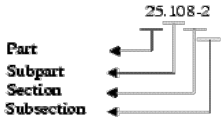
# DOE Acquisition Guide FY2023 Version 5

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@hq.doe.gov.

**ACQUSITION GUIDE - CHANGE LOG FY 2023 Version 5 -** *Updated August 2023*

| Chapter | Subject | Summary |
|---|---|---|
| 19.2 | Small Business Programs | This update: replaces previous version of Attachment 2 Partnership Agreement Between the U.S. Small Business Administration and the U.S. Department of Energy, dated 2013, with the current version, dated 2022. See accompanying Policy Flash for a summary of updates and changes. |

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# 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, not 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 <u>not</u> 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

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|---|---|
| **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). |

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| **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

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| **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

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| **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). |

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| **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. |

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| **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

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| **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

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| **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

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|---|---|
| **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. |
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| 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. |
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| 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. |

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## CHAPTER 4 -ADMINISTRATIVE MATTERS


- 4.1601 - Assigning I. D. Numbers Outside of the Strategic Integrated Procurement Enterprise System (STRIPES)
    - September 2018
- 4.804 - Contract Closeout Procedures - March 2023
- 4.1703 - Service Contract Report - March 2021

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

Guiding Principles:

- Support Department of Energy (DOE) Continuity of Operations by ensuring standard operating procedures are in place should actions need to take place outside of STRIPES.
- Do not duplicate Procurement Instrument Identifier (PIID) when issuing instrument numbers outside of STRIPES while providing PIID consistency in line with Federal Acquisition Regulation (FAR) Subpart 4.16 when appropriate.

*References: [Acquisition Letter (AL) 2018-01, FAR Subpart 4.16, FAR Subpart 4.6]*

## 1.0 Summary of Latest Changes

This update: (1) changes the chapter number from 4.6 to 4.1601 to align with the FAR, and (2) substantially changes the chapter to provide guidance for numbering business instruments processed outside of STRIPES should the system be inoperable.

## 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. It provides guidance on the DOE's procedures for assigning identifying numbers to all new requisitions, solicitations and business instruments processed outside of STRIPES. This chapter does not apply to instrument numbers issued and business instruments awarded prior to the deployment of STRIPES and/or prior to the implementation of the FAR Subpart 4.16 at the DOE. In addition, it does not apply to classified contracts and actions listed at FAR part 4.606(c), Reporting Data, as well as actions that do not obligated funds, e.g., sales contracts, payment-in-lieu of taxes, International Voluntary Contributions, etc.

### 2.1 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) and Financial Assistance Agreements.

"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 finalized/executed. The number may not be reused

"PIID" means Procurement Instrument Identifier as described in FAR Subpart 4.16.

"Requisition" means a document used to request, approve and 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 and other business instruments.

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

**2.2 Background.** Acquisition Letter (AL) 2018-01, issued on October 3, 2017, made the use of STRIPES mandatory for the awarding and administering of all acquisition and financial assistance actions by the Department's procurement offices.

When an exception to the use of STRIPES is required due to the activation of the Continuity of Operations plan (COOP), the following procedures shall be used for assigning identifying numbers to new requisitions, solicitations and business instruments processed outside of STRIPES until such time when STRIPES is available and the actions can be re-entered into the agency acquisition system.

**2.3 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 during the standard business process while maintaining the format as indicated by FAR Subpart 4.16 and/or current STRIPES format (Requisitions). The numbering formats identified below require the use of a higher sequential starting numbering range (900,000 to 999,999 or variation depending on instrument type). The higher number sequence will readily identify actions created outside of the system, ease reconciliation reporting and allow for a smooth transition of manually entering all data performed outside of the system into STRIPES once the application is made available. Requisition Numbers are outside the scope of FAR Subpart 4.16 but are included in the chapter due their involvement in STRIPES and the acquisition process.

Instrument numbers are created and formatted as follows:

### 2.3.1 Requisition Numbering

#### 2.3.1.1 Requisition Numbering – STRIPES

10 alphanumeric characters

Positions 1-2: Fiscal Year
Positions 3-4: Program Code (Please see Attachment 1 for Program Codes (Requesting Office))
Positions 5: "9" to indicate work performed outside of STRIPES
Positions 6-10: Number sequentially assigned by instrument type and tracked by the acquisition office to ensure no duplication.

| **Example STRIPES Requisition** | **Example STRIPES Requisition Completed Outside of STRIPES** |
|---|---|
| 18MA123456 | 18MA900001 |

#### 2.3.1.2 Requisition Amendment Numbering – STRIPES

Add 3 alphanumeric characters to the original 10 alphanumeric character string

Positions 1: "9" to indicate work performed outside of STRIPES
Positions 2-3: Number sequentially assigned based on specific base award and tracked by the contracting office to ensure no duplication.

| **Example STRIPES Requisition with Amendment** | **Example STRIPES Requisition Amendment Outside of STRIPES** | **Example Requisition Outside of STRIPES and Amendment Outside of STRIPES** |
|---|---|---|
| 18MA123456 001 | 18MA123456 901 | 18MA900001 901 |

#### 2.3.1.3 Requisition Numbering – Financial Information Management System (FIMS)

Western Area Power Administration (WAPA) uses a system called Maximo to start their requisitions. Those requisitions are then imported into the WAPA financial system called FIMS (Oracle Application) to be approved and then the approved requisitions are sent to STRIPES via an electronic file. No change to their number would be required. Should STRIPES be unavailable, the Requisitions will be made available to the Contracting Office(s) via email. Once STRIPES is available, the requisitions would be sent to STRIPES through the normal process and linked to awards that had been made or are in-process.

#### 2.3.1.4 Requisition Numbering – Portfolio Analysis and Management System (PAMS)

PAMS is used by the Office of Science in the award of Financial Assistance Agreements. "In-progress" status Requisitions are generated in PAMS and sent to STRIPES via an electronic file. Should STRIPES be unavailable, the Requisitions will be made available to the Contracting Office(s) via email. Requisitions would then be completed outside of STRIPES and once STRIPES is made available, be re-entered into STRIPES manually with a "Released" status and then linked to the awards created or in process.

10 alphanumeric characters

Positions 1-2: Fiscal Year
Positions 3-4: Program Code "SC"
Positions 5: "5" to indicate initial work performed via "PAMS" outside of STRIPES
Positions 6: "9" to indicate work performed outside of STRIPES.
Positions 7-10: Number sequentially assigned by instrument type and tracked by the acquisition office to ensure no duplication.

| **Example PAMS submitted Requisition to STRIPES** | **Example PAMS Requisition completed Outside of STRIPES** |
|---|---|
| 18SC500000 | 18SC590001 |

#### 2.3.1.5 Requisition Amendment Numbering - PAMS

Add 3 alphanumeric characters to the original 10 alphanumeric character string

Positions 1: "9" to indicate work performed outside of STRIPES
Positions 2-3: Number sequentially assigned based on specific base award and tracked by the contracting office to ensure no duplication.

| **Example PAMS submitted Requisition to STRIPES** | **Example PAMS Requisition submitted to STRIPES and Amendment completed Outside of STRIPES** | **Example PAMS Requisition completed Outside of STRIPES and Amendment completed Outside of STRIPES** |
|---|---|---|
| 18SC500000 001 | 18SC500000 901 | 18SC590001 901 |

### 2.3.2 Financial Assistance Business Instrument Numbering

Financial Assistance Instrument numbers are outside the scope of FAR Subpart 4.16.

#### 2.3.2.1 Funding Opportunity Announcement (FOA) Numbering

Funding Opportunity Announcement numbers contain the issuing Agency, the document type, the Program Office initiating the request, "9" to indicate work performed outside of STRIPES and a sequential number.

14 alphanumeric characters

| | |
|---|---|
| Positions 1-2: | DE – Represents the Department of Energy |
| Position 3: | "-" |
| Positions 4-6: | FOA – Identifies the document as a Funding Opportunity Announcement |
| Position 7: | "-" |
| Position 8: | "9" to indicate work performed outside of STRIPES |
| Positions 9-14: | Number sequentially assigned and tracked by the contracting office to ensure no duplication |

| **Example STRIPES FOA** | **Example FOA Outside of STRIPES** |
|---|---|
| DE-FOA-1234567 | DE-FOA-9000001 |

#### 2.3.2.2 Funding Opportunity Announcement Modification Numbering

Add 6 alphanumeric characters to the original 14 alphanumeric character string

| | |
|---|---|
| Positions 1: | "9" to indicate work performed outside of STRIPES |
| Positions 2-6: | Number sequentially assigned based on Funding Opportunity Announcement and tracked by the contracting office to ensure no duplication. |

| **Example STRIPES FOA Modification against existing STRIPES FOA** | **Example FOA Modification outside of STRIPES against existing STRIPES FOA** |
|---|---|
| DE-FOA-1234567 123456 | DE-FOA-1234567 900001 |

#### 2.3.2.3 Grant Numbering

12 alphanumeric characters

| | |
|---|---|
| Positions 1-2: | DE – Represents the Department of Energy |
| Position 3: | "-" |
| Positions 4-5: | Program Code (Please see Attachment 2 (Requesting Office)) |

Position 6: "9" to indicate work performed outside of STRIPES
Positions 7-12: Number sequentially assigned and tracked by the contracting office to ensure no duplication

| Example STRIPES Grant | Example Grant Outside of STRIPES |
|---|---|
| DE-MA1234567 | DE-MA9000001 |

2.3.2.4 Grant Modification Numbering

Add 4 alphanumeric characters to the original 12 alphanumeric character string

Positions 1: "9" to indicate work performed outside of STRIPES.
Positions 2-4: Number sequentially assigned based on specific base award and tracked by the contracting office to ensure no duplication.

| Example STRIPES Grant Mod against existing STRIPES Grant | Example Grant Mod Outside of STRIPES against existing STRIPES Grant | Example Grant Mod Outside of STRIPES against Grant Outside of STRIPES |
|---|---|---|
| DE-MA1234567 1234 | DE-MA1234567 9001 | DE-MA9000001 9001 |

2.3.3 Acquisition Business Instruments impacted by the Unique Procurement Instrument Identifier (UPIID) numbers

FAR Subpart 4.16 indicates the PIID must contain uppercase alpha and numeric characters only and can have no special characters such as dashes.

2.3.3.1 Acquisition Instruments impacted by FAR Subpart 4.16

The following information illustrates the composition of the PIID assigned outside of STRIPES in compliance with FAR Subpart 4.16.

17 alphanumeric characters

Positions 1-6: Contracting Office Activity Address Code (Please see Attachment 2)
Positions 7-8: Fiscal Year
Position 9: Type of Instrument (Please see Attachment 3)
Position 10-11: Program Code (Please see Attachment 1 (Requesting Office))
Positions 12: "9" to indicate work performed outside of STRIPES
Positions 13-17: Number sequentially assigned by instrument type and tracked by the acquisition office to ensure no duplication. (Please see Attachment 3 for FAR Subpart 4.16 Instrument Type Table for specified ranges)

| Example STRIPES Award | Example Award Outside of STRIPES |
|---|---|
| 89303018CMA123456 | 89303018CMA900001 |

2.3.3.2 Blanket Purchase Agreement (BPA) Calls

BPA Calls and Delivery Orders share the same instrument letter designation of "F". BPA Calls use 000001 through 399999 range. The upper range "390000" will be used to designate work performed outside the system. The following information illustrates the composition of the PIID as described in FAR Subpart 4.16.

17 alphanumeric characters

| | |
|---|---|
| Positions 1-6: | Contracting Office Activity Address Code (Please see Attachment 2) |
| Positions 7-8: | Fiscal Year |
| Position 9: | "F" Type of Instrument |
| Position 10-11: | Program Code (Please see Attachment 1 (Requesting Office)) |
| Positions 12-13: | "39" to indicate work performed outside of STRIPES |
| Positions 14-17: | Number sequentially assigned by instrument type and tracked by the acquisition office to ensure no duplication. (Please see Attachment 3 for FAR Subpart 4.16 Instrument Type Table for specified ranges) |

| Example STRIPES BPA Call | Example BPA Call Outside of STRIPES |
|---|---|
| 89303018FMA123456 | 89303018FMA390001 |

2.3.3.3 Delivery Orders

Delivery Orders and BPA Calls share the same instrument letter designation of "F". Delivery Orders use 400000 through 999999 range. The upper range "900000" will be used to designate work performed outside the system. The following information illustrates the composition of the PIID as described in FAR Subpart 4.16.

17 alphanumeric characters

| | |
|---|---|
| Positions 1-6: | Contracting Office Activity Address Code (Please see Attachment 2) |
| Positions 7-8: | Fiscal Year |
| Position 9: | "F" Type of Instrument |
| Position 10-11: | Program Code (Please see Attachment 1 (Requesting Office)) |
| Positions 12: | "9" to indicate work performed outside of STRIPES |

Positions 13-17: Number sequentially assigned by instrument type and tracked by the acquisition office to ensure no duplication. (Please see Attachment 3 for FAR Subpart 4.16 Instrument Type Table for specified ranges)

| **Example STRIPES Delivery Order** | **Example Delivery Order Outside of STRIPES** |
|---|---|
| 89303018FMA412345 | 89303018FMA900001 |

2.3.3.4 Acquisition Instrument Modification (Mod) Numbering

Add 6 alphanumeric characters to the original 17 alphanumeric character string

Position 1: "P" (issued by procuring office)
Positions 2: "9" to indicate work performed outside of STRIPES
Positions 3-6: Number sequentially assigned based on specific base award and tracked by the contracting office to ensure no duplication.

| **Example STRIPES Award Mod against existing STRIPES Award** | **Example Award Mod Outside of STRIPES against existing STRIPES Award** | **Example Award Mod Outside of STRIPES against Award Outside of STRIPES** |
|---|---|---|
| 89303018CMA123456 P00001 | 89303018CMA123456 P90001 | 89303018CMA900001 P90001 |

2.3.3.5 Solicitation Numbering

The following information illustrates the composition of the PIID as described in FAR Subpart 4.16.

17 alphanumeric characters

Positions 1-6: Contracting Office Activity Address Code (Please see Attachment 2)
Positions 7-8: Fiscal Year
Position 9: Type of Instrument (Please see Attachment 3)
Position 10-11: Program Code (Please see Attachment 1 (Requesting Office))
Positions 12: "9" to indicate work performed outside of STRIPES
Positions 13-17: Number sequentially assigned by instrument type and tracked by the acquisition office to ensure no duplication. (Please see Attachment 3 for FAR Subpart 4.16 Instrument Type Table for specified ranges)

| Example STRIPES Solicitation | Example STRIPES Solicitation Outside of STRIPES |
|---|---|
| 89303018QMA123456 | 89303018QMA900001 |

2.3.3.6 Solicitation Amendment Numbering

Add 4 alphanumeric characters to the original 17 alphanumeric character string

Positions 1: "9" to indicate work performed outside of STRIPES
Positions 2-4: Number sequentially assigned based on specific base solicitation and tracked by the contracting office to ensure no duplication.

| Example STRIPES Amendment against existing STRIPES Solicitation | Example Amendment outside STRIPES against existing STRIPES Solicitation | Example Amendment Outside STRIPES against Solicitation Outside of STRIPES |
|---|---|---|
| 89303018QMA123456 0001 | 89303018QMA123456 9001 | 89303018QMA900001 9001 |

## 2.4 Responsibilities

2.4.1 Director, Office of Acquisition Management

2.4.1.1 Define responsibilities in the use of instrument numbers.

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

2.4.2 Contracting Office

2.4.2.1 Establish registers for controlling the issuance of unique requisition numbers and instrument numbers required for the preparation of business instruments (see Attachment 1 for Program Codes, Attachment 2 for Contracting Office Activity Address Code (AAC) Table, Attachment 3 for FAR Subpart 4.16 Instrument Type Table).

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

2.4.2.3 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.

2.4.2.4 Develop business instrument numbers and record them in the registers with the unique requisition numbers from which they were derived.

2.4.2.5 Post COOP and when STRIPES is available, coordinate efforts with responsible parties to re-enter information into STRIPES and interfacing systems for proper reporting.

2.4.2.6 For actions over the micro-purchase threshold, enter award details directly into FPDS-NG after the award has been signed by the Contracting Officer consistent with FAR Subpart 4.6 Contract Reporting.

2.4.2.7 For Financial Assistance actions, consistent with 2 CFR 200.211, Public access to Federal award information, award details must be transmitted to USA Spending. In lieu of STRIPES, the contracting officers will receive a communication from Headquarters requesting details of awards performed outside the system so that they can be transmitted to USA Spending if appropriate.

### 2.5 Points of Contact

For further information relating to the guidance contained herein, contact the Systems Division at HQProcurementSystems@HQ.DOE.GOV.

## 3.0 Attachments

Attachment 1 – Program Code Table
Attachment 2 – Contracting Office Activity Address Code (AAC) Table
Attachment 3 – FAR Subpart 4.16 Instrument Type Table

## Attachment 1 – Program Code Table

| Program Codes | |
|---|---|
| Program Code | Description |
| AB | Office of the Secretary of Energy Advisory Board |
| AR | Advanced Research Projects Agency - Energy (ARPA-E) |
| AU | Office off Environment, Health, Safety and Security |
| CF | Office of the Chief Financial Officer |
| CI | Assistant Secretary for Congressional and Intergovernmental Affairs |
| EA | Office of Independent Enterprise Assessments |
| ED | Office of Economic Impact and Diversity |
| EE | Assistant Secretary for Energy Efficiency and Renewable Energy |
| EI | Energy Information Administration |
| EM | Assistant Secretary for Environmental Management |
| EP | Energy Policy and Systems Analysis |
| ET | Energy and Threat |
| FE | Assistant Secretary for Fossil Energy |
| GC | Office of the General Counsel |
| HC | Office of Human Capital Management |
| HG | Office of Hearings and Appeals |
| IA | Office of International Affairs |
| IE | Indian Energy Policy and Programs |
| IG | Office of Inspector General |
| IM | Chief Information Officer |
| LM | Office of Legacy Management |
| LP | Loan Program Office |
| MA | Office of Management |
| NA | National Nuclear Security Administration |
| NE | Assistant Secretary for Nuclear Energy |
| NR | Naval Reactors Laboratory Field Office |
| OE | Office of Electricity Delivery and Energy Reliability |
| PA | Office of Public Affairs |
| SB | Office of Small and Disadvantaged Business Utilization |
| SC | Office of Science |
| SP | Southeastern Power Administration |
| SW | Southwestern Power Administration |
| US | Office of the Under Secretary |
| WA | Western Area Power Administration |

## Attachment 2 – Contracting Office Activity Address Code (AAC) Table

| Activity Address Codes | |
|---|---|
| Code | Description |
| 892330 | PITTSBURGH NAVAL REACTORS OFFICE |
| 892331 | NATIONAL NUCLEAR SECURITY ADMN SVC |
| 892332 | NATIONAL NUCLEAR SECURITY ADMINISTR |
| 892430 | CHICAGO SERVICE CENTER (OFFICE OF SCIENCE) |
| 892431 | OAK RIDGE OFFICE |
| 892432 | IDAHO OPERATIONS OFFICE |
| 892433 | NATIONAL ENERGY TECHNOLOGY LAB |
| 892434 | GOLDEN FIELD OFFICE |
| 892435 | STRATEGIC PETROLEUM RESERVE PROJECT |
| 893030 | HEADQUARTERS PROCUREMENT SERVICES |
| 893031 | PORTSMOUTH/PADUCAH PROJECT OFFICE |
| 893032 | EM CARLSBAD |
| 893033 | OFFICE OF ENVIRONMENTAL MANAGEMENT |
| 893034 | EM LOS ALAMOS |
| 893035 | EM OAKRIDGE |
| 893037 | SAVANNAH RIVER OPERATIONS OFFICE |
| 893039 | RICHLAND OPERATIONS OFFICE |
| 893040 | OFFICE OF RIVER PROTECTION |
| 893041 | LAS VEGAS SATELLITE OFFICE |
| 895030 | WAPA (CSO) |
| 895031 | WAPA (DSW) |
| 895032 | WAPA (RMR) |
| 895033 | WAPA (SNR) |
| 895034 | WAPA (UGP) |
| 895035 | SOUTHEASTERN POWER ADMINISTRATION |
| 895036 | SOUTHWESTERN POWER ADMINISTRATION |
| 897030 | ADV RESEARCH PROJ AGCY-ENERGY |

## Attachment 3 - FAR Subpart 4.16 Instrument Type with DOE Sequence Ranges Table

| Award Type in STRIPES | Instrument Letter Designation | Sequence Range |
|---|---|---|
| Blanket Purchase Agreements (BPA) | A | Range will be 1 through 999,999 |
| Contracts<br>➢ Contracts of all types except indefinite-delivery contracts | C | Range will be 1 through 999,999 |
| Contracts<br>➢ Indefinite-delivery contracts (including Federal Supply Schedules, Government-wide acquisition contracts (GWACs), and multi-agency contracts) | D | Range will be 1 through 999,999 |
| Contracts<br>➢ Lease agreements | L | Range will be 1 through 999,999 |
| Contracts<br>➢ Basic ordering agreements | G | Range will be 1 through 999,999 |
| Contracts<br>➢ Agreements, including basic agreements and loan agreements, but excluding blanket purchase agreements, basic ordering agreements, and leases. Do not use this code for contracts or agreements with provisions for orders or calls | H | Range will be 1 through 999,999 |
| Delivery/Task Orders and BPA Calls | F<br><br>**Since BPA Calls and DO/TOs will share the same Instrument Type; each type of award will have designated numeric ranges.** | BPA Call range will be 1 through 399,999 and DO/TO range will be 400,000 through 999,999. |

| Award Type in STRIPES | Instrument Letter Designation | Sequence Range |
|---|---|---|
| Purchase Cards | **The FAR Case does not specifically assign a letter for Purchase Cards.**<br><br>The Instrument Type of K will be used for Purchase Cards.<br><br>Stakeholder direction is to assign the letter of K, M (M is made available and used only if the numbering capacity of K is exhausted during a fiscal year). | Range will be 1 through 999,999 |
| Purchase Orders | P, V (V is made available and used only if numbering capacity of P is exhausted during a fiscal year) | Range will be 1 through 999,999 |
| Interagency Agreements (IAAs) | **The FAR Case does not specifically assign a letter for IAA.**<br><br>The Instrument Type of S will be used for IAAs.<br><br>Stakeholder direction is to assign the letter of S, T (T is made available and used only if the numbering capacity of S is exhausted during a fiscal year). | Range will be 1 through 999,999 |
| Solicitations – Invitation For Bids | B | Range will be 1 through 999,999 |
| Solicitations – Request for Information | N | Range will be 1 through 999,999 |
| Solicitations – Request For Quotations | Q, U (U is made available and used only if numbering capacity of Q is exhausted during a fiscal year) | Range will be 1 through 999,999 |
| Solicitations – Request For Proposals | R | Range will be 1 through 999,999 |

# 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 4.804; FAR 4.805; FAR 42.705; FAR 42.708; FAR 45; and DEAR 904.804]*

## 1.0 Summary of Latest Changes

This update: (1) adds language in Section 2.3.7 to instruct contracting offices to complete a closeout modification in STRIPES and FPDS-NG to keep both systems in sync and (2) includes administrative changes.

## 2.0 Discussion

This Chapter concerns the final phase of the contract life cycle. The contract closeout 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 and/or all existing options have been exercised or expired; and/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 contracting office, 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 de-obligation 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 (HCAs) 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 must 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), contractor, and finance office/representative. Except for those actions which require a CO'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. Ensure that all subcontracting compliance reports for all years are submitted/approved in the Electronic Subcontract Reporting System (https://www.esrs.gov). The reports include semiannual individual, summary, and the year-end supplemental report for SDB.
- 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 prior to award to ensure that all applicable contract award and administration actions are completed. The closeout checklist is not all-inclusive. The CO must also refer to the FAR.

2.3.1 Commencing Closeout. Following completion of the contract or order, the CO or closeout staff shall proceed with closeout using the checklist at Appendix A.

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 and all actions have been completed, the CO shall prepare a letter of release of claims 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 Closeout Modification. The CO shall ensure that for both closeout procedures in accordance with FAR 4.804 and FAR 42.708 (if applicable), a modification to close out the award is completed for all actions over the micro-purchase threshold. The closeout modification should be done through the system of record (STRIPES) and FPDS with the reason for modification being "closeout".

2.3.8 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 remaining on the contract; and
- De-obligation. De-obligate any remaining funds.

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

2.3.10 Past Performance Evaluation. The COR and the CO are required to enter the past performance evaluation for the contractor into the Contractor Performance Assessment Reporting System (CPARS) in accordance with Acquisition Guide Chapter 42.1502. CPARS is now part of the System for Award Management (SAM). The SAM User Guide is available at https://sam.gov/content/help.

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

2.4.1 Records Retention and Disposition. Refer to the table in FAR 4.805 and to the NARA website, at https://www.archives.gov/records-mgmt/scheduling, to properly retain and dispose of contract files.

Note: currently no files are being destroyed. Instructions will be provided once a process has been developed. Destruction of files after the appliable retention period only requires the CO to indicate no claims were received after closeout of the award.

## 3.0 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 |

# 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. Small Business Review Form; DOE F 4220.2 | | | | |
| 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 | | | | |
| 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. Completed Closeout modification and finalized FPDS record | | | | Date completed: |
| 12. 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 Closeout 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:<br>☐ have been furnished;<br>☐ 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.<br>☐ was provided or acquired;<br>☐ was **not** provided or acquired; |
| **3.** **Warranties.** Are there any extended warranties? If so, please list the equipment description, serial number and warranty duration.<br>☐ There are extended warranties;<br>☐ There are **no** extended warranties;<br><br>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<br>☐ have been received and accepted;<br>☐ have **not** been received;<br>☐ have been received but **not** accepted; |

**COR Closeout 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 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) and all actions necessary to closeout the contract have been completed. To officially close this contract, please return the Contractor's Release of Claims (form enclosed).

***[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<br><br>UEI: TIN: |
| **7. Dollar Amount of Excess Funds** | |
| **8. a. Final Invoice Number** (Cost Re-imbursement Contract) | |
| **8. b. Final Invoice Date** | |

| | |
|---|---|
| **9. a. Final Invoice Number**<br>(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.

_____ _____

Signature Date
Contracting Officer

_____

_____

Type or Print Name
Email Address

# Service Contract Report

Guiding Principles

- Understand 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) refreshes the timeline and (2) revises the special interest functions by Product and Service Code (PSC) list (Attachment 1).

## 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**. DOE is required 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. A service contract inventory will assist DOE in better understanding how contractors are being used to support its mission and operations and whether contractors are being used appropriately. Specifically, DOE must –

- **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.

**2.2 Requirements.** DOE will take the following steps in the process of its analysis:

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

**Step 2:** Heads of Contracting Activities (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.

2.2.1 Inventory Analysis. The inventory analysis includes 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 Federal Acquisition Regulation (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 (COs) have taken the appropriate steps to ensure compliance with FAR 4.17.

**2.3 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 Timeline**. As specified in the FAR Subpart 4.17, the following provides a general timeline for the inventory exercise. Every year, the Office of Management and Budget includes the specific timeframes when it provides its annual guidance which will be provided to the programs upon publication. .

| | |
|---|---|
| Mid October | SAM opens for supplemental reporting. |
| Mid October – Late January | Interim supplemental reports provided to HCA to access progress in SAM |
| Mid December | Contractors complete initial data entry into SAM. |
| Mid December - January 30 | COs review contractor reported data and work with contractors to make revisions as necessary. Based upon those reviews, if contractor data are missing, COs can still direct contractors to enter new reports and correct existing reports. |
| Mid January | Activities prepare and submit 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 31 | SAM closes for reporting. |
| Late February | DOE submits draft Agency report to OMB for review. |
| March 1-31 | 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

**What contracts are covered by the Federal Acquisition Regulation 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.

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.

Research and Development (R&D) contracts must be included in the inventory. If a contract for R&D meets or exceeds the reporting thresholds established in FAR 4.17, the contractor must enter the required data in the SAM.

Reporting is required according to the following thresholds (see FAR 4.1703).

- All cost-reimbursement, time-and-materials, and labor-hour contracts and orders above the simplified acquisition threshold;
- Fixed-price definite-delivery contracts at or above $500,000;
- Indefinite-delivery contracts reporting requirements, which will be based on the expected dollar amount and type of the orders issued under the contracts; and
- First-tier subcontracts for services.

**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 contracts,

Federal Supply Schedule contracts, Government-wide Acquisition Contracts, 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 January 31. Agencies are required to review contractor input and work with them to make revisions, if and as necessary, by January 31.

**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, Office of Acquisition Management.

## 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 |
|---|---|
| DA01 | IT and Telecom – Business Application/Application Development Support Services (Labor)[1] |
| DD01 | IT and Telecom - Service Delivery Support Services: ITSM, Operations Center, Project/PM (Labor)[2] |
| DJ01 | IT and Telecom - Security And Compliance Support Services (Labor)[3] |
| F999 | Other Environmental Services |
| M1GC | Operation of Fuel Storage Buildings |
| R408 | Support- Professional: Program Management/Support |
| R423 | Support- Professional: Intelligence |
| R425 | Support- Professional: Engineering/Technical |
| R497 | Support- Professional: Personal Services Contracts |
| R499 | Support- Professional: Other |
| R699 | Support- Administrative: Other |
| R704 | Support- Management: Auditing |
| R707 | Support- Management: Contract/Procurement/Acquisition Support |
| R799 | Support- Management: Other |
| S206 | Housekeeping- Guard |
| U099 | Education/Training- Other |
| X1GC | Lease/Rental of Fuel Storage Buildings |
| Y1EC | Construction of Production Buildings |
| Y1JZ | Construction of Miscellaneous Buildings |
| Y1PZ | Construction of Other Non-Building Facilities |

[1] DA01 includes former PSC codes D302, D307, D399, and R413.

[2] DD01 includes former PSC Code D314.

[3] DJ01 includes former PSC Code D310.

# 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.

Table of Contents

## CHAPTER 5 - PUBLICIZING CONTRACT ACTIONS


- 5.201 - Synopsizing Proposed Non-Competitive Contract Actions Citing the Authority of FAR 6302-1 - February 2017
- 5.403 - Congressional Notifications - April 2020
    - Attachment - Guide for Congressional and Intergovernmental Notifications

# 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" (Oct 2018), issued via DOE Deputy Secretary Memorandum (Sept 12, 2018)]*

## 1.0 Summary of Latest Changes

This update: clarifies the requirement for reporting on Indefinite Delivery-type contracts and Blanket Purchase Agreements (BPAs).

## 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[1] (in accordance with FAR 5.303). Likewise, for Blanket Purchase Agreements and Indefinite Delivery-type contracts, reporting through ANA is required for actions resulting in a maximum contract or agreement value 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.

[1] This dollar value threshold applies, regardless of contract type (e.g., Firm Fixed Price, Cost Plus Award Fee, etc.)

- 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 |
| 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" (Oct 2018), issued via DOE Deputy Secretary Memorandum (Sept 12, 2018)

# Guide for Congressional and Intergovernmental Notifications




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

***Updated***
**October 2018**

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# Guide to Congressional & Intergovernmental Notifications

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**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 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 you can identify specific staff contacts on our website.

**Congressional & Intergovernmental Notifications**
**Summary of Categories**

1. **Advance Notification of Awards (ANA):** 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. ANA is an automated process that supports a standard email notification to congressional stakeholders. ANA notifications only occur when the dollar thresholds are met and are executed at the time of award rather that date of selection. 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 a primary tool for Program Offices to inform CI of upcoming program announcements that may need more extensive congressional or intergovernmental notification. The Priority Notification 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 form or equivalent

   Please note the PCIN is a notification to CI 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 301(b); 301(c)], only to the Appropriations Committees, are mandated by statute (see page 7). These notifications are initiated by the contracting offices and only pertain to contract awards and modifications or financial assistance awards or modifications. These are required in addition to ANA or PCIN financial assistance award notifications, and should be coordinated in tandem. The ANA and PCIN process will ensure any additional congressional or intergovernmental stakeholders are notified as appropriate after the 3-day mandated waiting period.

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.

| 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***<br><br>Generally any Matter that Merits a Media Release<br>Achieving a Major Milestone/Discovery<br>Draft or Final EIS/ Record of Decision Workforce Restructuring/Reduction In Force<br>Contractor Fee Determination or other fines or penalties<br>Appointment of Senior Lab or Field Officials<br>Opening or Closing of a Facility<br>Significant Awards<br>• Awards of significant stakeholder interest, below thresholds<br>• Due to significant stakeholder interest, suspended ANAs<br>  ○ Contract Award/Modification<br>  ○ Financial Assistance Award/Modification<br>• Final Request for Proposal (RFP)<br>• Final Funding Opportunity Announcement (FOA) | NA<br>NA<br>NA<br>NA<br>NA<br>NA<br>NA<br>**NA**<br>Any amount, as relevant<br><br><br>≥$4 Million<br>≥$2 Million<br>≥$25 Million<br>≥ $50 Million | 3 Business Day minimum<br><br>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/IGEA<br>CI/IGEA/CFO | Congress<br>• Specific Member(s)<br>• Authorizing Committees<br>• Appropriations Committees<br>Intergovernmental stakeholders | PCIN or Equivalent |
| **Advanced Notification of Awards (ANA) or Manual 4220.10** | | | | | | |
| Contract Award/Modification | ≥$4 Million | 3 Business Days | Contracting Office | CI | Congress—Specific Member(s)<br>Intergovernmental stakeholders | ANA or 4220.10 |
| Financial Assistance Award/Modification | ≥$2 Million | 3 Business Days | Contracting Office | CI | Congress—Specific Member(s)<br>Intergovernmental stakeholders | ANA or 4220.10 |
| Termination of DOE Financial Assistance | ≥$2 Million<br>(Based on Original Value) | 3 Business Days | Contracting Office with PO | CI | Congress—Specific Member(s)<br>Intergovernmental stakeholders | 4220.10 Manual |
| Termination of DOE Contract Award | ≥$4 Million<br>(Based on Original Value) | 3 Business Days | Contracting Office with PO | CI | Congress—Specific Member(s)<br>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<br>FY 2014: Multi-year awards not fully funded | FY 2012-13: 14-Calendar Days<br>FY 2014: 3 business days | Contracting Office | Contracting Office/CFO | 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/CFO | Congress—Appropriations Committees | Form Letter |

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**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. These notifications are executed at the time of award and not at the time of selection. Program Office points of contact should notify CI if selection notifications have already been done so the ANA process can be suspended.

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 award status in the STRIPES procurement database. Once all coordination is complete, ANA will transmit the DOE Form 4220.10 to relevant congressional 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.

**Priority Congressional & Intergovernmental Notifications (PCIN)**

The Priority Congressional & Intergovernmental Notification Form (Appendix C), is a primary tool for Program Offices to inform CI/IGEA/CFO 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 on the execution of the notification. Use of the PCIN form is preferred, but a substitute that includes all the pertinent information may also be used.

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.

The PCIN process applies to the following actions:

- Any Known Significant Issue of Interest to Congress, state, local or Tribal governments or generally any matter that merits a media release
- 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)
- DOE site visits or attendance at special events within a Member's state or district by DOE senior leadership

To inform CI of an upcoming program announcement, Program Offices should complete a PCIN form or its equivalent and provide it to their CI/IGEA/CFO Liaison for the program no later than 3 business 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.

**NOTE: The Office of Congressional and Intergovernmental Affairs operates as two units**

- **CI for Congressional interactions**
- **Intergovernmental and External Affairs (IGEA) for Governors, State Legislatures, Mayors, Tribal Leaders and other key stakeholders.**

**The PCIN form or its equivalent should be emailed to your CI program liaison always with a copy to the IGEA & CFO contact, which are listed in Appendix D.**

## 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 must be verified as completed by the CFO prior to release of any public information. If CI notifications are appropriate they should be executed after the XX day waiting period for Appropriations. CFO will coordinate with Program Offices directly to confirm the notification have been made and the waiting period expired.

- **Notices for Financial Assistance or Contracts of $1 Million or More:** Section 301(b) of the Energy and Water Appropriations Act for FY 2019 requires advance notification to the Committees on Appropriations 3 full business days prior to contract and financial assistance actions of $1 million or more.

- **Notices for Multi-Year Financial Assistance or Contracts:** Section 301(c) of the Energy and Water Appropriations Act for FY 2019 requires advance notification to the Committees on Appropriations prior to multi-year financial assistance actions.

  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.

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.

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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 fr**

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
☐ 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 Agree
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. ☐

Name: _____ Title: _____

Signature: _____ Office: _____

APPENDIX A

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# 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 (CI) ,Intergovernmental Affairs (IGEA) & CFO of matters likely of significant interest to Congress, Governors, and local and Tribal governments. The PCIN Form enumerates certain major items that should be covered through the PCIN process; programs are encouraged to also notify regarding 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, including State or District represented, 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.

      NOTE: CI should be informed when the notification will be handled by the PCIN process in lieu of ANA. ***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 ,INTERGOVERNMENTAL (IGEA), AND CFO LIAISONS**
  - 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)**
- ☐ **Generally any Matter covered by Media Release**
- ☐ **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

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| List of Points of Contact by Program | | | | |
|---|---|---|---|---|
| | | | | |
| | | | | |
| **Program** | **Career Federal POC** | **Appointee** | **IGEA POC** | **CFO** |
| **OSDBU** | Robert Tuttle | Jack Cramton | Amanda Quinones | Lisa Patterson |
| **EIA** | Matt Manning | Jack Cramton | TBD | Lisa Patterson |
| **IA** | Martha Oliver | Conner Brace | TBD | Bridget Forcier |
| **ARPA-E** | Matt Manning | Jimmy Ward | Doug Little | Bridget Forcier |
| **OP** | Martha Oliver | Allison Mills | TBD | Lisa Patterson |
| **LPO** | Matt Manning | Allison Mills | Doug Little | Bridget Forcier |
| **ED** | Robert Tuttle | Jack Cramton | Amanda Quinones | Lisa Patterson |
| **EE** | Martha Oliver | Allison Mills | Doug Little | Mindy Renfro |
| **Cyber (CESER)** | Matt Manning | Jack Cramton | Amanda Quinones | Bridget Forcier |
| **OTT** | Matt Manning | Jimmy Ward | Amanda Quinones | Bridget Forcier |
| **MA** | Matt Manning | TBD | Doug Little | Lisa Patterson |
| **CIO** | Matt Manning | Jack Cramton | Doug Little | Lisa Patterson |
| **GC** | Robert Tuttle | Conner Brace | Doug Little | Lisa Patterson |
| **CFO** | Matt Manning | TBD | Doug Little | Lisa Patterson |
| **HC** | Matt Manning | Jack Cramton | Doug Little | Lisa Patterson |
| **IE** | Matt Manning | Conner Brace | Matt Manning | Lisa Patterson |
| **Nominations** | N/A | Shawn Affolter | N/A | |
| **NNSA** | Pat Temple | Conner Brace | Doug Little | Bridget Forcier |
| **EM** | Pat Temple | TBD | Amanda Quinones | Mindy Renfro |
| **LM** | Pat Temple | TBD | Amanda Quinones | Mindy Renfro |
| **EA & AU** | Pat Temple | TBD | Amanda Quinones | Mindy Renfro |
| **NE** | Matt Manning | Jimmy Ward | Amanda Quinones | Mindy Renfro |
| **OE** | Robert Tuttle | Jack Cramton | Amanda Quinones | Bridget Forcier |
| **FE/Oil & Gas** | Robert Tuttle | Jack Cramton | | |
| **FE/Coal** | Robert Tuttle | Conner Brace | Doug Little | Lisa Peterson |
| **PMA** | Robert Tuttle | Jack Cramton | Amanda Quinones | Bridget Forcier |
| **SC** | Robert Tuttle | Jimmy Ward | Amanda Quinones | Bridget Forcier |
| **IN** | Pat Temple | Conner Brace | TBD | Bridget Forcier |
| **PM** | Pat Temple | TBD | TBD | Lisa Patterson |
| **HG** | Robert Tuttle | TBD | TBD | Lisa Patterson |
| | | | | |
| | | | *Updated 9/17/2018* | |

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## 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_9-2018.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_Guide9-2018.pdf

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## Table of Contents

## CHAPTER 6 - COMPETITION REQUIREMENTS


- 6.102 Competition Requirements - January 2018
- 6.502 Competition Advocate Responsibilities - February 2023

# Competition Requirements

Guiding Principles

- The Competition in Contracting Act (CICA) mandates, with limited exceptions, the use of full and open competition.
- Exceptions to full and open competition require justifications and approvals at specified levels.

*References: [FAR 6 and DEAR 906]*

## 1.0 Summary of Latest Changes

This update makes minor editorial and 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**. 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. Each exception, with supporting documentation, must be certified and approved at specified levels that vary according to the dollar value of the acquisition. The information that must be included in each justification is identified at FAR 6.303-1 and 6.303-2.

**2.2 Authority**. The Secretary of Energy has designated and delegated certain authorities and responsibilities to the Senior Procurement Executives (SPEs); these pertain to implementing and executing statutory and regulatory competition requirements. For DOE contracting activities, the SPE is the Director, Office of Acquisition Management. For National Nuclear Security Administration (NNSA) contracting activities, it is the Deputy Associate Administrator, Acquisition and Project Management.

In addition to the seven exceptions 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.

**2.3 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 for 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 of Justifications for Other Than Full and Open Competition (JOFOCs) is in accordance with the HCA Delegation of Authority/Designation memorandum.

**2.4 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's legal counsel of 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's 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 $700,000, 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.

**2.5 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. 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 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. For DOE procurements, the DEC, along with a copy of the draft JOFOC, shall be submitted to the Office of Contract Management (MA-62). NNSA contracting activities should follow the appropriate NNSA procedures.

- When the contract will be awarded after 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 prior 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.

**2.6 Public Interest (FAR 6.302-7)**. In rare circumstances, the public interest may not be best served by full and open competition. Such acquisitions should receive careful

scrutiny to ensure that there are adequate reasons to support the finding that it is not in the public interest to compete. This exception requires a determination by either the Secretary of Energy or the Administrator, NNSA that it is not in the public interest to seek full and open competition in the instant acquisition. 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, NNSA. 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, in accordance with the appropriate NNSA procedures.

Once the Secretary of Energy or the Administrator, NNSA 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.

**2.7 Work Direction**. Under no circumstance shall DOE personnel direct work to a particular source through, or accept work for (e.g., from other Federal agencies via an interagency agreement) any of DOE's contractors or their subcontractors for the purpose of avoiding the requirements of CICA, 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 (see FAR 15.404-1(h)).

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.

**2.8 Public Availability of the 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, which is Federal Business Opportunities, at *www.fbo.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 publicly available.

In order to post a JOFOC at www.fedbizopps.gov, go to the Opportunities section and find the "Justification & Approval (J&A)" notice type. Within DOE only the designated contracting activity personnel are allowed to post to www.fbo.gov the standalone J&A Notices , as well as to associate a notice with existing notices, such as awards, if applicable. The HCA shall ensure that each JOFOC document is redacted, as appropriate, before sharing it publicly. The contracting officer shall carefully screen a JOFOC for all contractor proprietary and other sensitive data, removing such data if they exist, including references and citations. Also, the contracting officer shall be guided by the exemptions to disclosure of information contained in the Freedom of Information Act (FOIA, 5 U.S.C. 552) and the prohibitions against disclosure in FAR 24.202, when 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.

**2.9 Best Practices**. When unsolicited proposals are considered, the unique or innovative method, approach, or idea contained in such proposals 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.

## 3.0 Attachments

| Attachment | Document Title |
|---|---|
| 1 | Justification for Other than Full and Open Competition |
| 2 | Determination of Exceptional Circumstances |
| 3 | Determination for Public Interest Exception |
| 4 | Sample Congressional Notification Letter for Public Interest Exception |

**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, e.g., 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 can not 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. 253I(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 designates the DOE Agency Competition Advocate to the Director, Office of Contract Management, within the Office of Acquisition Management.

## 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 DOE SPE has designated the DOE Agency Competition Advocate to the Director, Office of Contract Management, within the Office of Acquisition Management.

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.

## Table of Contents

## CHAPTER 7 - ACQUISITION PLANNING


- 7.1 Acquisition Planning - February 2015

# 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 7** | **Acquisition Planning** |
| **4. FAR Part 8** | **Required Sources of Supply** |
| **5. FAR Part 10** | **Market Research** |
| **6. FAR 11.402** | **Factors to Consider in Establishing Schedules** |
| **7. FAR 15.201(c)** | **Exchanges with Industry Before Receipt of Proposals** |
| **8. FAR Subpart 16.1** | **Selecting Contract Types** |
| **9. FAR 16.504(c)** | **Indefinite-Quantity Contracts - Multiple Award Preference** |
| **10. FAR 17** | **Special Contracting Methods** |
| **11. FAR Part 19** | **Small Business Programs** |
| **12. FAR 25.802(a)(2)** | **Other International Agreements and Coordination** |

| | |
|---|---|
| **13. FAR 34.004** | **Acquisition Strategy** |
| **14. FAR 36.301(a)** | **Two-Phase Design-Build Selection Procedures** |
| **15. FAR 37.6** | **Performance-Based Contracting** |
| **16. FAR 38.101(c)** | **Federal Supply Schedule Program** |
| **17. FAR 39.101(b) 39.102(c)** | **Acquisition of Information Technology** |
| **18. FAR 41.202** | **Acquiring Utility Services** |
| **19. DEAR Part 908** | **Required Sources of Supply** |
| **20. DOE O 413.3B** | **Program and Project Management for the Acquisition of Capital Assets, November 29, 2010** |
| **21. DOE O 436.1** | **Departmental Energy Sustainability, May 2, 2011** |
| **22. DOE G 413.3-13** | **U.S. Department of Energy Acquisition Strategy Guide for Capital Assets Projects, July 22, 2008** |
| **23. DOE O 580.1** | **Department of Energy Property Management Program** |
| **25. Deputy Secretary Letter** | **Project Acquisition Plans and Critical Decisions, November 15, 2001, signed by Francis S. Blake** |
| **26. Director, OMBE/CFO Letter** | **Mission Need Justification and Project Acquisition Plans, February 14, 2002, signed by Bruce M. Carnes** |
| **27. DOE Acquisition Guide, Chapter 17.1** | **Interagency Acquisitions, Interagency Transactions and Interagency Agreements** |
| **28. 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 act of acquiring by contract with appropriated funds supplies or services (including construction) by and for the use of the Federal Government through purchase or lease.

**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). Notably, 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

To the maximum extent practicable, 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, the briefing charts must meet the requirements of FAR 7.105 and appropriate approvals must be 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.) 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 or acquisition execution plans (AEPs) as required by DOE Order 413.3B, Program and Project Management For the Acquisition of Capital Assets. Either the AP or AEP is a document that is tailored and specific to your individual program.

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 Strategies (formerly called Acquisition Execution Plans by DOE Order 413.3A.3)

required by DOE G 413.3-13 U.S. Department of Energy Acquisition Strategy Guide for Capital Assets Projects, are different from the acquisition plans required by FAR Part 7. A project Acquisition Strategy is a key activity leading up to Critical Decision 1 - Approve Alternative Selection and Cost Range. It is a high-level business and technical management approach developed early in the project cycle designed to achieve project objectives within specified resource constraints. It is the framework for planning, organizing, staffing, controlling, and leading a project. It provides a master schedule for activities essential for project success, and for formulating functional strategies and plans. The Acquisition Strategy conveys the federal Integrated Project Team's (IPT) approach for the successful acquisition of the project, its intended outcomes, and rationale for that approach. The approach should address the market conditions, effective use of competition, and performance-based contracting opportunities. Projects may require multiple contracts and contract acquisition plans. Approvals of Acquisition Strategies do not constitute approvals required by the Office of Procurement and Assistance Management (in accordance with Chapter 7.1 of the DOE Acquisition Guide) for specific contact clearance purposes, including contract acquisition plans.

The Federal Project Director is responsible for the development of the Acquisition Strategy documents for each project subject to 413.3B. The Acquisition Strategy documents should form the basis for developing the contract acquisition plan for specific contract actions.

# 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:

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 $10 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 $10 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, Environment, Safety, and Health (includes NEPA), Security, Office of Economic Impact and Diversity, Office of Worker and Community Transition, Information Technology, and Office of Engineering and Construction 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.

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:

a) Include use of the metric system of measurement in proposed acquisitions in accordance with 15 U.S.C. 205a, *et seq.* (see FAR 11.002(b)) and agency metric plans and guidelines;

b) 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);

c) 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;

d) 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);

e) 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;

f) Structure contract requirements to facilitate competition by and among small business concerns; and

d) 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:

a) 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

b) 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.)

c) 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.

## Acquisition Milestones

- Determination of 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 their first step, 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. <u>Consultation Phase</u>

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 Acquisition Planning and Liaison 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:**

**Indefinite-Quantity Contracts**

In accordance with FAR 16.504(c), the contracting officer must determine whether multiple awards are appropriate as part of acquisition planning 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)).

**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.

**Socioeconomic Programs**

Acquisition planning should 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.)

**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/Source Evaluation BoardBriefings**

The following alternate approval process for acquisition plans may be utilized for procurements expected to exceed $25M, and selected for headquarters review. Under this alternate process, the acquisition plan topics and structure outlined in FAR 7.105 are presented in a briefing format. The briefings are herein identified as Headquarters Procurement Strategy Panel Briefings or Source Evaluation Board briefings (PSP/SEB briefing). At the PSP/SEB briefing, formal written minutes are prepared to summarize the discussion, actions and decisions of the PSP/SEB members. The approved minutes, along with the briefing charts, shall constitute the written acquisition plan, and shall be included in the contract file. Required participants in the PSP/SEB briefings include the Source Evaluation Board members, Source Selection Official, Ex-Officios, Competition Advocate, the Head of the Contracting Activity, General Counsel, and any other senior DOE officials required to approve the acquisition plan.

The briefing charts that constitute the written acquisition plan must be signed by the Contracting Officer, Competition Advocate, Head of the Contracting Activity, Source Selection Official, Headquarters Senior Program Official, Field/Site Office Manager, and approved by the Senior Procurement Executive for actions that exceed the HCA approval threshold.

This alternate process will provide senior DOE principals the opportunity to review proposed acquisition plans and to reach consensus on strategies and approaches that are most advantageous to the Government. PSP/SEB briefings shall be conducted as early as possible in the acquisition planning process to develop a systematic and disciplined approach to achieve an affordable and effective outcome.

The PSP/SEB briefings are not a requirements definition meeting. The purpose is to seek approval of the proposed acquisition approach for requirements that were previously defined and agreed to by the cognizant offices. Prior to the PSP/SEB briefings, the integrated project team/source evaluation board shall conduct all appropriate acquisition planning and requirements definition with interested offices (program, project, GC, MA, OECM, etc) in order to reach agreement on the broad parameters of the acquisition (contract type, contract term, incentive structure, etc.). It is important to achieve early agreement on these broad boundaries in order to prevent, as much as possible, schedule slippage due to last minute changes of direction. For the PSP/SEB briefing process to be effective the sites must involve the functional offices that make up the membership of the PSP/SEB to be part of the IPT/SEB charged with developing the acquisition strategy and all appropriate acquisition planning.

**Activity Based Schedule for Acquisition Planning**

In recent years, significant emphasis has been placed on reducing acquisition lead-times, from solicitation release to contract award. Much progress has been made. In order to further streamline the overall contract award process, the following activity based schedule for the acquisition planning phase has been developed:

Requirements Definition through Solicitation Release

| ACTION | WORK DAYS |
|---|---|
| Identify Need and Funding | Day Zero |
| Establish IPT/SEB | + 2 Weeks |
| ◊<br>Conduct Acquisition Strategy & Acquisition Planning Meetings (Establish Broad Boundaries) IPT/SEB/Program/GC/MA/OECM (Requirements definition should be in process during this period). | +4 Weeks |
| IPT/SEB Develop Draft Performance Work Statement & Acquisition Plan Framework | +6 Weeks |
| (continue any required internal Acquisition Strategy & Acquisition Planning Meetings) | |
| ◊<br>Conduct PSP/SEB Briefing/ Acquisition Plan Approved | |
| Develop RFP or Draft RFP and obtain required approvals | +17- 21 Weeks |
| | |
| Issue RFP | |
| Total Duration | 29-33 Weeks |

This schedule applies to FAR Part 15 procurements following the alternate (PSP/SEB briefing) process, but may be tailored as appropriate, and used for acquisitions following the traditional process.

# Chapter 10

## Process Measurement and Improvement

It is hoped that this guide and other process improvements will help you efficiently prepare high quality acquisition plans. When quality is built-in, the process can be pretty quick and painless. However, it can always get better which is why Office of Procurement and Assistance Management is committed to the concept of continuous process improvement for the acquisition planning process and welcomes your suggestions and lessons learned to simplify and speed the process while continuing to meet the regulatory requirements placed on this critical aspect of the acquisition business.

# Chapter 11

# 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 | Name |
| Contracting Officer | Contracting Activity |
| Office, Telephone | Competition Advocate |
| Date | Office, Telephone |
| | Date |

_____

Name
Head of Contracting Activity (HCA)
Office, Telephone
Date

ACQUISITION PLAN

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| | |
|---|---|
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| Attachment 2 | IPT Meeting Minutes |
| Attachment 3 | Funding Milestones |
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| Attachment 5 | Others, As Required |

## A. ACQUISITION BACKGROUND AND OBJECTIVES

1.0 PROGRAM DESCRIPTION

1.1 PROGRAM AUTHORITY AND IDENTIFICATION

1.2 BACKGROUND - FAR 7.105(a)

Summarize the technical and contractual history of the acquisition

1.3 STATEMENT OF NEED - FAR 7.105(a)

1.4 ACQUISITION ALTERNATIVES - FAR 7.105(a)

1.5 PROGRAM DIRECTION DOCUMENTS
Identify any relevant program documents

1.6 APPLICABLE STATUTES

1.7 ENERGY SYSTEMS ACQUISITION ADVISORY BOARD SCHEDULE AND APPROVALS -DOE O 413-.3B

1.8 ADVANCED PLANNING ACQUISITION TEAM (APAT) REVIEW AND APPROVAL – DOE Acquisition Guide Chapter 19.0

1.9 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

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B. PLAN OF ACTION

1.0 MARKET RESEARCH – FAR 10.002

1.1 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.

1.2 SMALL BUSINESS OPPORTUNITIES

2.0 COMPETITION (or other than full and open competition) – FAR 7.105(b)(2)(i) and FAR 7.104

2.1 COMPETITION, MAJOR COMPONENTS AND SUBSYSTEMS – FAR7.105(b)(2)(ii)

2.2 COMPETITION, SPARES, AND REPAIR PARTS – FAR 7.105(b)(2)(iii)

2.3 COMPETITION, SUBCONTRACTS – FAR 7.105(b)(2)(iv)

2.4 MULTIPLE SOURCING

Discuss the potential for multiple awards.

3.0 SOURCE SELECTION PROCEDURES – FAR 7.105(b)(4)

4.0 ACQUISITION CONSIDERATIONS – FAR 7.105(b)(5)

4.1 CONTRACT TYPE – FAR 7.105(b)(3)

4.2 SITE UTILIZATION AND MANAGEMENT PLANNING – AL 2009-03 Revision 1

4.3 WARRANTIES – FAR 7.105(b)(14)(ii)

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5.2 CONTRACT FUNDING

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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)

13.0 LOGISTICS CONSIDERATIONS – FAR 7.105(b)(14)

13.1 ASSUMPTIONS CONCERNING CONTRACTOR OR AGENCY SUPPORT – FAR 7.105(b)(14)(i)

13.2 QUALITY ASSURANCE, RELIABILITY, MAINTAINABILITY, WARRANTIES – FAR 7.105(b)(14)(ii)

13.3 REQUIREMENTS FOR CONTRACTOR DATA – FAR 7.105(b)(14)(iii)

13.4 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 |
|---|---|---|---|

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## CHAPTER 8 - REQUIRED SOURCES OF SUPPLIES AND SERVICES


- 8.3 Category Management - March 2022
- 8.404 Federal Supply Schedules - September 2018

# Category Management

Guiding Principles

- Category management (CM) refers to the business practice of buying common goods and services as an enterprise to eliminate redundancies, increase efficiency, and deliver more value and savings from the Department of Energy's (DOE's) acquisition programs.
- CM did not replace strategic sourcing; instead, it incorporates the strategic sourcing process and practices.

*References: [FAR 8, OMB Memo M-19-13, OMB Memo M-22-03, and Government-wide Category Management Key Performance Indicators, Volume 3.7 ]*

## 1.0 Summary of Changes

This guide chapter updates CM guidance to incorporate revised guidance from the Office of Management and Budget (OMB).

## 2.0 Discussion

CM is an approach the federal government is applying to buy smarter and more like a single enterprise. CM enables the government to eliminate redundancies, increase efficiency, and deliver more value and savings from the government's acquisition programs. It involves:

- Identifying core areas of spend;
- Collectively developing heightened levels of expertise in utilizing CM solutions;
- Leveraging shared best practices; and
- Providing strategic acquisition, supply, and demand management solutions.

Government-wide success of implementing CM is being assessed using the following six Key Performance Indicators (KPIs)[1]:

- Spend Under Management (SUM): The percentage of obligations through contracts that are actively managed in compliance with the SUM contract tiered maturity model
- Best-in-Class (BIC) Obligations: The percentage of obligations tracked via FPDS through BIC solutions

[1] Go to the Acquisition Gateway for "Government-wide Category Management Key Performance Indicators; Definitions and Guidance, V3.7, October 19, 2021"

- Cost Avoidance: Demonstrates the extent to which the program is delivering increased value for goods and services acquired by agencies, measured in dollars
- Reduction in Duplicative Contracts: Within Tier 0 and within a single agency, if a vendor has multiple contracts within the same market scope (PSC – NAICS), then these are flagged as duplicative; the measure will be tracked separately for all vendors and Other than Small to ensure there are no adverse impacts to small business vendors
- Small Business (SB) Utilization: Demonstrates the extent to which the program maintains or increases government use of SB (measured as a percentage) while implementing the CM strategies
- CM Training: Tracks the number of individuals trained in the aspects and components of CM

2.1 Overview. CM is the business practice of buying common goods and services on an enterprise-wide basis, as opposed to hundreds of individual agencies and departments buying individually. For CM purposes, goods and services are classified under 10 common government-wide categories that are related to PSCs:

- Information Technology
- Professional Services
- Security & Protection
- Facilities & Construction
- Industrial Products & Services
- Office Management
- Transportation & Logistics Services
- Travel
- Human Capital
- Medical

Each category is managed by a team of subject matter experts from various federal agencies to find and develop common contract solutions and best practices. Another aspect of CM is to bring decentralized spend into alignment with organized DOE and government-level spend strategies by sharing market intelligence, government and industry best practices, prices paid data, and other information to facilitate informed buying decisions.

OMB and the Category Management Leadership Council (CMLC) have developed a SUM model that assigns tiers to agencies' spend activity. SUM is the percentage of DOE's obligations that is managed in accordance with CM principles. The tiers are summarized as follows:

- **Tier 3** – *Spend managed at the government-wide level through use of BIC solutions.* Procurements awarded against identified BIC contracts. BIC contracts have been identified through a collaborative interagency process by acquisition category experts within the government as offering the best pricing, and terms and conditions within the

federal marketplace and reflecting the strongest contract management practices. Navigate to BIC contracts through ACQUISITION ANSWERS page on MAX.gov.[2]

- **Tier 2** – *Spend managed at the government-wide level through multi-agency or government-wide solutions.* Procurements awarded at this tier are against multi-agency or government-wide contracts that are not BIC. This includes Federal Supply Schedules (FSS), government-wide acquisition contracts (GWAC), multiple-award contracts (MAC), and other procurement instruments intended for use by multiple agencies. The contracts at this tier have strong contract management practices, including data and information sharing across agencies, and cross-agency metrics. These contracts can be found by following instructions on ACQUISITION ANSWERS (see footnote 2).

- **Tier 2-SB** – (*new tier*) Any procurements awarded to certified and self-certified socioeconomic small businesses that are not Tier 3. Tier 2-SB SUM is designed to empower agencies to take full advantage of the best strategies for reaching underserved small business communities. Tier 2-SB credit applies to 8(a) and other small-disadvantaged businesses, women-owned small businesses, service-disabled veteran-owned small businesses, and small businesses working in HUBZones. Tier 2-SB credit will be awarded to agencies automatically in bi-monthly updates to category management dashboards found on the Acquisition Gateway.

- **Tier 1** – *Spend managed at the agency-wide level with supporting mandatory-use policies and strong contract management practices.* Procurements awarded at this tier are against existing department/agency level contracts as mandated by DOE, including, but not limited to, indefinite delivery/indefinite quantity (IDIQ) contracts, blanket purchase agreements (BPAs), and some enterprise-wide agreements (EWAs). These procurements result from department level acquisition planning and data analysis, include demand management strategies (see 2.2.3), and have department level oversight. The procurements have metrics that are defined, tracked, and publicized. Tier 1 contracts can be found on ACQUISITION ANSWERS (see footnote 2). Tier 1 also includes those SB awards/contracts as addressed in paragraph 2.4 of this chapter.

- **Tier 0** – *Unaligned spend by the agency.* Procurements awarded at this tier are within DOE and are standalone contract actions that are not open for use by the entire department and/or other federal departments/agencies, except as addressed at paragraph 2.4. This includes lack of department-level acquisition planning, demand management, and/or oversight; and proceeding to award without consideration of like requirements across the entire department. It is understood, based upon the nature of requirements/actions, that Tier 0 is sometimes appropriate.

[2] The link to ACQUISITION ANSWERS is https://community.max.gov/x/6IA2PQ. On ACQUISITION ANSWERS hover over "Programs/Mission Areas", then "Strategic Programs", and select "Category Management". The CM page has a link to "Category Management on Acquisition Gateway" where BICs are maintained.

Questions on the available solutions including their scope, suitability, and availability for use can be directed to the Office of Acquisition Management (OAM), Strategic Programs Division or the point of contact listed for a particular solution.

2.2 DOE Responsibilities. At the department level, DOE must perform the following five key actions to implement CM:

2.2.1 Annually establish plans/goals to reduce unaligned spend and increase the use of BIC solutions for common goods and services, consistent with small business and other statutory socioeconomic responsibilities. The DOE Senior Accountable Official (SAO)[3] is responsible for establishing a plan to meet annual goals. The plan will support DOE efforts to reduce unaligned spend (Tier 0) by increasing use of DOE Preferred Solutions including EWAs, BIC, and other managed solutions (Tiers 1, 2, 2-SB, and 3). To establish the annual plan, the OAM will coordinate with the NNSA Office of Acquisition and Project Management (NA-APM), the Category Management Working Group (CMWG), and the DOE Acquisition Council (DAC). The plan will also address any efforts to use Tier 2-SB SUM credit to increase the participation of underserved communities while upholding the principles of category management stewardship. The SAO is encouraged to share any promising strategies and identify areas where further guidance, data analytics, and/or training (either at the agency or government-wide level) may be needed.

2.2.2 Develop effective vendor management strategies to improve communications with contractors, especially those that support mission-critical functions. DOE will build collaborative partnerships with vendors to manage performance and explore opportunities for efficiencies. Industry engagement and vendor management should take into consideration both pre-award [e.g., market research, industry days, and draft requests for proposals (RFPs)] and post-award strategies (e.g., gaining understanding of cost drivers, performance measures, and emerging commercial trends).

DOE/NNSA Vendor Communication Plan is available on the Guidance for Procurement Officials page at https://www.energy.gov/management/office-management/operational-management/procurement-and-acquisition/guidance-procurement.

2.2.3 Implement demand management strategies to eliminate inefficient purchasing and consumption behaviors. Demand management entails analyzing what and how a department and/or agency is buying, with a specific focus on reducing the total cost of ownership. Demand management in DOE includes defining strategies across the DOE and NNSA enterprise that seek to reduce duplication of effort and resources in obtaining required supplies and services.

2.2.4 Share data across the federal government to differentiate quality and value of products and services in making buying decisions. DOE will share information, such as prices

[3] The DOE SAO is the Director, Office of Acquisition Management, as designated by the Deputy Secretary.

paid, on the Acquisition Gateway for contracts that align to Tiers 1, 2, and 3. Contracting Officers (CO) should not agree to terms and conditions that broadly prohibit the sharing of prices, terms, and conditions for goods and services with other government agencies, including posting said information to the government side of the Acquisition Gateway.

2.2.5 Train and develop the workforce in CM principles and practices. DOE, through its Senior Procurement Executives (SPEs), will encourage the use of CM principles and practices. Formal and informal CM training will be provided for COs and other acquisition professionals. For current CM training opportunities, please contact your Category Management Working Group (CMWG) member. A list of CMWG members is available on ACQUISITION ANSWERS.

2.3 DOE Implementation. To implement CM, DOE uses a multi-pronged approach that includes evaluation of what and how DOE buys, how CM contracts are utilized, and identification of best practices in acquisition of supplies or services.

2.3.1 Roles and responsibilities.

2.3.1.1 SAO:

- Annually establish and approve DOE's CM plan to increase SUM while meeting SB goals and other statutory socio-economic requirements;
- Submit and brief the CM plan to OMB annually;
- Coordinate with OMB, the relevant government-wide CM manager (CMX), and other interested parties on CM issues;
- Appoint an official responsible for CM data collection and analytics; and
- Review Analysis of Alternatives (AoAs). See paragraph 2.6 on AoAs.

2.3.1.2 SPEs:

- Establish and maintain efficient processes and policies to support the principles and practices of CM;
- Establish department level policy and guidance requiring DOE/NNSA program offices to establish and submit annual plans including quarterly updates;
- Evaluate current policy to ensure proper development of the AoAs and achievement of SB contracting goals and other statutory socio-economic requirements;
- Review and approve AoAs; and
- Facilitate the sharing of information with the CMX and other federal agencies, including transactional data, best practices, demand management strategies, and vendor management strategies.

2.3.1.3 Office of Small and Disadvantaged Business Utilization (OSDBU):

- Work with SAO and SPEs to help develop an effective strategy for increasing SB participation for common contract solutions;
- Use the GSA SB dashboard to help the SAO and the acquisition team understand where use of BIC solutions and other multi-agency and government-wide contracts facilitates meeting DOE's SB contracting goals; and
- Help the SAO and the acquisition team understand where opting-out of BIC solutions and other multi-agency and Government-wide contracts in favor of department-wide contracts and/or local contracting is more suitable for achieving DOE's SB contracting goals.

2.3.1.4 OAM:

- Manage the implementation and execution of the CM program at the direction of the SAO and DOE SPE;
- Draft and implement department level CM policy to increase SUM while meeting SB goals and other statutory socio-economic requirements, and ensure execution and performance relative to those goals (including policy and guidance);
- Coordinate with the CMLC, the Office of Federal Procurement Policy, and GSA's CM Program Management Office (PMO), establishing policy and guidance, and managing and reporting on CM;
- Monitor compliance with the CM program policies and guidance;
- Prepare required reports;
- Share helpful information with DOE program offices, including best practices highlighted on the Acquisition Gateway;
- Lead the CM initiative on behalf of the SAO and the SPE by coordinating with the DAC and the CMWG, and maintaining the CM process;
- Process and review AoAs for non-NNSA offices;
- Update Procurement Management Review (PMR) inquiries to establish appropriate internal controls for the CM program;
- Collect departmental elements' submissions and consolidate those into DOE level reports; and
- Facilitate the sharing of prices paid data and terms & conditions on the Acquisition Gateway.

2.3.1.5 Heads of Contracting Activity (HCA):

- Establish and maintain efficient policies and procedures for their program and procurement office(s);

- Ensure participation on the CMWG and compliance with the DOE CM process;
- Establish and submit annual CM plan covering their program and procurement office(s), inclusive of activity goals that support department goals;
- Socialize/communicate CM policy and guidance with program offices/customers;
- Require that procurement offices under their purview share information (e.g., prices paid, terms & conditions), and methods that remove barriers (e.g., contract terms), with limited exceptions, on the Acquisition Gateway;
- Responsible for approving waiver requests for requirements consistent with their delegated procurement authorities (see paragraph 2.5). HCAs may further delegate authorities consistent with established delegations; and
- Establish, monitor, support, and report cost avoidance goals covering their program and procurement office(s).

2.3.1.6 Procurement Directors:

- Adhere to policies and procedures;
- Identify a participant for the CMWG and CM process;
- Establish, submit, and implement annual CM plan covering their procurement office, inclusive of goals and actions necessary to meet and/or exceed those goals;
- Responsible for achieving SB goals that maximize the potential of moving SB actions to Tier 1;
- Responsible for proposing updates to the list of DOE Preferred Solutions on ACQUISITION ANSWERS by proposing the addition, removal, or update of applicable contracts that they award or administer (see 2.7);
- Share information (e.g., prices paid, terms and conditions), to include removing barriers (e.g., contract terms), with limited exceptions, on the Acquisition Gateway;
- Establish, monitor, support, and report cost avoidance goals covering their program and procurement office(s);
- Require, track, and report CM training; and
- Socialize/communicate CM policy and guidance with program offices/customers.

2.3.1.7 COs/Contract Specialists:

- Award and administer acquisitions in accordance with CM statutes, regulations, and DOE policy (See 2.3.2 and 2.3.3 below).

2.3.1.8 CMWG:

- Adhere to the CMWG charter;
- Lead the implementation of CM and strategic acquisition management initiatives within DOE in support of the DAC;
- Facilitate accomplishment of external CM requirements;
- Develop and support DOE CM processes to optimize DOE spend and reduce duplication of requirements and contracts;
- Promote and facilitate CM related training at sites and within programs; and
- Share CM information within their procurement offices.

2.3.2 Forecasting, Evaluation and Measurement. Prior to the start of each fiscal year HCAs, when establishing the CM plan, will review data on their current contracts, then establish an inventory and forecast of requirements for the following fiscal years (currently two). The inventory and forecast will assist DOE in setting CM goals with OMB and provide information for analysis of potential DOE-wide agreements.

The SAO is responsible for establishing a CM plan to meet annual goals. The SAO will submit the annual CM plan to OMB. The CM plan will support DOE efforts to reduce unaligned spend (i.e., Tier 0) by increasing use of managed solutions (i.e., Tiers 1, 2, 2-SB, and 3), and increase use of BIC solutions (i.e., Tier 3). The SAO will ensure achievement of socioeconomic and other small business goals is prioritized over achievement of category management goals if the achievement of both goals is not possible. OAM and NA-APM will coordinate with the CMWG and the DAC to establish the annual CM plan.

The CMWG has developed a process that will facilitate the collection of data and other information necessary to establish the annual plan and provide quarterly updates. The process currently has six steps briefly outlined below [the complete process is available on ACQUISITION ANSWERS (see footnote 2)].

Step 1 – Establish an annual forecast for expiring awards
Step 2 – Identify procurement strategy for awards in Step 1
Step 3 – Establish procurement office fiscal year (FY) goals for BIC and SUM
Step 4 – Collect and consolidate information for DOE and NNSA
Step 5 – Review information for complex-wide requirements and opportunities
Step 6 – Report quarterly status from HCAs to DOE and NNSA

The CMWG will analyze the collected data for opportunities to establish DOE EWAs or other ways to consolidate requirements. The CMWG will also use the data to increase knowledge sharing across DOE of opportunities for using CM agreements and to provide information on possible suppliers and pricing.

2.3.3 Acquisition planning.

2.3.3.1 Mandatory process for acquisition planning. As end users identify a need for supplies and/or services, COs, in coordination with the end user and other program officials, must identify the method of acquiring that need in an effective, economical, and timely manner. As acquisition planning progresses, COs first consider those sources identified as mandatory in FAR Part 8, required by statute, or specified by regulation. If a mandatory source is not available, FAR 8.004 encourages the use of FSS, GWACs, MACs, and any other procurement instruments intended for use by multiple agencies, including, but not limited to, IDIQs, BPAs, and EWAs. Appropriate consideration should also be given to SBs (see paragraph 2.4).

While the FAR does not identify these solutions as a mandatory source, it is DOE policy to consider DOE Preferred Solutions (including EWAs) and BICs as mandatory sources. BIC contracts shall not be used where doing so might imperil the agency's ability to meet and exceed its socioeconomic small business contracting goals or might threaten growth of the agency's small business supplier base. As part of acquisition planning, COs also must consider existing contracts before electing to conduct an open market procurement. COs must consider potential existing solutions in the following order of preference:

1. FAR Part 8 sources including Ability ONE and Federal Prison Industries
2. DOE Preferred Solutions (e.g., DOE EWAs) found on ACQUISITION ANSWERS (see footnote 2)
3. BIC contracts
4. Tier 2 contracts
5. Tier 1 contracts

2.3.3.2 Documenting planning under CM. COs should evaluate scope, contract type, administrative costs/fees, SB considerations[4], and other requirements as they look at the solutions already available.

The acquisition plan and/or contract file must document the steps taken to identify appropriate contracts. It must document why none of the contracts currently available under the order of preference will fulfill the requirement. It should make a business case, appropriate to the complexity of the procurement, with supporting justification that includes an analysis that led to an existing solution being determined unsuitable based on considerations such as: (1) failed to produce better value; (2) insufficient scope; (3) incorrect contract type; (4) cost/price including fees to use the solutions; and (5) other considerations such as SB participation and DOE specific statutory and/or regulatory requirements.

[4] Includes whether the action may be considered bundled or consolidated per FAR 7.107.

For certain awards in the order of preference at 2.3.3.1, an AoA may be required. See Section 2.6 below.

2.4 Strategy to maximize utilization of SB concerns. In implementing CM, DOE will continue its emphasis on awards to SB concerns. DOE's Small Business First Policy, DOE P 547.1A, requires the fostering of a dynamic business environment for the SB community, which includes: small; veteran-owned; service-disabled veteran-owned; HUBZone; small disadvantaged; and women-owned SB concerns; to widen the opportunities for SB in DOE's acquisitions. DEAR 919.501(g) requires that a product or service acquired by a successful small business set-aside shall continue to be acquired on a set-aside basis. All SB socioeconomic (8a, veteran-owned; service-disabled veteran-owned; HUBZone; small disadvantaged; and women-owned SB concerns) awards will be considered Tier 2-SB. As a part of providing greater contract opportunities for SB concerns, DOE will allow awards to non-socioeconomic SB concerns to be considered "under management" at Tier 1 if the award has followed the designated process and was undertaken to achieve SB goals. To designate non-socioeconomic SB procurements as Tier 1, the following process must be followed and documented in the acquisition plan:

1. The CO considers only SB solutions in accordance with numbers 1 through 5 of the order of preference at Section 2.3.3.1 above.
2. The CO uses a set-aside for SBs and requires that the subsequent award(s) include:
   a) terms and conditions that allow department-wide use of the contract,
   b) a ceiling price and maximum quantity that supports department-wide use, and
   c) option periods that will support transitioning the requirement to a higher tiered, government-wide, or more advantageous contract.

2.5 Waiving the Use of Existing Contracts. The order of preference for existing solutions at paragraph 2.3.3.1 must be followed, inclusive of appropriate consideration for SB as described at paragraph 2.4. If the CO determines that an existing solution is not the best method for meeting the requirement, a waiver request must be completed, submitted, and approved. Approval authority for a waiver is provided as follows:

1. The DOE HCAs shall approve waivers consistent with their delegated procurement authorities, or applicable NNSA authority as determined by the NNSA SPE.
2. If the requirement is valued at $50M or greater the waiver must be approved as part of the existing DOE Business Clearance process or applicable NNSA process.

Waivers must be approved prior to establishing a contract or using a solution other than an existing one. The waiver request is a written determination prepared by the CO that thoroughly documents the business case with the supporting justification for not using an existing solution. The justification must include an explanation for the need to follow an alternate acquisition strategy, as well as a brief analysis of the value [price and non-price factors (e.g., delivery method, availability, country of origin, etc.)] of the required existing solution not selected in

comparison to the intended procurement contract. The waiver justification must also be documented in the Acquisition Plan, when a plan is required, and in the market research.

If a CO fails to use an existing solution without a waiver execution of the action may be considered an unauthorized commitment. This could result in the termination, suspension, or reduction of a CO's warrant authority. The CO may also be held personally liable for the amount of the action.

2.6 AoA. An AoA is a comparison of the full range of contractual options available for fulfilling a department and/or agency requirement for goods and/or services. An AoA is required for the following:

1. Tier 0 requirements/acquisitions over $50M planned for award or follow-on over the next 12 months that are not expected to be migrated to Tier 1, 2, 2-SB, or 3; and
2. Tier 1 requirements/acquisitions over $100M planned for award or follow-on over the next 12 months that are not expected to be migrated to Tier 2, 2-SB, or 3.

An AoA must be completed using the "Opt Out Spending" worksheet on page 25 of OMB Memo M-19-13. Submit the worksheet in conjunction with the applicable Business Clearance submission. The AoA must be approved by the cognizant SPE, reviewed by the SAO, and finally returned to OAM (Strategic Programs Division) for submission to OMB. OMB may share AoAs with other agencies.

AoAs are commonly used to document and justify requirements, actions, and decisions. The AoA used for CM must follow the template in OMB Memo M-19-13 as opposed to other guidance on AoAs such as that in DOE O 413.3.

Note that both a waiver, as addressed in paragraph 2.5, and an AoA could be required for a single action if both are applicable.

2.7 Establishing DOE Preferred Solutions and Updating the DOE Preferred Solutions List. The SAO and/or the DAC identify DOE Preferred Solutions as solutions that best support DOE's CM goals. Instructions for establishing DOE Preferred Solutions are available on ACQUISITION ANSWERS[5]. The OAM maintains a DOE Preferred Solutions list on ACQUISITION ANSWERS. Updates to this list can be made by emailing DOEPreferredList@hq.doe.gov. See the fields found on the existing list and provide the same data fields for the solution being added. DOE OAM validates the solution and adds it to the list. If a solution needs to be removed from the list send an email to DOEPreferredList@hq.doe.gov with the reason for and effective date of the removal.

[5] The link to ANSWERS is https://community.max.gov/x/6IA2PQ. ANSWERS contains a page for "Category Management" which has a link to the DOE Preferred Solutions.

2.8 Establishing and/or Updating the Tier Level for Contract Actions/Contracts. Contract tier levels are maintained in the Contract Inventory. Use the Contract Inventory process to establish or change the tier level for new and existing actions. The tier levels request goes thru OAM, Strategic Programs Division to the Office of Federal Procurement Policy at OMB.

2.9 IT Acquisitions. Acquisitions inclusive of IT supplies and services must obtain approval from the cognizant Chief Information Officer in accordance with the Federal Information Technology Acquisition Reform Act (FITARA). See Acquisition Guide Chapter 39.3 for guidance.

# Federal Supply Schedules

Guiding Principles

- There are unique ordering procedures for each of the following:
  - Supplies, and services not requiring a statement of work;
  - Services requiring a statement of work; and
  - Establishing, and ordering under, blanket purchase agreements (BPAs).
- FAR Subpart 17.5, Interagency Acquisitions, applies to FSS orders in excess of $550,000.

*References: [FAR 8.4, FAR 17.5, FAR 38]*

## 1.0 Summary of Latest Changes

This update: (1) changes the chapter number from 8.4 to 8.404 to align with the FAR, (2) updates the guidance to allow for small business set-asides pursuant to FAR 8.405-5, (3) encourages use of "Best In Class" contract solutions, (4) removes information that merely repeats or has now been implemented in the FAR (e.g., FAC 2005-50 changes resulting from Interim Rule FAR 2007-012), and (5) 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. See also DOE Acquisition Guide Chapter 17.1 (to be renumbered 17.502) for Federal Supply Schedule (FSS) orders exceeding $550,000.

**2.1 Overview of Federal Supply Schedules (FSS).** FAR subpart 8.4 - Federal Supply Schedules regulates the use of the FSS Program. The FSS Program is also known as the General Services Administration (GSA) Schedules Program or the Multiple Award Schedules Program. 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.

In a competitive procurement process, 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.

There are also schedules that allow procuring activities to focus their selection of contractors to special areas of interest, such as the Professional Services Schedule; the Facilities Maintenance and Management Schedule; the Scientific Equipment and Services Schedule; the Information Technology Schedule; and other products and services.

For an overview and complete details about the GSA Schedules Program, go to the GSA website at https://www.gsa.gov/acquisition/purchasing-programs/gsa-schedules.

**2.2 Best In Class.** Certain GSA Schedules, such as Schedule 70 (information technology hardware and software, including Governmentwide Strategic Solutions (GSS) for desktops and laptops), have been designated by the Office of Management and Budget (OMB) as "Best In Class" (BIC). A BIC designation means that these contracts are a preferred governmentwide solution that:

- Allows acquisition experts to take advantage of pre-vetted, governmentwide contract solutions;
- Supports a governmentwide migration to solutions that are mature and market-proven;
- Assists in the optimization of spend, within the governmentwide category management framework; and
- Increases the transactional data available for agency level and governmentwide analysis of buying behavior.

DOE contracting officers (CO[1]) are strongly encouraged to use GSA Schedule "Best In Class" contract solutions as applicable.

For the complete Best In Class Consolidated List, go to the GSA website at https://hallways.cap.gsa.gov/app/#/gateway/best-class-bic/6243/best-in-class-bic-consolidated-list.

**2.3 Blanket Purchase Agreements under GSA Schedule Contracts.** In accordance with FAR 8.405-3, COs may establish blanket purchase agreements (BPAs) under any FSS (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.

[1] CO means DOE contracting officer throughout this chapter, unless stated otherwise.

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;
- Allow DOE to leverage buying power through volume purchasing;
- Enable streamlined ordering procedures;
- Allow DOE to incorporate Contractor Team Arrangements (CTAs);
- Reduce procurement lead time; and
- Give DOE the ability to incorporate terms and conditions not in conflict with the underlying contract.

Important factors to consider before establishing a BPA are: (1) the costs of the purchases; (2) the administrative and processing costs; and (3) the qualifications of DOE and the vendors from whom DOE anticipates it will purchase products and services. Accurate and detailed record keeping is also required.

For an overview and complete details about the use of BPAs under the GSA Schedules Program, go to the GSA website at https://www.gsa.gov/acquisition/purchasing-programs/gsa-schedules/schedules-flexibilities/blanket-purchase-agreements-bpas.

## 3.0 Attachments

Attachment 1, Federal Supply Schedules: Frequently Asked Questions

# Federal Supply Schedules:

## Frequently Asked Questions

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## GENERAL

### Why should I use FSS?

Advantages of using the GSA Schedules Program include:

- It significantly reduces the acquisition time.
- The Service Contract Act review and the Equal Employment Opportunity review have already been performed by GSA.
- GSA has determined prices under FSS to be fair and reasonable (but see FAR 8.405-2(d), 8.405-3(b)(2)(vi)) and 8.405-3(c)(3)); volume purchasing allows the CO to seek additional price reductions at any time.
- Synopses are not required for schedule purchases (however, there is a posting requirement for orders and BPAs with an estimated value greater than the simplified acquisition threshold that is supported by a limited-source justification).
- There is quick delivery.
- The schedule orders count towards DOE 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.
- DOE can establish blanket purchase agreements (BPA) for recurring needs.

### Are FSS orders in excess of $550,000 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 $550,000. 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 DOE Acquisition Guide Chapter 17.1 (to be renumbered 17.502).

### Must I conduct acquisition planning and market research before using an FSS contract (schedule contract)?

The CO should perform acquisition planning and conduct market research as is appropriate to the circumstances. However, be sure you select the most appropriate schedule for your program's requirement. For instance, do not use the consolidated schedule if professional engineering services are required.

COs may consider socioeconomic status when identifying contractors for consideration or competition for award of an order or a BPA. At a minimum, COs 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.

**May I 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 an 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 DOE. Additionally, FSS contracts require team members to propose only their own rates; therefore, team members 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 CO 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 the next question and response for more details on posting the RFQ.[5]

**How do I issue an RFQ and receive quotes when using e-Buy?**

[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(f)(8)
[5] FAR 8.402(d)(1)

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, COs 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[6] 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 I ensure that fair notice is provided to all schedule contractors?**

A CO 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.

[6] Funding Opportunity Announcement

- 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[7]

**Do I 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, DOE-specific representations and certifications may need to be obtained for DOE-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 FSS?**

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 I place orders for services under FSS and document the order?**

The ordering procedures that you use depend on whether the type of services requires a

[7] FAR 8.404(e)

statement of work (SOW) and the dollar value of the order. All services ordered shall be within the scope of the GSA schedule contract.

When ordering services that do not require an SOW (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), follow the procedures at FAR 8.405-1.

When ordering services that require an SOW (e.g., professional services based on hourly rates), follow the procedures at FAR 8.405-2. For firm-fixed-price (FFP) orders, the FFP of the order should 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.

See limiting sources questions and responses for additional documentation 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. See FAR 8.405-1(f) for other factors that may be considered. For more information on best value, see evaluation criteria and best value questions and responses.

## PROCURING SUPPLIES

**What supplies are available on FSS?**

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 I place orders for supplies under 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.

The ordering procedures that you use under the schedule depend on the dollar value of the supplies you are acquiring. See FAR 8.405-1.

See limiting sources questions and responses for additional documentation guidance.

**Are there special posting requirements when an order contains brand-name specifications?**

Yes. When an order contains brand-name specifications, the CO 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. See FAR 8.405-1(f) for other factors that may be considered. For more information on best value, see evaluation criteria and best value questions and responses.

## BLANKET PURCHASE AGREEMENTS

**Can I establish blanket purchase agreements (BPA) under FSS?**

Yes. COs should establish blanket purchase agreements (BPA) (multiple-award BPAs are preferred over single-award BPA) under FSS when DOE needs a simplified method for filling

anticipated repetitive needs for services or supplies.[8] 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, you shall follow the procedures at FAR 8.405-3. At least once a year, the CO shall review the BPA and make a written determination documenting the results of the review.[9] If it is 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 BPAs

### How do I 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 services requiring an 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 an SOW.

See FAR 8.405-3(a)(7) for minimum documentation requirements. See limiting sources questions and responses for additional documentation guidance.

### When establishing BPAs, what should I consider when determining best value?

[8] FAR 8.405-3
[9] FAR 8.405-3(e)

See FAR 8.405-3(a)(2). You should also consider price to include seeking price reductions, and any other factors as appropriate.

**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 the type of services require a statement of work (SOW).

When establishing BPAs for supplies, and for services not requiring an SOW (e.g., services that are priced on a firm-fixed-price basis for a specific task, such as installation, maintenance, repair, transcription services, or printing and binding services), follow the procedures at FAR 8.405-3(b)(1). The GSA schedule contract number shall be cited on each BPA.

When establishing BPAs for services that require an SOW, follow the procedures at FAR 8.405-3(b)(2). 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 CO 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 DOE's needs, the CO must:

- For single-award BPAs with an estimated value exceeding the micro-purchase threshold but not exceeding $112 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 $112 million including any options, in addition, to the limited sources justification described above, the requirement for a head of agency written determination is required.[10] 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.

## ORDERING FROM BPAs

**What are the ordering procedures for a single-award BPA under FSS?**

If the CO 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, 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-

[10] FAR 8.405-3(a)(3)(ii)

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 holders 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 CO shall develop a statement of work for each order covered by the BPA. COs 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.

## LIMITING SOURCES

### What is a limited-source order or a limited-source blanket purchase agreement (BPA)?

A limited-source order or limited-source BPA occurs when a CO 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 CO must justify in writing and obtain appropriate approvals for 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 I 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 CO 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 CO 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.[11] 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, DOE's needs.

  - For proposed orders or BPAs based upon item(s) peculiar to one manufacturer circumstances justify limiting the source and exceeding the micro-purchase threshold but not the exceeding the simplified acquisition threshold, the CO 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 CO 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

[11] FAR 8.405-6(b)

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 limited-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: [12]

- 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 DOE'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;
- 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, DOE 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 CO's knowledge and belief; and

[12] FAR 8.405-6(c)

- Provide evidence that any supporting data that is the responsibility of technical or requirements personnel (*e.g.,* verifying DOE'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[13]:

- If the action exceeds the SAT but does not exceed $700,000, the Contracting Officer;
- 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.

**What are the posting requirements for item(s) peculiar to one manufacturer?**

For items peculiar to one manufacturer justification, the CO 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.

- 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;

[13]FAR 8.405-6(d) and HCA's Delegation of Authority/Designation memorandum

- The nature of the file (*e.g.,* size, format) does not make it cost-effective or practicable for the CO to provide access through e-Buy; or

- DOE's Senior Procurement Executive makes a written determination that access through e-Buy is not in DOE's interest.

**What are the posting requirements for limited-sources justifications, other than item(s) 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 DOE's website, which may provide access to the justification by linking to the GPE.

Depending on the circumstances for limited-sources justifications, there are two posting timelines 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 CO 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 CO 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 CO 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 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.

## SPECIAL ORDERING PROCEDURES AND FAR PART 15

**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.

Also, a CO 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 CO.

**Are teaming partners all required to be FSS contractors (schedule contractors)?**

Yes. To ensure that DOE receives the streamlining advantages of an FSS Contractor Team Arrangement, 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 REQUIREMENTS

**Can I buy supplies or services that are not identified on a particular schedule?**

Yes, but with certain restrictions. You may add items that are not included on the schedule contract, called *open market items*, to an FSS BPA or an individual order only if the conditions of FAR 8.402(f) are met.

**Must I 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 I 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.

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 I count awards under FSS to small business concerns toward DOE's socioeconomic goals?**

Yes. Awards to schedule contractors which fall into the various socioeconomic groups may be reported against DOE's annual socioeconomic accomplishments. However, for purposes of reporting an order placed with a small business schedule contractor, the CO may only take credit if the awardee meets a size standard that corresponds to the work performed. COs should rely on

the small business representations made by schedule contractors at the contract level.

**How can I maximize opportunities for small businesses under 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 COs to consider the availability of small business concerns when planning for FSS acquisitions and placing FSS orders.

The DOE Acquisition Guide, Chapter 19.2, sets forth Departmental policy addressing small business programs and strategies for maximizing contracting opportunities for small business. FAR 8.405-5(c) states that COs 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.

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. COs should actively assist their program customers in identifying schedule contractors that will help meet the program's procurement requirements.

See also the next question.

**Is it appropriate to set aside an order under FSS for small businesses?**

Yes. See FAR 8.405-5.

**When placing an FSS order, what should I 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 CO 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 I 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 I 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. [14] In a best value selection, low price does not necessarily assure selection.

When determining best value, in addition to price, the CO may consider the factors in addition to schedule-specific ordering procedures and the following factors.

- Evaluation criteria should be kept to the minimum necessary to objectively evaluate a contractor's ability to successfully fulfill DOE'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.

[14] FAR 8.405-1(f), FAR 8.405-3(a)(2)

- Contractor quotations need not be point scored.

**What is evaluated when ordering services requiring a statement of work?**

In addition to the best value selection considerations addressed in the above question, for service orders requiring an SOW in excess of the micro-purchase threshold, the CO 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 CO 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 for the proposed work on the 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 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 an 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 CO 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 CO 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(g), 8.405-2(f), and 8.405-3(a)(7), 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.

COs should use whatever evaluation approach, such as narrative or adjectival ratings, that is appropriate to the acquisition bearing in mind the intended streamlined nature of the FSS process.

## DEBRIEFING AND PROTESTS

**For services requiring an 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 CO 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 DOE'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 CO may elect to provide additional information to an unsuccessful schedule contractor. When electing to do so, the CO should consider the following:

- The timing for conducting such interactions are at the convenience of DOE, 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 CO (i.e., in writing, face-to-face, or via telephone).

- The level of information conveyed is at the discretion of the CO 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 DOE'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 an FSS contract protest the CO'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 CO 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 CO 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 CO 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 CO may elect to not exercise any remaining options under the order.

When the DOE CO has terminated for cause an individual order to a FSS schedule contractor, or if fraud is suspected, the GSA Schedule CO shall be notified of all instances by the DOE CO. See FAR 8.406-4.

**Is a termination for cause for an 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 CO shall ensure that information related to termination for cause notices and any amendments is 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 CO 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).

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## CHAPTER 9 - CONTRACTING QUALIFICATIONS


- 9.505 Organizational and Consultant Conflicts of Interest - September 2016
  - 9.505 - Attachment - NNSA Supplement

# 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.

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## CHAPTER 12 - ACQUISITION OF COMMERCIAL ITEMS


- 12.212 - Commercial Supplier License Agreements and Subscriptions - June 2018

# Commercial Supplier License Agreements and Subscriptions

Guiding Principles

- Contracting Officers should carefully review the terms and conditions of commercial supplier license agreements and subscriptions to ensure that they: (1) satisfy the Government's needs, and (2) do not conflict with the Government's sovereign authority or other Federal laws.
- Contracting Officers should review commercial supplier license agreements and subscriptions in accordance with the attached checklist and then consult with the DOE Office of General Counsel as needed.

*[References: FAR 12.212, FAR 12.216, FAR 12.302, FAR 27.405-3, FAR 52.227-19, DEAR 952.227-14, DEAR 970.2704-2(c)(3), and DEAR 970-5244-1(l)]*

## 1.0 Summary of Latest Changes

This is a new Acquisition Guide chapter.

## 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 purpose of this chapter is to provide DOE policy for reviewing commercial supplier license agreements and subscriptions. For assistance in reviewing non-commercial license agreements or subscriptions, please contact your office's legal representative.

**2.1 Background**. Information technology and other acquisitions may include supplies or services (e.g., computer software and related services), which are subject to commercial supplier license agreements ("Agreements"). These Agreements, often referred to as End User License Agreements ("EULAs"), Terms of Service ("TOS"), or other similar legal instruments or agreements, may be presented by an offeror as part of a proposal or quotation in response to a solicitation for a contract or order. The Agreements may include clauses that are

acceptable to private industry, but are inappropriate for acceptance by the Federal Government. For example, many Agreements contain indemnification clauses that are inconsistent with Federal law and unenforceable, and which could create a violation of the Anti-Deficiency Act (31 U.S.C. 1341) if agreed to by the Government (e.g., automatic renewals, absent mitigating terms in the contract such as the availability of funds clause). Paragraph (u) of the clause at FAR 52.212-4 prevents any such violations, but there may be other clauses included in Agreements that, if accepted by the Contracting Officer (CO), can put the Government at risk.

**2.2 Overview.** Several commonly recurring, conflicting or ambiguous clauses typically contained in Agreements are identified in this Acquisition Guide chapter (see Attachment 1) to assist DOE COs in negotiating individual Agreements in a cost-effective manner.

Similarly, proposals or quotations for subscriptions to newspapers, magazines, periodicals, or other publications (i.e., any publication printed, microfilmed, photocopied, or magnetically or otherwise recorded) may also include Agreements that contain inappropriate clauses for the Government. This Acquisition Guide chapter may assist DOE COs in negotiating those Agreements as well (see Attachment 1).

**2.3 Using the Agreement.** At their discretion, COs may make reference to, use, sign, or incorporate an Agreement into the contract or order, *if* the Agreement is consistent with Federal law. If the CO takes no exception to the Agreement, the CO must document the file that s/he has carefully reviewed all terms and conditions of the Agreement and considers them acceptable. The CO should exercise caution in accepting the terms and conditions of the Agreement, some of which may not be appropriate for Government contracting. COs must address any inconsistencies in the Agreement in the contract or order. The contract or order must clearly state that the contract or order terms take precedence over the Agreement.

## 3.0. Attachments

Attachment 1 – Review Checklist for Subscriptions and Commercial Supplier License Agreements ("Agreements")

# Attachment 1

## Review Checklist for Subscriptions and Commercial Supplier License Agreements ("Agreements")

DISCLAIMER: EVERY AGREEMENT IS UNIQUE SO THE CO AND/OR CONTRACT SPECIALIST (CS) MUST CAREFULLY READ ALL AGREEMENT PROVISIONS/CLAUSES. THIS CHECKLIST IS INTENDED FOR COMMERCIAL AGREEMENTS WHERE DOE IS RECEIVING THIRD PARTY DATA COMPILED BY VENDORS OR AGREEMENTS FOR COMMERCIAL OFF-THE-SHELF (COTS) SOFTWARE. THIS CHECKLIST MAY NOT BE APPROPRIATE FOR AN AGREEMENT THAT IS FOR NON-COMMERCIAL PRODUCTS/SERVICES, OR FOR PRODUCTS/SERVICES THAT HAVE BEEN CUSTOMIZED FOR DOE USE.

| | Item | Description |
|---|---|---|
| ✓ | 1. | The Program office reviews the Agreement to ensure that:<br>a. The services provided under the Agreement adequately meet the Program's needs; and<br>b. The Program understands the restrictions contained in the Agreement (particularly any restrictions as to the number of users and any restrictions on use (forwarding, copying, etc.)). If the Program has any issues, those should be specifically identified by the Program and addressed by the CO/CS. |
| ✓ | 2. | Federal Acquisition Regulation (FAR) 48 C.F.R. 52.212-4, Contract Terms and Conditions -- Commercial Items **must** govern the contract between the Government and the vendor.<br>a. The CO may incorporate the Agreement into the Contract as an attachment, and clearly mark the Agreement as such. The CO is not required to sign the Agreement; however, whether the CO signs the Agreement or not, the CO should specifically add language (underneath the signature block) stating: "This document is Attachment No. X to Contract No. Y. In the event of any conflict between the Contract and this Attachment, the terms and conditions of the Contract shall prevail."<br>b. If the CO does not incorporate the Agreement into the Contract as an attachment, but does reference or otherwise use the Agreement, the CO should still include the statement in paragraph a of this item that the Contract prevails over the Agreement. |

| | Item | Description |
|---|---|---|
| ✓ | 3. | The CO/CS reads the Agreement and, to the extent that the provisions conflict with federal law or FAR 52.212-4, strikes out those provisions. The most typical provisions that may be in conflict with federal law or FAR 52.212-4 are:<br><br>a. Payment/late payments/interest (governed by the Prompt Payment Act and 5 C.F.R. Part 1315; see FAR 52.212-4(g) and (i)).<br>b. Automatic renewal (governed by the Anti-Deficiency Act, and contrary to exercise of options clauses).<br>c. Termination provisions (including clauses about vendor ability to unilaterally terminate the contract for nonpayment or any limitation on the government right to terminate the Agreement for convenience) (see FAR 52.212-4(l) and (m)).<br>d. Nonrefundability of fees (see FAR 52.212-4(l)).<br>e. Indemnification/Limitation of Liability/Hold Harmless/Attorney's Fees clauses (governed by the Anti-Deficiency Act; see also FAR 52.212-4(h) and (u)).<br>f. Publicity/endorsement/use of logo/marketing: DOE cannot endorse private entities; further the DOE logo cannot be used without permission from DOE (see 10 CFR Part 1002; contact local counsel or, for procurements under the authority of Headquarters Procurement Operations, the Assistant General Counsel for General Law (GC-56) if an issue arises).<br>g. Warranties/Limitation of Liability/Disclaimers: At a minimum, strike out disclaimers of implied warranty of merchantability and fitness for a particular purpose (see FAR 12.404 and FAR 52.212-4(o)).<br>h. Governing law/jurisdiction (strike any provision stating the law of a foreign nation or a state apply, or that we agree to jurisdiction of a state court; disputes are governed by the Contract Disputes Act and FAR 52.233-1, Disputes; see FAR 52.212-4(d)).<br>i. Arbitration/dispute resolution provisions (see FAR 52.212-4(d)).<br>j. Availability of injunctive or equitable relief (see FAR 52.212-4(d)).<br>k. Designation of program person with authority to act (because only CO can change the contract; issue of CO warrant authority/prevent unauthorized direction to contractor).<br>l. Suspension (including ability of vendor to stop providing service if government fails to pay invoice)/stop work order/cost related to suspension (governed by Disputes clause).<br>m. Limitation on when lawsuit can be brought by the government against the vendor (governed by Disputes clause).<br>n. Irreparable injury incurred by the vendor as a result of breach of Agreement by the government (governed by Disputes clause). |

| | Item | Description |
|---|---|---|
| | | o. Government liability for attorney's fees incurred by the vendor in enforcement of the Agreement (governed by Disputes clause).<br>p. Designation of a third party beneficiary by the vendor (Legal issue; creates legal rights for an entity not a party to the contract).<br>q. Assignment of the Agreement (governed by the Assignment of Claims Act, see FAR 52.212-4(b)).<br>r. Liability of the government for taxes (see FAR 52.212-4(k)). |
| ✓ | 4. | The CO/CS reviews the terms and conditions of the Agreement and makes appropriate revisions, such as:<br>a. If a specific program is designated, add "U.S. Department of Energy."<br>b. To the extent any authorized users are specifically designated, make sure that DOE contractors are included (as appropriate). |
| ✓ | 5. | The CO/CS requests review by local patent counsel or, for procurements under the authority of Headquarters Procurement Operations, the Assistant General Counsel for Technology Transfer and Intellectual Property (GC-62) for intellectual property issues. |
| ✓ | 6. | If any issues remain that cannot be resolved by the CO/CS after reviewing the Agreement using this checklist, the CO/CS may request assistance from their local counsel. For procurements under the authority of Headquarters Procurement Operations, the local counsel is the Assistant General Counsel for Procurement and Financial Assistance (GC-61). |
| ✓ | 7. | After the Program and the CO/CS have performed steps 1-4, and consulted with legal counsel as needed, the CO/CS returns the revised Agreement to the vendor, along with the related Contract documents. If the vendor does not accept a change(s) in the revised Agreement, the CO/CS should consult with GC-61, GC-62, or local counsel as appropriate. |

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# CHAPTER 13 - SIMPLIFIED ACQUISITION PROCEDURES


- 13.101 Simplified Acquisition Procedures - April 2018
- 13.301 Purchase Card Policy and Operating Procedures - November 2018
- 13.302 Purchase Orders - August 2017

# Simplified Acquisition Procedures

Guiding Principles

- Simplified Acquisition Procedures (SAP) are streamlined techniques designed to reduce the administrative burden of awarding lower dollar value procurements.
- SAP should be used for any procurement at or below the Simplified Acquisition Threshold (SAT)
- SAP may be used for commercial item procurements between the SAT and $7 million (or $13 million for commercial items to be used in support of contingency operations or defense/recovery from nuclear, biological, chemical or radiological attack).

*References: [FAR Subpart 13.3, FAR Subpart 13.5, and DEAR 913.307]*

## 1.0 Summary of Latest Changes

This update revises the chapter number from 13.3 to 13.101, streamlines content, and makes various editorial and 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.** Simplified Acquisition Procedures (SAP) are contracting methods designed to streamline the acquisition process and facilitate the procurement of goods and services. 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). The benefits include fewer paperwork burdens 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]." This rule stemmed from acquisition reform, manifested in 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

SAP may also be used for commercial items acquisitions that exceed the SAT, but do not exceed $7 million (pursuant to the Clinger Cohen Act of 1996) (or $13 million for acquisitions described in 13.500(c)). When acquiring commercial items using SAP, the requirements of FAR Part 12 (Acquisition of Commercial Items) apply.

**2.2 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.

**2.3 Advantages**. Use of such procedures:

- reduces 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

**2.4 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 (unless deemed necessary). (Reference FAR 15.403-1 (a))

- Market research is still required, and may assist in refining the requirements and building source lists. The appropriate depth of market research will vary based on urgency, dollar value, complexity, and past experience with the requirement or similar requirements. 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.

- 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 such as 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.

- Soliciting a single 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 SAP.

- The contracting officer has broad discretion to fashion 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 making award, the contracting officer must determine that the proposed price(s) is/are fair and reasonable. Whenever possible, price reasonableness should be based 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.

### 2.5 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, Simplified Procedures for Certain Commercial Items, shall be prepared in accordance with FAR Subpart 13.501.

# 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 Master Contract GS-36F-GA002]*

## 1.0 Summary of Latest Changes

This update: (1) replaces all references and information relating to JPMChase Bank with those of Citibank, (2) removes all references to convenience checks (3) includes Class Deviation guidance for increasing the micro-purchase and simplified acquisition thresholds to $10,000 and $250,000, respectively and (4) includes administrative changes.

## 2.0 Discussion

The purpose of these Purchase Card Policy and Operating Procedures (Procedures) are 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-36F-GA002. In the event of any inconsistencies between these Procedures, the terms and conditions of the Contract, Office of Management and Budget (OMB) Guidelines or Federal Acquisition Regulations (FAR), the inconsistency will be resolved in the following order of precedence (1) the FAR, (2) 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 Citibank, is a Government tax exempt card, and includes the cardholder name and number. Purchase cards must be mailed to the cardholder's office. Citibank 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. Citibank must be paid the actual cost of transactions and in accordance with the Prompt Payment Act. Citibank provides program services support, full reporting, purchase authorization, customer service, and account setup services.

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.

For the purposes of these Procedures, the current FAR thresholds apply, unless the HCA provides the cardholder with the required documentation to increase the threshold under the Class Deviation as discussed below.

A Policy Flash and Class Deviation was signed by DOE and NNSA on March 16, 2018 to implement sections 805 and 806 of the National Defense Authorization Act (NDAA) of 2018 (Pub. L. 115-91), as well as section 217(b) of the NDAA for 2017 (Pub. L. 114-328). Existing purchase card limits of $3,500 for micro-purchases and $150,000 for the simplified acquisition thresholds were not raised to $10,000 and $250,000, respectively, through this deviation. Consistent with the Acquisition Certifications Program Handbook, the Heads of Contracting

Activity's (HCA) decision to increase cardholder or Contracting Officer warrant thresholds for an individual must take into consideration the total number of active warrants/cardholders, their dollar amounts, and anticipated workload. A HCA's decision to increase thresholds for individuals should include a documented determination that there is a valid need for the cardholder to possess such authority and the cardholder has the necessary skills, knowledge and business acumen to purchase under the new threshold.

Increases in purchasing authority must only be made in CitiManager if there is an HCA signed determination specific to that cardholder. Blanket/mass increases are not allowed.

Please see the web link to Policy Flash 2018-17 at https://www.energy.gov/management/downloads/far-class-deviation-increasing-micro-purchase-threshold-and-simplified.

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: 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), in writing. Refer to Attachment 8 for a Sample Designation of OPC letter.
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.
3. Develop, maintain, and implement written local procedures for use of the purchase card consistent with procurement regulations, OMB Guidelines, the GSA Master Contract terms and conditions, and these Procedures. 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 is returned to the OPC, or designee, who will deactivate the cardholder account and dispose of the purchase card.
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 2.9 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 Citibank. 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 transaction reports during the billing cycles to disclose potential prohibited or improper use, and taking immediate action to address suspected legal or policy violations.
12. Reviewing transactions, purchasing logs and supporting documentation of newly appointed cardholders within three months of their appointment.
13. 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.

14. 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.
15. Closing purchase card accounts of past employees and deactivating purchase card accounts for those out of the office for extended time periods.
16. Responding to data mining inquiries within 15 calendar days of notification and ensuring cardholders are responsive.
17. 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.
18. 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.
19. Ensuring that proper procedures are in place to adequately safeguard and control those items that are pilferable and sensitive.
20. 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.
21. Create and maintain separate AO and cardholder email distribution lists to ensure all are informed regarding specific requirements. For example, if cardholders are notified of a new prohibition then the AO should be informed to ensure efficient reconciliation.
22. Submitting timely quarterly/semi-annual information, as requested by the APC, to comply with OMB requirements.

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 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 Section 2.8, 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. 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 2.19 for tax exemption guidelines.
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 2.28 for retention 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 2.22 for reconciliation guidelines.
    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 CitiManager must submit disputes electronically. Cardholders without access to CitiManager must use Citibank'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 Citibank, to the AO, and to the OPC.
18. Contacting Citibank (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 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.
23. Ensuring purchases are only shipped to a business address. Personal addresses must never be used to receive shipments.

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 CitiManager, the dispute process must be completed electronically. In accordance with local procedures notification e-mails should be sent to appropriate parties. Refer to Sections 2.22 and 2.24 for reconciliation and dispute guidelines.
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 should be destroyed.

7. Notifying the OPC of any lost, stolen or compromised cards (in addition to the cardholder's immediate notification to Citibank) 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 Citibank. This includes distributing purchase card charges and credits to the appropriate accounts.
3. Ensuring that payments to Citibank 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. Receiving and verifying the amount of rebates received from Citibank.
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). Citibank 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. 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 Citibank 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 Forum sponsored by Citibank 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.

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 2.16 for additional information.)

The merchant must 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:

- Cardholder's name and routing symbol;
- Building number, room number, street address, city and state of delivery point; and
- Cardholder's telephone number.

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.

2.11 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.

The amount of available funds must be established prior to making any purchases. Purchases must be tracked to ensure that there are sufficient funds available 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 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.

2.13 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 merchants) – small business restrictions do not apply, but are strongly encouraged | Small business restrictions apply |

| | |
|---|---|
| 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.

2.14 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 |

2.15 Prohibitions and Restriction. Purchase card purchases are subject to the following restrictions and prohibitions:

1. Cash advances: Money orders and traveler's 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 products and services developed or provided by Kaspersky Lab.
5. Purchase of supplies or services for GSA fleet operated vehicles and DOE owned vehicles.
6. 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.
7. 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.)
8. 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.
9. 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.

10. Purchases by federal employees for contractor personnel, unless the contract states that DOE is responsible for providing the service or supplies.
11. 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 Citibank. 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 |

2.16 Other Purchases.

2.16.1 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.

2.16.2 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.

2.16.3 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.

2.16.4 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.

2.16.5 Conference Registration Fees. The purchase card is used for payment of conference registration fees (tuition), and meeting rooms. Micro-purchase cardholders may process purchase card payments for multiple individuals. 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.

2.16.6 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.

2.16.7 Stamps. Stamps must be logged and stored in a locked compartment by an authorized person, other than the cardholder.

2.17 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.

2.18 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.

2.19 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, Citibank 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.

2.20 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.

2.21 Personal Property Management and Accountability.

2.21.1 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.

2.21.2 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.

2.21.3 Sensitive Property. Property that includes all items, regardless of value, that require special control and accountability due to unusual rates of loss, theft or misuse, or due to national security or export control considerations. Such property includes weapons, ammunition, explosives, information technology equipment with memory capability, cameras, and communications equipment. These classifications do not preclude agencies from specifying additional personal property classifications to effectively manage their programs. 41 CFR 102-35.20.

2.21.4 Receipted. Written acknowledgment of having received an item and accepted accountable and custodial ownership.

2.21.5 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, 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.
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.

2.22 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 Citibank, 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, 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 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
    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 Citibank cardholder dispute form and forward a copy to Citibank. If the cardholder has access to CitiManager, the dispute process must be completed electronically. Refer to Section 2.24 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 CitiManager 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 CitiManager 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 Citibank's invoice with the consolidated report.
e. Make payment to Citibank 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.

2.23 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.

2.24 Disputes. A disagreement between a cardholder and a merchant regarding items appearing on the cardholder's monthly Statement of Account, which is presented to Citibank 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 Citibank.

If the cardholder does not have access to CitiManager, complete the cardholder dispute form (Attachment 12) and forward a copy of the form to Citibank 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 CitiManager, 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.

Citibank will credit the transaction until the dispute is resolved. Citibank 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 Citibank 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 Citibank 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 and E-bay transactions, are not disputable.

2.25 Lost, Stolen, or Breached Cards.

2.25.1 Telephone Notification. If the purchase card is lost, stolen or breached, it is the responsibility of the cardholder to notify their OPC and Citibank within one work day after discovering the card missing at the following telephone numbers 24 hours/day:

- Inside the continental United States - 1-888-790-7206
- Outside the continental United States - call collect 1-904-954-7850

2.25.2 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 Citibank 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.

2.25.3 Card Replacement. Citibank will mail a new card within 2 business days of the loss or theft. Please remind the Citibank 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.

2.25.4 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 Citibank. 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 Citibank detects suspicious activity on a card, a temporary hold will be placed on the card until Citibank 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.

2.26 Departure of Cardholders.

2.26.1 Cardholders Leaving the Agency. If a cardholder's employment is ending (e.g., resignation, retirement), the purchase card 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 CitiManager 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 CitiManager access was removed, cards were destroyed, etc.

2.26.2 Transferring Cardholders. If a cardholder is transferring to another position, which will also require use of the purchase card, 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 CitiManager, the cardholder's account should be closed from the losing office's hierarchy and a new account created in the acquiring office's hierarchy.

2.27 Reporting. At the end of the billing cycle, Citibank will issue detailed statements as follows:

- Cardholders will receive a Statement of Account showing all purchases and credits processed by Citibank 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.

2.28 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 2.22 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.

2.29 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.

2.30 Card Abuse.

2.30.1 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.

2.30.2 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.

2.30.3 Improper Purchases. Purchases of goods or services intended for government use but not permitted by law or regulation.

2.30.4 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<br>• Never received<br>• Lost/stolen<br>• Counterfeit<br>• Identity theft | Directly by merchant with or without knowledge or consent of the cardholder<br>• False charges<br>• Mischarges<br>• 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.

2.31 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 CitiManager and Intellilink that can be utilized as a starting point for analysis. The Summary Quarterly Merchant Report and Summary Quarterly Vendor Analysis Report in CitiManager 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.

2.32 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.

2.33 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.

2.34 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 Citibank (submitphishing@citi.com). When Citibank 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 Citibank'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 Citibank at 1-800-790-7206.

If the cardholder receives a phone call or email that appears to be from Citibank 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 Citibank 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 Citibank.

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.

2.35 Foreign Currency Conversion Fees. Citibank 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. Citibank 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.

2.36 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. Citibank 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 – Designation of Organizational Program Coordinator (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 Citibank 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 Citibank 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. 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 Citibank'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.

**Purchase Card:** A distinctly designed VISA purchase card issued by Citibank 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.

The GSA Master Contract states that cost-reimbursment contractors paying Citibank directly are not tax exempt and must not be issued purchase cards with the phrase "US 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. 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.

**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 28$^{th}$ of one month and ends on the 27$^{th}$ 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: _____

Supervisor:

_____ _____
Signature of supervisor of the nominee cardholder Date

_____
Typed/Printed Name

Concur:

_____ _____
Signature of Designated Official or Date
Head of Contracting Activity

_____
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, November 2018

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) or the Head of Contracting Officer canceling this Appointment.

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.
- Procedures for returning the purchase card, purchase card log and all associated documentation, when cardholders are departing DOE, taking temporary extended leave or transferring to another DOE office and it has been determined that the card is no longer needed.
- Establish how cardholders will certify that they have received the training, understand the regulations and procedures, and know the consequences of inappropriate actions.

### 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.# |
|---|---|---|---|---|---|---|
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**Attachment 8 – Designation of Organizational Program Coordinator**

DOE-XXXX DATE:

MEMORANDUM FOR JOHN SMITH

FROM: HEAD OF CONTRACTING ACTIVITY

SUBJECT: DESIGNATION OF ORGANIZATIONAL PROGRAM COORDINATOR

Reference: DOE Purchase Card Policy and Operating Procedures, November 2018

In accordance with the referenced Procedures, you are hereby designated as an Organizational Program Coordinator for _____ [insert cardholder's name]
Your responsibilities include but are not limited to the following:

1. Completing initial and refresher training, every two years.
2. Establishing local policy and guidance.
3. Monitoring purchase card usage for the contracting activity.
4. 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.
5. Reviewing and coordinating the approval of Delegations of Purchasing Authority or SF-1402s.
6. Managing cardholder accounts through Citibank. This includes ensuring account profiles properly reflect single purchase, monthly, and cycle spending limits, email addresses, phone numbers, Merchant Category Codes (MCC).

This appointment is automatically terminated upon the Organization Program Coordinator's employment ending (e.g., resignation, retirement, reassignment) or the Head of Contracting Officer canceling this Designation.

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.

ORGANIZATIONAL PROGRAM COORDINATOR ACKNOWLEDGEMENT

In accordance with DOE Purchase Card Policy and Operating Procedures, November 2018, I have reviewed, understand, and acknowledge my responsibilities as an Organizational Program Coordinator. I have completed the required training as required by the Agency Program Coordinator.

_____ _____
(Signature) Organizational Program Date

## Attachment 9 – Approving Official Training Roster

| NAME | APPOINTMENT DATE | INITIAL TRAINING | REFRESHER DATE | TERMINATION DATE |
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## Attachment 10 – Cardholder Training Roster

| NAME | SINGLE PURCHASE LIMIT | MONTHLY PURCHASE LIMIT | APPOINTMENT DATE | INITIAL TRAINING | REFRESHER DATE | TERMINATION DATE | APPROVING OFFICIAL |
|---|---|---|---|---|---|---|---|
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## 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.

_____ _____
Purchase Cardholder Date

_____
Typed/Printed Name

Approval:

_____ _____
Signature of Designated Official or Head of Contracting Activity Date

_____
Typed/Printed Name

# Citi® Commercial Cards

## Transaction Dispute Form

| Card Number (last 6 digits only): | | Cardholder Name: | |
|---|---|---|---|
| **Transaction Date (DD/MM/YY)** | **Merchant/Retailer Name** | | **Transaction Amount** |
| | | | |
| | | | |
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**Please read the descriptions below and mark the one that is most relevant to your dispute. Also, please attach a copy of the corresponding statement and mark the statement to indicate the disputed item(s). Card program regulations require that you provide additional information to document specific items, where indicated below. If you have any questions, please contact Citibank Customer Services via the telephone number on the reverse of your card.**

**1. UNAUTHORIZED TRANSACTION**

I certify that the charge listed above was not made by me or a person authorized by me. I did not receive any goods or services from this transaction nor did any person authorized by me.

**Note:** If you have not yet blocked your card, please contact Service at the number on the back of the card immediately.

My card was in my possession at the time the fraudulent transactions were made? [required] ☐ Yes ☐ No

**If Yes:**

Did anyone else have access to your card? If so, what is their relationship to you?

**If no, please choose one of the below options:**

| | |
|---|---|
| ☐ **My card was not received** | What is the mailing address where the card was to be delivered? [required] |
| ☐ **My card was lost/stolen on (MMDDYY) [required]** | I discovered the card was lost/stolen on (MMDDYY).<br>What happened? Did you file a police report? If so, please provide a copy. [required] |
| ☐ **I was threatened with physical harm and forced to use the card to complete fraudulent transactions** | Please provide a detailed description of the event along with additional documentation (eg, Police report).<br>If no police report, please explain: |

# Citi® Commercial Cards

Transaction Dispute Form

| 2. HOTEL CANCELLATION | |
|---|---|
| ☐ **With Cancellation Number** | I guaranteed a hotel reservation for late arrival and then cancelled it on_____(date) at_(am/pm). with cancellation number: _____<br>Was the cancellation policy given to you at the time of reservation? ☐ Yes ☐ No<br>If yes, please provide the details of the cancellation policy: |
| ☐ **Without Cancellation Number** | I guaranteed a hotel reservation for late arrival and then cancelled it on_____(date) at_____(am/pm) No cancellation number was given. Please provide the details of the cancellation, the merchant's response to your cancellation request and the name of person accepting the cancellation, if available:<br>_____<br>_____<br>Was the cancellation policy provided to you at the time of reservation? ☐ Yes ☐ No<br>If yes, please provide the details of the cancellation policy:<br>_____<br>_____<br>I understand it is required that I have attempted to contact the merchant and travel agent (if applicable), and their response on_____(date) was: _____<br>_____<br>**Please furnish proof of cancellation such as a copy of a phone bill showing the date and time the call was made to cancel the reservation.** |
| **3. AIRLINE TICKET CANCELLATION** | |
| ☐ | I have cancelled the above identified airline ticket on_____(date) because (reason):_____<br>_____<br>I was billed twice and I did not travel on ticket number_____When I ordered the ticket, I understood it was fully refundable if I chose to cancel.<br>On_____(date), I contacted the merchant and travel agent (if applicable) and their response was:<br>_____<br>_____<br>The name and number of the merchant and travel agent (if applicable) is:<br>_____<br>Please provide the details of the cancellation policy and cancellation number, if received: |
| **4. DUPLICATE PROCESSING** | |
| ☐ | I engaged in a transaction with the above merchant. I was billed for the same transaction more than once. |

# Citi® Commercial Cards

Transaction Dispute Form

| 5. MULTIPLE PROCESSING | |
|---|---|
| ☐ | I engaged in a transaction with the above merchant. I have no knowledge of the transaction noted above and it was not authorized by me or anyone representing me. My cards were in my possession at the time of the above transaction.<br>The correct transaction took place on_____(date), in the amount of $_____. |
| **6. CREDIT NOT RECEIVED** | |
| ☐ | I engaged in a transaction with the above merchant. I dispute the entire charge or a portion of it in the amount of $_____. I have contacted the merchant and asked that a credit be applied to my account.<br>I received a credit voucher for the above listed charge, but it has not been applied to my account. Attached is a copy of the credit slip. |
| **7. MERCHANDISE/SERVICE NOT RECEIVED** | |
| ☐ | Although I engaged in a transaction with the above merchant, I never received:<br>_____ (description of merchandise/service)<br>in the amount of $_____. I expected to receive it on_____(date).<br>If merchandise was to be sent, where was it to be delivered?<br>_____(Location).<br>I have contacted the merchant and asked that a credit be applied to my account. I contacted the merchant on_____(date) and their response was:_____ |
| **8. MERCHANDISE RETURNED** | |
| ☐ | My account has been charged for the above listed transaction, but the merchandise in the amount of $_____has since been returned on_____(date).<br>The reason for return was: _____<br>I have contacted the merchant on_____(date) and their response was: _____<br>Please provide details of the merchant's return policy, if one was provided:<br>Please list all items that were returned to the merchant:<br>Please furnish proof of your return/refusal of the merchandise. It can be obtained by requesting a trace through the local office of the delivery company that shipped the merchandise for you (if returned) or to you (if refused).<br>**If this proof is not available, please provide the following information:**<br>Date merchandise was received: _____<br>Invoice\tracking number for return: _____<br>Name of shipping company for return:_____ |

# Citi® Commercial Cards

Transcription Dispute Form

| 9. MERCHANDISE/SERVICE NOT AS DESCRIBED | |
|---|---|
| ☐ | The item(s) did not conform to what was agreed upon with the merchant. Provide an explanation of what merchandise or service was received and what was expected:<br>_____<br>_____<br>If written documentation is available that describes what was expected to be received, please fax/mail a copy.<br>Please note where this transaction took place:<br>☐ at the merchant's place of business ☐ through the mail ☐ email ☐ over the telephone<br>I received or expected to receive the merchandise/service on_____(date). The merchandise/service was returned or cancelled on_____(date). I contacted the merchant for a credit on_____(date) and attempted to discuss the matter. The merchant's response was:<br>_____<br>_____<br>Please send proof of your return/refusal of the merchandise. It can be obtained by requesting a trace through the local office of the delivery company that shipped the merchandise for you (if returned) or to you (if refused). **If this proof is not available, please provide:**<br>Name of shipping company for return:_____<br>Invoice tracking number for return: _____ |
| **10. CREDIT APPLIED AS CHARGE** | |
| ☐ | I have received a credit voucher for the above listed charge, but it was applied to my account as a charge.<br>Please furnish us proof of credit from the merchant. |
| **11. CANCELLED RECURRING TRANSACTION** | |
| ☐ **With Cancellation Number** | I notified the merchant on_____(date) to cancel pre-authorized recurring charges (i.e., insurance premium, membership fee) and I was provided a cancellation number of:_____.<br>I will refuse delivery should the merchandise be received. |
| ☐ **Without Cancellation Number** | I notified the merchant on_____(date) to cancel pre-authorized recurring charges (i.e., insurance premium, membership fee). The merchant has charged me again after this cancellation date.<br>I contacted the merchant again on_____(date), and their response was:<br>_____<br>_____<br>I will refuse delivery should the merchandise be received. |
| **12. PAID BY OTHER MEANS** | |
| ☐ | My card number was used to secure this purchase; however, the final payment was made by check, cash, or another credit card. I contacted the merchant on_____(date) and their response was:<br>_____<br>_____<br>**Please furnish a copy of the front and back of the check, a copy of the cash receipt or other documentation that payment was made by other means. If paid by 3rd party, please include their documentation.** |

# Citi® Commercial Cards

Transaction Dispute Form

| | |
|---|---|
| **13. ALTERED AMOUNT** | |
| ☐ | Although I engaged in the above transaction, the amount of the sale has been altered from $_____ to $_____.<br>Please furnish a copy of your sales receipt, with the correct amount. |
| **14. ATM DISCREPANCY** | |
| ☐ | I tried to withdraw cash from ATM, but cash was NOT dispensed (or) received only_____ from the ATM. |
| **15. INCORRECT TRANSACTION CURRENCY** | |
| ☐ | The transaction was to be completed in_____ currency, whereas merchant processed the charge in_____ currency, which resulted in higher charge to the card. |
| **16. OTHERS** (please specify, for NA clients only, please use this section to request charge copies) | |
| ☐ | _____<br>_____ |

**I certify that the above information is true to the best of my knowledge. If additional information is needed I can be reached on**

**_____ (STD or area code and telephone number) between the hours of_____ and_____.**

**Cardholder Signature:**_____ **Date:**_____(DD/MM/YY)

**ASIA:** Please email a scanned copy of form and relevant documentation to Citibank at customerservice.commcards@citi.com

**EMEA:** Please email a scanned copy of form and relevant documentation to Citibank at cc.disputes.declaration.form@citi.com

**LATAM:** Please email a scanned copy of form and relevant documentation to Citibank at commercial.disputes.latam@citi.com

**NA:** Please send the completed form and relevant documentation to Citibank at PO Box 6125, Sioux Falls SD 57117-6125 or alternatively fax the same at +1 866-763-7946 (International: +1 605-357-2019).

Upon receipt of your Dispute form, Citibank will begin investigation of the dispute and will provide you with confirmation or status of your disputed transaction via Email, Telephone, Letter or Billing Statement adjustment within a maximum of 30 business days. Please contact our Customer Service at the telephone number given on the reverse of your card if confirmation or resolution is not received within the stated timeframe, or if you have additional questions about your dispute.

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# 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

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- September 2018
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# Source Selection

Guiding Principles

- Source Selection procedures under FAR part 15 offer flexibility.
- Procurement integrity must be maintained.

*[References: FAR 15.3, FAR 3.104, DEAR 915]*

## 1.0 Summary of Latest Changes

This update: (1) updates references and (2) streamlines the presentation of concepts.

## 2.0 Discussion

This chapter supplements the primary acquisition regulations and policies contained in the references above and should be considered in the context of those references. This chapter covers the source selection process for Federal Acquisition Regulation (FAR) part 15 procurements. Under FAR part 15, the Department of Energy (DOE) typically uses the Source Evaluation Board (SEB) process. However, in some situations, a less-formal approach involving a Technical Evaluation Committee (TEC) may be appropriate. For the purposes of this chapter, references to SEB are understood to cover the TEC approach, as well.

**2.1 The Source Selection Process.** The FAR 15.3 source selection process starts with acquisition planning and culminates with lessons learned. Within each step of this process, many different activities occur. For example, preparation of the request for proposal (RFP) may include issuance of a draft RFP, as well as conducting an Industry Day and/or one-on-one meetings. Since each procurement is unique, the SEB has some flexibility in determining which activities are necessary for that procurement.

**2.2 Source Selection Authority.** The Secretary of Energy designated the Director, Office of Acquisition Management as Senior Procurement Executive (SPE) for DOE. In turn, the SPE delegates specific contracting authority (including dollar values) to each Head of the Contracting Activity (HCA). Within DOE, HCAs are senior management officials with cognizance over one or more procurement offices. Although the SPE retains source selection authority for all acquisitions exceeding $50 million, the various HCAs have source selection authority for actions valued at $50 million or less. HCA authority is re-delegable, as appropriate, following the procedures below.

2.2.1 Actions Valued at More than $50 Million. For actions exceeding $50 million, the HCA should submit a memo requesting designation of an individual as the Source Selection Official (SSO), along with a resume that contains name, title, experience (identifying any SEB, contracting, COR, and technical/program experience, with a discussion of involvement in contract-related matters), and training (identifying any procurement-related training). The memo should be sent to the SPE, with a copy to the Director, Field Assistance and Oversight Division, MA-621. In response, MA-621 will prepare the SSO designation memo, obtain the SPE's signature, and distribute the signed memo.

2.2.2 Actions Valued at $50 Million or Less. For actions less than or equal to $50 million, the Field Office Manager (or equivalent) should submit the request to the HCA. The request should include a resume that contains name, title, experience (identifying any SEB, contracting, COR, and technical/program experience, as well as involvement in contract-related matters), and training (highlighting any procurement-related training).

**2.3 SEB Composition and Designation.** The SEB should be tailored to the acquisition, assuring the ability to comprehensively evaluate proposals. SEB membership consists of a SEB chairperson, voting members, Contracting Officer (CO), advisors, executive secretary, and *ex officio* members. The number of voting members usually ranges from three to five people. It is recommended that the CO 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 minimum, each SEB shall include a cost advisor and legal counsel (either from headquarters or from field offices). Other areas where an advisor may be appropriate include: security, health and safety, human resources, finance, accounting, information technology, and intellectual property. Each SEB should have an executive secretary (non-voting member); this position is an excellent way to prepare an individual for an increased role on a future SEB. The roles and responsibilities of the SSO and the SEB members are described below.

2.3.1 Source Selection Official (SSO). Designated by the SPE for actions exceeding $50 million, and by the HCA for actions valued at $50 million or less (see section 2.2), the SSO is normally a senior program official at headquarters or a field office, who will:

- Appoint the SEB chairperson, the SEB members, advisors, and *ex officio* members via formal written memorandum. (For acquisitions greater than $50 million, the SEB composition must be coordinated with MA-621 prior to finalization);
- Ensure that the entire source selection process is conducted properly and efficiently;
- Review and approve the Acquisition Plan, the RFP, and the Source Selection Plan (SSP);
- Provide the SEB with the resources and guidance necessary for the evaluation process;
- Be briefed on the need to enter into discussions and establish a competitive range, if applicable;

- Request briefings and consultations with the SEB chair as required (including updates on all significant issues and the SEB's progress throughout the process);
- Participate in any aspect of the source selection process, such as reviewing proposals, reviewing draft reports, attending oral presentations (if the SSO attends one, he/she must attend all) etc., in order to assist in his/her final independent judgment/decision;
- 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(s); and
- Document the basis of the decision in the Source Selection Decision Document.

2.3.2 SEB Chairperson. Although the typical SEB Chairperson has a technical background, a CO can also serve as SEB Chairperson. Charged with overall responsibility for the SEB's activities during the source selection process, the Chairperson will:

- Ensure all members receive SEB training, as well as other needed training;
- Lead and formulate the agenda for all SEB meetings;
- Manage the acquisition against the schedule;
- Work with senior program management to ensure that adequate personnel and other resources are available in a timely manner to meet the needs of the acquisition;
- Ensure that proper evaluation tools and procedures (and training on their proper use) are available to the evaluators and advisors;
- Lead the SEB members in developing the RFP and other major requirements documents;
- Lead the SEB members in the proposal evaluation, based on input from the advisors, to support the CO's competitive range determination, if applicable;
- Ensure that the evaluations have been conducted properly and in adequate depth;
- Chair consensus boards, identifying strengths and weaknesses in proposals based upon RFP evaluation criteria, as well as their significance, and assigning ratings with supporting rationale;
- Lead preparation of trade-off recommendations consistent with the evaluation criteria, using the SEB's evaluation of strengths, weaknesses, etc., as requested by the SSO;
- Ensure source selection decisions are documented fully and contemporaneously;
- Attempt to resolve any reservations, concerns, or disagreements of individual SEB members. If resolution cannot be obtained, ensure that any dissenting opinions are documented and presented to the SSO;
- Give briefings or consultations, as required by the SSO and *ex officio* members;
- Report any events that affect the procurement schedule as soon as possible to obtain approval for revised milestone schedules as necessary;
- Lead SEB members in reviewing and approving all discussion questions prior to submission to the CO for action;
- Lead development of initial and final SEB reports, as applicable; schedule and conduct presentations to the SSO;

- Coordinate documents for HCA and business clearance review; and
- Ensure that SEB lessons learned are captured.

2.3.3 SEB Voting Members. As the primary evaluators and participants in the source selection process, the SEB members will:

- Assist in the development of the Acquisition Plan unless completed by an Integrated Procurement Team (IPT) or similar group;
- Assist in the development of the RFP;
- Participate in pre-solicitation meetings/conferences, site tours and pre-proposal conferences as applicable;
- Assist in the development of answers to questions received from interested parties;
- Independently evaluate each proposal in accordance with the RFP evaluation criteria and the SSP, including input from advisors (to include any dissenting opinions);
- Participate in oral presentations if applicable;
- Assist in the development of questions for offeror determined to be in the CR, if a CR is determined, and participate in discussions if they are held face-to-face;
- Participate, as necessary, in briefing the SSO;
- Participate in the technical evaluation of cost proposals, as required;
- Deliberate and develop a consensus among the SEB members of the strengths, weaknesses, deficiencies, and rating of each proposal;
- Assist in the documentation of evaluations and lessons learned; and
- Participate in debriefings, as required.

2.3.4 SEB Advisors. As non-voting members, SEB advisors provide subject matter expertise and input. SEB advisors will:

- Review designated aspects of proposals and provide advice and assessments in their respective areas of expertise, as requested;
- Recommend areas of the offeror' proposals that should be further analyzed, evaluated, or studied;
- Review questions and findings and assist the SEB/CO in preparation for discussions and/or responding to questions received on the RFP; and
- Assist the SEB in the preparation of written reports or other information related to the evaluation.

2.3.5 Contracting Officer. Serving as the primary procurement authority, the contracting officer (CO) will:

- Advise and support the SSO and SEB as needed;
- Protect the integrity of the process;

- After release of the RFP, serve as focal point for inquiries from actual or prospective offerors (FAR 15.303(c)(1));
- Issue the RFP, as well as any amendments to the RFP;
- After receipt of proposals, conduct and control all exchanges with offerors (FAR 15.303(c)(2));
- 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;
- Conduct and lead discussions with offerors in the competitive range, ensuring the discussions are meaningful (FAR 15.306(d)(3));
- Perform or oversee the evaluation of cost (FAR 15.404-1);
- Responsible for obtaining information adequate to establish price reasonableness and/or determine cost realism (FAR 15.402(a)(3));
- Purchase goods and services only at fair and reasonable price (FAR 15.402(a))
- Request proposal revisions as appropriate;
- Perform all the required checks (Equal Employment Opportunity and foreign ownership, control, or influence determination, etc.), make the responsibility determination, verify size status and compliance with the limitation of subcontracting when required;
- Make all necessary notifications (successful, unsuccessful and congressional) and coordinate the press release;
- Award the contract(s) after receiving all of the appropriate reviews and approvals;
- Lead the debriefings, document the file as required and provide all requested information to legal counsel if a protest is received;
- Assist in the documentation of lessons learned; and
- Ensure that all documentation and Source Selection Information is filed appropriately.

2.3.6 SEB Executive Secretary. As principal assistant to the SEB chairperson, the executive secretary will attend all necessary meetings, and accomplish such tasks as:

- Obtain secure work areas for conduct of SEB activity;
- Develop and implement procedures to control access to SEB work areas, and the safeguarding of SEB proceedings and data;
- Obtain supplies needed by the SEB;
- Obtain signed confidentiality and conflict of interest certificates from all SEB members, advisors and *ex officio* members (see section 2.9.1);
- Arrange for the preparation, reproduction, control and distribution of all material relating to the activity of the SEB;
- Obtain and distribute applicable procedures, policies, instruction, etc., to SEB members, advisors and ex officio members, as directed;
- Follow-up on action items assigned to SEB members to ensure the procurement schedule is maintained;

- Maintain 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;
- Assist with logistical and administrative matters involving tours, conferences and oral presentations;
- Assist in preparing and assembling any reports and presentations;
- Assist in timely, accurate documentation of source selection decisions and preserving records to meet records management requirements;
- Schedule debriefings, and dispose of all excess material with concurrence of SEB Chairperson, CO, and legal counsel;
- 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
- Survey the area where SEB activity occurred and arrange for the return of equipment and materials as appropriate.

2.3.7 *Ex Officio* Members. *Ex officio* participants are included by virtue of their official position. Although they are non-voting, they can officer advice and guidance to the SEB. As such, information can be shared with them on a need-to-know basis.

2.3.8 Non-DOE Evaluators. Normally, evaluations of proposals shall be performed only by DOE employees. In certain cases, however, Federal employees from other agencies may be used to provide special expertise. In still other cases, evaluators or advisors who are not Federal employees, including employees of DOE management and operating contractors, may be used where necessary. When non-Federal employees are used as evaluators, they may only participate as members of technical evaluation committees. They may not serve as members of the SEB or equivalent board or committee.

2.3.8.1 Determination on availability of DOE personnel. For every competitive procurement, a determination must be made on whether sufficient DOE personnel with the necessary training and capabilities are available to evaluate proposals (see FAR 37.204). If it is determined that qualified personnel are not available from DOE, but are available from other Federal agencies, a determination to that effect shall be made. Similarly, in the event that qualified personnel are not available within the Federal workforce, a determination to that effect shall be made. For SEB procurements, this determination should accompany the memorandum appointing the technical evaluation committee by the SSO. For all other procurements, the Contracting Officer will make this determination.

2.3.8.2 Requirements for decision to employ non-Federal evaluators or advisors. Any decision to employ non-Federal evaluators or advisors, in SEB procurements must be made by the SSO with the concurrence of the HCA. In non-SEB procurements, the decision shall be made by the senior program official or designee with the concurrence of the HCA. In a case

where multiple solicitations are part of a single program and would call for the same resources for evaluation, a class determination to use non-Federal evaluators may be made by the SPE.

2.3.8.2.1 Solicitation Provision. Where such non-Federal evaluators or advisors are to be used, the solicitation shall contain a provision informing prospective offerors that non-Federal personnel may be used in the evaluation of proposals.

2.3.8.2.2 A non-disclosure agreement (NDA), substantially the same as that in Attachment 1, must be signed before the non-Federal evaluator or advisor can access the proposal. Care should be taken that the required handling notice (see Attachment 2) is affixed to a cover sheet attached to the proposal before it is disclosed to the evaluator or advisor. In all instances, such persons will be required to comply with NDA requirements, as well as those involving Procurement Integrity, as detailed in the next section.

**2.4 Confidentiality and Conflict of Interest Certifications.** To safeguard the integrity of the SEB process, it is DOE's long-standing practice for SEB members to sign a confidentiality and a conflict of interest certification. Templates for both certifications are available in the STRIPES Library.

2.4.1 Confidentiality and Safeguarding. All personnel involved in a Source Selection must safeguard source selection information and must not disclose such information to anyone outside the membership of the SEB. Contractor bids and proposals shall be safeguarded from unauthorized disclosure throughout the process (see FAR 3.104-4). Information received in response to a Request for Information (RFI) shall be safeguarded from unauthorized disclosure (see FAR 15.207(b)). 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."

2.4.2 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 (see FAR 3.101-1).

**2.5 Source Selection Training.** The Office of Acquisition Management and the Office of General Counsel developed a course entitled "Source Selection for the SEB." This course is approximately 12 hours in length and is conducted at the various DOE offices. The training can be scheduled, either before RFP development or prior to receipt of proposals (or both), by contacting the Director, Field Assistance and Oversight Division, MA-621.

**2.6 Exchanges with Industry**. Exchanges with industry before receipt of proposals can promote early exchange of information: (1) in early acquisition planning to facilitate shaping the acquisition to the latest industry information or trends; (2) prior to the release of the solicitation or (3) after release of the solicitation but prior to receipt of proposals. FAR 15.201 identifies ways of promoting such exchange (see 2.11.1). While engaging in any of these activities, remember to: (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 advice if questions arise about any exchanges.

2.6.1 Pre-Solicitation Conferences, One-on-One Meetings, Pre-Proposal Conferences, and Site Tours. Five factors usually drive the need for such exchanges: (1) project complexity; (2) the need to share additional background data; (3) exceptional demands on a contractor's capability; (4) unavoidable ambiguity in requirements; and (5) access to classified material or facilities. Arrangements for pre-solicitation conferences and one-on-one meetings should be publicized in much the same manner that the RFP would be publicized – i.e., by posting to the same government-wise point of entry (GPE). The goal is to ensure that all interested parties/potential offerors have an opportunity to respond or attend. Minutes of any conferences should be captured and may be posted to the GPE.

2.6.1.1 Pre-Solicitation Conferences may be held. Prospective offerors should be advised that, notwithstanding information provided at the pre-solicitation conference, they are to rely solely on the information contained in the final RFP. Goals of a pre-solicitation conference include: (1) advising industry of the Government's requirements, (2) gain an understanding of industry's capabilities vis-à-vis meeting the Government's needs, and (3) obtain industry's input on the most effective means of meeting the Government's needs.

2.6.1.2 One-on-One Meetings with prospective offerors and other appropriate stakeholders may be conducted during the Government's acquisition planning phase, after issuance of a draft RFP, or in conjunction with the pre-solicitation conference. It is recommended that one-on-one meetings be held *after* the release of a draft RFP. Information appropriate to share includes: (1) summary of the work or a draft SOW, (2) anticipated contracting strategy (contract type, incentives, etc.), and (3) specific areas in which the Government desires input. Key areas of interest to the Government during one-on-one meetings include identifying: (1) any restrictive specifications, and (2) any barriers to competition. Care must be taken during these meetings to not provide information that might give a potential

offeror an unfair competitive advantage. Of course, once the *final* RFP is issued, one-on-one meetings should *not* be held with prospective offerors and other interested parties.

2.6.1.3 Pre-Proposal Conferences may be held after issuance of the RFP. If a pre-solicitation conference was held, it likely not necessary to conduct a pre-proposal conference. Consider these factors when deciding whether two conferences are needed: (1) the significance of the changes between the draft RFP (if issued) and the final RFP, and (2) the potential to generate additional competition. Pre-proposal conferences may: (1) outline principal features of the project, (2) fully describe details of the work statement and specifications, (3) clarify instructions for completing the proposal, (4) provide an opportunity for offerors to ask questions and receive answers, thus imparting a better understanding of the Government's requirements, and (5) stress the importance of certain elements of the solicitation. Prospective offerors should be advised that remarks made by Government personnel do not qualify, change, or otherwise amend the RFP: Only a formal, written amendment to the RFP is binding. A written record of conference proceedings shall be kept by the CO. This record will include any new material provided at the conference. Moreover, any questions and their answers shall be available to all potential offerors. Finally, if any aspect of the RFP changes as a result of the conference, the CO will issue a formal amendment to the RFP.

2.6.1.4 Site Tours. Site tours may, if needed, be held in conjunction with either a pre-solicitation conference or a pre-proposal conference. They 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. Site tours may range, depending on the nature of the SOW and the proposal requirements, from a detailed tour with access to facilities to a "windshield tour" for general familiarization. It is recommended that communications during site tours be closely monitored. To the extent possible, communications should be conducted by the CO; no Government personnel should have side conversations with interested parties. Scripted material is recommended to ensure that all necessary information is consistently communicated. In fact, scripts are necessary when the number of attendees is large enough to require that attendees be broken into smaller groups. Questions should be collected and answers made available to all interested parties by either posting them on a designated web site or issuing them via a formal solicitation amendment.

**2.7 Draft RFP.** A draft RFP communicates the Government's intentions/needs to industry, while soliciting questions, comments, suggestions, and corrections that improve the final product. Draft RFPs help to resolve potential contract issues. In some cases, this can lead to (1) significant cost savings and productivity enhancements; (2) reduced proposal preparation and evaluation time; (3) reduced need for solicitation amendments that could delay the acquisition; and (4) better proposals, end products, and services.

2.7.1 Issuing the Draft RFP. No hard-and-fast rule exists on when to issue a draft RFP; however, in the early stages of acquisition planning/procurement strategy development, the program officer(s), legal counsel, and CO/contract specialist are strongly encouraged to address the desirability of issuing a draft RFP. Generally draft RFPs are appropriate when, in the CO's judgment, the acquisition will benefit from early input from interested parties, especially when award without discussions is contemplated. Considerations 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 (SOW)/Statement of Objectives (SOO), novelty of the procurement, and potential human resource issues (pay, pension & benefits, workforce size, etc.). Even at this stage, attempt to issue a well thought-out draft RFP; the number of drafts should be kept to a minimum.

2.7.2 Elements of Draft RFP. To the extent practicable, the draft RFP should include all relevant parts of the solicitation, including the model contract, SOW, technical requirements, special contract requirements (Section H), instructions to offerors (Section L), and the evaluation criteria (Section M). The draft RFP should contain as much as possible of the "business" sections necessary for industry to provide meaningful comments; at minimum, it should include Sections L, M, and the Specification/SOW. The draft RFP should identify the point of contact to whom comments should be directed (preferably the CO or Contract Specialist), and the date by which all comments are due. The draft RFP should be published with a cover letter describing DOE's technical and contracting strategy, identifying those areas where DOE specifically desires comments. The letter should also include a statement that information presented in the draft RFP is subject to change, and incurring expenses or beginning to formulate an approach in preparation for the acquisition based on information presented in the draft RFP is solely at the potential offeror's risk."

2.7.3 Publicizing a Draft RFP. The CO/Contract Specialist should publicize the draft RFP in much the same manner as the final RFP would be publicized. A variety of methods may be used, such as posting announcements to 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. The CO should establish reasonable times for receipt of responses to draft RFPs that reflect the nature of the product or service, the supplier base, and the specifics of the individual procurement. The proposed contract action should be synopsized in accordance with FAR 5.201 prior to issuance of the draft solicitation. The notice of availability of a draft RFP and a future timeframe when the solicitation may be issued may be included in the same synopsis.

2.7.4 Handling Questions/Comments in Response to Draft RFP. The CO/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

comment 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 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 comment does not give an unfair competitive advantage to an individual offeror. Consider posting the list of questions/suggestions from industry, along with the Government's responses.

2.7.5 Additional Comment Periods. If the nature of a comment 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 potential offerors). It may also be helpful to convene a pre-solicitation conference (see also paragraph 2.6.1.1). One-on-one meetings can also be utilized to obtain feedback on the draft RFP. Questions and answers from these meetings should also be captured and made public through the GPE. In fact, all questions and answers, other than those deemed proprietary to a potential offeror's approach, should be captured and posted on the GPE. Once the final RFP is issued, one-on-one meetings should not be held with prospective offerors and other interested parties.

**2.8 Source Selection Plans and the RFP.** Acquisitions conducted under FAR part 15 endeavor to select the source(s) that represent the best value to the Government. This permits tradeoffs among cost and non-cost factors and allows the Government to accept other than the lowest-priced proposal (see FAR 15.101-1). RFPs must convey information adequate for offerors to understand the basis for the source selection. At minimum, RFPs for competitive proposals shall include: (1) a statement of all significant factors (including price) that are reasonably expected to be considered, and (2) the relative importance assigned to each of these factors.

2.8.1 The Source Selection Plan (SSP) is an internal Government document that reflects the RFP, but provides more detail. The SSP helps evaluators to assess a proposal's merit with respect to the evaluation factors and significant subfactors. The SSP also articulates the rating systems to be used. Commonly used rating systems are adjectival, color coding, and numerical. Key to rating systems is the consistency with which the method is applied to all competing proposals, along with the adequacy of the narrative that supports the rating.

2.8.1.1 Basic Elements of the SSP are: (1) evaluation factors and subfactors, as set forth in the RFP, (2) the rating system, (3) the basis for assigning scores, and (4) administrative procedures to guide the evaluation process. As mentioned above, there is a direct linkage between the SSP and the RFP sections. Parallel development of these two documents helps to assure that: (1) there are practical and effective methods for the SEB's evaluation against the evaluation criteria, and (2) the RFP provides necessary information to offerors.

2.8.1.1.1 Evaluation Factors and Weights, as set forth in the RFP, must be adhered to by the evaluators. The SEB should first identify the strengths and weaknesses involved with a proposal, and then assign the appropriate ratings to the criteria. When using a numeric system, this is especially important, as evaluators may fall into the trap of relying on the numbers, rather than the actual merits or weaknesses of the proposal. A sample rating scale for evaluating technical and management factors and significant subfactors is included in the model SSP, 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.

2.8.1.1.2 Rating System. While the FAR does not mandate the disclosure of specific rating methods in the RFP, such methods must be described in the SSP. In the event that any departures from the SSP are needed, they must be documented, coordinated with legal counsel, and made known to the SSO.

2.8.1.1.2.1 Adjectival Ratings. Adjectival ratings are a frequently used rating system. Adjectives reflect how well the offeror's proposal meets the requirements for each factor and subfactor. Often-used adjectives are: Outstanding, Good, Satisfactory, Marginal, and Unsatisfactory. Adjectival ratings may be employed independently or in connection with other rating systems.

2.8.1.1.2.2 Color-Coded Ratings. This system uses colors to indicate how well the offeror's proposal meets the requirements for each factor and subfactor. Frequently used colors include Green (outstanding), Blue (good), Yellow (satisfactory), Orange (marginal), and Red (unsatisfactory).

2.8.1.1.2.3 Collective Impact. When using either adjectival or color-coded systems, evaluators must assess the collective impact of subfactors on each higher-tier factor, and then assess the totality of the evaluation factors as they relate to one other under the weighting methodology set forth in the RFP. This forces evaluators to thoroughly understand the strengths and weaknesses of each individual proposal in relation to the evaluation criteria. While it is critical that such depth of understanding is reflected in the evaluation narrative, it also helps with the competitive range determination and other reports.

2.8.1.1.2.4 Numeric Ratings. This system assigns point values (e.g., 0 to10, 0 to 100) to proposals. This may appear to give more precise distinctions of merit, but numeric ratings have drawbacks. The apparent precision of numeric ratings may obscure the strengths and weaknesses that support the numbers. Moreover, the apparent mathematical precision can be distorted depending upon the evaluation criteria used. For

example, if a criterion indicated there could be no weaknesses, a very minor weakness could force assignment of the next lower-level rating. This would potentially cause a significant mathematical difference in the proposals.

2.8.1.1.2.5 Staggered Numeric System. If a numerical system is used, the scoring system should be staggered (e.g., scores 0, 5, 8 and 10 denote various ratings). The system should not use a full sequential scale (i.e., 0, 1, 2, 3 . . . 10) to represent the ratings. If the full sequential system is used, the evaluation team is forced to differentiate the rating: A satisfactory element could receive 4, 5 or 6 rating points, with differences among 4, 5 and 6 explained). Sequential systems may also result in overall proposal ratings that are numerically close; this may disguise the proposal differences. Moreover, using a 1-100 sequential system can result in a "public school" grading system, even if the rating plan provides differently: 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 technical differences amount to just a few points.

2.8.1.1.3 Basis for Assigning Scores. A standardized approach to scoring helps evaluators to reliably measure how well each proposal addresses the evaluation factors and subfactors in the RFP. This permits evaluation of proposals against a uniform objective baseline, rather than against one other. This also reduces bias and promotes consistency among evaluators. It is best to draft the scoring approaches while developing the factors and subfactor themselves.

- Specify a target level that the proposal must achieve in order to meet the requirement for the factor or subfactor consistent with the RFP.

- Describe guidelines for higher or lower ratings compared to the target level.

- Overly general approaches should be avoided, as they make consensus among evaluators more difficult to obtain and may obscure the differences between proposals.

- The mere inclusion of a topic in an offeror's proposal should not result in a determination that the proposal meets the requirement.

- While quantitative standards may appear easier to apply, qualitative standards are commonly used in source selections.

2.8.2 Award With or Without Discussions. When preparing the RFP, the CO must determine and seek the SSO’s approval on whether to award without discussions. For this decision, there are several factors to be considered:

- Complexity of the requirement,
- Likelihood of alternative technical approaches/solutions,
- Complexity of cost information to be provided in the proposal,
- Likelihood of proposed proprietary processes that will require agreement on ownership and use,
- Potential that information from the offeror's technical proposal will need to be incorporated into the contract, and
- Uniqueness of contract clauses that will need to be negotiated with individual offerors.

**2.9 Guidance to the SEB.** The CO and legal counsel provide business, procurement and legal advice and guidance to the SSO and SEB Chair. Although SEB training covers the whole source selection process, prior to the initiation of a procurement in a FAR 15 competitive procurement, the CO and legal counsel should brief the SEB on how the source selection process works. The briefing should cover the evaluation process and pertinent documents, conflicts of interest, proposal security, and procurement integrity. The briefing should inform the evaluators of their responsibilities and provide guidance on how to review proposals. If there are non-voting members on the SEB, the CO should explain the limits of their involvement in the process. The CO should also advise the SEB members of the planned schedule, 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 RFP included a requirement for oral presentations by the offerors, the CO must explain the evaluation process for oral presentations.

2.9.1 CO Briefings to SEB Prior to Evaluation of Proposals.

2.9.1.1 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.

2.9.1.2 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 password protected and closed when individuals are not physically at their computer. Proposals should not be downloaded to thumb drives or other portable media. The SEB chairman should arrange for appropriate facilities for safeguarding the proposals and other source selection information prior to the receipt of the proposals. The CO should inform the evaluators that proposals shall not be taken home. The evaluation and contents of proposals shall not be discussed outside the SEB with the exception of ex officio members, procurement advisors, legal counsel, and the SSO.

2.9.1.3 Potential Individual Conflicts of Interest. Individual conflicts of interest need to be resolved prior to beginning the evaluation. Evaluators must review all

proposed contractors, subcontractors, consultants, and teaming arrangements and report any potential conflicts of interest to the CO, legal counsel, and the SEB chairperson. 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; legal counsel will review the specifics of the situation to determine if a potential conflict exists. The evaluator will then be informed if any actions need to be taken to avoid the conflict of interest. Actions that may be taken include divestment of stock or removing the evaluator from the source evaluation process.

2.9.1.4 Apparent Conflicts of Interest. Evaluators must 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 CO and legal counsel.

2.9.1.5 Procurement Integrity Act. Implemented at FAR 3.104 (see https://www.energy.gov/management/procurement-integrity), the Procurement Integrity Act (41 U.S.C. §§ 2101-2107) addresses many issues. The two of most concern to evaluators are the prohibitions against employment discussions and the release of information regarding procurement. The CO 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 CO or legal counsel to the SEB may provide the procurement integrity briefing.

2.9.1.5.1 Employment Prohibitions. Evaluators should be instructed to consult with legal counsel regarding any contact with an offeror regarding non-Federal employment, as well as questions related to post-employment restrictions (18 U.S.C. 207 and 5 CFR parts 2637 and 2641, as well as the OFPP Act and FAR 3.104-3(c)). In general, evaluators need to be informed that they can't be involved in the source selection process while discussing potential employment (including submitting resumes) with any offerors, including subcontractors and consultants, who are proposing under the RFP. Evaluators with concerns about post-employment restrictions should discuss their situation with legal counsel prior to commencing evaluation of the proposals or becoming further involved with the procurement.

2.9.1.5.2. Disclosure of Proprietary or Source Selection Information. The Procurement Integrity Act also prohibits the disclosure of contractor bid or proposal information or source selection information. Source selection information includes: (1) proposed costs or prices; (2) SSPs; (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 other advisors; and (9) anything else marked “Source Selection Information.” Evaluators may only discuss contractor bid or proposal information or source selection information with individuals who are authorized, in accordance with DOE regulations or procedures, to receive such information. It is important to distinguish between what is public information and what is not. For example, RFP information is public, but the rating plan is not. The weights assigned to evaluation criteria are not public unless they are identified in the RFP. 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. Evaluators should be cautioned against holding any conversations with or answering any questions from offerors. All questions should be referred to the CO.

2.9.1.5.3 Reports of Potential Violations of the Procurement Integrity Act require the CO to determine if there is any impact on the pending award or selection of the contractor (see FAR 3.104-7). Evaluators should be advised that the earlier a potential procurement integrity violation is reported, the greater the CO's ability to mitigate its effect on the procurement. For example, the CO may be able to mitigate an unauthorized disclosure 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.

2.9.1.5.4 Examples of Violations are helpful, so that the evaluators can relate the procurement or legal jargon to real situations they may encounter. For example, in one case an 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. In 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.

2.9.1.6 Briefings on the Evaluation Process. The CO should provide an overview of the evaluation process and the steps to be followed. Evaluators should be instructed to review the pertinent documents prior to evaluating the proposals. Evaluators should review and become familiar with the SSP/rating plan, SOW, evaluation scoring sheets, the evaluation criteria in Sections L and M of the RFP, and the established weights for each criterion and sub-criterion.

2.9.1.6.1 Individual Proposal Evaluations must be done by each SEB member. Evaluations shall be based on the evaluation criteria in the RFP, and evaluators need to be cautioned against deviating from those criteria.

2.9.1.6.2 Uniqueness of the Past Performance Criterion. Evaluations of past performance draw from CPARS, from the offeror's previous and current customers, and from other sources.

2.9.1.6.3 Strengths, Weaknesses, and Deficiencies for each criterion must be documented in sufficient detail to support the assigned score or adjectival rating. This does not mean that evaluators will assign individual scores or ratings. It depends on the evaluation process established in the SSP. Commonly, individual evaluators will identify strengths, weaknesses and deficiencies; then the SEB meets to discuss and develop consensus strengths and weaknesses prior to assigning scores. This is the preferred method at DOE.

2.9.1.6.4 Do Not Compare Proposals Against One Another. Proposals shall be evaluated against the criteria and standards established in the solicitation. FAR 15.305(a) states that competitive proposals shall be evaluated solely on the factors and subfactors identified in the RFP. If the information sought does not exist where expected, evaluators should check for it elsewhere, such as the introduction, a diagram, or appendices.

2.9.1.6.5 Consistency is Key. Evaluators must be consistent during the evaluations, scoring, and developing of questions. Evaluators should discuss any 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 redundant 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.

2.9.2 Documentation of Evaluation. FAR 15.305(a)(3)(ii) states that 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 CO should advise the SEB that the evaluation report needs to be complete, accurate, and contain sufficient detail on strengths, weaknesses, deficiencies, and risks to demonstrate to an outside reviewer that the evaluation was fair, reasonable, and unbiased. Evaluation reports must be clear, convincing and supportable, and may be reviewed by the Government Accountability Office (GAO) or a judge during a protest. Some COs encourage evaluators to reference specific parts of each evaluation criterion and the applicable page(s) 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 facts that support the conclusions. The CO 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*."

**2.10 Past Performance as an Evaluation Factor.** Past performance is a required evaluation factor (FAR 15.304(c)(3)(i)) for negotiated competitive acquisitions over the Simplified Acquisition Threshold. Evaluating past performance entails going beyond the data in the Contractor Performance Assessment System (CPARS, https://www.cpars.gov). It also involves gathering and evaluating information not found in proposals, such as information from third parties about contractor performance on other relevant efforts.

2.10.1 Waivers of Past Performance. Although the past performance evaluation factor is mandatory, the CO may determine that it is inappropriate evaluation factor for a specific acquisition. In that event, the CO must document the special circumstances in the contract file.

2.10.2 Data Recency and Relevance. In soliciting information from offerors through Section L, the CO should consider using language such as "for the same or similar items or services," which helps to ensure the Government does not overly restrict its ability to consider an array of Past Performance Information (PPI). The evaluation team should review and consider the most recent and relevant data available – ideally, no more than three years old (six years for construction or architect-engineering contracts). Similar efforts that are either still in progress or just completed and have ample performance history are ideal.

2.10.3 Subcontractors. PPI on proposed subcontractors should not be requested unless they are major or critical subcontractors. Only information relevant to the scope for each proposed subcontractor should be requested.

2.10.4 Addressing Past Performance in the RFP. As required by FAR 15.304(d), the RFP must describe the general approach to be used in evaluating past performance. This includes what PPI will be evaluated (including methods for collecting PPI), how PPI will be evaluated, what its weight is relative to other evaluation factors, and how offerors with no PPI will be evaluated. PPI requested from offerors should be tailored to the circumstances of the acquisition and should not impose excessive burdens on offerors or evaluators. At minimum, the RFP should clearly state:

- 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. For this, the Government may use data provided by the offeror and data obtained from other sources including CPARS (https://www.cpars.gov).

- The Government may elect to consider data obtained from other sources that it considers current and accurate, but it will request the most recent information available.

- Offerors shall submit recent and relevant information concerning contracts and subcontracts (including Federal, State, and local government, as well as private-sector contracts) that demonstrates their ability to perform the proposed effort.

- Offerors may explain why referenced contracts are deemed relevant to the proposed acquisition. Offerors may provide information on problems encountered on such contracts and the actions taken to correct such problems. Offerors should specifically describe the work to be performed by major proposed subcontractors so that the Government can conduct meaningful performance risk evaluations.

- Evaluation of an offeror's PPI will be predicated on the degree to which it is relevant. Relevancy is not a separate element of past performance; rather, relevancy means that the PPI has a logical connection or similarity to the proposed acquisition's size, scope, and complexity. PPI with limited relevance may be used for evaluation, but may be considered less strongly. If there is no available record of past performance, the proposal will be evaluated neither favorably nor unfavorably.

2.10.5 Minimum of Two References. In order to generate as much PPI as possible for a given contract or subcontract, the offeror should identify at least two references. This also helps to ensure that the references' anonymity can be maintained (see FAR 15.306(e)).

2.10.5.1 Gathering and Verifying Information from References is the responsibility of the Government. Questionnaires followed up by telephone interviews have the most success in getting useful and timely responses. Questionnaires should be provided in the RFP (as an attachment to section L, and which offerors can disseminate to their intended references). Questionnaires may be returned by references directly to DOE without going through the offeror. This helps offerors understand what is important to the Government under this criterion. Questionnaires normally contain no more than one page of questions; the questions must be relevant to the specific acquisition, designed to elicit sufficiently detailed information for a thorough evaluation of past performance. If following up with references, the Government should ensure questions asked of each reference are the same. Inconsistency in questions can lead to the potential issue of unequal evaluation of offerors.

2.10.5.2 Other Pertinent 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 lists of references and PPI in advance of receiving the proposal. Accordingly, the RFP can request that offerors provide a summary past performance early (e.g., in advance of the proposal due date). This allows the Government to begin collecting data. To obtain timely completed questionnaires, the CO may have offerors send the questionnaires to all references in advance of submitting their proposals, so that the completed questionnaires arrive at the same time as the proposals. Avoid formula-driven past performance ratings, as evaluation of past performance is subjective.

2.10.5.3 Amount of PPI. 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 email addresses for references in contracting and technical areas.

2.10.6 No PPI. If the evaluation team finds no information, an offeror's lack of PPI must be treated as an unknown performance risk, having no positive or negative evaluation significance. The method and criteria for evaluating offerors with no PPI should be constructed for each acquisition to ensure that such offerors are evaluated neutrally on past performance. The solicitation must clearly describe the approach that will be used for evaluating offerors with no performance history.

2.10.7 Newly Formed Companies and Mergers. PPI from previously established companies from which new companies and mergers arise may be used to mitigate the absence of PPI for new entities. Note: Information from the Federal Awardee Performance and Integrity Information System (FAPIIS) may be used to trace predecessor companies (as well as for responsibility determinations, pursuant to FAR 9.104-6(b)). By examining predecessor companies, evaluators may gain basic insights on past performance. In addition to Federal sources, PPI should be considered from other sources such as State and local government contracts and private-sector contracts and subcontracts. The RFP must explain that this information will be considered.

2.10.8 Experience vs. Past Performance. The terms "experience" and "past performance" must be clearly defined in the RFP. Experience reflects whether contractors have performed similar work before; past performance describes how well contractors performed the work. If experience is to be evaluated, it should be a separate evaluation factor, not combined with past performance.

2.10.9 Definition of "Offeror." Make certain that section L defines whether the term "offeror" includes each firm in the business relationship (whether a joint venture, teaming arrangement, or major subcontractor) and who will be evaluated on past performance. Section L should also include a statement that PPI will be used for both the responsibility determination and the Best Value decision.

2.10.10 Amount of Weight to Place on PPI. Past performance should be given sufficient 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 an ideal weight for past performance relative to the weight of the other evaluation criteria.

2.10.11 Adverse PPI. In the case of adverse PPI on which offerors had no previous opportunity to comment, the CO 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 came from only one reference or when there is any doubt concerning the accuracy of the information.

2.10.11.1 Disclosure of PPI to Offerors. Although the Government must disclose PPI problems to offerors, including 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 information was received.

2.10.11.2 Adverse PPI on Entities with Relationships to Offeror. When receiving adverse PPI on entities that have formed business arrangements with a proposed prime contractor, the Government can only advise the proposed prime that there is a problem with one of the entities it has proposed to perform the requirement. Specifics cannot be provided to the offeror unless the affected entity agrees.

2.10.12 When to Conduct Communications/Exchanges on PPI: If award is to be made without conducting discussions, offerors *may* be given the opportunity to clarify the relevance of their PPI (see FAR 15.306(a)(2)). If a competitive range is to be established, offerors *shall* be given the opportunity to address PPI 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 (see 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 PPI to which the offeror has not yet had an opportunity to respond (see FAR 15.306(d)(3)). The preceding two requirements may appear redundant, but both are needed, as adverse PPI may become known to the CO both before and after establishment of the competitive range.

**2.11 Oral Presentations** provide offerors an opportunity to present information in person. Oral presentations can substitute or augment written proposals; they are subject to the same restrictions as written proposals, both with respect to timing (FAR 15.208) and content (FAR 15.306). Oral presentations permit evaluators to learn about key members of the offerors' teams, organizational structures, and how the contract will be managed. Oral presentations may also be conducted in an interview form, with evaluators probing for additional information, posing sample tasks, or otherwise testing the ability of the offerors' teams.

2.11.1 Approaches for Oral Presentations. Various approaches may be used, but evaluators should consider the media used to record the presentation; the extent and nature of the material and media used in the presentation; the Government participants; each offeror's team; and the amount of time permitted for the presentation.

2.11.2 Concerns. Also consider ways to alleviate concerns, such as presentation styles (rather than technical substance) impacting evaluators' decisions; limits on exchanges (to

assure they do not constitute discussions); and that efforts associated with preparing material for both oral and written formats are not duplicative.

2.11.3 Oral Preparation Instructions should cover:

- Topics the offeror must address;
- Technical and management factors;
- Who the offeror may bring to the presentation;
- Time limitations for the presentation;
- Other logistics for the site and presentation media;
- Government-offeror interactions during and after the presentation;
- Information disclosure rules;
- Statement that presentations do not constitute discussions (see FAR 15.306(d));
- Statement that the orals will be recorded in a mode adequate for meaningful review;
- Number of Government attendees and their titles.

2.11.4 Attendance at Oral Presentations will vary, based on the size, scope and complexity of the procurement. At minimum, the SEB chairperson, voting members, CO, and executive secretary must attend. Legal counsel usually do not attend. The SEB chairperson should determine which, if any, of the various advisors should attend. The SSO may elect to attend. To ensure fair competition, an evaluator's attendance at one oral presentation necessitates attendance at all oral presentations.

2.11.5 Preparation. The order of presenters must be determined. A lottery is often used to determine the sequence of presentations by offerors. The time between the first and last presentation should be as short as possible to minimize any advantage to the later presenters. The facility for the presentation must be determined. In most cases, the facility is selected and controlled by the buying activity. However, nothing precludes a presentation being given at an offeror's facility, although this is the least preferred option. When selecting a facility, consider:

- Accessibility;
- Availability for inspection by offerors before the actual presentation time; and
- Level of comfort 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.

2.11.6 Facilities and Resources. The RFP should, to the extent possible, describe the physical characteristics of the facility and resources available to offerors. The RFP should also clarify what types of equipment, if any, will be available to offerors, and any prohibitions on equipment types and usages. Prior to the presentation, the CO should review any ground rules with offerors, as conveyed in the instructions (see paragraph 2.11.3).

2.11.7 Government Evaluators' Responsibilities should be communicated by the CO both before and after the oral presentation:

- Oral presentations involve sensitive information subject to confidentiality;
- All Government evaluators should be present at every presentation;
- The CO must attend and should chair every presentation;
- If the SSO attends one oral presentation, the SSO should attend all oral presentations.
- The SSO should not, however, participate in any clarifications.

2.11.8 Preference for In-Person Presentations. Offerors should present in person, as video conferencing introduces the risk (for both parties) of diminished control of the meeting. Likewise, pre-recorded video or audio presentations are strongly discouraged.

2.11.9 Preference for Key Personnel Presenters. It is strongly recommended that the presenters should be the key personnel (project managers, task leaders, and other in-house staff) who will perform or personally direct the work.

2.11.10 Time Management. To encourage astute time management, each offeror should be held to firm limits on both the time and the materials used in the oral presentation. All offerors must be held to the same limits. Time allocated to each part of the presentation should be left to the offeror's discretion.

2.11.11 Benefits of Oral Presentations. Oral presentations enable faster, richer communication that benefits both Government and industry. However, the nature and extent of information exchanges between offerors and the Government during such presentations requires planning to avoid protests and other pitfalls.

2.11.12 Rules Regarding Exchanges with Offerors during the course of the solicitation process must be watched carefully (FAR 15.306). This is 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)).

2.11.12.1 Oral Presentations vs. Oral Discussions. The two terms are not synonymous. Oral discussions generally consist of communications following establishment of the competitive range. This 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.

2.11.12.2 Regulatory Controls. FAR 15.306, 15.306(d), and 15.307 prescribe strict controls 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. As stated earlier, restrictions on communications between the Government and the offeror should be addressed by the CO to all parties prior to the commencement of the oral presentation (see FAR 15.306).

2.11.12.3 Review of Ground Rules before the Oral Presentation is a necessity. However, limiting dialogue to questions that merely repeat statements that may not have been heard by the evaluators adds little value in improving the understanding of the offeror's presentation. Evaluators may ask questions, but need to be cautious about 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 CO, reaching out to legal counsel if necessary. Clarify whether only the CO will ask questions of the Offeror. 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)).

2.11.13 Recording the Oral Presentation. FAR 15.102(e) states that the CO shall maintain a record concerning what was 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 and audio recordings, written records, Government notes, and copies of briefing slides or presentation notes. COs shall record all oral presentations through audio and video recording, with a time-date stamp, unless legal counsel approves otherwise. In general, note-taking as a means of creating a record of the oral presentation is not a good substitute for audio/video documentation.

2.11.14 Evaluating the Oral Presentation. There is no firm rule regarding the appropriate time to evaluate the presentation; however, in DOE, it is recommended that the presentations be evaluated immediately after each is made. This enables evaluators to exchange reactions, summarize potential strengths and weaknesses, and verify perceptions and understandings. Materials referenced in a presentation, but not an actual part of the presentation, must not be accepted, or used in, evaluations.

**2.12 Exchanges with Offerors After Receipt of Proposals.** There are four types of exchanges with offerors: clarifications, communications, discussions, and negotiations. It is important that COs understand the differences among these exchanges.

2.12.1 Clarifications are limited exchanges that may occur when award without discussions is contemplated. Invoking clarifications with one offeror does not require exchanges with all offerors, so long as they are handled correctly and documented carefully. Care needs to be taken by the CO to ensure that exchanges are within the limits at FAR 15.306(a) and (b).

2.12.1.1 Appropriate Use of Clarifications. Clarifications allow for learning the relevance of PPI, for an offeror to respond to adverse PPI if the offeror has not previously had that opportunity, for resolving obvious minor or clerical errors (e.g., misplacement of decimal point in proposed price or cost information, incorrect Prompt Payment Act discount, reversal of F.O.B. Destination and F.O.B. Origin, error in designation of the product unit), and for resolving issues of responsibility or acceptability of the proposal as submitted. Clarifications are permitted to give the offeror an opportunity to make clear and obvious key points about the proposal as originally submitted.

2.12.1.2 Inappropriate Use of Clarifications. The offeror may not revise, expand, enhance, 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 and using those inferences to shade the meaning of the original proposal so that it becomes more attractive or beneficial to the Government.

2.12.2 Communications are exchanges after receipt of proposals and before establishment of the 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. As was the case with clarifications, invoking communications with one offeror does not require exchanges with all offerors, so long as this is handled correctly and documented carefully (see limits at FAR 15.306(a) and (b)). Like all elements of the source selection process, communications must be carefully documented by the CO to ensure 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.

2.12.2.1 Appropriate Use of Communications. Communications shall be held with offerors whose PPI is the determining factor preventing them from being placed within the competitive range. Such communications shall address adverse PPI to which an offeror has not had a prior opportunity to respond. Communications shall also address 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.

2.12.2.2 Inappropriate Use of Communications. Communications may not cure proposal defects or material omissions; materially alter the technical or cost elements of the proposal; or otherwise revise the proposal. Communications may not alter the Government’s evaluation of the proposal such that the offeror’s proposal has effectively been revised as a result of such communications and/or clarifications. If clarifications or communications inadvertently become discussions or negotiations, the CO should establish the competitive range and conduct discussions with all offerors in order to ensure fair treatment of all offerors.

2.12.3 Discussions. Once a competitive range has been established, communications will be expanded to include discussions and may also include additional clarifications. The CO must hold meaningful discussions with all offerors.

2.12.4 Negotiations are exchanges after determination of the competitive range that are undertaken with the intent of allowing the offeror to revise its proposal. When negotiations are conducted in a competitive environment, they take place after the competitive range is established and they are called discussions. (In competitive acquisitions, the terms "negotiations" and "discussions" are often used synonymously.)

2.12.5 Competitive Discussions/Negotiations. Some COs have restricted discussions with offerors in the competitive range to deficiencies, significant weaknesses, and adverse PPI to which the offeror has not yet had an opportunity to respond**.** However, such 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. FAR 15.306(d)(4) allows negotiations that more closely resemble what industry can do in acquiring goods and services. If, as a result of negotiations with one offeror, the Government realizes that a change in requirements would lead to more advantageous proposals, the RFP should be amended to reflect any new or changed requirement(s).

2.12.6 Communicating About Weaknesses and Deficiencies. FAR 15.306(d)(3) requires the CO to indicate to, or discuss with, each offeror still being considered for award, deficiencies, significant weaknesses, and adverse PPI to which the offeror has not yet had an opportunity to respond. The CO also is encouraged to discuss other aspects of the offeror's proposal that could, in the opinion of the CO, be altered or explained to enhance materially the proposal's potential for award. However, the CO is not required to discuss every area where the proposal could be improved.

2.12.6.1 "Deficiency" means a material failure of a proposal to meet a 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).

2.12.6.2 "Weakness" means a flaw in the proposal that increases the risk of unsuccessful contract performance (FAR 15.001).

2.12.6.3 "Significant Weakness" means 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 and based on the nature of the weaknesses, may constitute a significant weakness.

2.12.7 Limits on Exchanges. FAR 15.306(e) states that Government personnel involved in the acquisition shall not engage in conduct that:

- Favors one offeror over another;
- 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;
- Reveals an offeror's price without that offeror's permission;
- Reveals the names of individuals providing reference information about an offeror's past performance; or
- Knowingly furnishes source selection information in violation of 3.104 and 41 U.S.C. §§ 2101 and 2102.

2.12.8 Competitive Cost/Price Discussions/Negotiations. The CO 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. §§ 2101 and 2102. However, the release of internal Government documents such as audit reports or independent Government cost estimates is not recommended.

2.12.8.1 Discussions/Negotiations on Cost or Price. When negotiations are conducted, the CO 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 cost realism analyses 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 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)).

2.12.8.2 Handling significant cost/price spreads in competitive offers. A wide range of pricing may indicate that the offerors may not fully understand the Government’s requirements, or that there is vagueness in the solicitation that leads to widely different interpretation of the requirements. The CO needs to understand which is the case and proceed accordingly, including briefing the SSO as needed. In such circumstances, the CO may need to obtain 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-a-kind procurement, if there is a significant range of pricing and all the offerors are proposing the same technology, the CO should attempt through discussions to understand the major cost drivers underlying the differences and determine whether an offeror may be trying to “buy-in” with plans to “recover” after the award.

**2.13 Price and Cost Reasonableness. "**Price" means the offeror's cost plus any fee or profit applicable to contract type. Given the CO's responsibility for procuring supplies and services at fair and reasonable prices, the CO must ensure that price is evaluated in every source selection (see FAR 15.304(c)(1)). To determine reasonableness, the CO may perform either price analysis or cost analysis. If the price is based on adequate competition, generally no additional data from the offeror is necessary to determine price reasonableness. However, in source selections for cost-reimbursement contracts, the CO must also perform cost-realism analysis to determine the probable cost of performance of each offeror and use that to evaluate best value. The CO may request data to evaluate the cost realism of competing offers or competing approaches. The CO must document the evaluation of cost or price (see FAR 15.305(a)(1)).

2.13.1 Price Analysis. Price analysis is the process of examining and evaluating a proposed price without evaluating separate cost elements and proposed profit. In a competitive environment, price analysis is the preferred technique for determining price reasonableness because it permits the CO to make the determination without a detailed cost analysis. (See Guide chapter 15.404-1 for more information on evaluation of cost proposals.) Price analysis is generally based on data obtained from sources other than the offeror. These data are 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.

2.13.1.1 Price Analysis Techniques. One or more of the following techniques, or other techniques may be used to perform price analysis:

2.13.1.1.1 Comparison of All Proposed Prices received in response to the solicitation. Caution should be used when applying this technique, however, as all prices proposed may be unreasonable.

2.13.1.1.2 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.

2.13.1.1.3 Parametric Estimating may be used to identify inconsistencies in pricing that require further review. It is a technique used to estimate a particular cost or price (dependent variable) 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, etc.)

- 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.

2.13.1.1.4 Comparison to Published Price Lists may be done via published market prices of commodities, similar indexes, and discount or rebate arrangements.

2.13.1.1.5 Comparison of Proposed Prices to Independent Government Cost Estimates. See paragraph 2.13.3 for more details.

2.13.1.2 Sufficient information is key to determination of price reasonableness. When insufficient information is available from other sources, information sufficient to determine a fair and reasonable price must be requested from the offeror. Care must be taken to ensure that only essential information is requested. Certified cost and pricing data should not be requested unless required by regulation or determined necessary by the CO.

2.13.2 Cost Analysis entails the review and evaluation of the separate cost elements and profit/fee in an offeror's proposal (including cost or pricing data or information other than cost or pricing data), and application of judgment. Cost analysis is used to determine how well the proposed costs represent the cost of the contract, assuming reasonable economy and efficiency. Cost analysis must be performed anytime that cost or pricing data are required (see FAR 15.403-(4)(a)(1) and 15.404-1(a)(3)). Cost or pricing data are not obtained when there is adequate price competition. Cost analysis may also be used to evaluate other than cost or pricing data (see FAR 15.404-1(a)(4)). When cost analysis is required, the proposal must be analyzed to determine what costs to use in developing the negotiation objective and what price is deemed fair and reasonable. Note: Even when using cost analysis, the CO must also conduct price analysis to verify that the overall price is fair and reasonable.

2.13.2.1 Allowability of Costs. The CO may only consider allowable estimated costs in the cost analysis. 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 cost elements generally found in a cost proposal:

2.13.2.1.1 Direct Costs are costs incurred specifically for the contract. These costs take the form of material, labor, tooling, subcontract costs and other direct costs. 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.

2.13.2.1.2 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 and general and administrative (G&A).

2.13.2.1.2.1 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.

2.13.2.1.2.2 G&A Costs. 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.

2.13.3 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, 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, and is usually developed by the program office during acquisition planning. As discussed above, the IGCE can be used by the CO when performing price analysis to determine a price fair and reasonable.

2.13.4 Cost Realism analysis is the process of independently reviewing and evaluating specific elements of each offeror's cost proposal to: (1) verify the offeror's understanding of the requirements, (2) assess the extent to which the cost proposal is consistent with the technical proposal, as well as any unique methods of performance and materials, and (3) identify potential risks. Cost realism analysis leverages the technical evaluation of cost (see

Guide chapter 15.404-1) to determine the probable cost. Probable cost should reflect the evaluators' best estimate of the cost of any contract resulting from that offeror's proposal, including any recommended additions or reductions in personnel, equipment, or materials. Cost realism analysis must be performed on all cost-reimbursement contracts; a similar approach may also be used on competitive fixed-price contracts. Importantly, however, cost realism analysis is used for the purpose of determining best value (see FAR 15.404-1(d)) – not for making upward or downward adjustments to the offeror's cost proposal.

2.13.5 Technical Analysis or Evaluation of Cost must be performed in order to complete a cost realism analysis and determine the probable cost (see Guide chapter 15.404-1). 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. (see FAR 15.404-1(e)).

2.13.6 Fair and Reasonable Price means that the price is fair to both parties to the contract, considering the promised quality and timeliness of contract performance. The preceding concepts and techniques all aim to support the CO's fair and reasonable price determination.

**2.14 Tradeoffs Under Best Value Procurements**. On the best value continuum, there is 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. On one end of this continuum is the low-priced technically acceptable strategy. On 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. Best value procurements involve tradeoffs between cost and other factors such as technical and past performance (e.g., 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.

2.14.1 Steps in Tradeoff Analysis. First, the RFP should contain language that 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 (FAR 15.101-1(b)(2)). An evaluation of all technical and management criteria should be performed in accordance with the evaluation scheme provided for

in the RFP. The exact language in the RFP should be referred to frequently and followed closely in a tradeoff analysis. Ensure each word or phrase of the evaluation criteria is considered. It is important for the SEB 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 described 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 proposals is very important in making this decision.

2.14.2 Documentation of Tradeoff Decision. In accordance with FAR 15.308, the source selection decision shall be documented, with the rationale for any business judgments and tradeoffs made or relied on by the SSO, including the benefits associated with additional costs. Although the rationale must be documented, the documentation should not quantify the tradeoffs that led to the decision, unless this is required by the RFP. Rather, documentation should reflect that the evaluation of the offerors' proposals was reasonable and in accordance with the RFP criteria. GAO protest reports consistently indicate contemporaneous documentation must be in the file. In a protest, given the discretion granted to agencies for the conduct of Best Value procurements, disappointed offerors generally will have only two legal bases for challenging an agency's cost/technical tradeoff analysis: (1) that the agency's underlying cost and technical evaluations that formed the basis for the tradeoff decision were inconsistent with the terms of the solicitation; and (2) that the tradeoff decision was unreasonable. There is no legal requirement that the agency quantify any tradeoffs in terms of dollars. An agency should use the evaluation approach (e.g., narrative, quantification) that best meets its needs. For example, agencies can use narrative explanations of tradeoff decisions, so long as they are reasonable and consistent with the RFP criteria. Some examples of rationale for the business judgments and tradeoffs made by the SSO include 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. Determining factors should be described in a clear and convincing manner, providing justification as to how they relate to anticipated contract success.

2.14.3 Basis for Cost/Technical Tradeoff is not on the percentage 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 than cost.*

**2.15 Evaluation Report.** The FAR requires that evaluations of the relative strengths, deficiencies, and significant weaknesses, and risks of proposals be documented in the contract file (see 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 SEB/TEC, and be consistent with the SSP.

2.15.1 General Approach. Develop concise, 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, at 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 SSP requirements, 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 depends on the nature, scope, and complexity of the acquisition.

2.15.2 Level of Detail. 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:

- What is proposed;
- The Government’s assessment (i.e., good or bad/strong or weak)
- Why it is good or bad (i.e., the effect of what is proposed); and
- How it relates to the evaluation criteria.

2.15.3 Other Guiding Principles for the evaluation report:

- Reflect the process used to evaluate proposals (consistent with the SSP).
- Incorporate, attach, or reference all relevant evaluation information used to arrive at a consensus evaluation, e.g., audit reports, technical evaluation reports, etc.
- If discussions were held, 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.
- Provide sufficient information so that the SSO can clearly understand the area being evaluated and how it relates to the 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 report may be reviewed by a third party, e.g., GAO or a court, and thus needs to be definitive as to conclusions reached and the basis for such conclusions.

**2.16 Decision Document.** Proper documentation of the entire Source Selection Process is critical to the success of the procurement. The SSO decision shall be based on a comparative assessment of proposals against all source selection criteria in the RFP. While the SSO may use reports and analyses prepared by others, the decision shall represent the SSO's independent judgment. The decision shall be documented, and shall include the rationale for any business judgments and tradeoffs made or relied on by the SSO, including any benefits associated with additional costs. Although the rationale for the decision must be documented, that documentation need not quantify the tradeoffs that led to the decision. The documentation should 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 Document template is available in the STRIPES Library.

2.16.1 SSO's Understanding of the Evaluations. 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. Proper documentation assists the SSO in understanding the rationale employed by the evaluation team and increases confidence that the findings of SEB were consistent with the stated evaluation criteria and SSP and are reliable. The SSO must be provided sufficient information on each of the competing offerors and their proposals 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'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 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.

2.16.2 Fairness and Impartiality. Given the public trust invested in the source selection process, all stakeholders should be assured that the evaluation was fair and impartial. Protests 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 followed. Procuring agencies have an obligation to document their source selection decisions such 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.)

2.16.3 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. Email correspondence that is considered source selection information should be saved as an electronic file and added to STRIPES. When transmitting procurement sensitive data electronically, the CO must take adequate precautions to ensure data does not end up in the wrong hands. In cases where sensitive data is transmitted, the use of password-protected files or file encryption is required.

**2.17 Debriefings.** COs are required to provide debriefings, if requested, to all offerors. Debriefings should be informative and professionally presented; they should never degenerate into debates over the propriety of the source selection process. The general approach should be to address the offeror's reasonable questions about the procurement, and to provide information to the extent possible without prejudicing the procurement, should it be reopened for any reason. Because most of DOE's FAR 15 procurements are for services, this guidance is written with services procurements in mind (see 4 C.F.R. § 21.2(a)(2); 31 U.S.C. § 3553(d)(4)(B) and 41 U.S.C. § 3303).

2.17.1 Effect of the Debriefing Schedule on Potential Protests. Under FAR part 15, a company cannot pursue a GAO protest on an issue other than an RFP 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 best to schedule the debriefing very soon after the offeror is no longer under consideration for award, whether at the pre- or the post-award stage.

2.17.2 Preparing for Debriefings. The CO should plan for the debriefing well before award is made. Based on the particulars of the procurement, the CO 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.

2.17.3 Questions from Offerors. COs should request that offerors provide any questions in writing at least one day before the debriefing. This gives the agency time to review the questions and provide a more cogent answer. Even if questions are provided in advance, this does not prohibit additional questions at the debriefing.

2.17.4 Clocks. Once a "required and requested" debriefing is held, two clocks start to run on the offeror's time for filing a protest.

2.17.4.1 Determination of Forum. The first clock is used to determine whether GAO will consider the protest. Generally, a protest must be filed with GAO within ten calendar days after the debriefing. Protesters can also pursue protests at the Court of Federal Claims, which does not have a ten-calendar-day time limit for filing protests.

2.17.4.2 Determination of Whether to Stay or Suspend. The second clock determines whether the agency will have to stay the award or suspend performance of 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.

2.17.5 Preaward Stage. Debriefings may be held for offerors excluded from the competitive range. Through these debriefings, offerors gain insight on the evaluation of their proposals and how their proposals could be improved for future procurements.

2.17.5.1 Timing of Preaward Debriefings. Debriefings should occur as soon as possible after the offeror’s request, which is due no later than three days after notification of not being included in the competitive range (FAR 15.505(a)(1)).

2.17.5.2 Delay of Preaward Debriefing by the CO. The CO may delay the debriefing until after award, based on compelling reasons that a preaward debriefing is not in the best interest of the Government. The CO is required to document the rationale for such a

decision. In this scenario, the unsuccessful offeror cannot protest until after the debriefing; if the protest is successful, procurement actions after exclusion of the offeror may be nullified.

2.17.5.3 Delay of Preaward Debriefing by the Offeror. The offeror may request that the Government delay the preaward debriefing until after award. In this event, the CO should indicate in writing that debriefing is being postponed at the offeror's request. Given this scenario, the GAO will generally not find a protest based on the debriefing to be timely.

2.17.6 Post-Award Stage. Debriefings may be held for all offerors, upon request, who did not receive a debriefing at the pre-award stage. This applies to both successful and unsuccessful offerors.

2.17.6.1 Optimal Schedule for Unsuccessful Offerors. Ideally, the CO transmits a letter (template available in the STRIPES library) to the unsuccessful offeror on the day of award ("day zero"), informing the unsuccessful offeror of its right to request a debriefing within three days of receipt of notice, and offering a date for the debriefing should one be requested. The offered date will optimally be between four and eight days after the letter is transmitted. An unsuccessful offeror does not have the right to any particular schedule or location for the debriefing.

2.17.6.2 Unsuccessful Offerors: Special Considerations. Preparation and submission of a proposal is time-consuming, costly, and sometimes an emotional exercise for the offeror's proposal team. Thus, disappointed offerors may react with resentment, suspicion, and anger. As a consequence, some disappointed offerors view debriefings as an opportunity to vent, point out the questionable 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 by offering meager information, this is not desirable. Usually it is more productive to use the debriefing to discharge the emotion, demonstrate the procedural and substantive credibility of the decision, and convince the offeror that a basis for protest does not exist. The goal is for the offeror to come away with an understanding of why its proposal was not selected. There are usually one or two elements that negatively affected the evaluation; this should be summarized

for the offeror's benefit. For example, the offeror might have decided that it understood the Government's requirements better than the Government and pursued a strategy of offering what the offeror deemed best, despite the RFP requirements. In cases such as this, be prepared to review the RFP requirements. If discussions were held, it can be helpful to point out to an offeror where the issue(s) that led to its lack of success were raised in discussions.

2.17.6.3 Information to be Provided in Debriefings. FAR 15.506(d) and 15.505(e) set forth detailed lists of information to be provided; these provide a good agenda for the debriefing. Much of this information can be provided in advance of the actual debriefing, either in the unsuccessful offeror letter or in a later 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 saves time for everyone, and prevents disagreement over what was said, gives the offeror a chance to get past any emotional reaction to the evaluated strengths and weaknesses. This also tends to improve the questions asked at the debriefing.

2.17.4 Dialogue Surrounding Debriefings. Because the debriefing rules require the Government to provide reasonable responses to relevant questions about source selection procedures and how they 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.

2.17.5 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. It 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 source selections, 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 subfactor 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 awardee's pre-discussion scores. There is no requirement to provide the offeror with the awardee's subfactor scores. Providing more than the required information on 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 violate the prohibition against providing point-by-point comparisons between the awardee's and the debriefed offeror's proposals.

2.17.6 Provision of Ratings When Source Selection Team Is Divided. In the unlikely event that the SSO disagrees with aspects of the technical evaluation committee's report, either with respect to scores or to the strengths and weaknesses, provide the information upon which the selection was based -- the SSO's evaluation.

2.17.7 Information that 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 prohibition

on providing "point-by-point comparisons of the debriefed offeror's proposal with those of other offerors" is key. For this reason, it is advisable that the Government not have the other offerors' proposals or the evaluation of those 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.

2.17.8 Personnel Attending Debriefings. The FAR notes that the CO is responsible for the debriefing, but anticipates support from technical and legal counsel as needed. Neither the SSO, the SEB chairperson, nor the individual SEB team members are required to attend. Normally it is sufficient to have the CO, a technical evaluator, the executive

secretary, and legal counsel attend the debriefing. It is a good practice to have counsel present, particularly if the offeror indicates that its legal counsel will attend the debriefing, there are indications that a protest may be filed, or that the procurement is significant based on dollar size, complexity, or other sensitivity. On occasions where the CO 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 this, the presence of other officials in the source selection process (such as the SSO 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 CO must diligently prepare to control the communication. It is important that all Government participants be thoroughly prepared to defend their evaluations. Coordination with legal counsel is critical.

2.17.9 Common Problems in Debriefings. At the outset, the CO should state the purpose of the debrief, which is to provide constructive feedback. The debrief is not intended to change the outcome of the source selection decision.

2.17.9.1 Debating. As stressed above, the debriefer is charged with providing information to the offeror about the procurement, not with reconsidering or debating it. Thus, 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.

2.17.9.2 Indefinite Conclusion. The debriefing should have a definite conclusion so that the time when the offeror's protest clocks begin to run is clear. Once DOE has provided the required information and the offeror has finished asking its questions about whether proper source selection procedures were followed, the CO 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.

2.17.10 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 COs have generally denied offerors' requests to record a debriefing. If the CO considers agreeing to a request to record the debriefing, he or she should insist that two identical recordings be made and one be left with the agency. This will avoid disputes over whether the recording was altered in some way. The CO must prepare a summary of the debriefing and include it in the contract file.

2.17.11 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, not a "requested

and required" debriefing. The CO should, however, insist that the request be in writing and should include documentation in the file that the debriefing was not timely requested.

2.17.12 Debriefing the Awardee. While debriefings are commonly provided to unsuccessful offerors, FAR 15.506(a)(1) allows for debriefings of the awardee, as well.

2.17.13 Debriefs in Protest Situations. Sometimes an offeror will protest or state its intent to protest before the debriefing. This does not affect its right to a debriefing. In these cases, it is prudent to involve legal counsel.

2.17.14 Caucuses During the Debrief. It is advisable to take breaks during the debriefing if the Government needs 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.

2.17.15 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.

## 2.18 SEB Lessons Learned.

As mentioned earlier, MA-621 must collect and disseminate SEB lessons learned. A template for documenting SEB lessons learned is available in the STRIPES Library.

2.18.1 Documentation 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 MA-621 via email 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.

2.18.2 Lessons Learned Database. MA-621 will maintain a database of all DOE SEB lessons learned for acquisitions whose dollar value exceeds $25 million. The database is monitored for trends that develop.

2.18.3 Lessons Learned Dissemination. MA-621 will disseminate the lessons learned to each SEB within thirty days of the SEB being formally established. Any trend analysis that exists will accompany the lessons learned.

## 3.0 List of Attachments

1 – Non-Disclosure Agreement for Non-Federal Evaluators

2 – Government Notice for Handling of Proposals

**Attachment 1 – Conflict of Interest Non-Disclosure Agreement for Non-Federal Evaluators**

Conflict of Interest and Non-Disclosure Acknowledgement

In anticipation of my provision of advisory and support services for the Department of Energy under Contract Number [INSERT CONTRACT NUMBER],

I, _____ (Print Name), acknowledge the following:

(a) I understand that during the course of proposal evaluations under this contract, I may obtain access to confidential or proprietary business, technical, or financial information belonging to the Government or other entities, including but not limited to Department plans, policies, reports, studies, financial plans, internal data protected by the Privacy Act of 1974 (5 U.S.C. 552a), data which has not been released or otherwise made available to the public;

(b) I have read, and am familiar with, the applicable restrictions regarding organizational and personal conflicts of interest set forth at FAR Subpart 9.5, DEAR 952.209-72, DEAR 970.0371-6 and (name of Contractor) policies and procedures;

(c) To the best of my knowledge and belief, no conflict of interest exists that may--

(1) Result in my participation on a particular matter involving a procurement that will have a direct and predictable effect upon my financial interest;

(2) Diminish my capacity to impartially assist in the review of applications in response to a solicitation; or

(3) Result in a biased opinion or unfair advantage.

(d) In making the above statement, I have considered all the following factors that might place me in a position of conflict, real or apparent, regarding proposal information:

(1) All my stocks, bonds, other outstanding financial interests or commitments;
(2) All my employment arrangements (past, present, and under consideration); and
(3) All financial interests and employment arrangements of my spouse, minor children, and other members of my immediate household as well as my general partners, or any organization in which I serve as an officer, director, or trustee, or with whom I am negotiating for employment.

(e) I have a continuing obligation to disclose any circumstance that may create an actual or apparent conflict of interest. If I learn of any such conflict, I will report it immediately to my

supervisor, the Laboratory legal counsel and as otherwise required by Laboratory policy. The Laboratory Contractor, will, in turn, appropriately advise the Contracting Officer and/or his or her designated representative, and I will perform no more duties related to the procurement until I receive instructions on the matter.

(f) I agree to treat this information as proprietary and confidential and comply with agency procedures for the protection of such information (including electronic information) and use my best efforts to safeguard such information. I will not disclose the contents of, nor release, any such information to anyone either during or after the period of performance of Contract Number [INSERT CONTRACT NUMBER] other than:

(1) To individuals within my organization that are directly concerned with the performance of this contract and who have executed this Conflict of Interest and Non-Disclosure Acknowledgement;

(2) To other individuals designated by the DOE Contracting Officer; or

(3) Pursuant to an order from a court of competent jurisdiction.

(g) Whenever DOE furnishes any proposal information to me, I agree to use such information only for the purposes stated in a task or subtask assignment and to treat the information obtained in confidence. Further, I will not use such information for my own private gain or the private gain of others. This requirement for confidential treatment applies to information obtained from any source, including the offeror, without restriction. Any notice of restriction placed on such information by either DOE or the offeror shall be conspicuously affixed to any reproduction or abstract thereof and its provisions strictly complied with. Upon completion of my duties, I will return all copies to the DOE office that initially furnished such information.

Signature/Date: _____
Name/Title: _____
Organization: _____
Phone number: _____
Email address: _____

*Return to Contracting Officer/Selection Official*

**Attachment 2 – Government Notice for Handling Proposals**

## Government Notice for Handling Proposals

This proposal shall be used and disclosed for evaluation purposes only, and a copy of this Government notice shall be applied to any reproduction or abstract thereof. Any authorized restrictive notices which the submitter places on this proposal shall also be strictly complied with. Disclosure of this proposal outside the Government for evaluation purposes shall be made only to the extent authorized by, and in accordance with, the procedures in DEAR subsection 915.207-70.

(End of Notice)

# 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.

# Management Reserve and Contingency

Guiding Principle

- Effective contract pricing requires understanding the distinctions between the Federal Acquisition Regulation (FAR) term "contingency" and the program/project management terms "management reserve" and "contingency." Neither management reserve nor contingency (as defined in the DOE 413 series of directives) may be used in the pricing of contract actions.

*References: [FAR Subpart 15.4]*

## 1.0 Summary of Latest Changes

This is a new Acquisition Guide chapter. It applies to all contracts.

## 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 guide chapter provides guidance to contracting officers on: the distinctions between the Federal Acquisition Regulation (FAR) term "contingency" and the program/project management terms "management reserve" and "contingency;" and the effect of those distinctions on contract cost/pricing actions.

### 2.1 Definitions.

2.1.1 DOE 413.3. The DOE 413.3 series of directives defines management reserve as "(a)n amount of the total contract budget withheld for management control purposes by the contractor. Management Reserve is not part of the Performance Measurement Baseline." Contingency is defined as "(t)he portion of the project budget that is available for risk uncertainty within the project scope, but outside the scope of the contract. Contingency is budget that is not placed on the contract and is included in the Total Project Cost."

2.1.2 FAR. FAR 31.205-7(a) defines contingency as "a possible future event or condition arising from presently known or unknown causes, the outcome of which is indeterminable at the present time." The FAR does not have a definition for "management reserve" nor does it define contingency the same way as the DOE 413.3 series of directives does.

### 2.2 The DOE 413 Series of Directives.

2.2.1 Management Reserve. The DOE 413 series of directives, consistent with applicable Office of Management and Budget circulars and industry standards such as ANSI/EIA-748- A, identifies the term "management reserve" as a project management tool. As such, management reserve is calculated by the contractor after the Government and the contractor have agreed to the contract price to facilitate project management discipline. Often a contractor will initially calculate the amount of management reserve by considering the potential cost impact of uncertain events, i.e., risks that may be realized during contract/project performance and that, once realized, will affect the cost to perform the contract requirement. Examples are the recent price volatility in construction materials such as steel and concrete or less than anticipated productivity. Depending on its analysis of risk, the contractor may decide to hold back a certain amount of funding from its construction cost centers in order to cover the uncertainty of performance or overruns.

2.2.2 Contingency. The DOE 413 series of directives defines "contingency" as a Federal budgetary concept. Contingency is developed for budget purposes only. Contingency is the federally withheld amount used to fund requests for equitable adjustments with entitlement and changes under all contracts and contractor overruns on cost reimbursable contracts.

2.2.3 Contract Pricing. The terms management reserve and contingency are established in the DOE 413 series of directives for capital asset program/project management and budget identification purposes. They do not apply to the contracting officer's pre-award position of contract (and modification) pricing.

**2.3 FAR 31.205-7 Contingencies**. FAR Part 31 provides guidance to contracting officers regarding treatment of various types and categories of cost, including costs for "contingencies" as defined at FAR 31.205-7.

2.3.1 Categories of Contingencies. FAR 31.205-7(c) states that in connection with estimates of future costs, contingencies fall into two categories.

- Those that may arise from presently known and existing conditions, the effects of which are foreseeable within reasonable limits of accuracy, e.g., anticipated costs of rejects and defective work. Contingencies of this category are to be included in the estimates of future cost so as to provide the best estimate of performance cost. (FAR 31.205-7(c)(1))

- Those that may arise from presently known and unknown conditions, the effect of which cannot be measured so precisely as to provide equitable results to the contractor and to the Government. Contingencies of this category are to be excluded from cost estimates under the several items of cost, but should be disclosed separately (including the basis upon which the contingency is computed) to facilitate the negotiation of appropriate contractual coverage. FAR cites as examples severance pay, insurance and indemnification, and maintenance and repair costs. (FAR 31.205-7(c)(2))

2.3.2 When Contingencies Should Be Included In the Cost Estimate. In the case of FAR 31.205-7(c)(1), when the underlying sources and causes of performance uncertainty are known and the most likely cost effects of such uncertain events/conditions can be projected within reasonable limits of accuracy, they should be included in the contracting officer's estimate of fair and reasonable cost. An example is direct labor/material escalation in accordance with standard estimating procedures. Normal escalation costs can be reasonably and accurately projected and therefore meet the definition of allowable contingency costs.

2.3.3 Burden of Proof. For a proposed contingency cost (as with any proposed cost), the contractor has the burden of proof in demonstrating its proposed cost is reasonable, which includes demonstrating the reasonableness of any estimating method. Contracting officers should categorically reject any proposed cost or estimating technique that the contractor does not prove is reasonable and should give no credence to any estimating technique--regardless of its sophistication, complexity, or former use--that is not fully explained, reasonable, and appropriate to the circumstances.

2.3.4 Narrow Interpretation of Allowable Contingency. The FAR 31.205-7(c)(1) allowable contingency is limited to presently known and existing conditions whose effects are foreseeable within reasonable limits of accuracy and should be interpreted very narrowly and as part of a discrete cost element that can be accurately priced. FAR 31.205-7(c)(1) does not provide for contingency to be priced as a separate element of cost or cost objective.

2.3.5 Unallowable Contingency. Contingency that is not covered under FAR 31.205-7(c)(1) is covered by FAR 31.205-7(c)(2). FAR 31.205-7(c)(2) contingency should not to be priced into the contracting officer's fair and reasonable estimate of contract cost either as part of a cost element such as direct labor or material or as a separate contingency cost element. FAR 31.205-7(c)(2) provides that the contracting officer may provide contractual coverage of contractor specifically identified contingencies. For instance, in a period of economic uncertainty the contracting officer might decide that it is not practical to estimate a fair and reasonable material escalation factor. In this case FAR 31.205-7(c)(2) would allow the contracting officer to exclude any amount for material escalation in the negotiated contract price and to include an economic price adjustment clause in the contract. This is separate from the determination of the appropriate profit/fee.

2.3.6 Profit/Fee. There are a number of uncertainties inherit in the type of work the Department asks contractors to perform. Examples are the type and extent of contamination, the quantity of soil or groundwater requiring remediation, changes in the regulatory environment, and availability of waste disposal sites. Contingencies for these types of uncertainties should not be priced into contract actions to the extent they are addressed by the terms and conditions of the contract (for example, the Changes clause and the Differing Site Conditions clause).

In addition, contracting officers should not include in the contract price any management reserve, contingency, or other similar amount with or without profit/fee to cover any prospective requests for equitable adjustments, changes, or risks that might or might not occur during performance. If such events materialize, to the extent the contractor can establish

entitlement, the contracting officer may negotiate appropriate adjustments to the contract price in accordance with the applicable contract clauses.

There are always risks in the performance of a contract. A large part of the sharing of these risks between the contractor and the Government is normally established by the contract type. Regardless of the contract type, the contractor always assumes a certain amount of risk. The contractor assumption of normal risk is recognized in the profit/fee that the Government makes available to the contractor. Thus the contracting officer should not attempt to provide contractual coverage for all contingencies that a contractor may identify when using DOE's Weighted Guidelines.

2.3.7 Proscriptions. Contracting officers shall not -

- Use either management reserve or contingency (as defined in the DOE 413 series of directives or similar project management concepts) in the pricing of contract actions, even if they have been validated as part of the project management process.
- Except as narrowly allowed by FAR 31.205-7(c)(1), price estimated costs for contingencies into DOE contract actions and shall not pay any profit/fee to compensate for excluding such contingencies from the contract price.
- 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.
- Relieve the contractor of its responsibility to demonstrate that its proposed costs are reasonable and its estimating techniques are sound.

# 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.<br><br>T&M and LH contracts are evaluated as CPFF.<br><br>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.

# Provisional Payment of Fee

15.41

Guiding Principle

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- When utilizing provisional payment of fee carefully specify both the requirements the Contractor must meet to earn fee and the requirements it must meet to be entitled to provisional payment of fee.

*Reference: [FAR Subpart 16.4]*

## 1.0 Summary of Latest Changes

This is a new Acquisition Guide chapter. It applies to all contracts except Management and Operating contracts.

## 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 guide chapter provides guidance to Contracting Officers regarding on provisional payment of fee, which is a topic not explicitly addressed in the Federal Acquisition Regulation.

### 2.1 Definitions.

2.1.1 Price. Price means cost plus any fee or profit applicable to the contract.

2.1.2 Profit and Fee. The terms profit and fee are synonymous.

2.1.3 Incentive. Incentive means a term or condition (used only when a firm-fixed-price arrangement is not appropriate) whose purpose is to motivate the Contractor to provide supplies or services at lower costs and, in certain instances, with improved delivery or technical performance, by relating the amount of profit or fee earned to the Contractor's performance.

2.1.4 Earned fee for an incentive means the fee due the Contractor by virtue of its meeting the contract's requirements entitling it to fee. Earned fee does not occur until the Contractor has met all conditions stated in the contract for earning fee.

2.1.5 Available fee for an incentive means fee the Contractor might earn but has not yet earned.

2.1.6 Provisional payment of fee. Provisional payment of fee for an incentive means the Government's paying available fee to the Contractor for making progress towards meeting the performance measures for the incentive before the Contractor has earned the available fee. As "an authorized Government disbursement of monies to a contractor prior to acceptance of supplies and services by the Government," a provisional payment of fee falls under the category of a contract financing payment as stated in the Definitions section of FAR Part 32. The Government's determination that the Contractor has met the requirements for the provisional payment of fee for an incentive has no implications for the Government's eventual determination that the Contractor has or has not earned the associated available fee for the incentive. Provisional payment of fee is a separate and distinct concept from earned fee. A contractor could in some instances, for example, receive 100% of possible provisional fee payments yet not earn any fee (the contractor would be required to return all of the provisional fee payments). A contractor could in other instances, for example, receive 0% of possible provisional fee payments yet earn the entire amount of available fee (it would not receive any fee payments until the Government's determination that the Contractor had earned the associated available fee for the incentive).

2.1.7 Clause. Clause means a term or condition used in a contract.

**2.2 Earned Fee**. Articulating clearly in a contract what constitutes the Contractor's meeting the contract's requirements entitling it to fee for an incentive (how and when the Contractor earns fee) is a key aspect of contract formation. Under the FAR's contract formation and pricing construct and congruent with DOE fee policy, the concept of earned fee (similar to the concept of an incentive) does not fit in perfectly with firm-fixed-price contracting. A firm-fixed-price contract for one item (the simplest form of a fixed-price type contract) calls for the Contractor to deliver one item and for the Government to pay (the price) the Contractor once, upon performance, which occurs at contract completion. If the Contractor doesn't perform, the Government pays nothing (the Contractor works under the ultimate "incentive," receiving neither cost reimbursement nor fee if it does not perform).

2.2.1 Preference for Fixed-Price. DOE's policy is to first consider the use of a fixed-price contract. This contract type is most appropriate when supplies or services can be objectively defined in a statement of work and the risks involved can be estimated with an acceptable degree of certainty. Of all contract types, this contract type best matches DOE's two primary principles for aligning contract incentives, that is, it provides a contract that is structured so that the Contractor is not rewarded if the taxpayers are not well served and it results in the Contractor bearing responsibility for its actions.

2.2.2 Preference for Objective Performance Measures. If use of a fixed-price contract is not appropriate and a cost-reimbursement contract is selected, DOE policy mandates the Contracting Officer use objective performance measures as much as possible and only use subjective performance measures if objective measures are not feasible. DOE policy also mandates the Contracting Officer link all of, or a substantial portion of, the fee to the

achievement of final outcomes rather than interim accomplishments. Ideally, the Contractor will not earn fee for any incentive until it has completed the contract (or portion of the contract that provides value to the taxpayer, such as completion of all of the requirements for a performance based incentive). At the end of a major project, for example, if the Contractor has not met the objective of the contract for that project, it should not receive fee for its performance on that project.

2.2.3 Link Earning of Fee to Achievement of Final Outcomes. In all cases a contract's price, incentives included in its price, and all other terms should reflect the Government's and the Contractor's agreement to link, to the maximum extent practical, the Contractor's earning of fee to its achievement of final outcomes rather than interim accomplishments.

2.2.4 Specify the Requirements to Earn Fee. It is a fundamental requirement of DOE policy that if a contract includes an incentive it must specify unambiguously the requirements the Contractor must meet to earn the fee for the incentive.

**2.3 Provisional Payment of Fee**. As stated above, ideally, Contractors will not earn fee for any incentive until they have completed their contracts. It is evident, of course, that delaying Contractors' earning of fee will influence Contractors' toward proposing higher fees—because they will face greater uncertainly and bear higher financing costs. To mitigate this upward influence on fees due to the delayed earning of fees, Contracting Officers may sometimes determine it in the Government's interest to provide some provisional payment of fees. In some cases it may be appropriate to provide a mix of incentives in the contract with different types of fee payments associated with different incentives. A contract might appropriately be structured, for example, to allow some fee to be paid and earned as progress is made, some fee to be paid provisionally (but not earned) until contract completion, and other fee only to be earned and paid at contract completion.

2.3.1 Specify Requirements and Obligations. Before a contract may provide for provisional payment of fee for an incentive, it must first specify unambiguously the requirements the Contractor must meet to earn the fee for the incentive. After that requirement is met, if a contract provides for provisional payment of fee for an incentive, the contract must stipulate the requirements the Contractor must meet before the Government is obligated to pay fee, provisionally, to the Contractor for that incentive and for the Contractor to have any right to retain the provisionally paid fee.

2.3.2 Payment of Provisional Fee. The contract must also cover the following areas.

2.3.2.1 Contracting Officer's Discretion. The contract must state the Contracting Officer, at his/her sole discretion, determines if the Contractor has met the requirements.

2.3.2.2 Calculation of Payment. The Contracting Officer's calculation of the amount of each provisional fee payment:

- Will never be a set percentage, a fixed amount, or any other constant value;
- Will be directly and expressly linked to continued performance, that is, to continued progress towards eventually earning the available fee for the incentive;
- Will be accomplished per explicit procedures expressed in the contract; and
- With each successive payment, if any, will reflect the Contractor's cumulative performance to date.

2.3.2.3 Contractor's Failure. If the Contracting Officer determines the Contractor has not met the requirements to retain any provisionally paid fee and notifies the Contractor, the Contractor must return that provisionally paid fee to the Government within 30 days. The Contactor's obligation to return the provisional paid fee is independent of its intent to dispute or its disputing the Contracting Officer's determination.

If the Contractor fails to return the provisionally paid fee within 30 days of the Contracting Officer's determination, the Government, in addition to all other rights that accrue to the Government and all other consequences for the Contractor due to the Contractor's failure, may deduct the amount of the provisionally paid fee from: amounts it owes under invoices; amounts it would otherwise authorize the Contractor to draw down under a Letter of Credit; or any other amount it owes the Contractor for payment, financing, or other obligation.

**2.4 Contract Clause**. Contracting Officers must include the Provisional Payment of Fee clause, which is Attachment 1 to this guide chapter, in all contracts using provisional payment of fee.

**2.5 Best Practices**. If providing for provisional payment for an incentive in a contract, Contracting Officers must:

- Specify unambiguously in the contract the requirements the Contractor must meet to earn the fee for the incentive;
- Include the attached clause; and
- Ensure all parts of the contract are congruent with the clause's requirements.

**3.0 Attachments**: Attachment 1 Provisional Payment of Fee

Attachment 1

PROVISIONAL PAYMENT OF FEE

(a)Notwithstanding any other term or condition of this contract to the contrary, this clause applies to and has precedence over all other terms and conditions of this contract that provide for provisional payment of fee.

(b)The Contractor must notify the Contracting Officer immediately if it believes any incongruence exists between this clause and any other term or condition of this contract that provides for provisional payment of fee. If a term or condition of this contract provides for provisional payment of fee but fails to include all of the requirements of this clause, that term or condition will be considered to include the omitted requirements.

(c)This clause conforms to the Federal Acquisition Regulation and Department of Energy fee policy and constructs. The following definitions and concepts apply.

(1) *Price* means cost plus any fee or profit applicable to the contract.

(2) The terms *profit* and *fee* are synonymous.

(3) *Incentive* means a term or condition whose purpose is to motivate the Contractor to provide supplies or services at lower costs, and in certain instances with improved delivery or technical performance, by relating the amount of profit or fee earned to the Contractor's performance.

(4) *Earned fee* for an incentive means fee due the Contractor by virtue of its meeting the contract's requirements entitling it to fee. Earned fee does not occur until the Contractor has met <u>all</u> conditions stated in the contract for earning fee.

(5) *Available fee* for an incentive means the fee the Contractor might earn but has not yet earned.

(6) *Provisional payment of fee* for an incentive means the Government's paying available fee for an incentive to the Contractor for making progress towards meeting the performance measures for the incentive before the Contractor has earned the available fee.

(7) Provisional payment of fee has no implications for the Government's eventual determination that the Contractor has or has not earned the associated available fee. Provisional payment of fee is a separate and distinct concept from earned fee. The Contractor could, for example, receive 100% of possible provisional fee payments yet not earn any fee (the Contractor would be required to return all of the provisional fee payments). The Contractor could, for example, receive 0% of possible provisional fee payments yet earn the entire amount of available fee (it would not receive any fee payments until the Government's determination that the Contractor had earned the associated available fee for the incentive).

(8) *Clause* means a term or condition used in this contract.

(d)This contract's price, incentives included in its price, and all other terms and conditions reflect the Government's and the Contractor's agreement to link, to the maximum extent practical, the Contractor's earning of fee to its achievement of final outcomes rather than interim accomplishments.

(e)Certain terms and conditions of this contract provide for provisional payment of fee for certain incentives. Other terms and conditions of this contract provide for each such incentive the requirements the Contractor must meet to earn the fee linked to the incentive. The terms and conditions of this contract that provide for provisional payment of fee for certain incentives include for each such incentive the requirements the Contractor must meet before the Government is obligated to pay fee, provisionally, to the Contractor and for the Contractor to have any right to retain the provisionally paid fee.

(f)The Contracting Officer, at his/her sole discretion, will determine if the Contractor has met the requirements under which the Government will be obligated to pay fee, provisionally, to the Contractor and for the Contractor to have any right to retain the provisionally paid fee.

(g)If the Contracting Officer determines the Contractor has not met the requirements to retain any provisionally paid fee and notifies the Contractor, the Contractor must return that provisionally paid fee to the Government within 30 days:
(i) the Contactor's obligation to return the provisional paid fee is independent of its intent to dispute or its disputing the Contracting Officer's determination; and
(ii) if the Contractor fails to return the provisionally paid fee within 30 days of the Contracting Officer's determination, the Government, in addition to all other rights that accrue to the Government and all other consequences for the Contractor due to the Contractor's failure, may deduct the amount of the provisionally paid fee from: amounts it owes under invoices; amounts it would otherwise authorize the Contractor to draw down under a Letter of Credit; or any other amount it owes the Contractor for payment, financing, or other obligation.

(h)If the Contractor has earned fee associated with an incentive in an amount greater than the provisional fee the Government paid to the Contractor for the incentive, the Contractor will be entitled to retain the provisional fee and the Government will pay it the difference between the earned fee and the provisional fee.

# Negotiation Documentation: Pre-negotiation Plan and Price Negotiation Memorandum

Guiding Principle

- The primary purpose of a pre-negotiation plan is to ensure the Government has developed negotiation objectives that will lead to a fair and reasonable price.
- The primary purpose of a price negotiation memorandum is to explain, in light of the pre-negotiation plan, how the negotiated price was established.

*References: [FAR 15.4, FAR 52.215-20, and FAR 52.215-21]*

## 1.0 Summary of Latest Changes

This update: (1) revises the chapter number from 15.4-3 to 15.406 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. This chapter does not cover efforts and projects performed for DOE by other Federal agencies.

### 2.1 The Purpose of the Pre-negotiation Plan and the Price Negotiation Memorandum.

Negotiating any pricing action when the price is not established by law, regulation, or competition requires developing 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. When cost analysis is required, formal documentation (comprising the pre-negotiation plan and the price negotiation memorandum) is critical. The pre-negotiation plan must reflect a rigorous analysis, evaluation, and examination by element of cost. The price negotiation memorandum must reflect the results of the negotiation. Where there is a departure from the pre-negotiation plan, the price negotiation memorandum must identify not only the negotiated results, but also explain, with the same scope and depth of the analysis supporting the pre-negotiation objectives, why the negotiated results differ from the pre-negotiation objectives.

The focus of this guide chapter is on Change Orders and Requests for Equitable Adjustment (REAs). It can also serve as the basis for documenting price negotiations in the award of sole source contracts whose prices are not established by law, regulation, or competition.

2.1.1 The Pre-negotiation Plan. The pre-negotiation plan is the official documentation 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, the cost objectives, and the profit or fee objective. Because it serves as the basis of the negotiation, the pre-negotiation plan should fully explain the contractor's and Government's positions. The pre-negotiation plan template found at Attachment A of this guide chapter is provided to assist contracting officers in their analysis. Contracting activities are encouraged, through implementation level procedures, to establish additional templates aligned with their specific needs. However, such templates must conform to 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 template is strongly recommended. The pre-negotiation plan should:

- Identify and compare the contractor's proposed costs to the Government's position for each 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.
- 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 negotiation objectives. Where they are not fully utilized, the contracting officer should identify the extent to which they were not utilized and the basis. The contracting officer should include additional facts and circumstances supporting any analysis.
- Provide a detailed rationale for the Government's fee/profit objective.
- Provide full traceability to the proposal data that was relied upon.

2.1.2 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, which is referenced in FAR 15.4, provides instructions to the contractor and subcontractors. When submitting proposals, contractors must to provide a breakdown by element of cost that is clearly traceable to the Work Breakdown Structure (WBS) of the Statement of Work (SOW) and the individual Contract Line Item Numbers (CLINs), as applicable. A contractor's proposal should provide a breakdown for each element of cost, identify the basis of estimate for each element of cost, and include summary level tabulations.

Failure to ensure that 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 the clauses at: FAR 52.215-20 – Requirements for Cost or Pricing Data or Information Other Than Cost or Pricing Data; and FAR 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 must be obtained unless an exception applies.

2.1.3 Contract Changes and Requests for Equitable Adjustment (REA). The development of a pre-negotiation plan memorandum to negotiate an REA or the definitization of a Contract Change 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 read in tandem with the memoradum

when documenting the pre-negotiation objectives. Among other things, the Guide Chapter and memorandum provide guidance on the evaluation of REAs, the analysis required in establishing negotiation objectives, and documentation necessary. Some of the key points are:

- 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 costs that are not.
- The pre-negotiation plan must break out the cost of new work, deleted work, and cost in excess of work that had been negotiated. In addition, it 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 system. But it is a project management tool. It is neither a cost and price analysis technique nor a submission of current, accurate, and complete cost and pricing data. The baseline validation process is not an adequate substitute for cost and price analysis, which is the responsibility of the contracting officer.

2.1.4 The Pre-negotiation Plan Template. The required content of the pre-negotiation plan memorandum is identified in the pre-negotiation plan template. The template comprises five sections: (I) Background; (II) Summary of Total Cost and Fee/Profit; (III) 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 objectives represent the crux of the cost and price analysis that is the basis for the government's negotiation objective. Therefore, the reference notes identified for each element of cost should, as discussed earlier, provide full traceability to the proposal data that was relied upon. They should also provide 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 negotiation objective. Where recommendations or findings are not fully utilized, the contracting officer should identify the extent to which they are not utilized and explain the basis for this decision, including any additional facts and circumstances.

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 types of cost analysis and price analysis that are typically considered for each major element of cost and its associated reference note.

However, these are only 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.

2.1.5 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 any position that departs from the pre-negotiation plan. 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 plan is not required. However, where there are differences between the negotiation objectives and the negotiated outcome, or there were issues addressed and resolved during negotiation that were not identified in the pre-negotiation plan, the price negotiation memorandum should provide a full explanation of why the agreement reached is appropriate.

Where there is a deviation from the pre-negotiation plan, the price negotiation memorandum should reflect the basis for the negotiated 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<br>BACKGROUN |
|---|

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.1 Productive 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.2 Direct 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.3 Direct 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 Elements of 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
BACKGROUN

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.1 Productive 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.2 Direct 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.3 Direct 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?

# Unsolicited Proposals

Guiding Principles

- National Energy Technology Laboratory coordinates all unsolicited proposals for DOE.
- Unsolicited proposals for Energy Savings Performance Contracts are handled consistent with 10 CFR 436 subpart B.

*[References: FAR 15.6, DEAR 915.6, DOE Order 542.2A]*

## 1.0 Summary of Latest Changes

This update includes editorial changes, and adds a citation to DOE Order 542.2A, Unsolicited Proposals (or successor document).

## 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 Coordination of Unsolicited Proposals.** The National Energy Technology Laboratory coordinates the receipt and evaluation of all unsolicited proposals for DOE, consistent with the requirements of DOE Order 542.2A (or successor document).

**2.2 Guidance for Submitters.** Guidance for prospective submitters of unsolicited proposals is located at: http://www.netl.doe.gov/business/unsolicited-proposals. Questions regarding the process for the submission of unsolicited proposals should be referred to the DOE Unsolicited Proposal Manager at NETL by email at DOEUSP@NETL.DOE.GOV

**2.3 Energy Savings Performance Contracts.** For unsolicited proposals related to energy savings performance contracts, see guide chapter 41.2.

## Table of Contents

## CHAPTER 16 - TYPES OF CONTRACTS


- 16.102 General Guide to Contract Types - August 2020
- 16.104 Combining Contract Types Under Non-M&O Contracts - May 2019
- 16.405 Award-Fee Plans and Performance Evaluation Measurement Plans - April 2018
- 16.5 Multiple-Award Contracts and Governmentwide Acquisition Contracts Including Delivery Orders and Task Orders - September 2017

# 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 provides additional guidance regarding performing accounting system reviews and final indirect cost rate proposal reviews on cost reimbursement type contracts.

## 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. An accounting system review must be performed by a qualified auditor prior to award of a cost reimbursement type contract (unless the contractor has an approved accounting system and the approval was based on a recent audit by a qualified auditor). Additionally, if after award any changes are made to the accounting system, then an accounting system review of the changes must be performed by a qualified auditor and any changes must be approved by the CO. Finally, if during an annual review of a contractor's final indirect cost rate proposal the auditor decides the contractor's accounting system is not adequate for auditing the contractor's proposal, an accounting system review must be performed.

- 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.<br>• Contractors are experienced in meeting it.<br>• Market conditions are stable.<br>• 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<br>• A minimum, maximum, and target fee<br>• A formula for adjusting fee based on actual costs and/or performance<br>• Performance targets (optional) | • Estimated cost<br>• Base amount, if applicable, and an award amount<br>• Award fee evaluation criteria and procedures for measuring performance against the criteria | • Estimated cost<br>• Fixed fee | • Ceiling price<br>• A per-hour labor rate that also covers overhead and profit<br>• 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). |

# Combining Contract Types Under Non-M&O Contracts

Guiding Principles

- Multiple contract types, when clearly delineated by CLIN, may be used within a single contract vehicle.
- Appropriate clauses should be selected and specified for each contract type.

*[References: FAR 16, DEAR 916, DOE Acquisition Guide chapter 16.102, Federal Procurement Data System-Next Generation Data Element Dictionary]*

## 1.0 Summary of Latest Changes

This is a new Acquisition Guide chapter that articulates some best practices in using multiple contract types within a single non-Management and Operating (non-M&O) contract vehicle.

## 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 augments Guide chapter 16.102 (General Guide to Contract Types for Requirements Officials). It reinforces the notion that, if the entire contract cannot be executed on a firm-fixed-price (FFP) basis, then certain aspects of the contract may be performed under FFP contract line item numbers (CLINs), while other aspects are performed under cost-reimbursement type CLINs.

### 2.1 Applicability

This chapter is applicable to DOE and NNSA contracting activities, and is more pertinent to non-M&O contracts.

### 2.2 Policy on Combining Contract Types.

2.2.1 General. For contracts that, for the reasons covered at FAR 16.1, cannot be negotiated and performed on a FFP basis, the contracting officer (CO) must consider whether any portion of the contract can be established on a FFP basis (see FAR 16.103(b)). This policy is aimed at tying profit to risk and performance. In accordance with FAR 16.102, only the contract types described in FAR part 16 may be used. It should be noted that neither "hybrid" nor "combined" is an acknowledged contract type under the FAR. Instead, FAR part 16 states that a

combination of the FAR-recognized contract types may be used. While this flexibility can be advantageous, it requires a thorough analysis of the overall award. A decision will also have to be made regarding the predominant contract type for reporting in the Federal Procurement Data System (FPDS).

## 2.3 Procedures for Combining Contract Types.

2.3.1 Separate CLINs. First, where some portion(s) of the contract are FFP and others are in different categories of the fixed-price family or the cost-reimbursement family, the various contract types must be delineated under separate CLINs.

2.3.2 Clauses Clearly Associated with CLINs. When forming a contract featuring multiple contract types, the CO should clearly associate the appropriate clauses with each of the CLINs. This can be done through a cross-referenced matrix that shows which clauses apply to which CLINs vis-à-vis their contract types (see, e.g., 48 CFR subpart 52.3).

## 2.4 Advantages of Multiple Contract Types.

2.4.1 Balancing Risk. When properly planned, written, and negotiated, a contract featuring multiple contract types can better balance the risk between the Government and the contractor. This calls for rigorous analysis of requirements. Indefinite aspects of the work must be segregated from the definite requirements. Likewise, work with a high level of performance uncertainty must be segregated from work that is well defined and understood.

2.4.1.1 Different Requirements. Although there are often good reasons for cost-reimbursement arrangements, other requirements under a given contract might be stable, and definable in firm and specific terms, lending themselves to the FFP construct. Still other requirements carry risks that should be handled equitably (e.g., Fixed Price Level of Effort or Fixed Price with Economic Price Adjustment). The Government is responsible for clearly defining and specifying the requirements and work associated with each contract type.

2.4.1.3 Different Delivery Types. Risk can also be balanced by identifying requirements better suited to an indefinite delivery-type arrangement (see FAR 16.5) than to a cost-reimbursement contract, where the Government shoulders the cost and performance risk.

2.4.2 Lower Administrative Burdens with FFP CLINs. Once negotiated, the scope under FFP scope typically requires less administrative effort on the Government side than cost-reimbursement scope. Under FFP CLINs, the contractor has agreed to deliver a product or service on a specified date, in accordance with specified requirements, at a fixed price. Thus, there is no need for detailed analysis of cost performance and no need for the surveillance associated with cost principles (FAR part 31; DEAR part 931) or Cost Accounting Standards (FAR part 30).

## 2.5 Special Considerations for Using Multiple Contract Types.

2.5.1 Preaward Cost Evaluations. For each contract type contained in the overall award, an appropriate cost evaluation method is needed. For example, on competitive procurements, a cost-realism analysis is required for cost-reimbursement CLINs (see FAR 15.404-1(d)(2)). For fixed-price CLINs, only price analysis is required. Additional methods will be required for evaluating indefinite delivery-type CLINs, depending on the contract type, the extent of competition, and the nature of the work. Given that the evaluation team needs different approaches to evaluating different parts of a contractor's cost proposal, their work will increase in complexity. This could lead to a heightened risk of making mistakes during proposal evaluations, which could compromise the integrity of source selections.

2.5.2 Contract Administration. Administration appropriate to each contract type is needed. In order to avoid unnecessary burdens for the CO and the Contracting Officer's Representative (COR), the contract should clearly identify the contract type, as well as the clauses governed by contract type (e.g., payment, inspection, termination, changes, etc.), with the appropriate CLINs in Sections H or I. Moreover, any firm-fixed-price (FFP) scope and requirements must be unambiguous, as even seemingly minor changes under a FFP CLIN could result in requests for equitable adjustment.

2.5.3 Cost Accounting. For contracts with both fixed-price and cost-reimbursement CLINs, there is some risk of costs being charged to a CLIN other than the one under which those costs were proposed, evaluated, negotiated and awarded. The Government must clearly differentiate the work under each CLIN, in order to reduce the potential for mischarging of costs.

2.5.4 Coding in STRIPES. If questions arise during the acquisition planning process, DOE's Office of Contract Management Systems Division or NNSA's System and Tools Team should be consulted. They can help prevent coding issues from becoming long-term problems.

2.5.4.1 Coding for Type of Contract. Because STRIPES transmits data to the FPDS, the "Type of Contract" data element in STRIPES should be consistent with that in FPDS. Choices for "type of contract" are limited to those covered in FAR part 16, and only one type can be selected for each award. If an award has more than one contract type, the CO must identify the type with greater value, and select the appropriate value from the drop-down menu (see FPDS-Next Generation Data Element Dictionary).

2.5.4.2 Coding for Type of Vehicle. In STRIPES, there are two ways to characterize the type of vehicle: standalone and "Indefinite Delivery Vehicle (IDV)." In STRIPES, there is no way to issue task or delivery orders under a contracting vehicle coded as "standalone." Thus, if contract will have both standalone and indefinite delivery-type CLINs,

choose "IDV" as the type of vehicle, even if the preponderance of funds will be obligated under standalone CLINs.

**2.6 Training Needed**. Given the potential for better risk-sharing and post-award contract administration efficiencies, both Government and the contractor personnel may need refresher training on the distinctions between fixed-price work and cost-reimbursement work.

2.6.1 Government Personnel may need training on clear requirements writing, to including explicit inspection and acceptance criteria. Education on cardinal changes, cost monitoring and oversight in both fixed-price and cost-reimbursement settings is also important. Management of FFP work differs markedly from that of cost-reimbursement work.

2.6.2 Contractor Personnel new to contracts with multiple contract types, likewise, may not understand the differing levels of detail required, respectively, in invoices for fixed-price and cost-reimbursement work. This can be covered at the post-award conference.

**2.7 Best Practices.** Although the benefits of using contracts with multiple contract types often come with a steep learning curve, the key to success is identifying the right arrangement for each CLIN, and reinforcing that through the contractual documents, as well as ongoing communications among the parties.

2.7.1 Well-Written Requirements must consider the nature of the work, including the need for unproven technologies, the stability of requirements, any uncertainties in characterization data, regulatory constraints, the Government's ability to define delivery requirements, and any other unique conditions. In developing the requirements, it is important to account for the historical data, such as any observed variations in cost, contract management challenges, and the extent of orders and REAs. These factors should help the acquisition team determine the appropriate arrangements for the requirements. Ensure scope is clearly identified in the contract, so that there are no instances of same or similar work in two different CLINs with different contract types. Each CLIN in Section B must correlate to a section in Section C.

2.7.2 Acquisition Planning and Approvals. Awards that anticipate use of multiple contract types should identify the rationale and expected benefits for this added complexity in the Acquisition Planning documents and determine the preferred path forward for a combined contract type award. The CO's coordination and approval requirements likely do not address combining contract types and the approval process may need to be tailored. The approving official may have the flexibility to treat the review and approval of a combined contract type award based on highest risk contract type, even if of a minor dollar value, based on predominant dollar value, or other unique aspect of the award.

2.7.3 Early Engagement with Appropriate Personnel. Ensure that technical subject matter experts (SMEs), as well as the professionals who will ultimately manage the contract, are included early in the acquisition process. These professionals (administering COs and CORs) are best-positioned to anticipate any post-award administration challenges. They are

likely to have detailed knowledge of the requirements, procurement history, previous contract structures, complexities, and risks.

2.7.4 Solicitation provision. FAR 16.105 requires the provision at 52.216-1, Type of Contract, in most circumstances. This provision has fill-ins for the contract type. This provision advises industry as they prepare their proposal what type of contract the Government intends to award.

2.7.5 Pre-Proposal Conferences. The contractor may need to understand the reasons for the different contract types within a single notional contract award. Pre-proposal conferences can help to educate all potential offerors at the same time.

2.7.6 Applicable Clauses. Provide a cross-reference matrix, modeled after the matrix at 48 CFR subpart 52.3, that shows which clauses apply to which contract type. (Note: FFP CLINS must include well-established inspection and acceptance criteria.)

2.7.6.1 Funding. In Section G, use a table to show the status of CLINs that are incrementally funded, CLINs that are subject to contract financing payments, etc.

2.7.6.2 Payments. Clearly identify to which CLIN the payment clause(s) included in Section I apply.

2.7.7 Post-Award Conference. For the Post-Award Conference, include the Acquisition Integrated Project Team to help with explaining how the contract will be administered. Communicate expectations on the various invoicing and accounting practices, deliverables and schedule, terms of the performance work statement (PWS), reporting requirements, etc. Include a discussion of different contract types and related CLINs so that everyone understand the differing approaches to contract administration tied to different CLINs.

2.7.8 Audits. Make certain that policies and procedures are in place to prevent mischarges. Make sure the contractor's timekeeping system is audited, including payroll records. Ensure incurred cost audits are conducted, and that proper corrective actions are taken.

2.7.9 Quality Assurance Surveillance Plan (QASP) is a tool for helping staff monitor contractor performance, ultimately making contract management more efficient and effective.

# Award-Fee Plans and Performance Evaluation Measurement Plans

Guiding Principles

- Appropriately incentivized Award Fee Plans and Performance Evaluation Measurement Plans motivate the Contractor to deliver excellent performance with quality products and services while achieving the contract performance

*[References: FAR 16, 32, & 46; DEAR 915.404-4-72 & 916.405-2, DOE Acquisition Guide Chapters 16.102, 71.1]*

## 1.0 Summary of Latest Changes

This update: (1) replaces the Acquisition Guide Chapter 16.2R1 (June 2014), (2) removes redundant and unnecessary information, (3) provides guidance on fee methodology and evaluation methods documentation, and (4) clarifies establishment of evaluation criteria.

## 2.0 Discussion

The purpose of this chapter is to provide guidance in utilizing incentive contracts to motivate exceptional contractor performance, while aligning the incentives used with DOE and taxpayer interests and balancing cost, schedule and technical performance. DOE has many contracts with a combination of fee structures within the contract. For example, the contract may have elements of both incentive fee (objective, formula-based fee) and award fee (subjective evaluation of fee). In accordance with FAR 16.401(e)(3), award fee contracts must be supported by an award-fee plan.

At DOE, the award-fee plan (AFP) is part of the Performance Evaluation Management Plan (PEMP) (referred to as "the Plan" in this chapter). Contracts with only predetermined, formula-type incentives that are defined in the contract (e.g., Cost Plus Incentive Fee contract) at the time of award do not have an incentive plan. This chapter addresses both award-fee incentives and Performance Based Incentives (PBIs).

This chapter provides further guidance to the acquisition regulations and policies contained in the references above and should be considered in the context of those references.

This chapter does not apply to Management and Operating contracts. This chapter applies to award fee contracts and contracts with award fee and PBIs.

**2.1 Content of the Plan.** A template with sample language for the Plan is provided in Attachment 2. This Attachment also explains the purpose and intent of each component of the Plan. Each contracting activity has the latitude to revise the format of the template to meet site

specific or contract specific needs. Where a component of the Plan is required in order to achieve approval, the word "shall" is used.

**2.2 Fee Methodology Documentation.** A description of fee methodology supporting the subjective and objective criteria shall be submitted with the Plan. This is a companion documentation that is not within the Plan, but is a separate document for DOE internal use only. In documenting the fee methodology, the following factors should be included:

- The relative importance of the award fee (subjective) criterion and/or performance based incentives (PBI) relative to the government's objectives and relative to other award fee criteria or PBIs;
- The contractor's risk of unsuccessful performance and impact of unsuccessful performance to the government, and
- The contractor input (i.e., the estimated cost of performance) for the criterion or PBI.

The allocation of available fee to the various criteria for each performance period should align with the government's objectives for that performance period. In other words, this should not be a simple reiteration of the allocation for previous performance periods, without considering the government's objectives for the evaluation period or the effectiveness of the previous allocation at motivating the contractor to exceptional performance.

**2.3 Fee Structure.** The fee structure is one of the most critical elements of the plan and therefore, the Plan ***shall*** include the description of the fee structure in the Plan. An effective fee structure will place the government and our contractors in a win-win situation - the contractor earns maximum fee when the government gets the maximum benefit. Conversely, an ineffective fee structure may place the government and our contractors in an adversarial position. In a worst-case situation, the contractor earns maximum fee at the detriment of the government's desired outcome.

Significant effort should be placed on establishing the incentive fee for the PBIs and the relative worth/weight of each one. If the contract is primarily a production contract, then one or more of the PBIs will be associated with production goals. The other PBIs may vary over the course of the contract and will be selected based on the overall importance/value to the project. The weights of subjective and objective criteria will depend on the contract objective, project condition, and any other performance and mission objectives.

2.3.1 Establishing Total Fee for the Contract. The total fee for the contract may include:

- Base Amount, if any;
- Fee Pool for Award-fee Incentives; and
- Fee Pool for PBIs

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, both FAR and DEAR use the terms base amount and award amount/award-fee pool. For a contact that includes both award-fee incentives and PBI incentives, it is possible the total available fee would comprise a base amount, an amount for award-fee incentives, and PBI incentives.

The amount of the award fee available (award fee pool) 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).

DEAR 915.404-4-72 applies to cost-plus-award-fee contracts and 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 PBIs.

2.3.2 Performance Based Incentive Fee. PBIs are often preferred over award-fee incentives. PBIs are objective incentives (e.g., production rates, physical completion/ demolition of a building, fill 'x' number of canisters by 'z' date) driven by milestones with clear measureable completion criteria.

2.3.3 Award Fee. Award-fee contracts are appropriate when predetermined, formula-type incentives (e.g., CPIF) or Firm Fixed Price contracts 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 strengths, deficiencies and weaknesses. Unfortunately, this advantage is often overshadowed due to the substantial administrative costs incurred through the continual evaluations and processing of award fee decisions. From the contractor' point of view, the award fee is typically advantageous in that it usually yields higher fees than other incentives.

**2.4 Evaluation Criteria.** The Plan ***shall*** include the evaluation criteria. It is not always possible to exactly align the evaluation criteria in the Plan with the evaluation criteria in the Contractor Performance Assessment Reporting System (CPARS). However, when designing the Plan evaluation criteria, consider CPARS evaluation criteria to ensure the fee determinations are consistent with the CPARS evaluation.

The best practice is to tailor the Plan 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.

Note: the FAR permits the CO to make unilateral modifications of the award fee plan, if the modifications are made in a specified amount of time in advance of the related evaluation period. (See Section 2.7 *Issuance and Changes to the Plan*) Therefore, the criteria should:

- Focus on DOE receiving exceptional contractor performance;
- Focus on desired outcomes that are critical to the contract objectives in terms of cost, schedule, technical, quality and/or quantity;
- Avoid incentivizing rote tasks (e.g., implementing a safety program, managing records)
- Avoid incentivizing interim results (e.g., do not incentivize ancillary accomplishments, delivery of reports) that do not have clear impact to the end objective and may result in inefficient practices (i.e., "cherry-picking" of fee-bearing work);
- Avoid incentivizing base requirements (e.g., Integrated Baseline Review) unless the Plan includes measures of success for such events;
- Balance cost, schedule, and technical performances appropriately;
- Limit to a few significant areas where the government wants to emphasize/incentivize performance (too many criteria may dilute the importance of the end result);
- Specify unambiguously requirements the contractor must meet to earn fee for the incentive; and
- Consider the unique aspects of the contract, risk, and the likelihood of changing conditions

Overtime: Using overtime for the primary purpose of achieving PBIs is discouraged. A CO may determine not to approve contractor overtime requests for work that is clearly tied to PBIs except to lower overall cost to the government. A contractor's use of OT for PBIs may be indicative of poor cost or schedule control. If overtime payment is approved for work associated with PBIs, a CO must have clear justification for approving the OT. The justification should demonstrate how the overtime payment for PBIs benefits the government when there is already fee established for the work based on the importance of the PBIs. The benefits can be expressed in terms of reduced fee for allowing OT, direct cost savings it will generate in future work, etc.

2.4.1 Results Oriented Evaluation Criteria. Objective Evaluation Criteria or PBIs are clearly defined scope that can be objectively measured, observed, physically completed or tested. PBIs are the least administratively burdensome type of performance evaluation criteria, and, should, provide the best indicator of overall success. These criteria can be applicable to cost, schedule, technical or other contract performance requirements or objectives. Delivery incentives - should be considered when improvement from a required delivery schedule is a significant and meaningful 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-consequence 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))

Subjective Evaluation Criteria normally include 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 and lessons learned can be helpful in identifying those key problem or improvement areas that should be subject to fee evaluations. They are neither feasible nor effective to devise pre-determined objective criteria applicable to cost, schedule, technical or other contract performance requirements or objectives. Subjective criteria require a judgmental evaluation process, thus providing the government the flexibility to evaluate both actual performance and the conditions under which it was achieved.

2.4.2 Performance Measurement Standards. Performance measurement standards (e.g., quality levels of services) supplements the evaluation criteria. Clear and concise performance measurement standards (what and how the particular criterion will be measured) supplement the evaluation criteria and help clarify and identify when performance is achieved. The evaluator's professional opinion must be as informed as possible, and well documented.

Objective performance measurement standards are based on well-defined parameters for measuring performance. They may include inspection reports, test results, and physical evidences.

Subjective performance measurement standards may rely on an evaluator's professional opinions of performance quality and the conditions under which it was achieved. The evaluator's professional opinion must be as informed as possible. Subjective performance measurement standards have a cause and effect relationship among the criterion and its standards, the evaluator's observations, and a distinct reduction or improvement in quality. Subjective performance measurement standards tend to stay relatively stable (with some fine tuning) in each evaluation period once they are developed, unless there is a significant change in the contract that might affect the criteria, or if the standards prove to be ineffective.

2.4.3 Cost Control Criteria. All incentive-type contracts (including contracts with award fee only, contracts with only predetermined formula-type incentives, or contracts with both types of incentives) shall 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.

A cost control criterion is an important component of the Plan, therefore the cost control criterion ***shall*** be included in the Plan. The contractor's ability to control, adjust and accurately project contract costs is of key importance. Since the government employs the use of contractor cost and schedule performance to determine fee earned, it is critical the Plan establishes the initial condition that the data from which the collected cost information is reliable and accurate.

Emphasis or weight of the cost control criterion depends on the nature of the work (e.g., D&D, production, construction, commissioning, facility maintenance, site operations, Research and Development) and the requirements in a contract. For example, overall cost control of a contract may be important on the totality of site operations work rather than cost control on a specific

activity (e.g., providing utilities, providing waste water treatment operations) of the site operations.

When establishing the cost control criterion, consideration should be given to cost control that may be inherent in other criteria. For example, a production contractor may produce more production units than expected within the estimated cost, thereby reducing the per-unit cost or saving the government significant money in the long run. Likewise, a construction contractor may make more progress than expected within the performance period cost estimate, thereby expediting completion and saving cost down the road. Cost control criterion must be able to clearly measure the savings achieved and provide the evidence that the savings were applied to achieve other work to benefit the government. Additionally, consider the effect (e.g., unintended consequences) of cost savings in terms of cost control beyond the instant contract. For example, sites that have multiple contracts, cost savings initiatives under one contract may have an impact on other contract(s) which may cost the government more money in the long run. In other words, cutting corners on cost could have negative consequences.

To be able to effectively measure cost control, the criterion must be able to:

- Measure and demonstrate cost savings (note: cost cutting measure originating from funding constraints will not be considered as cost control or cost savings initiatives);
- Measure contractor cost performance (overruns or underruns) for the evaluation period; and
- Measure contractor cost performance (overruns or underruns) against a total estimated contract cost.

As with schedule criterion, the cost control criterion should be structured to discourage the contractor from "cherry picking" the work, i.e. doing the easiest portion of the work first to obtain large fee payments for cost underruns early, only to have even larger offsetting overruns later in the contract performance. Further, achievement of an individual PBI should not be at the expense of quality of the work associated with the PBI or so as to adversely impact other work at the site.

While a certified Earn Value Management System (EVMS) is an indication that the project performance information is collected and managed from a compliant EVMS Description, it does not provide a comprehensive contract performance measure. Therefore, reliance on the Cost Performance Index (CPI) without other supplemental methods and tools (i.e., physical evidence/demonstration, inspection) for the purpose of cost control evaluation criterion must 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. The supplemental methods and tools may include a healthy assessment program; a comparison of daily field schedules against baseline milestone schedules; an evaluation of monthly burn rates, projected costs, Estimate at Completion (EAC), and variance reporting.

Additionally, when an EVMS is required, the EVMS Compliance Score (hereafter referred to as 'Score') could be used. This Score represents the reliability of EVMS data and the controls

based on the implementation and completeness of compliant EVMS practices. It should be incorporated into the Plan to motivate the contractor's management and performance during the evaluation period. Through the use of standard algorithms and automated assessments, the Score objectively interprets the reliability of the contractor's EVMS compliance with EIA-748 requirements. The goal should be that the contractor emphasizes the importance of an EIA-748 complaint EVMS as part of a viable project management methodology to plan and control work. The Score's numerical result confirms whether or not the project is following the documented EVMS Description and associated processes to manage and minimize project risks, and accurately forecast completion dates and costs.

The goal should be to motivate effective cost control with EVMS, and the evaluation criteria should be based on the degree of cost control actually obtained. To this end, the Plan must include the initial condition under which the contractor can begin invoicing fees (See Section 2.10 Payment of Fee).

2.4.4 Schedule Control Criteria. Schedule control criterion is an important component of the Plan and therefore the schedule control criterion ***shall*** be included in the Plan. The contractor's ability to control, adjust, and manage schedule is of key importance. Since the government employs the use of contractor cost and schedule performance to determine fee earned, it is critical the Plan establishes the initial condition that the EVMS data from which the collected schedule information is reliable and accurate.

Schedule-driven milestones must be carefully established with the contract outcome in mind especially when early delivery may or may not benefit the contract objectives. In the case where an early delivery may not benefit the government immediately, delivering the services/products early may release the resources to apply to another area. In such a case, the criterion must clearly demonstrate what other products/services will be performed as a result of early delivery.

As with cost control criterion, the schedule criterion should be structured to discourage the contractor from "cherry picking" the work, i.e., doing the easiest portion of the work first to obtain large fee payments for being ahead of schedule early, only to have even longer delays later in the contract performance. Further, achievement of an individual PBI should not be at the expense of quality of the work associated with the PBI or so as to adversely impact other work at the site.

Reliance on the Schedule Performance Index (SPI) without other supplemental methods and tools (i.e., physical evidence/demonstration, inspection) for the purpose of schedule control evaluation criterion must be avoided. Other approaches for schedule control criterion could include achievement of interim milestones (physical completion of work), or comparison of completed work to performance metrics. The goal should be to motivate effective schedule management with EVMS, but the evaluation of schedule control should be based on the degree to which schedule improvement is actually obtained.

**2.5 Fee Processes.** While the fee structure is critical to ensuring alignment between the contractor's incentive and the government's objectives, the fee processes are also critical in ensuring a fair assessment of the contractor against the fee structure. Therefore, the plan ***shall***

include a description of how the contractor's performance will be measured against the evaluation criteria.

2.5.1 Evaluation Methods Documentation. In support of documenting the contractor's performance, the description of how the contractor's performance will be measured against the evaluation criteria must be included in the Plan.

The amount of fee the contractor may earn shall be commensurate with the contractor's performance measured against contract requirements and acquisition objectives in accordance with the criteria stated in the Plan. Therefore, evaluation methods shall be documented to support the amount of fee the contractor may earn.

A well thought out fee structure, and a well prepared evaluation method simplifies the development of the performance evaluation documentation.

**Notes on Performance Evaluation Documentation:** It is critical that the evaluators (e.g., PTM, Award Fee Boards) provide a good description (i.e., analysis) to support the recommendation to the FDO. Factual information is necessary, however it is equally important to present what effect the factual information has on the contract. A good relevant analysis of contractor performance, which will be carried into the CPARS, will provide clear and distinguishable information for the Source Evaluation Board (SEB) on future acquisition efforts.

**2.6 Provisional Payment of Fee.** If a contract provides for provisional payment of fee for an incentive, the contract must stipulate the requirements the contractor must meet before the government is obligated to pay fee, provisionally, to the contractor for that incentive and for the contractor to have any right to retain the provisionally paid fee. See AL 2014-02, Provisional Payment of Fee, for detailed guidance.

**2.7 Issuance and Changes to the Plan.** The processes of issuing and changing the Plan ***shall*** be included in the Plan. While collaborative efforts with the contractor is encouraged during development of the Plan, the determination and the methodology for determining the award fee are unilateral decisions and made solely at the discretion of the government (FAR 16.401(e)). The contractor's input should focus on ensuring that clear definitions of the PBI completion criteria are understood and determining the difficulty the contractor will encounter while endeavoring to accomplish the work scope so that the key barriers to success can be understood and weighed by the government. Collaborative efforts with the contractor should not be viewed as implying that the Plan must be issued as a bilateral contract modification.

The Plan shall describe the procedures to follow when changes are needed to the Plan after the evaluation period is in effect. If changes are required after the evaluation period has begun, use the following sample language as a guide: "*The PEMP shall be provided to the contractor [insert number of days] calendar days prior to the beginning of the first and each successive evaluation period. If there is not sufficient time for the PEMP to be provided to the contractor in the required number of days in advance of the beginning of the evaluation period, the*

*contractor shall not be evaluated on its performance until [insert number of days, same as above] calendar days after the PEMP is received by the contractor. The PEMP may be revised unilaterally at any time during the evaluation period; but the revised PEMP, or revised portion thereof, shall not be effective until [insert number of days, same as above] calendar days after the contractor receives the revised PEMP".*

**2.8 Evaluation Periods.** The Plan for the current evaluation period ***shall*** include only the award and incentive fee criteria that apply to the current evaluation period. In some instances, a PBI may take a little longer than one evaluation period to complete or a milestone that is a little past the current evaluation period. In such instance, PBIs may be approved to extend beyond one evaluation period, when appropriate, to incentivize the completion of long-term objectives. However, the award fee determination is based on the subjective criteria achieved within that particular evaluation period under which the annual Plan is approved.

Generally, the Plan's 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 PBIs should be structured to balance the period of performance, 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. Alternatively, when a PBI has an estimated completion time of more than one year, it may be appropriate to set the performance period for that PBI at completion, i.e., the applicable fee would be carried across more than one year.

**2.9 Fee Allocation.** If the risks and types of work are similar throughout the various evaluation periods, typically, the available award fee for the entire contract is allocated equally over the evaluation periods. For available incentive fee, fee allocations may be tied to accomplishment of milestones.

2.9.1 Unequal Allocation of Fee. Fee amounts should be allocated based upon the criticality of the key performance events (events on the critical path) and provide greater weight to performance events that occur toward the end of an evaluation period. For example, a consideration could be given to a contract which 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 greater allocation.

2.9.2 Reallocation of Fee. Reallocation of fee under a cost reimbursable incentive fee structure 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. This differs from unearned fee, where the contractor's performance has led to an award determination that is less than the award fee pool for that performance period. Unearned award fee cannot be rolled over to any subsequent evaluation period. (FAR 16.401(e)(4).))

**2.10 Payment of Fee.** Fee shall be paid only when the Contracting Officer determines the terms and conditions of the contract have been met. The Plan may establish terms and conditions under which the fee will not be paid. For example, the approval of an EVMS and the integrity and quality of the Integrated Master Schedule (IMS), and the Integrated Performance Management Baseline (IPMB) (with strict configuration control) are critical to having accurate and reliable performance data to determine contractors' performance. Contract requirement for Project Controls, Project Management, and Integrated Baseline must be enforced. Therefore, the Plan may include overriding terms and conditions which states that no fee will be paid until approval of EVMS and a reliable and high quality IMS and IPMB are accepted by DOE.

## 3.0 Attachments

Attachment 1 - Acronyms and Definitions
Attachment 2 - AFP/PEMP Template
Attachment 3 - Examples of Evaluation Criteria

**ACRONYMS AND DEFINITIONS**

Award-Fee Board (AFB) - 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 - 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.

Contractor Performance Assessment Reporting System (CPARS) – CPARS is web-enabled applications that are used to document Contractor and grantee performance information that is required by Federal Regulations. FAR Part 42 identifies requirements for documenting contractor performance evaluations for systems, non-systems, architect-engineer, and construction acquisitions.

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)) (ANSI/EIA-748 Earned Value Management System Guidelines)

Evaluation period(s) - Stated intervals during the contract period of performance after which the contractor will 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), and the corresponding amount of fee which will be paid (which may be provisional).

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)

Integrated Master Schedule (IMS) – A time-based schedule containing the networked, detailed tasks necessary to ensure successful program/contract execution.

Integrated Performance Management Baseline (IPMB) - A time–phased schedule of all the work to be performed, the budgeted cost for this work, and the organizational elements that produce the deliverables from this work.

Performance Based Incentive (PBI) – Objective incentive in the Plan that is based on delivery of product or services which has clear completion and acceptance criteria.

Performance Evaluation Board (PEB) - The team of individuals identified in the PEMP who have been designated to assist the CO and COR in determining the acceptance of completion of PBIs. The same team may also serve as AFB.

Performance Evaluation and Management Plan (PEMP) - Department of Energy's Performance Evaluation Plan that has both subjective (award fee element) and objective evaluation criteria (e.g., PBIs).

Provisional Fee – Fee that is paid to the contractor for interim performance for which repayment to the government may be required for reasons stated in the contract, which may include poor cumulative contract performance determined at a later date. AL 2014-02, Provisional Payment of Fee

**AFP/PEMP TEMPLATE**

*(Remember, this plan should be tailored to your particular acquisition or contract. This template only provides the minimum of what must be contained within an award-fee plan, therefore more detail information may be required to suit each contract or acquisition.)*

(*Fill-in information shown in italics*.)

**PERFORMANCE EVALUATION MEASUREMENT PLAN**

for

*(TITLE OF CONTRACT) (CONTRACT NUMBER)*

*(EVALUATION PERIOD)*

SAMPLE

APPROVED:

_____
Name of Fee Determining Official
(Title)

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SAMPLE

1.0 INTRODUCTION

This *(state type of fee(s))* plan (referred to as the "Plan" from this point forward) 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 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.

2.0 ORGANIZATION

The award fee organization consists of: the FDO; an Award Fee Board (AFB) which consists of a chairperson, the Contracting Officer (CO), a recorder, other functional area participants (e.g., Project Technical Monitor, advisor members; and the Contracting Officer Representative (COR). The Performance Evaluation and Management Plan (PEMP) Organization is described in Appendix C.

3.0 ROLES AND RESPONSIBILITIES [*May add additional individual/group, if required*]

a. Fee Determining Official. The individual who makes the final determination of the amount of fee to be awarded to the contractor. The FDO establishes the AFB. The FDO approves the award fee plan and any significant changes. The FDO reviews the recommendation(s) of the AFB, considers all pertinent data, determines the earned award fee amount for each evaluation period, and notifies the CO in writing of the final fee determination.

SAMPLE

b. Award Fee Board. Also known as Performance Evaluation Board. AFB members review Project Technical Monitors' (PTMs) 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.

c. The AFB Chair. The AFB Chair may add, remove or replace additional PTMs throughout the contract period of performance, as appropriate.

d. The AFB Recorder. The AFB Recorder will coordinate administrative actions required by the PTM(s), COR(s), the AFB, and the FDO. Administrative actions include receiving, processing, and distributing performance evaluation inputs, scheduling and assisting with internal milestones, i.e., AFB briefings, and other actions as required for the smooth operation of the award fee process.

e. Project Technical Monitor(PTM). The individual(s), including the COR(s), assigned to monitor and evaluate the contractor's performance on a continuing basis. The PTM's evaluation is the primary point of reference in determining the recommended award fee, and/or acceptance of completion of PBIs, especially the technical support area of performance. The PTM is responsible for providing their input, as requested, to the AFB. The PTM is an advisor to the AFB.

f. CO. The individual authorized to commit and obligate the government through the life of the contract. The CO is an advisor to the AFB. The CO is the liaison between contractor and government personnel and shall ensure the incentive process is properly administered in accordance with agency regulations and the terms of the contract. The CO shall also modify the contract in regards to any contractual issues that may arise during the term of the contract.

g. COR. The COR maintains written records of the contractor's performance in their assigned evaluation area(s) so that a fair and accurate evaluation is obtained. The COR prepares interim and end-of-period evaluation reports as directed by the AFB.

FEE STRUCTURE

***NOTE:***
*Describe the contract fee structure and elements, including subjective fee and objective fee percentages.*

*Each plan shall include a description of the fee structure. The fee structure is the mechanism by which the government provides incentives to our contractors to ensure that the government's objectives are obtained. A more detailed discussion of the fee structure is provided in Section 2.3 of the Acquisition Guide Chapter 16.405.*

SAMPLE

a. The subjective criteria is divided into the following general categories of performance: *[Insert subjective criteria]*. Each criterion will be evaluated separately, and will receive a grade ranging from Unsatisfactory to Excellent consistent with the FAR 16.401

b. The objective criteria, Performance Based Incentive (PBI) section, establishes criteria to incentivize the contractor to achieve. Using overtime (OT) for the primary purpose of achieving PBIs is discouraged. The CO may determine not to approve contractor OT requests for work that is clearly tied to PBIs. The contractor's use of OT for PBIs may be indicative of poor cost or schedule control. If OT payment is approved for work associated with PBIs, the CO must have clear justification for approving the OT. The justification should demonstrate how the OT payment for PBIs benefits the government when there is already fee established for the work based on the importance of the PBIs. The benefits can be expressed in terms of reduced fee for allowing OT, direct cost savings it will generate in future work, etc. *[Insert the contract objectives and reference the location where the PBIs are in the Plan]*. The PBI fees are provisional until the final contract cost determined. *[this sentence is only applicable if the contract has a provisional payment of fee clause]*.

c. Cost and Schedule control applicable to the PBI fee will be measured against the *[Describe in detail how the cost and schedule control will be measured. For example, describe how the EVM data is verified that assures the EVM data being used to determine cost and schedule control criteria are accurate. Alternatively, describe how the amount of fee awarded will be impacted by completing the work before or after the target completion date with no increase in cost or reduction in quality.]*.

d. Unearned fee will NOT be rolled over into any future evaluation periods or any other performance objectives.

5.0 FEE PROCESSES

***NOTE:***
*Detail the process used for your acquisition or contract. Each plan shall include a description of the fee processes. The fee processes is the mechanism by which the government provides payment of the fee to our contractors. While the fee structure is critical to providing the incentive to the contractors, the fee processes provide the mechanism for the contractors to collect fee, and are an integral part of ensuring that the government's objectives are obtained. A more detailed discussion of the fee processes is provided in Section 2.5 of the Acquisition Guide Chapter 16.405.*

a. Available Fee Amount. The available fee for each evaluation period is shown in [*Insert location, e.g., Appendix A, Fee Allocation by Evaluation Periods*]. The fee earned will be paid based on the contractor's performance during each evaluation period.

b. Evaluation Criteria. Evaluation criteria will be established for each performance evaluation period. See Acquisition Guide 16.405, section 2.4 Evaluation Criteria. If the CO does not give specific notice in writing to the contractor of any change to the evaluation criteria

SAMPLE

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 during the performance period will be made in accordance with Section 6.0.

c. Interim Evaluation Process. The AFB Recorder notifies each AFB member and PTM and COR *[Insert number of days]* calendar days before the midpoint of the evaluation period. PTMs/CORs submit their evaluation reports to the AFB *[insert number of days]* calendar days after this notification. The AFB 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 AFB Recorder notifies each AFB member and PTM and COR *[insert number of days]* calendar days before the end of the evaluation period. PTMs/CORs submit their evaluation reports to the AFB *[insert number of days*] calendar days after the end of the evaluation period. The AFB prepares its evaluation report and recommendation of earned fee. The AFB briefs the evaluation report and recommendation to the FDO. At this time, the AFB 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 *[insert number]* 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 AFB in evaluating the contractor's performance. The contractor's self-assessment may not exceed *[insert number of pages]* pages.

## 6.0 ISSUANCE AND CHANGES TO THE PLAN

> ***NOTE:***
> *Each plan shall include the process for making changes to the fee plan during the period of performance. (See Section 2.7 of Acquisition Guide Chapter 16.405)*

All significant changes are approved by the FDO and/or CO; the AFB 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.

Determination and the methodology for determining the award fee are unilateral decisions made solely at the discretion of the government in accordance with [*Insert "H.2060 Base and*

SAMPLE

*Award Fee" or "H.2060 Alternate I Base and Award Fee" whichever is applicable]. If this clause is not in the contract, use the following language*: "*Determination and the methodology for determining the award fee are unilateral decisions made solely at the discretion of the government. This Plan shall be issued unilaterally by the Contracting Officer for each evaluation period that establishes the criteria and procedures for evaluating the Contractor's performance for the purpose of determining any award-fee earned. This Plan shall be provided to the Contractor [insert number of days] calendar days prior to the beginning of the first and each successive evaluation period. If there is not sufficient time for the Performance Evaluation Management Plan (PEMP) to be provided to the Contractor in the required number of days in advance of the beginning of the evaluation period, the Contractor shall not be evaluated on its performance until [insert number of days, same as above] calendar days after the PEMP is received by the Contractor. The PEMP may be revised unilaterally at any time during the evaluation period; but the revised PEMP, or revised portion thereof, shall not be effective until [insert number of days, same as above] calendar days after the Contractor receives the revised PEMP."*

## 7.0 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.

SAMPLE

**Appendix A: 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 |
|---|---|---|---|
| *[Evaluation Period 1]* | *[Insert start date]* | *[Insert end date]* | *[Insert Amount]* |
| *[Evaluation Period 2]* | *[Insert start date]* | *[Insert end date]* | *[Insert Amount]* |
| *[Evaluation Period 3]* | *[Insert start date]* | *[Insert end date]* | *[Insert Amount]* |
| *[Evaluation Period 4]* | *[Insert start date]* | *[Insert end date]* | *[Insert Amount]* |
| *[Evaluation Period 5]* | *[Insert start date]* | *[Insert end date]* | *[Insert Amount]* |
| Total Available Fee | | | *[Insert Amount]* |

(If you have milestones or PBIs, include expected milestone/PBI completion dates for applicable evaluation period. Use a table similar to the one below.)

| Evaluation Period * | Milestones Titles | Completion Date | Available Fee |
|---|---|---|---|
| *[Evaluation Period]* | *[Insert Title]* | *[Insert completion date]* | *[Insert Amount]* |
| | *[Insert Title]* | *[Insert completion date]* | *[Insert Amount]* |
| | *[Insert Title]* | *[Insert completion date]* | *[Insert Amount]* |
| | *[Insert Title]* | *[Insert completion date]* | *[Insert Amount]* |
| | *[Insert Title]* | *[Insert completion date]* | *[Insert Amount]* |
| *[Total Available Fee for Evaluation Period]* | | | *[Insert Amount]* |

* The government may unilaterally revise the distribution of the remaining fee dollars among subsequent periods.

SAMPLE

**Appendix B: EVALUATION CRITERIA**

*[List and describe the Subjective Criteria, Performance Standards (i.e., quality level of services), and the Weights and Fee Amount. Describe the Surveillance methods for each criterion (how and what the criteria will be measured). Describe if there are any overriding conditions to meet the criteria.]*

*[List and describe the Objective Criteria, Performance Standards (quality level of services), and the weights and Fee Amount. Describe performance standards/quality level of services (e.g., limiting conditions or other parameters under which the criteria will be measured: such as plant condition, cost, schedule, deliverables including quality level and acceptance level, field verifications, overall quality, etc.) that meet the completion criteria. Describe if there are any overriding conditions to meet the criteria (e.g., safety, security, professional conduct, accuracy of reported information, compliance with CHRM clauses, etc.)]*

Note: Using overtime for the primary purpose of achieving PBIs is discouraged. CO may determine not to approve contractor overtime requests for work that is clearly tied to PBIs.

*Refer to ATTACHMENT 3 Evaluation Criteria for examples.*

SAMPLE

**Appendix C: PEMP ORGANIZATION**

*(Note: This Attachment may not be shared with the contractor since this information does not impact the contractor's evaluation results: sharing this information may create undue influence on the contractor's performance evaluation)*

PEMP ORGANIZATION *[No names should be included]*

Members:

Fee Determining Official: *(Position Title)*

Award Fee Review Board Chairperson: *(Position Title)*

Award Fee Review Board Members [List the Position Titles below]:

Performance Monitors [List the Subject Matter Experts (SME) Areas below]:
(Select your monitors based on the needs of your acquisition/contract)

SME/Area of Evaluation:

SAMPLE

## ATTACHMENT 3: EXAMPLES OF EVALUATION CRITERIA

*[These are performance measurement standards that supplement the Adjectival Rating assigned per FAR 16.401(e)(3) to determine the fee.]*

### QUALITY

| QUALITY #1 | Quality of Products and Services. |
|---|---|
| **EXCELLENT** | **Meets all of the VERY GOOD requirements plus:** The contractor fully understands the needs of the customer. The contractor takes proactive steps to ensure high quality that exceeds contractual requirements with proven benefit to the government by advancing the customer's objective |
| **VERY GOOD** | **Meets all of the GOOD requirements plus:** The contractor proactively works with DOE to ensure the customer's expectations are clearly understood. Quality meets contractual requirements and exceeds many contractual requirements to the government's benefit. |
| **GOOD** | **Meets all of the SATISFACTORY requirements plus:** Quality meets contractual requirements and exceeds some contractual requirements, to the government's benefit. |
| **SATISFACTORY** | Quality meets contractual requirements. The contractor's performance contained some minor problems for which corrective actions taken by the contractor appear or were satisfactory. |
| **UNSATISFACTORY** | Quality does not meet contractual requirements. The contractor's performance reflects a serious problem for which the contractor has not yet identified effective corrective actions. The contractor's proposed corrective actions appear only marginally effective or were not fully implemented. |

| QUALITY #2 | Implementation of Contractor Assurance System (CAS). |
|---|---|
| **EXCELLENT** | **Meets all of the VERY GOOD requirements plus:** The contractor communicates issues and performance trends or analysis results to senior management. The contractor makes informed decisions and corrects negative performance/compliance trends before they become significant issues. |
| **VERY GOOD** | **Meets all of the GOOD requirements plus:** The contractor categorizes the significance of findings based on risk and priority and other appropriate factors that enables contractor management to ensure that problems are evaluated and corrected on a timely basis. For issues categorized as higher significance findings, the contractor conducts a thorough analysis of the underlying causal factors; implements timely corrective actions that will address the cause(s) of the findings and prevent recurrence; conducts an effectiveness review using trained and qualified personnel to validate the effectiveness of the corrective action/plan implementation and results in preventing recurrences; and documents the analysis process and results. |
| **GOOD** | **Meets all of the SATISFACTORY requirements plus:** The contractor conducts periodic review of its corrective actions to ensure the corrective actions have been effective in preventing recurrence. If deficiencies are identified, the contractor develops revised corrective actions. |
| **SATISFACTORY** | The contractor maintains a Contractor Assurance System (CAS) to self-identify deficiencies and implements corrective actions that prevent recurrence. |
| **UNSATISFACTORY** | The contractor fails to meet criteria for satisfactory performance. |

**SCHEDULE AND COST CONTROL**

| SCHEDULE/COST #1 | EVM is effectively integrated and used for program management. |
|---|---|
| **EXCELLENT** | **Meets all the VERY GOOD requirements plus:** The contractor exercises proactive, innovative use of EVM. The contractor plans and implements continual process improvement in using EVM. |
| **VERY GOOD** | **Meets all of the GOOD requirements plus:** The contractor develops and sustains effective communication of performance status on a continual basis with the government. |
| **GOOD** | **Meets all the SATISFACTORY requirements plus:** The contractor effectively integrates earned value performance into program management reviews and uses earned value performance as a primary tool for program control and decision-making. |
| **SATISFACTORY** | The contractor uses earned value performance data to make program decisions as appropriate. |
| **UNSATISFACTORY** | The contractor fails to meet criteria for satisfactory performance. |

**MANAGEMENT**

| **MANAGEMENT #1** | Adequacy of proposals submitted during award fee period. |
|---|---|
| **EXCELLENT** | **Meets all of the VERY GOOD requirements plus:** Change proposals are stand-alone and require no iteration for government understanding. The contractor communicates during the proposal preparation phase and effectively resolves issues before submission. |
| **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. |
| **GOOD** | **Meets all of the SATISFACTORY requirements plus:** The contractor provides detailed analysis for subcontractor and material costs. |
| **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(s). |
| **UNSATISFACTORY** | The contractor fails to meet criteria for satisfactory performance. |

| **MANAGEMENT #2** | Management of Contract Deliverables. |
|---|---|
| **EXCELLENT** | **Meets all of the VERY GOOD requirements plus:** The contractor fully understands the needs of the customer. High quality deliverables are provided that exceed customer expectations, both in terms of quality and timeliness. |
| **VERY GOOD** | **Meets all of the GOOD requirements plus:** The contractor proactively works with DOE to ensure the customer's expectation are clearly understood. The contractor provides draft documents in advance of final deliverable to ensure the final product will meet or exceed customer expectations. |
| **GOOD** | **Meets all of the SATISFACTORY requirements plus:** Deliverables are of high quality and do not require rework. |
| **SATISFACTORY** | The contractor delivers contract deliverables on time. |
| **UNSATISFACTORY** | The contractor fails to meet criteria for satisfactory performance. |

| | |
|---|---|
| **MANAGEMENT #3** | Management of Subcontracts. |
| **EXCELLENT** | **Meets all of the VERY GOOD requirements plus:** The Contractor works proactively with subcontractors to fully communicate the needs of the customer. Subcontractor performance exceed customer expectations, both in terms of quality and timeliness. |
| **VERY GOOD** | **Meets all of the GOOD requirements plus:** The contractor ensures early identification of potential subcontract problems and the timely application of corporate resources to preclude subcontract problems from impacting overall contractor performance. |
| **GOOD** | **Meets all of the SATISFACTORY requirements plus:** Subcontractors are managed as an integral part of the contractor's team. Payments to subcontractors are prompt. The contractor assesses subcontractor to ensure compliance with labor and safety standards. |
| **SATISFACTORY** | Subcontractors are managed to ensure adequate performance of work, and do not impact overall contract performance. Payments to subcontractors are made on time. |
| **UNSATISFACTORY** | Contractor fails to meet criteria for satisfactory performance. |

**ENVIRONMENT, SAFETY AND HEALTH and QUALITY ASSURANCE**

| **ESH&Q #1** | Implementation of Integrated Safety Management System (ISMS) |
|---|---|
| **EXCELLENT** | **Meets all of the VERY GOOD requirements plus:** The contractor consistently challenges itself to improve safety performance. POMCs are strengthened every year as the contractor strives to improve ISM performance. |
| **VERY GOOD** | **Meets all of the GOOD requirements plus:** POMCs are developed as leading indicators. The contractor effectively uses POMC as forward-looking indicators to measure the health of the site's safety culture and proactively address potential safety, health, quality and environmental issue. |
| **GOOD** | **Meets all of the SATISFACTORY requirements plus:** The contractor develops effective POMCs which are used to verify the effective implementation of the ISMS. Corrective actions are implemented to address deficiencies in achieving POMCs. |
| **SATISFACTORY** | The contractor implements an Integrated Safety Management System (ISMS). The contractor has processes in place to maintain the approved ISMS Description. Performance Objectives, Measures and Commitments (POMCs) are developed with emphasis on Safety, Health, Quality, and Environmental Compliance and are submitted annual to DOE. |
| **UNSATISFACTORY** | The contractor fails to meet criteria for satisfactory performance. |

| **ESH&Q #2** | Regulatory management and environmental protection |
|---|---|
| **EXCELLENT** | **Meets all of the VERY GOOD requirements plus:** The contractor fully understands the needs of the customer and the regulators. Regulatory deliverables are provided that exceed customer expectations, both in terms of quality and timeliness. The contractor consistently challenges itself to improve environmental protection. |
| **VERY GOOD** | **Meets all of the GOOD requirements plus:** The contractor fosters positive relationships with the regulatory community through regular and proactive communications. |
| **GOOD** | **Meets all of the SATISFACTORY requirements plus:** The contractor understands the intent of the regulations and develops/ manages the regulatory program with a focus on the long-term benefit to the government. |
| **SATISFACTORY** | No Notice of Violations (NOVs) for actions within the control of the contractor. Routine regulatory required reports scheduled during this period are developed and submitted on time and are of good quality. |
| **UNSATISFACTORY** | The contractor fails to meet criteria for satisfactory performance. |

# 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).

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# Interagency Acquisitions

Guiding Principles

- Acquisition planning is needed to determine whether interagency acquisitions are in the best interest of the Government.
- Interagency acquisitions, providing a mechanism for using other agencies' resources, offer potential economies.

*References: FAR 17.5, DOE Acquisition Guide chapter 7.1, and STRIPES User Guide*

## 1.0 Summary of Latest Changes

This update: (1) clarifies requirements for market research and acquisition planning, as well as contract file documentation, (2) refines the focus to cover only Funds-Out Assisted Acquisitions, and (3) includes administrative changes.

## 2.0 Discussion

This chapter complements the acquisition regulations and policies contained in the references above and should be considered in that context. This chapter covers interagency acquisitions, which involve DOE requesting support from other agencies. Although interagency agreements are not traditional FAR-based contracts, they use terms, practices, and incorporate requirements found in the FAR. For all interagency acquisitions, acquisition planning and file documentation are required (see FAR 7.102(a)).

### 2.1 Applicability and Exclusions

This chapter, which focuses on "Funds Out" interagency assisted acquisitions, is applicable to DOE and NNSA contracting activities. However, the following are *excluded* from the guidance in this chapter:

- Intra-Agency Agreements, such as those among DOE components
- Memoranda of Understanding or similar documents used to obtain support from Federal employees at other agencies (previously called interagency transactions)

## 2.2 Interagency Acquisitions

All interagency acquisitions involve a servicing agency (the one that provides support and receives payment) and a requesting agency (the one that requires support and disburses payment).

2.2.1 "Funds In" vs. "Funds Out." When DOE transmits funds in return for support from another agency, this is called "Funds Out." When DOE receives funds to perform as the servicing agency, this is called "Funds In" or reimbursable work orders. "Funds In" agreements fall outside the scope of this chapter; see the Department of the Treasury's Interagency Agreement Guide

2.2.2 Assisted vs. Direct Acquisition. In an assisted acquisition, the servicing agency and the requesting agency must enter into an interagency agreement. Under such an agreement, the servicing agency performs acquisition duties on the requesting agency's behalf. In some cases, the servicing agency will charge a fee for this service (see FAR 17.502-2(d)(4). For a direct acquisition, on the other hand, no interagency agreement is needed. Under direct acquisitions, the servicing agency simply allows the requesting agency to place orders against its contracts (e.g., GSA schedules). See FAR part 8, FAR subpart 17.5, and Guide chapter 8.4 for more information on direct acquisitions.

2.2.3 Special Requirements for Interagency Acquisitions. Documentation of acquisition planning and market research, as well as the relevant statutory authority, are required for interagency acquisitions.

2.2.3.1 Statutory Authority. Cited in the assisted acquisition interagency agreement, common sources of statutory authority include --

2.2.3.1.1 The Economy Act of 1932 (31 U.S.C. 1535) provides general authority when more specific statutory authority does not exist. If the Economy Act is the statutory authority used, a determination that the interagency acquisition is in the Government's best interest, along with other determinations, is required (see FAR 17.502.2(c)(1)(i)).

2.2.3.1.2 Government Management Reform Act of 1994 authorizes agencies with franchise funds to charge fees for services. Administrative services such as accounting, human resources, security, and training are often obtained via franchise funds.

2.2.3.2 Acquisition Planning involves market research to identify potential sources to meet the DOE requirement. After consideration of mandatory sources (see FAR 8.002), market research could include sources such as those found on GSA's Acquisition Gateway, Federal Supply Schedules and GWACs, as well as open-market availability. All market research should be documented in the contract file. The dollar value and nature of the action will govern the required extent of the market research.

## 2.4 Interagency Agreements

Interagency agreements establish general terms, conditions, fees, administrative and ordering requirements, and funding information. Under these agreements, orders and other actions may be issued. Interagency agreements are required for assisted acquisitions, but not for direct acquisitions.

2.4.1 Constraints. Interagency agreements are not to be used to circumvent conditions and limitations imposed on the use of funds or other DOE policies and procedures (see FAR 17.501(b)). No interagency acquisition in any dollar amount can be initiated without the signature of a DOE Contracting Officer (CO).

2.4.2 Guidance for creating interagency agreements is found in Appendix A.

2.4.3 Role of the Requisitioner. The requisitioner may help to prepare the requisition, as well as related documentation, including Part B of the interagency agreement, with assistance from the servicing agency, the Contracting Officer's Representative (COR), the CO, and DOE's Office of Finance and Accounting (or field office equivalents), as needed.

2.4.4 Role of the DOE Contracting Officer. The DOE CO is the authorizing official for DOE. When DOE is the requesting agency, transmission of the agreement via STRIPES constitutes signature by DOE; the response to the agreement via FedConnect constitutes signature by the other agency. If FedConnect is not used, the signature must be original or an approved authenticated electronic signature of a warranted Contracting Officer. Signatures are required on the STRIPES IAA form, the Fiscal Service (FS) forms 7600A and 7600B; the hand-signed document must be scanned and uploaded into STRIPES as part of the official file. The FS 7600B takes effect when signed by authorized officials from both the servicing and the requesting agencies.

2.4.5 Reviewing Official. The interagency agreement should specify appropriate reviewing officials at both the requesting agency and the servicing agency. This may be the COR or another specified official to assist the servicing agency with timely contract administration.

## 2.5 Invoice Review and Payment

2.5.1 General. For general information on invoice review and payment, see chapter 32.901. The below guidance is specific to cases in which DOE is the requesting agency on Funds Out Assisted Acquisitions.

2.5.2 Funds-Out Assisted Acquisitions. When DOE provides funding for an assisted acquisition, the servicing agency should ensure adequate review of contractor invoices prior to payment. In cases where assisted acquisitions are used to support work at a contactor-operated DOE facility, the DOE COR (or similar official) may consult with the DOE contractor

employees to ensure the goods or services met the requirements of the assisted acquisition. When consulting with contractor employees or servicing agencies, however, DOE officials should neither seek nor share companies' proprietary information. Invoices provided by the servicing agency should be retained by the DOE Contracting Officer and the DOE contractor. In the case of Interagency Payments and Collections (IPAC) charges, the charges should be checked by the reviewing official specified in the interagency agreement.

2.5.3 Adequacy of Invoices. "Adequate" means the invoice and any supporting documentation contain a meaningful level of detail, confirming that goods delivered or services rendered are appropriate to the negotiated prices. The documentation should contain descriptions of goods or services, the quantities, the units of measure, the unit prices, the extended prices of supplies delivered or services performed (see FAR 32.905(b)(iv)), and any fee charged by the servicing agency (see FAR 17.502-2(d)(4)). However, invoices and supporting documentation need *not* provide a detailed cost breakdown, to include indirect rates.

## 3.0 Attachments

Appendix A – Interagency Agreement Procedures

## APPENDIX A – INTERAGENCY AGREEMENT PROCEDURES

The Strategic Integrated Procurement Enterprise System (STRIPES) has two interagency agreement templates: Part A (General Terms and Conditions), and Part B (Requirements and Funding Information).

### I. When DOE is the Requesting Agency (Funds Out)

DOE prepares the Fiscal Service (FS) forms 7600A and 7600B. With the implementation of G-Invoicing, G-Invoicing will assign an interagency agreement number for Part A; STRIPES will create an interagency agreement number for Part B. Use these numbers to identify the agreement.

**FS 7600A, General Terms and Conditions**. The authorizing official for the FS 7600A is the DOE CO. DOE CO completes FS 7600A in coordination with the program office and the servicing agency. If intellectual property rights are involved, consult with the cognizant Patent Counsel. If the period of performance is greater than five years, approval by the Procurement Director is required.

The IA should be effective on the date of the final signature, and will remain in effect through (date)/(for a period of # years). Both agencies must review the agreement to determine its suitability for modification to provide for revision, renewal, extension or termination. Execute any changes to the terms and conditions of the IA through a bilateral modification.

**Maintaining FS 7600A**. Periodic review (at least annually) is needed to determine whether expectations are being met (e.g., whether each agency is carrying out its responsibilities in a timely manner, whether continued supplies or services are needed). Document the assessment in the file. If the agreement period is longer than one year, terms and conditions should be reviewed annually. Unless otherwise approved by the contracting activity's Procurement Director, the agreement period cannot exceed five years (see FAR 17.204(e)). If, during execution of the agreement, the agreement is approved for an extension, the agreement period will need to be amended to reflect this change.

For **period-of-performance extensions**, the Contracting Officer prepares and signs the Determination and Findings (D&F). The D&F must be reviewed and approved by the Head of the Contracting Activity prior to the execution of the extension.

**Alternative dispute resolution**. If a disagreement arises on the interpretation of the provisions of this agreement, or amendments or revisions to the agreement that the parties cannot resolve at the operational level, each party must state in writing the area(s) of disagreement and give the statement to the other party for consideration. If the parties do not reach agreement on interpretation within 30 days, they must send the written description of the disagreement to their respective higher officials for appropriate resolution.

**De-obligation of Excess Funds.** Following the close-out of any award under any FS 7600B of this IA, or following the completion of certain performance periods of awards under any FS 7600B, the servicing agency promptly de-obligates any portion of the initial obligation not expended during performance of the award. The remaining amounts are not used for any purpose other than the specific, definite and clear project description included in FS 7600B.

**FS 7600B, Requirements and Funding Information.** Preparation of the FS 7600B may be aided by the requisitioner, who coordinates with the DOE CO and servicing agency. The FS 7600B must include specific, clear requirements, demonstrating a *bona fide* need in the fiscal year that funds are available for obligation. The level of detail will vary based on the acquisition assistance to be provided (e.g., task duration, number of offices involved), as well as the complexity and dollar value of the requirement. The FS 7600B also contains performance and delivery schedules, reflecting any scientific and technical deliverables, along with basic guidelines regarding their submission (see Guide chapter 35.1), and when necessary, the responsibilities of the servicing agency to ensure contract compliance. Submit any Scientific and Technical Information (STI) via DOE's Energy Link system, available at www.osti.gov/elink. The current version of DOE O 241.1B, "Scientific and Technical Information Management" contains definitions, submission requirements, etc. For questions, contact the STI Officer at 865-576-1188. The FS 7600B will become an attachment to the requisition. The DOE CO and the DOE Budget Office will review the FS 7600B for accuracy and completeness.

**Part B.** The DOE Contracting Officer, with support from the Program Office, should maintain Part B, ensuring the following:

(1) Conformity with the requirements at FAR subparts 7.3 and 7.5, as well as all DOE regulations, policies and procedures, to include any applicable business clearance review in accordance with DOE or NNSA approval processes;

(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) The DOE CO should monitor any Part B content provided to the servicing agency to ensure consistency with the scope of the agreement and 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, comply with all applicable regulations and policies. Review of contract deliverables and invoices should include ensuring that services provided remain within the scope of work and that labor is provided by appropriate and approved (if applicable) labor categories. The DOE CO and COR and/or program official should review Guide chapter 32.901 to better understand their responsibilities.

(5) 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;

(6) Description of any DOE-unique terms, conditions or requirements, to include intellectual property rights, to be incorporated into the interagency agreement and/or contract/order;

(7) Designation of the servicing agency contract administration services that may include: a quality assurance plan, contract surveillance, voucher examination, past performance data reporting via the Federal Procurement Data System (FPDS). Funds-Out acquisitions will be reported into FPDS by the servicing agency when the procurement action is issued. Instruct the servicing agency to report the action citing the funding agency and/or funding office code(s);

(8) Summary of any pre-award and/or post-award administrative functions to be retained by DOE. If the DOE CO deems 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 the current version of DOE O 361.1. 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

Each action executed must either include or incorporate by reference Part A, with a copy of Part B forwarded to the cognizant financial office for each transfer of funds.

## II. Interagency Agreements: Other Considerations

**Optional Form.** The U.S. Department of the Treasury, Bureau of the Fiscal Service (FS) offers the forms for interagency agreements (FS 7600A, FS 7600B) at https://fiscal.treasury.gov/g-invoice/resources.html#admin. For Funds Out, in the event the other agency desires use of these forms, complete them outside of STRIPES; then scan and attach them to the award in STRIPES as attachments.

**Billing instructions.** The DOE CO, with the DOE or NNSA program office and budget office, must ensure that funding information includes standard billing instructions to ensure timely, 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 Treasury's Financial Management Service.[1] These include:

(1) Intra-Governmental Payment and Collection (IPAC) System. As detailed in subparagraph 2.5.4 of this chapter, IPAC should be used if possible. If IPAC is not available, an alternate method shall be negotiated and documented in the FS 7600B.

(2) For Funds Out, the interagency agreement should identify the DOE funding codes and obligating document number (the interagency agreement number) and instruct the other agency

[1] 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 663), revised by Bulletin No. 2011-08, or successor version, Appendix 10 Intragovernmental Business Rules at http://www.fms.treas.gov/tfm/vol1/

to include the DOE obligating document number on all documentation related to the agreement. The DOE billing address for the interagency agreements is U.S. Department of Energy, P.O. Box 500, Germantown, MD 20875-0500. For Funds In, use the requesting agency's information.

(3) For Funds Out, when using IPAC, DOE obligating document number (the interagency agreement number) should be included as the purchase order number or obligating document number of the IPAC.

(4) The DOE obligating number serves as the common agreement number.[2]

(5) The interagency agreement specifies information for all agencies that are party to the agreement. For help in completing the following information, contact the local Finance office.

- 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)

[2] Department of the Treasury, Financial Management Service, Treasury Financial Manual Volume 1, Part 2 (Transmittal Letter 663), revised by Bulletin No. 2011-08, or it successor version, Appendix 10

# 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.

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  - Attachment 3 DOE F 4220.2 Small Business Review Form (Oct 2020)
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# Small Business Programs

Guiding Principles

- Include Small Business Program Managers (SBPM) participation during acquisition planning.
- Provide maximum practicable opportunities for small business concerns to be prime contractors in acquisitions.
- Include meaningful strategies to increase small business participation as ~~s~~subcontractor on awards not set aside for small business.

*[References: FAR 2, 6, 7, 8, 10, 13, 16, 19, 52; DEAR 919, 970; SBA Act Section 15(k); and 13 CFR Chapter 1]*

## 1.0 Summary of Latest Changes

This update: replaces previous version of Attachment 2 Partnership Agreement Between the U.S. Small Business Administration and the U.S. Department of Energy, dated 2013, with the current version, dated 2022. See accompanying Policy Flash for a summary of updates and changes.

## 2.0 Discussion

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. DOE's principles for engagement with the small business community are outlined in the Small Business First Policy DOE P 547.1A (Attachment 1).

The Small Business Act (15 U.S.C. 644) (Attachment 4) 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:

- 8(a) Business Development concerns which include Indian Tribes, Alaska Native Corporations (ANC), Native Hawaiian Organizations and Community Development Corporations
- Historically Underutilized Business Zone (HUBZone) small business concerns

- Women-Owned Small Business (WOSB) (includes Economically Disadvantaged Women-Owned Small Business (EDWOSB)) concerns
- Service-Disabled Veteran-Owned Small Business (SDVOSB) concerns

The Act further requires DOE 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.

The Small Business Act and the FAR identify the need for DOE to establish the Office of Small and Disadvantaged Business Utilization (OSDBU), and to designate individuals to assist in the utilization of small business concerns, including Small Business Technical Advisors (SBTA) and Small Business Program Managers (SBPM) across the Department.

Section (k) of the Small Business Act (Attachment 4) identifies activities the Director OSDBU, SBTA, and SBPM are expected to perform. Many of these activities are discussed throughout this chapter, as well as, the Contracting Officers (CO) role in their completion. Each year, the SBA releases a report card per agency that rates the agency on compliance with these activities and how well the agency met its small business goals. SBA uses the scorecards in reporting to Congress.

DOE's Management and Operating (M&O) contracts are a major part of DOE's success in meeting its mission and small business goals. The small business subcontracts of the M&O can be counted towards DOE's goals. Contracting Officers (CO) need to be vigilant in approving subcontracting plans with the M&Os and should consult with OSDBU and the SBPMs when reviewing M&O subcontracting plans.

The consideration of small business concerns is particularly important when using Best-in-Class and other contracts available through the Category Management Initiative. DOE's policies on Category Management are in Acquisition Guide Chapter 8.3.

**2.1 General Set-asides for Small Business**. Each acquisition of supplies or services that has an anticipated dollar value between the micro-purchase threshold and the Simplified Acquisition Threshold (SAT), is automatically reserved for small business concerns and must be set aside for small business concerns, subject to the exclusions in the FAR. This obligation also applies to purchase card transactions over the micro-purchase threshold and below the SAT. The 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 can be made at a fair market price. 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 business generally (FAR 19.203, 19.502-2). Small business set-asides have priority over acquisitions using full and open competition. (FAR 19.203(e)).

FAR 19 does not apply to task and delivery orders awarded under FAR 8.4, Federal Supply Schedules (FSS). At the CO's discretion, orders placed against these schedules may be set aside for small business concerns (8.405-5). Awards placed against a small business FSS contribute toward DOE's small business goals.

**2.2 Socio-economic Preference Programs**. SBA has established various programs enabling contracting personnel to target acquisitions for small business in specific socio-economic programs, to enhance their competitive stance. As referenced in FAR 19, these programs should be considered prior to setting aside an acquisition to small business concerns generally. The following actions are excluded from the requirements of FAR 19:

- Awards 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 except see FAR 8.405-5(a)(2)(ii))
- Purchases below the micro-purchase threshold (FAR 19.502-1(b))

2.2.1 Set-asides for Small Business Socio-economic Programs. There is no order of precedence among the small business socio-economic categories (FAR 19.203). Set-asides for the small business concerns in the socio-economic programs have the following general characteristics and requirements in common (exceptions are noted in below paragraphs):

- 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, the CO shall consider competition or a sole source award in the socio-economic programs prior to considering a general small business set-aside.
- The CO cannot unilaterally remove requirements from the 8(a) program unless authorized by SBA. This includes moving from the 8(a) program to the HUBZone, SDVOSB, or WOSB programs. The CO 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) (see the exception at FAR 19.815(c)(3))
- OSDBU shall review any decision to convert an activity performed by a small business concern to an activity performed by a Federal employee.
- 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. (FAR 19.001)
- If only one acceptable offer to a set-aside is received, the CO shall make an award to that concern. (FAR 19.502-2(a))
- A certain percentage of the overall award amount (i.e., contract price) must be accomplished by the small business concern for acquisitions over the SAT. (FAR 52.219-3, 52.219-14, 52.219-27-class deviation 2019-01, 52.219-29 and 52.219-30)

- Orders under multiple award contracts are excluded from the mandatory use of socio-economic programs and sole source requirements. (FAR 19.504)

The following summaries include unique characteristics and requirements for set-asides and awards to each type of socio-economic program. The CO should refer to FAR 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, the CO is utilizing 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 partnership agreement between DOE and SBA (Attachment 2). 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 above which they shall be competed when particular conditions exist (FAR 19.805-1). SBA may accept sole source awards when there are not two or more 8(a) participants expected to submit offers at a fair market price. Additionally, SBA may accept the requirement for an Indian Tribes, ANCs, Native Hawaiian Organizations and Community Development Corporations.

2.2.1.2 HUBZone Program. The HUBZone program was established to stimulate economic development in specifically designated areas of the U.S. HUBZone small business concerns must be certified by the SBA and appear on the List of Qualified HUBZone Small Business Concerns maintained by the SBA https://www.sba.gov/about-sba/sba-locations/headquarters-offices/office-hubzone-program. The CO must check the list to ensure a HUBZone small business concern has been certified before making an award to it. A price evaluation preference of 10 percent 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 percent 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. HUBZone certification can be found at https://certify.sba.gov/. (FAR 19.13)

2.2.1.3 SDVOSB Program. The Veterans Benefit Act of 2003 created the procurement program for small business concerns owned and controlled by service-disabled veterans (commonly referred to as the “Service-Disabled Veteran-owned Small Business (SDVOSB) Procurement Program”). The purpose of the SDVOSB program is to provide Federal contracting assistance to service-disabled veteran-owned small business concerns.

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 has a main category, WOSB, and a subcategory, EDWOSB concerns. WOSB and EDWOSB concerns have distinct requirements they must satisfy 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 North American Industry Classification System (NAICS) code. The determination affects the authority to set aside a procurement for either type of concern. Prior to award to either type of concern, the CO 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/. (FAR 19.15)

**2.3 Acquisition Planning**. The OSDBU, the SBPM, and the SBA Procurement Center Representative (PCR) should be engaged as early in the acquisition planning process as is feasible to provide:

- Current small business set-aside program guidance, requirements, and goals
- Information about the benefits of teaming arrangements
- Required internal and external agency interfaces with regard to small business contracting
- Information about the use of various small-business focused procurement sources

The SBPM should be actively involved as a partner to the CO during the market analysis and research phase of the acquisition planning process. The involvement of the SBPM can help promote a broadened approach to market research. The CO, with the assistance of the SBPM, will identify 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 cannot be subject to simplified acquisition procedures.

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. The SBPM has to identify 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 cannot be subject to simplified acquisition procedures.

If the CO determines that a partial small business set-aside is not possible and that the requirement should be competed on a full and open basis, the SBPM can advocate for maximizing small business subcontracting opportunities within the requirement's proposal preparation instructions, and small business subcontracting plan. The SBPM and SBA PCR review subcontracting plans prior to acceptance by the CO, to help increase small business subcontracting opportunities with the prime contractor.

When a solicitation will result in multiple award contracts, the CO should consider reserving award for small business concerns if a full or partial set-aside is not feasible. See FAR 19.503. Reserves may also be used for orders in accordance with FAR 19.504.

DOE has established special procedures for considering small business concerns during acquisition planning in its Category Management Program. See Acquisition Guide Chapter 8.3 for further information.

2.3.1 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 provides substantial benefits to the Government, it should also present maximum practicable opportunities to small businesses. The CO is required to provide the acquisition packages for consolidated, bundled, or substantially bundled requirements as prescribed in FAR 7 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 shall be referred to the Deputy Secretary through the Head of the Contracting Activity 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)

2.3.2 Subcontracting considerations. The CO shall work with the SBPM in determining whether there are subcontracting opportunities in accordance with FAR 19.7. The following actions shall be taken if it has been determined that subcontracting opportunities exist:

- The SBPM and the CO shall work to identify small business concerns to perform subcontracts.
- The CO shall determine if the acquisition should include contract language to incentivize prime contractors, e.g., incorporation of the incentive subcontracting clause, FAR 52.219-10 in Section I of the Request for Proposal, or a clause substantially the same, as allowed by FAR 19.708(c)(1).

**2.4 Market Research**. Market research shall be performed in accordance with FAR part 10. The CO should consult with the applicable SBA PCR during market research (FAR 10.001).

2.4.1 Sources Sought Notifications. The CO may publish sources sought notifications in the Contract Opportunities section on beta.SAM.gov, to improve small business participation in an acquisition. 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 criteria 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 the CO to search the database by the various socio-economic programs. The CO can use the information gained to determine whether a requirement should be placed in a socio-economic program. SAM.gov can be accessed at http://beta.sam.gov.

2.4.3 Other Market Research Efforts. FAR 10.002(b) identifies many different ways to effectively conduct market research, 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/.
- Engaging with industry, acquisition personnel, OSDBU, SBPMs, and other stakeholders
- Obtaining lists of similar items from other contracting activities, agencies, or trade associations
- 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 Review of Acquisitions Over $3 Million Not Set Aside for Small Business Concerns and Exceptions**. The CO shall submit proposed acquisitions valued over $3 million that are not set aside for small business to OSDBU for review. OSDBU review is only for acquisitions made with appropriated funds. OSDBU review does ***not*** apply to:

- Required sources
- Task/delivery orders and Blanket Purchase Agreements placed against Federal Supply Schedule contracts
- M&O contracts (but OSDBU review does review subcontracting plans)
- Task/delivery orders under existing DOE indefinite delivery vehicles contracts, e.g., IDIQs, Requirements contracts, etc.
- Interagency Agreements

The review occurs during the acquisition planning stage. The submission includes as applicable:

1. Completed DOE F 4220.2 Small Business Review Form, signed by the CO and SBPM (Attachment 3)

2. Draft acquisition plan
3. Draft solicitation
4. Documentation reflecting market research conducted within the past 18 months (FAR 10.002(b)(1))
5. Independent Government Cost Estimate
6. A copy of the signed sole source/limited sources justification
7. Presolicitation/Notice of Intent/Sources Sought, including any responses

The CO should work with the SBPM and OSDBU to determine the applicable 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 shall negotiate a new review date with the CO. Upon completion of its review, OSDBU shall provide an analysis and response to the proposed action not to set aside the procurement for small business participation. Where applicable, OSDBU's response shall 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.

The review threshold for the SBA PCR is the same as OSDBU's unless a different threshold is established locally between DOE and SBA.

## 2.6 Maximizing Opportunities and Increasing Participation.

2.6.1 Mentor-Protégé Program (MPP) Agreements. A method of increasing the participation of small businesses in government contracting is the use of MPP agreements. The DOE MPP and the SBA All Small MPP (ASMPP) operate independently. DOE prime contractors can currently use the DOE MPP as established at Department of Energy Acquisition Regulation (DEAR) Subpart 919.70. DOE prime contractors may simultaneously utilize the DOE MPP and the SBA ASMPP.

2.6.1.1 SBA ASMPP. The SBA "All Small" MPP provides for the establishment of MPPs for all small businesses. More information can be found at https://www.sba.gov/federal-contracting/contracting-assistance-programs/all-small-mentor-protege-program#section-header-0. A protégé and mentor who have an active SBA ASMPP agreement may form a joint venture to compete together for government contracts reserved for small businesses and those that are set aside for 8(a), service-disabled veteran-owned, women-owned, or HUBZone certified businesses as long as the protégé qualifies for the contract. In order for a joint venture to be able to bid on contracts reserved for small businesses, it must meet the requirements set forth in 13 Code of Federal Regulation (CFR) 125.8(b)(2), (c), and (d) to receive the exclusion of affiliation for contracting purposes.

2.6.1.2 DOE MPP. The DOE Mentor-Protégé Program is administered by OSDBU. It is designed to encourage DOE prime contractors to assist small business concerns, Historically Black Colleges and Universities (HBCU), and other minority institutions of higher learning. The mentor and the protégé structure an agreement which outlines the developmental activities to occur. It is a bilateral agreement, not a contract. The MPP seeks to foster long-term business relationships between these small business entities and DOE prime contractors, and to increase the overall number of these small business entities that receive DOE prime contracts and subcontracts. (DEAR 919.70)

2.6.2 Teaming Arrangements. Another method of increasing the participation of small businesses in the award of DOE prime contracts is the use of teaming arrangements, including Contractor Teaming Arrangements, Joint Ventures, and Small Business 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. The CO 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.

2.6.3 Multiple Award Contracts (MAC) and Government-Wide Acquisition Contracts (GWAC). The following techniques should be applied when using MACs and GWACs to fill program requirements:

- The CO should work closely with the cognizant SBPM 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/GWACs 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.
- Reserving one or more awards when a total and/or partial set-aside is not feasible.
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**2.7 Subcontracting with Small Businesses.** 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. 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.

2.7.1 Subcontracting in Solicitations. The CO, working with the SBPM, shall develop solicitations that include subcontracting plan requirements in accordance with FAR 19.704. The CO and the SBPM shall ensure the solicitation notifies offerors that:

- DOE requires large business contractors to maximize subcontracting opportunities to small business concerns to: (1) include only subcontracts involving performance in the U.S., or its outlying areas; and (2) exclude purchases from a corporation, company, or subdivision that is an affiliate of the prime/subcontractor.
- DOE goals may be included to serve as a minimum SB target. Specific targets may also be included in the solicitation.
- The SBA PCR shall review and advise the CO of the acceptability of the subcontracting plan prior to acceptance by the CO.

2.7.2 Subcontracting Plans. The CO 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. Subcontract reporting should be completed in a timely and accurate fashion through reporting the actual small business achievements in the Electronic Subcontracting Reporting System (eSRS) via Individual Subcontracting Reports (ISR) and Summary Subcontracting Reports (SSR).

The CO, working with the SBPM, is responsible for reviewing the ISRs and SSRs that relate to the contract administered by the contracting activity. The CO has overall responsibility for the ISRs and the SBPM is responsible for reviewing the SSRs for completeness and required information. M&O contractors' SBPMs shall be involved in all aspects of subcontracting, including setting goals and reporting.

The prime contractor shall validate data entered into the eSRS. For prime contractors who do not achieve their subcontracting goals, the CO shall require an improvement plan that identifies the steps the contractor shall take to improve subcontract achievement. The steps may include:

- Identifying additional subcontracting opportunities, including work previously performed by large subcontractors
- Seeking additional small business sources, i.e., from SAM.gov
- Publicizing subcontracting opportunities widely (FAR 5.206)
- Mentoring a small business that shall be developed as a potential small business subcontractor.

2.7.3 Limitations on Subcontracting. The Federal Acquisition Regulation (FAR) states that contracting officers may set aside solicitations to allow only small businesses to compete. Small business prime contractors are subject to limitations on subcontracting. The

limitations require that small business prime contractors must not pay more than between 50 and 85 percent of the amount paid by the Government to subcontractors that do not have the same small business program status, based on whether the contract is for services (except construction), supplies, general construction, or special trade. Costs of materials are excluded and not considered subcontracted amounts for supply, general construction, and construction by special trade. Any small business prime contractors that violate the subcontracting limitations are subject to a fine of $500,000, or the dollar amount spent by the prime on subcontractors in excess of permitted levels, whichever is greater.

The following actions shall be taken when limitations to subcontracting exist:

- The CO shall include the clause at FAR 52.219-14 in all contract awards to ensure that all contracts comply with the performance requirements (i.e. technical, cost, schedule/timeliness, management, small business subcontracting, including reduced or untimely payments to small business contractors when 19.702 (a) requires a subcontracting plan (as applicable) and other (as applicable) (e.g., trafficking violations, tax delinquency, failure to report in accordance with contract terms and conditions, defective cost or pricing data, terminations, suspension and debarments, and failure to comply with limitations on subcontracting).
- COs and other contracting personnel who monitor contract performance shall take training to ensure compliance with subcontracting requirements is adequately being met.
- COs shall retain responsibility for compliance with the limitations on subcontracting requirement and all applicable provisions of FAR 52.219-14 and any of the Department of Energy regulations. The CO, Contracting Officer Representatives, Project/Program Managers or other delegated official appointed by the CO shall perform reviews of contracts when adequate documentation related to subcontracting amounts have not been maintained and make a determination if the small business prime contractors did not comply with subcontracting limitations, pursue collection of penalties for any contractors that exceeded established limitations, and report any instances of non-compliance in contractor performance information.

## 2.8 Roles and Responsibilities.

2.8.1 Director, Office of Small & Disadvantaged Business Utilization (OSDBU). OSDBU plays a key role in developing, implementing, and managing DOE's Small Business Program at both the prime and subcontracting levels. On the subcontracting level, OSDBU: (1) proposes policies and strategies to the Secretary of Energy on ways to ensure that small businesses are provided an equitable opportunity to receive subcontracts for supplies and services that are procured by the DOE prime contractors; and (2) oversees actions of Departmental elements, offices, and facilities as they pertain to compliance with the subcontracting plan clauses in DOE contracts in accordance with FAR 19.7. In managing DOE's small business program, OSDBU serves as the agency's focal point for discussions about

small business policies and programs with Congress, the Office of Federal Procurement Policy (OFPP), Office of Management and Budget (OMB), SBA, and the small business community.

2.8.2 Senior Procurement Executive (SPE). The SPE is responsible for managerial direction of DOE's acquisition system, including implementation of unique acquisition policies, regulations, and standards for DOE. The SPE issues small business policies and regulatory guidance for headquarters and field procurement organizations, and outlines management strategies for providing maximum subcontracting opportunities to small business.

2.8.3 Head of the Contracting Activity (HCA). The HCA is the lead DOE official whose delegated authority includes: 1) managing, administering, and terminating contracts, and 2) ensuring the contracting activity provides opportunities for small business to fairly compete for contracts and subcontracts. The HCA shall designate a federal SBPM whose primary responsibilities include developing and administering the activity's small business program. The HCA also shall establish quality control systems to ensure timely reporting and accuracy of subcontracting reports. The HCA may issue directives outlining other steps to be taken to support the SPE's initiatives and DOE's small business objectives.

2.8.4 Contracting Officer (CO). The CO has the primary authority to enter into, administer, and terminate contracts, and to make related determinations and findings. The CO additionally has the authority and responsibility to negotiate, approve, and administer the subcontracting plan submitted by an offeror. The CO works with DOE's small business personnel, e.g., OSDBU and SBPM, to maximize subcontracting opportunities for small businesses and to monitor subcontracting compliance, pursuant to FAR 19.4 and 19.7. The CO is further responsible for semi-annually reviewing ISRs and annually reviewing SSRs that relate to the contracts they administer.

2.8.5 Small Business Technical Advisor (SBTA). The DOE shall assign at least two small business technical advisors to each procuring activity. (NOTE: For the National Nuclear Security Administration (NNSA), the NNSA Senior Procurement Executive or designee shall assign SBTA(s), as appropriate. See 50 U.S.C. § 2401(a) (2020); 50 U.S.C. § 2410(a) (2020).) The sole duties of the SBTA shall be to assist the PCR of the center to which such advisers are assigned, including the functions relating to sections 637, 644, 657a, 657f, and 657q of the Small Business Act, 15 U.S.C. § 644(k) (2012) (See attachment 4).

2.8.6 Small Business Program Manager (SBPM). An SBPM represents the program element or contracting activity in the inclusion of small business concerns in fulfilling their requirements pursuant to FAR 19.7. The SBPMs for the program element, contracting activity, or FMC, each have similar roles in regard to the conduct of the small business subcontracting program. Responsibilities of SBPMs can include:

- Ensuring establishment of M&O annual small business subcontracting plan goals.
- Negotiating recommendations for best and final subcontracting plans for the prime contractor, with the CO. The SBPM shall coordinate with the OSDBU when plan goals do not meet Department-wide subcontracting goals pursuant to the Department of Energy Acquisition Regulation (DEAR).
- Reviewing annual summary subcontracting achievements; identify shortcomings, if any; develop strategies for improving the subcontracting program; and periodically update management on the subcontracting status of the program element.
- Seeking to include small businesses in subcontracting opportunities in areas, technologies, or acquisitions that are not traditionally participated in by small businesses.
- Participating in local, regional, and national discussions pertaining to small business issues that impact DOE's small business subcontracting program.

2.8.7 Small Business Administration Procurement Center Representative (SBA PCR). The SBA PCR works with agencies' contracting activities to assist in enhancing opportunities for small businesses, for both the prime and subcontracting opportunities. The SBA monitors the small business subcontracting efforts of Federal prime contractors, and assigns one or more of its PCRs to Federal agencies, in order to review their acquisitions for small business subcontracting consideration.

**2.9 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 subcontracting award data. HCAs should ensure quality control systems are in place for accurate reporting of small business data.

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))

The CO should ensure prime contractors are aware of their subcontracting reporting and submission requirements so that they enter reports into eSRS within 30 days of the end of a reporting period. The subcontracting reporting periods end March 30 and September 30. Reporting is required even if there was no subcontracting activity under the contract during that period. The CO must acknowledge receipt of, review and accept, or reject subcontracting reports, within 60 days of the end of a reporting period. If the CO rejects a report, the contractor must resubmit the ISR or SSR within 30 days of receipt of the rejection. The CO shall ensure all parties' contact information, including email addresses, is current in eSRS. Prime contractors must ensure their large subcontractors at any tier follow the same subcontracting reporting requirements. (FAR 19.705-6)

## 3.0 Attachments

Attachment 1 - DOE P 547.1A Small Business First Policy (March 30, 2018)
Attachment 2 - Partnership Agreement between the U.S. Small Business Administration and the U.S. Department of Energy (2023)
Attachment 3 - DOE F 4220.2 Small Business Review Form (October 2020)
Attachment 4 – The Small Business Act, 15 U.S.C. § 644, as amended

# U.S. Department of Energy
## Washington, D.C.

**POLICY**

**DOE P 547.1A**

Approved: 03-30-2018

**SUBJECT:** SMALL BUSINESS FIRST POLICY

## PURPOSE AND SCOPE

To establish a Small Business Policy that reinforces the goals of the Small Business Act (Public Law 85-536, as amended), Small Business Jobs Act of 2010, and other applicable laws, Executive Orders, regulations and best business practices. This Policy will provide DOE's principles for engagement with the Nation's small business community.

## SUPERSEDES

DOE Policy 547.1, *Small Business First Policy*, dated 12-14-2012.

## POLICY

The Department of Energy (DOE) will foster a dynamic business environment for the small business community, which includes small, veteran-owned, service-disabled veteran-owned, HUBZone, small disadvantaged, and women-owned small business concerns. This will widen the scope of opportunities that small businesses can participate in, while also strengthening the Agency, and in turn, the American economy.

DOE commits to promoting inclusiveness in all Departmental activities by advancing initiatives that attract the innovation and creativity of small businesses. Advancement of these initiatives will enhance relationships among internal and external small business stakeholders, and expand the Agency's engagement with all socio-economic sectors of the Nation's small businesses.

DOE strives to create jobs and strengthen the small business economy by committing to identify and remove barriers wherever possible. Removing barriers benefits small businesses seeking to contribute to the Nation's energy science advancements, and to participate in furthering America's global energy dominance. DOE will advocate for and create new small business opportunities that support the Department's mission. DOE will ensure small businesses can take advantage of opportunities in its research and technology partnership programs. Fostering this engagement of the small business community will advance research and development across DOE's National Laboratories and production facilities, through greater access to the full breadth of America's workforce.

DOE's encouragement of new perspectives will promote avenues for small businesses to engage in the full range of the Agency's research, development, and deployment opportunities. DOE will continue to champion partnerships, such as the DOE Mentor-Protégé Program. Through these partnerships, small businesses will help keep DOE on the cutting edge of energy science and national security.

Increasing small business access to Agency opportunities is essential. DOE will continue to employ a broad promotion strategy and timely notification of these opportunities. Through these

efforts, the DOE community will build stronger internal and external relationships, advancing small business connections with DOE's goals and missions. DOE is committed to ensuring its small business partners continue to expand relationships with external small business advocates, such as the U.S. Small Business Administration, non-governmental organizations, and small business associations. DOE will facilitate relationships between small businesses and DOE Prime Contractors, providing subcontracting and other procurement opportunities.

Small business partnerships are a critical component to American energy dominance. DOE will strive to increase opportunities for businesses from all socio-economic sectors. Increased opportunities for engagement will strengthen the role of American small business concerns in the global marketplace, growing the Nation's self-reliant economy through increased small business stakeholder collaborations, higher productivity, and growth of American jobs.

**CONTACT**

The Office of Small and Disadvantaged Business Utilization at (202) 586-7377.

BY ORDER OF THE SECRETARY OF ENERGY:

DAN BROUILLETTE
Deputy Secretary

**PARTNERSHIP AGREEMENT**
**Between**
**The U.S. Small Business Administration**
**and**
**U.S. Department of Energy**
**for the**
**8(a) Business Development Program**

## Executive Summary

Sections 7(j)(10) and 8(a) of the Small Business Act (the Act) (15 U.S.C. §§ 636(j)(10) and 637(a)) authorize the U.S. Small Business Administration (SBA) to establish a business development program, which is known as the 8(a) Business Development (8(a) BD) Program. The program is a nine-year program created to assist firms owned and controlled by socially and economically disadvantaged individuals. Small business concerns owned and controlled by Alaska Native Corporations (ANCs), Indian Tribes, Native Hawaiian Organizations (NHOs), and Community Development Corporations (CDCs) are also eligible to participate in the 8(a) BD Program. The SBA services all 8(a) Program Participants to provide various management, technical, financial and procurement assistance designed to strengthen their ability to compete effectively in the American economy.

The SBA partners with federal agencies to promote maximum utilization of 8(a) Program Participants to ensure equitable access to contracting opportunities in the federal marketplace. Once certified participants are eligible to receive federal contracting preferences.

Pursuant to section 8(a) of the Act the SBA is authorized to enter into all types of contracts with other Federal agencies. By statute, the SBA enters into prime contracts with procuring activities and arranges for the performance of those contracts by awarding subcontracts to eligible 8(a) BD Program Participants. Through this Partnership Agreement (PA), the SBA is delegating its contract execution functions to the procuring activity and is authorizing the **U.S. Department of Energy (DOE)** to execute and sign contracts on behalf of the SBA and contract directly with the qualified 8(a) Program Participant. The **DOE** will continue to perform all other required contract administration services. The 8(a) BD Program is governed by Part 124 of SBA regulations (13 C.F.R. part 124) and the Federal Acquisition Regulation (FAR), subpart 19.8 (48 C.F.R. § subpart 19.8).

For contracts with a duration of not more than five years awarded to an 8(a) Program Participant, including multiple award contracts (MACs) and Government-Wide Acquisition Contracts (GWACs) that are set-aside exclusively for 8(a) Participants, the firm is considered an 8(a) certified small business throughout the life of that contract, even if the firm's term of participation in the 8(a) BD Program has ended or the firm has otherwise left the 8(a) BD Program. Thus, where an 8(a) Program Participant is awarded an 8(a) MAC, the Participant may be awarded competitive orders under that 8(a) MAC even if the firm's term of participation in the 8(a) BD Program has ended or the firm has otherwise left the program. However, for any sole source order under the 8(a) MAC, the firm must be an eligible Program Participant and must qualify as small for the applicable size standard on the date of award for the order.

In the case of MACs that were not set-aside for exclusive competition among 8(a) Participants, an agency may restrict competition for an order to eligible 8(a) contract holders if the procuring agency offers the order to the SBA and the SBA accepts it into the 8(a) BD Program. In such a case, any firm seeking to be awarded the order must be an eligible Program Participant on the initial date specified for receipt of offers contained in the order solicitation, or on the date of award of the order if there is no solicitation.

If an 8(a) Program Participant is awarded a long-term 8(a) contract (i.e., one with a duration that exceeds five years), the contracting officer must verify in the Dynamic Small Business Search (DSBS) whether the firm continues to be an eligible 8(a) Participant no more than 120 days prior to the end of the fifth year of the contract and no more than 120 days prior to exercising any option. Where the contract holder no longer qualifies as an eligible 8(a) Participant or will cease to qualify as an eligible 8(a) Participant during the 120-day period prior to the end of the fifth year of the contract, the option shall not be exercised.

I. **PURPOSE:** The purpose of this Partnership Agreement (PA) between the SBA and the **DOE** is to delegate the SBA's contract execution functions to **DOE** per 13 CFR § 124.501(a). The following items are applicable to this PA:

A. The PA sets forth the delegation of authority, delineates responsibilities, and establishes procedures for the award and oversight of 8(a) contract requirements.

B. The PA encompasses all competitive and non-competitive acquisitions of **DOE** requirements awarded through the 8(a) BD Program.

C. This PA applies to all SBA offices and all **DOE** Office of Small Disadvantaged Business Utilization (OSDBU) small business program offices and contracting offices deemed appropriate by the head of the agency, as defined in FAR 2.101 for **DOE**.

D. This PA supplements the requirements set forth for the 8(a) BD Program under FAR 19.8 and 13 CFR § 124.

E. This PA replaces any previously executed Memorandum of Understanding (MOU) or PA on the 8(a) BD Program between the SBA and **DOE**.

## II. ROLES AND RESPONSIBILITIES

### A. SBA

1. Delegates its 8(a) contract execution functions to the **DOE**, in accordance with 13 CFR § 124.501(a); delegates its authority under section 8(a)(1)(A) of the Act to enter into 8(a) prime contracts, and its authority under section 8(a)(1)(B) of the Act to arrange for the performance of such procurement contracts by eligible 8(a) Program Participants. The **DOE** may re-delegate this authority to all warranted **DOE** Contracting Officers (CO);

2. Remains the prime contractor on all 8(a) contract awards, modifications, options and purchase orders and must receive copies of all contracts and subsequent modifications from the **DOE** in accordance with the processes delineated in this PA. The 8(a) Program Participant remains the SBA's subcontractor;

3. Will implement its responsibilities under this PA through uniform procedures for use by all SBA offices;

4. Will provide training for the **DOE** on the SBA 8(a) BD Program and various aspects of the PA;

5. Shall review the **DOE's** offering letters, and issue acceptance or rejection letters in accordance with the procedures set forth in Section III of this PA;

6. Shall review requests from the **DOE** to release requirements from the 8(a) BD Program, and approve or deny such requests in accordance with the procedures set forth in Section III of this PA;

7. Shall select an appropriate 8(a) Program Participant when the **DOE** submits an open offering letter for a sole source requirement;

8. Shall make eligibility determinations for 8(a) Program Participants;

9. Shall retain the responsibility for ensuring that 8(a) Program Participants comply with all applicable provisions relating to continued eligibility for 8(a) BD Program participation per 13 CFR § 124.112;

10. May identify a requirement for an 8(a) Program Participant for a possible award. The SBA may submit capability statements to the appropriate **DOE** contracting activities for the purpose of matching requirements consistent with the 8(a) Program Participant's capability;

11. Shall retain its appeal authority in accordance with FAR 19.810 and 13 CFR § 124.505; and

12. Shall retain the right to review all non-classified information in contract files so that the SBA can ensure compliance with the terms and conditions of this agreement.

13. The SBA's Procurement Center Representative (PCR) will not sign **DOE's** small business coordination form until the following pending actions with 8(a) BD program are officially coordinated and resolved with the SBA: requests to release a requirement from the 8(a) BD program; compliance with the notice requirements of 13 CFR § 125.504(d) when work that is or was performed under one or more 8(a) contracts will be procured outside the program through a requirement that has been deemed new; and the notice requirements of 13 CFR § 125.504(d) when the agency seeks to re-procure a follow-on to an 8(a) contract through a pre-existing limited 8(a) contracting vehicle and the incumbent 8(a) contract award was not so limited. See Section II.B.5 of this PA for the notification requirements.

14. Shall ensure SBA officials receive requisite education and training to deliver services described in this PA.

**B. DOE**

1. Shall adhere to all 8(a) BD Program requirements identified in FAR 19.8 and 13 CFR § Part 124;

2. Shall determine which requirements are suitable for offering to the 8(a) BD Program in accordance with FAR 19.8 and 13 CFR § Part 124, and, where appropriate, identify in conjunction with the appropriate SBA servicing District Office, 8(a) Program Participants capable of performing these requirements;

3. Shall submit offering letters to the SBA per FAR 19.8, 13 CFR § 124.502 and this PA;

4. Shall submit release requests to the SBA per FAR 19.8, 13 CFR § 124.504(d) and this PA;

5. Shall notify the SBA servicing District Office and the PCR assigned to the contracting office initiating a non-8(a) procurement in accordance with 13 CFR §124.504(d)(1) and this PA where a procurement intended for award outside the 8(a) BD program will contain work currently performed under one or more 8(a) contracts and **DOE** determines that the procurement should not be considered a follow-on requirement to the 8(a) contract(s), but rather procured through a requirement that it considers to be new; such notification must include the dollar value (exclusive of service extensions under FAR 52.217-8), primary and vital requirements, and end user of the previously performed 8(a) contract(s) as well as the dollar value, primary and vital requirements, and end user of the requirement that the **DOE** considers to be new;

6. Shall notify the SBA servicing District Office when the agency seeks to re-procure a follow-on to an 8(a) contract through a pre-existing limited 8(a) contracting vehicle and the incumbent 8(a) contract award was not so limited;

7. Shall coordinate as early as possible with the SBA servicing District Office when it seeks to offer a sole source 8(a) procurement on behalf of a joint venture. The **DOE** shall submit offer letters for proposed 8(a) joint ventures for sole source 8(a) contracts to the SBA's District Office that services the 8(a)-managing venturer of the joint venture for approval before contract award per FAR 19.8, 13 CFR § 124 and this PA;

8. Shall retain the responsibility for ensuring 8(a) BD Program Participants comply with all limitations on subcontracting requirements, including FAR Clause 52.219-14;

9. Shall receive and retain the SBA's delegation of contract execution and review functions by reporting all 8(a) contract awards, modifications, options and purchase orders to the SBA until such time as the agreement is amended or terminated. Provide a copy of all 8(a) contract awards, purchase orders, orders under BOAs and BPAs, option year modifications, or other contract modifications (i.e., modifications that add time, money or scope changes; novation, name changes) to the SBA servicing District Office within fifteen (15) days of execution;

10. Shall have the final authority over CPARS ratings for 8(a) contracts. The SBA may provide input or recommendations, but the final rating is determined by the **DOE**;

11. Shall inform the CO and other warranted officials and their equivalents who are awarding 8(a) contracts of their responsibilities concerning this agreement; and

12. Shall ensure that the CO and other warranted officials and their equivalents obtain training on their obligations under this PA and the subcontracting limitations of FAR 52.219-14 and 13 CFR §§ 124.510 and 125.6.

13. Shall ensure that any proposed sole source 8(a) contract action contains the appropriate FAR Subpart 6.3 justification for use of other than full and open competition.

14. Shall ensure that any proposed sole source award that exceeds applicable sole source thresholds contain a Justification and Approval (J&A) as set forth in FAR 19.808-1(a).

**III. PROCEDURES:** The policies and regulations detailed in the FAR, including FAR 19.8 and 13 CFR § Part 124 shall apply to 8(a) contracts, orders, modifications and options. Agencies are not authorized to issue internal guidance that would deviate from this agreement. The **DOE** and the SBA agree to the following:

**A. 8(a) BD Program Offering and Acceptance**

**1. Offering letters:** The **DOE** will follow the procedures at 13 CFR § 124.502 and FAR 19.804-2 for instructions to offer a procurement to the SBA for award through the 8(a) BD Program and to submit offer letters to the SBA District Office. The SBA District Office will evaluate the offering letter package to determine if complete or request additional information if necessary. The **DOE** will allow the SBA five (5) working days to complete the review and respond with acceptance or decline.

Actions below the Simplified Acquisition Threshold (SAT) do not require offer and acceptance but do still require an eligibility determination for the 8(a) Program Participant (see Section III.A.3.b).

a. **Sole source 8(a) Offers:** Follow the procedures at FAR 19.808-1 and 13

CFR § 124.502(a). The **DOE** will coordinate with SBA on all offer letters for sole source 8(a) procurements to verify eligibility.

i. **Open Requirements:** If **DOE** has a requirement for which no specific 8(a) Program Participant is nominated, submit the offering letter to the SBA District Office that services the geographical area where the contracting activity is located. For competitive and open construction requirements, submit the offering letter to the SBA District Office servicing the geographical area where the work is to be performed. For construction requirements where place of performance is overseas submit the offer letter to the Division of Management and Technical Assistance at SBA's Headquarters at omta@sba.gov. Upon receipt of a complete offering letter package the respective SBA office will determine acceptance.

ii. **Nominated 8(a) Participants:** If **DOE** has a requirement for services or construction, and has nominated a specific 8(a) Program Participant, submit the offering letter to the SBA District Office responsible for servicing the nominated 8(a) firm.

iii. **Sole source offering on behalf of 8(a) Program Participant for contracts above the competitive thresholds.** Where the **DOE** determines that an 8(a) Program Participant is responsible to perform a specific requirement that exceeds the applicable competitive thresholds, but that there is not a reasonable expectation that at least two or more eligible 8(a) Program Participants will submit offers at a fair price, the **DOE** may submit a sole source offering letter on behalf of the identified 8(a) Program Participant. Only the AA/BD can approve such an offering. The **DOE** CO will work with the servicing the SBA District Office to coordinate the request and establish a review timeline. The **DOE** will use the appeal process described in Section III.C below to resolve concerns.

b. **Joint venture nominees**: Where **DOE** offers a sole source 8(a) procurement on behalf of a joint venture, the SBA will conduct an eligibility review of the lead 8(a) party to the joint venture as part of its acceptance. The SBA must approve the joint venture prior to the award of the sole source contract. Submit the offering letter as soon as possible to the SBA District Office servicing the 8(a) managing venturer to ensure that it is approved prior to award. Upon receipt, the SBA may issue the acceptance or denial letter and eligibility determination, applicable no later than five (5) working days; and will coordinate a response date with the agency point of contact if more review time is needed. If no response is received within five (5) working days of request for acceptance, the **DOE** may assume acceptance on the sixth ($6^{th}$) working day.

c. **For Basic Ordering Agreements (BOA) and Blanket Purchase Agreements (BPA)**: Refer to 13 CFR § 124.503(h). Neither BPA's or BOA's are contracts under the FAR (see 48 CFR § 13.303 and 48 CFR § 16.703(a)). Each 8(a) sole source or 8(a) competitive order to be issued under a BOA or BPA is an individual contract. The **DOE** must offer, and the SBA must accept, each sole-source order under a multiple-award BOA or BPA in addition to offering and accepting the BOA or BPA itself. An 8(a) Program Participant seeking to be awarded an order under a BOA or BPA must be a current, eligible Participant in connection with each order. The SBA will not accept for award on a sole source basis any task order under a BOA or BPA that would cause the total dollar amount of task orders issued to exceed the applicable competitive threshold.

d. **Competitive:** Submit the offering letter for competitive 8(a) requirements to the SBA District Office that services the geographical area where the **DOE's** contracting activity is located. For competitive requirements to be performed overseas, submit the offering letters to the Division of Management and Technical Assistance at the SBA's Headquarters via email at omta@sba.gov.

e. **Task or Delivery Order Contracts, including Multiple Award Contracts (MAC):**

**Multiple award contracts:** Refer to 13 CFR § 124.503(i). If the underlying task or delivery order contract or MAC was originally offered and accepted by the SBA for the 8(a) BD Program, and set-aside exclusively for 8(a) BD Program Participants, **DOE** is not required to submit offer letters for **competitive task orders**. For **sole source orders**, please follow the Offer and Acceptance procedures outlined in Section III.A.1.a.iii of this PA. The **DOE** must offer, and the SBA must accept, each sole source order under a multiple-award Task and Delivery Order Contract, in addition to offering and accepting the Task and Delivery Order Contract itself.

**Single award contracts:** No offer and acceptance are required for competitive or sole source orders.

f. **Establishing a new Multiple Award Contract (MAC) reserved for the 8(a) Program:** When establishing a new vehicle (defined as larger than 5 times the NAICS, multiple NAICS and/or a period of performance that is longer than five years) exclusively for 8(a) Program Participants **DOE** will work with their local SBA District Office to mutually establish a review timeline.

**2. SBA Acceptance in accordance with 13 CFR § 124.503:**

a. **Actions that exceed the simplified acquisition threshold:** Follow the procedures at FAR 19.804-3 and 13 CFR § 124.503(a). Upon receipt of a complete offering letter package the SBA District Office will determine acceptance. The **DOE** and the SBA agree that SBA's decision whether to accept or reject the requirement will be transmitted to the **DOE's** CO in writing within five (5) working days of receipt of the offer. Absent a notification of rejection within five (5) working days of receipt of the offer, **DOE** may assume acceptance on the sixth ($6^{th}$) working day unless an extension has been requested and accepted.

i. Reference FAR 19.804-3(a): **DOE** and the SBA District Office agree that if the CO sends an offering letter and subsequently changes strategy before the SBA acceptance has been provided, the **DOE's** CO may withdraw the offering letter from further consideration. Once the SBA receives the withdrawal, the SBA will stop the process of acceptance and the **DOE's** CO does not have to go through the release procedures to remove the requirement because it was never accepted into the 8(a) BD Program.

ii. **Withdrawal/substitution of offered requirement or Participant:** Refer to 13 CFR § 124.503(e). If the **DOE** determines the identified 8(a) Program Participant is not a good match for the procurement, including for such reasons as **DOE** finding the Participant non-responsible or the negotiations between the **DOE** and the Participant failing, the **DOE** may seek to substitute another 8(a) Program Participant. The **DOE** must inform the SBA District Office of its concerns regarding the originally identified Program Participant and identify whether it believes another Program Participant could fulfill its needs.

iii. If the SBA believes another Program Participant can fulfill the requirement, but the **DOE** disagrees, the SBA may appeal that decision to the head of the procuring agency pursuant to 13 CFR § 124.505(a)(2).

iv. If the SBA agrees that another Program Participant cannot adequately fulfill the requirement at a fair price, the **DOE** may withdraw the requirement from the 8(a) BD Program.

b. **Actions below the simplified acquisition threshold:** Follow the procedures at FAR 19.804-3(a)(2) and 13 CFR § 124.503(a)(4). When the **DOE's** CO decides to use the 8(a) BD Program, the SBA authorizes award of an 8(a) contract without requiring an offer and acceptance of the requirement for the 8(a) BD Program. The CO shall contact the SBA servicing District Office to verify eligibility of the nominated 8(a) Program

Participant. If no response is received within two (2) working days of an eligibility request, **DOE** may proceed with award on the third (3rd) working day. In such a case, the CO shall provide the following information to the SBA:

1. Firm's Name, Address and DUNS;
2. Total dollar amount;
3. A copy of the executed contract.

Reference FAR 19.804-3(b)(2): In the event that the SBA does not believe the NAICS code assigned to the procurement is reasonable, the **DOE** and the SBA District Office agree to pursue the informal escalation process outlined in paragraph III.C.1 of this PA before pursuing the procedures in FAR 19.804-3(b)(2).

c. **Federal Supply Schedules (FSS), including FAR Subpart 8.4 BPAs**: This section applies to all ordering activities governmentwide as defined at FAR 8.401.

The **DOE** must offer, and the SBA must accept, a Participant's base Schedule contract in order for the Participant to be deemed an eligible 8(a) contractor for any orders issued under the Schedule contract. This can be accomplished either by offering individual Schedule contracts to the SBA or by offering a pool under the Schedule for which only current 8(a) Program Participants are eligible. As with any other 8(a) contract, the SBA must determine eligibility prior to award of the contract. For those firms seeking to be deemed eligible 8(a) contractors under the FSS that currently have FSS contracts, the **DOE** must offer modifications to the existing base Schedule contract to the SBA or allow the firm to be awarded a new Schedule contract through a pool of eligible 8(a) Program Participants. SBA would perform an eligibility determination on the 8(a) firm prior to accepting the modification or contract.

The CO can issue 8(a) set-aside orders under FSS at their discretion. Subject to the following, the CO can issue orders from BPAs under FAR subpart 8.4 at their discretion.

Refer to Section III of this agreement for procedures for program offering, evaluation and acceptance.

i. For a single-award FSS BPA under FAR Subpart 8.4, 8(a) acceptance is not required for orders, provided the single-award BPA was awarded competitively and was itself accepted into the 8(a) program for a term that does not extend past a date that is the firm's graduation date plus five years. Only active 8(a) Participants are eligible to receive a single-award BPA through the 8(a) BD Program. If accepted into the 8(a) BD Program at issuance, FSS BPAs are subject to the release procedures of 13 CFR 124.504.

ii. For 8(a) sole source orders using multiple-award BPAs, the **DOE's** CO is required to submit an offering letter and obtain acceptance from the SBA. The 8(a) Participant must be eligible as of the date of award for the order. For 8(a) competitive orders off a FSS BPA, an 8(a) contractor is eligible only if the award is made not more than 5 years past the 8(a) contractor's graduation date.

iii. The ordering agency must offer and receive SBA acceptance for 8(a) sole-source orders. Only active 8(a) Participants are eligible to receive sole-source orders. Graduated 8(a) Participants are not eligible to receive sole-source orders.

iv. Where an 8(a) Participant was awarded a Schedule contract through a modification to a current Schedule contract, the 8(a) Participant may continue to receive new competitive orders under the Schedule contract for up to five (5) years from the date of award or recognition, even after the contractor's 8(a) Program term expires, the contractor otherwise exits the 8(a) Program, or the contractor becomes other than small for the NAICS code(s) assigned under the 8(a) contract. In addition, agencies may continue to take credit toward their prime contracting goals for orders awarded to 8(a) Program Participants.

Business concerns are not required to recertify size and/or socioeconomic status for set-aside orders (see FAR 19.301-2). However, if an 8(a) contractor re-represents that it is other than small for the NAICS code(s) assigned under the contract or, where ownership or control of the 8(a) contractor has changed and the SBA has granted a waiver to allow the contractor to continue performance (see 13 CFR § 124.515), the **DOE** may not credit any subsequent orders awarded to the contractor towards its small, disadvantaged business or small business goals. This is also dependent on whether ownership has changed to another 8(a) firm, or to another socially and economically disadvantaged individual, or, for the small business goal, where the firm is still small.

v. A limited source justification as noted at FAR 8.405-6 is not required for orders or BPAs that are sole source 8(a) awards under FSS.

**B. Competition below the competitive thresholds**

1. **General:** Reference FAR 19.805-1(a)(2): **DOE** and SBA acknowledge that, under the Federal Supply Schedule (FSS), STARS vehicles, or any governmentwide acquisition contract (GWAC), orders set aside for 8(a) Program Participants may be awarded on the basis of competition limited to all eligible 8(a) Program Participants at any dollar value. The

CO shall work with the SBA District Office to coordinate the 8(a) Program Offer and Acceptance. Refer to Section III.A. above.

2. **Procedures:** Follow the procedures at FAR 19.805-2(b): If **DOE** requests an eligibility determination the SBA has five (5) working days after receipt of the CO's request to respond. If **DOE** has not received a response within five (5) working days of request **DOE** may assume eligibility on the sixth ($6^{th}$) working day.

**C. SBA Appeals:** Reference FAR 19.810: **DOE** and the SBA agree to pursue the informal escalation process steps outlined below in the event that a disagreement arises between the **DOE's** CO and the SBA representative (District Office, Business Opportunity Specialist (BOS), Procurement Center Representative (PCR), or any SBA representative):

1. The **DOE's** CO shall seek assistance from their agency Small Business Technical Advisor (SBTA), or agency Small Business Specialist if an SBTA is not assigned, to coordinate a meeting with the SBA Representative to attempt to resolve the issue at the lowest level possible, within ten (10) working days. The SBA representative may include, but is not limited to, the District Director or their Deputy.

2. If step 1 is not successful, the **DOE** shall seek assistance and coordinate a meeting with the SBA District Director and the SBA Area Director to resolve within five (5) working days.

3. If there is no resolution from steps 1 or 2, the **DOE** shall contact their agency's Office of Small and Disadvantaged Business Utilization (OSDBU) to coordinate a meeting with the SBA Associate Administrator, Office of Business Development (AA/BD) to resolve within five (5) working days. The POC for these requests is the SBA's Director, Management and Technical Assistance Division and the **DOE** will email the request to the SBA at omta@sba.gov.

4. The last step in the informal escalation process before following the procedures of FAR 19.810 would be a discussion between the **DOE** OSDBU, the SBA Associate Administrator, Office of Business Development (AA/BD) and the Deputy Associate Administrator, Office of Government Contracting and Business Development (DAA/GCBD) to resolve the issue.

5. When the SBA is notified by an 8(a) Program Participant with concerns about **DOE** procurement causing adverse impact, the SBA will promptly notify the **DOE's** OSDBU and senior procurement official representative in writing. The **DOE** representative will respond in 10 (ten) working days.

**D. Administration of Contracts:** The **DOE's** CO must advise and consult with the SBA of any intent to terminate an 8(a) contract for default or convenience before doing so

(refer to 13 CFR § 124.518). The CO will contact the SBA District Office servicing the incumbent 8(a) firm awarded the original underlying contract.

**F. Release for Non-8(a) or Limited 8(a) Competition:** Reference FAR 19.815 and 13 CFR § 124.504(d) for release from the 8(a) BD Program. Where a procurement is offered and accepted into the 8(a) BD Program and subsequently awarded as an 8(a) contract, its follow-on requirement must remain in the 8(a) BD Program unless the SBA Associate Administrator for Business Development (AA/BD) agrees to release it.

1. **General:** The **DOE** CO must notify the SBA of any follow-on procurement from the 8(a) BD Program when going to a multiple award contract (MAC) that is not itself an 8(a) contract, but where the procuring activity intends to compete and award a competitive 8(a) order under the MAC.

   Release from the 8(a) BD Program is not required for follow-on procurements that are offered to and accepted into the program. Task or delivery orders, including BPAs using FAR 8.405-3, under a basic contract or established pools accepted into the 8(a) BD program are covered and do not require release.

2. **Procedures:** When a release is requested, **DOE** and the SBA agree to send the release request to the SBA District Office where the original offering letter or other notice was accepted. **DOE** will provide the following additional information in the request for release:

   a. Reason(s) for the request;
   b. Procurement history of the requirement;
   c. Market research;
   d. Re-procurement strategy;
   e. Incumbent 8(a) contractor name;
   f. Assigned NAICS Code; and,
   g. Statement of Work; and
   h. Copy of the SBA's original acceptance letter from the procurement history; and
   i. Agency goals and achievements for SDB, SDVOSB, HUBZone and WOSB.

3. Reference FAR 19.815(c): The **DOE** will coordinate its request for release with the SBA servicing District Office. Upon receipt of the request the SBA will work with the requestor to mutually establish a review timeline. The **DOE** will use the appeal process described in Section C above to resolve concerns.

4. **New Requirements***:* In accordance with 13 CFR § 124.3 and the definition of follow-on requirement or contract, the **DOE** and the SBA agree that the expansion or modification of an existing requirement may be considered a new requirement for:

   a. significant scope changes requiring different capabilities of

work,
b. 25% value change for equivalent periods of performance (adjusted for inflation), and/or
c. requirement end user changes.

Meeting any one of these conditions is not dispositive that a requirement is new. In particular, the 25% and end user rules cannot be applied rigidly in all cases (e.g., consolidated requirements and assisted acquisitions ).

ii. For **New requirement determinations**: The **DOE** CO shall notify the SBA servicing District Office and the PCR, as early as possible in the acquisition but no later than 30 days prior to the submission of the acquisition review package to the PCR that it intends to procure work currently under one or more 8(a) contracts as a requirement it considers to be new. Such notification must include:

a. The basis for **DOE's** determination that the requirement is new relative to the work currently fulfilled under the 8(a) BD Program;
b. The Independent Government Cost Estimate for the requirement and applicable market research based on estimated dollar value;
c. The statements of work for the new requirement and the work currently fulfilled under the 8(a) BD Program; and
d. Procurement history.

**IV. TERM / AMENDMENT**

A. This PA is effective on the date of SBA's signature. This PA may be amended, in writing, at any time by mutual agreement of the parties.

B. Either the SBA or **DOE** may terminate this PA upon thirty (30) calendar days advance written notice to the other party.

C. Either the SBA or **DOE** may suspend this PA for failure to follow the terms of this PA upon thirty (30) calendar days advance written notice to the other party.

D. This PA does not have an expiration date. However, it will be reviewed at a minimum every five (5) years from its effective date for accuracy and effectiveness and modified as needed.

Termination or suspension of this PA will require **DOE** to utilize the prescribed processes to contract with the SBA for the 8(a) BD Program as stated in FAR 19.8.

## V. ADMINISTRATION

**For DOE:**
John R. Bashista
Senior Procurement Executive
U.S. Department of Energy
John.Bashista@hq.doe.gov

**For NNSA:**
William J. Quigley
Acting Senior Procurement Executive
National Nuclear Security Administration
U.S. Department of Energy
William.Quigley@nnsa.doe.gov

**For SBA:**
Associate Administrator, Office of Business Development
Government Contracting and Business Development
Office of Program Review (OPR/GCBD)
Sharon.Gurley@sba.gov

**VI. ACCEPTANCE :** Authorized by, and on behalf of their respective agencies, the undersigned parties hereby accept the terms and conditions of this agreement.

**For DOE:**

Ron Pierce Digitally signed by Ron Pierce Date: 2022.09.08 13:51:35 -04'00'

Ron Pierce Date
Director, Small and Disadvantaged Business Utilization
U.S. Department of Energy
ron.pierce@hq.doe.gov

**For SBA:**

Donna L. Peebles September 20, 2022

Donna L. Peebles, D.M Date
Associate Administrator, Office of Business Development (AA/BD)
Office of Government Contracting and Business Development
U.S. Small Business Administration
dr.donna.peebles@sba.gov

DOE F 4220.2
Revised 12-2020
All Other Versions Are Obsolete

U.S. Department of Energy

Office of Small and Disadvantaged Business Utilization

# SMALL BUSINESS REVIEW FORM

| OSDBU Control Number: | Date a Completed 4220 Package is Received: |
|---|---|

## A. Proposed Contact Information

| **1a.** Acquisition Office and Program Element: | **1b.** Requisition Number: |
|---|---|
| **1c.** Contracting Officer or Contract Specialist Name: | **1d.** Contracting Officer or Contract Specialist Information (Telephone and Email): |

## B. Contract Information

**2a.** Description of Services and/or Supplies:

**2b.** History: New ☐ Recompete ☐ (If a recompete, provide information on current award. Note if it is awarded to a SB).

| **2c.** Competitive ☐ Non-competitive ☐ | **2d.** Total Estimated Contract Value (including Options): **$** |
|---|---|
| **2e.** Period of Performance (including Options) or Delivery Date: | **2f.** Anticipated Solicitation Issue Date: |

| **3a.** NAICS Code(s): | **3b.** NAICS Description: | **3c.** NAICS Size Standard: Employees _____ or Avg. Annual Receipts _____ |
|---|---|---|

## Proposed Small Business Participation/Consideration

**4a.** Small Business award:

☐ Small Business Set-Aside(FAR 19.5): ☐ 100% ☐ Partial: _____%

☐ 8(a)(FAR 19.8)

☐ Historically Underutilized Business Zone (HUBZone)(FAR 19.13)

☐ Women-Owned Small Business (WOSB)(FAR 19.15)

☐ Service-Disabled Veteran-Owned Small Business (SDVOSB)(FAR 19.14)

☐ Economically Disadvantaged Women-Owned Small Business (EDWOSB)(FAR 19.15)

☐ Other Set-Aside: cite authority e.g., (FAR 26.202-1, 6.208)

**4b.** Reason for Unrestricted Acquisition

☐ No reasonable expectation that offers will be obtained from at least two small business concerns.

☐ No reasonable expectation that award will be made at a fair market price.

☐ Sole Source/Proprietary item justified in accordance with FAR Part 6.3.

Is market research documentation provided? Yes ◯ No ◯



This form is 508 compliant.

**5.** Consolidation/Bundling Determination:

Is the requirement consolidated? Yes ◯ No ◯ Is the requirement bundled? Yes ◯ No ◯

If yes, attach supporting documentation. OSDBU concurrence is required on justification memorandum.

N/A: Below Consolidation established threshold: (FAR 7.107-2) ◯

**6.** Subcontract Plan Required: Yes ☐ No ☐ TBD ☐

## C. REVIEW & APPROVAL

**7.** Contracting Officer:

*Name* *Email*

*Phone Number* *Signature/Date*

**8.** Small Business Program Manager:

Concur ☐ Non-concur ☐ Comments? No ◯ Yes ◯ (If yes, add an attachment.)

*Name* *Email*

*Phone Number* *Signature/Date*

**9.** OSDBU Director (See instructions for signature threshold):

Concur ☐ Non-concur (If non-concurrence, provide written explanations) ☐ Comments? No ◯ Yes ◯ (If yes, add an attachment.)

*Name* *Email*

*Phone Number* *Signature/Date*

**10.** Small Business Administration (SBA) Procurement Center Representative (PCR):

Concur ☐ Non-concur (If non-concurrence, provide written explanations) ☐ Comments? No ◯ Yes ◯ (If yes, add an attachment.)

*Name* *Email*

*Phone Number* *Signature/Date*

**11.** Contracting Officer Decision after SBA PCR and OSDBU Director's Review:

Concur ☐ Non-concur ☐

(If non-concurrence, provide written explanation to the SBA and OSDBU Director)

Section 15(k) of the Small Business Act (15 U.S.C. 644(k))

*Signature/Date*



This form is 508 compliant.

# DOE F 4220.2- SMALL BUSINESS REVIEW FORM INSTRUCTIONS

**GENERAL INSTRUCTIONS:**

A DOE F. 4220.2 Small Business Review Form is required as identified in the DOE Acquisition Guide Chapter 19.2 (See Section 2.5 for exceptions). The OSDBU review threshold is $3M and above for awards not otherwise set-aside for small businesses. The review threshold for the SBA PCR is the same as OSDBU's unless a different threshold is established locally between DOE and cognizant PCR.

For fillable blocks that require additional space, enter "See attached" and attach a document with the necessary information.

**A. PROPOSED CONTACT INFORMATION** (Items 1a–1d)

**1a.** Enter Acquisition Office and Program Element name.

**1b**. Enter Requisition Number.

**1c.** Enter name of Contracting Officer or Contract Specialist (CO or CS) responsible for coordinating and completing this form.

**1d.** Enter telephone number and e-mail address of CO or CS.

**B. PROPOSED CONTRACT INFORMATION (Items 2a–3c)**

**2a.** Enter Description of Services and/or Supplies.

**2b.** History: Check "New" or "Recompete." If selecting "Recompete," provide information on the current award, including size of awardee.

**2c.** Check "Competitive" or "Non-competitive."

**2d.** Enter Total Estimated Contract Value (including options).

**2e.** Enter the Estimated Period of Performance (including options) or Delivery Date.

**2f.** Enter the Estimated Issue Date of the Solicitation.

**3a.** Enter North American Industry Classification System (NAICS) code (https://www.census.gov/eos/www/naics/)

**3b.** Enter NAICS code description.

**3c.** Enter NAICS code size standard. https://www.sba.gov/federal-contracting/contracting-guide/size-standards

**PROPOSED SMALL BUSINESS PARTICIPATION/CONSIDERATION** (Items 4a–6a)

**4a.** Check all that apply. Note: Above the simplified acquisition threshold, the contracting officer shall first consider an acquisition for the small business socioeconomic contracting programs before considering a small business set-aside (FAR 19.203(c)). Small business set-asides have priority over acquisitions using full and open competition (FAR 19.203(e)).

**4b**. Check the applicable box and indicate if market research is attached.

**5.** Select "N/A" if the effort is consolidated but below the consolidation threshold as referenced by the FAR citation. Select "Yes" or "No" as it applies. If "Yes," attach supporting documentation.

**6a.** Check "Yes," "No," or "TBD."

**C. REVIEW & APPROVAL** (Items 7–11)

**7.** Contracting Officer: Signature of CO who has the authority to bind the government and who is responsible for the acquisition.

**8.** Small Business Program Manager: The small business program manager (SBPM) will review, sign, date and indicate concurrence or non- concurrence with the method of acquisition determined by the CO. If the SBPM does not concur, another method will be recommended.

**9.** OSDBU Director: The OSDBU Director or designee has 10 business days, after receipt of a complete package from the CO, to review and sign the submitted 4220.2, or the OSDBU may request an extension. The OSDBU Director or designee will review, sign, date and indicate concurrence or non- concurrence with the method of acquisition determined by the CO and/or the SBPM. If the OSDBU Director or designee does not concur, another method will be recommended.

**10.** Small Business Administration (SBA) Procurement Center Representative (PCR): The SBA PCR shall sign and date this block to indicate concurrence or non-concurrence of the acquisition method determined by the CO. If the SBA PCR does not concur, the rationale will be documented and attached to this form and it will include a recommendation.

**11.** Contracting Officer Decision after SBA PCR Review: If the CO does not agree with the recommendations of the OSDBU Director or SBA PCR, the CO must provide rationale to the OSDBU Director and the SBA PCR within 5 working days, in accordance with FAR 19.506.

**NOTE:** For a complete package, at a minimum, the CO/CS shall forward all documentation listed below, as applicable, unless the DOE OSDBU waives the requirement. All OSDBU waivers will be in writing.

1. Completed DOE F 4220.2 Small Business Review Form, signed by the CO and SBPM.
2. Draft acquisition plan.
3. Draft solicitation.
4. Documentation reflecting market research conducted within the past 18 months (FAR 10.002(b)(1)).
5. Independent Government Cost Estimate.
6. A copy of the signed sole source/limited sources justification.
7. Presolicitation/Notice of Intent/Sources Sought, including any responses.



This form is 508 compliant.

### § 644. Awards or contracts

#### (a) Small business procurements

##### (1) In general

For purposes of this chapter, small business concerns shall receive any award or contract if such award or contract is, in the determination of the Administrator and the contracting agency, in the interest of—

(A) maintaining or mobilizing the full productive capacity of the United States;

(B) war or national defense programs; or

(C) assuring that a fair proportion of the total purchases and contracts for goods and services of the Government in each industry category (as defined under paragraph (2)) are awarded to small business concerns.

##### (2) Industry category defined

###### (A) In general

In this subsection, the term ''industry category'' means a discrete group of similar goods and services, as determined by the Administrator in accordance with the North American Industry Classification System codes used to establish small business size standards, except that the Administrator shall limit an industry category to a greater extent than provided under the North American Industry Classification System codes if the Administrator receives evidence indicating that further segmentation of the industry category is warranted—

(i) due to special capital equipment needs;

(ii) due to special labor requirements;

(iii) due to special geographic requirements, except as provided in subparagraph (B);

(iv) due to unique Federal buying patterns or requirements; or

(v) to recognize a new industry.

###### (B) Exception for geographic requirements

The Administrator may not further segment an industry category based on geographic requirements unless—

(i) the Government typically designates the geographic area where work for contracts for goods or services is to be performed;

(ii) Government purchases comprise the major portion of the entire domestic market for such goods or services; and

(iii) it is unreasonable to expect competition from business concerns located outside of the general geographic area due to the fixed location of facilities, high mobilization costs, or similar economic factors.

##### (3) Determinations with respect to awards or contracts

Determinations made pursuant to paragraph (1) may be made for individual awards or contracts, any part of an award or contract or task order, or for classes of awards or contracts or task orders.

##### (4) Increasing prime contracting opportunities for small business concerns

###### (A) Description of covered proposed procurements

The requirements of this paragraph shall apply to a proposed procurement that includes in its statement of work goods or services currently being supplied or performed by a small business concern and, as determined by the Administrator—

(i) is in a quantity or of an estimated dollar value which makes the participation of a small business concern as a prime contractor unlikely;

(ii) in the case of a proposed procurement for construction, seeks to bundle or consolidate discrete construction projects; or

(iii) is a solicitation that involves an unnecessary or unjustified bundling of contract requirements.

###### (B) Notice to procurement center representatives

With respect to proposed procurements described in subparagraph (A), at least 30 days before issuing a solicitation and concurrent with other processing steps required before issuing the solicitation, the contracting agency shall provide a copy of the proposed procurement to the procurement center representative of the contracting agency (as described in subsection (*l*)) along with a statement explaining—

(i) why the proposed procurement cannot be divided into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement;

(ii) why delivery schedules cannot be established on a realistic basis that will encourage the participation of small business concerns in a manner consistent with the actual requirements of the Government;

(iii) why the proposed procurement cannot be offered to increase the likelihood of the participation of small business concerns;

(iv) in the case of a proposed procurement for construction, why the proposed procurement cannot be offered as separate discrete projects; or

(v) why the contracting agency has determined that the bundling of contract requirements is necessary and justified.

###### (C) Alternatives to increase prime contracting opportunities for small business concerns

If the procurement center representative believes that the proposed procurement will make the participation of small business concerns as prime contractors unlikely, the procurement center representative, within 15 days after receiving the statement described in subparagraph (B), shall recommend to the contracting agency alternative procurement methods for increasing prime contracting opportunities for small business concerns.

**(D) Failure to agree on an alternative procurement method**

If the procurement center representative and the contracting agency fail to agree on an alternative procurement method, the Administrator shall submit the matter to the head of the appropriate department or agency for a determination.

**(5) Contracts for sale of government property**

With respect to a contract for the sale of Government property, small business concerns shall receive any such contract if, in the determination of the Administrator and the disposal agency, the award of such contract is in the interest of assuring that a fair proportion of the total sales of Government property be made to small business concerns.

**(6) Sale of electrical power or other property**

Nothing in this subsection shall be construed to change any preferences or priorities established by law with respect to the sale of electrical power or other property by the Federal Government.

**(7) Costs exceeding fair market price**

A contract may not be awarded under this subsection if the cost of the contract to the awarding agency exceeds a fair market price.

**(b) Placement of contracts by contracting procurement agency**

With respect to any work to be performed the amount of which would exceed the maximum amount of any contract for which a surety may be guaranteed against loss under section 694b of this title, the contracting procurement agency shall, to the extent practicable, place contracts so as to allow more than one small business concern to perform such work.

**(c) Programs for blind and handicapped individuals**

(1) As used in this subsection:

(A) The term ''Committee'' means the Committee for Purchase From People Who Are Blind or Severely Disabled established under section 8502 of title 41.

(B) The term ''public or private organization for the handicapped'' has the same meaning given such term in section 632(e) of this title.

(C) The term ''handicapped individual'' has the same meaning given such term in section 632(f) of this title.

(2)(A) During fiscal year 1995, public or private organizations for the handicapped shall be eligible to participate in programs authorized under this section in an aggregate amount not to exceed $40,000,000.

(B) None of the amounts authorized for participation by subparagraph (A) may be placed on the procurement list maintained by the Committee pursuant to section 8503 of title 41.

(3) The Administrator shall monitor and evaluate such participation.

(4)(A) Not later than ten days after the announcement of a proposed award of a contract by an agency or department to a public or private organization for the handicapped, a for-profit small business concern that has experienced or is likely to experience severe economic injury as the result of the proposed award may file an appeal of the proposed award with the Administrator.

(B) If such a concern files an appeal of a proposed award under subparagraph (A) and the Administrator, after consultation with the Executive Director of the Committee, finds that the concern has experienced or is likely to experience severe economic injury as the result of the proposed award, not later than thirty days after the filing of the appeal, the Administration shall require each agency and department having procurement powers to take such action as may be appropriate to alleviate economic injury sustained or likely to be sustained by the concern.

(5) Each agency and department having procurement powers shall report to the Office of Federal Procurement Policy each time a contract subject to paragraph (2)(A) is entered into, and shall include in its report the amount of the next higher bid submitted by a for-profit small business concern. The Office of Federal Procurement Policy shall collect data reported under the preceding sentence through the Federal procurement data system and shall report to the Administration which shall notify all such agencies and departments when the maximum amount of awards authorized under paragraph (2)(A) has been made during any fiscal year.

(6) For the purpose of this subsection, a contract may be awarded only if at least 75 per centum of the direct labor performed on each item being produced under the contract in the sheltered workshop or performed in providing each type of service under the contract by the sheltered workshop is performed by handicapped individuals.

(7) Agencies awarding one or more contracts to such an organization pursuant to the provisions of this subsection may use multiyear contracts, if appropriate.

**(d) Priority**

For purposes of this section priority shall be given to the awarding of contracts and the placement of subcontracts to small business concerns which shall perform a substantial proportion of the production on those contracts and subcontracts within areas of concentrated unemployment or underemployment or within labor surplus areas. Notwithstanding any other provision of law, total labor surplus area setasides pursuant to Defense Manpower Policy Number 4 (32A C.F.R. Chapter 1) or any successor policy shall be authorized if the Secretary or his designee specifically determines that there is a reasonable expectation that offers will be obtained from a sufficient number of eligible concerns so that awards will be made at reasonable prices. As soon as practicable and to the extent possible, in determining labor surplus areas, consideration shall be given to those persons who would be available for employment were suitable employment available. Until such definition reflects such number, the present criteria of such policy shall govern.

**(e) Procurement strategies; contract bundling**

**(1) In general**

To the maximum extent practicable, procurement strategies used by a Federal depart-

ment or agency having contracting authority shall facilitate the maximum participation of small business concerns as prime contractors, subcontractors, and suppliers, and each such Federal department or agency shall—

(A) provide opportunities for the participation of small business concerns during acquisition planning processes and in acquisition plans; and

(B) invite the participation of the appropriate Director of Small and Disadvantaged Business Utilization in acquisition planning processes and provide that Director access to acquisition plans.

**(2) Market research**

**(A) In general**

Before proceeding with an acquisition strategy that could lead to a contract containing consolidated procurement requirements, the head of an agency shall conduct market research to determine whether consolidation of the requirements is necessary and justified.

**(B) Factors**

For purposes of subparagraph (A), consolidation of the requirements may be determined as being necessary and justified if, as compared to the benefits that would be derived from contracting to meet those requirements if not consolidated, the Federal Government would derive from the consolidation measurably substantial benefits, including any combination of benefits that, in combination, are measurably substantial. Benefits described in the preceding sentence may include the following:

(i) Cost savings.

(ii) Quality improvements.

(iii) Reduction in acquisition cycle times.

(iv) Better terms and conditions.

(v) Any other benefits.

**(C) Reduction of costs not determinative**

The reduction of administrative or personnel costs alone shall not be a justification for bundling of contract requirements unless the cost savings are expected to be substantial in relation to the dollar value of the procurement requirements to be consolidated.

**(3) Strategy specifications**

If the head of a contracting agency determines that an acquisition plan for a procurement involves a substantial bundling of contract requirements, the head of a contracting agency shall publish a notice on a public website that such determination has been made not later than 7 days after making such determination. Any solicitation for a procurement related to the acquisition plan may not be published earlier than 7 days after such notice is published. Along with the publication of the solicitation, the head of a contracting agency shall publish a justification for the determination, which shall include the following information:

(A) The specific benefits anticipated to be derived from the bundling of contract requirements and a determination that such benefits justify the bundling.

(B) An identification of any alternative contracting approaches that would involve a lesser degree of bundling of contract requirements.

(C) An assessment of—

(i) the specific impediments to participation by small business concerns as prime contractors that result from the bundling of contract requirements; and

(ii) the specific actions designed to maximize participation of small business concerns as subcontractors (including suppliers) at various tiers under the contract or contracts that are awarded to meet the requirements.

**(4) Contract teaming**

**(A) In general**

In the case of a solicitation of offers for a bundled or consolidated contract that is issued by the head of an agency, a small business concern that provides for use of a particular team of subcontractors or a joint venture of small business concerns may submit an offer for the performance of the contract.

**(B) Evaluation of offers**

The head of the agency shall evaluate an offer described in subparagraph (A) in the same manner as other offers, with due consideration to the capabilities of all of the proposed subcontractors or members of the joint venture as follows:

**(i) Teams**

When evaluating an offer of a small business prime contractor that includes a proposed team of small business subcontractors, the head of the agency shall consider the capabilities and past performance of each first tier subcontractor that is part of the team as the capabilities and past performance of the small business prime contractor.

**(ii) Joint ventures**

When evaluating an offer of a joint venture of small business concerns, if the joint venture does not demonstrate sufficient capabilities or past performance to be considered for award of a contract opportunity, the head of the agency shall consider the capabilities and past performance of each member of the joint venture as the capabilities and past performance of the joint venture.

**(C) Status as a small business concern**

Participation of a small business concern in a team or a joint venture under this paragraph shall not affect the status of that concern as a small business concern for any other purpose.

**(f) Contracting preference for small business concerns in a major disaster area**

**(1) Definition**

In this subsection, the term ''disaster area'' means the area for which the President has de-

cleared a major disaster, during the period of the declaration.

**(2) Contracting preference**

An agency shall provide a contracting preference for a small business concern located in a disaster area if the small business concern will perform the work required under the contract in the disaster area.

**(3) Credit for meeting contracting goals**

If an agency awards a contract to a small business concern under the circumstances described in paragraph (2), the value of the contract shall be doubled for purposes of determining compliance with the goals for procurement contracts under subsection (g)(1)(A).

**(g) Goals for participation of small business concerns in procurement contracts**

(1) GOVERNMENTWIDE GOALS.—

(A) ESTABLISHMENT.—The President shall annually establish Governmentwide goals for procurement contracts awarded to small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women in accordance with the following:

(i) The Governmentwide goal for participation by small business concerns shall be established at not less than 23 percent of the total value of all prime contract awards for each fiscal year. In meeting this goal, the Government shall ensure the participation of small business concerns from a wide variety of industries and from a broad spectrum of small business concerns within each industry.

(ii) The Governmentwide goal for participation by small business concerns owned and controlled by service-disabled veterans shall be established at not less than 3 percent of the total value of all prime contract and subcontract awards for each fiscal year.

(iii) The Governmentwide goal for participation by qualified HUBZone small business concerns shall be established at not less than 3 percent of the total value of all prime contract and subcontract awards for each fiscal year.

(iv) The Governmentwide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year.

(v) The Governmentwide goal for participation by small business concerns owned and controlled by women shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year.

(B) ACHIEVEMENT OF GOVERNMENTWIDE GOALS.—Each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women to participate in the performance of contracts let by such agency. The Small Business Administration and the Administrator for Federal Procurement Policy shall, when exercising their authority pursuant to paragraph (2), insure that the cumulative annual prime contract goals for all agencies meet or exceed the annual Governmentwide prime contract goal established by the President pursuant to this paragraph.

(2)(A) The head of each Federal agency shall, after consultation with the Administration, establish goals for the participation by small business concerns, by small business concerns owned and controlled by service-disabled veterans, by qualified HUBZone small business concerns, by small business concerns owned and controlled by socially and economically disadvantaged individuals, and by small business concerns owned and controlled by women in procurement contracts of such agency. Such goals shall separately address prime contract awards and subcontract awards for each category of small business covered.

(B) Goals established under this subsection shall be jointly established by the Administration and the head of each Federal agency and shall realistically reflect the potential of small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women to perform such contracts and to perform subcontracts under such contracts. Contracts excluded from review by procurement center representatives pursuant to subsection (*l*)(9)(B) shall not be considered when establishing these goals.

(C) Whenever the Administration and the head of any Federal agency fail to agree on established goals, the disagreement shall be submitted to the Administrator for Federal Procurement Policy for final determination.

(D) After establishing goals under this paragraph for a fiscal year, the head of each Federal agency shall develop a plan for achieving such goals at both the prime contract and the subcontract level, which shall apportion responsibilities among the agency's acquisition executives and officials. In establishing goals under this paragraph, the head of each Federal agency shall make a consistent effort to annually expand participation by small business concerns from each industry category in procurement contracts and subcontracts of such agency, including participation by small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women.

(E) The head of each Federal agency, in attempting to attain expanded participation under subparagraph (D), shall consider—

(i) contracts awarded as the result of unrestricted competition; and

(ii) contracts awarded after competition restricted to eligible small business concerns under this section and under the program established under section 637(a) of this title.

(F)(i) Each procurement employee or program manager described in clause (ii) shall communicate to the subordinates of the procurement employee or program manager the importance of achieving goals established under subparagraph (A).

(ii) A procurement employee or program manager described in this clause is a senior procurement executive, senior program manager, or Director of Small and Disadvantaged Business Utilization of a Federal agency having contracting authority.

(3) First tier subcontracts that are awarded by Management and Operating contractors sponsored by the Department of Energy to small business concerns, small businesses[1] concerns owned and controlled by service disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women, shall be considered toward the annually established agency and Government-wide goals for procurement contracts awarded.

**(h) Reporting on goals for procurement contracts awarded to small business concerns**

**(1) Agency reports**

At the conclusion of each fiscal year, the head of each Federal agency shall submit to the Administrator a report describing—

(A) the extent of the participation by small business concerns, small business concerns owned and controlled by veterans (including service-disabled veterans), qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women in the procurement contracts of such agency during such fiscal year;

(B) whether the agency achieved the goals established for the agency under subsection (g)(2) with respect to such fiscal year;

(C) any justifications for a failure to achieve such goals; and

(D) a remediation plan with proposed new practices to better meet such goals, including analysis of factors leading to any failure to achieve such goals.

**(2) Reports by Administrator**

Not later than 60 days after receiving a report from each Federal agency under paragraph (1) with respect to a fiscal year, the Administrator shall submit to the President and Congress, and to make available on a public Web site, a report that includes—

(A) a copy of each report submitted to the Administrator under paragraph (1);

(B) a determination of whether each goal established by the President under subsection (g)(1) for such fiscal year was achieved;

(C) a determination of whether each goal established by the head of a Federal agency under subsection (g)(2) for such fiscal year was achieved;

(D) the reasons for any failure to achieve a goal established under paragraph (1) or (2) of subsection (g) for such fiscal year and a description of actions planned by the applicable agency to address such failure, including the Administrator's comments and recommendations on the proposed remediation plan; and

(E) for the Federal Government and each Federal agency, an analysis of the number and dollar amount of prime contracts awarded during such fiscal year to—

(i) small business concerns—

(I) in the aggregate;

(II) through sole source contracts;

(III) through competitions restricted to small business concerns;

(IV) through unrestricted competition;

(V) that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be small business concerns for purposes of the initial contract; and

(VI) that were awarded using a procurement method that restricted competition to small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, small business concerns owned and controlled by women, or a subset of any such concerns;

(ii) small business concerns owned and controlled by service-disabled veterans—

(I) in the aggregate;

(II) through sole source contracts;

(III) through competitions restricted to small business concerns;

(IV) through competitions restricted to small business concerns owned and controlled by service-disabled veterans;

(V) through unrestricted competition;

(VI) that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be small business concerns owned and controlled by service-disabled veterans for purposes of the initial contract; and

(VII) that were awarded using a procurement method that restricted competition to qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, small business concerns owned and controlled by women, or a subset of any such concerns;

[1] So in original. Probably should be ''business''.

(iii) qualified HUBZone small business concerns—

(I) in the aggregate;

(II) through sole source contracts;

(III) through competitions restricted to small business concerns;

(IV) through competitions restricted to qualified HUBZone small business concerns;

(V) through unrestricted competition where a price evaluation preference was used;

(VI) through unrestricted competition where a price evaluation preference was not used;

(VII) that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be qualified HUBZone small business concerns for purposes of the initial contract; and

(VIII) that were awarded using a procurement method that restricted competition to small business concerns owned and controlled by service-disabled veterans, small business concerns owned and controlled by socially and economically disadvantaged individuals, small business concerns owned and controlled by women, or a subset of any such concerns;

(iv) small business concerns owned and controlled by socially and economically disadvantaged individuals—

(I) in the aggregate;

(II) through sole source contracts;

(III) through competitions restricted to small business concerns;

(IV) through competitions restricted to small business concerns owned and controlled by socially and economically disadvantaged individuals;

(V) through unrestricted competition;

(VI) by reason of that concern's certification as a small business owned and controlled by socially and economically disadvantaged individuals;

(VII) that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be small business concerns owned and controlled by socially and economically disadvantaged individuals for purposes of the initial contract; and

(VIII) that were awarded using a procurement method that restricted competition to small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by women, or a subset of any such concerns;

(v) small business concerns owned by an Indian tribe (as such term is defined in section 637(a)(13) of this title) other than an Alaska Native Corporation—

(I) in the aggregate;

(II) through sole source contracts;

(III) through competitions restricted to small business concerns;

(IV) through competitions restricted to small business concerns owned and controlled by socially and economically disadvantaged individuals;

(V) through unrestricted competition; and

(VI) that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be small business concerns owned by an Indian tribe other than an Alaska Native Corporation for purposes of the initial contract;

(vi) small business concerns owned by a Native Hawaiian Organization—

(I) in the aggregate;

(II) through sole source contracts;

(III) through competitions restricted to small business concerns;

(IV) through competitions restricted to small business concerns owned and controlled by socially and economically disadvantaged individuals;

(V) through unrestricted competition; and

(VI) that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be small business concerns owned by a Native Hawaiian Organization for purposes of the initial contract;

(vii) small business concerns owned by an Alaska Native Corporation—

(I) in the aggregate;

(II) through sole source contracts;

(III) through competitions restricted to small business concerns;

(IV) through competitions restricted to small business concerns owned and controlled by socially and economically disadvantaged individuals;

(V) through unrestricted competition; and

(VI) that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be small business concerns owned by an Alaska Native Corporation for purposes of the initial contract; and

(viii) small business concerns owned and controlled by women—

(I) in the aggregate;

(II) through competitions restricted to small business concerns;

(III) through competitions restricted using the authority under section 637(m)(2) of this title;

(IV) through competitions restricted using the authority under section 637(m)(2) of this title and in which the waiver authority under section 637(m)(3) of this title was used;

(V) through sole source contracts awarded using the authority under subsection [2] 637(m)(7) of this title;

[2] So in original. Probably should be ''section''.

(VI) through sole source contracts awarded using the authority under section 637(m)(8) of this title;

(VII) by industry for contracts described in subclause (III), (IV), (V), or (VI);

(VIII) through unrestricted competition;

(IX) that were purchased by another entity after the initial contract was awarded and as a result of the purchase, would no longer be deemed to be small business concerns owned and controlled by women for purposes of the initial contract; and

(X) that were awarded using a procurement method that restricted competition to small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, or a subset of any such concerns; and

(F) for the Federal Government, the number, dollar amount, and distribution with respect to the North American Industry Classification System of subcontracts awarded during such fiscal year to small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women, provided that such information is publicly available through data systems developed pursuant to the Federal Funding Accountability and Transparency Act of 2006 (Public Law 109–282), or otherwise available as provided in paragraph (3).

**(3) Procurement data**

**(A) Federal Procurement Data System**

**(i) In general**

To assist in the implementation of this section, the Administrator shall have access to information collected through the Federal Procurement Data System, Federal Subcontracting Reporting System, or any new or successor system.

**(ii) GSA report**

On the date that the Administrator makes available the report required under paragraph (2), the Administrator of the General Services Administration shall submit to the President and Congress, and shall make available on a public website, a report in the same form and manner, and including the same information, as the report required under paragraph (2). The report shall include all procurements made for the period covered by the report and may not exclude any contract awarded.

**(B) Agency procurement data sources**

To assist in the implementation of this section, the head of each contracting agency shall provide, upon request of the Administrator, procurement information collected through agency data collection sources in existence at the time of the request. Contracting agencies shall not be required to establish new data collection systems to provide such data.

**(i) Small business set-asides**

Nothing in this chapter or any other provision of law precludes exclusive small business set-asides for procurements of architectural and engineering services, research, development, test and evaluation, and each Federal agency is authorized to develop such set-asides to further the interests of small business in those areas.

**(j) Small business reservation**

(1) Each contract for the purchase of goods and services that has an anticipated value greater than the micro-purchase threshold, but not greater than the simplified acquisition threshold shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and are competitive with regard to the quality and delivery of the goods or services being purchased.

(2) In carrying out paragraph (1), a contracting officer shall consider a responsive offer timely received from an eligible small business offeror.

(3) Nothing in paragraph (1) shall be construed as precluding an award of a contract with a value not greater than $100,000 under the authority of subsection (a) of section 637 of this title, section 712[3] of the Business Opportunity Development Reform Act of 1988 (Public Law 100–656; 15 U.S.C. 644 note), or section 7102 of the Federal Acquisition Streamlining Act of 1994.

**(k) Office of Small and Disadvantaged Business Utilization; Director**

There is hereby established in each Federal agency having procurement powers an office to be known as the ''Office of Small and Disadvantaged Business Utilization''. The management of each such office shall be vested in an officer or employee of such agency, with experience serving in any combination of the following roles: program manager, deputy program manager, or assistant program manager for Federal acquisition program; chief engineer, systems engineer, assistant engineer, or product support manager for Federal acquisition program; Federal contracting officer; small business technical advisor; contracts administrator for Federal Government contracts; attorney specializing in Federal procurement law; small business liaison officer; officer or employee who managed Federal Government contracts for a small business; or individual whose primary responsibilities were for the functions and duties of section 637, 644, 657a, 657f, or 657q of this title. Such officer or employee—

(1) shall be known as the ''Director of Small and Disadvantaged Business Utilization'' for such agency;

(2) shall be appointed by the head of such agency to a position that is a Senior Executive Service position (as such term is defined

[3] See References in Text note below.

under section 3132(a) of title 5), except that, for any agency in which the positions of Chief Acquisition Officer and senior procurement executive (as such terms are defined under section 657q(a) of this title) are not Senior Executive Service positions, the Director of Small and Disadvantaged Business Utilization may be appointed to a position compensated at not less than the minimum rate of basic pay payable for grade GS–15 of the General Schedule under section 5332 of title 5 (including comparability payments under section 5304 of title 5);

(3) shall be responsible only to (including with respect to performance appraisals), and report directly and exclusively to, the head of such agency or to the deputy of such head, except that the Director for the Office of the Secretary of Defense shall be responsible only to (including with respect to performance appraisals), and report directly and exclusively to, such Secretary or the Secretary's designee;

(4) shall be responsible for the implementation and execution of the functions and duties under sections 637, 644, 657a, 657f, and 657q of this title which relate to such agency;

(5) shall identify proposed solicitations that involve significant bundling of contract requirements, and work with the agency acquisition officials and the Administration to revise the procurement strategies for such proposed solicitations where appropriate to increase the probability of participation by small businesses as prime contractors, or to facilitate small business participation as subcontractors and suppliers, if a solicitation for a bundled contract is to be issued;

(6) shall assist small business concerns to obtain payments, required late payment interest penalties, or information regarding payments due to such concerns from an executive agency or a contractor, in conformity with chapter 39 of title 31 or any other protection for contractors or subcontractors (including suppliers) that is included in the Federal Acquisition Regulation or any individual agency supplement to such Government-wide regulation,[4]

(7) shall have supervisory authority over personnel of such agency to the extent that the functions and duties of such personnel relate to functions and duties under sections 637, 644, 657a, 657f, and 657q of this title;

(8) shall assign a small business technical adviser to each office to which the Administration has assigned a procurement center representative—

(A) who shall be a full-time employee of the procuring activity and shall be well qualified, technically trained and familiar with the supplies or services purchased at the activity; and

(B) whose principal duty shall be to assist the Administration procurement center representative in his duties and functions relating to sections 637, 644, 657a, 657f, and 657q of this title,[4]

(9) shall cooperate, and consult on a regular basis, with the Administration with respect to carrying out the functions and duties described in paragraph (4) of this subsection;

(10) shall make recommendations to contracting officers as to whether a particular contract requirement should be awarded pursuant to subsection (a) or section 637, 644, 657a, or 657f of this title, and the failure of the contracting officer to accept any such recommendations shall be documented and included within the appropriate contract file;

(11) shall review and advise such agency on any decision to convert an activity performed by a small business concern to an activity performed by a Federal employee;

(12) shall provide to the Chief Acquisition Officer and senior procurement executive of such agency advice and comments on acquisition strategies, market research, and justifications related to section 657q of this title;

(13) may provide training to small business concerns and contract specialists, except that such training may only be provided to the extent that the training does not interfere with the Director carrying out other responsibilities under this subsection;

(14) shall receive unsolicited proposals and, when appropriate, forward such proposals to personnel of the activity responsible for reviewing such proposals;

(15) shall carry out exclusively the duties enumerated in this chapter, and shall, while the Director, not hold any other title, position, or responsibility, except as necessary to carry out responsibilities under this subsection;

(16) shall submit, each fiscal year, to the Committee on Small Business of the House of Representatives and the Committee on Small Business and Entrepreneurship of the Senate a report describing—

(A) the training provided by the Director under paragraph (13) in the most recently completed fiscal year;

(B) the percentage of the budget of the Director used for such training in the most recently completed fiscal year;

(C) the percentage of the budget of the Director used for travel in the most recently completed fiscal year; and

(D) any failure of the agency to comply with section 637, 644, 657a, or 657f of this title;

(17) shall, when notified by a small business concern prior to the award of a contract that the small business concern believes that a solicitation, request for proposal, or request for quotation unduly restricts the ability of the small business concern to compete for the award—

(A) submit the notice of the small business concern to the contracting officer and, if necessary, recommend ways in which the solicitation, request for proposal, or request for quotation may be altered to increase the opportunity for competition;

(B) inform the advocate for competition of such agency (as established under section 1705 of title 41 or section 2318 of title 10) of such notice; and

(C) ensure that the small business concern is aware of other resources and processes

[4] So in original. The comma probably should be a semicolon.

available to address unduly restrictive provisions in a solicitation, request for proposal, or request for quotation, even if such resources and processes are provided by such agency, the Administration, the Comptroller General, or a procurement technical assistance program established under chapter 142 of title 10;

(18) shall review summary data provided by purchase card issuers of purchases made by the agency greater than the micro-purchase threshold (as defined under section 1902 of title 41) and less than the simplified acquisition threshold to ensure that the purchases have been made in compliance with the provisions of this chapter and have been properly recorded in the Federal Procurement Data System, if the method of payment is a purchase card issued by the Department of Defense pursuant to section 2784 of title 10 or by the head of an executive agency pursuant to section 1909 of title 41;

(19) shall provide assistance to a small business concern awarded a contract or subcontract under this chapter or under title 10 or title 41 in finding resources for education and training on compliance with contracting regulations (including the Federal Acquisition Regulation) after award of such a contract or subcontract; and

(20) shall review all subcontracting plans required by paragraph (4) or (5) of section 637(d) of this title to ensure that the plan provides maximum practicable opportunity for small business concerns to participate in the performance of the contract to which the plan applies.

This subsection shall not apply to the Administration.

**(*l*) Procurement center representatives**

(1) ASSIGNMENT AND ROLE.—The Administrator shall assign to each major procurement center a procurement center representative with such assistance as may be appropriate.

(2) ACTIVITIES.—A procurement center representative is authorized to—

(A) attend any provisioning conference or similar evaluation session during which determinations are made as to whether requirements are to be procured through other than full and open competition and make recommendations with respect to such requirements to the members of such conference or session;

(B) review, at any time, barriers to small business participation in Federal contracting previously imposed on goods and services through acquisition method coding or similar procedures, and recommend to personnel of the appropriate activity the prompt reevaluation of such barriers;

(C) review barriers to small business participation in Federal contracting arising out of restrictions on the rights of the United States in technical data, and, when appropriate, recommend that personnel of the appropriate activity initiate a review of the validity of such an asserted restriction;

(D) review any bundled or consolidated solicitation or contract in accordance with this chapter;

(E) have access to procurement records and other data of the procurement center commensurate with the level of such representative's approved security clearance classification, with such data provided upon request in electronic format, when available;

(F) receive unsolicited proposals from small business concerns and transmit such proposals to personnel of the activity responsible for reviewing such proposals, who shall furnish the procurement center representative with information regarding the disposition of any such proposal;

(G) consult with the Director the Office of Small and Disadvantaged Business Utilization of that agency and the agency personnel described in paragraph[5] (7) and (8) of subsection (k) with regard to agency insourcing decisions covered by subsection (k)(11);

(H) be an advocate for the maximum practicable utilization of small business concerns in Federal contracting, including by advocating against the consolidation or bundling of contract requirements when not justified;

(I) assist small business concerns with finding resources for education and training on compliance with contracting regulations (including the Federal Acquisition Regulation) after award of a contract or subcontract; and

(J) carry out any other responsibility assigned by the Administrator.

(3) APPEALS.—A procurement center representative is authorized to appeal the failure to act favorably on any recommendation made pursuant to paragraph (2). Such appeal shall be filed and processed in the same manner and subject to the same conditions and limitations as an appeal filed by the Administrator pursuant to subsection (a).

(4) The Administration shall assign and co-locate at least two small business technical advisers to each major procurement center in addition to such other advisers as may be authorized from time to time. The sole duties of such advisers shall be to assist the procurement center representative for the center to which such advisers are assigned in carrying out the functions described in paragraph (2) and the representatives referred to in subsection (k)(6).

(5) POSITION REQUIREMENTS.—

(A) IN GENERAL.—A procurement center representative assigned under this subsection shall—

(i) be a full-time employee of the Administration;

(ii) be fully qualified, technically trained, and familiar with the goods and services procured by the major procurement center to which that representative is assigned; and

(iii) have the certification described in subparagraph (C).

(B) COMPENSATION.—The Administrator shall establish personnel positions for procurement center representatives assigned under this subsection, which are classified at a grade level of the General Schedule sufficient to attract and retain highly qualified personnel.

(C) CERTIFICATION REQUIREMENTS.—

[5] So in original. Probably should be ''paragraphs''.

(i) IN GENERAL.—Consistent with the requirements of clause (ii), a procurement center representative shall have a Level III Federal Acquisition Certification in Contracting (or any successor certification) or the equivalent Department of Defense certification, except that any person serving in such a position on or before January 3, 2013, may continue to serve in that position for a period of 5 years without the required certification.

(ii) DELAY OF CERTIFICATION REQUIREMENTS.—

(I) TIMING.—The certification described in clause (i) is not required for any person serving as a procurement center representative until the date that is one calendar year after the date such person is appointed as a procurement center representative.

(II) APPLICATION.—The requirements of subclause (I) shall—

(aa) be included in any initial job posting for the position of a procurement center representative; and

(bb) apply to any person appointed as a procurement center representative after January 3, 2013.

(6) MAJOR PROCUREMENT CENTER DEFINED.—For purposes of this subsection, the term ''major procurement center'' means a procurement center that, in the opinion of the Administrator, purchases substantial dollar amounts of goods or services, including goods or services that are commercially available.

(7) TRAINING.—

(A) AUTHORIZATION.—At such times as the Administrator deems appropriate, the breakout procurement center representative[6] shall conduct familiarization sessions for contracting officers and other appropriate personnel of the procurement center to which such representative is assigned. Such sessions shall acquaint the participants with the provisions of this subsection and shall instruct them in methods designed to further the purposes of such subsection.

(B) LIMITATION.—A procurement center representative may provide training under subparagraph (A) only to the extent that the training does not interfere with the representative carrying out other activities under this subsection.

(8) ANNUAL BRIEFING AND REPORT.—A procurement center representative shall prepare and personally deliver an annual briefing and report to the head of the procurement center to which such representative is assigned. Such briefing and report shall detail the past and planned activities of the representative and shall contain such recommendations for improvement in the operation of the center as may be appropriate. The head of such center shall personally receive such briefing and report and shall, within 60 calendar days after receipt, respond, in writing, to each recommendation made by such representative.

(9) SCOPE OF REVIEW.—The Administrator—

(A) may not limit the scope of review by the procurement center representative for any solicitation of a contract or task order without regard to whether the contract or task order or part of the contract or task order is set aside for small business concerns, whether 1 or more contracts or task order awards are reserved for small business concerns under a multiple award contract, or whether or not the solicitation would result in a bundled or consolidated contract (as defined in subsection (s)) or a bundled or consolidated task order; and

(B) shall, unless the contracting agency requests a review, limit the scope of review by the procurement center representative for any solicitation of a contract or task order if such solicitation is awarded by or for the Department of Defense and—

(i) is conducted pursuant to section 2762 of title 22;

(ii) is a humanitarian operation as defined in section 401(e) of title 10;

(iii) is for a contingency operation, as defined in section 101(a)(13) of title 10;

(iv) is to be awarded pursuant to an agreement with the government of a foreign country in which Armed Forces of the United States are deployed; or

(v) both the place of award and the place of performance are outside of the United States and its territories.

**(m) Additional duties of procurement center representatives**

All procurement center representatives (including those referred to in subsection (k)(6)), in addition to such other duties as may be assigned by the Administrator, shall increase, insofar as possible, the number and dollar value of procurements that may be used for the programs established under this section and section 637(a) of this title.

**(n) Determination of labor surplus areas**

For purposes of this section, the determination of labor surplus areas shall be made on the basis of the criteria in effect at the time of the determination, except that any minimum population criteria shall not exceed twenty-five thousand. Such determination, as modified by the preceding sentence, shall be made by the Secretary of Labor.

**(*o*) Limitations on subcontracting**

A concern may not be awarded a contract under subsection (a) as a small business concern unless the concern agrees to satisfy the requirements of section 657s of this title.

**(p) Access to data**

**(1) Bundled contract defined**

In this subsection, the term ''bundled contract'' has the meaning given such term in section 632(*o*)(1) of this title.

**(2) Database**

**(A)[7] In general**

Not later than 180 days after December 21, 2000, the Administrator of the Small Busi-

[6] So in original. Probably should be ''the procurement center representative''.

[7] So in original. No subpar. (B) has been enacted.

ness Administration shall develop and shall thereafter maintain a database containing data and information regarding—

(i) each bundled contract awarded by a Federal agency; and

(ii) each small business concern that has been displaced as a prime contractor as a result of the award of such a contract.

**(3) Analysis**

For each bundled contract that is to be recompeted as a bundled contract, the Administrator shall determine—

(A) the amount of savings and benefits (in accordance with subsection (e)) achieved under the bundling of contract requirements; and

(B) whether such savings and benefits will continue to be realized if the contract remains bundled, and whether such savings and benefits would be greater if the procurement requirements were divided into separate solicitations suitable for award to small business concerns.

**(4) Annual report on contract bundling**

**(A) In general**

Not later than 1 year after December 21, 2000, and annually in March thereafter, the Administration shall transmit a report on contract bundling to the Committees on Small Business of the House of Representatives and the Senate.

**(B) Contents**

Each report transmitted under subparagraph (A) shall include—

(i) data on the number, arranged by industrial classification, of small business concerns displaced as prime contractors as a result of the award of bundled contracts by Federal agencies; and

(ii) a description of the activities with respect to previously bundled contracts of each Federal agency during the preceding year, including—

(I) data on the number and total dollar amount of all contract requirements that were bundled; and

(II) with respect to each bundled contract, data or information on—

(aa) the justification for the bundling of contract requirements;

(bb) the cost savings realized by bundling the contract requirements over the life of the contract;

(cc) the extent to which maintaining the bundled status of contract requirements is projected to result in continued cost savings;

(dd) the extent to which the bundling of contract requirements complied with the contracting agency's small business subcontracting plan, including the total dollar value awarded to small business concerns as subcontractors and the total dollar value previously awarded to small business concerns as prime contractors; and

(ee) the impact of the bundling of contract requirements on small business concerns unable to compete as prime contractors for the consolidated requirements and on the industries of such small business concerns, including a description of any changes to the proportion of any such industry that is composed of small business concerns.

**(5) Access to data**

**(A) Federal procurement data system**

To assist in the implementation of this section, the Administration shall have access to information collected through the Federal Procurement Data System.

**(B) Agency procurement data sources**

To assist in the implementation of this section, the head of each contracting agency shall provide, upon request of the Administration, procurement information collected through existing agency data collection sources.

**(q) Reports related to procurement center representatives**

**(1) Teaming and joint venture requirements**

**(A) In general**

Each Federal agency shall include in each solicitation for any multiple award contract above the substantial bundling threshold of the Federal agency a provision soliciting bids from any responsible source, including responsible small business concerns and teams or joint ventures of small business concerns.

**(B) Teams**

When evaluating an offer of a small business prime contractor that includes a proposed team of small business subcontractors for any multiple award contract above the substantial bundling threshold of the Federal agency, the head of the agency shall consider the capabilities and past performance of each first tier subcontractor that is part of the team as the capabilities and past performance of the small business prime contractor.

**(C) Joint ventures**

When evaluating an offer of a joint venture of small business concerns for any multiple award contract above the substantial bundling threshold of the Federal agency, if the joint venture does not demonstrate sufficient capabilities or past performance to be considered for award of a contract opportunity, the head of the agency shall consider the capabilities and past performance of each member of the joint venture as the capabilities and past performance of the joint venture.

**(2) Policies on reduction of contract bundling**

**(A) In general**

Not later than 1 year after September 27, 2010, the Federal Acquisition Regulatory Council established under section 1302(a) of title 41 shall amend the Federal Acquisition Regulation issued under section 1303(a) of title 41 to—

(i) establish a Government-wide policy regarding contract bundling, including re-

garding the solicitation of teaming and joint ventures under paragraph (1); and

(ii) require that the policy established under clause (i) be published on the website of each Federal agency.

**(B) Rationale for contract bundling**

Not later than 30 days after the date on which the head of a Federal agency submits data certifications to the Administrator for Federal Procurement Policy, the head of the Federal agency shall publish on the website of the Federal agency a list and rationale for any bundled contract for which the Federal agency solicited bids or that was awarded by the Federal agency.

**(3) Reporting**

Not later than 90 days after September 27, 2010, and every 3 years thereafter, the Administrator shall submit to the Committee on Small Business and Entrepreneurship of the Senate and the Committee on Small Business of the House of Representatives a report regarding procurement center representatives and commercial market representatives, which shall—

(A) identify each area for which the Administration has assigned a procurement center representative or a commercial market representative;

(B) explain why the Administration selected the areas identified under subparagraph (A); and

(C) describe the activities performed by procurement center representatives and commercial market representatives.

**(r) Multiple award contracts**

Not later than 1 year after September 27, 2010, the Administrator for Federal Procurement Policy and the Administrator, in consultation with the Administrator of General Services, shall, by regulation, establish guidance under which Federal agencies may, at their discretion—

(1) set aside part or parts of a multiple award contract for small business concerns, including the subcategories of small business concerns identified in subsection (g)(2);

(2) notwithstanding the fair opportunity requirements under section 2304c(b) of title 10 and section 4106(c) of title 41, set aside orders placed against multiple award contracts for small business concerns, including the subcategories of small business concerns identified in subsection (g)(2); and

(3) reserve 1 or more contract awards for small business concerns under full and open multiple award procurements, including the subcategories of small business concerns identified in subsection (g)(2).

**(s) Data quality improvement plan**

**(1) In general**

Not later than October 1, 2015, the Administrator of the Small Business Administration, in consultation with the Small Business Procurement Advisory Council, the Administrator for Federal Procurement Policy, and the Administrator of General Services, shall develop a plan to improve the quality of data reported on bundled or consolidated contracts in the Federal procurement data system (described in section 1122(a)(4)(A) of title 41).

**(2) Plan requirements**

The plan shall—

(A) describe the roles and responsibilities of the Administrator of the Small Business Administration, each Director of Small and Disadvantaged Business Utilization, the Administrator for Federal Procurement Policy, the Administrator of General Services, senior procurement executives, and Chief Acquisition Officers in—

(i) improving the quality of data reported on bundled or consolidated contracts in the Federal procurement data system; and

(ii) contributing to the annual report required by subsection (p)(4);

(B) recommend changes to policies and procedures, including training procedures of relevant personnel, to properly identify and mitigate the effects of bundled or consolidated contracts;

(C) recommend requirements for periodic and statistically valid data verification and validation; and

(D) recommend clear data verification responsibilities.

**(3) Plan submission**

The Administrator of the Small Business Administration shall submit the plan to the Committee on Small Business of the House of Representatives and the Committee on Small Business and Entrepreneurship of the Senate not later than December 1, 2016.

**(4) Implementation**

Not later than October 1, 2016, the Administrator of the Small Business Administration shall implement the plan described in this subsection.

**(5) Certification**

The Administrator shall annually provide to the Committee on Small Business of the House of Representatives and the Committee on Small Business and Entrepreneurship of the Senate a certification of the accuracy and completeness of data reported on bundled and consolidated contracts.

**(6) Definitions**

In this subsection, the following definitions apply:

**(A) Chief Acquisition Officer; senior procurement executive**

The terms ''Chief Acquisition Officer'' and ''senior procurement executive'' have the meanings given such terms in section 657q(a) of this title.

**(B) Bundled or consolidated contract**

The term ''bundled or consolidated contract'' means a bundled contract (as defined in section 632(*o*) of this title) or a contract resulting from the consolidation of contracting requirements (as defined in section 657q(a)(2) of this title).

**(t) GAO report on Small Business Administration programs in Puerto Rico**

Not later than one year after June 30, 2016, the Comptroller General of the United States shall

submit to the Committee on Small Business of the House of Representatives and the Committee on Small Business and Entrepreneurship of the Senate a report on the application and utilization of contracting activities of the Administration (including contracting activities relating to HUBZone small business concerns) in Puerto Rico. The report shall also identify any provisions of Federal law that may create an obstacle to the efficient implementation of such contracting activities.

**(u) Post-award compliance resources**

The Administrator shall provide to small business development centers and entities participating in the Procurement Technical Assistance Cooperative Agreement Program under chapter 142 of title 10 and shall make available on the website of the Administration, a list of resources for small business concerns seeking education and assistance on compliance with contracting regulations (including the Federal Acquisition Regulation) after award of a contract or subcontract.

**(v) Regulatory changes and training materials**

Not less than annually, the Administrator shall provide to the Defense Acquisition University (established under section 1746 of title 10), the Federal Acquisition Institute (established under section 1201 of title 41), the individual responsible for mandatory training and education of the acquisition workforce of each agency (described under section 1703(f)(1)(C) of title 41), small business development centers, and entities participating in the Procurement Technical Assistance Cooperative Agreement Program under chapter 142 of title 10—

(1) a list of all changes made in the prior year to regulations promulgated—

(A) by the Administrator that affect Federal acquisition; and

(B) by the Federal Acquisition Council that implement amendments to this chapter; and

(2) any materials the Administrator has developed that explain, train, or assist Federal agencies or departments or small business concerns with compliance with the regulations described in paragraph (1).

**(w) Solicitation notice regarding administration of change orders for construction**

**(1) In general**

With respect to any solicitation for the award of a contract for construction anticipated to be awarded to a small business concern, the agency administering such contract shall provide a notice along with the solicitation to prospective bidders and offerors that includes—

(A) information about the agency's policies or practices in complying with the requirements of the Federal Acquisition Regulation relating to the timely definitization of requests for an equitable adjustment; and

(B) information about the agency's past performance in definitizing requests for equitable adjustments in accordance with paragraph (2).

**(2) Requirements for agencies**

An agency shall provide the past performance information described under paragraph (1)(B) as follows:

(A) For the 3-year period preceding the issuance of the notice, to the extent such information is available.

(B) With respect to an agency that, on August 13, 2018, has not compiled the information described under paragraph (1)(B)—

(i) beginning 1 year after August 13, 2018, for the 1-year period preceding the issuance of the notice;

(ii) beginning 2 years after August 13, 2018, for the 2-year period preceding the issuance of the notice; and

(iii) beginning 3 years after August 13, 2018, and each year thereafter, for the 3-year period preceding the issuance of the notice.

**(3) Format of past performance information**

In the notice required under paragraph (1), the agency shall ensure that the past performance information described under paragraph (1)(B) is set forth separately for each definitization action that was completed during the following periods:

(A) Not more than 30 days after receipt of a request for an equitable adjustment.

(B) Not more than 60 days after receipt of a request for an equitable adjustment.

(C) Not more than 90 days after receipt of a request for an equitable adjustment.

(D) Not more than 180 days after receipt of a request for an equitable adjustment.

(E) Not more than 365 days after receipt of a request for an equitable adjustment.

(F) More than 365 days after receipt of a request for an equitable adjustment.

(G) After the completion of the performance of the contract through a contract modification addressing all undefinitized requests for an equitable adjustment received during the term of the contract.

**(x) Small business credit for Puerto Rico businesses**

**(1) Credit for meeting contracting goals**

If an agency awards a prime contract to Puerto Rico business during the period beginning on August 13, 2018, and ending on the date that is 4 years after such date, the value of the contract shall be doubled for purposes of determining compliance with the goals for procurement contracts under subsection (g)(1)(A)(i) during such period.

**(2) Report**

Along with the report required under subsection (h)(1), the head of each Federal agency shall submit to the Administrator, and make publicly available on the scorecard described in section 868(b) of the National Defense Authorization Act for Fiscal Year 2016 (15 U.S.C. 644 note), an analysis of the number and dollar amount of prime contracts awarded pursuant to paragraph (1) for each fiscal year of the period described in such paragraph.

(Pub. L. 85–536, § 2[15], July 18, 1958, 72 Stat. 395; Pub. L. 95–89, title V, § 502, Aug. 4, 1977, 91 Stat.

562; Pub. L. 95–507, title II, §§ 221, 232, 233, Oct. 24, 1978, 92 Stat. 1770, 1772; Pub. L. 96–302, title I, §§ 116, 117, July 2, 1980, 94 Stat. 839; Pub. L. 98–577, title IV, § 403(a), Oct. 30, 1984, 98 Stat. 3080; Pub. L. 99–272, title XVIII, § 18003(a), Apr. 7, 1986, 100 Stat. 363; Pub. L. 99–500, § 101(c) [title X, §§ 903(d), 921(a), (b)(1), (c)(2)–(e), 922(c)], Oct. 18, 1986, 100 Stat. 1783–82, 1783–132, 1783–147 to 1783–149, 1783–152, and Pub. L. 99–591, § 101(c) [title X, §§ 903(d), 921(a), (b)(1), (c)(2)–(e), 922(c)], Oct. 30, 1986, 100 Stat. 3341–82, 3341–132, 3341–147 to 3341–149, 3341–152; Pub. L. 99–661, div. A, title IX, formerly title IV, §§ 903(d), 921(a), (b)(1), (c)(2)–(e), 922(c), Nov. 14, 1986, 100 Stat. 3912, 3926–3928, 3932, renumbered title IX, Pub. L. 100–26, § 3(5), Apr. 21, 1987, 101 Stat. 273; Pub. L. 100–26, § 10(a)(1), (b)(1), Apr. 21, 1987, 101 Stat. 288; Pub. L. 100–180, div. A, title VIII, § 809(a)–(c), Dec. 4, 1987, 101 Stat. 1130; Pub. L. 100–496, § 12, Oct. 17, 1988, 102 Stat. 2465; Pub. L. 100–590, title I, §§ 110, 133(a), Nov. 3, 1988, 102 Stat. 2994, 3005; Pub. L. 100–656, title V, §§ 502, 503, title VI, §§ 601, 603, Nov. 15, 1988, 102 Stat. 3881, 3887, 3888; Pub. L. 101–37, §§ 19, 21, June 15, 1989, 103 Stat. 74, 75; Pub. L. 101–510, div. A, title VIII, § 806(e)(3), Nov. 5, 1990, 104 Stat. 1593; Pub. L. 101–574, title II, § 208, Nov. 15, 1990, 104 Stat. 2820; Pub. L. 102–190, div. A, title VIII, § 806(d), Dec. 5, 1991, 105 Stat. 1419; Pub. L. 102–366, title II, § 232(b), Sept. 4, 1992, 106 Stat. 1002; Pub. L. 102–484, div. A, title VIII, § 801(h)(8), Oct. 23, 1992, 106 Stat. 2446; Pub. L. 102–569, title IX, § 911(b), Oct. 29, 1992, 106 Stat. 4486; Pub. L. 103–355, title IV, § 4004, title VII, §§ 7101(a), 7106(a), Oct. 13, 1994, 108 Stat. 3338, 3367, 3374; Pub. L. 103–403, title III, § 305, Oct. 22, 1994, 108 Stat. 4189; Pub. L. 104–106, div. D, title XLIII, § 4321(c)(3), Feb. 10, 1996, 110 Stat. 674; Pub. L. 105–135, title IV, § 413, title VI, § 603(b), Dec. 2, 1997, 111 Stat. 2618, 2632; Pub. L. 106–50, title V, § 502, title VI, § 601, Aug. 17, 1999, 113 Stat. 247, 248; Pub. L. 106–554, § 1(a)(9) [title VIII, §§ 806(a), 810], Dec. 21, 2000, 114 Stat. 2763, 2763A–706; Pub. L. 111–240, title I, §§ 1312(a), (b), 1331, 1333, 1346, 1347(b)(2), Sept. 27, 2010, 124 Stat. 2537, 2541, 2542, 2546, 2547; Pub. L. 112–239, div. A, title XVI, §§ 1621, 1623, 1631(a), (b), 1632, 1691, 1696(a), (b)(3), Jan. 2, 2013, 126 Stat. 2067, 2069–2071, 2073, 2087, 2090, 2091; Pub. L. 113–66, div. A, title XVI, § 1613, Dec. 26, 2013, 127 Stat. 948; Pub. L. 113–76, div. D, title III, § 318, Jan. 17, 2014, 128 Stat. 178; Pub. L. 113–291, div. A, title VIII, §§ 822(a), 825(b), Dec. 19, 2014, 128 Stat. 3435, 3438; Pub. L. 114–88, div. B, title I, § 2108, Nov. 25, 2015, 129 Stat. 694; Pub. L. 114–92, div. A, title VIII, §§ 862(a), 863(a), 865(c), 867, 868(a), 870, Nov. 25, 2015, 129 Stat. 925, 926, 928, 932, 933, 938; Pub. L. 114–187, title IV, § 408, June 30, 2016, 130 Stat. 592; Pub. L. 114–328, div. A, title XVIII, §§ 1801, 1802, 1811–1813(a), (c), (d), 1814(a), 1821(b), Dec. 23, 2016, 130 Stat. 2648, 2650–2654; Pub. L. 115–91, div. A, title XVII, §§ 1702(a), (c), 1703(a), Dec. 12, 2017, 131 Stat. 1803; Pub. L. 115–232, div. A, title VIII, §§ 812(a)(2)(C)(viii), 855, 861(b), Aug. 13, 2018, 132 Stat. 1847, 1890, 1896.)

### References in Text

The Federal Funding Accountability and Transparency Act of 2006, referred to in subsec. (h)(2)(F), is Pub. L. 109–282, Sept. 26, 2006, 120 Stat. 1186, which is set out as a note under section 6101 of Title 31, Money and Finance.

Section 712 of the Business Opportunity Development Reform Act of 1988 (Public Law 100–656; 15 U.S.C. 644 note), referred to in subsec. (j)(3), was repealed by Pub. L. 111–240, title I, § 1335(a), Sept. 27, 2010, 124 Stat. 2543.

Section 7102 of the Federal Acquisition Streamlining Act of 1994, referred to in subsec. (j)(3), is section 7102 of Pub. L. 103–355, which is set out below.

Section 868(b) of the National Defense Authorization Act for Fiscal Year 2016, referred to in subsec. (x)(2), is section 868(b) of Pub. L. 114–92, which is set out as a note under this section.

### Codification

In subsec. (c)(1)(A), ''section 8502 of title 41'' substituted for ''the first section of the Act entitled 'An Act to create a Committee on Purchases of Blind-made Products, and for other purposes', approved June 25, 1938 (41 U.S.C. 46)'' on authority of Pub. L. 111–350, § 6(c), Jan. 4, 2011, 124 Stat. 3854, which Act enacted Title 41, Public Contracts.

In subsec. (c)(2)(B), ''section 8503 of title 41'' substituted for ''section 2 of the Act entitled 'An Act to create a Committee on Purchases of Blind-made Products, and for other purposes', approved June 25, 1938 (41 U.S.C. 47)'' on authority of Pub. L. 111–350, § 6(c), Jan. 4, 2011, 124 Stat. 3854, which Act enacted Title 41, Public Contracts.

In subsec. (q)(2)(A), ''section 1302(a) of title 41'' substituted for ''section 25(a) of the Office of Federal Procurement Policy Act (41 U.S.C. 4219(a) [421(a)])'' and ''section 1303(a) of title 41'' substituted for ''section 25 of such Act'' on authority of Pub. L. 111–350, § 6(c), Jan. 4, 2011, 124 Stat. 3854, which Act enacted Title 41, Public Contracts.

In subsec. (r)(2), ''section 4106(c) of title 41'' substituted for ''section 303J(b) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253j(b))'' on authority of Pub. L. 111–350, § 6(c), Jan. 4, 2011, 124 Stat. 3854, which Act enacted Title 41, Public Contracts.

Pub. L. 99–591 is a corrected version of Pub. L. 99–500.

### Prior Provisions

Prior similar provisions were contained in section 214 of act July 30, 1953, ch. 282, title II, 67 Stat. 238, as amended by act Aug. 9, 1955, ch. 628, § 9, 69 Stat. 551, which was previously classified to section 643 of this title. The provisions of section 215 of act July 30, 1953, formerly classified to this section, were transferred to section 2[10] of Pub. L. 85–536, and are classified to section 639 of this title. See Codification note set out under section 631 of this title.

### Amendments

2018—Subsec. (j)(3). Pub. L. 115–232, § 812(a)(2)(C)(viii)(I), struck out ''section 2323 of title 10,'' after ''section 637 of this title,''.

Subsec. (k)(10). Pub. L. 115–232, § 812(a)(2)(C)(viii)(II), substituted ''subsection (a) or'' for ''subsection (a),'' and struck out ''or section 2323 of title 10, which shall be made with due regard to the requirements of subsection (m),'' after ''or 657f of this title,''.

Subsec. (m). Pub. L. 115–232, § 812(a)(2)(C)(viii)(III), amended subsec. (m) generally. Prior to amendment, subsec. (m) related to policies and procedures for each agency subject to former section 2323 of title 10 to follow when implementing requirements under that section.

Subsec. (w). Pub. L. 115–232, § 855, added subsec. (w).

Subsec. (x). Pub. L. 115–232, § 861(b), added subsec. (x).

2017—Subsec. (a)(1)(C). Pub. L. 115–91, § 1702(c), substituted ''total purchases and contracts for goods and services'' for ''total purchase and contracts for goods and services''.

Subsec. (h)(2)(E)(i)(V), (VI). Pub. L. 115–91, § 1703(a)(1), added subcls. (V) and (VI).

Subsec. (h)(2)(E)(ii)(VI), (VII). Pub. L. 115–91, § 1703(a)(2), added subcls. (VI) and (VII).

Subsec. (h)(2)(E)(iii)(VII), (VIII). Pub. L. 115–91, § 1703(a)(3), added subcls. (VII) and (VIII).

Subsec. (h)(2)(E)(iv)(VII), (VIII). Pub. L. 115–91, § 1703(a)(4), added subcls. (VII) and (VIII).

Subsec. (h)(2)(E)(v)(VI). Pub. L. 115–91, §1703(a)(5), added subcl. (VI).

Subsec. (h)(2)(E)(vi)(VI). Pub. L. 115–91, §1703(a)(6), added subcl. (VI).

Subsec. (h)(2)(E)(vii)(VI). Pub. L. 115–91, §1703(a)(7), added subcl. (VI).

Subsec. (h)(2)(E)(viii)(IX), (X). Pub. L. 115–91, §1703(a)(8), added subcls. (IX) and (X).

Subsec. (j)(1). Pub. L. 115–91, §1702(a), substituted ''greater than the micro-purchase threshold, but not greater than the simplified acquisition threshold'' for ''greater than $2,500 but not greater than $100,000''.

2016—Subsec. (a). Pub. L. 114–328, §1801, amended subsec. (a) generally. Prior to amendment, subsec. (a) related to determination of awards or contracts, including notice requirement for certain large, consolidated, or bundled proposed procurements.

Subsec. (g)(2)(B). Pub. L. 114–328, §1811(b), inserted at end ''Contracts excluded from review by procurement center representatives pursuant to subsection (*l*)(9)(B) shall not be considered when establishing these goals.''

Subsec. (h)(3). Pub. L. 114–328, §1802, amended par. (3) generally. Prior to amendment, par. (3) related to access to data collected through the Federal Procurement Data System and provision of collected data upon request.

Subsec. (k). Pub. L. 114–328, §1812(1), (2), substituted ''section 637, 644, 657a, 657f, or 657q'' for ''section 637, 644 or 657q'' in introductory provisions and ''sections 637, 644, 657a, 657f, and 657q'' for ''this section and section 637'' wherever appearing.

Subsec. (k)(10). Pub. L. 114–328, §1812(3), substituted ''section 637, 644, 657a, or 657f'' for ''section 637(a)''.

Subsec. (k)(16)(D). Pub. L. 114–328, §1812(6), added subpar. (D).

Subsec. (k)(18). Pub. L. 114–328, §1812(4), (5), added par. (18).

Subsec. (k)(19). Pub. L. 114–328, §1813(a), added par. (19).

Subsec. (k)(20). Pub. L. 114–328, §1821(b), added par. (20).

Subsec. (*l*)(2)(I), (J). Pub. L. 114–328, §1813(d), added subpar. (I) and redesignated former subpar. (I) as (J).

Subsec. (*l*)(9). Pub. L. 114–328, §1811(a), added par. (9).

Subsec. (t). Pub. L. 114–187 added subsec. (t).

Subsec. (u). Pub. L. 114–328, §1813(c), added subsec. (u).

Subsec. (v). Pub. L. 114–328, §1814(a), added subsec. (v).

2015—Subsec. (e)(3). Pub. L. 114–92, §863(a), amended par. (3) generally. Prior to amendment, par. (3) set forth required elements for a proposed procurement strategy for a procurement involving a substantial bundling of contract requirements.

Subsec. (e)(4). Pub. L. 114–92, §867(a), amended par. (4) generally. Prior to amendment, text read as follows: ''In the case of a solicitation of offers for a bundled contract that is issued by the head of an agency, a small-business concern may submit an offer that provides for use of a particular team of subcontractors for the performance of the contract. The head of the agency shall evaluate the offer in the same manner as other offers, with due consideration to the capabilities of all of the proposed subcontractors. If a small business concern teams under this paragraph, it shall not affect its status as a small business concern for any other purpose.''

Subsec. (f). Pub. L. 114–88 added subsec. (f).

Subsec. (g)(1)(A)(i). Pub. L. 114–92, §868(a), inserted at end ''In meeting this goal, the Government shall ensure the participation of small business concerns from a wide variety of industries and from a broad spectrum of small business concerns within each industry.''

Subsec. (k)(17). Pub. L. 114–92, §870, added par. (17).

Subsec. (*l*)(5)(A)(iii). Pub. L. 114–92, §865(c)(1), amended cl. (iii) generally. Prior to amendment, cl. (iii) read as follows: ''have a Level III Federal Acquisition Certification in Contracting (or any successor certification) or the equivalent Department of Defense certification, except that any person serving in such a position on January 2, 2013, may continue to serve in that position for a period of 5 years without the required certification.''

Subsec. (*l*)(5)(C). Pub. L. 114–92, §865(c)(2), added subpar. (C).

Subsec. (q)(1). Pub. L. 114–92, §867(b), inserted ''and joint venture'' before ''requirements'' in par. heading, designated existing provisions as subpar. (A), inserted subpar. heading, and added subpars. (B) and (C).

Subsec. (s)(4) to (6). Pub. L. 114–92, §862(a), added pars. (4) and (5) and redesignated former par. (4) as (6).

2014—Subsec. (g)(3). Pub. L. 113–76 added par. (3).

Subsec. (h)(2)(E)(viii)(V) to (VIII). Pub. L. 113–291, §825(b), added subcls. (V) to (VII) and redesignated former subcl. (V) as (VIII).

Subsec. (s). Pub. L. 113–291, §822(a), added subsec. (s).

2013—Subsec. (e)(1). Pub. L. 112–239, §1623, substituted ''a Federal department or agency'' for ''the various agencies'' and '', and each such Federal department or agency shall—'' and subpars. (A) and (B) for period at end.

Subsec. (g)(1). Pub. L. 112–239, §1631(a), amended par. (1) generally. Prior to amendment, par. (1) related to annual Government-wide goals for participation of small business concerns in procurement contracts.

Subsec. (g)(2)(A). Pub. L. 112–239, §1631(b)(1), inserted at end ''Such goals shall separately address prime contract awards and subcontract awards for each category of small business covered.''

Subsec. (g)(2)(D). Pub. L. 112–239, §1631(b)(2), substituted ''After establishing goals under this paragraph for a fiscal year, the head of each Federal agency shall develop a plan for achieving such goals at both the prime contract and the subcontract level, which shall apportion responsibilities among the agency's acquisition executives and officials. In establishing goals under this paragraph, the head of each Federal agency shall make a consistent effort to annually expand participation by small business concerns from each industry category in procurement contracts and subcontracts of such agency, including participation by small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women.'' for ''For the purpose of establishing goals under this subsection, the head of each Federal agency shall make consistent efforts to annually expand participation by small business concerns from each industry category in procurement contracts of the agency, including participation by small business concerns owned and controlled by service-disabled veterans, by qualified HUBZone small business concerns, by small business concerns owned and controlled by socially and economically disadvantaged individuals, and by small business concerns owned and controlled by women.''

Subsec. (g)(2)(E), (F). Pub. L. 112–239, §1631(b)(3), added subpars. (E) and (F) and struck out former subpars. (E) and (F) which read as follows:

''(E) The head of each Federal agency, in attempting to attain the participation described in subparagraph (D), shall consider—

''(i) contracts awarded as the result of unrestricted competition; and

''(ii) contracts awarded after competition restricted to eligible small business concerns under this section and under the program established under section 637(a) of this title.

''(F)(i) Each procurement employee or program manager described in clause (ii) shall communicate to the subordinates of the procurement employee or program manager the importance of achieving small business goals.

''(ii) A procurement employee or program manager described in this clause is a senior procurement executive, senior program manager, or Director of Small and Disadvantaged Business Utilization of a Federal agency having contracting authority.''

Subsec. (h). Pub. L. 112–239, §1632, amended subsec. (h) generally. Prior to amendment, subsec. (h) related to

annual Federal agency reports to Small Business Administration and inclusion of Administration information in President's annual state of small business report to Congress.

Subsec. (h)(1)(D). Pub. L. 113–66 added subpar. (D).

Subsec. (k). Pub. L. 112–239, §1691(d), substituted '', with experience serving in any combination of the following roles: program manager, deputy program manager, or assistant program manager for Federal acquisition program; chief engineer, systems engineer, assistant engineer, or product support manager for Federal acquisition program; Federal contracting officer; small business technical advisor; contracts administrator for Federal Government contracts; attorney specializing in Federal procurement law; small business liaison officer; officer or employee who managed Federal Government contracts for a small business; or individual whose primary responsibilities were for the functions and duties of section 637, 644 or 657q of this title. Such officer or employee'' for ''who shall'' in introductory provisions.

Subsec. (k)(1). Pub. L. 112–239, §1691(e)(1), substituted ''shall be known'' for ''be known'' and ''such agency;'' for ''such agency,''.

Subsec. (k)(2). Pub. L. 112–239, §1691(e)(2), substituted ''shall be appointed by'' for ''be appointed by''.

Pub. L. 112–239, §1691(a), substituted ''such agency to a position that is a Senior Executive Service position (as such term is defined under section 3132(a) of title 5), except that, for any agency in which the positions of Chief Acquisition Officer and senior procurement executive (as such terms are defined under section 657q(a) of this title) are not Senior Executive Service positions, the Director of Small and Disadvantaged Business Utilization may be appointed to a position compensated at not less than the minimum rate of basic pay payable for grade GS–15 of the General Schedule under section 5332 of such title (including comparability payments under section 5304 of such title);'' for ''such agency,''.

Subsec. (k)(3). Pub. L. 112–239, §1691(e)(3), substituted ''Director'' for ''director'' and ''Secretary's designee;'' for ''Secretary's designee,''.

Pub. L. 112–239, §1691(b), substituted ''shall be responsible only to (including with respect to performance appraisals), and report directly and exclusively to, the head'' for ''be responsible only to, and report directly to, the head'' and ''be responsible only to (including with respect to performance appraisals), and report directly and exclusively to, such Secretary'' for ''be responsible only to, and report directly to, such Secretary''.

Subsec. (k)(4). Pub. L. 112–239, §1691(e)(4), substituted ''shall be responsible'' for ''be responsible'' and ''such agency;'' for ''such agency,''.

Subsec. (k)(5). Pub. L. 112–239, §1691(e)(5), substituted ''shall identify proposed'' for ''identify proposed''.

Subsec. (k)(6). Pub. L. 112–239, §1691(e)(6), substituted ''shall assist small'' for ''assist small''.

Subsec. (k)(7). Pub. L. 112–239, §1691(e)(7), substituted ''shall have supervisory'' for ''have supervisory'' and ''this title;'' for ''this title,''.

Subsec. (k)(8). Pub. L. 112–239, §1691(e)(8)(A), substituted ''shall assign a'' for ''assign a'' in introductory provisions.

Subsec. (k)(8)(A). Pub. L. 112–239, §1691(e)(8)(B), substituted ''the activity; and'' for ''the activity, and''.

Subsec. (k)(9). Pub. L. 112–239, §1691(e)(9), substituted ''shall cooperate, and'' for ''cooperate, and'' and ''subsection;'' for ''subsection, and''.

Subsec. (k)(10). Pub. L. 112–239, §1691(e)(10), substituted ''shall make recommendations'' for ''make recommendations'', ''subsection (a), section 637(a) of this title, or section 2323 of title 10, which shall'' for ''subsection (a) of this section, or section 637(a) of this title or section 2323 of title 10. Such recommendations shall'', and ''contract file;'' for ''contract file.''

Subsec. (k)(11) to (16). Pub. L. 112–239, §1691(c), added pars. (11) to (16).

Subsec. (*l*). Pub. L. 112–239, §1621(a), inserted heading.

Subsec. (*l*)(1). Pub. L. 112–239, §1621(b), amended par. (1) generally. Prior to amendment, par. (1) read as follows: ''The Administration shall assign to each major procurement center a breakout procurement center representative with such assistance as may be appropriate. The breakout procurement center representative shall carry out the activities described in paragraph (2), and shall be an advocate for the breakout of items for procurement through full and open competition, whenever appropriate, while maintaining the integrity of the system in which such items are used, and an advocate for the use of full and open competition, whenever appropriate, for the procurement of supplies and services by such center. Any breakout procurement center representative assigned under this subsection shall be in addition to the representative referred to in subsection (k)(6) of this section.''

Subsec. (*l*)(2). Pub. L. 112–239, §1621(c)(1), inserted heading and substituted ''A'' for ''In addition to carrying out the responsibilities assigned by the Administration, a breakout'' in introductory provisions.

Subsec. (*l*)(2)(B). Pub. L. 112–239, §1621(c)(2), substituted ''review, at any time, barriers to small business participation in Federal contracting'' for ''review, at any time, restrictions on competition'', ''goods and services'' for ''items'' and ''barriers'' for ''limitations''.

Subsec. (*l*)(2)(C). Pub. L. 112–239, §1621(c)(3), substituted ''review barriers to small business participation in Federal contracting'' for ''review restrictions on competition''.

Subsec. (*l*)(2)(D). Pub. L. 112–239, §1621(c)(4), added subpar. (D) and struck out former subpar. (D) which read as follows: ''obtain from any governmental source, and make available to personnel of the appropriate activity, technical data necessary for the preparation of a competitive solicitation package for any item of supply or service previously procured noncompetitively due to the unavailability of such technical data;''.

Subsec. (*l*)(2)(E). Pub. L. 112–239, §1621(c)(5), added subpar. (E) and struck out former subpar. (E) which read as follows: ''have access to procurement records and other data of the procurement center commensurate with the level of such representative's approved security clearance classification;''.

Subsec. (*l*)(2)(F) to (I). Pub. L. 112–239, §1621(c)(6), added subpars. (F) to (I) and struck out former subpars. (F) and (G) which read as follows:

''(F) receive unsolicited engineering proposals and, when appropriate (i) conduct a value analysis of such proposal to determine whether such proposal, if adopted, will result in lower costs to the United States without substantially impeding legitimate acquisition objectives and forward to personnel of the appropriate activity recommendations with respect to such proposal, or (ii) forward such proposals without analysis to personnel of the activity responsible for reviewing such proposals and who shall furnish the breakout procurement center representative with information regarding the disposition of any such proposal; and

''(G) review the systems that account for the acquisition and management of technical data within the procurement center to assure that such systems provide the maximum availability and access to data needed for the preparation of offers to sell to the United States those supplies to which such data pertain which potential offerors are entitled to receive.''

Subsec. (*l*)(3). Pub. L. 112–239, §1621(d), inserted heading and substituted ''A procurement center representative'' for ''A breakout procurement center representative''.

Subsec. (*l*)(4). Pub. L. 112–239, §1621(e), substituted ''procurement center representative'' for ''breakout procurement center representative''.

Subsec. (*l*)(5). Pub. L. 112–239, §1621(f), inserted par. heading, added subpar. (A), redesignated subpar. (C) as (B), inserted subpar. heading and substituted ''The Administrator shall establish personnel positions for procurement center representatives assigned under'' for ''The Administration shall establish personnel positions for breakout procurement representatives and advisers assigned pursuant to'' in subpar. (B), and struck out former subpars. (A) and (B) which read as follows:

''(A) The breakout procurement center representatives and technical advisers assigned pursuant to this subsection shall be—

''(i) full-time employees of the Administration; and

''(ii) fully qualified, technically trained, and familiar with the supplies and services procured by the major procurement center to which they are assigned.

''(B) In addition to the requirements of subparagraph (A), each breakout procurement center representative, and at least one technical adviser assigned to such representative, shall be an accredited engineer.''

Subsec. (*l*)(6). Pub. L. 112–239, § 1621(g), inserted heading and substituted in text ''goods or services, including goods or services that are commercially available'' for ''other than commercial items and which has the potential to incur significant savings as the result of the placement of a breakout procurement center representative''.

Subsec. (*l*)(7). Pub. L. 112–239, § 1621(h)(1), (2), (4), inserted par. heading, inserted subpar. (A) heading, and added subpar. (B). Former par. (7)(B) redesignated (8).

Subsec. (*l*)(8). Pub. L. 112–239, § 1621(h)(3), redesignated subpar. (7)(B) as par. (8), inserted heading, and substituted ''A procurement center representative'' for ''The breakout procurement center representative'' and ''60'' for ''sixty''.

Subsec. (*o*). Pub. L. 112–239, § 1696(b)(3), added subsec. (*o*) and struck out former subsec. (*o*) which related to requirements for performance of contracts by employees of small business concerns.

Subsec. (p). Pub. L. 112–239, § 1696(a)(1), substituted ''Access to data'' for ''Database, analysis, and annual report with respect to bundled contracts'' in heading.

Subsec. (q). Pub. L. 112–239, § 1696(a)(2), substituted ''Reports related to procurement center representatives'' for ''Bundling accountability measures'' in heading.

2010—Subsec. (g)(1). Pub. L. 111–240, § 1347(b)(2), inserted ''and subcontract'' before ''awards for fiscal year 2003'' in fourth sentence.

Pub. L. 111–240, § 1312(b), substituted ''Administrator for Federal Procurement Policy'' for ''Administrator of the Office of Federal Procurement Policy''.

Subsec. (g)(2). Pub. L. 111–240, § 1333, designated first to fifth sentences as subpars. (A) to (E), respectively, substituted ''the participation described in subparagraph (D)'' for ''such participation'' in subpar. (E), redesignated former subpars. (A) and (B) as cls. (i) and (ii), respectively, of subpar. (E), and added subpar. (F).

Pub. L. 111–240, § 1312(b), substituted ''Administrator for Federal Procurement Policy'' for ''Administrator of the Office of Federal Procurement Policy''.

Subsec. (h)(2). Pub. L. 111–240, § 1346, in introductory provisions, substituted ''submit to the President and the Committee on Small Business and Entrepreneurship of the Senate and the Committee on Small Business of the House of Representatives the compilation and analysis, which shall include the following:'' for ''submit them to the President and the Congress. The Administration's submission to the President shall include the following:''.

Subsec. (q). Pub. L. 111–240, § 1312(a), added subsec. (q).

Subsec. (r). Pub. L. 111–240, § 1331, added subsec. (r).

2000—Subsec. (a). Pub. L. 106–554, § 1(a)(9) [title VIII, § 806(a)], in eighth sentence, substituted ''definition of a 'United States industry' under the North American Industry Classification System, as established'' for ''four-digit standard industrial classification codes contained in the Standard Industrial Classification Manual published''.

Subsec. (p). Pub. L. 106–554, § 1(a)(9) [title VIII, § 810], added subsec. (p).

1999—Subsec. (g)(1). Pub. L. 106–50, § 502(a)(3), inserted ''small business concerns owned and controlled by service-disabled veterans,'' after ''the maximum practicable opportunity for small business concerns,'' in penultimate sentence.

Pub. L. 106–50, § 502(a)(2), inserted after second sentence ''The Government-wide goal for participation by small business concerns owned and controlled by service-disabled veterans shall be established at not less than 3 percent of the total value of all prime contract and subcontract awards for each fiscal year.''

Pub. L. 106–50, § 502(a)(1), inserted ''small business concerns owned and controlled by service disabled veterans,'' after ''small business concerns,'' the first place appearing in first sentence.

Subsec. (g)(2). Pub. L. 106–50, § 502(b)(3), inserted ''small business concerns owned and controlled by service-disabled veterans, by'' after ''including participation by'' in fourth sentence.

Pub. L. 106–50, § 502(b)(2), inserted ''small business concerns owned and controlled by service-disabled veterans,'' after ''small business concerns,'' the first place appearing in second sentence.

Pub. L. 106–50, § 502(b)(1), inserted ''by small business concerns owned and controlled by service-disabled veterans,'' after ''small business concerns,'' the first place appearing in first sentence.

Subsec. (h)(1). Pub. L. 106–50, § 601(a), inserted ''small business concerns owned and controlled by veterans (including service-disabled veterans),'' after ''small business concerns,'' the first place appearing.

Subsec. (h)(2). Pub. L. 106–50, § 601(b)(1), inserted ''and the Congress'' before period at end of first sentence in introductory provisions.

Subsec. (h)(2)(A), (D), (E). Pub. L. 106–50, § 601(b)(2), inserted ''small business concerns owned and controlled by service-disabled veterans,'' after ''small business concerns,'' the first place appearing.

1997—Subsec. (a). Pub. L. 105–135, § 413(b), in third sentence, inserted ''or the solicitation involves an unnecessary or unjustified bundling of contract requirements, as determined by the Administration,'' after ''discrete construction projects,'', substituted ''(4)'' for ''or (4)'', and inserted before period at end '', or (5) why the agency has determined that the bundled contract (as defined in section 632(*o*) of this title) is necessary and justified''.

Subsec. (e). Pub. L. 105–135, § 413(a), added subsec. (e).

Subsec. (g)(1). Pub. L. 105–135, § 603(b)(1), inserted ''qualified HUBZone small business concerns,'' after ''small business concerns,'' in two places, substituted ''not less than 23 percent of the total value'' for ''not less than 20 percent of the total value'', and inserted after second sentence ''The Governmentwide goal for participation by qualified HUBZone small business concerns shall be established at not less than 1 percent of the total value of all prime contract awards for fiscal year 1999, not less than 1.5 percent of the total value of all prime contract awards for fiscal year 2000, not less than 2 percent of the total value of all prime contract awards for fiscal year 2001, not less than 2.5 percent of the total value of all prime contract awards for fiscal year 2002, and not less than 3 percent of the total value of all prime contract awards for fiscal year 2003 and each fiscal year thereafter.''

Subsec. (g)(2). Pub. L. 105–135, § 603(b)(2)(B), (C), inserted ''qualified HUBZone small business concerns,'' after ''small business concerns,'' in second sentence and substituted ''by qualified HUBZone small business concerns, by small business concerns owned and controlled by socially and economically disadvantaged individuals, and by small business concerns owned and controlled by women'' for ''by small business concerns from each industry category in procurement contracts of the agency, including participation by small business concerns owned and controlled by socially and economically disadvantaged individuals and participation by small business concerns owned and controlled by women'' before period at end of fourth sentence.

Pub. L. 105–135, § 603(b)(2)(A), which directed substitution of '', by qualified HUBZone small business concerns, by small business concerns owned and controlled by socially and economically disadvantaged individuals'' for '',, by small business concerns owned and controlled by socially and economically disadvantaged individuals'' in first sentence, was executed by making the insertion for the quoted language which started

with a single comma to reflect the probable intent of Congress and the amendment by Pub. L. 104–106, § 4321(c)(3). See 1996 Amendment note below.

Subsec. (h). Pub. L. 105–135, § 603(b)(3), inserted ''qualified HUBZone small business concerns,'' after ''small business concerns,'' wherever appearing.

Subsec. (k)(5) to (10). Pub. L. 105–135, § 413(c)(1), (2), added par. (5) and redesignated former pars. (5) to (9) as (6) to (10), respectively.

1996—Subsec. (g)(2). Pub. L. 104–106 struck out second comma after ''goals for the participation by small business concerns,''.

1994—Subsec. (c)(2)(A). Pub. L. 103–403, § 305(1), amended subpar. (A) generally. Prior to amendment, subpar. (A) read as follows: ''During each of fiscal years 1989 through 1993, public or private organizations for the handicapped shall be eligible to participate in programs authorized under this section in an aggregate amount for each year as follows: In 1989 not more than $30,000,000, in 1990 not more than $40,000,000, and in each of 1991, 1992 and 1993 not more than $50,000,000.''

Subsec. (c)(7). Pub. L. 103–403, § 305(2), added par. (7).

Subsec. (e). Pub. L. 103–355, § 7101(a), struck out subsec. (e) which read as follows: ''In carrying out small business set-aside programs, departments, agencies, and instrumentalities of the executive branch shall award contracts, and encourage the placement of subcontracts for procurement to the following in the manner and in the order stated:

''(1) concerns which are small business concerns and which are located in labor surplus areas, on the basis of a total set-aside;

''(2) concerns which are small business concerns, on the basis of a total set-aside;

''(3) concerns which are small business concerns and which are located in a labor surplus area, on the basis of a partial set-aside;

''(4) concerns which are small business concerns, on the basis of a partial set-aside.''

Subsec. (f). Pub. L. 103–355, § 7101(a), struck out subsec. (f) which read as follows: ''After priority is given to the small business concerns specified in subsection (e) of this section, priority shall also be given to the awarding of contracts and the placement of subcontracts, on the basis of a total set-aside, to concerns which—

''(1) are not eligible under subsection (e) of this section;

''(2) are not small business concerns; and

''(3) will perform a substantial proportion of the production on those contracts and subcontracts within areas of concentrated unemployment or underemployment or within labor surplus areas.''

Subsec. (g)(1). Pub. L. 103–355, § 7106(a)(1), substituted '', small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women'' for ''and small business concerns owned and controlled by socially and economically disadvantaged individuals'' in first sentence and in sentence beginning with ''Notwithstanding the''.

Pub. L. 103–355, § 7106(a)(2)(A), inserted after third sentence ''The Government-wide goal for participation by small business concerns owned and controlled by women shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year.''

Subsec. (g)(2). Pub. L. 103–355, § 7106(a)(2)(B), in first sentence substituted '', by small business concerns owned and controlled by socially and economically disadvantaged individuals, and by small business concerns owned and controlled by women'' for ''and by small business concerns owned and controlled by socially and economically disadvantaged individuals,''.

Pub. L. 103–355, § 7106(a)(1), in second sentence substituted '', small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women'' for ''and small business concerns owned and controlled by socially and economically disadvantaged individuals''.

Pub. L. 103–355, § 7106(a)(2)(C), in fourth sentence inserted at end ''and participation by small business concerns owned and controlled by women''.

Subsec. (h)(1), (2)(A), (D), (E). Pub. L. 103–355, § 7106(a)(1), substituted '', small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women'' for ''and small business concerns owned and controlled by socially and economically disadvantaged individuals''.

Subsec. (h)(2)(F). Pub. L. 103–355, § 7106(a)(3), substituted ''small business concerns owned and controlled by women'' for ''women-owned small business enterprises''.

Subsec. (j). Pub. L. 103–355, § 4004, amended subsec. (j) generally. Prior to amendment, subsec. (j) read as follows: ''Each contract for the procurement of goods and services which has an anticipated value not in excess of the small purchase threshold and which is subject to small purchase procedures shall be reserved exclusively for small business concerns unless the contracting officer is unable to obtain offers from two or more small business concerns that are competitive with market prices and in terms of quality and delivery of the goods or services being purchased. In utilizing small purchase procedures, contracting officers shall, wherever circumstances permit, choose a method of payment which minimizes paperwork and facilitates prompt payment to contractors.''

1992—Subsec. (c)(1)(A). Pub. L. 102–569 substituted ''From People Who Are Blind or Severely Disabled'' for ''from the Blind and Other Severely Handicapped''.

Subsec. (c)(2)(B). Pub. L. 102–366, § 232(b)(1), which directed the substitution of ''Blind-made'' for ''Blind-made'', could not be executed to text because ''Blind-made'' did not appear in subpar. (B).

Subsec. (k)(3), (5). Pub. L. 102–366, § 232(b)(2), substituted comma for semicolon at end of pars. (3) and (5).

Subsec. (k)(9). Pub. L. 102–484, § 801(h)(8)(A), substituted ''section 2323 of title 10'' for ''section 1207 of Public Law 99–661''.

Subsec. (*l*)(6). Pub. L. 102–366, § 232(b)(3), inserted period at end.

Subsec. (m)(1). Pub. L. 102–484, § 801(h)(8)(B), substituted ''section 2323 of title 10'' for ''section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (10 U.S.C. 2301 note)''.

Subsec. (m)(2)(B). Pub. L. 102–366, § 232(b)(4), substituted ''requirements'' for ''requirement''.

Subsec. (m)(2)(C). Pub. L. 102–484, § 801(h)(8)(C), substituted ''section 2323 of title 10'' for ''section 1207 of the National Defense Authorization Act for Fiscal Year 1987 (10 U.S.C. 2301 note)''.

1991—Subsec. (k)(5). Pub. L. 102–190 amended par. (5) generally. Prior to amendment, par. (5) read as follows: ''assist small business concerns to obtain payments, late payment interest penalties, or information due to such concerns, in conformity with chapter 39 of title 31;''.

1990—Subsec. (a). Pub. L. 101–574 inserted after second sentence ''If a proposed procurement includes in its statement of work goods or services currently being performed by a small business, and if the proposed procurement is in a quantity or estimated dollar value the magnitude of which renders small business prime contract participation unlikely, or if a proposed procurement for construction seeks to package or consolidate discrete construction projects, the Procurement Activity shall provide a copy of the proposed procurement to the Procurement Activity's Small Business Procurement Center Representative at least 30 days prior to the solicitation's issuance along with a statement explaining (1) why the proposed acquisition cannot be divided into reasonably small lots (not less than economic production runs) to permit offers on quantities less than the total requirement, (2) why delivery schedules cannot be established on a realistic basis that will encourage small business participation to the extent consistent with the actual requirements of the Government, (3) why the proposed acquisition cannot be of-

fered so as to make small business participation likely, or (4) why construction cannot be procured as separate discrete projects. The thirty-day notification process shall occur concurrently with other processing steps required prior to issuance of the solicitation. Within 15 days after receipt of the proposed procurement and accompanying statement, if the Procurement Center Representative believes that the procurement as proposed will render small business prime contract participation unlikely, the Representative shall recommend to the Procurement Activity alternative procurement methods which would increase small business prime contracting opportunities.''

Subsec. (j). Pub. L. 101–510 substituted ''not in excess of the small purchase threshold'' for ''of less than $25,000''.

1989—Subsec. (h)(2)(A). Pub. L. 101–37, § 19, inserted ''individuals'' after ''economically disadvantaged''.

Subsec. (m)(1)(A). Pub. L. 101–37, § 21, substituted ''procedures'' for ''procedure''.

1988—Subsec. (c). Pub. L. 100–590, § 133(a), amended subsec. (c) generally, substituting provisions relating to programs for blind and handicapped individuals for provisions relating to eligibility, participating organizations, monitoring and evaluation, and report to Congressional committees.

Subsec. (g). Pub. L. 100–656, § 502, added par. (1) and designated existing provisions as par. (2) and former pars. (1) and (2) as subpars. (A) and (B).

Subsec. (h). Pub. L. 100–656, § 503, designated existing provisions as par. (1), struck out at end ''The Administration shall submit to the Select Committee on Small Business of the Senate and the Committee on Small Business of the House of Representatives information obtained from such reports, together with appropriate comments.'', and added pars. (2) and (3).

Subsec. (k)(3). Pub. L. 100–656, § 603(1), amended par. (3) generally. Prior to amendment, par. (3) read as follows: ''be responsible only to, and report directly to, the head of such agency or to his deputy, except that in the case of the Department of Defense the Director of the Office of Small and Disadvantaged Business Utilization shall be responsible to, and report directly to, the Under Secretary of Defense for Acquisition,''.

Subsec. (k)(5) to (8). Pub. L. 100–496 added par. (5) and redesignated former pars. (5) to (7) as (6) to (8), respectively.

Subsec. (k)(9). Pub. L. 100–656, § 603(2)–(4), added par. (9).

Subsec. (*l*)(2)(D). Pub. L. 100–590, § 110(1), struck out ''unrestricted'' before ''technical data'' in two places.

Subsec. (*l*)(2)(E). Pub. L. 100–590, § 110(2), amended subpar. (E) generally. Prior to amendment, subpar. (E) read as follows: ''have access to the unclassified procurement records and other data of the procurement center;''.

Subsec. (*l*)(3). Pub. L. 100–590, § 110(3), amended par. (3) generally. Prior to amendment, par. (3) read as follows: ''A breakout procurement center representative is authorized to appeal a failure to act favorably on any recommendation made pursuant to paragraph (2). Such appeal shall be in writing, specifically reciting both the circumstances of the appeal and the basis of the recommendation. The appeal shall be decided by a person within the employ of the appropriate activity who is at least one supervisory level above the person who initially failed to act favorably on the recommendation. Such appeal shall be decided within 30 calendar days of its receipt.''

Subsec. (*l*)(6). Pub. L. 100–590, § 110(4), amended par. (6) generally. Prior to amendment, par. (6) read as follows: ''For purposes of this subsection, the term 'major procurement center' means a procurement center of the Department of Defense that awarded contracts for items other than commercial items totaling at least $150,000,000 in the preceding fiscal year, and such other procurement centers as designated by the Administrator.''

Subsec. (*l*)(7). Pub. L. 100–590, § 110(5), added par. (7).

Subsec. (m). Pub. L. 100–656, § 601, amended subsec. (m) generally, substituting provisions related to implementation of section 1207 of Pub. L. 99–661 for former provisions related to labor surplus area procurement and manpower programs.

1987—Subsec. (a). Pub. L. 100–26, § 10(a)(1), made technical amendment to directory language of section 921(a)(1) of Pub. L. 99–500, Pub. L. 99–591, and Pub. L. 99–661. See 1986 Amendment note below.

Subsec. (g). Pub. L. 100–180, § 809(a)(2), struck out ''having a value of $25,000 or more'' after ''procurement contracts of such agency''.

Pub. L. 100–180, § 809(a)(1), provided for temporarily inserting ''having a value of $25,000 or more'' after ''procurement contracts of such agency''. See Effective Date of 1987 Amendments note below.

Subsec. (*o*)(1). Pub. L. 100–180, § 809(b)(1), substituted ''subsection (a)'' for ''this subsection'' in introductory provisions.

Subsec. (*o*)(1)(A). Pub. L. 100–26, § 10(b)(1)(A), substituted ''at least 50 percent of the cost of contract performance incurred for personnel shall be expended for employees of the concern'' for ''the concern will perform at least 50 percent of the cost of the contract with its own employees''.

Subsec. (*o*)(3). Pub. L. 100–26, § 10(b)(1)(B), substituted ''requirements of such paragraph'' for ''requirements of such subparagraph'' and inserted at end ''The percentage applicable to any such requirement shall be determined in accordance with paragraph (2).''

Subsec. (p). Pub. L. 100–180, § 809(c), struck out subsec. (p) which read as follows:

''(1) Except as provided in paragraphs (2) and (3), the head of any Federal agency shall, within five days of the agency's decision to set aside a procurement for small business concerns under this section, provide the names and addresses of the small business concerns expected to respond to the procurement to any person who requests such information.

''(2) The Secretary of Defense may decline to provide information under paragraph (1) in order to protect national security interests.

''(3) The head of a Federal agency is not required to release any information under paragraph (1) that is not required to be released under section 552 of title 5.''

1986—Subsec. (a). Pub. L. 99–500 and Pub. L. 99–591, § 101(c) [§ 921(a), (b)], Pub. L. 99–661, § 921(a), (b), as amended by Pub. L. 100–26, § 10(a)(1), amended subsec. (a) identically, inserting ''in each industry category'' in cl. (3), and inserting provision identifying an industry category, providing for determination of such category by the Administrator, and permitting segmentation of a market for goods and services under certain circumstances and provision that a contract not be awarded if the award would result in a cost to the awarding agency which exceeds a fair market price.

Subsec. (g). Pub. L. 99–500 and Pub. L. 99–591, § 101(c) [§ 921(d)], Pub. L. 99–661, § 921(d), amended subsec. (g) identically, striking out ''having values of $10,000 or more'' after ''such agency'' and inserting provision requiring the head of each Federal agency to make consistent efforts to annually expand participation by small business concerns from each industry category in procurement contracts of the agency.

Subsec. (j). Pub. L. 99–500 and Pub. L. 99–591, § 101(c) [§ 922(c)], Pub. L. 99–661, § 922(c), amended subsec. (j) identically, substituting ''$25,000'' for ''$10,000''.

Subsec. (k)(3). Pub. L. 99–500 and Pub. L. 99–591, § 101(c) [§ 903(d)], Pub. L. 99–661, § 903(d), which directed identical amendments to par. (3) by inserting '', except that in the case of the Department of Defense the Director of the Office of Small and Disadvantaged Business Utilization shall be responsible to, and report directly to, the Under Secretary of Defense for Acquisition'' was executed by inserting that phrase immediately before the comma at the end as the probable intent of Congress.

Subsec. (n). Pub. L. 99–272 added subsec. (n).

Subsecs. (*o*), (p). Pub. L. 99–500 and Pub. L. 99–591, § 101(c) [§ 921(c)(2), (e)], Pub. L. 99–661, § 921(c)(2), (e), amended section identically, adding subsecs. (*o*) and (p).

1984—Subsecs. (*l*), (m). Pub. L. 98–577 added subsec. (*l*) and redesignated former subsec. (*l*) as (m).

1980—Subsec. (c). Pub. L. 96–302, § 116, substituted provisions covering participation of not-for-profit organizations in certain authorized programs during fiscal years 1981, through 1983, the monitoring and evaluation of such participation as causing severe economic injury to for-profit small businesses and transmission of report to congressional committees not later than Jan. 1, 1982, respecting impact of contracts on the for-profit small businesses for provisions respecting eligibility during fiscal year 1978, of public and private organizations and individuals to participate in the award of contracts and requiring transmission of a report by March 1, 1979.

Subsec. (d). Pub. L. 96–302, § 117(a), substituted ''small business concerns'' for ''concerns''.

Subsec. (e). Pub. L. 96–302, § 117(b), in revising text, struck out from introductory clause reference to labor surplus areas; reenacted par. (1) reversing order of reference to small business concerns and location in labor surplus areas; reenacted par. (2); added par. (3); redesignated former par. (3) as (4); and struck out former par. (4) as to concerns located in labor surplus areas on basis of total set-aside, as covered in par. (1).

Subsec. (f). Pub. L. 96–302, § 117(b), substituted provision respecting other priorities in placement of contracts for requirement that subsecs. (d) and (e) of this section cease to be effective subsequent to Sept. 30, 1980, unless renewed prior to such date.

1978—Subsec. (f). Pub. L. 95–507, § 232, substituted ''September 30, 1980'' for ''September 30, 1979''.

Subsecs. (g) to (k). Pub. L. 95–507, § 221, added subsecs. (g) to (k).

Subsec. (*l*). Pub. L. 95–507, § 233, added subsec. (*l*).

1977—Pub. L. 95–89 designated existing provisions as subsec. (a) and added subsecs. (b) to (f).

CHANGE OF NAME

Committee on Small Business of Senate changed to Committee on Small Business and Entrepreneurship of Senate. See Senate Resolution No. 123, One Hundred Seventh Congress, June 29, 2001.

EFFECTIVE DATE OF 2017 AMENDMENT

Pub. L. 115–91, div. A, title XVII, § 1703(b), Dec. 12, 2017, 131 Stat. 1806, provided that: ''The Administrator of the Small Business Administration shall be required to report on the information required by clauses (i)(V), (ii)(VI), (iii)(VII), (iv)(VII), (v)(VI), (vi)(VI), (vii)(VI), and (viii)(IX) of section 15(h)(2)(E) of the Small Business Act (15 U.S.C. 644(h)(2)(E)) beginning on the date that such information is available in the Federal Procurement Data System, the System for Award Management, or any new or successor system.''

EFFECTIVE DATE OF 1997 AMENDMENT

Amendment by Pub. L. 105–135 effective Oct. 1, 1997, see section 3 of Pub. L. 105–135, set out as a note under section 631 of this title.

EFFECTIVE DATE OF 1996 AMENDMENT

For effective date and applicability of amendment by Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 2302 of Title 10, Armed Forces.

EFFECTIVE DATE OF 1994 AMENDMENT

For effective date and applicability of amendment by sections 4004 and 7106(a) of Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 2302 of Title 10, Armed Forces.

EFFECTIVE DATE OF 1989 AMENDMENT

Amendment by Pub. L. 101–37 applicable as if included in Pub. L. 100–656, see section 32 of Pub. L. 101–37, set out as a note under section 631 of this title.

EFFECTIVE DATE OF 1988 AMENDMENT

Amendment by sections 502 and 503 of Pub. L. 100–656 effective Oct. 1, 1989, and amendment by sections 601 and 603 of Pub. L. 100–656 effective Nov. 15, 1988, see section 803(a)(7), (b)(4)(C), of Pub. L. 100–656, as amended, set out as a note under section 631 of this title.

Amendment by Pub. L. 100–496 applicable to payments under contracts awarded, contracts renewed, and contract options exercised during or after the first fiscal quarter which begins more than 90 days after Oct. 17, 1988, see section 14(a) of Pub. L. 100–496, set out as a note under section 3902 of Title 31, Money and Finance.

EFFECTIVE DATE OF 1987 AMENDMENT

Pub. L. 100–180, div. A, title VIII, § 809(a)(1), Dec. 4, 1987, 101 Stat. 1130, provided that the amendment made by that section is in effect until Sept. 30, 1988.

Pub. L. 100–180, div. A, title VIII, § 809(a)(2), Dec. 4, 1987, 101 Stat. 1130, as amended by Pub. L. 100–656, title VII, § 731, Nov. 15, 1988, 102 Stat. 3897, provided that the amendment made by that section is effective Oct. 1, 1989.

Amendment by section 10(a)(1), (b)(1) of Pub. L. 100–26 applicable as if included in each instance of the Defense Acquisition Improvement Act (as specified in section 2 of Pub. L. 100–26) [title X of section 101(c) of Pub. L. 99–500 and Pub. L. 99–591, and title IX of div. A of Pub. L. 99–661] when each was enacted [Oct. 18, 1986, Oct. 30, 1986, and Nov. 14, 1986, respectively], see section 12(c) of Pub. L. 100–26, set out as a note under section 632 of this title.

EFFECTIVE DATE OF 1986 AMENDMENT

Pub. L. 99–272, title XVIII, § 18003(b), Apr. 7, 1986, 100 Stat. 364, provided that: ''The amendment made by subsection (a) [amending this section] shall take effect on the ninetieth day after the date of the enactment of this Act [Apr. 7, 1986].

Amendment by section 101(c) [title X, § 921(a), (b)(1), (c)(2)–(e)] of Pub. L. 99–500 and Pub. L. 99–591, and section 921(a), (b)(1), (c)(2)–(e) of Pub. L. 99–661 effective Oct. 1, 1987, see section 101(c) of Pub. L. 99–500 and Pub. L. 99–591, and section 921(g) of Pub. L. 99–661, set out as a note under section 632 of this title.

EFFECTIVE DATE OF 1980 AMENDMENT

Amendment by Pub. L. 96–302 effective Oct. 1, 1980, see section 507 of Pub. L. 96–302, set out as a note under section 631 of this title.

TRAINING TO BE UPDATED

Pub. L. 114–328, div. A, title XVIII, § 1814(b), Dec. 23, 2016, 130 Stat. 2654, provided that: ''After receipt of information from the Administrator of the Small Business Administration pursuant to section 15(v) of the Small Business Act [15 U.S.C. 644(v)], the Defense Acquisition University (established under section 1746 of title 10, United States Code) and the Federal Acquisition Institute (established under section 1201 of title 41, United States Code) shall periodically update the training provided to the acquisition workforce to incorporate such information.''

SCORECARD PROGRAM FOR EVALUATING FEDERAL AGENCY COMPLIANCE WITH SMALL BUSINESS CONTRACTING GOALS

Pub. L. 114–92, div. A, title VIII, § 868(b), Nov. 25, 2015, 129 Stat. 933, provided that:

''(1) IN GENERAL.—Not later than September 30, 2016, the Administrator of the Small Business Administration, in consultation with the Federal agencies, shall—

''(A) develop a methodology for calculating a score to be used to evaluate the compliance of each Federal agency with meeting the goals established pursuant to section 15(g)(1)(B) of the Small Business Act (15 U.S.C. 644(g)(1)(B)) based on each such goal; and

''(B) develop a scorecard based on such methodology.

''(2) USE OF SCORECARD.—Beginning in fiscal year 2017, the Administrator shall establish and carry out a program to use the scorecard developed under paragraph

(1) to evaluate whether each Federal agency is creating the maximum practicable opportunities for the award of prime contracts and subcontracts to small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women, by assigning a score to each Federal agency for the previous fiscal year.

''(3) CONTENTS OF SCORECARD.—The scorecard developed under paragraph (1) shall include, for each Federal agency, the following information:

''(A) A determination of whether the Federal agency met each of the prime contract goals established pursuant to section 15(g)(1)(B) of the Small Business Act (15 U.S.C. 644(g)(1)(B)) with respect to small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women.

''(B) A determination of whether the Federal agency met each of the subcontract goals established pursuant to such section with respect to small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women.

''(C) The number of small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women awarded prime contracts in each North American Industry Classification System code during the fiscal year and a comparison to the number of awarded contracts during the prior fiscal year, if available.

''(D) The number of small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women awarded subcontracts in each North American Industry Classification System code during the fiscal year and a comparison to the number of awarded subcontracts during the prior fiscal year, if available.

''(E) Any other factors that the Administrator deems important to achieve the maximum practicable utilization of small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women.

''(4) WEIGHTED FACTORS.—In using the scorecard to evaluate and assign a score to a Federal agency, the Administrator shall base—

''(A) fifty percent of the score on the dollar value of prime contracts described in paragraph (3)(A); and

''(B) fifty percent of the score on the information provided in subparagraphs (B) through (E) of paragraph (3), weighted in a manner determined by the Administrator to encourage the maximum practicable opportunity for the award of prime contracts and subcontracts to small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women.

''(5) PUBLICATION.—The scorecard used by the Administrator under this subsection shall be submitted to the President and Congress along with the report submitted under section 15(h)(2) of the Small Business Act (15 U.S.C. 644(h)(2)).

''(6) REPORT.—After the Administrator uses the scorecard for fiscal year 2018 to assign scores to Federal agencies, but not later than March 31, 2019, the Administrator shall submit a report to the Committee on Small Business of the House of Representatives and the Committee on Small Business and Entrepreneurship of the Senate. Such report shall include the following:

''(A) A description of any increase in the dollar amount of prime contracts and subcontracts awarded to small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women.

''(B) A description of any increase in the dollar amount of prime contracts and subcontracts, and the total number of contracts, awarded to small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women in each North American Industry Classification System code.

''(C) The recommendation of the Administrator on continuing, modifying, expanding, or terminating the program established under this subsection.

''(7) GAO REPORT ON SCORECARD METHODOLOGY.—Not later than September 30, 2018, the Comptroller General of the United States shall submit to the Committee on Small Business of the House of Representatives and the Committee on Small Business and Entrepreneurship of the Senate a report that—

''(A) evaluates whether the methodology used to calculate a score under this subsection accurately and effectively—

''(i) measures the compliance of each Federal agency with meeting the goals established pursuant to section 15(g)(1)(B) of the Small Business Act (15 U.S.C. 644(g)(1)(B)); and

''(ii) encourages Federal agencies to expand opportunities for small business concerns, small business concerns owned and controlled by service-disabled veterans, qualified HUBZone small business concerns, small business concerns owned and controlled by socially and economically disadvantaged individuals, and small business concerns owned and controlled by women to compete for and be awarded Federal procurement contracts across North American Industry Classification System codes; and

''(B) if warranted, makes recommendations on how to improve such methodology to improve its accuracy and effectiveness.

''(8) DEFINITIONS.—In this subsection:

''(A) ADMINISTRATOR.—The term 'Administrator' means the Administrator of the Small Business Administration.

''(B) FEDERAL AGENCY.—The term 'Federal agency' has the meaning given the term 'agency' by section 551(1) of title 5, United States Code, but does not include the United States Postal Service or the Government Accountability Office.

''(C) SCORECARD.—The term 'scorecard' shall mean any summary using a rating system to evaluate a Federal agency's efforts to meet goals established under section 15(g)(1)(B) of the Small Business Act (15 U.S.C. 644(g)(1)(B)) that—

''(i) includes the measures described in paragraph (3); and

''(ii) assigns a score to each Federal agency evaluated.

''(D) SMALL BUSINESS ACT DEFINITIONS.—

''(i) IN GENERAL.—The terms 'small business concern', 'small business concern owned and controlled

by service-disabled veterans', 'qualified HUBZone small business concern', and 'small business concern owned and controlled by women' have the meanings given such terms under section 3 of the Small Business Act (15 U.S.C. 632).

''(ii) SMALL BUSINESS CONCERNS OWNED AND CONTROLLED BY SOCIALLY AND ECONOMICALLY DISADVANTAGED INDIVIDUALS.—The term 'small business concern owned and controlled by socially and economically disadvantaged individuals' has the meaning given that term under section 8(d)(3)(C) of the Small Business Act (15 U.S.C. 637(d)(3)(C)).''

ADDITIONAL REQUIREMENTS FOR THE SMALL BUSINESS PREFERENCE PROGRAMS FOR PRIME AND SUBCONTRACT FEDERAL PROCUREMENT GOALS AND ACHIEVEMENTS

Pub. L. 112–239, div. A, title XVI, §1631(c), Jan. 2, 2013, 126 Stat. 2072, provided that: ''Not later than 180 days after the date of the enactment of this part [Jan. 2, 2013], the Administrator of the Small Business Administration shall review and revise the Goaling Guidelines for the Small Business Preference Programs for Prime and Subcontract Federal Procurement Goals and Achievements to the extent necessary to ensure that—

''(1) agency subcontracting goals are established on the basis of realistically achievable improvements to levels of subcontracting rather than on the basis of an average of previous years' subcontracting performance;

''(2) agency contracting and subcontracting goals are established in a manner that does not exclude categories of contracts on the basis of—

''(A) the type of goods or services for which the agency contracts;

''(B) in the case of contracts subject to competitive procedures under chapter 33 of title 41, United States Code—

''(i) whether or not funding for the contracts is made directly available to the agency by an Appropriations Act or is made available by reimbursement from another agency or account; or

''(ii) whether or not the contract is subject to the Federal Acquisition Regulation; and

''(3) whenever an agency contracting or subcontracting goal is established at a level lower than the Governmentwide goal for small business concerns or the relevant category of small business concerns, the Administration is required to document the basis for the decision to establish such lower goal.''

ELECTRONIC PROCUREMENT CENTER REPRESENTATIVE

Pub. L. 111–240, title I, §1312(d), Sept. 27, 2010, 124 Stat. 2538, provided that:

''(1) IN GENERAL.—Not later than 1 year after the date of enactment of this Act [Sept. 27, 2010], the Administrator [of the Small Business Administration] shall implement a 3-year pilot electronic procurement center representative program.

''(2) REPORT.—Not later than 30 days after the pilot program under paragraph (1) ends, the Comptroller General of the United States shall submit to the Committee on Small Business and Entrepreneurship of the Senate and the Committee on Small Business of the House of Representatives a report regarding the pilot program.''

SMALL BUSINESS TEAMS PILOT PROGRAM

Pub. L. 111–240, title I, §1314, Sept. 27, 2010, 124 Stat. 2540, provided that:

''(a) DEFINITIONS.—In this section—

''(1) the term 'Pilot Program' means the Small Business Teaming Pilot Program established under subsection (b); and

''(2) the term 'eligible organization' means a well-established national organization for small business concerns with the capacity to provide assistance to small business concerns (which may be provided with the assistance of the Administrator) relating to—

''(A) customer relations and outreach;

''(B) team relations and outreach; and

''(C) performance measurement and quality assurance.

''(b) ESTABLISHMENT.—The Administrator shall establish a Small Business Teaming Pilot Program for teaming and joint ventures involving small business concerns.

''(c) GRANTS.—Under the Pilot Program, the Administrator may make grants to eligible organizations to provide assistance and guidance to teams of small business concerns seeking to compete for larger procurement contracts.

''(d) CONTRACTING OPPORTUNITIES.—The Administrator shall work with eligible organizations receiving a grant under the Pilot Program to recommend appropriate contracting opportunities for teams or joint ventures of small business concerns.

''(e) REPORT.—Not later than 1 year before the date on which the authority to carry out the Pilot Program terminates under subsection (f), the Administrator shall submit to the Committee on Small Business and Entrepreneurship of the Senate and the Committee on Small Business of the House of Representatives a report on the effectiveness of the Pilot Program.

''(f) TERMINATION.—The authority to carry out the Pilot Program shall terminate 5 years after the date of enactment of this Act [Sept. 27, 2010].

''(g) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated for grants under subsection (c) $5,000,000 for each of fiscal years 2010 through 2015.''

[For definitions of ''Administrator'' and ''small business concern'' as used in section 1314 of Pub. L. 111–240, set out above, see section 1001 of Pub. L. 111–240, set out as a note under section 632 of this title.]

MANUFACTURING CONTRACTS THROUGH MANUFACTURING APPLICATION AND EDUCATION CENTERS

Pub. L. 103–403, title III, §303, Oct. 22, 1994, 108 Stat. 4188, authorized the Small Business Administration to promote the award of Federal manufacturing contracts to small business concerns that participate in manufacturing application and education centers by working with the Department of Commerce and other agencies to identify components and subsystems that are both critical and currently foreign-sourced, such authority to terminate on Sept. 30, 1997.

PILOT PROGRAM FOR VERY SMALL BUSINESS CONCERNS

Pub. L. 103–403, title III, §304, Oct. 22, 1994, 108 Stat. 4188, as amended by Pub. L. 105–135, title V, §508, Dec. 2, 1997, 111 Stat. 2627; Pub. L. 106–554, §1(a)(9) [title V, §503(c)], Dec. 21, 2000, 114 Stat. 2763, 2763A–695, required the Administrator of the Small Business Administration to establish and carry out a pilot program related to improved access to Federal contract opportunities for very small business concerns beginning not later than Aug. 30, 1995, and expiring on Sept. 30, 2003.

EXPEDITED RESOLUTION OF CONTRACT ADMINISTRATION MATTERS

Pub. L. 103–355, title II, §2353, Oct. 13, 1994, 108 Stat. 3323, provided that:

''(a) REGULATIONS REQUIRED.—(1) The Federal Acquisition Regulation shall include provisions that require a contracting officer—

''(A) to make every reasonable effort to respond in writing within 30 days to any written request made to a contracting officer with respect to a matter relating to the administration of a contract that is received from a small business concern; and

''(B) in the event that the contracting officer is unable to reply within the 30-day period, to transmit to the contractor within such period a written notification of a specific date by which the contracting officer expects to respond.

''(2) The provisions shall not apply to a request for a contracting officer's decision under the Contract Dis-

putes Act of 1978 ([former] 41 U.S.C. 601 et seq.) [see 41 U.S.C. 7101 et seq.].

''(b) RULE OF CONSTRUCTION.—Nothing in this section shall be considered as creating any rights under the Contract Disputes Act of 1978 ([former] 41 U.S.C. 601 et seq.) [see 41 U.S.C. 7101 et seq.].

''(c) DEFINITION.—In this section, the term 'small business concern' means a business concern that meets the requirements of section 3(a) of the Small Business Act (15 U.S.C. 632(a)) and the regulations promulgated pursuant to that section.''

CONTRACTING PROGRAM FOR CERTAIN SMALL BUSINESSES

Pub. L. 103–355, title VII, § 7102, Oct. 13, 1994, 108 Stat. 3367, as amended by Pub. L. 106–554, § 1(a)(9) [title V, § 503(d)], Dec. 21, 2000, 114 Stat. 2763, 2763A–695, provided that:

''(a) PROCUREMENT PROCEDURES AUTHORIZED.—(1) To facilitate the attainment of a goal for the participation of small business concerns owned and controlled by socially and economically disadvantaged individuals that is established for a Federal agency pursuant to section 15(g)(1) of the Small Business Act (15 U.S.C. 644(g)(1)), the head of the agency may enter into contracts using—

''(A) less than full and open competition by restricting the competition for such awards to small business concerns owned and controlled by socially and economically disadvantaged individuals described in subsection (d)(3)(C) of section 8 of the Small Business Act (15 U.S.C. 637); and

''(B) a price evaluation preference not in excess of 10 percent when evaluating an offer received from such a small business concern as the result of an unrestricted solicitation.

''(2) Paragraph (1) does not apply to the Department of Defense, the Coast Guard, and the National Aeronautics and Space Administration.

''(b) IMPLEMENTATION THROUGH THE FEDERAL ACQUISITION REGULATION.—

''(1) IN GENERAL.—The Federal Acquisition Regulation shall be revised to provide for uniform implementation of the authority provided in subsection (a).

''(2) MATTERS TO BE ADDRESSED.—The revisions of the Federal Acquisition Regulation made pursuant to paragraph (1) shall include—

''(A) conditions for the use of advance payments;

''(B) provisions for contract payment terms that provide for—

''(i) accelerated payment for work performed during the period for contract performance; and

''(ii) full payment for work performed;

''(C) guidance on how contracting officers may use, in solicitations for various classes of products or services, a price evaluation preference pursuant to subsection (a)(1)(B), to provide a reasonable advantage to small business concerns owned and controlled by socially and economically disadvantaged individuals without effectively eliminating any participation of other small business concerns; and

''(D)(i) procedures for a person to request the head of a Federal agency to determine whether the use of competitions restricted to small business concerns owned and controlled by socially and economically disadvantaged individuals at a contracting activity of such agency has caused a particular industry category to bear a disproportionate share of the contracts awarded to attain the goal established for that contracting activity; and

''(ii) guidance for limiting the use of such restricted competitions in the case of any contracting activity and class of contracts determined in accordance with such procedures to have caused a particular industry category to bear a disproportionate share of the contracts awarded to attain the goal established for that contracting activity.

''(c) TERMINATION.—This section shall cease to be effective at the end of September 30, 2003.''

[For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, as modified, set out as a note under section 542 of Title 6.]

SMALL BUSINESS PROCUREMENT ADVISORY COUNCIL

Pub. L. 103–355, title VII, § 7104, Oct. 13, 1994, 108 Stat. 3369, formerly set out as a note under this section, was transferred to section 644a of this title.

PROCUREMENT PROCEDURES UNDER SMALL BUSINESS COMPETITIVENESS DEMONSTRATION PROGRAM ACT OF 1988

Pub. L. 102–366, title II, § 202(h), Sept. 4, 1992, 106 Stat. 996, provided for procurement procedures under the Small Business Competitiveness Demonstration Program Act of 1988 prior to implementation of improvements to the collection of data regarding prime contract awards and of a system for collecting such data.

MODIFICATIONS OF TEST PLAN AND POLICY DIRECTION UNDER SMALL BUSINESS COMPETITIVENESS DEMONSTRATION PROGRAM ACT OF 1988

Pub. L. 102–366, title II, § 202(i), Sept. 4, 1992, 106 Stat. 996, required the Administrator for Federal Procurement Policy to issue certain modifications to the test plan and policy direction under the Small Business Competitiveness Demonstration Program Act of 1988.

CONTRACT BUNDLING STUDY

Pub. L. 102–366, title III, § 321, Sept. 4, 1992, 106 Stat. 1006, provided that the Administrator of the Small Business Administration was to conduct a study regarding the impact of the practice known as ''contract bundling'' on the participation of small business concerns in the Federal procurement process and, not later than May 15, 1993, to submit a report on the results of the study to the Committees on Small Business of the Senate and the House of Representatives.

SMALL BUSINESS COMPETITIVENESS DEMONSTRATION PROGRAM

Pub. L. 100–656, title VII, §§ 701–722, Nov. 15, 1988, 102 Stat. 3889–3895, as amended by Pub. L. 101–37, §§ 23–29, June 15, 1989, 103 Stat. 75, 76; Pub. L. 101–574, title II, § 243, Nov. 15, 1990, 104 Stat. 2827; Pub. L. 102–54, § 13(e), June 13, 1991, 105 Stat. 275; Pub. L. 102–366, title II, §§ 201–202(g), 203, Sept. 4, 1992, 106 Stat. 993–996; Pub. L. 102–484, div. A, title VIII, § 801(h)(9), Oct. 23, 1992, 106 Stat. 2446; Pub. L. 102–564, title III, § 307(a), Oct. 28, 1992, 106 Stat. 4263; Pub. L. 103–160, div. A, title VIII, § 850(2), Nov. 30, 1993, 107 Stat. 1726; Pub. L. 103–446, title XII, § 1202(a)(1), Nov. 2, 1994, 108 Stat. 4689; Pub. L. 104–208, div. D, title I, § 108(a)–(c)(1), Sept. 30, 1996, 110 Stat. 3009–732, 3009–733; Pub. L. 105–18, title II, § 2002, June 12, 1997, 111 Stat. 174; Pub. L. 105–135, title IV, §§ 401–405, Dec. 2, 1997, 111 Stat. 2616; Pub. L. 108–375, div. A, title VIII, § 821, Oct. 28, 2004, 118 Stat. 2016, known as the Small Business Competitiveness Demonstration Program Act of 1988, established a Small Business Competitiveness Demonstration Program, prior to repeal by Pub. L. 111–240, title I, § 1335(a), Sept. 27, 2010, 124 Stat. 2543.

[Pub. L. 111–240, title I, § 1335(b), Sept. 27, 2010, 124 Stat. 2543, provided that: ''The amendment made by this section [repealing sections 701–722 of Pub. L. 100–656, formerly set out above, and section 741 of Pub. L. 100–656, formerly set out below]—

[''(1) shall take effect on the date of enactment of this Act [Sept. 27, 2010]; and

[''(2) apply to the first full fiscal year after the date of enactment of this Act.'']

SEGMENTATION OF INDUSTRY CATEGORY OF SHIPBUILDING AND SHIP REPAIR

Pub. L. 100–656, title VII, §741, Nov. 15, 1988, 102 Stat. 3897, authorized the Small Business Administration to segment the industry category of shipbuilding and ship repair, prior to repeal by Pub. L. 111–240, title I, §1335(a), Sept. 27, 2010, 124 Stat. 2543.

PROGRAMS FOR BLIND AND HANDICAPPED INDIVIDUALS; REPORT ON IMPACT ON SMALL BUSINESS CONCERNS

Pub. L. 100–590, title I, §133(b), Nov. 3, 1988, 102 Stat. 3006, provided that not later than Sept. 30, 1992, the General Accounting Office was to prepare a report describing the impact that contracts awarded under subsec. (c) of this section had on for-profit small business concerns for fiscal years 1989 through 1991, and transmit the report to the Committees on Small Business of the Senate and the House of Representatives.

TASK FORCE ON PURCHASES FROM BLIND AND SEVERELY HANDICAPPED INDIVIDUALS; ESTABLISHMENT; MEETINGS; RECOMMENDATIONS

Pub. L. 100–590, title I, §133(c), Nov. 3, 1988, 102 Stat. 3006, provided that: ''There is established within the Small Business Administration a task force on purchases from the blind and severely handicapped which shall consist of one representative of the small business community appointed by the Administrator of the Small Business Administration and one individual knowledgeable in the affiars [sic] of or experienced in the work of sheltered workshops appointed by the Executive Director of the Committee for Purchase from the Blind and Other Severely Handicapped established under the first section of the Act entitled 'An Act to create a Committee on Purchases of Blind-made Products, and for other purposes', approved June 25, 1938 ([former] 41 U.S.C. 46) [now 41 U.S.C. 8502]. The task force shall meet at least once every six months for the purpose of reviewing the award of contracts under section 15(c) of the Small Business Act [15 U.S.C. 644(c)] and recommending to the Small Business Administration such administrative or statutory changes as it deems appropriate.''

STANDARDS FOR MEASURING COST SAVINGS FROM BREAKOUT PROCUREMENT CENTER REPRESENTATIVES

Pub. L. 98–577, title IV, §403(b), Oct. 30, 1984, 98 Stat. 3082, provided that:

''(1) The Administrator of the Small Business Administration and the Comptroller General of the United States shall jointly establish standards for measuring cost savings achieved through the efforts of breakout procurement center representatives and for measuring the extent to which competition has been increased as a result of such efforts. Thereafter, the Administrator shall annually prepare and submit to the Congress a report setting forth—

''(A) the cost savings achieved during the year covered by such report through the efforts of breakout procurement center representatives;

''(B) an evaluation of the extent to which competition has been increased as a result of such efforts; and

''(C) such other information as the Administrator may deem appropriate.

''(2) Within 180 days following the submission of the second annual report to Congress by the Administrator, the Comptroller General shall report to the Congress an evaluation of the Administration's adherence to the standards jointly established and the accuracy of the information the Administration has submitted to the Congress.''

EX. ORD. NO. 13157. INCREASING OPPORTUNITIES FOR WOMEN-OWNED SMALL BUSINESSES

Ex. Ord. No. 13157, May 23, 2000, 65 F.R. 34035, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Small Business Act, 15 U.S.C. 631, *et seq.*, section 7106 of the Federal Acquisition Streamlining Act of 1994 (Public Law 103–355) [amending 15 U.S.C. 632, 637, 644, 645], and the Office of Federal Procurement Policy [Act], [former] 41 U.S.C. 403, *et seq.*, and in order to strengthen the executive branch's commitment to increased opportunities for women-owned small businesses, it is hereby ordered as follows:

SECTION 1. *Executive Branch Policy*. In order to reaffirm and strengthen the statutory policy contained in the Small Business Act, 15 U.S.C. 644(g)(1), it shall be the policy of the executive branch to take the steps necessary to meet or exceed the 5 percent Government-wide goal for participation in procurement by women-owned small businesses (WOSBs). Further, the executive branch shall implement this policy by establishing a participation goal for WOSBs of not less than 5 percent of the total value of all prime contract awards for each fiscal year and of not less than 5 percent of the total value of all subcontract awards for each fiscal year.

SEC. 2. *Responsibilities of Federal Departments and Agencies*. Each department and agency (hereafter referred to collectively as ''agency'') that has procurement authority shall develop a long-term comprehensive strategy to expand opportunities for WOSBs. Where feasible and consistent with the effective and efficient performance of its mission, each agency shall establish a goal of achieving a participation rate for WOSBs of not less than 5 percent of the total value of all prime contract awards for each fiscal year and of not less than 5 percent of the total value of all subcontract awards for each fiscal year. The agency's plans shall include, where appropriate, methods and programs as set forth in section 4 of this order.

SEC. 3. *Responsibilities of the Small Business Administration*. The Small Business Administration (SBA) shall establish an Assistant Administrator for Women's Procurement within the SBA's Office of Government Contracting. This officer shall be responsible for:

(a) working with each agency to develop and implement policies to achieve the participation goals for WOSBs for the executive branch and individual agencies;

(b) advising agencies on how to implement strategies that will increase the participation of WOSBs in Federal procurement;

(c) evaluating, on a semiannual basis, using the Federal Procurement Data System (FPDS), the achievement of prime and subcontract goals and actual prime and subcontract awards to WOSBs for each agency;

(d) preparing a report, which shall be submitted by the Administrator of the SBA to the President, through the Interagency Committee on Women's Business Enterprise and the Office of Federal Procurement Policy (OFPP), on findings based on the FPDS, regarding prime contracts and subcontracts awarded to WOSBs;

(e) making recommendations and working with Federal agencies to expand participation rates for WOSBs, with a particular emphasis on agencies in which the participation rate for these businesses is less than 5 percent;

(f) providing a program of training and development seminars and conferences to instruct women on how to participate in the SBA's 8(a) [15 U.S.C. 637(a)] program, the Small Disadvantaged Business (SDB) program, the HUBZone program, and other small business contracting programs for which they may be eligible;

(g) developing and implementing a single uniform Federal Government-wide website, which provides links to other websites within the Federal system concerning acquisition, small businesses, and women-owned businesses, and which provides current procurement information for WOSBs and other small businesses;

(h) developing an interactive electronic commerce database that allows small businesses to register

their businesses and capabilities as potential contractors for Federal agencies, and enables contracting officers to identify and locate potential contractors; and

(i) working with existing women-owned business organizations, State and local governments, and others in order to promote the sharing of information and the development of more uniform State and local standards for WOSBs that reduce the burden on these firms in competing for procurement opportunities.

SEC. 4. *Other Responsibilities of Federal Agencies*. To the extent permitted by law, each Federal agency shall work with the SBA to ensure maximum participation of WOSBs in the procurement process by taking the following steps:

(a) designating a senior acquisition official who will work with the SBA to identify and promote contracting opportunities for WOSBs;

(b) requiring contracting officers, to the maximum extent practicable, to include WOSBs in competitive acquisitions;

(c) prescribing procedures to ensure that acquisition planners, to the maximum extent practicable, structure acquisitions to facilitate competition by and among small businesses, HUBZone small businesses, SDBs, and WOSBs, and providing guidance on structuring acquisitions, including, but not limited to, those expected to result in multiple award contracts, in order to facilitate competition by and among these groups;

(d) implementing mentor-protege programs, which include women-owned small business firms; and

(e) offering industry-wide as well as industry-specific outreach, training, and technical assistance programs for WOSBs including, where appropriate, the use of Government acquisitions forecasts, in order to assist WOSBs in developing their products, skills, business planning practices, and marketing techniques.

SEC. 5. *Subcontracting Plans*. The head of each Federal agency, or designated representative, shall work closely with the SBA, OFPP, and others to develop procedures to increase compliance by prime contractors with subcontracting plans proposed under section 8(d) of the Small Business Act (15 U.S.C. 637(d)) or section 834 of Public Law 101–189, as amended (15 U.S.C. 637 note), including subcontracting plans involving WOSBs.

SEC. 6. *Action Plans*. If a Federal agency fails to meet its annual goals in expanding contract opportunities for WOSBs, it shall work with the SBA to develop an action plan to increase the likelihood that participation goals will be met or exceeded in future years.

SEC. 7. *Compliance*. Independent agencies are requested to comply with the provisions of this order.

SEC. 8. *Consultation and Advice*. In developing the long-term comprehensive strategies required by section 2 of this order, Federal agencies shall consult with, and seek information and advice from, State and local governments, WOSBs, other private-sector partners, and other experts.

SEC. 9. *Judicial Review*. This order is for internal management purposes for the Federal Government. It does not create any right or benefit, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, its employees, or any other person.

WILLIAM J. CLINTON.

### EX. ORD. NO. 13170. INCREASING OPPORTUNITIES AND ACCESS FOR DISADVANTAGED BUSINESSES

Ex. Ord. No. 13170, Oct. 6, 2000, 65 F.R. 60827, provided:

By the authority vested in me as President by the Constitution and the laws of the United States of America, including the Small Business Act (15 U.S.C. 631 *et seq.*), section 7102 of the Federal Acquisition Streamlining Act of 1994 (Public Law 103–355, 15 U.S.C. 644 note), the Office of Federal Procurement Policy Act ([former] 41 U.S.C. 403 *et seq.*), Executive Order 11625 [15 U.S.C. 631 note], and to provide for increased access for disadvantaged businesses to Federal contracting opportunities, it is hereby ordered as follows:

SECTION 1. *Policy*. It is the policy of the executive branch to ensure nondiscrimination in Federal procurement opportunities for businesses in the Small Disadvantaged Business Program (SDBs), businesses in the section 8(a) Business Development program of the Small Business Administration (8(a)s), and Minority Business Enterprises (MBEs) as defined in section 6 of Executive Order 11625, of October 13, 1971, and to take affirmative action to ensure inclusion of these businesses in Federal contracting. These businesses are of vital importance to job growth and the economic strength of the United States but have faced historic exclusion and underutilization in Federal procurement. All agencies within the executive branch with procurement authority are required to take all necessary steps, as permitted by law, to increase contracting between the Federal Government and SDBs, 8(a)s, and MBEs.

SEC. 2. *Responsibilities of Executive Departments and Agencies with Procurement Authority*. The head of each executive department and agency shall carry out the terms of this order and shall designate, where appropriate, his or her Deputy Secretary or equivalent to implement the terms of this order.

(a) Each department and agency with procurement authority shall:

(i) aggressively seek to ensure that 8(a)s, SDBs, and MBEs are aware of future prime contracting opportunities through wide dissemination of contract announcements, including sources likely to reach 8(a)s, SDBs, other small businesses, and MBEs. Each department and agency shall use all available forms of communication to implement this provision, including the Internet, speciality press, and trade press;

(ii) work with the Small Business Administration (SBA) to ensure that information regarding sole source contracts awarded through the section 8(a) program receives the widest dissemination possible to 8(a)s;

(iii) ensure that the price evaluation preference programs authorized by the Federal Acquisition Streamlining Act of 1994 [Pub. L. 103–355, see Tables for classification] are used to the maximum extent permitted by law in areas of economic activity in which SDBs have historically been underused;

(iv) aggressively use the firms in the section 8(a) program, particularly in the developmental stage of the program, so that these firms have an opportunity to overcome artificial barriers to Federal contracting and gain access to the Federal procurement arena;

(v) ensure that department and agency heads take all reasonable steps so that prime contractors meet or exceed Federal subcontracting goals, and enforce subcontracting commitments as required by the Small Business Act (15 U.S.C. 637(d)) and other related laws. In particular, they shall ensure that prime contractors actively solicit bids for subcontracting opportunities from 8(a)s and SDBs, and fulfill their SDB and section 8(d) subcontracting obligations. Enforcement of SDB subcontracting plan commitments shall include assessments of liquidated damages, where appropriate, pursuant to applicable contract clauses;

(vi) encourage the establishment of business-to-business mentoring and teaming relationships, including the implementation of Mentor-Protege programs, to foster the development of the technical and managerial capabilities of 8(a)s and SDBs and to facilitate long-term business relationships;

(vii) offer information, training, and technical assistance programs for 8(a)s and SDBs including, where appropriate, Government acquisition forecasts in order to assist 8(a)s and SDBs in developing their products, skills, business planning practices, and marketing techniques;

(viii) train program and procurement officials regarding the policy of including 8(a)s and SDBs in Federal procurement. This includes prescribing proce-

dures to ensure that acquisition planners, to the maximum extent practicable, structure acquisitions to facilitate competition by SDBs and 8(a)s, including their participation in the competition of multiple award requirements;

(ix) provide the information required by the Department of Commerce when it requests data to develop the benchmarks used in the price evaluation preference programs authorized by the Federal Acquisition Streamlining Act of 1994;

(x) ensure that Directors of Offices of Small and Disadvantaged Business Utilization carry out their responsibilities to maximize the participation of 8(a)s and SDBs in Federal procurement and, in particular, ensure that the Directors report directly to the head of each department or agency as required by law; and

(xi) as required by law, establish with the Small Business Administration small business goals to ensure that the government-wide goal for participation of small business concerns is not less than 23 percent of Federal prime contracts. Where feasible and consistent with the effective and efficient performance of its mission, each agency shall establish a goal of achieving a participation rate for SDBs of not less than 5 percent of the total value of prime contract awards for each fiscal year and of not less than 5 percent of the total value of subcontract awards for each year. Each agency shall also establish a goal for awards made to 8(a) firms pursuant to section 8(a) of the Small Business Act [15 U.S.C. 637(a)]. These goals shall be considered the minimum goals and every effort shall be taken to exceed these goals wherever feasible.

(b) Each department and agency with procurement authority shall:

(i) develop a long-term comprehensive plan to implement the requirements of section 2(a) of this order and submit this plan to the Director of the Office of Management and Budget (OMB) within 90 days of the date of this order. The Director of OMB shall review each plan and report to the President on the sufficiency of each plan to carry out the terms of this order; and

(ii) annually, by April 30 each year, assess its efforts and the results of those efforts to increase utilization of 8(a)s, SDBs, and MBEs as both prime contractors and subcontractors and report on those efforts to the President through the Director of OMB, who shall review the evaluations made of the agency assessments by the Small Business Administration.

SEC. 3. *Responsibilities of the Small Business Administration*. The Administrator of the SBA shall:

(a) evaluate on a semi-annual basis, using the Federal Procurement Data System (FPDS), the achievement of government-wide prime and subcontract goals and the actual prime and subcontract awards to 8(a)s and SDBs for each department and agency. The OMB shall review SBA's evaluation;

(b) ensure that Procurement Center Representatives receive adequate training regarding the section 8(a) and SDB programs and that they consistently and aggressively seek opportunities for maximizing the use of 8(a)s and SDBs in department and agency procurements; and

(c) ensure that each department and agency's small and disadvantaged business procurement goals as well as the amount of procurement of each department and agency with 8(a)s, SDBs, and MBEs is publicly available in an easily accessible and understandable format such as through publication on the Internet.

SEC. 4. *Federal Advertising*. Each department or agency that contracts with businesses to develop advertising for the department or agency or to broadcast Federal advertising shall take an aggressive role in ensuring substantial minority-owned entities' participation, including 8(a), SDB, and MBE, in Federal advertising-related procurements. Each department and agency shall ensure that all creation, placement, and transmission of Federal advertising is fully reflective of the Nation's diversity. To achieve this diversity, special attention shall be given to ensure placement in publications and television and radio stations that reach specific ethnic and racial audiences. Each department and agency shall ensure that payment for Federal advertising is commensurate with fair market rates in the relevant market. Each department and agency shall structure advertising contracts as commercial acquisitions consistent with part 12 of the Federal Acquisition Regulation processes and paperwork to enhance participation by 8(a)s, SDBs, and MBEs.

SEC. 5. *Information Technology*. Each department and agency shall aggressively seek to ensure substantial 8(a), SDB, and MBE participation in procurements for and related to information technology, including procurements in the telecommunications industry. In so doing, the Chief Information Officer in each department and agency shall coordinate with procurement officials to implement this section.

SEC. 6. *General Services Administration Schedules*. The SBA and the General Services Administration (GSA) shall act promptly to expand inclusion of 8(a)s and SDBs on GSA Schedules, and provide greater opportunities for 8(a) and SDB participation in orders under such schedules. The GSA should ensure that procurement and program officials at all levels that use GSA Schedules aggressively seek to utilize the Schedule contracts of 8(a)s and SDBs. The GSA shall allow agencies ordering from designated 8(a) firms under the Multiple Award Schedule to count those orders toward their 8(a) procurement goals.

SEC. 7. *Bundling Contracts*. To the extent permitted by law, departments and agencies must submit to the SBA for review any contracts that are proposed to be bundled. The determination of the SBA with regard to the appropriateness of bundling in each instance must be carefully reviewed by the department or agency head, or his or her designee, and must be given due consideration. If there is an unresolvable conflict, then the SBA or the department or agency can seek assistance from the OMB.

SEC. 8. *Awards Program*. The Secretary of Commerce and the Administrator of the SBA shall jointly undertake a feasibility study to determine the appropriateness of an awards program for executive departments and agencies who best exemplify the letter and intent of this order in increasing opportunities for 8(a)s, SDBs, and MBEs in Federal procurement. Such study shall be presented to the President within 90 days of the date of this order.

SEC. 9. *Applicability*. Independent agencies are requested to comply with the provisions of this order.

SEC. 10. *Administration, Enforcement, and Judicial Review*.

(a) This order shall be carried out to the extent permitted by law and consistent with the Administration's priorities and appropriations.

(b) This order is not intended and should not be construed to create any right or benefit, substantive or procedural, enforceable at law by a party against the United States, its agencies, its officers, or its employees.

WILLIAM J. CLINTON.

DELEGATION OF AUTHORITY TO ESTABLISH ANNUAL GOALS FOR PARTICIPATION OF SMALL BUSINESS CONCERNS IN PROCUREMENT CONTRACTS

Memorandum of the President of the United States, June 6, 1990, 55 F.R. 27453–27455, provided:

Memorandum for the Director of the Office of Management and Budget

By the authority vested in me as President by the Constitution and laws of the United States, including section 15(g) of the Small Business Act, as amended [subsec. (g) of this section], and section 301 of Title 3 of the United States Code, I hereby delegate to the Director of the Office of Management and Budget the authority vested in the President to establish the annual goals required by Section 502 of the Business Opportunity Development Reform Act of 1988 (P.L. 100–656) [amending this section].

You are authorized and directed to publish this memorandum in the Federal Register.

GEORGE BUSH.

CONTINUED COMMITMENT TO SMALL, SMALL DISADVANTAGED, AND SMALL WOMEN-OWNED BUSINESSES IN FEDERAL PROCUREMENT

Memorandum of President of the United States, Oct. 13, 1994, 59 F.R. 52397, provided:

Memorandum for the Heads of Executive Departments and Agencies [and] the President's Management Council

It is the policy of the Federal Government that a fair proportion of its contracts be placed with small, small disadvantaged, and small women-owned businesses. Such businesses should also have the maximum practicable opportunity to participate as subcontractors in contracts awarded by the Federal Government consistent with efficient contract performance. I am committed to the continuation of this policy. Therefore, I ask that you encourage the use of various tools, including set-asides, price preferences, and section 8(a) of the Small Business Act (15 U.S.C. 637(a)), as necessary to achieve this policy objective.

The Federal Acquisition Streamlining Act of 1994 [Pub. L. 103–355, see Short Title of 1994 Act note set out under section 101 of Title 41, Public Contracts] authorizes civilian agencies to utilize set-aside procurements for small disadvantaged businesses. The Act also, for the first time, establishes goals for contracting with small women-owned businesses. These provisions, along with others in the Act, will provide greater access to Federal Government business opportunities for small, small disadvantaged, and small women-owned businesses. Department and agency heads should ensure that efforts to streamline acquisition procedures encourage the participation of these businesses in Federal procurements.

This memorandum shall be published in the Federal Register.

WILLIAM J. CLINTON.

### § 644a. Small Business Procurement Advisory Council

#### (a) Establishment

There is hereby established an interagency council to be known as the ''Small Business Procurement Advisory Council'' (hereinafter in this section referred to as the ''Council'').

#### (b) Duties

The duties of the Council are—

(1) to develop positions on proposed procurement regulations affecting the small business community;

(2) to submit comments reflecting such positions to appropriate regulatory authorities;

(3) to conduct reviews of each Office of Small and Disadvantaged Business Utilization established under section 644(k) of this title to determine the compliance of each Office with requirements under such section;

(4) to identify best practices for maximizing small business utilization in Federal contracting that may be implemented by Federal agencies having procurement powers; and

(5) to submit, annually, to the Committee on Small Business of the House of Representatives and the Committee on Small Business and Entrepreneurship of the Senate a report describing—

(A) the comments submitted under paragraph (2) during the 1-year period ending on the date on which the report is submitted, including any outcomes related to the comments;

(B) the results of reviews conducted under paragraph (3) during such 1-year period; and

(C) best practices identified under paragraph (4) during such 1-year period.

#### (c) Membership

The Council shall be composed of the following members:

(1) The Administrator of the Small Business Administration (or the designee of the Administrator).

(2) The Director of the Minority Business Development Agency.

(3) The head of each Office of Small and Disadvantaged Business Utilization in each Federal agency having procurement powers.

#### (d) Chairman

The Council shall be chaired by the Administrator of the Small Business Administration (or the designee of the Administrator).

#### (e) Meetings

The Council shall meet at the call of the chairman as necessary to consider proposed procurement regulations affecting the small business community.

#### (f) Consideration of Council comments

The Federal Acquisition Regulatory Council and other appropriate regulatory authorities shall consider comments submitted in a timely manner pursuant to subsection (b)(2).

(Pub. L. 103–355, title VII, § 7104, Oct. 13, 1994, 108 Stat. 3369; Pub. L. 112–239, div. A, title XVI, § 1692, Jan. 2, 2013, 126 Stat. 2089.)

CODIFICATION

Section was formerly set out as a note under section 644 of this title.

Section was enacted as part of the Federal Acquisition Streamlining Act of 1994, and not as part of the Small Business Act which comprises this chapter.

AMENDMENTS

2013—Subsec. (b)(3) to (5). Pub. L. 112–239, § 1692(a), added pars. (3) to (5).

Subsec. (c)(3). Pub. L. 112–239, § 1692(b), struck out ''(established under section 644(k) of this title)'' after ''Utilization''.

Subsec. (d). Pub. L. 112–239, § 1692(c), inserted ''(or the designee of the Administrator)'' after ''Small Business Administration''.

### § 645. Offenses and penalties

#### (a) False statements; overvaluation of securities

Whoever makes any statement knowing it to be false, or whoever willfully overvalues any security, for the purpose of obtaining for himself or for any applicant any loan, or extension thereof by renewal, deferment of action, or otherwise, or the acceptance, release, or substitution of security therefor, or for the purpose of influencing in any way the action of the Administration, or for the purpose of obtaining money, property, or anything of value, under this chapter, shall be punished by a fine of not more than $5,000 or by imprisonment for not more than two years, or both.

#### (b) Embezzlement, etc.

Whoever, being connected in any capacity with the Administration, (1) embezzles, ab-

**Table of Contents**

## CHAPTER 22 - APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS


- 22.403 Labor Standards for Construction and Services - April 2018

# Labor Standards for Construction and Services

Guiding Principles

- The complexity of the Department's construction program requires a high degree of coordination among contractors, especially when two or more contractors 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.

*References: [FAR 22.3, FAR 22.4, FAR 22.10, DEAR 970.2204-1-1]*

## 1.0 Summary of Latest Changes

This update includes administrative changes such as updating references and outdated language.

## 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.

**2.1 Overview**. This section discusses the application of labor standards for contracts involving construction and services. While the Federal Acquisition Regulation (FAR) and Department of Energy Acquisition Regulation (DEAR) provide detailed guidance for the application of these labor statutes, this chapter provides DOE's acquisition community with examples of when the statutes may apply to specific situations. This guidance, along with the FAR and DEAR requirements, is intended to provide DOE personnel the kind of information needed to make decisions regarding application of relevant labor laws to Government contracts.

To assist the Contracting Officer (CO) in implementing the Department's non-delegable responsibility for making a determination whether work is covered by Wage Rate Requirements (Construction), formerly known as the Davis-Bacon Act (DBA) and, if it is, for inserting the appropriate wage determination (WD). For Managing and Operating (M&O) contractors, the process set forth in Section IV, Labor Standards Determinations Applicable at DOE/NNSA Facilities Operated Pursuant to Management and Operating Contracts, below, may be used.

**2.2 Background**. The FAR, at 48 CFR subparts 22.3, 22.4, 22.10, and the DEAR at 48 CFR 970.2204-1-1 provide guidance to Department[1] CO's for applying statutory labor requirements to contracts that involve construction and services. The statutes addressed in these FAR subparts include:

- Wage Rate Requirements (Construction), formerly known as the Davis-Bacon Act (DBA);
- Service Contract Labor Standards, formerly known as the Service Contract Act (SCA);
- The Contract Work Hours and Safety Standards Act; and
- The Copeland (Anti-Kickback) Act.

The DBA is applicable to contracts in excess of $2,000 to which the United States or the District of Columbia is a party for the construction, alteration, or repair (including painting and decorating) of public buildings or public works of the United States (or the District of Columbia). FAR 22.407(a) prescribes that contracts involving construction valued at $2,000 or more must include the various DBA compliance requirements set out in FAR 52.222-6 through FAR 52.222-15. An M&O Contractor/and other facility contractor that performs construction with its own employees must comply with all Department of Labor DBA regulations which are incorporated into the contract through FAR 52.222-6 through FAR 52.222-15.

FAR 52.222-6, *Construction Wage Rate Requirements*, requires, among other things, 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 (DBRA's).

**2.3 Services under Service Contract Labor Standards (formerly known as the Service Contract Act (SCA)**. SCA applies to every contract in excess of $2,500 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 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

[1] For purposes of this Acquisition Guide Chapter 22.1, Department is defined as the Department of Energy (DOE) including the National Nuclear Security Administration (NNSA).

increases) contained in the collective bargaining agreement of a predecessor SCA contractor, consistent with Section 4(c) of the SCA. Please see 29 CFR 4.130 for an illustrative list of services covered by the SCA. SCA contracts must contain the FAR clause 48 CFR 52.222-41.

**Note: SCA coverage *does not* apply to DOE management and operating (M&O) contracts, but *does* apply to subcontracts awarded thereunder. *See* DEAR 970.5244-1(x)(4). Because of the non-applicability of the SCA to M&O contracts, in the examples that follow, when work is determined to be service work, performance of the work is not subject to the SCA if an M&O contractor's employees perform the service work. The service work is subject to the SCA if it is performed by a subcontractor to the M&O contractor.**

**2.4 Illustrations of Work under the Labor Standards Statutes**. The following examples identify some of the more difficult contractual situations for determining whether the DBA and the SCA apply likely to be confronted in DOE practice. These examples are intended only as guidance and are not intended to provide conclusive labor standards determinations for particular circumstances. Such determinations can only be made by the CO, who may seek the assistance of other Department personnel such as contractor human resources/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 Field Operations Handbook, Chapters 14 (SCA) and 15 (DBA), available at http://www.dol.gov/whd/FOH/index.htm.

2.4.1 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 also subject to the DBA. The operation of such prototypes once construction is complete is not covered by the DBA unless those adjustments themselves involve significant construction amounting to alteration or repair or re-construction of the structure.

2.4.2 Paving. The construction of roads, including grading and repair, is generally subject to the 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 minor patching of surfaces, filling chuck holes, patching shoulders, and resurfacing railroad crossings, is not subject to the DBA, but, rather, is covered by the SCA. Similarly, when performed on a routine and recurring basis or schedule, patch and maintenance work on a parking lot, the replacement of bumper stops, repainting of handicapped parking signs on the pavement, and touchup of parking dividers are

subject to the SCA. Repainting/restripping of entire parking lots would be covered by the DBA. But note that, as in the case of painting, as discussed, below at pp. 6-7, the delay of paving maintenance work could mean that that work – when actually done – would amount to construction.

2.4.3 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 the DBA. Maintenance that is necessary to keep the boiler in safe operating condition after normal operations have begun and which does not amount to the alteration, repair, reconstruction, or rebuilding of the existing structure would be subject to SCA.

2.4.4 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 the work to be 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.

2.4.5 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 the 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, or temporary services) and temporary weather protection of equipment, is covered by the SCA, as opposed to the DBA.

2.4.6 Painting. Painting and decorating are specifically identified as covered work in the DBA. However, painting which is closely integrated with operation and maintenance activities, such as painting to color code process lines, service piping, valves or directional arrows is covered by the SCA when performed on a scheduled, recurring, and routine basis. Similarly, the application of various coating materials to localize contamination, the painting of machine tools to identify degree of contamination, and the repainting of machine tools and equipment as part of preventive maintenance are not subject to the DBA. Painting of offices and other plant structures after the original construction is complete is covered by the DBA if such painting exceeds 200 square feet.

2.4.7 Installation, Rearrangement and Adjustment of Equipment. The installation of mechanical equipment and instruments as part of a current construction project that is 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 the Assistant General Counsel for Contractor Human Resources (GC-63) or the NNSA Office of General Counsel, as appropriate, for assistance in determining whether the work constitutes substantial and segregable construction.**

Thus, furnishing and installing mechanical equipment that requires alteration of the building structure or running wiring through walls which involves more than an *incidental* amount of construction is likely be covered by the DBA. Alteration or rearrangement of existing facilities involving similar work to accommodate new or different equipment is also covered.

The DBA also applies to installing a security system or an intrusion detection system; installing permanent shelving that 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, or where those adjustments themselves involve significant construction amounting to alteration or repair or re-construction of the structure.

2.4.8 Maintenance Contracts. Contracts for servicing of equipment or facility maintenance work are subject to SCA. Maintenance includes typically scheduled, routine, recurring 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 it may exceed what can be fairly characterized as routine scheduled maintenance work and would then 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 the 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 or requires the alteration of the existing structure or includes painting of offices or other space (over 200 sq.ft.), or where the landscaping work involves extensive landscaping, it is generally covered by the DBA.

Where a maintenance or SCA contract requires substantial and segregable tasks for construction, alteration, or repair, the 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 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 coverage. Moreover, DOL guidance provides that, where an "[a]ctivity that generally takes more than 32 hours for repair of a particular building component," the length of time involved itself is indicative of DBA repair work. Similarly, the cost of the labor or the labor and materials involved, 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 personnel are encouraged to contact the Office of the Assistant General Counsel for Contractor Human Resources (GC-63) or the NNSA Office of General Counsel, as appropriate, for assistance in determining whether the work constitutes substantial and segregable construction. The determination of whether "extensive" landscaping is required is a particularly difficult issue that should be submitted to GC-63 or to NNSA GC, as appropriate, for review.**

2.4.9 Telephone and Utility Systems. **NOTE: There is no DBA exemption for utility companies.** Whether employees of a public utility are covered by the DBA when performing construction-type work in connection with Federal and Federal-assisted projects, will depend upon the nature of the contracts involved, and the work to be performed, 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 the DBA. Relocation of utility lines to accommodate construction of a public work is subject to the DBA. Similarly, if a utility company agrees to undertake a portion

[2] **NOTE:** The reverse is not the case, i.e., 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 the service work that will be performed under the construction contract.

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 requested to add new transformers or extend its power lines to provide power to the DBA/DBRA covered project, and will own the new equipment/lines, such work is not subject to the DBA/DBRA if performed by employees of the utility. Thus, contracts involving the installation of new telephone systems or utilities are not subject to the 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.[3]

**NOTE: The application of the DBA in these situations is fact based and DOE personnel are encouraged to contact the Office of the Assistant General Counsel for Contractor Human Resources (GC-63), or NNSA GC, as appropriate, for assistance in determining whether the utility company work is covered by the DBA.**

2.4.10 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 the SCA rather than the DBA. Where construction is expected to occur at some point of time, but not in the next 2-3 years, the demolition work by itself is not covered by the DBA.

**NOTE: The application of the DBA in these situations is fact based and DOE personnel are encouraged to contact the Office of the Assistant General Counsel for Contractor Human Resources (GC-63), or NNSA GC, as appropriate, for assistance in determining whether the utility company work is covered by the DBA.**

2.4.11 Decontamination and Decommissioning. Decontamination work, including washing, scrubbing, and scraping to remove contamination; contaminated soil or other materials; and painting or other resurfacing, is not covered by the 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 and providing that it does not exceed 200 square feet.

[3] But, note that a different outcome pertained under Recovery Act grant situations because Section 1606 of the Recovery Act required application of the DBA to construction performed by laborers and mechanics "**employed by contractors and subcontractors** on projects funded directly by or assisted in whole or in part by and through the Federal Government pursuant to this Act. . ." (emphasis added), but not to employees of the grantee.

**NOTE: The application of the DBA in these situations is fact based and DOE personnel are encouraged to contact the Office of the Assistant General Counsel for Contractor Human Resources (GC-63), or NNSA GC, as appropriate, for assistance in determining whether the utility company work is covered by the DBA.**

**2.5 Labor Standards Determinations Applicable at DOE/NNSA Facilities Operated Pursuant to Management and Operating Contracts**. The Department cannot delegate labor standards coverage determinations to its contractors. However, pursuant to 48 C.F.R. 970.2204-1-1(b)(3), the Head of Contracting Activity (HCA) may prescribe for M&O contracts classes of work as 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. HCA's 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). The Department also recognizes that each facility/site has differing circumstances and that it may be beneficial if the contractor works with the CO to determine the classes of covered work.

Upon request by an M&O contractor, CO's 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 Contractor Human Resources (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.

**NOTE: In all cases, the CO must obtain the written concurrence of the DOE or NNSA Office of General Counsel on the actual determination of coverage, prior to the submission to the contractor.**

Although coverage of specific classes of work may be determined by the CO, the 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 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. If the CO believes it will expedite the process, the contractor may pull a WD from the DOL website at www.wdol.gov and provide it to the CO or designee for approval.

CO's should, as a part of their normal operational awareness and systems oversight, ensure that labor standards policies, procedures, and management controls are implemented by M&O contractors. M&O contractors and other contractors are responsible for ensuring compliance by

their subcontractors (*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 performed under these determinations.

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 the CO. No changes are required to processes currently used by the CO and the DOE or NNSA Labor Standards Committee at an M&O site/facility.

**2.6 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), the Y-12 National Security Complex and at the Portsmouth and Paducah Gaseous Diffusion Plants.

**2.7 DOE's Role in Construction Labor Relations**. The Department is not the employer of the Department's contractor work force. The DBA and SCA require the payment of at least the wages (including benefits) set out in the appropriate wage determination. So long as those minimum levels are met, wages, hours, and working conditions are terms and conditions of employment to be negotiated by the contractor with any labor organizations representing their employees for collective bargaining and thus should be left to the orderly processes of negotiation and agreement between the contractor and such labor organizations, with maximum possible freedom from Government interference.

Project labor agreements (PLA's) 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. 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.) may be addressed in those agreements.

It is critical that DOE contractors follow practices that experience has shown are consistent with the 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 accomplishment of DOE's programs at reasonable costs.

**2.8 DOE 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 Contractor Human Resources (GC-63), or, if you do not have such an assigned contact, call Jean Stucky at 202-586-7532. For NNSA, contract Lisa Mangi in the Office of General Counsel at 202-586-2647.

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## CHAPTER 23 – SUSTAINABLE ACQUISITION POLICY


- 23.1 Sustainable Acquisition Policy - August 2017
- 23.70 Coordination of Fee Reductions Concerning Worker Safety and Health with the Office of Enforcement - May 2020

# 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/SustainabilityDashboard/. 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

# Coordination of Fee Reductions Concerning Worker Safety and Health with the Office of Enforcement

Guiding Principles

- Contracting Officers must coordinate with the Office of Enforcement before pursuing a fee reduction for a contractor's violation of a Departmental regulation related to the enforcement of worker safety and health concerns.
- The Office of Enforcement and the Field Element Enforcement Coordinator will assist Contracting Officers, characterize the Office of Enforcement's findings, and explain their link to the Office's recommendation for an appropriate monetary sanction.

*References: [DEAR 923.7002, DEAR 952.223-76, DEAR 952.223-77, DEAR 970.2303-2-70, and DEAR 970.5215-3]*

## 1.0 Summary of Latest Changes

This is a new Acquisition Guide chapter. It applies to both Management and Operating (M&O) and non-M&O contracts.

## 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 focus of this guide chapter is on Contracting Officers' responsibility to coordinate with the Office of Enforcement before pursuing a fee reduction for a contractor's violation of a Departmental regulation related to the enforcement of worker safety and health concerns, how coordination occurs, and coordinating effectively.

### 2.1 Coordination before Pursuing a Fee Reduction for Violation Related to the Enforcement of Worker Safety and Health Concerns.

For both M&O and non-M&O contracts, Contracting Officers must coordinate with the Office of Enforcement before pursuing a fee reduction for a contractor's violation of a Departmental regulation related to the enforcement of worker safety and health concerns.

2.1.1 The Conditional Payment of Fee or Profit clauses. The DEAR includes three conditional payment of fee clauses: DEAR 952.223-76, Conditional Payment of Fee or Profit—Safeguarding Restricted Data and Other Classified Information and Protection of Worker Safety and

Health; DEAR 952.223-77, Protection of Worker Safety and Health; and DEAR 970.5215.3, Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts. The clauses give the Contracting Officer, among other things, the right to reduce the contractor's otherwise earned fee if the contractor does not meet the contract's requirements regarding worker safety and health.

2.1.2 The Office of Enforcement and the Safety Enforcement Program. The Office of Enforcement, within DOE's Office of Enterprise Assessments, implements the Department's safety enforcement program on behalf of the Secretary of Energy in accordance with the Atomic Energy Act. The Atomic Energy Act authorizes DOE to impose a civil penalty or a contract fee reduction on the contractor, but not both, for a contractor's violation of a Departmental regulation related to the enforcement of worker safety and health concerns. DEAR 923.7002 and DEAR 970.2303-2-70 require Contracting Officers to coordinate with the Office of Enforcement before pursuing a fee reduction relating to any contractor violation of DOE's worker safety and health regulations.

2.1.3 Ensuring Actions Taken Are Commensurate With Violations' Safety Significance. The Office of Enforcement, to realize DOE's objective of implementing a safety program that is consistent, transparent, and fair, considers it vital that the enforcement actions taken against contractors are commensurate with the number and severity of the regulatory violations involved and their associated safety significance. The Office of Enforcement also considers it important that any monetary impact on the contractor be consistent with those factors and with cases of similar severity and consequence, and be clearly linked to violations of enforceable DOE requirements.

2.1.4 Contracting Officers' Responsibility. Contracting Officers, when considering fee reductions under the DEAR's three conditional payment of fee clauses, must adhere to the clauses' requirements. They must coordinate with the Office of Enforcement before pursuing a fee reduction for a contractor's violation of a Departmental regulation related to the enforcement of worker safety and health concerns.

2.1.5 Procedures and Available Assistance. In practice, the Office of Enforcement formally notifies a DOE contractor of the commencement of an enforcement investigation. The cognizant DOE Field Element Manager is copied on the notification, which ensures site/field office personnel, including Contracting Officers, are aware of the investigation. Concurrently, the Office of Enforcement transmits a memorandum to the Field Element Manager to request early and ongoing coordination of possible fee reductions or civil penalties. The Office of Enforcement and the Field Element Enforcement Coordinator will provide assistance to Contracting Officers and will characterize the Office of Enforcement's findings and explain their link to the Office's recommendation for an appropriate monetary sanction, be it a contract fee reduction or a civil penalty.

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# CHAPTER 25 - FOREIGN ACQUISITION


- 25.000 Foreign Acquisition - August 2017
  - Attachment - Determination and Findings
- 25.7100 Compliance with U.S. Export Control Laws, Regulations and Policies - June 2016

# 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

# Compliance with U.S. Export Control Laws, Regulations and Policies

Guiding Principles

- DOE contractors are subject to applicable U.S. export control laws, regulations and policies when exporting materials and technical information resulting from the performance of their contracts.
- Technology is a critical part of the DOE's mission and requires special consideration in identifying and protecting sensitive technologies including intellectual property and pending patents.

*[References: FAR 17.6, DEAR 917.6, DEAR 925.71, AEA of 1954 as amended, DOE IG Report DOE/IG-0645, DOE IG Report INS-O-07-01, GAO Report GAO-11-354, EAA of 1979 as amended, EAR (15 CFR Parts 730-774), AECA (22 U.S.C. 2778), ITAR (22 CFR Parts 120-130), 10 CFR Part 810, 10 CFR Part 110, TWEA (50 U.S.C. App. 5(b) as amended), 31 CFR 500, IAEA INFCIRC 254 Part 1, IAEA INFCIRC 254 Part 2, EO 12981 as amended by EO 13020 and EO 13026, NNPA of 1978, DOE Order 142.3A, NSDD 189, DOE Order 551.1D, DOE Order 580.1A Chg 1]*

## 1.0 Summary of Latest Changes

This update: (1) changes the chapter number from 3.3 to 25 to coincide with the FAR, (2) discontinues use of DOE Form 580.1, (3) updates approval organizational titles, (4) simplifies the alternative disposition procedures as revised in DOE Order 580.1A, Chg 1 of March 30, 2012, and (5) 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 guidance to DOE contracting officers on complying with United States (U.S.) export control laws and regulations and with assisting DOE contractors, including M&O contractors, who are required to either set up an Export Management and Compliance Program (EMCP) or improve upon an existing export compliance program. It is not intended to be comprehensive and encompass all aspects of export control requirements. Inconsistencies between this supplement and laws, regulations, or policies should be resolved in favor of the respective law, regulation or policy. Questions regarding export controls should be directed to legal counsel or the cognizant export licensing authority.

2.2 **Background**. An export is the transmission, shipping or carrying of equipment, materials, items, proprietary software, and/or protected technology/information abroad or to a foreign person. For export control purposes, foreign persons comprise foreign companies/corporations not incorporated in the U.S., foreign institutions/governments, and foreign persons who are not Legal Permanent Residents (LPRs). Exporting can occur as an export, "deemed export," re-export or "temporary-export." A "deemed export" is the transmission of protected technology/information to a non-LPR foreign person within U.S. boundaries. A "re-export" is transmission, shipping and carrying of equipment, materials, items, proprietary software, and/or protected technology/information from one foreign country/non-LPR foreign person to a second foreign country/non-LPR foreign person. A "temporary-export" involves a tangible item, material, or equipment which is under physical control in some manner that is returned to the U.S. or the country of origin after a specified period of time. U.S. export control policy is enforced through export control laws and regulations administered by the Departments of State (DOS), Commerce (DOC) and Energy (DOE), and by the Nuclear Regulatory Commission (NRC) and the U.S. Treasury Department (USTD). The identified Federal agencies administer export control laws, regulations and international treaties addressing unique areas of concern, although some overlapping responsibilities exist in the areas of weapons of mass destruction, delivery systems and dual-use applications.
For the control of most sensitive technology or its application, the primary method of protection is the security classification process. For DOE technology the classification system is augmented by the Unclassified Controlled Nuclear Information (UCNI) controls established by Section 148 of the Atomic Energy Act of 1954 (Reference c).

U.S. export control policy is consistent with international treaties/agreements. As a signatory of the Nuclear Nonproliferation Treaty (NPT), the U.S. is obligated to prevent non-nuclear weapons-states from acquiring nuclear explosive devices or related technology when facilitating the transfer of materials, equipment and technologies for the peaceful uses of nuclear energy to NPT adherents. Other requirements regarding technology related to weapons of mass destruction (WMD) flow from U.S. membership in five multilateral export control regimes: the Nuclear Suppliers Group (NSG), the NPT Exporters (Zangger) Committee, the Missile Technology Control Regime (MTCR), the Australia Group (AG) and the Wassenaar Arrangement (WA).

2.3 **Export Control Laws, Regulations and Policies**. The following U.S. export control laws and regulations apply to DOE contracts when exporting materials and technical information resulting from the performance of their contracts:

- Department of Commerce - Export Administration Act (Reference g) and Export Administration Regulations (Reference h)
- Department of State - Arms Export Control Act (Reference i) and International Traffic in Arms Regulations (Reference j)
- Department of Energy - Atomic Energy Act of 1954 (Reference c) and Assistance to Foreign Atomic Energy Activities (Reference k)
- Nuclear Regulatory Commission - Atomic Energy Act of 1954 (Reference c) and Export and Import of Nuclear Equipment and Material (Reference l)

- Department of Treasury - Trading with the Enemy Act (Reference m) and the Foreign Asset Control Regulations (Reference n)

Questions regarding export controls should be directed to the cognizant licensing authority or general counsel.

2.4. **Export Control Policy and International Treaties/Agreements**. U.S. export control policy is enforced through export control laws and regulations administered by the DOS, DOC, DOE, NRC and USTD. U.S. export control policy is consistent with international treaties/agreements between like-minded countries for the mutual protection of the treaty parties. Each of the identified Federal agencies has its own set of export control laws and regulations and international treaties addressing the specific areas of concern with some overlap responsibility in the areas of weapons of mass destruction, delivery systems, and dual-use applications.
As a signatory of the NPT, the U.S. is obligated to prevent non-nuclear weapons-states from acquiring nuclear explosive devices or related technology when facilitating the transfer of materials, equipment, and technologies for the peaceful uses of nuclear energy to NPT adherents.

Other requirements regarding technology related to WMD flow from U.S. membership in the following five multilateral export control regimes:

- Nuclear Suppliers Group (NSG) http://www.nuclearsuppliersgroup.org/en/guidelines (accessed 2/4/16)

  Trigger List

  The NSG publishes the agreed guidance on equipment, materials and related technologies for processing, use or production of special fissionable materials into a Trigger List that is published by the IAEA. (Reference o) and

  Dual-Use List

  The NSG also publishes through the IAEA agreed guidance on the transfer of nuclear-related dual-use equipment, materials and related technologies. (Reference p);

- Nuclear Non-Proliferation Treaty Exporters (Zangger) Committee. http://www.foi.se/en/Customer--Partners/Projects/zc/zangger/ (accessed 2/4/16);
- Missile Technology Control Regime (MTCR). http://www.mtcr.info/english/annex.html (accessed 2/4/16);
- Australia Group (AG). http://www.australiagroup.net/en/index.html (accessed 2/4/16); and
- Wassenaar Arrangement (WA). http://www.wassenaar.org/controllists/index.html (accessed 2/4/16).

2.5 **Definitions (Reference h)**. Exporting can occur as an Export, Deemed Export, Re-Export and/or Temporary-Export to Foreign Persons.

Foreign Persons include foreign institutions/governments and foreign companies/corporations that were not incorporated in the United States. Foreign persons do not possess permanent legal residence within the United States.

Export is the transmission/shipping/carrying of equipment, materials, items, proprietary software, and/or protected technology/information abroad or to a foreign person.

Deemed Export is the transmission of protected technology/information to a foreign person within U.S. boundaries.

Re-Export is the transmission/shipping/carrying of equipment, materials, items, proprietary software, and/or protected technology/information from one foreign country/person to a second foreign country/person.

Temporary-Export involves a tangible item, material, or equipment which is under physical control in some manner that is returned to the U.S. or the country of origin after a specified period of time.

2.6 **Export Control Transfer Methods**. Transfer can occur by the transmission of technology/items by physical or electronic means such as:

- Shipping (by land, sea, or air) of export controlled information (ECI); hand-carrying on foreign travel; or performing processes or services in a foreign country that convey expertise.
- Sales, loans, or donations to foreign persons, including associated technical manuals.
- Consulting with or training foreign persons.
- Publications, presentations, and participation in international exchange programs or conferences.
- Mail, faxes, emails, postings/data transfer on the Internet, or communication through telephone calls.
- Cooperative Research and Development Agreements (CRADA), Strategic Partnership Projects (SPP) agreements, patent applications, non-disclosure agreements, procurement specifications, Memoranda of Agreement/Understanding, and contracting instruments.
- Sharing export controlled technology/information with foreign persons in the U.S., including visits or assignments of foreign persons to DOE facilities.

2.7 **Export Control Laws, Regulations and Jurisdiction**

2.7.1 Agencies' Areas of Responsibility Under Export Control Laws, Regulations and Jurisdiction. U.S. Government agencies are responsible for specific areas of export control based on their historical administration and knowledge of particular fields. U.S. Government agencies work together in assigning specific areas of responsibility and item/technology definitions when commodities or technologies overlap or have dual-uses (Reference q).

- Department of Energy: Atomic Energy Act

The DOE has jurisdictional authority for exports of any item or service whose release would reveal a "specific nuclear weapon function." (References c and r)

- Department of Energy: 10 CFR Part 810, "Assistance to Foreign Atomic Energy Activities"

  The DOE has jurisdictional authority for exports for peaceful nuclear purposes of nuclear reactor technology, nuclear enrichment and reprocessing technology, heavy water production technology, and related areas. (References k and r)

- Nuclear Regulatory Commission: 10 CFR Part 110, "Export and Import of Nuclear Equipment and Material"

  The NRC has jurisdictional authority for exports for peaceful nuclear purposes of nuclear reactors, nuclear enrichment and reprocessing facilities, heavy water production facilities, related proprietary operation and maintenance manuals, and related equipment. (References l and r)

- Department of Commerce: Export Administration Regulations

  DOC has jurisdictional authority over a broad range of commercial dual-use commodities that are grouped into ten categories. Within each of these categories are the following subcategories: equipment, assemblies, and components; test, inspection and production equipment; materials; software; and technology. Each of the subcategories is defined by items listed from highest level of control to lowest level of control. The EAR (Reference h) "deemed exports" rules regulate providing export controlled technical information to certain foreign persons in the U.S. through the provision of documents, software, training or employment, as set forth in the Bureau of Industry and Security (BIS) policies.

- Department of State: International Traffic in Arms Regulations

  The Arms Export Control Act (Reference i) is implemented through the ITAR (Reference j). DOS has jurisdictional authority over munitions items, including military systems, equipment, components, and services, and space-related systems, equipment, components, services and items.

- Treasury Department: Foreign Asset Control Regulations

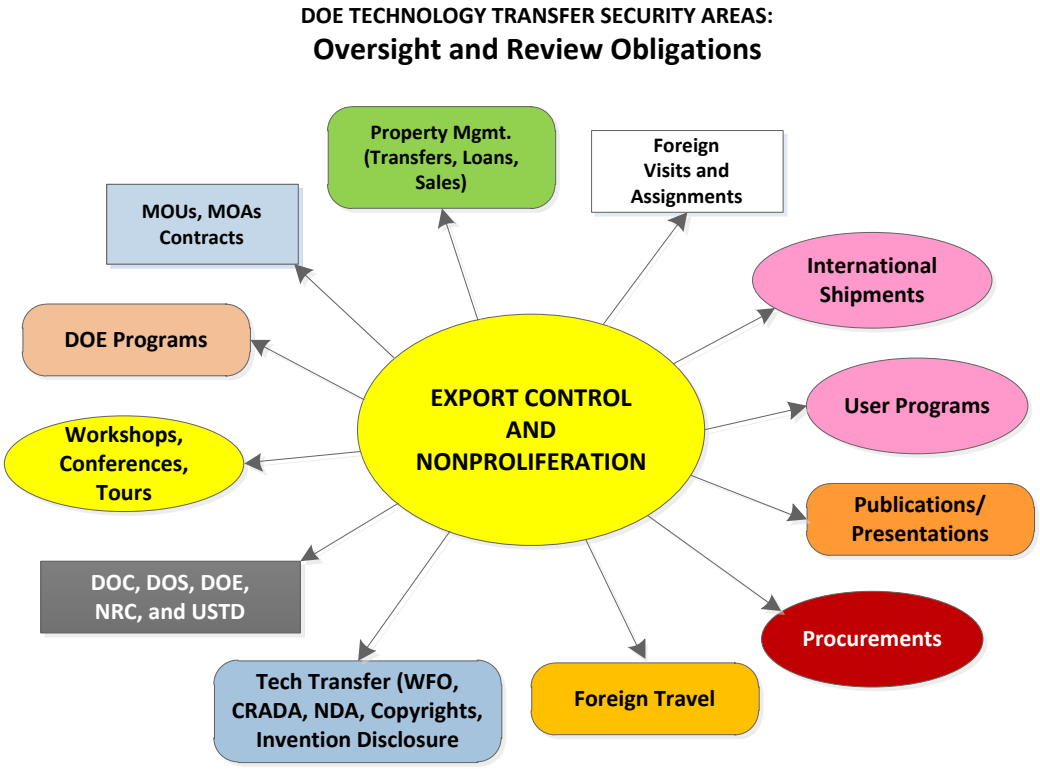
  The Trading with the Enemy Act (Reference m) is implemented through the Foreign Asset Control Regulations (Reference n). The USTD Office of

Foreign Asset Control (OFAC) has jurisdictional authority over all financial and tangible items having a destination to embargoed and terrorist sponsoring states.

NOTE: Contact the Office of the General Counsel for the most up-to-date versions of the above listed statutes and regulations.

2.7.2 DOE Prime Contract Requirements. Requirements include, but are not limited to:

- DOE O 142.3A Unclassified Foreign Visits and Assignments
- DOE O 205.1B Department of Energy Cyber Security Management Program
- DOE O 241.1B, Scientific and Technical Information Management
- DOE O 470.4B Safeguards and Security Program
- DOE O 471.1B Identification and Protection of Unclassified Controlled Nuclear Information
- DOE O 471.3 Change 1, Identifying and Protecting Official Use Only Information
- DOE O 481.1C Admin Chg 1 Strategic Partnership Projects (formerly known as Work for Others (Non-Department of Energy Funded Work))
- DOE O 482.1 DOE Facilities Technology Partnering Programs (User Facilities)
- DOE O 483.1 DOE Cooperative Research and Development Agreements
- DOE O 483.1-1 DOE Cooperative Research and Development Agreement Manual
- DOE O 484.1 Admin Chg 1, Reimbursable Work for Department of Homeland Security
- DOE O 551.1C Official Foreign Travel
- DOE O 580.1A Department of Energy Personal Property Management Program




## 2.8 DOE Technology Transfer Areas: Oversight and Review Obligations

2.8.1 Foreign Visits and Assignments. The review and approval of all foreign national visits and assignments is required by DOE 142.3A (Reference s). Requests should be reviewed by a Subject Matter Expert (SME) in order to evaluate information, software, and physical areas to be accessed to ensure that no export controlled technology will be transferred. Release of technology or software subject to the Export Administration Act (Reference g) to a foreign person in the U.S. is considered to be a "deemed export" to the home country or countries of the foreign person, as described in EAR (Reference h) 734.2 (b). These transfers are the most critical issues to be addressed during any visit or assignment. Requests should also be vetted for DOC, DOS and USTD sanctioned and denied parties, including debarred persons, listed entities and USTD Specially Designated Nationals.

2.8.2 International Shipments. Shipping reviews should include all international mailings, shipments and drop shipments. Embargoes and terrorist-sensitive restrictions must be considered when reviewing shipping requests. Consignees should be vetted for DOC, DOS and USTD sanctioned and denied parties, including debarred persons, listed entities and USTD Specially Designated Nationals.

2.8.3 User Programs. User programs should be reviewed to establish boundaries for proposals that contain proprietary information. Users with proposals that do not contain proprietary information perform fundamental and applied research work with the intent

to publish as established in DOE Order 482.1 (Reference t) and defined in NSDD-189 (Reference u). Proposals and research activities should be reviewed by SMEs to ensure that controlled technology, as described in EAR (Reference h) 734.2 (b) is not transferred from the user to foreign persons within the user facility.

2.8.4 Publications/Presentations. Publication and presentation reviews by SMEs prior to public release should include review as required by NSDD-189, including classified information, ECI, and other national security content. This applies to web release as well. This function is often performed in conjunction with the technical information office and the classification office.

Markings for technical information determined to be ECI may vary depending on the needs and preferences of site or program managers. The following format is preferred for the distribution limitation statement on such documents:

*EXPORT CONTROLLED INFORMATION*

*Contains technical information whose export is restricted by * . Violations may result in administrative, civil, and/or criminal penalties. Limit dissemination to U.S. persons†. The cognizant program manager must approve other dissemination. This notice shall not be separated from the attached document*.

*Reviewer (Signature)*

*Date*

* Fill in the appropriate export control regulation, e.g., DOC Export Control Classification Number (ECCN) xxxx, DOS ITAR Category xx, NRC 10 CFR Part 110.xx, DOE 10 CFR Part 810.xx, or other jurisdiction classification as appropriate.

2.8.5 Procurement. All procurements involving foreign countries, persons or companies should be reviewed by SMEs, including intellectual property counsel, for technology transfer and export control concerns. Specific language addressing export control laws and regulations should be part of the standard contractual terms and conditions. If special export conditions or restrictions are needed, they should be added to the contract language prior to the onset of work.

2.8.6 Foreign Travel. The review and approval of all travel to a foreign country is required by DOE Order 551.1C (Reference v). Requests should be reviewed by SMEs in order to evaluate any technology to be discussed in foreign countries. Any presentations or demonstrations to be given outside the U.S. should be reviewed and approved by the local Export Control Department, as well as the Technical Information Office. Destinations should be vetted for DOC entity list and USTD sanctions list association, as travel to these destinations could require an export license or be prohibited. Laptops should be cleared for transport to a foreign destination.

2.8.7 Tech Transfer. The technology transfer area includes activities such as SPPs, CRADAs, non-disclosure agreements, User Facility Agreements (UFA), and licenses for invention disclosures, copyrights, and patents. These contractual vehicles must be reviewed by an SME for controlled technology both coming into the facility and leaving the facility. All parties involved must be authorized for the receipt of specific technology, as well as protecting proprietary information. Sponsor approval should always be received before involving a foreign person in these types of activities.

2.8.8 Departments of Homeland Security, Defense and State. Most often work for these agencies will come to a facility through a SPP mechanism. However, special care should be noted when dealing with these work scopes. In addition to technology and equipment controlled by DOC under the EAR (Reference h), these areas are often subject to ITAR (Reference j) controls by the DOS and some data is considered critical infrastructure data. It is vital to determine if any technology to be transferred is subject to ITAR controls, and if so, either obtain a DOS license or insure that none of the information is transferred to a foreign person.

2.8.9 Workshops, Conferences and Tours. Workshops and conferences should be reviewed by SMEs of the host organization for foreign national attendance. If information to be available at the event is assumed to be publicly available, all internal presentations and demonstrations should be reviewed to ensure compliance. Outside presenters and demonstrators should provide signed assurances that their information has been reviewed by their respective organizations and is declared publicly releasable. All tours should be reviewed for content and access. Special care should be noted when tours are given to individuals from a facility on the DOC Entity List, as these may require positive escort to ensure compliance. Before an export-controlled technical disclosure is made, a DOS license, DOC license, NRC license, USTD authorization or DOE 10 CFR Part 810 authorization must be obtained.

2.8.10 DOE Programs. Foreign persons (including foreign national employees) participating in DOE programs should be cleared through the sponsoring DOE Headquarters program office, which must obtain concurrence from the contractor's Export Control Department. If there is the possibility of transfer of nuclear technology to a foreign entity, the sponsoring Headquarters program office should consult with the Office of Nonproliferation and International Security (NA-24) to determine whether the activity is subject to DOE 10 CFR 810 authorization before foreign participation can take place including the sharing or transfer of nuclear software codes. Care should also be taken to determine if a DOS, DOC, or NRC license is needed before the transfer of any materials, equipment, technology or software to a foreign entity.

2.8.11 Contracts. Contractual documents should be reviewed to assure that export control requirements are provided for both work coming into the facility and work being outsourced from the facility. This should be handled using the contract clauses provided in 48 CFR Parts 925.7102, 952.225-71, 970.2571-3, and 970.5225-1, as applicable.

2.8.12 Property Management. Per DOE Order 580.1A (Reference w), the property management organization should ensure that export control concerns of High Risk Personal Property (HRPP) are addressed when property is loaned, transferred or dispositioned.

HRPP includes:

- Property especially designed or prepared (EDP) for use in the nuclear fuel cycle illustrative list in 10 CFR 110 (Reference l), including items listed in the NSG Trigger List (Reference o).

- Property listed on the EAR (Reference h) Control List (15 CFR 774) because of dual-use applications in the design, development, production or use of weapons of mass destruction, and conventional weapons, including property as listed in the NSG Dual-Use List (Reference p), and the International Control Lists of the Australia Group, the Missile Technology Control Regime and the Wassenaar Arrangement.

- Property listed on the ITAR (Reference j) U.S. Munitions List (22 CFR 121), and the Atomic Energy Act (Reference c) including nuclear weapon components or weapon-like components.

HRPP must be controlled from acquisition through disposal. HRPP must be identified at acquisition and marked as such. All the requirements of DOE Order 580.1A, including marking, recording, inventory, utilization, and disposal apply to HRPP.

Nuclear weapon components, nuclear weapon-like components, NSG Trigger List items that are not sanitized or destroyed must be approved for alternative disposition. Written request for alternative disposition should be made through the cognizant Head of Departmental Element and then through NA-24 for disposition approval by the Deputy Administrator for Defense Nuclear Nonproliferation (NA-20).

The following Export Restriction Notice shall be included in all transfers, sales or other offerings of unclassified information, materials, technology, equipment or software:

> *Export Restriction Notice* - The use, disposition, export, and reexport of this property are subject to export control laws, regulations and directives that include but are not limited to: the Atomic Energy Act of 1954, as amended; the Arms Export Control Act (22 U.S.C. § 2751 et seq.); the Export Administration Act of 1979 as continued under the International Emergency Economic Powers Act (Title II of Pub.L. 95-223, 91 Stat. 1626, October 28, 1977); Trading with the Enemy Act (50 U.S.C. App. 5(b) as amended by the Foreign Assistance Act of 1961); Assistance to Foreign Atomic Energy Activities (10

CFR part 810); Export and Import of Nuclear Equipment and Material (10 CFR part 110); International Traffic in Arms Regulations (22 CFR parts 120 through 130); Export Administration Regulations (15 CFR part 730 through 734); Foreign Assets Control Regulations (31 CFR parts 500 through 598); DOE Order 142.3A, Unclassified Foreign Visits and Assignments, October 14, 2010; DOE Order 551.1D, Official Foreign Travel, April 2, 2012; and DOE Order 580.1A, Department of Energy Personal Property Management Program, March 30, 2012; and the Espionage Act (37 U.S.C. 791 et seq.) which among other things, prohibit:

- The making of false statements and concealment of any material information regarding the use or disposition, export or re-export of the property; and
- Any use or disposition, export or re-export of the property which is not authorized in accordance with the provisions of this agreement.

2.9 **Export Control "Carve Out."** The following discussion applies to information only. It does not include any tangible products, services, items, equipment, software, and systems which are export controlled. Information falls into the following three categories: 1) openly releasable, 2) controlled for reasons other than export controls, such as proprietary business strategies and personal information, and 3) export controlled technology/information. The U. S. Government has recognized and acknowledged these differences and has reflected the openly releasable portion of information.

2.9.1 Publicly Available Information. Publicly available information is information that is generally accessible to the interested public in any form and therefore not subject to export control laws and regulations. The following information which is published and which is generally accessible or available to the public without restriction:

- through sales at newsstands and bookstores;
- through subscriptions which are available without restriction to any individual who desires to obtain or purchase the published information;
- through second class mailing privileges granted by the U.S. Government;
- at libraries open to the public or from which the public can obtain documents;
- through patents available at any patent office;
- through unlimited distribution at a conference, meeting, seminar, trade show or exhibition, generally accessible to the public, in the U.S.;
- through public release (i.e., unlimited distribution) in any form (e.g., not necessarily in published form) after approval by the cognizant U.S. Government department or agency; and
- through federally-funded fundamental research in science and engineering at colleges, universities and laboratories (DOE contractors) in the U.S. where the resulting information is ordinarily published and shared broadly in the scientific community.

2.9.2 Fundamental Research. Fundamental research is basic and applied research in science and engineering, where the resulting information is ordinarily published and shared broadly within the scientific community. Conversely, proprietary research and industrial

development, design, production, and product utilization are under the U.S. Government jurisdiction and therefore subject to U.S. export control laws and regulations. It should be understood that these terms have strict definitions in addition to the prohibitions and end user restrictions discussed in the next section.

2.9.3 Limitations on Fundamental Research and Publicly Available Information. Although openly publishable literature is not subject to export control, DOE's policy is to oppose interaction with terrorist and embargoed countries unless there is specific U.S. Government policy support for sponsorship for such interactions. All DOE funded/ sponsored interactions should be reviewed by an SME to assure NSDD-189 compliance.

College, University and DOE Laboratory research will not be considered "fundamental research" if:

- the researchers accept other restrictions on publication of scientific and technical information resulting from the project or activity, or
- the research is funded by the U.S. Government and specific access and dissemination controls protecting information resulting from the research are applicable.

The U.S. Government has chosen to prohibit certain types of equipment, materials, software and technology (reasons for control include nuclear nonproliferation, chemical and biological weapons nonproliferation, national security, missile delivery systems, encryption), certain end uses (military, weapons of mass destruction, missile technology) for export, re-export, and deemed export by U.S. persons including U.S. organizations. Under regulation 15 CFR Part 736 (Reference h) "Prohibitions" are detailed highlighting the above areas and override NSDD-189.

NSDD-189 does not take precedence over statutes. NSDD-189 does not exempt any research, whether basic, fundamental, or applied, from statutes that apply to export controls such as the Arms Export Control Act (Reference i), the Export Administration Act (Reference g), or the U.S. International Emergency Economic Powers Act, or the regulations that implement those statutes (the ITAR (Reference j) and the EAR (Reference h)). Thus, if export-controlled items are used to conduct research or are generated as part of the research efforts, the export control laws and regulations apply to the controlled items.

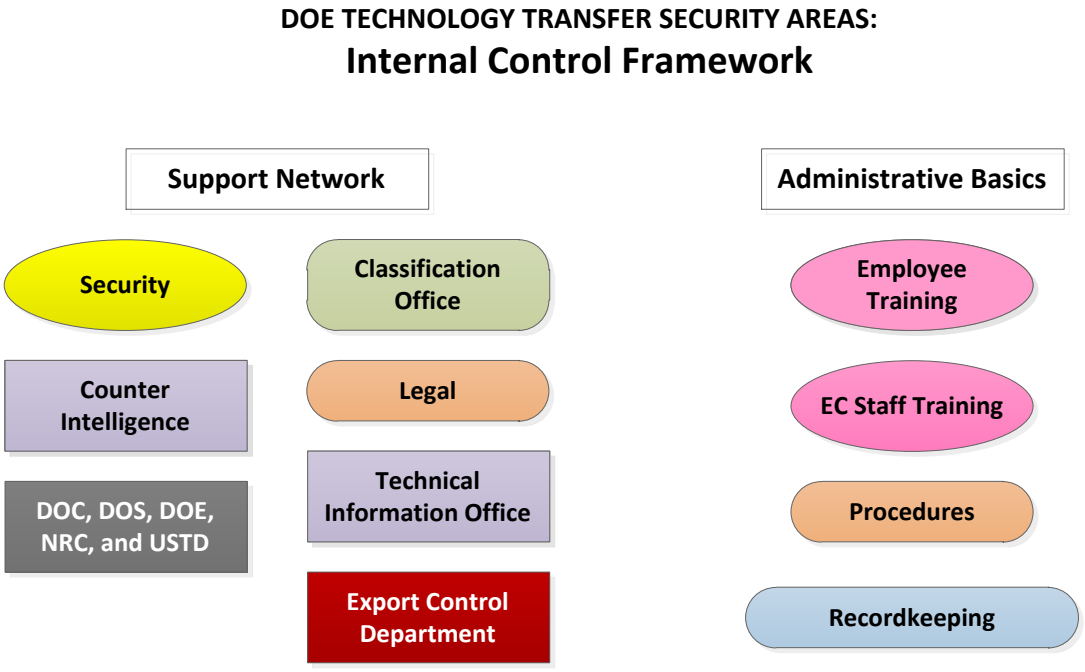
2.10 **Export Control Violations and Penalties**. Violations of export control laws and regulations can have serious consequences for the United States, DOE, and the DOE Laboratory involved. The U.S. can have its national security threatened or compromised, if certain highly-sensitive information would fall into the wrong hands. DOE could suffer programmatic consequences, if there was a significant failure.

Contractors and their employees can face severe financial and operational restrictions as a result of a violation. The regulations for each export control licensing authority (DOS, DOC, NRC, DOE, and USTD) have a specific set of criminal and civil penalties.

If a violation occurs or one is thought to have occurred, self-disclosure is not only recommended, it is required. Each export control jurisdictional authority has its own disclosure process. Each agency and/or contractor has or should have an escalation process for such matters.

Depending on circumstances and the significance of the violation, penalties can include:

- Fines for the individual and/or legal entity contractor
- Denial of export privileges for a specified period of time or indefinitely
- Loss of Programs/Projects
- Loss of reputation
- Debarment, seizure, and/or forfeiture
- Imprisonment




2.11 **Export Management and Compliance Program (EMCP)**. The following discussion provides guidance for DOE contracting officers on determining whether DOE contractors should be required to either set up an EMCP or improve an existing export compliance program. The DOC BIS offers guidance on how to set up an EMCP for dual-use items by providing the elements of such a program with examples and discussions for doing so at the following URL: http://www.bis.doc.gov/index.php/compliance-a-training/export-management-a-compliance/compliance (accessed 2/4/16).

The DOS Directorate of Defense Trade Controls offers guidance on an export compliance program for munitions items at the following URL (click on Compliance Program Guidelines): http://pmddtc.state.gov/compliance (accessed 2/4/16).

The key elements of a DOC ECMP or a DOS Export Compliance Program as applied to DOE contractor activity can be summarized as follows:

2.11.1 Management Commitment and Policy. The first steps in setting up an EMCP are to establish written export compliance standards for the organization, commit resources for the export compliance program and designate senior officials to manage the program. This results in an Export Policy Statement from company management issued to all company organizations and employees. The statement will clearly state that the company and its employees will comply with all U.S. Government laws and regulations and that every employee will be aware of and understand any export control requirements related to his or her work. This policy statement identifies the export control organization and contacts for additional information and support. It also identifies the potential risks to the individual and the business entity of incurring violations.

2.11.2 Registration. Exports that fall under the DOS require the exporter to register prior to submitting temporary, deemed, other exports and/or re-exports. This registration process generally includes organization officers asserting commitments to comply with the law and regulation which includes having an EMCP in place.

2.11.3 Risk Assessment of the Export Program. DOE Laboratories have a variety of mission objectives from National Nuclear Security Administration (NNSA) defense and nonproliferation initiatives to the Office of Science (fundamental and applied research) to Office of Nuclear Energy (nuclear research) which support sensitive and non-sensitive programs/projects of varying degrees. The greater the level of sensitivity the greater the level of scrutiny is required during review and authorization (graded approach).

A second factor is the number of foreign persons that are visitors, assignees, and employees at DOE facilities. A greater number of foreign persons on-site will mean a greater opportunity for an unintended transfer (deemed export) to occur. Another factor is the citizenship of the foreign person. If they are from a country of proliferation concern and/or work for a sensitive foreign facility, a greater level of scrutiny is required during review and authorization (graded approach).

A third factor is the number of foreign or international agreements each DOE Laboratory has in place. The number of these agreements has increased and this increase is expected to continue into the future. Therefore, a greater level of scrutiny of exports, re-exports, and deemed exports is required (graded approach).

DOE Laboratories have different missions. Therefore the workflow through-put will be very different from lab to lab. Additionally the organizational structure for handling export control activities can vary as well. Some organizations use different organizations to oversee classified work, tangible exports, technology exports, property management, and imports.

Examples of inflows include, among others, DOE Work Authorizations/Programs/ Projects, SPPs, CRADAs, contracts, international agreements, memoranda of understanding (MOU)/memoranda of agreement (MOA), non-disclosure agreements, purchase orders, foreign visits and assignments. An analysis of these flows through the work flow process will help

identify the nexus (interaction) between the work and foreign employees/consultants who might be involved in export-controlled work (deemed export).

Example of outflows include, among others, procurement, foreign travel, shipping, and electronic transfers, which provide opportunities for export-controlled activities (exports, re-exports, and deemed exports). Analysis of the points of release will identify areas where an export-control process is needed to address the release requirements for controlled items and technology.

2.11.4 Export Compliance Staffing and Training. Once the inflows and outflows are identified, the process of risk analysis determination leads to the process of risk mitigation by providing SMEs (staffing) to manage export compliance for the transfer of items and technology. The amount of coverage depends on many factors from Laboratory mission (types and amount of sensitive work) to the amount of interaction with foreign persons and facilities. To cover all these transactions, laboratories should have a multi-level training program. Examples include training of hosts for foreign national visitors, awareness training for technical staff, program/project specific training, licensing training for deemed exports and technical assistance agreements, which tend to be more complicated with provisos and conditions. This process will provide the range of resources necessary for meeting export-control requirements. As export-control laws and regulations change and/or the configuration of the programs and project change in sensitivity, the appropriated resource level must be modified to reflect these conditions.

2.11.5 Recordkeeping Regulatory Requirements. Most U.S. export control authorities require a minimum of records retention for a period of five years after the completion of the work. Depending on the license provisos and conditions, the retention time may be longer.

2.11.6 Internal and External Compliance Monitoring and Periodic Audits. Any EMCP should include an organizational review of the legal entity itself and an export control self-assessment to assure an effective compliance program. On a periodic basis, review of the functional and program areas is important to assure compliance validation and identify areas requiring improvement.

An internal review on a regular basis is highly recommended to assure that new requirements are implemented, quality is being maintained, and the organizational focus properly reflects changing internal and external conditions.

2.11.7 Export Violations. Finally, an EMCP must address reporting and documentation procedures for handling compliance problems. These include procedures for 1) investigating potential errors, failures or export violations, 2) reporting violations through internal management and to external authorities, if required, and 3) taking corrective actions to quickly identify failures or weaknesses in the program, to take short-term and long-term actions to prevent further problems, to modify procedures to prevent future problems, and to mitigate the consequences of past failures.

2.11.8 Conclusion on EMCP. The export-control compliance business requires broad knowledge in program/project management, technical aspects of the work/product, multi-agency laws and regulations, and foreign policy considerations in a constantly changing environment. Technology is a critical part of the DOE Laboratory mission and requires special consideration in identifying and protecting sensitive technologies including intellectual property and pending patents. The implementation of an EMCP requires a corporate policy, external and internal business analysis, established procedures and training. The EMCP helps protect sensitive technologies and minimizes the risk of compromising U.S. national security and compliance obligations with multilateral export control regime partners and United Nations resolutions. In addition, an effective EMCP minimizes the risk of negative publicity to DOE and its contractors that would come from the exposure of export violations, as well as the risk of potential fines and penalties for DOE contractors.

## 2.12 **Export Control Review Process**

2.12.1 Identification of Technology (Controlled)/Items/Materials Process. The initial step in the identification of technology, items or materials process is to properly classify the technology, item or materials in the context of its intended purpose under the appropriate jurisdiction (discussed in the next bullet).

In order to support this identification process working with external suppliers, vendors, and sponsors, and internally with technical and/or program staff members, can be very helpful. If these resources do not provide a reliable classification, an advisory opinion or commodity classification request to the U.S. Government agency having export control jurisdiction is needed. This will protect the exporter in a compliance review.

2.12.2 Identification of Jurisdictional Authority. In conjunction with identifying the technology, items and/or materials, determining which U.S. Government agency has jurisdictional authority is critical for proper export control compliance. Points of jurisdictional authority can intersect between the DOS, DOC, DOE, USTD, and the NRC. When the appropriate jurisdiction is **not clear**, submission of a Commodity Classification (CCATS) to the DOC or Commodity Jurisdiction (CJ) request to the DOS is required.

2.12.3 Specific Classification of Technology/Item/Materials. Within the regulation for each of the U.S. export control jurisdictions (DOS/ DOC/NRC/ DOE/USTD) is a list of definitions and categories. Within these definitions and categories are specific export requirements. Additionally, under certain jurisdictions, a graded approach is utilized to determine whether a license or exemption/exception can be employed for a specific export transaction.

2.12.4 Screening of Foreign Individuals/Facilities. Once the technology, item and/or materials are defined and the appropriate jurisdiction is asserted, the next requirement is to “Screen” the foreign person or facility. The U.S. Government in cooperation with foreign governments has developed lists of persons, facilities and countries that will either be denied an export or require an export license with provisos and conditions. Each U.S. Government agency

has lists that can be accessed on their web sites (http://export.gov/ecr/eg_main_023148.asp (accessed 2/4/16)), or a commercial service can be purchased to facilitate this review.

2.12.5 License/No License/Exemption/Exception. Once the above steps of the export control review process have been completed, as applicable, the next step is to determine if an export license, no export license, deemed export license, re-export license, an exemption or exception notification is required and to identify other reporting requirements. If an export, deemed export and/or re-export license is required, documentation (license application with attachments) must be submitted to the appropriate agency. The application package will include technology/item/materials description, classification/category number, description of involved parties, end user, end use, purpose, method of transfer, and other requirements based on the U.S. Government agency's regulatory requirements to. It should be noted that the timeframe for obtaining a license can take many months.

2.12.6 Exporting, Deemed Exporting and Re-exporting. Once the license has been received, depending on the complexity of the specific license situation (deemed export, technical assistance agreement) proper implementation is critical to maintaining compliance. This action is generally referred to as "License Administration." Prior to license implementation consideration of the following may be helpful to support the license administration.

- Have the involved parties been informed and trained (as appropriate)?
- If a tangible item is being shipped abroad, has the item classification been identified with other relevant information and been input into the Automated Export System (AES)?
- Has the Freight Forwarder been provided the appropriate information, e.g., license conditions?
- If a technology transfer, have the export parties entered into an agreement referencing the conditions of the license or other export requirements with partners, consignees, or others?
- Has required follow up documentation been provided to the appropriate U.S. Government agency?
- Has the technology, item, and/or material been marked (paperwork) with the appropriate end-use and/or end-user restrictions?

2.12.7 Documentation and Records Management. Documentation is required by all U.S. Government agencies in varying levels of detail and generally for a period of five years. Documentation may be needed to confirm the technology/item/materials definition, program/project definition, analysis of jurisdiction, classification, requirements/reasons for control or other. Additionally, documentation can be used in a database to serve as a historical reference for present and future export control transactions. Lastly documentation can support answering an inquiry relating to an enforcement action.

The storage, handling and disposal of contract files are governed by FAR 4.805 and DEAR Subpart 904.8. Generally, contracts and related records or documents exceeding the simplified acquisition threshold must be retained for 6 years and 3 months after final payment.

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# CHAPTER 30 - COST ACCOUNTING STANDARDS ADMINISTRATION


- 30.201 DOE’s Oversight of Certain Contractor Defined Benefit Pension Plans and Its Effect on Contracts, Cost Accounting Standards Compliance, and Audits - March 2022

# 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 andCAS 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: Cost Accounting Standards 412 and 413, Model H-clause om Employee Compensation: Pay and Benefits}*

## 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 non-M&O major site and facility management contracts (FMCs) where work had previously been performed under a DOE M&O contract. For purposes of this Chapter an 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 FMC contractors for pension costs based on amounts actually contributed to the pension fund trust for the fiscal year in which they are made, with a floor of the amount that meets the minimum required contributions under the Employee Retirement Income Security Act (ERISA) as amended.

To implement this policy, DOE includes language related to reimbursing contractors for pension contributions in section H of the contract.

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 related pension contractual requirements in Section H of their contracts. 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 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 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 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.

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## CHAPTER 31 - CONTRACT COST PRINCIPLES AND PROCEDURES


- 31.201-2 Allowability of Incurred Costs - April 2018
- 31.205-13 Allowable Food and Beverage Costs at DOE and Contractor Sponsored Conferences - August 2017
- 31.205-1 Contracting with Public Relations Firms - September 2016
- 31.205.33 Contractor Legal Management Requirements, Approving Settlements, and Determining the Allowability of Settlement Costs - September 2016
- 31.5 - Contractor Intergovernmental Personnel Act (IPA) Assignments: Allowability of Costs - September 2018

# Allowability of Incurred Costs

Guiding Principle

- Determining the allowability of incurred costs requires understanding the five FAR requirements. Misunderstandings can be minimized by early communications, which may include advance agreements.

*References: [FAR 31]*

## 1.0 Summary of Latest Changes

This update: (1) revises the chapter number from 31.4 to 31.201-2 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. This chapter does not cover efforts and projects performed for DOE by other Federal agencies.

### 2.1 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.

2.1.1 Cost Principles Applicable. 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.

2.1.2 Determining Costs Are Allowable. 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).

2.1.3 The Five Requirements of Allowability. 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.)

2.1.4 When a Cost Is Reasonable. 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.

2.1.5 When a Cost Is Allocable. 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.

2.1.6 Cost Accounting Standards. 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.

2.1.7 Contract Terms. 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.

2.1.8 Limitations in FAR. 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.

2.1.9 Meeting All Five Requirements. 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, the Government will not reimburse them.

**2.2 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. FAR also cautions Contracting Officers that they are not authorized to agree to a treatment of costs inconsistent with FAR Part 31 or 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, …."

**2.3 <u>Cost Reasonableness: Actions Before Costs Are Incurred</u>**. 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. Moreover, 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.

**2.4 <u>Best Practices</u>.**

2.4.1 Establish Advance Agreements When Appropriate**.** 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, …."

2.4.2 Address Reasonableness When Appropriate. 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.

## 2.5 Examples.

2.5.1 Advance Agreement Regarding Meals. 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.

2.5.2 Advance Agreement Regarding Travel. 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.

# 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.

# Contractor Intergovernmental Personnel Act (IPA) Assignments: Allowability of Costs

Guiding Principles

- IPA assignments are useful instruments, allowing for the interchange of employees between Federal agencies and eligible non-Federal organizations.
- IPA assignments of non-Federal employees have some constraints, and must be managed astutely.

*[References:* 5 U.S.C. §3372, *5 C.F.R. § 334.104*, *48 C.F.R. part 31*, *DOE Manual 321-1.1*]

## 1.0 Summary of Latest Changes

This is a new Acquisition Guide chapter.

## 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.** The Intergovernmental Personnel Act (IPA) of 1970, as amended (5 U.S.C. 3371-3376) provides for the interchange of employees between Federal agencies and eligible non-Federal organizations. Pursuant to this statute, eligible non-Federal organizations include Federally Funded Research and Development Centers (FFRDCs) and nonprofit organizations whose principal function is to offer professional advisory, research, educational, or development services, or related services. DOE Manual 321.1-1, Intergovernmental Personnel Act Assignments, which implements provisions of the IPA within DOE, contains a certification process for determining eligibility of non-Federal organizations. Chapter 3 of DOE M 321.1-1 provides detailed requirements of non-Federal employee assignments to DOE; however, it does not address non-Federal employee assignments to non-DOE Federal organizations. To provide additional coverage, this guide chapter clarifies some aspects of non-Federal employee IPA assignments to both DOE and non-DOE Federal organizations.

**2.2 Limitations on Single IPA Assignments of Non-Federal government employees.** Statutory limitations on State or local government employees to Federal agencies are

found at 5 U.S.C. §3372(a), which states that such IPAs are not to exceed (NTE) two years, but may be extended for another period NTE two years. IPAs for Indian tribe employees to Federal agencies, however, may be extended as long as the assignment is beneficial to both parties. Employees of other eligible organizations (such as institutions of higher education or FFRDCs) are treated the same as State or local government employees [5 U.S.C. §3372(e)(1) and (e)(2)]; accordingly, the two-year duration limit (with potential extension for an additional two years) at 5 U.S.C. 3372(a) applies. Regulatory limitations on the duration of IPA assignments are found at 5 C.F.R. § 334.104(a), which states that the two-year limit, with a potential extension of two more years, pertains to all employees on IPAs. "Employee," defined at 5 C.F.R. § 334.102 for purposes of IPAs, includes an individual employed for at least 90 days in a career position with a State, local, or Indian tribal government, an institution of higher education, or another eligible organization.

**2.3 Limitations on Collective IPA Assignments of Non-Federal employees.** The collective length of all IPA assignments is addressed at 5 C.F.R. § 334.104(b). For Federal employees, the duration cannot exceed six years[1]. However, as articulated in chapter 1 of DOE M 321.1-1, this pertains only to Federal employees on IPAs, not to DOE contractor employees. The limitation at 5 C.F.R. § 334.104(c), however, which bars Federal agencies from sending or receiving employees on IPAs if the employee has participated for four continuous years without at least a 12-month return to duty with his or her employing organization. This pertains to all employees, both Federal and non-Federal, on IPAs (see chapter 1 of DOE M 321.1-1).

**2.4 Costs of IPA Assignments.** When it is determined that a non-Federal employee is eligible to serve on an IPA assignment with either DOE or non-DOE Federal organizations, the assignee remains a permanent employee of his or her non-Federal entity. As such, that entity compensates and provides benefits to the employee. Similarly, the employee remains subject to the entity's personnel policies while on IPA assignment. The entity may be reimbursed for part or all of the employee's salary and benefits, in accordance with any cost-sharing agreements (see paragraph 2.4.3).

2.4.1 Policy on Reimbursement of Costs. Consistent with 5 U.S.C. §3375, travel costs may be reimbursed if the employee agrees to complete the entire IPA assignment or at least one year, whichever is less[2]. Full details on types of costs and requirements for allowability appear at 5 U.S.C. chapter 57. DOE policies on reimbursement of IPA travel costs are provided in DOE M 321.1-1, chapters I and III. Also governing allowability are FAR 31.201-2 and applicable DOE cost principles. Importantly, in accordance with DOE M 321.1-1 (chapter III, paragraph 5), special documentation is required if the assignee's salary is equal to or above the Executive Level I rate of pay.

[1] OPM may waive this restriction upon the written request of the agency head, or his or her designee.
[2] The agency head may waive cost-recovery rights, if desired.

2.4.2 Process for Reimbursement of Costs. In order for non-Federal entities to obtain reimbursement for IPA costs, the process set forth in DOE M 321.1-1 must be followed. This process is summarized as follows: The IPA assignment must be initiated via a written Assignment Agreement (Optional Form 69), which shall be signed by the designated DOE approving official (head of the DOE element or the Executive Resources Board Chair, as applicable), the appropriate official of the other participating organization, and the employee. To complement the Assignment Agreement, the contractor must certify the benefits and employment status of the employee, as well as the organization's eligibility. The employee must provide a conflict-of-interest certification, as well as an acceptable cost analysis that compares per diem and relocation expenses. When fulfilling an IPA assignment at a location at least 50 miles distant from the employee's former duty station, the assignee may be paid either a reduced per diem allowance or relocation expenses, whichever option is the lesser amount. In addition, the contracting officer should negotiate an advance agreement, as described in guide chapter 31.4.

2.4.3 Cost Sharing. In accordance with DOE M 321.1-1 (chapter I, paragraph 12.b), participating organizations may establish an assignment on a wholly reimbursable, a partially reimbursable, or a non-reimbursable basis. Usually, because the work to be performed is of mutual benefit to both organizations, the organizations should share the cost of the assignment. For the cost to be fully borne by just one organization, justification must be provided with the Assignment Agreement.

## 2.5 Oversight Requirements.

2.5.1 Proposed Assignments. As conveyed in Chapter 1 of DOE M 321.1-1, IPAs must only be proposed for sound public purposes that further the goals and objectives of the participating organizations. Assignments should not be requested primarily to meet the personal interests of employees, to circumvent personnel ceilings and contractor support limitations, or to avoid unpleasant personnel decisions. There are multiple parties involved in eligibility determination and approval (e.g., General Counsel, Office of Chief Financial Officer, and Executive Resources Board Chair), as reflected in DOE M 321.1-1.

2.5.2 Execution of Assignments must be through written Assignment Agreements, as contained in DOE M 321.1-1.

2.5.3 Amendments and Extensions. The Assignment Agreement is also used to amend or extend an assignment. In accordance with DOE M 321.1-1, concurrences of all parties to the original agreement (see paragraph 2.5.1) is required.

2.5.4 Terminations. When terminations are necessary, participating organizations should be notified in accordance with DOE M 321.1-1. Again, concurrence of all parties to the initial assignment (see paragraph 2.5.1) is required.

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# 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.

# Time-Limited Funding on Contract Planning, Award, and Administration

Guiding Principle

- Contracting Officers should consider the implications of receiving time-limited funding for contract planning, award, and administration.

*References: [31 U.S.C. 1502(a), 41 U.S.C. 3902, FAR 32.703-3 ]*

## 1.0 Summary of New Chapter

This guide chapter provides guidance to Contracting Officers on the implications of time-limited funding for contract planning, award, and administration. The guidance is not new; it was formerly in Acquisition Letter Number 2012-06, which is being placed in Archive status. It applies to contracts funded in whole or part with time-limited funds. (The chapter uses "two-year" money and "one- year" money in its examples, but there are other types of time-limited funds.)

## 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.

**2.1 No Time Limit on the Use of "No-Year" Money**. In contrast to most federal agencies, the Department's appropriations have historically provided most of its funding in the form of "no-year" money, which may be obligated until expended. There is no time limit on the use of "no-year" money.

**2.2 Time-Limited Funds.** The Department's appropriations have occasionally provided funding in the form of time-limited funds, typically referred to as "one-year," "two-year," or "multiple year" money. This type of funding is not available for obligation until expended, but is instead available for obligation only for a definite period as expressed in the funding's appropriations statute. An example would be a Department's appropriation including "two-year" money, meaning that the money would be available for obligation for two years (e.g., from 10/1/2020 until 9/30/2022). Another example would be a Department's appropriation including "one-year" money, meaning that the money would be available for obligation for one year (e.g., from 10/1/2020 until 9/30/2021).

When the Department receives time-limited funds, requirements officials and Contracting Officers must, among other things, assess how the *bona fide* needs rule applies.

2.2.1 *Bona Fide* Needs Rule. The *bona fide* needs rule applies to acquiring goods and services using time-limited funds. The rule is derived from the so-called time statute, 31 U.S.C. § 1502(a), which provides, in part, that a fund limited for obligation to a definite period is available only for payment of expenses properly incurred in that period or to complete contracts properly made within that period. The rule limits the use of appropriated, time-limited funds to meet a legitimate need arising during the availability of the particular appropriation or paying for items obtained under contracts awarded per the requirements of 31 U.S.C. § 1502(a). The *bona fide* needs rule does not apply to no-year funds.

2.2.2 Severability. The Government Accountability Office (GAO) has developed a concept called severability to help determine whether a requirement is a *bona fide* need. Briefly, a requirement is severable if it can be separated into components that independently provide value to the agency.

Severable services tend to be continuing and recurring in nature. The key to determining if a requirement is severable is deciding if the agency realizes a benefit at the time each component of the requirement is provided—it is not relevant whether the contract has or has not been performed to completion. The classic example of a severable requirement is window-washing. Even if only half of the windows are washed, the agency has realized a benefit—it has half of its windows cleaned. When a requirement is severable, each of its separate components must be funded only with the time-limited funds applicable to the period in which the need for the component arises.

2.2.3 Non-Severability. Non-severable requirements, on the other hand, involve work that cannot be separated into components for which the agency realizes a benefit at the time each component is provided. Non-severable requirements must be performed as a single effort to meet a single requirement. An example would be a study that must culminate in a final report for the agency to realize a benefit.

2.2.4 Time-Limited Funds Rules.

If using time-limited funds, the basic rules are:

2.2.4.1 Non-Severable. For non-severable requirements, agencies may obligate time-limited funds to cover all requirements (such as non-severable services) that will be performed under the entire contract, including the portion of the requirements that will be performed subsequent to the period during which the time-limited funds may be obligated. The

entire non-severable requirement (with all of its separate components) is considered a *bona fide* need of the time period that the agency entered into the contract.

2.2.4.2 Severable. For severable requirements, agencies may obligate time-limited funds only to cover the requirements (such as severable services) that will be performed in the period during which the time-limited funds may be obligated. Each of the separate components of the severable requirements must be funded only with the time-limited funds applicable to the period in which the need for the component arises.

There is one partial exception to this basic rule for the funding of severable requirements. The Federal Acquisition Streamlining Act (41 U.S.C. § 3902) provides that an agency may enter into a contract, option, or order for severable services that crosses fiscal years and fund it (with all of its components) with funds of the current fiscal year, provided that the period of performance of the contract, option, or order does not exceed one year. The partial exception applies to: one-year funds; and multiple year funds *in the last year of their availability for obligation* (prior to the last year there is no need for an exception to obligate funds across fiscal years during the normal period of availability).

## 2.3 Best Practices.

2.3.1 Contracting Officers must understand the proper use of time-limited funding on contract planning, award, and administration.

2.3.2 Contracting Officers must understand the bona fide needs rule as it applies to time-limited funding on contract planning, award, and administration.

2.3.3 Contracting Officers must understand the basic rules for use of time-limited funds as they apply to contract planning, award, and administration.

# 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

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## CHAPTER 33 - PROTESTS, DISPUTES AND APPEALS


- 33.102 Protests - September 2018
- 33.214 Alternative Dispute Resolution - November 2016

# 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.

*References: [FAR 33.1, DEAR 933.1, GAO Regulations at 4 CFR 21]*

## 1.0 Summary of Latest Changes

This update includes administrative changes such as updating references and outdated language (formerly 33.1).

## 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.

**2.1 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.

**2.2 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 also provide the Department with an opportunity to remedy significant errors in a procurement identified in the protest or during the Department's review.

**2.3 Forums for Protest.** Currently, protests can be filed in three different fora: (1) 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 933.103); (2) the GAO; and (3) 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, if appropriate, providing additional information addressing the offeror's concerns may prevent the filing of a protest, or may encourage the potential protester to pursue any protest within the agency before filing a protest with GAO or a suit in court. For example, a contractor may be educated as to the propriety of the agency's process or the CO may determine, with the advice of counsel, that corrective action should be taken before a protest is filed.

**2.4 Processing Protests.** Upon receiving notice of a protest, the CO must withhold award or suspend contract performance, unless and until the HCA, in accordance with the provisions at FAR 33.103(f), 33.104(b), (c), and (d), and DEAR 933.104(b) and (c), decides otherwise. For purposes of DEAR 933.104, concurrence from the "DOE counsel handling the protest" is the local counsel for the procurement. The local counsel for procurements under the authority of Headquarters Procurement Operations is the Assistant General Counsel for Procurement and Financial Assistance (GC-61). The CO should provide a copy of the protest (including any attachments or exhibits) to field counsel and/or GC-61 as soon as practical after receipt of the protest.

**2.5 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), (2), or (3) 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 individual circumstances require a longer period of time. Within five calendar days of receipt of the protest, DOE shall send a letter to the protester acknowledging receipt of the protest and indicating the projected decision date. 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 will not 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.

**2.6 Protests to Be Resolved by the Contracting Activity's HCA.** The CO should prepare a report similar to that discussed in FAR 33.104(a)(3)(iv)(B). The report should include both a statement of relevant facts and a legal analysis, and other information 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.

**2.7 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)(B). 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 milestone schedule must be met 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 shall prepare a draft protest decision memo, coordinate the draft protest decision memo with GC-61 and provide to the Director, OCM within 24 calendar days after receipt of protest.

3. OCM shall brief the Senior Procurement Executive on the status of the protest within 28 calendar days after receipt of protest.

4. The protest decision memo shall be provided to the Senior Procurement Executive within 33 calendar days after receipt of protest.

**2.8 Protests to the GAO**. Not later than one 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 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

[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.

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 that appears to contain nonpublic information, should 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, or GC-61 will negotiate a redacted version with the protester's counsel. The CO works with 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.

**2.9 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) revises paragraph 2.4 regarding clause DOE-H-2033 Alternative Dispute Resolution and (2) changes Energy Board of Contract Appeals (EBCA) to Civilian Board of Contract Appeals (CBCA).

## 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 Civilian Board of Contract Appeals (CBCA) and disputed claims before they have been appealed to either the CBCA 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, or something similar, may be inserted in solicitations and contracts which contain the clause at FAR 52.233-1, Disputes.

## 3.0 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 Civilian 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, CBCA 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 CBCA should be consulted by the contracting officer and/or the contractor in the earliest stages of ADR planning whenever the CBCA 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 try to 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 CBCA, 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 CBCA or to the United States Court of Federal Claims. CBCA 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 CBCA, 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 CBCA hearing officer) who is appointed by the Chair of the CBCA 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 CBCA is not resolved through use

of the settlement judge, it will be restored to the CBCA docket. This process is also available at General Services Board of Contract Appeals (GSBCA) and many other tribunals, including the Federal Claims Court.

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# CHAPTER 35 - RESEARCH AND DEVELOPMENT CONTRACTING


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# 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 wh**ich 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.

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# CHAPTER 37 - SERVICE CONTRACTING


- 37.1 Support Service Contracting - May 2017
- 37.601 Performance Based Services Acquisition - August 2016

# 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:

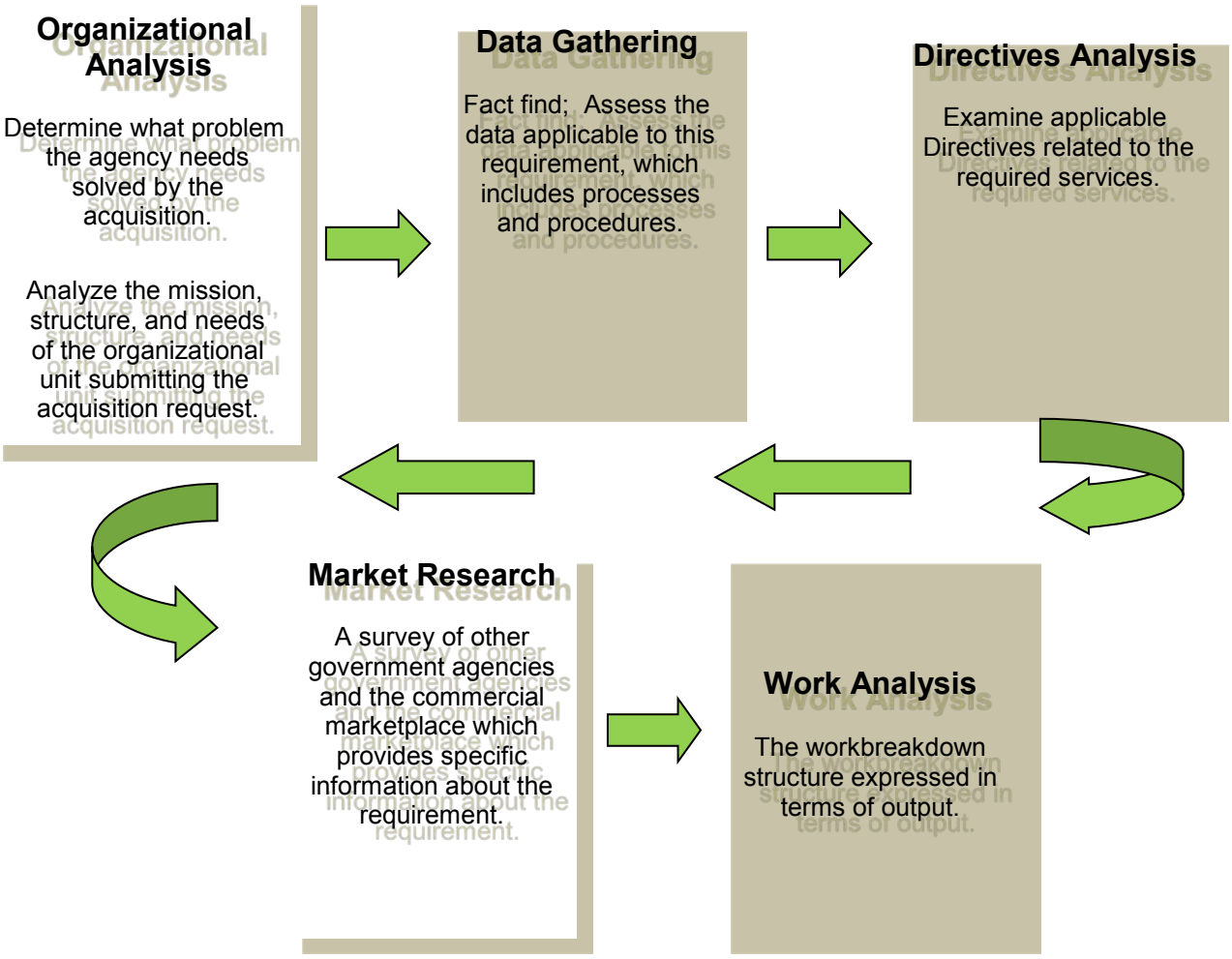
- Organizational Analysis (data may overlap with needs assessment);
- Data Gathering;
- Directives Analysis;
- Market Research; and
- Work Analysis.

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.

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# CHAPTER 39 - ACQUISITION OF INFORMATION TECHNOLOGY


- 39.3 Acquisition of Information Technology and the Federal Information Technology Acquisition Reform Act (FITARA) - May 2023
- 39.203 Section 508 Accessibility Program - September 2017

# Acquisition of Information Technology and the Federal Information Technology Acquisition Reform Act (FITARA)

Guiding Principle

FITARA requires that the Department of Energy (DOE) Chief Information Officer (CIO) be significantly involved in Information Technology (IT) procurement decision making, and that DOE may not enter into a contract or other agreement that includes IT or IT services unless the action has been reviewed and approved by the CIO.

**Any award that is not compliant with FITARA or this guidance may be considered an unauthorized commitment**.

*[References: Public Law 113–291 (FITARA); OMB Memorandum M-15-14; OMB Circular A-130; DOE Memorandum on Information Technology Management Reforms dated October 21, 2016; DOE Order 200.1A Chg 1 (MinChg), DOE Order 415.1 Chg 2 (MinChg),*

*Department of Energy FITARA Implementation Plan and Self-Assessment, DOE/NNSA Senior Procurement Executives Memorandum - Requirements to Use Existing Strategic Sourcing Agreements dated March 25,2016, and OCIO IT Acquisitions webpage.]*

## 1.0 Summary of Latest Changes

This update: (1) changes the DOE CIO IT Acquisition Approval Process instruction website link in section 4.5.6.

## 2.0 Overview

**2.1** FITARA was enacted on December 19, 2014. FITARA outlines specific requirements related to:

- Agency Chief Information Officer (CIO) Authority Enhancements
- Enhanced Transparency and Improved Risk Management in IT Investments
- Portfolio Review
- Federal Data Center Consolidation Initiative
- Expansion of Training and Use of IT Cadres
- Maximizing the Benefit of the Federal Strategic Sourcing Initiative

- Government-wide Software Purchasing Program

To implement the requirements of FITARA the Office of Management and Budget (OMB) published guidance in OMB Memorandum M-15-14 (M-15-14) reflecting input from a diverse group of stakeholders, including representatives from the Chief Financial Officer (CFO), Chief Human Capital Officer (CHCO), Chief Acquisition Officer (CAO), Assistant Secretary for Management (ASAM), Chief Operating Officer (COO), and CIO communities.

CFO Act agencies and their divisions and offices are subject to the requirements outlined in FITARA and the OMB Memorandum, except where otherwise noted.

**2.2** FITARA prescribes that DOE may not enter into a contract or other agreement for information technology (IT) or IT services unless the contract or other agreement has been reviewed and approved by the DOE CIO. Further, agencies may use the governance processes of the agency to approve such a contract or other agreement if the CIO of the agency is included as a full participant in the governance processes.

**2.3** OMB further states in M-15-14 that the CIO will share acquisition and procurement responsibilities with the CAO regarding requirements for IT, IT services or contain IT or IT services.

**2.3.1** Specifically, the DOE CIO is responsible for the review and approval of acquisition strategies and acquisition plans that contain IT requirements. Therefore, DOE shall not approve an acquisition strategy or acquisition plan (as described in FAR Part 7) or interagency agreement (such as those used to support purchases through another agency) that includes IT without review and approval by the DOE CIO. For contract actions, including purchase card actions, which contain IT without an approved acquisition strategy or acquisition plan, the DOE CIO shall review and approve the action itself.

**2.3.2** The CAO is responsible for ensuring contract actions that contain IT, or modifications of those contract actions, are consistent with DOE CIO-approved acquisition strategies and plans. The CAO shall indicate to the DOE CIO when planned acquisition strategies and acquisition plans include IT and ensure they are reviewed and approved by the DOE CIO.

**2.4** DOE Orders 200.1 and 415.1 were changed to add FITARA as a statutory and regulatory requirement, and to incorporate changes to DOE IT Management guidance as appropriate, including budget and acquisition reviews and approvals.

## 3.0 Terminology

**3.1** *CAO* is the Chief Acquisition Officer which, for purposes of this chapter, is defined as the Senior Procurement Executive at DOE.

**3.2** *Contracting Activity* is the supporting DOE procurement office.

**3.3** *Information Technology (IT),* pursuant to M-15-14, is defined as:

**A.** Any services or equipment, or interconnected system(s) or subsystem(s) of equipment, that are used in the automatic acquisition, storage, analysis, evaluation, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information by the agency;

**B.** where such services or equipment are "used by an agency" if used by the agency directly or if used by a contractor under a contract with the agency that requires either use of the services or equipment or requires use of the services or equipment to a significant extent in the performance of a service or the furnishing of a product.

**C.** The term "information technology" includes computers, ancillary equipment (including imaging peripherals, input, output, and storage devices necessary for security and surveillance), peripheral equipment designed to be controlled by the central processing unit of a computer, software, firmware and similar procedures, services (including provisioned services such as cloud computing and support services that support any point of the lifecycle of the equipment or service), and related resources.

**D.** The term "information technology" does not include any equipment that is acquired by a contractor incidental to a contract that does not require use of the equipment.

## 4.0 DOE IT Acquisition Policy

**4.1 Purpose.** To provide DOE elements with FITARA implementation guidance as it relates to DOE's Federal Contracting Activities.

**4.2 Applicability.** FITARA policies and guidance apply to all DOE elements. However, NNSA elements should follow guidance and procedures established by their Office of the Chief Information Officer (OCIO) and Office of Acquisitions and Project Management.

**4.3 Policy regarding DOE Contractors.** Heads of Contracting Activities (HCAs) and Procurement Directors (PDs) will ensure that the applicable Contract Requirement Document (CRD) from DOE Orders 200.1 and 415.1 are included in the appropriate contracts and the contractors are complying with the CRDs.

## 4.4 CAO IT Acquisition Policy

HCAs and PDs must ensure that they follow and support the DOE CIO's procedures for the review and approval of acquisition strategies, acquisition plans, contract and interagency awards, and contract and interagency award modifications that contain any IT supplies or services requirements. Federal Contracting Activities should update local review and approval procedures as necessary to implement and sustain this guidance. HCAs and PDs are encouraged to leverage existing procurement processes to optimize time and avoid the creation of new processes.

The following paragraphs provide guidance for stages of the procurement process as applicable.

**4.4.1** When defining requirements departmental elements shall follow their existing policies and processes. Early inclusion of/collaboration with the OCIO will bring more expertise to bear and allow DOE CIO to suggest existing resources that may fulfill the requirement(s) as applicable. Departmental elements must review acquisitions for and use opportunities to leverage acquisition initiatives such as shared services, strategic sourcing, and incremental development or modular contracting. Each acquisition must be supported by cost estimates that have been reviewed by the DOE CIO, for IT-related costs.

**4.4.2** When conducting market research departmental elements shall follow their existing policies and processes. When considering sources review FAR part 8– Required Sources of Supplies and Services, check the OAM Category Management page in Acquisition Answers for existing acquisition strategies or plans, and check the Acquisition Gateway.

**4.4.3** Requiring activities shall follow existing policies and procedures for Acquisition Planning. When Integrated Project Teams (IPTs) are formed for IT requirements and requirements that include IT, the requiring activity and Contracting Activity shall include the DOE CIO (or DOE CIO designee) as a member of the IPT and any resulting Acquisition Plan (or strategy) must receive DOE CIO (or DOE CIO designee) approval. The approved Acquisition Plan (or strategy) must, at a minimum, be referenced in any resulting requirements package(s). If an Acquisition Plan (or strategy) is not required but IT is included in the procurement, the final requirements package must receive DOE CIO (or DOE CIO designee) approval prior to submission to the Contracting Activity and release of a solicitation.

**4.4.4** During the solicitation stage, should the requirement or acquisition plan change in a manner that changes the quantity or quality of the IT, the requirements package, including the changes, must again be reviewed and approved by the DOE CIO (or DOE CIO designee).

**4.4.5** Non-administrative modifications to contract actions that include IT but do not support an approved acquisition strategy or plan require DOE CIO (or DOE CIO designee) review and approval.

**4.4.6** Outgoing IAAs and non-administrative amendments to existing IAAs, which include IT requirements, are subject to the review and approval processes in section 4.3 above. Incoming IAAs that require DOE to acquire IT for the requesting agency, including any non-administrative amendments, must demonstrate written approval from the requesting agency's CIO (or CIO designee) and the DOE CIO (or DOE CIO designee) prior to any solicitation.

## 4.5 CIO IT Acquisition Policy

The DOE CIO review and approval process applies to any IT contract action, whether the principal purpose of the contract action is for the acquisition of IT or for some other stated purpose, but that purpose requires acquisition of IT. This process applies regardless of dollar value where the IT asset or service is to be:

- Acquired by new contract or new agreement;
- Acquired via modification to an existing contract or existing agreement, when such IT has not already been previously agreed to and negotiated between the parties; and
- Purchased on a purchase card that cannot be acquired through an established Program/Site/Office process.

**4.5.1** Exemptions. In accordance with M-15-14, for purposes of operations security, the DOE CIO will exempt the Technology Crime Section, Office of Investigation, Office of Inspector General (OIG) from its review of IT acquisitions. Technology Crime Section IT acquisitions under this exemption shall not exceed $150k per IT acquisition.

**4.5.2** DOE CIO-approved Acquisition Strategies and Plans. Procurement Requests for IT commodities do not need DOE CIO approval if they are consistent with, and in direct support of, a DOE CIO-approved Acquisition Strategy or Acquisition Plan. The Procurement Request must identify the Acquisition Strategy or Acquisition Plan. Failure to provide the necessary documentation will result in the Procurement Request being routed to the DOE CIO for normal FITARA review. A list of DOE CIO-approved Acquisition Strategies and Plans will be posted here: https://www.energy.gov/cio/guidance/it-acquisition .

**4.5.3** Individual DOE CIO Reviews. The DOE CIO reserves the right to conduct individual FITARA reviews. Individual reviews or modifications to Acquisitions

Strategies or Acquisition Plans may be indicated, for example, where risk factors have changed since the DOE CIO approved the initial Acquisition Strategy or Plan.

**4.5.4** Transition to Cloud and Data Center Shared Services. The DOE CIO will not approve, nor shall the DOE Contracting Officer (CO) process, an IT acquisition(s) initiating a new data center or significantly expanding an existing data center unless approved by the OMB CIO. To request such approval, Program Offices must submit a written justification in accordance with the OCIO instructions that includes an analysis of alternatives (including opportunities for cloud services, inter-agency shared services, and third party co-location) and an explanation of the net reduction in the agency's data center inventory that will be facilitated by the new or expanded data center (such as through consolidation of multiple existing data centers into a single new data center).

**4.5.5** Cloud Services. Cloud environments are scalable and allow agencies to provision resources as required, on demand. DOE COs shall ensure Acquisition Plans are consistent with the DOE CIO's policy that requires that the Program Offices consider use of cloud infrastructure wherever possible when planning new mission or support applications or consolidating existing applications. Program Offices should take into consideration cost, security requirements, and application needs when evaluating cloud environments. As required by FITARA, Program Offices utilizing cloud services shall do so in a manner that is consistent with requirements of the Federal Risk and Authorization Management Program (FedRAMP) and National Institute of Standards and Technology (NIST) guidance.

**4.5.6** Specific DOE CIO IT Acquisition Approval Process instructions can be found at: https://powerpedia.energy.gov/wiki/IT_Acquisition .

## 4.6 Emergency/Disruptive Circumstances

In order to sustain performance of DOE essential functions and supporting activities before, during, or after an emergency, incident, or circumstances that disrupt normal operations, DOE elements should refer to Continuity of Operations (COOP) Implementation Plans and/or other such established plans for guidance. For the management of all IT requirements when normal operations are disrupted (or reasonably anticipated to be disrupted), DOE elements and Federal Contracting Activities should follow established emergency procurement procedures. When IT acquisition strategies and plans, as discussed in paragraph 4.5.2 above, *do not* exist for the IT procured when normal operations are disrupted (or reasonably are anticipated to be disrupted) departmental elements shall request CIO approval as soon as possible—*which may, in fact, be post-acquisition*. Note: As dictated by the nature of the emergency, incident, or circumstances, Federal Contracting Offices are expected to exercise discretion in taking action to ensure continued performance of

DOE essential functions and supporting activities. Federal Contracting Offices will include the OCIO on the procurement distribution. Once received, the DOE CIO will adjudicate emergency procurements and follow up as appropriate—mindful of the need to maintain performance of DOE essential functions and supporting activities.

## 4.7 Interim Policies, Procedures, and Guidance

As policies, procedures, and guidance matures; changes to this chapter will be published via addendum to this chapter.

Some of these policies, procedures, and guidance may be interim guidance until permanent Acquisition Strategies are implemented. None of this guidance is intended to supersede the requirements in existing FITARA related Acquisition Strategies or any other guidance, procedures, policies, and/or directives as provided in cardholder training, Delegation of Authority, and/or any other document.

### Section 4.7 – Addendum 1

This addendum provides updated policies and procedures for the purchasing of IT regardless of dollar amount. These policies and procedures include both permanent Acquisition Strategies/Plans, and interim Acquisition Strategies/Plans in effect until permanent Acquisition Strategies are implemented. This guidance is not intended to supersede the requirements in existing FITARA related Acquisition Strategies or any other guidance, procedures, policies, and/or directives as provided in cardholder training, Delegation(s) of Authority, and/or any other document.

Program offices shall retain records of any IT purchases not submitted to the DOE CIO and produce them upon request. This guidance pertains only to review and approval by the DOE CIO. Program office-specific policies, including those that require approval from other information management oversight officials, remain in effect.

Acquisition Strategy for Procuring IT Using Purchase Card (interim)

DOE CIO review and approval is not required when using a purchase card for IT purchases. However, DOE CIO review and approval may be required if the IT purchase is addressed by an existing approved acquisition strategy (e.g. Laptops and Desktops plan). Review the existing acquisition strategies to determine if review and approval is required. The preferred vehicles for these purchases are Best-In-Class contracts or other managed procurement vehicles such as those found on the Acquisition Gateway and/or GSA Advantage.

Acquisition Strategy for Procuring Laptops and Desktops

DOE CIO review and approval is not required when the Requiring Activity (program office) anticipates using the following approved existing vehicles to procure laptops and desktops that meet the OMB approved configurations:

a. GSA IT Schedule 70
b. NASA SEWP
c. NITAAC CIO-CS
d. ARMY CHESS

Current approved existing vehicles and OMB approved configurations are found on the Acquisition Gateway here https://hallways.cap.gsa.gov/app/#/app-viewer/laptop-desktop-finder. DOE Contracting Officers are responsible for ensuring that approved existing vehicles and OMB approved configurations are actually procured. DOE CIO review and approval is required when the Requiring Activity anticipates not using one of the approved existing vehicles or OMB approved configurations. DOE Contracting Officers are responsible for ensuring that required review and approval is accomplished.

Acquisition Strategy for Using the Enterprise-Wide Agreements (EWAs) for IT Acquisitions

When the Requiring Activity anticipates using EWAs, DOE CIO review and approval is not required. DOE Contracting Officers are responsible for ensuring that the DOE EWA is actually used at award. DOE CIO review and approval is required when the Requiring Activity anticipates not using the DOE EWAs. DOE Contracting Officers are responsible for ensuring that required review and approval is accomplished.

# 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.

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# CHAPTER 41 - ACQUISITION OF UTILITY SERVICES


- 41.2 Utilities - June 2023
  - Signed Memo - CARBON POLLUTION - FREE ELECTRICITY PROCUREMENTS (June 2023)

# 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 provide concurrence on 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 436.1A, 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) revisions to incorporate the Memorandum for Heads of Contracting Activities, entitled Carbon Pollution-Free Electricity Procurements, issued in July 2022 and (2) 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. 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), 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 436.1A, *Departmental Sustainability,* page 15, under duties of Field Managers, paragraph 5). 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 **Carbon Pollution-Free Electricity (CFE) Procurements**. Carbon pollution-free electricity means electrical energy produced from resources that generate no carbon emissions, including marine energy, solar, wind, hydrokinetic (including tidal, wave, current, and thermal), geothermal, hydroelectric, nuclear, renewably sourced hydrogen, and electrical energy generation from fossil resources to the extent there is active capture and storage of carbon dioxide emissions that meets EPA requirements. Additionally, qualifying CFE generation comes from resources that meet the CFE criteria described in the implementing instructions for Executive Order (EO) 14057 "Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability," such as placed in service date and delivered to balancing area. DOE developed climate action plans designed to increase CFE in utility contracts. The plans will further the goals of EO 14057 and DOE's mandate to achieve 100 percent CFE on a net annual basis by fiscal year 2030, including 50 percent CFE 24/7 as defined in the EO.

2.4.1 Competitive or Retail Electric Choice Markets. In electricity procurements where competition is available, solicitations for electricity should describe the Department's requirement as 100 percent CFE, including 50 percent CFE 24/7 to the maximum extent practicable by fiscal year 2030, as defined by EO 14057. COs and program office representatives should work with FEMP to determine the availability and pricing of CFE in the regional market, and to the extent possible, establish a minimum percentage of CFE in the solicitation. Consideration should be given to including evaluation criteria that specify that all evaluation factors other than price (including CFE percentage), when combined, are more important than price. Furthermore, consideration should be given to including evaluation criteria that state that higher relative percentages of CFE, and other factors such as experience in providing CFE, will be more important than cost. Evaluation criteria should be neutral with regard to the CFE resource that generates the electricity, including marine energy, solar, wind,

hydrokinetic (including tidal, wave, current, and thermal), geothermal, hydroelectric, nuclear, renewably sourced hydrogen, and electrical energy generation from fossil resources to the extent there is active capture and storage of carbon dioxide emissions that meets EPA requirements.

2.4.2 Vertically Integrated Markets. In vertically integrated markets, COs should coordinate with FEMP to either choose a qualifying CFE tariff (refer to https://www.energy.gov/femp/federal-utility-carbon-pollution-free-electricity-program-availability-map), or negotiate the maximum practicable CFE percentage. FEMP can also assist program offices with collaborations with other agency partners such as the Defense Logistics Agency and GSA.

2.5 **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.

2.6 **Indian Energy Preference Provision**. When an exception to FAR 41.204(c)(1) exists, or retail electric competition is available, 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. Contracts for commodity electricity and those structured as power purchase agreements should include the Preference. 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.

2.6.1 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.

2.6.2 Definitions.

2.6.2.1 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.

2.6.2.2 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).

2.6.3 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.

2.6.4 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.

2.6.5 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.

For electricity procurements, COs are encouraged to consider the importance of evaluation criteria and using a best value tradeoff process. It could 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 in electricity procurements.

2.6.5.1 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.

2.6.5.2 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.

2.6.6 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.

2.6.7 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.

2.7 **Maximum contract length**. GSA is authorized to enter into ten-year public utility contracts that may include option periods of up to an additional ten years, provided that no separate charges are imposed if the option period is not exercised (40 U.S.C § 501). Additionally, ten-year contracts for CFE may include options beyond the initial ten-year term. 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.

2.8 **Field Assistance and Oversight Division Review**. As DOE transitions to this new approach for electricity procurements, DOE Heads of Contracting Activities shall offer all utility solicitations and source evaluation documents to the Office of Acquisition Management's Field Assistance and Oversight Division, MA-62, prior to issuance of the solicitation.

2.9 **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 telephone at 202-431-7601 for Tracy Niro and 202-893-4807 for John Michael Forrest or email at either tracy.niro@ee.doe.gov or john.forrest@hq.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.

**Department of Energy**
Washington, DC 20585

July 15, 2022

MEMORANDUM FOR HEADS OF CONTRACTING ACTIVITIES

FROM: JOHN R. BASHISTA
SENIOR PROCUREMENT EXECUTIVE

Berta L. Schreiber
Digitally signed by Berta L. Schreiber
Date: 2022.07.13 11:25:17 -04'00'

S. KEITH HAMILTON
DEPUTY ASSOCIATE ADMINISTRATOR
FOR ACQUISTION AND PROJECT MANAGEMENT
AND SENIOR PROCUREMENT EXECUTIVE, NNSA

S. Keith Hamilton
Digitally signed by S. Keith Hamilton
Date: 2022.07.15 15:37:07 -04'00'

SUBJECT: CARBON POLLUTION-FREE ELECTRICITY PROCUREMENTS

The Federal Government faces unprecedented challenges and increasing risks and costs resulting from the climate crisis. Immediate action is required to protect the environment, drive innovation, and create economic opportunities. The Department of Energy is fully committed to addressing these challenges and leading the Government in delivering on agency sustainability goals and objectives. As we continue to fulfill our mission essential work requirements, we are looking to increase carbon pollution-free electricity (CFE) in our utility contracts. President Biden issued Executive Order 14057 "Catalyzing Clean Energy Industries and Jobs Through Federal Sustainability" on December 8, 2021. One of the primary goals of this Executive Order is for Federal Government agencies to achieve 100 percent CFE on a net annual basis by fiscal year 2030, including 50 percent CFE 24/7 as defined in EO 14047. To achieve this objective, the Department of Energy needs to be innovative in its acquisition of electricity.

In order to achieve these ambitious goals, Heads of Contracting Activities (HCA) are requested to consider the importance of evaluation criteria and using a best value tradeoff process in electricity procurements. To further the goals of reducing carbon pollution, it could 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 in electricity procurements. In electricity markets where competition is available (retail electric choice markets), solicitations for electricity should describe the Department's requirement as 100 percent CFE, including 50 percent CFE 24/7 to the maximum extent practicable. Contracting Officers and program office representatives should work with the Federal Energy Management Program (FEMP) to determine the availability and pricing of CFE in the regional market, and to the extent possible, establish a minimum percentage of CFE in the solicitation. Consideration should be given to including evaluation criteria that specify that all evaluation factors other than price (including CFE percentage), when combined, are more important than price. Furthermore, consideration should be given to including evaluation criteria that state that higher relative percentages of CFE, and other factors such as experience in providing CFE, will be more important than cost. Evaluation criteria should be neutral with regard to the CFE resource that generates the

electricity, including marine energy, solar, wind, hydrokinetic (including tidal, wave, current, and thermal), geothermal, hydroelectric, nuclear, renewably sourced hydrogen, and electrical energy generation from fossil resources to the extent there is active capture and storage of carbon dioxide emissions that meets EPA requirements. In regulated markets, Contracting Officers should coordinate with FEMP to negotiate the maximum practical CFE percentage, and FEMP can assist program offices for collaborations with other agency partners such as the Defense Logistics Agency and GSA.

The Office of Acquisition Management, Contract and Financial Assistance Policy Division is in the process of revising the Acquisition Guide to incorporate guidance that emphasizes using best value tradeoff strategy and other approaches for maximizing CFE in the electricity acquisitions.

As DOE transitions to this new approach for electricity procurements, DOE Heads of Contracting Activities shall offer utility solicitations and source evaluation documents to the Office of Acquisition Management's (OAM) Field Assistance and Oversight Division. OAM will facilitate an interdisciplinary Community of Practice to advance the development and sharing of innovative practices for utility solicitation requirements and evaluation criteria, and other strategies to further the objective to increase carbon pollution-free electricity (CFE) in our utility contracts. The Community of Practice will include Program Headquarters and Field representatives, FEMP, and sustainability experts from the Office of Asset Management. Additional information on the Community of Practice will be forthcoming. For information pertaining to NNSA, contact NNSA at (505) 845-4337.

Additionally, 10-year contracts for CFE may include options beyond the initial 10-year term. In collaboration with GSA, we have clarification from DOE's Office of General Counsel that under 40 U.S.C. 501, GSA is authorized to enter into 10-year public utility services contracts that may include option periods of up to additional 10-years, provided that no separate charges are imposed if the option period is not exercised. GSA further confirms that pursuant to its Delegation of Authority to the Secretary of Energy, GSA has delegated to the Secretary of Energy this same authority.

**Distribution**
Heads of Contracting Activities
Heads of Departmental Elements

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## CHAPTER 42 - CONTRACT ADMINISTRATION AND AUDIT SERVICES


- 42.101 Audit Requirements for Non Management and Operating Contracts - February 2023
- 42.102 Audit Management - October 2019
- 42.201 Contract Management Planning - June 2018
- 42.703-1 Indirect Cost Rate Administration - September 2017
- 42.1202 Novation Agreements - August 2016
- 42.1502 Contractor Performance Information - March 2017

# 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 89303022AMA000041. 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), Michael Dombrowski at Michael.Dombrowski@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 30.202-7 "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.

# Audit Management

Guiding Principles

- Effective audit management requires communicating effectively with audit service providers.
- The Contracting Officer acts as a good steward of the taxpayer's dollars by carefully considering the procurement's size and complexity, the extent of subcontracting, the applicability of cost accounting standards, and available knowledge and resources in determining the need for audit services.

*References: [FAR Part 42]*

## 1.0 Summary of Latest Changes

This is a new Acquisition Guide chapter. It applies only to non-Management and Operating (M&O) contracts.

## 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 guide chapter provides guidance to Contracting Officers (COs) on planning audits for other than M&O contracts. (M&O contract audits are covered by: Department of Energy Acquisition Regulation (DEAR) 970.5232-3, Accounts, records, and inspection; Chapter 4 of the Accounting Handbook; and the Inspector General (IG) Audit Manual.)

For the purpose of this AL, references to DOE include the National Nuclear Security Administration (NNSA).

### 2.1 Audits for Contracts and Audits for Financial Assistance.

2.1.1 Audits for Contracts. The Department transfers over $15 million each year to audit service providers--the Defense Contract Audit Agency (DCAA) and a private audit service provider.

Audit services may be obtained for non-M&O prime contracts and subcontracts under them and for subcontracts under M&O prime contracts.

(The Office of Inspector General (OIG) has audit cognizance for prime M&O contracts through

the use of the Cooperative Audit Strategy Program).

Other agencies may have audit cognizance for other than DOE M&O prime contracts. The Department of Health and Human Services (HHS), the Office of Naval Research (ONR), and DCAA are examples.

2.1.2 Audits for Financial Assistance. Requirements for audit of financial assistance awards depend on whether the audit is a pre-award audit or a post-award audit.

2.1.2.1 Pre-Award Audits. While pre-award audits are not required for financial assistance awards, they may be helpful in the risk review of an applicant or to review a proposed project budget. Therefore, audits should be considered for high dollar value awards, high risk recipients with poor financial management systems, internal controls, past performance, or when other risk factors exist**.**

2.1.2.2 Post-Award Audits. A non-Federal entity that expends $750,000 or more during the non-Federal entity's fiscal year in Federal funds must have an audit conducted for that year to obtain information on the non-Federal entity's financial management practices and administration of Federal funds.

The Single Audit Requirements are set forth in 2 CFR 200 Subpart F and supersede OMB Circular A-133 for the audit of Institutions of Higher Education (IHEs), States, Local Governments, Indian Tribes and Non-Profit Organizations for fiscal years beginning on or after December 26, 2014.

All IHEs, States, Local Governments, Indian Tribes, and Non-Profit Organizations that expend over $750,000 in Federal funds, exclusive of cost share, in any year are required to have a single audit conducted in accordance with 2 CFR 200 Subpart F. This requirement flows down to subrecipients that meet the $750,000 dollar threshold. Notwithstanding the exclusion of cost share in determining whether the $750,000 threshold has been exceeded, the scope of the audit must assess whether the recipient is in compliance with the cost share arrangement set forth in the terms of the award.

The For-Profit Audit Requirements are set forth in 2 CFR 910 Subpart F and supersede the DOE For-Profit Audit Guidance Parts I through IV for the audit of expenditures in non-federal entities for fiscal years beginning on or after December 26, 2014.

For-Profit entities that expend over $750,000 in DOE funds, excluding cost share, in a fiscal year are required to have a compliance audit conducted in accordance with 2 CFR 910 Subpart F. Notwithstanding the exclusion of cost share in determining whether the $750,000 threshold has been exceeded, the scope of the audit must assess whether the recipient is in compliance with the cost share arrangement set forth in the terms of the award.

For more information on financial assistance audit requirements and responsibilities see 2 CFR 200 Subpart F, 2 CFR 910 Subpart F and the DOE Guide to Financial Assistance.

## 2.2 Audit Service Providers for DOE.

2.2.1 Audit Service Providers for Financial Assistance. The Cognizant Agency for Audit and the Cognizant Agency for Indirect Costs are defined in 2 CFR 200. For a list of Cognizant Agencies for Audit see the Federal Audit Clearinghouse website at https://harvester.census.gov/facweb/

and for assignment of Cognizant Agencies for Indirect Costs see Appendices III, IV, V and VII of 2 CFR 200.

2.2.2 Audit Service Providers for Contracts. Historically, DCAA has been the predominant provider of contract audit services for DOE. DCAA offers a variety of services in addition to audit support, such as rate verification and partial audit. Currently DCAA provides about 66% of DOE's contract audit services.

One alternative to DCAA that the CO may use is obtaining audit services from a private sector provider. One such provider easily available is CohnReznick, LLP because a Blanket Purchase Agreement is in place with them. The CO may place an order for audit support through an individual award against BPA DE-MA0011836. The CO is responsible for administering the order. For further information contact the BPA Contracting Officer's Representative, Salem Fussell, at salem.fussell@hqdoe.gov.

If a contractor's earned value management system (EVMS) must be certified, DOE's Office of Engineering and Construction Management (OECM) is the primary organization that performs certification and does so in accordance with the DOE 413 Series of Orders for any cost-reimbursement contracts exceeding $50 million. EVMS certification of contractors for the DOE was provided previously by Defense Contract Management Agency (DCMA).

**2.3 Considerations Before Requesting a Contract Audit**. According to FAR 15.404-2, the CO should request field pricing assistance when the information available at the buying activity is inadequate to determine a fair and reasonable price. The CO must tailor requests to reflect the minimum essential supplementary information needed to make this determination. DEAR 915.404-2-70 requires the CO to request a review by the cognizant Federal audit activity when the pricing action will be based on cost or pricing data and exceeds certain thresholds.

2.3.1 Timing of the Audit. A key step when planning a proposal evaluation is to determine the level of audit agency support necessary. Essential considerations are the establishing the contract timeline (i.e., prior to or after contract award) and identifying products and services needed from the audit service provider, which vary depending on the contract phase (pre-award and post-award) and specific circumstances.

- In the pre-award phase, audits are primarily requested by the CO. Services available vary from reviews of full proposals and/or rates, rate verification, partial proposed reviews, and agreed-upon-procedures. Other services include financial capability determinations, evaluating contractor estimating systems, evaluating contractor initial price proposals, evaluating initial disclosure statements, and supporting negotiations.
- In the post-award phase, contract audit services covered are contractually required or requested by the CO. Examples include reviews of provisional billing rates (PBRs), audits of final indirect rate proposals for establishment of final indirect rates, requests for equitable adjustments, progress payments, and EVMS.
- Additional services applicable for specific circumstances may include reviews of forward pricing rate agreements (FPRAs); audits of termination settlement proposals; and audits of cost accounting standards (CAS) disclosure statements or

of issues of CAS compliance. Contractually required reviews include audits of contractor internal financial systems, incurred costs, and estimating systems.

2.3.2 Type of Procurement. There are many factors to consider when determining the extent of audit support required. They include the type of procurement (e.g., development versus commercial-off-the-shelf (COTS) supplies/equipment), size, complexity, total cost, subcontracting, and CAS implications. The following are some basic questions that should be answered regarding the procurement's size and complexity, subcontracting, and the applicability of and issues relating to CAS.

2.3.2.1 Procurement Size and Complexity. Address these questions regarding size and complexity:

- What is the dollar value?
- Is this a major acquisition?
- What is the complexity level of the program?
- What is the previous experience of the offeror/contractor?
- Is this a new firm or new product or service area for the firm?
- What is the past performance record of the offeror?
- How adequate is the financial information submitted by the offeror? For example, does it include audited annual reports?
- Does a proposal with certified cost or pricing data meet the minimum dollar threshold for audits required by DEAR 915.404-2-70?
- Is this a large procurement or a large contract award for the firm?

2.3.2.2 Subcontracting. Address these questions regarding subcontracting:

- Is there a substantial subcontracted cost included in the proposal's total price?
- Is the number of subcontractors significant?
- What is the magnitude of total subcontracted costs in relation to the prime contract?

2.3.2.3 CAS Applicability and Issues. Address these questions regarding CAS:

- Are there any outstanding CAS non-compliances affecting the proposal?
- Is there relevant information on the specific contractor (e.g., prior audit reports, historical data, other pertinent DOE contracts on same or similar efforts, FPRAs, etc.).

2.3.3 Other Considerations Before Requesting a Contract Audit. Always review and consider other information available on the specific contractor or an offeror before ordering an audit. Below are examples of questions you should consider in making your decision during the pre-award and post-award phases of your procurement.

2.3.3.1 Pre-Award Phase Questions. Address these questions before award when considering the need for an audit:

- Do I have audit reports from recent proposal reviews on the specific offeror?
- Do I have unresolved questionable areas and non-compliance issues in the previous audit reports?

- Do I have the offeror's actual contract costs on previous contracts to compare to the prices proposed?
- Can I verify the proposed labor rates based on information already available?
- Do I have recent FPR proposals, recommendations, or agreements on the offeror?
- Is available data adequate for determining the reasonableness of the offeror's proposed price?
- Are the offeror's estimating, accounting, or purchasing methods reliable?
- Do adverse audit findings disclose significant internal control problems and/or unresolved questioned costs?
- Is the government unable to make a price reasonableness determination because of lack of knowledge of the particular contractor, risk factors identified that may require technical assistance from the program office, or inadequacy of existing information?

2.3.3.2 Post-Award Phase Questions. Address these questions after award when considering the need for audit:

- Are invoiced costs allowable, reasonable, and allocable?
- Do I have final negotiated indirect rates as established by the cognizant federal agency (CFA), cognizant designated office (CDO), or CO to generate the cost claims by the contractor?
- Do I have the proper incurred cost rates for final contract closeouts?

**2.4 Requesting Rate Verification, Partial Audit, or Full Audit.** Depending upon the factors discussed above, the CO must determine if a full or partial audit or rate verification is sufficient to determine price reasonableness. The CO may request the development of recommended rates for applicable labor categories and corresponding indirect rates if the procurement simply involves services.

Rate verification for pre-award action is not as extensive as an audit, but the audit service provider can ensure that the rates proposed are reasonable. Rate verification consists of the audit service provider determining whether proposed rates are consistent with previously approved or recommended provisional rates. Rate verifications can be performed quickly and are useful when the contractor has had previous dealings with the government and there has not been any significant change in the contractor's rates. DCAA does not charge DOE directly for this service.

A partial audit is a review of contractor's rates, including examining indirect pools, cost bases, and direct labor rates.

A full audit involves a review of contractor costs including the rates reflecting those costs in accordance with the criteria established by generally accepted government auditing standards (GAGAS). For indirect costs this entails a review of indirect pool rates and associated bases. An audit may be necessary when the contractor has no prior or recent dealings with the government or there has been a significant change in contractor rates. A full audit is also necessary for post-award closeout under cost-type contracts and certain non-profit entities, unless quick closeout procedure is used or formally waived by the CO. In this circumstance a closeout audit or some form of financial reconciliation is still required. An audit provides a more complete review of costs than rate verification. An audit is also used when rate verification will not provide sufficient support in analyzing the contractor's proposal.

DCAA also performs agreed-upon-procedures, such as a tailored review of a specific area or cost element of a proposal, a review for cost realism, or an evaluation factor. Another DCAA service is an audit follow-up, where DCAA reviews specific contractor rates at a specified later date. All these services are an additional cost to the cost of the original audit.

**2.5 Cognizant Federal Agency (CFA).** As defined by FAR 2.101, "a cognizant Federal agency means the Federal agency that, on behalf of all Federal agencies, is responsible for establishing final indirect cost rates and forward pricing indirect rates, if applicable, and administering cost accounting standards for all contracts in a business unit. 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."

The assignment of CFA responsibility for any given contractor is based on which federal agency has awarded the predominance of the contractor's contract dollars. If DOE is the CFA, the CO should (1) ensure that FPRAs are established; (2) establish and track contractor PBRs and final indirect cost rate proposals; (3) request advisory audit services when deemed appropriate; and (4) establish pre-negotiation objectives and negotiate settlement of annual incurred costs and indirect rates. The CO should ensure that the contractor's or offeror's proposed rates are properly applied.

If DOE is not the CFA, the DOE CO should coordinate with the CFA to obtain or establish PBRs to be used by DOE non-M&O contractors, coordinate with the CFA to obtain or establish forward pricing indirect rates, monitor DOE contracts managed by other agencies as the CFA, and obtain and review all applicable audit reports and agreement letters issued by the CFA. The DOE CO should receive the same rates used by the CFA for a given contractor unless the contract/financial assistance award in question has a specific advanced agreement that renders a different indirect rate than normally allowed by the appropriate cost principles. These instances may require the CO to re-negotiate the indirect rate specific to a particular award/contract. DOE COs have the authority to withhold payment of indirect costs if current PBRs are not being applied, as approved by the appropriate CFA. See DOE Acquisition Guide Chapter 42.703-1, Indirect Cost Rate Administration (September 2017) for policy, procedures and responsibilities.

**2.6 Acquiring Contract Audit Services**. In accordance with FAR 42.1, Contract Audit Services, the Department has established an interagency agreement (IA) with DCAA to obtain contract audit services. (As mentioned earlier, when DCAA is not available one alternative is obtaining audit services from a private sector provider such as CohnReznick, LLP, which has a Blanket Purchase Agreement with DOE.)

However, there are instances where a DOE Program may require that a separate audit service agreement be established in order to satisfy a unique need outside of the Department's existing agreements. For example, a Program may require that the responsible audit agency establish an on-site office for a set time period to provide the necessary audit services required at that site. When such unique, separate audit service agreements are determined necessary, through local discussion among the stakeholders, (procurement, legal, budget, program, etc.) and approval by the CO, a single point-of-contact (POC) for the audit services should be established in order to avoid potentially duplicative or unnecessary audits, reviews, inspections, and examination of contractor and subcontract records associated with that site and project.

Ordering procedures under DOE's IAA provide for local ordering by the CO. The CO is ultimately

responsible for determining the need for and ordering audits. The DOE POC for audit services is MA-62. Each DOE program CO that requests audits from any audit service provider may designate a single POC (as determined by local procedure) responsible for tracking his or her audit request. Each program office is responsible for monitoring and coordinating funding requirements for audits in accordance with the DOE Working Capital Fund (WCF) procedures. Funding for these services is managed under the DOE WCF Program. Starting at the beginning of the fiscal year, the WCF obtains funding from each program based on the previous use for these services plus an additional annual escalation. The WCF bills each program one quarter in arrears. In cases where a program may exceed or underuse its allotted share of funds for the current FY, the funding estimate for the next FY would be adjusted to accommodate the differences.

Where DCAA is the cognizant audit agency, the responsible DCAA audit office is determined based on the level of audit activity and geographical location. Consistent with this practice, DCAA and the DOE POC for audit services assign the corresponding DOE Program site an identifying Funding Customer Identification Code (FCID), which tracks billable hours, dollars spent, and other information for a particular DOE Program Office.

**2.7 <u>Ensuring Effective Audit Management</u>**. The following are actions that should be considered to ensure effective audit management.

- Use the cognizant audit agency at all times unless special circumstances warrant an exception.
- Prevent duplication of effort as required by the Single Audit Act; coordinate with the cognizant audit agency and the OIG.
- Provide the appropriate supporting information to the cognizant audit agency necessary to conduct an effective audit or rate verification.
- Describe in the written request the support needed, state the specific areas for which input is required from the audit provider, and include all information necessary to perform the review (such as the offeror's proposal and the applicable portions of the solicitation, particularly those describing requirements and delivery schedules).
- Assign a realistic deadline for receipt of the report (normally, pre-award audits can be expected to take a minimum of approximately 30 days to perform).
- Describe the reason for requesting the audit and include the name, address, and phone number of the contact person at the firm.
- Be specific in what is requested.
- Adhere to the normal audit cycle.
- Work with DCAA to ensure that they receive the final indirect submissions from the audit entity in a timely manner.
- Coordinate with the appropriate CFA and CDO prior to initiating any special audits.
- Request only audit support in those areas where adequate information is not already available.
- Submit the pre/post negotiation memorandums to DCAA to close the audit process with DCAA and include: the negotiation position; the resolution of audit recommendations as described in FAR 15.406-3 and FAR 42.705-1; a summary of the contractor's proposal; and any DCAA, HHS, ONR, or other field pricing assistance recommendations. If the CO

deviates from a recommendation of the auditor, the memorandum should include an explanation of why.

# Contract Management Planning

Guiding Principles

- Contract management plans can be a useful tool to ensure transparency and accountability for contract administration functions.
- The form and content of contract management plans should be tailored to address the specific requirements and risks of the individual contract.
- Effective contract management plans are those that are regularly used and referenced by DOE officials with contract administration and oversight responsibilities.

*[References: FAR 42.201—Contract Administration Responsibilities, FAR 46.4—Government Contract Quality Assurance, DOE Order 413.3B, Program and Project Management for the Acquisition of Capital Assets]*

## 1.0 Discussion

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

### 1.1 Use of contract management plans for contract administration

1.1.1 Purpose. Contract management plans are tools to help organize contract administration functions, ensure that roles and responsibilities are clearly assigned, and assist in establishing accountability for contract administration.

1.1.2 Scope and timing. Contract management plans should be developed, approved, and distributed prior to the beginning of a contract's period of performance. In order to meet this timeframe, it will usually be necessary to begin working on the plan during contract transition, or sooner.

Because contract management includes activities to be performed by Federal officials during contract performance, contract transition activities that occur prior to contract performance are not included in the plan. Separate contract transition plans should be developed as needed for each contract.

1.1.3 Contracts that require plans. Contract management plans are required for contracts involving major construction or cleanup projects, including contracts for projects that are subject to DOE Order 413.3B, *Program and Project Management for the Acquisition of Capital Assets*.

When equivalent processes or documents exist that functionally duplicate a contract management plan, the Field Assistance and Oversight Division may

approve the use of such alternative processes or documents in lieu of the required contract management plan.

1.1.4 Contracts for which formal plans are optional. Contract management plans may be developed for any contract when use of a formal plan is deemed necessary or useful by the HCA or the procurement office.

## 1.2 Form and content of the contract management plans

The content and format of the contract management plans should be tailored to the requirements of the relevant contract and the responsible contract management office. The attachment to this chapter lists the standard elements of a contract management plan that may be adopted as appropriate when developing an individual plan.

The contract management plan should not duplicate information contained in the contract itself or in other contract management documents, such as the incentive plan, the Performance Evaluation and Measurement Plan (PEMP), or the contract transition plan. Other relevant contract management documents should be referenced as needed.

## 1.3 Review and approval

Contract management plans, or substantive changes to existing plans, are reviewed and approved by the cognizant HCA or the official designated by the HCA. The Field Assistance and Oversight Division may also choose to review contract management plans as needed as part of its normal oversight and advisory functions, or may review the plan if requested by the CO.

The Field Assistance and Oversight Division must approve requests to use alternative processes or documents in lieu of a contract management plan, when a plan is required under section 2.1 of this chapter.

## 1.4 Updates

Plans should be reviewed periodically and updated as needed to reflect changes in personnel, DOE organizational changes, or changes to policies and requirements applicable to contract management. Updates may also be appropriate after major changes are made to the contract, including major contract modifications, and after events that affect DOE's assessment of key performance risks.

Substantive changes to the plan should be reviewed and approved by the official who approved the original plan. Updating a contract management plan to reflect organizational or staffing changes is not considered a substantive change.

## 2.0 Attachment

Standard Elements for a Contract Management Plan

**Attachment: Standard Elements for a Contract Management Plan**

| ***Plan Element*** | ***Description*** |
|---|---|
| 1. Summary and Background | • Provide a brief description of the contract and the DOE office responsible for contract management<br>• Describe the role of other DOE offices supporting contract management, if applicable<br>• Reference the contract and other relevant documents; repeat information from these documents only as necessary to establish context for the rest of the contract management plan |
| 2. Key contract management team members | • Identify the offices and the individuals responsible for contract administration and oversight, including designated CORs and technical monitors.<br>• Describe the roles and responsibilities for each office and team member |
| 3. Key performance risks and contract assurance | • Identify key contract performance risks<br>• Document the processes and individuals responsible for monitoring contractor performance for each identified risk<br>• Describe how Contractor Assurance Systems will be used to identify and mitigate risks, if applicable<br>• Assign the federal officials responsible for oversight and monitoring of Contractor Assurance System processes<br>• Describe how the contractor's internal audit activity will be used to identify and mitigate risks, if applicable (see *DOE Acquisition Guide* Chapter 70.42.101) |
| 4. Performance Monitoring--Inspection, surveillance, and acceptance | • As needed, document procedures for inspection, surveillance, and acceptance of contract performance and deliverables, if this is not already addressed through a separate quality assurance surveillance plan (QASP).<br>• As needed, include a discussion of the personnel responsible for inspection, surveillance and acceptance, and procedures for addressing identified performance or quality concerns.<br>• If applicable, provide a reference to the separate QASP that addresses inspection, surveillance, and acceptance |
| 5. Project management | • Document project management processes, roles and responsibilities if the contract involves performance of projects that are not already subject to formal DOE project management processes<br>• Reference separate project management criteria as appropriate |

| ***Plan Element*** | ***Description*** |
|---|---|
| 6. Management of contractor litigation | • Document processes, roles and responsibilities of Federal officials as needed to supplement existing contract provisions on contractor litigation management<br>• Reference applicable contract provisions and DOE regulations and policies as needed |
| 7. Contractor human resource management | • Document processes, roles and responsibilities of Federal officials as needed to implement the requirements of DOE Order 351.1 *Contractor Human Resource Management Programs* and associated contract provisions.<br>• Reference applicable contract provisions and DOE regulations and policies as needed |
| 8. Cost Allowability | • Describe processes, roles and responsibilities for assessing the allowability, reasonableness, and allocability of contract costs<br>• Identify any audit resources that will support the review of cost allowability, including cost allocations and compliance with Cost Accounting Standards (CAS)<br>• If the contract is subject to DOE's Cooperative Audit Strategy (see *DOE Acquisition Guide* Chapter 70.42.101), assign the Federal officials with responsibility for oversight of the contractor's internal audit activity, including review and approval of annual audit plans |
| 9. Contract records and data retention | • Document roles, responsibilities and expectations for management and retention of contract-related records<br>• If applicable, describe processes for ensuring Federal retention of any computer code or contract-related data generated by the contractor<br>• As appropriate, reference COR delegations that assign responsibilities for records and data retention<br>• Clarify any record management processes that occur outside of STRIPES |
| 10. Contractor internal audit functions | • If applicable, describe the role of the contractor's internal audit organization<br>• Assign the federal official(s) responsible for reviewing internal audit plans, coordinating with the contractor's audit committee, and assessing the independence and performance of the internal audit function |
| 11. Continuity of operations planning (COOP) | • Describe processes for ensuring timely communications and decision-making during emergencies |

| ***Plan Element*** | ***Description*** |
|---|---|
| 12. Role of non-DOE entities | • If applicable, discuss the role of non-DOE entities in contract administration, including any assessments of contractor performance<br>• If applicable, document the role of the owner's agent, owner's representative, or other outside party used to assist in project management and/or assess the contractor's performance and deliverables<br>• Document the role of any non-DOE Federal, State or Local regulatory agency in assessing contractor compliance with applicable laws, regulations, or agreements |
| 13. Other contract-specific issues | • Address any other contract-specific issues that require management and oversight by Federal officials |

# 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.<br><br>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.

## Table of Contents

# CHAPTER 43 - CONTRACT MODIFICATIONS


- 43.102 Contract Modifications - June 2018
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# Contract Modifications

Guiding Principles

- Only DOE Contracting Officers are authorized to issue modifications to DOE contracts.
- Contracting Officers shall use a Standard Form 30 within the contract writing system to issue all modifications.

*References: [FAR Part 43, FAR Part 13.307]*

## 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. The purpose of this chapter is to provide a consistent approach across DOE for processing and executing modifications to ensure that contract changes are formally binding on both the Government and the Contractor.

**2.1 Contract Modification**. A contract modification is any written change 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 Unilateral or Bilateral action.

2.1.1 Unilateral Modification. Unilateral Modifications are changes to the contract signed only by the Contracting Officer. Examples of Unilateral Modification use are to:

- Make administrative changes;
- Issue Change Orders;
- Make changes authorized by clauses other than the Changes clause; and
- Issue termination notices.

2.1.2 Bilateral Modification. Bilateral Modifications are changes to the contract signed by the Contracting Officer and the Contractor. Bilateral modifications are often referred to as 'supplemental agreements' because they represent additional agreements to be incorporated in and made a part of the original contract. Any Bilateral Modification requires the same elements required to form a contract: Offer, Acceptance, Consideration, Competent Parties, and Legal Purpose. Examples of Bilateral Modification use are to:

- Make negotiated equitable adjustments resulting from the issuance of a Change Order;
- Definitize letter contracts; and
- Reflect other agreements of the parties modifying the terms of the contract.

**2.2 Guidance.** 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 Attachment 1 CONTRACT MODIFICATION AUTHORITY GUIDANCE CHART (SF 30, BLOCK 13). 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.

2.2.1 SF30. 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.

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.

For bilateral modifications, Contracting Officers shall ensure that the SF30 is signed by a person authorized to bind the Contractor.

2.2.2 STRIPES. Contracting Officers shall not manage contracts outside of the formal electronic system (STRIPES) unless the contracts are in closeout status.

## 3.0 Attachments

Attachment 1 – CONTRACT MODIFICATION AUTHORITY GUIDANCE CHART (SF 30, BLOCK 13)

# 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.<br><br>Generally, Government contracts contain a changes clause that permits the CO to make unilateral changes in designated areas, within the scope of the contract.<br><br>Examples for FFP changes:<br>a) Drawing, designs or specifications<br>b) Method of shipment or packing<br>c) Place of delivery<br>d) Method or manner of work performance<br>e) GFPs or facilities | Citation of Authority: None required.<br><br>An administrative change is a written unilateral contract change that does not affect the substantive right of the parties.<br><br>Examples, but not limited to:<br>a) Change paying office<br>b) Change individual COR<br>c) Change appropriations data<br>d) Correct typographical errors | Citation of Authority: Any contract clause, term, or condition which requires written bilateral agreement between the Government and the Contractor.<br><br>Examples, but not limited to:<br>a) Change delivery, price, quantity, etc.<br>b) Definitization of unilateral Change Order to reflect the agreement reached in the negotiation.<br>c) Definitization of other unilateral actions (Stop work, Government Delay of work, etc.)<br>d) Definitization of Unpriced Actions.<br>e) Economic Price Adjustment clauses.<br>f) In preference to a Change Order when a supplemental agreement is considered feasible.<br>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.<br><br>Examples, but not limited to:<br>a) Termination<br>b) Disputes<br>c) Public Law 85-804<br>d) Option<br>e) Government Property |

# Change Order Administration

Guiding Principles

- Change orders must identify the distinct work, deliverables and other requirements associated with the change in order to allow the contractor to appropriately segregate the costs associated with the changed work.
- The Change Order Accounting clause (FAR 52.243-6) must be invoked *for each change or series of related changes whose estimated cost exceeds $100,000*, and a firm date set for receipt of a complete, auditable proposal.

*References: [FAR Subpart 43.2, Acquisition Guide 15.402, "Pricing Contract Modifications"]*

## 1.0 Summary of Latest Changes

This update: (1) revises the chapter number from 43.2 to 43.201, (2) clarifies that fee for work performed between change order issuance and definitization should be significantly reduced, and (3) makes various editorial and administrative changes including some reorganization of content.

## 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 guidance to ensure the proper issuance and administration of change orders. A change order template and sample clause are provided in order to facilitate consistent application across the complex.

**2.2 Background**. A change order is a written order, signed by the Contracting Officer, directing the contractor to make a change pursuant to the Changes clause. The Changes clause permits the Contracting Officer to make unilateral changes in designated areas within the general scope of the contract. 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. 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 the process of definitizing the change order is not prolonged unnecessarily.

**2.3 General Guidance for Change Order Modifications**. The following factors should be considered when issuing a change order:

- 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 $700,000 or more ($1.5 million for construction) (FAR 19.702(a)(3)).

- Document any change order issued; in particular, address the rationale for determining the work to be within the scope of the subject contract. The Contracting Officer is advised to consult with Counsel to ensure the change does not constitute a cardinal change to the contract.

- Change orders shall have a not-to-exceed ceiling. When issuing a single modification with multiple changes, the Contracting Officer should consider whether to use a single not-to-exceed value for the entire change order or individual values associated with each of the changes.

- 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.

- Each change order shall contain a definitization schedule. The schedule shall contain at least the following:

    - Dates for submission of the contractor's Request for Equitable Adjustment (REA) including required cost or pricing data, as applicable.

    - A date for the start of negotiations.

    - 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).

- The clause at FAR 52.243-6, Change Order Accounting 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. When issuing a change order expected to exceed $100,000, it is imperative to invoke this clause. 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.*

- All unpriced change orders/modifications 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 unpriced change orders/modifications are also required.

- 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 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 Attachment 1.*

- The following guidelines should be followed:
    - No fee shall be paid to the contractor for changed work, including provisional, prior to the definitization of the change order.
    - Due to the contractor's reduced cost risk for work performed between change order issuance and definitization, a significantly reduced fee is normally warranted. The CO should perform a fresh weighted guidelines analysis to determine the appropriate fee during this time.
    - Delivery schedules or milestone requirements for assessing performance of the work should be articulated. 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.
    - As applicable, Section F must be modified to reflect a revised period of performance.
    - 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.
    - 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.
    - 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.
    - Prior to adding requirements deemed to be beyond the scope of the contract, the Contracting Officer must ensure that FAR Part 6 requirements are met, as applicable. Once justifications required by FAR Part 6 are approved, the change order can be issued.
    - Contracting Officers should follow FAR and DEAR in issuing, pricing, and negotiating all change orders.
    - 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.

**2.4 Template**. The template provided as Attachment 1 provides a format 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 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 minimizing the risk of 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, or 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 the clause at FAR 52.243-6 (if applicable), and 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 also 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 among individual contracts.

## 3.0 Attachments

Attachment 1 Change Order Template

**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 clarify any associated changes to the contract terms. These revisions are being made under the authority of the contract clause contained in Section I, entitled "Changes" *(Cite the FAR Reference.)*

The work identified in this modification shall be performed using funds either currently obligated under this contract or added to this contract by 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. *(NOTE: Due to the contractor's reduced cost risk for work performed prior to definitization, a fresh weighted guidelines analysis should be performed to determine the appropriate fee during this time.)*

**2. Section C, Description/Specifications/Statement of Work is amended as follows:**

Paragraph C. XX is modified as follows:

• If modifying a *SOWor PWS - 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 SOW.*

- *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 37.601).*

• *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)*

• <u>Other Requirements</u> – *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 _____. *(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/price, and fee Proposal)<br>*(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 other hand,, 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<br>*(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 15.402, 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 hereby 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, as 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/Price and Fee Proposal. The Technical Proposal shall contain the contractor's approach to perform the work, and the Cost/Price 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/Price 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 – [fill in # of hard copies, if appropriate] and 1 electronic copy.<br>• Cost and Fee Proposal –1 electronic copy.<br>• Both portions of the proposal shall contain a table of contents. |
| PageSize | • 8 1/2" x 11"<br>• Fold-outs shall not exceed 11" x 17" |
| Typeface and Font Size | • Font size used in the text portions of the proposal shall be 12-point or larger.<br>• Typeface print used in 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.<br>•Font size used in charts, graphics, figures and tables may be smaller than 12-point, 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 and the proposed work schedule shall be a submitted in *(fill in appropriate format*). |

## 3. PREPARATION INSTRUCTIONS COVER LETTER

The cover letter shall include, but not be limited to, the following:

(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;

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.

(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 – If applicable, 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 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 ___(*fill-in*)___, 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 ___(*fill-in*)___. 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 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.*)

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**

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**

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 | | | | | | | | | | |

Appendix 3
Schedule B

Equipment – Consolidated Summary

| | *FY 20XX* | | | *FY 20XX* | | | *FY 20XX* | | | *Total* |
|---|---|---|---|---|---|---|---|---|---|---|
| *Description:* | *Units* | *Unit Rate* | *Total* | *Units* | *Unit Rate* | *Total* | *Units* | *Unit Rate* | *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

| | *FY 20XX* | | | *FY 20XX* | | | *FY 20XX* | | | *Total* |
|---|---|---|---|---|---|---|---|---|---|---|
| *Description;* | *Units* | *Unit Rate* | *Total* | *Units* | *Unit Rate* | *Total* | *Units* | *Unit Rate* | *Total* | *All Years* |
| -A | | | | | | | | | | |
| -B | | | | | | | | | | |
| -C | | | | | | | | | | |
| -D | | | | | | | | | | |
| Total | | | | | | | | | | |

Appendix 4

Waste Quantities and Cost – Consolidated Summary

| *WBS and Description* | *FY 20XX* | | | *FY 20XX* | | | *FY 20XX* | | | *Total* | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | *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 | | | | | | | | | | | | |

## Table of Contents

# CHAPTER 47 – DOCUMENTATION AND APPROVAL OF FEDERALLY FUNDED INTERNATIONAL TRAVEL (FLY AMERICA ACT – OPEN SKIES AGREEMENT)


- 47.403 Documentation and Approval of Federally Funded International Travel (Fly America Act-Open Skies Agreement) - September 2018

# Documentation and Approval of Federally Funded International Travel (Fly America Act-Open Skies Agreement)

Guiding Principles

- The Fly America Act requires that foreign air travel funded with Federal dollars be performed on U.S. flag air carriers, with exceptions.
- Open Skies agreements are considered qualifying "bilateral or multilateral [air transportation] agreement[s]".
- Government contractors may use Open Skies Agreement rates even when a GSA Airline City Pair Contract fare exists.

*[References: 49 U.S.C. §40101(e), 49 U.S.C. §40118 (Fly America Act), Airline Open Skies Agreements, 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, DEAR Subpart 952.247-70, DOE Order 551.1D Foreign Travel]*

## 1.0 Summary of Latest Changes

This update includes administrative changes (formerly 42.2).

## 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 to DOE Contracting Officers, Contracting Officer Representatives, and Program Officials on documentation and approval of federally funded international travel by Non-M&O DOE 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. See Section 4.2 for international travel by M&O Contractors.

**2.1 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.

**2.2 Exceptions to the Fly America Act.** 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 States 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*.

**2.3 Changes to US-EU Open Skies Agreement.** 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. The most significant change is that, under the amended agreement. EU airlines are now granted the right to transport civilian agency-funded passengers who are NOT eligible to travel on GSA Airline city Pair Contract fares between a point in the United States and a point outside the United States even if there is a GSA Airline City Pair Contract fare in effect between the origin and destination points.

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: https://www.gsa.gov/cdnstatic/FTRBulletin11-02USEUOpenSkies.PDF

**2.4 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).

**2.5 Guidance.**

2.5.1 Non-M&O Contracts. Contracting Officers, Contracting Officer Representatives or Program Officials responsible for reviewing and approving for payment Non-M&O DOE 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 (d) for contractor use of the Open Skies Agreement.

2.5.2 M&O Contracts. Contracting Officers shall insert the clause at 952.247-70, Foreign Travel and the Contractor Requirements Document (CRD) contained in Department of Energy (DOE) Order 551.1D, Official Foreign Travel, or its successor when foreign travel may be required under the M&O contract. The M&O Contractor's foreign travel shall be conducted pursuant to the requirements of the CRD contained in DOE Order 551.1D or its successor in effect at the time of award.

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## CHAPTER 48 – VALUE ENGINEERING


- 48.102 Value Engineering in M&O Contracts - August 2017

# 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 The FAR Mandatory Program Approach May Apply to Portions of a Major Contract.** 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

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# CHAPTER 50 - EXTRAORDINARY CONTRACTUAL ACTIONS AND THE SAFETY ACT


- 50.101-2 Extraordinary Contractual Actions - April 2016

# 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.

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# 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.

# 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 Linking Performance Fee to Acquisition Outcomes**. 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 Rollover of Performance Fee**. 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;

# 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

# Responding to Solicitations Under DOE's Strategic Partnership Project (SPP) Agreements

Guiding Principles

- SPP solicitation responses maximize access to DOE highly specialized and unique facilities, services, and technical expertise when private sector facilities are inadequate.
- Agreements increase research and development interactions and provide opportunities for transferring technology while assisting in maintaining core competencies and enhancing the science and technology base at DOE facilities.
- Effective use of the guidance ensures DOE maintains compliance with applicable non-competition laws, regulations and statutes.

*References: [FAR 17.5, FAR 35.016, FAR 35.017, DEAR 970.1707, DEAR 970.5217-1, and DOE Order 481.1D]*

## 1.0 Summary of Latest Changes

This update makes administrative changes to ensure consistency with DOE Order 481.1D and DEAR language.

## 2.0 Discussion

This chapter supplements other more primary acquisition regulations and polices contained in the references above and should be considered in the context of those references. Additional information on this subject can be found in documents listed in the Authorities section below.

**2.1 Overview.** This chapter provides guidance on the Department's policy related to DOE's laboratories ability to respond to solicitations from non-DOE sponsors using SPP Agreements. This chapter addresses the effect of laws, regulations, and statutes to DOE/NNSA SPP 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 SPP 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 SPP policy related to participation in and responding to Requests for Proposals. This guidance does not apply to DOE issued solicitations.

**2.2 Applicability.** This guidance applies to all DOE sponsored facilities performing SPP 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.

**2.3 Background.** 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 (AEA). A large portion of this work is currently conducted using SPP agreements. DOE defines SPP work 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 .1D, "Strategic Partnership Projects [Formerly known as Work for Others (NON-DEPARTMENT OF ENERGY WORK)]" provides DOE policy for the performance of SPP. 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 SPP policy, 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 SPP agreements support of Other Federal Agencies (OFAs) mission work, DOE also performs work for the private sector, academia, and state, local and foreign governments.

SPP agreements are important to the vitality of the DOE, DOE's National Laboratories and DOE's other facilities. To preserve the option of performing SPP, 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 and in section 2.4.6 is 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.

**2.4 Authority.** 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.

2.4.1 Facility Contract Authorization. Under this authority, the DEAR 970.5217-1 "Work for Others (since renamed SPP) 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 SPP (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:

2.4.2 Department of Homeland Security 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."

2.4.3 Non-competiton Restrictions. 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 in agreement 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.

2.4.4 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 a 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 governmentrequirements 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 SPP policy and procedural requirements set forth in DOE Order 481.1D. 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.

2.4.5 DOE RFP/RFP-type and BAA/BAA-like Solicitation responses under SPP. 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 using SPP agreements. 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 SPP 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 SPP 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 SPP 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 SPP 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 SPP 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.

Broad Agency Announcements (BAA) and BAA-like instruments:

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 SPP agreement prior to the non-DOE sponsor issuing a RFP or RFP-type solicitation. The purpose of the SPP agreement would be to include the scope of work negotiated in the SPP agreement into the subsequently issued non-DOE RFP or RFP-type solicitation as sponsor provided services. The SPP 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.

2.4.6 Additional 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," was renamed SPP. 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 481.1D, STRATEGIC PARTNERSHIP PROJECTS [FORMERLY KNOWN AS WORK FOR OTHERS (NON DEPARTMENT OF ENERGY FUNDED WORK)] 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."

# DOE Strategic Partnership Projects and Cooperative Research and Development Agreements Using a Master Scope of Work

Guiding Principles

- Routine work performed by a Contractor under Strategic Partnership Project (SPP) agreements or Cooperative Research and Development Agreements (CRADAs) for non-Federal sponsors may be suitable for special processing under a Master Scope of Work.[1]
- Consistent with the Deputy Secretary's decision on October 23, 2018[2], cognizant Contracting Officers have the option to negotiate, develop, and use a Master Scope of Work to approve certain routine work rather than provide approval on a transaction-by-transaction basis.

*[References: DOE SPP Order 481.1E, 48 C.F.R. § 970.2770, 48 C.F.R. § 970.5227-3, Sections 31, 32, 33 of the Atomic Energy Act of 1954 (42 U.S.C. §§ 2051-2053), 15 U.S.C. § 3710a, DOE CRADA Order 483.1B]*

## 1.0 Summary of Latest Changes

This is a new Acquisition Guide chapter.

## 2.0 Discussion

### 2.1 Background.

Consistent with applicable DOE/NNSA authorities and policies, DOE/NNSA makes its resources available to non-DOE/non-NNSA entities through a number of contractual mechanisms including SPPs and CRADAs. While these mechanisms have been generally successful in allowing outside entities to engage with Contractors, some SPPs and CRADAs are routine work that would benefit from a streamlined process for approval. For routine work funded by non-Federal sponsors, DOE/NNSA has authorized the use of a Master Scope of Work (MSW) to speed the start of performance for these types of projects and limit required DOE/NNSA transactional approvals. SPPs are authorized for use under M&O contracts by the clause at 48 C.F.R. § 970.5217-1 and implemented in accordance with the current version of DOE Order 481.1, while CRADAs are authorized, in part, by the clause at 48 C.F.R. § 970.5227-3 and implemented in accordance with the current version of DOE Order 483.1.

[1] The use of an MSW to approve certain CRADAs relies, in part, on DOE's authority to permit a Contractor to enter into CRADAs to the extent provided in a DOE-approved Annual Strategic Plan under 15 U.S.C. § 3710a.

[2] Decision of Recommended technology Transition Reforms authorizing Implementation of a Risk Based, Master Scope of work Approach for the Approval of Routine Laboratory Partnering Agreements without Requiring Department of Energy Transactional Approval (EXEC-2018-004586).

2.2 Overview.

2.2.1 This chapter provides guidance and procedures to: (1) create and approve an MSW; and (2) use and administer the approved MSW to process individual non-Federal SPPs and CRADAs.

2.2.2 *Master Scope of Work*

2.2.2.1 The MSW is a detailed description of a routine scope of work (encompassing one or more projects) containing information sufficient to: (1) ensure that the Contractor and the cognizant Contracting Officer (CO) have a common understanding of the work to be performed; and (2) allow DOE to make all reviews, approvals, determinations, and certifications required pursuant to relevant DOE Orders and policy.

2.2.2.2 Routine work is work that is typical or customary at a particular facility which can be described in sufficient detail for the CO and the Contractor to agree to the scope of work. The CO approval of the MSW (and the requisite determinations and certifications) will be applied to the individual projects that fall within the approved MSW. MSWs may cover multiple SPP or CRADA transactions, possibly from more than one non-Federal sponsor. In addition, more than one MSW may be approved under a contract. The CO has substantial discretion in determining what constitutes a routine scope of work.

## 3.0 **Guidance**

Although DOE/NNSA has authorized the use of MSWs for certain routine work for non-Federal sponsors, developing and using an MSW is at the CO's discretion. The MSW is intended to provide the CO with the Contractor assurances necessary to apply the CO's approval of the MSW as a whole to individual SPP or CRADA projects falling under the MSW and to ensure contract management responsibilities are met. The MSW may be implemented only if the CO and the Contractor agree to the MSW in writing. An MSW must reflect current mission priorities of the facility's cognizant DOE/NNSA headquarters program office.

The MSW process must never be authorized or utilized for any type of classified or other work requiring classification guidance.

The MSW process must address removal of an individual transaction from the MSW process when the transaction requires additional approvals as described in 3.1.2.5. The transaction, with the CO's approval, may be completed using the MSW process after the required approvals are secured.

3.1 MSW Minimum Requirements.

The CO must ensure that the MSW satisfies the minimum requirements set forth herein. To utilize the MSW process, the CO must review and approve the Contractor proposed MSW procedures and each MSW that clearly defines the routine work to be performed. The Contractor MSW procedures must address how the Contractor will develop and obtain approval for an MSW and the process and requirements for individual projects executed under an approved MSW. The following minimum requirements must be satisfied:

3.1.1 *Mandatory/Optional Requirements for each MSW*

3.1.1.1 Mandatory MSW Criteria

3.1.1.1.1 Routine Scope of Work. The routine scope of work must be clearly identified and may cover multiple projects for one or more sponsors. As an example, a Contractor may propose a MSW for dosimetry services, and once approved by the CO, multiple projects related to these services may be processed under the MSW.

3.1.1.1.2 Agreements to be Used. Any CO approved agreement terms and conditions, including any CO approved local model agreements, proposed for use in connection with each MSW.

3.1.1.1.3 Prohibited Work. Any type of classified or other work requiring classification guidance is not permitted.

3.1.1.1.4 Approval Process. Process for obtaining: (1) CO approval of a MSW; and (2) cognizant Secretarial Office approval of the first negotiated MSW.

3.1.1.2 Optional MSW Criteria

3.1.1.2.1 Funding Limits. The MSW may include a total funding limit for the MSW or a funding limit for individual projects under the MSW to ensure that DOE/NNSA mission work is not adversely impacted. If a funding limit is reached, the CO and Contractor must mutually agree to increase the limit.

3.1.1.2.2 Period of Performance Limit. The MSW may include a period of performance limit for individual projects. If a new project is proposed in excess of the MSW period of performance limit, or an existing project is proposed for extension resulting in the project exceeding the MSW performance limit, the

CO and Contractor must mutually agree to the proposed period of performance.

3.1.1.2.3 Other Content. The Contractor and CO may include other agreed upon criteria or conditions that are consistent with this guidance and DOE policy.

3.1.1.3 Reauthorization. Procedures for the CO to annually review, reauthorize and, if needed, update each MSW.

3.1.2 *Procedures for Individual Project approval under an MSW*

3.1.2.1 Contractor Determination. Procedures for the Contractor to determine and provide to the CO its written determination that a specific project falls within the boundaries of the MSW.

3.1.2.2 High Risk Criteria for Individual Projects (i.e., filters). The CO and Contractor must identify in the written procedures any requirements that need to be met for a project to be eligible for processing under an MSW in order to screen out potentially high risk transactions. Minimum criteria must include that the proposed project:

3.1.2.2.1 Uses standard or otherwise CO pre-approved terms and conditions or approved model agreements;

3.1.2.2.2 Presents no conflict of interest concerns that are unmitigable under the procedures established pursuant to 48 C.F.R. § 970.5227-3(d); and

3.1.2.2.3 Is not subject to DOE P 485.1, *Foreign Engagements with DOE National Laboratories*.

3.1.2.3 Re-Determination Upon Significant Change in Scope. Procedures for the Contractor to determine if there has been a significant change in scope for an individual project that requires a review of the project and, if so, a written determination regarding whether it remains within the boundaries of the MSW.

3.1.2.4 Reasonable and Timely Notifications to CO. Procedures to provide reasonable notification to the CO of agreements the Contractor is processing through the MSW including: (1) written documentation of the determination described in Section 3.1.2.1; and (2) timely access to individual transaction packages.

3.1.2.5 MSW Exit and Re-Entry. If the Contractor determines that a project does not meet the criteria for processing under the MSW whether on the basis of one or more criteria identified in section 3.1.1.2 or for any other reason, the project must exit the MSW workflow. The CO may approve re-entry if and when the additional requirements have been met and appropriately cleared, e.g., foreign-sponsored work.[3]

3.1.2.6 Ability to Start Work. The CO shall ensure that the Contractor procedures describe how work on an individual project under an approved MSW will begin only when the Contractor: (1) determines that the project is within the boundaries of the MSW under Section 3.1.2.1; (2) the agreement is signed; and (3) funding is secured.

3.2 Negotiations. If and when the Contractor submits the MSW to the CO, the CO and the Contractor should promptly begin negotiations in an expedited manner and exercise reasonable diligence to reach agreement.

3.3 Effective Date and Reauthorization. A MSW will be effective for one year from the date it receives CO approval. The CO may reauthorize the MSW annually thereafter according to procedures in the MSW required under Section 3.1.1.3. Individual transactions under the MSW may include a period of performance longer than one year and may extend beyond the end date of the MSW under which it was approved.

3.4 DOE/NNSA Review and Oversight.

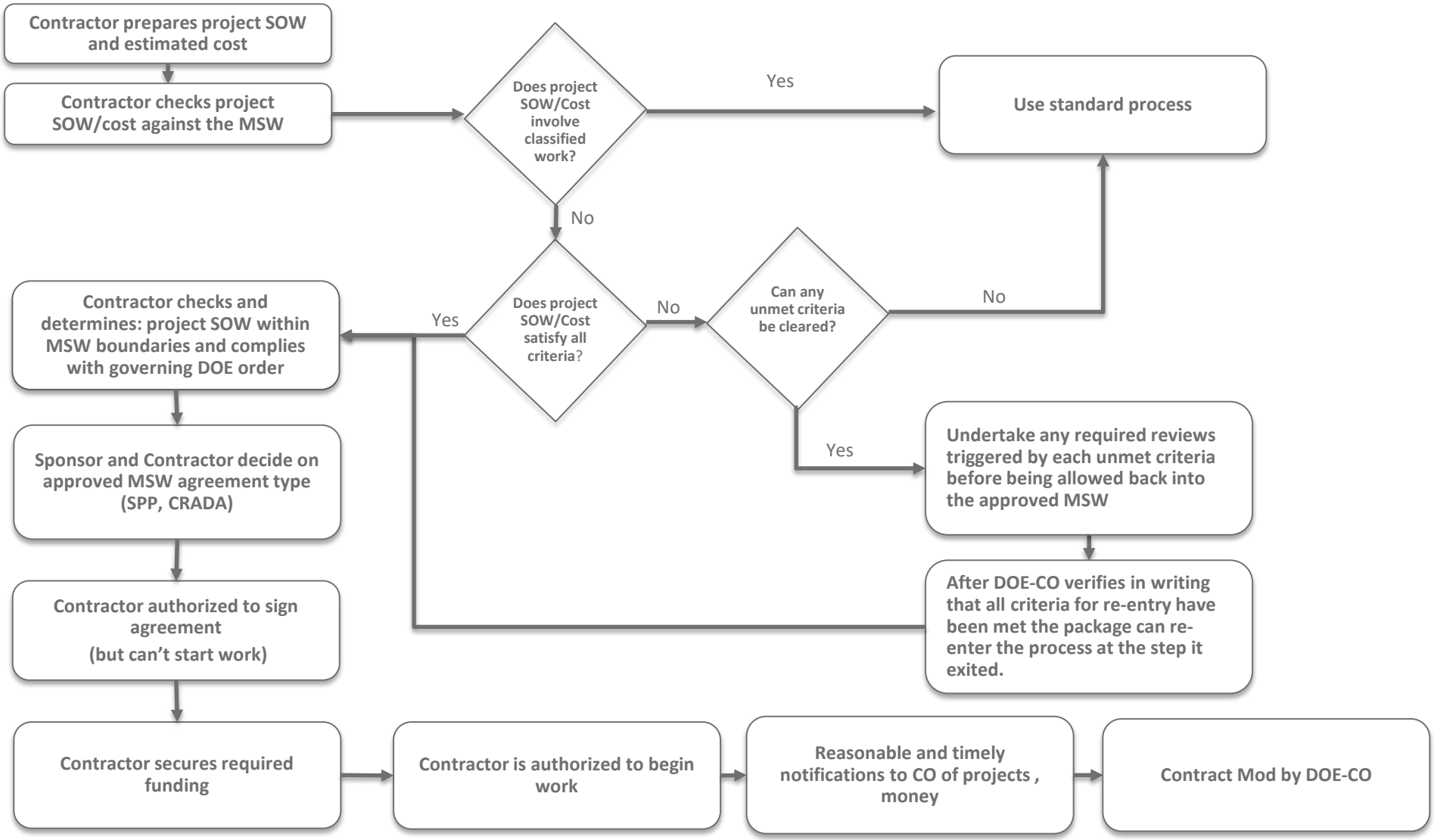
3.4.1 *Periodic Review of the MSW.* In addition to the reauthorization procedures under Section 3.1.1.3, the CO and the Contractor must mutually agree to procedures for a periodic CO review of the MSW program, e.g., the MSW and agreements processed under it. The periodic review must occur at least semi-annually for a period of two years from the effective date of the MSW and at least annually thereafter.

3.4.2 *Additional Oversight.* The CO may review or stop work on any individual project inappropriately processed through an MSW at the CO's sole discretion. The Contractor and the CO may agree to impose reasonable limits on the timeframe for CO review of individual projects.

3.5 MSW Workflow Guidance - Flowchart.

If an SPP agreement subject to DOE P 485.1 is approved for re-entry into, and processes through, an MSW, that agreement remains subject to restrictions in the SPP Order (DOE O 481.1E) on applying the DOE Class Patent Waiver No. W(C)-2011-009 when the Sponsor is either foreign-owned or -controlled or is sponsoring research on behalf of a foreign entity.

# Approved MSW – Individual Transaction Workflow




U.S. DEPARTMENT 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 Procedures Dealing with the Marking of Data Delivered Under the Contract.** 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 Other Related Provisions.** 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 DOE Contracts that Must Have a Technology Transfer Program.** 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]**

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[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 Principles

- 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.

*[References: DEAR 931.205-47(h), DEAR 952.216-7, Alt II, DEAR 970.3102-05-47(h), DEAR 970.5232-2]*

## 1.0 Summary of Latest Changes

This update: (1) incorporates changes resulting from the enhanced whistleblower protections made permanent by Public Law 114-261 in 2016; (2) incorporates relevant material from Acquisition Letter 2016-6; 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 is applicable to all elements of the Department, including the NNSA. The purpose of this chapter is to assist contracting officers (COs) with implementing the requirements at DEAR 931.205-47(h); and to establish procedures for consulting with counsel on allowability determinations.

**2.1 Background**. During the 1990s, DOE established its Contractor Employee Protection Program (10 CFR 708) that provided an administrative forum for contractor employees to bring claims of discriminatory action by contractors resulting from whistleblower activities of the employees. DOE addressed the issue of reimbursement of contractor costs related to defense of actions under this program through a rulemaking in 2000. In January 2013, a statutory pilot program was created to enhance whistleblower protections; in December 2016, the pilot program was made permanent (Pub. L. 114-261). This statute also clarifies that the cost principles at 10 U.S.C. 2324(k) and 41 U.S.C. 4304 and 4310 apply to costs incurred by a contractor, subcontractor, or personal services contractor.

**2.2 Requirements of the Cost Principle.**

2.2.1 Consultation with Counsel. DEAR 931.205-47(h) requires COs 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. 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 DOE to establish a whistleblower costs point of contact in the Office of General Counsel (GC). Before making an allowability determination on costs associated with whistleblower actions, COs or their designated representatives must consult with counsel. This is intended to promote an even-handed approach and to avoid unwarranted variation across DOE's complex of facilities.

2.2.1.1 GC 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.

2.2.1.2 Requests for Consultation. 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:
- Employee back-pay award;
- Damages, if any, awarded to employee, and whether they are compensatory or punitive;
- Employee legal fees reimbursed;
- Contractor legal fees reimbursed;
- Any provisions in the contract addressing the pertinent cost, including any reasons why the costs should be treated or funded differently than as a normal cost;
- Key facts or circumstances that may be pivotal in determination of allowability or unallowability (e.g., 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, email 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. GC 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.

2.2.2 Application of the Cost Principle in Specific Circumstances.

2.2.2.1 Whistleblower Claims after an Adverse Decision. Following an adverse decision by the DOE's Office of Hearings and Appeals under 10 CFR 708 or by a Department of Labor Administrative Law Judge under the Energy Reorganization Act, COs may not reimburse a contractor for any legal fees or expenses incurred (see 42 U.S.C. § 5853(1)). Similarly, claims under 41 U.S.C. 4712 proceedings in which the contractor or subcontractor is required to pay a monetary penalty or take corrective action may not be reimbursed (FAR 31.205-47(b)(2)).

2.2.2.2 Whistleblower Claims after Reversal of an Adverse Decision. In the event that an adverse decision is reversed, the CO may conclude that the costs of the proceeding, including costs of appeal, are allowable. However, in making that determination, the CO should review the materials from the administrative or judicial proceeding, especially the adverse decision and the decision reversing it. A reviewing tribunal may reverse a decision for many reasons, some of which may not involve the merits of the case (e.g., expiration of statute of limitations). In such cases, the CO may take account of the trial court's finding regarding the defendant's conduct.

2.2.2.3 Whistleblower Claims after Disposition by Consent or Compromise. After disposition of claims by consent or compromise (i.e., settlement), COs must determine allowability of costs only after considering the terms of the contract, relevant cost regulations, and relevant facts and circumstances, including Federal law and policy (DEAR 931.205-47(h)(2)(iii).) In settled proceedings, one key consideration in determining allowability is whether the contractor, in fact, retaliated against a whistleblower. The CO must review the available evidence, stipulations in the settlement agreement and other information, consulting with GC to assess whether the contractor violated Federal policy. If it is determined that the contractor more likely than not violated applicable law or policy, the costs associated with the related whistleblower proceeding may not be allowed.

2.2.2.4 Whistleblower Claims under 41 U.S.C. 4712 after Disposition by Consent or Compromise. FAR 31.205-47(c)(2)(ii) and (e)(3) provide that DOE may reimburse contractors for up to 80% of costs related to settled claims in which the CO, in consultation with GC, determines that there was very little likelihood that the claimant would have been successful on the merits.

In making this determination, the CO must consider all necessary information, including the contractor's written rationale (specific details, including a description of all claims and procedural actions in the case, copies of all filings and associated pre- or post-Complaint demand letters, the settlement agreement or proposed settlement agreement). The contracting officer may request any other information deemed necessary, including motions for summary judgment and responses to such motions.

Additionally, in making this determination, the CO must examine claims with an objective view of the surrounding facts. While exogenous circumstances not related to the actual facts of a claim or the actual conduct of the contractor may support a decision to settle a claim, such circumstances are not relevant to determining whether the contractor engaged in prohibited retaliatory conduct and should not be considered in the objective review of the merits of a claim.

**2.3 Accounting for Costs.** As with all costs, the contractor is responsible for proper accounting for whistleblower proceeding costs and for maintaining records to demonstrate that claimed costs have actually been incurred, are allocable to the contract, and comply with applicable FAR and DEAR cost principles (FAR 31.201-2(d)). In order to assess costs, the CO must also request a description of all claims and procedural actions at issue, as well as all filings in the proceeding and the executed or proposed settlement. The CO must inform the contractor that failure to expeditiously provide the requested information may result in a contracting officer determining that costs are unallowable. The CO may request additional information as necessary; however, such requests should not become a full-dress litigation on the merits of the whistleblower's claims and should not normally require a contractor to develop extensive additional evidence regarding the underlying events.

**2.4 Provisional Reimbursement.** The CO, in conjunction with GC, must consider all contractor requests for provisional reimbursement of whistleblower proceeding costs on a case-by-case basis.

2.4.1 Provisional Reimbursement of Whistleblower Claims. DEAR 931.205-47(h)(2)(i) provides that a CO may authorize reimbursement of costs on a provisional basis in appropriate cases. The CO shall require the contractor to submit a supporting justification that includes a thorough explanation of the facts underlying the proceeding; such facts may be used to determine the appropriateness of provisional reimbursement. For example, the CO must weigh a contractor's historical violations of Federal law or policies barring reprisal against whistleblowers in deciding whether to permit provisional reimbursement. The CO must also

request an explanation as to how legal costs will be effectively managed where such a description has not already been submitted in connection with a 10 CFR part 719 significant matter determination. A contractor's past compliance with Legal Management Plans, if applicable, should also be considered.

2.4.2 Provisional Reimbursement of Whistleblower Claims under 41 U.S.C. 4712. During the pendency of any proceeding under 41 U.S.C. 4712, COs are generally to withhold payment of associated costs, but are permitted to authorize provisional reimbursement if deemed to be in the best interest of the Government (see FAR 31.205-47(g)).

# 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 Principles

- The creation and maintenance of rigorous business, financial, and accounting systems by the contractor is crucial to ensuring the integrity and reliability of the cost data used by officials of the Office of the Chief Financial Officer, the Office of the Inspector General, and the office of the Director, Office of Acquisition Management.
- To ensure the reliability of these systems the Department requires each contractor to maintain an internal audit activity to support the Office of the Inspector General as part of the Cooperative Audit Strategy. The internal audit activity is responsible for performing operational and financial audits (including allowable cost reviews) and assessing the adequacy of management control systems.

*References: [DEAR 970.5203-1, Management Controls, DEAR 970.5232-2, entitled Payments and advances, DEAR 970.5232-3, entitled Accounts, Records and Inspection, Chapter 23 of the Financial Management Handbook, and Chapter 14 of the Inspector General Audit Manual]*

## 1.0 Summary of Latest Changes

This update: (1) corrects outdated references and streamlines descriptions of roles and processes to reflect more cogently the roles of the participants in the Cooperative Audit Strategy; 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 does not cover efforts and projects performed for DOE by other Federal agencies. This update does not contain any significant changes, but it does include clearer descriptions of the processes involved in executing the Cooperative Audit Strategy, including current best practices.

**2.1 Overview.** This chapter provides guidance to contracting officers in their reviews of: (1) the Internal Audit Implementation Design, submitted within 30 days of contract award, at each 5th year of contract performance, upon the exercise of an option, upon any

contract extension, or upon a significant contract change; (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. The contractor is required to provide these documents and perform supporting activities pursuant to DEAR 970.5232-3, Accounts, Records, and Inspection and DEAR 970.5203-1, Management Controls.

This chapter also explains the responsibilities and interactions of the contracting officer, the Office of the Inspector General, and the cognizant Chief Financial Officer in the operation of the cooperative audit strategy.

**2.2 Background.** The Office of Inspector General, in consultation with the Office of the Chief Financial Officer, the Office of Acquisition Management, 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 Office of Inspector General has implemented the Cooperative Audit Strategy at most major contractor locations.

The success of the Cooperative Audit Strategy depends on the Office of Inspector General and Contractor Internal Auditors working closely with Cognizant Chief Financial Officers, the Office of Acquisition Management, NNSA's Office of Acquisition and Project Management, contracting officers, and cognizant program personnel. The Office of Inspector General, Contractor Internal Auditors, and Department officials have established a Steering Committee for the Cooperative Audit Strategy to address current issues and implement ongoing improvements.

**2.3 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. The contracting officer, in conjunction with the Office of Inspector General and the Cognizant Chief Financial Officer, reviews and approves the report.

- *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 Statement of Costs Incurred and Claimed 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 upon (1) contract award (2) at each 5th year of contract performance (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 integrated accounting are required to prepare and submit the SCIC to the contracting officer annually. Contractors operating under non-integrated accounting are required to provide a SCIC annually unless otherwise agreed by the contracting officer. The contracting officer is responsible for coordinating the review of the SCIC with the Office of Inspector General and the Cognizant Chief Financial Officer, including coordinating to ensure contractor readiness for review and that reviews are planned. Submission and processing of the SCIC is discussed in Section 2d (2) of Chapter 23 of the DOE Financial Management Handbook.

- *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.

**2.4 Responsibilities**.

- Contracting Officer (CO): The CO, in conjunction with the Office of Inspector General and the Cognizant Chief Financial Officer, is responsible for reviewing and approving (1) the Internal Audit Implementation Design; (2) the Annual Audit Plan; (3) the Annual Audit Report; and (4) the SCIC. 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 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 Office of Inspector General (OIG): The OIG develops audit policy for the Department's programs and operations. In that capacity, the OIG is the cognizant auditor for the Department's major facilities contractors. The OIG relies upon the contractors' Internal Audit Activities to support the Cooperative Audit Strategy. The OIG provides guidance to cognizant COs, HCAs, Department site or office managers, and Cognizant Chief Financial Officers on the sufficiency of the design and operation of Internal Audit Activities, particularly as they support the SCIC. Representatives of the OIG 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 OIG will coordinate these evaluations and audits with the

cognizant COs, HCAs, and Cognizant Chief Financial Officers 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 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's 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 SCIC. The Cognizant 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.

## 2.5 Preparation and Submission of Documents by Internal Audit Activity.

2.5.1 Internal Audit Implementation Design. The contactor's Internal Audit Implementation Design must be submitted on time, include a detailed description of the design, and provide certain assurances.

2.5.1.1 Timely submission. 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, upon the exercise of an option, or any contract extension. (Additionally, while not explicitly stated in DEAR 970.5232-3, the contractor is obligated by the clear intent of DEAR 970.5232-3, sound contract administration precepts, and its responsibility to work hand-in-hand with the Department as a sound steward of taxpayer dollars, to submit the Internal Audit Implementation Design that is satisfactory to the CO at the 5th year of contract performance and upon any significant contract change.)

2.5.1.2 Description of design. 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 the 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 Internal Audit Activity.

2.5.1.3 Assurances. 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 the SCIC. 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.

2.5.1.4 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. 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 that 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, that has a negative impact on the work product of an internal audit or the internal audit activity.

2.5.1.5 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 mandatory for 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; and the extent to which non-audit work is requested of internal audit staff.

2.5.1.6 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.

2.5.1.7 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 OIG. A sample audit program is included in the OIG Audit Manual Chapter 14 along with additional guidance for contractor internal audit departments and can be accessed at http://www.energy.gov/sites/prod/files/2014/12/f19/DOE%20OIG%20Audit%20Manual%20%28Release%208%29%20-%202014.pdf

Deviations from the OIG audit program must be approved by the CO after consultation with the OIG and the Cognizant 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, the cognizant OIG, and the CO. 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.

2.5.1.8 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) make a request through the CO for DCAA assistance; or (3) make a 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 an M&O contractor would like to utilize the BPA to obtain audit support to audit one of its subcontractors, it should contact the CO at its site. Only a CO is authorized to place orders against the BPA. Independent contract audit support acquired by the M&O contractor to audit its subcontracts must be conducted by qualified auditors and must meet the Institute of Internal Auditors standards.

2.5.1.9 Peer Review. The purposes of peer review are primarily to (1) evaluate the Internal Audit Activity's compliance with the Standards for the Professional Practice of Internal Auditing; (2) appraise the quality of the Internal Audit Activity; and (3) make recommendations for improvement. Secondarily, peer reviews serve as a factor in the OIG'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's Internal Audit Activities. However, the OIG 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. The contractor should provide the OIG and the DOE field element a copy of its peer review report when it becomes available.

2.5.2 Annual Audit Plan. DEAR 970.5232-3 requires that by June 30 of each contract performance period, the contractor submit to the CO 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 Government Accountability Office or OIG or other developments that have occurred since the previous plan. The Annual Audit Plan should also consider high risk issues specified in the OIG 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 Cognizant CFO and the OIG 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 OIG to avoid duplication of planned OIG 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.

2.5.3 Annual Audit Report. The contractor's Internal Audit Activity is required to submit an Annual Audit Report by January 31st that describes and summarizes the results of the activities undertaken pursuant to the previous fiscal year's Annual Audit Plan. The Annual Audit Plan should include the Contractor's plans for addressing the findings disclosed during the fiscal year and summaries of specific contractor practices that resulted in unallowable costs. It should describe the allowability of costs audit methodology. The Annual Audit Plan is distributed to the CO and the HCA with a copy to the cognizant OIG 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.

# Management and Operating Contractors' Audit Coverage of Cost-Reimbursement Subcontracts

Guiding Principles

- Contracting Officers must ensure management and operating contractors:
  - adopt a documented approach for conducting audits with a reasonable threshold for selecting subcontracts; and
  - perform or obtain audits that, when applicable, meet the requirements of the Institute of Internal Auditors standards.

*References: [DEAR 970.5203-1; DEAR 970.5232-3; DEAR 970.5244-1]*

## 1.0 Summary of Latest Changes

This is a new Acquisition Guide chapter. It applies to Management and Operating (M&O) contracts.

## 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 guide chapter provides guidance to Contracting Officers regarding monitoring M&O contractors' fulfillment of their contractual obligation to provide adequate audit coverage of cost-type subcontracts.

### 2.1 Contractual Requirements for Subcontract Audit.

2.1.1 DEAR 970.5203-1 Management controls. DEAR 970.5203-1 requires the M&O contractor to maintain effective systems of management controls for both administrative functions and programmatic functions to ensure, among other things, that costs incurred are in compliance with the clauses and intended purposes of the contract and that resources are safeguarded against waste, loss, mismanagement, or misappropriation. Under the requirements of the clause the contractor must, among other things:

- Establish and maintain systems of controls satisfactory to the Government work;
- Document its system of controls;

- Periodically review its systems of controls to ensure they are adequate to provide reasonable assurance that the objectives of the systems are being accomplished and they are working effectively;
- Annually, or as directed by the Contracting Officer, supply the Contracting Officer copies of the reports reflecting the status of recommendations resulting from management audits performed by its internal audit activity and other audit organizations; and
- Maintain a baseline quality assurance program that implements documented performance, quality standards, and control and assessment techniques.

2.1.2 DEAR 970.5232-3 Accounts, records, and inspection. DEAR 970.5232-3 requires the M&O contractor to either conduct an audit of each cost-reimbursement subcontractor's costs or arrange for such an audit to be performed. The clause also requires the contractor to design and maintain an internal audit plan and an internal audit organization.

2.1.2.1 Clause requirements. Under the requirements of the clause the contractor must, among other things, within 30 days of contract award and at each 5th year of contract performance, the exercise of any contract option, or the extension of the contract, submit to the Contracting Officer for approval an Internal Audit Implementation Design to include the overall strategy for internal audits. 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, 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. The Internal Audit Implementation Design must describe:

- The internal audit organization's placement within the contractor's organization and its reporting requirements;
- The audit organization's size and the experience and educational standards of its staff;
- The audit organization's relationship to the corporate entities of the contractor;
- The standards to be used in conducting the internal audits;
- The overall internal audit strategy of the contract, considering particularly the method of auditing costs incurred in the performance of the contract;
- The intended use of external audit resources;
- The plan for audit of subcontracts, both pre-award and post-award; and
- The schedule for peer review of internal audits by other contractor internal audit organizations, or other independent third party audit entities approved by the Contracting Officer.

2.1.2.2 Reports. The clause requires two reports:

- By each January 31 of the contract performance period, the contractor must submit an annual audit report, providing a summary of the audit activities undertaken during the previous fiscal year that reflects the results of the internal audits during the previous fiscal year and the actions to be taken to

resolve weaknesses identified in the contractor's system of business, financial, or management controls; and

- By each June 30 of the contract performance period, the contractor must submit to the Contracting Officer an annual audit plan for the activities to be undertaken by the internal audit organization during the next fiscal year that is designed to test the costs incurred and contractor management systems described in the internal audit design

2.1.2.3 Required revisions. The clause also gives The Contracting Officer the authority to require revisions to the documents the clause requires the contractor submit, including the design plan for the internal audits, the annual report, and the annual internal audits.

2.1.2.4 Remedies for Unsatisfactory Performance. Regarding remedies for unsatisfactory performance, the clause contains the following language: " If at any time during contract performance, the Contracting Officer determines that unallowable costs were claimed by the contractor to the extent of making the contractor's management controls suspect, or the contractor's management systems that validate costs incurred and claimed suspect, the Contracting Officer may, in his or her sole discretion, require the contractor to cease using the special financial institution account in whole or with regard to specified accounts, requiring reimbursable costs to be claimed by periodic vouchering."

2.1.2.5 Penalties for Unallowable Costs and Other Actions. The Contracting Officer may: impose a penalty under 48 CFR 970.5242-1, Penalties for Unallowable Costs; require a refund; reduce the contractor's otherwise earned fee; and take such other action as authorized in law, regulation, or the contract.

2.1.3 DEAR 970.5244-1 Contractor Purchasing System. DEAR 970.5244-1 requires the management and operating contractor to provide for post-award audit of cost-reimbursement subcontracts, assigns responsibility for determining the costs allowable under each cost-reimbursement subcontract to the contractor, and emphasizes that for costs to be allowable they must be incurred per the FAR and DEAR cost principles.

**2.2 How M&O Contractors Meet Contractual Requirements for Subcontract Audit**. M&O contractors may use their internal audit staff, engage contract auditors, or use the services of DCAA to perform audits of their subcontractors. The internally performed audits must, at a minimum, meet the Institute of Internal Auditors Standards.

**2.3 How DOE Monitors Contractors' Provision of Adequate Audit Coverage of Cost-Reimbursement Subcontracts**.

2.3.1 Joint Responsibility. DOE officials from three offices--the Contracting Officer, representatives of the Inspector General (IG), and representatives from the Office of the Chief Financial Officer (CFO)--are primarily responsible for monitoring management and operating contractors' fulfillment of their contractual obligation to provide adequate audit coverage of cost-type subcontracts. They coordinate their oversight primarily through the

execution of the cooperative audit strategy.

2.3.2 Cooperative Audit Strategy. The cooperative audit strategy allows the Department to rely on the work of contractors' internal audit activities. Its success depends on the IG and contractors' internal auditors working closely with Contracting Officers and the CFO. Therefore, there should be frequent communication between these officials, particularly when changes occur in the Internal Audit Implementation Design or the Annual Audit Plan.

2.3.3 Approval of Contractor's Submissions. The Contracting Officer, in conjunction with the IG and CFO, reviews and approves each contractor's Internal Audit Implementation Design, Annual Audit Plan, and Annual Audit Report. The Contracting Officer should coordinate the review of the Annual Audit Plan with the IG and CFO by July 15th of each year. Thereafter, each contractor will provide a copy of its approved Annual Audit Plan to the Contracting Officer, Head of Contracting Activity, local IG audit office with cognizance over the contractor, and designated IG Headquarters point of contact.

2.3.4 The Cognizant Auditor. The IG, the cognizant auditor for M&O contracts, develops audit policy, provides guidance to the Contracting Officer and the CFO on the sufficiency of the design and operation of the contractor's internal audit activities, and periodically evaluates both the contractor's internal audit activities and the contractor's audits. The IG assists the Contracting Officer in reviewing and approving each contractor's Internal Audit Implementation Design, Annual Audit Plan, and Annual Audit Report.

2.3.5 The CFO. The CFO provides expert counsel and guidance to the Contracting Officer on the adequacy of the contractor's financial management system. The CFO assists the Contracting Officer in reviewing and approving each contractor's Internal Audit Implementation Design, Annual Audit Plan, and Annual Audit Report.

## 2.4 Office of Inspector General Audits.

2.4.1 Summary of Audit Results. DOE IG audits over the past several years of M&O contractors' audit coverage of cost-type subcontracts have revealed subcontract audit issues and indicate the need for a top-down approach to resolve those issues, which have occurred at multiple sites. The audits discovered significant subcontract costs that either had not been audited or had not been reviewed in a manner that met the Institute of Internal Auditors Standards. Clearly, as the IG and the Senior Procurement Executives agreed, these issues could only have arisen because M&O contractors failed to develop and implement effective subcontract audit policies, and the issues' existence substantially increases the risk that unallowable costs will be incurred and billed without being detected in a timely manner. To resolve these issues, it is imperative Contracting Officers ensure contractors both: adopt a documented risk based approach for conducting audits with a reasonable threshold for selecting subcontracts; and perform or obtain audits that meet the requirements of the Institute of Internal Auditors standards.

2.4.2 Serious Issues Identified by the Audits. DOE IG audits have revealed significant subcontract audit issues. Some specific issues were:

- Lack of procedures requiring subcontract audit;
- Procedures requiring subcontract audit were not based on a reasonable risk-based approach;
- Procedures requiring subcontract audit did not require audits meet required professional standards (the standards set by the Institute of Internal Auditors); and
- Procedures were adequate for both how audit coverage was determined and professional standards being required, but the procedures were not followed.

**2.5** **Best Practices**. Each Contracting Officer must ensure, using the tools and processes of the Cooperative Audit Strategy and taking any other contract administration actions appropriate, that M&O contractors: adopt a documented approach for conducting audits with a reasonable threshold for selecting subcontracts; and perform or obtain audits that meet the requirements of the Institute of Internal Auditors standards. Specifically, each Contracting Officer, at a minimum, must:

- Demand the contractor submit all required documents on time;
- In reviewing and approving the contractor's Internal Audit Implementation Design, Annual Audit Plan, and Annual Audit Report consult with the IG and the CFO and jointly determine whether the contractor's planning and its execution of its planning have resulted in, and will continue to result in, provision of adequate audit coverage of its cost-type subcontracts;
- Ensure all of the specific subcontract audit issues identified in IG audits either do not exist for the contractor (or if they do exist they are explicitly addressed and appropriately resolved);
- Require the contractor to correct any inadequacies in its systems of management controls related to subcontract audit before granting related approvals; and
- Employ any appropriate contractual remedy if the contractor fails to provide adequate audit coverage of its cost-type subcontracts.

# 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)

Subcontractor:

NAME

ADDRESS

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

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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

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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:

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- 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.]

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## 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.

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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.

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**CLAUSE 8 - ORDER OF PRECEDENCE**

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

**CLAUSE 9 - SECURITY REQUIREMENTS**

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

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

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

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

E. Within 15 days of receiving the written notification of the Subcontractor's stated inability to proceed, the Contractor's Procurement Representative must determine whether (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

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"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.

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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.<br>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 |

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| | |
|---|---|
| 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. |

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**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)

# DOE's Oversight of its M&O Contractors' Purchasing Systems

Guiding Principles

- Contracting officers should take advantage of all of the resources DOE provides to ensure their M&O contractors meet FAR's requirements for their purchasing systems.

*[References: FAR Part 44, DEAR Part 970.44]*

## 1.0 Summary of Latest Changes

This is a new Acquisition Guide chapter.

## 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. This chapter does not cover efforts and projects performed for DOE by other Federal agencies.

The purpose of this chapter is to establish a clear construct of how DOE ensures its M&O contractors meet the FAR's requirements for their management of their purchasing systems.

### 2.1 FAR Requirements.

2.1.1 The Contractor's Purchasing System. FAR requires a contractor's purchasing system ensure the contractor: spends Government funds efficiently and effectively; and complies with Government policy when subcontracting.

2.1.2 How the Government Assesses the Contractor's Purchasing System. The FAR requires the contracting officer in overseeing the contractor's purchasing system to:

- Create a plan at contract award with the help of specialists to maintain a sufficient level of surveillance to ensure that the contractor is effectively managing its purchasing program;

- Execute the surveillance plan and ensure that the contractor is effectively managing its purchasing program; and

- Based upon his/her surveillance, decide at contract award and every three years if a contactor purchasing system review is necessary (and arrange for one if one is necessary).

The FAR requires the contracting officer, when developing and executing a surveillance plan for a contractor's purchasing system or conducting a contractor purchasing system review, to consider the following (FAR 44.202-2 and FAR 44.303):

Is the contactor--

- Following its approved make-or-buy plan, if any?

- Obtaining special test equipment, equipment, or real property from Government sources when appropriate?

- Selecting supplies, equipment, or services that are technically justified?

- Complying with its contract's requirements for subcontracting with small businesses and purchasing from nonprofit agencies designated by the Committee for Purchase from People Who Are Blind or Severely Disabled?

    - Including establishing and following policies for subcontracting with small businesses?

- Obtaining adequate price competition when appropriate and justifying its determination adequate price competition is not appropriate?

    - Including using market research effectively?

- Adequately assessing subcontractors' alternate proposals, if offered?

- Using a sound basis to select and determine the responsibility of subcontractors?

- Obtaining certified cost or pricing data when appropriate or data other than certified cost or pricing data when appropriate and performing adequate cost or price analysis?

    - Including establishing and using effective pricing policies and techniques?

- Including appropriately treating affiliates and other concerns having close working arrangements with the contractor?

- Using subcontract types appropriate for the risks involved and consistent with current policy?

- Adequately considering what is needed when planning to use subcontracts that will involve using Government-provided equipment and real property?

- Adequately and reasonably translating prime contract technical requirements into subcontract requirements?

- Complying with applicable cost accounting standards in awarding subcontracts?

- Determining if potential subcontractors are in the System for Award Management Exclusions?

  - Including establishing and using methods to

    - evaluate subcontractor responsibility, and

    - if subcontracting with a party on the Exclusions list, adequately protect the Government's interests?

- Effectively planning for, making awards under, and performing contract management of major subcontract programs?

- Effectively using management control systems, including internal audit procedures, to administer progress payments to subcontractors?

- Using higher-level quality standards?

**2.2 DOE's Construct for Meeting the FAR's Requirements for Overseeing Contractor Purchasing Systems.** DOE's construct for ensuring its M&O contractors (and other contractors if appropriate) effectively manage their purchasing systems comprises the development and execution of the FAR surveillance plan (surveillance) supported by:

- The DOE risk assessment tool (surveillance);

- The DOE handbook for contractor purchasing system reviews;

- Utilization of M&O contractors' purchasing expertise; and

- Performance Management Reviews (PMRs) and Cooperative Audit Strategy.

**2.3 Details of DOE's Construct for Meeting the FAR's Requirements for Overseeing Contractor Purchasing Systems.** In other words, DOE meets FAR's requirements regarding overseeing the contractor's purchasing system by:

- Requiring the contracting officer at contract award to create and execute the required FAR surveillance plan to maintain a sufficient level of surveillance; and in support of that plan:
    - Requiring the contracting officer to use a DOE risk assessment tool as a benchmark to:
        - Ensure he/she is maintaining the sufficient level of surveillance; and
        - Determine both at contract award and periodically if a contactor purchasing system review is necessary (and obtain one if one is necessary);
- Requiring the contracting officer to obtain a contactor purchasing system review every six years, regardless of the contracting officer's determination of the need for one;
- When a contractor purchasing system review is necessary or required, sending a contingent of federal and contractor officials, headed by a federal official, to conduct it using a DOE handbook (currently titled "PERT") that ensures the contingent's review--
    - Includes FAR's thirteen "considerations" (FAR 44.202-2) and eleven "special attention" areas (FAR 44.303), while taking into account DOE's unique utilization of the M&O contractors' purchasing expertise; and
- Using PMRs and the capabilities available under the Cooperative Audit Strategy to provide additional assurance the contracting officer's execution of his/her surveillance plan is ensuring the contractor's effective management of its purchasing program.

**2.4 FAR Surveillance Plan, DOE Risk Assessment Tool, DOE Handbook, and DOE Utilization of the M&O Contractors' Expertise.**

2.4.1 FAR Surveillance Plan. The FAR requires the contracting officer to ensure the contractor is effectively managing its purchasing system. In consonance with that requirement, FAR also requires the contracting officer to develop a plan to maintain a sufficient level of surveillance and to do so with the help of subcontacting, audit, pricing, technical, and other necessary specialists. The plan should cover: the "phases" of the contractor's purchasing system (preaward, postaward, performance, and contract completion); the "operations" that affect the contractor's purchasing system; and the effectiveness of the contractor's corrective actions taken as a result of Government recommendations.

In addition to requiring the contracting officer to execute the surveillance plan, in consonance with that requirement FAR also requires the contracting officer to determine at contract award and every three years after if a contactor purchasing system review is required—and arrange for one if one is required. DOE adds an additional requirement—the contracting officer must arrange for a contractor purchasing system review at least every six years regardless of his/her determination of whether one is needed.

2.4.2 DOE Risk Assessment Tool. DOE provides the contracting officer its risk assessment tool to help him/her follow a consistent and sound approach to:

- Maintain a sufficient level of surveillance of his/her contractor's purchasing system; and

- Determine if a contractor purchasing system review is needed.

In other words, the tool helps the contracting officer:

- Assess the health of the contractor's purchasing system;

- Document his/her assessment; and

- Support his/her determination of whether a contractor purchasing system review is needed.

2.4.3 DOE Handbook for contractor purchasing system reviews. When DOE conducts a contractor purchasing system review, it uses a contingent of federal and contractor officials, headed by a federal official. A "contractor purchasing system review" means the complete evaluation of a contractor's purchasing of material and services, subcontracting, and subcontract management from development of the requirement through completion of subcontract performance."

In conducting its review, the contingent follows a handbook to ensure its evaluation of the contractor's purchasing system:

- Includes the thirteen "considerations" listed in FAR 44.202-2;
- Gives "special attention" to the eleven areas listed in FAR 44.303(a) through FAR 44.303(k); and
- Takes into account DOE's unique utilization of the M&O contractor's expertise.

2.4.4 DOE Unique Utilization of M&O Contractor Expertise. DOE takes advantage of its M&O contactors' unique expertise by:

- Allowing them to use their contracting procedures as the basis for developing their purchasing systems;
- Recognizing their purchases are neither Federal procurements nor directly subject to FAR; and
- Ensuring they apply the best in commercial purchasing practices.

# 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?

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# CHAPTER 71 - REVIEW AND APPROVAL OF CONTRACT AND FINANCIAL ASSISTANCE ACTIONS


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# 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 provides useful subcontract consent review practices and guidance and clarifies the Contractor Purchasing System Review (CPSR) waiver request 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).

Based on lessons learned from BCRs of several major acquisitions in fiscal year 2019, MA-621 is implementing a “murder-board” type approach to all BCRs. This approach entails field site acquisition teams sharing draft acquisition documents up-front as part of a collaborative review process, followed by a meeting scheduled to discuss proposed review comment resolution with MA-621 and other support reviewers. This process is in lieu of the back and forth document revision submissions via email that commonly occurred under the previous review process. The intent of this “murder-board” approach is to avoid any major issues arising later in the approval process. In most cases, local independent review and site counsel review should have occurred prior to sharing documents with MA-621 for review.

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 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 2.2.1 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 previous 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.*

2.2.1 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 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 42.201.
- 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), are not subject to BCR. Continuations of financial assistance awards that involve budget periods previously evaluated at the point of the base award are also not subject to BCR. However, MA-621 reserves the right to call these actions in for BCR in the event circumstances warrant additional review.*

2.3 BCR Document Submission/Coordination Requirements. 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.

Sharing individual pieces of documentation and early draft documents, versus waiting for an entire document to be finalized, will 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. Draft documents 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.

Prior to the HCA submitting the official/final documents for BCR, all comments must be resolved by a real-time comment resolution discussion via an available conferencing method (e.g., Cisco WebEx Session, Virtual Teleconferencing (VTC), or in-person site visits). Attendees should include those offices that provided substantive comments on the draft documents. *In those instances where the CO believes a real-time comment resolution discussion would not be beneficial, a business case must be submitted by the field site to MA-621 in order to obtain a waiver of this process*. After comments are resolved via the discussions, the HCA may submit the approved documents for BCR and MA-621 will process the BCR request accordingly. Prior to the HCA submitting a package to MA-621 for BCR, 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 package from being approved/cleared. Because much of the review process occurs early on through collaborative review between offices, the HCA BCR submission serves primarily as a way to document the official contract file with written evidence of the required approvals prior to moving forward with an action. The HCA requesting formal BCR should understand that if outstanding issues exist when a document is submitted for Formal BCR, it is the right of MA-621 to request an additional murder board style meeting to resolve these issues.

Section 2.4 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 2.4, the CO should consult the applicable regulation, policy, or the procurement office's designated MA-621 liaison. *Note: Certain regulations and DOE policies prescribe requirements for the coordination of packages with specific headquarters offices for review and concurrence prior to submission to MA-621 for BCR (e.g. coordination with the Office of Small and Disadvantaged Business Utilization (OSDBU) and Office of the Chief Information Officer). It is the site's responsibility to ensure those reviews and concurrences have taken place.*

2.3.1 BCR Comment Definitions. When providing feedback 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 strongly encouraged.*
- **Clarification**: Additional information, explanation, or clarification needed to improve the document. *Response required, for further discussion.*
- **Suggestion**: May improve the document flow, comprehension, logic and/or analysis. *Optional, for consideration.*
- **Editorial**: Spelling, punctuation, grammar, etc.

2.4 Examples of BCR Action Required Documentation 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, Task Orders Indefinite Delivery/Indefinite Quantity (IDIQ)Contracts, 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. | Subcontract Consent Actions |
| Example 9. | Performance Evaluation Management Plans/Award Fee Plans |
| Example 10. | Interagency Agreements |
| Example 11. | 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 (to be submitted upon clearance of the RFP and prior to proposal receipt;
- 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, Task Orders under IDIQ Contracts, Modifications, Requests for Equitable Adjustments, and Change Orders**

The BCR of these actions will typically require the following information/documentation:

- Draft RFP/Draft Request for Task Order Proposal/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 limited 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. 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. As with prime contract actions, early collaboration on subcontract acquisition approaches between the site CO and MA-621 should occur well in advance of site submittal of a BCR review package. Acquisition plans and solicitations for subcontract actions should be discussed with MA-621 **early in the acquisition process** to prevent any disagreements at the time of the final subcontract consent request BCR submittal.

A helpful template to document CO analysis of subcontract consent packages can be found on Acquisition ANSWERS at https://community.max.gov/x/85o0Ww. COs are encouraged to utilize this template checklist, or a locally designed template that contains the same information, when documenting the analysis required by the FAR.

**Example 9 – Performance Evaluation Management Plans/Award Fee Plans**

For new awards and prior to the issuance of a modification to incorporate the annual or a revised PEMP/AFP, the following information shall be provided to MA-621 for BCR:

- Documentation supporting the fee methodology in accordance with Acquisition Guide Chapter 16.405;
- 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 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 contracts subject to the Procurement Evaluation and Re-Engineering Team (PERT) process, upon completion of the CO Risk Assessment Tool, if the CO determines that they would like to seek a Targeted PERT Review in lieu of a conventional PERT Review, a waiver request should be submitted to MA-621 through the Annual Call (see Section 2.2 of this Guide chapter) no later than one year prior to the second 3-year review cycle. The BCR of a CO waiver request 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><br>- 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).<br><br><u>Annual FPDS-NG Data Quality Validation and Verification (V&V) Certification:</u><br>- 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.<br><br><u>Quarterly Data Act Certification:</u><br>- 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.<br><br>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><br>- 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).<br><br><u>Annual FPDS-NG Data Quality Validation and Verification (V&V) Certification:</u><br>- 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.<br><br>Prime Awardees must report one month after sub-award. | Quarterly DATA Act Certification<br><br>DOE HCAs certify to the SPE that:<br><br>- 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<br>- FSRS reporting to assess compliance and completeness<br><br>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.<br><br>Awardees must update their entity registration annually. | Quarterly DATA Act Certification:<br>- 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.<br><br>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).<br><br>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:<br><br>Contractor Performance Assessment Reporting System<br><br>Contractor performance information must be collected, and a CPAR completed, on contracts/orders for systems and non- | Quarterly CPARS Review<br><br>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.<br><br>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.<br><br>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<br><br>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.<br><br>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.<br><br>Prime contractors are responsible for passing down subcontracting reporting | Per eSRS FAQs:<br><br>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:<br><br>Contracting Officer Responsibilities include:<br><br>(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).<br><br>(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).<br><br>Commercial Reports are due to be submitted by contractors within 30 days after the government's fiscal year.<br><br>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).<br><br>(i) The authority to acknowledge or reject SSRs for commercial plans resides with the contracting officer who approved the commercial plan.<br><br>(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.

# Procurement Management Review Program

Guiding Principles
- Ensure DOE procurements comply with all applicable policies
- Promote continuous process improvement in how DOE expends taxpayer dollars to achieve its missions

*[Reference: OMB Circular A-123; Redesignation of Authority and Redelegation of Authority Order No. 00-001.09 of October 22, 2019]*

## 1.0 Summary of Latest Changes

This update: (1) Moved all attachments to a dedicated MAX.gov page, (2) added Crosswalk of PMR Objectives and Topics, (3) deleted three sub-objectives regarding the effectiveness of site communications, (4) deleted the Charge Memo and all references thereto, (5) deleted PMR Program Coordinator and reassigned duties, (6) deleted references to the Annual PMR Program Review, (7) updated approach to M&O sites, (8) updated Line of Inquiry (LOI) team responsibilities with Review Area team responsibilities, (9) added virtual PMR procedures, (10) added Site Contracting Lead responsibilities, and (11) includes administrative changes.

## 2.0 Discussion

2.1 Authority. The Senior Procurement Executive (SPE) established the Procurement Management Review (PMR) program pursuant to the duties delegated in Department of Energy (DOE) Redesignation of Authority and Redelegation of Authority Number 00-001.09 of October 22, 2019, to *"provide overall management direction of the Department of Energy's (Department) procurement system"* and *"measure and evaluate procurement office performance against stated goals"*.

2.2 Mission Statement. The mission of the DOE PMR Program is to ensure that contract actions, financial assistance (FA) actions, and interagency acquisitions (IA) are awarded and administered in accordance with all applicable statutes, regulations, and federal policies. In addition, the PMR program will accomplish the following: (1) provide the DOE SPE data to make annual Federal Managers Financial Integrity Act (FMFIA) assurances, (2) minimize administrative operating costs, (3) reflect integrity, fairness, and transparency in DOE's business operations, (4) fulfill public policy objectives, and (5) provide for knowledge sharing and increased awareness among DOE procurement activities.

2.3 Vision. The DOE PMR Program will be an ongoing, forward-looking, strategic partnership, involving headquarters, the Heads of Contracting Activities' (HCAs') offices, and site offices, to ensure the effectiveness and integrity of the DOE acquisition system.

2.4 Objectives.

2.4.1 The DOE PMR Program is designed to evaluate whether the Department's procurement offices:

2.4.1.1 Have adequate resources and are effectively organized to carry out their assigned responsibilities;

2.4.1.2 Conduct procurement operations in a manner that facilitates successfully meeting the agency's mission;

2.4.1.3 Comply with laws, regulations, and departmental policies in all procurement actions and related activities;

2.4.1.4 Comply with contract terms, and ensure compliance by the contractor(s);

2.4.1.5 Maintain an appropriate and effective level of oversight of contractor activities;

2.4.1.6 Maintain and effectively use a system of internal controls and procedures;

2.4.1.7 Possess an appropriate level of delegated independent contracting authority;

2.4.1.8 Comply with the limits to the office's delegated authority, and any guidance received from headquarters;

2.4.1.9 Are full participants in DOE's acquisition knowledge sharing activities;

2.4.1.10 Make use of procurement information and data as a site management tool, as well as a means of encouraging awareness and providing feedback to the acquisition staff;

2.4.1.11 Ensure that data and information reported to internal and external activities and systems (FPDS-NG, GAO, OMB, Congress, etc.) is current, complete, and accurate; and

2.4.1.12 Conduct all activities in a manner reflective of the highest level of ethics, integrity, and fairness.

2.4.2 The DOE PMR Program will promote knowledge sharing by identifying procurement best practices and lessons learned and sharing this information with all DOE procurement offices.

2.4.3 The DOE PMR Program will promote continuous process improvement by identifying systemic or recurring procurement issues, including headquarters issues/opportunities for improvement that may impact DOE contracting activities' effectiveness, and making recommendations for their remediation.

2.4.4 The DOE PMR Program will promote knowledge sharing and professional development by including in its activities acquisition professionals from both headquarters and site offices, diverse specialties, experience levels, and backgrounds.

2.4.5 The DOE PMR Program will facilitate effective oversight and delegation of authority by reducing or increasing the level of headquarters' oversight (including the frequency of PMRs and other risk-based reviews), and by making recommendations to the SPE for changes in the level of procurement authority based on PMR observations.

2.5 Strategy.

2.5.1 The PMR Program will fulfill its mission through periodic, comprehensive PMRs of DOE site procurement office activities. The Office of Contract Management (OCM) plans, schedules, leads, and facilitates each review. The PMR Program delegates PMR Teams to conduct PMR reviews of each site procurement office.

2.5.2 Each PMR Team includes both headquarters and field personnel, including a variety of procurement-related specialties and backgrounds as appropriate for the types of actions reviewed. The PMR Team may also include one or more observers (e.g., entry-level 1102) as a professional development activity.

2.5.3 PMR Teams conduct reviews based on the site's submission of deliverables (See PMR Questions and Deliverables (Attachment 1)) for each Review Area (see Section 2.5.4) followed by site interviews and discussions with the site's acquisition staff and management regarding Review Area issues. Virtual PMRs may replace the onsite portion of the PMR.

2.5.4 Review Areas. The review consists of a detailed and tailored assessment of the following:

2.5.4.1 Organizational Structure

2.5.4.1.1 Assess the organization to ensure it is effectively and efficiently structured to support the procurement and programmatic mission.

2.5.4.2 Best Practices

2.5.4.2.1 Assess use of best practices, meritorious processes or procedures used by the office, and whether these practices can be utilized by other sites.

2.5.4.3 Systems

2.5.4.3.1 Assess procurement-related systems and data quality processes.

2.5.4.4 Policies, Procedures, and Internal Controls

2.5.4.4.1 Ensure policies and procedures are current and accurate. Assess the in-place internal controls.

2.5.4.4.2 Assess knowledge of and compliance with procurement related policies, procedures, and processes.

2.5.4.4.3 Assess procurement office pursuit of opportunities to use Spend Under Management and Best in Class vehicles.

2.5.4.4.4 Assess knowledge of and compliance with related policies, procedures, and processes and the effective management of the Purchase Card program.

2.5.4.5 Acquisition Management.

2.5.4.5.1 Assess office's effectiveness in planning, soliciting, awarding, and managing contracts under its cognizance.

2.5.4.6 Personal Property.

2.5.4.6.1 Assess personal property management by both the Government and contractor(s). *Note: The Office of Acquisition Management (MA-60) and the Office of Asset Management (MA-50) have an agreement whereby Industrial Property Management Specialists may accompany the PMR to minimize disruptions of multiple onsite reviews. The property review is separate and distinct from the PMR.*

2.5.5 A crosswalk between the evaluation Objectives (Paragraph 2.4), Review Areas (Paragraph 2.5.4) and Topics (Paragraph 3.3.4.1) is in Crosswalk of PMR Objectives and Topics (Attachment 2).

## 3.0 Procedures

3.1 Annual PMR Planning.

3.1.1 Generally, DOE procurement offices receive a PMR every four years. However, based upon the results in the PMR Report or otherwise (e.g. Business Clearance Review results, Risk Assessment Tool results), the Director, OCM, may recommend to the SPE that a particular site's PMR cycle be shortened to three years or extended to five years.

3.1.2 The Chief, Field Assistance and Oversight Division (FAOD) will review the PMR schedule with the Director, OCM early in the 4th quarter of each fiscal year for the upcoming fiscal year. The schedule is based on the PMR cycle for each site plus any special PMRs requested by the SPE. The schedule is maintained on the Acquisition Answers MA621 Procurement Management Reviews (PMR) page.

3.1.2.1 For each site scheduled, the Chief FAOD will work informally with the site Procurement Director (PD) or Contracting Lead to establish dates for the PMR.

3.1.3 The Director, OCM, will send an Annual PMR Call Letter (Attachment 3) to all HCAs and PDs. The letter will:

3.1.3.1 Identify the PMR sites and dates for the upcoming fiscal year and request nominations for participants as either PMR Team members or PMR observers.

3.1.3.2 Clearly state the time commitment required and that travel costs are the responsibility of the participant's organization.

3.1.3.3 Describe the many benefits to the participant, including earned Continuous Learning Points (CLPs) which is typically 20 CLPs for a one-week PMR.

3.1.3.4 For planning purposes, send a courtesy copy of the PMR schedule to the Office of Asset Management, MA-50.

3.1.4 The Director, OCM, will select the membership for each PMR Team from the OAM staff and the field nominations. The PMR team is composed of eight to twelve participants (not including observers), which includes:

3.1.4.1 Team Chairperson (Director, OCM or delegate)

3.1.4.2 Team Lead (Chief, FAOD or delegate)

3.1.4.3 The FAOD liaison (FAOD Procurement Analyst)

3.1.4.4 Procurement Analyst (Strategic Program Division)

3.1.4.5 Procurement Analyst(s) (FAOD or Procurement Policy Division). Quantity: 1-2

3.1.4.6 Various Specialist (Systems Division). Quantity: 1

3.1.4.7 Contract Specialists or Procurement Analysts (other field or headquarters organizations, including MA-64). Quantity: 2-4

3.1.4.8 The Departmental Purchase Card Program Coordinator (virtual participant)

3.1.4.9 Property Specialist(s) (names provided by MA-50). Quantity: 1-2

3.1.5 For virtual PMRs the Director, OCM, will generally select the team membership from the OAM staff. Each virtual PMR Team is composed of between four to nine participants to include:

3.1.5.1 Team Chairperson (Director, OCM or delegate)

3.1.5.2 Team Lead (Chief, FAOD or delegate)

3.1.5.3 The site liaison or FAOD liaison (FAOD Procurement Analyst)

3.1.5.4 Procurement Analyst (Strategic Program Division). Quantity: 0-1

3.1.5.5 Procurement Analyst(s) (FAOD). Quantity: 0-2

3.1.5.6 Various Specialist(s) (Systems Division). Quantity: 0-1

3.1.5.7 Contract Specialists or Procurement Analysts (other field or headquarters organizations, including MA-64). Quantity: 0-2

3.1.5.8 The Departmental Purchase Card Program Coordinator

3.1.6 The Director, OCM, will notify each selected participant (team members and observers) of the site and selected dates for the PMR. The Director, OCM, will also notify the HCAs and PDs of the disposition of their nominations.

3.2 PMR Preparation.

3.2.1 PMRs are tailored to the specifics of the site.

3.2.2 The cognizant FAOD liaison must monitor the PMR schedule and Notice of Upcoming PMR letter to keep apprised of PMRs for their respective site(s). If scheduled, download and complete the PMR Milestone Schedule (Attachment 4) to ensure timely accomplishment of milestones.

3.2.3 At least six weeks prior to the PMR site visit (refer to PMR Milestone Schedule), the cognizant FAOD liaison will organize weekly Pre-PMR Team meetings. The meetings will cover PMR organization, logistics considerations, the daily PMR schedule (virtual or onsite), and Review Areas. Each meeting may include one or more file review briefs by the FAOD Procurement Analysts or PMR Team members and one or more deliverable review debriefs by the cognizant Review Area team(s). *Note: Invite site personnel to present an overview of the site operations, including details of its acquisition operations, at one of the first few meetings to facilitate a better understanding of the site.* For onsite PMRs, PMR Team Package (Attachment 8) provides a convenient way for the liaison to organize these meetings and provide the team with updated information. Based on the file and document reviews, the team will develop a list of interviewees which the cognizant FAOD liaison will provide to the site PD or Contracting Lead at least 10 days prior to the site visit.

3.2.4 Prior to the PMR entrance brief and in accordance with the PMR Milestone Schedule, Chief, FAOD will send a Notice of Upcoming PMR (Attachment 5) to the Site Manager.

3.2.5 The cognizant FAOD liaison will follow up with an email notice to the site Procurement Director, requesting a Contracting Lead, verifying the dates of the PMR, a preliminary PMR schedule, a list of logistics information needed from the site, and provide the unique link to the MAX.gov Site Documentation Page (i.e., deliverables page) (see PMR Questions and Deliverables (Attachment 1)). The liaison will work with the Contracting Lead to ensure submission of the pre-PMR deliverables in sufficient time to allow the PMR Team to conduct a thorough document review prior to the site or virtual visit. Also see PMR Milestone Schedule.

3.2.6 The cognizant FAOD liaison will provide the site's Personnel Warrant/Certification Status listing to MA-615 (Professional Development Division (PDD)), who will verify the information provided. The PDD will return a report to the liaison, identifying any contradictory warrant/certification information. The liaison will work with the site to resolve any contradictory information. The liaison will provide the final warrant/certification report to the Organizational Structure Review Area team for incorporation into its observations and recommendations, as appropriate. The liaison will upload the warrant information to the PMR site for the FAOD Procurement Analysts and PMR Team members conducting the file reviews to ensure the Contracting Officers (COs) were properly warranted at the time the contract/FA/IA action was signed.

3.2.7 STRIPES File Review. The liaison will request the iPortal Business Intelligence "Actions by Award Date" spreadsheet from MA-623 (Systems Division) which lists all of the site's contract actions, financial assistance (FA) actions, and interagency agreement (IA) actions since the last PMR. The query is also available via the Procurement Insight Center, Interactive Standard Reports Catalog.

3.2.7.1 The liaison will select a representative sample of approximately 80-100 (fewer for small sites) contract/FA/IA actions to be reviewed prior to the PMR. The sample will represent the universe of actions across multiple factors, including contract type, purpose of the action (e.g., funding, change order, option exercise, new award, financial assistance, etc.), CO, fiscal year, and procedures (Part 15, 12, 13, 43, and Subparts 8.4 and 16.5, etc. as applicable). Weight the sample to include a higher percentage of large dollar actions and those actions with increased risk. *Note for M&O PMRs, the liaison will select a smaller sample of M&O contract actions and if applicable, a larger sample of non-M&O contract actions. This approach to M&Os may constitute a smaller sampling of contract files but is offset by the supplemental reviews of subcontract consent packages, CPARS evaluation reviews, fee determinations, deliverables and Individual Subcontracting Plans. (See Section 3.3.4.4).*

3.2.7.2 Once the sample is selected, the Chief, FAOD, will assign the file reviews to the FAOD Procurement Analysts and PMR Team members for action.

3.2.7.3 The Procurement Analysts and team members will conduct the reviews in STRIPES, using the Contract, Financial Assistance, and Interagency Acquisition Action File Review Checklists (Attachment 6) as guidance. If STRIPES files are missing documentation, the reviewer will notify the liaison with the specific documents that are missing, and the liaison will request the site PD or Contracting Lead submit those documents, if available. Upon completion of the file reviews, each reviewer will summarize the observations in a PMR File Review Summary (Attachment 7). Team members will use the file review observations to develop follow-up questions for the interviews.

3.2.8 Each Review Area team, upon completion of the respective review, will summarize the observations, and arrange with the cognizant FAOD liaison to brief the observations to the PMR Team per the briefing schedule (see PMR Milestone Schedule). Any observations will be used to develop follow-up questions for the interviews.

3.2.9 For virtual PMRs, the PMR preparation tasks and timeframes described above and in the PMR Milestone Schedule will be adapted and adjusted by the Chief, FAOD, as appropriate for the level of effort required.

3.3 PMR Execution and Review Area Teams. Prior to the first PMR Team Meeting, the Director, OCM, will assign each PMR Team member to a specific Review Area. *Note: Review Areas may be added, deleted, or combined, at the discretion of the Director, OCM, based on knowledge of the site's procurement activities or specific areas of concern expressed by the HCA or SPE.* Most of the review time is spent in preparation of interviews through the review of the deliverables and the STRIPES file reviews. Each Review Area team is responsible for conducting a comprehensive review and is required to brief their respective review results to the PMR Team at the appointed team meeting prior to the site visit. The Review Area teams are as follows:

3.3.1 Organizational Structure. To assess the organization to ensure it is effectively and efficiently structured to support the procurement and programmatic mission, the organizational structure review team reviews the deliverables submitted and relies primarily on the interviews conducted at the site or virtual visit.

3.3.2 Best Practices and Systems. The team assesses the site's submittals which the site deems to be a best practice or meritorious process or procedure. The team also assesses the site's use of site-specific procurement-related systems, Federal systems, corporate business system for contract writing, STRIPES, and data quality.

3.3.2.1 Best Practices reviews the deliverables and, if applicable, a site demonstration of the submitted practice(s). The team will determine if the submitted practice, process or procedure can be utilized by other sites. The team's determination of whether the practice is a best, meritorious, or notable process or procedure is based on a subjective analysis on the uniqueness, ease of transferability, and applicability of the practice to other DOE sites.

3.3.2.2 Systems reviews existing data systems, site personnel knowledge of systems, policies, procedures, and internal controls regarding systems and data quality.

3.3.3 Policies, Procedures, and Internal Controls. The team ensures policies and procedures are current and accurate; assesses the in-place internal controls; and determines knowledge of and compliance with procurement related policies, procedures, and processes through interviews.

3.3.3.1 Strategic Programs Division (MA-622) will provide the cognizant FAOD liaison with a review and analysis of the site's use of Spend Under Management (SUM), Purchase Card (PCard) Program and any pertinent observations/recommendations from the most recent Procurement Evaluation and Re-Engineering Team (PERT) review. In particular, the information should focus on the effectiveness of the site's internal controls (documentation obtained from the site) and any systemic issues or concerns. Additionally, the report should identify and discuss any recent violations of PCard policy. If the cognizant FAOD liaison determines that SUM, PCard or PERT issues should be discussed during the interviews, the liaison will provide the information to the appropriate Review Area team(s). The liaison will ensure incorporation of any SUM, PERT or PCard-related observations or recommendations in the PMR Report.

3.3.3.2 Strategic Partnership Program (SPP). If any of the site's contractors have a SPP, the cognizant FAOD liaison will request a review and analysis of the site's administration of the SPP via MA-611 (Contract and Financial Assistance Policy Division) and include any observations in the PMR report.

3.3.4 Acquisition Management. The team assesses the office's effectiveness in planning, soliciting, awarding, and managing contracts, financial assistance actions and interagency agreements under its cognizance through policy and file reviews, and site personnel interviews.

3.3.4.1 STRIPES File Reviews. The team conducts a detailed file review of a sampling of the site's contract actions, financial assistance actions, and interagency acquisitions to assess if STRIPES contract files are complete, in good order, and sufficient to support the contracting action. The procurement related PMR Review Topics include, but are not limited to:

- Warrant and certification levels;
- Site organization, staffing, and succession plan;
- Roles and responsibilities;
- Local policies and procedures;
- Internal quality controls;
- Acquisition planning;
- Proper use of appropriate procedures (FAR 8.4, 12, 13, 14, 15, 16.5, or 17.5, or Title 2 of the Code of Federal Regulations (Financial Assistance (FA)) for new acquisitions;

- Use of category management by both the Government and contractor(s) (when appropriate);
- Appropriate use of contract types;
- Market research;
- Level of competition;
- Contract pricing;
- Source selection;
- Contract document structure, format, consistency, and thoroughness (including clauses);
- Compliance with the Federal Information Technology Acquisition Reform Act (FITARA);
- Proper usage and control of undefinitized contract actions;
- Contract change management;
- Contract modifications, option exercises, extensions, and terminations;
- Interagency Acquisitions;
- Financial Assistance awards, renewals, continuations, non-compliance notices, and terminations;
- Contract file documentation and organization;
- Subcontract consent/approval and oversight;
- Oversight of contractor business systems (cost accounting, project management, balanced scorecard, purchasing, risk assessment tool, etc.);
- Administration of contractor invoices;
- Audits and oversight of contract costs;
- Contract closeout;
- Data quality management; and
- Contractor performance assessment (i.e., CPARS) and contract fee administration (see Section 3.3.4.2);

3.3.4.2 The Acquisition Management team reviews the site's posting of Contractor Performance Assessment Rating System (CPARS) reports since the previous PMR. The assigned team member(s) to the CPARS review will report on the posting of all required reports; the timeliness of the reports; the quality of the reports; confirm the evaluation was performed, assessed, reviewed, approved, and documented in a timely manner (FAR 42.1503); and whether the CPARS reports align with other contractor performance assessments, such as fee determinations (i.e., PEMP scores align with contractor's annual CPARS ratings).

3.3.4.3 Annual incentive plans (e.g., PEMP) for contracts less than $50M. The assigned CPARS analyst will verify the plan was properly tracked, reviewed, and evaluated in accordance with Acquisition Guide 71.1, supporting rationale for the annual evaluation score is sufficiently documented, and the corresponding fee is in accordance with the plan results.

3.3.4.4 Management and Operating sites. The Acquisition Management team tailors the PMR approach to M&O contracts and sites based on the mix of M&O to non-M&O contract actions, if applicable. Regarding STRIPES file reviews, see note at paragraph 3.2.7.1. In addition to file reviews the team will review:

3.3.4.4.1 Small Business Subcontracting Plan – FAR 52.219-9 & 19.704. Ensure applicable reviews/approvals were obtained (Site CO, DOE Procurement Small Business Analyst, SBA, etc.) and documented. Ensure timely execution of the modification with appropriate signatures.

3.3.4.4.2 M&O contract deliverables. Verify deliverables are properly tracked and monitored ensuring timely submission. Verify deliverables are properly reviewed/approved/accepted/documented by site. Ensure additions/changes resulting from the language modifications to deliverables are appropriately reviewed, approved, accepted, and documented by site.

3.3.5 Personal Property Management. See Section 2.5.4.6

3.4 PMR Site Visit.

3.4.1 The PMR site visit typically lasts from two to five days, depending upon the number of acquisition staff at the site and the number and size of contract/FA/IA actions.

3.4.2 The first day of the PMR begins with a site overview briefing (including any necessary safety and security information) and a PMR Team In-Brief (Attachment 9).

3.4.3 PMR Team members spend a majority of the PMR time conducting interviews with site personnel. The interview schedule is set in advance by the cognizant FAOD liaison and the site PD or Contracting Lead. The site is responsible for ensuring that the interviewees are available for interviews at the assigned time and location.. To the maximum extent possible, strive to schedule interviews such that each interviewee is only interviewed once, i.e., each PMR Team member who needs to interview a particular interviewee must attend the one session with that interviewee. *Note: Due to sensitivities of potential human resources discussions, the one interview requirement does not apply to the Organization Structure team*. Interviews shall last no more than 90 minutes and should be attended by at least two team members. Each Review Area team is responsible for developing and/or selecting appropriate interview questions for each interviewee based on the interviewee's role in the site organization, the Review Area team's document reviews, and the appropriate review topics from Section 3.3.4.1. File reviewers who are on the PMR Team should develop follow-up questions based on all file review observations and attend the interview(s) with the cognizant Contracting Officer(s). Upon discovery of significant issues, interviewers should pursue a line of discussion with the interviewees that will enable root cause analysis of the issue. All interviews are non-attributional.

3.4.4 At the end of each day, the entire PMR Team will meet so that each Review Area team can informally present its observations from the day's interviews to the entire PMR Team.

The purpose of this "crosstalk" is to identify any common observations, any conflicting observations, and any concerns that should be passed to another Review Area team to explore/consider further.

3.4.5 After the crosstalk, the PMR Chairperson and the PMR Team Lead will informally brief the site management (typically, the site manager or deputy, and the PD or Contracting Lead) on the PMR Team's observations for that day. The purpose of the daily management brief is to ensure that the site management is not surprised by anything presented in the formal Out-Brief, and to prevent any misunderstandings related to the daily observations.

3.4.6 PMR Out-Brief

3.4.6.1 Typically, on the last day of the PMR, each Review Area team will meet to draft its formal observations and recommendations. Summarize these observations and recommendations in bullet form on one or two slides in the PMR Out-Brief (Attachment 10).

3.4.6.2 The entire PMR Team then meets to review the final PMR Out-Brief. This final review of the Out-Brief should ensure that observations are based on systemic observations, that observations from one Review Area team do not duplicate nor conflict with another Review Area team's observations, that recommendations are actionable, and that the information presented cannot be misinterpreted. The Out-Brief slides should present overarching observations and recommendations in a concise, bulleted format. Observations and recommendations need not be limited to the site activities but may include items directed toward the HCA or headquarters organizations. The final PMR Out-Brief is then presented to the SPE in advance of the briefing to the site.

3.4.6.3 The PMR Team presents the Out-Brief to the site management, including the site manager, deputy, PD/Contract Lead, and whatever site acquisition personnel the site manager would like to attend. All PMR Team members will attend the Out-Brief. Typically, each Review Area team will choose a spokesperson to present the team's observations and recommendations. When presenting its slide(s) during the Out-Brief, each Review Area team should elaborate on all specific recommendations and all *significant* observations to be included in the PMR Report.

3.4.6.3.1 Recommendations will include any corrective actions to be taken by the site; any changes to be made in headquarters' systems, policies, or procedures; any changes in procurement authority delegation or level of oversight; and the timeframe until the next PMR for that site.

3.4.6.3.2 If there are recommendations, the site is required to submit and implement a Corrective Action Plan (CAP). OCM will oversee and monitor the site's implementation of its CAP through quarterly site updates.

3.4.6.3.3 If changes to headquarters' systems, policies, or procedures are recommended, such recommendations will be coordinated through the appropriate headquarters' office.

3.4.6.3.4 As part of its knowledge sharing responsibility, OCM may share PMR observations, on a non-attribution basis, as appropriate, with the DOE procurement community.

3.4.7 PMR After Action Review. Upon completion of the Out-Brief, or as soon as the schedule allows (i.e., travel), the PMR Team will meet to conduct an after-action review. The cognizant FAOD liaison will collect lessons learned and recommended improvements to the PMR process and provide those comments to OCM. If the review cannot be completed immediately following the Out-Brief, it should be conducted as early in the following week as possible.

3.5 Virtual PMR Briefs and Interviews.

3.5.1 Schedules for virtual PMR briefings and interviews will be negotiated between the cognizant FAOD liaison and the PD or Contracting Lead. While FAOD can be flexible in scheduling this effort, site personnel must make reasonable accommodations for briefings and interviews to not unduly delay completion of the PMR.

3.5.2 Based on conversations with the FAOD liaison and the site PD, the Chief, FAOD, may decide to conduct a virtual In-Brief (Attachment 9) with site management and/or site procurement staff.

3.5.3 Interviews and the Out-Brief with site personnel will be conducted virtually, as appropriate. Otherwise, the interview process and the Out-Brief will generally follow the guidance provided in Sections 3.2 through 3.4 above.

3.6 The PMR Report.

3.6.1 The cognizant FAOD liaison is responsible for assembling and editing the PMR Report (Attachment 11). The PMR Report will be in accordance with the below milestones (also see PMR Milestone Schedule, Attachment 4):

| Action | Milestone |
|---|---|
| Draft Sections<br><br>Each Review Area team will provide the cognizant FAOD liaison with a draft of its section of the report. Each Review Area section should include a discussion of each of the observations, any root cause analysis conducted, and any resultant recommendations. The liaison will provide samples as needed for | Out-Brief +15 days |

| | |
|---|---|
| guidance. File review observations and recommendations will typically be included in the Acquisition Management section of the report. | |
| Draft Report<br><br>The cognizant liaison will assemble and edit the draft report for consistency. The liaison will route the draft PMR Report, via the Chief, FAOD, for approval by the Director, OCM. Upon approval. The liaison will send the draft report to the site PD or Contracting Lead for comment. | Out-Brief +35 days |
| Site Comment<br><br>Upon receipt of the site comments, the liaison will discuss the comments with the Chief, FAOD, and the Director, OCM, to determine what, if any, changes need to be made to the report. The liaison will coordinate revision of the report with the PMR Team members, as necessary. | Out-Brief +45 days |
| Participation Memorandum<br><br>After issuance of the PMR Report, the FAOD liaison will forward a PMR Participation Memo (Attachment 12) to each PMR participant. The memo will state the number of Continuous Learning Points (CLPs) earned for participation – typically 32 CLPs for a one-week PMR site visit. The FAOD liaison will also invite the PMR participants to provide any feedback regarding their experience, including any recommendations for improving the PMR process. | Out-Brief +55 days |
| Final Report<br><br>The FAOD liaison will route the revised PMR Report for approval by the SPE. Once approved, the liaison will send the final report to the cognizant HCA, site manager and PD/Contracting Lead, and request a CAP (if required), any responses to the observations and recommendations, and any suggestions for improving the PMR process. | Out-Brief +75 days |
| Corrective Action Plan<br><br>If required by the PMR Report, the site will provide a CAP (Attachment 13) to address the recommendations within the report. The CAP will be sent to the FAOD liaison within 30 days of receipt of the report. The CAP will describe one or more corrective actions for each recommendation, with a planned completion date for each action. The liaison will provide a copy of the CAP, along with any comments or suggestions received from the site to the Chief, FAOD. The liaison will report quarterly on the site's progress in completing the CAP to the Chief, FAOD. These quarterly reports will continue until the final CAP action is closed. | Out-Brief +105 days |

3.7 Knowledge Sharing.

3.7.1 Following each PMR, OCM will collect and evaluate lessons learned obtained from the site and the PMR Team to ensure continuous process improvement of the PMR program.

3.7.2 Chief, FAOD will post the listing of Best/Meritorious Practices on FAOD's PMR Community of Practice (CoP) website on MAX.gov.

3.7.3 Periodically, at the request of the Director, OCM, the Chief, FAOD, will prepare and deliver a trend analysis of PMR observations. Upon approval, the analysis will be posted on FAOD's PMR CoP website on MAX.gov.

3.7.4 At the request of the Director, OCM, the Chief, FAOD, will present information on the PMR Program at conferences, workshops, or meetings.

**4.0 Roles and Responsibilities**

4.1 Director, Office of Acquisition Management (OAM): As the Department's SPE, the Director, OAM:

4.1.1 May implement, modify, or abolish the PMR Program pursuant to the Authority cited in 2.1, above;

4.1.2 May participate in any or all portions of a specific PMR, including any preliminary or final briefings with site personnel;

4.1.3 May direct the cognizant HCA to adjust a site's procurement authority and/or review thresholds; and/or may adjust the next PMR cycle, based upon the observations and recommendations contained within the PMR Report;

4.1.4 Will approve the site's final completion of all action items contained in any required CAP; and

4.1.5 Will consider developing and implementing changes to the Department's procurement system, including, but not limited to, changes to policy, guidance, tools, and the PMR Program itself based on the results of the PMRs conducted.

4.2 Director, OCM: The Director, OCM, is the senior executive responsible for implementation of the PMR Program, will:

4.2.1 Annually review the PMR schedule for the upcoming fiscal year;

4.2.2 Notify all HCAs and Procurement Directors (PDs) of the PMR schedule for the upcoming fiscal year;

4.2.3 Solicit nominations for PMR Team members and observers from the HCAs and PDs;

4.2.4 Select team members and observers for each PMR from the nominees submitted and notify the HCAs and PDs of the selections;

4.2.5 Serve as Chairperson for each PMR Team;

4.2.6 Monitor the activities and end products of PMR Teams to ensure consistency, uniformity, and efficacy of PMR observations and recommendations; and

4.2.7 Based on risks revealed by a site's PMR, determine if additional procurement actions will be selected for Business Clearance Review below the delegated procurement authority threshold for review.

4.3 Chief, Field Assistance and Oversight Division (FAOD), OCM: The Chief, FAOD, will:

4.3.1 Serve as the Team Lead for each PMR Team;

4.3.2 In the absence of the Director, OCM, serve as Chairperson for a PMR Team;

4.3.3 Annually review the PMR schedule for the upcoming fiscal year;

4.3.4 Ensure new PMR Team members are trained;

4.3.5 Organize and assign PMR work to the FAOD Procurement Analysts;

4.3.6 Coordinate PMR activities and schedules with other organizations, as needed;

4.3.7 Ensure the consistency, uniformity, validity, and efficacy of contract file reviews;

4.3.8 Collect and organize PMR data and information obtained from individual PMRs;

4.3.9 Coordinate PMR knowledge-sharing, including the posting, on a non-attributional basis, of best practices, recurring observations, and key recommendations; and

4.3.10 Direct revisions to this Acquisition Guide Chapter, as needed.

4.4 Cognizant FAOD Procurement Analyst (Liaison) for the Specific PMR Site: The PMR FAOD liaison will perform PMR Team organization and site coordination functions, including the following:

4.4.1 Monitor the PMR schedule and complete the PMR Milestone Schedule as required;

4.4.2 Establish or coordinate the establishment of the PMR collaboration page on MAX.gov;

4.4.3 Organize and plan all PMR Team meetings;

4.4.4 Provide the site office with the specific PMR schedule and the list of deliverables;

4.4.5 Receive and distribute the site deliverables for review;

4.4.6 Arrange site logistics (e.g., hotel group reservations, information technology support, presentation equipment, transportation, communications, etc.);

4.4.7 Ensure the PMR Team is aware of any specific site safety or security requirements;

4.4.8 Select the contract files to be reviewed;

4.4.9 Coordinate the interview schedule with the site;

4.4.10 Assemble the In-Brief and Out-Brief slides;

4.4.11 Collect the final Review Area team write-ups and assemble them into the PMR Report;

4.4.12 Provide a draft copy of the PMR Report to the site PD (or Contracting Lead);

4.4.13 Obtain the site's responses to the draft PMR Report, and coordinate any resulting edits with the PMR Team;

4.4.14 Provide a copy of the final PMR Report to HCA and the site PD (or Contracting Lead);

4.4.15 Obtain the site's response to the report and CAP, if required;

4.4.16 Monitor and report on the site's progress in completing any corrective actions; and

4.4.17 Prepare the CLP certificates for PMR participants.

4.5 FAOD Procurement Analysts: The FAOD Procurement Analysts will:

4.5.1 Perform contract file reviews as assigned and prepare written reports thereon, and present observations to the PMR Team;

4.5.2 Participate as a PMR Team member as assigned; and

4.5.3 Assist and mentor inexperienced PMR Team members and observers, as needed.

4.6 PMR Team Members: Individuals selected to participate as PMR Team members will:

4.6.1 Clear their schedule as necessary to participate in all PMR Team activities;

4.6.2 Attend (in person or virtually) all PMR Team meetings;

4.6.3 Make travel arrangements as instructed by the FAOD liaison;

4.6.4 Participate in the review of Review Area deliverables with other members of the assigned Review Area team;

4.6.5 Brief the PMR Team on the Review Area deliverables;

4.6.6 Perform contract file reviews as assigned, prepare written reports and present observations to the PMR Team;

4.6.7 Participate in the site In-Brief, all assigned interviews, all Review Area coordination meetings, and the site Out-Brief; and

4.6.8 Participate in the drafting of the assigned Review Area section of the PMR Report with other members of the assigned Review Area team.

4.7 HCAs: HCAs will:

4.7.1 Nominate, or endorse a PD's nomination of, qualified candidates (GS-1102-13/14/15 with at least 3 years of DOE experience) to participate as PMR Team members;

4.7.2 Nominate, or endorse a PD's nomination of, qualified candidates (entry-level GS-1102s) to participate as PMR observers;

4.7.3 For a PMR scheduled to be performed at a site over which he or she has cognizance:

4.7.3.1 Review the PMR Report, and forward to the site manager;

4.7.3.2 If appropriate, adjust a site's delegation of procurement authority based upon the observations and recommendations of the PMR Report; and

4.7.3.3 Review and approve the site's response to the Procurement Report, including the CAP, if required.

4.8 PDs: Site PDs will:

4.8.1 Nominate qualified candidates (GS-1102-13/14/15 with at least 3 years of DOE experience) to participate as PMR Team members;

4.8.2 Nominate qualified candidates (entry-level GS-1102s) to participate as PMR observers;

4.8.3 Provide travel funding for any employee selected to participate as a PMR Team member or observer; and for a PMR scheduled to be performed at the PD's site:

4.8.3.1 Appoint a Contracting Lead (see Section 4.9) to coordinate PMR logistics and deliverables with the FAOD liaison;

4.8.3.2 Ensure site deliverables are provided in a timely manner to FAOD as requested;

4.8.3.3 Ensure site personnel are available for interviews during the PMR;

4.8.3.4 Participate in the site In-Brief, daily management briefings, and the site Out-Brief;

4.8.3.5 Provide the site response to the draft PMR Report,

4.8.3.6 Develop and provide a CAP, if required;

4.8.3.7 Monitor and periodically report on the CAP progress until all action items are closed; and

4.8.3.8 Request from the SPE, via the cognizant HCA, approval of completion of all CAP items.

4.9 Site Contracting Lead. The appointed Contracting Lead will:

4.9.1 Ensure site deliverables are provided on time as requested by the FAOD liaison based on the PMR Milestone Schedule;

4.9.2 Ensure PMR Questions and Deliverables responses are complete and thorough;

4.9.3 Coordinate the interview schedule with the FAOD liaison; and

4.9.4 Act as the single point-of-contact for the FAOD liaison for various logistical needs (e.g., computer access, building access) of the PMR Team.

## 5.0 Attachments

Attachment 1: PMR Questions and Deliverables
Attachment 2: Crosswalk of PMR Objectives and Topics
Attachment 3: Annual PMR Call Letter (template)
Attachment 4: PMR Milestone Schedule
Attachment 5: Notice of Upcoming PMR (template)
Attachment 6: Contract, Financial Assistance, and Interagency Acquisition Action File Review Checklists

Attachment 7: PMR File Review Summary (template)
Attachment 8: PMR Team Package (template)
Attachment 9: PMR Team In-Brief (template)
Attachment 10: PMR Out-Brief (template)
Attachment 11: PMR Report (template)
Attachment 12: PMR Participation Memo (template)
Attachment 13: Corrective Action Plan (template)