



U.S. Department of Health and Human Services

DHHS PROJECT OFFICERS' CONTRACTING HANDBOOK

Table of Contents

SECTION I. INTRODUCTION	I-1
A. Project Officer Training Course Prerequisites	I-1
B. The Role of the Project Officer in the Acquisition Process	I-2
C. The Regulations (FAR Part 1).....	I-3
D. Overview of the Handbook	I-4
SECTION II. ACQUISITION BASICS.....	II-1
A. Distinction Between Acquisition and Assistance	II-1
B. Choosing the Funding Mechanism (PL 95-224)	II-1
1. Grants and Cooperative Agreements.....	II-1
2. Contracts.....	II-2
3. Inter- And Intra-Agency Agreements.....	II-3
C. Contracting Basics	II-3
1. Nature of a Contract	II-3
2. Contract Interpretation	II-4
3. Authority to Enter Into Contracts.....	II-5
D. Methods of Acquisition.....	II-7
1. Competition in Contracting	II-7
2. Processing Requirements.....	II-11
3. Contracting Methods	II-11
4. Simplified Acquisitions (FAR Part 13).....	II-15
E. Types of Contracts (FAR Part 16).....	II-18
1. Fixed-Price Contracts.....	II-19
2. Cost-Reimbursement Contracts	II-20
3. Completion vs. Level-of-Effort (Term) Contracts	II-23

4.	Other Types of Contracts.....	II-23
F.	Agreements.....	II-25
1.	Basic Agreements	II-25
2.	Basic Ordering Agreements (BOAs).....	II-25
G.	Distinction between R&D and Non-R&D	II-25
H.	Services	II-26
1.	Task Orders.....	II-26
2.	Personal vs. Non-Personal Services	II-26
3.	Criteria for Recognizing Personal Services	II-27
4.	Competition in Services	II-29
5.	Advisory and Assistance Services.....	II-29
6.	Government Use of Private Sector Temporaries.....	II-30
7.	Service Contract Act of 1965, as Amended.....	II-30
8.	Performance-Based Service Contracting.....	II-36
9.	Severable Contracts.....	II-38
I.	Acquisition Through Other Than Full And Open Competition (FAR Part 6) ..	II-38
1.	Circumstances Permitting Other Than Full and Open Competition	II-38
2.	Justifications and Approvals Required	II-39
J.	Socioeconomic Programs (FAR Part 19).....	II-42
1.	SBA 8(a) Program for Small Disadvantaged Businesses	II-44
2.	Eligibility.....	II-44
SECTION III. PRE-SOLICITATION ACTIVITIES		III-1
A.	Acquisition Planning and Scheduling.....	III-2
B.	Concept Development.....	III-5
C.	Market Research	III-6
D.	Determining Whether To Bundle Requirements	III-7
E.	Request for Contract (RFC)	III-8
1.	Responsibilities for Preparing the RFC	III-8
2.	Contents of the RFC.....	III-9
3.	Acquisition Schedule Plan.....	III-16
4.	Approvals of the RFC.....	III-17
5.	Special Approvals And Clearances	III-17

F.	The Statement of Work.....	III-21
1.	Common Elements of Statements of Work	III-22
2.	Steps in Writing a Statement of Work (SOW).....	III-24
G.	The Independent Government Cost Estimates (IGCE).....	III-33
1.	Steps in Developing Detailed Independent Cost Estimates	III-34
H.	Assuring Information Security	III-38
I.	Technical Evaluation Planning (FAR Part 15).....	III-38
1.	Planning the Technical Evaluation of Proposals.....	III-38
2.	Developing Technical Evaluation Factors and Subfactors	III-39
3.	Oral Presentations (OFPP “Guidance for the Use of Oral Presentations”).....	III-47
J.	Unsolicited Proposals (FAR Part 15.6).....	III-48
1.	Advance Guidance (FAR Part 15.604).....	III-49
2.	Contents of Unsolicited Proposals	III-50
3.	Receipt and Initial Review of Unsolicited Proposals	III-51
4.	Evaluation of Unsolicited Proposals	III-52
SECTION IV. SOLICITATION, EVALUATION, AND AWARD.....		IV-1
A.	The Request For Proposal (RFP) (FAR Part 15).....	IV-1
B.	Uniform Contract Format.....	IV-2
C.	Other RFP Development Considerations.....	IV-3
D.	Publicizing Requirements (FAR Part 5)	IV-4
1.	Developing a Source List	IV-4
2.	Requirements for Acquisition Notices and Synopses.....	IV-4
3.	Exchanges with Industry Before Receipt of Proposals.....	IV-5
E.	Exchanges with Industry Before Receipt of Proposals (FAR Part 15.201).....	IV-8
F.	Pre-Proposal Conferences (FAR Part 15).....	IV-10
G.	Communication With Offerors During Solicitation Period	IV-11
H.	Amendment to the Solicitation (FAR Part 15).....	IV-11
I.	Receipt and Management of Proposals (FAR Part 15).....	IV-12
J.	Proposal Dissemination.....	IV-13
K.	Review of Technical Proposals	IV-14
1.	Technical Evaluation Panels	IV-14
2.	Role of the Project Officer.....	IV-15

3.	Reading and Scoring Proposals.....	IV-16
4.	The Technical Evaluation Report.....	IV-17
L.	Review of R&D Technical Proposals.....	IV-17
1.	Role of the Scientific Review Administrator at the Technical Evaluation Meeting.....	IV-18
2.	Role of the Project Officer at the Technical Evaluation Meeting.....	IV-19
3.	Role of the Contracting Officer at the Technical Evaluation Meeting.....	IV-19
4.	Recommendation and Scoring Of Proposals by the Technical Evaluation Group.....	IV-19
5.	The Technical Evaluation Report.....	IV-19
M.	Exchanges With Offerors After Receipt of Proposals.....	IV-20
N.	Determining the Competitive Range (FAR Part 15).....	IV-21
O.	Review Of Business/Cost Proposals.....	IV-21
P.	Discussions With Offerors After Establishment of the Competitive Range....	IV-23
1.	Proposal Revisions.....	IV-25
2.	Negotiation.....	IV-25
3.	The Negotiation Memorandum.....	IV-27
Q.	Selection.....	IV-27
R.	Information Security After Selection.....	IV-28
S.	Completion of Contract Award.....	IV-28
T.	Publicizing the Award.....	IV-29
1.	Governmentwide Point of Entry.....	IV-29
2.	Public Announcement.....	IV-29
3.	NIH 1688 (CRISP) Reporting.....	IV-30
4.	Notification to Unsuccessful Offerors.....	IV-30
U.	Debriefing Unsuccessful Offerors.....	IV-30
V.	Protests (FAR Part 33).....	IV-31
SECTION V. POST-AWARD ADMINISTRATION.....		V-1
A.	Limitations on the Project Officer.....	V-2
B.	Communicating with the Contracting Officer.....	V-3
C.	Contract Start-Up.....	V-4
1.	Standard Contract Clauses.....	V-5
2.	Postaward Orientation.....	V-5

3.	Project Officer Work Plan	V-6
D.	Government Contract Quality Assurance (FAR Part 46)	V-6
E.	Contract Monitoring	V-7
1.	Reports and Other Deliverables	V-7
2.	Site Visits.....	V-10
3.	Reviewing Vouchers	V-10
4.	Task Order Management	V-11
F.	Inadequate Contractor Performance	V-12
1.	Withholding Payment.....	V-13
2.	Terminations—Noncommercial Items (FAR Part 49)	V-13
3.	Terminations—Commercial Items	V-14
G.	Contract Modifications (FAR Part 43)	V-15
1.	Types of Modifications.....	V-15
2.	Consideration For Contract Modification.....	V-16
3.	Processing Contract Modifications	V-16
H.	Change Orders (FAR Subpart 43.2)	V-17
I.	Constructive Changes	V-19
J.	Resolving Disputes (FAR Part 33)	V-22
K.	Government Property (FAR Part 45).....	V-23
L.	Subcontracts (FAR Part 44)	V-24
1.	Administration of Subcontracts	V-24
2.	Action Prior To Award.....	V-24
3.	Action After Award.....	V-25
M.	Options (FAR Subpart 17.2)	V-26
N.	Incremental Funding	V-26
O.	Contract Closeout (FAR Subpart 4.804).....	V-27
P.	Contract Files (FAR Subpart 4.8) and Project Files	V-29

SECTION VI. STANDARDS OF ETHICAL CONDUCT	VI-1
A. Gifts and Gratuities.....	VI-2
B. Definition Of “Personally and Substantially”	VI-3
C. Conflicting Financial Interests	VI-3
D. Appearance of Impartiality.....	VI-4
E. Use of Official Information.....	VI-5
F. Protecting the Integrity of the Acquisition Process	VI-5
1. Procurement Integrity Act	VI-6
2. Disclosing/Obtaining Procurement Information	VI-6
3. Soliciting or Discussing Employment	VI-7
4. Post-Employment Restrictions.....	VI-8
5. Summary.....	VI-9
G. Sexual Harassment.....	VI-9
H. Do’s and Don’ts.....	VI-9

Exhibits

Exhibit I-1. Rules and Regulations that Apply to Federal Acquisitions.....	I-5
Exhibit II-1. Non-personal and Personal Services Factors.....	II-45
Exhibit II-2. Order of Precedence for Procurement Actions.....	II-49
Exhibit III-1 The Acquisition Process.....	III-55
Exhibit III-2. Sample Work Breakdown Structure	III-57
Exhibit III-3. Security Before Issuing Solicitation	III-59
Exhibit IV-1 Uniform Contract Format.....	IV-33
Exhibit IV-2 Security After Selection, Before Contract Award	IV-35
Exhibit V-1. Sample Work Plan	V-31
Exhibit V-2. Public Voucher for Purchases and Services Other Than Personal (Standard Form 1034)	V-33

SECTION I. INTRODUCTION

Every year the Department of Health and Human Services spends billions on contracts. This represents a substantial commitment in personnel as well as in dollars because each contract must be planned and monitored by both a Contracting Officer and a Project Officer. Their duty is to ensure that the Government receives fair value for its money and acts in a correct and legal manner. Although the responsibilities and specific duties of Contracting Officers are detailed in the Federal Acquisition Regulation (FAR) and the Department's acquisition regulation, there has been no single document that identifies or describes all of the responsibilities of a Project Officer.

This handbook has been written specifically for Project Officers. It does not have the force of regulation, although it is based on the regulations. It is intended to guide Project Officers through the acquisition process. This handbook outlines and explains many of the factors affecting the Federal acquisition process, as well as the major steps in the process itself. It delineates the duties of the Project Officer, and explains which functions are the responsibility of the Project Officer and which are those of the Contracting Officer.

This handbook includes information of particular interest to Project Officers engaged in Research and Development (R&D) contracting. Usually it will be found in text boxes such as this one.

The Contracting Officer is responsible for ensuring that the Project Officer and technical proposal evaluators have successfully completed the required training discussed in the Project Officer course training prerequisites below.

A. PROJECT OFFICER TRAINING COURSE PREREQUISITES

HHS designated Project Officers and technical proposal evaluators must meet the following prerequisites.

Project Officers:

- 1) Newly appointed Project Officers, and Project Officers with less than three years' experience and no previous related training, are required to take the appropriate Basic Officer course. (The grade level for Project Officers attending the course should be GS-7 and above.) All Project Officers are encouraged to take the appropriate "Writing Statements of Work" and/or "Performance Work Statement" courses.
- 2) Project Officer with more than three years' experience, and Project Officers with less than three years' experience who have successfully completed the appropriate basic course, are qualified (and encouraged) to take the Advanced Project Officer course.

- 3) Additional information on prerequisites for these courses may be found in the DHHS Acquisition Training and Certification Program Handbook.

Technical Proposal Evaluators:

- 1) Technical proposal evaluators, regardless of experience, are required to take the appropriate Basic Project Officer course or its equivalent.
- 2) Upon completion of the basic course it is recommended that they take the appropriate Advanced Project Officer course.

Peer and objective reviewers are excluded from these requirements.

B. THE ROLE OF THE PROJECT OFFICER IN THE ACQUISITION PROCESS

Once a decision is made to acquire supplies or services through the acquisition process, a partnership is created between Project Officers and Contracting Officers. This partnership is essential to establishing and achieving contract objectives. These two officials are responsible for ensuring that the acquisition process is successful.

Contracting Officers and Project Officers have both separate and common responsibilities. Lead responsibility shifts from one to the other during the various stages of the acquisition process. During the pre-solicitation phase, the Project Officer has the lead and the Contracting Officer operates in an advisory capacity. As this phase ends and the solicitation, evaluation, and award phase begins, the main responsibility shifts to the Contracting Officer, with the Project Officer acting largely as an advisor. During post-award administration, Project Officers, acting as authorized representatives of the Contracting Officer, within the limits of their authority as designated by the Contracting Officer, assume lead responsibility for some functions, and the Contracting Officer for others.

The roles of Project Officers and Contracting Officers are different. Contracting Officers sign on behalf of the Government and bear the legal responsibility for the contract. They alone can take action to enter into, terminate, or change a contractual commitment on behalf of the Government.



Project Officers support Contracting Officers. As representatives of the program office, they must ensure that program requirements are clearly defined and must advise the Contracting Officer to help ensure that the contract is designed to meet those requirements. In addition, they must advise the Contracting Officer to help ensure that competitive sources are solicited, evaluated, and selected, and that the price the Government pays for the services it acquires is reasonable. They must establish quality assurance standards and delivery requirements and make sure that these are met. While the contract is in force, Project Officers must ensure compliance with all contract clauses and applicable laws and must report any deviations to the Contracting Officer.

Project Officers play a substantial role in biomedical and behavioral Research and Development (R&D) contracts at National Institute of Health (NIH), due to the specialized technical subject matter and the extensive interaction with the NIH peer review system. This is sometimes acknowledged by their designation as the Contracting Officer's Technical Representative or delegation to them of some technical interactions with contractors.

C. THE REGULATIONS (FAR PART 1)



There are two separate sets of regulations governing the Federal acquisition process: the Federal Acquisition Regulation (FAR) and the Department's acquisition regulation. Although Project Officers do not usually use either of these documents extensively, they should be generally familiar with them. References to both documents appear in this manual. Copies of both can be found in the contract office.

The **FAR** is the primary regulation for use by all Federal agencies when they acquire supplies and services with appropriated funds. It was developed in accordance with requirements of the Office of Federal Procurement Policy Act of 1974, as amended. The FAR provides for coordination, simplicity, and uniformity in the Federal acquisition process. It is written in clear, straightforward language and is easy to use and understand.

The Department's acquisition regulation, **Health and Human Services Acquisition Regulation (HHSAR)**, is issued by the Department under the authority of 5 U.S.C. 301 and Section 205(c) of the Federal Property and Administrative Services Act of 1949, as amended (40 U.S.C. 486(c)). The HHSAR implements or supplements the FAR. It comprises, together with the FAR, agency policies, procedures, contract clauses, solicitation provisions, and forms that govern the contracting process or otherwise control the relationship between the agency (including any of its sub-organizations) and contractors or prospective contractors.

The NIH also has the NIH Manuals system to further clarify the FAR and the Department's acquisition regulations as they are implemented at NIH. Specific chapters related to contracting are referenced in this handbook.

A list of references for rules and regulations that apply to Federal acquisitions can be found in Exhibit I-1, Page I-5.

D. OVERVIEW OF THE HANDBOOK

This handbook describes the responsibilities a Project Officer must fulfill. It begins with a section on acquisition basics that explains the fundamentals of contracting and the basic principles of the acquisition process. It discusses the different funding mechanisms, methods of acquisition, and types of contracts. Sections III through V deal with the three distinct phases of the acquisition process and the specific responsibilities of Project Officers in each. Section III covers pre-solicitation activities; Section IV, the process of solicitation and award; and Section V, the crucial process of post-award administration.

Section VI covers the standards of conduct that are particularly applicable to Project Officers. The glossary lists and defines some standard acquisition terms.

EXHIBIT I-1.**Rules and Regulations that Apply to Federal Acquisitions**

Title	Code of Federal Regulations (CFRs)	Coverage
Office of Federal Procurement Policy (OFPP) Policy Letters	N/A	Establishes Government policies for acquiring supplies and services
The Federal Acquisition Regulation (FAR)	48 CFR Ch. 1	Establishes governmentwide rules and regulations that apply generally to the acquisition of supplies and services
FAR Supplements (Within HHS, the HHSAR)	48 CFR Chs. 2-53	Establishes regulations that apply generally to the acquisition of supplies and services within the issuing Federal department or agency
Labor	29 CFR, 41 CFR Ch. 50	Establishes rules for socioeconomic objectives and related programs under its cognizance, such as the Fair Labor Standards Act
Small Business Administration (SBA)	13 CFR	Establishes rules for socioeconomic objectives and the related programs under its cognizance, such as the small business set-aside program
OMB Circular No. A-130	N/A	Management of Federal Information Resources

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SECTION II. ACQUISITION BASICS

This section of the handbook describes the fundamentals of contract law and key basic principles of the Federal acquisition process. Familiarity with these basic concepts and terms can help Project Officers fulfill their responsibilities and know when to seek assistance from Contracting Officers.

A. DISTINCTION BETWEEN ACQUISITION AND ASSISTANCE

Acquisition encompasses the processes the Government employs to obtain supplies or services through contracts or similar instruments, such as purchase orders and basic ordering agreements. The acquisition process almost always results in a **contract**. This flows from an offer made by a bidder or offeror and an acceptance of that offer by a Contracting Officer on behalf of the Government.

Assistance describes the process by which the Government transfers money, property, services, or anything of value to recipients **to accomplish a public purpose of support or stimulation** authorized by a Federal statute. The instruments used to carry out the assistance process are grants and cooperative agreements. These instruments usually result from an application being made by a recipient and an acceptance being effected by a grants officer on behalf of the Government.

In general, the acquisition process is used when the purpose of the proposed instrument to be executed is “the acquisition by purchase, lease, or barter of supplies or services for the **direct benefit or use** of the Federal Government.” This quotation comes from the Federal Grant and Cooperative Agreement Act of 1977 (PL 95-224), whose purpose is to ensure that Government contracts and grants are used appropriately.

B. CHOOSING THE FUNDING MECHANISM (PL 95-224)

1. GRANTS AND COOPERATIVE AGREEMENTS

Grants or cooperative agreements should generally be used for:

- General financial assistance (stimulation and support) to eligible recipients under specific legislation authorizing the assistance; and
- Financial assistance (stimulation or support) to a specific program activity eligible for assistance under specific legislation authorizing the assistance.

Grants and cooperative agreements are quite similar. Usually the Department awards a grant when it contemplates **no substantial involvement** between itself and the recipient. When there is likely to be **substantial Government and recipient involvement**, a cooperative agreement must be used. This distinction in the degree of Departmental-recipient involvement is the major practical difference between the two award instruments.

The NIH requires each institute or center to ensure that proposed cooperative agreements are reviewed by that IC's Chief Contracting Officer and Grants Management Officer with regard to the assistance/acquisition and substantial involvement issues. Office of Extramural Research (OER) requires the signatures of both individuals prior to its review of the proposed cooperative agreement. The Project Officer should ensure that IC individuals are briefed and guidance obtained early in the planning process.

Since this handbook focuses on acquisition and contracting, it does not address assistance planning, execution, and management. Project Officers who need information in those areas should refer to the Department's *Grants Administration Manual*.

Other references include PHS Grants Administration Manual, Part 142—Use of Cooperative Agreements; NIH Manual 4110—Request for Applications (RFAs) and Program Announcements (PAs); and NIH Manual 4815—Implementation of Cooperative Agreements—Initiation, Review, Award, and Administration.

Grants and cooperative agreements are covered by 31 U.S.C. 6301, et seq.

2. CONTRACTS

Contracts are used when the Department needs to acquire supplies and such services as:

- Evaluation (including research of an evaluative nature) of the performance of Government programs, projects, or grants initiated by the funding agency for its direct benefit;
- Technical assistance rendered to the Government or on behalf of the Government to any third party, including recipients of grants and cooperative agreements;
- Surveys, studies, and research that will provide information the Government will use for its direct activities or will disseminate to the public;
- Consulting services or professional services of all kinds, if provided to the Government or to a third party on the Government's behalf;
- Training projects where the Government selects the individuals or group to be trained or specifies the curriculum content (fellowship awards are excepted);

- Planning for Government use;
- Production of publications or audiovisual materials for the conduct of direct operations of the Government;
- Design or development of items for Government use or pursuant to agency definition or specifications;
- Conferences conducted on behalf of the Government;
- Generation of management information or other data for Government use; and
- Research and development.

3. INTER- AND INTRA-AGENCY AGREEMENTS

Grants, cooperative agreements, and contracts are methods of assistance and acquisition with non-Government organizations. Inter-/intra-agency acquisition means a procedure by which the offices needing supplies or services (the requesting activity) obtains them from another activity (the servicing activity). Inter- and intra-agency agreements are authorized under the Economy Act (314.5.c.1535) for acquiring goods and services from other Federal Government activities. These acquisitions are not categorized in that Act as “contracts,” and Contracting Officers do not have authority to execute such agreements.

Authority to execute inter- and intra-agency agreements is currently only delegated to the IC's Director and Deputy Director.

NIH Manual 1165 and HHS General Administration Manual, Chapter 8-77, describe the format for, and the approval requirements of, such agreements. These agreements can cover a variety of fund transfer actions. Those for the direct acquisition of research goods and services must be accorded the same treatment as contracts with regard to “concept” and “peer” review requirements. The Project Officer must normally involve the Contracting Officer in the negotiation and business administration of acquisition inter- and intra-agency agreements.

C. CONTRACTING BASICS

1. NATURE OF A CONTRACT

A contract can be defined as an agreement between two or more parties consisting of a promise, or mutual promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty. Unlike most social exchanges of promises, a contract establishes a binding legal relationship that obligates parties to keep their promises. In nearly all Government contracts, one party is a “seller” obligated by the contract to provide supplies or services. The other party is the Government, which, as the “buyer,” is obligated to pay for those supplies or services.

ELEMENTS OF EVERY CONTRACT

- **Legal Capacity to Contract**
- **Offer**—A bid or proposal by a competent offeror that a contract be entered into
- **Acceptance**—The expression by the offeree of his/her assent to the offer and communication of that assent to the offeror
- **Lawful Purpose**
- **Consideration**—Something of value in the eyes of the law exchanged by the parties to bind the agreement
- **In Accordance with Law and Regulation**

In Government contracting, the bid or proposal is the offer. It is made by an offeror seeking to enter into a contract with the Government. An Invitation for Bid (IFB) or a Request for Proposal (RFP) is not an offer. Rather these are called solicitations and are used to communicate Government requirements to prospective contractors and to solicit bids or proposals.

When the Government, after bid opening or proposal evaluation and negotiation, chooses one bidder/offeror to contract with, it performs the act of acceptance. The consideration in Government contracts is usually payment by the Government and delivery of supplies or services by the contractor.

There are other requirements for the formation of contracts. A contract must have a lawful purpose. It cannot violate a statute, for example. Contracts must be entered into by competent parties. They must be mentally and legally competent for the contract to be valid.

Contracts must have certainty of terms and conditions to be enforceable. Since courts have to rely on the meaning of the language of a contract to enforce it, this language must be clear and certain. Project Officers' specifications or statements of work, for example, must communicate clear requirements. Although non-Government contracts may sometimes be oral, Government contracts (including modifications) are always in writing.

2. CONTRACT INTERPRETATION

Government contracts are subject to essentially the same common law rules of interpretation applied to other contracts. Several of these basic rules are:

- The intent of the parties must be gathered from the whole contract.
- Provisions of a contract should not be interpreted so as to render one or more meaningless, unless otherwise impossible, and the interpretation that gives reasonable meaning to the whole document is preferred.
- The dominant purpose and the interpretation adopted by the parties will be used to ascertain the meaning of the contract provisions.
- Specific provisions prevail over general provisions when in conflict.
- A standard clause entitled “Order of Precedence” resolves inconsistencies within the contract provisions by assigning precedence in a specified order within the contract parts.
- Any ambiguous provision susceptible to more than one interpretation will be interpreted against the party responsible for creating it—in Government contracts this is almost always the Government, as the contract provisions are normally prepared by the Government.

3. AUTHORITY TO ENTER INTO CONTRACTS

Although the United States is a legal entity having authority to enter into contracts and administer them, it is a legal abstraction. It must act by and through “agents” or human representatives. An agent is a person who has been authorized by another (called the “principal”) to act for him/her. An agent’s acts are binding on the principal to the extent that these acts are within the authority given to the agent.



All persons involved in making or administering U.S. Government contracts act solely as agents of the United States and have only the authority delegated to them.

In the Department, as in other Federal departments and agencies, the authority and responsibility to contract is vested in the agency head who, in turn, delegates this authority to Contracting Officers. Although Contracting Officers, in turn, may delegate certain limited authority to administer parts of the contract, they are the only persons (with a few limited exceptions) authorized to enter into or modify contracts on behalf of the Department.

Contracting Officers have an important stewardship role in the acquisition process. They act as the United States’ agents for the acquisition of supplies and services. They are responsible to ensure that contractors live up to their contracted obligations. Project Officers must ensure that they do nothing to infringe upon unique Contracting Officer responsibilities. Project Officers may be given certain limited authority to act on behalf of the Contracting Officers—particularly in providing technical direction to the contractor. This authority will be discussed in Section V of this handbook, Post-award Administration. It is important to point out that Project Officers cannot obligate the

Government or change the terms or conditions of contracts. Only the Contracting Officer can do that.

Just as the Government requires agents to act on its behalf, so does the other party to the contract—the contractor. Agents will almost always be used by the contractor—necessarily so if the contractor is a corporation—to enter into and carry out the contract with the Government. One important difference is that only a person with **actual** authority (by statute, regulation, or contract terms) may bind the Government. An agent with **apparent** as well as actual authority may bind the contractor. Nevertheless, contractors usually try to limit and specify those who are its agents authorized to act on its behalf.

FAR 2.101. Head of agency (also called agency head) means the Secretary, Attorney General, Administrator, Governor, Chairperson, or other chief official of an executive agency, unless otherwise indicated, including any deputy or assistant chief official of an executive agency.

Within HHS, Head of the agency (or agency head), unless otherwise specified, means the *head of the Operating Division (OPDIV)* for—

- ACF (Administration for Children and Families),
- AHRQ (Agency for Healthcare Research and Quality),
- HCFA (Health Care Financing Administration),
- PSC (Program Support Center),
- CDCP (Centers for Disease Control and Prevention),
- FDA (Food and Drug Administration),
- HRSA (Health Resources and Services Administration),
- IHS (Indian Health Service),
- NIH (National Institutes of Health), and
- SAMHSA (Substance Abuse and Mental Health Services Administration).

Or the *Assistant Secretary for Management and Budget (ASMB)* for—

- The Office of the Secretary (OS).

Head of the contracting activity (HCA) is defined in terms of certain organizational positions as follows:

For...	The HCA is...
• OGAM-OS	(Office of Grants and Acquisition Management) <i>Director, Office of Acquisition Management</i>
• ACF	<i>Director, Division of Acquisition Management</i>
• AHRQ	<i>Director, Division of Contracts Management</i>
• HCFA	<i>Director, Acquisition and Grants Group</i>
• PSC	<i>Director, Division of Acquisition Management</i>
• CDCP	<i>Director, Procurement and Grants Office</i>
• FDA	<i>Director, Policy, Evaluation and Support Staff, Office of Facilities, Acquisition, and Central Services</i>
• HRSA	<i>Director, Division of Grants and Procurement Management</i>
• IHS	<i>Director, Division of Acquisitions and Grants Management</i>
• NIH	<i>Director, Office of Acquisition Management and Policy</i>
• SAMHSA	<i>Director, Division of Contracts Management</i>

D. METHODS OF ACQUISITION

Federal law defines acquisition methods and processes. Although these methods and processes differ substantially, they have in common the goal of enhancing competition in contracting. Full and open competition in Federal contracting is the norm. Deviations from the norm are possible but often require careful justification and high-level approval.

Maximum competition is usually desirable from a public policy perspective. It is also desirable because, if properly administered, competition in contracting will result in the timely delivery to the Government of quality supplies and services at a reasonable cost.

Acquisition can be looked at in two dimensions. One dimension describes the acquisition methods in terms of degree of competition. The other dimension describes the different process activities involved in implementing a particular method.

1. COMPETITION IN CONTRACTING

By statute (10 USC. 2304 and 41 USC. 253) and Regulation (FAR Part 6), “full and open” competition is required with certain limited exceptions, and Contracting Officers shall promote and provide for full and open competition in soliciting offers and awarding

Government contracts. “Full and open competition” means that all responsible sources are permitted to compete (FAR 2.101). This policy is based on two blocks. Full and open competition will:

- (1) Result in the “best value” for the Government;
- (2) Allow all contractors to compete, thus maximizing the confidence of the governed—contractors and taxpayers—in the fairness and cost-effectiveness of the Federal acquisition system.

Therefore, the Contracting Officer always begins the acquisition process with the assumption that it will be accomplished via full and open competition.

Full and open competition is divided into two categories:

- (1) Full and open competition (without qualification)
- (2) Full and open competition after exclusions of sources resulting from:
 - Exclusion to establish or maintain an alternative source;
 - Set-asides for small business;
 - Small business Act, Section 8(a) competition among 8(a) eligible contractors (socially and economically disadvantaged firms as determined by the Small Business Administration);
 - Set-asides for HUBZone small business competitions (small businesses located in certain geographic areas (HUBZones) identified by the Small Business Administration.

Observe that “full and open competition” after exclusion of sources for any of the above stated reasons departs from that which is generally thought of as full and open competition (i.e., “Everybody”) because sources are excluded. Thus, for example, a regulatory “full and open competition” small business set-aside excludes offerors that are not small businesses (i.e., large businesses and non-profits).

The practical difference between regulatory and generic full and open competition becomes apparent considering that FAR 19.501(d) requires the Contracting Officer to set aside acquisitions for small business participation only unless he or she determines (and documents) that:

- (1) Only one offer is likely to be received if set aside; and
- (2) Award will not be made at a fair market price if set aside.

In many cases, the Contracting Officer is unable to make this determination. Thus, many regulatory “full and open competition” acquisitions are set aside for small business

participation only, contrary to the generic idea that full and open means every organization can offer.

Contracting Officers may provide for fulfillment of the full and open competition requirement by using “competitive procedures” (FAR 6.101) for the acquisition including:

- (1) Sealed bids
- (2) Competitive proposals
- (3) Combinations of competitive procedures
- (4) Other competitive procedures including:
 - (a) Selection of architect-engineer contractors in accordance with the Brooks Act (40 USC 541)
 - (b) Certain competitive research and development via a public “Broad Agency Announcement” or soliciting all contractor offers and a peer review; or
 - (c) Use of GSA multiple award schedules.

Both Congress and the implementing FAR, however, recognize that in some acquisitions, it may not be possible or practical to have full and open competition. Rather, there will have to be “Other Than Full and Open Competition.” Such situations are, however, a fall back choice and are an exception to the usual requirement for full and open competition. As such, generally, they require a robust “Justification for Other Than Full and Open Competition (JOFOC). The JOFOC, signed by the Contracting Officer or higher authority, if the acquisition is over \$500,000, must demonstrate that the acquisition that it supports fits clearly into the description of one of the seven statutory/regulation exceptions that permit other than full and open competition. (This justification and the role of Project Officers in its development are discussed further in Section III.) These seven exceptions are:

- (1) Only one responsible source and no other supplies or services will satisfy agency requirements;
- (2) The agency’s need 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 solicited;
- (3) Industrial mobilization; engineering, developmental, or research capability; or expert services;

- (4) An international agreement or treaty between the United States and a foreign government or international organization;
- (5) A Federal statute authorizes or requires acquisition through certain sources (e.g., Federal Prison Industries, Qualified Nonprofit Agencies for the Blind or other Severely Disabled, Small Business Act, Section 8(a) non-competitive, HUBZone non-competitive, the Robert T. Stafford Disaster Relief and Emergency Assistance Act);
- (6) Disclosure of the agency's needs would compromise the national security unless the number of solicited sources is limited;
- (7) An agency head determines that it is not in the public interest to have full and open competition—this determination must be made by the Secretary, who must notify Congress 30 days before contract award.

As a practical matter, for DHHS acquisition, this list of exceptions shrinks to three,

- (1) Only one responsible source and no other supplies or services will satisfy agency requirements,
- (2) The agency's need 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 solicited, and
- (3) A Federal statute authorizes or requires acquisition through certain sources (e.g., Federal Prison Industries, Qualified Nonprofit Agencies for the Blind or other Severely Disabled, Small Business Act, Section 8(a) non-competitive, HUBZone non-competitive, the Robert T. Stafford Disaster Relief and Emergency Assistance Act) for all but a few buys.

Specific grounds for exception justifications that are not acceptable are (FAR 6.301(c)):

- (1) A lack of advance planning by the requiring office,
- (2) Concerns related to the funds available, e.g., funds will expire before award can be made.

The strong policy for maximizing the competition requires that, even when full and open competition has been limited by application of an appropriate exception, as, for example, by an unusual and compelling urgency, the Contracting Officer must solicit as many firms as is practical in the particular circumstances.

2. PROCESSING REQUIREMENTS

In processing requirements, we consider the level of competition somewhat in reverse order. The Contracting Officer will first check the requirement against mandatory sources of supply, like UNICOR and the Blind and Severely Handicapped agencies (NIB/NISH). If a mandatory source is not applicable, the requirement will then be examined for the appropriateness of set-asides or whether a sole source situation or an urgent and compelling need circumstance exists. If such a condition exists and can be properly justified, the procurement will be made using other than full and open competition. FAR 6.302 cites all of the circumstances under which other than full and open competition may be utilized and discusses the justifications required for their use. These justifications and approvals are further discussed in Section III of this handbook. (See Section III for order of procedures for procurement activities.)

If other than full and open competition cannot be properly justified, the acquisition will be processed using some form of full and open competition.

3. CONTRACTING METHODS

The second aspect of acquisition involves the process or steps carried out from solicitation to award. There are three contracting methods: sealed bidding, contracting by negotiation, and simplified acquisitions.

a. Sealed Bidding (FAR Part 14)

Sealed bidding is a method of contracting that employs competitive bids, public opening of bids, and awards. An Invitation for Bid (IFB) is prepared describing the Government's requirements clearly, accurately, and completely. These IFBs are then publicized in sufficient time to enable prospective bidders to prepare and submit bids. The bids are publicly opened at a predetermined time and place. The amount of each bid is publicly announced.

The Government evaluates each bid but holds no discussion with the bidders. An award is made to the responsible and responsive bidder whose bid is most advantageous to the Government, considering only price and price-related factors. A "**responsive**" bidder is one whose bid conforms to the terms and conditions of the solicitation.

In the chart below is a checklist to determine a contractor's responsibility.

To be determined *responsible*, a prospective contractor must:

- Have adequate financial resources to perform the contract, or the ability to obtain them.
- Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and governmental business commitments.
- Have a satisfactory performance record. A prospective contractor shall not be determined responsible or non-responsible solely on the basis of a lack of relevant performance history, except when there is a special standard necessary for a particular or class of acquisitions.
- Have a satisfactory record of integrity and business ethics including satisfactory compliance with the law including tax laws, labor and employment laws, environmental laws, antitrust laws, and consumer protection laws.
- Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them. This includes, as appropriate, such elements as production control procedures, property control systems, quality assurance measures, and safety programs applicable to materials to be produced or services to be performed by the prospective contractor and subcontractors.
- Have the necessary production, construction, and technical equipment and facilities, or ability to obtain them; and
- Be otherwise qualified and eligible to receive an award under applicable laws and regulations.

Statute and regulations give preference to sealed bidding over other competitive proposals. Contracting Officers must solicit sealed bids if:

- Time permits the solicitation, submission, and evaluation of sealed bids.
- Award will be made on the basis of price and other price-related factors.
- It is not necessary to conduct discussions with the responding bidders about their bids.
- There is a reasonable expectation of receiving more than one sealed bid.

If any one or more of these conditions is lacking, the Contracting Officer can contract by negotiation.

Sealed bidding is used when the requirements are so clearly specified that the Government can be sure that prospective bidders will understand and be able to prepare a responsive bid. Further, price must be the factor that determines who “wins” the contract among equally responsive and responsible bidders.

Sealed bidding is the most economical and efficient method of procurement; most prospective bidders view sealed bidding as the fairest of methods. On the other hand, sealed bidding is the least flexible method of procurement. Sealed bidding commits the Government to a predetermined solution (in the form of hard and fast specifications) to its needs; there is no allowance for trade-offs between price and non-price evaluation factors.

Only **firm fixed-price contract or fixed-price contract with economic price adjustment** clauses can be used in the sealed bidding process. Sealed bids are most often used to acquire supplies and equipment that can be clearly specified and described and to acquire services that are equally clean-cut. Examples of supplies are nearly endless. They include commercial items, food, medical and scientific equipment, fuel, industrial chemicals, machinery, electrical and electronic equipment components, and hundreds of other categories. Services that can be acquired through sealed bids include, but are not limited to, transportation, photographic services, provision of lodging and subsistence, certain repair and maintenance services, housekeeping services.

Two-step sealed bidding is a combination of competitive procedures designed to attain the benefits of sealed bidding when adequate specifications are not available. An objective is to permit the development of a sufficiently descriptive and not unduly restrictive statement of the Government’s requirements, including an adequate technical data package, so that subsequent acquisitions may be made by conventional sealed bidding. This method is especially useful in acquisitions requiring technical proposals, particularly those for complex items. It is conducted in two steps:

- (1) Step one consists of the request for, submission, evaluation, and (if necessary) discussion of a technical proposal. No pricing is involved. The objective is to determine the acceptability of the supplies or services offered. As used in this context, the word “technical” has a broad connotation and includes, among other things, the engineering approach, special manufacturing processes, and special testing techniques. It is the proper step for clarification of questions relating to technical requirements. Conformity to the technical requirements is resolved in this step.
- (2) Step two involves the submission of sealed priced bids by those who submitted acceptable technical proposals in step one. Bids submitted in step two are evaluated and the awards made in accordance with FAR Subparts 14.3 and 14.4.

b. Contracting by Negotiation (FAR Part 15)

Department Project Officers have more involvement in the negotiated method of procurement than in the sealed bidding method. If one of the four conditions for sealed bidding is absent, the Government uses this process. Because of the nature of the various missions of the Department, it is not always possible to develop a set of totally unambiguous specifications such as are required for sealed bids. In addition, given the nature of these requirements, award may have to be made on the basis of factors in addition to price or cost. These factors often relate to the proposed technical approach, and quality of the staff. In addition, the requirements and the specifications for such acquisitions often result in offers that must be clarified through discussion after they are submitted.

Synopsis

Contracting by negotiation includes several steps. After the requirement is determined and the acquisition is planned according to departmental requirements, the Contracting Officer must disseminate information on the proposed contract actions as follows.

- (1) For proposed contract actions to exceed \$25,000, by synthesizing (summarizing) in the Governmentwide Point of Entry (GPE)¹.
- (2) For proposed contract actions expected to exceed \$10,000, but not expected to exceed \$25,000, by displaying in a public place, or by any appropriate electronic means.

Request for Proposals

A Request for Proposals (RFP) is prepared and transmitted to a number of sources, many of whom comprise an established list of offerors and many of whom responded to the GPE synopsis. Offerors then prepare and submit proposals in response to the RFP. These proposals consist of a technical proposal and a business or cost proposal.

Source Selection Processes and Techniques

Technical proposals are evaluated against a set of technical evaluation factors and subfactors that were included in the RFP. Cost or price proposals also are evaluated to determine whether the proposed costs or prices are reasonable, and to determine the offerors' understanding of the work and their ability to perform the contract.

Competitive Range

The Contracting Officer next determines which proposals are in the competitive range for the purpose of conducting written or oral discussions. The determination is made on the

¹ The GPE is FedBizOpps (<http://www.fedbizopps.gov/>).

basis of cost or price and technical factors and past performance information. Proposals are included in the competitive range when they are evaluated as most highly-rated unless the range is further reduced for purposes of efficient competition.

Written or Oral Discussion

The next step is the conduct of oral or written discussions. Although this is not a mandatory step, it is a usual one. During these discussions, the Government attempts to resolve uncertainties concerning the technical proposal and to provide the offeror with reasonable opportunity to revise its proposal as a result of bargaining on price, schedule, technical requirements, type of contract or other terms of a proposed contract.

Final Proposal Revision

After discussions are concluded, the Contracting Officer may request proposal revisions that clarify and document understandings reached during negotiations. Requests for final proposal revisions must advise offerors that the final proposal revisions must be in writing and that the Government intends to make award without obtaining further revisions.

Source Selection

The next step is evaluation of final proposal revisions and selection of the source to perform the contract. Selection is based on a comparative assessment of proposals against all source selection criteria in the solicitation.

Any type of contract may be used in the contracting by negotiation process. The foregoing steps constitute the negotiation process. This handbook will discuss each step in more detail in later sections.

4. SIMPLIFIED ACQUISITIONS (FAR PART 13)

The Federal Acquisition Streamlining Act (FASA), Public Law 103-355, was enacted on October 13, 1994. The Act created a threshold for the use of Simplified Acquisition Procedures (SAP).

Simplified Acquisition Threshold (SAT) means \$100,000

Simplified Acquisition Procedures exempt contracts and subcontracts at or below SAT from a variety of laws, provisions, and clauses.

The FAR also provides special authority to use Simplified Acquisition Procedures for acquisition of commercial items exceeding the SAT but not greater than \$5,000,000, including options.

Awards can be made by using one of the following simplified procedures:

- Purchase orders;
- Governmentwide Commercial Purchase Card/ SmartPay Card;
- Blanket Purchase Agreements (BPAs); and
- Imprest Funds or Third Party Drafts;
- Test programs for certain commercial items.



The Contracting Officer makes the decision to use Simplified Acquisition Procedures but the Project Officer, during the acquisition planning process, is required to give suggestions and conduct discussions with the acquisition staff concerning approaches to acquisition.

There are some general principles relating to simplified acquisitions.

First, except for **micro-purchases** of \$2,500 or less, Contracting Officers generally solicit oral or written quotations from three or more vendors to promote competition to the maximum extent practicable.

Second, Simplified Acquisition Procedures must be used in ways that encourage acquisition from small businesses. Except for micro-purchases of \$2,500 or less, simplified acquisitions anticipated to exceed \$2,500 but not \$100,000 are reserved exclusively for small businesses, unless the Contracting Officer finds that certain exceptional conditions exist.

Third, acquisitions using Simplified Acquisition Procedures should not be used to circumvent regular acquisition requirements. It is improper, for example, to break down into smaller acquisitions a requirement that will cost an aggregate of more than the SAT, merely to permit the use of Simplified Acquisition Procedures.

Electronic Commerce. FAR Subpart 13.003(f) states that agencies must maximize the use of electronic commerce when practicable and cost-effective. Drawings and lengthy specifications can be provided off-line in hard copy or through other appropriate means.

a. Purchase Orders

Purchase orders are offers by the Government to buy supplies or services upon specified terms and conditions, the aggregate amount of which does not exceed the SAT. The purchase order is unique in Government acquisition in that it is an offer by the Government. Bids and proposals are offers by the prospective contractor; a contract comes into being when the Government accepts that offer. On the other hand, purchase

orders are Government offers that do not become part of a contract until the contractor indicates its acceptance by signing the purchase order document or beginning work or delivering the supplies or services. Quite frequently in the Department, contractors are not required to sign purchase orders. They exhibit the acceptance by beginning the work described in the purchase order.

Purchase orders sometimes follow the solicitation of quotations. While solicitations can be made orally, for complex or certain other acquisitions a Request for Quotation (RFQ) is issued by the Department. An RFQ solicits information from a prospective contractor about its price, and sometimes its approach and capabilities. The response to an RFQ by one organization or individual is not an offer. Rather it is an informational response that has no legal standing.

b. Governmentwide Commercial Purchase Card/SmartPay Card

The Governmentwide Commercial Purchase Card/SmartPay Card is designed to look like a regular commercial credit card so that stores will recognize it as a normal credit card with normal payment mechanisms. Each purchase card is issued with certain limits and restrictions coded electronically onto the magnetic strip on the back. As a purchase cardholder, you are assigned two kinds of spending limits: a single-purchase limit and a monthly (cumulative) limit. The purchase card is the preferred means to purchase and pay for micro-purchases. Micro-purchases are not required to be set-aside for small business concerns and they are not subject to the "Buy American Act".

c. Blanket Purchase Agreements (BPAs)

BPAs are an example of an agreement used for filling anticipated repetitive needs for supplies and services. A BPA, in effect, is a **charge account** with qualified sources of supply and services. It has an overall price limitation that cannot be exceeded by the aggregate of all purchases made under it, unless the limit is raised by the Contracting Officer.

Under a BPA, separate acquisitions are made according to detailed but simple procedures. No one purchase can exceed the SAT or \$5,000,000 for acquisition of commercial items conducted under FAR Subpart 13.5.

d. Imprest Fund and Third Party Drafts

Imprest funds and third party drafts may be used to acquire and pay for supplies or services in accordance with agency policies and procedures. The imprest fund may be used when the transaction does not exceed \$500. The third party draft may be used for transactions that do not exceed \$2,500. The imprest fund limit may be adjusted by the agency head. Third-party draft adjustments must be in accord with Treasury restrictions.

e. Test Program for Certain Commercial Items

FAR Subpart 13.5 authorizes, as a test program, use of simplified procedures for the acquisition of supplies and services in amounts greater than the simplified acquisition threshold, but not exceeding \$5,000,000, including options, if the Contracting Officer reasonably expects, based on the nature of the supplies or services sought, and on market research, that offers will include only commercial items.

Under this test program, Contracting Officers may use any simplified acquisition procedure in this part, subject to any specific dollar limitation applicable to the particular procedure. The purpose of this test program is to vest Contracting Officers with additional procedural discretion and flexibility, so that commercial item acquisitions in this dollar range may be solicited, offered, evaluated, and awarded in a simplified manner that maximizes efficiency and economy and minimizes burden and administrative costs for both the Government and industry (10 U.S.C 2304(g) and 2305 and 41 U.S.C. 253(g) and 253a and 253b).

For the period of this test, contracting activities must employ the simplified procedures authorized by the test to the maximum extent practicable.

When acquiring commercial items using these procedures, the requirements of FAR Part 12 apply, subject to the order of precedence provided at 12.102(c). This includes the use of the provisions and clauses specified in Subpart 12.3.

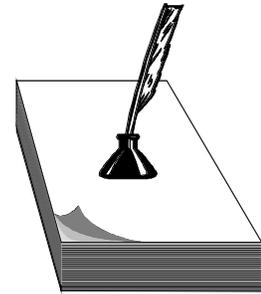
The authority to issue solicitations under this subpart will expire on January 1, 2004.

E. TYPES OF CONTRACTS (FAR PART 16)

The Federal Acquisition Regulation provides for two broad categories of contract types: fixed-price and cost-reimbursement. Each category consists of variations of the type but the essential characteristics within each category are the same.

The Contracting Officer chooses the type of contract. This choice can be subject to negotiation with contractors when contracting by negotiation. Project Officers need to understand the characteristics of each major contract type because these can significantly affect acquisition planning and contract administration duties.

Contract types differ in two key respects. One difference is the amount of risk placed on the Government and the contractor. The other is the degree of contract management or administration that each type places on the Government.



1. FIXED-PRICE CONTRACTS

Although there are several types of fixed-price contracts, the one most commonly used is the firm fixed-price contract. In this type, the contractor agrees to deliver all supplies or services at the times specified for an agreed upon price that cannot be changed (unless the contract is modified). If the contract price is \$200,000 and the contractor spends \$225,000, the contractor loses the difference. The contractor still must deliver all it promised and the Government need only pay the initially agreed upon price after delivery and acceptance of the supplies or services. On the other hand, if the contractor's costs were only \$180,000, it would make a profit of \$20,000.

Firm fixed-price contracts place maximum risk on contractors and little or no risk on the Government. The contractor has made a commitment in the contract to deliver all it promised in return for the specified consideration. The Government has the right to receive what it bought for the price it promised to pay. If the contractor fails to perform at the contract price, it is liable for breach of contract, which can bring severe additional costs on the contractor.

Because the risk is high to contractors, their incentive to perform according to the terms and conditions of the contract is quite high. Therefore, the Government's contract monitoring requirements are usually far less than those for cost-reimbursement type contracts. Project Officers must monitor and review contract proposals and perform other contracting administration duties on fixed-price contracts. But the magnitude of this effort is normally far less than for cost-reimbursement type contracts.

If firm fixed-price contracts confer maximum risk on contractors while minimizing Government risk and if they minimize Government monitoring responsibility, why aren't they always used for Federal acquisitions? The main reason is that many Government requirements cannot be translated into the definable and clear-cut specifications needed for this kind of contract. For an offeror to prepare a proposal or agree to a fixed-price contract, the specifications must be quite unambiguous and contain little or no uncertainty. If such specifications are possible, then responsible potential contractors are willing and able to develop a fair and reasonably priced offer and to assume a reasonable risk.

Many requirements in the Department, however, cannot be specified with the certainty required for fixed-price contracts. In the absence of this certainty responsible potential contractors have no way of estimating the price of the work with the degree of accuracy needed for fixed-price contract risk.

Research and development, demonstration projects, the conduct of surveys and studies, and related requirements are typical examples of work that has too much uncertainty attached to it to use fixed-price contracts. If the Government tried to use a fixed-price contract to meet these needs, it would either result in offers from sources that are not responsible or capable of doing the work, or offers that have astronomically high prices attached to them to cover the great potential risk to contractors.

FIXED-PRICE CONTRACTS

- Firm-fixed price (FFP)
- Fixed-price with economic price adjustment (FPwEPA)
- Fixed-price incentive (FPI)
- Fixed-price with prospective price redetermination
- Fixed-ceiling-price with retroactive price redetermination
- Firm-fixed-price, level-of-effort term

2. COST-REIMBURSEMENT CONTRACTS

Cost-reimbursement contracts, the second category of contract type, are widely used in the Department. Like the fixed-price contracts, there are several variations. The most common is the cost-plus-fixed-fee (CPFF) contract. The CPFF is used when the uncertainties involved in contract performance are of such magnitude that cost of performance cannot be estimated with sufficient reasonableness to permit use of fixed-price type contracts. Rather than guaranteeing to perform all contract terms and conditions at the specified price, the contractor agrees to deliver its **best effort** to perform the requirements in return for costs incurred and a reasonable fee. The CPFF provides for negotiations of estimated cost and a payment of a fixed dollar fee to the contractor. This fee cannot be changed unless the scope of work in the contract is changed by the parties to the contract.

The IC's contracting offices predominantly use the cost reimbursement type of contract. This is because research and development, demonstrations, the conduct of surveys and studies, and related requirements are too uncertain to use fixed-price contracts. Fixed price contracts are, however, encouraged for ease in administration and closeout activity for any award projected to be under \$100,000.

Because the contractor cannot specify the exact price of performing, a "total estimated cost" is agreed to. This total estimated cost represents the best estimate of both the Government and the contractor, agreed to in negotiations. It also is a contract cost limitation that the contractor cannot exceed, except at the risk of non-reimbursement. This limit can be changed by mutual agreement of the Government and the contractor through a modification to the contract.

The Contracting Officer is prohibited from negotiating a fee that exceeds 15% of the contract's estimated cost, excluding fee, for research and development contracts. This holds for architect/engineer contracts also, where the limit is 6%. For other cost-plus-fixed-fee contracts, the fee limitation is 10% of the contract's estimated cost, excluding fee.

Every fully funded cost-reimbursement type contract must contain the **Limitation of Cost** clause. It limits the Government's liability if the contractor exceeds the total estimated cost. The clause requires the contractor to notify the Government when it expects to reach 75 percent of the total estimated costs in the next 60 days.

For those cost-reimbursement type contracts that are incrementally funded, insert the **Limitation of Funds** clause. This clause identifies the present amount available for payment by the Government, the money allotted to this contract, items covered, Government's share of the cost if this is a cost sharing contract, and the period of performance the estimated amount allotted will cover.

Project Officers should review both clauses carefully. They spell out the essential nature of cost-reimbursement contracts in terms of contractor performance obligations and cost/fund limitations. The Limitation of Cost clause can be found at FAR 52.232-20. The Limitation of Funds clause can be found at FAR 52.232-22.

In cost-plus-fixed-fee contracts, the contractor's risk is minimal. The contractor only promises to do its best (or "use its best effort") to perform the work. No guarantee is given to the Government. Failure to do the specified work will not be a breach of contract, nor will it cost the contractor any money, so long as it used its best efforts.

The Government's risk is commensurately high. It has no guarantee that it will get the specified work. If the work is not completed and the maximum costs have been reimbursed to the contractor, the Government has two choices, equally unsatisfactory. It can elect (1) not to add funds to the contract and therefore not get any further work, or (2) to add money to the contract to fund the remaining work. This latter action is known as funding the cost overrun.

Cost overruns are an unavoidable risk of the cost-reimbursement type contract. While overruns are occasionally caused by contractor waste or inefficiency, far more often they are due to the unavoidable lack of certainty in contract requirements. Given the nature of the work acquired by cost-reimbursement contracts, contractor performance often evolves in ways neither the contractor nor the Government foresaw at the time of award.

Because of the high Government risk and the lack of guaranteed performance, cost-reimbursement contracts must be monitored far more closely than fixed-price types. The Project Officer must ensure that the contractor is indeed providing its best efforts and that the contractor is judiciously expending funds and controlling cost.

In addition to the cost-plus-fixed-fee contract, there are several other kinds of cost-reimbursement type contracts.

COST-REIMBURSEMENT CONTRACTS

- Cost
- Cost-sharing (CS)
- Cost-plus-incentive-fee (CPIF)
- Cost-plus-award-fee (CPAF)
- Cost-plus-fixed-fee (CPFF)

- **Cost contracts.** These are identical to the cost-plus-fixed-fee contract except they contain no fee. Reimbursement is made only for appropriate costs.

Cost contracts are usually used for Research and Development work, particularly with non-profit educational or other non-profit organizations.
- **Cost-sharing contracts.** These are cost reimbursement contracts in which the contractor receives no fee and is reimbursed for only an agreed-upon portion of costs. The contractor, in effect, agrees to share a portion of the costs in expectation of some future gain or benefit.
- **Cost-plus-award-fee contracts.** These are similar to the cost-plus-fixed-fee contract except that they set two fee levels. One is a base amount fixed at inception of the contract. The other is an award amount that the contractor may earn in whole or in part during performance. The amount of the award fee to be paid is determined by the Government's judgmental evaluation of the contractor's performance in terms of stated criteria in the contract. Periodic evaluations at stated intervals are made so that the contractor will be kept informed of the quality of its performance and the areas in which improvement is expected. The award fee inducement is to provide motivation for excellence in such areas as quality, timeliness, technical ingenuity, and cost-effective management.
- **Cost-plus-incentive-fee contracts.** These are similar to the cost-plus-fixed-fee contract except that the initially negotiated fee may be adjusted later by a formula based on the relationship of total allowable costs to total target costs. This increase or decrease is intended to provide an incentive for the contractor to manage the contract effectively. The contract may also include technical performance incentives.

This type of cost-reimbursement contract requires substantial administrative effort on the part of the Government for the periodic analysis and negotiation of subjective fee amounts. It should only be used on high dollar value projects

where the expected benefits warrant the additional time and cost of administration.

3. COMPLETION VS. LEVEL-OF-EFFORT (TERM) CONTRACTS

Firm fixed-price and cost-reimbursement contracts may take either of two forms—completion or term (level-of-effort).

The completion form describes the scope of work by stating a definite goal or target and specifying an end product. This form of contract normally requires the contractor to complete and deliver the specified end product (e.g., a final report of research accomplishing the goal or target) within the estimated cost, if possible, as a condition for payment of the entire fixed fee. However, in the event the work cannot be completed within the estimated cost, the Government may require more effort without increase in fee, provided the Government increases the estimated cost.

FAR 16.207 states, "A firm-fixed-price, level-of-effort term contract is suitable for investigation or study in a specific research and development area. The product of the contract is usually a report showing the results achieved through application of the required level of effort. However, payment is based on the effort expended rather than on the results achieved."

The term form describes the scope of work in general terms and obligates the contractor to devote a specified level of effort for a stated time period. Under this contract form, if the performance is considered satisfactory by the Government, any fixed fee is payable at the expiration of the agreed-upon period, upon contractor certification that the level of effort specified in the contract has been expended. Renewal for further periods of performance or the addition of effort beyond the acceptance standards described in the contract is a new acquisition that involves new cost and fee arrangements as well as the appropriate approvals for a sole source acquisition.

Because of the differences in obligation assumed by the contractor, the completion form is preferred over the term form whenever the work, or specific milestones for the work, can be defined well enough to permit development of estimates within which the contractor can be expected to complete the work. The term form must not be used unless the contractor is obligated by the contract to provide a specific level of effort within a definite time period. (FAR 16.306)

Further information on preparing term versus completion statements of work is contained in Section III of this Handbook.

4. OTHER TYPES OF CONTRACTS

There are other types of contracts besides fixed-price and cost-reimbursement. The most important, in terms of Departmental use, are described briefly below. Project Officers should consult with Contracting Officers about the use of these types.

a. Indefinite Delivery Type Contracts

If the exact delivery date is unknown when the contract is written, a choice may be made from three types of indefinite delivery contracts.

- A **definite-quantity contract** provides for delivery of a definite quantity of specific supplies or services for a fixed period, with deliveries to be scheduled at designated locations upon order. This contract type may be used when it can be determined in advance that: (1) a definite quantity of supplies or services will be required during the contract period and (2) the supplies or services are regularly available or will be available after a short lead time.
- A **requirements contract** provides for filling all actual requirements (usually specifying maximum/minimum quantities) for specific supplies or services during a specified contract period, with deliveries to be scheduled by placing orders with the contractor. A requirements contract may be appropriate for acquiring any items or services when the Government anticipates recurring requirements but cannot predetermine the precise quantity of supplies or services that the activity will need during a definite period. Funds are obligated by each delivery order, not by the contract itself.
- An **indefinite-quantity contract** provides for an indefinite quantity, within stated limits, of specific supplies or services to be furnished during a fixed period, with deliveries to be scheduled by placing orders with the contractor. The contract must require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services and, if and as ordered, the contractor to furnish any additional quantities, not to exceed a stated maximum. An indefinite-quantity contract may be used when the Government cannot predetermine, above a specified minimum, the precise quantities of supplies or services that will be required during the contract period, and it is inadvisable for the Government to commit itself for more than a minimum quantity. Funds for other than the stated minimum quantity are obligated by each delivery order, not by the contract itself.

b. Time-And-Materials and Labor-Hour Contracts

A time-and-materials contract provides for payment of supplies and services on the basis of the number of direct labor-hours required and the cost of materials used. The contract sets forth a rate of payment for each direct labor-hour; this rate, which is negotiated, includes an allowance for overhead and profit. The contract also provides that the Government reimburses the contractor at "cost" (as defined in the contract) for materials used. The labor-hour contract is a variation of the time and materials contract, differing only in that it does not provide for payment for materials. Use of the time and materials or labor-hour form of contract is suitable when neither the extent, the duration, nor the cost of the work can be estimated with reasonable accuracy at the start (for example, engineering and design services relating to production, repair, maintenance, or overhaul work).

These types of contracts are quite similar to cost-reimbursement contracts. They need intensive monitoring by Project Officers to ensure that the contractor is operating efficiently and that it is exercising effective cost management and control. Before these types of contracts are entered into, the Contracting Officer must prepare a document, called a determination and findings, which states that no other contract type is suitable to meet the requirement. Also, like cost-reimbursement contracts time-and-materials and labor-hour contracts have ceilings that the contractor exceeds at its own risk.

F. AGREEMENTS

1. BASIC AGREEMENTS

A basic agreement is a provisional agreement between the contractor and the Department. It contains certain designated clauses that will be incorporated by reference in future negotiated contracts. A basic agreement may be used when the Department or contracting activity plans to place a large number of contracts with a contractor and/or anticipates substantial recurring negotiation problems. A basic agreement is not a contract.

2. BASIC ORDERING AGREEMENTS (BOAs)

A basic ordering agreement is similar to a basic agreement except that it also includes a description, as specific as practicable, of the supplies to be furnished or services to be performed when ordered and a description of the method of determination of the prices to be paid. The BOA lists the activities that are authorized to place orders under the agreements, but it is not a contract and cannot be used to restrict competition.

G. DISTINCTION BETWEEN R&D AND NON-R&D

NIH Manual 6315-1—Initiation, Review, Evaluation, and Award of Research and Development (R&D) Contract Projects—defines the terms R&D and non-R&D for use at DHHS.

R&D acquisition policies and procedures apply for the review, evaluation, negotiation, and award of NIH biomedical and behavioral Research and Development contract projects. They apply to all contract projects for the conduct of R&D and/or the direct support of the conduct of R&D, including innovative testing, research, demonstration, and related efforts. The term R&D includes research, development, demonstration, and support. It does not apply to contracts for purposes incidentally related to R&D such as:

- Routine purchase of commercially available items sold in substantial quantities to the general public with published price lists, etc., i.e., “off-the-shelf”, laboratory or

general equipment, materials, supplies, animals, or routine services for R&D projects;

- The conduct of program evaluations, public or technical information services or clearing houses, scientific conference or logistics support, or other services not directly performing nor directly supporting R&D; nor
- Performance of minor enhancements to existing equipment or systems.

H. SERVICES

1. TASK ORDERS

A “Task Order” means an order for services placed against an established contract or with Government sources. A task order calls directly for a contractor’s time and effort rather than for a concrete end product.

2. PERSONAL VS. NON-PERSONAL SERVICES

In the acquisition of services, it important to determine if the service is personal or non-personal. (NOTE: The majority of your purchasing actions will be non-personal.) Government policy generally prohibits acquiring the services of individuals by contract in such a way that the individuals become, in effect, employees of the Government. Such “personal services” contracts are disallowed (unless specifically authorized by statute) because they can be used as devices for avoiding civil service controls as well as ceilings on personnel counts and salaries). (See Exhibit II-1, Non-personal and Personal Services Factors, Page II-45.)

Document your determination with a brief memorandum in the file. Remember, if there is a problem, check with the appropriate higher authority, i.e., immediate supervisor, procurement supervisor, Contracting Officer, department manager, personnel management, etc. Use the following guidelines to assist in your determination:

1. Determine whether the proposed service is for a non-personal or personal services contract using the following definitions.

“**Service contract**” means a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply. A service contract may be either a non-personal or personal contract. It can also cover services performed by either professional or nonprofessional personnel whether on an individual or organizational basis.

Some of the areas in which service contracts are found include the following:

- a) Maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization, or modification of supplies, systems, or equipment.
- b) Routine recurring maintenance of real property.
- c) Housekeeping and base services.
- d) Advisory and assistance services.
- e) Operation of Government-owned equipment, facilities, and systems.
- f) Communications services.
- g) Architect-Engineering.
- h) Transportation and related services.
- i) Research and Development.

“**Non-personal services contract**” means a contract under which the personnel rendering the services are not subject either by the contract’s terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government and its employees.

“**Personal services contract**” means a contract that, by its expressed terms or as administered, make the contractor personnel appear to be Government employees.

2. In doubtful cases, obtain the review of legal counsel.
3. Document the file with:
 - The opinion of legal counsel, if any;
 - A memorandum of the facts and rationale supporting the conclusion that the contract does not violate the prohibition requiring agencies not to award personal services contracts unless specifically authorized by statute; and,
 - Any further documentation that your agency may require.

3. CRITERIA FOR RECOGNIZING PERSONAL SERVICES

Civil Service laws and regulations and the Classification Act establish requirements that must be met by the Government in hiring its employees. In addition, these laws and regulations established personnel ceilings for each agency.

The purchasing agent is responsible for ensuring compliance with the policy against personal services purchases and must be aware of the sensitivity of the issue, and ensure that applicable statutory and regulatory procedures are followed.

In doubtful cases, check with senior purchasing management personnel before proceeding.

Orders for non-personal services, when properly issued and administered, represent an approved resource for the accomplishment of your agency's programs.

The FAR provides guidelines for characterizing particular services as "personal" or "non-personal". There are many factors involved, all of which are not of equal importance. The characterization of services in a particular case cannot be made simply by counting factors, but can only be the result of a balancing of all the factors in accordance with their relative importance.

The following examples of personal versus non-personal services are provided to help clarify their differences. They are provided for illustrative purposes only. YOU SHOULD NOT use them as the basis for a determination in any specific case.

Personal Services. Examples of personal services orders that may not be made include:

- Order for preparation of a staff-type report on the operation of a particular Government office or installation, where no specialized skills are required and where the report would ordinarily be prepared by the regular officers or employees of the office or installation, even if there is to be no Government supervision and even if payment is to be for an "end product" report;
- Order for the furnishing of persons to perform the various day-to-day functions of administration of orders for a Government agency, even if there is no Government supervision (This does not preclude the use of architect-engineers as "construction managers");
- Order with an accounting firm to come in and perform day-to-day accounting functions for the Government.

Non-personal Services. The following are examples of non-personal service orders that may be made.

- Order for an expert in a given area to review grant applications received and recommend which applications should be awarded the grant (However, see Advisory and Assistance Services on page II-29)
- Order for field engineering work requiring specialized equipment and trained personnel unavailable to the Government but not involving the exercise of discretion on behalf of the Government where the contractor performs work adequately described in the order, free of Government supervision

- Order with an individual for delivery of lectures without Government supervision, at specific places, on specific dates, and on a specialized subject, even if payment is by the hour
- Order for janitorial services, where the order provides for specific tasks to be performed in specific places, free of Government direction, supervision, and control over the contractor's employees, at a fixed price for the work to be performed
- Furnishing of equipment and personnel to plow a field, harvest a crop, or weed a plot when the job is done on a fixed-price basis
- Research and development order, providing a fixed price for a level of effort, as long as the work is performed by the contractor independently of Government direction, supervision, and control

4. COMPETITION IN SERVICES

The statutes and regulations requiring competition are fully applicable to services orders. You must obtain competition to the maximum practicable extent, as you would do for any simplified acquisition.

5. ADVISORY AND ASSISTANCE SERVICES

OMB Circular A-11 states that the Director of the Office of Management and Budget shall establish the funding for advisory and assistance services for each department and agency as a separate object class in each budget annually submitted to the Congress under this section.

The term "advisory and assistance services" includes the following services when provided by non-governmental sources.

1. Management and professional support services
2. Studies, analyses, and evaluations
3. Engineering and technical services

The term "advisory and assistance services" does not include (among others) the following services:

1. Routine information technology services unless they are an integral part of a contract for the acquisition of advisory and assistance services;
2. Architectural and engineering services, as defined in the Brooks Architect Engineers Act;
3. Research on theoretical mathematics and basic research involving medical, biological, physical, social, psychological, or other phenomena.

6. GOVERNMENT USE OF PRIVATE SECTOR TEMPORARIES

In this era of “rightsizing” it is not uncommon for the Government to use the services of private sector temporaries. Agencies may enter into contracts for the services of temporary help service firms. These contracts may be for brief or intermittent use of the skills of private sector temporaries. The services provided by temporary help firms may not be regarded or treated as personal services. They must not be used in lieu of regular recruitment under civil service laws or to displace Federal employees. Purchase of these services must be in accordance with the authority, criteria, and conditions of 5 CFR Part 300, Subpart E, Use of Private Sector Temporaries, and your agency procedures.

7. SERVICE CONTRACT ACT OF 1965, AS AMENDED

FAR Subpart 22.10 outlines policies and procedures relating to the Service Contract Act of 1965, as amended. The Act is an adaptation of the “prevailing wage” concept of the Davis-Bacon Act. While the law originally covered only blue-collar workers, its provisions were amended by P.L. 94-489 to extend coverage to white-collar workers. Accordingly, the minimum wage protection of the Act now extends to all workers, both blue-collar and white-collar, other than persons employed in a bona fide executive, administrative, or professional capacity as those terms are used in the Fair Labor Standards Act and in 29 CFR 541.

P.L. 94-489 accomplished this change by adding to section 2(a)(5) of the Act a reference to 5 USC 5332, which deals with white-collar workers, and by amending the definition of service contract employee in section 8(b) of the Act.

Once the decision has been made that a services order will properly satisfy the requiring activity’s needs, you will have to determine if the Service Contract Act of 1965, as amended applies. The Act provides for the Secretary of Labor to determine the minimum wages to be paid employees working under Federal orders for services in excess of \$2,500. Wage levels vary by type of service and by locality. The wage determination is made an attachment to the order, and the contractor and any subcontractors are obligated to comply with it. Consequently, the purchasing agent must obtain from the Department of Labor, prior to the award of a service order, the determination of prevailing wages for the locality in which the order is to be performed. In addition to the micro purchase threshold requirement, other criteria spelled out in the Act are:

- The principal purpose of the order is to furnish services;
- It is to be performed, to a significant or substantial extent, by other than executive, administrative or professional employees;
- It is to be performed primarily in the United States;
- It is not otherwise exempted by law.

The following examples, while not definitive or exclusive, illustrate some of the types of services covered by the Act.

- Motor pool operation, parking, taxicab, and ambulance services
- Packing, crating, and storage
- Custodial, janitorial, housekeeping, and guard services
- Food service and lodging
- Laundry, dry-cleaning, linen-supply, and clothing alteration and repair services
- Snow, trash, and garbage removal
- Aerial spraying and aerial reconnaissance for fire detection
- Some support services at installations, including grounds maintenance and landscaping
- Certain specialized services requiring specific skills such as drafting, illustrating, graphic arts, stenographic reporting, or mortuary services
- Electronic equipment maintenance and operation and engineering support services
- Maintenance and repair of all types of equipment, for example, aircraft, engines, electrical motors, vehicles, and electronic, office and related business and construction equipment
- Operation, maintenance, or logistics support of a Federal facility
- Data collection, processing and analysis services

The Act also authorizes the Secretary of Labor to establish occupational health and safety standards that are applicable to contractor and subcontractor employees. These standards are stated in 29 CFR 1900-1919. They contain the provision that:

No part of the services covered by this Act will be performed in buildings, surroundings, or under working conditions provided by or under the control or supervision of the contractor or any subcontractor, which are unsanitary or hazardous or dangerous to the health or safety of service employees engaged to furnish the services.

In relation to that provision, contractors and subcontractors must maintain records of all work injuries for a period of three years.

a. Exemptions From Provisions of the Act

The following types of orders are exempt from coverage under the Service Contract Act (See FAR 22.1003-3 and 22.1003-4).

- Orders for maintenance and repair of certain information technology, scientific, medical, and office/business equipment
- Orders for construction or repair
- Orders under the Walsh-Healey Public Contracts Act
- Orders for carriage of freight or personnel if rates for such carriage are set by the Interstate Commerce Act
- Orders for communication services
- Orders for public utility services
- Orders for employment
- Orders for operating postal contract stations for the U.S. Postal Service
- Orders for services that are furnished outside of the United States
- Any order exempted by the Secretary of Labor

b. Submission of SF 98 and SF 98a

Wages to be paid contractor employees under the act are determined by either prevailing rates or collective bargaining agreements. Under prevailing rates provisions, contractors with orders that exceed \$2,500, must pay their employees no less than the local wages and fringe benefits as determined by the Department of Labor (DOL) or, in the absence of a wage determination, the minimum wage set forth in the Fair Labor Standards Act. To obtain the prevailing wage determination for your area, complete Standard Forms 98 and 98a, "Notice of Intention to Make a Service Contract and Response Notice" and "Attachment A", respectively. Attach any supplemental information necessary to support the "Notice" and submit your package to the Administrator, Wage and Hour Division, Employment Standards Administration, U. S. Department of Labor, Washington, DC 20210. This request must be forwarded for recurring and known requirements not less than 60 days (nor more than 120 days, except with the approval of the Wage and Hour Division) before the earlier of (1) issuance of any RFQ, or (2) issuance of modifications for exercise of option(s), performance extensions, or change of description (scope). If the Notice is for a non-recurring or unknown requirement and advance planning is not feasible, the Notice shall be submitted as soon as possible, but not later than 30 days before commencement of the action. The following information should be included in your Notice request.

- Identification of all classes of services employees to be used on the order. If a wage determination is under a Collective Bargaining Agreement (CBA), use the exact title shown in the CBA. If there is no CBA, use the exact title shown in the Wage and Hour Division's Service Contract Act Directory of Occupations. If the Directory cannot be used, provide an appropriate job title and description.
- The wage that would be paid each class if employed by the agency and subject to the provisions of the General Schedule (GS) or Wage Board (WB) rates

- If known, the place of performance. If not known, request determinations for all possible places or areas of performance or for additional possible places of performance if asked to do so in writing by the prospective contractor(s).

You may need to check the status or request expediting of your Notice from the Wage and Hour Division. These inquiries and requests will be made in accordance with your agency's policies.

If the wage determination or revision is late and there is no CBA, contact the Wage and Hour Division to ascertain when it can be expected. If the Wage and Hour Division is unable to provide the wage determination or revision by the latest date needed to maintain the solicitation schedule, you must use the latest wage determination or revision, if any, incorporated in the existing order. If any new or revised wage determination is received later in response to the Notice, you must include it in the solicitation or order within 30 calendar days of receipt. If the order has been awarded, you must equitably adjust the price to reflect any changed cost of performance resulting from incorporating the wage determination or revision. The Administrator, Wage and Hour Division, may require retroactive application of the wage determination for purchasing actions in excess of \$2,500 that use more than five service employees.

If a CBA exists, and the response from the Wage and Hour Division is late, you must contact them to determine when the determination or revision can be expected. If the Wage and Hour Division is unable to provide the determination or revision by the latest date needed to maintain the solicitation schedule, you must incorporate in the solicitation the wage and fringe benefit terms of the CBA, or the CBA itself, and the FAR clause 52.222-47, Service Contract Act (SCA) Minimum Wages and Fringe Benefits. If the solicitation has been awarded, an equitable adjustment following receipt of the wage determination or revision will not be required, since the wage determination or revision will be based on the economic terms of the CBA.

If your solicitation has been delayed, for whatever reason, more than 60 days from such date as indicated on the submitted Notice, you must, in accordance with your agency procedures, contact the Wage and Hour Division to determine whether the wage determination issued under the initial submission is still current. Any revision of a wage determination received by your agency as a result of that communication, or upon discovery by the Wage and Hour Division of a delay, must supersede the earlier response as the wage determination applicable to the particular purchase.

The back of SF 98 contains instructions for its completion. (Only the original and three copies are to be forwarded.) Whenever the detailed information requested is not readily available, such pertinent general information as is available should be provided. For example, if meaningful estimates of the number of service employees in various classes to be used on the contract cannot be made, estimates of the total number of employees may be supplied. The "Response" portion of the original of the form will be completed by the Wage and Hour Division and returned.

Supplies of Standard Form 98 are available in all GSA supply depots under stock number 7540-00-926-8972.

If you are unable to file the notice on time, you should submit it as soon as possible, with a detailed explanation of the circumstances that prevented filing. To comply with FAR requirements, your solicitation should contain a statement similar to the one that follows:

The Provisions of the Service Contract Act of 1965 may apply to this solicitation. If a wage determination by the Department of Labor is applicable, an amendment to this solicitation will be issued indicating a minimum hourly wage.

The solicitation, and any purchase order exceeding the micro-purchase threshold to which the Act applies, should include any DOL wage determination as an attachment.

c. Modification of Order to Incorporate a Wage Determination

If a required wage determination is not included in an order (because the notice was not filed or was not filed in time) and if a wage determination from the Department of Labor is received after issuance of the purchase order, the purchasing activity must discuss with the contractor a modification to:

- Incorporate the wage determination that is to be effective as of the date of issuance unless otherwise specified;
- Equitably adjust the order price to compensate for any increased cost of performance under the order caused by the wage determination.

d. Submission of SF 99

The following discussion outlines the responsibilities of the Contracting Officer in processing information to DOL to assist it in its wage rate determination. The Project Officer's role is to identify to the Contracting Officer the types of labor that would be applicable in the performance of the contract.

Orders in excess of micro purchase threshold must be reported to DOL on Standard Form 99, Notice of Award of Contract, if the agency does not report to the Federal Procurement Data System.

e. Notification to Contractors and Employees

At the time of award, the purchasing agent must furnish the contractor Department of Labor WH Publication 1313, Notice to Employees Working on Government Contracts, for posting at a prominent place at the work site before performance begins.

The form advises employees of their benefits under the Service Contract Act and satisfies the requirement of the clause pertaining to the Act that states that contractors must post the form at a prominent and accessible place at the work site.

Supplies of the form may be obtained from normal supply channels or from the Workplace Standards Administration, U.S. Department of Labor, Washington, D.C. 20210.

Circumstances may arise that would require appealing a Wage and Hour Division determination. Examples of these circumstances are:

- The terms of the CBA vary substantially from those prevailing for similar services in the locality;
- The incumbent CBA was not the result of “arm’s length” negotiations;
- The wage determinations contain significant errors or omissions.

To resolve these issues, contact your agency labor advisor to determine appropriate action.

When an order has provisions for adjusting the price to reflect changes, the purchasing agent is responsible for updating of the rates. This is done by issuing a modification to the order. Some typical examples of when this may occur are:

- Modifications that change the description (scope) of work that cause significant labor requirements;
- Exercise of options or other such extensions of performance.

When these situations occur, you are required to request updated wage determinations by preparing the SF98 and 98a within the prescribed time limits and forwarding them to the Wage and Hour Division.

Remember that early in the solicitation process, you are to determine if there is a predecessor order and if so, whether the contractor and their employees are covered by a CBA. If there is a CBA, you must obtain a copy. This may require coordination with an administrative purchasing officer who is responsible for administering the predecessor order. Paragraph (m) of the clause at FAR 52.222-41, Service Contract Act of 1965, as amended, requires incumbent contractors to furnish you copies of each CBA in existence. You are to submit a copy of each CBA together with any related documents specifying wage rates and fringe benefits currently or prospectively payable under each agreement with the Notice to the Wage and Hour Division.

Where there is a CBA, you are required to notify the incumbent contractor and the contractor’s employees’ CBA agent in writing of the following:

- The forthcoming successor order and applicable solicitation dates (issuance, closing, award, performance start, etc.)
- The forthcoming order modification and applicable dates (extensions, change in requirements, performance start, etc.)

This written notification must be given at least 30 days in advance of the earliest applicable purchase date in time for all parties concerned to receive it in accordance with FAR 22.1012-3, Response to Timely Submission of Notice - With Collective Bargaining Agreement.

If the CBA does not apply to all service employees under the order, you are required to list them separately on the SF98a. They must be listed under classifications that are (1) subject to the CBA and (2) not subject to any CBA. You should estimate the number of employees in each skill classification covered in the CBA.

8. PERFORMANCE-BASED SERVICE CONTRACTING

FAR Part 37.102 states performance-based contracting is the preferred method for acquiring services. When acquiring services, including those acquired under supply contracts, agencies must:

- 1) Use performance-based contracting methods to the maximum extent practicable, except for:
 - (i) Architect-engineer services acquired in accordance with (IAW) FAR Part 36.
 - (ii) Construction IAW FAR Part 36)
 - (iii) Utility Services IAW FAR Part 41; or
 - (iv) Services that are incidental to supply purchases; and
- 2) Use the following order of preference:
 - (i) A firm-fixed price performance-based contract or task order,
 - (ii) A performance-based contract or task order that is not firm-fixed price,
 - (iii) A contract or task order that is not performance-based.

Performance-based service contracting (PBSC) emphasizes that all aspects of an acquisition are structured around the purpose of the work to be performed, as opposed to the manner in which the work is to be performed. PBSC is designed to ensure that the contractors are given freedom to determine how to meet the Government's performance objectives, that approximate performance quality levels are achieved, and that payment is made only for services that meet these levels.

Performance-based contracting methods ensure that required performance quality levels are achieved and that total payment is related to the degree to which services performed meet contract standards.

Performance-based contracts—

- Describe the requirements in terms of results required rather than the methods of performance of the work;
- Use measurable performance standards (i.e., terms of quality, timeliness, quantity, etc.) and quality assurance surveillance plans;
- Specify procedures for reductions of fee or for reductions to the price of a fixed-price contract when services are not performed or do not meet contract requirements; and
- Include performance incentives where appropriate.

The foundation of performance-based services is the contract statement of work, which is referred to as the Performance Work Statement (PWS). The PWS describes the effort in terms of objective, measurable performance standards (outputs). These standards should include such elements as “what, when, where, how many, and how well” the work is to be performed.

A Quality Assurance Plan (QAP) also known as Quality Assurance Surveillance Plan (QASP), which directly corresponds to the performance standards and measures contractor performance, is needed to determine whether contractor services meet contract PWS requirements. Positive and/or negative performance incentives, based on QAP measurements, should be included.

The Government contract quality assurance must be performed at such times (including any stage of manufacture or performance of services) and places (including subcontractors' plants) as may be necessary to determine that the supplies or services conform to the contract requirements. Quality assurance surveillance plans should be prepared in conjunction with the preparation of the statement of work or the performance work statement. The plan should specify:

- 1) All work requiring surveillance; and
- 2) The method of surveillance.

The Project Officer is responsible for developing the PWS and the QASP. The Contracting Officer is responsible for reviewing the plan to assure that it conforms to the PWS. The PWS performance standards and the QASP are interdependent and must be compatible in form, style, substance, and should be cross-referenced. For an acquisition to be a true PBSC, it should contain a PWS, a QASP, and appropriate incentives.

9. SEVERABLE CONTRACTS

A severable contract is one whose nature and purpose allows division and apportionment; having two or more parts in respect to matters and things contemplated and embraced by it, not necessarily dependent upon each other; or intended by parties as being dependent.

FAR 32.703-3(b) "Contracts crossing fiscal years" states the following:

The head of an executive agency, except NASA, may enter into a contract, exercise an option, or place an order under a contract for severable services for a period that begins in one fiscal year and ends in the next fiscal year if the period of the contract awarded, option exercised, or order placed does not exceed one year...Funds made available for a fiscal year may be obligated for the total amount of an action entered into under this authority.

FAR 37.106(c) adds, "Agencies with statutory multiyear authority shall consider the use of this authority to encourage and promote economical business operations when acquiring services."

I. ACQUISITION THROUGH OTHER THAN FULL AND OPEN COMPETITION (FAR PART 6)

1. CIRCUMSTANCES PERMITTING OTHER THAN FULL AND OPEN COMPETITION

There are seven circumstances that permit other than full and open competition.

There is **only one responsible source** and no other supplies or services will satisfy agency requirements. For example, follow-on contracts for the continuation of major research and development studies on long-term social and health programs, major research studies, or clinical trials may be deemed to be available only from the original source when it is likely that award to any other source would result in unacceptable delays in filling the requirements of the Department or the OPDIV/IC. Any request to purchase supplies or service or to support efforts from a single source is a complex process that requires early and close coordination between Project Officer and Contracting Officer.

The Division of Contracts and Grants, OD, distributes and updates to the IC contract offices a DESK GUIDE for preparation, submission, and approval of a justification for other than full and open competition (JOFOC). Contact your Contracting Officer for the current version early in the planning process whenever a single source is contemplated.

When the OPDIV/IC head has determined that a specified item of technical equipment or parts must be obtained to meet an activity's

program responsibility **to test and evaluate certain kinds and types of supplies, and only one source is available.** (This criterion is limited to testing and evaluation purposes only and may not be used for initial outfitting or repetitive acquisitions. Project Officers should support the use of this criterion with citations from their agency's legislation and the technical rationale for the item of equipment required.)

When the OPDIV/IC head has determined that **there is existing equipment that, for reasons of compatibility and interchangeability, requires an item that is manufactured only by one source.** This criterion is for use in acquisitions where a particular brand name item is required, and an "or equal" will not meet the Government's requirements. This criterion may not be used when there are other manufacturers available that may be able to produce acceptable items, even though their supplies might require some adjustments and modifications. The other manufacturers must be given the opportunity to compete.

Each contracting activity within the Department has appointed a Competition Advocate who is responsible for promoting full and open competition and challenging barriers to competition.

2. JUSTIFICATIONS AND APPROVALS REQUIRED

The program office should discuss prospective "other than full and open competition" requests with their supporting contracting office as early as possible during the acquisition planning stage (see FAR Part 7.1), and before developing the Request for Contract (RFC). The discussions may resolve uncertainties, provide program offices with names of other sources, allow proper scheduling of the acquisition, and avoid delays that might otherwise occur should it be determined that the request for other than full and open competition is not justified.

When a program office desires to obtain certain supplies or services by contract without full and open competition, it must—usually at the time of forwarding the requisition or request for contract—furnish the contracting office with a justification explaining why full and open competition is not feasible. All justifications must be initially reviewed by the Contracting Officer.

Justifications in excess of \$100,000 (simplified acquisition threshold) must be in the form of a separate, self-contained document, prepared in accordance with the Department's acquisition regulation and called a "JOFOC" (Justification for Other than Full and Open Competition).

Justifications of \$100,000 or less may be in the form of a paragraph or paragraphs contained in the requisition or request for contract.

Use Form NIH 1757-11, Justification for Other than Full and Open Competition (JOFOC) as the cover page of the document. The JOFOC Desk Guide for NIH Contracts, disseminated to the Contracting Community by the OAMP, should be consulted for further details.

The JOFOC must be approved in writing—

- For a proposed contract not exceeding \$500,000, by the Contracting Officer unless a higher approval level is established in agency procedures.
- For a proposed contract over \$500,000 but not exceeding \$10,000,000, by the competition advocate for the procuring activity designated pursuant to FAR Part 6.501. This authority is not delegable.
- For a proposed contract over \$10,000,000 but not exceeding \$50,000,000, by the head of the procuring activity, or a designee who is serving in a position in grade GS-16 or above (or in a comparable or higher position under another schedule).
- For a proposed contract over \$50,000,000, by the senior procurement executive of the agency designated pursuant to the OFPP Act (41 U.S.C. 414(3) in accordance with agency procedures. This authority is not delegable.

Justifications, whether over or under \$100,000, must fully describe what is to be acquired, offer reasons that go beyond inconvenience, and explain why it is not feasible to obtain competition. Justifications must be supported by verifiable facts rather than mere opinions. Documentation in the justification should be sufficient to permit an individual with technical competence in the area to follow the rationale.

Justifications must contain sufficient facts and rationale to justify the use of the specific authority cited. As a minimum, each justification shall include the following information:

- Identification of the agency and the contracting activity and specific identification of the document as a “Justification for Other than Full and Open Competition.”
- Nature and/or description of the action to be approved.
- Description of the supplies or services required to meet the agency’s needs (including the estimated value).
- Identification of the statutory authority permitting other than full and open competition.
- Demonstration that the proposed contractor’s unique qualifications or the nature of the acquisition requires use of the authority cited.
- Description of efforts made to ensure that offers are solicited from as many potential sources as is practicable.

- Determination by the Contracting Officer that the anticipated cost to the government will be fair and reasonable.
- Description of the market research conducted and the results, or a statement of the reasons market research was not conducted.
- Any other facts supporting the use of other than full and open competition, such as an explanation of why technical data packages, specifications, engineering descriptions, statements of work, or purchase descriptions suitable for full and open competition have not been developed or are not available.
- A list of the sources, if any, which expressed an interest in the acquisition in writing.
- A statement of the actions, if any, the Department may take to remove or overcome any barriers to competition before any subsequent acquisition for the supplies or services required.
- Contracting Officer certification that the justification is accurate and complete to the best of the Contracting Officer's knowledge and belief.

Signature lines are:

Recommended _____ Date _____
Project Officer

Concur _____ Date _____
Project Officer's Immediate Supervisor

Concur _____ Date _____
Contracting Officer

Approved _____ Date _____
Approving Official

The Contracting Officer who receives a JOFOC for processing after ascertaining that the document is complete, forwards the JOFOC exceeding \$500,000, with his or her concurrence or nonconcurrence, to the appropriate competition advocate for his or her approval. When the Contracting Officer does not concur with the JOFOC, a written explanation setting forth the reasons must be provided to the competition advocate. If the JOFOC is disapproved by the competition advocate, the Contracting Officer must promptly notify the concerned program office.

J. SOCIOECONOMIC PROGRAMS (FAR PART 19)

An important governmental policy is to place a fair proportion of its acquisitions with small business, small disadvantaged business, and women-owned small business concerns.

It is Government policy to ensure that such concerns also will have the maximum practicable opportunity to participate as subcontractors in the contracts awarded by any executive agency, consistent with efficient contract performance.

Within the Department, the functional management responsibilities for the Department's small business, small disadvantaged business, and women-owned small business concerns are delegated to the Director of Small and Disadvantaged Business Utilization (OSDBU) in the Office of the Secretary. Each office has appointed a small business specialist (SBS) who is responsible for ensuring that the Programs are implemented within their offices. They locate capable small business, small disadvantaged business, and women-owned small business sources for current and future acquisitions.

The SBS also must ensure that contracting and technical staff members are knowledgeable about these program requirements and that they take all reasonable action to increase small business participation.

The SBS must review each proposed acquisition prior to the Contracting Officer's review to determine the feasibility of recommending award to SBA pursuant to section 8(a) of the Small Business Act. When a contract is not appropriate for 8(a) award, the SBS must then review the proposed acquisition to determine if it can be recommended as a total or partial set-aside for small business concerns.

Although the primary responsibility for implementing these policies rests with the contracting office, Project Officers should be knowledgeable about these programs and should take steps to include these businesses in their acquisitions. They are listed and defined below:

Small business concern. For subcontracts valued at \$10,000 or less, a concern (including its affiliates) that does not have more than 500 employees.

For subcontracts valued at more than \$10,000, a small business concern is one that does not have employees or average annual receipts exceeding the size standard in 13 CFR part 121² for the product or service it is providing on the subcontract.

² See FAR 19.102.

Small disadvantaged business concern. As used in FAR Part 52, means an offeror that represents, as part of its offer, that it is a small business under the size standard applicable to the acquisition; and either—

- (1) It has received certification as a small disadvantaged business concern consistent with 13 CFR part 124, subpart B; and
 - (i) No material change in disadvantaged ownership and control has occurred since its certification;
 - (ii) Where the concern is owned by one or more disadvantaged individuals, the net worth of each individual upon whom the certification is based does not exceed \$750,000 after taking into account the applicable exclusions set forth at 13 CFR 124.104(c)(2); and
 - (iii) It is identified, on the date of its representation, as a certified small disadvantaged business concern in the data base maintained by the Small Business Administration (PRO-Net); or
- (2) For a prime contractor, it has submitted a completed application to the Small Business Administration or a private certifier to be certified as a small disadvantaged business concern in accordance with 13 CFR part 124, subpart B, and a decision on that application is pending, and that no material change in disadvantaged ownership and control has occurred since it submitted its application. In this case, a contractor must receive certification as a small disadvantaged business by the Small Business Administration prior to contract award.

Women-owned small business concern. A small business concern that is at least 51 percent owned by one or more women; or, in the case of any publicly owned business, at least 51% of the stock of which is owned by one or more women. The management and daily business operations must be controlled by one or more women.

Historically Underutilized Business Zone (HUBZone) Program was created by the Historically Underutilized Business Zone (HUBZone) Act of 1997. The purpose of the HUBZone program is to provide Federal contracting assistance for qualified small business concerns located in historically underutilized business zones in order to increase employment opportunities, investment, and economic development in those areas. Contracting Officers must consider HUBZone set-asides before considering HUBZone sole-source awards or small business set-asides. (See Exhibit II-2, Page II-49.)

HUBZone small business concern is determined by SBA and appears on the List of Qualified HUBZone Small Business concerns maintained by the SBA.

1. SBA 8(A) PROGRAM FOR SMALL DISADVANTAGED BUSINESSES

Contract awards to small business concerns owned by economically and socially disadvantaged individuals are facilitated through Section 8(a) of the Small Business Act. The Small Business Administration has the authority to enter into contracts with government departments and agencies for their requirements of supplies, services, construction, and research and development. Under this approach, the contract awards are made directly to the SBA, which then enters into subcontracts with eligible concerns. The SBA may enter into these contracts with Federal agencies and subcontract the performance to SBA-certified concerns on either a competitive or a non-competitive basis.

In addition, the SBA is authorized to provide technical and administrative assistance to its subcontractors and other types of assistance and liaison activities needed to coordinate contract performance. The Act requires that the procurement authority under 8(a) be used exclusively for developing minority and other socially and economically disadvantaged businesses, and it defines 8(a) eligibility requirements.

2. ELIGIBILITY

To be eligible for 8(a) awards, a small business must be at least 51 percent owned and operated by persons who are both “socially and economically disadvantaged.” It must be able, with assistance, to perform possible contract awards, and it must have a reasonable prospect for success in the private sector. No contracts may be awarded under 8(a) unless SBA can provide the contractors with the services necessary to promote their competitive viability within a reasonable length of time.

EXHIBIT II-1.

Non-Personal And Personal Services Factors

(Some of these factors include parenthetical explanations or qualifications that indicate the type of judgment that you should exercise.)

THE NATURE OF THE WORK

- To what extent the Government can obtain civil servants to do the job, or whether the contractor has specialized knowledge or equipment that might be useful in a doubtful case (but it should not in itself create doubt about services that are otherwise clearly non-personal).
- To what extent the services represent the discharge of a governmental function that calls for the exercise of personal judgment and discretion on behalf of the Government. (This factor, if present in a sufficient degree, may alone render the services personal in nature.)
- To what extent the requirement for services to be performed under the order is continuing rather than short-term or intermittent. (This factor is one that might be useful in a doubtful case, but it should not in itself create doubt about services that are otherwise clearly non-personal.)

PURCHASING PROVISIONS CONCERNING THE CONTRACTOR'S EMPLOYEES

(In considering the following, you should note that supervision and control of a contractor or his/her employees, if present in a sufficient degree, may alone render the services personal in nature.)

- To what extent the Government specifies the qualifications of, or reserves the right to approve, individual contractor employees

(It is permissible to some extent to specify in the order the technical and experience qualifications of these employees, if this is necessary to assure satisfactory performance.)

- To what extent the Government reserves the right to assign tasks to and prepare work schedules for contractor employees during performance of the order

(This does not preclude including work schedules for the contractor at the inception of the order, or the establishment of a time of performance for orders issued under a requirement or other indefinite delivery-type contract.)

- To what extent the Government retains the right (whether actually exercised or not) to supervise the work of the contractor employees, either directly or indirectly
- To what extent the Government reserves the right to supervise or control the method in which the contractor performs the service, the number of people it will employ, the specific duties of individual employees, and similar details

(However, it is always permissible to provide in the order that the contractor's employees must comply with regulations for the protection of life and property. Also, it is permissible to specify a recommended, or occasionally even a minimum, number of people the contractor must employ, if this is necessary to assure performance. In those events, it should be made clear in the order that this does not in any way minimize the contractor's obligation to use as many employees as are necessary for proper performance.)

- To what extent the Government will review performance by each individual contractor employee, as opposed to reviewing a final product on an overall basis after completion of the work
- To what extent the Government retains the right to have contractor employees removed from the job for reasons other than misconduct or security

OTHER FACTORS

- Whether the services can properly be defined as an end product
- Whether the contractor undertakes a specific task or project that is definable either at the inception of the order or at some point during performance, or whether the work is defined on a day-to-day basis

(However, this does not preclude use of requirements or other indefinite delivery-type contracts, provided the nature of the work is specifically described in the contract, and orders are formally issued to the contractor rather than to individual employees.)

- Whether payment will be for results accomplished or solely according to time worked

(This is a factor that might be useful in a doubtful case but should not in itself create doubt about services that are otherwise clearly non-personal.)

- To what extent the Government is to furnish the office or working space, facilities, equipment and supplies necessary for performance

(This is a factor that might be useful in a doubtful case but which should not in itself create doubt about services that are otherwise clearly non-personal.)

ADMINISTRATION OF THE ORDER

- To what extent the contractor employees are used interchangeably with Government personnel to perform the same functions
- To what extent the contractor employees are integrated into the Government's organizational structure
- To what extent any of the elements above are present in the administration of the order, regardless of whether they are provided for by the terms of the order

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EXHIBIT II-2

Order Of Precedence For Procurement Actions

1. Required Sources of Supply (FAR Part 8)
2. SBA 8(a) Set-asides (FAR Part 19.8)
 - Sole Source or Competitive
3. Historically Underutilized Business Zone
HUBZone Set-asides
(FAR Part 19.13)
 - Sole Source or Competitive
4. Small Business Set-aside (FAR Part 19.5)
 - Total
 - Partial
5. Full and Open Competition (FAR Part 6.1)
6. Other Than Full and Open Competition (FAR Part 6.3)

Note: The Indian Health Service (HIS) provides for Indian Only Set-asides (Indian Health Manual, Chapter 5), which takes preference after required Sources of Supply, but before SBA 8(a) Set-asides.

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SECTION III. PRE-SOLICITATION ACTIVITIES

The acquisition process is illustrated in Exhibit III-1 (Page III-55). It has three discrete phases:

- (1) Preparing for the solicitation (requirements development, pre-solicitation, or planning phase);
- (2) Soliciting, evaluating, and awarding the contract; and
- (3) Administering the awarded contract.

This section covers the first of these phases—pre-solicitation activities. It outlines the basic tasks that the Government must complete before approaching the business community for proposals. It also addresses the responsibilities of the Project Officer, although many of these tasks require close cooperation with the Contracting Officer to be accomplished effectively.

There are many steps—some optional, most required—in the process leading up to a request for proposals. There is sufficient variability within the Department to make it essential for Project Officers to consult with their own Contracting Officer, rather than rely solely on this manual.

The activities in the first phase of the acquisition process are designed to produce one major document: the request for contract (RFC). The RFC is a detailed document. Many of its components are critical to ensuring that the Government receives quality supplies and services at a fair price once a contract is signed. Therefore, the text concentrates on the most complicated and critical of these components—explaining exactly what they should contain and how to produce them.

Section III outlines steps in complying with FAR Part 7, Acquisition Planning. Because it involves assembling information about which special approvals and clearances are required, a brief description of these approvals and clearances and where they are required is included here.

The section ends with a brief explanation of the procedures for handling unsolicited proposals and a discussion of special socioeconomic acquisition programs.

A. ACQUISITION PLANNING AND SCHEDULING

Planning for an acquisition is the best way of ensuring that the product or service will be acquired in the most efficient, trouble-free manner. This process should begin as soon as a program need is identified and it is obvious that the need must be met outside the Government. Acquisition planning involves a general consideration of all the elements that will be required in connection with a particular acquisition. This process may be quite simple or very elaborate, depending on the cost, political sensitivity, complexity, or importance of the item or service being acquired.



Acquisition planning helps the Contracting Officer and the Project Officer to efficiently procure outside services by enabling them to allocate and schedule the work involved in an acquisition, and to resolve potential problems early in the process.

Failing to schedule the overall acquisition workload of an office, agency, IC or OPDIV results in an inordinate percentage of contract awards being made in the closing months, weeks, and even days of the fiscal year. This excessive year-end spending invites increased intervention and scrutiny from Congress, the Office of Management and Budget, and the media.

The key to avoiding this is to begin advance acquisition planning early in the fiscal year. In fact, experience shows that the many steps—some of which are quite lengthy—and the need to spread acquisitions over the fiscal year, mean that planning for acquisitions may well cover more than one fiscal year. Planning will often have to begin in one fiscal year in order to negotiate and award a contract in the next year.

To assist in conceptualizing the entire acquisition process, Table III-1 shows a generalized overview of the acquisition milestones that have to be completed before the award of a contract, the responsible party(ies), and the MINIMUM time for their accomplishment. A key factor in success of the process is early coordinated involvement of the Project Officer, the Contracting Officer, and the scientific review administrator (SRA).

Table III-1

ACQUISITION MILESTONES

The schedule shown below (almost 10 months) should be considered a GENERIC representation of the time required to process *an approved RFC* through to award of a contract. The ORDER and exact timing of some steps may vary by IC, but these are the major steps for a competitive acquisition, including the probable *MINIMUM* elapsed time in calendar days from the approval of a Request for Contract by the IC Director. Note that the time necessary for completion of the first three milestones has NOT been factored in. The time may vary considerably, but should be taken into account as it could *lengthen* the schedule by 3 months to 1 year.

	MILESTONE	RESPONSIBILITY	ELAPSED CALENDAR DAYS
1.	ACQUISITION INITIATION		
	Fiscal Year Annual Plan Submission/Approval	Project Officer/IC Director	90 to 120
	Concept Review Meeting	Project Officer	60 to 90
	Request for Contract Preparation	Project/ Contracting Officer	30 to 60
	Request for Contract Approval	IC Director	0
	SBS Review Completed	Varies by IC	5
	DCG Presolicitation Review Completed	DCG, OA	12
2.	ACQUISITION SOLICITATION		
	Governmentwide Point of Entry & NIH Guide Publication	Contracting Officer	15
	Request for Proposals (RFP) Issued	Contracting Officer	30
3.	PROPOSAL RECEIPT AND TECHNICAL REVIEW *		
	RFP Closing Date	Contracting Officer	75
	Proposals to IC Review Office	Contracting Officer	80
	Appointment of Technical Evaluators	Scientific Review Administrator	95
	Technical Peer Review Meeting	Scientific Review Administrator	131
	Draft Report	Scientific Review Administrator	152

	MILESTONE	RESPONSIBILITY	ELAPSED CALENDAR DAYS
4.	COMPETITIVE RANGE DETERMINATION AND DISCUSSIONS		
	Competitive Range Determination	Contracting/Project Officer	160
	Technical Cost Assessment Questionnaire	Project Officer	162
	Cost and Price Analysis/Waiver of Audit	Contracting Officer	169
	Discussion Initiation With Offeror(s)	Contracting Officer	176
	Conduct Negotiations	Contracting/Project Officer	186
	Receipt of Final Proposal Revisions (FPRs)	Contracting Officer	193
5.	SOURCE SELECTION AND DETERMINATIONS		
	Technical Review/Recommendation on FPRs	Varies by IC	200
	Source Selection Determination	Contracting Officer	207
	IC Review	Varies by IC	212
6.	NEGOTIATIONS WITH SELECTED SOURCE		
	Conduct Limited Negotiations	Contracting Officer	226
	Complete Clearances and File Documentation	Contracting Officer	233
7.	REVIEWS AND APPROVALS **		
	IC Chief Contracting Officer	Contracting Officer	239
	NIH Board of Awards	DCG/OA	253
	General Counsel (Over \$5,000,000)		263
8.	AWARD NOTIFICATIONS		
	Signature Transmittal Letter	Contracting Officer	268
	Award Signed	Contracting Officer	278

* AIDS acquisitions have specially mandated time requirements from proposal receipt to award that must be taken into account in the planning process.

** SPECIAL APPROVALS AND CLEARANCES: HHSAR 307.1052 identifies several approvals and clearances that must be addressed prior to action on an RFC by the Contracting Officer or prior to contract award. Failure to obtain approval or clearance can significantly lengthen the time necessary to award a contract.

B. CONCEPT DEVELOPMENT

Concept development is the first step in an acquisition. In this phase the agency realizes that an acquisition is necessary and defines, in broad terms, what this effort will entail. Concept development may include assessment of prior contract results, in-depth literature searches, and discussions with technical and scientific personnel, both within and outside the Government. These discussions may serve to determine interest, scientific approaches, technical capabilities, and the state-of-the-art relevant to the subject area. In holding such discussions with people outside the Government, care must be taken not to disclose advance information on any specific acquisition, proposed or contemplated. To do so might create the impression that the Government has given the recipient an unfair advantage over other organizations solicited subsequently.

Concept development is the first step in an acquisition for biomedical and behavioral R&D. Most Project Officers at the NIH will be involved with concept development from the very first stages.

Once the concept has been formulated, it must be reviewed for program relevance, need, merit, priority, and timeliness by the appropriate management staff.

Institutes and programs within institutes have different ways of dealing with concept development. Concept clearance (which is required for Requests for Applications [RFAs] as well) may be obtained from a group specifically constituted for that purpose (e.g., a Special Review Committee or Special Emphasis Panel [SEP]) or by other means, such as conferences, chartered advisory panels, etc. Requests to initiate RFAs or RFPs must specifically describe how concept clearance was obtained.

Concept clearance requires the assessment of five aspects of a proposed activity:

- Significance from a scientific or technical standpoint;
- Availability of the technology/resources to accomplish it
- Extent to which there are uses for the results;
- Adequacy of the proposed methodology (if a specific approach is proposed), and
- Applicability of the NIH policy on inclusion of women and members of minority groups, if the research will involve human subjects, and evaluation of whether gender/minority questions are germane to the objectives of the proposed project (Manual Issuance 7110 and 7120).

Concept clearance may be waived if the request for contract is for a re-competition of an ongoing project for which the validity of the project concept has been established, the purpose, scope, and objectives remain as before, and the state-of-the-art of the scientific content is basically unchanged (Manual Issuance 6315-1). However, it is best

to discuss this with the Contracting Officer.

The names and affiliations of the concept reviewers should accompany a statement of concept clearance. As with other technical review groups, this group is limited to 25% government personnel, which may be documented by minutes of a meeting. The discussion and results of the concept review group's deliberations concerning the inclusion/non-inclusion of women and minorities as research subjects in the project under review must be addressed in the concept review minutes.

Program staff may find it useful to provide a standardized format for obtaining concept clearance. It is important to recognize that reviewers are being asked to assess the concept only. If they were called upon to review a draft RFP they, and their institutions, would be barred from competing when the RFP is issued. There might be cases where a review of the RFP was desired, but this constraint should be clearly noted. NIH Manual Issuance 1805 explains the few instances where exemptions may be granted.

In many agencies, the concept development phase is intimately connected with the agency's budget process because these agencies use the budget process as the primary means of identifying, defining, and approving agency acquisitions.

Although most Project Officers do not become involved with an acquisition until after the initial budgeting has been accomplished, Project Officers always have to deal with budget considerations. This happens, for example, when the initial cost of an acquisition is underestimated and additional funds are required. Although it is important to have funds for an acquisition—especially a major one—included in the agency's budget, occasionally one that has not been included is turned over to a Project Officer. If funds have not been budgeted, it still may be possible to fund a particular acquisition. Project Officers who are faced with this situation should contact their budget component for advice and guidance.

C. MARKET RESEARCH

FAR Part 10 (see FAR Excerpts Appendix) requires agencies to conduct market research. It prescribes policies and procedures for conducting market research to arrive at the most suitable approach to acquiring, distributing, and supporting supplies and services.

Market research is conducted to determine if commercial items or nondevelopmental items are available to meet the Government's needs, or could be modified to meet the Government's needs.

FAR Subpart 2.101 defines market research as "collecting and analyzing information about capabilities within the market to satisfy agency needs." The results of market research are used "to arrive at the most suitable approach to acquiring, distributing, and supporting supplies and services requirements."

Market research accomplishes the goal of fulfilling Government needs by acquiring commercial products when such products would adequately satisfy those needs. In addition, market research is further required to:

- Promote full and open competition;
- Ensure that the need is met in a cost-effective manner.

Typical types of data that are collected during market research are:

- Availability;
- Warranty information;
- Cost to modify commercial products;
- Distribution and support capabilities.

D. DETERMINING WHETHER TO BUNDLE REQUIREMENTS

Deciding whether to bundle requirements is an important step in initial acquisition planning. FAR 2.101 defines bundling as consolidating two or more requirements for supplies or services, previously provided or performed under separate smaller contracts, into a consolidation for a single contract that is likely to be unsuitable for award to a small business concern due to:

- The diversity, size or specialized nature of the elements of the performance specified;
- The aggregate dollar value of the anticipated award.
- The geographical dispersion of the contract performance sites; or
- Any combination of the above.

While bundling was at one time encouraged for efficiency and pricing reasons, it has become much less popular in recent years. FAR 7.107 cautions agencies to consider bundling only when market research demonstrates that bundling is likely to save the Government:

- Ten percent of the estimated value (including options) if the value is \$75 million or less; or
- Five percent of the estimated contract value (including options) or \$7.5 million, whichever is greater, if the value exceeds \$75 million.

Reduction of administrative or personnel costs alone is not sufficient justification for bundling unless the cost savings are expected to be at least ten percent of the estimated contract value (including options) of the bundled requirements.

However, without power of delegation, the service acquisition executable for the military departments, the Under Secretary of Defense for Acquisition, Technology and Logistics for the Defense agencies, or the Deputy Secretary or equivalent for the civilian agencies, may determine that bundling is necessary and justified when:

- (1) The expected benefits do not meet the above thresholds but are critical to the agency's mission success; and
- (2) The acquisition strategy provides for maximum practicable participation by small business concerns.

For short, bundling should not be entered into lightly, and, when it is considered, the benefits should clearly be identified in a supporting justification.

When bundling is being considered, do the following:

- When performing market research, consult with the local Small Business Administration Procurement Center Representative (PCR) or, if a PCR is not assigned to the procuring activity, the SBA Office of Government Contracting Area Office serving the area in which the primary activity is located.
- Prepare and incorporate justification for anticipated bundling in the acquisition planning data portion of the Request For Contract (RFC).

An OFPP Report on Contract Bundling was issued in October 2002, which detailed the increased use of bundling by Federal agencies and the reduced involvement of small business in the acquisition process. The OFPP made numerous recommendations in the report for reducing bundling and increasing small business involvement including increased vigilance in review of bundling requirements by senior management. It appears that, if small business opportunities do not increase, tighter restrictions on bundling will be implemented.

E. REQUEST FOR CONTRACT (RFC)

For DHHS, the acquisition planning document is the Request for Contract (RFC).

1. RESPONSIBILITIES FOR PREPARING THE RFC

The Request for Contract (RFC) usually is prepared jointly by the Project Officer and the Contracting Officer, although the Head of Contracting Activity (HCA) may request that a different procedure be followed.

Project Officers who expect to initiate acquisitions should discuss their requirements with the responsible Contracting Officer. These discussions should result in understandings on:

- The details of the acquisition plan;
- Preliminary conclusions on the work statement or specifications and appropriate evaluation criteria; and
- Preliminary ideas on the content and timing of the Request for Contract (RFC).

It is also advisable to discuss the acquisition schedule with the responsible individual in the IC's scientific review branch at this stage, since capacity to conduct peer review may affect the schedule.

Contracting Officers are required to coordinate with program personnel to ensure appropriately comprehensive planning for acquisitions, timely initiation of requests for contracts, and to ensure that program personnel are informed about proper acquisition practices and methods.

2. CONTENTS OF THE RFC

DHHS does not prescribe a standard format for the RFC. Any document or group of documents will be acceptable as an RFC as long as all of the information cited below is included.

The Department prescribes that RFCs address the content of written acquisition plans that is spelled out in FAR 7.105. In general, the plan must address all the technical, business, management, and other significant considerations that will control the acquisition. The specific content will vary, depending on the nature, circumstances, and stage of the acquisition.

RFCs for service contracts must describe the strategies for implementing performance-based contracting methods or must provide rationale for not using those methods, which are in FAR Part 37.6.

The FAR lists the items to be included in two groups: (a) Acquisition Background and Objectives, and (b) The Plan of Action

Acquisition Background and Objectives

Statement of need. Introduce the plan by a brief statement of need. Summarize the technical and contractual history of the acquisition. Discuss feasible acquisition alternatives, the impact of prior acquisitions on those alternatives, and any related in-house effort.

Applicable conditions. State all significant conditions affecting the acquisition, such as requirements for compatibility with existing or future systems or programs, and any known cost, schedule, and capability or performance constraints.

Cost. Set forth the established cost goals for the acquisition and the rationale supporting them, and discuss related cost concepts to be employed, including, as appropriate, the following items:

- Life-cycle cost...
- Design-to-cost...
- Application of should-cost [analysis]...

Capability or performance. Specify the required capabilities or performance characteristics of the supplies or the performance standards of the services being acquired and state how they are related to the need.

Delivery or performance-period requirements. Describe the basis for establishing delivery or performance-period requirements. Explain and provide reasons for any urgency if it results in concurrency of development and production or constitutes justification for not providing for full and open competition.

Trade-offs. Discuss the expected consequences of trade-offs among the various cost, capability or performance, and schedule goals.

Risks. Discuss technical, cost, and schedule risks and describe what efforts are planned or underway to reduce risk and the consequences of failure to achieve goals. If concurrency of development and production is planned, discuss its effects on cost and schedule risks.

Acquisition streamlining. If specifically designated by the requiring agency as a program subject to acquisition streamlining, discuss plans and procedures to—

- Encourage industry participation by using draft solicitations, presolicitation conferences, and other means of stimulating industry involvement during design and development in recommending the most appropriate application and tailoring of contract requirements;
- Select and tailor only the necessary and cost-effective requirements; and
- State the timeframe for identifying which of those specifications and standards, originally provided for guidance only, shall become mandatory.

Plan of Action

Sources. Indicate the prospective sources of supplies or services that can meet the need. Consider required sources of supplies or services and sources identifiable through databases including the Governmentwide database of contracts and other procurement instruments intended for use by multiple agencies available at www.contractdirectory.gov. Include consideration of small business, veteran-owned

small business, service-disabled veteran-owned small business, HUBZone small business, small disadvantaged business, and women-owned small business concerns, and the impact of any bundling that might affect their participation in the acquisition. Address the extent and results of the market research and indicate their impact on the various elements of the plan.

Competition. Describe how competition will be sought, promoted, and sustained throughout the course of the acquisition. If full and open competition is not contemplated, cite the authority in FAR 6.302, discuss the basis for the application of that authority, identify the source(s), and discuss why full and open competition cannot be obtained....

- Describe how competition will be sought, promoted, and sustained for ... components or subsystems...and...for spares and repair parts...
- When effective subcontract competition is both feasible and desirable, describe how such subcontract competition will be sought, promoted, and sustained throughout the course of the acquisition....

Source-selection procedures. Discuss the source-selection procedures for the acquisition, including the timing for submission and evaluation of proposals, and the relationship of evaluation factors to the attainment of the acquisition objectives.

Acquisition considerations. For each contract contemplated, discuss contract type selection; use of multiyear contracting, options, or other special contracting methods; any special clauses, special solicitation provisions, or FAR deviations required; whether sealed bidding or negotiation will be used and why; whether equipment will be acquired by lease or purchase and why; and any other contracting considerations. Provide rationale if a performance-based contract will not be used or if a performance-based contract for services is contemplated on other than a firm fixed price basis.

* * *

Budgeting and funding. Include budget estimates, explain how they were derived, and discuss the schedule for obtaining adequate funds at the time they are required.

Product or service descriptions. Explain the choice of product or service description types (including performance-based contracting descriptions) to be used in the acquisition.

Priorities, allocations, and allotments. When urgency of the requirement dictates a particularly short delivery or performance schedule, certain priorities may apply. If so, specify the method for obtaining and using priorities, allocations, and allotments, and the reasons for them.

Contractor versus Government performance. Address the consideration given to OMB Circular No. A-76.

Inherently governmental functions. Address the consideration given to OFPP Policy Letter 92-1.

Management information requirements. Discuss, as appropriate, what management system will be used by the Government to monitor the contractor's effort.

Make or buy. Discuss any consideration given to make-or-buy programs.

Test and evaluation. To the extent applicable, describe the test program of the contractor and the Government. Describe the test program for each major phase of a major system acquisition. If concurrency is planned, discuss the extent of testing to be accomplished before production release.

Logistics considerations. Describe the assumptions determining contractor or agency support...; the reliability, maintainability, and quality assurance requirements...; the requirements for contractor data and data rights, their estimated cost, and the use to be made of the data; and standardization concepts...

Government-furnished property. Indicate any property to be furnished to contractors, including material and facilities, and discuss any associated considerations, such as its availability or the schedule for its acquisition.

Government-furnished information. Discuss any Government information, such as manuals, drawings, and test data, to be provided to prospective offerors and contractors.

Environmental and energy conservation objectives. Discuss all applicable environmental and energy conservation objectives associated with the acquisition..., the proposed resolution of environmental issues, and any environmentally-related requirements to be included in solicitations and contracts.

Security considerations. For acquisitions dealing with classified matters, discuss how adequate security will be established, maintained, and monitored.

Contract administration. Describe how the contract will be administered. In contracts for services, include how inspection and acceptance corresponding to the work statement's performance criteria will be enforced.

Other considerations. Discuss, as applicable, standardization concepts, the industrial readiness program, the Defense Production Act, the Occupational Safety and Health Act, foreign sales implications, and any other matters germane to the plan not covered elsewhere.

Milestones for the acquisition cycle. Address the following steps and any others appropriate:

- Acquisition plan approval.
- Statement of work.
- Specifications.
- Data requirements.
- Completion of acquisition-package preparation.
- Purchase request.
- Justification and approval for other than full and open competition where applicable and/or any required D&F approval.
- Issuance of synopsis.
- Issuance of solicitation.
- Evaluation of proposals, audits, and field reports.
- Beginning and completion of negotiations.
- Contract preparation, review, and clearance.
- Contract award.

Identification of participants in acquisition plan preparation. List the individuals who participated in preparing the acquisition plan, giving contact information for each.

In addition to what is required by the FAR, DHHS requires that the RFC must include:

Purpose of contract. Provide a brief description of the requirements, including the citation of the legislation that authorizes the program or project, and a statement as to the intended purpose/use of the proposed contract.

Period of Performance. The number of months (or other time period) required for total performance and, if applicable, for each phase of work indicated in the statement of work (SOW), as well as the proposed starting date.

Estimated cost (IGCE) and funds citation. An estimate of the total cost of the proposed contract and, if applicable, the estimate for each phase indicated in the SOW. The Project Officer must provide a cost breakdown of all contribution cost factors, an estimate of the technical staff hours, direct material, subcontracting, travel, etc. The Project Officer may consult with contracting and cost advisory personnel in developing this information. This section must include the certification of funds availability for the proposed acquisition. Along with the appropriation and accounting information citations should be included. When funds for the proposed acquisition are not currently available for obligation but are anticipated, a statement of intent to commit funds from the financial management officer shall be included in lieu of the certification that funds are available.

Specifications, purchase description, or statement of work. A description of the work to be performed, which may be in the form of a specification, purchase description, statement of work, Performance Work Statement, or Statement of Objectives, must be included in the RFC. Use of the specification is primarily limited to supply or service contracts where the material end item or service to be delivered is well defined by the Government. To the maximum extent possible, requirements should be defined as performance-based work statements that focus on outcomes or results. If the RFC for a service contract is not utilizing a performance-based statement of work, with associated measures and a quality surveillance plan, the rationale for this determination must be documented. If a performance-base service contract is utilized, the RFC must detail the performance standards that must be met, the quality surveillance plan that will be implemented and the performance incentives to be used, if applicable.

Schedule of deliverables/reporting requirements.

Project Officer and alternate.

If applicable to the acquisition the RFC must also include:

- | |
|---|
| <ul style="list-style-type: none">• Minutes of the Concept Clearance. Include the minutes or an explanation of why the presolicitation Concept Clearance was waived. |
|---|

- **Background and need.** The background, history, and necessity for the proposed contract are discussed in this section. It should include prior, present and future planned efforts by the program office in the same or related areas, and a description of efforts by other departmental activities and Federal agencies in the same or related efforts if known. In addition, specific project information, such as the relevance or contribution to the overall program objectives, reasons for the need, priority, and project overlap are to be provided.
- **Reference materials.** A list should be provided by title and description, of study reports, plans, drawings, and other data to be made available to prospective offerors for use in preparation of proposals and/or the contractor for use in performance of the contract. The Project Officer must indicate whether this material is currently available or when it will be available, and how it may be accessed by potential offerors.

- **Technical evaluation factors and instructions.** Information concerning the technical evaluation and instructions that pertain to the specific requirements of the project must be included in the RFC. Evaluation factors may include understanding of the problem, technical approach, experience, personnel, facilities, etc. Criteria areas discussed in the statement of work and the relative order of importance or weights assigned to each of these areas for technical evaluation purposes must be identified by the Project Officer.

If, at the time of acquisition planning, it is determined that the scientific objectives require inclusion of all representative subjects from the general population, language highlighting the requirement for inclusion of women and minorities shall be incorporated into the technical proposal instructions and the work statement. The technical evaluation criteria shall include a delineation of evaluation criteria reflective of this requirement (Manual Issuance 7110). The technical evaluation criteria should be developed in coordination with the scientific review branch or unit that will manage the peer review.

- **Sources for solicitation.** Within a particular field of interest, a Project Officer becomes familiar with many potential sources and acquires knowledge of each source's technical capability, physical resources, experiences in a given area, and performance history. It is expected that the Project Officer will use this knowledge to develop a recommended source list. The Project Officer will also use appropriate business/scientific journals to identify new sources, in addition to those that the Contracting Officer will obtain from advertising through the Governmentwide Point of Entry (FedBizOpps) and the *NIH Guide for Grants and Contracts*.

In developing a source list, the Project Officer must be careful to avoid improper vendor contacts.

Additionally, it is incumbent upon the Project Officer to cooperate with the Small Business Specialist (SBS) and Contracting Officer in identifying viable small, small disadvantaged, and women-owned businesses concerns, to which Federal acquisition dollars can be targeted in accordance with statutory set-aside programs and executive orders.

- **Special program clearances or approvals.** Any required clearance or approval must be included with the RFC. The servicing contracting office should work with the Project Officer and provide comprehensive checklists that include OPDIV/IC special approvals, clearances, and other requirements that are needed. It is the responsibility of the Project Officer to obtain the necessary clearances and approvals.
- **Technical proposal instructions.** In some ICs, the Project Officer develops a comprehensive list of technical proposal instructions. These relate directly to the SOW and the technical evaluation criteria. Offerors should be encouraged to provide a timeline of activities in the proposal, since this helps the reviewers

identify gaps in the planning of the contract activities and illustrates the offeror's grasp of the project.

3. ACQUISITION SCHEDULE PLAN

The following acquisition schedule should be included in all RFCs to the extent the items are significant or appropriate to the acquisition. Additional items may be added as appropriate.

ACQUISITION SCHEDULE	
Actions	Date
• Advance notice or sources sought synopsis — released	_____
• Advance notice or sources sought synopsis — closed	_____
• Synopsis evaluation received	_____
• Request for contract received	_____
• Special program approval received	_____
• Synopsis publicizing proposed release of acquisition	_____
• Request for proposal released	_____
• Preproposal conference conducted	_____
• Proposals received	_____
• Technical evaluation received	_____
• Cost advisory or audit report received	_____
• Equal opportunity clearance obtained	_____
• Prenegotiation conference conducted	_____
• Negotiation completed	_____
• Contract document prepared	_____
• Contract approval completed	_____
• Contract released	_____
• Award	_____

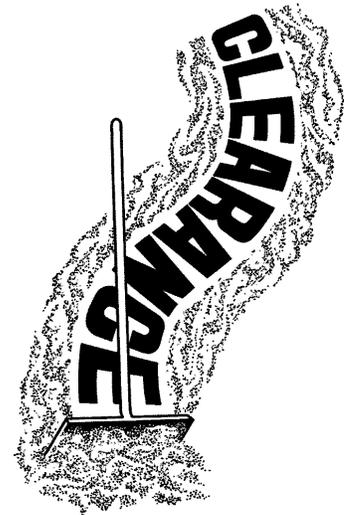
4. APPROVALS OF THE RFC

All acquisition planning documents must be signed by the Project Officer and the contract negotiator. Acquisition planning documents for acquisitions estimated to be between \$100,000 and \$1,000,000 must be approved by the Contracting Officer. Acquisition planning documents for acquisitions established to be in excess of \$1 million must be approved by the HCA (Head of Contracting Activity) or his/her designee. The designated official must be in a position no lower than the level above the Contracting Officer. One copy of all acquisition planning documents must be filed with the POR (Principal Official Responsible for Acquisition) or the designated official for planning purposes. The original acquisition planning documents must be retained in the contract file.

5. SPECIAL APPROVALS AND CLEARANCES

There are numerous types of acquisitions, or elements within an acquisition, that require particular approvals or clearances. The discussion here in this manual can alert the Project Officer to areas where special action may be needed. But if such clearances are required, the Project Officer will have to seek out the most recent guidance (for example, NIH Manual Issuance) or contact the person/office responsible for such clearances (e.g., Privacy Act Coordinator or the Project Clearance Officer for questions about the Paperwork Reduction Act/OMB clearance).

The following special program approvals or clearances should be reviewed to see if they relate to the acquisition in question. Those that are relevant must be addressed in the acquisition planning document.



a. Information Technology

The policies and procedures for use in acquiring information technology are found at FAR Part 39, OMB Circular No. A-130, Management of Federal Information Resources, and the Department's IRM manual.

b. Information Systems

As discussed on pages III-38 and IV-28, Project Officers must provide security certifications in acquisitions where the contractor will be required to develop or have access to a DHHS information system, even where acquiring information technology is not the primary purpose of the acquisition. See also Appendix A for more information.

c. Evaluation Contracts

Evaluation *studies* are defined as those seeking to *formally* assess existing Federal policies, programs, or their components. Such *studies* are performed to *inform policy decision-making officials* about program performance, with respect either to program objectives or other significant intended or unintended effects. The Assistant Secretary for Planning and Evaluation (ASPE) must approve all evaluation projects for proposed solicitations, except those that have been included in an evaluation plan previously approved by the ASPE.

d. Paid Advertising

Paid advertisements and notices to be published in newspapers and periodicals may be authorized by the Contracting Officer in accordance with the requirements and conditions set forth in FAR Subpart 5.5. Requests for advertising must be accompanied by written authority to advertise or publish, giving the names of the newspapers or journals, frequency and dates of proposed advertisements, estimated cost, and other pertinent information. Paid advertisements should be limited to the publication of essential details of grant announcements, invitations for bids, and requests for proposals, including those for the sale of personal property, and for the recruitment of employees.

e. Printing

FAR Subpart 8.8 defines “Government printing” as printing, binding, and blank-book work for use of an executive department, independent agency, or establishment of the Government. Government printing must be done by or through the Government Printing Office (GPO). The Project Officer must coordinate with the Contracting Officer to determine if there are any applicable exceptions.

f. Fraud, Abuse, and Waste

All proposed acquisitions that concern the subjects of fraud, abuse, and waste must be reviewed and approved by the Inspector General or Deputy Inspector General. Written approval from either must be included in the request for contract.

g. Paperwork Reduction Act

Under the Paperwork Reduction Act of 1995 (PL 104-13), a Federal agency *obtaining information from persons*, other than from Federal employees *within the scope of their employment*, (that is, asking persons to provide information beyond what the persons would ordinarily provide in the course of doing their jobs) must obtain advance written approval from the Department or Office of Management and Budget.

The Paperwork Reduction Act defines a "person" as an individual, partnership, association, corporation, business trust, or legal representative, an organized group of individuals, a State, territorial, tribal, or local government or branch thereof, or political subdivision of a State, territory, tribal, or local government or a branch of a political subdivision.

h. Contracts with Federal Employees

Contracts between the Government and Government employees, or between the Government and organizations that are substantially owned or controlled by Government employees may not knowingly be entered into, except for the most compelling reasons (See FAR Subpart 3.6). Authority to enter into such a contract must be obtained before contract award from either the Assistant Secretary for Management and Budget, the head of the OPDIV/IC, or the regional director, or their designees. (See 45 CFR Part 73.)

i. Publications

All projects that will result in contracts in excess of \$2,500, and that include publications, must be reviewed and approved by the Office of the Assistant Secretary for Public Affairs (OASPA). Form HHS-615, Publication Planning and Clearance Request, should be forwarded to OASPA through the OPDIV/IC Public Affairs Officer. Publications are defined in the chapter on publications in the Public Affairs Management Manual.

j. Public Affairs Services

Projects for the acquisition of public affairs services in excess of \$5,000 must be submitted to the Office of the Assistant Secretary for Public Affairs (OASPA) for review and approval on Form HHS-524B, Request for Public Affairs Service Contract.

k. Audiovisual Services

All audiovisuals must be acquired under the Government-wide Contracting System for Motion Picture and Videotape Productions, unless they are included in the exceptions to the mandatory use of the uniform system. (See the HHS General Administration Manual, Chapter 1-121.) Any proposed acquisition of an audiovisual project requires submission of Standard Form 282, Mandatory Title Check, to the National Audiovisual Center. When the results of this title check have been reviewed and approved, and the Project Officer has determined that existing materials are not adequate to fulfill the requirement, the Project Officer must prepare a statement to that effect. For acquisitions in excess of \$5,000, a copy of that statement, together with Standard



Form 202, Federal Audiovisual Production Report and Form HHS-524A, Request for Audiovisual material, must be submitted through the OPDIV/IC Public Affairs Officer to the Office of the Assistant Secretary for Public Affairs (OASPA) for review and approval. The OASPA will then forward the Standard Form 202 and the statement explaining why existing materials are insufficient to the National Audiovisual Center. An approved copy of the form HHS-524A will be returned to the OPDIV/IC for transmission to the Contracting Officer. (See the HHS General Administration Manual Chapter 1-121.)

l. Privacy Act

The Department's policy is to protect the privacy of individuals to the maximum possible extent, while permitting the exchange of records required to fulfill its administrative and program responsibilities and its responsibilities for disclosing records to which the general public is entitled under the Freedom of Information act. The Privacy Act is applicable whenever the Department contracts for the design, development, operation, or maintenance of a system of records on individuals in order to accomplish a departmental function. The key factor is whether a departmental function is involved. Therefore, the Privacy Act requirements apply to a departmental contract when, under the contract, the contractor must maintain or operate a system of records to accomplish a departmental function.

The Project Officer should consult with the activity's Privacy Act Coordinator, and as necessary with the Office of the General Counsel, to determine whether or not the Act applies to the proposed contract. The RFC must contain a statement regarding applicability. When the Act is applicable, the Project Officer must prepare a "system notice" for publication in the *Federal Register*. This notice must describe the Department's intent, i.e., to establish a new system of records on individuals, to make modifications to an existing system, or to disclose information in regard to an existing system. A copy of the "system notice" should be attached to the request for contract. The contract cannot be awarded until the "system notice" has been published in the *Federal Register*. (See HHS Privacy Act regulation, 45 CFR 5b, and FAR Subpart 24.1.)

m. A-76 Review (FAR Subpart 7.3)

OMB Circular No. A-76, Performance of Commercial Activities, provides that it is the policy of the Government to rely generally on private commercial sources for supplies and services, if certain criteria are met. At the same time, it recognizes that some functions are inherently Governmental and must be performed by Government personnel. It also provides that it is Government policy to give appropriate consideration to relative cost in deciding between Government performance and performance under contract. In comparing the costs of Government and contractor performance, the Circular provides that agencies shall base the contractor's cost of performance on firm offers.

The Circular and the Cost Comparison Handbook, Supplement No. 1 to the Circular, prescribe the overall policies and detailed procedures required of all agencies in making cost comparisons between contractor and Government performance.

n. Foreign Contracts

Foreign contracts require additional special approvals. Program officers responsible for acquisitions for which foreign awards are contemplated should discuss their requirements with the Contracting Officer at the earliest possible stage of acquisition planning in order to avoid serious delays in the award process.

F. THE STATEMENT OF WORK

The statement of work (SOW) or in performance-based contracting the Performance Work Statement (PWS) is probably the single most critical document in the acquisition process. It must define requirements in clear, concise language identifying specific work to be accomplished. It also defines the respective responsibilities of the Government and the contractor, and provides an objective measure so that both the Government and the contractor will know when the work is complete and payment is justified. In this section we will use the SOW synonymously with PWS unless noted otherwise.



The SOW must be precisely worded because it will be read and interpreted by a variety of people, such as attorneys, acquisition personnel, cost estimators, accountants, technical specialists, etc. If the SOW does not state exactly what is wanted, or does not state it precisely, it will generate contract administration problems for both the Project Officer and the Contracting Officer. Ambiguous statements of work often result in unsatisfactory contractor performance, delays, disputes, and higher contract costs.

The Comptroller General and the courts generally interpret ambiguous requirements against the drafter.

Statements of work are sometimes referred to administrative boards or the courts for interpretation. These interpretations represent what an objective third party thinks is the intention of the document. Generally speaking, the court or board will not concern itself with what the drafter **intended** to express, but will look at what **was** expressed. This determination is usually made solely on the basis of the words used and the context in which they appear.

How the SOW is written affects the entire acquisition cycle. It determines the type of contract that is awarded, it influences the number and quality of proposals received, and it serves as a baseline against which to evaluate proposals, and later, contractor performance. Thus, the SOW is the key element in shaping and directing all three stages of the acquisition cycle: pre-solicitation, solicitation and contract award, and post-award administration.

In the pre-solicitation phase, the SOW establishes the parameters of the Government's requirements so that the program and Contracting Officers can determine the best way to

accomplish them. Therefore, the SOW must articulate program objectives. It must also establish actual minimum requirements for performance of the proposed work.

In the solicitation, evaluation, and award phase, the SOW is the vehicle that communicates the Government's requirements to prospective offerors. At this stage, the SOW guides the offerors on the content of their technical proposals. When a contract is awarded, the SOW becomes part of the contract between the two parties, stating what has been offered by the proposer and accepted by the Government. Therefore, the statement of work defines the scope of work, including tasks the contractor must undertake, types or stages of work, number and type of personnel, sequence of effort, and reporting requirements. The SOW must also establish a guide for technical evaluation of the proposals. Both the offeror and the evaluators need a list of factors that clearly state how the agency will compare the offers. The technical evaluation criteria are not part of the SOW itself but, because they relate directly to the requirements specified in the SOW, they must be carefully considered when preparing it.

At the post-award stage, the SOW provides the mechanism for defining the work or supplies that are to be produced and the deadlines for producing them. To be effective at this stage, the SOW should provide a guide for monitoring the progress of work by specifying what supplies should be delivered or tasks accomplished at specific times during the course of the contract. The SOW also should describe the supplies or results from the work effort and set the standards of contractor performance.

1. COMMON ELEMENTS OF STATEMENTS OF WORK

Because each acquisition is unique, each SOW must be tailored to the specifics of the project. The elements of a SOW will vary with the objective, complexity, size, and nature of the acquisition. In general, it should cover the following matters, as appropriate.

- **Background.** Describes the requirements in general, non-technical terms, and explains why the acquisition is being pursued and how it relates to past, current, or future projects. Include a summary of statutory program authority and any regulations that are applicable. If any techniques have been tried and been found effective, they should be included here.
- **Project objectives.** Provides a succinct statement of the purpose of the acquisition. It should outline the results that the Government expects, and may also identify the benefit to the program that is contemplated.
- **Scope of work.** Provides an overall, non-technical description of the work to be performed. It expands on the project objectives, but does not attempt to detail all of the work required. Identify and summarize the various phases of the project, and define its limits in terms of specific objectives, time, special provisions, or limitations. This information must be consistent with the detailed requirements.

Contractor responsibilities are often summarized here, as are the results or supplies expected.

- **Detailed technical requirements.** States most precisely what is expected of the contractor in the performance of the work. It describes the specific tasks and phases of the work and specifies the total effort each task or phase is to receive. Considerations that may guide the contractor in its analysis, design, or experimentation on the designated problems should also be included.

Specify the requirements (i.e. training, computer modeling, tests, verification, etc.), and indicate the scope of each. Include the parameters of tests, for example, and the criteria governing the number of designs, numbers of tests, performance, etc. Also identify any budgetary, environmental, or other constraints. If more than one approach is possible and the Government prefers a particular approach, it should be identified. When applicable, state the criteria on which a choice of alternative approaches will be based.

If end supplies or deliverables are required under the contract, they should be clearly and firmly defined and the criteria for acceptance should be given. Delivery or completion schedules are expressed either by calendar date or as a certain number of days from the date of contract award. When using the latter method, specify whether work days or calendar days are meant.

- **Reporting schedule.** Specify how the contractor shows that it has fulfilled its obligations. Define the mechanism by which the contractor can demonstrate progress and compliance with the requirements, and present any problems it may have encountered. This is usually accomplished through monthly or bimonthly progress reports. Discuss what areas the reports are to cover, the report format, number of copies the contractor should submit, and to whom they should be submitted. Clearly identify the criteria to be used by the Government for acceptance.

It is important to require the preparation and submission of technical and financial progress reports to reflect contractor certification of satisfactory progress. If possible, the reports should be coordinated to provide a correlation between costs incurred and the state of contract completion.

- **Special considerations.** Include if there is any information that does not fit neatly or logically into one of the other sections. For example, to explain any special relationships between the contractor and other contractors working for the Government.

- **References.** Provide a detailed list and description of any studies, reports, and other data referred to elsewhere in the statement of work. Each document should be properly described, cited, and cross-referenced to the applicable part of the work statement. If documents are limited or hard to get, and will not be attached to the RFP, tell where they can be obtained, or when and where they will be available for review. Examples of references include: field memoranda, technical reports, scholarly studies, articles, specifications, and standards.

2. STEPS IN WRITING A STATEMENT OF WORK (SOW)

Because the SOW is the most influential document in an acquisition, it must be carefully planned and written. It expresses what the contractor is to accomplish and determines whether the Government receives the supplies or services it needs.



a. Planning the Statement of Work

Carefully planning the SOW will save time in the writing phase and will make it possible to develop a concise, trouble-free RFP. The first step is to determine the project's objectives. This involves developing clear statements about why the agency is undertaking the acquisition, and what it hopes to achieve. Such a statement is critical because it is impossible to communicate a requirement to potential offerors unless the need can be clearly stated.

Once the project's objectives have been stated clearly in writing, the next step is to meet with the Contracting Officer, who will help lay out the requirements for the acquisition and the schedule that must be met if a contract is to be awarded by a specific date. The Contracting Officer can also identify sources of information on regulations and contracting, as well as in-house experts who may be able to help.

The next step is to determine all of the individual requirements that must be accomplished if the agency is to meet its objectives. Requirements that need to be considered at this stage include:

Deliverables

- What supplies/services are required?
- Who will use the supplies and how?

Standards of Performance

- What performance/accuracy standards can be specified for the supplies or services?

Personnel

- What categories of staff should conduct the project for the contractor?
- What should be their qualifications?
- What should be the qualifications/experience of the contractor?

Methodology

- What is the appropriate methodology?
- Are there different possible methodologies?
- What stages/phases can the project be broken into?

Schedule

- When are the results of the project needed?
- How long should the project take?
- What is the schedule for the deliverables?

Location

- Where should the project take place?
- Will travel be required?

Once all of the requirements have been listed, they can be arranged into a logical sequence.

During the process of listing the requirements, it may be helpful to do some background reading. Collect and analyze previous documents and contract deliverables that bear on the requirements, including:

- Documents that discuss overall program goals and objectives;
- Reports, manuals, or other deliverables produced in the past; and
- Statements of work developed for similar projects.

Review Government-wide or departmental regulations, policy directives, or administrative memoranda that apply to the type of acquisition under consideration. Consult with other program personnel to elicit views on the project, its objectives and requirements.

At this stage, it is important to decide if the complexity of the project requires advice from technical specialists or help from additional writers. If so, identify the personnel needed and specify the areas that each should address.

b. Specifying the Contractual Approach

Once the project objectives have been clearly stated and the requirements listed, it becomes possible to begin specifying the contractual approach. This process will require a number of decisions:

- Whether the SOW is a detailed design-oriented requirements document, a performance-oriented requirements document, or combined;
- Whether a completion requirement or a level-of-effort requirement is contemplated; and
- Whether or not phasing is appropriate.

Each of these decisions will be discussed in more detail below, but as these decisions are being made, a few points should be kept in mind. The objectives of a proposed project will affect the amount of flexibility the contractor will be allowed in planning an approach to the work. A SOW may be broad and general, or specific and detailed. But whether a SOW is loose or tight, simple or complex, certain general principals apply. The SOW:

- Should neither be so narrow as to restrict the contractor's efforts nor so broad as to permit the contractor to explore or undertake work in areas having little relationship to the particular contract tasks;
- Must define the contractor's obligations and be definitive enough to protect the Government's interests;
- Should give the contractor sufficient guidance to be able to perform the work required; it should provide a clear, unambiguous, and complete basis for effective and efficient performance.

c. Detailed Design-Oriented Requirements Document vs. Performance-Oriented Requirements Documents

A SOW may be a detailed design-oriented requirements document, a performance-oriented requirements document, or a combination of both. A **detailed design-oriented**

requirements document describes the work in terms of “**how**” the work is to be accomplished or the number of hours to be provided. A Detailed-design could also include specific materials, parameters, and methods a contractor is to use in delivering a project or service to the Government. The Government is responsible for the results. The contractor must follow the specified steps, but the Government is responsible for ensuring that following these steps will produce the desired result. For example, if the Government issues a detailed design-oriented document for a testing program, the contractor would be responsible for implementing the program but not the validity or usefulness of the test results.

A **performance-oriented requirements document**, on the other hand, does not limit a contractor to providing a specific product or service. It describes the work in terms of “**what**” is to be the required output. It tells the contractor the objectives to be accomplished; the end goal, or the desired achievement, including all pertinent information needed to properly offer a proposal. For example, a performance-oriented PWS for a training course might specify the skills to be taught and the level of skill that participants are to achieve. It is then the contractor’s responsibility to specify in its proposal how these objectives will be accomplished.

As a general rule, it is best to place maximum responsibility for performance on the contractor, because the contractor is being hired for its expertise and ability to perform. However, the cost of the contract may be higher if the contractor must determine the proper approach and methods. Consequently, if the program office or agency believes it knows a good method for accomplishing its objectives, the cost benefit of specifying this method in the SOW should be weighed against the risk that contractors might know even better methods.

Often SOWs use a combination of detailed design-oriented and performance-oriented requirements. If such a combination is used, the Government must be certain that the contractor can, by adhering to the Government’s requirements documents, achieve the required result.

FAR Part 11 requires that requirements be stated in terms of:

- Functions to be performed;
- Performance required; or
- Essential physical characteristics.

The Project Officer must also define requirements in terms that enable and encourage the offerors to supply commercial or nondevelopmental items.

In describing its requirements, the Government is rapidly moving to using performance-based SOWs. FAR Subpart 37-602 provides guidance on using them. Performance-based SOWs are to:

- Describe the work in terms of what is to be the required output rather than either how the work is to be accomplished or the number of hours to be provided;
- Enable assessment of work performance against measurable performance standards;
- Rely on the use of measurable performance standards and financial incentives in a competitive environment to encourage competition to develop and institute innovative and cost-effective methods of performing the work; and
- Avoid combining requirements into a single acquisition that is too broad for the agency or a prospective contractor to manage effectively

Quality Assurance Surveillance Plans (QASP) must be developed when acquiring services using a performance-based SOW. These plans must recognize the responsibility of the contractor to carry out its quality control obligations and must contain measurable inspection and acceptance criteria corresponding to the performance standards contained in the SOW. The QASPs must focus on the level of performance required by the SOW, rather than the methodology used by the contractor to achieve that level of performance.

d. Term vs. Completion Statements of Work

Careful distinctions must be drawn in the SOW between a term (or level-of-effort) acquisition and a completion acquisition. Term SOWs require that the contractor furnish a report on technical effort during a specified period of time, while completion SOWs often require the contractor to develop a tangible end item that is designed to meet specific performance characteristics.

A **term** or **level-of-effort** SOW is appropriate for research where the Government is seeking to discover the feasibility of later development, or to gather general information. A term or level-of-effort statement of work may only require that a specific number of labor-hours be expended on a particular course of research, or that a certain number of tests be run, without reference to any intended conclusion. For example, a level-of-effort SOW might entail providing a certain level of maintenance services or technical support.

A **completion-type** SOW is appropriate to development work where the feasibility of producing an end item is already known. Completion-type statements of work may describe what is to be achieved through the contracted effort—such as the development of new methods, new end items, or other tangible results. For example, a completion requirement might entail delivering a final study report, submitting test results, or developing and delivering documentation on a computer program.

Whichever method is selected, the SOW should be definitive and precise. In describing an end item, for example, be specific about the characteristics it must possess and the standards it must meet. In a level-of-effort SOW, where results of the effort are not measurable, be specific about the goals and directions toward which the contractor is to deploy resources.

e. Phasing

Individual research, development, or demonstration projects frequently lie well beyond the present state of the art and entail procedures and techniques of great complexity and difficulty. Under these circumstances, a contractor, no matter how carefully selected, may be unable to deliver the desired result. Moreover, the job of evaluating the contractor's progress is often difficult. Such a contract is frequently divided into stages (or phases) of accomplishment, each of which must be completed and approved before the contractor may proceed to the next. When phases of work can be identified, the statement of work should provide for phasing and the request for proposals will require the submission of proposed costs by phases. The resultant contract will reflect costs by phases, require the contractor to identify incurred costs by phases, establish delivery schedules by phases, and require the written acceptance of each phase.



Phasing makes it necessary to develop methods and controls, including reporting requirements for each phase of the contract and the factors for evaluating the reports submitted that will provide, at the earliest possible time, appropriate data for making decisions relative to all phases. A phased contract may include stages of accomplishment such as research, development, and demonstration. Within each phase, there may be a number of tasks that should be included in the statement of work.

Phasing should not be used for projects where several tasks must proceed simultaneously because if each task is made a separate phase, progress will be blocked by lack of data.

f. Outlining and Writing the SOW

Once the individual requirements for accomplishing the project objectives have been clearly stated, and the contractual approach has been specified, the next step is to outline the SOW. An outline provides a structure for the document and saves a great deal of writing time. A detailed outline makes it easier to focus on content and to spot inconsistencies, redundancies, and gaps that may need to be filled. It saves time in the writing phase by providing a clear picture of the inter-relationship among ideas, and the most logical order to present them. This can best be done by developing a work breakdown structure (WBS) for the contemplated effort. A sample WBS is shown at Exhibit III-2, Page III-57.

Once the outline has been completed, write a first draft. Remember that the purpose is not to create an entertaining piece of literature, but to express a need and state requirements so that a contractor can understand and respond to them. The next section of this chapter gives specific suggestions for ensuring that the SOW is clear. In general, however, the object in writing a first draft is to get the ideas down on paper. Follow the outline, and write one part at a time. Write as much as possible at a time, but don't try to revise the first draft as it is being written. Include enough detail to communicate clearly with the reader. Explain and illustrate points wherever it is necessary to convey the correct meaning.

g. Revising the Statement of Work

When the first draft is complete, it will need to be rewritten and revised. The writer should read the statement of work several times with a view to revising it. The first time, check only the content.

- ✓ Does it contain sufficient information?
- ✓ Are more examples needed?
- ✓ Are the sources the best obtainable?
- ✓ Has too much material been included?
- ✓ Is the writing based on sound reasoning?

The second time through, check the effectiveness of the organization.

- ✓ Is the subject stated clearly?
- ✓ Is the subject advanced in clear stages?
- ✓ Is the connection between the stages clear?

During the third reading check the sentence structure and grammar. The next part of this Section provides suggestions on what to look for during the third reading and some pitfalls to avoid.

Revise the SOW, read it again, and continue this process until it is logical and readable, conveys exactly what is required of the contractor, and emphasizes the critical elements. One of the best ways of determining if a SOW meets these design objectives is to have it reviewed by someone else in the program office. Writers often have trouble critiquing their own writing because they tend to read into their own work what they intended it to say instead of what it actually says.

h. Hints for Writing Statements of Work

The basic purpose of all writing is to convey a meaning to a reader. The quality and clarity of the writing will determine whether or not that purpose is accomplished. If the writing is unclear, the reader will not understand the message; if it is wordy, the reader will waste time trying to determine the meaning and may misinterpret it. If the language is unfamiliar or too technical, the reader may misunderstand or lose interest. The list that follows contains some writing pitfalls, along with some suggestions for how to avoid them.

- **Use simple, direct, and clear language.** Considerable clarity can be achieved by using short, clear, well-understood words. Avoid technical language unless its meaning is well understood or unless it is defined in the statement of work itself. Words with multiple meanings and vague words also should be avoided unless they are defined.
- **Use active verbs.** Passive verbs can be vague. For example, say “the contractor shall perform...”, not “it shall be performed...” because the latter leaves the question of who shall do the performing open. This is particularly important in research and development acquisitions where many of the contractor’s activities depend on the Government supplying certain information first.
- **Use adjectives carefully.** Many times adjectives soften nouns and make their meaning vague instead of adding clarity. For example, using adjectives such as “workmanlike,” “successful,” “substantial,” and “reasonable” to modify the description of work the contractor is to perform tends to decrease the contractor’s obligation rather than increase it.
- **Use language consistently.** Do not change a word or phrase unless a change in meaning is intended. The repetition of long, awkward phrases can often be avoided by inventing an arbitrary name and using that consistently; thus, “the XYZ Company, Inc. (herein called the Contractor).”
- **Take care in employing modifiers and exceptions.** These can cause confusion when the reader is unsure of the reference. If a modifier comes at the end of a long series of phrases, it is sometimes impossible to determine if the modifier refers to the entire series or merely to the last item.
- **Use and/or sparingly.** The use of and/or can be confusing. This is one place where the rule of using as few words as possible can be ignored. For example, if the SOW says, “The contractor shall supply A, B, and/or C,” is the firm in compliance if it supplies A and C? Or can it merely supply C, under the assumption that “and/or” meant that

supplying C was sufficient? If the writer really means that the contractor has the choice of supplying any or all of the three items, it is better to say, "The contractor shall supply either, A, B, or C, all of them, or any combination of them."

In addition to the specific uses of language mentioned above, there are certain elements in the SOW that often cause confusion:

- **Time.** One of the big problems in writing a SOW is to specify when something must be done. It is best if the obligation is made certain. "On February 1, the contractor shall submit a report...." But sometimes the report will depend on certain other contingencies. One of the most annoying contingencies is the uncertainty as to the time when the contractor is to start work or is permitted by the Government to start work. For this purpose, drafters like to say, "Deliver within 90 calendar days...." Be sure to specify 90 days from when. Avoid "90 days from the award of the contract" because this is ambiguous. "Awarded" might mean the time the Government decided who the contractor was to be, the date of approval by the Contracting Officer, or the date the contract was signed. To avoid this kind of ambiguity, say "90 days from the *effective date of the contract*." The "effective date" is a definitive date, i.e., 2 November 2XXX, and it gives a firm base from which to start.
- **Notices.** Frequently a SOW requires that a report be delivered to a certain person. Generally, it is better to specify this person by title rather than by name, because personnel can change.
- **Incorporation by reference.** Often there is a need to incorporate some other document into the SOW. When this is done, it should be clear. The incorporated document should be completely identified by date, by title, and by revision number, if applicable. It should be attached, unless it is too cumbersome; then its location should be identified. If "standard tables" are incorporated, the drafter should be clear about which tables these are and know exactly what they say. They may include material that might be objectionable to the Government.
- **Agreements to agree.** Exercise caution in "agreeing to agree" on some significant points. If "the model is to be painted a color to be mutually agreed upon" and the drafter really does not care what color it is, then no harm is done. But if the color is significant, the matter should not be left open.



- **Theoretical discussion.** Sometimes theoretical discussion is included in a SOW, with confusing results. If it is necessary to include scientific background or theoretical reasons for doing the work, the drafter should try to do this in a separate part of the SOW so that there will be a clear line of demarcation between the “why” and the “what.” The SOW ideally should consist of a description of work, not theoretical discussion. The inclusion of the latter may have the effect of modifying the instructions so that the contractor is given a *reason* for not performing in accordance with the drafter’s wishes or for doing something that was not desired.
- **Government obligations.** Care should be taken in describing what the Government is supposed to do. Frequently the contractor’s obligation to perform will depend on what the Government does first. If the Government does not perform its part, the contractor will be excused from performing. If it appears that the Government has not performed, then the contractor will have the foundation for an excuse, even if the Government has done its part. This situation may arise when it is not sufficiently clear what the Government is to do and when.

As an example, the phrase, “Based on information supplied by the Government the contractor shall...” leaves open what information the Government should supply. It could be a great deal; it could be very little. There is no way of knowing whether it is significant or not, costly or inexpensive.

There is no way of determining when the Government has supplied this information. But the contractor is in a position at any time to claim that whatever it was, the firm did not have it. Furthermore, the contractor is in a position to claim that even if it did get it, it did not get it soon enough. Tell precisely the kind of information the Government will supply, and when. Limit the obligation to supplying information or services that are readily available to the Government. Do not agree to give information or services that the Government does not have or that may cost a great deal to get.

G. THE INDEPENDENT GOVERNMENT COST ESTIMATES (IGCE)

Contractors responding to an RFP must submit a cost proposal in addition to a technical proposal. Although the acquisition process is designed to ensure price competition, the Project Officer needs to make sure that the prices offered are within the range that the program has budgeted for a particular acquisition. Therefore, the Government requires that an “Independent Government Estimate of Costs” be submitted by the Project Officer as part of the request for contract. This document is the Government’s assessment of the probable cost of the supplies or services to be acquired. It assures that program funds are

available for the acquisition, assists in the assessment of the utility and cost of individual tasks as they relate to the overall project, and serves as a basis for determining the reasonableness of an offeror's proposed costs and understanding of the RFP.

An SOW is usually developed before a cost estimate since the SOW provides the basis for many decisions about cost.

There are two types of cost estimates: detailed cost estimates and lump sum estimates. **Detailed cost** estimates analyze the individual cost elements of an anticipated proposal. These estimates are made by task and relate directly to the SOW and are discussed below. A **lump sum** estimate projects the cost of the acquisition on a gross basis, without regard to individual cost elements. This type of estimate may be prepared when the ultimate award price can be determined without examining individual cost elements and fee or profit. For example, a lump sum estimate may be used when price is controlled by competition or the Government will be acquiring commercial items.

As with many other aspects of contracting, the Project Officer should work closely with the Contracting Officer and should seek guidance regarding the procedures used in their office.

1. STEPS IN DEVELOPING DETAILED INDEPENDENT COST ESTIMATES

Detailed cost estimates should be prepared by the Project Officer, although the Contracting Officer can often help with advice on approximate Overhead and General and Administrative rates.

The following step-by-step procedures may be used in developing detailed cost estimates. If the SOW has been written, several of these steps will already have been accomplished.

- a. Divide the effort into identifiable tasks or logical steps.
- b. List the categories of labor that will be required in each task or step, i.e., clerical, engineer, research scientist, engineer, etc. In a "level-of-effort" acquisition, it is necessary to consider, in as much detail as possible, the categories of expertise desired and the training and experience that will be required for each category. This will yield a more accurate estimate.
- c. Estimate the per-day or per-month cost of each category of labor.
- d. Estimate the total effort from each labor category by task in terms of person days or person months.



- e. Multiply the number of person days or months in each category by the estimate of time required. This will yield the estimated direct labor cost.
- f. Estimate the amount and type of materials and supplies that will be required and the cost of each.
- g. Identify any other elements of direct cost that the acquisition may require, such as consultant services, computer rentals, etc., and estimate the cost of these.
- h. Estimate the travel requirements, if any. Identify the destinations, the number of people involved, the length of each trip, and the total number of trips anticipated. Use this information to estimate the cost of this travel in terms of both transportation and per diem.
- i. If a subcontractor will be required, identify the tasks to be subcontracted and estimate the cost.
- j. Estimate the amount of overhead that will be charged.

In determining the project costs, profit or fee must be considered. The FAR establishes statutory limitations and the HHSAR provides additional guidance. The type of contract and the risk the Government is willing to assume are considered in arriving at a profit objective.

Since indirect costs vary widely between academic and nonacademic institutions, this can have a significant impact on the overall cost estimate. Variations in overhead and general and administrative costs can create major discrepancies between estimated direct costs and total costs and between offerors at different types of institutions.

When all of this information has been collected, a detailed cost estimate can be prepared. Two sample formats are shown below.

IGCE Sample Format 1

	Est. No. of Days per Category		Rate		Total Estimate
I. Direct Labor Category					
_____	_____	X	_____	=	_____
_____	_____	X	_____	=	_____
_____	_____	X	_____	=	_____
_____	_____	X	_____	=	_____
_____	_____	X	_____	=	_____
_____	_____	X	_____	=	_____
SUBTOTAL (Item I)					\$ _____
2. Fringe Benefits (_____ % direct labor)			_____		
3. Direct Material Costs					
Purchased parts and supplies			\$ _____		
Subcontracts			\$ _____		
Other material			\$ _____		
SUBTOTAL (Item 3)					\$ _____
4. Other Direct Costs					\$ _____
Travel			\$ _____		
Consultants			\$ _____		
Other			\$ _____		
SUBTOTAL (Item 4)					\$ _____
TOTAL DIRECT COSTS (Items 1-4)					\$ _____
5. General & Administrative Expense (_____ % direct labor)					\$ _____
6. Fee or profit*					\$ _____
TOTAL ESTIMATED COST					\$ _____

* The fee will vary between 0 and 15% depending on the type of cost contract being considered. Percentages (%) are statutory limitations.

- Supply and service contracts: not to exceed 10% of contract's estimated cost.
- Research and Development: not to exceed 15% of contract's estimated cost.
- Architect-engineer contract: not to exceed 6% of the estimated cost of construction.

IGCE Sample Format 2

	Est. No. of Hours per Category		Est. Hourly Rate	=	Total Estimate
I. Direct Labor					
Professional (M.D.)	_____	X	_____	=	_____
Professional (Ph.D.)	_____	X	_____	=	_____
Professional (Other)	_____	X	_____	=	_____
Technicians	_____	X	_____	=	_____
Administrative Support	_____	X	_____	=	_____
Other Support	_____	X	_____	=	_____
SUBTOTAL (Item I)					\$ _____
2. Fringe Benefits @ 22% direct labor			_____		
SUBTOTAL (Items 1 and 2)					\$ _____
3. Other Direct Costs					
Material/Supplies			\$ _____		
Equipment			\$ _____		
Travel			\$ _____		
Consultants			\$ _____		
Computer Costs			\$ _____		
Other			\$ _____		
SUBTOTAL (Item 3)			\$ _____		
SUBTOTAL DIRECT COSTS (Items 1-3)					\$ _____
4. Indirect Costs @ 50% of Total Direct Costs					\$ _____
TOTAL EST. COSTS YEAR 1 (Items 1-4)					\$ _____
5. Fee* @ 7% total estimated costs (if anticipated award(s) will be made to a profit-making organization or nonprofit organization requiring a fee for performance)					\$ _____
GRAND TOTAL ESTIMATED COSTS, YEAR 1 (Items 1-5)					\$ _____
Year II (add inflation of 5% to year 1**)					\$ _____
Year III (add 5% to year 2)					\$ _____
Year IV (add 5% to year 3)					\$ _____
Year V (add 5% to year 4)					\$ _____

* The fee will vary between 0 and 15% depending on the type of cost contract being considered. Percentages (%) are statutory limitations.

- Supply and service contracts: not to exceed 10% of contract's estimated cost.
- Research and Development: not to exceed 15% of contract's estimated cost.
- Architect-engineer contract: not to exceed 6% of the estimated cost of construction.

** Of course, if the nature of the work changes from year to year, the basis for the cost estimates would also change and a simple inflation adjustment will not be adequate for projection.

H. ASSURING INFORMATION SECURITY

Acquisitions that will require the contractor to develop or have access to an agency information system are of particular concern. The procedures for assuring information security are discussed in more detail in Appendix A.

Before the solicitation is issued, the Project Officer and the Information Systems Security Officer (ISSO) must certify that the statement of work for the project specifies appropriate security requirements. The Project Officer must document the certification in the acquisition file. See Exhibit III-3 (Page III-59) for the certification format.

At NIH an Information Systems Security Officer (ISSO) is designated for each Institute or Center. An ISSO roster and their associated duties is available at http://www.cit.nih.gov/security-isso.asp .
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The Project Officer and the Information Systems Security Officer are responsible for determining the category of safeguarded information and an overall security level designation (based on the data's sensitivity level and the operational criticality of the data system). They must also determine the appropriate position sensitivity designation for the individuals who will access the agency information under the proposed contract.

According to these determinations, the Contracting Officer ensures the solicitation includes the appropriate technical proposal instructions and provisions. If prospective contractors need access to sensitive information in order to prepare proposals, they will be required to complete and submit Non-Disclosure Agreements. The Project Officer must retain copies of these non-disclosure certifications.

I. TECHNICAL EVALUATION PLANNING (FAR PART 15)

1. PLANNING THE TECHNICAL EVALUATION OF PROPOSALS

The SOW and the technical evaluation factors and subfactors, taken together, establish the ground rules for an acquisition. The SOW states precisely what supplies or services the Government is requesting. The technical evaluation factors clearly state the factors that will be used in evaluating the proposals and the relative importance of each technical factor. It is important to plan the technical evaluation factors while writing the SOW because these two parts of the RFP are intimately connected.

Developing a SOW requires the Project Officer to identify project objectives and the actual functions required to accomplish them. Choosing and weighting the evaluation factors requires that this process be taken one step further—the Project Officer must identify the characteristics or

attributes that are required to perform the functions necessary to accomplish the project objectives. Because every contract is different, it is important that the Project Officer take the time to identify those technical attributes of an offeror that are important in predicting whether the required work will be accomplished with the highest degree of quality.

In developing the evaluation factors, advice and input should be solicited from both the Contracting Officer and the SRA who will conduct the technical peer review meeting. Some ICs require approval of evaluation factors by the IC unit responsible for scientific review.

2. DEVELOPING TECHNICAL EVALUATION FACTORS AND SUBFACTORS

a. Purpose of the Factors and Subfactors

Evaluation factors permit an objective assessment of the merits of individual proposals against standards, rather than against other proposals. Each RFP must identify the specific evaluation factor and the relative importance of the factor used so prospective offerors may judge the basis by which their proposals are to be evaluated, and how they may best devote their efforts in preparing their proposals. Factors should be definable in specific qualitative terms that are readily understandable by both the offerors and the evaluators.

Development of evaluation factors and the assignment of the relative importance or weight to each factor require the exercise of judgment on a case-by-case basis because they must be tailored to the requirements of the individual acquisition. Because the factors will serve as a standard against which all proposals will be evaluated, it is imperative that they be chosen carefully to emphasize those factors considered to be critical in the selection of a contractor.

The final evaluation factors and indications of their relative importance or weights, as included in the RFP, cannot be changed except by a formal amendment to the RFP issued by the Contracting Officer. No factors other than those set forth in the RFP can be used in the evaluation of proposals.



b. Selecting and Developing Technical Evaluation Factors and Significant Subfactors

Evaluation factors must be clear, concise, and fair so that all potential offerors are fully aware of the basis for proposal evaluation and are given an equal opportunity to compete. All evaluation factors should have the following attributes.

- Sufficient detail to provide offerors (and evaluators) with a total understanding of the factors to be used in the evaluation process
- Address the key programmatic concerns that offerors must be aware of in preparing proposals
- Be specifically applicable to the acquisition—they should not merely be restatement of factors from previous acquisitions
- Represent only the significant areas of importance that must be emphasized, rather than a multitude of factors (All factors tend to lose importance if too many are included. Using too many factors and subfactors will prove as detrimental as using too few.)

Examples of topics that form a basis for the development of evaluation factors are listed below. These examples are intended to help Project Officers develop actual evaluation criteria for a specific acquisition and should only be used if they are applicable to that acquisition.

- Understanding of the problem and statement of work
- Method of accomplishing the objectives and intent of the SOW
- Soundness of the scientific or technical approach for executing the requirements of the statement of work (to include, when applicable, preliminary layouts, sketches, diagrams, other graphic representations, calculations, curves, and other data necessary for presentation, substantiation, justification, or understanding of the approach)
- Special technical factors, such as experience or pertinent novel ideas in the specific branch of science or technology involved
- Feasibility and/or practicality of successfully accomplishing the requirements (to include a statement and discussion of anticipated major difficulties and problem areas and recommended approaches for their resolution)
- Availability of required special research, tests, and other equipment or facilities
- The managerial ability to achieve delivery or performance requirements as demonstrated by the proposed use of management and other personnel resources, and to successfully manage the project, including subcontractor and/or consultant efforts, if applicable, as evidenced by the management plan and demonstrated by previous experience

- Availability, qualifications, experience, education, and competence of professional, technical, and other personnel, to include proposed subcontractors and consultants (as evidenced by resumes, endorsements, and explanations of previous efforts)
- Soundness of the proposed staff time or labor hours, propriety of personnel classifications (professional, technical, others), necessity for type and quantity of material and facilities proposed, validity of proposed subcontracting, and necessity of proposed travel

The FAR requires the following factors be included:

- Price or cost;
- Past Performance (all solicitations with an estimated value in excess of \$100,000).

c. Weighting Factors and Significant Subfactors

A statement or indication of the relative importance or weight must be assigned to each evaluation factor. This informs prospective offerors (and evaluators) of the specific significance of each factor in comparison to the other factors. Similarly, if a factor is subdivided into significant subfactors, each of the subfactors must be assigned a statement or indication of the relative importance of weight.

Evaluations may be conducted using any rating method or combination of methods, including color ratings, adjectival ratings, numerical weights, or ordinal ratings. The numerical score method is preferable because it is more precise and informative. However, in some instances the use of the adjective description method may be more appropriate.

The relative strengths, deficiencies, significant weaknesses, and risks supporting proposal evaluation must be documented in the contract files.

d. Cost or Price as a Factor

Cost or price to the Government shall be included as an evaluation factor in every source selection. A statement must be included in the RFP to reflect the relationship of cost or price in comparison to other factors. The Contracting Officer must ensure that this statement accurately reflects the appropriate balance between cost or price and the technical factors. The Contracting Officer and Project Officer should work together in arriving at the final determination regarding the relationship.

The solicitation must state whether all evaluation factors other than cost or price, when combined are:

- Significantly more important than cost or price;

- Approximately equal to cost or price; or
- Significantly less important than cost or price.

e. Sample Evaluation Factors

The two sample formats that follow are for general guidance and should be varied to suit the requirements for each individual project. The items identified may be expanded or modified to reflect technical factors considered to be critical to the specific acquisition. The specific points assigned to each factor must be identified in the RFP, and the factors are listed in their relative order of importance.

FORMAT 1**Understanding of the Problem (40 Points)**

Proposal demonstrates a complete understanding of the requirements and indicates a clear awareness of the contract objectives. Proposal demonstrates that the offeror knows the subject well enough to anticipate and avoid problems, and to react appropriately when problems do arise.

Soundness of Approach (30 Points)

Proposal describes the proposed approach to comply with each of the requirements specified in the Statement of Work. The proposal is consistent with the stated goals and objectives. The proposed approach of ensuring the achievement of timely and acceptable performance is well documented and sound. Milestone and/or phasing charts illustrate a logical sequence of proposed events.

Personnel (30 Points)

1. The staff is competent and experienced in the skills required in the Statement of Work. Resumes of staff and consultants reflect not only academic qualifications, but also length and variety of experience in similar tasks and clearly demonstrate relevant training and experience. If subcontractors are proposed, information is provided to support the qualifications of the subcontractors.
2. Information is provided as to which key personnel will be used on this project. Documentation is provided on the decision-making authority of the project director as related to other elements of the organization. The percentage of time each staff member will contribute to the program is adequately identified. The extent to which outside consultants or specialists will be used is documented and evidence of their availability is provided.

FORMAT 2**SECTION M—EVALUATION FACTORS FOR AWARD****GENERAL**

The major evaluation factors for this solicitation include technical (which encompasses experience and past performance factors) cost/price factors and Small Disadvantaged Business (SDB) Participation. Although technical factors are of paramount consideration in the award of the contract, cost/price and SDB participation is also important to the overall contract award decision. All evaluation factors other than cost or price, when combined, are significantly more important than cost or price. In any case, the Government reserves the right to make an award(s) to that offeror whose proposal provides the best overall value to the Government.

The evaluation will be based on the demonstrated capabilities of the prospective Contractors in relation to the needs of the project as set forth in the RFP. The merits of each proposal will be evaluated carefully. Each proposal must document the feasibility of successful implementation of the requirements of the RFP. Offerors must submit information sufficient to evaluate their proposals based on the detailed criteria listed below.

TECHNICAL EVALUATION CRITERIA

The evaluation criteria are used by the Peer Review committee when reviewing the technical proposals. The criteria below are listed in the order of relative importance with weights assigned for evaluation purposes.

I. GENERAL

The technical proposal will receive paramount consideration in the selection of the Contractor(s) for this acquisition. The evaluation will be based on the demonstrated capabilities of the prospective contractors in relation to the needs of the project as set forth in the RFP. The merits of each proposal will be evaluated carefully, based on responsiveness to the RFP and the thoroughness and feasibility of the technical approach taken. Offerors must submit information sufficient to evaluate their proposals based on the detailed criteria listed below. Failure to provide the information required to evaluate the proposal may result in rejection of that proposal without further consideration.

Listed below are the mandatory qualification criteria and evaluation criteria. The qualification criteria establish conditions that must be met in order for your proposal to be considered. The evaluation criteria are used by the Peer Review committee to evaluate the technical proposals. The criteria below are listed in the order of relative importance with weights assigned for evaluation purposes.

Offerors must indicate their willingness to sign a confidentiality of information statement, since structural formulas and other confidential information on discreet compounds may be included in work assignments under this contract.

II. MANDATORY QUALIFICATION CRITERIA

Proposals must meet the Mandatory Qualification Criterion at the time of submission of initial proposals.

The laboratory facility must be in compliance with the Good Laboratory Practice Regulations as published in the Friday, December 22, 1978 Federal Register, Vol. 43, No. 247, pp. 59986-60025. A copy of the most recent FDA GLP inspection report must be included in the proposal.

The National Institutes of Health (NIH) requires that prior to awarding of funds for contracts involving the use or intended use of animals in research, an approved Animal Welfare Assurance from the

Office of Extramural Research (OER), Office of Laboratory Animal Welfare (OLAW), Office of the Director, NIH must be obtained and maintained for the duration of the contract.

III. TECHNICAL EVALUATION CRITERIA

Proposals submitted in response to this RFP will be evaluated in accordance with the factors listed below:

A. Personnel 40 points

1. Availability and qualifications of a Program Director (Principal Investigator [PI]) with at least 5 years of relevant experience in managing an interdisciplinary team in the conduct of toxicology and pharmacology investigations of therapeutic agents.

Suitability and adequacy of the PI's recent scientific accomplishments to this project as evidenced by bibliography and resume (including study reports, published and accepted manuscripts).

2. Availability of Work Assignment Project Leaders (Study Directors) with leadership experience in performing team oriented studies of a similar nature to that to be performed under this contract. Suitability and adequacy of recent scientific accomplishments to this project as evidenced by bibliography and resume (including study reports, published and accepted manuscripts).

3. Suitability and adequacy of the training, experience and qualifications of other personnel in pathology, laboratory animal care, clinical pathology, analytical chemistry, pharmacokinetics, and quality assurance. In addition, describe the availability and suitability of personnel for performing in vitro bone marrow assays, cardiotoxicity, immunotoxicity, neurotoxicity, safety pharmacology, mutagenicity and reproductive/teratology studies.

4. Extent of experience of the proposed staff functioning as a study team.

B. Technical Approach And Awareness Of The Problem 25 points

Documentation of a realistic technical approach to the program as a whole and to each protocol, drawing upon recent experience in the conduct of toxicology and pharmacology studies including discussions on analytical chemistry, animal care, clinical pathology, histopathology, toxicity evaluations (drug versus nondrug related) and quality assurance. Understanding of the problems likely to be encountered in the studies as demonstrated by first hand experience with diverse types of drugs. Discuss technical approach with regard to specialty studies such as in vitro bone marrow assays, cardiotoxicity, immunotoxicity, neurotoxicity, safety pharmacology, mutagenicity and reproductive/teratology studies.

C. Facilities And Equipment 25 points

Availability and accessibility of suitable animal and laboratory space for the projected studies. Accessibility and adequacy of major equipment needed for the proposed work including analytical and computer equipment. Adequacy of library resources.

D. Organizational Experience 10 points

Evidence of organizational support for proposed work. Extent of organizational ability to provide appropriate manpower and resources for each Work Assignment. Adequacy of the safety and security procedures for the proposed work.

IV. PAST PERFORMANCE FACTOR (NOTE: NEW SOLICITATION REQUIREMENT)

The offeror's past performance will be evaluated after determination of the competitive range. Only those offerors included in the competitive range will be evaluated.

The Government will evaluate the quality of the offeror's past performance based on information

obtained from references provided by the offeror, as well as other relevant past performance information obtained from other sources known to the Government.

Evaluation of past performance will be a subjective assessment based on a consideration of all relevant facts and circumstances. It will not be based on absolute standards of acceptable performance. The Government is seeking to determine whether the offeror has consistently demonstrated a commitment to customer satisfaction and timely delivery of services at fair and reasonable prices.

The assessment of the offeror's past performance will be used as a means of evaluating the relative capability of the offeror and the other competitors. Thus, an offeror with an exceptional record of past performance may receive a more favorable evaluation than another whose record is acceptable, even though both may have acceptable technical proposals.

Past performance will not be scored, but the Government's conclusions about overall quality of the offeror's past performance will be highly influential in determining the relative merits of the offeror's proposal and in selecting the offeror whose proposal is considered most advantageous to the Government.

By past performance, the Government means the offeror's record of conforming to specifications and to standards of good workmanship; the contractor's record of forecasting and controlling costs; the offeror's adherence to contract schedules, including the administrative aspects of performance; the offeror's reputation for reasonable and cooperative behavior and commitment to customer satisfaction; and generally, the offeror's business-like concern for the interest of the customer.

The Government will consider the number or severity of an offeror's problems, the effectiveness of corrective actions taken, the offeror's overall work record, and the age and relevance of past performance information.

The lack of a performance record may result in an unknown performance risk assessment, which will neither be used to the advantage nor disadvantage of the offeror.

V. EXTENT OF SMALL DISADVANTAGED BUSINESS PARTICIPATION

SDB participation will not be scored, but the Government's conclusions about overall commitment and realism of the offeror's SDB Participation targets will be used in determining the relative merits of the offeror's proposal and in selecting the offeror whose proposal is considered to offer the best value to the Government.

The extent of the offeror's Small Disadvantaged Business Participation Targets will be evaluated before determination of the competitive range. Evaluation of SDB participation will be assessed based on consideration of the information presented in the offeror's proposal. The Government is seeking to determine whether the offeror has demonstrated a commitment to use SDB concerns for the work that it intends to perform.

Offers will be evaluated on the following sub-factors:

- (a) Extent to which SDB concerns are specifically identified
- (b) Extent of commitment to use SDB concerns
- (c) Complexity and variety of the work SDB concerns are to perform
- (d) Realism of the proposal
- (e) Past performance of offerors in complying with subcontracting plan goals for SDB concerns and monetary targets for SDB participation
- (f) Extent of participation of SDB concerns in terms of the value of the total acquisition.

3. ORAL PRESENTATIONS (OFPP “GUIDANCE FOR THE USE OF ORAL PRESENTATIONS”)

The use of oral presentations as a substitute for a portion of the traditional written proposal in competitive negotiated procurements is gaining increased interest. This concept is viewed as a method of streamlining the proposal evaluation and source selection process. Procurement and program staff who have tried this approach have found it to be an exciting and effective way of doing business.

The purpose of using oral presentations is to reduce or eliminate the need for written material where information can be conveyed in a more meaningful and efficient way through verbal means. Its major use has been to permit evaluators to receive information regarding the offeror's ability to perform the work directly from the key members of the offeror's team who will actually perform the work. In many cases, the evaluators conduct the oral presentation in interview form, posing sample tasks, probing for additional information, or using other techniques to determine the ability of the offeror.

The advantages of using oral presentations include the reduction of time and cost in the source selection process. The process can also reduce the offeror's costs and increase competition. In addition, the “face to face” interaction improves communication and enhances the exchange of information between the Government and the offerors. Oral presentation provides a more level playing field for those offerors with expertise to satisfy the Government's requirement, but less experience in preparing written Government proposals. This method can also help the Government determine which offerors truly possess the capability to perform versus those offerors who have the resources of great proposal writers, but less ability to produce the actual work. All the advantages of the oral presentation method mentioned work together to improve the ability of the Government to select the most advantageous offer.

Oral presentations are most useful in situations where the Government's Statement of Work is clear and not overly complex in nature. Oral presentations are also useful in requirements where the offeror's qualifications and demonstrated understanding of the work serves as the prime evaluation criterion.

In terms of application, agencies are free to design an approach that best fits the nature of the procurement and available resources. Variations in approach have included:

- Media used to record the presentation
- Restrictions on the extent and nature of material used in the presentation
- Type, number, and background of Government participants
- Type, number, and background of offeror's presentation team
- Amount of time permitted for the presentation

In all instances, the RFP must notify that oral presentations will be used to evaluate and select the contractor, and explicit instructions must be included regarding the extent and

nature of the approach. Setting a firm time limit ensures that each offeror has an equal amount of time and controls the amount of material used during the presentation. All of the Government evaluators who are responsible for evaluating the offers for a specific requirement should be present at each oral presentation. Further, requiring the presenters to be the same individuals who will perform or direct the work will avoid use of “professional” presenters. Rejecting submission of video tapes or other types of media during the presentation will also ensure that presentations are made in person and are representative of the offeror’s true capabilities.

Evaluations can be performed after all the presentations are held or after each individual presentation. There is no firm rule, however there are benefits to promptly evaluating each presentation while the information is still fresh and the evaluation team is still assembled.

In conclusion, the use of oral presentations appears to be an effective method of streamlining source selection and enhancing the ability of the Government to discern the most advantageous offer. Based upon an examination of the procurement statutes and regulations, and GAO and court cases, there are no legal impediments to the use of oral presentations. Used appropriately, it is a proven alternative to the costly and time-consuming method of written proposals. If you are interested in pursuing this method for one of your requirements, contact your Contracting Officer early in the acquisition process to obtain more information and specific guidance geared to your acquisition.

J. UNSOLICITED PROPOSALS (FAR PART 15.6)

Unsolicited proposal means a written proposal for a new or innovative idea that is submitted to an agency on the initiative of the offeror for the purpose of obtaining a contract with the Government, and that is not in response to a request for proposal, Broad Agency Announcement, Small Business Innovation Research topic, Small Business Technology Transfer Research topic, Program Research and Development Announcement, or any other Government initiated solicitation or program.

It is the policy of the Government to encourage the submission of new and innovative ideas in response to Broad Agency Announcements, Small Business Innovation Research topics, Small Business Technology Transfer Research topics, Program Research and Development Announcements, or any other Government initiated solicitation or program. When the new and innovative ideas do not fall under topic areas publicized under those programs or techniques, the ideas may be submitted as unsolicited proposals.

A valid unsolicited proposal must meet each of the following criteria:

- It must be innovative and unique;
- It must be independently originated and developed by the offeror;
- It must be prepared without Government supervision, endorsement, direction, or direct Government involvement;
- It must include sufficient detail to permit a determination that Government support could be worthwhile, and the proposed work could benefit the Departments, research and development, or other mission responsibilities; and
- It must not be an advance proposal for a known Department requirement that can be acquired by competitive methods.

Any unsolicited proposals received by any organizational element should be forwarded immediately to the contracting office. The contracting office will acknowledge the receipt of all unsolicited proposals and assign an appropriate control number to the proposal. In the acknowledgment letter, the Contracting Officer will request any additional information that is required in order to make the proposal complete. The contracting office will then forward the unsolicited proposal to the appropriate program office for preliminary review.

Only the cognizant contracting officer has the authority to bind the Government regarding unsolicited proposals.

1. ADVANCE GUIDANCE (FAR PART 15.604)

Preliminary contact with agency technical or other appropriate personnel before preparing a detailed unsolicited proposal or submitting proprietary information to the Government may save considerable time and effort for both parties. Agencies must make available to potential offerors of unsolicited proposals at least the following information:

- Definition and content of what constitutes an unsolicited proposal acceptable for formal evaluation.
- Requirements concerning responsible prospective contractors, and organizational conflicts of interest.
- Guidance on preferred methods for submitting ideas/concepts to the Government, such as any agency: upcoming solicitations; Broad Agency Announcements; Small Business Innovation Research programs; Small Business Technology Transfer Research programs; Program Research and Development Announcements; or grant programs.

- Agency points of contact for information regarding advertising, contributions, and other types of transactions similar to unsolicited proposals.
- Information sources on agency objectives and areas of potential interest.
- Procedures for submission and evaluation of unsolicited proposals.
- Instructions for identifying and marking proprietary information.

2. CONTENTS OF UNSOLICITED PROPOSALS

All unsolicited proposals must contain a certification that provides the following statement.

<p style="text-align: center;">Unsolicited Proposal Certification by Offeror</p> <p>This is to certify, to the best of my knowledge and belief, that:</p> <ul style="list-style-type: none">a. This proposal has not been prepared under Government supervision.b. The methods and approaches stated in the proposal were developed by this offeror.c. Any contact with employees of the Department of Health and Human Services has been within the limits set forth in FAR 15.604, Agency points of contact.d. No prior commitments were received from Departmental employees regarding acceptance of this proposal. <p>Date: _____</p> <p>Organization: _____</p> <p>Name: _____</p> <p>Title: _____</p> <p style="text-align: center;"><i>(This certificate shall be signed by a responsible official of the proposing organization or a person authorized to obligate the organization contractually.)</i></p>

The following information must be provided as part of the unsolicited proposal.

- Name and address of the organization or individual submitting the proposal
- Date of preparation or submission

- Clear and concise title and abstract of the proposal
- An outline and discussion of the purpose of the proposed effort or activity, the methodology to be used, and the nature and extent of the anticipated results
- Names of the key personnel to be involved, brief biographical information, including principal publications and relevant experience
- Proposed starting and completion dates
- Equipment, facility, and personnel requirements
- Proposed budget, including separate cost estimates for salaries and wages, equipment, expendable supplies, services, travel, subcontracts, other direct costs and overhead
- Names of any other Federal agencies receiving the unsolicited proposal and/or funding the proposed effort or activity
- Brief description of the offeror's facilities, particularly those that would be used in the proposed effort or activity
- Brief outline of the offeror's previous work and experience in the field
- Period for which the proposal is valid
- Names and telephone numbers of offeror's primary business and technical personnel whom the agency may contact during evaluation or negotiations
- Identification of proprietary data that the offeror intends to be used by the DHHS for evaluation purposes only
- Signature of a responsible official of the proposing organization or a person authorized to obligate the organization contractually
- Other statements, if applicable, about organizational conflicts of interest, security clearances, and environmental impacts

3. RECEIPT AND INITIAL REVIEW OF UNSOLICITED PROPOSALS

The Head of Contracting Activity is responsible for establishing procedures for controlling the receipt, evaluation, and timely disposition of unsolicited proposals. The Head of Contracting Activity or his/her designee shall be the point of contact for coordinating the receipt and handling of unsolicited proposals.

Before initiating a comprehensive evaluation, the agency contact point shall determine if the proposal:

- 1) Is a valid unsolicited proposal, meeting the required information and certification stated above;
- 2) Is suitable for submission in response to an existing agency requirement;
- 3) Is related to the agency mission;
- 4) Contains sufficient technical and cost information for evaluation;
- 5) Has been approved by a responsible official or other representative authorized to obligate the offeror contractually; and complies with the marking requirements for limited use of data.

If the proposal meets the above requirements, the contact point shall promptly acknowledge receipt and process the proposal.

If a proposal is rejected because the proposal does not meet the requirements in the initial comprehensive evaluation above, the HHS point of contact shall promptly inform the offeror of the reasons for rejection in writing and of the proposed disposition of the unsolicited proposal.

4. EVALUATION OF UNSOLICITED PROPOSALS

Comprehensive evaluations must be coordinated by the agency contact point, who shall attach or imprint on each unsolicited proposal, circulated for evaluation, the legend for “Use and Disclosure of Data” for data that the offeror does not want disclosed to the public or the Government except for evaluation purposes.

Each unsolicited proposal considered acceptable for further consideration by the Contracting Officer must be forwarded to that unit of the HCA responsible for technical evaluation. Peer review must be by three or more experts, none of whom may be required to make other recommendations or take actions concerning the contract as a part of their official duties.

When performing a comprehensive evaluation of an unsolicited proposal, evaluators shall consider the following factors, in addition to any other appropriate factor for the particular proposal:

- Unique, innovative, and meritorious methods, approaches, or concepts demonstrated by the proposal;
- Overall scientific, technical, or socioeconomic merits of the proposal;
- Potential contribution of the effort to the agency’s specific mission;
- The offeror’s capabilities, related experience, facilities, techniques, or unique combinations of these that are integral factors for achieving the proposal

objectives; The qualifications, capabilities, and experience of the proposed principal investigator, team leader, or key personnel critical to achieving the proposal objectives; and

- The realism of the proposed cost.

The cognizant scientific review administrator must provide the results of the evaluation in writing to the Contracting Officer and Project Officer. If this review results in the finding that the proposal is unacceptable, the Contracting Officer will immediately notify the offeror, provide reasons why the proposal is unacceptable, and return the proposal to the offeror.

A favorable evaluation of an unsolicited proposal does not, in itself, justify awarding a contract without providing for full and open competition. The Contracting Officer must return an otherwise acceptable unsolicited proposal to the offeror, citing reasons, when its substance:

- Is available to the Government without restriction from another source;
- Closely resembles a pending competitive acquisition; or
- Does not demonstrate an innovative and unique method, approach, or concept.

If the program office decides to award the unsolicited proposal, it must support its recommendations with facts and circumstances that precluded competition and furnish a "Justification for Acceptance of Unsolicited Proposal." This justification must document:

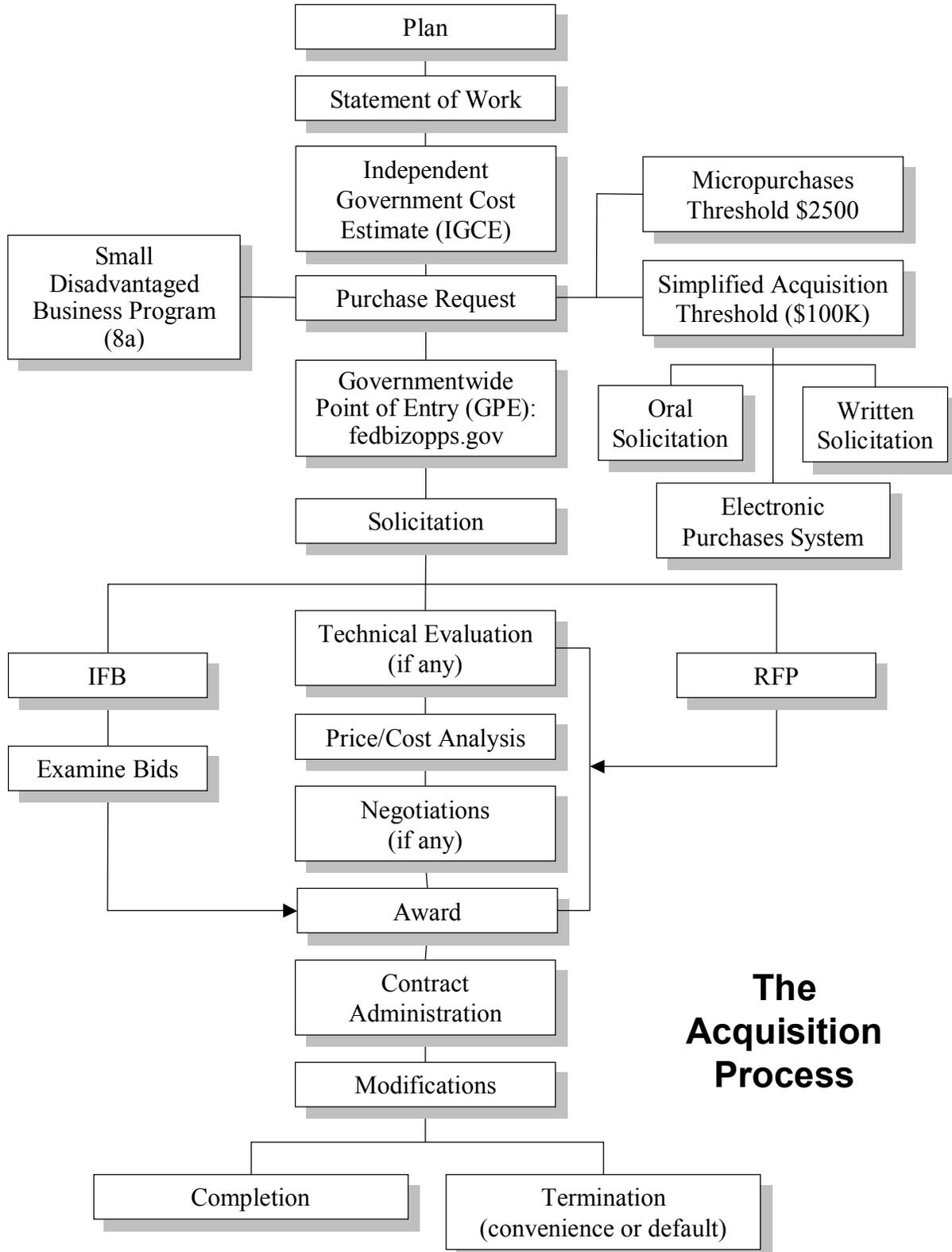
1. That the substance of the proposal is not available to the HCA without restriction from another source, or competition is otherwise precluded; and either:
2. That the acquisition is for basic scientific research and the proposal was selected on the basis of its overall merit, cost and contribution to the program's objectives, after a thorough evaluation and comparison with other proposals, solicited or unsolicited, in the same or related fields; or
3. That the acquisition is for services other than basic research (e.g., development, feasibility studies, etc.); the unsolicited proposal contains technical data or offers unique capabilities that are not available from another source and it is not feasible or practical to define the HCA's requirement in such a way as to avoid the necessity of using the technical data contained in the unsolicited proposal.

Justification for acceptance of an unsolicited proposal should be submitted to the Contracting Officer, together with, but as a separate document from, the RFC and must be signed by the same program official who signs the RFC. These justifications must be reviewed and approved at the same levels as those set forth in "ACQUISITIONS THROUGH OTHER THAN FULL AND OPEN COMPETITION".

When the evaluation is completed the evaluators must notify the agency point of contact of their recommendations.

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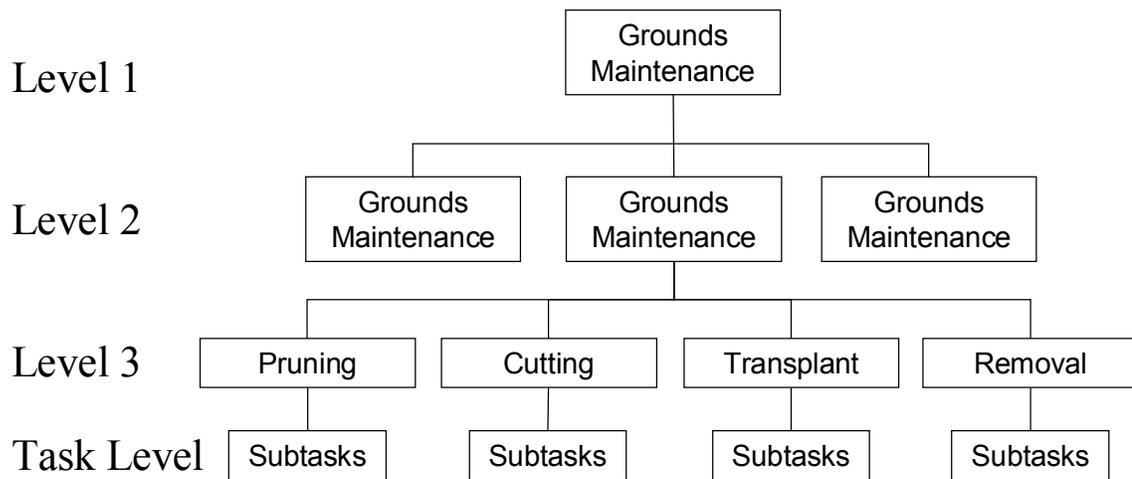
EXHIBIT III-1. The Acquisition Process



The Acquisition Process

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EXHIBIT III-2. Sample Work Breakdown Structure



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Exhibit III-3. Information Security Before Issuing Solicitation

The Contracting Officer must obtain the following certification from the Project Officer and Information Systems Security Officer prior to issuing a solicitation where, in whole or in part, the contractor will develop or have access to a DHHS information system.

The following memorandum certifies that the statement of work complies with the security requirements of the DHHS Automated Information Systems Security Program (AISSP). Fill in necessary information. (Reference: Exhibit XIV-A of the DHHS AISSP Handbook.)

MEMORANDUM	
Date:	[Date]
From:	[Project Officer] and [Information Systems Security Officer]
Subject:	Certification of Adequacy of Information System Security Requirements
Reference:	[Project Title]
To:	[Contracting Officer]
<p>We certify that the statement of work for the referenced project specifies appropriate security requirements necessary to adequately protect the Government's interests in compliance with all Federal, DHHS, and Operating Division/Agency information system security requirements as prescribed by OMB Circular A-130, Appendix III, "Security of Federal Automated Information Systems," and the DHHS Automated Information Systems Security Program (AISSP) Handbook. The security requirements are set forth in such a manner that all prospective contractors can readily understand what is required.</p>	
_____	_____
Project Officer	Date
_____	_____
Information Systems Security Officer	Date

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SECTION IV. SOLICITATION, EVALUATION, AND AWARD

The Federal government uses different methods and approaches to acquire supplies and services. These acquisition methods and approaches, their differences and similarities, are discussed in Section II of this handbook.

Contracting by Negotiation is the most commonly used approach in the Department. It is also the most complex and places the most demands on the Project Officer. In this contracting approach, the Government communicates its requirements to the business community by means of a solicitation document known as a Request for Proposal (RFP). In addition to the statement of work (SOW), discussed in detail in the previous section, this document contains various representations and/or certifications to be completed by prospective contractors, as well as the proposed terms and conditions of the resulting contract. Also included are instructions to offerors to guide them in preparing their proposals, and information telling offerors how the Government will evaluate proposals to determine which offer will be selected for contract award.

The primary responsibility shifts to the Contracting Officer during most aspects of the solicitation, evaluation, and award phase of an acquisition. The Project Officer primarily plays a supporting role at this stage. This section gives a detailed outline of the project during solicitation, evaluation, and award.

A. THE REQUEST FOR PROPOSAL (RFP) (FAR PART 15)



The purpose of the RFP is to convey information that prospective offerors need to prepare a proposal. It describes all the information that prospective offerors must furnish to permit a meaningful and equitable evaluation of their offers. The RFP includes the SOW, and the terms, conditions, and provisions that will form the basis for the final definitive contract. The RFP must be clear, complete, accurate, and consistent with the requirements of the acquisition so that it provides all who receive it with the same understanding of the requirements.

The Contracting Officer is responsible for preparing the RFP with the assistance of the Project Officer. However, much of the information in the RFP is derived directly from the Request for Contract (RFC) or is otherwise furnished by the Project Officer. As a rule, the Contracting Officer does not have the technical knowledge to uncover or correct any substantive deficiencies that may exist in the technical data. Therefore, the Project Officer must take care to develop an RFC and supporting documentation during the pre-solicitation phase that will fully satisfy program needs and objectives when included in the RFP.

Clear distinctions must be made as to the contents and purpose of the SOW, the instructions to offerors, and the evaluation factors and subfactors.

The RFP should meet the following objectives.

- The statement of work must clearly specify the work to be done by the contractor (or, if it is an R&D acquisition, presents a clear statement of the requirements; see FAR Part 35).
- The general, technical, and business instructions must delineate all the essential information prospective offerors need to prepare their proposals.
- Evaluation factors must clearly indicate the technical, management, personnel, and cost or pricing factors that will be the major considerations in selecting the successful offeror.

The RFP must require that proposals be submitted in two parts—a “technical proposal” and a “business proposal.” Each part is to be separate and complete in so that one may be evaluated independently of the other.

Generally, the RFP will require offerors to omit any reference to cost in their technical proposals. However, resource information, such as data concerning labor hours and categories, materials, subcontracts, travel, computer time, etc., must be included in the technical proposal so that the offeror’s understanding of the scope of work may be evaluated.

The technical and business proposal instructions must provide all the information deemed essential for proper evaluation of the proposals so that all prospective offerors are aware of all requirements, and so that differences in proposals will reflect each offeror’s individual approach to the requirements, not different interpretations of the requirements.

The RFP must inform prospective offerors of all evaluation factors and of the relative importance or weight attached to each factor. Evaluation factors must be described sufficiently enough in the RFP to inform prospective offerors of the significant matters that should be addressed in the proposals. Only the evaluation factors set forth in the RFP can be used in evaluating proposals; these factors can only be modified by a formal amendment to the RFP.

The RFP must include the terms, conditions, and provisions that will form the basis for the final definitive contract(s).

B. UNIFORM CONTRACT FORMAT

The Federal Acquisition Regulation (FAR) requires Contracting Officers to use the uniform contract format outlined in Exhibit IV-1 (Page IV-33) in preparing both RFPs

and the resulting contracts. This format not only makes it easier for the Government to prepare RFPs and contracts, it also makes it easier for offerors and contractors to use these documents.

C. OTHER RFP DEVELOPMENT CONSIDERATIONS

The Project Officer and the Contracting Officer should jointly consider the following items in assembling the RFP:

- **Alternate Proposals**—RFPs may allow for submission of alternate proposals, *provided* the offeror submits a proposal for performance of the RFP statement of work. Alternate proposals may be considered by the Project Officer if overall performance would be improved or not compromised, and if they are in the best interests of the Government.
- **Solicitation Period**—
Generally, thirty calendar days is established as the minimum time period between the date of distribution of a solicitation and the date set for receipt of proposals.

The NIH has an informal minimum of 60 days for R&D involving innovative and detailed technical proposals from offerors.
- **Facsimile Proposals**—The FAR permits the Contracting Officer to authorize facsimile proposals. The most practicable circumstances for authorization of facsimile receipt might be only in limited situations such as when time is very limited, or for final proposal revisions.
- **Number of Copies of Proposals to be Requested**—Each RFP must request offerors to submit the minimum number of technical and business proposals necessary for the review and evaluation process.
- **RFP Review and Approvals**—The Project Officer must be given an opportunity by the Contracting Officer to review the final RFP before it is released.
- **Request For Proposals Distribution**—The Project Officer is expected to provide a list of potential contractors as a part of the RFC. The Contracting Officer is responsible for distributing the RFP and maintaining a list of recipients of the solicitation.

D. PUBLICIZING REQUIREMENTS (FAR PART 5)

1. DEVELOPING A SOURCE LIST

Within a particular field of interest, a Project Officer becomes familiar with many potential sources. He or she acquires knowledge of each source's technical capability, physical resources, experiences in a given area, and performance history.

The NIH publishes the *NIH Guide for Grants and Contracts* as a supplementary means of communicating with those sources likely to respond to an NIH solicitation.

The Project Officer also should review appropriate business and scientific journals to identify new sources, in addition to those the Contracting Officer will obtain by synopsis in the Governmentwide point of entry (GPE). It is the government's policy that Contracting Officers must publicize contracting actions in order to:

- Increase competition;
- Broaden industry participation in meeting Government requirements, and
- Assist small business, small disadvantaged business, and women-owned small business concerns in obtaining contracts and subcontracts.

2. REQUIREMENTS FOR ACQUISITION NOTICES AND SYNOPSES

The Small Business Act and the Office of Federal Procurement Policy Act require that following proposed acquisitions notices appear on the GPE at least 15 days before issuance of a solicitation, except for acquisitions of commercial items, which is discussed below.

- Solicitations for supplies or services expected to exceed \$25,000;
- Orders expected to exceed \$25,000 to be placed under a basic ordering agreement or similar agreement, and
- Awards of contracts for property or services expected to exceed \$25,000 if there is likely to be a subcontract.

It is permissible to deviate from this requirement when the Contracting Officer has determined that delivery or performance is urgent and that the 15-day period between notification of the availability and issuance of the solicitation would be detrimental to the successful completion of the acquisition. For acquisitions of commercial items, the Contracting Officer may:

- (1) Establish a shorter period for issuance of the solicitation; or
- (2) Use a combined synopsis and solicitation procedure.

The Contracting Officer must establish a solicitation response time that will afford potential offerors a reasonable opportunity to respond to each proposed contract action in an amount estimated to be greater than \$25,000, but not greater than the simplified acquisition threshold (SAT); or each contract action for the acquisition of commercial items in an amount estimated to be greater than \$25,000.

Except for the acquisition of commercial items, agencies must allow at least a 30 day response time for receipt of bids or proposals from the date of issuance of a solicitation, if the proposed contract action is expected to exceed the SAT.

Agencies must allow at least a 45-day response time for receipt of bids or proposals from the date of publication of the notice for proposed procurement actions categorized as research and development when the contract action is expected to exceed the SAT.
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A reasonable number of copies of the solicitation must be maintained to fulfill anticipated requests during the response period.

3. EXCHANGES WITH INDUSTRY BEFORE RECEIPT OF PROPOSALS

Exchanges of information among all interested parties, from the earliest identification of a requirement through receipt of proposals, are encouraged. Any exchange of information must be consistent with procurement integrity requirements found at FAR 3.104 and in “Section VI—Standards of Ethical Conduct” in this handbook.

“Interested parties” is defined as potential offerors, end users, Government acquisition and supporting personnel, and others involved in the conduct or outcome of the acquisition.

The purpose of exchanging information is to improve the understanding of Government requirements and industry capabilities, thereby allowing potential offerors to judge whether or how they can satisfy the Government’s requirements. It also enhances the Government’s ability to obtain quality supplies and services, including construction, at reasonable prices, and increases efficiency in proposal preparation, proposal evaluation, negotiation, and contract award.

Agencies are encouraged to promote early exchanges of information about future acquisitions. An early exchange of information among industry and the program manager, Contracting Officer, and other participants in the acquisition process can identify and resolve concerns regarding:

- The acquisition strategy, including proposed contract type, terms and conditions, and acquisition planning schedules;

- The feasibility of the requirement, including performance requirements, statements of work, and data requirements;
- The suitability of the proposal instructions and evaluation factors and significant subfactors, including the approach for assessing past performance information;
- The availability of reference documents; and,
- Any other industry concerns or questions.

Some techniques to promote early exchanges of information are—

- 1) Industry or small business conferences;
- 2) Public hearings
- 3) Market research
- 4) One-on-one meetings with potential offerors
 - Any that are substantially involved with potential contract terms and conditions should include the Contracting Office.
 - General information about agency mission needs and future requirements may be disclosed at any time.
- 5) Pre-solicitation notices
- 6) Draft RFPs
- 7) RFIs
- 8) Pre-solicitation or preproposal conferences
- 9) Site visits

FAR 5.205(e) suggests using its special notices of proposed contract actions, or electronic notices, to publicize the Government's requirement or solicit information from industry.

Requests for Information (RFIs) may be used when the Government does not presently intend to award a contract, but wants to obtain price, delivery, other market information, or capabilities for planning purposes. Responses to these notices are not offers and cannot be accepted by the Government to form a binding contract.

After release of the solicitation, the Contracting Officer must be the focal point of any exchange with potential offerors.

When specific information about a proposed acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential offerors, that information must be made available to the public as soon as practicable, but not later than the next general release of information, in order to avoid creating an unfair competitive advantage.

Information provided to a particular offeror in response to that offeror's request must not be disclosed if doing so would reveal the potential offeror's confidential business strategy, and would be protected by the Procurement Integrity Act or Freedom Of Information Act.

When a presolicitation or preproposal conference is conducted, materials distributed at the conference should be made available to all potential offerors, upon request.

The FAR recognizes special situations that apply to exchanges with industry before proposals are transmitted. These situations are discussed below.

- 1) Research and development (R&D) advance notices.
 - Contracting Officers may transmit to the GPE advance notices of their interest in potential R&D programs whenever market research does not produce a sufficient number of concerns to obtain adequate competition.
 - Advance notices must not be used where security considerations prohibit such publication.
- 2) Federally Funded Research and Development Centers (FFRDC).

Before establishing a FFRDC or before changing its basic purpose and mission, the sponsor must transmit at least three notices over a 90-day period to the GPE and the Federal Register, indicating the agency's intention to sponsor an FFRDC or change the basic purpose or mission of the FFRDC.
- 3) Special notices.

Contracting Officers may transmit to the GPE special notices of procurement matters such as business fairs, long-range procurement estimates, prebid or preproposal conferences, meetings, and the availability of draft solicitations or draft specifications for review.
- 4) Architect-engineering (A&E) services.

Contracting Officers—

- Must publish notices of intent to contract for A&E services (unless exempted by FAR 5.202) when the total fee is expected to exceed \$25,000;
 - When the total fee is expected to exceed \$10,000 but not exceed \$25,000, must display a notice of the solicitation or a copy of the solicitation in a public place at the contracting office.
- 5) Effort to locate commercial sources under OMB Circular A-76.

When determining the availability of commercial sources under the OMB Circular A-76, the Contracting Officer must not arrive at a conclusion that there are no commercial sources capable of providing the required supplies or services until publicizing the requirement through the GPE at least three times in a 90 calendar-day period, with a minimum of 30 calendar days between notices. If it is an urgent requirement this can be reduced to 60 days with a minimum of 30 days between notices

- 6) Section 8 (a) competitive acquisition.

When a national buy requirement is being considered for competitive acquisition limited to eligible 8(a) concerns, the Contracting Officer must transmit a synopsis of the proposed contract action to the GPE.

E. EXCHANGES WITH INDUSTRY BEFORE RECEIPT OF PROPOSALS (FAR PART 15.201)

Exchanges of information among all interested parties, from the earliest identification of a requirement through receipt of proposals, are encouraged. Any exchange of information must be consistent with procurement integrity requirements. Interested parties include potential offerors, end users, Government acquisition and supporting personnel, and others involved in the conduct or outcome of the acquisition.

The purpose of exchanging information is to improve the understanding of Government requirements and industry capabilities, thereby allowing potential offerors to judge whether or how they can satisfy the Government's requirements, and enhancing the Government's ability to obtain quality supplies and services, including construction, at reasonable prices, and increase efficiency in proposal preparation, proposal evaluation, negotiation, and contract award.

Agencies are encouraged to promote early exchanges of information about future acquisitions. An early exchange of information among industry and the program manager, contracting officer, and other participants in the acquisition process can identify and resolve concerns regarding the acquisition strategy, including proposed contract type, terms and conditions, and acquisition planning schedules; the feasibility of the requirement, including performance requirements, statements of work, and data

requirements; the suitability of the proposal instructions and evaluation criteria, including the approach for assessing past performance information; the availability of reference documents; and any other industry concerns or questions. Some techniques to promote early exchanges of information are—

- (1) Industry or small business conferences;
- (2) Public hearings;
- (3) Market research, as described in Part 10;
- (4) One-on-one meetings with potential offerors (any that are substantially involved with potential contract terms and conditions should include the contracting officer; also see paragraph (f) of this section regarding restrictions on disclosure of information);
- (5) Presolicitation notices;
- (6) Draft RFPs;
- (7) RFIs;
- (8) Presolicitation or preproposal conferences; and
- (9) Site visits.

Electronic notices may be used to publicize the Government's requirement or solicit information from industry.

RFIs may be used when the Government does not presently intend to award a contract, but wants to obtain price, delivery, other market information, or capabilities for planning purposes. Responses to these notices are not offers and cannot be accepted by the Government to form a binding contract. There is no required format for RFIs.

FAR 5.205, Special Situations

Research and development (R&D) advance notices. Contracting officers may transmit to the GPE advance notices of their interest in potential R&D programs whenever market research does not produce a sufficient number of concerns to obtain adequate competition. Advance notices must not be used where security considerations prohibit such publication. Advance notices will enable potential sources to learn of R&D programs and provide these sources with an opportunity to submit information which will permit evaluation of their capabilities...

General information about agency mission needs and future requirements may be disclosed at any time. *After release of the solicitation, the contracting officer must be the focal point of any exchange with potential offerors.* When specific information about a proposed acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential offerors, that information must be made available to the public as soon as practicable, but no later than the next general release of information, in order to avoid creating an unfair competitive advantage. Information provided to a potential offeror in response to its request must not be disclosed if doing so would reveal the

potential offeror's confidential business strategy, and is protected under 3.104 or Subpart 24.2. When conducting a presolicitation or preproposal conference, materials distributed at the conference should be made available to all potential offerors, upon request.

F. PRE-PROPOSAL CONFERENCES (FAR PART 15)

The Government encourages exchanges of information among all interested parties. The purpose of exchanging information is to improve the understanding of Government requirements and industry capabilities. One technique to promote early exchanges of information is the pre-solicitation or pre-proposal conference.

The Contracting Officer and the Project Officer may decide that a pre-proposal conference is in the Government's interest. Whenever possible, notice of such a conference should be included in the RFP. If the decision is made after the RFP is issued, all recipients must be provided adequate notice of the time, date, location, purpose, and scope of the conference, and invited to submit questions in advance for inclusion on the agenda. The pre-proposal conference may be used to:

- Clarify complicated work statements;
- Disseminate background data that offer further insight into the size and complexity of the acquisition, as well as the risks of undertaking the project;
- Discuss anticipated difficulties during contract administration, including any exceptional demands on a prospective contractor's capacity and capability;
- Disclose any ambiguities, errors, or omissions in the RFP that may later be corrected in a written amendment; and
- Provide any additional information that is better presented at a conference or that may not have been known at the time the RFP was issued.

The pre-proposal conference is conducted by the Contracting Officer or a designated representative, with the Project Officer in attendance to provide support. The Contracting Officer is responsible for determining the agenda and ensuring that a record of conference proceedings is prepared for distribution to all recipients of the RFP, whether or not they attend the conference.

G. COMMUNICATION WITH OFFERORS DURING SOLICITATION PERIOD

To ensure that the competition is fair and equitable, every firm must be provided with the same information. Under no circumstances may any Government employee take any action that might give one firm an advantage over another.

In the interval between the time the RFP is published and the contract is awarded, only authorized acquisition personnel should have any contact with the offerors. The RFP gives the name of the Contracting Officer and states that only he/she represents the Government. All correspondence to prospective contractors (relating to this acquisition) must be signed by the Contracting Officer or the authorized representative, and all correspondence from prospective contractors (relating to this acquisition) must be received by the Contracting Officer.

FAR 15.201 states that exchanges of information between the Government and industry are encouraged at all stages of the process, but caution must be used to ensure no preference is given. Techniques that may be used include industry conferences, public hearings, pre-solicitation notices, draft Requests for Proposal (RFPs), Requests for Information (RFIs), pre-solicitation or proposal conferences, site visits, and one-on-one meetings with potential offerors.

If, for any reason, one offeror is given information that goes beyond what is contained in the RFP, the same information must be given to all other organizations responding to the solicitation. This must be done by means of a formal amendment that corrects, clarifies, or changes RFP requirements.

H. AMENDMENT TO THE SOLICITATION (FAR PART 15)

It may be necessary to amend the RFP for a variety of reasons, either before or after receipt of the proposals. For example:

- The Contracting Officer determines that material changes need to be made in the statement of work, terms, or conditions contained in the original solicitation; or quantities need to be increased or decreased;
- The Contracting Officer becomes aware that a number of potential offerors can be expected to be late, which would raise doubt as to whether adequate competition will be obtained. In this case, they may agree to extend the due date by amendment of the solicitation.

The Contracting Officer makes these determinations in full cooperation and communication with the Project Officer.

Amendments to solicitations increase administrative effort and costs, and they may delay contract award and performance. For this reason, they should be held to a minimum

through careful acquisition planning. When an amendment is unavoidable, the Contracting Officer must prepare and distribute it to all recipients of the RFP. Any amendment requires that the Contracting Officer must provide a reasonable time for potential offerors to respond to the change.

I. RECEIPT AND MANAGEMENT OF PROPOSALS (FAR PART 15)

Proposals received under a competitive procurement may be accepted only by the Contracting Officer. Their receipt should be recorded by time and date and they should be properly safeguarded by the Contracting Officer until the deadline for submission has passed.

No proposal received after the time and date specified in the RFP may be accepted unless it was:

- Received before award is made; and
- The Contracting Officer determines that accepting the late proposal would not unduly delay the acquisition and:
 - If it was transmitted through an electronic commerce method authorized by the solicitation, it was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals; or
 - There is acceptable evidence to establish that it was received at the Government installation designated for receipt of proposals and was under the Government's control prior to the time set for receipt of proposals; or
 - It was the only proposal received.

Generally, the types of biomedical or behavioral Research and Development acquisitions sponsored by HHS will be governed by an alternate provision on late proposals. This means that a proposal received after the specified date may still be considered if it is determined by the Contracting Officer, with the assistance of the Project Officer, or cost analysis personnel, to offer significant cost or technical advantages to the Government. The late proposal must be received before proposals are distributed for peer evaluation, or within five calendar days after the exact time specified for receipt, whichever is earlier, for the Contracting Officer to be able to make such a determination.

“However, a late modification of an otherwise successful proposal, that makes its terms more favorable to the Government, will be considered at any time it is received and may be accepted” (FAR 15.208(b)(ii)).

One of the most important administrative responsibilities of project and contract personnel during the pre-award period is to maintain the confidentiality of the proposals received. Unless offerors are assured that their data will not leak out to their competitors, they may be unwilling to provide the Government with technical data and other essential information about their operations. However, care must be taken when considering the use or disclosure of technical data to ensure that HHS has sufficient rights to use the data in the desired manner. To preclude the improper use or disclosure of the offerors' data, program personnel should familiarize themselves with HHS policy as described in FAR 15.207. The receipt, storage, and handling of proposals *must* be treated with all the safeguards necessary to prevent offerors from receiving information that might give them a competitive advantage.

Unless offerors are assured that their data will not leak out to their competitors, they may be unwilling to provide the Government with technical data and other essential information about their operations. However, care must be taken when considering the use or disclosure of technical data to ensure that the HHS has sufficient rights to use the data in the desired manner. To preclude the improper use or disclosure of the offerors' data, program personnel should familiarize themselves with the HHS policy.

In addition, project personnel must not reveal any information related to the identity of potential contractors, information concerning any proposal, or the status of any proposal in relation to others. Release of such information could jeopardize any resultant award and subject the persons involved to disciplinary action.

After the closing date, the Contracting Officer uses a transmittal memorandum to forward the technical proposals to the Project Officer or review panel chairperson for evaluation and to establish a date for receipt of the technical evaluation report. The Contracting Officer retains the business proposals until the technical evaluation report is completed.

J. PROPOSAL DISSEMINATION

After the RFP closing date, the Contracting Officer will forward technical proposals (including direct cost information), in accordance with local IC policy, to the organizational component responsible for the technical evaluation. The Contracting Officer will retain control of the business proposals until the technical evaluation report is completed.

After the technical evaluation meeting, all proposals must be accounted for by either disposing of them in a manner that preserves the confidentiality of the material, or filing in an appropriate manner.

K. REVIEW OF TECHNICAL PROPOSALS

The Department's policy is to select contractors on the basis of a competitive, objective review, and to document source selections thoroughly. This review is performed by a technical evaluation panel convened by the program office funding the procurement.

1. TECHNICAL EVALUATION PANELS

The technical evaluation panel reviews all proposals submitted in response to an RFP to determine which are technically acceptable. A technical evaluation panel is required for all acquisitions that are expected to exceed \$500,000. The Contracting Officer may require a technical evaluation panel for acquisitions that do not exceed \$500,000, depending on their complexity.

The technical evaluation panel is responsible for evaluating the original proposals; making recommendations to the chairperson regarding weaknesses and deficiencies; reviewing supplemental, revised, and/or final proposal revisions; and, if required, assisting the Contracting Officer during discussions and negotiations and reviewing supplemental, revised and/or final proposed revisions.

To the extent possible, the same evaluators should be available throughout the entire evaluation and selection process to ensure continuity and consistency in the treatment of proposals. It is usually necessary to conduct a second technical evaluation of proposals submitted as final proposal revisions. The following are examples of circumstances when it would not be necessary for the technical evaluation panel to evaluate revised proposals submitted during the acquisition:

- The answers to the questions do not have a substantial impact on the proposal;
- Final proposal revisions are not materially different from the original proposals, or
- The rankings of the offerors are not affected because the revisions to the proposals are relatively minor.

The chairperson, with the concurrence of the Contracting Officer, may decide not to have the panel evaluate the revised proposals. Whenever this decision is made, it must be fully documented by the chairperson and approved by the Contracting Officer.

Attendance by the evaluators is mandatory when the Contracting Officer considers the technical evaluation panel meeting to be necessary. When the chairperson determines that an evaluator's failure to attend the meetings is prejudicial to the evaluation, the chairperson may replace the individual after discussing the situation with the Contracting Officer and obtaining both his/her concurrence and the approval of the program official responsible for appointing the panel members. Whenever continuity of the evaluation

process is not possible, and either new evaluators are selected or a reduced panel is used, each proposal being reviewed at that stage of the acquisition should be reviewed by all members of the revised panel unless this is impractical because of the receipt of an unusually large number of proposals.

The technical evaluation panel should be composed of Government employees. Outside evaluators may be used when expertise is required that is not available within the Government, or as required by law. The research entities of DHHS are required to have a peer review of research and development projects in accordance with Public Law 93-352 as amended by PL 94-63; 42 U.S.C. 298 I-4. This legislation states that not more than one-fourth of the members of a peer review group may be officers or employees of the Federal government.

Business proposals are evaluated after the Contracting Officer has accepted the technical evaluation. Evaluations of business proposals are conducted only for those proposals that are in the competitive range. Although the panel's primary responsibility is to evaluate technical proposals, it also may be asked to comment on some aspects of the business proposal. Generally, these will be limited to quantitative elements of cost, such as the number of hours of a given skill required to accomplish a task, the amount and destinations for travel, etc. These cost elements will also help the technical evaluation panel judge an offeror's understanding of the requirement.

2. ROLE OF THE PROJECT OFFICER

As the Contracting Officer's technical representative for the acquisition, the Project Officer's responsibility is to recommend panel members who are knowledgeable about the technical aspects of the acquisition, and who are competent to identify the strengths and weaknesses of the various proposals. At least 50 percent of the program personnel appointed to a technical evaluation panel for any competitive solicitation must have successfully completed the basic Project Officer training course or its equivalent. This requirement applies to the initial technical proposal evaluation, as well as to any subsequent technical evaluations that may be required.

The determination of course equivalency must be made by the Head of Contracting Activity (not delegable) of the cognizant contracting activity. The Contracting Officer is responsible for ensuring that the Project Officer and technical proposal evaluators have successfully completed the required training.

If a panel member has an apparent or real conflict of interest related to a proposal being evaluated, that member must be replaced with another evaluator. If a suitable replacement is not available, the panel must perform the review with one less evaluator.

The Project Officer should submit the recommended list of panel members to an official within the program office in a position at least one level above the Project Officer, or in accordance with contracting activity procedures. This official reviews the recommendations, appoints the panel members, and selects the chairperson.

3. READING AND SCORING PROPOSALS

Normally the technical evaluation panel convenes to evaluate the proposals, unless the Contracting Officer decides this is not feasible or practicable.

When a panel convenes, the chairperson is responsible for keeping track of all copies of the technical proposals provided by the Contracting Officer. The chairperson generally distributes the technical proposals at the initial panel meeting and establishes procedures for securing the proposals whenever they are not being evaluated. After the evaluation is complete, all proposals must be accounted for by returning them to the Contracting Officer, destroying them, or filing them in a way that will maintain their confidential nature.

The Contracting Officer should address the initial meeting of the panel and state the basic evaluation ground rules. The Contracting Officer should provide written guidance to the panel if he/she is unable to attend the initial meeting. The guidance should include:

- An explanation of conflicts of interest;
- The necessity of reading and understanding the solicitation, especially the statement of work and evaluation criteria, before reading the proposals;
- The need for evaluators to restrict the review only to the solicitation and the contents of the technical proposals;
- The need for each evaluator to review all the proposals;
- The need to watch for ambiguities, inconsistencies, errors, and deficiencies that should be noted;
- An explanation of the evaluation process and what will be expected of the evaluators;
- The need for the evaluators to be aware of the requirement to have complete written documentation of the individual strengths and weaknesses that affect the scoring of the proposals; and
- An instruction directing the evaluators that, until the award is made, information concerning the acquisition must not be disclosed to any person not directly involved in the evaluation process.

Every evaluator should read each proposal, describe strengths and weaknesses, and develop preliminary scores in relation to each evaluation criterion set forth in the solicitation. The evaluators use either the rating sheets in the technical evaluation plan (discussed below) or rating sheets approved by the Contracting Officer when a technical evaluation plan is not required.

Each evaluator individually scores each proposal, judging the merits of each against the evaluation criteria published in the RFP. No factors other than those set forth in the RFP may be used.

After individual review, the evaluators should discuss in detail the strengths and weaknesses described by each evaluator. Evaluators may change their numerical scores at this time if they believe they have gained a new understanding of the requirements and the proposed approach. However, they should not feel pressured to make changes to conform to the group if they do not wish to do so. The panel collectively ranks the proposals. Generally, this is done by totaling the numerical scores assigned to the criteria by each evaluator, and developing an average rating for each offeror. Other methods are permissible, depending on the rating plan employed. In any case, numerical scores must be accompanied by a supporting narrative that discusses what was considered in the scoring.

When the proposals have been ranked, the evaluators should then identify each as either acceptable or unacceptable. A proposal may be rated as technically unacceptable if it does not meet a design or performance requirement, or if it deviates from the criteria set forth in the RFP. Predetermined cutoff scores cannot be used.

4. THE TECHNICAL EVALUATION REPORT

A technical evaluation report must be prepared and signed by all voting panel members for submission to the Contracting Officer. The report is maintained as a permanent record in the contract file. The report should reflect the ranking of proposals and identify each proposal as acceptable or unacceptable. The report must also include a narrative evaluation specifying the strengths and weaknesses of each proposal, a copy of the rating sheet and any reservations, qualifications, or areas to be addressed that might affect the selection of sources for negotiation and award.

The report also should include specific points and questions that are to be raised in discussions or negotiations. A determination of technical unacceptability must be supported with concrete technical data. The use of phrases such as “it could not be determined” and “sketchy presentation” is not adequate support for unacceptable ratings. The narrative forms the basis for later debriefings; therefore, specific references and terms must be used.

L. REVIEW OF R&D TECHNICAL PROPOSALS

The requirements for and the process of review of R&D technical proposals are detailed in NIH Manual 6315-1—Initiation, Review, Evaluation, and Award of Research & Development (R&D) Contract Projects. The following is presented as a brief summary of NIH Manual 6315-1.

Shortly after the receipt of proposals the scientific review administrator may convene a pre-review meeting with the Project Officer and the Contracting Officer to discuss review roles, responsibilities, potential problems, and areas of expertise needed to cover the major aspects of the technical proposals. The Project Officer must help the scientific review administrator and the Contracting Officer examine technical proposals before submitting them to peer reviewers to ensure that the proposals are complete.

The HHS policy is to select contractors on the basis of a competitive, objective peer review, and to document source selections thoroughly. This review is performed by a technical evaluation group convened by the responsible review organization.

The technical evaluation group must review all R&D proposals submitted and accepted in response to an RFP. The review staff has overall responsibility for the management of all phases of this technical evaluation review including: development, timely distribution, and implementation of guidelines for reviewers; selection and approval of reviewers; safeguarding confidentiality of materials; management of technical evaluation group meetings; and documentation of review group recommendations.

Selection of reviewers is also guided by conflict of interest considerations (i.e. any individual having a real or potential conflict of interest regarding any proposal cannot participate in the review). Proposed reviewers are selected from among those with appropriate training and experience in the fields of science and technology relevant to the subject matter of the project. Not more than 25% of the reviewers may be officers or employees of the Federal Government. Selection of reviewers is the responsibility of the review organization. A list of potential reviewers may be compiled by the responsible program area and submitted to the scientific review administrator before selection of the evaluation group.

The constituted technical evaluation group is responsible for: assessing each proposal under consideration in accordance with the technical evaluation criteria contained in the RFP; providing the scientific review administrator for the technical evaluation group with written evaluations of proposals, including appropriate comments on direct cost elements; providing a numerical score for each proposal; and recommending the proposals as acceptable or unacceptable.

1. ROLE OF THE SCIENTIFIC REVIEW ADMINISTRATOR AT THE TECHNICAL EVALUATION MEETING

The scientific review administrator for the technical evaluation group is the Government's official representative responsible for the general management of the review meeting. It is his/her responsibility to advise the technical evaluation group of pertinent portions of the conflict of interest regulations and confidentiality concerns with respect to the technical documents and proceedings. This individual must also explain proper review procedures. He or she must also provide to reviewers relevant portions of the project plan and technical portions of the RFP, including evaluation criteria or other program information, to assist reviewers in understanding the scientific rationale for the solicitation.

2. ROLE OF THE PROJECT OFFICER AT THE TECHNICAL EVALUATION MEETING

The Project Officer summarizes the background and objectives of the RFP to ensure the technical evaluation group's understanding of the intent of the RFP.

3. ROLE OF THE CONTRACTING OFFICER AT THE TECHNICAL EVALUATION MEETING

The Contracting Officer provides guidance to the reviewers regarding contract policy. The Contracting Officer presents policy and procedural information in regard to the contracting process, serves as a resource on procedural, legal, and administrative matters relevant to the contracting process, and ensures that all contracting regulations and policies are upheld.

4. RECOMMENDATION AND SCORING OF PROPOSALS BY THE TECHNICAL EVALUATION GROUP

When the discussion of each proposal has been completed and the strengths and weaknesses have been thoroughly covered, each reviewer must score the proposal utilizing the review criteria and then rate it as acceptable or unacceptable. A proposal is considered acceptable if it is reasonably complete, addresses all essential elements of the RFP, and shows that the offeror appears capable of meeting all essential requirements. A proposal is unacceptable when it has little or no scientific merit and cannot be made acceptable by meaningful discussions, and when there is no possibility of award without major modifications.

A separate signed score sheet is provided by each reviewer for each proposal; and an average score is computed from the individual score sheets. Reviewers will make additional comments and suggestions concerning the action to be taken with respect to the proposal, and any other significant technical or direct cost issues which will be useful in subsequent negotiations.

5. THE TECHNICAL EVALUATION REPORT

The scientific review administrator must prepare a Technical Evaluation Report for submission to the Contracting Officer and to be maintained as a permanent record in the contract file. Each report must contain a numerical score and identify each proposal as acceptable or unacceptable. The report must include a narrative evaluation specifying the strengths and weaknesses of each proposal with respect to each of the technical evaluation criteria, and any reservations, qualifications, or areas to be addressed that might affect the selection of sources for negotiation and award. The report should include any specific points and questions to be raised in discussions or negotiations. Concrete technical reasons supporting a recommendation of unacceptable must be included. The scientific review administrator, where applicable, must include in the report

a summary of the discussions concerning the ethical acceptability of procedures involving research with human subjects and animals, as well as suitability of the content of any proposed forms, questionnaires, and surveys (if applicable), and inclusion of women and minorities in clinical research.

M. EXCHANGES WITH OFFERORS AFTER RECEIPT OF PROPOSALS

As stated in FAR 15.306, during the evaluation process, communications between the agency and the offerors are extremely limited. This is particularly true in situations where award without discussion is contemplated. In this situation, offerors may only be given the opportunity to clarify certain aspects of proposals (e.g., the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor or clerical errors.

If a competitive range is to be established, communications are somewhat less restricted and:

- (1) Shall be limited to the following:
 - (a) Offerors whose past performance information is the determining factor preventing them from being placed within the competitive range. Such communications shall address adverse past performance information to which an offeror has not had a prior opportunity to respond; and
 - (b) Those offerors whose exclusion from, or inclusion in, the competitive range is uncertain.
- (2) May be conducted to enhance Government understanding of proposals; allow reasonable interpretation of the proposal; or facilitate the Government's evaluation process. Such communications shall not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, and/or otherwise revise the proposal. Such communications may be considered in rating proposals for the purpose of establishing the competitive range.
- (3) Are for the purpose of addressing issues that must be explored to determine whether a proposal should be placed in the competitive range. Such communications shall not provide an opportunity for the offeror to revise its proposal, but may address—
 - (a) Ambiguities in the proposal or other concerns (e.g., perceived deficiencies, weaknesses, errors, omissions, or mistakes; and
 - (b) Information relating to relevant past performance; and

- (4) Shall address adverse past performance information to which the offeror has not previously had an opportunity to comment.

N. DETERMINING THE COMPETITIVE RANGE (FAR PART 15)

Agencies shall evaluate all proposals solely on the factors and subfactors specified in the solicitation. Then, if discussions are to be conducted, the agencies must establish the competitive range. Based on the ratings of each proposal against all evaluation criteria, the Contracting Officer must establish a competitive range that includes all proposals most highly rated, unless the range is further reduced for purposes of efficiency pursuant to the paragraph below.

After evaluating all proposals in accordance with the standards above, the Contracting Officer may determine that number of most highly-rated proposals is too high for conducting an efficient competition. Provided the solicitation notifies offerors that the competitive range can be limited for purposes of efficiency, the Contracting Officer may limit the number of proposals in the competitive range to the greatest number that will permit an efficient competition among the most high-rated proposals.

If the Contracting Officer, after complying with the other FAR provisions, decides that an offeror's proposal should no longer be included in the competitive range, the proposal will be eliminated from consideration for award. Written notice of this decision shall be provided to unsuccessful offerors. Offerors excluded or otherwise eliminated from the competitive range may request a debriefing.

O. REVIEW OF BUSINESS/COST PROPOSALS

The Contracting Officer is responsible for evaluating business considerations, i.e., those factors relating to cost/price analysis and determination of contractor's responsibility (e.g., adequate financial resources, ability to comply with delivery or performance schedule, satisfactory record of performance, etc.). Business evaluations normally center around cost analysis and analysis of contractor's financial strength and management capability.

Each business proposal in the competitive range requires some form of price or cost analysis. The Contracting Officer must

Following receipt of the technical evaluation summaries from the scientific review administrator, the Contracting Officer, with the assistance of the Project Officer and cost analyst, as necessary, conducts an initial business evaluation of each proposal in the competitive range. This review consists of a preliminary evaluation of factors relating to cost/price analysis and determination of the offeror's responsibility.

This business evaluation normally centers around cost analysis and analysis of contractor's financial strength and management capability. It also considers budgetary issues raised in the peer review meeting. Comparisons of the Government Cost Estimate (developed with the Project Officer for the RFC) with proposal cost data and with technical factors and information about whether prices are realistic, help the Contracting Officer decide which proposals to include in the competitive range.

exercise judgment in determining the extent of analysis in each case. The record must be carefully documented to disclose the extent to which the various elements of cost, fixed fee, or profit contained in the contractor's proposal were analyzed. Elements considered in cost analysis generally include direct material and labor costs, subcontracting costs, overhead rates, general and administrative expenses, travel costs, and profit or fee. Elements considered in evaluating contractor's financial strength and management capability include:

- Organization
- Past performance on similar contractual efforts
- Reputation for reliability
- Availability of required facilities and personnel
- Cost controls
- Accounting policies and procedures
- Purchasing procedures
- Personnel practices (Equal Employment Opportunity, etc.)
- Property accounting and control
- Financial resources

In addition, adequacy of the contractor's facilities and key personnel critical to contract performance should be evaluated.

The Project Officer and/or the technical evaluation panel should analyze such items as:

- The number of labor hours proposed for various labor categories;
- The mix of labor hours and categories of labor in relation to the technical requirements of the project;
- The types, numbers, and hours/days of proposed consultants;
- The logic of proposed subcontracting;
- The proposed travel, including number of trips, locations, purpose, and travelers.
- The type and quantity of data processing.

Form NIH-2497—Project Officer's Technical Questionnaire—must be completed jointly by the Project Officer and the Contracting Officer during oral discussions of the cost proposal between those two officials prior to the start of negotiations with offerors in the competitive range.

The Project Officer and/or the evaluation panel should tell the Contracting Officer whether these elements are necessary and reasonable for efficient contract performance.

Exceptions to proposed elements should be supported in sufficient detail to allow the Contracting Officer to negotiate effectively.

In addition, the Contracting Officer must be concerned with general standards for responsible prospective contractors, such as:

- Does it have adequate financial resources to perform the contract, or the ability to obtain them?
- Is it able to comply with the proposed delivery or performance schedule?
- Does it have a satisfactory performance record?
- Does it have a satisfactory record of integrity and business ethics?
- Does it have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them?
- Does it have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them?
- Is it otherwise qualified and eligible to receive an award under applicable laws and regulations?

In addition, the Contracting Officer may request that the technical evaluation panel review cost or pricing data as a means of facilitating the decision about including a proposal in the competitive range. Situations that may make such a review necessary include:

- A suspected “buy-in” (i.e., a deliberately low bid made with the expectation that the resulting loss will be made up in modifications to the contract or in future contracts);
- Large difference in cost or price among the proposals;
- Proposals receiving a high technical rating that have relatively high costs; and
- Proposals receiving low technical rating that have relatively low costs.

The comparison of cost data with technical factors and information about whether prices are realistic should help the Contracting Officer decide which proposals to include in the competitive range.

P. DISCUSSIONS WITH OFFERORS AFTER ESTABLISHMENT OF THE COMPETITIVE RANGE

Negotiations are exchanges, in either a competitive or sole source environment, between the Government and offerors, that are undertaken with the intent of allowing the offeror to revise its proposal. These negotiations may include bargaining. Bargaining includes persuasion, alteration of assumptions and positions, and give-and-take. They may apply to price, schedule, or technical requirements, type of contract, or other terms of a

proposed contract. When negotiations are conducted in a competitive acquisition, they take place after establishment of the competitive range and are called discussions.

Discussions are tailored to each offeror's proposal and shall be conducted by the Contracting Officer with each offeror within the competitive range. The primary objective of discussions is to maximize the Government's ability to obtain best value, based on the requirements and the evaluation factors set forth in the solicitation.

The Contracting Officer shall indicate to or discuss with each offeror, still being considered for award, significant weaknesses, deficiencies, and other aspects of its proposal (such as cost, price, technical and past performance, and terms and conditions) that could, in the opinion of the Contracting Officer, be altered or explained to enhance materially the proposal's potential for award. The scope and extent of discussion are a matter of Contracting Officer judgment. In discussing other aspects of the proposal, the Government may, if the solicitation stated that evaluation credit would be given for technical solutions exceeding any mandatory minimums, negotiate with offerors for increased performance beyond any mandatory minimum.

If, after discussions have begun, an offeror originally in the competitive range is no longer considered to be among the most highly-rated offerors still being considered for award, that offeror may be eliminated from the competitive range, whether or not all material aspects of the proposal have been discussed or the offeror has been afforded an opportunity to submit a proposal revision.

Government personnel involved in the acquisition shall not engage in conduct that—

- (1) Favors one offeror over another;
- (2) Reveals an offeror's technical solution, including unique technology, innovative and unique uses of commercial items, or any information that would compromise an offeror's intellectual property to another offeror;
- (3) Reveals an offeror's price without the offeror's permission. However, the Contracting Officer may inform an offeror that its price is considered by the Government to be too high, or too low, and reveal the results of the analysis supporting that conclusion. It is also permissible, at the Government's discretion, to indicate to all offerors the cost or price that the Government's price analysis, market research, and other reviews have identified as reasonable.
- (4) Reveals the names of individuals providing reference information about an offeror's past performance; or
- (5) Knowingly furnishes source selection information.

1. PROPOSAL REVISIONS

The Contracting Officer may request or allow proposal revisions that clarify and document understandings reached during negotiations. At the conclusion of discussions, each offeror still in the competitive range shall be given an opportunity to submit a final proposal revision. The Contracting Officer is required to establish a common cut-off date for receipt of final proposal revisions. Requests for final proposal revisions shall advise offerors that the final proposal revisions must be in writing and that the Government intends to make award without obtaining further revisions.

2. NEGOTIATION

a. Developing Negotiation Objectives

Developing the Government's negotiation goals is a process that will require close coordination between the Contracting Officer and the Project Officer. They should discuss uncertainties or deficiencies included in the technical evaluation report for each proposal in the competitive range. Additional clarifying technical questions can be developed by the Project Officer. The management and cost or price questions should be prepared by the Contracting Officer with assistance from the Project Officer and cost analyst, as required.

The Contracting Officer (based on input from the technical evaluation group, the competitive range determination, Project Officer's Technical Questionnaire and additional coordination, and business audit review) is responsible for developing the Government's objectives and the strategy for meeting those objectives in contract negotiations. It is expected that the Contracting Officer will hold a pre-negotiation meeting with the Project Officer and other Government attendees to discuss negotiation goals and strategy and to develop a unified negotiating position. In establishing this strategy, the following should be considered.

- Subjects to be discussed
- Content and presentation of revised positions
- Requirements for support of positions
- All other technical procedures for reaching agreement

b. Technical and Business Discussions

Discussions give offerors an opportunity to clarify, correct, or support the proposals. They must therefore be meaningful and address the findings and recommendations from advisory and staff reviews, and may include judgmental cost and business

Because R&D contract awards are based usually on factors other than costs, technical and business discussions with offerors within the competitive range are a significant aspect of negotiations.

management responsibility issues as well as technical factors.

Either written or oral discussions may be conducted with each offeror determined to be among the most highly rated. In some cases, the Contracting Officer represents the Government in negotiating with offerors; in other cases there will be a negotiation team composed of those individuals with skills and backgrounds appropriate for the specific acquisition. In either case, the Contracting Officer shall be the focal point and control the discussions, with the other members present in an advisory capacity. The Contracting Officer may elect to have various members of the team lead the negotiations in particular areas. However, the Contracting Officer should always be in control of the overall negotiations.

Discussions are carried on separately with each offeror in the competitive range and may take the form of site visits. *The goal is to maximize the Government's ability to obtain best value, based on the requirement and the evaluation factors set forth in the solicitation.* There should be no reference in discussion with any offeror to the proposal of any other offeror. In fact, no offeror should even be told whether there are any other offerors.

The Contracting Officer shall point out to each offeror the ambiguities, uncertainties, and deficiencies, if any, in its proposal. Each offeror shall be given a reasonable opportunity to support, clarify, correct, improve, or revise its proposal. No offeror may be given information that will give a competitive advantage over other offerors.

The discussions shall aim primarily to identify proposal deficiencies and ambiguities, improve their clarity from both technical and business standpoints, and eliminate unnecessarily elaborate provisions exceeding HHS requirements. Discussions must not attempt to improve the quality of proposals up to levels of higher-ranking proposals, nor introduce new evaluation elements.

The Contracting Officer shall:

- Control all discussions;
- Advise offerors of deficiencies, ambiguities, errors and other uncertainties of the proposals; and
- Provide opportunity for offerors to submit technical, cost/price, or other corrections to satisfy the DHHS requirements fully.

In those processes, all personnel must avoid:

- Technical leveling, i.e., helping any offeror improve its proposal to the level of other proposals by discussing weaknesses resulting from the offeror's lack of diligence, competence, or inventiveness in preparing the proposal;

- Technical transfusion, i.e., disclosure of technical information from other proposals, resulting in improvement of a competing proposal; and
- Auction techniques, e.g.,
 - Indicating a price that an offeror must meet to obtain further consideration;
 - Advising an offeror of its price standing relative to other offerors; or
 - Providing information about other offerors' prices.

c. Competitive Range Site Visits

Competitive range site visits may be necessary to assess information regarding certain offerors' capabilities, resources, organization, physical facilities, etc., and to clarify necessary proposal details unfamiliar to evaluators and staff. Site visits are considered as included within the technical and business discussions. Contracting Officers should conduct site visits together with appropriate program staff since they generally involve, or at least can be construed to involve, oral discussions. Contracting Officers are responsible for conducting and documenting competitive range site visit discussions, although program staff take the lead in technical aspects of the proceedings, including selection of appropriate scientific or technical consultant reviewers to participate in the site visit. These may be Technical Evaluation Group members.

3. THE NEGOTIATION MEMORANDUM

The negotiation memorandum or summary of negotiations is a complete record of all actions leading to award of a contract. It is prepared by the Contracting Officer in sufficient detail to explain and support the rationale, judgments, and authorities upon which all actions were predicated. The memorandum documents the negotiation process and reflects the negotiator's actions, skills, and judgments in concluding a satisfactory agreement for the Government.

The Project Officer should assist the Contracting Officer in providing documentary evidence to support the justification for award.

Q. SELECTION

The FAR requires that the Contracting Officer select the source or sources whose proposal is the best value to the Government. As stated earlier, at the conclusion of discussions, each offeror still in the competitive range may submit a final proposal revision, which may be subject to a final evaluation by the technical evaluation panel and a cost/price analysis, as necessary. This final evaluation produces a ranking of proposals that aids in the selection of one (or more) offer that achieves the "best value" edict.

The Department does not specify a formal source selection procedure. Agency heads are responsible for source selection. In most cases the Contracting Officer is the source selection authority, unless the agency head appoints another individual for a particular acquisition or group of acquisitions. When the Contracting Officer makes the source selection it will be made on the basis of input from the Project Officer.

In some cases, where large and or potentially sensitive acquisitions are involved, the source selection authority will establish an evaluation team, tailored for the particular acquisition. The team will include appropriate contracting, legal, logistical, technical, and other expertise to ensure a comprehensive evaluation of offers.

In a formal source selection the evaluation panel will consist of technical personnel who are knowledgeable about the subject area and the project. They will evaluate and score the proposals and determine the proposals that are in the competitive range. The Project Officer usually chairs the panel. The panel's recommendations are then made to the source selection authority that is responsible for making the final selection decision.

Sometimes in more complex or highly visible project the Source Selection Authority (SSA) may appoint a source selection advisory counsel (SSAC). The SSAC represents disciplines that have an inherent interest in the project. They are usually personnel that represent various departments within the agency such as comptrollers, technical, contracting, legal etc. Their purpose is to advise the SSA on business and technical matters pertaining to the final source selection.

R. INFORMATION SECURITY AFTER SELECTION

In the case of acquisitions where the contractor will develop or have access to a DHHS information system, there are some additional steps building on the procedures followed before the solicitation is released, mentioned on Page III-38. Once the contractor is selected (but before the contract is awarded) the Project Officer and the Information Systems Security Officer must certify that the proposal received complies with the DHHS Automated Information Systems Security Program (AISSP) Handbook. See Exhibit IV-2 on Page IV-35 for the certification format.

The Contracting Officer will ensure the contract contains the appropriate provisions and clauses. One of the provisions will require the contractor to provide Non-disclosure Agreements for its employees that will have access to sensitive information, and the Project Officer is responsible for retaining copies of these agreements. See Appendix A for more information.

S. COMPLETION OF CONTRACT AWARD

The Contracting Officer is responsible for preparing the final contract document. The Contracting Officer coordinates with all parties to the negotiation to ensure that the final

document fully delineates the agreement reached at negotiations and is representative of the needs of the program office. The Contracting Officer reviews all the contract and file documents for completeness, accuracy, and compliance with requirements.

The Contracting Officer signs the contract on behalf of the Government. The contract becomes effective on the date signed by the Contracting Officer, unless otherwise specified in the contract. Finally, a copy of the fully executed contract is forwarded to the contractor, as well as to the Project Officer.

T. PUBLICIZING THE AWARD

1. GOVERNMENTWIDE POINT OF ENTRY

The Contracting Officer must transmit all required notices to the Governmentwide point of entry (GPE). The GPE; means the single point where Government business opportunities greater than \$25,000, including synopses of proposed contract actions, solicitations, and associated information, can be accessed electronically by the public. The GPE is located at <http://www.fedbizopps.gov>.

Except for contract actions described in FAR subpart 5.301(b) Contracting Officers must synopsise through the GPE awards exceeding \$25,000 that are:

- Subject to the Trade Agreements Act; or
- Likely to result in the award of any subcontracts.

The dollar threshold is not a prohibition against publicizing an award of a smaller amount when publicizing would be advantageous to industry or to the Government.

There are exceptions to publicizing awards such as:

- Security,
- Perishable subsistence supplies,
- Award for utility services, other than telecommunications, and only one source is available,
- Award as a result of an unsolicited research proposal that demonstrate unique ideas.

2. PUBLIC ANNOUNCEMENT

Federal regulations require the Contracting Officer to make information available on awards over \$3 million to the Department in sufficient time for an official announcement

by 5:00 pm (Washington, DC time) on the day of award. No information shall be released on such awards prior to this public release time.

3. NIH 1688 (CRISP) REPORTING

The NIH Form 1688-1 "Project Objectives" must be completed for every new R&D award. In some offices the Project Officer completes the 1688, while many offices have the contractor complete this form. In either case, it should be forwarded to the Contracting Officer who ensures that a copy is forwarded to the Office of Extramural Research and a copy is placed in the contract file.

4. NOTIFICATION TO UNSUCCESSFUL OFFERORS

a. Preaward Notices

- **Preaward notices of exclusion from competitive range.** The Contracting Officer shall notify offerors promptly in writing when their proposals are excluded from the competitive range or otherwise eliminated from the competition. The notice shall state the basis for the determination and that a proposal revision will not be considered.
- **Preaward notices for small business set-asides.** In addition, for a small business set-aside, the Contracting Officer shall, upon completion of negotiations and determinations of responsibility, but prior to award, inform each unsuccessful offeror in writing of the name and location of the apparent successful offeror.

b. Postaward Notices

- Within three days after the date of contract award, the Contracting Officer shall provide written notification to each offeror whose proposal was in the competitive range but was not selected for award (10 U.S.C. 2305(b)(5) and 41 U.S.C. 253b(3)) or had not been previously notified under paragraph (a) of this section.

U. DEBRIEFING UNSUCCESSFUL OFFERORS

Any Department employee who receives either a written or oral request for a debriefing from an unsuccessful offeror should immediately refer the request to the Contracting Officer. If the request is made orally, the Contracting Officer should require that the request be made in writing. The Contracting Officer must be present at all debriefings and must review written debriefings prior to release.

Preaward debriefing of offerors. Offerors excluded from the competitive range or otherwise excluded from the competition before award may request a debriefing before award (10 U.S.C. 2305 (b) (6) (A) and 41 U.S.C. 253b (f) - (h)).

- The offeror may request a preaward debriefing by submitting a written request for debriefing to the Contracting Officer within three days after receipt of the notice of exclusion from the competition.
- At the offeror's request, this debriefing may be delayed until after award. If the debriefing is delayed until after award, it shall include all information normally provided in a postaward debriefing.

Postaward debriefing of offerors.

- An offeror, upon its written request received by the agency within three days after the date on which that offeror has received notification of contract award, shall be debriefed and furnished the basis for the selection decision and contract award.
- To the maximum extent practicable, the debriefing should occur within five days after receipt of the written request. Offerors that requested a postaward debriefing in lieu of a preaward debriefing, or whose debriefing was delayed for compelling reasons beyond contract award, also shall be debriefed within this time period.
- An offeror that was notified of exclusion from the competition (FAR 15.505(a)), but failed to submit a timely request, is not entitled to a debriefing.

V. PROTESTS (FAR PART 33)

Offerors may object to an award by filing a protest with the Contracting Officer or higher authority. The Contracting Officer is primarily responsible for resolving it, with assistance from the Project Officer. Protests frequently occur when:

- A solicited source is provided with information on the acquisition requirements that is not provided to all other solicited sources;
- A program attempts to direct an acquisition to a sole source who is only one of a number of sources who might perform the work;
- One source improperly receives information on another's proposal during negotiation;
- Solicitation requirements are unnecessarily restrictive.

Protest regulations impose very tight time requirements on the Government to respond to inquiries and produce and prepare file documentation if the Government wants to receive a favorable opinion in the matter of a protest. Protests received before award prohibits the award action from taking place. The Project Officer, Contracting Officer, and other staff necessary to prepare protest documentation files shall be required to devote full and immediate attention to the protest issue until the matter is resolved.

EXHIBIT IV-1**Uniform Contract Format**

Section	Title
Part I—The Schedule	
A	Solicitation/contract form
B	Supplies or services and prices/costs
C	Description/specifications/work statement
D	Packaging and marking
E	Inspection and acceptance
F	Deliveries or performance
G	Contract administration data
H	Special contract requirements
Part II—Contract Clauses	
I	Contract clauses
Part III—List of Documents, Exhibits, and Other Attachments	
J	List of attachments
Part IV—Representations and Instructions	
K	Representations, certifications, and other statements of offerors or quoters
L	Instructions, conditions, and notices to offerors or quoters
M	Evaluation factors for award

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EXHIBIT IV-2.

Security Format After Selection, Before Contract Award

The Contracting Officer must obtain the following certification from the Project Officer and Information Systems Security Officer *prior to award* of a contract where, in whole or in part—

- The contractor will develop or have access to a DHHS information system, and
- The contract is subject to the security requirements of the DHHS information systems security program.

The following memorandum certifies that the proposal received from the apparent successful offeror complies with the security requirements of the DHHS Automated Information Systems Security Program (AISSP). Fill in necessary information. (Reference: Exhibit XIV-B of the DHHS AISSP Handbook.)

MEMORANDUM	
Date:	[Date]
From:	[Project Officer] and [Information Systems Security Officer]
Subject:	Certification that Proposal Received Complies With the DHHS AISSP
Reference:	[Project Title]
To:	[Contracting Officer]
<p>We certify that the proposal submitted by _____, dated _____, specifies appropriate security requirements necessary to comply with Office of Management and Budget (OMB) Circular A-130, Appendix III, "Security of Federal Automated Information Systems," and the DHHS Automated Information Systems Security Program (AISSP) Handbook.</p>	
Project Officer	Date
Information Systems Security Officer	Date

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SECTION V. POST-AWARD ADMINISTRATION

(FAR Parts 42-51)

POSTAWARD GOAL

Assure that purchased supplies and services are:

- ✓ **Delivered or performed when and where specified in the contract**
- ✓ **Acceptable, in terms of conforming to the contract's specifications or statement of work**
- ✓ **Furnished in compliance with other terms and conditions of the contract**

Contract administration involves ensuring that the contract is performed—as written—by both the contractor and the Government. No matter what type of contract is involved, a breakdown in administration can undo all previous achievements discussed in the other sections of this handbook. The Project Officer must monitor a contractor's progress closely and make known to the Contracting Officer potential problems that threaten performance so that remedial measures may be taken. Planning for effective contract monitoring begins in the acquisition planning stage.

The administration of a contract begins after contract award. It ends at closeout of the contract when performance is complete and accepted by the Government, and the contractor has received its final payment. Therefore, contract administration includes all the functions and duties relating to such tasks as:

- Monitoring the contractor's technical progress;
- Reviewing invoices for payment in accordance with contractual terms;
- Reviewing and directing the correction of the contractor's property control system controlling Government property;
- Consenting to subcontracts;
- Reviewing task orders;

- Overseeing contract modifications and terminations where authorized; and
- Performing other administrative tasks required by the contract.

Contract administration can be simple, or complex and time consuming, depending on the type of contract, contractor performance, and the nature of the work. For example, a fixed-price contract for commercial items requires relatively little post-award administration. In contrast, a cost-type contract requires careful technical surveillance and auditing of costs and imposes an administrative burden on both the Government and the contractor. No matter what type of contract is involved, however, it should be closely monitored. If technical or business problems are not solved before they disrupt the contractor's scheduled performance, the Government may find itself in a situation with either a pending termination or a forced contract modification. Either is a poor remedy, considering the lost time or unnecessary costs that could have been avoided if the Government had administered the contract properly.

A. LIMITATIONS ON THE PROJECT OFFICER

Contract administration is the responsibility of the Contracting Officer. The Contracting Officer is the only person who may modify the contract, or take any action to enter or change a contractual commitment on behalf of the Government. The legal responsibility for the contract rests with the Contracting Officer. He or she delegates certain authority to the Project Officer and holds the Project Officer accountable for exercising that authority properly. In fact, the Project Officer often is described as the Contracting Officer's technical representative (COTR), or by other similar terms.

In most cases, the Contracting Officer authorizes the Project Officer to perform the following functions in administering the technical aspects of the contract:

- Correspond directly with the contractor. Copies of all correspondence must be sent to the Contracting Officer. In situations where the Project Officer is not clear about the effect of the correspondence on contractual provisions, the correspondence should be cleared with the Contracting Officer in advance;
- Hold conferences with the contractor;
- Conduct on-site visits*;
- Approve all technical data submitted by the contractor;
- Provide technical direction, as authorized, in technical matters when such direction involves situations such as choosing from among

*It should be noted that certain ICs have specific requirements for the frequency of site visits and the composition of site visit teams.

alternate methods that are within the scope of work of the contract as written (technical direction must not affect cost, period of performance, or other terms and conditions of the contract);

- Provide technical monitoring during contract performance; and
- Issue letters to the contractor and Contracting Officer relating to delivery, acceptance, or rejection in accordance with the terms and conditions of the contract.

In addition to exercising delegated authorities, the Project Officer is expected to:

- Maintain a file documenting significant actions and containing copies of trip reports, correspondence, and reports and deliverables received under the contract; and
- Advise and assist the Contracting Officer, as necessary, in administering the business aspects of the contract—reviewing vouchers, invoices, reports, and deliverables; coordinating program office decisions as they bear on the contract; preparing final summary statements for contract closeout; and preparing contractor performance evaluations.

The Project Officer is not authorized to issue or approve changes in the contract or to enter into any agreement, contract modification, or any other matter changing the cost or terms and conditions of the contract.

B. COMMUNICATING WITH THE CONTRACTING OFFICER

The Project Officer functions *only* as the technical representative of the Contracting Officer. The Contracting Officer delegates certain contract administration functions to the Project Officer, but the legal responsibility for the contract remains with the Contracting Officer. The Project Officer functions as the “eyes and ears” of the Contracting Officer by monitoring technical performance, and reporting any potential or actual problems to the Contracting Officer. It is imperative that the Project Officer stays in close communication with the Contracting Officer, relaying any information that may affect contractual commitments and requirements.

The balance of this section discusses the myriad functions that contract administration entails, with special emphasis on the communication between the Project Officer and the Contracting Officer.

C. CONTRACT START-UP

Once a contract has been awarded, the Project Officer will be given a copy of the contract. The Project Officer's first responsibility is to read and understand the contract.

Government contracts are subject to essentially the same common law rules of interpretation applied to other contracts. Several of these basic rules are:

- The intent of the parties must be gathered from the whole contract.
- The provisions of a contract should not be interpreted so as to render one or more meaningless, unless otherwise impossible, and the interpretation that gives reasonable meaning to the whole document is preferred.
- The dominant purpose and the interpretation adopted by the parties will be used to ascertain the meaning of the contract provisions.
- Specific provisions prevail over general provisions when in conflict.
- A standard clause entitled "Order of Precedence" resolves inconsistencies within the contract provisions by assigning precedence in a specified order within the contract parts.
- An ambiguous provision susceptible to more than one interpretation will be interpreted against the party responsible for creating it—in Government contracts this is almost always the Government, as the contract provisions are normally prepared by the Government.

Equally important to the performance of Government contracts, or more aptly the risk thereof, are the specifications or statement of work that the contractor must meet. Contract specifications dictate the nature and degree of performance to be undertaken by a contractor. When the specifications are accurate, complete, and realistic the only issue is contractor performance or, more properly, attributing the responsibility for a performance failure to either the Government or the contractor.

On the other hand, where specifications are shown to be defective or are such that performance is impossible, the contractor may either be excused for lack of performance or may be entitled to additional compensation if the cost of performance is increased.

Similarly, a mutual mistake of fact may result in an adjustment to the contract price. In this situation, there must be a mistaken concept by both parties as to a material fact that results in performance being more costly. In order for the contractor to recover the extra cost of performance, the contractor must show that the contract did not allocate to it the risk of such a mistake. In addition, contractor must show that the Government received a

benefit from the extra work for which it would have been willing to contract had the true facts been known.

1. STANDARD CONTRACT CLAUSES

Department contracts contain clauses applicable to that particular contract that are incorporated by reference. The Project Officer should understand what these clauses require. They can be found in either the FAR Part 52 or the Department's regulation.

2. POSTAWARD ORIENTATION

The fundamental task of Government contract administrators is to ensure that the contractor fulfills its obligations. Post-award orientation is a useful tool for ensuring good contractor performance by:

- Achieving a clear and mutual understanding of all contractual requirements;
- Clarifying contract administration and quality assurance procedures that will be applied;
- Clarifying the roles of Government personnel who will be involved in administering the contract; and
- Identifying and resolving potential problems.

In relatively simple acquisitions, post-award orientation may be accomplished in a letter. This letter should identify the Government representative responsible for contract administration. It should also cite clearly any special or unusual requirements, such as production tests, special reports, and subcontracting consent requirements.

When an analysis shows that the contractor may not have a clear understanding of all the requirements of the contract, or when there are other existing or potential problems that may adversely affect contract performance, the Contracting Officer may decide that a post-award orientation conference is necessary.

Post-award conferences should be preceded with a meeting of all the Government personnel who have administrative responsibilities for the contract. This advance meeting is intended to establish a coordinated Government position regarding the agenda and the specific responsibility of each Government representative participating in the conference. The agenda should cover all matters that need to be clarified or otherwise discussed with the contractor to avoid a misunderstanding of the contract requirements. These matters might include:

- Clarification of the specifications or the contents of the statement of work;

- Quality assurance and testing requirements;
- Special contract provisions;
- Reporting requirements;
- Procedures for monitoring and measuring progress; and
- Billing, voucher, or invoice approval, and payment procedures.

If the Contracting Officer does not chair the orientation conference, this responsibility can be delegated to the Project Officer. The conference should be conducted in a businesslike manner. Both parties have an existing contractual relationship and the purpose of the conference is to promote accurate understanding of the contract, not to alter it.

Post-award orientation of subcontractors is the responsibility of the prime contractor. If Government personnel attend a subcontractor orientation conference, they should recognize that the Government has no privity of contract with the subcontractor. Therefore, all instructions, interpretations, or other contractual dealings with the subcontractor are the business of the prime contractor, not the business of the Government.

3. PROJECT OFFICER WORK PLAN

An important tool for the Project Officer in the contract administration phase is the Project Officer work plan. It can range from the simple to the complex, and should be a straightforward description of events and activities that the Project Officer needs to be cognizant of in order to properly monitor the contract. The plan will be drawn from lists of deliverables, reporting requirements, Government Furnished Property clauses, etc. See Exhibit V-1 (Page V-31) for a sample work plan format.

D. GOVERNMENT CONTRACT QUALITY ASSURANCE (FAR PART 46)

Before services or supplies furnished by the contractor can be accepted, the Project Officer must determine acceptability by review, test, evaluation, or inspection. He or she reports the results to the Contracting Officer.

Final acceptance by the Contracting Officer of supplies tendered or services rendered concludes performance by the contractor, except for administrative details relating to contract closeout. After final acceptance, the contractor can no longer be held responsible for unsatisfactory effort, unless otherwise specified in the contract. Therefore, the Project Officer must ensure that the work performed under the contract is measured against the contract quality requirements. If performance does not meet contract quality requirements, it is incumbent upon the Project Officer to identify deficiencies and to

advise the Contracting Officer. This allows remedial action before final payment and contract closeout.

E. CONTRACT MONITORING

The contractor has primary responsibility for performance of the contract, but the Project Officer and the Contracting Officer have a vested interest in continually monitoring contractor performance. Unsatisfactory performance under a contract may jeopardize a project and even an entire program.

Contract monitoring varies considerably both in intensity and in methodology, depending on the importance and size of the contract effort, as well as the type of contract. Cost-reimbursement-type contracts generally warrant closer monitoring because the Government's risk is higher than under a fixed-price contract.



In monitoring a contractor's performance, the Government is primarily interested in progress toward completion of the specified requirements and the financial status of the contract. One valuable tool in this area is reporting requirements. The Government, in the contract document itself, may require the contractor to provide just about any type of report conceivable. It must be remembered, however, that the Government is paying, as part of the contract price, for any reports required of a contractor. Reports are discussed in greater detail below.

Additional information may also be obtained in the form of letters and phone calls between the contractor and Project Officer and Contracting Officer. Visits to the contractor's facilities are sometimes necessary to evaluate the contractor's performance. However, it is important to maintain a reasonable balance. Although the Government has a right and a duty to monitor contractor performance, Government personnel may be subject to charges of interference in the contractor's operation or of making unreasonable demands if discretion is not used in this area.

1. REPORTS AND OTHER DELIVERABLES

a. Technical Progress Reports

Progress reports should include all relevant details to provide Project Officers with most of their information on the progress of the work. However, they should not become too burdensome to prepare. Technical progress reports may be submitted in letter format. The letter may include the number and names of persons working on the project; the facilities devoted to the work; the number of person-days expended; the direction of the work; and

the latest observations, problems encountered, predictions, and plans for the next reporting period.

Contractors should be encouraged to furnish preliminary technical information in these status reports even though it is tentative and not ready for widespread distribution. Researchers are often reluctant to commit themselves to premature technical conclusions, and it may be necessary to assure the contractor that the Department will treat its technical progress information as privileged communications.

In addition to keeping the Project Officer informed of progress, the technical progress report gives the contractor an opportunity to stop periodically and evaluate its efforts in terms of the intent and specifications of the contract. The necessity for writing and analyzing progress reports forces both the contractor and the Project Officer to periodically evaluate the work in relation to all contractual requirements.

b. Clinical Population Reports

If a contract involves clinical research, the Project Officer is responsible for annual submission of data on the gender and racial/ethnic composition of all clinical study populations to their IC Planning and Evaluation Officer. The Project Officer, in consultation with the Contracting Officer, must develop study-specific reporting requirements to ensure that the contractor submits the required data. Details of reporting requirements are contained in NIH Manual Chapters 7110 and 7120.

c. Invention Reports

An invention is any discovery that is or may be patentable or otherwise protectable under Title 35 of the United States Code, or any novel variety of plant that is or may be protected under the Plant Variety Protection Act (7 U.S.C. 2321, et seq.). The contractor is required to disclose to the Government any invention the contractor conceived or first actually reduced to practice in the performance of work under a contract, provided that in the case of a variety of plant, the date of determination (as defined in section 41(d) of the Plant Variety Protection Act, 7 U.S.C. 2401(d)) must also occur during the period of contract performance (see FAR 27.3 and 52.227-11). The Project Officer must report to the Contracting Officer and the Extramural Inventions Office, OER, any invention he/she thinks has occurred during the contract to ensure that patent rights are protected.

d. Financial Status Reports

Financial reports are an important element in contract administration, especially in cost-reimbursement contracts. They reveal the financial status of the contract and provide information that is helpful in avoiding or anticipating cost overruns. Financial reports provide both the Project Officer and the Contracting Officer with a means of checking the contractor's expenditures based on cost elements. They also enable them to match costs incurred with technical results achieved.

The amount of detailed financial information required will vary, depending on the type of contract involved, the nature of the work or services being procured, and the method of payment. Under a cost-reimbursement contract, the contractor is entitled to full and prompt payment for all incurred allowable, allocable, and reasonable costs, without any holdback by the Government pending completion of performance. Therefore, cost-reimbursement contracts require close monitoring by the Project Officer. The Government does not pay excess costs for the end product either because of a contractor's inefficiency (e.g., missed schedules, unacceptable reports, etc.), or as a result of unforeseen problems, which, if promptly addressed, could prevent excess costs.

Contract cost and work force reporting is required on all cost-reimbursement type contracts that are financed under letter of credit, regardless of dollar value, and on all other cost-reimbursement type contracts of \$100,000 or more. Financial and manpower information may be submitted either as a separate contract financial report or as an addendum to an invoice, as prescribed by the contract. The frequency, format (including instructions), extent, and structure (including cost elements, labor categories, and hours expended by the contractor) must be prescribed in all applicable RFPs and contracts.

e. Deliverables

A deliverable is any item or service that the contractor is contractually obligated to deliver to the Government during the contract period. The Project Officer is responsible for determining whether supplies or services delivered by the contractor conform to the contract quality requirements. In discharging this responsibility, the Project Officer should keep in mind that, once a contractor's work has been accepted, the contractor is excused from further performance or correction should it prove to be unsatisfactory.

In many Department contracts, the end result or deliverable is a report or an instrument, such as a survey. The Project Officer is responsible for conducting a technical review of the report, comparing it to the requirements set forth in the contract statement of work and applicable specifications. Where appropriate, the Project Officer should solicit the comments and concurrence of other appropriate technical experts and/or from other affected program officers. Any required revisions must be transmitted to the contractor over the signature of the Contracting Officer.

In the event that the work is termed unsatisfactory, the Project Officer and the Contracting Officer must determine what further actions are required, asking the advice of legal counsel if necessary. The Project Officer should provide written notification to the Contracting Officer when the contract work has been judged complete and technically acceptable, so that the Contracting Officer can communicate acceptance to the contractor.

2. SITE VISITS

Site visits may be unnecessary for small, straightforward contracts, but when a contract is large and complex, they are indispensable.

Although there are no specific requirements for the performance of postaward site visits, certain ICs have requirements of their own which must be met by Project Officers, who should familiarize themselves with any requirements mandated by their own ICs.

Strictly speaking, site visits should be conducted jointly by the Contracting Officer and the Project Officer, but as a practical matter site visits are often delegated to the Project Officer. However, the Contracting Officer should clear site visits, whether or not a representative from the contracting office is making the site visit. A site visit is usually arranged in advance with the contractor. In rare cases, there may be a reason to make an unannounced visit, but these situations require careful consideration and should have the explicit approval of the Contracting Officer.

The purpose of a site visit is to check the contractor's performance. Reasons for making a site visit include:

- Checking actual contract performance against scheduled and reported performance;
- Identifying any scientific or technical problems that could seriously affect the overall program objectives or schedule (If major problems are identified, the Project Officer should notify the Contracting Officer);
- Seeing if the facilities and working conditions are adequate; and
- Verifying that the number of employees charged to a cost-reimbursement contract is the number of people actually performing work under the contract. For example, if the voucher shows 10 people assigned to the contract full-time, the Government representative making a site visit should verify that these individuals are actually working on the contract.

3. REVIEWING VOUCHERS

When a cost-reimbursement contract is awarded, contractors are required to submit a voucher to the Department, usually every month, using (Standard Form) SF-1034 or SF-1035, "Public Voucher for Purchases and Services Other than Personal" (see Exhibit V-2, Page V-33). In lieu of SF-1034 and SF-1035, claims may be

Usually on a monthly basis, R&D contractors who are not on letters of credit are required to submit invoices (vouchers) to the Department.

Normally the contract calls for the original invoice to be submitted to the Division of Financial Management, NIH, concurrently with copies to the Contracting Officer.

submitted on the payee's letterhead or self-designed form provided that it contains the information shown on the sample invoice/financing request included in the RFP.

The Project Officer is responsible for reviewing these vouchers to assess the reasonableness of the costs claimed and relate the total expenditures to the physical progress of the contract, based on monitoring activities such as meetings, site visits, progress reports, etc. Any significant disparity between progress and expenditures may indicate the contractor is in trouble, and should be immediately brought to the attention of the Contracting Officer.

For cost-reimbursement contracts, where the work is budgeted by phase or task, approval of vouchers is controlled by these incremental limitations; therefore special care must be exercised to assure that costs are not incurred prematurely.

All contractor's vouchers submitted to the Project Officer by the Contracting Officer for review will contain the following certification: "Materials and/or services have been received and are acceptable in accordance with the terms of the contract." The Project Officer must attest to this statement. The Project Officer must review, sign, and return these vouchers to the Contracting Officer within three days.

All invoices submitted to the Project Officer must be reviewed within five calendar days to determine if the expenditure rate is commensurate with technical progress. If it is, the Project Officer must then sign or stamp the copies "Recommended for Approval" and return one copy to the Contracting Officer.

Invoices for fixed price contracts are processed for payment after approval of the Project Officer. Vouchers for cost-reimbursement contracts are immediately submitted to the payment office upon receipt by the Contracting Officer. A copy is provided to the Project Officer for concurrent review. When deliverables are late, the Contracting Officer withholds payment until the deliverables have been submitted

Contract cost and work force reporting are additional financial reports discussed under Financial Status Reports.

4. TASK ORDER MANAGEMENT

A very popular form of contracting that requires special administrative procedures is task order contracting. Under a task order contract, which may be awarded to one vendor or to multiple vendors, the work statement for the contract is often very general, requiring the specifics of each job to be written into specific task orders. This structure, while providing maximum flexibility, puts something of an administrative burden on the Project Officer, since a work statement must be developed for each task order situation, and frequently the price of the task orders must be individually negotiated, and, of course, the administration of each task order is separate from the administration of every other task order.

The best way to understand task orders is to conceptualize them as separate "mini-contracts" written within the broad "umbrella" of the "mother contract." The flexibility

that these contracts provide to the agency is that many groups within the agency may be able to take advantage of the task order contract, write unique task statements, and administer their task orders individually.

Task order contracts are usually limited in three ways. One limitation is on the type of work that is included in the work statement, which may be restricted to certain work skills or may be so broad as to encompass any activity supporting a program area. The second limitation is a level of effort, usually stated in person-hours terms or in overall dollar amounts. Third, the duration of the contract, including options, is normally limited to five years.

As a task order manager, each Project Officer may be able to experience the entire acquisition cycle as the developer of a task statement, a key advisor to the Contracting Officer in negotiating the terms and price of the task order, and in administering the task order to successful completion.

F. INADEQUATE CONTRACTOR PERFORMANCE

In a delinquency or default situation, contractor performance is delayed, inadequate, or both. Project Officers must thoroughly understand the rights and responsibility of both the Government and the contractor so that they will do nothing that might be considered prejudicial to either party.



When unsatisfactory contract performance is identified, the Project Officer must notify the Contracting Officer promptly so remedial steps can be taken. Silence on the part of the Government could be interpreted by the contractor as Government acceptance of performance, which may differ from that stated in the contract. Such situations could adversely affect the Government's right to withhold payments, terminate for default, or otherwise exercise certain rights under the contract.

Unsatisfactory performance can be considered in degrees. The Government's actions can be oriented to correct the unsatisfactory performance or to protect the Government's interest in the event of a contractor's default. Depending upon the Contracting Officer's evaluation of the seriousness of the unsatisfactory performance he/she may:

- By letter or through a meeting, bring the particular deficiency to the attention of the contractor and obtain a commitment for appropriate corrective action;
- Extend the contract schedule if excusable delays in performance are involved;
- Stop or suspend work in order to resolve problems before proceeding;

- Withhold contract payments in cases where the contractor fails to comply with delivery or reporting provisions of the contract; or
- Terminate the contract for default (all or part of the work).

After a complete review of the situation, the Contracting Officer may send a notice of failure of performance to the contractor. This notice, which officially notifies the contractor of the delinquency, requires the contractor to inform the Contracting Officer of the cause(s) of the delinquency so that a proper determination can be made concerning continuation or termination of the contract.

Without express authority from the Contracting Officer to the contrary, the Project Officer should have no contact with the contractor during this period. Any action that might encourage the contractor to continue performance may have the effect of waiving the Government's rights under the contract.

1. WITHHOLDING PAYMENT

All Government contracts contain a clause allowing the Government to withhold payments. A contractor's failure to either submit a report, or to perform or deliver services, or work when required by the contract, is to be considered default in performance. In either circumstance, the Contracting Officer is directed to immediately issue a formal "cure notice." It includes a statement that contract payments will be withheld if the default is not "cured" or is not determined to be excusable. A "cure notice" is a formal notice from the Contracting Officer pointing out a deficiency in contractor performance and directing that it be "cured" within a specified time—usually 10 days.



If the default is not determined to be excusable or a response is not received within the allotted time, the Contracting Officer initiates withholding action on all contract payments and determines whether termination for default or other action would be in the best interest of the Government.

When determination is made that contract payments should be withheld, the Contracting Officer should immediately notify the contractor, in writing, that payments have been suspended until the default or failure is cured.

2. TERMINATIONS—NONCOMMERCIAL ITEMS (FAR PART 49)

Situations may arise when the work contracted for does not run to completion. Two standard contract clauses are designed to cover this eventuality: the "Termination for Convenience of the Government" clause and the "Default" clause. Both types of terminations can be either partial or complete (i.e., all or any part of the work can be subject to the termination). The portion of the contract that is not terminated, must be completed by the contractor. The contractor has no contractual right to decide that the

remaining work is insufficient to merit its attention and then opt not to continue with it. No matter what type of termination is issued, or the extent of the terminated portion of the work, the decision to terminate is a unilateral right of the Government.

a. Termination for Convenience

The Termination for Convenience clause gives the Government the right to cancel a contract when to do so is in the best interest of the Government, notwithstanding the contractor's ability and readiness to perform.

Termination for convenience requires that a financial settlement be made for the work that has been accomplished under the contract up to the effective date of the termination.

Settlements may be reached by one or a combination of the following methods:

- Negotiated agreement;
- Determination of the Contracting Officer; and
- Costing out under invoices or vouchers (in the case of costs under cost-reimbursement contracts).

Following the termination, the Government and the contractor may need to reach an agreement on an equitable settlement. The Contracting Officer evaluates the contractor's settlement claim and establishes the Government's position with respect to the various elements of cost or price included. A cost or price analysis must be performed and, in some cases, the contractor's books and records must be audited. A memorandum documenting the negotiations must be placed in the contract file.

b. Termination for Default

The Termination for Default clause allows the Government to terminate the contract when the contractor fails to make progress with the work or to perform any other contract requirements within the period provided by a "cure notice." The detailed conditions under which a contract may be terminated for default, and the procedures for doing this are set forth in FAR Part 49. Once a Contracting Officer has determined that it is necessary to invoke the Termination for Default clause, the Project Officer should have no further contact with the contractor unless specifically directed to do so by the Contracting Officer.

3. TERMINATIONS—COMMERCIAL ITEMS

Terminations for commercial items are for **convenience** or **cause**. Termination for convenience or cause is governed by FAR 52.212-4. FAR Part 49 does not apply.

G. CONTRACT MODIFICATIONS (FAR PART 43)



A contract modification is any written change in the terms of the contract, i.e., SOW, period of performance, quantity, price or other provisions of a contract, whether accomplished in accordance with a contract provision or by mutual agreement of the parties. During the contract life, different types of modifications may be necessary to incorporate new requirements or to handle problems that develop after contract award. Contract modifications must be made in writing by the Contracting Officer in order to preclude misunderstanding between the parties concerning work to be performed.

1. TYPES OF MODIFICATIONS**a. Modifications Made Pursuant to Contract Clauses**

Various contract terms and provisions provide for modifications to a contract if certain conditions arise or if information not known at the time of contract award becomes available. For example, the Government Furnished Property clause provides for equitable adjustment of the contract estimated cost and performance dates in the event the property furnished by the Government is not suitable for the intended use. The Limitation of Cost clause used in cost-reimbursement contracts permits funding of cost overruns, when authorized.

b. Supplemental Agreement (Bilateral Modification)

A supplemental agreement is a bilateral modification of the contract that either adds work or revises the existing terms of the contract. Such agreements may have cost implications. Supplemental agreements are generally used under the following circumstances:

- To provide an equitable adjustment when a change order has been issued pursuant to the Changes clause, Government-furnished Property clause, and other clauses or special provisions of the contract;
- When it is necessary to change the contract price, delivery schedule, quantity, or other terms of the contract;
- When the Government wishes to modify a contract and the proposed modification is for work that is an inseparable part of the original procurement;
- To finalize the settlement agreement when a contract has been terminated for convenience of the Government; and
- To permit a contractor to complete a contract after a non-excusable delay when the contractor assumes liability for actual damages.

c. **Modifications Involving New Acquisition Actions**

Before initiating a modification, it is necessary to determine that it is **within the scope** of the existing contract rather than a “new procurement” outside the scope of the contract. A “new procurement” must be conducted as a separate procurement action.

If the work you wish to add to your contract is outside the scope, then it must either be competed or approved for “other than full and open competition”. The work cannot be awarded automatically to a contractor simply because the contractor has a current contract with the Department. If the new procurement is to be awarded noncompetitively, it must be justified as a noncompetitive procurement. See Section II.I (Page II-38) regarding JOFOCs.

2. **CONSIDERATION FOR CONTRACT MODIFICATION**

Generally there must be consideration whenever a contract is modified. “Consideration” is the benefit each party confers upon the other for the modification.

Although contract modifications usually result in price/cost increases, they may sometimes result in price/cost reductions. The requirement for consideration, as set forth in various decisions of the Comptroller General, is that no officer or employee of the Government may alter a contract to the prejudice of the Government unless the Government receives corresponding, tangible, contractual benefits. Thus, there is no such thing as a “no cost” extension to the period of performance of a contract. If the Government allows a longer period of time for delivery, the “cost” to the Government is its right to delivery of the product or service by the date agreed upon. The law requires the contractor to provide some form of consideration for the Government giving up of that right.

Certain administrative changes may be made without consideration provided the contractor’s rights are not affected; e.g., change in the appropriation data or a change in the paying office, etc. Once a valid contract is executed, no adjustment can be made to contract terms merely because it may appear, in retrospect, that either the contractor or the Government has made a “bad bargain.”

3. **PROCESSING CONTRACT MODIFICATIONS**

Requests for **unilateral modifications** are initiated by the Government. Unilateral modifications (such as administrative changes or exercise of the provisions of the Changes clause) are within the authority of the Contracting Officer, without agreement from the contractor. Modifications resulting from bilateral modifications can be initiated by a written request from either the Government or the contractor. For these bilateral modifications the Project Officer must prepare a supporting memorandum to document the need for the modification and to provide other appropriate information necessary to process it. The memorandum should contain the following information.

- The number of the contract being modified and the modification number
- The contract title (project identification)
- The complete name and address of the contractor
- The names, mailing addresses, and telephone numbers of the project and alternate Project Officers
- The type of modification recommended
- The basis for the modification (Explain the circumstances— e.g., who, what, when, where, and why— that resulted in the need for the modification and the reasons why a modification should be made)
- A brief description of the contractor's performance, as well as the identification of any known problem areas
- An independent Government estimate of cost for the modification
- The estimated total time necessary to accomplish the required services
- A complete description of the work to be changed or modified

Contract modification concurrence must be obtained to the extent that such modifications result in new or additional requirements that are subject to a concurrence. For example, a new report format used by 10 or more respondents would require OMB approval. The Contracting Officer must advise Project Officers of the need for such concurrence.

H. CHANGE ORDERS (FAR SUBPART 43.2)

The contract clause entitled *Changes* distinguishes Government contracts from other contracts by the control over performance vested in one of the contracting parties—the Government.

Unlike contracts in the private sector where performance must conform to pre-agreed terms in the absence of a modification issued by both parties, the changes clause in a Government contract allows the Government to alter the work to be performed without the consent of the contractor.

The clause provides, in essence, that the Contracting Officer may by written order make any change in the work within the general scope of the contract. Such changes may result also in an appropriate upward or downward equitable adjustment in the contract price, delivery schedule, or time for performance. Additionally, the clause provides that a dispute over the equitable adjustment is a question of fact under the "Disputes" clause, and that nothing in the Changes clause excuses the contractor from proceeding with the contract as changed. This power, unique to Government procurement, allows the Contracting Officer to alter performance without unnecessary interruption and to subsequently determine the appropriate contract price adjustment.

The changes clause imposes certain requirements for issuing a valid change order. The clause states that the change must be ordered by the Contracting Officer and must be made by written order. One of the more important requirements is that the change ordered must come within the general scope of the contract.

The "Changes" clause addresses only the Government's unilateral right to order changes; the provision is silent with respect to changes suggested by the contractor.

Contractor-suggested changes may be accomplished either by issuance of a "change order" in response to the contractor's request if the change is otherwise "within the scope of the contract," or by noncompetitive modification if the change goes beyond the scope of the contract.

Adjustments to the performance requirements of NIH contracts, particularly those with educational institutions, often result from suggestions initiated by the contractor or from mutual agreement of the parties.

Before the Contracting Officer invokes his/her unilateral authority under the "Changes" provision, or responds to a contractor's request to issue a change order, a distinction must be made between changes "within the general scope of the contract" and "cardinal" or "material changes," which constitute new work requirements and go beyond the general scope of activities described in the original contract specification. In general, a variation of the way in which an activity is performed is a specification change, whereas an increase in the activity itself is new work. In some circumstances, a variation in the way an activity is performed can result in increased activity and still be regarded as a change. The language "within the general scope of the contract," refers to variations of some requirements that could have been readily agreed to by the parties at the time of contract formation without impacting on competition (i.e., changes in specifications, method of shipment, and place of delivery). Similarly, new work may not be added by a change order which should have been part of the contract initially and which impacts on competition.

Though these specific requirements are included in the Changes clause and are thus a part of the contract, courts and various appeals boards have acted in such a way so as to negate or modify some of the requirements. This is especially true in the area of **constructive changes**.

I. CONSTRUCTIVE CHANGES

A **constructive change** arises whenever, by informal action or inaction of the Government, the situation of the contractor is so altered as to have the same effect as though an order had been issued under the Changes clause. The term is derived from the verb “to construe”—not from “to construct.” Thus, the constructive change is a situation that can be construed as having the effect of a change order.

There are several ways in which a constructive change occurs. The list provided below is not all-inclusive. This is an area of equity or fairness—and fairness depends greatly on the situation. An action by the Government may lead to a successful claim by a contractor under such principles—but in a very similar situation, the claim will be successfully defended by the Government.

a. Common Causes of Constructive Changes

The following are the most common ways in which a constructive change can occur.

- Inadequate (latently defective) requirements documents
- Improperly interpreted specifications
- Overly strict inspection
- Failure to recognize delays caused by the Government
- Technical defects in the Change Order process
- Improper technical direction

If **requirements documents are defective** in such a way that reasonable review prior to preparation of a bid or proposal would not disclose the defect (i.e., the defect is latent), this has the effect of making the work more difficult for the contractor than is reasonably expected. Adding a work requirement in this accidental manner is tantamount to making a change to the specifications. It leads to an obligation on the part of the Government to make an equitable adjustment in a fashion similar to that which would be made under the changes clause. This general area includes cases where performance is completely impossible.

If, during the course of contract performance, questions arise concerning the **meaning of the requirements documents** (or other terms of the contract), the contractor is generally required to inquire of the Government as to the meaning. The Government’s interpretation may differ from the contractor’s interpretation. Under the disputes clause, the contractor must comply with any “final decision” of the Contracting Officer. Later, this disagreement may be subject to review by a Claims Court. If it is determined that the Government had

required more than a reasonable reading of the requirements documents would require, then the contractor is entitled to an adjustment.

Overly strict inspection is closely related to erroneous interpretation of requirements documents. Suppose that a delivery has been made. The Project Officer, in the role of inspector, rejects the items and requires certain corrections. The contractor then makes those corrections. If the contractor later makes a claim for additional work, and it is determined that the initial delivery was not defective, the adjustment will be under the principles of constructive change.

If the **Government causes a delay** for the contractor—but then insists on having the original delivery schedule met—this is a constructive acceleration. Time should have been added for performance.

Finally, there are the cases of **improper technical direction**, usually from the Project Officer. The difference between improper technical direction and overly strict inspection or erroneous interpretation of requirements documents, is that the error occurs because the Project Officer either does not bother to determine the limits of his/her authority, or deliberately ignores such limits. For example, the Project Officer decides that something needs to be done and attempts to get the contractor to do it for “free”. In great many cases, this kind of error in procedure does not lead to a claim. Contractors will often comply with improper orders for “free” services because they want to maintain the goodwill of the Project Officer, whose opinions can affect their chances for future work. But if this happens too often, most contractors will eventually begin to follow the lead set by the Project Officer. The most common form of this is for the contractor to say to the Project Officer: “We have made several changes for you at no charge, surely you can overlook this little defect?” Thus, contracts with supposedly enforceable obligations on both parties end up becoming a mockery.

b. How to Avoid Constructive Changes

Careful preparation of initial contracts (removing ambiguities or inconsistencies from the requirements documents) is the first step in avoiding constructive change. This includes careful drafting of a formal modification. The Government often does not consider the magnitude of the effect a modification will have on the contractor. For example, when an equitable adjustment is negotiated, the Government does not allow the contractor enough additional time to perform. This, in turn, creates a constructive change for which an adjustment will become due.

Another important factor in avoiding constructive changes is for the Project Officer to know what the contract requires. Both erroneous interpretations of requirements documents and overly strict inspection tend to result from a failure by the Project Officer to read the contract carefully. When decisions are made based on what “everybody” knows the requirements documents *ought* to say rather than on what they really do say, claims frequently result.

To avoid constructive change, it is very important for the Project Officer to keep proper records. For example, if, during an interim inspection, the Project Officer tells the contractor that some aspect of performance is inadequate, the aspect should be explained in writing, with a copy transmitted to the contractor through the Contracting Officer.

Documentation of final inspections is important. It is not sufficient to tell the contractor that the product is unacceptable. Specific problems should be identified in writing. Contractors can mistake a general comment about one way to correct a problem as specific direction that this is the only acceptable way. Good documentation can eliminate that sort of misunderstanding.

Finally, the Project Officer must always act in good faith and must always follow Government procedures. Do not try to get something for nothing. Do not try to get around the paperwork. The Government loses claims—and the reasonable technical cooperation of its contractors—when the Project Officer circumvents the required procedures and principles.

c. Ratification of Unauthorized Commitments

Ratification means the act of approving an unauthorized commitment. An unauthorized commitment means an agreement that is not binding, solely because the Government representative who made the agreement lacked the authority to do so. An unauthorized commitment can be approved (ratified) only by an official who has such approval authority.

The FAR makes it clear that unauthorized commitments should be precluded to the maximum extent possible and prescribes specific procedures and limitations relative to ratification.

Typically, unauthorized commitments are made by technical representatives, or project personnel in connection with their duties relative to a specific contract or contracts, or even when a contract does not exist. It seems that their actions are unintentional and occur because of a lack of understanding of their authority vis-à-vis that of the Contracting Officer.

If ratification becomes necessary or desirable, the action shall generally be handled as follows:

The person who made the unauthorized contractual commitment must furnish the Contracting Officer with all records and documents having to do with the action, as well as a written statement of the facts in the situation including statements as to why the normal procurement process was not used; how the contractor was selected; the other sources considered; the work to be done or product to be supplied; the estimated or agreed price; the source of available funding; and, information as to whether the contractor has commenced performance. The Contracting Officer will review the information supplied and forward it, with any additional information or comments, to the Head of Contracting Activity or a designee for evaluation and approval or disapproval.

If ratification is authorized, the Head of Contracting Activity or the designee will return the file to the Contracting Officer for the proper issuance of a contract or contract modification as well as the ratification notice.

Agencies consider the problem of unauthorized commitments to be very grave and the Head of Contracting Activity must report all requests for ratification and ratification authorized to Agency management.

J. RESOLVING DISPUTES (FAR PART 33)

No matter how carefully a contract is negotiated and written, disputes can and often do arise under Government contracts. This is primarily due to the complex nature of the Government acquisition process and the involved relationship between the contractor and the Government. The Disputes clause included in all Government contracts is designed to ensure that disagreements between the Government and the contractor will not interfere with the scheduled performance of the contract. It also provides a channel through which disagreements and differences can be resolved by the persons directly involved.

The Contracting Officer has wide powers to settle contractual matters. Some of the matters that may be settled by decision of the Contracting Officer are making equitable adjustments pursuant to the Changes and Government Furnished Property clauses; reducing prices under the Inspection clause; and providing for reimbursement for extra work performed. If agreement can be reached between the two parties in regard to the equitable adjustments, additional reimbursement, or refunds required under any contract clause, a bilateral agreement may be negotiated between the two parties.

If agreement cannot be reached, these issues, as well as others involving disagreements are resolved under the procedures set out in the Disputes clause.

The standard Disputes clause (FAR 52.233-1) included in all Government contracts provides:

- The contract is subject to the Contracts Disputes Act of 1978, as amended (41 U.S.C. 601-613).
- For contractor claims of \$100,000 or less, the Contracting Officer must render a decision within 60 days. For contractor claims in excess of \$100,000, the Contracting Officer must decide the claim within 60 days or notify the contractor of the date when the decision will be made.
- The Contracting Officer's decision is final unless the contractor appeals or files a suit as provided in the Act.

- The Contracting Officer's authority under the Act does not extend to claims or disputes that by statute or regulation other agencies are expressly authorized to decide.
- Interest on the amount found due on contractor claims is paid from the date the claim is received by the Contracting Officer until the date of payment.
- Except, as the parties may otherwise agree, pending final resolution of a claim by the contractor arising under the contract, the contractor must proceed diligently with the performance of the contract in accordance with the Contracting Officer's decision.

K. GOVERNMENT PROPERTY (FAR PART 45)

Government regulations state that a contractor may be provided Government property or allowed to acquire such property at Government expense upon determination that:

- No practicable or economical alternative exists; e.g., acquisition from other sources, utilization of subcontractors, rental property, or modification of program project requirements, etc.;
- The Government receives adequate consideration for providing the property; or
- Furnishing Government property is likely to result in substantially lower cost to the Government for the items produced or services rendered when all costs involved are compared with the cost to the Government of the contractor's use of privately-owned property.



The determination that it is necessary to provide a contractor or subcontractor with property is made by the Contracting Officer with the advice of the agency property official.

When Government property is provided under a contract, the Project Officer frequently will be asked to advise or assist the Contracting Officer in administering its use.

L. SUBCONTRACTS (FAR PART 44)

Subcontracting means any contract entered into by a subcontractor to furnish supplies or services for performance of a prime contract or a subcontract.

In the case of a prime contract, the Government is the buyer and the contractor is the seller. However, when the contractor lets subcontracts, the contractor becomes the buyer, while the subcontractor becomes the seller. The prime contractor and the Government have a direct legal relationship. No such direct legal relationship exists between the Government and the subcontractor. Even in acquisitions where the contract specifies that the Government has a right to review and approve subcontracts, no direct relationship between the Government and the subcontractor is established.

1. ADMINISTRATION OF SUBCONTRACTS

The prime contractor, not the Government, is responsible for administering subcontracts. When the Government buys the services of a contractor it is buying, among other services, its management services. It is the responsibility of the prime contractor in an acquisition to ensure the performance of the subcontractor. Nevertheless, there are a number of monitoring and contract administration functions a Project Officer can perform to promote effective subcontract operations.

2. ACTION PRIOR TO AWARD

The Project Officer has the opportunity to begin monitoring the sub-acquisition process prior to award. When the Project Officer reviews proposed subcontracts before forwarding them to the Contracting Officer for approval, the FAR suggests that the following questions be asked:

- Is the decision to subcontract consistent with the contractor's approved make-or-buy program, if any? (See FAR Subpart 15.407-2.)
- Is the subcontract for special test equipment or facilities that are available from Government sources? (See FAR Part 45.3.)
- Is the selection of the particular supplies, equipment, or services technically justified?
- Has the contractor complied with the prime contract requirements regarding small business subcontracting, including, if applicable, its plan for subcontracting with small business, small disadvantaged

business, and women-owned small business concerns? (See FAR Part 19)

- Was adequate price competition obtained or its absence properly justified?
- Does the contractor have a sound basis for selecting and determining the **responsibility** of the particular subcontractor?
- Has the contractor performed adequate cost or price analysis or price comparisons and obtained accurate, complete, and current cost or pricing data, including any required certifications?
- Has adequate consideration been obtained for any proposed subcontract that will involve the use of government-furnished facilities?
- Has the contractor adequately and reasonably translated prime contract technical requirements into subcontract requirements?

In reviewing the proposed subcontract, the Project Officer should be especially careful if:

- The prime contractor has had previous subcontracting problems;
- There has been little or no competition for the supplies or services;
- There is a close relationship between the prime contractor and the proposed subcontractor; and
- The subcontract is to be placed on a time and material, cost-reimbursement, labor hour, fixed-price incentive, or fixed-price redeterminable basis.

3. ACTION AFTER AWARD

After the subcontract has been let, it is the prime contractor's responsibility to manage it. But here again, the Project Officer has certain responsibilities to ensure that the prime contractor is managing it adequately. The Project Officer can review the effectiveness of the contractor's subcontract administration function. Observations can be made of such things as the support, direction, and timeliness of actions provided by the contractor to subcontractors.

An important area to be covered in any review of subcontract administration is the contractor's system for making subcontract changes. Procedures must provide not only for timely processing of changes but also for prompt notification of all parties concerned, including the Government.

M. OPTIONS (FAR SUBPART 17.2)

Option means a unilateral right in a contract by which, for a specified time, the Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract.

Options are most often used in situations where the Government is indefinite as to the quantities it requires. A contract with an option provision will allow for the purchase of a specified quantity, with the Government retaining the right to purchase a specified further quantity at a set price at some later time.

Option provisions invariably contain a statement to the effect that the Government will notify the contractor within some specified time (e.g., 60 days prior to the expiration date of the contract) of its intent to exercise the option.

The decision to acquire the option quantity is primarily the Project Officer's. In order to avoid the possibility of losing the Government's right to exercise the option, the Project Officer must notify the Contracting Officer of this decision in sufficient time to allow the Contracting Officer to put the contractor on notice within the time specified in the contract.

To exercise an option, revalidation of the requirement as well as a market analysis to establish that doing so is in the Government's best interest may be required. If so, the Project Officer will have a role to play in these functions.

The Project Officer is also responsible for providing the funds necessary to pay for the option quantity.

N. INCREMENTAL FUNDING

An incrementally funded contract is a contract in which the total work effort is to be performed over multiple time periods and funds are allotted to cover discernible phases or increments of performance.

Detailed acquisition funding requirements are contained in the Department's fiscal regulations.

Incremental funding may be applied to cost-reimbursement type contracts for the acquisition of research and development and other types of nonpersonal, nonseverable services. It may not be applied to contract for construction services, architect-engineer services, or severable services. Incremental funding allows nonseverable cost-reimbursement contracts, awarded for more than one year, to be funded from succeeding fiscal years.

It is HHS policy that contracts for projects of multiple year duration be fully funded, whenever possible, to cover the entire project. However, incrementally funded contracts may be used when:

- (1) A project, which is part of an approved program, is anticipated to be of multiple year duration, but funds are not currently available to cover the entire project;
- (2) The project represents a valid need for the fiscal year in which the contract is awarded and of the succeeding fiscal years of the project's duration, during which additional funds may be obligated by increasing the allotment to the contract;
- (3) The project is so significant to the approved program that there is reasonable assurance that it will command a high priority for proposed appropriations to cover the entire multiple year duration; and
- (4) The statement of work is specific and is defined by separate phases or increments so that, at the completion of each, progress can be effectively measured.

O. CONTRACT CLOSEOUT (FAR SUBPART 4.804)

A contract is completed when all services have been rendered; all articles, material, report data, exhibits, etc., have been delivered and accepted; all administrative actions accomplished; and final payment made to the contractor. Contract closeout actions are primarily the responsibility of the Contracting Officer, but the assistance of the Project Officer will be required to certify that all services have been rendered in a satisfactory manner and all deliverables are complete and acceptable. The Project Officer also will play an important role in evaluating the contractor's performance under the contract. The Project Officer's assistance is indispensable when disputes, litigation, patent and copyright problems, etc., are involved.

Upon completion of the contract, the Contracting Officer must ensure or determine, as applicable that:

- All services have been rendered;
- All supplies have been tendered and accepted;
- All payments and collections have been made;
- Release from liabilities, obligations, and claims have been obtained from the contractor;
- Contractor performance has been appraised as provided for by the terms of the contract.
- Assignment of refunds, credits, etc. have been executed by the contractor;
- All administrative actions have been accomplished, including the settlement of disputes, protests, and litigation; determination of final overhead rates; release of funds; and disposal of property etc.; and
- The file is properly documented.



The file must include all inspection and acceptance documents, or a statement from the Project Officer that all services and deliveries required by the contract have been performed or delivered in accordance with the terms of the contract and are acceptable to the Government. All discrepancies in actual performance or delivery with contract requirements must be reconciled before the contract file is closed.

All public vouchers and contractor invoices that support advance, partial, progress, and final payments must be included. The contract file must also include written documentation related to settlement of any questions of disallowed or suspended costs. In addition, any discrepancies between payments and deliveries or performance and between billings and payments require documentation.

If there was a subcontract, the file must contain subcontract approvals, including the letter or document of approval and the subcontract review memorandum. If approval of individual subcontracts is waived by approval of the contractor's purchasing system, approval must be included in the contract file. The file must also contain documentation of the resolution of disputes between prime and subcontractors, unless the prime contractor releases the Government from any obligation relating to the subcontractor's claim.

Contract modifications that result from additions or changes to the terms and conditions must be included, as must inventory and records of disposition of Government-owned property. All clearance and reports relating to inventories, patents, royalties, copyrights, publications, tax exemptions, etc. should go into the file. Also the file must contain copies of inquiries and answers and reports to and from sources such as the Congress, the General Accounting Office, audit activities, etc.

P. CONTRACT FILES (FAR SUBPART 4.8) AND PROJECT FILES

The FAR is quite specific about the requirements for establishing, maintaining, and disposing of contract files. These files must be maintained by the Contracting Officer and must be sufficient to constitute a complete history of the transaction for the purpose of:

- Providing a complete background as a basis for informed decisions at each step in the acquisition process;
- Supporting actions taken;
- Providing information for reviews and investigations; and
- Furnishing essential facts in the event of litigation or congressional inquiries.

There are no regulatory requirements for a Project Officer to maintain a contract file. However, a project file will enhance the Project Officer's ability to effectively and efficiently monitor a contractor's progress, as well as provide data that will ensure continuity in contract administration should there be a change in Project Officers during the course of a contract. Such a project file should contain data specifically related to the Project Officer's role and responsibilities. These data include copies of the:

- Solicitation (IFB or RFP) and any subsequent amendments;
- Winning proposal;
- Contract and any subsequent contract modifications;
- Negotiation documents;
- Work plan schedules;
- Budgets and invoices, and any correspondence between the Project Officer and the Contracting Officer concerning project budgets and expenditures;
- Supplies submitted by the contractor;
- Correspondence between the contractor and the Project Officer;
- Contractor's interim and progress reports, as well as all draft and final deliveries;
- Copies of any press releases, records, or letters concerning project results; and
- Other data requested by the Contracting Officer.

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EXHIBIT V-1.

Sample Work Plan

February

- 1 Progress Report due
- 3 Meeting with Contracting Officer to discuss Progress Report
- 9 Meeting with contractor to discuss Progress Report (if necessary)
- 15 Data Delivery
- 20 Site Visit
- 28 Provide feedback on Data Delivery (coordination with staff experts required)

March

- 1 Progress Report due
- 3 Meeting with Contracting Officer to discuss Progress Report
- 9 Meeting with contractor to discuss Progress Report (if necessary)
- 18 Status Meeting on Task X
- 22 Line Item Delivery. Formal inspection and acceptance required.
- 27 Inspection Report completed and deliverable accepted or rejected.

Note: Items for Work Plan will be drawn from the contract—PWS and QASP mostly—and will be different in each situation. The sample merely gives you a scenario of events that might be included and a simple format for drafting the Work Plan.

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EXHIBIT V-2. Public Voucher for Purchases and Services

Standard Form 1034 Revised January 1980 Department of the Treasury TFRM 4-2000 1034-118		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 <i>(Enter description, item number of contract of Federal supply schedule, and other information deemed necessary)</i>	QUAN- TITY	UNIT PRICE		AMOUNT	
				COST	PER		
						TOTAL	
(Use continuation sheet(s) if necessary) (Payee must NOT use the space below)							
PAYMENT: <input type="checkbox"/> PROVISIONAL <input type="checkbox"/> COMPLETE <input type="checkbox"/> PARTIAL <input type="checkbox"/> FINAL <input type="checkbox"/> PROGRESS <input type="checkbox"/> ADVANCE		APPROVED FOR = \$	EXCHANGE RATE = \$1.00	DIFFERENCES			
		BY ²		Amount verified; correct for			
		TITLE		(Signature or initials)			
Pursuant to authority vested in me, I certify that this voucher is correct and proper for payment.							
(Date)		(Authorized Certifying Officer) ³		(Title)			
ACCOUNTING CLASSIFICATION							
PAID BY	CHECK NUMBER	ON ACCOUNT OF U.S. TREASURY		CHECK NUMBER	ON (Name of bank)		
	CASH	DATE		PAYEE ³			
				PER			
				TITLE			

Previous edition usable

NSN 7540-00-634-4206

PRIVACY ACT STATEMENT

The information requested on this form is required under the provisions of 31 U.S.C. 82b and 82c, for the purpose of disbursing Federal money. The information requested is to identify the particular creditor and the amounts to be paid. Failure to furnish this information will hinder discharge of the payment obligation.

Exhibit V-2. SF 1034, Page 2 of 2

Standard Form 1034 A Revised January 1980 Department of the Treasury IFORM 4-2000		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		
					GOVERNMENT B/L NUMBER		
SHIPPED FROM		TO		WEIGHT			
NUMBER AND DATE OF ORDER	DATE OF DELIVERY OR SERVICE	ARTICLES OR SERVICES <i>(Enter description, item number of contract of Federal supply schedule, and other information deemed necessary)</i>	QUAN- TITY	UNIT PRICE		AMOUNT	
				COST	PER		
						TOTAL	
(Use continuation sheet(s) if necessary)			(Payee must NOT use the space below)				
PAYMENT: <input type="checkbox"/> PROVISIONAL <input type="checkbox"/> COMPLETE <input type="checkbox"/> PARTIAL <input type="checkbox"/> FINAL <input type="checkbox"/> PROGRESS <input type="checkbox"/> ADVANCE					DIFFERENCES		
					Amount verified; correct for		
					<i>(Signature or initials)</i>		
MEMORANDUM							
ACCOUNTING CLASSIFICATION							
PAY BY	CHECK NUMBER	ON ACCOUNT OF U.S. TREASURY		CHECK NUMBER	ON (Name of bank)		
	CASH	DATE					
	\$						

1034-213

NSN: 7540-00-634-4207

PRIVACY ACT STATEMENT

The information requested on this form is required under the provisions of 31 U.S.C. 82b and 82c, for the purpose of disbursing Federal money. The information requested is to identify the particular creditor and the amounts to be paid. Failure to furnish this information will hinder discharge of the payment obligation.

SECTION VI. STANDARDS OF ETHICAL CONDUCT



“All I did was give a friend of mine some information on a competitor’s proposal.”

Each year, the Federal Government spends billions of dollars on acquisitions. With this magnitude of spending, it is inevitable that public officials who participate in the acquisition process will come under close public scrutiny and may occasionally be subjected to situations that may lead to improprieties, abuse of office, fraud, or theft.

By virtue of their unique position and responsibilities regarding the acquisition process, Project Officers are particularly susceptible to improper influences from those who seek to do business with the Government. Therefore, Project Officers should take particular care to familiarize themselves with both Government-wide and departmental regulations governing standards of ethical conduct for Government employees. This section briefly discusses those ethical conduct standards that are particularly relevant to Project Officers.

Government-wide standards are found at 5.C.F.R. Part 2635.

A. GIFTS AND GRATUITIES

As a rule, no Government employee may solicit or accept any gratuity, gift, favor, entertainment, loan, or anything of monetary value from anyone who—

- Has or is seeking to obtain Government business with the employee's agency,
- Conducts activities that are regulated by the employee's agency, or
- Has interests that may be substantially affected by the performance or nonperformance of the employee's official duties.

The terms “gratuity” and “gift” include nearly anything of monetary value (i.e., entertainment, hospitality, transportation, lodgings, meals, services, training, discount, loan or forbearance).

It does **not** include items that clearly are not gifts:

- Publicly available loans from banks and financial institutions;
- Discounts available to the general public;
- Anything paid for by the Government, secured under Government contract or accepted by the Government under specific statutory authority;
- Training to facilitate use of its products provided by a vendor whose products are furnished under Government contract.



It also does **not** include certain inconsequential items:

- Modest items of food and refreshments (each agency establishes its own definition of “modest”);
- Plaques and certificates having no intrinsic value.

There are several exceptions to the prohibitions against accepting gifts. For example, with some limitations, employees may accept:

- Unsolicited gifts with a market value of \$20 or less per occasion, aggregating no more than \$50 in a calendar year from any single source;
- Gifts motivated by a family relationship or personal friendship;

- Free attendance at certain widely-attended gatherings, such as conferences and receptions, when the cost of attendance is borne by the sponsor of the event; and
- Food, refreshments and entertainment at certain meetings or events while on duty in a foreign country.

B. DEFINITION OF “PERSONALLY AND SUBSTANTIALLY”

The regulations often refer to Federal employees who are “participating personally and substantially.” FAR 3.104-1 defines “participating personally and substantially” as—

Active and significant involvement of an official in any of the following activities directly related to that procurement:

- (i) *Drafting, reviewing, or approving the specification or statement of work for the procurement.*
- (ii) *Preparing or developing the solicitation.*
- (iii) *Evaluating bids or proposals, or selecting a source.*
- (iv) *Negotiating price or terms and conditions of the contract.*
- (v) *Reviewing and approving the award of the contract.*

When there is a question of whether an individual is “participating personally and substantially,” the activities of the individual should be analyzed by the Contracting Officer to determine whether there is both personal and substantial involvement in a procurement.

C. CONFLICTING FINANCIAL INTERESTS

The Government-wide Standards of Ethical Conduct (5.C.F.R. Part 2635) deal with Government employees’ participation in matters affecting a personal financial interest. Basically, the standards prohibit an employee from participating “personally and substantially” as a Government employee in a matter in which any of the following individuals or organizations has a financial interest:

- The employee, the employee’s spouse, the employee’s minor child, or the employee’s general partner;
- An organization in which the employee serves as an officer, director, trustee, general partner, or employee; or

- A person or organization with which the employee is negotiating for prospective employment or has an arrangement for prospective employment.

In acquisition matters, this means that a Contracting Officer, Project Officer, proposal evaluator, source selection official, or any other Government official having a financial interest in one or more offerors responding to a proposal would be prohibited from engaging in decisions, approvals, disapprovals, recommendations, and investigations; providing advice; or making any other significant effort regarding the acquisition process. This includes participating in drafting specifications or statements of work for acquisitions when the drafter expects a company in which he or she has a financial interest to submit a proposal.

Criminal penalties may be imposed under 18 USC 208 for violations of these prohibitions. The Standards provide alternatives to non participation, which may involve selling or giving up the conflicting financial interest or obtaining a statutory waiver that will permit the employee to continue to perform specific official duties. Consult with your deputy ethics counselor for full details.

D. APPEARANCE OF IMPARTIALITY

There may be circumstances other than conflicting financial interests in which employee should not perform official duties in order to avoid an *appearance* of loss of impartiality.

Employees should obtain specific authorization before participating in certain government matters where their impartiality is likely to be questioned. These matters include those:

- Involving specific parties, such as contracts, grants or investigations, that are likely to affect the financial interests of members of employees' households; or
- In which persons with whom employees have specific relationships are parties or represent parties. This should include, for example, matters involving employers of spouses or minor children, or anyone with whom employees have or seek a business or financial relationship.

Executive Order (E.O.) 11222 extends this policy somewhat in providing that “an employee need not have a financial interest that actually conflicts with his or her duties to violate the prohibition of Executive Order 11222. Any financial interest that could reasonably be viewed as an interest that might compromise the employee’s integrity, whether or not this is in fact true, is subject to this prohibition.”

Generally, employees who will have a conflict of interest, as described above, must disqualify themselves from participating in the acquisition process. However, this discussion of conflict of interest is only a general treatment of a fairly complex subject.

Government employees who are required to participate in a particular procurement that may present them with a conflict of interest should refer to the applicable sections of the HHS Standards of Conduct and E.O. 11222 for full details.

Consult your deputy ethics counselor for the procedures by which employees may be authorized to participate in such matters when it serves the agency's interests.

E. USE OF OFFICIAL INFORMATION

The public interest requires that certain information in the possession of the Government be kept confidential, and released only with general or specific authority under Department or other regulations. Such information may involve the national security or be private, personal, or business information that has been furnished to the Government in confidence. In addition, information in the possession of the Government and not generally available may not be used for private gain.

The "Standards of Conduct" include a prohibition against engaging in financial transactions using nonpublic information, or allowing the improper use of nonpublic information to further private interests.

Most of the prohibitions against use of official information are applicable to the regulations governing conflict of interest. Government employees are sometimes able to obtain information about an action the Government is about to take or some other matter that is not generally known. Such a use of official information is clearly a violation of a public trust. Employees shall not, directly or indirectly, make use of official information not made available to the general public, for the purpose of furthering any private interest.

F. PROTECTING THE INTEGRITY OF THE ACQUISITION PROCESS

The term, "integrity of the acquisition process," in this instance, means allowing private sector firms to compete for the Government's business on a scrupulously fair basis. The emphasis here is on the word **fair**. Not only is fairness a prerequisite in Government acquisition due to the Government's unique position as representative of the American people, but fairness also helps ensure that the Government will obtain its supplies and services at the best price available.

Government personnel who are associated with the acquisition process have a responsibility to protect its integrity, maintaining fairness in the Government's treatment of all vendors. There are numerous points within the acquisition process where the potential to lose this fairness is high. For example:

Pre-solicitation. Allowing a vendor or vendors access to information on a particular acquisition (especially the specification or work statement)

before such information is available to the business community at large may give the vendor(s) receiving the information an unfair advantage over others.

Specifications. Intentionally writing an unnecessarily restrictive specification or work statement that would effectively exclude the products or services of a vendor and/or increase the prospects for award to another vendor is an obviously unfair practice. Not only does this give advantage to one or more vendors over others, but it also restricts competition and makes it more likely that the Government will ultimately pay a higher price.

Confidentiality of Offeror's proposals. From the time proposals are received in response to a solicitation until a contract is awarded, all information concerning the proposals, including their number and submitters, must be held in strict confidence. Should this information become available to one or more offerors, it could put that offeror(s) at a distinct advantage.

1. PROCUREMENT INTEGRITY ACT

The Procurement Integrity Act has far-reaching implications not only in numbers and types of transactions covered, but also in extending to post-Government employment situations. This statute places restrictions on a broadly defined category of Government employees as well as on contractors.

The "procurement integrity" statute, 41 U.S.C 423 (the "Act"), was enacted to prevent improper practices in the procurement of supplies and services. It is implemented by FAR 3.104. The Act prohibits certain activities by competing contractors and Government procurement officials during the conduct of a Federal agency procurement. In general, these prohibited activities involve:

- Prohibition on disclosing procurement information,
- Prohibition on obtaining procurement information, or
- Soliciting or disclosing proprietary or source selection information.

2. DISCLOSING/OBTAINING PROCUREMENT INFORMATION

No person or other entity may disclose contractor bid or proposal information to any person other than one authorized in accordance with applicable agency regulations or procedures by the head of the agency or designee, or the Contracting Officer, to receive such information.

FAR 2.101 defines "Source selection information" as any of the following information that is prepared for use by an agency for the purpose of evaluating a bid or proposal to enter into an agency procurement contract, if that information has not been previously made available to the public or disclosed publicly:

- (1) Bid prices submitted in response to an agency invitation for bids, or lists of those bid prices before bid opening.
- (2) Proposed costs or prices submitted in response an agency solicitation, or lists of those proposed costs prices.
- (3) Source selection plans.
- (4) Technical evaluation plans.
- (5) Technical evaluations of proposals.
- (6) Cost or price evaluations of proposals.
- (7) Competitive range determinations that identify proposals that have a reasonable chance of being selected award of a contract.
- (8) Rankings of bids, proposals, or competitors.
- (9) Reports and evaluations of source selection panels, boards, or advisory councils.
- (10) Other information marked as "Source Selection Information—See FAR 2.101 and 3.104" based on a case-by- case determination by the head of the agency or the contracting officer, that its disclosure would jeopardize integrity or successful completion of the Federal agency procurement to which the information relates.

3. SOLICITING OR DISCUSSING EMPLOYMENT

Government officers and employees are prohibited from participating personally and substantially in any particular matter that would affect the financial interests of any person with whom the employee is seeking employment. An employee who engages in negotiations or is otherwise seeking employment with an offeror or who has an arrangement concerning future employment with an offeror must disqualify him or herself. (FAR 3.104-2(b)(2))

Further, if an agency official, participating personally and substantially in a Federal agency procurement for a contract in excess of the simplified acquisition threshold, contacts or is contacted by a person who is an offeror in that Federal agency procurement regarding possible non-Federal employment for that official, the official must—

- (i) Promptly report the contact in writing to the official's supervisor and to the agency ethics official; and
- (ii) Either reject the possibility of non-Federal employment or disqualify himself or herself from further personal and substantial participation in that Federal agency procurement (see 3.104-5) until such time as the agency authorizes the

official to resume participation in that procurement, in accordance with the requirements of 18 U.S.C. 208 and applicable agency regulations, because—

(A) The person is no longer an offeror in that Federal agency procurement;
or

(B) All discussions with the offeror regarding possible non-Federal employment have terminated without an agreement or arrangement for employment.

(FAR 3.104-3(c))

4. POST-EMPLOYMENT RESTRICTIONS

FAR 3.104-3(d) states:

A former official of a Federal agency may not accept compensation from a contractor that has been awarded a competitive or sole source contract, as an employee, officer, director, or consultant of the contractor within a period of 1 year after such former official—

(i) Served, at the time of selection of the contractor or the award of a contract to that contractor, as the procuring contracting officer, the source selection authority, a member of a source selection evaluation board, or the chief of a financial or technical evaluation team in a procurement in which that contractor was selected for award of a contract in excess of \$10,000,000;

(ii) Served as the program manager, deputy program manager, or administrative contracting officer for a contract in excess of \$10,000,000 awarded to that contractor; or

(iii) Personally made for the Federal agency a decision to—

(A) Award a contract, subcontract, modification of a contract or subcontract, or a task order or delivery order in excess of \$10,000,000 to that contractor;

(B) Establish overhead or other rates applicable to a contract or contracts for that contractor that are valued in excess of \$10,000,000;

(C) Approve issuance of a contract payment or payments in excess of \$10,000,000 to that contractor; or

(D) Pay or settle a claim in excess of \$10,000,000 with that contractor.

Post-employment restrictions prohibit certain activities by former Government employees, including representation of a contractor before the Government in relation to any contract or other particular matter involving specific parties on which the former

employee participated personally and substantially while employed by the Government (FAR 104-2(b)(3)).

Questions related to individual post-employment situations should be directed to the appropriate agency ethics official.

5. SUMMARY

Although the above-mentioned requirements may have some punitive aspects in the event they are violated, they should be understood in terms of their basic intent, i.e., to ensure the integrity of these processes. They also assist individuals to withstand pressures to approve the expenditure of funds for purposes/recipients that could not otherwise stand the tests of objective evaluation. If they are violated, however, individuals can expect serious consequences. There are documented instances of individuals spending time in jail, being fired or removed from positions of influence and contractors being debarred as a result.

G. SEXUAL HARASSMENT

Sexual harassment is defined as deliberate, unsolicited verbal comments, gestures, or physical contact of a sexual nature that are unwelcome. The regulations specifically prohibit this conduct in relationships between Department personnel who take or recommend action on a grant or contract and the grantee or contractor.

H. DO'S AND DON'TS

This supplement to the previous information is not an exhaustive list, but indicates some known pitfalls to be aware of and avoid.

DON'T make commitments of any type to provide funding to non-Federal sources or solicit "unsolicited" proposals as a means of making funds available. Examples include promises to support conferences or meetings, to make up a shortfall in non-Federal funding, etc. If such requests can be anticipated, **DO** seek the advice and assistance of cognizant contracts personnel as to propriety of the action and the choice of legal instrument.

DON'T provide any information to non-Federal sources or other Federal employees who do not have "a need to know" about any planned or pending contract. Certain information, i.e., proprietary or source selection information, is prohibited from being released, and the release of other information may be inappropriate in a given instance. **DO** refer any requests for information, either written or oral, about planned or pending actions to cognizant contracts personnel.

DON'T accept money or anything of more than nominal value either as an individual or on behalf of the organization from any non-Federal organization. Promotional material such as pencils or magnets are considered to have nominal value. **DO** consult cognizant contracts personnel about the propriety of participating in vendor promotional training. **DO** participate in demonstrations of product capability as a means of determining potential sources but only as a general source of information and not in relation to a requirement for which the acquisition process has already begun.

DO ensure that you disclose your financial interests in any organizations to whom the Department may potentially award grants or contracts.

DON'T requisition for equipment or supplies that are not essential for operations or mission accomplishment or use or allow others to use Government-owned equipment or supplies for unauthorized purposes.

DO use common sense. If you are being asked to do a favor in making funding available or a project has sensitivities attached to it, either political, social or economic, bring it to the attention of your management, as well as contracts and/or legal staff.



U.S. Department of Health and Human Services
DHHS PROJECT OFFICERS' CONTRACTING HANDBOOK
STANDARD VERSION
TOPICAL INDEX

A

- A-76, III-12, III-20, IV-8
- A-76 Review (FAR Subpart 7.3), III-20
- ACF (Administration for Children and Families), II-6, II-7
- Acquisition Planning and Scheduling, III-2
- Acquisition Process, Integrity of, VI-5
- Acquisition Schedule Plan, III-16
- Acquisition, Methods of, II-7
- Acquisition/Assistance Distinction, II-1
- Action After Award, V-25
- Action Prior To Award, V-24
- Administration of Subcontracts, V-24
- Advance Guidance, III-49
- Advisory and Assistance Services, II-28, II-29
- Agreements, II-2, II-25, III-32, III-38, IV-28, IV-29
- AHRQ (Agency for Healthcare Research and Quality), II-6, II-7
- Amendment to the Solicitation, IV-11
- Announcement of Award, IV-29
- Announcing (Publicizing) Requirements, IV-4
- Appearance of Impartiality, VI-4
- Approval (required for certain acquisitions), III-17
- Approval, (acquisitions concerning) Fraud, Abuse, and Waste, III-18
- Approval, Other Than Full And Open Competition, II-39
- Approvals of the RFC, III-17
- Assistance/Acquisition Distinction, II-1
- Audiovisual Services, III-19
- Authority to Enter Into Contracts, II-5
- Avoiding Constructive Changes, V-20
- Award, Announcement of, IV-29
- Award, Contract, IV-35
- Award, Publicizing, IV-29

B

- Basic Agreements, II-25
- Basic Ordering Agreement (BOA), II-25
- Before Receipt of Proposals, Exchanges with Industry, IV-5, IV-8
- Bilateral Modification (Supplemental Agreement), V-15
- Blanket Purchase Agreement (BPA), II-16, II-17
- BOA (Basic Ordering Agreement), II-25
- BPA (Blanket Purchase Agreement), II-17

C

- CDCP (Centers for Disease Control and Prevention), II-6, II-7
- Change Orders (FAR Subpart 43.2), V-17, V-19
- Changes, Constructive, V-19
- Choosing the Funding Mechanism, II-1
- Circumstances Permitting Other Than Full and Open Competition, II-38
- Clearances, III-4
- Commercial Item, II-13, II-15, II-16, II-17, II-18, III-6, III-34, IV-4, IV-5, IV-24, V-2, V-14
- Commercial Items, Test Program, II-18
- Common Elements of Statements of Work, III-22
- Communicating with Contracting Officer, V-3
- Communication with Offerors, IV-11
- Competition, II-7, II-29, II-39, III-11
- Competition in Contracting, II-7
- Competition in Services, II-29
- Competition, Full and Open, II-9, II-39, II-40, II-49
- Competitive Range, II-14, III-4, III-45, III-46, IV-15, IV-20, IV-21, IV-22, IV-23, IV-24, IV-25, IV-26, IV-27, IV-28, IV-30, IV-31, VI-7
- Completion of Contract Award, IV-28
- Completion vs. Term, III-28
- Concept Development, III-5
- Conflicting Financial Interests, VI-3
- Consideration For Contract Modification, V-16
- Constructive Changes, V-19
- Constructive Changes, Avoiding, V-20
- Contents of the RFC, III-9
- Contents of Unsolicited Proposals, III-50
- Contract Award, IV-35
- Contract Clause, IV-33
- Contract Closeout (FAR Subpart 4.804), V-27
- Contract Files, V-29
- Contract Files and Project Files, V-29
- Contract Interpretation, II-4
- Contract Modifications (FAR Part 43), V-15
- Contract Monitoring, V-7
- Contract Start-Up, V-4
- Contract, Indefinite Delivery, II-24
- Contract, Nature of, II-3
- Contract, Severable, II-38
- Contract, Time-And-Materials, II-24
- Contracting Basics, II-3
- Contracting by Negotiation, II-14, IV-1
- Contracting Method, II-11
- Contracting Officer, I-1, I-2, I-3, II-1, II-2, II-3, II-5, II-7, II-8, II-9, II-10, II-11, II-12, II-13, II-14, II-15, II-16, II-17, II-18, II-20, II-23, II-25, II-26, II-34, II-37, II-38, II-39, II-40, II-41, II-42, II-43, III-1, III-2, III-3, III-4, III-6, III-8, III-9, III-15, III-17, III-18, III-20, III-21, III-24, III-32, III-34, III-38, III-39, III-41, III-48, III-49, III-52, III-53, III-59, IV-1, IV-2, IV-3, IV-4, IV-5, IV-6, IV-7, IV-8, IV-10, IV-11, IV-12, IV-13, IV-14, IV-15, IV-16, IV-17, IV-18, IV-19, IV-21, IV-22, IV-23, IV-24, IV-25, IV-26, IV-27, IV-28, IV-29, IV-30, IV-31, IV-32, IV-35, V-1, V-2, V-3, V-5, V-6, V-7, V-8, V-9, V-10, V-11, V-12, V-13, V-14, V-15, V-16, V-17, V-18, V-19, V-21, V-22, V-23, V-24, V-26, V-27, V-29, V-31, VI-3, VI-4, VI-6

Contractor Performance, Inadequate, V-12
 Contracts vs. Grants and Cooperative Agreements, II-2
 Contracts with Federal Employees, III-19
 Contractual Approach, planning, III-26
 Cooperative Agreements, II-1, II-2
 Cost Estimates, developing, III-34
 Cost or Price as a Factor, III-41
 Cost-Reimbursement Contract, II-20
 Criteria for Recognizing Personal Services, II-27
 Cure notice, V-13, V-14

D

Debriefing Unsuccessful Offerors, IV-30
 Definition Of, VI-3
 Deliverables, III-24, V-9
 Detailed Design vs. Performance, III-26
 Determining the Competitive Range, IV-21
 Developing a Source List, IV-4
 Developing Negotiation Objectives, IV-25
 Disclosing/Obtaining Procurement Information, VI-6
 Discussions, IV-23, IV-24, IV-25, IV-26
 Discussions With Offerors After Establishment of the Competitive Range, IV-23

E

Eligibility for 8(a) Awards, II-44
 Employment Restrictions, VI-8
 Employment, Soliciting or Discussing, VI-7
 Ethical Conduct, VI-1
 Evaluation Contract, III-18
 Evaluation Factors, III-39, III-42

Evaluation of Unsolicited Proposals, III-52
 Exchanges with Industry, IV-5, IV-8
 Exchanges with Industry Before Receipt of Proposals, IV-5, IV-8
 Exchanges With Offerors After Receipt of Proposals, IV-20
 Exemptions From Services Contract Act, II-31

F

Factors and Subfactors, III-39
 FAR Part 1 (FAR System), I-3, II-11, II-14, II-15, II-18, II-42, II-49, III-6, III-27, III-38, III-48, III-49, IV-1, IV-8, IV-10, IV-11, IV-12, IV-21, V-25
 FAR Part 5 (Publicizing Contract Actions), II-43, IV-4, V-5
 FAR Part 6 (Competition Requirements), II-7, II-38, II-40, II-49
 FAR Part 7 (Acquisition Planning), II-39, III-1
 FAR Part 10 (Market Research), III-6
 FAR Part 13 (Simplified Acquisition Procedures), II-15
 FAR Part 14 (Sealed Bidding), II-11
 FAR Part 15 (Contracting by Negotiation), II-14, III-38, III-48, III-49, IV-1, IV-8, IV-10, IV-11, IV-12, IV-21
 FAR Part 16 (Types of Contracts), II-18
 FAR Part 19 (Small Business Programs), II-42, II-49, V-25
 FAR Part 33 (Protests, Disputes and Appeals), IV-31, V-22
 FAR Part 43 (Contract Modifications), V-15
 FAR Part 44 (Subcontracting Policies and Procedures), V-24
 FAR Part 45 (Government Property), V-23, V-24

FAR Part 46 (Quality Assurance), V-6
 FAR Part 49 (Terminations of Contracts),
 V-13, V-14
 FAR Subpart 4.8 (Government Contract
 Files), V-27
 FAR Subpart 43.2 (Change Orders), V-17
 FAR Subpart 7.3 (Contractor vs.
 Government Performance), III-20
 FAR Subpart 15.201 (Exchanges with
 industry before receipt of proposals), IV-8
 FAR Subpart 17.2 (Options), V-26
 FAR Subpart Part 15.6 (Unsolicited
 Proposals), III-48, III-49
 FAR Subpart Part 15.604 (Agency points of
 contact), III-49
 FDA (Food and Drug Administration), II-6,
 II-7, III-44
 Financial Status Reports, V-8, V-11
 Fixed-Price Contracts, II-19
 Fraud, III-18, VI-1
 Fraud, Abuse, and Waste, III-18
 Full and Open Competition, II-9, II-39,
 II-40, II-49

G

Gifts, VI-2
 Government Contract Quality Assurance
 (FAR Part 46), V-6
 Government Property (FAR Part 45), V-23
 Governmentwide Commercial Purchase
 Card, II-16, II-17
 Governmentwide Point of Entry (GPE),
 II-14, III-3, III-15, IV-29
 GPE (Governmentwide Point of Entry),
 II-14, IV-4, IV-7, IV-8, IV-9, IV-29
 Grants, II-1, II-2, II-3, II-7, II-38, III-15,
 IV-4

Gratuities, VI-2

H

Harassment, Sexual, VI-9
 HCFA (Health Care Financing
 Administration), II-6, II-7
 Head of agency, II-6
 HRSA (Health Resources and Services
 Administration), II-6, II-7

I

IGCE (Independent Government Cost
 Estimate), III-13, III-33, III-36, III-37
 IHS (Indian Health Service), II-6, II-7
 Imprest Fund, II-16, II-17
 Inadequate Contractor Performance, V-12
 Incremental Funding, V-26
 Indefinite Delivery, II-24
 Independent Government Cost Estimate
 (IGCE), III-33
 Information Security, III-38, III-59, IV-28
 Information Security After Selection of
 Contractor, IV-28
 Information Technology, acquiring, III-17
 Integrity, VI-5
 Integrity of the Acquisition Process, VI-5
 Inter- And Intra-Agency Agreements, II-3

J

Justifications, Approval for Other than Full
 and Open Competition, II-39

L

Level-of-Effort (Term), II-20, II-23, III-26,
 III-28, III-29, III-34
 Limitations on the Project Officer, V-2

M

Market Research, III-6
 Methods of Acquisition, II-7
 Methods of Contracting, II-11
 Modification, II-34
 Modification, Consideration For, V-16
 Modifications Involving New Acquisition Actions, V-16
 Modifications Made Pursuant to Contract Clauses, V-15
 Modifying the Contract, II-35, V-15, V-16
 Monitoring the Contract, V-7

N

Nature of a Contract, II-3
 Negotiation, III-16, IV-25, IV-27, V-29
 Negotiation Memorandum, IV-27
 NIH (National Institutes of Health), II-6
 NIH 1688 (CRISP) Reporting, IV-30
 Non-Personal/Personal Services, II-26
 Non-R&D/R&D Distinction, II-25
 Notices, III-32
 Notification of benefits under the Service Contract Act, II-34
 Notification to Unsuccessful Offerors, IV-30

O

Offerors, Communication With, IV-11
 Offerors, Discussions After Establishing Competitive Range, IV-23
 Offerors, Exchanges With After Receipt of Proposals, IV-20
 Office of the Secretary (OS), II-6
 Official Information, Use, VI-5
 OPDIV (Operating Division), II-6

Open Competition, II-9
 Options (FAR Subpart 17.2), V-26
 Oral Presentations, III-47
 Orientation, Postaward, V-5
 OS (Office of the Secretary), II-6
 Other Than Full And Open Competition (FAR Part 6), II-38
 Other Than Full And Open Competition, Justifications, Approvals, II-39

P

Paid Advertising, III-18
 Paperwork Reduction Act, III-17, III-18, III-19
 Performance Based Service Contracting (PBSC), II-36, II-37
 Performance vs. Detailed Design, III-26
 Performance, Inadequate Contractor, V-12
 Personal Service, II-26, II-28, II-45
 Personal Services, Recognizing, II-27
 Personal/Non-Personal Services, II-26
 Phasing, III-29
 PL 95-224, II-1
 Planning Technical Evaluation of Proposals, III-38
 Planning the SOW, III-24
 Planning, Acquisition, III-2
 Post-Award Administration, V-1
 Post-Award Notices, IV-30
 Post-Award Orientation, V-5
 Post-Employment Restrictions, VI-8
 Pre-Award Notices, IV-30
 Pre-Proposal Conferences, IV-10
 Printing, III-18

- Privacy Act, III-17, III-20
- Private Sector Temporaries, II-30
- Processing Contract Modifications, V-16
- Processing Requirements, II-11
- Procurement Integrity Act, IV-7, VI-6
- Project Officer, I-1, I-2, I-3, II-1, II-9, II-14, II-16, IV-15, IV-19, V-2, V-3, V-4
- Project Officer Limitations, V-2
- Project Officer Work Plan, V-6
- Project Officer, Role, I-2
- Project Officer, Training Prerequisites, I-1
- Proposal Dissemination, IV-13
- Proposal Revisions, III-4, IV-25
- Proposals, Receipt and Management of, IV-12
- Proposals, Unsolicited, III-48, III-50, III-53
- Protests, IV-31, IV-32
- PSC (Program Support Center), II-6
- Public Affairs Services, III-19
- Public Announcement, IV-29
- Publications, III-19
- Publicizing Requirements, IV-4
- Publicizing the Award, IV-29
- Purchase Orders, II-16
- Q**
- Quality Assurance, II-37, III-28
- R**
- R&D/Non-R&D Distinction, II-25
- Ratification of Unauthorized Commitments, V-21
- Reading and Scoring Proposals, IV-16
- Receipt and Initial Review of Unsolicited Proposals, III-51
- Receipt and Management of Proposals, IV-12
- Recommendation, Scoring of Proposals by the Technical Evaluation Group, IV-19
- Regulations, I-3, I-5, III-44
- Reports and Other Deliverables, V-7
- Request for Contract (RFC), II-39, III-3, III-8, III-9, IV-1
- Request For Proposal (RFP), IV-1, IV-3
- Requirements for Acquisition Notices and Synopses, IV-4
- Requirements, Publicizing, IV-4
- Resolving Disputes (FAR Part 33), V-22
- Responsibilities, RFC, III-8
- Reviewing Business/Cost Proposals, IV-21
- Reviewing R&D Technical Proposals, IV-17
- Reviewing Technical Proposals, IV-14
- Reviewing Vouchers, V-10
- Revising the SOW, III-30
- RFC (Request for Contract), II-39, III-1, III-3, III-4, III-8, III-9, III-13, III-14, III-15, III-20, III-53, IV-1, IV-3, IV-21
- RFP (Request For Proposal), II-4, II-14, III-3, III-6, III-24, III-33, III-38, III-39, III-41, III-42, III-44, III-45, III-47, IV-1, IV-2, IV-3, IV-10, IV-11, IV-12, IV-13, IV-14, IV-17, IV-18, IV-19, V-11, V-29
- RFP Development Considerations, IV-3
- Role of the Contracting Officer at the Technical Evaluation Meeting, IV-19
- Role of the Project Officer, IV-15, IV-19
- Role of the Project Officer at the Technical Evaluation Meeting, IV-19
- Role of the Scientific Review Administrator at the Technical Evaluation Meeting, IV-18

Role, Project Officer in Acquisition, I-2

S

SAMHSA (Substance Abuse and Mental Health Services Administration), II-6, II-7

SBA (Small Business Administration), I-5, II-42, II-43, II-44, II-49, III-8

SBA 8(a) Program for Small Disadvantaged Businesses, II-44

Scheduling, Acquisition, III-2

Sealed Bidding, II-11

Security, III-12, III-38, III-59, IV-28, IV-29, IV-35

Selection for Award, II-9, II-14, II-15, III-4, IV-18, IV-27, IV-28, IV-35, VI-7

Service Contract Act of 1965, II-30, II-31, II-32, II-33, II-34, II-35

Services, II-13, II-26, II-28, II-36, V-10, V-33

Services, Advisory and Assistance, II-28, II-29

Severable Contracts, II-38

Sexual Harassment, VI-9

SF 98 and SF 98a, II-32, II-33

SF 99, II-34

Simplified Acquisitions (FAR Part 13), II-15, II-16

Site Visits, IV-27, V-10

Small Business Administration (SBA), I-5, II-8, II-43, II-44, III-8

Small Disadvantaged Business, III-44, III-46

Small Disadvantaged Businesses Program, II-44

SmartPay Card, II-16, II-17

Socioeconomic Programs (FAR Part 19), II-42

Solicitation, Amendment, IV-11

Soliciting or Discussing Employment, VI-7

SOW, Common Elements of, III-22

SOW, Planning, III-24

SOW, Revising, III-30

SOW, Writing, III-24, III-29

Specifying the Contractual Approach, III-26

Standard Contract Clauses, V-5

Standards of Ethical Conduct, VI-1

Start-Up of Contract, V-4

Steps in Developing Detailed Independent Cost Estimates, III-34

Steps in Writing SOW, III-24

Subcontracts (FAR Part 44), III-36, V-24

Subcontracts, Action After Award, V-25

Subcontracts, Action Prior To Award, V-24

Subfactors and Factors, III-39

Supplemental Agreement (Bilateral Modification), V-15

T

Task Order, II-26, V-11

Task Order Management, V-11

Technical and Business Discussions, IV-25

Technical Evaluation Factors and Subfactors, III-39

Technical Evaluation Panel, IV-14, IV-15, IV-16, IV-22, IV-23, IV-27

Technical Evaluation Planning, III-38

Technical Evaluation Report, IV-17, IV-19

Technical Progress Reports, V-7

Term (Level-of-Effort), II-23, III-28

Term vs. Completion, III-28

Termination for Convenience, V-13, V-14

Termination for Default, V-14

Terminations—Commercial Items, V-14
Terminations—Noncommercial Items (FAR Part 49), V-13
Test Program for Certain Commercial Items, II-18
Third Party Drafts, II-16, II-17
Time-And-Materials Contracts, II-24
Training, Project Officer, I-1
Types of Contracts (FAR Part 16), II-18, II-23
Types of Modifications, V-15

U

Uniform Contract Format, IV-2, IV-33
Unsolicited Proposals, III-48, III-50, III-53

Unsuccessful Offerors, Debriefing, IV-30
Unsuccessful Offerors, Notification, IV-30
Use of Official Information, VI-5

V

Voucher, V-10, V-33

W

Wage Determination, II-30, II-32, II-33, II-34, II-35
Weighting Factors and Significant Subfactors, III-41
Withholding Payment, V-13
Work Plan, V-31
Writing the SOW, III-29