

CHAPTER 2 - PROCUREMENT PLANNING AND PREPARATIONS

| <u>Part</u> | <u>Sec</u> | <u>Title</u> | <u>Page</u> |
|--------------------|-------------------|--|--------------------|
| <u>2.1.</u> | | <u>Policy</u> | |
| | 2.1.1. | General | 2 |
| | 2.1.2. | Roles and Responsibilities | 2 |
| | 2.1.3. | Requesting Office Responsibilities | 2 |
| | 2.1.4. | Purchasing Office Responsibilities | 3 |
| | 2.1.5. | Procurement Planning Benefits | 3 |
| | 2.1.6. | Market Research | 4 |
| | 2.1.7. | Source Selection Plans | 5 |
| <u>2.2.</u> | | <u>Terms and Conditions</u> | |
| | 2.2.1. | Quality Requirements | 8 |
| | 2.2.2. | Acceptance of Products and Services | 9 |
| | 2.2.3. | Warranties | 11 |
| | 2.2.4. | Delivery or Performance Schedule | 12 |
| | 2.2.5. | Liquidated Damages | 14 |
| | 2.2.6. | Judiciary Property | 15 |
| | 2.2.7. | Options | 15 |
| | 2.2.8. | Equipment Lease or Purchase | 18 |
| | 2.2.9. | Funding Contract Awards | 19 |
| | 2.2.10. | Contract Financing | 22 |
| <u>2.3.</u> | | <u>Descriptions, Specifications, and Statements of Work</u> | |
| | 2.3.1. | General | 26 |
| | 2.3.2. | Specifications | 26 |
| | 2.3.3. | Statements of Work | 27 |
| | 2.3.4. | Product Descriptions | 27 |
| Exhibit 2-1 | | Sample Evaluation Factors | 29 |

CHAPTER 2 - PROCUREMENT PLANNING AND PREPARATIONS

Part 2.1. Policy

2.1.1. General Effective procurement planning and preparation will produce more efficient and economical procurements, which will deliver products or perform services in an acceptable and timely manner. Procurement planning is the process by which the efforts of all personnel responsible for significant aspects of a project are coordinated and integrated in a comprehensive manner. The formality and detail of the planning and preparation process will vary with the size, complexity, mission-criticality, and projected dollar value of the requirement. Procurement planning must include the related budget planning. Major purchases must be planned and budgeted in a manner consistent with the court's budget process, governance mechanisms and management reporting processes. A summary of planned major procurements is included as part of management reports to the chief judge or federal public defender per the management oversight and standards handbook. It will include one-year, two-year, and five-year planning lead times.

2.1.2. Roles and Responsibilities Initiating and planning procurement actions requires a team effort. The team must include those from both the requesting and purchasing offices. For a court unit or federal public defender organization (FPDO), the purchasing office is the office where the procuring function resides; in the Administrative Office (AO), it is the Procurement Management Division (PMD). Although other judiciary offices play a role in the procurement process, overall responsibility for the contracting aspects within the procurement process lies with the Contracting Officer (CO). However, the planning for major purchases is the responsibility of the unit executive.

2.1.3. Requesting Office Responsibilities The requesting office must identify, prepare, and provide procurement requirements to the purchasing office. The procurement requirements will be in the form of a requirements package, containing documents which support the requirements. Requesting office representatives are responsible for:

- (1) identifying potential procurement requirements;
- (2) initiating discussions with purchasing office representatives;
- (3) providing a complete requisition, including, but not limited to:
 - (a) properly approved, in writing, expenditure authority;
 - (b) any required justifications, (for example, preparing a justification for other than full and open competition, if applicable);
 - (c) description of the essential elements of the proposed purchase:
 - 1) a clear and specific description of the products or services required;
 - 2) a schedule for delivery or performance;
 - 3) a list of deliverable data or reports:
 - (i) including media in which they will be furnished;
 - (ii) their frequency;

- (2) allowing better workload planning and scheduling;
- (3) consolidating requirements for greater economies;
- (4) providing sufficient lead time and resources in the selection of appropriate contract types and development of innovative contracting methods;
- (5) providing sufficient time to obtain required approvals before submission of requisitions;
- (6) identifying and obtaining necessary reviews and approvals throughout the procurement process;
- (7) allowing for early identification and resolution of potential problems;
- (8) ensuring the adequacy of specifications or statements of work;
- (9) identifying capable sources sufficient to promote adequate competition;
- (10) preventing unrealistic delivery or performance schedules; and
- (11) receiving acceptable products and services in a timely manner.

2.1.6. Market Research

- a. **General** Market research is central to sound procurement planning and must be addressed by the whole procurement team. Market research helps identify:
 - (1) products or services that are available to satisfy a requirement;
 - (2) whether the judiciary's minimum requirements are practical/realistic;
 - (3) source availability to furnish the required products or services;
 - (4) how to appropriately describe the requirements; and
 - (5) whether cost estimates and schedules are realistic.
- b. **Market Research Methods** may include:
 - (1) assessing the suitability and adaptability of commercially available products or services to satisfy judiciary requirements;
 - (2) identifying those elements of the requirements that may pose significant risks and added costs;
 - (3) determining the status of applicable technology and the extent and success of its commercial application;
 - (4) conducting industry briefings or presolicitation discussions or conferences with potential contractors to discuss requirements and to obtain recommendations;
 - (5) publicizing new specifications and, when appropriate, issuing solicitations for informational or planning purposes far enough in advance to permit generation and consideration of industry comments;
 - (6) attending industry and scientific conferences and acquiring literature about commercial products, industry trends, product availability, business practices, product/service reliability, and prices;
 - (7) testing and evaluating commercial products in a judiciary operating environment to develop reliable performance data, determine any necessary modifications, and develop operational cost information;
 - (8) analyzing the purchase history of requirements to determine the level of competition, prices, and performance results;
 - (9) publishing sources-sought notices in accordance with [3.2.](#); or

- (10) consulting with AO, other court units, other government agencies, or non-profit organizations.
- c. Solicitation Provisions and Clauses** The CO will insert [Provision 2-1](#), “Request for Information or Solicitation for Planning Purposes” in solicitations issued for planning or informational purposes, and clearly note on the face of the solicitation that it is for information or planning purposes. The CO will appropriately fill in the provision’s blank spaces.

2.1.7. Source Selection Plans

- a.** The CO will develop a source selection plan for each competitive procurement:
- (1) above the judiciary’s small purchase threshold (see [3.4.1.c.](#) and [Guide Volume 1, Chapter 8, Part B](#)); or
 - (2) below the judiciary’s small purchase threshold when the CO determines a best value solicitation is appropriate.
- b.** The CO will develop the source selection plan in collaboration with the evaluation panel, requesting office, and other advisors as needed.
- (1) The plan must outline the objective of the procurement and address operational requirements, the potential cost, and any special requirements for quality and reliability.
 - (2) If using best value, the plan must also include evaluation factors, tailored to the specific needs and nature of each procurement. They must address the significant discriminating areas that will be considered in evaluating and determining the best choice. The plan must include:
 - (a) the selected evaluation factors;
 - (b) their order of relative importance; and
 - (c) the evaluation methods and procedures that will be used in evaluating competing offers.
- c. Technically Acceptable Lowest Price** will be used when there is a cost or price competition between offers. The solicitation will state the judiciary’s minimum technical requirements. For example, a copy machine’s technical standard could be the number of pages photocopied per minute. All offers meeting or exceeding these technical requirements will be evaluated based on price. Technically acceptable lowest price:
- (1) is best suited for procurements where the judiciary is acquiring a product or routine service for which it has a well-defined specification or statement of work; and
 - (2) will include commercial or off-the-shelf products or services where there has been no justification for a best value source selection.
- d. Best Value Purchases** is used for procurements when the quality of performance above the minimum acceptable level will enhance mission accomplishment.
- (1) A best value competition involves an evaluation and comparison of cost or price and other factors.

- (2) The best value method of evaluation is suitable only for certain types of negotiated procurements and is more complicated to conduct than the technically acceptable lowest price approach.
- (3) When the judiciary is buying professional and technical services, or is buying a product to be built to a performance specification, the best value source selection is the preferred method.
- (4) When using a best value method of evaluation, the CO must make a meaningful cost/technical trade-off decision, which is derived from an analysis of the offers measured against the evaluation criteria.
- (5) Criteria for best value will be broadly stated in Section M of the solicitation, including the source selection plan, the evaluation factors, their relative importance, and any further guidance.
- (6) The cost/technical trade-off documentation must justify the CO's determination to make award on an offer other than the lowest priced/technically acceptable offer.

e. Evaluation Panels For each source selection plan, the CO must establish an evaluation panel.

- (1) The size and membership depends upon the purchase's:
 - (a) size;
 - (b) scope;
 - (c) complexity; and
 - (d) mission-criticality.
- (2) Evaluation panel responsibilities include the following:
 - (a) assist the CO in developing a source selection plan;
 - (b) evaluate the offers received, efficiently and impartially, in accordance with:
 - 1) the source selection plan; and
 - 2) the evaluation factors included in the solicitation;
 - (c) present a written report of its findings to the CO. The report will contain narrative statements discussing the major strengths and weaknesses of the various offers as compared to the evaluation factors. This report will be used by the CO to hold discussions, if necessary, and select the contractor.
- (3) Evaluation panel efforts may be limited to:
 - (a) one panel but two separate reviews:
 - 1) first reviewing the technical offers,
 - 2) then with cost or price evaluated; or
 - (b) subpanels may be established for separate evaluation of:
 - 1) the technical offer and
 - 2) the proposed price.

f. Evaluation Factors Properly chosen and clearly stated evaluation factors are essential to effective offer evaluation and proper ratings by evaluation panel members. See [Exhibit 2-1](#) for a sample of technical evaluation factors for use in a solicitation for services. Commercial off-the-shelf product solicitations are less complex. For example, in purchasing a printer, speed and dots per inch specifications could be of equal importance, but both of less importance than the expected life of the equipment.

- (1) Evaluation factors must be in accordance with the objectives of the purchase. Cost or price related factors and satisfactory past performance ratings are always evaluated, even if the relative weight is low.
 - (2) The appropriate weight must be stated for each factor in relation to the other factors. However, if a high rating is given to a less significant factor, the result may offset low scores on more important factors. This would result in an unbalanced overall score, complicating determinations for trade-offs or justification for award.
 - (3) These weights could be stated as:
 - (a) a list of the factors with a statement that they are in descending order of importance;
 - (b) a statement that one factor is more important, or significantly more important, than another;
 - (c) a percentage of the effort for each factor; or
 - (d) any other expression that clearly communicates the relative weight of the factors.
 - (4) The absence of a statement in the solicitation reflecting the relative weight(s) of evaluation factors will be construed as all factors being of equal weight.
 - (5) Use of too many factors can:
 - (a) unduly complicate and extend the evaluation process;
 - (b) dilute essential evaluation elements; and
 - (c) lead to an unintended leveling of the evaluation scores. Leveling of the scores tends to make the offers appear to be equal, when in fact they are not. This will make the final choice more difficult.
 - (6) Examples of other evaluation factors, other than cost or price, that may apply are:
 - (a) a demonstrated understanding of the solicitation requirement;
 - (b) a clearly developed management plan;
 - (c) an effective quality assurance plan;
 - (d) acceptably qualified and experienced key personnel;
 - (e) adequate resources;
 - (f) appropriate experience; and
 - (g) excellence of design.
- g. Evaluation Sub-factors** may be established under the appropriate evaluation factor. For example, under a "management plan" evaluation factor, there could be sub-factors for "organization" and "operational concepts."
- h. Cost or Price Related Factors** must be treated and evaluated separately from the other evaluation factors. Its weight must always be stated relative to the other evaluation factors in the solicitation, and it may increase in importance if the technical ranking of offerors is close. Cost/price offer specifics can also provide insight into an offeror's "understanding of the requirement," their "resources," "experience," or other evaluation factors.
- i. Rating Systems** Many forms of rating systems are suitable for evaluation purposes, from adjectival ratings (outstanding/excellent/good) to color codes (blue/green/yellow/red) to various forms of numerical scoring. Depending on the

specific procurement, one system may be preferable to another. However, the rating system used must be simple, practical, and applied in a consistent manner by the raters.

Part 2.2. Terms and Conditions

2.2.1. Quality Control/Assurance Requirements

- a. The CO must include the appropriate quality control/assurance requirements in all solicitations and contracts. The type and extent of contract quality control/assurance requirements depends on the complexity, size, and risks for delivery or completion of service involved in the procurement. Such requirements may be applied through means ranging from inspection at time of delivery to a requirement for the contractor's implementation of a comprehensive quality control program.
- b. Solicitations and contracts may provide for alternate inspection methods to promote competition and lower costs. The solicitation may also permit contractor-recommended alternatives.
- c. For products or services purchased using small purchase procedures, the judiciary usually relies on the contractor to accomplish all appropriate inspection and testing to ensure the deliverables conform to contract quality requirements.
- d. When the CO determines that the judiciary needs to test the products or services before delivery, or decides that the contractor's internal work processes are insufficient, the judiciary should not rely on inspection by the contractor. When making these determinations, the CO must consider the:
 - (1) nature of the products and services being purchased and their intended use;
 - (2) potential losses in the event of defects;
 - (3) likelihood of uncontested replacement or correction of defective work; and
 - (4) cost of detailed inspection.
- e. **Standard Inspection Requirements**
 - (1) [Clause 2-5A](#), "Inspection of Products" will be included in all solicitations and contracts for *products*, which are expected to exceed the judiciary's small purchase threshold.
 - (2) [Clause 2-5B](#), "Inspection of Services" will be included in all solicitations and contracts for *services*, which are expected to exceed the judiciary's small purchase threshold, unless another appropriate inspection clause applies (e.g., [Clause 5-10](#), "Inspection of Professional Services").
 - (3) The CO may include either of the above clauses in solicitations and contracts below the judiciary's small purchase threshold if the CO determines inclusion is in the judiciary's interest. Both clauses:
 - (a) require the contractor to provide and maintain an inspection system acceptable to the judiciary;
 - (b) give the judiciary the right to make inspections and tests while work is in process, if appropriate; and
 - (c) require the contractor to keep and make available to the judiciary complete records of its inspection.

- (4) [Clause 2-10](#), “Responsibility for Products” is required to be included in contracts for (a) products or (b) services involving the furnishing of products, when a fixed-price contract is contemplated and the contract is expected to exceed \$100,000. The CO may include the clause in actions below \$100,000 when the CO determines the clause is needed.

f. Quality Assurance at Judiciary Site or Destination

- (1) Quality assurance performed at destination is normally limited to inspection of the products or services. Inspection is appropriate at destination when:
 - (a) products are commercial or off-the-shelf and require no technical inspection;
 - (b) necessary testing equipment is located only at destination;
 - (c) the procurement is for services performed at destination; or
 - (d) it is determined to be in the judiciary's interest.
- (2) The CO may consider that it is unnecessary to include a formal judiciary quality assurance surveillance plan. Then the following suggestions will assist the judiciary in inspecting for the purposes of accepting or rejecting the product or service. The judiciary program representative will routinely examine products or services for the purposes of acceptance at the time of delivery or when an invoice is presented on a monthly basis. At this time, the representative (usually the COTR) will inspect the effectiveness of the delivery or performance to determine its acceptance. When the CO receives a report from the COTR which indicates that the delivery or performance is not in conformance with the CO requirements, then a deduction from the invoice may be negotiated for an appropriate amount, or the item may be re-delivered or re-performed if it is in the judiciary’s best interest, considering time and expense.

g. Quality Assurance at Contractor Site or Origin Solicitations and contracts must require that quality assurance, including inspection, be performed at origin (contractor's site) when:

- (1) performance at any other place would require uneconomical disassembly or destructive testing;
- (2) considerable loss would result from the manufacture and shipment of unacceptable products or from a delay in making necessary corrections;
- (3) special required instruments, gauges, or facilities are available only at origin;
- (4) performance at any other place would destroy or require the replacement of costly packing and packaging; or
- (5) it is determined to be in the judiciary's interest.

2.2.2. Acceptance of Products and Services

- a.** Acceptance constitutes acknowledgment that the products or services conform with applicable quality and quantity requirements, except as provided in this section and subject to other terms and conditions of the contract. Acceptance may take place before delivery, at the time of delivery, or after delivery, depending on the terms and conditions

- of the contract. Products or services will ordinarily not be accepted before completion of judiciary contract quality assurance actions.
- b. Acceptance certificate** Acceptance will ordinarily be evidenced by execution of an acceptance certificate on an inspection or receiving report form or commercial shipping document/packing list. The solicitation and contract must specify the place, time, and criteria for acceptance. Failure to specify clear and unambiguous criteria for acceptance can undermine the judiciary's ability to reject unacceptable products and/or services.
 - c. Responsibility for Acceptance** Acceptance of products or services is the responsibility of the contracting officer. The contracting officer may request information on acceptability from the COTR or other judiciary employee before accepting the product or service.
 - d. Place of Acceptance** Each procurement must specify the place of acceptance. Procurements which provide for judiciary contract quality assurance at origin will ordinarily provide for acceptance at origin. Procurements which provide for judiciary contract quality assurance at destination will ordinarily provide for acceptance at destination. Products accepted at a place other than destination will not be reinspected at destination for acceptance purposes, but will be examined at destination for quantity, damage in transit, and possible substitution or fraud.
 - e. Certificate of conformance** The contractor may execute a certificate of conformance in certain instances instead of relying on origin inspection (whether the contract calls for acceptance at origin or destination) at the discretion of the contracting officer if the following conditions apply:
 - (1) acceptance on the basis of a contractor's certificate of conformance is in the judiciary's interest;
 - (2) small losses would be incurred in the event of a defect; or because of the contractor's reputation or past performance it is likely that the products or services furnished will be acceptable and any defective work would be replaced, corrected, or repaired without contest. In no case will the judiciary's right to inspect products under the inspection provisions of the contract be prejudiced.
 - f. Transfer of title and risk of loss**
 - (1) Title to products will pass to the judiciary upon formal acceptance, regardless of when or where the judiciary takes physical possession, unless the contract specifically provides for earlier transfer of title.
 - (2) Unless the contract specifically provides otherwise, under JP3 clause 2-25A risk of loss of or damage to products will remain with the contractor until, and will pass to the judiciary upon:
 - (a) delivery of the products to a carrier if transportation is F.o.b. origin; or
 - (b) acceptance by the judiciary or delivery of the products to the judiciary at the destination specified in the contract, whichever is later, if transportation is F.o.b. destination.
 - (3) Paragraph (2) of this section will not apply to products that so fail to conform to contract requirements as to give a right of rejection. The risk of loss of or damage to such non-conforming products remains with the contractor until cure or acceptance. After cure or acceptance, paragraph (2) of this section will apply.

- (4) Under paragraph (2) of this section, the contractor will not be liable for loss of, or damage to, products caused by the negligence of officers, agents, or employees of the judiciary acting within the scope of their employment.

2.2.3. Warranties

- a. A warranty clause must be used when it is in the judiciary's interest to have the right to assert claims regarding defective products or services after their acceptance. A warranty clause gives the CO additional time after acceptance to require contractor correction of deficiencies or defects, reperformance, an equitable adjustment in the price, or other appropriate remedies.
- b. Warranty coverage may begin with delivery or at the occurrence of a specified event, such as installation of equipment. This coverage may continue for a given number of days or months or until the occurrence of another specified event. The value of a warranty clause depends upon the particular products or services being procured. The clause, its use, terms, and conditions are influenced by many factors and must be tailored to fit the specific purchase and individual risks involved. It is important to remember that warranty clauses impact an item's purchase price, may be included in an item's purchase price, and possibly make it more expensive.
- c. With input from the requesting office as to their needs, the CO decides whether or not to require and use a warranty clause. The clause may be used either for individual purchases or classes of purchases. Before making this decision, the CO must consider the following:
 - (1) cost of the warranty (including the effect of a warranty on price competition and the administrative cost and difficulty of enforcing the warranty);
 - (2) criticality of meeting specifications;
 - (3) potential damage to the judiciary in the event of defective performance;
 - (4) cost of correction or replacement, either by the contractor or another source, in the absence of a warranty;
 - (5) ability to take advantage of the warranty, considering shipping time, distance of the user from the source, and other factors;
 - (6) the effect of the warranty as a deterrent against deficiencies;
 - (7) the extent to which acceptance is to be based upon contractor inspection or quality control;
 - (8) whether the inspection and acceptance system provides adequate protection against deficiencies;
 - (9) reliance on brand-name integrity;
 - (10) whether a warranty is regularly given for a commercial component of a more complex end item;
 - (11) whether the product or service is intended for the safety or protection of employees;
 - (12) the stage of development of the item and the state of the art; and
 - (13) customary trade practices.

d. Clauses

- (1) [Provision 2-15](#), “Warranty Information” will be included in all solicitations for products or services, if warranties are customary in the trade.
- (2) A warranty clause will be included in all solicitations and contracts, when the CO has determined a warranty is appropriate for the products or services being purchased. At that time, one of the following clauses will be included in the solicitation:
 - (a) [Clause 2-20A](#), “Incorporation of Warranty” will be included when it is anticipated that a contractor’s standard commercial warranty will be offered.
 - (b) [Clause 2-20B](#), “Contractor Warranty” will be included for all solicitations and contracts for products when the CO has approved in writing the use of a warranty clause.
 - (c) [Clause 2-20C](#), “Warranty of Services” will be included in solicitations and contracts when services are contemplated and the CO has approved in writing the use of the warranty clause.

2.2.4 Delivery or Performance Schedule

- a. The solicitation and contract must specify the delivery mode, as well as, where and when the product or service is to be delivered. An essential element of the solicitation and contract is a realistic delivery or performance schedule, which must be clearly stated.
- b. **Clauses:**
 - (1) [Clause 2-25A](#), “Delivery Terms and Contractor’s Responsibilities” is included in all solicitations and contracts for products or services involving the furnishing of products.
 - (2) [Clause 2-25B](#), “Commercial Bill of Lading Notations” is included in all cost-reimbursement or fixed price F.o.b. origin solicitations and contracts for products or services involving the furnishing of products anticipated to exceed the judiciary’s small purchase threshold. The CO will appropriately fill in the clause’s blank spaces.
- c. Solicitation and delivery instructions will specify the F.o.b. point, as follows:
 - (1) *F.o.b. destination* delivery by the consignor or seller to a destination specified in the solicitation. The cost of shipping and risk of loss are borne by the seller or consignor. Title to the products passes to the judiciary when deliverables arrive at the stated destination; or
 - (2) *F.o.b. origin* The judiciary makes the arrangements for, and pays for, the pick-up, transportation, and delivery to the required destination. Title passes to the judiciary when delivery is made to the carrier. The contractor’s risk is limited to loss or damage caused by improper marking or packing of the products.
- d. The F.o.b. point must be determined on the basis of overall costs involved. It is important to remember that delivery clauses impact an item’s price. The destination shipment expense may be included in an item’s purchase price, and possibly make it

- more expensive. The CO must consider that lower freight rates may be available to the judiciary and that government-controlled transportation may be available.
- e. When acceptance of products is at destination, the purchase document delivery terms must specify F.o.b. destination.
 - f. If the judiciary can expect to suffer damage from late delivery or performance, liquidated damages may be included in the solicitation or contract ([see 2.2.5.](#)).
 - g. When the delivery or performance schedule is stated in terms of specific calendar dates, the solicitation must state:
 - (1) that the schedule is based upon:
 - (a) the contractor's receipt of notice of award; or
 - (b) the contractor's notice to proceed by a specific date; and
 - (2) that the delivery or performance schedule will be extended by a specified number of days after the date the contractor receives notice of award or notice to proceed.
- Note:** It is sometimes more expedient to express required delivery dates in terms of number of calendar days or working days after the effective date of the contract or after award of the contract.
- h. Clauses concerning delivery relate to situations involving delivery schedules. The CO will include the following clauses as applicable in the solicitation or contract document:
 - (1) [Clause 2-30A](#), "Time of Delivery" When the solicitation specifies a required delivery schedule, but the judiciary may consider an earlier delivery advantageous, then this clause will be included in solicitations and contracts.
 - (2) [Clause 2-30B](#), "Desired and Required Time of Delivery" When the judiciary desires delivery by a certain time, but requires delivery by a specified later time, and the delivery schedule is to be based on the date of the procurement, then this clause will be included in solicitations and contracts.
 - (3) [Clause 2-35](#), "F.o.b. Destination, Within Judiciary's Premises" When delivery term is F.o.b. destination within the judiciary's premises, then this clause will be included in solicitations and contracts.
 - i. **Other Solicitation Provisions and Clauses** During procurement planning, the CO must determine the applicability of provisions and clauses. Some provisions and clauses are mandatory for all purchases, others are applicable for purchases of a particular type.
 - (1) Quantity clauses are included in solicitations and contracts when the CO anticipates there may be a variation of quantity or delivery of excess quantities.
 - (a) [Clause 2-40A](#), "Variation in Quantity" is included in solicitations and contracts when authorizing a variation in quantity in fixed-price procurements for products or for services that involve the furnishing of products. The CO will appropriately fill in the clause's blank spaces.
 - (b) [Clause 2-40B](#), "Delivery of Excess Quantities" is included in solicitations and contracts when a fixed-price products procurement is contemplated and the judiciary may be willing to accept a quantity greater than that specified.
 - (2) [Clause 2-45](#), "Packaging and Marking" is included in all solicitations and contracts for products, or when a service involving the furnishing of products is anticipated.

- (3) [Clause 2-50](#), “Continuity of Services” is included in solicitations and contracts for services, when:
 - (a) the acquired services under the procurement are considered vital to the judiciary;
 - (b) must be continued without interruption;
 - (c) when, upon contract expiration, a successor (either the judiciary or another contractor), may continue them; and
 - (d) the judiciary anticipates difficulties during the transition from one contractor to another, or to the judiciary.
- (4) [Clause 2-55](#), “Privacy or Security Safeguards” This clause will be included in all solicitations and awards when the acquisition involves the design, development, or operation of a system of records using commercial information technology services or information technology support services.
- (5) [Clause 2-60](#), “Stop-Work Order” is included in all solicitations and contracts.
- (6) [Clause 2-65](#), “Key Personnel” For services when it is necessary to identify contractor key personnel because they have the required expertise for the procurement, then this clause will be included in solicitations, contracts, RFQs, and purchase orders. The CO may determine that this is not necessary, because contractor flexibility is desired, or it is more cost prohibitive to pay extra for specific expertise. The CO will appropriately fill in the clause’s blank spaces.
- (7) [Provision 2-70](#), “Site Visit” For services to be performed on judiciary installations, when a site visit is applicable, then this provision will be included in solicitations.

2.2.5. Liquidated Damages

- a. Liquidated damages are one of several remedies the judiciary may use when any delay in delivery or performance, solely attributable to the contractor, will cause damage to the judiciary. The CO must receive written approval from the PE before including liquidated damages in the solicitation. [Section 7.6.4.](#), Including Liquidated Damages, must also be reviewed.
- b. Liquidated damages may be included in solicitations when:
 - (1) the time, delivery, or performance is such an important factor in the performance of the contract that the judiciary may reasonably expect to suffer damage if the delivery or performance is delinquent; and
 - (2) the amount of actual damages would be difficult or impossible to determine or prove.
- c. Liquidated damages must not be used punitively for a contractor’s failure, but as a re-payment of judiciary loss. Any formula for calculating liquidated damages must be based on an analysis of the procurement-specific anticipated amount of judiciary losses that would directly result from delay in contractor delivery or performance.
- d. The CO must determine and document in each case:
 - (1) why the use of liquidated damages is appropriate; and
 - (2) how the rate was determined reasonable, and not punitive.

- (3) The determined rate must, as a minimum, cover the estimated cost of inspection and oversight for each day of delay. Whenever the judiciary is likely to suffer other specific damages due to a contractor-caused delay, the rate must also include an amount for these damages. Examples of specific damages are the:
 - (a) cost of substitute facilities;
 - (b) cost of lost work-hours or productivity; or
 - (c) rental of buildings or equipment.
- e. If appropriate to reflect the probable damages, the assessment of liquidated damages may be in two or more increments with a declining rate as the delay continues. To prevent an unreasonable assessment of liquidated damages, the CO may also include:
 - (1) an overall maximum dollar amount;
 - (2) a period of time during which liquidated damages may be assessed;
 - (3) or both.
- f. The CO also may consider terminating for default or taking other appropriate action in lieu of or following an earlier assessment of liquidated damages.
- g. Whenever liquidated damages are to be assessed for contractor delay, when the CO determines it is appropriate, the CO must include [Clause 2-75](#), "Liquidated Damages" in solicitations and contracts. The CO will insert the estimated dollar amount in the blank.

2.2.6 Judiciary Property The judiciary may provide materials or other property to a contractor for its use in performance of a contract when doing so will result in significant economies, standardization, expedited production, or when it is otherwise in the judiciary's interest. Judiciary-furnished property must be specified in the solicitation and the resulting award document in sufficient detail (including inventories or requisitioning procedures) to enable offerors to evaluate the requirement and consider it in their pricing proposal. When the judiciary will furnish property, the solicitation and resulting award document must include [Clause 2-80](#), "Judiciary Property."

2.2.7 Options

- a. Options may be included in solicitations and awards when:
 - (1) increased requirements during the performance period are anticipated;
 - (2) continuing performance past the original performance period may be required; or
 - (3) both.
- b. Options may be considered when additional requirements are anticipated and subsequent competition would be impractical due to such factors as production lead-time and delivery requirements.
- c. Option clauses may require that additional quantities be priced the same as the basic quantities or at a different price.
- d. There is no guarantee that the option will be exercised by the judiciary. Therefore, the improper or unnecessary use of options can result in unnecessarily elevated prices to the judiciary. Options may require offerors or contractors to offer firm prices:
 - (1) for additional quantities at the same level as the basic requirements;
 - (2) for quantities that may be ordered during extended periods of performance; or

- (3) both.
- e. The use of options during a competitive procurement may be preferable to later negotiating a price with the successful contractor at a time when it is the only practicable source.
- f. Option provisions and clauses may not be included in procurements when:
- (1) the contractor would be required to incur undue risks (such as when the price or availability of necessary materials or labor cannot be reasonably estimated); or
 - (2) market prices for the products or services involved are likely to fluctuate or change substantially. This may occur, for example, in procurement of IT equipment.
- g. The option quantities represent known firm requirements which are approved in writing, unless:
- (1) the basic quantity is a learning or testing quantity and there is some uncertainty as to contractor or equipment performance; and
 - (2) realistic competition for the option quantity is impracticable once the initial procurement is awarded.
- h. In the case of options for extended periods of performance of services, the total of the basic and option periods must not exceed five years. In the case of options for increased quantities, the total of the basic and option quantities must not exceed the requirements for five years.
- i. The CO must limit:
- (1) the additional quantities of products or services that may be purchased; and/or
 - (2) the duration of the period for which performance of the procurement may be extended under the option.
- j. The solicitation and resulting award document must also fix the period or window within which the option can be exercised. This period must be set to give the contractor adequate notice for performance under the option. In determining the period, consideration must be given to the necessary lead-time to ensure continuous production and the time required for additional funding and other approvals. The period for exercising the option must always be kept to a minimum.
- k. When a solicitation contains an option for additional quantities of products at prices not to exceed those for the initial quantities, care must be taken to ensure that the option quantities are reasonable to both the judiciary and the contractor. Otherwise, this may jeopardize future delivery or performance. The additional quantities or the period under option must be evaluated, justified, and documented in the procurement file by the CO.
- l. Option Provisions and Clauses**
- (1) Evaluation of Options provisions are usually included in solicitations exceeding the judiciary's small purchase threshold. However, the CO may determine that options are also appropriate to a small purchase. When appropriate, the solicitation will include one of the following as applicable:
 - (a) [Provision 2-85A](#), "Evaluation Inclusive of Options" is included in solicitations when evaluation will include the options;
 - (b) [Provision 2-85B](#), "Evaluation Exclusive of Options" is included in solicitations when evaluation will exclude the options.

- (c) [Provision 2-85C](#), “Evaluation of Options Exercised at Time of Contract Award” is included in solicitations if the CO has determined that there is a reasonable likelihood that the option will be exercised, and the option may be exercised at the time of award.
- (2) When options are involved the CO will include one of the following option clauses as applicable in solicitations and awards:
 - (a) [Clause 2-90A](#), “Option for Increased Quantity” will be included when the solicitation or contract expresses the option quantity as a percentage of the basic quantity or as an additional quantity of a specific line item.
 - (b) [Clause 2-90B](#), “Option for Increased Quantity - Separately Priced Line Item” is included in solicitations and awards for products when the inclusion of an option is appropriate and the option quantity is identified as a separately priced line item having the same nomenclature as a corresponding basic line item.
 - (c) [Clause 2-90C](#), “Option to Extend Services” is included when it is intended to have the option to extend the services to be performed up to six months beyond the resulting award’s period of performance. The CO will appropriately fill in the clause’s blank spaces.
 - (d) [Clause 2-90D](#), “Option to Extend the Term of the Contract” is included to provide for delivery of products or services when the inclusion of an option is appropriate and it is necessary to include:
 - 1) a requirement that the judiciary must give the contractor a preliminary written notice of its intent to extend the procurement;
 - 2) a statement that an extension of the procurement includes an extension of the option; and
 - 3) a specified limitation on the total duration of the procurement.
 The CO will appropriately fill in the clause’s blank spaces.
- m. Exercise of Options** Prior to exercising an option, the CO must send a preliminary notice to the contractor, stating the judiciary’s intent to exercise the option. This must be sent to the contractor within the time frame specified in the option clause (see [Clause 2-90C](#) or [D](#)). The CO may exercise options only after first determining that:
 - (1) sufficient funds are available;
 - (2) the requirement covered by the option fulfills an existing judiciary need;
 - (3) the exercise of the option is the most advantageous method of fulfilling the judiciary’s continuing need, price and other factors considered; and
 - (4) the CO, after considering price and other factors, makes a determination on the basis of at least one of the following:
 - (a) a new solicitation would fail to produce a better price or a more advantageous offer than that offered by the option;
 - (b) an informal analysis of prices or an examination of the market indicates that the option price is better than prices available in the market or that the option is the more advantageous offer; or

- (c) the time between the award of the procurement containing the option and the exercise of the option is so short that it indicates the option price is the lowest price obtainable or the more advantageous offer.

2.2.8. Equipment Lease or Purchase

- a. **General** This guidance pertains to the decision to obtain equipment by lease or purchase. It applies to both the initial procurement of equipment and the renewal or extension of existing equipment leases. The judiciary should consider whether to lease or purchase equipment or products based on a case-by-case evaluation of comparative costs and other factors.
- b. The CO will first obtain the requirement from the requesting office and conduct market research. If the lease vs buy decision can be made at this time, then a written decision must be documented in the procurement file. The solicitation or request for quotes also may allow vendors to offer both purchase and lease pricing options. The decision would then be made by award. Whether prior to the solicitation/request, or at award, the CO and requesting office must deliberate the lease vs buy decision, and the procurement file must be documented with the CO's written decision. The requesting office will assist the CO in making a determination as to whether leasing or buying is more advantageous. The following are factors which should be considered:
 - (1) estimated length of the period the equipment is to be used and the estimated usage within that period;
 - (2) financial and operating advantages of alternative types and makes of equipment;
 - (3) cumulative rental payments for the estimated period of use, including option periods. Use an inflation factor for the subsequent year(s). A budget analyst will assist in obtaining this factor;
 - (4) net purchase price;
 - (5) any differences in transportation and installation costs;
 - (6) any maintenance and other service costs;
 - (7) potential obsolescence of the equipment because of imminent technological improvements;
 - (8) availability of purchase options;
 - (9) trade-in or salvage value;
 - (10) availability of a servicing capability, especially for highly complex equipment: (i.e. if it is purchased, a determination if the equipment will be serviced by the judiciary or other sources). If by the lease contractor, then these costs must be considered;
 - (11) cost to terminate the lease if the judiciary no longer needs the equipment; and
 - (12) cost for any damage caused to the equipment.
- c. **Purchase method**
 - (1) Generally, the purchase method is appropriate if the equipment will be used beyond the point in time when cumulative leasing costs exceed the purchase costs. The estimate for cumulative leasing costs will include any proposed option

- periods, calculated with their inflation factor and any other costs associated with leasing (i.e. cost for termination, maintenance, installation, etc. See **b.** above).
- (2) COs should not rule out the purchase method of equipment in favor of leasing merely because of the possibility that future technological advances might make the selected equipment less desirable.

d. Lease method

- (1) The lease method may be appropriate after considering the factors in **b.** above and if the deliberations determine it is in the judiciary's advantage under the circumstances. The lease method may also serve as an interim measure:
- (a) when the circumstances require immediate use of equipment to meet program or system goals; and
- (b) the circumstances do not currently support purchase.
- (2) If a lease is justified:
- (a) a lease with option to purchase is preferable (also see (4) and (5) below);
- (b) a lease may be structured as a base period with options. Option period(s) should be negotiated at the time of initial award for the subsequent year(s) to be exercised at the discretion of the government;
- (c) advance payment is not authorized for any lease period, except in accordance with 2.2.10. Payment must be made in arrears in accordance with a mutually agreed upon time period (e.g. monthly, quarterly, annually);
- (d) the cost to terminate the lease must be discussed and included in the procurement. Any potential termination costs must be reserved at award.
- (3) Generally, a lease with numerous option periods should be avoided, but may be appropriate if an option to purchase or other favorable terms are included.
- (4) If a lease with option to purchase is used, the contract shall state the purchase price or provide a formula which shows how the purchase price will be established at the time of purchase.
- (5) The CO must insert *JP3* [Clause 2-110](#), "Option to Purchase Equipment," in solicitations and contracts involving a lease with option to purchase.

- e. Commercial agreement** If the lease includes a commercial agreement, then the procedures in [5.4](#) must be followed.

2.2.9. Funding Contract Awards

a. Policy

No officer or employee of the judiciary may create or authorize an obligation in excess of the funds available, or in advance of appropriations (Anti-Deficiency Act, 31 U.S.C. 1341), unless otherwise authorized by law. Before executing any contract, the contracting officer shall—

- (1) Obtain written assurance from responsible fiscal authority that adequate funds are available or

- (2) Expressly condition the contract upon availability of funds in accordance with [2.2.9.c](#), d and e below.

b. Contract Funding Requirements

- (1) If the contract is fully funded, funds are obligated to cover the price or estimated price of a fixed-price contract or the estimated cost and any fee of a cost-reimbursement contract.
- (2) If the contract is incrementally funded (e.g., a multi-year or cost-reimbursement contract), funds are obligated to cover **whatever portion of the total price or estimated cost and corresponding increment of fee the judiciary determines to be appropriate. (See [4.1.14.b\(2\)](#) regarding minimum funding for multi-year contracts.)**

c. Fiscal year contracts

The contracting officer may initiate a contract action properly chargeable to funds of the new fiscal year before these funds are available, provided that the contract includes [Clause 7-115](#), “Availability of Funds.”

d. Indefinite-quantity or requirements contracts

A one-year indefinite-quantity or requirements contract for services that is funded by annual appropriations may extend beyond the fiscal year in which it begins; provided, that any specified minimum quantities are certain to be ordered in the initial fiscal year.

e. Acceptance of supplies or services

The Government shall not accept supplies or services under a contract conditioned upon the availability of funds until the contracting officer has given the contractor notice, to be confirmed in writing, that funds are available.

f. Contracts Crossing Fiscal Years

- (1) A contract that is funded by annual appropriations may not cross fiscal years, except in accordance with statutory authorization (e.g., 31 U.S.C. 1308 and 28 U.S.C. 604(g)(4)(A) and (B)), or when the contract calls for non-severable services that cannot feasibly be subdivided for separate performance in each fiscal year.
- (2) The Director is statutorily authorized to enter into a contract, exercise an option, or place an order under a contract for severable services (e.g., equipment maintenance services, court reporting services, interpreter services, etc.) 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 (28 U.S.C. 604(g)(4)(A)). Funds made available for a fiscal year may be obligated for the total amount of the contract, option, or order entered into under this authority.
- (3) **All actions under paragraph f(2) above must be reported to PMD upon award for inclusion in consolidated reporting to Congress of the use of this authority.**

g. Limitation of Cost or Funds

- (1) When a contract contains [Clause 4-85](#), “Limitation of Cost” or [Clause 4-90](#), “Limitation of Funds”, the contracting officer, upon learning that the contractor is approaching the estimated cost of the contract or the limit of the funds obligated, shall promptly obtain funding and programming information pertinent to the contract’s continuation and notify the contractor in writing that—
 - (a) Additional funds have been obligated in a specified amount;
 - (b) The contract is not to be further funded and the contractor should submit a proposal for an adjustment of fee, if any, based on the percentage of work completed in relation to the total work called for under the contract;
 - (c) The contract is to be terminated; or
 - (d) The Government is considering whether to obligate additional funds. In this event, the CO’s notice must also include the statements that the contractor is entitled by the contract terms to stop work when the obligated funding is reached and that any work beyond the obligated funding will be at the contractor’s risk.
- (2) Upon learning that a partially funded contract containing any of the clauses referenced in paragraph g(1) above will receive no further funds, the contracting officer shall promptly give the contractor written notice of the decision not to provide funds.

h. Funding for Changes

- (1) Under a cost-reimbursement contract, the contracting officer may issue a change order, a direction to replace or repair defective items or work, or a termination notice without immediately increasing the funds available. Since a contractor is not obligated to incur costs in excess of the estimated cost in the contract, the contracting officer shall ensure availability of funds for directed actions. The contracting officer may direct that any increase in the funds obligated on a contract be used for the sole purpose of funding termination or other specified expenses.
- (2) Under a firm fixed price contract, the contracting officer must ensure that funds are available in the appropriate amount before authorizing changes.

i. Anti-Deficiency Act

Government personnel encouraging a contractor to continue work in the absence of funds will incur a violation of Revised Statutes section 3679 (31 U.S.C. 1341) that may subject the violator to civil or criminal penalties.

j. Clauses for contracting in advance of funds

- (1) Insert [Clause 7-115](#), “Availability of Funds”, in solicitations and contracts if the contract will be chargeable to funds of the new fiscal year and the contract action will be initiated before the funds are available.

- (2) Insert [Clause 7-120](#), “Availability of Funds for the Next Fiscal Year”, in labor-hour, time-and-materials, or cost-type solicitations and contracts if (a) the contract is funded using annual appropriations; (b) the performance period will cross fiscal years; and (c) there are insufficient funds in the current year for the initial period of performance.

2.2.10. Contract Financing

a. Definition

“*Contract financing payment*” means an authorized Government disbursement of monies to a contractor prior to the acceptance of products or services by the Government.

- (1) Contract financing payments include—
 - (a) Commercial advance payments;
 - (b) Performance based payments;
 - (c) Progress payments based on cost;
 - (d) Progress payments based on a percentage or stage of completion; and
 - (e) Interim payments under a cost reimbursement contract.
- (2) Contract financing payments do not include—
 - (a) Routine invoice payments for products and services that have been received and accepted;
 - (b) Payments for partial deliveries; or
 - (c) Lease and rental payments.

b. Authority

The Director has authority under 28 U.S.C. 604(g)(4)(C) to enter into contracts containing contract financing terms for the purchase of commercial item services. Of the various types of contract financing listed in [2.2.10.a](#), only advance payment is currently authorized for judiciary usage. This *JP3* section prescribes procedures applicable to the inclusion of commercial advance payment terms in purchase orders and contracts.

c. Delegation

Subject to the following limitations, the Director has delegated to chief judges and FPDs the authority to use commercial advance payment, subject to the limitations of the bona fide needs rule, in the purchase of services under the following conditions:

- (1) the purchase is for –
 - (a) commercial training for an individual employee or group of employees;
 - (b) maintenance support services for 1) photocopy equipment, 2) IT equipment and/or 3) software; or
 - (c) extended warranties of commercial items which are ordered at the same time the item is purchased;
- (2) the total amount of the commercial advance payment does not exceed \$25,000;
- (3) the period of performance to be paid in advance does not exceed a 12 month period (not applicable to the purchase of extended warranties); and
- (4) no advance payment is made prior to the end of the first month of the period of performance.

The Procurement Executive may approve the inclusion of commercial advance payment terms for transactions outside these limits.

d. Policy

In approving the use of commercial advance payments, the contracting officer must keep in mind that Congress intended this authority to be used sparingly since it poses certain risks to the Government should the contractor declare bankruptcy or fail to perform, for example. The security obtained, the amounts and timing of commercial advance payments, and the anticipated savings to the Government must be analyzed as a whole to determine whether making advance payment will be in the best interest of the Government. (See f.(4) regarding required determinations.)

e. Limitations

- (1) Any proposed use of a commercial advance payment which does not meet all of the conditions in paragraph c, Delegation, must be forwarded to the PE, for review prior to award. If the request is approved, a one-time delegation of authority to enter into the contract will be issued. (See f.(4) for required determinations.)
- (2) Performance is deemed to commence on the first day of the contract period of performance. While actual performance of services under maintenance support service agreements for photocopier equipment, IT equipment and/or software might not occur on the first day of the performance period, for advance payment purposes performance is deemed to commence on the first day of the contract period of performance. Similarly, when the award is made in advance of the first day of the contract period of performance (such as, for example, contracts awarded in August or September which begin performance in October), performance commences on the first day of the contract period of performance, not as of the date of award.
- (3) The Contracting Officer must obtain adequate security prior to authorizing a commercial advance payment. See Paragraph f(1) and (2) below.

f. Procedures

- (1) *Solicitations.* If an offeror proposes commercial advance payment terms in response to a solicitation for the services authorized in c(1), and the Contracting Officer is willing to consider the request, the solicitation must be amended to add [Clause 2-115](#), "Terms for Commercial Advance Payment of Purchases" to the solicitation to notify all offerors of the availability of advance pay.
- (2) *Evaluating offers with different payment terms.* An offer stating that the commercial advance payment terms will not be used by the offeror does not alter the evaluation of the offer, nor does it render the offer nonresponsive or otherwise unacceptable. In the event of award to an offeror who declined the proposed advance payment, the advance payment provisions shall not be included in the resulting contract. Acceptance or refusal of the commercial advance payment term shall not be a basis for adjusting offerors' proposed prices, because the effect is reflected in each offeror's proposed prices.
- (3) *Evaluating Adequacy of Security for Advance Pay.*

- (a) The Contracting Officer shall review the apparent successful offeror's financial condition to determine whether it is acceptable as adequate security for the risk incurred by making advance payment. Assessment of the contractor's financial condition shall consider both net worth and liquidity. If awarding under a GSA schedule, the Contracting Officer may consider that GSA has previously determined the contractor to be responsible, which includes a finding that the contractor has adequate financial resources to perform. Other methods of verifying the contractor's financial condition to make this determination include the following:
 - 1) Checking Dun and Bradstreet, if this service is available
 - 2) Requesting audited financial statements from the offeror
 - (b) If the Contracting Officer finds the offeror's financial condition to be adequate security, [Clause 2-125](#), "Security for Advance Payment," must be included in the awarded contract as well as [Clause 2-115](#), "Terms for Commercial Advance Payment of Purchases".
 - (c) If the Contracting Officer does not consider the offeror's financial condition to be adequate security, the Contracting Officer must require that the offeror provide an irrevocable letter of credit from a Federally insured financial institution as specified in [Clause 2-115](#). The letter of credit must be at least equal to the amount of the advance payment made to the contractor. If the offeror refuses to provide the required letter of credit, the Contracting Officer may request pricing based upon payment in arrears. If the revised proposal still is the apparent successful offer in accordance with the solicitation's evaluation procedures, the CO may make award upon the basis of payment in arrears. Any award made based upon payment in arrears should not include any advance payment clauses.
- (4) *Contract Administration.* The Contracting Officer shall be responsible for receiving, approving, and transmitting all commercial advance payment requests to the payment office. The contracting officer responsible for approving requests for commercial advance payment(s) shall also be responsible for determining that the security provided by the contractor continues to be adequate. If the contractor's financial condition is the Government's security, the contracting officer shall monitor the contractor's financial condition at least quarterly. If the Contracting Officer determines that the contractor's financial condition has become insufficient, the Contracting Officer must request additional security under [Clause 2-115](#). In this situation, in addition to an irrevocable letter of credit from a Federally insured financial institution, the following alternative forms of security may be accepted:
- (a) A lien paramount to all other liens without filing, notice, or other action by the judiciary. The contractor must identify what the lien is upon, e.g., the work in process, the contractor's plant, or the contractor's inventory, and the Contracting Officer must issue a modification to the contract to reflect the lien and the asset(s) supporting it. The Contracting Officer also

must ensure the Government's right to verify the existence and value of the asset. In addition, the contractor must certify that the assets subject to the lien are free from any prior encumbrances that may result from such things as capital equipment loans, installment purchases, working capital loans, lines of credit and revolving credit arrangements.

- (b) A bond from a corporate surety listed in [Department of Treasury Circular 570, "Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and Acceptable Reinsuring Companies"](#) (the bond must guarantee repayment of the unliquidated advance payment).
- (c) A guarantee of repayment from a person or corporation of demonstrated liquid net worth, connected by significant ownership to the contractor; or
- (d) Title to identified contractor assets of adequate worth, such as U.S. Government securities, certificates of deposit, stocks and bonds actively traded on U.S. national stock exchange or real property.

The additional security obtained must be at least equal to the maximum unliquidated amount of the advance payment already made to the contractor. The following example illustrates this situation: Advance payment of \$12,000 has been made based on twelve months of performance at \$1,000/month. After seven months of performance the Contracting Officer determines additional security is required. The value of that security would be \$5,000 based upon the remaining five months of performance, since the value of the initial seven months of performance (\$7,000) has liquidated that portion of the advance payment. The value of the security may be adjusted periodically during contract performance, as long as it is always equal to or greater than the amount of unliquidated advance payment.

- (5) *Determinations.* The CO must include the following determinations in the contract file:
 - (a) a determination that it is appropriate or customary in the commercial marketplace to make commercial advance payments for the specific service being purchased (for those types of purchases listed at [2.2.10.c\(1\)](#), this determination has been made and the Contracting Officer shall simply state that the purchase meets the conditions of [2.2.10.c\(1\)](#));
 - (b) a determination that authorizing commercial advance payment is in the best interest of the Government, which shall include an analysis of the demonstrable savings expected to be realized by the use of commercial advance payment. The best interest of the judiciary determination shall address the following:
 - 1) A brief summary of the solicitation or contract requirements (description of services, period of performance, etc.);
 - 2) The contractor's need for commercial advance payments and the potential benefits to the judiciary from providing commercial advance payments;

- 3) Actions which the Contracting Officer will take to minimize the judiciary's risk of loss from providing commercial advance payment;
 - 4) The proposed commercial advance payment contract terms; and
 - 5) If the CO accepts the contractor's financial condition to be adequate security, the determination shall also include the CO's analysis supporting that decision. If the contractor has provided a letter of credit as security, a copy of the letter of credit must be provided.
- (6) *Clauses.* Include Clauses [2-115](#), "Terms for Commercial Advance Payment of Purchases", and [2-120](#), "Submission of Invoice", in all contracts which authorize commercial advance payment. Include Clause 2-115, Alt I if the purchase is for photocopy equipment maintenance and allows offers to request commercial advance payment. If the contractor's financial condition is accepted as adequate security, include [Clause 2-125](#), "Security for Advance Payment".
- (7) ***Reporting.*** All awards which include commercial advance payment terms under paragraph [2.2.10.c](#), Delegation, and do not require approval in advance by the PE, must be reported to PMD upon award for reporting to Congress on the use of this authority.

Part 2.3. Descriptions, Specifications, and Statements of Work

2.3.1. General

- a. All procurement actions require a clear and concise description of the products or services to be procured devoid of generalizations, ambiguities, and omissions. For requirements processed under small purchase procedures, the description may be less detailed than for complex requirements processed under formal contracting procedures. However, the CO must ensure that descriptions, specifications or statements of work (SOW) are prepared in a way that promote competition. Unnecessarily restrictive SOWs or specifications may negatively impact competition. Restrictive descriptions may require only one, or a limited number of vendors or product choices, when other choices, which closely resemble the requirements could also be considered, if the requirement is stated in less restrictive language.
- b. Specifications and SOWs that are susceptible to more than one reasonable interpretation are ambiguous and objectionable. They impede full and open competition by failing to ensure that offerors are competing on a "common" or "equal" basis. The result may lead to procurement administration problems or inadequate contractor performance.

2.3.2. Specifications

- a. Specifications are normally used when purchasing a product rather than a service. Specifications must fully and completely state the judiciary's needs considering the nature of the products being purchased. Specifications may be stated in terms of:

- (1) function, so that a variety of products may be considered as qualified;
 - (2) performance, including the range of acceptable characteristics or the minimum acceptable standards; or
 - (3) design requirements, providing exact dimensions, materials, or characteristics.
- b. Clause [Clause 2-95](#), “Material Requirements”** For products that are not commercial or off-the-shelf items and when it is necessary to specify the material requirements then this clause will be included in solicitations, contracts, RFQs, and purchase orders.

2.3.3. Statements of Work (SOW) Statements of Work (SOW) are normally used when purchasing services rather than end-products. However, a SOW may include specifications or product descriptions. The SOW must describe the work clearly and at a level of detail sufficient to ensure the judiciary obtains the service it seeks. After award, the SOW is the standard for measuring performance and is used by both the judiciary and the contractor to determine rights and obligations under the procurement.

2.3.4. Product Descriptions

- a.** Whenever standard or modified commercial products will meet judiciary requirements, product descriptions must be used instead of specifications. Product descriptions must include:
- (1) a common generic identification of the item. This is the preferred description. The identification must include the salient characteristics or function of the product. For example for a printer, it will be described that it is expected to print at a minimum x pages per minute, in black ink or color, etc.;
 - (2) the description may include known acceptable brand-name products, identified by model or catalog number, and the commercial catalogs in which they appear. If the brand-name is followed by the phrase “or equal,” and if it is the only clear way to describe the product, then this is acceptable. The CO must then consider other “or equal” products. However, if the brand name is specified without the phrase “or equal,” or is defined so as to require a particular “brand name,” product, or a feature of a product peculiar to one manufacturer, thereby precluding consideration of a product manufactured by another company, then this is restricting competition to only those who can provide the specified brand name item and a justification for other than full and open competition is required. (Also see Note in [3.6.1.c.\(2\)](#)). The product’s salient characteristics or function will generally be presented in the product’s advertisement. These could be used as the common generic identification of the item described in (1) above instead of describing it by the brand name; and
 - (3) a description of any required modification to the product.
- b.** If offers for equivalent (“or equal”) products other than those specified will be considered:
- (1) the product description must include a description of the item's essential characteristics, such as material, size or capacity, the equipment with which the items will be used, and any restrictive operating environmental conditions;

- (2) space must be provided for offerors to identify the manufacturer's brand names and models or catalog numbers of the “equal” product proposed.
- (3) [Provision 2-100](#), “Brand Name or Equal” When the product description includes a specific brand name and an “equal” product is also acceptable, then this provision will be included in the solicitation or RFQ.

c. Other Clauses and Provisions

- (1) [Provision 2-105](#), “Economic Purchase Quantity-Products” For products, this provision will be included in solicitations and RFQs, unless:
 - (a) purchased under a GSA multiple award schedule;
 - (b) the CO determines the judiciary already has the data;
 - (c) the data is not otherwise readily available; or
 - (d) it is impracticable for the judiciary to vary its future requirements.The offeror will appropriately fill in the provision’s blank spaces.
- (2) [Clause 2-110](#), “Option to Purchase Equipment” For the lease or rental of equipment with option to purchase, this clause will be included in solicitations, contracts, RFQs, and purchase orders.

Exhibit 2-1

Sample Technical Evaluation Factors

NOTE: This example is for a service contract solicitation and the evaluation factors are specific to that particular procurement. Each procurement will have their own specific requirements for this criteria. THIS IS ONLY AN EXAMPLE. For small purchases there would not be a section L or M. Therefore, for small purchases, it would be appropriate to use another paragraph numbering style which will correspond to the rest of the procurement.

The following is sample Section L Language:

L.7.2. Technical Approach

The offeror's proposal shall contain the following sections:

L.7.2.1. Section 1 - Staffing Plan/Retention Plan

This section shall contain the offerors proposed Staffing Plan and Retention Plan. At a minimum the offeror shall address:

1. Staffing Plan: The offeror shall describe its plan and company approach/policy for ensuring responsive access to adequate numbers of personnel with the qualifications and experience required under this solicitation. This plan shall address the offeror's staffing plan applicable to personnel who are or will be employed by your firm and available for tasking under this contract, as well as any plans/approach/policy regarding access to necessary skills and expertise available through other organizations. This plan shall also identify any teaming/subcontracting arrangements to be used in the performance of the contract and the benefit any such arrangement will bring to the offeror's staffing plan. This plan shall address the offeror's long term staffing plan as well as how specific (and sometimes unique) skills/resources will be acquired responsively for specific tasks identified in the statement of work.

2. Retention Plan: The offeror shall describe its plan/approach/policy for retaining sufficient personnel with the necessary qualifications and skills to support tasks under this contract. This plan should address the retention of employees of the offeror's firm as well as the retention of any agreements with other organizations under which the offeror plans to access qualified personnel to support this contract. This plan should fully describe the offeror's approach to retaining and maintaining a trained, technically proficient staff, with the experiences and expertise that will be required by the judiciary for specific tasks under this contract.

L.7.2.2. Section 2 - Past Performance and Past Experience

The offeror's past performance and past experience will be evaluated to assess the offeror's ability to successfully perform similar work required by this solicitation. In particular,

the offeror's experience will be evaluated to ascertain the breadth of experience as it relates to the requirements of this solicitation. At a minimum, the offeror shall provide descriptions of three (3) previous government or commercial projects/contracts performed successfully within five (5) years of proposal submission. The offeror shall demonstrate that these projects/contracts were for comparable services of a similar size and scope. The following information must be submitted for each:

- Name and description of project.
- Contract number/project number.
- Brief description of the project (including contract number and award date)
- Offeror's role (i.e. prime contractor; subcontractor)
- Percentage of work completed in offeror's role
- Name and address of customer company or government agency.
- Names, addresses, and telephone numbers of a customer's technical point of contact and the customer's contracting officer.
- Awarded price/cost
- Final, or projected final, price/cost
- Number of offeror's personnel assigned to the contract/project
- Time frame to complete project
- Narrative description of the size/scope of the project and how it directly relates to the requirements of this solicitation

References provided in this section will be additionally evaluated to assess the successful performance of the contract/project for which a reference was submitted. The judiciary will consider in its assessment the offeror's reliability of services, attention to customer requirements, control of costs, and level of customer satisfaction.

L.7.2.3. Section 3 - Key Personnel

The offeror shall provide the resume of the project director*, identified in Section C.9.1., to be assigned to the contract resulting from this solicitation. Each resume shall be no more than two (2) pages and contain the following information:

- Full name.
- Education.
- Chronological work experience, with most recent first, that substantiates by involvement and duration the skill positions and services for which they are being proposed. Include company name and phone number of immediate supervisor for each work experience.
- A brief narrative relating work experience for the proposed effort
- Affiliations with professional organizations
- Relevant licenses and certifications
- A dated and signed statement by the individual certifying that the information of the resume is true and accurate.

*Note: Any other key personnel positions identified in the solicitation will also be identified and a resume for each requested.

The following is sample Section M Language:

M.2.1.2.2. Technical Approach Evaluation

The technical approach factors will be evaluated based upon the information contained in the offeror's proposal, as well as any other outside information available to the judiciary that pertains to the offeror's technical approach. The ultimate objective of the evaluation is to determine which proposal offers the best technical value to the judiciary. Although price/cost is considered secondary to technical capabilities, it will be a significant criterion for award as part of an integrated assessment with the offeror's technical approach. The proposals will be evaluated based on the evaluation factors set forth below:

Technical Approach Factors

- A. Staffing Plan/Retention Plan (L.7.2.1.)
- B. Past Performance (L.7.2.2.)
- C. Past Experience (L.7.2.2.)
- D. Key Personnel (L.7.2.3.)

With respect to the evaluation of technical excellence, the technical approach factors identified above are listed in descending order of importance. For each factor, the evaluation will consist of an assessment of the degree to which the services offered in the proposal provide added value, added capability, and/or reduced risk. Additionally, the evaluation will identify the strengths, weaknesses, and risks in each offeror's proposal based on each evaluation factor.

M.2.1.2.3. Price Evaluation

The offeror's proposed pricing will be evaluated for reasonableness. Offers that are unrealistically high or low in price will be considered indicative of a lack of understanding of the complexity and risk associated with work performed under the resulting contract. Offers that contain unrealistic prices will not be considered for award.

THIS PAGE INTENTIONALLY BLANK