




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

MAR 30 2006

OFFICE OF
SOLID WASTE AND
EMERGENCY RESPONSE

MEMORANDUM

SUBJECT: OSWER Guidance 9272.0-21: Performance Based Contracting by Other Federal Agencies at Federal Facilities

FROM: 
James E. Woolford, Director
Federal Facilities Restoration and Reuse Office

TO: Superfund National Program Managers

PURPOSE

The purpose of this Memorandum is to provide guidance on appropriate roles and responsibilities for EPA personnel where other Federal agencies are using Performance Based Contracting (PBC) at federal facilities to conduct response actions at contaminated sites. This guidance was coordinated with the Federal Facilities Leadership Council and the Office of Acquisition Management.

BACKGROUND

Federal Acquisition Regulation (FAR) Part 37 requires the use of PBC to the maximum extent practicable. Effective use of PBC may offer cost and time benefits to the government and can make contractors more accountable for achieving measurable, clearly defined objectives. Other federal organizations, notably the Department of Defense (DoD) and the Department of Energy (DOE), are actively procuring and using PBCs for federal facility site response. This has led to situations where EPA employees have been asked to assume inappropriate procurement and contract management roles and responsibilities.

According to the Office of Federal Procurement Policy, the characteristics of PBCs include:

- Performance requirements that define the work in measurable, mission-related terms,
- Performance standards (i.e. quality, quantity, timeliness) tied to the performance requirements,
- Inclusion of a Government quality assurance (QA) plan that describes how the contractor's performance will be measured against the performance standards, and

- If the acquisition is either critical to agency mission accomplishment or requires relatively large expenditures of funds, it includes positive and negative incentives tied to the Government QA plan measurements.

A PBC may be either firm fixed price or some form of cost-plus contract. In either case, it is essential for the Government to clearly define the existing situation at the response site, the objective of the contract and the performance standards during the acquisition process. Failure to do can lead to contract changes that can add cost and extend the period of performance.

In its implementation of this FAR requirement, EPA is requiring that all contracts and orders for eligible services be placed as performance-based service acquisitions, so EPA certainly recognizes the importance of PBCs and supports their use by other federal organizations.

While performance-based attributes are present in any contract or order, i.e., timeliness, errors, customer satisfaction, the degree to which such contract or order is performance-based may vary. Site conditions and the need for environmental restoration may affect the degree to which an order or contract is performance-based. It is important for Regional offices to review documents such as Preliminary Assessment/Site Investigation (PA/SI) reports, Remedial Investigation (RI) reports, Feasibility Study (FS) report, Monitoring reports, Records of Decision (RODs) and other Decisions Document (DD), as well as any other agreements to understand site conditions and established requirements. EPA personnel may be able to provide significant assistance to other federal organizations in assuring the requirements contained in those documents are reflected in the PBCs. In general, PBCs are easier to implement and more successful when comprehensive data for the site is available (e.g. nature and extent of contamination) and there is a clearly defined objective.

Some questions that are important before choosing the PBC approach are:

- Are the nature, concentration level, and extent of contamination well defined?
- What laws and regulations are applicable for determining cleanup goals?
- What is the anticipated future land use of the site?
- What RCRA/CERCLA phase is the site(s) in? A PBC can be applied at any phase of a site's cleanup life cycle; however, use of PBC is probably optimal after the Remedial Investigation is complete.

Performance-Based Contracting: Guiding Principles

- The "privity of contract" is between the lead federal agency and their contractor(s)
- EPA has no responsibility or authority for the solicitation, award or direction of another federal agency's contracts.
- EPA may be able to assist the development of Statements of Work (SOW) or Statements of Objectives (SOO) to assure they properly address commitments documented in Federal Facility Agreements/Interagency Agreements (FFA/IAGs), RODs, etc.

- The ultimate authority for contract management is the Contracting Officer.
- The oversight and direction of contractor performance is the responsibility of the Contracting Officer (CO)
- The CO may delegate certain authorities for technical direction to a Contracting Officer's Representative (COR).
- The COR may not issue direction that changes the cost of the contract, e.g., scope or schedule.
- Changes to a contract involving scope or schedule may only be made by the CO
- Unauthorized contract modifications involving changes in cost are "constructive changes."
- Constructive changes can result from direction or recommendation to the contractor by anyone other than the CO. This can include non-CORs from the other federal agency or EPA personnel.
- Constructive changes may be ratified by the CO, but may also require additional funding.
- EPA personnel are NOT contract officials for other agencies' contractors
- During contract solicitation/award, EPA personnel must not discuss contract requirements with prospective contractors. If questions arise they must be submitted to CO, who may then request clarification from EPA.
- EPA personnel should not participate in or attend contract selection meetings.
- After award, EPA personnel should not correspond directly with contractor personnel; all communications with other federal agencies' contractors should be through the CO or COR. If verbal discussions are necessary, the CO/COR should be present to provide direction to the contractor.
- After award, it is preferable for EPA to not provide guidance in the absence of the CO/COR. In the event this is not available and EPA guidance is necessary to maintain progress, the CO/COR must be notified in writing as soon as possible to document the guidance provided.

Appropriate PBC Activities for EPA Personnel

The following web site provides information on the "Seven Steps to Performance Based Services Acquisition". This information is provided to illustrate the process that other federal organizations will follow. EPA personnel may be requested to provide assistance during many of these steps.

<http://www.acqnet.gov/Library/OFPP/BestPractices/pbsc/index.html>

The seven steps are:

1. Establish an integrated solutions team
2. Describe the problem that needs solving
3. Examine private-sector and public-sector solutions
4. Develop a performance work statement (PWS) or Statement of Objectives (SOO)
5. Decide how to measure and manage performance
6. Select the right contractor

7. Manage performance

It is appropriate for EPA personnel to participate on an integrated solutions team during the description of the problem, the development of a PWS or SOO and the definition of how to measure performance, e.g. the development of the QA plan. Performance objectives should be clearly defined; objectives for the contractor such as "work with regulators to obtain approval" are not appropriate. EPA should not have any involvement with the selection of contractors and should not perform any contract management activities.

OVERSIGHT OF SITE RESPONSE ACTIVITIES

One aspect of PBCs that EPA Regional programs have observed is that other federal organizations may tend to provide less oversight of PBC contractors than they have in the past when carrying out cleanup actions. Since the other federal organization may be less directly involved with oversight of their contractors, the PBC contractor may be more inclined to engage directly with EPA in attempting to address and resolve issues at a site.

EPA oversight of response activities such as Remedial Investigations and Remedial Actions being performed by a PBC contractor requires careful separation from contract management. For instance, if an EPA Remedial Project Manager (RPM) observes actions by the PBC that could compromise compliance with regulatory or interagency agreement requirements, she or he may alert the contractor about the concern, but may not direct the contractor to stop work or change the performance of the work. Instead, the RPM should immediately notify their counterpart in the other federal agency of the concern and any guidance provided to the contractor. If the notification is verbal, it must also be documented in writing for the record. It is the responsibility of the designated CO or COR to provide direction to the contractor. Note that only the CO may direct the contractor to stop work. Stop work orders almost always have cost and schedule implications. It will be important to the other federal organization to minimize or prevent change orders that change the scope and cost of the contract, so EPA must avoid any action that could lead to such a change without direction from the responsible federal organization.

CONCURRENCE ON DECISION DOCUMENTS

EPA has the authority and responsibility to review and concur on decision documents at National Priorities List federal facility sites. These are typically defined in the FFA and include, but are not limited to, Quality Assurance Project Plans (QAPP), Records of Decision (ROD) and Action Memoranda. With PBCs, these documents will likely be prepared by the contractor. In the interest of time, the lead federal organization may direct the contractor to submit the documents directly to EPA and request that EPA work directly with the contractor to identify and resolve problems. This inappropriately mixes contract management with regulatory oversight and should be avoided. Both contract management and regulatory compliance are the responsibility of the lead federal

organization and may not be delegated to the contractor. All formal communication with the contractor should be through the lead federal agency.

CONCLUSION

The use of PBCs is required by Federal Acquisition Regulations whenever practicable. By linking payment to performance measures, PBCs offer potential advantages to the Government. In the interests of minimizing costs while expediting the reduction of risks to public health and the environment, EPA is committed to working with the lead federal agencies in applying a performance basis in cleanup activities. EPA must also assure that remedial actions meet regulatory requirements and satisfy the need to protect human health and the environment. With the use of PBCs, contractor performance is directly related to meeting regulatory requirements and protection of human health and the environment. Where a Federal Facility Agreement or similar agreement is in place, the other federal agency, not their contractor, retains all responsibility for compliance. The selected contracting approach does not alter the terms and conditions of the agreement.

It is incumbent on EPA personnel to avoid any direct contract management actions while performing oversight of lead federal agency compliance with regulations. It may be beneficial for EPA personnel involved with oversight of site response actions performed by PBCs to take EPA training for CORs to gain familiarity with contract procurement and management processes.

Questions may be referred to Mike Carter, e-mail carter.mike@epa.gov or phone number 703-603-0046.

cc: Federal Facilities Leadership Council
Sallie McElrath, OAM