorization system.
- The M&O contractor's operating under certain cost principles designed by DOE for use in its M&O contracts.

2.5.5 Indicia of DOE's Use of the M&O Form of Contract. The Department of Energy has disparate missions, generally involving energy research and development, weapons production and stockpile management, and environmental remediation and restoration. DOE's scientific research and development programs are extensive and include, for example, research in

[27] 41 U.S.C. §§ 351 *et seq.* (2000).
[28] 40 U.S.C. §§ 3141 *et seq.* (2000).

nuclear energy, high energy physics, the human genome, and naval nuclear propulsion, among other demanding and important areas.

Many of DOE's sites operated and managed by DOE's M&O contracts were placed in locations that at the time were isolated from population centers due to the potential danger and security concerns inherent in the research, design, development, and production of nuclear weapons and other activities. Currently, DOE's M&O contractors have approximately 100,000 employees as compared to DOE's approximately14,000 employees.

Because of the need to share various types of controlled and sensitive information with its contractors, as well as to ensure that potential conflicts of interest are managed, DOE generally requires that the M&O contractors be subsidiaries of their corporate parents, dedicated to performance at the specific site and supported by performance guarantees from their corporate parents. This limits the ability of the performing contractor to propose on or accept work for other Federal agencies[29] or third parties. The contractors' budget processes are integrated into those of the Department, and, in almost all cases, the budgets for DOE's M&O contracts are line items in the Department's budgets. The contractors operate under special financial institution accounts established by DOE under which, for the Government's benefit, contractors incur costs under their contracts. DOE establishes requirements for the contractors' accounting systems.

Aside from the size of these M&O and other major management contracts, they differ from stereotypical contracts awarded by Federal agencies in many ways relevant to small business goaling and achievement. These contractors manage and operate vast sites, consisting of hundreds and often thousands of acres, and they are responsible for all facets of the complex and demanding scientific work DOE assigns to the contractors and for stewardship of the site infrastructure.

Under this statutory contracting model, DOE directs the subject matter areas in which the contractors are focused and the overall performance objectives to be accomplished; however, Congress directed that the contractors be relied upon to apply best management, scientific, and business practices in carrying out that direction. This reliance gave rise to what has become known as a "special relationship," characterized by the use of these contractors to perform major portions of the agency's mission.

DOE's M&O contracts share indicators of that special relationship in their history and in their current operation. Those indicators are evidence of the unique nature of these contracts, bearing directly on why DOE's M&O contracts differ from contracts awarded by all other Federal agencies.

An evaluation of the history of DOE's M&O contracts results in the following commonly recognized indicators for their use.

- Generally, the contractor assumes multi-program scientific and technical responsibilities and work under a broad statement of work.

[29] Other than that accepted under DOE's Strategic Partnership Projects program, under which it assigns qualifying work to its M&O contractors under the Economy Act, 31 U.S.C. § 1535 (2000) and sections 31 and 33 of the Atomic Energy Act. See notes 10 and 11, respectively, *supra*, for statutes providing special access to DOE's laboratories for the Department of Homeland Security and the Nuclear Regulatory Commission.

- The requirement is continuing with no foreseeable end.
- The contractor is responsible for integration of scientific and technical and infrastructure functions.
- The contractor performs the substantial portion of scientific and technical responsibilities with its own workforce.
- The contractor's workforce is large, remaining at the site despite change of contractors. This results in the need for DOE to assume stewardship of employee relations and workplace labor conditions.
- DOE oversees security, health, and safety at the site.
- Work takes place at very large, Government-owned reservations and facilities.
- DOE requires the successful offeror to form a corporate entity specifically for and dedicated to the performance of the DOE M&O contract. The contactor may accept work only directly from DOE or as allowed specifically under the M&O contract.
- The contractor must link its accounting system with the Department's, and integrate its budget process with the Department's; usually the budgets for M&O contracts are line items in the Department's budget.

b e te t

CHAPTER 19 – SMALL BUSINESS PROGRAMS

1 2 Sm e r r m er e September 2017

Small Business Programs

Guiding Principles

- Include small business participation as early as practicable during acquisition planning.
- Provide maximum practicable opportunities for all types of small business concerns to be prime contractors in acquisitions.
- Include meaningful strategies to increase small business participation as a prime or subcontractor on awards not set-aside for small business.

[References: FAR 2, 6, 7, 8, 10, 13, 16, 19, 52; DEAR 919, 970; and 13 CFR Chapter 1]

1.0 Summary of Latest Changes

This update: (1) removes content duplicative of primary references, (2) adds, deletes, streamlines and consolidates content, and (3) includes administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. This chapter provides guidance and instruction to contracting personnel regarding small business programs in the U.S. Department of Energy (DOE). It is important for all acquisition professionals to remember that maximizing the use of small business concerns as prime contractors or their consideration by primes as subcontractors in acquisitions enhances DOE mission success!

The Small Business Act (Public Law 85-536, as amended)[1] establishes multiple small business preference socio-economic programs, in addition to small business concerns generally, for DOE to focus its efforts on promoting their participation in Federal acquisitions. These socio-economic programs include—

[1] https://www.sba.gov/sites/default/files/files/Small%20Business%20Act.pdf

- 8(a) Business Development concerns which include Indian tribes and Alaskan Native Corporations (ANCs)
- Historically Under-utilized Business Zone (HUBZone) concerns
- Women Owned Small Business (WOSB) (includes Economically Disadvantaged Women Owned Small Businesses (EDWOSB)) concerns
- Service Disabled Veteran Owned Small Businesses (SDVOSB) concerns

The Act further requires agencies to negotiate annual goals with the Small Business Administration (SBA) for a percentage of acquisition dollars to go to small business concerns generally, and small business concerns in the socio-economic programs specifically. The socio-economic program definitions are in the Federal Acquisition Regulation (FAR) part 2.1.

2.1 **General Set-asides for Small Business**. Each acquisition of supplies or services that has an anticipated dollar value exceeding the Micro-purchase threshold, but not over the Simplified Acquisition Threshold (SAT), is automatically reserved exclusively for small business concerns and shall be set aside for small business or any of the socio-economic programs subject to the exclusions in the FAR. Documentation of adequate market research is required if no set-aside is made. This obligation also applies to purchase card transactions over the Micro-purchase threshold and below the SAT. The Contracting Officer (CO) shall set aside any acquisition over the SAT for small business participation when there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns and award will be made at fair market prices. A CO shall consider making a set-aside to any one of the small business socio-economic programs before making a set-aside for small businesses generally (i.e., an acquisition where all categories of small businesses compete against each other). (FAR 19.203, 19.502-2)

2.2 **Socio-economic Preference Programs**. SBA has established various programs enabling contracting personnel to target acquisitions to small businesses in specific socio-economic programs to enhance their competitive stance. As referenced in FAR part 19, these should be considered prior to setting aside an acquisition to small business concerns generally. The following actions are excluded from the requirements of FAR part 19 –

- Awards that can be made to Federal Prison Industries or AbilityOne participating non-profit agencies, as applicable (FAR 8.002, 8.6)
- Orders against Federal Supply Schedules (FAR 8.405-5)
- Purchases below the Micro-purchase threshold (FAR 19.502-1)

2.2.1 Set-asides for Small Business Socio-economic Programs. No small business socio-economic program has priority over any other. (FAR 19.203) For the most part (exceptions are noted in below paragraphs), set-asides for the small business concerns in the

socio-economic programs have the following general characteristics and requirements in common—

- Acquisitions above the Micro-purchase threshold may be limited for competition within a specific small business socio-economic program.
- For acquisitions valued above the SAT, COs shall consider competition or sole source award in the socio-economic programs prior to considering a general small business set-aside.
- COs cannot remove requirements from the 8(a) program to the HUBZone, SDVOSB, or WOSB programs unless authorized by SBA.
- There must be a reasonable expectation that offers will be received from two or more small business concerns within a socio-economic program.
- The award is made at a fair market price (see FAR 19.001 for definition of this term)
- If only one acceptable offer in response to a set-aside is received, the CO should make an award to that concern.
- A certain percentage of costs for performance of work must be accomplished by the small business concern for acquisitions over the SAT. (FAR 52.219-3, 52.219-27, 52.219-29 and 52.219-30)
- Excluding participants in the SBA 8(a) program, orders under indefinite-delivery contracts are excluded from the mandatory use of socio-economic programs and sole source requirements.

The following summaries include some of the unique characteristics and requirements for set-asides and awards to each type of socio-economic program. COs should refer to FAR part 19 for all-inclusive listings of the socio-economic programs' characteristics and requirements.

2.2.1.1 8(a) Business Development Program. Contracts signed with an 8(a) participant are between the contracting activity and SBA. Participating 8(a) firms are considered subcontractors to SBA. When making an award, COs are executing SBA's authority to enter into contracts under section (8)a(1)(A) of the Small Business Act. This is done in accordance with the attached partnership agreement between DOE and SBA. The delegated authority streamlines completion of the award between DOE and SBA and the subcontract between SBA and the selected 8(a) participant.

8(a) contracts have specific thresholds ($7 million for those with manufacturing North American Industry Classification System (NAICS) code, $4 million all others) above which they shall be competed when particular conditions exist. SBA may accept sole source awards when there are not two or more 8(a) participants expected to submit offers at fair market

prices. Additionally, SBA may accept the requirement for an Indian tribe or ANC. (FAR 19.805-1)

COs should note that once a requirement is accepted into the 8(a) program by SBA, unless there is a mandatory source, it must remain in the program until released by SBA. (FAR 8.002, 8.003, 19.8 and 13 CFR 124, 125, 126)

2.2.1.2 HUBZone Program. The HUBZone Program was established to stimulate economic development in specifically designated areas of the US. "HUBZone small business concerns" must be certified by the Small Business Administration (SBA) and appear on the List of Qualified HUBZone Small Business Concerns maintained by the SBA. COs must check the list to ensure a HUBZone small business concern has been certified before making an award to it. 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. A price evaluation factor of 10% is added to all offers except offers from HUBZone small business concerns that have not waived the factor or offers from other small business concerns. The factor of 10 percent shall be applied on a line item basis or to any group of items on which award may be made. The price evaluation preference shall not be used if price is not a selection factor or if all fair and reasonable offers are accepted. In addition to exclusions noted above, the HUBZone program cannot be used to purchase commissary or exchange resale items. (FAR 19.13)

2.2.1.3 SDVOSB Program. SDVOSB concerns must make specific representations to the CO at the time of offer submission. (FAR 19.14)

2.2.1.4 WOSB Program. This program is made up of the main category, WOSBs and a subcategory, Economically Disadvantaged Woman Owned Small Business (EDWOSB) concerns. WOSB and EDWOSB concerns have distinct requirements they must meet to be provided preferences in the program. A major distinction is the determination by SBA on whether either is underrepresented or substantially underrepresented in an assigned NAICS code. The determination affects the authority to set aside a procurement for either type of concern. Information on NAICS codes generally and those subject to this determination can be found at www.naics.com/search/ and http://www.sba.gov/WOSB respectively. Prior to award to either type of concern, COs must verify whether the apparent awardee has submitted the required documentation to the WOSB Program Repository. The WOSB Repository is located at https://certify.sba.gov/.

2.3 Acquisition Planning. COs should engage stakeholders at key points in acquisition planning as appropriate. Small Business Program Managers (SBPM) should be engaged as early in the acquisition planning stage as is feasible to provide the acquisition team:

- Current small business set-aside program guidance, requirements and goals;
- The benefits of teaming arrangements;
- Required internal and external agency interfaces; and
- The use of various small-business focused procurement sources.

SBPMs should be actively involved as a partner during the market analysis and research phase of the acquisition planning process. SBPMs can promote a broadened approach to market research, to determine the most small-business-focused acquisition strategies by:

- Querying the Past Performance Information Retrieval System (PPIRS) and the Federal Awardee Performance and Integrity Information System (FAPIIS) to determine a vendor's technical capabilities and past performance within specific market segments;
- Analyzing key market trends and drivers within a market segment, including market size, rate of growth, and relevant economic trends; and
- Identifying how vendors compete in their market in areas relevant to the upcoming requirement, (e.g., service, price, quality, etc.) and determining the extent of competition within their segment.

SBPMs assist the acquisition team throughout acquisition planning by identifying small businesses that meet the "rule of two" requirement, and ensuring that the award may be made at a fair market price.

Where a set-aside is not deemed appropriate, per FAR 19.502-2, then a partial set-aside should be considered. FAR 19.502-3 provides guidance on partial set-asides for small business when the requirement is severable, and the SBPM has identified one or more small businesses with the technical competence and capacity to satisfy the partial set-aside requirement at a fair market price, and the acquisition is not subject to simplified acquisition procedures.

If the CO determines that a partial small business set-aside is not possible and the requirement will be competed on a full and open basis, SBPMs can advocate for maximizing small business subcontracting opportunities within the requirement's proposal preparation instructions and small business subcontracting plan. The SBPM reviews subcontracting plans prior to acceptance by the CO to help increase small business subcontracting opportunities with the prime contractor.

2.3.1 Advanced Planning Acquisition Team (APAT). APATs consist of:

- The Office of Small and Disadvantaged Business Utilization (OSDBU);
- Senior management;

- The Office of Acquisition Management or the National Nuclear Security Administration Office of Acquisition and Project Management as appropriate;
- Program Element Project Managers; and
- SBA Procurement Center Representatives (PCR).

New solicitations for other than Management and Operating (M&O) contracts valued at $100 million or above are subject to an APAT review. OSDBU reserves the right, as part of the APAT process, to review or waive the review of an acquisition regardless of dollar value, if it determines it is in the best interests of DOE. The SBPM of a program element with the requirement, or the cognizant CO, forwards the acquisition plan to the APAT for initial review.

The APAT reviews proposed acquisition strategies to identify practicable approaches for small business prime and subcontracting participation. APAT meetings include discussions on the feasibility of setting aside an acquisition in whole or part and reserving support functions from a large statement of work for prime or subcontract small business opportunities.

2.3.2 Review of Acquisitions Over $3 Million Not Set Aside for Small Business Concerns. COs shall submit proposed acquisitions valued over $3 million which are not set aside for small business to OSDBU for review except as noted below. This review should occur during the acquisition planning stage. The submission includes the current DOE F 4220.2 and a complete acquisition package. A complete package may include:

- The acquisition plan;
- Draft solicitation;
- Documentation reflecting market research conducted within the past 18 months
- Independent Government Cost Estimate;
- A copy of the signed sole source/limited sources justification;
- Presolicitation/Notice of Intent, any responses; and
- Explanation narratives for a set-aside determination from the CO, SBPM, Small Business Specialist, the SBA PCR, District SBA Small Business Specialist, and/or the Procurement Director.

Based on an acquisitions magnitude and complexity, few, some or all of these documents could be required. COs should work with their Small Business Specialist and OSDBU to determine the appropriate documentation needed for OSDBU to provide the necessary review and feedback.

OSDBU has 10 business days from receipt of a complete package to finish its review. If a timely review is not possible, OSDBU will negotiate a new review date with the CO. Upon completion of its review, OSDBU will provide an analysis and response to the proposed action not to set aside the procurement for small business participation. When possible, OSDBU's response will

include recommendations for small business participation as subcontractors, incorporation of the requirement for a Mentor-Protégé agreement for the term of the contract, and language that provides DOE the right to set aside work for future small business prime contracting opportunities.

Task/delivery orders and Blanket Purchase Agreements placed against Federal Supply Schedules contracts are exempt from the requirements of FAR 19 (except for the requirement at 19.202-1(e)(1)(iii)). As a result, these types of actions are not subject to OSDBU review. Regardless of this fact, COs may still consider doing discretionary set-asides to small businesses to include the socio-economic programs. Once an order under this authority is set aside, the specific eligibility requirements for that program apply. (FAR 8.404, 8.405-5)

2.3.3 Contract Consolidation/Bundling. Section 1313 of the Small Business Jobs Act of 2010 regulates the consolidation or bundling of contracts, as defined in Section 44(a)(2). By definition, consolidated contracts awarded to small businesses are not bundled contracts. Likewise, M&O contracts are not bundled contracts and are considered a special form of contracting as discussed in FAR 17.6. If contract consolidation is otherwise meritorious, the consolidated procurement should present maximum practicable opportunities to small businesses. COs are required to provide the acquisition packages for consolidated, bundled or substantially bundled acquisitions at or above $6 million to OSDBU and the SBA PCR. OSDBU in accordance with the Small Business Act, ensures conformity with the statutory requirements regarding bundling, and helps find approaches to maximize the participation of small businesses in the procurement. When the program office and OSDBU disagree about the need to bundle, the matter will be referred to the Deputy Secretary through the Head of the Contracting Activity (HCA) and the Senior Procurement Executive. The Deputy Secretary, without power of delegation, may determine that bundling is necessary and justified if the expected benefits do not meet the thresholds identified in FAR 7.107-2(d), but are critical to mission success; and the acquisition strategy provides for maximum practicable participation by small business concerns. (FAR 7.107-2(e), 7.107-3(f)(1), 19.202-1)

2.3.3.1 Use Evaluation Factor for Past Performance in Subcontracting. Plans to preserve and promote small business participation in a bundled contract may include—

- A factor to evaluate past performance under previous subcontracting plans
- FAR 52.219-10, Incentive Subcontracting Program

2.4 Market Research.

2.4.1 Sources-Sought Notifications. COs may publish Sources-Sought notifications on FedBizOpps at http://www.fbo.gov, to improve small business participation in

an acquisition. FedBizOpps provides small businesses easy access to acquisition information to identify prime contracting and subcontracting opportunities. Although the notice may include "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 and whether various set-asides are appropriate.

2.4.2 The System for Award Management (SAM). SAM allows firms to register their company profile, enabling COs to search the database with filters distinguishing socio-economic program qualifiers. COs can use the information gained to determine whether a requirement should be placed in a socio-economic program. SAM can be accessed at https://www.sam.gov/.

2.4.3 Other Market Research Efforts. FAR 10.002(b) identifies many different ways to effectively conduct market research to determine industry's capabilities, including—

- Contacting Subject Matter Experts regarding market capabilities to meet requirements
- Reviewing results of recent (18 months or less) market research for similar or identical requirements
- Querying the government-wide contract databases at https://www.sba.gov/contracting/finding-government-customers/contracting-resources-small-businesses
- Querying the Small Business Dynamic Search database at http://web.sba.gov/pro-net/search/dsp_dsbs.cfm
- Querying the Department of Veteran Affairs vendor locator at https://www.vip.vetbiz.gov/Public/Search/Default.aspx
- Engaging with industry, acquisition personnel, SBPMs and other stakeholders
- Obtaining lists of similar items from other contracting activities or agencies, trade associations or other sources
- Reviewing catalogs and other product literature published by manufacturers and distributors
- Holding pre-solicitation conferences to involve potential offerors at the beginning stage of the acquisition process

2.5 Maximizing Opportunities and Increasing Participation.

2.5.1 Mentor-Protégé Program (MPP) Agreements. A method of increasing the participation of small businesses in government contracting is the use of MPP agreements. DOE's MPP and SBA's All Small MPP operate separately. DOE prime contractors can currently

use the DOE MPP as established at Department of Energy Acquisition Regulation (DEAR) Subpart 919.70.

2.5.1.1 SBA MPP. SBA's "All Small" MPP provides for the establishment of MPPs for all small businesses, in addition to the 8(a) program. The "All Small" MPP was modeled on the successful 8(a) program. More information on this program can be found at https://www.sba.gov/contracting/government-contracting-programs/all-small-mentor-protege-program.

13 Code of Federal Regulations (CFR) 121.103(h)(3)(B)(2)(iii) provides for a joint venture that may include a large business and an 8(a) firm, which qualifies as a Mentor-Protégé arrangement under SBA's MPP. (13 CFR 124.520) Such a joint venture will be recognized as small for the NAICS code size standard assigned to the procurement, to include 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, excluding the value of that award. (13 CFR 124.513(b)(2)) This program effort results in a pool of firms that can more quickly be approved by SBA as joint ventures that are eligible to bid on a specific project. For any 8(a) contract, joint ventures must perform the applicable percentage of work required by 13 CFR 124.510, and the 8(a) partner(s) to the joint venture must perform a significant portion of the contract. (13 CFR 124.513(d))

2.5.1.2 DOE MPP. DOE's current Mentor-Protégé Program is administered by OSDBU. It is designed to encourage DOE prime contractors to assist small disadvantaged businesses certified by SBA under Section 8(a) of the Small Business Act (8(a)), other small disadvantaged businesses, WOSBs, SDVOSBs, Historically Black Colleges and Universities, and other minority institutions of higher learning, in enhancing their capabilities to perform contracts and subcontracts for DOE and other Federal agencies. The program, structured as a bilateral agreement, not as a contract, seeks to foster long-term business relationships between these small business entities and DOE prime contractors, and increase the overall number of these small business entities that receive DOE prime contracts and subcontracts. (DEAR 919.70)

2.5.2 Teaming Arrangements. Another method of increasing the participation of small businesses in the award of DOE prime contracts is the use of teaming arrangements. 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. COs shall insert the provision DOE-L-2021, Guidance for Prospective Offerors – Impact of Teaming Arrangements on Small Business Status, in all solicitations that are set-aside for small business. It advises offerors of SBA's

affiliation rules and suggests they seek legal counsel if proposing a joint venture, subcontracting, or other form of teaming arrangement.

2.5.3 Multiple Award Contracts (MAC). The following techniques should be applied when using MACs (defined at FAR 2.101) to fill program requirements. (16.504(c))

- COs should work closely with the cognizant Small Business Program Manager and OSDBU to identify small business opportunities early in the acquisition planning process
- Business strategies such as teaming arrangements should be considered in an effort to maximize opportunities for small businesses
- MACs should be exclusively set-aside for competition among small businesses when there is a reasonable expectation that offers will be obtained from at least two responsible small business concerns
- 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

2.5.4 Government-Wide Acquisition Contracts (GWAC). FAR 2.101 defines GWACs as task or delivery order contracts for IT established by one agency for government-wide use. GWACs pre-screen contractors deemed capable of performing specific requirements potentially expediting the acquisition process. The National Institutes of Health's GWAC SP3 Small Business is one example located at https://nitaac.nih.gov/services/cio-sp3-small-business. Another frequently used GWAC is the 8(a) Streamlined Technology Acquisition Resources for Services II (STARS II), a small business set-aside contract for technology solutions located at http://www.gsa.gov/portal/content/105243. The OASIS Small Business (SB) GWACs provide flexible and innovative solutions for complex professional services. They are located at https://www.gsa.gov/portal/category/104731. Additional GWACS with small business options can be found at https://www.contractdirectory.gov/contractdirectory/.

2.6 Subcontracting with Small Businesses.

2.6.1 Good Faith Subcontract Support Provision Rescinded. The previous version of this guide contained this provision. FAR Case 2014-003 updated FAR clause 52.219-9, Small Business Subcontracting Plan to contain the subject matter of the provision. DOE contracts shall no longer use the previous model provision and only use the updated FAR clause.

2.6.2 Subcontracting Plans. COs shall ensure any large business contracts over the thresholds cited in FAR 19.702(a), have a small business subcontracting plan in place that has practicable small business goals; and subcontract reporting is completed in a timely and

accurate fashion through reporting the actual small business achievements in the Electronic Subcontracting Reporting System (eSRS) as accepted in Individual Subcontracting Reports or Summary Subcontracting Reports. COs, in consultation with SBPMs, shall meet periodically with directors of contractor purchasing offices to review the status of the contractor's performance against its small business subcontracting plan. FAR 19.7 speaks to subcontracting compliance relating to small businesses, including assignment of compliance responsibilities between contracting offices, small business offices, and program offices, and periodic oversight and review activities.

M&O subcontracting plans shall support achievement of the DOE goals negotiated with SBA, or maintain the average of their past 3-fiscal years' small business achievement, whichever is higher. M&O subcontracting plans reflecting less than the agency-wide goals shall be submitted through OSDBU to the HCA for approval/ disapproval. All other required subcontracting plans should be guided by the negotiated goals at the time the sub-contracting plan is negotiated.

The negotiated subcontracting goals can be found at https://www.sba.gov/contracting/contracting-officials/goaling.

2.6.3 Subcontracting Procedures.

2.6.3.1 8(a) Pilot Program. M&O Contractors are authorized to award subcontracts on a noncompetitive basis if their value is less than the thresholds at FAR 19.805-1(a)(2) to SBA 8(a) certified firms. Contractors may also reserve requirements in excess of those thresholds for competition among 8(a) firms. The contractor shall assure that awards are made at fair market prices.

2.6.3.2 Discretionary Set-Asides. M&O Contractors are authorized to set aside purchases at any dollar value for award to small businesses and to make purchases valued up to the SAT on a sole source basis to small businesses through awards made at fair market prices.

2.6.3.3 DOE Mentor-Protégé Program. DOE's Mentor-Protégé Program (DEAR 919.70) 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 recognized under the DOE Mentor-Protégé Program are authorized, subject to DEAR 919.7011(3), to award noncompetitive subcontracts to their protégés. Protégés in the DOE MPP are eligible to receive non-competitive subcontracts as part of their developmental assistance.(DEAR 919.7011(a)(3)) Further, other site and facilities management contractors may award noncompetitive subcontracts as developmental assistance to a protégé of another DOE Mentor.

Mentors are limited to awarding subcontracts to protégés on a non-competitive basis within the same dollar thresholds as identified for the 8(a) Program. (FAR 19.805-1(a)(2))

2.7 Other Considerations.

2.7.1 Security Clearances. Much of DOE's work is classified, requiring appropriately cleared facilities and staff. Small businesses may not have the resources to readily have the requisite clearances which may limit their participation in these acquisitions. COs should consider the following to mitigate or remove these barriers when processing procurements that involve classified work:

- Consulting security personnel when the procurement may involve security requirements to ensure the requirements are not overstated; and
- Issuing solicitations and awarding contracts 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.

2.7.2 Small Business Goals. The Small Business Act requires agencies to negotiate both prime and subcontracting goals for small business concerns generally as well as small business concerns in the socio-economic programs. Information on the government-wide goaling guidelines is at https://www.sba.gov/contracting/contracting-officials/goaling. OSDBU coordinates with program elements to establish their goals based on budget spend in relation to DOE's negotiated SBA goals. OSDBU may negotiate different goals for each program element and those may be higher than the overall DOE goal. OSDBU, in coordination with program elements, may discuss mutually agreed-upon modifications to the DOE-internal goals, which are intended to then sum up to DOE's total annual goal.

2.8 **Small Business Reporting and Data Quality**. The systems for collecting and reporting business award information are the Federal Procurement Data System—Next Generation (FPDS-NG) for prime contract award data and the Electronic Subcontract Reporting System (eSRS) for prime contractor subcontracting award data.

2.8.1 Improving the Accuracy of Small Business Information. HCAs should ensure that proper quality control systems are in place for accurate reporting of small business data as outlined in the SB First Policy DOE P 547.1. To ensure full and current representation of subcontracting dollars obligated to small businesses, and so that SBA lets it be included in DOE's small business goal calculations, eSRS data must be entered such that it is accepted by

the cognizant procurement official. The entry must thus include all of the socio-economic data and NAICS code information into the eSRS database.

HCAs include the accuracy of Federal contract data as a compliance standard for the contracting activities' Federal assessment program.

The CO is responsible for ensuring that M&O contractors:

- Establish reasonable controls for accurate reporting of small business subcontracting data, including data submissions to electronic data collection systems;
- Maintain current and accurate listings of small business suppliers;
- Obtain certification of size status;
- 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
- Refer to the CO instances of small business status misrepresentation.

2.8.2 Electronic Subcontracting Reporting System (eSRS). The eSRS is the SBA-authorized electronic, web-based system for subcontract reporting. Contractors are responsible for entering timely and accurate reports into eSRS. In addition, prime contractors are responsible for passing down subcontracting reporting requirements to their subcontractors and lower-tier subcontractors. (FAR 52.219-9 (d)(10)(ii)-(vi))

COs must ensure prime contractors are aware of their subcontracting reporting and submission requirements to properly and timely submit their subcontracting reports into eSRS within 30 days of a reporting period ending (i.e., March 31 and September 30). Reporting is required regardless if there was any subcontracting activity under the contract. COs are responsible for acknowledging receipt of, reviewing and accepting or rejecting subcontracting reports within 60 days of the end of a reporting period. If a report is rejected by the CO, the contractor is required to resubmit the ISR within 30 days of receipt of the rejection. COs must ensure all parties' contact information to include email addresses are current in eSRS to ensure the reports are routed and notifications are made correctly. OSDBU encourages use of an entity account, to ensure access to cognizant eSRS stakeholders is maintained in the event of personnel turnover. Prime Contractors are responsible for ensuring their large subcontractors at any tier, follow the same subcontracting reporting requirements. (FAR 19.705-6)

OSDBU works with both COs and SBPMs to ensure SSRs are reviewed for completeness and accuracy prior to SBA extracting the government-wide subcontracting goal report.

The HCA should ensure that proper quality control systems are in place to ensure reporting and accuracy of subcontracting reports. This will require accurate data in FPDS-NG, since eSRS relies on this data for its reports.

3.0 Attachments

Attachment 1 - Partnership Agreement Between the U.S. Small Business Administration and the U.S. Department of Energy (2012)
Attachment 2 - DOE F 4220.2 Small Business Review Form (Jan 2014)
Attachment 3 - DOE P 547.1 Small Business First Policy

b e te t

CHAPTER 22 - APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

22 1 b r St r r tr t Ser e September 2012

Labor Standards for Construction and Services

Guiding Principles

- The complexity of the Department's construction program requires a high degree of coordination among contractors, such as when two or more are performing construction at the same time and at the same DOE site.
- Both contracting and program personnel need to be aware of the dynamics involved in these situations.

Reference: FAR subparts 22.3, 22.4, 22.10 and DEAR 970.2204

I. Overview

This section discusses the application of labor standards for contracts involving construction and services. While the Federal Acquisition Regulations (FAR) and Department of Energy Acquisition Regulations (DEAR) provide detailed guidance for the application of these labor statutes, this chapter provides DOE's acquisition community examples of when the statutes may apply to specific situations. This guidance, along with the FAR and DEAR requirements, gives DOE personnel the kind of information needed to make decisions regarding application of relevant labor laws to Government contracts.

To assist the CO in implementing this responsibility for Management and Operating (M&O) contractors, the process set forth in Section IV, Labor Standards Determinations at DOE and NNSA M&O Contract Facilities, may be used.

II. Background

The FAR, at 48 CFR subparts 22.3, 22.4, 22.10, and the DEAR at 48 CFR 970.2204 provide guidance to Department[1] Contracting Officers (COs) for applying statutory labor

requirements to contracts that involve construction and services. The statutes addressed in these FAR subparts include:

[1] For purposes of this Acquisition Guide Chapter 22.1, Department is defined as the Department of Energy (DOE) which includes the National Nuclear Security Administration (NNSA).

- The Davis-Bacon Act (DBA);
- The Service Contract Act (SCA);
- The Contract Work Hours and Safety Standards Act; and
- The Copeland (Anti-Kickback) Act.

1. Construction under the DBA

The DBA provides that contracts in excess of $2,000 to which the United States or the District of Columbia is a party for construction, alteration, or repair (including painting and decorating) of public buildings or public works of the United States (or the District of Columbia), shall contain a Federal Acquisition Regulation (FAR) clause (FAR 52.222-6) stating, *inter alia,* that no laborer or mechanic employed upon the site of the work shall receive less than the prevailing wage rates for construction in that area as determined by the Secretary of Labor. In some cases, Congress has extended the DBA requirements to construction financed in whole or in part by federal grants, loans, loan guarantees, and other financial assistance programs by means of specific Davis-Bacon Related Acts (DBRAs).

2. Services Under the SCA

The McNamara-O'Hara Service Contract Act (SCA) applies to every contract entered into by the United States or the District of Columbia, the principal purpose of which is to furnish services to the United States through the use of service employees. The SCA requires contractors and subcontractors performing services on covered federal or District of Columbia contracts in excess of $2,500 to pay service employees in various classes no less than the monetary wage rates and to furnish fringe benefits found prevailing in the locality, or the rates (including prospective increases) contained in the collective bargaining agreement of a predecessor SCA contractor consistent with Section 4(c) of the SCA. See 22.1003-5 and 29 CFR 4.130 for a partial list of services covered by the SCA. SCA contracts must contain the FAR clauses at 48 CFR 52.222-41.

Please note that SCA coverage **does not** apply to DOE management and operating (M&O) contracts, but **does** apply to subcontracts thereunder. In the illustrations within this Guide,

where work is subject to SCA, the work, when performed by M&O contractor employees, would not be covered by SCA.

III. Illustrations of work under the labor standards statutes

The following examples identify some of the contractual situations where the DBA and the SCA may or may not apply. These examples are not intended to provide conclusive labor standards determinations in particular circumstances. Such determinations can only be made by the CO, who may seek the assistance of other Department personnel such as industrial relations personnel. It is the responsibility of the CO to provide the contractor with the appropriate wage determination for the work to be performed, whether the construction contract is an M&O Contractor, or other facility operations contractor.

Additional examples of work covered by the DBA and SCA may be found in Department of Labor (DOL) materials, in particular the SCA and DBA Field Operations Handbooks, Chapters 14 and 15 available at http://www.dol.gov/whd/FOH/index.htm.

1. Prototypes

The construction of full-scale operating prototypes for structures, i.e., biorefinery plants, methane digesters, and photovoltaic collection systems, is covered by the DBA. In fabricating such prototypes, the assembling and fitting of components into the building(s), including installation of heat exchangers, control wiring, etc., is subject to DBA.

2. Paving

The construction of roads, including grading and repair, is generally subject to DBA. Repair includes work in roadbeds before resurfacing, the building-up of shoulders, forming ditches, culverts and bridges, and the resurfacing of roads.

However, recurring maintenance work, such as patching surfaces, filling chuck holes, patching shoulders, and resurfacing railroad crossings is not subject to DBA, but, rather, is covered by the SCA. Similarly, when performed on a recurring basis or schedule,

patch and maintenance work on a parking lot, the replacement of bumper stops, and the repainting of parking dividers are subject to SCA.

3. Stationary boilers

The construction, alteration and/or repair, including installation and rebuilding, of stationary boilers costing more than $2,000 for labor and materials is subject to DBA. Maintenance that is necessary to keep the boiler in safe operating condition would be subject to SCA.

4. Start-up and Commissioning

If, during construction of complex facilities, a facility is turned over to the operating contractor a section at a time, issues of statutory coverage may arise and must be evaluated carefully, especially with regard to commissioning activities and start-up testing. When final testing of new construction is performed by personnel of the operating organization after acceptance of construction, the testing is not subject to the DBA. If, however, commissioning and testing is part of work done by construction personnel prior to acceptance of construction in order to demonstrate that the construction meets contract requirements, such work is properly viewed as part of the construction process.

5. Restart of operating activity after fire or other catastrophe

The restart of operations or rebuilding of a plant following a catastrophe, including the replacement of structural members, roof trusses, walls, roof, utility services, and process piping is subject to DBA. However, where process equipment can be restarted and/or operational activities resumed prior to or in lieu of such rebuilding, the start-up of equipment, including preliminary activity (e.g., cleaning, drying, checking, adjustment, temporary services) and temporary weather protection of equipment, is covered by the SCA, as opposed to the DBA.

6. Painting

Painting and decorating are specifically identified as covered work in the DBA. However, painting which is closely integrated with operation and maintenance activities and painting to color code process lines and service piping, valves and directional arrows are covered by the SCA unless such painting exceeds 200 square feet, in which case it

will be covered by DBA. Similarly, the application of various materials to localize contamination, the painting of machine tools to identify degree of contamination, and the

repainting of machine tools, equipment and plant structures as part of preventive maintenance are not subject to the statutes when performed with a stable work force employed by the operating contractor.

7. Installation, rearrangement and adjustment of equipment

The installation of mechanical equipment and instruments that are necessary to permit a new facility to be utilized for its intended purpose is part of construction and covered by the DBA. For these purposes, installation includes not just the initial installation, but also the arrangement, adjustment, balancing, calibration, and checking of the instruments or equipment involved with that installation.

When, however, the installation, rearrangement or adjustment of equipment is not part of a current construction project it is not subject to DBA, unless the work itself involves substantial and segregable construction. Factors to be considered in determining whether work is DBA construction include the type of work performed by the employees installing the equipment on the project site and, specifically, the techniques, materials, and equipment used and the skills called for in its performance; the extent to which structural modifications to buildings are needed to accommodate the equipment (such as widening entrances, relocating walls, or installing wiring); and the cost of the installation work, either in terms of absolute amount or in relation to the cost of the equipment and the total project cost. **NOTE: None of these factors is dispositive and DOE personnel are encouraged to contact the Office of General Counsel (GC-63) for assistance in determining which work constitutes substantial and segregable construction.**

Thus, furnishing and installing mechanical equipment that requires alteration of the building structure or running wiring through walls would likely involve more than an incidental amount of construction. Alteration or rearrangement of existing facilities involving similar work to accommodate new or different equipment is also covered. DBA also applies to installing a security system or an intrusion detection system; installing permanent shelving, which is attached to a structure; installing air-conditioning ducts; excavating outside cable trenches and laying cable; installing heavy generators; mounting radar antenna; and installing instrumentation grounding systems, where a substantial amount of construction work is required.

8. Maintenance contracts

Contracts for servicing of equipment or facility or maintenance work are subject to SCA. Maintenance includes the typically scheduled, routine, recurring kind of work that is necessary to keep a facility in an efficient operating condition. Such work includes custodial services, snow removal, and routine HVAC filter changes.

However, if routine maintenance is deferred for an extended period of time, when done it may exceed what can be fairly characterized as routine scheduled maintenance work and be covered by the DBA. For example, if a railroad bridge is scheduled to be painted and checked every 2 years, but that work is delayed repeatedly for a period of nearly 10 years, the painting that is required when that bridge is eventually painted is likely to be so extensive as to exceed what can be considered maintenance and, therefore covered by DBA.

Routine upkeep of landscaping, carpet laying and installation of drapery performed as part of routine maintenance and upkeep is covered by the SCA. Where, however, such work is performed as part of a construction contract, it is generally covered by DBA.

Where a maintenance or SCA contract requires substantial and separable tasks for construction, alteration or repair, DBA will apply to those aspects of the contract.[2] See 29 CFR 4.116(c)(2). Many of the same factors to be considered are as set forth under installation Section 7 above, and include the type, quantity, and cost of the work at issue.

For example, if the work involves techniques, materials, equipment, and skills typically used in construction, or if structural modifications to buildings are needed to accommodate the necessary equipment (such as widening entrances, relocating walls, or installing wiring), these factors would be suggestive of DBA covereage. Moreover, DOL guidance indicates that an "[a]ctivity that generally takes more than 32 hours for repair of a particular building component" is indicative of DBA repair work. Finally, the cost of the work, either in absolute dollars or as a percentage of contract costs (or in the case of installation, as a percentage of the equipment cost) is a factor used to ascertain whether

work involves substantial construction rising to the level requiring coverage under the DBA. **NOTE: As stated above, none of these factors are dispositive and DOE**

[2] The reverse is not the case, i.e., that if a contract is primarily one for construction of a public building or work, there is no requirement by statute or regulation to segregate service work and apply the SCA to service work that will be performed under the Construction contract.

personnel are encouraged to contact the Office of the Assistant General Counsel for Labor and Pensions (GC-63) for assistance in determining which work constitutes substantial and segregable construction.

9. Telephone and utility systems

Whether or not the performance of construction-type work in connection with Federal and Federal-assisted projects by employees of a public utility is covered by the DBA will depend upon the nature of the contracts involved and the work performed thereunder, as well as the specific requirements of any specific DBRA involved.

A contract for a central telephone system to be installed by the manufacturer and owned by the United States is subject to DBA. Relocation of utility lines to accommodate construction of a public work is subject to DBA. Similarly, if a utility company agrees to undertake a portion of the construction of a project, which by statute is covered by the DBA/DBRA, such work would be subject to the DBA/DBRA labor standards requirements of the construction contract, consistent with any specific statutory requirements.

If, however, a public utility is in effect extending its own utility system and is furnishing its own materials, such work is not subject to DBA/DBRA. Thus, contracts involving the installation of telephone systems or utilities are not subject to DBA when the work is performed by employees of the telephone or utility company supplying the services, and the material and equipment installed will be owned by the telephone or utility company. Such installation is considered to be an extension of the utility's services. The same conclusion would apply if the utility company contracts out the work.

10. Demolition, Dismantling or Removal of Improvements

Demolition, dismantling or removal of improvements is covered by the DBA where follow on construction is anticipated, even if by separate contract. Where such work does not anticipate follow-on construction activity, the work would be covered under SCA and not by DBA.

11. Decontamination and Decommissioning

Decontamination work, including washing, scrubbing, and scraping to remove contamination; contaminated soil or other materials;[3] and painting or other resurfacing, is not covered by DBA, provided that such painting or resurfacing is an integral part of the decontamination activity and performed by the employees of the contractor(s) performing the decontamination.

IV. Labor Standards Determinations at DOE and NNSA M&O Contract Facilities

The Department cannot delegate labor standards coverage determinations to its contractors. While the CO must make the initial labor standards coverage determinations, the DOL ultimately has the authority to determine labor standards coverage. 5 U.S.C. 901 *et seq*. However, the DEAR provides a mechanism by which the HCA, consistent with the DEAR, may prescribe classes of work for M&O contracts to which applicability or non-applicability of the DBA is clear, and for which the HCA will require no further DOE or National Nuclear Security Administration (NNSA) determination on coverage in advance of the work (48 C.F.R. 970.2204-1-1(b)(3)).

The Department recognizes that each facility/site has differing circumstances and that it would be more beneficial if the contractor works with the CO to determine the classes of covered work. Heads of Contracting Activities (HCAs) may delegate the use of their authority to make DBA class determinations to the CO at the site, enabling the CO to make the class determinations as set forth in the DEAR. All such delegations by the HCA must be made pursuant to a signed delegation memo giving a specific CO the HCA's authorization as provided in DEAR 970.2204-1-1(b)(3).

Upon request by an M&O contractor, COs may work with the contractor, in consultation with local field counsel; the DOE or NNSA Contractor Human Resources/Industrial Relations Specialists; and the Office of the Assistant General Counsel for Labor and Pension Law (GC-63), for DOE, or the Office of the General Counsel for NNSA, to determine classes of work to which applicability or non-applicability of the DBA is clear, and for which the CO will require no further DOE/NNSA determination on coverage in advance of the work.

Although coverage of specific classes of work may be determined by the CO, the

[3] Excavation of significant amounts of contaminated soil and other materials will be subject to DBA.

contractor is required to continue to submit a request to the CO for an appropriate wage determination (WD) for the work to be performed for subcontracts. It is recognized that WDs are now much easier to obtain; however, FAR subpart 22.4 requires that the CO take the actions to choose the correct WD and to modify a cost-reimbursement contract to incorporate modified WDs. Absent CO or designee approval of specific WDs, the contractor would be at risk of incurring unallowable costs. The contractor may pull a WD from the DOL website www.wdol.gov and provide it to the CO or designee for approval, if the CO believes that will expedite the process.

COs should, as a facet of their normal operational awareness and systems oversight, ensure that labor standards policies, procedures and management controls are implemented by M&O contractors, which are responsible for compliance by its subcontracts (*see, e.g.,* FAR clause 52.222-11(c)). Where a CO has made determinations for classes of covered work, the CO will perform regular audits to ensure the contractor is properly classifying the work within the classes of work.

The CO is not required to make class determinations. This Section IV process for determining classes of work subject to DBA provides an option available to the M&O and CO. No changes are required to processes used by the COs and DOE or NNSA Labor Standards Committee at an M&O site/facility.

V. Section 1804 Decontamination or Decommissioning

Section 1804 of the Atomic Energy Act of 1954, as amended by Title XI of the Energy Policy Act of 1992, 42 U.S.C. Sec. 2297g-3, requires that "[a]ll laborers and mechanics employed by contractors or subcontractors in the performance of decontamination or decommissioning of uranium enrichment facilities of the Department shall be paid wages" in accordance with, and otherwise comply with the requirements applicable to, the DBA. It is important to keep the requirements of Section 1804 in mind in evaluating activities at the East Tennessee Technology Park (ETTP) and at the Portsmouth and Paducah Gaseous Diffusion Plants.

VI. DOE's Role in Construction Labor Relations

The Department is not the employer of the Department's contractor work force. Wages, hours, and working conditions that are the subjects of collective bargaining will be left to

the orderly processes of negotiation and agreement between DOE contractor management

and employee representatives with maximum possible freedom from Government interference.

Project labor agreements (PLAs) entered into by DOE contractors and covering construction on a DOE site, have been a tool for constructing Departmental facilities and accomplishing the Department's missions. It is critical that DOE contractors follow practices that experience has shown are consistent with stability of collective bargaining relationships. DOE expects its contractors to maintain positive labor-management relations and adopt labor relations policies and practices that reflect the best experience of American industry to assure successful accomplishent of DOE's programs at reasonable costs. Factors unique to a particular project (such as duration of the project, tenure of employment, housing and travel accommodations, length of regular workweek, uniformity of shift, special subsidies, etc.) are considered and addressed in project labor agreements.

VII. Headquarters Point of Contact

Any questions addressing labor standards issues as discussed herein may be referred to your assigned contact within the Office of the Assistant General Counsel for Labor & Pension Law (GC-63), or, if you do not have such an assigned contact, call Jean Stucky at 202-586-7532.

b e te t

CHAPTER 23 – SUSTAINABLE ACQUISITION POLICY

2 1 S t b e t t 2017

Sustainable Acquisition Policy

Guiding Principles

- Lead by example.
- Partner with your contractors to maximize sustainable acquisition throughout the supply chain.
- Think efficiency when procuring products that consume energy, materials, or water.

[References: FAR 4, 5, 7, 8, 10, 11, 12, 13, 23, 36, 39, 42, 52; DEAR 923, 970.23, 970.5223-7; DOE O 413.3B Chg 3, Program and Project Management for the Acquisition of Capital Assets; DOE Order 436.1, Departmental Sustainability; and DOE Strategic Sustainability Performance Plan]

1.0 Summary of Latest Changes

This update: (1) removes content duplicative of FAR or DOE orders, (2) adds, deletes, streamlines and consolidates content, and (3) includes administrative changes, including the reorganization of content formerly included in chapter 23.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. This chapter does not cover efforts and projects performed for DOE by other Federal agencies. The chapter informs DOE acquisition personnel of the sustainability considerations affecting the acquisition process. This chapter includes DOE personnel's roles and responsibilities to implement sustainable acquisition requirements in DOE's Strategic Sustainability Performance Plan (SSPP). DOE Management and Operating (M&O) contractors should also become familiarized with these requirements and implement processes at their sites to ensure compliance. The significant changes in this chapter are a result of the rescission of numerous executive orders on sustainability, revisions to solely focus the chapter on sustainability, and removal of duplicative information contained in the references.

2.1 Roles and Responsibilities. The primary roles and responsibilities a contracting officer (CO) may encounter while conducting sustainable acquisitions are listed below. Additional information can be found in DOE Order 436.1, Departmental Sustainability.

2.1.1 Senior Sustainability Officer (SSO). Monitors sustainability progress and reports to the Office of Management and Budget (OMB) Director and the Council on Environmental Quality (CEQ) Chair regarding progress on implementing the DOE SSPP. DOE's SSO is the Under Secretary for Management and Performance.

2.1.2 Sustainability Performance Office (SPO). DOE's principal point of contact for sustainability which directly supports the SSO. The SPO duties include developing instructions, collecting and analyzing data, and implementing and updating the SSPP. The SPO also provides technical assistance to support Departmental elements' sustainability efforts, including providing data summaries, analysis and projections.

2.1.3 Head of Contracting Activity (HCA). Ensures sustainability requirements are included in all contracts as applicable, to include each M&O contract or any other contract requiring contractor operation of Government owned facilities or vehicles.

HCAs must appoint a Sustainable Acquisition Advocate for each Contracting Activity who will perform the duties as applicable in Attachment 1.

2.1.4 Field Managers. Ensures appropriate quantifiable sustainability and energy goals/targets are integrated into contracting documents, such as the Performance Evaluation and Measurement Plans (or equivalent). The field manager notifies a CO when a contract should include the Contractor Requirements Document.

2.1.5 Sustainable Acquisition Advocate. Informs and works with Environmental Sustainability Coordinators, Energy Coordinators, Fleet Managers and other specialists to implement sustainable acquisition in the procurement organization. DOE management contractors are encouraged to appoint Advocates for the sites they manage. Sustainable Acquisition Advocates may perform some of the duties identified in Attachment 1 as applicable.

2.1.6 Contracting Officer (CO). Ensure appropriate provisions and clauses are contained in all applicable solicitations and contracts. This responsibility includes ensuring that designated product specifications are incorporated in all applicable contracts. COs must work with requirements and contractor personnel to be certain they are aware of their responsibilities in this area. A sustainable contracting checklist is provided at Attachment 2.

COs are also responsible for correctly entering data into the Federal Procurement Data System – Next Generation (FPDS-NG) for their products, services and M&O contracts with recovered and biobased content (blocks 8K and 8L).

2.1.7 Purchase Card Holders. Ensure transactions below the micro-purchase threshold are made in accordance with sustainability requirements. Further information can be found in DOE Acquisition Guide chapter 13.1, DOE Policy and Operating Procedures for the

Use of the GSA SmartPay2 Purchase Card - August 2012. Purchase Card Holders can refer to Green Procurement Compilation (https://sftool.gov/greenprocurement) for easy access to products and services that meet the requirements.

2.2 Background. "Sustainable acquisition" means acquiring goods, services and construction in order to create and maintain conditions: 1) under which humans and nature can exist in productive harmony; and 2) that permits fulfilling the social, economic, and other requirements of present and future generations.

The Federal and DOE sustainable acquisition requirements derive from a variety of legislative, executive, and regulatory requirements. DOE promotes sustainable acquisition by ensuring required environmental performance and sustainability factors are included to the extent practicable for applicable procurements in the planning, award, and execution phases of the acquisition. Many of these requirements reinforce, or provide clarity on compliance with, other drivers. Contracts can only be "sustainable" when the correct language is included. There is an attachment to this chapter that provides many sustainability resources for all personnel involved in the acquisition process to help compliance with the requirements.

2.2.1 FAR Requirements. You are probably aware of the environmental factors of sustainable acquisition prescribed in FAR parts 23, DEAR part 923 and subpart 970.23. However, as you prepare solicitations and contracts, be aware of the following less obvious parts of the FAR as they also contain sustainability requirements.

- Subpart 2.1 provides definitions for relevant terms, such as: energy-efficient product; energy-efficient standby power devices; environmentally preferable; pollution prevention; recovered material; renewable energy, sustainable acquisition; virgin material; and waste reduction.
- Subparts 4.302, 4.303, and 4.602(a)(3) direct agencies to specify double-sided printing on recycled paper in solicitations and contracts and report on sustainable acquisition in the FPDS-NG.
- Subpart 5.207(c)(11) requires any synopses submitted to a Government-wide point of entry include sustainable acquisition requirements and, if applicable, high-performance sustainable building requirements.
- Subparts 7.103(p)(1, 2, and 4) and 7.105(b)(17) require environmental and energy considerations in acquisition policy and in the contents of written acquisition plans and makes those considerations part of an agency head's responsibilities.
- Subpart 8.405-1(f)(7) allows environmental and energy efficiency considerations, in addition to price, when determining best value for supplies and services not requiring a statement of work, and when establishing Blanket Purchase Agreements (BPAs).

- Subparts 10.001(a)(3)(v) and 10.002(b)(1)(v) require using the results of Market Research to ensure maximum practicable use of recovered materials and promote energy conservation and efficiency.
- Subpart 11.002(d) and 11.3 require consideration of and setting requirements for sustainable acquisition.
- Subpart 12.301(e)(3) allows COs to use the provisions and clauses contained in Part 23 regarding the use of recovered material when appropriate for the item being acquired.
- Subpart 13.201(f) states that sustainable acquisition requirements apply to acquisitions at or below the micro-purchases threshold.
- Subparts 36.601-3(a) and 36.602-1(a)(2) require incorporation of environmental concerns into the contracting procedures and selection criteria.
- Subpart 39.101 requires agencies to identify information technology requirements, including consideration of energy efficiency; Electronic Product Environmental Assessment Tool (EPEAT) standards; policies to enable power management, double-sided printing, and other energy-efficient or environmentally preferable features on all agency electronic products; and best management practices for energy-efficient management of servers and Federal data centers.
- Subpart 42.302(a)(68)(ii and iii) addresses the environmental concerns that must be incorporated into contract administration functions.

2.2.2 DEAR Requirements. In addition to DEAR clauses, the prescriptions in DEAR subsections part 923.103 and 970.2301-2(b) make certain FAR clauses applicable to some DOE contracts they would not normally apply.

2.2.2.1 Applicable Contracts. The following contracts are required to contain the FAR clauses in section 2.2.2.3 due to the prescriptions of the DEAR clauses in section 2.2.2.2.

- M&O contracts
- Contracts operation of Government facilities or fleets;
- Contracts for mission operations at Government facilities; or
- Contracts for construction at Government-owned facilities.

2.2.2.2 DEAR Sustainability Clauses.[1] In accordance with their prescriptions, COs shall include the following clauses in DOE contracts as applicable.

[1] The DEAR at 970.2301-2(a) prescribes the clause at 970.5223-6 Executive Order 13423, Strengthening Federal Environmental, Energy, and Transportation Management. EO 13423 was rescinded by EO 13693 on March 19, 2017. Consequently this clause is obsolete and is not included in this guide. The DEAR will be updated appropriately in the future.

- 952.223-78, Sustainable Acquisition Program, or its Alternate I
- 970.5223-7 Sustainable acquisition program, or its Alternate I.[2]

2.2.2.3 DEAR Prescribed FAR Clauses. Due to the prescriptions of the DEAR clauses, COs must include the following FAR clauses in the types of contracts listed in section 2.2.2.1. These clauses require contractors to report to the System for Award Management (SAM) at https://www.sam.gov/portal/SAM/ and provide a copy of the report to COs.

- 52.223-1, Biobased Product Certification
- 52.223-2, Affirmative Procurement of Biobased Products under Service and Construction Contracts;
- 52.223-10, Waste Reduction Program;
- FAR 52.223-19, Compliance with Environmental Management Systems (see 923.903 regarding the applicability of this clause to specific DOE contracts);
- 52.223-15, Energy Efficiency in Energy Consuming Products; and
- 52.223-17, Affirmative Procurement of EPA-designated Items in Service and Construction Contracts.

2.2.3. Primary DOE Orders. The following orders contain Contractor Requirements Documents (CRDs) related to sustainable acquisition at DOE.

2.2.3.1 DOE O 413.3B Change 3 (Page Change), Program and Project Management for the Acquisition of Capital Assets. The CRD must be included in all contracts that make the contractor responsible for planning, design, construction and execution of capital asset projects subject to the Order.

2.2.3.2 DOE O 436.1, Departmental Sustainability. The CRD applies to M&O; fleets operations; facilities construction, demolition or facility infrastructure improvements; or other supply and service acquisition management contracts for Government facilities, fleets or mission operations.

2.3 Compliance. DOE promotes sustainable acquisition and procurement by ensuring sustainability requirements are included, to the maximum extent practicable, in applicable procurements during the planning, award, and execution phases of the acquisition. "Applicable" means the procurement includes purchase or use of products or services for which there are Federal sustainability requirements. DOE personnel must consider sustainable products and services identified by the Environmental Protection Agency (EPA), or voluntary specification,

[2] DEAR 970.2301-2(b) prescribes a non-existent clause "970.5223-6, Sustainable and Environmentally Preferable Purchasing Practices." The correct clause is cited here, 970.5223-7 Sustainable Acquisition Program, or its Alternate I. The DEAR will be updated to correct this in the future.

labels, or standards recommended by EPA. Where none of these exist, DOE personnel should consider using voluntary standards for sustainable performance.

COs ensure sustainable acquisition requirements are considered and deemed either "applicable" or "not applicable" to the products and services purchased by, on behalf of, or for the Government during all acquisitions, including new contracts, actions (to include purchase cards), and modifications against existing contracts.

2.3.1 Pre-award. During acquisition planning, COs must ensure consideration of such factors as reuse of products, life cycle cost, elimination of virgin material requirements, use of biobased products, use of recovered materials, recyclability, use of environmentally preferable products, energy efficiency, water savings, waste prevention (including toxicity reduction or elimination) and ultimate disposal. Once applicable requirements are identified, COs ensure they are included in contract documentation, purchase agreements, service agreements, purchase orders, delivery orders, and communications with contractors and sub-contractors. Requirements can be included in the statement of work, statement of objectives, or ordering documents, or through inclusion of applicable FAR and/or agency provisions and clauses. Note that for products purchased under the GSA Multiple Award Schedule contracts, Government-Wide Acquisition Contracts, IDIQ contracts, or BPAs, applicable FAR clauses might be included in the base contract vehicle.

2.3.2 Contract Administration. COs must ensure sustainability criteria is incorporated into contracts as well as processes and procedures for contractor monitoring and performance reviews.

2.3.3 Reviews. Progress toward 100% compliance with sustainable acquisition requirements is monitored by semi-annual contract reviews, information captured in FPDS-NG or other methods established by CEQ and OMB. COs can expect reviews of at least 5% of their new contract actions to ensure they contain the applicable provisions and clauses.

2.4 Metrics and Reporting. Site sustainable acquisition data is collected by the SPO using various means including FPDS-NG, SAM and the DOE sustainability reporting platform Sustainability Dashboard (Dashboard) located at https://doegrit.energy.gov/Sustainability Dashboard/. The Dashboard also features analytical tools for sites or programs to manage their sustainability data.

2.4.1 Dashboard Data Entry Categories. Electronics Acquisition and Sustainable Contracts Review are both reported in the Dashboard. A full description of the required data is available in the Dashboard User Guide posted on the Dashboard Help section.

2.4.2 Sustainable Contract Metrics. This Dashboard module collects information relevant to contracts for sustainable acquisition provisions and clauses in new and modified

contracts. DOE committed in the SSPP to increase its sustainable contracts to 100% by 2020 on a graduated bases. The progression to 100% is based on the following schedule—

- FY 2015 - FY 2019: 75%
- FY 2020 (and each year thereafter): 100%

In FY 2016, DOE sites reported 93% of new contract actions contained all applicable sustainable clauses.

2.4.3 Biobased Reporting. DOE must include biobased targets in its SSPP unless it achieved a 95% compliance rate with biopreferred and biobased purchasing requirements for the previous fiscal year. COs must ensure contractors submit timely annual reports of their biopreferred and biobased purchases using SAM when FAR clause 52.223-2 is included in their contracts. Contractors are also required to provide a copy of the report to their CO. The information in these reports allows DOE to measure performance against the targets. The contract reviews for Q3 and Q4 of FY 2016 demonstrated 81% compliance performance.

2.4.4 FPDS and SAM Reporting. COs must ensure the applicable sustainable acquisition clauses are contained in their contracts and select the appropriate classification under the "Primary Product/Service Code" section in STRIPES to ensure the proper reporting to FPDS-NG. By selecting the correct classification, COs ensure that FPDS-NG blocks 8K and 8L are properly coded for EPA designated products or services and biopreferred and biobased products.

In the case of biopreferred and biobased products, FPDS-NG then triggers SAM to enable the contractors' ability to submit their annual reports. If the classification is erroneously not selected in STRIPES either at the initial award or subsequent modification, a contractor will be unable to report in SAM.

Due to the long-term nature of some DOE contracts, the applicable clauses may have come into existence after award. In those and other instances when a contract does not, but should contain the clauses, the CO should consider incorporating them in accordance with FAR section 1.108(d)(3). This will ensure accurate reporting of DOE progress in sustainable acquisitions. If a contract does not contain the clauses, reporting may not be done and DOE may not get credit for the action.

3.0 Attachments

Attachment 1 - Sustainable Acquisition Advocate Sample Activities
Attachment 2 - Sustainable Acquisition Resources

Sustainable Acquisition Advocate Sample Activities

Ensure that personnel at the contracting activity are aware of the FAR sustainable acquisition requirements and the need to use the required sustainable acquisition solicitation provisions and contract clauses in their contracts. A central location for these requirements (organized by product category) is the Green Procurement Compilation (https://sftool.gov/greenprocurement).

Ensure that personnel at your contracting activity are aware of the following sustainable acquisition programs and the Federal preference for these products over equivalent products lacking the favorable attributes:

- Alternative fuel vehicles and alternative fuels required by the Energy Policy Act of 2005. Find information at http://www.afdc.energy.gov/afdc.

- Biobased products are designated by the U.S. Department of Agriculture (USDA) in the BioPreferred program. Biobased products are those designated by USDA pursuant to the Farm Security and Rural Investment Act, 7 USC 8102. This coverage is part of the Affirmative Procurement Program found at FAR 23.4. USDA maintains a Home Page with the list of designated items at: https://www.biopreferred.gov/BioPreferred/faces/catalog/Catalog.xhtml.

- Energy from renewable sources required by the Energy Policy Act of 2005 at http://www.eere.energy.gov/.

- Energy Star® products identified by DOE and EPA at http://energystar.gov, as well as FEMP-designated energy-efficient products at https://energy.gov/eere/femp/find-product-categories-covered-efficiency-programs.

- Environmentally preferable products and services, including EPEAT-registered electronic products. A Home Page identifying environmentally preferable electronic equipment is at: http://www.epeat.net.

- Non-ozone depleting substances, as identified in EPA's Significant New Alternatives Program at http://www.epa.gov/ozone/snap/index.html.

- Recycled content products designated in EPA's Comprehensive Procurement Guidelines at https://www.epa.gov/smm/comprehensive-procurement-guideline-cpg-program.

- Water-efficient products, including those meeting EPA's Water-Sense standards http://www.epa.gov/watersense/.

Promote employee support of the environmental, energy efficiency, and transportation initiatives through informational displays and promotional activities.

Support sustainable acquisition program initiatives to include Affirmative Procurement Program, ENERGY STAR®, and Federal Energy Management Program, as well as environmental and

transportation initiatives and accomplishments in local Home Pages, Intranet sites, newsletters, et cetera.

Support initiatives to promote participation in pilot acquisitions of environmentally preferable products.

Promote a team approach among the members of the local acquisition community including procurement, property, environment, program, supply, facilities, construction, etc.

Promote consideration of a broad range of environmental factors in developing plans, drawings, work statements, specifications, or other product descriptions for use at the facility. Include such factors as elimination of virgin material requirements, use of biobased products, use of recovered materials, reuse of products, life cycle cost, recyclability, use of environmentally preferable products, waste prevention (including toxicity reduction or elimination) and ultimate disposal.

Coordinate with the Environmental Sustainability Coordinator to ensure that local procedures provide a means for purchase cardholders to report their sustainable acquisition accomplishments and transactions pursuant to supporting reporting requirements.

Review justifications to acquire other than an EPA or USDA designated item because it is impossible to acquire the item:

- Competitively within a reasonable time frame;
- Meeting appropriate performance standards; or,
- At a reasonable price.

Sustainable Acquisition Resources

Department of Energy Resources

Alternative fuels and vehicles - http://www.afdc.energy.gov/

Energy efficient products - https://energy.gov/eere/femp/find-product-categories-covered-efficiency-programs

Federal Energy Management Program - http://energy.gov/eere/femp/federal-energy-management-program

Sustainable Acquisition - https://www.fedcenter.gov/members/workgroups/sustainableacquisition/

U.S. Environmental Protection Agency Resources

Comprehensive Procurement Guidelines - https://www.epa.gov/smm/comprehensive-procurement-guideline-cpg-program

ENERGY STAR – https://www.energystar.gov/products?s=mega

Safer Choice (Chemically intensive products that contain safer ingredients) - https://www.gov/saferchoice

SmartWay Transport partners and SmartWay products (Fuel efficient products and services) https://www.epa.gov/smartway

SNAP Program (Alternatives to ozone-depleting substances & high global warming potential hydrofluorocarbons) - https://www.epa.gov/snap

Sustainable Marketplace: Greener Products and Services - http://www.epa.gov/greenerproducts

WaterSense (Water efficient products) - https://www.epa.gov/watersense/watersense-products

Other Important Resources

GSA Green Procurement Compilation - https://sftool.gov/greenprocurement

The Office of Federal Sustainability - https://www.sustainability.gov/

AbilityOne - (green purchasing products/services) – http://www.abilityone.gov/abilityone_program/green_greening.html

US Department of Agriculture Biopreferred Catalog - https://www.biopreferred.gov/BioPreferred/faces/catalog/Catalog.xhtml

EPEAT-registered products (Sustainable electronics) - http://www.epeat.net

Federal Prison Industries, Inc. (FPI or UNICOR), Energy efficient and green products - https://www.unicor.gov/Shopping/viewCat_m.asp?iStore=UNI&idCategory=1633

b e te t

CHAPTER 25 - FOREIGN ACQUISITION

2 000 re t t 2017

- tt me t eterm t

Foreign Acquisition

Guiding Principle

Contracting Officers shall follow all regulatory and statutory requirements in acquiring goods and services from foreign sources.

[References: FAR 25*,* DEAR 925*,* Executive Order 13788 *Buy American and Hire American]*

1.0 Summary of Latest Changes

This is a new Guide Chapter. This Chapter replaces Acquisition Letter (AL) 2008-06, entitled *Domestic and Foreign Procurement Preference Requirements*, which has been canceled. AL 2008-06 disseminated deviations to FAR provisions and clauses relating to foreign acquisition for use by Department of Energy (DOE), National Nuclear Security Administration (NNSA), and Power Marketing Administration (PMA) contracting activities. The provision and clause deviations are now included in DOE's STRIPES database.

Contracting Officers are cautioned that the various international trade agreements that impact foreign acquisitions are revised frequently, including the various procurement dollar thresholds, and participating countries. Therefore, whenever there is a reasonable possibility that foreign entities may submit offers in response to a DOE, NNSA, or PMA solicitation, Contracting Officers should consult with appropriate Legal Counsel to determine applicability of FAR and DEAR provisions and clauses relating to foreign acquisitions.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. This chapter discusses the use of FAR provisions and clauses for use in foreign acquisitions, and also includes the class deviation that was executed by the DOE and NNSA Senior Procurement Executives (SPE).

2.1 Background. Numerous statutes, regulations, international agreements, and policies address the procurement of domestic and foreign supplies, construction material, and services by Federal agencies. FAR Part 25 and agency supplemental regulations implement these rules. Executive Order 13788 states that it is the policy of the Executive Branch to maximize, consistent with law, through terms and conditions of Federal procurements, the use of goods, products, and materials produced in the United States.

FAR Subparts 25.1 and 25.2 address the Buy American Act (BAA) requirements. The BAA establishes a preference for offers of "domestic end products" and "domestic construction material" as compared to offers of "foreign end products" and "foreign construction material" (see FAR 25.003 for definitions) in Federal procurements. The BAA applies to supplies acquired for use in the United States, including supplies acquired under contracts set aside for small business concerns, if: (1) the supply contract exceeds the micro-purchase threshold; (2) the supply portion of a contract for services involving the furnishing of supplies (*e.g.,* lease) exceeds the micro-purchase threshold; or, (3) the contract is for the construction, alteration, or repair of any public building or public work in the United States. The BAA does not apply to services. Exceptions to the application of the BAA are set forth in FAR 25.103 and FAR 25.202. Also, FAR 25.104 identifies articles that have been determined to be nonavailable from domestic sources, which are therefore exempt from BAA requirements.

FAR Subpart 25.4 sets forth policies and procedures that apply to acquisitions that are covered by various trade agreements, including the World Trade Organization Government Procurement Agreement (WTO GPA), numerous Free Trade Agreements (FTAs), the Caribbean Basin Trade Initiative, and the Israeli Trade Act (ITA). FAR 25.401 identifies several exceptions to the Trade Agreements policies and procedures.

In general, the Trade Agreements Act (TAA) gives the President the authority to waive the BAA's discriminatory provisions for eligible products from countries that have signed an international trade agreement with the United States. The President has delegated this waiver authority to the U. S. Trade Representative (USTR), who has waived the BAA procedures in acquisitions for eligible products covered by the WTO GPA, FTA, or the ITA. The end result is that foreign offers of eligible products would then receive equal consideration with domestic offers. The value of the acquisition is a determining factor in the applicability of trade agreements and FAR 25.402 sets forth the various dollar thresholds, which are revised by the USTR regularly, and published in the Federal Register. Contracting activities with specific dollar-denominated procurement thresholds are responsible for monitoring those thresholds when making purchases at, or near, those levels.

2.2 Guidance. DOE, NNSA, and the PMAs are not subject to the Israeli Trade Act (FAR 25.406), or the Caribbean Basin Economic Recovery Act (FAR 25.405), which provide for non-discriminatory treatment of end products or construction materials from Israel, and certain Caribbean Basin countries. However, DOE, NNSA, and the PMAs must continue to waive the restrictions of the BAA to end products from Israel and Caribbean Basin countries listed as "designated countries" in accordance with section 205.405 of the TAA.

The deviated FAR provisions and clauses included in STRIPES reflect these exceptions, which are unique to DOE. Additionally, pursuant to Annex IV of the North American Free Trade Agreement (NAFTA), the PMAs may not waive the BAA requirements for offers of supplies or construction from Canada. The STRIPES database includes the FAR deviations that reflect this exception which is unique to the PMAs.

The STRIPES deviations to FAR provisions and clauses have been approved by the DOE and NNSA SPEs. These versions of the FAR provisions and clauses should be used in accordance with the relevant FAR prescriptions contained in FAR Subpart 25.11.

2.3 Class Deviation. The Class Deviation for FAR 52.225-3, -4, -5, -6, -11, and -12 that was approved by the DOE and NNSA SPEs is attached.

3.0 Attachments

Federal Acquisition Regulation (FAR) Class Deviation Regarding FAR 52.225-3, -4, -5, -6, -11, and -12.

Attachment

Class Deviation

DEPARTMENT OF ENERGY
and
NATIONAL NUCLEAR SECURITY ADMINISTRATION

DETERMINATION AND FINDINGS

FEDERAL ACQUISITION REGULATION (FAR) CLASS DEVIATION REGARDING FAR 52.225-3, -4, -5, -6, -11, and -12

FINDINGS:

1. The statutes, regulations, and policies that govern the actions of Federal agencies regarding foreign acquisition, such as the Buy American Act (BAA), the Trade Agreements Act (TAA), the Israeli Trade Act (ITA), and the Carribean Basin Economic Recovery Act (CBERA), are stated in FAR Part 25.

2. The Department of Energy (DOE), including the National Nuclear Security Administration (NNSA), and the Power Marketing Administrations (PMAs), have been treated separately in many respects. For instance, DOE, NNSA, and PMAs are not subject to the CBERA or the ITA (FAR 25.406). The PMAs are required by the U.S. Trade Representative not to give preferred treatment under the North American Free Trade Agreement (NAFTA) or the TAA to Canadian products and construction materials.

3. The clauses and solicitation provisions at FAR 52.225-3, -4, -5, -6, -11, and -12, reflect application of statutes and preferences to which DOE, NNSA, and the PMAs are not subject. In order to accurately reflect the application of those clauses and solicitation provisions for use in DOE, they must be modified to exclude portions that cover the CBERA and the ITA. The portions of those clauses and solicitation provisions that relate to the TAA and Canada must also be modified for use by the PMAs.

4. FAR Subpart 25.11 prescribes the use of the appropriate clauses and solicitation provisions. Those FAR prescriptions do not reflect the special treatment of DOE, NNSA, and the PMAs. The prescriptions are generally based upon dollar thresholds. The U.S. Trade Representative has designated special dollar thresholds for the PMAs. In order to properly use the clauses and solicitation provisions, the FAR prescriptions must be adapted to reflect the obligation of DOE, NNSA, and the PMAs.

5. On July 12, 2002, DOE and NNSA executed a similar Class Deviation for these FAR clauses.

DETERMINATION:

Pursuant to FAR Subparts 1.4 and 1.7, and based upon these findings, I hereby determine that it is necessary to deviate from the clauses and solicitation provisions at FAR 52.225-3, -4, -5, -6, -11, and -12 to accurately specify the obligations of DOE, NNSA, and the PMAs with regard to foreign acquisitions.

In accordance with FAR 1.703, I further determine that it is necessary to deviate from the prescription of the clauses and solicitation provisions at FAR 25.11 in order to properly reflect their use by DOE, NNSA, and the PMAs, under the laws of the United States and direction of the President and the U.S. Trade Representative. This class deviation shall be effective until the DEAR is amended to incorporate the deviations to these FAR clauses.

APPROVAL _____ DATE 2/19/08
Director, Office of Procurement and Assistance Management
Department of Energy

APPROVAL _____ DATE 2/19/08
Director, Office of Acquisition and Supply Management
National Nuclear Security Administration

b e te t

CHAPTER 30 - COST ACCOUNTING STANDARDS ADMINISTRATION

0 201 er t ert tr t r e e e e t e t e t tr t t
t St r mp e t e ember 201

DOE's Oversight of Certain Contractor Defined Benefit Pension Plans and Its Effect on Contracts, Cost Accounting Standards Compliance, and Audits

Guiding Principles

- Before requesting an audit, advise auditors of the divergence of DOE requirements from those of CAS 412 and CAS 413; and
- When requesting the audit, direct the auditors to audit to DOE's requirements where incongruities between DOE's requirements and those of CAS 412 or CAS 413 occur.

[References: DOE Order 350.1, Cost Accounting Standards 412 and 413]

1.0 Summary of Latest Changes

This update makes administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. This chapter does not cover efforts and projects performed for DOE by other Federal agencies.

This Chapter provides guidance regarding Cost Accounting Standards and DOE's oversight of defined benefit pension plans sponsored by DOE contractors under: (1) management and operating (M&O) contracts; and (2) any other facility management contracts (FMCs) where work had previously been performed under a DOE M&O contract. For purposes of this Chapter, a FMC is a DOE contract in which the successor contractor has been required to employ all or part of the former contractor's workforce and has assumed sponsorship of the employee pension and benefit plans, or one in which the contractor has retained sponsorship of benefit plans after the performance of the underlying work scope has been completed. FMCs include, but are not limited to, environmental remediation, infrastructure services and other site specific project completion contracts.

2.1 DOE's Pension Funding Requirements Versus Those of Cost Accounting Standards. DOE has oversight responsibility with respect to defined benefit pension plans sponsored by DOE contractors under: (1) M&O contracts; and (2) FMCs where work was previously performed under a DOE M&O contract. DOE's policy is to reimburse its M&O and

Liability with Respect to Cost Accounting Standards clause, without obtaining consideration, to any affected contract without the clause as soon as practicable.

Before requesting an audit related to affected contracts, Contracting Officers shall advise auditors of the divergence of DOE requirements from Cost Accounting Standard 412 and Cost Accounting Standard 413 requirements. When requesting an audit of affected contracts, Contracting Officers shall direct auditors to audit to DOE's requirements where incongruities with Cost Accounting Standard 412 and Cost Accounting Standard 413 occur.

FMC contractors for minimum contributions required under ERISA to their pension plans covering site employees.

To implement this policy, DOE includes the Contractor Requirements Document (CRD) of Chapter VI of DOE Order 350.1, Contractor Human Resource Management Programs, into each of the affected contracts. (In some cases, rather than including the CRD of Chapter VI of the Order in the contract, DOE has included the requirements of the CRD in a clause in section H of the contract. This Chapter uses the term "CRD of DOE Order 350.1" or simply "CRD" to refer to either the CRD of Chapter VI of DOE Order 350.1 or a clause in section H of a contract incorporating the CRD's requirements.)

As a result of the divergence of DOE's policy from the requirements of Cost Accounting Standard 412 and Cost Accounting Standard 413, DOE contractors sometimes are not in compliance with certain aspects of Cost Accounting Standard 412 or Cost Accounting Standard 413. The M&O contract clause on Liability with Respect to Cost Accounting Standards (DEAR 970.5232-5) protects contractors from liability for not complying with Cost Accounting Standards if their failure to comply was due to DOE's direction. The clause is required for M&O contracts. As discussed earlier, certain FMCs, while not M&O contracts, are former M&O contracts under which DOE chose to maintain its oversight of the contractor's pension system and included the CRD. The Liability with respect to Cost Accounting Standards clause should be included in these contacts. Even if the Liability with respect to Cost Accounting Standards clause is not included in a particular contract, DOE will not disallow costs or otherwise penalize a contractor for Cost Accounting Standards non-compliance due to the contractor's compliance with DOE direction.

The Liability with respect to Cost Accounting Standards clause does not waive Cost Accounting Standards. It only indemnifies the contractor for non-compliances with Cost Accounting Standards that are caused by the contractor's following DOE written direction. The contractor must comply with all other terms of the contract (to the extent not precluded by DOE's direction), including those relating to the timing of funding that are found in the cost principles applicable to the contract.

2.2 Guidance. Contracting Officers shall include the CRD of DOE Order 350.1 (or successor requirements implementing Departmental policy regarding reimbursement of pension contributions) and the Liability with Respect to Cost Accounting Standards clause in: M&O contracts; and other FMCs where work had previously been performed under a DOE M&O contract and the successor contractor has been required to employ all or part of the former contractor's workforce and to sponsor the employee pension and benefit plans or retain sponsorship of benefit plans that survive the performance of work scope.

For any FMC that contains the CRD of DOE Order 350.1 (or other DOE requirements which diverge from CAS requirements) and not the Liability with Respect to Cost Accounting Standards clause, Contracting Officers shall not disallow any costs or otherwise penalize the contractors as a result of their non-compliance with Cost Accounting Standards due solely to their compliance with written DOE direction. In addition, the Contracting Officer shall add the

b e te t

CHAPTER 31 - CONTRACT COST PRINCIPLES AND PROCEDURES

1 20 1 b e e er e t t tr t r Sp re ere e t 2017

1 20 1 tr t t b e t rm September 201

1 20 tr t r e eme t e reme t ppr Sett eme t eterm t e b t Sett eme t t September 201

1 b t rre t pr 201

Allowable Food and Beverage Costs At Department Of Energy (DOE) and Contractor Sponsored Conferences

Guiding Principles

- Effective oversight systems are essential to ensuring the high quality/integrity of costs charged to contracts.
- Collaboration and cooperation are required to maintain timely, effective control processes.

[References: FAR Part 31]

1.0 Summary of Latest Changes

This update: (1) revises the chapter number from 31.2 to 31.205-13 to align with the FAR, and (2) includes administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the reference above and should be considered in the context of that reference.

2.1 Overview. This guide chapter discusses how Contracting Officers should help ensure only allowable food and beverage costs are charged to contracts (both management and operating contracts and other than management and operating contracts) that involve DOE and contractor sponsored conferences. The chapter reminds Contracting Officers of the requirements of Federal and Departmental regulations, Departmental procurement policy, and governing contract terms and conditions. Finally, the chapter points out contractual and administrative requirements and the attendant responsibilities of Contracting Officers.

2.2 Federal Acquisition Regulation (FAR). The FAR cost principles, found at FAR Part 31, are incorporated into a management and operating contract via its Payments and advances clause (Department of Energy Acquisition Regulation (DEAR) 970.5232-2) and into an other than management and operating contracts via the Allowable cost and payment clause (DEAR 952.216-7). Those cost principles state that for a cost to be allowable, it must be allocable to the contract, reasonable, and not specifically unallowable per FAR Part 31. Two cost principles directly related to conference costs are found at FAR 31.205-43 (Trade, business, technical and professional activity costs) and FAR 31.205-14 (Entertainment costs). The concept of reasonableness and how it applies to a food and beverage cost incurred at a conference will be discussed below under "Departmental Procurement Policy."

2.3 Department of Energy Acquisition Regulation (DEAR). The DEAR cost principles do not include any additional cost principles to the FAR that specifically cover allowable food and beverage costs that involve DOE and contractor sponsored conferences.

2.4 Departmental Procurement Policy. As stated above, the concept of reasonableness applies in determining if a cost, including a food and beverage cost incurred at a conference, is allowable. FAR Part 31 provides a discussion of reasonableness, which is included in a more detailed discussion in Acquisition Letter 2005-12, Meal Costs in Management and Operating Contracts. While that Acquisition Letter does not focus on the allowability of food and beverage cost incurred at a conference, its explanation of the concept of reasonableness is applicable to all DOE contracts (both management and operating contracts and other than management and operating contracts).

As Acquisition Letter 2005-12 states, 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's 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.

A reasonableness test (both nature and amount) must be met for any cost to be allowable—that is, to be allowable, both the nature of the reimbursement and its amount must be reasonable for the specific circumstances under which they are incurred. 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. However, 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.

Contracting Officers should use the following criteria (DOE's benchmarks of allowable/unallowable food and beverage costs, which are based on Department of Justice guidance) in determining the reasonableness of food and beverage costs charged to contracts that involve DOE and DOE contractor sponsored conferences.

- The amount by which the cost per person of any meal provided exceeds 150% of the locality's meals and incidental expenses (M&IE) rate for that meal should be examined closely. For example, if dinner will be provided at a locality with a $56.00 per day M&IE rate with a $29.00 per dinner M&IE rate (see www.gsa.gov/mie), the cost of the dinner provided at a conference should not exceed $43.50 ($29.00 x 150%) per person. The amount by which the cost per person of any meal exceeds 150% of the locality's M&IE rate for the meal calculated using this methodology should in almost every case be determined unallowable.

- The number of meals provided should be reviewed for reasonableness under the circumstances of the conference's professional activities and goals.
- The amount by which the cost per person for refreshments provided in one day exceeds 25% of the locality's per day M&IE rate should in almost every case be determined unallowable. For example, if the locality's per day M&IE rate is $56.00, then the cost per person of refreshments provided at a conference cannot exceed $14.00 ($56.00 x 25%) per day.

2.5 Contract Terms and Conditions. Contract terms and conditions incorporate, either directly or by reference, all of the requirements of Federal and Departmental regulations and Departmental procurement policy.

2.6 Contractual and Administrative Requirements and Contracting Officer Responsibilities. The Contracting Officer must ensure, as part of his or her review of the contractor's proposed Annual Audit Plan (see Acquisition Guide Chapter 70.4) or other audit planning documents as appropriate, that the plan places appropriate emphasis on the audit of conference costs in accordance with the requirements of Federal and Departmental regulations and Departmental procurement policy.

As part of the Contacting Officer's review and approval of the Contractor's Purchasing System, the Contracting Officer: must review contractor internal policies, procedures, and internal controls on conferences; ensure their compliance with the requirements discussed in this Guide chapter; ensure the contractor has implemented the internal policies, procedures, and internal controls; and, for DOE M&O contracts, require, in coordination with the Office of Inspector General or other audit organization as appropriate, the contractor to direct its internal audit staff to ensure adherence to the internal policies, procedures, and internal controls.

2.7 Model Language to Communicate the Department's Expectations to Contractors. The following language is provided for those situations where the Contracting Officer deems it prudent to notify the Contactor in writing regarding what the Department will consider reasonable for food and beverage costs provided at a conference.

The contractor is responsible for ensuring that only allowable food and beverage costs are charged to the contract regarding Department of Energy and contractor sponsored conferences. Regarding the reasonableness of such costs, the contractor shall adhere to the following criteria. The Government will apply these criteria in determining the reasonableness of food and beverage costs charged to the contract.

The amount by which the cost per person of any meal provided exceeds 150% of the locality's meals and incidental expenses (M&IE) rate for that meal will be examined closely. For example, if dinner will be provided in a locality with a $56.00 per day M&IE rate with a $29.00 per dinner M&IE rate (see www.gsa.gov/mie), the cost of the dinner provided at a conference should not exceed $43.50 ($29.00 x 150%) per person. The amount by which the cost per person of any meal exceeds 150% of the locality's M&IE rate for the meal calculated using this methodology will be unallowable unless the contractor provides sufficient evidence to substantiate the amount is reasonable.

The number of meals provided must be reasonable under the circumstances of the conference's professional activities and goals.

The amount by which the cost per person of refreshments provided in one day exceeds 25% of the locality's per day M&IE rate will in almost every case be unallowable. For example, if the locality's per day M&IE rate is $56.00, then the cost per person of refreshments provided at a conference cannot exceed $14.00 ($56.00 x 25%) per day.

Contracting with Public Relations Firms

Guiding Principles

- Be aware of the requirement to coordinate all public relations contracts with OPA.
- Be aware of cost principles in FAR 31.2.

[Reference: FAR 31.205-1]

1.0 Summary of Latest Changes

This update includes minor administrative changes.

2.0 Discussion

2.1 Overview. This chapter supplements other more primary acquisition regulations and policies contained in the reference above and should be considered in the context of that reference. It also discusses the Department of Energy's procedures when obtaining contractual services from public relations firms. "Public relations" means all functions and activities dedicated to-

(1) Maintaining, protecting, and enhancing the image of a concern or its products; or

(2) Maintaining or promoting reciprocal understanding and favorable relations with the public at large, or any segment of the public. The term public relations include activities associated with areas such as advertising, customer relations, etc.

2.2 Background. The Office of Public Affairs (OPA) is responsible for collecting and disseminating information about the Department's programs, missions, and activities. The OPA establishes guidelines for the review and coordination of activities for that mission. These activities include coordination on contacts to public relations firms that assist program offices in collecting and disseminating information.

2.3 Current Requirements. OPA has requested that no DOE contract action for the acquisition of public relations or communications services be initiated without coordination with the Headquarters Office of Public Affairs, PA-1, or Public Information (PA-40). National Nuclear Security Administration offices should coordinate through NA-3.5, Office of Congressional, Intergovernmental and External Affairs.

The procurement request initiator is responsible for this coordination prior to submitting the procurement request to the cognizant procurement office. Contracting Officers should not process any requirement for public relations or communications services without the consent of the Office of Public Affairs. Requests received without said consent should be returned to the initiator for action. Communications services are not intended to encompass contracts for telephone service.

Contractor Legal Management Requirements, Approving Settlements, and Determining the Allowability of Settlement Costs

Guiding Principles:

Close collaboration between Department counsel and Contracting Officers is required to ensure effective management of contractors' legal costs.

Decisions regarding contractors' requests to settle legal claims and the allowability of associated costs may be made simultaneously only in limited circumstances.

[References: 10 CFR Part 719, FAR Subpart 31.2, DEAR Subpart 31, and DEAR Subpart 970.31]

Summary of latest changes

This guide chapter replaces its predecessor (Chapter 31.3 of September 2010 "Contractor Legal Management Requirements") and significantly expands upon its guidance. The predecessor chapter only briefly discussed two aspects of managing contractor legal costs: contractors' hiring outside counsel; and contractors' exercise of prudent business judgement. This guide chapter provides great detail concerning the requirements of the current version of the Contractor Legal Management Requirements at 10 CFR part 719 (reflecting its May 2013 update), addresses considerations for approving settlements, and covers several key facets of determining the allowability of settlement costs.

Overview

This guide chapter deals with three aspects of the Department's management of contractor legal matters—(1) regulatory requirements regarding contractors' litigation management and legal expenditures, (2) approving contractors' requests to settle, and (3) making cost allowability determinations for approved settlements.

Background

DOE has placed special emphasis on managing contractor litigation and its associated costs for over two decades. The first litigation management procedures, issued in March 1994, applied to virtually all cases where DOE might be contractually responsible for contractor litigation costs. These procedures imposed substantive requirements on DOE field counsel, contractor counsel, and outside counsel to ensure that the public funds were not spent imprudently. Contactors' non-compliance resulted in disallowance of costs. The procedures have been

revised several times and were codified in the Code of Federal Regulations (CFR) in April 2001. These Contractor Legal Management Requirements at 10 CFR part 719 were most recently updated in May 2013. Among other revisions, the 2013 update instituted a requirement that contractors obtain DOE permission to settle certain matters involving contractor payment of $25,000 and over and clarified that contractors' compliance with the regulations at 10 CFR part 719 is a prerequisite for reimbursement of legal costs covered by the regulations.

Discussion

Contractor Legal Management Requirements (10 CFR part 719)

Title 10 CFR part 719, *Contractor Legal Management Requirements*, "facilitates management of retained legal counsel and contractor legal costs, including litigation and legal matter costs." The requirements cover all M&O contracts; non-M&O cost-reimbursement contracts exceeding $100,000,000; and non-M&O contracts exceeding $100,000,000 that include cost-reimbursable elements exceeding $10,000,000 (e.g., contracts with both fixed-price and cost-reimbursable line items where the cost-reimbursable line items exceed $10,000,000 or time-and-materials contracts where the materials portions exceed $10,000,000).

Key requirements include the following:

- Legal Management Plan (LMP) – Each contractor is required to submit this document within 60 days of contract award, describing the contractor's practices for managing legal costs and legal matters for which it procures the services of retained legal counsel. Department counsel generally receives, reviews, and approves the LMP. Department counsel is defined as "the attorney in the DOE or NNSA field office, or Headquarters office, designated as the contracting officer's representative and point of contact for a contractor or for Department retained legal counsel, for purposes of this part." (Note: LMP's may include lower dollar value thresholds for reporting and/or permission requirements than required by 10 CFR part 719.)
- Annual Legal Budget – Contractors must submit an annual legal budget that includes cost projections for significant matters at a level of detail reflective of the types of billable activities and the stage of each such matter. Significant matters include matters involving significant issues as determined by Department counsel and identified to a contractor in writing, and any legal matters where the amount of legal costs over the life of the matter is expected to exceed $100,000.
- Staffing and Resource Plans – Contractors are required to submit this document prepared by retained legal counsel that describes the method for managing a significant matter in litigation.
- Engagement Letters – Each contractor must submit a copy of an executed engagement letter between it and retained legal counsel to Department counsel when the retained counsel is expected to provide $25,000 or more in legal services for a particular matter.
- Contractor Initiation of Litigation – Each contractor must provide written notice to Department counsel prior to initiating litigation or appealing from adverse decisions.

A contractor may not initiate litigation for which it seeks reimbursement without prior written authorization of Department counsel.

- Litigation against the Contractor – Contractors must give the contracting officer and Department counsel immediate notice in writing of any legal proceeding, including any proceeding before an administrative agency.
- Settlements – Contractors must obtain permission from Department counsel to enter a settlement agreement if the settlement agreement requires contractor payment of $25,000 or more.
- Specific categories of costs – The regulations address assessment of the reasonableness of legal fees, outside counsel travel costs, and identify certain costs that require advanced approval to be considered for reimbursement.

Title 10 CFR 719.40 conditions reimbursement of legal costs on contractor compliance with the requirements of Title 10 CFR part 719. Any costs covered by the Contractor Legal Management Requirements that do not comply with them are expressly unallowable.

Any request to deviate from the Contractor Legal Management Requirements must be submitted in writing to Department counsel and approved by the DOE or NNSA General Counsel, as applicable. Even if the Contractor Legal Management Requirements have been followed, to be allowable contractor legal costs must comply with all of the other requirements at FAR 31.201-2(a), i.e., the costs must be reasonable, allocable, Cost Accounting Standards (CAS) (or Generally Accepted Accounting Principles (GAAP) if no CAS apply) compliant, compliant with the terms of the contract, and compliant with any limitations in FAR subpart 31.2.

Settlement Permission Requests Under 10 CFR 719.33

Title 10 CFR 719.33 requires contractors to seek permission from Department counsel to enter into a settlement agreement if the agreement requires contractor payment of $25,000 or more. In its written request to Department counsel seeking settlement permission, the contractor must provide the background of the case, the history of the settlement discussions, the proposed terms of the settlement, and a description as to why settlement of the matter is in the best interest of the Department. *See* 10 CFR 719.34. Title 10 CFR 719.33 specifically notes that a determination that the contractor may settle the case does not mean that the underlying costs will be considered allowable. As noted above, compliance with all parts of 10 CFR part 719, including DOE/NNSA approval of settlements, is a prerequisite for a legal cost to be allowable.

Allowability of Settlement and Associated Legal Costs

Timing of Settlement and Associated Legal Costs Allowability Decisions. An allowability determination regarding a settlement may occur either 1) simultaneous with the determination as to whether the contractor may settle a case pursuant to 10 CFR 719.33, or 2) after the settlement agreement is executed. In both cases, the contracting officer must coordinate with Department counsel to review the facts surrounding the underlying claim and settlement.

At the time a contractor seeks simultaneous settlement permission from Department counsel under 10 CFR 719.33 and a cost allowability determination, the contractor may be in a position of superior knowledge or may have failed to obtain or deliver reasonably available pertinent information regarding the underlying facts that should factor into a determination of cost allowability. If Department counsel suspects either situation exists, he or she must refrain from considering requests for a cost allowability determination and the contracting officer must not make a cost allowability determination. In addition, as a practical matter, the time between the contractor's request to settle a case pursuant to 10 CFR 719.33 and the point at which the contractor needs an answer regarding permission to settle is often a very short period. In such instances approving simultaneous requests for settlement permission and cost allowability determinations may be impractical. The contracting officer must withhold a determination regarding the allowability of any portion or aspect of settlement related costs until he or she is able to make a fully informed decision on allowability.

Principles Guiding Cost Allowability Determinations. First, the contracting officer, in conjunction with Department counsel must evaluate whether the requirements of 10 CFR part 719 have been adhered to by the contractor. Then, FAR 31.205-47, *Costs related to legal and other proceedings*, should be used to determine whether the settlement and associated legal costs should be allowed under the criteria contained therein. Contracting officers must consider the specific facts surrounding the legal claims settled by the agreement under review.

Section 2.1 of Appendix A to 10 CFR part 719 provides: "While 10 CFR part 719 provides procedures associated with incurring and monitoring legal costs, the evaluation of the reason for the incurrence of the legal costs, e.g., liability, fault or avoidability, is a separate issue. The reason for the contractor incurring costs may affect the allowability of the contractor's legal costs." Such considerations include the following:

- Whistleblower claims – Costs associated with certain settled whistleblower cases are governed by DEAR 931.205-47(h) (non-M&O) or DEAR 970.3102-05-47 (M&O), which require the contracting officer (in consultation with Department counsel) to consider the terms of the contract, relevant cost regulations, and the relevant facts and circumstances, including federal law and policy prohibiting reprisal against whistleblowers, when determining whether defense, settlement, and award costs are allowable. See AL 2016-06, Provisional Reimbursement and Allowability of Costs Associated with Whistleblower Actions, at http://energy.gov/sites/prod/files/2016/08/f33/08-04-16_-_Acquisition_Letter_No._AL-2016-06.pdf.
- Employment Discrimination claims – Costs associated with certain settled employment discrimination lawsuits require the contracting officer (in consultation with Department counsel) to analyze the facts underlying the settled claim and determine whether the plaintiff's claims had more than very little likelihood of success on the merits to determine whether the legal costs and settlement costs are allowable. See AL 2014-03, Allowability of Contractor Litigation Defense and Settlement Costs, at http://energy.gov/sites/prod/files/2016/02/f29/AL%202014-03.pdf.
- Contractor Managerial Actions - The DEAR "Insurance-litigation and claims" clauses at DEAR 952.231–71 (non-M&O) and DEAR 970.5228-1 (M&O) provide limitations

on the allowability of costs that result from the willful misconduct, lack of good faith, or failure to exercise prudent business judgment by contractor managerial personnel.

It is essential to keep in mind at all times that even if the settlement is authorized and the settlement costs meet all of the above requirements, to be allowable the costs must comply with all of the other requirements of FAR 31.201-2(a), i.e., the costs must be reasonable, allocable, CAS (or GAAP if no CAS apply) compliant, compliant with the terms of the contract, and compliant with any limitations in FAR subpart 31.2.

Documentation of Settlement Allowability

In all instances, contracting officers must appropriately document determinations regarding contractors' requests for permission to settle and for reimbursement of settlement and associated legal costs. Upon determination that granting settlement permission is appropriate, the contracting officer's review of the allowability of the settlement costs should be performed expeditiously. (As stated earlier, the contracting officer must withhold a determination regarding the allowability of any portion or aspect of settlement related costs until he or she is able to make a fully informed decision on allowability. Additionally, complex litigation may necessitate an extended period of review.) Where the contracting officer, after consulting with Department counsel, is able to provide simultaneous settlement permission and cost allowability determination regarding the allowability of any portion or aspect of settlement related costs, a post-execution review of the associated settlement agreement is not required, unless otherwise required by the Legal Management Plan. Where new information becomes available that should have been provided by the contractor with its request for settlement permission and cost allowability determination, however, contracting officers must consult with Department counsel to determine whether further review is warranted.

Allowability of Incurred Costs

Guiding Principle

Determining the allowability of incurred costs requires understanding the five FAR requirements for reimbursement. The subject is complex. Misunderstandings can be minimized by early communication.

References

FAR Part 31	Contract Cost Principles and Procedures
DEAR Subpart 970.31	Contract Cost Principles and Procedures
DEAR Part 931	Contract Cost Principles and Procedures

I. Overview

This guide chapter discusses determining the allowability of incurred costs, emphasizing the five FAR requirements, especially the reasonableness requirement.

The chapter requires Contracting Officers, when reviewing current advance agreements or establishing new advance agreements, to ensure they: (1) neither provide that a cost unallowable per FAR Part 31 or applicable DOE cost principles is allowable nor agree to any other treatment of costs inconsistent with FAR Part 31 or applicable DOE cost principles; and (2) emphasize that the five requirements for allowability listed in FAR Subsection 31.201-2, especially the reasonableness requirement, must be met for the cost to be reimbursable.

The chapter also encourages Contracting Officers to be proactive in minimizing potential disputes over cost reasonableness and to communicate their view of a potentially troublesome cost's reasonableness to their contractors in writing before the cost is incurred.

II. Types of Contracts Affected

This guide chapter focuses on the reimbursement of incurred costs under cost-reimbursement contracts and contracts with cost-reimbursement line items.

(While not the focus of this guide chapter, many elements of the guidance provided apply to the pricing—which is primarily about estimated costs—of contracts, subcontracts, and modifications where cost analysis is performed.)

III. Background

Cost Allowability (Five Requirements; the Reasonableness Requirement)

Federal Acquisition Regulation (FAR) Part 31 discusses Federal contract cost principles and procedures. These principles and procedures apply to the pricing of contracts, subcontracts, and modifications where cost analysis is performed and to the determination, negotiation, or allowance of costs when required by a contract clause. Typically, FAR Part 31 (more specifically FAR subpart 31.2) is incorporated into a DOE contract by the DOE Payments and Advances clause at DEAR 970.5232-2 (in management and operating contracts) or the DOE Allowable Cost and Payment clause at 952.216-7 (in non-management and operating cost-reimbursement contracts and contracts with cost-reimbursement line items). The DOE specific cost principles supplement the FAR cost principles in management and operating contracts and in non-management and operating cost-reimbursement contracts and contracts with cost-reimbursement line items. They are incorporated into a contract by the DOE Payments and Advances clause or the DOE Allowable Cost and Payment clause.

FAR Subpart 31.2 addresses contracts with commercial organizations and stipulates costs are allowable (that is, reimbursable by the Government) to the extent they are reasonable, allocable, and determined to be allowable under FAR Sections 31.201 (general costs), 31.202 (direct costs), 31.203 (indirect costs), and 31.205 (selected costs).

FAR Subsection 31.201-2 specifies a cost is allowable only if it complies with five requirements: reasonableness, allocability, cost accounting standards if applicable (otherwise generally accepted accounting principles and practices appropriate to the circumstances), the terms of the contract, and the limitations set forth in FAR Subpart 31.2. (This language is a somewhat inelegant since FAR Subsection 31.201-2 is one of the "terms of the contract" by virtue of either the Payments and Advances clause or the Allowable Cost and Payment clause included in the contract. Both clauses incorporate the FAR cost principles and the applicable DOE cost principles.)

A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. If the contractor is not subject to effective competitive restraints, reasonableness of costs must be examined with particular care.

What is reasonable depends on, among other things, whether the cost: is generally recognized as ordinary and necessary for the conduct of a contractor's business or contract performance; incurred per a generally accepted sound business practice, arm's-length bargaining, law, and regulation; congruent with the contractor's responsibilities to the Government and the public at large; and consistent with the contractor's established practices. No presumption of reasonableness is attached to the incurrence of costs by a contractor. If the Government's initial review of the facts results in a challenge of a cost by the Government, the burden of proof is on the contractor to establish that the cost is reasonable.

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 and, subject to the foregoing, is allocable if it: is incurred specifically for the contract; benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or is necessary to the overall operation of the business, although a direct relationship to any particular cost objective cannot be shown.

The Cost Accounting Standards and policies and procedures for applying them are found at 48 CFR Chapter 99 (FAR) Appendix and FAR Part 30. They were formulated specifically for Federal procurement and address the measurement, assignment, and allocation of costs to negotiated Government contracts and subcontracts. Some contracts and subcontracts are exempt from the Cost Accounting Standards. Exemptions are listed at 48 CFR Chapter 9903.201-1(b) (FAR) Appendix. Even though a contract may be exempt from the Cost Accounting Standards, it remains subject to the measurement, assignment and allocability rules of selected Cost Accounting Standards because certain cost principles in FAR subpart 31.2 incorporate those rules. Contracts not subject to full Cost Accounting Standards coverage, for example, are subject to the applicable Cost Accounting Standards provisions in paragraphs (b) through (h) of FAR section 31.203. Generally accepted accounting principles and practices come from a variety of sources. They are a combination of authoritative standards and the commonly accepted ways of recording and reporting accounting information. Their focus is financial accounting. They reflect a general agreement as to which economic resources and obligations should be recorded as assets and liabilities, which changes in assets and liabilities should be recorded, when they should be recorded, how the assets and liabilities and changes in them should be measured, what information should be disclosed, how it should be disclosed, and which financial statements should be prepared. They were not formulated specifically for Federal procurement, and their shortcomings in addressing pricing and accounting issues that arise frequently in Government contracts were a primary reason for the dissemination of the Cost Accounting Standards.

The terms of the contract, in addition to those that explicitly address FAR or DEAR cost principles, can affect a cost's allowability in a number of ways. A contract term that requires

compliance with a statute would preclude reimbursement of costs a contractor incurred in deliberately flouting the statute. A contract provision that sets a ceiling on an indirect cost rate that the contractor can use to claim costs would preclude reimbursement of any additional costs calculated using a rate higher than the ceiling. A labor-hour contract (by definition) would preclude reimbursement of any material costs.

The limitations set forth in FAR Subpart 31.2 include both the "Selected costs" of FAR Section 31.205 (the "cost principles") and the guidance of FAR Sections 31.201 through 31.204.

FAR Section 31.205, among other things, establishes that certain costs are specifically unallowable and certain costs are specifically allowable. In the latter instance, FAR 31.205 does not mean a selected cost cited as specifically allowable will always be allowable (that is, the Government will reimburse the cost). The selected cost still must meet all of FAR 31.201-2's five requirements. Even though certain costs of depreciation, compensation, and relocation, for example, are specifically allowable in FAR 31.205, if the costs do not also meet each of the five requirements listed in FAR 31.201-2, they will not be reimbursed by the Government.

Advance Agreements

To avoid disallowance or dispute based on unreasonableness, unallocability, or unallowability under the cost principles, FAR encourages Contracting Officers and contractors to seek advance agreement on the treatment of special or unusual costs but cautions Contracting Officers that they are not authorized to agree to a treatment of costs inconsistent with FAR Part 31or to provide that a cost unallowable per FAR Part 31 is allowable.

Occasionally, in their zeal to act as good stewards of the taxpayers' dollars and manage their contracts efficiently, Contracting Officers establish advance agreements that bring about the exact opposite of what they were intended to achieve. That is, they increase the probability of disallowance of a cost or a dispute over it because the language of the agreements creates an ambiguity. Most often this ambiguity pertains to the reasonableness requirement.

Advance agreements may, among other things, state a certain cost will not be reimbursed, will be reimbursed up to a ceiling, or will be reimbursed. Regarding reasonableness of a cost, advance agreements may not state that the nature and amount of the cost they address will always be considered reasonable. They may establish only that the nature and amount of a particular cost will not always be considered specifically unreasonable. In other words, advance agreements regarding a particular cost must always, regardless of their subject, emphasize that FAR Part 31's five requirements for reimbursement, especially reasonableness, remain applicable to the particular cost.

Advance agreements should not simply state, for example, that travel costs up to a ceiling are allowable. Such language could mislead some parties to believe, erroneously, any travel costs incurred below the ceiling would be reimbursed. Per FAR Part 31, only travel costs both **below the ceiling** and **otherwise allowable per FAR Part 31** (and in DOE, of course, this includes the applicable DOE cost principles) would be reimbursed. One way of ensuring appropriate emphasis is given to all of the five requirements is to preface any discussion of a cost's allowability with the following language: "If not otherwise unallowable per the terms of the contract, including the requirements of FAR Subsection 31.201-2 and of applicable DOE cost principles."

Cost Reasonableness:
Contracting Officer Actions Before Costs Are Incurred

Disputes over an incurred cost's reasonableness can be a source of unnecessary friction between the Government and a contractor. Once the contractor has incurred a cost in fulfilling its obligations under its contract it is understandable if the contractor is extremely reluctant to pay the cost out of its own pocket. Courts and Boards have been sympathetic to contractors' appeals of Government decisions to disallow costs because the costs were unreasonable.

On the other hand, if the contractor knows before it incurs a cost that the cost's reasonableness will be questioned, most disputes regarding a cost's reasonableness can be avoided. A contractor would likely avoid incurring any cost the Government had indicated it would consider unreasonable.

Advance agreements are not always employed. And it is neither practical nor desirable to address every cost under every circumstance under cost-reimbursement contractual arrangements. There are occasions, however, where the Government is aware the contractor may be contemplating incurring certain costs that would likely lead to disputes over their reasonableness. In such situations, both parties will benefit from a statement from the Contracting Officer indicating what the Government will consider reasonable.

IV. Guidance

Advance Agreements

In administering cost-reimbursement contracts and other contractual vehicles under which the Government must reimburse a contractor's incurred costs, Contracting Officers should seek to establish advance agreements where appropriate on the treatment of special or unusual costs. Contracting Officers shall not agree that a cost unallowable per FAR Part 31 or applicable DOE cost principles is allowable or that any other treatment of costs inconsistent with FAR Part 31 is permitted. Advance agreements regarding costs must always emphasize that, regardless of their language, the Government will only reimburse costs if each of the five requirements for

allowability listed in FAR Subsection 31.201-2 are met, especially the reasonableness requirement. Contracting officers must preface any discussion of a cost's allowability with the following or similar language: "If not otherwise unallowable per the terms of the contract, including the requirements of FAR Subsection 31.201-2 and of applicable DOE cost principles."

Cost Reasonableness: Contracting Officer Actions Before Costs Are Incurred

In administering cost-reimbursement contracts and other contractual vehicles under which the Government must reimburse a contractor's incurred costs, Contracting Officers should consider if it is prudent to specify what the Government will consider reasonable regarding a particular cost prior to the contractor's incurring the cost. The Contracting Officer may proscribe the cost, set a ceiling on the cost, establish criteria for determining the reasonableness of the cost, or take any other action he/she deems prudent to avoid unnecessary disputes regarding the reasonableness of a potential future cost before the contractor incurs it. Contracting Officers should attempt to accomplish such understandings working with contractors, but if circumstances do not permit mutual agreement to be reached in a timely manner they should not hesitate to take unilateral action. Written communication of any ilk from a Contracting Officer to a contractor will help minimize misunderstandings over what the Government will consider reasonable.

Examples

An advance agreement regarding meals may not state that the nature and amount of the cost of employees' meals will always be considered reasonable. 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.

An advance agreement regarding travel expenses may not state that the nature and amount of all of the cost of employees' travel expenses on extended assignments will always be considered reasonable. Prudent business people do not routinely pay all of the cost of their employees' travel expenses if the employees are on extended assignment ─ the nature of all of the expenses is not reasonable. An occasion could arise, however, in which the Government imposed a

requirement that necessitated a contractor's employee's extended assignment and the particular circumstances justified some reimbursement of travel expenses. The nature of these expenses is then reasonable. Even if the nature of the expenses is reasonable, a portion of the expenses could be unallowable because the total of the expenses is excessive. So in the previous example, if the contractor provided its employee a travel allowance far in excess of Federal norms, the amount of the expense would be unreasonable and only the portion of the expense in line with Federal norms would be allowable. Finally, after some period of time, the employee's travel expenses would exceed any relocation costs and therefore typically not be allowable since the nature of the expenses would not be reasonable.

If a Contracting Officer believes travel will not be necessary under a cost-reimbursement contract that does not include an advance agreement on travel, the Contracting Officer should consider providing a written statement to the contractor indicating the Government will not consider travel costs reasonable.

If a Contracting Officer believes local travel will be necessary but easily accommodated using public transportation (as opposed to renting cars) under a cost-reimbursement contract that does not include an advance agreement on travel, the Contracting Officer should consider providing a written statement to the contractor indicating the Government will not consider travel costs for renting cars reasonable.

b e te t

CHAPTER 32 - CONTRACT FINANCING

2 01 e e ppr e t 2017

2 01 er rm e r tee 201

Reviewing and Approving Contract Invoices

Guiding Principles

Contracting Officers are responsible for ensuring that contract invoices are properly reviewed and analyzed and that the Government makes payments to contractors only for goods and services received and accepted pursuant to contractual terms and conditions.

[References: FAR Part 42 and DEAR Part 942]

1.0 Summary of Latest Changes

This update: (1) revises the chapter number from 32.1 to 32.901 to align with the FAR, and (2) includes administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references.

2.1 Overview. This guide chapter discusses guidance for ensuring that invoices/vouchers are properly reviewed and analyzed prior to making any payments to contractors (for the purposes of this Chapter, the terms "invoice" and "voucher" are used interchangeably). Recent Government Accountability Office (GAO) audits have identified several cases of inadequate practices relating to the review and approval of contract invoices. The weaknesses identified in the audits contributed to situations where the agency was vulnerable to making improper payments to contractors. While the audit findings are not necessarily indicative of a systemic problem within DOE, proper contract administration practices related to the invoice review and approval process are being highlighted in this Chapter for invoice approving officials to follow.

Individual DOE procurement offices may currently have their own local standard operating procedures in place for processing contract invoices. This Guide Chapter is not intended to repeat or conflict with local procedural guidance, but to offer general guiding principles for approving officials to consider when reviewing and analyzing cost elements included in contract invoices.

2.2 Background. The approval of contract invoices is just one of the many contract administration functions for which Contracting Officers (CO) are responsible. As with many administrative functions, the review and approval of invoices may be delegated by the CO to other Government personnel, such as a Contract Specialist (CS), a Contracting Officer Representative (COR), or another qualified federal agency representative (such as the Defense Contract Audit Agency).

Nonetheless, the cognizant CO is ultimately responsible for monies paid out under his or her contracts, and must ensure that invoices are thoroughly and adequately reviewed.

Proper practices for reviewing and approving invoices are addressed in formal training required under DOE's Acquisition Career Management Program (ACMP), which is defined in DOE O 361.1B. The Order prescribes training requirements for COs, CSs, and CORs, and includes a requirement for refresher training every two years. Procurement Directors should ensure that all acquisition personnel meet the requirements of the ACMP prior to performing contract administration functions, including the review and approval of contract invoices.

Contract terms and conditions spell out the specific instructions to contractors for submitting and substantiating their invoices. In DOE, contractors submit invoices electronically through the Oak Ridge Financial Service Center's (ORFSC) Vendor Inquiry Payment Electronic Reporting System (VIPERS). Once an invoice is received and logged into the accounting system, appropriate DOE personnel, who have been identified as the proper reviewing and approving officials, receive notification from VIPERS that an invoice has been submitted and is ready for review and approval. Approving officials can then access the Vendor Invoice Approval System (VIAS) which gives the cognizant contracting and program officials the necessary access for reviewing and approving the invoice. These officials access the electronic invoice on the web page, review the pertinent information, and either approve in full or partially, or disapprove the invoice for payment.

2.3 Review of Invoices. The responsible invoice approving official must ensure that the following specific items are adequately addressed prior to approving the invoice, as applicable to their specific contract -

- Have the required items been delivered and/or the required services been performed?
- Are delivery and/or performance in accordance with the contractual terms and conditions?
- Are any billed items and/or services included in previously paid invoices?
- Are all submitted costs consistent with requirements in the contract, including contract ceilings, key personnel, subcontract costs, travel and equipment?

- Have all Other Direct Costs (ODCs) been properly substantiated and are the costs consistent with the requirements in the contract?
- Are all costs allowable and allocable to the contract?
- Is the invoiced period within the period of performance of the contract?
- Were technical oversight and assessment results of the contractor's performance reviewed against the invoice?
- Are labor hours billed at appropriate rates?
- Are contractor employees qualified to perform the work consistent with the terms of the contract?
- Were progress payments under a fixed-price contract reviewed for accuracy and completeness and do they match other contractor reported data?
- Are all identifying data on the invoice (contract number, contractor name, address, date of invoice, etc) accurate?
- Was consideration given to any unique contractual terms and conditions (discounts, inspection periods, etc.)?
- Are provisional rates and fees billed consistent with contractual terms and conditions, and are the rates applied appropriately to costs?
- Are arithmetic calculations correct?
- Are claimed costs within the estimated cost of the award?
- Are payments within the ceilings established in the Limitation of Cost or Limitation of Funds clauses?
- Are deductions being made in the invoice amount? If so, was the contractor appropriately notified?
- If an overpayment was detected, was there a prompt follow-up and recovery of the funds?

Although this list of items may not be all-inclusive, following a methodical invoice review and approval process that includes analyzing these kinds of invoice items can ensure that the

Government makes payments to contractors only for goods and services received and accepted pursuant to contractual terms and conditions.

2.4 Expedited Review of Small Business Invoices. In accordance with the OMB Memorandum M-11-32, "Accelerating Payments to Small Businesses for Goods and Services," issued on September 14, 2011, it is the policy of the Executive Branch to pay invoices from small businesses as quickly as practicable, with a goal of paying within 15 days. The memorandum does not modify the Prompt Payment Act's late payment interest penalty provisions. In order to achieve the goal, Contracting Officers must ensure that small business invoices are reviewed and approved in VIAS within 10 calendar days. This will leave sufficient time for CFO to process payment within the overall 15 day goal.

If invoice approval has been delegated to the COR, the CO must inform the COR of this new requirement and ensure they are able to comply. If the COR is unable to comply, the CO shall rescind the delegation to approve invoices.

Performance Guarantees

Guiding Principle

A performance guarantee is an enforceable commitment by a corporate entity to supply the necessary resources to a prospective contractor and to assume all contractual obligations of the prospective contractor.

[References: FAR 9.104; FAR 9.105; FAR 32.501-5; DEAR 909.104-3; DEAR 970.0970]

1.0 Summary of Latest Changes

This update includes administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references.

2.1 **Overview**. This chapter provides a model performance guarantee agreement for use with new entities that contract with the Department.

2.2 **Background**. The Department of Energy contracts with entities that have been created by an already existing corporate entity or entities solely for the purpose of performing a specific contract. This occurs with the award of most management and operating contracts.

This situation also can occur in the award of contracts that are not management and operating contracts where the prospective awardee is created for performance of the instant contract, for example, where a joint venture or similar legally binding corporate partnership is created in other types of contracts.

The Government's interests must be protected if the financial and other resources of a potential awardee necessary to establish financial responsibility are owned or controlled by a parent corporate entity or other entity.

Prior to award of any contract, the contracting officer must make a responsibility determination, including consideration of whether the new entity will have sufficient financial and other resources available to it to carry out performance of the prospective contract, including any liabilities it could incur to the Department under the terms of the contract.

Attached is a model performance guarantee agreement. Each performance guarantee agreement should be drafted to ensure that it is enforceable in the forum where an enforcement action would be brought should the subsidiary corporate entity fail to perform, and should the parent or other entity refuse to fulfill its guarantee. The performance guarantee agreement should then be included as an appendix to the contract.

3.0 Attachment

1 Performance Guarantee Agreement

PERFORMANCE GUARANTEE AGREEMENT

For value received, and in consideration of, and in order to induce the United States (the Government) to enter into Contract No. _____ for the _____ (Contract dated, _____ , by and between the Government and _____ (Contractor), the undersigned, _____ (Guarantor), a corporation incorporated in the State of _____ with its principal place of business at _____ hereby unconditionally guarantees to the Government (a) the full and prompt payment and performance of all obligations, accrued and executory, which Contractor presently or hereafter may have to the Government under the Contract, and (b) the full and prompt payment and performance by Contractor of all other obligations and liabilities of Contractor to the Government, fixed or contingent, due or to become due, direct or indirect, now existing or hereafter and howsoever arising or incurred under the Contract, and (c) Guarantor further agrees to indemnify the Government against any losses the Government may sustain and expenses it may incur as a result of the enforcement or attempted enforcement by the Government of any of its rights and remedies under the Contract, in the event of a default by Contractor thereunder, and/or as a result of the enforcement or attempted enforcement by the Government of any of its rights against Guarantor hereunder.

Guarantor has read and consents to the signing of the Contract. Guarantor further agrees that Contractor shall have the full right, without any notice to or consent from Guarantor, to make any and all modifications or amendments to the Contract without affecting, impairing, or discharging, in whole or in part, the liability of Guarantor hereunder.

Guarantor hereby expressly waives all defenses which might constitute a legal or equitable discharge of a surety or guarantor, and agrees that this Performance Guarantee Agreement shall be valid and unconditionally binding upon Guarantor regardless of (i) the reorganization, merger, or consolidation of Contractor into or with another entity, corporate or otherwise, or the liquidation or dissolution of Contractor, or the sale or other disposition of all or substantially all of the capital stock, business or assets of Contractor to any other person or party, or (ii) the institution of any bankruptcy, reorganization, insolvency, debt agreement, or receivership proceedings by or against Contractor, or adjudication of Contractor as a bankrupt, or (iii) the assertion by the Government against Contractor of any of the Government's rights and remedies provided for under the Contract, including any modifications or amendments thereto, or under any other document(s) or instrument(s) executed by Contractor, or existing in the Government's favor in law, equity, or bankruptcy.

Guarantor further agrees that its liability under this Performance Guarantee Agreement shall be continuing, absolute, primary, and direct, and that the Government shall not be required to pursue any right or remedy it may have against Contractor or other Guarantors under the Contract, or any modifications or amendments thereto, or any other document(s) or instrument(s) executed by Contractor, or otherwise. Guarantor affirms that the Government shall not be required to first commence any action or obtain any judgment against Contractor before

enforcing this Performance Guarantee Agreement against Guarantor, and that Guarantor will, upon demand, pay the Government any amount, the payment of which is guaranteed hereunder and the payment of which by Contractor is in default under the Contract or under any other document(s) or instrument(s) executed by Contractor as aforesaid, and that Guarantor will, upon demand, perform all other obligations of Contractor, the performance of which by Contractor is guaranteed hereunder.

Guarantor agrees to assure that it shall cause this Performance Guarantee Agreement to be unconditionally binding upon any successor(s) to its interests regardless of (i) the reorganization, merger, or consolidation of Guarantor into or with another entity, corporate or otherwise, or the liquidation or dissolution of Guarantor, or the sale or other disposition of all or substantially all of the capital stock, business, or assets of Guarantor to any other person or party, or (ii) the institution of any bankruptcy, reorganization, insolvency, debt agreement, or receivership proceedings by or against Guarantor, or adjudication of Guarantor as a bankrupt.

Guarantor further warrants and represents to the Government that the execution and delivery of this Performance Guarantee Agreement is not in contravention of Guarantor's Articles of Organization, Charter, by-laws, and applicable law; that the execution and delivery of this Performance Guarantee Agreement, and the performance thereof, has been duly authorized by the Guarantor's Board of Directors, Trustees, or any other management board which is required to participate in such decisions; and that the execution, delivery, and performance of this Performance Guarantee Agreement will not result in a breach of, or constitute a default under, any loan agreement, indenture, or contract to which Guarantor is a party or by or under which it is bound.

No express or implied provision, warranty, representation or term of this Performance Guarantee Agreement is intended, or is to be construed, to confer upon any third person(s) any rights or remedies whatsoever, except as expressly provided in this Performance Guarantee Agreement.

In witness thereof, Guarantor has caused this Performance Guarantee Agreement to be executed by its duly authorized officer, and its corporate seal to be affixed hereto on _____.

NAME OF CORPORATION

NAME AND POSITION OF OFFICIAL

EXECUTING PERFORMANCE

GUARANTEE AGREEMENT ON BEHALF OF GUARANTOR

ATTESTATION INCLUDING APPLICATION

OF SEAL BY AN OFFICIAL OF

GUARANTOR AUTHORIZED TO AFFIX

CORPORATE SEAL

b e te t

CHAPTER 33 - PROTESTS, DISPUTES AND APPEALS

1 r te t t ber 200

21 ter t e p te e t t 201

PROTESTS

Guiding Principles

- Resolving solicitation issues before a protest is filed may avoid a protest and associated costs and delays in contract award.
- When a protest is filed, prompt action by the Contracting Officer (CO) will help to assure efficient and timely resolution of the protest.

[Reference: FAR 33.1, DEAR 933.1, GAO Regulations at 4 CFR 21]

Overview

This chapter discusses the processing of documents in response to a bid protest filed for decision by the contracting activity, the Senior Procurement Executive, the Government Accountability Office (GAO), or the Court of Federal Claims.

Background

The FAR, DEAR and GAO regulations referenced above provide detailed direction for the handling of protests. This Guide section presents additional information that may be helpful to those personnel who are involved with the protest process.

Protests are a structured means by which offerors challenge some aspect of the Department's handling of a procurement. Protests can also provide the Department with an opportunity to remedy significant errors in a procurement.

Forums for Protest

Currently, protests can be filed in three different fora: 1) to the agency (these "agency protests" are decided by either the Head of the Contracting Activity (HCA) or the Senior Procurement Executive as set forth in DEAR Part 933); 2) to the GAO; and 3) to the United States Court of Federal Claims.

If an offeror contacts the CO or the Contract Specialist (specialist) prior to filing a protest, the CO or specialist should consider whether it is appropriate to provide substantive guidance that addresses the offeror's concerns. If it is appropriate, addressing the offeror's concerns may help avoid the filing of a protest, and may encourage the potential protester to pursue any protest within the agency before filing a protest with GAO or a suit in court. The CO may also determine, with the advice of Counsel, whether corrective action should be taken before a protest is filed.

Processing Protests

Upon receiving notice of a protest, the CO must withhold award or suspend contract performance in accordance with the provisions at FAR 33.103(f), 33.104(b), (c), and (d), and DEAR 933.104(b) and (c).

I. Protests to the Department of Energy Contracting Activity's HCA or Senior Procurement Executive

Protests to DOE will be decided either by the HCA or the Senior Procurement Executive. Generally, unless the protester requests that the protest be decided by the Senior Procurement Executive, the HCA has served as the Source Selection Official, or the circumstances at DEAR 933.103 (i)(1)(i), (ii), or (iii) exist, protests to DOE will be decided by the HCA. The Senior Procurement Executive or the HCA (whichever is the deciding authority) will issue a decision on the protest within 35 calendar days, unless a longer period of time is needed. Within five calendar days of receipt of the protest, a letter shall be sent to the protester acknowledging receipt of the protest and indicating the projected date by which the protest will be decided. If the protest is to be decided by the HCA, the CO will issue the letter. If the protest is to be decided by the Senior Procurement Executive, the Office of Contract Management (OCM) will issue the letter. If the protest cannot be decided by the projected date, this information should be provided to the protester in writing, along with a revised estimate of the decision date.

Protest decisions must be in writing. Even if the decision is to dismiss the protest on a procedural ground (such as lack of timeliness, lack of interested party status), the protest decision should note the allegations of the protest. Protest decisions should be sent by expeditious means to the protester. If the protester has a designated representative, the decision must be sent to the representative. DOE should obtain verification of the receipt of the protest decision and this information should be included in the contract file. If there is a subsequent GAO or Court of Federal Claims protest, the date of receipt of the agency protest may be material. The contract file should include the protest decision and evidence of the protester's receipt of the protest.

The CO should make every attempt to resolve the protest through direct negotiations with the offeror with due regard for the need to take corrective action, if appropriate.

Protests to Be Resolved by the Contracting Activity's HCA

The CO should prepare a report including the elements at FAR 33.104(a)(3)(iv) and assemble the information (including legal analysis) necessary to enable review of the protest and the issuance of a decision by the HCA. The report shall be signed by the CO and field counsel. In order for the HCA to render a protest decision within 35 calendar days, the CO shall brief the HCA on the status of the protest within 14 calendar days after receipt of protest, and provide the report to the HCA within 28 calendar days after receipt of the protest. The CO should provide a copy of the protest and the protest decision of the HCA to the OCM.

Protests to Be Resolved by the Senior Procurement Executive

The CO should notify OCM immediately and provide OCM with a copy of any protest that is to be decided by the Senior Procurement Executive.

The CO shall prepare a report similar to that discussed in FAR 33.104(a)(3)(iv). The report should include both a statement of relevant facts and a legal analysis, and shall be signed by the CO and field counsel. The report shall be concurred on and submitted through the contracting activity's HCA to the OCM. The OCM will determine if it would be advantageous to provide the protester and interested parties with a copy of the statement of relevant facts. Prior to providing the protester and interested parties with a copy of the statement of relevant facts, the OCM shall coordinate with the Assistant General Counsel for Procurement and Financial Assistance (GC-61) regarding the information to be distributed. If it is determined to be advantageous, the OCM should allow the protester seven calendar days to provide comments. Any comments received should be provided to the CO to address, usually in writing. The CO shall be provided seven calendar days in which to submit an addendum. The CO shall consult with the OCM concerning the number of copies needed and any other information required.

The following provides a schedule of milestones in order for the Senior Procurement Executive to render a protest decision within 35 calendar days from receipt of the protest:

1. CO submits a report to the OCM within 12 calendar days after receipt of protest.[1]

2. OCM, in coordination with GC-61, shall prepare a draft protest decision memo to be provided to the Director, OCM within 24 calendar days after receipt of protest.

4. OCM shall brief the Senior Procurement Executive on the status of the protest within 28 calendar days after receipt of protest.

5. The protest decision memo shall be provided to the Senior Procurement Executive within 33 calendar days after receipt of protest.

The Office of Contract Management will explore with the protester whether the use of alternative dispute resolution techniques may assist in the resolution of the protest decision.

[1] DEAR 933.103 currently includes a limit of 21 calendar days. An amendment to the DEAR to delete this internal guidance on timeframes is in process. Accordingly, CO's shall follow the timeframes prescribed in this chapter.

II. Protests to the GAO

Not later than one (1) day after a protest is filed with the GAO, the protester provides a copy of its complete protest to the contact person stated in the solicitation or to the CO. Within one (1) day of receipt of a protest, the CO must give notice of the protest to the contractor, if award has been made, or, if no award has been made, to all offerors who appear to have a reasonable prospect of receiving award if the protest is denied. In most instances, the protest will be marked as containing "protected material" or will have a legend reflecting that the protester considers the information nonpublic. Any protest with a legend of that nature, or one filed by the protester "per se" (that is, by itself and not by counsel) that appears to contain nonpublic information, may not be distributed to other offerors or to DOE personnel who are not involved in the procurement. In that event, the CO should request a redacted version from the protester. The CO works with the counsel to the procurement in reviewing the merits of the protest, and preparing the agency report. GC-61 will coordinate with the CO and counsel to the procurement on all stages of the protest. GAO makes every effort to issue a decision on the protest, and any supplemental protest, within 100 calendar days after the initial protest is filed.

III. Protests in Federal Courts

When a bid protest is filed with the Court of Federal Claims, the Department will be represented by the U.S. Department of Justice. Upon receipt of any bid protest complaint the CO should immediately notify counsel for the procurement, as well as GC-61 and GC-30.

Alternative Dispute Resolution

Guiding Principle

Employing alternative dispute resolution techniques in contractual disagreements may result in equitable settlements without going through the formal litigation process, resulting in less costly and timelier resolutions.

[References: FAR 33, DEAR 933]

1.0 Summary of Latest Changes

This update: (1) adds a paragraph pertaining to clause DOE-H-2033 Alternative Dispute Resolution and (2) makes administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references.

2.1 **Overview**. This section provides guidance for the use of alternative dispute resolution techniques in connection with disputes that arise under the Contract Disputes Act of 1978, 41 U.S.C. sections 601-613.

2.2 **Background**. Alternative Dispute Resolution (ADR) refers to a range of procedures intended to resolve disputes at less cost, more quickly, and with greater satisfaction for the parties involved than is possible through formal litigation.

The techniques are flexible and adaptable to the particularities of each individual case and permit the parties to take into account their respective litigation risks. The employment of ADR is a consensual matter and cannot be instituted without the agreement of both DOE and the contractor.

2.3 **Policy**. It is DOE policy to make maximum use of ADR as an alternative to formal litigation where it appears such an approach will facilitate dispute resolution. The goal is to resolve the dispute at the earliest stage feasible, preferably before the contracting officer's final decision, by the fastest and least expensive method possible and at the lowest appropriate organizational level. A preference for the early application of ADR is reflected at FAR 33.204, which states, “The Government’s policy is to try to

resolve all contractual issues by mutual agreement at the contracting officer's level.

The contracting officer is key to resolving contentious issues before they become unnecessary contract disputes. By exploring all reasonable avenues for a negotiated settlement with the contractor, the contracting officer can avoid most disputes.

When all possibilities for negotiation have failed, the contracting officer should endeavor to move the potential dispute into ADR.

The Contract Disputes Act (CDA), as amended by the Federal Acquisition Streamlining Act of 1994, requires that, for small businesses, "In any case in which the contracting officer rejects a contractor's request for alternative dispute resolution proceedings, the contracting officer shall provide the contractor with a written explanation, citing one or more of the conditions in section 572(b) of title 5, United States Code, the Alternative Means of Dispute Resolution Act, or such other specific reasons that alternative dispute resolution procedures are inappropriate for the resolution of the dispute."

In any case in which a contractor rejects a request of an agency for alternative dispute resolution proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

ADR should also be considered for disputes that are before the Energy Board of Contract Appeals (EBCA) and disputed claims before they have been appealed to either the EBCA or the United States Court of Federal Claims. Since United States Federal Claims Court cases are under the control of the Justice Department rather than DOE, DOE needs to coordinate ADR in those actions with DOJ.

2.4 **Contracts**. Clause DOE-H-2033 Alternative Dispute Resolution shall be inserted in solicitations and contracts which contain the clause at FAR 52.233-1, Disputes.

3.1 Attachments

1. Alternative Dispute Resolution Guidance

ATTACHMENT 1

Alternative Dispute Resolution Guidance

The following guidance is provided for all contract claims pursuant to the CDA or appeals before the Energy Board of Contract Appeals, whether in advance of litigation or after litigation has commenced. If the parties are unable to satisfactorily resolve the dispute using ADR, or cannot agree on its application, they resume the formal litigation process.

When should ADR be used?

Generally, ADR should be considered whenever a dispute arises as to the parties' rights or obligations under a government contract and that dispute remains unresolved after exploration of issues by the parties. The use of ADR represents a business decision on the part of the parties, divorced from the emotions surrounding a particular dispute, that an alternative method of resolving a claim is preferable to the expense, delay, and risks associated with formal litigation. It should be remembered that ADR is in many cases risk-free; if no resolution is reached, the parties retain all of their legal rights.

The best candidates for ADR treatment are those cases in which only facts are in dispute, while the most difficult are those in which disputed law is applied to uncontested facts. However, the fact that resolution of the dispute may involve legal issues, such as contract interpretation, does not preclude that case from consideration. Likewise, the amount in controversy is a relevant, but not controlling, factor in the decision whether to use ADR. It is strongly suggested, however, that the parties give serious consideration to using ADR in all disputes where the amount in controversy is less than $100,000. ADR may also be particularly effective in large, complex, multi-claim construction-related disputes.

As a general rule, and subject to the qualifications discussed below, if the responsible agency official answers yes to one or more of the following questions, then ADR is the preferred way to resolve the dispute:

(1) Have settlement discussions reached an impasse?
(2) Have ADR techniques been used successfully in similar situations, so far as we know?
(3) Is there a significant disagreement over technical data, or is there a need for independent, expert analysis?
(4) Does the claim have merit, but is its value overstated?
(5) Are there multiple parties, issues, and/or claims involved that can be resolved together?
(6) Are there strong emotions that would benefit from the presence of a neutral?
(7) Is there a continuing relationship between the parties that the dispute adversely affects?
(8) Does formal resolution require more effort and time than the matter may merit?

This is by no means an exhaustive list of issues to consider when determining whether or not to use ADR. Each case will have its own individual characteristics that might influence the official's decision whether or not to use ADR. Each case, therefore, should be evaluated on its own merits, with the caveat that it is the policy of DOE to resolve disputes by ADR whenever

feasible.

Because of its ADR experience, ability to assist in developing ADR agreements and protocols, and cost-effectiveness, EBCA is often an obvious choice to provide/conduct all forms of ADR services, as required, for DOE whether prior to or after the issuance of a final decision by the contracting officer, so long as the contractor agrees. The EBCA should be consulted by the contracting officer and/or the contractor in the earliest stages of ADR planning whenever the EBCA may become a source of ADR services. Contracts for the services of third party neutrals are also authorized, the costs of which should ordinarily be shared by the parties. Other federal agencies can also provide neutrals at low cost.

When is use of ADR less likely to be effective?

Although the use of ADR in any case should not be precluded, the following types of cases have generally proven to be less likely candidates for ADR:

(1) Those involving disputes controlled by clear legal precedent, making compromise difficult.
(2) Those whose resolution will have a significant impact on other pending cases or on the future conduct of business.

In these cases, the value of a definitive or authoritative resolution of the matter may outweigh the short-term benefits of a speedy resolution by ADR.

In general, if an agency official answers yes to any of the following questions, then the dispute is not one that is appropriate for ADR, and the parties should prepare for litigation:

(1) Is the dispute primarily over issues of disputed law rather than fact?
(2) Is a decision with precedential value needed?
(3) Is a significant policy question involved?
(4) Is a full public record of the proceeding important?
(5) Would the outcome significantly affect nonparties?
(6) Are the costs of pursuing an ADR procedure greater (in time and money) than the costs of pursuing litigation?

Is the nature of the case such that ADR might be used merely for delay?

What are the steps in the process?

The following six steps are associated with using ADR concepts:

Step One - Unassisted negotiations. Parties tryto work out disagreement among themselves.

Step Two - Before issuing a final decision (decision) on a claim, the contracting officer consults with the DOE ADR specialist concerning whether the disagreement appears susceptible to resolution by ADR. The FAR recognizes the potential usefulness of ADR at this early stage in the process by recommending the use of informal discussions between the

parties. In particular, the contracting officer may want to propose to the other party, one, or a combination, of the following ADR techniques, and the parties may request the Chair of EBCA, or any other acceptable federal or nonfederal neutral, to provide/conduct:

(a) Mediation
(b) Neutral Evaluation
(c) Settlement Judge
(d) Mini-trial

Step Three - If the claim either cannot be settled by the parties at Steps One or Two, the contracting officer must prepare to issue a decision. If the claim involves a factual dispute, the contracting officer shall send the contractor a copy of the proposed findings of fact and advise him that all supporting data may be reviewed at the contracting officer's office. The contractor shall be requested to indicate in writing whether it concurs in the proposed findings of fact and, if not, to indicate specifically which facts it is not in agreement with and submit evidence in rebuttal. The contracting officer shall then review the contractor's comments and make any appropriate corrections in the proposed findings of fact.

Step Four - The contracting officer shall issue a decision on each contract dispute claim within sixty (60) days from the receipt of the written request from the contractor, or within a reasonable time if, the submitted claim is over $100,000. The decision is a written document furnished the contractor, which contains the final findings of fact and reasons upon which the conclusion of the contracting officer is based.

Step Five - The contractor may appeal the contracting officer's decision to the EBCA or to the United States Court of Federal Claims. EBCA recognizes that resolution of the dispute at the earliest stage feasible, by the fastest and least expensive method possible, benefits both parties. The Board has several model procedures available. The Federal Claims Court also has ADR procedures available to the parties. The Justice Department is responsible for entering into such procedures, but ordinarily consults with DOE before doing so. DOE fully supports the use of ADR in appropriate cases before the Federal Claims Court.

Step Six - DOE's decision whether to use ADR at this stage should be made by assigned counsel, in consultation with the contracting officer. If DOE and the contractor agree that the claim is susceptible to resolution by ADR, then the next step is to select and consult with the contractor and attempt to reach agreement on an appropriate procedure.

What are examples of ADR techniques?

Mini-trial. Brings together an official from each of the contracting parties with authority to resolve the dispute. Neither official should have had responsibility for either preparing the claim (in the case of the contractor), denying the claim (in the case of DOE), or preparing the case for trial. They hear abbreviated, factual presentations from a representative of each party and then they discuss settlement. It is governed by a written agreement between the parties, which is tailored to the particular needs of the case. It generally has three stages, which usually can be completed within 90 days.

(1) The prehearing stage. Covers the time between agreement on written procedures and commencement of hearing. Parties, with assistance of a neutral, complete whatever preparation is provided for in agreement, such as discovery and exchange of position papers. This consumes the bulk of the time to complete the mini-trial.

(2) The hearing stage. Representatives present their respective positions to the officials. Each representative is given a specific amount of time within which to make the presentation. How that time is utilized is solely at the discretion of the representative. There may also be an opportunity for rebuttal and a question and answer period for the officials. This stage usually takes 1 to 3 days.

(3) The posthearing discussion stage. Officials meet to discuss resolving the dispute. The mini-trial agreement should establish a time limit within which officials either agree or settle the matter or agree to resume the underlying litigation. These discussions are settlement negotiations and, as such, may not be used by either party in subsequent litigation as an admission of liability or any aspect of settlement.

The agreement may provide for services of a neutral advisor. A potential source of a neutral advisor is the EBCA, which has substantive experience and established reputation for objectivity and cost effectiveness. Other federal agencies can provide neutrals at minimum cost. It should be noted that the employment of a neutral advisor from the private sector will necessitate cost- expenditure by DOE.

Mediation. Mediation is a process in which the disputing parties select a neutral third party to assist them in reaching a settlement of the dispute. The process is private, voluntary, informal and nonbinding. It provides an opportunity to explore a wide range of potential solutions and to address interests that may be outside the scope of the stated controversy or could not be addressed by judicial action. The mediator has no power to impose a settlement. The function of the mediator is determined in part by the desires of the parties and in part by the attitude of the individual chosen to mediate. Some mediators propose settlement terms and attempt to persuade parties to make concessions. Other mediators work only with party-generated proposals and try to help parties realistically assess their options. Some mediators work primarily in joint sessions with all parties present while others make extensive use of private caucuses. At a minimum, most mediators will provide an environment in which the parties can communicate constructively with each other and assist the parties in overcoming obstacles to settlement.

Settlement Judge. An administrative judge (or EBCA hearing officer) who is appointed by the Chair of the EBCA for the purpose of assisting the parties in reaching a settlement. The settlement judge will not hear or have any formal or informal decision-making authority in the case, but can promote settlement through frank, in-depth discussion of the strengths and weaknesses of each party's position. The agenda for meetings will be flexible to accommodate the requirements of the individual case. The settlement judge may meet either jointly or separately with the parties to further the settlement effort. Settlement judges' recommendations are not binding on the parties. If a dispute or appeal to the EBCA is not resolved through use

of the settlement judge, it will be restored to the EBCA docket. This process is also available at General Services Board of Contract Appeals (GSBCA) and many other tribunals, including the Federal Claims Court.

b e te t

CHAPTER 35 - RESEARCH AND DEVELOPMENT CONTRACTING

00 t rt p t e e r e e pme t tr t e 201
00 mpet t er t e er t 200 pr 2017
01 S e t e rm t ep rt pr 2017

Cost Participation in Research and Development Contracting

Guiding Principles

- Cost participation allows costs and benefits to be shared by both the Government and contractors performing research, development, and/or demonstration projects under DOE prime contracts.
- Cost participation encompasses cost sharing, cost matching, cost limitation (direct or indirect), participation in kind, and similar concepts.

[References: Public Law 109-58, Energy Policy Act of 2005, FAR 35.003(b), DEAR 917.70]

1.0 Summary of Latest Changes

This update: (1) combines Acquisition Guide Chapters 17.2, Cost Participation, and 35.2, Cost Sharing in Research and Development Contracting, (2) updates delegations of authority, (3) updates sample cost sharing language for inclusion in solicitations and contracts, and (4) includes administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. This chapter does not cover efforts and projects performed for the Department of Energy (DOE) by other Federal agencies.

2.1 **Energy Policy Act of 2005**. Section 988 of the Energy Policy Act (EPAct) of 2005 establishes Department-wide cost sharing requirements for most research, development, demonstration, and commercial application activities initiated after August 8, 2005. Some programs authorized in other sections of EPAct 2005 may have specific cost sharing requirements. The requirements of Section 988 supersede cost sharing requirements that have been contained in previous authorization and appropriations laws. Section 988 also provides guidance, in addition to the applicable cost principles, for determining allowable costs.

2.1.1 Authority to Exclude Research and Development of a Basic or Fundamental Nature from Cost Sharing Requirements. The authority in Sec 988(b)(2) has been delegated to the Under Secretary for Science and Energy in Delegation Order 00-006.00C.

2.1.2 The following authorities have been delegated to the Under Secretary for Science and Energy in Delegation Order 00-006.00C, and the Director of the Advanced Research Projects Agency – Energy (ARPA-E) in Delegation Order 00-038.00B:

- Authority to reduce or eliminate the cost sharing requirement for applied research and development [Sec 988(b)(3)]; and

- Authority to reduce the cost sharing requirement for demonstration and commercial application activities [Sec 988(c)(2)].

2.1.3 Solicitation/Contract Requirements. Contracting Officers must include the requisite cost sharing requirement (specifying dollar or percentage) and information in any solicitation and contract for research and development, demonstration, and/or commercial application programs and activities. The following is sample language. Contracting Officers may adjust the percentages based on Sec. 988:

- 20 percent of the total allowable costs for this research and development project shall be borne by the Contractor. The Department of Energy will reimburse the Contractor for the government's 80% share.

- 50 percent of the total allowable costs for this demonstration shall be borne by the Contractor. The Department of Energy will reimburse the Contractor for the government's 50% share.

The solicitation and contract should include appropriate provisions, clauses, and terms and conditions on cost allowability.

2.1.4 Royalties. Royalties should not be used to repay or recover the Federal share, but may be used as a reward for technology transfer activities.

2.2 **Forms of Cost Participation**. Cost participation may be in various forms or combinations which include, but are not limited to cash outlays; real property, or interest therein, needed for the project; personal property or services; cost matching; foregone fee; or other in-kind participation (see 2.4 below).

Cost participation may include the value of contributions of other non-Federal sources, provided the contributions were not previously obtained free of charge. The value of any noncash contribution is established by DOE after consultation with the contractor.

Cost participation may be accomplished by a contribution to either direct or indirect costs provided such costs are otherwise allowable in accordance with the cost principles of the contract. Allowable costs which are absorbed by the contractor as its share of cost participation

may not be charged directly or indirectly to the Federal Government under any other contract, financial assistance award, or other agreement.

2.3 **Third Party Provider of Cost Participation**. A contractor's cost participation may be provided by other companies or associations with which it has contractual arrangements to perform the project. However, the fact that a project is jointly funded, e.g., where DOE and an industry association fund a third party (the contractor), does not preclude the contracting officer from seeking, as appropriate, cost participation by the contractor.

The contracting officer must ensure that arrangements between DOE and non-Government organizations for jointly sharing the cost of projects performed by third party contractors provide that each party to the cost sharing agreement pay its share of program costs directly to the performing contractor. The DOE Chief Financial Officer, Headquarters, or designee, must approve any alternative arrangement in advance.

2.4 **In-kind Contributions**. In-kind contributions represent non-cash contributions provided by the performing contractor or a non-Federal third party who is participating with DOE in a co-sponsored project or contract. In-kind contributions may be in the form of personal property (equipment and supplies), real property (land and buildings) or services which are directly beneficial, specifically identifiable and necessary to performance of the project or program. DOE accepts in-kind contributions that are:

- Verifiable from the contractor's books and records;
- Necessary for the effective and efficient accomplishment of the project;
- Types of charges that would otherwise be allowable under applicable Federal cost principles appropriate to the contractor's organization;
- Not charged to the Federal Government under any contract, agreement or grant, unless specifically authorized by legislation; and
- Not included as contributions for any other Federal program.

2.4.1 Value of Contractor In-kind Contributions. In-kind contributions are not valued in excess of their fair market value. When the Government will receive title to donated land, buildings, equipment or supplies and the property is not fully consumed during performance of the co-sponsored project, the property's in-kind value is based on the contractor's booked cost (i.e., acquisition cost less depreciation, if any) at the time of donation.

In the event the booked costs reflect unrealistic values when compared to current market conditions, a more appropriate value is developed through an independent appraisal of the fair market value of the donated property or property in similar condition and circumstance.

To the extent required, the value of any property or services to be donated is established in accordance with generally accepted accounting policies and the appropriate Federal cost principles applicable to the contractor's organization.

2.4.2 Value of Non-Federal Third Party In-kind Contributions. Values should be reasonable and not exceed the fair market value of the item at the time of donation. Special treatment is given to the following types of third party in-kind donated items:

- Donated Employee Services

  Employee services are valued at the employee's regular rate of pay (exclusive of fringe benefits and indirect costs) provided the donated services require use of the same skills for which the employee is normally paid. Otherwise, the rate of pay, for valuation purposes, is consistent with the rates paid for similar work in the labor market in which the contractor competes for such skills.

- Volunteer Services

  Rates used to value volunteered personal services of professional, clerical, or other individuals should be consistent with those regular rates paid by the contractor for similar work.

- Property

  Values for personal or real property, or the use thereof, are dependent upon the donor's intended disposition of the property upon project completion. When title is donated at no cost to the Government or the property will be fully consumed during project performance, a reasonable value not in excess of the fair market value of the donated property, or comparable property in similar condition, is established provided the fair market value of land or buildings is established by an independent appraisal. When title is retained by the donor or acquired by the contractor, reasonable usage values not in excess of the fair rental value of the donated property or comparable property are established provided the fair rental value of donated space is established by an independent appraisal.

2.5 **Fee or Profit**. Fee or profit is not paid to the contractor under a cost participation contract. However, contracting officers should consider foregone fee or profit in establishing the degree of cost participation. Fee or profit is also not paid to any member of the proposing team having a substantial and direct interest in the project. Competitive subcontracts placed with the

prior written consent of the contracting officer and subcontracts for routine supplies and services are not covered by this prohibition.

2.6 **Level of Cost Participation**. Contractors are expected to contribute a reasonable amount of the total project cost to be covered under the contract (see EPAct 2005, Sec 988). The ratio of cost participation should correlate to the apparent advantages available to a contractor and the proximity of implementing commercialization. The extent to which a performing organization contributes to the cost of a project is taken into consideration in the allocation of patent rights under DOE's waiver policy.

The contracting officer, in consultation with the program office, establishes the desired levels of cost participation for a solicitation or a contractor by considering such factors as:

- The availability of the technology to a contractor's competitors;
- The risks involved in achieving commercial success;
- The length of time before the project is likely to be commercially successful;
- Improvements in the performer's future commercial competitive position;
- Disposition of property at project's end;
- Whether the results of the project are transferable to other parties with production capabilities, and the contractor would obtain patent or other property rights which could be sold or licensed;
- Whether the potential benefits will be lessened if the contractor lacks production or other capabilities with which to capitalize the results of the project; and
- Whether the performing organization lacks adequate non-Federal sources of funds to contribute to the effort.

2.7 **Best Practices**.

2.7.1 Contracting officers must ensure that contractors clearly understand the need to maintain an accounting system with records that adequately reflect the nature and extent of their cost contribution as well as those costs charged to DOE.

2.7.2 Financial proceeds from the sale of products resulting from a project must be appropriately recorded. These records are subject to audit by DOE.

2.7.3 Contracting officers must include disposition instructions in the contract for any property and equipment furnished or acquired during the project.

Competition Under the Energy Policy Act of 2005

Guiding Principle

- Contracting Officers are responsible for ensuring that awards of funds for programs authorized under EPAct 05, including research, development, demonstration and commercial applications, shall be accomplished competitively to the maximum extent practicable.

[References: Public Law 109-58, and FAR 35]

1.0 Summary of Latest Changes

This update: (1) updates relevant references, and (2) includes administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. This chapter discusses implementation of the competition requirements included in Section 989 of the Energy Policy Act of 2005 (EPAct 05), Public Law 109-58.

2.1 Background. Section 989, Merit Review of Proposals, provides general provisions covering the award of funds for programs authorized by EPAct 05. Awards of funds for programs authorized under EPAct 05, including research, development, demonstration and commercial applications, shall be accomplished competitively to the maximum extent practicable. The Federal Acquisition Regulation (FAR), the Department of Energy Acquisition Regulation (DEAR), DOE Directives (DOE O 412.1A), and other related DOE guidance (ALs, guides, etc) provide for the types of competitive processes applicable to competitions, as well as guidance for those circumstances in which the use of competitive processes are deemed inappropriate.

2.2 Guidance. Competitive awards under EPAct 05 shall involve competitions open to all qualified entities within one or more of the following categories of organizations:

(1) Institutions of higher education
(2) National Laboratories
(3) Nonprofit and for-profit private entities
(4) State and local governments
(5) Consortia of entities described in paragraphs (1) through (4)

Any award of funds for programs authorized under EPAct 05 or an amendment made by this Act, whether competitive or non-competitive, shall be made only after an impartial review of the scientific and technical merits of the proposal(s)/applications(s). Such a review shall be accomplished by complying with the applicable FAR regulation, including Parts 8, 12, and 15.

For purposes of this AL, National Laboratories are those defined by Section 2 of EPAct 05 as any of the following laboratories:

(A) Ames Laboratory
(B) Argonne National Laboratory
(C) Brookhaven National Laboratory
(D) Fermi National Accelerator Laboratory
(E) Idaho National Laboratory
(F) Lawrence Berkeley National Laboratory
(G) Lawrence Livermore National Laboratory
(H) Los Alamos National Laboratory
(I) National Energy Technology Laboratory
(J) National Renewable Energy Laboratory
(K) Oak Ridge National Laboratory
(L) Pacific Northwest National Laboratory
(M) Princeton Plasma Physics Laboratory
(N) Sandia National Laboratory
(O) Savannah River National Laboratory
(P) Stanford Linear Accelerator Center
(Q) Thomas Jefferson National Accelerator Facility

Section 989 provides authority for DOE Contracting Officers to permit the National

Laboratories, which are otherwise precluded from responding to a Federal Request for Proposal (RFP) (FAR 35.017-1) to submit a proposal in response to an RFP. As such, Program Officials need to decide whether a particular opportunity authorized under EPAct is appropriate for participation by the National Laboratories and discuss the issue with the cognizant Contracting Officer. The RFP must indicate whether or not National Laboratories are eligible to compete.

Nothing herein obviates the requirement for a contractor operating a national laboratory to obtain DOE approval prior to responding to an RFP/Funding Opportunity Announcement (FOA), which would require the use of DOE facilities in performance of the statement of work. All RFPs that allow the National Laboratories to compete shall be submitted to the Office of Contract Management (MA-62) for DOE, or the Office of Acquisition and Project Management (NA-APM) for NNSA, for review, unless such review is waived by the cognizant office.

Scientific and Technical Information Reporting

Guiding Principles:

- Reporting scientific and technical information (STI) ensures public access and preservation of federally funded research results to advance science and technology.
- Pursuant to the DOE Public Access Plan, accepted manuscripts of journal articles as a type of STI are reportable to the DOE Office of Scientific and Technical Information (OSTI.
- STI that is not publicly releasable is also to be reported to OSTI, with access restricted as appropriate.

*[References: FAR 35.010, DEAR 935.010, DEAR 970.5227-2, DOE Order 241.1B or its successor version, OSTP Memorandum, "*Increasing Access to the Results of Federally Funded Scientific Research*," DOE Public Access Plan*, and S-1 Memorandum, "Public Access to the Results of DOE-Funded Scientific Research*."]*

1.0 Summary of Latest Changes

This update: (1) revises guidance related to public access of federally funded research results and (2) makes administrative and formatting changes.

2.1 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references.

2.2 Contracts Requiring Scientific and Technical Information Products, Including Reports. Scientific and technical information (STI) serves to document results of the work conducted through research and development (R&D) contracts, management and operation (M&O) contracts, other facility management contracts (FMC), and non-major site/facility management contracts. In order to ensure that DOE-funded STI in its various forms is appropriately managed, such contracts should require scientific and technical information

reporting.

Specifically, all of these contracts shall include instructions requiring the contractor to make all STI products, including technical reports, accepted manuscripts of journal articles, scientific and technical software, and any other form of research results, available electronically to the U.S. Department of Energy (DOE) Office of Scientific and Technical Information (OSTI), DOE's central coordinating office for STI, at www.osti.gov. STI is to be made available to OSTI in accordance with DOE Order 241.1B, *Scientific and Technical Information Management*, or its successor version.

For types of contracts other than M&O or FMC, including R&D and non-major site/facility management contracts, the STI products (technical reports, accepted manuscripts, etc.) required are specified in the statement of work. For M&O and FMC contracts, the STI shall be provided in accordance with the Contractor Requirements Document (CRD), Attachment 1 of DOE Order 241.1B, or its successor version.

The majority of STI produced is publicly releasable, with a small percentage requiring controlled access. In the performance of DOE contracted obligations, STI is reportable to OSTI, whether it is publicly releasable, controlled unclassified information, Unclassified Controlled Nuclear Information (UCNI), or classified. OSTI restricts access to protected categories of STI as appropriate (based on laws, regulations, and requirements, as noted in DOE Order 241.1B or its successor version).

2.3 Electronic Reporting. To minimize the burden associated with reporting, the Department provides web-enabled reporting processes to be used by DOE contractors. Scientific/technical reports or other STI deliverables must be made available by announcing and/or providing them in acceptable electronic formats to OSTI. An Announcement Notice (AN) is required for each STI product. Submission options include: (1) The DOE Energy Link System (E-Link) or (2) automated protocols pre-arranged with OSTI.

- E-Link: This web-based system allows completion of the applicable AN online and uploading the associated STI product or identifying the unique persistent identifier (URL) for the corresponding STI product. Information and instructions for E-Link can be accessed at https://www.osti.gov/elink/. Additional information about the submission process is available at https://www.osti.gov/stip/submittal.

- Automated protocols: Most major facilities have established automated processes that streamline the announcement process. This process includes use of web services, batch uploads, and harvesting for submission of Announcement Notice metadata as well as STI products and also enables routine announcement of metadata contained in the

Announcement Notices with links to the STI products posted by the contractor on public web sites where applicable. More information can be found at https://www.osti.gov/stip/doelabssitesguidance.

- Best practices, including formats: Various best practices, including formats, which are defined by stakeholders and participants of the Scientific and Technical Information Program (STIP), are provided on the STIP website, https://www.osti.gov/stip.

- Classified STI: Reporting of classified STI or unclassified controlled nuclear information (UCNI) STI products requires site-specific coordination. Options are available to submit metadata and the associated full-text STI product or to submit only the metadata. Classified and UCNI STI products transmitted to OSTI are to be properly marked with the appropriate announcement and/or access limitations on the accompanying announcement notice, AN 241.5, *Restricted Announcement of U.S. Department of Energy Classified and UCNI Scientific and Technical Information (see also* https://www.osti.gov/stip/classified*)*. Contact OSTI for additional guidance at stip@osti.gov.

2.4 Procedures. The information below can be used to inform contractors about the procedures to be followed. DOE national laboratories and other major sites/facilities normally have an established process to provide STI to OSTI, for which it is recommended that the respective site's designated STI Manager be consulted. Additional information about submittal is available at https://www.osti.gov/stip/providingsti

2.4.1 M&O or FMC. M&O or FMC contractors providing STI technical reports can choose to make electronic STI Announcement Notices and electronic STI products available via E-Link by selecting the 241.1 Announcement Notice option, *Announcement of DOE Scientific and Technical Information*, and/or by establishing an automated protocol with OSTI which allows for routine submission of metadata with links to site-hosted full-text products. Instructions for the web Announcement Notice are located at www.osti.gov/elink. The organization's authorized releasing official should ensure the completion of the required fields in E-Link, review the STI product to determine public availability or potential limitations on access, and release the STI product to OSTI. Following coordination with OSTI, contractors may also establish automated protocols for routine submissions. Once submitted via E-Link or through automated protocols, STI is then made accessible to the research community, industry, and the public as appropriate through a range of web services managed by OSTI. Refer to the STIP website (www.osti.gov/stip) for information, references, definitions, and instructions about STI, and refer to the OSTI website (www.osti.gov) for links to web products and systems that provide access to Departmental STI.

2.4.2 R&D and Non-Major Site/Facility Management Contractors. R&D and non-major site/facility management contractors submitting STI reports or other STI deliverables or products to DOE should use E-Link (https://www.osti.gov/elink) and choose the 241.3 Announcement Notice option, *US DOE Announcement of DOE Scientific and Technical Information (STI) for use by Financial Assistance Recipients and Non-Major Site/Facility Management Contractors*. The releasing official of the submitting organization should complete the required fields and "submit" the notice via E-Link and upload the scientific and technical report or other STI product. The awarding office's authorized releasing official then ensures the completion of the required fields, reviews the STI product, determines public availability or potential limitations, and releases the notice and STI product via E-Link to OSTI. STI is then made accessible to the research community, industry, and the public as appropriate through a range of web services managed by OSTI. Refer to the STIP website (www.osti.gov/stip) for information, references, definitions, and instructions about STI, and refer to the OSTI website (www.osti.gov) for links to web products and systems that provide access to Departmental STI.

2.5 Other STI Products. In addition to technical reports, other types of STI are created by the DOE community which document research results and therefore should be announced to OSTI.

2.5.1 Scientific and Technical Computer Software. Scientific and technical computer software is one form of STI that must also be made available and announced to OSTI. Use *Announcement of Computer Software*, Announcement Notice 241.4, accessible at https://www.osti.gov/elink/241-4.jsp. Refer to the STIP website (https://www.osti.gov/stip/softwareannounce) for additional information.

2.5.2 Accepted Manuscripts of Journal Articles. DOE's Public Access Plan calls for submission of final, peer-reviewed accepted manuscripts, which the Department includes in a web-based portal, the DOE Public Access Gateway for Energy and Science (DOE PAGES), that will make scholarly scientific publications resulting from DOE research funding publicly accessible and searchable at no charge to readers. Accepted manuscripts are to be announced and submitted to OSTI electronically, similarly to other forms of STI. More information is available at https://www.osti.gov/stip/publicaccessfaq.

2.5.3 Additional STI Products. Other types of STI created by the DOE community to document research results include conference papers/presentations/proceedings books, patents, theses, and publicly available scientific research datasets/collections. A list of STI Products made available through the DOE STI Program is provided in Attachment 3 of DOE O 241.1B, *Scientific and Technical Information Management*. There are several types of Announcement Notices to be used; refer to the list of Announcement Notices at

https://www.osti.gov/stip/providingsti.

For the most up-to-date instructions, formats, and examples of STI product types, and information on Announcement Notice options, refer to the STI Program website (https://www.osti.gov/stip/stitypes).

2.6 Questions. Additional questions related to use of E-Link may be emailed to elink@osti.gov. Questions about OSTI or STI policies may be sent to stip@osti.gov.

b e te t

CHAPTER 37 - SERVICE CONTRACTING

7 1 S pp rt Ser e tr t 2017
7 01 er rm e e Ser e t t 201

Support Services Contracting

Guiding Principles

- Inherently Governmental functions may only be performed by Government employees.
- Avoid even the appearance of personal services relationships.
- Use Statements of Objectives and a Performance Work Statements
- Assess performance through a quality assurance surveillance plan
- Practice appropriate management oversight to preserve agency control.

[Reference: FAR Part 37, DOE AL 2015-07]

1.0 Summary of Latest Changes

This update includes administrative and editorial changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies, such as FAR part 37. It provides guidance for the planning and acquisition of support services contracts, which represent a significant portion of the Department of Energy (DOE)'s total contracting efforts. Under support services contracts, DOE programs acquire professional and technical services, library services, employee health services, audit services, elevator maintenance support, information technology support, hearing officers, and temporary help agency services. The size, diversity, and number of DOE contracting actions highlight the need for successful planning, negotiation, award and administration of this class of contracts. Moreover, support services contracts must be carefully developed and administered to ensure that contractors do not perform inherently Governmental functions or personal services.

This chapter will help DOE contracting, program, and other personnel in the development and award of more definitive contracts which should permit better measurement of contractor performance. The chapter begins with an overview, identifying the types of services that are inherently Governmental and discussing the prohibition on personal service contracts. Basic information on contract administration and the Service Contract Labor Standards are also provided. The chapter also covers the development of support service contracts, from acquisition planning through statements of work, including ideas for performance work statements and statements of objectives (SOOs). The chapter also identifies special

circumstances that may arise in support services contracting, such as commercial terms and conditions and multiple award, task order contracts. At the end of the chapter, there are several appendices containing more detailed information and checklists.

2.1 **Introduction**.

Support services are the activities required by the Government to aid in the development and execution of programs and functions. Support services fall into three main categories:

Technical support services, which include development of specifications, system definition, system review and reliability analyses, trade-off analyses, economic and environmental analyses, test and evaluation, and survey or reviews to improve the effectiveness, efficiency, and economy of technical operations.

Management support services, which include analyses of workload and workflow, management studies, automated data processing, manpower systems analyses, preparation of program plans, training and education, analyses of management processes, and any other reports or analyses directed at improving the effectiveness, efficiency, and economy of management and general administrative operations.

Maintenance and operations services, which include general housekeeping and custodial services, physical security, firefighting, logistics, and maintenance.

2.1.1 Inherently Governmental Functions. When contracting for support services, agencies must avoid contracting for inherently Governmental services (see subpart 7.5 of the Federal Acquisition Regulation (FAR) and DOE Acquisition Letter (AL) 2015-07. An inherently Governmental function is one so closely related to the public interest as to mandate performance by Government employees. Such functions 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 might include the armed forces, the courts, or public roadways. The second would include tax collection, the money supply, and control of banking. Services or products in support of these Government functions, however, are usually considered commercial activities.

Appendix A provides examples of functions to be performed only by DOE personnel. Further examples may be found at FAR 7.503(c). Appendix B lists services that are not inherently Governmental in nature, but that may approach that category. Notably, services in support of Government functions similar to inherently Governmental functions may be appropriately contracted for if sufficient management controls are in place. Appendix C provides a checklist aimed at ensuring the contractor does not take over a Government function and the Government does not abdicate its responsibilities.

2.1.2 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. However, Federal employees may perform commercial functions under certain circumstances, such as when proposed commercial prices are unreasonable or there is a lack of commercial sources (e.g., in a geographically isolated location).

2.1.3 Personal Services Contracts. Government personnel must also avoid even the appearance of a personal services relationship with contractor personnel. Personal services contracts tend to circumvent the rules covering the employment of civil servants. Personal services shall not be obtained via contract unless Congress has specifically authorized the acquisition of personal services. A personal services contract results when Government personnel assume the role of directly instructing, supervising, or controlling a contractor employee's work. The following are illustrations of improper personal services:

- DOE restricts contractor employee qualifications to a particular person.
- DOE reviews the performance of individual contractor personnel, rather than the contractor's final product or service.
- Contractor employees are used interchangeably with DOE personnel to perform the same or similar functions.

The FAR 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 problems with personal services. Additionally, DOE's management and operating (M&O) contractors shall not be directed to award subcontracts to provide support service to a Departmental office; nor shall they be asked to provide support service if the service is outside their primary mission.

2.1.4 Service Contract Labor Standards. Several labor statutes apply to Federal contracts (see FAR part 22). Among the most likely to affect a support services contract are the Service Contract Labor Standards (41 U.S.C. 6703)), which arose from the Service Contract Act (SCA). Under the SCA, contractors are required to comply with 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 implement 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 (FAR 22.1002-1). SCA is not applicable to 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.

2.1.5 Contract Administration. Contract administration under support services contracts requires special diligence. Since support services contracts are labor-intensive, much attention to the amount and types of labor being used is needed, in order to assure work accomplishment within the budgeted hours and dollars. Special considerations, as detailed later in this chapter, may include:

2.1.5.1 Technical Direction. As the work progresses, it may be necessary to furnish technical direction to ensure that the work stays within the contract's scope 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.

2.1.5.2 Performance-Based Contracts. Contract administration efforts will center upon measurement of performance measured against the contract's performance management criteria.

2.1.5.3 Multiple award, task order-type contracts. Part of contract administration under this construct involves competing and awarding task orders.

2.1.5.4 Task assignment contracts are very common in support services contracting. They present additional challenges with proper contract administration. Appendix D describes contract administration under this type of contract.

2.2 Developing Support Services Contracts.

2.2.1 Acquisition Planning. Advance planning is vital to the improvement of support services contracting. Acquisition planning is the team process, in which efforts of all personnel (program, contracting, legal, finance, etc.) 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. This includes developing a strategy for managing the acquisition. During this period, program and contracting personnel must combine their capabilities to develop the most definitive Statement of Work (SOW) possible, develop comprehensive cost estimates, and otherwise develop the procurement package. The requirements must be written in clear, understandable language and describe the requirements in sufficient detail to be understood by offerors and to permit qualitative measurement of the contractor's performance. If a performance-based contract is planned, this is the time to develop performance objectives and measurement criteria.

2.2.2 Market Research. Market research means collecting and analyzing information about capabilities within the market to satisfy Government requirements. FAR parts 10 and 12 contain 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. The extent of market research should be appropriate to the circumstances of the

service being acquired. Urgency, estimated dollar value, complexity, and past experience are some factors that may impact the extent of market research needed.

2.2.3 Drafting the SOW. An organized approach to preparing a SOW is essential. The SOW defines the overall objective of the services, and details the tasks that must be completed. A well-crafted SOW should minimize ambiguity, thereby increasing the likelihood that the objective can be met within budget and schedule. Usage of technical jargon is discouraged, as SOWs are often read and interpreted by persons of varied backgrounds. To ensure that inherently governmental functions are not performed, the SOW should contain language that reserves these functions for Government officials and causes contractor employees and products to be clearly identified (see FAR 11.106). Other SOW recommendations follow:

- Describe the required objectives and desired results, including the Government's minimum requirements.
- Provide background information to promote understanding of the requirements.
- Include detailed descriptions of the technical requirements and tasks
- Detail the reporting requirements and any other deliverable items, such as data, experimental hardware, mockups, prototypes, etc.
- Use short sentences with simple and concise language.
- Use active rather than passive voice.
- Use terms consistently.
- Ensure that mandatory and permissive terms are used properly.
- Avoid use of pronouns.
- Define abbreviations and acronyms before using them.
- Identify who is responsible.
- Avoid establishing a requirement that depends on actions by an entity who is not a party to the contract.

2.2.4 Performance-Based Service Acquisition.[1] Both statute and regulation establish a preference for performance-based service acquisition (PBSA), which provides for a more commercial-like practices (see FAR 37.102). It is the policy of DOE to use PBSA where practicable. Through PBSA methods, DOE can 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 emphasis on the outcome, rather than process, 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.

[1]The performance incentive guidance provided in Chapter 70.15 was developed for specific use with M&O contracts. However, use of this guide in the service contract environment is not precluded.

2.2.4.1 Steps to successful PBSAs. Guidance provided to all Federal agencies, "Seven Steps to Successful PBSAs," is summarized below.

- Establish an integrated solutions team.
- Describe the problem that needs a solution.
- Explore private-sector and public-sector solutions.
- Develop a SOO or PWS (see Appendix E for a checklist).
- Decide how to measure and manage performance.
- Select the appropriate contractor.
- Manage performance.

2.2.4.2 Key components of PBSAs include a needs assessment, a PWS, an SOO, and a Quality Assurance Surveillance Plan, as detailed below.

2.2.4.2.1 Needs Assessment. An initial consideration by the Integrated Project Team (IPT) is what goal or outcome is to be achieved. This is a collaborative effort and is a first step after the team is assembled. At this stage, the team will determine 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 enable the acquisition to be described in terms of how it supports mission-based performance goals, establishing a clear link between acquisition and mission. The needs assessment sets a high-level acquisition framework.

2.2.4.2.2 Performance Work Statement (PWS). The PWS captures findings from the needs-assessment process (e.g., job analysis, performance objectives, performance standards, etc.). The PWS identifies the agency's requirement in clear, specific and objective terms. Elements of a PWS 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.

2.2.4.2.3 Statement of Objectives (SOO). The SOO, in fewer than five pages, provides basic performance objectives of the acquisition. The SOO is to be used in the solicitation in place of the SOW or PWS, and may be converted to a more definitive work statement once contractor proposals are negotiated. The SOO links the acquisition to agency mission, as well as the problem to be solved or outcome to be achieved. The SOO's core information is also derived from the needs analysis. The SOO maximizes the offeror's ability to develop its own tactics for meeting the Government's requirements.

2.2.4.2.4 Quality Assurance Surveillance Plan (QASP). The QASP is a tool for measuring contractor success as it relates to achieving the desired outcome. Plans may include metrics, quality levels, performance standards, etc., and recognize the responsibility of the contractor as discussed in FAR 37.602. However, whenever possible, a commercial QASP should be relied upon for indicators of specific performance objectives. For example, the International Standards Organization (ISO) has established the ISO 9000, which are

quality management standards applicable to 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 QASPs are intended to be living documents (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.

2.2.4.3 Contract Type Order of Preference. Legislation has set forth a preference for PBSA, which also provides for the use of simplified commercial procedures. Although historically Firm Fixed Price (FFP) has been the preferred contract type for PBSA, it has not always been the best motivator of performance. In general, when risk is minimal or predictable, use FFP; when risk is questionable or changeable, use another appropriate contract type. In general, though, the order of preference is as follows:

- FFP performance-based contract or task order
- Non-FFP performance-based contract or task order.
- Contract or task order that is not performance-based.

2.3 Working with Support Services Contractors.

2.3.1 Contractor Employee and Work Product Identification. If contractor employees will be working in the Federal workplace and attending meetings, answering Government telephones, sending emails, or working in similar situations where their contractor status is not obvious, they must be required to identify themselves and their work products to avoid creating an impression that they are Government officials or their work efforts are those of Federal employees. Federal managers shall ensure that contractor employees:

- Identify themselves as contractor personnel on phone calls and at meetings;
- Use signature blocks that indicate they are contractor employees and identify their company;
- Identify themselves as contractor employees if using a ".gov" email address, either by: (a) stating they are contractor employees supporting DOE; or (b) by their signature block (the word "contractor" must appear in the signature block).
- Wear a distinctive badge that distinguishes them from Federal employees;
- Mark documents they produce, when appropriate, as contractor products; and
- Indicate the extent of their participation in documents they help produce.

Federal managers must ensure that contractor employees working in the Federal workplace do not misrepresent themselves as Federal employees, perform inherently governmental functions, or provide personal services. Federal managers generally must not be involved in contractor personnel decisions. When in doubt, managers should consult their legal and human capital specialists.

2.3.2 Federal Employees' Involvement in Contractors' Personnel Decisions. Federal employees generally should not be involved in contractors' personnel decisions. Such participation in contractors' hiring and firing decisions obscures the traditional and appropriate allocation of contract performance and cost risks between the Government and the contractor. That allocation is embedded in the contract through the Federal procurement process (e.g., by the choice of source selection technique, contract type, terms, and conditions).

2.3.2.1 Special Cases. In rare cases, there are circumstances where, due to the nature of the services or supplies being procured, a vital Federal interest in the contractor's selection of certain employees may call for some Federal officials' involvement in a hiring decision. In those instances, the risks of violating prohibitions regarding personal services or inherently governmental functions, and of complicating the contractual relationship, must explicitly be acknowledged. Then they must be appropriately mitigated, preferably by written communication from the contracting officer that includes the rationale for Federal involvement. An example of a Federal action that would be appropriate in some cases is the contracting officer's expressing to contractor management that a contractor employee performed poorly in a critical area (e.g., safety or security) and should not continue to be assigned to that area. It would not be appropriate for any Federal official to direct or imply to the contractor that the employee should be terminated.

2.3.2.2 Actions to avoid. Federal managers shall not:

- Direct a contractor to hire a particular individual (but they may provide the contractor with the names of individuals that are competent);
- Direct a contractor to fire a particular individual; or
- Design work requirements around a single individual.

2.4 Special Circumstances.

2.4.1 Commercial Items. The Federal government's preference for the acquisition of commercial items and services is manifested in FAR part 12. Market research is required in all acquisitions of commercial services. For services to be considered commercial and therefore subject to FAR part 12, the services must be for:

- installation services, maintenance services, repair services, or training services in support of a commercial item; or,
- services 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.

2.4.2 Multiple Award Task Order Contracts. FAR subpart 16.5 sets forth a preference for making multiple awards of indefinite-quantity contracts. In fact, multiple-award indefinite-quantity contracts are the mandatory form of contract for advisory and assistance service requirements exceeding $13,500,000 (including all options) and 3 years.[2] An indefinite-quantity task-order contract is one that does not specify a firm quantity (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, each contractor must be given a fair opportunity to be considered for each task order issued (see FAR 16.505); contractors who feel deprived of such fair opportunity may protest the award. Multiple award contracts require more administrative effort, as there is not only competition for the master contracts, but also for the award of individual task orders.

2.5 Summary and Additional Resources. Support services contracting is a significant portion of DOE's acquisition portfolio. Support service contracting has two sensitive aspects:

- Inherently Governmental functions may not be contracted out;
- Personal services contracts, i.e., those akin to employer-employee relationships between Government and contractor personnel, are illegal.

If market research reveals that the required support service is available in the commercial marketplace on a FFP basis and the service falls within the definition at FAR 2.101, it will generally be necessary to acquire the service on a FFP basis under commercial contract terms and conditions. In addition, support services requirements for advisory and assistance services exceeding the threshold at FAR 16.503(d) must generally be acquired by the use of multiple award, task-order contracts. Use of the multiple award approach is also encouraged for acquisitions below the mandated threshold.

The appendices contain checklists to aid in drafting support services requirements, lists of inherently Governmental functions, and guidance on administering task assignment contracts.

3.0 Attachments

Appendix A – Examples of Inherently Governmental Functions
Appendix B – Functions Requiring Increased Management Oversight
Appendix C - Responsibilities Checklist for Functions Closely Associated with Inherently Governmental Functions
Appendix D – Administration of Task Assignment Contracts
Appendix E – Checklist for Performance Work Statement

[2] See FAR 16.503(d) for current threshold. This requirement applies, unless the contracting officer or other official designated by the head of the agency makes a written determination that the services required are so unique or highly specialized that it is not practicable to make multiple awards (FAR 16.504(d)).

APPENDIX A

EXAMPLES OF INHERENTLY GOVERNMENTAL FUNCTIONS
(source: DOE AL 2015-07; see also the more general list at FAR 7.503(c))

The following is an illustrative list of functions considered to be inherently governmental. This list should be reviewed in conjunction with the list of functions closely associated with inherently governmental functions found in Appendix B to better understand the differences between the actions identified on each list. Note that we removed item 24 from the examples of Inherently Governmental Functions in Appendix A because the issue of whether representation of the government by a contractor-attorney before administrative and judicial tribunals constitutes an inherently governmental function is not yet settled.

Note: For most functions, the list also identifies activities performed in connection with the stated function. In many cases, a function will include multiple activities, some of which may not be inherently governmental.

1. The direct conduct of criminal investigation.
2. The control of prosecutions and performance of adjudicatory functions (other than those relating to arbitration or other methods of alternative dispute resolution).
3. The command of military forces, especially the leadership of military personnel who are performing a combat, combat support or combat service support role.
4. Combat.
5. Security provided under any of the circumstances set out below. This provision should not be interpreted to preclude contractors taking action in self-defense or defense of others against the imminent threat of death or serious injury.
    a) Security operations performed in direct support of combat as part of a larger integrated armed force.
    b) Security operations performed in environments where, in the judgment of the responsible Federal official, there is significant potential for the security operations to evolve into combat. Where the U.S. military is present, the judgment of the military commander should be sought regarding the potential for the operations to evolve into combat.
    c) Security that entails augmenting or reinforcing others (whether private security contractors, civilians, or military units) that have become engaged in combat.
6. The conduct of foreign relations and the determination of foreign policy.
7. The determination of agency policy, such as determining the content and application of regulations.
8. The determination of budget policy, guidance, and strategy.
9. The determination of Federal program priorities or budget requests.
10. The selection or non-selection of individuals for Federal Government employment, including the interviewing of individuals for employment.

11. The direction and control of Federal employees.
12. The direction and control of intelligence and counter-intelligence operations.
13. The approval of position descriptions and performance standards for Federal employees.
14. The determination of what government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices with specified ranges and subject to other reasonable conditions deemed appropriate by the agency).
15. In Federal procurement activities with respect to prime contracts:
    a) 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);
    b) participating as a voting member on any source selection boards;
    c) approving of any contractual documents, including documents defining requirements, incentive plans, and evaluation criteria;
    d) determining that prices are fair and reasonable;
    e) awarding contracts;
    f) administering contracts (including ordering changes in contract performance or contract quantities, making final determinations about a contractor's performance, including approving award fee determinations or past performance evaluations and taking action based on those evaluations, and accepting or rejecting contractor products or services);
    g) terminating contracts;
    h) determining whether contract costs are reasonable, allocable, and allowable; and
    i) participating as a voting member on performance evaluation boards.
16. The selection of grant and cooperative agreement recipients including:
    a) approval of agreement activities,
    b) negotiating the scope of work to be conducted under grants / cooperative agreements,
    c) approval of modifications to grant/cooperative agreement budgets and activities, and
    d) performance monitoring.
17. The approval of agency responses to Freedom of Information Act requests (other than routine responses that, because of statute, regulation, or agency policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and the approval of agency responses to the administrative appeals of denials of Freedom of Information Act requests.
18. The conduct of administrative hearings to determine the eligibility of any person for a security clearance, or involving actions that affect matters of personal reputation or eligibility to participate in government programs.
19. The approval of Federal licensing actions and inspections.
20. The collection, control, and disbursement of fees, royalties, duties, fines, taxes and other

public funds, unless authorized by statute, such as title 31 U.S.C. 952 (relating to private collection contractors) and title 31 U.S.C. 3718 (relating to private attorney collection services), but not including:

a) collection of fees, fines, penalties, costs or other charges from visitors to or patrons of mess halls, post or base exchange concessions, national parks, and similar entities or activities, or from other persons, where the amount to be collected is predetermined or can be readily calculated and the funds collected can be readily controlled using standard cash management techniques, and

b) routine voucher and invoice examination.

21. The control of the Treasury accounts.
22. The administration of public trusts.
23. The drafting of official agency proposals for legislation, Congressional testimony, responses to Congressional correspondence, or responses to audit reports from an inspector general, the Government Accountability Office, or other Federal audit entity.

APPENDIX B

EXAMPLES OF FUNCTIONS CLOSELY ASSOCIATED WITH THE PERFORMANCE OF INHERENTLY GOVERNMENTAL FUNCTIONS
(source: DOE AL 2015-07; see also FAR 7.503(d) and FAR 37.114)

The following is an illustrative list of functions that are generally not considered to be inherently governmental, but are closely associated with the performance of inherently governmental functions. This list should be reviewed in conjunction with the list of inherently governmental functions in Appendix A to better understand the differences between the actions identified on each list.

Note: For most functions, the list also identifies activities performed in connection with the stated function. In many cases, a function will include multiple activities, some of which may not be closely associated with performance of inherently governmental functions.

1. Services in support of inherently governmental functions, including, but not limited to the following:

    a) performing budget preparation activities, such as workload modeling, fact finding, efficiency studies, and should-cost analyses.
    b) undertaking activities to support agency planning and reorganization.
    c) providing support for developing policies, including drafting documents, and conducting analyses, feasibility studies, and strategy options.
    d) providing services to support the development of regulations and legislative proposals pursuant to specific policy direction.
    e) supporting acquisition, including in the areas of:

        i. acquisition planning, such as by –
            I. conducting market research,
            II. developing inputs for government cost estimates, and
            III. drafting statements of work and other pre-award documents;

        ii. source selection, such as by –
            I. preparing a technical evaluation and associated documentation;
            II. participating as a technical advisor to a source selection board or as a nonvoting member of a source selection evaluation board; and
            III. drafting the price negotiations memorandum; and

        iii. contract management, such as by –
            I. assisting in the evaluation of a contractor's performance (e.g., by collecting information performing an analysis, or making a recommendation for a proposed performance rating), and

II. providing support for assessing contract claims and preparing termination settlement documents.

f) Preparation of responses to Freedom of Information Act requests.

2. Work in a situation that permits or might permit access to confidential business information or other sensitive information (other than situations covered by the National Industrial Security Program described in FAR 4.402(b)).

3. Dissemination of information regarding agency policies or regulations, such as conducting community relations campaigns, or conducting agency training courses.

4. Participation in a situation where it might be assumed that participants are agency employees or representatives, such as attending conferences on behalf of an agency.

5. Service as arbitrators or provision of alternative dispute resolution (ADR) services.

6. Construction of buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments.

7. Provision of inspection services.

8. Provision of legal advice and interpretations of regulations and statutes to government officials.

9. Provision of 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 C:

RESPONSIBILITIES CHECKLIST FOR FUNCTIONS CLOSELY ASSOCIATED WITH INHERENTLY GOVERNMENTAL FUNCTIONS

If the agency determines that contractor performance of a function closely associated with an inherently governmental function is appropriate, the agency shall –

1. Limit or guide a contractor's exercise of discretion and retain control of government operations by both –

   (i) establishing in the contract specified ranges of acceptable decisions and/or conduct; and
   (ii) establishing in advance a process for subjecting the contractor's discretionary decisions and conduct to meaningful oversight and, whenever necessary, final approval by an agency official;

2. Assign a sufficient number of qualified government employees, with expertise to administer or perform the work, to give special management attention to the contractor's activities, in particular, to ensure that they do not expand to include inherently governmental functions, are not performed in ways not contemplated by the contract so as to become inherently governmental, do not undermine the integrity of the government's decision-making process as provided by the Policy Letter subsections 5-1(a)(1)(ii)(B) and (C), and do not interfere with Federal employees' performance of the closely-associated inherently governmental functions (see Policy Letter subsection 5-2(b)(2) for guidance on steps to take where a determination is made that the contract is being used to fulfill responsibilities that are inherently governmental);

3. Ensure that the level of oversight and management that would be needed to retain government control of contractor performance and preclude the transfer of inherently governmental responsibilities to the contractor would not result in unauthorized personal services as provided by FAR 37.104;

4. Ensure that a reasonable identification of contractors and contractor work products is made whenever there is a risk that Congress, the public, or other persons outside of the government might confuse contractor personnel or work products with government officials or work products, respectively; and

5. Take appropriate steps to avoid or mitigate conflicts of interest, such as by conducting pre-award conflict of interest reviews, to ensure contract performance is in accordance with objective standards and contract specifications, and developing a conflict of interest mitigation plan, if needed, that identifies the conflict and specific actions that will be taken to lessen the potential for conflict of interest or reduce the risk involved with a potential conflict of interest.

APPENDIX D

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 (COR) 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 COR 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 COR 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.

APPENDIX E

CHECKLIST FOR PERFORMANCE WORK STATEMENT (PWS)

The key elements of a performance work statement (PWS) 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. Other criteria follow:

Requirements are specific enough to permit offeror to identify required resources (labor, materials, equipment, timing of deliveries, travel requirements, specific place of performance, etc.). PWS articulates "when" and "where," as well as "what."

Required reports and documentation are specified.

Duties stated clearly enough to permit the Government's technical representative to determine whether they have been completed.

All obligations of the Government are delineated.

Respective duties and interfaces of contractor and Government personnel are clear.
Any necessary approvals are stated.

Requirements do not create employer-employee relationships.

Inherently Governmental functions are reserved for performance by DOE.

The PWS 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.") Loopholes are eliminated.

General information is separated from direction (background information, suggested procedures, etc., are clearly distinguishable from contractor responsibilities).

Each task has a completion date (calendar days or workdays are specified, as appropriate).

Section headings and content are compatible.

Extraneous, ambiguous, subjective, or "catch-all" statements are eliminated.

If Government-furnished equipment (GFE) is to be provided, PWS states the nature, condition, and availability of the equipment.

No particular source(s) are favored.

Performance-Based Services Acquisition

Guiding Principle

Performance-based services acquisition strategies embrace commercial best practices and innovative processes while leveraging the competitive forces of the marketplace and achieving cost effective service delivery.

[Reference: Public Law 106-398, § 821, FAR 37.6]

1.0 Summary of Latest Changes

This update: (1) changes the chapter number from 37.2 to 37.601 to coincide with the FAR, (2) updates references, and (3) includes administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. DOE also has a performance-based services acquisition toolkit that includes links to best practices and samples, including the DoD Guidebook for Performance-Based Services Acquisition. The toolkit is located at the following site: http://www.energy.gov/management/office-management/operational-management/procurement-and-acquisition/guidance-procureme-2. This chapter does not assist in establishing performance measures and incentives related to DOE Management and Operating (M&O) Contracts and other major operating contracts.

2.1 Overview. The purpose of this chapter is to provide acquisition professionals and program offices with a resource that enables them to achieve success in performance-based services acquisition (PBSA).

Federal acquisition law has established a preference for PBSA, which improves procurement services by encouraging the use of simplified procedures under FAR Part 12, Acquisition of Commercial Items.

There are many benefits of acquiring services through the use of PBSA methods. The agency has a greater probability of meeting mission needs by directing the focus on intended results rather than the process. PBSA also reduces performance risk because the contractor is involved at the front end of the acquisition process. Detailed specifications and work process descriptions are not needed because the performance work statement (PWS) and the statement of objectives

(SOO) describe the end use. These advantages allow the agency to set the standard and the outcome while giving contractors the freedom to execute an innovative and unrestrictive method of delivery.

The following information is contained in this chapter:

- Definitions
- Objectives of PBSA
- Development of the Performance Work Statement (PWS)
- Development of the Statement of Objectives (SOO)
- Managing to Contract Completion

2.2 Definitions. The following list of terms is directly associated with the PBSA methodology. Some of the terms are defined elsewhere in existing regulation and guidance; however, this chapter seeks to provide a working definition of the terms discussed and should not be considered all inclusive:

Acceptable Quality Level (AQL)	The maximum degree of variance from the standard or expectation, e.g., allowable error rate.
Best Value	The process used to select the most advantageous offer to the government, typically using trade-offs while considering technical merit over price.
Incentive	Motivators of successful performance.
Job Analysis	Identification of essential inputs, processes, and outputs.
Measurable Performance Standards	Describes what is considered acceptable performance by use of quantifiable, easy to apply, attainable attributes.
Needs Assessment	The process by which the team determines what problem the agency needs to solve. What result or outcome is needed on a macro level and does it meet the organizational and mission objectives?
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-Based Services Acquisition (PBSA)	An acquisition strategy designed to meet mission and program needs that describes measurable performance objectives as related to specific outcomes or results.
Performance Metrics	A series of negotiable indicators that are meant to provide a way to measure contractor success and are also discriminators of quality in a best value scenario.
Performance Objectives	Desired outcome of work to be performed as determined by the team analysis recorded in agency business documents, e.g., business case, acquisition strategy, etc.

Performance Work Statement (PWS)	A document that describes the agency's requirement in clear, specific, objective, and measurable outcomes or results.
Quality Assurance Surveillance Plan (QASP)	A government developed tool generally used to assess contractor success against the agreed upon performance standards.
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.

2.3 **Objectives of PBSA**. The major objective of PBSA is to create a link 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:

- Maximize contractor performance through competition and innovation, encouraging contractors to find a cost effective way of service delivery;
- Promote the use of commercial services by allowing contractors to offer routine industry solutions that pose minimal risk to the government;
- Move the focus from process to results, thereby providing a means for the preferred outcome; and
- Achieve cost savings.

2.3.1 Maximize Contractor Performance. Certain services lend themselves to PBSA because performance expectations can be identified and they are easy to measure, such as information technology support services, janitorial services, and guard services. Performance presents minimal risk to the government. Conversely, there are other services, such as software development, that are more complex and maximize contractor performance through competition and innovative processes that focus on the desired outcome. In this instance, a SOO that focuses on the end result, and performance incentives, may prove to be more useful. This technique may guard against being too prescriptive, yet allow for the mitigation of technical risk and other concerns.

2.3.2 Promote Use of Commercial Services. The use of FAR Part 12 procedures streamlines the acquisition process while expanding the range of potential solutions or outcomes. Market research is a key component to buying best value services from the commercial marketplace.

2.3.3 Move Focus from Process to Results. PBSA clearly spells out the desired end result(s) expected from the contractor's performance. It is critical to structure requirements around the purpose of the work to be performed as opposed to the manner in which the work is to be performed, e.g., labor mix, number of hours, type of equipment, etc. Contractors should be given flexibility to determine how to best meet the government's performance expectations.

2.3.4 Achieve Cost Savings. PBSA allows for contractor innovation and ingenuity that may result in cost savings to the government. Contractors decide how to best meet performance objectives and how to ensure that standards are achieved with acceptable levels of quality. Performance standards must be attainable and their measures must clearly convey what constitutes an acceptable level. As necessary, standards may have positive or negative incentives to motivate performance, e.g., monetary, past performance, government oversight, etc.

Critical to the success of PBSA is careful program and project planning (see DOE O 413.3B Chg 2 (PgChg), Program and Project Management for the Acquisition of Capital Assets), collaborative market research, detailed performance work statements, high level statement of objectives (if applicable), and the "critical-few" performance measures.

2.4 Development of the Performance Work Statement (PWS). There are two ways to describe the Government's needs under PBSA - a PWS or a SOO. In terms of organization of information, a statement of work (SOW) like approach is suitable for a PWS, e.g., introduction, background information, scope, etc., adapted as appropriate.

2.4.1 Job Analysis. Preparation of the PWS requires a comprehensive job analysis to ensure that expected outcomes or end results are accurate and complete. The job analysis also forms the basis for developing measurable performance standards and creating the quality assurance surveillance plan (QASP). The job analysis is a bottom-up evaluation of each aspect of the requirement (inputs, processes, and outputs). Processes and procedures for repetitive requirements should be verified and validated to ensure that outcomes are cost effective and solutions are industry driven. During the job analysis, it is important to differentiate between what is actually being done and perceptions of what is being done. A job analysis consists of:

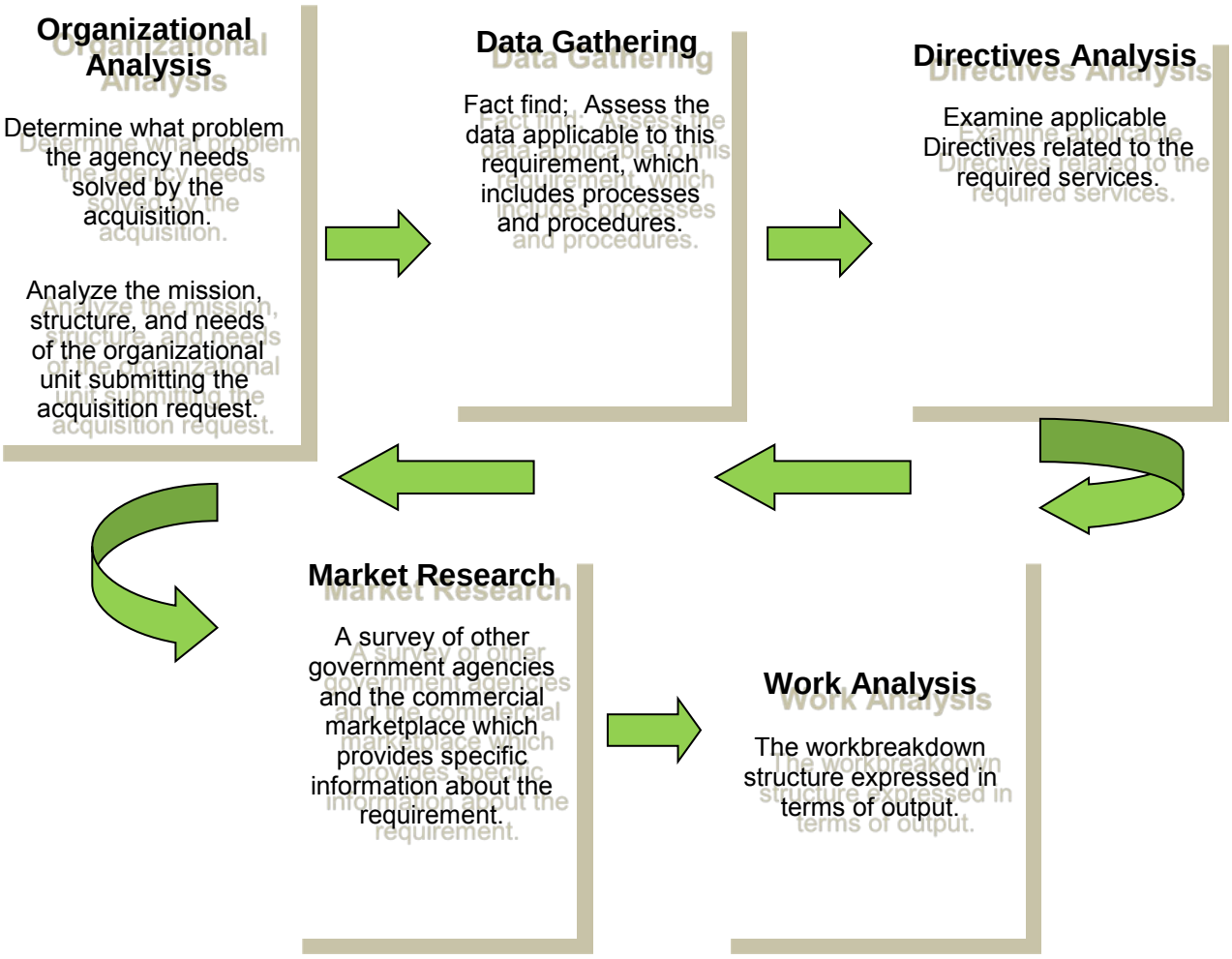
- Organizational Analysis (data may overlap with needs assessment);
- Data Gathering;
- Directives Analysis;
- Market Research; and
- Work Analysis.

WARNING: During the job analysis, the examination of "how" things are done could unintentionally lead to creating a PWS that (1) instructs the contractor how to perform a task, and/or (2) provides a process-oriented description. To safeguard against this, the Seven Steps to

Performance-Based Services Acquisition guide advocates 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 1) and proceed in the PBSA process.

Exhibit 1

DOE Job Analysis



Organizational Analysis

The first step in conducting the job analysis is to conduct an analysis of the organizational unit supported by the required services, including 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 answered, 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 PWS. 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 it to the contractor. If any changes affect the facility, e.g., 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, e.g., 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 PWS 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, restriction of the contractor's innovative approach, etc.

Market Research

The objective of market research is to become informed about the service industry that will provide a 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 may also be obtained from trade publications, contractor capability statements, the Small Business Administration, etc. A sources sought synopsis and/or draft solicitation may be used in conjunction with a market survey to obtain information. Market research should:

- 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 are the "how to" actions that will be taken by the contractor in order to achieve the product or outcome. (*Remember, how to complete the work steps is 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 in terms of timeliness, error rates, accuracy rates, completion rates, cost control, etc. One method of documenting work outputs is to set up a tree diagram, dividing the job into parts that contribute to a final outcome or result.

The ultimate goal of the job analysis is to understand and describe the desired outcome, which enables the development of (1) measurable performance standards, and (2) acceptable quality levels.

2.4.2 Performance Analysis. The performance analysis process will identify how the results of the job analysis (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 determining 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 maximum 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 highest 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. 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, etc.	System must be operational 95% of the time.	Could be 100% inspection, random sampling, periodic sampling, etc.	Incentives and disincentives may include greater or lesser fee, longer or shorter performance term, less or more surveillance, etc.

Note: Incentives and disincentives may be used to motivate successful contract performance as it relates to the desired outcomes. However, the use of incentives or disincentives is not required as part of the PBSA methodology.

2.4.3 Drafting the PWS. The results of the above analyses develop the foundation for the 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. When writing the PWS, 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 the 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 promoting successful contract performance

2.5 Development of the Statement of Objectives (SOO). The use of the SOO is a methodology that requires competing contractors to develop the PWS, performance metrics and measurement plan, and quality assurance plan, which are evaluated before contract award.

A key aspect of the SOO is that it is a short, 3-5 pages, high-level document. It 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 information is available regarding the requirement, or when use of the PWS is otherwise inappropriate. Unlike the PWS, the FAR advocates a preferred content for the SOO (see FAR 37.602(c)). The SOO should be incorporated into the request for proposal as Section C or part of Section C, depending on how the solicitation is formatted.

In accordance with the FAR, the SOO should address the following:

Purpose

The purpose should provide information to the offeror regarding the reason for this requirement. The purpose may be a vision of what is to be achieved organizationally as a result of the acquisition.

Scope or Mission

This 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; the “full range of services” is the goal so that all aspects of what is being purchased are captured. The structure of the SOO provides for industry driven innovation, cost efficiency, and competitive solutions.

Period and Place of Performance

Address whether option periods and award terms apply, and whether work will be performed at the contractor's facility, at a Government site, or both.

Background

Provide pertinent background information that would help the offeror propose a more accurate PWS.

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 constraint is anything that limits performance relative to the goal. It is 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.

2.6 Quality Assurance Surveillance Plan (QASP). The QASP 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 PWS approach, the QASP is usually 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 SOO approach, the QASP may be developed by the offeror as part of the response to the RFP. The QASP summarizes the performance standards and acceptable quality levels for the appropriate standard, describes how performance will be monitored and how results will be evaluated, and explains the impact on contract payment. The QASP focuses on the level of performance and not the method for achieving it.

2.6.1 PWS. The QASP may be part of the PWS, but it is usually contained as a separate document within the contract. There may be one QASP for the entire PWS or multiple

QASPs associated with specific tasks within the PWS. The QASP helps the Government assess contractor success and perform overall contract management. The most common types of surveillance methods used are 100% inspection, random sampling, periodic sampling, customer input, and unscheduled inspections. 100% inspection is best suited for infrequent tasks or tasks with strict performance requirements. Inspection is required at each occurrence and is often 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. Agency resources must be considered, as well as the relative importance of each task to help determine which tasks should be inspected, how to inspect them, and how often they should be inspected. Customer input is a method 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 PWS and performance standards should be reviewed and simplified. The CO should brief contractors on the surveillance requirements and ask the contractor to provide a requirement-specific quality control plan describing procedures it will use to maintain acceptable quality levels under the contract.

2.6.2 SOO. The SOO approach is particularly suitable for having the offeror propose performance metrics and the QASP because the SOO requires each offeror to develop an innovative competitive solution to the government's requirement. Consequently, each proposal should have different metrics, measures, and quality assurance plan(s). In this instance, the QASP should be tailored to the proposed solution. 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 measures continue to be considered.

2.7 **Incentives**. The incentive plan 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. Where monetary incentives are not desirable or considered ineffective as a motivating factor, non-monetary incentives such as extensions to award term should be explored. If deductions are used, 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 describes types of incentives:

Type of Incentive	Description
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 upward or downward 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 to the Government.
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 exceeding performance standards during a stated period of time.

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 both positive and negative incentives 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. Trade-offs must be considered and should be consistent with the overall objectives of the acquisition to prevent the contractor from concentrating its efforts on any one incentive area.

A cost-plus-award-fee contract may support an award term incentive. However, award fee contracts are resource intensive in their administration, so this type of contract should only be used with large dollar value requirements. The available award fee pool acts as a motivating factor on 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. Objective factors such as cost control, and timeliness of deliverables tend to be easily identifiable and motivate contractor performance effectively. In some cases it may be appropriate to use subjective factors such as quality of the product or service. Objective factors suggest that a certain outcome will result in a certain fee. Subjective factors may appear vague and less convincing. Nonetheless, subjective factors should be used when there are clear discriminators. Award fee criteria may be changed during contract performance to reflect the current situation and changes in mission priorities.

2.8 **Managing to Completion**. The key to successful project completion is managing contract performance within the performance-based acquisition structure. The first step is identical to the last: maintaining team formation. Team effectiveness is critical. Each individual brings a certain skill set to the team that may be needed at any time. 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. At this stage the contractor is part of the team, and the contractor's expertise and knowledge should be used to ensure project success.

b e te t

CHAPTER 39 - ACQUISITION OF INFORMATION TECHNOLOGY

Section 508 Accessibility Program - September 2017

Section 508 Accessibility Program

Guiding Principles

- Individuals with disabilities should have comparable access to and use of information, data, and equipment.
- Information and Communication Technology acquired by DOE must meet the standards set forth at 36 CFR 1194.

[References: FAR 39.2 and 36 CFR 1194]

1.0 Summary of Latest Changes

This update: (1) revises the chapter number from 39.2 to 39.203 to align with the FAR, (2) reorganizes, updates, and streamlines the guidance, and (3) includes administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. This chapter provides additional guidance on DOE's purchase of Information and Communication Technology (ICT) supplies and services. These requirement stem from Section 508 of the Rehabilitation Act of 1973, as amended, and codified at 36 CFR 1194.

2.1 Purchasing compliant supplies and services. When purchasing ICT supplies and/or services, Contracting Officers must determine if the accessibility standards found in FAR 39.2 and 36 CFR 1194 apply, or if an exception or exemption exists. Section 508 applies to all Federal prime contracts and all task and delivery orders placed against Government-wide contracts, such as Federal Supply Schedules. Legacy systems that comply with the previous standards do not have to be modified to meet the revised Section 508 standards unless they are altered after January 1, 2018.

2.1.1 Exceptions and Exemptions. ICT supplies and services must meet the applicable accessibility standards at 36 CFR part 1194, unless one of the following exceptions or exemptions apply.

1) ICT operated by agencies as part of a National Security System, as defined at 40 U.S.C. 11103(a).
2) Supplies or services acquired by the contractor, incidental to the contract, for its internal workplace use.
3) Equipment located in office spaces and only frequented by service personnel.
4) Compliance with all applicable accessibility standards is not required when it would impose an undue burden on the agency or require fundamental alteration to the nature of the ICT being acquired.

2.1.2 Market Research. As part of market research for the purchase, Contracting Officers must determine the availability of supplies and/or services that comply with the applicable accessibility standards. Accessible supplies and services can be found by reviewing the "Buy Accessible" link at http://section508.gov. When fully compliant supplies are determined to be unavailable, the Contracting Officer and end user should look for technically equivalent items and partially compliant items.

2.1.3 Documentation. The Contracting Officer must document the results of market research by discussing the market research performed and the conclusions of that research. If one of the exceptions or exemptions apply, the Contracting Officer must document the file with a justification for using that exception or exemption.

2.2 Electronic Content. All public-facing and agency official communications must comply with Section 508. This includes Requests for Proposal and Requests for Quotations. If the contractor will work on agency websites, software or other systems that include public-facing and official communications, the contract or task order must identify Section 508 compliance as a requirement. If the information cannot be produced in a compliant manner, an alternate method of providing the information must be provided.

b e te t

CHAPTER 41 - ACQUISITION OF UTILITY SERVICES

1 2 t t e t 2017

Utilities

Guiding Principles

- Acquisition of utilities requires careful analysis and planning to ensure the service is acquired efficiently.
- Consult with Federal Energy Management Program (FEMP) prior to any utility acquisition, Energy Savings Performance Contract, Utility Energy Service Contract, or Power Purchase Agreement, as these can significantly impact cost.
- FEMP and Office of General Counsel must review and approve all contracts for utility services.
- Competition may be limited to qualified Indian tribes and tribal majority-owned organizations for the purchase of renewable energy products.

References: FAR 41, DEAR 941 and 970.4102, DOE Order 436.1, Energy Policy Act of 2005, DOE Policy on Acquiring Renewable Energy Products from Indian Tribes

1.0 Summary of Latest Changes

This update includes: (1) a correction to the Headquarters review process, (2) integration of requirements of the Energy Policy Act of 2005, and (3) administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references.

2.1 **Overview**. This section discusses the acquisition of utility services by DOE and its contractors.

2.2 **Background**. DOE's mission involves projects that use large amounts of electricity and other utilities. The acquisition of utility services requires analysis of the quantity of service necessary and proper planning to assure that the service is acquired effectively and at the lowest reasonable cost. Planning should begin approximately 24 months prior to expiration of an existing contract, and should consider the availability of General Services Administration

(GSA) areawide contracts, as well as the appropriateness of separate contracts (see FAR 41.205). Contact the Office of the Federal Energy Management Program (FEMP), situated within the Office of Energy Efficiency and Renewable Energy, early in the acquisition planning process. FEMP has expert staff available to conduct a variety of studies, including option studies and analyses of potential utility service cost impacts of Energy Savings Performance Contracts, Power Purchase Agreements, and Utility Energy Service Contracts, as performance contracts can have significant and sometimes unforeseen impacts on utility costs.

2.3 **Headquarters Review and Concurrence**. The Contracting Officer (CO) must work with the program office to submit solicitations, contracts, and contract modifications for utility services at all DOE-owned or –leased facilities to the Office of General Counsel (OGC), as well as to FEMP, for review and concurrence (see DOE Order 436.1, *Departmental Sustainability,* page 7, under duties of Field Managers, paragraph 6). The term "contracts" includes interagency, as well as intra-agency, agreements and subcontracts. Note: NNSA COs are to follow Business Operating Procedure 03.06, *Supplemental Procedures for Alternative Financed Energy Savings Projects.*

2.4 **GSA Areawide Contracts**. FAR 41.204(c)(1) requires the use of GSA areawide contracts in covered areas with two exceptions: (a) service is available from more than one supplier, or (b) the head of the contracting activity (HCA) or designee determines that use of the areawide contract is not advantageous to the Government.

2.5 **Indian Energy Preference Provision**. When an exception to FAR 41.204(c)(1) exists, the CO may limit competition to qualified Indian tribes and tribal majority-owned organizations for the purchase of renewable energy, renewable energy products, and renewable energy by-products. See DOE Policy on Acquiring Renewable Energy Products from Indian Tribes (December 2012) for more information. Contact FEMP for information on the regulatory environment at specific sites, as well as the options for procuring renewable energy.

2.5.1 Competition in Contracting Act (CICA). The Indian preference provision of Energy Policy Act of 2005 (EPAct 2005) permits the use of the CICA exception at FAR 6.302-5, as it provides for procedures “otherwise expressly authorized by statute.” Therefore, when purchasing renewable energy or other renewable energy products or byproducts, COs may limit competition to Indian-owned organizations.

2.5.2 Definitions.

2.5.2.1 Renewable energy is limited to energy generated by the resources defined in § 203(b)(2) of EPAct 2005: solar, wind, biomass, landfill gas, ocean (including tidal, wave, current, and thermal), geothermal, municipal solid waste, or new hydroelectric generation capacity achieved from increased efficiency or additions of new capacity at an existing hydroelectric project.

2.5.2.2 Qualified sources. Preference can only be given to a tribe or an energy and resource production enterprise, partnership, consortium, corporation, or other type of business organization, in which one or more Indian tribes owns and controls at least a 51 percent ownership interest, as defined in § 2602(d)(1) of EPAct 1992, as amended by § 503 of EPAct 2005 (25 U.S.C. § 3502).

2.5.3 Justification for Other than Full and Open Competition (JOFOC). COs must remember that the use of FAR 6.302-5(a) requires a JOFOC because the underlying statute "authorizes" but does not require (see FAR 6.302-5(c)) that the procurement be made from a specified source.

2.5.4 Publicizing the requirement. The CO should provide a reasonable opportunity for any entity in the statutorily defined list to participate by publishing the synopsis and solicitation on FedBizOpps. The synopsis should indicate that the acquisition is limited to those sources identified in in § 2602(d)(1) of EPAct 2005.

2.5.5 Pricing Considerations. Section 2602(d)(2) of EPAct 2005, as amended, provides that in carrying out this preference, the Government shall not pay more than the prevailing market price or obtain less than prevailing market terms and conditions. Prevailing market price is the price at which a given commodity or service may commonly be bought or sold in an open marketplace. Similarly, prevailing market terms and conditions are those terms and conditions associated with the purchase of particular commodities or services that are common or widespread in the marketplace in which the commodities or services are sold.

2.5.5.1 Factors to be considered include the type of renewable energy product or by-product required; local market conditions for similar products (if available); local market rates for similar products (if available); and, for renewable energy produced on tribal lands, the double value of any included RECs.

2.5.5.2 Documentation. When utilizing this preference, COs must clearly document the file to show that, in addition to being fair and reasonable, the price is not more than the prevailing market price and the terms obtained are not less than the prevailing market terms. Contact FEMP for technical support in performing the prevailing market price analysis.

2.5.6 Consistency with State law. FAR 41.201(d) implements a statutory prohibition on agencies use of appropriated funds for the purchase of electricity in a manner inconsistent with State law. The electric utility industry is extremely complex and the local regulatory environment may dictate the only legally available providers of electricity. A site-specific analysis conducted by subject matter experts is necessary to determine what the local regulatory environment requires. Due to the complexity and the special rules for utility acquisitions, FEMP should be consulted for its expert advice.

2.5.7 Responsibility Determinations shall be made prior to award (see the criteria at FAR 9.104). Many tribes may not have relevant past performance under procurement contracts, but could have a history of performance under contracts and grants awarded by the respective offices within the U.S. Department of the Interior (Bureau of Indian Affairs or BIA) and U.S. Department of Health and Human Services (Indian Health Service or IHS) under the authority of the Indian Self-Determination and Education Assistance Act, P.L. 93-638, as amended. COs may wish to verify with BIA and IHS that the tribe has not been suspended and/or debarred and whether there are any significant performance issues.

2.5.8 Maximum contract length. The maximum length is ten years, including options, for public utility services acquisitions and renewable energy (40 U.S.C § 501). Energy savings acquisitions and electric services for uranium enrichment installations (per the Atomic Energy Act of 1954, as amended (42 U.S.C. 2204)), are authorized for periods not exceeding 25 years, including options.

2.6 **Summary and Additional Resources.** DOE procures large amounts of electricity and other utilities. Such acquisitions require analysis and proper planning. Acquisition planning should consider the availability of GSA areawide contracts, as well as the appropriateness of a separate contract. FEMP has expert staff, available via 202-431-7601 or tracy.niro@ee.doe.gov, to conduct various studies in support of utility services acquisitions. FEMP and OGC must review and concur with all contracts for utility services. The Office of Field Assistance and Oversight Division, MA-62, may also be consulted for assistance.

b e te t

CHAPTER 42 - CONTRACT ADMINISTRATION AND AUDIT SERVICES

2 101 t e reme t r eme t per t tr t 201
2 2 me t t ppr e er e ter t r e mer t pe S e reeme t pr 2012
2 tr t eme t ebr r 2012
2 70 1 re t t te m tr t September 2017
2 1202 t reeme t t 201
2 1 02 tr t r er rm e rm t r 2017
2 1 ep rt t er tr t r rm t t e er r ee er rm e te r t rm t S tem S t 201

Audit Requirements for Non-Management and Operating Contracts

Guiding Principles

- Obtaining audit services is often called for by regulation, policy, or prudence.
- The auditor can play a vital role in supporting the Contracting Officer in source selection, pricing actions, and ensuring only allowable costs are reimbursed.

[References: FAR 9.1, FAR 15.404-1, FAR 15.404-2, FAR 31, FAR 32.202-7, FAR 42.1, FAR 42.7, FAR 52.216-7, DEAR 915.404-2-70, and Acquisition Guide Chapter 42.1]

1.0 Summary of Latest Changes

This update: (1) provides information regarding an alternative to Defense Contract Audit Agency (DCAA) audit support that is available to Department of Energy (DOE) Contracting Officers, and (2) includes administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references.

2.1 **Background**. DOE's large dollar value contracts are predominantly cost-reimbursement contracts. In establishing the price of such contracts (that is, the estimated cost and fixed/incentive/award fee) and administering them throughout their term, the Government's risk of overpayment lies in the costs actually reimbursed over the life of the contract. The Government does not reimburse estimated cost, but rather actual cost up to the cost-reimbursement contract's ceiling. The fee is small relative to the actual cost.

While selecting the offeror that will provide the best value in a competition for a cost-reimbursement contract and pricing the cost-reimbursement contract fairly and reasonably are important, reimbursing only costs that are allocable, allowable, and reasonable over the life of the contract is where a significant portion of the Government's financial concern lies.

Previously, the majority of DOE's contract dollars were obligated on management and operating (M&O) contracts for which DOE's Inspector General (IG) is the auditor and DOE's Chief Financial Officer (CFO) provides abundant financial and accounting support. DCAA's services were readily available for the few other DOE contracts, which were typically of small dollar value. Now some large dollar value contracts are no longer M&O contracts; therefore the IG is not the auditor and the CFO is not necessarily involved. DCAA's services are not always readily available in a timely manner for audits of final indirect cost rate proposals (sometimes referred to as incurred cost

proposals).

This guide chapter addresses how the Contracting Officer should view the vital role of auditors in: source selection in cost-reimbursement contracting; pricing actions for all contract types; and ensuring the Government is reimbursing only costs that are allocable, allowable, and reasonable during cost-reimbursement contract performance.

2.2 **Private Sector Audit Support Availability**. As an alternative to DCAA audit support, DOE/NNSA Contracting Officers may obtain audit services from a private sector provider of audit services. One available option is a Blanket Purchase Agreement (BPA) for audit services that is currently in place with CohnReznick, LLP. Orders for audit support can be placed by any DOE/NNSA Contracting Officer through individual awards issued against BPA DE- MA0011836. Each order placed against the BPA is awarded and administered by the field site Contracting Officer placing the order. For further information regarding placing orders for audit support with CohnReznick, LLP, please contact the BPA Contracting Officer's Representative (COR), Salem Fussell, at salem.fussell@hq.doe.gov.

2.3 **Requirements for Auditor Assistance**. Audits are necessary when significant incurred costs are involved or actual cost data on previous contracts exists and is relevant to the current contract pricing action. Audits should not be waived unless the data used to support determining the reasonableness of the price has been audited within the past year and cost/pricing reports from DOE pricing support personnel or Department of Defense contract management offices do not satisfy the audit requirement of DEAR 915.404-2-70.

2.3.1 Responsibility Determinations. FAR 9.1 "Responsible Prospective Contractors" requires the Contracting Officer to obtain from the auditor any information, when it is neither on hand nor readily available, required concerning the adequacy of prospective contractor's accounting system and the system's suitability for use in administering the proposed type of contract.

2.3.2 Proposal Analysis. The following are some applicable sections of the FAR and DEAR that indicate when audit assistance is required and useful during proposal analysis:

- 15.404-1 "Proposal Analysis Techniques"
- 15.404-2 "Data to Support Proposal Analysis"
- 915.404-2-70 "Audit as an aid in proposal analysis"

2.3.3 Cost Accounting Standards. For Cost Accounting Standards (CAS) covered contracts, FAR audit requirements of the contractor's CAS Disclosure Statement (if one is required) can be found in the following section of the FAR:

- FAR 32.202-7 "Determinations"

The cognizant federal agency appoints the cognizant federal agency official. The cognizant federal agency will normally be the agency with the largest dollar amount of negotiated contracts. It is responsible, on behalf of all federal agencies, for establishing final indirect cost rates and administering CAS for all contracts in a business unit. The cognizant federal agency official is

responsible for determining whether the contractor's disclosure statement adequately describes its cost accounting practices. After determining the contractor's disclosure statement is adequate, the cognizant federal agency official is responsible for determining if the contractor's disclosed cost accounting practices comply with CAS and FAR Part 31.

The Contracting Officer may not award a CAS-covered contract until the cognizant federal agency official has made a written determination that any required CAS disclosure statement is adequate.

2.3.4 Contract Audit Services. The following is an applicable section of the FAR that regarding contract audit services:

- FAR 42.1 "Contract Audit Services"

Acquisition Letter (AL) 2008-02 "Audit Management" provides additional guidance to contracting officers on planning audits for other than M&O contracts, as well as other factors to consider when determining the extent of audit support to request.

2.3.5 Indirect Cost Rates. The following are some applicable sections of the FAR that provide rules and guidance regarding indirect cost rates:

- FAR 42.7 "Indirect Cost Rates" (covers both billing rates and final indirect cost rates)
- FAR 52.216-7 "Allowable Cost and Payment"

In addition, Acquisition Guide Chapter 42.1 "Indirect Cost Rate Administration" discusses the Department's procedures for the administration of indirect cost rates for contracts and financial assistance instruments.

2.4 **Mechanisms Auditors Use to Ensure Claimed Costs Are Allowable**. The amount of audit work required to verify that the Government is reimbursing only costs that are allocable, allowable, and reasonable for a particular effort depends on a number of factors, including, among other things, whether the contractor's accounting system has ever been determined adequate, the size, quality, and independence of the contractor's internal control staff, the complexity of the contract, how recently the contractor has been audited and what was audited, and the results of past audits. Less audit effort may be required for an established Government contractor with a large number of cost-reimbursement contracts and a good record of keeping its accounting system effective and its billings and cost incurred submissions accurate. Auditors have less work if they can rely on ongoing system audits, frequent invoice reviews, recent final indirect cost rate proposal audits, and a robust contractor internal control organization that has proven to be reliable. There are factors other than those mentioned above that could influence the amount of audit work required and auditors include all factors in the risk assessment performed for each audit assignment.

2.5 **The Role of the Contracting Officer**. DOE Contracting Officers are responsible for ensuring performance of all necessary actions for effective contracting and safeguarding the interests of the United States in its contractual relationships. In fulfilling these responsibilities, they have wide latitude to exercise their business judgment; however, they are required to request and

consider the advice of specialists in other fields, such as auditors, when appropriate. Contracting Officers are members of the acquisition team, which consists of all participants in the acquisition, and, as such, are to exercise personal initiative and sound business judgment in providing the best value product or service to meet the customers' needs, while maintaining the public's trust and fulfilling public policy objectives.

DOE Contracting Officers generally must request and rely upon the advice of auditors, such as DCAA or private sector audit firms, in making a number of determinations under their non- M&O contracts. As good stewards of the taxpayers' dollar, they are obligated to maximize the return on the entire spectrum of the Department's resources devoted to audits and audit related efforts.

Contracting Officers should consider consulting with the DOE CFO, which typically possesses significant knowledge and experience in financial management and controls. In addition, Contracting Officers should also consider consulting the DOE IG, which possesses significant knowledge and experience in auditing, especially in maximizing the effectiveness of contractors' internal control systems in supporting audit work and reducing the need for and cost of audits.

Documentation and Approval of Federally Funded International Travel (Fly America Act-Open Skies Agreement)

References:
- 49 U.S.C. §40101(e)
- 49 U.S.C. §40118 (Fly America Act)
- Airline Open Skies Agreements (http://www.gsa.gov/portal/content/103191)
- FAR Subpart 47.4
- FAR 52.247-63
- 41 CFR §301-10.131 through §301-10.143 (Federal Travel Regulations)
- GSA Bulletin FTR 11-02

Overview

This section provides guidance to DOE Contracting Officers, Contracting Officer Representatives, and Program Officials on documentation and approval of federally funded international travel by Federal contractors and subcontractors in accordance with FAR 52.247-63 PREFERENCE FOR U.S.-FLAG AIR CARRIERS (JUNE 2003), 49 U.S.C. §40118 (Fly America Act) and the Open Skies Agreements as amended.

Background

Contracts that include FAR clause 52.247-63, PREFERENCE FOR U.S.-FLAG AIR CARRIERS (JUNE 2003) as prescribed in FAR 47.405 require that, if available, the Contractor (and subcontractors), in performing work under the contract, shall use U.S.-flag air carriers for international air transportation of personnel (and their personal effects) or property. The clause also indicates that if the Contractor selects a carrier other than a U.S.-flag air carrier, the travel voucher must include a statement indicating the reason it was necessary and allowable to use the foreign-flag air carrier as provided in FAR Section 47.403 - Guidelines for implementation of the Fly America Act.

The Fly America Act (40 U.S.C. §40118) is part of the Federal Travel Regulations (41 CFR Parts 301-10.131 through 301-10.143) promulgated by the General Services Administration (GSA) which implements statutory requirements and Executive branch policies for travel by Federal civilian employees and others authorized to travel at Government expense. Recipients of Federal funds, either through Federal contracts, subcontracts or Federal financial assistance, are required to abide by the provisions of the Fly America Act. The Fly America Act requires that foreign air travel funded with Federal dollars be performed on U.S. flag air carriers, except as provided in 41 CFR §301-10.136 and § 301-10.137 or when one of the exceptions in 41 CFR §301-10.135 applies.

An exception to the Fly America Act is FAR 47.403-2 – AIR TRANSPORT AGREEMENTS BETWEEN THE UNITED STATES AND FOREIGN GOVERNMENTS which states:

> "Nothing in the guidelines of the Comptroller General shall preclude, and no penalty shall attend, the use of a foreign flag air carrier that provides transportation under an air transportation agreement between the United States and a Foreign government, the terms of which are consistent with the international aviation policy goals at 49 U.S.C. 1502(b) and provide reciprocal rights and benefits."

This is consistent with the exception provided in 41 CFR §301-10.135(b) which states you must use a U.S. flag air carrier for travel unless:

> "The transportation is provided under a bilateral or multilateral air transportation agreement to which the United States Government and the government of a foreign country are parties, and which the Department of Transportation has determined meets the requirements of the Fly America Act."

The United Sates Government has entered into several air transport agreements that allow federal funded transportation services for travel and cargo movements to use foreign air carriers under certain circumstances. Open Skies agreements are considered qualifying "bilateral or multilateral [air transportation] agreement[s]". A full list of current Open Skies partners is available at *http://www.gsa.gov/openskies*.

On October 6, 2010, GSA issued GSA Bulletin FTR 11-02, to inform agencies of the amendment to the U.S.-EU Open Skies Agreement effective June 24, 2010. One significant change made by the amendment affects Contractors' use of the Open Skies Agreement rates when a GSA Airline City Pair Contract fare is in place. Contractors are **not** eligible to utilize GSA Airline City Pair Contract fares. Prior to this Open Skies amendment, if there was a GSA Airline City Pair in place, Government Contractors were precluded from using foreign carriers per the Open Skies Agreement for travel. However, this amendment to the Open Skies Agreement now provides that Government contractors may use Open Skies Agreement rates even when a GSA Airline City Pair Contract fare exists. This amendment also allows EU airlines to transport passengers between points in the United States and points outside the EU if the EU airline is authorized to serve the route under the United States-EU Open Skies Agreement. For more details see GSA Bulletin FTR-11-02 at: http://www.gsa.gov/portal/content/102886#TravelPerDiemBulletins.

TERMS AND DEFINITIONS:

International Air Transportation means transportation by air between a place in the United States and a place outside the United States or between two places both of which are outside the United States.

United States means the 50 States, the District of Columbia, and outlying areas of the United States.

U.S.-flag air carrier means an air carrier holding a certificate under section 401 of the Federal Aviation Act of 1958 (49 U.S.C. §41102).

GUIDANCE:
Contracting Officers, Contracting Officer Representatives or Program Officials responsible for reviewing and approving for payment Contractor invoices that include travel expenses must ensure that when a foreign air carrier is used a certification is provided with the invoice in accordance with §301-10.142 of the FTR. Reimbursement for travel expenses from a foreign air carrier fare may be denied if appropriate certification is not provided. The certification must include:

- Traveler's name
- Dates of travel
- Origin and destination of travel
- Detailed itinerary of travel, name of air carrier and flight number for each leg of the trip
- A statement explaining why you met one of the exceptions in §301-10.135, 301-10.136, or 301-10.137 or a copy of your agency's written approval that foreign air carrier service was deemed a matter of necessity in accordance with §301-10.138.

This certification satisfies the requirement of FAR 52.247-63, PREFERENCE FOR U.S.-FLAG AIR CARRIERS, subparagraph (f) for contractor use of the Open Skies Agreement.

CONTRACT MANAGEMENT PLANNING

Guiding Principle:

The Contract Management Plan is essential for effective management of DOE's most complex contracts.

Applicability:

This section is applicable to the contracting activities of the Department of Energy (DOE).

References:

- FAR 46.4, "Government Contract Quality Assurance"
- FAR 42, Contract Administration and Auditing Services
- FAR 43, Contract Modifications
- DEAR 970.1100-1, "Performance-based Contracting"
- DOE Acquisition Guide, Chapter 7.1, "Acquisition Planning"
- DOE Acquisition Guide, Chapter 37, "Service Contracting"
- DOE Acquisition Guide Chapter 43.2, "Change Order Template"
- DOE O 413.3B, "Program and Project Management for the Acquisition of Capital Assets"
- GAO Report GAO-09-406T, March 2009
- GAO Report GAO-09-271, January 2009

Background

In the GAO reports referenced above, GAO observed, "DOE's contract management, including both contract administration and project management, continues to be at high risk for fraud, waste, abuse and mismanagement. Further, DOE needs to ensure that it has the necessary personnel and resources in place and that solutions identified to contract deficiencies are independently validated for effectiveness and sustainability." GAO observations and recommendations were taken into account in developing this Guide. Specifically, the Contract Management Plan (CMP) framework should assist contract and project managers in improving contract oversight and strengthening performance accountability.

Contract management is a multi-disciplined process which encompasses technical, business, and procurement perspectives. The CMP is critical to effective program execution in the areas of risk management, performance based incentives, quality assurance, and changing mission priorities. Good planning builds effective partnerships, establishes open communications, sets clear expectations, defines roles and responsibilities, and sets the framework for DOE mission

success.

Contract management occurs after contract award and involves those activities performed by the entire Contract Management Team (CMT) performed by the entire Contract Management Team (CMT) in managing the contract, and overseeing contractor performance to ultimately achieve the Government's objectives. The CMT includes project/program managers, technical, legal, contracting and financial officials, and federal safeguards and security directors. DOE organizations should ensure that personnel performing the duties of contractor oversight are adequately trained and appropriately placed within the organization to meet the challenges of performance measurement of the contractor.

For DOE to 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 execution objectives with contract management planning. The CMP provides a framework for the interactions between various government staff and the contractor from the date the contract is awarded through contract completion.

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

What is the purpose of a CMP?

The CMP is one of the primary tools by which the Government can achieve its objectives while simultaneously reducing cost, technical and schedule risks, ultimately providing wise stewardship of taxpayer dollars. The CMP is the key document guiding the coordinated efforts of the contract management team (project managers, program managers, attorneys, and financial and procurement officials, etc.) throughout the term of the contract. Identifying team members' roles and responsibilities early on, as well as applying the appropriate level of surveillance and risk mitigation to contract oversight, is critical to effective contract management. The CMP fuses functional activities and human resources into one corporate business oversight and communication strategy. The level of detail may vary depending on the complexity of the contract. The CMP should specify all parameters related to government oversight and contractor performance, for example:

- ✓ Performance requirements of the statement of work
- ✓ Method for conducting quality inspections, assessments, evaluations, etc.
- ✓ Major roles, responsibilities, authorities, and limitations,
- ✓ Program/project milestones and contract deliverables
- ✓ Level and types of surveillance
- ✓ Contract oversight objectives (i.e., Performance Evaluation Measurement Plan (PEMP), Contractor Assurance Systems (CAS), and Work Authorizations)

Early planning during the pre-award phase is key to establishing an effective contract management tool. Identification of roles and responsibilities of the government and contractor as well as the appropriate level of surveillance and risk mitigation is critical to mission success.

When Is a Contract Management Plan required?

CMPs are required for any of the following (with the exception of the National Nuclear Security Administration, for which CMPs are required only for Management and Operating Contracts):

- 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 supporting projects are subject to the requirements of DOE O 413.3B, "Program and Project Management for the Acquisition of Capital Assets," and any successor directives

- Any contract or task/delivery order greater than or equal to $20M;

- Any significant change to the contract scope or value (greater than 20% increase or decrease in value); or,

- The exercise of an option year that meets any of the above criteria.

The Contracting Officer may always determine that a CMP is necessary and execute one for any contract or task/delivery order.

What are the approval/concurrence requirements for CMPs?

1. COs, through their HCAs, must send their CMPs to Office of Procurement and Assistance Management (OPAM), Field Assistance and Oversight Division (MA-621), for concurrence no later than 30 days after contract award, contract modification, or exercise of an option that meets the criteria for a CMP. The HCA shall ensure that all internal concurrence signatures are provided with the CMP. See Acquisition Guide 71.1, Headquarters Business Clearance Review Process E.2. c. and d. The HCA shall approve and sign the CMP after receipt of MA-621 concurrence and disseminate it to the contract management team.

2. The MA-621 field liaison will coordinate review and concurrence by the appropriate Headquarters program/staff office(s) in the areas of, for example, contractor Human Resources (HR), project management, environment, safety, and health, security, engineering and construction management, legal, and property.

3. MA-621 will forward a concurrence memorandum to the HCA at the completion of HQ reviews, with a copy to the CO.

4. The CO is responsible for final distribution of the CMP to the contract management team and contractor.

5. CMPs must be revised to reflect current contract conditions. CMP revisions that incorporate a change to the contract scope or value (20% increase or decrease in value) require the concurrence of MA-621.

6. National Nuclear Security Administration will coordinate and review CMPs through its own offices, which differ from the above, and the approval authority will reside with the NNSA HCA.

What Is The Role of the Contract Management Team?

The Contract Management Team (CMT) consists of all participants in Government acquisition, including representatives of the technical and procurement communities and stakeholders. The primary team members are the CO, Contracting Officer Representative (COR), Technical Monitor (TM), Federal Project Director (FPD), and Site Office Manager. Matrixed support shall be provided to the CMT from other subject matter experts (General Counsel, local federal safeguards and security director, Environment, Safety and Health (ES&H), as well as other critical functional areas), as necessary. The team is responsible and accountable for the wise use of public resources and works collaboratively in ensuring the contractor's successful execution of the work project set forth in the contract.

The CMT should convene regular meetings to discuss the contractor's performance, delivery schedules, quality of services, safeguards and security issues, risk issues, cost and any other contractual matters. Regularly scheduled meetings between the CO and COR should also be conducted.

As established 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 in its contractual relationships. In order to assist the CO to carry out this mandate, CO's often find it practical to delegate portions of their responsibilities that are delegable. For this reason, CO's appoint CORs and authorize the COR to monitor contract performance and to provide technical direction (as defined in DEAR clause 952.242-70).

In accordance with FAR 1.604, CORs are technical representatives of the CO. CORs help to ensure government-contractor business relationships are mutually beneficial and that the products and services being acquired by the government are delivered per the terms and conditions of the contract. The dynamic nature of the acquisition environment makes the proper conduct of COR roles and responsibilities absolutely critical to successful contract management.

It is essential that CORs understand their relationship to the CO, to the Contractor, the limits of their authority, and all of their delegated responsibilities. As the technical representative of the CO the functions the COR normally performs include: technical monitoring, shifting work emphasis, inspection, approval of shop drawings, testing, approval of samples, and other functions of a technical nature. The COR is not authorized to perform any function that results in a change in the scope, price, terms or conditions of the contract.

Normally, CORs are the only individuals delegated any technical direction responsibility by the CO. CORs shall 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 defined functional areas.

CORs must be provided with appropriate support, training, and tools to effectively perform these activities. In accordance with the DOE Acquisition Career Management Program Handbook, CORs must have the COR Federal Acquisition Certification (FAC) before being appointed and assuming the responsibilities of a COR.

CORs may enlist the assistance of Technical Monitors (TMs) for feedback on contractor performance and specifically to the quality and timeliness of contract deliverables. Such TMs do not have a specific delegation of authority to act as a COR and therefore cannot direct the contractor, redirect scope, or impact the contract in any way. TMs involved in any type of contractor oversight must communicate any performance issues or concerns to the COR immediately so that such issues are resolved in a timely manner.

FPDs are responsible for successfully developing, executing, and managing projects within the approved Performance Baseline in accordance with DOE O 413.3B. They are responsible for project management activities for discrete projects under their cognizance. They are accountable for planning, implementing, and completing a project. The CMP should discuss the responsibilities of the FPD under the contract and the Earned Value Management System implemented by the contract.

FPD's are certified by DOE's Project Management Career Development Program (PMCDP). FPD's must be certified at a level appropriate for the contract. The PMCDP certification requirements are listed at http://energy.gov/sites/prod/files/Requirements at a Glance 0.PDF.

The Site Office Manager may or may not be designated with COR responsibilities. If the Site Office Manager is designated as a COR or Assistant COR, they will be responsible for the same duties and authorities of a COR as prescribed by Section H.7, DEAR Clause 952.242-70.

Sites are cautioned that the potential for a conflict of interest may exist in circumstances when the organization structure is such that a COR supervises a CO. A conflict of interest may arise when a CO makes a decision on a contractual issue and the COR supervisor desires to overturn the CO decision. Early and frequent communication to ensure that all parties understand both

the technical and contractual issues is paramount to avoiding or mitigating such situations. The parties should establish cooperative ways to resolve any disagreements that may arise during contract performance. The CO is required to take full responsibility for the contract and it is critical for the CO to be able to make independent decisions.

Subject matter experts can be assigned in a variety of functional areas as needed by the contract. Subject matter experts do not have authority to give direction to the contractor. They provide expertise in their area of expertise as needed.

What are the key components of a CMP?

Key components that should be considered for incorporation in a CMP include:

- Contract summary and background
- Identification of CMT members and their roles & responsibilities
- Methods of coordination and communication among contract management team members
- Contract transition planning
- Government furnished property
- Government furnished services and items
- Methods for monitoring performance based objectives
- Inspection and acceptance process
- Invoice review and/or letter of credit
- Contractor performance and fee administration
- Approach to maintaining integration of contract changes, project baseline change, and budget change
- Contractor litigation management
- Contract records and final closeout
- Contract deliverables
- Contract performance risk areas
- Strategies for cost and/or schedule reduction
- Agreements with state, community, or other entities
- Contractor human resource management
- Continuity of Operations Planning (COOP) coordination
- Stop work authority

The above list is not all inclusive. Some of the listed components may not apply to your contract. The CMP must be tailored to the unique management requirements of the specific contract. For further guidance, refer to the CMP Template provided as Attachment I to this Chapter. The CMP you are crafting will usually reference other documents (e.g., PEMP, Contractor Assurance System, Risk Management Plans, Federal Contract Transition Plan, etc.). These documents and their access location must be identified in the CMP. The goal is to tie these documents into a cohesive management strategy, not to duplicate these documents in the CMP.

In addition to the above, DOE places special emphasis on the following contract oversight processes and requirements which should be included in a CMP when applicable:

Program and Project Management

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 DOE in particular. Project management requirements currently contained in DOE O 413.3B provide excellent means to ensure that contracts and projects are properly managed. The roles of the Contracting Officer, Federal Project Director, and other key individuals, including their responsibilities related to DOE O 413.3B and Earned Value Management Systems, should be discussed in the CMP.

Contractor Assurance System (CAS)

Contractors responsible for Government-owned/contractor-operated sites are required to implement a comprehensive and rigorous CAS in accordance with DOE O 226.1B, "Department of Energy Oversight Policy". Contractor assurance systems shall encompass processes and activities designed to: identify deficiencies and opportunities for improvement, report deficiencies to responsible managers, complete corrective actions, and share in lessons learned. The contractor is required to submit, for DOE review and approval, a detailed system program that conforms to the requirements of applicable regulation, DOE orders and the contract terms and conditions.

The DOE site management is responsible for federal oversight of the CAS in accordance with the referenced order. DOE oversight encompasses activities performed by DOE organizations to determine whether Federal and contractor program management systems, including assurance and oversight systems, are performing effectively and in compliance with DOE requirements. These systems are transparent to DOE officials and implemented on a web-based platform to enable input by both DOE and the contractor in a real-time manner. Oversight programs include operational awareness activities, onsite reviews, assessments, self-assessments, performance evaluations, and other activities that involve evaluation of contractor organizations.

Contract Change Control

An effective contract change control process is critical to ensuring that both contract and project requirements are successfully met. Ineffective change management occurs when informal, inappropriate direction by DOE technical, project and program officials is provided to the contractor. This has caused an increase in high risk contractual actions, Requests for Equitable Adjustments (REAs), and claims under the "Disputes" clause. To improve effectiveness in change control management, DOE must ensure that only COs or duly appointed CORs provide technical direction to contractors.

Given that contractors are held accountable for the performance of the contract at agreed to cost or price and schedule, it is imperative that all authorized deviations from the original baseline be reflected in the contract at all times. (Note: The contractor is not allowed to change the contract

cost, price, schedule, and/or statement of work as agreed to in the original award of the contract by submitting or updating the project's performance measurement baseline). To achieve contract, project and program success, it is imperative that accurate project baselines are established and maintained and the baseline is reflected, in real-time, in the contract in terms of cost, scope, and schedule. Effective contract management requires that the contract cost, scope, and schedule be current at all times.

For changes related to construction and environmental cleanup projects, HCA's shall establish formal government change control boards (CCBs) with all members of the CMT participating. CCB approval should be obtained before a formal change can be issued by the Contracting Officer. Before making an approval determination, the CCB will consider all perspectives of the proposed change, including budget (i.e., funding availability), and impacts to baseline, statement of work, schedule, and performance measures. Change control management processes and CCBs are further described in DOE G 413.3-20 "Change Control Management Guide". It is important that the CMP clearly address the membership and roles and responsibilities of the CCB that applies to the contract at hand.

In accordance with FAR 43.102 (b), changes should always be priced before execution whenever this can be accomplished without adversely affecting the interests of the government. REAs, resulting from change orders that cannot be fully negotiated before change order modification issuance, shall be negotiated in the shortest practicable time and prior to the incurrence of significant costs by the contractor. Contracting Officers shall establish suspense schedules to ensure prompt definitization of un-priced change orders (no later than 180 days after issuance of a change order). These suspense (or definitization) schedules are incorporated in the unilateral un-priced change order issued by the Contracting Officer per the template and guidance provided by Acquisition Guide Chapter 43.2.

Mutual understanding of, and adherence to, roles and responsibilities among CMT members is essential to effective and efficient contract change control and project success. Roles and responsibilities and change control processes shall be clearly defined in the CMP.

- CORs, Technical Monitors, and Federal Project Directors (FPDs) are responsible to know the limits of their authority and must avoid out of scope direction at all times, and,
- All CMT members are to keep the CO involved in project/program activities and identify all issues to the CO in a timely manner to anticipate the need for change orders and REAs.

To effectively manage contract performance, the Department develops a PEMP that incorporates performance objectives, measures and expectations with associated fee that corresponds to the relative value (of the work accomplished) to the government. All PEMPs should be based on the scope of work and priorities as stated in the contract. The PEMP should identify a specific method of rating contractor performance and a method of fee determination that include subjective/objective measures and award term criteria as applicable to the specific contract. However, in order for the contractor to receive earned fee, DOE regulations also require the contractor to meet the minimum contract requirements, for example: environment, safety and

health, catastrophic events, specified level of performance, and cost control measures. These non-mission-critical work elements must be performed at a satisfactory level and within schedule to allow the contractor to earn any fee. This approach encourages the contractor to meet the requirements of the PEMP as well as all other terms and conditions of the contract.

The CMP should discuss the methods of rating contract performance identified in the PEMP. The CMT member(s) responsible for rating contract performance should also be identified in the PEMP.

How can the CMT use the CMP to ensure successful contract performance?

- ✓ Coordinate and solicit input from all Government staff in contract management;
- ✓ Disseminate the CMP for all parties to become familiar with and refer to on a daily basis;
- ✓ Identify the CMP as a key component for contract oversight;
- ✓ Meet regularly with all parties performing contractor oversight to share contractor status;
- ✓ Discuss any key contract vulnerabilities or performance risk areas;
- ✓ Decide on any course of action, and determine future activities;
- ✓ Track and report on milestones from the CMT contractor deliverables chart;
- ✓ Identify and immediately resolve any issues that will affect contract performance;
- ✓ Take immediate action on any risk areas that develop during term of the contract;
- ✓ Document revised responsibilities and changed scope or cost during life of contract in the CMP after appropriate contract changes are executed.

CONTRACT MANAGEMENT PLAN TEMPLATE

CONTRACTING ACTIVITY NAME

CONTRACT NUMBER

DATE

Concurrences:

_____
Name
Federal Project Director
Office Symbol, Telephone Number
Date

_____
Name
Procurement Director
Office Symbol, Telephone Number
Date

_____
Name
Site Office Contracting Officer
Office Symbol, Telephone Number
Date

_____
Name
Director, Field Assistance and Oversight Division
Office of Procurement and Assistance Management
MA-621, Telephone Number
Date

Approval:

_____
Name Date
Head of Contracting Activity (HCA)
Office Symbol, Telephone Number

CONTRACT MANAGEMENT PLAN
TABLE OF CONTENTS

1.0 Contract Summary and Background of the Scope of Work 12
2.0 Identification of Key Contract Management Team Members, Including Roles and Responsibilities 13
3.0 Contract Management Processes 13
3.1 Contract Transition Planning 13
3.2 Contract Communication Protocol 13
3.2.1 Formal communications with the Contractor 13
3.2.2 Informal communications 14
3.2.3 Outside Communications 14
3.3 Government Furnished Property (GFP) 14
3.4 Inspection/Surveillance and Acceptance Processes 14
3.5 Stop-work Authorities 15
3.6 Contract Payment Method 15
3.7 Performance Evaluation Measurement Plan (PEMP) and 15
Fee Administration 15
3.8 Conditional Payment of Fee Contract Clause 15
3.9 Project Management Activities and Contract Change Control 15
Process 15
3.10 Review of Contractor's Requests for Equitable Adjustments 16
3.11 Contractor Litigation Management Plan 16
3.12 Contractor Human Resource Management 16
3.13 Contract Records 16
3.14 Contract Closeout 16
3.15 Continuity of Operations Planning 17
4.0 Contract Deliverables 17
5.0 Key Contract Vulnerabilities or Performance Risk Areas 17
6.0 Contractor Past Performance Reporting Requirements 17
7.0 Contractor Assurance System 17
8.0 Agreements with State, Community, or Other Entities 17
9.0 Unique Contract Terms and Conditions and Deviations 18
10.0 Other Special Emphasis Areas 18

CONTRACT MANAGEMENT PLAN TEMPLATE
(*CONTRACT ACTIVITY NAME)*

Please note that this template contains key components that should be considered when drafting a Contract Management Plan (CMP). This template is not all-inclusive and all areas may not apply to your contract; therefore, each CMP is to be customized according to the complexities of your particular contract.

In addition, information required in the CMP may already exist under another document (i.e., Functional Requirement Accountability Management, Performance Evaluation Measurement Plan (PEMP), Quality Assurance Surveillance Pan (QASP), Risk Management Plans, etc.). Reference these documents within the CMP as appropriate, along with access instructions.

Although the Contracting Officer prepares the CMP, it is vitally important that the CMP contain the input of other members of the contract management team to ensure that existing issues, vulnerabilities, and risks are adequately addressed. Consequently, the draft CMP should be routed for input through members of the Contract Management Team.

Purpose of the Contract Management Plan

This CMP has been developed to serve as a detailed reference of how contract management will be conducted with respect to Contract Number _____.

1.0 Contract Summary and Background of the Scope of Work

In this section, provide a summary of the contract and the statement of work. This section should include the type of work being performed, the goals of the contract, the place of performance, and significant features of the contract. The CMP should include the following contract information.

Contractor name:	
Contract number:	
Current Performance of period:	
Current contract value:	
Contract type:	
Contractor key personnel: (Note: You may reference the contract Key Personnel clause.)	

2.0 Identification of Key Contract Management Team Members, Including Roles and Responsibilities

This section should identify individuals along with their corresponding contract oversight responsibilities. Include individuals such as Contracting Officer, Contracting Officer Representative, Technical Monitors, FPD, site manager, quality assurance monitors, facilities representatives, program officials, contractor human resource management specialists, project controls specialist, organizational property management officer, property administrator, and other Program Office Security Officials. List individuals by name and include contact details. Describe the extent of limits on authorities.

Describe how the team members relate to, coordinate and interact to resolve contract management issues. Discuss how the post award conferences, regular meetings, ad hoc meetings, performance evaluation meetings, established relationships, etc. are used to identify, analyze and resolve contract management issues and challenges.

3.0 Contract Management Processes

In this section, identify the critical process or guidelines for successfully managing the contract and reference sections of the contract (e.g., conditions, instructions, contract clauses, etc.) that support these functions. In each critical process, explain how the team members are integrated to effectively address and resolve contract management issues. Successfully integrating team members into an effective team go a long ways toward ensuring issues are addressed in a timely manner and effectively resolved. This interaction can be through regular meetings to discuss pertinent issues or it can be through ad hoc groups specifically formed to address more compelling issues and problems.

3.1 Contract Transition Planning

Address the plan for transitioning from an incumbent contract to a new contractor and/or contract type. Include transition strategies, schedules and identify the individuals responsible for facilitating a smooth transition. Also include coordination plans for other on-site contractors.

3.2 Contract Communication Protocol

In the following sections, address how formal, informal and outside communications are expected to flow.

3.2.1 Formal communications with the Contractor

Include in this section technical direction to the contractor, correspondence instructions, and correspondence controls and tracking systems for such items as correspondence, email, meetings, and telephone calls. This section should

reference contract requirements regarding formal communication.

3.2.2 Informal communications

In this section, address non-binding communication and meetings with CMT members. Informal communication can occur between members of the CMT and any contractor employee. This type of communication is non-binding for both the government and contractor and does not constitute contract direction.

Additionally in this section, address the frequency by which the CMT will meet to discuss on-going and new issues. Issues and corresponding resolutions should be documented so that "lessons learned" may be developed. The CMT should also discuss best practices in these meetings to see if these practices could be adopted in other problem areas.

3.2.3 Outside Communications

Include in this section the communication protocol with parties other than DOE staff (e.g. non CMT members, other government agencies including state & local government, etc.) regarding responsibilities and work scope. This section should address the coordination process with CMT members. It is critical that communications with entities outside of the contractual relationship between the contractor and DOE not be construed as contractual direction to change the scope or terms and conditions of the contract.

3.3 Government Furnished Property (GFP)

Discuss the strategy for furnishing and monitoring the GFP. Identify the key individuals responsible for ensuring GFP is provided in a timely manner. Also identify any property system logs, automated system and schedules of audits to be conducted in this area.

In addition to GFP, contracts may include Government Furnished Services/Items (GFS/I). In this area, reference any government furnished services and items identified in the contract. Identify the key individuals responsible for ensuring timely delivery of GFS/I. Include government reviews and approvals and performance, cost and schedule impacts if not timely delivered.

3.4 Inspection/Surveillance and Acceptance Processes

Discuss the strategy for ensuring contract requirements conforms to quality assurance provisions and address the roles and responsibilities of the individuals involved in this process. Also, reference the sections in the contract that addresses inspection and acceptance.

Identify the surveillance process that will be incorporated by the contractor and federal

staff as part of an integrated management system. This process should include a clear definition of the scope of surveillance, the responsibilities, methods for conducting inspections and the schedule for the oversight process and change control procedures.

3.5 Stop-work Authorities

Discuss the stop work authority for Contracting Officers and DOE employees, as provided in the contract.

3.6 Contract Payment Method

Discuss the plan or process (e.g. instructions, certifications, documentation, etc.) for reviewing and approving invoices, and/or the establishment of a contractor's letter of credit. Also, discuss the roles and responsibilities of those individuals that have direct involvement in the process. Reference any areas in the contract that address payment terms.

3.7 Performance Evaluation Measurement Plan (PEMP) and Fee Administration

Describe how fee is administered through a performance based process as described in the site specific PEMP. This should include identification of the roles and responsibilities for the PEMP process such as the CO, COR and Fee Determining Official (FDO). Identify all types of incentives such as subjective/objective performance measures and Award Term measures with associated gateways that can be earned by the contractor and the associated evaluation process. Explain the oversight process to be followed during the evaluation period such as status reporting to ensure the contractor is making sufficient progress in achieving performance measures. Also outline the process to be followed when changes to any performance measure are required and who may approve such changes.

3.8 Conditional Payment of Fee Contract Clause

Identify the process used by the FDO and CMT to establish any fee reduction decisions based on catastrophic incidents, that may occur, which are attributable to the contractor.

3.9 Project Management Activities and Contract Change Control Process

Identify baseline management and control procedures, performance baseline definition and controls, contingency management planning, performance measurement reporting and cognizant responsible support organizations.

Describe how and who will review, concur, and approve baseline changes and variances. This paragraph must describe the process from a functionally integrated (e.g., contractual, technical, financial, and legal) perspective. If the contract is for major construction or

cleanup the required Change Control Board membership and process should be described in this paragraph.

Discuss the strategy and procedures for managing the formal contract change control process to scope, cost and schedule as well as mitigating variances to approved scope, cost/price or schedule.

3.10 Review of Contractor's Requests for Equitable Adjustments

Discuss the review and approval process for evaluating Requests for Equitable Adjustments (REAs). Also, include the roles and responsibilities of the parties involved in the process. Indicate that change order modifications will include a definitization schedule (which does not exceed 180 days) and will be otherwise consistent with the guidance provided in Acquisition Guide Chapter 43.2. Discuss all additional procedures for ensuring that REAs are proposed, evaluated, negotiated and contractually implemented in a timely manner.

3.11 Contractor Litigation Management Plan

Address the contractor litigation management process and include contract references to legal management requirements. Also, identify individuals responsible for controlling and overseeing this process as prescribed by 10 CFR 719.

3.12 Contractor Human Resource Management

Describe roles and responsibilities relative to oversight and management of pensions, other post-benefits, and compensation, and in particular DOE Order 350.1, "Contractor Human Resource Management Programs."

Address how post contract liabilities will be processed (e.g. pension plans, post retirement benefits, medical expenses, employee welfare trust plan, insurance reserves etc.). Reference any areas in the contract that addresses post-contract liabilities.

3.13 Contract Records

Identify the records acquired or generated by the contractor in performing this contract (i.e., property records, occupational and health records, audit records, etc.). Discuss the strategy and the parties involved in ensuring that the records will be transferred to the new contract or maintained with the expired contract. DEAR 970.5204-3.

3.14 Contract Closeout

Address the strategy for ensuring that requirements of contract are met when the contract is physically complete. Contract closeout shall conform to the requirements of FAR 4.804, Closeout of Contract Files.

3.15 Continuity of Operations Planning

Identify key procurement, program, and finance personnel. Describe the process for ensuring timely communication and decision making during emergency situations where routine communication structures have been interrupted.

4.0 Contract Deliverables

Identify critical milestones and contract deliverables (e.g. Transition Plan, Risk Mitigation Plan, Project Management, Integrated Safety Management System, Quality Surveillance Assurance Plan, Government Furnished Services/Items, Litigation Management Plan, Collective Bargaining Units, etc.); and the individuals responsible for the requirement. See Appendix A for a sample deliverable matrix.

5.0 Key Contract Vulnerabilities or Performance Risk Areas

Identify known significant contract vulnerabilities or performance risks and the individuals responsible for mitigating these risks. If DOE O 413.3B is applicable, reference the risk management plan in this section or include it as an attachment to the CMP.

6.0 Contractor Past Performance Reporting Requirements

Identify all procedures and systems that will be used to ensure compliance with agency's contractor past performance reporting requirements. Identify key individuals responsible for serving as the program and assessing official in the Contractor Performance Assessment Reporting System (CPARS).

7.0 Contractor Assurance System

Describe the contractor assurance system as required by applicable DOE directives and contract terms and conditions as required by DOE O 226.1 and contractor's timeline for implementation.

8.0 Agreements with State, Community, or Other Entities

This section should address any partnering agreements with the state, community, or other entities the contractor must comply with in meeting the requirements of the contract. This paragraph should also identify the parties responsible for fostering these agreements.

Examples of partnering agreements include those entered into under the following laws and regulations: Resource Conservation and Recovery Act Permit, Clean Air Act Air Operating Permit, Toxic Substances Control Act, 10 CFR 830, Nuclear Safety Management, 10 CFR 835, Radiological Protection (10 CFR 835) and State Environmental Policy Act, etc.

9.0 Unique Contract Terms and Conditions and Deviations

List and describe all unique terms and conditions.

10.0 Other Special Emphasis Areas

In this section, discuss approaches to contract management and execution (i.e. contract startup, post award orientation for government personnel, post award conference with contractor, lessons learned, etc.) to ensure the government and contractor have a clear understanding of the contract requirements and each other's intent.

Appendices & Attachment(s)/Links

(Example List – Tailor as appropriate)

Appendix A1 - Contract Deliverables with Cognizant Manager and Action Required

Appendix A2 - Contract Requirements Documents (CRDs) Deliverables

---

Attachment 1 – Site Annual Performance Plan

Attachment 2 – Site Environment, Safety and Health (ES&H) Program Plan

Attachment 3 -- Contractor Performance Evaluation and Measurement Plan (PEMP)

Attachment 4-- Quality Assurance Plan – Integrated Safety and Quality Management System

Attachment 5 – Contractor Assurance Plan

Attachment 6 - Contractor's Commitments

Attachment 7 – Project Execution Plan

Attachment 8 – Identification of Contract Management Team Members

Indirect Cost Rate Administration

Guiding Principles

- Establishing indirect cost rates provides uniformity of approach with a contractor when more than one contract, agency, or awarding office is involved.
- It provides economy of administration.
- It provides timely settlement and closeout of contracts.

[References: FAR 42.7, DEAR 942.7, FAR 31, DEAR 931]

1.0 Summary of Latest Changes

This update: (1) changes the chapter number from 42.7 to 42.703-1 to align with the FAR, (2) removes references to financial assistance, and (3) includes administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. This section discusses the Department's procedures for the administration of contractor overhead costs, general and administrative (G&A) expenses, and rates for DOE awarded contracts.

The Office of Contract and Financial Assistance Policy (MA-61) develops and maintains policies and procedures for the establishment and administration of indirect cost rates for commercial and noncommercial organizations.

2.1 Terminology

Predominant Financial Interest – A term used to characterize the Federal agency with the largest financial 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 predominant interest in the organization[1]. 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 Designated 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 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 awards.

Direct Cost - Any cost which is identified specifically with a particular final cost objective, (e.g., material purchased for use under a single contract).

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 to benefit multiple contracts).

Indirect Cost Rate - The percentage or dollar factor that expresses the ratio of allowable indirect costs to the appropriate direct cost base (e.g., labor, manufacturing, etc.) for a given accounting period. Such rates may be in the form of *Billing Rates, Final Indirect Cost Rates, Predetermined Final Indirect Cost Rates, Fixed Rate With Carry Forward, Forward Pricing Rates.*

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", "estimated" or "provisional" rates and are based on previous audits or experience, information resulting from recent review, or similar reliable data or experience of other contracting activities.

Final Indirect Cost Rates – These indirect cost rates reflect actual cost experience for the covered period, and are settled upon by the Government and the awardee prior to contract close-out.

[1] Notable exceptions include: (a) the Department of Health and Human Services (HHS) serves as CFA for all States and most cities; (2) either HHS or the Office of Naval Research (ONR) serves as CFA for institutions of higher education; (3) the Department of the Interior is the CFA for all Indian tribal governments; and (4) HHS serves as the main CFA for hospitals.

Predetermined Final Indirect Cost Rates – Predetermined final indirect cost 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 indirect cost 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 a adjustment to the rate computation of a subsequent period.

Forward Pricing Rate – These indirect cost rates are used to price indirect expenses during specified fiscal years and are used in developing contract negotiation objectives and negotiating contact prices. The rates may, when deemed appropriate, be incorporated into a written forward pricing rate agreement and may include indirect cost rates, direct labor 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.

2.2 DOE Policy and Procedures. When DOE is not the CFA, the Department will accept and use the indirect cost rates established for the respective organization by the CFA, 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., typically after a five-year period, pursuant to FAR 42.003(b), and typically when the predominant financial interest has shifted to another Federal agency), the change is agreed to by both the DOE and the other Federal agency.

When determining allowable costs under DOE contracts awarded to that organization, all DOE contracting officers must 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.

HCAs may request changes to CDO assignments for a particular organization. Re-designation 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 re-designation, 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 (G&A) expense distributions, if applicable.

2.3 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

2.3.1 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 (DCAA) or the Department of Health and Human Services (HHS)). 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 pre-negotiation 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.

- Document actions taken in a formal negotiation memorandum and retain 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 HHS for Government-wide distribution).

- Assist other contracting officers, as necessary, when quick closeout procedures at FAR 42.708 are applied.

2.3.2 Where the DOE has no direct responsibility for the negotiation of rates with the organization in question, the COO 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 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.

2.4 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.

2.4.1 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 are applied.

- Inform the CCO of such actions taken.

Novation Agreements

Guiding Principles:

- *Novation* is a legal concept that aims to achieve a process of substitution. It is a transaction by which, with the consent of all the parties concerned, a new contract is substituted for one that already exists.
- The effect of a novation is to discharge the original contract between two parties (the continuing party and the outgoing party) and substitute it with a new contract between the continuing party and a new party (the incoming party).

[References: FAR 42.12, FAR 4.11, 41 U.S.C. 6305(a)]

1.0 Summary of Latest Changes

This update: (1) implements the Government policy pursuant to the references listed within this Chapter and (2) establishes policies, assigns responsibilities, and provides procedures for novation, change-of-name, and business recombination (restructuring) agreements.

2.1 Discussion

This chapter provides guidance on Novation Agreement processes and required documentation. If it is consistent with the Government's interest, it is the DOE policy to follow the procedures below described in this chapter.

2.2 Inherent Consideration. The inherent considerations that should be made related to a Novation Agreement include:

2.2.1 Is a Novation Agreement Required? Federal law prohibits the transfer of government contracts to a third party (discussed in paragraph 2.4). Nevertheless, under certain circumstances, FAR 42.1204(a)(2) identifies three situations in which the Government may consent (through the execution of a formal "Novation Agreement") to the transfer of a federal contract.

In the end, a contractor's novation obligations will depend upon the form of merger/acquisition selected by the parties. While many factors obviously will bear upon that selection, the potential novation obligations should be among them.

2.2.2 What Should Be Included In The "Novation Package"? Once a contractor has determined that a novation agreement is required, it will need to prepare a "novation package" for submission to the cognizant contracting officer (more on this below). While the contracting officer has some discretion in the matter, he/she generally will expect the parties to submit the documents listed in Paragraph 2.4 below.

2.2.3 To Whom Should The "Novation Package" Be Submitted? The "novation package" is usually submitted to the cognizant contracting officer who will coordinate the novation process on behalf of all interested federal agencies. This single point of contact relieves the contractor of the burden of having to submit paperwork to multiple agencies, and it allows the Government to speak with a single voice.

The appropriate point of contact may vary depending on whether the acquisition involves a single transferor or multiple transferors. In situations involving only one transferor and a CO has been assigned to any of the contracts, then the "novation package" should be submitted to that CO or the CO responsible for corporate office (if the contracts are in more than one plant or division). Alternatively, if a CO has not been assigned to any of the contracts, then the "novation package" should be submitted to the CO with the largest unsettled dollar balance (unbilled plus billed but unpaid).

2.3 Procedures. The following procedures and steps are required when processing a Novation Agreement. Documentation of the results, and in support of the results, is required and must be included in the official contract file.

2.3.1 CO Responsibility. Recognize a successor in interest to Government contracts when contractor assets are transferred. The recognition process is conducted through execution of a legal document "Novation Agreement" by the contractor (transferor), successor in interest (transferee), and the Government. Through the use of the "Novation Agreement," the transferor, among other things, guarantees performance of the contract, the transferee assumes all obligations under the contract, and the Government recognizes the transfer of the contract and related assets. Document, in the contract file, the principal elements of the negotiated agreement and the justification for the CO's acceptance/non-acceptance of the contractor's proposal.

2.3.2 Evaluation Requirement. Evaluate the proposal of sale, business combination, or change-of-name.

2.3.3 Recognition of Successor. Determine whether it is in the best interest of the Government to recognize a successor in interest to the Government contract. Recognize a change in a contractor's name. If only a change of the contractor's name is involved and the Government's and contractor's rights and obligations remain unaffected, the parties shall execute an agreement to reflect the name change.

2.3.4 Execute Novation/Change-of-Name Agreement. The CO is required to prepare a modification in order to execute the Novation/Change-of-Name Agreement. The agreements are legal documents requiring the related parties to use suggested format and contents. The format may be adapted to fit specific cases by the CO in consultation with DOE's Office of General Counsel (GC).

2.3.5 Distribution. Distribute the agreements to related parties which include but are not limited to the transferor, the transferee and the Chief Financial Officer (CF). The agreements must be reviewed by GC prior to "acceptance" and distribution.

2.3.6 Records Management. Comply with records management and retention requirements, as further described in DOE Records Management Handbook.

2.4 Proposal of Sale, Business Combination, or Change-of-Name.

2.4.1 Applicability. Section 6305(a) of Title 41 U.S.C. (formerly section 15 of Title 41 U.S.C.) prohibits transfer of Government contracts from the contractor to a third party. However, the Government may, when in its interest, recognize a third party as the successor in interest to a Government contractor when the third party's interest in the contract arises out of the transfer of all the contractor's assets.

2.4.2 Contractor's Responsibility. If a contractor wishes the Government to recognize a successor in interest to its contracts or a name change, the contractor must submit a written request to the responsible contracting officer.

2.4.3 Documents. When a contractor asks the Government to recognize a successor in interest (Novation) or recognize a change in contractor's name (Change-of-Name), the contractor shall forward documents to the CO in accordance with FAR Part 42.1204(e).

2.3 Evaluation of Contractor's Novation/Change-of-Name Agreement.

2.3.1 List of Documents for Novation. The CO shall obtain one copy of each of the documents, as applicable, in accordance with FAR 42.1204(f) and the documents stated in paragraph 2.4.3.

2.3.2 Modification of Document List. The Novation Agreement Checklist, included as Attachment 1 in this Guide Chapter, should be used as a tool to confirm whether all necessary documents are submitted. If the CO has acquired the documents during its participation in the pre-merger or pre-acquisition review process, or the Government's interests are adequately protected with an alternative formulation of the information, the CO may modify the list of documents to be submitted by the contractor.

2.3.3 Determination of Adequacy of Documentation. The CO shall review the documentation submitted by the contractor, and promptly notify the contractor of any deficiencies and request corrective action as required.

2.3.4 Review Request. Prior to the execution of a Novation Agreement, the CO must find that the proposed Novation is in the government's best interest. In order to make such a finding, the CO must consider legal sufficiency and the transferee's capability to perform the contract.

2.3.4.1 Legal Sufficiency. In instances of novation and/or change of name, the CO shall obtain review from GC for a legal sufficiency determination. In instances in which a firm that is to be party to the agreement, a known affiliate of the same, or associated natural person is/are debarred, suspended, proposed for debarment or suspension, or when the CO is aware that such action is being considered even though not yet done, the CO shall notify counsel as part of such request. The official contract file must contain GC's legal sufficiency determination.

2.3.4.2 Financial Capability. As appropriate, a financial capability review should be guided by the specific requirements set forth in the contracts being transferred and should include, but not be limited to, assets, liabilities, and revenue stream of the transferee.

2.3.4.3 Technical Capability. For a Novation Agreement, the CO shall review information regarding the transferee's capability to perform the technical requirements specified in the contracts being transferred. Review and input may be provided by Government personnel at the program activity, and/or other Government personnel involved with or having knowledge of, the requirements and capabilities needed for the item(s) or service(s) at issue.

2.3.4.4 Security Requirements. For a Novation Agreement, the CO shall ensure that the transferee meets all security classification requirements (for both personnel and facilities) specified in the contracts being transferred.

2.3.4.5 Foreign Interests. For a Novation Agreement, the CO shall review whether the transfer of assets and liabilities could potentially result in foreign ownership, control or influence (FOCI), which could jeopardize the ability to perform current and future classified contracts.

2.3.4.6 Business Status. For a Novation Agreement, the CO shall review whether the transferee meets any specified set-aside requirements based on business status, such as small business. Also consider whether the transferee will be able to retain such status after the transfer is completed. FAR 19.301-2(b)(1) requires contractors to recertify their small business size status within 30 days after execution of a novation agreement.

2.3.4.7 Intellectual Property/Data Rights. For a Novation Agreement, the CO shall carefully consider whether the control, ownership, and transfer of data rights has been properly addressed in the transfer of assets and liabilities between the contractors in accordance FAR 27.4. Most importantly, ensure that Government interest and/or rights in such data has been properly addressed and protected.

2.3.4.8 Other Considerations. The CO shall also consider any implications the proposed Novation Agreement may have on Cost Accounting Standards (CAS) coverage, approval status for business systems (accounting, estimating and purchasing), etc., of the transferee.

2.3.5 Conflicts of Interest. When considering whether to recognize a third party as a successor in interest to Government contracts, the CO shall identify and evaluate any organizational conflicts of interest in accordance with FAR 9.5. If the CO determines that a conflict of interest cannot be resolved, but that it is in the best interest of the Government to approve the Novation Agreement request, in accordance with FAR 42.1204(d) a request for a waiver of application of general rule or procedure in FAR 9.5 may be submitted in accordance with the procedures at FAR 9.503.

2.3.6 External Restructuring Costs. When a Novation Agreement is requested and the transferee intends to incur restructuring costs for external restructuring activities, the CO for the transferor shall include "[t]he Transferor and the Transferee agree that the Government is not obligated to pay or reimburse either of them for, or otherwise give effect to, any costs, taxes, or other expenses, or any related increases, directly or indirectly arising out of or resulting from the transfer or this Agreement" (or other similar language proposed by GC), other than those that the Government in the absence of this transfer or Agreement would have been obligated to pay or reimburse under the terms of the contracts, as paragraph (b)(7) of the Novation Agreement instead of the paragraph (b)(7) provided in the sample format at FAR 42.1204(i).

2.3.7 Formal Agreement. There may be instances in which the contractor asserts that a Novation Agreement is not required. For one example, a "conversion" from one form of legal entity to a Limited Liability Company (LLC) may be such an instance. The determination of whether a Novation Agreement is needed can entail technical legal considerations, and so the CO should seek assistance from legal counsel before concluding that a Novation Agreement is or is not required in any instance in which questions regarding need for such agreement arise. Further, even if a Novation Agreement is not needed, a formal agreement may be appropriate. Refer to FAR 42.1204(b)

2.4. Determination to Recognize a Successor in Interest or Change-of-Name. The following steps should be followed by the CO:

2.4.1 Basis of Determination. After receiving a legal sufficiency determination from GC, the CO shall make a determination whether or not it is in the Government's interest to

recognize the proposed successor in interest, giving consideration to the following, in accordance with FAR 42.1203(c).

2.4.2. Novation Agreement. The CO shall notify the contractor if he or she decides that a successor will not be recognized. In this situation, the original contractor remains under contractual obligation to perform the existing contracts as provided in FAR 42.1204(c).

2.4.3. Change-of-Name. When a contractor requests in writing that the Government recognize a name change, the CO, after consultation with GC, shall determine whether the Government and the contractor's obligations remain unaffected and whether advance notification to the contracting and administration offices is warranted in accordance with FAR 42.1205 .

2.4.4. Coordination among DOE Contracting Offices.

2.4.4.1. The cognizant CO over the transferee shall have the responsibility for resolving and dispositioning pre-existing open issues such as reportable audits after the execution of the Novation Agreement. However, the cognizant CO over the transferor shall make every effort to resolve/disposition all open issues prior to the execution of the Novation Agreement.

2.4.4.2. If there are different COs for the transferor and the transferee, such COs shall coordinate and cooperate in the orderly transition of contract. The contracts who manage the COs cognizant over transferor and/or transferee shall communicate with each other in order to resolve and disposition pre-existing open issues.

2.4.4.3. If the contracts director supervises both COs cognizant over transferor and/or transferee, the contracts director shall make a decision on how to resolve and disposition pre-existing open issues.

2.4.5.Memorandum of Record (MOR). In the contract file, the CO shall document the principal elements of the negotiated agreement and the process of decision making. The MOR must support the final conclusion reached by the CO. The MOR shall:

- Be appropriately detailed and organized to provide a clear link to the findings, conclusions, and recommendations contained in the record. The rationale and extent of procedures performed, including the conclusions reached, shall be documented in the MOR as well.
- Be signed by the supervisor as evidence of the work performed.
- Include the analysis of other functional specialist comments or reports, including but not limited to Defense Contract Audit Agency (DCAA), legal counsel, etc., when the CO relies on the specialists' work provided.
- Include sufficient documentation to describe the scope of work performed, the area covered, the nature and extent of procedures applied, the documents obtained and analyzed, and the conclusion, even though the extent of

documentation needed is a matter of the CO's judgment. The MFR may include copies of documents obtained from the contractor, review reports or comments provided by legal counsel, DCAA, and/or other functional specialists.

2.5 Execution of Novation/Change-of-Name Agreement.

2.5.1 Contents of Novation Agreement. The CO, the transferor, and the transferee shall execute the Novation Agreement. It shall ordinarily provide in part that in accordance with FAR 42.1204(h).

2.5.1.1 Specialized Language. The cognizant CO shall include "[t]he Transferor and the Transferee agree that the Government is not obligated to pay or reimburse either of them for, or otherwise give effect to, any costs, taxes, or other expenses, or any related increases, directly or indirectly arising out of or resulting from the transfer or this Agreement, other than those that the Government in the absence of this transfer or Agreement would have been obligated to pay or reimburse under the terms of the contracts" as paragraph (b)(7) of the Novation Agreement instead of the paragraph (b)(7) provided in the sample format at FAR 42.1204(i) when a Novation Agreement is requested and the transferee intends to incur restructuring costs for external restructuring activities.

2.5.1.2 Assumption of Liabilities. Any separate agreement between the transferor and the transferee regarding the assumption of liabilities (e.g., long-term incentive compensation plans, Cost Accounting Standards non-compliances, environmental cleanup costs, and final overhead costs) should be referenced specifically in the Novation Agreement in accordance with FAR 42.1203(e). Legal sufficiency determination from GC is required.

2.5.2 Format. The format for agreements stated in FAR 42.12 shall be followed by the CO.

2.5.3 Novation Agreement. The CO shall use the format stated in FAR 42.1204(i) for agreements when the transfer and transferee are corporations and all the transferor's assets are transferred. The format may be adapted to fit specific cases and may be used as a guide in preparing similar agreements for other situations. However, before making any substantial alterations or additions to the Novation Agreement format at FAR 42.1204(i), the CO, with input from GC. The CO shall resolve any objections from the addressees before executing the agreement.

2.5.4 Change-of-Name. Upon receipt of a legal sufficiency determination, the CO and contractor shall execute the Change-of-Name Agreement in accordance with FAR 42.1205(a). A suggested format is in FAR 42.1205(b), which may be adapted for specific cases.

2.5.5 Contract Modification. The CO shall issue a contract modification, utilizing, a Standard Form (SF) 30, Amendment of Solicitation/Modification of Contract, to transfer/update contracts.

2.5.6 System for Award Management Coordination. In those cases where a contractual modification is required (e.g., Novation and Change-of-Name Agreements or change in address/CMO), it is important that COs advise contractors to wait until such modifications are actually processed before making changes to SAM information. However, since timing is crucial, the CO shall advise the contractor to update SAM within 48 hours after the signing of the modification. The CO shall follow-up with the contractor or check the SAM to confirm that the change to SAM has been made.

COs should note the Government's right to suspend payments under FAR 4.11 and FAR 52.204-7 when a contractor fails to comply with the FAR 42, Novation and Change-of-Name, requirements after making certain changes in the SAM.

2.5.7 Best-Interest Determination. No term of this Guide Chapter shall be construed as requiring a CO to sign any agreement being discussed herein if contrary to statute or regulation, or if not in the best interests of the Government. A Best-Interest Determination by the CO is required to be in the official contract file.

2.6 Distribution of Novation/Change-of-Name Agreements. The following distribution of documents is required.

2.6.1 Agreements. The CO shall distribute signed copies of Novation/Change-of-Name Agreements as stated in FAR 42.1203(g).

2.6.2 Standard Form 30. The CO shall adhere to the requirements as stated in FAR 42.1203(h).

2.7 Management and Retention of Records. Maintaining records is required in accordance with the information below.

2.7.1 Novation/Change-of-Name Records. The records shall be retained for a minimum of 6 years and 3 months after completion of the contract(s), or final payment or termination of the program effort, or settlement of disputes/incidents, whichever is later. Retention of the file documentation is the responsibility of the COs.

2.7.2 CO Responsibility. The CO is responsible for complying with the records management requirements. The work product shall be stored using a naming convention that will allow for its logical retrieval and shall be stored in a specific location identified by the component or in accordance with Department direction.

3.1 Attachments

1. Novation Agreement Checklist (3 Pages).

ATTACHMENT 1

NOVATION AGREEMENT CHECKLIST

Note: This Checklist is recommended for use and serves as a reminder of the documents that are required to be included in the official contract file.*

1. CHANGE OF NAME REQUIREMENTS * (Reference FAR 42.1205)

_____ 3 Signed copies (original signatures) of the Change of Name Agreement

One copy of each of the following:

_____ Authenticated document by the State effecting the name change

_____ General Counsel opinion stating the transfer was properly effected under applicable law with an effective date

_____ List of all affected contracts and unsettled purchase orders, with the contract number and type, name and address of the contracting office

2. NOVATION AGREEMENT REQUIREMENT * (Reference FAR 42.1204)

_____ 3 Signed copies (original signatures) of the Novation Agreement

One copy of each of the following:

_____ Document describing the proposed transaction (purchase/sale agreement, memorandum of understanding)

_____ List of contracts affected reflecting

___ Contract Number and type

___ Name and address of contracting office

___ Total dollar value

___ Approximate unpaid balance

_____ Evidence of the transferee's capability to perform

_____ Any other relevant information requested by the CO

_____ Authenticated copy of the instrument affecting the transfer of assets (bill of sale, certificate of merger, contract, deed, agreement or court decree)

_____ Certified copy of each resolution of corporate board of directors authorizing the transfer of assets

_____ Certified copy of the minutes of each corporate party's stockholder meeting necessary to approve the transfer of assets

_____ Authenticated copy of the transferee's certificate and article of incorporation if a corporation was formed to receive assets

_____ Opinion of legal counsel of transferor and transferee stating that transfer was properly effected under applicable law and the effective date of transfer

_____ Balance sheets of the transferor and transferee before and after the transfer of assets

_____ Evidence of any security clearance requirements

_____ Consent of sureties if bonds are used, or a statement from the transferor that none are required

* You may not have all of these documents, but each must be addressed.

Contractor Performance Information

Guiding Principles

- The primary purpose of past performance evaluations is to ensure that accurate data on contractor performance is current and available for use in source selections.
- A past performance evaluation report provides a record of a contractor's performance, both positive and negative, on a given contract during a specified period of time.
- The quality of the narrative component supporting the past performance information evaluation is critical.

[*References:* *FAR 42.15*, CPARS Guide]

1.0 Summary of Latest Changes

This update deletes duplicative and outdated guidance and makes various administrative changes.

2.1 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. The Contractor Performance Assessment Reporting System (CPARS) Guide includes consistent processes and procedures for agencies to use when reporting on past performance information and should be read in conjunction with Federal Acquisition Regulation (FAR) Part 42.15 and other FAR Parts related to past performance information.

2.1 Introduction. CPARS is a web-enabled application that collects and manages the library of automated evaluations and is available at http://www.cpars.gov. CPARS facilitates communication and cooperation between the Federal Government and industry. It provides

contractor performance information to include Government ratings and narratives, as well as industry narratives.

Irrespective of the type or complexity of the contractor performance appraisal systems (e.g., performance based acquisition reviews, performance evaluation and measurement reports, contract management plans, award fee determinations, etc.) that are used by DOE program elements, contractor performance evaluations required by FAR 42.15 must be entered into CPARS.

Since all Federal agencies use CPARS, the CPARS guidance and user manuals were updated to include civilian and defense agencies. Guidance for the Contractor Performance Assessment Reporting System (CPARS), November 2016 or current version, herein referred to as the "CPARS Guide," is based on the authorities prescribed by the FAR and Department of Energy Acquisition Regulation (DEAR) and its supplements. The CPARS Guide is non-regulatory in nature and intended to provide useful information and best practices for using CPARS. The CPARS Guide is available at http://www.cpars.gov/. It identifies roles and responsibilities and provides guidance and procedures for systematically assessing contractor performance as required by FAR Part 42.15.

2.2 Background. As of October 2008, CPARS is the mandatory Department of Energy (DOE) system used to report contractor performance into Past Performance Information Retrieval System (PPIRS). PPIRS is the official Government source to retrieve contractor performance information and report/track CPAR compliance rates.

The primary purpose of past performance evaluations is to ensure the contractor is held accountable for its performance and that accurate data on contractor performance is current and available for use in source selections. Performance evaluations will be used as a resource in awarding best value contracts and orders to contractors that consistently provide quality, on-time products and services that conform to contractual requirements. Evaluations can be used to effectively communicate a contractor's strengths and weaknesses to source selection officials.

DOE uses CPARS for reporting and collecting past performance evaluations, as required by the FAR. CPARS is an automated contractor performance information database that serves as the entry point for evaluations which are fed into the government-wide PPIRS, which is the single, authorized application to retrieve contractor performance information.

Contractor performance on classified contracts are not exempt from evaluation. Contractor performance evaluations on classified programs are managed in accordance with the records management procedures of DOE Order 470.6, Technical Security Program (or its successor version). Copies of classified contractor performance evaluations are maintained and distributed

in accordance with DOE O 470.6. ***Evaluations of classified contracts shall not be entered into CPARS or PPIRS.***

Through PPIRS, the contractor performance information can be retrieved by the contracting activity for use in the source selection process to support making an award based on a best value. Government access to PPIRS is restricted to those individuals who are working on source selections. Each contracting activity shall have a PPIRS Access Authorization Agent who controls and provides government access.

2.3 Roles and Responsibilities. See the CPARS Guide Section C – Responsibilities Assigned for a thorough explanation of the roles and responsibilities for each party involved in the CPARS process. At DOE, the roles of Department Point of Contact and Agency Point of Contact are performed by the Office of Systems (MA-623).

2.4 Records Retention for Contractor Performance Evaluations. Contractor performance evaluations prepared in CPARS are retained for a period of one year after the FINAL CPAR evaluation is completed. For Architect-Engineer and Construction evaluations, these reports are retained for six years. The reports are then placed in an archive table where they can be retrieved if necessary. In PPIRS, CPAR evaluations reports are retained for three years after the contract completion date. Architect-Engineer and Construction evaluations reports are retained for six years. ***The CPAR report shall not be uploaded into the Strategic Integrated Procurement Enterprise System (STRIPES)***.

2.5 CPARS Training & Continuous Learning Points.

- CPARS Training

The Assessing Official (AO), typically a contract specialist or contracting officer, is responsible for ensuring that the Assessing Official Representative (AOR), typically a contracting officer's representative (COR), and the contractor are knowledgeable about the CPARS and the on-line training that is available to them. Training for both the Government and contractors is offered monthly via webcast and the calendar can be found on the CPARS web site. See the table on the next page for additional training information.

The following classes are highly recommended to all DOE employees who are responsible at any stage of past performance evaluations:

- CPARS Overview at https://www.cpars.gov/webtrain_auto.htm
- Quality and Narrative Writing

- Plain Language writing (not sure if this is what is mean by the above)
- Focal Point Functions

For contractors to become familiar with CPARS, the following class is highly recommended:

- CPARS Overview Course at https://www.cpars.gov/webtrain_auto.htm

The DOE Acquisition Career Manager (ACM) has approved Continuous Learning Points (CLPs) for CPARS web based training classes. See the following table for list of all available past performance and Federal Awardee Performance and Integrity and Information System (FAPIIS) training opportunities. The table is an excerpt from the OFFP's March 6, 2013 memorandum *Improving the Collection and Use of Information about Contractor Performance and Integrity*.

Past Performance and FAPIIS Training Opportunities		
Course	**Description**	**Course Information**
DOD CPARS and FAPIIS Training.	Provides information on how to use CPARS and FAPIIS. Upon completion, students receive a Certificate of Completion and continuous learning points (CLP).	Seminar, Online Training, and training material available at http://www.cpars.gov/allapps/cpcbtdlf.htm.
DOD PPIRS Training	Provides information about PPIRS and the valuable source selection sensitive information shared across federal government agencies and its use in source selection and contract award decisions.	Schedule of PPIRS classes is available at https://www.ppirs.gov/webtrain.htm
DOD *Past Performance Information Course – CLC 028.*	Provides relevant information to all acquisition personnel required to participate in this contract administration function. Upon completion, students receive 3 CLPs.	The course schedule is available at www.dau.mil.
FAI – 4 minute multi-media FAPIIS overview.	Explains what the FAPIIS module why it is important, how it impacts the acquisition and grants communities, as well as how the system interrelates with other systems containing similar Information.	FAI website available at http://www.fai.gov/FAPIIS/trailer/module.htm.
FAI *Federal Awardee Performance and Integrity and Information System (FAPIIS) - FAC 019.*	Provides guidance on how to consider the FAPIIS information. Upon completion, students will receive 1 CLP.	This course is available on the Defense Acquisition University (DAU) website at www.dau.mil.

		Note: FAPIIS courseware was developed by FAI and tested and hosted on the DAU website.
Note: It is highly recommended that these courses be made available to all agency acquisition personnel responsible for reporting and using performance and integrity information. Questions about the training should be directed to DOD, DAU, or FAI points of contact listed on their respective websites, or you may seek information from your Site Acquisition Career Manager.		

2.6 Internal Management Controls/Compliance Assessments. Each contracting activity shall establish a process for conducting regular compliance assessments to include assigning a primary point of contact responsible for the compliance assessments. Part of the compliance assessment shall be to review the process and review the performance metrics used to measure compliance and quality on a regular basis. The objective is to achieve 100% quality CPARS submission and completion of all applicable contract/orders of contractor performance information. The regular compliance assessments of contractor performance information are comprised of quarterly CPARS data quality reviews and Procurement Management Reviews.

- CPARS Data Quality Reviews

The CPARS data quality reviews (see the CPARS Quality Checklist) shall be performed and submitted on a quarterly basis. The CPARS data quality reviews are part of the DOE Data Quality Reviews. The CPARS data quality reviews shall regularly measure the contractor performance information for compliance and quality. Each contracting activity shall review the activity's performance metrics to evaluate and validate the quality and timeliness of contractor performance evaluations. This review shall include the contracting activity's corrective action plan to address any unregistered contracts/orders/agreements, overdue evaluations and incomplete evaluations. The Office of Contract Management, Field Assistance and Oversight Division (MA-621) site assigned procurement analysts will provide oversight to ensure compliance with CPARS reporting requirements.

- Procurement Management Reviews

The DOE Procurement Management Reviews (PMRs) are a peer review process. The lines of inquiry are established in coordination with the Head of the Contracting Activity. The PMR may validate site compliance with the requirement for submitting past performance data into CPARS. Prior to performing a site PMR which includes a past performance review, the PMR team will examine the CPARS database. If CPAR reports were required but not performed, the PMR team will identify those contract actions to the site being reviewed to determine why the reports were not completed. The

field sites will be required to perform corrective action to comply with CPARS reporting requirements. Additionally, the PMR team will examine the timeliness, accuracy, and quality of the CPAR submittals.

2.7 Best Practices.

- **General**
  - Past performance information is "For Official Use Only" and "Source Selection Information" and should be so marked.
  - The narrative is the most critical aspect of past performance information evaluations.
  - Use of Plain Language writing concepts
- **Solicitation and source selection**
  - See the Acquisition Guide Chapter 15.1, Source Selection Guide, for its discussion and guidance on source selection.
  - See the Acquisition Guide Chapter 15.304, Establishing Evaluation Criteria, for its discussion and guidance in the development of evaluation criteria for source selection.
- **Contract performance**
  - If the AOR communicates with the contractor throughout the performance period, the evaluation should be easier to write. Then, the AOR can create a working evaluation draft off-line by documenting the important significant metrics and/or events and cut and paste this documentation into CPARS for the evaluation period.
  - Include performance expectations in the Government's and contractor's initial post award meeting.
  - Performance evaluations are the responsibility of the program/project/contracting team, considering the customer's input. Feedback to contractors regarding ongoing performance issues should be

developed through discussions with reviews occurring on a regular basis and transmitted through CPARS. The Reviewing Official resolves disagreements in the evaluation report between the contractor and the Government. The Assessing Official (contracting officer or contract specialist) finalizes the evaluation.

- When exercising an option [FAR 17.207 (c)], the contracting officer needs to consider the contractor's past performance evaluations on other contract actions, as well as, the contractor's performance on the current contract has been acceptable, e.g., received satisfactory ratings.

- In addition to complying with FAR 17.207(c) before exercising an option, see Acquisition Guide Chapter 70.9, Contract Options: Evaluating Contractor Past Performance, for model guidelines to use in assessing a contractor's past performance for the purpose of making decisions regarding the exercising of contract options.

- 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.

- **Advise the contractor:**

  - To take the CPARS Overview training.

  - That past performance information is handled with the same procedures as if it were "source selection information" in PPIRS.

  - To acknowledge receipt of the Government's request to the contractor to provide comments on an evaluation and to respond to this request within 30 calendar days.

2.8 Points of Contact.

- Questions regarding past performance policy issues may be directed to the Office of Policy, Contract and Financial Assistance Division MA-611.

- Questions on how to use the CPARS system, the PPIRS reporting capability, and account access issues may be directed to the DOE Agency Coordinator, Office of Systems, Systems Division MA-623, by e-mail to HQProcurementSystems@hq.doe.gov

- Questions on the use of past performance information for source selection, internal management controls, CPARS data quality review and compliance assessments may be directed to the Office of Contract Management, Field Assistance and Oversight Division MA-621.

Reporting Other Contractor Information into Federal Awardee Performance and Integrity Information System (FAPIIS)

Guiding Principles

Report other contractor information into FAPIIS through CPARS.

The DOE Official Responsible for reporting the specific FAPIIS information is responsible for 100% reporting compliance.

The DOE Agency Coordinator will submit OMB required reports to the OMB MAX site on a quarterly basis or as required.

Other contractor information includes--
Terminations for cause or default;
Defective cost or pricing data;
Determinations of non-responsibility; and
Administrative agreements for debarment or suspension.

Federal Acquisition Regulation (FAR) Subparts

- 8.4 Federal Supply Schedules – 8.406 Ordering activity responsibilities
- 9.1 Responsible Prospective Contractors – 9.104 Solicitation provisions and contract clauses and 9.105 Procedures
- 9.4 Debarment, Suspension and Ineligibility – 9.406 Debarment and 9.407 Suspension
- 12.4 Unique Requirements Regarding Terms and Conditions for Commercial Items - 12.403 Termination
- 15.4 Contract Pricing – 15.407 Special cost or pricing areas
- 42.15 Contractor Performance Information – 42.1503 Procedures
- 49.4 Termination for Default – 49.402 Termination of fixed-price contracts for default

DEAR and Acquisition Guide

- Chapter 42.15 Contractor Performance Information

This chapter has two sections. Section I provides a summary on reporting other contractor information into the Federal Awardee Performance Integrity Information System (FAPIIS). Section II describes DOE's procedure on the use of the FAPIIS module in the Contractor Performance Assessment Reporting System (CPARS). This update adds requirement for 100% reporting compliance. It describes methods that the DOE Official Responsible for Reporting FAPIIS information should use to ensure compliance and to monitor the integrity of the information to support 100% reporting. It adds the OMB

MAX quarterly reporting requirement by the DOE Agency Coordinator. Also, a table is added to list the available past performance and FAPIIS training opportunities.

Section I. OVERVIEW

The Federal Awardee Performance and Integrity Information System (FAPIIS) is intended to significantly enhance the scope of information available to contracting officers as they evaluate the integrity and performance of prospective contractors. FAPIIS will include contracting officers' non-responsibility determinations (*i.e.*, agency assessments that prospective contractors do not meet requisite responsibility standards to perform for the Government), contract terminations for default or cause, agency defective pricing determinations, administrative agreements entered into by suspension and debarment officials to resolve a suspension or debarment, and contractor self-reporting of criminal convictions, civil liability, and adverse administrative actions. The system will collect this information, on an ongoing basis, from existing systems within the Government.

The Acquisition Guide has two chapters addressing the implementation of Federal Acquisition Regulation (FAR) Part 42.15 – Contractor Performance Information. Chapter 42.15, Contractor Performance Information, addresses DOE's application of CPARS and the evaluation and reporting of contractor performance. This chapter 42.16, Reporting Other Contractor Information into Federal Awardee Performance and Integrity Information System, addresses the data entry procedures and management for reporting other contracting information into the FAPIIS module in CPARS.

Section II. Federal Awardee Performance and Integrity Information System (FAPIIS) Module in CPARS

The Federal Awardee Performance and Integrity Information System (FAPIIS) is a web-enabled application that is used to collect other contractor performance information including terminations for cause or default, defective cost or pricing data, determinations of non-responsibility, and administrative agreements for debarment or suspension. Once records are completed in FAPIIS, they become available in the PPIRS where they are used to support future acquisitions. Only Government personnel have access to FAPIIS at www.cpars.scd.disa.mil.

To view the FAPIIS records, there are two FAPIIS data management reports. These reports are the FAPIIS Public Report and the Contract Termination for Default-Cause Report.

The FAPIIS Public Report at www.fapiis.gov enables the public to view FAPIIS Report records (e.g., Terminations for Default, Terminations for Cause, Terminations for Material Failure to Comply, Non-responsibility Determinations, Recipient Not Qualified Determinations, Defective Pricing Determinations, Administrative Agreements, and Determinations of Contractor Fault reported to FAPIIS by Federal Government personnel). The website also has information

on potential Federal Government awardees and to determine if the awardee has reported information in FAPIIS regarding any civil or criminal proceedings.

The Contract Termination for Default-Cause Report, available in the Federal Procurement Data System-Next Generation (FPDS-NG or FPDS), reflects the "Termination for Default (complete or partial)" and "Termination for Cause" data for the date range specified. It provides information on contracts that were terminated for default or cause. DOE can use this FPDS report to monitor and compare their reporting of these actions into FAPIIS to measure their FAPIIS compliance. The information can be used to help analyze and monitor the contractors terminated, frequency of these actions, and review the rationale for these actions. This report is available at www.fpds.gov under Reports | Standard Reports, then click "How".

A. Roles and Responsibilities for FAPIIS Module

- **FAPIIS Data Entry User (contracting officer, contract specialist, debarring official, or suspending official)**
  - Reviews the current version of the FAPIIS user manual at https://www.cpars.csd.disa.mil.
  - Takes FAPIIS training (on-site or on-line).
  - Creates, updates and completes FAPIIS records in a timely manner.
  - 100% reporting compliance is expected.
  - Monitors the status of records that he/she has started or completed.
  - Completes his/her records that are started, but not completed.
  - On a monthly and quarterly basis, ensures actions that require FAPIIS reporting are completed.
  - Will notify the responsible contract specialist or contracting officer about related actions that require a contractor performance evaluation into CPARS, ACASS or CCASS.
  - Updates user profile as necessary.
  - Provides user feedback as necessary.

Focal Point (CPARS point of contact at contracting activities)
  - Reviews the current version of the FAPIIS user manual at https://www.cpars.csd.disa.mil.
  - Takes FAPIIS training (on-site or on-line).
  - Provides access to alternate(s) and is responsible for any alternate(s).
  - Provides access to FAPIIS for Data Entry User(s) within own contracting activity,
  - Assists the FAPIIS Data Entry User(s) in implementing the FAPIIS process by providing training and helping with administrative matters to ensure that records are completed in a time manner.
  - Monitors and checks the status of pertinent records that have been started but are not yet completed and marked for release to PPIRS.
  - Conducts quarterly reviews to ensure that 100% of the information required is reported accurately and timely by the contracting officers for all applicable

terminations for default or for cause, non-responsibility determinations, defective cost or pricing determinations and whether the contracting officers monitor the contractors reporting of integrity information for civil proceedings and criminal convictions.

- **Alternate Focal Point (at contracting activities)**
  - Reviews the current version of the FAPIIS user manual at https://www.cpars.csd.disa.mil.
  - Takes FAPIIS training (on-site or on-line).
  - Provides access to FAPIIS for Data Entry User(s) within own contracting activity
  - Assists the FAPIIS Data Entry User(s) in implementing the FAPIIS process by providing training and helping with administrative matters to ensure that records are completed in a time manner.
  - Monitors and checks the status of pertinent records that have been started but are not yet completed and marked for release to PPIRS.
  - Assists the Focal Point in quarterly reviews to ensure that 100% of the information required is reported.

- **Agency Point of Contact (Agency Coordinator)**
  (On-line CPARS information will title this position as the Command Point of Contact)
  - Authorizes access to FAPIIS Focal Point(s).
  - Monitors the status of records across DOE that have been started or completed to ensure 100% reporting compliance.
  - Enters or uploads any OMB required reports at the OMB MAX site on quarterly basis. For details, see Office of Federal Procurement Policy's (OFFP) March 6, 2013 memorandum *Improving the Collection and Use of Information about Contractor Performance and Integrity*.

B. Other Contractor Information -- Reporting Criteria and Responsibility for Submitting and Completing FAPIIS

1. In order to ensure consistent, comprehensive, timely, and meaningful FAPIIS documentation, the other contractor information shall be collected for all contract actions that require reporting into the Federal Procurement Data System-Next Generation (FPDS-NG) in accordance with FAR Subpart 4.6 – Contract Reporting. See Chapter 42.15, Section II.C., Types of Contract Actions to Report in CPARS, for details.

2. The following other contractor information shall be reported into FAPIIS.

- **Non-responsibility determination:** In accordance with FAR 9.105-2, the contracting officer shall sufficiently document the determination of non-responsibility and timely submit it within 3 working days in FAPIIS if—

  - The contract is valued at more than the simplified acquisition threshold;

- The determination of non-responsibility is based on lack of satisfactory performance record or lack of satisfactory record of integrity and business ethics; and

- The Small Business Administration does not issue a Certificate of Competency.

- **Termination for cause:** In accordance with FAR 8.406-4 and 12.403(c)(4), the contracting officer shall ensure that information related to termination for cause notices and any amendments are reported within 3 business days. This includes reporting any subsequent notice of the conversion to a termination for convenience or withdrawal.

- **Defective cost or pricing:** In accordance with FAR 15.407-1, the contracting officer shall ensure that information relating to the contracting officer's final determination for defective cost or pricing data, to include subsequent changes, is reported within 3 business days. This includes reporting any changes to the final determination in the event of the following:

    - Contracting officer's decision in accordance with the Contract Disputes Act;
    - Board of Contract Appeals decision; or
    - Court decision.

- **Termination for default:** In accordance with FAR 49.402 regarding termination of fixed price contracts, the contracting officer shall ensure that information relating to the termination for default notice and a subsequent withdrawal or conversion to a termination for convenience is reported within 3 business days.

- **Administrative agreement:**

    - **Debarment:** In accordance with FAR 9.406-3 and when FAPIIS module has this feature, the debarring official shall enter requested information into FAPIIS regarding the results of the administrative agreement to resolve a debarment proceeding and timely submit this information within 3 business days. The debarring official is responsible for the accuracy of the documentation.

    - **Suspension:** In accordance with FAR 9.407-3 and when FAPIIS module has this feature, the suspending official shall enter requested information into FAPIIS regarding the results of the administrative agreement to resolve a suspension proceeding and timely submit this information within 3 business days. The suspension official is responsible for the accuracy of the documentation.

3. Reports (records) not completed within 30 days are automatically deleted.

4. Before uploading any attachment into FAPIIS make sure the document does not contain information that should not be disclosed and also ensure that the document is properly marked, e.g. "For Official Use – Source Selection Information – See FAR 2.101 and 3.104," as appropriate.

5. FAPIIS reporting requires 100% compliance. For **DOE provided information**, the DOE official responsible for reporting should conduct reviews at least quarterly (preferably more frequently) to ensure that 100% of the information required is reported in FAPIIS. For **contractor provided information**, the contracting officer should take reasonable steps, such as sampling or conducting routine data quality reviews, to ensure that the required integrity information on criminal convictions, civil liability, and adverse administrative proceedings is being reported. For example, if a contracting officer becomes aware of a conviction, or is notified by a third party regarding a civil judgment or adverse administrative proceeding, the contracting officer should check the validity of the information to assess if it should be documented in the system.

Depending on the type of FAPIIS information to be reported and monitored, the DOE Official Responsible for Reporting FAPIIS information should review the methods for monitoring integrity information table and implement these methods or other effective methods to ensure the integrity of the information reported. The table is an excerpt from the OFFP's March 6, 2013 memorandum *Improving the Collection and Use of Information about Contractor Performance and Integrity*.

Methods for Monitoring Integrity Information

FAPIIS Information	Timeframe for Entering Records in FAPIIS	Official Responsible For Reporting FAPIIS information	Monitoring Compliance Note: Agencies should monitor compliance weekly or monthly to reach quarterly compliance targets	System of record used to monitor compliance	Quarterly Compliance Target
Terminations for Default or for Cause	3 Working Days	CO	Use FPDS Standard Report, *Contract Termination for Default-Cause Report*, to compare FPDS records to FAPIIS termination for default or for cause records.	FPDS and FAPIIS	100%
Non-responsibility Determinations	3 Working Days	CO	Sample solicitation and contract files on a routine basis.	Contract file/ FAPIIS	100%
Defective Cost or Pricing Determinations	3 Working Days	CO	Sample contract files on a routine basis.	Contract file/ FAPIIS	100%
Administrative Agreements (excluding individuals)	3 Working Days	Suspension/ Debarment Officials (SDOs)	Check with the Suspension and Debarment Officials (SDOs) on a routine basis.	Agency SDO file/FAPIIS	100%
Contractor Reported Integrity Information – Civil proceedings and Criminal convictions	Prior to award and on a semiannual basis (IAW FAR 52.209-8)	Contractor	Sampling, random inspection of the FAPIIS and other relevant sources.	FAPIIS	100%

C. CPARS Evaluations

A CPARS evaluation is separate and distinct from a FAPIIS report. When a contract action requires an evaluation report in accordance with Chapter 42.15 and a FAPIIS report, the following action is required:

- For CPARS evaluation, the Assessing Official Representative or the Assessing Official is responsible to ensure the CPARS evaluation includes the relevant other contractor information in the evaluation.

- For Architect-Engineer Contract Administration Support Systems (ACASS) or

Construction Contractor Appraisal Support System (CCASS) evaluation, the Assessing Official Representative or the Assessing Official is responsible to ensure the ACASS or CCASS evaluation includes the relevant other contractor information in the evaluation.

D. Records Retention for Other Contractor Information

Reports prepared in FAPIIS should be maintained in electronic form. The FAPIIS records are retained for 5 years following the action date in FAPIIS and PPIRS.

E. E-mail Notifications

To facilitate the recording process, FAPIIS application will send e-mail notifications to the Government and the contractor. A list of the e-mail notifications is as follows:

- **Command POC Member assigned**
- **Focal Point assigned**
- **Alternate Focal Point assigned**
- **FAPIIS Data Entry assigned**
- **FAPIIS Data Entry assigned/records transferred**
- **Weekly reminders to complete FAPIIS records**
- **Overdue notification (record incomplete)**
- **Contractor notification that FAPIIS record is available in PPIRS**

F. FAPIIS Training

The Focal Point is responsible for ensuring that the FAPIIS Alternate Focal Point(s) and the Data Entry User(s) are knowledgeable about FAPIIS and the training that is available to them. Training for the Government is offered monthly via webcast and the calendar can be found on the CPARS web site. The FAPIIS class is highly recommended to all DOE employees who are or may become a FAPIIS Focal Point, a FAPIIS Alternate Focal Point, and/or a FAPIIS Data Entry User. See the following table for list of all available past performance and FAPIIS training opportunities. The table is an excerpt from the OFFP's March 6, 2013 memorandum *Improving the Collection and Use of Information about Contractor Performance and Integrity*.

Past Performance and FAPIIS Training Opportunities		
Course	**Description**	**Course Information**
DOD CPARS and FAPIIS Training.	Provides information on how to use CPARS and FAPIIS. Upon completion, students receive a Certificate of Completion and continuous learning points (CLP).	Seminar, Online Training, and training material available at http://www.cpars.gov/allapps/cpcbtdlf.htm.
DOD PPIRS Training	Provides information about PPIRS and the valuable source selection sensitive information shared across federal government agencies and its use in source selection and contract award decisions.	Schedule of PPIRS classes is available at https://www.ppirs.gov/webtrain/webtrain.htm.
DOD *Past Performance Information Course – CLC 028.*	Provides relevant information to all acquisition personnel required to participate in this contract administration function. Upon completion, students receive 3 CLPs.	The course schedule is available at www.dau.mil.
FAI – 4 minute multi-media FAPIIS overview.	Explains what the FAPIIS module why it is important, how it impacts the acquisition and grants communities, as well as how the system interrelates with other systems containing similar Information.	FAI website available at http://www.fai.gov/FAPIIS/trailer/module.htm.
FAI *Federal Awardee Performance and Integrity and Information System (FAPIIS) - FAC 019.*	Provides guidance on how to consider the FAPIIS information. Upon completion, students will receive 1 CLP.	This course is available on the Defense Acquisition University (DAU) website at www.dau.mil. Note: FAPIIS courseware was developed by FAI and tested and hosted on the DAU website.
Note: It is highly recommended that these courses be made available to all agency acquisition personnel responsible for reporting and using performance and integrity information. Questions about the training should be directed to DOD, DAU, or FAI points of contact listed on their respective websites, or you may seek information from your agency Acquisition Career Manager.		

G. Points of Contact

- Questions regarding FAPIIS policy may be directed to the Office of Policy, Contract and Financial Assistance Policy Division, MA-611, at (202) 287-1330.

- Questions on how to use the FAPIIS system may be e-mailed to the DOE Agency Coordinator, Systems Division, MA-662, at HQProcurementSystems@hq.doe.gov.

b e te t

CHAPTER 43 - CONTRACT MODIFICATIONS

1 tr t t ebr r 201

2 e r er m tr t t 201

t me t r e t eme t t tr t eme t r eme t
per t t e mb r eme t tr t r p t et r e t r me t eme t
e t m t e mm t per t t er r r e t r 201

Contract Modifications

Guiding Principle

Contracting Officers must ensure that contract modifications are properly executed and are formally binding on the Government and the contractor.

References

FAR Part 43, Contract Modifications
FAR Part 13.307, Forms-Simplified Acquisition Procedures

Overview

The purpose of this Chapter is to provide a consistent approach across the Department for processing and executing modifications to ensure that contract changes are formally binding on both the Government and the contractor.

Definition

A contract modification is a written alteration to the terms and conditions of a contract issued by the Contracting Officer acting within the limits of their authority. These alterations include, but are not limited to, changes to the statements of work, specification, delivery point, rate of delivery, contract period, price, quantity, or any other terms and conditions of an existing contract. A contract modification can be accomplished by either (a) bilateral actions such as a supplemental agreement, or (b) unilateral actions such as changes made pursuant to the Changes Clause, administrative changes, notices of termination, and notices to exercise a contract option.

Guidance

1) A contract modification must be issued to make any changes to the terms and conditions of the contract. Examples of changes include payment of earned fee to the contractor, or updating the contract through an Appendix revision. Additional examples are provided in the attached authority selection guidance chart. Contracting Officers are advised to seek assistance from their appropriate supervisor/legal support/policy office should specific contract activities become unclear as to whether they would affect changes to terms and conditions to their contracts. Only DOE Contracting Officers are authorized to issue modifications to DOE contracts.

2) Contracting Officers shall use a Standard Form (SF) 30 within the contract writing system to issue all modifications. This guidance applies to all FAR references including where the use of an SF30 is an available option.

3) On rare occasions when Contracting Officers must justifiably direct changes to contracts through oral or electronic messages, a formal written modification using an SF30 shall be effected and issued within 2 business days to confirm the change (see FAR 43.201(c)). (Also see FAR 43.104 which provides the process for timely notification of contract changes by contractors.)

4) Contracting Officers shall not manage contracts outside of the formal electronic system (STRIPES) unless the contracts are in closeout status.

5) For bilateral modifications, Contracting Officers shall ensure that the SF30 is signed by a person authorized to bind the contractor.

CONTRACT MODIFICATION AUTHORITY GUIDANCE CHART (SF 30, BLOCK 13)

CHANGES CLAUSE (FAR 43.2)	**ADMINISTRATIVE CHANGES (FAR 43.103(b))**	**SUPPLEMENTAL AGREEMENT (FAR 43.103(a))**	**OTHER**
Citation of Authority: Use the appropriate changes clause in the contract. Generally, Government contracts contain a changes clause that permits the CO to make unilateral changes in designated areas, within the scope of the contract. Examples for FFP changes: a) Drawing, designs or specifications b) Method of shipment or packing c) Place of delivery d) Method or manner of work performance e) GFPs or facilities	Citation of Authority: None required. An administrative change is a written unilateral contract change that does not affect the substantive right of the parties. Examples, but not limited to: a) Change paying office b) Change individual COR c) Change appropriations data d) Correct typographical errors	Citation of Authority: Any contract clause, term, or condition which requires written agreement between the Government and the contractor. Examples, but not limited to: a) Change delivery, price, quantity, etc. b) Definitization of unilateral Change Order to reflect the agreement reached in the negotiation. c) Definitization of other unilateral actions (Stop work, Government Delay of work, etc.) d) Definitization of Unpriced Actions. e) Economic Price Adjustment clauses. f) In preference to a Change Order when a supplemental agreement is considered feasible. g) Use "mutual agreement of the parties" when no other authority is applicable.	Citation of Authority: Appropriate contract clause, term or condition, or FAR and DEAR references, which permits the CO to take action with or without contractor's concurrence. Examples, but not limited to: a) Termination b) Disputes c) Public Law 85-804 d) Option e) Government Property

Change Order Administration

References

- FAR Subpart 43.2, "Change Orders"
- Policy Flash 2008-39, "Contract Change Order Administration of Department of Energy (DOE) Prime Contracts"
- Acquisition Guide 15.4-1, "Pricing Contract Modifications"

Overview

This chapter provides guidance to ensure the proper issuance and administration of change orders. A change order template and sample clauses are provided in order to facilitate consistent application across the complex.

Background

A change order is a written order, signed by the Contracting Officer, directing the contractor to make a change (authorized by the Changes clause) on a unilateral basis. The Changes clause permits the Contracting Officer to make unilateral changes in designated areas within the general scope of the contract (FAR Subpart 43.201). The contractor must continue performance of the contract as changed. However, in the case of an incrementally-funded cost reimbursement contract, the contractor is only bound to continue performance up to the point established in the Limitation of Funds clause.

Change Orders are the least preferred method of changing contracts. In accordance with FAR 43.102(b), contract modifications, including changes that could be issued unilaterally, shall be priced before their execution if this can be done without adversely affecting the interest of the Government. If a significant cost increase could result from a contract modification and time does not permit negotiation of a price, at least a ceiling price shall be negotiated unless doing so is impractical.

When issuing change orders, it is imperative to identify the distinct work, associated deliverables, and the other contract requirements associated with the change. This will allow the contractor to appropriately segregate the costs associated with the changed work, and facilitate

the negotiation of an equitable adjustment. Furthermore, it is extremely important to invoke the change order accounting clause and set a firm date for receipt of a complete, auditable proposal so that that the process of definitizing the change order does not drag on.

Template

This template sets forth guidance for change order modifications for contracts and task orders. Change orders are not generally used in Management and Operating (M&O) contracts.
When issuing change orders, the government should generally estimate a price (cost plus any fee or profit, as applicable to the contract type) before signing the change order to ensure that funding is available to pay for the changed work; thereby, avoiding Anti-Deficiency Act violations.

The change order modification will accomplish the following:

- Direct the contractor to implement the change under the authority of the Changes clause of each contract. Cite the proper authority (e.g. FAR 52.243-1, 52.243-2, and 52.243-3, as applicable) on the cover page of the Standard Form (SF) 30, Amendment of Solicitation/Modification of Contract, Block 13A.

- Invoke change order accounting pursuant to FAR clause 52.243-6 (if applicable), or the new DOE clause H.XX "Change Order Accounting" (provided in the template).

- Request a timely and auditable proposal to definitize the change order.

- Add special language related to the changes and certain other provisions that are required.

Below are other aspects related to use of the template:

- Words in bracketed italics are instructional notes to help guide the Contracting Officer in preparing the contract modification.

- While the word "contract" is used throughout, the guidance applies to modification of a task order, master contract, etc.

- Where specific clause titles are used in the model, these are to be viewed as the general subject matter of the clause. Actual clause titles may vary between individual contracts.

GENERAL GUIDANCE FOR CHANGE ORDER MODIFICATIONS

The following factors should be considered when issuing a change order:

1. Contracting Officer shall request a revised Small Business Subcontracting Plan and goals if the negotiated settlement for change orders issued increases the value of the contract by $550,000 or more.

2. Document any change order issued; in particular addressing the rationale for determining the work to be within the scope of the subject contract. The Contracting Officer is advised to consult with their Counsel to ensure the change does not constitute a cardinal change to the contract.

3. Change orders shall have a not-to-exceed ceiling. When issuing a single modification with multiple changes the Contracting Officer should consider whether a single not-to-exceed value should be used or individual values associated with each of the changes.

4. The Contracting Officer is authorized to establish the not-to-exceed ceiling value(s) at the lesser of 50% of the independent government cost estimate for the subject action or funding for six (6) months of contractor performance.

5. Each change order shall contain a definitization schedule. The schedule shall contain at least the following:

    a) Dates for submission of the contractor's Request for Equitable Adjustment (REA) including required cost or pricing data, as applicable.

    b) A date for the start of negotiations.

    c) A date for definitization, which shall be the earliest practicable date for definitization. (The negotiation schedule should provide for definitization of the contract within 180 days after the date of the un-priced change order/ modification or before completion of 40 percent of the work to be performed, whichever occurs first.

6. If the contract contains the FAR clause 52.243-6, Change Order Accounting, it is imperative to invoke the clause when issuing a change order expected to exceed $100,000. The clause should be included in all (non-M&O) contracts for capital asset projects, decontamination & decommissioning (D&D), soil & groundwater remediation, and construction contracts over $10 million. It should also be included in supply and research & development contracts of significant complexity when numerous change orders are anticipated. The following DOE clause invokes and supplements FAR 52.243-6, and should be included in all solicitations and contracts which contain it:

H.XXX MANDATORY CHANGE ORDER ACCOUNTING

(a) In accordance with FAR 52.243-6, the Contractor must establish change order accounting for each change or series of related changes whose estimated cost exceeds $100,000.

(b) The Government has no obligation under this clause or any other term or condition of this contract to remind the Contractor of its obligations under this clause. The Government may or may not, for example, refer to this clause when issuing change orders.

(c) If the Contractor separately identifies costs in its invoices that pertain to the changed work, the Contractor may invoice costs for both changed work and other work in the same invoice.

(d) If the Contractor fails to provide an adequate, auditable definitization proposal within 120 days of the Contracting Officer's request for such proposal, the Government may consider some or all of the associated bid and proposal costs to be unallowable.

(e) If the Contractor fails to comply fully with the requirements of this clause, the Government may reflect the Contractor's failure in its—
(1) determination of otherwise earned fee under the contract; and/or
(2) past performance evaluation of the Contractor's performance.

7. All un-priced change orders/modifications that are estimated to exceed the HCA's delegated procurement authority require the advance review and approval or waiver of MA-621 in accordance with established procedures. In addition, review and approval or waiver of the definitization of any un-priced change orders/modifications are also required.

8. When requesting REAs from the contractor the Contracting Officer should stress the need for cost, performance, and schedule realism. Additionally, the Contracting Officer should emphasize the importance of providing a timely proposal, prepared in accordance with the preparation instructions and advise the contractor that failure to do so will be noted in past performance evaluations and in the determination of otherwise earned fee under the contract, and may also result in disallowance of bid and proposal costs. REA preparation instructions can be provided under separate cover or as an attachment to the change order issuance modification. *The REA preparation instructions are provided as an attachment to this template.*

9. The following guidelines shall be followed:

   a) No fee shall be paid to the contractor for changed work, including provisional, prior to the definitization of the change order.

   b) Specify the delivery schedule or milestone requirements to assess performance of the work. These performance outcomes and measures may subsequently be

incorporated into fee incentives, through the Performance Evaluation Management Plan (PEMP), Award Fee Plan, or other similar document.

c) As applicable, Section F must be modified to reflect a revised period of performance.

d) The contractor may invoice costs for both changed work and other work in the same invoice. However, the contractor shall separately identify costs in its invoices that pertain to the changed work if Change Order Accounting applies.

e) For actions that are being used to accelerate work that is already priced in the contract, the modification should include the specific scope of work that is to be accelerated including the new work schedule and the metrics that will be used to measure successful performance of the work.

f) For modifications that are adding supplemental work within the scope of the contract that was not priced when the contract was awarded or added by a previously priced and definitized modification, the modification should include the specific scope of work that is to be added including the work schedule and the metrics that will be used to measure successful performance of the work.

g) Prior to adding requirements deemed to be beyond the scope of the contract, the Contracting Officer must insure that FAR Part 6 requirements are met, as applicable. Once justifications required by FAR Part 6 are approved, the change order can be issued.

h) Contracting Officers should follow FAR, DEAR, and the guidance issued by the Director, Office of Contract Management, dated April 1, 2008, titled “Contract Change Order Administration of Department of Energy Prime Contracts” in issuing, pricing, and negotiating all change orders.

i) Contracting Officers must obtain a certificate of current cost or pricing data after completion of contract negotiations (FAR 15.403-4) unless an exception is applicable or waived by the Head of the Contracting Activity.

Change Order Modification Template
(*Text for Inclusion in Change Order Modification)*

The purpose of this modification is to issue a change order revising the Statement of Work (SOW) or Performance Work Statement (PWS), and to make certain other changes to the contract terms associated with the revised SOW or PWS. These revisions are being made under the authority of the contract clause contained in Section I, entitled "Changes" (Cite the FAR Reference.)

The work described in this modification shall be performed using funds either currently obligated under this contract or added to this contract by this modification.

The contractor is to begin work immediately. The contractor is authorized to incur costs Not-To-Exceed (NTE) $_____, consistent with the other contract terms and conditions and pending definitization of this change.

The following represent examples of changes that may be made to the contract as a result of the change order:

1. Section B, Supplies or Services and Prices/Costs are amended as follows:

A. Paragraph B.XX is modified to add the following:

The contractor shall, in accordance with the terms of this contract, provide the personnel, materials, supplies, and services and do all things necessary for, or incidental to, performing the changed work. This work is generally described as follows:

(Include a brief description of the work, including deliverables, schedules, and incentives as applicable.)

The detailed description of the changed work contained in attachments to this modification identified as Section C and Attachment XX in Section J of the contract.

B. Paragraph B.XX is modified to add the following *(if applicable)*:

Pursuant to the clause in Section I, entitled "Limitation of Funds," total funds in the amount of $_____are obligated herein and made available for payment of allowable costs and fee earned related only to the changed work from the effective date of this modification through the period of performance contained in Section F.

C. Paragraph B.XX is modified to add the following:

No fee shall be paid to the contractor for work under this change order for the changed work including provisional fee, prior to definitization.

2. Section C, Description/Specifications/Statement of Work is amended as follows:

Paragraph C. XX is modified as follows:

• If modifying a *Statement of Work or Performance Work Statement - The work that will be performed as a result of the change. These situations may include the following:*

- *Added or Deleted (FAR 15.408 III B Change Orders, Modification, and Claims) work - In situations where work is required within the existing general scope of the contract, additional text describing the changed work is added to the statement of work.*

- *Acceleration of work - If existing work, already specified in the statement of work, is to be accelerated, the accelerated work to be performed must be described in such a manner to allow the work to be identified and clearly distinguished from the other work.*

- *A product-oriented work breakdown structure (WBS) (if applicable) should be used for performing the changed work. This WBS should also form the basis for the contractor's cost proposal. (Cost Proposal instructions should include at what WBS level (1, 2, 3) should be submitted in the proposal. The level usually depends on the complexity of the effort.*

• *Schedule – Section C, or a Section J attachment, must specify schedule or milestone requirements for the work specified.*

• *Performance outcomes and measures – Section C, or a Section J attachment, must specify performance outcomes and measures that will be used to assess performance of the work. While these performance outcomes and measures may subsequently be incorporated into fee incentives, through the Performance Evaluation Management Plan (PEMP), Award Fee Plan, or other similar document, Section C needs to tie the work to these outcomes and measures. (Acquisition Guide 37.2).*

• *Deliverables – Section C, or a Section J attachment, must specify the associated deliverables. (Reference the name or title of the deliverable and/or the form number, if there is one)*

- *Other Requirements – Specify other requirements associated with the performance of the work. These may include reporting requirements related to project status, earned value, or other cost type reports generally associated with work performance.)*

3. Section E, Inspection and Acceptance is amended as follows:

(*Add or modify Section E clauses related to any changes to the contract requirements.)*

4. Section F, Deliveries or Performance is amended as follows:

Paragraph F.XX is modified to add the following:

The period of performance for the changed work specified in Section C shall be for the period of performance beginning_____*(date modification is signed by the Contracting Officer)* through_____. *(The date of completion of the work.)*

5. Section G, Contract Administration Data is amended as follows:

Paragraph G.XX is modified to add the following:

The following invoice procedure will apply to the submission of invoices for the changed work specified in Section C, as incorporated by Modification XXX):

The contractor may invoice costs for both the changed work and other work in the same invoice. However, the contractor shall separately identify costs in its invoices that pertain to the changed work until the parties agree to an equitable adjustment for the changes ordered by the Contracting Officer (*Reference FAR 15.408 III B or specify how the invoice should be submitted*). *(This paragraph will only apply if the CO invokes Change Order Accounting for the change order).*

6. The following is a definitization schedule for this change order.

A. This schedule applies only to the changed work specified in Section C as directed by the Contracting Officer under this modification in accordance with the clause in Section I, entitled "Changes," until such time that the Contracting Officer and the contractor reach a mutual agreement and modify the contract definitizing the changed work.

MODIFICATION DEFINITIZATION

(a) The Contractor agrees to begin promptly negotiating with the Contracting Officer the terms of a definitive modification for the changed work directed

under this modification. The Contractor agrees to submit an REA (technical, cost, and fee proposal) in accordance with the instructions provided as an attachment to this modification.

(b) The schedule for definitizing this modification is as follows:

(*Insert dates for key milestones related to the definitization of the modification.)*

Milestone	Date
Contractor submits REA (technical, cost, and fee Proposal) *(The Changes clause may state the required time for the submission of an REA. If time is sufficient, state the actual date based on the time allowed by the clause. If time is not sufficient based on the effort required for the submission of an REA, state the necessary time, not to exceed 60 days after issuance of this modification. (Note: Due to the complexity of the change order it may be necessary to negotiate a due date beyond 60 days; however, you are still required to definitize within 180 days. On the contrary, a less complex REA may be submitted in less than 60 days.)*	
Commence negotiations	
Mutual agreement on definitization of changed work	
Contractor submits certificate of current cost or pricing data	
Execute definitization contract modification *(This date provides for definitization within 180 days after issuance of this modification.)*	

(c) If agreement on a definitive modification is not reached by the definitization date in paragraph (b) of this section, or within any extension of it granted by the Contracting Officer, the Contracting Officer may, with the approval of the head of the contracting activity, determine a reasonable price in accordance with Subpart 15.4 and Part 31 of the FAR and Acquisition Guide 15.4-1, subject to Contractor appeal as provided in the Disputes clause. In any event, the Contractor shall proceed with completion of the contract, subject only to the clause in section I, entitled "Limitation of Government Liability," added by this modification.

B. The following clauses are modified *(or added)* as follows:

(There may be existing clauses in contracts that need to be modified for application to the changed work due to the nature of the specific work or in order to provide additional oversight or control. Other clauses in Section H should be reviewed for this purpose. In addition, there may be a need for new clauses applicable to the changed work. Areas that should be assessed include:

- *Financial management and oversight,*
- *Project controls,*
- *Baseline management and change control, and*
- *Special reporting, etc.)*

7. FAR 52.243-6 CHANGE ORDER ACCOUNTING (APR 1984) is herby invoked.

(Add this clause and DOE H.XXX Mandatory Change Order Accounting for change orders over $100,000 if they are not already in the contract.

8. Section J, List of Attachments is amended as follows:

A. The following attachments are modified *(or added)* as follows:
(Additional or amended attachments should be included, as applicable, e.g., Section C detailed SOW/PWS, revised deliverables, etc.)

B. There are certain attachments to the contract that will need to be updated as a result of the changed work to the contract. These will be addressed during the definitization period in accordance with the applicable provisions of the contract, e.g., *(Performance Evaluation Management Plan (PEMP) or award fee plan, Quality Assurance Surveillance Plan (QASP) Small Business Subcontracting Plan, etc. For example, the fee incentives for the changed work may be separately identified, with associated available fee, in a modification to the PEMP or other method depending on the type of fee under the contract.)*

C. The contractor's REA (technical, cost/price, and fee proposal) shall be prepared in accordance with Attachment XX to this modification. (*The REA Preparation Instructions are provided herein as an Attachment to this template.)*

Change Order Definitization Supplemental Agreement

(Text for Inclusion in Change Order Bilateral Definitization Modification)

The change order modification (Sections B-J described above) becomes the model for your definitization modification. The bilateral definitization modifies the contract incorporating the changed work. As a result, Sections B-J are updated to accurately incorporate the changed work and finalized with the conclusion of negotiations.

The definitization modification shall include a release similar to the following (FAR 43.204)(c):

CONTRACTOR'S STATEMENT OF RELEASE

In consideration of the modification(s) agreed to herein as complete equitable adjustments for the Contractor's_____(describe)_____"proposals(s) for adjustment," the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the "proposal(s) for adjustment" (except for_____).

Attachment XX
Modification XXX

SUGGESTED REA PREPARATION INSTRUCTIONS

[This document provides a template for preparation instructions for the submission of REAs for the definitization of work authorized under the Changes clause for the changed work. This template is intended to address the pertinent areas of the REA, including technical, cost/price, and fee/profit to assure adequate information is obtained to perform a proper evaluation of the request and execution of a definitized agreement. These model instructions should be tailored based on the individual contract's terms and the nature of the change order issued.]

1. INTRODUCTION

This document contains instructions to the contractor for the preparation of an REA in response to the change order.

The contractor shall provide a written REA consisting of a Technical Proposal and a Cost and Fee Proposal. The Technical Proposal shall contain the contractor's approach to perform the work, and the Cost and Fee Proposal shall contain the estimated cost of performing the work and any associated fee/profit. The contractor shall assure that there is consistency between the Technical Proposal and the Cost and Fee Proposal. Depending on the time between the issuance of the change order and submission of the REA, the contractor may be required to submit data based on actual costs incurred for the directed changed effort.

2. PREPARATION INSTRUCTIONS – GENERAL INFORMATION

The contractor shall submit written REA information in the format as outlined in Table 1.

[The inclusion of the specific requirements for the REA format contained in Table 1 below is not intended to be enforced to the extent that is necessary in a competitive acquisition where page limitations dictate such rigor. Rather, this approach is suggested to facilitate getting a formal and consistent REAs from the various contractors.]

- Table 1 -

Suggested REA Instructions Format	
Number of Copies	• Technical Proposal – 3 hard copies and 1 electronic copy. • Cost and Fee Proposal – 3 hard copies and 1 electronic copy. • Both portions of the proposal shall contain a table of contents.
Paper Size	• 8 1/2" x 11" paper. • Fold-outs shall not exceed 11" x 17"
Print Type	• Print type (Font size) used in the text portions of the proposal shall be no smaller than 12 point font. • Print type used in completing any forms attached to this document as Microsoft (MS) Word, Access, or Excel documents should not be changed from the styles used in the attachments. • Print type used in charts, graphics, figures and tables may be smaller than 12 point Font, but must be clearly legible.
Page Margins	Page margins shall be 1-inch on the top, bottom, left, and right sides of the page, exclusive of headers and footers.
Page Numbering	All pages, including forms, tables, and exhibits, shall be appropriately numbered and identified with the name of the contractor.
CD-ROM or DVD Requirements	CD-ROMs or DVDs shall be clearly labeled with the contract number. Files submitted shall be readable using Microsoft (MS) Word, Access, or Excel (Version 2003), and the proposal schedule shall be a submitted as Primavera P3e Version 5.x, "XER" file type.

3. PREPARATION INSTRUCTIONS COVER LETTER

The cover letter shall include, but not be limited to, the following:

Acquisition Guide
Chapter 43.2 (August 2013)

(a) The contract and modification number.

(b) The name, address, telephone numbers, facsimile numbers, and electronic addresses of the contractor's representative(s) responsible for providing additional information, as required, on the Technical Proposal and the Cost and Fee Proposal.

(c) The name and contact information of the contractor's representative(s) with the authority to negotiate the definitization of this modification with the Contracting Officer.

(d) Identification of any proposed changes to the SOW/PWS or other terms included in this modification that the contractor believes would be in the best interest of the Government in meeting the objectives of the changed work. *(The government should have already provided this in the change order.)*

(e) The name and contact information for the contractor's cognizant Administrative Contracting Officer (ACO) and Defense Contract Audit Agency (DCAA), if any.

(f) A statement that the contractor will cooperate fully and expeditiously in providing access to proposal information that may be necessary to be reviewed by representatives of DOE, e.g. Defense Contract Audit Agency (DCAA), for the purpose of definitizing this modification.

(g) CERTIFICATIONS - TBD

4. PREPARATION INSTRUCTIONS TECHNICAL PROPOSAL (*The following are examples of instructions to provide the contractor if a technical proposal is required.*)

The Technical Proposal shall be organized in accordance with the Work Breakdown Structure (WBS) or PWS as shown in Section C. The SOW/PWS shall include the following:

(a) Description of the proposed strategy and technical approach (including any innovations) to implement the requirements of the changed work.

(b) Description of the specific detailed approach to the management, execution and sequencing of the work for the major WBS elements or PWS identified in the Section C. SOW/PWS. This description shall include the following:

i. A description of the work that will be performed by the contractor and the work that will be performed by subcontractors;

ii. The supporting rationale for the division of work between the contractor and subcontractors, including considerations related to efficiency of performance, cost, the need to hire additional staff, etc;

Acquisition Guide
Chapter 43.2 (August 2013)

iii. The extent of utilization of small business subcontractors; and

iv. The extent of utilization of fixed-price subcontracting.

(c) Identification of the risks and impacts to the proposed approach, rationale for the identified risks and impacts, and the contractor's approach to eliminate, avoid and/or mitigate the risks throughout performance of the changed work.

5. PREPARATION INSTRUCTIONS – COST AND FEE PROPOSAL

The Cost and Fee Proposal shall be prepared in accordance with the following instructions:

(a) FAR 15 - The contractor shall prepare its cost proposal in accordance with Table 15-2, of Part 15 of the Federal Acquisition Regulation (FAR).

(b) For contracts subject to DOE Order 413.3A, Program and Project Management of the Acquisition of Capital Assets, the Cost proposal shall be prepared as shown in Appendix IA, Schedules A-C. Costs shall be proposed by WBS consistent with and at the lowest level of the WBS as described in the SOW, and consistent with the Technical Proposal.

For contracts that are not subject to DOE Order 413.3A, and are not proposed by WBS, the Cost proposal shall be prepared in accordance with Appendix 1B, (Cost Proposal Instructions and Cost Proposal Spreadsheet), and consistent with the Technical Proposal.

(c) Other Formats Required as Checked Below - Formats contained in the appendices to this document shall be used for the submission of the estimated costs as follows:

[ ] Appendix 2 – Labor – Consolidated Summary
[ ] Appendix 3 – Material, Equipment, Subcontracts, and Other Direct Costs – Consolidated Summaries (Schedules A-D)
[ ] Appendix 4 – Waste Quantities and Cost – Consolidated Summary *(if applicable)*

The contractor should assure consistency and traceability between these various appendices, schedules, and supporting information.

(d) Appendix 2 - Appendix 2 is to be used to provide a direct labor summary (labor category, labor rate, and labor hours) on both a cumulative total and fiscal year basis. This should show the hours for the contractor, subcontractor, LLC members, and any other direct labor hours.

Acquisition Guide

(e) Appendix 3 - Appendix 3 is to used to provide, in total and by fiscal year, materials (Schedule A), equipment (Schedule B), subcontracts (Schedule C, major subcontracts over $X million are to be individually listed), and other direct costs (Schedule D). Additional schedules should be included as appropriate to address elements of cost which are not included in Schedules A-D.

(f) Appendix 4 - Appendix 4 is to be used to provide a separate summary table of waste quantities by waste type in cubic feet by fiscal year by WBS. The contractor shall provide the summary of waste quantities, at a minimum, to a level equal to the WBS. This waste summary shall be supplemented by additional tables that include all costs associated with waste disposition including treatment, transportation and disposal for each waste type by fiscal year. Separate detailed computations shall be provided for treatment, transportation, and disposal cost by WBS. The basis of estimate associated with information provided in the waste summary table (including the additional tables) should be fully explained in supporting documentation.

(g) Schedule - A resource loaded P3 schedule shall be provided which shall be presented at the level of detail as shown in the WBS/PWS. The schedule shall include logic ties.

(h) Basis of Estimate (BOE) – A BOE shall be provided that thoroughly documents all estimates. A BOE description shall be provided for each activity at the lowest level in the estimate. The detailed narrative description of the basis of estimate shall be organized by WBS/PWS and include the following: how the proposed costs were derived; key assumptions and supporting rationale, including assumptions related to site conditions; source of existing verifiable data and judgment factors in projecting from known data to the estimate; estimating methods, parametric estimates, and models, etc; and other assumptions and related information to provide clarity and understanding of the contractor's basis of estimate to demonstrate reasonableness and realism.

(i) Cost Elements – Costs shall be provided by major cost elements as applicable such as: direct labor (including labor categories, direct labor hours and direct labor rates for each labor category type), fringe benefits, direct labor overhead, material, general and administrative costs (G&A), material handling overhead, equipment (including capital investments), subcontract cost, disposal cost, transportation cost, treatment cost, supplies, travel, relocation, other direct costs (ODCs). Notwithstanding that all "subcontract" costs are included above, LLC member/other teaming arrangement/subcontractors ($X million or more) shall be individually estimated and costs provided by major cost elements as described in this paragraph. Subcontractors who refuse to provide proprietary cost data to the contractor should submit their proprietary cost proposals to the Contracting

Acquisition Guide

Officer under separate cover. Appendix 1 is to be used to provide the costs by major cost elements, WBS/PWS, and fiscal year.

(j) Indirect Rates - A detailed estimate for each indirect rate (fringe benefit, material handling, labor overhead and G&A, if applicable) proposed by fiscal year is to be provided. The detailed estimate shall include cost, by cost element, for the allocation pool and the allocation base showing how each cost element within the allocation pool and allocation base was derived. The contractor shall provide all related information to provide a clear understanding of the basis of estimate. The contractor shall compute all of the indirect rates by fiscal year. This data shall be provided for each LLC member/other teaming arrangement/ subcontractor (over $X million). Subcontractors who refuse to provide proprietary cost data to the contractor should submit their proprietary cost proposals to the Contracting Officer under separate cover.

(k) Escalation - Identify the escalation factors used for each fiscal year, the source of the proposed escalation rates, and the rationale as to why the proposed escalation rates are reasonable.

(l) Electronic Media - Cost Proposal information and any spreadsheets submitted by the prime and subcontractor(s) or mathematical computation shall be submitted using Microsoft Excel 2003 or later, format and shall be working versions, including formulas and computations with no protected cells. The contractor shall also provide the electronic version of the cost proposal in Adobe Acrobat 8.0 (PDF) or higher. The electronic media versions provided shall be searchable.

(m) Cognizant ACO/DCAA - The contractor shall provide the name, address and telephone number of the cognizant ACO and the cognizant DCAA office, if any. If the contractor is an LLC or has subcontractor(s) ($X million or more), this data must be provided for each entity performing work.

(n) Accounting System - The contractor shall submit an explanation of how costs related to the changed work will be accumulated, recorded, invoiced, and reported using the contractor's accounting system in order to assure that costs associated with changed work are separate from other costs incurred under the contract until the parties agree to an equitable adjustment for the changes ordered by the Contracting Officer. The contractor shall identify the cognizant Government audit agency that has issued reports regarding the adequacy of the accounting system for accumulating and billing costs under Government contracts. This data must also be provided for each member of an LLC and each subcontractor that is performing work estimated to be $X million or more.

(o) Cost Accounting Standards - If the contractor, LLC members, or subcontractor(s) ($X million or more) performing work are covered by Cost

Acquisition Guide

Accounting Standards (CAS), the contractor shall discuss the adequacy of the disclosure statement. The contractor shall also identify whether the cognizant Government audit agency has issued any audit reports on the compliance with the CAS requirements of any of these entities.

(p) Government Furnished Property - The contractor shall provide a list of any Government Furnished Property (GFP) that will be used in the performance of the changed work that is in addition to the GFP already provided.

(q) Fee - The contractor's fee/profit proposal shall address the following:

(i) The contractual basis for any adjustment in the fee currently in the contract;
(ii) The proposed amount of fee associated with the changed work; and
(iii) A description of how the proposed fee is calculated and the supporting rationale as to why the proposed fee/profit amount is reasonable.

(The contract terms of the individual contracts related to fee provisions must be considered in preparing this instruction to the contractor. Considerations will include: type of contract, e.g., CPAF, CPIF, FFP; whether the work is added or accelerated, etc.)

Acquisition Guide

Appendix 1
Schedule A

Cost By WBS

WBS	FY 20XX	FY 20XX	FY 20XX	Total
C.1.1 – Groundwater Environmental Actions				
C.2.1 – D&D of Building XX				
C.3.1 – Waste Disposal				
Total Cost				
Fee				
Total Cost and Fee				

Appendix 1
Schedule B

Cost By Cost Element WBS 1.1 – Groundwater Environmental Actions

	FY 20XX	FY 20XX	FY 20XX	Total
Direct Labor (include hours and rates)				
Insert Direct Labor Categories				
Fringe Benefits (include base and rates)				
Direct Labor Overhead (include base and rates)				
Materials				
Material Handling Overhead (include base and rates)				
Equipment				
Subcontract Costs				
Disposal Costs				
Transportation Costs				
Treatment Costs				
Supplies				
Travel				
Relocation				
Other Direct Costs				
Joint Venture/LLC Member/Other teaming arrangement/Subcontractor ($XM or over) (complete for each major entry)				
Direct Labor (include hours and rates)				
Insert Direct Labor Categories				
Fringe Benefits (include base and rates)				
Direct Labor Overhead (include base and rates)				
Materials				
Material Handling Overhead (include base and rates)				
Equipment				
Subcontract Costs				
Disposal Costs				
Transportation Costs				
Treatment Costs				
Supplies				
Travel				
Relocation				
Other Direct Costs				
G&A Costs (include base and rates)				
Subtotal Cost				
G&A Costs (include base and rates)				
Total Cost				

Each Spreadsheet shall be completed by FY and cumulatively

Acquisition Guide Chapter 43.2 (August 2013)

Appendix 1
Schedule C

Cost By Cost Element WBS 1.1.1 – Groundwater Subproject X

	FY 20XX	FY 20XX	FY 20XX	Total
Direct Labor (include labor hours and rates)				
Fringe Benefits (include base and rates)				
Direct Labor Overhead (include base and rates)				
Materials				
Material Handling Overhead (include base and rates)				
Equipment				
Subcontract Costs				
Disposal Costs				
Transportation Costs				
Treatment Costs				
Supplies				
Travel				
Relocation				
Other Direct Costs				
Joint Venture/LLC Member/Other teaming arrangement/Subcontractor ($XM or over) (Complete for each major entry)				
Direct Labor (include labor hours and rates)				
Insert Direct Labor Categories				
Fringe Benefits (include base and rates)				
Direct Labor Overhead (include base and rates)				
Materials				
Material Handling Overhead (include base and rates)				
Equipment				
Subcontract Costs				
Disposal Costs				
Transportation Costs				
Treatment Costs				
Supplies				
Travel				
Relocation				
Other Direct Costs				
G&A Costs (include base and rates)				
Subtotal Cost				
G&A Costs				
Total Cost				

Each Spreadsheet shall be completed by FY and cumulatively

Acquisition Guide

Appendix 2

Labor – Consolidated Summary

	FY 20XX			*FY 20XX*			*FY 20XX*			*Total*
Labor Category:	*Hours*	*Hourly Rate*	*Total*	*Hours*	*Hourly Rate*	*Total*	*Hours*	*Hourly Rate*	*Total*	*All Years*
Contractor:										
-Category A										
-Category B										
-Category C										
Total										
Subcontractor:										
- Category A										
-Category B										
-Category C										
Total										
LLC:										
- Category A										
-Category B										
-Category C										
Total										
Grand Total										

Appendix 3
Schedule A

Materials – Consolidated Summary

	FY 20XX			*FY 20XX*			*FY 20XX*			*Total*
Description:	*Units*	*Unit Rate*	*Total*	*Units*	*Unit Rate*	*Total*	*Units*	*Unit Rate*	*Total*	*All Years*
-Item A										
-Item B										
-Item C										
Item D										
-All Other Items										
Total										

Acquisition Guide Chapter 43.2 (August 2013)

Appendix 3
Schedule B

Equipment – Consolidated Summary

Description;	FY 20XX Units	FY 20XX Unit Rate	FY 20XX Total	FY 20XX Units	FY 20XX Unit Rate	FY 20XX Total	FY 20XX Units	FY 20XX Unit Rate	FY 20XX Total	Total All Years
-Equipment A										
-Equipment B										
-Equipment C										
-Equipment D										
Total										

Appendix 3
Schedule C

Subcontracts – Consolidated Summary

Description:	FY 20XX	FY 20XX	FY 20XX	Total All Years
-A				
-B				
-C				
-D				
Total				

Appendix 3
Schedule D

Other Direct Costs – Consolidated Summary

Description;	FY 20XX Units	FY 20XX Unit Rate	FY 20XX Total	FY 20XX Units	FY 20XX Unit Rate	FY 20XX Total	FY 20XX Units	FY 20XX Unit Rate	FY 20XX Total	Total All Years
-A										
-B										
-C										
-D										
Total										

Acquisition Guide Chapter 43.2 (August 2013)

Appendix 4

Waste Quantities and Cost – Consolidated Summary

	FY 20XX			*FY 20XX*			*FY 20XX*			*Total*		
WBS and Description	*Quantity*	*Transportation Cost*	*Disposal Cost*	*Quantity*	*Transportation Cost*	*Disposal Cost*	*Quantity*	*Transportation Cost*	*Disposal Cost*	*Quantity*	*Transportation Cost*	*Disposal Cost*
C.1.1 – Groundwater Environmental Actions												
LLW												
MLLW												
RH-TRU												
CH-TRU												
Hazardous												
Industrial												
C.2.1 – D&D of Building XX												
LLW												
MLLW												
RH-TRU												
CH-TRU												
Hazardous												
Industrial												
Total												

Maintaining Alignment of Project Management with Contract Management for Non-Management and Operating (M&O) Cost Reimbursement Contracts for Capital Asset Projects, Environmental Remediation, Decontamination and Decommissioning, Facility Operations, and Other Major Projects

GUIDING PRINCIPLES

- This chapter applies to contracts utilizing performance measurement baselines.
- The Government must have a process in place to ensure effective and timely management of contract modifications.
- To ensure that projects remain aligned with the contracts under which they are executed.

Purpose and Applicability

This chapter provides guidance on how Contracting Officers (COs) should manage contract changes, and how COs and Federal Project Directors (FPDs) should maintain alignment between project and contract management under non-M&O cost reimbursement contracts for capital asset projects, environmental remediation, decontamination and decommissioning, facility operations, and other projects. This chapter has three sections. Section I provides pre-award guidance on the CO's role in planning for the management of contract changes. Section II provides post award guidance on the CO's role for managing contract changes to align with the project baseline. Section III has Definitions, Acronyms and References. When the contract supports a capital asset project, this chapter complements Department of Energy (DOE) Guide (DOE G) 413.3-20 - Change Control Management Guide. This chapter applies to contracts utilizing performance measurement baselines. M&O contracts and Advisory and Assistance Service contracts are excluded from this DOE Acquisition Guide (AG) Chapter.

In addition, this chapter references AG Chapters. The CO should be sure to consider and incorporate guidance from these related chapters.

Table of Contents

Purpose and Applicability 1

SECTION I: PRE-AWARD 3

A. Acquisition Strategy 3

B. CO's Responsibilities on the IPT 3

C. Acquisition Plan 4

D. Contract Management Plan 4

E. Solicitation Preparation 4

F. Other Pre-Award and Post Award Issues 7

SECTION II: POST AWARD 9

A. Contract Changes 9

B. Federal Acquisition and Fiscal Laws Regarding Contract Award, Performance and Changes (Non-M&O) 10

C. The Overarching Change Control Process 11

D. The Contract Change Process 14

E. The Baseline Change Proposal (BCP) Approval Process 17

F. Contractor Management Reserve 19

G. Overruns 20

H. Contracting Officer Action to Assess Overrun 21

I. Examples 23

SECTION III: DEFINITIONS, ACRONYMS AND REFERENCES 26

A. Definitions 26

B. Acronyms 30

C. References 31

SECTION I: PRE-AWARD

This section provides guidance for the planning, preparation and management of contract changes for a non-M&O cost reimbursement contract in support of either a capital asset project or a non-M&O major site and facility, environmental remediation, decontamination/decommissioning, or facility operations contract which has a defined scope, cost and schedule. Planning involves pre-award activity (e.g., acquisition strategy, acquisition planning, and solicitation preparation) and post award activity in anticipation of project changes and other situations which may require a contract change. There are other AG Chapters and DOE Directives that provide detailed guidance for overall planning and execution. See the references at the end of this chapter for a complete list. Some of the AG Chapters are:

- Chapter 7.0 - Integrating Acquisition Planning Processes – An Overview
- Chapter 7.1 - Acquisition Planning
- Chapter 15.4-3 - Negotiation Documentation: Pre-negotiation Plan & the Price Negotiation Memorandum
- Chapter 34.1 - Project Management and the Acquisition of Major Systems
- Chapter 42.5 - Contract Management Planning
- Chapter 70.11 - The Department of Energy Directives System
- Chapter 71.1 - Headquarters Business Clearance Process

A. Acquisition Strategy

Effective contract management begins during acquisition planning, well before contract award. Before contract award, the CO must have a process in place to ensure, among other things, effective and timely management of contract modifications, as required, implementing baseline change proposals and cost overruns. Establishing the process during acquisition planning will ensure procedures are in place and proper clauses are incorporated into the contract to support future changes. It is the responsibility of the CO to ensure these procedures and clauses are in place. The acquisition strategy represents a high level plan which documents alternatives considered in selecting the best approach for approval through the critical decision (CD) review and approval process in accordance with DOE Order (DOE O) 413.3B. From the initially approved acquisition strategy document at CD-1, the acquisition plan is written.

B. CO's Responsibilities on the IPT

The CO is the only member of the IPT with authority to enter into, administer, modify, change, and/or terminate contracts. Significant CO responsibilities include:

- Serve as the principal business advisor to the Project Acquisition Executive, the FPD and the IPT.

- Participate in the formulation of the acquisition strategy and acquisition plan.
- Work with the IPT to develop solicitations and evaluate and award mission-oriented contracts.
- Work with the IPT to ensure alignment between the Project Execution Plan (PEP) and the Contract Management Plan (CMP).
- Assist in the development of contract cost, schedule and performance incentives.
- Incorporate the applicable clauses, terms and conditions, and contractor requirement documents in the solicitation and the contract. Ensure that the prime contractor complies with the terms of the contract to include subcontractor flow down requirements of the contractor requirements document, FAR and DEAR clauses and earned value management system (EVMS)[1] related terms and conditions.

C. Acquisition Plan

Acquisition planning should identify critical areas, potential issues and risks of contract performance, as well as identify Government obligations and responsibilities that may arise during contract performance. The acquisition plan should also consider ways to effectively eliminate or mitigate these potential issues and risks. If planning is done properly prior to contract award, the CO will have a process in place to ensure effective and timely execution of contract modifications. AG Chapter 7.1 provides more detailed guidance for acquisition planning.

D. Contract Management Plan

An objective of an effective CMP is to ensure that the contract's products and services are delivered on time consistent with the contract's stated performance and quality standards at a reasonable cost while minimizing the Government's risk. Many of the documents (Quality Assurance Surveillance Plan, Performance Evaluation and Measurement Plan, Risk Management Plan, etc.) created or modified during the acquisition planning phase will be analyzed to determine an appropriate contract management strategy.

Chapter 42.5, Contract Management Planning, provides more detailed guidance on the requirement to create and update a formal CMP.

E. Solicitation Preparation

To ensure effective management of contract modifications when preparing the solicitation, the solicitation should include the following FAR and DEAR clauses and provisions, as applicable, and incorporate the applicable DOE directive contractor requirements document in

[1] DOE O 413.3B and DOE G 413.3-10A

the solicitation and contract.

- FAR

- 52.215-10 Price Reduction for Defective Certified Cost or Pricing Data clause, as applicable
- 52.215-11 Price Reduction for Defective Certified Cost or Pricing Data – Modifications clause, as applicable
- 52.215-12 Subcontractor Certified Cost or Pricing Data clause, as applicable
- 52.215-13 Subcontractor Certified Cost or Pricing Data – Modifications clause, as applicable
- 52.215-21 Requirements for Certified Cost or Pricing Data and Other Than Certified Cost or Pricing Data – Modifications clause, as applicable
- 52.216-24 Limitation of Government Liability, or a clause similar to it
- 52.232-20 Limitations of Cost clause, as applicable for fully funded cost reimbursement contract
- 52.232-22 Limitations of Funds clause, as applicable for incrementally funded cost reimbursement contract
- 52.234-2 Notice of Earned Value Management System – Pre-Award IBR provision, as applicable
- 52.234-3 Notice of Earned Value Management System – Post-Award IBR provision, as applicable
- 52.234-4 Earned Value Management System clause, as applicable
- 52.243-2 Changes - Cost-Reimbursement clause -- use basic clause or applicable alternate.
- 52.243-6 Change Order Accounting clause *(See section below for additional guidance.)*
- 52.243-7 Notification of Changes clause *(See section below for additional guidance.)*

- DEAR

- 952.242-70 Technical Direction clause *(See section below for additional guidance.)*

- DOE Directive (Contractor Requirements Document)

- DOE O 413.3B - Program and Project Management for the Acquisition of Capital Assets, Attachment 1 - Contractor Requirements Document
- Be certain to identify in Section J a list of the applicable DOE Directives. Remember to include in Section H a clause describing the contractor's requirement to comply with directives.

Additional guidance for some FAR and DEAR provisions and clauses is as follows:

- **Earned Value Management System (EVMS) provision FAR 52.234-2 and FAR clauses 52.234-3 or 52.234-4**

Consideration for using Earned Value Management (EVM) on a project begins in the acquisition planning phase. To ensure that EVM is adequately addressed, the IPT should plan for EVM and structure the solicitation to ensure that the requirement is addressed throughout every step of the acquisition process. This examination continues through the solicitation, source selection and post-award, and the execution phase (contract management). For additional guidance, see FAR 34.2 – Earned Value Management, AG Chapter 34.1 – Project management and the Acquisition of Major Systems, DOE Order 413.3B - Program and Project Management for the Acquisition of Capital Assets, and DOE Guide 413.3-10A – Earned Value Management System.

- **52.243-6 -- Change Order Accounting.**

The Contracting Officer shall include FAR 52.243-6, Change Order Accounting, in non-M&O contracts for capital asset projects, site and facility management, environmental remediation, decontamination/decommissioning, facility operation, and other contracts with significant technical complexity and for which changes are anticipated. When FAR 52.243-6, Change Order Accounting, is part of the contract, the CO shall require the contractor to segregate all costs associated with a change order and to retain records of those segregated costs.

The CO should include language in the solicitation advising offerors of the need to comply with the cost segregation requirements of the Change Order Accounting clause.

- **52.243-7 -- Notification of Changes.**

The CO should insert a clause substantially the same as the clause at 52.243-7, Notification of Changes, in solicitations and contracts. Per the FAR, the clause is available for use primarily in negotiated research and development or supply contracts for the acquisition of major weapon systems or principal subsystems. For DOE, the clause should also be used in contracts for which changes are anticipated, or the CO anticipates that situations will arise that may result in a contractor alleging that the Government has effected changes other than those identified as such in writing and signed by the CO. If the contract amount is expected to be less than $1,000,000, the clause shall not be used, unless the CO anticipates that situations will arise that may result in a contractor alleging that the Government has effected changes other than those identified as such in writing and signed by the CO.

- **952.242-70 Technical Direction**

This clause, or a clause substantially the same, should be inserted in solicitations and contracts when an appointed Contracting Officer's Representative (COR) will issue technical

direction to the contractor under the contract. The COR designation must be made in writing by the CO. The designation shall identify the responsibilities and limitations of the designation.

The COR performs certain technical functions in administering a contract. These functions include, but are not limited to, technical monitoring, inspection, approval of shop drawings, testing, and approval of samples. The COR acts solely as a technical representative of the CO and is not authorized to perform any function that results in a change in the scope, price, terms or conditions of the contract.

Technical direction must be within the scope of work stated in the contract. All technical direction shall be issued in writing by the COR. The term "technical direction" is defined to include, without limitation:

(1) Providing direction to the Contractor that redirects contract effort, shift work emphasis between work areas or tasks, require pursuit of certain lines of inquiry, fill in details, or otherwise serve to accomplish the contractual Statement of Work.

(2) Providing written information to the Contractor that assists in interpreting drawings, specifications, or technical portions of the work description.

(3) Reviewing and, where required by the contract, approving, technical reports, drawings, specifications, and technical information to be delivered by the Contractor to the Government.

F. Other Pre-Award and Post Award Issues

➢ Analysis of Cost Proposals

AG Chapter 15.4-4 – General Guide for Technical Analysis of Cost Proposals for Acquisition Contracts, provides guidance and information to enhance the quality of technical analyses of cost proposals.

➢ Contract Audit and Pricing Support

It is important for the CO to obtain adequate audit and pricing support to:

- Provide scrutiny into the offeror's or contractor's cost or price proposal;
- Confirm that the offeror's or contractor's accounting system and practices are adequate for the contract type; and
- Ensure that the cost or price to be paid is fair and reasonable.

When the contract will be based on cost or pricing data submitted by the offeror/contractor, prior to contract negotiation or modification negotiation in excess of FAR threshold stated at FAR 15.403-4(a)(1), DEAR 915.404-2-70, Audit as an aid in proposal analysis, requires a cognizant Federal audit activity to review the offeror's/contractor's proposal. This requirement applies to preaward actions, post award actions such as modifications that include changes, definitization of unpriced change orders, request for equitable adjustments, overrun proposals, claims, etc.

- **Contractor Responsibility Determinations**

AG Chapter 9.4 – Contractor Responsibility Determinations provides a general overview of the CO responsibilities for making responsibility determinations of prospective contractors before awarding a contract. FAR 9.106 requires the CO to obtain information on the prospective contractor's responsibility to include any required preaward survey, when necessary. Standard forms 1403 through 1408 document the survey.

The CO shall ensure that the offeror/contractor has an approved accounting system and purchasing system for use under the contract. If the offeror/contractor does not have an approved accounting system and purchasing system, the CO shall request audit and pricing support. Standard Form 1408 – Preaward Survey of Prospective Contractor Accounting System documents the results of the contractor's accounting system preaward survey.

SECTION II: POST AWARD

A. Contract Changes

Contract changes become necessary for a variety of reasons. The Changes clause provides the Government with the unilateral right to make certain changes within the general scope of the contract to include changes in design, specifications, place of performance, and methods for packing and shipping. Changes in requirements may not be addressed by the Changes clause or other clauses that permit unilateral changes. However, these changes in requirements could be effected by bilateral agreement as long as these changes are within the general scope of the contract. In accordance with FAR clause 52.243-7, when the contractor notifies and submits required information to the CO of a change, the CO and the FPD must analyze the submission and make a determination that there was a change to the contract. The CO must modify the contract if a change occurred.

There are limits to what can be adjusted on the contract using the Changes clauses. The CO may make changes within the general scope of the contract to the plans and specifications or instructions incorporated in the contract. The general scope of the contract is defined in the contract and is bounded by the contract terms, conditions, and requirements. Changes that go beyond what was included in the contract (aside from unilateral changes as discussed above) must be agreed to by both the contractor and the Government. This includes additions and deletions to the scope of work. The project performance baseline can only be changed after either a unilateral contract modification is issued or a bilateral contract modification is negotiated and the Acquisition Executive is briefed on the negotiated modification and approves the baseline change proposal. See Section D The Contract Change Process for details.

Before changes to the general scope of any contract may occur, the CO must provide a scope determination to determine if the change falls within scope. If the answer is no, before new work can be added to the contract, the CO may need approval to do a sole source action per the Competition in Contracting Act of 1984 as implemented at FAR Subpart 6.3 – Other Than Full and Open Competition. Before scope can be removed, the CO must determine if the removal constitutes a partial termination. If it does, FAR Part 49 must be followed. Note that when new scope is added or removed, the cost associated with the scope moves as well as any related fee adjustment.

The contractor has made a contractual binding commitment about the cost, the timing of performance or deliveries, and the quality of the work that is to be performed or delivered. To allow the Government the opportunity to maintain its rights to obtain the benefits of the deal it agreed to at the time of contract award, the Government team should seek consideration (something of value) from the contractor each time the cost, schedule, and/or scope are adjusted.

Once the contract is awarded and the contract price is established, and the Performance Measurement Baseline (PMB) and Contract Budget Baseline (CBB) are established, changes may occur and the CO and FPD should anticipate them. Internal adjustments to plans for future actions are a normal management process as events happen, variances occur, and situations change.

If there will be a change to the contract terms, conditions, or requirements, a change cannot be made to the performance measurement baseline (PMB) or contract budget baseline (CBB) until a contract modification is issued. To ensure that the PMB remains aligned with the contract, the process for making project changes should be integrated with the contract change process. A contract modification must be negotiated prior to approving project baseline changes unless the baseline change is within the contractor's authority and there is no change to the contract. See Section E. Baseline Change Proposal Approval Process for details.

B. Federal Acquisition and Fiscal Laws Regarding Contract Award, Performance and Changes (Non-M&O)

Given key Federal acquisition and fiscal laws, it is very important that the project align completely with the contract at all times. If Federal personnel violate certain rules and laws, they can be held personally and financially responsible for the cost of the changed work.

Federal Employee Code of Conduct. Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. Part 2635, state that Federal employees shall not make a commitment or promise relating to the award or performance of a contract, or any representation that could be considered as such a commitment [5 C.F.R. § 2635.101(b)(6)]. Violating this tenet is considered a serious breach of Federal ethics rules, with associated disciplinary penalties.

Authorized verses Unauthorized Commitments. COs are the only Federal employees authorized to make commitments regarding contracts because they have been given a written delegation of contracting authority, called a warrant, that gives them the express authority. FAR 43.102(a) states that only COs acting within the scope of their authority are empowered to execute contract modifications on behalf of the Government.

Other Government personnel shall not—

- Execute contract modifications;
- Act in such a manner as to cause the contractor to believe that they have authority to bind the Government; or
- Direct or encourage the contractor to perform work that is not within the scope of the contract.

If the appropriate DOE official authorizes the approval of an unauthorized commitment, the

CO may later ratify the unauthorized commitment. Ratification of an unauthorized commitment does not preclude disciplinary action against the Federal employee responsible for the action.

Anti-Deficiency Act. The Anti-Deficiency Act (ADA) [31 U.S.C. § 1341(a)] prohibits any Federal employee from obligating the Government, by contract or otherwise, in excess of or in advance of appropriations, unless authorized by some specific statute. A Federal employee who violates the ADA is subject to two types of sanctions: administrative and criminal. The Federal employee may be subject to appropriate administrative discipline including, when circumstances warrant, suspension from duty without pay or removal from office. In addition, the Federal employee may also be subject to fines, imprisonment, or both. Responsibility for ADA violations is usually fixed at the highest level of management that knew about or should have known about the violation, i.e., the Program Manager or Site Manager.

The ADA prohibits a Federal employee from the following:

- Making or authorizing expenditure from, or creating or authorizing an obligation under, any appropriation or fund in excess of the amount available in the appropriation or fund unless authorized by law. (31 U.S.C. § 1341(a)(1)(A)).
- Involving the Government in any obligation to pay money before funds have been appropriated for that purpose, unless otherwise allowed by law. (31 U.S.C. § 1341(a)(1)(B)).
- Accepting voluntary services for the United States, or employing personal services not authorized by law, except in cases of emergency involving the safety of human life or the protection of property. (31 U.S.C. § 1342).
- Making obligations or expenditures in excess of an apportionment or reapportionment, or in excess of the amount permitted by agency regulations. (31 U.S.C. § 1517(a)).

C. The Overarching Change Control Process

Once the contract has been awarded, there may be changes to the contract and project which result in changes to the contract price and contractor-controlled Performance Measurement Baseline (PMB) and, in some instances, changes to the Total Project Cost/Performance Baseline (PB). Figure 1 shows the relationship between the total project cost/total project baseline, contract cost and fee, contract budget base, and performance measurement baseline at the time of contract award. The total project cost/total project baseline includes the contract price, DOE contingency and other DOE project costs (referred to in project terms as DOE Other Direct Project Costs). Other DOE direct project costs is not the same as contractor other direct costs under the contract. DOE Other Direct Project Costs may include other DOE contracts required for total project execution such as contracts for external independent reviews, technical support service contracts, and other DOE prime contracts for other components of the overall project.

The contract price at award includes the contract total estimated cost (the contract budget base is the same as the total estimated cost at contract award) and contract profit/fee. The contract total estimated cost (at award, the contract budget base) includes the contractor's management reserve (the contractor controlled contingency) and the contractor's performance measurement baseline. Keep this in mind as you read through this section.

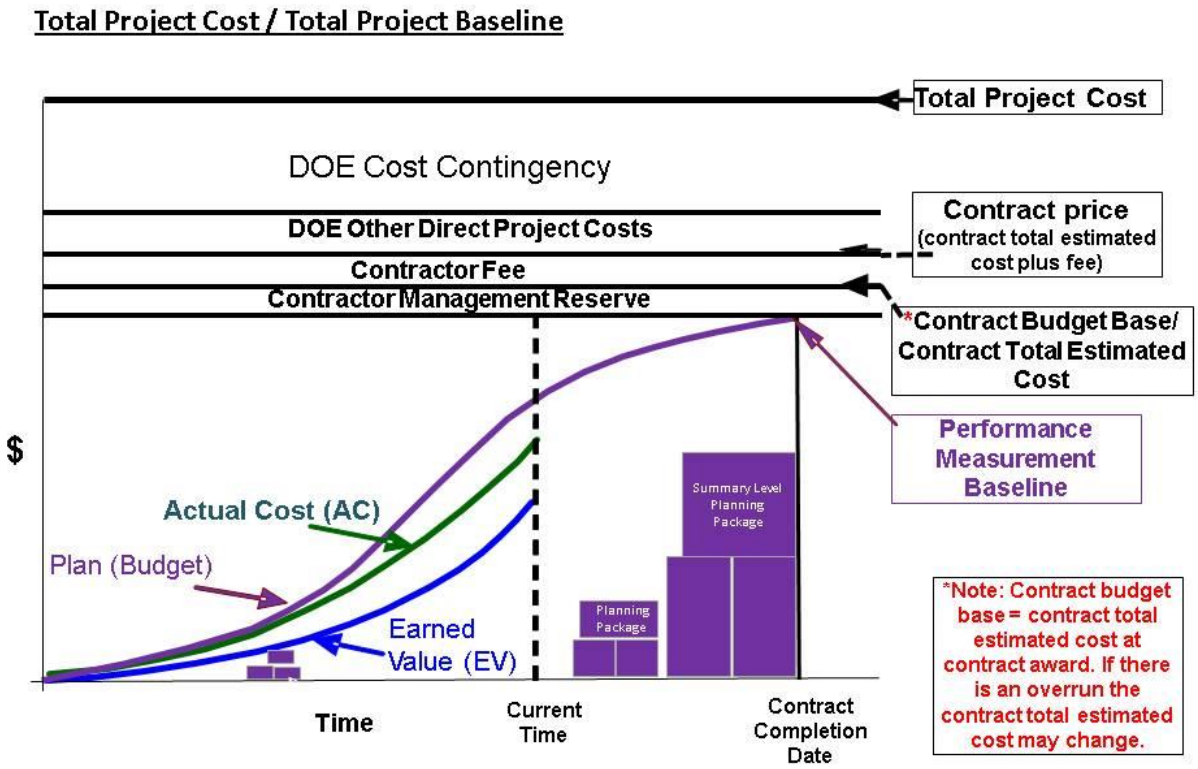


Figure 1. Total Project Cost / Total Project Baseline

The contract change control process is the most important element of DOE's contract management framework and activities. A change control process provides a mechanism to make timely and appropriate changes to the contract requirements. Formal change control includes not only the decision-making framework for assessing, negotiating, and implementing contract changes, but also includes project management and performance tracking systems, authorization and control levels, financial and funding management, and contract and project documentation. In accordance with 413.3B, Head of the Contracting Activities (HCA) are required to establish a formal CCB for major construction projects and environmental cleanup contracts.

As the sole individual with the authority to modify the contract, the CO must serve as a member of the CCB. Some of the CO's CCB responsibilities are:

- Participate as a standing member.
- Request cost estimates from the contractor.
- Request the contractor submit its baseline change proposal (BCP) for approval of contemplated changes.
- Request the contractor submit certified cost & pricing data, if required.
- Determine if changes are within contract scope.
- Issue modifications to the contract (i.e., cost, schedule, and scope) if approved by the approving authority and funding is available.
- Ensure changes for cost, schedule, and scope requirements are made in accordance with the contract.

When the Government requires a change to the contract, the FPD will work with the CO to describe the required changes. The CO will send the request for proposal to the contractor. The negotiation for such changes should be completed prior to the contractor performing the changed work. CO should not issue unpriced change orders unless absolutely necessary.

The CO should—

- Always be alert to potential change issues and circumstances;
- Insist on demonstration of entitlement for any adjustment to the cost, schedule or scope;
- Carefully trace changes to what the Government is entitled and has already paid for under the contract versus the work that is being added and/or deducted;
- Insist upon submission of clear, definitive, itemized details pertaining to any changes affecting cost, scope and/or schedule;
- Follow FAR and DEAR procedural requirements for cost analysis and negotiation, including obtaining cost proposals that comply with FAR 15.408, Table 15-2, Section III, Formats for Submission of Line Item Summaries, section B, Change Orders, Modifications and Claims, or specify a format for certified cost or pricing data other than the format required by Table 15-2 in accordance with FAR Clause 52.215-21 Alternate I;
- Ensure that contractor's cost proposal has a technical evaluation and cost analysis, including audit and field pricing support, when required, and document the results; and
- Include ceiling prices, definitization schedules, and limitations on the Government's liability when unpriced change orders are issued.

AG Chapter 43.2 – Change Order Template provides general guidance to expedite the contracting process by helping assure a consistent application of the contract terms for various change order modifications to contract for changes to existing work and associated requirements.

D. The Contract Change Process

This section describes the steps in the typical process for making changes to the contract and the contractor-controlled PMB. In some instances, a contract change may result in changes to the Government's Total Project Performance Baseline , the performance baseline (PB) for the total project. The overall process and order of events that must be followed are summarized below. There are more detailed steps discussed later in this section.

1) The CO issues a contract modification (priced change order) or an unpriced change order. If it is an unpriced change order, the CO will request a cost proposal from the contractor after the change order is issued. The contractor shall submit a baseline change proposal (BCP) after the CO has issued an unpriced change order, or when the CO requests a cost proposal from the contractor for a priced change order. The FPD is responsible for developing an independent government cost estimate (IGCE).
2) After the CO receives the proposal from the contractor, the CO obtains an audit of the proposal, obtains a technical evaluation of the cost proposal, and analyzes the cost proposal. While the contractor's cost proposal is being analyzed, the contractor's BCP may be evaluated.
3) The CO prepares and obtains approval of the pre-negotiation memorandum. The CO negotiates the contract change as authorized in the pre-negotiation memorandum.
4) The results of the negotiation are documented in the post-negotiation memorandum.
5) The Acquisition Executive is briefed on the BCP and approval of the BCP is obtained. The CO then signs and issues the final contract definitization modification/supplemental agreement.

The contract changes can be initiated: (1) at the request of DOE when the DOE requirement changes; or (2) when the Government team, through the Change Control Board (CCB), agrees that a contractor-suggested improvement, request for equitable adjustment (REA), or efficiency has merit. The contractor cannot change the contract price, Contract Budget Base (CBB), schedule, or statement of work (SOW) that it agreed to in the contract by simply submitting a BCP or updating the PMB. The CO is the only person authorized to direct changes to the scope, schedule, or cost of the contract. The Secretarial Acquisition Executive/Acquisition Executive (SAE/AE) is the only person authorized to approve changes to the PB.

The Government must establish formal CCBs for contracts for major construction projects, environmental cleanup, facility operation, decontamination and decommissioning and other project contracts. Note that the CO should be a CCB member, regardless of the level at which the CCB is established (e.g., the DOE-HQ level, the site office level or the FPD level) and MUST be involved with the determination of whether the change will require modification of the contract terms, conditions, schedule, and/or cost/price. The CO is the only person that can change the contract terms and conditions, cost/price, technical requirements, and schedule per FAR 43.102(a).

The following five step process describes the change process for DOE prime contracts. The project baseline change process is implemented in parallel and coordinated with the contract change process. The CO issues a bilateral contract modification (priced change order) or an unpriced change order (unilateral) reflecting the Government's requirements. For a priced change order, the CO must follow the procedures described under Step 1 Priced change order. At the completion of negotiations, the Government/contractor mutually agreed upon cost, schedule, and scope. For an unpriced change order, the CO must include, at a minimum, the information described under Step 1 unpriced change order and AG Chapter 43.2. Unless the PMB change is within the contractor's authority, the CO must negotiate a contract change prior to the approval of the PMB change.

Step 1 - If the Government needs to make a change in the scope of the contract that affects the estimated contract cost, fee (if any), performance/delivery schedule, or option periods, the CCB will review the change. If the change is approved by the CCB, the CO will modify the contract. The general areas a CO may direct a unilateral change are stated in the applicable Changes clause cited in the contract. Other changes are possible, but they require that both the contractor and the Government agree before the changes to the cost, schedule or scope can be executed. See below guidance for priced change order and for unpriced change order.

- **Priced change order** – **<u>The preference is to issue a bilaterally priced change order.</u>** The proper procedure for implementing a contract change is for the CO, after ensuring all internal processes and procedures have been followed, to issue a request for proposal to the contractor with at least a 30 calendar day response time for submission of the proposal. Complex changes may require longer response times. The contractor must submit a proposal that complies with the format requirement at FAR 15.408 Table 15-2, Section III B, Instructions for Change Orders, Modifications, and Claims, or specify a format for certified cost or pricing data other than the format required by Table 15-2 in accordance with FAR Clause 52.215-21 Alternate I. This format tracks the estimated cost for the work already performed, the work to be deleted, the work to be added, and the net cost of the change, by cost element. The resulting information must be cross referenced to where the supporting rationale for the proposed amounts is in the proposal. This format should be used whether or not certified cost and pricing data is submitted, as it provides the structure required to adequately analyze the additive and deductive elements within complex contract changes.

Unpriced change order - In **<u>exceptional circumstances</u>**, issuing an unpriced change order [the FPD may refer to this as authorized unpriced work (AUW)] may be necessary. (See AG Chapter 43.2 for additional information on issuing unpriced change orders.)

- This method should be used when implementation of the change is urgent due to mission requirements or necessary to minimize implementation costs when delay in issuing the change could dramatically increase costs. DOE G 413.3-20 refers to change orders as AUW. An

unpriced change order that has been issued by a warranted CO acting within the limits of his or her authority is the only way that change orders may be added to the contract.

➢ All unpriced change orders/modification that are estimated to exceed the HCA's delegated procurement authority require the advance review and approval or waiver of MA-621 in accordance with AG Chapter 71.1 Headquarters Business Clearance Process. Also, the definitization of an unpriced change order/modification requires either a review and approval or a waiver of the definitization schedule beyond 180 calendar days.

The unpriced change order should:

- Have a not-to-exceed (NTE) ceiling. (When issuing a single modification with multiple changes the CO should consider whether a single NTE value should be used or individual values associated with each change.) Include the statement, that in performing this change order, the Contractor is not authorized to make expenditures or incur obligations exceeding (insert NTE ceiling) or include a clause similar to FAR 52.216-24 Limitation of Government Liability.

- Establish the NTE ceiling value(s) at the lesser of 50% of the IGCE for the subject action **or** funding for six (6) months of contractor performance.

- Contain a definitization schedule with dates for submission of the contractor's REA adjustment including required cost or pricing data, as applicable, a start date for negotiations and a date for definitization, which shall be the earliest practicable date. The schedule will provide for definitization of the change order within 180 calendar days after the date of the unpriced change order or before completion of 40 percent of the work to be performed, whichever occurs first.

Step 2 - The impacts for each contract change should be individually evaluated and documented by the CO with the assistance of technical personnel. Changes having a cost impact require an IGCE. The IGCE should be completed prior to receipt of the contractor's proposal. After receipt of the contractor's proposal, the CO must ensure that a technical evaluation and cost analysis, including audit and field pricing support when required, are performed and documented. The CO coordinates with the Defense Contract Audit Agency (DCAA), or other selected auditor, the amount of audit support that will be required, based on the dollar amount and complexity of the proposed change.

Step 3 - Before negotiating with the contractor, the CO must prepare a pre-negotiation plan (FAR 15.406.1 Pre-negotiation Objectives) and obtain the appropriate approvals including business clearance, as required. See AG Chapter 71.1 for Headquarters business clearance process. The CO shall not relieve the contractor of its responsibility to demonstrate that its proposed costs are reasonable and its estimating techniques are sound. After contract

negotiations are complete, but before executing the contract modification, the CO obtains a certificate of current cost or pricing data per FAR 15.403-4(b)(2) unless an exception applies per FAR 15.403-l(b) or the requirement for cost and pricing data has been waived by the HCA (FAR 15.403-l(c)(4)). Certified cost or pricing data is required where there is any pricing adjustment exceeding $650,000.

Step 4 - The results of the negotiations are documented in a post-negotiation memorandum (PNM) (FAR 15.406-3, Documenting the Negotiation and AG Chapter 15.4-3 - Negotiation Documentation: Pre-negotiation Plan & the Price Negotiation Memorandum).

Step 5 – When changes are negotiated in advance of a contract modification being issued, bilateral modifications (supplemental agreements) are signed by the CO and the contractor. Contract changes should be negotiated prior to final approval of a BCP. Following definitization, the PMB should be adjusted through change control to reflect the final negotiated cost and schedule. The entire estimated budget for the new work scope should be included in the revised PMB. Contract modifications should not be signed until after the SAE/AE approves the BCP (if the applicable threshold has been reached). The FPD will inform the CO when the BCP is approved. The CO issues the modification.

E. The Baseline Change Proposal (BCP) Approval Process

The contract terms and conditions and/or DOE O 413.3B requires contracts/projects to have formal CCB processes in place. The contract terms and conditions, DOE Order, as well as Department acquisition guidance, takes into consideration that each project will have nuances that differ from others based on contractor's business processes. This is fine so long as the project CCB process complies with contract terms and conditions and/or DOE O 413.3B. This Guide cannot cover all possible nuances but attempts to provide general rules of engagement when BCPs are processed.

The project change process is implemented in parallel and coordinated with the contract change process. A BCP does not change the contract. Only a contract modification issued by the CO changes the contract.

Depending upon the nature of change, the contractor must develop a detailed change proposal for review by the CCB. Each change must be supported by a justification, its impact on scope, cost and schedule, and identify who is responsible, i.e., the contractor or DOE. For changes that are noted as DOE responsibility, the contractor must affirmatively demonstrate that Government action caused the increased cost, schedule slip, or delay of meeting the contract requirements.

These steps are necessary but may not be sufficient when the change involves a contract modification. The process described above is generally applicable no matter the level of change

approval authority required. However, as the approval level moves up the chain of command, additional materials, briefings, etc. may be required. This is only a summary of the integrated process. For a description of all 45 steps in the BCP process, see DOE G 413.3-20 - Change Control Management Guide - Figure 4-1 and Table 4-1. Overall Change Control Process (Non-M&O Contract).

- **BCP Approval and Disposition:**

If the BCP approval is within the contractor's authority, the contractor notifies the FPD of the finalized BCP change. Government approval is not required. For example – the contractor realizes risk and identifies additional in-scope work and moves budget from contractor management reserve to the PMB to replan/add future work packages. A BCP is not within the contractor's authority if there is a change to a contract requirement or term, if there will be a change in the contract estimated cost and fee, or a change to the CBB.

When the project change involves a contract change, the steps for preparing and approving the contract change should proceed in parallel with project change control process. The BCP must not be approved until after negotiation of the contract change by the CO. Contract modifications should not be executed until after the SAE/AE has been briefed and approves the BCP (if the applicable threshold has been reached).[2]

Only changes to the contract that have been vetted through the CCB process should be implemented by contract modification. Not all changes approved by the CCB will result in a change to the contract. Likewise, not all changes to the contract will involve a change to the cost, schedule, requirements or a BCP, but the CCB must be aware of all changes being made to the contract. It is imperative that all IPT members understand that the contract modification by the CO and approval of a BCP if a contract change is required must be closely coordinated such that one does not significantly lag behind and create misalignment. Changes to project's performance baseline or the receipt of a revised PMB from a contractor do not constitute a contract change or a BCP.

DOE Order 413.3B discusses the requirements for proper baseline management under contract modifications for new performance baselines (see DOE O 413.3B, Appendix A, 6.e). The Order requires that prior to approval of a baseline change by the SAE/AE, the FPD should coordinate with the CO to identify the specific contract changes that may be required, develop an IGCE (refer to FAR 36.203 and FAR 15.406-1), establish a schedule for receipt of a contractor's proposal(s), obtain audit support, and ensure the timely analysis, negotiation, and execution of contract modification(s) that comply with regulatory, Departmental policy and statutory requirements.

[2] DOE O 413.3B, Appendix A

F. Contractor Management Reserve

Within the negotiated total estimated contract cost (at the time of contract award, in project terms, the CBB), the contractor may establish its management reserve (MR). In Section II.C., see figure 1. The amount of MR identified by the contractor is based on the contract in-scope risks, estimating uncertainties, and management/expert opinion. MR is not negotiated as a separate cost element as it is a form of contingency held by the contractor to manage its contract. The balance of the total estimated contract cost, or CBB, is the PMB.

- The CO shall not, except as narrowly allowed by FAR 31.205-7(c)(1), price estimated costs for Contractor Management Reserve into DOE contract actions and shall not pay any fee to compensate for excluding such contingencies from the contract price. FAR 31.205-7(c)(1) does not provide for Contractor Management Reserve/Contract Contingency to be priced as a separate element of cost or cost objective.

- The CO shall not include in the contract price any amount (for management reserve, contingency, etc.) to cover prospective requests for equitable adjustments, changes, or risks that might or might not occur during performance.

Establishment of Management Reserve. After contract award, or the negotiation of a contract change, the contractor establishes the amount of its MR under a contract. The contractor can use a variety of means to establish its initial MR balance, from the simplistic rescission across the board of a specified percentage of the negotiated total estimated contract cost (at contract award the CBB), or a more complex method such as determining what areas of risk exist in its plan for executing the project as informed by their own experience and the use of risk based cost estimating and scheduling tools.

Adjustment to MR which does not require a contract change. The contractor may distribute its MR budget from the contract MR it established to the contract PMB Work Breakdown Structure (WBS) to add scope for future work within the contract statement of work but unplanned in the PMB, or to replan existing future work packages for realized risks such as lower than planned craft production rates. The point being that the contractor can manage its MR and its budget for the contract work as long as it does not involve a change to a contract term or condition. Distribution of contractor MR to the contractor PMB entails the addition of contractor work planning packages and contractor budget. An example might be that the contractor experienced lower than expected costs for concrete and distributes the savings to higher than expected costs for a particular subcontract. This type of adjustment does not require a change to the contract. The total dollar value, schedule, and scope of the contract are not changed as a result of such adjustments.

Impact of Underrun on Contract Performance Management Baseline. When a project's

WBS control account under a contract completes as an underrun (contractor budget greater than actual costs on a particular control account), the PMB cannot be reduced to match the actual costs and the balance transferred to contractor MR. Such practice invalidates project level cost performance indicators.

G. Overruns

An overrun is when the actual cost of contractor performance exceeds, or will exceed, the total estimated contract cost. A contract overrun occurs either, when the original contract cost estimate is exceeded, or when the total costs incurred exceed the estimated cost as adjusted in accordance with the contract clauses. Contract clauses provide that the contractor can stop work rather than incur overrun costs. ***When the contractor incurs costs in excess of the estimated costs specified in the contract, the Government is not required to fund an overrun.***

The Limitation of Costs (FAR 52.232-20) clause and the Limitation of Funds (FAR 52.232-22) clause require the contractor to give two types of notices to the CO. These notices are incurred cost notice and the estimated cost notice.

Incurred cost notice. The contractor is required to give notice when its incurred cost, plus cost to be incurred within a stated period will exceed a specified percentage of the estimated cost of the contract or the funds allotted. This notice warns the CO that actual costs will soon approach the estimated or allotted costs.

Estimated cost notice. The estimated cost notice is the "overrun" notice. Under the Limitations of Cost clause, the contract requires the contractor to notify the CO at any time the contractor has reason to believe that the costs at completion will be either greater or substantially less that previously estimated. Under the Limitations of Funds clause, the contract requires the contractor to notify the CO of the estimated amount of additional funds required and when the funds will be required. The contractor's notice to the CO must indicate that the estimated cost of the contract is insufficient for contract performance.

For the contractor to comply with the notice requirements and avoid incurring an overrun, the contractor must maintain accurate records of incurred costs, present commitments, and current estimates of the cost at completion.

DO NOT expect contractor notification requirements to replace effective contract surveillance! You should be questioning significant variations long before contractor notification. By the time you receive contractor notification, it may be too late for the contractor to take corrective action. In fact, the contractor may fail to provide timely notice despite the contract requirement. There have been many contracts where the contractor did not provide notice until after all contract funds were expended.

H. Contracting Officer Action to Assess Overrun

The CO may learn of an overrun through the Government's contract surveillance, the Government's monitoring of the contractor's monthly earned value management reports, or when the contractor notifies the CO of a potential overrun. Regardless of how the CO learns that there is a potential overrun, or in fact, an overrun, the CO needs to determine if the work has progressed appropriately and if not, then the CO needs to take action as prescribed at FAR 32.704, Limitation of cost or funds, which states:

> "…[T]he contracting officer, upon learning that the contractor is approaching the estimated cost of the contract or the limit of the funds allotted, shall promptly obtain funding and programming information pertinent to the contract's continuation and notify the contractor in writing that—
>
> (i) Additional funds have been allotted, or the estimated cost has been increased, in a specified amount;
>
> (ii) The contract is not to be further funded and that the contractor should submit a proposal for an adjustment of fee, if any, based on the percentage of work completed in relation to the total work called for under the contract;
>
> (iii) The contract is to be terminated; or
>
> (iv) (A) The Government is considering whether to allot additional funds or increase the estimated cost—
>
> (B) The contractor is entitled by the contract terms to stop work when the funding or cost limit is reached; and
>
> (C) Any work beyond the funding or cost limit will be at the contractor's risk.
>
> (2) Upon learning that a partially funded contract containing any of the clauses (Limitation of Costs or Limitation of Funds) will receive no further funds, the contracting officer shall promptly give the contractor written notice of the decision not to provide funds.
>
> (b) Under a cost-reimbursement contract, the contracting officer may issue a change order, a direction to replace or repair defective items or work, or a termination notice without immediately increasing the funds available. Since a contractor is not obligated to incur costs in excess of the estimated cost in the contract, the contracting officer shall ensure availability of funds for directed actions. The contracting officer may direct that

any increase in the estimated cost or amount allotted to a contract be used for the sole purpose of funding termination or other specified expenses.

(c) Government personnel encouraging a contractor to continue work in the absence of funds will incur a violation of Revised Statutes section 3679 (31 U.S.C. 1341) that may subject the violator to civil or criminal penalties." *[End of FAR excerpt]*

Options available to the CO depend upon whether the contractor gave prior notice of the overrun and, if not, whether the overrun was foreseeable. Just because the contractor gave notice, it does not automatically entitle the contractor to overrun funding. The contractor always has the option to stop work. If the contractor gave prior notice of an overrun, the options available to the CO are: provide additional funds, modify the statement of work to permit performance within the estimated cost of the contract, permit the work to continue until the funds are exhausted, or terminate the contract.

If the overrun was unforeseeable and the contractor did not give prior notice, the lack of notice is not a valid reason to automatically refuse funding the overrun. The facts leading to the overrun must be carefully reviewed by the CO.

When the Government identifies a contractor overrun of the estimated contract cost, the CO is responsible for determining whether or not the overrun will be funded and in what amount. For cost-reimbursement contracts[3], the CO must determine the most appropriate action considering that the Government is responsible for reimbursing the contractor for all allowable costs up to the cost and funding limits established in the contract. The most common alternatives for action include:

- Provide additional funds/time to complete the contract as is;
- Redefine the contract effort to fit existing funds; or
- Terminate the contract.

As the CO determines the appropriate course of action, the CO should consider contract cost and other factors including—

- Contract schedule;
- Probable impact of not completing the contract;
- Alternatives to completing the contract (e.g., terminate and reprocure from another source);
- Availability and sources of funding; and
- Other factors.

[3] DoD's Contract Pricing Reference Guides - Volume 4 - Advanced Issues in Contract Pricing - Chapter 4 Forecasting Cost Overruns, Section 4.3 Resolving Potential Cost Overruns. The Guides are posted at the Defense Acquisition University's Acquisition Community Connection (ACC), under the Contracting ACC Practice Center https://acc.dau.mil/CommunityBrowser.aspx?id=406579.

If the CO determines the overrun might be funded, the CO ensures the contractor adheres to FAR Part 15. Once the proposal is negotiated, the CO must change the contract to identify the increased estimated contract value and the amount of contractor overrun. For purposes of past performance evaluations, it's important that the CO clearly identify contractor-caused impacts in the post-negotiation memorandum (PNM). A summary from the PNM should be included in the Contractor Performance Assessment Report (FAR 42.15).

I. Examples

The following are examples that result in a contract change to a cost reimbursement contract. The first bullet provides examples of Government directed changes. The second example describes when an overrun is identified and the Government establishes an over target baseline.

- **Examples of Government Directed Changes**

1) Requirement to upgrade a facility that is in the design phase from Performance Category 2 (PC-2) to Performance Category 3 (PC-3) seismic criteria.

2) Requirement to increase planned waste processing throughput by addition of an Alpha Finishing Facility (AFF).

3) Change to the contract to include Nuclear Quality Assurance (NQA) NQA-1-2004 as primary quality standard.

The CO should issue a contract modification and request a proposal from the contractor as described at the Contract Change Process Step 1 of this chapter and follow the steps to issue a priced or unpriced modification to the contract to negotiate the contract change.

- **Contract Cost and/or Schedule Overruns**

If the contractor overruns, or is anticipated to overrun, the estimated contract cost the CO, with input from the FPD and IPT, may issue a priced or unpriced contract modification for the overrun and authorize the establishment of an over target baseline (OTB) and/or an over target schedule (OTS) [when the planned schedule exceeds the contract costs and/or the completion date] pending negotiation of the contract overrun (if the modification was unpriced). An overrun PMB or OTB/OTS allows for planning, control, and performance measurement of authorized work to improve managerial control over the execution of the remaining work in a project. The CO should request a proposal from the contractor as described at the Contract Change Process Step 1 of this chapter and follow the steps to issue a priced or unpriced modification to the contract to negotiate the contract overrun.

All cost and/or schedule overruns do not require the contractor to process an OTB/OTS. If the FPD requests authorization of an OTB and/or OTS, the CO will need to issue a cost overrun modification to obligate additional funding without adjusting work scope. The cost overrun modification is for funding only. The contractor is not entitled to more fee under the contract for a cost overrun, and the contractor does not increase the CBB by the amount of the negotiated cost overrun modification.

OTB/OTS do not change the contract estimated cost, fee, and/or contract schedule. The OTB/OTS are implemented solely for planning, controlling, and measuring performance on already authorized work; however, in most cases the CO must authorize the contractor's use of OTB. If the new schedule results in an OTS situation, both parties must recognize that the existing contract milestone schedule still remains in effect for purposes of contract administration and execution. The new dates in the OTS are for performance measurement purposes only and do not represent an agreement to modify the contract fee, schedule, terms or conditions. The CO will only issue a modification for the cost overrun. The OTB is the sum of CBB and the recognized overrun.

When the contract is awarded, the CBB is the total estimated cost of the contract. If the CO issues a change to the contract that adds additional scope/requirements and associated costs, the CBB is increased to add the costs for contract change once the CO issues the modification to change the contract. If the CO issues an undefinitized contract modification (in project terms, authorized unpriced work), then the CBB is increased to include the costs associated with the contract change. The CBB is not increased by the amount of a cost overrun that has been negotiated by the CO. Figure 2, Contract Cost and Schedule Overrun, illustrates that once there is a contract overrun, the CBB is no longer the same as the total estimated cost of the contract.

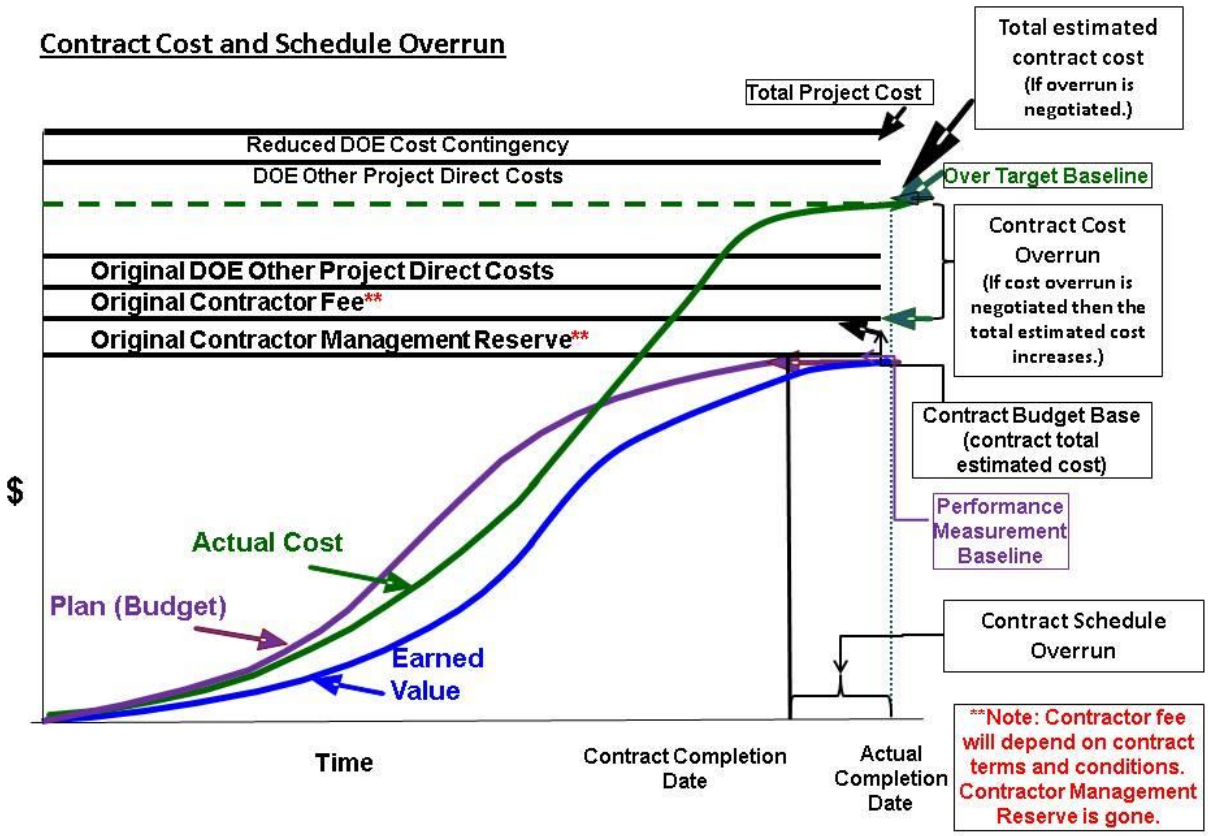


Figure 2. Contract Cost and Schedule Overrun

SECTION III: DEFINITIONS, ACRONYMS AND REFERENCES

A. Definitions

Acquisition Plan. An acquisition plan is developed in accordance with FAR Subpart 7.1, and related Department of Energy guidance. The plan details procurement strategies and supporting assumptions.

Acquisition Strategy. An acquisition strategy is a comprehensive high-level business and technical management approach designed to achieve project objectives within specified resource constraints; the plan for satisfying the mission need in the most effective, economical, and timely manner; the framework for the next phases of planning, organizing, staffing, controlling, and leading a project. It provides an acquisition approach for activities essential for project success and for formulating functional strategies and plans. (Source: DOE G 413.3-13)

Authorized Unpriced Work (AUW). An authorized unpriced work is contractually approved, but not yet negotiated; it is, the estimated cost (excluding fee or profit) for contract changes that have been approved by the government CO but have not yet been fully negotiated. This type of change is also called undefinitized change orders. AUW is the estimated cost approved by the CO for pending contract modifications that are still being negotiated. (Source: DOE G 413.3-20)

Baseline. A baseline is a quantitative definition of cost, schedule and technical performance that serves as a base or standard for measurement and control during the performance of an effort; the established plan against which the status of resources and the effort of the overall program, field program(s), project(s), task(s), or subtask(s) are measured, assessed and controlled. Once established, baselines are subject to change control discipline. (Source: DOE O 413.3B)

Baseline Change Proposal (BCP). The baseline change proposal is a document that provides a complete description of a proposed change to an approved performance baseline, including the resulting impacts on the project scope, schedule, design, methods, and cost baselines. (Source: DOE O 413.3B)

Capital Asset Project. A capital asset project is a project with defined start and end points required in the acquisition of capital assets. The project acquisition cost of a capital asset includes both its purchase price and all other costs incurred to bring it to a form and location suitable for its intended use. It is independent of funding type. It excludes operating expense funded activities such as repair, maintenance or alterations that are part of routine operations and maintenance functions. (Source: DOE O 413.3B)

Change Control. A change control process ensures changes to the approved baseline are properly identified, reviewed, approved, implemented and tested, coordinated within the IPT,

and documented. (Process refers to both contract and project changes.) (Source: DOE G 413.3-20)

Change Control Board (CCB). The review body who has the authority for approving changes that are consistent with the project's baseline performance requirements, budgeted cost, and schedule. CCB membership should include the project management, contracts representative, Chief Finance Office representative, and Subject Matter Experts (SMEs) that support the project on technical matters. The CCB plays a critical role in managing change to the project's baseline and ensuring prospective changes are clearly defined, appropriate, and within the cost, schedule and performance parameters approved by the Acquisition Executive as specified in the Project Execution Plan (PEP). (Source: DOE G 413.3-20)

Change Order. A change order is a written order, signed by the CO, directing the contractor to make a change that the Changes clause authorizes the CO to order without the contractor's consent. (Source: FAR 2.101)

Contract Budget Base (CBB). When the contract is awarded, the CBB is the total estimated cost of the contract. In project terms the contract budget base is performance measurement baseline plus contractor management reserve. If the Contracting Officer issues a change to the contract that adds additional scope/requirements and associated costs, the CBB is increased to add the costs for contract change once the Contracting Officer issues the modification to change the contract. If the Contracting Officer issues an undefinitized contract modification [authorized unpriced work], then the CBB is increased to include the costs associated with the contract change. The CBB is not increased by the amount of a cost overrun that has been negotiated by the Contracting Officer. The CBB is no longer the same as the total estimated cost of the contract once there is a contract overrun.

Earned Value Management System (EVMS). EVMS is an integrated set of policies, procedures and practices to objectively track true performance on a project or program. EVMS represents an integration methodology that is able to provide an early warning of performance problems while enhancing leadership decisions for successful corrective action. (Source: DOE O 413.3B)

EVMS Certification. The EVMS certification determines that a Contractor's EVMS, on all applicable projects, is in full compliance with ANSI/EIA-748B, or as required by the contract, and in accordance with FAR 52.234-4, EVMS. (Source: DOE O 413.3B)

EVMS Surveillance. The EVMS surveillance is the process of reviewing a Contractor's certified EVMS, on all applicable projects, to establish continuing compliance with ANSI/EIA-748B, or as required by the contract, and in accordance with FAR Subpart 52.234-4, EVMS. Surveillance may also verify that EVMS use is properly implemented by the contractor. (Source: DOE O 413.3B)

Government Total Project Contingency. Government total project contingency is the portion of project budget and schedule that is available for uncertainty within the project scope but outside the scope of the contract. Contingency is budget and schedule that is not placed on contract and is included in total project cost. Contingency is controlled by Federal personnel as delineated in the project execution plan. (Source: DOE O 413.3B)

Integrated Project Team (IPT). An integrated project team is a cross-functional group of individuals organized for the specific purpose of delivering a project to an external or internal customer. It is led by a Federal Project Director. (Source: DOE O 413.3B)

Management Reserve. Management reserve is an amount of the total contract budget withheld for management control purposes by the contractor. Management reserve is not part of the Performance Measurement Baseline. (Source: DOE O 413.3B)

Over Target Baseline (OTB). An over target baseline is a project management tool that is implemented when there is a cost overrun under the contract. An OTB is implemented for planning, controlling, and measuring performance; there is no change to the contract requirements or schedule. The CBB does not change when an OTB is implemented. An OTB allows project managers to retain visibility into the original CBB while measuring performance when a contract experiences an overrun. OTB is the sum of CBB and the recognized overrun. (Note: It is utilized when the contractor has overrun the contract cost.)

Over Target Schedule (OTS). See OTB above. The schedule portion of an OTB. (Source: DOE G 413.3-20)

Performance Baseline (PB). The performance baseline is a collective key performance, scope, cost, and schedule parameters, which are defined for all projects at CD-2. The PB includes the entire project budget (total project cost including fee and contingency) and represents DOE's commitment to Congress. (Source: DOE O 413.3B)

Performance Measurement Baseline (PMB). The performance measurement baseline is the baseline cost that encompasses all contractor project work packages and planning packages, derived from summing all the costs from the WBS. The PMB is the benchmark used within EVMS to monitor project (and contract) execution performance. (Source: DOE O 413.3B)

Project Execution Plan (PEP). The project execution plan is DOE's core document for management of a project. It establishes the policies and procedures to be followed in order to manage and control project planning, initiation, definition, execution, and transition/closeout, and uses the outcomes and outputs from all project planning processes, integrating them into a formally approved document. A PEP includes an accurate reflection of how the project is to be

accomplished, resource requirements, technical considerations, risk management, configuration management, and roles and responsibilities. (Source: DOE O 413.3B)

Project Management Plan (PMP). The PMP is the contractor-prepared document that sets forth the plans, organization and systems that the contractor will utilize to manage the project. Its content and the extent of detail of the PMP will vary in accordance with the size and type of project and state of project execution. (Source: DOE O 413.3B)

Request for Equitable Adjustment (REA). A REA is a request by one of the contracting parties for an equitable adjustment under a contract clause providing for such adjustment. A contractor typically submits a request for equitable adjustment under the contract's changes clause

Total Project Cost (TPC). The total project cost is all costs between CD-0 and CD-4 specific to a project incurred through the startup of a facility, but prior to the operation of the facility. Thus, TPC includes the total estimated cost and fee for all contracts included in the project and may include Government prime contracts for external independent review, technical support services, and other prime Government contracts for components of the projects [total estimated cost and fee for all contracts included in the project [referred to in project terminology as other direct project costs]. (Source: DOE O 413.3B)

B. Acronyms

AE	Acquisition Executive
ADA	Anti Deficiency Act
AG	Acquisition Guide
AUW	Authorized Unpriced Work
BCP	Baseline Change Proposal
CCB	Change Control Board
CBB	Contract Budget Base
CD	Critical Decision
CMP	Contract Management Plan
CO	Contracting Officer
COR	Contracting Officer's Representative
CRD	Contractor Requirements Document
DCAA	Defense Contract Audit Agency
DEAR	Department of Energy Acquisition Regulation
DOE	Department of Energy
EVMS	Earned Value Management System
FAR	Federal Acquisition Regulation
FPD	Federal Project Director
HCA	Head of the Contracting Activity
IGCE	Independent Government Cost Estimate
IPR	Independent Project Review
IPT	Integrated Project Team
MR	Management Reserve
O	Order
OTB	Over Target Baseline
OTS	Over Target Schedule
PB	Performance Baseline
PEP	Project Execution Plan
PMB	Performance Measurement Baseline
PMP	Project Management Plan
REA	Request for Equitable Adjustment
SAE	Secretarial Acquisition Executive
SOW	Statement of Work
TPC	Total Project Cost
WBS	Work Breakdown Structure

C. References

Federal Acquisition Regulation (FAR) Parts and Subparts

- 6.3 – Competition Requirements
- 15.4 – Contract Pricing
- 31.2 – Contracts with Commercial Organizations
- 34.2 – Earned Value Management
- 36.2 – Special Aspects of Contracting for Construction
- 43 – Contract Modifications

Department of Energy Acquisition Regulation (DEAR) Parts and Subparts

- 906 – Competition Requirements
- 915.4 – Contract Pricing

DOE Acquisition Guide (AG) Chapters

- 6.1 - Competition Requirements
- 7.0 - Integrating Acquisition Planning Processes – An Overview
- 7.1 - Acquisition Planning
- 9.4 - Contractor Responsibility Determinations
- 15.4-3 - Negotiation Documentation: Pre-negotiation Plan & the Price Negotiation Memorandum
- 15.4-4 - General Guide for Technical Analysis of Cost Proposals for Acquisition Contracts
- 34.1 - Project Management and the Acquisition of Major Systems
- 42.5 - Contract Management Planning
- 42.15 - Contractor Past Performance Information
- 43.1 - Contract Modifications
- 43.2 - Change Order Template
- 70.11 - The Department of Energy Directives System
- 71.1 - Headquarters Business Clearance Process

DOE Directives

- DOE Order 413.3B - Program and Project Management for the Acquisition of Capital Assets
- DOE Guide 413.3-10A - Earned Value Management System.
- DOE Guide 413.3-13 - Acquisition Strategy Guide for Capital Asset Projects
- DOE Guide 413.3-20 - Change Control Management Guide

b e te t

CHAPTER 48 – VALUE ENGINEERING

0 e eer tr t 200

Value Engineering In M&O Contracts

Guiding Principles

The structure of the Department's major contracts includes general conditions that mitigate against achieving equitable cost sharing under standard FAR value engineering initiatives. Consequently, it is prudent to select carefully the situations to which FAR value engineering concepts should be applied.

[Reference: FAR Part 48]

1.0 Summary of Latest Changes

This update: (1) revises the chapter number from 48 to 48.102 to align with the FAR, and (2) includes administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies and should be considered in the context of them.

2.1 Value Engineering in Major Contracts. This Guide Chapter provides Contracting Officers guidance on the application of value engineering (VE) to management and operating contracts and other contracts for the performance of work at current or former management and operating contract sites and facilities that would require or benefit from VE, where the requirements of the prescribed FAR clauses are inappropriate (hereinafter referred to as "major contracts").

2.2 Value Engineering Approaches. There are two VE approaches described in FAR Part 48, the "incentive" (also known as voluntary) and the "mandatory program." In the incentive approach, the contractor participates voluntarily and uses its resources to develop and submit value engineering change proposals. If the Government accepts a value engineering change proposal, the contractor shares in savings and receives payment for its allowable proposal costs. In the mandatory program approach, the Government requires and pays for a specific VE effort. The contractor must perform VE of the scope and level of effort required by the contract. The contractor shares in savings, but at a lower percentage than under the incentive approach.

FAR Part 48 also prescribes three clauses, 52.248-1, 52.248-2, and 52.248-3. The clauses

apply to contracts in general, architect-engineer contracts, and construction contracts, respectively. Procedures are slightly different and sharing of savings are more restricted for architect-engineer contracts and construction contracts. FAR 52.248-1 has three Alternates. Alternate I applies if the contracting officer chooses the mandatory program approach. Alternate II applies if the contracting officer chooses both the incentive approach and the mandatory program approach. Alternative III applies if collateral savings are not to be included.

2.3 Applying Value Engineering to Major Contracts. DOE major contracts are different than those envisioned by the authors of FAR Part 48. The structure of the Department's major contracts includes general conditions that mitigate against achieving equitable cost sharing. They are:

- A lack of firm cost estimates;
- Requirements covered by award fee that already require the contractor to identify and institute practices to improve performance;
- Requirements covered by a contract clause;
- Accounting systems that do not separately track the benefits and costs of VE efforts;
- Costs of unsuccessful VE proposals are direct costs (under the cost accounting standards) to the contract, while in the existing FAR Value Engineering policy these costs are indirect costs; and
- Some contracts are a composite of dissimilar work and contract types.

2.4 Cost Savings Can Be Achieved through Various Mechanisms. We expect our major contractors to help is save money in three ways, two of which are value engineering. The three ways are:

- We agree to fairly consider the contractor's suggestions to replace specifications, standards, etc., that are stipulated for the contractor to follow. This is the FAR incentive approach. This concept does not apply where the contractor has participated in determining the specifications, standards, etc., of the contract;
- We direct the contractor to perform value engineering. This is the FAR mandatory program approach; and
- We require the contractor to identify and institute practices that will improve performance. This is not value engineering under the FAR definition. It does not allow the contractor a share of the cost savings that result. Examples are the "Performance Improvement and Collaboration" clause and the subjective evaluation of the contractor's performance efforts under award fee.

2.5 The FAR Incentive Approach May Apply to Portions of a Major Contract. The general conditions present in a major contract mean the incentive approach as prescribed in FAR Part 48 will only apply to those portions of a major contract where the particular conditions described below exist, and even then only in a modified form (also described below).

The particular conditions that must exist for the incentive approach to apply are:

- DOE dictated the specification, design, process, etc., that the contractor must follow;
- The contractor's cost reduction effort is not covered under award fee (or any other incentive);
- The contracting officer has confidence in the cost estimate for the work at issue; that is, confidence in the cost estimate is similar to that which would be achieved under normal FAR pricing conditions. While obtaining cost and pricing data and performing cost analysis are not required, the contracting officer must have adequate rationale for concluding the cost estimate is reliable enough to merit sharing savings based on the contractor performing at less than the estimate; and
- The proposal, if accepted, must require a change to the contract and result in overall savings to DOE after implementation.

When all the particular conditions listed above exist, a modified incentive approach is applicable. Modified incentive approach means:

- Costs of unsuccessful proposals are not allowable unless approved in advance by the contracting officer;
- A lower percentage of savings is provided to the contractor than permitted by FAR (typically no more than 20 percent), based on the contracting officer's confidence in the cost estimate;
- The HCA must approve the VE proposal; and
- Savings are not recognized until the affected work is completed satisfactorily and the contracting officer confirms the contractor has successfully accounted for the costs and benefits of the VE effort.

2.6 <u>The FAR Mandatory Program Approach May Apply to Portions of a Major Contract</u>. Because the Government decides when to require VE effort in mandatory program approach, the contractor's allowable, allocable and reasonable proposal costs are reimbursed. The Government would, however, only share savings where the particular conditions described above for the incentive approach exist, and, even then, only at a lower percentage than the FAR permits.

When all of the particular conditions described above exist, a modified mandatory program approach is applicable. Modified mandatory program approach means:

- A lower percentage of savings is provided to the contractor than permitted by FAR (typically no more than 10 percent), based on the contracting officer's confidence in the cost estimate. In some cases the percentage should be zero;
- The HCA must approve the VE proposal; and

- Savings are not recognized until the affected work is completed satisfactorily and the contracting officer confirms the contractor has successfully accounted for the costs and benefits of the VE effort.

2.7 Both Approaches Can Be Used in the Same Major Contract. In certain circumstances, one or more value engineering approaches may apply to different portions of a major contract. You can "mix and match" the value engineering approach and the affected contract effort. Examples of different approaches are:

- Under one major contract, for example, the FAR "Value Engineering-Architect-Engineer" clause may apply to an Architect-Engineering effort, a modified FAR "Value Engineering" clause may apply to the acquisition of a large capital asset, and a modified FAR "Value Engineering Alternate I" clause may apply to a significant and costly project;
- Under another major contract no FAR value engineering approach may be appropriate because the reliability of the cost estimates does not merit cost sharing;
- Under another major contract the modified mandatory program approach may be appropriate for a specific project, and the contractor's share of savings should be only 5 percent; and
- Under another major contract DOE may direct the contractor to subcontract for a value engineering analysis of a costly and complex project; this situation is not a FAR value engineering approach and does not merit cost sharing.

2.8 VE Provisions Flow-down to Subcontracts. Major contractors should extend VE provisions to their subcontractors, where appropriate, by granting them a percentage of whatever share of savings the major contractors receive from DOE. Major contractors will be required to approve subcontractors' requests to perform value engineering analyses in advance. Agreements between the major contractors and their subcontractors do not affect the contractual relationship between major contractors and DOE. DOE's share of savings, for example, is not affected by the major contractor's agreement to provide a portion of its share of savings to a subcontractor.

2.9 Value Engineering and Award Fee/Incentive Structures. Value engineering incentive payments do not constitute profit or fee within the limitations imposed by 10 U.S.C. 2306(d) and 41 U.S.C. 254(b). The benefits of an accepted value engineering change proposal should not be rewarded both as value engineering shares and as incentives under performance, design-to-cost, or similar incentives of the contract. Only those benefits of an accepted value engineering change proposal not rewardable under other incentives may be rewarded under a value engineering clause.

2.10 If the Particular Conditions Are Present. If the particular conditions that must exist for one of the value engineering approaches to apply are present, Contracting Officers

should consider inserting and applying to appropriate portions of existing major contracts one or more of the modified versions of clauses at FAR 52.248-1 and FAR 52.248-3 (after first removing the clause at DEAR 970.5215-4, Cost reduction, if present).

Contracting Officers must modify the clause at FAR 52.248-1 so that it:

- Requires the contractor to obtain the Contracting Officer's approval before incurring any value engineering development and implementation costs;
- States the sharing arrangement for the incentive (voluntary) approach for a cost-reimbursement contract will be determined by the Contracting Officer and will be no greater than 20%;
- States the sharing arrangement for the program requirement (mandatory) approach for a cost-reimbursement contract will be determined by the Contacting Officer, will be no greater than 10%, and may be zero; and
- States the collateral savings rate for a cost-reimbursement contract will be determined by the Contracting Officer, will be no greater than 10%, and may be zero.

Contracting Officers must modify the clause at FAR 52.248-3 so that it:

- Requires the contractor to obtain the Contracting Officer's approval before incurring any value engineering development and implementation costs; and
- States the collateral savings rate for a cost-reimbursement contract will be determined by the Contracting Officer, will be no greater than 10%, and may be zero.

Attachment #1

DEPARTMENT OF ENERGY

DETERMINATION AND FINDINGS

FEDERAL ACQUISITION REGULATION (FAR) CLASS DEVIATION
REGARDING FAR 52.248-1 and FAR 52.248-3

FINDINGS:

1. There are two Value Engineering (VE) approaches described in FAR Part 48, the "incentive" (also known as voluntary) and the "mandatory program." In the incentive approach, the contractor participates voluntarily and uses its resources to develop and submit value engineering change proposals. If the government accepts a value engineering change proposal, the contractor shares in savings and receives payment for its allowable proposal costs. In the mandatory program approach, the Government requires and pays for a specific VE effort. The contractor must perform VE of the scope and level of effort required by the contract. The contractor shares in savings, but at a lower percentage than under the incentive approach.

2. The structure of the Department's major contracts (management and operating contracts and other contracts for the performance of work at current or former management and operating contract sites and facilities that would require or benefit from VE, where the requirements of the prescribed FAR clauses are inappropriate) includes general conditions that involve mitigating factors that prelude equitable cost sharing. They are: a lack of firm cost estimates; requirements covered by award fee that already require the contractor to identify and institute practices to improve performance; requirements for performance improvements covered by other contract clauses; accounting systems that do not separately track the benefits and costs of VE efforts; costs of unsuccessful VE proposals are direct costs (under the cost accounting standards) to the contract, while in the existing FAR Value Engineering policy these costs are indirect costs; and some contracts are a composite of dissimilar work and contract types.

3. The general conditions present in a major contract mean the incentive approach as prescribed in FAR Part 48 will only apply to those portions of a major contract where particular conditions exist, and even then only in a modified form.

4. The particular conditions that must exist for the incentive approach to apply are: DOE dictated the specification, design, process, etc., that the contractor must follow; the

contractor's cost reduction effort is not covered under award fee (or any other incentive); the contracting officer has confidence in the cost estimate for the work at issue; and the proposal, if accepted, must require a change to the contract and result in overall savings to DOE after implementation. When all of the particular conditions exist, a modified incentive approach is applicable. Modified incentive approach means: costs of unsuccessful proposals are not allowable unless approved in advance by the contracting officer; lower percentage of savings given to the contractor than permitted by FAR (typically no more 20 percent), based on the contracting officer's confidence in the cost estimate; the Head of the Contracting Activity must approve the VE proposal; and savings are not recognized until the affected work is completed satisfactorily and the contracting officer confirms the contractor has successfully accounted for the costs and benefits of the VE effort.

5. For the mandatory program approach, the Government would only share savings where the particular conditions described above for the incentive approach exist, and even then only at a lower percentage than the FAR permits. When all of the particular conditions described above exist, a modified mandatory program approach is applicable. Modified mandatory program approach means: lower percentage of savings given to the contractor than permitted by FAR; the Head of the Contracting Activity must approve the VE proposal; and savings are not recognized until the affected work is completed satisfactorily and the contracting officer confirms the contractor has successfully accounted for the costs and benefits of the VE effort.

6. In accordance with FAR 1.404, consultation with the Civilian Agency Acquisition Council Chairman before approving this class deviation to the FAR has been accomplished. The appropriate consultation and approval have been completed under the authority granted to the civilian agencies under Civilian Agency Acquisition Letter 2002-01.

DETERMINATION:

Based upon these findings, I hereby determine that it is necessary to deviate from the clauses at FAR 52.248-1 and FAR 52.248-3 to reflect fairly the structure of DOE's major contracts as it affects equitable cost sharing in value engineering arrangements.

APPROVAL_____ DATE_____

Director, Office of Procurement
and Assistance Management
Department of Energy

b e te t

CHAPTER 50 - EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY ACT

0 101 2 tr r r tr t t pr 201

Extraordinary Contractual Actions

References

FAR Subpart 50.1, Extraordinary Contractual Actions
FAR Section 52.250-1, Indemnification Under Public Law 85-804
DEAR Part 950, Extraordinary Contractual Actions
DEAR Section 970.5001-4, Contract Clause

Overview

The purpose of this Chapter is to describe the process for the Department of Energy's (DOE) preparation, coordination and approval in determining whether to provide a DOE or National Nuclear Security Administration (NNSA) contractor indemnification for unusually hazardous or nuclear risks as a form of extraordinary contractual relief pursuant to Pub. L. No. 85-804.

Background

Under Pub. L. No. 85-804 (50 USC 1431 et seq.), "[t]he President may authorize any department or agency of the Government which exercises functions in connection with the national defense" to grant various forms of extraordinary contractual relief, where the relief would "facilitate the national defense." Pub. L. No. 85-804 provides the President with broad authority to grant extraordinary contractual relief, such as an increase of contract price without consideration, or indemnification for unusually hazardous or nuclear risks. Executive Order 10789, "Contracting Authority of Government Agencies in Connection with National Defense Functions," identifies the agencies to which this authority has been delegated and describes how it is to be implemented. DOE is one of the agencies with this delegated authority. The decision to grant indemnification for unusually hazardous or nuclear risks may be made only by the Secretary of Energy.

This Chapter focuses on the process for preparing, reviewing and obtaining Secretarial approval for extraordinary contractual relief under Pub. L. No. 85-804 in the form of indemnification for unusually hazardous or nuclear risks. The form of an indemnification request and the criteria for granting the request are set forth in the Federal Acquisition Regulation (FAR) at 50.104-3(a) "Indemnification requests" and 50.104-3(b) "Action on indemnification requests," respectively. These procedures also may be followed for other forms of extraordinary contractual relief amounting to more than $70,000 which must be approved at the Secretarial level. Pursuant to FAR 50.102-1, the decision to grant extraordinary contractual relief amounting to $70,000 or less to a DOE contractor has been delegated to the DOE Senior Procurement Executive and the NNSA Senior Procurement Executive, for their respective organizations.

Historically, most requests for indemnification by the Secretary of Energy under Pub. L. No. 85-804 have related to nonproliferation, weapons reduction, and other national security activities that have the potential for resulting in a nuclear incident outside the United States. DOE contractors have sought indemnification under Pub. L. No. 85-804 for these activities because the Price-Anderson Act (section 170d. of the Atomic Energy Act of 1954, as amended) limits indemnification for a "nuclear incident" outside the United States to $500 million and is available only when the nuclear material causing the incident is owned by the United States and the nuclear incident results from a contractual activity on behalf of DOE. Further, indemnification under the Price-Anderson Act does not cover non-radiological risks, such as risks from exposure to chemical or biological agents**.**

In response to these requests, the Secretary of Energy had granted indemnification under Pub. L. No. 85-804 to contractors performing certain high-priority national security work abroad. In a 1994 memorandum from the Secretary to the Vice President, the Secretary outlined her policy for providing this indemnification in future contracts, and identified a non-exclusive list of programs and activities for which indemnification coverage would be appropriate (e.g., packaging and transportation of radioactive material outside the United States for non-proliferation purposes).

In addition, in recent years DOE is increasingly using its contractors in emergency response and anti-terrorism activities that may arise unexpectedly and require a case-by-case determination for coverage under Pub. L. No. 85-804. Accordingly, to ensure readiness in the face of unpredictable exigencies and to address contractor concerns regarding work in particular arenas, the Secretary has, in certain contracts, included provisions whereby the Secretarially-approved indemnification may be invoked by designated officials on a case-by-case basis ("case-by-case indemnification") for particular requested or approved work.

Indemnification under these circumstances is permitted only upon the request or approval of the designated official, and only for the particular activity specified in the request or approval. Thus, language in a contract allowing for a case-by-case indemnification under specified conditions does not constitute an automatic extension of the Secretarially-approved indemnification. Section IV of this Chapter describes the process for extending a case-by-case indemnification.

Relief under Pub. L. No. 85-804 is never a routine contract action and should not be treated as such. The authority to grant this extraordinary contractual relief must be exercised with great caution. The grant of relief must be based on a sound and compelling justification. Speculation that the relief might be helpful is not sufficient. In requesting, reviewing and approving relief, careful consideration must be given to the extent to which the statutory and regulatory criteria are satisfied, the need for the relief, the consequences of not granting the relief, and the benefit to the Department and the United States in facilitating the national defense. Examination of these issues is vital when the relief takes the form of an indemnification which, in effect, transfers large and potentially unlimited liability to the United States. Secretarial approval of new work or

modified work or case-by-case work that is being indemnified does not constitute ordering the work or funding the work.

Guidance

I. What are the Elements of a New or Modified Indemnification Request to the Secretary?

A. Contractor Request for Indemnification
B. Contracting Officer's Recommendation
C. Proposed H clause defining unusually hazardous or nuclear risks
D. Copy of Existing Contract Indemnification (if applicable)
E. Program Secretarial Official Action Memorandum to Secretary
F. Secretarial Memorandum of Decision

Contact the Office of the Assistant General Counsel for Civilian Nuclear Programs for additional information, as needed.

II. What is the Process for Requesting a New Indemnification?

A. Applicability

1. The most common situations where a contractor may submit a request for indemnification under Pub. L. No. 85-804 are:

    a. a contractor does not have an existing contract with DOE or NNSA and has been awarded a new contract;
    b. a contractor has an existing contract with DOE or NNSA and has been awarded a new contract;
    c. a contractor has an existing contract with DOE or NNSA that has been noncompetitively extended, in which case the extension is considered a new contract;
    d. a contractor has an existing contract with DOE or NNSA that does not include indemnification under Pub. L. No. 85-804, but the contractor is, or will be, engaging in certain work for which the contractor believes relief is necessary; or
    e. whenever there is a "new" DOE or NNSA contract in effect, such that any existing Pub. L. No. 85-804 indemnification coverage does not automatically carry forward to the new contract. This is the case whether or not the contractor or work under the new contract is the same as that for which indemnification was previously granted.

2. A contractor may submit a request for Pub. L. No. 85-804 indemnification to the cognizant contracting officer (CO). The request for indemnification for unusually hazardous or nuclear risks must identify the contract involved, what relief is sought, what work to be covered by the relief, why the relief is necessary and appropriate, and otherwise provide the information required at FAR 50.104-3(a) ("Indemnification requests"). The contractor must provide sufficient information to enable the CO to determine that the criteria at FAR 50.104-3(b) ("Action on indemnification requests") are satisfied. Secretarial approval of a new indemnification does not constitute tasking or funding of the work.

3. The CO must be provided with the contractor's request at least 60 days *prior to* the date that the contractor has requested the extraordinary contractual relief to be effective. If expedited relief is sought, the request must contain a detailed discussion of why the request could not have been submitted in a timely manner and what adverse consequences, if any, will result in not granting the relief on an expedited basis.

4. Retroactive application of Pub. L. No. 85-804 is strongly disfavored, and would require extraordinary circumstances and compelling justification to be requested and considered for approval. The burden of providing a compelling basis as to why it is needed would be upon the requester. Any approval of retroactive application of Pub. L. No. 85-804 would be only by the Secretary, and would be limited to the circumstances explicitly identified in such Secretarial approval.

B. Contracting Officer Responsibilities

1. The CO receiving the request must review and determine, after consultation with program officials and local field counsel, whether to recommend that the requested relief satisfies the criteria at FAR 50.104-3(a) and 50.104-3(b).

2. If the CO concludes that the request should be granted, the CO shall prepare a package to support granting the request. The package must include: 1) the CO's Recommendation; 2) the contractor's request; 3) a copy of the existing indemnification, if any; 4) the FAR 52.250-1 clause; 5) the proposed H clause defining unusually hazardous or nuclear risks; 6) a draft Secretarial Memorandum of Decision; and 7) any other relevant supporting documentation. The CO should contact the field counsel, the NNSA General

Counsel, and the DOE Office of the Assistant General Counsel for Civilian Nuclear Programs, as appropriate, for assistance in preparing the package. At NNSA, the CO shall contact NNSA General Counsel for assistance in preparing the package.

3. The CO Recommendation must address and demonstrate that the criteria at FAR 50.104-3(b) are satisfied, including a definition and evaluation of the unusually hazardous or nuclear risks involved, a description of the relief to be granted, and a statement that the indemnification would facilitate the national defense and is both necessary and appropriate to achieve the objectives of the Department.

4. The CO must include FAR 52.250-1 "Indemnification Under Public Law 85-804" or FAR 52.250-1, Alternate I "Indemnification Under Public Law 85-804 – Cost Reimbursement Contracts." In management and operating contracts, the CO may substitute the words "Obligation of Funds" for "Limitation of Costs or Limitation of Funds" in accordance with Department of Energy Acquisition Regulation (DEAR) 970.5004-1. The CO shall identify in a separate draft H clause, the unusually hazardous or nuclear risks involved (including, if applicable, activities requiring a case-by-case indemnification determination) and excluding from its coverage liabilities already indemnified under the Price-Anderson Act or other provision of law. If the CO is recommending that the Secretary authorize extending the indemnification to a contractor's domestic or foreign subcontractor(s) and/or supplier(s), or authorize the CO to do so, the recommendation shall be identified and authorized in the Secretary's Memorandum of Decision.

C. Head of Contracting Activity Responsibilities

1. The cognizant Head of Contracting Activity (HCA) of the contracting action shall receive the package from the CO through the appropriate chain of command and shall review the CO's Recommendation and supporting documentation. The HCA, upon concurrence, shall prepare a transmittal memorandum to the Program Secretarial Official (PSO) at DOE/NNSA Headquarters whose organization is responsible for the project (the "Requesting PSO"). The term "PSO" includes the Deputy Administrators for the NNSA. The transmittal must provide background on the contractor's request for indemnification, the basis for any recommendation of the HCA, and forward the CO's Recommendation package and supporting documentation to the Requesting PSO, with a copy to the NNSA General Counsel (for NNSA

contracts or where NNSA is responsible for the project), and the DOE Assistant General Counsel for Civilian Nuclear Programs.

2. The HCA should forward the package to the HQ PSO at least 40 days prior to the date that the contractor has requested the extraordinary contractual relief to be effective.

D. Program Secretarial Officer Responsibilities

1. The Requesting PSO shall take responsibility for the request at Headquarters (except where the work is pursuant to a "Strategic Partnership Program" [formerly known as the "Work for Others" program] arrangement, see subsection 3, below), with support from the PSO whose organization is responsible for the contract under which the work will be performed (the "Primary PSO"). If the Requesting PSO concurs with the recommendation from the HCA, the Requesting PSO shall prepare an Action Memorandum package for the Secretary recommending that the request be approved.

2. The Action Memorandum should identify and provide background on the contract, including its scope and effective date, reference any indemnification under Pub. L. No. 85-804 that the contractor may have under an existing contract, and explain the contractor's current request for indemnification. The Action Memorandum should also discuss the proposed work for which indemnification is recommended, the basis for the PSO's recommendation, any relevant sensitivities, and whether the indemnification is in the best interests of the U.S. and would support the national defense.

3. In cases where a contractor would perform work for another federal agency under a "Strategic Partnership Program" arrangement that may be covered by the indemnification, the Primary PSO must take responsibility for the request at Headquarters. In addition, the Primary PSO must ensure that the Action Memorandum includes confirmation that the interagency agreement includes a provision requiring full cost recovery that would cover any costs incurred under Pub. L. No. 85-804. That is, if the contractor incurs costs, including costs indemnified under Pub. L. No. 85-804, while performing the work for the other federal agency, then the other federal agency is responsible for such costs.

4. The Action Memorandum package should reference and attach as appropriate the following supporting documentation: 1) the contractor's request; 2) any indemnification for similar work under an existing contract; 3) the CO's Recommendation; 4) the CO's proposed H clause defining the unusually hazardous or nuclear risks; and 5) a draft Memorandum of Decision for the Secretary's approval which includes, as attachments, the applicable I clause

(either FAR 52.250-1, or FAR 52.250-1, Alternate I) and the H clause to be approved by the Secretary. The Memorandum of Decision shall include substantially the same information that is required in the CO's Recommendation, as prescribed by FAR 50.104-3(b).

E. Reviewing Offices Responsibilities

1. For DOE contracts, the Requesting PSO must submit the Action Memorandum package to the DOE General Counsel for concurrences from: 1) the DOE Assistant General Counsel for Civilian Nuclear Programs; 2) the DOE Assistant General Counsel for Procurement and Financial Assistance; and 3) the DOE General Counsel.

2. For NNSA contracts, the Requesting PSO must submit the Action Memorandum package to the NNSA General Counsel for concurrences from: 1) the DOE Assistant General Counsel for Civilian Nuclear Programs; 2) the DOE Assistant General Counsel for Procurement and Financial Assistance; and 3) the NNSA General Counsel.

3. For all contracts, where the Requesting PSO is not the same as the Primary PSO (e.g., NNSA national security work to be performed by a DOE Office of Science contractor), the concurrence of the Primary PSO must be obtained on the Action Memorandum package.

F. Secretarial Approval

Only the Secretary of Energy may grant the request for extraordinary contractual relief under Pub. L. No. 85-804 where the relief is for indemnification of any value against unusually hazardous or nuclear risks.

III. What is the Process for Requesting a Modification to an Indemnification?

A. Applicability

1. A contractor may submit a request for modification to an existing indemnification when the tasking of a new project that involves activities that are not encompassed within the existing definition of unusually hazardous or nuclear risks is imminent. The Secretarial approval of 85-804 relief for a modification to an existing indemnification does not constitute tasking or funding the work.

2. A modification to an existing indemnification to add a new project to the definition of unusually hazardous or nuclear risks is appropriate for projects that are of a continuous nature. A request to modify an existing indemnification is not the same as a contractor request for a case-by-case indemnification, described below in section IV, which is appropriate for particular activities of a discrete, non-continuous nature.

B. Elements and Process for Modification of an Existing Indemnification

1. The elements of a request for modification are the same as those in a request for a new indemnification to the Secretary, described above in section I.

2. The only major distinctions between the elements of a request for modification of an existing indemnification and a request for a new indemnification are: 1) the modification request would be appropriately tailored to provide the basis for approval of only the new project activities to be added to the H clause definition of unusually hazardous or nuclear risks, as opposed to a new indemnification request for approval of inclusion of both the I clause containing the appropriate FAR 52.250-1 indemnification under Pub. L. No. 85-804 and the related H clause defining the unusually hazardous or nuclear risks in the contract; and 2) since the request is for a modification of an existing indemnification, the Secretarial Memorandum of Decision need only include as an attachment the new, as modified H clause definition of unusually hazardous or nuclear risks, rather than also include the I clause containing the appropriate FAR 52.250-1 indemnification provision.

3. The process for requesting, reviewing and approving a modification request is the same as for a new indemnification, described above in section II. That is, the responsibilities of the CO, the HCA, the PSOs, the Reviewing Offices, and the Secretary are the same.

IV. What is the Process for Invoking an Approved Case-By-Case Indemnification?

In certain circumstances, the Secretary has approved prospective indemnification which may be extended to particular activities *if* specifically requested or approved by a designated official. A typical clause reads as follows:

> *Other activities relating to non-proliferation, emergency response, anti-terrorism activities, or critical national security activities that involve the use, detection, identification, assessment, control, containment, dismantlement, characterization, packaging, transportation, movement, storage or disposal of nuclear, radiological, chemical, biological, or*

explosive materials, facilities or devices, provided such activities are specifically requested or approved, in writing, by the President of the United States, the Secretary of Energy, the Deputy Secretary of Energy, or an Under Secretary, and further provided that the request or approval specifically identifies the particular requested or approved activity and makes the indemnity provided by this clause applicable to that particular activity because it involves extraordinary risks.

This type of indemnification must be invoked by such designated official on a case-by-case basis, in compliance with the conditions and limitations set forth in the indemnification clause, and in accordance with the procedures in this Chapter. This type of indemnification is not intended for projects that are of a continuous nature.

A. Elements of a Case-By-Case Indemnification Request

1. Contractor's request
2. Copy of existing contract indemnification
3. CO's recommendation package
4. PSO's Action Memorandum constituting the decision document

B. Applicability

A DOE or NNSA contractor may request that the Secretary's case-by-case indemnification authorization be invoked to cover work by submitting a letter to the DOE or NNSA CO for the contract under which the work will be performed, identifying the case-by-case indemnification provision under the contract, the particular activities to be performed at the direction of a DOE or NNSA official, and the basis for claiming that those activities fall within the scope of the case-by-case indemnification. Secretarial approval of a case-by-case indemnification request does not constitute ordering the work or funding the work. The contractor's letter should include the existing contract indemnification clause, any written request from the relevant DOE or NNSA program office for the particular project to which the case-by-case indemnification would apply, and any statement of work describing such project.

C. Contracting Officer Responsibilities

1. The CO receiving the contractor's request to invoke a case-by-case indemnification must determine, after consultation with DOE or NNSA program officials and local field counsel, whether to recommend that such indemnification be invoked.

2. If the CO concludes that the case-by-case indemnification should be granted, the CO will prepare a package including a recommendation by the CO that identifies the case-by-case indemnification provision, describes the work to be performed, and explains why the particular work falls within the scope of the case-by-case indemnification. The CO's package should be directed for review to the HCA.

3. If the HCA concurs, the CO's package should be forwarded to the Requesting PSO at DOE/NNSA Headquarters and include a short transmittal memorandum to the PSO recommending approval of the case-by-case indemnification.

D. Program Secretarial Officer Responsibilities:

1. The Requesting PSO at Headquarters is responsible for the coordination and approval process at Headquarters (except where the work is pursuant to a "Strategic Partnership Program" arrangement, see subsection 2, below). If concurring, the PSO must prepare an Action Memorandum package to one of the officials designated in the contract's existing case-by-case indemnification clause recommending that such indemnification be granted for the particular work.

2. In cases where a contractor would perform work for another federal agency under a "Strategic Partnership Program" arrangement that may be covered by the indemnification, the Primary PSO must take responsibility for the request at Headquarters. In addition, the Primary PSO must ensure that the Action Memorandum includes confirmation that the interagency agreement includes a provision requiring full cost recovery that would cover any costs incurred under Pub. L. No. 85-804. That is, if the contractor incurs costs, including costs indemnified under Pub. L. No. 85-804, while performing the work for the other federal agency, then the other federal agency is responsible for such costs.

3. The PSO's Action Memorandum should address the background for the request, the work to be performed, the basis for granting the extension, and the PSO's recommendation for approval. The Action Memorandum package should include as attachments: 1) the contractor's request; 2) the recommendation package from the CO; 3) the HCA's recommendation; and 4) the existing case-by-case indemnification provision. The PSO's Action Memorandum shall provide signature lines for either approval or disapproval by the designated official, such that this Action Memorandum will constitute the decision document approving the case-by-case indemnification.

E. Reviewing Offices Responsibilities

1. For DOE contracts, the Requesting PSO must submit the Action Memorandum package to the DOE General Counsel for concurrences from: 1) the DOE Assistant General Counsel for Civilian Nuclear Programs; 2) the DOE Assistant General Counsel for Procurement and Financial Assistance; and 3) the DOE General Counsel.

2. For NNSA contracts, the Requesting PSO must submit the Action Memorandum package to the NNSA General Counsel for concurrence. Additionally, the Requesting PSO must consult with, and consider comments from: 1) the DOE Assistant General Counsel for Civilian Nuclear Programs; and 2) the DOE Assistant General Counsel for Procurement and Financial Assistance.

3. For all contracts, where the Requesting PSO (e.g., NNSA) is not the same as the Primary PSO (e.g., Office of Science), the concurrence of the Primary PSO must be obtained on the Action Memorandum package.

F. Which Designated Official Approves the Case-By-Case Indemnification?

1. Where the indemnification provision expressly identifies one particular official as authorized to approve the case-by-case indemnification, only that designated official may approve.

2. Where paragraph 1. above is not applicable, the designated official to approve the case-by-case indemnification must be the Under Secretary whose organization is responsible for the project (the "Requesting Under Secretary").

3. The Requesting Under Secretary must obtain the concurrence of the Under Secretary whose organization is responsible for the contract under which the work will be performed (the "Primary Under Secretary") if the Requesting Under Secretary and the Primary Under Secretary are different individuals.

V. What are the Post-Approval Procedures?

A. Extension of Approved Indemnification to Subcontractors and Suppliers

1. Only the Secretary has the authority to extend an indemnification to a contractor's domestic subcontractors and suppliers, and/or to foreign subcontractors and suppliers. The Secretary has the discretion to authorize the CO to grant such extensions; however, the CO's authority to extend an

indemnification granted by the Secretary under Pub. L. 85-804 to domestic or foreign subcontractors and suppliers is effective if and only to the extent granted in the Secretary's Memorandum of Decision. Such extension may only take effect where the Secretary's Memorandum of Decision granting the indemnification explicitly provides the CO with the authority to extend the indemnification to domestic subcontractors and suppliers, and/or to foreign subcontractors and suppliers.

2. The CO's determination to extend any indemnification to either domestic or foreign subcontractors and suppliers must be in writing and is appropriate only to the extent needed to achieve the objectives of the Department. As a matter of practice, the CO has exercised authority to extend the indemnification to domestic subcontractors and suppliers as necessary to meet the objectives of the Department. However, a CO's grant of an extension of the indemnification to foreign subcontractors and suppliers is not a matter of practice, and would require significant and compelling justification.

B. Distribution of Approved Indemnification

After the decision is made, the Requesting PSO shall assure: 1) for NNSA contracts, that copies of the supporting documentation, the recommendation of the PSO, the concurrences of appropriate officials, and the Secretarial Memorandum of Decision are provided to the NNSA Senior Procurement Executive and General Counsel (both NNSA and DOE); and 2) for DOE contracts, that copies of the supporting documentation, the recommendation of the PSO, the concurrences of appropriate officials, and the Secretarial Memorandum of Decision are provided to the DOE Senior Procurement Executive and General Counsel. This is in addition to the normal distribution to the CO.

b e te t

CHAPTER 70 - DOE MANAGEMENT AND OPERATING CONTRACTS

70 0 71 tr t r m e r e eme t r 2017
70 7 pter 11 e r pert er r pert r p rt t eme t
70 10 ter tr t r r e r 200
70 1 0 tr t r e t e ee er er rm e ee r erm 2017
70 17 e p t S t t er r r t er r r m t ber 2012
70 170 1 t t e r me t ember 201
70 2 71 e er t 201
70 2701 te t t t pr 2017
70 102 0 tr t r mpe t r b e 201
70 1 t te t t eb er t t e r 200
70 1 b e e er e t t tr t r Sp re ere e t 2017
70 1 20 tr t r e eme t e reme t ppr Sett eme t eterm t e b t Sett eme t t September 201
70 270 ter t e pr 2007
70 2 101 per t e t Str te r 201
70 e e eme t tr t r r S tem r 200
70 02 tr t r St r e e r S b tr t t t t t r pr t r t r 2017
70 710 t e t t er t e e r e r m r r t 2017

Contractor Human Resources Management

Guiding Principles

To ensure DOE contractors manage their Human Resource programs to:

- Support the DOE mission,
- Promote workforce excellence,
- Champion work force diversity,
- Achieve effective cost management performance, and
- Comply with applicable laws and regulations.

[References: DOE Order 350.1 , DOE Order 350.3]

1.0 Summary of Latest Changes

This update reflects that DOE Order 350.1 was separated into two orders:
(1) DOE O 350.1: Contractor Human Resource Management Programs; and
(2) DOE O 350.3: Labor Standards Compliance, Contractor Labor Relations, and Contractor Workforce Restructuring Programs.

2.1 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. This chapter does not cover efforts and projects performed for DOE by other Federal agencies.

2.2 Contractor Human Resources

Contractors that manage the Department's facilities have significant numbers of employees necessary for the operation of Department of Energy (DOE) sites and facilities. The Human

Resource issues which arise are complex and extremely sensitive, and can create a potentially significant cost to the Department.

This chapter covers subjects set forth in DOE O 350.1 and DOE O 350.3. Those subjects include:

- Advance understandings on cost (retirement programs, risk management, and insurance);
- Labor standards;
- Work force restructuring; and
- Labor relations.

2.3 Advance Understandings on Cost

This section provides information related to the roles and responsibilities of both Departmental elements and individuals involved in and responsible for:

- Oversight of DOE Management and Operation (M&O) and other facility operation contracts that provide cost reimbursement for contractor human resource programs;
- Determination of allowability and reasonableness of contractor employee compensation and related human resource costs; and
- Measurement and evaluation of the effectiveness of contractor human resource management in recruiting, deploying and retaining a reasonably priced workforce to meet DOE mission objectives.

The Department reaches advance understandings on contractor human resource costs (personnel appendices) in M&O and other facility operation contracts for which it reimburses those costs to:

- Determine allocability, allowability, and reasonableness of costs prior to incurrence, thereby avoiding subsequent disallowances and disputes;
- Provide appropriate and reasonable compensation levels to recruit and retain contractor employees to meet DOE mission objectives; and
- Assure prudent expenditures of public funds.

Generally, an advance understanding on contractor human resource costs is needed when:

- Policies are established specifically for contract work;
- The contractor's work is predominantly or exclusively made up of negotiated Government contract work;
- Contract work is so different from the organization's private sector contract work that existing established policies cannot reasonably be extended to and consistently applied on contract work;
- Established policies proposed for contract work are not sufficiently definitive to permit a clear advance mutual understanding of allowable costs and to provide a basis for audit;

- The contractor's personnel policies, programs, and practices must be revised or disallowed to comply with DOE policies; or
- The contractor does not have written policies/procedures.

2.4 Negotiating an advance understanding

At the beginning of the acquisition cycle a Request for Proposal may include specific requirements for contractor human resource management programs to be applied by the winning contractor. The pre-negotiation package is the precursor to the advance understanding on contractor human resource costs. Allowable Human Resource costs need to be described, but avoid process and/or transactional requirements that do not directly affect the allowability of Human Resource costs. Include the standards and methods for control of compensation increase funds, as well as comparators (benchmarks). The contractor will use those to establish, adjust, and evaluate Human Resource costs during the contract term.

Two basic methods which DOE uses to achieve and record advance understandings with its contractors:

1. Negotiation of an advance understanding (personnel appendix) to the contract, which sets forth the policies, programs, and practices accepted by the Department as items of allowable cost or as the basis for determining the allowability of human resource costs; or
2. Review of, and agreement with established policies, programs, and schedules (and any changes thereto during the contract term) applicable to the contractor's private operations that are acceptable for contract work and which are consistently and uniformly followed throughout the contractor's organization.

2.5 Model H Clause

Most advance agreements to date have followed the format of the Model H Clause, which contains sections for an introduction, definitions, compensation/pay programs, welfare benefits, retirement programs, paid time off, Employee Assistance Program (EAP) sections, and other sections necessary to deal with specific major items of allowable cost. If you have questions regarding the Model H Clause, contact the Contractor Human Resources Policy Division (MA-612).

2.6 Reasonableness of Contractor Human Resource Costs.

Evaluating the reasonableness of contractor human resource costs:

- The contractor's competitive labor market;
- The significance of Government contracting on the labor market;
- Whether the workforce is represented by one or more unions;

- The impact of the contractor's private operations (to the extent a contractor has private, non-DOE, operations);
- DOE acceptance of reasonableness findings of other federal agencies; and
- The extent to which contractor human resource costs are based upon valid survey data, and generally conform to policies and practices of the industry with which the contractor is identified in its private operations.

If an organization exists solely to perform DOE work under a cost type contract (for example, Limited Liability Companies), little financial incentive for, or experience in, exercising prudent business judgement in contractor human resource areas may exist. In such instances, DOE guidance to contractors on business management performance expectations and measures to evaluate reasonableness of such costs, and the importance of the valid application of the metrics in this section, become even more important.

The contract administration team must work in close coordination because of the:

- Magnitude of human resource costs, as a percentage of overall contract cost and as a dollar amount;
- Cost and volatility of retiree pension and medical benefits and associated long term liabilities;
- Increasing costs of health care;
- Technical, legal, and regulatory requirements under which contractor human resource programs must operate; and
- Socio-political environment in which the Department operates.

2.7 Risk Management and Insurance

Risk Management:

The Department has risks or potential liabilities or exposures in every business or activity. Risk management is the process of analyzing and identifying potential risks or liabilities associated with a business or activity processes or procedures. The Department must determine the best method to eliminate, reduce, and/or finance those risks or potential liabilities. Risks that cannot be eliminated or significantly reduced can result in potential financial liabilities that must be accepted or transferred to another entity.

Insurance:

Federal Acquisition Regulation (FAR) 28.3 and Department of Energy Acquisition Regulation (DEAR) 928.3 discuss Government policies and procedures regarding insurance. Insurance is the most common, readily available, and identifiable method to transfer a risk or potential financial liability to another entity.

Insurance is an appealing remedy and works because insurance companies can provide, for a relatively reasonable fee (premium), a significantly large financial liability coverage amount. Insurance companies can provide this normally cost effective service because of the theory of large numbers and associated risk analysis (projected losses for the risk exposure). The premiums, from a very large number of people or businesses with similar risk exposures, are held in reserve and invested to use in paying for actual covered losses as they occur.

The insurance company accepts the risk and financial liability and makes any required financial restitution. Consequently, this indemnifies the insured against financial loss resulting from the covered risk after meeting deductibles and co-pays. The premium is a pro-rated allocation to the "large number" of insured for all potential financial losses projected to occur, even if these losses do not occur, plus all of the insurance company's administrative direct and indirect expenses, and profit. In theory, the larger the number of those insured, the smaller the premium.

2.8 The Department's Alternative to Commercial Insurance

Commercial insurance under M&O and facility contracts:

Because our M&O site and facility contractors are few in number and, have rather unique and in some cases extreme and classified risks or potential liabilities, they are not offered the same cost savings and risk sharing opportunities provided normal commercial operations. The FAR recognizes a contractor's potential exposure and responsibility for potential liabilities, and allows contractors to charge, under certain circumstances, insurance and insurance type expenses to a contract.

Under extraordinary emergencies as granted by Public Law (Pub. L.) 85-804, as amended by Pub. L. 93-155 (50 U.S.C. 1431-1435), DOE is allowed to indemnify contractors from certain risk and costs. FAR Part 50 prescribes policies and procedures for entering into, amending, or modifying contracts in order to facilitate various indemnifications.

Using the FAR's general contract authority and as further discussed at DEAR 950.71, DOE may enter into indemnity agreements with its contractors. Indemnities give contractors some limited risk and liability protection. The Department's assumption of liability will be expressly limited to the availability of appropriated funds placed on the contract. DOE's policy also limits these agreements to liabilities for nuclear incidents that may not be otherwise covered by a statutory indemnity, and for uninsured non-nuclear risks.

Subject to certain limitations, the DOE, under FAR 52.250-1, indemnifies contractors with respect to unusually hazardous or nuclear risks against:

- Claims by third persons for death; personal injury; or loss of, damage to, or loss of use of property;
- Loss of, damage to, or loss of use of Contractor property, excluding loss of profit; and

- Loss of, damage to, or loss of use of Government property, excluding loss of profit.

Types of insurance that should not be approved:

Contractors can rely on the Department to compensate for certain types of insurance, but may not always perform the most critical analysis of the types of coverage appropriate for their need. This can lead to their purchase of special insurance coverages that may not be necessary or in the Department's best interest. These coverages, to the extent they protect and benefit the contractor, but provide limited or no protection or benefit for the Department, should not be approved. Examples of the type of coverage that should not be approved include Directors' and Officers' liability insurance and other forms of professional liability insurance.

2.9 Workforce Restructuring

The Department has the responsibility to ensure contractors pursue the application of best business practices to promote efficiency and to ensure contractor workforce restructuring actions are conducted in a manner that minimizes the impact on programmatic activities. The Department has a responsibility to ensure fair treatment of workers when restructuring of the contractor work force is required and perform workforce planning that provides for the continued availability of critical knowledge, skills, and abilities required for the Department's mission.

Section 3161 of the National Defense Authorization Act of 1993, sets forth specific requirements and objectives to be followed when workforce changes occur at defense nuclear facilities. Secretarial policy and DOE O 350.3 extends these objectives to all DOE contractor workforce restructuring.

The purpose of the requirements pertaining to workforce restructuring are to:

- Minimize involuntary separations;
- Ensure contractor workforce restructuring actions are conducted in a manner that minimizes the effect on programmatic activities;
- Ensure contractors provide reasonable notice to employees, their representatives, public officials, and other stakeholders of necessary reductions in contractor employment;
- Facilitate workforce planning by Department contractors;

Workforce restructuring is based on a general plan developed by DOE for a site consistent with the objectives and requirements of Section 3161. When separations are required, the contractor develops a specific plan indicating which job classifications will be reduced, how workers will be selected, including both voluntary and involuntary processes, and what separation benefits those contractor employees will receive. Practical experience in this sensitive area demonstrates the critical importance of ongoing communication and consultation between the contractor, field organizations, affected programs, legal counsel, and the Office of the Assistant General Counsel for Contractor Human Resources (GC-63). DOE's contracts also include provisions governing

how the existing workforce will be treated in terms of hiring, bargaining recognition, and compensation if there is a change in contractors.

2.10 Labor Relations

This section provides information to the contract administration team members about the DOE's policy on labor-management relations and the roles and responsibilities of DOE and its contractors.

The extent of Government ownership of plant and materials, and the overriding concerns of national defense and security, impose special conditions on labor organizations representing the contractor employees. DOE retains absolute authority on all questions of security and security rules, including the administration of security.

FAR 22.101-1 requires agencies to remain impartial concerning any dispute between labor and contractor management and that agency personnel must not undertake the conciliation, mediation, or arbitration of a labor dispute. Furthermore, DOE must not take a public position concerning the merits of a labor dispute between a contractor and its employees or organizations representing those employees.

Although DOE is not a party to the contractual relationship between contractor and union, it does have an oversight responsibility. This ensures that contractors pursue collective bargaining practices that promote efficiency and economy in contract operations, judicious expenditure of public funds, equitable resolution of disputes, and effective collective bargaining relationships.

The Contractor shall consult with DOE prior to contract negotiations with respect to the economic parameters for bargaining and during the term of a collective bargaining agreement on matters that may have a significant impact on work rules or past customs and practices. The contracting officer, in consultation with the Head of Contracting Activity, will approve or disapprove the contractor's proposed economic bargaining parameters for cost reimbursement purposes.

The Office of the Assistant General Counsel for Contractor Human Resources (GC-63) has staff expertise to assist in answering questions and determining what actions, if any, DOE may wish to consider with regard to contractor labor relations.

CHAPTER 11
REAL PROPERTY, PERSONAL PROPERTY AND TRANSPORTATION MANAGEMENT

WHAT ARE THE BASIC PRINCIPLES AND OBJECTIVES OF PROPERTY AND TRANSPORTATION MANAGEMENT?

1. To understand and properly classify the types and amounts of personal property that a contractor possesses.

2. To verify the requirement for personal property and ensure it is used in the manner authorized.

4. To ensure the proper care of, and accounting for, personal property.

5. To ensure the proper disposition of personal property at contract closeout.

6. To ensure the effective acquisition, use, maintenance and disposal of real property by the proper application of real property authorities.

7. To ensure the Certified Realty Specialist is used to review and approve all contractor real estate actions.

8. To ensure that the DOE Transportation Manager is utilized and appropriate packaging and transportation regulations and

WHY IS REAL PROPERTY, PERSONAL PROPERTY AND TRANSPORTATION MANAGEMENT IMPORTANT?

The Government has a significant investment in both real and personal property. The proper management of both real and personal property help to conserve costly Government resources. Proper transportation management helps to ensure that supplies and services are transported cost effectively and in a manner which protects property, individuals and the environment. This chapter details the roles and responsibilities of the members of the contract administration team in the transportation, personal property and real property management areas. It also provides the mechanisms its PBMC contractors should use to perform those responsibilities.

Property management is broadly defined as those functions of the government and its contractors that deal with the acquisition, control, protection, and disposition of Government property. People who manage property need to be familiar with the property for which they are responsible (both real and personal) and must be able to forecast future needs of the activities that they support. The real and personal property of the Federal government represents an asset that must be maintained, protected, controlled, used, and disposed of in a most effective and efficient manner. The effective management of real property also involves acquisitions, leases,

permits, utilization, and disposals with and without the underlying land.

Specifically, **personal property** management is defined as the:

- Management, coordination, and regulation of activities concerned with the planning of property needs;
- Acquisition of property;
- Receipt, storage, and distribution of property;
- Proper care and utilization of property;
- Property accounting control; and
- Disposition of property.

The basic principles of transportation and personal property management under which PBMC's operate are governed by requirements identified in the Federal Property Management Regulations (FPMR), DOE Property Management Regulations (DOEPMR), Federal Acquisition Regulation (FAR), and Department of Energy Acquisition Regulation(DEAR). Field sites develop and implement site-specific instructions that embellish, enhance, or further restrict the broader requirements of the FPMR and DOE PMR.

The basic principles of **real property** management are found in the statutory language of the various authorities applicable to the Department (e.g., Atomic Energy Act and DOE Organization Act), as well as the FPMR, DOE Order 430.1A, and the Real Property Desk Guide. Field elements may also develop and implement site-specific instructions relative to their real property management function.

What are the legal concepts behind Government property?

Personal Property: The subject of Government-owned personal property held by contractors is essentially one of bailment. The property consists of tangible, personal property required in research and production processes. The owner (bailor) of the property is the Government. The recipients (bailee) of the property are Government contractors. Bailment refers to performance on Government contracts.

The rights, powers, privileges, and immunities of the two parties to the bailment may be expressed as terms in the contract or they may be implied. Expressed terms are contained in the various contract property clauses included in the contract. Implied rights and duties may arise from statements of intent or courses of conduct before, during, or after contract performance. If the rights of the parties are not clearly specified and understood; and if the intention of the parties is not articulated in some other manner, disputes that arise between the parties are settled under the law by relying on general principles and precedents incorporated in the law and the applicable regulations.

Real Property: The term "bailment" does not apply to real property. The underlying land and facilities comprising the Department's real property are made available to the contractor, allowing its use by the contractor to perform the contract. There is no "lease" of land from the

Government to the contractor, nor is any rent paid. Since "fee title" to the land and facilities is vested in the United States Government, contractors cannot dispose of or otherwise cloud title to the real property. That is an inherently governmental function and is within the sole purview of government officials.. There are a few instances where government-owned facilities or "improvements" are located on private land, and even a few where government-owned facilities and private facilities are contiguous on private land. The ultimate disposition of those improvements, if such were to occur, are usually found in the terms of the site-specific contract.

Why does the Government provide personal property to contractors?

Government-owned property is considered an aid to procurement. There are many reasons why property owned by the Government may be required or provided to contractors. Several of the factors to be considered are briefly explained below:

- Economy - the cost of the contract may be reduced if the contractor doesn't need to buy the equipment and, thereby, a more favorable price may be obtained.

- Security - sometimes performance requires the use of classified equipment only available from the Government.

- Increase competition - in cases where a limited number of sources are interested in competing for Government work because of expensive equipment investment required, the availability of Government equipment may increase the number of potential bidders.

- Expedite Research/Production - some equipment requires a long lead-time to produce or acquire.

- Maintain the industrial base - some equipment is used so rarely or is so costly to maintain that except for retention by the Government, it would otherwise be lost from the domestic inventory.

Inasmuch as all existing PBMC contractors are already in possession of Government personal property, the above reasons for providing Government property would usually apply only in limited situations. Such situations might include providing Government personal property through the prime contract to subcontractors when the need arises.

What are the costs of government-owned personal property?

Good management comes from an awareness of the benefits versus the costs of management actions. Government-owned personal property can be an aid to procurement and, therefore, some benefits can accrue to the parties to the bailment. However, there are costs which should be considered such as the:

- Cost of the personal property;

- Cost of administration;

- Reduction of competition inherent in one source with significant furnished personal property;
- Reduction in contractor liability associated with the performance of the equipment; and
- Cost of disposal of personal property.

What are the types of property?

While there are different definitions of Government property by agency, generally the classifications include:

- **Real property:** land, buildings, other structures and facilities, improvements, and affixed equipment; and
- **Personal property:** movable equipment, machine tools, test equipment, furniture, vehicles, etc.

What is the policy on providing personal property to contractors?

The initial premise regarding the provision of Government personal property is that contractors are expected to furnish all assets required to perform under their contracts. If the contractor is unable to furnish necessary equipment, the Government may offer to furnish existing assets. Federal Property Management Regulations Subpart 101-43.301 states that the first source of supply for Government property is excess personal property. If such assets are not available, the Government can authorize the purchase or fabrication of the personal property by the contractor. In cases where Government furnished personal property is made available to a contractor, efforts should be made to obtain financial or other consideration for the use of the personal property.

It is recommended that the approval status of the contractor's personal property system be examined when providing Government property. Government personal property personnel interact with the contractor differently if the contractor has an already approved personal property system as opposed to a system which is either not Government approved or has deficiencies.

What are the contractual devices for providing personal property to contractors?

Contracting Officers (COs), when preparing a contract in which Government-furnished property will be made available, must ensure that the appropriate contract clauses are used. Contract administrators must be able to recognize the unique requirements of the types of contracts involved and those included clauses that require decisions and surveillance with respect to property matters. Various forms of contracts are used in Government procurement, and property is treated differently under each instrument.

- Fixed Price - Personal property may be furnished to or the contractor may be directed to purchase personal property, title to which will vest in the Government upon commencement of first use or payment by the Government, whichever comes first. Responsibility for missing, lost, or damaged personal property is not tied to negligence.

- Cost Reimbursement - There are two significant differences in the personal property provisions associated with this form of contract versus those in fixed priced contracts. In a fixed price contract the government may furnish the personal property or direct that it be purchased by the contractor. In a cost reimbursement contract, essentially everything paid for by the Department becomes Government-owned personal property. The other significant provision is the risk of loss feature. Contractor liability is based on:

  - Willful misconduct or lack or good faith.

  - Failure of the contractor's managerial personnel to take all reasonable steps to comply with any appropriate written direction of the contracting officer to safeguard such property; or

  - Failure of the contractor's managerial personnel to establish, administer, or properly maintain an approved property management system.

- Leases of Real Property - Contracts typically allow contractors to acquire leased office space, laboratory, or other space appropriate to perform under the contract. These are allowed as covered or allowable costs. Contract administrators should coordinate with the Certified Realty Specialist to ensure that a valid requirement exists for the space and that the lease is approved by the Certified Realty Specialist prior to execution.

What is Real Property Management?

Real property transactions require significant coordination. Consultation with the Certified Realty Specialist or, in the absence thereof, with Headquarters Real Estate staff in the Office of Contract and Resource Management (MA-53) will ensure the exercise of discretion in applying government authority or making value judgments in the acquisition, use, and disposal of real property - an inherently Governmental function.

What are the functions of the Contracting Officer regarding Government personal and real property?

It is not possible to list all of the property responsibilities of the CO in this brief outline. However, some major decisions that should draw the attention of the CO are:

- Selecting and drafting the contract terms and conditions including appropriate personal and/or real property clauses when property is to be provided;

- Ensuring that the Federal Property Management Regulations and the DOE Property Management Regulations are applied to contracts appropriately;

- Approving the provision of Government property;

- Coordinate with the Certified Realty Specialist on all actions associated with

real property including but limited to approving leases;

- Approving and tracking progress payments (property acquisition);
- Approving transfers of personal property;
- Reviewing, approving and disapproving (as appropriate) a contractor's personal property management system; and
- Assessing liability for missing, lost or damaged personal property.

The CO will normally delegate, through appropriate mechanisms, the responsibility for personal property management for contract(s) to a CO representative (COR). This authority to act as the CO's representative for personal property issues will be delegated to either the Organizational Property Management Officer or to a Property Administrator depending entirely on local procedures.

What are the functions of the Organizational Property Management Officer (OPMO)?

The OPMO is the key individual at a Field/Operations office with authority for administering the office's personal property management program. OPMOs normally are responsible for supporting several functions however, they shall:

Establish and administer a personal property management program for the field element which will provide for:

- Effective management of personal property in the custody of DOE and designated contractors, consistent with applicable laws and regulations;
- Application of regulations, instructions, standards, procedures, and practices as prescribed in the FPMR and DOE-PMR.;
- Planning and scheduling of personal property requirements to ensure that supplies and equipment are available to satisfy program needs while minimizing operating costs and inventory levels;
- Development and maintenance of complete and accurate inventory control and accountability record systems;
- Maximum utilization of available personal property for official purposes;
- Proper care and securing of personal property to include storage, handling, preservation, and preventative maintenance;
- Identification of personal property excess to the needs of the organization; re-utilization of the property within the Department; reporting of the property to GSA for transfer or donation; and disposition of surplus property by sale, abandonment, or destruction, as appropriate;
- Development and submission of required personal property reports;
- Assurance that DOE employees and designated contractors are aware that acts of theft, illegal possession, and

unlawful destruction or use of personal property are punishable violations of federal law, notwithstanding disciplinary measures taken under administrative policy;

- Assurance that DOE employees and its designated contractors are aware that every user of personal property is responsible for its physical protection and for reporting loss, theft, destruction, or damage of such property;

- Conduct periodic management reviews within the activity to ensure compliance with prescribed policies, regulations, standards, and procedures;

- Conduct periodic management reviews of contractor activities to ensure property management performance expectations are met by the contractor;

- Establishment of equipment and supply subsidiary records and accounts to support general ledger control accounts for personal property.

Other duties of the OPMO include:

- Process, through the contracting officer, requests for deviations to Departmental regulations;

- Serve as the principal point of contact for their organizations in matters concerning personal property management; and

- Represent their organizations at, or designate a representative to attend, Departmental meetings concerning personal property management issues; and act as liaison with other DOE offices or other Federal agencies in personal property management.

What are the functions of the Property Administrator?

Depending on local procedures, if the authority to act as the CO's representative on an individual contract is delegated to an individual other than the OPMO, then the major functions of the COR for property management administration would be the following duties. If the OPMO is delegated that authority, then these functions would be added to the list delineated in the previous section:

- Represent contracting officers in the administration of all contract requirements and obligations relating to Government personal property;

- Make recommendations concerning acceptability of contractor personal property management systems;

- Develop and apply system survey programs for designated contractors under their cognizance;

- Evaluate contractor property control systems on an ongoing basis;

- Advise contracting officers and OPMOs of any contractor noncompliance with approved procedures, or other significant problems that they cannot resolve, and recommend appropriate action;

- Resolve property administration matters and obtain assistance as necessary from contractor management, OPMOs, and program, financial, legal, technical, and security specialists as needed;

- Perform other contract administration functions related to contractor personal property management operations as delegated by contracting officers; and

- Maintain records of current operating procedures issued under the contract.

Who is the Certified Realty Specialist?

The acquisition, management, and disposal of real property has been delegated in the field to the Certified Realty Specialists with the exception of donations of land to the Department and the condemnation of real property for Federal use. At some sites, the Certified Realty Specialist has approval and signatory authority for all actions including contractor actions. In most cases, the Certified Realty Specialist has approval authority only, with signatory authority either at the Operations Office manager level (or as delegated) for Federal actions, and at the Contracting Officer level for contractor activities. How a Certified Realty Specialist manages his or her program is largely discretionary within the bounds of statutory, regulatory, and guidance constraints. For example, a Certified Realty Specialist may set up a leasing program with a contractor whereby General Service Administration utilization goals, standard conditions, and local best business practices are invoked when a contractor enters into a lease for office or other space. Once the leasing program is defined and accepted, and requirements defined and validated, the Certified Realty Specialist may only see the final product before execution. Certified Realty Specialists provide periodic oversight to ensure that space, for example, is being effectively utilized for the purposes leased.

In some situations, temporary interests in land (e.g., easements or licenses) are required to allow the contractor to perform. With Certified Realty Specialist assistance, the contractor often does the “leg work” for the temporary interest, but approval rests with the Certified Realty Specialist.

Whatever the contractor real estate action, the key to the success of the Certified Realty Specialist program vis-a-vis the contractor, is the acknowledgment by the Contract Administrator that real estate subject matter expertise rests with the Certified Realty Specialist and that all contractor real estate actions are to be submitted to the Certified Realty Specialist for review and approval.

Why is consultation with the Certified Realty Specialist important?

Situations where consultation has not occurred have resulted in the following contractor actions and Department consequences:

- Excess contractor space leased in the National Capitol Region and long term lease renewals that would not have otherwise been approved,

- Purchase orders for space which terms exceed best business practices,

- Sole source commitments for space without benefit of competition,
- Informal agreements with private landowners to use land without benefit of statutory entitlements to property owners, and
- Granting use of Federal lands and buildings without benefit of real estate instruments defining use and protecting Federal interests.

Facility Maintenance Management and How It Is Accomplished:

A primary Federal responsibility regarding management of real property is stewardship and maintenance of the assets in a condition to be able to meet mission requirements. In this regard, the contracting officer must have the contractor submit a **Maintenance Management Program Process Plan** (in consultation with the Federal maintenance manager) and approve it, provided it meets the minimum requirements as specified in the Contractor Requirements Document of DOE Order 430.1, "Land and Facility Use Planning." The process must include the following:

- The identification, inventory, and periodic assessment of the condition of physical assets in the maintenance program,
- The establishment of requirements, budgets, and a work management system to maintain the physical assets in a condition suitable for their intended use,
- The preventive, predictive, and corrective maintenance to ensure physical asset availability for planned use and/or proper disposition,
- A configuration management process to ensure the integrity of physical assets and the management system,
- The efficient and effective management and use of energy and utilities,
- A method for the prioritization of infrastructure requirements,
- The management of backlogs associated with maintenance, repair, and capital improvements.

TRANSPORTATION MANAGEMENT

WHAT IS A GENERAL DESCRIPTION OF THE PROCESSES UNDER TRANSPORTATION?

It is important for members of the contract administration team to coordinate with the local DOE Transportation Manager before contract award during the drafting of the solicitation or contract, and when transportation issues arise under the Department's Performance Based Management Contracts (PBMCs).

FAR 47.101, "Policies," states that the contracting officer shall obtain traffic management advice and assistance in the

consideration of transportation factors required for:

- Solicitations and awards;
- Contract administration, modification, and termination; and
- Transportation of property by the Government to and from contractors' plants.

The proper planning and administration of transportation can avoid or mitigate both cost and safety concerns. The DOE order which outlines major safety responsibilities and authorities of DOE personnel, DOE M 411.1-1A, "Safety Management Functions, Responsibilities and Authorities Manual," specifically references transportation orders:

- DOE O 460.1A, "Packaging and Transportation Safety" and
- DOE O 460.2, "Departmental Materials Transportation and Management"

The Office of Environmental Management has departmental responsibility for all transportation authorities and is the corporate center of packaging and transportation expertise. It supports infrastructure and coordinated transportation activities for all DOE materials including hazardous materials, substances and wastes.

Typically, the Department's packaging and transportation activities are performed through four Program Offices which provide program policy direction and oversight. The Office of Defense Programs manages weapons components and subassemblies transportation. The Office of Nuclear Energy, Science, and Technology/Naval Reactors manages the transportation of naval spent fuel and isotopes. The Office of Civilian and Radioactive Waste Management manages commercial spent fuel transportation programs. The Office of Environmental Management manages transportation of spent fuel, special nuclear materials and radioactive and hazardous waste materials and provides management direction (policy and guidance) and oversight for all Departmental elements having a transportation and/or packaging interest. Each DOE Field Element has a designated transportation manager who should be consulted and relied upon for all transportation matters.

However, the Office of Environmental Management is assigned DOE-wide responsibility to establish policy and guidance for DOE transportation and packaging management; represent DOE with other Federal activities; establish and maintain a transportation logistics program, etc.

Transportation responsibilities include providing the mechanisms to achieve the most efficient, economical and safe delivery of government materials from origin to final destination. In this process, DOE has negotiated tenders (discounted pricing agreements) with rail, air and motor carriers on behalf of the agency and its contractors. Tenders are located on the Automated Transportation Management System rate/route module. Rate and service negotiation support is available from the

DOE transportation manager. To obtain these pricing agreements and/or acquire information relating to transporting non-pricing agreement materials, contact the DOE transportation manager. Also, it's highly recommended that bid requests with transportation costs be separated from other costs.

When obtaining services that involve hazardous materials, the DOE transportation manager has a preferred motor carrier list that should be utilized to move such material. This list is based on results of the Motor Carrier Evaluation Program that evaluates motor carrier compliance to regulations, safe operations, financial stability, and equipment maintenance and road worthiness. Transportation safety is top priority to the Department. To obtain the list of preferred carriers, contact the Field Element Transportation Manager access the Internet web page address at **http://www.emwebwin.com/**, which is also listed in Appendix B.

In shipping situations where certain factors may warrant special considerations, (e.g. high value products, short delivery time, or excessive weight or dimensional parameters) it is recommended that the appropriate DOE contractor or DOE transportation specialist be contacted in order to achieve the best possible shipping scenario to meet each of the customers needs at the lowest landed cost.

Vehicles used by DOE Contractors are required to comply with local, state and federal regulations (49 CFR 350-399, Federal Motor Carrier Safety Regulations). See DOE Order 460.1A and DOE O 460.2 for guidance concerning vehicle operators.

DOE maintains two directives with Contract Requirements Documents and guides governing transportation. These are:

- DOE Order 460.2, "Department Materials Transportation and Packaging Management;" and

- DOE Order 460.1A "Packaging and Transportation Safety".

The "DOE Transportation Operation Manual" is an excellent guidance manual to assist all DOE offices in the area of transportation; packaging, operations, and procurement personnel in ensuring transportation functions are implemented properly. The "DOE Transportation Operations Manual" may be obtained from the DOE/NV Transportation Manager at (702) 295-7444.

DOE Contractor transportation personnel are responsible for operations and logistics functions. DOE Transportation Managers in the Field elements provide contractor oversight and guidance. The Office of Environmental Management is responsible for programs that support transportation/packaging:

- Policy/guidance development,

- Integrated Safety Management,

- Regulatory compliance and oversight,

- Program integration
- Transportation and packaging management,
- Transportation stakeholder interface, and
- Systems engineering and analysis.

Where can I obtain general information on DOE transportation?

For general information relating to DOE transportation, refer to web site **http://www.ntp.doe.gov/** which is also listed in Appendix B. Specific information can be obtained by contacting the DOE Office of Transportation at 301-903-1969.

The Office of Environmental Management (EM) has established the National Transportation Program (NTP) with the Albuquerque Operations Office (AL) and the Idaho Operations Office (ID) to assist in coordinating transportation operations and activities among DOE Field elements. The NTP participants (EM, AL and ID) work with DOE Field elements and contractors to provide assistance in transportation matters.

WHAT ARE MY MAJOR ROLES AND RESPONSIBILITIES IN THE AREA OF PROPERTY AND TRANSPORTATION 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; and is either commonly performed by this individual or reflects "good business practice."

(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.

MAJOR ROLES AND RESPONSIBILITIES IN THE AREA OF PERSONAL PROPERTY MANAGEMENT

HEADS OF FIELD ORGANIZATIONS

* Ensure that a personal property management program is established for their organizations.
[Title 41 CFR Part 109, “DOE Property Management Regulations”]

* Appoint an Organizational Property Management Officer responsible for the organization’s personal property management program.
[Title 41 CFR Part 109, “DOE Property Management Regulations”]

DEPARTMENTAL PROPERTY MANAGEMENT OFFICER

* Develop and issue Departmental personal property management policies and guidance.
[Title 41 CFR Part 109, "DOE Property Management Regulations"]

* Administer and evaluate the Department's personal property management program.
[Title 41 CFR Part 109, "DOE Property Management Regulations"]

ORGANIZATIONAL PROPERTY MANAGEMENT OFFICER

* Establish and administer personal property management programs within their organizations in accordance with the Federal requirements prescribed in the FPMR and Departmental standards and practices contained in this chapter.
[Title 41 CFR Part 109, "DOE Property Management Regulations"]

* Conduct periodic management reviews to assure organizational compliance with prescribed Federal and Departmental policies, regulations, and standards.

* Serve as principal point of contact for their organization in matters regarding personal property management.

CONTRACTING OFFICER

* Determine whether to delegate authority to a Property Administrator to act as the CO's authorized representative for handling personal property matters.

Direct the disposition of property during the progress of the work or upon completion or termination of the contract.
[DEAR 970.5204-21]

Direct the contractor to identify Government property by marking and segregating such that Government ownership is indicated.
[DEAR 970.5204-21]

Direct the contractor to conduct physical inventories as prescribed by regulation.
[DEAR 970.5204-21]

Approve, as appropriate, the contractor to sell, exchange, or acquire Government property at a fair market price as agreed upon with the contractor.
[DEAR 970.5204-21]

Direct the application of proceeds from a property disposition to either the reduction of costs allowable under the contract, or credit to account to the Government.
[DEAR 970.5204-21]

Require the contractor to render an accounting of all Government property which has come into its possession or custody under this contract upon completion of the work or termination of the contract.
[DEAR 970.5204-21]

May direct the contractor to safeguard and protect Government property in his possession or custody in accordance with sound business practices.
[DEAR 970.5204-21]

May direct, in writing, the contractor to safeguard high-risk property and classified materials.
[DEAR 970.5204-21]

Inform the contractor when there is reason to believe that lost, damaged, or destroyed Government property is the result of contractor managerial personnel's: willful misconduct or lack of good faith; failure to take reasonable steps to comply with written direction of the CO to safeguard property, or; failure to establish, administer, or properly maintain an approved property management system in accordance with Federal Regulations.
Determine whether the contractor has met its burden of proof to show that it should not be required to compensate the Government for the loss, destruction or damage to property.
[DEAR 970.5204-21]

Determine a fair market value for lost, damaged or destroyed property if none exists.
[DEAR 970.5204-21]

Approve the contractor's property management system when maintained and administered in accordance with sound business practice, Federal regulations, directives, and specified instructions and when it provides for**:**

- Comprehensive coverage of Government property's entire life cycle from identification through disposition;
- Employee personal responsibility and accountability;
- Full integration with contractor's other administrative and financial systems; and

- A method for continuously improving property management practices through practices established by “best in class” performers.

[DEAR 970.5204-21]

* Ensure, for property management system approval, that the contractor provides a baseline inventory of all Government property within six months of contract execution, unless the CO directs otherwise.
[DEAR 970.5204-21]

* Ensure, for property management system approval, a joint reconciliation of the property inventory with any predecessor contractor
[DEAR 970.5204-21]

Authorize, when appropriate, the contractor to obtain and use Interagency Fleet Management System vehicles and related services.
[FAR 52.251-2]

Obtain Interagency Fleet Management System vehicles and related services when authorized by the CO.
[FAR 52.251-2]

PROPERTY ADMINISTRATOR

* Support the contract administration function.
* Is an authorized representative of the CO regarding the contractual and technical aspects of Government property.
* Act on behalf of the CO and is appointed in writing by a “Certificate of Appointment.”
* Evaluate the contractor’s property management system in writing.
* Administer an approved property program for Government property through its life cycle to final disposition.
* Review the contractor’s property system procedures.

CONTRACTOR

Identify Government property coming into its possession or custody by marking and segregating it in a way that indicates Government ownership.
[DEAR 970.5204-21; Title 41 CFR 109 - 1.5105; Title 41 CFR 109 - 1.5106]

Dispose of Government property in its possession or custody as directed by the CO.
Sell, exchange, or acquire Government property at a fair market value as agreed by the CO.
Apply amount received from disposition of property to reduce costs allowable under the contract, or otherwise credited to account to the Government as directed by the CO.
Render an accounting of all Government property which has come into its possession or custody under the contract upon completion of the work or termination of the contract.
[DEAR 970.5204-21]

Take all reasonable precautions in addition to other actions directed by the CO to safeguard and protect Government property.
[DEAR 970.5204-21]

Ensure that adequate safeguards are established and complied with for the handling, control, and disposition of High-Risk property and classified materials consistent with practices and procedures for property management contained in Federal Regulations.
[DEAR 970.5204-21]

Understand and agree that the term "contractor's managerial personnel" means directors, officers, managers, superintendents, or other equivalent representatives who have supervision or direction of the following in connection with the performance of a contract:

- All or substantially all of the business; or
- All or substantially all of the operations at any one facility or separate location; or
- A separate and complete major industrial operation; or
- A separate and complete major construction, alteration, or repair operation; or
- A separate or discrete major task or operation.

Understands and agrees that for a nonprofit situation, the term "contractor's managerial personnel" means directors, officers, managers, superintendents, or other equivalent representatives who have supervision or direction of all or substantially all of**:**
(a) the business; or
(b) the operations at any one facility or separate location; or
(c) the contractor's Government property system and/or Major System Acquisition or Major Project.
[DEAR 970.5204-21]

Is liable for the loss, destruction, or damage to Government property caused by:

- willful misconduct or lack of good faith on the part of the Contractor's managerial personnel;
- failure of contractor managerial personnel to take all reasonable steps to comply with appropriate written direction of the CO regarding property and classified materials;

- failure of contractor managerial personnel to establish, administer, or properly maintain an approved property management system in accordance with Federal Regulations and directives or instructions from the CO.

Has the burden of proof to demonstrate that it should not be required to compensate the Government if its property is lost, damaged, or destroyed as a result of conduct listed above.
[DEAR 970.5204-21]

Compensate the Government if it is determined liable for lost, damaged, or destroyed property as follows:

- Damaged property: pays for repair plus costs incurred for temporary replacement. Costs to repair will not exceed fair market value of property.
- Destroyed or lost property: pays fair market value of property at time of loss or destruction, plus costs incurred for temporary replacement or disposition of destroyed property.

Accepts CO's determination of what property's fair market value is if it is determined that no fair market value exists.
[DEAR 970.5204-21]

In the event of damaged, destroyed, or lost property:

- Immediately inform the CO of the occasion or extent;
- Take all reasonable steps to protect the remaining property;
- Repair or replace the property in accordance with CO's written direction.
- Take no action prejudicial to the right of the Government to recover, and provides all reasonable assistance in obtaining recovery.

[DEAR 970.5204-21]

Use Government property only for performance of the contract.
[DEAR 970.5204-21]

Establish, administer, and properly maintain an approved property management system for Government property in its possession.
The system accounts for control, utilization, maintenance, repair, protection, preservation, and disposition of the property and is maintained and administered in accordance with sound business practices, Federal Regulations, directives, and instructions as prescribed by the CO.
[DEAR 970.5204-21]

Design a system that provides for:

- Comprehensive coverage of Government property's entire life cycle, from identification through disposition;
- Employee personal responsibility and accountability;
- Full integration with contractor's other administrative and financial systems;

- A method for continuously improving property management practices through practices established by “best in class” performers.

[DEAR 970.5204-21]

Provide a baseline inventory of all Government property within six months after execution of the contract.
[DEAR 970.5204-21]

Conduct a joint reconciliation of the property inventory with any predecessor contractor.
Agree to participate in a joint reconciliation of the property inventory upon completion of the contract.
[DEAR 970.5204-21]

Furnish DOE the documentation required by the State to acquire tags.
[DEAR 952.208-7]

Operate all leased motor vehicles on Federal tags unless it is determined that State tags are necessary to accomplish the mission.
[DEAR 952.208-7]

PROPERTY CUSTODIAN

* Provide reasonable physical protection for property.
[DEAR 970.5204-21]

* Report consumption, i.e., shrinkage (unlocated and damaged) to supervisors promptly.
[DEAR 970.5204-21]

* Contact the property control activity when property is no longer required or repairs are required.
[DEAR 970.5204-21]

* Contact the accountable individual when changes in custody occur.
[DEAR 970.5204-21]

* Use property for official purposes only.
[DEAR 970.5204-21]

* Apprise the accountable individual regarding disposal risks of property (i.e., High Risk).
[DEAR 970.5204-21]

MAJOR ROLES AND RESPONSIBILITIES FOR REAL PROPERTY

CONTRACTING OFFICER

Approve the purchase, lease, or temporary acquisition of real property by the contractor (*In consultation with a Certified Realty Specialist).
Provide the contractor (*in consultation with a Certified Realty Specialist) with direction on the justification of and execution of any real property acquisitions**.**
[DEAR 952.217-70]

Ensure the requirements specified in the Contractor Requirements Document are included in contracts and subcontracts. Work with each contractor to document in a formal agreement and/or contract the establishment and use of agreed upon performance-based objectives, measures, and expectations for these requirements.
[DOE O 430.1A]

CONTRACTOR

Acquire or propose to acquire, with the prior written approval of the contracting officer, real property by purchase, lease, or acquisition of temporary interest through easement, permit or license. (Note: At DOE, contractors have not acquired real property for the Government, although they have been allowed to do much of the preparatory work. Please consult your Certified Realty Specialist if this issue arises.)
[DEAR 952.217-70]

Ensure justification and execution of any real property acquisition is in accordance with CO's direction.
[DEAR 952.217-70]

Include DEAR 952.217-70 in all subcontracts in which real property will be acquired.
[DEAR 952.217-70]

Use a process for the operation and maintenance of physical assets that shall ensure, as a minimum:

- The identification, inventory, and periodic assessment of the condition of physical assets in the maintenance program.
- The establishment of requirements, budgets, and a work management system to maintain physical assets in a condition suitable for their intended use.
- The preventive, predictive, and corrective maintenance to ensure physical asset availability for planned use and/or proper disposition.
- A configuration management process to ensure the integrity of physical assets and system.
- The efficient and effective management and use of energy and utilities.
- A method for the prioritization of infrastructure requirements.
- The management of backlogs associated with maintenance, repair, and capital improvements.

[DOE O 430.1A]

MAJOR ROLES AND RESPONSIBILITIES FOR TRANSPORTATION

OFFICE OF ENVIRONMENTAL MANAGEMENT

Certifying official responsible for administration of DOE program for certification of fissile and Type B packaging.
Approve DOE contractor facilities for test and evaluation of Department of Transportation Specification package designs for radioactive materials.
Provide the point of coordination for DOE with outside regulatory agencies concerning transportation safety packaging.
Review requests for DOT Certificates of Competent Authority for international transportation and NRC Certificates of Compliance and forward requests to the appropriate agency.
Support the sharing of packaging and transportation safety successes and corrective actions through lessons learned program.
Provide technical assistance and training for packaging and transportation safety matters.
[DOE O 460.1A]

Establishes policy and guidance for DOE materials transportation and packaging
Represents DOE in matters dealing with transportation and packaging operations with other Federal entities.
Establishes and manages a transportation logistics program.
Conducts technical assessments of DOE Field Elements.
[DOE O 460.2]

PROGRAM OFFICE

Ensure DOE Field Elements and contractors fully implement and comply with this order.
Coordinate program related transportation plans and systems and packaging development activities with the Office of Environmental Management.
Conduct program reviews of transportation and packaging management with the Office of Environmental Management.
[**DOE O 460.2]**

OPERATIONS/FIELD OFFICE MANAGER

Ensure contractors under their purview fully implement and comply with the Order.
Review and approve contractor onsite Transportation Safety Documents.
Review and process through the Office of Environmental Management: requests for DOE exemptions, Department of Transportation exemptions and renewals, and Nuclear Regulatory Commission packaging certificates.
Review and process Safety Analysis Reports for Packagings through the responsible Secretarial Officer.
Determine whether adequate protection can most effectively be achieved by operating under old or revised Orders.
Ensure the Contractor Requirements Document is incorporated into contracts by the CO either through a clause or statement of work.
Obtain waivers from tribal, state, and local transportation laws, rules and regulations as needed and provide to the responsible Secretarial Officer and the Office of Environmental Management.
[DOE O 460.1A]

Ensure that all DOE Field Elements and contractors under their purview involved in performing or managing transportation and packaging fully implement and comply with the requirements of this order.
Issue Price-Anderson indemnity agreement certificates to carriers, upon their request, or notify the requesting carriers and the referring organization, as applicable, that the shipment is not covered by an indemnity agreement.
Negotiate with carriers, or authorize cost-type contractors to negotiate with carriers, concerning rates, classification ratings, services, and related transportation matters.
Conduct Technical Assessments of site transportation and packaging programs at least every 3 years, and provide timely notice to EM-26 of the need for associated technology for use in transportation and packaging operations and development.
[DOE O 460.2]

Determine whether to request a contracting officer to incorporate the requirements of the Contractor Requirements Document into new or existing contracts or whether the requirements of the canceled Orders should remain effective as incorporated into existing contracts in order to provide adequate protection.
[DOE O 460.2]

CONTRACTING OFFICER

Grant written permission to ship in other vessels and equitably adjust the contract price to reflect the difference in cost. **[FAR 52.247-64]**

Authorize, if advisable, supplies to be shipped on a commercial bill of lading.
[FAR 52.247-1]

Authorize, to the extent advantageous to the Government, supplies to be shipped on a Government bill of lading
[41 CFR 109-40.50]

CONTRACTOR

Ensure before shipment is made that the commercial shipping documents are annotated whether government is consignor/consignee in accordance with the clause.
[FAR 52.247-1, 41 CFR 109-40, DOE O 460.2]

Agree to use and have subcontractors use U.S.-flag air carriers for international transportation of personnel (and their personal effects) or property to the extent that service by those carriers is available**. [FAR 52.247-63]**

Include a statement of unavailability of a U.S.-flag air carrier on the voucher identifying the essentiality of such travel and the rationale for that action if a carrier other than a U.S.-flag air carrier is used. **[FAR 52.247-63]**

Use privately owned U.S.-flag commercial vessels to ship at least 50 percent of the gross tonnage under the contract whenever shipping any equipment, materials, or commodities, under the conditions set forth in paragraph (a) to the extent that such vessels are available at rates that are fair and reasonable for privately owned U.S. -flag commercial vessels.
[FAR 52.247-64]

Submit one legible copy of a rated on-board ocean bill of lading for each shipment to the CO and the Office of Cargo Preference, in accordance with the clause.
Subcontractor bills of lading are submitted through the prime contractor.
[FAR 52.247-64]

Insert the substance of the clause in all subcontracts or purchase orders, except for contracts at or below the simplified acquisition threshold.
[FAR 52.247-64]

WHERE CAN I GO FOR MORE DETAILED INFORMATION ON TRANSPORTATION AND PROPERTY MANAGEMENT?

On Personal Property Management

1. DEAR 952.208-7, "Tagging of Leased Vehicles"
2. DEAR 970.5204-21, "Property"
3. Department of Energy Property Management Regulations (Title 41 CFR Chapter 109)
4. Acquisition Guide, Chapter 45, "Government Property"
5. Federal Property Management Regulations (Title 41 CFR Chapter 101)
6. FAR 52.251-2, "Interagency Fleet Management System Vehicles and Related Services"

On Real Property Management

7. DEAR 952.217-70, "Acquisition of Real Property"
8. Acquisition Guide, Chapter 45, "Government Property"
9. DOE Order 430.1, "Land and Facility Use Planning"
10. DOE O 430.1A, "Life Cycle Asset Management"
11. Federal Property Regulations (Code of Federal Regulations, Title 41, Chapter 101)
12. DOE Real Estate Process, Desk Guide for Real Estate Personnel (This Guide is not available electronically through the Internet but may be accessed through the Certified Realty Specialist.)

On Transportation Management

13. FAR 52.247-1, "Commercial Bill of Lading Notations"
14. FAR 52.247-63, "Preference for U.S.-Flag Air Carriers"
15. FAR 52.247-64, "Preference for Privately Owned U.S.-Flag Commercial Vessels"
16. DOE O 460.1A, "Packaging and Transportation Safety"
17. DOE O 460.2, "Departmental Materials Transportation and Management"
18. 41 CFR 101-40 "Transportation and Traffic Management" (Federal Regulations)
19. 41 CFR 109-40 "Transportation and Traffic Management" (DOE Regulations)

20. 49 CFR (all chapters)
21. DOE G 460.2 “Implementation Guide for DOE O 460.2"
22. DOE Transportation Operations Manual

DO YOU HAVE ANY COMMENTS OR SUGGESTIONS FOR IMPROVING THIS CHAPTER OR THE BOOK? IF SO, PLEASE CONTACT US AT:

editor@pr.doe.gov

Inter-Contractor Purchases

0 Overview

This chapter provides guidance on the internal management control process to be followed by contracting activities to ensure that Inter-Contractor Purchases (ICPs) entered into by authorized contractors under their cognizance comply with necessary requirements.

This guidance provided here does not affect a contractor's ability to place orders against pre-established contracts for property or services awarded by another contractor for use by other Department of Energy (DOE) contractors pursuant to the consortium purchasing concept. This guidance also does not affect the responsibilities for accounting for ICP transactions in accordance with the Accounting Handbook.

Guiding Principles

- Inter-Contractor Purchases expedite the purchase of necessary special or unique services or expertise from other authorized DOE contractors.
- Contractors have a responsibility or periodically assess the use of ICP transactions and report to DOE any inappropriate uses.

• Background

The Department of Energy Acquisition Regulation requires that a contractor's purchasing system make use of effective competitive techniques in obtaining the services and expertise necessary to meet its mission needs.

The Department's ICP process evolved to expedite the acquiring of unique or specialized services and expertise from other DOE major facilities contractors, thereby reducing lead and delivery time from months to a matter of days. The ICP process, however, was intended for use only in special circumstances (e.g., where services are not readily available from the private sector). Many of the process steps inherent in a normal procurement transaction, such as cost and price analysis, rate verifications, flow-down clauses are eliminated through use of an ICP transaction.

In order to facilitate this type of transaction, the Department developed a process for the inter-office transfer of funds involving, among other things, ICP transactions of $250,000 or more and a similar process for ICP transactions under $250,000. Neither of those processes is affected by this guidance.

• Definitions

The term ***Inter-Contractor Purchase*** means a subcontract level purchase transaction between two or more DOE management and operating contractors or site integrating contractors. The transaction is appropriate only as described in this guidance. These transactions tend to be less formal than a subcontract, however, the necessity of establishing a fair and reasonable cost for performance and the necessity of effectively administering the transaction remain. Inter-Contractor Purchases as used in this Guide Chapter Letter include transactions known by the following names, among others: Inter-office Work Orders, Integrated Contractor Order, Memorandum Purchase Order, Integrated Contractor Requisitions.

The term ***Contractor*** means a management and operating contractor or other major site or facilities contractor which is a party to an ICP transaction.

• Guidance

Contracting Officers shall ensure that the contractor's approved procurement system provides adequate management control and oversight relating to the use of ICPs, / consisting of the following principles:

> An ICP transaction is used only if the following criteria are met: (a) the performing contractor has special or unique experience or equipment to perform work not readily available from the private sector; (b) the nature of the work is consistent with the scope of the performing contractor's contract; and (c) any effort subcontracted by the performing contractor is incidental to the effort.

It is the requesting contractor's responsibility to ensure that the use of an ICP is at a fair and reasonable cost or price and properly administered.

For ICP transactions expected to exceed $250,000, the requesting contractor shall appropriately document compliance with the criteria of A 1. above and the fairness and reasonableness of the proposed cost or price. ICPs expected to exceed $1,000,000 shall be documented and submitted to the DOE contracting officer for written consent prior to the issuance of the proposed ICP.

Upon receipt of an appropriately documented contractor's request to issue an ICP expected to exceed $1,000,000, the contracting officer will either provide written consent to issue the ICP or require that the acquisition be processed as a normal purchase in accordance with the contractor's purchasing systems and methods. The consideration and disposition should occur within two working days of receipt of the request.

The contractor should periodically assess the adequacy of its control system, determining whether ICPs were used in an appropriate manner and are being effectively performed. The assessment is subject to validation by the DOE/NNSA field activity that has cognizance over the contractor. The contractor shall promptly notify the DOE contracting officer of any ICP transaction found to be inconsistent with these guidelines.

A contractor's inappropriate use of an ICP may be the basis for lowering the threshold for prior written consent of DOE then in effect and may result in the disallowance of costs incurred that are in excess of those that would have been incurred had the transaction been handled appropriately.

M&O Contractor Incentives – Fee, Rollover of Performance Fee, and Award Term

Guiding Principle

DOE contractors are motivated in a variety of ways, depending on the nature of the firm, the Government's requirement, or other specific circumstances. No single method applies to all contractors. The goal of the Department is to obtain maximum return from its contractors by offering a rational mix of integrated, fair, and challenging incentives to its contractors.

[Reference: DEAR 970.1504-1-2]

1.0 Summary of Latest Changes

This update makes administrative and formatting changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references.

2.1 Overview. This chapter provides: (1) a synopsis of the M&O contractor fee policy (focused on the mechanics of the calculation and the key considerations of the policy); (2) guidance on a key aspect of the policy, linking performance fee to outcomes, including guidelines on allowing rollover of performance fee; and (3) guidance on the use of the non-fee incentive of award term. In this guide chapter, the term "DOE" refers to both DOE and NNSA.

2.2 Background. M&O contractor fee policy, found at DEAR 970.1504-1, provides a comprehensive approach to determining an appropriate fee for contractors performing DOE M&O contracts and other contracts as determined by the DOE Senior Procurement Executive. Since the contractors and the work they perform cover a wide spectrum, the fee policy is necessarily complex. The first section of this guide chapter provides a straightforward articulation of basic mechanics and considerations of the policy. Fee must be tied to contractor performance. The guidance in the second section of this guide chapter discusses rollover of performance fee (fee not earned in an evaluation period that is available for payment in a

subsequent period), which requires careful consideration of its effect on the contractor's motivation, because it provides the opportunity to earn the same fee more than once.

The final section of this guide chapter provides guidance on the non-fee incentive of award term. Although recognized and used for a number of years by several Federal agencies, no Government-wide regulation or guidance currently addresses award term incentives. Within DOE, the Report of the Blue Ribbon Commission on the Use of Competitive Procedures for the Department of Energy Labs, titled "Competing the Management and Operations Contracts for DOE's National Laboratories," suggested that outstanding laboratory contractors could "be rewarded with significant contract extensions, in most cases up to a maximum of 20 years." It's important to understand that this incentive has considerations that must be weighed carefully to ensure that DOE derives a meaningful benefit from its use. As a matter of DOE policy, award term incentives may only be used in management and operating (M&O) contracts for DOE laboratories and then only with the approval of the DOE Senior Procurement Executive or NNSA Senior Procurement Executive, as appropriate.

2.3 Synopsis of M&O Fee Calculation & Key Considerations of M&O Fee Policy

2.3.1 How To Calculate Total Available Fee. There are four possible components in the fee calculation, depending on whether the site is a laboratory or a non-laboratory and whether the contract type is fixed-fee or cost-plus-award fee.

- Non-Laboratory
  - Fixed-fee contract
    - Determine the fee base
    - Determine the maximum fee from the fee schedule for that fee base
    - Calculate the "appropriate fixed fee"
      - Evaluate the eight significant factors at 970.1504-1-5
      - Assign "appropriate fee values"
  - Cost-plus-award-fee contract
    - Multiply the "appropriate fixed fee" by the classification factor for the facility/task (from DEAR 970.1504-1-9 (c), (d), and (e)) to obtain total available fee
- Laboratory
  - Fixed-fee contract
    - Determine if fee is appropriate at all (from the six considerations at 970.1504-1-3). If not, stop here!

- If fee appropriate
  - Determine the fee base
  - Determine the maximum fee from the fee schedule tied to the fee base
  - Calculate the "appropriate fixed fee"
    - Evaluate the eight significant factors at 970.1504-1-5
    - Re-evaluate the six considerations at 970.1504-1-3
    - Consider benefits lab operator will receive due to its tax status
    - Assign appropriate fee values
    - Ensure appropriate fixed fee is less than or equal to 75% of the fixed fee that would have been calculated for a non-laboratory

- Cost-plus-award-fee contract
  - Determine if fee is appropriate at all (from the six considerations at 970.1504-1-3)
  - If fee appropriate
    - Multiply the "appropriate fixed fee" by the classification factor for the facility/task to obtain total available fee (970.1504-1-9 (c), (d), and (e))
  - Ensure the total available fee is less than or equal to 75% of the total available fee that would have been calculated for a non-laboratory.

2.3.2 Key Considerations For Determining M&O Total Available Fee

- Coordinate all M&O fee determinations with the Procurement Executive, whether or not using the maximum fee allowed or a lesser amount and whether adhering to fee policy or not

- Procurement Executive approval is required for the following
  - Establishing fees outside the annual funding cycle
  - Establishing fee amount greater than that derived from the fee schedules
  - Establishing total available fee greater than normal due either to the contractor using its own facilities or other resources or to the contractor being assigned objective performance incentives that are of unusual difficulty or performance incentives whose completion would provide extraordinary value
  - Including allowable costs as proposed fee in a laboratory contract
  - Establishing total available fee for a laboratory greater than 75% of that which would have been calculated for a non-laboratory

- Not establishing the fee for the life of a laboratory contract
- Using a cost-plus-fixed fee contract type for other than a laboratory contract
- Using a fee schedule more than once in determining fee
- For a cost-plus-award-fee contract, establishing a total available fee greater than the product of: the fee that would be calculated for a fixed fee contract and the appropriate classification factor

- Assess whether fee motivated contractor performance
  - Dramatic increases in total available fee over historical levels generally not warranted

- Consider the Fee Base/Fee Schedule
  - Generally, use only one fee base/fee schedule, that of the predominant work, for a contract
  - If unusual circumstances exist and considering using more than one fee base/fee schedule
    - Prepare rationale
    - Coordinate as soon as practical with procurement executive
    - Approval criteria are the significant differences between the nature, scope, risk, and dollar value of the other work and that of the predominant work
- Additional constraints on laboratories for determining fee
  - Six considerations (970.1504-1-3) to determine if any fee is appropriate; if fee is appropriate, use the six considerations again in determining appropriate fee
  - Consider tax status of contractor in determining fee
  - Fee must be less than or equal to 75% of the fee that would have been calculated for a non-laboratory
  - Fees for laboratories may be significantly less than fees for non-laboratories

2.4 **<u>Linking Performance Fee to Acquisition Outcomes</u>**. A cost-plus-award-fee (CPAF) contract is generally the appropriate contract type for an M&O contract. Total available fee in this case is the sum of base fee and performance fee. Base fee is not generally appropriate. Performance fee can comprise both objective and subjective fee components.

Performance fee must relate to clearly defined performance objectives and performance measures. Where feasible, the performance objectives and measures should be expressed as desired results or outcomes. The specific measures used to determine the contractor's achievement must be stated as concretely as possible. Following these principles will increase

the probability that the contractor will only receive performance fee for government negotiated acquisition outcomes. This is especially important to keep in mind in evaluating the contractor's performance against its objectives and measures for subjective fee components.

Using subjective fee components is less desirable than using objective fee components because there is not as clear a link between performance and reward. Only when it is not feasible to use objective measures of performance should subjective fee components be used, and they should be tied to identifiable interim outcomes, discrete events, or milestones to the maximum extent practicable. When using subjective fee components it is especially important to ensure that the contract/award fee plan clearly defines how the Government will measure the contractor's performance. Fee payment must depend upon only one thing--the contractor's providing the acquisition outcomes for which DOE negotiated.

2.5 <u>Rollover of Performance Fee</u>. Some performance evaluation and measurement plans contemplate the rollover of unearned performance fee—typically the subjective fee component—from one period to another. Since this practice gives the contractor more than one chance to earn the same fee, its use could violate the principles discussed above. Consequently, the following limitations apply when applying rollover (these limitations do not apply to the extent a clearly identifiable Government action or inaction caused the contractor to fail to earn performance fee):

- The DOE Senior Procurement Executive or the NNSA Senior Procurement Executive, as appropriate, must approve use of a rollover provision. Because the use of a rollover is an exception rather than the rule, convincing rationale addressing both benefits and costs must accompany any request for use. The DOE Senior Procurement Executive or the NNSA Senior Procurement Executive, as appropriate, will consider the following, among other things related to the benefits and costs of the proposed rollover, in determining whether rollover is appropriate:
    - The contractor may only earn a portion of the unearned performance fee—regardless of how well the contractor performs in the subsequent period. The size of this portion depends on
        - how close the contractor came to delivering the originally negotiated performance (for example, a contractor failing to reach a milestone by a year must earn significantly less that a contractor that fails by a week) and
        - how much DOE still desires the originally negotiated performance, some other performance, or both.
    - The performance expectations must be in place before the contractor starts work on the effort associated with the rollover fee.
    - The performance expectations must be of such rigor and evident nexus to the value of the "new" work as to be clearly equitable to the Department.

The contract file must include complete documentation of the use of rollover.

2.6 Award Term

2.6.1 General.

- In establishing appropriate incentives for contractors, it is well-founded Government policy that fee is to be reasonable, reflecting effort (the complexity of the work and the resources required for contract performance), cost risk (the degree of cost responsibility and associated risk the contractor assumes under the contract type and the reliability of the cost estimates in relation to the complexity of the task), and several other factors (for example, support of Federal socioeconomic programs, investment in capital, and independent development).

- An award term incentive provides a new dimension in contractor incentives. An award term incentive has similarities to award fee, with the major difference being the contractor earns additional periods of performance instead of award fee. An award term incentive rewards the contractor with additional contract term if: (1) the performance of the contractor meets specific contractually required criteria; and (2) any contract specified conditions are met. The process for administering award term can be similar to, or separate from, the process for administering award fee, but the award term performance objectives must be distinct and separate from the award fee performance objectives. Typically, the contractor's superlative performance in meeting award fee performance objectives will be the only gateway to the contractor's being eligible to earn award term. Additionally, the award term performance objectives will be higher, broader, or further reaching in scope (or perhaps all three) than the award fee performance objectives.

- If an award term incentive is used, it must be integrated with other contract incentives, for example, fee. Consequently, while the value of an award term incentive can not be easily quantified, it must be considered in determining a reasonable fee. That is, if a fee of x dollars is reasonable for a contract that includes no other incentives, then a fee of less than x dollars would be reasonable for a contract that includes an award term incentive. A 5 to 15 percent reduction (to the amount of total available fee for the contract that would be reasonable if no award term incentive were included) would usually be appropriate. An example of a reasonable reduction would be a 1 percent reduction to each annual available fee amount (that would be reasonable if there were no award term incentive) for each additional year that the contractor can earn over the course of the contract. In this example if the contract includes a base term of five years and 15 additional years that the contractor can earn, the 1 percent reduction per additional year

results in a 15 percent reduction to each annual available fee amount. The formula for this example is:

[(1 percent reduction in annual available fee amount)/(each additional year that the contractor can earn)] x

1. [15 possible additional years that the contractor can earn]=
2. 15 percent reduction to each annual available fee amount.

- To avoid creating commitments that the Government does not want to make and expectations of contractors that will not be fulfilled, the award term clause must specify clearly that if certain conditions (which may be outside the control of the contractor) are not met the contractor will lose (1) the opportunity to earn additional award term and (2) any award term benefits it may already have earned. The clause must also state that the Department has no further obligation to the contractor if this happens and that the determination of whether the conditions have been met is at the sole discretion of the contracting officer. These and other conditions and terms are listed in the subsequent section titled, "Award Term Clause: Required Conditions and Terms."

2.6.2 Applicability.

- Award term incentives may only be used in performance-based M&O contracts for laboratories where it is clear that the potential benefit to the Department from the contractor's increased motivation exceeds the potential impact on future competitions and the additional administrative burden/cost.

2.6.3 Limitations.

- The Head of Departmental Element must obtain the approval of the DOE Senior Procurement Executive or the NNSA Senior Procurement Executive, as appropriate, prior to initiating any plan to apply award term incentives.

- Award term incentives may not be used in conjunction with contract options to extend the contract period of performance.

- Award term incentives may be used only in contracts that have been awarded pursuant to full and open competition for the basic contract award.

- Award term incentives may be used only if all of the criteria for the contractor's earning of award term are discussed in the RFP and defined clearly in the contract before the start of each evaluation period for award term.

- Award term incentives may only be used in M&O contracts for DOE's national laboratories and only with the approval of the DOE Senior Procurement Executive or the NNSA Senior Procurement Executive, as appropriate.

2.6.4 Conditions For Use.

- Trade-off with fee--

  - Award term incentives replace, in whole or in part, monetary fee incentives. Accordingly, award term incentives are not permitted if the resultant contract would provide the contractor with a total available fee equal to the amount calculated under the DEAR fee policy. As the contemplated length of the potential award term periods increases, a corresponding decrease must occur in the contemplated total available fee.

- Length and Number of Terms--

  - The cumulative length of the contract's base term and all possible award terms shall not exceed the lesser of: 20 years; the approved length of the M&O form of contract and term (DEAR 970.1706 and any approved deviations); or the approved length of the use and need of a Federally Funded Research and Development Center (DEAR 970.3501 and any approved deviations), if applicable.

  - The length of award term periods and the number of such periods shall vary depending upon how effort under the contract is best facilitated by a potentially long contract term.

  - The contract's award term clause shall limit the maximum amount of additional term that the contractor can earn for a year of performance to one year.

- Distinction from Award Fee--

  - Performance objectives for earning award term shall be distinct from those for earning award fee.

- The Head of the Departmental Element must approve the objectives. Performance objectives for earning award term must be stated in the contract prior to the start of the evaluation period. Annually, the award term determining official shall report his/her assessment of the contractor performance of award term performance objectives to the Head of the Departmental Element.

- Award Term Clause: Required Conditions and Terms

  - Conditions: The contract's award term clause (or other clauses of the contract) must include the following conditions 1 through 7. Conditions 1 through 5 apply to both the contractor's right to earn award term and to the contractor's right to perform any term earned. Conditions 6 and 7 apply only to the contractor's right to perform any term earned.

    - The Department has a continuing need for the supplies/services.
    - The Department has sufficient funds to reimburse the contractor.
    - The Department must not have terminated the contract for convenience or default.
    - The Department has a continuing need for the M&O form of contract.
    - The Department has not concluded that it does not have a continuing need for the use of a Federally Funded Research and Development Center.
    - The contractor agrees to contract modifications applicable to the award term period earned to implement any significant new Department or government requirements.
    - The contractor agrees to contract modifications applicable to the award term period earned that reflect monetary performance incentives (performance measures, fee policy, etc.) similar to the base period, unless otherwise stated.

  - Terms: The contract's award term clause must include the following terms:

    - The contracting officer will at his or her sole discretion determine if the contractor has met the conditions to earn award term and to perform any award term earned.
    - If the conditions and terms to earn award term are not satisfied, the Department has no additional obligation under the clause to the contractor; that is, cancellation of the opportunity to earn award term or cancellation of the award term earned for any reason, term, or condition set forth in the award term clause does not entitle the contractor to an equitable adjustment or any other compensation.

- Before the start of any award term evaluation period the Government may modify both: the criteria the contractor must meet to earn award term extensions; and the conditions to which the contractor's being able to earn award term or to perform award term extensions earned are subject.
- The Department has the same right to terminate for convenience or default any portion of the contract (base term or earned award term) as it would have if the contract did not contain its award term cause.
- If at the end of an evaluation period after the contractor has received credit for any earned award term extension, two or fewer years remain on the term of the contract: (i) the Government, at its sole discretion, may end the contract as early as the end of the remaining term of the contract or as late as two years from the end of the evaluation period; and (ii) the contractor must continue to perform up to the point in time decided by the Government in (i) above.
- The contracting officer must modify the contract to reflect any earned award term extension before the contractor proceeds.

- Sample Clauses

  - Two sample award term clauses are provided as Attachments A and B. These are not mandatory clauses. They are provided simply to aid contracting officers in developing clauses that match their particular situations.

  - The **Attachment A clause** conforms generally to the guidelines above and includes additional conditions for consideration: the contractor loses some contract term for poor performance (using this feature necessitates stating a minimum contract term); the contractor must earn an outstanding rating for two consecutive periods to earn any award term extension; the contractor loses the ability to earn further award term extensions if the remaining contract term falls below two years (with certain exceptions); the Government may reduce any earned Award Term extension for contractor performance failures under the "Conditional Payment of Fee, Profit, and Other Incentives—Facilities Management Contracts" clause (DEAR 970.5215-3); and specific discussion of how and when changes to the Award Term Plan can be made.

  - The **Attachment B clause** also conforms generally to the guidelines above. It uses simpler mechanics than the clause at Attachment A, and it uses the term "Award Term Determining Official." It also includes conditions under the "Conditional Payment of Fee, Profit, and Other Incentives—Facilities

Management Contracts" clause (DEAR 970.5215-3) and the "Management Controls" clause (DEAR 970.5203-1).

Attachment A

SAMPLE AWARD TERM CLAUSE

Award Term

Contract Length. The Government may extend or reduce the initial five (5) year contract term based on the contractor's performance. The minimum contract term is three (3) years. The maximum contract term is twenty (20) years.

Contractor Performance. The Government will evaluate the contractor's performance per the clause in Section H entitled, "Award Term Plan."

Award Term determinations.

The term "remaining term of the contract" as used in this clause means the period of contract performance to which the contractor is entitled at the end of a performance evaluation period, after receiving credit of any earned award term extension. If at the end of an evaluation period the remaining term of the contract does not equal or exceed two years: (1) the Government, at its sole discretion, may end the contract as early as the end of the remaining term of the contract or as late as two years from the end of the performance evaluation period; and (2) the contractor must continue to perform up to the point in time decided by the Government in (1) above.

The contractor must earn an overall performance rating of "Outstanding" during two (2) consecutive annual performance evaluation periods in order to begin earning Award Term extensions, beginning with the first two years of this contract. Once two consecutive "Outstanding" ratings have been earned the contract shall be extended for two (2) years (one for each "Outstanding" performance rating earned) and shall continue to be extended an additional one (1) year for each "Outstanding" performance rating earned in consecutive years

Should the contractor earn an overall performance rating of "Excellent" during any annual performance evaluation period, the contract term will neither be extended nor reduced.

Should the contractor earn an overall performance rating of "Good" during any annual performance evaluation period, the contract term shall be reduced by one (1) year.

Should the contractor earn an overall performance rating of "Marginal" or less, the contract term shall be reduced by one (1) year and the Government may, at its sole discretion, start a new acquisition.

Conditions.

The Contracting Officer shall unilaterally modify the contract to reflect any extension or reduction of the contract term. In the case of extensions, the contractor shall not proceed until this modification is executed.

Nothing in this clause shall diminish or remove any rights afforded the Government regarding contract termination as may be set forth elsewhere within this contract.

The contractor's earning of award term extensions and the contractor's right to perform earned award term extensions are subject to:

The Government's continuing need for the contract's work;
The availability of funds;
The Government's continuing need for the management and operating form of contract;
The Government has not concluded that it does not have a continuing need for the use of a Federally Funded Research and Development Center;
The contractor's agreement to incorporate contract modifications that reflect significant new DOE policy;
The contractor's agreement to reasonable monetary performance incentives; and
Termination for convenience or default.

The Government may reduce any earned award term extensions by up to three years if the contractor's performance results in a first degree performance failure under the clause of this contract entitled "Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts."

Bilateral changes may be made to the Award Term Plan at any time during contract performance. If the Government or the contractor desires to change the Award Term Plan and agreement cannot be reached, the Government may make unilateral changes before the start of an award term evaluation period.

The contractor is not entitled to any cancellation charges, termination costs, equitable adjustments, or any other compensation if its earning of award term extensions, or its right to perform earned award term extensions, or both, are cancelled due to any of the conditions stated above.

Before the start of any award term evaluation period, the Government may modify both: (1) the criteria the contractor must meet in order to earn award term extensions; and (2) conditions affecting the contractor's ability to earn award term or to perform under any earned award term extensions.

The contracting officer will at his or her sole discretion determine if the contractor has met: the criteria to earn award term; the conditions to earn award term; and the conditions to perform any award term earned.

Attachment B

SAMPLE AWARD TERM CLAUSE

AWARD TERM INCENTIVE

(a) Definitions. For purposes of this clause:

(1) "Outstanding" means the highest rating available to the contractor under the performance evaluation process used to assess contractor performance against stated contract performance objectives. The term "outstanding" may be expressed using numbers, adjectives, or any other assessment approach deemed appropriate by the Government.

(2) "Satisfactory" means the rating available to the contractor under the performance evaluation process where the contractor has met the stated contract performance objectives. The term "satisfactory" may be expressed using numbers, adjectives, or any other assessment approach deemed appropriate by the Government.

(3) "Award Term Determination Official (ATDO)" means the Department of Energy official designated to determine whether the contractor has met contractual requirements to earn any award term extension during an evaluation period

(4) "Initial contract term," for purposes of this clause only, means the period of performance commencing on the date the contractor assumes full responsibility for a site pursuant to the provisions of Clause H XXXX through the end date specified in the initial contract period of performance.

(b) Eligibility for Award Term Extensions. In order for the contractor to earn a contract term extension pursuant to the award term incentive, the contactor must:

(1) Have been assessed by the ATDO to have achieved an annual average overall rating of "outstanding" for each performance evaluation period (except as provided in (2) below), and, meet contract performance objectives, standards, or criteria and other contract requirements applicable to earning additional award term, defined in the Performance Evaluation and Measurement Plan (or equivalent document), as determined by the ATDO.

(2) With respect to the evaluation periods for the first award term extension, the Contractor must achieve a minimal rating of satisfactory for the first and an overall rating of outstanding for each of the next two.

(c) Award Term Evaluation and Determination

(1) The Government may extend the initial contract term up to a total of twenty years through operation of this award term incentive clause. The evaluation periods for the first award term extension will be the first three performance evaluation periods of the initial contract term. Evaluations for subsequent award term extensions will be conducted annually.

(2) The ATDO will unilaterally determine if the contractor: (i) meets eligibility requirements to earn an award term extension; and (ii) has earned additional contract term.

(3) The amount of award term that may be earned by the contractor for performance during the first evaluation periods will not exceed 36 months. The amount of award term that may be earned by the contractor for each subsequent evaluation period is 12 months.

(4) If the ATDO determines that the contractor has earned additional award term, the Contracting Officer must modify the contract to extend the term of the contract before the contractor may begin work on the extended term.

(5) If the Contractor fails either (i) to earn the first award term extension, or (ii) to earn the award term during three consecutive evaluation periods, the contractor becomes ineligible to earn any additional award term extension(s) under the contract.

(6) If at the end of an evaluation period after the contractor has received credit for any earned award term extension, two or fewer years remain on the term of the contract: (i) the Government, at its sole discretion, may end the contract as early as the end of the remaining term of the contract or as late as two years from the end of the evaluation period; and (ii) the contractor must continue to perform up to the point in time decided by the Government in (i) above.

(d) Conditions.

(1) This clause does not confer any other rights to the Contractor other than the right to earn additional contract term as specified herein. Any additional contract term awarded under this clause remains subject to all other terms and conditions of this Contract. Should the terms of this clause conflict with any other terms of this Contract, then this clause shall be subordinate.

(2) The contractor's earning of and right to perform any award term extension are subject to:

(i) The Government's continuing need for the contract's work;

RESPONDING TO SOLICITATIONS UNDER DOE WORK FOR OTHERS PROGRAM

Guiding Principles

- Maximize access to DOE facilities and expertise through the Work for Others Program
- Maintain compliance with non-competition laws, regulations and statutes.

PURPOSE:

To provide guidance on the Department's policy related to DOE's laboratories ability to respond to solicitations from non-DOE sponsors under the Work for Others (WFO) program.

SCOPE:

This chapter provides guidance on the effect of laws, regulations, and statutes to DOE/NNSA WFO policy related to the prohibition of DOE Federally Funded Research and Development Centers (FFRDCs) and other facilities from competing directly with the domestic private sector. Particular emphasis is placed on WFO requirements governing how a DOE/NNSA site/facility management contractor operating an FFRDC or other DOE/NNSA facility may respond to Broad Agency Announcements (BAAs), financial assistance solicitations, Program Research and Development Announcements, and similar solicitations from other Federal agencies or non-Federal entities that do not result in head-to-head competition. Additional guidance is provided regarding DOE's WFO policy related to participation in and responding to Requests for Proposals. This guidance does not apply to DOE issued solicitations.

This guidance applies to all DOE sponsored facilities performing WFO activities. Given the complicated nature of this issue and the variety and number of potential sponsors of work, updates to this chapter will occur. DOE recognizes that while alternative terms may be used for agency specific solicitations, based on their characteristics, the solicitations fall into two categories discussed below: RFP-type or BAA-like. The following background and analysis of the

regulations and their effect on DOE policy does not add additional requirements or reviews beyond those contained in DOE Order 481.1C.

Authorities:

Economy Act of 1932, as amended (31 U.S.C. § 1535), which authorizes an agency to place order for goods and services, subject to availability, with another government agency when the head of the ordering agency determines that it is in the best interest of the government to do so.

Atomic Energy Act of 1954,(Pub. L. No. 83-303), sections 31, 32, 33, as amended, (42 U.S.C § 2011 et seq.), which authorizes the conduct of research and development and certain training activities for non-DOE/non-NNSA entities, provided that private facilities or laboratories are inadequate for that purpose.

The Energy Reorganization Act (ERA) of 1974 (Pub.L. No. 93-438), section 205, (42 U.S.C. § 5845), which requires Federal agencies to furnish to the NRC, on a reimbursable basis, such research services as the NRC deems necessary and requests for the performance of its function.

Homeland Security Act of 2002 (HSA) (Pub. L. No. 107-296), section 309(a) (2), (6 U.S.C. § 189), which authorizes any of DOE national laboratories and sites to accept and perform work for the Secretary of Homeland Security, consistent with resources provided, and perform such work on an equal basis to other missions at the laboratory and not on a noninterference basis with other missions of such laboratory or site.

FAR 17.5, “Interagency Acquisitions under the Economy act,” which prescribes policies and procedures for a Federal agency to obtain supplies or services from another Federal agency.

FAR 35.016, “Broad Agency Announcement” which prescribes procedures for the use of the broad agency announcement with Peer or Scientific review (see FAR 6.102(d)(2)) for the acquisition of basic or applied research and that part of development not related to the development of a specific system or hardware procurement.

FAR 35.017, “Federally Funded Research and Development Centers (FFRDCs),” which establishes Government-wide policies for the review and termination of FFRDCs and related sponsoring agreements.

Department of Energy Acquisition Regulation (DEAR) 970.1707 and 970.5217-1, “Work for Others,” The standard clause at 970.5217-1 authorizes the performance of work for non-DOE entities by DOE management and operating contractors and establishes specific conditions under which this work can be approved and performed, including but not limited to a prohibition against direct competition with the domestic private sector.

DOE Order 481.1C, WORK FOR OTHERS (NON-DEPARTMENT OF ENERGY FUNDED WORK) which establishes policies and procedures for the performance of non-DOE work states, "A contractor may not respond to Requests for Proposals (RFPs) or other solicitations from another Federal agency or non-federal entity that involves head-to-head competition as an offeror team member, or subcontractor to an offeror."

The Work for Others Program:

DOE's National Laboratories and facilities have used their unique scientific and technical expertise to perform research and development (R&D) or applied engineering work for organizations other than DOE since the enactment of the Atomic Energy Act of 1954. A large portion of this work is currently conducted under DOE's Work for Others program (WFO). DOE defines WFO as the performance of work for non-DOE entities by DOE personnel and/or their respective contractor personnel or the use of DOE facilities for work that is not directly funded by DOE appropriations. DOE Order 481 .1C "Work for Others (NON-DEPARTMENT OF ENERGY WORK)" provides DOE policy for the performance of WFO. The intent of the order is to ensure compliance with laws, regulations, and statutes, including restrictions pertaining to DOE facilities competing with the private sector. DOE considers Comptroller General Decisions to inform its interpretation of federal regulations and its development of policy requirements.

Under the WFO program, DOE authorizes use of its contractor and facility resources to non-DOE sources only when such resources do not place the facility in direct competition with the private sector. Reciprocal benefits include providing support for developing and maintaining competencies important to the achievement of DOE's mission work. Although the vast majority of DOE's WFO services are provided in support of Other Federal Agencies (OFAs), DOE also performs work for the private sector, academia, and state, local and foreign governments.

The WFO program is important to the vitality of the DOE, DOE's National Laboratories and DOE's other major Government-Owned Contractor-Operated facilities. To preserve the option of performing WFO, the department must ensure that its policies and procedures ensure compliance with statutory and regulatory guidance. Foremost among these is the requirement to avoid situations where DOE's FFRDCs are engaged in practices that place these facilities in direct competition with the private sector. Below is a summary discussion of the relevant laws, regulations and statutes that demonstrate the intent of authorizing access to DOE facilities for performance of work is predicated on the work not being able to be performed by the private sector.

DOE FFRDCs and other DOE major facility contractors primarily perform work for other Federal agencies under the authority provided in sections 31, 32, and 33 of the Atomic Energy Act (AEA) of 1954, (Pub. L. No. 83-303), as amended, (42 U.S.C. § 2011 *et seq.*) 42 U.S.C. § 2053 states:

> § 2053. Research for others; charges
>
> Where the Commission [formerly the Atomic Energy Commission, now DOE] finds

> private facilities or laboratories are inadequate for the purpose, it is authorized to conduct for other persons, through its own facilities, such of those activities and studies of the types specified in section 31 [42 USCS § 2051] as it deems appropriate to the development of energy. To the extent the Commission determines that private facilities or laboratories are inadequate to the purpose, and that the Commission's facilities, or scientific or technical resources have the potential of lending significant assistance to other persons in the fields of protection of public health and safety, the Commission may also assist other persons in these fields by conducting for such persons, through the Commission's own facilities, research and development or training activities and studies. The Commission is authorized to determine and make such charges as in its discretion may be desirable for the conduct of the activities and studies referred to in this section.

Under this authority, the DEAR 970.5217-1 "Work for Others clause authorizes the performance of work for non-DOE entities by DOE management and operating contractors and establishes specific conditions under which this work can be approved and performed, including but not limited to a prohibition against direct competition with the domestic private sector. This clause in the laboratory contract satisfies the condition in FAR 17.503(e) that an FFRDC may only accept work from other federal agencies if the terms of the FFRDC's sponsoring agreement permit it; for DOE FFRDCs, the contract is the document that is the sponsoring agreement. *See also* FAR 35.017-1(a). Although the AEA is the most common authority for DOE to perform work for non-DOE activities, other more agency-specific statutory authorizations have been passed by Congress. The Energy Reorganization Act (ERA) and the Homeland Security Act (HSA) establish similar yet significantly different relationships between DOE and the Nuclear Regulatory Commission (NRC) and the Department of Homeland Security (DHS) respectively. These statutes specifically broaden DOE's authority to engage with specific agencies under DOE's WFO program (but do not relax the FAR prohibition on FFRDCs head to head competition with the private sector). For example, section 309(a)(2) of the HSA states:

> ACCEPTANCE AND PERFORMANCE BY LABS AND SITES.—
> Notwithstanding any other law governing the administration, mission, use or operations of any of the Department of Energy national laboratories and sites, such laboratories and sites are authorized to accept and perform work for the Secretary [of DHS] consistent with resources provided, and perform such work on an equal basis to other missions at the laboratory and not on a noninterference basis with other missions of such laboratory or site.

This provision of the HSA effectively elevates the core mission of DHS, concerning, national security, over any other policy concern including any unfair competitive advantage DOE's labs and sites may have over the private sector when DHS requests and places work directly with DOE . It does not permit DOE to respond to competitive solicitations issued by DHS under an RFP. DOE promulgated DOE O 484.1, "Reimbursable Work for the Department of Homeland Security," to establish DOE policies and procedures for the acceptance, performance, and administration of reimbursable work directly funded by the Department of Homeland Security to specifically address the broader parameters for acceptance and performance of DHS work. This example illustrates, however, that absent such specific statutory to authorize work for a

particular agency under other circumstances, the general authority established by the AEA as implemented by the FAR and the DEAR is controlling.,

The Economy Act of 1932, as amended, (31 U.S.C. § 1535) authorizes agencies to enter into agreements to obtain supplies or services by interagency acquisition. The Economy Act applies when more specific statutory authority does not exist. FAR Part 17.5, "Interagency Acquisitions" prescribes policies and procedures applicable to all interagency acquisitions under any authority except orders of $500k or less issued against Federal Supply Schedules. FAR 17.503(e) requires that "[T]he non-sponsoring agency shall provide to the sponsoring agency necessary documentation that the requested work would not place the FFRDC in direct competition with domestic private industry."

Authorities used by DOE and other federal agencies to enter into Inter-agency Agreeents (IA's) establish specific conditions on the performance of such work. A primary consideration is that the work will not place DOE facilities in direct competition with the domestic private sector. Absent an authorization like that provided to DHS for directly funded work, the FAR competition restrictions (identified below) would apply in all agency to agency agreements. This is because DOE facilities have significant advantages over other potential offerors, concerning the use of government funded facilities and technologies; reimbursement of most if not all operational costs; and indemnification from most operational liabilities. These advantages effectively remove any possibility of fair and open competition with equally qualified offerors on a level playing field. The DOE applies FFRDC competition restrictions to all non-DOE funded work.

Federal Acquisition Regulation:

The use of FFRDCs is governed by FAR Part 17, "Special Contracting Methods" and Part 35 "Research and Development Contracting."

The FAR addresses competition and FFRDCs at FAR 17.503(e), 35.017, 35.016.

> FAR 17.503 (e) provides that … "The non-sponsoring agency shall provide to the sponsoring agency necessary documentation that the requested work would not place the FFRDC in direct competition with the domestic private industry."
>
> FAR 35.017 (a)(2) provides that …"It is not the Government's intent that an FFRDC use its privileged information or access to facilities to compete with the private sector. However, an FFRDC may perform work for other than the sponsoring agency under the Economy Act, or other applicable legislation, when the work is not otherwise available from the private sector."
>
> FAR 35.017-1 (c)(4), A prohibition against the FFRDC competing with any non-FFRDC concern in response to a Federal agency request for proposal for other

than the operation of an FFRDC. This prohibition is not required to be applied to any parent organization or other subsidiary of the parent organization in its non-FFRDC operations. Requests for information, qualifications or capabilities can be answered unless otherwise restricted by the sponsor.

FAR 35.016 (d) states, "[the primary basis for selecting] proposals received as a result of the BAA shall be evaluated in accordance with evaluation criteria specified therein through a peer or scientific review process. Written evaluation reports on individual proposals will be necessary but proposals need not be evaluated against each other since they are not submitted in accordance with a common work statement."

FAR 35.016 (e) states, "The primary basis for selecting proposals for acceptance shall be technical, importance to agency programs, and fund availability. Cost realism and reasonableness shall also be considered to the extent appropriate."

These FAR provisions further emphasize and in most cases specifically prohibit FFRDCs from directly competing with the private sector. However, it is worth noting that BAA definitions and the procedures by which solicitations are considered and awarded are discussed independently in FAR 35.016. This is consonant with DOE's policy that a DOE/NNSA site/facility management contractor operating an FFRDC or other DOE/NNSA facility may respond to Broad Agency Announcements, financial assistance solicitations, Program Research and Development Announcements, and similar solicitations from other Federal agencies or non-Federal entities that do not result in head-to-head competition, subject to the following requirements:

1) the solicitation must be a general research announcement used for the acquisition of basic or applied research to further advance scientific knowledge or understanding rather than focus on a specific system or hardware solution;
2) evaluation and selection is performed through a merit or peer review process using pre-established general selection criteria;
3) the primary basis for selection is technical approach, importance to the Agency, and funds availability.

DOE Policy/GAO Decisions

The following GAO decisions illustrate positions on both FFRDC prohibition from direct competition with the private sector and the potential for BAA and BAA-like response opportunity.

General Accounting Office (GAO) decision, Logicon RDA, B-27624019, (1997 U.S. Comp. Gen. LEXIS 214), held that the FAR prohibition on FFRDC competition with the private sector applies

equally be it at the prime contractor or subcontractor level. The Comptroller General pointed out that an FFRDC may violate the FAR prohibition of competing with the private sector by responding to an agency RFP because the prohibition in FAR 35.017-1(c) (4) makes no distinction between an FFRDC's role as a prime contractor or subcontractor. The Comptroller General's decision concludes that " the determination [of] whether an FFRDC is competing with a private firm in violation of the regulation depends upon the impact of its participation on the procurement, from both a technical and cost standpoint." Energy Compression Research Corp., B-243650.2, November 18, 1991, 91-2 CPD ¶ 466 at 5 (1991 U.S. Comp. Gen. LEXIS 1325). Thus DOE 's policy aligns with GAO's position that to the extent that proposed FFRDC's participation impacts the outcome of the selection, the FFRDC's participation places it in position of competing head to head with the domestic private sector.

Appropriately used, the BAA process solicits for a variety of diverse responses that present dissimilar "best science solutions" to more broadly defined technical challenges. In contrast, the RFP process establishes government requirements for a specific statement of work that anticipates multiple responses proposing similar solutions within well defined cost parameters. The differences become clearer in the review and award processes. The BAA evaluation process is by peer review, using more broadly defined selection criteria, that does not anticipate proposal comparison and does not place cost as a primary consideration. The opposite is true for the RFP process. The RFP evaluation process anticipates multiple responses from firms capable of performing the work using similar approaches to provide very specific sponsor-defined deliverables. The FAR requires head to head comparisons of offers and, with the exception of Brooks Act architect-engineering contracts, using costs as a significant factor in the award decision. See FAR 15.308; 41 U.S.C. § 3306(c)(1)(B).

Because they are distinct mechanisms with different purposes, responses to a BAA, either directly or as a subcontractor, should not be constrained by the restrictions placed on evaluations of RFPs by the FAR. The characteristics of a BAA and the process for evaluating them are different from RFPs. FAR 35.016 defines these differences. They are: 1) BAAs are general research announcements that are used for the acquisition of basic and applied research ideas to further advance scientific knowledge or understanding rather than focusing on a specific system or hardware solution; 2) evaluations and selections are performed through a peer or scientific review process based on pre-established selection criteria and proposals need not be evaluated against one another (head-to-head competition) because they are not submitted in accordance with a common work statement.; and 3) the primary basis for selection is technical approach, importance to the agency, and funds availability.

Our opinion is supported by the Comptroller General in its decision in Centre Manufacturing Co. Inc., B-255347.2, March 2, 1994, 94-1 CPD ¶ 162 (1994 U.S. Comp. Gen. LEXIS 161). The Comptroller General stated that,

> A BAA is a contracting method by which government agencies can acquire basic and applied research. BAAs may be used by agencies to fulfill requirements for scientific study and experimentation directed toward advancing the state of the art or increasing

> knowledge or understanding rather than focusing on a specific system or hardware solution. Unlike sealed bidding and other negotiated procurement methods, a BAA does not contain a specific statement of work and no formal solicitation is issued. Under a BAA, the agency identifies a broad area of interest within which research may benefit the government, and organizations are then invited to submit their ideas within a specified period of time. The firms that submit proposals are not competing against each other but rather are attempting to demonstrate that their proposed research meets the agency's requirement.
>
> Avogadro Energy Sys., B-244106, Sept. 9, 1991, 91-2 CPD ¶ 229 (1991 U.S. Comp. Gen. LEXIS 1017)

DOE's policy permitting responses to BAA and BAA-like solicitations will continue contingent on satisfying WFO policy and procedural requirements set forth in DOE Order 481.1C. Specific requirements include: Federal agencies must provide a written statement that placement of the work with DOE will not place DOE in direct competition with the private sector and a written certification must be made by the approving DOE Contracting Officer or a DOE official to whom such authority has been delegated that the proposed work is not in direct competition with the private sector.

DOE RFP/RFP-type and BAA/BAA-like Solicitation responses under the Work for Others program

The department remains committed to preserving its ability to perform work for non-DOE entities. DOE must strive to comply with both specific requirements and the overall intent of non-competition restrictions placed on FFRDCs. These guidelines are intended to address the FFRDC competition restrictions as they relate to other agency solicitations and DOE's ability to respond to the solicitations under the WFO program. Despite our best efforts the complexities of this issue can be expected to present new challenges from the departmental to the individual agreement level. Implementation of the guidance requires practitioners to use sound business judgment and common sense approaches. For purpose of implementation, the following will apply to responses to solicitations issued by any non-DOE entity. DOE WFO policy and requirements beyond those listed below will continue to apply as well.

- DOE and its contractors may provide facility capability statements or other communication to requesting organizations, at any time however, such information shall not be represented as available or included in a RFP response.

- Following completion of a competitive solicitation process, an awardee may enter into a WFO agreement with the DOE and its contractors. As stated above, the awardee must compete for award absent DOE and contactor participation. Only at the conclusion of the competitive process may an independent agreement under WFO be entered into

between DOE and the sponsor.

- Federal agencies use numerous names for competitive and non-competitive solicitations/announcements including Financial Assistance, Program Research and Development, Funding Opportunities, and Research Funding. Using the FAR, most can be defined as having the characteristics of either a RFP or BAA. Agency specific names for solicitations and inconsistent use of the terms RFP and BAA can raise questions if a response is permissible under current DOE WFO policy. Therefore the agency provided name of the solicitation shall not by itself control if a response by a DOE contractor is appropriate.

- Solicitation characteristics for RFPs and BAAs shall be the first determinant for permissibility of response. Specific attention should be paid to the intent and process by which a solicitation is issued and selections are made. Responses to non-DOE RFPs or other solicitations that involve head-to-head competition as an offeror team member, or subcontractor to an offeror are not permitted.

- Discussions with the issuing agency may be held to determine if the solicitation meets DOE's WFO BAA or RFP requirements and to clarify if FFRDC responses were anticipated and would be considered.

Written certification must be made by the approving DOE Contracting Officer or a DOE official to whom such authority has been delegated that the proposed work is not in direct competition with the domestic private sector.

<u>Broad Agency Announcements (BAA) and BAA-like instruments:</u>

DOE and its contractors may respond to BAA or a BAA-like instrument as defined above as either an offeror, team member or as a proposed subcontractor subject to the following:.

- BAA-like instruments are defined the characteristics above and those described in FAR 35.016.
- Contractors will provide a written notification to the Cognizant Site Office prior to responding to a BAA (Site Offices and the Contractor can mutually agree to alternative notification timing if prior notification inhibits timely responses).
- Response must propose the use of technologies, services, etc., otherwise unavailable in the private sector.
- Responses must include notification that performance of the work is contingent on DOE approval.
- When providing an award to DOE and its contractors, Federal agency BAA sponsors shall provide a written statement that, to the best of the agency's knowledge, the work will not place DOE and their contractors in direct competition with the domestic private sector.

- Non-Federal BAA-like sponsors are not required to provide a non-competition statement under DOE 481.1C however; the DOE and contractor will apply noncompetitive restrictions (including making a non-competition determination) to all BAA and BAA-like responses.

DOE or its contractor may seek clarity if the agency will accept a response from a FFRDC, prior to responding.

Request for Proposals RFP and RFP-type instruments

The DOE and a federal or non-federal sponsor may enter into a WFO agreement prior to the non-DOE sponsor issuing a RFP or RFP-type solicitation. The purpose of the WFO agreement would be to include the scope of work negotiated in the WFO agreement into the subsequently issued non-DOE RFP or RFP-type solicitation as sponsor provided services. The WFO activity must be clearly identified in the RFP as sponsor provided services.

DOE and its contractors may not respond to other federal agency RFPs as offerors, team members, or subcontractors in the RFP submission and selection process.

DOE and its contractors may not respond to RFP-type solicitations by non-Federal sponsors as offerors, team members, or subcontractors where the DOE facility is placed in direct competition with the private sector.

- RFP-type solicitations are defined by RFP characteristics described above.

ACQUISITION PLANNING IN THE M&O ENVIRONMENT

GUIDING PRINCIPLES

Acquisition Alternatives packages should be started at least 2 years prior to contract expiration.

[References: FAR Part 7 and Subpart 17.6; DEAR 970.1706; and Acquisition Guide Chapters 7.1 and 71.1]

1.0 Summary of Latest Changes

This update: (1) deletes the previous guide chapter 70.3 and re-issues this new chapter 70.1706-1 in its place; (2) revises the description of the acquisition alternatives package to require a thorough discussion of alternatives beyond simply extending or re-competing an M&O contract; and (3) makes various formatting and editorial changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. The purpose of this chapter is to discuss the unique acquisition planning and approval requirements associated with the Management and Operating (M&O) form of contract.

3.0 Background

Subpart 17.6 of the FAR prescribes policies and procedures for the award, renewal, and extension of M&O contracts. Section 17.602 permits Heads of Agencies to award and renew M&O contracts in accordance with an agency's statutory authority or the Competition in Contracting Act of 1984 (CICA), and agency regulations governing such contracts.

Subpart 917.6 of the Department of Energy Acquisition Regulation (DEAR) implements the FAR by prescribing DOE's policy regarding competition of M&O contracts. Section 917.602 (b) affirms that DOE will provide for full and open competition in the award of contracts for the

management and operation of its facilities and sites. Section 917.602 (c) permits the use of other than full and open competition for an extension to the term of an M&O contract, provided it can be justified in accordance with CICA and FAR Part 6, and the Head of Agency approves the justification.

Because of the significance of M&O contracts to the fulfillment of the Department's mission, there is a need to balance the benefits of competition with the benefits of relatively long-term contract relationships. DOE's policies, as set forth in DEAR 917 and 970, accommodate both of these objectives by establishing competition as the norm and providing for a contract period of up to 10 years, including options, when the contract is awarded utilizing full and open competition. In addition, FAR 17.605 (b) and (c) indicate that replacement of an incumbent contractor should usually be based largely upon expectation of meaningful improvement in performance or cost. Therefore, when reviewing contractor performance, CO's should consider:

- The incumbent contractor's overall performance, including, specifically, technical, administrative, and cost performance;
- The potential impact of a change in contractors on program needs, including safety, national defense, and mobilization considerations; and
- Whether it is likely that qualified offerors will compete for the contract.

Under FAR 17.602(a), the Head of the Agency may authorize contracting officers to enter into or renew M&O contracts. FAR 17.605(b) requires contracting officers to review each M&O contract periodically, but at least every five years, to consider whether the M&O contract should be extended with the incumbent contractor or competed. The practical effect of these two requirements is the Agency Head's authorization to extend or compete an M&O contract and the contracting officer's review occur serially.

4.1 Acquisition Alternatives Package

Prior to finalizing the written acquisition plan required by FAR, the Secretary must decide whether to extend or compete an M&O contract. To inform this decision, programs must prepare an Acquisition Alternatives Package twenty-four months before contract expiration. The package consists of an action memo for the Secretary and the following attachments:

- A summary of acquisition alternatives which provides background, the statutory and regulatory basis for FFRDC and M&O contract decisions, a summary discussion of the continuing need for FFRDC designation (if applicable) and M&O form of contract, and a recommendation of whether to extend or compete the action supported by the analysis required by FAR 17.605(c);
- A discussion of the incumbent's performance history, including technical, administrative, and cost performance;

- A discussion of the potential impact of a change in contractors on program needs, including safety, national defense, and mobilization considerations impact of a change;

- A discussion of whether it is likely that qualified offerors will compete for the contract. In this discussion include any expressions of interest and the history of competition for the M&O contract;

- Brief description of programmatic objectives for the planned contract period, include negotiation objectives if a non-competitive extension is the recommended option;
- A thorough discussion of the acquisition alternatives, to include a reasoned consideration of whether the entire scope of work should be extended or competed as-is, or whether some aspects of the current effort should be extended while other areas (e.g. mission support functions) should be competed and contracted for separately. Include the recommended acquisition alternative and supporting rationale;

- An authorization to continue operating under an M&O contract for the Secretary to sign (See Attachments A, E and F);

- If applicable, an authorization to continue sponsorship of an FFRDC for the Secretary to sign (See Attachments C and D);

- If applicable, a review of the use and need for continued operation as an FFRDC in accordance with FAR 35.017-4; and

- If applicable, Congressional notification letters required by Section 995 of the Energy Policy Act (EPACT) of 2005

The Contracting Officer and the cognizant Program Secretarial Officer have the responsibility for developing and obtaining concurrences/approval of the acquisition alternatives package. Acquisition alternatives packages must be signed by the Contracting Officer, Field/Site Office Manager, Head of Contracting Activity, cognizant Program Secretarial Officer, and the cognizant Program Under Secretary. Concurrence must be obtained from MA, GC and CI (if congressional notification letters are required). Final approval rests with the Secretary.

5.1 Acquisition Plan

At DOE, the cognizant Assistant Secretary must concur in and the Senior Procurement Executive must approve any acquisition plan for an M&O contract. However, NNSA approvals will be in accordance with the most recent revision of NNSA Policy Letter BOP-003.0304. The acquisition plan must adhere to Federal Acquisition Regulation (FAR) 7.105, Contents of written acquisition plans, and the associated coverage of these requirements in the Acquisition Guide

Chapter 7.1, Acquisition Planning. In addition to the FAR and Acquisition Guide Chapter guidance, the acquisition plan must include the following:

- In the discussion required by FAR 7.105 (b) (2), Competition, include a summary of the Acquisition Alternatives considered and the acquisition alternative approved by the Secretary.

- If extension was the acquisition alternative approved by the Secretary, summarize the rationale and justification for the non-competitive extension. The maximum length of the extension cannot exceed five years. Both the acquisition plan and the justification for other than full and open competition must provide clear evidence that: (1) the need to maintain a relationship with the incumbent contractor beyond the term of the contract justifies an exception to full and open competition; and (2) extending the contract is in the best interests of DOE, as justified by one of the seven statutory authorities listed in FAR 6.302 permitting contracting without providing for full and open competition.

- If the acquisition alternative approved by the Secretary is full and open competition, include the supporting rationale and include a discussion of how it is anticipated that competition will meet the Department's expectation of meaningful improvement in performance or cost.

Additionally, the acquisition plan must include:

- A description of the incumbent's performance history in areas such as program accomplishment, safety, health, environment, energy conservation, financial and business management and socio-economic programs, including measurable results against established performance measures and criteria. The detailed performance history included in the Acquisition Alternatives analysis package approved by the Secretary may be attached and referenced.

- Significant projects or other objectives planned for assignment during the planned contract period.

- A discussion of principal issues and/or significant changes to be negotiated in the terms and conditions of the planned contract, including the extent to which performance-based management provisions are present in the existing contract, will be incorporated into the new contract, or can be negotiated into the existing contract.

- a discussion of the potential impact of a change in contractors on program needs;

- a discussion of whether it is likely that qualified offerors would compete for the contract;

- Include the approved Authorization to Continue Operation of the Laboratory/Site/Facility Under a Management and Operating Contract as an attachment;

- Include the approved Approval to Continue Sponsorship of the Laboratory/Site/Facility as an attachment;

- Any other information pertinent to the decision.

The Acquisition Plan must be submitted for approval by the Senior Procurement Executive, through the cognizant Assistant Secretary and the Head of the Contracting Activity (HCA). The Contracting Officer and the cognizant Program Secretarial Officer have the responsibility for developing and obtaining concurrences/approval of the acquisition plan.

6.0 Justification for Other than Full and Open Competition

A justification for other than full and open competition (JOFOC) must be prepared when a non-competitive extension is contemplated, and must cite the most appropriate statutory authority listed in FAR 6.302. The JOFOC must be prepared in accordance with FAR Part 6. Include the JOFOC as an attachment to the acquisition plan. The HCA and the cognizant program Assistant Secretary(s) shall sign the JOFOC to indicate their concurrence. Refer to Acquisition Guide chapter 6.1 for other required signatures.

Attachment A

AUTHORIZATION OF M&O FORM OF CONTRACT

To meet competition policy for M&O contracts, as set forth in DEAR 917.602, and preserve the benefits of long-term contract relationships, a class deviation to the requirement of FAR 17.605(b) that the Agency Head authorize the renewal and extension of a M&O contract in conjunction with, and at the time of, the contracting officer's review of the contract has been authorized by the Senior Procurement Executive. The essence of this deviation is to permit a revision to the timing of the Agency Head authorization for the renewal and extension of M&O contracts. Accordingly, the Head of Agency may authorize, prior to award of the contract, the use of the M&O form of contract for a period of up to ten years and permit extension of the contract with the incumbent contractor beyond the base term through the exercise of an option to extend the term of the contract. The length of the base term and any optional terms shall be in accordance with DEAR 970.1706-1. The Head of the Agency authorization to use the M&O form of contract and permit a contract term of up to ten years is subject to the condition that, prior to the exercise of the option, the contracting officer complies with the review and approval requirements of DEAR 970.1706-1(b). Attachment B to this Acquisition Letter provides a copy of the deviation to FAR 17.605(b). Attachments E and F to this Acquisition Letter provide templates for Agency Head authorization of the M&O form of contract.

Where an extension using noncompetitive procedures pursuant to FAR is anticipated, the request to authorize the continued use of the M&O contract shall be submitted as part of the acquisition plan.

Attachment B

FINDINGS AND DETERMINATION
CLASS DEVIATION TO THE
FEDERAL ACQUISITION REGULATION

I. Findings

A. The Federal Acquisition Regulation (FAR), subpart 17.6, recognizes a special contract method known as management and operating contracting. FAR 17.601 defines management and operating contracts as contracts for the operation, maintenance, or support of Government-owned or Government-controlled research, development, special production, or testing establishment wholly or principally devoted to one or more major programs of the contracting Federal agency. This subpart establishes requirements for entering into management and operating contracts and it provides procedures for extending or competing such contracts. Such contracts are to be used only by agencies with requisite statutory authority. The Department of Energy has authority for the use of such contracts based on the Atomic Energy Act, the Energy Reorganization Act of 1974, and the Department of Energy Organization Act.

B. The Department of Energy has Contract Reform Team Report concluded that the Department's policies and practices regarding the extension of its management and operating contracts needed to be revamped. The Contract Reporm Team found that existing policies favored indefinite extensions of incumbent contractors and that in practice, few competitions for management and operating contracts were undertaken. Such policies and practices effectively precluded the introduction of new companies and best management practices into the Department's laboratory and weapons production complex. The Report also recognized the need to balance the benefits of a competitive environment with the recognition that long contract terms of up to 10 years can facilitate superior performance. Accordingly, the Contract Reform Report recommended that the Department institute a new policy that establishes competition as the norm, and that exceptions to competition be made only in exceptional circumstances.

C. Under current FAR policy, found at FAR 17.605(c), management and operating contractors should only be replaced when the Agency expects that such replacement might result in meaningful improvement in performance or costs. FAR 17.605(b) requires contracting officers to review each management and operating contract periodically, but at least every five years, to consider whether the management and operating contract should be renewed and extended with the incumbent contractor.

D. In accordance with FAR 17.602(a) and 17.605(b), a renewal and extension of a management and operating contract must be authorized by the Head of the Agency. Because management and operating contracts were usually extended with the incumbent contractor, rather than competed, the requirement for Agency Head authorization to renew and extend the contracts at intervals of no more than five years served to ensure

control at the highest levels and prevent unbridled use of this unique contracting authority.

E. In order to institutionalize a policy that favors competition, yet preserves the benefits of long-term contract relationships, a class deviation to the requirement of FAR 17.605(b) that the Agency Head authorize the renewal and extension of a management and operating contract in conjunction with, and at the time of, the contracting officer's review of the contract is needed.

The essence of this deviation is a revision to the timing of the Agency Head authorization for the renewal and extension of competitively awarded management and operating contracts. Under the Department's new policy that favors competition, the Head of Agency would authorize the use of the management and operating contract for a period of up to ten years and permit extension of the contract with the incumbent contractor beyond an initial 5 year contract.

The requirement of FAR 17.605(b) that the contracting officer periodically review the management and operating contract would be preserved and would occur at the time the contracting officer performs and assessment as to whether competing the contract would produce a more advantageous offer than the exercise of the option. The contracting officer's decision to exercise of the option would be subject to the approval of the Head of the Contracting Activity and the cognizant program Assistant Secretary(s) or equivalent, thus ensuring high-level authorization of the action.

F. Management and operating contracts awarded and extended on a noncompetitive basis would require justification and reauthorization by the Agency Head at such time as the need to renew and extend the contract is determined, that is, at intervals of no more than 5 years. Authority for such extensions will be accomplished using new, more stringent procedures implemented on an interim basis through a Department of Energy Acquisition Letter. The issuance of Acquisition Letters is authorized by Subpart 901.301-70 of the Department of Energy Acquisition Regulation.

G. This is a class deviation which affects all management and operating contracts.

H. Such a deviation has not been requested before.

I. It is intended that the revised extend/compete policy will establish competition as the norm and encourage higher quality contractor performance by linking contract extensions more directly to performance.

J. It is intended that this deviation will remain in effect until such time as the DEAR is amended to reflect the contract reform initiatives.

II. Determination

A. Based upon the above findings, I hereby determine that it is reasonable and prudent that:

(1) the Head of the Agency authorize the use of the management and operating contract for a period of up to ten-years when the initial contract is awarded competitively and permit extension of the contract with the incumbent contractor beyond an initial 5-year contract term through the exercise of an option period of no longer than 5 years.

(2) the Head of the Contracting Activity and cognizant program Assistant Secretary(s) approve the contracting officer's decision to exercise an option to extend a competitively-awarded management and operating contract, provided that the Head of the Agency previously has authorized use of that form of contract beyond the basic contract period.

B. Therefore, in accordance with the authority vested in me by 48 CFR 901.404, Class deviations, I hereby grant a deviation, on a class basis, to the requirements of 48 CFR 17.605(b) with respect to determinations to extend or compete performance based management contracts.

Signed 9/27/94
Richard H. Hopf Date
Procurement Executive
Department of Energy

Concurrence: **Signed** 9/23/94
Deputy General Counsel Date
For Technology Transfer
And Procurement

Attachment C

FFRDC Determination for a Contract Competition

APPROVAL TO CONTINUE SPONSORSHIP OF THE _[insert the name of the laboratory/site/facility]___ AS A FEDERALLY FUNDED RESEARCH AND DEVELOPMENT CENTER

The _[insert the name of the laboratory/site/facility]_ is a Department of Energy (DOE) Federally Funded Research and Development Center (FFRDC) managed and operated by _[insert the name of the contractor]_ under DOE Contract _[insert contract number]_. The current contract, which serves as the sponsoring agreement, expires [insert date]. _[insert one or two sentences briefly describing the laboratory/site/facility mission]_. Federal Acquisition Regulation (FAR) 35.017-4 provides for the Head of the sponsoring Agency to approve the continuance of the sponsorship of the FFRDC.

A new sponsoring agreement is currently being procured by the DOE _[insert DOE office name]_, under Request for Proposals (RFP) number _[insert RFP number]_. The resultant contract from this competitive RFP will include a base period of _[insert number of years]_ years with a _[option or award term]/*[select appropriate clause]* clause that allows the contract to be extended for up to an additional _[insert number of years]_ years. It is anticipated that the new contract will be in place by _[insert date]_.

As Head of the Agency, as defined in FAR 2.101, I hereby determine, pursuant to FAR 35.017-4, that: (1) the technical needs and mission requirements performed by the FFRDC continue to exist at a level consistent with current needs; (2) consideration has been given to alternative sources in meeting DOE's needs; (3) in accordance with current annual assessments of the FFRDC's performance, the FFRDC continues to maintain a high level of performance in meeting the sponsor's needs; (4) the FFRDC has maintained an adequate and cost-effective operation; and (5) the criteria for establishing the FFRDC continue to be satisfied and the sponsoring agreement is in compliance with FAR 35.017-1. Accordingly, I approve the continued operation of [insert the name of the laboratory/site/facility]_ as a DOE FFRDC for a five year period that will be effective on the date of the new contract award. [Note - The term of a FFRDC cannot exceed 5 years]

_____ _____

[insert the Secretary of Energy's name] Date
Secretary of Energy

Attachment D

FFRDC Determination for a Contract Extension

APPROVAL TO CONTINUE SPONSORSHIP OF THE_[insert the name of the laboratory/site/facility]___ AS A FEDERALLY FUNDED RESEARCH AND DEVELOPMENT CENTER

The _[insert the name of the laboratory/site/facility]_ is a Department of Energy (DOE) Federally Funded Research and Development Center (FFRDC) managed and operated by _[insert the name of the contractor]_ under DOE Contract _[insert contract number]_. This contract, which serves as the sponsoring agreement, expires on [insert date]. A non-competitive contract extension is currently being pursued in accordance with FAR 6.301. _[In one or two sentences, briefly describe the laboratory/site/facility mission]_. Federal Acquisition Regulation (FAR) Subpart 35.017-4 provides for the Head of the sponsoring Agency to approve the continuance of the sponsorship of the FFRDC.

As Head of the Agency, as defined in FAR 2.101, I hereby determine, pursuant to FAR 35.017-4, that: (1) the technical needs and mission requirements performed by the FFRDC continue to exist at a level consistent with current needs; (2) consideration has been given to alternative sources in meeting DOE's needs; (3) in accordance with current annual assessments of the FFRDC's performance, the FFRDC continues to maintain a high level of performance in meeting the sponsor's needs; (4) the FFRDC has maintained an adequate and cost-effective operation; and (5) the criteria for establishing the FFRDC continue to be satisfied and the sponsoring agreement is in compliance with FAR 35.017-1. Accordingly, I approve the continued operation of _[insert the name of the laboratory/site/facility]_ as a DOE FFRDC for the period _[insert the starting date] through _[insert the end date]. [Note – The term of a FFRDC cannot exceed 5 years]

_____ _____

[insert the Secretary of Energy's name] Date
Secretary of Energy

Attachment E

[M&O Authorization for a Contract Competition]

AUTHORIZATION TO CONTINUE OPERATION OF
THE _[insert the name of the laboratory/site/facility]___
UNDER A MANAGEMENT AND OPERATING CONTRACT

The _[insert the name of the laboratory/site/facility]_ is currently managed and operated by _[insert the name of the contractor]_ for the Department of Energy under a Management and Operating (M&O) contract as defined in Federal Acquisition Regulation (FAR) Subpart 17.6. The current contract and the determination authorizing the M&O form of contract expire on _[insert the expiration date]_. _[In one or two sentences, briefly describe the laboratory/site/facility mission]_.

A new contract is currently being procured by the DOE _[insert DOE office name]_, under Request for Proposals (RFP) number _[insert RFP number]_. The resultant contract from this competitive RFP will include a base period of _[insert number of years]_ years with a _[option or award term]*[select appropriate clause]* clause that allows the contract to be extended for up to an additional _[insert number of years]_ years. It is anticipated that the new contract will be in place by _[insert date]_

The continued operation of _[insert the name of the laboratory/site/facility]_ will require the type of contractual arrangement that, by both its purpose and special relationship it creates between the government and the contractor, is characterized as an M&O contract as defined in FAR 17.601. As set forth in FAR 17.602(a), the Head of an Agency may determine in writing to authorize contracting officers to enter into, or renew, M&O contracts in accordance with the agency's statutory authority, or the Competition in Contracting Act of 1984, and the agency's regulations governing such contracts.

As Head of the Agency, as defined in FAR 2.101, I hereby authorize the continued use of a management and operating contract arrangement for the operation of _[insert the name of the laboratory/site/facility]___ during the period of _[insert the starting date] through _[insert the end date].

[Note: In accordance with DEAR 970.1706-1, the total term of an M&O contract cannot exceed ten (10) years.]

_____ _____
[insert the Secretary of Energy's name] Date
Secretary of Energy

Attachment F

[M&O Authorization for a Non-competitive Extension]

AUTHORIZATION TO CONTINUE OPERATION OF THE _[insert the name of the laboratory/site/facility]___ UNDER A MANAGEMENT AND OPERATING CONTRACT

The _[insert the name of the laboratory/site/facility]_ is currently managed and operated by _[insert the name of the contractor]__for the Department of Energy under DOE contract _[insert contract number]. This contract is a Management and Operating (M&O) contract as defined in Federal Acquisition Regulation (FAR) Subpart 17.6. The current contract and the determination authorizing the M&O form of contract expire on _[insert the expiration date]_. A non-competitive extension is currently being pursued in accordance with FAR 6.301. [In one or two sentences, briefly describe the laboratory/site/facility mission]_.

The continued operation of _[insert the name of the laboratory/site/facility]_ will require the type of contractual arrangement that, by both its purpose and special relationship it creates between the government and the contractor, is characterized as an M&O contract as defined in FAR 17.601. As set forth in FAR 17.602(a), the Head of an Agency may determine in writing to authorize contracting officers to enter into, or renew, M&O contracts in accordance with the agency's statutory authority, or the Competition in Contracting Act of 1984, and the agency's regulations governing such contracts.

As Head of the Agency, as defined in FAR 2.101, I hereby authorize the continued use of a management and operating contract arrangement for the operation of _[insert the name of the laboratory/site/facility]__ during the period of _[insert the starting date] through _[insert the end date].

_____ _____

[insert the Secretary of Energy's name] Date

Secretary of Energy

The Diversity Plan

Guiding Principles

- Plan for and create a more diverse workforce.
- Develop an integrated approach to managing diversity across business operations.

[References: DEAR 970.2671 and 970.5226-1]

1.0 Summary of Latest Changes

This update: (1) deletes the previous guide chapter 70.7, Chapter 12, The Diversity Plan, Equal Employment Opportunity, and Small Business (June 2006) and re-issues this new chapter 70.2671 in its place, and (2) makes administrative changes.

2.1 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references.

2.1 **Diversity Plan Objective**. The objective of the Diversity Plan, as implemented by the Department of Energy Acquisition Regulation (DEAR) 970.5226-1, "Diversity Plan" clause is to obtain the contractor's commitment to diversity sensitivity and inclusiveness in all aspects of its business practices, the workplace, and relations with the community at large. DOE Management and Operating contractors have the opportunity to be innovative with their Diversity Plans in order to increase opportunities for:

- Minorities,
- Women,
- Veterans,
- American Indians,
- Hispanics,
- Asian/Pacific Americans,
- African Americans,

- Disabled, and
- Other groups of workers, who, historically, have not had the opportunity to fully use their talents.

2.2 **Diversity Plan Contents**. DEAR 970.5226-1, "Diversity Plan" requires contractors to submit a plan within 90 days of contract award that includes innovative strategies for increasing opportunities to fully use the talents and capabilities of a diverse work force. The Diversity Plan should be tailored to the unique circumstances of the individual contract site (e.g., mission, organization culture). The contractor's business and management strategies for diversity should focus on creating a work environment that accepts and respects the characteristics, skills, and experiences that each individual brings to the work environment consistent with the Department's policy on diversity (see DEAR 970.2671-1) and the Department's objectives for its Diversity Program (see DOE O 311.1B). Accordingly, the contractor's Diversity Plan should address the linkage between the following elements and the contractor's organizational business and management strategies for diversity, including the contractor's vision and definition of diversity:

2.2.1 Contractor's Workforce. The Department's contracts contain clauses on Equal Employment Opportunity (EEO) and Affirmative Action (AA). The plan may discuss how the contractor has or plans to establish and maintain results-oriented EEO and AA programs in accordance with the requirements of these clauses, and how the contractor's organization includes or plans to include elements/dimensions of diversity that are targeted at enhancing such programs.

2.2.2 Educational Outreach. The plan may discuss the contractor's strategies to foster relationships with Minority Educational Institutions and other institutions of higher learning (e.g., Historically Black Colleges and Universities, Hispanic serving institutions, and Native American institutions) to increase their participation in federally sponsored programs through subcontracting opportunities, research and development partnerships, and mentor-protégé relationships. The contractor's plan may also discuss cooperative programs which encourage under represented students to pursue science, engineering, and technology careers.

2.2.3 Community Involvement and Outreach. The plan may discuss the contractor's community relations activities in support of diverse elements of the local community, for example: Support for science, mathematics, and engineering education; support for community service organizations; assistance to governmental and community service organizations for equal opportunity activities; community assistance in connection with work force reduction plans; Strategic partnerships with professional and scientific organizations to enhance recruitment into all levels of the organization; and Use of direct sponsorship or making individual employees available to work with a specific community activity. Also, the contractor's plan may discuss cooperative programs which encourage under represented students to pursue science, engineering, and technology careers.

2.2.4 Subcontracting. If appropriate to the contractor, the contract will contain FAR clause 52.219-9, entitled, "Small Business Subcontracting Plan," and other small business related clauses. Additionally, the solicitation under which the contractor proposed may have contained additional guidance on small business subcontracting. The plan may discuss outreach activities and achievements for enhancing subcontracting opportunities for small businesses, small disadvantaged businesses (e.g., small businesses owned and controlled by socially and economically disadvantaged individuals, Native American Tribes, Alaska Native Corporations, or Native Hawaiian Organizations), small business firms located in historically underutilized business zones, women-owned small businesses, and veteran-owned (including service-disabled veteran-owned) small businesses. The plan may also discuss actual or planned participation in the Department's Mentor-Protégé Program.

2.2.5 Economic Development including Technology Transfer. Some of the Department's contracts include clauses dealing with technology transfer, DEAR 970.5227-2, 970.5227-3, 970.5227-10, and 970.5227-12. Planning or activities developed under such clauses may apply to this element of the Diversity Plan. Additionally, subcontracting policies and activities undertaken or planned by the contractor with small, small disadvantaged, Hubzone small business, women-owned, and veteran owned small business concerns for the purpose of assisting the economic development of, or transferring technology to, such business concerns may be discussed.

2.2.6 Prevention of Profiling Based on Race or National Origin. Profiling pertains to those practices that scrutinize, target or treat employees or applicants for employment differently or single them out or select them for unjustified additional scrutiny, based on race or national origin. The plan may discuss the contractor's approach to preventing prohibited profiling practices, including strategies for early detection of potential profiling in the contractor's business activities (e.g., personnel actions, security clearances).

2.3 **Evaluation**. The Department evaluates the contractor's performance against the requirements of the Diversity Plan to determine the extent to which the contractor's performance complies with the approved plan. Evaluated performance that is less than that required under the contract may result in either a reduction in the amount of award fee awarded to the contractor or, for those contracts not containing award fee provisions, other measures. For contracts that provide for an award fee, Heads of Contracting Activities may evaluate the contractor's performance against its Diversity Plan under the award fee portion of the annual contract Performance Evaluation and Measurement Plan (or similar document) of the contract. To the extent that general business management is a factor in the evaluation of the contract performance relating to award fee, the Diversity Plan is included as an element in that evaluation. If any elements of the Diversity Plan are already evaluated elsewhere (e.g., subcontracting plan or technology transfer) under the contract for the purposes of award fee, those elements must not be evaluated again under the Diversity Plan factor.

Patent and Data Rights

Guiding Principles

- Determination of the rights DOE and the contractor have in data first produced under a contract.
- Prompt reporting of invention disclosure and filing by contractor of patent application.
- Cooperation among academia, federal laboratories, and industry is fostered through the Technology Transfer Program.

[References: FAR 27]

1.0 Summary of Latest Changes

This update makes administrative changes.

2.1 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the reference above and should be considered in the context of that reference.

2.2 Overview. This chapter informs members of the contract administration team about the roles and responsibilities regarding administration of the intellectual property provisions DOE contracts, particularly DOE management and operation M&O contracts. This chapter is divided into two sections dealing with rights in data and patent rights.

2.3 Rights In Data. In the Department, any contract for research, development, demonstration or any other contract that will involve the production of scientific or technical data must include a rights in data clause. Such a clause describes:

- The rights of the Department and the contractor in technical data and computer software first produced under the contract;
- The rights and obligations of the contractor with regard to copyrighting technical data and computer software;
- The conditions under which the contractor may include copyrighted data or proprietary data in deliverables nor originating under the contract;
- The contractor's obligations in marking its proprietary data, and

- The contractor's obligation to respect the proprietary markings of the data of others.

Major objectives of the rights in data clauses are to:

- Assure that generally the Government has the unfettered right to use and distribute, without limitation, data first produced under the contract with Government funds;

- Assure that any restrictions, such as allowing the contractor to copyright, are conscious decisions and made only for good cause after deliberation;

- Prevent any potential for the Government's having to pay royalties subsequently for data first produced under the contract;

- Prevent the potential of sole source contract awards based upon data first produced under a Government contract; and

- Prevent the potential for claims, lawsuits against the Government for copyright infringement or misuse of data which may be proprietary to a third party.

  The rights in data clauses assure that the Department acquires an unlimited rights license to use and distribute the data so produced. This license right should include, not just the data delivered by the contractor under the contract, but also the data produced under the contract but not delivered.

  It is important to recognize that the rights in data clauses only allocate rights to use and distribute, and describes the rights and responsibilities of the parties in specified circumstances. **The clauses do not require the delivery of specific work products. Deliverables must be specified elsewhere in the contract.**

Data is not limited as to form. For example, it includes:

- Any medium such as handwritten notes, electronically stored materials; and typewritten materials (technical data); and

- Computer software, which is the computer program used to create, manipulate, and store technical data.

  The clauses differentiate between technical data and computer software in copyright licenses and in the protection of allegedly proprietary data (that developed at private expense and held in confidence by the originator) used in contract performance.

Rights in data clauses only allocate rights to use and distribute and describe the rights and responsibilities of the parties in specified circumstances. **The clauses do not require the delivery of specific work products. Deliverables must be specified elsewhere in the contract.**

2.2.1 Explaining the Rights in Data Clauses. Allocation of rights in data: The definitions necessary for the proper administration of the rights in data clauses are contained in paragraph (a) of the clause as used in Department of Energy. The Department of Energy Acquisition Regulation provided for substituting the definitions at 927.4039 for those of FAR 52.227-14.

Generally (except in copyright situations), the clause provides that the Government has the unlimited right to use or distribute:

- Data first produced under the contract;
- Form, fit, and function data;
- Instructional, maintenance, or training materials; and
- Any other data delivered under the contract unless qualifying and marked as limited rights or restricted computer software in accordance with the clause. FAR 52.227-14 provides that the contractor has the right to:
    - Use and distribute data first produced under the contract,
    - Mark allegedly proprietary technical data and computer software to prevent disclosure in accordance with the clause,
    - Assure data delivered is properly marked, and
    - Establish claim to copyright in accordance with the clause. Under the clauses prescribed for use in DOE's performance-based management contracts and those that additionally involve technology transfer activities, DOE acquires *ownership* of all contract data.

DOE also acquires, with certain exceptions, unlimited rights in technical data and computer software specifically used in the performance of the contract. In order to ensure that the operation of a facility is not dependent on the incumbent contractor, the incumbent contractor must leave all such data at the facility. Leaving the data at the facility makes this data available to any successor contractor.

2.2.2 Controlling the Contractor's Enforcement of Copyright. Copyright is one of two major ways that can limit the distribution of data. Copyright creates in the originator of the data a right to prevent others from reproducing its work or portions of it without

permission and possible payment of a royalty. This right potentially conflicts with the Government's desire to:

- Have no limitations on its ability to copy or distribute the data for any purpose,
- Allow any of its other contractors to use the data for any purpose in the performance of their contracts, and
- Disseminate data first produced under its contracts (this is also a statutory obligation).

FAR 52.227-14 discusses the copyright. It provides that the contractor may without the Contracting Officer's (CO's) approval assert its copyright in contract data contained in academic, technical, or professional journals, symposia proceedings or similar works. The Government retains a royalty free license to copy, disseminate, and make derivative works from the copyrighted data.

By signing a contract, the contractor has agreed not to assert its copyright that exists in the data first produced under the contract in any other situation without approval of the CO. The CO may grant that approval, if at all, only after consultation with patent counsel and the program office.

Where approval is granted, paragraph (c)(1) states that a license is retained by the Government. The retained license differs depending upon whether the data subject to whether the copyright is for technical data or computer software. The license for the latter generally does not allow the Government to distribute copies to the public.

Under the clause, the contractor is prohibited, without the CO's prior written permission, from including in any deliverable copyrighted data which was not first produced under the contract. The contractor is not prohibited from including copyrighted data if they have secured a license for the government.

The right to assert copyright is further proscribed in DOE's management contracts (DEAR 970.5227-1). The clause for use in management and operating (M&O) contracts involving technology transfer activities (DEAR 970.5227-2) contains copyright provisions that detail the effect of the contractor's right to assert copyright in the context of those technology transfer activities.

2.2.3 <u>Procedures Dealing with the Marking of Data Delivered Under the Contract</u>. FAR 52.227-14 puts the contractor on notice that its right to use contract data may be affected by export or national security controls. It requires that in performance of the contract, absent specific authorization from the CO, the contractor must handle data in accordance with any restrictive markings.

DEAR 927.409 requires the insertion of a subparagraph (d)(3) by which the contractor agrees

not to assert its copyright in computer software first produced under the contract without the permission of local patent counsel.

The clause establishes a procedure involving the CO that protects the Government from the contractor's unauthorized marking of data delivered under the contract. The clause provides a procedure by which the CO may be authorized to strike improper markings, allowing the use or dissemination of the data without restriction. Data markings contain instructions on the use of data and inhibit the ability of the recipient of the data to use them for any purpose, including the further distribution of the data. The clause provides a procedure by which a contractor can seek to have the CO correct markings on delivered data or add markings to proprietary data from which they were mistakenly omitted. The only notices that are allowed on data delivered under the contract are those described in Alternate II or Alternate III of FAR 52.227-14. Those alternates are used when deliverables contain technical data (Alternate II) or computer software (Alternate III) developed at private expense and considered proprietary.

Paragraph (g) of FAR 52.227-14 authorizes the contractor not to deliver proprietary data, so long as the contractor provides form, fit, and function data. Alternates II (as subparagraph (g)(2)) or III (as subparagraph (g)(3)) or both should be inserted where the contract requires the delivery of limited rights data (proprietary technical data) or restricted rights software (proprietary computer software). The contractor has the obligation to assure that data delivered with limited rights or restricted computer software markings do, in fact, qualify for such treatment.

2.2.4 Procedures Dealing with the Marking of Data Delivered Under the Contract. DOE uses Alternate V to FAR 52.227-14 which authorizes the CO or an authorized representative to inspect any data withheld from delivery as proprietary under the authority of paragraph (g)(1) of this clause.

2.2.5 Other Rights in Data Clauses. The DEAR 952.227-14, "Rights in Data - General" clause contains two additional alternates for use in the rights in data clause (FAR 52.227-14). Alternate VI provides that the contractor agrees to license its limited rights data or restricted rights computer software to the Government or third parties when necessary to the practice of the technology of the contract. Alternate VII is used to limit the contractor's use of DOE restricted data.

Contract data not specified as a contract deliverable is subject to order during the contract and up to three years after contract completion under the Federal Acquisition Regulation (FAR) 52.227-16 "Additional Data Requirements" clause.

There are contracting situations that call for other rights in data clauses. First, the clause, "Rights In Data-Special Works," (FAR 52.227-17) is intended for use in situations in which the contractor is to prepare a work, perhaps a book or motion picture that may be identified with the agency, for which the agency must have complete control over its content and use.

This use may be an official agency history or a public service documentary. By entering into

the contract, the contractor agrees:

- Not to assert its copyright;
- Not to include copyrighted data in the deliverable;
- To assign its copyright to the Government if so desired;
- Not to use the produce; and
- To indemnify the Government against any liability incurred as a result of the violation of trade secrets, copyrights, of right of privacy or publicity. The clause, "Rights In Data-Existing Works," (FAR 52.227-18) would be used where the agency has a need for a work that is a compendium of existing works. The contractor must obtain the necessary licenses to allow the Government to make use of the work product. The contractor indemnifies the Government from any resulting liability for copyright infringement or violation of proprietary data.

The rights in data clause, "Commercial Computer Software - Restricted Rights," (FAR 52.227-19) is used when commercial computer software is procured. The clause states the license that the Government acquires. That license is modeled after the restricted computer software license, Alternate III to the "Rights in Data-General" clause, and replaces any "shrinkwrap" license under which the commercial computer software is normally sold.

2.2.6 <u>Other Related Provisions</u>. The "Refund of Royalties" clause (DEAR 952.227-9) or the clause at DEAR 970.5227-8, Refund of Royalties (in conjunction with the solicitation provision at 970.5227-7) for M&O contracts requires the contractor to disclose any royalties it may pay or require to be paid in performing the contract. Royalties may be associated with the practice of a patent, the right to copy copyrighted materials, and the use of proprietary data. Since royalties are totally subject to negotiation and what the market will bear, this provision allows a conscious decision by the Government as to whether:

- The data is, in fact, proprietary;
- The Government has a license or other interest in the patent or copyright obviating the need to pay a royalty; or
- The amount of the royalty is a fair market value.

Solicitations that may result in a negotiated contract, should contain FAR 52.227-6 requesting royalty information in order that appropriate action may be taken to reduce or eliminate excessive or improper royalties. If a response to the solicitation includes a charge for royalties, the CO shall forward the information to patent counsel for appropriate action, prior to contract award.

DEAR 952.227-82, "Rights in Proposal Data," provides that the Government has what amounts to the unlimited right to use or distribute any portion of the technical proposal which served as a basis of award of the contract. The clause provides the contractor the ability to identify portions of the proposal that it considers proprietary. However, this recognition does not prevent later action by the Government to establish that the identified data is not proprietary.

Without this provision, contractors could claim that the entire proposal or large portions of it were proprietary.

2.2.7 Responsibilities Regarding Data Rights. Each decision of the Department with respect to the intellectual property provisions of DOE's contracts necessitates consultation between the CO, local patent counsel, and the Contracting Officer's Representative (COR).

Deliverables of data are subject to this clause. Any contract data that should have been delivered but was not, raises a question of whether contract data is being consciously and inappropriately withheld by the contractor. The clause establishes the rights the Government needs to ensure that contract data is available and may be used for any purpose the Department believes to be appropriate.

Critical decisions leading to effective administration of the rights in data clauses of the contract are made **BEFORE** contract award in the design of the clauses in light of the statement of work and the program. Such decisions flow from answers to questions such as:

- Does the Department have need to require delivery of limited rights data or restricted computer software, leading to the selection of Alternate II or III or both? **(FAR 52.227-14)**

- Will it be necessary for the contractor to license its limited rights data or restricted computer software to the Department or third parties, leading to the selection of Alternate VI? **(DEAR 952.227-14)**

2.3 Patent Rights. There are several major objectives of the patent rights clauses:

- Prompt reporting by contractors of invention disclosures to DOE. If applicable, prompt election by contractor in writing, of whether to retain title to reported intervention;

- Prompt filing by contractors of patent applications to which it elects to retain title;

- Execution and prompt delivery to DOE of all instruments necessary to establish or confirm Government rights to these inventions and to convey title to DOE if applicable; and

- Inclusion of additional requirements, including restrictions on disposition of income from technology transfer activities, for M&O contractors with a technology transfer mission.

2.3.1 Brief Description of the Process Associated with Patent Rights under DOE Contracts. DOE contractors for research, developmental or demonstration work, including M& O contractors, are required to disclose to DOE, within specified time periods, each invention which is or may be patentable, that is made under the contract. The disclosure shall be in written report form and shall contain sufficient technical detail to convey a clear understanding of the invention's nature, purpose and operation. The disclosure shall also include any information pertinent to publication, sale or public use of the invention.

In order to effectuate this requirement, contractors are to require, in writing, their technical employees to promptly disclose in writing to appropriate contractor personnel, each invention made under the contract. Contractors generally report inventions to the DOE Field Patent Counsel, with a copy to the CO. Field Patent Counsel review submittals for completeness and evaluate invention disclosures if DOE has an interest in filing a patent application thereon. DOE may request assignment of title, or of all rights, to inventions if the contractor fails to disclose the invention to DOE within specified times.

Contractor compliance with these provisions is incentivized by these potential penalties for non- compliance. Certain contractors, e.g., small businesses and nonprofit organizations, and other contractors who have obtained an advance patent waiver, may retain ownership, but to do so must, in writing, elect to retain ownership of subject inventions within time periods specified in their respective contracts. Their failure to make a timely election to retain ownership could result in forfeiture of invention rights. Election is generally made in writing to the CO who forwards the election to field patent counsel.

In order to foster prompt filing of patent applications on suitable inventions, rather than maintaining these inventions as unpublished "trade secrets," contractors are required to file patent applications on elected inventions within specified time periods. Contractors are also required to execute and promptly deliver to DOE Field Patent Counsel, all instruments, such as patent assignments or confirmatory licenses, necessary to establish or confirm Government rights to inventions made under DOE contracts.

For large business contractors, the CO may withhold payment, up to certain limits, if the Contractor fails to convey to the Government title and/or rights to the invention as set forth in the contract, or if the Contractor fails to establish effective procedures for reporting inventions, or fails to disclose inventions as necessary. The CO or his or her authorized representative may also examine contractor records to determine whether contractors are complying with the provisions.

For M&O contractors having technology transfer missions, i.e., generally all M&O contractors other than naval nuclear propulsion contractors, additional requirements related to management of technology transfer activities are included. Generally, contractors must use income resulting from technology transfer activities at the respective facilities as set forth in the contract.

Upon termination or expiration of the contract, any unexpended balances must be transferred, at the CO's request, to a successor contractor, or in the absence of a successor contractor, to an entity designated by the CO. Annual reports on contractor technology transfer activities should be provided to the CO.

2.3.2 Other Patent Related Provisions. In addition to a patent rights clause and a data rights clause, intellectual property provisions include clauses addressing additional matters, such as:

- Authorization and consent by the Government to the contractor using technology patented by third parties;
- Possible indemnification of the Government in the event of damages for patent infringement; and
- Clauses addressing payment or refund of royalties that may be included in a contract price. Major objectives of these provisions are the:
  - Authorization of contractors to use patented technology of others in contracts in some cases;
  - Allocation of payment of damages in the event of a claim by a patent holder for patent infringement through inclusion or lack of inclusion of a patent indemnity clause; and
  - Assurance that the Government is not required to pay a royalty for use of patented technology if it already has a license to use the technology.

A brief description of the process associated with these other patent related provisions follows:

- The Government itself can legally use a third party's patented technology without fear of court injunction preventing such use. A Government contractor can do so only if there is authorization and consent by the Government. The Government generally provides such authorization and consent in its contracts. However, such authorization is limited in the appropriate clause to that subject matter specified for delivery in the contract, or actually accepted by the Government. For research and development contracts, a broader authorization and consent clause is authorized, which provides authorization and consent for use of inventions in any activity under the contract.

- While the Government, and its contractors with authorization and consent, can legally use patented technology without consent of the patent owner obtaining an injunction preventing such use, the patent owner may still sue the Government for damages for any such use. In the absence of a patent indemnity provision, the Government itself would most likely be liable for any such damages. Generally, there is no patent indemnity provision required in research and development contracts, where broad authorization and consent is provided. We do not want to inhibit the contractor from using the best available technology in conduction research. However, in contracts for supplies or services that normally are available on the commercial market, a clause providing for the contractor's indemnifying the Government for liability for patent infringement is included.

  Research and development contracts that may include supplies or services normally available on the commercial market will also contain this clause indemnifying the Government for liability for patent infringement.

2.4 Technology Transfer Program. The Stevenson-Wydler Technology Innovation Act of 1980 made the transfer of federally owned or originated technology to state and local governments, and to the private sector, a national policy and the duty of each federal laboratory. The purpose of the Stevenson-Wydler Act was the renewal and expansion of mechanisms to foster and encourage cooperation among academia, federal laboratories, and industry in technology transfer, personnel exchanges, and joint research projects. Since passage of the Stevenson-Wydler Act, Federal agencies have been required to have a formal Technology Transfer program.

The National Competitiveness Technology Transfer Act of 1989 (included as Section 3131, *et seq.*, of the DOD Authorization Act for FY 1990) further amended the Stevenson-Wydler Technology Innovation Act of 1980 to enhance Technology Transfer between the Federal Government and the private sector. It empowered contractor-owned Government laboratories to enter into CRADAs, and allowed information and innovations brought into, and created through, CRADAs to be protected from disclosure.

The National Defense Authorization Act for Fiscal Year 1994 expanded the definition of laboratory to include weapon production facilities that are operated for national security purposes and are engaged in the production, maintenance, testing, or dismantlement of a nuclear weapon or its components.

2.4.1 <u>DOE Contracts that Must Have a Technology Transfer Program</u>. In accordance with DEAR 970.2770-3, all new awards for or extensions of existing DOE laboratory or weapon production facility management and operating contracts must have technology transfer, including authorization to award Cooperative Research and Development Agreements (CRADAs), as a laboratory or facility mission. A management and operating contractor for a facility not deemed to be a laboratory or weapon production facility may be

authorized on a case-by-case basis to support the DOE technology transfer mission including, but not limited to, participating in CRADA awarded by DOE laboratories and weapon production facilities.

2.4.2 Contract Provision that Implements the Technology Transfer Program under DOE Contracts. DEAR 970.5227-4 states that the contracting officer must insert the clause at 970.5227-3, "Technology Transfer Mission," in each solicitation for a new or an extension of an existing laboratory or weapon production facility management and operating contract. The contracting officer shall use the basic clause with its Alternate I if the contractor:

- is a nonprofit organization or small business eligible under 35 U.S.C. §§ 200, *et seq.*,
- wishes to receive title to any inventions under the contract, and
- proposes to fund at private expense the maintaining, licensing, and marketing of the inventions.

Readers should consult DEAR 970.5227-4 for further information on the use of alternates to the clause.

2.5 Major Roles and Responsibilities in the Area of Patents and Data Rights. 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:

- The responsibility is necessary to perform Government contract administration responsibilities; and is either commonly performed by this individual or reflects "good business practice."
- 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.

PATENT COUNSEL

• Counsel the CO and the COR, understand the requirement, its potential place in DOE's programs, and the role that technical data and computer software first produced under the contract may play to design the most appropriate version of the rights in data clause.

• Participate in the enforcement of inspection rights in the clause to determine appropriate resolution, if data deliverables under the contract indicate that data first produced under the contract is being withheld by the contractor.
[FAR 52.227-14[1], FAR 52.227-16, DEAR 952.227-14[2], DEAR 970.5227-1, DEAR 970.5227-2]

•Counsel the CO and the COR, in determining whether to grant any contractor request to copyright contract data.
[FAR 52.227-14, DEAR 952.227-14, DEAR 970.5227-1, DEAR 970.5227-2]

• Counsel the CO and the COR, in determining whether to grant any contractor request to restrictively mark data from which it alleges markings were omitted, or to correct markings.

• Issue, to the extent appropriate, written authorization for the contractor to assert copyright in any technical data or computer software first produced in the performance of the contract. To the extent such authorization is granted, the Government reserves for itself and others acting on its behalf, a nonexclusive, paid-up, irrevocable, world-wide license for Governmental purposes to publish, distribute, translate, duplicate, exhibit, and perform any such data copyrighted by the Contractor.
[DEAR 970.5227-1]

• Counsel the CO and the COR, in determining whether to allow the contractor to mark data from which it alleges markings were omitted or to correct markings.
[FAR 52.227-14, FAR 52.227-16]

• Review, document, and maintain files on invention disclosures, patent assignments, confirmatory licenses, and other patent related documents submitted by contractors.
[DEAR 952.227-11, DEAR 952.227-13, DEAR 970.5227-10-, DEAR 970.5227-11]

• Evaluate invention disclosures where DOE has an ownership interest in the invention.
[DEAR 952.227-11, DEAR 952.227-13, DEAR 970.5227-10, DEAR 970.5227-11]

---

[1] DOE uses the Rights in Data-General clause at FAR 52.227-14 in all non-M&O contracts under which technical data or software may be produced during performance. However, Contracting Officers must alter the clause in accordance with DEAR 927.409.

[2] The clause at DEAR 952.227-14 provides additional alternatives to the clause at FAR 52.227-14 and instructions for their use.

• Determine whether any proposed royalty is properly chargeable to the government and allocable to the contract, if the CO forwards royalty information to patent counsel.
[DEAR 952.227-9, 970.5227-7, 970.5227-8]

• Advise and coordinate with the contracting officer as appropriate when the contracting officer is conducting actions associated with the Technology Transfer provisions of the contract.

CONTRACTING OFFICER

• Enforce the inspection rights in the clause to determine appropriate resolution, if data deliverables under the contract indicate that data first produced under the contract is being withheld by the contractor.
[FAR 52.227-14, FAR 52.227-16, DEAR 952.227-14, DEAR 970.5227-1, DEAR 970.5227-2]

• May receive copies of invention disclosures or other patent related documents. Forward to appropriate field or headquarters patent counsel.
[DEAR 952.227-11, DEAR 952.227-13, DEAR 970.5227-10, DEAR 970.5227-11, 970.5227-12]

• May withhold payment, for large business contractors, up to certain limits, for contractor failure to comply with certain specified patent related requirements, e.g., prompt reporting of inventions. Such action should be taken only with the recommendation and approval of appropriate patent counsel.
[DEAR 952.227-13, DEAR 970.5227-11, 970.5227-12]

• Include the broad 'Authorization and Consent" clause at FAR 52.227-1, Alternate I, without a patent indemnity provision, for work that is primarily R&D.

• Include the basic "Authorization and Consent" clause at FAR 52.227-1, and the patent indemnity clause at FAR 52.227-3, for supplies and services, or work that includes both R&D, and supplies and services, but where R&D is not the primary purpose.
[FAR 52.227-1, FAR 52.227-3]

• Include the "Royalty Information" clause in solicitations that may result in a negotiated contract.
[DEAR 952.227-9, 970.5227-7, 970.5227-8]

• If royalty information is provided, forward this information to patent counsel for appropriate action.

• For fixed price contracts that include royalties in the target or contract price and where circumstances make it questionable whether the royalties will actually be paid by the contractor, the "Refund of Royalties" clause of DEAR 952.227-9 should be included.

[FAR 952.227-9]

• Substitute the definitions at DEAR 927.409 for paragraph (a) of FAR 52.227-14, "Rights in Data-General," and include the paragraph (d)(3) and Alternate V at DEAR 927.409 if it is contemplated that data will be produced, furnished, or acquired under the contract; except use Alternate IV rather than paragraph (d)(3) in contracts for basic or applied research with educational institutions except where software is specified for delivery or where other special circumstances exist.
[DEAR 927.409]

• Understand (in consultation with Patent Counsel and the Contracting Officer's Representative) the requirement, its potential place in DOE's programs, and the role that technical data and computer software first produced under the contract may play so that the most appropriate version of the rights in data clause may be included in the contract. This will maximize the potential for competition of future related requirements.

• Determine (in consultation with Patent Counsel and the COR), whether to grant any request by the contractor to copyright contract data.
[FAR 52.227-14, DEAR 970.5227-1, DEAR 970.5227-2]

• Determine (*in consultation with Patent Counsel and the COR), whether to allow the contractor to mark data from which it alleges markings were omitted or to correct markings.
[FAR 52.227-14]

• For contractors with a technology transfer mission, execute the provisions of technology transfer requirements as follows:

• Ensure that, in addition to any separately designated funds, the allowable costs associated with the conduct of technology transfer through the Office of Research and Technology Applications, in any fiscal year, do not exceed an amount equal to 0.5 percent of the operating funds included in the Federal research and development budget (including Work For Others) of the Laboratory for that fiscal year without written approval of the Contracting Officer. Approve such costs only as determined to be appropriate.

• Approve implementing procedures to avoid employee or organizational conflicts of interest or require specific changes to those procedures within thirty (30) days of receipt.

• Act on all contractor requests for approval of licensing and assignment agreements which are not likely to meet either of the conditions set forth in subparagraphs (f)(1)(i) or (ii) of this clause within thirty (30) days of receipt of request.

• For contractors with a technology transfer mission, execute the provisions of technology transfer requirements as follows:

•Approve, as appropriate, proposed exceptions to the requirement, that under written technology transfer agreements, the contractor will include a requirement that the U.S. Government and the

Contractor be indemnified for all damages, costs, and expenses, including attorneys' fees, arising from personal injury or property damage occurring as a result of the making, using or selling of a product, process or service by or on behalf of the Participant, its assignees or licensees which was derived from the work performed under the agreement.

• Approve the contractor's policy for making awards or sharing of royalties with contractor employees, other co-inventors and coauthors.

• In the event of termination or expiration of the contract, request that the contractor transfer any unexpended balance of income received for use at the laboratory to a successor contractor or other entity.

• Direct the contractor to transfer title, as one package, to the extent the Contractor retains title, in all patents and patent applications, licenses, accounts containing royalty revenues from such license agreements, including equity positions in third party entities, and other Intellectual Property rights which arose at the Laboratory, to the successor contractor or to the Government on termination or expiration of the contract.

• Approve, prior to the contractor's entering into any technology transfer arrangement, when such technology or any part of such technology is classified or sensitive under Section 148 of the Atomic Energy Act (42 U.S.C. § 2168).

• Evaluate as part of the annual appraisal process, with input from the cognizant Secretarial Officer or program office, the contractor's performance in implementing the technology transfer mission and the effectiveness of the contractor's procedures.

• Provide approval for the Laboratory Director or his designee to enter into Cooperative Research and Development Agreements, on behalf of the DOE, as provided in a contracting officer approved Joint Work Statement.

• Approve Joint Work Statements and modifications to Joint Work Statements as appropriate and in accordance with the "Technology Transfer" clause.

• Request the contractor to transmit protected data to other DOE facilities for use by DOE or its contractors by or on behalf of the Government unless otherwise expressly approved by the contracting officer in advance for a specific Cooperative Research and Development Agreement

• Determine, only as appropriate, that contractor employee financial interest is not so substantial as to be considered likely to affect (conflict of interest) the integrity of the Contractor employee's participation in the process of preparing, negotiating, or approving a Cooperative Research and Development Agreement.

• Grant prior written permission, as appropriate, for the contractor to provide for the withholding of data produced in conducting research and development activities in costshared agreements for a period of up to five (5) years.

[DEAR 970.5227-3]

• Determine if royalties proposed by the contractor are properly chargeable to the government and allocable to the contract.
[DEAR 952.227-9]

• May provide notice to the Contractor as soon as practicable of any claim or suit; afford the Contractor an opportunity under applicable laws, rules, or regulations to participate in the defense thereof; and obtain the Contractor's consent to the settlement of any suit or claim other than as required by final decree of a court of competent jurisdiction.
[FAR 52.227-2]

CONTRACTOR

• Where desired, request permission from the CO or the Patent Counsel, as the clause indicates, to assert copyright in contract data.
[FAR 52.227-14, FAR 52.227-17, DEAR 952.227-14, DEAR 970.5227-1, DEAR 970.5227-2]

• Mark any qualifying proprietary data with the markings specified in the contract.
[FAR 52.227-14, FAR 52.227-19]

• Where markings on data delivered may have been omitted or stated incorrectly, request permission from the CO to insert or correct markings. Comply with a request from the CO to substantiate markings on data delivered.
[FAR 52.227-14, DEAR 952.227-14]

• Require technical employees to promptly disclose inventions, in writing, to appropriate contractor personnel and promptly forward to DOE disclosures of inventions which are or may be patentable.
[DEAR 952.227-11, DEAR 952.227-13, DEAR 970.5227-10, DEAR 970.5227-11, 970.5227-12]

• Elect in writing within specified time periods, to retain ownership of the invention.
[DEAR 952.227-11, DEAR 970.5227-10]

• Execute and promptly deliver to DOE written instruments, such as patent assignments or confirmatory licenses, necessary to confirm Government rights in a particular invention. **[DEAR 952.227-11, DEAR 970.5227-10]**

• Include "Authorization and Consent," suitably modified in appropriate subcontracts.
[FAR 52.227-1]

• Indemnify the Government and its officers, agents, and employees against liability,

including costs, for infringement of any United States patent as set forth in the clause.
[FAR 52.227-3]

• Include information in the response relating to each separate item of royalty or license fee as set forth in the clause, when an offeror's response to a solicitation contains costs or charges for royalties.
[DEAR 952.227-9, 970.5227-7]

• Furnish to the CO, before final payment under the contract, a statement of royalties paid or required to be paid in connection with performing the contract and subcontracts together with the reasons.
[DEAR 952.227-9, DEAR 970.5227-8]

For contractors with a technology transfer mission, execute the provisions of Technology Transfer as follows:

• Establish and carry out its technology transfer efforts through appropriate organizational elements consistent with the requirements for an Office of Research and Technology Applications pursuant to paragraphs (b) and (c) of Section 11 of the Steven-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710).

• Establish implementing procedures that seek to avoid employee and organizational conflicts of interest, or the appearance of conflicts of interest, in the conduct of its technology transfer activities.

• Provide implementing procedures to the CO for review and approval within sixty (60) days after execution of the contract.

• Prepare procedures and take all reasonable measures to ensure widespread notice of availability of technologies suited for transfer and opportunities for exclusive licensing and joint research agreements, as set in paragraph (e) of the clause.

• In its licensing and assignments of intellectual property, give preference in such a manner as to enhance the accrual of economic and technological benefits to the U.S. domestic economy.

• Consider the factors set forth in subparagraphs (f)(1)(i) and (ii) of the "Technology Transfer Mission" clause in all of its licensing and assignment decisions involving laboratory intellectual property where the laboratory obtains rights during the course of the contractor's operation of the laboratory under this contract.

• If the contractor determines that neither of the conditions in subparagraphs (f)(1)(i) or (ii) are likely to be fulfilled, the contractor, prior to entering into licensing and assignment agreements, must obtain the approval of the CO.

• The contractor agrees to be bound by the provisions of 35 U.S.C. 204 (Preference for United States Industry).

[DEAR 970.5227-3]

For contractors with a technology transfer mission, execute the provisions of Technology Transfer as follows:

• In entering into written technology transfer agreements, including but not limited to, research and development agreements, licenses, assignments and Cooperative Research and Development Agreements, agrees to include in such agreements the requirement set forth in paragraph (g). Identify, and obtain the approval of the CO for any proposed exceptions to this requirement.

• Use royalty or other income earned or retained as a result of performance of authorized technology transfer activities for scientific research, development, technology transfer, and education at the Laboratory, consistent with the research and development mission and objectives of the Laboratory and subject to Section 12(b)(5) of the Stevenson-Wydler Technology Innovation Act of 1980, as amended (15 U.S.C. 3710a(b)(5)) and Chapter 38 of the Patent Laws (35 U.S.C. §§ 200, *et seq.*) as amended**.**

• Included as part of its annual Laboratory Institutional Plan or other such annual document, a plan setting out those uses to which royalties and other income received as a result of performance of authorized technology transfer activities will be applied at the Laboratory, and at the end of the year, provide a separate accounting for how the funds were actually used.

• Shall establish subject to the approval of the Contracting Officer a policy for making awards or sharing of royalties with Contractor employees, other co-inventors and coauthors, including Federal employee co-inventors when deemed appropriate by the Contracting Officer.

• Transfer, in the event of termination or upon the expiration of the contract, any unexpended balance of income received for use at the Laboratory, at the Contracting Officer's request to a successor contractor, or in the absence of a successor contractor, to such other entity as designated by the Contracting Officer.

• Notify and obtain the approval of the CO prior to entering into technology transfers which affect sensitive or classified technology in accordance with subparagraph (j)(1) of the clause.

• Include in all technology transfer agreements with third parties the notice that the export of goods and/or Technical Data from the United States may require some form of export control license or other authority from the U.S. Government and that failure to obtain such export control license may result in criminal liability under U.S. laws.

• Conduct internal export control reviews and assure that technology is transferred in accordance with applicable law as required by subparagraph (j)(3).

• Maintain records, of its technology transfer activities, satisfactory to DOE of its technology transfer activities and shall provide annual reports to the Contracting Officer to enable DOE

to maintain the reporting requirements of Section 12(c)(6) of the Stevenson-Wydler Technology Innovation Act of 1980, as amended.

- Submit an annual plan to the CO for conducting its technology transfer function for the upcoming year as set forth in paragraph (l) of the clause.

- Develop and implement effective internal controls for all technology transfer activities consistent with the audit and record requirements of the contract.

- The Laboratory Director of his designee, following evaluation of Cooperative Research and Development Agreements (CRADAs) in accordance with the clause, may enter into CRADAs on behalf of the DOE subject to the requirements set forth in the upon approval of the Contracting Officer and as provided in a DOE approved Joint Work Statement. The contractor may not enter into, or start work on, a CRADA until the contracting officer has granted approval.

- Provide for the withholding of data produced in conduction research and development activities in cost-shared agreements not covered by paragraph (n) in accordance with subparagraph (n)(3)of the clause, with prior written permission of the CO.

- Agrees, at the request of the Contracting Officer, to transmit data, which would be protected from disclosure under the clause, to other DOE facilities for use by DOE or its Contractor by or on behalf of the Government unless otherwise expressly approved by the Contracting Officer in advance for a specific CRADA.

- Agrees to inform prospective CRADA participants, which are intending to substantially pay full cost recovery for the effort under a proposed CRADA, of the availability of alternative forms of agreements, i.e., WFO and UFA, and of the Class Patent Waiver provisions associated therewith.

- Ensure that not employee shall have a substantial role (including an advisory role) in the preparation, negotiation, or approval of a CRADA, if, to such employee's knowledge a potential conflict of interest may exist in accordance with the clause.
  [DEAR 970.5227-3]

- Grant to the Government, and others acting on its behalf, a paid-up nonexclusive, irrevocable, worldwide license to reproduce, prepare derivative works, and perform publicly and display publicly, by or on behalf of the Government, for all the material or subject matter called for under the contract.

- Indemnify the Government against any liability, including costs and expenses, incurred as the result of:

  (1) the violation of trade secrets, copyrights, or right of privacy or publicity, arising out of the creation, delivery, publication or use of any data furnished under this contract; or

(2) any libelous or other unlawful matter contained in such data.

[FAR 52.227-18]

CONTRACTING OFFICER'S REPRESENTATIVE

• Participate with the CO and Patent Counsel by providing a perspective to facilitate understanding the requirement, its potential place in DOE's programs, and the role that technical data and computer software first produced under the contract may play in order to design the most appropriate version of the rights in data clause.

• Call to the CO's attention and participate in the enforcement of inspection rights in the clause to determine appropriate resolution, if data deliverables under the contract indicate that data first produced under the contract is being withheld by the contractor.

• Participate with the CO and the Patent Counsel in arriving at a determination whether to grant any request by the contractor to copyright contract data.

• Participate with the CO and Patent Counsel in arriving at a determination whether to allow the contractor to mark data from which it alleges markings were omitted or to correct markings.

For More Detailed Information on Patents and Data Rights:

Data Rights

1. DEAR 952.227-14, "Rights in Data-General"
2. DEAR 952.227-82, "Rights in Proposal Data"
3. DEAR 970.5227-1, "Rights in Data-Facilities"
4. DEAR 970.5227-2, "Rights in Data-Technology Transfer"
5. DEAR 927.409, "Solicitation Provisions and Contract Clauses"
6. FAR 52.227-14, "Rights in Data-General"
7. DEAR 952.227-14, "Rights in Data-General"
8. FAR 52.227-16, "Additional Data Requirements"
9. FAR 52.227-17, "Rights in Data-Special Works"
10. FAR 52.227-18, "Rights in Data-Existing Works"
11. FAR 52.227-19, "Commercial Computer Software-Restricted Rights"
12. FAR Subpart 27.4, "Rights in Data and Copyrights"
13. DEAR Subpart 927.4, "Technical Data and Copyrights"
14. DEAR Subpart 970.27, "Patents, Data, and Copyrights"

Patent Rights

15. DEAR 952.227-11, “Patent Rights – Retention by Contractor”
16. DEAR 952.227-13, “Patent Rights - Acquisition by the Government”
17. DEAR 970.5227-3, “Technology Transfer Mission”
18. DEAR 970.5227-1004-71, “Patent Rights - Management and Operating Contracts, Nonprofit Organization or Small Business Firm Contractor”
19. DEAR 970.5227-11, “Patent Rights – Management and Operating Contracts, For-profit Contractor, Non-Technology Transfer”
20. DEAR 970.5227-1204-72, “Patent Rights - Management and Operating Contractors, For-profit Contractor, Advance Class Waiver”
21. FAR Subpart 27.2, “Patents”
22. FAR Subpart 27.3, “Patent Rights Under Government Contracts”
23. DEAR Subpart 927.2, “Patents”
24. DEAR Subpart 927.3 , “Patent Rights Under Government Contracts”
25. DEAR Subpart 970.27, “Patents, Data, and Copyrights”

Other Related Subjects

26. DEAR 952.227-9, “Refund of Royalties”
27. DEAR 970.5227-7, “Royalty Information”
28. DEAR 970.5227-8, “Refund of Royalties”
29. FAR 52.227-1, “Authorization and Consent”
30. FAR 52.227-3, “Patent Indemnity”
31. FAR 52.227-6, “Royalty Information”
32. FAR Subpart 27.1, “Patents, Data, and Copyrights – General”
33. DEAR Subpart 970.27, “Patents, Data, and Copyright”

Contractor Compensation - Variable Pay

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.

[Reference: FAR 31.205-6, DEAR 970.3102-05-6, DOE Order 350.1]

1.0 Summary of Latest Changes

This update: (1) changes the chapter number from 70.5 to 70.3102-05-6 to reflect the applicable FAR part, and (2) includes administrative changes.

2.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references.

2.1 **Overview.** This section provides guidelines for the Department's Heads of Contracting Activity (HCAs) and Contracting Officers (COs) responsible for administering and managing DOE management and operating (M&O) contracts, non-M&O major site and facility contracts, and contracts that require DOE approval of contractor compensation and benefits for reasonableness.

2.2 **Background.** The Department encourages the use of variable pay programs as described in this chapter. 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, Compensation for personal services, DEAR 970.3102-05-6, Compensation for personal services and DOE Order 350.1, Contractor Human Resource Management Programs 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, Compensation.

Additional guidance is provided annually by the Chief, Contractor Human Resources Policy Division (MA-612).

2.3 **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).

2.4 **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; and
- Facilitate accomplishment of DOE missions.

2.5 **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.

COSTS ASSOCIATED WITH WHISTLEBLOWER ACTIONS

Guiding Principle:

Allowability determinations for costs associated with whistleblower actions are made on a case-by-case basis after considering contract terms, relevant cost regulations, and relevant circumstances.

Applicability:

This section is applicable to all elements of the Department of Energy including the National Nuclear Security Administration.

References:

- DEAR 931.205-47(h)
- DEAR 952.216-7, Alt II
- DEAR 970.3102-05-47(h)
- DEAR 970.5232-2, Payments and Advances

Rescission:

- AL 2001-03, Costs Associated with Whistleblower Actions, May 25, 2001

What is the Purpose of this Guidance?

The purpose of this guidance is to:

(1) Assist contracting officers implementing the requirements contained at DEAR 931.205-47(h); and
(2) Establish procedures for consulting with counsel on allowability determinations.

What is the Background Information You Need to Know?

During the 1990s the Department established a program (10 CFR Part 708) providing an administrative forum for contractor employees to bring claims of discriminatory action by contractors resulting from whistleblower activities of the employees.

The Department also addressed the issue of reimbursement of contractor costs related to defense of actions under this new program and under related administrative

whistleblower forums. A final rulemaking addressing cost reimbursement issues was published in the Federal Register on October 18, 2000 (65 FR 62299).

What are the requirements of the cost principle?

DEAR 931.205-47(h) requires contracting officers to determine allowability of defense, settlement and award costs on a case-by-case basis after considering the terms of the contract, relevant cost regulations, and relevant facts and circumstances, including federal law and policy prohibiting reprisal against whistleblowers, available at the conclusion of the employee whistleblower claim. The cost principle addresses only the costs associated with whistleblower retaliation claims filed in Federal and state courts and with Federal agencies under 29 CFR Part 24, 48 CFR (FAR) subpart 3.9, 10 CFR Part 708 or 42 U.S.C. 7239.

The DEAR cost principle also requires the Department to establish a whistleblower costs point-of-contact in the Office of General Counsel (the GC point-of-contact). Contracting officers, or their designated representatives, must consult with counsel before making an allowability determination on costs associated with whistleblower actions as specified in the regulation. The purpose of this requirement is to promote an evenhanded approach and to avoid unwarranted variation across the Department's complex of facilities.

Who is the Office of General Counsel Point-of-Contact?

The Office of the Assistant General Counsel for Procurement and Financial Assistance (GC-61) will serve as the GC point-of-contact. DEAR 931.205-47(h)(2)(ii) makes consultation with the GC point-of-contact mandatory. Contracting officer consultation with local counsel will also satisfy this requirement. Local counsel, when consulted instead of the GC point-of-contact, will determine whether further consultation with Headquarters is required. The GC point-of-contact will assist contracting officers, their designated representatives, and local counsel by providing summaries of relevant cases of Board of Contract Appeals decisions and other guidance material. When appropriate, and based on the information provided about the case, the GC point-of-contact will consult with the General Counsel for NNSA when a NNSA site is involved, and with other Headquarters and program offices, including the Office of Environment, Safety and Health, and the Offices of Procurement and Assistance Management.

What is the Procedure for "Consulting" with Counsel?

The following information may be useful in any request for consultation:

- Type of action:
  (Federal or state court, or administrative action under 29 CFR Part 24, 48 CFR subpart 3.9, 10 CFR Part 708 or 42 U.S.C. 7239)
- Breakdown of costs submitted for reimbursement, including settlement costs and any of the following categories if applicable:
  (A) Employee back-pay award:

(B) Damages, if any, awarded to employee, and whether they are compensatory or punitive:
(C) Employee legal fees reimbursed:
(D) Contractor legal fees reimbursed:

- Any particular provisions in the contract addressing the pertinent cost and if there are any reasons why the costs should be treated or funded any differently than as a normal cost:
- Key facts or circumstances which may be pivotal in determination of allowability or unallowability:
  (For example: the finding was reached by a judge or jury; any statements of culpability contained in a settlement agreement; the existence of similar complaints against the employer or a particular individual; or remedial action instituted by the contractor)
- Name, e-mail address, and phone number of person requesting the consultation.
- Guidance may be requested on provisional reimbursement to the contractor of its costs while the legal action is pending, but consultation on this is not required.

Counsel will review the available information and provide comments and guidance material to the individual requesting consultation within 30 days of receiving the information. The individual assisting in the consultation will then be available for further discussion with the contracting officer after he/she has reviewed the provided guidance.

Allowable Food and Beverage Costs At Department Of Energy (DOE) and Contractor Sponsored Conferences

Guiding Principles

- Effective oversight systems are essential to ensuring the high quality/integrity of costs charged to contracts.
- Collaboration and cooperation are required to maintain timely, effective control processes.

1.0 Summary of Latest Changes

This update: (1) revises the allusion to chapter 31.2 to chapter 31.205-13 (the number of chapter 31.2 was changed to align with FAR), and (2) includes administrative changes.

2.0 Discussion

See Acquisition Guide Chapter 31.205-13 Allowable Food and Beverage Costs At Department Of Energy (DOE) and Contractor Sponsored Conferences.

Contractor Legal Management Requirements, Approving Settlements, and Determining the Allowability of Settlement Costs

Guiding Principles:

Close collaboration between Department counsel and Contracting Officers is required to ensure effective management of contractors' legal costs.

Decisions regarding contractors' requests to settle legal claims and the allowability of associated costs may be made simultaneously only in limited circumstances.

[References: 10 CFR Part 719, FAR Subpart 31.2, DEAR Subpart 31, and DEAR Subpart 970.31]

Summary of latest changes

This guide chapter replaces its predecessor (Chapter 70-31C of September 2010 "Contractor Legal Management Requirements") and significantly expands upon its guidance. The predecessor chapter only briefly discussed two aspects of managing contractor legal costs: contractors' hiring outside counsel; and contractors' exercise of prudent business judgement. This guide chapter provides great detail concerning the requirements of the current version of the Contractor Legal Management Requirements at 10 CFR part 719 (reflecting its May 2013 update), addresses considerations for approving settlements, and covers several key facets of determining the allowability of settlement costs.

Overview

This guide chapter deals with three aspects of the Department's management of contractor legal matters—(1) regulatory requirements regarding contractors' litigation management and legal expenditures, (2) approving contractors' requests to settle, and (3) making cost allowability determinations for approved settlements.

Background

DOE has placed special emphasis on managing contractor litigation and its associated costs for over two decades. The first litigation management procedures, issued in March 1994, applied to virtually all cases where DOE might be contractually responsible for contractor litigation costs. These procedures imposed substantive requirements on DOE field counsel, contractor counsel, and outside counsel to ensure that the public funds were not spent imprudently. Contactors' non-compliance resulted in disallowance of costs. The procedures have been

revised several times and were codified in the Code of Federal Regulations (CFR) in April 2001. These Contractor Legal Management Requirements at 10 CFR part 719 were most recently updated in May 2013. Among other revisions, the 2013 update instituted a requirement that contractors obtain DOE permission to settle certain matters involving contractor payment of $25,000 and over and clarified that contractors' compliance with the regulations at 10 CFR part 719 is a prerequisite for reimbursement of legal costs covered by the regulations.

Discussion

Contractor Legal Management Requirements (10 CFR part 719)

Title 10 CFR part 719, *Contractor Legal Management Requirements*, "facilitates management of retained legal counsel and contractor legal costs, including litigation and legal matter costs." The requirements cover all M&O contracts; non-M&O cost-reimbursement contracts exceeding $100,000,000; and non-M&O contracts exceeding $100,000,000 that include cost-reimbursable elements exceeding $10,000,000 (e.g., contracts with both fixed-price and cost-reimbursable line items where the cost-reimbursable line items exceed $10,000,000 or time-and-materials contracts where the materials portions exceed $10,000,000).

Key requirements include the following:

- Legal Management Plan (LMP) – Each contractor is required to submit this document within 60 days of contract award, describing the contractor's practices for managing legal costs and legal matters for which it procures the services of retained legal counsel. Department counsel generally receives, reviews, and approves the LMP. Department counsel is defined as "the attorney in the DOE or NNSA field office, or Headquarters office, designated as the contracting officer's representative and point of contact for a contractor or for Department retained legal counsel, for purposes of this part." (Note: LMP's may include lower dollar value thresholds for reporting and/or permission requirements than required by 10 CFR part 719.)
- Annual Legal Budget – Contractors must submit an annual legal budget that includes cost projections for significant matters at a level of detail reflective of the types of billable activities and the stage of each such matter. Significant matters include matters involving significant issues as determined by Department counsel and identified to a contractor in writing, and any legal matters where the amount of legal costs over the life of the matter is expected to exceed $100,000.
- Staffing and Resource Plans – Contractors are required to submit this document prepared by retained legal counsel that describes the method for managing a significant matter in litigation.
- Engagement Letters – Each contractor must submit a copy of an executed engagement letter between it and retained legal counsel to Department counsel when the retained counsel is expected to provide $25,000 or more in legal services for a particular matter.
- Contractor Initiation of Litigation – Each contractor must provide written notice to Department counsel prior to initiating litigation or appealing from adverse decisions.

A contractor may not initiate litigation for which it seeks reimbursement without prior written authorization of Department counsel.

- Litigation against the Contractor – Contractors must give the contracting officer and Department counsel immediate notice in writing of any legal proceeding, including any proceeding before an administrative agency.
- Settlements – Contractors must obtain permission from Department counsel to enter a settlement agreement if the settlement agreement requires contractor payment of $25,000 or more.
- Specific categories of costs – The regulations address assessment of the reasonableness of legal fees, outside counsel travel costs, and identify certain costs that require advanced approval to be considered for reimbursement.

Title 10 CFR 719.40 conditions reimbursement of legal costs on contractor compliance with the requirements of Title 10 CFR part 719. Any costs covered by the Contractor Legal Management Requirements that do not comply with them are expressly unallowable.

Any request to deviate from the Contractor Legal Management Requirements must be submitted in writing to Department counsel and approved by the DOE or NNSA General Counsel, as applicable. Even if the Contractor Legal Management Requirements have been followed, to be allowable contractor legal costs must comply with all of the other requirements at FAR 31.201-2(a), i.e., the costs must be reasonable, allocable, Cost Accounting Standards (CAS) (or Generally Accepted Accounting Principles (GAAP) if no CAS apply) compliant, compliant with the terms of the contract, and compliant with any limitations in FAR subpart 31.2.

Settlement Permission Requests Under 10 CFR 719.33

Title 10 CFR 719.33 requires contractors to seek permission from Department counsel to enter into a settlement agreement if the agreement requires contractor payment of $25,000 or more. In its written request to Department counsel seeking settlement permission, the contractor must provide the background of the case, the history of the settlement discussions, the proposed terms of the settlement, and a description as to why settlement of the matter is in the best interest of the Department. *See* 10 CFR 719.34. Title 10 CFR 719.33 specifically notes that a determination that the contractor may settle the case does not mean that the underlying costs will be considered allowable. As noted above, compliance with all parts of 10 CFR part 719, including DOE/NNSA approval of settlements, is a prerequisite for a legal cost to be allowable.

Allowability of Settlement and Associated Legal Costs

Timing of Settlement and Associated Legal Costs Allowability Decisions. An allowability determination regarding a settlement may occur either 1) simultaneous with the determination as to whether the contractor may settle a case pursuant to 10 CFR 719.33, or 2) after the settlement agreement is executed. In both cases, the contracting officer must coordinate with Department counsel to review the facts surrounding the underlying claim and settlement.

At the time a contractor seeks simultaneous settlement permission from Department counsel under 10 CFR 719.33 and a cost allowability determination, the contractor may be in a position of superior knowledge or may have failed to obtain or deliver reasonably available pertinent information regarding the underlying facts that should factor into a determination of cost allowability. If Department counsel suspects either situation exists, he or she must refrain from considering requests for a cost allowability determination and the contracting officer must not make a cost allowability determination. In addition, as a practical matter, the time between the contractor's request to settle a case pursuant to 10 CFR 719.33 and the point at which the contractor needs an answer regarding permission to settle is often a very short period. In such instances approving simultaneous requests for settlement permission and cost allowability determinations may be impractical. The contracting officer must withhold a determination regarding the allowability of any portion or aspect of settlement related costs until he or she is able to make a fully informed decision on allowability.

Principles Guiding Cost Allowability Determinations. First, the contracting officer, in conjunction with Department counsel must evaluate whether the requirements of 10 CFR part 719 have been adhered to by the contractor. Then, FAR 31.205-47, *Costs related to legal and other proceedings*, should be used to determine whether the settlement and associated legal costs should be allowed under the criteria contained therein. Contracting officers must consider the specific facts surrounding the legal claims settled by the agreement under review.

Section 2.1 of Appendix A to 10 CFR part 719 provides: "While 10 CFR part 719 provides procedures associated with incurring and monitoring legal costs, the evaluation of the reason for the incurrence of the legal costs, e.g., liability, fault or avoidability, is a separate issue. The reason for the contractor incurring costs may affect the allowability of the contractor's legal costs." Such considerations include the following:

- Whistleblower claims – Costs associated with certain settled whistleblower cases are governed by DEAR 931.205-47(h) (non-M&O) or DEAR 970.3102-05-47 (M&O), which require the contracting officer (in consultation with Department counsel) to consider the terms of the contract, relevant cost regulations, and the relevant facts and circumstances, including federal law and policy prohibiting reprisal against whistleblowers, when determining whether defense, settlement, and award costs are allowable. See AL 2016-06, Provisional Reimbursement and Allowability of Costs Associated with Whistleblower Actions, at http://energy.gov/sites/prod/files/2016/08/f33/08-04-16_-_Acquisition_Letter_No._AL-2016-06.pdf.
- Employment Discrimination claims – Costs associated with certain settled employment discrimination lawsuits require the contracting officer (in consultation with Department counsel) to analyze the facts underlying the settled claim and determine whether the plaintiff's claims had more than very little likelihood of success on the merits to determine whether the legal costs and settlement costs are allowable. See AL 2014-03, Allowability of Contractor Litigation Defense and Settlement Costs, at http://energy.gov/sites/prod/files/2016/02/f29/AL%202014-03.pdf.
- Contractor Managerial Actions - The DEAR "Insurance-litigation and claims" clauses at DEAR 952.231–71 (non-M&O) and DEAR 970.5228-1 (M&O) provide limitations

on the allowability of costs that result from the willful misconduct, lack of good faith, or failure to exercise prudent business judgment by contractor managerial personnel.

It is essential to keep in mind at all times that even if the settlement is authorized and the settlement costs meet all of the above requirements, to be allowable the costs must comply with all of the other requirements of FAR 31.201-2(a), i.e., the costs must be reasonable, allocable, CAS (or GAAP if no CAS apply) compliant, compliant with the terms of the contract, and compliant with any limitations in FAR subpart 31.2.

Documentation of Settlement Allowability

In all instances, contracting officers must appropriately document determinations regarding contractors' requests for permission to settle and for reimbursement of settlement and associated legal costs. Upon determination that granting settlement permission is appropriate, the contracting officer's review of the allowability of the settlement costs should be performed expeditiously. (As stated earlier, the contracting officer must withhold a determination regarding the allowability of any portion or aspect of settlement related costs until he or she is able to make a fully informed decision on allowability. Additionally, complex litigation may necessitate an extended period of review.) Where the contracting officer, after consulting with Department counsel, is able to provide simultaneous settlement permission and cost allowability determination regarding the allowability of any portion or aspect of settlement related costs, a post-execution review of the associated settlement agreement is not required, unless otherwise required by the Legal Management Plan. Where new information becomes available that should have been provided by the contractor with its request for settlement permission and cost allowability determination, however, contracting officers must consult with Department counsel to determine whether further review is warranted.

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, (2) request through the CO for DCAA assistance, or (3) request through the CO for audit assistance utilizing the audit support Blanket Purchase Agreement (BPA) administered by the Field Assistance and Oversight Division (MA-621). The current audit support BPA is with CohnReznick, LLP. In the event the prime M&O contractor would like to utilize the BPA to obtain audit support to audit one of their subcontractors, they should contact a Department of Energy (DOE) CO at their site. Only a DOE CO is authorized to place orders against the BPA. Independent contract audit support acquired by the DOE prime M&O contractor to audit their subcontracts must be conducted by qualified auditors and must meet the Institute of Internal Auditors standards.

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.

1. **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.

2. **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.

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.

M&O Contractor Standard Research Subcontract (Educational Institution or Nonprofit Organization)

Guiding Principles

- Use of the model M&O research subcontract will benefit the DOE complex as well as the university research community.

[References: DEAR 970.4402]

1.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references.

1.1 Purpose. The purpose of this chapter is to provide an updated version of the Management and Operating (M&O) Contractor Standard Research Subcontract (Educational Institution or Nonprofit Organization) Model and to encourage its use whenever appropriate.

1.2 Background. In 2004, the Integrated Contractor Purchasing Team (including representatives from other federally funded research facilities and DOE/NNSA) developed a model research subcontract. A subsequent review and update was completed in 2010 and disseminated via Policy Flash 2010-79. The attached update to the model subcontract (see Attachment 1) is the result of a similar stakeholders' collaboration from across the DOE complex. Accordingly, DOE encourages 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 the proposed subcontract is for other than standard research and development work (e.g. work performed on a DOE/NNSA site, a programmatic requirement for open source software distribution, etc.), the articles and clauses, in the model should be tailored to address those specific requirements.

While we understand that some M&O contractors have developed automated systems that may not be able to handle the identical sequence of the standard subcontract without major reprogramming (e.g. signature page is at the end rather than the beginning), it is not necessary to reprogram existing systems as long as the model text of the articles and clauses are used. Contractors may also make minor changes and/or additions to the text (e.g. change "mailed" to "e-mailed" or

"faxed," require payment by electronic funds transfer, or require reports to be submitted electronically, etc.).

We believe that usage of this standardized research subcontract will benefit the DOE complex as well as the university research community and request your support and encouragement of its use.

Attachment 1

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:
E-Mail: Fax:

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 (Appendix A) and other documents attached or incorporated by reference, which together constitute the entire Subcontract and supersede all prior discussions, negotiations, representations, and agreements.

[SUBCONTRACTOR NAME)

By:
Name:
Title:
Date:

[M&O CONTRACTOR NAME)

By:
Name:
Title:
Date:

Attachment 1

TABLE OF CONTENTS

SCHEDULE OF ARTICLES

1.Statement of Work 3

2. Report Preparation Requirements 3

3. Period of Performance 3

4. Costs and Payments 3

5. Invoices for Payment 4

6. Contractor-Furnished and Subcontractor-Acquired Property 4

7. Subcontract Administration 5

8. Travel Requirements 5

9. Performance of Work 5

10.Incorporated Documents 5

GENERAL PROVISIONS

CLAUSE 1- PUBLICATIONS 6
CLAUSE 2 – NOTICES 6
CLAUSE 3 – ASSIGNMENTS 6
CLAUSE 4 – DISPUTES 6
CLAUSE 5 - RESPONSIBILITY FOR TECHNOLOGY EXPORT CONTROL 7
CLAUSE 6 - COST ACCOUNTING STANDARDS (CAS) LIABILITY 7
CLAUSE 7 - DISCLOSURE AND USE RESTRICTIONS FOR LIMITED RIGHTS DATA 7
CLAUSE 8 - ORDER OF PRECEDENCE 8
CLAUSE 9 - SECURITY REQUIREMENTS 8
CLAUSE 10 - CLAUSES INCORPORATED BY REFERENCE 8

Attachment 1

SCHEDULE OF ARTICLES

1. Statement of Work

The Subcontractor shall perform certain research and development work identified as " ", dated, and more fully described in the *Statement of Work,* Appendix B, to this Subcontract.

The Subcontractor'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.

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.

d. The Subcontractor shall submit the final and any intermediate reports to the Contractor's Technical Representative, 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.

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 and 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 E) to this Subcontract.]

b. Check provision below that applies OR include only applicable provision:

Attachment 1

This Subcontract is fully-funded and is subject to the *Limitation of Cost* 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 or a period of performance.)

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 any property acquired by the Subcontractor shall include the following information: a description of the property, an assigned property number, the name of the manufacturer, serial and model number, the acquisition date, unit price, quantity, total cost and location of the item.

6. Contractor-Furnished and Subcontractor-Acquired Property

a. The Contractor shall furnish the Subcontractor the materials, equipment, and supplies listed in *Contractor-Furnished Government Property,* Appendix F, 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.

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.

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

Attachment 1

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.

e. The Contractor shall determine at the conclusion of the Subcontract whether the educational institution shall be allowed to retain high risk and/or sensitive items.

7. Subcontract Administration

a. The Contractor's Procurement Representative for this Subcontract is [insert Contractor's Procurement Representative's Name]. The Procurement Representative 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 at the following address:

Procurement Department
ATTN:
[Insert mailing address]

b. Any notices and approvals required by this Subcontract from the Contractor to the Subcontractor shall be issued by the Procurement Representative.

c. The Contractor's Technical Representative for this Subcontract is [insert Contract's Technical Representative's 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.

d. The Subcontractor shall, as a condition of full payment, assist the Contractor after the completion of the work in accomplishing the administrative closeout of this Subcontract, including, as necessary or required, the furnishing of documentation and reports, the disposition of property, the disclosure of any inventions, the execution of any required documents, the performance of any audits, and the settlement of any interim or disallowed costs.

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 (at least 45 days prior to travel) by the Contractor, even if the cost is included in the Subcontractor's cost proposal for this Subcontract. Foreign travel requests should be submitted in accordance with DOE Order 551.1D (or current version).

c. Any travel costs will be reimbursable in accordance with the Subcontractor's institutional travel policy.

9. Performance of Work

The Subcontractor will/will not perform the work at a DOE/NNSA Facility.

10. Incorporated Documents

The following documents are hereby incorporated as Attachments to this Schedule of Articles of this Subcontract:

Attachment 1

- Appendix A- General Provisions for Standard Research Subcontracts, dated_____
- Appendix B- Statement of Work dated_____
- Appendix C- Travel Costs, dated_____(if applicable)
- Appendix D- Intellectual Property, dated_____(if applicable)
- Appendix E- Subcontractor's Cost Proposal dated_____(if applicable)
- Appendix F – Contractor-Furnished Government Property dated_____(if applicable)
- [List others if applicable.]

Attachment 1

APPENDIX A - 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 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 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, 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, but are not required to, 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 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.

Attachment 1

B. Formal Resolution

1. If a dispute has not been resolved by informal resolution, it may, but is not required to, 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 in accordance with DEAR 970.5225-1 COMPLIANCE WITH EXPORT CONTROL LAWS AND REGULATIONS, incorporated herein by reference.

CLAUSE 6 - COST ACCOUNTING STANDARDS (CAS) LIABILITY

[Applicable to Subcontracts exceeding $750,000]

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 or lower-tier 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, Rights in Data-General (DEC 2007) 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.

Attachment 1

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 (I) 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, **as they exist on the effective date of this Subcontract,** 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://ecfr.gpoaccess.gov/cgilt/text/text-idx?sid=802fadefcObfl8e947d936c6ef6ec328&c=ecfr&tp!=!ecfrbrowseiTitle48/48tab02.tpl

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

Attachment 1

"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 52.245-1, Alternate II, in which clauses "Government" shall mean the United States Government and "Contracting Officer" shall mean the DOE/NNSA Contracting Officer for Prime Contract DE- [insert number] 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.

Attachment 1

The FAR and DEAR clauses listed below shall be applicable to this Subcontract based on the value of the Subcontract and the nature and location of the work, as indicated.

APPLICABLE TO ALL SUBCONTRACTS UNLESS OTHERWISE INDICATED BELOW:

DEAR 952.204-71	SENSITIVE FOREIGN NATIONS CONTROLS. Applies if the Subcontract is for unclassified research involving nuclear technology.
FAR 52.215-23	LIMITATIONS ON PASS-THROUGH CHARGES
FAR 52.216-7	ALLOWABLE COST AND PAYMENT. 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
FAR 52.222-21	PROHIBITION OF SEGREGATED FACILITIES
FAR 52.222-26	EQUAL OPPORTUNITY
FAR 52.222-50	COMBATING TRAFFICKING IN PERSONS
FAR 52.222-54	EMPLOYMENT ELIGIBILITY VERFICATION
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
DEAR 970.5225-1	COMPLIANCE WITH EXPORT CONTROL LAWS AND REGULATIONS
DEAR 970.5227-4	AUTHORIZATION AND CONSENT, Paragraph (a).
DEAR 952.227-9	REFUND OF ROYALTIES. 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). (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.) [Check provision below that applies OR include only applicable provision].
FAR 52.227-14	RIGHTS IN DATA-GENERAL with ALTERNATE V including new paragraph G) and DEAR 927.409 revised paragraphs (a) Definitions 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 with ALTERNATE IV and revised paragraph (c)(l) and DEAR 927.409, revised paragraph (a) Definitions applies if the Subcontract is for basic or applied research to be performed solely by colleges and universities, computer software is not being developed as indicated in the Statement of Work, and no other special circumstances apply per DEAR 927.409.
FAR 52.227-23	RIGHTS TO PROPOSAL DATA (TECHNICAL). Applies if the Subcontract is based upon a technical proposal.
FAR 52.229-10	STATE OF NEW MEXICO GROSS RECEIPTS AND COMPENSATING TAX. Applies if any part of this Subcontract is to be performed in the State of New Mexico.
DEAR 970.5232-3	ACCOUNTS, RECORDS, AND INSPECTION
FAR 52.232-20	LIMITATION OF COST. Applies if the Subcontract is fully funded.
FAR 52.232-22	LIMITATION OF FUNDS. Applies if the Subcontract is incrementally funded.
FAR 52.242-15	STOP-WORK ORDER with ALTERNATE I.
FAR 52.243-2	CHANGES - COST -REIMBURSEMENT, WITH ALTERNATE V

Attachment 1

FAR 52.244-2	SUBCONTRACTS with ALTERNATE I. 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 52.245-1	GOVERNMENT PROPERTY (COST-REIMBURSEMENT, TIME-AND-MATERIALS, OR LABOR-HOUR CONTRACTS with Alternate II (JUN 2007). Paragraphs (e)(l), (e)(2), and revised (e)(3). Insert DEAR 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. Applies if the Subcontract involves international air transportation.
FAR 52.247-64	PREFERENCE FOR PRIVATELY OWNED U.S.-FLAG COMMERCIAL VESSELS.
DEAR 952.247-70	FOREIGN TRAVEL.
FAR 52.249-5	TERMINATION FOR CONVENIENCE OF THE GOVERNMENT (EDUCATIONAL AND OTHER NONPROFIT INSTITUTIONS).
DEAR 952.217-70	ACQUISTION OF REAL PROPERTY. Applies if the Subcontract involves leased space that is reimbursed.

APPLICABLE IF THE SUBCONTRACT IS FOR $15,000 OR MORE:

FAR 52.222-36	EQUAL OPPORTUNITY FOR WORKERS WITH DISABILITIES.

APPLICABLE IF THE SUBCONTRACT EXCEEDS $150,000:

FAR 52.203-5	COVENANT AGAINST CONTINGENT FEES
FAR 52.203-6	RESTRICTIONS ON SUBCONTRACTOR SALES TO THE GOVERNMENT
FAR 52.203-7	ANTI-KICKBACK PROCEDURES
FAR 52.203-10	PRICE OR FEE ADJUSTMENT FOR ILLEGAL OR IMPROPER ACTIVITY
FAR 52.203-12	LIMITATION ON PAYMENTS TO INFLUENCE CERTAIN FEDERAL TRANSACTIONS
FAR 52.219-8	UTILIZATION OF SMALL BUSINESS CONCERNS
FAR 52.222-35	EQUAL OPPORTUNITY FOR VETERANS
FAR 52.222-37	EMPLOYMENT REPORTS ON VETERANS
DEAR 970.5227-5	NOTICE AND ASSISTANCE REGARDING PATENT AND COPYRIGHT INFRINGEMENT

APPLICABLE IF THE SUBCONTRACT EXCEEDS $500,000:

FAR 52.227-16	ADDITIONAL DATA REQUIREMENTS.

APPLICABLE IF THE SUBCONTRACT EXCEEDS $700,000:

FAR 52.219-9	SMALL BUSINESS SUBCONTRACTING PLAN. Applies unless there are no subcontracting possibilities.

Attachment 1

APPLICABLE IF THE SUBCONTRACT EXCEEDS $750,000:

FAR 52.215-10	PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA if subcontract exceeds $750,000.
FAR 52.215-11	PRICE REDUCTION FOR DEFECTIVE COST OR PRICING DATA-MODIFICATIONS not used when 52.215-10 is included. In subcontracts greater than $750,000.
FAR 52.215-12	SUBCONTRACTOR COST OR PRICING DATA. Applies if 52.215-10 applies.
FAR 52.215-13	SUBCONTRACTOR COST OR PRICING DATA-MODIFICATIONS. Applies if 52.215-11 applies.
FAR 52.230-2	COST ACCOUNTING STANDARDS, 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, 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, excluding paragraph (b).
FAR 52.230-6	ADMINISTRATION OF COST ACCOUNTING STANDARDS.

(END OF GENERAL PROVISIONS)

M&O Acquisition Planning –Identification and Consideration of Lessons Learned From Prior M&O Acquisitions

GUIDING PRINCIPLE

- Lessons learned should be identified, analyzed, and shared across the complex to inform future acquisition planning efforts.

[References: FAR 7.103(t) and Acquisition Guide Chapter 70.1706-1]

1.0 Discussion

This chapter supplements other more primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. The purpose of this chapter is to establish procedures for the submission and sharing of lessons learned case studies to inform acquisition planning for future M&O contracts.

2.0 Background

This chapter further implements the requirement at FAR 7.103(t) for the agency head to establish procedures "ensuring that knowledge gained from prior acquisitions is used to further refine requirements and acquisition strategies."

Lessons learned should be documented for acquisition practices relating to an M&O contract that (1) are substantively different from the practices previously employed at the site and (2) could potentially be considered for future acquisitions. Such substantive changes could include the addition or removal of significant contract scope, including the consolidation of activities under one contract that were previously performed by multiple contractors or significant changes to the award or incentive fee practices.

3.0 Lessons Learned

- Heads of Contracting Activity (HCAs) shall ensure that a lessons learned analysis is conducted, documented in writing, and submitted to the Office of Acquisition Management through the office's assigned business clearance analyst following any acquisition that utilized alternatives to the single M&O contract approach. In order to ensure a useful analysis is conducted that takes into account all relevant impacts on contract costs, performance, and any management integration issues, it will be necessary to allow a sufficient amount of time to elapse following contract award. Accordingly, lessons learned analyses should be conducted and submitted not later than three years after contract award. A sample template is provided as an attachment. For NNSA, lessons learned analyses should be submitted through the relevant HCA.

- The DOE Office of Acquisition Management (MA-60) will maintain and publish a library of the lessons learned case studies on the DOE Acquisition Answers web-page (https://community.max.gov/display/DOE/Acquisition+ANSWERS). Accordingly, HCAs should ensure that any lessons learned case studies submitted are suitable for sharing and represent the considered judgement of management.

- The Field Assistance and Oversight Division (MA-621) will ensure that lessons learned analyses are conducted and submitted as required.

- M&O contract lessons learned should be considered when developing the acquisition alternatives package (AG 70.1706-1) for any DOE/NNSA site that is currently operated through an M&O contract.

Attachment

Template for a Case Study Description

I. Background

- Contracting office submitting the case study
- Point of contact for the case study
- Short description of the alternative approach

II. Benefits

- Describe the original reasons for choosing the alternative
- Describe the benefits anticipated at the time of acquisition planning
- Describe whether the anticipated benefits were realized

III. Impacts

Describe the effects of the alternative strategy on:

- Contract costs
- Performance
- Management integration—coordination of complementary activities at the DOE site
- Administrative efficiency—increase or decrease in contractor administrative costs, duplication or redundancy in contractor administrative functions
- Contractor Human Resource Management, including DOE's management of liabilities for contractor pensions and post-retirement benefits
- Government and contractor accountability for performance outcomes--whether the alternative approach dilutes or increased DOE's ability to hold contractors accountable for performance outcomes.
- Federal or Federal support service resources—the extent to which there were, or were not, sufficient resources in place to effectively manage the alternative approach. Discuss experience with the need for additional federal or federal support service resource needs by function (for example, procurement, safety, security, budget, legal, and other oversight areas).

IV. Conclusions & key considerations for future acquisition planning

- Was the alternative successful?
- What are the circumstances under which this alternative could be used effectively for future acquisitions?

b e te t

CHAPTER 71 - REVIEW AND APPROVAL OF CONTRACT AND FINANCIAL ASSISTANCE ACTIONS

71 1 e rter e e r e r e e ember 201
71 t ep rt t eme t 2011
71 tt me t t t

Headquarters Business Clearance Review Process

Guiding Principles

- Timely acquisition planning is critical;
- Effective oversight control systems are essential to ensuring the quality/integrity of procurement transactions; and
- Up-front and early collaboration and cooperation are instrumental for a timely and effective acquisition process.

References: Acquisition Guide Chapter 1, Acquisition Guide Chapter 7.1, Acquisition Guide Chapter 7.3, Acquisition Guide Chapter 32.2, Acquisition Guide Chapter 70.1706-1, Acquisition Letter (AL) 2009-03, Federal Acquisition Regulation (FAR) Part 6, FAR 17.502-2(c)(2), FAR Part 17.6, FAR Part 17.605, FAR 35.017-4, FAR 44.2, Department of Energy Acquisition Regulation (DEAR) 917.6, and the DOE Guide to Financial Assistance.

1.0 Summary of Latest Changes

This update: (1) restructures and reformats the document, (2) removes redundant and unnecessary information, and (3) provides renewed emphasis on up-front and early collaboration between field sites and headquarters in order to expedite the Business Clearance Review (BCR) process.

2.0 Discussion

This chapter provides guidance regarding the policies and procedures governing the Field Assistance and Oversight Division (MA-621). This office is responsible for the Headquarters BCR process, whereby certain procurement actions (e.g., solicitations, contracts, major contract changes, etc.) are required to be reviewed and approved by the Department of Energy (DOE) Senior Procurement Executive (SPE) as a condition for execution. This section does not apply to the National Nuclear Security Administration (NNSA).

MA-621 recognizes that acquisition timelines are often severely compressed due to regulatory and legal milestones that must be met, safety concerns that have to be addressed, and mission critical work that must be accomplished. In this highly volatile environment, acquisition planning and contract management must occur at the “speed of light”, while at the same time support successful mission execution. Because of this, MA-621 strongly supports and welcomes up-front

and early collaboration between the field site acquisition team, the program office headquarters acquisition support team (if applicable), and MA-621.

2.1 The Flow of Procurement Authority within DOE. The Secretary of Energy designated the Director, Office of Acquisition Management (OAM), as the SPE for DOE. This designation includes delegations of authority for contracting and financial assistance. The SPE re-delegates specific contracting authority to senior management officials who have cognizance over one or more procurement offices. These officials are referred to under government-wide acquisition regulations (i.e., the FAR) as the Head of the Contracting Activity (HCA). Each HCA receives a specific HCA delegation memorandum from the SPE that cites specific contracting authority that is limited by dollar thresholds, the requirements of the FAR, the DEAR, the DOE Financial Assistance Regulations, and DOE policies and procedures. HCAs use this authority to execute and manage a broad range of contractual, financial, and administrative activities and functions. Each HCA may delegate some, but not all, of his or her specific contracting authority. DOE Acquisition Guide Chapter 1 addresses delegable and non-delegable HCA functions and responsibilities.

The DOE SPE is responsible for ensuring the efficiency, effectiveness, and integrity of the Department's procurement system. To execute its responsibilities, the office of the SPE has established a number of interdependent processes and procedures. For example, MA-621 administers the Procurement Management Review (PMR) program, which supplements other contracting activity performance assessment efforts and augments other corporate-level internal control processes, allowing the SPE to perform a risk-based analysis regarding the health of a field site procurement office and to decide whether fewer/more BCR transactional reviews are necessary. MA-621 holds responsibility for the Department's BCR process and serves as the SPE's representative in the review and approval of major acquisition and financial assistance actions that exceed HCA delegated authority. Certain procurement actions (e.g., solicitations, contracts, major contract changes, etc.) must be reviewed and approved/cleared by the DOE SPE via the BCR process before execution. MA-621 is tasked with ensuring that all statutory, regulatory, and policy compliance requirements are satisfied, assisting field and program offices with implementing sound acquisition and financial assistance practices throughout the entire life-cycle, and providing guidance, advice, and expertise as needed. Additionally, MA-621 assists field offices and program offices in planning and developing business strategies for acquisition, financial assistance, and other actions (e.g., interagency agreements, subcontract consents, major modifications). MA-621 may be contacted for assistance on any action, regardless of dollar value.

2.2 The Informal Review Process. During the development of all acquisition documentation at any point in the acquisition cycle, early, frank, and open communication and collaboration is encouraged between the field site acquisition team, the program office headquarters acquisition team (if applicable), and MA-621, the end goal of which is a meeting of the minds with respect to a particular solution or path forward. This early, joint collaborative approach should mitigate the need for additional re-work and/or strategy reversal, which can be

extremely time intensive when occurring at later, more formal stages of the review and approval cycle.

Sharing individual pieces of documentation and early draft documents, versus waiting for an entire document to be finalized, will enhance the efficiency of later reviews, and provide an opportunity for all parties to explore possible alternatives, analyze potential positive and negative outcomes, and discuss the rationale for selecting a particular alternative early in the process. Informal documentation can be reviewed simultaneously by the field site acquisition team, the program office headquarters acquisition team (if applicable), and MA-621, versus a time intensive linear process. Informal comments can be shared amongst all parties to facilitate resolution and revision. Approval, conditional approval, or disapproval documentation will not be provided for informal review documents.

Prior to submitting a package to MA-621 for formal BCR in accordance with Section 2.3, the field site and program office headquarters acquisition support team (if applicable) should ensure to the greatest extent possible, there are no unresolved comments or ongoing discussions on draft documents which would preclude the formal package from being approved/cleared.

2.3 The Formal BCR Process. This section outlines the formal BCR process; however, prior to proceeding with submitting a package for formal BCR, MA-621 strongly encourages and welcomes up-front and early collaboration between the field site acquisition team, the program office headquarters acquisition support team (if applicable), and MA-621 as described in the preceding section.

2.3.1 Annual Business Clearance Call. Prior to the beginning of each fiscal year, MA-621 requests each procurement office provide a projection for the upcoming fiscal year of all contracts, financial assistance awards, and other actions that are expected to exceed its HCA's procurement authority, thereby making the actions subject to the BCR process. In the event a site does not have at least five (5) actions in a fiscal year that exceed the HCA delegated threshold, the site is to submit information regarding their highest five (5) actions in terms of dollar value, which are then subject to the BCR process. For copies of SPE re-delegations of authority to HCAs in order to determine HCA authority and delegated thresholds, please visit https://www.directives.doe.gov/delegations.

As soon as practicable and based on a risk based analysis of the procurement office's annual call submission, specific actions will be selected for review via a response memorandum from the Chief of MA-621 to all HCAs and Procurement Directors (PDs). For each action selected, MA-621 will notify the cognizant HCA and PD of the scope of the BCR and whether the acquisition is selected for full review (i.e., require that all documentation from acquisition planning through selection/award be reviewed), or limited review (i.e., require review of only certain transaction-related documentation, such as the acquisition plan and/or solicitation). Actions that are not selected as part of the annual call response for MA-621 BCR are deemed to have received a waiver from the BCR process. All actions granted a waiver from the BCR process should be

processed as though approval/clearance by the SPE has been granted. However, HCA review and approval is still necessary when applicable.

Each procurement office must also report, through the HCA to MA-621, all actions that arise during the fiscal year that meet the criteria prescribed in Section 2.3.2 of this document, but were not submitted in response to the MA-621 annual call request for projected actions. HCAs should ensure that such notification is provided as soon as the requirement is known to ensure sufficient time to complete the potential BCR of the action.

Throughout the year, MA-621 may make a determination to decrease or increase the number of actions selected for BCR based on, to name a few, quality of documents submitted for previous BCRs, the site's willingness and ability to address comments on informal reviews, observations made at a recent PMR, reports issued by the Government Accountability Office (GAO) and the Office of the Inspector General (IG), and information gathered from other support offices, such as the Office of General Counsel. In those instances where actions are selected or waived for review outside of the annual call process, the Chief of MA-621 will send the cognizant HCA a separate written notification indicating which action is selected or waived for BCR.

Note: For program elements that have centralized HCA authority (i.e., Environmental Management (EM) and Science (SC)), the BCR process and annual call requirements apply individually to each procurement office under the HCA's cognizance.

2.3.2 Actions Subject to the BCR Process. Actions subject to BCR include:

- Actions for which authority is not delegated to the HCA pursuant to the HCA's written delegation of authority from the SPE.
- Actions with values that exceed the HCA's delegated authorities, including actions that exceed the transaction specific dollar thresholds identified in the HCA delegation letter. This also includes modifications that:
    - Exceed both 20% of the original contract value and $10 million (not applicable to Power Marketing Administration contracts);
    - Increase the total contract/task order value above the HCA's delegation threshold for new competitive acquisitions. Actions that involve increases and decreases to the award value with an absolute value for the modification above $50 million are subject to review. For example, when $26 million in additional work is added to a contract through the same modification that includes a $25 million reduction, the absolute value of the change, $51 million, would determine whether the modification is subject to BCR;
    - Involve a significant restructuring of the terms and conditions of the award (e.g., contract type, deviation/modification of

standard clauses) and the original base award was approved by MA-621 through BCR, regardless of the estimated value; and

- Increase the period of performance of the award beyond 5 years. Note that modifications of existing awards exercising the right of the Government available under contract options (e.g. options/direction issued in conjunction with FAR 52.217-8 Option to Extend Services, FAR 52.217-9 Option to Extend the Term of the Contract, and FAR 52.237-2 Continuity of Services) do not require BCR. These options are reviewed/approved at the appropriate level during the pre-award phase of the acquisition.

- Actions for which the approving authority is prescribed by law, regulation, or DOE policy as a specific senior DOE official (e.g., the DOE SPE, the Secretary of Energy). Such actions include, but are not limited to: authority to use the Management and Operating (M&O) form of contract; ratifications; award of Technology Investment Agreements (TIAs); Performance Evaluation Management Plans (PEMPs) for all contracts whose value exceeds the HCAs delegated level of authority; and requests for equivalencies or exemptions to the required Contract Management Plans (CMPs), as specified in DOE Acquisition Guide Chapter 32.2.
- Actions which, based on the judgment of the HCA and/or the SPE (regardless of the dollar value of the transaction), involve significant litigation or performance risk, or may generate unusual interest from the public, media, congress, or other governmental entity.

Note: The SPE may, at any time, tailor all or individual HCA delegated authorities based on Government-wide procurement initiatives, Office of Federal Procurement Policy (OFPP) guidance, GAO audits, IG audits, PMR observations, and other relevant bases (e.g., changes to law or regulation).

Additionally, administrative modifications, funding modifications, and option exercise modifications (non-M&O) involving options previously evaluated and negotiated at the point of the base award (whether that action was selected for BCR or not), <u>are not subject to BCR</u>. Continuations of financial assistance awards that involve budget periods previously evaluated at the point of the base award <u>are also not subject to BCR</u>. However, MA-621 reserves the right to call these actions in for BCR in the event circumstances warrant additional review.

2.3.3 <u>BCR Document Submission/Coordination Requirements</u>. The HCA is responsible for ensuring the submission of a complete and high-quality package for actions that are selected for BCR review. In the event the HCA has re-delegated BCR submission responsibility to another individual, written evidence of the HCA re-delegation should be provided to MA-621. Upon receipt of a complete package, MA-621 will commence the BCR

process. Please note that for a review package to be considered complete, it must include evidence of local independent review and coordination, including the formal concurrence of the procurement office's legal counsel, as well as the PD and the cognizant HCA. In addition, all comments and comment resolutions resulting from local independent review must be included with the submission. Experience has shown that early and substantive collaboration between field office staff members and headquarters functional counterparts streamlines this process.

After receipt of a complete package, the BCR process takes approximately 10 business days to complete and provide the approval/clearance, disapproval or conditional approval/clearance. If the 10 day timeframe cannot be met, the MA-621 liaison will contact the appropriate personnel and provide the anticipated BCR completion date. Typically, formal BCR is completed in less than 10 business days if the site has followed the Informal Review Process described in Section 2.2.

Section 2.5 of this guide chapter provides, for common acquisition action types, examples of documents that are generally required as part of the BCR submission package. The section addresses the most common actions that are subject to the BCR process. For actions that are not addressed in Section 2.5, the Contracting Officer should consult the applicable regulation, policy, or the procurement office's designated MA-621 liaison.

2.3.4 BCR Comment Definitions. When providing feedback to the HCA regarding a BCR package, comments will be categorized as follows:

- **Mandatory**: Violations of law, regulation, policy or directive; unacceptable business and/or legal risk; or ambiguities and/or conflicts which require correction/discussion. *Corrective action required.*
- **Highly Recommend**: Best business advice based on law, regulation, and/or policy, experience, and lessons learned. *Corrective action recommended.*
- **Clarification**: Additional information, explanation, or clarification needed to improve the document. *Optional, for consideration.*
- **Suggestion**: May improve the document flow, comprehension, logic and/or analysis. *Optional, for consideration.*
- **Editorial**: Spelling, punctuation, grammar, etc.

2.4 Responsibilities. This section outlines responsibilities of headquarters and field site personnel during the BCR process.

2.4.1 HCA. The HCA responsibilities are as follows:

- Promote early and substantive collaboration and coordination between his/her field office staff (e.g., Contracting Officer, Integrated Project Team (IPT) members, Source Evaluation Board (SEB) members,

procurement, legal, finance, safety, security, and industrial relations), the MA-621 liaison, and their headquarters functional counterparts. The HCA must ensure that actions submitted comply with the guidance herein.

- Ensure that the documents have been through the site's internal review process (i.e., quality assurance reviews to include the PD and local legal counsel review and concurrence). Documents submitted for BCR that do not provide evidence that required quality assurance reviews have occurred may be rejected by MA-621 and be returned to the HCA.

- Provide evidence of the cognizant PD's written affirmation of compliance with all statutory, regulatory (FAR, DEAR) and administrative (Acquisition Letters, Acquisition Guide, DOE Directives, etc.) requirements. This includes affirmation of compliance with all prescribed policies and procedures, inclusion of all prescribed provisions and clauses without deviation, and/or the specific identification of deviations from prescribed policies, procedures, provisions and clauses.

- Provide documentation of their concurrence on all packages submitted to MA-621 for BCR.

- Ensure the effective management and timely resolution of BCR comments, and the timely resubmission of amended packages for final review and approval/clearance by MA-621. At a minimum, all "mandatory" comments must be corrected before resubmitting for review and approval. Please note that the site should also provide their responses to all other non-mandatory BCR comments. If there are any mandatory comments with which the HCA does not agree, the cover memo of the revised package should specifically address what was not corrected and the rationale for not correcting it. While the HCA is not required to resubmit documents that have been conditionally approved, the HCA shall provide a document explaining how the comments contained in the conditional approval were addressed.

- Provide documentation regarding any re-delegation of HCA responsibilities applicable to the BCR submission.

2.4.2 Contracting Officer. The Contracting Officer (CO) responsibilities are as follows:

- Ensure documentation submitted to the HCA and MA-621 follows the applicable procurement and financial assistance policies and procedures. The CO is strongly encouraged to submit drafts of documents soliciting advice from the MA-621 liaison throughout the acquisition process.

- Clearly identify any deviations to FAR or DEAR clauses, significant revisions to STRIPES corporate clauses, or any special terms and conditions. Deviations to FAR or DEAR clauses must be approved before submission of the package for BCR review in accordance with Acquisition Guide Chapter 1.1.

2.4.3 MA-621. The MA-621 liaison will:

- Through coordination with the HCA and PD, engage on actions either formally (e.g., as an advisor to an IPT), or informally (e.g. preliminary review/consultation of draft documents), to the extent required and/or appropriate, at the earliest practicable stages to expedite document development and streamline the subsequent BCR process.

- Following the receipt of a formal BCR package, conduct an initial review of the package to ensure compliance with the requirements prescribed in Section 2.3.3, BCR Document Submission/Coordination Requirements. The target milestone for MA-621 review is 10 business days from the date of receipt of a complete package.

- Email the cognizant HCA, PD, and CO if a package is rejected as a result of missing required documentation. The 10 day time period for review will not begin until a complete package is delivered to MA-621.

- In order to expedite the Formal BCR Process, make themselves available to discuss potentially controversial issues prior to submission of a formal BCR package. An expedited review is contingent upon up-front and early involvement by the appropriate MA-621 liaison to ensure knowledge of the intricacies of the action is understood and known in advance.

- Review informal draft documents (see Section 2.2, The Informal Review Process).

- Coordinate the official package for review and formal concurrence by the appropriate headquarters program/staff offices. Examples of other

program/staff offices that MA-621 may involve in the review process include the Office of General Counsel (i.e. procurement counsel, labor counsel, and intellectual property counsel), Office of Procurement and Assistance Policy, Office of Asset Management, Office of Project Management Oversight and Assessments, and the Office of the Chief Financial Officer. *Note: Certain regulations and DOE policies prescribe requirements for the coordination of packages with specific headquarters offices for review and formal concurrence prior to submission to MA-621 for BCR (e.g. coordination with the Office of Small and Disadvantaged Business Utilization (OSDBU) for Advance Planning Acquisition Team (APAT) review and small business set-aside determinations). It is the site's responsibility to ensure those reviews and concurrences have taken place.*

- Review the formal BCR package, distribute the package to other necessary support office reviewers (e.g. GC-61, MA-611, PM-20), consolidate reviewer comments, and assist the HCA in reconciling comments resulting from these reviews. While MA-621 will assist in resolving acquisition issues, the HCA is responsible for developing and implementing the corrective actions, as well as serving as the main point of contact regarding program/contracting outcomes.

- Following the HCA's successful resolution of mandatory BCR comments, MA-621 will provide final approval/clearance of the action. To the extent practicable and deemed appropriate by the Chief of MA-621, approval/clearance of an action may be provided conditioned upon the HCA addressing/resolving mandatory BCR comments prior to moving forward with the action under review (e.g., prior to posting solicitation, signing Source Selection Decision Document, issuing contract award, etc.). Typically, if conditional approval is granted, the revised BCR package which resolves the remaining mandatory comments does not need to be resubmitted to MA-621 for review and the HCA may move forward with the action.

2.5 Examples of BCR Actions. This section provides guidance regarding the type of documentation required to be included with specific types of actions submitted for BCR, as appropriate. This is not intended to be an all-inclusive list of actions subject to BCR, nor is it an all-inclusive list of required supporting documentation, but instead, is a list of typical types of actions subject to BCR and the associated supporting documents necessary to include as part of the BCR package.

Example 1. Acquisition Plans
Example 2. Solicitations

Example 3. Non-competitive Awards, Modifications, Requests for Equitable Adjustments, and Change Orders
Example 4. Source Evaluation Board (SEB) Reports/Technical Evaluation Reports
Example 5. Source Selection Decision Documents
Example 6. Funding Opportunity Announcements, Financial Assistance Awards, and Technology Investment Agreements
Example 7. M&O Contract Actions (i.e., extend compete, option exercise, and Federally Funded Research and Development Center designations)
Example 8. Ratification Actions
Example 9. Subcontract Consent Actions
Example 10. Performance Evaluation Management Plans/Award Fee Plans
Example 11. Interagency Agreements
Example 12. Contractor Purchasing System Review (CPSR) Waivers

Example 1 – Acquisition Plans

The BCR of Acquisition Plans will typically require the following information/documentation:

- Draft Acquisition Plan and associated documents in accordance with Acquisition Guide Chapter 7.1;
- Market research documentation;
- Evidence of Federal Information Technology Acquisition Reform Act (FITARA) approval (if applicable);
- DOE F 4220.2 demonstrating completion/approval of required small business review process;
- Any applicable Justification & Approval (such as a Justification for Other than Full and Open Competition (JOFOC)), Determinations & Findings, and/or other business case analysis document relevant to the acquisition; and
- Evidence of local independent review and approval, including legal review in accordance with local procedures and submission of comments and their resolution performed during the local review process.

Example 2 – Solicitations

The BCR of solicitations will typically require the following information/documentation:

- Draft solicitation (RFP, RFQ, IFB), including the model contract;
- Rating Plan/Source Selection Plan, if applicable;
- Copies of any deviations being requested;
- Clear indication of any revisions made to STRIPES Corporate clauses or provisions; and

- Evidence of local independent review and approval including legal review. This includes submission of comments and comment resolution.

Note: The MA-621 liaison should be involved in the development of the draft RFP at the earliest possible stages of document development. With initial involvement in the draft RFP, MA-621 will then typically only review significant changes from the draft RFP to the RFP formally submitted to MA-621 for BCR.

Example 3 – Non-Competitive Awards, Modifications, Requests for Equitable Adjustments, and Change Orders

The BCR of these actions will typically require the following information/documentation:

- Draft RFP/contract modification;
- Required Justification document (e.g., Justification for Other than Full and Open Competition (JOFOC), Limited Sources Justification, Justification for Exception to Fair Opportunity), if applicable;
- The CO's scope determination verifying the work is within the scope of the contract;
- Documentation (including technical evaluation of costs and the Weighted Guidelines Method, or other method, for establishing the profit or fee objective) to support a pricing action;
- Analysis of any other proposed consideration (e.g., schedule delay);
- Draft Pre-negotiation Plan;
- Copies of any FAR or DEAR deviations processed or being requested; and
- Evidence of local independent review and approval, including legal review in accordance with local procedures. This includes submission of comments and comment resolution.

Prior to the Completion of Negotiations/Discussions. If there were significant departures from the objectives of the pre-negotiation plan, including new and significant issues that were not addressed in the pre-negotiation plan, the CO shall submit these revisions to MA-621 for BCR.

After Completing Negotiations, but Prior to Award. One copy of the post negotiation memorandum, the contractor/offeror's Certificate of Current Cost or Pricing Data, and the negotiated contract action shall be submitted for BCR. In the event all of the pre-negotiation objectives were substantially met and at the request of the cognizant HCA, MA-621 may elect to waive, or limit, its review of post-negotiation documents. In the event a waiver or limit review is agreed upon, MA-621 will provide this decision in writing to the HCA and a copy of the post negotiation memorandum and negotiated contract shall be provided by the site to the MA-621 liaison for information purposes only.

Example 4 – Source Evaluation Board (SEB) Reports/Technical Evaluation Committee (TEC) Reports

The BCR of SEB and TEC reports will typically require the following information/documentation:

- Draft (unsigned) SEB or TEC report;
- Supporting attachments/documents to the draft SEB or TEC report (e.g., technical evaluation of costs, cost analysis, audit reports, IGCE, etc.); and
- Evidence of local independent review and approval including legal review. This includes submission of comments and comment resolution.

Example 5 – Source Selection Decision Documents

The BCR of Source Selection Decision Documents will typically require the following information/documentation:

- Copy of the signed SEB or TEC report;
- Draft (unsigned) Source Selection Decision Document to include a sufficiently documented discussion of the rationale for cost vs. technical tradeoffs. Specifically, it must document that any additional technical merit is worth the additional price premium; and
- Evidence of local independent review and approval including legal review. This includes submission of comments and comment resolution.

Example 6 – Funding Opportunity Announcement (FOA), Financial Assistance Award, and Technology Investment Agreement (TIA)

The DOE Guide to Financial Assistance should be followed when preparing and submitting financial assistance actions.

Prior to the release of the funding opportunity announcement, the following documents and information shall be submitted:

- Draft FOA, including merit review criteria, Program Policy Factors, and the Merit Review Plan;
- Copies of any deviations processed or being requested;
- Clear indication of any revisions to STRIPES Corporate clauses or provisions; and
- Evidence of local independent review and approval, including legal review in

accordance with local procedures. This includes submission of comments and comment resolution.

Prior to the approval of a Determination of Non-Competitive Financial Assistance (DNFA), except for the public interest criterion, the following documents and information shall be submitted:

- Draft (unsigned) DNFA; and
- Supporting documentation, such as a copy of the application and merit review documentation.

Prior to the award of a competitive or non-competitive financial assistance action (including renewal applications/awards) or a TIA, the documents and information below shall be submitted. Documents should be submitted in draft form and prior to any Congressional notices or selection announcements. When the action involves a renewal which causes the financial assistance award to exceed the delegation authority of the HCA, the CO shall notify MA-621 and ask for guidance on whether MA-621 review is necessary.

- Draft (unsigned) financial assistance agreement;
- Supporting documentation, such as a copy of the selected application, budget review documentation, and technical evaluation (if applicable);
- Draft Selection Statement (if applicable); and
- Evidence of local independent review and approval, including legal review in accordance with local procedures. This includes submission of comments and comment resolution.

Note: If a FOA or DNFA is selected for BCR, the selection and award documents associated for that FOA or DNFA are not selected for review, unless MA-621 specifically identifies those documents as being selected for BCR.

Example 7 – M&O Contract Actions (i.e., extend compete, option exercise, and Federally Funded Research and Development Center (FFRDC) designations)

BCR is required for several decision points and documents related to M&O contracts. The following provides a description of the BCR of those actions.

Extend/Compete Actions (including options in non-competitively awarded contracts)

The first step in the competition/extension process is for the responsible Cognizant Secretarial Office (CSO), with support from the local site office management, to analyze the acquisition alternatives and strategies, in the development of the contract extend/compete decision package to include the acquisition alternatives analysis required in accordance with

FAR 17.605 and Acquisition Guide Chapter 70.1706-1. This analysis and its related concurrences for the proposed M&O contract action, must occur at least 24 months before contract expiration. It must be consistent with FAR Part 17.6, DEAR 917.6, and FAR Part 6. The package contents must include a discussion of all procurement alternatives and briefing materials for all involved HQ officials (e.g., the SPE, GC, the Deputy Secretary, and the Secretary).

The Acquisition Plan included in the extend/compete decision package (to be approved by the Deputy Secretary and prepared in accordance with FAR Part 7 and DOE Acquisition Guide Chapters 7.1) must include:

- A description of the incumbent's performance history in areas such as program accomplishment, safety, health, environment, energy conservation, financial, and business management and socio-economic programs, including measurable results against established performance measures and criteria;
- Identification of significant projects planned during the period of performance;
- For capital asset acquisitions above the General Plant Project (GPP) threshold, DOE Order and Manual 413.3B must be followed, especially regarding 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.;
- Identification of principal issues, negotiation objectives, and/or significant changes to the current contract terms and conditions, including the extent to which performance based management provisions are or will be negotiated into the contract;
- If the contract is for a FFRDC, a review of the use and continued need for the FFRDC designation in accordance with FAR 35.017-4 (FFRDC designations are limited to a 5 year time period, but may be renewed). Include a request for the authorization for a FFRDC as a separate attachment, to be signed by the Secretary;
- A determination that the M&O contract or performance-based management contract remains appropriate (CO review of suitability of M&O contract to be conducted at least once every 5 years);
- A discussion of the potential impact of a change in contractor on program needs; and
- Rationale that competition for the period of the extension is not in DOE's best interest.

After approval of the Acquisition Plan, a JOFOC (if extension is recommended) is prepared in accordance with FAR Part 6.

The JOFOC must include a separate certification by the HCA and cognizant program

Assistant Secretary that the use of full and open competition is not in the best interest of the Department (if extension is recommended).

Exercise of Option on an M&O Contract

The exercise of an option available on an M&O contract (and previously evaluated as part of a competitive acquisition) shall be approved by the SPE and the cognizant Assistant Secretary(ies). The documentation required is identical to the documentation required in any contract option exercise as prescribed in FAR Part 17 as well as any reviews prescribed by the cognizant Program Office and HCA. The contracting activity shall submit documentation prepared by the CO, and approved by the cognizant Assistant Secretary(ies), indicating that the exercise of the option is in the best interest of the Government, to the SPE. The SPE will provide correspondence of SPE approval, coordinated by MA-621.

Example 8 – Subcontract Consent Actions

In the event a subcontract consent action is selected for BCR, the cognizant field site shall submit adequate documentation in order to verify compliance with the requirements of FAR 44.2 – Consent to Subcontracts. This includes documentation submitted by the prime contractor pursuing the subcontract action, as well as memorandums drafted by the federal CO documenting and describing his/her compliance with all aspects of FAR 44.2.

Example 9 – Performance Evaluation Management Plans/Award Fee Plans

For new awards and prior to the issuance of a modification to incorporate the PEMP/AFP, the following information shall be provided to MA-621 for BCR:

- Documentation supporting the fee methodology in accordance with Acquisition Guide Chapter 16.2;
- Documentation supporting the selection and/or changes to performance-based requirements, objectives, measures and incentives, as well as subjective criteria; and
- Evidence of local independent review and approval. This includes submission of comments and comment resolution.

Example 10 – Interagency Agreements

The BCR of Interagency Agreements will typically require the following information/documentation:

- Draft Interagency Agreement terms and conditions;
- Required Determination of Best Procurement Approach supporting the use of an Interagency Agreement;
- Required Determinations and Findings for awards issued under the authority of the Economy Act;
- Documentation (including technical evaluation of costs) to support the pricing action; and
- Evidence of local independent review and approval, including legal review in accordance with local procedures. This includes submission of comments and comment resolution.

Example 11 – Contractor Purchasing System Review (CPSR) Waivers

For those Contractor Purchasing System Reviews (CPSRs) subject to the Procurement Evaluation and Re-Engineering Team (PERT) process, a CPSR waiver request should be submitted to the MA-621 Annual Call (see Section 2.3.1 of this guide chapter) no later than one year prior to the second 3-year review cycle. The BCR of a CO recommendation to waive a CPSR will typically require the following information/documentation:

- Completed CO Risk Assessment Tool document providing the business case for the waiver request; and
- Evidence of local review and approval, inclusive of HCA concurrence on the CO determination, in accordance with local procedures.

Data Reporting – Quality Management

Guiding Principles

Department of Energy (DOE) Procurement Directors are responsible for ensuring all Acquisition and Financial Assistance data submissions are complete, accurate, and timely. The intent of this chapter is to provide guidance on the quality of data released from DOE, including:

- Importance of Accurate Data Reporting
- Meeting Federal & Departmental Reporting Requirements
- Ensuring Data Quality
- Reviewing & Certifying Reported Data
- DOE Data Quality Plan
- References

1.0 Summary of Latest Changes

This update: Modified to include the importance of accurate data reporting quality, meeting Federal & Departmental reporting requirements, ensuring data quality, and reviewing and certifying reported data. DOE Data Quality Plan updated to include DATA Act certification requirements.

2.0 Background

The Federal Funding Accountability and Transparency Act of 2006 (FFATA) was signed into law on September 26, 2006, to increase Federal spending transparency. The legislation required that federal contract, grant, loan, and other financial assistance awards be displayed on a searchable, publicly accessible website, USASpending.gov, to give the American public access to information on how their tax dollars are being spent.

In May 2014, the Digital Accountability and Transparency Act (DATA Act) was signed into law. The DATA Act required Federal agencies to develop government-wide data standards and to report spending in greater detail.

To ensure the data reported is complete, accurate and timely, Federal Acquisition Regulation (FAR) Part 4.604 and related OMB guidance requires agency Chief Acquisition Officers (CAOs)

to certify annually to the Office of Federal Procurement Policy (OFPP) and the General Services Administration (GSA) their previous fiscal year's FPDS-NG records are complete and accurate. In addition, agency DATA Act Senior Accountable Officials (SAOs) must provide a quarterly assurance that their agency's internal controls support the reliability and validity of the agency data reported for display on USASpending.gov.

The DOE Data Quality Plan (attached) provides detail on how the data review and certification requirements must be completed. In order to meet the objective of providing complete, accurate, and timely information, each contracting activity is required to become familiar with the plan and conduct the required reviews identified in the plan. In addition, each contracting activity is required to identify a Data Quality Point of Contact (POC) to coordinate the completion of the reviews and certifications.

3.0 Importance of Accurate Data Reporting and Comprehensive Data Quality Procedures

The data entered in department-wide and government-wide procurement systems is used to make critical decisions every day. The quality of the data reported is of utmost importance to DOE's mission. Every member of the Department has a responsibility to ensure the quality of the data released both inside and outside the agency. Each DOE procurement office is responsible for the completeness, accuracy, and timeliness of all data released from their respective office and any data submitted to department-wide and government-wide systems and reports. Leadership plays an important role in encouraging their employees to ensure the quality of all data prior to it being released. Even though leadership can't be involved in the release of all data via a report or to a system, they must ensure internal controls are in place and they have confidence their staff is following guidelines to ensure the accuracy of data.

Ultimately, the data reporting requirements, data quality procedures, and review processes in place for procurement systems ensure that the data reported from the systems is useful, actionable information.

Complete, accurate, and timely Federal acquisition and financial assistance data is essential for ensuring the government has the right information when planning and awarding contracts and financial assistance instruments, and that the public has reliable data to track how tax dollars are being spent.

4.0 Meeting Federal & Departmental Reporting Requirements

Since 2008, the DOE has utilized the commercial-off-the-shelf (COTS) product PRISM (provided by Compusearch) as its system-of-record for procurement management information. The software, referred to as the STRategic Integrated Procurement Enterprise System (STRIPES), supports actions performed by the Department's procurement offices. STRIPES interfaces with FPDS-NG, FedBizOpps, Grants.gov, FedConnect, as well as other systems, to

improve the efficiency and effectiveness of awarding and administering acquisition and financial assistance instruments and to also report data.

STRIPES plays an integral role in meeting the FFATA, DATA Act and FAR reporting requirements. In particular, STRIPES is designed to report government-wide acquisition actions with a value exceeding the micro-purchase threshold to FPDS-NG and collect the financial assistance data that is required to be reported to USASpending.gov. In addition to reporting procurement transactions, Contracting Officers are also responsible for completing vendor performance reporting in CPARS and FAPIIS. There are also reporting requirements for various systems that must be met by DOE contracted vendors such as eSRS and FSRS. Contracting Officers are responsible for reviewing and, in some cases, certifying the data has been submitted.

Additional information regarding the FPDS-NG and USASpending.gov reporting requirements, reviews and certifications, as well as requirements for other procurement-related systems that DOE utilizes, can be found in the attached table following the section below titled "Reviewing & Certifying Reported Data".

The Department's Office of Management works collaboratively with the procurement community across the agency to ensure these various reporting requirements are understood and followed. In particular, the Systems Division within the Office of Management helps ensure the Department's procurement systems and processes allow personnel to meet the objective of providing complete, accurate, and timely information.

5.0 Ensuring Data Quality

The Department utilizes many different processes and procedures for ensuring the quality of the data that is reported to procurement systems. Potential data quality issues may be related to the reporting requirements and guidelines, the logical accuracy of the information, as well as the consistency of the information between systems.

In most cases, systems have built-in, internal controls that check for a wide range of potential data quality issues. In addition, DOE has developed data quality tools to supplement the built-in checks in many systems.

The Office of Management Systems Division works with the procurement community to develop and update procedures as reporting requirements change and are added. The Data Quality Points of Contact (DQ POCs) function as experts for their contract office's data quality processes and procedures and work closely with the Office of Management Systems Division to ensure that all data quality-related activities are completed as efficiently as possible.

Although internal and external controls are in place for data quality, it is ultimately the responsibility of the procurement personnel entering the data and the Contracting Officer to ensure the quality of the information being reported.

For more information regarding the Department's data quality efforts, please see the DOE Data Quality Plan.

6.0 Reviewing & Certifying Reported Data

After data has been reported and passed available system data quality checks, the Department is responsible for reviewing and, in some cases, certifying the finalized information as a final step toward ensuring the overall quality of its procurement activity. Table 1: Reporting, Review and Certification Requirements (below) identifies pertinent requirements for data reported in procurement systems. The DOE Data Quality Plan (attached) provides details regarding how reviews and certifications must be completed.

Reporting, Review and Certification Requirements

System Name	Description	Reporting Requirement	Review and/or Certification Requirement
Strategic Integrated Procurement Enterprise System (STRIPES)	DOE's contract writing system is the system-of-record for acquisition and financial assistance actions as well as the official contract file (AL 2010-03/FAL 2010-03)	Refer to Acquisition Guide Chapter 4.6 and Acquisition Letter 2010-03.	<u>Quarterly FPDS-NG Data Quality Review:</u> - Each Contracting Office completes a data quality review comparing the FPDS-NG data elements required by OFPP against information in the award files in STRIPES. DOE HCAs submit the results of the reviews to the Senior Procurement Executive (SPE). <u>Annual FPDS-NG Data Quality Validation and Verification (V&V) Certification:</u> - The Department's SPE signs the FPDS-NG data quality V&V certification for submission to OFPP and GSA based on the quarterly data quality reviews completed. <u>Quarterly Data Act Certification:</u> - DOE HCAs certify to the SPE that internal controls and validations are in place to support the reliability and validity of DOE procurement and financial assistance data. See DOE Data Quality Plan

System Name	Description	Reporting Requirement	Review and/or Certification Requirement
Federal Procurement Data System Next Generation (FPDS-NG)	FPDS-NG maintains publicly available information about all unclassified contract actions exceeding the micro-purchase threshold, and any modifications to those actions that change previously reported contract action report data, regardless of dollar value.	Refer to FAR Subpart 4.6—Contract Reporting	<u>Quarterly FPDS-NG Data Quality Review:</u> - Each Contracting Office completes a data quality review comparing the FPDS-NG data elements required by OFPP against information in the award files in STRIPES. DOE HCAs submit the results of the reviews to the Senior Procurement Executive (SPE). <u>Annual FPDS-NG Data Quality Validation and Verification (V&V) Certification:</u> - The Department's SPE signs the FPDS-NG data quality V&V certification for submission to OFPP and GSA based on the quarterly data quality reviews completed.
Federal Funding Accountability and Transparency Act Sub-award Reporting System (FSRS)	The reporting tool Federal prime awardees use to capture and report sub-award and executive compensation data regarding their first-tier sub-awards to	Refer to Policy Flash 2010-69, Reporting of Executive Compensation and First-Tier Subcontract Awards under the Federal Funding Accountability and Transparency Act of 2006 as amended. Prime Awardees must report one month after sub-award.	Quarterly DATA Act Certification DOE HCAs certify to the SPE that: - internal controls and validations are in place to ensure, as applicable, contracts and financial assistance awards contain terms and conditions requiring reporting of executive compensation for sub awardees

System Name	Description	Reporting Requirement	Review and/or Certification Requirement
FSRS (continued)	meet the FFATA reporting requirements.		- local policies, procedures, and internal controls include reviews of contractor - FSRS reporting to assess compliance and completeness Refer to the DOE Data Quality Plan for more detail.
System for Award Management (SAM)	The primary database for the U.S. Federal Government to manage information on potential government business partners or federal financial assistance recipients.	Contracting Officers must validate vendor data with SAM for procurement and financial assistance transactions prior to award. Awardees must update their entity registration annually.	Quarterly DATA Act Certification: - DOE HCAs certify to the SPE that internal controls and validations are in place to ensure, as applicable, contracts and financial assistance awards contain terms and conditions requiring reporting of executive compensation and that vendor data is validated with SAM for procurement and financial assistance transactions prior to award. Refer to the DOE Data Quality Plan for more detail.
USASpending.gov	The publicly accessible and searchable website mandated by the	Prime contract transaction data is submitted through agency contract writing system to FPDS-NG to be published on USAspending.gov.	Prime recipients are required to report awards to first-tier sub-recipients to FSRS for display on USAspending.gov via the Federal Funding

System Name	Description	Reporting Requirement	Review and/or Certification Requirement
USASpending.gov (continued)	Federal Funding Accountability and Transparency Act (FFATA) of 2006 to give the American public access to information on how their tax dollars are spent.	Financial assistance transactions are reported to the USASpending.gov Award Submission Portal (ASP) by the agencies via file upload. Note: the ASP Portal will be replaced by the Financial Assistance Broker Submission (FABS) in fall 2017.	Accountability and Transparency Act Sub award Reporting System (FSRS). See STRIPES, FPDS-NG, FSRS and SAM review and/or certification requirements.
Contractor Performance Assessment Reporting System (CPARS)	CPARS hosts a suite of web-enabled applications that are used to document contractor and grantee performance information that is required by Federal Regulations.	Refer to Acquisition Guide Chapter 42.1502 - Contractor Performance Information for Guidance and CPARS Guidance documents available at the following website: Contractor Performance Assessment Reporting System Contractor performance information must be collected, and a CPAR completed, on contracts/orders for systems and non-	Quarterly CPARS Review Refer to Acquisition Guide Chapter 42.1502 - Contractor Performance Information for Guidance.

System Name	Description	Reporting Requirement	Review and/or Certification Requirement
CPARS (continued)		systems exceeding the simplified acquisition threshold in FAR 42.15. Assessing Officials are responsible for completing evaluations in a timely fashion.	
Federal Awardee Performance and Integrity Information System (FAPIIS)	FAPIIS is used to collect contractor and grantee performance information. Once records are completed in FAPIIS, they become available in the Past Performance Information Retrieval System (PPIRS)	Refer to Acquisition Guide Chapter 42.16, Reporting Other Contractor Information into Federal Awardee Performance and Integrity Information System.	Quarterly FAPIIS Review Refer to Acquisition Guide Chapter 42.16, Reporting Other Contractor Information into Federal Awardee Performance and Integrity Information System.

System Name	Description	Reporting Requirement	Review and/or Certification Requirement
Past Performance Information Retrieval System (PPIRS)	The government wide single repository of past performance data. Supports FAR requirement to consider past performance information prior to making a contract award.	PPIRS is the official Government source to retrieve contractor performance information and report/track CPAR compliance rates. See CPARS and FAPIIS above for further reporting requirements.	See CPARS and FAPIIS review and/or certification requirements. See FAR Parts 9, 13, 15, 36 and 42.
Electronic Subcontracting Reporting System (eSRS)	Designed for prime contractors to report accomplishments toward subcontracting goals required by their contract. Prime contractors are responsible for passing down subcontracting reporting	Per eSRS FAQs: Individual Summary Reports (ISR) must be submitted semi-annually by contractors at contract completion, always 30 days after the close of each reporting period unless otherwise directed by the Contracting Officer. April 30th for the period ended March 31st and October 30th for the period ended September 30th.	Per eSRS FAQs: Contracting Officer Responsibilities include: (1) Ensure subcontracting reports are submitted into the eSRS within 30 days after the report ending date (e.g., by October 30th for the fiscal year ended September 30th). (2) Review ISRs, and where applicable, SSRs, in eSRS within 60 days of the report ending date (e.g., by November 30th for a report submitted for the fiscal year ended September 30th).

System Name	Description	Reporting Requirement	Review and/or Certification Requirement
eSRS (continued)	requirement to their subcontractors and lower tier subcontractors, as appropriate (FAR 19.708(b), 52.219-9 (d)(10)(ii) through (vi)).	Subcontracting Summary Reports (SSR) must be submitted semi-annually by contractors (for the six months ended March 31st and the twelve months ended September 30th). Commercial Reports are due to be submitted by contractors within 30 days after the government's fiscal year. Refer to Acquisition Guide Chapter 19.0 - Small Business Programs - An Overview for more detail.	(3) Either acknowledge receipt of or reject the reports in accordance with subpart 19.7, 52.219-9, Small Business Subcontracting Plan, and the eSRS instructions (www.esrs.gov). (i) The authority to acknowledge or reject SSRs for commercial plans resides with the contracting officer who approved the commercial plan. (ii) If a report is rejected, the Contracting Officer must provide an explanation for the rejection to allow the prime contractor the opportunity to respond specifically to identify deficiencies.

Table 1: Reporting, Review and Certification Requirements

7.0 References

Acquisition Guide Chapter 19.0 - Small Business Programs - An Overview

Acquisition Guide Chapter 42.15 - Contractor Performance Information

Acquisition Guide Chapter 42.16 - Reporting Other Contractor Information into Federal Awardee Performance and Integrity Information System (FAPIIS)

FAR Subpart 4.6 - Contract Reporting

FAR 52.204-10 Reporting Executive Compensation and First-Tier Subcontract Awards

Office of Federal Procurement Policy (OFPP) Memorandum - Improving Acquisition Data Quality for FY 2009 and 2010

OFPP Memorandum - Improving Federal Procurement Data Quality - Guidance for Annual Verification and Validation

Office of Management and Budget (OMB) Circular No. A-123 - Management's Responsibility for Internal Control

OMB Memorandum M-17-04 - Additional Guidance for Data Act Implementation: Further Requirements for Reporting and Assuring Data Reliability

OMB Memorandum M-10-06 - Open Government Directive - Framework to Ensure Quality of Federal Spending Information OMB Management Procedures Memorandum 2016-03 - Implementing a Data-Centric Approach for Reporting Federal Spending Information

OMB M-08-12 - Guidance on Future Data Submissions under the Federal Funding

OMB Memorandum M-15-12 - Increasing Transparency of Federal Spending by Making Federal Spending Data Accessible, Searchable, and Reliable

Policy Flash 2010-82 - Sub-award Reporting for FFATA

PUBLIC LAW 109–282—SEPT. 26, 2006 –Federal Funding Accountability and Transparency Act 0f 2006

PUBLIC LAW 113–101—MAY 9, 2014 – Digital Accountability and Transparency Act of 2014

U.S. DOE Data Quality Plan

U.S. Department of Energy Data Quality Plan

Acquisition Data: Federal Procurement Data System - Next Generation (FPDS-NG)

In accordance with the Federal Acquisition Regulation (FAR) Part 4.604 and related guidance, agency Chief Acquisition Officers (CAOs) must certify annually each January to the Office of Federal Procurement Policy (OFPP) and the General Services Administration (GSA) that their previous fiscal year's FPDS-NG records are complete and accurate. OFPP Memoranda issued on October 7, 2009 and May 31, 2011 detailed guidance to all CAOs for agency submissions of the annual data quality certification. In addition, the Digital Accountability and Transparency Act (DATA) was signed into law on May 2014. The DATA Act and related guidance, requires agency DATA Act Senior Accountable Officials (SAOs) to provide a quarterly assurance that their agency's internal controls support the reliability and validity of the agency data reported for display on USASpending.gov. For acquisition data reported to USASpending.gov, DOE relies on the quarterly data quality reviews that are conducted for the annual FPDS-NG data quality certification to meet this requirement.

The U.S. Department of Energy (DOE) has developed a process of approaching FPDS-NG data quality in accordance with OFPP Memorandum – Improving Acquisition Data Quality for Fiscal Years 2009 and 2010 and OFPP Memorandum - Improving Federal Procurement Data Quality - Guidance for Annual Verification and Validation (May 31, 2011).

DOE's contracting offices are required to perform a quarterly data quality review of FPDS-NG data. This review requires each contracting office to identify an independent reviewer of the data, having no affiliation with the contractual action under review. The reviewers are required to have working knowledge of and experience with federal procurement processes and the FPDS-NG system. The reviewers compare the FPDS-NG data elements against information obtained from STRIPES as applicable. Specific fields required by OFPP for the end of the year Federal Procurement Data Verification and Validation (V&V) certification are selected for reviewing.

The following procedures are followed per OFPP guidance:

1. The sample design and sample size must be sufficient to produce statistically valid conclusions for the overall department at the 95% confidence level, with a margin of error of no more than 5 percentage points. For example, an overall accuracy rate of 92 percent for the sample would translate to an overall confidence level of 87% to 97% for agency-wide data.
2. The contract action reports (CARs) sampled are selected randomly from a population of FPDS-NG records (excluding "draft" records) that includes all of the FPDS-NG use cases (i.e., transaction types) employed by the agency. A sufficient number of CARs are selected for review.
3. Each sampled CAR must be validated against the associated STRIPES records, including any associated data in the agency CWS, by an individual other than the Contract Officer (CO) who awarded the contract or the person entering the contract data for that CAR. The reviewer must obtain sufficient information to validate any CAR data elements not contained in STRIPES. Data elements that cannot be validated must be considered

incorrect. Additionally, any CAR data elements that match data in the CWS but are determined to be inaccurate due to business process guidelines (ex. the Award Description should be written in plain English, without acronyms), should be considered incorrect.

4. The head of contracting activity (HCA) for each contracting office approves the data quality review reports for submission. COs have been informed that the entry of correct data is their responsibility per FAR Part 4.604. Also, at the end of each year, the Department's Senior Procurement Executive (SPE) signs the V&V of DOE FPDS-NG data to OFPP and GSA.

Financial Assistance Data: USASpending.gov

The DATA Act requires agency DATA Act Senior Accountable Officials (SAOs) to provide a quarterly assurance that their agency's internal controls support the reliability and validity of the agency data reported for display on USASpending.gov. For financial assistance data, DOE relies on the validations in place in the reporting systems to meet this requirement (see internal controls section below).

DOE's financial assistance data is entered into the CWS and the D2 DATA Act information Model Schema (DAIMS) form and the data is then fed to the Department's iManage Data Warehouse (IDW) for internal reporting purposes. A D2 DAIMS file is generated and extracted from STRIPES and submitted to USASpending.gov through the USASpending.gov Award Submission Portal (ASP) Note: the ASP Portal will be replaced by the Financial Assistance Broker Submission (FABS) and the DAIMS version 1.1 will be implemented in the fall of 2017. Data is also submitted to the Data Act Broker and reconciled quarterly. The data is validated prior to being submitted to the ASP and the Data Act Broker.

Internal Controls for Acquisition & Financial Assistance Data Quality

The Department's CWS, the Strategic Integrated Procurement Enterprise System (STRIPES), has many automated routines to determine that the acquisition and financial assistance data meets specific parameters to enhance data quality. The system will not allow subsequent steps of a transaction to occur if data fields for the immediate step are not correct and valid for the field in which the data is entered. Validations edits also occur during the process of reporting acquisition data in to FPDS-NG and reporting financial assistance data to the ASP. In addition, reports are available through FPDS-NG to ensure the data is entered in an accurate and timely manner. The reports include anomaly reports that flag questionable data element values based on their relationship to other data elements and the status of actions report that identifies draft, error, and void actions. These reports also ensure any issues identified from reviews conducted by GSA and the Small Business Administration (SBA) regarding FPDS-NG data are reviewed and corrected, as needed.

DOE has also implemented the Correctness and Accuracy Reporting Solution (CARS). CARS is a tool administered, provided, operated, and maintained by the Systems Division (MA-623) that scans internal and publicly-available award information for identified FAR violations, data inconsistencies, and accuracy between systems. The focus is on a subset of the 25 fields that OMB requires for the annual FPDS-NG V&V certification and to supplement the validations implemented by the USASpending.gov ASP. CARS supports users who are involved in the

awarding of contracts and grants.

Data Quality Points-of-Contact (DQ POCs) identified by each contracting office receive CARS emails when potential issues have been identified. The DQ POCs are responsible for:

- Determining who CARS emails are sent to at his/her contracting office
- Monitoring responses to CARS email notifications at the contracting office.
- Monitoring CARS weekly alerts indicating data check alerts that have not been addressed, when applicable.
- Submitting and/or reviewing and approving or disapproving data check exceptions.
- Monitoring overall data quality and improvement over time.

Ultimately, COs are responsible for reviewing data entered into STRIPES at the time of award. Many contracting offices have also implemented regular monitoring reviews of data to identify errors and work with the appropriate staff to correct the errors and make sure appropriate training is received. In addition, a data quality assessment component has been implemented as part of the Department's peer review programs.

Highly Compensated Officer and Subaward Data

The DATA Act requires agency DATA Act Senior Accountable Officials (SAOs) to provide a quarterly assurance that their agency's internal controls support the reliability and validity of the agency data reported for display on USASpending.gov, including highly compensated officer and subaward data.

DOE meets this requirement by certifying that internal controls and verifications are in place to ensure, as applicable, contracts and financial assistance awards contain terms and conditions requiring reporting of executive compensation for prime awardees and subawardees. In addition, for prime awardees, Contracting Officers verify vendor data with the System for Award Management (SAM) for acquisition and financial assistance transactions prior to award. For subawardees, policies, procedures, and internal controls must be in place at each contracting office including reviews of contractor reporting in the FFATA Subaward Reporting System (FSRS) to assess compliance and completeness.

Policy Flash 2010-69, Reporting of Executive Compensation and First-Tier Subcontract Awards under the Federal Funding Accountability and Transparency Act of 2006 as amended, provides additional detail regarding FSRS compliance.

Contractor Performance Data

The DOE Acquisition Guide has two chapters addressing the implementation of Federal Acquisition Regulation (FAR) Part 42.15 – Contractor Performance Information. Chapter 42.15, Contractor Performance Information, addresses DOE's application of Contractor Performance Assessment Reporting System (CPARS) and the evaluation and reporting of contractor performance. Chapter 42.16, Reporting Other Contractor Information into Federal Awardee Performance and Integrity Information System, addresses the data entry procedures and management for reporting other contracting information into the FAPIIS module in CPARS.

Subcontracting Achievements Data

Contracting Officers are also responsible for ensuring contractors report subcontracting achievements in the Electronic Subcontracting Reporting system (eSRS). Acquisition Guide Chapter 19.0 - Small Business Programs - An Overview provides details regarding the review of data submitted in eSRS.

Training

Training and documentation for reporting data is available for STRIPES and GSA Integrated Award Environment (IAE) systems (FPDS-NG, eSRS, FSRS, CPARS, FAPIIS, and SAM) to include (depending on the system): video tutorials, manuals, quick reference guides, webinars, and data dictionaries. DOE has also developed a desk guide for completing the D2 DAIMS form and provides training for staff that report financial assistance actions.

The Department provides additional guidance, as needed, via various forums such as the Procurement Systems Working Group (PSWG) and teleconferences and webinars on an as needed basis. As data quality errors are identified, additional internal guidance is provided by the contracting office or Headquarters to address the errors.