

Guide Chapter 70.32 Contract Financing

Guide Subchapter 70.3270 Alternative Financing

Guiding Principle

The contracting officer should assist program officials in ensuring that neither the contract's statement of work nor any other direction to the contractor precludes qualifying the alternative financing endeavor as an operating lease.

Background:

The Office of Engineering and Construction Management (MA-50) manages the Department's Alternative Financing policy. It has defined Alternative Financing as "the process whereby DOE and its operational elements use private development to provide the use of capital assets under the auspices of an operating lease." The Department's policy is to consider alternative financing to obtain the use of capital assets when: appropriate; supported by thorough analysis; cleared by OMB; and in the best interests of the Department and the taxpayer.

The Office of Engineering and Construction Management has stated that it is important for Alternative Financing proposals to be evaluated to determine that they do not involve long-term or unique Government requirements. Alternative methods of acquisition involving third-party financing and lease arrangements may be appropriate to satisfy shorter-term needs. The scoring criteria established by OMB Circular A-11, Appendix B, "Budgetary Treatment of Lease-Purchases and Leases of Capital Assets," tend to limit the Government's use of "operating leases" to short term. Determining if a multi-year lease will score in its entirety in the first year will involve a review of the criteria set forth in the definition of "Operating lease" within the Circular. A key criterion in determining whether a lease is an operating lease is the inclusion of a 365 day termination clause.

Guidance:

Alternative financing arrangements are often complex and each case is unique. (Proposals must be independently generated with no impetus from the Federal Government.) It is incumbent on the Department to complete a detailed review and analysis of each proposal to ensure that any decision to approve it is consistent with achieving mission requirements, achieved by the most economical and flexible means available, and in the best interests of the Government and the taxpayer.

Program mission requirements must be evaluated initially to determine whether mission need is expected to be long- or short-term in nature. Generally, long-term requirements and assets without commercial use are not appropriate for alternative financing. Operating lease scoring criteria tend to limit the Government's approval of alternatively financed projects to shorter-term leases and leases that contain clauses allowing termination upon only one year notice or less with no termination penalties.

Conflict of Interest Considerations:

The Office of Engineering and Construction Management's draft policy for alternative financing states that representatives of contractors that do not have a financial interest in the outcome of an alternative financing proposal may be involved in, but cannot influence the outcome. Further, a contractor that has a financial interest in any phase of the development of the business case proposal should not be eligible to recover any costs expended in proceeding on the project. Consequently, no direction should be given to any contractor permitting an alternative financing arrangement unless the direction is accompanied in writing by restrictions on allowable costs contained in this paragraph. Although not required in every case, officials should in all cases consider negotiating advance agreements on which costs will be allowable with any contractor that the Department is contemplating tasking to participate in the process.

Conclusion:

The main procurement concern with alternative financing endeavors is ensuring qualification of the effort as an operating lease. Therefore, the contracting officer should consult with the cognizant program officials whenever any issue related to alternative financing arises. Any communication or direction to the contractor related to alternative financing should be vetted first by program officials.

Contracting Officers should assist program officials in their efforts to comply with the OMB requirements for alternative financing. They should help program officials ensure that neither the contract's statement of work nor any other direction to the contractor invalidates alternative financing endeavors (that is, disqualifies them as operating leases).