AT-92-5 Contract Terms For Ensuring Contractor Performance

ACF is providing guidance on States' use of contract terms to ensure that State systems developed for programs covered under 45 CFR Part 95, Subpart F meet the Federal requirement for maximum practical open and free competition and that these systems are procured in the most cost effective way.

Transmittal No. ACF-AT-92-5 Date: January 16, 1992

TO : STATE PUBLIC ASSISTANCE AGENCIES AND OTHER INTERESTED PARTIES

SUBJECT : CONTRACT TERMS FOR ENSURING CONTRACTOR PERFORMANCE

REFERENCES: 45 CFR PART 95, SUBPART F; 45 CFR PART 74

PURPOSE : ACF is providing guidance on States' use of contract terms to ensure that State systems developed for programs covered under 45 CFR Part 95, Subpart F meet the Federal requirement for maximum practical open and free competition and that these systems are procured in the most cost effective way.

BACKGROUND: To ensure vendor performance, States undertaking automatic data processing (ADP) systems development projects, with the aid of private contractors, require one or more of the following in their contracts:

Prescribed payment terms -- Payments prorated according to the relative value of, and tied to acceptance of, deliverables. In many cases this includes a final payment which is a substantial percentage of the total contract value (e.g., 20 percent) which is not paid until the system is accepted or certified.

Liquidated damages -- Fixed amounts assessed contractors for compensation of damages, which may be difficult or impossible to determine precisely, as a result of contractor non-performance.

Performance bonds -- Bonds, usually secured through financial or insurance firms, from which costs for non-compliance can be assessed.

A number of States have started to require a 20 percent to 100 percent performance bond in their contracts. Our experience is that provision for liquidated damages, in combination with prescribed payment terms, provides the level of security needed to ensure vendor performance.

DISCUSSION: While we agree that vendors must be held accountable for their performance, using one or a combination of the methods described above involves costs for contractors which are passed on to Federal and State agencies. Performance bonds, in particular, are costly because: a contractor must make a direct outlay of funds to acquire the bond; and the systems initiatives being bonded are costly, which affects the cost of the bond. This increases the bid price and the cost of the project.

Our experience is that, in cases where States have had problems or failures in systems projects, performance bonds would not have provided the compensation States seek. In these cases, performance problems most often stemmed from a lack of specificity in the Statement of Work (SOW) section of the Request for Proposals (RFP), and other matters including project management. When the project is effectively managed, performance issues are kept to a minimum.

ACF POLICY: The preferred method of ensuring contractor performance is through prescribed payment terms. Payment terms may be used in conjunction with liquidated damages clauses to ensure that all contract obligations, including timeliness and quality of deliverables, are met by the vendor.

If a State wishes to require that vendors post a performance bond of more than 20 percent, justification must be submitted to the Department and approved through the Advance Planning Document procedures. The justification must include: an explanation of why a performance bond is proposed rather than, or in addition to, other contracting measures; the percent of the contract amount covered by the performance bond, and an explanation of why the State is proposing this amount; the methods and procedures which will be used to ensure the bonding agent is appropriate; details as to how the bond will be administered; and an explanation of when and how it will be exercised.

INQUIRIES TO: Administration for Children and Families
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