



## Department of Energy

Washington, DC 20585

April 1, 2008

### MEMORANDUM FOR DISTRIBUTION

FROM:

*Thomas E. Brown*  
THOMAS E. BROWN, DIRECTOR  
OFFICE OF CONTRACT MANAGEMENT  
OFFICE OF PROCUREMENT AND  
ASSISTANCE MANAGEMENT

SUBJECT:

Contract Change Order Administration of Department of Energy  
Prime Contracts

The purpose of this memorandum is to highlight the need for good contract administration of Department of Energy (DOE) contracts (non management and operating contracts) including those covered by DOE Order 413.3A, Program and Project Management for the Acquisition of Capital Assets. One of the focus areas of the DOE's efforts to improve contract and project management is the recognition that effective contract change order administration is critical to ensuring that contract and project requirements are met. Fundamentally, the award of an appropriate contract type that best reflects performance and risk at a reasonable cost or price establishes the foundation for successful project performance. Contract management planning, as documented in a formal contract management plan (See DOE Acquisition Guide Chapter 42.5) provides the "road map" for administering and monitoring key elements of contract performance. A sound contract management plan must clearly outline (1) the roles and responsibilities of key DOE officials, (2) key contract milestones and other performance requirements, (3) processes for ensuring that the rights and remedies of the parties remain operational, and (4) an effective contract change control process.

A mature and rigorous contract change control process is, arguably, the most important element of DOE's contract management framework and activities. A change control process provides a mechanism to make timely and appropriate changes to the contract requirements to reflect changes to the contract within the scope of the contract "Changes" clause. Formal change control includes not only the decision-making framework for assessing, negotiating, and implementing contract changes, but also includes project management and performance tracking systems, authorization and control levels, financial and funding management, and contract and project documentation.

There is a direct correlation between the contract estimated cost and fee (or fixed price) and the contractor's project performance measurement baseline. Contracts for projects subject to DOE Order 413.3 require the contractor to develop and deliver to DOE a contractor project performance measurement baseline. The contractor's project performance measurement baseline total cost plus management reserve (contractor's contingency) should equal the contract total estimated or target cost or price. The contractor should not be allowed to change the contract cost, price, schedule, and/or statement of work (SOW) that it agreed to in the original award by simply submitting or



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updating the project's performance measurement baseline. Contractors should be held accountable for the performance of their contracts at the agreed to contract cost or price and schedule.

Heads of Contracting Activities (HCA) are encouraged to establish formal Government change control boards (CCB) for major construction projects and environmental cleanup contracts. Contracting officers should issue approved program office or CCB changes (un-priced or bilateral) to the SOW by contract modification (Federal Acquisition Regulation (FAR) 43.201(a)) and request change proposals from the contractor.<sup>1</sup> Changes to project performance measurement baselines or the receipt of a revised baseline from a contractor do not constitute a contract change or a change proposal.

Validated project performance measurement baselines are valuable tools for Federal project directors and contractor project personnel to manage their projects. This management includes tracking performance against a baseline plan utilizing a certified earned value management system. However, DOE contracting officers are not authorized to modify a contract's estimated cost and fee/price or contractually required delivery dates/schedules based on a contractor's initial or revised project performance measurement baseline even if the baseline has been validated by DOE's Office of Engineering and Construction Management. A project performance measurement baseline is not considered cost and pricing data as defined by the FAR Part 15. In addition, the Department's validation reviews of these baselines do not differentiate contract overruns, new work, deleted work, change orders, requests for equitable adjustments (REA), incurred costs to date, contractor entitlement for change orders and REAs, and responsibility for schedule changes and delays. A baseline validation review also does not constitute a contract audit. A validated contractor project performance measurement baseline does not remove the contracting officer's responsibility for evaluating and negotiating outstanding contract changes and REAs even if the contractor may have accounted for these items in the revised baseline.

At times, the scope of the SOW that was established in a solicitation may change due to a delay in the award of the contract or the amount of work that the incumbent contractor actually completed versus the work that was projected to be completed at the time the solicitation was issued. In this case, the contracting officer should require the contractor to identify the differences in the scope within 60 to 90 days of contract award. Once the differences are verified, the contracting officer should issue a change order and request that the contractor submit both technical and cost proposals. This process has been referred to as a "true-up." The true-up should be negotiated as any other change order (see the attached guidance). The true-up should be completed in a timely fashion and should not wait for the submission or validation of the contractor's project performance measurement baseline.

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<sup>1</sup> Prior to issuing either a priced or unpriced change order estimated to be in excess of the HCAs delegated procurement authority, the HCA shall obtain Office of Contract Management (MA-62) approval in accordance with Department of Energy Acquisition Regulation (DEAR) Acquisition Guide Chapter 71.

Fee may be paid on contract change orders and REA's with entitlement in accordance with applicable FAR and DEAR fee policy based on the net cost of the added and deleted work. Contractor performance that will result in the earning of minimum or no fee is not justification for adding more fees to the contract. Fee may not be based on initial or revised project performance measurement baselines. Fee may not be calculated or paid on estimated work to go or on cost overruns.

Contract change orders and REAs including the associated contract fee should be negotiated to the extent possible prior to the incurrence of significant costs. Incentive or performance fees may not be established or paid on incurred costs, past delivery dates, or other actions which have been accomplished by the contractor prior to the negotiation of the fee. To the extent that changes and REAs involve significant costs incurred prior to agreement on contract price, the fee objective should be reduced to reflect decreased cost risk. Only fixed fee adjusted for reduced cost risk shall be negotiated on changes and REAs negotiated after all costs have been incurred.

Please provide copies of this letter and the attached guidance to all procurement personnel including contracting officers, contract specialists, and cost/price analysts. If there are any questions or comments on this guidance, feel free to contact me at 202-287-1348 or [thomas.brown@hq.doe.gov](mailto:thomas.brown@hq.doe.gov) or one of the Acquisition Planning and Liaison Division (MA-621) procurement analysts.

Attachment

## ATTACHMENT

### CONTRACT CHANGE AND REQUEST FOR EQUITABLE ADJUSTMENT (REA) GUIDANCE

If the Government needs to make a change in the scope of the contract that affects an increase (or decrease) in the estimated contract cost, fee (if any), delivery schedule, or option periods, the Contracting Officer (CO) should issue a change order. The general areas a CO may direct a change are stated in the applicable changes clause cited in the contract. The proper procedure for implementing a contract change is for the CO, after assuring all internal processes and procedures have been followed, to issue a request for proposal to the contractor with a draft contract modification definitization schedule. Contract change orders and REAs should be negotiated in a timely fashion in accordance with the Federal Acquisition Regulation (FAR) and the Department of Energy Acquisition Regulation (DEAR). (Note: It is important that adequate funding is available to fund the contract change in order to not violate the Antideficiency Act).

The entitlement and quantum for each contract change and REA have to be individually evaluated and documented by the contracting officer. After receipt of the contractor's proposal, the CO shall ensure that a technical evaluation and cost analysis including audit and field pricing support when required (see attached letter from Edward R. Simpson to the Procurement Directors dated August 20, 2001), be performed and documented. Before negotiating with the contractor, the CO should prepare a pre-negotiation memorandum (pre-neg) (FAR 15.406.1 Pre-negotiation Objectives)

The pre-neg should discuss the proposed contractor position and the Department of Energy (DOE) objective by cost element. The pre-neg should address the reasonableness of the proposed cost changes from the current contract cost. It should breakout the cost of the new work, deleted work, change orders, REAs, and cost overruns. While one pre-neg may address several changes or REAs, the pre-neg should address the contractor's proposal and the DOE objective for each individual entitlement.

On REAs, the pre-neg should first establish the contractor entitlement or the lack thereof for each REA. The contracting officer may need to have a separate technical evaluation of the entitlement to support the pre-neg. On each REA with entitlement, the quantum has to be addressed in same manner as changes and new work.

After contract negotiations are complete but before executing the contract modification, the Contracting Officer shall obtain a certificate of current cost or pricing data per FAR 15.403-4(b)(2) unless an exception is applicable per FAR 15.403-1(b) or waived by the Head of the Contracting Activity (HCA) (FAR 15.403-1(c)(4)). Most change orders require certified cost and pricing data unless the item

being changed is a commercial item. Any waiver of the requirement to submit certified cost and pricing data must present information and a solid case to support the action sufficient to withstand the scrutiny by internal and external reviews and be within the HCA's delegated procurement authority. For actions that exceed the HCA's delegation, the HCA must obtain prior approval from the Office of Contract Management (MA-62).

The results of the negotiations are required to be documented with a post-negotiation memorandum (FAR 15.406-3, Documenting the Negotiation). After the appropriate approval of the action, the Contracting Officer should implement a bilateral contract modification that includes release language per FAR 43.204, Administration.

In certain circumstances, it may be necessary to issue an undefinitized/unpriced change order modification. In these exceptional instances, the CO may unilaterally direct by contract modification an immediate change within the general scope of the contract. The changed contractual requirement should be limited to the minimum effort required to satisfy the requirement while a proposal is prepared, analyzed, and negotiated.

In the contract modification, the CO is required to set a ceiling price for the changed contractual requirements. The ceiling price should be separately identified in the unpriced change order from the pricing structure of the basic contract. It is suggested that the CO consider utilizing FAR 52.243-6, Change Order Accounting, for changes expected to exceed \$100,000 for visibility into actual costs incurred pending definitization. The process of definitizing an unpriced change order mirrors the process outlined for a traditional change order. The CO should definitize the change as soon as practicable.

Most DOE cost reimbursable contracts contain both a technical direction clause and a changes clause. Technical direction is an important tool for the contracting officer's technical representative (COR) who is often the Federal Project Director, but it must be within the SOW stated in the contract and preferably should be in writing. Technical direction may not be used to assign effort outside of the SOW and may not constitute a contract "Change" (FAR 43.202, Authority to Issue Change Orders). The CORs are responsible for ensuring that they do not exceed their authority. If, in the contractor's opinion, technical direction has been issued that constitutes a change to the contract, the contractor is responsible for notifying the contracting officer in writing as soon as possible (FAR 43.104(a), Notification of Contract Changes) prior to performing the technical direction. As a best practice, the CO should be working with the COR and the contractor to avoid situations where the contractor feels compelled to seek instruction on the propriety of a technical direction. If advanced coordination is not practicable, the contracting officer is encouraged to be proactive in reviewing issued technical directions and coordinating any required actions.

Contract Change Order Administration of Department of Energy Prime Contracts

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Department of Energy

Washington, DC 20585

AUG 20 2001

MEMORANDUM FOR PROCUREMENT DIRECTORS

FROM:

  
EDWARD R. SIMPSON, ACTING DIRECTOR  
OFFICE OF CONTRACT MANAGEMENT  
OFFICE OF PROCUREMENT &  
ASSISTANCE MANAGEMENT

SUBJECT:

CONTRACT AUDITS

The purpose of this memorandum is to emphasize the need for obtaining timely contract audit and pricing support for contracts for the Department of Energy's (DOE) major projects such as construction and environmental remediation work. As we move away from relying on traditional management and operating contracts to accomplish our major projects, it is important that DOE obtain adequate audit and pricing support to: provide scrutiny into the offeror's or contractor's cost or price proposal; confirm that the offeror's or contractor's accounting system and practices are adequate for the contract type; and ensure that the cost or price to be paid under these new contracts is fair and reasonable.

Department of Energy Acquisition Regulation (DEAR) 915.404-2-70, Audit As An Aid In Proposal Analysis requires a cognizant Federal audit activity review of any contract or modification action of \$500,000 or more for firm fixed price contract types and \$1 million or more for all other contracts when the contract price will be based on cost or pricing data submitted by the offeror/contractor. This DEAR requirement applies to not only preaward actions but contract modifications that include changes, definitization of unpriced change orders, request for equitable adjustments, overrun proposals, claims, price negotiations of unpriced options, settlement proposals, termination proposals, determinations of cost incurred for the payment of incentive fees, separately priced task orders, etc. Changes that include both deductive and additive work must consider both the increases and decreases for the purpose of the audit threshold (e.g. a \$400,000 modification resulting from a reduction of \$500,000 and an increase of \$900,000 would be valued at \$1,400,000 for threshold applicability purposes. See Federal Acquisition Regulation (FAR) 15.403-4(a)(1)(iii)). Contracting officer decisions on claims (see FAR 33.202) exceeding the thresholds above should also be supported by audit reviews where cost and pricing data is used to support the contracting officer's position.

The DEAR requirement may be waived at a level above the contracting officer when the reasonableness of the negotiated contract price can be determined from the information already available. It should be noted that independent Government estimates shall not be used as the sole justification for any such waiver. In addition, cost/pricing reports from DOE pricing support personnel or from Department of Defense field level contract management offices (see DEAR 915.404-2) do not satisfy the DEAR 915.404-2-70 audit requirement. In general, audits should



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not be waived unless the existing cost data being used to support the contract price has been audited within the past year. Audits are also deemed necessary when significant incurred costs are involved or when historical actual cost data on previous contracts exists and are relevant to the current contract action.

While requiring cost and pricing data and obtaining proposal audits when required is normally associated with single source contract actions, it should be noted that information other than cost and pricing data and audit assistance may be necessary on competitive procurements as well. FAR 15.404-1(d)(2) requires that cost realism analyses shall be performed on cost reimbursement contracts to determine the probable cost of performance for each offeror. Cost realism analyses may also be used on competitive fixed-priced incentive contracts or, in exceptional cases, on other competitive fixed-price type contracts when new requirements may not be fully understood by competing offerors, there are quality concerns, or past experience indicates that contractors proposed costs have resulted in quality or service shortfalls (see DEAR 15.404-1(d)(3)). If there is a significant cost/price spread in competitive offers, it may be an indication that the offerors may not fully understand the Government's requirements. Additionally, when joint ventures, limited liability corporations, or other similar entities with no prior cost history propose, audit assistance may be useful in evaluating proposed indirect costs and new accounting systems.

Any prenegotiation plans on contract actions requiring Office of Contract Management, MA-52, approval that do not include the appropriate audit support required by DEAR shall include a copy of the waiver and the supporting rationale as required by DEAR 915.404-2-70(b). If there is any uncertainty about whether or not an audit is required in any specific procurement action, feel free to discuss it with your assigned MA-52 "buddy". If there are any problems arranging audit support, the Office of Policy, MA-51, within the Office of Procurement and Assistance Management, can be contacted for assistance. If there are any questions about this letter, please contact Thomas Brown of my staff at 202-586-9075.

Please distribute this memorandum to all contracting officers and pricing support personnel.