EPA 202-B-91-001

# EPA Contract Administration

# CONTRACT ADMINISTRATION

## FOR PROJECT OFFICERS, WORK ASSIGNMENT MANAGERS AND DELIVERY ORDER OFFICERS

U.S. Environmental Protection Agency
Procurement and Contracts Management Division

November 1991

## FOREWORD

We're pleased to take this opportunity to extend a warm welcome to all EPA Project Officers, Work Assignment Managers, Delivery Order Officers, and Delivery Order Project Officers to this course in Contract Administration. Your role as a contract manager is a vital and critical one. To assist you in this important capacity, the Office of Acquisition Management (OAM) developed this training course and manual which we hope you will find useful.

Our Agency has received serious scrutiny on contract management-related issues from Congressional oversight committees and the general public. The Office of Acquisition Management wants to work with you in partnership and give you the assistance you need to be an effective and responsible contract manager. The training you are about to receive is designed to provide you with an understanding of your professional responsibilities in managing and administering the technical aspects of EPA contracts. It also provides you with some useful examples and practical exercises which will enable you to become a more effective manager of the contracts you oversee.

We hope we have made this manual easy to read and use so that you will turn to it from time to time as questions arise in your role as a Project Officer, Work Assignment Manager, Delivery Order Officer, and/or Delivery Order Project Officer. If you have comments or recommendations about either the course or the handbook, please direct them to the Training and Certification Branch staff (3802F) or to your Contracting Officer.

Thank you for your participation and interest. We hope you enjoy the course.

Betty L. Bailey

Betty L. Bailey, Director
Office of Acquisition Management

Jeanette L. B

Jeanette L. Brown, Deputy Director
Office of Acquisition Management

Copy for PCMD-Certificates.

CONTRACT ADMINISTRATION COURSE REGISTRATION

_____
(Name: First, Middle Initial, and Last) (Date)

_____
(Title)

_____ _____
(Organization) (Mail Code)

_____
(Street Address of Organization)

_____ _____ _____
(City) (State) (Zip Code)

Work Phone: _____ _____
(Area Code) (Number)

Have you taken the 3½-day Project Officer Course? __ Yes __ No
Date Completed _____

Do you presently have interim Project Officer Certification?
__ Yes __No

Are you a Superfund employee? ____ Yes ____ No

---

_____
(Name: First, Middle Initial, and Last) (Date)

_____
(Title)

_____ _____
(Organization) (Mail Code)

_____
(Street Address of Organization)

_____ _____ _____
(City) (State) (Zip Code)

Work Phone: _____ _____
(Area Code) (Number)

Have you taken the 3½-day Project Officer Course? ___ Yes ___ No
Date Completed _____

Has your organizational address changes since taking the Project Officer Course? ____ Yes ____ No

Do you presently have interim Project Officer Certification ?
____ Yes ____ No

Are you a Superfund employee? ____ Yes ____ No

Copy for your Training Officer.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

APR 17 1990

MEMORANDUM

SUBJECT: Contracting at EPA

THE ADMINISTRATOR

TO: All Agency Personnel

Since coming to EPA, I have been continually impressed with the broad range of work that we perform. It follows that the expertise required to successfully perform such an assortment of functions must be equally varied. EPA is fortunate to employ a multi-talented workforce. However, we are still not able to do all of this work ourselves. We must get help from the outside, specifically by way of contractor support.

**Contract Management and Accountability**

Due to the extent of EPA's contracting, it is critical for us to effectively manage our contracts. In recent years, we have improved considerably by focussing on those individuals who perform the day-to-day contract management activities. However, in a very real sense, we are all contract managers. Each one of us, including myself and senior management, bears responsibility.

Agency accountability begins when we make a decision to use contractor support. And, once we accept a final product from a contractor, we become responsible for its content and for how it may be used in reaching Agency decisions. To assure accountability at senior management levels, I am requiring all EPA managers to include in their performance standards a requirement emphasizing contracting controls. The Procurement and Contracts Management Division (PCMD) has the lead in developing this language.

**Prohibited Contracting**

With increasing frequency, I am becoming aware of uses of contractor support that leave us open to criticism. In many cases, we have used contractors in areas of a policy and decision-making nature that should remain under the sole authority of EPA. Although I am certain that key decisions are being made internally by EPA managers, there is often the appearance that contractors make those decisions for us. This perception is highly damaging to EPA's credibility. And, it must be stopped.

As a result, I am instituting measures to maintain tighter control on the Agency's use of contracting support. Attachment A to this memorandum comprises a list of activities for which EPA will not contract. The prohibition of these activities will be

incorporated into all future contracts and current contractors will be alerted to this new policy. These prohibitions also extend to Agency subcontractors.

**Sensitive Areas**

Attachment B is a list of activities that often place the Agency in positions of vulnerability. They are not activities from which contractor involvement is precluded but are ones wherein we must exercise great control if we choose to contract for them. Over the next months, PCMD will be issuing direction regarding contracting for these types of activities. As a minimum, prior to procuring support in any of these areas, adequate control measures must be established to ensure a final Agency product that is unbiased and represents Agency thinking.

**Broadening Competition**

A high percentage of the tasks falling into the "sensitive" range are purchased by program offices under broad management consultant contracts. Having a limited number of contractors supporting us in so many of these areas creates great potential for conflict of interest. I ask senior management to help alleviate this situation by breaking requirements into smaller portions. Instead of just one contract, a program might be supported by two or three. This would reduce the conflict of interest potential and provide for more involvement of small and minority-owned businesses.

**Conclusion**

Within the near future, I will be issuing an EPA Executive Order which will implement in greater detail the policies discussed in this memorandum. The use of contractor support at EPA is a very practical way to meet our obligations. However, each of us is responsible for this Agency's reputation and for the ideas and opinions we express on behalf of it. Whenever a contract is used, we must ensure that we provide clear guidance to contractors on our thoughts, ideas, and positions and that we scrutinize contractor outputs to ensure they reflect this guidance. I am confident that each one of us will take ownership of this large responsibility and work to create an environment which is conducive to the accomplishment of our many tasks through the judicious use of contractual support.

William K. Reilly

William K. Reilly

Attachments

Attachment A

## PROHIBITED CONTRACTING ACTIVITIES AT EPA

1. The actual preparation of Congressional testimony

2. The interviewing or hiring of individuals for employment at EPA

3. Developing and/or writing of Position Descriptions and Performance Standards

4. The actual determination of Agency policy

5. Participating as a voting member on a Performance Evaluation Board; participating in and/or attending Award Fee meetings

6. Preparing Award Fee letters, even under typing services contracts

7. The actual preparation of Award Fee Plans

8. The preparation of documents on EPA letterhead other than routine administrative correspondence

9. Reviewing vouchers and invoices for the purposes of determining whether cost, hours, and work performed are reasonable

10. The development of Statements of Work, Work Assignments, Technical Direction Documents, Delivery Orders, or any other work issuance document under a contract that the contractor is performing or may perform

11. On behalf of EPA, actually preparing responses to audit reports from the Inspector General, General Accounting Office, or other auditing entities

12. On behalf of EPA, actually preparing responses to Congressional correspondence

13. The actual preparation of responses to Freedom of Information Act requests, other than routine, non-judgmental correspondence -- in all cases, EPA must sign it

14. Any contract which authorizes a contractor to represent itself as EPA to outside parties

15. Conducting administrative hearings

16. Reviewing findings concerning the eligibility of EPA employees for security clearances

17. The actual preparation of an office's official budget request

Attachment B

## ACTIVITIES OF POTENTIAL VULNERABILITY

The following activities very often require contractor involvement in programs that are dependent upon contractor support to accomplish their mission. These activities may result in the improper use of contractors if internal controls to ensure proper oversight have not been established. They may also lead to the perception that inherent Government functions have been assigned to contractors. Whenever contractors are used to perform these tasks, Agency employees must play an active role in overseeing the effort and making all final decisions. This requires close monitoring to ensure that final outputs reflect the Agency's positions, thoughts, and ideas.

1. Budget preparation support including workload modeling, fact-finding, efficiency studies, should-cost analyses, etc.

2. Reorganization and planning support

3. Support services such as analyses, feasibility studies, etc. to be used by EPA personnel in developing policy

4. Regulation development support

5. Any support in the in-house evaluation of another contractor's performance

6. Involvement in strategic acquisition planning

7. Support on improving contract management

8. Providing specialized expertise in the contractor selection process

9. Situations where contractors share office space with EPA employees

10. Providing specialized expertise in the development of Statements of Work, Work Assignments, other contract-ordered tasks

11. Support in preparing responses to Freedom of Information Act requests

12. Any situation wherein a contractor has access to Confidential Business Information and/or any other sensitive information

13. Any support involving EPA policy or regulatory interpretation, such as staffing hotlines, attending conferences on behalf of EPA, community relations efforts, conducting EPA training courses

14. Any situation where it can be assumed that the contractor is EPA, without specifically identifying itself as a contractor

15. Independently interpreting EPA policies or regulations on EPA's behalf to outside parties

## CONTRACT ADMINISTRATION COURSE
## AGENDA

**DAY 1**

| | |
|---|---|
| 9:00-9:30 | PURPOSE AND OVERVIEW - Chapter 1 |
| 9:30-10:30 | CONTRACT ADMINISTRATION AND THE AUTHORITY OF GOVERNMENT PERSONNEL - Chapter 2 |
| 10:30-10:45 | Break |
| 10:45-11:30 | ELEMENTS AND TYPES OF CONTRACTS - Chapter 3 |
| 11:30-12:00 | CONTRACT FUNDING - Chapter 4 |
| 12:00-1:00 | Lunch |
| 1:00-2:00 | STANDARDS OF CONDUCT - Chapter 5 |
| 2:00-2:30 | PLANNING AND PREPARATION - Chapter 6 |
| 2:30-2:45 | Break |
| 2:45-4:00 | ISSUANCE OF WORK - Chapter 7 |

**DAY 2**

| | |
|---|---|
| 9:00-9:15 | ISSUANCE OF WORK |
| 9:15-10:15 | WORK PLANS AND COST PROPOSALS - Chapter 8 |
| 10:15-10:30 | Break |
| 10:30-12:00 | REACHING CONSENSUS - Chapter 9 |
| 12:00-1:00 | Lunch |
| 1:00-2:15 | TECHNICAL MONITORING - Chapter 10 |
| 2:15-2:30 | Break |
| 2:30-4:00 | FINANCIAL MONITORING - Chapter 11 |

## CONTRACT ADMINISTRATION COURSE
## AGENDA (Cont.)

**DAY 3**

| | |
|---|---|
| 9:00-9:30 | FINANCIAL MONITORING (Cont.) |
| 9:30-10:30 | EVALUATING PERFORMANCE AND DELIVERABLES AND GIVING FEEDBACK - Chapter 12 |
| 10:30-10:45 | Break |
| 10:30-12:00 | CONTRACT MODIFICATIONS - Chapter 13 |
| 12:00-1:00 | Lunch |
| 1:00-2:00 | DISPUTES, CLAIMS, TERMINATIONS AND CLOSEOUTS - Chapter 14 |
| 2:00-2:15 | MISCELLANEOUS CONTRACT PROVISIONS AND SPECIAL CONTRACT TYPES - Chapter 15 |
| 2:15-2:30 | Break |
| 2:30-4:00 | EXAM AND COURSE EVALUATION |

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## GLOSSARY OF ACRONYMS USED IN MANUAL

| | |
|---|---|
| AA | Assistant Administrator |
| AC&C | Abatement Control and Compliance Appropriation |
| ADOO | Administrative Delivery Order Officer |
| Blue Team | PCMD Quality Assurance Staff |
| BOA | Basic Ordering Agreement |
| CBI | Confidential Business Information |
| CERCLA | Comprehensive Emergency Response and Cleanup Act |
| CFR | Code of Federal Regulations |
| CMM | Contracts Management Manual |
| CO | Contracting Officer |
| CPAF | Cost Plus Award Fee |
| CPFF | Cost Plus Fixed Fee |
| DCN | Document Control Number |
| DO | Delivery Order |
| DOL | Department of Labor |
| DOO | Delivery Order Officer |
| DOPO | Delivery Order Project Officer |
| EPAAR | Environmental Protection Agency Acquisition Regulations |
| ERCS | Emergency Response Contracts |
| FAR | Federal Acquisition Regulations |
| FDO | Fee Determination Official |
| FMD-RTP | Financial Management Division, Research Triangle Park, NC |
| FTE | Full Time Equivalent |
| FY | Fiscal Year |
| G&A | General and Adminstrative Costs |
| GFP | Government Furnished Property |
| GSA | General Services Administration |
| IBCA | Department of Interior Board of Contract Appeals |
| ID/IQ | Indefinite Delivery/Indefinite Quantity |
| JOFOC | Justification for Other than Full and Open Competition |
| LOE | Level of Effort |
| OARM | Office of Administration and Resource Management |
| ODC | Other Direct Costs |
| OF | Official Form |
| PCMD | Procurement and Contracts Management Division |
| PEB | Performance Evaluation Board |
| PO | Project Officer |
| POR | Performance Observation Report |
| PR | Procurement Request/Order |
| R&D | Research and Development |
| RCRA | Resource Conservation and Recovery Act |
| RFP | Request For Proposals |
| S&E | Salary and Expense |
| SBA | Small Business Adminstration |
| SF | Standard Form |
| SIRMO | Servicing Information Resources Management Officer |
| SOW | Statement of Work |
| T&M | Time and Materials |
| TAT | Technical Assistance Team |
| TDD | Technical Direction Directive |
| TDM | Technical Direction Memorandum |

| | |
|---|---|
| TID | Technical Instruction Directive |
| WA | Work Assignment |
| WAM | Work Assignment Manager |

# PURPOSE AND OVERVIEW

# PURPOSE OF COURSE

Goal: Prepare You As EPA Staff To Function Effectively As Contract Managers.

1. Increase Knowledge Of Applicable Laws And Regulations So You Can Function Effectively Within Them And Avoid Personal Liability

2. Raise Awareness Of Pertinent Issues, But Also Learn The Nuts And Bolts Of Contract Administration

3. Improve Ability To Use Contractors To Accomplish The Agency's Mission, Without Squandering Its Resources

IGNORANCE OF THE LAW IS NO EXCUSE!

EPA

# Designation and Appointment of Project Officer/ Work Assignment Manager/Delivery Order Officer

*(For Other Than Small Purchases)*

**Note:** This form is not a Contracting Officer warrant. Delivery Order Officers and Administrative Delivery Order Officers require a warrant of Contracting Officer authority. Any request for a Delivery Order Officer warrant must be accompanied by the additional information required in Chapter 8 of the Contracts Management Manual.

| 1a. Name of Nominee | | b. Title | |
|---|---|---|---|
| c. Organization | d. Mail Code | e. Telephone | f. Years of Contract Experience |

2. The nomination is for:

- ☐ Project Officer
- ☐ Work Assignment Manager
- ☐ Delivery Order Officer
- ☐ Administrative Delivery Order Officer
- ☐ Delivery Order Project Officer

3. The Nominee Has:

| | Yes | No |
|---|---|---|
| a. Completed the basic Project Officer Course | ☐ | ☐ |
| b. Completed the Contract Administration Course | ☐ | ☐ |
| c. Incorporated appropriate contract management criteria in position description and performance standard. *(If criteria have not been incorporated, they must be incorporated within 30 days of appointment.)* | ☐ | ☐ |
| d. If the nominee has not completed the basic Project Officer Course or the Contract Administration Course, has a waiver or interim certification been provided | ☐ | ☐ |

*If the answer to items a, b, or c is "No," or the answer to item d is "No," attach an explanation.)*

4. Estimated Dollar Amount of Contract, Work Assignment, or Delivery Order

5. Nomination is for *(Check one)*:

☐ a new contract, work assignment, or delivery order entitled _____.

☐ a change in the Project Officer, Work Assignment Manager, or Delivery Order Officer on Contract No. _____

*(if applicable, the work assignment no./delivery order no. is _____.)*

## Certification

The undersigned nominee and requesting official certify that the designation of this nominee complies with the workload limitations and other requirements set forth in Chapter 7 of the Contracts Management Manual.

| 6a. Signature of Nominee | | b. Date |
|---|---|---|
| 7a. Signature of Requesting Official *(Division Director or Higher)* | b. Name and Title | c. Date: |
| 8a. Signature of Approval Official *(Contracts Organization)* | b. Name and Title | c. Date: |

PCMD 9/89



EPA Form 1900-65 (6-85) Official Contract File Copy

## Chapter 1
## PURPOSE AND OVERVIEW

Why does EPA need a course on contract administration? Because EPA spends well over 25% of its funds through the contracting process, and some EPA programs spend an even higher percentage. And because errors on the part of government personnel can be very costly, both to the government and to the individual staff member. Contract administration is every bit as important a function to government agencies like EPA as internal staff administration. But it is far more complex.

### 1.1 Purpose of Course

The purpose of this course is to prepare EPA staff involved in contract administration to function effectively in their various roles as Project Officers, Work Assignment Manager, Task Managers, Delivery Order Officers, Administrative Delivery Order Officers, and Delivery Order Project Officers. The course is designed to enable EPA staff to: a) become knowledgeable of applicable laws and regulations, so as to function effectively within them and avoid personal liability; b) become aware of pertinent issues, as well as learn the nuts and bolts of contract administration, and c) become better able to use contractors to accomplish EPA's mission, without squandering its resources.

### 1.2 Purpose of Handbook

The purpose of this handbook is to provide a ready reference for Project Officers, Work Assignment Managers, Delivery Order Officers, Administrative Delivery Order Officers and Delivery Order Project Officers on the basic principles of contract administration. Any specific questions or problems under your contracts should be referred to your Contracting Officer. Comments about this handbook or about the Project Officer training course in Contract Administration should be submitted to the Procurement Policy staff of the Procurement and Contracts Management Division (PM-214F), 202/382-5024.

### 1.3 Project Officer Certification Program

It is EPA policy that all individuals serving as Project Officers, Work Assignment Managers, Delivery Order Officers and Delivery Order Project Officers on Agency contracts fully understand their responsibilities and duties. These individuals are defined as follows:

(1) Project Officer. The Project Officer (PO) is an Agency program official who initiates a procurement action for other than a small purchase, evaluates contractor proposals, and/or, in the contract administration phase, acts as the technical representative of the Contracting Officer for monitoring contract performance after award. Some federal agencies use the term COTR, or Contracting Officer's Technical Representative, to refer to the project officer.

(2) Work Assignment Manager. The Work Assignment Manager (WAM) is an Agency program official who prepares written directives (known as work assignments) to contractors under cost-reimbursement level of effort (term form) contracts. The Work Assignment Manager monitors the contractor's performance of such directives and works under the direction and control of

the Project Officer. For large work assignments which are broken down into individual tasks, Work Assignment Managers may also be responsible for supervising one or more Task Managers responsible for oversight of one or more Work Assignment tasks.

(3) Delivery Order Officer. The Delivery Order Officer (DOO) is an Agency program official who monitors the performance of the delivery order after its issuance. The Delivery Order Officer may have Contracting Officer authority to issue orders to contractors under indefinite delivery/indefinite quantity contracts, if he/she has a valid warrant.

(4) Administrative Delivery Order Officer. The ADOO is an administrative officer who has the warrant authority to sign delivery orders but does not actually monitor them. The ADOO typically executes that signatory authority on behalf of multiple Delivery Order Project Officers.

(5) Delivery Order Project Officer. This individual prepares delivery orders for review and issuance by the Administrative Delivery Order Officer or the Contracting Officer. The Delivery Order Project Officer (DOPO) monitors contractor performance of the delivery order after its issuance. The Delivery Order Project Officer does not require a warrant of Contracting Officer authority.

Chapter 7 of the EPA Contracts Management Manual specifies the required training, experience, and workload limitations that must be met for an individual to serve in one of the above capacities. Program offices should become familiar with these requirements to help them identify individuals who qualify to hold these positions and any training needs of others. The referenced chapter also sets forth a requirement that employees' position descriptions and performance standards include criteria on their pre-award and post-award contracting duties. Performance standards are to be prepared in accordance with applicable Agency directives on the subject.

To help promote an understanding of the acquisition process and the principles of contract management, the Procurement and Contracts Management Division (PCMD) has developed a Basic Project Officer training course and a Contract Administration Course. These courses emphasize the responsibilities and duties during the pre-award and post-award phases of the procurement process. Individuals must meet the attendance requirements of both courses in order to be certified as Project Officers. Work Assignment Managers, Delivery Order Officers, or Delivery Order Project Officers are required to take only the Contract Administration Course.

The basic course is three and one-half days in length; the Contract Administration course is three days. To satisfy certification requirements, all course participants must demonstrate their understanding of the course material by taking a written examination on the final day of each course. At the conclusion of each course, the Director, PCMD, will forward a certificate of training to each individual who successfully completes the course.

Delivery Order Officers and Administrative Delivery Order Officers, in addition to the training and other requirements covered herein, must comply with the Contracting Officer Warrant Program in Chapter 8 of the Contracts Management Manual in order to be delegated Contracting Officer authority to obligate funds on behalf of the Government.

This authority is not delegated to those individuals designated as Delivery Order Project Officers, however, and the requirements of Chapter 8 of the Contracts Management Manual do not apply to them.

The experience requirements and workload limitations for Project Officers, Work Assignment Managers, Delivery Order Officers, Administrative Delivery Order Officers and Delivery Order Project Officers are discussed in Chapter 2. For each level of experience, there is a limitation on the size of an individual contract or delivery order which may be monitored, as well as a limitation on the total value of all contracts, work assignments or delivery orders which may be monitored at any one time.

Assistant, Associate and Regional Administrators, General Counsel, the Inspector General, and Heads of Headquarters Staff Offices or their designees are responsible for designating individuals who have completed the training program and fulfilled the other requirements of Contracts Management Manual Chapter 7 to serve as Project Officers, Work Assignment Managers, Delivery Order Officers and Delivery Order Project Officers.

Various Officials of PCMD appoint Project Officers and Work Assignment Managers to administer contracts for EPA. The appointments are made for employees selected by program offices to serve on individual contracts. Appointments will be made in consultation with the program office. For Project Officers, the appointment authority is delegated to the Chief of the Contracting Office for contracts of $5,000,000 or more, and to the Sections Heads of the appropriate Contracting Office for contracts below $5,000,000. For Work Assignment Managers and Delivery Order Project Officers, the appointment authority is delegated to the Contracting Officer. The Chief of the Contracting Office appoints all Delivery Order Officers and Administrative Delivery Order Officers for contracts.

EPA Form 1900-65 (see page 4) must be used for the designation of all Project Officers, Work Assignment Managers, Delivery Order Officers, Delivery Order Project Officers, and Administrative Delivery Order Officers. A separate form is required for each individual contract, work assignment and delivery order. Any change in the designation of individuals on a particular contract will require resubmission of the form to the appropriate Contracting Office. The form should also be used to designate alternates in case the Project Officer, etc. becomes unavailable.

Certified Project Officers, Work Assignment Managers, Delivery Order Officers and Delivery Order Project Officers who do not perform their duties in a responsible, responsive, or acceptable manner, or who abuse their authority (such as failing to comply with the EPA Standards of Conduct in 40 CFR Part 3) may have their certification withdrawn by the Director, Procurement and Contracts Management Division. The Director, PCMD, will coordinate the withdrawal of any certification with the affected program office. The Director, PCMD, will provide the program office a copy of the documentation supporting the withdrawal and the opportunity for comment prior to withdrawal.

Individuals who have had their Project Officer, Work Assignment Manager, Delivery Order Officer or Delivery Order Project Officer certifications withdrawn may be recertified upon the written recommendation of their Assistant, Associate, or Regional Administrator, General Counsel, Inspector General, and Heads of Headquarters Staff Offices with approval by the Director, PCMD. The recommendation must contain

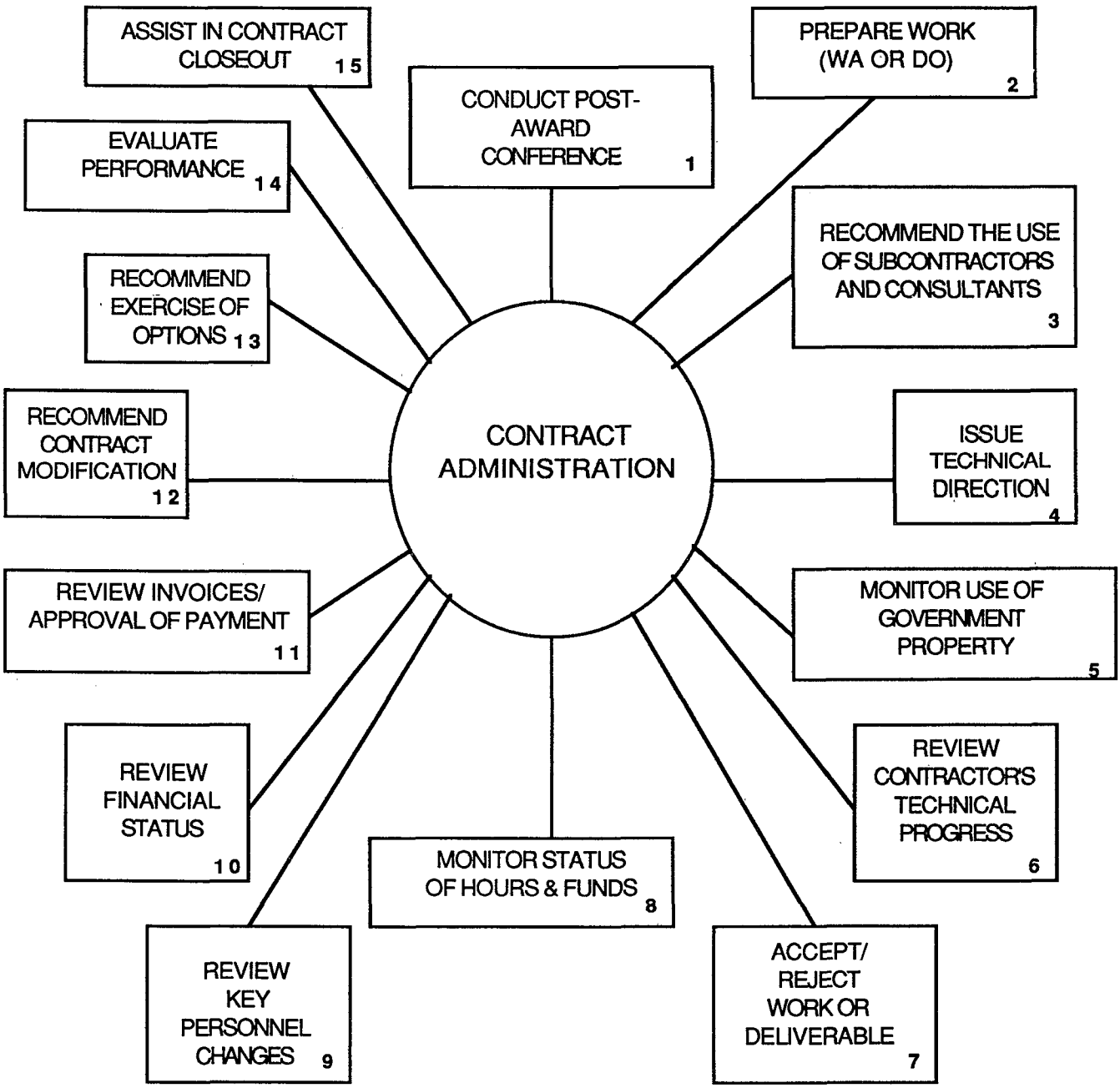
(1) a brief description of the circumstances necessitating the certification withdrawal, (2) steps being taken to remedy the deficiency, and (3) an action plan to ensure that the deficiency does not occur again. Recommendations for recertification must be routed to the Director, PCMD, through the Chief of the Contracting Office.

### 1.4 Summary of Course Content

The basic Project Officer's Handbook covers in detail the subjects included in the 3 and 1/2-day Project Officer's course. Basically, that course covers all aspects of the pre-award contracting process, with particular emphasis on developing statements of work and technical evaluation criteria, and conducting technical evaluations of offerors' proposals. The 3-day course in Contract Administration covers the post-award phase, from award of the contract through contract closeout. It also includes specific details of the responsibilities and duties of Project Officers, Work Assignment Managers, Delivery Order Officers, and Delivery Order Project Officers. The combination of the two training courses is designed to give EPA employees who are not contracting professionals a clearer understanding of the acquisition process and the knowledge to ensure that the Agency receives the best possible products or services for the money it spends.

# CONTRACT ADMINISTRATION AND THE AUTHORITY OF GOVERNMENT PERSONNEL

# CONTRACT ADMINISTRATION PROCESS



# ELEMENTS OF A CONTRACT

A Contract Is:

1. An AGREEMENT
2. Between COMPETENT PARTIES
3. For A VALID CONSIDERATION
4. To Accomplish A LAWFUL PURPOSE
5. With TERMS CLEARLY SET FORTH
6. In The FORM REQUIRED By Law

A Contract Must Contain All Six Elements To Be Legal.

# PARTIES TO A CONTRACT

1. Government
2. Contractor
   a. An Individual
   b. A Partnership
   c. A Nonprofit Organization
   d. A Private Organization
   e. A State Or Local Government
   f. A Joint Venture (2 Or More Legal Entities Jointly & Severally Responsible For Fulfilling The Contract Obligations)

# DUTIES OF THE PARTIES

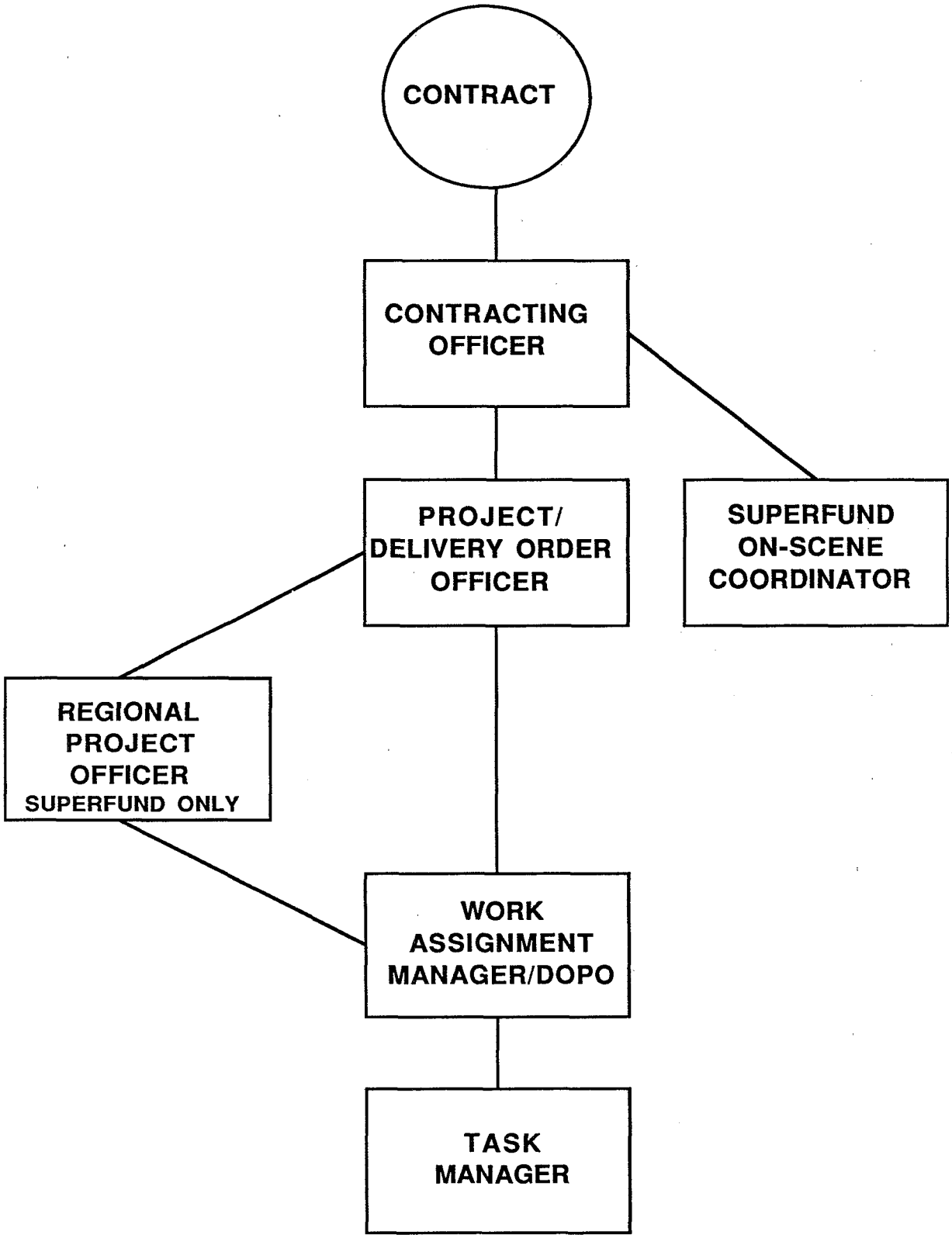
1. Government - Not To Unreasonably Interfere With Or Delay Contractor Performance, E.g., By:

   a) Failing to provide agreed-upon Government property
   b) Failing to provide necessary access to Government facilities
   c) Issuing faulty specifications or statements or work that result in Contractor delays
   d) Unreasonably delaying Government approvals or consent that Contractor requires to continue performance

2. Contractor - To Proceed Diligently With Performance Unless:

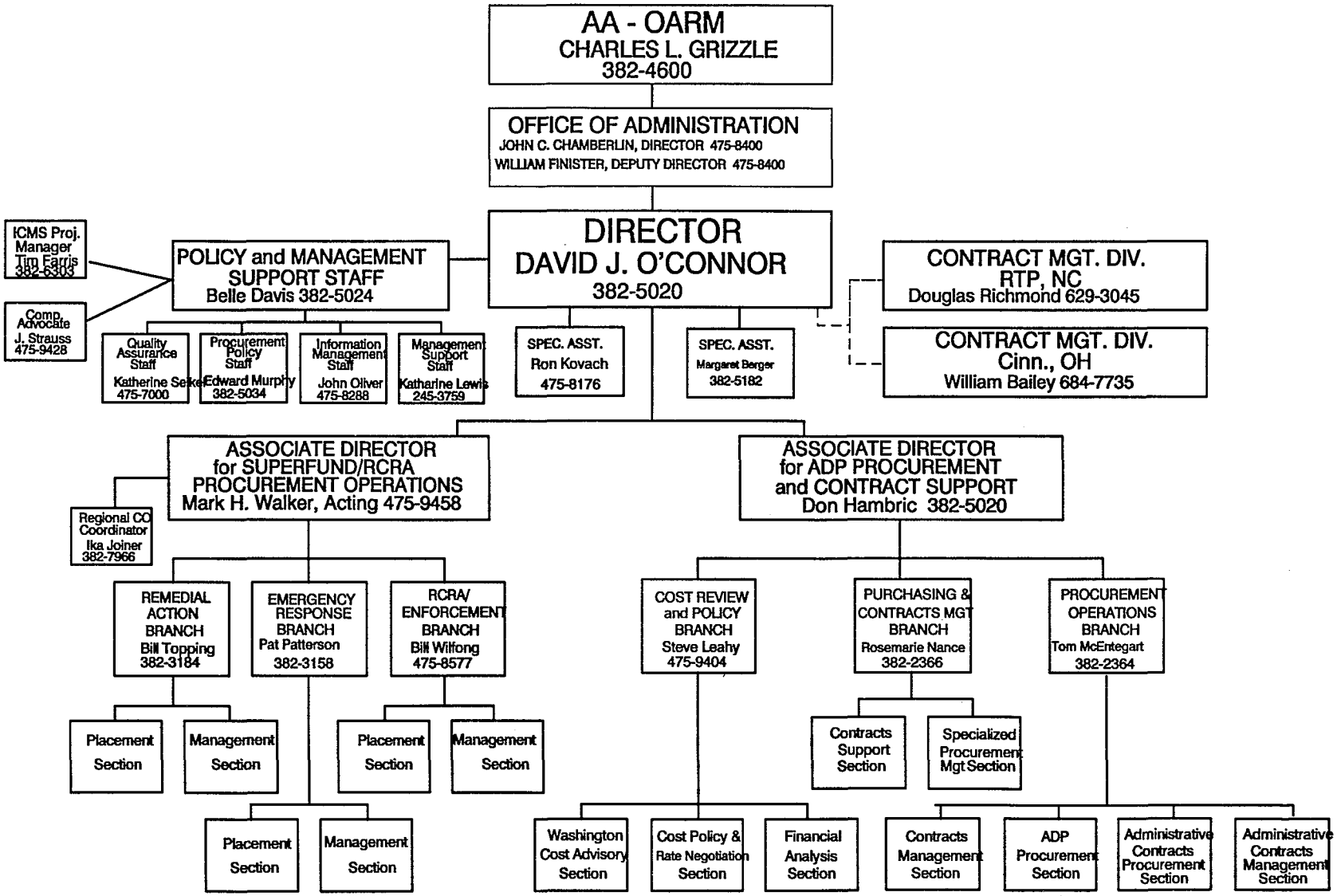
   a) Excused by Government gross and material breach of contract or impossibiity of performance
   b) Suspended or stopped by Stop Work Order or Limitation of Cost or Funds clauses under cost reimbursement contract

# DELEGATION OF AUTHORITY



October 1990

# PROCUREMENT AND CONTRACTS MANAGEMENT DIVISION (PCMD)



# AUTHORITY

1. **Must Be Delegated**
   E.g., Authority Of Superfund Delivery Order Officer To Sign Delivery Orders Up To Specified Limit (Delegated From Contracting Officer); Authority Of Work Assignment Manager (Delegated From Project Officer)

2. **Must Be Actual (Vs. Apparant)**
   Express Authority Of Contracting Officer To Sign Contracts To Obligate Government Up To Limits Expressed In CO's Written Warrant. (Government Is Not Bound If Person Acting Appears To Have Authority But In Fact Does Not, E.g., Where CO Obligates Funds In Excess Of Limits Of CO's Warrant.)

# ROLE OF THE CONTRACTING OFFICER

**The Contracting Officer Is The Only Person Who Has The Authority To:**

1. Sign A Contract

2. Obligate Funds*

3. Issue Work Assignments**

4. Modify Contract Terms Or Conditions

5. Terminate A Contract

6. Accept Supplies And/Or Services**

* Except Delivery Order Officers Who Have Been Issued A Contracting Officer's Warrant, E.g., Superfund On-Scene Coordinator With Warrant Up To $250,000

** Unless Such Authority Has Been Delegated To The Project Officer As Is Stated In The Contract.

# ROLE OF THE PROJECT OFFICER

1. Monitor Overall Contract Performance

2. Monitor Contract Administration By Work Assignment Managers Under Level Of Effort (LOE) Contracts

3. Review Technical & Financial Progress Reports

4. Provide Technical Direction

5. Monitor Use Of Government Property

6. Certify Vouchers

7. Recommend Contract Modifications To The Contracting Officer

8. Assist In Contract Closeout

Note: These Duties Concern Only Contract Administration. The Project Officer Has Many Preaward Duties As Well.

# ROLE OF THE WORK ASSIGNMENT MANAGER

1. Develop Statement Of Work And Level Of Effort (LOE) Estimate For Specific Work Assignments Under Term Form Contracts

2. Monitor Performance On Work Assignments

3. Provide Technical Direction

4. Recommend Work Assignment Amendments To Project Officer

5. Review Relevant Portions Of Monthly Technical & Financial Progress Reports

6. Assist The Project Officer In Voucher Certification

# ROLE OF THE DELIVERY ORDER OFFICER

1. Develop Statement Of Work & Cost Estimate, & Determine Labor Categories For Delivery Orders Under Indefinite Delivery/Indefinite Quantity Contracts (Time-And-Material Contracts)

2. Issue Delivery Orders To Contractor (Within Limits Of Authority)

3. Provide Technical Direction

4. Monitor Performance On Delivery Orders

5. Review Monthly Technical & Financial Progress Reports

6. Issue Delivery Order Modifications (Within Limits Of Authority)

7. Recommend Contract Modifications To The Contracting Officer

8. Certify Vouchers

# DELIVERY ORDER OFFICER DISTINCTIONS

## (Indefinite Delivery/Indefinite Quantity Contracts)

- ADMINISTRATIVE DELIVERY ORDER OFFICERS

  Review & Issue Delivery Orders, But Do Not Monitor Performance

  Required To Have Limited Warrant Of Contracting Officer Authority (Because Obligating Funds)

- DELIVERY ORDER PROJECT OFFICERS

  Prepare Delivery Orders For Issuance By Administrative Delivery Order Officer Or Contracting Officer

  Monitor Contractor Performance

  Not Required To Have Contracting Officer Authority

- DELIVERY ORDER OFFICERS

  Issue Delivery Orders & Monitor Contractor Performance

  Required To Have Limited Warrant Of Contracting Officer Authority

(Different Contracts Are Set Up In Different Ways. Some Use All Three Of The Above Functions, Some Use Two, And Some Use Just One. The Contract Terms & Conditions Should Be Consulted To Determine Who The "Players" Are.)

## EXPERIENCE AND WORKLOAD LIMITATIONS

### PROJECT OFFICERS AND DEPUTY PROJECT OFFICERS

| Experience | Workload Limit Cumulative Dollar Amount* |
|---|---|
| Less than 2 years * | |
| Superfund and ADP contracts ..... | $50 Million |
| All others contracts ..... | $25 Million |
| 2 years and over ** | |
| Superfund and ADP contracts ..... | $200 Million |
| All others contracts ..... | $100 Million |

* Limitation applies to total value of 1 or more contracts.

** Limitations apply to total value of 2 or more contracts (no limitation for monitoring a single contract)

### WORK ASSIGNMENT MANAGERS/REMEDIAL PROJECT MANAGERS/DELIVERY ORDER OFFICERS/DELIVERY ORDER PROJECT OFFICERS

| Experience | Workload Limit Cumulative Dollar Amount |
|---|---|
| Less than 2 years * | |
| Superfund and ADP contracts ..... | $20 Million |
| All others contracts ..... | $5 Million |
| 2 years and over ** | |
| Superfund and ADP contracts ..... | $60 Million |
| All others contracts ..... | $15 Million |

* Limitation applies to total value of 1 or more delivery orders/work assignments (DO/WA).

** Limitations apply to total value of 2 or more DO/WA (no limitation for monitoring a single DO/WA)

### ON-SCENE COORDINATORS

Because of the emergency nature of these actions, there are no limits on the number of individual orders or cumulative dollar amounts for On-Scene Coordinators.

**NOTES:** a. For purposes of this chapter, experience is considered work in a contract monitoring function (i.e. project officer, ordering officer, etc.) either at EPA or another Federal agency.

b. For the purpose of computing workload limitations, the limitations apply to all contracts/actions whose period of performance has not yet expired.

# OTHER INDIVIDUALS INVOLVED IN CONTRACT ADMINISTRATION

1. The Contract Specialist/Administrator
2. The Property Administrator
3. The Accounting Technician
4. The Cost Analyst/Auditor
5. The Procurement Analyst (On PCMD's Review Team)

# PROCUREMENT REGULATIONS*

1. FEDERAL ACQUISITION REGULATION (FAR) - Title 48 CFR Chapter 1

   Governs All Executive Agencies In Their Acquisition Of Supplies And Services With Appropriated Funds

2. ENVIRONMENTAL PROTECTION AGENCY ACQUISITION REGULATIONS (EPAAR) - Title 48 CFR Chapter 15

   Implements And Supplements The FAR For EPA

3. CONTRACTS MANAGEMENT MANUAL (CMM) - EPA Directive 1900

   Sets Forth Additional EPA Policies And Procedures On Acquisition Matters Of Particular Interest To Program Officers And Acquisition Personnel

4. PCMD ACQUISITION HANDBOOK

   Supplements The Above Regulations On Subjects Of Primary Interest To Acquisition Personnel

* Obtainable from your Contracting Officer.

Project Officer's Checklist

Contract Administration Review
Contract No. _____

1. Monitor contractor performance to determine whether or not the following conditions exist:

   a) technical performance is timely and of acceptable quality.

   b) technical progress is commensurate with incurred costs.

   c) costs incurred are in line with the negotiated elements of cost or total cost.

| | Yes | No | N/A |
|---|---|---|---|
| A. Technical Monitoring | | | |
| 1. Is PO receiving CO notification of timely, acceptable performance? | ___ | ___ | ___ |
| a. How often? | | | |
| b. What form? | | | |
| 2. How monitor scheduled deliveries? | ___ | ___ | ___ |
| 3. Any schedule slippages? | ___ | ___ | ___ |
| 4. Is PO furnishing CO timely notification for remedial action? | ___ | ___ | ___ |
| 5. Are Monthly Progress Reports reviewed for problems? | ___ | ___ | ___ |
| 6. Are there any unresolved problems? | ___ | ___ | ___ |
| B. Cost Monitoring | | | |
| 1. What types of reports are received? | ___ | ___ | ___ |
| 2. Are reports submitted IAW contract? | ___ | ___ | ___ |
| 3. How monitor progress vs incurred cost and actual vs projected costs? | ___ | ___ | ___ |
| - Any independent logs/records maintained? | ___ | ___ | ___ |
| - What indicators employees? | ___ | ___ | ___ |

| | Yes | No | N/A |
|---|---|---|---|
| 4. How monitor possibility of underruns/ overruns? | ___ | ___ | ___ |
| 5. What proactive methods are taken to prevent problems? | ___ | ___ | ___ |
| 6. What action (if necessary) will be taken to ensure proper monitoring? | ___ | ___ | ___ |

2. Assignment of work, placement of delivery orders, and issuance of directives to contractors are timely and within the scope of the contract, and are sufficiently detailed to promote meaningful performance.

| | Yes | No | N/A |
|---|---|---|---|
| A. Approved 1900-65's in file? | ___ | ___ | ___ |
| B. Contractor knowledge of authorized personnel? | ___ | ___ | ___ |
| C. Sufficient time allowed by PO for CO to process work properly? | ___ | ___ | ___ |
| D. Any verbal WAs/DOs issued by PO/CO before work begins? | ___ | ___ | ___ |
| E. Within scope of contract? | ___ | ___ | ___ |
| F. Sufficiently detailed SOW? | ___ | ___ | ___ |
| G. Are task limits (if any) exceeded? | ___ | ___ | ___ |
| H. Are tasks governmental in nature or personal services? | ___ | ___ | ___ |
| I. Are work plans received for each task and monitored? | ___ | ___ | ___ |
| J. Proper use of funding? | ___ | ___ | ___ |

| | | Yes | No | N/A |
|---|---|---|---|---|
| K. | Independent costs estimates prepared? | ___ | ___ | ___ |
| L. | Is PO/WA authority delineated? | ___ | ___ | ___ |
| M. | Is PO/WA authority exceeded? | ___ | ___ | ___ |

3. Administrative actions are performed expeditiously with no programmatic impact and are adequately documented to establish clear "audit trails."

| | | Yes | No | N/A |
|---|---|---|---|---|
| A. | Is Project Officer certified? | ___ | ___ | ___ |
| B. | Within workload limitations, according to Chapter 7, Contract Managment Manual? | ___ | ___ | ___ |
| C. | Small Business | | | |
| | - Is this an 8(a) contract? | ___ | ___ | ___ |
| | - Any claims? | ___ | ___ | ___ |
| D. | Key Personnel | | | |
| | 1. Did contract require prior approval/ notification of Key Personnel changes? | ___ | ___ | ___ |
| | 2. Does contract file reflect appropriate documentation? | ___ | ___ | ___ |
| E. | Property Administration | | | |
| | 1. Any GFP/E/I/ or Data? | ___ | ___ | ___ |
| | 2. Any post award changes? | ___ | ___ | ___ |
| F. | Advance Agreements | | | |
| | 1. Any negotiated | ___ | ___ | ___ |
| | 2. Contractor compliance? | ___ | ___ | ___ |

| | Yes | No | N/A |
|---|---|---|---|
| G. Property Administration | | | |
| 1. Any GFP/E/I/ or Data? | ___ | ___ | ___ |
| 2. Any post award changes? | ___ | ___ | ___ |
| H. Modifications | | | |
| (To be repeated, as necessary, for several mods) | | | |
| 1. Change Order #_____ | | | |
| a. SF 30 block 11 (or 13) completed properly? | ___ | ___ | ___ |
| b. Authorized by Changes Clause? | ___ | ___ | ___ |
| c. Definitization by Supplemental Agreement in File? | ___ | ___ | ___ |
| 2. Modification No. _____ | | | |
| a. SF 30 block 11 (or 13) completed properly? | ___ | ___ | ___ |
| b. Authorization? | ___ | ___ | ___ |
| c. Appropriate documentation | ___ | ___ | ___ |
| 3. Administrative Change #_____ | | | |
| a. SF 30, Block 11 (or 13) completed properly? | ___ | ___ | ___ |
| b. Appropriate documentation? | ___ | ___ | ___ |
| 4. Options | | | |
| a. SF 30, Block 11 (or 13) completed properly | ___ | ___ | ___ |

4. Timely follow-up/resolution is performed for audits and internal/external reviews.

| | | Yes | No | N/A |
|---|---|---|---|---|
| A. | Any cost audit reports requiring follow-up? | ___ | ___ | ___ |
| B. | Internal controls review? | ___ | ___ | ___ |
| C. | Status of any prior recommendations? | ___ | ___ | ___ |

5. Contract actions concerning administrative remedies are pursued in a timely and appropriate manner with proper documentation.

| | | Yes | No | N/A |
|---|---|---|---|---|
| A. | Post Award Orientation | | | |
| | 1. Was it conducted? | ___ | ___ | ___ |
| | 2. Did CO feel it was necessary? | ___ | ___ | ___ |
| | 3. If one had been conducted, would it have precluded subsequent problems? | ___ | ___ | ___ |
| B. | Insurance | | | |
| | 1. Have any problems arisen? | ___ | ___ | ___ |
| C. | Termination/Claims | | | |
| | 1. Any unresolved terminations/claims | ___ | ___ | ___ |
| | 2. Appropriate, timely documents issued? | ___ | ___ | ___ |
| D. | Warranties/Guarantees | | | |
| | 1. Any warranties/guarantees? | ___ | ___ | ___ |

6. Organization conflicts of interest

| | Yes | No | N/A |
|---|---|---|---|
| A. Have any Was/DOs created any conflicts of interest? | ____ | ____ | ____ |
| B. Has PO notified CO of any possible conflicts? | ____ | ____ | ____ |
| C. Has contractor notified CO of any possible conflicts? | ____ | ____ | ____ |
| D. What remedies were effected? | ____ | ____ | ____ |

7. Miscellaneous Observations

EXHIBIT A

CONTRACT ADMINISTRATION AREAS OF REVIEW

I. COST MONITORING

A. Financial reports/vouchers
B. Independent logs
C. Overruns/underruns
D. ODC and travel ceilings
E. Labor mix/average hourly rate
F. Unit 14 checklists

II. TECHNICAL PERFORMANCE MONITORING

A. Technical reports
B. Acceptability
C. Timeliness
D. Deliverables
E. Unit 14 checklists

III. PROPERTY ADMINISTRATION

A. Approvals
B. Documentation

IV. SUBCONTRACTS/CONSULTANTS

A. Copy of agreement
B. Summary of prime/sub negotations
C. Competition/sole source
D. Cost/price reasonableness
E. Approvals
F. Reports

V. ISSUANCE OF WORK ASSIGNMENTS, DELIVERY ORDERS, OTHER DIRECTIVES

A. Timelines
B. Within scope
C. Work Plan approvals
D. Limits exceeded
E. Amendments
F. Issued by authorized person

VI. MODIFICATIONS

A. Change orders
B. Options
C. Administrative modifications
D. New scope
E. Key personnel
F Documentation

VII. DISPUTES, CLAIMS, TERMINATIONS

A. Disputes
B. Claims
C. Terminations

VIII. OTHER

A. Organizational conflicts of interest
B. Improper business practices
C. Security of confidential business information
D. Follow-up/resolution of audits, other post-award reviews
E. Project Officer workload limitations

## Chapter 2
## CONTRACT ADMINISTRATION AND THE AUTHORITY OF GOVERNMENT PERSONNEL

What is contract administration? Ask a variety of people and you will get a variety of answers. Some might say it is the monitoring of contractor performance until the products or services which have been contracted for have been provided. Others might say it is the review of contractor reports, the certification of vouchers, and the inspection and acceptance of all deliverables. Still others might advise that it means whatever duties are required to get the best possible product within the time required. All of these people would be right.

### 2.1 Overview of Contract Administration

Contract administration encompasses all functions relating to a contract from the moment it is awarded until final payment has been made and the contract is closed out. Here at EPA, some contract administration duties are delegated by Contracting Officers to program office technical contract managers designated as Project Officers, Work Assignment Managers, Delivery Order Officers, Administrative Delivery Order Officers, and Delivery Order Project Officers. Because program contract managers are entrusted with much of the contractor oversight required, an understanding of the principles and duties involved in contract administration is essential.

Effective contract administration requires direct liaison between the Contracting Officer and the Project Officer or Delivery Order Officer during the entire life of a contract. This team concept is critical to a successful contract. It is important to remember that the Contracting Officer has overall responsibility for obtaining satisfactory contract performance. But with close cooperation and an understanding of his or her duties, the Project Officer or Delivery Order Officer can help assure better results and a more successful accomplishment of the program mission.

### 2.2 Definition of a Contract

What is a contract? What is an agent? What is the authority of the Contracting Officer? What types of legal entities can contract with the Government? Who has what authority? What are the regulations governing the contracting process? It is important to understand these terms in order to properly administer a contract.

The Federal Acquisition Regulations define a contract as "a mutually binding legal relationship obligating the seller to furnish supplies or services (including construction) and the buyer to pay for them." This basic definition is applicable to <u>all</u> types of contracts. For a contract to be legally enforceable, it must contain the following essential elements. It must be: (1) An agreement (2) between competent parties (3) for a valid consideration (4) to accomplish a lawful purpose (5) with terms clearly set forth (6) in the form required by law. If a contract does not meet these six tests, the relationship is not a legal one.

An agent is a person authorized to act for another. The difference between an agent and an employee is that the employee performs some type of service for the employer while an agent is appointed to represent the employer in dealings with third parties. Contracting Officers are agents for the United States Government and the Environmental Protection Agency, while Project Officers are technical representatives of the Contracting Officers - not agents - who assist them in administering contracts.

Contracting Officers have authority to enter into, administer, or terminate contracts, and may bind the Government only to the extent of the authority delegated to them. Contracting Officers are the only persons with the authority to enter into and sign contracts on behalf of the Government. As agents of the Government, their acts bind the Government to third parties (contractors) and also give the Government rights against the third parties. Contractors also use agents to carry out the contract and deal with the Government regarding its administration and modification.

The other party with which a Government contract is made may be any legal entity with the capacity to contract. The various types are:

- An individual
- A partnership
- A nonprofit organization
- A private corporation
- A State or local Government
- A joint venture (two or more legal entities jointly and severally responsible for fulfilling the contract obligations)

Any one of these entities could be an EPA contractor. The majority of EPA contracts are held with private corporations.

## 2.3 Duties of the Parties

One party to any EPA contract will be the United States of America, the other will be the contractor. The parties to a contract bind themselves to the provisions of that contract. Besides the specific written provisions, however, each party has one fundamental underlying duty common to government contracts.

The Government has the basic duty not to unreasonably interfere with or delay the contractor in his or her performance of the contract. The Project Officer is responsible for ensuring that his or her actions do not violate this basic duty. Any violation thereof constitutes a "breach of contract" for which the contractor is legally entitled to recover the amount of any damage caused him by the breach. Generally, this is done through contract modification adjusting the cost or price.

The following actions are examples of those which might unreasonably interfere with or delay contract performance:

(1) Failure to provide, within the time required or in a condition suitable for use, any Government property which the Government agreed to furnish;

(2) Failure to provide access to Government premises on which work must be performed;

(3) Issuing faulty specifications or Statements of Work that result in delaying the contractor; and

(4) Unreasonably delaying Government approvals or consent that the contractor must obtain in order to commence or continue performance under the contract.

Project Officers, Work Assignment Managers, and Delivery Order Officers must be certain that they are not delaying contract performance by such action or inaction.

The contractor has the basic duty to proceed diligently with performance of the contract. This basic duty comes to an end only when the contract is completed or terminated. (If termination is only partial, the contractor must diligently proceed with the portion not terminated.) Disagreements or disputes do not relieve the contractor of the duty to proceed during the appeal process.

The contractor's basic duty to proceed may only be excused by sufficiently gross and material breach of contract by the Government, or by impossibility of performance. Their duty to proceed may also be stopped or suspended by the Contracting Officer's issuance of a Stop Work Order or, under a cost reimbursement contract, by the Limitation of Cost or Limitation of Funds clauses when contract funds are depleted.

## 2.4 Authority of Government Personnel

The Government is not bound by the actions of any unauthorized persons. Persons who commit the Government, without the proper authority to do so, may be personally liable to the other party to the contract.

### (1) Actual vs. Apparent Authority

A Contracting Officer is delegated authority in writing, with a document known as a warrant. A warrant may contain limitations on the authority of the individual, or it may be unlimited. The warrant reflects the Contracting Officer's express, or actual, authority to obligate the United States by contract.

The law will not bind the United States in cases in which the person acting appears to have had the authority to act but in fact did not.

An example of such apparent authority would be a Contracting Officer obligating funds in excess of the limits of his or her warrant. Another would be a Project Officer directing the Contractor to make changes in the performance of the technical requirements of the Statement of Work of a contract.

Apparent authority is not to be taken lightly. Unless the Government ratifies the action (see Chapter 13), the person who acted without authorization may be liable to the other party for any monies due. Contractors have a responsibility to ensure that the person with whom they are dealing has the proper authority, but the Government employee has a responsibility to act within the limits of the employee's own authority.

(2) **Role of the Contracting Officer.**

The Contracting Officer is the only person who has the authority to:

1. sign a contract
2. obligate funds*
3. issue work assignments**
4. modify any contract terms or conditions
5. terminate a contract
6. accept supplies and/or services**

* except Delivery Order Officers who have been issued a Contracting Officer's Warrant, such as Superfund On-Scene Coordinators with warrants up to $250,000.
** unless such authority has been delegated to the Project Officer, as is stated in the contract.

In the contract administration phase, the role of the Contracting Officer is to monitor the contractor's progress (with the assistance of the Project Officer), ensure that the contract terms and conditions are being adhered to, and make any necessary contract modifications. The Contracting Officer must also resolve all disputes that arise, request any necessary audits, negotiate equitable adjustments, and, if necessary, terminate the contract. Project Officers should use the Contracting Officer's knowledge and expertise whenever questions arise, and involve the Contracting Officer to the fullest extent necessary.

(3) **Role of the Project Officer, Work Assignment Manager, Delivery Order Officer, Administrative Delivery Order Officer and Delivery Order Project Officer.**

(a) Project Officer. The Project Officer's role in contract administration is one of monitoring contract performance from both a technical and financial standpoint. This monitoring is done in close coordination with the Contracting Officer. The Project Officer also provides technical direction to the contractor, reviews and evaluates contractor deliverables and performance, monitors use of government property, certifies monthly vouchers for payment, and, if necessary, recommends contract modifications to the Contracting Officer during the course of contract performance. The contract closeout process also requires the involvement of the Project Officer.

For cost-reimbursement LOE contracts or indefinite delivery/ indefinite quantity contracts, the Project Officer also is responsible for supervising the contract administration activities delegated to Work Assignment Managers, Delivery Order Officers and Delivery Order Project Officers. See page 19 for a complete listing of Project Officer responsibilities.

(b) Work Assignment Manager. The Work Assignment Manager (WAM) acts as the technical representative of the Contracting Officer on specific work assignment(s) under cost reimbursement, term form contracts, under the supervision of the contract Project Officer. The WAM typically develops work assignments, monitors performance under these work assignments, provides technical direction, and recommends any necessary modifications to the Project Officer.

Since the WAM most closely oversees the contractor's performance for the particular work assignment, the WAM is also responsible for reviewing those portions of the monthly technical and financial progress reports relevant to his or her work assignment, and for assisting the Project Officer in voucher certification.

(c) Delivery Order Officer. The Delivery Order Officer (DOO) performs similar duties to the Project Officer under indefinite delivery/ indefinite quantity contracts. The DOO also may have a Contracting Officer's warrant to issue delivery orders and obligate funds on behalf of the Government.

(d) Administrative Delivery Order Officer. The Administrative Delivery Order Officer (ADOO) reviews and issues delivery orders, but does not monitor their performance, and is required to have a limited warrant of contracting authority. Performance monitoring is the responsibility of the Delivery Order Project Officer.

(e) Delivery Order Project Officer. The Delivery Order Project Officer (DOPO) performs similar duties to the Work Assignment Manager, but under indefinite delivery/indefinite quantity contracts. The DOPO monitors performance of delivery orders and recommends modifications to the DOO.

The individuals listed above must take care that they act only within the limits of their authority.

(4) **Experience and Workload Limitations.** As noted in Chapter 1, for each level of experience and each position, there is a limitation on the size of an individual contract or delivery order which may be monitored, as well as a limitation on the total value of all contracts, work assignments or delivery orders which may be monitored at any one time. The current limitations are set forth on pages 23-25 . All such limitations are subject to waiver by the Director, PCMD. Application for waiver must be made directly to PCMD.

(5) **Other Government Personnel.**

Many other EPA employees are involved to varying extents in the administration of a contract. Some of these are summarized below:

(a) Contract Specialist. This individual works under a Contracting Officer, processes all contract documents, and generally performs the same functions without signatory authority. Contract Specialists often work more closely on day to day, routine issues with Project Officers than does the Contracting Officer, who has the ultimate

responsibility for the contracting process and performance on many contracts.

(b) Property Administrator. This is an EPA employee designated by the Contracting Officer to administer property for contracts under which Government property is involved. The Property Administrator is responsible for evaluating the adequacy of the contractor's property procedures, and for keeping track of all Government property in the possession of the contractor. (See Chapters 7 and 11 for details).

(c) Accounting Technician. An accounting technician is the person in the disbursing office who processes contractor's vouchers for payment. The accounting technician ensures that the Project Officer has determined that the payment request is commensurate with the goods received or services performed before notifying the Treasury Department to pay the contractor.

(d) Cost Analyst/Auditor. From time to time during contract performance, major modifications require the submission of a contractor's cost proposal. A cost analyst and/or auditor is needed to analyze the proposal, element by element, and provide recommendations to the Contracting Officer. This individual often provides advice concerning salary rates, indirect expenses, and consultant or subcontract costs, and may, if the contract is large enough, perform a purchasing system review and a financial management review.

(e) Procurement Analyst. A member of the Quality Assurance staff of PCMD ("the Blue Team") will review the contract administration activities on all active contracts over $5 million, to determine if appropriate and effective management techniques are being employed. Files of both Contracting Officers and Project Officers and Delivery Order Officers will be reviewed for this purpose, and a report will be issued on the findings of this review. See pages 28-34 for a sample of the Project Officer's checklist used in such reviews, together with a listing of contract administration areas of review.

## 2.5 Acquisition Regulations

Contracting personnel have a wide variety of regulations and policies to follow. EPA contracting personnel and others who deal with contracts are governed by all of the following:

(1) The Federal Acquisition Regulation (FAR) is a single common regulation for use by all executive agencies in their acquisition of supplies and services with appropriated funds.

The FAR System was developed in accordance with the requirements of the Office of Federal Procurement Policy Act of 1974, as amended by Public Law 96-83. The FAR was issued within applicable laws under the joint authorities of the Administrator of General Services, the Secretary of Defense, and the Administrator for the National Aeronautics and Space Administration, under the broad policy guidance of the Administrator for Federal Procurement Policy. The FAR is codified as Chapter 1 of Title 48 of the Code of Federal Regulations with an effective date of April 1, 1984.

(2) The Environmental Protection Agency Acquisition Regulation (EPAAR) implements the FAR where further implementation is needed for EPA and supplements the FAR when coverage is needed for subject matter not covered in the FAR. The EPAAR is codified as Chapter 15 within Title 48 of the Code of Federal Regulations. In addition, EPA has established acquisition policies and procedures that are disseminated through the EPA Contracts Management Manual and the Acquisition Handbook. The EPAAR generally is reserved for those items implementing and supplementing the FAR and for policies and procedures that affect the public.

(3) The Contracts Management Manual (CMM) in EPA Directive 1900 is reserved for subjects of particular interest to Project Officers and other program personnel involved in the acquisition process as well as acquisition personnel. It generally does not address contractual relationships.

(4) The Acquisition Handbook is used for subjects of primary interest to acquisition personnel in addition to those items already contained in the FAR and EPAAR.

Copies of the FAR and EPAAR can be purchased from the Government Printing Office. The CMM and Acquisition Handbook can be obtained from G-100 at Headquarters. Your contracting officer will also usually have a reference copy of these reguations or manuals, as does PCMD at 382–5024.

# ELEMENTS AND TYPES OF CONTRACTS

# MAJOR ELEMENTS OF GOVERNMENT CONTRACTS

1. ADMINISTRATIVE DETAILS
   Name/Address of Contractor, Names Of Contracting Officer, Project Officer, Contract Specialist, Address Of EPA Paying Office, Etc.

2. CONTRACT PARAMETERS
   Contract Amount, Period Of Performance, Level Of Effort Or Minimums/Maximums, Options.

3. WORK REQUIREMENTS
   Statement Of Work, Reporting Requirements, Personnel Qualifications, Other Technical Details.

4. STANDARD TERMS AND CONDITIONS
   Changes, Disputes, Terminations, Etc.

5. SPECIALIZED TERMS AND CONDITIONS
   Award Fee Plan, Key Personnel Lists, Subcontract Approvals, Etc.

# ORDER OF PRECEDENCE

If There Is Inconsistency In The Solicitation Or Contract, The Order Of Precedence For Resolving That Inconsistency Is As Follows:

a. The Schedule (Excluding Specifications)
b. Representations And Instructions
c. Contract Clauses
d. Other Documents, Exhibits & Attachments
e. The Specifications

NOTE: Specifications Contained In The Statement Of Work Receive Lowest Preference And Are Overriden By All Other Contract Terms And Conditions.

# SIGNIFICANT "BOILERPLATE" CLAUSES

1. Limitation of Cost
2. Limitation of Funds
3. Level of Effort/Cost Reimbursement Term
4. Work Assignments
5. Fixed Fee
6. Order of Precedence
7. Award Fee
8. Ordering By Designated Ordering Officers
9. Fixed Rates For Services - Indefinite Delivery/Indefinite Quantity Contract
10. Technical Direction
11. Key Personnel
12. Organizational Conflicts of Interest

## SIGNIFICANT "BOILERPLATE" CLAUSES

13. Subcontracts
14. Monthly Progress Report - Cost-Type
15. Monthly Progress Report - Time & Materials Or Labor-Hour Or Indefinite Delivery/Indefinite Quantity Fixed Rate Services Contract
16. Option To Extend the Term of the Contract - Cost-Type Contract
17. Option For Increased Quantity - Cost-Type Contract
18. Inspection of Services - Cost-Reimbursement
19. Inspection of Research & Development - Cost-Reimbursement
20. Inspection - Time And Material & Labor-Hour
21. Changes - Cost-Reimbursement
22. Changes - Time-And-Materials or Labor-Hour
23. Notification of Changes

# TYPES OF CONTRACTS

1. Fixed Price

2. Cost Reimbursement (Cost, Cost-Plus-Fixed-Fee, Cost-Plus-Award-Fee)

3. Time-And-Materials

4. Labor Hour

5. Indefinite Delivery/Indefinite Quantity

NOTE: Letter Contracts are preliminary contractual instruments which may be definitized as any of the above types.

| CONTRACT | FEATURES | APPLICABILITY | ADVANTAGES TO CONTRACTOR | DISADVANTAGES TO CONTRACTOR |
|---|---|---|---|---|
| FIRM FIXED PRICE (FFP) | Goverment pays fixed price (established before award) which is not subject to any adjustment regardless of contractor's cost experience. | Used when:<br>1). There are reasonably definite design or performance specifications<br>and<br>2). A fair and reasonable price can be established at the outset. | 1). Potential for higher profit<br>2). Minimum government control<br>3). Fewer administrative cost | 1). Greater assumption of financial and technical risks<br>2). Vigilance required to initiate and substantiate change claims |
| COST-PLUS-FIXED-FEE (CPFF) | Government pays allowable cost plus a negotiated, fixed fee (profit). Fixed fee does not vary with actual costs, but may be adjusted for changes in work to be performed. May be completion or term form. | Used where performance is uncertain and accurate cost estimates are impossible. | 1). Low risk<br>2). Risk of loss of government property transferred | 1). Maximum control by government<br>2). Lower fees because of lower risks. |
| COST-PLUS-AWARD-FEE | Government pays allowable cost plus base fee (does not vary with performance) and all or part of an award fee (based on subjective government evaluation of contractor's performance). Evaluation and payments of award fee made periodically (usually every 3-4 months) during performance. | Used where a cost reimbursement contract is appropriate and it is important that contractor be provided motivation for excellence in contract performance in areas such as management, quality, timeliness, ingenuity, and cost effectiveness. Usually used for contracts with a total value of greater than $5 million. | 1). Possibility of increased fee<br>2). Reward for good management and good performance<br>3). Limited risk | 1). Limit on fee (usually 10%)<br>2). Complexity of negotiations<br>3). increased burden to "prove" itself<br>4). Performance may be affected by government monitoring/technical direction |
| LABOR-HOUR AND TIME-AND-MATERIALS (L-H, T&M) | Government pays a fixed rate for each hour of direct labor worked by contractor, up to a negotiated ceiling on the total price. (Time-and-materials contracts also provide for payments for materials at cost). Indirect costs and profit are all incorporated in the fixed hourly rates. | Used typically for engineering and design services, repair, maintenance or overhaul work, or in emergency situations. Least preferred contract type. Must have appropriate government surveillance during performance. | 1). Potential to maximize profits<br>2). Minimal risk | 1). Constant government surveillance. |
| INDEFINITE DELIVERY/ INDEFINITE QUANITY (ID/IQ) | Contract is somewhat open-ended, i.e., does not specify delivery or performance terms. Payments may be on a fixed price, cost reimbursable, fixed rate per item or service, or a labor-hour basis. Orders are placed against the contract after award. Indefinite quantity contracts provide for a "minimum" and a "maximum" quantity. | Used when the exact time and/or place of delivery is not known at the time of contracting. May be used for either supplies or services. | 1). Guaranteed minimum quantity (unless government terminates contract).<br>2). Potential to maximize profits depending upon payment provisions. | 1). No control over scheduling of orders<br>2). No guarantee of orders beyond contract minimum.<br>3). Possible substantial amount of government surveillance, depending upon payment provisions<br>4). Requires high degree of management involvement. |

# FIRM FIXED PRICE CONTRACTS

1. Government Pays Fixed Price (Established Before Award) Which Is Not Subject To Adjustment Regardless Of Contractor's Cost Experience

2. Used When:
   - Reasonably Definite Design Or Performance Specifications
   - A Fair & Reasonable Price Can Be Established At The Outset

3. Advantages to Contractor:
   - Potential For Higher Contractor Profits
   - Minimum Government Control
   - Fewer Administrative Costs

4. Disadvantages to Contractor:
   - Greater Assumption Of Financial/Technical Risks
   - Vigilance Is Required To Initiate And Substantiate Change Claims

5. Advantages To Government:
   - Contractor Bears Risk Of Performance; Government's Risk Is Fixed And Limited

6. Disadvantages To Government:
   - No Right To Issue Technical Direction

# FAMILY OF COST-TYPE CONTRACTS

1. COST ONLY
2. COST PLUS FIXED FEE*
3. COST PLUS AWARD FEE*
4. COST PLUS INCENTIVE FEE
5. COST SHARING

* Commonly Used At EPA

# COST-PLUS-FIXED-FEE CONTRACTS

1. Government Pays Reasonable, Allowable & Allocable Costs Plus A Negotiated Fixed Fee (Profit). Fixed Fee Does Not Vary With Actual Costs, But May Be Adjusted For Changes In Work To Be Performed.

2. Used When:
   - Performance Desired Can't Be Clearly Specified, And
   - Accurate Cost Estimates Are Impossible

3. Advantages to Contractor:
   - Lower Cost Risk (Best Efforts Only)
   - Reduced Liability For Government Property

4. Disadvantages to Contractor:
   - Maximum Involvement By Government
   - Lower Fee (Profit) Because Of Lower Risks

5. Advantages to Government:
   - Greater Flexibility, Greater Control

6. Disadvantages to Government:
   - Government Assumes Greater Risk
   - Greater Resources Required To Monitor Costs And Performance

# COST-PLUS-AWARD-FEE CONTRACTS

1. Government Pays Reasonable, Allowable & Allocable Cost Plus A Base Fee (0% to 3%) That Does Not Vary With Performance And An Award Fee Based On Subjective Government Evaluation Of Contractor's Performance.

2. Used When:
   - Cost-Reimbursement Contract Is Appropriate,
   - Important To Motivate Contractor To Excellence
   - Contract Value Usually Greater Than $5 Million

3. Advantages To Contractor:
   - Possibility Of Increased Fee
   - Reward For Good Management And Good Performance

4. Disadvantages To Contractor:
   - Complexity Of Negotiation
   - Increased Burden To "Prove" Itself
   - Award Fee May Be Affected By Government Monitoring/Technical Direction

5. Advantages To Government :
   - Ability To Reward Good Performance

6. Disadvantages To Government :
   - Evaluation Process Is Time-Consuming

# FORMS OF COST-REIMBURSEMENT CONTRACTS

1. COMPLETION FORM: Describes The Scope Of Work To Be Done As A Clearly Defined Task Or Job, With A Specific End Product Required.

2. TERM FORM (LEVEL OF EFFORT): Describes The Scope Of Work To Be Done In General Terms And Obligates The Contractor To Devote A Specified Level Of Effort For A Stated Period Of Time. Specific Tasks Are Assigned ToThe Contractor Through Issuance Of Work Assignments.

# TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS

1. Government Pays A Fixed Rate For Each Hour Of Direct Labor Worked By Contractor, Up To Negotiated Ceiling On The Total Price. (Time-And-Materials Contracts Also Provide For Payments For Materials At Cost.) Indirect Costs And Profit Are Included In The Fixed Hourly Rates.

2. Used For Engineering And Design Services, Repair, Maintenance Or Overhaul Work, Or In Emergency Situations.

3. Advantages To Contractor:
   - Potential To Maximize Profits
   - Minimal Risk

4. Disadvantages To Contractor:
   - Constant Government Surveillance During Performance

5. Advantages To Government:
   - Greater Flexibility And Control

6. Disadvantages To Government:
   - Potentially High Cost To Government In Terms Of Cost And Government Surveillance Required
   - LEAST PREFERRED CONTRACT TYPE

# LABOR RATE CALCULATION FOR LABOR-HOUR CONTRACTS

**Basic Hourly Rate:** Ranges from $14 - $16
Category Average: $15

**Fixed Loaded Rate = $32.40**

| | CATEGORY AVERAGE | JOHN S. | SUE T. |
|---|---|---|---|
| LABOR | $15.00 | $14.00 | $16.00 |
| INDIRECT COSTS (@ 100%) | $15.00 | $14.00 | $16.00 |
| PROFIT | $ 2.40 | $ 4.40 | $ .40 |
| TOTAL | $32.40 | $32.40 | $32.40 |

With The Category Average, The Contractor Earns 8% Profit.

With John S., The Contractor Earns 15.7% Profit.

With Sue T., The Contractor Earns Only 1.25% Profit.

# INDEFINITE DELIVERY/INDEFINITE QUANTITY CONTRACTS

1. Orders Are Placed Against The Contract After Award. Orders Specify Time And Place Of Delivery And Quantity To Be Delivered.

2. Three Types:

   Definite Quantity - Definite Quantity Of Specified Supplies Or Services For A Fixed Period.

   Requirements - Filling All Requirements For Specific Supplies Or Services During Contract Period; Sets Maximum Limit; May Set Minimum.

   Indefinite Quantity - Indefinite Quantity Of Specified Supplies Or Services, Providing For A "Minimum" And A "Maximum" Quantity.

3. Used When The Exact Time Or Place Of Delivery, Or Quantity Required, Is Not Known At Time Of Contract Award. May Be Used For Either Supplies Or Services.

# INDEFINITE DELIVERY/INDEFINITE QUANTITY CONTRACTS (Cont.)

4. Advantages to Contractor:
   - Guaranteed Minimum Quantity
   - Potential To Maximize Profits

5. Disadvantages to Contractor:
   - No Control Over Scheduling Of Orders
   - No Guarantee of Orders Beyond Contract Minimum
   - Possible Substantial Amount of Government Surveillence
   - Requires High Degree of Management Involvement

6. Advantages To Government
   - Guarantees Government Ability to Purchase Within Contract Range (Minimum and Maximum Quantity)
   - Great Flexibility And Control Over Scheduling Of Orders

7. Disadvantages To Government
   - Requires Government Purchase Of Minimum Quantity At Specified Price
   - Requires Substantial Amount of Government Surveillence

# MAJOR EPA PROCUREMENT CLASSES

## 1. Mission Contracts

Large, Multi-Year Contracts (Base Plus One Or More Option Years) With Broad Statements Of Work, Exercised By Issuing Work Assignments/Task Orders. Typically Are Term Level Of Effort (LOE) Contracts, But May Be Designed to Enable Issuing Of Fixed Price, Completion or Term Form Cost Plus Task Orders. Advantages Of Flexibility And Continuity.

## 2. Non-Mission Contracts

Contract Statement Of Work Specifies Desired Performance Without Further Clarification. May Be Any Type Of Contract.

## 3. Small Purchase Orders (<$25,000)

Method To Procure Products Or Services Valued At Less Than $25,000. Expedited Procurement Procedures.

# METHODS OF DEFINITIZING CONTRACTS

## 1. Work Assignment

Defines Work To Be Performed (Services/Products To Be Provided) By Contractor Under Broadly Defined Task In Mission Contract. Must Be Signed By Project Officer, Contracting Officer And Contractor.

## 2. Delivery Order

Specifies Products To Be Delivered By Contractor Under Time & Materials-Type Contracts (Basic Ordering Agreements). Must Be Signed By Delivery Order Officer (With Warrant) And Contractor.

## 3. Task/Technical Directive

Used To Definitize A Broad Work Assignment Or Delivery Order And/Or Give Technical Direction To Contractor. (Also Called TDM's, Or Technical Direction Memorandum; TID's, Or Technical Instruction Directive). May Take The Form Of A Formal Agreement Where Provisions Have Been Made For Contractor Signature.

SAMPLE

# WORK ASSIGNMENT ACTION REQUEST

CONTRACT NUMBER _____ WORK ASSIGNMENT NO: _____

CONTRACTOR _____ AMENDMENT NUMBER _____

WORK ASSIGNMENT TITLE: _____

PURPOSE: [ ] Initiate Work Assignment [ ] Amend Work Assignment ( ) SOW ( ) LOE
[ ] Approve Work Plan: [ ] Amend Work Plan ( ) SOW ( ) LOE
[ ] Extend Completion Date to: _____ [ ] Disapprove Plan
[ ] Other: _____ [ ] Closeout

COMMENTS:

---

ESTIMATED LEVEL OF EFFORT (WA) _____ GOVT COST ESTIMATE _____
APPROVED LEVEL OF EFFORT (WP) _____ APPROVED AMOUNT _____
CUMULATIVE LEVEL OF EFFORT _____ CUMULATIVE AMOUNT _____

PERIOD OF PERFORMANCE: _____* through _____
(*Date of Contracting Officer Signature unless otherwise specified)

---

## APPROVALS

I have thoroughly reviewed the attached and find that (initial where appropriate):

1. The work assignment
   (a) gives the contractor clear direction and describes needed, useful deliverables _____
   (b) is essential to achieve our technical goals _____
   (c) is within the scope of the contract _____

2. The work plan
   (a) has sufficient steps to achieve the work goals _____
   (b) proposes costs/labor hours that are reasonable and commensurate with the work assignment _____
   (c) is within the statement of work _____

| (Signature) | (Date) | (Mail Code) | (Phone #) |
|---|---|---|---|
| Work Assignment Manager | | | |
| Project Officer | | | |
| Branch Chief/Section Chief | | | |
| Contracting Officer | | | |

INSTRUCTIONS - WORK ASSIGNMENT ACTION REQUEST

Be brief and follow the format provided. Always abide by the "Restrictions on the Work Assignment Manager/Project Officer" to "never give direction to the Contractor that will increase the level of effort or change the authorized Statement of Work."

## WORK ASSIGNMENT REQUEST FORM

The Work Assignment Action is completed for all actions requiring Contracting Officer approval. Contact the Project Officer for additional assistance.

Work Assignment Manager (or Task Manager on his/her behalf) should complete the form.

- Indicate the appropriate contract, work assignement and/or amendment numbers.
- Assign a short, descriptive title.
- Check the purpose(s) of the action; if it involves an amendment, indicate whether it amends the scope of work (SOW), level of effort (LOE) or both.
- Use the comments section to elaborate on "other" or clarify the purpose, or to indicate need for rapid processing, etc., if applicable.
- If a Work Assignment: indicate the estimated level of effort, government cost and period of performance (leave the first blank blank, and write the completion date in the second blank).
- If a Work Plan: fill in all estimates, both the estimated, approval and cumulative levels of effort and amounts. The period of performance for an amendment is the original work assignment date through the desired completion date, which may or may not be the same as the original work assignment date.
- Approvals: The work assignment manager, project and contract officers are required to initial 1(a)-1(c) for work assignments, and 2(a)- 2(c) for work plans, and to sign, date, etc. the form. The branch chief or section chief, whoever is appropriate, initials only 1(a) and (b) or 2(a), as appropriate, and signs, dates, etc., the form, to indicate their knowledge and approval.
- Attach Work Assignment Statement of Work

## STATEMENT OF WORK

A Statement of Work in the following format should accompany each request for a Work Assignment or Amendment. (See following page.)

STATEMENT OF WORK
CONTRACT/WA/AMENDMENT NUMBERS:_____
CONTRACTOR NAME

1. Title: Make it short, descriptive and the same as on the Request Form.

2. Estimated Period of Performance: State it as the "Effective date of work assignment until (insert required completion date)." Performance normally cannot extend beyond the effective contract option period which usually ends September 30.

3. EPA Work Assignment Manager: Include the full name, address, room number, mail code and commercial and FTS telephone number of the person who will responsibly manage the work assignment (WA). This is not to be confused with the EPA Project Officer for the entire contract.

4. Background: Briefly summarize any history leading to the need for this work, indicate the purposes of the work, identify benefits, and include any other information linking the work to the Office of Emergency and Remedial Response.

5. Scope of Work: Identify and number the tasks sequentially to be performed by the Contractor. Specify the required completion date for each task and/or deliverable to be produced, and provide deliverable specifications, if any. Work requirements shall clearly establish the contractor's responsibility by using the explicit working: "The Contractor shall...." Work assignments will not be issued based on poorly written work statements.

6. Schedule of Deliverables: Normally in a table, summarize the tasks required, deliverables to be produced, and expected delivery dates. Tasks listed should match or be abbreviated forms of tasks titles in scope of work.

7. Special Reporting: Contract Articles routinely require a work plan (including QA), monthly progress, deliverable and financial reports, and a final report for each work assignment. Specify only special reports, quantities and addresses. If there are no special reporting requirements, indicate "None".

8. General: List if: (a) Confidential Business Information is disclosed to the Contractor; (b) The Contractor uses Government furnished equipment, date or facilities; (c) expert testimony is expected; (d) release of information and results of the Contractor is restricted; (e) credentials for right-of-entry as required; and (f) other conditions necessary for project performance.

9. Suggested Skills Mix and Level of Effort: Identify EPA's best estimate of the professional (nonclerical) direct labor hours necessary to perform the requested work. Break it down by labor category and then totaled. Note any special qualifications needed, if any.

# ORDER FOR SUPPLIES OR SERVICES

PAGE 1 OF PAGES

**IMPORTANT:** Mark all packages and papers with contract and/or order numbers.

| 1. DATE OF ORDER | 2. CONTRACT NO. *(If any)* | 3. ORDER NO. | 4. REQUISITION/REFERENCE NO. |
|---|---|---|---|
| | | | |

**5. ISSUING OFFICE** *(Address correspondence to)*

**6. SHIP TO:** *(Consignee and address, ZIP Code)*

**SHIP VIA:**

**7. TO: CONTRACTOR** *(Name, address and ZIP Code)*

**8. TYPE OF ORDER**

☐ **A. PURCHASE** — Reference your _____

Please furnish the following on the terms and conditions specified on both sides of this order and on the attached sheets, if any, including delivery as indicated. This purchase is negotiated under authority of:

☐ **B. DELIVERY** — Except for billing instructions on the reverse, this delivery order is subject to instructions contained on this side only of this form and is issued subject to the terms and conditions of the above-numbered contract.

**9. ACCOUNTING AND APPROPRIATION DATA**

**10. REQUISITIONING OFFICE**

**11. BUSINESS CLASSIFICATION** *(Check appropriate box(es))*

☐ SMALL ☐ OTHER THAN SMALL ☐ DIS-ADVAN-TAGED ☐ WOMEN-OWNED

| 12. F.O.B. POINT | 14. GOVERNMENT B/L NO. | 15. DELIVER TO F.O.B. POINT ON OR BEFORE *(Date)* | 16. DISCOUNT TERMS |
|---|---|---|---|
| 13. PLACE OF INSPECTION AND ACCEPTANCE | | | |

**17. SCHEDULE** *(See reverse for Rejections)*

| ITEM NO. (A) | SUPPLIES OR SERVICES (B) | QUANTITY ORDERED (C) | UNIT (D) | UNIT PRICE (E) | AMOUNT (F) | QUANTITY ACCEPTED (G) |
|---|---|---|---|---|---|---|
| | | | | | | |

| | | | | | |
|---|---|---|---|---|---|
| ***SEE BILLING INSTRUCTIONS ON REVERSE*** | 18. SHIPPING POINT | 19. GROSS SHIPPING WEIGHT | 20. INVOICE NO. | | 17(H). TOT. *(Cont. pages)* ◀ |
| | 21. MAIL INVOICE TO: *(Include ZIP Code)* | | | | 17(I). GRAND TOTAL ◀ |

**22. UNITED STATES OF AMERICA BY** *(Signature)* ▶

**23. NAME** *(Typed)*

**TITLE: CONTRACTING/ORDERING OFFICER**

NSN 7540-01-152-8083 STANDARD 50347-101

**OPTIONAL FORM 347 (10-83)**
Prescribed by GSA
FAR (48 CFR) 53.213(e)

## PURCHASE ORDER TERMS AND CONDITIONS

52.252-2 CLAUSES INCORPORATED BY REFERENCE (Apr 84): This contract incorporates the following clauses by reference with the same force and effect as if they were given in full text. Upon request the Contracting Officer will make their full text available:

FEDERAL ACQUISITION REGULATION (48 CFR CHAPTER 1) CLAUSES

| | |
|---|---|
| 52.203-1 | Officials Not to Benefit (Apr 84) |
| 52.203-3 | Gratuities (Apr 84) |
| 52.203-4 | Covenant Against Contingent Fees (Apr 84) |
| 52.212-9 | Variation in Quantity (Apr 84) (In the preceding clause, the permissible variations are stated in the schedule) |
| 52.222-3 | Convict Labor (Apr 84) |
| 52.222-4 | Contract Work Hours and Safety Standards Act—Overtime Compensation—General (Apr 84) |
| 52.222-26 | Equal Opportunity (Apr 84) |
| 52.222-36 | Affirmative Action for Handicapped Workers (Apr 84) |
| 52.222-40 | Service Contract Act of 1965—Contracts of $2500 or Less (Apr 84) |
| 52.222-41 | Service Contract Act of 1965 (Apr 84) |
| 52.225-3 | Buy American Act—Supplies (Apr 84) |
| 52.232-1 | Payments (Apr 84) |
| 52.232-8 | Discounts for Prompt Payment (Apr 84) (With Alternate 1) |
| 52.233-1 | Disputes (Apr 84) |
| 52.243-1 | Changes — Fixed Price (Apr 84) |
| 52.249-1 | Termination for Convenience of the Government (Fixed Price) (Short Form) (Apr 84) |

NOTE.—If desired, this order (or a copy thereof) may be used by the Contractor as the Contractor's invoice, instead of a separate invoice, provided the following statement (signed and dated) is on (or attached to) the order: "Payment is requested in the amount of $_____. No other invoice will be submitted." However, if the Contractor wishes to submit an invoice, the following information must be provided: contract number (if any), order number, item number(s), description of supplies or services, sizes, quantities, unit prices, and extended totals. Prepaid shipping costs will be indicated as a separate item on the invoice. Where shipping costs exceed $10 (except for parcel post), the billing must be supported by a bill of lading or receipt. When several orders are invoiced to an ordering activity during the same billing period, consolidated periodic billings are encouraged.

### RECEIVING REPORT

Quantity in the "Quantity Accepted" column on the face of this order has been: ☐ inspected, ☐ accepted, ☐ received by me and conforms to contract. Items listed below have been rejected for the reasons indicated.

| SHIPMENT NUMBER | PARTIAL / FINAL | | DATE RECEIVED | SIGNATURE OF AUTHORIZED U.S. GOV'T. REP. | DATE |
|---|---|---|---|---|---|
| TOTAL CONTAINERS | | GROSS WEIGHT | RECEIVED AT | TITLE | |

REPORT OF REJECTIONS

| ITEM NO. | SUPPLIES OR SERVICES | UNIT | QUANTITY REJECTED | REASON FOR REJECTION |
|---|---|---|---|---|
| | | | | |

OPTIONAL FORM 347 BACK (10-83)

**Sample**

# TASK DIRECTIVE

CONTRACTOR: _____

CONTRACT NO: _____

WORK ASSIGNMENT NO: _____

TASK NO: _____

DATE OF DIRECTIVE: _____

TD NO: _____

MAXIMUM HOURS AUTHORIZED: _____

ESTIMATED COST: _____

DUE DATE: _____

TASK TITLE: _____

DESCRIPTION OF TASK: _____

| SPECIFIC TASK ACTIVITIES/DELIVERABLES | DEADLINES |
|---|---|
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | |
| | |

[ ] ADDITIONAL SCOPE ATTACHED

COMMENTS:

| AUTHORIZING: | SIGNATURE | DATE | PHONE NO |
|---|---|---|---|
| TASK MANAGER: | | | |
| WORK ASSIGNMT MGR: | | | |
| PROJECT OFFICER: | | | |

RECEIVED BY:

[ ] Accepted [ ] Rejected [ ] Accepted With Exceptions (Attached)

| CONTRACTOR: | | | |
|---|---|---|---|

## INSTRUCTIONS FOR COMPLETING TASK DIRECTIVE

### Purpose

The Task Directive is used to give technical direction to the contractor in the conduct of a task which has not been explicitly defined in the work assignment in terms of either the specific activity(ies) or approach desired, the deliverable(s), the due date(s) and/or the level of effort. It can also be used to further clarify the task articulated in the work assignment.

### Form Completion

Be brief and follow the format provided. Always abide by the "Restrictions on the Work Assignment Manager/Project Officer" to "never give direction to the Contractor that will increase the level of effort or change the authorized Statement of Work."

1. Complete all standard information in the top blocks.

   - Task Directive Number: For any given task, the numbering should begin with the number 1, and be assigned chronologically by task. (For purposes of computerized recordkeeping, the TD number should be a combination of the work assignment number, the task number, and the next available TD number associated with the task, beginning with the number 1, (e.g., TD8-3-2 represents Work Assignment 8, Task 3, Task Directive #2.) The TD number should be verified by the Work Assignment Manager.

   - Date of Directive: Should be filled in by and be the date signed by the work assignment manager, unless project officer authorization is required, in which case it is completed by the project officer.

2. Task Title: Should either match the title of the task in the work assignment, or if the work assignment task title is overly broad, be written as a short description of the specific task or activity desired.

3. Description of Task: Give a general description of the overall task.

4. Specific Task Activities/Deliverables: State concisely the activities to be performed and resulting deliverables to be produced, numbered sequentially in the order of desired performance. If there is insufficient space, put an "X" in the "Additional Scope Attached" and continue on an attachment.

5. Deadlines: Should be numbered to match the activities/deliverables and located parallel to the particular activity/deliverable.

6. Comments: State any additional requirements, e.g., reporting, methodology.

7. Authorizing: Must be signed by the task manager and work assignment manager for all tasks. Project officer signature is required only when the task directive is used to exercise a broad "Other support" task in a work assignment.

8. Task directives must be signed and dated by the contractor.

*(Shaded areas are for use of procurement office only)*

Page of

US Environmental Protection Agency
Washington, DC 20460

EPA **Procurement Request/Order**

| | | |
|---|---|---|
| 1. Name of Originator | | 2. Date of Requisition |
| 3. Mail Code | 4. Telephone Number | 5. Date Item Required |

6. Signature of Originator

7. Recommended Procurement Method
☐ Competitive ☐ Other than full and open competition ☐ Sole source small purchase

| 8. Deliver To *(Project Manager)* | 9. Address | 10. Mail Code | 11. Telephone Number |
|---|---|---|---|
| | | | |

12. Financial Data — a. Appropriation — b. Servicing Finance Office Number

**NOTE:** Item 12(d) Document Type — Contract = "C," Purchase Order = "P"

| FMO Use (c) *(13 digits)* | DT (d) | Document Control Number (e) *(6 digits)* | Account Number (f) *(10 digits)* | Object Class (g) *(4 digits)* | Amount (h) Dollars | Cents |
|---|---|---|---|---|---|---|
| | | | | | | |
| | | | | | | |
| | | | | | | |

13. Suggested Source *(Name, Address, ZIP Code, Phone/Contact)*

14. Amount of money committed is:
☐ Original
☐ Increase
☐ Decrease

15. For Small Purchases Only: Contracting Office is authorized to exceed the amount shown in Block 12(h) by 10% or $100, whichever is less.
☐ Yes ☐ No

**16. Approvals**

| | | | |
|---|---|---|---|
| a. Branch/Office | Date | d. Property Management Officer/Designee | Date |
| b. Division/Office | Date | e. Other *(Specify)* | Date |
| c. Funds listed in Block 12 and Block 15 *(if any)* are available and reserved. *(Signature of Certifying Official)* | Date | f. Other *(Specify)* | Date |

| 17. Date of Order | 18. Order Number | 19. Contract Number *(if any)* | 20. Discount Terms |
|---|---|---|---|
| | | | |

| 21. FOB Point | 22. Delivery to FOB Point by *On or before (Date)* | 23. Person Taking Order/Quote and Phone No. |
|---|---|---|
| | | |

24. Contractor *(Name, address, ZIP Code)*

25. Type of Order
☐ a. Purchase

Reference your quote *(See block 23)*

Please furnish the above on the terms specified on both sides of this order and on the attached sheets, if any, including delivery as indicated.

☐ b. Delivery provisions on the reverse are deleted. The delivery order is subject to the terms and conditions of the contract. *(See Block 19)*

c. ☐ Oral ☐ Written ☐ Confirming

**26. Schedule**

| Item Number (a) | Supplies or Services (b) | Quantity Ordered (c) | Unit (d) | Estimated Unit Price (e) | Unit Price (f) | Amount (g) | Quantity Accepted (h) |
|---|---|---|---|---|---|---|---|
| | | | | | | | |
| | | | | | Total $ | | |

| 27. United States of America By *(Signature)* | 28. Typed Name and Title of Contracting Officer |
|---|---|
| | |

EPA Form 1900-8 (Rev. 9-86) Previous editions are obsolete.

COPY 4—COMMITMENT CLERK (OBLIGATION COPY)

# Instructions for Completing EPA Form 1900-8
# Procurement Request/Order

**General:**

This form is a 9-part interleaved set and is designed to be completed with an elite typewriter (12 pitch). The originating office should complete all areas that apply. Shaded areas are reserved for Procurement use only. After completing the form, in accordance with the instructions below, retain the copy marked for "Originator" and send the others through required channels.

**Item:**

| | |
|---|---|
| 1 thru 6 | Enter the originator's name, mail code, telephone number, date of requisition, signature of originator, and the latest date that the items can be delivered. |
| 7 | Self explanatory. Attach a justification for other than full and open competition or for sole source small purchases. |
| 8 thru 11 | Enter the name, address, mail code, and telephone number. If the person is the same as the originator, leave blank. |
| 12 | Self explanatory. Failure to include the appropriation number, the number of the Servicing Finance Office designated by the Financial Management Division for the accounting office which will record the commitment and obligation, document type, document control number, account number, object class, or dollar amount may result in the return of the request to the originator for completion of these items. Special care should be taken to insure that all data placed in these blocks are accurate and appear legibly on all copies as these data will serve to record the commitment of funds as well as to eventually obligate the funds on the contract document. Note: Item 12(d) should be used to denote document type (DT) code, i.e., C = EPA prime contract, P = EPA purchase or delivery order. |
| 13 | If more than 1 source is suggested, attach a list of the contractor's/vendor's name, address, and point of contact (if known) for each source. |
| 14 | Self explanatory. |
| 15 | **For Small Purchases Only:** Check one box. If "Yes" is checked, the funds certifying official must commit sufficient funds in the Document Control Register to cover the total potential amount of the obligation. |
| 16 | Self explanatory. |
| 17 thru 25 | For procurement office use only. |
| 26(a) | Self explanatory. |
| 26(b) | The degree of detail required will vary with the complexity of the proposed procurement. Each request shall contain sufficient information on its face to process the request. If the proposed procurement is for nonpersonal work or services, provide a title which specifically describes the work or services to be procured and limit the title to sixty (60) positions, including the spaces between each word of the title for computer input, and attach the documentation required in Chapter 2 of the Contracts Management Manual. In other instances, describe the article(s) requested in detail using manufacturer's model numbers and descriptions, if possible, and provide specification, quantity increment, delivery requirement, and special packaging or transportation requirements. (Use EPA Form 1900-8A, Continuation Sheet, if additional space is required.) |
| 26(c) and 26(d) | Self explanatory. |
| 26(e) | Enter the estimated price of the item |
| 26(f) and 26(g) | For Procurement use only — **Leave Blank.** |
| 26(h) | Used for inspection and acceptance only. |
| 27 and 28 | To be completed by the contracting officer. |
| **Note:** | The contracting officer will complete the blocks marked "Invoice Address" and "Ship To" on copy 2 when this form is used as a purchase order. |

## Remove this page before completing the Procurement Request.

**EPA Form 1900-8 (Rev. 9-86) Previous editions are obsolete.**

Chapter 3
# ELEMENTS AND TYPES OF CONTRACTS

This chapter discusses the basic elements of government contracts, and then introduces the different types of contracts. It is important to understand the difference between these types in order to perform effective contract administration. The various terms and conditions applicable to each contract type point to different Government responsibilities and different rights and obligations of both the contractor and the Government.

## 3.1 Major Contract Elements

Contracts are comprised of several elements. The Statement of Work is only one of these, although it is the one typically most familiar to program staff since it is written by them. Project Officers, Work Assignment Managers and Delivery Order Officers need to be familiar with all the elements, however, in order to effectively manage their contracts. Terms and conditions contained in other parts of the contract can have a major impact on contract management. EPA staff unfamiliar with these terms may be in for a rude surprise, since these terms will override terms in the statement of work.

The five major elements of a government contract include:

1. **Administrative Details.** These include such items as the name and address of the contractor, the names of the contracting officer, project officer, contract specialist, the address of the EPA Paying Office, etc.

2. **Contract Parameters.** These include information such as the amount of the contract, the period of performance, the level of effort or the minimum and maximum amount of work that can be ordered, option periods and amounts, etc.

3. **Work Requirements.** This is the technical part of the contract most familiar to program staff, and includes the statement of work, personnel qualifications, and other technical details.

4. **Standard Terms and Conditions.** These are frequently termed the contract "Boilerplate" -- clauses that are routinely included in government contracts. These clauses are typically drawn from the FAR or EPAAR discussed in Chapter 2, and deal with such critical matters as reporting requirements, fees, technical direction, progress reports, contract changes, etc. Many of these clauses are not written out in full in each contract, but are rather "incorporated by reference." That is, they are listed by title and clause number in the contract. They are nonetheless a valid part of the contract.

   The standard clauses used will depend on the type of contract involved. A list of some of the more significant of these clauses is included on page 47, and a number of the clauses are quoted and discussed throughout the course.

5. **Specialized Terms and Conditions.** These terms are included above and beyond standard terms and conditions to deal with matters peculiar to the particular contract, e.g., the award fee plan, the list of key personnel, subcontract approvals, etc.

Project Officers should not assume that the contract boilerplate is identical from contract to contract. Changes in the FAR and EPAAR do occur periodically, and the specialized terms and conditions included are unique to that particular contract. Although Project Officers, Work Assignment Managers, Delivery Order Officers and Delivery Order Project Officers generally take the time to familiarize themselves with the contract parameters and work requirements, it is critical that they also be aware of the standard and specialized terms and conditions. These latter terms may govern in cases of inconsistency with the specifications included in the statement of work, as described below.

### 3.2 Order of Precedence

The written terms of a contract govern, no matter what each party personally understands the agreement to be. The Contracting Officer is the only person, outside the courts or the Boards of Contract Appeals, who can or should interpret a contract on behalf of the Government. Project Officers, Delivery Order Officers and other program staff should always defer to the Contracting Officer when called upon to interpret the meaning of any contract provision.

All EPA contracts include a clause entitled "Order of Precedence." This means that, in the event of any inconsistency within the contract provisions, the following portions, in order of precedence, will govern:

(1) the contract schedule (excluding the specifications);

(2) representations and other instructions;

(3) contract clauses (standard and specialized terms and conditions);

(4) other documents, exhibits and attachments; and

(5) the specifications (in the statement of work).

In other words, specifications contained in the statement of work receive lowest preference and will be overridden by all other contract terms and conditions.

If a contract provision can be interpreted in more than one way, even after applying the order of precedence shown above, it is termed an "ambiguity." Ambiguities are almost always resolved in favor of the contractor, since the Government drafted the document.

### 3.3 Types of Contracts

EPA uses a variety of different types of contracts. Each type has its advantages and disadvantages, both for the government and the contractor. Some types are definitely preferable over others, but may need to be used because of some characteristic of the work to be performed. Hopefully for the technical contract manager, the contract type selected is well-matched to the work to be performed.

EPA uses five basic contract types: the fixed price contract; the cost-reimbursement contract; time and materials contract; labor hour contract; and indefinite delivery/indefinite quantity contract.

A summary of the various contract types and their characteristics is found on page 50.

## 3.4 Firm Fixed Price Contracts

The firm fixed price contract provides for a price which is not subject to any adjustment, regardless of the contractor's cost experience during performance. In a firm fixed price contract, the specified price is paid to the contractor when the items called for by the contract have been delivered and accepted. The statement of work or contract specifications define the products to be provided or services to be performed.

### 3.4.1. When Used

This type of contract is used only when a definitive design or performance specification or statement of work exists, and a fair and reasonable price can be established prior to award. If major cost uncertainties are present, or definite specifications are not available, a fixed price contract may not be awarded. Because the contractor assumes full cost responsibility in a fixed-price arrangement, and because this type of contract imposes a minimum administrative burden on both parties, it is always the preferable type to use if conditions permit.

Fixed price arrangements are generally used for an entire contract. However, it is possible to mix types of delivery orders under an indefinite delivery/indefinite quantity contract. Small purchases (discussed later on page 86) are generally fixed price contracts.

### 3.4.2. Issuance of Work

The statement of work in the contract or the contract specifications govern the work. The statement of work in the contract as originally written should be sufficiently specific that there is no need for technical direction from the Government. Changes in the statement of work can only be made through formal amendment, giving the contractor the opportunity to renegotiate the price.

### 3.4.3. Government Responsibilities

The Project Officer is responsible for periodically evaluating the contractor's progress to assure that time deadlines are met, and for inspecting the items to verify that the quality requirements have been adhered to. The Government is entitled to receive exactly what the contract requires, and the standard "Inspection" clause (see page 297 ff ) gives the Government the right to inspect all deliverables at any time, whether at source or at destination. However, the clause also states that the Government cannot unnecessarily delay the work by conducting inspections and tests. The Government has no authority to provide technical direction under fixed price contracts; technical direction that can be interpreted as Government interference can give the Contractor a contract claim.

The responsibility for acceptance belongs to the Contracting Officer, unless the contract delegates that authority, in writing, to the Project Officer. (Most of EPA's contracts do delegate the authority for acceptance to the Project Officer, but it must be specifically stated in the contract before the Project Officer can assume responsibility for that function.) Whoever performs this function must be thoroughly familiar with the specifications or Statement of Work. Acceptance or rejection of all items must take place as soon as possible after delivery. If a Project Officer has reason to reject any item, he or she should contact the Contracting Officer immediately so official notification to the contractor can be made and corrective action can be taken. The contractor must correct the deficiency, or the Government has the right either to replace or correct the defective good or services and charge the contractor the cost, or to require delivery of the defective goods at a reduced price. The Government also has the right to terminate the contract for default (see Chapter 14).

Project Officers must ensure that they expedite the handling and certification of contractor vouchers, since delays can strain the contractor's financial ability to perform, and can violate the provisions of the Prompt Payment Act (see Chapter 11).

The Government's obligation to make payment under fixed price contracts is expressed in the standard "Payments" clause. Basically, this clause provides for payment of the price(s) stated in the contract for supplies delivered and accepted, or for services rendered and accepted, upon the submission of proper invoices or vouchers. The clause also provides for payment for accepted partial deliveries when the amount is at least $1,000, or 50 percent of the total contract price, whichever occurs first.

It is also possible to make progress payments if the contract so provides. Progress payments are payments made as work progresses under a contract in order to help the contractor finance performance of the work. These payments are based upon costs incurred or percentage of completion, and are made before actual completion or acceptance of the work.

### 3.4.4. Contractor Responsibilities

The contractor submits a bid to perform the work defined by the Government. Once that bid is accepted, the contractor's responsibility is to deliver the product or service at the bid price. If the contractor underbids the work to be performed, the contractor must bear the loss. Fixed price contracts give the contractor a major incentive for efficient performance.

### 3.4.5. Advantages/Disadvantages for Government

The advantages of fixed price contracts to the Government are high. The contractor bears the risk of performance; the Government's risk is fixed and limited. If the contractor fails to deliver, the Government simply doesn't pay. On the other hand, the Government has no right to issue technical direction, and if the contractor is having problems, the Government can't simply intervene. The Government can nonetheless use its inspection authority to inspect the product being produced and point out deficiencies or variance from the contract specifications.

Although the Government has no right to issue technical direction, it is nonetheless essential to maintain some level of Government monitoring, particularly if delivery of the product or service by a particular deadline is critical to the Government. Although the Government can reject the product or service that fails to meet specifications, and not pay the contractor until the product or service is correctly

delivered, it is preferable to get the product on time. The Government can not simply ignore oversight of its fixed price contracts.

### 3.4.6. Advantages/Disadvantages for Contractor

Fixed price contracts have numerous advantages for the contractor. If bid properly and managed efficiently, there is potential for higher contractor profits than the typical 7-10% range for cost reimbursement contracts. If the Government accepts the contractor's bid of $20,000 and it actually only costs the contractor $15,000 to perform, the contractor nets a 25% profit. On the other hand, the contractor assumes the risk of getting the work done for the price bid, and if it costs the contractor $22,000 to produce the product or service, the contractor loses money. There is a high cost of error for the contractor, particularly if the contractor underestimates the technical difficulty of the work.

Fixed price contracts also have the advantage of minimum government control and oversight, and involve fewer administrative costs for the contractor. On the other hand, the contractor has to be vigilant in initiating and substantiating change claims. If, for example, the site conditions vary from those specified or presumed in the contract, the contractor must ensure that a cost adjustment is made to account for those differing conditions.

### 3.4.7 Other Aspects

As stated above, the fixed price of the contract or of a particular item in the contract is not subject to adjustment by reason of actual contractor costs. The following situations are examples of ones which might cause the price(s) to be adjusted:

(1) defective workmanship or material;

(2) latent defects;

(3) defective pricing data;

(4) assessment of liquidated damages;

(5) variations in quantity in excess of those permitted by the contract;

(6) partial or complete termination of the contract.

If any of these situations occurs, the Contracting Officer may have to modify the contract to reflect a change in the firm fixed price.

## 3.5 Cost-Reimbursement Contracts

Cost-reimbursement contracts are exactly what they state: the Government agrees to reimburse the contractor's cost of performance.

### 3.5.1 Cost Reimbursement Contract Types

There are five (5) different types of fee (profit) structures which are used with cost-reimbursement contracts. This include cost-only, cost plus fixed fee, cost plus award fee, cost plus incentive fee, and cost sharing contracts. The three (3) described below are generally used at EPA:

(1) **Cost Contract** - With this type, the contractor receives no fee at all. Generally, such contracts are awarded primarily to educational institutions and other nonprofit organizations. They may also be appropriate for research and development work or for facilities contracts.

(2) **Cost-Plus-Fixed-Fee (CPFF)** - This is the most prevalent type of cost-reimbursement contract awarded in this Agency. Under this arrangement, the contractor is paid a negotiated fee that is fixed at the inception of the contract. The amount of fee does not vary with actual cost, but stays fixed unless adjusted as a result of changes in the work to be performed.

(3) **Cost-Plus-Award-Fee (CPAF)** - A CPAF contract provides for a fee consisting of 1) a fixed base amount, and 2) an award pool, the amount of which awarded is based upon a subjective, judgmental evaluation by the Government of the contractor's performance. Areas such as quality, timeliness, ingenuity, and cost effectiveness are evaluated by EPA in accordance with established criteria. The amount of award fee to be paid is decided at stated intervals (usually every quarter or trimester) during contract performance. The overall objective is to motivate the contractor in a positive way to improve poor performance or to continue good performance. This type of contract is considered for use when the expected effort is anticipated to exceed $5 million and a cost-reimbursement contract has been selected. However, it may be used for contracts of any dollar value. Most Superfund cleanup contracts are CPAF contracts.

### 3.5.2 Forms of Cost-Reimbursement Contracts

Cost-reimbursement contracts of any of the types listed above can be structured in one of two basic forms:

(1) The completion form is one which describes the scope of work to be done as a clearly defined task or job with a definite goal or target expressed and with a specific end-product required. This contract form normally requires the contractor to complete and deliver the specified end-product (such as, a final report of an analysis) as a condition for payment of the entire fixed fee established for completing the work. The contractor is expected to complete the work within the negotiated estimated cost. However, in the event the work cannot be completed within the estimated cost, the Government may elect to continue the work provided it increases the estimated cost. The contractor then must complete the work at no additional fee.

(2) The term form (level of effort) contract is one which describes the scope of work to be done in general terms and which obligates the contractor to devote a specified level of effort for a stated period of time. Under this form, the fixed fee is payable at the end of the agreed-upon period of time provided the contractor has exerted the level of effort specified in the contract in performing the work called for, and such performance is considered satisfactory by the Government. Extensions in periods of performance or requirements for additional levels of effort are new acquisitions and involve new fee and cost arrangements as well as adequate justification for other than full and open competition or sole source awards.

The completion form of contract, because of differences in obligation assumed by the contractor, is generally preferred over the term form. Under a completion form contract, prospective contractors are reasonably expected to complete all of the work called for by the Statement of Work within the estimated cost.

### 3.5.3. When Used

The Contracting Officer will award a cost-reimbursement type contract when the estimate of total costs negotiated is believed to be reasonable under the circumstances, but because of the degree of uncertainties involved, a fixed-price arrangement is not feasible. In this situation, the Government assumes the risk, and pays the contractor the actual allowable costs incurred in the performance of the contract, up to the estimate of total costs established at the time of negotiation. Beyond this amount, the contractor will not be reimbursed and is required to stop work unless additional funds are provided and continued work is authorized by the Contracting Officer. The contractor must have, or establish, an accounting system that is acceptable to the Agency before being awarded a cost-reimbursement contract.

Cost-reimbursement contracts are appropriate for research and development activities (such as development of computer systems) where it is difficult if not impossible to know in advance exactly what will need to be done, or how much it will cost to do it..

### 3.5.4. Issuance of Work

Many EPA cost-reimbursement term form contracts are what are called "mission contracts" discussed later in this chapter on page 13, and are very large, multi-year contracts involving numerous rather broadly defined tasks. The contract is "definitized" by means of issuing specific work assignments, which are, in turn, managed by Work Assignment Managers.

### 3.5.5 Government Responsibilities

The Government has major responsibility for definitizing the cost-reimbursement contract, as well as for providing technical direction and oversight. The Government role in cost-reimbursement contracts requires a high degree of involvement, and continuous evaluation of the status of work in progress.

The basic obligation of the Government under a cost-reimbursement contract is to make payment to the contractor for the costs incurred during performance, plus whatever amount of fee has been negotiated or awarded. The Contracting Officer must determine the allowable costs in accordance with the principles set forth in FAR Part 31. Specific types of costs are unallowable in these regulations, such as interest on borrowing, bad debts, entertainment, advertising costs unless need arises under the contract, fines and penalties from violations of Federal, state or local laws, etc..

Under these principles, the Government also will pay the contractor only if the costs claimed are reasonable and allocable. Reasonable costs are those of an amount and type that would be incurred by an ordinarily prudent business person in a competitive business, and must be consistent with the contractor's normal operating practices. Allocable costs include 1) direct costs or expenses incurred specifically for performance on that contract, and 2) a portion of indirect costs, which are expenses

which cannot be assigned directly to a specific contract but which benefit the contract indirectly.

Under a CPFF Contract, the contractor is paid a portion of the fixed fee with each voucher until 85 percent of the fee has been paid. The remaining 15 percent of fee, or $100,000, whichever is less, is withheld by the Agency until the final voucher is paid. This amount is also withheld from the base fee amount of a CPAF contract.

### 3.5.5 Contractor Responsibilities

The contractor under cost-reimbursement contracts is not required to provide a finished product meeting clearly defined specifications in order to get paid. The contractor is only required to use the contractor's "best efforts" to provide the desired performance. With term-form contracts, if the contractor's best efforts do not deliver the desired performance, the contractor is not penalized. If fact, the contractor gets paid even if the work has to be redone. In term-form contracts, the contractor's basic obligation is simply to deliver the hours of work bid up to the contract ceiling. The only time the contractor doesn't get paid under cost reimbursement contracts is if the government can prove a clear case of fraud or deliberate ignoring of government technical direction. That is why continuous government monitoring is so important, so that appropriate technical direction can be given to guide the contractor's efforts toward project completion.

In completion-form contracts, however, the contractor is expected to delivery the specified end-product within the estimated cost, and failure to do so can result in reduction of fee and completion of work at no additional fee.

### 3.5.6. Advantages/Disadvantages for Government

Cost-reimbursement contracts provide the Government the major advantages of flexibility and maximum control. The Government is not bound to a rigid set of specifications or tightly defined statement of work necessary in a fixed price contract. Rather, since the statement of work generally has such broad task areas, the Government can assign work as it needs it in the form of specific work assignments under the broad tasks. This permits the Government to adjust the contract work to meet its needs as these needs become defined. In addition, the Government can modify the work assignment to redirect the work.

If the contract is an award-fee contract, the Government has the additional advantage of being able to reward good contractor performance, increasing the contractor's incentive to perform at a higher level.

There are, however, disadvantages. The Government not only assumes all of the cost risks in cost-reimbursement contracts, but there are other disadvantages as well. A far greater administrative burden is placed upon the Government in a cost-reimbursement arrangement. Costs must be audited, at a minimum, once before final payment, and a determination must be made that all costs claimed are allowable, allocable, and reasonable. (See Chapter 11 for further details.)

Many times, individual vouchers may be audited. Frequent financial monitoring is also required. Administration is even further complicated if Government property is involved (see Chapter 11). If the contract is an award-fee contract, periodic contractor evaluations are required to administer the award fee process, which can be time-consuming.

Further, there is less incentive afforded the contractor to control costs or to improve performance, unless the award fee form is used. Because of these disadvantages, cost-reimbursement contracts should be used only when necessary and when conditions warrant.

### 3.5.6. Advantages/Disadvantages for Contractor

The cost-reimbursement contract has the advantage of sheltering the contractor from risk. The contractor gets paid even if the contractor fails to complete the work within the desired time frame or cost estimate. In term-form contracts, the contractor is paid for time spent (best efforts), not for work completed or products delivered. On the other hand, the contractor may have to settle for a lower fee or profit as a result of the lower risks involved. In addition, the administrative costs (recordkeeping, reporting, etc.) associated with cost-reimbursement contracts are much higher, and there is a great deal more government control and involvement. The contractor must be able and willing to be responsive to changing government needs and technical direction.

If the contract is an award-fee contract, the contractor has the possibility of earning a higher fee as a reward for good management and performance. However, the award fee process subjects the contractor to periodic formal evaluation, imposing an increased burden on the contractor to "prove itself". In addition, the award fee may be adversely affected by the quality of Government monitoring and technical direction. If Government staff only documents deficiences and failss to adequately document good performance in the performance appraisal process, the contractor may not obtain the award it deserves.

## 3.6 Time-and-Materials Contracts

The time-and-materials (T&M) type of contract provides for the procurement of supplies or services on the basis of (1) direct labor hours at specified fixed hourly rates (rates include wages, overhead, general and administrative expense, and profit), and (2) material at cost, and, where appropriate, material handling costs as a part of material costs. Material handling costs may include indirect costs not included in the labor rates, including general and administrative expense. A variation on the time-and-materials contract is one where fixed rates for equipment are used as well as fixed rates for labor.

### 3.6.1 When Used

This type of contract is usually used in the procurement of (1) engineering and design services, (2) repair, maintenance, or overhaul work; and (3) work to be performed in emergency situations (e.g., Superfund cleanups).

Time and materials contracts should be used only where it is not possible at the time of placing the contract to estimate the extent or duration of the work or to anticipate costs with any reasonable degree of accuracy. Particular care should be exercised in the use of this type of contract since its nature does not encourage effective cost control. Thus, it is essential that a T&M contract be used only where provision is made for adequate controls, including appropriate surveillance by EPA personnel during performance to give reasonable assurance that inefficient or wasteful methods are not being used.

### 3.6.2. Issuance of Work

Work is generally ordered by an ordering officer in the form of a delivery order. (See Optional Form 347 on page 67.)

### 3.6.3. Government Responsibilities

The basic responsibility of the Government is to pay the contractor for services rendered, up to the negotiated ceiling amount. Because there is absolutely no incentive for the contractor to control costs under this contract type, continuous Government surveillance is required to ensure that the services provided are being effectively and efficiently managed, and that materials provided are being provided at a reasonable cost.

### 3.6.4. Contractor Responsibilities

The contractor's prime responsibility is to deliver the labor hours and materials ordered, up to the specified ceiling amount. The contractor does not guarantee its performance to produce any particular end product.

### 3.6.5. Advantages/Disadvantages for Government

Time and materials contracts are useful because of the flexibility and control they offer. Work can be ordered when and as needed; changes within the scope are easily made to adjust to changing situations. Only labor rates and the contract ceiling are fixed.

On the other hand, time and materials contracts do not afford the contractor any positive profit incentive to control the cost of materials or to manage its labor force effectively. Since it does not encourage effective cost control, it requires almost constant Government surveillance. It should be used only after the Contracting Officer determines that no other type of contract will suitably serve. It sometimes requires the daily acceptance of charges by Government personnel, who must monitor performance to ensure that charges are appropriate for the work performed.

### 3.6.6. Advantages/Disadvantages for Contractor

The T&M contract is advantageous from the contractor's point of view because of the minimal cost risk involved and the potential to maximize profits. However, the contractor is subject to continuous government surveillance during performance, and there are high administrative costs associated with the government technical and financial monitoring.

## 3.7 Labor-Hour Contracts

The labor-hour type of contract is very similar to the time-and-materials type of contract, except that materials will not be supplied. The contractor is reimbursed strictly on the basis of hours worked at the fixed labor rates specified in the contract. Handout 3-9 on page 57 illustrates the problems potentially associated with labor-hour (or time and materials) contracts. Since the contractor is reimbursed at a fixed rate for labor falling within a particular category, the contractor has a high incentive to use lower-paid and thus less experienced employees on a particular job, since the contractor's profit margin on the lower-paid employee may be substantially higher. This can work to the government's disadvantage.

## 3.8 Indefinite Delivery/Indefinite Quantity Contracts

One of the following indefinite delivery type contracts may be used for procurement where the exact time or place of delivery, or quantity to be delivered, is not known at time of contracting.

(1) Definite Quantity Contracts. This type of contract provides for a definite quantity of specified supplies or for the performance of specified services for a fixed period. Deliveries or performance occur at designated locations upon order by EPA. This type of contract is particularly suitable for use where it is known in advance that a definite quantity of supplies or services will be required during a specified period and is regularly available or will be available after a short lead time.

(2) Requirements Contracts. This type of contract provides for filling all actual purchase requirements of specific supplies or services during a contract period with deliveries to be scheduled by the placement of orders to the contractor. All Agency requirements for the supplies or services covered by this type of contract must be ordered from that contractor, and cannot be procured through any other contracts. (This restriction does not apply to the other two types of indefinite delivery contracts.)

A realistic estimate of total quantity to be ordered throughout the contract period is stated for the information of prospective contractors. However, the Government is not bound by the estimate set forth. The estimate may be obtained from the records of previous requirements and consumption, or by other means. The contract states the maximum limit of the contractor's obligation to deliver and appropriate provisions limiting the Government's obligation to order. It may also specify the maximum quantities which may be ordered under each individual order during a specified period of time. Similarly, when small orders are anticipated, the contract may specify the minimum quantities to be ordered. Funds are obligated by each order and not by the contract itself.

A requirements contract may be used for procurement when it is impossible to determine in advance the precise quantities of the supplies or services that will be needed by EPA during a definite period of time. Advantages to the government of this type of contract are:

(1) flexibility with respect to both quantities and delivery scheduling;

(2) supplies or services need be ordered only after actual need has materialized.

Generally, the requirements contract is appropriate for use when the item or service is commercially available and when a recurring need is anticipated.

(3) Indefinite Quantity Contracts. The indefinite quantity type of contract provides for the furnishing of an indefinite quantity of specified supplies or services, with deliveries to be scheduled by the placement of orders to the contractor. The contract provides that the Government will order a stated minimum quantity of the supplies or services and that the contractor will

furnish the minimum and any additional quantities not exceeding a stated maximum.

The maximum quantity (or amount expressed in dollars) should represent the Government's best estimate of potential usage. In appropriate cases the maximum may be raised during the contract period, if justification for using other than full and open competition exists. The minimum must be more than a nominal quantity; yet it should not exceed the amount which is fairly certain to be ordered. The common practice is for the first order to be for the minimum quantity, and placed simultaneously with contract award. EPA Form 1900-8 (see form on page 71), Optional Form 347 or another form approved by EPA may be used in placing orders. Some contracts of this type also stipulate minimum and maximum quantities applicable to each order.

### 3.8.1. When Used

An indefinite quantity contract may be used where it is impossible to determine in advance the precise quantities of the supplies or services that will be needed by EPA during a definite period of time and it is not advisable for the Agency to commit itself for more than a minimum quantity.

Traditionally, fixed-price or fixed-rate arrangements have been used in indefinite quantity contracts. In such cases the solicitation provides for fixed amounts per item specified, and evaluation of proposals for award is based on respective offerors' bid prices per item times the maximum quantity. Other forms of pricing arrangements may be used. These methods include: (i) fixed loaded labor rates in the time-and-material or labor-hour mode and (ii) cost-reimbursement.

### 3.8.2. Issuance of Work

Work is ordered through the issuance of delivery orders.

### 3.8.3. Advantages/Disadvantages for Government

If time-and-materials or labor-hour pricing arrangements are used, the indefinite quantity contract has the same disadvantages as those types of contracts. Therefore, it is essential that adequate Government surveillance be performed at all times.

There are, however, certain advantages to the indefinite quantity type which make it attractive to the government in some situations. These are:

(1) discrete funding with each order;

(2) flexibility with respect to both quantities and delivery scheduling;

(3) placing orders only as the need arises;

(4) flexibility in the types of pricing arrangements selected for use; and

(5) the Government's legal obligation is limited to contract minimums and delivery orders as issued.

### 3.8.4. Advantages/Disadvantages for Contractor

These contracts have the advantage of guaranteeing that the Government will order a specified minimum quantity of product or services. They also provide the contractor with the potential of maximizing profits, particularly if time and material or labor-hour arrangements are used.

The disadvantages from the contractor's standpoint are also major, however. The contractor has no control over the scheduling of orders, and must respond promptly when orders are placed. The contractor must always "be prepared." In addition, there is no guarantee that the Government will order more than the required minimum quantity. So the contractor has to stay prepared but may not be requested to deliver. This can be costly, and it is hard for the contractor to plan effective resource allocation. There is also likely to be a high degree of Government surveillance, and the contracts require a high degree of management involvement on the part of the contractor.

## 3.9 Letter Contracts

A letter contract is a written preliminary contract that authorizes the contractor to begin work immediately, before negotiations have been completed and a definitive contract awarded. It is used only when the supplies or services are so urgently needed that the Government's interests demand that the contractor be given a binding commitment to commence performance, e.g., in Superfund cleanups to procure emergency response services from local contractors.

A letter contract must contain a maximum liability of the Government to cover the estimated amount necessary to cover the contractor's efforts before the contract is definitized (negotiated and converted to another type of contract). This liability must not exceed 50 percent of the estimated cost of the definitive contract. Definitization of the contract must occur within 180 days after the date of the letter contract or before completion of 40 percent of the work to be performed, whichever occurs first.

## 3.10 Major Procurement Classes

From the standpoint of contract administration and its complexities, an alternative method of categorizing contracts and technical monitoring requirements is to classify them as mission contracts, non-mission contracts, and small purchase orders. This classification is useful because it distinguishes the relative size and complexity of the contract, the number of individuals involved in contract administration, and the scope of technical review required.

(1) **Mission Contracts** are typically large, multi-year contracts characterized by broad statements of work. Performance is obtained by the issuance of individual work assignments (or in the case of indefinite delivery/indefinite quantity contracts, through the issuance of delivery orders.) That is, the contract is "definitized" through the issuance of work assignments or delivery orders. Page 63 is an example of a work assignment action request used for issuing work assignments. Page 67 illustrates a sample delivery order form.

Mission-type contracts usually involve at least two administrative levels. For example, LOE contracts are administered by a Project Officer, who

typically delegates the preparation and monitoring of work assignments to one or more Work Assignment Managers. For indefinite delivery/indefinite quantity contracts, the Delivery Order Officer or Administrative Delivery Order Officer may delegate the preparation and monitoring of delivery orders to one or more Delivery Order Project Officers.

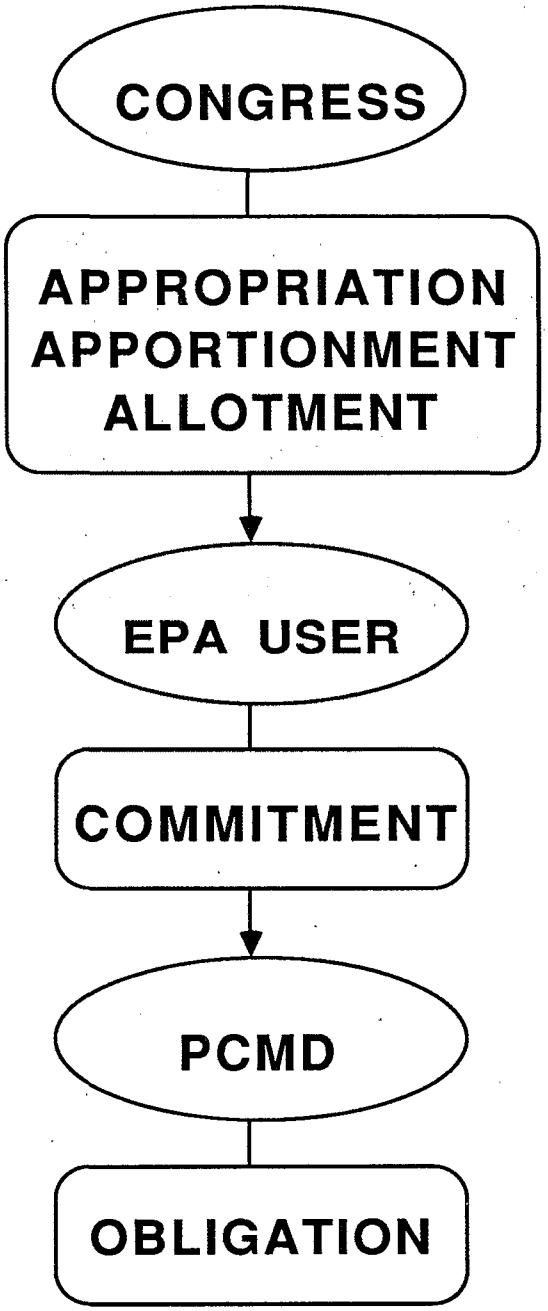
Some Superfund contracts have yet a third method of definitizing work, through the issuance of Technical Direction Memoranda (TDMs) or Technical Instruction Directives (TIDs). These are used to formalize the issuance of technical direction where the work assignment or delivery order is broad and requires further definition. A sample of a task directive is found on page 69.

(2) **Small Purchase Orders** are contracts used to procure products or services valued at $25,000 or less. Because of their scope and relative simplicity (most are fixed priced contracts), contract administration for small purchase orders is similarly simple. The Project Officer usually is the only program individual involved, the work is usually relatively well-defined and requires minimal oversight, and the period of performance is generally short.

(3) **Non-Mission or All Other Contracts.** The balance of EPA contracts for the performance of work valued in excess of $25,000 are typically administratively simple, since they involve only one administrative layer, the Project or Ordering Officer. The Project/Ordering Officer handles all contract administration functions delegated by the Contracting Officer, regardless of contract type.

# CONTRACT FUNDING

# THE CONTRACT FUNDING PROCESS
# (Or, How We Get And Spend Money!)



# APPROPRIATED FUNDS

## LIMITS ESTABLISHED BY CONGRESS

**Time Restrictions**

Limit The Time During Which Funds May Be Obligated Or Expended

**Subject-Matter Restrictions**

Limit the Use To Which Funds Can Be Put For Accomplishing Specific Purposes

# THE LIFE OF AN APPROPRIATION

- ANNUAL APPROPRIATIONS (6890200)

  May Be Obligated Only During The Fiscal Year Covered By the Appropriation Act. Unobligated/ Funds Are Lost To The Agency. E.g., EPA's S&E Appropriation)

- MULTI-YEAR APPROPRIATIONS (689/00108)

  May Be Obligated During A Specified Period In Excess Of One Year, But May Not Be Obligated After The Life Of The Funding. (These Are Usually Two-Year Appropriations, E.g., EPA's R&D And AC&C Appropriations. R&D's Number Is 689/00107.) However, These Funds Must Be Recertified When Using A Prior Year Account Number.

- NO-YEAR APPROPRIATIONS (68/20X8145)

  Are "On-Going" Funds And May Be Obligated Until The Appropriation Is Exhausted. Funds Not Obligated Remain With The Agency And Do Not Lapse Back To The Treasury. (E.g., EPA's Superfund Appropriation). However, These Funds Must Be Recertified When Using A Prior Year Account Number.

# BONA FIDE NEED RULE

## GAO DEFINITION

A Fiscal Year Appropriation May Be Obligated Only To Meet A Legitimate Or Bona Fide Need Arising In The Fiscal Year For Which The Appropriation Is Available.

Issue: This Rule Comes Into Play When You Have End Of Year Funds That You Either Must Obligate Or Lose.

# TYPES OF SERVICES

## 1. SEVERABLE SERVICES:

Performance Must Be A Bona Fide Need For The Time Period In Which It Occurs. Hours Of Service Can Only Be Charged To, And Consumed In, The Fiscal Year In Which The Need Arises.

Deliverable Is Always A Service (Not A Product, Even When It Appears To Be A Product) For A Specified Time Period. Service Must Stop At The End Of The Fiscal Year, Regardless Of The Stage Of Project Completion. Option Years Exercised Must Spend Option Year Hours And Funds.

Typical Examples Are All Term Form (Level Of Effort) Contracts, Some Labor-Hour And Time & Materials Contracts.

# RULES FOR SEVERABLE SERVICE CONTRACTS

(All Term Form [LOE's], Some Labor/Hour, Time & Materials Contracts)

1. All Hours Within Contract Period (Base And Each Option) Must Be Ordered And Completed Within The Contract Period Charged.

2. Work Assignments Must End Concurrently With Expiration Of The Charged Contract Period. Uncompleted Or Further Efforts Must Be Issued Under New Work Assignments Charged To The Subsequent Contract Period (Fiscal Year Appropriation).

3. Contract Performance Periods Must Be Established Consistent With The Period Of The Appropriation Encumbered (Base And Each Option Year).

4. The Contract Base And Each Option Period Are Separate And Distinct. Hours Not Ordered At The End Of Each Period Are Not Available For Use In Subsequent Contract Periods. Can Transfer Unexpended Funds To Subsequent Period If Appropriation Extends.

# TYPES OF SERVICES

## 2. NONSEVERABLE SERVICES:

Performance Can Not Be Segmented. The Service Is Integral To Providing An End-Product. To Discontinue The Effort Based On Passage Of Time Alone Would Deny EPA The End Product Deliverable Which EPA Contracted For. The Bona Fide Need Arises At The Time The Product Is Ordered (I.e., When Funds Are Obligated). Effort May Continue Regardless Of Fiscal Year Boundaries To Enable Completion Of The Product Deliverable.

E.g., Completion-Type Contracts, Most Time & Material Contracts, Most Labor-Hour Contracts, Most ID/IQ Contracts.

# RULES FOR NONSEVERABLE SERVICE CONTRACTS

(Fixed Price Or Cost-Reimbursement Completion Form Contracts)

1. Effort May Cross Fiscal Years. Prior Fiscal Year Funds May Be Used To Pay For Tasks Completed In Subsequent Fiscal Year, So Long As All Funds Were Obligated During Fiscal Year When Task Was Initiated.

# ANNUAL APPROPRIATION EXAMPLE (6810200)

(E.G., FY 91 SALARIES & EXPENSES)

1. TERM FORM (LEVEL OF EFFORT): Must Obligate FY 91 Funds And Complete Performance In FY 1991. May Sometimes Deobligate Excess Funds & Reobligate To Other Contract That Can Complete Performance/Spend Funds During FY 1991.

2. COMPLETION FORM: Must Obligate FY 91 Funds In FY 1991, But Performance May Extend Beyond FY 1991. Excess Funds May Be Deobligated And Reobligated In FY 1991 Only.

3. INDEFINITE QUANTITY: Nature Of Delivery Order Governs. If Work Statement Is Severable, Then #1 Above Applies. If Nonseverable, Then #2 Above Applies. Delivery Orders Must Be Issued Within Specified Contract Period, But Normally Contract Terms Allow Performance To Go Beyond The Contract Period Of Performance.

# MULTI-YEAR APPROPRIATIONS EXAMPLE (681/20108)

(E.G., A.C.&C., R&D Appropriations)

1. TERM FORM (LEVEL OF EFFORT): Must Obligate FY 91/92 Funds In FY 1991, Unless The Comptroller Grants A Carryover Allowance (Re-Certification). Funds Must Be Expended And Performance Completed By End Of FY 92.

2. COMPLETION FORM: Must Obligate FY 91/92 Funds In FY 1991 Unless The Comptoller Grants A Carryover Allowance, But Performance May Extend Into Later Years. Or Until End Product (Deliverable) Is Completed And Accepted.

3. INDEFINITE QUANTITY: Nature Of Delivery Order Governs. If Work Statement Is Severable, Then #1 Above Applies. If Nonseverable, Then #2 Above Applies. All Delivery Orders Must Be Issued Within Specified Contract Period. Normally Contract Terms Allow Performance To Go Beyond The Contract Period Of Issuance.

# NO-YEAR APPROPRIATION EXAMPLE (68/20X8145)

(E.G., Superfund Appropriation)

1. TERM FORM (LEVEL OF EFFORT): Must Obligate FY 91 Account Funds In FY 1991, Unless Comptroller Grants Carryover Allowance (Recertification). Must Complete Performance Within Existing Contract Period, But Otherwise Is No Limitation On Year Of Expenditure. May Deobligate Excess Funds. Need To Recertify Funds From One Year To Next Due To EPA Policy.

2. COMPLETION FORM: Must Obligate FY 91 Funds In FY 1991 Unless Obtain Carryover Allowance, But Performance May Extend Into Later Years. May Deobligate And Reobligate Excess Funds Subject To Need To Recertify.

3. INDEFINITE QUANTITY: Nature Of Delivery Order Governs. If Work Statement Is Severable, Then #1 Above Applies. If Nonseverable, Then #2 Above Applies. All Delivery Orders Must Be Issued Within Specified Contract Period. Normally Contract Terms Allow Performance To Go Beyond The Contract Period Of Issuance.

# CONTRACTS FUNDED FROM MULTIPLE APPROPRIATIONS

**The Director, Financial Management Division, Must Approve The Project Officer's Rationale For Allocating Costs Among Appropriations When:**

1. **Any Proposed Contract Will Be Funded From More Than One Appropriation And Will Have Neither Delivery Orders Nor Work Assignments,**

   **OR**

2. **Any Specific Work Assignment Or Delivery Order Will Be Funded From More Than One Appropriation.**

# RATIONALE FOR MULTIPLE APPROPRIATIONS

Rationale Must State:

- The Contract Number
- The Work Assignment Or Delivery Order Number (If Applicable)
- Each Appropriation Number
- The Allocation Method Proposed
- The Basis For Use Of Such Methodology

The Director, FMD, Must Approve The Rationale Before The Contract Can Be Awarded Or The Work Assignment Or Delivery Order Can Be Issued.

Chapter 4
# CONTRACT FUNDING

Contract funding is a complex issue which is fully understood by surprisingly few people. Rules apply as to which contracts can be incrementally funded. This chapter will attempt to explore these issues with the intent of making them less complex for Project Officers and other personnel outside the contracting and budgetary fields. The rules on contract funding are as applicable during contract administration as they are during the pre-award phase of a contract.

## 4.1 The Appropriations and Contract Funding Process

Funding for EPA contracts results from a Congressional appropriation. Public funds may not be used for the acquisition of supplies and services without authorization from Congress. The Agency's proposed budget is presented to Congress well in advance of the fiscal year for which it is proposed. It is reviewed by both the House and the Senate, defended by Agency officials, and must be approved by both Appropriations Committees before it is passed into law.

EPA may spend its appropriated funds in line with its budget, and commit its funds to carry out the budgeted projects, including contracts. The particular program (e.g., Superfund) "commits" its funds to specific contracts; PCMD contracting officers in turn have the authority to "obligate" those committed funds through the signing of contracts on behalf of EPA.

## 4.2 Types of Appropriations

Congress establishes limits on the use of appropriated funds, which are either time restrictions, subject-matter restrictions, or both. Time restrictions limit the time during which funds may be obligated or expended. Subject matter restrictions limit the use to which money can be put for accomplishing specific purposes, such as a program or project.

Annual appropriations (one-year funds) may be obligated only during the fiscal year covered by the Appropriation Act. Thus, any unobligated funds are lost to the Agency. Multiple-year appropriations, such as two-year appropriations, may be obligated within a specified period in excess of one year, but may not be obligated after the life of the funding. "No year" funds are "continuing" funds, under which obligations may be made without time restrictions until the appropriation is exhausted.

EPA currently has several appropriations against which contracts may be charged:

(1) Annual Appropriations. Funds appropriated under the Salaries and Expenses (S&E) Appropriation currently last for only one year. Funds not obligated during the fiscal year revert back to the Treasury. Contracts typically charged to this appropriation are generally administrative in nature, i.e., janitorial services, landscaping services, or economic consultants. The S&E appropriation number for FY 91 is 6810200 (FY92 would be 6820200, etc.) and must appear on all procurements requests.

(2) Multi-Year Appropriations. Funds appropriated under the Abatement, Control and Compliance (A,C&C) Appropriation are available for two years; funds not obligated the first year are "carried over" into the second year. The Office of the Comptroller issues "carryover" allowances the second year. Carryover funds may also be reprogrammed (moved from one account to another), subject to the same restrictions as new authority. Contracts funded under this appropriation are generally program-related, i.e., contracts to perform laboratory analyses of water or hazardous waste materials, or contracts to perform environmental impact studies. The AC&C appropriation number for FY 91/92 is 681/20108; for FY 92/93 would be 682/30108, etc. The number "68" is EPA's designated number.

(3) Research and Development (R&D) Appropriation. These funds are also available for two years. The Office of Research and Development manages most of this appropriation and issues a variety of research grants and contracts under its aegis. The R&D appropriation number for FY 91/92 is 681/20107. Other organizations may also have two-year appropriations.

(4) No-Year Appropriations. The Superfund Appropriation is a "no-year" appropriation; the funds are available until obligated and do not lapse back to Treasury. The majority of the Superfund appropriation is managed by the Office of Solid Waste and Emergency Response. Contracts are issued for a variety of purposes, including laboratory analyses, cleanup of hazardous waste, and construction of containment facilities. The Superfund appropriation number is 68-20X8145. This number remains constant throughout the life of the appropriation.

(5) Other. There are a number of other appropriations which are smaller than those mentioned above, are specified for much narrower purposes, and are usually managed by a single office, e.g., Building and Facilities funds for construction work.

### 4.3 Bona Fide Need Rule

The general rule for lawfully obligating a fiscal year appropriation is that the supplies or services are intended to serve a bona fide need of the fiscal year for which the appropriation was made. This rule has particular application in the contract administration phase, as it may limit the carryover of funding and hours into option periods in certain types of contracts.

The main question to be answered, if the contract is for services, is whether the services can be classified as severable or non-severable. These terms, as they apply to the bona fide need question, are defined as follows:

(1) **Non-Severable** - a contract is non-severable if the required performance is such that it cannot be segmented on the basis of time. The performance required focuses on completion of the required work rather than providing effort over a period of time. Generally, non-severable contracts tend to involve non-repetitive services or products where there is a definitive workscope which cannot be fragmented by time periods. A completion form of cost-reimbursement contract is non-severable, e.g., providing registration services for a specific event. Fixed price contracts are also generally non-severable. (However, fixed price orders placed under indefinite quantity/indefinite delivery form contracts may be

severable, as in the case of janitorial services.). An example of non-severable service contract would be a requirement for an economic analysis of a specific industry affected by a proposed EPA regulation.

Under a non-severable contract, appropriations available for the year in which the contract is executed may be used to fund the entire performance, even though delivery or performance may continue into a later fiscal year in which the appropriated funds are not available. This is true because a bona fide need exists during the fiscal year in which the contract is awarded and funds are available for obligation.

(2) **Severable** - a contract is severable when the required performance reflects a direct relationship to specific time period(s) and performance can be identified only as a bona fide need for the time period in which it occurs. Severable contracts tend to involve repetitive or routine continuing services, and are defined in terms of hours and not end product. They tend to have a general workscope. A general rule of thumb is: If the contract requires performance of services throughout a period of time rather than by a certain date, there is a good likelihood that it is severable. Severable contracts continue over a time period as opposed to a single job arrangement. Services provided under cost reimbursement, term form (LOE) contracts are defined as severable. An example of severable services is a contract calling for general policy support in the area of CERCLA Enforcement where work assignments are to be issued during contract performance which describe specific tasks to be performed, such as gathering all EPA costs on a particular hazardous waste site for recovery against the responsible party.

Under a severable contract, the period of the contract must be consistent with the period for which the funds are available, and hours or services must be expended during the period of availability. In other words, a contract for severable services funded with a 2-year appropriation can have a base period only as long as the availability of the appropriation. (See paragraph (e), below for an example of this rule.) Other restrictions applicable to severable service contracts, including term form, level-of-effort contracts are listed below:

(a) Completion of Existing Work. All hours available within a given contract period of performance must be used within that period or they are lost. Work assignments which task specific directions and/or order hours of effort must be issued and completed within the same contract period to be construed as valid charges to the appropriation of that period.

(b) Issuance of New Work. New work assignments to conclude efforts initiated under work assignments from a previous contract period (base period or an option period) must be issued so that funds and hours available in the new period are charged for the work accomplished during that subsequent period.

(c) Options. Performance beyond the contract base period may be accomplished by the use of options. The exercise of options originally evaluated at the solicitation stage and priced in contracts is not considered to be new procurement. As such, follow-on work assignments for work begun in the previous contract period may

begin with the issuance of a new work assignment concurrent with the effective date of the option period. Cost-reimbursement term contracts may include a provision stating that, when an option to extend the contract term is exercised, work assignments initiated in a previous period but not completed are extended into the option period.

The provision must clearly state that hours performed and costs incurred during the option period are charged to that option period. Work assignments must have a specific completion date and if this date extends into the option period, the work assignment must refer to the provision discussed above. A modification may be issued by the Contracting Officer to existing contracts to incorporate the provision.

(d) Extensions of Performance Period. Any extensions to the period of performance of a term form contract, i.e., to the base or any of the option periods of performance, is by regulation defined as new procurement. As such, extensions can only be accomplished through full and open competition procedures or through one of the seven (7) statutory exceptions to obtaining full and open competition. Each period of performance (base and each option) is separate and distinct and these procedures apply separately for extensions to each period. Work assignments for follow-on or new work may only be issued upon approval and execution of the extension. These work assignments may be issued concurrent with the effective date of any such contract modification.

(e) Period of Performance. To ensure that obligations in each contract period of performance (base and each option) are proper, such periods of performance must be established consistent with the period of the appropriation(s). For example, the base period of the contract could extend from the date of award to the expiration date of a two-year appropriation. For a contract awarded October 1, 1985, or thereafter against a two-year appropriation, (e.g. FY 86/87), the base period could extend until September 30, 1987.

A contract funded with the same appropriation and awarded on December 15, 1986 could also have a base period through September 30, 1987. Option periods beyond this base period may also be established consistent with anticipated periods of future appropriations. However, considering pricing uncertainties beyond three years in the future, good contract management would strongly suggest that option periods beyond the base period be written for one year at a time.

(f) Unexpended Funds; Audits. The contract base and each option period of performance are separate and distinct. Hours not ordered and unexpended funds from expiring appropriations remaining at the end of each period are not available for use in the subsequent contract period. Funds from expiring appropriations should be deobligated to the extent they exceed the Government's liability. To definitively ascertain all actual allowable, allocable, and reasonable costs requires a final audit. Contracting Officers could order audits and close each year separately. It is generally more efficient to only order a single final audit after the conclusion of the last option

period. Normally, funds are deobligated only after settlement of the final contract audit, but may be deobligated earlier, provided that sufficient funds are left to provide for unforeseeable increases in cost that may result, e.g., from the application of final indirect cost rates. (See Section 4.8, below, for a discussion of deobligation of contract funds.)

(g) No-Year Appropriations. Contract performance periods involving appropriations with indefinite obligation terms, commonly referred to as no-year funds or x-year appropriations, should be consistent with sound program and contract management needs. Contract periods (base and options) may be established for terms as long as these needs dictate. Generally, contract periods of up to three years approach the limit of sound contract management. Periods for more than three years must be approved by the Chief of the Contracting Office prior to issuance of the solicitation.

Because of these restrictions on severable service contracts, Project Officers are encouraged to develop definitive Statements of Work that can be priced as either cost-reimbursement completion type or fixed-price completion contracts, which, as they constitute non-severable services, may cross fiscal years and be charged to the year in which the contract is executed. See Appendix 4A on page 113ff for a comptroller general decision and further discussion.

### 4.4 Accounting Data

Contract obligations carry with them certain accounting data which specifically identify them. These are:

(1) Appropriation number - As described above, this number varies depending whether the appropriation is annual, multi-year or no-year. For example, the annual S&E appropriation number for FY88 was 6880200.

(2) Account number - An account number is a 10-digit alpha/numeric identification which classifies accounting data by organizational structure and program budget.

(3) Document control number (DCN) - The DCN is a 6-digit serial number uniquely assigned to each commitment, and is recorded with each obligation made against that commitment.

(4) Object Class - An object class is a code used to identify the kind of material or service to be obtained. It consists of four digits and is divided into two parts, i.e., a major object class (first two digits) and a sub-object class (last two digits).

(5) Amount - The amount of the obligation is to be shown in dollars and cents.

Each EPA program office has an administrative staff member designated to assign and manage that office's funds. This individual records all commitments made and monitors the availability of program funds. This individual should be contacted to obtain the appropriate DCN number and verify all accounting data.

## 4.5 Selecting Appropriations to Fund Contracts and Distribution of Costs Among Source Appropriations

Each time a work assignment, delivery order or contract without work assignments or delivery orders is funded, the office originating the action must decide which appropriation or appropriations will be the source of funds for that contract action. Certain rules apply to the selection process and to the distribution of costs among appropriations if more than one appropriation is used.

a. **Selecting Appropriations.** Not all EPA appropriations are available to fund every type of contract action. To find out which appropriations are available to fund a given contract action, an office must first decide which object class should be assigned to the action. The Financial Management Division (Fiscal Policies and Procedures Branch) annually distributes an updated listing of object classes and definitions. (The object class is entered as part of the accounting data on procurement requests.) The office must then review the Budget Division's (Budget Formulation and Control Branch) listing of allowable object classes by appropriation to determine which appropriations are available to fund the particular contract action. Before the procurement request is sent forward to PCMD, an office originating a contract action must ensure, through their senior budget officer, that only allowable appropriations are used.

b. **Consistent Use of Appropriations.** Generally, a single appropriation is chosen to fund each work assignment, delivery order, or contract without work assignments or delivery orders. The General Accounting Office has issued an opinion to EPA on the continued use of that appropriation, once selected, to the exclusion of any other source of funds. The basic rule, as stated in Resources Management Direction 2510 (Planning and Budgeting), page 4-4 is:

> Where either of two appropriations may reasonably be construed as available for expenditures not specifically mentioned under either appropriation, the determination of the agency as to which of the two appropriations to use will not be questioned. However, once the election has been made, the continued use of the appropriation selected to the exclusion of any other for the same purpose is required, in the absence of changes in the appropriation acts.....

Under this "pick and stick" rule, for example, EPA could not decide to fund a work assignment from the Research and Development appropriation and then subsequently propose to place additional funds on the same effort from the Abatement, Compliance and Control apppropriation.

c. **Distributing Costs Among Appropriations.** Where a work assignment, delivery order or contract provides services or other benefits to more than one program, the costs (both obligations and disbursements) of that contract action may be charged to more than one appropriation. For example, a contract work assignment for entry of Agency financial data into the EPA finacial system provides services benefitting both the Superfund program, which is funded from the Superfund appropriation, and other Agency programs funded from the Salaries and Expenses appropriation. Data entry for Superfund could possibly have been separated out, and individual work assignments issue for each. However, EPA may combine the work under one work assignment, and fund it from both the "benefitting" appropriations if it is in the interest of government efficiency and cost-effectiveness to do so.

This situation is distinguishable from the circumstances described above, where a single appropriation had to be selected to fund the action. In the above case, the work was not divisible as to benefitting appropriation.

If a work assignment, delivery order or contract benefits more than one appropriation, there are two options for charging costs to the respective appropriations. The option chosen for distributing the costs must be clearly stated as part of the procurement request. The two approaches are:

i. Direct Charging. If there is a practical, cost-effective way of determining which portion of services are being performed for each Program, the costs should be directly identified as such. In the keypunching example, it may be feasible to separate Superfund processing from other work and to record the hours of contractor staff doing work benefitting each. Or for a work assignment to perform literature searches, the staff hours and computer user charges may be distinguishable as to the Program being serviced.

ii. Allocation Methodologies. If direct charging is not feasible or not an accurate method of determining the costs to be charged to each source appropriation, the contract costs may be allocated to the appropriations. However, before PCMD will approve a procurement using an allocation methodology, the Director of EPA's Financial Management Division must approve the methodology. To request approval, the originating office must submit a copy of the procurement request and the statement of work to the Director, FMD, along with at least the following information:

- o Explanation of why direct charging of costs is not practical or would be less accurate than allocation methods;
- o Identification of the "statistic" proposed to be used to distribute the costs (e.g., the ratio of Superfund transactions to total transactions processed by the keypunching service, or ratio of Superfund FTEs to total FTEs in the office to which a contractor is providing services.);
- o Explanation of why the proposed ratio for distributing costs is the best indicator of benefit to the respective programs served; and
- o A statement indicating that the numerical ratios will be reviewed and updated, and the contract charging adjusted accordingly, by the end of each fiscal year. (See Contracts Management Manual Chapter 9 for additional information.)

A signature block for the Director, FMD, must be included at the bottom of this information.

Once the allocation methodology is approved, the Project Officer is responsible for ensuring that the calculations are properly done, that the numerical averages are updated as needed (e.g., as transaction ratios change), and that the costs are properly allocated on the Project Officer Invoice Approval form or on the contract voucher.

Allocation methodologies have typically been used for support type contracts that benefit both the Superfund Program and the other programs of the Agency, whose intramural expenses have traditionally been funded from the Salaries and Expenses appropriation.

NOTE: The requirement for FMD review of allocation methodologies applies only to use of more than one appropriation in the circumstances described above -- it does NOT apply when more than one account under a SINGLE appropriation funds a contract action.

### 4.6 Voucher Payment.

The Project Officer must provide on every invoice approval the accounts (and amounts) against which invoiced costs are to be charged. (See Chapter 11 for details.)

The financial management office cannot pay contractor billings unless the account numbers and amounts to be charged to each account are clearly stated on the Project Officer approval. A Project Officer's failure to comply with these procedures will delay processing of payments and may result in an Agency violation of Prompt Payment Act requirements.

### 4.7 Incremental Funding

Incremental funding is defined as partial funding of a cost-reimbursement contract. It is used in situations where program offices do not have the full amount of funds available at the time of contract execution, but expect to have it later in the contract period.

This type of funding can only be used under cost-reimbursement contracts. Under a fixed-price contract, the entire amount of the contract must be obligated at the time of contract award. Indefinite delivery/indefinite quantity contracts must obligate the entire contract minimum at award; thereafter, each delivery order must be fully funded at the time of issuance.

Under an incrementally-funded contract, a contractor is required to perform only until the amount funded has been expended, not up to the entire negotiated estimated cost. For this reason, Project Officers must ensure that the amount of incremental funding made available is sufficient to keep the contractor working until the balance can be obligated. If the Government fails to provide the full amount of funds needed to complete the work, the contractor will cease to perform and is no longer liable for further work unless and until additional funding is made available. Contracts will not be awarded on an incrementally-funded basis unless there is a reasonable assurance that the entire estimated cost will be provided before the incremental funding is exhausted.

### 4.8 Deobligation of Contract Funds

Contract funds may only be deobligated by a Contracting Officer and only in certain situations. These are:

(1) Substitution of funding from one appropriation or account to another. In this case, the deobligation takes place concurrently with the obligation of an equal amount of funding with different accounting or appropriation data.

(2) Deobligation of unearned award fee after the Fee Determination Official awards the fee for a specific period.

(3) Unexpended funds from expiring appropriations remaining at the end of each

contract period. (This is usually only done after an interim or final audit has been performed, unless a mutual agreement has been executed between the contractor and the Government to reduce the estimated cost for that period. When excess funds are deobligated before a final audit, the Contracting Officer must retain a certain amount to cover possible adjustments for indirect rate increases and other potential adjustments.)

(4) Settlement of an interim final audit on a particular contract period. This must be executed by bilateral contract modification or, if agreement cannot be reached, by a final decision of the Contracting Officer.

(5) Termination for convenience of the Government (total or partial) where the remaining hours or costs are not needed. Settlement procedures require a final audit to determine the Government's actual liability.

(6) Termination for default where the work has not been completed. All excess funds for uncompleted work will be deobligated. This may or may not require a final audit, depending upon the nature of the contract. Funds deolbigated as a result of a default termination may also be used on a successor contract which covers the same items or services.

(7) Equitable adjustment on certain change orders or supplemental agreements which result in a decrease to the contract cost or price.

(8) Settlement of a final contract audit after the last option period has been completed and all actual costs are known, and determined to be allowable, allocable, and reasonable. If agreement cannot be reached on the total final cost, the Contracting Office will issue a final decision, subject to the "Disputes" clause of the contract (See Chapter 14).

Deobligation of funds occurs through preparation of a purchase order similar to the one originally processed to obligate the funds (including the appropriate accounting data described above) and indicating the amount of funds to be deobligated, as well as the reason for the deobligation. See Appendix 4B on page 120 for a more detailed discussion of deobligation and recertification of funds.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 13 1986

OFFICE OF
ADMINISTRATION
AND RESOURCES
MANAGEMENT

MEMORANDUM

SUBJECT: Comptroller General Decision on EPA Level of Effort Contracts

FROM: Brian K. Polly, Director
Procurement and Contracts Management Division (PM-214

TO: See Addressees

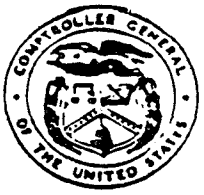
Attached for your information is the subject decision. This decision confirms existing Procurement and Contracts Management Division policy on the issuance of work assignments under level of effort contracts.

Attachment

List of Addressees

Rosemarie Nance (PM-214-F)
William Wilfong (PM-214-F)
Pam John (PM-214-F)
Jack Zabretsky (PM-214-F)
Don Hambric (PM-214)
Douglas Richmond - RTP
Richard Pohlkamp - CINN
6 Regional Contract Specialists
Policy & Quality Assurance Branch Staff

DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-214597 DATE: December 24, 1985

MATTER OF:

EPA Level of Effort Contracts - Appropriation Availability

DIGEST:

1. The Environmental Protection Agency may not issue a nonseverable work assignment under a cost-reimbursement, level of effort, term contract where the effort furnished will extend beyond the contract's initial period of performance into an option period. The Federal Acquisition Regulation requires that term contracts be "for a specified level of effort for a stated period of time." Further, issuance of a work assignment which could not be performed until the next fiscal year would violate the bona fide need rule.

2. The Environmental Protection Agency may not modify a level of effort contract to accommodate a non-severable task extending beyond the original contract period of performance. Since the period of performance is an essential part of a level of effort contract, any change in that term would substantially change the contract such that the contract for which competition was held and the contract to be performed are essentially different. Accordingly, such a contract could not be extended by contract modification.

This is in response to a request from C. Morgan Kinghorn, Comptroller of the Environmental Protection Agency (EPA), for a decision regarding the propriety of issuing a hypothetical nonseverable work assignment under a cost-reimbursement, level of effort, term contract, in which the effort furnished will extend beyond the contract's initial period of performance. EPA has also asked informally whether it may modify an existing level of effort contract to accommodate a work assignment extending beyond the term of the original contract to be funded with appropriations available during the

initial contract period. Although the contract described in EPA's hypothetical also contains options to extend the contract for additional periods of performance, EPA recognizes that performance under any options would be funded with appropriations available during the fiscal year covered by the option period. EPA's second question, however, is whether a modification, prior to option exercise, extending performance beyond the end of the fiscal year during which the original period of performance takes place, may encumber the funds of the expiring fiscal year.

For the reasons set forth below, we conclude that EPA may not issue a work assignment extending beyond the term of a level of effort contract, nor may it modify the term of an existing level of effort contract to accommodate such a work assignment.

Background: EPA uses level of effort, term contracts to perform service-intensive type work, including, for example, economic cost and benefit analyses and technical analyses of hazardous waste regulations. Typically, EPA, through its level of effort term contracts, purchases, on a cost-reimbursement basis, a specified quantity of person-hours (the level of effort) for the contract's base period and each option period. The contract's estimated cost is established, based upon a maximum number of hours set forth in the contract. EPA is obligated to order and the contractor is obligated to furnish the specified level of effort within the time period set forth in the contract. The contract provides for a downward adjustment in the contractor's fees if the contractor provides less than 90 percent of the specified level of effort. The contract's scope of work merely sets forth the broad outlines of the type of work to be performed. During the term of the contract, EPA issues work assignments which draw on the contract's specified quantity of person-hours and require the contractor to work on a specific task.

EPA raises the following hypothetical situation:

> "Assume a level of effort, work assignment contract is awarded October 1, 1982, with a period of performance through September 30, 1983. The contract has an option for one additional year running from October 1, 1983, through September 30, 1984. Both the basic period of performance and the option year are for 10,000 professional hours for each period. Assume that the contractor has provided 9,000 hours as of September 25, 1983 and EPA issues a

> work assignment on September 26, 1983, for 1,000 hours. The contractor will provide the bulk of hours in FY 1984. The work assignment, when viewed alone, is for nonseverable services."

For purposes of our analysis of this hypothetical situation, we have assumed what EPA has implied but not stated, that the contract is being funded under an appropriation that is available for obligation only through the end of the contract term.1/

EPA asks two questions regarding this hypothetical situation. The first question is whether it properly may issue the 1,000 hour work assignment on September 26, 1983, recognizing that the contractor will provide the bulk of hours in fiscal year 1984. The second question is whether it could modify the terms of a level of effort contract to accommodate a work assignment extending beyond the term of the contract.

Analysis: We conclude that in the hypothetical situation posed by EPA, the issuance of a work assignment which could not be completed within the contract's initial term of performance, i.e., by September 30, 1983, would have violated both the Federal Procurement Regulations (FPR)2/ and the "bona fide need" rule, 31 U.S.C. § 1502(a). As EPA concedes, EPA's level of effort contracts fall squarely within the FPR definition of "term contracts." Section 1-3.405(e)(2) of the FPR provide:

> "The Term form is one which describes the scope of work to be done in general terms and which obligates the contractor to devote a specified level of effort for a stated period of time for the conduct of research and development."

---

1/ Our assumption is based on statements in EPA's inquiry letter such as "so long as a nonseverable work assignment was issued during the period of availability of a particular appropriation * * *." P.4. We are aware that EPA generally receives appropriations which are available for 2 fiscal years, but the principles remain the same.

2/ The FPR, rather than the Federal Acquisition Regulation (FAR), governed procurements by civilian agencies during the time period specified in EPA's hypothetical questions. However, the FAR has nearly identical provisions. See FAR 16.306(d)(2) and (4).

The FPR further provides in section 1-3.405(e)(5):

> "In no event should the term form of contract be used unless the contractor is obligated by the contract to provide a specific level-of-effort within a definite period of time." (Emphasis added.)

Accordingly, to permit a contractor to provide a portion of the required 10,000 professional hours beyond the basic period of performance, i.e., after September 30, 1983, would be contrary to the FPR requirement that such term contracts "provide a specific level of effort within a definite period of time."

Further, the issuance of a work assignment which could not be completed within the contract's initial term of performance would also violate the bona fide need rule. The bona fide need rule requires that appropriations made available for obligation during a given fiscal year or years may be obligated only to meet a legitimate need arising in that fiscal year (or years). 31 U.S.C. § 1502(a) (1982). See, e.g., 38 Comp. Gen. 628 (1959).

As a general rule, service contracts can extend beyond the duration of an appropriation period only when the portion of the contract to be performed after the expiration of the appropriation period is not severable from the portion performed during the prior period. See 60 Comp. Gen. 219 (1981). In the EPA case, the level of effort contract is, by definition, a severable services contract. It requires the performance of a certain number of hours of work within a specified time period rather than requiring the completion of a series of work objectives. Because the original contract in EPA's hypothetical is for 10,000 hours of work to be performed in fiscal year 1983, funds obligated under the contract may not be expended for work performed within fiscal year 1984. See B-183184, May 30, 1975. The fact that a work assignment issued under the contract late in the fiscal year might, by its nature, be considered nonseverable if this were what the FPR (as well as the FAR) call a "completion" form of term contract, does not change the result in this case. A completion contract would require the contractor to complete and deliver a specified end product--e.g., a final report. As long as the end product is a bona fide need of the year in which it was ordered, the funds could remain obligated until the end product was delivered. See FPR 1-3.405(e)(1) and FAR 16.302(d)(1). In contrast, the EPA hypothetical contract calls for 10,000 work hours before the end of the fiscal year. Performance of those hours in the next fiscal year would not be consistent with the requirements of the contract.

The second question raised informally by EPA is whether it may modify the original contract to accommodate the completion of a work assignment, performance of which will extend beyond the end of the contract period of performance. In raising this question, EPA says it recognizes that a modification cannot be issued which extends the term of the contract beyond the period of availability of the fiscal year appropriation to be charged. Essentially, EPA is asking whether it may amend a level of effort contract near the end of the fiscal year to provide for the performance of a nonseverable task, performance of which will extend beyond the end of the fiscal year. As noted, EPA's modification would be for the purpose of funding the modification with expiring appropriations. Any options exercised, of course, would be funded with currently available appropriations.

The determination of whether a particular modification should be treated as a new procurement is generally decided on a case-by-case basis. For example, we have held that if the contract as changed is materially different from the contract for which the original competition was held, the new requirement should be procured competitively, unless a non-competitive procurement is justifiable. 57 Comp. Gen. 285, 286 (1976).

The essential characteristics of a level of effort contract are the stated level of work and the term in which that work is to be performed. Therefore, any change in that structure -- particularly a change from a specified level of effort for a fixed term to the performance of specified, non-severable tasks -- would "substantially" change the contract such that "the contract for which competition was held and the contract to be performed are essentially different." Accordingly, we conclude that a modification of the sort suggested by EPA to a level of effort contract could not be done by contract modification, but rather would require the execution of a new contract. This is because EPA's suggested modification would turn a level of effort contract into a contract for one or more nonseverable tasks.

In a memorandum prepared by the EPA Office of General Counsel on this issue before it was submitted to us, the suggestion was made that use of indefinite quantity or requirements contracts would eliminate the end of year problems encountered with level of effort term contracts. We would agree that the kind of services explained in EPA's hypothetical question could be acquired under such an arrangement, provided that the nature of the services themselves is nonseverable. It appears that the most satisfactory form of contract, for EPA's purposes, may be the completion contract, described earlier as requiring a specific end product as a

condition for payment of the full fee and costs. As a non-severable contract, performance could extend into a subsequent year but be payable from funds obligated at the time the contract was executed. See FAR 16.306(d)(1),(2), and (3).

Milton J. Socolar
for Comptroller General
of the United States

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

SEP 12 1984

OFFICE OF ADMINISTRATION AND RESOURCES MANAGEMENT

MEMORANDUM

SUBJECT: Recertification of Funds

FROM: C. Morgan Kinghorn
Comptroller

TO: See Attached Listing

The purpose of this memorandum is to state the Office of the Comptroller policy and procedures for the deobligation and recertification of excess funds currently obligated on Agency contracts. I am offering the following guidance to help clarify the recertification process as it applies, in particular, to cost reimbursement term form contracts. The recertification process has been the subject of much discussion since the Office of General Counsel decision applying the bona fide need principle to cost reimbursement term contracts. Definitive policy on the application of the bona fide need principle was issued by Seymour Greenstone on February 10, 1984.

BACKGROUND

The bona fide need principle is defined as an obligation against an appropriation which is valid only if it relates to an actual need existing within the life of an appropriation. In order to obligate a fiscal year appropriation for payments to be made in a succeeding year, the contract imposing the obligation must not only have been made within the fiscal year to be charged, but the contract must have been made to meet a bona fide need of that fiscal year.

DEOBLIGATION AND RECERTIFICATION POLICY

You should use the following guidance to determine when recertification is required.

1. Cost reimbursement term form contracts with option periods. Excess funds (i.e. those funds obligated on the contract in excess of the work performed or expected to be performed) exist on the contract.

a. If the life of the appropriation obligated on the base contract will expire before the end of the option period, the excess funds are not available to fund the option period. Recertification is not possible.

Example:

A cost reimbursement term form contract is to expire on September 30, 1984. The contract contains a one year option. The funds obligated for the base year effort are from the fiscal year 1983/1984 Abatement, Control and Compliance appropriation. Excess fiscal year 1983/1984 funds are not available to fund the fiscal year 1985 option period.

b. If the life of the appropriation obligated on the base contract will cover the option period, the excess funds may be deobligated from the base period and may be used to fund the option period effort. If the reobligation occurs during the current year allowance, no recertification is required. If the reobligation is planned for a time after the year of the current allowance, and remains within the life of the appropriation, recertification is required.

Example

The cost reimbursement term form contract expires on September 30, 1984. The contract contains a one year option period. The funds obligated for the base year effort are from the fiscal year 1984/1985 Abatement, Control and Compliance appropriation. Excess fiscal year 1984/1985 funds have been identified on the base contract. The excess funds may be removed (deobligated) from the base contract and used to fund the option period (fiscal year 1985) if the option is exercised and the obligation is made on or before September 30, 1984 (i.e. before the end of the current year allowance). No recertification is necessary. The excess funds may be removed from the base contract and used to fund the option period after September 30, 1984, only if the funds have been recertified.

2. Indefinite quantity - delivery order form contracts with option periods. Excess funds (i.e. funds obligated on a delivery order in excess of the anticipated actual expenditures) exist on a delivery order.

a. If the life of the appropriation obligated on the delivery order will expire before the issuance of a new delivery order, the excess funds are not available to fund the new delivery order. Recertification is not possible.

Example:

An indefinite quantity contract has a base ordering period of January 1, 1984 to January 1, 1985. A delivery order issued on January 1, 1984 and funded with fiscal year 1984 Salaries and Expenses funds is found to have excess funds available. The funds may not be removed from the initial delivery order and placed on a new delivery order to be issued after September 30, 1984. However, funds may be removed from the initial delivery order during the current year allowance and used elsewhere if action is taken prior to October 1, 1984.

b. If the life of the appropriation obligated on the delivery order will cover the time the new delivery order is placed, the excess funds on the initial delivery order may be reobligated on a new delivery order (this assumes the new delivery order is nonseverable or if severable, that the period of performance of the delivery order is within the period of availability of the appropriation). If the new delivery order is issued (under the base

contract or a new option period) within the period of the current year's allowance, no recertification is necessary. If the new delivery order is to be issued in a period beyond the current year's allowance, recertification is required.

Example:

An indefinite quantity contract has a base ordering period of January 1, 1984 to January 1, 1985. A delivery order issued on April 1, 1984 and funded with no year Superfund monies is found to have excess funds available. The excess funds may be removed from the delivery order and placed on a delivery order issued on September 1, 1984. No recertification is necessary. If excess funds are removed from the delivery order and placed on a delivery order issued on November 1, 1984 the funds first must be recertified. The new obligation is beyond the initial year's allowance.

3. Excess funds are identified on an Agency contract. The excess funds may be deobligated from this contract and reobligated on a new contract if the appropriation used to fund the original contract is still available. If the new obligation occurs within the current year's allowance period, no recertification is required. If the new obligation occurs after the current year's allowance has ended, recertification is required.

Example:

A cost plus fixed fee contract is identified as having excess fiscal year 1984/1985 Abatement, Control and Compliance funds. These funds were part of the fiscal year 1984 allowance. These excess funds may be deobligated and reobligated on a new contract without recertification if the new contract obligation occurs in fiscal year 1984. Recertification is required for a new obligation in fiscal year 1985.

RECERTIFICATION PROCEDURES

Allowance Holder Responsibility - Where recertification of funds is necessary, it is the responsibility of the allowance holder to initiate deobligating documents and forward to Procurement & Contracts Management Division for processing. A written request for recertification should also be sent to the Budget Division attaching a copy of the deobligating document. The request should include a justification for the use of recertified funds. In cases where recertification is necessary, the allowance holder should not presume that the funds will be recertified.

Procurement & Contracts Management Division (PCMD) Responsibility - PCMD will expedite processing of the deobligating document and forward it to the applicable servicing Finance Office.

Financial Management Division - The Financial Management Division will record the deobligations from PCMD immediately and include the amount of the deobligation as part of net recoveries in their monthly and end-of-year report.

Budget Division - The Budget Division will expedite requests for recertification and respond as quickly as possible to reissue funds in an Allowance. In some cases, the Budget Division must first request that net recovered funds be apportioned to EPA by the Office of Management and Budget (OMB). Funds then can be recertified to the Allowance Holder in an Advice of Allowance.

Please be aware that there is no change to the existing procedure to have deobligated prior year funds recertified. Current guidance can be found in Policy & Procedure Memorandum (PPM) #13, Recovery and Overrun of Prior Year Obligations. According to Agency Policy as stated in this PPM, there is no guarantee that deobligated funds will be recertified. The issuance of recovered funds is subject to Agency priority needs at the discretion of the Administrator and Deputy Administrator. If you have any questions concerning this memo, please contact Rick Peterson (382-4212).

Attachment

# STANDARDS OF CONDUCT

## ETHICS PRETEST

Which of the following circumstances would EPA view as ethical employee behavior. (Indicate yes/no/comments)

1. EPA employee accepts Christmas gift from EPA contractor who has been personal friend for 10 years and has been giving Christmas gifts during that entire period.

2. EPA employee speaking on behalf of EPA at professional meeting two hours from Washington accepts ride to meeting with other speaker from private company.

3. EPA employee attends federal office automation trade show and accepts the following items from vendors there:
   a) desk calendar;
   b) discount coupon for software worth $99.00;
   c) disk holder with vendor's name and address (worth $12.00 retail);
   d) pen with vendor's name and address (worth $4.99 retail);
   e) free buffet lunch.

4. EPA employee in OSWER has received proposals from several companies in response to solicitation. The lowest bidder presently has contract with OARM. OSWER employee calls project officer in OARM to inqurie if lowest bidder has been performing satisfactory work and within original contract budget. Is project officer permitted to respond?

5. EPA employee receives unsoliciated proposal, but has no funds to fund proposal. One year later, EPA employee writes RFP for competitive procurement based on proposal submitted, and divulging the methods proposed in the unsolicited proposal. Is this permissible? Does the original submitter have a right to protest?

6. EPA employee receives invitations from EPA contractors to attend Christmas parties. To avoid any showing of partiality, EPA employee decides to attend all parties.

7. EPA employee attends all-day briefing by EPA contractor at contractor's office. Contractor provides buffet lunch for all attendees, both public and private.

8. EPA employee's husband has substantial private stock in EPA contractor company, representing 25% of husband's net worth; employee is husband's beneficiary. EPA employee serves on technical review panel for major procurement, where EPA contractor has submitted proposal.

9. EPA employee receives and accepts invitation to speak on behalf of EPA at private conference at the Greenbriar funded by state government funds. Invitation includes transportation, meal and lodging expenses and $200 honorarium. Employee also attends separate reception and dinner for speakers sponsored by private company arranging the conference.

10. EPA employee is friend of local official running for reelection, and assists official in telephone poll on specific election issues totally unrelated to federal activities or issues.

11. EPA employee prepares competitive procurement RFP. During the alloted response period, employee leaves EPA and joins firm that is bidding on the RFP, assists firm in preparing bid proposal, and appears as staff in the proposal.

12. EPA contract is due to expire and be recompeted. Existing contractor requests EPA project officer for information regarding anticipated requirements and continuation work. EPA project officer gives information to contractor.

13. If a bribe if offered, the employee should not accept anything, but indicate a willingness to consider the offer, and then contact EPA's Office of Inspector General.

14. An EPA employee served on a technical evaluation panel for a contract award. After he left EPA, he went to work for the contractor and was assigned to work as project manager for the contract he helped to award. A dispute arises over the meaning of a contract provision and the company's management asks the former employee to prepare a written submission to EPA for signature of the company's president.

15. An employee is the treasurer of an environmental group which has applied to EPA for a grant. The employee receives no pay for this activity.

16. Which of the following qualify as indicators of potential fraud: (Circle ones that are indicators)

a. Purchasing items and services from single source.

b. Selective release of information concerning requirements and pending purchases.

c. Providing mailing list of potential contractors to contracting officer for mailing out RFPs.

d. Defining statement of work and specifications to fit products/capabilities of limited set of contractors.

e. Using statements of work, specifications or sole source justifications developed by or in consultation with a specific contractor.

f. Splitting up requirements to fit within the small purchase requirements ($25,000).

g. Vague specifications.

h. When requested by a contractor to recommend possible subcontractors or experts with the desired expertise, providing references to several known individuals or groups.

i. Acceptance of a late bid (e.g., five minutes after deadline).

j. Wide variance between the technical rating given the best proposal and all other proposals.

k. Bidders who are qualified and capable of performing fail to bid with no apparent reason, and relatively fewer than normal bids are submitted.

l. Identical bid amounts on a contract line item by two or more contractors.

m. Contractor includes interest costs as part of contract costs to be reimbursed by the government.

n. Contractors submits progress payment request for work completed but not yet accepted by the government.

# STANDARDS OF CONDUCT

RULE: EMPLOYEE SHOULD AVOID ANY ACTIVITY OR SITUATION WHICH CREATES EVEN THE APPEARANCE OF IMPROPRIETY OR CONFLICT OF INTEREST.

SUBRULES:

1. No Participation In Any Decision Where Employee Or Close Relative Has Financial Interest. File Financial Statements Depending On Grade (If GS-13 Or Above, Although Some Divisions Require Lower Levels).

2. No Representation Or Other Party In Court/Agency In Matter In Which U.S. Or D.C. Government Is Party Or Has Interest.

3. No Outside Employment That Violates Law, Creates Conflict Of Interest, Or Involves EPA Project, Time, Property, Or Confidential Information.

4. No Gifts From Foreign Government Over $180; No Gifts From Private Parties Over $10 Retail.

5. No Payment Accepted For Official Appearance. (Can Accept Gifts For EPA Scholarship Fund Or Daycare Center.) No Payment In Excess Of $2000 For Private Outside Appearance.

# STANDARDS OF CONDUCT (CONT.)

## SUBRULES:

6. No Outside Activities That Relate To Specific EPA Matters, Involve Government-Financed Trips, Approving Advertising, Imply Official EPA Support, Involve Personal Compensation For Work Performed As Government Employee.

7. No Reimbursement For Official Travel Expenses Except From State/Local Governments Or 501(c)(3), And Not In Excess Of Government Travel Regulations.

8. No Nonofficial Use Of Government Property Or Time.

9. No Hatch Act-Restricted Activities.

10. General Standards Related To Not Using Public Office For Private Gain; Giving Preferential Treatment; Impeding Government Efficiency/Economy; Losing Independence/Impartiality of Action; Making Decision Outside Official Channels; Adversely Affecting Confidence Of Public In Government Integrity.

# STANDARDS OF CONDUCT

1. **GRATUITIES: Solicitation Or Acceptance Of Gifts, Entertainment, Or Favors From A Contractor Is Expressly Prohibited. The Following Are Exceptions To This Rule:**

   1. Food Or Refreshments Of NOMINAL VALUE Only When Official Business Is Being Transacted During The Meal And Only When There Is No Arrangement For Separate Billings.

   2. Food Or Refreshments At WIDELY ATTENDED Gatherings Sponsored By Industrial, Technical Or Professional Organizations;

   3. INCIDENTAL Transportation From A Private Organization In Connection With Official Duties;

   4. UNSOLICITED Advertising Or Promotional Material Of NOMINAL Value (Under $10 Retail), Such As Pens, Pads, Or Calendars; And

   5. Gifts From Family Or Friends Only If It Is Obvious That The Personal Relationship, And Not The Business Relationship, Is The Reason For Such Gifts. Although The Gift May Be Acceptable, The Relationship In Itself May Be a Conflict.

# STANDARDS OF CONDUCT (CONT.)

2. PROTECTING CONFIDENTIAL BUSINESS INFORMATION:

   EPA Personnel Are Not Permitted To Divulge Any Information Considered By A Contractor To Be Confidential To Anyone Outside The Government Or Not Having A Need To Know (Including Other EPA Employees).

3. MAINTAINING IMPARTIALITY:

   EPA Employees Must Treat All Firms With Objectivity And Equal Conduct. There Should Be No "Outside Socializing" With Contractor Personnel.

4. DISCLOSURE OF PROCUREMENT INFORMATION:

   Project Officer And Other Technical Evaluation or Source Evaluation Board Members Must Maintain The Integrity Of The Competitive Process And The Independence Of Contractors' Proposals By Not Divulging Any Confidential Procurement Information Before, During Or After An Acquisition.

# STANDARDS OF CONDUCT (CONT.)

## 5. POST EMPLOYMENT RESTRICTIONS:

No EPA Procurement Official May Solicit Or Accept Promise Of Future Employment Or Business Opportunity With Competing Contractor During Conduct Of Procurement (Eff. July 1989)

After July 16, 1989, No Procurement Official Or Reviewer Of The Award, Modification Or Extension Of Contract May Participate In Negotiations Or Advising On Negotiations On Behalf Of Contractor For 2 Years From Date Of Agency Participation; Nor Work Personally And Substantially On Contract For Contractor For 2 Years From Date Of Agency Participation.

Former Govt. Employees Permanently Barred From Representing Parties Other Than U.S. Govt. Before Federal Court Or Agency On Matters In Which They Were Personally And Substantially Involved At EPA; Barred For 2 Years Only If Official Responsibility For Matters But Not Actual Participation In Them.

# STANDARDS OF CONDUCT (CONT.)

## 5. POST EMPLOYMENT RESTRICTIONS (Cont.):

One-Year Prohibition Against Award Of Sole-Source Contract To Former Employee Or Employee's Firm If Employee Was Involved In Developing Or Negotiating Contract Proposal At EPA, or Would Be Involved In Management, Administration Or Performance Of Project At EPA.

Former Senior Employees Restricted From Assisting Outside Party By Personal Presence Before Agency Regarding Matters Where Participated Personally And Substantially For 2 Years; Also Prohibited From Communicating With Intent To Influence EPA On Any Matter For 1 Year

*Note: One-year suspension of implementation of these Procurement Integrity Act restrictions in effect beginning 12/1/89.

## PROCUREMENT OFFICIAL CERTIFICATE OF INTEGRITY

The undersigned certifies that:

1. He/she is familiar with and will comply with the requirements of section 27(b) and (e) of the Office of Federal Procurement Policy Act (41 U.S.C. 423) as implemented in section 3.104-3 of the Federal Acquisition Regulation (copy attached).

2. He/she will not engage in any conduct prohibited by sections 27(a), (b), (c), and (e) of the Act.

3. He/she will report immediately to the Contracting Officer any information concerning a violation or possible violation of sections 27(a), (b), (c), or (e) of the Act.

This certification concerns a matter within the jurisdiction of an Agency of the United States and the making of a false, fictitious, or fraudulent certification may render the maker subject to prosecution under Title 18, United States Code, Section 1001.

| | |
|---|---|
| Name | Date |
| Title | Organization |

## PROCUREMENT OFFICIAL EXIT CERTIFICATE

The undersigned certifies that:

He/she understands the continuing obligation, during the conduct of the procurement, not to disclose proprietary or source selection information related to the procurement(s) on which he/she served as a procurement official.

This certification concerns a matter within the jurisdiction of an Agecy of the United States and the making of a falso, fictitious, or fraudulent certification may render the maker subject to prosecution under Title 18, United States Code, Section 1001.

_____ _____

Name Date

Chapter 5
# STANDARDS OF CONDUCT

Federal employees are responsible for the day-to-day management of the Government and its funds. As such, the taxpayers expect and are entitled to impeccable conduct on the part of Government personnel. All official decisions must be free from any consideration of personal self-interest or any type of favoritism.

EPA employees should read and understand the requirements of 40 CFR Part 3, which sets forth the standards of conduct for personal behavior. In addition, a pamphlet entitled "U.S. Environmental Protection Agency Guidance on Ethics and Conflicts of Interest" is available and has been distributed to all employees. A more recent publication entitled "Ethics in a Nutshell" can be obtained by calling 475-8960. These pamphlets summarize and explain the basic conflict of interest laws and EPA regulations. It is absolutely vital that the restrictions are understood, since criminal penalties may be imposed for any serious violations.

In 1988, Congress passed the Federal Procurement Policy Act Amendments of 1988, Public Law 100-679. Section 6, entitled "Procurement Integrity," prohibits competing contractors and government procurement officials from offering or accepting gratuities, soliciting or discussing postgovernment employment during a procurement, or soliciting or disclosing proprietary or source selection information. Interim implementing regulations went into effect on July 16, 1989. A one-year suspension of the implementation of these regulations went into effect December 1, 1989. Nonetheless, they were in effect for several months and may take effect again in one year. These regulations and EPA guidance associated with them should therefore be reviewed and understood by EPA employees.

The Designated Agency Ethics Official responsible for managing the EPA ethics program is EPA's Deputy General Counsel. He is assisted by an Alternate Agency Ethics Official and by Deputy Ethics Officials in each program area or region. These officials are responsible for advising their employees on the rules of ethics, coordinating their advice with the Designated Agency Ethics Official, reviewing requests for approval of outside employment, and reviewing and maintaining confidential statements of employment and financial interest. Deputy Ethics Officials are Assistant Administrators, Associate Administrators, Staff Office Directors, Regional Administrators, Office Directors, Laboratory Directors, and the Inspector General. If questions arise, employees should consult either their Deputy Ethics Official or the Designated Agency Ethics Official.

## 5.1 Ethics for all Government Employees

The following general standards are applicable to all EPA employees:

(1) An employee shall not participate in any decision, as a Government officer or employee, on a matter in which he or she (or a close relative) has a financial interest. This restriction applies to rulemaking, policy matters, adjudications, grants and contracts. An employee must recuse him or herself from all such matters even if it would create only the appearance of a conflict of interest. Certain types of financial interest are exempted from the statute, and others may be waived by the Designated Agency Ethics Official if it is deemed that the financial interest is not so substantial as to affect the integrity of the employee's services.

(2) Designated EPA employees must file confidential financial disclosure statements in order to assist the Agency in preventing conflicts of interest on the part of certain key employees in decision-making roles. Generally, GS-13's and above who exercise judgment in decisions relating to contracts, grants, or regulations which might have economic impacts on those outside the Government, are required to file such statements. However, below the level of GS-13, employees who serve as Project Officers, Contracting Officers, On-Scene Coordinators, Inspectors, or Auditors will also be requested to file confidential financial disclosure statements.

(3) No employee may represent any outside party before a court or Government agency in a matter in which the United States or the District of Columbia is a party or has a direct interest.

(4) An employee's salary may not be supplemented by any source other than the United States Government (except if contributed by a state, county, or municipality) as compensation for the employee's services as a Government official.

(5) An employee shall not engage in any outside employment which would violate Federal or State law, give rise to a real or apparent conflict of interest, involve work for an EPA project, or involve the use of EPA time or property, or any information confidential to EPA.

(6) Employees may not solicit, accept, or retain gifts of over "minimal value" (in excess of $180) tendered by any foreign government. All gifts from foreign governments must be reported to the Office of International Activities. Gifts of more than minimal value may only be accepted if refusal to accept would cause offense or embarrassment, and any such gifts must be turned over to the Agency for disposal.

(7) No employee may accept payment for any official appearance, i.e., as an EPA representative, unless that payment is accepted on behalf of and donated to the EPA Scholarship Fund or Day Care Center. If the appearance is clearly in the nature of private outside activity, honoraria are limited to $2,000 for any one appearance.

(8) An employee who does any teaching, speaking, writing, or editing outside of his EPA official duties is restricted from all of the following activities:

(a) Instructing people on dealing with specific matters pending in EPA;

(b) Pursuing any such activities in connection with trips at Government expense;

(c) Approving or disapproving of advertising;

(d) Expressing or implying official EPA support or approval of any work or the opinions expressed; or

(e) Accepting outside compensation for any work performed as a part of Government duties.

In addition, if an employee writes on a subject related to his or her official duties, the written material must either omit any mention whatsoever of the employee's connection with EPA or include the following disclaimer:

> "This (article, book, etc.) was (written/ edited) by (name) in (his/her) private capacity. No official support or endorsement by the Environmental Protection Agency is intended or should be inferred."

(9) Employees may not accept any reimbursement for official travel expenses from outside sources except state or local governments or organizations listed under Section 501(c)(3) of the Internal Revenue Code. Even from these sources, the amounts may not be greater than EPA would have provided under the Travel Regulations.

(10) Employees may not use or allow the use of Government property or time (including Government offices, equipment, or the services of subordinates) for other than official purposes.

(11) All employees are subject to the restrictions on political activity covered in the Hatch Act. In addition, employees may not use their official authority to affect a federal election, promise any Government favors or rewards in return for political activity, deprive anyone of Government employment or benefits for refusal to make a political contribution, solicit any such contributions from federal employees, make a political contribution to another federal employee, or solicit or receive political contributions on Government premises.

(12) General standards which affect all EPA employees prohibit any action which might result in, or create the appearance of:

(a) Using public office for private gain;

(b) Giving preferential treatment to any organization or person;

(c) Impeding Government efficiency or economy;

(d) Losing independence or impartiality of action;

(e) Making a Government decision outside official channels; or

(f) Adversely affecting the confidence of the general public in the integrity of the Government.

### 5.2 Rules for Personnel who Deal with Contractors

Government employees who work with contractors have even further restrictions placed upon them due to the sensitivity of this work. There must be no question of favoritism or any action which might compromise or appear to compromise the integrity of EPA's acquisition program. All Project Officers, Work Assignment Managers, and Delivery Order Officers, as well as any other individuals who work with contractors, must observe the following restrictions in the conduct of their relationships with EPA contractors:

(1) Gratuities

Solicitation or acceptance of gifts, entertainment, or favors from a contractor is expressly prohibited. Exceptions include:

(a) Food or refreshments of nominal value only when official business is being transacted during the meal and only when there is no arrangement for separate billing;

(b) Food or refreshments at widely attended gatherings sponsored by industrial, technical or professional organizations if the employee is representing EPA;

(c) Incidental transportation from a private organization in connection with official duties;

(d) Unsolicited advertising or promotional material of nominal value (under $10), such as pens, pads, or calendars; and

(e) Gifts from family or friends only if it is obvious that the personal relationship, and not the business relationship, is the reason for such gifts. Although the gift may be acceptable, the relationship in itself may be a conflict.

Employees must use judgment and discretion even when using any of the exceptions listed above. If the acceptance of such a nominal gift or gratuity would create even the appearance of an impropriety or if the contractor would expect to be rewarded through an employee's official EPA capacity, it must be declined.

(2) Protection of Confidential Business Information

EPA technical personnel often are privy to information which contractors consider to be highly confidential. Examples of such confidential business information include: profit margins, indirect cost rates, number and kind of employees, individual salary rates, or amount of award fee earned. Unauthorized disclosure of such information is a violation of a contractor's rights under the Freedom of Information Act, and could possibly place its competitors in a more advantageous position on future requirements. Therefore, care must be taken not to discuss anything known about a particular contractor to anyone (including other EPA employees) not having a "need to know." Even such an innocent remarks as offering your personal opinion of a contractor's performance on a particular task could be detrimental and is unauthorized.

(3) Maintaining Impartiality

It is very easy to become partial towards a firm who is performing exceptionally well and meeting your every need. When you work very closely on a day-to-day basis with contractor personnel, it is difficult to maintain an objective opinion. However, care must be taken to keep the relationship at arm's length.

The Government and the contractor are separate parties to an agreement with different responsibilities and different goals. Our goal is to receive products or services within a reasonable time period and at a reasonable cost, while our responsibility is to provide technical direction, enforce the terms and conditions of the contract, and to make payment in return for products or services.

The contractor, on the other hand, is trying to make a profit and enhance his reputation so he can continue to make profits in the future. He is responsible for adhering to the terms of the contract and delivering the products or services.

Since the interests of the two parties are so different, Government employees must remain objective about a contractor's performance. Government funds must be spent wisely and efficiently, and it must not appear that Project Officers, Work Assignment Managers or Delivery Order Officers are losing sight of their responsibilities and goals. Therefore, a distance must be maintained, and socializing with contractor personnel outside of official duties is firmly discouraged. Government employees' actions should be such that a full public disclosure would not give rise to a question of impropriety. Project Officers are particularly susceptible to this possibility, and should take great care that their conduct is proper.

(4) Disclosure of Procurement Information

All information before award of any contract or contract modification is considered to be highly confidential. Any unauthorized disclosure of such information could lead to one or more offerors' having a competitive advantage over others, which could result in a bid protest and a ruling against the Agency. The integrity of the competitive process is entirely dependent on the premise that all firms are on an equal footing. In the case of a contract modification, the validity of a cost proposal is only assured if the contractor prepares it independently without benefit of Government estimates, knowledge of the amount of funding available, or any prenegotiation positions being considered by EPA.

Project Officers and any other program personnel privy to such information must ensure that they do not inadvertently let slip any advance or otherwise confidential procurement information to current contractors or other firms who contact them, either before, during or after contract award. Penalties associated with disclosure can be severe. Individual employees can be fined up to $100,000, whether EPA or Contractor. In addition, an Agency employee who knowingly and willfully discloses or promises to disclose any proprietary or source selection information can be subject to criminal penalites up to five years of imprisonment.

If any questions arise, or there are areas of which program personnel are not sure, direct all inquiries to your Contracting Officer. It is important to have such information come directly from the Contracting Officer rather than the Project Officer anyway, as this ensures that there is a control on who receives what information.

## 5.3 Post-Employment Restrictions

All employees are subject to some type of conflict-of-interest restrictions after their EPA employment has ceased. These restrictions were made more stringent by the July 1989 Procurement Integrity prohibitions. The following is a brief summary of these restrictions:

(1) All former Government employees are permanently barred from representing anyone other than the United States before a Federal court or agency with respect to contracts, grants or adjudications, or any other matter involving "specific parties", in which they ever participated "personally and substantially" as Government employees. Rulemaking is not included. Former employees are not barred from seeking competitive contracts or working on contracts with the agency for which they worked, excepted as limited by (7) below.

(2) Former employees who, in their final year of EPA employment, had official responsibility for particular matters involving "specific parties" but did not actually participate in them are prohibited from representing outside parties on such matters for a period of two years.

(3) Former employees designated as "senior employees" are restricted from assisting an outside party "by personal presence" in connection with particular matters in which they ever participated personally or substantially for a period of two years. ("Senior employees" include Assistant Administrators, Office Directors, Regional Administrators, some Directors of Staff Offices reporting to the Administrator, and some Division Directors.)

(4) Former employees who served in "senior employee" positions are prohibited from any communication with EPA with intent to influence on any matter, including rulemaking, regardless of whether the former employees participated in the matter, for a period of one year. Communications with courts and Justice Department attorneys in connection with cases involving EPA are included in the restrictions.

(5) There is a one-year prohibition against award of a sole source contract to a former EPA employee or to a firm in which the former employee is an officer or director if he or she was involved in developing or negotiating the contract proposal or will be involved in the management, administration, or performance of the project. However, there is no prohibition against the award of a competitive contract involving a former EPA employee, excepted as limited by (7) below.

(6) Effectively July 16, 1989, during the conduct of an Agency procurement of property or services, no Agency procurement official may knowingly solicit or accept, directly or indirectly, any promise of future employment or business opportunity from, or engage, directly or indirectly, in any discussion of future employment or business opportunity with, any officer, employee, representative, agent, or consultant of any competing contractor. The term "procurement official" includes any individual, whether an employee or a contract consultant or advisor to EPA, who has participated <u>personally</u> and <u>substantially</u> in the conduct of a procurement. Once the conduct of the procurement has ceased, however, the former procurement

official is free to engage in such employment discussions although he or she remains subject to the post employment prohibitions on participating in procurement negotiations and working on the contract for two years, and on disclosure of proprietary and source selection information.

(7) No EPA official or employee who has participated personally and substantially in the conduct of any EPA procurement or who has personally reviewed the award, modification or extension of any contract for such procurement shall a) participate in any manner, as an officer, employee, agent, or representative of a competing contractor, in any negotiations leading to the award, modification or extension of a contract for such procurement or in any advising on negotiating strategies, or (b) participate personally and substantially on behalf of the competing contractor in the performance of such contract for a two-year period after such participation or review. Thus, if you personally and substantially participated in a procurement as a procurement official or personally functioned as reviewer of that procurement after the effective date of July 16, 1989, you are barred from working personally and substantially on the contract for two years from the date of your participation. The two-year ban on providing advice or information to a competing contractor does not apply to providing scientific, technical, or other advice that is unrelated to negotiating strategies. Pages 136/7 present examples of procurement integrity certificates to be signed by procurement officials, developed in response to the procurement integrity act amendments.

To participate "personally" means directly, and includes the participation of a subordinate when actually directed by the supervisor in the matter. "Substantial" participation means "significant" participation, i.e., the individual's involvement must be of signficance to the matter. Individuals may seek an Agency decision on whether their participation has been so personal and substantial as to trigger these prohibitions.

As noted earlier, implementation of the Procurement Integrity Act Amendments of July 1989 has been suspended for a one-year period effective December 1, 1989. Therefore several of these restrictions will not be in effect until the conclusion of that period.

Appendix 5A contains an example of a conflict of interest situation where an offeror's consultant gained in-depth knowledge of proposals while a government employee. A bid protest resulted in ultimate exclusion of the offeror's proposal. Apparent disclosure of that information was deemed to have given the offeror undue advantage over its competitors.

# Decisions and Rulings in Brief

**Bid Protests — ADP Procurements — Specifications** — An agency cannot reject a quotation for ADP equipment that could be reasonably interpreted as meeting its needs, the General Services Administration Board of Contract Appeals rules. The Army issued an RFQ asking schedule contractors to quote prices for rental and maintenance of a "computer output on microfiche" system. The solicitation stated that the system must have an "in line duplicator and collator with a method of preparing the number of copies required from coding in the master fiche." The protester, which submitted the lowest quote, offered to supply a system that could determine the number of copies required from machine readable bar coding on the master fiche. By comparison, only one source produces a system that meets the government's needs precisely as described in the solicitation.

The rejection of the low quote—for a system that met the agency's needs by a different method—was tantamount to making one company's design criterion a minimum mandatory requirement, Administrative Judge Vincent LaBella points out. "Even if we could interpret the RFQ as requiring a system that reads coding in the master fiche, [the government] failed to provide the necessary justification for the requirement and failed to obtain the approval required when goods are available from only one source listed on a GSA nonmandatory ADP schedule contract." Furthermore, the requirement for coding in the master fiche appears only in the RFQ's general description of the desired system, the board observes, adding that mandatory requirements were listed elsewhere in the solicitation. Moreover, the relevant mandatory provision appears as a functional rather than as a design requirement, the board notes. "It was reasonable for protester to assume that a functionally equivalent system would be acceptable...;why else would [the agency] have issued an RFQ permitting quotations on equivalent equipment?"

Finally, rejection of the low offer here is a clear violation of the Competition in Contracting Act and implementing regulations, the board declares. "We conclude that [the] acquisition in this case violated the requirement in FIRMR §201-32.206(a)(2)(ii) for meeting its stated needs at the lowest overall costs." The agency's stated requirements, as reasonably interpreted, are met by the protester's equipment, the board emphasizes. "We find that [the government] has [sought] to impose a specific make and model specification, and that it has attempted to use a schedule contract for requirements available from only one source." The protest is sustained (NCR Corp., GSBCA No. 8155-P, 11/18/85).

**Conflicts of Interest — Evidence** — Evidence that an offeror's consultant gained in-depth knowledge of proposals while a government employee justifies excluding the proposal from consideration, the General Accounting Office rules. The deputy director of the procuring activity, after evaluation of proposals on a contract to provide engineering services, retired from government service and joined the protester as a consultant. The agency, concerned that the consultant had extensive knowledge of the proposals, amended the RFP to add additonal tasks and evaluation factors. Nevertheless, the protester offered a 33 percent price reduction in its best and final offer. Consequently, the agency concluded that the protester knew the relative technical and cost rankings of its competitors, and that any resulting award would be based on an unfair competitive advantage. Accordingly, the agency disqualified protester's offer.

The protester noted that the consultant's employment agreement bars him from disclosing any confidential information, including that of the government. However, the agency produced affidavits from two procurement officials stating that the consultant had been briefed on the strengths and weaknesses of each offeror's engineering services, and that he worked on a source selection plan while employed by the government. The agency, before disqualifying an offer, need not demonstrate an actual conflict of interest, GAO observes. "We find that the potential for a decisive unfair advantage was reasonably established to the Navy by the [two officials'] statements." The mere possibility that both officials were mistaken, or that the protester actually obtained no competitive advantage, does not render unreasonable the agency's concern about a serious impropriety, GAO adds. The protester took no action—other than signing a standard employment contract—to prevent an improper use of the consultant's knowledge or to address the agency's concerns. The agency had reasonable grounds to conclude that an impropriety or conflict of interest was likely, and to exclude the protester from the competition.

The facts do not establish that there was an organizational conflict of interest, GAO acknowledges. However, agencies may impose restrictions based on their needs or the nature of the procurement. "We see little difference between excluding an offeror because of an unfair advantage gained helping prepare the statement of work... and excluding [one] that has entered into a consulting agreement with a retired official who not only was involved in planning the procurement, but is reasonably believed to know the standing of other offerors and the details of their proposals." (GAO; NKF Engineering, Inc., B-220007, 12/9/85).

**Counterclaims — Sureties** — A contractor's criminal conviction for fraud does not operate as an estoppel on the issue of a surety's liability under a Miller Act performance bond, the U.S. District Court for the Eastern District of New York determines. The court

# PLANNING AND PREPARATION

# RESPONSIBILITIES RELATED TO TERM FORM (LEVEL OF EFFORT) CONTRACTS

## 1. PROJECT OFFICER ROLE:

Oversee Issuance Of Work Assignments; Ensure That Work Assignments Fit Under Contract Statement Of Work

Supervise Work Assignment Manager On The Administration Of Work Assignments But Otherwise Delegate Daily Work Assignment Management To Work Assignment Manager

All Other Responsibilities As Usual, Including Financial Supervision

## 2. WORK ASSIGNMENT MANAGER/DOPO ROLE:

Draft And Manage Work Assignments; Prepare Technical Directives; Supervise Task Managers (If Applicable)

Review Monthly Progress Reports, Including Technical And Financial Reports

Recommend Modifications, Extensions, Etc. To Project Officer

# PREPARING FOR CONTRACT ADMINISTRATION

1. Read Your Contract.

2. Evaluate The Statement Of Work.

   - Make A List Or Chart Of Tasks And Deliverables
   - Make A List Of The Government's Duties And Obligations.

3. Set Up Contract Files And Record-Keeping Systems.

4. Meet With The Contractor To Go Over Tasks And Ensure Understanding Of Contract, Work Assignment And/Or Delivery Order. Note, However, That Only The Contracting Officer Can "Interpret" Contract Terms.

# STEP 1: READ THE CONTRACT

1. Obtain An Official Copy Of The Contract That Is The Result Of Final Signing And Includes Any Changes Made During Contract Negotiations.

2. Thoroughly Read The Contract Statement Of Work.

3. Familiarize Yourself With The Key Personnel.

4. Read Pertinent Contract Terms And Conditions (These Override The Contract Statement Of Work.)

5. Ensure That You Have Completed Form 1900-65 Designating You Project Officer Or Work Assignment Manager/Delivery Order Officer For The Contract.

6. Familiarize Yourself With All Reporting And Deliverable Provisions.

7. Familiarize Yourself With Contract Funding Provisions And Payment Terms.

## STEP 2: EVALUATE STATEMENT OF WORK

1. Make A List Or Chart Of Tasks And Deliverables.

2. Make A List Of Government's Duties And Obligations.

3. Review Schedule And Adequacy Of Reporting Requirements.

4. Identify Areas Needing Clarification Or Modification (And If Contract Modification May Be Required).

5. Develop Proposed Modifications/Clarifications.

6. If WAM Or Delivery Order Officer, Discuss With Project Officer.

7. Discuss, As Pertinent, With Contracting Officer.

# SCHEDULE OF TASKS AND DELIVERABLES

CONTRACT NO. 68-01-0001

CONTRACT: John Doe Environmental, Inc.

DATE OF AWARD: 9/30/85

EXPIRATION DATE: 8/31/86

| TASK/DELIVERABLE | GOVT. TASK DUE | GOVT. TASK ACTUAL | CONTRACTOR TASK DUE | CONTRACTOR TASK ACTUAL |
|---|---|---|---|---|
| 1. DELIVER GOVT-FURNISHED DATA | 10/15/85 | 10/13/85 | | |
| 2. PROVIDE DRAFT REPORT | | | 11/30/85 | 11/30/85 |
| 3. REVIEW DRAFT REPORT AND PROVIDE COMMENTS TO CONTRACTOR | 12/15/85 | 12/16/85 | | |
| 4. PROVIDE FINAL REPORT ON CHEMICAL INDUSTRY | | | 1/31/86 | |

# SCHEDULE OF TASKS AND DELIVERABLES

| TASK/DELIVERABLE | WEEKS AFTER AWARD | | | | | | | | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|---|
| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 | 12 | 13 | 14 | 15 | 16 | 17 |
| 1. DEVELOP PROJECT WORKPLAN | | | | | | | | | | | | | | | | | |
| 2. REVIEW GOVT-FURNISHED DATA | | | | | | | | | | | | | | | | | |
| 3. PREPARE DRAFT REPORT | | | | | | | | | | | | | | | | | |
| 4. PROVIDE FINAL REPORT ON CHEMICAL INDUSTRY | | | | | | | | | | | | | | | | | |
| Status Reports | | | | | | | | | | | | | | | | | |

1 Final Project Workplan (2 weeks)

2 Review Government Data (6 weeks)

3 Prepare preliminary draft (8 weeks)

4 Complete draft (12 weeks)

5 Complete final report (16 weeks)

# CONTENT OF THE CONTRACT STATEMENT OF WORK

1. Background Information
2. Technical Considerations
3. Detailed Description Of Work
4. Specialized Reporting Requirements
5. Deliverables
6. Special Considerations

NOTE: Categories Included May Vary With Contract Type, E.g., Depending On If It Is A Mission Or Non-Mission Contract.

# STATEMENT OF WORK TYPES

## 1. LEVEL OF EFFORT TYPE

Some Quantity Of Technical/Professional Effort

No Specific End Result Can Be Forecast (E.g., Basic Research)

Statement Of Work Must Give An Indication Of The Projected Level Of Effort (E.g., 8000 Person Hours Of Effort To Determine The Effect Of XX On YY.

## 2. COMPLETION TYPE (JOB OR TASK TYPE)

Specific End Result Can Be Prescribed (E.g., Product, New Method)

Amount Of Effort Not Stated In Contract Statement Of Work

# STATEMENT OF WORK CHARACTERISTICS

1. BROAD STATEMENT OF WORK (Mission-Type)

   Provides Flexibility

   More Difficult To Price Accurately

   Often Leads To Cost Reimbursement Type Contract

2. NARROW STATEMENT OF WORK

   Closely Restricts Activity

   May Require Later Changes

   May Limit Innovation

   Provides Tighter Control

   May Lead To Firm Fixed Price Type Contract

GOAL: TO STRIKE REASONABLE BALANCE

STATEMENT OF WORK

The contractor shall furnish the personnel, services, materials, and equipment required to assist the Policy Preparation Branch (PPB) and the Office of Environmental Programs (OEP), as well as other related elements of the Environmental Protection Agency (EPA) in developing and implementing policies and regulations as mandated by statute. Related activities in support of such rule making will also be involved. Individual requirements under this contract will generally fall within, but not be limited to the following categories:

A. Technical Assistance for OEP Divisions and EPA Regions

The contractor may be asked to summarize technical data from ongoing and past research efforts to allow PPB to determine requirements for new guidance and consistency with existing guidance. The technical assistance will be directed at the Planning and Implementation Division as well as other offices within OEP and the 10 EPA regions. Technical assignments may be of a statistical, economic, health and/or engineering nature, and may involve consultation with Federal or State technical personnel. Such assignments will result from, or lead to, the development of specific technical guidance documents.

Technical transfer may also be an integral portion of this effort to ensure that all the EPA regions remain abreast of technological development. The technology transfer may take the form of conferences to bring together appropriate experts in the substantive areas including economics, human health, environmental impacts, and exposure risks. The contractor may be asked to assist OEP by preparing agendas, audio visual aids, scheduling for those conferences, compiling digests of technical papers, presentation, and conference proceedings. No more than five such meetings, normally to be held in Regional offices, are likely to be arranged each year.

B. System Development

The contractor may be required to provide or develop a variety of systems (manual or automated) to assist OEP in tracking, coordinating, and monitoring the activities, policies, correspondence, etc. in its area of responsibility. Such assignments may involve new software development, modification of existing programs to meet current needs, or other tasks as assigned by OEP.

C. General Policy Support

This effort provides for assistance to OEP staff in the development of technical policies, strategies and plans for EPA environmental responsibilities. The policies, strategies and plans will be consistent with existing statutes and regulations. The contractor's duties will range from assisting OEP in coordinating with EPA offices as well as outside agencies to preparing policy option papers for presentations to Agency management.

D. Other Tasks as Assigned

The contractor shall be prepared to provide support as specified in individual work assignments in any other areas as directed by EPA.

# STATEMENT OF WORK PROBLEMS

## COMMON FAULTS

Sentences Too Long And Unwieldy (Sentence Length Tends To Increase With Complexity Of Project, But The More Complex The Project, The More Important The Clarity Of The Statement Of Work)

Use Of Bureaucratic Terms ("Trade" Terminology Is Ok)

Sentences Capable Of Several Interpretations
(If two interpretations are possible, will be interpreted against the writer, e.g. the Govt)

Failure To Use Terms Consistently When Discussing Same Thing

Too Much Inclusion Of "How To Do It"; Discuss The "What," Not The "How"

# STATEMENT OF WORK PROBLEMS (Cont.)

## USE OF COMPLEX AND UNCOMMON WORDS

- Tends To Increase If Writer Does Not Understand The Purpose Of The Effort

## EXCESSIVE VERBIAGE

- Increases Likelihood Of Ambiguity And Conflicting Terms
- Adds To Problems Of Various Persons Who Will Need To Understand Statement Of Work
  - Technical persons (Govt and contractor), contracting officers, contractor administrative persons, attorneys, boards of review and courts

## EXCESSIVE USE OF PASSIVE VOICE

# STEP 3: SET UP FILES AND RECORD SYSTEMS

1. Basic Contract File
2. File on PO and Contract Monitor Designation
3. Internal Correspondence File
4. Contractor Correspondence File
5. Technical Direction/Evaluation File
6. Payment File
7. Computerized Or Manual Tracking Systems

# BASIC CONTRACT FILE

1. Copy Of Contract And All Modifications

2. Copy Of Contractor's Technical And Cost Proposal (Including Resumes & Labor Rates)*

3. Copy Of Specifications, Drawings Or Manuals Incorporated Into The Contract By Reference

4. Listing Of Contractor Submittal Requirements

5. Listing Of Government-Furnished Property Or Services

6. Listing Of All Information, Data Or Documents Furnished To Contractor

7. Copy Of The Pre-Award Survey, If Conducted

8. Schedule Of Compliance Reviews

*Highly Confidential

# FILE ON PROJECT OFFICER AND CONTRACT DESIGNATIONS

1. Copy Of PO Designation, Including Alternates (EPA Form 1900-65)

2. Copies Of Approved Work Assignment Manager And Delivery Order Officer Designations, Including Alternates (EPA Form 1900-65)

3. Listing of Contract Administration Functions Delegated to the PO, DO or WAM/DOPO

# INTERNAL CORRESPONDENCE FILE

1. Record Of Communications Between PO And Other Support Activities

2. Copies Of All Correspondence Between The PO And The Contracting Officer

3. Copies Of Correspondence Between The PO And WAM/DOPO And Program Offices

# CONTRACTOR CORRESPONDENCE FILE

1. Copy Of All General Correspondence Related To The Contract

2. Original Of All Contractor Submittals Of Data And Reports

3. Copy Of Notices To Proceed, Stop Work Orders Or Cure Notices

4. Copy Of All Letters Of Approval Pertaining To: Materials; The Contractor's Quality Control Program; Changes In Contractor Key Personnel; Prospective Employees; Work Schedules

5. Copy Of Letters Between the Contracting Officer And The Contractor

# TECHNICAL DIRECTION/EVALUATION FILE

1. Copy Of All Drafts Submitted By Contractor

2. Copy Of All Comments Provided To Contractor On Contractor Submittals, Or Other Records Of Technical Direction Given

3. Copy Of Government's Contract Monitoring Logs And Communication Records, Meeting Records And Notes

4. Copy Of Contractor Evaluation Form And Deliverable Review Form (See 12-3), Including CPAF Performance Event Forms

# CONTRACTOR COMMUNICATIONS RECORD

CONTRACT NO. 68-01-0001

CONTRACT: John Doe Environmental, Inc.

| DATE/ TIME | CONTACT | SUMMARY OF DISCUSSION/DECISIONS MADE |
|---|---|---|

# MEETING RECORD
## CONTRACT NO. 68-01-0001
## CONTRACT: John Doe Environmental, Inc.

---

**DATE/TIME:**

**ATTENDEES:**

**PURPOSE/DESCRIPTION:**

**DECISIONS MADE:**

**NEXT STEPS (EPA , CONTRACTOR) (Actions to Take, Issues to Resolve):**

# PAYMENT FILE

1. Information Relative to Discount Provisions for Prompt Payment

2. Copy of Contractor Invoices And Record Of Date Received (Date Stamped)

3. Copies of Inspection Reports

4. Letters Pertaining to Invoice Clarifications, Deductions Or Fee Adjustments

5. Back-Up Documentation for Recommendation of Contractor Payment or Progress Payment

6. Copy of Recommended Suspensions Or Disallowances

# TRACKING SYSTEMS

## MANUAL OR AUTOMATED SYSTEMS TO TRACK:

1. WAM Assigned
2. Work Assignments Issued And Workplans Received
3. Deliverables And Due Dates
4. Actual Task Or Subtask Completion
5. Funds Obligated And Expended By Account Number
6. Funds Allocated And Expended By Work Assignment
7. Hours Assigned And Expended

# SUGGESTED FILE PLAN FOR WORK ASSIGNMENT MANAGERS AND DELIVERY ORDER PROJECT OFFICERS

1. Copy Of Work Assignment /Delivery Order, With All Modifications

2. Copy Of Approved Designation Of Work Assignment Manager/Delivery Order Project Officer And Alternates

3. Copy Of Contract And All Modifications

4. Contractor's Work Plan (Drafts & Final, With Evidence Of Government Approval Of Final)

5. Schedule Of All Tasks And Deliverables

6. Copies Of All Deliverables With Related Correspondence (Approvals, Rejections, Comments On Draft)

7. Correspondence Relating To Subcontract Or Consultant Approvals

## SUGGESTED FILE PLAN (Cont.)

8. Technical Progress Reports

9. Financial Progress Reports

10. Copy of Invoices (With Supporting Documentation) & Related Correspondence

11. Documentation and Forms Related to Government-Furnished Property

12. Records of Meetings and Phone Calls with Contractor

13. Miscellaneous Correspondence

14. Evaluation of Contractor's Performance

# STEP 4: CONDUCT POST-AWARD ORIENTATION

This Should Include Review/Discussion Of:

1. The Statement Of Work (Including Schedule Of Major Tasks And All Deliverables)

2. Reporting Requirements

3. Special Contract Provisions (Key Personnel Clause, Subcontract Consent Clause, Etc.)

4. Procedures For Monitoring And Measuring Progress

5. Invoicing And Payment Procedures, Incl. Whom To Contact

6. The Key Players, Their Responsibilities And The Chain Of Command (Both Government & Contractor); Whom To Contact For What (E.g., Property Manager)

7. Logistics Of Operation And Communications

Chapter 6
# PLANNING AND PREPARATION

Before one can properly administer a contract, there are certain steps which are important to assuring satisfactory contract performance and effective administration. Some of these begin before award of the contract, when the requirement is first being defined. Others are to be performed immediately after award. All of these tasks are extremely essential if EPA is to receive the best possible products or services within the time required.

## 6.1 The Importance of the Pre-Award Phase

Effective contract administration is based upon the premise that the contract expresses the exact agreement of the parties. EPA's primary intention is to get what it is paying for at the level of quality desired by the program office. But a contract is a legally enforceable agreement which is only as good as the language it contains. In other words, a contract is interpreted to mean what it actually says, not what one or the other of the parties meant to say.

It is also of the utmost importance that the contractor have the necessary experience and qualifications to perform the work called for by the contract. If the contractor proves to be incapable of providing the desired quality, there is not much remedy afforded to EPA unless specific contract provisions have been breached. This is often not the case, as excellence and quality are difficult to define.

All of this only serves to underline how important pre-award planning is to the Government. Whoever originates the requirement, whether the Project Officer, Work Assignment Manager, Delivery Order Officer or Delivery Order Project Officer, has a basic responsibility to ensure that the language in the RFP and the resultant contract will meet his or her needs. Statements of Work must be clear and concise, and state exactly what the Government requires. Evaluation criteria should be structured so as to allow the selection of a highly qualified source. Reports of Work and other deliverables should be well-defined, with reasonable deadlines which will meet EPA's needs.

In performing any of these pre-award planning tasks, Project Officers as well as Contracting Officers need to be aware of the particular requirements and any problems which are involved in administering and monitoring the different types of contracts. This awareness can help these personnel to be effective contract administrators and reduce the time they need to spend in monitoring the contract.

## 6.2 Reading and Understanding the Contract

After a contract has been awarded in EPA, what is the first thing the Project Officer should do? The answer is: READ THE CONTRACT.

Even if the Project Officer was responsible for drafting the requirement in the first place, the most important part of contract administration is to become thoroughly familiar with the specific obligations of both the contractor and the Government. By reading the entire contract, the Project Officer will be able to monitor the contractor's progress more successfully as different stages of performance are reached. If questions arise, the Contracting Officer will make time available to assist the Project Officer in understanding the contract's terms and conditions.

One of the first things which should be examined is: what are the obligations of the Government? The contract may require EPA to provide property or data to the contractor. If the property or data is not provided on time, the contractor may have an excuse for delaying performance, and may even have a basis for a monetary claim against the Government. Project Officers must be very careful to guard against such potential delays caused by the Government, and should develop some type of schedule, coordinating with other EPA offices, if appropriate, for the timely fulfillment of these obligations.

### 6.3 Schedule of Major Tasks and Deliverables

After reviewing the Government's obligations, the Project Officer should next make a list of each of the major tasks under the contract. (If the contract is a term form, or a fixed-rate, indefinite quantity type, this function, as well as the determination of the Government's obligations, will be performed for each task by the Work Assignment Manager or Delivery Order Officer, with oversight by the Project Officer.) See pages 153-4 for sample schedules.

The list of tasks should include all associated deliverables, reporting requirements, and deadlines, as well as any specific inspection requirements and duties of the Government. This list should be kept up-to-date by the Project Officer, and used as a tool for monitoring progress and determining the extent of contract completion.

In identifying the work the contractor is legally obligated to perform, keep in mind that some documents describing the requirements may have been made a part of the contract by a device called "incorporation by reference". Requirements incorporated by reference are not written out in full in the contract, but are simply listed by title and FAR or other reference. Examples of this are many clauses required by the Federal Acquisition Regulations. Clauses which are incorporated by reference are just as binding on the contractor as any other provision specifically written in full text in the contract. EPA personnel and contractors should review these clauses (by reviewing the referenced clauses in, for example, the FAR), to ensure their knowledge of the applicable requirements. Pages 47-8 list a number of the more important clauses; these are discussed in more detail in later chapters, e.g., in Chapter 7, pages 187 ff.

### 6.4 Post-Award Orientation

Once a review of the Government's and the contractor's obligations has been made, it is often useful to hold a post-award orientation conference with the contractor. This will help to ensure that all aspects of the contract requirements are clear and that each party is certain of its obligations. Post-award orientation is a useful tool for contributing to good contractor performance by:

- increasing the assurance that the contractor understands everything the contract requires.

- clarifying the roles of the Government personnel with whom the contractor will deal during the life of the contract.

- explaining the contract administration procedures that will be used.

Depending upon the complexity of the contract, the format for post-award orientation may be relatively simple, such as a letter signed by the Contracting Officer, or a conference call with both the Project Officer and Contracting Officer participating. Or, it might be more formal, with a meeting attended by contractor representatives and

various EPA personnel involved in the administration of the contract. Regardless of format, the following significant items should be covered:

(1) The Statement of Work (including major tasks and all deliverables);

(2) Reporting Requirements;

(3) Special Contract Provisions (Key Personnel clause, Subcontract Consent clause, etc.);

(4) Procedures for monitoring and measuring progress;

(5) Invoicing and Payment Procedures;

(6) The Key Players, Their Responsibilities and the Chain of Command

(7) The Logistics of Operation and Communications

The conference should always be chaired by the Contracting Officer. The objective is to promote an understanding of the contract, and usually it is necessary for the EPA personnel involved to meet beforehand to develop the agenda and establish a coordinated position on all points. Preparing for the conference also presents an excellent opportunity to ensure that all EPA personnel involved in the contract (Work Assignment Managers, Delivery Order Officers and Delivery Order Project Officers) are similarly oriented.

After the conference, it is a good idea to prepare a report covering the items discussed, the understandings reached, and any further actions required, and distribute it to all attendees.

### 6.5 **Records, Logs, Reports and Files**

The need to maintain proper records, logs, and reports cannot be emphasized enough. The Project Officer's records are considered part of the official contract documentation. In event of a contract dispute, these records may be subjected to examination by the Board of Contract Appeals or by the Federal Courts. The Project Officer should immediately, upon his or her designation, set up a contract administration and suspense file for the contract.

Documents concerning the contract must be contained in the Project Officer's official files. This includes copies of the contract and any modifications, all related internal and external correspondance, copies of all contractor deliverables, and all financial and payment information. Exhibit 6-A is a sample file plan which may be used for this purpose. Sample contractor communications records and meeting record forms are presented on pages 169-70.

The sample plan may be changed to meet the specific requirements of the contract. For example, it may be wise to set up a special file section if Government-furnished property or special equipment is involved in the contract. If the contract provides for award fee payments, a section that specifically relates to this area should be set up in the files.

Work Assignment Managers, Delivery Order Officers and Delivery Order Project Officers have similar recordkeeping requirements, depending on the extent of their

delegated responsibilities. (See pages181-2 for a suggested file plan.) Failure to maintain such records reduces the government's ability to hold the contractor accountable for the contracted-for performance.

## Sample Contract Administration

## File Plan

### Basic Contract File

Copy of contract and all modifications thereto

Copy of specifications, drawings, or manuals incorporated into the contract by reference

Listing of contractor submittal requirements

Listing of Government-furnished property or services

Listing of all information or documents furnished to the contractor

Copy of the pre-award survey, if conducted

Schedule of compliance reviews

### File on PO and Contract Monitor Designation

Copy of PO designation

Letters of contract monitor assignments with copy of transmittal letter furnished to the contractor

Listing of specialized contract administration functions delegated to the PO or contract monitor

### Internal Correspondence File

Record of communications between PO and other support activities

In-house pre-performance checklist

Copies of all correspondence between the PO and the Contracting Officer

Copies of correspondence between the PO and contract monitors and sponsoring activities



Figure 6-A (page 1 of 2)

Contractor Correspondence File

Copy of all general correspondence related to the contract

Original of all contractor submittals of data and reports

Copy of notice to proceed, stop work, or correct deficiencies

Copy of all letters of approval pertaining to, for example: materials; the contractor's quality control program; prospective employees; work schedules, etc.

Payment File

Information relative to discount provisions for prompt payment

Copy of contractor invoices

Copies of inspection reports

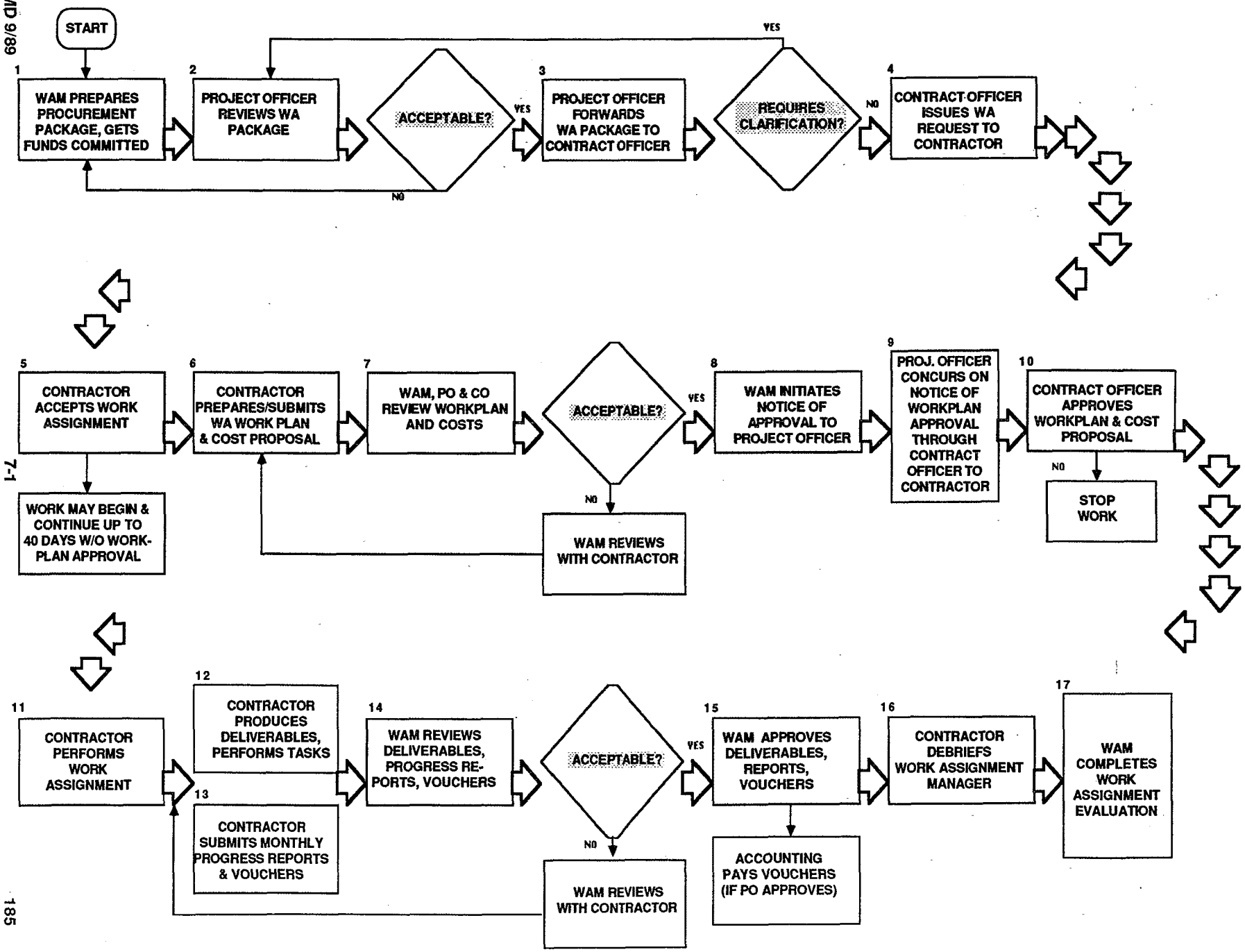
Letters pertaining to contract deductions or fee adjustments

Back-up documentation for recommendation of contractor payment or progress payment.

Figure 6-A (page 2 of 2)

# ISSUANCE OF WORK

# WORK ASSIGNMENT ISSUANCE PROCESS



# WORK ASSIGNMENT CLAUSE

Specifies Required Work Assignment Elements, I.e., Number, Estimate Of Required Labor Hours, Period Of Performance & Schedule Of Deliverables, And Description Of The Work.

Requires Contractor To Sign Work Assignment To Acknowledge Receipt And Submit Work Plan To PO And CO.

Requires Contractor To Stop Work If They Do Not Receive Work Plan Approval.

Contractor Must Notify CO If Work Assignment Suggests Change To Contract Terms Or Conditions.

WORK ASSIGNMENTS (APR 1984)

(a) The Contractor shall perform work under this contract as specified in written work assignments issued by the Contracting Officer.

(b) Each work assignment will include (1) a numerical designation, (2) the estimate of required labor hours, (3) the period of performance and schedule of deliverables, and (4) the description of the work.

(c) The Contractor shall acknowledge receipt of each work assignment by returning to the Contracting Officer a signed copy of the work assignment within ..... calendar days after its receipt. The Contractor shall begin work immediately upon receipt of a work assignment. Within ..... calendar days after receipt of a work assignment, the Contractor shall submit ..... copies of a work plan to the Project Officer and ..... copies to the Contracting Officer. The work plan shall include a detailed technical and staffing plan and a detailed cost estimate. Within ..... calendar days after receipt of the work plan, the Contracting Officer will provide written approval or disapproval of it to the Contractor. If the Contractor has not received approval on a work plan within ..... calendar days after its submission, the Contractor shall stop work on that work assignment. Also, if the Contracting Officer disapproves a work plan, the Contractor shall stop work until the problem causing the disapproval is resolved. In either case, the Contractor shall resume work only when the Contracting Officer finally approves the work plan.

(d) This clause does not change the requirements of the "Level of Effort" clause, nor the notification requirements of either the "Limitation of Cost" or "Limitation of Funds" clauses.

(e) Work assignments shall not allow for any change to the terms or conditions of the contract. Where any language in the work assignment may suggest a change to the terms or conditions, the Contractor shall immediately notify the Contracting Officer.

# DELIVERY ORDER CLAUSE

Specifies Individuals (Aside From Contracting Officer) Who Are Authorized Ordering Officials.

Requires Use Of Optional Form 347 Or Other Agency Prescribed Form To Order Supplies Or Services.

Requires Use Of Standard Form 30 If Amending

Requires Contractor To Acknowledge Receipt And Submit Staffing Plan To Ordering Officer Within 10 Days.

If Contractor Considers Estimated Hours Or Completion Date Unreasonable, Must Notify Ordering Officer And Contracting Officer In Writing Within 10 Days

Contractor Must Not Exceed Order Ceiling Price, And Contractor Must Notify CO If Contractor Believes Costs Will Exceed 85% Of Total Cost Within Next 30 Days

ORDERING--BY DESIGNATED ORDERING OFFICERS (APR 1984)

(a) The Government will order any supplies and services to be furnished under this contract by issuing delivery orders on Optional Form 347, or any agency prescribed form, from ..... through ..... In addition to the Contracting Officer, the following individuals are authorized ordering officers.

.....
.....

(b) A Standard Form 30 will be the method of amending delivery orders.

(c) The Contractor shall acknowledge receipt of each order and shall prepare and forward to the Ordering Officer within ten (10) calendar days the proposed staffing plan for accomplishing the assigned task within the period specified.

(d) If the Contractor considers the estimated labor hours or specified work completion date to be unreasonable, he/she shall promptly notify the Ordering Officer and Contracting Officer in writing within 10 calendar days, stating why the estimated labor hours or specified completion date is considered unreasonable.

(e) Each delivery order will have a ceiling price, which the Contractor may not exceed. When the Contractor has reason to believe that the labor payment and support costs for the order, which will accrue in the next thirty (30) days, will bring total cost to over 85 percent of the ceiling price specified in the order, the Contractor shall notify the Ordering Officer.

(f) Paragraphs (c), (d), and (e) of this clause apply only when services are being ordered.

# PREPARING THE STATEMENT OF WORK FOR WORK ASSIGNMENTS/DELIVERY ORDERS

1. Determine Objectives Of The Work

2. Consider What The Govt Should Provide, E.g., Furnish Or Make Available Background Reports

3. Prepare Outline, Insuring That All Needed Points Are Included; Arrange In Logical Sequence

4. One Person (If Feasible) Writes Draft Statement Of Work To Attain Good Flow Of Thoughts

5. Edit Statement Of Work

   Eliminate excessive verbiage
   Check sentence lengths (mix of short/longer sentences; make it readable)
   Eliminate bureacratese
   Define any uncommon acronyms or technical terms at first point of use (or provide glossary)
   Stress use of active voice (E.g., dog bites On-Scene Coordinator vs. On-Scene Coordinator is bitten by dog)

# PREPARING THE STATEMENT OF WORK (Cont.)

6. Pass Draft Version To Another Person For Review

7. Make Changes Based On The Review

8. Prepare In Final Form

THROUGHOUT -- REMEMBER TO CONSIDER:

- You Can't Reasonably Guard Against Every Conceivable Contingency

- You Can Guard Against Some Performance Problems By:

  - Clearly specifying delivery dates

  - Including the means to evaluate whether contractor is delivering the quality of work required

# ELEMENTS OF WORK ASSIGNMENT

1. PERIOD OF PERFORMANCE

   (Should last until final deliverable is due)

2. LEVEL OF EFFORT

   (Estimated number of person-hours required to perform the assignment)

3. STATEMENT OF WORK

   Title*

   Purpose Of Task/Background*

   Detailed Task Description (Specific Tasks/Deliverables)*

   Required Additional Reports (W/ Desired Format)

   Schedule Of Tasks And Deliverables*

   Suggested Skill Mix

   Required Personnel Qualifications

   Provision Of Government-Furnished Data

   Special Requirements or Restrictions

   *Mandatory Components (Others Should Be Included If Applicable)

PROJECT MUST FALL WITHIN CONTRACT STATEMENT OF WORK!

# LEVEL OF EFFORT (LOE)/COST REIMBURSEMENT TERM CONTRACT

HOURS, Not Dollars, Are What Are Counted And Allocated.

Most LOE Contracts DO NOT Count Support Personnel Such As Company Management, Typists, And Clerical In Direct Labor. However, Some Contracts May Deviate From This Method.

Level Of Effort Does Include Subcontractor And Consultant Hours, As Well As Contractor Hours.

Hours Not Used In Given Contract Period Are Lost And Cannot Be Used In Later Period.

LEVEL OF EFFORT--COST-REIMBURSEMENT TERM CONTRACT (APR 1984)

(a) The Contractor shall perform all work and provide all required reports within the level of effort specified below. The Government hereby orders ..... direct labor hours for the base period, which represents the Government's best estimate of the level of effort to fulfill these requirements.

(b) Direct labor includes personnel such as engineers, scientists, draftsmen, technicians, statisticians, and programmers and not support personnel such as company management, typists, and key punch operators even though such support personnel are normally treated as direct labor by the Contractor. The level of effort specified in paragraph (a) includes Contractor, subcontractor, and consultant labor hours.

(c) If the Contractor provides less than 90 percent of the level of effort specified for the base period or any optional period ordered, an equitable downward adjustment of the fixed fee, if any, for that period will be made. The Government may require the Contractor to provide additional effort up to 110 percent of the level of effort for any period until the estimated cost for that period has been reached. However, this additional effort shall not result in any increase in the fixed fee, if any. If this is a cost-plus-incentive-fee (CPIF) contract, the term "fee" in this paragraph means "base fee and incentive fee." If this is a cost-plus-award-fee (CPAF) contract, the term "fee" in this paragraph means "base fee and award fee."

(d) If the level of effort specified to be ordered during a given base or option period is not ordered during that period, that level of effort may not be accumulated and ordered during a subsequent period.

(e) These terms and conditions do not supersede the requirements of either the "Limitation of Cost" or "Limitation of Funds" clauses.

DEFINITION OF LABOR CLASSIFICATIONS

Listed below are qualifications for each category of professional services the contractor must provide:

(a) Level IV: Senior Professional (Management):

At least eight years of professional experience planning, conducting and participationg in short-term studies; the design, review and evaluation of management and administrative systems; and the provision of management support. At least some of the experience must include scheduling work to meet completion dates, estimating manpower needs and reviewing project progress and making changes in methodology where necessary. This individual plans, conducts, and supervises projects of major significance, necessitating advanced knowledge and the ability to originate and apply new and unique methods and procedures. This person supplies technical advice and counsel to other professionals and generally operates with wide latitude for unreviewed action. In addition, must have at least a masters degree in business administration, management, public administration, or related discipline unless the Experience/Qualification Substitutions clause is satisfied.

(b) Level III: Mid Professional (Senior Analyst):

At least three years professional experience participating in short-term studies; the design, review and evaluation of management and adminsitrative systems; and the provision of information management policy support. Individual receives assignments associated with projects from the senior professional translating technical guidance received into usable data applicable to the particular assignment. Work assignments are varied and require some originality and ingenuity. In addition, must have at least a masters degree in the social sciences, management, business administration, public administration, or related discipline unless the Experience/Qualification Substitutions clause is satisfied.

(c) Level II: Junior Professional (Analyst):

Less than three years of experience in the areas listed above under "Mid Professional (Senior Analyst)." Individual gathers and correlates basic data and performs routine analyses. Person works on less complicated assignments where little evaluation is required. In addition, must have at least a bachelors degree in the social sciences, management or business, unless the Experience/Qualifications Substitutions clause is satisfied.

Experience/Qualification Substitutions:

(a) Any combination of additional years of experience in the proposed field of expertise plus full time college level study in the particular field totaling four (4) years will be an acceptable substitute for a bachelors degree.

(b) A bachelors degree plus any combination of additional years of experience and graduate level study in the proposed field of expertise totaling two (2) years will be an acceptable substitute for masters degree.

(c) Additional years of graduate level study in an appropriate field will be considered equal to years of experience on a two-for-one basis.

## DEFINITION OF LABOR CLASSIFICATIONS

Offerors shall use the following labor classifications in preparing their technical and cost proposals:

### PROFESSIONAL

(1) Level 4 - Plans, conducts and supervises projects of major significance, necessitating advanced knowledge and the ability to originate and apply new and unique methods and procedures. Supplies technical advice and counsel to other professionals. Generally operates with wide latitude for unreviewed action.

Typical Title: Project Leader, Chief Engineer
Normal Qualifications: Ph.D. Degree or equivalent; and
Experience: 10 years or more

(2) Level 3 - Under general supervision of project leader, plans, conducts and supervises assignments normally involving smaller or less important projects. Estimates and schedules work to meet completion dates. Directs assistance, reviews progress and evaluates results; makes changes in methods, design or equipment where necessary. Operates with same latitude for unreviewed action or decision.

Typical Title: Project Engineer, Group Leader
Normal Qualifications: Masters Degree or equivalent; and
Experience: 6-12 years

(3) Level 2 - Under supervision of a senior or project leader, carries out assignments associated with projects. Translates technical guidance received from supervisor into usable data applicable to the particular assignment coordinates the activities of juniors or technicians. Work assignments are varied and require some originality and ingenuity.

Typical Title: Engineer, Analyst
Normal Qualifications: B.S. Degree or equivalent; and
Experience: 3-8 years

(4) Level 1 - Lowest or entering classification. Works under close supervision of senior or project leader. Gathers and correlates basic data and performs routine analyses. Works on less complicated assignments where little evaluation is required.

Typical Title: Junior, Associate
Normal Qualifications: B.S. Degree or equivalent; and
Experience: 0-3 years

Experience/Qualifications Substitutions

(1) Any combination of additional years of experience in the proposed field of expertise plus full time college level study in the particular field totaling four (4) years will be an acceptable substitute for a B.S. Degree.

(2) A B.S. Degree plus any combination of additional years of experience and graduate level study in the proposed field of expertise totaling two (2) years will be an acceptable substitute for a Masters Degree.

(3) A B.S. Degree plus any combination of additional years of experience and graduate level study in the proposed field of expertise totaling four (4) years or a Masters Degree plus two (2) years of either additional experience or graduate level study in the proposed field of expertise will be an acceptable substitute for a Ph.D. Degree.

(4) Additional years of graduate level study in an appropriate field will be considered equal to years of experience on a one-for-one basis.

TECHNICIAN

(1) Level 3 - Performs nonroutine and complex assignments. Works under general supervision of a scientist or engineer. Performs experiments or tests which may require nonstandard procedures and complex instrumentation. Records, computes and analyzes test data prepares test reports. May supervise lower level technicians.

Typical Title: Senior Technician Experience: 6 years or more

(2) Level 2 - Performs assignments that are normally standardized. Operates testing or processing equipment of moderate complexity. May construct components or subassemblies of prototype models. May troubleshoot malfunctioning equipment and make simple repairs. Extracts and processes test data.

Typical Title: Technician Experience: 2-6 years

(3) Level 1 - Performs simple and routine tasks or tests under close supervision. Records test data and may prepare simple charts or graphs. Performs routine maintenance and may install or set up test equipment.

Typical Title: Junior Technicians, Technician Trainee Experience: 0-2 years

Experience/Qualifications Substitutions

(1) Any combination of additional years of experience in the proposed field of expertise plus full time college level

study in the particular field totaling four (4) years will be an acceptable substitute for a B.S. Degree.

(2) A B.S. Degree plus any combination of additional years of experience and graduate level study in the proposed field of expertise totaling two (2) years will be an acceptable substitute for a Masters Degree.

(3) A B.S. Degree plus any combination of additional years of experience and graduate level study in the proposed field of expertise totaling four (4) years or a Masters Degree plus two (2) years of either additional experience or graduate level study in the proposed field of expertise will be an acceptable substitute for a Ph.D. Degree.

(4) Additional years of graduate level study in an appropriate field will be considered equal to years of experience on a one-for-one basis.

# FIXED RATES FOR SERVICES

**This Clause Sets Labor Rates For Personnel Classes For Duration Of Contract.**

**Rates Stated Are To Cover All Expenses, Including Report Preparation, Salaries, Overhead, General And Administrative Expenses, And Profit.**

**Contractor Must Maintain Time And Labor Distribution Records For all Employees Working Under The Contract.**

FIXED RATES FOR SERVICES--INDEFINITE DELIVERY/INDEFINITE QUANTITY CONTRACT (APR 1984)

The following fixed rates shall apply for payment purposes for the duration of the contract.

| Personnel Classification | Skill Level | Estimated Direct Labor Hours | Fixed Hourly Rate | Total |
|---|---|---|---|---|
| ..... | ..... | ..... | ..... | ..... |
| ..... | ..... | ..... | ..... | ..... |
| ..... | ..... | ..... | ..... | ..... |
| ..... | ..... | ..... | ..... | ..... |

The rate, or rates, set forth above cover all expenses, including report preparation, salaries, overhead, general and administrative expenses, and profit.

The Contractor shall voucher for only the time of the personnel whose services are applied directly to the work called for in individual Delivery Orders and accepted by the EPA Project Officer. The Government shall pay the Contractor for the life of a delivery order at rates in effect when the delivery order was issued, even if performance under the delivery order crosses into another period. The Contractor shall maintain time and labor distribution records for all employees who work under the contract. These records must document time worked and work performed by each individual on all Delivery Orders.

(End of clause)

# ESTIMATING WORK ASSIGNMENT COSTS

## TO ESTIMATE TOTAL LABOR HOURS:

1. Break Down Work Assignments Into Tasks

2. Estimate Hours Required To Perform Each Task, By Labor Category

3. Sum Total Hours, Across All Tasks, For Each Labor Category

4. Sum Total Hours

## TO ESTIMATE TOTAL WORK ASSIGNMENT COSTS:

5. Multiply Total Hours Times Average Loaded Hourly Rate For Contract (E.g., $50/hour)

# PROJECTED LABOR BUDGET

| DIRECT LABOR | Est. Hrs | | Rate | | Est. Cost |
|---|---|---|---|---|---|
| Prof. Level 3 | 10 | X | 20 | = | $200 |
| Prof. Level 1 | 10 | X | 10 | = | $100 |
| TOTAL DIRECT | 20 | | | | $300 |

| LABOR OVERHEAD | RATE (%) | | BASE | | |
|---|---|---|---|---|---|
| Fringe Benefits | 33%* | X | 300 | = | $100 |
| Overhead | 50%* | X | 400 | = | $200 |
| TOTAL LABOR OVERHEAD | | | | | $300 |

TOTAL BURDENED LABOR $600

*Typical range = 33-45% for fringes; 40-100% for overhead

# PROJECTED LABOR BUDGET + ODC'S

## WITH RATES LOADED W/ FRINGES & OVERHEAD

| DIRECT LABOR | Est. Hrs | | Rate | | Est. Cost |
|---|---|---|---|---|---|
| Prof. Level 3 | 10 | X | 40 | = | $400 |
| Prof. Level 1 | 10 | X | 20 | = | 200 |
| TOTAL DIRECT | 20 | | | | $600 |

| OTHER DIRECT COSTS | |
|---|---|
| Travel | $180 |
| Subcontractors (200 prof. hrs.) | 6000 |
| Computer Time* | 820 |
| TOTAL ODC'S | $7000 |
| TOTAL DIRECT COST AND LABOR | $7600 |

*Must Be Approved by OIRM Or SIRMO As Appropriate

# PROPOSED WORK ASSIGNMENT BUDGET

## WITH RATES LOADED W/ FRINGES & OVERHEAD

| DIRECT LABOR | Est. Hrs | | Rate | | Est. Cost |
|---|---|---|---|---|---|
| Prof. Level 3 | 10 | X | 40 | = | $400 |
| Prof. Level 1 | 10 | X | 20 | = | 200 |
| TOTAL DIRECT | 20 | | | | $600 |

| OTHER DIRECT COSTS | |
|---|---|
| Travel | $180 |
| Subcontractors (200 prof. hrs.)* | 6000 |
| Computer Time | 820 |
| TOTAL ODC'S | $7000 |

| | |
|---|---|
| TOTAL DIRECT COST AND LABOR | $7600 |
| GENERAL & ADMINISTRATION (10%) | $760 |
| TOTAL ESTIMATED COST | $8360 |
| FEE (7%) | $585 |
| TOTAL ESTIMATED COST + FEE | $8945 |

Average Hourly Rate (Incl. ODC's) = $40.66
(Total costs of $8945 divided by 220 hours of labor,
i.e., 20 hrs.of direct labor + 200 subcontractor hours)
* Separate Breakdown Should Be Provided

# ESTIMATING TOTAL COSTS

1. Calculate Total Hours Per Labor Category

2. Multiply Hours Per Labor Category Times Hourly Rate Per Category

3. Sum The Costs For All Categories = Total Labor Costs (Unloaded, I.e., No Fringes)

4. Multiply Labor Costs Times Fringe Benefit Rate (E g., 33%) = Total Labor Costs

5. Multiply Total Labor Costs Times Overhead Rate (E.g., 50%)

6. Add Other Direct Costs (E.g., Consultants, Subcontractors, Travel, Other Direct Such As Photocopy, Computer Time)

7. Multiply Sum Of Labor Costs + Other Direct Costs Times G&A (E.g., 10% For General & Administrative Costs) = Estimated Cost

8. Multiply Estimated Cost Times Fixed Fee (E.g., 7%) = Estimated Cost Plus Fixed Fee

# RESTRICTIONS ON STATEMENTS OF WORK

1. Do NOT Include Any Internally Developed Cost Estimates

2. Do NOT Direct The Contractor To Use Any Specific Employee, Consultant Or Subcontractor

3. Do NOT Include Any Tasks Outside The Scope Of The Basic Contract

# OTHER CONSIDERATIONS IN PREPARING A WORK ASSIGNMENT/ DELIVERY ORDER SOW

1. Existence Of Any Organizational Or Individual Conflicts Of Interest

2. Qualifications of Contractor Staff To Perform Task Or Need To Obtain Subcontractors/Consultants Consent

3. Key Personnel

4. Avoidance of Creating Personal Services Contract

5. Need For/Use Of Government Furnished Property

# ORGANIZATIONAL CONFLICTS OF INTEREST

An Organizational Conflict Of Interest Exists When The Nature Of The Work To Be Performed Under A Government Contract May, Without Some Restriction On Future Activities,

1. Result In An Unfair Competitive Advantage To The Contractor

2. Impair The Contractor's Objectivity In Performing The Contract Work

NOTE: It Is Similarly Important To Check The Existence Of Any Conflicts Of Interest, E.g., Ownership Of Stock In A Company To Be Regulated.

ORGANIZATIONAL CONFLICTS OF INTEREST
(APR 1984)

(a) The Contractor warrants that, to the best of the Contractor's knowledge and belief, there are no relevant facts or circumstances which could give rise to an organizational conflict of interest, as defined in FAR Subpart 9.5, or that the Contractor has disclosed all such relevant information.

(b) The Contractor agrees that if an actual or potential organizational conflict of interest is discovered after award, the Contractor will make a full disclosure in writing to the Contracting Officer. This disclosure shall include a description of actions which the Contractor has taken or proposes to take, after consultation with the Contracting Officer, to avoid, mitigate, or neutralize the actual or potential conflict.

(c) Remedies - The EPA may terminate this contract for convenience, in whole or in part, if it deems such termination necessary to avoid an organizational conflict of interest. If the Contractor was aware of a potential organizational conflict of interest prior to award or discovered an actual or potential conflict after award and did not disclose or misrepresented relevant information to the Contracting Officer, the Government may terminate the contract for default, debar the Contractor from Government contracting, or pursue such other remedies as may be permitted by law or this contract.

(d) The Contractor further agrees to insert in any subcontract or consultant agreement hereunder, provisions which shall conform substantially to the language of this clause, including this paragraph (d).

# SUBCONTRACTS REQUIRING GOVERNMENT CONSENT

1. For The Fabrication, Purchase, Rental, Installation Or Other Acquisition Of Special Test Equipment Valued At More Than $10,000 Or Of Any Items Of Industrial Facilities

2. That Have Experimental, Development Or Research Work As One Of Their Purposes

3. For Architect-Engineering Services

4. Cost-Reimbursement, Time-and-Materials Or Labor-Hour Type

5. Fixed Price Subcontracts That Exceed Either $25,000 Or 5% Of The Total Estimated Cost Of The Prime Contract

   (These Consent Requirements Apply To All Prime Contracts Except Firm Fixed Price Contracts.)

SUBCONTRACTS (COST-REIMBURSEMENT AND LETTER CONTRACTS) (JUL 1985)

(a) "Subcontract," as used in this clause, includes but is not limited to purchase orders, and changes and modifications to purchase orders. The Contractor shall notify the Contracting Officer reasonably in advance of entering into any subcontract if—

(1) The proposed subcontract is of the cost-reimbursement, time-and-materials, or labor-hour type;

(2) The proposed subcontract is fixed-price and exceeds either $25,000 or 5 percent of the total estimated cost of this contract;

(3) The proposed subcontract has experimental, developmental, or research work as one of its purposes; or

(4) This contract is not a facilities contract and the proposed subcontract provides for the fabrication, purchase, rental, installation, or other acquisition of special test equipment valued in excess of $10,000 or of any items of facilities.

(b) (1) In the case of a proposed subcontract that (i) is of the cost-reimbursement, time-and-materials, or labor-hour type and is estimated to exceed $10,000, including any fee, (ii) is proposed to exceed $100,000, or (iii) is one of a number of subcontracts with a single subcontractor, under this contract, for the same or related supplies or services that, in the aggregate, are expected to exceed $100,000, the advance notification required by paragraph (a) above shall include the information specified in subparagraph (2) below.

(2) (i) A description of the supplies or services to be subcontracted.

(ii) Identification of the type of subcontract to be used.

(iii) Identification of the proposed subcontractor and an explanation of why and how the proposed subcontractor was selected, including the competition obtained.

(iv) The proposed subcontract price and the Contractor's cost or price analysis.

(v) The subcontractor's current, complete, and accurate cost or pricing data and Certificate of Current Cost or Pricing Data, if required by other contract provisions.

(vi) The subcontractor's Disclosure Statement or Certificate relating to Cost Accounting Standards when such data are required by other provisions of this contract.

(Continued on the next page)

SUBCONTRACTS - Continued

(vii) A negotiation memorandum reflecting—

(A) The principal elements of the subcontract price negotiations;

(B) The most significant considerations controlling establishment of initial or revised prices;

(C) The reason cost or pricing data were or were not required;

(D) The extent, if any, to which the Contractor did not rely on the subcontractor's cost or pricing data in determining the price objective and in negotiating the final price;

(E) The extent to which it was recognized in the negotiation that the subcontractor's cost or pricing data were not accurate, complete, or current; the action taken by the Contractor and the subcontractor; and the effect of any such defective data on the total price negotiated;

(F) The reasons for any significant difference between the Contractor's price objective and the price negotiated; and

(G) A complete explanation of the incentive fee or profit plan when incentives are used. The explanation shall identify each critical performance element, management decisions used to quantify each incentive element, reasons for the incentives, and a summary of all trade-off possibilities considered.

(c) The Contractor shall obtain the Contracting Officer's written consent before placing any subcontract for which advance notification is requred under paragraph (a) above. However, the Contracting Officer may ratify in writing any such subcontract. Ratification shall constitute the consent of the Contracting Officer.

(d) If the Contractor has an approved purchasing system and the subcontract is within the scope of such approval, the Contractor may enter into the subcontracts described in subparagraphs (a)(1) and (a)(2) above without the consent of the Contracting Officer, unless this contract is for the acquisition of major systems, subsystems, or their components.

(e) Even if the Contractor's purchasing system has been approved, the Contractor shall obtain the Contracting Officer's written consent before placing subcontracts that have been selected for special surveillance and identified in the Schedule of this contract.

(f) Unless the consent or approval specifically provides otherwise, neither consent by the Contracting Officer to any subcontract nor approval of the Contractor's purchasing system shall constitute a determination (1) of the acceptability of any subcontract terms or conditions, (2) of the allowability of any cost under this contract, or (3) to relieve the Contractor of any responsibility for performing this contract.

(g) No subcontract placed under this contract shall provide for payment on a cost-plus-a-percentage-of-cost basis, and any fee payable under cost-reimbursement type subcontracts shall not exceed the fee limitations in paragraph 15.903(d) of the Federal Acquisition Regulation (FAR).

(h) The Contractor shall give the Contracting Officer immediate written notice of any action or suit filed and prompt notice of any claim made against the Contractor by any subcontractor or vendor that, in the opinion of the Contractor, may result in litigation related in any way to this contract, with respect to which the Contractor may be entitled to reimbursement from the Government.

(i) (1) The Contractor shall insert in each price redetermination or incentive price revision subcontract under this contract the substance of the paragraph "Quarterly limitation on payments statement" of the clause at 52.216-5, Price Redetermination—Prospective, 52.216-6, Price Redetermination—Retroactive, 52.216-16, Incentive Price Revision—Firm Target, or 52.216-17, Incentive Price Revision—Successive Targets, as appropriate, modified in accordance with the paragraph entitled "Subcontracts" of that clause.

(2) Additionally, the Contractor shall include in each cost-reimbursement subcontract under this contract a requirement that the subcontractor insert the substance of the appropriate modified subparagraph referred to in subparagraph (1) above in each lower tier price redetermination or incentive price revision subcontract under that subcontract.

(j) To facilitate small business participation in subcontracting, the Contractor agrees to provide progress payments on subcontracts under this contract that are fixed-price subcontracts with small business concerns in conformity with the standards for customary progress payments stated in FAR 32.502-1 and 32.504(f), as in effect on the date of this contract. The Contractor further agrees that the need for such progress payments will not be considered a handicap or adverse factor in the award of subcontracts.

(k) The Government reserves the right to review the Contractor's purchasing system as set forth in FAR Subpart 44.3.

SAMPLE

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**WASHINGTON, D.C. 20460**

MEMORANDUM

SUBJECT: Subcontractor/Consultant Approval EPA Contract No.

FROM: Work Assignment Manager

THRU: Gary R. Polvi, P.E., Project Officer
Officer of Water Enforcement and Permits (EN-338)

TO: William Bailey, Contracting Officer
Contracts Management Division, Cinc., OH

Your approval is recommended for the following subcontractor(s)/. consultant(s), proposed by _____ (Prime Contractor), as identified below in the subject work assignment work plan:

Work Assignment/Amendment No.: _____

Work Plan Title/Dated: _____

_____

List of Subcontractors/Consultants Recommended for Approval: _____

_____

_____

_____

I make the following certifications for each subcontractor/ consultant identified in this approval requests:

That I have reviewed the subject subcontractor/consultant effort, from both technical and cost perspecties and (except as noted in the attached work plan approval) find the subcontractor/ consultant effort necessary and reasonable to achieve the technical objective of the subject work assignment/work assignment amendment;

That the proposed subcontractor(s)/consultant(s) were selected independently by the prime contractor; and

That the efforts of the approved subcontractor(s)/consultant(s) are to be managed and directed by the prime contractor.



_____ Date

_____ EPA Work Assignment Manager

# KEY PERSONNEL

UNDER THE PROVISIONS OF THE "KEY PERSONNEL" CLAUSE, THE CONTRACTOR AGREES TO:

1. Assign To The Contract Work Certain Key Personnel;

2. Not Remove These Key Personnel From The Contract Work For A Certain Period Of Time (Generally 90 Days) Without The Consent Of The Contracting Officer; And

3. Obtain The Government's Approval On Any Proposed Substitutions.

KEY PESONNEL (APR 1984)

(a) The Contractor shall assign to this contract the following key personnel:

.....
.....

(b) During the first ninety (90) days of performance, the Contractor shall make no substitutions of key personnel unless the substitution is necessitated by illness, death, or termination of employment. The Contractor shall notify the Contracting Officer within 15 calendar days after the occurrence of any of these events and provide the information required by paragraph (c) below. After the initial 90-day period, the Contractor shall submit the information required by paragraph (c) to the Contracting Officer at least 15 days prior to making any permanent substitutions.

(c) The Contractor shall provide a detailed explanation of the circumstances necessitating the proposed substitutions, complete resumes for the proposed substitutes, and any additional information requested by the Contracting Officer. Proposed substitutes should have comparable qualifications to those of the persons being replaced. The Contracting Officer will notify the Contractor within 15 calendar days after receipt of all required information of the decision on substitutions. This clause will be modified to reflect any approved changes of key personnel.

# PERSONAL SERVICES

1. A Personal Services Contract Results When The Government Assumes The Right To Instruct, Supervise Or Control A Contractor's Employee In How He/She Performs The Work.

2. It Is The Contractor's Right To Hire And Fire, To Assign And Organize The Work.

3. Project Officers, Work Assignment Managers And Delivery Order Officers Must Take Care Not To Create A Work Assignment That Creates A Personal Services Contract (Employee/Employee Relationship).

PERSONAL SERVICE CONTRACTS ARE ILLEGAL!

# ADVISORY & ASSISTANCE SERVICES

1. Services To Support Or Improve Agency Policy Development, Decision-making, Management, And Administration, Or To Support Or Improve Operation Of Management Systems, To Include:
   - -- Individual Experts and Consultants
   - -- Studies, Analyses and Evaluations
   - -- Management and Professional Support Services
   - -- Engineering and Technical Service

2. Procurement Requests For A&A Services Require:
   - -- Written Justification Of Need And Certification That Services Do Not Unnecessarily Duplicate Any Previously Performed Work Or Services
   - -- Written Approval By Official At Level Above Requesting Office, Or Higher Level If During 4th Quarter Of Fiscal Year Or Agency Requires

3. Management Controls:
   - -- Work Statements Are Specific, Complete And Specify Fixed Period Of Performance
   - -- Acquisition Follows Competition In Contracting Act Requirements
   - -- Disclosure To Avoid Conflict Of Interest
   - -- Proper Monitoring And Contract Administration
   - -- Written Evaluation At Conclusion To Assess Utility Of Deliverables And Contractor Performance

PROCUREMENT REQUEST RATIONALE CHECKLIST
(to be submitted with EPA Forms 1900-8 and 1900-8A)

Item 1 The title of this procurement is _____

Item 2 This procurement request package contains the following documents. (Check all applicable boxes and attached documents as appropriate.)

| See Attachment # | Check | Description |
|---|---|---|
| _____ | _____ | EPA Form 1900-8 |
| _____ | _____ | Procurement Abstract* |
| _____ | _____ | Statement or Scope of Work* |
| _____ | _____ | Concise Technical Proposal Instructions* |
| _____ | _____ | Competitive Technical Evaluation Criteria* |
| _____ | _____ | Justification for Other Than Full and Open Competition (JOFOC) |
| _____ | _____ | D&F to provide full and open competition after exclusion of source (see FAR 6.2) |
| _____ | _____ | Justification for Advisory and Assistance Services |
| _____ | _____ | Justification of Need (Government-Furnished Property (GFP)/ Equipment)* |
| _____ | _____ | Quality Assurance (QA) Review Form |
| _____ | _____ | Recommended Sources List |
| _____ | _____ | Reports Description |
| _____ | _____ | Government-Furnished Property Description |

* The PROJECT OFFICER'S HANDBOOK provides guidance for preparing these documents. Also, see Item 11.

Item 3: This procurement [ ]involves [ ]does not involve advisory and assistance services. (If advisory and assistance services are involved, attach a justification that provides a statement of the need for the services and a certification that such services do not unnecessarily duplicate any previously performed work or services). (See page 4 of Figure 2-2 for required approvals)

Item 4: This procurement [ ]involves [ ]does not involve legal analysis. I have [ ] have not [ ]discussed this procurement with the Office of General Counsel which [ ]concurs [ ]does not concur with proceeding with this procurement

Figure 2-1
Page 1 of 5

# 7-POINT JUSTIFICATION OF NEED FOR GFP

1. Identify The Specific Program And Project For Which The Property Is Required.

2. Identify The Type, Quantity And Estimated Cost (Including Any Transportation Or Installation Costs) Of Each Item Of Property Required.

3. Explain Why The Property Is Necessary For Contract Performance.

4. Explain Why It Is In The Interest Of The Government To Provide The Property Rather Than To Require The Contractor To Provide The Property At No Direct Cost To The Contract.

5. Identify The Location Of The Contractor's Facility At Which The Property Will Be Used, And The Contractor's Personnel Responsible For Acquisition And Management Of The Property.

# 7-POINT JUSTIFICATION OF NEED FOR GFP (Cont.)

6. For Property To Be Acquired By The Contractor At Government Expense, Include A Certification That No In-house Excess Property Is Available And Include The Concurrence Of The Local Property Office.

7. For Equipment To Be Acquired By The Contractor At Government Expense (E.g., Purchase Of Special Test Equipment), Include A Lease Vs. Purchase Analysis.

## CASE STUDY
## THE CASE OF DDD

On September 30, 1994, a cost-reimbursement, term form contract was awarded to the Technically Acceptable Corporation (TAC) for the purpose of collecting and analyzing data on the pesticide industry. The level of effort provided in the contract is 20,000 hours. The period of performance extends until September 30, 1996, and there is an option to extend the period of performance for an additional year, through September 30, 1997. The option contains an additional 10,000 LOE hours.

You are a Work Assignment Manager, and you have a requirement for TAC to study the long and short-term effects of the new pesticide, "DDD", on the environment, when used on soybean plants. There is some data in-house on the chemical composition of the pesticide, which you will furnish to the contractor. You expect TAC to conduct research on studies which have already been done in this area, as well as an appropriate amount of testing. At the end of the effort, you want a final report. It is anticipated that the work will take about 2500 person-hours and take about a year to complete.

It is now January 30, 1996. The Project Officer advises you that, to date, twelve work assignments have been issued under the contract, totalling approximately 17,000 hours.

Prepare a Work Assignment package for submission to the Contracting Officer. This must include a Level of Effort, a Period of Performance, and a Statement of Work. Also (although this will not be issued to the contractor), prepare a cost estimate for the project. On the next page, some pertinent information about the contract is provided.

CONTRACT NO. 68-0X-1234

CONTRACTOR: TECHNICALLY ACCEPTABLE CORPORATION
#1A Main Street
Podunk, USA 00000

BASE PERIOD: October 1, 1994 - September 30, 1996
OPTION YEAR I: October 1, 1996 - September 30, 1997
OPTION YEAR II: October 1, 1997 - September 30, 1998

| | LEVEL OF EFFORT | ESTIMATED COST (plus fixed fee) |
|---|---|---|
| BASE PERIOD | 20,000 hours | $1,304,084 |
| OPTION YEAR I | 10,000 hours | $ 678,124 |
| OPTION YEAR II | 10,000 hours | $ 705,249 |

CEILING ON TRAVEL COSTS (Per Year) $5,000
CEILING ON ODC's (Per Year) $7,500

ESTIMATED AVERAGE RATE PER HOUR (unloaded): $22.45
(loaded): $60.66 (excludes fee)
$65.20 (with fixed fee)

BASE PERIOD LABOR CATEGORIES, RATES, & PROPOSED HOURS:

| | | |
|---|---|---|
| PROJECT MANAGER | $27.00 | 3600 hours |
| SR. ENGINEER/V.P. | 30.00 | 416 hours |
| SR. RESEARCHER | 20.00 | 8100 hours |
| RESEARCH ASSISTANT | 14.50 | 1800 hours |
| STAFF WRITER | 18.00 | 5400 hours |
| SOIL SPECIALIST | 9.00 | 684 hours |
| SECRETARY | 11.50 | 1600 hours |
| CLERK-TYPIST | 9.00 | 720 hours |

INDIRECT COST RATES:

OVERHEAD & FRINGE BENEFITS: 111% of DIRECT LABOR
GENERAL & ADMINISTRATIVE EXPENSE: 18.5% OF TOTAL COSTS

Chapter 7
# ISSUANCE OF WORK AND RELATED CONSIDERATIONS

Probably the most time-consuming role of a Project Officer in relation to contract management is that of technical monitoring. This is the area where the involvement of the Project Officer, Work Assignment Manager, Delivery Order Officer or Delivery Order Project Officer exerts the most influence over the actual work product the Agency will receive. From the time the assignment is given to the contractor until the work is accepted by EPA, these individuals are responsible for assuring that the contractor understands the work requirements and performs in a manner to produce quality results within the time required.

## 7.1 Issuance of Work

Under a fixed price contract or a cost-reimbursement completion form contract, the work requirements are clearly specified in the Statement of Work or specifications. Under these types of contracts, the Project Officer's role is primarily one of monitoring progress. Many of EPA's contracts, however, contain broad statements of work, and are of a level of effort or fixed-rate indefinite delivery/indefinite quantity type, where the actual assignments are specified in individual work assignments or delivery orders. These individual efforts are usually assigned and monitored by EPA employees other than the Project Officer (e.g., Work Assignment Managers under term form contracts and Delivery Order Officers and Delivery Order Project Officers under indefinite delivery/indefinite quantity contracts.) The actual assignment of work varies considerably between the two types of contracts.

Preparing Work Assignments Under Level of Effort Contracts

Implementation of a work assignment begins with the Work Assignment Manager's preparation of the Work Assignment Request (see sample on page 63.) This request, along with Form 1900-65 (see page 4) designating the Work Assignment Manager as manager of the proposed work assignment, and any other required justifications, is forwarded to the Project Officer who reviews the package for accuracy and acceptability. If no changes or clarifications are needed, the package is forwarded to the Contracting Officer for issuance to the contractor.

The Work Assignment requirements are specified in the standard contract work assignment clause (see page 187), and consist of the following items:

(1) statement of work;

(2) period of performance and schedule of deliverables;

(3) an estimate of the level of effort.

The statement of work has four mandatory components: a title, background and purpose of the task, detailed task description, and schedule of tasks and deliverables. This table summarizing the major tasks involved and expected delivery dates is an extremely useful tool for summarizing work requirements and facilitating subsequent monitoring. (See samples on pages 153-54.)

In preparing the statement of work, the Work Assignment Manager must take care to keep the assignment within the general scope of work of the contract. Assignments must be specific in terms of end product(s) required, and the number and types of reports to be submitted. Any other specific requirements involved may also be specified in the Work Assignment, e.g., the recommended skill mix, required personnel qualifications, or the provision of government-furnished data. NO SPECIFIC COST ESTIMATES ARE TO BE FORWARDED TO THE CONTRACTOR. This gives away the Government's estimated cost, and guarantees that the contractor will propose at least that amount. Only estimated level of effort in terms of projected hours may be communicated. NOR MAY EPA DIRECT THE CONTRACTOR TO USE ANY SPECIFIC EMPLOYEE, CONSULTANT OR SUBCONTRACTOR. The government is limited to specifying its requirements in terms of required skills and qualifications.

The Work Assignment should be complete. That is, it should contain all the information the contractor needs to begin working immediately and to prepare a work plan, if required. Some suggestions for preparing statements of work are presented on pages 190-1.

The period of performance will generally be from the effective date of the Work Assignment until the completion date specified. Performance cannot extend beyond the current contract base or option period. The level of effort specified will be based upon the estimated number of direct labor hours required to perform the task(s).

Preparing Delivery Orders Under Indefinite Delivery/Indefinite Quantity Contracts

Issuance of a delivery order depends upon how the contract is set up. Under some contracts, only the Contracting Officer may issue orders. Under others, individual program personnel are authorized to issue orders up to a specified dollar limitation. Because delivery orders obligate funds, an employee must have a Contracting Officer's warrant to issue orders.

If a Delivery Order Officer with a warrant is located in a program office, all Delivery Orders within his or her authority do not have to pass through the Contracting Officer before issuance to the contractor. They must, however, first be reviewed by the EPA Project Officer responsible for managing the overall effort under the entire contract. Delivery Orders in excess of a Delivery Order Officer's delegated authority must be forwarded to the Contracting Officer for issuance.

The content of delivery orders is governed by the standard contract clause on Ordering by Designated Ordering Officers (see page 189). Delivery orders under most contracts are written on Optional Form 347, Order for Supplies or Services (see page 67). Most blocks on this form requiring completion are self-explanatory. The estimated number of hours in each labor category must be listed in block 17, with the associated fixed rate for each labor category.

A ceiling price on total Other Direct Costs must also be provided, and the total of each of these entries (loaded direct labor plus ODS) will be computed and set forth as the ceiling price on the entire order. The delivery order Statement of Work must be attached to the order. (See above section on Work Assignments for guidance on how to prepare a Statement of Work. See also pages 190-1.)

A Procurement Request (EPA Form 1900-8, page 71) must be completed for the entire amount of the delivery order and forwarded to the Contracting Officer or Delivery Order Officer, unless the order is within the contract minimum which was obligated at

the time of contract award. The accounting and appropriation data from this commitment notice must also appear in block 9 of the delivery order, and must match the information exactly.

If a Delivery Order Officer has a limit on his or her obligation authority which is less than the total of the delivery order, the entire order must be placed by the Contracting Officer, who is authorized to obligate the total amount of funds. The delivery order and PR should be forwarded immediately to the Contracting Officer for issuance.

The period of performance of a given delivery order may extend beyond the ordering period of the contract, within the limits specified. (This is unlike hours under term form contracts, which may not be carried over into subsequent periods). Orders for severable services (i.e., work assignments) are subject to the bona fide need principles discussed in Chapter 4, where the period of performance may not extend beyond the life of an appropriation. Orders for nonseverable services (e.g., fixed price contracts and delivery orders) are not restricted in this manner. The final completion date for all the tasks under the order should be entered in block 15 of the OF347.

## 7.2 Estimating Hours and Level of Effort

Estimating the hours for work assignments and delivery orders is a significant part of preparing the work assignment or delivery order, and requires thoughtful effort on the part of the the EPA staff preparing the estimate. The first step is to define the levels of personnel required to perform the work. Care must be taken to avoid the use of overly-qualified personnel, which could result in prematurely reaching the contract cost ceiling amount. Two different ways of defining labor classifications, depending on the type of work being performed, are presented on pages 195ff. Labor classifications must, however, be matched to the work to be performed. Work assignment managers and delivery order officers will be required to use those categories already listed in their particular contract.

Once the appropriate categories have been identified, EPA staff must estimate the total number of hours required from each labor class. This requires thinking through the proposed work assignment tasks, and estimating the time required of each staff level for each task. These hours are then summed and indicated on the work assignment. The procedures to be followed are summarized on pages 202ff.

Direct labor hours generally do not include support personnel such as company management, typists and clerical personnel. Level of effort does, however, include subcontractor and consultant hours along with contractor hours, which are included as other direct costs (ODCs) along with travel, computer time, etc.

## 7.3 Estimating Total Contract Costs

Work assignment managers and delivery order officers are not generally required to prepare work assignment or delivery order cost estimates. They merely make an estimate of the total hours required. Project officers, however, must be able both to estimate and monitor contract costs, and compare invoiced costs against the original contract budget.

For work assignments and delivery orders, an estimate of the total costs can be obtained by multiplying total projected hours times the average hourly rate for the contract, e.g., 200 hours times $60/hour results in a cost estimate of $12,000 for the work. The average hourly rate used in this case incorporates an estimate of the average

ODCs (other direct costs), G&A (general and administrative costs, such as the contractor's finance and personnel staff), and fee or profit (see pages 202ff).

It is important for all EPA personnel, however, to understand how to estimate and evaluate contract budgets. This process is detailed below and in the contract itself, with examples on pages 203-205.

Direct Labor. A contract budget may have five basic elements: a) direct labor, b) labor overhead, c) other direct costs, d) general and administrative costs, and e) fee or profit. (Since different contractors use somewhat different cost estimation systems, there may be some variance in the factors and how they are applied.) Direct labor is very simply your salary divided by 2080 hours (assuming 40-hour work weeks), the number of hours in the standard government work year. If your salary is $20,800, your hourly rate is thus $10.00 per hour, or $20,800 divided by 2080 hours.

Labor Overhead. Labor overhead is the second element. Labor overhead consists of two factors: fringe benefits, and overhead. Your salary is only one part of your total compensation. You also get sick leave, annual leave, pension, and other such benefits generally called fringe benefits, or "fringes." Fringe benefits generally range from 25-40% of direct labor, depending on the company involved and its fringe benefit package. Assuming the company's fringe benefit rate to be 35%, you therefore multiple the hourly labor rate times the company's fringe benefit rate, e.g., $10/hour X 35% fringes = $3.50. Your hourly rate "loaded" with fringes is thus $13.50.

Overhead includes the organization's costs of keeping you working. It includes such costs as space rental, furniture and furnishings, supplies, business equipment, secretarial and clerical support staff, and other such costs. Overhead can vary widely, depending on how expensively the organization is set up and staffed. It can range from 15% to 200% or more. The overhead rate of a company will significantly affect how competitive it will be in bidding on government contracts. Some companies therefore have separate overhead rates for government work versus private work. (A contractor cannot charge the government more than it charges the private sector, although it can charge less.) Assuming the company's overhead rate to be 50%, you multiple your hourly rate loaded with fringes times the overhead rate to obtain total labor overhead (e.g., $13.50 x 50% = $20.25). Thus, if the salary you are receiving is $10.00 per hour, the actual cost of keeping you employed, including fringes and overhead, is actually $20.25, or more than double what you receive. Your direct hourly cost, "loaded" with fringes and overhead, is known as your "loaded hourly rate." (See page 203 for a sample).

Other Direct Costs. ODCs include the cost of travel, special equipment required for the particular work to be performed (e.g., computer time on the special network not ordinarily available or covered in overhead), subcontract costs or the cost of special consultants, etc. These direct costs are added to the project labor costs and summed to obtain the total direct cost plus labor.

General and Administration. G&A is the cost of the organization's management, e.g., EPA's administrator and assistant administrators, or a company's president and officers, along with their support staffs (legal, financial, personnel, etc.). This can range from 2-20% or so, and is multipled times the sum of the labor costs and ODCs. Assuming that you are projected to require 100 hours of work at $20.25/hour, and ODCs are $200, then you would multiple the G&A rate of, say, 10% times $2225 (the sum of $2025 + $200), to get $222.50 G&A, for a total amount of $2447.50.

Fee. Government contracts usually provide for a fee or profit. The amount of fee charged is generally negotiated along with other contract terms when the contract is awarded. Fees may range from 5 to 15% (up to 6% for architectural/engineering services; 15% for R&D; and 10% for all other, unless an exception is granted). This fee is charged on top of all other costs. For example, if the fee were 7%, the above contract amount of $2557.50 would be multiplied by 7% to get the total contract costs, plus fee. The result would be a fee of $171.33, for a total estimated price of $2728.83. Page 205 is a sample budget including calculation of all costs, including fee.

## 7.4 Consideration #1: Organizational Conflicts of Interest

In preparing Statements of Work, EPA staff must take into account a number of additional factors so they can be appropriately managed or avoided. One of the most important factors to be considered is the existence of any organizational or individual conflicts of interest.

Organizational conflicts of interest are situations that occur from time to time with respect to EPA contracts. It is always preferable to prevent such conflicts from arising during contract performance by identifying the possibilities during the pre-award phase and taking steps at that time to avoid them. However, sometimes conflicts of interest cannot be foreseen nor completely avoided prior to award and Project Officers need to be aware of what they are and what to do about them if such situations do arise during the performance of a contract.

### Definition

The FAR defines an organizational conflict of interest as a situation that exists "when the nature of the work to be performed under a proposed Government contract may, without some restriction on future activities, (a) result in an unfair competitive advantage to the contractor or (b) impair the contractor's objectivity in performing the contract work." It is the latter situation which is of the most concern during contract performance. (See text of EPAAR clause on page 210.)

Any of a contractor's outside interests, be they organizational, financial, contractual, or of some other type, could affect its objectivity in performing work for EPA. This is more likely to occur in contracts involving consultant or management support services, but the possibility exists in all contracts. Regulations require that the Contracting Officer take immediate steps to avoid, neutralize, or mitigate any actual, potential, or apparent conflict of interest once notified of its existence. Project Officers are required to notify their Contracting Officer immediately if they see or suspect a situation where a contractor's outside interests are affecting its independent judgment in performing work on an EPA contract, or if the appearance of such a conflict exists, even if the work performed by a contractor is not in fact biased or lacking in impartial judgment.

### What to Look For

All EPA contracts over $10,000 contain a clause requiring the contractor to disclose in writing to the Contracting Officer any actual or potential conflict of interest discovered after award of a contract. Ideally, this would take care of all such situations and the Project Officer need not be further concerned. However, many times what may not be a conflict in the mind of the contractor could be a very significant problem in the opinion of the Agency, but if the contractor does not notify EPA, the Contracting Officer is not aware of its existence. If the contractor is aware of such a situation and fails to

notify the Contracting Officer, the contract may be terminated for default (see Chapter 14). For these reasons, Project Officers must be "on the lookout" at all times during contract performance for situations which might be classified as organizational conflicts of interest, and must notify the Contracting Officer if a potential one is discovered. If any doubt exists, the Contracting Officer should be notified anyway, and he or she will obtain the opinion of legal counsel before making a determination as to whether or not an organizational conflict of interest exists.

Project Officers should subject all such situations to the following tests:

(1) Is the contractor being asked to perform work which will affect an industry of which it is a part, or from which it derives a substantial portion of its income?

(2) Is the contractor performing an analysis for EPA that it is also performing for a firm which will be affected by the results of that analysis?

(3) Is the contractor performing consulting services for an industry regulated by EPA at the same time as it under contract to EPA for any work on the same subject?

(4) Do the work results provided by a contractor appear to be lacking in complete objectivity from any aspect?

(5) On any Superfund contracts, can the contractor potentially be found liable as a responsible party on any site for which it is being asked to perform work for EPA?

(6) Is there any possibility that even the appearance of one of these situations might undermine the credibility of the work results in the eyes of the general public?

If the answers to any of these questions is in the affirmative, an actual or potential conflict of interest probably does exist, and the Contracting Officer must be notified immediately.

Procedures in the Event of the Existence of an Organizational Conflict of Interest

As stated above, if a determination is made that an actual, potential, or apparent conflict of interest does exist, the Contracting Officer must take immediate steps to avoid, neutralize, or mitigate the situation. This may take the form of a bilateral contract modification, under which the contractor agrees to refrain from performing any specific outside work for a certain period of time, or is barred from specific future EPA work for a specified period. Or, the Contracting Officer may direct the Project Officer not to assign a specific Work Assignment or Delivery Order to the contractor.

If the conflict is significant and the Contracting Officer is unable to resolve or avoid it, the contract may have to be terminated for the convenience of the Government, either in whole or in part, depending on the nature of the conflict. Since all of these possibilities are less than desirable, it is far preferable to identify potential conflicts before award of the contract, and take steps at that time to prevent all conflicts of interest from occurring during performance of the work.

## 7.5 Consideration #2: Subcontracts, Consultants and Key Personnel

The quality of a contract, especially one for services, is only as good as the best personnel assigned to perform it. Often, the contractor will supplement his own staff with the services of consultants and sub-contractors, and will identify them, as well as key personnel from his own staff, in his technical proposal in order to win the award. Certain policies govern the use of subcontractors, consultants, and key personnel and Government representatives who participate in the contracting process need to be aware of them. This section attempts to explain these key provisions.

Consent to Subcontract

A sizeable portion of many EPA contracts is performed by subcontractors. This is often necessary for the successful accomplishment of the program mission. The existence of subcontracts allows the federal dollar to be spread out over many more firms than would be the case if prime contractors performed the total effort. Other benefits arise from the fact that the combined expertise of two or more firms may offer a better quality product or service to the Government than that of a single firm. But, because the Government has no direct legal relationship with subcontractors, and because it is often risky to rely wholly on the prime contractor's assurance that subcontracted work will satisfy all Government requirements, there are contractual controls in place.

The prime contractor is selected in part for its management abilities, which includes the right to manage the contract in every aspect. The Government cannot direct the contractor to subcontract any part of the work. The Government may also not, under any circumstances, direct the prime contractor to subcontract with a specific firm. Even a suggestion of a particular firm or firms would be improper. These decisions are entirely at the discretion of the prime contractor, who has overall responsibility for contract performance. Nonetheless, in certain situations, the Contracting Officer must consent to the use of certain types of subcontracts. (See pertinent FAR clause on page 212.)

Consent to subcontract is not required under firm-fixed price contracts, as the Government's interest is presumably adequately protected in this instance by the type of contract because of the fixed price. However, under all other types of prime contracts used at EPA, the following types of subcontracts require the consent of the Contracting Officer before the prime contractor may enter into a subcontract agreement:

(1) subcontracts of any type for the fabrication, purchase, rental, installation, or other acquisition of special test equipment valued at more than $10,000 or of any items of industrial facilities;

(2) subcontracts that have experimental, developmental, or research work as one of their purposes;

(3) subcontracts for architect-engineer services;

(4) all subcontracts which are cost-reimbursement, time-and-materials or labor-hour types; and

(5) fixed-price subcontracts that exceed either $25,000 or 5 percent of the total estimated cost of the prime contract.

If the contractor's purchasing system has been reviewed and officially approved by the Government, the types of subcontracts listed in (4) and (5) above do not require the Contracting Officer's consent. Nonetheless, the contractor must still provide advance notification before entering into such subcontracts. Page 214 presents a sample subcontractor/consultant approval memorandum which can be used for transmitting the Work Assignment Manager or Project Officer's request for approval to the EPA Contracting Officer.

The Contracting Officer considers such factors as technical need for services, compliance with the prime contract's requirements for subcontracting with labor surplus area or small business concerns, adequacy of competition obtained, responsibility of the proposed subcontractor, proposed type of subcontract, technical requirements proposed, and adequacy of cost or price analysis performed. The Project Officer will usually be requested to comment on the technical need for the supplies or services, the reasonableness of the subcontract estimate, the capabilities of the proposed subcontractor, and, in the case of a request to acquire property, the availability of the item within EPA. Consent must be in the form of a written modification to the contract or a letter to the prime contractor, and must be signed by the Contracting Officer.

Privity of Contract Principle

The Government's only direct contractual relationship is with the prime contractor; there is no such relationship between EPA and any subcontractor at any tier (or as it is usually phrased, there is no "privity of contract" between the Government and its subcontractors). What this means is that EPA has no right to deal directly with a subcontractor on any issue, and the subcontractor has no right to obtain a direct decision of the Contracting Officer and no right of appeal to the Board of Contract Appeals. It is the responsibility of the prime contractor to arbitrate any disputes between himself and his subcontractors. The fact that the prime contract requires advance Government consent to a subcontract does not remove the subcontractor from the no-privity rule.

By ignoring rules against communicating directly with subcontractors, Government personnel could actually create privity between EPA and its subcontractors. This means that a contractual relationship might be developed between these two parties, of which the prime contractor would not be a part. In such an instance, the prime could not be held liable for any default on the part of the subcontractor, and the Agency might lose a substantial portion of its contractual rights. For this reason, Project Officers, Work Assignment Managers, and Delivery Order Officers must be particularly careful to guard against such activity.

Because there is no privity of contract between EPA and any subcontractor, how does a Project Officer provide technical direction and monitor performance when much of the work has been subcontracted? This is where the prime contractor's management services come in. All technical direction must be communicated to the subcontractor VIA THE PRIME CONTRACTOR. It is critical that Project Officers understand this and not attempt to contact subcontractors directly for the purpose of giving direction. Similarly, the monitoring of technical performance and financial expenditures on the part of subcontractors is done through the prime contractor's progress reports, and any problems noted should be discussed with the prime contractor, who is responsible for total performance under the contract. Particular attention should be paid to the performance of subcontractors, as there may be a tendency on the part of the prime to devote less management attention to this portion of the work and thus allow slippages to occur. But if this does happen, the Project Officer should let the prime contractor know that he is not adequately managing the entire contract.

Consultant Approval

Often in the performance of EPA contracts there is a need to bring in a consultant with a particular expertise to assist in some aspect of the work. Usually, the technical performance benefits greatly from such expertise. However, hourly or daily rates charged by consultants are often prohibitive and may not be commensurate with the technical benefits we might derive. Therefore, when the use of consultants is anticipated as a possiblity in cost-reimbursement and some indefinite quantity contracts, the Contracting Officer will insert a clause in the contract requiring the contractor to obtain EPA approval before a consultant is used.

The technical qualifications of the proposed consultant, the benefits to be derived from his or her use, the amount of usage, and the rate proposed, are all reviewed by EPA before approval is granted. A contract modification is executed to approve the use of the consultant, and it will usually specify the fixed rate to be charged and set a limit on the number of hours or days the consultant can be used. This way, the Government is protected against excessive use of, and excessive charging by, expert consultants under cost-reimbursement and indefinite quantity type contracts.

The same rules about directing consultant work as those set forth above for subcontractors are applicable. In other words, EPA cannot direct the contractor to hire any consultants or influence the selection of such consultants in any way. And, as with subcontractors, EPA has no privity of contract with any consultants used in the performance of its contracts. The prime contractor is responsible for all aspects of performance.

Key Personnel

The qualifications of contractor personnel have a direct effect on the quality of performance. In many cases, the best way to assure good quality of work performed is to assure that personnel with the necessary capabilities, qualifications, and experience are assigned to the work effort. This is particularly important for contracts calling for creative or conceptual development or analysis. An offeror who proposes the best-qualified personnel to perform the work, and is selected on that basis, should use those personnel on the resultant contract to make his proposal meaningful. To ensure that this occurs, the Government usually includes a "Key Personnel" clause (see page 216). Under the provisions of this clause, the contractor agrees: 1) to assign to the contract work certain key personnel, 2) not to remove these key personnel from the contract work for a certain period of time (generally 90 days unless specifically lengthened in the contract terms) without the consent of the Contracting Officer, and 3) to obtain the Government's approval on any proposed substitutions.

Through monitoring, the Project Officer can assure that key personnel have not been removed or diverted from the contract work and that their level of effort is as required for satisfactory contract performance. Key personnel should be working in those capacities and for the level of effort that were indicated by the contractor.

## 7.6 Consideration #3: Personal Services

A personal services contract results when the government assumes the right to instruct, supervise or control a contractor's employee in how that employee performs his or her work. It is the contractor's right to hire and fire the contractor's employees, and to assign and organize the contracted-for work.

In drafting statements of work for work assignments or delivery orders, Work Assignment Managers and Delivery Order Officers must take care to avoid creating a work assignment or delivery order that creates an employer/employee relationship between the government and the contractor's employee. This is particularly a problem where the contractor's employees are working on-site with EPA personnel, e.g., at Superfund sites. Personal services contracts are illegal, and must be avoided in all situations.

The following elements should be reviewed to assess whether a contract is personal in nature:

a. Requires contractor performance on-site;
b. Government provides principal tools and equipment;
c. Services are applied directly to the integral effort of EPA or an organizational subpart to further its assigned function or mission;
d. Comparable services are performed in the same or similar agencies using civil service personnel;
e. The need for the type of service can reasonably be expected to last beyond one year
f. The inherent nature of the service, or the manner in which it is provided, reasonably requires, directly or indirectly, Government direction or supervision of contract employees in order to
    (1) adequately protect the Government's interest;
    (2) retain control of the function involved; or
    (3) retain full personal responsibilities for the function supported in a duly authorized Federal officer or employee.

All of these elements do not have to be present to have the contract deemed a personal services contract and thus illegal. The most important element to be avoided is the supervision of contractor employees by government personnel. EPA has provided guidance on the Use of Contractor Services in the form of an EPA Order that should be read by all EPA personnel (see Appendix 7A).

### 7.7 Consideration #4: Use of Advisory and Assistance Services

In January, 1988, OMB issued Circular A-120 entitled "Guidelines for the Use of Advisory and Assistance Services," superceding a more narrowly focused 1980 circular entitled "Guidelines for the Use of Consulting Services." (See Appendix 7B for the Guidelines and related Contracts Management Manual guidance.) Advisory and assistance services are services acquired from non-governmental sources by contract or by personnel appointment to support or improve agency policy development, decision-making, management, and administration, or to support or improve the operation of management systems. Such services may take the form of information, advice, opinions, alternatives, conclusions, recommendations, training, and direct assistance. The scope of the current circular includes: a) individual experts and consultants (including advisory committee members); b) studies, analyses and evaluations; c) management and professional support services and d) engineering and technical services. There are also numerous exclusions (see page 248g).

Individuals preparing statements of work for contracts which may employ advisory and assistance services are now required to do the following:

(a) Include with their procurement request the procurement request rationale checklist (see page 217b) indicating whether the procurement request involves advisory and assistance services, and if so, attaching a justification that provides a statement of the need for the services and a certification that such services do not unnecessarily duplicate any previously performed work or services. (The contracting officer is responsible for determining whether any requested contractual action, regardless of dollar value, constitutes advisory and assistance services, and that determination shall be final. Procurement requests for work assignments under already approved contracts do not require separate determination.)

(b) Obtain the necessary approvals. Obtain the approval, for a small purchase, of a program official at least one organizational level above the initiating office. (For requirements received in the fourth quarter of the year for approval during that fiscal year, however, approval at the second level above the initiating office must also be obtained.)

For other than small purchases not in excess of $1,000,000, the approval of a program official at the level of Associate, Assistant or Regional Administrator, Inspector General or General Counsel, must be obtained. If the procurement request exceeds $1,000,000, approval is also required by the Assistant Administrator or equivalent at Headquarters, or the Regional Administrator. All such requests must also be routed through the Director, PCMD.

(c) Ensure that their statements of work do not procure advisory and assistance services that would be:

(1) used in performing work of a policy, decison-making, or managerial nature which is the direct responsibility of agency officials;

(2) used to bypass or undermine personnel ceilings, pay limitations, or competitive employment procedures;

(3) awarded on a preferential basis to former government employees;

(4) used under any circumstance specifically to aid in influencing or enacting legislation;

(5) procured through grants and cooperative agreements; and

(6) obtained for professional or technical advice which is readily available within the agency or another Federal agency, except when the contract is entered into pursuant to the procedures and provisions of Circular A-76 ("Performance of Commercial Activities")

(d) Ensure the institution of the following management controls:

(1) Work statements are specific, complete and specify a fixed period of performance for the service to be provided;

(2) Advisory and assistance service arrangements are properly administered and monitored to ensure that performance is satisfactory;

(3) To the extent practicable, contracts for these services require a written report.

## 7.8 Consideration #5: Government Property

It is EPA's general policy that contractors should provide all resources necessary to perform Agency contracts. Nevertheless, situations do arise where it is in the best interest of the Government to furnish certain property to the contractor. When Government property is, or is proposed to be, in the hands of contractors, certain policies and procedures are applicable, and Project Officers need to be aware of them and make proper provision in their work assignments.

Justification of Need

Whenever a Project Officer recommends property be provided to a contractor, a written justification of need must be submitted to the Contracting Officer. The justification must address the following points, and must be signed and approved at the Division Director or equivalent level in the program office:

(1) Identify the specific program and project for which the property is required, as well as the contract and the Work Assignment or Delivery Order number. Also identify the EPA account number(s) that the item is to be charged against.

(2) Identify the type, quantity, and estimated cost (including any transportation or installation costs) of each item of property required.

(3) Explain why the property is necessary for contract performance.

(4) Explain why it is in the interest of the Government to provide the property rather than to require the contractor to provide the property at no direct cost to the contract.

(5) Identify the location of the contractor's facility at which the property will be used, and the contractor's personnel responsible for acquisition and management of the property.

(6) For property to be acquired by the contractor at Government expense, include a certification that no in-house or GSA excess property is available and include the concurrence of the local property office.

(7) For equipment to be acquired by the contractor at Government expense, include a lease vs. purchase analysis.

This justification is required whether the property will be furnished at time of contract award or later, during performance. (If the need arises after award, normally the Government must receive some consideration for the furnishing of property, which the Contracting Officer will negotiate with the contractor.) When the need to furnish Government property is known before award, all property to be furnished should be identified in the solicitation.

The Contracting Officer will review the justification and may or may not concur in the recommendation. Of particular concern is whether or not the equipment is special purpose or general purpose. It is against Government policy to furnish items of a general purpose nature (such as furniture, typewriters, etc.) rather than the contractor.

If the Contracting Officer concurs in the decision to furnish Government property, it must be approved at an administrative level above the Contracting Officer.

Government property furnished to a contractor must be listed in the contract. Otherwise, there is no authorization or record of the transaction. It would be difficult to monitor its use and handling, and ensure its proper disposition after the contract has ended. Government property may not be provided to a contractor without being formally authorized through a contract. Property may not be authorized in a work assignment or delivery order.

Project Officers who want to recommend furnishing Government property or the acquisition of contractor-acquired property to subcontractors must follow the same procedures used for dealing with a prime contractor. The prime contractor is responsible for acquiring any information about Government property from the subcontractor and for reporting to the Property Administrator (see below). The same procedures regarding property acquisition, utilization, disposal, etc. apply to the subcontractor as well.

If property is furnished and/or acquired by a subcontractor, it is the responsibility of the prime contractor to assure that the subcontractor operates according to all EPA regulations, that the property is used only as authorized by the contract, and that it is adequately cared for and maintained. Procedures necessary to assure the accomplishment of this responsibility should be included in any contractor's property control system.

Property Provided by the Government Versus Property Acquired by a Contractor

Government property comes into the possession of a contractor in one of two ways. Either the property is already owned by the Government and furnished to the contractor, or the contractor is authorized to acquire the property at Government expense. For several reasons, the first way is preferred. First, it is usually less costly to purchase it ourselves. Second, the Agency's competitive procurement procedures should result in a better price than the contractor could obtain. Finally, it could be perceived that program offices are attempting to bypass budget ceilings on equipment and other items by using contract funds to obtain the property. However, the Government could be liable for delaying the contractor if we fail to meet scheduled delivery dates or the property is received by the contractor in a condition unsuitable for use.

Loans of Government property on a short-term basis should not be made to a contractor without the Contracting Officer's authorization. If the need exists for property to be loaned to a contractor, the Project Officer should immediately advise the Contracting Officer in writing with a copy to the Property Administrator (see below). Included in this memorandum should be a comprehensive Justification of Need to be considered in making the decision.

## The Contract Property Administrator

A Property Administrator is an EPA employee designated by the Contracting Officer in the contract to act as his or her representative in certain matters concerning the management and control of Government property.

Project Officers should assure that both the Contracting Officer and Property Administrator are always fully informed on all matters affecting contract property administration. Providing such information is vital due to the great variety of rules and regulations that affect the administration of Government property in the possession of contractors.

Copies of all contracts are provided to the Property Administrator, who immediately forwards a "Contractor's Guide for Control of Government Property" to each contractor. When a review of a contract reveals authorization for the acquisition of property, decals to be affixed to the property and a reporting form (EPA 1730-1, "Report of Nonexpendable Property Acquired by Contractor") are provided to the contractor to identify EPA property. (See copy of form on page 350).

A copy of EPA Form 1730-1 must also be attached to the contractor's invoice to support any claim for reimbursement. Government-furnished property is transferred from a program's accountability after verification of receipt by the contractor. A final inventory must account for all residual property, expendable and nonexpendable.

## Actions Involving Other Property Accountable Area Offices

Property accountable areas are established throughout EPA to control Government-owned property. Each program office is an area within an accountable area of the Agency and all of the program's equipment is charged to that particular area. Therefore, when a determination is made by the Contracting Officer to provide Government property to a contractor, the Project Officer must notify both the Property Administrator and the responsible program person, so that a transfer of reponsibility from EPA to the contractor may be processed. No movement of equipment either to or from a contract may be made without involvement of both of these individuals.

## Written Property Control Procedures by Contractors

Normal contract property administration practice provides for the control of property by means of written procedures that communicate the organization's standards, techniques, and instructions to operational personnel. Immediately after the award of an initial contract, the Property Administrator will request the name, title, address, and telephone number of the contractor's representative for contract property administration. Contractors with large inventories of high dollar value equipment that is Government-furnished or contractor-acquired will be requested to provide their property control system policies and procedures to the Property Administrator for approval.

In cases where a contractor has only a few employees, the need for written procedures will be evaluated by the Property Administrator. If the control system is found to be inadequate, necessary corrective actions will be referred to the Contracting Officer.

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In cases where a contractor has only a few employees, the need for written procedures will be evaluated by the Property Administrator. If the control system is found to be inadequate, necessary corrective actions will be referred to the Contracting Officer.

# EPA TRANSMITTAL

CLASSIFICATION NO.: 1900.1

APPROVAL DATE: 10/31/85

ADDRESSEE

## USE OF CONTRACTOR SERVICES

1. PURPOSE. This Transmittal issues a new Order on the Use of Contractor Services.

2. EXPLANATION. The Order will help employees in avoiding personal services arrangements in their contract activities. It provides further guidance and clarification of material already covered in the Contracts Management Manual, Environmental Protection Agency Acquisition Regulation, and the Federal Acquisition Regulation.

3. FILING INSTRUCTIONS. File the document in numerical order in a three-ring binder established for Agency directives.

Gary M. Katz, Director
Management and Organization Division

ORIGINATOR: Procurement and Contracts Management Division/Office o Administration

EPA Form 1315-12 (Rev. 7-82) REPLACES EPA FORMS 1315-1A AND THE PREVIOUS EDITION OF 1315-12.

PCMD 9/89

# USE OF CONTRACTOR SERVICES

1. PURPOSE. As more and more activities require contractor support to be furnished on-site at Government facilities, the question of whether these contracted actions are personal or nonpersonal in nature continues to arise. The Government is normally required to obtain its employees by hiring through personnel channels. Therefore, the procurement of personal services by contract is prohibited unless specifically authorized by statute. This Order is designed to assist you in avoiding personal services arrangements in your contract activities.

2. RESPONSIBILITIES. Contracting Officers, Project Officers, Delivery Order Officers, and all other EPA personnel are responsible for ensuring that personal services relationships between Government and contractor employees are avoided.

3. DEFINITION. Personal services contracts exist when the nature of the relationship between the contractor and the Government can be characterized as an employer-employee relationship. An employer-employee relationship exists when either by the terms of the contract itself, or because of the manner in which the contract is managed, contractor personnel are subject to the day-to-day supervision and control of Government personnel.

4. ASSESSING THE PERSONAL NATURE OF A CONTRACT. While one of the most important elements to be avoided in a contractual relationship is the supervision of contractor employees by Government personnel (see f. below), the Federal Acquisition Regulation (FAR 37.104(d)) provides other descriptive elements which should be used as a guide in assessing whether or not a contract is personal in nature. All of these elements need not be present to have an improper personal services arrangement:

a. Performance on-site.

b. Principal tools and equipment furnished by the Government.

c. Services are applied directly to the integral effort of the Agency or an organizational subpart in furtherance of assigned function or mission.

d. Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.

e. The need for the type of service provided can reasonably be expected to last beyond one year.

f. The inherent nature of the service, or the manner in which it is provided reasonably requires, directly or indirectly, Government direction or supervision of contract employees in order to:

(1) Adequately protect the Government's interest;

(2) Retain control of the function involved; or

(3) Retain full personal responsibilities for the function supported in a duly authorized Federal officer or employee.

USE OF CONTRACTOR SERVICES

5. PRINCIPLES FOR MANAGING A CONTRACT.

a. The contracting officer is responsible for determining prior to award, that the contract does not involve the procurement of personal services. But, even though supervision by Government employees is not directly required by the terms of the contract, a personal services situation can develop through improper contract management.

b. Technical management generally relates to the manner in which work direction is given. Interchange of information of a technical nature is not prohibited. In managing the contract, however, the following principles should be observed:

(1) Insofar as possible, let the contract define the job. This can best be accomplished when the contract contains a definitive statement of work.

(2) When the job scope must be changed, notify the contracting officer immediately so that the appropriate contract changes may be issued.

(3) When the job definition requires interpretation of the work description or other direction which is clearly within the project officer's authority, make sure that such direction is issued from the Project Officer to the appropriate contractor contact person in the form of a written technical directive. Do not give any instructions to individual contractor employees.

(4) Prepare memorandums for the record of all meetings, trips and telephone conversations relating to the contract.

(5) Ensure that all contractor and all EPA occupied space is readily identifiable. Generally, on site contractor employees are physically located in separate areas from Government employees. In isolated cases where a general area must be occupied or used by both EPA and contractor employees, some sort of physical separation, identification of space, and scheduling of equipment usage should be arranged.

(6) All requests for contractor follow-up or touch-up services should be directed from the Project Officer to the contractor's project manager. Likewise, contractor employees must operate through the contractor's supervisor to obtain any information needed to complete the work product.

(7) Strictly avoid situations in which one EPA on-site contractor provides support to another EPA on-site contractor, except where the contract requires such support to be furnished (e.g., janitorial services, security services, etc.).

(8) Strictly avoid Government intervention with respect to hiring or firing of employees or assigning particular employees to specific tasks.

6. ADDITIONAL GUIDANCE.

a. I have attached a comprehensive paper on the use of contractor services which was prepared by the U.S. Department of the Navy (Attached). This paper further illustrates proper use of contractor services.

b. As in any contract situation, you are encouraged to contact your contracting officer for advice and guidance as required on a case-by-case basis.

John C. Chamberlin
Director
Office of Administration

"Guide for Using Contractor Services"

Basically, we do our work in the Department of the Navy two ways: "in-house" with military and civilian personnel, or "out-of-house" by contract. Which way it is done is a decision based on policy, practicality, and law. Generally speaking, it has been Government policy for a number of years to perform commercial or industrial activities by contract unless some compelling reason — such as military readiness, security, or economy — warrants bringing the job "in-house." Which route to follow is the subject of other Office of Management and Budget, Department of Defense, and Department of the Navy instructions, and is not at issue here. Our concern here is only that, if a decision is made to let a contract involving services, we make it properly, and use the services properly.

The fundamentals are these. It is perfectly proper for the Government to purchase by contract what may be described as a finished product — a piece of hardware, a defined piece of research, or a report. Unless Congress has passed a specific statute to authorize something different, the Government may not contract out for the services of people who receive their assignments from Government personnel, work under the direct supervision of Government personnel, and whose relationship to the Government is thus no different from that of a Government employee. Where the Government wishes to procure services in this fashion, it must hire the people directly, in accordance with the Civil Service Laws.

A finished product versus personal services — these form the two ends of the spectrum. The one may be procured by contract; the other may not. In between are situations where the Government does not want to hire people, yet the work it needs to have performed is essentially just labor — cleaning, painting, or operating a radar station. In these situations, the Government may still obtain the work by contract, providing two conditions are met: (1) the contract must ask for the finished product only, and (2) the contract must be administered in such a way that control and supervision over the work and discretion of the techniques which will be used remain solely with the contractor. In other words, if the Government wants a building painted, it defines the job, lets the contractor paint the building as he sees fit, and then accepts it or rejects it solely on the basis of whether the completed job meets the specifications. This would be a perfectly legal contract for a finished product. On the other hand, if the contractual arrangement with the painting contractor is such that he is really only providing us with painters whom we direct and and supervise as we would our own military or civilian employees, then the contract would be for personal services and would be illegal. In that case, the Government would, in effect, be "hiring" employees without regard to the Civil Service System. That it may not do, and that is the reason all service contracts must provide for a clearly defined task or job.

The Problem:

A contract may thus cross over into the forbidden area either because of the way it is written or because of the way it is administered. The former should not occur very often. ASPR, Armed Services Procurement Regulations, provides adequate guidance and procedures which, if faithfully pursued, will insure that every contract for services is in fact legal on its face. But even the

best-written contracts can later be ruled illegal if they are not administered properly. Good, intelligent contract administration is really the key to avoiding personal services problems.

In essence, a forbidden personal service contract results when the Government assumes the right to instruct, supervise, or control a contractor's employee in how he performs his work. It is one thing, for example, to sit down in a restaurant, order a steak medium rare, and accept it or reject it when it arrives. It is quite another to insure that it is cooked to satisfaction by going out to the kitchen, looking over the chef's shoulder, and telling him how to adjust the flame, when to turn the steak over, and how to season it. When the Government exercises this sort of direct supervision and control over contract personnel, it is using them as if they were its own civil service or military personnel. Control such as this — however well-intentioned — renders the services personal and the contract illegal.

How, then, can personal services problems be avoided? The answer must begin early with contract planning, because these problems are far easier to prevent than to cure.

Pre-Contract Planning:

In planning the contract, the contracting officer must receive a great deal of willing cooperation from all hands — technical personnel, legal personnel, and especially the users — those with the requirement for the proposed services. Under ASPR, before the contracting officer may enter into a service contract, he must make a written determination that the services are nonpersonal. To do so, he must rely almost completely upon the users for the facts he needs, because only they can provide them. As the first step, therefore, the contracting officer must learn the whole story — all the circumstance of what the services are to be and how they will be used. In view of his responsibility for making the procurement, he deserves — and has every right to receive — the users' fullest assistance and candor.

Second, the users must provide the contracting officer with a detailed description of the job they want done. Since the contract must be couched in terms of providing the Government with some sort of finished product, this is the information that will be needed to draft proper specifications, task orders, or work assignments. Although it is the job of the contracting personnel to reduce this information to contract format, it is the job of the users to explain precisely what work they want performed.

Third, there must be a review of all the collateral circumstances which might have a bearing upon whether an illegal personal services contract has been created. Although the key factor is the degree to which the Government exercises control and supervision over the performance of the contract, the Civil Service Commission's opinion, as well as rulings of the Comptroller General, also look to related circumstances which, by their very nature, go hand in hand with the exercise of Government control over contract performance.

An example might be a contract under which the contractor was provided with articles of Government property. While it is not unusual for the Government to furnish equipment or material for use in performing its contracts, what is furnished is usually specialized or otherwise difficult for the contractor to provide for himself. If, instead, the Government furnishes something ordinary like office equipment, drafting tables, or typing paper — the sorts of things any employer ordinarily provides his own employees — then, if unexplained, an inference may be drawn that the Government is treating the contractor's employees as its own.

Similarly, our civilian employees or military personnel generally work on-site, whereas a contractor's employees usually do not. Thus, providing the contractor with office space at a Government location might lend weight to an inference that his employees are, in effect, Government employees. By the same token, the work should be planned to avoid a mix of Government and contractor personnel so that they are not working side-by-side under similar conditions and supervision. It should be cautioned, however, that a determination of personal services would still be found in cases where these personnel - although physically separated — were all performing the same work and were otherwise interchangeable. The same would be true where succeeding contracts with different firms included provisions for orderly changeover of key personnel, and the same contract employees were found doing the same work at the same desk year after year. And personal services have even been found, in incentive or award fee contracts, where the evaluation of contract performance was made, not upon the whole job, but rather upon the separate performance of individual contractor employees.

Factors like these are important because each such piece of circumstantial evidence may contribute to a later conclusion that the services concerned are personal. All of them pertain to supervision and control, and they are weighed according to the extent of their contributions to actual Government control over the contractor's personnel. Taken together and viewed objectively, they may give every practical appearance that contract employees are being treated as if they were actually Government employees.

In the planning stage, then, requirements, technical, and contracting people should pursue every effort toward eliminating as many such factors as they can. None of them alone would necessarily be fatal to the contract's legality, and some of them might indeed be absolutely necessary and, therefore, inevitable. It is important to realize, however, that these ancillary factors can be critical to the result and that they can be effectively provided for only in advance. If they are carefully considered during the planning stage, and if there are good reasons for providing the contractor with tools, or working space, or doing anything else which might imply Government supervision or control, then the contract can provide for them, and later be administered, in a manner which will be proper and will not be susceptible to drawing an inference of personal services later on.

The Contract:

The sort of planning described above should provide the contracting officer and his staff with all they need to know about the actual requirements, in order to reduce them to clearly defined work statements. They must,

then, in clear, understandable language, set forth exactly what the Government wants to have done. They must provide in the contract all the specifications or instruction the contractor needs, both to undertake and to complete the job. This will insure that the Government has the right to expect an acceptable end product without the need for control over the way the contractor goes about his work.

It is not enough, however, to write something like "furnish such assistance as is or may be necessary to support the overall mission of the activity," or "update and revise 40 drawings in accordance with the oral instructions of the division supervisor or his duly authorized representative." The contract, or the task orders or work assignments written under it, should adequately describe the job to be done so that further informal direction is unnecessary. This, of course, does not mean that they cannot be formally modified or amended, if needed.

Furthermore, the contract must avoid creating in the Government a specific or even an implicit power to hire or fire the contractor's employees. It is always permissible to retain the authority to require security clearances or other legitimate and relevant administrative controls, but it must not go beyond that. The contractor, for example, may be required to accommodate himself and his working hours to our daily business routine if he is working on-base, whereas it would be improper to impose such a schedule upon work he performed on his own premises. And it goes without saying that the contract must not provide for Government supervision or control over the contractor's staff.

Nor will the inclusion of artifical procedures for contract administration remove the Government from a situation of supervision and control if one actually exists. It is no use, for example, to provide an elaborate organization in the contract for the transmission of work assignments on a supervisory level if, in practice, it is to be phoned from a Government draftsman to his contractor counterpart. And even where such conduits have actually been used in contract administration, they have been viewed as mere camouflage where the alleged supervisors or technical directors were so untrained or unskilled as to be incapable of direction and were, at best, only figureheads. It may be helpful for the contract to make it clear that the contractor is providing management or judgment as well as personnel, but only if that is truly the case. To repeat what was said earlier, writing a legal contract is not the end of the road. The heart of most personal services cases has been contract administration — what actually happened — not withstanding the niceties of the written contract terms.

Contract Administration:

What, then, are the pitfalls of contract administration? Essentially, the Government must keep "hands off" the contractor's employees during the course of contract operations, in order to avoid sliding into the area of supervision and control. Does that mean that, after the contract is signed, there can be no further contact with the contractor or his staff? The answer to that is obviously "No." In the course of almost any contract performance, there must be some dialogue between both sides. Complete insulation from one another is as unnecessary as it is undesirable.

The permissible range of dialogue between the Government's representatives and the contractor's representatives is whatever liaison and discussion or explanation is necessary to carry out the traditional processes of contract administration. We have inspectors and quality control personnel, for example, and their work cannot be done in a vacuum. It usually requires contract and communication to be useful, and this is entirely proper. And we usually assign personnel in a liaison capacity, not only for surveillance and to keep us apprised of progress, but also for a contact through whom the contractor can relay his questions or problems. It is a rare contract that does not involve answering questions about the Government's specifications, and this, too, is a legitimate liaison function.

In addition, the Government is generally concerned about the contractor's delivery schedule — whether he will have the work performed on time. Accordingly, the contract milestones are important, and insuring that they are met may demand prodding and reminding of many shapes and forms. Like the liaison and inspection mentioned above, this can be done properly as well, because it does not involve the exercise of supervision or control over the individual employees. In all proper administration functions, Government representatives do not dictate what or how the contractor is to perform. The "what" is set out in the contractor's responsibility. In their contract administration roles, our personnel should primarily be policing the written terms of the contract and assisting the contractor when necessary to insure that the Government receives the job it bargained for on time.

Contract administration begins to run afoul when our representatives go beyond the terms of the contract. By telling the contractor what to do, they may be subjecting the Government to claims for changes. That is another matter. But by directing how to do it, they are crossing the line into a personal services situation. Then they are beginning to exercise supervision or control. When the inspector, liaison officer, or any other Government representative turns from surveillance to supervision, he begins to use the contractor's employees as if they were Government employees, and is well on the way to transforming the contract into one for personal services. Often, this arises from no more than a well-intentioned but overzealous desire upon the part of responsible Government officials to achieve near perfection in the services obtained. Such overzealousness must be restrained.

After all, it is the contractor's privilege to do the job however he sees fit, so long as he stays within the terms and conditions of the contract. Unless the contract legitimately provides otherwise, it is not our business whether he does the work with one computer or 200 men, which employees work on which assignments, or whether they work nights or mornings, or whether they do task A before task B, or vice versa. It is the contractor's right to hire and fire, to assign and organize the work — in short, to run

his own company. The moment the Government usurps that right and begins to tell his personnel what to do next or how to do it, then it has started down the slippery slope toward a personal services situation. This illustrates the rule for illegality, but it also must be understood that the greater the technical direction to the contractor, the greater the responsibility for successful performance is assume by the Government. This situation is not desirable because it not only compromises the Government's rights to enforcement of the contract's provisions, but it also transforms an otherwise proper contract into an illegal one.

Sometimes it is the actions of the contractor himself which will cause the contract to cross over into the forbidden area. By being overzealous in attempting to be responsive to the Navy organization with which he is working, the contractor may initiate contacts which result in Government control or supervision over the work being performed. In other words, where the contractor himself continually asks the Government for direction on how to carry out the various tasks required by the contract, the Government may end up, in effect, supervising the performance of the work. This type of situation must be guarded against.

The contractor's employees should always be looking only to their own superiors for instructions, and they, in turn, must look back to the written terms of the contract. This chain of responsibility must exist throughout the performance of every contract, and it reemphasizes the need discussed earlier for giving meticulous attention to the contract work statements, task orders, or work assignments at the outset. And it further underlines the need for assuring that the contract preparation is a genuinely coordinated effort by everyone involved — the users, technical staffs, contracting staffs, and lawyers — so that, with the input from them, all the work to be performed is so clearly and accurately spelled out there will be neither need nor temptation to slide into the easy trap of supervising any stage of the job.

## Statutory Exception:

As was mentioned at the beginning, these rules of contracting must be followed in every service contract unless there is specific authority from Congress to proceed otherwise. There may be situations — and they do arise from time to time — when it is desirable for the Government to have precisely that sort of supervision and control which is generally improper, and where the short duration of the work dictates against hiring employees under Civil Service.

# APPENDIX 7B

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

NOV 3 1989

OFFICE OF
ADMINISTRATION
AND RESOURCES
MANAGEMENT

MEMORANDUM

SUBJECT: Approval Requirements for Contracts with Possible Use of Advisory and Assistance Services

FROM: David J. O'Connor, Director
Procurement and Contracts Management Division
(PM-214F)

TO: Associate Directors
PCMD Branch and Staff Chiefs
Douglas Richmond, RTP
William Bailey, CINN
Richard Feldman, OGC
Regional Coordinator

Chapter 2 of the Contracts Management Manual (CMM) requires special justification and approval for contracts involving consulting services (now referred to as advisory and assistance services). This memorandum reminds you of the need to obtain such approvals prior to contract award.

The Procurement Request Rationale Checklist, submitted with EPA Form 1900-8, "Procurement Request/Order," contains a block indicating whether the proposed procurement involves advisory and assistance services. Using OMB Circular A-120, "Guidelines for the Use of Advisory and Assistance Services," dated January 4, 1988, and the proposed contract's scope of work, Contracting Officers must review this block to determine if the project officer's determination on the Checklist is correct.

If the procurement involves possible use of advisory and assistance services, a justification must be prepared and special approvals obtained as prescribed in Chapter 2 of the CMM. These approvals and justification are required at the time the Procurement Request/Order is submitted. If after contract award, the Contracting Officer determines that advisory and assistance services are involved and required approvals were not obtained, justification and approval must be received before advisory and assistance services can be

ordered. Justification and approval of individual work assignments for use of advisory and assistance services are not required after approval at the contract level has been obtained.

In coding information on the contract into the Federal Procurement Data System (FPDS) through the Contract Information System, the Contracting Officer should determine if the predominant use of the action being coded constitutes advisory and assistance services. If so, a "Y" should be entered in the block marked Advisory/Assistance Services Award. Otherwise an "N" should be entered. This determination should be made independently for each action requiring data entry, both at the time the initial contract data is entered as well as for each funding action.

Please contact Joe Nemargut on FTS 382-5019 if you need further information.

## 2.5 EQUIPMENT LEASE OR PURCHASE

a. The Contracting Officer will perform the necessary analysis leading to a decision to lease or purchase equipment considering comparative costs and other factors. The Contracting Officer will be assisted by the Project Officer and the cost/price analyst, as necessary, and shall document the analysis in the contract file. (See Chapter 5 for additional guidance on furnishing Government property to contractors.)

b. Guidance relative to equipment lease vs. purchase determinations is contained in the Federal Acquisition Regulation (FAR), Subpart 7.4.

## 2.6 ADVISORY AND ASSISTANCE SERVICES

The management and control of contracts for advisory and assistance services are addressed in OMB Circular A-120 dated January 4, 1988.

The Circular defines advisory and assistance services as those services acquired from non-governmental sources by contract or by personnel appointment to support or improve agency policy development, decision-making, management, and administration, <u>or</u> to support or improve the operation of management systems. Attachment A contains the complete definition from the Circular. The Circular excludes ADP/Telecommunications related services that are subject to control under the Federal Information Resources Management Regulation.

After consultation with the Project Officer, the Contracting Officer will determine if the services requested are advisory and assistance services and are nonpersonal.

## 2.7 PLANNING PURPOSE PROCUREMENT REQUESTS

Planning Purpose Procurement Requests are defined in Chapter 1 of this Manual. Such actions shall be clearly marked on the face of the EPA Form 1900-8 as "PLANNING PURPOSE PROCUREMENT REQUEST" and shall contain all program and other approvals that would be needed if the action were fully funded.

to January 27, 1988, for the deadline by which the licensee may file a request for hearing with respect to issuance of the amendment to the subject facility operating license. This is also the date by which any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene.

Dated at Bethesda, Maryland, this 7th day of January 1988.

For the Nuclear Regulatory Commission.

David L. Meyer,

*Chief, Rules and Procedures Branch, Division of Rules and Records, Office of Administration and Resources Management.*

[FR Doc. 88-520 Filed 1-11-88; 8:45 am]

BILLING CODE 7590-01-M

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[Docket No. 50-312]

**Sacramento Municipal Utility District; Consideration of Issuance of Amendment to Facility Operating License and Proposed No Significant Hazards Consideration, Determination, and Opportunity for Prior Hearing; Correction**

The United States Nuclear Regulatory Commission issued a notice in the Federal Register on December 28, 1987 (52 FR 48889) that it is considering issuance of an amendment to Facility Operating License No. DPR-54, issued to Sacramento Municipal Utility District for operation of the Rancho Seco Nuclear Generating Station located in Sacramento County, California. The date on page 48889 of the earlier notice is changed from January 25, 1988 to January 27, 1988, for the deadline by which the licensee may file a request for hearing with respect to issuance of the amendment to the subject facility operating license. This is also the date by which any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written petition for leave to intervene.

Dated at Bethesda, Maryland, this 7th day of January 1988.

For the Nuclear Regulatory Commission.

David L. Meyer,

*Chief, Rules and Procedures Branch, Division of Rules and Records, Office of Administration and Resources Management.*

[FR Doc. 88-521 Filed 1-11-88; 8:45 am]

BILLING CODE 7590-01-M

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## OFFICE OF MANAGEMENT AND BUDGET

### Guidelines for the Use of Consulting Services

**AGENCY:** Office of Management and Budget.

**ACTION:** Revision to Circular A-120, "Guidelines for the Use of Consulting Services".

**SUMMARY:** This notice revises OMB Circular A-120, "Guidelines for the Use of Consulting Services," dated April 14, 1980.

The revision is based on recommendations of the Cabinet Council on Management and Administration which in 1984 conducted a study in response to reports of abuses of consulting services by Federal departments and agencies.

The revision: (1) Expands the coverage of the circular; (2) requires the designation of a single official by each agency to be responsible and accountable for assuring that the provisions of the circular are met; (3) mandates minimum controls for the management and reporting of advisory and assistance services; and (4) exempts from the provisions of the circular all activities carried out in accordance with Circular A-76 (Revised) "Performance of Commercial Activities."

**EFFECTIVE DATE:** These revisions to Circular A-120 are effective immediately.

**FOR FURTHER INFORMATION CONTACT:** Contact the Office of Management and Budget, Financial Management Division, New Executive Office Building, 726 Jackson Place NW., Room 10201, Washington, DC 20503, (202) 395-6903.

**SUPPLEMENTARY INFORMATION:** Notice of the proposed revision was published for comment in the Federal Register on June 25, 1987, (52 FR 23918). In response, OMB received comments from more than 20 Federal agencies and private organizations.

Following is a summary of the major comments grouped by subject and a response to each.

*Comment:* Since the Cabinet Council study, a number of new safeguards have come into being. These include various provisions of the Competition in Contracting Act (Pub. L. 98-369), the establishment of competition advocates in all Federal agencies, the issuance of Circular A-123, and the annual reports by agency inspectors general. Because of these developments, the coverage of the circular should not be expanded.

*Response:* The additional management controls enacted since the Cabinet Council study may be presumed to have diminished abuses in the procurement of advisory and assistance services. However, there is not evidence that abuses have been eliminated and the types of activities covered by the expanded coverage continue to be inherently vulnerable. Further, the expanded coverage of the circular is consistent with the coverage adopted by the Department of Defense in 1986.

*Comment:* A substantial paperwork and management burden will be created by applying the controls previously required only for consulting services to the much larger number of procurements of advisory and assistance services.

*Response:* First, in response to comments (as noted below) the circular has been revised to eliminate day to day operational activities from its requirements. Secondly, agencies may find it useful to review their existing controls and consider whether it is desirable to apply them in their entirety to the newly covered activities. Some agencies now utilize greater control than is required by the Federal Acquisition Regulations (Subpart 37.2—Consultant Services). These additional controls need not be applied to all advisory and assistance services if, in the judgment of the agency, it is not desirable.

*Comment:* The requirement that the renewal of contracts entered into in accordance with Circular A-76 be subject to the provisions of the circular would constitute a disincentive to the initial use of the A-76 process.

*Response:* Section 3 has been revised to exempt all activities reviewed in accordance with Circular A-76.

*Comment:* The proposed definition includes a large number of routine, day to day activities which had never been identified as subject to significant abuses.

*Response:* Section 1.6 of the Exclusions has been revised to exclude day-to-day operations of functions such as building maintenance or ADP operations. In the same vein, section 5.A.(3)c has been revised to exclude training which maintains skills necessary for normal operations.

*Comment:* The requirement that procurements of advisory and assistance services be reported to the Federal Procurement Data System solely by use of the Individual Contract Action Report (SF 279) ignores the existence of accurate alternative reporting systems.

*Response:* Section 9 of the circular, Data Requirements, has been revised so that the Office of Federal Procurement Policy (OFPP) can allow agencies to use alternative reporting systems when appropriate.

A small number of additional revisions were also made in order to clarify the text and correct technical inaccuracies.

James C. Miller III,

*Director.*

[Circular No. A-120]

To the Heads of Executive Departments and Establishments

*Subject:* Guidelines for the use of Advisory and Assistance Services

1. *Purpose.* This circular establishes policy, assigns responsibilities, and sets guidelines to be followed by executive branch agencies in determining and controlling the appropriate use of advisory and assistance services obtained from individuals and organizations. This circular supersedes OMB Circular No. A-120 "Guidelines for the Use of Consulting Services," dated April 14, 1980.

2. *Background.* OMB Bulletin No. 78-11, issued May 5, 1978, first required agencies to apply extra controls to the procurement of consultant services. Circular A-120, dated April 14, 1980, provided permanent guidance in lieu of the interim guidance provided by the Bulletin. A Model Control System for consulting services was issued on January 15, 1982, to provide further guidance, which was non-mandatory.

In 1984, the Cabinet Council on Management and Administration (CCMA) completed a study of consulting services to estimate expenditures, review definitions and existing controls, and propose reforms. The study resulted from continuing reports, by GAO and other agencies, of problems in the way the Government manages and uses consulting services.

This revision of Circular A-120 is being issued (1) to expand the coverage of the circular; (2) to mandate controls for the management and reporting of advisory and assistance services; and (3) to clarify the relationship between Circular A-120 and OMB Circular No. A-76 (Revised) "Performance of Commercial Activities," issued August 4, 1983.

3. *Relationship to OMB Circular A-76.* Activities that are reviewed in accordance with the A-76 process are exempt from the provisions of this circular except that when the functions performed by the contractor meet the definition of advisory and assistance services set forth in this circular, the contracting action must be reported in accordance with Sections 8.A. and 9.A. below. When A-76 contracts are renewed, they are also exempt from the provisions of this circular.

4. *Coverage.* The provisions of this circular apply to advisory and assistance services obtained by the following arrangements:

A. Personnel appointment;

B. Procurement contract; and

C. Advisory committee membership.

5. *Definition.* Advisory and Assistance Services are those services acquired fron non-governmental sources by contract or by personnel appointment to support or improve agency policy development, decision-making, management, and administration, or to support or improve the operation of management systems. Such services may take the form of information, advice, opinions, alternatives, conclusions, recommendations, training, and direct assistance. Advisory and assistance services include consultant services provided by indivduals, as defined in the Federal Personel Manual, Chapter 304.

A. Advisory and assistance services include activities having any of the following characteristics:

(1) Individual Experts and Consultants. Individual experts and consultants are persons possessing special, current knowledge or skill which may be combined with extensive operational experience. This enables them to provide information, opinions, advice, or recommendations to enhance understanding of complex issues or to improve the quality and timeliness of policy development or decision-making. These named individuals may either work independently or be assembled into panels, commissions, or committees.

(2) Studies, Analyses, and Evaluations. Studies, analyses, and evaluations are organized, analytic assessments needed to provide the insights necessary for understanding complex issues or improving policy development or decision-making. These analytic efforts result in formal, structured documents containing data or leading to conclusions and/or recommendations. This summary description is operationally defined by the following criteria:

a. Objective: To enhance understanding of complex issues or to improve the quality and timeliness of agency policy development or decision-making by providing new insights into, understanding of, alternative solutions to, or recommendations on agency policy and program issues, through the application of fact finding, analysis, and evaluation.

b. Areas of application: All subjects, issues, or problems involving policy development or decision-making in the agency. These may involve concepts, organizations, programs and other systems, and the application of such systems.

c. Outputs: Outputs are formal, structured documents containing or leading to conclusions and/or recommendations. Data bases, models, methodologies, and related software created in support of a study, analysis, or evaluation are to be considered part of the overall study effort.

d. Exclusions and exemptions: A complete list of exclusions and exemptions from the provisions of this circular is attached.

(3) Management and Professional Support Services. Management and professional support services take the form of advice, training, or direct assistance for organizations to ensure more efficient or effective operations of managerial, adminstrative, or related systems. This summary description is operationally defined in terms of the following criteria:

a. Objective: To ensure more efficient or effective operation of management support or related systems by providing advice, training, or direct assistance associated with the design or operation of such systems.

b. Areas of application: Management support or related systems such as program management, project monitoring and reporting, data collection, logistics management, budgeting, accounting, auditing, personnel management, paperwork management, records management, space management, and public relations.

c. Outputs: Services in the form of information, opinions, advice, training, or direct assistance that lead to the improved design or operation of managerial, administrative, or related systems. This does not include training which maintains skills necessary for normal operations. Written reports are normally incidental to the performance of the service.

d. Exclusions and exemptions: A complete list of exclusions and exemptions from the provisions of this circular is attached.

(4) Engineering and Technical Services. Engineering and technical services (technical representatives) take the form of advice, training, or under unusual circumstances, direct assistance to ensure more efficient or effective operation or maintenance of existing platforms, weapon systems, related systems, and associated software. All engineering and technical services provided prior to final Government acceptance of a complete "hardware system" are part of the normal development, production, and

procurement processes and do not fall within the meaning of this category. Engineering and technical services provided after final Government acceptance of a complete hardware system are within the meaning of this category except where they are procured to increase the original design performance capabilities of existing or new systems or where they are integral to the operational support of a deployed system and have been formally reviewed and approved in the acquisition planning process.

6. *Exclusions.* The attachment lists the Government programs and activities that are excluded from the provisions of this circular unless agencies decide to include them (see Section 8A below).

7. *Policy.*

A. When essential to the mission of the agency, the proper use of advisory and assistance services is a legitimate way to:

(1) Obtain outside points of view to avoid too limited judgment on significant issues;

(2) Obtain advice regarding developments in industry, university or foundation research;

(3) Obtain the opinions, special knowledge, or skills of noted experts whose national or international prestige can contribute to the sources of important projects;

(4) Enhance the understanding of, and develop alternative solutions to, complex issues;

(5) Support and improve the operation of organizations;

(6) Ensure the more efficient or effective operation of managerial or hardware systems; and

(7) Secure citizen advisory participation in developing or implementing Government programs that, by their nature or by statutory provision, call for such participation.

B. Advisory and assistance services shall not be:

(1) Used in performing work of a policy, decision-making, or managerial nature which is the direct responsibility of agency officials;

(2) Used to bypass or undermine personnel ceilings, pay limitations, or competitive employment procedures;

(3) Awarded on a preferential basis to former Government employees;

(4) Used under any circumstances specifically to aid in influencing or enacting legislation;

(5) Procured through grants and cooperative agreements; and

(6) Obtained for professional or technical advice which is readily available within the agency or another Federal agency, except when the contract is entered into pursuant to the procedures and provisions of Circular A-76.

C. No contracts for advisory and assistance services may be continued longer than five years without being reviewed for continued compliance with this circular.

8. *Management Controls.*

A. Each agency will assure that it maintains an accounting or information system which effectively monitors and reports advisory and assistance service activites.

B. Each agency's management control system for advisory and assistance services shall at a minimum comply with the Federal Acquisition Regulation. Agencies are encouraged to apply the same control system to other procurements which in their judgment require similar management attention, notwithstanding the exclusion of those functions or programs from the provisions of this circular.

C. Each agency will assure that for all advisory and assistance service arrangements:

(1) The elements of the management control system required by this circular have been observed, and all procurements under this circular are administered in accordance with the requirements of the Federal Acquisition Regulation;

(2) As prescribed by the Federal Acquisition Regulation, written approval of all advisory and assistance services arrangements will be required at a level above the organization sponsoring the activity. Additionally, written approval for all advisory and assistance service arrangements during the fourth fiscal quarter will be required at the second level or higher above the organization sponsoring the activity;

(3) Every requirement is appropriate and fully justified in writing. Such justification will provide a statement of need and will certify that such services do not unnecessarily duplicate any previously performed work or services;

(4) Work statements are specific, complete, and specify a fixed period of performance for the service to be provided;

(5) Acquisition of advisory and assistance services conform to the Competition in Contracting Act of 1984;

(6) Appropriate disclosure is required of, and warning provisions are given to, the performer(s) to avoid conflict of interest;

(7) Advisory and assistance service arrangements are properly administered and monitored to ensure that performance is satisfactory;

(8) The service is properly evaluated at the conclusion of the arrangement to assess its utility to the agency and the performance of the contractor; and

(9) To the extent practicable, contracts for these services require a written report. Such reports typically would document the services delivered and may, in part, take the form of software packages.

D. Delegations of Authority.

(1) Each agency head shall designate a single official reporting directly to him or her who shall be responsible and accountable for assuring that the acquisition of advisory and assistance services meets the provisions contained in this circular. The single official shall have minimum responsibility for the procurement of such services.

(2) Each agency will establish specific levels of delegation of authority to approve the need for advisory and assistance services based on the policy and guidelines contained in this circular. The senior official shall review each advisory and assistance services request which exceeds an amount to be determined by the agency.

E. Policy and procedures governing advisory committees and their membership as well as the procurement of advisory and assistance services are contained in General Services Administration regulations, 41 CFR Part 101-6.

F. The Federal Personnel Manual, Chapter 304, governs policy and procedures regarding personnel appointments.

G. The Federal Acquisition Regulation governs policy and procedures regarding contracts.

9. *Data Requirements.*

A. Contracted advisory and assistance services shall be reported to the Federal Procurement Data System (FPDS) in accordance with the instructions in the FPDS Reporting Manual.

B. Contract actions of $25,000 or less reported on the Summary Contract Action Report ($25,000 or less) (SF 281) are not covered by this reporting requirement.

C. The following data systems will continue to provide information on advisory and assistance service arrangements within the executive branch:

(1) Central Personnel Data File (CPDF), operated by the Office of Personnel Management, provides data on personnel appointments, segregating advisors, experts, and advisory committee members.

(2) The Federal Procurement Data System (FPDS) provides data on contract arrangements that are monitored by the management control

system required by Section 8 of this circular.

(3) Advisory committee data is provided in accordance with Section 2 of Executive Order No. 12024 to fulfill the requirements of section 6(c) of the Federal Advisory Committee Act, as amended (Pub. L. 92–463, 5 U.S.C., App.).

10. *Effective Date.* This circular is effective immediately.

11. *Inquiries.* All questions or inquiries should be submitted to the Office of Management Budget. Telephone number (202) 395–6903.

James C. Miller III,

*Director.*

*Exclusions*

I. The following activities are excluded from the purview of Circular A–120.

1. Activities that are reviewed in accordance with the A–76 process. (Such activities must be reported in accordance with sections 8.A and 9.A.)

2. Architectural and engineering services of construction and construction management services.

3. ADP/Telecommunications may be excluded if such functions and related services are controlled in accordance with 41 CFR Part 201, the Federal Information Resource Management Regulations.

4. Research on theoretical mathematics and basic medical, biological, physical, social, psychological or other phenomena.

5. Engineering studies related to specific physical or performance characteristics of existing or proposed systems.

6. The day-to-day operation of facilities (e.g., the Johnson Space Center and related facilities) and functions (e.g., ADP operations, building maintenance, etc.).

7. Government-owned, contractor operated facilities (GOCOs) (e.g., Oak Ridge National Laboratory, the Holstan Army Ammunition Plant in Kingsport, Tennessee). However, any contract for advisory and assistance services other than the basic contract for operation and management of a GOCO shall come under the provisions of this circular.

8. Clinical medicine.

9. Those support services of a managerial or administrative nature performed as a simultaneous part of, and non-separable from, specific development, production, or operational support activities. In this context, non-separable means that the managerial or administrative systems in question (e.g., subcontractor monitoring or configuration control) cannot reasonably be operated by anyone other than the designer or producer of the end-item hardware.

10. Contracts entered into in furtherance of statutorily mandated advisory committees.

11. Initial training, training aids, and technical documentation acquired as an integral part of the lease or purchase of equipment.

12. Routine maintenance of equipment, routine administrative services (e.g., mail, reproduction, telephone), printing services, and direct advertising (media) costs.

13. Auctioneers, realty-brokers, appraisers, and surveyors.

II. The following programs are excluded from the purview of Circular A–120.

1. The National Foreign Intelligence Program (NFIP).

2. The General Defense Intelligence Program (GDIP).

3. Tactical Intelligence and Related Activities (TIARA).

4. Foreign Military Sales.

[FR Doc. 88–461 Filed 1–11–88; 8:45 am]

BILLING CODE 3110–01–M

## DEPARTMENT OF TRANSPORTATION

### National Highway Traffic Safety Administration

[Docket No. IP 87–12; Notice 2]

### Grant of Petition for Determination of Inconsequential Noncompliance; General Motors Corp.

This notice grants the petition by General Motors Corporation of Warren, Michigan, to be exempted from the notification and remedy requirements of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. 1381 *et seq.*) for an apparent noncompliance with 49 CFR 571.101, Federal Motor Vehicle Safety Standard No. 101, "Controls and Displays." The basis of the grant is that the noncompliance is inconsequential as it relates to motor vehicle safety.

Notice of the petition was published on October 6, 1987, and an opportunity afforded for comment (52 FR 37394).

Standard No. 101 specifies individual identifying symbols for the windshield washer control and the windshield washer and wiper combined control. General Motors has determined that a total of forty-eight 1987 Brigadier trucks were manufactured with an incorrect illuminated identification for the windshield washer control. The symbol for combined windshield washer and wiper was used instead of the identifying symbol for windshield washer alone. General Motors supports its petition with the following:

1. "The washer control in question is properly identified on the control itself with the symbol specified in FMVSS 101. The incorrect symbol usage is limited to an adjacent identification which is present for purposes of meeting the illumination requirement of FMVSS 101.

2. The Owner's Manual clearly illustrates and describes the washer control and its function.

3. A driver will easily and readily recognize this control, especially the skilled professional driver of heavy duty commercial vehicles such as the Brigadier."

No comments were received on the petition.

Because the control itself bears the proper symbol, NHTSA believes that any confusion on the part of the driver is most likely to occur when the headlamps are in use, and the incorrect identification illuminated. The instrument panels of the trucks in question are designed such that the windshield washer control is adjacent to the windshield wiper control. The illuminated identification of the wiper control is correct, as is the symbol on the washer control itself, minimizing the possibility that the operator will activate the washer control in the belief that it is the wiper control. Accordingly, petitioner has met its burden of persuasion that the noncompliance herein described is inconsequential as it relates to motor vehicle safety, and its petition is granted.

(Sec. 102, Pub. L. 83–492, 88 Stat. 1470 (15 U.S.C. 1417); delegations of authority at 49 CFR 1.50 and 49 CFR 501.8)

Issued on January 6, 1988.

Barry Felrice,

*Associate Administrator for Rulemaking.*

[FR Doc. 88–497 Filed 1–11–88; 8:45 am]

BILLING CODE 4910–59–M

## DEPARTMENT OF THE TREASURY

### Office of the Secretary

### List of Countries Requiring Cooperation With an International Boycott

In order to comply with the mandate of section 999(a)(3) of the Internal Revenue Code of 1954, the Department of the Treasury is publishing a current list of countries which may require participation in, or cooperation with, an international boycott (within the meaning of section 999(b)(3) of the Internal Revenue Code of 1954). The list is the same as the prior quarterly list published in the Federal Register.

On the basis of the best information currently available to the Department of the Treasury, the following countries may require participation in, or cooperation with, an international boycott (within the meaning of section

PROCUREMENT REQUEST RATIONALE CHECKLIST
(to be submitted with EPA Forms 1900-8 and 1900-8A)

Item 1 The title of this procurement is _____

Item 2 This procurement request package contains the following documents. (Check all applicable boxes and attached documents as appropriate.)

| See Attachment # | Check | Description |
|---|---|---|
| _____ | _____ | EPA Form 1900-8 |
| _____ | _____ | Procurement Abstract* |
| _____ | _____ | Statement or Scope of Work* |
| _____ | _____ | Concise Technical Proposal Instructions* |
| _____ | _____ | Competitive Technical Evaluation Criteria* |
| _____ | _____ | Justification for Other Than Full and Open Competition (JOFOC) |
| _____ | _____ | D&F to provide full and open competition after exclusion of source (see FAR 6.2) |
| _____ | _____ | Justification for Advisory and Assistance Services |
| _____ | _____ | Justification of Need (Government-Furnished Property (GFP)/ Equipment)* |
| _____ | _____ | Quality Assurance (QA) Review Form |
| _____ | _____ | Recommended Sources List |
| _____ | _____ | Reports Description |
| _____ | _____ | Government-Furnished Property Description |

* The PROJECT OFFICER'S HANDBOOK provides guidance for preparing these documents. Also, see Item 11.

Item 3: This procurement [ ]involves [ ]does not involve advisory and assistance services. (If advisory and assistance services are involved, attach a justification that provides a statement of the need for the services and a certification that such services do not unnecessarily duplicate any previously performed work or services). (See page 4 of Figure 2-2 for required approvals)

Item 4: This procurement [ ]involves [ ]does not involve legal analysis. I have [ ] have not [ ]discussed this procurement with the Office of General Counsel which [ ]concurs [ ]does not concur with proceeding with this procurement

Figure 2-1
Page 1 of 5

PROCUREMENT REQUEST APPROVALS

B. Management Approvals

The following approvals apply to all procurement requests (P.R.'s), except PR's to add funds to incrementally funded contracts. These approvals are in addition to those listed in A above.

| Item | Approval |
|---|---|
| 1. Procurement Requests for Advisory and Assistance Services. | |
| (a) Small Purchases | Program official at least one organizational level above the initiating office.<br><br>When award is made during the fourth quarter, a program official at least two organizational levels above the initiating office. |
| (b) Other Than Small Purchases not in Excess of $1M | Program official not below the level of Associate, Assistant or Regional Administrator, Inspector General, or General Counsel. |
| (c) Advisory and Assistance Services Exceeding $1M | If the procurement request exceeds $1M, in addition to the approvals in (b) above, approval is required by the Assistant Administrator for Administration and Resources Management. (Assistant Administrator or Equivalent at HQ or the Regional Administrator in the Regions should make the request for approval). Requests in this category must be routed through the Director, Procurement and Contracts Management Division. |

# YOU'VE ISSUED YOUR WORK ASSIGNMENT, SO

# NOW WHAT?!

# WORKPLAN REQUIREMENTS

**Workplans Or Staffing Plans Must Be Submitted:**

- **In Response To Initial Work Assignments/ Deliver Orders**

- **If There Is A Change In The Scope, Level Of Effort Or Period Of Performance Of An On-Going Assignment**

# COMPONENTS OF A WORKPLAN

1. Statement Of The Project Goals (Purpose)

2. Detailed Technical Approach With Action Steps

3. Description Of Each Task/Deliverable With Schedule For Completion

4. Proposed Personnel

5. Areas Requiring Clarification/Suggested Modifications/Anticipated Problems

6. Proposed Format(s) For Special Progress Reports, If Required

7. Proposed Use Of Subcontractors, With Discussion Of How The Effort Will Be Managed By The Prime Contractor

8. Detailed Cost Proposal, Broken Down By Task And Subtask, Including Subcontractor Cost Breakdown

# WHAT TO LOOK FOR IN A WORKPLAN

1. Does Contractor Demonstrate Complete Understanding Of The Project (All Elements, Or Just One?)

2. Are The Proposed Milestones Appropriate/Too Generous/Too Ambitious?

3. Can The Effort Be Accomplished Reasonably Within The LOE? Is It Too High?

4. Is The Overall Staffing Plan Appropriate & Reasonable? Are The Personnel Qualified? Over-Qualified For The Task?

5. Has The Contractor Identified Any Questions Or Problems Which Need To Be Resolved?

6. Is There Too Much Subcontracting? Can The Contractor Maintain Adequate Control Over The Project?

## WHAT TO LOOK FOR IN A WORKPLAN (Cont.)

7. Cost Proposal:

- Are The Hours And Rates Appropriate & Reasonable?
- Is The Labor Mix Appropriate For The Work?
- Are The Indirect Cost Rates Those Which Have Already Been Negotiated And Are Stated In The Contract?
- Is The Subcontracted Portion Of The Effort Reasonable?
- Is The Proposed Amount Of Travel Acceptable?
- Did The Contractor Provide A Breakdown On ODC's? Is Each Component Reasonable?
- Are Proposed Subs/Consultants Already Approved?
- Will Approval Of The Workplan Require A Ceiling Increase Of Any Proposed Sub/Consultant?
- Is Any GFP Involved, And Has It Been Authorized In The Contract?

STATEMENT OF WORK
WORK ASSIGNMENT #13

## BACKGROUND AND PURPOSE

The Environmental Protection Agency (EPA) has a Congressional mandate to approve the use of all pesticides for commercial application. It is critical to both the welfare of the U.S. population, as well as a healthy environment where natural plant life can flourish without harmful effects, that no pesticides be used which could harm either human life or environmental resources.

EPA is thus charged with studying the effects of all pesticides proposed for use before granting approval. Last year, the pesticide "DDD" was used widely in both Japan and France and is gaining in popularity in other agricultural areas of the world. In those countries, it appears to be effective as a deterrant against many plant-destroying insects. However, Canada has rejected the widespread use of this chemical based upon its research and testing efforts which have shown a possible harmful effect from "DDD" on the soybean plant and its consumers.

"DDD" has recently been formally proposed to the U.S. Government for approval in this country. The purpose of this work assignment is to compile all research and data which currently exist on "DDD" into a comprehensive summary document. The contractor shall also prepare a testing plan for EPA so the Agency or another party can conduct its own study on the long and short-term effects of this pesticide. A further phase of the effort may follow in a future work assignment (if the option to extend the term of this contract is exercised), which will consist of the actual testing of "DDD" in accordance with the approved testing plan. A detailed description of the tasks the contractor is to perform follows, including a schedule of reports and deliverables and their due dates.

## TASK I - CONDUCT LITERATURE SEARCH

The contractor shall review all existing data and research on the pesticide "DDD". This shall include any documents produced in the United States as well as other countries where such research has been conducted. The three foreign nations where the majority of known literature has been compiled are Japan, France and Canada; however, there may be other countries where data on "DDD" have been produced as well. EPA has access to much of the Japanese research within its own library; copies of all such documents will be furnished to the contractor within fifteen (15) days after issuance of this work assignment.

The contractor shall be responsible for obtaining all other documents which have been produced on the pesticide.

TASK II - PREPARE COMPLETE SUMMARY OF ALL RESEARCH CONDUCTED ON "DDD"

The contractor shall produce a comprehensive final report which will summarize all research and findings to date on the pesticide "DDD". This document shall include all decisions made by foreign governments on whether to allow use of "DDD" on the crops of that nation, and the basis for such decisions. The contractor shall also include recommendations to EPA, based solely on existing research, as to whether "DDD" should be approved for widespread, unrestricted use, restricted use on certain crops, or not at all at this time.

TASK III - PREPARE TESTING PLAN

The contractor shall propose a plan for testing the long and short-term effects of "DDD" on soybean plants. (The actual testing is not to be conducted under this work assignment.) The testing plan shall include the proposed extent of testing, a schedule for when it should be conducted, a detailed description of both the application and the way the effects of "DDD" will be determined, and an estimated cost for conducting the entire testing project.

GENERAL

The contractor shall furnish a copy of each section of the monthly technical and financial progress reports which relate to this work assignment directly to the Work Assignment Manager at the same time the reports are submitted to the Project Officer and the Contracting Officer. In addition, the following additional financial information shall be submitted to the Work Assignment Manager on the same date:

(1) A graph using a vertical axis for dollars and a horizontal axis for time increments that shows the actual and projected rate of expenditures against the total budget approved in the work plan, and

(2) A cumulative incurred cost per direct labor hour average computation compared with the budgeted average cost per labor hour derived from the approved work plan.

The contractor shall communicate by telephone with the Work Assignment Manager at least once per week (Friday afternoons, unless otherwise directed by the Work Assignment Manager) to discuss the progress made that week, any problems

any obstacles encountered, and the complete status of all on-going tasks. In addition, the contractor shall meet in person wih the Work Assignment Manager on a bi-monthly basis for the same purpose.

The contractor shall be prepared to submit for inspection copies of all work in progress at any time as directed by the Work Assignment Manager.

The following is a suggested skills mix representing EPA's best estimate for the performance of this Work Assignment. The contractor shall specify its proposed skills mix with the staffing plan submitted as part of the required work plan.

| | |
|---|---|
| Program Director (P-4) | 300 hours |
| Senior Researcher (P-3) | 800 hours |
| Research Assistant (P-2) | 250 hours |
| Staff Writer (P-2) | 150 hours |
| | 1500 - Estimated Level of Effort |

WORK ASSIGNMENT #13
SCHEDULE OF TASKS AND DELIVERABLES

| TASKS/DELIVERABLES | | DUE DATE |
|---|---|---|
| I. | PREPARE/SUBMIT WORK PLAN | 15 days after Work Assignment issuance |
| II. | RECEIVE GOVERNMENT-FURNISHED DATA | " " |
| III. | BEGIN LITERATURE SEARCH | February 28 |
| IV. | COMPLETE LITERATURE SEARCH | May 15 |
| V. | SUBMIT 1st DRAFT REPORT ON DATA COMPILATION | June 30 |
| VI. | RECEIVE EPA COMMENTS | July 15 |
| VII. | SUBMIT 2nd DRAFT REPORT ON DATA COMPILATION | August 1 |
| VIII. | RECEIVE EPA COMMENTS | August 15 |
| IX. | DELIVER FINAL SUMMARY DOCUMENT OF DATA COMPILATION TO EPA | August 30 |
| X. | SUBMIT DRAFT TESTING PLAN | September 10 |
| XI. | RECEIVE EPA COMMENTS | September 17 |
| XII. | SUBMIT FINAL TESTING PLAN | September 30 |

PROPOSED WORK PLAN FOR
WORK ASSIGNMENT #13

## PURPOSE

This Project Workplan represents Technically Acceptable Corporation's (TAC) approach to performing the work described in EPA's Work Assignment #13 issued on February 1, 1996 under Contract 68-0X-1234. The objective of this work assignment is to compile all research and data which currently exist on the pesticide "DDD" into a comprehensive summary document, to include recommendations based on the research as to whether EPA should approve, disapprove, or approve for restricted use only, the pesticide. In addition, the contractor shall prepare a testing plan for the conduct of a study of the long and short-term effects of this pesticide.

## TECHNICAL APPROACH

Because EPA will be relying on the results of this research to make its preliminary decision on whether to approve "DDD" on a short-term basis for use in the United States, pending implementation of a longer-term and thorough testing program before issuing final approval, TCC proposes that the methodological approach followed be extremely thorough. The tasks TAC proposes are thus more detailed, and the hours allocated more extensive, to accomodate this more cautious approach.

Since the health and environmental damage from preliminary approval of "DDD" could be so extensive, as a result of its use on crops such as soybeans which have such broad exposure nationally, TAC believes this approach to be in the best interest of accomplishing EPA's health and environmental protection mandate.

## PROJECT TASKS/SCHEDULE AND DELIVERABLES

This project will consist of three major tasks with numerous subtasks to be completed over a nine-month time period. Exhibit 1 summarizes these tasks, the timeframes for completion and deliverables to be submitted. The activities which will be performed as part of each task are described below.

### Task 1 - Conduct Literature Search

#### Subtask 1.1 - Development of Project Workplan

The purpose of this subtask is to prepare and discuss the proposed project workplan with the EPA Task Manager and

other EPA officials, as needed. These meetings will be used to clarify and refine the scope of work, identify pertinent study issues and the availability of existing relevant documentation and finalize study schedule and deliverable dates. A revised finalized project workplan will be submitted within 15 calendar days from issuance of the Work Assignment (February 15).

Subtask 1.2 - Receive and Review Government-Furnished Data

EPA will provide TAC copies of all documents in EPA's possession related to DDD by February 15. TAC will review those documents to determine the extent and quality of data currently available and to determine data gaps. TAC will then prepare preliminary summary of that data identifying the data gaps for preliminary discussion with EPA. This preliminary review will assist EPA and TAC in determining the extent of additional research required.

Subtask 1.3 - Conduct Literature Search

TAC proposes to undertake an extensive literature search to identify all sources obtainable within the United States and other pertinent countries. The following actions are anticipated:

a. Literature search conducted of the literature available at the U.S. Library of Congress, U.S. Department of Agriculture, and National Institute for Occupational Safety and Health.

b. Thorough review of all commercially available chemical data bases.

c. Written inquiries to the departments of agriculture and environmental agencies of the states, with telephone follow-up to ensure response, and review of all data obtained.

d. Written inquiries to all major U.S. Schools of Agriculture, with telephone follow-up and review of all data obtained.

e. Written inquiries to the departments of agriculture and environmental agencies of all nations known to have used and/or studied DDD, with telephone follow-up and review of all data obtained.

Where documents, studies or data are available only at the particular sites, TAC proposes to obtain copies where possible. If a particularly rich source of data is located, however, and documents cannot be sent either because of pure volume or time restrictions, TAC proposes to conduct on-site research. All sites to be visited will be approved in advance by the EPA Proj 8-10 Officer, and it is proposed

that the EPA Work Assignment Manager be a member of the site visit team.

Subtask 1.4 - Conduct Telephone or Site Visit Follow-Up

It is often difficult to determine the quality of studies undertaken from the written literature, because of inadequate description of the study's methodology in the written literature. This makes it very difficult to assess the quality of the resulting data and the true extent of the data gaps. Where particularly important findings are claimed, TAC therefore proposes to conduct follow-up inquiries, by phone or in person, to determine the quality of the data.

Several deliverables will be submitted during this task which are described as follows:

a) Revised workplan, based on interaction with EPA staff.

b) Summary in the form of a briefing to be presented to EPA, summarizing data gaps identified after review of data provided by EPA.

c) Summaries of telephone interview and site visit data collected.

Task 2 - Prepare Complete Summary of Research Conducted on "DDD"

Subtask 2.1 - Prepare Draft Summary Report

TAC will summarize the data collected as described above into a preliminary draft for submission to EPA for technical review and comment. TAC will similarly prepare a summary briefing for EPA management summarizing TAC's conclusions and recommendations.

Subtask 2.2 - Prepare Final Report

Based on feedback obtained, TAC will finalize the report and briefing.

Subtask 2.3 - Present Report and Briefing to EPA Management

At a mutually agreed-upon date as proposed by EPA, TAC will present a briefing on its conclusions and recommendations to EPA management.

Several deliverables will be submitted during this task which are described as follows:

a) Draft summary report summarizing research and findings to date, indicating all decisions made by foreign

governments regarding use of DDD and the basis for those decisions, and including TAC's recommendations, based on the research, as to whether DDD should be approved for any use in the United States.

b) Final summary report.

c) Summary briefing summarizing findings and recommendations.

Task 3 - Prepare Testing Plan

Subtask 3.1 - Prepare Draft Testing Plan

During the research phase, TAC will collect information regarding the testing methodologies used by states, universities, foreign governments and independent researchers to study DDD's effects on health and the environment. TAC will review and evaluate the methodologies used and quality of the results obtained as part of preparing a plan for EPA to use in conducting its own research.

Subtask 3.2 - Prepare Final Testing Plan

TAC will meet with EPA officials to review and discuss any comments received, and incorporate the results of those meetings into the final testing plan.

Two deliverables will be submitted during this task which are described as follows:

a) Draft testing plan, including the proposed extent of testing, a schedule for its conduct, a detailed description of the application and the way the effects of DDD will be determined, and an estimated cost for conducting the testing program. Also included as an appendix will be a summary of testing methodologies used by other researchers, and an assessment of their results, strengths and weaknesses.

b) Final testing plan.

PROPOSED STAFFING AND BUDGET

Exhibit II identifies the proposed staffing and budget. Mr. Arnie Haig, Vice President of TAC, along with Mr. Jay Theisman, the Project Manager, will be responsible for the overall progress of the project. Day-to-day task management will be the responsibility of Mr. Louis Thomas, Senior Researcher. Ms. Susan Ewing, research assistant, and Bernie Goodman, researcher, will conduct a major part of the research effort. Dickie Nixon, TAC's pesticides expert, will provide technical advice and assistance

in reviewing technical findings and recommendations. Resumes of all staff are attached.

We estimate that the project will require approximately 2350 hours at a total labor cost of $46,600 to complete. The total project cost is estimated at $142,858.95.

## ISSUES AND ANTICIPATED PROBLEMS

To complete this project within the timeframe proposed by EPA, EPA's provision of technical documentation and comments according to its proposed timeframe will be crucial. It is also difficult at this time, prior to initiating research, to know the precise scope of this task or the responsiveness of foreign governments to our inquiries. EPA assistance in supporting research efforts will likely be significant in obtaining cooperation of foreign government officials.

EXHIBIT 1
WORK ASSIGNMENT #13
SCHEDULE OF TASKS AND DELIVERABLES

| TASKS/DELIVERABLES | | DUE DATE |
|---|---|---|
| I. | PREPARE/SUBMIT FINAL WORK PLAN | February 15 |
| II. | RECEIVE GOVERNMENT-FURNISHED DATA | February 15 |
| III. | PRESENT BRIEFING TO EPA ON DATA GAPS | March 12 |
| IV. | BEGIN LITERATURE SEARCH | March 20 |
| V. | COMPLETE LITERATURE SEARCH, DELIVER INTERVIEW SUMMARIES | May 15 |
| VI. | SUBMIT 1st DRAFT REPORT ON DATA COMPILATION | June 30 |
| VII. | RECEIVE EPA COMMENTS | July 15 |
| VIII. | SUBMIT 2nd DRAFT REPORT ON DATA COMPILATION | August 1 |
| IX. | RECEIVE EPA COMMENTS | August 15 |
| X. | DELIVER FINAL SUMMARY DOCUMENT OF DATA COMPILATION TO EPA, DELIVER BRIEFING | August 30 |
| XI. | SUBMIT DRAFT TESTING PLAN | September 10 |
| XII | RECEIVE EPA COMMENTS | September 17 |
| XIII. | SUBMIT FINAL TESTING PLAN, DELIVER BRIEFING | September 30 |

EXHIBIT II
PROPOSED STAFFING AND BUDGET

LABOR:

| Title | Level | Rate | Hours | Total Cost |
|---|---|---|---|---|
| Project Manager | P-4 | $27.00 | 400 | 10,800.00 |
| Senior Engineer/VP | P-4 | 30.00 | 100 | 3,000.00 |
| Senior Researcher | P-3 | 20.00 | 1000 | 20,000.00 |
| Research Assistant | P-2 | 14.50 | 400 | 5,800.00 |
| Staff Writer | P-2 | 18.00 | 300 | 5,400.00 |
| Secretary | P-1 | 11.50 | 100 | 1,150.00 |
| Clerk-Typist | P-1 | 9.00 | 50 | 450.00 |
| SUBTOTAL | | | 2350 | $46,600.00 |
| OVERHEAD AND FRINGES (111% of Labor) | | | | 51,726.00 |
| OTHER DIRECT COSTS | | | | |
| Travel | | | | 11,000.00 |
| Copying and Printing | | | | 1,800.00 |
| Computer Time | | | | 500.00 |
| SUBTOTAL | | | | 13,300.00 |
| TOTAL DIRECT | | | | $111,626.00 |
| G&A (18.5% of Total Direct) | | | | 20,650.81 |
| TOTAL COST (without fee) | | | | $132,276.81 |
| FEE (8% of Total Cost) | | | | 10,582.14 |
| TOTAL COST INCLUDING FEE | | | | $142,858.95 |

Chapter 8
# WORK PLANS AND COST PROPOSALS

Most EPA contracts require the contractor to submit a work plan and/or cost proposal before commencing work. The purpose of the work plan is to give the contractor the opportunity to lay out how the contractor proposes to perform the work assigned, as well as the proposed cost. This in turn permits EPA to ensure that the contractor appropriately understands the work to be performed, and to approve (or disapprove and amend) the proposed approach and costs for doing the work. The process of obtaining consensus on the workplan can be a simple process, or entail numerous meetings and negotiation.

Work plans typically are submitted in response to initial work assignments and delivery orders. They should also be amended whenever there is a change in scope, level of effort or period of performance of an on-going assignment.

## 8.1 Workplan Components

A workplan should contain the following components:

a) a statement of project goals (the purpose of the assignment);

b) a detailed technical approach, with action steps;

c) a description of each task and deliverable, with a schedule for completion;

d) proposed personnel;

e) indication of any areas requiring clarification, suggested modifications, and any anticipated problems;

f) proposed formats for any special progress reports, if required;

g) any proposed use of subcontractors, as well as how they will be managed;

h) a detailed cost proposed, broken down by task, including a subcontractor breakdown.

Not all workplans will contain every element. However, effort put in at this stage to clarify the details of the work to be performed will pay off in avoided disputes and allegations of miscommunication at a later stage. Workplans should <u>not</u> be simple restatements of the work assignment.

When assignments are being given at the task level, e.g., with technical direction directives, submission of a task plan may be similarly appropriate. See pages 271-73 for a sample task directive and task plan.

## 8.2 Workplan Review

Once the workplan is submitted, the Government has a certain period of time to review and approve it. The review process should be thorough. The plan should be compared, item for item, with the work assignment or statement of work. Any discrepancies should be noted, as well as changes that should be made.

Since the work plan is being reviewed for the purpose of ensuring that the contractor's understanding of, and approach for, accomplishing the effort is within the scope of the assignment, and that the proposed level of staffing and resources are appropriate, sufficient, and reasonable for performing the work, the reviewer must determine the acceptability of the contractor's understanding and approach.

1. Does the contractor demonstrate complete understanding of all the project elements?

2. Is the proposed approach for accomplishing the work reasonable and likely to achieve the government's objectives? Are there ways to do it more efficiently or effectively?

3. Did the contractor make any substantive changes in the work to be performed, or the sequence of performance, and are these changes acceptable?

4. Are the proposed milestones appropriate, too generous or too ambitious? Will they meet the government's needs and deadlines?

5. Can the effort be accomplished reasonably within the LOE available. Is it too high?

6. Is the overall staffing plan appropriate and reasonable? Are the personnel qualified, underqualified or overqualified for the task? Is the contractor using people already familiar with the task or introducing new staff to the project who might need extra time to get up to speed?

7. Has the contractor identified any questions or problems which need to be resolved?

8. Is there too much subcontracting relative to the amount of prime contractor time proposed? Can the contractor maintain adequate control over the project?

Cost proposals should be reviewed with the same questions in mind, and looked at from both a qualitative and quantitative point of view.

1. Are the hours and rates appropriate and reasonable? (Rates which have already been approved by the Government such as fringe, overhead, G&A, and fee should not be questioned.)

2. Is the labor mix appropriate for the work?

3. Are the indirect cost rates those which have already been negotiated and are stated in the contract?

4. Is the subcontracted portion of the effort reasonable?

5. Is the proposed amount of travel acceptable?

6. Did the contractor provide a breakdown of ODCs? Is each component reasonable?

7. Are the proposed subcontractors and consultants already approved?

8. Will approval of the workplan require a ceiling increase of any proposed subcontractor or consultant?

9. Is any government furnished property involved, and has it been authorized in the contract?

## 8.3 Authorizing Performance Before Signoff

Sometimes the contractor is authorized to begin performance while the work plan is under development or review. However, usually the contract will specify a point at which work is to stop if work plan approval has not been received, or if the work plan is rejected. Therefore, timely review of these documents is critical to ensure that the work is completed on time. Delays on the part of the Government can excuse a contractor, under the terms of the contract, from continuing performance.

**Sample**
# TASK DIRECTIVE

CONTRACTOR: Technics Incorporated
CONTRACT NO: 68-03-58-33
WORK ASSIGNMENT NO: 8
TASK NO: 1
DATE OF DIRECTIVE: 2/2/87

TD NO: 2
MAXIMUM HOURS AUTHORIZED: 30
ESTIMATED COST: $3000.00
DUE DATE: 2/16/87

TASK TITLE:

DESCRIPTION OF TASK: Review and comment on revisions in second draft of NCP and preamble.

| SPECIFIC TASK ACTIVITIES/DELIVERABLES | DEADLINES |
|---|---|
| 1. Review second draft, determine consistency of revisions with pertinent statutes (CERCLA as amended) and with existing NCP and preamble. Prepare comments sheet. | 2/10/87 |
| 2. Meet with EPA staff to discuss issues raised by revisions and possible solutions in terms of further revision. | 2/14/87 |
| 3. Prepare comments sheet with proposed language changes. (final draft) | 2/16/87 |

[ ] ADDITIONAL SCOPE ATTACHED

COMMENTS:

| AUTHORIZING: | SIGNATURE | DATE | PHONE NO |
|---|---|---|---|
| TASK MANAGER: | | | |
| WORK ASSIGNMT MGR: | | | |
| PROJECT OFFICER: | | | |

RECEIVED BY: [ ] Accepted [ ] Rejected [ ] Accepted With Exceptions (Attached)

CONTRACTOR: _____ _____ _____

TASK PLAN FOR TASK DIRECTIVE #8-1-2
(Review of NCP Draft #2)
CONTRACT NO. 68-03-5833
Technics Incorporated

PURPOSE

This Task Plan represents Technics Incorporated's approach to performing the work described in EPA's Task Directive #1 issued on February 2, 1987. The objective of the task is to review and comment on revisions incorporated into the second draft of the National Contingency Plan and preamble, based on comments received from work group members and other internal and external reviewers, and propose further revisions as pertinent in light of the statutory requirements of CERCLA, its Amendments and the existing NCP.

TASK APPROACH

This task involves comparing the revisions made and incorporated into the second draft of the National Contingency Plan with the language and requirements of CERCLA and its amendments, and the existing NCP. If any inconsistency is identified, Technics will note those discrepancies on its comments sheet for discussion with EPA staff, including the apparent seriousness of the discrepancies noted.

After discussion with EPA staff, Technics will propose additional language changes to resolve any discrepancies, or prepare, in its comments, a justification for the discrepancy as represented by EPA's decision to maintain the proposed language.

Exhibit 1 below summarizes these activities, deliverables and due dates.

EXHIBIT 1
SCHEDULE OF ACTIVITIES/DELIVERABLES/DUE DATES

| Activity | Deliverable | Due Date |
|---|---|---|
| 1. Review second draft, conduct research as needed to determine consistency of revisions with CERCLA and its amendments and with existing NCP and preamble. Prepare comments. | Comments sheet | 2/10/87 |
| 2. Meet with EPA staff to discuss questions raised/inconsistencies found as result of revisions, and possible solutions | | 2/14/87 |
| 3. Draft proposed language changes, incorporate into comments sheet | Comments sheet w/ language changes | 2/16/87 |

## PROPOSED STAFFING AND BUDGET

Proposed staff for the task include:

| | | |
|---|---|---|
| Program Manager (P-4) | Rob Lockett | 5 hours |
| Management Analyst (P-3) | June Lilly | 15 hours |
| Program Analyst (P-2) | Roger Lite | 10 hours |
| TOTAL | | 30 hours |

Technics estimates that the project will require approximately 30 hours at a total labor cost of $3,000. There are no anticipated direct costs.

## SPECIAL REPORTING AND COORDINATION

None

## ISSUES AND ANTICIPATED PROBLEMS

None

# REACHING CONSENSUS

This Chapter Is Reserved Until Further Notice

# TECHNICAL DIRECTION

# TECHNICAL DIRECTION

This Clause Permits The Project Officer To Provide Technical Direction In The Form Of:

- Direction That Assists Contractor To Accomplish Statement Of Work,
- Comments On And Approval Of Reports And Other Deliverables.

Technical Direction Must Not:

- Institute Additional Work Outside Contract Scope
- Constitute A Contract Change
- Increase Or Decrease Estimated Cost Of Contract
- Alter Period Of Performance
- Change Other Express Terms And Conditions

Project Officer Must Issue Direction IN WRITING, Or Must CONFIRM Verbal Direction IN WRITING WITHIN FIVE CALENDAR DAYS

1552.237-71 Technical Direction.

As prescribed in 1537.110, insert the following contract clause in cost-reimbursement contracts.

H.## TECHNICAL DIRECTION (EPAAR 1552.237-71) (APR 1984)

(a) The Project Officer will provide technical direction on contract performance. Technical direction includes:

(1) Direction to the Contractor which assists him in accomplishing the Statement of Work.

(2) Comments on and approval of reports or other deliverables.

(b) Technical direction must be within the contract Statement of Work. The Project Officer does not have the authority to issue technical direction which (1) institutes additional work outside the scope of the contract; (2) constitutes a change as defined in the "Changes" clause; (3) causes an increase or decrease in the estimated cost of the contract; (4) alters the period of performance; or (5) changes any of the other express terms or conditions of the contract.

(c) Technical direction will be issued in writing by the Project Officer or confirmed by him in writing within five (5) calendar days after verbal issuance.

(End of clause)

# TECHNICAL DIRECTION GUIDELINES

1. Refrain From Discussing Or Divulging To The Contractor Any Information Relevant To A Work Assignment Or Delivery Order Prior To Issuance.

2. Never Authorize Work To Begin Before Issuance Of A Work Assignment Or Delivery Order.

3. Do Not Give Direction Which Will Affect The Terms And Conditions, Cost/Price, Delivery Or Performance Schedule Or Level Of Effort Of The Contract.

4. Do Not Direct The Contractor To Perform Services Which Are "Inherently Governmental" In Nature (E. g., Making Policy).

5. BEWARE OF CREATING AN EMPLOYER/EMPLOYEE RELATIONSHIP (Personal Services).

EXHIBIT V-2(2)

| | | |
|---|---|---|
| 1A. Cost Center: | TAT ZONE II CONTRACT<br>CONTRACT NO. 68-01-7368<br>TECHNICAL DIRECTION DOCUMENT (TDD)<br>ECOLOGY AND ENVIRONMENT, INC. | 2. No.:<br>T<br>Amendment _____ |
| 1B. Account No.: | | |

| | | | |
|---|---|---|---|
| 3A. Priority<br>☐ High<br>☐ Medium<br>☐ Low | 4A. Estimate of Total Hours:<br>Total Costs: | 5A. EPA Site Name: | 7. Completion Date: |
| | | 5B. SSID No.: / 5C. City/County/State: | 8. Reference Info:<br>☐ Yes ☐ Attached<br>☐ No ☐ Pick-up |
| 3B. Key EPA Contact:<br>Name:<br>Phone: | 4B. Overtime Approved:<br>☐ Yes ☐ No | 6. Source of Funds: ☐ Other _____<br>☐ CERCLA<br>☐ 311<br>☐ UST | 8A. Subtask Code: |

9. Type of Activity:

| CWA-311 | CERCLA | AS SPECIFIED ABOVE | |
|---|---|---|---|
| ☐ SPCC | ☐ Site Assessment | ☐ Special Project | ☐ Quality Assurance |
| ☐ On-Scene Monitoring | ☐ Removal Funded | ☐ Analytical Project | ☐ Training |
| ☐ Spill Clean-up Funded | ☐ Removal PRP (AO/CO) | ☐ TITLE III | ☐ Program Management |
| | ☐ On-Site Monitoring | ☐ UST | ☐ Technical Assistance |
| | | ☐ FEMA | ☐ Information Management |

10. General Task Description: _____

11. Desired Report Form:
☐ Formal Report
☐ Letter Report
☐ Formal Briefing
☐ Other (Specify)

12. Specific Elements:

13. Interim Deadlines:

14. Authorizing DPO: _____ (Signature)

15. Date:

16. Received by: ☐ Accepted ☐ Accepted with Exceptions (Attached) ☐ Rejected _____ (TATL Signature)

17. Date:

T007037

Distribution:

| | | |
|---|---|---|
| Sheet 1 | White | - DPO Copy |
| Sheet 2 | Blue | - TATL Copy |
| Sheet 3 | Green | - ZPM Copy |
| Sheet 4 | Canary | - PO Copy |
| Sheet 5 | Pink | - CO Copy |
| Sheet 6 | Goldenrod | - DPO Original (Unsigned by TATL) |

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PCMD 9/89

EXHIBIT V-2(1)

| 1. COST CENTER: | TAT – CONTRACT 68-01-7367<br>TECHNICAL DIRECTION DOCUMENT (TDD)<br>OHM EMERGENCY RESPONSE AND<br>SPILL PREVENTION PROGRAM<br><br>ROY F. WESTON INC. | 2. NO:<br><br>2A. TYPE: |
|---|---|---|

| 3. PRIORITY: | 4. SOURCE OF FUNDS: | 5. EPA SITE ID:<br><br>5A. EPA SITE NAME: | 6. COMPLETION DATE:<br><br>7. OVERTIME APPROVED: ☐ YES ☐ NO | 8. REFERENCE INFO: |
|---|---|---|---|---|
| ☐ HIGH (1)<br>☐ MEDIUM (2)<br>☐ LOW (3) | ☐ CERCLA (1)<br>☐ 311 (2)<br>☐ UST (3)<br>☐ FEMA (4)<br>☐<br>☐ | | | ☐ YES ☐ NO<br>☐ ATTACHED<br>☐ PICK UP |

9. GENERAL TASK DESCRIPTION:

9A. ESTIMATED COST: $ ESTIMATED HOURS:

10. SPECIFIC ELEMENTS: 11. INTERIM DEADLINES:

12D. DESIRED REPORT FORM: FORMAL REPORT ☐ LETTER REPORT ☐ FORMAL BRIEF ☐

OTHER (SPECIFY):

13. COMMENTS:

| 14. AUTHORIZING DPO: | 15. DATE: |
|---|---|
| (SIGNATURE) | |
| 16. RECEIVED BY: ☐ ACCEPTED ☐ ACCEPTED WITH EXCEPTIONS ☐ REJECTED | 17. DATE: |
| (TATL SIGNATURE) | |

18. DESCRIPTOR:

Sheet 1 White – DPO Copy (Signed by TATL Replaces Original)
Sheet 2 Green – TATL Copy
Sheet 3 Canary – RPMO Copy
Sheet 4 Pink – Project Officer Copy
Sheet 5 Blue – Contracting Officer Copy (Washington, DC)
Sheet 6 [illegible] – DPO Original Copy

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# PERSONAL SERVICES

1. A Personal Services Contract Results When The Government Assumes The Right To Instruct, Supervise Or Control A Contractor's Employee In How He/She Performs The Work.

2. It Is The Contractor's Right To Hire And Fire, To Assign And Organize The Work.

3. Project Officers, Work Assignment Managers And Delivery Order Officers Must Take Care Not To Cross The Line From Surveillance To Supervision. Tell The Contractor "What" And Not "How".

PERSONAL SERVICE CONTRACTS ARE ILLEGAL!

(Employer/Employee Relationships)

# PRECAUTIONS
# GOVT PERSONNEL MUST TAKE
# WITH SUBCONTRACTORS

1. NEVER Direct That Any Portion Of Work Should Be Performed By Subcontractor Rather Than Prime Contractor.

2. NEVER Direct Prime To Subcontract With A Specific Firm.

3. NEVER Consent To A Subcontract. Only The Contracting Officer Can Give Consent.

4. NEVER Provide Technical Direction To A Subcontractor - There Is No Privity Of Contract.

# PRIVITY OF CONTRACT

There Is NO DIRECT CONTRACTUAL RELATIONSHIP, I.e., No "Privity Of Contract" Between EPA And Any Subcontractor.

Because There Is No "Privity Of Contract," EPA May Not Deal Directly With Its Subcontractors On Contractual Issues.

Subcontractors Also Have No Right To Obtain A Direct Decision Of The Contracting Officer And No Right Of Appeal To The Board Of Contract Appeals.

# EFFECTIVE WAYS TO MONITOR THE CONTRACTOR'S PROGRESS

1. Inspection Of Work (At Work Site, If Possible)
2. Telephone Communications
3. Meetings With Contractor Personnel
4. Comparison Of Progress With Work Plan Schedule Of Tasks And Deliverables
5. Review Of Progress Reports
6. Review Of Financial Management Reports
7. Review of Deliverables
8. Evaluation Of Contractor Performance

# INSPECTION OF SERVICES

Contractor Must Provide And Maintain Inspection System Acceptable To Government Covering Contracted For Services.

Government Has Right To Inspect And Test All Services To Extent Practicable At All Times And All Places During Contract Term. Inspection Should Not Unduly Delay Work.

If Services Do Not Conform With Contract Requirements, Government May Require Reperformance For No Additional Fee. If Defects Cannot Be Corrected Through Reperformance, Government May 1) Reduce Fee, 2) Require Contractor To Ensure Correct Future Performance.

If Contractor Fails To Take Necessary Action, Government May 1) Reduce Fee By Amount Necessary To Get Services Performed Elsewhere Or 2) Terminate The Contract.

## INSPECTION OF SERVICES—COST-REIMBURSEMENT (APR 1984)

(a) Definition. "Services," as used in this clause, includes services performed, workmanship, and material furnished or used in performing services.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the services under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Government during contract performance and for as long afterwards as the contract requires.

(c) The Government has the right to inspect and test all services called for by the contract, to the extent practicable at all places and times during the term of the contract. The Government shall perform inspections and tests in a manner that will not unduly delay the work.

(d) If any of the services performed do not conform with contract requirements, the Government may require the Contractor to perform the services again in conformity with contract requirements, for no additional fee. When the defects in services cannot be corrected by reperformance, the Government may (1) require the Contractor to take necessary action to ensure that future performance conforms to contract requirements and (2) reduce any fee payable under the contract to reflect the reduced value of the services performed.

(e) If the Contractor fails to promptly perform the services again or take the action necessary to ensure future performance in conformity with contract requirements, the Government may (1) by contract or otherwise, perform the services and reduce any fee payable by an amount that is equitable under the circumstances or (2) terminate the contract for default.

# INSPECTION--TIME & MATERIALS

Contractor Must Provide And Maintain Inspection System Acceptable To Government.

Government Has Right To Inspect And Test All Materials Furnished & Services Performed To Extent Practicable. Government May Inspect Plant Of Contractor Or Subcontractor.

Government Shall Accept Or Reject Services And Materials At Place Of Delivery Promptly, And They Are Presumed Accepted 60 Days After Delivery Unless Accepted Earlier.

If Services Or Materials Do Not Conform With Contract Requirements, Government May Require Replacement Or Correction During Contract Term Or Within Six Months Thereafter, With Fee For Profit Deducted From Costs.

Contractor's Failure To Perform Resulting From Contractor Fraud, Lack Of Good Faith, Or Willful Misconduct Of Management, Or By Contractor's Employee Where Contractor's Management Has Reasonable Grounds To Believe The Employee Is Habitually Careless Or Unqualified, Shall Be Corrected By Contractor At No Cost To The Govt.

## INSPECTION—TIME-AND-MATERIAL AND LABOR-HOUR (JAN 1986)

(a) Definitions. "Contractor's managerial personnel," as used in this clause, means any of the Contractor's directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of—

(1) All or substantially all of the Contractor's business;

(2) All or substantially all of the Contractor's operation at any one plant or separate location at which the contract is being performed; or

(3) A separate and complete major industrial operation connected with the performance of this contract.

"Materials," as used in this clause, includes data when the contract does not include the Warranty of Data clause.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the material, fabricating methods, work, and services under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Government during contract performance and for as long afterwards as the contract requires.

(c) The Government has the right to inspect and test all materials furnished and services performed under this contract, to the extent practicable at all places and times, including the period of performance, and in any event before acceptance. The Government may also inspect the plant or plants of the Contractor or any subcontractor engaged in contract performance. The Government shall perform inspections and tests in a manner that will not unduly delay the work.

(d) If the Government performs inspection or test on the premises of the Contractor or a subcontractor, the Contractor shall furnish and shall require subcontractors to furnish all reasonable facilities and assistance for the safe and convenient performance of these duties.

(e) Unless otherwise specified in the contract, the Government shall accept or reject services and materials at the place of delivery as promptly as practicable after delivery, and they shall be presumed accepted 60 days after the date of delivery, unless accepted earlier.

(f) At any time during contract performance, but not later than 6 months (or such other time as may be specified in the contract) after acceptance of the services or materials last delivered under this contract, the Government may require the Contractor to replace or correct services or materials that at time of delivery failed to meet contract requirements. Except as otherwise specified in paragraph (h) below, the cost of replacement or correction shall be determined under the Payments Under Time-and-Materials and Labor-Hour Contracts clause, but the "hourly rate" for labor hours incurred in the replacement or correction shall be reduced to exclude that portion of the rate attributable to profit. The Contractor shall not tender for acceptance materials and services required to be replaced or corrected without disclosing the former requirement for replacement or correction, and, when required, shall disclose the corrective action taken.

(g) (1) If the Contractor fails to proceed with reasonable promptness to perform required replacement or correction, and if the replacement or correction can be performed within the ceiling price (or the ceiling price as increased by the Government), the Government may—

(i) By contract or otherwise, perform the replacement or correction, charge to the Contractor any increased cost, or deduct such increased cost from any amounts paid or due under this contract; or

(ii) Terminate this contract for default.

(2) Failure to agree to the amount of increased cost to be charged to the Contractor shall be a dispute.

(h) Notwithstanding paragraphs (f) and (g) above, the Government may at any time require the Contractor to remedy by correction or replacement, without cost to the Government, any failure by the Contractor to comply with the requirements of this contract, if the failure is due to (1) fraud, lack of good faith, or willful misconduct on the part of the Contractor's managerial personnel or (2) the conduct of one or more of the Contractor's employees selected or retained by the Contractor after any of the Contractor's managerial personnel has reasonable grounds to believe that the employee is habitually careless or unqualified.

(i) This clause applies in the same manner and to the same extent to corrected or replacement materials or services as to materials and services originally delivered under this contract.

(j) The Contractor has no obligation or liability under this contract to correct or replace materials and services that at time of delivery do not meet contract requirements, except as provided in this clause or as may be otherwise specified in the contract.

(k) Unless otherwise specified in the contract, the Contractor's obligation to correct or replace Government-furnished property shall be governed by the clause pertaining to Government property.

# CONTRACTOR COMMUNICATIONS RECORD

CONTRACT NO. 68-01-0001

CONTRACT: John Doe Environmental, Inc.

| DATE/ TIME | CONTACT | SUMMARY OF DISCUSSION/ DECISIONS MADE |
|---|---|---|
| 1/2/87 | Rider | Deliverable #2 will be two days late, due to bad weather. Agreed to accept delay. |
| 1/4/87 | Samual | Requested decision on number of users and categories. Informed that 3 user groups (programmer w/ total access; desk officers w/ data entry & all reports access; program offices w/ program-only access to reading/printing program reports. |

# MEETING RECORD

CONTRACT NO. 68-01-0001

CONTRACT: John Doe Environmental, Inc.

---

DATE/TIME: 7/10/89 1:00 - 3:00

ATTENDEES: Lewis, Andrews, MacIntosh

PURPOSE/DESCRIPTION: Met to discuss scope of Subtask #3 study to be conducted.

DECISIONS MADE:

1. Begin study in July. Complete design by February 1.
2. Set up meeting to discuss design possibilities.

NEXT STEPS (EPA , CONTRACTOR) (Actions to Take, Issues to Resolve):

EPA: Obtain list of people to attend meeting on study design, and possible agency experts.

Contractor: Prepare outline of study design, by December 15.

MONTHLY PROGRESS REPORT--COST-TYPE CONTRACT (APR 1984)

The Contractor shall furnish ..... copies of a combined monthly technical and financial progress report briefly stating the progress made, including the percentage of the project completed during the reporting period. If work is ordered using work assignments include the percentage of work ordered and completed during the reporting period. Specific discussions shall include difficulties encountered and remedial action taken during the reporting period and anticipated activity during the subsequent reporting period. In addition, the report shall specify contract financial status as follows:

(a) For term form contracts, provide:

(1) Cumulative costs and direct labor hours expended from the effective date of the contract through the last day of the current reporting month. Include a cumulative incurred cost per direct labor hour average computation and compare the result to the cumulative average cost per direct labor hour derived from the estimated cost of the contract.

(2) Actual costs and direct labor hours expended during the current reporting month.

(3) Estimated costs and direct labor hours to be expended during the next reporting period.

(4) Actual costs and direct labor hours incurred for each work assignment issued and estimates of costs and man hours required to complete each work assignment.

(b) For completion form contracts, provide a graph using a vertical axis for dollars and a horizontal axis for time increments that shows the actual and projected rate of expenditures against the total estimated cost of the contract.

(c) This submission does not change the notification requirements of the "Limitation of Cost" or "Limitation of Funds" clauses requiring separate written notice to the Contracting Officer.

(d) The reports shall be submitted to the following addressees on or before the ..... of each month following the first complete calendar month of the contract. Distribute reports as follows:

| No. of Copies | Addressee |
|---|---|
| ..... | Project Officer |
| ..... | Contracting Officer |

MONTHLY PROGRESS REPORT- ..ME AND MATERIALS OR LABOR HOUR, OR INDEFINITE DELIVERY-INDEFINITE QUANTITY FIXED RATE SERVICES CONTRACT (APR 1984)

The Contractor shall furnish ..... copies of a combined monthly technical and financial progress report briefly stating the progress made, including the percentage of the project completed during the reporting period. If the contract is an indefinite delivery/indefinite quantity type, include the percentage of the work ordered and completed during the reporting period. Specific discussions shall include difficulties encountered and remedial action taken during the reporting period and anticipated activity during the subsequent reporting period. In addition, the report shall specify contract financial status by:

(a) Cumulative costs and labor hours expended from the effective date of the contract through the last day of the current reporting month.

(b) Actual costs and labor hours expended during the current reporting month.

(c) Estimated costs and labor hours to be expended during the next reporting period.

(d) For indefinite quantity contracts, actual costs and direct labor hours incurred for each delivery order issued and estimates of costs and man hours required to complete each delivery order.

(e) The reports shall be submitted to the following addressees on or before the ..... of each month following the first complete calendar month of the contract. Distribute reports as follows:

| No. of Copies | Addressee |
|---|---|
| ..... | Project Officer |
| ..... | Contracting Officer |

(End of clause)

# A GOOD PROGRESS REPORT WILL:

1. Give The Complete Status Of All Project Elements, Avoiding Boilerplate Repetition Of Work Plan.

2. Highlight The Contractor's Major Accomplishments During The Month.

3. Point Out Any Problems Or Obstacles Encountered.

4. Discuss The Key Personnel On The Assignment And What They Did On The Project During The Month.

5. Discuss Any Changes (If Applicable) To The Key Personnel.

6. Discuss Work To Be Performed/Completed During The Next Month, Including Any Deliverables With Their Anticipated Delivery Dates.

7. Compare The Level Of Effort Expended To Date With That Proposed And Agreed To In The Work Plan.

8. Estimate The Level Of Effort Required To Complete The Project.

# PROGRESS REPORT OUTLINE

**EPA CONTRACT # 00-00-0000**
**Work Assignment #00**

## TECHNICAL

I. Percent of Work Ordered and Completed

II. Progress Made During The Period

III. Specific Problems Encountered/Remedial Action Taken

IV. Anticipated Activities and Deliverables For Next Reporting Period

V. Changes Made/Anticipated (Personnel, Schedule, etc.)

# PROGRESS REPORT OUTLINE (Cont.)

EPA CONTRACT # 00-00-0000
Work Assignment #00

## FINANCIAL

I. Workhours Proposed Vs. Actual Vs. Estimated to Completion

II. Funds Budgeted Vs. Actual (Period Vs. Cumulative) Vs. Estimated To Completion (By Task) And Variance

III. Average Cost Per Hour

IV. Summary of Travel (Budgeted Vs. Actual), Description of Trips

V. Summary of ODC's (Budgeted Vs. Actual), Description & Breakdown

VI. Subcontract Costs (By Subcontractor--Budgeted Vs. Actual)

# SUGGESTED ELEMENTS FOR SUCCESSFUL COMMUNICATION WITH CONTRACTORS

1. Have Frequent Communications.

2. Get Proposed Changes To Due Dates In Writing.

3. Get Copy Of Table Of Contents Before A Deliverable Is Completed.

4. Bring Proper Levels Of Personnel Into Discussions.

5. Formally Amend Work Assignment Whenever Changes Occur.

6. Call One Day Ahead Of Time To Confirm Meeting Agenda, Times, Places, Number Of Attendees, Etc., Or To Confirm Delivery Requirements.

## Chapter 10
## TECHNICAL MONITORING

The technical monitoring role of a Project Officer, Work Assignment Manager, or Delivery Order Officer is crucial in assuring that the contractor understands the work requirements and performs in a manner to produce quality results within the time required. Once the work assignment has been issued, and the work plan submitted and approved, it is up to these individuals to monitor the contractor's performance to ensure that EPA obtains the agreed-upon performance.

### 10.1 Technical Direction

Throughout the period of performance, a Project Officer, Work Assignment Manager, and/or Delivery Order Officer will often need to communicate with the contractor for the purpose of directing the effort to ensure that the desired results are achieved. This is not usually the situation in fixed-price contracts, because the requirements should have been clearly laid out in the contract itself. In fact, technical personnel must be careful not to provide technical direction unless the contract contains a clause permitting them to do so. Providing inappropriate technical direction which diverts or delays the contractor can give the contractor a cause of action against the government. However, in cost-reimbursement and many indefinite delivery contracts, the Technical Direction clause 1552.237-71 (see page 284) will be present, and allows (and in fact mandates) technical personnel to communicate with the contractor regarding the work effort.

Technical direction is made a responsibility of the Project Officer (or her/her designees) by the Technical Direction clause. It specifies that the Project Officer "will give technical direction on contract performance," including (1) direction to the Contractor which assists the Contractor in accomplishing the Statement of Work, and (2) comments on and approval of reports or other deliverables.

Technical direction should always be reduced to writing, with a copy to the Contracting Officer (plus one to the Project Officer, if the direction is given by a WAM or DOPO). If the technical direction was issued orally, the Technical Direction clause mandates that it be reduced to writing within 5 calendar days.

### 10.2 Technical Direction Under Superfund

Superfund contracts have formalized the provision of technical direction by setting up special forms called, depending on the contract involved, Technical Direction Memoranda (TDMs), Technical Instruction Directives (TIDs), or Technical Direction Directives (TDDs). There are filled out on-site and permit immediate and formalized documentation of the direction given. The contractor is frequently requested to sign the form to indicate the contractor's acknowledgment of the direction given. Sample forms are included on pages 286-7.

### 10.3 Prohibited Activities

While there are many types of direction which are authorized for technical personnel, the following activities are prohibited:

- Formally or informally discussing or divulging any information relevant to a Work Assignment or Delivery Order prior to its issuance with the contractor or any potential subcontractors or consultants.

- Making changes or issuing orders which will affect the terms and conditions of the contract.

  Only the Contracting Officer can direct a change to any terms or conditions of a contract, work assignment, or delivery order. (See Chapter 13 on Contract Modifications.) A contractor who is advised of a change without the signature of the Contracting Officer is required to notify the Contracting Officer immediately and identify any adjustments to the cost or delivery schedule which are affected by the change. The contractor is prohibited from proceeding with the change unless formal approval is given by the Contracting Officer. Project Officers, Work Assignment Managers or Delivery Order Officers who direct unauthorized changes to a contract may be relieved of their authority by the Director, PCMD, and may be held personally liable for any increase in costs.

- Giving technical direction that will increase costs and/or the level of effort and/or change the technical approach of the contract, work assignment, or delivery order. (This can constitute a constructive change, which is discussed in Chapter 13 on Contract Modifications. Such changes should be formalized as amendments to the Work Assignment or Delivery Order, also discussed in Chapter 13.)

- Authorizing services or work to begin before issuance of the work assignment or delivery order.

- Directing the contractor to perform services which are "inherently Governmental" in nature, e.g., drafting policy.

- Creating a personal conflict-of-interest situation such as working as a part-time consultant in the technical field relating to the contract or approving situations which may create an organizational conflict-of-interest.

- Directing or requesting the contractor to perform services which create an employer/employee or personal services relationship. (See EPA Directive 1900.1 "USE OF CONTRACTOR SERVICES" at end of Ch. 7, on page 237, and page 231 on personal services contracts).

- Providing technical direction to a subcontractor, since there is no privity of contract or direct contractual relationship with the subcontract. All technical direction should be given directly to the prime contractor, unless the contract otherwise authorizes (e.g., some Superfund contracts).

Technical personnel do not have the authority to bind the Government to an express (i.e., written) contract for additional services or supplies beyond what the contract provides. However, they could so mislead a contractor that the Government could be bound to pay the contractor's costs for services rendered on the theory that the Government should pay for benefits it receives. Case law indicates that the Government could hold the individual who gave the technical direction liable for any additional costs incurred by the contractor in such a situation. The utmost in caution is therefore required.

## 10.4 Technical Monitoring of Progress

Under every contract, there is a need to keep abreast of the progress of the contractor's performance to assure satisfactory completion of the effort. EPA relies on Project Officers, Work Assignment Managers, and/or Delivery Order Officers to carry out this very critical function of contract monitoring.

Project Officers cannot assume that all contractor personnel are familiar with the terms of the contract. While some personnel may become familiar with the Statement of Work through involvement in preparation of the proposal, they may not always be the people who are assigned to work under the contract. When they are actually working on the contract, they may have subordinates who are not as familiar with the contract terms. On long jobs, personnel turnover may make this problem worse.

In cases where all contractor personnel are familiar with the Statement of Work, there is sometimes a temptation to cut a corner or to provide what appears to be just as good as what was called for in the contract, but isn't. Under the stress of time, items may "fall through the cracks." Specific characteristics or elements may be overlooked in both the work effort and progress reports.

Accordingly, it cannot be assumed that the contract effort will be performed exactly as required. Government personnel must actively oversee the work effort and monitor the contractor's performance with the objective of assuring that such performance meets the requirements of the contract.

History has shown that when the Project Officer, Work Assignment Manager or Delivery Order Officer does not or cannot devote adequate time to determining what is actually being done under the contract, the results can be disastrous. The Project Officer is the "eyes and ears" of the Contracting Officer, and, as such, must be aware of the responsibility of assuring that the work performed is exactly in accordance with the minimum terms of the contract.

There are several methods by which technical personnel can monitor progress under a contract:

(1) Monitoring by Inspection

Inspection clauses in the contract (see pages 293ff and 313ff for examples) give the Government the right to inspect and test the work performed under the contract. This right is standard under Government contracts; it is derived from the concept that the Government has the right to determine if the goods or services offered are what was ordered. This right can be exercised at any stage and place of work performance. Inspection of the contractor's work may involve the use of spot checks, scheduled inspections, random sampling, user reports, and periodic review of the contractor's quality assurance and control programs.

The need for inspection will vary from case to case and is dependent upon the type of contract, the nature of the work being performed, the contractor's past performance history, and the criticality of the work performance. If, for example, a contractor has an outstanding quality assurance program and performance levels, the amount of monitoring may be reduced.

The decision of whether or not to use inspection as the main tool for monitoring performance is dependent upon many factors, including: type of work, type of contract, place of performance, and feasibility of performing inspections. As previously discussed, production of standard, "off-the-shelf" items under fixed-price contracts may require lower levels of monitoring, whereas cost-reimbursement type contracts frequently require a high level of monitoring. Careful attention to the monitoring and inspection levels required is a key responsibility of the Project Officer.

Review of a draft report is one type of inspection. Revisions can be directed before the final report is submitted. Project Officers must ensure, however, that draft reports are reviewed within the time period specified in the contract. Delays could result in loss of our rights to obtain the final product on time.

(2) Periodic Meetings

Another helpful tool in monitoring progress is the practice of periodic meetings to discuss performance. Depending upon the contract, these may be conducted on a regular schedule, or on an "as-needed" basis, and may be specific to one or more aspects of performance or may cover the overall contract. It might be sufficient to hold these by telephone if the need is minor and the contractor is not locally available. Where there are major problems, however, or many complex areas are under discussion, face-to-face meetings may be the only feasible method of reviewing contract performance. Restraint should be exercised, however, in order to avoid using an unreasonable amount of contract funds not commensurate with the complexity of the problems.

The Contracting Officer should always be notified of all meetings to be held with the contractor and provided an opportunity to attend. In addition, the EPA Project Officer, Work Assignment Manager or Delivery Order Officer must document the general content of all meetings, including all telephone conversations. Failure to document such decisions can leave EPA staff very vulnerable to allegations of changes made by EPA in such conversations or meetings. Sample forms for routine documentation are included on pages 296-7, and should note the date, the parties involved, and a summary of the discussion and any decisions made. Next steps required by EPA or the contractor should also be noted.

(3) Monitoring through Progress Reports

Most contracts incorporate clauses requiring the submission of periodic progress reports incorporating both technical and financial information (see pages 298-9). A sample progress report outline is included on pages 301-2.

A good progress report will a) indicate the complete status of all project elements, b) highlight the contractor's accomplishments for the period; c) point out any problems or obstacles encountered; d) discuss what key personnel did on the project; e) discuss any changes in key personnel; f) discussed work planned for the next month, including deliverables due and their delivery dates; g) compare the level of effort expended to date with that

agreed to in the work plan; and h) estimate the level of effort required to complete the project.

The use of a contractor's written progress reports can be of significant help in providing a picture of work progress under the contract. The Project Officer is responsible for ensuring that the contractor complies with reporting provisions. When reports are part of a contract, they have been included in the contract price or cost. Accordingly, the Project Officer should ensure that the Government gets exactly those reports required, in the time frames provided for, and in the detail required. Care should be taken not to require extra reports above contract requirements, as they could lead to a claim against the Government for increased costs.

Information required by the Project Officer is important in evaluating progress and for making management decisions relating to technical performance of the contract. Although the information flow provided must be adequate to the requirements of the Government, it should not be so detailed and involved as to create unnecessary administrative and financial burdens on the contractor. Additionally, the Government personnel assigned to review the contractor's reports must be capable of assessing the included information.

Often the contractor is reluctant to make certain information available. This is caused by a tendancy to withhold "bad news" or information that may indicate that the contractor is having problems. Contractors generally believe that things can be worked out, given a little time. Both the contractor and the Project Officer must remember that the reason for progress reports is to enable the Government to determine whether the contract is being performed properly. Accordingly, it is vital that the Project Officer ensure the timely submission of progress reports from the contractor and review the reports with great care.

If the Project Officer determines after contract award that the reporting requirements are insufficient to meet program needs, the Contracting Officer should be requested to negotiate a modification. If reports are not submitted on time, or are deficient, the Project Officer should request that the Contracting Officer direct the contractor to promptly remedy the situation.

It is essential that Project Officers read progress reports promptly, so that any problems which have arisen can be dealt with right away. Failure to read and understand progress reports renders them virtually useless. Similarly, progress reports that are vague or too general are of no value and may be an effort on the part of the contractor to obscure problem areas. The Project Officer should get whatever clarification is required to render progress reports meaningful and seek whatever assistance is required to fully understand them. Verification of the information contained in progress reports should be accomplished, at the minimum, on a spot-check basis.

(4) Reviewing Financial Management Reports

The financial management reviews conducted by PCMD's Quality Assurance staff and discussed in Chapter 11 are a good tool for monitoring progress from a technical standpoint, as well. A major emphasis of these reviews is the cost-to-complete estimate, which may often represent the most accurate

measurement of contractor progress. Project Officers should therefore pay close attention to the report generated from a financial management review, as it may tell more than just how costs are being managed. Project Officers on large contracts will need to ensure that they get feedback from their Work Assignment Managers and Delivery Order Officers on how technical progress is matching financial expenditures before approval of such reports.

(5) Reviewing Work Plans

If a work plan or task plan similar to those on pages 259 and 271 was submitted, it can be a useful tool in monitoring progress. Actual progress can be compared against the overall scheme presented in the work plan. Technical personnel can use it to assist in identifying delays in completion and noting areas where the contractor may have fallen behind.

The work plan should contain a schedule that identifies each step required for contract completion and the period of time needed to accomplish that step. The schedule is usually expressed in calendar days or weeks. The plan should be updated as required to reflect changes in estimates for completion of work elements and the total work effort.

## 10.5 Assuring Timeliness and Quality

Contractor deficiencies can affect either the timely completion of contract requirements or the quality of the products or services provided to the Government. While monitoring contractor progress, attention should be paid equally to both aspects of performance. The following discussion is designed to help guide Project Officers and their representatives in monitoring both.

### Assuring Timeliness of Performance

The Project Officer must understand from the onset that the contract type has an impact both on the amount of monitoring needed and the probability of timely performance by the contractor. In fixed-price contracts, the Government's right to terminate for default under the "Default" clause (see Chapter 14) may motivate the contractor to complete on time. In the case of cost-reimbursement contracts, which are "best effort" contracts, possible motivators include withholding of payment and the fact that the firm will gain a poor reputation. However, legitimate charges cannot be withheld in a cost reimbursement arrangement. Accordingly, with this type of contract the assurance of timely completion of the work effort is highly dependent on the monitoring efforts of the Project Officer.

Failure to deliver on time almost always is the result of a build-up of factors during performance. If the Project Officer keeps in close touch with the progress of the work effort, such interim delays can be identified and corrective action initiated. The Agency depends on the Project Officer to obtain and analyze progress information and to develop a recommended course of action.

All contracts contain a period of performance or delivery schedule, as shown below:

(1) Completion Contracts and Nonseverable Delivery Orders Under Indefinite Delivery Contracts

Completion contracts and some orders under indefinite delivery contracts call for a finite job, such as writing a handbook or collecting specific data and delivering it in a certain format. These contracts or orders specify a time for completion of the work and delivery of the results. The date must be met for the contractor to fulfill its obligation. But often, other matters are at stake. For example, the completed work may be required before other work can begin. Untimely delivery can result in program delays, with a cumulative effect beyond the initial work effort, impacting program effort, personnel, and costs.

(2) Term Form (Level-of-Effort) Contracts and Severable Delivery Orders under Indefinite Quantity Contracts

In these types of contracts, what is being purchased is an obligation by the contractor to apply a specified level of effort towards a specific objective or kind of work over a certain period of time. In these cases, the completion or end date in the contract or order relates more to the contractor's obligation to work than the completion of the effort. Once the end date comes, the contractor has no further obligation to continue work on the order, regardless of the status of job completion or hours remaining in the contract or order. In such cases, there is no assurance that the work will be completed and, therefore, there is potential waste. Close technical monitoring is critical to ensuring completion of the product or service.

**Assuring Quality**

The quality of the contractor's work is most important. If it is poor, the product or service may be useless.

Contracts for supplies can usually specify the physical attributes that will result in an acceptable product. Contracts for services, particularly those involving creative work or investigations, typically cannot describe specific attributes of the final result. Quality control in service contracts can best be assured by monitoring both the personnel assigned to the work and the methods used by the contractor as the work progresses.

The quality of a study or analysis depends to a great extent on the methods used. The validity of the conclusions may be suspect if the contractor failed to take into account all data or relevant factors. Interim conclusions that are suspect may seriously undermine all follow-on efforts, resulting in a total waste and possible requirement for a new start.

Generally, in contracts for technical services, the Project Officer is responsible for continuous monitoring of the contractor's efforts, as they progress, in order to assure satisfactory quality of work performed. This does not mean taking charge of the contractor's work effort. It does mean:

(1) Using technical expertise to identify contractor actions or lack of action that affect the quality of the work.

(2) Identifying and calling the contractor's attention to deficiencies.

(3) Keeping well-informed of what the contractor is doing.

(4) Working out appropriate action to remedy deficiencies.

Quality of the contractor's output is also dependent upon the competence of its personnel. In many cases, the best way to assure quality of work performed is to assure that personnel with the necessary capabilities, qualifications, and experience are assigned to the work effort. This is true in service contracts calling for creative or conceptual development or analysis. However, Project Officers should never appear to act as the contractor's personnel department. These functions are the contractor's, not the Government's. The Project Officer's role is one of reviewing and working with the contractor to remedy any inadequacies.

If a "Key Personnel" clause is included in the contract (see Chapter 7), the Project Officer should ensure, through monitoring, that such individuals have not been removed or diverted from the contract work and that they are providing the required level of effort. Key personnel should be working in those capacities and at the levels agreed to by the contractor and the Government in the original proposal or work plan.

The competence of non-key personnel is also important in assuring the quality of the work performed. If contractor personnel do not appear satisfactory with regard to training, experience, or other factors, the Project Officer should direct this to the attention of the contractor.

Under cost-reimbursement and some indefinite delivery contracts, the Project Officer may learn a great deal about the number and types of contractor personnel being utilized by reviewing invoices. Also, the Project Officer is normally permitted to ask for and receive information (i.e., resumes, position descriptions, etc.) that is reasonably required to determine if the personnel are qualified to perform the assignment.

## 10.6 Effective Communication with Contractors

Successful monitoring of quality and timeliness absolutely requires continuous and effective communication with the contractor. To accomplish this requires several elements. First, communications must be frequent. Second, get all proposed changes in due dates in writing. Third, be sure to discuss what you anticipate receiving in a report and get a copy of the draft table of contents (and ideally, a draft outline of the entirety) before a written deliverable is completed, so that you are sure that you are getting what is needed. Fourth, be sure to bring the proper levels of personnel into all discussions, that that time is not wasted with the wrong people present. Fifth, formally amend work assignments and delivery orders whenever changes occur, and document all other discussions where decisions are made. And finally, be sure to call in advance to confirm meeting agendas, people attending, etc. or to confirm delivery requirements.

Government's expense or otherwise dispose of the property or (2) effect repairs to return the property to its condition when inspected under the solicitation or, if not inspected, last available for inspection under the solicitation. After completing the directed action and upon written request of the Contractor, the Contracting Officer shall equitably adjust any contractual provisions affected by the return, disposition, or repair in accordance with the procedures provided for in the Changes clause of this contract. The foregoing provisions for adjustment are the exclusive remedy available to the Contractor, and the Government shall not be otherwise liable for any delivery of Government property furnished "as is" in a condition other than that in which it was originally offered.

(d) Except as otherwise provided in this clause, Government property furnished "as is" shall be governed by the Government Property clause of this contract.

(End of clause)

(AV 7-104.24(e) 1965 APR)

**52.246-1 Contractor Inspection Requirements.**

As prescribed in 46.301, insert the following clause in solicitations and contracts for supplies or services when the contract amount is expected to be within the small purchase limitation and (a) inclusion of the clause is necessary to ensure an explicit understanding of the contractor's inspection responsibilities, or (b) inclusion of the clause is required under agency procedures. The clause shall not be used if the contracting officer has made the determination specified in 46.202-1(b).

CONTRACTOR INSPECTION REQUIREMENTS

(APR 1984)

The Contractor is responsible for performing or having performed all inspections and tests necessary to substantiate that the supplies or services furnished under this contract conform to contract requirements, including any applicable technical requirements for specified manufacturers' parts. This clause takes precedence over any Government inspection and testing required in the contract's specifications, except for specialized inspections or tests specified to be performed solely by the Government.

(End of clause)

(R 7-103.24 1968 SEP)

**52.246-2 Inspection of Supplies—Fixed-Price.**

As prescribed in 46.302, insert the following clause in solicitations and contracts for supplies, or services that involve the furnishing of supplies, when a fixed-price contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The clause may be inserted in such solicitations and contracts when the contract amount is expected to be within the small purchase limitation and inclusion of the clause is in the Government's interest.

INSPECTION OF SUPPLIES—FIXED-PRICE

(APR 1984)

(a) Definition. "Supplies," as used in this clause, includes but is not limited to raw materials, components, intermediate assemblies, end products, and lots of supplies.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering supplies under this contract and shall tender to the Government for acceptance only supplies that have been inspected in accordance with the inspection system and have been found by the Contractor to be in conformity with contract requirements. As part of the system, the Contractor shall prepare records evidencing all inspections made under the system and the outcome. These records shall be kept complete and made available to the Government during contract performance and for as long afterwards as the contract requires. The Government may perform reviews and evaluations as reasonably necessary to ascertain compliance with this paragraph. These reviews and evaluations shall be conducted in a manner that will not unduly delay the contract work. The right of review, whether exercised or not, does not relieve the Contractor of the obligations under the contract.

(c) The Government has the right to inspect and test all supplies called for by the contract, to the extent practicable, at all places and times, including the period of manufacture, and in any event before acceptance. The Government shall perform inspections and tests in a manner that will not unduly delay the work. The Government assumes no contractual obligation to perform any inspection and test for the benefit of the Contractor unless specifically set forth elsewhere in this contract.

(d) If the Government performs inspection or test on the premises of the Contractor or a subcontractor, the Contractor shall furnish, and shall require subcontractors to furnish, without additional charge, all reasonable facilities and assistance for the safe and convenient performance of these duties. Except as otherwise provided in the contract, the Government shall bear the expense of Government inspections or tests made at other than the Contractor's or subcontractor's premises; *provided*, that in case of rejection, the Government shall not be liable for any reduction in the value of inspection or test samples.

(e) (1) When supplies are not ready at the time specified by the Contractor for inspection or test, the Contracting Officer may charge to the Contractor the additional cost of inspection or test.

(2) The Contracting Officer may also charge the Contractor for any additional cost of inspection or test when prior rejection makes reinspection or retest necessary.

(f) The Government has the right either to reject or to require correction of nonconforming supplies. Supplies are nonconforming when they are defective in material or workmanship or are otherwise not in con-

formity with contract requirements. The Government may reject nonconforming supplies with or without disposition instructions.

(g) The Contractor shall remove supplies rejected or required to be corrected. However, the Contracting Officer may require or permit correction in place, promptly after notice, by and at the expense of the Contractor. The Contractor shall not tender for acceptance corrected or rejected supplies without disclosing the former rejection or requirement for correction, and, when required, shall disclose the corrective action taken.

(h) If the Contractor fails to promptly remove, replace, or correct rejected supplies that are required to be removed or to be replaced or corrected, the Government may either (1) by contract or otherwise, remove, replace, or correct the supplies and charge the cost to the Contractor or (2) terminate the contract for default. Unless the Contractor corrects or replaces the supplies within the delivery schedule, the Contracting Officer may require their delivery and make an equitable price reduction. Failure to agree to a price reduction shall be a dispute.

(i) (1) If this contract provides for the performance of Government quality assurance at source, and if requested by the Government, the Contractor shall furnish advance notification of the time (i) when Contractor inspection or tests will be performed in accordance with the terms and conditions of the contract and (ii) when the supplies will be ready for Government inspection.

(2) The Government request shall specify the period and method of the advance notification and the Government representative to whom it shall be furnished. Requests shall not require more than 2 workdays of advance notification if the Government representative is in residence in the Contractor's plant, nor more than 7 workdays in other instances.

(j) The Government shall accept or reject supplies as promptly as practicable after delivery, unless otherwise provided in the contract. Government failure to inspect and accept or reject the supplies shall not relieve the Contractor from responsibility, nor impose liability on the Government, for nonconforming supplies.

(k) Inspections and tests by the Government do not relieve the Contractor of responsibility for defects or other failures to meet contract requirements discovered before acceptance. Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract.

(l) If acceptance is not conclusive for any of the reasons in paragraph (f) hereof, the Government, in addition to any other rights and remedies provided by law, or under other provisions of this contract, shall have the right to require the Contractor (1) at no increase in contract price, to correct or replace the defective or nonconforming supplies at the original point of delivery or at the Contractor's plant at the Contracting Officer's election, and in accordance with a reasonable delivery schedule as may be agreed upon between the Contractor and the Contracting Officer; *provided*, that the Contracting Officer may require a reduction in contract price if the Contractor fails to meet such delivery schedule, or (2) within a reasonable time after receipt by the Contractor of notice of defects or nonconformance, to repay such portion of the contract as is equitable under the circumstances if the Contracting Officer elects not to require correction or replacement. When supplies are returned to the Contractor, the Contractor shall bear the transportation cost from the original point of delivery to the Contractor's plant and return to the original point when that point is not the Contractor's plant. If the Contractor fails to perform or act as required in (1) or (2) above and does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure, the Government shall have the right to contract or otherwise to replace or correct such supplies and charge to the Contractor the cost occasioned the Government thereby.

(End of clause)
(R 7-103.5(a) 1958 MAY)
(R 7-103.5(d) 1977 SEP)
(R 1-7.102-5)

*Alternate I* (APR 1984). If a fixed-price incentive contract is contemplated, substitute paragraphs (g), (h), and (l) below for paragraphs (g), (h), and (l) of the basic clause.

(g) The Contractor shall remove supplies rejected or required to be corrected. However, the Contracting Officer may require or permit correction in place, promptly after notice. The Contractor shall not tender for acceptance corrected or rejected supplies without disclosing the former rejection or requirement for correction, and when required shall disclose the corrective action taken. Cost of removal, replacement, or correction shall be considered a cost incurred, or to be incurred, in the total final negotiated cost fixed under the incentive price revision clause. However, replacements or corrections by the Contractor after the establishment of the total final price shall be at no increase in the total final price.

(h) If the Contractor fails to promptly remove, replace, or correct rejected supplies that are required to be removed or to be replaced or corrected, the Government may either (1) by contract or otherwise, remove, replace, or correct the supplies and equitably reduce the target price or, if established, the total final price or (2) may terminate the contract for default. Unless the Contractor corrects or replaces the nonconforming supplies within the delivery schedule, the Contracting Officer may require their delivery and equitably reduce any target price or, if it is established, the

total final contract price. Failure to agree upon an equitable price reduction shall be a dispute.

(l) If acceptance is not conclusive for any of the reasons in paragraph (f) hereof, the Government, in addition to any other rights and remedies provided by law, or under other provisions of this contract, shall have the right to require the Contractor (1) at no increase in any target price or, if it is established, the total final price of this contract, to correct or replace the defective or nonconforming supplies at the original point of delivery or at the Contractor's plant at the Contracting Officer's election, and in accordance with a reasonable delivery schedule as may be agreed upon between the Contractor and the Contracting Officer; *provided*, that the Contracting Officer may require a reduction in any target price, or, if it is established, the total final price of this contract, if the Contractor fails to meet such delivery schedule; or (2) within a reasonable time after receipt by the Contractor of notice of defects or nonconformance, to repay such portion of the total final price as is equitable under the circumstances if the Contracting Officer elects not to require correction or replacement. When supplies are returned to the Contractor, the Contractor shall bear the transportation costs from the original point of delivery to the Contractor's plant and return to the original point when that point is not the Contractor's plant. If the Contractor fails to perform or act as required in (1) or (2) above and does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure, the Government shall have the right by contract or otherwise to replace or correct such supplies and equitably reduce any target price or, if it is established, the total final price of this contract.

(R 7-103.5(b) 1962 NOV)

*Alternate II* (APR 1984). If a fixed-ceiling-price contract with retroactive price redetermination is contemplated, substitute paragraphs (g), (h), and (l) below for paragraphs (g), (h), and (l) of the basic clause:

(g) The Contractor shall remove supplies rejected or required to be corrected. However, the Contracting Officer may require or permit correction in place, promptly after notice. The Contractor shall not tender for acceptance corrected or rejected supplies without disclosing the former rejection or requirement for correction, and when required shall disclose the corrective action taken. Cost of removal, replacement, or correction shall be considered a cost incurred, or to be incurred, when redetermining the prices under the price redetermination clause. However, replacements or corrections by the Contractor after the establishment of the redetermined prices shall be at no increase in the redetermined price.

(h) If the Contractor fails to promptly remove, replace, or correct rejected supplies that are required to be removed or to be replaced or corrected, the Government may either (1) by contract or otherwise, remove, replace, or correct the supplies and equitably reduce the initial contract prices or, if established, the redetermined contract prices or (2) terminate the contract for default. Unless the Contractor corrects or replaces the nonconforming supplies within the delivery schedule, the Contracting Officer may require their delivery and equitably reduce the initial contract price or, if it is established, the redetermined contract prices. Failure to agree upon an equitable price reduction shall be a dispute.

(l) If acceptance is not conclusive for any of the reasons in paragraph (f) hereof, the Government, in addition to any other rights and remedies provided by law, or under other provisions of this contract, shall have the right to require the Contractor (1) at no increase in the initial contract prices, or, if it is established, the redetermined prices of this contract, to correct or replace the defective or nonconforming supplies at the original point of delivery or at the Contractor's plant at the Contracting Officer's election, and in accordance with a reasonable delivery schedule as may be agreed upon between the Contractor and the Contracting Officer; *provided*, that the Contracting Officer may require a reduction in the initial contract prices, or, if it is established, the redetermined prices of this contract, if the Contractor fails to meet such delivery schedule; or (2) within a reasonable time after receipt by the Contractor of notice of defects or nonconformance, to repay such portion of the initial contract prices, or, if it is established, the redetermined prices of this contract, as is equitable under the circumstances if the Contracting Officer elects not to require correction or replacement. When supplies are returned to the Contractor, the Contractor shall bear the transportation costs from the original point of delivery to the Contractor's plant and return to the original point when that point is not the Contractor's plant. If the Contractor fails to perform or act as required in (1) or (2) above and does not cure such failure within a period of 10 days (or such longer period as the Contracting Officer may authorize in writing) after receipt of notice from the Contracting Officer specifying such failure, the Government shall have the right by contract or otherwise to replace or correct such supplies and equitably reduce the initial contract prices, or, if it is established, the redetermined prices of this contract.

(R 7-103.5(c) 1962 NOV)

**52.246-3 Inspection of Supplies—Cost-Reimbursement.**

As prescribed in 46.303, insert the following clause in solicitations and contracts for supplies, or services that involve the furnishing of supplies, when a cost-reimbursement contract is contemplated:

INSPECTION OF SUPPLIES—COST-REIMBURSEMENT (APR 1984)

(a) Definitions.

"Contractor's managerial personnel," as used in this clause, means any of the Contractor's directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of—

(1) All or substantially all of the Contractor's business;

(2) All or substantially all of the Contractor's operation at a plant or separate location at which the contract is being performed; or

(3) A separate and complete major industrial operation connected with performing this contract.

"Supplies," as used in this clause, includes but is not limited to raw materials, components, intermediate assemblies, end products, lots of supplies, and, when the contract does not include the Warranty of Data clause, data.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the supplies, fabricating methods, and special tooling under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Government during contract performance and for as long afterwards as the contract requires.

(c) The Government has the right to inspect and test the contract supplies, to the extent practicable at all places and times, including the period of manufacture, and in any event before acceptance. The Government may also inspect the plant or plants of the Contractor or any subcontractor engaged in the contract performance. The Government shall perform inspections and tests in a manner that will not unduly delay the work.

(d) If the Government performs inspection or test on the premises of the Contractor or a subcontractor, the Contractor shall furnish and shall require subcontractors to furnish all reasonable facilities and assistance for the safe and convenient performance of these duties.

(e) Unless otherwise specified in the contract, the Government shall accept supplies as promptly as practicable after delivery, and supplies shall be deemed accepted 60 days after delivery, unless accepted earlier.

(f) At any time during contract performance, but no later than 6 months (or such other time as may be specified in the contract) after acceptance of the supplies to be delivered under the contract, the Government may require the Contractor to replace or correct any supplies that are nonconforming at time of delivery. Supplies are nonconforming when they are defective in material or workmanship or are otherwise not in conformity with contract requirements. Except as otherwise provided in paragraph (h) below, the cost of replacement or correction shall be included in allowable cost, determined as provided in the Allowable Cost and Payment clause, but no additional fee shall be paid. The Contractor shall not tender for acceptance supplies required to be replaced or corrected without disclosing the former requirement for replacement or correction, and, when required, shall disclose the corrective action taken.

(g) (1) If the Contractor fails to proceed with reasonable promptness to perform required replacement or correction, the Government may—

(i) By contract or otherwise, perform the replacement or correction and charge to the Contractor any increased cost or make an equitable reduction in any fixed fee paid or payable under the contract;

(ii) Require delivery of undelivered supplies at an equitable reduction in any fixed fee paid or payable under the contract; or

(iii) Terminate the contract for default.

(2) Failure to agree on the amount of increased cost to be charged to the Contractor or to the reduction in the fixed fee shall be a dispute.

(h) Notwithstanding paragraphs (f) and (g) above, the Government may at any time require the Contractor to correct or replace, without cost to the Government, nonconforming supplies, if the nonconformances are due to (1) fraud, lack of good faith, or willful misconduct on the part of the Contractor's managerial personnel or (2) the conduct of one or more of the Contractor's employees selected or retained by the Contractor after any of the Contractor's managerial personnel has reasonable grounds to believe that the employee is habitually careless or unqualified.

(i) This clause applies in the same manner to corrected or replacement supplies as to supplies originally delivered.

(j) The Contractor shall have no obligation or liability under this contract to replace supplies that were nonconforming at the time of delivery, except as provided in this clause or as may be otherwise provided in the contract.

(k) Except as otherwise specified in the contract, the Contractor's obligation to correct or replace Government-furnished property shall be governed by the clause pertaining to Government property.

(End of clause)

(R 7-203.5(a) 1974 OCT)

(R 1-7.202-5)

**52.246-4 Inspection of Services—Fixed-Price.**

As prescribed in 46.304, insert the following clause in solicitations and contracts for services, or supplies that involve the furnishing of services, when a fixed-price contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The clause may be inserted in such solicitations and contracts when the contract amount is expected to be within the small purchase limitation, and inclusion of the clause is in the Government's interest.

INSPECTION OF SERVICES—FIXED-PRICE

(APR 1984)

(a) Definitions. "Services," as used in this clause, includes services performed, workmanship, and material furnished or utilized in the performance of services.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the services under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Government during contract performance and for as long afterwards as the contract requires.

(c) The Government has the right to inspect and test all services called for by the contract, to the extent practicable at all times and places during the term of the contract. The Government shall perform inspections and tests in a manner that will not unduly delay the work.

(d) If any of the services do not conform with contract requirements, the Government may require the Contractor to perform the services again in conformity with contract requirements, at no increase in contract amount. When the defects in services cannot be corrected by reperformance, the Government may (1) require the Contractor to take necessary action to ensure that future performance conforms to contract requirements and (2) reduce the contract price to reflect the reduced value of the services performed.

(e) If the Contractor fails to promptly perform the services again or to take the necessary action to ensure future performance in conformity with contract requirements, the Government may (1) by contract or otherwise, perform the services and charge to the Contractor any cost incurred by the Government that is directly related to the performance of such service or (2) terminate the contract for default.

(End of clause)

(R 7-1902.4 1971 NOV)

**52.246-5 Inspection of Services—Cost-Reimbursement.**

As prescribed in 46.305, insert the following clause in solicitations and contracts for services, or supplies that involve the furnishing of services, when a cost-reimbursement contract is contemplated:

INSPECTION OF SERVICES—COST-REIMBURSEMENT (APR 1984)

(a) Definition. "Services," as used in this clause, includes services performed, workmanship, and material furnished or used in performing services.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the services under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Government during contract performance and for as long afterwards as the contract requires.

(c) The Government has the right to inspect and test all services called for by the contract, to the extent practicable at all places and times during the term of the contract. The Government shall perform inspections and tests in a manner that will not unduly delay the work.

(d) If any of the services performed do not conform with contract requirements, the Government may require the Contractor to perform the services again in conformity with contract requirements, for no additional fee. When the defects in services cannot be corrected by reperformance, the Government may (1) require the Contractor to take necessary action to ensure that future performance conforms to contract requirements and (2) reduce any fee payable under the contract to reflect the reduced value of the services performed.

(e) If the Contractor fails to promptly perform the services again or take the action necessary to ensure future performance in conformity with contract requirements, the Government may (1) by contract or otherwise, perform the services and reduce any fee payable by an amount that is equitable under the circumstances or (2) terminate the contract for default.

(End of clause)

(R 7-1909.5 1971 NOV)

**52.246-6 Inspection—Time-and-Material and Labor-Hour.**

As prescribed in 46.306, insert the following clause in solicitations and contracts when a time-and-material contract or a labor-hour contract is contemplated:

INSPECTION—TIME-AND-MATERIAL AND LABOR-HOUR (APR 1984)

(a) Definitions. "Contractor's managerial personnel," as used in this clause, means any of the Contractor's directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of—

(1) All or substantially all of the Contractor's business;

(2) All or substantially all of the Contractor's operation at any one plant or separate location at which the contract is being performed; or

(3) A separate and complete major industrial operation connected with the performance of this contract.

"Materials," as used in this clause, includes data when the contract does not include the Warranty of Data clause.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the material, fabricating methods, work, and services under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Government during contract performance and for as long afterwards as the contract requires.

(c) The Government has the right to inspect and test all materials furnished and services performed under this contract, to the extent practicable at all places and times, including the period of performance, and in any event before acceptance. The Government may also

inspect the plant or plants of the Contractor or any subcontractor engaged in contract performance. The Government shall perform inspections and tests in a manner that will not unduly delay the work.

(d) If the Government performs inspection or test on the premises of the Contractor or a subcontractor, the Contractor shall furnish and shall require subcontractors to furnish all reasonable facilities and assistance for the safe and convenient performance of these duties.

(e) Unless otherwise specified in the contract, the Government shall accept or reject services and materials at the place of delivery as promptly as practicable after delivery, and they shall be presumed accepted 60 days after the date of delivery, unless accepted earlier.

(f) At any time during contract performance, but not later than 6 months (or such other time as may be specified in the contract) after acceptance of the services or materials last delivered under this contract, the Government may require the Contractor to replace or correct services or materials that at time of delivery failed to meet contract requirements. Except as otherwise specified in paragraph (h) below, the cost of replacement or correction shall be determined under the Allowable Cost and Payment clause, but the "hourly rate" for labor hours incurred in the replacement or correction shall be reduced to exclude that portion of the rate attributable to profit. The Contractor shall not tender for acceptance materials and services required to be replaced or corrected without disclosing the former requirement for replacement or correction, and, when required, shall disclose the corrective action taken.

(g) (1) If the Contractor fails to proceed with reasonable promptness to perform required replacement or correction, and if the replacement or correction can be performed within the ceiling price (or the ceiling price as increased by the Government), the Government may—

(i) By contract or otherwise, perform the replacement or correction, charge to the Contractor any increased cost, or deduct such increased cost from any amounts paid or due under this contract; or

(ii) Terminate this contract for default.

(2) Failure to agree to the amount of increased cost to be charged to the Contractor shall be a dispute.

(h) Notwithstanding paragraphs (f) and (g) above, the Government may at any time require the Contractor to remedy by correction or replacement, without cost to the Government, any failure by the Contractor to comply with the requirements of this contract, if the failure is due to (1) fraud, lack of good faith, or willful misconduct on the part of the Contractor's managerial personnel or (2) the conduct of one or more of the Contractor's employees selected or retained by the Contractor after any of the Contractor's managerial personnel has reasonable grounds to believe that the employee is habitually careless or unqualified.

(i) This clause applies in the same manner and to the same extent to corrected or replacement materials or services as to materials and services originally delivered under this contract.

(j) The Contractor has no obligation or liability under this contract to correct or replace materials and services that at time of delivery do not meet contract requirements, except as provided in this clause or as may be otherwise specified in the contract.

(k) Unless otherwise specified in the contract, the Contractor's obligation to correct or replace Government-furnished property shall be governed by the clause pertaining to Government property.

(End of clause)

(R 7-901.21 1974 OCT)

*Alternate I* (APR 1984). If Government inspection and acceptance are to be performed at the contractor's plant, paragraph (e) below may be substituted for paragraph (e) of the basic clause:

(e) The Government shall inspect for acceptance all items (other than aircraft to be flown away, if any) to be furnished under this contract at the Contractor's plant or plants specified in the contract, or at any other plant or plants approved for such purpose in writing by the Contracting Officer. The Contractor shall inform the contract administration office or Contracting Officer when the work is ready for inspection. The Government reserves the right to charge to the Contractor any additional cost of Government inspection and test when items are not ready at the time for which inspection and test is requested by the Contractor.

(R 7-901.21 1974 OCT)

*Alternate II* (APR 1984). If a labor-hour contract is contemplated, and if no specific reimbursement for materials furnished is intended, the contracting officer may add the following paragraph (l) to the basic clause:

(l) The terms of this clause that govern reimbursement for materials furnished are considered to have been deleted.

**52.246-7 Inspection of Research and Development—Fixed-Price.**

As prescribed in 46.307(a), insert the following clause in solicitations and contracts for research and development when (a) the primary objective of the contract is the delivery of end items other than designs, drawings, or reports, (b) a fixed-price contract is contemplated, and (c) the contract amount is expected to exceed the small purchase limitation; unless use of the clause is impractical and the clause prescribed in 46.309 is considered to be more appropriate. The following clause may be used in such solicitations and contracts when the contract amount is expected to be within the small purchase limitation and its use is in the Government's interest.

INSPECTION OF RESEARCH AND

DEVELOPMENT—FIXED-PRICE (APR 1984)

(a) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the work under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Government during contract performance and for as long afterwards as the contract requires.

(b) The Government has the right to inspect and test all work called for by the contract, to the extent practicable at all places and times, including the period of performance, and in any event before acceptance. The Government may also inspect the premises of the Contractor or any subcontractor engaged in contract performance. The Government shall perform inspections and tests in a manner that will not unduly delay the work.

(c) If the Government performs any inspection or test on the premises of the Contractor or a subcontractor, the Contractor shall furnish and shall require subcontractors to furnish, without additional charge, all reasonable facilities and assistance for the safe and convenient performance of these duties. Except as otherwise provided in the contract, the Government shall bear the expense of Government inspections or tests made at other than the Contractor's or subcontractor's premises.

(d) The Government shall accept or reject the work as promptly as practicable after delivery, unless otherwise specified in the contract. Government failure to inspect and accept or reject the work shall not relieve the Contractor from responsibility, nor impose liability on the Government, for nonconforming work. Work is nonconforming when it is defective in material or workmanship or is otherwise not in conformity with contract requirements.

(e) The Government has the right to reject nonconforming work. If the Contractor fails or is unable to correct or to replace nonconforming work within the delivery schedule (or such later time as the Contracting Officer may authorize), the Contracting Officer may accept the work and make an equitable price reduction. Failure to agree on a price reduction shall be a dispute.

(f) Inspection and test by the Government does not relieve the Contractor from responsibility for defects or other failures to meet the contract requirements that may be discovered before acceptance. Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise specified in the contract. If acceptance is not conclusive for any of these causes, the Government, in addition to any other rights and remedies provided by law, or under other provisions of this contract, shall have the right to require the Contractor (1) at no increase in contract price, to correct or replace the defective or nonconforming supplies (work) at the original point of delivery or at the Contractor's plant at the Contracting Officer's election, and in accordance with a reasonable delivery schedule as may be agreed upon between the Contractor and the Contracting Officer; *provided*, the Contracting Officer may require a reduction in contract price if the Contractor fails to meet such delivery schedule; or (2) within a reasonable time after the Contractor's receipt of notice of defects or nonconformance, to repayment of such portion of the contract price as is equitable under the circumstances if the Government elects not to require correction or replacement. When supplies (work) are (is) returned to the Contractor, the Contractor shall bear transportation costs from the original point of delivery to the Contractor's plant and return to the original point of delivery when that point is not the Contractor's plant.

(End of clause)

(R 7-302.4(a) 1976 JUL)

(R 1-7.302-4(a))

**52.246-8 Inspection of Research and Development—Cost-Reimbursement.**

As prescribed in 46.308, insert the following clause in solicitations and contracts for research and development when (a) the primary objective is the delivery of end items other than designs, drawings, or reports, and (b) a cost-reimbursement contract is contemplated; unless use of the clause is impractical and the clause prescribed in 46.309 is considered to be more appropriate:

INSPECTION OF RESEARCH AND DEVELOPMENT— COST-REIMBURSEMENT (APR 1984)

(a) Definitions. "Contractor's managerial personnel," as used in this clause, means the Contractor's directors, officers, managers, superintendents, or equivalent representatives who have supervision or direction of—

(1) All or substantially all of the Contractor's business;

(2) All or substantially all of the Contractor's operation at any one plant or separate location at which the contract is being performed; or

(3) A separate and complete major industrial operation connected with performing this contract.

"Work," as used in this clause, includes data when the contract does not include the Warranty of Data clause.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the work under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Government during contract performance and for as long afterwards as the contract requires.

(c) The Government has the right to inspect and test all work called for by the contract, to the extent practicable at all places and times, including the period of performance, and in any event before acceptance. The Government may also inspect the plant or plants of the Contractor or its subcontractors engaged in the contract performance. The Government shall perform in-

spections and tests in a manner that will not unduly delay the work.

(d) If the Government performs any inspection or test on the premises of the Contractor or a subcontractor, the Contractor shall furnish and shall require subcontractors to furnish all reasonable facilities and assistance for the safe and convenient performance of these duties.

(e) Unless otherwise provided in the contract, the Government shall accept work as promptly as practicable after delivery, and work shall be deemed accepted 90 days after delivery, unless accepted earlier.

(f) At any time during contract performance, but no later than 6 months (or such other time as may be specified in the contract) after acceptance of all of the end items (other than designs, drawings, or reports) to be delivered under the contract, the Government may require the Contractor to replace or correct work not meeting contract requirements. Time devoted to the replacement or correction of such work shall not be included in the computation of the above time period. Except as otherwise provided in paragraph (h) below, the cost of replacement or correction shall be determined as specified in the Allowable Cost and Payment clause, but no additional fee shall be paid. The Contractor shall not tender for acceptance work required to be replaced or corrected without disclosing the former requirement for replacement or correction, and, when required, shall disclose the corrective action taken.

(g) (1) If the Contractor fails to proceed with reasonable promptness to perform required replacement or correction, the Government may—

(i) By contract or otherwise, perform the replacement or correction, charge to the Contractor any increased cost, or make an equitable reduction in any fixed fee paid or payable under the contract;

(ii) Require delivery of any undelivered articles and shall have the right to make an equitable reduction in any fixed fee paid or payable under the contract; or

(iii) Terminate the contract for default.

(2) Failure to agree on the amount of increased cost to be charged the Contractor or to the reduction in fixed fee shall be a dispute.

(h) Notwithstanding paragraphs (f) and (g) above, the Government may at any time require the Contractor to remedy by correction or replacement, without cost to the Government, any failure by the Contractor to comply with the requirements of this contract, if the failure is due to (1) fraud, lack of good faith, or willful misconduct on the part of the Contractor's managerial personnel or (2) the conduct of one or more of the Contractor's employees selected or retained by the Contractor after any of the Contractor's managerial personnel has reasonable grounds to believe that the employee is habitually careless or unqualified.

(i) This clause shall apply in the same manner to a corrected or replacement end item or components as to work originally delivered.

(j) The Contractor has no obligation or liability under the contract to correct or replace articles not meeting contract requirements at time of delivery, except as provided in this clause or as may otherwise be specified in the contract.

(k) Unless otherwise provided in the contract, the Contractor's obligations to correct or replace Government-furnished property shall be governed by the clause pertaining to Government property.

(End of clause)
(R 7-402.5(a)(1) 1974 OCT)
(R 1-7-402.5(a))

*Alternate I* (APR 1984). If it is contemplated that the contract will be on a no-fee basis, substitute paragraphs (f) and (g) below for paragraphs (f) and (g) of the basic clause.

(f) At any time during contract performance, but not later than 6 months (or such other time as may be specified in the contract) after acceptance of all of the end items (other than designs, drawings, or reports) to be delivered under the contract, the Government may require the Contractor to correct or replace work not meeting contract requirements. Time devoted to the correction or replacement of such work shall not be included in the computation of the above time period. Except as otherwise provided in paragraph (g) below, the allowability of the cost of any such replacement or correction shall be determined as specified in the Allowable Cost and Payment clause. The Contractor shall not tender for acceptance corrected work without disclosing the former requirement for correction, and, when required, shall disclose the corrective action taken.

(g) If the Contractor fails to proceed with reasonable promptness to perform required replacement or correction, the Government may (1) by contract or otherwise, perform the replacement or correction and charge to the Contractor any increased cost, (2) require delivery of any undelivered articles, or (3) terminate the contract for default. Failure to agree on the amount of increased cost to be charged to the Contractor shall be a dispute.

(R 7-402.5(a)(3) 1974 OCT)
(R 1-7-402.5(b))

**52.246-9 Inspection of Research and Development (Short Form).**

As prescribed in 46.309, insert the following clause:

INSPECTION OF RESEARCH AND DEVELOPMENT (SHORT FORM) (APR 1984)

The Government has the right to inspect and evaluate the work performed or being performed under the contract, and the premises where the work is being performed, at all reasonable times and in a manner that will not unduly delay the work. If the Government performs inspection or evaluation on the premises of the Contractor or a subcontractor, the Contractor shall furnish and shall require subcontractors to furnish all reasonable facilities and assistance for the safe and convenient performance of these duties.

(End of clause)

(R 7-402.5(b) 1959 FEB)
(R 7-302.4(b) 1959 JUN)
(R 1-7.302-4(b))
(R 1-7.402-5(c))

**52.246-10 Inspection of Facilities.**

As precribed in 46.310, insert the following clause in solicitations and contracts when a facilities contract is contemplated:

INSPECTION OF FACILITIES (APR 1984)

(a) Definition. "Contractor's managerial personnel," as used in this clause, is defined in the Liability for the Facilities clause of this contract.

(b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the facilities and work called for by this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Government during contract performance and for as long afterwards as the contract requires.

(c) The Government has the right to inspect and test the facilities and work called for by the contract, to the extent practicable at all places and times, including the period of manufacture. The Government may also inspect the facilities and work at the plant or plants of the Contractor or its subcontractors engaged in the performance of the contract. The Government shall perform inspections and tests in a manner that will not unduly delay the work to be performed by the Contractor under this contract or any related contract.

(d) If the Government performs inspection or test on the premises of the Contractor or a subcontractor, the Contractor shall furnish and shall require subcontractors to furnish all reasonable facilities and assistance for the safe and convenient performance of these duties.

(e) The Contracting Officer may, at any time, require the Contractor to correct or replace facilities or work that is defective or does not conform to contract requirements. Except as provided in paragraph (f) below, corrections and replacements shall be at Government expense if, under the terms of this contract, the facilities or work corrected or replaced were initially furnished, or required to be performed at Government expense.

(f) The Contracting Officer may, at any time, require the Contractor to correct or replace facilities or work that is defective or does not conform to contract requirements, without cost to the Government under this contract or any related contract or subcontract, if the defects or failures are due to fraud, lack of good faith, or willful misconduct on the part of the Contractor's managerial personnel; or to the conduct of one or more of the Contractor's employees selected or retained by the Contractor after any of the Contractor's managerial personnel has reasonable grounds to believe that the employee is habitually careless or unqualified.

(g) Corrected or replacement facilities or work shall be subject to this clause in the same manner as facilities or work originally completed under the contract.

(End of clause)

(R 7-702.6 1964 SEP)

**52.246-11 Higher-Level Contract Quality Requirement (Government Specification).**

As prescribed in 46.311, insert the following clause in solicitations and contracts when the inclusion of a higher-level contract quality requirement is appropriate (see 46.202-3):

HIGHER-LEVEL CONTRACT QUALITY REQUIREMENT (GOVERNMENT SPECIFICATION)(APR 1984)

(a) Definition. "Contract date," as used in this clause, means the date set for bid opening or, if this is a negotiated contract or a modification, the effective date of this contract or modification.

(b) The Contractor shall comply with the specification titled ..... [*Contracting Officer insert the title and number of the specification*], in effect on the contract date, which is hereby incorporated into this contract.

(End of clause)

(R 7-104.28 1967 AUG)
(R 7-104.33 1967 AUG)
(R 7-703.44 1967 AUG)
(R 7-203.5(b) 1967 AUG)
(R 7-302.4(c) 1967 AUG)
(R 7-402.5(c) 1967 AUG)
(R 7-602.10(b) 1967 AUG
(R 7-901.25 1967 AUG)

**52.246-12 Inspection of Construction.**

As prescribed in 46.312, insert the following clause in solicitations and contracts for construction when a fixed-price contract is contemplated and the contract amount is expected to exceed the small purchase limitation. The clause may be used in such solicitations and contracts when the contract amount is expected to be within the small purchase limitation and its use is in the Government's interest.

INSPECTION OF CONSTRUCTION (JUL 1986)

# FINANCIAL MONITORING

# OR....

# THE PROJECT OFFICER'S LAMENT ---

## "WHERE, OH WHERE, DOES THE MONEY GO?"

# PROGRESS REPORT OUTLINE

**EPA CONTRACT # 00-00-0000**
**Work Assignment #00**

## FINANCIAL

I. Workhours Proposed Vs. Actual Vs. Estimated to Completion

II. Funds Budgeted Vs. Actual (Period Vs. Cumulative) Vs. Estimated To Completion (By Task) And Variance

III. Average Cost Per Hour

IV. Summary of Travel (Budgeted Vs. Actual), Description of Trips

V. Summary of ODC's (Budgeted Vs. Actual), Description & Breakdown

VI. Subcontract Costs (By Subcontractor--Budgeted Vs. Actual)

# COMPARING ESTIMATED VS. ACTUAL LABOR HOUR COSTS

## Estimated Average Cost Per Direct Labor Hour

| | |
|---|---|
| Estimated Cost Of Contract: | $750,000 |
| Level Of Effort Available: | 20,000 hours |
| Average Cost Per Labor Hour: | $ 37.50 |

## Incurred Average Cost Per Direct Labor Hour

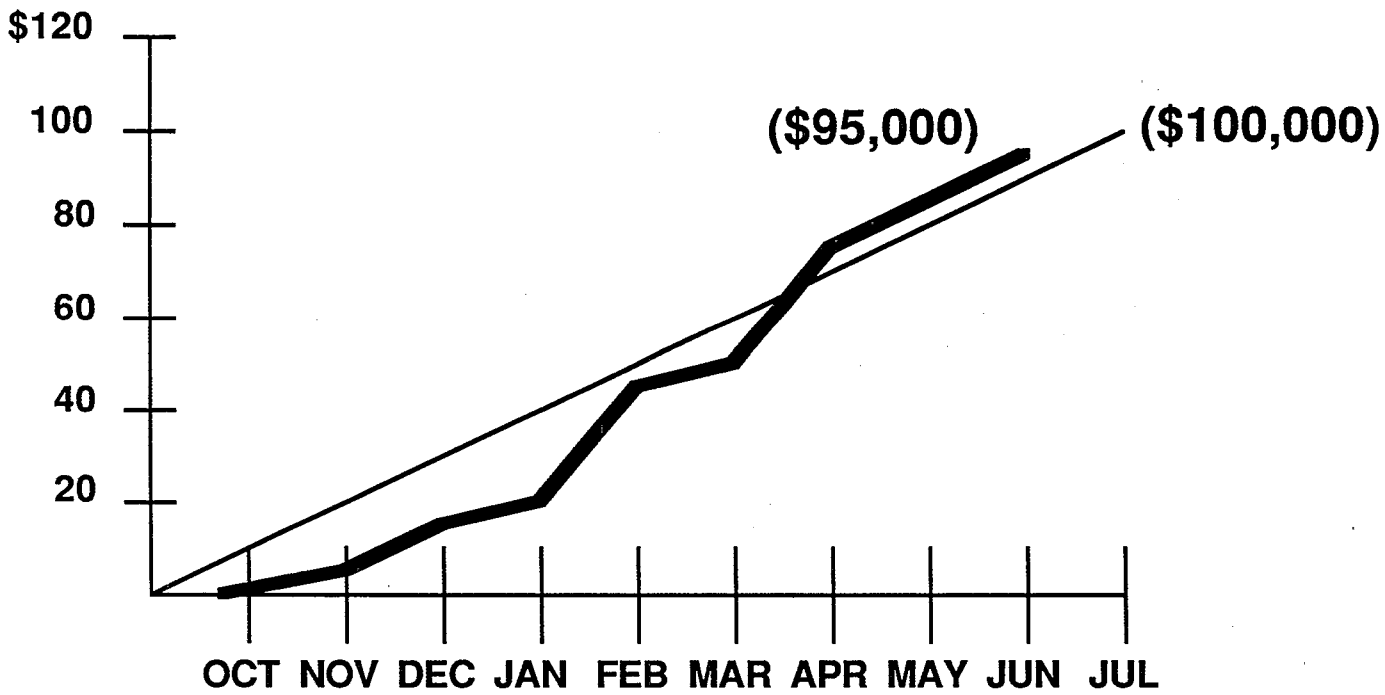
| | |
|---|---|
| Cost Incurred: | $425,000 |
| Level Of Effort Expended: | 10,000 hours |
| Average Cost Per Labor Hour: | $42.50 |

# SAMPLE

## MONITORING PERCENTAGE OF COMPLETION
(Completion Form Contract)

## MONTHLY FINANCIAL REPORT FOR THE PERIOD ENDING JUNE 30

**Percentage Of Work Completed = 90%**
**Cost to Complete = $10,000**




= Projected expenditures

= Actual expenditures

# SAMPLE

**MEMORANDUM**

**SUBJECT:** Payment under Contract No. _____

**FROM:** _____, Project Officer

**TO:** _____, Work Assignment Manager

You have been designated as a Work Assignment Manager for at least one of the work assignments issued under subject contract. As such, you are accountable and responsible for the monitoring of the contractor's performance, within the allotted budget and time frame. Accordingly, I look to you to provide me with a monthly Work Assignment Notification so that I have a basis to certify the contractor's monthly invoices. To this end, please forward to me by the 1st of EACH MONTH a completed Work Assignment Status Notification, a copy of which is attached hereto. A separate form should be submitted for each work assignment which you manage.

Thank you for your cooperation.

# SAMPLE

Work Assignment Status Notification
Contract No. _____
Invoice No. _____

_____ I have reviewed the invoice costs and recommend payment in full.

_____ I have reviewed the invoice costs and recommend suspension of _____ amount for the reasons set forth below.

# SAMPLE

SUBJECT: Contract Invoice#_____ For Delivery Order# _____

TO: _____, Delivery Order Project Officer

FROM: _____, Project Officer, PM-213
382-xxxx

Enclosed is a copy of an invoice for services performed under your Delivery Order on Contract Number _____. Payment is due promptly.

I need your approval WITHIN ONE WEEK of the date above in order to pay the invoice. Please indicate your approval by signing below, or by calling me at 382-xxxx.

Thank you.

---

Delivery Order Project Officer:

Charges reflected in this invoice are appropriate for payment and are mathematically correct.

Signed: _____
DOPO

Date: _____

# VOUCHER PAYMENTS ON MULTIPLE ACCOUNT FUNDED CONTRACTS

**Whenever A Contract Has Multiple Account Funding, The Project Officer Must Provide On Every Certification For Payment The Accounts And Amounts To Be Charged.**

US Environmental Protection Agency
Washington, DC 20460

EPA

# Project Officer Invoice Approval

**Instructions**

1. Complete and return to the servicing finance office indicated below. This form is required for every invoice. **Submit only one invoice per form.**
2. Return the original copy; retain the yellow copy for your files.
3. Send either a completed form or an explanation for disapproval within **five calendar days** of your receipt of invoice to assure responsive payment processing to the contractor. If you cannot approve payment, or if you approve partial payment, return the invoice with a memorandum of explanation.
4. **Dollar amounts distributed by account number must equal total amount to be paid.**
5. You may attach invoices with specific account charging data instead of completing Part II of this form.

**Part I. Identification**

| Servicing Finance Office: | Contractor | |
|---|---|---|
| US Environmental Protection Agency<br>Financial Management Division (MD-32)<br>Customer Assistance Unit<br>Research Triangle Park, NC 27711<br>Phone: Commercial (919) 541-1148; FTS 629-1148 | Contract Number | |
| | Invoice Number | Date of Invoice |

**Part II. Account Charging Instructions**

| WA No. and/or DCN *(Optional)* | Account Number | Dollar Amount |
|---|---|---|
| | | |
| | | |
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| | | |
| | | |

**Total Amount To Be Paid** ☐ as invoiced ☐ partial payment $

**Incomplete and inaccurate data on this form will delay payment of the invoice.**

**Part III. Approval**

I have determined that the above cited contract has commenced and the payment requested is commensurate with the contractor's level of progress on the contract.

☐ Goods or services have been delivered in full as requested by the contract to support this payment.

☐ Sufficient progress has been made by the contractor to support this progress payment as authorized by the contract.

# Payment Document Requires Immediate Action

| Project Officer's Name *(Type or print legibly)* | Project Officer's Signature | Date |
|---|---|---|
| | | |
| Pr[illegible] and Mail Code | Office Telephone | E-Mail ID Number |
| | | |

11-8

332

EPA Form 2550-19 (Rev. 5-86) Previous editions are obsolete.

SERVICING FINANCE OFFICE COPY

SAMPLE

# TRACKING SYSTEM FOR MULTIPLE ACCOUNT NUMBERS

| VOUCHER # | BREAKDOWN | ACCOUNT NUMBERS A | B | C | D | TOTAL |
|---|---|---|---|---|---|---|
| | | 100,000 | 30,000 | 25,000 | 645,000 | 800,000 |
| #1 | COST | 5,000 | 985 | 0 | 1,250 | 7,235 |
| | FEE | 400 | 79 | 0 | 100 | 579 |
| | | 94,600 | 28,936 | 25,000 | 64,300 | 792,186 |
| #2 | COST | 800 | 600 | 1,000 | 4,700 | 7,100 |
| | FEE | 64 | 48 | 80 | 376 | 568 |
| | | 93,736 | 28,288 | 23,920 | 641,547 | 784,518 |
| #3 | COST | | | | | |
| | FEE | | | | | |
| | | | | | | |
| #4 | COST | | | | | |
| | FEE | | | | | |

Standard Form 1034–A
September 1973
4 Treasury FRM 2000

# PUBLIC VOUCHER FOR PURCHASES AND SERVICES OTHER THAN PERSONAL

VOUCHER NO.

U.S. DEPARTMENT, BUREAU, OR ESTABLISHMENT AND LOCATION

DATE VOUCHER PREPARED

SCHEDULE NO.

CONTRACT NUMBER AND DATE

PAID BY

REQUISITION NUMBER AND DATE

PAYEE'S NAME AND ADDRESS

DATE INVOICE RECEIVED

DISCOUNT TERMS

PAYEE'S ACCOUNT NUMBER

SHIPPED FROM | TO | WEIGHT

GOVERNMENT B/L NUMBER

| NUMBER AND DATE OF ORDER | DATE OF DELIVERY OR SERVICE | ARTICLES OR SERVICES (*Enter description, item number of contract or Federal supply schedule, and other information deemed necessary*) | QUANTITY | UNIT PRICE COST | UNIT PRICE PER | AMOUNT |
|---|---|---|---|---|---|---|
| | | | | | | |

(Use continuation sheet(s) if necessary) **(Payee must NOT use the space below)** **TOTAL**

PAYMENT:
- ☐ COMPLETE
- ☐ PARTIAL
- ☐ FINAL
- ☐ PROGRESS
- ☐ ADVANCE

DIFFERENCES

Amount verified; correct for

(*Signature or initials*)

# MEMORANDUM

ACCOUNTING CLASSIFICATION

PAID BY

CHECK NUMBER ON TREASURER OF THE UNITED STATES

CHECK NUMBER ON (*Name of bank*)

CASH $

DATE



BCMD 9/89
U.S. GOVERNMENT PRINTING OFFICE: 1975-563-334

Standard Form 1035
September 1973
4 Treasury FRM 2000
1035-110

# PUBLIC VOUCHER FOR PURCHASES AND SERVICES OTHER THAN PERSONAL

*CONTINUATION SHEET*

VOUCHER NO. 5
SCHEDULE NO
SHEET NO.

U.S. DEPARTMENT, BUREAU, OR ESTABLISHMENT: U.S. Environmental Protection Agency

| NUMBER AND DATE OF ORDER | DATE OF DELIVERY OR SERVICE | ARTICLES OR SERVICES (Enter description, item number of contract or Federal supply schedule, and other information deemed necessary) | QUANTITY | UNIT PRICE COST | UNIT PRICE PER | AMOUNT |
|---|---|---|---|---|---|---|
| TAC CORPORATION<br>P.O. BOX 12345<br>Seven Seas, Tennessee 0000X | | Contract No. 68-0X-1234 | Estimated Cost:<br>Fixed Fee (7.5%):<br>Total CPFF: | | | $1,213,101<br>90,983<br>$1,304,084 |

| COST ELEMENTS | Current Amount Claimed | Cumulative Amount Claimed |
|---|---|---|
| 1. Direct Labor | $20,486 | $137,000 |
| 2. Overhead and Fringe Benefits (111% of Direct Labor) | 22,739 | 152,070 |
| 3. Travel | 9,000 | 12,000 |
| 4. Consultants | 1,200 | 4,000 |
| 5. Subcontractors | 25,000 | 65,000 |
| 6. Other Direct Costs | 4,500 | 12,530 |
| SUBTOTAL DIRECT COSTS | 82,925 | 382,600 |
| 7. G & A Expenses (25% of total costs) | 20,731 | 95,650 |
| TOTAL COSTS | 103,656 | 478,250 |
| 8. Fixed Fee (10%) | 10,366 | 38,461 |
| TOTAL AMOUNT CLAIMED | 114,022 | 516,711 |



PCMD 9/69



☆ GPO: 1979 0-281-187 P.O. 4377

## CONTRACTOR'S COST PROPOSAL

(covers two-year base period)

| | | |
|---|---|---|
| 1. | Direct Labor | $449,016 |
| 2. | Overhead and Fringe Benefits (111% of item 1) | 498,408 |
| 3. | Travel | 10,000 |
| 4. | Consultants | 8,400 |
| 5. | Subcontractors | 42,890 |
| 6. | Other Direct Costs | 15,000 |
| | SUBTOTAL | $1,023,714 |
| 7. | G & A Expense (18.5% of items 1-6) | 189,387 |
| | SUBTOTAL | $1,213,101 |
| 8. | Fixed Fee (7.5%) | 90,983 |
| | TOTAL (ESTIMATED COST PLUS FIXED FEE) | $1,304,084 |

## AVERAGE MONTHLY INCREMENTS

| | | |
|---|---|---|
| 1. | Direct Labor | $18,709 |
| 2. | Overhead & Fringe | 20,767 |
| 3. | Travel | 417 |
| 4. | Consultants | 350 |
| 5. | Subcontractors | 1,787 |
| 6. | Other Direct Costs | 625 |
| | SUBTOTAL | $42,655 |
| 7. | G & A Expense | 7,891 |
| | SUBTOTAL (AVERAGE MONTHLY ESTIMATED COST) | $50,546 |
| 8. | Fixed Fee | 3,091 |
| | TOTAL (AVERAGE MONTHLY CPFF) | $53,637 |

INVOICE #5

SUPPORTING DATA

1. Direct Labor Breakdown

| Name | Category | Rate | Hours | Cost |
|---|---|---|---|---|
| J. Theisman | Project Manager | $27.00 | 160 | $4,320 |
| A. Haig | V.P. | 30.00 | 24 | 720 |
| L. Thomas | Sr. Researcher | 22.00 | 160 | 3,520 |
| S.E. Ewing | Research Ass't. | 14.50 | 88 | 1,276 |
| T. D. Nixon | Pesticide Expert | 26.00 | 60 | 1,560 |
| B. Goodman | Researcher | 15.20 | 250 | 3,800 |
| W. Churchill | Staff Writer | 18.00 | 120 | 2,160 |
| D. Rather | Secretary | 11.50 | 100 | 1,150 |
| R. Lavelle | Clerk-Typist | 9.00(reg.)<br>13.50(OT) | 160(reg.)<br>40(OT) | 1,440<br>540 |
| | TOTALS | | 1,112 | $20,486 |

2. Travel Breakdown

| | |
|---|---|
| a. 2 round-trips to Washington, DC to meet with Project Officer | $450 |
| b. local mileage (100 miles @ .205) | 21 |
| c. local parking expenses | 77 |
| d. 1 round-trip to Manhattan to review pesticide data | 352 |
| | $900 |

3. Subcontractor Expenses

| | |
|---|---|
| a. Enviro-nment, Inc. | $9,200 |
| b. Mr. Clean Contractor Group | 6,500 |
| c. Cash Consumers, LTD | 9,300 |
| | $25,000 |

4. Other Direct Costs

| | |
|---|---|
| a. purchase of personal computer | $3,900 |
| b. photocopying, office supplies, mailing, etc. | 600 |
| | $4,500 |

# PROMPT PAYMENT ACT

## Requires Government To Pay Invoices Within 30 Days Of Invoice Receipt Or Incur Interest Penalty.

## Exceptions:

(a) Payment may be delayed because of dispute between EPA and contractor over payment amount or other issues regarding contract compliance.

(b) Does not apply to provisional, advance or progress payments, although Agency policy is to pay within 30 days regardless.

(c) Payments on construction contracts are due within 14 days, unless a longer period has been provided for in the solicitation to give EPA adequate time to inspect the work.

(d) To obtain contractor discount, EPA must make payment by discount date.

# FIXED FEE

## Authorizes Contracting Officer To Withhold Up To15% (Or Maximum of $100,000) Of Fee As Reserve To Protect Government's Interest

**FIXED FEE (FAR/APR 1984)**

(a) The Government shall pay the Contractor for performing this contract the fixed fee specified in the Schedule.

(b) Payment of the fixed fee shall be made as specified in the Schedule: provided, that after payment of 85 percent of the fixed fee, the Contracting Officer may withhold further payment of fee until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government's interest. This reserve shall not exceed 15 percent of the total fixed fee or $100,000, whichever is less.

# LIMITATION OF COST

CONTRACTOR MUST NOTIFY GOVERNMENT WHENEVER:

Costs Within Next 60 Days Will Exceed 75% Of Total Estimated Cost

Total Cost Will Be GREATER Or SUBSTANTIALLY LESS Than Estimated Costs (Overrun Or Significant Underrun)

LIMITATION OF COST (APR 1984)

(a) The parties estimate that performance of this contract, exclusive of any fee, will not cost the Government more than (1) the estimated cost specified in the Schedule or, (2) if this is a cost-sharing contract, the Government's share of the estimated cost specified in the Schedule. The Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within the estimated cost, which, if this is a cost-sharing contract, includes both the Government's and the Contractor's share of the cost.

(b) The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that—

(1) The costs the contractor expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of the estimated cost specified in the Schedule; or

(2) The total cost for the performance of this contract, exclusive of any fee, will be either greater or substantially less than had been previously estimated.

(c) As part of the notification, the Contractor shall provide the Contracting Officer a revised estimate of the total cost of performing this contract.

(d) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause—

(1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of (i) the estimated cost specified in the Schedule or, (ii) if this is a cost-sharing contract, the estimated cost to the Government specified in the Schedule; and

(2) The Contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of the estimated cost specified in the Schedule, until the Contracting Officer (i) notifies the Contractor in writing that the estimated cost has been increased and (ii) provides a revised estimated total cost of performing this contract. If this is a cost-sharing contract, the increase shall be allocated in accordance with the formula specified in the Schedule.

(e) No notice, communication, or representation in any form other than that specified in subparagraph (d)(2) above, or from any person other than the Contracting Officer, shall affect this contract's estimated cost to the Government. In the absence of the specified notice, the Government is not obligated to reimburse the Contractor for any costs in excess of the estimated cost or, if this is a cost-sharing contract, for any costs in excess of the estimated cost to the Government specified in the Schedule, whether those excess costs were incurred during the course of the contract or as a result of termination.

(f) If the estimated cost specified in the Schedule is increased, any costs the Contractor incurs before the increase that are in excess of the previously estimated cost shall be allowable to the same extent as if incurred afterward, unless the Contracting Officer issues a termination or other notice directing that the increase is solely to cover termination or other specified expenses.

(g) Change orders shall not be considered an authorization to exceed the estimated cost to the Government specified in the Schedule, unless they contain a statement increasing the estimated cost.

(h) If this contract is terminated or the estimated cost is not increased, the Government and the Contractor shall negotiate an equitable distribution of all property produced or purchased under the contract, based upon the share of costs incurred by each.

# LIMITATION OF FUNDS

Applicable To Incrementally Funded Contracts

Requires Contractor To Notify Government Whenever It Expects Costs Within The Next 60 Days Will Exceed 75% Of The Incrementally Funded Amount

LIMITATION OF FUNDS (APR 1984)

(a) The parties estimate that performance of this contract will not cost the Government more than (1) the estimated cost specified in the Schedule or, (2) if this is a cost-sharing contract, the Government's share of the estimated cost specified in the Schedule. The Contractor agrees to use its best efforts to perform the work specified in the Schedule and all obligations under this contract within the estimated cost, which, if this is a cost-sharing contract, includes both the Government's and the Contractor's share of the cost.

(b) The Schedule specifies the amount presently available for payment by the Government and allotted to this contract, the items covered, the Government's share of the cost if this is a cost-sharing contract, and the period of performance it is estimated the allotted amount will cover. The parties contemplate that the Government will allot additional funds incrementally to the contract up to the full estimated cost to the Government specified in the Schedule, exclusive of any fee. The Contractor agrees to perform, or have performed, work on the contract up to the point at which the total amount paid and payable by the Government under the contract approximates but does not exceed the total amount actually allotted by the Government to the contract.

(c) The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that the costs it expects to incur under this contract in the next 60 days, when added to all costs previously incurred, will exceed 75 percent of (1) the total amount so far allotted to the contract by the Government or, (2) if this is a cost-sharing contract, the amount then allotted to the contract by the Government plus the Contractor's corresponding share. The notice shall state the estimated amount of additional funds required to continue performance for the period specified in the Schedule.

(d) Sixty days before the end of the period specified in the Schedule, the Contractor shall notify the Contracting Officer in writing of the estimated amount of additional funds, if any, required to continue timely performance under the contract or for any further period specified in the Schedule or otherwise agreed upon, and when the funds will be required.

(e) If, after notification, additional funds are not allotted by the end of the period specified in the Schedule or another agreed-upon date, upon the Contractor's written request the Contracting Officer will terminate this contract on that date in accordance with the provisions of the Termination clause of this contract. If the Contractor estimates that the funds available will allow it to continue to discharge its obligations beyond that date, it may specify a later date in its request, and the Contracting Officer may terminate this contract on that later date.

(f) Except as required by other provisions of this contract, specifically citing and stated to be an exception to this clause—

(1) The Government is not obligated to reimburse the Contractor for costs incurred in excess of the total amount allotted by the Government to this contract; and

(2) The Contractor is not obligated to continue performance under this contract (including actions under the Termination clause of this contract) or otherwise incur costs in excess of (i) the amount then allotted to the contract by the Government or, (ii) if this is a cost-sharing contract, the amount then allotted by the Government to the contract plus the Contractor's corresponding share, until the Contracting Officer notifies the Contractor in writing that the amount allotted by the Government has been increased and specifies an increased amount, which shall then constitute the total amount allotted by the Government to this contract.

(g) The estimated cost shall be increased to the extent that (1) the amount allotted by the Government or, (2) if this is a cost-sharing contract, the amount then allotted by the Government to the contract plus the Contractor's corresponding share, exceeds the estimated cost specified in the Schedule. If this is a cost-sharing contract, the increase shall be allocated in accordance with the formula specified in the Schedule.

(h) No notice, communication, or representation in any form other than that specified in subparagraph (f)(2) above, or from any person other than the Contracting Officer, shall affect the amount allotted by the Government to this contract. In the absence of the specified notice, the Government is not obligated to reimburse the Contractor for any costs in excess of the total amount allotted by the Government to this contract, whether incurred during the course of the contract or as a result of termination.

(i) When and to the extent that the amount allotted by the Government to the contract is increased, any costs the Contractor incurs before the increase that are in excess of (1) the amount previously allotted by the Government or, (2) if this is a cost-sharing contract, the amount previously allotted by the Government to the contract plus the Contractor's corresponding share, shall be allowable to the same extent as if incurred afterward, unless the Contracting Officer issues a termination or other notice and directs that the increase is solely to cover termination or other specified expenses.

(j) Change orders shall not be considered an authorization to exceed the amount allotted by the Government specified in the Schedule, unless they contain a statement increasing the amount allotted.

(k) Nothing in this clause shall affect the right of the Government to terminate this contract. If this contract is terminated, the Government and the Contractor shall negotiate an equitable distribution of all property produced or purchased under the contract, based upon the share of costs incurred by each.

(l) If the Government does not allot sufficient funds to allow completion of the work, the Contractor is entitled to a percentage of the fee specified in the Schedule equalling the percentage of completion of the work contemplated by this contract.

Manpower Program Analysis Consultation and Training Inc. (LBCA No. 80-BCA-113, November 4, 1981. Contract No. 99-6-601-08-82)

FACTS

Finding of Fact

1. On August 27, 1976, the Institute for Manpower Program Analysis Consultation and Training, Inc. (IMPACT) entered into an agreement (subcontract) with the Small Business Administration (SBA) (Contract No. SB 543(8a) 76-C-315) for the development and field testing of a job bank openings summary data retrieval system under the prime contract between SBA and the Department of Labor (DOL) (Contract No. 99-6-601-08-82). The estimated total amount of the contract prior to any modification was $88,696 and the period of performance extended from August 27, 1976 through August 26, 1977.

2. The basic contract provided for estimated direct costs of $68,234, indirect cost of $15,441 (32.8% of $47,804) and a profit of $5,021.

The four-page Statement of Work, which was drafted by DOL staff (Tr. 225-26), stated that the project was designed to improve the effectiveness and efficiency of the Employment Service system by improving the ability of the Job Information Service staff to use and implement job search information and techniques that facilitate job placements. Specifically, the project was stated to involve the preparation of training materials related to the job search function and training.

3. The General Provisions of the contract provide under clause three, Limitation of Cost:

"(a) It is estimated that the total cost to the Government for the performance of this contract, exclusive of any fee, will not exceed the estimated cost set forth in the Schedule, and the Contractor agrees to use his best efforts to perform the work specified in the Schedule and all obligations under this contract within such estimated cost. If, at any time, the Contractor has reason to believe that the cost which he expects to incur in the performance of this contract in the next succeeding 60 days, when added

to all costs previously incurred, will exceed 75 percent of the estimated costs then set forth in the Schedule, or if, at any time, the Contractor has reason to believe that the total cost to the Government for the performance of this contract, exclusive of any fee, will be greater or substantially less than the then estimated cost hereof, the Contractor shall notify the Contracting Officer in writing to that effect, giving the revised estimate of such total cost for the performance of this contract.

"(b) Except as required by other provision of this contract specifically citing and stated to be an exception from this clause, the Government shall not be obligated to reimburse the Contractor for costs incurred in excess of the estimated cost set forth in the Schedule, and the Contractor shall not be obligated to continue performance under the contract (including actions under the Termination clause) or otherwise to incur costs in excess of the estimated cost set forth in the Schedule, unless and until the Contracting Officer shall have notified the Contractor in writing that such estimated cost has been increased and shall have specified in such notice a revised estimated cost which shall thereupon constitute the estimated cost of performance of this contract. No notice, communication, or representation in any other form or from any person other than the Contracting Officer shall affect the estimated cost of this contract. In the absence of the specified notice, the Government shall not be obligated to reimburse the Contractor for any costs in excess of the estimated cost set forth in the Schedule, whether those excess costs were incurred during the course of the contract or as a result of termination. When and to the extent that the estimated cost set forth in the Schedule has been increased, any costs incurred by the Contractor in excess of the estimated cost prior to such increase shall be allowable to the same extent as if such costs incurred by the Contractor had been incurred after the increase; unless the Contracting Officer issues a termination or other notice and directs that the increase is solely for the purpose of covering termination or other specified expenses.

"(c) Change orders issued pursuant to the Changes clauses of this contract shall not be considered an authorization to the Contractor to exceed the estimated cost set forth in the Schedule in the absence of a statement in the change order, or other contract modification, increasing the estimated cost."

4. On June 15, 1977, IMPACT submitted cost and technical proposals to add two training sessions, 150 training packages and 75 audio-visual presentations. Negotiations culminated in September 1977 and a modification raised the contract amount to $118,673 while extending the completion date to August 18, 1978.

5. On December 5, 1977, Ms. Patricia King, the DOL project officer, spoke on telephone with Mr. Willis Thibado, the Director of Appellant's Training Division, regarding certain alterations in the work products. Predicated on this call, Mr. Thibado, in his December 6, 1977 letter to Ms. King confirmed the following understanding: (1) IMPACT would combine the use of the training manuals with the audiovisual presentation; (2) the same number of manuals would be developed and the same amount of time for material development would be necessary; (3) there would be no increase or decrease in costs in the development of the manuals; (4) the slide/tape presentations would be organized to coincide with the five chapters of the training manual and would be self-contained; (5) the same number of slides, the same amount of tape, and the same amount of time for material development would be used; and (6) there would be no increase or decrease in costs for development of the slide/tape presentation. During the month of March, 1978 IMPACT completed three separate revisions of the training manual as requested by Ms. King on behalf of DOL.

6. By letter to Ms. King dated June 6, 1978, Mr. Thibado requested a modification of IMPACT's cost proposal. The letter indicated that IMPACT's expenditures through May 31, 1978 exceeded the Modification's cost estimates by $11,382.00 with an additional $2,000.00-$4,000.00 to be spent in writing the final reports. Several reasons were advanced by Mr. Thibado for the overruns, including the following: (1) the change in emphasis of the training materials that was imposed after the training needs assessment was conducted; (2) the impact this change in emphasis had on the size of the training manual; (3) the costs of developing the training portfolios, materials not required to be produced under the contract as executed; (4) the substantial increases in the scope and size of the drafts of the training manual and workbook that were required.

7. After receipt of the June 6 letter, Ms. King requested that IMPACT submit additional documentation in support of the request for modification. No response to the request was received from IMPACT during the period of contract performance. By letter dated September 15, 1978, IMPACT submitted the requested additional documentation and indicated that the request for modification then amounted to $17,423.00.

8. All products and services which IMPACT was required to provide to DOL were delivered and furnished prior to the date of contract completion.

9. On May 22, 1980, the DOL Contracting Officer, disallowed all amounts claimed by IMPACT in excess of the contract price of $118,673, because IMPACT did not compy with General Provision 3, "Limitation of Cost" clause, which requires the Contractor to notify the Contracting Officer in advance and in writing of a possible cost overrun and to secure advance approval.

# MONITORING GOVERNMENT PROPERTY

## A Significant Financial Responsibility In Some Contracts Involving Monitoring Purchase, Use And Disposition Of Government Property

## Activities Involved:

(a) Review Reimbursement Vouchers To Ensure That Acquisitions Are Authorized And Itemized On EPA Form 1730-1.

(b) Review Contractor Inventory And Recommend Appropriate Disposition Of Property To Property Administrator

(c) Inspect Property Status And Use At Contractor Site; ensure Appropriate Preventative Maintenance.

(d) Coordinate With Contractor, Contracting Officer And Property Administrator On Desired Changes, Alterations, Returns, Transfers, Or Trade-ins Of Property.

(e) Ensure Filing Of Information To Property Administrator Or Contracting Officer If Property Is Lost, Stolen Or Damaged.

(f) Assure Appropriate Disposal, Return Or Transfer Of Government Property At Contract Completion.

# PROPERTY CERTIFICATION

**I Certify That The Listed Property Is Free Of Biological, Radioactive, Chemical, Or Any Other Contamination Hazardous To Health And That The Property Is Safe For Disposal And Reuse.**

_____
Signature

_____
Title

_____
Date

## Instructions: EPA Form 1730-1

Please read the Paperwork Reduction Act Notice in the Contractor's Guide for Control of Government Property.

Form Approved. OMB No. 9000-0075. Expires 8-31-90.

EPA

United States Environmental Protection Agency
Washington, DC 20460

### Report of Nonexpendable Government Property Acquired by Contractor

| Contract Number | Report Number |
|---|---|
| *Self explanatory* | *You assign this* |
| **Contractor's Voucher No.** | **Date** |
| *You assign this* | *Date prepared* |

Contractor's Name and Location Where Property Is Physically Located

*Self explanatory*

**Instructions to Contractor:**

a) Submit original to Property Administrator.
b) A copy of this report **Must** be attached to voucher submitted to Financial Management Division to support claim for reimbursement.

| List below each article of nonexpendable property | | Date Acquired | Manufacturer's Model Number | Manufacturer's Serial Number | EPA Decal Number | EPA Account Number | Contractor's PO Number to Vendor/Mfg | Unit Cost |
|---|---|---|---|---|---|---|---|---|
| Qty | Nomenclature/Description (Include mfg. name) | | | | | | | |
| | *Item, description, manufacturer's name EXAMPLE: Computer, personal, portable laptop - Tandy* | *MO-DA-YR* | *Given by MFG* | *Given by MFG* | *Decal # provided by EPA.* | *Provided in your contract. See page 47 for more information.* | *Purchase Order # you assigned when the item was ordered.* | *Cost of the item, including tax, shipping and/or handling. Round off to nearest dollar* |
| | *NOTE: If you have a large number of acquisitions, you may use this form as a cover sheet. Fill in all information on the form except the item data, and attach it to a copy of your acquisition listing.* | | | | | | | |

**Certification**

I certify that the statements I have made on this form and all attachments thereto are true, accurate, and complete. I acknowledge that any knowingly false or misleading statement may be punishable by fine or imprisonment or both under applicable law.

| Name and Address of EPA Property Administrator | Purchase Authority | Signature of Contractor's Representative | |
|---|---|---|---|
| *Designated by a clause in your contract* | Clause Number of Contract: *Clause or mod. # authorizing property* | *Your contact person: NOT an EPA representative* | |
| | Contracting Officer's Letter of Approval Dated: *Fill in date of letter (attach copy)* | Title: *Title of signee* | |
| | Other *(Explain)*: *Example: property justification (attach copy)* | EPA Voucher Number: *EPA will assign* | Date: *EPA will date* |

EPA Form 1730-1 (Rev. 9-88) Previous editions are obsolete.

# Chapter 11
# FINANCIAL MANAGEMENT OF CONTRACTS

The degree of financial management required in monitoring contracts is directly related to the type of contract and the amount of risk assumed by the Government. The greater the risk which EPA is bearing, the greater must be our oversight. Thus, in a firm fixed price situation where the Government bears almost no risk for the cost of performance, the contractor has a strong incentive to perform the contract in the most economical way. Little financial monitoring is needed.

Under cost-type contracts, however, the contractor has little incentive to control costs, as he or she will be reimbursed for whatever he or she spends in doing the work barring a determination that costs are unreasonable or unallowable. Most of the risk in this situation is borne by the Government and a significant amount of oversight is required. A time-and-materials, labor-hour, or fixed-rate indefinite-quantity for services contract is of even more concern, for the contractor has a direct incentive not to control costs or perform efficiently, because every additional hour of labor charged will result in additional profit.

Federal employees have a responsibility to monitor the efforts of contractors in order to prevent waste of public funds and to obtain the required services within the amount budgeted. Therefore, the importance of diligent financial management of contracts cannot be emphasized too strongly. This chapter provides guidance to Project Officers on their role in this activity.

## 11.1 Cost-reimbursement Contracts

Under EPA cost-type contracts, there is a requirement for the contractor to submit a combined monthly technical and financial progress report. While Project Officers, Work Assignment Managers and Delivery Order Officers might properly be particularly concerned about technical progress, the financial status of a project is of equal importance. Project Officers are responsible for reviewing the financial portion of the report each month and reporting to their Contracting Officer any problems they see developing.

Format and content of the financial reports differ in a number of respects between term form and completion form contracts. Term form (level of effort) contractors are required to include the following information each month:

(1) Cumulative costs and direct labor hours expended from the effective date of the contract through the last day of the current reporting month. A cumulative incurred cost-per-direct-labor-hour-average computation (actual "loaded" contract cost per labor hour) will be included, with a comparison of the result to the cumulative average cost per direct labor hour derived from the estimated cost of the contract.

(2) Actual costs and direct labor hours expended during the current reporting month.

(3) Estimated costs and direct labor hours to be expended during the next reporting period.

(4) Actual costs and direct labor hours incurred for each work assignment issued and estimates of costs and staff hours required to complete each work assignment.

Work Assignment Managers and Delivery Order Project Officers should review the information for their own work assignments and delivery orders, while Project Officers need to be concerned with the contract as a whole. Project personnel should pay particular attention to the average incurred cost per hour versus the estimated cost per hour, as this will help highlight any potential problem of the funding being depleted before the hours have been expended. (See sample on page 326). This may signify excessive use of higher labor categories than necessary or anticipated. Diligent monitoring of remaining costs and hours is a must, and Project Officers should keep track of actual costs and hours expended versus the amounts in the contract. If it appears that more than 100% of the contract hours will be required, preparation should begin as early as possible for supplemental contract support. In most cases, this will have to be obtained competitively, which involves a substantial lead time before award.

Individual work assignments should be monitored from the perspective of percentage of completion compared to the actual effort and costs expended. If a work plan budget was prepared by the contractor, the financial status should be compared against that. For example, if at 25% of completion of the effort, 50% of the estimated hours and costs have been expended, the Contracting Officer may have to increase the number of hours on that work assignment, and the Work Assignment Manager's own cost estimate will have to be adjusted. The Contract Project Officer needs to be aware of this as well, in order to track the financial status of the contract as a whole. The total contract hours and dollars, in fact, are the controlling factors in financial management of a term form contract.

Under a completion-form contract, the monthly financial progress report will include a graph showing the actual and projected rate of expenditure against the total estimated cost of the contract. (See sample on page 327.) This graph will enable Project Officers to track the rate of expenditure each month, and spot potential problems before they occur. The contractor's projected cost to complete the effort should be compared to the remaining available funds, to determine whether or not additional funds will be required before the contract is completed.

Monthly vouchers are another good way to identify potential problems. Vouchers break down the monthly expenditures by cost element (i.e., direct labor, materials, subcontracts, indirect expenses, etc.), which makes it easier to spot where the higher level of spending has occurred. If further detail is necessary, the Project Officer should request an explanation from the contractor and back-up documentation, e.g., copies of vendor invoices, a breakdown of the direct labor charges, etc.

Project Officers should also request Work Assignment Managers and Delivery Order Officers to review and sign off on contractor invoices routinely, since these individuals are most likely to be aware of contractor performance. Sample forms for Project Officers to use in such certification are included on pages 328-30.

Where it is evident that potential problems exist, the Contracting Officer should be informed immediately. If only minor cost growth trends are indicated, they may be susceptible to correction. For example, the Project Officer might be able to suggest to the contractor that lower levels of personnel are acceptable for less critical portions of a project, or convince him that fewer trips need to be taken at contract expense.

Perhaps the contractor is simply not managing the contract in an efficient manner. Measures can be taken to alleviate these types of problems.

However, if corrective action will not prevent the funding from being depleted before the end of the period of performance, decisions regarding additional funding or reducing the scope of the contract will have to be made. This should be done as early as possible, and the decisions will have to be made jointly between the Contracting Officer and the Project Officer.

All cost-reimbursement contracts contain a clause entitled "Limitation of Cost," which limits the Government's obligation to the amount set forth in the contract. (See page 341 for text.) It also relieves the contractor of the obligation to proceed any further once the estimated cost has been expended. (When the contract is incrementally funded, the "Limitation of Funds" clause governs, relieving the contractor from proceeding once the amount funded is exhausted. See page 343 for text.) And, both clauses require the contractor to inform the Contracting Officer immediately when 75% of that amount will be exceeded within the next 60 days, or any time he or she believes that the total cost for performance will be either greater or substantially less than had been included in the contract. This notification allows the Government to avoid a crisis by making a decision about what to do before the funds are actually depleted.

If a contractor's costs exceed or are expected to exceed the estimated cost in the contract, the contract is in a cost overrun situation. Legally, by the terms of the contract, the Government is not obliged to pay the overrun if the contractor has failed to notify the Contracting Officer. Formal notification of a possible overrun is required by the "Limitation of Cost" or "Limitation of Funds" clause. However, if the Government has other ways of being aware of the situation (e.g., through monthly reports or vouchers), and by silence or other action encourages the contractor to continue working, the courts and the Boards of Contract Appeals have ruled that such action (or inaction) effectively obligates the Government to reimburse the contractor for the additional costs. Therefore, Project Officers must take precautions to refrain from encouraging any continuance of work once funds have been exhausted.

## 11.2 Time-and-Materials, Labor-Hour, and Fixed-Rate for Services Contracts

The monthly reporting requirements for time-and-materials, labor-hour, and indefinite delivery/indefinite quantity fixed-rate services contracts differ somewhat from those for cost-reimbursement contracts. The following information is required to be included:

(1) Cumulative costs and labor hours expended from the effective date of the contract through the last day of the current reporting month.

(2) Actual costs and labor hours expended during the current reporting month.

(3) Estimated costs and labor hours to be expended during the next reporting period.

(4) For indefinite quantity contracts, percentage of work ordered and completed during the reporting period, actual costs and direct labor hours incurred for each delivery order issued, and estimates of costs and staff hours required to complete each delivery order.

All contracts in this category contain an amount which represents the maximum liability of the Government, and beyond which the contractor may not charge EPA. A fixed rate, indefinite quantity contract also contains a minimum amount which is guaranteed to the contractor unless the contract is terminated. Between the minimum and maximum amounts, the Government will issue delivery orders for services within the scope of the contract.

These contracts typically include a provision that establishes the agreed hourly rate of compensation for each category of labor. The rate includes direct labor costs, indirect costs, and profit. Estimates of the number of hours to be utilized in each category are set forth in the contract. The Government may order up to these ceiling amounts. (When total amounts are set forth in each delivery order, however, they are treated as ceilings on hours in each labor category.) Each rate also represents a range of actual salaries within each labor category. This means that the contractor may earn a different amount of profit based on the salary of the employee actually used to perform the work. For example, the category average is $15 per hour, but the actual salary range in this category is $14 - $16. John S. is at the bottom end of the scale making $14 per hour while Sue T., in the same labor category, earns $16. The fixed rate in this category is $15 direct labor + $15 (100%) in indirect costs + $2.40 (8%) profit, or $32.40.

The following breakdown shows what happens to the contractor's profit margin if the contractor uses the lower paid employee to perform work on the contract:

| | category average | John S. | Sue T. |
|---|---|---|---|
| total fixed rate | $32.40 | $32.40 | $32.40 |
| direct labor | $15.00 | $14.00 | $16.00 |
| indirect costs (100% of direct labor) | $15.00 | $14.00 | $16.00 |
| profit | $ 2.40 (8%) | $ 4.40 (15%) | $ .40 (1.25%) |

Obviously, it is to the contractor's advantage to utilize John S. on the contract, because the contractor receives 15% profit instead of 8%. But what does this mean for the Government? Are we really getting the quality of service we require?

The fact that John S. earns $2.00 less per hour than Sue T. probably indicates that he is somewhat less experienced, and may require more hours to perform the work, thereby earning more profit for the contractor. But the contractor has the right to assign John S. to the contract provided he meets the minimum qualification standards, and the higher profit incentive means it is likely he will do so. And John's lesser capabilities may result in more time required on the project. Every additional hour spent means another $4.40 in profit returned to the contractor. Clearly, the contractor has no incentive to control the total number of hours expended on a project, provided the contractor stays within the ceiling of the delivery order. And, since ceilings are often established based only on the Government's best estimate, they sometimes may not equate to what the work actually costs.

For these reasons, adequate surveillance of performance is necessary by both EPA Project Officers as well as Contracting Officers. It is perfectly acceptable to pay a visit to the contractor's facility if feasible, and survey the work being performed. The Contracting Officer should be notified before the visit. Ask for labor records or find out who is working on the contract. Many contracts require submission of staff resumes. Monthly financial reports should be studied to spot problems. And invoices or vouchers should be reviewed for information on each labor category. To avoid reaching ceilings prematurely, Project Officers should keep a running check on total hours in each category, both expended and estimated. It is also important to monitor the costs of travel, materials, and other direct costs. This attention is critical, because if the contract or delivery order ceiling is reached while a project is still in progress, EPA may not realize any value from the work. Ceilings cannot easily be raised.

## 11.3 Financial Management Reviews

The Procurement and Contracts Management Division "Blue Team" often performs financial management reviews on EPA cost-reimbursement and indefinite delivery type contracts over $5 million. These reviews, held during the course of contract performance, focus on the contractor's own financial management and accounting procedures, including cost control, monitoring of each individual cost element, payment to subcontractors, etc. The cost analysts who perform these reviews also examine monthly progress reports and vouchers, and obtain from the contractor an estimate of cost to complete performance. The reports issued as a result of these reviews can be a very useful tool in financial management, and will be made available to the contract Project Officer.

## 11.4 Cost Management - The Contractor's Job

The information in this chapter is designed to assist Project Officers in the very important function of contract financial management. With proper attention, Government funds will not be wasted. The more the contractor realizes that a close watch is being kept on the status of the funds and the contract expenditures, the more incentive there is to be economical. A Project Officer who continually asks questions can go a long way towards preventing a cost overrun or a depletion of funds before the work is completed.

When working with contractors to correct problems which have arisen, however, Project Officers must take care to remember that managing the contract work is basically the contractor's job. The proper approach is to observe this management activity, and require the contractor to proceed in an economical or efficient manner. It is not the Project Officer's function to take over the management of the contract and substitute his or her own judgment for the contractor's. If inefficient or wasteful methods are being used by the contractor, report it to the Contracting Officer.

## 11.5 Voucher Certifications And Payments To Contractors

As stated in Chapter 2, the fundamental obligation of the Government is to make payment to the contractor for supplies or services delivered and accepted. Processing of payments begins with the submission of invoices or vouchers by the contractor.

## 11.6 Project Officer Responsibilities

It is the Project Officer's responsibility to verify contractor invoices/vouchers. Government personnel have a responsibility to process these documents for payment in a timely fashion. Undue delay can cause financial hardship for the contractor and can result in the case of fixed price contracts, in the Government's having to pay interest to the contractor, as provided in the Prompt Payment Act (See section 11.8, below). All vouchers should be certified and submitted to the Financial Management Division - RTP (FMD-RPT) by the Project Officer within one (1) week of receipt.

The Project Officer's involvement in the processing of vouchers and invoices differs depending upon 1) the type of contract, 2) the payment provisions of the contract, 3) what is being purchased, and 4) the types of appropriations and accounts which make up the funding on the contract. The following is an explanation of the difference in the requirements:

(1) Provisional Payments Under Cost-Reimbursement Contracts and Fixed Rate for Services Indefinite Delivery/Indefinite Quantity Contracts:

Provisional Payments are made subject to final audit to determine the allowability, allocability, and reasonableness of the costs paid under cost-reimbursement contracts, and to verify the accuracy of charges under indefinite delivery/indefinite quantity contracts. The following are Project Officer responsiblities for the processing of invoices/vouchers under these types of contracts.

(a) Immediately upon receipt of the Project Officer Invoice Approval Form (see EPA Form 2550-19 on page 332) from the FMD-RTP, the Project Officer determines whether the payment request is commensurate with the items delivered and/or services performed by the contractor. This may required obtaining verification from Work Assignment Managers and Delivery Order Project Officers. Project Officer response is required within one (1) week.

(b) When no exception is taken, the Project Officer shall approve and sign the Form 2550-19 and return it to the EPA Financial Management Division (MD-32), Research Triangle Park, NC 27719 for further processing. A copy of the invoice/voucher should be retained by the Project Officer for the file.

(c) If, during the review, the Project Officer takes exception to any of the costs being invoiced, he/she must prepare a memorandum setting forth (a) the reasons for the recommended suspension, and (b) the amount recommended for payment, and submit it together with the invoice/voucher, to the FMD-RTP for appropriate action.

(d) At the same time, a copy of the memorandum recommending disallowance or suspension, and a copy of the invoice/voucher, should be forwarded to the Contracting Officer, who will investigate the problem and determine the amount due and payable. If any deductions are taken, the Contracting Officer will notify the FMD-RTP and the contractor in writing.

NOTE: Approval should not be given for payment of the entire minimum quantity under indefinite delivery/indefinite quantity contracts unless the Project Officer has verified that the minimum has been ordered and delivered.

(2) Completion Voucher, Cumulative Claim and Reconciliation Under Cost-Reimbursement Contracts:

The completion voucher is submitted when the contractor has incurred all costs under the contract. It is a provisional voucher designated "completion" and initiates an audit of all costs incurred under the contract. This voucher summarizes all direct and indirect costs incurred under the contract. The Project Officer shall process completion vouchers in exactly the same manner as provisional vouchers, as set forth above.

(3) Lump Sum Payments for Services, Supply, and Equipment Under Fixed-Price Contracts:

(a) The Project Officer reviews the invoice and ascertains that the contractor has performed and/or delivered all services and/or materials contracted for; and that the Government has conducted final inspection of, and has accepted, all contract services and/or materials.

(b) When no exceptions are taken, the Project Officer signs the Project Officer Invoice Approval, EPA Form 2550-19, and returns it to the FMD-RTP, retaining the copy of the invoice for the file.

(c) If, during the review, the Project Officer takes exception to any of the services or items being invoiced, he/she must prepare a memorandum setting forth (a) the reasons for the recommended disallowance or suspension, and (b) the amount recommended for payment, and submit it, together with the invoice, to the FMD-RTP for appropriate action.

(d) At the same time, a copy of the memorandum recommending disallowance or suspension, and a copy of the invoice/voucher, should be forwarded to the Contracting Officer, who will investigate the problem and determine the amount due and payable. If any deductions are taken, the Contracting Officer will notify the FMD-RTP and the contractor in writing.

(4) Progress and Partial Payments for Services, Supplies, and Equipment Under Fixed-Price Contracts:

Partial payments refer to those made when a part of a fixed-price contract is delivered, accepted, and paid. Progress payments are payments made under fixed-price contracts that are based on the progression of work. (Progress payments on fixed price contracts are only authorized if the contract states for what the payment will be made, and if the work is "priceable.") Payment for an order under an indefinite quantity contract is similar to a partial payment under a fixed price contract, as the Government is paying for a specified number of hours at the fixed rates in the contract.

(a) The Project Officer reviews the invoice to ascertain that all services and/or items billed have been satisfactorily performed and/or received, inspected, and accepted by the Agency.

(b) When no exceptions are taken, the Project Officer approves and signs the Project Officer Invoice Approval (EPA Form 2250-19) and returns it to the FMD-RTP, retaining a copy of the invoice for the file.

(c) If, during the review, the Project Officer takes exception to any of the services or items being invoiced, he/she must prepare a memorandum setting forth (a) the reasons for the recommended disallowance or suspension, and (b) the amount recommended for payment, and submit it, together with the invoice, to the FMD-RTP for appropriate action.

(d) At the same time, a copy of the memorandum recommending disallowance or suspension, and a copy of the invoice/voucher, should be forwarded to the Contracting Officer, who will investigate the problem and determine the amount due and payable. If any deductions are taken, the Contracting Officer will notify the FMD-RTP and the contractor in writing.

(5) Progress Payments Under Fixed-Price Contracts for Construction:

(a) The Project Officer reviews the invoice and ascertains that all services and/or items invoiced have been satisfactorily performed and/or delivered by the contractor and accepted by the Agency.

(b) If no exceptions are taken to the amount invoiced, the Project Officer shall (a) sign the Project Officer Invoice Approval (EPA Form 2550-19), signifying agreement with the amount invoiced, and (b) forward the approved Notification form and the original and three copies of the contractor's invoice to the Contracting Officer (not the finance office) for further processing, retaining the fourth copy of the invoice for the file.

(c) If, during the review, the Project Officer takes exception to any of the work being billed, he/she should prepare a memorandum setting forth (a) the reasons for the recommended disalllowance or suspension, and (b) the amount recommended for payment, and submit it, together with the invoice, to the Contracting Officer for appropriate action.

(6) Final Payments Under Fixed-Price Contracts for Construction.

The Project Officer approves the final invoice when the following conditions have been satisfied:

(a) Final inspection has been made.

(b) All work, including the correction of punch list items, has been accepted by the Government. The Project Officer then certifies and dispatches invoice copies in accordance with (5) above.

(7) Provisional Payments Under Time-and-Materials and Labor-Hour Contracts.

(a) Immediately upon receipt of the Project Officer Invoice Approval (EPA Form 2550-19) from the FMD-RTP, the Project Officer conducts a review of the invoice and determines whether the payment request is commensurate with the services performed and materials delivered by the contractor. Project Officer response is required within one (1) week.

(b) When no exception is taken, the Project Officer shall approve and sign the Form 2550-19 and return it to the servicing finance office for further processing. A copy of the invoice/ voucher should be retained by the Project Officer for the file.

(c) If, during the review, the Project Officer takes exception to any of the services or items being invoiced, he/she must prepare a memorandum setting forth (a) the reasons for the recommended disallowance or suspension, and (b) the amount recommended for payment, and submit it, together with the invoice/ voucher, to the FMD-RTP for appropriate action. At the same time, a copy of both the memorandum and the voucher should be forwarded to the Contracting Officer, who will determine the amount due and payable.

Project Officers should use EPA Form 2550-19, Project Officer Invoice Approval (Page 332) to specifically state the account numbers to be charged by amounts on the invoice. If the entire invoiced amount is to be charged to a single account, that account number must be stated. If the invoice is detailed by work assignment totals and each total is charged to only one account, it is acceptable to provide the account number next to the work assignment amounts on the invoice itself. Where multiple accounts are involved, however, the amount to be charged to each account must be noted on the form. Any partial payment instructions must be accompanied by an explanation.

## 11.7 Guidelines for Suspension or Disallowance of Amounts Invoiced

Under the provisions of a cost-reimbursement contract, the contractor is paid all allowable, allocable, and reasonable costs up to a pre-determined contractual maximum in return for its best efforts to perform the work. The costs incurred by the contractor in performing the work must be allowable, allocable, and reasonable as defined in the Federal Acquisition Regulations. In addition, cost expenditure must be in accordance with any special provisions of the contract.

The Project Officer, in reviewing costs submitted under a cost-reimbursement contract, must examine them from the perspective of whether the expenditure is attributable to the contract and what a prudent businessperson would pay under like or similar circumstances. The Project Officer may recommend suspension of the cost(s) and recommend payment of the vouchers less the suspended cost. Prior to recommending suspension of costs, every effort within the time allowed should be made by the Project Officer to obtain from the contractor the rationale and back-up supporting the expenditure. Lacking either the back-up or an acceptable rationale, the suspension should be recommended.

The contractor knows that while it has the right to manage the work effort, EPA has the right to "disallow" costs that are unreasonable in nature or amount. This can be a powerful means of persuading a contractor to manage efficiently. This right, which is different from a suspension, can be exercised only by the Contracting Officer. A disallowed cost is one where the Contracting Officer has made a final determination that the Government will not pay the cost. When a contractor is aware that Project Officer is keeping an eye on costs and may raise questions, there is a greater incentive to manage the work effort economically. Indefinite Delivery, Time-and-Materials and Labor-Hour contracts contain already agreed-to costs per labor hour. However, even though the Government is generally obligated to pay for all hours incurred in good faith for contract performance, the Project Officer still may question the contractor where it appears that excessive labor hours are being used, or higher than required levels of personnel are on the job.

The only time an exception should be taken on an invoice under a fixed price contract is if the items were not delivered, services were not rendered, or the items or services were not accepted by the Government. Otherwise, the contractor is ultimately due the full fixed price of the contract, whether paid on a partial, progress, or lump sum basis.

## 11.8 The Prompt Payment Act

The Prompt Payment Act (Public Law 97-177) was designed to encourage Federal agencies to pay their bills on time. Amendments to the Act incorporating clarifications and revisions went into effect for all payments made after April 1, 1989. The Act and its Amendments authorize the charging of an interest penalty when payments are made after 30 days from receipt of an invoice or when discounts are taken after the discount period has expired. For this reason, any delays by Project Officers in processing invoices might cause an interest penalty to be assessed against EPA. Any such interest will be paid out of the appropriate program funds.

Although provisional, advance, and progress payments made during performance of a contract are not subject to interest on overdue payments, prompt payment requires the Agency to pay all vouchers within 30 days after receipt. Interest charges can only be assessed on partial or lump-sum payments under fixed price contracts and final vouchers under cost-reimbursement and fixed-rate indefinite quantity contracts when payment is made late. Nonetheless, all employees handling vouchers should be mindful to make payment within 30 days of actual receipt of an invoice or the payment due date.

On construction contracts, however, EPA is required to pay interest on progress payment requests that are not paid within 14 days, unless a longer period has been specified in the contract to enable the Government adequate opportunity to inspect the work. EPA is also required to pay interest on any amounts which EPA has retained under a prime contract clause providing for retaining a percentage of progress payments that are approved for release, if payment is not made by the contract date or by the 30th day after final acceptance. Interest is also due on all final payments or partial payments made a) after the 30th day after receipt of a proper invoice, or b) after the 30th day after Agency acceptance of the completed work or services.

Interest payments also do not accrue when payment is delayed because of a dispute between EPA and the contractor over the amount of payment or other issues regarding compliance with contract terms. However, the appropriate disputes procedures must be followed and the Contracting Officer.

If the contractor specifies a discount date on the invoice, EPA may take the discount whenever economically justified, but only after acceptance has occurred. EPA may not take the discount after the time specified by the contractor.

## 11.9 Processing Payments

Submission of invoices or vouchers with documentation supporting the contractor's cost claims starts the payment process. Listed below are a few suggestions which will help you, as Project Officers, to expedite the payment process:

1. Assign an alternate Project Officer who can fill in for you during your absence. This can be accomplished by designating an alternate project officer in a memorandum, sending the memorandum to the Contracts Office and a copy to FMD-RTP and the alternate project officer.

2. Use E-mail and/or telefax media to communicate with FMD-RTP. In an emergency situation, FMD-RTP will accept a telefax copy of the signed approval form. The original invoice/voucher and approval form, however, must be forwarded to FMD-RTP prior to actual payment to the contractor. FMD-RTP's E-mail ID is "EPA 3195 (RTP.CAP)." The telefax number is FTS 629-7971, or commercial (919) 541-7971.

3. If for some reason an invoice/voucher is "invalid," and the entire amount must be rebilled by the contractor, do not return the invoice/voucher to the contractor. Immediately notify FMD-RTP via phone or E-mail, and return the invoice/voucher to FMD-RTP. FMD-RTP will return the invoice to the contractor and delete it from the delinquent file.

4. Contact FMD-RTP "Customer Assistance Office" immediately should you have any questions. This staff is responsible for serving your needs. Hours of operation are from 7:30 AM to 5:30 PM EST/EDT each workday. For your convenience, off hour messages can be left through a phone service. This number is FTS 629-1148, or commercial (919) 541-1148.

The Contracting Officer reviews all invoices/vouchers recommending suspension to determine what costs should be allowed or paid. Where the contract provides for reimbursement of indirect costs at negotiated rates, costs must be examined to assure that there is no duplication of costs between direct and indirect cost items.

The degree of the Contracting Officer's examination depends on the circumstances. Payment for questionable items can be suspended by the Contracting Officer pending resolution, and over- and under-payment can be subsequently adjusted. Especially under the Prompt Payment Act Provisions, it is important that the Project Officer promptly advise the Contracting Officer of any concerns regarding an invoice or voucher provided for review prior to payment.

The Contracting Officer has the authority to suspend payment while problems are being resolved. (It should be noted that the interest penalty provisions do not apply to progress, advance or provisional payments made to the contractor, but do apply to the final payment.) The potential adverse impact of the Contracting Officer's failure to exercise this important right on behalf of the Government was illustrated in a recent case where a contractor was allowed to recover interest on over $34,000 in holiday pay expenses as a fringe labor cost on the basis of its proof that holiday pay was contractually excluded from overhead rates as an indirect cost. In part, the contractor's

proof was based on the fact that the Project Officer responsible for approval and certification of invoices routinely approved requests for holiday pay during more than half the contract's duration. This case illustrates the need for clear expression of contract provisions regarding costs, complete understanding of such provisions by persons authorized to approve and certify invoices, and immediate communication between the Contracting Officer and his or her authorized representative in the event of any questions.

A detailed audit is conducted, in most cases, prior to final payment of cost-reimbursable contracts. The Contracting Officer will seek clarification and justification of any items of cost questioned by the audit. The Contracting Officer should make the final decision, under the "Disputes" clause, to resolve the matter if agreement cannot otherwise be reached. Acceptance of final payment releases the government from any claims against it by the contractor. However, the government should also obtain a signed release from the contractor.

## 11.10 Monitoring and Control of Government Property

Many government contracts do not involve any government property. In some contracts, however, monitoring the purchase, use and disposition of government property is a significant financial responsibility and needs be taken quite seriously by the government monitor.

There are a number of activities involved in monitoring and controlling Government property in the possession of contractors which require Project Officer involvement. These are summarized below:

(1) Review of Reimbursement Vouchers

Vouchers submitted by the contractor under cost-reimbursement contracts are forwarded to the Project Officer by the Financial Management Office for review and approval of contractor-acquired Government property as well as other costs claimed. A copy of any such voucher must also be forwarded by RPT to the Property Administrator as a means of notification of equipment receipts. All direct charges to the contract for acquisition of nonexpendable equipment and material must have been previously authorized within the contract.

Such acquisitions must be individually itemized on EPA Form 1730-1, "Report of Nonexpendable Government Property Acquired By Contractor", to show the required personal property management information. (See sample in Appendix and on page 350.) Those items acquired but not authorized under the contract should be brought to the attention of the Financial Management Office, the Contracting Officer, and the Property Administrator. If the Project Officer determines that an acquisition was not required nor authorized for the performance of a contract, he should recommend to the Contracting Officer and Financial Management Office that the contractor not be reimbursed for the purchase.

(2) Inventories

(a) The Property Administrator requires annual, final, or if necessary, special inventories from contractors having contracts under which property has been furnished or acquired. The inventory is performed

by the contractor and includes property associated with particular contracts. The process includes reconciling the inventory with the Property Administrator's records.

Annual inventories include all accountable property (i.e., nonexpendable personal property with an acquisition cost of $1000 or more and sensitive items costing $300 or more) acquired, furnished, and/or rented/leased. Final inventories also include accountable items, as well as expendable items not consumed during the performance of the contract, regardless of their value. The amount of accrued lease credits for leased property are included on the final inventory. A copy of the final inventory is furnished by the Property Administrator to the Project Officer for disposition recommendation. Annual and special inventories are available to the Project Officer on request. The Project Officer may recommend that the Agency:

(i) reassign the inventory or a part thereof to another contract;

(ii) reassign inventory to a licensee by means of a Revocable License Agreement for a loan;

(iii) have the inventory returned to the sponsoring program; or

(iv) report the inventory as excess to the needs of the sponsoring program.

(b) If the property is installed so as to necessitate removal and/or restoration, the contractor should provide the Property Administrator with estimated costs of removal and restoration and with a list of actions required (e.g., disconnection of utilities, use of crane, special handling equipment, etc.). The Project Officer should advise the Property Administrator of any and all unusual circumstances related to the inventory. For example, is the property contaminated or unsafe for further use? Do any odors exist that could prohibt further use? How is the property installed (underground, in a body of water)?

(3) Inspections

(a) During site visits, the Project Officer should ascertain or verify the status of both contractor-acquired and/or Government-furnished property that is in the possession of the contractor. The Project Officer should also assure that the contractor has affixed Agency property number decals to Government equipment in the contractor's possession. In addition, a positive determination should be made that the property is being used according to the contract performance requirements and is still needed for performing the contract work. (Note: Equipment not required for performance is to be reported by the contractor to the Property Administrator for coordination with the Project Officer as to future needs.) If equipment is not required, the Project Officer may recommend it be: (1) assigned to another EPA contractor, (2) assigned to a licensee through a Revocable License Agreement; (3) returned to the sponsoring program; (4) made available to another EPA program; or (5) declared excess to the program needs.

(b) The Property Administrator will coordinate all disposal transactions with the contractor after receiving written instructions from the Contracting Officer and advice from the Project Officer.

(4) Preventive Maintenance

Project Officers should verify that preventive maintenance is performed on a regularly scheduled basis by the contractor in accordance with approved property system procedures to prevent malfunctions and to correct minor defects before they result in serious consequences. An effective preventive maintenance program must be established by the contractor, and records must be maintained to disclose the maintenance actions performed and deficiencies discovered as a result of inspections.

(5) Changes, Modifications, or Alterations to Property by Contractors

(a) A Project Officer desirous of requiring or allowing a contractor to modify or alter property in the contractor's possession should request authorization from the Contracting Officer before the actual transaction. The Property Administrator will present the contractor/Project Officer's request to the Contracting Officer to a three-member panel for approval.

(b) Contractors may not modify or alter any property until written approval is received from the Contracting Officer. Contractors may be liable when Government property is damaged or destroyed, or when there is evidence of unreasonable use or consumption.

(6) Return/Transfer of Property

(a) If property is to be returned to the Government before completion of the contract, both the Contracting Officer and the Property Administrator must be advised promptly in writing before the transaction occurs so that an adjustment in accountability is made to the contract.

(b) If the need arises to transfer an item of property from one contract to another, the Contracting Officer and the Property Administrator for both contracts must be advised in writing before the transaction occurs so that all records (both contract and property) can be modified. Detailed property information should be included in the correspondence to assure that the proper item is transferred.

(7) Trade-in of Property

The contractor should first discuss the need or reason for a trade-in of property with the Project Officer. If there are no reasonable alternatives, such as reassignment of the needed item from in-house inventories to the contractor, the Project Officer should advise the contractor to acquire quotes for purchase prices with and without trade-in. Once the quotes are acquired, they should be submitted to the Contracting Officer for review and approval. The Contracting Officer may review the transactions with the Property Administrator to determine whether outright purchase or purchase with

trade-in option is the most beneficial to the Government. Once the Contracting Officer determines the appropriate method, a contract modification will be issued to authorize the contractor to acquire the property.

(8) Lost, Stolen, or Damaged Property

When accountable equipment is lost, missing, or damaged, a comprehensive report must be filed with the Property Administrator by the contractor within three days after the Contracting Officer determines the actual status of the property. All the circumstances surrounding the transaction should be outlined, including names of individuals involved in the investigation, their title, and organization. The local police and the FBI must be advised of any EPA property suspected of having been stolen. Damaged property should be retained by the contractor until written notification is received from the Contracting Officer relieving him of accountability. Attached to the report for missing property should be copies of police and FBI reports.

A report of lost property should include a statement indicating what search was made and which responsible individuals were contacted in attempts to locate the property.

Any given case involving lost, missing or damaged property will be considered open until the contractor receives a written response from the Contracting Officer.

(9) Suspension of Payment

Whenever the Property Administrator has problems with the contractor in acquiring final inventories, information to confirm shipment, or transactions relating to lost, missing, or damaged items of Government property, a memorandum will be provided to the Contracting Officer recommending: (i) withholding of fee, (ii) that a given amount be suspended from the next voucher; or (iii) that the amount of the item in question be denied until the problem can be resolved. The Property Administrator will furnish the Project Officer copies of all correspondence. The Contracting Officer will notify the Financial Management Office of what action to take until the problem is resolved.

## 11.11 Disposal, Return, or Transfer of Government Property

At the end of the contract period of performance, Government-owned property must be removed from the contractor's possession unless title has been vested in the contractor or a follow-on contract is awarded. The contractor can purchase the property from EPA. In most situations the property will either be returned to EPA or transferred to a new contractor. However, if there is no longer a need for an item, or it is no longer useable, the Contracting Officer may authorize it be abandoned or disposed of. In all situations, it is imperative that the Property Administrator be advised of the recommended disposition of the property. He or she will make the appropriate arrangements and coordinate with the contractor.

Upon completion, certain contracts require that any Government property which has been exposed to hazardous or toxic substances must be certified by the Contractor that it is free of biological, radioactive, chemical or any other contamination hazardous

to health and that the property is safe for shipment or acquisition by others. The following certification must be signed by an authorized official of the contractor for each excess declaration transaction or for the final inventory and forwarded to the Property Administrator with a courtesy copy to the Project Officer:

PROPERTY CERTIFICATION

I certify that the listed property is free of biological, radioactive, chemical, or any other contamination hazardous to health and that the property is safe for disposal or reuse.

_____
Signature

_____
Title

_____
Date

When the contractor is unable to decontaminate the property for shipment, the condition shall be identified on the final inventory or by special letter to the Property Administrator. A copy of such information will be sent to the Project Officer who should provide information to the Property Administrator recommending further procedure to process the property. This information will be submitted to the Contracting Officer.

Once the Property Administrator receives disposal instructions from the Contracting Officer, the contractor will be advised as to how to dispose of the property. The Property Administrator will determine whether the property is needed within the Agency or whether it is excess to EPA's needs, and will advise the Contracting Officer.

Sale of Property

Specialized equipment needed for a contract which cannot be used by EPA because of its specialization may be authorized for purchase by the contractor. A contractor may be authorized to secure at his expense the services of an independent appraiser, acceptable to the Government, to evaluate and determine the current on-site, fair market value of the equipment. The contractor will then credit the contract for the amount estimated by the appraiser, thereby transferring title to the contractor. These transactions usually take place at the end of the contract.

Disposal of Installed Personal Property

Installed personal property falls into three categories. The first is property that can be readily removed from the contractor's facility with simple labor services (i.e., it is not installed into any utilities, and it requires no restoration). The second category is property that is installed in the contractor's facility and that requires restoration of the contractor's premises. The third category is property installed into (i) contractor's

equipment and/or equipment in the possession of the contractor but owned by another; (ii) EPA equipment authorized for use under another contract for which the period of performance has not expired.

A determination regarding restoration of the contractor's facility or equipment should be made by the Contracting Officer and incorporated into the official contract at the same time the property is authorized in the contract.

On-Site Transfer of Equipment to a New Contractor

The transfer of Government-owned facilities or property between two contractors requires extremely close coordination by both the Project Officer and Property Administrator. Both the present contractor and the new contractor must conduct their own physical inventories independently of each other and submit their findings to the Property Administrator for reconciliation and resolution. The inventory from the present contractor is used as its final inventory, and if completed to the satisfaction of the Property Administrator, authorization of contract property administration closeout is granted.

The inventory provided by the new contractor is used to ensure that the Government-furnished property is accurately stated in the contract and any problems are resolved with the previous contractor before contract property administration release. Many contracts involve significant inventories, and it is to EPA's advantage to ensure that the new GFP listing in the contract is totally correct. Discrepancies between the old and new contracts may require the issuance of a contract modification to the new contract to reflect the differences. Project Officers are requested to assist in resolving any overages and/or shortages reported by either contractor and, if necessary, in the preparation of supporting documents to determine liability.

Contractor shall provide complete details to support any claimed reduction in refunds.

(3) If the Contractor fails to submit the quarterly statement within 45 days after the end of each quarter and it is later determined that the Government has overpaid the Contractor, the Contractor shall repay the excess to the Government immediately. Unless repaid within 30 days after the end of the statement submittal period, the amount of the excess shall bear interest, computed from the date the quarterly statement was due to the date of repayment, at the rate established in accordance with the Interest clause.

(h) *Subcontracts.* No subcontract placed under this contract may provide for payment on a cost-plus-a-percentage-of-cost basis. The Contractor shall—

(1) Insert in each price redetermination or incentive price revision subcontract the substance of paragraph (g) above, and of this paragraph (h), modified to omit mention of the Government and to reflect the position of the Contractor as purchaser and of the subcontractor as vendor, and to omit that part of subparagraph (g)(2) above relating to tax credits; and

(2) Include in each cost-reimbursement subcontract a requirement that each lower-tier price redetermination or incentive price revision subcontract contain the substance of paragraph (g) above, and of this paragraph (h) modified as required by subparagraph (1) above.

(i) *Disagreements.* If the Contractor and the Contracting Officer fail to agree upon redetermined prices within 60 days (or within such other period as the parties agree) after the date on which the data required by paragraph (c) above are to be submitted, the Contracting Officer shall promptly issue a decision in accordance with the Disputes clause. For the purpose of paragraphs (e), (f), and (g) above, and pending final settlement of the disagreement on appeal, by failure to appeal, or by agreement, this decision shall be treated as an executed contract modification.

(j) *Termination.* If this contract is terminated before price redetermination, prices shall be established in accordance with this clause for completed supplies and services not terminated. All other elements of the termination shall be resolved in accordance with other applicable clauses of this contract.

(End of clause)
(AV 7-109.3(b) 1980 FEB)

**52.216-7 Allowable Cost and Payment.**

As prescribed in 16.307(a), insert the following clause:

ALLOWABLE COST AND PAYMENT (APR 1984)

(a) *Invoicing.* The Government shall make payments to the Contractor when requested as work progresses, but (except for small business concerns) not more often than once every 2 weeks, in amounts determined to be allowable by the Contracting Officer in accordance with Subpart 31.2 of the Federal Acquisition Regulation (FAR) in effect on the date of this contract and the terms of this contract. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract.

(b) *Reimbursing costs.* (1) For the purpose of reimbursing allowable costs (except as provided in subparagraph (2) below, with respect to pension, deferred profit sharing, and employee stock ownership plan contributions), the term "costs" includes only—

(i) Those recorded costs that, at the time of the request for reimbursement, the Contractor has paid by cash, check, or other form of actual payment for items or services purchased directly for the contract;

(ii) When the Contractor is not delinquent in paying costs of contract performance in the ordinary course of business, costs incurred, but not necessarily paid, for—

(A) Materials issued from the Contractor's inventory and placed in the production process for use on the contract;

(B) Direct labor;

(C) Direct travel;

(D) Other direct in-house costs; and

(E) Properly allocable and allowable indirect costs, as shown in the records maintained by the Contractor for purposes of obtaining reimbursement under Government contracts; and

(iii) The amount of progress payments that have been paid to the Contractor's subcontractors under similar cost standards.

(2) Contractor contributions to any pension, profit-sharing, or employee stock ownership plan funds that are paid quarterly or more often may be included in indirect costs for payment purposes; *provided*, that the Contractor pays the contribution to the fund within 30 days after the close of the peruod covered. Payments made 30 days or more after the close of a period shall not be included until the Contractor actually makes the payment. Accrued costs for such contributions that are paid less often than quarterly shall be excluded from indirect costs for payment purposes until the Contractor actually makes the payment.

(3) Notwithstanding the audit and adjustment of invoices or vouchers under paragraph (g) below, allowable indirect costs under this contract shall be obtained by applying indirect cost rates established in accordance with paragraph (d) below.

(4) Any statements in specifications or other documents incorporated in this contract by reference designating performance of services or furnishing of materials at the Contractor's expense or at no cost to

the Government shall be disregarded for purposes of cost-reimbursement under this clause.

(c) *Small business concerns.* A small business concern be paid more often than every 2 weeks and may in and be paid for recorded costs for items or se es purchased directly for the contract, even though the concern has not yet paid for those items or services.

(d) *Final indirect cost rates.* (1) Final annual indirect cost rates and the appropriate bases shall be established in accordance with Subpart 42.7 of the Federal Acquisition Regulation (FAR) in effect for the period covered by the indirect cost rate proposal.

(2) The Contractor shall, within 90 days after the expiration of each of its fiscal years, or by a later date approved by the Contracting Officer, submit to the cognizant Contracting Officer responsible for negotiating its final indirect cost rates and, if required by agency procedures, to the cognizant audit activity proposed final indirect cost rates for that period and supporting cost data specifying the contract and/or subcontract to which the rates apply. The proposed rates shall be based on the Contractor's actual cost experience for that period. The appropriate Government representative and Contractor shall establish the final indirect cost rates as promptly as practical after receipt of the Contractor's proposal.

(3) The Contractor and the appropriate Government representative shall execute a written understanding setting forth the final indirect cost rates. The understanding shall specify (i) the agreed-upon final annual indirect cost rates, (ii) the bases to which the rates apply, (iii) the periods for which the rates apply, (iv) any specific indirect cost items treated as direct costs in the settlement, and (v) the affected contract and/or subcontract, identifying any with advance agreements or special terms and the applicable rates. The understanding shall not change any monetary ceiling, contract obligation, or specific cost allowance or disallowance provided for in this contract. The understanding is incorporated into this contract upon execution.

(4) Failure by the parties to agree on a final annual indirect cost rate shall be a dispute within the meaning of the Disputes clause.

(e) *Billing rates.* Until final annual indirect cost rates are established for any period, the Government shall reimburse the Contractor at billing rates established by the Contracting Officer or by an authorized representative (the cognizant auditor), subject to adjustment when the final rates are established. These billing rates—

(1) Shall be the anticipated final rates; and

(2) May be prospectively or retroactively revised by mutual agreement, at either party's request, to prevent substantial overpayment or underpayment.

(f) *Quick-closeout procedures.* When the Contractor and Contracting Officer agree, the quick-closeout procedures of Subpart 42.7 of the FAR may be used.

(g) *Audit.* At any time or times before final payment, the Contracting Officer may have the Contractor's invoices or vouchers and statements of cost audited. Any payment may be (1) reduced by amounts found by the Contracting Officer not to constitute allowable costs or (2) adjusted for prior overpayments or underpayments.

(h) *Final payment.* (1) The Contractor shall submit a completion invoice or voucher, designated as such, promptly upon completion of the work, but no later than one year (or longer, as the Contracting Officer may approve in writing) from the completion date. Upon approval of that invoice or voucher, and upon the Contractor's compliance with all terms of this contract, the Government shall promptly pay any balance of allowable costs and that part of the fee (if any) not previously paid.

(2) The Contractor shall pay to the Government any refunds, rebates, credits, or other amounts (including interest, if any) accruing to or received by the Contractor or any assignee under this contract, to the extent that those amounts are properly allocable to costs for which the Contractor has been reimbursed by the Government. Reasonable expenses incurred by the Contractor for securing refunds, rebates, credits, or other amounts shall be allowable costs if approved by the Contracting Officer. Before final payment under this contract, the Contractor and each assignee whose assignment is in effect at the time of final payment shall execute and deliver—

(i) An assignment to the Government, in form and substance satisfactory to the Contracting Officer, of refunds, rebates, credits, or other amounts (including interest, if any) properly allocable to costs for which the Contractor has been reimbursed by the Government under this contract; and

(ii) A release discharging the Government, its officers, agents, and employees from all liabilities, obligations, and claims arising out of or under this contract, except—

(A) Specified claims stated in exact amounts, or in estimated amounts when the exact amounts are not known;

(B) Claims (including reasonable incidental expenses) based upon liabilities of the Contractor to third parties arising out of the performance of this contract; *provided*, that the claims are not

known to the Contractor on the date of the execution of the release, and that the Contractor gives notice of the claims in writing to the Contracting Officer within 6 years following the release date or notice of final payment date, whichever is earlier; and

(C) Claims for reimbursement of costs, including reasonable incidental expenses, incurred by the Contractor under the patent clauses of this contract, excluding, however, any expenses arising from the Contractor's indemnification of the Government against patent liability.

(End of clause)
(R 7-203.4(a) 1978 SEP)
(R 7-203.4(b) 1979 MAR)
(R 7-203.4(c)(4)(iv))
(R 7-402.3(a) and (c)(5)(iii)
(R 7-605.5)
(R 7-1909.4)
(R 1-7.202-4)
(R 1-7.203-9)
(R 1-3.704-1 and -2)
(R 1-7.402-3(a) and (b)(1) and (3))
(R 1-7.403-9)

**52.216-8 Fixed Fee.**

As prescribed in 16.307(b), insert the following clause in solicitations and contracts when a cost-plus-fixed-fee contract (other than a facilities contract or a construction contract) is contemplated.

FIXED FEE (APR 1984)

(a) The Government shall pay the Contractor for performing this contract the fixed fee specified in the Schedule.

(b) Payment of the fixed fee shall be made as specified in the Schedule; *provided*, that after payment of 85 percent of the fixed fee, the Contracting Officer may withhold further payment of fee until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government's interest. This reserve shall not exceed 15 percent of the total fixed fee or $100,000, whichever is less.

(End of clause)
(R 7-203.4(a) 1978 SEP)
(R 7-203.4(c)(9))
(R 7-402.3(a) and (c)(7))
(R 7-1909.4)
(R 1-7.202-4)
(R 1-7.402-3(a) and (b)(5))

**52.216-9 Fixed Fee—Construction.**

As prescribed in 16.307(c), insert the following clause in solicitations and contracts when a cost-plus-fixed-fee construction contract is contemplated:

FIXED FEE—CONSTRUCTION (APR 1984)

(a) The Government shall pay to the Contractor for performing this contract the fixed fee specified in the Schedule.

(b) Payment of the fixed fee shall be made in installments based upon the percentage of completion of the work as determined from estimates submitted to and approved by the Contracting Officer, but subject to the withholding provisions of paragraph (c) below.

(c) After the payment of 85 percent of the fixed fee, the Contracting Officer may withhold further payment of fee until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government's interest. This reserve shall not exceed 15 percent of the total fixed fee or $100,000, whichever is less.

(End of clause)
(R 7-203.4(a) 1978 SEP)
(R 7-605.5)

**52.216-10 Incentive Fee.**

As prescribed in 16.307(d), insert the following clause in solicitations and contracts when a cost-plus-incentive-fee contract (other than a facilities contract) is contemplated:

INCENTIVE FEE (APR 1984)

(a) *General.* The Government shall pay the Contractor for performing this contract a fee determined as provided in this contract.

(b) *Target cost and target fee.* The target cost and target fee specified in the Schedule are subject to adjustment if the contract is modified in accordance with paragraph (d) below.

(1) "Target cost," as used in this contract, means the estimated cost of this contract as initially negotiated, adjusted in accordance with paragraph (d) below.

(2) "Target fee," as used in this contract, means the fee initially negotiated on the assumption that this contract would be performed for a cost equal to the estimated cost initially negotiated, adjusted in accordance with paragraph (d) below.

(c) *Withholding of payment.* Normally, the Government shall pay the fee to the Contractor as specified in the Schedule. However, when the Contracting Officer considers that performance or cost indicates that the Contractor will not achieve target, the Government shall pay on the basis of an appropriate lesser fee. When the Contractor demonstrates that performance or cost clearly indicates that the Contractor will earn a fee significantly above the target fee, the Government may, at the sole discretion of the Contracting Officer, pay on the basis of an appropriate higher fee. After payment of 85 percent of the applicable fee, the Contracting Officer may withhold further payment of fee until a reserve is set aside in an amount that the Contracting Officer considers necessary to protect the Government's interest. This reserve shall not exceed 15 percent of the applicable fee or $100,000, whichever is less.

(d) *Equitable adjustments.* When the work under this contract is increased or decreased by a modification to

## Sample EPA Form 1730-1: Supporting Property Costs Claimed on Voucher

Please read the Paperwork Reduction Act Notice in the Contractor's Guide for Control of Government Property.

Form Approved. OMB No. 9000-0075. Expires 8-31-90.

EPA

United States Environmental Protection Agency
Washington, DC 20460

**Report of Nonexpendable Government Property Acquired by Contractor**

| Contract Number | Report Number |
|---|---|
| 68-W8-0125 | 2 |
| **Contractor's Voucher No.** | **Date** |
| 2 | 11-30-88 |

**Instructions to Contractor:**

a) Submit original to Property Administrator.
b) A copy of this report **Must** be attached to voucher submitted to Financial Management Division to support claim for reimbursement.

Contractor's Name and Location Where Property is Physically Located

*DYNATREND INCORPORATED*
*21 Cabot Road*
*Woburn, Massachusetts 01801*

| List below each article of nonexpendable property | | Date Acquired | Manufacturer's Model Number | Manufacturer's Serial Number | EPA Decal Number | EPA Account Number | Contractor's PO Number to Vendor/Mfg | Unit Cost |
|---|---|---|---|---|---|---|---|---|
| Qty | Nomenclature/Description (Include mfg. name) | | | | | | | |
| 1 | Computer, personal, portable laptop - Tandy | 11-12-88 | 123-1234 | 12345678 | 098765 | 7ABC33XOAR | 88-124 | $ 400 |
| 1 | Sampler, air, constant flow with skip - Anderson | 11-1-88 | AB111 | 54321 | 098761 | 7ABC33XOAR | 88-121 | 1,700 |
| 1 | Monitor, dust - GCA | 11-10-88 | 1000223 | 1234 | 098760 | 7ABC33XOAR | 88-118 | 1,600 |
| 1 | Meter, combustible gas with accessories - MSA | 11-2-88 | 260 | 135791 | 098768 | 7ABC33XOAR | 88-110 | 1,050 |
| 1 | Computer, personal - IBM<br>$3,500 initial acquisition cost<br>1 year lease expires 11-30-89<br>$250/month, straight lease no credits | 11-1-88 | 60 | 1234567 | L12345 | 7BC33XOAR | 88-102 | 250 |
| | TOTAL | | | | | | | $5,000 |
| | NOTE: This sample includes a sensitive item and a leased item | | | | | | | |

**Certification**

I certify that the statements I have made on this form and all attachments thereto are true, accurate, and complete. I acknowledge that any knowingly false or misleading statement may be punishable by fine or imprisonment or both under applicable law.

| Name and Address of EPA Property Administrator | Purchase Authority | Signature of Contractor's Representative |
|---|---|---|
| *Contract Property Administrator*<br>*Facilities Management and Services Division*<br>*Environmental Protection Agency, MD-36*<br>*Research Triangle Park, N.C. 27711* | X Clause Number of Contract: G.11<br>Contracting Officer's Letter of Approval Dated:<br>Other (Explain) | Beth Corrigan<br>Title: *Contract Administrator*<br>EPA Voucher Number / Date |

EPA Form 1730-1 (Rev. 9-88) Previous editions are obsolete.

# EVALUATING PERFORMANCE AND DELIVERABLES AND GIVING FEEDBACK

# CONTRACTOR PERFORMANCE EVALUATION

1. On-Site Inspections
2. Written Communications
3. Evaluation Of Deliverables
4. Evaluation Of Overall Performance On Each Work Assignment
5. Summary Evaluation By Project Officer On Contract As A Whole

# GIVING CONTRACTORS FEEDBACK ON PERFORMANCE

1. DON'T DELAY! Give Feedback Immediately When A Problem Is Discovered.

2. BE SPECIFIC: Indicate Specific Problem, Using Specific Example(s). Be Accurate. Avoid Generalities. Give Examples Of Correct Performance, If Possible.

3. KEEP RECORDS: Record Time/Date Of Feedback And Feedback Given. Record Contractor's Response. Write Memo To File Following Feedback Session And Give Copy To Contractor.

4. REINFORCE POSITIVE PERFORMANCE: Give Positive As Well As Negative Feedback.

# GIVING CONTRACTORS FEEDBACK ON PERFORMANCE (Cont.)

5. BE PREPARED: Have Agenda For All Contractor Meetings; Review Materials In Advance And Have Comments Ready.

6. DEAL WITH PRIME CONTRACTOR ONLY: Give Feedback Directly To Prime, Not To Subcontractor.

7. KEEP PROJECT OFFICER/CONTRACTING OFFICER INFORMED.

# OPTIONS FOR HANDLING DEFICIENT OR DELINQUENT PERFORMANCE

1. Fixed Price Contracts: Reject Deliverable.

2. Cost Reimbursable Contracts: Discuss Deficiencies With Contractor. Since The Contractor Only Guarantees Best Efforts, Government Must Pay For Reperformance. If Contractor Does Not Correct Deficiencies, Government Can Suspend Payment On Future Payments.

3. LOE Contracts: CO Can Disallow Contractor's Costs If Contractor Ignored Agency's Written Technical Direction Or Clearly Exceeded Scope Of Work Requested By Agency (I.e., Contractor "Volunteered") Or Where Contractor Failed To Inquire About And Clarify Obvious Ambiguities Or Acted In Bad Faith.

4. Government Can Claim Liquidated Damages If The Original Contract So Provided.

SAMPLE

# DELIVERABLE REVIEW FORM

Contract#_____
Del. Order/Work Assignment#_____
Deliverable Due Date: _____
Date of Receipt: _____

Deliverable Number & Title: _____

_____

Description of Deliverable (Exact Contract Specifications)
(Attach if more space needed)

Decision: [ ] Accepted [ ] Rejected (See Comments)
[ ] Amendment Proposed (See Comments)

Comments:

1. Were all specifications met, to the desired level of quality? If not, what is missing?
2. Was deliverable timely? If not timely, did delay make deliverable of reduced value to government? Why was it not timely?
3. What, if any, changes are needed to meet specifications or improve quality or usefulness?
4. Will any changes requested/desired affect the contractor's scope of work or constitute a contract or work assignment modification?

Reviewer: _____ Date Reviewed: _____

# REVOCATION OF ACCEPTANCE

## (Fixed Price)

**EPA May Revoke Acceptance Of A Deliverable On The Following Conditions:**

- **Latent Defects**
- **Contractor Fraud**
- **Gross Mistakes**
- **Guarantees Or Warranties Provided By Contractor That Are Not Met**

# WAYS TO IMPROVE CONTRACTOR PERFORMANCE

1. Use Of Fixed Price Contracts

2. Refusal To Accept Deficient Performance (Services Or Deliverables); Requiring Reperformance With No Additional Fee

3. Refusal To Pay Contractor Invoices Pending Correction Of Deficiencies

4. Effective Feedback On Performance; Appropriate Use Of Praise Or Criticism

5. Careful And Thorough Contract Monitoring

6. Periodic Performance Evaluations

7. Exercising Of Contract Option Years

8. Use of Award Fee Contracts

## ERCS CONTRACTOR PERFORMANCE SUMMARY

| | | |
|---|---|---|
| 1. CONTRACT NO. | 2. DELIVERY ORDER NO. | 3. EPA REGION/USCG DISTRICT: |
| 4. DELIVERY ORDER CEILING AMOUNT: | | 5. ZONE: |

| | |
|---|---|
| 6. ISSUED TO: CONTRACTOR (*Name, Address and Zip Code*) | 7. RESPONSE LOCATION: (*Site Name, Address and Zip Code*) |
| 8. RESPONSE MANAGER: (*Name and Phone No.*) | 9. ON-SCENE COORDINATOR: (*Name and Phone No.*) |

10. DESCRIBE SCOPE OF WORK:

11. PERSONNEL AND EQUIPMENT ON SITE WITHIN REQUIRED RESPONSE TIME? COMMENT:

| | |
|---|---|
| 12. WORK PERFORMED BY: ERCS CONTRACTOR ____<br>SUBCONTRACTOR (*Name*) _____ | 13. INITIAL COST ESTIMATE: _____<br>FINAL COST: _____ |
| 14. ANY PROBLEMS RESULTING FROM USE OF SUBCONTRACTOR? | 15. REASONS FOR COST SAVINGS/OVERRUN, IF ANY: |

16. EVALUATION OF CONTRACTOR'S COST CONTROLS:

17. DAILY COST REPORTS:
CURRENT ____ ACCURATE ____

SHEET 1 WHITE — OSC COPY
SHEET 2 CANARY — OPS RETENTION COPY
SHEET 3 PINK — PROJECT OFFICER COPY
SHEET 4 GOLD — CONTRACTING OFFICER COPY

## ERCS CONTRACTOR PERFORMANCE SUMMARY

| CONTRACT NO. | DELIVERY ORDER NO. |
|---|---|
| | |

**19. PERSONNEL AND EQUIPMENT USED IN AN EFFICIENT MANNER?** COMMENT:

**20. INTERACTIONS BETWEEN ERCS CONTRACTOR AND OTHER ON-SCENE PERSONNEL** *(i.e., TAT, REM/FIT, State Personnel)*

☐ GOOD ☐ SATISFACTORY ☐ UNSATISFACTORY COMMENT:

**21. NECESSARY SAFETY PRECAUTIONS TAKEN?** ☐ YES ☐ NO COMMENT:

**22. UNUSUAL PROBLEMS/OCCURRENCES AFFECTING CONTRACTOR'S PERFORMANCE:**

**23. OVERALL ASSESSMENT OF CONTRACTOR'S PERFORMANCE:** *(Additional pages may be added, as necessary)*

| *Name of On-Scene Coordinator* | *Signature* | *Date* |
|---|---|---|
| | | |

SHEET 1 WHITE — OSC COPY
SHEET 2 CANARY — OPO RETENTION COPY
SHEET 3 PINK — PROJECT OFFICER COPY
SHEET 4 GOLD — CONTRACTING OFFICER COPY

AWARD FEE (APR 1984)

The amount of award fee the Contractor earns, if any, is based on a subjective evaluation by the Government of the quality of the Contractor's performance in accordance with the award fee plan. The Government will determine the amount of award fee every ..... months beginning ..... The Fee Determination Official (FDO) will unilaterally determine the amount of award fee. The FDO's determination will be in writing to the Contractor and is not subject to the "Disputes" clause. The Government may unilaterally change the award fee plan at any time and will provide such changes in writing to the Contractor prior to the beginning of the applicable evaluation period. The Contractor may submit a voucher for the earned award fee. Available award fee not earned during one period does not carry over to subsequent periods.

# COST PLUS AWARD FEE (CPAF) CONTRACTING

<u>Elements of a CPAF Contract:</u>

| | | |
|---|---|---|
| 1. ESTIMATED COST | = | Negotiated Cost |
| 2. BASE FEE | = | Fixed Dollar Amount - Normally 3% Or Less |
| 3. AWARD FEE POOL | = | Based On Negotiated Estimated Costs X (.07). Maximum Amount Available To Award Good Performance - Normally 7% |

(Base And Award Fee Amount Normally Does Not Exceed 10% Of The Estimated Cost.)

SAMPLE

# COST PLUS AWARD FEE (CPAF) CONTRACTING

## Fee Allocation Matrix

**Contract No:** **Contractor:**

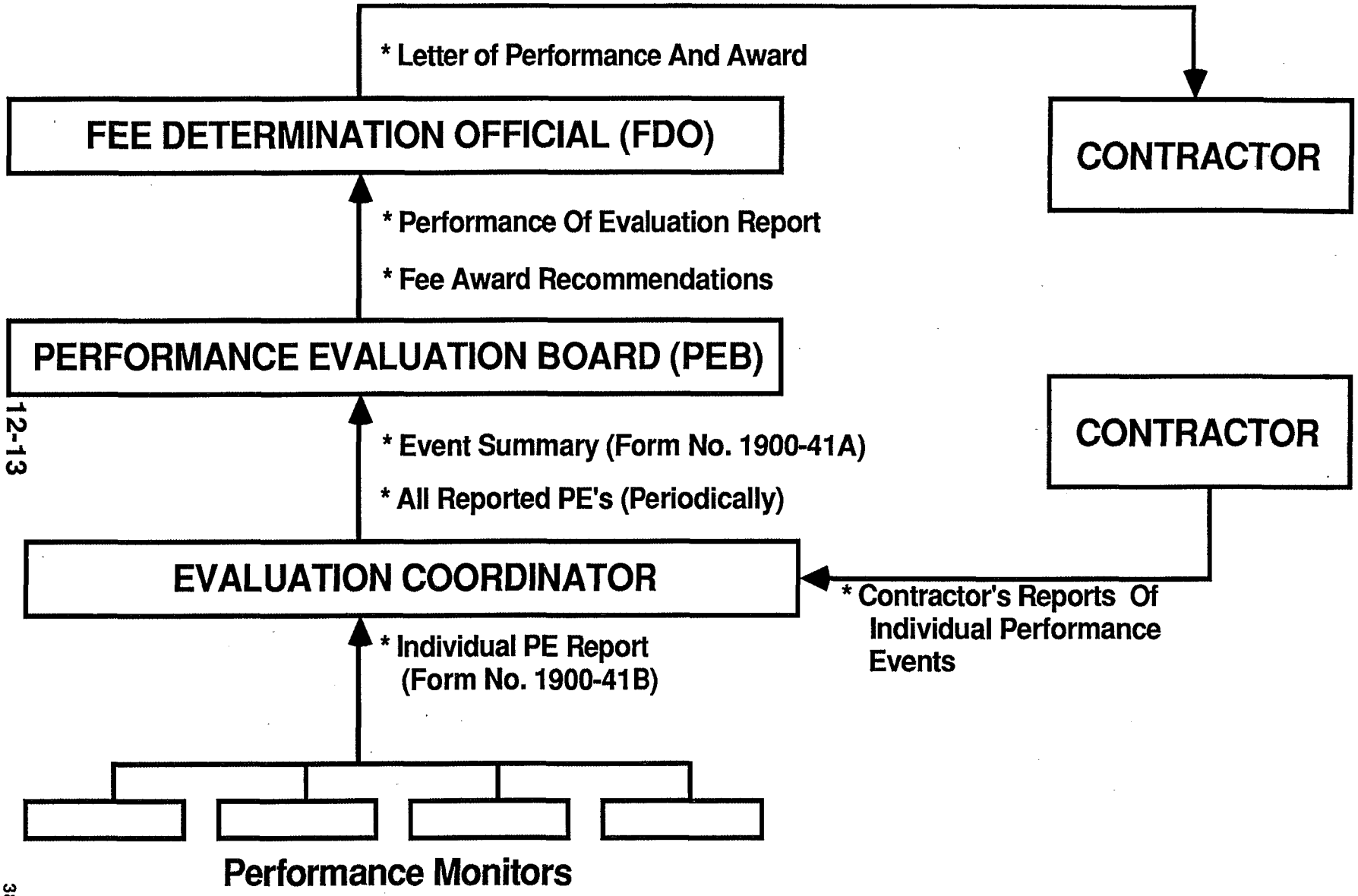
| EVALUATION CATEGORY: | PERFORMANCE EVALUATION PERIODS | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 |
| Sampling & Analysis | 10% | 30% | 35% | 30% | 30% | 25% | 25% | 20% |
| Emergency Response | 20% | 20% | 20% | 20% | 20% | 20% | 20% | 20% |
| Technical Support | 10% | 10% | 10% | 15% | 15% | 20% | 20% | 25% |
| Data Security/Risk Analysis | 10% | 10% | 10% | 10% | 10% | 10% | 10% | 10% |
| Program Management | 50% | 30% | 25% | 25% | 25% | 25% | 25% | 25% |
| Total Available Dollars | $30K | $35K | $25K | $20K | $20K | $35K | $35K | $30K |

Approved: _____ Date: _____

Chairman, Performance Evaluation Board

PROCUREMENT AND CONTRACTS MANAGEMENT DIVISION

# CPAF CONTRACT PERFORMANCE REPORTING REVIEW AND EVALUATION PROCEDURE




PROCUREMENT AND CONTRACTS MANAGEMENT DIVISION

# CPAF CONTRACT INDIVIDUAL PERFORMANCE EVENT

| CONTRACT NO. | CONTRACTOR | TASK ORDER NO. |
|---|---|---|
| | | |

| REPORTING ELEMENT | DATE OF REPORTED EVENT |
|---|---|
| | |

PERFORMANCE EVALUATION CATEGORY

WAS CONTRACTOR NOTIFIED ? ☐ YES ☐ NO BY WHOM? WHEN?

DESCRIPTION OF PERFORMANCE EVENT

| MONITOR | SIGNATURE OF MONITOR | DATE |
|---|---|---|
| | | |

COORDINATOR'S ASSESSMENT

| COORDINATOR | SIGNATURE OF COORDINATOR | DATE |
|---|---|---|
| | | |

# DEFINITION OF PERFORMANCE

The Performance Monitors will observe the following definitions of Contractor performance in reporting and judgijng observations:

| | | |
|---|---|---|
| (1) Superior | "+" | The observation is indicative of performance which exceeds the satisfactory level. |
| (2) Satisfactory | "O" | The observation is indicative of an acceptable level of performance. |
| (3) Subtandard | "-" | The observation is indicative of performance which is less than satisfactory. |

PROCUREMENT AND CONTRACTS MANAGEMENT DIVISION

Chapter 12

# EVALUATING PERFORMANCE AND DELIVERABLES AND GIVING FEEDBACK

What is the Government's remedy if the contractor is not performing properly, in accordance with the terms of the contract? What should a Project Officer do if he or she is not satisfied with an intermediate deliverable, or the final work product? How do we handle a deficiency discovered after acceptance of an item? The answers depend upon the type of contract involved and the specific provisions contained therein, as well as the actions of the Government during the course of contract performance. If the contract is a firm-fixed-price type, the contract is usually very clear on the rights and responsibilities of the parties. But in a contract for research and development, for example, where the Statement of Work is vague, the situation may involve the exercise of judgment and discretion by the Contracting Officer. If the contract is a cost-plus-award-fee contract, an intermediate performance evaluation can send the contractor a clear financial message.

## 12.1 Evaluating Contractor Performance

There are a variety of ways and points in the life of a contract to formally evaluate contractor performance. One method, the conduct of inspections, was discussed earlier in Chapter 10. Conduct of an on-site inspection is appropriate whether the contractor is providing a service or a deliverable.

Evaluation of deliverables is a second means of formal contractor evaluation. Formal evaluation should also take place at the conclusion of each work assignment or delivery order, as well as at the conclusion of the entire contract. And finally, for very large and long contracts, a schedule of periodic formal evaluation may be built in. Award fee contracts incorporate such a periodic evaluation.

## 12.2 Giving Contractors Feedback On Performance

The importance of prompt Government action if potential deficiencies are discovered during the contract performance cannot be stressed enough. The longer problems drift along, the worse they tend to get, the more difficult and time-consuming they are to resolve, and the greater the chance exists that the Government may lose its contractual rights. The goal in contract monitoring is to be aware of all situations arising under the contract. Proper and timely action on the part of technical personnel gives the Government the time and opportunity to make decisions and adjustments as problems arise.

Several common-sense rules apply in giving contractors feedback on performance.

a. Don't Delay. First and foremost, feedback should be immediate. Once a problem is discovered, act immediately to document the problem and inform the contractor.

b. Be Specific. In giving feedback, indicate the specific problem, using specific examples. Don't use generalities. If possible, give positive examples of the desired performance, preferably drawn from the contractor's existing work to date. Be sure to be accurate.

c. Keep Records. Document the time and date the feedback is given, and the nature of the feedback, as well as the contractor's response. Write a memo to the record following the feedback session, and give a copy to the contractor. (Or ask the contractor to summarize it for you. But if you do, be sure to verify its accuracy.)

d. Reinforce Positive Performance. Positive feedback reinforcing the desired performance is extremely important, particularly when it comes to making the contractor aware of exactly what the Government wants, and creating good communication with the contractor. Be sure to reinforce the positive work the contractor has done along with pointing out the deficiencies.

e. Be Prepared. Before contractor meetings, prepare an agenda, and be sure to have reviewed all materials for the meeting and have comments prepared. Identify in advance (for yourself and the contractor) what the objective of the meeting is, and what you want to accomplish.

f. Deal Only With The Prime Contractor. Unless there is a contractual exception (e.g., as there may be with some Superfund contracts), give feedback only to the prime contractor, even if the feedback relates to subcontract work. It is the prime's responsibility to communicate feedback to its subcontractors.

g. Keep The Contracting Officer Informed. When there are deficiencies in contractor performance to be communicated, be sure to inform the Project Officer for the contract, as well as the Contracting Officer. Both can advise as to the appropriate way to proceed. And it certain cases, it may be their responsibility to proceed rather than yours.

## 12.3 Deficiencies Discovered During Performance

Contractors guarantee their performance in fixed price contracts. Fixed price contracts for supplies generally call for inspection during performance. If this takes place, and an item is found to be defective, it will be rejected immediately and the contractor notified. New items will have to be produced. If this is not done or they are still defective, or if future delays can be clearly foreseen the contractor will be formally notified that the Government considers this a condition endangering performance, and the contract may be terminated for default if the problem is not corrected. Hopefully, this will be sufficient to get performance back on track. If not, the Contracting Officer has the option of termination for default (see Chapter 14) or of accepting the items which are late or defective at a reduced price or in exchange for some other form of consideration.

Under a cost-reimbursement contract, the contractor is required only to use his best efforts to perform the work. Quality is a subjective opinion, and the statement of work does not always clearly express what the Project Officer had in mind when envisioning the work results. For this reason, diligent contract monitoring is important. Early discussion with the contractor in order to redirect the effort can help avoid delivery of services which are of poor quality. In most cases, the contractor will be responsive to this approach and will voluntarily take action to improve performance.

When a Project Officer discovers that a contract requirement is not being met, he or she should call attention to the discrepancy and first seek a voluntary commitment by the contractor to take remedial action. The Contracting Officer must be notified

immediately, and follow-up action is necessary to ensure that the deficiency has been corrected.

In cases where the contractor disputes the existence of the discrepancy, claiming the requirements of the contract are, in fact, being met, the Government must determine the grounds for the contractor's claim. This must be in writing, and must involve the Contracting Officer at the earliest stage possible. If the Project Officer believes the contractor's position is wrong or unreasonable, he or she should inform the Contracting Officer in writing, and the Contracting Officer will make a decision. If the contractor disagrees, the matter will become a Dispute. (See Chapter 14.)

Failure to perform on time is another possible deficiency to watch for. Depending upon the situation, when a delay is anticipated, there might be alternative actions available. Work may be accelerated by applying greater resources, e.g., personnel, overtime, or equipment. (The availability of resources and money must be determined by the program office.) At times, a new technical approach or system may be used to solve the problem. It is possible that the program office may find the delay to be acceptable. However, the Project Officer is not authorized to waive the requirements of the delivery schedule. It must also be understood that if the contract to be accelerated is of a cost-reimbursement type, the accelerated effort will most probably increase the cost to the Government. If it is a fixed-priced completion contract and acceleration is needed to avoid default, the cost of acceleration will be borne by the contractor.

One powerful right of the Government is the right to suspend payment of authorized progress payments on fixed price contracts unless and until satisfactory progress has been shown or deliveries made. If a Project Officer is not satisfied with a contractor's progress, the Contracting Officer should be notified immediately. A decision will then be made as to whether progress payments should be withheld. In cost-reimbursement contracts, however, the right is merely one of suspending payment. The government must ultimately reimburse the contractor for work performed by the contractor in response to the government's written technical direction regardless of the government's satisfaction with the work produced. The government can refuse payment only where Contracting Officer determines that the contractor exceeded the scope of work requested, charged for hours not spent on the contract, proceeded in bad faith, or some similar circumstance. Costs that are reasonable, allowable and allocable must be paid.

Liquidated damages are another means of adjusting for deficiencies in contract performance, but they must have been negotiated into the original contract agreement before they can be assessed during performance. Usually, they take the form of dollar reductions for each day of delayed performance. Liquidated damages provisions are not often used in EPA contracts.

## 12.4 Acceptance or Rejection

Every contract has some type of inspection clause which sets forth the rights and responsibilities of the contracting parties concerning the delivery or performance of acceptable supplies or services. The impact of the clause is dependent upon the type of contract involved as well as whether the contract is for supplies or services. Some of the various rights and responsibilities are listed below:

(1) The contractor is required to provide and maintain an inspection system acceptable to the Government and maintain complete records of such inspections.

(2) The Government has the right to inspect supplies or services before acceptance. With this right goes the responsibility to make inspection in a manner that will not unduly delay the work.

(3) The Government has the right to reject supplies that do not conform to contract specifications. In cost-reimbursement type supply contracts, the Government may, up to six months after acceptance, require the contractor to replace or correct supplies that are nonconforming at the time of delivery.

(4) In fixed-price supply contracts, acceptance by the Government is not conclusive with regard to latent defects, fraud, or such gross mistakes as to amount to fraud. (See Chapter 14).

(5) In cost-reimbursement service contracts, if services performed do not conform to contract requirements, the Government has the right to require the contractor to perform the services again for no additional fee. However, the Government must pay the contractor's costs for reperformance.

If the products or services conform to contract requirements, they should be accepted by the Project Officer. But if they do not conform, the CO must reject them immediately. To exercise its right of rejection, the Government must notify the contractor of the rejection. The notice should be prepared by the Project Officer and signed by the Contracting Officer. The written notice should:

(1) Specifically identify what is rejected;

(2) Identify the basis for rejection; that is, the specific failure to conform to contract requirements;

(3) State what corrective action is required; and

(4) State whether correction should be made at the Government facility or elsewhere.

Page 378 provides a sample deliverable review form that Government personnel can use to document the results of their review of deliverables and communicate it to the contractor. This form can be modified to suit the individual contract needs.

Unless the contract provides otherwise, acceptance or rejection must be made as promptly as is practical after delivery, since a delay in such notice may, in some circumstances, imply acceptance. Inspection of partial products or work in process does not relieve the contractor of the responsibility for correcting defects discovered prior to acceptance of the final product or the completed work. Furthermore, Government failure to inspect, and to accept or reject, does not relieve the contractor from responsibility for a defect.

### 12.5 Revocation of Acceptance

Normally, once a product or service is accepted by the Government, acceptance is final and binding. However, in a few instances, the Government has a right to require correction after an item has been accepted. One of the following conditions must be present:

(1) Latent Defects

A patent defect is one that could reasonably be discovered by normal inspection methods. A latent defect is one that could not be reasonably discovered using normal inspection techniques. It does not have to be impossible to discover. A defect discoverable by special tests (X-ray) is a latent defect if such special tests are not normally used to inspect that kind of item.

The fact that the contractor could have very easily discovered the defect does not make it patent. Government contracting personnel or full-time quality assurance/quality control specialists are qualified to determine if a defect discovered after inspection is patent or latent. Only latent defects discovered after acceptance are subject to correction by the contractor without cost to the Government under a fixed price contract.

(2) Fraud

The Government has the right to revoke acceptance if it was deceived into an acceptance by fraud. Fraud involves an intentional deceit or falsehood. Acceptance due to fraud may be revoked even if the defect was patent.

(3) Gross Mistakes

If the contractor's conduct with respect to a defect involves a mistake so gross as to amount to fraud, the Government has the right to revoke acceptance as if there were fraud.

(4) Guarantees or Warranties

A guarantee or warranty is a promise or affirmation given by a seller to EPA regarding the nature, usefulness or condition of the supplies or performance of services to be furnished. The principal purposes of a guarantee/warranty are to delineate the rights and obligations of the contractor and EPA for defective items and services and to foster quality performance. Generally, warranties survive acceptance of the contract items for a stated period of time or use, or until the occurrence of a specified event, notwithstanding other contractual provisions pertaining to acceptance by the Government. Thus, they allow EPA additional time after acceptance in which to assert a right consistent with the warranty or guarantee.

When acceptance is properly revoked, the Government has the same remedies available as when the defects are discovered prior to acceptance and the items rejected at that time.

## 12.6 Periodic Formal Performance Evaluations

The conduct of periodic formal performance evaluation is a very useful means of giving the contractor feedback and attempting to provide an incentive for improved performance. Such evaluations can be scheduled on a routine basis (e.g., quarterly or semi-annually), or be tied to the completion of work assignments or deliver orders. Several of the Superfund contracts have established forms for the conduct of such evaluations, e.g., see pages 382-3. The final evaluation of contractor performance

conducted as part of contract closeout is discussed in Chapter 14. A sample form for conducting such an evaluation is provided on page 451.

## 12.7 Cost-Plus-Award-Fee Contracts

Another means the government has for encouraging high performance quality is to provide monetary incentives for good performance. This is done through use of cost-plus-award fee contracts.

All the policies and requirements covering CPAF contracts are contained in the Environmental Protection Agency Acquisition Regulations, Part 1516.4. Project Officers can obtain a copy of these from their Contracting Officers. Presented here is a brief summary of the contract administration functions relating to these contracts.

An award fee plan is included in the solicitation and incorporated into each CPAF contract. This document describes what criteria the Government will use to determine the fee to be awarded the contractor each period. The following elements must be included:

(1) The base fee amount;

(2) The total award fee pool;

(3) Performance areas to be evaluated;

(4) Criteria to be used in evaluations;

(5) Relative weights to be assigned to performance areas and to the evaluation criteria;

(6) Frequency and timing of award fee determination;

(7) Proportion of the total award fee pool to be available for each evaluation period; and

(8) Procedures to be followed (the timing involved) in evaluating performance and determining the award fee.

The Government may unilaterally change the award fee plan (except base fee amount and the total fee pool), but must notify the contractor prior to the evaluation period in which any changes will take effect. If the plan is incorporated into the contract, a contract modification is required.

A Performance Evaluation Board (PEB) is a board of EPA officials established before the award of an CPAF contract. These individuals perform the in-depth review of all aspects of contractor performance at periodic intervals (usually every 4 months) during the period of the contract. They then recommend to the Fee Determination Official (FDO) an appropriate amount of fee to be awarded to the contractor. The FDO makes the final determination of the award fee. (The Fee Determination Official is the Chief of the Contracting Office which is administering the CPAF contract). The PEB Chairperson and the other members are initially appointed by the Director, PCMD; thereafter, any changes are approved by the PEB Chairperson. One voting member of the PEB will always be a representative from the contracts office.

The PEB evaluates performance on the basis of Performance Event Reports (see page 388) which are submitted each period by Performance Monitors (individual EPA employees who observe the contractor's performance on a close, continuous day-to-day basis). Performance Monitors report on either technical or business aspects of the contractor's performance, and report their observations on individual "events" which occur during the period, and which are representative of contractor performance.

Events are reported on EPA Form 1900-41B, CPAF Contract Individual Performance Event (See page 388), and submitted to the Evaluation Coordinator. Performance monitors should assess the performance using the definitions stated in the contract. The EPAAR specifies the following rating plan:

(1) Superior - "+" - The performance event exceeds the satisfactory level.

(2) Satisfactory - "o" - The performance event is acceptable.

(3) Substandard - "-" - The performance event is less than satisfactory.

However, some programs have been granted deviations, e.g., the Superfund TAT (Technical Assistance Team) contracts, five levels of rating criteria are being used: exceptional, exceeded expectations, satisfactory, marginal, and unsatisfactory. These are summarized on pages 398-9, and accompanied by more detailed performance observation reports. Emergency Response contracts (ERCs) also have their own performance summary and CPAF performance event reports (see pages 400ff).

The Evaluation Coordinator will present these reports to the Performance Evaluation Board (PEB), along with a summary of significant events. The PEB will review these reports against each performance evaluation category and determine the recommended award fee for each category. A Performance Evaluation Report will then be prepared and forwarded to the Contracting Officer, who will present it to the Fee Determination Official for final determination of the amount of fee to be awarded to the contractor.

A letter will then be sent to the contractor's general management, informing them of the amount and basis of the fee awarded, and any changes to the award fee plan to be effective during the next evaluation period. The contractor is then authorized to invoice for the award fee earned during the previous period.

# EXHIBIT VII-11

## RATING GUIDELINES FOR PERFORMANCE EVALUATION CRITERIA

| RATING | TAT PERFORMANCE EVALUATION CRITERIA | | | | | |
|---|---|---|---|---|---|---|
| | PROJECT PLANNING | TECHNICAL COMPETENCE AND INNOVATION | SCHEDULE AND COST CONTROL | REPORTING | RESOURCE UTILIZATION | EFFORT |
| 5 EXCEPTIONAL | Ensures that cost/time is minimized to meet technical direction specifications<br><br>"Fast tracking" or stream- lined approaches implemented as necessary | Innovative technical solution applied<br><br>Results may establish state-of-the-art approach to address problems<br><br>Met original established removal action goals and objectives | Original schedule met in spite of major operation impediments<br><br>Services completed ahead of schedule at a reduced cost to the Government than originally estimated | Reports provide such insight into key problems and potential solutions as to serve as master plan for corrective action<br><br>No re-write of report required by EPA personnel | All of the contractor resources are applied to minimize costs and time, while enhancing overall work quality | Contingency plans always developed<br><br>Response actions taken in extreme weather conditions or high risk areas<br><br>Personal effort well beyond contract requirements |
| 4 EXCEEDED EXPECTATIONS | Provides for significant cost/time savings and contains adequate approaches to address requirements contained in TDD | Quality was above average of experience with similar type contractors over past two years | Original schedule met in spite of minor operational impediments<br><br>Services completed on schedule at a reduced cost to the Government | All reports are of consistent high quality, both in content and presentation<br><br>No re-write of report required by EPA personnel | One or a few of the contractor resources are utilized efficiently, resulting in cost or time savings and providing specified quality of work | Appropriate resource allocation to counter operations impediments<br><br>Responsive to minor changes in scope of work and priority adjustments |
| 3 SATISFACTORY | Adequate to meet requirements specified in Statement(s) of Work, and goals and objectives of the program and/or contract requirements | Quality was average of experience with similar type contractors over past two years | Original schedule met<br><br>Cost was reasonable considering scope of effort | All required reports were delivered on time and with contents as specified | Staffing, subcontracting, equipment, and other resources (e.g., travel) adequately utilized to meet project and contract requirements | Resources mobilized in sufficient time to meet established budget/ schedule<br><br>Regular communication and interaction with Agency personnel |
| 2 MARGINAL | Work assignment or contract specifications not completely addressed<br><br>Cost and/or time disproportionate to required level of effort | Quality was below average of experience with similar type contractors over past two years | Original schedule slipped without adequate warning or justification<br><br>Available cost savings not taken advantage of | Required reports were delivered within 1-6 days after due date but without justification or warning<br><br>Contents of report not as specified | One or a few of contractor resources are not used efficiently, resulting in cost overruns and time delays | Effort was below average of experience with similar type of contractors over the last two years under similar circumstances |
| 1 UNSATISFACTORY | Incorrect identification of requirements needed to meet TDD SOW<br><br>Inadequate schedule to provide quality product or service | Lack of technical competence evident in any of major technical or management areas addressed | Activities completed so late as to have resulted in loss of utility or negatively impacted program | Required reports delivered more than one week late without adequate justification or warning<br><br>Contents of reports inadequate to permit interpretation of problems or actions | Consistent poor utilization of resources which hinders the implementation of the program | Ad hoc requests and operational impediments unaddressed, and adequate warning or justification was not provided or was unacceptable |

EXHIBIT VII-12

Award Fee Percentages vs. Performance Assessment Definitions

P E R F O R M A N C E S P E C T R U M

0_____20_____40_____50_____60_____80_____100

| | |
|---|---|
| 0 - 19 | Performance below 20 is indicative of serious mismanagement, negligence, and/or incompetence. Continued performance at this level may require the Government to consider contract termination for cause. |
| 20 - 39 | Performance between 20 and 39 is substandard, and requires the contractor to take immediate corrective action. Areas of adequate or better performance are offset significantly by poorer performance in other areas. |
| 40 - 59 | Performance between 40 and 59 is satisfactory, with the 50 point being the expressed level of satisfactory performance that can be expected from a good CPAF contractor. Areas requiring improvement are approximately offset by better performance in other areas. |
| 60 - 79 | Performance between 60 and 79 is superior. The satisfactory level is exceeded and the monitors can cite only a few minor areas requiring improvement. |
| 80 - 100 | Performance of 80 or above is outstanding. There are no significant areas of poor performance and there are factors indicating creativity, ingenuity, initiative, and/or excellent performance under very adverse circumstances. |

EXHIBIT V-4(1)

| Cost Center | ACKNOWLEDGEMENT OF COMPLETION<br>PERFORMANCE OBSERVATION REPORT: PART I | | |
|---|---|---|---|
| Contract No:<br>68-01-7367 | Contractor:<br>Roy F. Weston, Inc. | | TDD No. |
| Reporting Element: | Date(s) of Reported Observation | Approx. No. of Hours | ☐ Format Report<br>☐ Letter Report<br>☐ Formal Briefing<br>☐ Other (Specify) |
| Performance Evaluation Category: | | | |
| Description of Contractor Observation By: _____<br>Name/Title | | | |
| Rating: 5,4,3,2,1 | Signature of Contractor: | | Date: |
| Description of EPA Observation By: _____<br>Name/Title | | | |
| Rating: 5,4,3,2,1 | Signature of EPA: | | Date: |
| Signature of Regional POR Coordinator: | | | Date: |
| HQ Coordinator's Evaluation By: _____<br>Name/Title | | | |
| Rating: 5,4,3,2,1 | Signature of HQ: | | Date: |
| DPO Action: | ☐ Accepted | ☐ Accepted with Exceptions | ☐ Rejected |
| Cost To Date: _____ Date: _____<br>Total Cost To Closure: _____ | | Actual Total Hours: _____ | |
| I certify that the attached materials meet and comply with all requirements of the subject TDD.<br>_____ TATL Signature (Interim) _____ TATL Signature (Final) | | | Date:<br>_____ Interim<br>_____ Final |
| I acknowledge that I have been provided with the materials and services specified in the subject TDD within its original or revised time frames.<br>_____ DPO Signature (Interim) _____ DPO Signature (Final) | | | Date:<br>_____ Interim<br>_____ Final |

Sheet 1 White - Hdqtrs Coordinator
Sheet 2 White - DPO Copy
Sheet 3 Blue - TATL Copy
Sheet 4 Green - ZPM Copy
Sheet 5 Canary - Project Officer Copy
Sheet 6 Pink - Contracting Officer Copy
Sheet 7 Goldenrod - DPO (Interim Copy)

EXHIBIT V-4(2)

| COST CENTER | ACKNOWLEDGEMENT OF COMPLETION<br>PERFORMANCE OBSERVATION REPORT: PART I | CONTRACT NO.<br>68-01-7368 |
|---|---|---|
| CONTRACTOR: Ecology and Environment, Inc. | | TDD NO. |

| REPORTING ELEMENT: | DATE(S) OF REPORTED OBSERVATION | APPROX. NO. OF HOURS | ACCOUNT NO. |
|---|---|---|---|
| | | | |

PERFORMANCE EVALUATION CATEGORY:

DESCRIPTION OF CONTRACTOR OBSERVATION BY:

| RATING: 5, 4, 3, 2, 1 | SIGNATURE OF CONTRACTOR: | DATE: |
|---|---|---|

DESCRIPTION OF EPA OBSERVATION BY:

NAME/TITLE

| RATING: 5, 4, 3, 2, 1 | SIGNATURE OF EPA: | DATE: |
|---|---|---|

| SIGNATURE OF REGIONAL POR COORDINATOR: | DATE: |
|---|---|

HQ COORDINATOR'S EVALUATION BY.

NAME/TITLE

| RATING. 5, 4, 3, 2, 1 | SIGNATURE OF HQ: | DATE: |
|---|---|---|

DPO ACTION: ☐ ACCEPTED ☐ ACCEPTED WITH EXCEPTIONS ☐ REJECTED

COST TO DATE: _____ DATE: _____

TOTAL COST TO CLOSURE: _____

ACTUAL TOTAL HOURS: _____

I CERTIFY THAT THE ATTACHED MATERIALS MEET AND COMPLY WITH ALL REQUIREMENTS OF THE SUBJECT TDD.

TATL SIGNATURE (INTERIM) _____ TATL SIGNATURE (FINAL) _____

DATE: _____ INTERIM _____ FINAL

I ACKNOWLEDGE THAT I HAVE BEEN PROVIDED WITH THE MATERIALS AND SERVICES SPECIFIED IN THE SUBJECT TDD WITHIN ITS ORIGINAL OR REVISED TIME FRAMES.

DPO SIGNATURE (INTERIM) _____ DPO SIGNATURE (FINAL) _____

DATE: _____ INTERIM _____ FINAL

Distribution:

| | | |
|---|---|---|
| Sheet 1 | White | - HQS Coordinator |
| Sheet 2 | White | - DPO Copy |
| Sheet 3 | Blue | - TATL Copy |
| Sheet 4 | Green | - ZPM Copy |
| Sheet 5 | Canary | - PO Copy |
| Sheet 6 | Pink | - CO Copy |
| Sheet 7 | Goldenrod | - DPO Interim |

T006A0:

EXHIBIT VI-2

## CPAF CONTRACT INDIVIDUAL PERFORMANCE EVENT

| CONTRACT NO. | CONTRACTOR | TASK ORDER NO. |
|---|---|---|
| REPORTING ELEMENT | | DATE(S) OF REPORTED EVENT |
| PERFORMANCE EVALUATION CATEGORY | | |
| WAS CONTRACTOR NOTIFIED? ☐ YES ☐ NO | BY WHOM? | WHEN? |

| DESCRIPTION OF PERFORMANCE EVENT<br>CATEGORY | ADJECTIVAL RATING * | SUPPORTING COMMENTS FOR OVERALL CATEGORY RATING |
|---|---|---|
| A. MANAGEMENT | | |
| 1. Adequacy and timeliness of subcontracting and purchasing procedures and documentation supporting: award and purchasing decisions; extent of competition; basis for non-competitive selections; Contracting Officer/OSC consent. | 1. | |
| 2. Prompt and accurate submission of subcontract reports. | 2. | |
| 3. Review of subcontractor vouchers for reasonableness and accuracy. | 3. | |
| 4. Coordination and liaison with subcontractors. | 4. | |
| 5. Practice and enforcement of appropriate safety measures on site. | 5. | |
| 6. Adequacy of decision to use subcontracted effort in lieu of performance by prime. | 6. | |
| 7. Adequacy of program and site management in directing and supporting performance of the cleanup effort. | 7. | |
| 8. Adequacy and timeliness of submission of all reports. | 8. | |
| 9. Compliance with contract terms for subcontracted services. | 9. | |
| Overall Rating for Category: | | |
| B. SCHEDULE | | |
| 1. Prime and subcontractors' adherence to site work schedule. | 1. | |
| 2. Prime monitoring and coordination of subcontractors. | 2. | |
| Overall Rating for Category: | | |
| C. COST | | |
| 1. Overall control of cost incurred including subcontractors. | 1. | |
| 2. Accuracy and completeness of cost data and cost reports, invoices, and supporting data. | 2. | |
| 3. Prime monitoring of subcontractor cost. | 3. | |
| 4. Overall control of program management costs. | 4. | |
| Overall Rating for Category: | | |

* Superior (+), Satisfactory (0), Substandard (-)

| +, 0, OR - | SIGNATURE OF MONITOR | DATE |
|---|---|---|

COORDINATOR'S ASSESSMENT

| +, 0, OR - | SIGNATURE OF COORDINATOR | DATE |
|---|---|---|

EXHIBIT VI-4

SUMMARY OF PERFORMANCE EVENT REPORTS

| CONTRACT # | CONTRACTOR | REGION | EVALUATION PERIOD |
|---|---|---|---|
| | | | FROM: TO: |

| DELIVERY ORDER NUMBER | TOTAL HOURS | RATING | | DESCRIPTIVE TITLE OF WORK |
|---|---|---|---|---|
| | | EPA | CON-TRACTOR | |
| | | | | |

| EVALUATION COORDINATOR SIGNATURE | DATE |
|---|---|

- Preparing an evaluation package for the PEB containing individual PERs and a Summary of PERs

- Attending the PEB review meetings, serving as PEB Executive Secretary, and presenting information contained in the evaluation package.

Upon receipt of the PERs from each Regional EPA office, the Project Officer should review each PER. Particular attention should be given to comparing EPA's assessments with the contractor's assessments, whenever possible. Discrepancies in ratings should be noted by the Project Officer on the PER. The Project Officer can modify the ratings in either the EPA or contractor PERs, as appropriate. Any such modifications should be explained in the box designated for "Coordinators Assessment."

In reviewing the PERs, the Project Officer should assess evaluation ratings and supporting comments for consistency and clarity. If problems are encountered, the Project Officer should resolve them through discussions with the OSC who originated the PER.

After reviewing and commenting on each PER, the Project Officer should sign and date the PER, and assemble it with other PERs from that Region for submission to the PEB.

### 3.2 The Summary of Performance Evaluation Reports

Prior to submitting the PERs, however, the Project Officer should prepare a Summary of Performance Evaluation Reports. Exhibit VI-4 shows the form that should be used for this purpose. The Project Officer is responsible for completing this Summary, which provides a quick assessment of the contractor's overall performance. Contractor and EPA overall ratings are listed for each Delivery Order evaluated during the period, along with a brief description of the activities carried out under the

# CONTRACT MODIFICATIONS

# MODIFICATIONS

**Modifications Can Result From Any Of The Following Circumstances:**

- -- Changing Agency Needs
- -- Inadequate Specifications That Resulted In Inadequate Deliverables
- -- Need to Increase or Decrease Funds
- -- Exercise of Options to Continue Work
- -- Extensions to Provide Additional Time
- -- Suspension of Work
- -- Equitable Adjustments

# [illegible] ICATIONS

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

[illegible]

# BILATERAL MODIFICATIONS

Bilateral Modifications Result From Any Of The Following Circumstances:

-- Novation Agreements

-- New Procurement That Increases The Scope Or Quantity Of Work

-- Inspection And Correction Of Defects (Cost-Reimbursement Supply And R&D)

Equitable Adjustments

# AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT

| 1. CONTRACT ID CODE | PAGE OF PAGES |
|---|---|
| | |

| 2. AMENDMENT/MODIFICATION NO. | 3. EFFECTIVE DATE | 4. REQUISITION/PURCHASE REQ. NO. | 5. PROJECT NO. *(If applicable)* |
|---|---|---|---|
| | | | |

| 6. ISSUED BY | CODE | 7. ADMINISTERED BY *(If other than Item 6)* | CODE |
|---|---|---|---|
| | | | |

| 8. NAME AND ADDRESS OF CONTRACTOR *(No., street, county, State and ZIP Code)* | (√) | 9A. AMENDMENT OF SOLICITATION NO. |
|---|---|---|
| | | 9B. DATED *(SEE ITEM 11)* |
| | | 10A. MODIFICATION OF CONTRACT/ORDER NO. |
| CODE / FACILITY CODE | | 10B. DATED *(SEE ITEM 13)* |

## 11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS

☐ The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers ☐ is extended, ☐ is not extended.

Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods:

(a) By completing Items 8 and 15, and returning _____ copies of the amendment; (b) By acknowledging receipt of this amendment on each copy of the offer submitted; or (c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers. FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER. If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.

12. ACCOUNTING AND APPROPRIATION DATA *(If required)*

## 13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.

| (√) | |
|---|---|
| √ | A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: *(Specify authority)* THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A. |
| | B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES *(such as changes in paying office, appropriation data, etc.)* SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b). |
| | C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF: |
| | D. OTHER *(Specify type of modification and authority)* |

E. IMPORTANT: Contractor ☐ is not, ☐ is required to sign this document and return _____ copies to the issuing office.

14. DESCRIPTION OF AMENDMENT/MODIFICATION *(Organized by UCF section headings, including solicitation/contract subject matter where feasible.)*

Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.

| 15A. NAME AND TITLE OF SIGNER *(Type or print)* | | 16A. NAME AND TITLE OF CONTRACTING OFFICER *(Type or print)* | |
|---|---|---|---|
| 15B. CONTRACTOR/OFFEROR<br>*(Signature of person authorized to sign)* | 15C. DATE SIGNED | 16B. UNITED STATES OF AMERICA<br>BY *(Signature of Contracting Officer)* | 16C. DATE SIGNED<br>411 |

PCMD 9/89

NSN 7540-01-152-8070
PREVIOUS EDITION UNUSABLE

30-105

**STANDARD FORM 30** (REV. 10-83)
Prescribed by GSA
FAR (48 CFR) 53.243

Instructions for items other than those that are self-explanatory, are as follows:

(a) Item 1 (Contract ID Code). Insert the contract type identification code that appears in the title block of the contract being modified.

(b) Item 3 (Effective date).

(1) For a solicitation amendment, change order, or administrative change, the effective date shall be the issue date of the amendment, change order, or administrative change.

(2) For a supplemental agreement, the effective date shall be the date agreed to by the contracting parties.

(3) For a modification issued as an initial or confirming notice of termination for the convenience of the Government, the effective date and the modification number of the confirming notice shall be the same as the effective date and modification number of the initial notice.

(4) For a modification converting a termination for default to a termination for the convenience of the Government, the effective date shall be the same as the effective date of the termination for default.

(5) For a modification confirming the contracting officer's determination of the amount due in settlement of a contract termination, the effective date shall be the same as the effective date of the initial decision.

(c) Item 6 (Issued By). Insert the name and address of the issuing office. If applicable, insert the appropriate issuing office code in the code block.

(d) Item 8 (Name and Address of Contractor). For modifications to a contract or order, enter the contractor's name, address, and code as shown in the original contract or order, unless changed by this or a previous modification.

(e) Items 9, (Amendment of Solicitation No.—Dated), and 10, (Modification of Contract/Order No.—Dated). Check the appropriate box and in the corresponding blanks insert the number and date of the original solicitation, contract, or order.

(f) Item 12 (Accounting and Appropriation Data). When appropriate, indicate the impact of the modification on each affected accounting classification by inserting one of the following entries:

(1) Accounting classification .....
Net increase $ .....

(2) Accounting classification .....
Net decrease $ .....

NOTE: If there are changes to multiple accounting classifications that cannot be placed in block 12, insert an asterisk and the words "See continuation sheet".

(g) Item 13. Check the appropriate box to indicate the type of modification. Insert in the corresponding blank the authority under which the modification is issued. Check whether or not contractor must sign this document. (See FAR 43.103.)

(h) Item 14 (Description of Amendment/Modification).

(1) Organize amendments or modifications under the appropriate Uniform Contract Format (UCF) section headings from the applicable solicitation or contract. The UCF table of contents, however, shall not be set forth in this document.

(2) Indicate the impact of the modification on the overall total contract price by inserting one of the following entries:

(i) Total contract price increased by $ .....

(ii) Total contract price decreased by $ .....

(iii) Total contract price unchanged.

(3) State reason for modification.

(4) When removing, reinstating, or adding funds, identify the contract items and accounting classifications.

(5) When the SF 30 is used to reflect a determination by the contracting officer of the amount due in settlement of a contract terminated for the convenience of the Government, the entry in Item 14 of the modification may be limited to —

(i) A reference to the letter determination; and

(ii) A statement of the net amount determined to be due in settlement of the contract.

(6) Include subject matter or short title of solicitation/contract where feasible.

(i) Item 16B. The contracting officer's signature is not required on solicitation amendments. The contracting officer's signature is normally affixed last on supplemental agreements.

# THE CHANGES CLAUSE

The Government May Unilaterally Direct A Change, Within The General Scope Of The Contract, In Any One Or More Of The Following:

-- SUPPLY CONTRACTS

1. Drawings, Designs Or Specifications*
2. Method Of Shipment Or Packing
3. Place Of Inspection, Delivery Or Acceptance

-- SERVICE CONTRACTS

1. Description Of Services To Be Performed
2. Time Of Performance (Hours Of The Day, Days Of The Week, Etc.)
3. Place Of Performance Of The Services

* This Does Not Apply To Commercial Specifications.

CHANGES—COST-REIMBURSEMENT (APR 1984)

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Drawings, designs, or specifications when the supplies to be furnished are to be specially manufactured for the Government in accordance with the drawings, designs, or specifications.

(2) Method of shipment or packing.

(3) Place of delivery.

(b) If any such change causes an increase or decrease in the estimated cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this contract, the Contracting Officer shall make an equitable adjustment in the (1) estimated cost, delivery or completion schedule, or both; (2) amount of any fixed fee; and (3) other affected terms and shall modify the contract accordingly.

(c) The Contractor must submit any "proposal for adjustment" (hereafter referred to as proposal) under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(d) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

(e) Notwithstanding the terms and conditions of paragraphs (a) and (b) above, the estimated cost of this contract and, if this contract is incrementally funded, the funds allotted for the performance of this contract, shall not be increased or considered to be increased except by specific written modification of the contract indicating the new contract estimated cost and, if this contract is incrementally funded, the new amount allotted to the contract. Until this modification is made, the Contractor shall not be obligated to continue performance or incur costs beyond the point established in the Limitation of Cost or Limitation of Funds clause of this contract.

(End of clause)
(R 7-203.2 1967 APR)
(R 1-7.202-2)

*Alternate I* (APR 1984). If the requirement is for services and no supplies are to be furnished, substitute the following paragraph (a) for paragraph (a) of the basic clause:

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Description of services to be performed.

(2) Time of performance (i.e., hours of the day, days of the week, etc.).† 3 - 8

(3) Place of performance of the services.

## CHANGES—TIME-AND-MATERIALS OR LABOR-HOURS (APR 1984)

(a) The Contracting Officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in any one or more of the following:

(1) Drawings, designs, or specifications.

(2) Method of shipment or packing.

(3) Place of delivery.

(4) Amount of Government-furnished property.

(b) If any change causes an increase or decrease in any hourly rate, the ceiling price, or the time required for performance of any part of the work under this contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this contract, the Contracting Officer shall make an equitable adjustment in the (1) ceiling price, (2) hourly rates, (3) delivery schedule, and (4) other affected terms, and shall modify the contract accordingly.

(c) The Contractor must submit any "proposal for adjustment" (hereafter referred to as proposal) under this clause within 30 days from the date of receipt of the written order. However, if the Contracting Officer decides that the facts justify it, the Contracting Officer may receive and act upon a proposal submitted before final payment of the contract.

(d) Failure to agree to any adjustment shall be a dispute under the Disputes clause. However, nothing in this clause shall excuse the Contractor from proceeding with the contract as changed.

# CARDINAL CHANGES

A Cardinal Change Is One Which Is Outside The Scope Of The Original Contract, I.e., Not Within The Contemplation Of The Parties At The Time Of Award.

A Cardinal Change Issued Under The Changes Clause Constitutes A Breach Of Contract By The Government.

# EQUITABLE ADJUSTMENTS

FOUR BASIC PRINCIPLES :

-- Both Parties Should Be Made Whole As A Result Of The Adjustment.

-- Neither Party Should Gain An Advantage Or Suffer A Loss.

-- Profitable Contracts Should Remain Equally Profitable.

-- Existing Losses Should Not Be Borne By The Government.

NOTIFICATION OF CHANGES (APR 1984)

(a) *Definitions.* "Contracting Officer," as used in this clause, does not include any representative of the Contracting Officer. "Specifically authorized representative (SAR)," as used in this clause, means any person the Contracting Officer has so designated by written notice (a copy of which shall be provided to the Contractor) which shall refer to this subparagraph and shall be issued to the designated representative before the SAR exercises such authority.

(b) *Notice.* The primary purpose of this clause is to obtain prompt reporting of Government conduct that the Contractor considers to constitute a change to this contract. Except for changes identified as such in writing and signed by the Contracting Officer, the Contractor shall notify the Administrative Contracting Officer in writing promptly, within.....(*to be negotiated*) calendar days from the date that the Contractor identifies any Government conduct (including actions, inactions, and written or oral communications) that the Contractor regards as a change to the contract terms and conditions. On the basis of the most accurate information available to the Contractor, the notice shall state—

(1) The date, nature, and circumstances of the conduct regarded as a change;

(2) The name, function, and activity of each Government individual and Contractor official or employee involved in or knowledgeable about such conduct;

(3) The identification of any documents and the substance of any oral communication involved in such conduct;

(4) In the instance of alleged acceleration of scheduled performance or delivery, the basis upon which it arose;

(5) The particular elements of contract performance for which the Contractor may seek an equitable adjustment under this clause, including—

(i) What contract line items have been or may be affected by the alleged change;

(ii) What labor or materials or both have been or may be added, deleted, or wasted by the alleged change;

(iii) To the extent practicable, what delay and disruption in the manner and sequence of performance and effect on continued performance have been or may be caused by the alleged change;

(iv) What adjustments to contract price, delivery schedule, and other provisions affected by the alleged change are estimated; and

(6) The Contractor's estimate of the time by which the Government must respond to the Contractor's notice to minimize cost, delay or disruption of performance.

(c) *Continued performance.* Following submission of the notice required by (b) above, the Contractor shall diligently continue performance of this contract to the maximum extent possible in accordance with its terms and conditions as construed by the Contractor, unless the notice reports a direction of the Contracting Officer or a communication from a SAR of the Contracting Officer, in either of which events the Contractor shall continue performance; *provided*, however, that if the Contractor regards the direction or communication as a change as described in (b) above, notice shall be given in the manner provided. All directions, communications, interpretations, orders and similar actions of the SAR shall be reduced to writing promptly and copies furnished to the Contractor and to the Contracting Officer. The Contracting Officer shall promptly countermand any action which exceeds the authority of the SAR.

(d) *Government response.* The Contracting Officer shall promptly, within..... (*to be negotiated*) calendar days after receipt of notice, respond to the notice in writing. In responding, the Contracting Officer shall either—

(1) Confirm that the conduct of which the Contractor gave notice constitutes a change and when necessary direct the mode of further performance;

(2) Countermand any communication regarded as a change;

(3) Deny that the conduct of which the Contractor gave notice constitutes a change and when necessary direct the mode of further performance; or

(4) In the event the Contractor's notice information is inadequate to make a decision under (1), (2), or (3) above, advise the Contractor what additional information is required, and establish the date by which it should be furnished and the date thereafter by which the Government will respond.

(e) *Equitable adjustments.* (1) If the Contracting Officer confirms that Government conduct effected a change as alleged by the Contractor, and the conduct causes an increase or decrease in the Contractor's cost of, or the time required for, performance of any part of the work under this contract, whether changed or not changed by such conduct, an equitable adjustment shall be made—

(i) In the contract price or delivery schedule or both; and

(ii) In such other provisions of the contract as may be affected.

(2) The contract shall be modified in writing accordingly. In the case of drawings, designs or specifications which are defective and for which the Government is responsible, the equitable adjustment shall include the cost and time extension for delay reasonably incurred by the Contractor in attempting to comply with the defective drawings, designs or specifications before the Contractor identified, or reasonably should have identified, such defect. When the cost of property made obsolete or excess as a result of a change confirmed by the Contracting Officer under this clause is included in the equitable adjustment, the Contracting Officer shall have the right to prescribe the manner of disposition of the property. The equitable adjustment shall not include increased costs or time extensions for delay resulting from the Contractor's failure to provide notice or to continue performance as provided, respectively, in (b) and (c) above.

NOTE: The phrases "contract price" and "cost" wherever they appear in the clause, may be appropriately modified to apply to cost-reimbursement or incentive contracts, or to combinations thereof.

# SUPPLEMENTAL AGREEMENTS

A Supplemental Agreement Is Any Contract Modification Which Is Accomplished By Mutual Agreement Of The Parties.

It Must:

- Involve Consideration For Both Sides.
- Not Eliminate Or Change Any Contract Clause Required By Law.
- Not Waive Any Substantive Right Of The Government Without Consideration.
- Contain All Six Elements Of A Contract:

  An AGREEMENT

  Between COMPETENT PARTIES

  For A VALID CONSIDERATION

  To Accomplish A LAWFUL PURPOSE

  With TERMS CLEARLY SET FORTH

  In The FORM REQUIRED By Law.

# OPTIONS

An Option Is A Unilateral Right Of The Government To:

-- Obtain Increased Quantitites Of Supplies Or Services Within The Existing Contract Period.

-- Obtain Additional Periods Of Performance.

# OPTIONS

## WITHIN AN EXISTING CONTRACT PERIOD

- -- May Not Exceed 50% Of The Base Quantity Without Approval Of The Director, PCMD
- -- Will Usually Be Restricted In Terms Of Time, Frequency And Increments In Which They Can Be Exercised

## TO EXTEND THE PERIOD OF PERFORMANCE

- -- Total Contract Period May Not Exceed 3 Years Without Approval Of The Chief, Contracts Office
- -- Written Notice Of Intent To Exercise The Option Must Be Furnished To The Contractor At Least 60 Days Before The Effective Date Of The Option

## OPTION TO EXTEND THE TERM OF THE CONTRACT-- COST-TYPE CONTRACT (APR 1984)

The Government has the option to extend the term of this contract for ..... additional period(s). If more than 60 days remain in the contract period of performance, the Government, without prior written notification, may exercise this option by issuing a contract modification. To exercise this option within the last 60 days of the period of performance, the Government must provide to the Contractor written notification prior to that last 60-day period. This preliminary notification does not commit the Government to exercising the option. The Government's estimated level of effort is ..... direct labor hours for the first option period and ..... for the second. Use of an option will result in the following contract modifications:

(a) The "Period of Performance" clause will be amended to cover a base period from ..... to ..... and option periods from ..... to ..... and ..... to .....

(b) Paragraph (a) of the "Level of Effort" clause will be amended to reflect a new and separate level of effort of ..... for the first option period and a new and separate level of effort of ..... for the second option period.

(c) The "Estimated Cost and Fixed Fee" clause will be amended to reflect increased estimated costs and fixed fee for each option period as follows:

| | Option 1 | Option 2 |
|---|---|---|
| Estimated Cost | ..... | ..... |
| Fixed Fee | ..... | ..... |
| Total | ..... | ..... |

(d) If this contract contains "not to exceed amounts" for elements of other direct costs (ODC), those amounts will be increased as follows:

| Other Direct Cost Item | Option 1 | Option 2 |
|---|---|---|
| ..... | ..... | ..... |
| ..... | ..... | ..... |
| ..... | ..... | ..... |

OPTION FOR INCREASED QUANTITY—COST-TYPE CONTRACT (APR 1984)

By issuing a contract modification, the Government may increase the estimated level of effort by ..... direct labor hours during the base period, ..... during the first option period, and ..... during the second option period. The Government may issue a maximum of ..... orders to increase the level of effort in blocks of ..... hours during any given period. The estimated cost and fixed fee of each block of hours is as follows:

| | Base Period | Option 1 | Option 2 |
|---|---|---|---|
| Estimated Cost | ..... | ..... | ..... |
| Fixed Fee | ..... | ..... | ..... |
| Total | ..... | ..... | ..... |

When these options are exercised, paragraph (a) of the "Level of Effort" clause and the "Estimated Cost and Fixed Fee" clause will be modified accordingly.

OPTIONS - EXERCISE OF OPTIONS - TIMELY NOTICE

Fourth Street Estates, Inc.
GSBCA No. 5813. September 1, 1981, Contract No. GS-03B-6116

Facts

On March 28, 1972, the United States Government, through its General Services Administration, entered into a lease with Fourth Street Estates, Inc. (FSE), whereby the Government leased the premises known as 400 T Street, NE, in Washington, DC, together with its adjacent parking lot. The term of the lease was five years, beginning June 1, 1972 and ending May 31, 1977 at an annual rate of $1.43 per square foot, payable monthly. The lease contained an option in favor of the Government to renew the lease for five one year renewal terms at the same rental rate. To exercise its renewal option the Government was required to give notice in accordance with the following lease provision:

> "This lease may be renewed at the option of the Government, ... provided notice be given in writing to the Lessor at least 60 days before the end of the original lease term or any renewal term; ...."

The Government exercised its renewal options during the years 1977, 1978, and 1979, without incident, or objection by FSE. The notices of renewal for the years 1977 and 1979 were sent more than sixty days before the end of the then current term. The notice for the year 1978 was nine days late, but FSE made no objection. In the year 1980, the Government hand delivered its lease renewal notice to the office of FSE's agent on April 2 at 4:15 p.m. The agent refused to accept it because it was given less than sixty days before the end of the current term. On the same date FSE offered to re-lease the premises at $7 per square foot. At the date of hearing, March 24, 1981, the Government was in possession of the premises and had been paying the rent set out in the lease. Appellant had accepted those payments.

In response to FSE's position that the renewal notice was not given in time, the contracting officer issued a final decision on July 11, 1980, that found the renewal notice timely and the renewal lease in effect. FSE challenges that decision.

# COMPETITION IN CONTRACTING ACT (CICA)

-- Effective April 1, 1985

-- Requires Government To Compete All Procurements Above A Certain Amount Unless Criteria Justifying The Use Of Other Than Full And Open Competition Are Met.

-- Applies To Both New Awards And Modifications To Existing Contracts That Increase The Scope Of The Contract, I.e., Additional Performance Periods.

# JUSTIFICATION FOR OTHER THAN FULL AND OPEN COMPETITION

1. ONLY ONE RESPONSIBLE SOURCE*

   -- When The Supplies Or Services Required By The Agency Are Available From Only One Responsible Source, As Determined By A Market Search, And No Other Type Of Supplies Or Services Will Satisfy Agency Requirements.

2. UNUSUAL AND COMPELLING URGENCY*

   -- When The Agency's Need For The Supplies Or Services Is Of Such Unusual And Compelling Urgency That The Government Would Be Seriously Injured Unless The Agency Is Permitted To Limit The Number Of Sources From Which It Solicits Bids Or Proposals.

* EPA Generally Uses Only #1, 2 And 5.

## JUSTIFICATION FOR OTHER THAN FULL AND OPEN COMPETITION (Cont.)

3. INDUSTRIAL MOBILIZATION, OR EXPERIMENTAL, DEVELOPMENTAL OR RESEARCH WORK

   -- When It Is Necessary To Award The Contract To A Particular Source Or Sources In Order To:

      1) Maintain A Facility, Producer, Manufacturer, Or Other Supplier Available For Furnishing Supplies Or Services In Case Of A National Emergency Or To Achieve Industrial Mobilization, Or

      2) Establish Or Maintain An Essential Engineering, Research Or Development Capability To Be Provided By An Educational Or Other Nonprofit Institution Or A Federally Funded Research And Development Center.

## JUSTIFICATION FOR OTHER THAN FULL AND OPEN COMPETITION (Cont.)

4. INTERNATIONAL AGREEMENT

--When Precluded By The Terms Of An International Agreement Or Treaty Between The United States And Foreign Government Or International Organization, Or The Written Directions Of A Foreign Government Reimbursing The Agency For The Cost Of The Acquisition Of The Supplies Or Services For Such Government.

5. AUTHORIZED OR REQUIRED BY STATUTE*

--When:

1) A Statute Expressly Authorizes Or RequiresThat The Acquisition Be Made Through Another Agency Or From A Specified Source,
Or

2) The Agency's Need Is For A Brand Name Commercial Item For Authorized Resale.

## JUSTIFICATION FOR OTHER THAN FULL AND OPEN COMPETITION (Cont.)

6. NATIONAL SECURITY

   --When The Disclosure Of The Agency's NeedsWould Compromise The National Security Unless The Agency Is Permitted To Limit The Number Of Sources From Which It Solicits Bids Or Proposals.

7. PUBLIC INTEREST

   --When The Agency Head Determines That It Is In The Public Interest In The Particular Acquisition Concerned And Notifies Congress At Least 30 Days In Advance Of Such An Award.

# CONSTRUCTIVE CHANGE

An Implied Change, I.e., An Act (Or Omission) By The Contracting Officer Or Other Authorized Government Official Which, By Its Nature, Can Be Construed To Have The Effect Of A Formal Written Change Order, Entitling The Contractor To Equitable Adjustment Under The Changes Clause.

E.g., A Requirement That The Contractor Perform Work Different From That Prescribed By The Original Terms Of The Contract.

EPA Contracts Require The Contractor To Immediately Notify The CO When Any Government Action Implies A Contract Change.

# RATIFICATIONS

Government Agreement To Assume Legal Liability For An Action Taken By Government Personnel Lacking Formally Delegated Contracting Authority.

I.e., The Government Takes The Federal Employee Off The Hook For Personal Liability For Unauthorized Action.

However, Ratification Can Only Occur If The Action Would Have Otherwise Been Valid If Made By A Contracting Officer. EPA Cannot Ratify Illegal Actions.

The Assistant Administrator Of OARM Sends A Formal Notification Of The Person's Unauthorized Action And Its Ratification To The Pertinent Assistant, Associate Or Regional Administrator. (Very Visible!)

Chapter 13
# CONTRACT MODIFICATIONS

Contract administration would be a fairly routine procedure if everything in the original wording of a contract, work assignment or delivery order remained the same throughout the period of performance. Unfortunately, that is not always possible, and changes to the terms or conditions of a contract often become necessary as a result of unforeseen circumstances, ambiguous or unclear provisions, deficient specifications, or changes in the Government's requirements. Such changes are effected through a device called a contract modification. The various types and the regulations surrounding their use are examined in this chapter.

## 13.1 Unilateral vs. Bilateral Modifications

Contract modifications fall into two major classes: unilateral and bilateral. Unilateral modifications require only the signature of the Contracting Officer, and are classified either as administrative modifications, or changes that the contract schedule itself authorizes on a unilateral basis (such as change orders that are issued under the authority of the "Changes" clause, exercise of options within the time period allowed, or notices of termination). Bilateral modifications, which require the signature of both parties (the Contracting Officer and the contractor), include all supplemental agreements and any other changes not authorized to be issued unilaterally. Below are examples of typical contract modifications and their classifications:

| Purpose of Modification | Unilateral | Bilateral |
|---|---|---|
| Changes in: specifications, designs, drawings, place of delivery, inspection, acceptance, or method of shipping or packing. | X | |
| Exercise of option | X | |
| Termination | X | |
| Administrative changes | X | |
| Novation agreements | | X |
| New procurement: increase in scope or quantity of work | | X |
| Equitable adjustments: | | |
| Definitization of change orders | | X |
| Differing site conditions | | X |
| Suspension of work | | X |
| Government property (fixed-price and R&D) | | X |
| Inspection (fixed-price supply and R&D) | | X |
| Inspection and correction of defects (cost-reimbursement supply and R&D) | | X |

Whether a modification may be executed unilaterally or bilaterally depends on whether it is administrative or a new agreement, or whether the provisions of the contract give the Government the right to act unilaterally. Administrative changes are ones that do not affect the rights or obligations of either party; examples are changes in accounting or appropriation data, or the designation of a new Project Officer or Contracting Officer. A bilateral change affects the price, quantity, quality, or delivery, or the terms and conditions of the contract. Administrative changes may be effected unilaterally by the Contracting Officer; other changes may be made unilaterally only if the contract so provides in its language.

### 13.2 The "Changes" Clause

The "Changes" clause in Government contracts provides that the Contracting Officer may unilaterally direct a change, within the general scope of the contract, in any one or more of the following:

CONTRACTS FOR SUPPLIES

(1) Drawings, designs, or specifications (in the case of supplies, only where the supplies are to be specifically manufactured for the Government);

(2) Method of shipment or packing; or

(3) Place of inspection, delivery, or acceptance.

CONTRACTS FOR SERVICES

(1) Description of services to be performed;

(2) Time of performance (i.e., hours of the day, days of the week, etc.); or

(3) Place of performance of the services.

Such changes may be directed without the consent of the contractor, who is obligated to proceed with the work as changed when a change order is issued. If there is an impact on schedule, cost, or any other contractual aspect, the contractor may submit a proposal for an equitable adjustment within thirty (30) days of receipt of a change order. If the cost of work is decreased as a result of the change, the Government has a similar right to a downward equitable adjustment in the contract price. Negotiation of an equitable adjustment is a subsequent action, and is considered a supplemental agreement effected by a bilateral contract modification.

An extremely close review of the contractor's proposal for an equitable adjustment must be made, as there may be a tendency for the contractor to use this as a means of recovering losses under a fixed price contract or disguising an overrun under a cost reimbursement contract. Equitable adjustments should cover only the cost impact of the change.

Changes are limited to the above types and must fall within the general scope of the contract. Change orders should be issued in writing by the Contracting Officer.

## 13.3 Supplemental Agreements

A supplemental agreement is any contract change which is accomplished by mutual agreement of the parties. It must always involve consideration for both sides, just like a contract. This type of modification is preferred over a change order because negotiation usually precedes its issuance, thereby allowing the Government to assess the cost impact of the change and negotiate both cost and technical aspects before directing the contractor to proceed. A supplemental agreement may affect any part of a contract, but may not eliminate or change any contract clause required by law, nor waive any substantive right of the Government without consideration.

Both change orders and supplemental agreements may be requested by the Project Officer; if a cost increase is anticipated, a Procurement Request must be submitted with the request. Contract modifications are executed on Standard Form 30 (See page 411 for sample.)

## 13.4 Equitable Adjustments

Under the "Changes" clause, equitable adjustments to price, estimated cost, delivery schedules, or other areas impacted by the change must be reflected in a supplemental agreement. In addition to "Changes," several other clauses call for equitable adjustments under certain circumstances. Among these clauses are:

(1) Differing Site Conditions (construction);

(2) Suspension of Work (construction);

(3) Government Property;

(4) Inspection (fixed-price supply and fixed-price R&D); and

(5) Inspection and Correction of Defects (cost-reimbursement supply and cost-reimbursement R&D).

The most common adjustments arise under the "Changes" clause. Basic principles apply to all equitable adjustments. Both parties should be made whole as a result of the adjustment. Neither party should gain an advantage or suffer a loss. Profitable contracts should remain equally profitable and any existing losses sustained by the contractor should not be borne by the Government. That is the essence of the term "equitable."

Most adjustments are based on costs, although they may be priced by reference to catalogs or market value of supplies or services. If based on costs, adjustments must consider the effect of the change on the entire contract, not just the portion of the work affected by the change.

Changes in costs may also require a change in profit or fee to reflect the circumstances of the new situation. In some cases an adjustment may be negotiated only with respect to the fee - for example, in the event of delivery of nonconforming supplies in a cost-reimbursement contract.

If the contractor's claim is for a few dollars, it is not safe to assume that little examination is required. For example, the deleted work may be labor intensive, with costs comprised primarily of direct labor and, therefore, subject to overhead charges.

The added work may be capital intensive, and the costs not subject to the same extent of overhead. Unless care is taken, the contractor could compare only the direct costs of the deleted and added work and end up collecting overhead expenses as well.

Often, estimating the cost of a change is difficult. Out of necessity, such estimating requires a particularly thorough and careful cost or price analysis by the Contracting Officer before a supplemental agreement can be negotiated.

Difficulty may still be encountered even though cost data is available. The estimates of costs of work deleted can be based on either (1) the cost estimated at the time the contract was negotiated, or (2) the costs at the time the change was made. If the original estimate is used and costs have risen, then the contractor will suffer a smaller loss or more profit. If the reverse is true, then the contractor will have a greater loss and less profit. Contractor-suggested changes should be thoroughly reviewed to assure that the contractor is not suggesting changes to enhance its profit position.

Pricing adjustments after the work is done is much easier than estimating costs in advance. The contractor's data may clearly show the actual costs of the changes to which a customary profit may be added. This is an appealing rationale, but it has its dangers. If a change order has been issued and the work is completed prior to pricing the adjustment, then the more that is spent on the added work, the higher the contractor's cost may be. Even if the contractor can be trusted to control costs in such a situation, the Government will not have had an opportunity to review the contractor's proposed costs and possibly point out more efficient production methods or management controls.

Forward pricing, that is, issuance of a single supplemental agreement instead of a unilateral order followed by an adjustment, allows for a complete negotiation on technical as well as price aspects of a change. It may not be practical to do this for all changes, especially if there are many small ones to be made. In that case, a single negotiation session resulting in a single supplemental agreement may be preferred.

### 13.5 Exercise of Options

Options that were included as part of the original contract may be exercised unilaterally by the Contracting Officer within the period stipulated. They are not considered to be new procurements, as they were clearly within the contemplation of the parties at the time of award.

Options may be either additional quantities during a specific contract period, or may extend the contract period with increased quantities in the new term. It is even possible to include options within options (e.g., during Option Period I, there is a level of effort of 5000 hours, with an option of 2000 additional hours during the period). Generally, options for increased quantities are limited to 50% of the basic quantity, and the total term of the contract is limited to 3 years, unless you obtain prior approval of the Director, PCMD. The cost or price of all options is provided for in the basic contract, and is negotiated with the basic contract amount.

Unless otherwise stated in the contract, all service contracts employing option periods require that a preliminary written notice of the Government's intention to exercise the option be furnished to the Contractor at least sixty (60) calendar days prior to the end of the current period. Failure to provide such preliminary notice within the timeframe established in the contract waives the Government's right to exercise the option unilaterally and may require a justification for other than full and open

competition and the negotiation of a bilateral contract modification in order to extend the period of performance where such an extension is authorized.

When the term of the service contract coincides with the fiscal year and delays in receipt of authority to obligate funds for the new fiscal year are anticipated, the Contracting Officer, if the contract so provides, may, within 60 days after the end of the fiscal year, unilaterally exercise an option to extend the term of the contract. Project Officers must provide advance notice to their Contracting Officers in order that the notice be issued to the contractor within the time required. The option may be exercised only if funds become available within the 60-day period. In the event that sufficient funding is not available within the 60-day period, the Government waives the right to exercise the option unilaterally, thereby rendering any additional requirements subject to normal competitive procurement procedures.

The Contracting Officer, if the contract so provides and subject to certain conditions, may exercise an option contingent upon the availability of funds. To exercise such an option, the contract must contain the clause entitled "Availability of Funds". Under no circumstance shall any action be taken which could be construed as creating a legal liability on the part of the Government until a formal notice of availability of funds in the form of a contract modification has been issued by the Contracting Officer. Acceptance of any goods or services under such an arrangement is strictly prohibited until funds are obligated.

### 13.6 Cardinal Changes

Mutual agreement is not always enough to authorize use of a sole source modification. Certain changes are not permitted because they are outside the scope of the contract. Additional work or additional hours not covered in options fall within this area and are considered new procurement; they must be obtained competitively or fall within the seven (7) statutory exceptions to full and open competition (see 13.8, below).

The scope of the contract is defined as whatever was within the contemplation of the parties at the time of entering into the contract. Any change order issued under the "Changes" clause which is outside the scope is defined as a "cardinal change", and constitutes a breach of contract by the Government. For this reason, many changes which Project Officers seek to improve their contract will be refused by their Contracting Officer. Within the area of "permissible" changes, Contracting Officers will support the program office to the fullest exent possible, but cardinal changes are not within any Contracting Officer's authority.

### 13.7 Increases in Scope

Many times, the initial amount of contract support provided in a contract proves to be insufficient. Increases in the contract are often necessary to complete a job already underway, if no options exist allowing for a greater quantity of hours or services. Depending upon the type of contract involved, it may or may not be possible to obtain an increase.

Completion form cost reimbursement contracts may be increased (in the cost portion only) if the original work cannot be completed within the estimated cost; the contractor receives no increase in fee to complete the work called for by the contract. This is not considered an increase in scope. An increase in the scope of work required, however, (i.e., additional hours) would constitute new procurement. Work assignments under term form contracts and delivery orders under indefinite delivery/indefinite

quantity contracts may be increased within the total contract limits of hours and dollars, but any increases in these contract maximums are also considered new procurements. Fixed price contracts would never be increased unless the requirements changed (quality or quantity), and such increases in scope would be new procurements, as well.

### 13.8 Exceptions to Full and Open Competition

Because of the regulations concerning full and open competition, such new procurements will normally have to be made on a competitive basis, and there is no guarantee that the same contractor will win the award. The Competition in Contracting Act, which took effect on April 1, 1985, severely limited the Government's ability to award other than fully competitive contracts or contract modifications. There are now only seven (7) statutory exceptions to the requirements for obtaining full and open competition. These are:

(1) Only One Responsible Source (when the supplies or services required by the agency are available from only one responsible source, as determined by a market search, and no other type of supplies or services will satisfy agency requirements);

(2) Unusual and Compelling Urgency (when the agency's need for the supplies or services is of such an unusual and compelling urgency that the Government would be seriously injured unless the agency is permitted to limit the number of sources from which it solicits bids or proposals);

(3) Industrial Mobilization; or Experimental, Development, or Research Work (when it is necessary to award the contract to a particular source or sources in order (i) to maintain a facility, producer, manufacturer, or other supplier available for furnishing supplies or services in case of a national emergency or to achieve industrial mobilization, or (ii) to establish or maintain an essential engineering, research or development capability to be provided by an educational or other nonprofit institution or a federally funded research and development center);

(4) International Agreement (when precluded by the terms of an international agreement or a treaty between the United States and foreign government or international organization, or the written directions of a foreign government reimbursing the agency for the cost of the acquisition of the supplies or services for such government);

(5) Authorized or Required by Statute (when (i) a statute expressly authorizes or requires that the acquistion be made through another agency or from a specified source, or (ii) the agency's need is for a brand name commercial item for authorized resale);

(6) National Security (when the disclosure of the agency's needs would compromise the national security unless the agency is permitted to limit the number of sources from which it solicits bids or proposals); and

(7) Public Interest (when the agency head determines that it is in the public interest in the particular acquisition concerned and notifies Congress at least 30 days in advance of such an award).

If a situation does not fall within one of the above exceptions, competition must be obtained. If a sole source procurement can be authorized, the Project Officer must prepare a Justification for Other than Full and Open Competition (JOFOC) with the assistance of the Contracting Officer. It's a good idea to meet or talk with the Contracting Officer and the EPA Competition Advocate, who must approve all JOFOC's over $100,000, before undertaking this effort to be sure there is sufficient justification to limit competition.

Increases in scope could often be justified in the past on a sole source basis, but the new regulations clearly limit that possibility now. For this reason, the use of options is encouraged if the possibility of increased requirements exists, and Project Officers should take care not to allow wasteful utilization of contract resources. Diligent financial monitoring will also help spot shortages early, and a redirection of effort at that time may eliminate the problem altogether.

## 13.9 Constructive Changes

Sometimes, the Government, by its actions, changes the contract without a formal written modification. This is an implied change, also known as a "constructive" change, and is defined as an oral or written act or omission by the Contracting Officer or other authorized Government official which is of such a nature that it is construed to have the same effect as a formal written change order under the "Changes" clause. In other words, the Contracting Officer, by requiring a contractor to perform work different from that prescribed by the original terms of the contract, may actually change the contract without issuing a change order, and the contractor is entitled to relief (an equitable adjustment) under the "Changes" clause. Therefore, it is critical that any actions on the part of a Contracting Officer do not imply a contract change.

The conduct of a Project Officer may have the same effect. Therefore, care should be taken to avoid crossing the line between providing technical direction and inferring a change. Project Officers do not have the authority to direct any action that will affect the cost or price, description of the work, or the time or place for performance or delivery. What might not seem important at the time, may end up having a substantial effect on final costs, or the work product required, and the contractor is entitled to file a claim.

EPA contracts contain a provision requiring the contractor to notify the Contracting Officer immediately when any action on the part of Government personnel implies a change to the terms and conditions of a contract. This allows the Contracting Officer either to issue a formal change order, or require the contractor to discontinue work on the implied changes. However, it may be impossible not to formalize a constructive change if the Government has received any benefits, and program offices will be assessed the cost of any equitable adjustments resulting from such changes.

At times a contractor may suggest modifications to the contract. Often the change will technically improve the contract services or supplies and the Project Officer should realize this. However, it should be kept in mind that contractors, especially those who are experiencing a loss under a contract, will suggest changes so as to provide a chance to better their profit position. It is important to review the contractor's expenditures on a contract and technical progress made to attempt to verify if the contractor is possibly trying to recover from a loss position. The Project Officer also must beware of leading the contractor to believe that the Project Officer's opinion authorizes the contractor to proceed. Such improper authorization would be in effect a constructive change.

If the contractor makes the change and later claims extra costs, the Government may find it very difficult to deny these claims for costs if they were incurred in good faith (especially if the agency benefits). The Project Officer's action would be improper and unauthorized since only Government personnel designated as Contracting Officers have the authority to obligate the Government.

The Project Officer has considerable responsibility for identifying need for change orders, even though only the Contracting Officer has the power to issue such orders. Since the Project Officer monitors the contract performance, he or she will often be in an excellent position to recommend changes that meet the Government's requirement and can help formulate that change. The Project Officer can also be of significant assistance in determining both what a reasonable price/cost of the change should be and the effects of the change on the contract. It is important that all potential effects of a change are examined, so if additional funding is required it can be obtained prior to issuing the change order.

After a change order has been issued, the Project Officer is responsible for assuring that the contractor is implementing it.

## 13.10 Ratifications

If actions are taken by Government personnel who do not have formally delegated contracting authority, they do not necessarily obligate the Government for the expenditure of funds. However, under certain circumstances, unauthorized actions may be ratified. Ratification of an unauthorized action can only occur if the action would have been valid had it been made by a Contracting Officer. If an unauthorized action is otherwise improper, a Contracting Officer cannot ratify it and the Agency must deny legal liability, in which case the person committing the unauthorized action may become personally liable. Therefore, extreme caution must be taken to avoid such a situation.

Unauthorized procurement actions are not limited to new procurements or purchases. Increases in scope and other changes to existing contracts, directed by an unauthorized person, or even a change in the period of performance, are unauthorized actions.

When an unauthorized action has been revealed, the following procedures apply:

(1) The program office must notify the cognizant contracting office by memorandum of the circumstances surrounding the action. The memorandum must include:

(a) All relevant documents and records;

(b) Documentation why the work was necessary to and for the benefit of the Government;

(c) A statement of steps taken or proposed to prevent reoccurrence of the unauthorized action;

(d) Approval of the Division Director (or equivalent) of the responsible office;

(e) If expenditure of funds is involved, the notification must also include a Procurement Request/Order (EPA Form 1900-8) with sufficient funds to cover the supply or service involved; and

(f) If the service or supply was beyond the scope of the existing contract, or involved any new procurement on a sole source basis, the notification must include a justification for other than full and open competition (JOFOC).

(2) After receipt of the notification, the Contracting Officer:

(a) Makes a determination and findings regarding ratification of the unauthorized act. Additional information may be required from the contractor and an opinion from the General Counsel;

(b) Informs (at the Contracting Officer's discretion) the Inspector General through the Director, PCMD; and

(c) Prepares a memorandum from the Assistant Administrator for Administration and Resources Management to the Assistant, Associate or Regional Administrator of the program advising of the person committing the unauthorized action.

Accomplishment of (2) (b) and (c) above for actions that would entail small purchase procedures is at the discretion of the Chief of the Contracting Office or the Management Division Director or equivalent at a regional or field activity.

### 13.11 Amendments to Work Assignments or Delivery Orders

As noted above, it may be necessary to amend part of a work assignment or delivery order (rather than the contract itself) as a result of the contractor's work plan or because of unforeseen developments which arise during the course of performance. An amendment may take many forms, such as increasing the number of hours or the ceiling price, decreasing a portion of the effort, changing the period of performance, or modifying the Statement of Work. Any anticipated amendments should be discussed as soon as possible with the Contracting Officer, as certain types of changes may require formal negotiations with the contractor, and some may not be within the scope of the contract and therefore cannot be executed unless certain other actions are taken.

When a decision has been made to amend the assignment or order, a written request should be forwarded through the Project Officer to the Contracting Officer. (See page 63 for a sample work assignment amendment form.) The basis for the change should be explained, with whatever specific wording changes or substitutions are necessary. If a revised work plan will be required of the contractor, this should be indicated.

Only the Contracting Officer can direct a change to any terms or conditions of a contract, work assignment, or delivery order. A contractor who is advised of a change without the signature of the Contracting Officer is required to notify the Contracting Officer immediately and identify any adjustments to the cost or delivery schedule which are affected by the change. The contractor is prohibited from proceeding with the change unless formal approval is given by the Contracting Officer. Project Officers, Work Assignment Managers or Delivery Order Officers who direct unauthorized changes to a

contract may be relieved of their authority by the Director, PCMD, and may become personally liable for any increase in costs.

# DISPUTES, CLAIMS, TERMINATIONS AND CLOSEOUTS

# HANDLING DISPUTES:
# Contract Disputes Act of 1978

1. First Step: Final Decision of Contracting Officer

2. Second Step: Appeal to Agency Board of Contract Appeals
   or
   Direct Petition to Claims Court (lengthy procedure)

3. Third Step: Appeal to Federal Court of Appeals

# CONTRACT TERMINATION

## TWO TYPES:

**Termination For Convenience Of The Government:**

When Supplies Or Services Are No Longer Needed Or It Is Otherwise In The Government's Best Interests.

**Termination For Default:**

When The Contractor Has Failed To Perform Its Contractual Obligations.

# TERMINATION FOR CONVENIENCE

- -- Can Stop Contract At Will Of Government
- -- Contractor Gets All Or Negotiated Portion Of Fee
- -- Settlement Costs

# TERMINATION FOR DEFAULT

**The Government's Right To Terminate For Default Is Based On The Contractor's Failure To:**

1) **Perform On Time.**

2) **Perform Any Other Provision Of The Contract.**

3) **Make Progress, To The Extent That The Delay Endangers Contract Performance.**

# STEPS IN CONTRACT TERMINATION FOR DEFAULT

1. Government Issuance Of Notice To Cure
2. Government Issuance Of Show Cause Letter
3. Passage Of Required 10-Day Period
4. Notice of Termination

# PROJECT OFFICER RESPONSIBILITES IN CONTRACT CLOSEOUT

1. Certifying That All Technical Requirements Of The Contract Have Been Met, That The Products Or Services Have Been Satisfactorily Completed Within The Contract Amount, And That The Final Report And All Other Deliverables Have Been Received And Accepted.

2. Recommending The Disposition Of All Government Property In The Contractor's Possession.

3. Reviewing And Determining The Accuracy Of The Contractor's Reporting Of Inventions, Data Rights, Copyrights And Software Development.

4. Examining And Approving The Completion Voucher (On Cost-Reimbursement Contracts).

5. Evaluating The Contractor's Performance.

# PROJECT OFFICER'S EVALUATION OF CONTRACTOR PERFORMANCE

*(Read instructions on reverse before completing form)*

| | | |
|---|---|---|
| 1. FROM | 2. TO | |
| 3. FORWARD *(original only)* TO:<br>Quality Assurance Section (PM-214)<br>Washington, DC 20460 | 4. CONTRACT NO. | 5. ACTIVITY |
| 6. CONTRACTOR'S NAME AND ADDRESS | 7. PROJECT OFFICER'S NAME | 8. TECHNICAL PROGRAM |
| | 9. BASIC CONTRACT COST | 10. FINAL CONTRACT COST |
| | 11. CONTRACTOR PROJECT OFFICER'S NAME | |

12. PROJECT TITLE

13. EVALUATED CONTRACTOR'S TECHNICAL ADHERENCE TO SCOPE OF WORK AND COMMITMENT OF PERSONNEL *(Circle one of the following and give narrative of rating)* E VG A P U

14. EVALUATE CONTRACTOR'S TECHNICAL PERFORMANCE AND TECHNICAL APPROACH TO THE PROJECT *(Circle one of the following and give narrative of rating)* E VG A P U

15. EVALUATE CONTRACTOR'S SUBMISSION/DELIVERY OF PROGRESS REPORT, FINANCIAL REPORT, FINAL REPORT, EQUIPMENT *(Circle one of the following and give narrative of rating)* E VG A P U

16. EVALUATE CONTRACTOR'S DELIVERED END PRODUCT *(Report, Equipment, etc.) (Circle one of the following and give narrative of rating)*
E VG A P U

17. HAS CONTRACTOR ☐ OVERRUN, OR ☐ UNDERRUN THE CONTRACT *(Explain reason for either)*

18. RECOMMENDATIONS AND ADVICE TO PERSONNEL CONSIDERING THIS CONTRACTOR FOR FUTURE AWARDS

| | | |
|---|---|---|
| 19. PROJECT OFFICER'S SIGNATURE | 20. DATE | 21. OVERALL RATING *(Check one)*<br>E VG A P U |

EPA Form 1900-27 (Rev. 4-84) Previous editions are obsolete.

U. S. GOVERNMENT PRINTING OFFICE: 1984-441-065/7303

PCMD 9/89

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## INSTRUCTIONS

Prepare in duplicate and distribute as follows:

Original to be forwarded to Headquarters, Quality Assurance Section (PM-214), Washington, DC 20460.

Copy to be forwarded to Contract Administrator for contract file.

The following guidelines are to be used by the Project Officer responsible for the project in the preparation of the form the completion of the technical phase and/or acceptance of the final end product of the contract. The information must b accurate, as it will provide other program staff personnel or anyone else in the agency an orderly and uniform method determining and recording the effectiveness of contractors in meeting their contractural commitments for futu consideration in contract awards. The information will be filed in the contract file, and with the contractor's bidde application file. The Project Officer's technical rating of the contractor and the contracting officer's business rating will b entered in the contractor performance evaluation system maintained by the Quality Assurance Section. All items ha been numbered to identify specific instructions as they pertain to individual items.

Rate Contractor in areas listed in items 13, 14, 15, 16, and 21 by circling one of the following on the form:

E (Excellent); VG (Very Good); A (Average); P (Poor); or U (Unsatisfactory)

Provide a detailed narrative of background material to support the rating. Attach additional sheets, if necessary.

### FOLLOWING ITEMS TO BE FILLED IN BY THE CONTRACT ADMINISTRATOR RESPONSIBLE FOR THE CONTRACT.

| ITEM(S) | |
|---|---|
| 1 thru 4 | Self-explanatory |
| 5 | Activity responsible for the project such as Washington, DC, RTP, Cincinnati, Region No. or Laborato |
| 6 and 7 | Self-explanatory |
| 8 | Name of Section or Division within the Program responsible for the project. |
| 9 and 10 | Self-explanatory. |
| 11 | Self-explanatory. |
| 12 | Self-explanatory. |

### FOLLOWING ITEMS TO BE FILLED IN BY COGNIZANT PROJECT OFFICER

| | |
|---|---|
| 13 | Has contractor fulfilled the requirements of the scope of work as specified in the contract? Did t Contractor adhere to his proposal, including his proposed commitment of personnel? |
| 14 | Indicate degree of creative contribution (level of technology) made by the contractor in response to th understanding of EPA's mission. If engaged in study contract or consulting contract, contracto understanding of Federal Laws affecting the work (e.g., for a consultant on impact statements, und standing of NEPA and all related guidelines and significant court decisions). |
| 15 | Did the contractor submit the report or equipment as per contract schedule? If not, give reason. |
| 16 | Is the report or equipment delivered of high value and/or good quality? Did the report require ma corrections, and did the contractor balk at making the corrections without additional cost? |
| 17 | Information desired is: give number of overruns and reasons for this (do not consider scope char where contractor had to submit a proposal for the additional work); ratio of additional funding un limitation of cost provision to original estimated costs. Was underrun achieved by reducing the scope work or through the development of new methods? |

EPA Form 1900-27 (Rev. 4-84) Reverse

Chapter 14
# DISPUTES, CLAIMS, TERMINATIONS AND CLOSEOUTS

Most contracts are completed as planned with few problems, and once work is completed, the contract closeout process occurs. However, disagreements do arise from time to time which are difficult to resolve. If a Project Officer notes an emerging difference of opinion regarding the rights or obligations of either party, he or she should immediately notify the Contracting Officer to attempt to resolve it to everyone's mutual satisfaction. The longer a disagreement goes on, the harder it is to settle and the more time and effort will be required in the process.

If a controversy cannot be satisfactorily resolved, the Contracting Officer will attempt to negotiate a formal bilateral agreement. One possible outcome is contract termination. If no agreement can be reached, the Contracting Officer will issue a final decision under the disputes clause, and the procedures are governed by statute and the provisions of the contract.

## 14.1 Contract Disputes Act of 1978

The Contract Disputes Act of 1978 is applicable to all types of disagreements (except fraud) under Government contracts and provides for 1) a decision by the Contracting Officer, then 2) an appeal (if desired by the contractor) to either the Board of Contract Appeals or directly to the U.S. Court of Claims. It requires the contractor to proceed diligently with performance of the contract (in accordance with the Contracting Officer's final decision) while the dispute is under appeal. The Act sets forth time frames under which disputes and appeals must be filed and decisions must be issued. It also provides for payment of interest on contractor claims should the dispute be resolved in favor of the contractor.

The disputes procedure is the traditional means for resolving conflicts arising under a contract which cannot be resolved by means of negotiation and mutual agreement. The contract clause entitled "Disputes" implements the law and sets forth the procedures the contractor must follow in the event of a dispute. Because the Government would be unable to fulfill its lawful duties if all contract work stopped every time a disagreement arose, the administrative disputes procedure requires that contract work continue during the appeals process.

## 14.2 Contracting Officer's Final Decision

It is Government policy that all contractual issues be resolved at the level of the Contracting Officer without litigation, if at all possible. Informal discussions will be held first, with participation by the Project Officer, and might also include individuals uninvolved in the dispute, if necessary to resolve the disagreement. When such measures are unsuccessful, the contractor may request, in writing, a final decision by the Contracting Officer. (In some situations, the Contracting Officer may issue such a decision without such a request by the Contractor.)

The law requires that a written decision be issued by the Contracting Officer before the contractor can take the case elsewhere. The decision must be issued within 60 days of receipt of a monetary claim if it is $50,000.00 or less, and within a reasonable time if over $50,000.00 provided the contractor is notified within the 60-day period as to when the decision will be issued. Failure to issue a decision within the required

time may be deemed a denial of the claim, and the contractor is authorized to file an appeal.

The decision of the Contracting Officer is the first step in the disputes procedure. It is based upon a review of all available facts and on the advice of legal counsel, and may, on occasion, go against the position of the Project Officer if the facts so warrant. Therefore, early coordination of problems with the Contracting Officer will help avoid this possibility at a later date.

Any amounts which are owed to a contractor under a claim but are not in dispute must be paid promptly, without awaiting the results of an appeal. Payment for work which continues during the appeal will also be paid in accordance with contract payment provisions.

### 14.3 Board of Contract Appeals

If a contractor disagrees with the final decision issued by the Contracting Officer, he has the right to appeal to the Agency Board of Contract Appeals. Pursuant to a longstanding interagency agreement between EPA and the Department of Interior, the Department of the Interior Board of Contract Appeals (IBCA) will hear appeals from final decisions of EPA Contracting Officers.

An appeal must be filed within 90 days after receipt of the Contracting Officer's decision. If an appeal is filed, EPA must submit an answer to the complaint. This must be accomplished within 30 days, and will probably require Project Officer input if the dispute involves something in the Statement of Work or any other technical aspect. The IBCA will conduct an administrative hearing at which both parties may be present or represented. Presence is not required, however. The Board of Contract Appeals has the following time periods in which to issue a decision:

Claims of $10,000 or less - 120 days

Claims of $50,000 or less - 180 days (whenever possible)

Claims of over $50,000 - no time limit

If the decision is in the contractor's favor, it is up to the Contracting Officer to implement the decision of the Board. Interest is payable on the amount due on the claim from the date the Contracting Officer receives it to the date of payment. The Government can only appeal the decision with the approval of the Agency Head and the Attorney General of the United States.

Contractors who wish to appeal a decision of the IBCA must do so within 120 days. Appeals are heard by the Court of Appeals for the Federal Circuit. The ruling from this court is final.

### 14.4 Court of Claims

Rather than file an appeal of a Contracting Officer's decision with the Board of Contract Appeals, the contractor has direct access to the claims court, and may file a petition with the court within 12 months from the date of receipt of the final decision. If he or she chooses to go this route, the IBCA will not get involved. As a practical matter, this option is rarely pursued unless the amount of the claim is substantial, as proceedings in this court may take years to be resolved.

## 14.5 Contract Termination

The laws which give the Government the power to enter into contracts also give it the right to terminate such contracts. Most contracts provide for termination by the Government for either of two reasons: default of the contractor or convenience of the Government. The ability to terminate a contract is a unilateral right of the Government; the contractor does not have any such rights.

Terminations may be complete or partial. A complete termination requires the contractor to stop all work under the contract, while a partial termination discontinues only a portion of the uncompleted work. Whether a contract is partially or completely terminated is dependent upon the exact circumstances surrounding the decision to terminate.

It is preferable to work out possible solutions to contracting problems before resorting to contract termination. Terminations can be costly and time-consuming, and often wind up in litigation. Nonetheless, terminations are sometimes unavoidable. The two types are explained in detail in this chapter.

## 14.6 Termination for the Convenience of the Government

Under the Termination for Convenience clause, the Government has a right to cancel work under a contract whenever it determines that it is in its best interest. Such a decision is a unilateral right of the Government. It is not, however, a decision that can be made lightly. Cancellation of the work under a contract is an expensive and undesirable course of action. A default termination may result in a need to reprocure, which can be expensive and time-consuming; it may require payment of the contractor's entire fee as part of settlement. Generally, such terminations occur because of changes in Government requirements or because contract funding is not available. However, there may be other circumstances which make termination advisable, such as an unavoidable organizational conflict of interest, a decision that it would be more cost-effective to do the work in-house, etc.

The Termination for Convenience clause outlines the actions of the contracting parties to be taken in consumating the termination of work and settlement. In terminating a contract, there may be extensive adminstrative effort involved on the part of the Government with respect to the various actions necessary to complete the settlement.

The first step in a termination for convenience is written notification to the contractor by the Contracting Officer. The notice clearly indicates that the contract is being terminated for the convenience of the Government. It also gives: (1) an effective date for the termination (usually the date of the notice); (2) the extent of the termination identifying what portion, if any, should be continued; and (3) any special instructions.

Upon receipt of the notice, the contractor is obligated to comply with the Termination clause and the terms of the notice, which generally include:

(1) Stopping work on the terminated portion of the contract;

(2) Terminating related subcontracts;

(3) Continuing with the unterminated portion and promptly requesting any equitable adjustment in price on the continued portion;

(4) Taking action to protect and preserve any Government property or to return it as directed by the Contracting Officer;

(5) Settling claims and liabilities arising from terminated subcontracts; and

(6) Promptly submitting its own claim for settlement. (The contractor has one year to submit such a claim.)

The Contracting Officer directs the actions of the contractor, reviews the settlement proposal, and promptly negotiates a settlement. A number of people, including the Project Officer, may be involved in fulfilling these multi-faceted duties. One of the activities of the Contracting Officer in which the Project Officer may participate is the settlement conference. At the conference, the Contracting Officer will:

(1) Explain the general principles governing settlements under the relevant clause, including the contractor's obligations with respect to subcontracts;

(2) Determine the status of the work, and, if necessary, clarify the extent of the termination;

(3) Determine the subcontracts being terminated and who is handling them for the contractor;

(4) Make all arrangements for proper handling and disposition of Government property;

(5) Discuss the form of the settlement proposal and the accounting data required; and

(6) Establish a tentative schedule for negotiation of the settlement.

Aside from possibly making the recommendation to terminate for convenience, the Project Officer will be involved in settlement conferences, advising the Contracting Officer on the disposition of property and evaluating the reasonableness (quantitatively and qualitatively) of the contractor's settlement proposal.

### 14.7 Termination for Default

The Government has a contractual right to terminate, in whole or in part, the contractor's right to proceed with the work when it has failed to perform its contractual obligations. The decision to terminate is discretionary. Termination may not be in the best interests of the Government even if a default termination is justified, because of the lengthy time required to procure another contractor and get the new contractor up to speed. The Contracting Officer should exhaust all reasonable efforts to prevail upon the contractor to correct whatever problems exist.

If a contract is terminated for default, however, and it is determined afterwards that the contractor was not in default or that the default was "excusable" (see section 14.10, below), the termination will be considered to be for the convenience of the Government. The rights of the parties are then governed by the Termination for

Convenience clause. Or, if the Contracting Officer determines it to be in the best interests of the Government, the contract may be reinstated by mutual agreement.

The Government's right to terminate for default is based on the contractor's failure to:

(1) Perform on time, as provided in the contract;

(2) Perform any other provision of the contract; or

(3) Make progress, to the extent that the delay endangers contract performance. Although not expressly provided for in the Default clause, the Government may immediately terminate for default if the contractor definitely exhibits an intention not to perform within the time fixed in the contract, even if he is not yet "late."

Depending upon contract type, the following consequences may result from a termination for default:

(1) Under fixed-price type contracts, the Government does not have to pay the costs of uncompleted work, but only the costs of products delivered to and accepted by the Government. In the case of a cost-reimbursement contract, the Government is liable for costs incurred up to the date of termination, plus a proportional part of any fee. In this situation, Government is not liable for settlement expenses, nor for any profit on costs of preparation for work in progress;

(2) The contractor must return any progress or advance payments;

(3) The Government has the right to take over the contractor's inventory, subject to a negotiated compensation;

(4) Under fixed-price type contracts, the contractor may be liable for any excess costs the Government has to pay in repurchasing the supplies or services. (However, a cost-reimbursement contract does not contain any provision for recovery of excess repurchase costs.); or

(5) The contractor may also be liable for breach of contract damages.

Prior to taking any default action, the Contracting Officer will normally take action on one of the following remedies short of termination. At this time, the Contracting Officer should also determine:

(1) Whether it would be effective to withhold payment until satisfactory performance is demonstrated;

(2) Whether, if default action is taken, there is an alternative source of supply;

(3) Whether the contractor's financial condition is such that it would be able to reimburse the Government for the excess costs of repurchase;

(4) What would be the impact of default upon the contractor's ability to liquidate progress payments or continue to perform under other Government contracts;

(5) Whether continued performance under a revised delivery schedule would be more in the Government's interest;

(6) Whether the Government's interest would be better served by offering advance payments or some other special financing agreement;

(7) Whether, if the contractor cannot continue to perform, an arrangement to have the contract performed by a capable subcontractor might be an appropriate solution;

(8) Whether, where a capable organization declines to perform as a subcontractor, a novation agreement can be arranged whereby the desired performance can be obtained from that organization while the original contractor still remains legally liable for the contract;

(9) Whether there is a surety or trustee in bankruptcy who would be willing to take over the responsibility for performing the contract; and

(10) Whether, where the requirement for the supplies or services no longer exists and the contractor is not liable to the Government for damages, a no-cost termination agreement should be executed.

The Contracting Officer, with the assistance of the Project Officer, has a reasonable time to determine if it is in the Agency's best interest to exercise its right to terminate a contract for default. The definition of a reasonable period of time depends upon the facts of each case and varies from case to case. The contract file must be fully documented to explain the reason(s) for default and the Agency's rationale for evoking the Default provision.

The Government is not required to give notice of failure or notice of the possibility of default prior to issuing a termination for default if the basis for default is failure to deliver or to perform on time. If, however, the Government fails to enforce the provisions related to timely delivery, or takes any action that might be construed as a waiver of the delivery or performance date, then the Contracting Officer must send a preliminary notice to the contractor, proposing or setting a new date. It is important that Project Officers do not take actions that could possibly be construed as a waiver of the Government's contractual rights.

### 14.8 Cure Notice

In cases where the failure to perform involves provisions other than those concerned with timely delivery, or failure to make such progress as to endanger performance altogether, the Contracting Officer must give the contractor notice of such failure and allow at least ten (10) days for cure (remedy) of the failure before issuing a termination notice. This "ten-day cure notice":

(1) States that a termination for default may arise unless the failure to perform and make adequate progress is cured within ten (10) days (or longer);

(2) Calls the contractor's attention to its contractual liabilities in the event of default;

(3) Requests an explanation of the failure to perform and plan for corrective action;

(4) States that failure to present an explanation may be taken as an admission that there is no valid explanation; and

(5) Where appropriate, invites the contractor to discuss the matter at a conference.

If the contractor responds with a valid explanation of an "excusable delay", or cures his or her failure to perform within the 10-day period, nothing further is done except to keep a close eye on future progress. If, however, the failure to perform is not remedied, and/or there was no existence of a condition of "excusable delay", the Contracting Officer may decide to terminate the contract for default.

### 14.9 Termination

Once the Contracting Officer determines that termination for default is in order, then the Contracting Officer will issue an official written notice of termination that:

(1) Sets forth the contract number and date and describes the acts or omissions that constitute the default;

(2) States that the contractor's right to proceed with performance of the contract (or a portion of the contract) is terminated;

(3) States, if the Contracting Officer has not determined whether the failure to perform is excusable, that it is possible that the contractor will be held liable for any excess costs the Government must pay in repurchasing terminated supplies or services;

(4) States, if the Contracting Officer has determined that the failure to perform is inexcusable, that (1) the notice of termination constitutes such a determination and is a final decision under the Disputes clause, (2) the contractor will be held liable for any excess costs of repurchase, and (3) the contractor has the right to appeal under the Disputes clause;

(5) States that the Government reserves all rights and remedies provided by law or under the contract; and

(6) States that the notice represents a decision that the contractor is in default as specified and that the contractor has the right to appeal under the Disputes clause.

### 14.10 Excusable Delays

The contractor has certain defenses against the Government's notice of termination for default which are contained in the Default clause.

If the failure to perform is caused by factors beyond the control of the contractor, and without contractor fault or negligence, the contract cannot be terminated for default. If the failure to perform is caused by a subcontractor (at any tier), and if it is caused by factors beyond the control of the contractor and subcontractor and without their fault or negligence, then the contract cannot be terminated by default unless the

supplies or services to be furnished by the subcontractor were obtainable elsewhere to meet the required delivery dates.

Simply put:

- A contractor's default is excusable if it is not caused by either contracting party, or if it is caused by the Government.

- A contractor's default is inexcusable if caused by the contractor's own fault or negligence, by that of something or someone within its control, or by that of one of the subcontractors.

There are several excusable causes listed in the excusable delay section of the Default clause, some of which are:

(1) Acts of God or the public enemy;

(2) Acts of the Government in either its sovereign or contractual capacity;

(3) Fires, floods, epidemics, or quarantine restrictions; and

(4) Strikes, freight embargoes, or unusually severe weather.

In every such case, the failure to perform must be beyond the control and without fault or negligence of the contractor. Also, the excusable cause must be the direct cause of the failure to perform. If actions by both the Government and the contractor contribute to the default, and the specific causes and effects of the responsibilities of each are so intertwined as to defy disentanglement, then the contractor's default will not be excused.

If, prior to issuance of a notice of termination, the Contracting Officer determines that the contractor's failure is excusable but the termination is in the best interests of the Government, the Contracting Officer can take either of these actions:

(1) Terminate for convenience where the contract contains a Termination for Convenience clause; or

(2) Negotiate to terminate at no cost to either party, where the contract does not contain a Termination for Convenience clause.

If the Contracting Officer is not able to determine whether the contractor's failure is excusable prior to the issuance of the termination, the Contracting Officer will issue a written decision as soon as possible. The written decision will be delivered to the contractor promptly, with advice on the contractor's right to appeal under the Disputes clause.

### 14.11 Waiver of Default

Personnel who are involved with contractors must take extra precautions not to act in a manner which will waive the Government's rights to terminate for default. The situations described below are of special concern:

- After the contractor is found to be in default, the Government's rights will be waived if (1) the Government acts or fails to act and thus encourages the contractor to continue performance, and (2) the contractor, relying on that encouragement, continues to work and incurs costs in performance of the contract.

- If, after default, a contractor continues to perform and incurs costs, the Board of Contract Appeals will carefully examine the contract administration personnel to see if they said or did anything, or failed to say or do anything, that may have encouraged the contractor to continue. If the Board finds such evidence, it will hold that a waiver is the result.

- The following kinds of acts on the part of Government personnel have been held to waive a default:

  (1) Accepting late delivery;

  (2) Ordering and accepting corrective action after default;

  (3) Encouraging continued performance;

  (4) Negotiating a revised delivery schedule; or

  (5) Revising other contract terms.

- The following kinds of acts on the part of Government personnel have been held to <u>not</u> waive a default:

  (1) The Contracting Officer conducts negotiations concerning revisions of delivery times, without implying to the contractor that late delivery is acceptable without any consideration.

  (2) If, after default, the contractor does nothing to continue work or incur costs, then there will normally be no waiver, in spite of anything the contract administration personnel may have or have not said or done. The Government's right to terminate for default will remain intact.

  (3) The Government attempts, unsuccessfully, to revise other contract terms.

The best way to avoid waiver of default is to have good rapport and communication between the Contracting Officer and the Project Officer so that all personnel who are involved with the contractor will know the contract status, the Government's position, and what each party is supposed to do and not do.

When it is concluded that the Government's action or failure to act is grounds for a waiver of the contractor's default, the Contracting Officer should take immediate steps to establish a new delivery schedule. These steps will revive the Government's right to terminate for default so that the right is available in the event of a new default.

## 14.12 Contract Closeout

A contract is considered complete when 1) all deliverables have been delivered and accepted, or 2) all required services have been performed and accepted, and 3) the period of performance, including all option provisions which have been exercised have expired. Contracts that are physically complete must be administratively closed out, which involves the settlement of all outstanding contractual issues and the documentation of the file. The Contracting Officer is responsible for closing out the contract with the assistance of the Project Officer.

## 14.13 Closeout Procedures

The contract closeout process encompasses all those actions required to see that the Government has received the goods or services under contract, the contractor has been paid the correct amount, Government property is accounted for, all required reports have been received and the file is properly documented and transmitted to the records center.

The Federal Acquisition Regulations set forth the following time standards for closing out contract files:

Firm Fixed Price Contracts - 6 months from the date on which the Contracting Officer receives evidence of physical completion.

Cost Reimbursement And Indefinite Quantity Contracts Requiring Settlement of Indirect Cost Rates - 36 months from the date on which the Contracting Officer receives evidence of physical completion.

All Other Contracts - 20 months from the date on which the Contracting Officer receives evidence of physical completion.

Timely closeout of contracts is important because there might be payments due the contractor, and EPA's financial accounts need to be closed out. Excess funding must be returned to the Treasury Department, typically because closout occurs so long after funding that excess funds cannot be deobligated and reprogrammed for use at EPA. Also, allowing completed contracts to remain open can generate late claims and disputes.

After all costs have been incurred under a cost-reimbursement contrat, and/or items delivered, the contractor will submit a completion voucher, summarizing all costs claimed throughout the contract period. (This step is not necessary for firm fixed price contracts, as the voucher submitted after the items are accepted will specify the fixed price of the contract and contractor costs are irrelevant.) The Project Officer will be requested to examine the voucher from the perspective of (1) was the work performed and (2) are the costs allocable and reasonable.

The completion voucher serves as the basis for requesting a final audit, which will provide to the Contracting Officer a report on the contractor's actual costs and serves as the basis for negotiating a final cost settlement. The Contracting Officer must then determine the allowability, allocability, and reasonableness of costs claimed and may enter into negotiations with the contractor. A final cost is then negotiated and final payment can be made. The final voucher submitted by the contractor is certified by the Contracting Officer (not the Project Officer) and is subject to all provisions of the Prompt Payment Act (see Chapter 11). Other requirements of closeout of completed contracts are:

- proper disposition of Government property;

- release of all future claims from the contractor;

- proper disposition of any classified material; and

- disclosure of all inventions.

## 14.14 Project Officer Responsibilities

Project Officers will be requested to assist in part of the contract closeout process. Listed below are the tasks the Project Officer normally will be responsible for performing:

(1) Certifying that all technical requirements of the contract have been satisfied, that the products or services have been satisfactorily completed within the contract amount, and that the final report and all deliverables have been received and accepted;

(2) Reviewing and determining the accuracy of the contractor's reporting of inventions;

(3) Examining the completion voucher (on cost-reimbursement contracts); and

(4) Evaluating the contractor's performance under the contract.

Most of these activities will be requested by the Contracting Officer in writing, so the Project Officer need only respond to the written request. Nonetheless, it is essential that the tasks be performed as quickly as possible, as contract closeout is a time-consuming process and many steps are dependent upon completion of the preceding steps. Project Officers must take care to be responsive to these requests, as their duties as Project Officers do not end until contract closeout is completed.

It is essential that contractor evaluations be well thought out by Project Officers and backed up by documentation. These evaluations can later serve as the basis for evaluating past performance of a potential contractor in consideration for award of future requirements.

Good or bad experiences can be used by the Contracting Officer and thus enhance EPA's acquisition program in later years. EPA Form 1900-27 (See page 451) will be used for this purpose, and will be forwarded to the Project Officer by a PCMD contract specialist or contract administrator during the closeout process.

# MISCELLANEOUS CONTRACT PROVISIONS AND SPECIAL CONTRACT TYPES

# SPECIAL PROVISIONS

## 1. Patents

Generally, Contractor may elect to retain title to invention made in performance of contract work, but Government receives license to practice invention worldwide; contact EPA's Patent Advisor for information.

## 2. Data Rights

Contracts involving acquisition of limited rights data (developed at private expense that is trade secret, commercial, financial, confidential, or privileged), or restricted computer software, must contain clauses defining the respective rights of Government and contractor regarding its use, duplication or disclosure.

# SPECIAL PROVISIONS (Cont.)

## 3. Peer And Administrative Review

All scientific, informational or educational material designed for public distribution and attributable to EPA and produced by an EPA employee, consultant, contractor or grantee, must undergo EPA's review process prior to publication by EPA or the contractor.

## 4. Contractors' Working Files

Contractor must maintain accurate working files on all work documentation required in performance; Contracting Officer can require contractor to provide EPA with all such information.

# SPECIAL PROVISIONS (Cont.)

## 5. Confidential Business Information

- Contractor given access to proprietary data submitted to EPA must protect its confidentiality. Contractor must:

- Use data only to carry out contract work

- Not disclose information to other than EPA employees unless prior written approval

- Return all copies to Contracting Officer

- Not use it to compete against related businesses

- Get Contracting Officer consent prior to entering into subcontract requiring disclosure

- Include disclosure restrictions in subcontracts.

# SPECIAL PROVISIONS (Cont.)

## 6. Drug-Free Workplace

- Offeror/contractor required to certify and agree that offeror/contractor and employees will not engage in unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in the performance of a government contract

- Offeror/Contractor with employees agrees to:

- Notify employees of prohibition/that required to notify employer if convicted under criminal drug statute within 5 days of conviction; provide copy drug-free certification statement

- Establish drug-free awareness program

- Notify contracting officer of any violations and take appropriate personnel action

- Make a good-faith effort to maintain a drug-free workplace

- Penalties: Suspension of contract payments; termination for default; suspension; debarment

# CONTRACTS SUBJECT TO SPECIFIC LABOR LAWS

## Government Contracts Are Subject To The Following Labor Laws Requiring Certain Minimum Pay Standards

- CONTRACT WORK HOURS AND SAFETY STANDARDS ACT - applies to laborers & mechanics for contracts over $2500, and contruction contracts over $2000

- WALSH-HEALEY PUBLIC CONTRACTS ACT - applies to all contracts over $10,000 for manufacture or furnishing of materials, supplies, articles or equipment

- FAIR LABOR STANDARDS ACT - applies to all government contracts

- SERVICE CONTRACT ACT - applies to service employees on service contracts over $2500

- DAVIS BACON ACT - applies to all contracts for construction, alteration or repair over $2000.

# CONSTRUCTION CONTRACTS

## Construction Contracts Have Unique Requirements, Including:

- Contractor Must Furnish Performance And Payment Bonds If Contract Over $25,000

- If Site Conditions Differ Materially From Those Known When Fixed Price Contract Bid Submitted, Contractor Entitled To Adjustment

- Special Contractor Evaluation Is Required By FAR For Contracts: 1) $500,000 Or More; 2) $100,000 Or More If Any Element Either Unsatisfactory Or Outstanding; 3) $100,000 Or More, If Contract Terminated For Convenience Of Government.

# SECTION 8(a) CONTRACTS

**Section 8(a) Of Small Business Act Authorizes SBA To Contract With Federal Agencies And Then Subcontract Work To Socially/Economically Disadvantaged Small Business. 8(a) Contracts Have Special Requirements:**

- Contract Modifications Require Two Changes - One With SBA Prime Contract And One Between SBA And Subcontractor
- Payment Is Made Directly To Subcontractors (Not Thru SBA); Advance Payments May Be Issued And Should Be Expedited
- May Require More Project Officer Assistance Because Of Government's Special Responsibility
- Award of 8(a) Contract Excluded From Requirements For Full And Open Competition
- Agency Restricted In Terminating Contract; Must Terminate With SBA First.

Chapter 15

# MISCELLANEOUS CONTRACT PROVISIONS AND SPECIAL CONTRACT TYPES

It is impossible to describe in this chapter all of the many contract provisions which require special administration duties. Many are only applicable to one type of contract or certain specific situations. Nonetheless, presented here are several which are common to many EPA contracts and are of interest to Project Officers. Others may be included in individual contracts; in these situations, Contracting Officers will advise their Project Officers of their responsibilities with respect to these unique provisions.

## 15.1 Patents and Data Rights

### (1) Patents

A patent is a grant given by the Government to an inventor, which gives the inventor exclusive control for 17 years of the invention and the opportunity to enforce that control by court action against any infringers. The Government's policy is to encourage the use of inventions in performing contracts, even though the inventions may be covered by US patents. In those cases where the Government has authorized or consented to the manufacture or use of an invention covered by a patent, any suit for infringement of the patent based on a Government contractor's use or manufacture of the invention can be maintained only against the Government and not against the contractor or subcontractor.

However, if the patent infringement results from performance under construction contracts or contracts for supplies or services that normally are sold by any supplier to the public in the commercial open market, the liability may ultimately be borne by the contractor or subcontractor. Therefore, the Government may require that the contractor agree to indemnify the United States against liability for patent infringement in these situations.

The general rule is, where the contractor performs work or provides supplies which are unique to the Government and which he does not ordinarily make for his commerical customers, the Government assumes the risk of indemnity and does not include an indemnity clause. But where the supplies or services are "standard commercial" and have been sold to the general public, the contractor must assume the risk. EPA contractors are required to notify the Contracting Officer of all claims of infringement that come to their attention in connection with contract performance.

Under the terms of most EPA contracts, the contractor may elect to retain title to any invention made in the performance of work under the contract. If this occurs, the Government will receive a nonexclusive, nontransferable, paid-up license to practice any such invention throughout the world. Under certain circumstances, the Government is granted only limited rights, or takes title to the invention itself.

To exercise its right to retain title to an invention, the contractor must disclose it to the Contracting Officer within two months after it is disclosed to the contractor by the inventor. The contractor must decide within a certain period of time after disclosure whether it elects to retain title to the invention, and must file its initial patent application within another specified period after that. (The time periods vary depending on whether the contractor is a small or large business or a nonprofit organization). The contractor is also required to submit annual reports on the utilization of any invention when title is vested in the Government.

Since the majority of EPA's contracts cover services rather than supplies, inventions are infrequently created under our contracts. EPA does have a Patent Advisor in the Office of General Counsel who is available to answer questions if the issue does arise.

(2) Rights in Data and Copyrights

It is necessary for EPA, in order to carry out its missions and programs, to acquire or obtain access to many kinds of data produced during or used in the performance of its contracts to meet programmatic and statutory requirements, including regulatory activities. At the same time, EPA recognizes that its contractors may have a proprietary right or other valid economic interest in certain data resulting from private investment, and that protection from unauthorized use and disclosure of this data is necessary in order to prevent the compromise of such property right or economic interest, avoid jeopardizing the contractor's commercial position, and maintain EPA's ability to obtain access to or use such data.

The protection of this data by EPA is necessary to encourage qualified contractors to participate in EPA programs and apply innovative concepts to such programs. Subpart 1527.70 of the Environmental Protection Agency Acquisition Regulations (EPAAR) set forth specific policies, procedures, solicitation provisions, and contract clauses relating to the acquisition of data and the rights in data or copyrights relative thereto.

It is important for Project Officers to recognize that acquisition of data involves not only the identification and definition of the data to be acquired and the circumstances of its use, but also the rights of the Government to the use of such data. In fact, in many cases, the Government is acquiring the right to use of the data rather than title to the data itself. It is EPA's practice to identify and define its data requirements to the extent possible in the statement of work of the contract. Recognizing that this may not always be feasible, EPA has made provisions for the acquisition of data subsequent to award of the contract. In either event, since preparation, maintenance and storage of data generally represent a substantial expense to both the Government and contractor, data requirements shall be kept to a minimum consistent with program needs.

Following are definitions of various terms as they are used in the EPAAR:

(a) "Computer software" means computer programs, computer data bases, and their documentation.

(b) "Data" means recorded information, regardless of form or media and includes computer software. It does not include information incidental to contract administration such as financial, business or management information.

(c) "Form, fit, and function data" means data relating to, and sufficient to enable physical and functional interchangeability; as well as data identifying source, size, configuration, mating and attachment characteristics, functional characteristics, and performance requirements.

(d) "Limited rights" means the rights of the Government in limited-rights data, as set forth in a Limited Rights Notice if included in the data rights clause of the contract.

(e) "Limited-rights data" means data that embodies trade secrets or is commercial or financial and confidential or privileged to the extent that such data pertains to items, components, or processes developed (or with a backup computer in case of inoperability) at private expense, including minor modifications thereof. (Contracting Officers may, with the concurrence of the Project Officer, use the following alternate definition: "Limited-rights data" means data developed at private expense that embodies trade secrets or is commercial or financial and confidential or privileged).

(f) "Restricted computer software" means computer software developed at private expense and that is a trade secret, or is commercial or financial and confidential or privileged, or is published copyrighted software.

(g) "Restricted rights" means the right of the Government in restricted computer software as set forth in a Restricted Rights Notice if included in a data rights clause of the contract or as otherwise may be included or incorporated in the contract.

(h) "Unlimited rights" means the right of the Government, without additional cost to the Government, to use, disclose, reproduce, prepare derivative works, distribute copies to perform publicly and display publicly, in any manner and for any purpose, and to have or permit others to do so.

All contracts which involve the acquisition of data discussed and defined above must contain clauses which define the respective rights of both the Government and the contractor regarding such matters as its use, duplication and disclosure. The type of contract, the particular subject matter of the contract, or the intended use of the data, must be considered in selecting the appropriate contract clause. It is therefore essential that all Project Officers whose acquisition includes data be familiar with the various clauses so that they may assist the Contracting Officer in selecting the clause which best serves both the Government and the program being supported.

Following is a brief general discussion of the various clauses. Their full text is contained in EPAAR Temporary Regulation 1 (effective date: July 15, 1984) and may be obtained by contacting your supporting Contracting Officer. Specific questions regarding the selection of clauses, appropriate to program needs, should be addressed to the Contracting Officer early in the pre-solicitation phase of the acquisition process.

(a) Rights in Data - General (EPAAR 1552.227-71)

(i) This clause balances EPA's program and mission needs with the Contractor's right to protect property and valid economic interest stemming from private investment. The Contractor is protected from unauthorized use or disclosure of limited rights data or restricted computer software either by withholding delivery or by placing a "Restricted Rights Notice" authorized by the clause on the data to be restricted. Further, the categories or types of data which the Government is to acquire with limited rights are specifically identified along with an enumeration and definition of the use or disclosure rights of EPA. Although the Contracting Officer may revise these purposes consistent with EPA's needs, appropriate purposes include: use by support service contractors, evaluation by non-Government evaluators and use where required by other contractors participating in the same program.

(ii) Pursuant to this clause, contractors may establish or maintain copyright protection for data first produced and/or delivered under the contract. However, the Government will normally be granted a nonexclusive, irrevocable license, which includes the rights to reproduce, prepare derivative works, and distribute to the public. The Contractor is permitted to establish claim of copyright to scientific and technical articles based on, or derived from, the contract work and published in academic, professional, or technical journals. Such permission may also be granted in other cases.

(iii) Regarding restricted computer software, the means of protection afforded the contractor are the same as those for limited rights data. However, the Contractor may also substitute form, fit and function data or deliver the software with restricted rights relative to its use, disclosure, and reproduction. It is important in circumstances when such software is needed for use in more than one computer that the number be specified in the contract schedule.

When EPA acquires software with restricted rights, it may use the software (or copy for use) in or with the computer or computers for which it was acquired. EPA may also reproduce it for archival or backup purposes, modify, adapt or combine it with other software (the resultant software is subject to the same restriction in rights). It also may be disclosed or reproduced by support contractors or their subcontractors, subject to the same restrictions in rights.

(iv) In the event EPA questions the Contractor's authority to limit the use of data or restrict the use of software, procedures are provided by the clause.

(b) Rights in Data - Special Works (EPAAR 1552.227-72)

(i) Generally, this clause is used in contracts which are primarily for the production or compilation of data (other than limited rights data or restricted computer software) for EPA's internal use, or when there is a need to limit the distribution or use of the data or to obtain indemnity for liability that may arise from the content, performance, or use of the data. It would also be used where "existing works" are being modified.

(ii) The following are circumstances under which use of the clause is required:

(A) Production of audio-visual works;

(B) Agency histories;

(C) Recruiting, morale, training, or career guidance works;

(D) Works involving instruction or guidance of Government officers and employees;

(E) Works intended for use in connection with EPA regulatory or enforcement activities not involving research, developmental or experimental work;

(F) Collection of data containing personally identifiable information, the disclosure of which would violate rights of privacy or publicity;

(G) Investigatory reports; and

(H) Works, the early release for EPA regulatory or enforcement activities.

(iii) Under this clause, EPA has unlimited rights in all data delivered and in all data first produced, the right to limit the Contractor's claim to copyright, and the right to limit the use and release of data except for purposes specifically provided for in the contract.

(iv) The contractor indemnifies the Government and its officers, agents, and employees against liability resulting from violation of trade secrets, copyrights, a right of privacy or publicity, provided the Government gives timely notice of its intent to make such a claim.

(c) Rights in Data - Existing Works (EPAAR 1552.227-73)

(i) This clause is used in contracts for the acquisition (without modification) of such works as motion pictures, videotapes, sound recordings, literary, pictorial or other similar works. The contract may limit the use of such work in terms of means of exhibition or transmission, time, audience, or geographical locations.

(ii) In the case of existing computer software, no special clause is required, although the contract must contain terms sufficient to permit EPA to fulfill the need for which the software is being acquired. Care should be exercised to ensure that any vendor's standard commercial lease, license, or purchase agreement be consistent with EPA's purpose for acquisition. As with the acquisition of other computer software, Project Officers should consult early on with the Contracting Officer regarding EPA's intended use and the establishment of the contract language necessary to protect the rights of EPA in that use.

(iii) Contracts for other existing works, being acquired off-the shelf with no intent of reproduction or use which may be prohibited by the author's or publisher's rights, need and contain any of the clauses discussed above.

(iv) Modification of existing works is considered to be "Special works" for rights in data purposes.

(4) Additional Data Requirements (EPAAR 1552.227-74)

In recognition of the fact that in some contracting situations, it may not be possible or appropriate to ascertain all data requirements at the time of contracting, this clause permits the Government to order data any time during contract performance or within three years of final payment any data which was first produced or specifically used in the contract. It provides for compensation to the Contractor for formatting, production, and delivery.

## 15.2 Peer and Administrative Review

The Administrator has implemented an internal review process for EPA scientific, informational, and educational materials designed for public distribution. Any such materials attributable to EPA, whether produced by an EPA employee, consultant, contractor, or grantee, must be reviewed through the control system established in the EPA Order prior to public distribution. The intent of the Order is to ensure the high quality, completeness, and accuracy of materials attributable to EPA.

A contract clause restricts the contractor from independently publishing or printing material generated under contract until after completion of the EPA review process. A copy of any paper, article, or other dissemination of information intended for publication must be submitted to the Contracting Officer at least 30 days prior to publication. The Government is to notify the contractor of review completion within the number of calendar days specified in the contract clause after the contractor's transmittal to the Project Officer of material developed under the contract. If the contractor does not receive Project Officer notification within this period, the contractor is to notify the Contracting Officer in writing.

The contract clause will establish statements the contractor must include in any public distribution of the contract-generated material, whether or not the Agency has decided to publish the material.

## 15.3 Contractors' Working Files

EPA contracts may provide that contractors must maintain accurate working files (by task or work assignment, if applicable) on all work documentation required in performance. The Contracting Officer has the right to require the contractor to provide EPA with all information contained in these working files.

## 15.4 Treatment of Confidential Business Information

Periodically, the Agency has requirements that call for a contractor to review or analyze proprietary data that has been submitted to EPA. Contract clauses exist which protect the confidentiality of such data by requiring the contractor to:

(1) use the confidential information only for the purposes of carrying out the work required by the contract;

(2) not disclose the information to anyone other than EPA employees without the prior written approval of EPA's General Counsel;

(3) return all copies of the information to the Contracting Officer when it is no longer required or upon completion of the contract;

(4) not use any confidential information supplied by EPA or obtained during contract performance to compete with any business to which the confidential information relates;

(5) obtain the written consent of the Contracting Officer prior to entering into any subcontract that will involve the disclosure of such confidential information to the subcontractor; and

(6) include the same requirements in any subcontract which will involve the furnishing of confidential business information to the subcontractor.

More specific procedures are included in contracts which involve access to confidential business information, related to either the Federal Insecticide, Fungicide, Rodenticide Act or the Toxic Substances Control Act.

Project Officers who discover that a contractor is not in compliance with any of the contract requirements in this area must immediately notify their Contracting Officer.

## 15.5 Certification Regarding a Drug-Free Workplace

In March of 1989, a new FAR regulation (at 52.223-5 and 6) was published requiring that all offerors for Government contracts certify that they will not engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in the performance of the government contract. Failure to so certify renders the offeror unqualified and ineligible for the award of a government contract.

In submitting any offer for a government contract, the offeror (if other than an individual) certifies that it will:

(1) publish a statement notifying employees that the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance is prohibited in the offeror's workplace, and specifying the actions to be taken against employees for any violation of that prohibition;

(2) establish a drug-free awareness program to inform employees about the dangers of drug abuse in the workplace, the Contractor's policy of maintaining a drug-free workplace, available drug counseling, rehabilitation, and employee assistance programs, and the penalties for drug abuse violation;

(3) provide all employees engaged in contract performance with a copy of the statement of (1) above;

(4) notify employees that they are required to abide by the terms of the statement and to notify the employer of any criminal drug statute conviction within five days of such conviction;

(5) notify the contracting officer within 10 days of any such notification by an employee or otherwise receiving actual notice of such conviction;

(6) impose sanctions or remedial measures on any employee convicted of drug abuse violations occuring in the workplace (including personnel actions up to and including termination, or requiring the employee to satisfactorily participate in a drug assistance or rehabilitation program); and

(7) make a good faith effort to maintain a drug-free workplace through implementation of the above (1) through (6).

In addition, any individual offeror/contractor that has no more than one employee including the offeror/contractor agrees, by award of the contract or acceptance of a purchase order, not to engage in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in the performance of the contract. The contractor's failure to comply with these requirements may render the contractor subject to suspension of contract payments, termination of the contract for default, and suspension or disbarment.

Project Officers who discover that a contractor is not in compliance with any of the contract requirements in this area must immediately notify their Contracting Officer.

## ADMINISTRATION OF SPECIAL TYPES OF CONTRACTS

Certain types of contracts contain provisions which demand special administration techniques. While it would be too lengthy to discuss them all here, the most typical ones used at EPA are set forth in this chapter with a short discussion about their unique provisions.

### 15.6 Contracts Subject to Specific Labor Laws

All Government contracts contain provisions requiring certain pay standards. Various laws have been promulgated for the protection of these employees; these are summarized below:

(1) Contract Work Hours and Safety Standards Act - applicable to laborers and mechanics on all contracts over $2500 ($2000 for construction contracts);

(2) Walsh-Healey Public Contracts Act - Applicable to all contracts over $10,000 for the manufacture or furnishing of materials, supplies, articles, or equipment;

(3) Fair Labor Standards Act - applicable to all government contracts regardless of size;

(4) Service Contract Act - applicable to service employees on all service contracts over $2500; and

(5) Davis Bacon Act - applicable to all contracts for construction, alteration, or repair which are over $2,000.

Much of the enforcement of the labor laws is handled by the US Department of Labor. Nonetheless, EPA has certain responsibilities, and any Government employee who is aware of or suspects a violation of any such law is responsible for reporting it to the Contracting Officer, who will refer the matter to the appropriate authorities.

The last two acts listed above require the most monitoring by the contracting agency. Both require the inclusion of wage determinations in those contracts which are applicable and the enforcement of minimum wage standards for the employees affected. Most of the administration of the Service Contract Act requirements is handled by the Department of Labor (DOL). EPA Project Officers and Contracting Officers, however, are responsible for ensuring that 1) DOL is notified of the existence of all such contracts, 2) all contractors are fully informed of their responsibilities, and 3) contractors post DOL Form SC-1 in a prominent place at every job site.

The Davis Bacon Act, applicable to construction contracts, requires the review of weekly payroll records for all employees (whether employed by the prime contractor or any subcontractor) to verify compliance with the minimum wage rates and other provisions of the law. Project Officers must ensure that wage determinations are posted in a prominent place at the work site, and they may be asked to verify that the employees' classifications on the payroll records conform with the work actually performed.

Violations of these labor laws may result in suspension of payment, liquidated damages assessment, or ultimately, suspension or debarment of the contractor from receiving future Government contracts. Technical personnel who are assigned to monitor contracts with any of these provisions should review the requirements and their own responsibilities with their Contracting Officers immediately after award.

## 15.7 Construction Contracts

Besides the administration of the Davis Bacon Act provisions, construction contracts carry with them a number of unique requirements with which technical personnel should become familiar. The majority of the Agency's construction activities which are contracted are in the Superfund program, and the majority of these are handled as subcontracts under the remedial planning program. Therefore, much of the administration is managed by the prime contractors. However, Project Officers should know the requirements, and there are a certain number of prime contracts for construction awarded in EPA, which do require special administration activities.

One unique feature of construction contracts over $25,000 is the requirement for the furnishing of both performance and payment bonds by the contractor. A performance bond is a guarantee that the contractor will fulfill 100% of the obligations of the contract; a payment bond assures payment to all persons supplying labor or material under the contract. This means that if the contractor fails to fulfill either of these requirements, a "surety" is named to be legally liable for the debt. Prime contractors will usually require the same guarantees from their subcontractors.

Fixed price construction contracts also provide that if site conditions differ materially from those known at the time of submission of a bid or proposal, the contractor may be entitled to an adjustment in contract price as a result. Project Officers will be required to provide input on the evaluation of contractors' claims if or when this occurs.

Finally, special contractor evaluations are required by the FAR for each construction contract of 1) $500,000 or more, 2) $100,000 or more, if any element of performance was either unsatisfactory or outstanding, 3) more than $10,000, if the contract was terminated for default, or 4) $100,000 or more, if the contract was terminated for convenience of the Government. The evaluation must be prepared by the

Contracting Officer with input from the Project Officer within two weeks after final acceptance of the work or contract termination.

## 15.8 Contracts with the Small Business Administration Under the 8(a) Program

Section 8(a) of the Small Business Act, as amended, authorizes the Small Business Administration (SBA) to contract with Federal agencies and then to subcontract the work to socially and economically disadvantaged small business. Any type of service may be contracted for under the 8(a) program.

SBA delegates the administration of 8(a) subcontracts to the procuring agency, which results in certain differences in contract administration. For example, contract modifications must be accomplished by two changes: one with the SBA prime contract, and the other between SBA and the subcontractor.

Some 8(a) contracts may call for advance payments, since these firms are small businesses and often do not have the cash flow to finance their contracts to completion or until receipt of progress payments. It is therefore important that Project Officers expedite payment requests from these firms to avoid possible disruptions in contractor performance caused by cash flow problems. Under the terms of the contracts, payment is made directly to the subcontractors, and does not "pass through" SBA.

It is a special responsibility of the Government to assist an 8(a) contractor in becoming a viable business entity. Project Officers may become particularly involved in spending extra effort in guiding and directing the firm's performance. Hopefully, this will result in a better product or service than might otherwise have been obtained. In addition, because awarding a contract to an 8(a) firm requires no statutory exemptions for other than full and open competition, program offices may gain benefits through follow-on or succeeding contracts with the same company, not often possible with other firms, due to the requirements for competitive acquisitions.

The 8(a) subcontractor is subject to the termination clauses contained in the prime contract with SBA. However, independent exercise of the termination right by the agency is restricted. Normally, the SBA will try to reach an agreement to modify the requirements of the contract to avoid termination. If this fails, the agency may actually terminate the contract with SBA, who cannot be held liable for any excess costs of repurchase (see Chapter 14). If this occurs, SBA in turn will terminate the subcontract.

# APPENDICES

## ETHICS PRETEST AND RESPONSES

Which of the following circumstances would EPA view as ethical employee behavior. (Indicate yes/no/comments)

1. EPA employee accepts Christmas gift from EPA contractor who has been personal friend for 10 years and has been giving Christmas gifts during that entire period.

   Response: Issue is whether personal friendship preceeded EPA contractor relationship. Okay, if gift result of personal friendship that preceeded EPA contractor status. However, if employee is managing EPA contract with contractor at time of gift, is not acceptable.

2. EPA employee speaking on behalf of EPA at professional meeting two hours from Washington accepts ride to meeting with other speaker from private company.

   Response: Issue is whether transportation is considered "incidental" and whether other speaker is personal friend/professional acquaintance or EPA contractor. If incidental, okay; if personal friend/professional acquaintance, okay. If not incidental and also EPA contractor, not okay. This would be considered incidental and okay.

3. EPA employee attends federal office automation trade show and accepts the following items from vendors there:
   a) desk calendar;
   b) discount coupon for software worth $99.00;
   c) disk holder with vendor's name and address (worth $12.00 retail);
   d) pen with vendor's name and address (worth $4.99 retail);
   e) free buffet lunch.

   Response: Issue is value of promotional item (if less than $10.00 retail value) and if it would give appearance of preference (e.g., vender's name is prominently displayed and employee uses in office.) a) okay; b) no; c) no; d) okay; e) okay if all attendees receive.

4. EPA employee in OSWER has received proposals from several companies in response to solicitation. The lowest bidder presently has contract with OARM. OSWER employee calls project officer in OARM to inquire if lowest bidder has been performing satisfactory work and within original contract budget. Is project officer permitted to respond?

   Response: Issue is how the project officer responds. Okay to offer facts; inappropriate to offer subjective opinions. Information received can't be used by inquirer in scoring proposals.

5. EPA employee receives unsoliciated proposal, but has no funds to fund proposal. One year later, EPA employee writes RFP for competitive procurement based on proposal submitted, and divulging the methods proposed in the unsolicited proposal. Is this permissible? Does the original submitter have a right to protest?

Response: Issue is whether the RFP divulged confidential procurement information. If the methods are unique and employee can't describe them without giving away the approach, is not permissible. If divulges, original submitter has right to protest.

6. EPA employee receives invitations from EPA contractors to attend Christmas parties. To avoid any showing of partiality, EPA employee decides to attend all parties.

   Response: Not appropriate, because may have appearance of conflict of interest. However, it has been considered proper to attend such an event where the EPA employee has recently worked for the company, under the personal relationship exception.

7. EPA employee attends all-day briefing by EPA contractor at contractor's office. Contractor provides buffet lunch for all attendees, both public and private.

   Response: Issue is whether there is any way for the EPA employee to pay for the lunch. If not, it's permitted under the "widely attended gathering" exception.

8. EPA employee's husband has substantial private stock in EPA contractor company, representing 25% of husband's net worth; employee is husband's beneficiary. EPA employee serves on technical review panel for major procurement, where EPA contractor has submitted proposal.

   Response: Employee should recuse self from the panel.

9. EPA employee receives and accepts invitation to speak on behalf of EPA at private conference at the Greenbriar funded by state government funds. Invitation includes transportation, meal and lodging expenses and $200 honorarium. Employee also attends separate reception and dinner for speakers sponsored by private company arranging the conference.

   Response: Acceptance directly from the state is okay if there is an IPA agreement, or the private company is a 501(c)(3) (charitable or educational) organization. If so, acceptance of travel and meals is okay. If private company, acceptance is not permitted except for meals available to all attendees. If the Greenbrier offers a deal whereby they charge regular rates for everyone else and government rate within per diem amounts for government speakers, this could also be acceptable. Honorarium may not be accepted because this is official appearance.

10. EPA employee is friend of local official running for reelection, and assists official in telephone poll on specific election issues totally unrelated to federal activities or issues.

    Response: Hatch Act prohibits if assistance is on behalf of partison candidate or (except in local counties with large number of federal employees) if any of the candidates is a Republican or Democrat.

11. EPA employee prepares competitive procurement RFP. During the alloted response period, employee leaves EPA and joins firm that is bidding on the RFP, assists firm in preparing bid proposal, and appears as staff in the proposal.

    Response during suspension of Procurement Integrity Act: Appearing as staff is okay. However, if the procurement were noncompetitive, approval of Assistant

Administrator for Administration would be required. However, this may be viewed as unfair competitive advantage depending on nature of procurement.

Response when Procurement Integrity Act implemented: Not acceptable to appear as staff on contract. Under Act, no official who has participated personally and substantially in conduct of Federal agency procurements shall participate personally and substantially on behalf of the competing contractor in the performance of such contract during the period ending two years after the last date such individual participated personally and substantially in the conduct of such procurement.

12. EPA contract is due to expire and be recompeted. Existing contractor requests EPA project officer for information regarding anticipated requirements and continuation work. EPA project officer gives information to contractor.

    Response: As long as contractor requests information and it is actively solicited by contractor, is permissible, if the information is also available upon request to other contractors. To avoid creating situation of giving competitive advantage to any specific contractor, however, information should be made available to all prospective contractors at same time.

13. If a bribe if offered, the employee should not accept anything, but indicate a willingness to consider the offer, and then contact EPA's Office of Inspector General.

    Response: Yes, because rejection of the bribe may threaten the briber and cause the briber to attempt to throw the blame on the employee by reporting that the employee solicited the bribe.

14. An EPA employee served on a technical evaluation panel for a contract award. After he left EPA, he went to work for the contractor and was assigned to work as project manager for the contract he helped to award. A dispute arises over the meaning of a contract provision and the company's management asks the former employee to prepare a written submission to EPA for signature of the company's president.

    Response during suspension of Procurement Integrity Act: Okay, because the statute bars only representational activity, and not aid and assistance. Could not send under his own name. Is okay to work on the contract. Is not acceptable for former employee to service as project manager, however; only as staff.

    Response after implementation of Procurement Integrity Act: Not acceptable to work on contract. No Government official or employee who has personally reviewed and approved the award, modification or extension of any contract for a procurement shall, during the period ending two years after the last date such individual personally reviewed and approved the award, modification or extension of any contract for such procurement, shall participate personally and substantially on behalf of the competing contractor in the performance of such contract.

15. An employee is the treasurer of an environmental group which has applied to EPA for a grant. The employee receives no pay for this activity.

    Response: The employee is barred from participating in any way, even by advice or recommendation, in the EPA decision on the application, since he is an officer of an organization which has a financial interest in the matter.

16. Which of the following qualify as indicators of potential fraud: (Circle ones that are indicators)

a. Purchasing items and services from single source. (Yes)

b. Selective release of information concerning requirements and pending purchases. (Yes)

c. Providing mailing list of potential contractors to contracting officer for mailing out RFPs. (No)

d. Defining statement of work and specifications to fit products/capabilities of limited set of contractors. (Yes, unless minimum needs are described)

e. Using statements of work, specifications or sole source justifications developed by or in consultation with a specific contractor. (Yes, if that contractor is permitted to bid. That contractor must be prohibited from bidding.)

f. Splitting up requirements to fit within the small purchase requirements ($25,000). (Yes)

g. Vague specifications. (Yes. It allows offerors to determine government needs.)

h. When requested by a contractor to recommend possible subcontractors or experts with the desired expertise, providing references to several known individuals or groups. (No. It's okay if the contractor asks; but don't recommend any given one.)

i. Acceptance of a late bid (e.g., five minutes after deadline). (Yes)

j. Wide variance between the technical rating given the best proposal and all other proposals. (Yes)

k. Bidders who are qualified and capable of performing fail to bid with no apparent reason, and relatively fewer than normal bids are submitted. (Yes. May be collusion; may have lost faith in EPA's competitive process.)

l. Identical bid amounts on a contract line item by two or more contractors. (Yes. May be collusion.)

m. Contractor includes interest costs as part of contract costs to be reimbursed by the government. (Yes.....not allowable.)

n. Contractors submits progress payment request for work completed but not yet accepted by the government. (No. Is okay if is not final payment.)

DECISION

[¶ 15,436] MANPOWER PROGRAM ANALYSIS CONSULTATION AND TRAINING, INC.

LBCA No. 80-BCA-113. November 4, 1981. Contract No. 99-6-601-08-82.

Cost Principles -- Limitation of Cost Clause -- Timely Notice

Because he failed to give the proper notice under the Limitation of Cost clause, a contractor was not entitled to be reimbursed for additional costs incurred under a cost reimbursement contract for a data retrieval system. The contractor claimed a cost overrun of $17,423 and requested funding of that amount under the contract. Under the Limitation of Cost clause, a contractor must notify the contracting officer when he has reason to believe that the costs he expects to incur within the next 60 days will exceed 75 percent of the estimated cost, or that the total cost of performance will be substantially greater or less than the estimated cost. Although the contractor gave notice to government administrative personnel, he did not address such notice to the contracting officer. Approval of an overrun by the administrative personnel would have had no effect. Even if the notice had been submitted to the proper person, it was questionable whether he had not already incurred the costs. In that case, notice would have been untimely.

DECISION

Fourth Street Estates, Inc.

Exercise of a lease renewal option by the government was ineffective because the notice requirement in the lease was not met. Whether the notice on April 2, 1980, satisfied the lease requirement that renewal notice be given 60 days before the end of the current term--in this case May 31, 1980--depended on how the days were counted. The government took the position that in calculating the notice period the notice-day was to be counted, but the board found the better view to be that the day of the notice should not be included. Therefore, beginning on April 3 and counting the days there were 28 remaining in April and 31 in May, a total of 59. Furthermore, even though the lessor accepted rent at the old rate, this did not constitute waiver of his right to insist on timely notice of renewal. The lessor objected to the late notice at the time of delivery, refused to accept it, and has maintained his objections since.

The attempted lease renewal was ineffective. This appeal is remanded to the contracting officer for such action as is deemed appropriate. Appellant is entitled to the difference between the rent paid by the Government after May 31, 1980, and the fair market rental value of the premises during the period of Government occupancy, subject to limitations imposed by law, together with interest according to law until paid. 50 AM JUR 2d, Landlord and Tenant ¶1200; 41 U.S.C. ¶611 (Supp. II, 1978).

WORK PLAN NEGOTIATION

Instructions for EPA Work Assignment Manager

You are John Wamo, working for EPA. You drafted the attached work assignment, and have worked with TAC before on previous work assignments. You were somewhat surprised to receive TAC's work plan and discover the task expansion (e.g., site visits, telephone follow-up, briefings, extra reports) included in it. You wanted to complete this task assignment, plus the testing phase (option year), for a total of 2500 hours. TAC has proposed to use 2350 for this assignment alone.

Your role is to get TAC back to the original 1500 hours you had contemplated for the task, or minimally, to get the total work (including option year) for no more than 2500 hours. You know the testing program in the option year will take at least 800 contractor hours, so you have some leeway for negotiation (up to 1700 hours) on the first year, although not a great deal. There is also a possibility that you can get some additional funding for the option year, but no more than an additional 300 hours (for a total of 2800 hours.) You can't count on the additional funding, however. You recognize the value of doing some telephone followup, but the site visits seem rather unnecessary to you. You are shocked at the amount of travel proposed by the contractor.

You also want to make sure that TAC will consider your father-in-law's gardening firm for the testing phase to be performed in the option year. Although this session is only supposed to cover the current work assignment, you want to lay the groundwork now, before TAC gets geared up for the testing phase. You realize you cannot force TAC to use your father-in-law, but since you know he is cheaper than anyone else, you want to make sure he is considered.

Negotiate the best possible deal for EPA, within these parameters.

WORK PLAN NEGOTIATION

Instructions for Technically Acceptable Corporation (TAC)

You are Jay Theisman, Project Manager for TAC. You have submitted the attached work plan for carrying out EPA's Work Assignment #13. You are fully aware that your work plan exceeds the scope of the work assignment contemplated by EPA. However, your company currently has a cash flow crunch because you just lost a big contract, and you need to provide additional coverage for your staff. You have therefore added additional tasks and hours to the proposed work assignment, in hopes of providing additional coverage. You want to avoid any subcontractors, and have proposed none, to ensure that TAC gets the most staff coverage. You also believe, of course, that those tasks will improve the assignment.

You also would like to have the opportunity to visit Japan and France, and see the site visits as a nice "benie" for yourself. You have deliverately included the Work Assignment Manager as part of the site visit team, as an incentive for him to approve the site visits. TAC's President, however, has requested you to negotiate for additional staff hours rather than direct costs such as travel, because staff hours best assist the company. As far as you know, EPA has the additional funds to fund this assignment.

Your role in this negotiation is to convince EPA to accept your work plan, with its additional subtasks and hours.

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NAME _____

DATE _____

LOCATION _____

# FINAL EXAMINATION
# CONTRACT ADMINISTRATION COURSE
# ANSWER SHEET

Mark "X" Through The Correct Answer

| | True or False | | | True or False | |
|---|---|---|---|---|---|
| 1. | T | F | 11. | T | F |
| 2. | T | F | 12. | T | F |
| 3. | T | F | 13. | T | F |
| 4. | T | F | 14. | T | F |
| 5. | T | F | 15. | T | F |
| 6. | T | F | 16. | T | F |
| 7. | T | F | 17. | T | F |
| 8. | T | F | 18. | T | F |
| 9. | T | F | 19. | T | F |
| 10. | T | F | 20. | T | F |

Multiple Choice

| | | | | | | | | | |
|---|---|---|---|---|---|---|---|---|---|
| 21. | a. | b. | c. | d. | 31. | a. | b. | c. | d. |
| 22. | a. | b. | c. | d. | 32. | a. | b. | c. | d. |
| 23. | a. | b. | c. | d. | 33. | a. | b. | c. | d. |
| 24. | a. | b. | c. | d. | 34. | a. | b. | c. | d. |
| 25. | a. | b. | c. | d. | 35. | a. | b. | c. | d. |
| 26. | a. | b. | c. | d. | 36. | a. | b. | c. | d. |
| 27. | a. | b. | c. | d. | 37. | a. | b. | c. | d. |
| 28. | a. | b. | c. | d. | 38. | a. | b. | c. | d. |
| 29. | a. | b. | c. | d. | 39. | a. | b. | c. | d. |
| 30. | a. | b. | c. | d. | 40. | a. | b. | c. | d. |

Fill-in-the-blank

41. _____

42. _____

43. _____

44. _____

45. _____

46. _____

47. _____

48. _____

49. _____

50. _____

CONTRACT ADMINISTRATION TRAINING COURSE FOR
PROJECT OFFICERS, WORK ASSIGNMENT MANAGERS, AND DELIVERY ORDER OFFICERS

EVALUATION FORM.

Student reactions to this training course in contract administration are very important in evaluating the quality and effectiveness of training being provided by PCMD. Your pertinent comments on any aspect of this course will be welcomed and considered. (Do not limit remarks to the form's questions.) Please return this form to the instructor at the end of the course.

NAME (Optional) _____ DATES _____

OFFICE (Optional) _____

LOCATION _____ INSTRUCTOR _____

Are you currently serving as a : ___ Project Officer? ___ Work Assignment Manager? ___ Delivery Order Officer? Do you expect to hold one or more of these positions in the near future? _____

What were your personal objectives for taking this course?

_____

_____

Did you read the course objectives as stated by EPA? ____Yes ___ No

Were the stated course objectives the same as yours? ____Yes ___No

Did you feel the course was ____ too complex for your current job?

___ not detailed enough? ___ just right?

Please check the box on the following page that most accurately describes your feelings about the areas being evaluated:

| | EXCELLENT | VERY GOOD | GOOD | SATISFACTORY | POOR |
|---|---|---|---|---|---|
| **I. COURSE** | | | | | |
| A. How well did the course content support the stated course objectives? | | | | | |
| B. How well structured/organized was the course—i.e., sequence of materials, mixture of lecture/cases, etc.? | | | | | |
| C. How well were your personal objectives for attending the course met? | | | | | |
| D. How would you rate the content of the course materials? | | | | | |
| E. What is your overall rating of the course? | | | | | |
| **II. INSTRUCTOR** | | | | | |
| A. Demonstrated knowledge of subject matter. | | | | | |
| B. Responded to appropriate questions. | | | | | |
| C. Encouraged participation where appropriate. | | | | | |
| D. Ability to clearly express concepts and facts. | | | | | |
| E. Sensitivity to class needs. | | | | | |
| F. Overall rating of instructor. | | | | | |

| III. TRAINING FACILITY | EXCELLENT | VERY GOOD | GOOD | SATISFACTORY | POOR |
|---|---|---|---|---|---|
| A. How would you rate the training facility with respect to comfort, access, acoustics, adequacy of space, ability to see, etc. | | | | | |

IV. Did this training relate to your current job? ___ Yes ___ No

(If no, explain) _____

_____

V. Would you recommend this course to other EPA employees ___ Yes ___ No

(If no, explain) _____

_____

VI. Please state additional comments or recommendations you may have regarding the course.

_____

_____

_____

# MANAGING CONTRACTS CAN BE REWARDING

The Office of Administration and Resources Management has established the Contracts Management Awards Program to reward outstanding project officers and other contract managers. You are encouraged to nominate program employees who have made exceptional contributions in managing the Agency's contracts. Awards range from $1,000 to $5,000. Up to 6 awards may be presented.

Nominations are due in January each year and awards are made in May.

To obtain additional information regarding this program and a nomination package for the current year, please contact the Quality Assurance Staff of the Procurement and Contracts Management Division (PM-214F), FTS 260-6081.

**REMEMBER.....MANAGING CONTRACTS CAN BE REWARDING!**