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No. 21-\_\_\_\_\_

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Optimum Services, Inc.,

Petitioner,

v.

Secretary of the Interior,

Respondent

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**PETITIONER'S APPENDIX**

**VOLUME ONE**

**PAGES 1A-351A**

/signed/ James W. Copeland

James W. Copeland, Counsel for Petitioner

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2a

NOTE: This disposition is nonprecedential.

**United States Court of Appeals  
for the Federal Circuit**

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**OPTIMUM SERVICES, INC.,**  
*Appellant*

**v.**

**SECRETARY OF THE INTERIOR,**  
*Appellee*

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2020-1087

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Appeal from the Civilian Board of Contract Appeals in  
No. 4968, Administrative Judge Catherine B. Hyatt, Ad-  
ministrative Judge Harold C. "Chuck" Kullberg, Adminis-  
trative Judge Joseph A. Vergilio.

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**JUDGMENT**

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JAMES COPELAND, Copeland Law Firm, LLC, Atlanta,  
GA, argued for appellant.

DANIEL B. VOLK, Commercial Litigation Branch, Civil  
Division, United States Department of Justice, Washing-  
ton, DC, argued for appellee. Also represented by JEFFREY  
B. CLARK, ROBERT EDWARD KIRSCHMAN, JR., PATRICIA M.  
MCCARTHY; PAUL SAX, Office of the Solicitor, United States  
Department of Interior, Lakewood, CO.



**3a**

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THIS CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

PER CURIAM (O'MALLEY, REYNA, and HUGHES, *Circuit Judges*).

**AFFIRMED. See Fed. Cir. R. 36.**

ENTERED BY ORDER OF THE COURT

November 9, 2020  
Date

/s/ Peter R. Marksteiner  
Peter R. Marksteiner  
Clerk of Court



UNITED STATES  
CIVILIAN BOARD OF CONTRACT APPEALS

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**THIS OPINION WAS INITIALLY ISSUED UNDER PROTECTIVE ORDER AND  
IS BEING RELEASED TO THE PUBLIC IN ITS ENTIRETY ON JULY 9, 2019**

DENIED: July 1, 2019

CBCA 4968

OPTIMUM SERVICES, INC.,

Appellant,

v.

DEPARTMENT OF THE INTERIOR,

Respondent.

James W. Copeland of Copeland Law Firm, LLC, Atlanta, GA, counsel for Appellant.

Paul Sax, Office of the Solicitor, Department of the Interior, Lakewood, CO, counsel for Respondent.

Before Board Judges **HYATT**, **VERGILIO**, and **KULLBERG**.

Opinion for the Board by Board Judge **KULLBERG**. Board Judge **VERGILIO** concurs.

**KULLBERG**, Board Judge.

Respondent, Department of the Interior (DOI or Government), and appellant, Optimum Services, Inc. (OSI), have filed cross-motions for summary relief.<sup>1</sup> At issue is

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<sup>1</sup> The Board's revised rules replaced the term summary relief with summary judgment. 48 CFR 6101.8(f) (2018). The Government's motion preceded that change in the

whether the termination of OSI's contract for convenience in response to a post-award protest was a breach of contract. OSI seeks recovery of its anticipated profits. For the reasons stated below, the Board denies OSI's motion, grants DOI's motion, and denies the appeal.

### Background

On June 16, 2008, the National Park Service (NPS), an agency within DOI, issued solicitation N5297080232 (solicitation) for ecological restoration services in the Everglades National Park in Florida. Appeal File, Exhibit 9 at 2.<sup>2</sup> The description of work in the solicitation noted that the Everglades National Park encompassed more than 1.5 million acres and provided, generally, for "on-site ecological restoration . . . with the recovery of a pre-existing ecosystem . . . that . . . has been physically disturbed." Exhibit 2 at 99. One area identified for such restoration was the "Hole-in-the- Donut (HID)." *Id.* The HID consisted of "approximately 6040 acres [that were] once virtually a monospecific stand of an invasive exotic plant called Brazilian pepper." *Id.*

On December 23, 2008, NPS awarded to OSI contract C2000091200 (contract). Exhibit 2 at 1. NPS awarded the contract after OSI had filed a protest at the Government Accountability Office (GAO)<sup>3</sup> that challenged NPS' September 18, 2008, award of the contract to Westwind Contracting, Inc. (WCI). Exhibits 3, 5. In response to OSI's protest, NPS took corrective action that included further discussions and a new source selection decision.<sup>4</sup> Exhibits 6, 25. NPS terminated WCI's contract the same day that it awarded OSI's contract. Exhibit 8.

The contract was an indefinite-delivery/indefinite-quantity (IDIQ) contract with a base year and four option years for restoration services in the Everglades National Park. Exhibit 2 at 6, 10. Paragraph B.1 of the contract provided that "the minimum quantity of services

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Board's rules, and appellant filed its motion shortly afterward.

<sup>2</sup> All exhibits are found in the appeal file, unless otherwise noted.

<sup>3</sup> On July 7, 2004, the General Accounting Office was renamed the Government Accountability Office. Pub. L. No. 108-271, § 8(a), 118 Stat. 814 (2004). References to GAO in this decision will refer to either the Government Accountability Office or the General Accounting Office, depending on when that name was in use.

<sup>4</sup> On November 17, 2008, GAO dismissed Optimum's protest. *Optimum Services, Inc.*, B-400677 (Nov. 17, 2008).

ordered by the Government shall equal \$2 million worth of services.” *Id.* at 6. Additionally, paragraph F.3 of the contract stated that “[t]he contractor is guaranteed a minimum of \$2 million during the life of the contract.” *Id.* at 10.

The contract incorporated in full Federal Acquisition Regulation (FAR) clause 48 CFR 52.249-2 (2007) (FAR 52.249-2), Termination for Convenience of the Government (fixed price), May 2004, that provided, in pertinent part, the following:

(a) The Government may terminate performance of work under this contract in whole or, from time to time, in part if the Contracting Officer determines that a termination is in the Government’s interest. The Contracting Officer shall terminate by delivering to the Contractor a Notice of Termination specifying the extent of termination and the effective date.

....

(e) After termination, the Contractor shall submit a final termination settlement proposal to the Contracting Officer in the form and with the certification prescribed by the Contracting Officer.

....

(f) Subject to paragraph (e) of this clause, the Contractor and the Contracting Officer may agree upon the whole or any part of the amount to be paid or remaining to be paid because of the termination. The amount may include a reasonable allowance for profit on work done. However, the agreed amount . . . may not exceed the total contract price as reduced by (1) the amount of payments previously made and (2) the contract price of work not terminated.

Exhibit 2 at 79-80. The contract also incorporated in full FAR 52.215-8, Order of Precedence–Uniform Contract Format, October 1997, that stated, in pertinent part, the following:

Any inconsistency in this solicitation or contract shall be resolved by giving precedence in the following order:

(a) The Schedule (excluding the specifications).

(b) Representations and other instructions.

- (c) Contract clauses.
- (d) Other documents, exhibits, and attachments.
- (e) The specifications.

*Id.* at 35. Finally, the contract included FAR 52.233-3, Protest after Award, August 1996, that provided, in pertinent part, the following:

(a) Upon receipt of a notice of protest (as defined in FAR 33.101) or a determination that a protest is likely (see FAR 33.102(d)), the Contracting Officer may, by written order to the Contractor, direct the Contractor to stop performance of the work called for by this contract. The order shall be specifically identified as a stop-work order issued under this clause. Upon receipt of the order, the Contractor shall immediately comply with its terms and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the period of work stoppage. Upon receipt of the final decision in the protest, the Contracting Officer shall either—

- (1) Cancel the stop-work order; or
- (2) Terminate the work covered by the order as provided in the Default, or the Termination for Convenience of the Government, clause of this contract.

....

(e) The Government's rights to terminate this contract at any time are not affected by action taken under this clause.

*Id.* at 73.

On January 12, 2009, WCI protested NPS' award of the contract to OSI at the United States Court of Federal Claims (COFC). Exhibit 9. WCI alleged in its complaint that NPS had violated FAR 15.507 by giving OSI key information from WCI's second price proposal without its permission during OSI's debriefing on September 23, 2008. *Id.* at 11-13. WCI also alleged that NPS had not properly evaluated OSI's proposal. *Id.* at 13-15. On January 13, 2008, COFC granted OSI's motion to intervene in the protest. Exhibit 10.

In a series of conference calls during the period from January 12 to 15, 2009, employees of NPS discussed how the agency should respond to WCI's protest. Exhibit 106

at 7. The contracting officer (CO) at NPS during that period was not present during those conference calls, but he relied upon “input from other critical attendees.” *Id.* at 8. OSI’s written deposition question 9(a) to the CO asked the following: “[W]ho made the NPS’ decision to take corrective action (including the termination for convenience of [OSI’s] contract) in response to [WCI’s] COFC bid protest?” *Id.* at 8-9. The CO represented the following:

Contracting “decisions” don’t become such until the warranted contracting officer executes the document formalizing the decision. We clearly had a lead attorney that was guiding us through this process to make sure we were conducting ourselves in a legally-sufficient manner. The decision to do corrective action and the termination fell on my shoulders having followed the advice from [counsel].

*Id.* at 9.

By letter dated January 15, 2009, NPS’ legal counsel informed the Department of Justice (DOJ) counsel of the following:

After reviewing the Department of Justice’s recommendations and obtaining the approvals of relevant program office officials as well as our own chain-of-command, the U.S. Department of [the] Interior, [the NPS] has determined to take voluntary corrective action in connection with this matter. The form of voluntary corrective action will entail the [NPS] cancelling the current solicitation and terminating the contract award to [OSI] for convenience. The [NPS] will use a different contractual vehicle for a particular segment of its needs at the Everglades National Park this season. This autumn, the [NPS] will solicit a new contract to better reflect its needs.

Exhibit 11. On January 16, 2009, WCI filed a motion to dismiss the protest, and OSI filed its opposition to the dismissal on January 19, 2009. Exhibits 12, 13. On January 22, 2009, COFC dismissed the protest over OSI’s objection. *Westwind Contracting, Inc. v. United States*, No. 09-25C (Fed. Cl. Jan. 22, 2009). On January 26, 2009, NPS notified OSI that the contract had been terminated for convenience. Exhibit 17.

On January 23, 2009, OSI filed a protest with GAO, which challenged NPS’ decision to cancel the solicitation. Exhibit 16. In its response to OSI’s protest, NPS explained that “another round of pricing would decrease the price proposals so low below the Independent Government Cost Estimate (IGCE) that either NPS would have to find the prices

unreasonable or, if not unreasonable, there would be an impact on the performance of the contract.” Exhibit 20 at 3. Additionally, NPS stated the following:

Because of the short dry season, typically lasting from December to May, no work can be performed this year under this [request for proposals]. NPS is using a different contractual vehicle to accomplish some work during the remainder of this dry season. This other contract will not decrease the amount of acreage to be covered in the re-solicitation because the IDIQ contract cannot cover all acreage of work. Additionally, NPS faced the risk of losing the funding, which is provided by the state of Florida through a mitigation bank fund, if NPS did not conduct any work this dry season.

*Id.* at 3 n.2.

GAO denied OSI’s protest. *Optimum Services, Inc.*, B-401051, 09 CPD ¶ 85 (Apr. 15, 2009). With regard to cancellation of the solicitation, GAO’s decision stated the following:

We have held that a reasonable basis for cancellation exists where the solicitation does not accurately reflect the agency’s requirements. Due to reduced funding levels, the agency here recognized that the solicitation did not accurately reflect its requirements given that the maximum estimated order quantities for the CLINs were overstated, as were the maximum order dollar values for the base and option periods.

*Id.* at 3-4 (citations omitted). GAO’s decision also dismissed as “mere inference and supposition” OSI’s contention that NPS’ “articulated reasons for canceling the solicitation [were] essentially a pretext . . . motivated by the . . . desire to avoid resolving [WCI’s] protest in court.” *Id.* at 3 n.1.

On February 12, 2009, NPS issued solicitation N5297090038 for “Environmental Remediation of the ‘HID.’” Exhibit 21 at 1-2. Subsequently, on March 11, 2009, NPS awarded contract C5297090038 to Cherokee Enterprises, Inc. (CEI) in the amount of \$1,325,531. *Id.* at 2. On August 21, 2009, NPS issued another solicitation for land restoration and vegetation clearing for the HID area at the Everglades National Park. Exhibit 31 at 2. The solicitation provided for “Multiple IDIQ Award . . . to eligible 8a Contractors registered in the South Florida District of the [Small Business Administration].” *Id.* On February 4, 2010, NPS awarded contracts under the solicitation to CEI and Homestead Concrete & Drainage, Inc. (Homestead). Exhibits 31 at 3, 32 at 3. OSI contends that it was ineligible for an award because the contracts were “8-A set

aside contracts (instead of Small Business Set Aside Contracts), for which [it] could not qualify.” Appellant’s Second Amended Set of Undisputed Facts at 99-100.

On January 15, 2015, OSI submitted to NPS its claim for termination costs in the amount of \$21,468 and a breach of contract claim in the amount of \$584,785. Exhibit 73 at 1. OSI contended that NPS breached the contract because it did not purchase the minimum quantity of \$2 million before terminating the contract, and the termination of the contract was either done in bad faith or was an abuse of discretion. *Id.* at 6-21. OSI computed its breach of contract damages based upon its anticipated profits on \$2 million, the minimum amount of services to be purchased under the contract. *Id.* at 22.

The CO’s decision, which was dated June 12, 2015, allowed OSI payment of only its incurred costs in the amount of \$21,468 and denied the remainder of OSI’s claim for breach of contract damages. Exhibit 1 at 8. On September 18, 2015, OSI submitted to NPS its invoice in the amount of \$21,468. Exhibit 74. On September 28, 2015, OSI executed a release of claim in which it agreed that NPS’ payment of \$21,468 was a release of all claims with the exception of its breach of contract damages claim. Exhibit 75. OSI filed a timely appeal of the CO’s decision. Subsequently, each party filed a motion for summary relief.

### Discussion

Both DOI and OSI have moved for summary relief regarding the issue of whether NPS’ termination of the contract for convenience was a breach of contract. OSI has accepted payment from NPS for its actual costs incurred under the contract, and the only issue before the Board is whether OSI is entitled to recover breach of contract damages. DOI’s motion for summary relief argues that neither of the grounds for breach of contract asserted in OSI’s claim, bad faith and abuse of discretion, are supported by the facts in this appeal. Additionally, DOI contends that the contract did not require NPS to purchase the required minimum under the contract before terminating the contract for convenience. For those reasons, DOI urges that the appeal be denied.

OSI’s motion alleges that the termination of its contract for convenience was the result of either bad faith or an abuse of discretion, and, in the alternative, OSI argues that it was a breach of contract for NPS to terminate the contract before purchasing the guaranteed minimum of \$2 million. With regard to its allegation of bad faith, OSI contends that NPS terminated the contract in order to obtain a better price for the work from a different contractor. OSI contends that the termination of its contract was an abuse of discretion because WCI’s protest lacked merit, and NPS had alternatives to terminating the contract in response to WCI’s protest. Additionally, OSI contends that NPS’ decisions to cancel the solicitation and award contracts to CEI and Homestead were unreasonable. Finally, OSI



argues that the CO did not make an independent decision to terminate the contract because he relied upon the advice of legal counsel.

The Board rules on the parties' motions for summary relief according to the same standard for summary judgment. See *GE Capital Information Technology Solutions-Federal Systems v. General Services Administration*, GSBCA 15467, 01-2 BCA ¶ 31,445, at 155,306 (summary relief is the analogous procedure to summary judgment). Summary judgment is only appropriate where there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Id.* It is not the judge's function "to weigh the evidence and determine the truth of the matter." *Id.* at 249. All justifiable inferences and presumptions are to be resolved in favor of the nonmoving party. *Id.* at 255.

The moving party has the initial responsibility of stating the basis for its motion and "identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). "[A]llegations without support are not evidence." *McAllen Hospitals LP v. Department of Veterans Affairs*, CBCA 2774, et al., 14-1 BCA ¶ 35,758, at 174,970 (quoting *Max Castle*, AGBCA 97-128-1, 97-1 BCA ¶ 28,833, at 143,845). Where both parties move for summary relief, each party's motion must be reviewed on its own merits, and all reasonable inferences must be resolved in favor of the non-moving party. *First Commerce Corp. v. United States*, 335 F.3d 1373, 1379 (Fed. Cir. 2003); *DeMarini Sports, Inc. v. Worth, Inc.*, 239 F.3d 1314, 1322 (Fed. Cir. 2001). The fact that cross-motions have been filed does not require the granting of one of the motions. *California v. United States*, 271 F.3d 1377, 1380 (Fed. Cir. 2001).

The Board addresses, first, whether the termination of OSI's contract either was done in bad faith or was an abuse of discretion. In general, termination for convenience is "[o]ne of the few exceptions to the common law requisite mutuality of contract." *Maxima Corp. v. United States*, 847 F.2d 1549, 1552 (Fed. Cir. 1988). "The Government can terminate a contract for convenience when it is in its best interests." *J.R. Mannes Government Services Corp. v. Department of Justice*, CBCA 5911, 18-1 BCA ¶ 37,015, at 180,263 (citing *Securiforce International America, LLC v. United States*, 879 F.3d 1354, 1365 (Fed. Cir. 2018)). Additionally, this Board has recognized the following:

A court or board of contract appeals may find that a termination for the convenience of the Government constituted a breach of contract only if the tribunal finds that the termination was motivated by bad faith or constituted an

abuse of discretion, or that the Government entered into the contract with no intention of fulfilling its promises. *Greenlee Construction, Inc. v. General Services Administration*, CBCA 415, et al., 07-2 BCA ¶ 33,619, at 166,510 (citing *T & M Distributors, Inc. v. United States*, 185 F.3d 1279, 1283, (Fed. Cir. 1999); *Krygoski Construction Co. v. United States*, 94 F.3d 1537, 1541, 1543-44 (Fed. Cir. 1996); *Caldwell & Santmyer, Inc. v. Glickman*, 55 F.3d 1578, 1581 (Fed. Cir. 1995)). As long as adequate cause for the termination is found, the termination will be held valid, even if that cause was not known at the time of termination. *John Reiner & Co. v. United States*, 325 F.2d 438, 443 (Ct. Cl. 1963).

*Oregon Woods, Inc. v. Department of the Interior*, CBCA 1072, 09-1 BCA ¶ 34,014, at 168,202-03 (2008), *reconsideration denied*, 09-1 BCA ¶ 34,063, *aff'd*, *Oregon Woods, Inc. v. Salazar*, 355 Fed. App'x 403 (Fed. Cir. 2009).

“In the absence of bad faith or clear abuse of discretion, the contracting officer’s election to terminate for the government’s convenience is conclusive.” *T & M Distributors, Inc.*, 185 F.3d at 1283. Proof of bad faith requires showing “clear and convincing” evidence that overcomes the presumption that government officials act in good faith. *See Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1239 (Fed. Cir. 2002). “[T]he clear and convincing standard most closely approximates . . . the ‘well-nigh irrefragable’ proof standard.” *Id.* at 1239-40. For that reason, “it logically follows that showing a government official acted in bad faith is intended to be very difficult, and that something stronger than a ‘preponderance of evidence’ is necessary to overcome the presumption that he acted in good faith, *i.e.*, properly.” *Id.* at 1240. With regard to abuse of discretion, this Board recognizes the following:

In determining whether the decision . . . was so arbitrary or capricious as to constitute an abuse of discretion [the Board] will consider– “(1) evidence of subjective bad faith on the part of the government official, (2) whether there is a reasonable, contract-related basis for the official’s decision, (3) the amount of discretion given to the official, and (4) whether the official violated an applicable statute or regulation.”

*AFR & Associates, Inc. v. Department of Housing & Urban Development*, CBCA 946, 09-2 BCA ¶ 34,226, at 169,169 (quoting *McDonnell Douglas Corp. v. United States*, 182 F.3d 1319, 1326 (Fed. Cir. 1999); *see also Keco Industries v. United States*, 492 F.2d 1200, 1203-04 (Ct. Cl. 1974).

OSI cites the Board's decision in *Sigal Construction Corp. v. General Services Administration*, CBCA 508, 10-1 BCA ¶ 34,442, in support of its contention that NPS acted in bad faith by terminating the contract in order to obtain "the contract work . . . by another contractor at a better price." Appellant's Amended Motion for Summary Relief at 81. In *Sigal*, the Board found that during the course of contract performance, a GSA employee contacted another contractor and "request[ed] a cost proposal to perform . . . restoration required by the contract awarded to Sigal." *Id.* at 169,969. GSA then suspended part of Sigal's work under the contract. *Id.* The Board found that GSA "constructively terminated for convenience a portion of the contract." *Id.* at 169,971. Consequently, the Board held that "[i]t was a breach of contract." *Id.* Additionally, the Board recognized that "[o]ne of the few limitations on the Government's right to terminate for convenience is that the Government may not terminate simply to get a better price for performing needed work." *Id.* (citing *Krygoski Construction Co.*, 94 F.3d at 1541).

Additionally, OSI relies on *Krygoski Construction Co.* and *Torncello v. United States*, 681 F.2d 756 (Ct. Cl. 1982) (en banc), in support of its contention that NPS terminated its contract in order to obtain a better price. Appellant's Amended Motion for Summary Relief at 81. In *Krygoski Construction Co.*, the court recognized that "the applicability of . . . '[*Torncello*]' stands for the unremarkable proposition that when the government contracts with a party knowing full well that it will not honor the contract, it cannot avoid a breach claim by advert[ing] to the convenience termination clause.'" 94 F.3d at 1543-44 (quoting *Salsbury Industries v. United States*, 905 F.2d 1518, 1521 (Fed. Cir. 1990)). The court in *Torncello* stated, "We cannot condone termination based on knowledge of a lower cost when that knowledge preceded award of the contract." 681 F.2d at 772.

The grounds for showing bad faith as set forth in *Sigal*, *Krygoski*, and *Torncello* are not present in this appeal, and OSI's reliance on those decisions is misplaced. The record shows that NPS terminated OSI's contract in response to WCI's protest, and the termination of OSI's contract was part of an agreement to resolve that protest. OSI has neither proven nor alleged that NPS awarded the contract to OSI with the intent of not honoring that contract because a less expensive potential contractor had already been identified, and "[t]he mere fact that a contracting officer awards a contract to another company after terminating the . . . contract is insufficient to show bad faith." *Universal Home Health Supplies, Inc. v. Department of Veterans Affairs*, CBCA 4012, *et al.*, 16-1 BCA ¶ 36,370, at 177,285 (quoting *Kalvar Corp. v. United States*, 543 F.2d 1298, 1302 (Ct. Cl. 1976)).

OSI contends that NPS' "decision to take corrective action was unreasonable because [WCI's] Count 1 arguments (violation of FAR 15.507 [and] failure to mitigate unfair competitive advantage) were not a reasonable basis for the NPS to find actual impropriety in the award to [OSI], or any prejudice to [WCI]." Appellant's Amended Motion for

Summary Relief at 14. Additionally, OSI argues that NPS’ “decision to take corrective action was unreasonable because the NPS failed to consider its option of making multiple awards to [OSI] and [WCI].” *Id.* at 45. OSI contends that the corrective action, which included cancelling the solicitation and issuing new solicitations, “was not rationally related to the perceived impropriety in the award to [OSI].” *Id.* at 47. Although OSI acknowledges that GAO denied its protest of NPS’ decision to cancel the solicitation, OSI contends that “GAO’s April 2009 decision was irrational.” *Id.* at 75. The Board addresses OSI’s arguments along the lines of two issues: (1) the reasonableness of NPS’ termination of the contract in response to WCI’s protest; and (2) the Board’s jurisdiction to review matters related to NPS’ corrective action with regard to the solicitation.

We address, first, the reasonableness of NPS’ decision to terminate OSI’s contract in response to WCI’s protest. A contractor is not entitled to recover anticipated profits when an agency terminates a contract for convenience in response to a protest. *See G.C. Casebolt v. United States*, 421 F.2d 710, 712-13 (Ct. Cl. 1970) (contract terminated after protest filed); *John Reiner & Co.*, 325 F.2d at 443 (contract terminated after GAO ruled that contract award was improper); *Arnold V. Hedberg*, ASBCA 31747, 90-1 BCA ¶ 22,577, at 113,312 (1989) (termination of lease after GAO granted protest was “per se reasonable and done in good faith.”); *see also Salsbury Industries*, 905 F.2d at 1522 (“Convenience terminations have been sustained when they were invoked to avoid conflict with other governmental entities.”). In *G.C. Casebolt*, the court recognized that “it could clearly be deemed ‘in the best interest of the Government’ (the standard for a convenience-termination) to terminate plaintiff’s contract at once, so as to deflate the existing controversy . . . and to avoid a possible rebuke by the General Accounting Office.” 421 F.2d at 713.

The above-cited decisions recognized that the Government acts reasonably in resolving a protest informally because doing so avoids the possibility of an adverse decision, and resolving a protest by terminating a contract does not entitle a contractor to anticipated profits. Those decisions do not suggest that an adverse result from a protest must be proven with certainty in order to justify the termination of a contract, and the Board rejects OSI’s attempt to direct the Board into a detailed analysis of the merits of WCI’s protest as a means to determine the reasonableness of NPS’ decision to terminate the contract. NPS was faced with possible delays in contract performance and the expenditure of time and resources as a result of continuing to oppose WCI’s protest, and its decision to terminate OSI’s contract was, therefore, in the best interests of the Government. OSI is not entitled to recover anticipated profits under such circumstances.

OSI presents, at length, a number of grounds upon which NPS could have opposed WCI’s protest and suggests that NPS unreasonably failed to consider alternatives to the termination of its contract, such as multiple contract awards. The contract put OSI on notice

that the Government's right to terminate the contract for convenience was not affected by a protest. Such an attempt by OSI to argue that NPS could have successfully opposed WCI's protest or resolved it differently is a matter of speculation and not evidence. *See Bowers Investment Co. v. Department of Transportation*, CBCA 1196, 09-2 BCA ¶ 34,238, at 169,217 (appellant failed to carry burden of proof with a claim "based on unsubstantiated circumstantial evidence and speculation").

The second issue presented by OSI is whether the Board has jurisdiction to review the corrective action taken by NPS, which was the cancellation of the solicitation, and OSI's protest of that cancellation at GAO. This Board's jurisdiction is pursuant to the Contract Disputes Act (CDA), 41 U.S.C. §§ 7101-7109 (2012). Our authority under the CDA "is limited to hearing and deciding appeals by contractors of decisions issued by contracting officers on claims' by or against particular agencies of the Federal Government 'under contracts for the procurement of property (other than real property in being); services; construction, alteration, repair, or maintenance of real property; or disposal of personal property.'" *Kristin Allred v. Department of Veterans Affairs*, CBCA 4952, 15-1 BCA ¶ 36,108, at 176,282 (quoting *AMEC Construction Management, Inc. v. General Services Administration*, CBCA 389, et al., 07-1 BCA ¶ 33,505, at 166,039). The CDA "deals with contractors, not with disappointed bidders." *Coastal Corp. v. United States*, 713 F.2d 728, 730 (Fed. Cir. 1983) (quoting *United States v. John C. Grimberg, Inc.*, 702 F.2d 1362, 1368 (Fed. Cir. 1983)). In contrast, "bid protest jurisdiction arises when an agency decides to take corrective action even when such action is not fully implemented." *Systems Application & Technologies, Inc. v. United States*, 691 F.3d 1374, 1381 (Fed. Cir. 2012). The Competition in Contracting Act (CICA), 31 U.S.C. §§ 3552-3556, provides that "the Comptroller General may determine whether the solicitation, proposed award, or award complies with statute and regulation." *Id.* § 3554(b)(1). NPS' decision to terminate the contract and its decision to cancel the solicitation were two separate actions, and the Board only reviews the termination of the contract pursuant to the CDA. The Board does not review NPS' decision to take corrective action by cancelling the solicitation. Although OSI again argues, at great length, that the cancellation of the solicitation was unreasonable and that GAO's denial of its protest of the cancellation was "irrational," the Board's CDA jurisdiction does not allow for the review of matters that GAO addressed almost ten years ago.

Finally, OSI erroneously contends that NPS' termination of the contract was a breach of contract because the CO did not "put his own mind to the problems and render his own decisions' as to whether a termination was in the Government's interest." Appellant's Amended Motion for Summary Relief at 80 (quoting *New York Shipbuilding Corp. v. United States*, 385 F.2d 427, 435 (Ct. Cl. 1967)). In *Securiforce International America, LLC v. United States*, 879 F.3d 1354 (Fed. Cir. 2018), the Court recognized the following:

In *New York Shipbuilding Corp. v. United States* . . . the Court of Claims determined that where a contract specified that factual disputes “shall be decided by the Nuclear Projects Officer of the Maritime Administration,” [385 F.2d] at 429, the contractor was entitled to a resolution by that particular officer, *id.* at 433-35. “The contractor, in particular, bargained for the Nuclear Projects Officer as the first tribunal to determine controversies,” but a different official rendered the final decision, contrary to the contract’s terms. *Id.* at 434.

. . . .

Securiforce’s contract required only that “[t]he Government” make the termination decision. Our cases interpreting similarly worded clauses in the default context do not require a decision by a particular official but only a reasonable conclusion that there was no reasonable likelihood the contractor would perform within the time remaining. . . . We conclude that the Claims Court erred in holding that the decision to terminate for convenience was invalid because it was not reached independently by the CO.

879 F.3d at 1364. OSI’s reliance on *New York Shipbuilding*, therefore, is misplaced because that decision dealt with a contract requirement for decisions to be made by the nuclear projects officer, and there was no similar requirement in OSI’s contract. The Termination for Convenience clause stated that “[t]he Government may terminate performance of work.” Nothing in the contract suggests that the CO’s decision to terminate the contract would be made in isolation. OSI offers no legal authority to suggest that the CO should have made his decision without considering the advice of others, including legal counsel. In response to OSI’s discovery, the CO stated that he made his decision to terminate OSI’s contract based upon advice of counsel, but the decision “fell on [his] shoulders.” No reasonable reading of that statement would suggest that the CO abdicated his responsibility or acted in any manner contrary to the requirements of the contract.

OSI’s alternate theory for summary relief argues that it is entitled to recover its anticipated profits on the required contract minimum of \$2 million because “[a]n obligatory minimum quantity is necessary to provide non-illusory consideration for an indefinite quantities contract.” Appellant’s Amended Motion for Summary Relief at 90. “[T]he Government’s decision to terminate a contract for convenience essentially acts to convert a fixed-price contract into a cost reimbursement contract.” *Russell Sand & Gravel Co. v. International Boundary & Water Commission*, CBCA 2235, 13 BCA ¶ 35,455, at 173,868 (citing *Divecon Services, LP v. Department of Commerce*, GSBCA 15997-COM, et al., 04-2 BCA ¶ 32,656, at 161,636; *Airo Services, Inc. v. General Services Administration*, GSBCA 14301, 98-2 BCA ¶ 29,909, at 148,071; *Richerson Construction, Inc. v. General*

*Services Administration*, GSBCA 11161, et al., 93-1 BCA ¶ 25,239, at 125,704 (1992); *Praecomm, Inc. v. United States*, 78 Fed. Cl. 5, 12 (2007), *aff'd*, 296 F. App'x 929 (Fed. Cir. 2008)). “Boards of Contract Appeals have recognized that the Government may terminate an indefinite-quantity contract prior to purchasing the minimum quantity, without rendering the contract illusory due to lack of consideration.” *Montana Refining Co.*, ASBCA 50515, 00-1 BCA ¶ 30,694, at 151,627 (1999) (citing *Plaza 70 Interiors, Ltd.*, HUD BCA 94-C-150-C9, 95-2 BCA ¶ 27,668, at 137,938-39; *Automated Services, Inc.*, DOT BCA 1753, 87-1 BCA ¶ 19,459, at 98,353). “[T]he compensation available under the termination for convenience clause provides adequate consideration to the contractor.” *Id.* The contract, therefore, did not require NPS to purchase the minimum quantity under the contract before it could terminate the contract for convenience, and the Government’s right to terminate the contract for convenience does not render it illusory. OSI has already recovered its actual, incurred costs under the contract, and it is not entitled to recover any anticipated profits.

Additionally, OSI argues that “[t]he Order of Precedence clause gives the guaranteed minimum terms precedence over the termination for convenience clause.” Appellant’s Amended Motion for Summary Relief at 87. Such an interpretation, however, “would vitiate the Termination for Convenience clause and, thus, be contrary to the rule that an interpretation should avoid conflict between contract provisions.” *Montana Refining Co.*, 00-1 BCA at 151,629 (citing *Hol-Gar Manufacturing Corp. v. United States*, 35 F.2d 972, 979 (Ct. Cl. 1965)). “[W]here a contract provision is clear, ‘[t]he rules of contract construction should not be permitted to create an ambiguity where none exists or change or twist the plain meaning of a simple agreement.’” *National Housing Group, Inc. v. Department of Housing & Urban Development*, CBCA 340, et al., 09-1 BCA ¶ 34,043, at 168,377 (quoting *WIBCO, Inc.*, GSBCA 4247, 75-2 BCA ¶ 11,564, at 55,208). The Order of Precedence clause in the contract only applied in resolving an inconsistency between contract provisions, but the Termination for Convenience clause was not inconsistent with the required minimum under the contract. As discussed above, a termination for convenience converts a fixed-price contract into a cost reimbursement contract, and, consequently, the contractor’s recovery is limited to the cost of work performed up to the point of termination. No reasonable reading of the contract would suggest that OSI is entitled to be paid anticipated profits for work never performed because the contract was terminated for convenience.

The Board finds that there are no material facts in dispute for purposes of deciding this appeal on the issue of whether OSI is entitled to recover breach of contract damages. DOI’s motion has shown that NPS properly terminated the contract for convenience and that OSI is not entitled to recover breach of contract damages. OSI has not established that the termination for convenience was either done in bad faith or was an abuse

of discretion, and NPS was not obligated to purchase the required contract minimum before terminating the contract for convenience. In the absence of a dispute of material facts, the Board finds that OSI has failed to meet its burden of proof and denies its motion, and the Board grants the Government's motion.

Decision

Appellant's motion for summary relief is denied. The Government's motion for summary relief is granted. The appeal is **DENIED**.

H. Chuck Kullberg  
H. CHUCK KULLBERG  
Board Judge

I concur:

Catherine B. Hyatt  
CATHERINE B. HYATT  
Board Judge

**VERGILIO**, Board Judge, concurring.

Because I would grant the agency's motion for summary judgment (which makes moot the contractor's motion), I concur in the result denying the appeal. The contractor contends that the termination for convenience is a breach of the contract and that it is entitled to profits on work not performed (it has received other termination settlement costs). The contract permits the agency to terminate the contract. Although the contractor contends that the contracting officer acted in bad faith and abused his discretion, neither assertion is sufficiently substantiated to support the notion that the termination was a breach and thus avoid summary judgment. Under the contract, the contractor is not entitled to profits on work not performed. The contractor does not prevail.



In seeking what it characterizes as lost profits, the contractor contends in its complaint that the agency breached the contract by failing to satisfy the minimum requirements of the contract, and that the contracting officer acted in bad faith and abused his discretion in terminating for convenience the underlying contract.

The contract contains a Termination for Convenience clause. In response to a protest, the agency terminated for convenience the contract with the contractor. The contract permits such a termination and details the relief available to the contractor. The contractor may recover profits on work performed, but not on work not performed. The guaranteed minimum in the contract is subject to the termination for convenience provisions and the relief available thereunder. The contractor is not entitled to the profits it seeks under the clause and contract. *Greenlee Construction, Inc. v. General Services Administration*, CBCA 415, et al., 07-2 BCA ¶ 33,619, at 166,513.

The contractor contends that the termination for convenience represents a breach of the contract, such that its relief should not be limited to that defined by the clause. The contractor has failed to identify any specific conduct by the contracting officer in terminating the contract for convenience that would support a conclusion that the action was taken in bad faith or represents an abuse of discretion. *J.R. Mannes Government Services Corp. v. Department of Justice*, CBCA 5638, 17-1 BCA ¶ 36,911.

Joseph A. Vergilio  
JOSEPH A. VERGILIO  
Board Judge



## United States Department of the Interior

NATIONAL PARK SERVICE  
DENVER SERVICE CENTER  
12795 W. Alameda Parkway  
P.O. Box 25287  
Denver, Colorado 80225-0287

IN REPLY REFER TO:  
D5217 (DSC-D&C)  
EVER-137534  
1443C2000091200

June 12, 2015

Optimum Services, Inc.  
Attn: Dan Eastman, President  
208 N. Parrott Avenue  
Okeechobee, FL 34972

Reference: Everglades National Park, Dade County, Florida, Contract No. 1443C2000091200,  
Land Restoration and Land Clearing Contract, EVER-137534

Subject: Contracting Officer's Determination on Termination for Convenience Settlement  
Proposal Dated January 21, 2010.

Dear Mr. Eastman:

This letter responds to the amended termination cost settlement proposal and new claim (January 15 Amended Settlement Proposal and Claim) Optimum Services, Inc. (Optimum) submitted to the National Park Service (NPS) on January 15, 2015. In Optimum's January 15 Amended Settlement Proposal and Claim it requests \$21,468 for the settlement and \$584,785 for breach of contract damages.

### **Background**

The January 15 Amended Settlement Proposal and Claim relates to the termination of contract 1443C0000091200 (the Contract), which was awarded to Optimum on December 23, 2008, and terminated January 26, 2009. The contract was an indefinite-delivery/indefinite-quantity (IDIQ) contract for one-year with four one-year options for ecological restoration services within Everglades National Park (the Park) in the Hole in the Donut (HID) area of the Park. The contract provided that the NPS would order, at a minimum, \$2 million worth of services under the contract; and identified a maximum of \$24 Million for the base year, \$24 Million for the first and second option years, \$25.5 Million for option year three and \$26 Million for option year four.

In response to the Request for Proposals (RFP) for the IDIQ contract, the NPS received proposals from several offerors, including Optimum and Westwind Contracting, Inc. (Westwind). The NPS initially awarded the contract to Westwind. Optimum filed a protest with the General Accounting Office (GAO), which was dismissed when the NPS informed GAO that it would take corrective action, which

would include conducting discussions with offerors, obtaining revised proposals, reevaluating proposals, and making a new source selection decision. (See *Optimum Servs., Inc.*, B-400677, Nov. 17, 2008). On the same day that GAO dismissed Optimum's protest, Westwind filed an agency-level protest, which the Agency denied on November 21, 2008.

After reevaluating proposals, the NPS awarded the contract to Optimum on December 23, 2008. On January 12, 2009, Westwind protested the award to Optimum. The protest, filed at the U.S. Court of Federal Claims, alleged that the NPS failed to mitigate any unfair competitive advantage Optimum may have received as a result of the disclosure of Westwind's price during Optimum's debriefing on September 23, 2008. Westwind also alleged that the NPS's evaluation of offerors' past performance and experience was flawed. In response to Westwind's protest, the NPS advised the Department of Justice (DOJ) that it would terminate the award to Optimum. It also noted that it would not resolicit the same IDIQ contract, but instead cancel the solicitation and "solicit a new contract to better reflect its needs." Appeal File (AF), Tab 6. After DOJ informed the Court of the NPS's intention to cancel the solicitation, Westwind requested that the Court dismiss its protest as moot. Optimum objected, arguing that there was no reasonable basis for the NPS to cancel the solicitation. The Court dismissed Westwind's protest over Optimum's objection, noting that the NPS's "cancellation decision is not at issue in this protest." *Westwind Contracting, Inc. v. United States*, No. 09-25C (Fed. Cl.), Order of Dismissal, Jan. 22, 2009.

On January 23, 2009, the day after the Court dismissed Westwind's protest, Optimum filed a protest with the GAO arguing that the NPS did not have a reasonable basis to cancel the solicitation. Westwind intervened and argued that, once the NPS awarded the contract to Optimum, the solicitation was effectively cancelled and, therefore, the GAO had nothing to review except for whether the NPS properly terminated the contract for convenience. GAO noted that, while it normally declines to review the termination of contracts:

[W]e will review the propriety of a termination where it flows from a defect the contracting agency perceived in the award process. In such cases, we examine the award procedures that underlie the termination action for the limited purpose of determining whether the initial award was improper and, if so, whether the corrective action taken is proper . . . Here, as discussed below, the agency's termination of Optimum's award flowed directly from the agency's concern that the solicitation did not accurately reflect the agency's requirements. Under these circumstances, we will review the protest which, ultimately, turns on the propriety of the agency's decision to cancel the solicitation.

In the end, the GAO held that the NPS acted reasonably when it terminated Optimum's contract for convenience and cancelled the underlying solicitation where the solicitation's maximum estimated quantities and maximum ordering values did not reflect the NPS's requirements due to a reduction in program funding.

The NPS terminated the contract on January 26, 2009, just a little over one month after it was awarded, and before the NPS issued any task orders under the Contract.

On January 21, 2010, Optimum submitted its first termination cost settlement proposal (January 21 Settlement Proposal) to the NPS. Included in the January 21 Settlement Proposal were costs for equipment and labor and damages related to an alleged breach of contract. Optimum alleged that the NPS had breached its contract because it was anti-deficient and had not funded the minimum quantities under the contract. The NPS responded to the proposal on March 31, 2011. AF, Tab 61. In that letter, the NPS determined that Optimum was entitled to a total of \$21,468 for termination costs based off of findings detailed in the NPS's May 27, 2010 audit of Optimum's settlement proposal. See AF Tab 35.

The NPS issued a final decision on August 5, 2011 (Final Decision). AF Tab 64. Consistent with the March 31 letter, the Contracting Officer determined that Optimum was entitled to a total of \$21,468 in termination costs. The Contracting Officer rejected Optimum's breach of contract claim because the NPS could demonstrate that it had funding available to cover the contract minimum. On September 28, 2011, Optimum submitted a "revised" settlement with a new theory regarding how the NPS had breached its contract with Optimum. Optimum's January 15 Amended Claim (Opt. Amd. Cl.), Tab EE. No longer was Optimum claiming that the NPS breached its contract because it couldn't fund the contract minimum (which was shown to be without merit), now Optimum was claiming that the NPS had abused its discretion and acted in bad faith when it terminated Optimum's contract for convenience.

Optimum filed an appeal with the Civilian Board of Contract Appeals (the Board) on December, 2011. On June 4, 2012, the Board dismissed the claim for lack of jurisdiction because Optimum failed to certify the claim for a sum certain amount. Optimum assured the NPS that it would resubmit its claim within six months. Almost two and a half years later, on January 15, 2015, Optimum forwarded the January 15 Amended Settlement Proposal and Claim to the Government. In the January 15 Amended Settlement Proposal and Claim, Optimum accepted the NPS' determination on acceptable settlement costs of \$21,468, based on the May 27, 2010 audit. The claim also alleges that the NPS breached its contract with Optimum when it terminated for convenience and it is entitled to \$584,785 in damages.

### **Amended Settlement Proposal**

In the January 15 Amended Settlement Proposal and Claim, Optimum agreed to settle the termination for convenience costs for items 1 - 5 in the amount of \$21,468.00, which is consistent with the previous Contracting Officer's final decision dated August 5, 2011. We agree to pay Optimum these amounts.

### **Breach Claim**

Optimum's January 15 Amended Settlement Proposal and Claim also requests a final decision on new claims for breach of contract in the amount of \$584,785. Specifically Optimum claims that the NPS' termination for convenience was a breach of contract for the following reasons:



1. The NPS breached the contract because the contract would be illusory and would fail for lack of consideration if the Government's minimum obligation was subject to the Termination for Convenience Clause;
2. The Government breached the contract because the order of precedence clause assigns precedence to the minimum quantity and guaranteed a minimum terms;
3. The Government breached the contract because it acted in bad faith; and
4. The Government breached the contract because there was abuse of discretion.

The NPS does not believe that Optimum is entitled to any of the claimed breach costs because the NPS acted reasonably in terminating the contract for its convenience. Further, the GAO has already found that the NPS was acting reasonably in terminating Optimum's contract.

**A. The NPS Reasonably Terminated Optimum's Contract for its Convenience and the GAO has already Ruled in NPS' Favor**

The Contract contained Federal Acquisition Clause (FAR) 52.249-02, which allows the Government a right to terminate its contract, in whole or in part, when it is in the Government's interest. The courts and boards recognize the government's broad right to terminate a contract for convenience. It is not the province of the courts to decide *de novo* whether termination of the contract was the best course of action. *Salsbury Indus. v. United States*, 905 F.2d 1518 (Fed. Cir. 1990).

As Optimum is aware, the NPS terminated Optimum's contract for convenience as a means of taking corrective action in response to a bid protest before the U.S. Court of Federal Claims. Also, the NPS decided to issue a revised solicitation because there was "unclear and/or confusing language" regarding the NPS' evaluation of offerors' past performance and because there was a significant reduction in funding in the program, which made it likely that the NPS could only exercise the minimum quantities under the contract.

As stated in the facts above, the GAO had the opportunity to review the Agency's decisions regarding termination, and made a determination that the Agency *acted reasonably* when it terminated Optimum's contract for convenience and cancelled the underlying solicitation when it knew that the stated minimums and maximums did not reflect the agency's requirements due to a reduction in program funding. *Matter of Optimum Services, Inc.*, B-401051 (April 15, 2009).

**B. The NPS Did not Breach its Contract with Optimum**

**1. The NPS Can Terminate IDIQ Contracts**

Optimum's first claim is that the NPS breached the contract because the NPS's right to terminate for convenience does not apply to an IDIQ contract where there is a minimum guarantee. Optimum claims that if the termination for convenience clause were applicable, then the contract would be illusory and fail for lack of consideration. Optimum cites *Torncello v. US* at 681 F.2d 756, 761-62 (Ct. Cl. 1983) to support its position.

We disagree that *Torncello* stands for the proposition that the Government cannot terminate a contract for convenience unless and until a minimum quantity is ordered under an IDIQ contract. *Torncello*, instead, noted that a contract without a stated minimum would fail for lack of consideration. It did not address termination of an IDIQ contract. We have found no authority that prohibits the Government from terminating IDIQ contracts for convenience before the contractor has done any work under a contract and before the government has met its minimum requirement. In fact, the GAO has often recommended that the Agency terminate contracts for convenience, including IDIQ contracts, in circumstances where there may have been an improper award. See, e.g., *Intelligent Decisions, Inc.*, 2014 Comp. Gen. Proc. Dec. ¶ 213 (protester protested award of IDIQ contracts and GAO recommended that Air Force terminate the IDIQ contracts the Air Force had already awarded for convenience); *In re Lockheed, IMS*, 93-2 Comp. Gen. Proc. Dec. ¶69 (GAO recommended that the agency terminate contract for convenience if another contractor was properly in line for award).

## **2. The NPS did not Breach its Contract because the Order of Precedence Clause**

Optimum claims that the NPS breached the contract because the order of precedence clause would give precedence to the minimum quantity and guaranteed minimum terms, which are in the schedule, over the termination for convenience clause, which is in the contract. The order of precedence clause in the Contract at 52.215-08, identifies how an offeror may address any inconsistencies in a solicitation or contract. It certainly does not preclude the Government from exercising its rights under the contract. Optimum has not referenced any case law or other authority that would indicate that the NPS cannot exercise its right to terminate the contract for convenience because of the precedence clause.

## **3. The NPS did not Breach its Contract because there was bad faith**

Optimum alleges that the NPS breached the contract because its termination for convenience was done in bad faith. To find that a termination for convenience in legal effect is a breach of contract, a contractor must prove bad faith or clear abuse of discretion. *Kalvar Corp., Inc., v. United States*, 543 F.2d 1298 (Ct. Cl. 1976); *Salsbury Indus. v. United States*, 905 F.2d 1518 (Fed. Cir. 1990).

The court proceeds from a "strong presumption that government officials . . . carry out their duties lawfully and in good faith." *Am-Pro Protective Agency, Inc. v. United States*, 281 F.3d 1234, 1238 (Fed. Cir. 2002). A showing of bad faith requires proof tantamount to some specific intent to injure the plaintiff, malice, or "designedly oppressive conduct." *Kalvar Corp., Inc., v. United States*, 543 F.2d 1298, 1302 (Ct. Cl. 1976). Because courts and boards presume that contracting officers act conscientiously in the discharge of their duties, overcoming this strong presumption requires "clear and convincing evidence." *Am-Pro Protective Services, Inc. v. United States*, 281 F.3d 1234, 1241 (Fed. Cir. 2002). This "clear and convincing evidence" standard is an articulation of a long-standing precedent holding that, to overcome the presumption of good faith, contractors alleging bad faith on the part of the government need "well-nigh irrefragable proof." *Id.*, See also *J. Cooper & Associates v. US*, 53 Fed. Cl. 8, 23-24 (2002).

The NPS has explained the reasons why it terminated Optimum's contract for convenience and cancelled the underlying solicitation. First, the NPS terminated the contract for convenience because it was taking corrective action due to Westwind's protest. Second, it cancelled the underlying solicitation because the NPS failed to mitigate the unfair competitive advantage Optimum derived as a consequence of learning Westwind's price information during its debriefing. Third, the solicitation needed to be revised to address "unclear and/or confusing" language regarding the agency's evaluation of offerors' past performance and experience. Fourth, as a consequence of a significant reduction in funding (approximately 50 percent), the NPS could only, at best, meet its minimum requirements under the IDIQ. The NPS decided that it needed to reevaluate the solicitation and compete the contracts on the basis of reduced requirements. Finally, after careful analysis of the requirement, the NPS determined that the requirement was more properly a construction contract, given the tools, etc. needed to accomplish the work.

Subsequent to the COFC dismissing Westwind's protest, the GAO specifically looked at the NPS' decision to terminate Optimum's contract for convenience and cancel the underlying solicitation and found that the Government acted reasonably. The GAO has already looked into the propriety of the NPS' actions. It did not find that the Government acted in bad faith in terminating Optimum's contract. To the contrary, the GAO found that the Government acted reasonably in both terminating Optimum's contract for convenience and resoliciting using revised estimates.

Optimum presents no new evidence that shows that the NPS acted in bad faith. Instead, Optimum merely cites to NPS's March 2, 2009 statement of facts to argue that NPS terminated its contract "because it would result in a better technical approach and price to fulfill the requirement." AF, Tab 21 961; Opt. Amd. Cl., Tab V. Optimum morphs this sentence to mean that the termination decision was based on "better . . . price." While Optimum argues that the NPS terminated its contract because the NPS wanted a "better price," elsewhere its claim recognizes that just the opposite was true. One of the reasons the NPS wanted to resolicit, rather than compel yet another round of negotiations with those contractors that had offered under the initial contract, was that "NPS was concerned that another round of pricing would decrease the price proposals so low below the government estimate . . . that either NPS would have to find the process unreasonable, or, if not unreasonable, there would be an impact on the performance of the contract." In other words, the NPS was worried that the pricing would be *too low* if the offerors were allowed to continue battling it out. AF, Tab 21 961; Opt. Amd. Cl., Tab V.

It is the CO's position that Optimum cannot reasonably meet the burden of proof for bad faith based on one sentence on price taken out of context. Certainly Optimum cannot meet the high burden of "irrefragable proof." This, especially after GAO looked at the same facts and circumstances and found that the NPS was acting reasonably in its decision to terminate.

#### **4. The NPS did not Abuse its Discretion in Terminating Optimum's Contract for Convenience.**

A contracting officer's decision to terminate for convenience cannot be arbitrary or capricious. The Court of Claims cited four factors to apply in determining whether a contracting officer's discretionary



decision is arbitrary or capricious. *Keco Indus. v. United States*, 492 F.2d 1200, 1203-04 (Ct. Cl. 1974). These factors are: (1) evidence of subjective bad faith on the part of the government official; (2) Lack of a reasonable basis for the decision; (3) The degree of proof to recover is related to the amount of discretion given to the government official; *i.e.*, the greater the discretion granted, the more difficult it is to prove that the decision was arbitrary and capricious; and, (4) a proven violation of an applicable statute or regulation (this factor alone may be enough to show that the conduct was arbitrary and capricious).

Optimum cannot meet its burden to prove that there was an abuse of discretion. First, as discussed above, there is simply no evidence of bad faith on the part of the government official. Second, the NPS had a reasonable basis for its decision to terminate for convenience as the COFC and GAO acknowledged in its opinion. Third, the Contracting Office had discretion to terminate for convenience and made the decision to terminate. Finally, the Government did not violate any statutes or regulations when it reasonably terminated Optimum's contract for convenience.

Optimum's arguments that the NPS breached its contract with Optimum through abuse of discretion are without merit. Optimum's breach claim is based on second-guessing the decisions of the NPS, the DOJ, and the COFC related to Westwind's protest. Optimum claims that the NPS should have sought to have Westwind's protest dismissed as untimely. Optimum claims that the decision to take corrective action in response to the protest was unreasonable. Optimum also claims that instead of taking corrective action and immediately terminating Optimum's contract for convenience, that the NPS should have utilized a bridge contract while waiting for the COFC's decision on the protest. While Optimum is at liberty to conjecture that the NPS could have made different decisions with respect to Westwind's protest, these decisions were within the NPS's discretion. The fact that Optimum does not like the decisions that the NPS made does not render them arbitrary and capricious.

Optimum had the right to intervene in the protest, and, indeed, exercised its right. See *Westwind Contracting, Inc. v. United States*, No. 09-25C (Fed. Cl.), Order, January 13, 2009. Opt. Amd. Cl., Tab L. In its Opposition to Westwind's motion to dismiss the protest, Optimum made many of the same arguments that it is making in the current breach claim. The COFC agreed with NPS' corrective action approach and dismissed Westwind's protest over the objection of the intervener, Optimum. *Westwind Contracting, Inc. v. United States*, No. 09-25C (Fed. Cl.), Order of Dismissal, Jan. 22, 2009.

As stated above, subsequent to the COFC dismissing Westwind's protest, the GAO specifically looked at the NPS' decision to terminate Optimum's contract for convenience and found that the Government acted reasonably. Optimum would have us ignore the fact that both the COFC and GAO found that the Government's actions to terminate the contract and resolicit reasonable.

Given the facts above, the Contracting Officer simply cannot find any merit in Optimum's claims that the Government breached Optimum's contract when it terminated the contract for convenience.



**Conclusion:**

As stated above, the Contracting Officer agrees that you are entitled to your proposed termination settlement costs in the amount of \$21,468.00. The unilateral delivery order (P11PD22299) issued to Optimum on September 28, 2011, remains available for invoicing purposes to close out this portion of the contractors claim. Please prepare a valid invoice and submit it along with a release of claims to the Contracting Officer for processing.

With respect to Optimum's January 15 Amended Claim, the Contracting Officer's final determination on this matter is as follows. The Contracting Officer denies the breach of contract claims in its entirety. You may choose to accept this determination and proceed to a bilateral modification and closeout of this action. On the other hand, Optimum may appeal this decision to the Civilian Board of Contract Appeals (CBCA), 6th Floor, 1800 F Street, N.W., Washington, DC 20036, and its rules of procedure at <http://www.cbca.gsa.gov>. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the CBCA and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number.

Instead of appealing to the CBCA, you may bring an action directly in the United States Court of Federal Claims (except as provided in the Contract Disputes Act of 1978, 41 U.S.C. 7102, regarding Maritime Contracts) within 12 months of the date you receive this decision.

If you have any questions or concerns regarding this letter, please contact the undersigned at 303-969-2055.

Sincerely,



Darrin Knapp  
Contracting Officer

**5 USC Ch. 7: JUDICIAL REVIEW****From Title 5—GOVERNMENT ORGANIZATION AND EMPLOYEES  
PART I—THE AGENCIES GENERALLY****CHAPTER 7—JUDICIAL REVIEW**

Sec.	
701.	Application; definitions.
702.	Right of review.
703.	Form and venue of proceeding.
704.	Actions reviewable.
705.	Relief pending review.
706.	Scope of review.

**STATUTORY NOTES AND RELATED SUBSIDIARIES****SHORT TITLE**

The provisions of sections 551 to 559 of this title and this chapter were originally enacted by act June 11, 1946, ch. 423, 60 Stat. 237, popularly known as the "Administrative Procedure Act". That Act was repealed as part of the general revision of this title by Pub. L. 89–554 and its provisions incorporated into sections 551 to 559 of this title and this chapter.

**§701. Application; definitions**

(a) This chapter applies, according to the provisions thereof, except to the extent that—

- (1) statutes preclude judicial review; or
- (2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

- (A) the Congress;
- (B) the courts of the United States;
- (C) the governments of the territories or possessions of the United States;
- (D) the government of the District of Columbia;
- (E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;
- (F) courts martial and military commissions;
- (G) military authority exercised in the field in time of war or in occupied territory; or
- (H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; subchapter II of chapter 471 of title 49; or sections 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix; <sup>1</sup> and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 103–272, §5(a), July 5, 1994, 108 Stat. 1373; Pub. L. 111–350, §5(a)(3), Jan. 4, 2011, 124 Stat. 3841.)

**HISTORICAL AND REVISION NOTES**

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
(a)	5 U.S.C. 1009 (introductory clause).	June 11, 1946, ch. 324, §10 (introductory clause), 60 Stat. 243.

In subsection (a), the words "This chapter applies, according to the provisions thereof," are added to avoid the necessity of repeating the introductory clause of former section 1009 in sections 702–706.

Subsection (b) is added on authority of section 2 of the Act of June 11, 1946, ch. 324, 60 Stat. 237,

as amended, which is carried into section 551 of this title.

In subsection (b)(1)(G), the words "or naval" are omitted as included in "military".

In subsection (b)(1)(H), the words "functions which by law expire on the termination of present hostilities, within any fixed period thereafter, or before July 1, 1947" are omitted as executed. Reference to the "Selective Training and Service Act of 1940" is omitted as that Act expired on Mar. 31, 1947. Reference to the "Sugar Control Extension Act of 1947" is omitted as that Act expired on Mar. 31, 1948. References to the "Housing and Rent Act of 1947, as amended" and the "Veterans' Emergency Housing Act of 1946" have been consolidated as they are related. The reference to former section 1641(b)(2) of title 50, appendix, is retained notwithstanding its repeal by §111(a)(1) of the Act of Sept. 21, 1961, Pub. L. 87-256, 75 Stat. 538, since §111(c) of the Act provides that a reference in other Acts to a provision of law repealed by §111(a) shall be considered to be a reference to the appropriate provisions of Pub. L. 87-256.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

#### EDITORIAL NOTES

#### REFERENCES IN TEXT

Sections 1884 and 1891-1902 of title 50, appendix, referred to in subsec. (b)(1)(H), were a part of the various Housing and Rent Acts which were classified to section 1881 et seq. of the former Appendix to Title 50, War and National Defense, and had been repealed or omitted from the Code as executed prior to the elimination of the Appendix to Title 50. See Elimination of Title 50, Appendix note preceding section 1 of Title 50. Section 1641 of title 50, appendix, referred to in subsec. (b)(1)(H), was repealed by Pub. L. 87-256, §111(a)(1), Sept. 21, 1961, 75 Stat. 538.

#### AMENDMENTS

**2011**—Subsec. (b)(1)(H). Pub. L. 111-350 struck out "chapter 2 of title 41;" after "title 12;".

**1994**—Subsec. (b)(1)(H). Pub. L. 103-272 substituted "subchapter II of chapter 471 of title 49; or sections" for "or sections 1622,".

<sup>1</sup> See *References in Text* note below.

### §702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94-574, §1, Oct. 21, 1976, 90 Stat. 2721.)

#### HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
	5 U.S.C. 1009(a).	June 11, 1946, ch. 324, §10(a), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

#### EDITORIAL NOTES

#### AMENDMENTS

**1976**—Pub. L. 94–574 removed the defense of sovereign immunity as a bar to judicial review of Federal administrative action otherwise subject to judicial review.

### §703. Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392; Pub. L. 94–574, §1, Oct. 21, 1976, 90 Stat. 2721.)

#### HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
	5 U.S.C. 1009(b).	June 11, 1946, ch. 324, §10(b), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface to the report.

#### EDITORIAL NOTES

#### AMENDMENTS

**1976**—Pub. L. 94–574 provided that if no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer as defendant.

### §704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

#### HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
	5 U.S.C. 1009(c).	June 11, 1946, ch. 324, §10(c), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

### §705. Relief pending review

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other writ to a reviewing court, may issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

## HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
	5 U.S.C. 1009(d).	June 11, 1946, ch. 324, §10(d), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

**§706. Scope of review**

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

- (1) compel agency action unlawfully withheld or unreasonably delayed; and
- (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
  - (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
  - (B) contrary to constitutional right, power, privilege, or immunity;
  - (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
  - (D) without observance of procedure required by law;
  - (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
  - (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 393.)

## HISTORICAL AND REVISION NOTES

<i>Derivation</i>	<i>U.S. Code</i>	<i>Revised Statutes and Statutes at Large</i>
	5 U.S.C. 1009(e).	June 11, 1946, ch. 324, §10(e), 60 Stat. 243.

Standard changes are made to conform with the definitions applicable and the style of this title as outlined in the preface of this report.

**STATUTORY NOTES AND RELATED SUBSIDIARIES****ABBREVIATION OF RECORD**

Pub. L. 85–791, Aug. 28, 1958, 72 Stat. 941, which authorized abbreviation of record on review or enforcement of orders of administrative agencies and review on the original papers, provided, in section 35 thereof, that: "This Act [see Tables for classification] shall not be construed to repeal or modify any provision of the Administrative Procedure Act [see Short Title note set out preceding section 551 of this title]."

**28 USC 1491: Claims against United States generally; actions involving Tennessee Valley Authority**  
Text contains those laws in effect on April 5, 2021

**From Title 28-JUDICIARY AND JUDICIAL PROCEDURE**

PART IV-JURISDICTION AND VENUE

CHAPTER 91-UNITED STATES COURT OF FEDERAL CLAIMS

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## **§1491. Claims against United States generally; actions involving Tennessee Valley Authority**

(a)(1) The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. For the purpose of this paragraph, an express or implied contract with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration shall be considered an express or implied contract with the United States.

(2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. In any case within its jurisdiction, the court shall have the power to remand appropriate matters to any administrative or executive body or official with such direction as it may deem proper and just. The Court of Federal Claims shall have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under section 7104(b)(1) of title 41, including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 <sup>1</sup> of that Act.

(b)(1) Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to render judgment on an action by an interested party objecting to a solicitation by a Federal agency for bids or proposals for a proposed contract or to a proposed award or the award of a contract or any alleged violation of statute or regulation in connection with a procurement or a proposed procurement. Both the United States Court of Federal Claims and the district courts of the United States shall have jurisdiction to entertain such an action without regard to whether suit is instituted before or after the contract is awarded.

(2) To afford relief in such an action, the courts may award any relief that the court considers proper, including declaratory and injunctive relief except that any monetary relief shall be limited to bid preparation and proposal costs.

(3) In exercising jurisdiction under this subsection, the courts shall give due regard to the interests of national defense and national security and the need for expeditious resolution of the action.

(4) In any action under this subsection, the courts shall review the agency's decision pursuant to the standards set forth in section 706 of title 5.

(5) If an interested party who is a member of the private sector commences an action described in paragraph (1) with respect to a public-private competition conducted under Office of Management and Budget Circular A-76 regarding the performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A-76, then an interested party described in section 3551(2)(B) of title 31 shall be entitled to intervene in that action.

(6) Jurisdiction over any action described in paragraph (1) arising out of a maritime contract, or a solicitation for a proposed maritime contract, shall be governed by this section and shall not be subject to the jurisdiction of the district courts of the United States under the Suits in Admiralty Act (chapter 309 of title 46) or the Public Vessels Act (chapter 311 of title 46).

(c) Nothing herein shall be construed to give the United States Court of Federal Claims jurisdiction of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action against, or founded on conduct of, the Tennessee Valley Authority, or to amend or modify the provisions of the Tennessee Valley Authority Act of 1933 with respect to actions by or against the Authority.

(June 25, 1948, ch. 646, 62 Stat. 940 ; July 28, 1953, ch. 253, §7, 67 Stat. 226 ; Sept. 3, 1954, ch. 1263, §44(a), (b), 68 Stat. 1241 ; Pub. L. 91-350, §1(b), July 23, 1970, 84 Stat. 449 ; Pub. L. 92-415, §1, Aug. 29, 1972, 86 Stat. 652 ; Pub. L. 95-563, §14(i), Nov. 1, 1978, 92 Stat. 2391 ; Pub. L. 96-417, title V, §509, Oct. 10, 1980, 94 Stat. 1743 ; Pub. L. 97-164, title I, §133(a), Apr. 2, 1982, 96 Stat. 39 ; Pub. L. 102-572, title IX, §§902(a), 907(b)(1), Oct. 29, 1992, 106 Stat. 4516 , 4519; Pub. L. 104-320, §12(a), Oct. 19, 1996, 110 Stat. 3874 ; Pub. L. 110-161, div. D, title VII, §739(c)(2), Dec. 26, 2007, 121 Stat. 2031 ; Pub. L. 110-181, div. A, title III, §326(c), Jan. 28, 2008, 122 Stat. 63 ; Pub. L. 110-417, [div. A], title X, §1061(d), Oct. 14, 2008, 122 Stat. 4613 ; Pub. L. 111-350, §5(g)(7), Jan. 4, 2011, 124 Stat. 3848 ; Pub. L. 112-81, div. A, title VIII, §861(a), Dec. 31, 2011, 125 Stat. 1521 .)

### HISTORICAL AND REVISION NOTES

Based on title 28, U.S.C., 1940 ed., §250(1) (Mar. 3, 1911, ch. 231; §145, 36 Stat. 1136).

District courts are given concurrent jurisdiction of certain claims against the United States under section 1346 of this title. (See also reviser's note under that section and section 1621 of this title relating to jurisdiction of the Tax Court.)

The proviso in section 250(1) of title 28, U.S.C., 1940 ed., relating to claims growing out of the Civil War, commonly known as "war claims," and other claims which had been reported adversely before March 3, 1887 by any court, department, or commission authorized to determine them, were omitted as obsolete.

The exception in section 250(1) of title 28, U.S.C., 1940 ed., as to pension claims appears in section 1501 of this title.

Words "in respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty, if the United States were suable" were omitted as unnecessary since the Court of Claims manifestly, under this section will determine whether a petition against the United States states a cause of action. In any event, the Court of Claims has no admiralty jurisdiction, but the Suits in Admiralty Act, sections 741-752 of title 46, U.S.C., 1940 ed., Shipping, vests exclusive jurisdiction over suits in admiralty against the United States in the district courts. *Sanday & Co. v. U.S.*, 1932, 76 Ct.Cl. 370.

For additional provisions respecting jurisdiction of the court of claims in war contract settlement cases see section 114b of Title 41, U.S.C., 1940 ed., Public Contracts.

Changes were made in phraseology.

### EDITORIAL NOTES

### REFERENCES IN TEXT

Section 6 of the Contract Disputes Act of 1978, referred to in subsec. (a)(2), was classified to section 605 of former Title 41, Public Contracts, and was repealed and restated as subsecs. (a) to (c)(1) and (d) to (h) of section 7103 of Title 41, Public Contracts, by Pub. L. 111-350, §§3, 7(b), Jan. 4, 2011, 124 Stat. 3677 , 3855.

The Tennessee Valley Authority Act of 1933, referred to in subsec. (c), is act May 18, 1933, ch. 32, 48 Stat. 58 , which is classified generally to chapter 12A (§831 et seq.) of Title 16, Conservation. For complete classification of this Act to the Code, see section 831 of Title 16 and Tables.

### AMENDMENTS

**2011**-Subsec. (a)(2). Pub. L. 111-350 substituted "section 7104(b)(1) of title 41" for "section 10(a)(1) of the Contract Disputes Act of 1978".

Subsec. (b)(6). Pub. L. 112-81 added par. (6).

**2008**-Subsec. (b)(5). Pub. L. 110-417 struck out par. (5), as added by Pub. L. 110-161, which read as follows: "If a private sector interested party commences an action described in paragraph (1) in the case of a public-private competition conducted under Office of Management and Budget Circular A-76 regarding performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A-76, then an official or person described in section 3551(2)(B) of title 31 shall be entitled to intervene in that action."

Pub. L. 110-181 added par. (5).

**2007**-Subsec. (b)(5). Pub. L. 110-161 added par. (5).

**1996**-Subsec. (a)(3). Pub. L. 104-320, §12(a)(2), struck out par. (3) which read as follows: "To afford complete relief on any contract claim brought before the contract is awarded, the court shall have exclusive jurisdiction to grant declaratory judgments and such equitable and extraordinary relief as it

deems proper, including but not limited to injunctive relief. In exercising this jurisdiction, the court shall give due regard to the interests of national defense and national security."

Subsecs. (b), (c). Pub. L. 104–320, §12(a)(1), (3), added subsec. (b) and redesignated former subsec. (b) as (c).

1992-Subsec. (a)(1). Pub. L. 102–572, §902(a)(1), substituted "United States Court of Federal Claims" for "United States Claims Court".

Subsec. (a)(2). Pub. L. 102–572, §907(b)(1), inserted before period at end ", including a dispute concerning termination of a contract, rights in tangible or intangible property, compliance with cost accounting standards, and other nonmonetary disputes on which a decision of the contracting officer has been issued under section 6 of that Act".

Pub. L. 102–572, §902(a)(2), substituted "Court of Federal Claims" for "Claims Court".

Subsec. (b). Pub. L. 102–572, §902(a)(1), substituted "United States Court of Federal Claims" for "United States Claims Court".

1982-Subsec. (a)(1). Pub. L. 97–164 designated first two sentences of existing first undesignated paragraph as subsec. (a)(1) and substituted "United States Claims Court" for "Court of Claims".

Subsec. (a)(2). Pub. L. 97–164 designated third, fourth, and fifth sentences of existing first undesignated paragraph as par. (2) and substituted "The Claims Court" for "The Court of Claims" and "arising under section 10(a)(1) of the Contract Disputes Act of 1978" for "arising under the Contract Disputes Act of 1978".

Subsec. (a)(3). Pub. L. 97–164 added par. (3).

Subsec. (b). Pub. L. 97–164 designated existing second undesignated paragraph as subsec. (b) and substituted "United States Claims Court" for "Court of Claims", "conduct of, the Tennessee Valley Authority, or" for "actions of, the Tennessee Valley Authority, nor", "Tennessee Valley Authority Act of 1933" for "Tennessee Valley Authority Act of 1933, as amended," and "actions by or against the Authority" for "suits by or against the Authority".

1980-Pub. L. 96–417 substituted "Court of Claims of any civil action within the exclusive jurisdiction of the Court of International Trade, or of any action" for "in suits" in second par.

1978-Pub. L. 95–563 provided that the Court of Claims would have jurisdiction to render judgment upon any claim by or against, or dispute with, a contractor arising under the Contract Disputes Act of 1978.

1972-Pub. L. 92–415 inserted provisions authorizing the court to issue orders directing restoration to office or position, placement in appropriate duty or retirement status and correction of applicable records and to issue such orders to any United States official and to remand appropriate matters to administrative and executive bodies with proper directions.

1970-Pub. L. 91–350 specified that the term "express or implied contracts with the United States" includes express or implied contracts with the Army and Air Force Exchange Service, Navy Exchanges, Marine Corps Exchanges, Coast Guard Exchanges, or Exchange Councils of the National Aeronautics and Space Administration.

1954-Act Sept. 3, 1954, inserted "; actions involving Tennessee Valley Authority" in section catchline and altered the form of first par. to spell out the general jurisdiction of the Court in paragraph form rather than as clauses of the par.

1953-Act July 28, 1953, substituted "United States Court of Claims" for "Court of Claims" near beginning of section, and inserted last par.

#### **STATUTORY NOTES AND RELATED SUBSIDIARIES**

##### **EFFECTIVE DATE OF 2011 AMENDMENT**

Pub. L. 112–81, div. A, title VIII, §861(b), Dec. 31, 2011, 125 Stat. 1521, provided that: "The amendment made by subsection (a) [amending this section] shall apply to any cause of action filed on or after the first day of the first month beginning more than 30 days after the date of the enactment of this Act [Dec. 31, 2011]."

##### **EFFECTIVE DATE OF 2008 AMENDMENT**

Pub. L. 110–181, div. A, title III, §326(d), Jan. 28, 2008, 122 Stat. 63, provided that: "Subparagraph (B) of section 3551(2) of title 31, United States Code (as added by subsection (a)), and paragraph (5) of section 1491(b) of title 28, United States Code (as added by subsection (c)), shall apply to-

"(1) a protest or civil action that challenges final selection of the source of performance of an



activity or function of a Federal agency that is made pursuant to a study initiated under Office of Management and Budget Circular A-76 on or after January 1, 2004; and

"(2) any other protest or civil action that relates to a public-private competition initiated under Office of Management and Budget Circular A-76, or to a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A-76, on or after the date of the enactment of this Act [Jan. 28, 2008]."

#### **EFFECTIVE DATE OF 2007 AMENDMENT**

Paragraph (5) of subsec. (b) of this section applicable to protests and civil actions that challenge final selections of sources of performance of an activity or function of a Federal agency that are made pursuant to studies initiated under Office of Management and Budget Circular A-76 on or after Jan. 1, 2004; and to any other protests and civil actions that relate to public-private competitions initiated under Office of Management and Budget Circular A-76, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A-76, on or after Dec. 26, 2007, see section 739(c)(3) of Pub. L. 110-161, set out as a note under section 501 of Title 31, Money and Finance.

Amendment by Pub. L. 110-161 applicable with respect to fiscal year 2008 and each succeeding fiscal year, see section 739(e) of Pub. L. 110-161, set out as a note under section 501 of Title 31, Money and Finance.

#### **EFFECTIVE DATE OF 1996 AMENDMENT**

Pub. L. 104-320, §12(b), Oct. 19, 1996, 110 Stat. 3875, provided that: "This section [amending this section and section 3556 of Title 31, Money and Finance, and enacting provisions set out as notes under this section and section 3556 of Title 31] and the amendments made by this section shall take effect on December 31, 1996 and shall apply to all actions filed on or after that date."

#### **EFFECTIVE DATE OF 1992 AMENDMENT**

Amendment by section 902(a) of Pub. L. 102-572 effective Oct. 29, 1992, see section 911 of Pub. L. 102-572, set out as a note under section 171 of this title.

Pub. L. 102-572, title IX, §907(b)(2), Oct. 29, 1992, 106 Stat. 4519, provided that: "The amendment made by paragraph (1) [amending this section] shall be effective with respect to all actions filed before, on, or after the date of the enactment of this Act [Oct. 29, 1992], except for those actions which, before such date of enactment, have been the subject of-

"(A) a final judgment of the United States Claims Court, if the time for appeal of that judgment has expired without an appeal having been filed, or

"(B) a final judgment of the Court of Appeals for the Federal Circuit."

#### **EFFECTIVE DATE OF 1982 AMENDMENT**

Amendment by Pub. L. 97-164 effective Oct. 1, 1982, see section 402 of Pub. L. 97-164, set out as a note under section 171 of this title.

#### **EFFECTIVE DATE OF 1980 AMENDMENT**

Amendment by Pub. L. 96-417 effective Nov. 1, 1980, and applicable with respect to civil actions pending on or commenced on or after such date, see section 701(a) of Pub. L. 96-417, set out as a note under section 251 of this title.

#### **EFFECTIVE DATE OF 1978 AMENDMENT**

Amendment by Pub. L. 95-563 effective with respect to contracts entered into 120 days after Nov. 1, 1978, and, at the election of the contractor, with respect to any claim pending at such time before the contracting officer or initiated thereafter, see section 16 of Pub. L. 95-563, Nov. 1, 1978, 92 Stat. 2391, formerly set out as an Effective Date note under section 601 of former Title 41, Public Contracts.

#### **EFFECTIVE DATE OF 1972 AMENDMENT**

Pub. L. 92-415, §2, Aug. 29, 1972, 86 Stat. 652, provided that: "This Act [amending this section] shall be applicable to all judicial proceedings pending on or instituted after the date of its enactment [Aug. 29, 1972]."

### EFFECTIVE DATE OF 1970 AMENDMENT

Amendment by Pub. L. 91-350 applicable to claims and civil actions dismissed before or pending on July 23, 1970, if the claim or civil action was based upon a transaction, omission, or breach that occurred not more than six years prior to July 23, 1970, notwithstanding a determination or judgment made prior to July 23, 1970, that the United States district courts or the United States Court of Claims did not have jurisdiction to entertain a suit on an express or implied contract with a nonappropriated fund instrumentality of the United States, see section 2 of Pub. L. 91-350, set out as a note under section 1346 of this title.

### SAVINGS PROVISION

Pub. L. 104-320, §12(e), Oct. 19, 1996, 110 Stat. 3875 , provided that:

"(1) ORDERS.-A termination under subsection (d) [set out below] shall not terminate the effectiveness of orders that have been issued by a court in connection with an action within the jurisdiction of that court on or before December 31, 2000. Such orders shall continue in effect according to their terms until modified, terminated, superseded, set aside, or revoked by a court of competent jurisdiction or by operation of law.

"(2) PROCEEDINGS AND APPLICATIONS.-(A) a termination under subsection (d) shall not affect the jurisdiction of a court of the United States to continue with any proceeding that is pending before the court on December 31, 2000.

"(B) Orders may be issued in any such proceeding, appeals may be taken therefrom, and payments may be made pursuant to such orders, as if such termination had not occurred. An order issued in any such proceeding shall continue in effect until modified, terminated, superseded, set aside, or revoked by a court of competent jurisdiction or by operation of law.

"(C) Nothing in this paragraph prohibits the discontinuance or modification of any such proceeding under the same terms and conditions and to the same extent that proceeding could have been discontinued or modified absent such termination."

### SUNSET PROVISION

Pub. L. 104-320, §12(d), Oct. 19, 1996, 110 Stat. 3875 , provided that: "The jurisdiction of the district courts of the United States over the actions described in section 1491(b)(1) of title 28, United States Code (as amended by subsection (a) of this section) shall terminate on January 1, 2001 unless extended by Congress. The savings provisions in subsection (e) [set out above] shall apply if the bid protest jurisdiction of the district courts of the United States terminates under this subsection."

### TRANSFER OF FUNCTIONS

For transfer of authorities, functions, personnel, and assets of the Coast Guard, including the authorities and functions of the Secretary of Transportation relating thereto, to the Department of Homeland Security, and for treatment of related references, see sections 468(b), 551(d), 552(d), and 557 of Title 6, Domestic Security, and the Department of Homeland Security Reorganization Plan of November 25, 2002, set out as a note under section 542 of Title 6.

### STUDY ON CONCURRENT JURISDICTION

Pub. L. 104-320, §12(c), Oct. 19, 1996, 110 Stat. 3875 , required that, no earlier than 2 years after Dec. 31, 1996, the General Accounting Office was to undertake a study regarding the concurrent jurisdiction of the district courts of the United States and the Court of Federal Claims over bid protests to determine whether concurrent jurisdiction was necessary, which study was to be completed no later than Dec. 31, 1999, and was to specifically consider the effect of any proposed change on the ability of small businesses to challenge violations of Federal procurement law.

<sup>1</sup> See References in Text note below.

<sup>2</sup> So in original. Probably should be "United".

**31 USC SUBTITLE III, CHAPTER 35, SUBCHAPTER V: PROCUREMENT PROTEST SYSTEM**
**From Title 31—MONEY AND FINANCE**

SUBTITLE III—FINANCIAL MANAGEMENT

CHAPTER 35—ACCOUNTING AND COLLECTION

**SUBCHAPTER V—PROCUREMENT PROTEST SYSTEM**
**§3551. Definitions**

In this subchapter:

(1) The term "protest" means a written objection by an interested party to any of the following:

(A) A solicitation or other request by a Federal agency for offers for a contract for the procurement of property or services.

(B) The cancellation of such a solicitation or other request.

(C) An award or proposed award of such a contract.

(D) A termination or cancellation of an award of such a contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

(E) Conversion of a function that is being performed by Federal employees to private sector performance.

(2) The term "interested party"—

(A) with respect to a contract or a solicitation or other request for offers described in paragraph (1), means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract; and

(B) with respect to a public-private competition conducted under Office of Management and Budget Circular A-76 with respect to the performance of an activity or function of a Federal agency, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A-76, includes—

(i) any official who is responsible for submitting the agency tender in such competition; and

(ii) any one individual who, for the purpose of representing the Federal employees engaged in the performance of the activity or function for which the public-private competition is conducted in a protest under this subchapter that relates to such public-private competition, has been designated as the agent of the Federal employees by a majority of such employees.

(3) The term "Federal agency" has the meaning given such term by section 102 of title 40.

(Added Pub. L. 98-369, div. B, title VII, §2741(a), July 18, 1984, 98 Stat. 1199; amended Pub. L. 99-145, title XIII, §1304(d), Nov. 8, 1985, 99 Stat. 742; Pub. L. 103-272, §4(f)(1)(K), July 5, 1994, 108 Stat. 1362; Pub. L. 103-355, title I, §1401, Oct. 13, 1994, 108 Stat. 3287; Pub. L. 104-106, div. D, title XLIII, §4321(d)(1), Feb. 10, 1996, 110 Stat. 674; Pub. L. 107-217, §3(h)(6), Aug. 21, 2002, 116 Stat. 1300; Pub. L. 108-375, div. A, title III, §326(a), Oct. 28, 2004, 118 Stat. 1848; Pub. L. 110-161, div. D, title VII, §739(c)(1)(A), Dec. 26, 2007, 121 Stat. 2030; Pub. L. 110-181, div. A, title III, §326(a), Jan. 28, 2008, 122 Stat. 62; Pub. L. 111-84, div. A, title III, §327(a), (b), Oct. 28, 2009, 123 Stat. 2255.)

**EDITORIAL NOTES**
**AMENDMENTS**
**2009**—Par. (1)(E). Pub. L. 111-84, §327(a), added subpar. (E).

Par. (2)(B)(i). Pub. L. 111-84, §327(b), amended cl. (i) generally. Prior to amendment, cl. (i) read as follows: "any official who submitted the agency tender in such competition; and".

**2008**—Par. (2). Pub. L. 110-181 amended par. (2) generally. Prior to amendment, par. (2) read as follows: "The term 'interested party'—

"(A) with respect to a contract or a solicitation or other request for offers described in paragraph (1), means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract; and

"(B) with respect to a public-private competition conducted under Office of Management and Budget Circular A-76 regarding performance of an activity or function of a Federal agency, or a

decision to convert a function performed by Federal employees to private sector performance without a competition under OMB Circular A-76, includes—

"(i) any official who submitted the agency tender in such competition; and

"(ii) any one person who, for the purpose of representing them in a protest under this subchapter that relates to such competition, has been designated as their agent by a majority of the employees of such Federal agency who are engaged in the performance of such activity or function."

**2007**—Par. (2). Pub. L. 110-161 amended par. (2) generally. Prior to amendment, par. (2) read as follows:

"(2)(A) The term 'interested party', with respect to a contract or a solicitation or other request for offers described in paragraph (1), means an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of the contract or by failure to award the contract.

"(B) The term includes the official responsible for submitting the Federal agency tender in a public-private competition conducted under Office of Management and Budget Circular A-76 regarding an activity or function of a Federal agency performed by more than 65 full-time equivalent employees of the Federal agency."

**2004**—Par. (2). Pub. L. 108-375 designated existing provisions as subpar. (A) and added subpar. (B).

**2002**—Par. (3). Pub. L. 107-217 substituted "section 102 of title 40" for "section 3 of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 472)".

**1996**—Pub. L. 104-106, §4321(d)(1)(A), substituted "subchapter:" for "subchapter—" in introductory provisions.

Par. (2). Pub. L. 104-106, §4321(d)(1)(B), substituted "or a solicitation or other request for offers" for "or proposed contract".

**1994**—Par. (1). Pub. L. 103-355, §1401(a), amended par. (1) generally. Prior to amendment, par. (1) read as follows: " 'protest' means a written objection by an interested party to a solicitation by a Federal agency for bids or proposals for a proposed contract for the procurement of property or services or a written objection by an interested party to a proposed award or the award of such a contract;".

Pub. L. 103-272 substituted "a Federal" for "an Federal".

Par. (2). Pub. L. 103-355, §1401(b)(1), inserted "The term" after "(2)" and substituted a period for "; and" at end.

Par. (3). Pub. L. 103-355, §1401(b)(2), inserted "The term" after "(3)".

**1985**—Par. (1). Pub. L. 99-145 substituted "Federal agency" for "executive agency".

## **STATUTORY NOTES AND RELATED SUBSIDIARIES**

### **EFFECTIVE DATE OF 2009 AMENDMENT**

Pub. L. 111-84, div. A, title III, §327(d), Oct. 28, 2009, 123 Stat. 2255, provided that: "The amendments made by this section [amending this section and section 3554 of this title] shall apply—

"(1) to any protest or civil action that relates to a public-private competition conducted after the date of the enactment of this Act [Oct. 28, 2009] under Office of Management and Budget Circular A-76, or any successor circular; and

"(2) to a decision made after the date of the enactment of this Act to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A-76."

### **EFFECTIVE DATE OF 2008 AMENDMENT**

Par. (2)(B) of this section, as added by Pub. L. 110-181, applicable to a protest or civil action that challenges final selection of the source of performance of an activity or function of a Federal agency made pursuant to a study under OMB Circular A-76 on or after Jan. 1, 2004, and to any other protest or civil action that relates to a public-private competition under Circular A-76 or to a decision to convert a function performed by Federal employees to private sector performance without a competition under Circular A-76, on or after Jan. 28, 2008, see section 326(d) of Pub. L. 110-181, set out as a note under section 1491 of Title 28, Judiciary and Judicial Procedure.

### **EFFECTIVE DATE OF 2007 AMENDMENT**

Paragraph (2)(B) of this section applicable to protests and civil actions that challenge final

selections of sources of performance of an activity or function of a Federal agency that are made pursuant to studies initiated under Office of Management and Budget Circular A-76 on or after Jan. 1, 2004; and to any other protests and civil actions that relate to public-private competitions initiated under Office of Management and Budget Circular A-76, or a decision to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A-76, on or after Dec. 26, 2007, see section 739(c)(3) of Pub. L. 110-161, set out as a note under section 501 of this title.

Amendment by Pub. L. 110-161 applicable with respect to fiscal year 2008 and each succeeding fiscal year, see section 739(e) of Pub. L. 110-161, set out as a note under section 501 of this title.

#### **EFFECTIVE DATE OF 2004 AMENDMENT**

Pub. L. 108-375, div. A, title III, §326(d), Oct. 28, 2004, 118 Stat. 1848, provided that: "The amendments made by this section [amending this section and sections 3552 and 3553 of this title] shall apply to protests filed under subchapter V of chapter 35 of title 31, United States Code, that relate to studies initiated under Office of Management and Budget Circular A-76 on or after the end of the 90-day period beginning on the date of the enactment of this Act [Oct. 28, 2004]."

#### **EFFECTIVE DATE OF 1996 AMENDMENT**

For effective date and applicability of amendment by Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 2302 of Title 10, Armed Forces.

#### **EFFECTIVE DATE OF 1994 AMENDMENT**

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 2302 of Title 10, Armed Forces.

#### **EFFECTIVE DATE**

Section applicable with respect to any protest filed after Jan. 14, 1985, see section 2751(b) of Pub. L. 98-369, set out as a note under section 2302 of Title 10, Armed Forces.

#### **CONSTRUCTION OF 2004 AMENDMENT**

Pub. L. 108-375, div. A, title III, §326(e), Oct. 28, 2004, 118 Stat. 1849, provided that: "The amendments made by this section [amending this section and sections 3552 and 3553 of this title] shall not be construed to authorize the use of a protest under subchapter V of chapter 35 of title 31, United States Code, with regard to a decision made by an agency tender official."

### **§3552. Protests by interested parties concerning procurement actions**

(a) A protest concerning an alleged violation of a procurement statute or regulation shall be decided by the Comptroller General if filed in accordance with this subchapter.

(b)(1) In the case of an agency tender official who is an interested party under section 3551(2)(B) of this title, the official may file a protest in connection with the public-private competition for which the official is an interested party. At the request of a majority of the employees of the Federal agency who are engaged in the performance of the activity or function subject to such public-private competition, the official shall file a protest in connection with such public-private competition unless the official determines that there is no reasonable basis for the protest.

(2) The determination of an agency tender official under paragraph (1) whether or not to file a protest is not subject to administrative or judicial review. An agency tender official shall provide written notification to Congress whenever the official makes a determination under paragraph (1) that there is no reasonable basis for a protest.

(Added Pub. L. 98-369, div. B, title VII, §2741(a), July 18, 1984, 98 Stat. 1199; amended Pub. L. 103-272, §4(f)(1)(L), July 5, 1994, 108 Stat. 1362; Pub. L. 103-355, title X, §10005(d), Oct. 13, 1994, 108 Stat. 3408; Pub. L. 104-106, div. E, title LVI, §5603, Feb. 10, 1996, 110 Stat. 700; Pub. L. 108-375, div. A, title III, §326(b), Oct. 28, 2004, 118 Stat. 1848.)

#### **EDITORIAL NOTES**

#### **AMENDMENTS**

**2004**—Pub. L. 108-375 designated existing provisions as subsec. (a) and added subsec. (b).

**1996**—Pub. L. 104-106 struck out at end "An interested party who has filed a protest under section 111(f) of the Federal Property and Administrative Services Act of 1949 (40 U.S.C. 759(f)) with respect to

a procurement or proposed procurement may not file a protest with respect to that procurement under this subchapter."

1994—Pub. L. 103–272 and Pub. L. 103–355 amended section identically, substituting "section 111(f)" for "section 111(h)" and "759(f)" for "759(h)".

#### **STATUTORY NOTES AND RELATED SUBSIDIARIES**

##### **EFFECTIVE DATE OF 2004 AMENDMENT**

Amendment by Pub. L. 108–375 applicable to protests filed under this subchapter that relate to studies initiated under Office of Management and Budget Circular A–76 on or after the end of the 90-day period beginning on Oct. 28, 2004, see section 326(d) of Pub. L. 108–375, set out as a note under section 3551 of this title.

##### **EFFECTIVE DATE OF 1996 AMENDMENT**

Amendment by Pub. L. 104–106 effective 180 days after Feb. 10, 1996, see section 5701 of Pub. L. 104–106, div. E, title LVII, Feb. 10, 1996, 110 Stat. 702.

##### **EFFECTIVE DATE OF 1994 AMENDMENT**

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 2302 of Title 10, Armed Forces.

##### **EFFECTIVE DATE**

Section applicable with respect to any protest filed after Jan. 14, 1985, see section 2751(b) of Pub. L. 98–369, set out as a note under section 2302 of Title 10, Armed Forces.

##### **CONSTRUCTION OF 2004 AMENDMENT**

Amendment by Pub. L. 108–375 not to be construed to authorize the use of a protest under this subchapter with regard to a decision made by an agency tender official, see section 326(e) of Pub. L. 108–375, set out as a note under section 3551 of this title.

### **§3553. Review of protests; effect on contracts pending decision**

(a) Under procedures prescribed under section 3555 of this title, the Comptroller General shall decide a protest submitted to the Comptroller General by an interested party.

(b)(1) Within one day after the receipt of a protest, the Comptroller General shall notify the Federal agency involved of the protest.

(2) Except as provided in paragraph (3) of this subsection, a Federal agency receiving a notice of a protested procurement under paragraph (1) of this subsection shall submit to the Comptroller General a complete report (including all relevant documents) on the protested procurement—

(A) within 30 days after the date of the agency's receipt of that notice;

(B) if the Comptroller General, upon a showing by the Federal agency, determines (and states the reasons in writing) that the specific circumstances of the protest require a longer period, within the longer period determined by the Comptroller General; or

(C) in a case determined by the Comptroller General to be suitable for the express option under section 3554(a)(2) of this title, within 20 days after the date of the Federal agency's receipt of that determination.

(3) A Federal agency need not submit a report to the Comptroller General pursuant to paragraph (2) of this subsection if the agency is sooner notified by the Comptroller General that the protest concerned has been dismissed under section 3554(a)(4) of this title.

(c)(1) Except as provided in paragraph (2) of this subsection, a contract may not be awarded in any procurement after the Federal agency has received notice of a protest with respect to such procurement from the Comptroller General and while the protest is pending.

(2) The head of the procuring activity responsible for award of a contract may authorize the award of the contract (notwithstanding a protest of which the Federal agency has notice under this section)—

(A) upon a written finding that urgent and compelling circumstances which significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General under this subchapter; and

(B) after the Comptroller General is advised of that finding.

(3) A finding may not be made under paragraph (2)(A) of this subsection unless the award of the contract is otherwise likely to occur within 30 days after the making of such finding.

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(d)(1) A contractor awarded a Federal agency contract may, during the period described in paragraph (4), begin performance of the contract and engage in any related activities that result in obligations being incurred by the United States under the contract unless the contracting officer responsible for the award of the contract withholds authorization to proceed with performance of the contract.

(2) The contracting officer may withhold an authorization to proceed with performance of the contract during the period described in paragraph (4) if the contracting officer determines in writing that—

(A) a protest is likely to be filed; and

(B) the immediate performance of the contract is not in the best interests of the United States.

(3)(A) If the Federal agency awarding the contract receives notice of a protest in accordance with this section during the period described in paragraph (4)—

(i) the contracting officer may not authorize performance of the contract to begin while the protest is pending; or

(ii) if authorization for contract performance to proceed was not withheld in accordance with paragraph (2) before receipt of the notice, the contracting officer shall immediately direct the contractor to cease performance under the contract and to suspend any related activities that may result in additional obligations being incurred by the United States under that contract.

(B) Performance and related activities suspended pursuant to subparagraph (A)(ii) by reason of a protest may not be resumed while the protest is pending.

(C) The head of the procuring activity may authorize the performance of the contract (notwithstanding a protest of which the Federal agency has notice under this section)—

(i) upon a written finding that—

(I) performance of the contract is in the best interests of the United States; or

(II) urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General concerning the protest; and

(ii) after the Comptroller General is notified of that finding.

(4)(A) The period referred to in paragraphs (2) and (3)(A), with respect to a contract, is the period beginning on the date of the contract award and ending on the later of—

(i) the date that is 10 days after the date of the contract award; or

(ii) the date that is 5 days after the debriefing date offered to an unsuccessful offeror for any debriefing that is requested and, when requested, is required.

(B) For procurements conducted by any component of the Department of Defense, the 5-day period described in subparagraph (A)(ii) does not commence until the day the Government delivers to a disappointed offeror the written responses to any questions submitted pursuant to section 2305(b)(5)(B)(vii) of title 10.

(e) The authority of the head of the procuring activity to make findings and to authorize the award and performance of contracts under subsections (c) and (d) of this section may not be delegated.

(f)(1) Within such deadlines as the Comptroller General prescribes, upon request each Federal agency shall provide to an interested party any document relevant to a protested procurement action (including the report required by subsection (b)(2) of this section) that would not give that party a competitive advantage and that the party is otherwise authorized by law to receive.

(2)(A) The Comptroller General may issue protective orders which establish terms, conditions, and restrictions for the provision of any document to a party under paragraph (1), that prohibit or restrict the disclosure by the party of information described in subparagraph (B) that is contained in such a document.

(B) Information referred to in subparagraph (A) is procurement sensitive information, trade secrets, or other proprietary or confidential research, development, or commercial information.

(C) A protective order under this paragraph shall not be considered to authorize the withholding of any document or information from Congress or an executive agency.

(g) If an interested party files a protest in connection with a public-private competition described in section 3551(2)(B) of this title, a person representing a majority of the employees of the Federal agency who are engaged in the performance of the activity or function subject to the public-private competition may intervene in protest.

(Added Pub. L. 98–369, div. B, title VII, §2741(a), July 18, 1984, 98 Stat. 1200; amended Pub. L. 103–355, title I, §§1402, 1403(c), Oct. 13, 1994, 108 Stat. 3287, 3290; Pub. L. 104–106, div. D, title XLIII, §4321(d)(2), div. E, title LV, §5501(1), Feb. 10, 1996, 110 Stat. 674, 698; Pub. L. 108–375, div. A, title III, §326(c), Oct. 28, 2004, 118 Stat. 1848; Pub. L. 115–91, div. A, title VIII, §818(c), Dec. 12, 2017, 131 Stat. 1464.)

### EDITORIAL NOTES

### AMENDMENTS

2017—Subsec. (d)(4). Pub. L. 115–91 redesignated existing provisions as subpar. (A) and former

subpars. (A) and (B) as cls. (i) and (ii), respectively, of subpar. (A) and added subpar. (B).

**2004**—Subsec. (g). Pub. L. 108–375 added subsec. (g).

**1996**—Subsec. (b)(2)(A). Pub. L. 104–106, §5501(1), substituted "30 days" for "35 days".

Subsec. (b)(3). Pub. L. 104–106, §4321(d)(2), substituted "3554(a)(4)" for "3554(a)(3)".

**1994**—Subsec. (b)(1). Pub. L. 103–355, §1402(a)(1)(A), substituted "one day after" for "one working day of".

Subsec. (b)(2)(A). Pub. L. 103–355, §1402(a)(1)(B)(i), substituted "35 days after" for "25 working days from".

Subsec. (b)(2)(C). Pub. L. 103–355, §1402(a)(1)(B)(ii), substituted "20 days after" for "10 working days from".

Subsec. (c)(3). Pub. L. 103–355, §1402(a)(2), substituted "after the making of such finding" for "thereafter".

Subsec. (d). Pub. L. 103–355, §1402(b), amended subsec. (d) generally. Prior to amendment, subsec. (d) read as follows:

"(d)(1) If a Federal agency receives notice of a protest under this section after the contract has been awarded but within 10 days of the date of the contract award, the Federal agency (except as provided under paragraph (2)) shall, upon receipt of that notice, immediately direct the contractor to cease performance under the contract and to suspend any related activities that may result in additional obligations being incurred by the United States under that contract. Performance of the contract may not be resumed while the protest is pending.

"(2) The head of the procuring activity responsible for award of a contract may authorize the performance of the contract (notwithstanding a protest of which the Federal agency has notice under this section)—

"(A) upon a written finding—

"(i) that performance of the contract is in the best interests of the United States; or

"(ii) that urgent and compelling circumstances that significantly affect interests of the United States will not permit waiting for the decision of the Comptroller General concerning the protest; and

"(B) after the Comptroller General is notified of that finding."

Subsec. (f). Pub. L. 103–355, §1403(c), designated existing provisions as par. (1) and added par. (2).

## **STATUTORY NOTES AND RELATED SUBSIDIARIES**

### **EFFECTIVE DATE OF 2004 AMENDMENT**

Amendment by Pub. L. 108–375 applicable to protests filed under this subchapter that relate to studies initiated under Office of Management and Budget Circular A–76 on or after the end of the 90-day period beginning on Oct. 28, 2004, see section 326(d) of Pub. L. 108–375, set out as a note under section 3551 of this title.

### **EFFECTIVE DATE OF 1996 AMENDMENT**

For effective date and applicability of amendment by section 4321(d)(2) of Pub. L. 104–106, see section 4401 of Pub. L. 104–106, set out as a note under section 2302 of Title 10, Armed Forces.

Amendment by section 5501(1) of Pub. L. 104–106 effective 180 days after Feb. 10, 1996, see section 5701 of Pub. L. 104–106, div. E, title LVII, Feb. 10, 1996, 110 Stat. 702.

### **EFFECTIVE DATE OF 1994 AMENDMENT**

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 2302 of Title 10, Armed Forces.

### **EFFECTIVE DATE**

Section applicable with respect to any protest filed after Jan. 14, 1985, see section 2751(b) of Pub. L. 98–369, set out as a note under section 2302 of Title 10, Armed Forces.

### **CONSTRUCTION OF 2004 AMENDMENT**

Amendment by Pub. L. 108–375 not to be construed to authorize the use of a protest under this subchapter with regard to a decision made by an agency tender official, see section 326(e) of Pub. L. 108–375, set out as a note under section 3551 of this title.



### §3554. Decisions on protests

(a)(1) To the maximum extent practicable, the Comptroller General shall provide for the inexpensive and expeditious resolution of protests under this subchapter. Except as provided under paragraph (2) of this subsection, the Comptroller General shall issue a final decision concerning a protest within 100 days after the date the protest is submitted to the Comptroller General.

(2) The Comptroller General shall, by regulation prescribed pursuant to section 3555 of this title, establish an express option for deciding those protests which the Comptroller General determines suitable for resolution within 65 days after the date the protest is submitted.

(3) An amendment to a protest that adds a new ground of protest, if timely made, should be resolved, to the maximum extent practicable, within the time limit established under paragraph (1) of this subsection for final decision of the initial protest. If an amended protest cannot be resolved within such time limit, the Comptroller General may resolve the amended protest through the express option under paragraph (2) of this subsection.

(4) The Comptroller General may dismiss a protest that the Comptroller General determines is frivolous or which, on its face, does not state a valid basis for protest.

(b)(1) With respect to a solicitation for a contract, or a proposed award or the award of a contract, protested under this subchapter, the Comptroller General may determine whether the solicitation, proposed award, or award complies with statute and regulation. If the Comptroller General determines that the solicitation, proposed award, or award does not comply with a statute or regulation, the Comptroller General shall recommend that the Federal agency—

- (A) refrain from exercising any of its options under the contract;
- (B) recompile the contract immediately;
- (C) cancel the solicitation issued pursuant to the public-private competition conducted under Office of Management and Budget Circular A-76 or any successor circular;
- (D) issue a new solicitation;
- (E) terminate the contract;
- (F) award a contract consistent with the requirements of such statute and regulation;
- (G) implement any combination of recommendations under clauses (A), (B), (C), (D), (E), and (F); or
- (H) implement such other recommendations as the Comptroller General determines to be necessary in order to promote compliance with procurement statutes and regulations.

(2) If the head of the procuring activity responsible for a contract makes a finding under section 3553(d)(3)(C) (i)(I) of this title, the Comptroller General shall make recommendations under this subsection without regard to any cost or disruption from terminating, recompeting, or reawarding the contract.

(3) If the Federal agency fails to implement fully the recommendations of the Comptroller General under this subsection with respect to a solicitation for a contract or an award or proposed award of a contract within 60 days after receiving the recommendations, the head of the procuring activity responsible for that contract shall report such failure to the Comptroller General not later than 5 days after the end of such 60-day period.

(c)(1) If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may recommend that the Federal agency conducting the procurement pay to an appropriate interested party the costs of—

- (A) filing and pursuing the protest, including reasonable attorneys' fees and consultant and expert witness fees; and
- (B) bid and proposal preparation.

(2) No party (other than a small business concern (within the meaning of section 3(a) of the Small Business Act)) may be paid, pursuant to a recommendation made under the authority of paragraph (1)—

- (A) costs for consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Federal Government; or
- (B) costs for attorneys' fees that exceed \$150 per hour unless the agency determines, based on the recommendation of the Comptroller General on a case by case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.

(3) If the Comptroller General recommends under paragraph (1) that a Federal agency pay costs to an interested party, the Federal agency shall—

- (A) pay the costs promptly; or
- (B) if the Federal agency does not make such payment, promptly report to the Comptroller General the reasons for the failure to follow the Comptroller General's recommendation.

(4) If the Comptroller General recommends under paragraph (1) that a Federal agency pay costs to an interested party, the Federal agency and the interested party shall attempt to reach an agreement on the amount of the costs to be paid. If the Federal agency and the interested party are unable to agree on the amount to be paid,

the Comptroller General may, upon the request of the interested party, recommend to the Federal agency the amount of the costs that the Federal agency should pay.

(d) Each decision of the Comptroller General under this subchapter shall be signed by the Comptroller General or a designee for that purpose. A copy of the decision shall be made available to the interested parties, the head of the procuring activity responsible for the solicitation, proposed award, or award of the contract, and the senior procurement executive of the Federal agency involved.

(e)(1) The Comptroller General shall report promptly to the Committee on Governmental Affairs and the Committee on Appropriations of the Senate and to the Committee on Government Reform and Oversight and the Committee on Appropriations of the House of Representatives any case in which a Federal agency fails to implement fully a recommendation of the Comptroller General under subsection (b) or (c). The report shall include—

(A) a comprehensive review of the pertinent procurement, including the circumstances of the failure of the Federal agency to implement a recommendation of the Comptroller General; and

(B) a recommendation regarding whether, in order to correct an inequity or to preserve the integrity of the procurement process, the Congress should consider—

- (i) private relief legislation;
- (ii) legislative rescission or cancellation of funds;
- (iii) further investigation by Congress; or
- (iv) other action.

(2) Not later than January 31 of each year, the Comptroller General shall transmit to the Congress a report containing a summary of each instance in which a Federal agency did not fully implement a recommendation of the Comptroller General under subsection (b) or (c) during the preceding year. The report shall also describe each instance in which a final decision in a protest was not rendered within 100 days after the date the protest is submitted to the Comptroller General. The report shall also include a summary of the most prevalent grounds for sustaining protests during such preceding year.

(Added Pub. L. 98–369, div. B, title VII, §2741(a), July 18, 1984, 98 Stat. 1201; amended Pub. L. 100–463, title VIII, §8139, Oct. 1, 1988, 102 Stat. 2270–47; Pub. L. 103–355, title I, §1403(a)–(b)(3), Oct. 13, 1994, 108 Stat. 3289, 3290; Pub. L. 104–106, div. D, title XLIII, §4321(d)(3), div. E, title LV, §5501(2), Feb. 10, 1996, 110 Stat. 674, 698; Pub. L. 111–84, div. A, title III, §327(c), Oct. 28, 2009, 123 Stat. 2255; Pub. L. 112–239, div. A, title VIII, §867, Jan. 2, 2013, 126 Stat. 1862.)

#### EDITORIAL NOTES

#### REFERENCES IN TEXT

Section 3(a) of the Small Business Act, referred to in subsec. (c)(2), is classified to section 632(a) of Title 15, Commerce and Trade.

#### AMENDMENTS

**2013**—Subsec. (e)(2). Pub. L. 112–239 inserted at end "The report shall also include a summary of the most prevalent grounds for sustaining protests during such preceding year."

**2009**—Subsec. (b)(1)(C) to (H). Pub. L. 111–84 added subpar. (C), redesignated former subpars. (C) to (G) as (D) to (H), respectively, and substituted ", (E), and (F)" for ", and (E)" in subpar. (G).

**1996**—Subsec. (a)(1). Pub. L. 104–106, §5501(2)(A), substituted "100 days" for "125 days".

Subsec. (b)(2). Pub. L. 104–106, §4321(d)(3), substituted "section 3553(d)(3)(C)(i)(I)" for "section 3553(d)(2)(A)(i)".

Subsec. (e)(1). Pub. L. 104–106, §5501(2)(B)(i), substituted "Government Reform and Oversight" for "Government Operations".

Subsec. (e)(2). Pub. L. 104–106, §5501(2)(B)(ii), substituted "100 days" for "125 days".

**1994**—Subsec. (a)(1). Pub. L. 103–355, §1403(a)(1), substituted "125 days after" for "90 working days from".

Subsec. (a)(2). Pub. L. 103–355, §1403(a)(2), substituted "65 days after" for "45 calendar days from".

Subsec. (a)(3), (4). Pub. L. 103–355, §1403(a)(3), (4), added par. (3) and redesignated former par. (3) as (4).

Subsec. (b)(3). Pub. L. 103–355, §1403(b)(1), added par. (3).

Subsec. (c). Pub. L. 103–355, §1403(b)(2), amended subsec. (c) generally. Prior to amendment, subsec. (c) read as follows:

"(c)(1) If the Comptroller General determines that a solicitation for a contract or a proposed award or the award of a contract does not comply with a statute or regulation, the Comptroller General may declare an appropriate interested party to be entitled to the costs of—

"(A) filing and pursuing the protest, including reasonable attorneys' fees; and

"(B) bid and proposal preparation.

"(2) Monetary awards to which a party is declared to be entitled under paragraph (1) of this subsection shall be paid promptly by the Federal agency concerned out of funds available to or for the use of the Federal agency for the procurement of property and services."

Subsec. (e). Pub. L. 103-355, §1403(b)(3), amended subsec. (e) generally. Prior to amendment, subsec. (e) read as follows:

"(e)(1) The head of the procuring activity responsible for the solicitation, proposed award, or award of the contract shall report to the Comptroller General, if the Federal agency has not fully implemented those recommendations within 60 days of receipt of the Comptroller General's recommendations under subsection (b) of this section.

"(2) Not later than January 31 of each year, the Comptroller General shall transmit to Congress a report describing each instance in which a Federal agency did not fully implement the Comptroller General's recommendations during the preceding fiscal year."

1988—Subsec. (a)(1). Pub. L. 100-463 struck out "unless the Comptroller General determines and states in writing the reasons that the specific circumstances of the protest require a longer period" after "submitted to the Comptroller General" before period at end.

#### **STATUTORY NOTES AND RELATED SUBSIDIARIES**

##### **CHANGE OF NAME**

Committee on Governmental Affairs of Senate changed to Committee on Homeland Security and Governmental Affairs of Senate, effective Jan. 4, 2005, by Senate Resolution No. 445, One Hundred Eighth Congress, Oct. 9, 2004.

Committee on Government Reform and Oversight of House of Representatives changed to Committee on Government Reform of House of Representatives by House Resolution No. 5, One Hundred Sixth Congress, Jan. 6, 1999. Committee on Government Reform of House of Representatives changed to Committee on Oversight and Government Reform of House of Representatives by House Resolution No. 6, One Hundred Tenth Congress, Jan. 5, 2007. Committee on Oversight and Government Reform of House of Representatives changed to Committee on Oversight and Reform of House of Representatives by House Resolution No. 6, One Hundred Sixteenth Congress, Jan. 9, 2019.

##### **EFFECTIVE DATE OF 2009 AMENDMENT**

Amendment by Pub. L. 111-84 applicable to any protest or civil action that relates to a public-private competition conducted after Oct. 28, 2009, under Office of Management and Budget Circular A-76, or any successor circular, and to a decision made after Oct. 28, 2009, to convert a function performed by Federal employees to private sector performance without a competition under Office of Management and Budget Circular A-76, see section 327(d) of Pub. L. 111-84, set out as a note under section 3551 of this title.

##### **EFFECTIVE DATE OF 1996 AMENDMENT**

For effective date and applicability of amendment by section 4321(d)(3) of Pub. L. 104-106, see section 4401 of Pub. L. 104-106, set out as a note under section 2302 of Title 10, Armed Forces.

Amendment by section 5501(2) of Pub. L. 104-106 effective 180 days after Feb. 10, 1996, see section 5701 of Pub. L. 104-106, div. E, title LVII, Feb. 10, 1996, 110 Stat. 702.

##### **EFFECTIVE DATE OF 1994 AMENDMENT**

For effective date and applicability of amendment by Pub. L. 103-355, see section 10001 of Pub. L. 103-355, set out as a note under section 2302 of Title 10, Armed Forces.

##### **EFFECTIVE DATE**

Section applicable with respect to any protest filed after Jan. 14, 1985, see section 2751(b) of Pub. L. 98-369, set out as a note under section 2302 of Title 10, Armed Forces.

#### **INCLUSION OF INFORMATION ON COMMON GROUNDS FOR SUSTAINING BID PROTESTS IN ANNUAL GOVERNMENT ACCOUNTABILITY OFFICE REPORTS TO CONGRESS**

Pub. L. 114–328, div. A, title VIII, §889, Dec. 23, 2016, 130 Stat. 2323, provided that: "The Comptroller General of the United States shall include in the annual report to Congress on the Government Accountability Office each year a list of the most common grounds for sustaining protests relating to bids for contracts during such year."

### **PROMPT PAYMENT OF COSTS UNDER PRIOR LAW**

Pub. L. 103–355, title I, §1403(b)(4), Oct. 13, 1994, 108 Stat. 3290, provided that: "Costs to which the Comptroller General declared an interested party to be entitled under section 3554 of title 31, United States Code, as in effect immediately before the enactment of this Act [Oct. 13, 1994], shall, if not paid or otherwise satisfied by the Federal agency concerned before the date of the enactment of this Act, be paid promptly."

### **§3555. Regulations; authority of Comptroller General to verify assertions**

(a) The Comptroller General shall prescribe such procedures as may be necessary to the expeditious decision of protests under this subchapter, including procedures for accelerated resolution of protests under the express option authorized by section 3554(a)(2) of this title. Such procedures shall provide that the protest process may not be delayed by the failure of a party to make a filing within the time provided for the filing.

(b) The procedures shall provide that, in the computation of any period described in this subchapter—

(1) the day of the act, event, or default from which the designated period of time begins to run not be included; and

(2) the last day after such act, event, or default be included, unless—

(A) such last day is a Saturday, a Sunday, or a legal holiday; or

(B) in the case of a filing of a paper at the Government Accountability Office or a Federal agency, such last day is a day on which weather or other conditions cause the closing of the Government Accountability Office or Federal agency, in which event the next day that is not a Saturday, Sunday, or legal holiday shall be included.

(c) ELECTRONIC FILING AND DOCUMENT DISSEMINATION SYSTEM.—

(1) ESTABLISHMENT AND OPERATION OF SYSTEM.—The Comptroller General shall establish and operate an electronic filing and document dissemination system under which, in accordance with procedures prescribed by the Comptroller General—

(A) a person filing a protest under this subchapter may file the protest through electronic means; and

(B) all documents and information required with respect to the protest may be disseminated and made available to the parties to the protest through electronic means.

(2) IMPOSITION OF FEES.—

(A) IN GENERAL.—The Comptroller General may require each person who files a protest under this subchapter to pay a fee to support the establishment and operation of the electronic system under this subsection, without regard to whether or not the person uses the system with respect to the protest.

(B) AMOUNT.—The Comptroller General shall establish (and from time to time shall update) a schedule setting forth the amount of the fee to be paid under subparagraph (A).

(3) TREATMENT OF AMOUNTS COLLECTED.—

(A) ESTABLISHMENT OF ACCOUNT.—The Comptroller General shall maintain a separate account among the accounts of the Government Accountability Office for the electronic system under this subsection, and shall deposit all amounts received as fees under paragraph (2) into the account.

(B) USE OF AMOUNTS.—Amounts in the account maintained under this paragraph shall be available to the Comptroller General, without fiscal year limitation, solely to establish and operate the electronic system under this subsection.

(d) The Comptroller General may use any authority available under chapter 7 of this title and this chapter to verify assertions made by parties in protests under this subchapter.

(Added Pub. L. 98–369, div. B, title VII, §2741(a), July 18, 1984, 98 Stat. 1202; amended Pub. L. 103–355, title I, §1404, Oct. 13, 1994, 108 Stat. 3291; Pub. L. 108–271, §8(b), July 7, 2004, 118 Stat. 814; Pub. L. 113–76, div. I, title I, §1501, Jan. 17, 2014, 128 Stat. 433.)

### **EDITORIAL NOTES**

### **AMENDMENTS**

**2014**—Subsec. (c). Pub. L. 113–76 amended subsec. (c) generally. Prior to amendment, subsec. (c)

read as follows: "The Comptroller General may prescribe procedures for the electronic filing and dissemination of documents and information required under this subchapter. In prescribing such procedures, the Comptroller General shall consider the ability of all parties to achieve electronic access to such documents and records."

**2004**—Subsec. (b)(2)(B). Pub. L. 108–271 substituted "Government Accountability Office" for "General Accounting Office" in two places.

**1994**—Subsec. (a). Pub. L. 103–355, §1404(c), substituted "The Comptroller General" for "Not later than January 15, 1985, the Comptroller General".

Subsecs. (b) to (d). Pub. L. 103–355, §1404(a), (b), added subsecs. (b) and (c) and redesignated former subsec. (b) as (d).

#### **STATUTORY NOTES AND RELATED SUBSIDIARIES**

##### **EFFECTIVE DATE OF 1994 AMENDMENT**

For effective date and applicability of amendment by Pub. L. 103–355, see section 10001 of Pub. L. 103–355, set out as a note under section 2302 of Title 10, Armed Forces.

##### **EFFECTIVE DATE**

Section applicable with respect to any protest filed after Jan. 14, 1985, see section 2751(b) of Pub. L. 98–369, set out as a note under section 2302 of Title 10, Armed Forces.

### **§3556. Nonexclusivity of remedies; matters included in agency record**

This subchapter does not give the Comptroller General exclusive jurisdiction over protests, and nothing contained in this subchapter shall affect the right of any interested party to file a protest with the contracting agency or to file an action in the United States Court of Federal Claims. In any such action based on a procurement or proposed procurement with respect to which a protest has been filed under this subchapter, the reports required by sections 3553(b)(2) and 3554(e)(1) of this title with respect to such procurement or proposed procurement and any decision or recommendation of the Comptroller General under this subchapter with respect to such procurement or proposed procurement shall be considered to be part of the agency record subject to review.

(Added Pub. L. 98–369, div. B, title VII, §2741(a), July 18, 1984, 98 Stat. 1202; amended Pub. L. 102–572, title IX, §902(b)(1), Oct. 29, 1992, 106 Stat. 4516; Pub. L. 104–320, §12(f), Oct. 19, 1996, 110 Stat. 3876.)

#### **EDITORIAL NOTES**

##### **AMENDMENTS**

**1996**—Pub. L. 104–320, which directed the amendment of this section by striking "a court of the United States or" in first sentence, was executed by striking "a district court of the United States or" after "to file an action in" in first sentence to reflect the probable intent of Congress.

**1992**—Pub. L. 102–572 substituted "United States Court of Federal Claims" for "United States Claims Court".

#### **STATUTORY NOTES AND RELATED SUBSIDIARIES**

##### **EFFECTIVE DATE OF 1996 AMENDMENT**

Amendment by Pub. L. 104–320 effective Jan. 1, 2001, see section 12(f) of Pub. L. 104–320, set out as a Nonexclusivity of GAO Remedies note below.

##### **EFFECTIVE DATE OF 1992 AMENDMENT**

Amendment by Pub. L. 102–572 effective Oct. 29, 1992, see section 911 of Pub. L. 102–572, set out as a note under section 171 of Title 28, Judiciary and Judicial Procedure.

##### **EFFECTIVE DATE**

Section applicable with respect to any protest filed after Jan. 14, 1985, see section 2751(b) of Pub. L. 98–369, set out as a note under section 2302 of Title 10, Armed Forces.

#### **NONEXCLUSIVITY OF GAO REMEDIES**

Pub. L. 104–320, §12(f), Oct. 19, 1996, 110 Stat. 3876, provided that: "In the event that the bid protest jurisdiction of the district courts of the United States is terminated pursuant to subsection (d) [set out as a Sunset Provision note under section 1491 of Title 28, Judiciary and Judicial Procedure], then section 3556 of title 31, United States Code, shall be amended by striking 'a court of the United States or' in the first sentence." [Bid protest jurisdiction of the district courts of the United States terminated on Jan. 1, 2001, pursuant to section 12(d) of Pub. L. 104–320.]

### **§3557. Expedited action in protests of public-private competitions**

For any protest of a public-private competition conducted under Office of Management and Budget Circular A–76 with respect to the performance of an activity or function of a Federal agency, the Comptroller General shall administer the provisions of this subchapter in the manner best suited for expediting the final resolution of the protest and the final action in the public-private competition.

(Added Pub. L. 110–181, div. A, title III, §326(b)(1), Jan. 28, 2008, 122 Stat. 63; amended Pub. L. 110–417, [div. A], title X, §1061(c)(2), Oct. 14, 2008, 122 Stat. 4613.)

#### **EDITORIAL NOTES**

#### **CODIFICATION**

Another section 3557, added Pub. L. 110–161, div. D, title VII, §739(c)(1)(B)(i), Dec. 26, 2007, 121 Stat. 2030, related to an expedited action in protests for public-private competitions, prior to repeal by Pub. L. 110–417, [div. A], title X, §1061(c)(1), Oct. 14, 2008, 122 Stat. 4613.

#### **AMENDMENTS**

**2008**—Pub. L. 110–417 substituted "public-private" for "Public-Private" in section catchline.

**41 USC 3704: Post-award debriefings**

Text contains those laws in effect on April 6, 2021

**From Title 41-PUBLIC CONTRACTS**

Subtitle I-Federal Procurement Policy

Division C-Procurement

CHAPTER 37-AWARDING OF CONTRACTS

**Jump To:**[Source Credit](#)[Miscellaneous](#)**§3704. Post-award debriefings**

(a) **REQUEST FOR DEBRIEFING.**-When a contract is awarded by the head of an executive agency on the basis of competitive proposals, an unsuccessful offeror, on written request received by the agency within 3 days after the date on which the unsuccessful offeror receives the notification of the contract award, shall be debriefed and furnished the basis for the selection decision and contract award.

(b) **WHEN DEBRIEFING TO BE CONDUCTED.**-The executive agency shall debrief the offeror within, to the maximum extent practicable, 5 days after receipt of the request by the executive agency.

(c) **INFORMATION TO BE PROVIDED.**-The debriefing shall include, at a minimum-

- (1) the executive agency's evaluation of the significant weak or deficient factors in the offeror's offer;
- (2) the overall evaluated cost and technical rating of the offer of the contractor awarded the contract and the overall evaluated cost and technical rating of the offer of the debriefed offeror;
- (3) the overall ranking of all offers;
- (4) a summary of the rationale for the award;
- (5) in the case of a proposal that includes a commercial product that is an end item under the contract, the make and model of the item being provided in accordance with the offer of the contractor awarded the contract; and
- (6) reasonable responses to relevant questions posed by the debriefed offeror as to whether source selection procedures set forth in the solicitation, applicable regulations, and other applicable authorities were followed by the executive agency.

(d) **INFORMATION NOT TO BE INCLUDED.**-The debriefing may not include point-by-point comparisons of the debriefed offeror's offer with other offers and may not disclose any information that is exempt from disclosure under section 552(b) of title 5.

(e) **INCLUSION OF STATEMENT IN SOLICITATION.**-Each solicitation for competitive proposals shall include a statement that information described in subsection (c) may be disclosed in post-award debriefings.

(f) **AFTER SUCCESSFUL PROTEST.**-If, within one year after the date of the contract award and as a result of a successful procurement protest, the executive agency seeks to fulfill the requirement under the protested contract either on the basis of a new solicitation of offers or on the basis of new best and final offers requested for that contract, the head of the executive agency shall make available to all offerors-

- (1) the information provided in debriefings under this section regarding the offer of the contractor awarded the contract; and
- (2) the same information that would have been provided to the original offerors.

(g) **SUMMARY TO BE INCLUDED IN FILE.**-The contracting officer shall include a summary of the debriefing in the contract file.

( Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3771 ; Pub. L. 115-232, div. A, title VIII, §836(b)(15), Aug. 13, 2018, 132 Stat. 1864 .)

**HISTORICAL AND REVISION NOTES**

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
3704(a)	41:253b(e)(1) (1st sentence).	June 30, 1949, ch. 288, title III, §303B(e), as added Pub. L. 103-355, title I, §1064(2), Oct. 13, 1994, 108 Stat. 3268 ; Pub. L. 104-106, title XLI, §4104(b)(1), Feb. 10, 1996, 110 Stat. 645 .
3704(b)	41:253b(e)(1) (last sentence).	
3704(c)	41:253b(e)(2).	

3704(d)	41:253b(e)(3).	
3704(e)	41:253b(e)(4).	
3704(f)	41:253b(e)(5).	
3704(g)	41:253b(g) (related to 41:253b(e)).	June 30, 1949, ch. 288, title III, §303B(g) (related to §303B(e)), as added Pub. L. 104–106, title XLI, §4104(b)(3), Feb. 10, 1996, 110 Stat. 645 .

**EDITORIAL NOTES****AMENDMENTS**

**2018**–Subsec. (c)(5). Pub. L. 115–232 substituted "commercial product" for "commercial item".

**STATUTORY NOTES AND RELATED SUBSIDIARIES****EFFECTIVE DATE OF 2018 AMENDMENT**

Amendment by Pub. L. 115–232 effective Jan. 1, 2020, subject to a savings provision, see section 836(h) of Pub. L. 115–232, set out as an Effective Date of 2018 Amendment; Savings Provision note under section 453b of Title 6, Domestic Security.



**41 USC Subtitle III: Contract Disputes**  
**From Title 41—PUBLIC CONTRACTS**

**Subtitle III—Contract Disputes**

Chapter  
**71. Contract Disputes**

Sec.  
**7101**

**CHAPTER 71—CONTRACT DISPUTES**

Sec.	
7101.	Definitions.
7102.	Applicability of chapter.
7103.	Decision by contracting officer.
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7105.	Agency boards.
7106.	Agency board procedures for accelerated and small claims.
7107.	Judicial review of agency board decisions.
7108.	Payment of claims.
7109.	Interest.

**§7101. Definitions**

In this chapter:

(1) **ADMINISTRATOR.**—The term "Administrator" means the Administrator for Federal Procurement Policy appointed pursuant to section 1102 of this title.

(2) **AGENCY BOARD OR AGENCY BOARD OF CONTRACT APPEALS.**—The term "agency board" or "agency board of contract appeals" means—

- (A) the Armed Services Board;
- (B) the Civilian Board;
- (C) the board of contract appeals of the Tennessee Valley Authority; or
- (D) the Postal Service Board established under section 7105(d)(1) of this title.

(3) **AGENCY HEAD.**—The term "agency head" means the head and any assistant head of an executive agency. The term may include the chief official of a principal division of an executive agency if the head of the executive agency so designates that chief official.

(4) **ARMED SERVICES BOARD.**—The term "Armed Services Board" means the Armed Services Board of Contract Appeals established under section 7105(a)(1) of this title.

(5) **CIVILIAN BOARD.**—The term "Civilian Board" means the Civilian Board of Contract Appeals established under section 7105(b)(1) of this title.

(6) **CONTRACTING OFFICER.**—The term "contracting officer"—

- (A) means an individual who, by appointment in accordance with applicable regulations, has the authority to make and administer contracts and to make determinations and findings with respect to contracts; and
- (B) includes an authorized representative of the contracting officer, acting within the limits of the representative's authority.

(7) **CONTRACTOR.**—The term "contractor" means a party to a Federal Government contract other than the Federal Government.

(8) **EXECUTIVE AGENCY.**—The term "executive agency" means—

- (A) an executive department as defined in section 101 of title 5;
- (B) a military department as defined in section 102 of title 5;
- (C) an independent establishment as defined in section 104 of title 5, except that the term does not include the Government Accountability Office; and
- (D) a wholly owned Government corporation as defined in section 9101(3) of title 31.

(9) **MISREPRESENTATION OF FACT.**—The term "misrepresentation of fact" means a false statement of substantive fact, or conduct that leads to a belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3816.)

#### HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
7101	41:601.	Pub. L. 95–563, §2, Nov. 1, 1978, 92 Stat. 2383; Pub. L. 104–106, div. D, title XLIII, §4322(b)(5), Feb. 10, 1996, 110 Stat. 677; Pub. L. 109–163, div. A, title VIII, §847(d)(1), Jan. 6, 2006, 119 Stat. 3393.

In paragraph (8)(C), the words "Government Accountability Office" are substituted for "General Accounting Office" because of section 8(b) of the GAO Human Capital Reform Act of 2004 (Public Law 108–271, 118 Stat. 814, 31 U.S.C. 702 note).

In paragraph (8)(D), the words "section 9101(3) of title 31" are substituted for "section 846 of title 31" because of section 4(b) of Public Law 97–258 (31 U.S.C. note prec. 101).

### §7102. Applicability of chapter

(a) EXECUTIVE AGENCY CONTRACTS.—Unless otherwise specifically provided in this chapter, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of title 28) made by an executive agency for—

- (1) the procurement of property, other than real property in being;
- (2) the procurement of services;
- (3) the procurement of construction, alteration, repair, or maintenance of real property; or
- (4) the disposal of personal property.

(b) TENNESSEE VALLEY AUTHORITY CONTRACTS.—

(1) IN GENERAL.—With respect to contracts of the Tennessee Valley Authority, this chapter applies only to contracts containing a clause that requires contract disputes to be resolved through an agency administrative process.

(2) EXCLUSION.—Notwithstanding any other provision of this chapter, this chapter does not apply to a contract of the Tennessee Valley Authority for the sale of fertilizer or electric power or related to the conduct or operation of the electric power system.

(c) FOREIGN GOVERNMENT OR INTERNATIONAL ORGANIZATION CONTRACTS.—If an agency head determines that applying this chapter would not be in the public interest, this chapter does not apply to a contract with a foreign government, an agency of a foreign government, an international organization, or a subsidiary body of an international organization.

(d) MARITIME CONTRACTS.—Appeals under section 7107(a) of this title and actions brought under sections 7104(b) and 7107(b) to (f) of this title, arising out of maritime contracts, are governed by chapter 309 or 311 of title 46, as applicable, to the extent that those chapters are not inconsistent with this chapter.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3817.)

#### HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
7102(a)–(c)	41:602.	Pub. L. 95–563, §§3, 4, Nov. 1, 1978, 92 Stat. 2383.
7102(d)	41:603.	

In subsection (c), the words "an agency head" are substituted for "the head of the agency" for consistency with the defined term "agency head" in section 7101 of the revised title.

In subsection (d), the words "chapter 309 or 311 of title 46" are substituted for "the Act of March 9, 1920, as amended (41 Stat. 525, as amended; 46 U.S.C. 741–752) or the Act of March 3, 1925, as amended (43 Stat. 1112, as amended; 46 U.S.C. 781–790)" in section 4 of the Contract Disputes Act of 1978 (Public Law 95–563, 92 Stat. 2384) because of section 18(c) of Public Law 109–304 (46 U.S.C. note prec. 101).

### **§7103. Decision by contracting officer**

**(a) CLAIMS GENERALLY.—**

(1) **SUBMISSION OF CONTRACTOR'S CLAIMS TO CONTRACTING OFFICER.**—Each claim by a contractor against the Federal Government relating to a contract shall be submitted to the contracting officer for a decision.

(2) **CONTRACTOR'S CLAIMS IN WRITING.**—Each claim by a contractor against the Federal Government relating to a contract shall be in writing.

(3) **CONTRACTING OFFICER TO DECIDE FEDERAL GOVERNMENT'S CLAIMS.**—Each claim by the Federal Government against a contractor relating to a contract shall be the subject of a written decision by the contracting officer.

**(4) TIME FOR SUBMITTING CLAIMS.—**

(A) **IN GENERAL.**—Each claim by a contractor against the Federal Government relating to a contract and each claim by the Federal Government against a contractor relating to a contract shall be submitted within 6 years after the accrual of the claim.

(B) **EXCEPTION.**—Subparagraph (A) of this paragraph does not apply to a claim by the Federal Government against a contractor that is based on a claim by the contractor involving fraud.

(5) **APPLICABILITY.**—The authority of this subsection and subsections (c)(1), (d), and (e) does not extend to a claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine.

**(b) CERTIFICATION OF CLAIMS.—**

(1) **REQUIREMENT GENERALLY.**—For claims of more than \$100,000 made by a contractor, the contractor shall certify that—

(A) the claim is made in good faith;

(B) the supporting data are accurate and complete to the best of the contractor's knowledge and belief;

(C) the amount requested accurately reflects the contract adjustment for which the contractor believes the Federal Government is liable; and

(D) the certifier is authorized to certify the claim on behalf of the contractor.

(2) **WHO MAY EXECUTE CERTIFICATION.**—The certification required by paragraph (1) may be executed by an individual authorized to bind the contractor with respect to the claim.

(3) **FAILURE TO CERTIFY OR DEFECTIVE CERTIFICATION.**—A contracting officer is not obligated to render a final decision on a claim of more than \$100,000 that is not certified in accordance with paragraph (1) if, within 60 days after receipt of the claim, the contracting officer notifies the contractor in writing of the reasons why any attempted certification was found to be defective. A defect in the certification of a claim does not deprive a court or an agency board of jurisdiction over the claim. Prior to the entry of a final judgment by a court or a decision by an agency board, the court or agency board shall require a defective certification to be corrected.

**(c) FRAUDULENT CLAIMS.—**

(1) **NO AUTHORITY TO SETTLE.**—This section does not authorize an agency head to settle, compromise, pay, or otherwise adjust any claim involving fraud.

(2) **LIABILITY OF CONTRACTOR.**—If a contractor is unable to support any part of the contractor's claim and it is determined that the inability is attributable to a misrepresentation of fact or fraud by the contractor, then the contractor is liable to the Federal Government for an amount equal to the unsupported part of the claim plus all of the Federal Government's costs attributable to reviewing the unsupported part of the claim. Liability under this paragraph shall be determined within 6 years of the commission of the misrepresentation of fact or fraud.

(d) **ISSUANCE OF DECISION.**—The contracting officer shall issue a decision in writing and shall mail or otherwise furnish a copy of the decision to the contractor.

(e) **CONTENTS OF DECISION.**—The contracting officer's decision shall state the reasons for the decision reached and shall inform the contractor of the contractor's rights as provided in this chapter. Specific findings of fact are not required. If made, specific findings of fact are not binding in any subsequent proceeding.

**(f) TIME FOR ISSUANCE OF DECISION.—**

(1) **CLAIM OF \$100,000 OR LESS.**—A contracting officer shall issue a decision on any submitted claim of \$100,000 or less within 60 days from the contracting officer's receipt of a written request from the contractor that a decision be rendered within that period.

(2) **CLAIM OF MORE THAN \$100,000.**—A contracting officer shall, within 60 days of receipt of a submitted certified claim over \$100,000—

(A) issue a decision; or

(B) notify the contractor of the time within which a decision will be issued.

(3) **GENERAL REQUIREMENT OF REASONABLENESS.**—The decision of a contracting officer on submitted claims

shall be issued within a reasonable time, in accordance with regulations prescribed by the agency, taking into account such factors as the size and complexity of the claim and the adequacy of information in support of the claim provided by the contractor.

(4) REQUESTING TRIBUNAL TO DIRECT ISSUANCE WITHIN SPECIFIED TIME PERIOD.—A contractor may request the tribunal concerned to direct a contracting officer to issue a decision in a specified period of time, as determined by the tribunal concerned, in the event of undue delay on the part of the contracting officer.

(5) FAILURE TO ISSUE DECISION WITHIN REQUIRED TIME PERIOD.—Failure by a contracting officer to issue a decision on a claim within the required time period is deemed to be a decision by the contracting officer denying the claim and authorizes an appeal or action on the claim as otherwise provided in this chapter. However, the tribunal concerned may, at its option, stay the proceedings of the appeal or action to obtain a decision by the contracting officer.

(g) FINALITY OF DECISION UNLESS APPEALED.—The contracting officer's decision on a claim is final and conclusive and is not subject to review by any forum, tribunal, or Federal Government agency, unless an appeal or action is timely commenced as authorized by this chapter. This chapter does not prohibit an executive agency from including a clause in a Federal Government contract requiring that, pending final decision of an appeal, action, or final settlement, a contractor shall proceed diligently with performance of the contract in accordance with the contracting officer's decision.

(h) ALTERNATIVE MEANS OF DISPUTE RESOLUTION.—

(1) IN GENERAL.—Notwithstanding any other provision of this chapter, a contractor and a contracting officer may use any alternative means of dispute resolution under subchapter IV of chapter 5 of title 5, or other mutually agreeable procedures, for resolving claims. All provisions of subchapter IV of chapter 5 of title 5 apply to alternative means of dispute resolution under this subsection.

(2) CERTIFICATION OF CLAIM.—The contractor shall certify the claim when required to do so under subsection (b)(1) or other law.

(3) REJECTING REQUEST FOR ALTERNATIVE DISPUTE RESOLUTION.—

(A) CONTRACTING OFFICER.—A contracting officer who rejects a contractor's request for alternative dispute resolution proceedings shall provide the contractor with a written explanation, citing one or more of the conditions in section 572(b) of title 5 or other specific reasons that alternative dispute resolution procedures are inappropriate.

(B) CONTRACTOR.—A contractor that rejects an agency's request for alternative dispute resolution proceedings shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3817.)

#### HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
7103(a)(1)	41:605(a) (1st sentence related to submission).	Pub. L. 95–563, §§5, 6(a) (1st, 2d, 5th–last sentences), (b), (c)(3), (5), Nov. 1, 1978, 92 Stat. 2384, 2385.
7103(a)(2)	41:605(a) (1st sentence related to writing requirement).	
7103(a)(3)	41:605(a) (2d sentence).	
7103(a)(4)(A)	41:605(a) (3d sentence).	Pub. L. 95–563, §6(a) (3d, 4th sentences), Nov. 1, 1978, as added Pub. L. 103–355, title II, §2351(a)(1), Oct. 13, 1994, 108 Stat. 3322, amended Pub. L. 104–106, div. D, title XLIII, §4321(a)(6), Feb. 10, 1996, 110 Stat. 671.
7103(a)(4)(B)	41:605(a) (4th sentence).	
7103(a)(5)	41:605(a) (8th sentence).	
7103(b)(1)	41:605(c)(1) (last sentence).	Pub. L. 95–563, §6(c)(1) (last sentence), Nov. 1, 1978, 92 Stat. 2385; Pub. L. 102–572, title IX, §907(a)(1)(A), Oct. 29, 1992, 106 Stat. 4518; Pub. L. 103–355, title II, §2351(b), Oct. 13, 1994, 108 Stat. 3322.
7103(b)(2)	41:605(c)(7).	Pub. L. 95–563, §6(c)(6), (7), as added Pub. L. 102–572, title IX, §907(a)(1)(B), Oct. 29, 1992, 106 Stat. 4518.
7103(b)(3)	41:605(c)(6).	
7103(c)(1)	41:605(a) (last sentence).	
7103(c)(2)	41:604.	

7103(d)	41:605(a) (5th sentence).	
7103(e)	41:605(a) (6th, 7th sentences).	
7103(f)(1)	41:605(c)(1) (1st sentence).	Pub. L. 95-563, §6(c)(1) (1st sentence), (2), Nov. 1, 1978, 92 Stat. 2385; Pub. L. 103-355, title II, §2351(b), Oct. 13, 1994, 108 Stat. 3322.
7103(f)(2)	41:605(c)(2).	
7103(f)(3)	41:605(c)(3).	
7103(f)(4)	41:605(c)(4).	Pub. L. 95-563, §6(c)(4), Nov. 1, 1978, 92 Stat. 2385; Pub. L. 103-355, title II, §2351(e), Oct. 13, 1994, 108 Stat. 3322.
7103(f)(5)	41:605(c)(5).	
7103(g)	41:605(b).	
7103(h)(1)	41:605(d) (1st, last sentences).	Pub. L. 95-563, §6(d) (1st, last sentences), as added Pub. L. 101-552, §6(a), Nov. 15, 1990, 104 Stat. 2745, 2746; Pub. L. 104-106, div. D, title XLIII, §4322(b)(6), Feb. 10, 1996, 110 Stat. 677; Pub. L. 105-85, div. A, title X, §1073(g)(3), Nov. 18, 1997, 111 Stat. 1906.
7103(h)(2)	41:605(d) (2d sentence).	Pub. L. 95-563, §6(d) (2d sentence), as added Pub. L. 101-552, §6(a), Nov. 15, 1990, 104 Stat. 2745; Pub. L. 104-320, §6(1), Oct. 19, 1996, 110 Stat. 3871.
7103(h)(3)(A)	41:605(e) (1st sentence).	Pub. L. 95-563, §6(e), as added Pub. L. 101-552, §6(a), Nov. 15, 1990, 104 Stat. 2746; Pub. L. 103-355, title II, §2352, Oct. 13, 1994, 108 Stat. 3322; Pub. L. 104-106, div. D, title XLIII, §§4321(a)(7), 4322(b)(6), Feb. 10, 1996, 110 Stat. 671, 677; Pub. L. 104-320, §6(2), Oct. 19, 1996, 110 Stat. 3871; Pub. L. 105-85, div. A, title X, §1073(g)(3), Nov. 18, 1997, 111 Stat. 1906.
7103(h)(3)(B)	41:605(e) (last sentence).	

In subsection (b)(1)(D) and (2), the word "duly" is omitted as unnecessary.

In subsection (b)(3), the words "of contract appeals" are omitted as unnecessary because of the definition of "agency board" in section 7101 of the revised title.

In subsection (c)(2), the words "this subsection", which appear in section 5 of the Contract Disputes Act of 1978 (Pub. L. 95-563, 92 Stat. 2384), and which were probably intended to mean "this section", are translated as "this paragraph" in accordance with the probable intent of Congress.

In subsection (f)(5), the words "the commencement of" are omitted as unnecessary. The words "of the appeal or action" are substituted for "in the event an appeal or suit is so commenced in the absence of a prior decision by the contracting officer" to eliminate unnecessary words.

#### **§7104. Contractor's right of appeal from decision by contracting officer**

(a) **APPEAL TO AGENCY BOARD.**—A contractor, within 90 days from the date of receipt of a contracting officer's decision under section 7103 of this title, may appeal the decision to an agency board as provided in section 7105 of this title.

(b) **BRINGING AN ACTION DE NOVO IN FEDERAL COURT.**—

(1) **IN GENERAL.**—Except as provided in paragraph (2), and in lieu of appealing the decision of a contracting officer under section 7103 of this title to an agency board, a contractor may bring an action directly on the claim in the United States Court of Federal Claims, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(2) **TENNESSEE VALLEY AUTHORITY.**—In the case of an action against the Tennessee Valley Authority, the contractor may only bring an action directly on the claim in a district court of the United States pursuant to section 1337 of title 28, notwithstanding any contract provision, regulation, or rule of law to the contrary.

(3) **TIME FOR FILING.**—A contractor shall file any action under paragraph (1) or (2) within 12 months from the date of receipt of a contracting officer's decision under section 7103 of this title.

(4) **DE NOVO.**—An action under paragraph (1) or (2) shall proceed de novo in accordance with the rules of the

appropriate court.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3820.)

#### HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
7104(a)	41:606.	Pub. L. 95–563, §7, Nov. 1, 1978, 92 Stat. 2385.
7104(b)	41:609(a).	Pub. L. 95–563, §10(a), Nov. 1, 1978, 92 Stat. 2388; Pub. L. 97–164, title I, §161(10), Apr. 2, 1982, 96 Stat. 49.

In subsection (a), the words "of contract appeals" are omitted as unnecessary because of the definition of "agency board" in section 7101 of the revised title.

In subsection (b)(1), the words "United States Court of Federal Claims" are substituted for "United States Claims Court" because of section 902(b)(1) of the Federal Courts Administration Act of 1992 (Pub. L. 102–572, 106 Stat. 4516, 28 U.S.C. 171 note).

### §7105. Agency boards

#### (a) ARMED SERVICES BOARD.—

(1) ESTABLISHMENT.—An Armed Services Board of Contract Appeals may be established within the Department of Defense when the Secretary of Defense, after consultation with the Administrator, determines from a workload study that the volume of contract claims justifies the establishment of a full-time agency board of at least 3 members who shall have no other inconsistent duties. Workload studies will be updated at least once every 3 years and submitted to the Administrator.

(2) APPOINTMENT OF MEMBERS AND COMPENSATION.—Members of the Armed Services Board shall be selected and appointed in the same manner as administrative law judges appointed pursuant to section 3105 of title 5, with an additional requirement that members must have had at least 5 years of experience in public contract law. The Secretary of Defense shall designate the chairman and vice chairman of the Armed Services Board from among the appointed members. Compensation for the chairman, vice chairman, and other members shall be determined under section 5372a of title 5.

#### (b) CIVILIAN BOARD.—

(1) ESTABLISHMENT.—There is established in the General Services Administration the Civilian Board of Contract Appeals.

##### (2) MEMBERSHIP.—

(A) ELIGIBILITY.—The Civilian Board consists of members appointed by the Administrator of General Services (in consultation with the Administrator for Federal Procurement Policy) from a register of applicants maintained by the Administrator of General Services, in accordance with rules issued by the Administrator of General Services (in consultation with the Administrator for Federal Procurement Policy) for establishing and maintaining a register of eligible applicants and selecting Civilian Board members. The Administrator of General Services shall appoint a member without regard to political affiliation and solely on the basis of the professional qualifications required to perform the duties and responsibilities of a Civilian Board member.

(B) APPOINTMENT OF MEMBERS AND COMPENSATION.—Members of the Civilian Board shall be selected and appointed to serve in the same manner as administrative law judges appointed pursuant to section 3105 of title 5, with an additional requirement that members must have had at least 5 years experience in public contract law. Compensation for the members shall be determined under section 5372a of title 5.

(3) REMOVAL.—Members of the Civilian Board are subject to removal in the same manner as administrative law judges, as provided in section 7521 of title 5.

##### (4) FUNCTIONS.—

(A) IN GENERAL.—The Civilian Board has jurisdiction as provided by subsection (e)(1)(B).

(B) ADDITIONAL JURISDICTION.—With the concurrence of the Federal agencies affected, the Civilian Board may assume—

(i) jurisdiction over any additional category of laws or disputes over which an agency board of contract appeals established pursuant to section 8 of the Contract Disputes Act exercised jurisdiction before January 6, 2007; and

(ii) any other function the agency board performed before January 6, 2007, on behalf of those agencies.

#### (c) TENNESSEE VALLEY AUTHORITY BOARD.—

(1) ESTABLISHMENT.—The Board of Directors of the Tennessee Valley Authority may establish a board of

contract appeals of the Tennessee Valley Authority of an indeterminate number of members.

(2) **APPOINTMENT OF MEMBERS AND COMPENSATION.**—The Board of Directors of the Tennessee Valley Authority shall establish criteria for the appointment of members to the agency board established under paragraph (1), and shall designate a chairman of the agency board. The chairman and other members of the agency board shall receive compensation, at the daily equivalent of the rates determined under section 5372a of title 5, for each day they are engaged in the actual performance of their duties as members of the agency board.

(d) **POSTAL SERVICE BOARD.**—

(1) **ESTABLISHMENT.**—There is established an agency board of contract appeals known as the Postal Service Board of Contract Appeals.

(2) **APPOINTMENT AND SERVICE OF MEMBERS.**—The Postal Service Board of Contract Appeals consists of judges appointed by the Postmaster General. The judges shall meet the qualifications of and serve in the same manner as members of the Civilian Board.

(3) **APPLICATION.**—This chapter applies to contract disputes before the Postal Service Board of Contract Appeals in the same manner as it applies to contract disputes before the Civilian Board.

(e) **JURISDICTION.**—

(1) **IN GENERAL.**—

(A) **ARMED SERVICES BOARD.**—The Armed Services Board has jurisdiction to decide any appeal from a decision of a contracting officer of the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, or the National Aeronautics and Space Administration relative to a contract made by that department or agency.

(B) **CIVILIAN BOARD.**—The Civilian Board has jurisdiction to decide any appeal from a decision of a contracting officer of any executive agency (other than the Department of Defense, the Department of the Army, the Department of the Navy, the Department of the Air Force, the National Aeronautics and Space Administration, the United States Postal Service, the Postal Regulatory Commission, or the Tennessee Valley Authority) relative to a contract made by that agency.

(C) **POSTAL SERVICE BOARD.**—The Postal Service Board of Contract Appeals has jurisdiction to decide any appeal from a decision of a contracting officer of the United States Postal Service or the Postal Regulatory Commission relative to a contract made by either agency.

(D) **OTHER AGENCY BOARDS.**—Each other agency board has jurisdiction to decide any appeal from a decision of a contracting officer relative to a contract made by its agency.

(2) **RELIEF.**—In exercising this jurisdiction, an agency board may grant any relief that would be available to a litigant asserting a contract claim in the United States Court of Federal Claims.

(f) **SUBPOENA, DISCOVERY, AND DEPOSITION.**—A member of an agency board of contract appeals may administer oaths to witnesses, authorize depositions and discovery proceedings, and require by subpoena the attendance of witnesses, and production of books and papers, for the taking of testimony or evidence by deposition or in the hearing of an appeal by the agency board. In case of contumacy or refusal to obey a subpoena by a person who resides, is found, or transacts business within the jurisdiction of a United States district court, the court, upon application of the agency board through the Attorney General, or upon application by the board of contract appeals of the Tennessee Valley Authority, shall have jurisdiction to issue the person an order requiring the person to appear before the agency board or a member of the agency board, to produce evidence or to give testimony, or both. Any failure of the person to obey the order of the court may be punished by the court as contempt of court.

(g) **DECISIONS.**—An agency board shall—

(1) to the fullest extent practicable provide informal, expeditious, and inexpensive resolution of disputes;

(2) issue a decision in writing or take other appropriate action on each appeal submitted; and

(3) mail or otherwise furnish a copy of the decision to the contractor and the contracting officer.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3820; Pub. L. 111–259, title IV, §422, Oct. 7, 2010, 124 Stat. 2727; Pub. L. 111–383, div. A, title X, §1075(o), Jan. 7, 2011, 124 Stat. 4378.)

#### **AMENDMENTS NOT SHOWN IN TEXT**

*Subsecs. (b) and (e)(1)(A), (B), (D) and (2) of this section were derived from sections 438 and 607(d), respectively, of former Title 41, Public Contracts. Sections 438 and 607(d) were amended by Pub. L. 111–383, div. A, title X, §1075(o), Jan. 7, 2011, 124 Stat. 4378, and Pub. L. 111–259, title IV, §422, Oct. 7, 2010, 124 Stat. 2727, respectively, prior to being repealed and reenacted as subsecs. (b) and (e)(1)(A), (B), (D) and (2) of this section by Pub. L. 111–350, §§3, 7(b), Jan. 4, 2011, 124 Stat. 3677, 3855. For applicability of those amendments to this section, see section 6(a) of Pub. L. 111–350, set out as a Transitional and Savings Provisions note preceding section 101 of this title. Section 438 of former Title 41 was amended in subsec. (c)(1) by striking “(41 U.S.C. 607(b))” and inserting “(41 U.S.C. 607(d))” and in subsec. (c)(2)(A) by inserting “of 1978” after “Contract Disputes Act”. Section 607(d) of former Title 41 was amended by adding at the end “Notwithstanding any other provision of this section and any other provision of law, an appeal from a decision of a contracting officer of the Central Intelligence Agency relative to a contract made by that Agency may be filed with whichever of the Armed Services*



*Board of Contract Appeals or the Civilian Board of Contract Appeals is specified by such contracting officer as the Board to which such an appeal may be made and such Board shall have jurisdiction to decide that appeal."*

#### HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
7105(a)	41:607(a)(1), (b)(1).	Pub. L. 95-563, §8(a)(1), (b)(1), Nov. 1, 1978, 92 Stat. 2385; Pub. L. 101-509, title V, §529 [title I, §104(d)(4)], Nov. 5, 1990, 104 Stat. 1447; Pub. L. 109-163, div. A, title VIII, §847(d)(3), Jan. 6, 2006, 119 Stat. 3394.
7105(b)	41:438.	Pub. L. 93-400, §42, as added Pub. L. 109-163, div. A, title VIII, §847(a), Jan. 6, 2006, 119 Stat. 3391.
7105(c)	41:607(a)(2), (b)(2).	Pub. L. 95-563, §8(a)(2), (b)(2), Nov. 1, 1978, 92 Stat. 2385, 2386.
7105(d)	41:607(c) (1st, 3d, last sentences).	Pub. L. 95-563, §8(c), Nov. 1, 1978, 92 Stat. 2386; Pub. L. 109-163, div. A, title VIII, §847(d)(2)(B), Jan. 6, 2006, 119 Stat. 3394.
7105(e)(1) (A), (B)	41:607(d) (1st, 2d sentences).	Pub. L. 95-563, §8(d), Nov. 1, 1978, 92 Stat. 2386; Pub. L. 97-164, title I, §160(a)(15), Apr. 2, 1982, 96 Stat. 48; Pub. L. 109-163, div. A, title VIII, §847(d)(2)(A), Jan. 6, 2006, 119 Stat. 3393.
7105(e)(1)(C)	41:607(c) (2d sentence).	
7105(e)(1)(D)	41:607(d) (3d sentence).	
7105(e)(2)	41:607(d) (last sentence).	
7105(f)	41:610.	Pub. L. 95-563, §11, Nov. 1, 1978, 92 Stat. 2388.
7105(g)	41:607(e).	Pub. L. 95-563, §8(e), Nov. 1, 1978, 92 Stat. 2386.

In subsection (a)(2), the words "administrative law judges" are substituted for "hearing examiners" because of section 3 of Public Law 95-251 (5 U.S.C. 3105 note). The words "Full-time members of agency boards serving as such on the effective date of this chapter shall be considered qualified" are omitted as obsolete.

In subsection (b), the text of 41 U.S.C. 438 (b)(1)(C) is omitted as obsolete.

In subsection (e)(1)(B) and (C), the words "Postal Regulatory Commission" are substituted for "Postal Rate Commission" because of section 604(f) of the Postal Accountability and Enhancement Act (Public Law 109-435, 120 Stat. 3242, 39 U.S.C. 404 note).

#### EDITORIAL NOTES

#### REFERENCES IN TEXT

Section 8 of the Contract Disputes Act, referred to in subsec. (b)(4)(B)(i), probably means section 8 of Pub. L. 95-563, the Contract Disputes Act of 1978, which was classified to former section 607 of this title prior to being repealed and reenacted as subsecs. (a), (c) to (e), and (g) of this section by Pub. L. 111-350, §§3, 7(b), Jan. 4, 2011, 124 Stat. 3677, 3855.

### **§7106. Agency board procedures for accelerated and small claims**

(a) **ACCELERATED PROCEDURE WHERE \$100,000 OR LESS IN DISPUTE.**—The rules of each agency board shall include a procedure for the accelerated disposition of any appeal from a decision of a contracting officer where the amount in dispute is \$100,000 or less. The accelerated procedure is applicable at the sole election of the contractor. An appeal under the accelerated procedure shall be resolved, whenever possible, within 180 days from the date the contractor elects to use the procedure.

(b) **SMALL CLAIMS PROCEDURE.**—

(1) **IN GENERAL.**—The rules of each agency board shall include a procedure for the expedited disposition of

any appeal from a decision of a contracting officer where the amount in dispute is \$50,000 or less, or in the case of a small business concern (as defined in the Small Business Act (15 U.S.C. 631 et seq.) and regulations under that Act), \$150,000 or less. The small claims procedure is applicable at the sole election of the contractor.

(2) **SIMPLIFIED RULES OF PROCEDURE.**—The small claims procedure shall provide for simplified rules of procedure to facilitate the decision of any appeal. An appeal under the small claims procedure may be decided by a single member of the agency board with such concurrences as may be provided by rule or regulation.

(3) **TIME OF DECISION.**—An appeal under the small claims procedure shall be resolved, whenever possible, within 120 days from the date the contractor elects to use the procedure.

(4) **FINALITY OF DECISION.**—A decision against the Federal Government or against the contractor reached under the small claims procedure is final and conclusive and may not be set aside except in cases of fraud.

(5) **NO PRECEDENT.**—Administrative determinations and final decisions under this subsection have no value as precedent for future cases under this chapter.

(6) **REVIEW OF REQUISITE AMOUNTS IN CONTROVERSY.**—The Administrator, from time to time, may review the dollar amounts specified in paragraph (1) and adjust the amounts in accordance with economic indexes selected by the Administrator.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3823.)

#### HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
7106(a)	41:607(f).	Pub. L. 95–563, §8(f), Nov. 1, 1978, 92 Stat. 2386; Pub. L. 103–355, title II, §2351(c), Oct. 13, 1994, 108 Stat. 3322.
7106(b)	41:608.	Pub. L. 95–563, §9, Nov. 1, 1978, 92 Stat. 2387; Pub. L. 103–355, title II, §2351(d), Oct. 13, 1994, 108 Stat. 3322; Pub. L. 109–364, div. A, title VIII, §857, Oct. 17, 2006, 120 Stat. 2349.

In subsection (a), the word "only" is omitted for consistency with a similar provision in 41:608(a) and because the word "only" is redundant with the word "sole".

In subsection (b)(6), the words "from time to time, may review" are substituted for "is authorized to review at least every three years" because the source law, while effectively granting the Administrator authority to conduct the reviews, does not require the Administrator to conduct any reviews, and does not restrict the number of reviews the Administrator may conduct during any time period. The words "beginning with the third year after November 1, 1978" are omitted as obsolete. The words "the dollar amount specified in paragraph (1)" are substituted for "the dollar amount defined in subsection (a) of this section as a small claim" to eliminate unnecessary words and because 41:608(a), restated as paragraph (1), does not explicitly provide a definition for the term "small claim".

#### SENATE REVISION AMENDMENT

In subsec. (b)(6), "AMOUNTS" substituted for "AMOUNT" in heading and "amounts" substituted for "amount" in two places in text by S. Amdt. 4726 (111th Cong.). See 156 Cong. Rec. 18683 (2010).

### §7107. Judicial review of agency board decisions

(a) **REVIEW.**—

(1) **IN GENERAL.**—The decision of an agency board is final, except that—

(A) a contractor may appeal the decision to the United States Court of Appeals for the Federal Circuit within 120 days from the date the contractor receives a copy of the decision; or

(B) if an agency head determines that an appeal should be taken, the agency head, with the prior approval of the Attorney General, may transmit the decision to the United States Court of Appeals for the Federal Circuit for judicial review under section 1295 of title 28, within 120 days from the date the agency receives a copy of the decision.

(2) **TENNESSEE VALLEY AUTHORITY.**—Notwithstanding paragraph (1), a decision of the board of contract appeals of the Tennessee Valley Authority is final, except that—

(A) a contractor may appeal the decision to a United States district court pursuant to section 1337 of title 28, within 120 days from the date the contractor receives a copy of the decision; or

(B) the Tennessee Valley Authority may appeal the decision to a United States district court pursuant to section 1337 of title 28, within 120 days from the date of the decision.

(3) REVIEW OF ARBITRATION.—An award by an arbitrator under this chapter shall be reviewed pursuant to sections 9 to 13 of title 9, except that the court may set aside or limit any award that is found to violate limitations imposed by Federal statute.

(b) FINALITY OF AGENCY BOARD DECISIONS ON QUESTIONS OF LAW AND FACT.—Notwithstanding any contract provision, regulation, or rule of law to the contrary, in an appeal by a contractor or the Federal Government from the decision of an agency board pursuant to subsection (a)—

(1) the decision of the agency board on a question of law is not final or conclusive; but

(2) the decision of the agency board on a question of fact is final and conclusive and may not be set aside unless the decision is—

(A) fraudulent, arbitrary, or capricious;

(B) so grossly erroneous as to necessarily imply bad faith; or

(C) not supported by substantial evidence.

(c) REMAND.—In an appeal by a contractor or the Federal Government from the decision of an agency board pursuant to subsection (a), the court may render an opinion and judgment and remand the case for further action by the agency board or by the executive agency as appropriate, with direction the court considers just and proper.

(d) CONSOLIDATION.—If 2 or more actions arising from one contract are filed in the United States Court of Federal Claims and one or more agency boards, for the convenience of parties or witnesses or in the interest of justice, the United States Court of Federal Claims may order the consolidation of the actions in that court or transfer any actions to or among the agency boards involved.

(e) JUDGMENTS AS TO FEWER THAN ALL CLAIMS OR PARTIES.—In an action filed pursuant to this chapter involving 2 or more claims, counterclaims, cross-claims, or third-party claims, and where a portion of one of the claims can be divided for purposes of decision or judgment, and in any action where multiple parties are involved, the court, whenever appropriate, may enter a judgment as to one or more but fewer than all of the claims or portions of claims or parties.

(f) ADVISORY OPINIONS.—

(1) IN GENERAL.—Whenever an action involving an issue described in paragraph (2) is pending in a district court of the United States, the district court may request an agency board to provide the court with an advisory opinion on the matters of contract interpretation under consideration.

(2) APPLICABLE ISSUE.—An issue referred to in paragraph (1) is any issue that could be the proper subject of a final decision of a contracting officer appealable under this chapter.

(3) REFERRAL TO AGENCY BOARD WITH JURISDICTION.—A district court shall direct a request under paragraph (1) to the agency board having jurisdiction under this chapter to adjudicate appeals of contract claims under the contract being interpreted by the court.

(4) TIMELY RESPONSE.—After receiving a request for an advisory opinion under paragraph (1), an agency board shall provide the advisory opinion in a timely manner to the district court making the request.

(Pub. L. 111–350, §3, Jan. 4, 2011, 124 Stat. 3824.)

#### HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
7107(a)	41:607(g).	Pub. L. 95–563, §8(g), Nov. 1, 1978, 92 Stat. 2387; Pub. L. 97–164, title I, §156, Apr. 2, 1982, 96 Stat. 47; Pub. L. 101–552, §6(b), Nov. 15, 1990, 104 Stat. 2746.
7107(b)	41:609(b).	Pub. L. 95–563, §10(b), (e), Nov. 1, 1978, 92 Stat. 2388.
7107(c)	41:609(c).	Pub. L. 95–563, §10(c), Nov. 1, 1978, 92 Stat. 2388; Pub. L. 97–164, title I, §157, Apr. 2, 1982, 96 Stat. 47.
7107(d)	41:609(d).	Pub. L. 95–563, §10(d), Nov. 1, 1978, 92 Stat. 2388; Pub. L. 97–164, title I, §160(a)(15), Apr. 2, 1982, 96 Stat. 48.
7107(e)	41:609(e).	Pub. L. 95–563, §10(f), as added Pub. L. 103–355, title II, §2354, Oct. 13, 1994, 108 Stat. 3323.
7107(f)	41:609(f).	

In subsection (a)(1)(B), the words "may transmit" are substituted for "transmits" to correct the grammatical structure of the provision in accordance with the probable intent of Congress. The words "the decision" are substituted for "the decision of the board of contract appeals" and for "the board's

decision" to eliminate unnecessary words and for consistency with 41:607(g)(1)(A).

In subsection (a)(2)(B), the words "in any case" are omitted as unnecessary.

In subsection (d), the words "United States Court of Federal Claims" are substituted for "United States Claims Court" because of section 902(b)(1) of the Federal Courts Administration Act of 1992 (Pub. L. 102-572, 106 Stat. 4516, 28 U.S.C. 171 note).

In subsection (f)(1), (3), and (4), the words "agency board" are substituted for "board of contract appeals" to eliminate unnecessary words and for consistency with the definition of "agency board" in section 7101 of the revised title.

In subsection (f)(1), the words "under consideration" are substituted for "at issue" to avoid potential confusion with the words "issue described in paragraph (2)".

## §7108. Payment of claims

(a) JUDGMENTS.—Any judgment against the Federal Government on a claim under this chapter shall be paid promptly in accordance with the procedures provided by section 1304 of title 31.

(b) MONETARY AWARDS.—Any monetary award to a contractor by an agency board shall be paid promptly in accordance with the procedures contained in subsection (a).

(c) REIMBURSEMENT.—Payments made pursuant to subsections (a) and (b) shall be reimbursed to the fund provided by section 1304 of title 31 by the agency whose appropriations were used for the contract out of available amounts or by obtaining additional appropriations for purposes of reimbursement.

(d) TENNESSEE VALLEY AUTHORITY.—

(1) JUDGMENTS.—Notwithstanding subsections (a) to (c), any judgment against the Tennessee Valley Authority on a claim under this chapter shall be paid promptly in accordance with section 9(b) of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831h(b)).

(2) MONETARY AWARDS.—Notwithstanding subsections (a) to (c), any monetary award to a contractor by the board of contract appeals of the Tennessee Valley Authority shall be paid in accordance with section 9(b) of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831h(b)).

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3825.)

### HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
7108	41:612.	Pub. L. 95-563, §13, Nov. 1, 1978, 92 Stat. 2389; Pub. L. 104-106, div. D, title XLIII, §4322(b)(7), Feb. 10, 1996, 110 Stat. 677.

## §7109. Interest

(a) PERIOD.—

(1) IN GENERAL.—Interest on an amount found due a contractor on a claim shall be paid to the contractor for the period beginning with the date the contracting officer receives the contractor's claim, pursuant to section 7103(a) of this title, until the date of payment of the claim.

(2) DEFECTIVE CERTIFICATION.—On a claim for which the certification under section 7103(b)(1) of this title is found to be defective, any interest due under this section shall be paid for the period beginning with the date the contracting officer initially receives the contractor's claim until the date of payment of the claim.

(b) RATE.—Interest shall accrue and be paid at a rate which the Secretary of the Treasury shall specify as applicable for each successive 6-month period. The rate shall be determined by the Secretary of the Treasury taking into consideration current private commercial rates of interest for new loans maturing in approximately 5 years.

(Pub. L. 111-350, §3, Jan. 4, 2011, 124 Stat. 3825.)

### HISTORICAL AND REVISION NOTES

<i>Revised Section</i>	<i>Source (U.S. Code)</i>	<i>Source (Statutes at Large)</i>
7109(a)(1)	41:611 (1st sentence).	Pub. L. 95-563, §12, Nov. 1, 1978, 92 Stat. 2389.
7109(a)(2)	41:611 note.	Pub. L. 102-572, title IX, §907(a)(3), Oct. 29, 1992, 106 Stat. 4518.

In subsection (a)(2), the words "on or after the date of the enactment of this Act", "the later of", and "or the date of the enactment of this Act" are omitted as obsolete.

Subsection (b) is substituted for "The interest provided for in this section shall be paid at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41 (85 Stat. 97) for the Renegotiation Board" to eliminate obsolete language and to codify the criteria under which the interest rate is computed. Section 2(a)(3) of the Act of July 1, 1971 (Pub. L. 92-41, 85 Stat. 97), amended section 105(b)(2) of the Renegotiation Act of 1951 (Mar. 23, 1951, ch. 15, 65 Stat. 13) by adding provisions substantially similar to those enacted here. However, the Renegotiation Act of 1951 (Mar. 23, 1951, ch. 15, 65 Stat. 7) was omitted from the Code pursuant to section 102(c)(1) of the Act (65 Stat. 8), amended several times, the last being Public Law 94-185 (89 Stat. 1061), which provided that most provisions of that Act do not apply to receipts and accruals attributable to contract performance after September 30, 1976, and in view of the termination of the Renegotiation Board and the transfer of property and records of the Board to the Administrator of the General Services Administration on March 31, 1979, pursuant to Public Law 95-431 (92 Stat. 1043). Although the Renegotiation Board is no longer in existence, Federal agencies, including the General Services Administration, are required to use interest rates that are computed under the criteria set out in this subsection. See 31:3902(a) and the website of the Bureau of the Public Debt, available at <http://www.publicdebt.treas.gov/opd/opdprmt2.htm>. For an example of publication of rates under the criteria enacted here, see Federal Register, volume 67, number 247, page 78566, December 24, 2002.

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(Use as applicable).

### Column and Instruction

- (1) Enter the cutoff date required by the contract, if applicable.
- (2) Enter the number of units completed during the period for which experienced costs of production are being submitted.
- (3) Enter the number of units remaining to be completed under the contract.
- (4) Enter the cumulative contract amount.
- (5) Enter your redetermination proposal amount.
- (6) Enter the difference between the contract amount and the redetermination proposal amount. When this result is negative, place the amount in parentheses. Column (4) minus Column (5) equals Column (6).
- (7) Enter appropriate cost elements. When residual inventory exists, the final costs established under fixed-price-incentive and fixed-price-redeterminable arrangements should be net of the fair market value of such inventory. In support of subcontract costs, submit a listing of all subcontracts subject to repricing action, annotated as to their status.
- (8) Enter all costs incurred under the contract before starting production and other nonrecurring costs (usually referred to as startup costs) from your books and records as of the cutoff date. These include such costs as preproduction engineering, special plant rearrangement, training program, and any identifiable nonrecurring costs such as initial rework, spoilage, pilot runs, etc. In the event the amounts are not segregated in or otherwise available from your records, enter in this column your best estimates. Explain the basis for each estimate and how the costs are charged on your accounting records (e.g., included in production costs as direct engineering labor, charged to manufacturing overhead). Also show how the costs would be allocated to the units at their various stages of contract completion.
- (9) Enter in Column (9) the production costs from your books and records (exclusive of preproduction costs reported in Column (8)) of the units completed as of the cutoff date.
- (10) Enter in Column (10) the costs of work in process as determined from your records or inventories at the cutoff date. When the amounts for work in process are not available in your records but reliable estimates for them can be made, enter the estimated amounts in Column (10) and enter in Column (9) the differences between the total incurred costs (exclusive of preproduction costs) as of the cutoff date and these estimates. Explain the basis for the estimates, including identification of any provision for experienced or anticipated allowances, such as shrinkage, rework, design changes, etc. Furnish experienced unit or lot costs (or labor hours) from inception of contract to the cutoff date, im-

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provement curves, and any other available production cost history pertaining to the item(s) to which your proposal relates.

(11) Enter total incurred costs (Total of Columns (8), (9), and (10)).

(12) Enter those necessary and reasonable costs that in your judgment will properly be incurred in completing the remaining work to be performed under the contract with respect to the item(s) to which your proposal relates.

(13) Enter total estimated cost (Total of Columns (11) and (12)).

(14) Identify the attachment in which the information supporting the specific cost element may be found. (Attach separate pages as necessary.)

[62 FR 51230, Sept. 30, 1997, as amended at 63 FR 58596, Oct. 30, 1998; 66 FR 2129, Jan. 10, 2001; 67 FR 6115, Feb. 8, 2002; 71 FR 57367, Sept. 28, 2006; 72 FR 63049, Nov. 7, 2007; 74 FR 52855, Oct. 14, 2009; 75 FR 53133, 53147, Aug. 30, 2010; 75 FR 77745, Dec. 13, 2010; 80 FR 38297, July 2, 2015; 82 FR 4713, Jan. 13, 2017]

## Subpart 15.5—Preaward, Award, and Postaward Notifications, Protests, and Mistakes

### 15.501 Definition.

*Day*, as used in this subpart, has the meaning set forth at 33.101.

### 15.502 Applicability.

This subpart applies to competitive proposals, as described in 6.102(b), and a combination of competitive procedures, as described in 6.102(c). The procedures in 15.504, 15.506, 15.507, 15.508, and 15.509, with reasonable modification, should be followed for sole source acquisitions and acquisitions described in 6.102(d)(1) and (2).

### 15.503 Notifications to unsuccessful offerors.

(a) *Preaward notices*—(1) *Preaward notices of exclusion from competitive range*. The contracting officer shall notify offerors promptly in writing when their proposals are excluded from the competitive range or otherwise eliminated from the competition. The notice shall state the basis for the determination and that a proposal revision will not be considered.

(2) *Preaward notices for small business programs*. (i) In addition to the notice in paragraph (a)(1) of this section, the contracting officer shall notify each offeror in writing prior to award and

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upon completion of negotiations and determinations of responsibility—

(A) When using a small business set-aside (see subpart 19.5);

(B) When using the HUBZone procedures in 19.1305 or 19.1307;

(C) When using the service-disabled veteran-owned small business procedures in 19.1405; or

(D) When using the Women-Owned Small Business Program procedures in 19.1505.

(i) The notice shall state—

(A) The name and address of the apparently successful offeror;

(B) That the Government will not consider subsequent revisions of the offeror's proposal; and

(C) That no response is required unless a basis exists to challenge the size status or small business status of the apparently successful offeror (e.g., small business concern, small disadvantaged business concern, HUBZone small business concern, service-disabled veteran-owned small business concern, economically disadvantaged women-owned small business concern, or women-owned small business concern eligible under the Women-Owned Small Business Program).

(ii) The notice is not required when the contracting officer determines in writing that the urgency of the requirement necessitates award without delay or when the contract is entered into under the 8(a) program (see 19.805-2).

(b) *Postaward notices.* (1) Within 3 days after the date of contract award, the contracting officer shall provide written notification to each offeror whose proposal was in the competitive range but was not selected for award (10 U.S.C. 2305(b)(5) and 41 U.S.C. 3704) or had not been previously notified under paragraph (a) of this section. The notice shall include—

(i) The number of offerors solicited;

(ii) The number of proposals received;

(iii) The name and address of each offeror receiving an award;

(iv) The items, quantities, and any stated unit prices of each award. If the number of items or other factors makes listing any stated unit prices impracticable at that time, only the total contract price need be furnished in the notice. However, the items,

quantities, and any stated unit prices of each award shall be made publicly available, upon request; and

(v) In general terms, the reason(s) the offeror's proposal was not accepted, unless the price information in paragraph (b)(1)(iv) of this section readily reveals the reason. In no event shall an offeror's cost breakdown, profit, overhead rates, trade secrets, manufacturing processes and techniques, or other confidential business information be disclosed to any other offeror.

(2) Upon request, the contracting officer shall furnish the information described in paragraph (b)(1) of this section to unsuccessful offerors in solicitations using simplified acquisition procedures in part 13.

(3) Upon request, the contracting officer shall provide the information in paragraph (b)(1) of this section to unsuccessful offerors that received a preaward notice of exclusion from the competitive range.

[62 FR 51230, Sept. 30, 1997, as amended at 63 FR 35721, June 30, 1998; 63 FR 36121, July 1, 1998; 63 FR 70267, Dec. 18, 1998; 65 FR 80265, Dec. 20, 2000; 66 FR 17756, Apr. 3, 2001; 66 FR 66986, 66990, Dec. 27, 2001; 69 FR 25276, May 5, 2004; 76 FR 18309, Apr. 1, 2011; 79 FR 24202, Apr. 29, 2014; 79 FR 43582, July 25, 2014; 79 FR 61750, Oct. 14, 2014]

**15.504 Award to successful offeror.**

The contracting officer shall award a contract to the successful offeror by furnishing the executed contract or other notice of the award to that offeror.

(a) If the award document includes information that is different than the latest signed proposal, as amended by the offeror's written correspondence, both the offeror and the contracting officer shall sign the contract award.

(b) When an award is made to an offeror for less than all of the items that may be awarded and additional items are being withheld for subsequent award, each notice shall state that the Government may make subsequent awards on those additional items within the proposal acceptance period.

(c) If the Optional Form (OF) 307, Contract Award, Standard Form (SF) 26, Award/Contract, or SF 33, Solicitation, Offer and Award, is not used to award the contract, the first page of



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the award document shall contain the Government's acceptance statement from Block 15 of that form, exclusive of the Item 3 reference language, and shall contain the contracting officer's name, signature, and date. In addition, if the award document includes information that is different than the signed proposal, as amended by the offeror's written correspondence, the first page shall include the contractor's agreement statement from Block 14 of the OF 307 and the signature of the contractor's authorized representative.

**15.505 Preaward debriefing of offerors.**

Offerors excluded from the competitive range or otherwise excluded from the competition before award may request a debriefing before award (10 U.S.C. 2305(b)(6)(A) and 41 U.S.C. 3705).

(a)(1) The offeror may request a preaward debriefing by submitting a written request for debriefing to the contracting officer within 3 days after receipt of the notice of exclusion from the competition.

(2) At the offeror's request, this debriefing may be delayed until after award. If the debriefing is delayed until after award, it shall include all information normally provided in a postaward debriefing (see 15.506(d)). Debriefings delayed pursuant to this paragraph could affect the timeliness of any protest filed subsequent to the debriefing.

(3) If the offeror does not submit a timely request, the offeror need not be given either a preaward or a postaward debriefing. Offerors are entitled to no more than one debriefing for each proposal.

(b) The contracting officer shall make every effort to debrief the unsuccessful offeror as soon as practicable, but may refuse the request for a debriefing if, for compelling reasons, it is not in the best interests of the Government to conduct a debriefing at that time. The rationale for delaying the debriefing shall be documented in the contract file. If the contracting officer delays the debriefing, it shall be provided no later than the time postaward debriefings are provided under 15.506. In that event, the contracting officer

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shall include the information at 15.506(d) in the debriefing.

(c) Debriefings may be done orally, in writing, or by any other method acceptable to the contracting officer.

(d) The contracting officer should normally chair any debriefing session held. Individuals who conducted the evaluations shall provide support.

(e) At a minimum, preaward debriefings shall include—

(1) The agency's evaluation of significant elements in the offeror's proposal;

(2) A summary of the rationale for eliminating the offeror from the competition; and

(3) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed in the process of eliminating the offeror from the competition.

(f) Preaward debriefings shall not disclose—

- (1) The number of offerors;
- (2) The identity of other offerors;
- (3) The content of other offerors proposals;
- (4) The ranking of other offerors;
- (5) The evaluation of other offerors;

or

(6) Any of the information prohibited in 15.506(e).

(g) An official summary of the debriefing shall be included in the contract file.

[62 FR 51230, Sept. 30, 1997, as amended at 79 FR 24202, Apr. 29, 2014]

**15.506 Postaward debriefing of offerors.**

(a)(1) An offeror, upon its written request received by the agency within 3 days after the date on which that offeror has received notification of contract award in accordance with 15.503(b), shall be debriefed and furnished the basis for the selection decision and contract award.

(2) To the maximum extent practicable, the debriefing should occur within 5 days after receipt of the written request. Offerors that requested a postaward debriefing in lieu of a preaward debriefing, or whose debriefing was delayed for compelling reasons beyond contract award, also should be debriefed within this time period.

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(3) An offeror that was notified of exclusion from the competition (see 15.505(a)), but failed to submit a timely request, is not entitled to a debriefing.

(4)(i) Untimely debriefing requests may be accommodated.

(ii) Government accommodation of a request for delayed debriefing pursuant to 15.505(a)(2), or any untimely debriefing request, does not automatically extend the deadlines for filing protests. Debriefings delayed pursuant to 15.505(a)(2) could affect the timeliness of any protest filed subsequent to the debriefing.

(b) Debriefings of successful and unsuccessful offerors may be done orally, in writing, or by any other method acceptable to the contracting officer.

(c) The contracting officer should normally chair any debriefing session held. Individuals who conducted the evaluations shall provide support.

(d) At a minimum, the debriefing information shall include—

(1) The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;

(2) The overall evaluated cost or price (including unit prices), and technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror;

(3) The overall ranking of all offerors, when any ranking was developed by the agency during the source selection;

(4) A summary of the rationale for award;

(5) For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror; and

(6) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

(e) The debriefing shall not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, the debriefing shall not reveal any information prohibited from disclosure by 24.202 or exempt from release under the Freedom of Information Act (5 U.S.C. 552) including—

(1) Trade secrets;

(2) Privileged or confidential manufacturing processes and techniques;

(3) Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information; and

(4) The names of individuals providing reference information about an offeror's past performance.

(f) An official summary of the debriefing shall be included in the contract file.

**15.507 Protests against award.**

(a) Protests against award in negotiated acquisitions shall be handled in accordance with part 33. Use of agency protest procedures that incorporate the alternative dispute resolution provisions of Executive Order 12979 is encouraged for both preaward and postaward protests.

(b) If a protest causes the agency, within 1 year of contract award, to—

(1) Issue a new solicitation on the protested contract award, the contracting officer shall provide the information in paragraph (c) of this section to all prospective offerors for the new solicitation; or

(2) Issue a new request for revised proposals on the protested contract award, the contracting officer shall provide the information in paragraph (c) of this section to offerors that were in the competitive range and are requested to submit revised proposals.

(c) The following information will be provided to appropriate parties:

(1) Information provided to unsuccessful offerors in any debriefings conducted on the original award regarding the successful offeror's proposal; and

(2) Other nonproprietary information that would have been provided to the original offerors.

**15.508 Discovery of mistakes.**

Mistakes in a contractor's proposal that are disclosed after award shall be processed substantially in accordance with the procedures for mistakes in bids at 14.407-4.

**15.509****48 CFR Ch. 1 (10–1–19 Edition)****15.509 Forms.**

Optional Form 307, Contract Award, Standard Form (SF) 26, Award/Contract, or SF 33, Solicitation, Offer and Award, may be used to award negotiated contracts in which the signature of both parties on a single document is appropriate. Note however, if using the SF 26 for a negotiated procurement, block 18 is not to be used. If these forms are not used, the award document shall incorporate the agreement and award language from the OF 307.

[62 FR 51230, Sept. 30, 1997, as amended at 75 FR 13416, Mar. 19, 2010]

### **Subpart 15.6—Unsolicited Proposals**

**15.600 Scope of subpart.**

This subpart sets forth policies and procedures concerning the submission, receipt, evaluation, and acceptance or rejection of unsolicited proposals.

**15.601 Definitions.**

As used in this subpart—

*Advertising material* means material designed to acquaint the Government with a prospective contractor's present products, services, or potential capabilities, or designed to stimulate the Government's interest in buying such products or services.

*Commercial item offer* means an offer of a commercial item that the vendor wishes to see introduced in the Government's supply system as an alternate or a replacement for an existing supply item. This term does not include innovative or unique configurations or uses of commercial items that are being offered for further development and that may be submitted as an unsolicited proposal.

*Contribution* means a concept, suggestion, or idea presented to the Government for its use with no indication that the source intends to devote any further effort to it on the Government's behalf.

[62 FR 51230, Sept. 30, 1997, as amended at 66 FR 2129, Jan. 10, 2001]

**15.602 Policy.**

It is the policy of the Government to encourage the submission of new and

innovative ideas in response to Broad Agency Announcements, Small Business Innovation Research topics, Small Business Technology Transfer Research topics, Program Research and Development Announcements, or any other Government-initiated solicitation or program. When the new and innovative ideas do not fall under topic areas publicized under those programs or techniques, the ideas may be submitted as unsolicited proposals.

**15.603 General.**

(a) Unsolicited proposals allow unique and innovative ideas or approaches that have been developed outside the Government to be made available to Government agencies for use in accomplishment of their missions. Unsolicited proposals are offered with the intent that the Government will enter into a contract with the offeror for research and development or other efforts supporting the Government mission, and often represent a substantial investment of time and effort by the offeror.

(b) Advertising material, commercial item offers, or contributions, as defined in 15.601, or routine correspondence on technical issues, are not unsolicited proposals.

(c) A valid unsolicited proposal must—

- (1) Be innovative and unique;
- (2) Be independently originated and developed by the offeror;
- (3) Be prepared without Government supervision, endorsement, direction, or direct Government involvement;
- (4) Include sufficient detail to permit a determination that Government support could be worthwhile and the proposed work could benefit the agency's research and development or other mission responsibilities;
- (5) Not be an advance proposal for a known agency requirement that can be acquired by competitive methods; and
- (6) Not address a previously published agency requirement.

(d) Unsolicited proposals in response to a publicized general statement of agency needs are considered to be independently originated.

## ELECTRONIC CODE OF FEDERAL REGULATIONS

**e-CFR data is current as of April 5, 2021**

Title 48 → Chapter 1 → Subchapter C → Part 16 → Subpart 16.5

Title 48: Federal Acquisition Regulations System  
PART 16—TYPES OF CONTRACTS

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**Subpart 16.5—Indefinite-Delivery Contracts**

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[↑ Back to Top](#)**16.500 Scope of subpart.**

(a) This subpart prescribes policies and procedures for making awards of indefinite-delivery contracts and establishes a preference for making multiple awards of indefinite-quantity contracts.

(b) This subpart does not limit the use of other than competitive procedures authorized by part 6.

(c) Nothing in this subpart restricts the authority of the General Services Administration (GSA) to enter into schedule, multiple award, or task or delivery order contracts under any other provision of law. Therefore, GSA regulations and the coverage for the Federal Supply Schedule program in subpart 8.4 and part 38 take precedence over this subpart.

(d) The statutory multiple award preference implemented by this subpart does not apply to architect-engineer contracts subject to the procedures in subpart 36.6. However, agencies are not precluded from making multiple awards for architect-engineer services using the procedures in this subpart, provided the selection of contractors and placement of orders are consistent with subpart 36.6.

(e) See subpart 19.5 for procedures to set aside part or parts of multiple-award contracts for small businesses; to reserve one or more awards for small business on multiple-award contracts; and to set aside orders for small businesses under multiple-award contracts.

[65 FR 24318, Apr. 25, 2000, as amended at 85 FR 11757, Feb. 27, 2020]

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#### **16.501-1 Definitions.**

As used in this subpart—

*Delivery-order contract* means a contract for supplies that does not procure or specify a firm quantity of supplies (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of supplies during the period of the contract.

*Task-order contract* means a contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.

[60 FR 49725, Sept. 26, 1995, as amended at 65 FR 24318, Apr. 25, 2000; 75 FR 13421, Mar. 19, 2010]

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#### **16.501-2 General.**

(a) There are three types of indefinite-delivery contracts: Definite-quantity contracts, requirements contracts, and indefinite-quantity contracts. The appropriate type of indefinite-delivery contract may be used to acquire supplies and/or services when the exact times and/or exact quantities of future deliveries are not known at the time of contract award. Pursuant to 10 U.S.C. 2304d and 41 U.S.C. 4101, requirements contracts and indefinite-quantity contracts are also known as delivery-order contracts or task-order contracts.

(b) The various types of indefinite-delivery contracts offer the following advantages:

(1) All three types permit (i) Government stocks to be maintained at minimum levels and (ii) direct shipment to users.

(2) Indefinite-quantity contracts and requirements contracts also permit (i) flexibility in both quantities and delivery scheduling and (ii) ordering of supplies or services after requirements materialize.

(3) Indefinite-quantity contracts limit the Government's obligation to the minimum quantity specified in the contract.

(4) Requirements contracts may permit faster deliveries when production lead time is involved, because contractors are usually willing to maintain limited stocks when the Government will obtain all of its actual purchase requirements from the contractor.

(c) Indefinite-delivery contracts may provide for any appropriate cost or pricing arrangement under part 16. Cost or pricing arrangements that provide for an estimated quantity of supplies or services (e.g., estimated number of labor hours) must comply with the appropriate procedures of this subpart.

[48 FR 42219, Sept. 19, 1983. Redesignated and amended at 60 FR 49725, Sept. 26, 1995; 75 FR 13421, Mar. 19, 2010; 79 FR 24202, Apr. 29, 2014]

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**16.502 Definite-quantity contracts.**

(a) *Description.* A definite-quantity contract provides for delivery of a definite quantity of specific supplies or services for a fixed period, with deliveries or performance to be scheduled at designated locations upon order.

(b) *Application.* A definite-quantity contract may be used when it can be determined in advance that (1) a definite quantity of supplies or services will be required during the contract period and (2) the supplies or services are regularly available or will be available after a short lead time.

[48 FR 42219, Sept. 19, 1983, as amended at 60 FR 49725, Sept. 26, 1995]

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**16.503 Requirements contracts.**

(a) *Description.* A requirements contract provides for filling all actual purchase requirements of designated Government activities for supplies or services during a specified contract period (from one contractor), with deliveries or performance to be scheduled by placing orders with the contractor.

(1) For the information of offerors and contractors, the contracting officer shall state a realistic estimated total quantity in the solicitation and resulting contract. This estimate is not a representation to an offeror or contractor that the estimated quantity will be required or ordered, or that conditions affecting requirements will be stable or normal. The contracting officer may obtain the estimate from records of previous requirements and consumption, or by other means, and should base the estimate on the most current information available.

(2) The contract shall state, if feasible, the maximum limit of the contractor's obligation to deliver and the Government's obligation to order. The contract may also specify maximum or minimum quantities that the Government may order under each individual order and the maximum that it may order during a specified period of time.

(b) *Application.* (1) A requirements contract may be appropriate for acquiring any supplies or services when the Government anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that designated Government activities will need during a definite period.

(2) No requirements contract in an amount estimated to exceed \$100million (including all options) may be awarded to a single source unless a determination is executed in accordance with 16.504(c)(1)(ii)(D).

(c) *Government property furnished for repair.* When a requirements contract is used to acquire work (e.g., repair, modification, or overhaul) on existing items of Government property, the contracting officer shall specify in the Schedule that failure of the Government to furnish such items in the amounts or quantities described in the Schedule as *estimated* or *maximum* will not entitle the contractor to any equitable adjustment in price under the Government Property clause of the contract.

(d) *Limitations on use of requirements contracts for advisory and assistance services.* (1) Except as provided in paragraph (d)(2) of this section, no solicitation for a requirements



contract for advisory and assistance services in excess of three years and \$15 million (including all options) may be issued unless the contracting officer or other official designated by the head of the agency determines in writing that the services required are so unique or highly specialized that it is not practicable to make multiple awards using the procedures in 16.504.

(2) The limitation in paragraph (d)(1) of this section is not applicable to an acquisition of supplies or services that includes the acquisition of advisory and assistance services, if the contracting officer or other official designated by the head of the agency determines that the advisory and assistance services are necessarily incident to, and not a significant component of, the contract.

[48 FR 42219, Sept. 19, 1983, as amended at 56 FR 15150, Apr. 15, 1991; 60 FR 49725, Sept. 26, 1995; 71 FR 57367, Sept. 28, 2006; 73 FR 54010, Sept. 17, 2008; 75 FR 13421, Mar. 19, 2010; 75 FR 53133, Aug. 30, 2010; 80 FR 38297, July 2, 2015; 85 FR 62488, Oct. 2, 2020]

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#### **16.504 Indefinite-quantity contracts.**

(a) *Description.* An indefinite-quantity contract provides for an indefinite quantity, within stated limits, of supplies or services during a fixed period. The Government places orders for individual requirements. Quantity limits may be stated as number of units or as dollar values.

(1) The contract must require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services. In addition, if ordered, the contractor must furnish any additional quantities, not to exceed the stated maximum. The contracting officer should establish a reasonable maximum quantity based on market research, trends on recent contracts for similar supplies or services, survey of potential users, or any other rational basis.

(2) To ensure that the contract is binding, the minimum quantity must be more than a nominal quantity, but it should not exceed the amount that the Government is fairly certain to order.

(3) The contract may also specify maximum or minimum quantities that the Government may order under each task or delivery order and the maximum that it may order during a specific period of time.

(4) A solicitation and contract for an indefinite quantity must—

(i) Specify the period of the contract, including the number of options and the period for which the Government may extend the contract under each option;

(ii) Specify the total minimum and maximum quantity of supplies or services the Government will acquire under the contract;

(iii) Include a statement of work, specifications, or other description, that reasonably describes the general scope, nature, complexity, and purpose of the supplies or services the Government will acquire under the contract in a manner that will enable a prospective offeror to decide whether to submit an offer;

(iv) State the procedures that the Government will use in issuing orders, including the ordering media, and, if multiple awards may be made, state the procedures and selection criteria that the Government will use to provide awardees a fair opportunity to be considered for each order (see 16.505(b)(1));

(v) Include a description of the activities authorized to issue orders; and

(vi) Include authorization for placing oral orders, if appropriate, provided that the Government has established procedures for obligating funds and that oral orders are confirmed in writing.

(b) *Application.* Contracting officers may use an indefinite-quantity contract when the Government cannot predetermine, above a specified minimum, the precise quantities of supplies or services that the Government will require during the contract period, and it is inadvisable for the Government to commit itself for more than a minimum quantity. The contracting officer should use an indefinite-quantity contract only when a recurring need is anticipated.

(c) *Multiple award preference—(1) Planning the acquisition.* (i) Except for indefinite-quantity contracts for advisory and assistance services as provided in paragraph (c)(2) of this section, the contracting officer must, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources.

(ii)(A) The contracting officer must determine whether multiple awards are appropriate as part of acquisition planning. The contracting officer must avoid situations in which awardees specialize exclusively in one or a few areas within the statement of work, thus creating the likelihood that orders in those areas will be awarded on a sole-source basis; however, each awardee need not be capable of performing every requirement as well as any other awardee under the contracts. The contracting officer should consider the following when determining the number of contracts to be awarded:

(1) The scope and complexity of the contract requirement.

(2) The expected duration and frequency of task or delivery orders.

(3) The mix of resources a contractor must have to perform expected task or delivery order requirements.

(4) The ability to maintain competition among the awardees throughout the contracts' period of performance.

(B) The contracting officer must not use the multiple award approach if—

(1) Only one contractor is capable of providing performance at the level of quality required because the supplies or services are unique or highly specialized;

(2) Based on the contracting officer's knowledge of the market, more favorable terms and conditions, including pricing, will be provided if a single award is made;

(3) The expected cost of administration of multiple contracts outweighs the expected benefits of making multiple awards;



(4) The projected orders are so integrally related that only a single contractor can reasonably perform the work;

(5) The total estimated value of the contract is at or below the simplified acquisition threshold; or

(6) Multiple awards would not be in the best interests of the Government.

(C) The contracting officer must document the decision whether or not to use multiple awards in the acquisition plan or contract file. The contracting officer may determine that a class of acquisitions is not appropriate for multiple awards (see subpart 1.7).

(D)(1) No task or delivery order contract in an amount estimated to exceed \$100 million (including all options) may be awarded to a single source unless the head of the agency determines in writing that—

(i) The task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work;

(ii) The contract provides only for firm-fixed price (see 16.202) task or delivery orders for —

(A) Products for which unit prices are established in the contract; or

(B) Services for which prices are established in the contract for the specific tasks to be performed;

(iii) Only one source is qualified and capable of performing the work at a reasonable price to the Government; or

(iv) It is necessary in the public interest to award the contract to a single source due to exceptional circumstances.

(2) The head of the agency must notify Congress within 30 days after any determination under paragraph (c)(1)(ii)(D)(1)(iv) of this section.

(3) The requirement for a determination for a single-award contract greater than \$100 million—

(i) Is in addition to any applicable requirements of Subpart 6.3; and

(ii) Is not applicable for architect-engineer services awarded pursuant to Subpart 36.6.

(2) *Contracts for advisory and assistance services.* (i) Except as provided in paragraph (c)(2)(ii) of this section, if an indefinite-quantity contract for advisory and assistance services exceeds 3 years and \$15 million, including all options, the contracting officer must make multiple awards unless—

(A) The contracting officer or other official designated by the head of the agency determines in writing, as part of acquisition planning, that multiple awards are not practicable. The contracting officer or other official must determine that only one contractor can

reasonably perform the work because either the scope of work is unique or highly specialized or the tasks so integrally related;

(B) The contracting officer or other official designated by the head of the agency determines in writing, after the evaluation of offers, that only one offeror is capable of providing the services required at the level of quality required; or

(C) Only one offer is received.

(ii) The requirements of paragraph (c)(2)(i) of this section do not apply if the contracting officer or other official designated by the head of the agency determines that the advisory and assistance services are incidental and not a significant component of the contract.

[65 FR 24318, Apr. 25, 2000, as amended at 71 FR 57367, Sept. 28, 2006; 73 FR 54010, Sept. 17, 2008; 75 FR 13421, Mar. 19, 2010; 75 FR 53133, Aug. 30, 2010; 78 FR 13767, Feb. 28, 2013; 80 FR 38297, July 2, 2015; 84 FR 38838, Aug. 7, 2019; 85 FR 40071, July 2, 2020; 85 FR 62488, Oct. 2, 2020]

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## **16.505 Ordering.**

(a) *General.* (1) In general, the contracting officer does not synopsise orders under indefinite-delivery contracts; except see 16.505(a)(4) and (11), and 16.505(b)(2)(ii)(D).

(2) Individual orders shall clearly describe all services to be performed or supplies to be delivered so the full cost or price for the performance of the work can be established when the order is placed. Orders shall be within the scope, issued within the period of performance, and be within the maximum value of the contract.

(3) Performance-based acquisition methods must be used to the maximum extent practicable, if the contract or order is for services (see 37.102(a) and subpart 37.6).

(4) The following requirements apply when procuring items peculiar to one manufacturer:

(i) The contracting officer must justify restricting consideration to an item peculiar to one manufacturer (e.g., a particular brand-name, product, or a feature of a product that is peculiar to one manufacturer). A brand-name item, even if available on more than one contract, is an item peculiar to one manufacturer. Brand-name specifications shall not be used unless the particular brand-name, product, or feature is essential to the Government's requirements and market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or cannot be modified to meet, the agency's needs.

(ii) Requirements for use of items peculiar to one manufacturer shall be justified and approved using the format(s) and requirements from paragraphs (b)(2)(ii)(A), (B), and (C) of this section, modified to show the brand-name justification. A justification is required unless a justification covering the requirements in the order was previously approved for the contract in accordance with 6.302-1(c) or unless the base contract is a single-award contract awarded under full and open competition. Justifications for the use of brand-name specifications must be completed and approved at the time the requirement for a brand-name is determined.

(iii)(A) For an order in excess of \$30,000, the contracting officer shall—

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(1) Post the justification and supporting documentation on the agency Web site used (if any) to solicit offers for orders under the contract; or

(2) Provide the justification and supporting documentation along with the solicitation to all contract awardees.

(B) The justifications for brand-name acquisitions may apply to the portion of the acquisition requiring the brand-name item. If the justification is to cover only the portion of the acquisition which is brand-name, then it should so state; the approval level requirements will then only apply to that portion.

(C) The requirements in paragraph (a)(4)(iii)(A) of this section do not apply when disclosure would compromise the national security (e.g., would result in disclosure of classified information) or create other security risks.

(D) The justification is subject to the screening requirement in paragraph (b)(2)(ii)(D)(4) of this section.

(5) When acquiring information technology and related services, consider the use of modular contracting to reduce program risk (see 39.103(a)).

(6) Orders may be placed by using any medium specified in the contract.

(7) Orders placed under indefinite-delivery contracts must contain the following information:

(i) Date of order.

(ii) Contract number and order number.

(iii) For supplies and services, line item number, subline item number (if applicable), description, quantity, and unit price or estimated cost and fee (as applicable). The corresponding line item number and subline item number from the base contract shall also be included.

(iv) Delivery or performance schedule.

(v) Place of delivery or performance (including consignee).

(vi) Any packaging, packing, and shipping instructions.

(vii) Accounting and appropriation data.

(viii) Method of payment and payment office, if not specified in the contract (see 32.1110(e)).

(ix) North American Industry Classification System code (see 19.102(b)(3)).

(8) Orders placed under a task-order contract or delivery-order contract awarded by another agency (i.e., a Governmentwide acquisition contract, or multi-agency contract)—

(i) Are not exempt from the development of acquisition plans (see subpart 7.1), and an information technology acquisition strategy (see part 39);

(ii) May not be used to circumvent conditions and limitations imposed on the use of funds (e.g., 31 U.S.C. 1501(a)(1)); and

(iii) Shall comply with all FAR requirements for a consolidated or bundled contract when the order meets the definition at 2.101(b) of “consolidation” or “bundling”.

(9) In accordance with section 1427(b) of Public Law 108-136 (40 U.S.C. 1103 note), orders placed under multi-agency contracts for services that substantially or to a dominant extent specify performance of architect-engineer services, as defined in 2.101, shall—

(i) Be awarded using the procedures at subpart 36.6; and

(ii) Require the direct supervision of a professional architect or engineer licensed, registered or certified in the State, Federal District, or outlying area, in which the services are to be performed.

(10)(i) No protest under subpart 33.1 is authorized in connection with the issuance or proposed issuance of an order under a task-order contract or delivery-order contract, except—

(A) A protest on the grounds that the order increases the scope, period, or maximum value of the contract; or

(B)(1) For agencies other than DoD, NASA, and the Coast Guard, a protest of an order valued in excess of \$10 million (41 U.S.C. 4106(f)); or

(2) For DoD, NASA, or the Coast Guard, a protest of an order valued in excess of \$25 million (10 U.S.C. 2304c(e)).

(ii) Protests of orders in excess of the thresholds stated in 16.505(a)(10)(i)(B) may only be filed with the Government Accountability Office, in accordance with the procedures at 33.104.

(iii) For protests of small business size status for set-aside orders, see 19.302.

(11) Publicize orders funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) as follows:

(i) Notices of proposed orders shall follow the procedures in 5.704 for posting orders.

(ii) Award notices for orders shall follow the procedures in 5.705.

(12) When using the Governmentwide commercial purchase card as a method of payment, orders at or below the micro-purchase threshold are exempt from verification in the System for Award Management as to whether the contractor has a delinquent debt subject to collection under the Treasury Offset Program (TOP).

(b) *Orders under multiple-award contracts—(1) Fair opportunity.* (i) The contracting officer must provide each awardee a fair opportunity to be considered for each order exceeding \$3,500 issued under multiple delivery-order contracts or multiple task-order contracts, except—

(A) As provided for in paragraph (b)(2) of this section; or

(B) Orders issued under 19.504(c)(1)(ii).

(ii) The contracting officer may exercise broad discretion in developing appropriate order placement procedures. The contracting officer should keep submission requirements to a minimum. Contracting officers may use streamlined procedures, including oral presentations. If the order does not exceed the simplified acquisition threshold, the contracting officer need not contact each of the multiple awardees under the contract before selecting an order awardee if the contracting officer has information available to ensure that each awardee is provided a fair opportunity to be considered for each order. The competition requirements in part 6 and the policies in subpart 15.3 do not apply to the ordering process. However, the contracting officer shall—

(A) Develop placement procedures that will provide each awardee a fair opportunity to be considered for each order and that reflect the requirement and other aspects of the contracting environment;

(B) Not use any method (such as allocation or designation of any preferred awardee) that would not result in fair consideration being given to all awardees prior to placing each order;

(C) Tailor the procedures to each acquisition;

(D) Include the procedures in the solicitation and the contract;

(E) Consider price or cost under each order as one of the factors in the selection decision;

(F) Except for DoD, ensure the criteria at 15.101-2(c)(1)-(5) are met when using the lowest price technically acceptable source selection process; and

(G) Except for DoD, avoid using the lowest price technically acceptable source selection process to acquire certain supplies and services in accordance with 15.101-2(d).

(iii) *Orders exceeding the simplified acquisition threshold.* (A) Each order exceeding the simplified acquisition threshold shall be placed on a competitive basis in accordance with paragraph (b)(1)(iii)(B) of this section, unless supported by a written determination that one of the circumstances described at 16.505(b)(2)(i) applies to the order and the requirement is waived on the basis of a justification that is prepared in accordance with 16.505(b)(2)(ii)(B);

(B) The contracting officer shall—

(1) Provide a fair notice of the intent to make a purchase, including a clear description of the supplies to be delivered or the services to be performed and the basis upon which the selection will be made to all contractors offering the required supplies or services under the multiple-award contract; and

(2) Afford all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered.

(iv) *Orders exceeding \$6 million.* For task or delivery orders in excess of \$6 million, the requirement to provide all awardees a fair opportunity to be considered for each order shall include, at a minimum—

(A) A notice of the task or delivery order that includes a clear statement of the agency's requirements;

(B) A reasonable response period;

(C) Disclosure of the significant factors and subfactors, including cost or price, that the agency expects to consider in evaluating proposals, and their relative importance;

(D) Where award is made on a best value basis, a written statement documenting the basis for award and the relative importance of quality and price or cost factors; and

(E) An opportunity for a postaward debriefing in accordance with paragraph (b)(6) of this section.

(v) The contracting officer should consider the following when developing the procedures:

(A)(1) Past performance on earlier orders under the contract, including quality, timeliness and cost control.

(2) Potential impact on other orders placed with the contractor.

(3) Minimum order requirements.

(4) The amount of time contractors need to make informed business decisions on whether to respond to potential orders.

(5) Whether contractors could be encouraged to respond to potential orders by outreach efforts to promote exchanges of information, such as—

(i) Seeking comments from two or more contractors on draft statements of work; or

(ii) Using a multiphased approach when effort required to respond to a potential order may be resource intensive (e.g., requirements are complex or need continued development), where all contractors are initially considered on price considerations (e.g., rough estimates), and other considerations as appropriate (e.g., proposed conceptual approach, past performance). The contractors most likely to submit the highest value solutions are then selected for one-on-one sessions with the Government to increase their understanding of the requirements, provide suggestions for refining requirements, and discuss risk reduction measures.

(B) Formal evaluation plans or scoring of quotes or offers are not required.

(2) *Exceptions to the fair opportunity process.* (i) The contracting officer shall give every awardee a fair opportunity to be considered for a delivery-order or task-order exceeding \$3,500 unless one of the following statutory exceptions applies:

(A) The agency need for the supplies or services is so urgent that providing a fair opportunity would result in unacceptable delays.

(B) Only one awardee is capable of providing the supplies or services required at the level of quality required because the supplies or services ordered are unique or highly specialized.

(C) The order must be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to an order already issued under the contract, provided that all awardees were given a fair opportunity to be considered for the original order.

(D) It is necessary to place an order to satisfy a minimum guarantee.

(E) For orders exceeding the simplified acquisition threshold, a statute expressly authorizes or requires that the purchase be made from a specified source.

(F) In accordance with section 1331 of Public Law 111-240 (15 U.S.C. 644(r)), contracting officers may, at their discretion, set aside orders for any of the small business concerns identified in 19.000(a)(3). When setting aside orders for small business concerns, the specific small business program eligibility requirements identified in part 19 apply.

(G) For DoD, NASA, and the Coast Guard, the order satisfies one of the exceptions permitting the use of other than full and open competition listed in 6.302 (10 U.S.C. 2304c(b)(5)). The public interest exception shall not be used unless Congress is notified in accordance with 10 U.S.C. 2304(c)(7).

(ii) The justification for an exception to fair opportunity shall be in writing as specified in paragraph (b)(2)(ii)(A) or (B) of this section. No justification is needed for the exception described in paragraph (b)(2)(i)(F) of this section.

(A) *Orders exceeding \$3,500, but not exceeding the simplified acquisition threshold.* The contracting officer shall document the basis for using an exception to the fair opportunity process. If the contracting officer uses the logical follow-on exception, the rationale shall describe why the relationship between the initial order and the follow-on is logical (e.g., in terms of scope, period of performance, or value).

(B) *Orders exceeding the simplified acquisition threshold.* As a minimum, each justification shall include the following information and be approved in accordance with paragraph (b)(2)(ii)(C) of this section:

(1) Identification of the agency and the contracting activity, and specific identification of the document as a "Justification for an Exception to Fair Opportunity."

(2) Nature and/or description of the action being approved.

(3) A description of the supplies or services required to meet the agency's needs (including the estimated value).

(4) Identification of the exception to fair opportunity (see 16.505(b)(2)) and the supporting rationale, including a demonstration that the proposed contractor's unique qualifications or the nature of the acquisition requires use of the exception cited. If the

contracting officer uses the logical follow-on exception, the rationale shall describe why the relationship between the initial order and the follow-on is logical (e.g., in terms of scope, period of performance, or value).

(5) A determination by the contracting officer that the anticipated cost to the Government will be fair and reasonable.

(6) Any other facts supporting the justification.

(7) A statement of the actions, if any, the agency may take to remove or overcome any barriers that led to the exception to fair opportunity before any subsequent acquisition for the supplies or services is made.

(8) The contracting officer's certification that the justification is accurate and complete to the best of the contracting officer's knowledge and belief.

(9) Evidence that any supporting data that is the responsibility of technical or requirements personnel (e.g., verifying the Government's minimum needs or requirements or other rationale for an exception to fair opportunity) and which form a basis for the justification have been certified as complete and accurate by the technical or requirements personnel.

(10) A written determination by the approving official that one of the circumstances in paragraphs (b)(2)(i)(A) through (E) and (G) of this section applies to the order.

(C) *Approval.* (1) For proposed orders exceeding the simplified acquisition threshold, but not exceeding \$750,000, the ordering activity contracting officer's certification that the justification is accurate and complete to the best of the ordering activity contracting officer's knowledge and belief will serve as approval, unless a higher approval level is established in accordance with agency procedures.

(2) For a proposed order exceeding \$750,000, but not exceeding \$15 million, the justification must be approved by the advocate for competition of the activity placing the order, or by an official named in paragraph (b)(2)(ii)(C)(3) or (4) of this section. This authority is not delegable.

(3) For a proposed order exceeding \$15 million, but not exceeding \$75 million (or, for DoD, NASA, and the Coast Guard, not exceeding \$100 million), the justification must be approved by—

(i) The head of the procuring activity placing the order;

(ii) A designee who—

(A) If a member of the armed forces, is a general or flag officer;

(B) If a civilian, is serving in a position in a grade above GS-15 under the General Schedule (or in a comparable or higher position under another schedule); or

(iii) An official named in paragraph (b)(2)(ii)(C)(4) of this section.

(4) For a proposed order exceeding \$75 million (or, for DoD, NASA, and the Coast Guard, over \$100 million), the justification must be approved by the senior procurement



executive of the agency placing the order. This authority is not delegable, except in the case of the Under Secretary of Defense for Acquisition and Sustainment, acting as the senior procurement executive for the Department of Defense.

(D) *Posting.* (1) Except as provided in paragraph (b)(2)(ii)(D)(5) of this section, within 14 days after placing an order exceeding the simplified acquisition threshold that does not provide for fair opportunity in accordance with 16.505(b), the contract officer shall—

(i) Publish a notice in accordance with 5.301; and

(ii) Make publicly available the justification required at paragraph (b)(2)(ii)(B) of this section.

(2) The justification shall be made publicly available—

(i) At the GPE <https://www.fbo.gov>;

(ii) On the Web site of the agency, which may provide access to the justifications by linking to the GPE; and

(iii) Must remain posted for a minimum of 30 days.

(3) In the case of an order permitted under paragraph (b)(2)(i)(A) of this section, the justification shall be posted within 30 days after award of the order.

(4) Contracting officers shall carefully screen all justifications for contractor proprietary data and remove all such data, and such references and citations as are necessary to protect the proprietary data, before making the justifications available for public inspection. Contracting officers shall also be guided by the exemptions to disclosure of information contained in the Freedom of Information Act (5 U.S.C. 552) and the prohibitions against disclosure in 24.202 in determining whether other data should be removed. Although the submitter notice process set out in Executive Order 12600 “Predisclosure Notification Procedures for Confidential Commercial Information” does not apply, if the justification appears to contain proprietary data, the contracting officer should provide the contractor that submitted the information an opportunity to review the justification for proprietary data before making the justification available for public inspection, redacted as necessary. This process must not prevent or delay the posting of the justification in accordance with the timeframes required in (paragraphs (b)(2)(ii)(D)(1) and (3) of this section).

(5) The posting requirement of this section does not apply—

(i) When disclosure would compromise the national security (e.g., would result in disclosure of classified information) or create other security risks; or

(ii) To a small business set-aside under paragraph (b)(2)(i)(F) of this section.

(3) *Pricing orders.* If the contract did not establish the price for the supply or service, the contracting officer must establish prices for each order using the policies and methods in subpart 15.4.

(4) *Cost reimbursement orders.* For additional requirements for cost-reimbursement orders, see 16.301-3.

(5) *Time-and-materials or labor-hour orders.* For additional requirements for time-and-materials or labor-hour orders, see 16.601(e).

(6) *Postaward notices and debriefing of awardees for orders exceeding \$6 million.* The contracting officer shall notify unsuccessful awardees when the total price of a task or delivery order exceeds \$6 million.

(i) The procedures at 15.503(b)(1) shall be followed when providing postaward notification to unsuccessful awardees.

(ii) The procedures at 15.506 shall be followed when providing postaward debriefing to unsuccessful awardees.

(iii) A summary of the debriefing shall be included in the task or delivery order file.

(7) *Decision documentation for orders.* (i) The contracting officer shall document in the contract file the rationale for placement and price of each order, including the basis for award and the rationale for any tradeoffs among cost or price and non-cost considerations in making the award decision. This documentation need not quantify the tradeoffs that led to the decision.

(ii) The contract file shall also identify the basis for using an exception to the fair opportunity process (see paragraph (b)(2) of this section).

(iii) Except for DoD, the contracting officer shall document in the contract file a justification for use of the lowest price technically acceptable source selection process, when applicable.

(8) *Task-order and delivery-order ombudsman.* The head of the agency shall designate a task-order and delivery-order ombudsman. The ombudsman must review complaints from contractors and ensure they are afforded a fair opportunity to be considered, consistent with the procedures in the contract. The ombudsman must be a senior agency official who is independent of the contracting officer and may be the agency's advocate for competition.

(9) *Small business.* The contracting officer should rely on the small business representations at the contract level (but see section 19.301-2(b)(2) for order rerepresentations).

(c) *Limitation on ordering period for task-order contracts for advisory and assistance services.* (1) Except as provided for in paragraphs (c)(2) and (3) of this section, the ordering period of a task-order contract for advisory and assistance services, including all options or modifications, normally may not exceed 5 years.

(2) The 5-year limitation does not apply when—

(i) A longer ordering period is specifically authorized by a statute; or

(ii) The contract is for an acquisition of supplies or services that includes the acquisition of advisory and assistance services and the contracting officer, or other official designated by the head of the agency, determines that the advisory and assistance services are incidental and not a significant component of the contract.

(3) The contracting officer may extend the contract on a sole-source basis only once for a period not to exceed 6 months if the contracting officer, or other official designated by the head of the agency, determines that—

(i) The award of a follow-on contract is delayed by circumstances that were not reasonably foreseeable at the time the initial contract was entered into; and

(ii) The extension is necessary to ensure continuity of services, pending the award of the follow-on contract.

[65 FR 24319, Apr. 25, 2000]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting section 16.505, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at [www.govinfo.gov](http://www.govinfo.gov).

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#### **16.506 Solicitation provisions and contract clauses.**

(a) Insert the clause at 52.216-18, Ordering, in solicitations and contracts when a definite-quantity contract, a requirements contract, or an indefinite-quantity contract is contemplated.

(b) Insert a clause substantially the same as the clause at 52.216-19, Order Limitations, in solicitations and contracts when a definite-quantity contract, a requirements contract, or an indefinite-quantity contract is contemplated.

(c) Insert the clause at 52.216-20, Definite Quantity, in solicitations and contracts when a definite-quantity contract is contemplated.

(d)(1) Insert the clause at 52.216-21, Requirements, in solicitations and contracts when a requirements contract is contemplated.

(2) If the contract is for nonpersonal services and related supplies and covers estimated requirements that exceed a specific Government activity's internal capability to produce or perform, use the clause with its *Alternate I*.

(3) If the contract includes subsistence for both Government use and resale in the same Schedule, and similar products may be acquired on a brand-name basis, use the clause with its *Alternate II* (but see paragraph (d)(5) of this section).

(4) If the contract involves a partial small business set-aside, use the clause with its *Alternate III* (but see subparagraph (5) below).

(5) If the contract—

(i) Includes subsistence for Government use and resale in the same schedule and similar products may be acquired on a brand-name basis; and

(ii) Involves a partial small business set-aside, use the clause with its *Alternate IV*.

(e) Insert the clause at 52.216-22, Indefinite Quantity, in solicitations and contracts when an indefinite-quantity contract is contemplated.

(f) Insert the provision at 52.216-27, Single or Multiple Awards, in solicitations for indefinite-quantity contracts that may result in multiple contract awards. Modify the provision to specify the estimated number of awards. Do not use this provision for advisory and assistance services contracts that exceed 3 years and \$15 million (including all options).

(g) Insert the provision at 52.216-28, Multiple Awards for Advisory and Assistance Services, in solicitations for task-order contracts for advisory and assistance services that exceed 3 years and \$15 million (including all options), unless a determination has been made under 16.504(c)(2)(i)(A). Modify the provision to specify the estimated number of awards.

(h) See 10.001(d) for insertion of the clause at 52.210-1, Market Research, when the contract is over \$6 million for the procurement of items other than commercial items.

(i) See 7.107-6 for use of 52.207-6, Solicitation of Offers from Small Business Concerns and Small Business Teaming Arrangement or Joint Ventures (Multiple-Award Contracts) in solicitations for multiple-award contracts above the substantial bundling threshold of the agency.

(j) Insert the clause at 52.216-32, Task-Order and Delivery-Order Ombudsman, in solicitations and contracts when a multiple-award indefinite-delivery indefinite-quantity contract is contemplated. Use the clause with its Alternate I when the contract will be available for use by multiple agencies (e.g., Governmentwide acquisition contracts or multi-agency contracts). When placing orders under the multiple-award contract available for use by multiple agencies, the ordering activity's contracting officer shall complete paragraph (d) (2) and include Alternate I in the notice of intent to place an order, and in the resulting order.

[48 FR 42219, Sept. 19, 1983; 60 FR 48260, Sept. 18, 1995. Redesignated and amended at 60 FR 49726, 49727, Sept. 26, 1995; 65 FR 24320, Apr. 25, 2000; 71 FR 57367, Sept. 28, 2006; 75 FR 53133, Aug. 30, 2010; 76 FR 14565, Mar. 16, 2011; 80 FR 38298, July 2, 2015; 81 FR 67772, Sept. 30, 2016; 84 FR 38838, Aug. 7, 2019; 85 FR 62489, Oct. 2, 2020]

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**ELECTRONIC CODE OF FEDERAL REGULATIONS****e-CFR data is current as of April 5, 2021**

Title 48 → Chapter 1 → Subchapter C → Part 16 → Subpart 16.5

Title 48: Federal Acquisition Regulations System  
PART 16—TYPES OF CONTRACTS

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**Subpart 16.5—Indefinite-Delivery Contracts**

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[↑ Back to Top](#)**16.500 Scope of subpart.**

(a) This subpart prescribes policies and procedures for making awards of indefinite-delivery contracts and establishes a preference for making multiple awards of indefinite-quantity contracts.

(b) This subpart does not limit the use of other than competitive procedures authorized by part 6.

(c) Nothing in this subpart restricts the authority of the General Services Administration (GSA) to enter into schedule, multiple award, or task or delivery order contracts under any other provision of law. Therefore, GSA regulations and the coverage for the Federal Supply Schedule program in subpart 8.4 and part 38 take precedence over this subpart.

(d) The statutory multiple award preference implemented by this subpart does not apply to architect-engineer contracts subject to the procedures in subpart 36.6. However, agencies are not precluded from making multiple awards for architect-engineer services using the procedures in this subpart, provided the selection of contractors and placement of orders are consistent with subpart 36.6.

(e) See subpart 19.5 for procedures to set aside part or parts of multiple-award contracts for small businesses; to reserve one or more awards for small business on multiple-award contracts; and to set aside orders for small businesses under multiple-award contracts.

[65 FR 24318, Apr. 25, 2000, as amended at 85 FR 11757, Feb. 27, 2020]

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#### **16.501-1 Definitions.**

As used in this subpart—

*Delivery-order contract* means a contract for supplies that does not procure or specify a firm quantity of supplies (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of supplies during the period of the contract.

*Task-order contract* means a contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.

[60 FR 49725, Sept. 26, 1995, as amended at 65 FR 24318, Apr. 25, 2000; 75 FR 13421, Mar. 19, 2010]

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#### **16.501-2 General.**

(a) There are three types of indefinite-delivery contracts: Definite-quantity contracts, requirements contracts, and indefinite-quantity contracts. The appropriate type of indefinite-delivery contract may be used to acquire supplies and/or services when the exact times and/or exact quantities of future deliveries are not known at the time of contract award. Pursuant to 10 U.S.C. 2304d and 41 U.S.C. 4101, requirements contracts and indefinite-quantity contracts are also known as delivery-order contracts or task-order contracts.

(b) The various types of indefinite-delivery contracts offer the following advantages:

(1) All three types permit (i) Government stocks to be maintained at minimum levels and (ii) direct shipment to users.

(2) Indefinite-quantity contracts and requirements contracts also permit (i) flexibility in both quantities and delivery scheduling and (ii) ordering of supplies or services after requirements materialize.

(3) Indefinite-quantity contracts limit the Government's obligation to the minimum quantity specified in the contract.

(4) Requirements contracts may permit faster deliveries when production lead time is involved, because contractors are usually willing to maintain limited stocks when the Government will obtain all of its actual purchase requirements from the contractor.

(c) Indefinite-delivery contracts may provide for any appropriate cost or pricing arrangement under part 16. Cost or pricing arrangements that provide for an estimated quantity of supplies or services (e.g., estimated number of labor hours) must comply with the appropriate procedures of this subpart.

[48 FR 42219, Sept. 19, 1983. Redesignated and amended at 60 FR 49725, Sept. 26, 1995; 75 FR 13421, Mar. 19, 2010; 79 FR 24202, Apr. 29, 2014]

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### **16.502 Definite-quantity contracts.**

(a) *Description.* A definite-quantity contract provides for delivery of a definite quantity of specific supplies or services for a fixed period, with deliveries or performance to be scheduled at designated locations upon order.

(b) *Application.* A definite-quantity contract may be used when it can be determined in advance that (1) a definite quantity of supplies or services will be required during the contract period and (2) the supplies or services are regularly available or will be available after a short lead time.

[48 FR 42219, Sept. 19, 1983, as amended at 60 FR 49725, Sept. 26, 1995]

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### **16.503 Requirements contracts.**

(a) *Description.* A requirements contract provides for filling all actual purchase requirements of designated Government activities for supplies or services during a specified contract period (from one contractor), with deliveries or performance to be scheduled by placing orders with the contractor.

(1) For the information of offerors and contractors, the contracting officer shall state a realistic estimated total quantity in the solicitation and resulting contract. This estimate is not a representation to an offeror or contractor that the estimated quantity will be required or ordered, or that conditions affecting requirements will be stable or normal. The contracting officer may obtain the estimate from records of previous requirements and consumption, or by other means, and should base the estimate on the most current information available.

(2) The contract shall state, if feasible, the maximum limit of the contractor's obligation to deliver and the Government's obligation to order. The contract may also specify maximum or minimum quantities that the Government may order under each individual order and the maximum that it may order during a specified period of time.

(b) *Application.* (1) A requirements contract may be appropriate for acquiring any supplies or services when the Government anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that designated Government activities will need during a definite period.

(2) No requirements contract in an amount estimated to exceed \$100million (including all options) may be awarded to a single source unless a determination is executed in accordance with 16.504(c)(1)(ii)(D).

(c) *Government property furnished for repair.* When a requirements contract is used to acquire work (e.g., repair, modification, or overhaul) on existing items of Government property, the contracting officer shall specify in the Schedule that failure of the Government to furnish such items in the amounts or quantities described in the Schedule as *estimated* or *maximum* will not entitle the contractor to any equitable adjustment in price under the Government Property clause of the contract.

(d) *Limitations on use of requirements contracts for advisory and assistance services.* (1) Except as provided in paragraph (d)(2) of this section, no solicitation for a requirements

contract for advisory and assistance services in excess of three years and \$15 million (including all options) may be issued unless the contracting officer or other official designated by the head of the agency determines in writing that the services required are so unique or highly specialized that it is not practicable to make multiple awards using the procedures in 16.504.

(2) The limitation in paragraph (d)(1) of this section is not applicable to an acquisition of supplies or services that includes the acquisition of advisory and assistance services, if the contracting officer or other official designated by the head of the agency determines that the advisory and assistance services are necessarily incident to, and not a significant component of, the contract.

[48 FR 42219, Sept. 19, 1983, as amended at 56 FR 15150, Apr. 15, 1991; 60 FR 49725, Sept. 26, 1995; 71 FR 57367, Sept. 28, 2006; 73 FR 54010, Sept. 17, 2008; 75 FR 13421, Mar. 19, 2010; 75 FR 53133, Aug. 30, 2010; 80 FR 38297, July 2, 2015; 85 FR 62488, Oct. 2, 2020]

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#### **16.504 Indefinite-quantity contracts.**

(a) *Description.* An indefinite-quantity contract provides for an indefinite quantity, within stated limits, of supplies or services during a fixed period. The Government places orders for individual requirements. Quantity limits may be stated as number of units or as dollar values.

(1) The contract must require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services. In addition, if ordered, the contractor must furnish any additional quantities, not to exceed the stated maximum. The contracting officer should establish a reasonable maximum quantity based on market research, trends on recent contracts for similar supplies or services, survey of potential users, or any other rational basis.

(2) To ensure that the contract is binding, the minimum quantity must be more than a nominal quantity, but it should not exceed the amount that the Government is fairly certain to order.

(3) The contract may also specify maximum or minimum quantities that the Government may order under each task or delivery order and the maximum that it may order during a specific period of time.

(4) A solicitation and contract for an indefinite quantity must—

(i) Specify the period of the contract, including the number of options and the period for which the Government may extend the contract under each option;

(ii) Specify the total minimum and maximum quantity of supplies or services the Government will acquire under the contract;

(iii) Include a statement of work, specifications, or other description, that reasonably describes the general scope, nature, complexity, and purpose of the supplies or services the Government will acquire under the contract in a manner that will enable a prospective offeror to decide whether to submit an offer;



(iv) State the procedures that the Government will use in issuing orders, including the ordering media, and, if multiple awards may be made, state the procedures and selection criteria that the Government will use to provide awardees a fair opportunity to be considered for each order (see 16.505(b)(1));

(v) Include a description of the activities authorized to issue orders; and

(vi) Include authorization for placing oral orders, if appropriate, provided that the Government has established procedures for obligating funds and that oral orders are confirmed in writing.

(b) *Application.* Contracting officers may use an indefinite-quantity contract when the Government cannot predetermine, above a specified minimum, the precise quantities of supplies or services that the Government will require during the contract period, and it is inadvisable for the Government to commit itself for more than a minimum quantity. The contracting officer should use an indefinite-quantity contract only when a recurring need is anticipated.

(c) *Multiple award preference—(1) Planning the acquisition.* (i) Except for indefinite-quantity contracts for advisory and assistance services as provided in paragraph (c)(2) of this section, the contracting officer must, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources.

(ii)(A) The contracting officer must determine whether multiple awards are appropriate as part of acquisition planning. The contracting officer must avoid situations in which awardees specialize exclusively in one or a few areas within the statement of work, thus creating the likelihood that orders in those areas will be awarded on a sole-source basis; however, each awardee need not be capable of performing every requirement as well as any other awardee under the contracts. The contracting officer should consider the following when determining the number of contracts to be awarded:

(1) The scope and complexity of the contract requirement.

(2) The expected duration and frequency of task or delivery orders.

(3) The mix of resources a contractor must have to perform expected task or delivery order requirements.

(4) The ability to maintain competition among the awardees throughout the contracts' period of performance.

(B) The contracting officer must not use the multiple award approach if—

(1) Only one contractor is capable of providing performance at the level of quality required because the supplies or services are unique or highly specialized;

(2) Based on the contracting officer's knowledge of the market, more favorable terms and conditions, including pricing, will be provided if a single award is made;

(3) The expected cost of administration of multiple contracts outweighs the expected benefits of making multiple awards;

(4) The projected orders are so integrally related that only a single contractor can reasonably perform the work;

(5) The total estimated value of the contract is at or below the simplified acquisition threshold; or

(6) Multiple awards would not be in the best interests of the Government.

(C) The contracting officer must document the decision whether or not to use multiple awards in the acquisition plan or contract file. The contracting officer may determine that a class of acquisitions is not appropriate for multiple awards (see subpart 1.7).

(D)(1) No task or delivery order contract in an amount estimated to exceed \$100 million (including all options) may be awarded to a single source unless the head of the agency determines in writing that—

(i) The task or delivery orders expected under the contract are so integrally related that only a single source can reasonably perform the work;

(ii) The contract provides only for firm-fixed price (see 16.202) task or delivery orders for —

(A) Products for which unit prices are established in the contract; or

(B) Services for which prices are established in the contract for the specific tasks to be performed;

(iii) Only one source is qualified and capable of performing the work at a reasonable price to the Government; or

(iv) It is necessary in the public interest to award the contract to a single source due to exceptional circumstances.

(2) The head of the agency must notify Congress within 30 days after any determination under paragraph (c)(1)(ii)(D)(1)(iv) of this section.

(3) The requirement for a determination for a single-award contract greater than \$100 million—

(i) Is in addition to any applicable requirements of Subpart 6.3; and

(ii) Is not applicable for architect-engineer services awarded pursuant to Subpart 36.6.

(2) *Contracts for advisory and assistance services.* (i) Except as provided in paragraph (c)(2)(ii) of this section, if an indefinite-quantity contract for advisory and assistance services exceeds 3 years and \$15 million, including all options, the contracting officer must make multiple awards unless—

(A) The contracting officer or other official designated by the head of the agency determines in writing, as part of acquisition planning, that multiple awards are not practicable. The contracting officer or other official must determine that only one contractor can

reasonably perform the work because either the scope of work is unique or highly specialized or the tasks so integrally related;

(B) The contracting officer or other official designated by the head of the agency determines in writing, after the evaluation of offers, that only one offeror is capable of providing the services required at the level of quality required; or

(C) Only one offer is received.

(ii) The requirements of paragraph (c)(2)(i) of this section do not apply if the contracting officer or other official designated by the head of the agency determines that the advisory and assistance services are incidental and not a significant component of the contract.

[65 FR 24318, Apr. 25, 2000, as amended at 71 FR 57367, Sept. 28, 2006; 73 FR 54010, Sept. 17, 2008; 75 FR 13421, Mar. 19, 2010; 75 FR 53133, Aug. 30, 2010; 78 FR 13767, Feb. 28, 2013; 80 FR 38297, July 2, 2015; 84 FR 38838, Aug. 7, 2019; 85 FR 40071, July 2, 2020; 85 FR 62488, Oct. 2, 2020]

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## **16.505 Ordering.**

(a) *General.* (1) In general, the contracting officer does not synopsise orders under indefinite-delivery contracts; except see 16.505(a)(4) and (11), and 16.505(b)(2)(ii)(D).

(2) Individual orders shall clearly describe all services to be performed or supplies to be delivered so the full cost or price for the performance of the work can be established when the order is placed. Orders shall be within the scope, issued within the period of performance, and be within the maximum value of the contract.

(3) Performance-based acquisition methods must be used to the maximum extent practicable, if the contract or order is for services (see 37.102(a) and subpart 37.6).

(4) The following requirements apply when procuring items peculiar to one manufacturer:

(i) The contracting officer must justify restricting consideration to an item peculiar to one manufacturer (e.g., a particular brand-name, product, or a feature of a product that is peculiar to one manufacturer). A brand-name item, even if available on more than one contract, is an item peculiar to one manufacturer. Brand-name specifications shall not be used unless the particular brand-name, product, or feature is essential to the Government's requirements and market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or cannot be modified to meet, the agency's needs.

(ii) Requirements for use of items peculiar to one manufacturer shall be justified and approved using the format(s) and requirements from paragraphs (b)(2)(ii)(A), (B), and (C) of this section, modified to show the brand-name justification. A justification is required unless a justification covering the requirements in the order was previously approved for the contract in accordance with 6.302-1(c) or unless the base contract is a single-award contract awarded under full and open competition. Justifications for the use of brand-name specifications must be completed and approved at the time the requirement for a brand-name is determined.

(iii)(A) For an order in excess of \$30,000, the contracting officer shall—

(1) Post the justification and supporting documentation on the agency Web site used (if any) to solicit offers for orders under the contract; or

(2) Provide the justification and supporting documentation along with the solicitation to all contract awardees.

(B) The justifications for brand-name acquisitions may apply to the portion of the acquisition requiring the brand-name item. If the justification is to cover only the portion of the acquisition which is brand-name, then it should so state; the approval level requirements will then only apply to that portion.

(C) The requirements in paragraph (a)(4)(iii)(A) of this section do not apply when disclosure would compromise the national security (e.g., would result in disclosure of classified information) or create other security risks.

(D) The justification is subject to the screening requirement in paragraph (b)(2)(ii)(D)(4) of this section.

(5) When acquiring information technology and related services, consider the use of modular contracting to reduce program risk (see 39.103(a)).

(6) Orders may be placed by using any medium specified in the contract.

(7) Orders placed under indefinite-delivery contracts must contain the following information:

(i) Date of order.

(ii) Contract number and order number.

(iii) For supplies and services, line item number, subline item number (if applicable), description, quantity, and unit price or estimated cost and fee (as applicable). The corresponding line item number and subline item number from the base contract shall also be included.

(iv) Delivery or performance schedule.

(v) Place of delivery or performance (including consignee).

(vi) Any packaging, packing, and shipping instructions.

(vii) Accounting and appropriation data.

(viii) Method of payment and payment office, if not specified in the contract (see 32.1110(e)).

(ix) North American Industry Classification System code (see 19.102(b)(3)).

(8) Orders placed under a task-order contract or delivery-order contract awarded by another agency (i.e., a Governmentwide acquisition contract, or multi-agency contract)—

(i) Are not exempt from the development of acquisition plans (see subpart 7.1), and an information technology acquisition strategy (see part 39);

(ii) May not be used to circumvent conditions and limitations imposed on the use of funds (e.g., 31 U.S.C. 1501(a)(1)); and

(iii) Shall comply with all FAR requirements for a consolidated or bundled contract when the order meets the definition at 2.101(b) of "consolidation" or "bundling".

(9) In accordance with section 1427(b) of Public Law 108-136 (40 U.S.C. 1103 note), orders placed under multi-agency contracts for services that substantially or to a dominant extent specify performance of architect-engineer services, as defined in 2.101, shall—

(i) Be awarded using the procedures at subpart 36.6; and

(ii) Require the direct supervision of a professional architect or engineer licensed, registered or certified in the State, Federal District, or outlying area, in which the services are to be performed.

(10)(i) No protest under subpart 33.1 is authorized in connection with the issuance or proposed issuance of an order under a task-order contract or delivery-order contract, except—

(A) A protest on the grounds that the order increases the scope, period, or maximum value of the contract; or

(B)(1) For agencies other than DoD, NASA, and the Coast Guard, a protest of an order valued in excess of \$10 million (41 U.S.C. 4106(f)); or

(2) For DoD, NASA, or the Coast Guard, a protest of an order valued in excess of \$25 million (10 U.S.C. 2304c(e)).

(ii) Protests of orders in excess of the thresholds stated in 16.505(a)(10)(i)(B) may only be filed with the Government Accountability Office, in accordance with the procedures at 33.104.

(iii) For protests of small business size status for set-aside orders, see 19.302.

(11) Publicize orders funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) as follows:

(i) Notices of proposed orders shall follow the procedures in 5.704 for posting orders.

(ii) Award notices for orders shall follow the procedures in 5.705.

(12) When using the Governmentwide commercial purchase card as a method of payment, orders at or below the micro-purchase threshold are exempt from verification in the System for Award Management as to whether the contractor has a delinquent debt subject to collection under the Treasury Offset Program (TOP).

(b) *Orders under multiple-award contracts—(1) Fair opportunity.* (i) The contracting officer must provide each awardee a fair opportunity to be considered for each order exceeding \$3,500 issued under multiple delivery-order contracts or multiple task-order contracts, except—

(A) As provided for in paragraph (b)(2) of this section; or

(B) Orders issued under 19.504(c)(1)(ii).

(ii) The contracting officer may exercise broad discretion in developing appropriate order placement procedures. The contracting officer should keep submission requirements to a minimum. Contracting officers may use streamlined procedures, including oral presentations. If the order does not exceed the simplified acquisition threshold, the contracting officer need not contact each of the multiple awardees under the contract before selecting an order awardee if the contracting officer has information available to ensure that each awardee is provided a fair opportunity to be considered for each order. The competition requirements in part 6 and the policies in subpart 15.3 do not apply to the ordering process. However, the contracting officer shall—

(A) Develop placement procedures that will provide each awardee a fair opportunity to be considered for each order and that reflect the requirement and other aspects of the contracting environment;

(B) Not use any method (such as allocation or designation of any preferred awardee) that would not result in fair consideration being given to all awardees prior to placing each order;

(C) Tailor the procedures to each acquisition;

(D) Include the procedures in the solicitation and the contract;

(E) Consider price or cost under each order as one of the factors in the selection decision;

(F) Except for DoD, ensure the criteria at 15.101-2(c)(1)-(5) are met when using the lowest price technically acceptable source selection process; and

(G) Except for DoD, avoid using the lowest price technically acceptable source selection process to acquire certain supplies and services in accordance with 15.101-2(d).

(iii) *Orders exceeding the simplified acquisition threshold.* (A) Each order exceeding the simplified acquisition threshold shall be placed on a competitive basis in accordance with paragraph (b)(1)(iii)(B) of this section, unless supported by a written determination that one of the circumstances described at 16.505(b)(2)(i) applies to the order and the requirement is waived on the basis of a justification that is prepared in accordance with 16.505(b)(2)(ii)(B);

(B) The contracting officer shall—

(1) Provide a fair notice of the intent to make a purchase, including a clear description of the supplies to be delivered or the services to be performed and the basis upon which the selection will be made to all contractors offering the required supplies or services under the multiple-award contract; and

(2) Afford all contractors responding to the notice a fair opportunity to submit an offer and have that offer fairly considered.

(iv) *Orders exceeding \$6 million.* For task or delivery orders in excess of \$6 million, the requirement to provide all awardees a fair opportunity to be considered for each order shall include, at a minimum—

(A) A notice of the task or delivery order that includes a clear statement of the agency's requirements;

(B) A reasonable response period;

(C) Disclosure of the significant factors and subfactors, including cost or price, that the agency expects to consider in evaluating proposals, and their relative importance;

(D) Where award is made on a best value basis, a written statement documenting the basis for award and the relative importance of quality and price or cost factors; and

(E) An opportunity for a postaward debriefing in accordance with paragraph (b)(6) of this section.

(v) The contracting officer should consider the following when developing the procedures:

(A)(1) Past performance on earlier orders under the contract, including quality, timeliness and cost control.

(2) Potential impact on other orders placed with the contractor.

(3) Minimum order requirements.

(4) The amount of time contractors need to make informed business decisions on whether to respond to potential orders.

(5) Whether contractors could be encouraged to respond to potential orders by outreach efforts to promote exchanges of information, such as—

(i) Seeking comments from two or more contractors on draft statements of work; or

(ii) Using a multiphased approach when effort required to respond to a potential order may be resource intensive (e.g., requirements are complex or need continued development), where all contractors are initially considered on price considerations (e.g., rough estimates), and other considerations as appropriate (e.g., proposed conceptual approach, past performance). The contractors most likely to submit the highest value solutions are then selected for one-on-one sessions with the Government to increase their understanding of the requirements, provide suggestions for refining requirements, and discuss risk reduction measures.

(B) Formal evaluation plans or scoring of quotes or offers are not required.

(2) *Exceptions to the fair opportunity process.* (i) The contracting officer shall give every awardee a fair opportunity to be considered for a delivery-order or task-order exceeding \$3,500 unless one of the following statutory exceptions applies:

(A) The agency need for the supplies or services is so urgent that providing a fair opportunity would result in unacceptable delays.

(B) Only one awardee is capable of providing the supplies or services required at the level of quality required because the supplies or services ordered are unique or highly specialized.

(C) The order must be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to an order already issued under the contract, provided that all awardees were given a fair opportunity to be considered for the original order.

(D) It is necessary to place an order to satisfy a minimum guarantee.

(E) For orders exceeding the simplified acquisition threshold, a statute expressly authorizes or requires that the purchase be made from a specified source.

(F) In accordance with section 1331 of Public Law 111-240 (15 U.S.C. 644(r)), contracting officers may, at their discretion, set aside orders for any of the small business concerns identified in 19.000(a)(3). When setting aside orders for small business concerns, the specific small business program eligibility requirements identified in part 19 apply.

(G) For DoD, NASA, and the Coast Guard, the order satisfies one of the exceptions permitting the use of other than full and open competition listed in 6.302 (10 U.S.C. 2304c(b)(5)). The public interest exception shall not be used unless Congress is notified in accordance with 10 U.S.C. 2304(c)(7).

(ii) The justification for an exception to fair opportunity shall be in writing as specified in paragraph (b)(2)(ii)(A) or (B) of this section. No justification is needed for the exception described in paragraph (b)(2)(i)(F) of this section.

(A) *Orders exceeding \$3,500, but not exceeding the simplified acquisition threshold.* The contracting officer shall document the basis for using an exception to the fair opportunity process. If the contracting officer uses the logical follow-on exception, the rationale shall describe why the relationship between the initial order and the follow-on is logical (e.g., in terms of scope, period of performance, or value).

(B) *Orders exceeding the simplified acquisition threshold.* As a minimum, each justification shall include the following information and be approved in accordance with paragraph (b)(2)(ii)(C) of this section:

(1) Identification of the agency and the contracting activity, and specific identification of the document as a "Justification for an Exception to Fair Opportunity."

(2) Nature and/or description of the action being approved.

(3) A description of the supplies or services required to meet the agency's needs (including the estimated value).

(4) Identification of the exception to fair opportunity (see 16.505(b)(2)) and the supporting rationale, including a demonstration that the proposed contractor's unique qualifications or the nature of the acquisition requires use of the exception cited. If the



contracting officer uses the logical follow-on exception, the rationale shall describe why the relationship between the initial order and the follow-on is logical (e.g., in terms of scope, period of performance, or value).

(5) A determination by the contracting officer that the anticipated cost to the Government will be fair and reasonable.

(6) Any other facts supporting the justification.

(7) A statement of the actions, if any, the agency may take to remove or overcome any barriers that led to the exception to fair opportunity before any subsequent acquisition for the supplies or services is made.

(8) The contracting officer's certification that the justification is accurate and complete to the best of the contracting officer's knowledge and belief.

(9) Evidence that any supporting data that is the responsibility of technical or requirements personnel (e.g., verifying the Government's minimum needs or requirements or other rationale for an exception to fair opportunity) and which form a basis for the justification have been certified as complete and accurate by the technical or requirements personnel.

(10) A written determination by the approving official that one of the circumstances in paragraphs (b)(2)(i)(A) through (E) and (G) of this section applies to the order.

(C) *Approval.* (1) For proposed orders exceeding the simplified acquisition threshold, but not exceeding \$750,000, the ordering activity contracting officer's certification that the justification is accurate and complete to the best of the ordering activity contracting officer's knowledge and belief will serve as approval, unless a higher approval level is established in accordance with agency procedures.

(2) For a proposed order exceeding \$750,000, but not exceeding \$15 million, the justification must be approved by the advocate for competition of the activity placing the order, or by an official named in paragraph (b)(2)(ii)(C)(3) or (4) of this section. This authority is not delegable.

(3) For a proposed order exceeding \$15 million, but not exceeding \$75 million (or, for DoD, NASA, and the Coast Guard, not exceeding \$100 million), the justification must be approved by—

(i) The head of the procuring activity placing the order;

(ii) A designee who—

(A) If a member of the armed forces, is a general or flag officer;

(B) If a civilian, is serving in a position in a grade above GS-15 under the General Schedule (or in a comparable or higher position under another schedule); or

(iii) An official named in paragraph (b)(2)(ii)(C)(4) of this section.

(4) For a proposed order exceeding \$75 million (or, for DoD, NASA, and the Coast Guard, over \$100 million), the justification must be approved by the senior procurement

executive of the agency placing the order. This authority is not delegable, except in the case of the Under Secretary of Defense for Acquisition and Sustainment, acting as the senior procurement executive for the Department of Defense.

(D) *Posting.* (1) Except as provided in paragraph (b)(2)(ii)(D)(5) of this section, within 14 days after placing an order exceeding the simplified acquisition threshold that does not provide for fair opportunity in accordance with 16.505(b), the contract officer shall—

(i) Publish a notice in accordance with 5.301; and

(ii) Make publicly available the justification required at paragraph (b)(2)(ii)(B) of this section.

(2) The justification shall be made publicly available—

(i) At the GPE <https://www.fbo.gov>;

(ii) On the Web site of the agency, which may provide access to the justifications by linking to the GPE; and

(iii) Must remain posted for a minimum of 30 days.

(3) In the case of an order permitted under paragraph (b)(2)(i)(A) of this section, the justification shall be posted within 30 days after award of the order.

(4) Contracting officers shall carefully screen all justifications for contractor proprietary data and remove all such data, and such references and citations as are necessary to protect the proprietary data, before making the justifications available for public inspection. Contracting officers shall also be guided by the exemptions to disclosure of information contained in the Freedom of Information Act (5 U.S.C. 552) and the prohibitions against disclosure in 24.202 in determining whether other data should be removed. Although the submitter notice process set out in Executive Order 12600 “Predisclosure Notification Procedures for Confidential Commercial Information” does not apply, if the justification appears to contain proprietary data, the contracting officer should provide the contractor that submitted the information an opportunity to review the justification for proprietary data before making the justification available for public inspection, redacted as necessary. This process must not prevent or delay the posting of the justification in accordance with the timeframes required in (paragraphs (b)(2)(ii)(D)(1) and (3) of this section).

(5) The posting requirement of this section does not apply—

(i) When disclosure would compromise the national security (e.g., would result in disclosure of classified information) or create other security risks; or

(ii) To a small business set-aside under paragraph (b)(2)(i)(F) of this section.

(3) *Pricing orders.* If the contract did not establish the price for the supply or service, the contracting officer must establish prices for each order using the policies and methods in subpart 15.4.

(4) *Cost reimbursement orders.* For additional requirements for cost-reimbursement orders, see 16.301-3.

(5) *Time-and-materials or labor-hour orders.* For additional requirements for time-and-materials or labor-hour orders, see 16.601(e).

(6) *Postaward notices and debriefing of awardees for orders exceeding \$6 million.* The contracting officer shall notify unsuccessful awardees when the total price of a task or delivery order exceeds \$6 million.

(i) The procedures at 15.503(b)(1) shall be followed when providing postaward notification to unsuccessful awardees.

(ii) The procedures at 15.506 shall be followed when providing postaward debriefing to unsuccessful awardees.

(iii) A summary of the debriefing shall be included in the task or delivery order file.

(7) *Decision documentation for orders.* (i) The contracting officer shall document in the contract file the rationale for placement and price of each order, including the basis for award and the rationale for any tradeoffs among cost or price and non-cost considerations in making the award decision. This documentation need not quantify the tradeoffs that led to the decision.

(ii) The contract file shall also identify the basis for using an exception to the fair opportunity process (see paragraph (b)(2) of this section).

(iii) Except for DoD, the contracting officer shall document in the contract file a justification for use of the lowest price technically acceptable source selection process, when applicable.

(8) *Task-order and delivery-order ombudsman.* The head of the agency shall designate a task-order and delivery-order ombudsman. The ombudsman must review complaints from contractors and ensure they are afforded a fair opportunity to be considered, consistent with the procedures in the contract. The ombudsman must be a senior agency official who is independent of the contracting officer and may be the agency's advocate for competition.

(9) *Small business.* The contracting officer should rely on the small business representations at the contract level (but see section 19.301-2(b)(2) for order rerepresentations).

(c) *Limitation on ordering period for task-order contracts for advisory and assistance services.* (1) Except as provided for in paragraphs (c)(2) and (3) of this section, the ordering period of a task-order contract for advisory and assistance services, including all options or modifications, normally may not exceed 5 years.

(2) The 5-year limitation does not apply when—

(i) A longer ordering period is specifically authorized by a statute; or

(ii) The contract is for an acquisition of supplies or services that includes the acquisition of advisory and assistance services and the contracting officer, or other official designated by the head of the agency, determines that the advisory and assistance services are incidental and not a significant component of the contract.

(3) The contracting officer may extend the contract on a sole-source basis only once for a period not to exceed 6 months if the contracting officer, or other official designated by the head of the agency, determines that—

(i) The award of a follow-on contract is delayed by circumstances that were not reasonably foreseeable at the time the initial contract was entered into; and

(ii) The extension is necessary to ensure continuity of services, pending the award of the follow-on contract.

[65 FR 24319, Apr. 25, 2000]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting section 16.505, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at [www.govinfo.gov](http://www.govinfo.gov).

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#### **16.506 Solicitation provisions and contract clauses.**

(a) Insert the clause at 52.216-18, Ordering, in solicitations and contracts when a definite-quantity contract, a requirements contract, or an indefinite-quantity contract is contemplated.

(b) Insert a clause substantially the same as the clause at 52.216-19, Order Limitations, in solicitations and contracts when a definite-quantity contract, a requirements contract, or an indefinite-quantity contract is contemplated.

(c) Insert the clause at 52.216-20, Definite Quantity, in solicitations and contracts when a definite-quantity contract is contemplated.

(d)(1) Insert the clause at 52.216-21, Requirements, in solicitations and contracts when a requirements contract is contemplated.

(2) If the contract is for nonpersonal services and related supplies and covers estimated requirements that exceed a specific Government activity's internal capability to produce or perform, use the clause with its *Alternate I*.

(3) If the contract includes subsistence for both Government use and resale in the same Schedule, and similar products may be acquired on a brand-name basis, use the clause with its *Alternate II* (but see paragraph (d)(5) of this section).

(4) If the contract involves a partial small business set-aside, use the clause with its *Alternate III* (but see subparagraph (5) below).

(5) If the contract—

(i) Includes subsistence for Government use and resale in the same schedule and similar products may be acquired on a brand-name basis; and

(ii) Involves a partial small business set-aside, use the clause with its *Alternate IV*.

(e) Insert the clause at 52.216-22, Indefinite Quantity, in solicitations and contracts when an indefinite-quantity contract is contemplated.

(f) Insert the provision at 52.216-27, Single or Multiple Awards, in solicitations for indefinite-quantity contracts that may result in multiple contract awards. Modify the provision to specify the estimated number of awards. Do not use this provision for advisory and assistance services contracts that exceed 3 years and \$15 million (including all options).

(g) Insert the provision at 52.216-28, Multiple Awards for Advisory and Assistance Services, in solicitations for task-order contracts for advisory and assistance services that exceed 3 years and \$15 million (including all options), unless a determination has been made under 16.504(c)(2)(i)(A). Modify the provision to specify the estimated number of awards.

(h) See 10.001(d) for insertion of the clause at 52.210-1, Market Research, when the contract is over \$6 million for the procurement of items other than commercial items.

(i) See 7.107-6 for use of 52.207-6, Solicitation of Offers from Small Business Concerns and Small Business Teaming Arrangement or Joint Ventures (Multiple-Award Contracts) in solicitations for multiple-award contracts above the substantial bundling threshold of the agency.

(j) Insert the clause at 52.216-32, Task-Order and Delivery-Order Ombudsman, in solicitations and contracts when a multiple-award indefinite-delivery indefinite-quantity contract is contemplated. Use the clause with its Alternate I when the contract will be available for use by multiple agencies (e.g., Governmentwide acquisition contracts or multi-agency contracts). When placing orders under the multiple-award contract available for use by multiple agencies, the ordering activity's contracting officer shall complete paragraph (d) (2) and include Alternate I in the notice of intent to place an order, and in the resulting order.

[48 FR 42219, Sept. 19, 1983; 60 FR 48260, Sept. 18, 1995. Redesignated and amended at 60 FR 49726, 49727, Sept. 26, 1995; 65 FR 24320, Apr. 25, 2000; 71 FR 57367, Sept. 28, 2006; 75 FR 53133, Aug. 30, 2010; 76 FR 14565, Mar. 16, 2011; 80 FR 38298, July 2, 2015; 81 FR 67772, Sept. 30, 2016; 84 FR 38838, Aug. 7, 2019; 85 FR 62489, Oct. 2, 2020]

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**ELECTRONIC CODE OF FEDERAL REGULATIONS****e-CFR data is current as of April 5, 2021**

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Title 48: Federal Acquisition Regulations System

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**PART 33—PROTESTS, DISPUTES, AND APPEALS**

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AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.[↑ Back to Top](#)

### **33.000 Scope of part.**

This part prescribes policies and procedures for filing protests and for processing contract disputes and appeals.

[50 FR 2270, Jan. 15, 1985]

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### **33.001 General.**

There are other Federal court-related protest authorities and dispute-appeal authorities that are not covered by this part of the FAR, e.g., 28 U.S.C. 1491 for Court of Federal Claims jurisdiction. Contracting officers should contact their designated legal advisor for additional information whenever they become aware of any litigation related to their contracts.

[77 FR 56743, Sept. 13, 2012]

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## **Subpart 33.1—Protests**

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### **33.101 Definitions.**

As used in this subpart—

*Day* means a calendar day, unless otherwise specified. In the computation of any period—

(1) The day of the act, event, or default from which the designated period of time begins to run is not included; and

(2) The last day after the act, event, or default is included unless—

(i) The last day is a Saturday, Sunday, or Federal holiday; or

(ii) In the case of a filing of a paper at any appropriate administrative forum, the last day is a day on which weather or other conditions cause the closing of the forum for all or part of the day, in which event the next day on which the appropriate administrative forum is open is included.

*Filed* means the complete receipt of any document by an agency before its close of business. Documents received after close of business are considered filed as of the next day. Unless otherwise stated, the agency close of business is presumed to be 4:30 p.m., local time.



*Interested Party for the purpose of filing a protest* means an actual or prospective offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract.

*Protest* means a written objection by an interested party to any of the following:

- (1) A solicitation or other request by an agency for offers for a contract for the procurement of property or services.
- (2) The cancellation of the solicitation or other request.
- (3) An award or proposed award of the contract.
- (4) A termination or cancellation of an award of the contract, if the written objection contains an allegation that the termination or cancellation is based in whole or in part on improprieties concerning the award of the contract.

*Protest venue* means protests filed with the agency, the Government Accountability Office, or the U.S. Court of Federal Claims. U.S. District Courts do not have any bid protest jurisdiction.

[50 FR 2270, Jan. 15, 1985, as amended at 53 FR 43391, Oct. 26, 1988; 54 FR 19827, May 8, 1989; 60 FR 48225, Sept. 18, 1995; 62 FR 64933, Dec. 9, 1997; 66 FR 2132, Jan. 10, 2001; 77 FR 56743, Sept. 13, 2012]

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### **33.102 General.**

(a) Without regard to the protest venue, contracting officers shall consider all protests and seek legal advice, whether protests are submitted before or after award and whether filed directly with the agency, the Government Accountability Office (GAO), or the U.S. Court of Federal Claims. (See 19.302 for protests of small business status, 19.305 for protests of disadvantaged business status, 19.306 for protests of HUBZone small business status, and 19.307 for protests of service-disabled veteran-owned small business status, and 19.308 for protests of the status of an economically disadvantaged women-owned small business concern or of a women-owned small business concern eligible under the Women-Owned Small Business Program.)

(b) If, in connection with a protest, the head of an agency determines that a solicitation, proposed award, or award does not comply with the requirements of law or regulation, the head of the agency may—

- (1) Take any action that could have been recommended by the Comptroller General had the protest been filed with the Government Accountability Office;
- (2) Pay appropriate costs as stated in 33.104(h);

(3) Require the awardee to reimburse the Government's costs, as provided in this paragraph, where a postaward protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification. In addition to any other remedy available, and pursuant to the requirements of Subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

(i) When a protest is sustained by GAO under circumstances that may allow the Government to seek reimbursement for protest costs, the contracting officer will determine whether the protest was sustained based on the awardee's negligent or intentional misrepresentation. If the protest was sustained on several issues, protest costs shall be apportioned according to the costs attributable to the awardee's actions.

(ii) The contracting officer shall review the amount of the debt, degree of the awardee's fault, and costs of collection, to determine whether a demand for reimbursement ought to be made. If it is in the best interests of the Government to seek reimbursement, the contracting officer shall notify the contractor in writing of the nature and amount of the debt, and the intention to collect by offset if necessary. Prior to issuing a final decision, the contracting officer shall afford the contractor an opportunity to inspect and copy agency records pertaining to the debt to the extent permitted by statute and regulation, and to request review of the matter by the head of the contracting activity.

(iii) When appropriate, the contracting officer shall also refer the matter to the agency debarment official for consideration under Subpart 9.4.

(c) In accordance with 31 U.S.C. 1558, with respect to any protest filed with the GAO, if the funds available to the agency for a contract at the time a protest is filed in connection with a solicitation for, proposed award of, or award of such a contract would otherwise expire, such funds shall remain available for obligation for 100 days after the date on which the final ruling is made on the protest. A ruling is considered final on the date on which the time allowed for filing an appeal or request for reconsideration has expired, or the date on which a decision is rendered on such appeal or request, whichever is later.

(d) *Protest likely after award.* The contracting officer may stay performance of a contract within the time period contained in 33.104(c)(1) if the contracting officer makes a written determination that—

(1) A protest is likely to be filed; and

(2) Delay of performance is, under the circumstances, in the best interests of the United States.

(e) An interested party wishing to protest is encouraged to seek resolution within the agency (see 33.103) before filing a protest with the GAO, but may protest to the GAO in accordance with GAO regulations (4 CFR part 21).

(f) No person may file a protest at GAO for a procurement integrity violation unless that person reported to the contracting officer the information constituting evidence of the violation within 14 days after the person first discovered the possible violation (41 U.S.C. 2106).

[50 FR 2270, Jan. 15, 1985]

EDITORIAL NOTE: For FEDERAL REGISTER citations affecting §33.102, see the List of CFR Sections Affected, which appears in the Finding Aids section of the printed volume and at [www.govinfo.gov](http://www.govinfo.gov).

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### **33.103 Protests to the agency.**

(a) *Reference.* Executive Order 12979, Agency Procurement Protests, establishes policy on agency procurement protests.

(b) Prior to submission of an agency protest, all parties shall use their best efforts to resolve concerns raised by an interested party at the contracting officer level through open and frank discussions.

(c) The agency should provide for inexpensive, informal, procedurally simple, and expeditious resolution of protests. Where appropriate, the use of alternative dispute resolution techniques, third party neutrals, and another agency's personnel are acceptable protest resolution methods.

(d) The following procedures are established to resolve agency protests effectively, to build confidence in the Government's acquisition system, and to reduce protests outside of the agency:

(1) Protests shall be concise and logically presented to facilitate review by the agency. Failure to substantially comply with any of the requirements of paragraph (d)(2) of this section may be grounds for dismissal of the protest.

(2) Protests shall include the following information:

(i) Name, address, and fax and telephone numbers of the protester.

(ii) Solicitation or contract number.

(iii) Detailed statement of the legal and factual grounds for the protest, to include a description of resulting prejudice to the protester.

(iv) Copies of relevant documents.

(v) Request for a ruling by the agency.

(vi) Statement as to the form of relief requested.

(vii) All information establishing that the protester is an interested party for the purpose of filing a protest.

(viii) All information establishing the timeliness of the protest.

(3) All protests filed directly with the agency will be addressed to the contracting officer or other official designated to receive protests.

(4) In accordance with agency procedures, interested parties may request an independent review of their protest at a level above the contracting officer; solicitations should advise potential bidders and offerors that this review is available. Agency procedures and/or solicitations shall notify potential bidders and offerors whether this independent review is available as an alternative to consideration by the contracting officer of a protest or is available as an appeal of a contracting officer decision on a protest. Agencies shall designate the official(s) who are to conduct this independent review, but the official(s) need not be within the contracting officer's supervisory chain. When practicable, officials designated to conduct the independent review should not have had previous personal involvement in the procurement. If there is an agency appellate review of the contracting officer's decision on the protest, it will not extend GAO's timeliness requirements. Therefore, any subsequent protest to the GAO must be filed within 10 days of knowledge of initial adverse agency action (4 CFR 21.2(a)(3)).

(e) Protests based on alleged apparent improprieties in a solicitation shall be filed before bid opening or the closing date for receipt of proposals. In all other cases, protests shall be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier. The agency, for good cause shown, or where it determines that a protest raises issues significant to the agency's acquisition system, may consider the merits of any protest which is not timely filed.

(f) *Action upon receipt of protest.* (1) Upon receipt of a protest before award, a contract may not be awarded, pending agency resolution of the protest, unless contract award is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures.

(2) If award is withheld pending agency resolution of the protest, the contracting officer will inform the offerors whose offers might become eligible for award of the contract. If appropriate, the offerors should be requested, before expiration of the time for acceptance of their offers, to extend the time for acceptance to avoid the need for resolicitation. In the event of failure to obtain such extension of offers, consideration should be given to proceeding with award pursuant to paragraph (f)(1) of this section.

(3) Upon receipt of a protest within 10 days after contract award or within 5 days after a debriefing date offered to the protester under a timely debriefing request in accordance with 15.505 or 15.506, whichever is later, the contracting officer shall immediately suspend performance, pending resolution of the protest within the agency,

including any review by an independent higher level official, unless continued performance is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved at a level above the contracting officer, or by another official pursuant to agency procedures.

(4) Pursuing an agency protest does not extend the time for obtaining a stay at GAO. Agencies may include, as part of the agency protest process, a voluntary suspension period when agency protests are denied and the protester subsequently files at GAO.

(g) Agencies shall make their best efforts to resolve agency protests within 35 days after the protest is filed. To the extent permitted by law and regulation, the parties may exchange relevant information.

(h) Agency protest decisions shall be well-reasoned, and explain the agency position. The protest decision shall be provided to the protester using a method that provides evidence of receipt.

[61 FR 39219, July 29, 1996, as amended at 61 FR 69289, Dec. 31, 1996; 62 FR 270, Jan. 2, 1997; 62 FR 10710, Mar. 10, 1997; 62 FR 51271, Sept. 30, 1997]

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### **33.104 Protests to GAO.**

Procedures for protests to GAO are found at 4 CFR Part 21 (GAO Bid Protest Regulations). In the event guidance concerning GAO procedure in this section conflicts with 4 CFR part 21, 4 CFR part 21 governs.

(a) *General procedures.* (1) A protester is required to furnish a copy of its complete protest to the official and location designated in the solicitation or, in the absence of such a designation, to the contracting officer, so it is received no later than 1 day after the protest is filed with the GAO. The GAO may dismiss the protest if the protester fails to furnish a complete copy of the protest within 1 day.

(2) Immediately after receipt of the GAO's written notice that a protest has been filed, the agency shall give notice of the protest to the contractor if the award has been made, or, if no award has been made, to all parties who appear to have a reasonable prospect of receiving award if the protest is denied. The agency shall furnish copies of the protest submissions to such parties with instructions to (i) communicate directly with the GAO, and (ii) provide copies of any such communication to the agency and to other participating parties when they become known. However, if the protester has identified sensitive information and requests a protective order, then the contracting officer shall obtain a redacted version from the protester to furnish to other interested parties, if one has not already been provided.

(3)(i) Upon notice that a protest has been filed with the GAO, the contracting officer shall immediately begin compiling the information necessary for a report to the GAO. The

agency shall submit a complete report to the GAO within 30 days after the GAO notifies the agency by telephone that a protest has been filed, or within 20 days after receipt from the GAO of a determination to use the express option, unless the GAO—

(A) Advises the agency that the protest has been dismissed; or

(B) Authorizes a longer period in response to an agency's request for an extension. Any new date is documented in the agency's file.

(ii) When a protest is filed with the GAO, and an actual or prospective offeror so requests, the procuring agency shall, in accordance with any applicable protective orders, provide actual or prospective offerors reasonable access to the protest file. However, if the GAO dismisses the protest before the documents are submitted to the GAO, then no protest file need be made available. Information exempt from disclosure under 5 U.S.C. 552 may be redacted from the protest file. The protest file shall be made available to non-intervening actual or prospective offerors within a reasonable time after submittal of an agency report to the GAO. The protest file shall include an index and as appropriate—

(A) The protest;

(B) The offer submitted by the protester;

(C) The offer being considered for award or being protested;

(D) All relevant evaluation documents;

(E) The solicitation, including the specifications or portions relevant to the protest;

(F) The abstract of offers or relevant portions; and

(G) Any other documents that the agency determines are relevant to the protest, including documents specifically requested by the protester.

(iii) At least 5 days prior to the filing of the report, in cases in which the protester has filed a request for specific documents, the agency shall provide to all parties and the GAO a list of those documents, or portions of documents, that the agency has released to the protester or intends to produce in its report, and those documents that the agency intends to withhold from the protester and the reasons for the proposed withholding. Any objection to the scope of the agency's proposed disclosure or nondisclosure of the documents must be filed with the GAO and the other parties within 2 days after receipt of this list.

(iv) The agency report to the GAO shall include—

(A) A copy of the documents described in 33.104(a)(3)(ii);

(B) The contracting officer's signed statement of relevant facts, including a best estimate of the contract value and a memorandum of law. The contracting officer's



estimate of the contract value; and a memorandum of law. The contracting officer's statement shall set forth findings, actions, and recommendations, and any additional evidence or information not provided in the protest file that may be necessary to determine the merits of the protest; and

(C) A list of parties being provided the documents.

(4)(i) At the same time the agency submits its report to the GAO, the agency shall furnish copies of its report to the protester and any intervenors. A party shall receive all relevant documents, except—

(A) Those that the agency has decided to withhold from that party for any reason, including those covered by a protective order issued by the GAO. Documents covered by a protective order shall be released only in accordance with the terms of the order. Examples of documents the agency may decide to exclude from a copy of the report include documents previously furnished to or prepared by a party; classified information; and information that would give the party a competitive advantage; and

(B) Protester's documents which the agency determines, pursuant to law or regulation, to withhold from any interested party.

(ii)(A) If the protester requests additional documents within 2 days after the protester knew the existence or relevance of additional documents, or should have known, the agency shall provide the requested documents to the GAO within 2 days of receipt of the request.

(B) The additional documents shall also be provided to the protester and other interested parties within this 2-day period unless the agency has decided to withhold them for any reason (see subdivision (a)(4)(i) of this section). This includes any documents covered by a protective order issued by the GAO. Documents covered by a protective order shall be provided only in accordance with the terms of the order.

(C) The agency shall notify the GAO of any documents withheld from the protester and other interested parties and shall state the reasons for withholding them.

(5) The GAO may issue protective orders which establish terms, conditions, and restrictions for the provision of any document to an interested party. Protective orders prohibit or restrict the disclosure by the party of procurement sensitive information, trade secrets or other proprietary or confidential research, development or commercial information that is contained in such document. Protective orders do not authorize withholding any documents or information from the United States Congress or an executive agency.

(i) *Requests for protective orders.* Any party seeking issuance of a protective order shall file its request with the GAO as soon as practicable after the protest is filed, with copies furnished simultaneously to all parties.

(ii) *Exclusions and rebuttals.* Within 2 days after receipt of a copy of the protective order request, any party may file with the GAO a request that particular documents be



excluded from the coverage of the protective order, or that particular parties or individuals be included in or excluded from the protective order. Copies of the request shall be furnished simultaneously to all parties.

(iii) *Additional documents.* If the existence or relevance of additional documents first becomes evident after a protective order has been issued, any party may request that these additional documents be covered by the protective order. Any party to the protective order also may request that individuals not already covered by the protective order be included in the order. Requests shall be filed with the GAO, with copies furnished simultaneously to all parties.

(iv) *Sanctions and remedies.* The GAO may impose appropriate sanctions for any violation of the terms of the protective order. Improper disclosure of protected information will entitle the aggrieved party to all appropriate remedies under law or equity. The GAO may also take appropriate action against an agency which fails to provide documents designated in a protective order.

(6) The protester and other interested parties are required to furnish a copy of any comments on the agency report directly to the GAO within 10 days, or 5 days if express option is used, after receipt of the report, with copies provided to the contracting officer and to other participating interested parties. If a hearing is held, these comments are due within 5 days after the hearing.

(7) Agencies shall furnish the GAO with the name, title, and telephone number of one or more officials (in both field and headquarters offices, if desired) whom the GAO may contact who are knowledgeable about the subject matter of the protest. Each agency shall be responsible for promptly advising the GAO of any change in the designated officials.

(b) *Protests before award.* (1) When the agency has received notice from the GAO of a protest filed directly with the GAO, a contract may not be awarded unless authorized, in accordance with agency procedures, by the head of the contracting activity, on a nondelegable basis, upon a written finding that—

(i) Urgent and compelling circumstances which significantly affect the interest of the United States will not permit awaiting the decision of the GAO; and

(ii) Award is likely to occur within 30 days of the written finding.

(2) A contract award shall not be authorized until the agency has notified the GAO of the finding in subparagraph (b)(1) of this section.

(3) When a protest against the making of an award is received and award will be withheld pending disposition of the protest, the contracting officer should inform the offerors whose offers might become eligible for award of the protest. If appropriate, those offerors should be requested, before expiration of the time for acceptance of their offer, to extend the time for acceptance to avoid the need for resolicitation. In the event of failure

to obtain such extensions of offers, consideration should be given to proceeding under subparagraph (b)(1) of this section.

(c) *Protests after award.* (1) When the agency receives notice of a protest from the GAO within 10 days after contract award or within 5 days after a debriefing date offered to the protester for any debriefing that is required by 15.505 or 15.506, whichever is later, the contracting officer shall immediately suspend performance or terminate the awarded contract, except as provided in paragraphs (c) (2) and (3) of this section.

(2) In accordance with agency procedures, the head of the contracting activity may, on a nondelegable basis, authorize contract performance, notwithstanding the protest, upon a written finding that—

(i) Contract performance will be in the best interests of the United States; or

(ii) Urgent and compelling circumstances that significantly affect the interests of the United States will not permit waiting for the GAO's decision.

(3) Contract performance shall not be authorized until the agency has notified the GAO of the finding in subparagraph (c)(2) of this section.

(4) When it is decided to suspend performance or terminate the awarded contract, the contracting officer should attempt to negotiate a mutual agreement on a no-cost basis.

(5) When the agency receives notice of a protest filed with the GAO after the dates contained in subparagraph (c)(1), the contracting officer need not suspend contract performance or terminate the awarded contract unless the contracting officer believes that an award may be invalidated and a delay in receiving the supplies or services is not prejudicial to the Government's interest.

(d) *Findings and notice.* If the decision is to proceed with contract award, or continue contract performance under paragraphs (b) or (c) of this section, the contracting officer shall include the written findings or other required documentation in the file. The contracting officer also shall give written notice of the decision to the protester and other interested parties.

(e) *Hearings.* The GAO may hold a hearing at the request of the agency, a protester, or other interested party who has responded to the notice in paragraph (a)(2) of this section. A recording or transcription of the hearing will normally be made, and copies may be obtained from the GAO. All parties may file comments on the hearing and the agency report within 5 days of the hearing.

(f) *GAO decision time.* GAO issues its recommendation on a protest within 100 days from the date of filing of the protest with the GAO, or within 65 days under the express option. The GAO attempts to issue its recommendation on an amended protest that adds a new ground of protest within the time limit of the initial protest. If an amended protest

cannot be resolved within the initial time limit, the GAO may resolve the amended protest through an express option.

(g) *Notice to GAO.* If the agency has not fully implemented the GAO recommendations with respect to a solicitation for a contract or an award or a proposed award of a contract within 60 days of receiving the GAO recommendations, the head of the contracting activity responsible for that contract shall report the failure to the GAO not later than 5 days after the expiration of the 60-day period. The report shall explain the reasons why the GAO's recommendation, exclusive of costs, has not been followed by the agency.

(h) *Award of costs.* (1) If the GAO determines that a solicitation for a contract, a proposed award, or an award of a contract does not comply with a statute or regulation, the GAO may recommend that the agency pay to an appropriate protester the cost, exclusive of profit, of filing and pursuing the protest, including reasonable attorney, consultant, and expert witness fees, and bid and proposal preparation costs. The agency shall use funds available for the procurement to pay the costs awarded.

(2) The protester shall file its claim for costs with the contracting agency within 60 days after receipt of the GAO's recommendation that the agency pay the protester its costs. Failure to file the claim within that time may result in forfeiture of the protester's right to recover its costs.

(3) The agency shall attempt to reach an agreement on the amount of costs to be paid. If the agency and the protester are unable to agree on the amount to be paid, the GAO may, upon request of the protester, recommend to the agency the amount of costs that the agency should pay.

(4) Within 60 days after the GAO recommends the amount of costs the agency should pay the protester, the agency shall notify the GAO of the action taken by the agency in response to the recommendation.

(5) No agency shall pay a party, other than a small business concern within the meaning of section 3(a) of the Small Business Act (see 2.101, "Small business concern"), costs under paragraph (h)(2) of this section—

(i) For consultant and expert witness fees that exceed the highest rate of compensation for expert witnesses paid by the Government pursuant to 5 U.S.C. 3109 and 5 CFR 304.105; or

(ii) For attorney's fees that exceed \$150 per hour, unless the agency determines, based on the recommendation of the Comptroller General on a case-by-case basis, that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee. The cap placed on attorneys' fees for businesses, other than small businesses, constitutes a benchmark as to a "reasonable" level for attorney's fees for small businesses.

(6) Before paying a recommended award of costs, agency personnel should consult legal counsel. Section 33.104(h) applies to all recommended awards of costs that have not yet been paid.

(7) Any costs the contractor receives under this section shall not be the subject of subsequent proposals, billings, or claims against the Government, and those exclusions should be reflected in the cost agreement.

(8) If the Government pays costs, as provided in paragraph (h)(1) of this section, where a postaward protest is sustained as the result of an awardee's intentional or negligent misstatement, misrepresentation, or miscertification, the Government may require the awardee to reimburse the Government the amount of such costs. In addition to any other remedy available, and pursuant to the requirements of subpart 32.6, the Government may collect this debt by offsetting the amount against any payment due the awardee under any contract between the awardee and the Government.

[57 FR 60585, Dec. 21, 1992, as amended at 60 FR 48227, 48275, Sept. 18, 1995; 61 FR 41470, Aug. 8, 1996; 61 FR 69289, Dec. 31, 1996; 62 FR 12718, Mar. 17, 1997; 62 FR 51271, Sept. 30, 1997; 62 FR 64933, Dec. 9, 1997; 63 FR 1532, Jan. 9, 1998; 63 FR 58603, Oct. 30, 1998; 72 FR 63065, Nov. 7, 2007]

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### **33.105 Protests at the U.S. Court of Federal Claims.**

Procedures for protests at the U.S. Court of Federal Claims are set forth in the rules of the U.S. Court of Federal Claims. The rules may be found at <http://www.uscfc.uscourts.gov/rules-and-forms>.

[77 FR 56743, Sept. 13, 2012]

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### **33.106 Solicitation provision and contract clause.**

(a) The contracting officer shall insert the provision at 52.233-2, Service of Protest, in solicitations for contracts expected to exceed the simplified acquisition threshold.

(b) The contracting officer shall insert the clause at 52.233-3, Protest After Award, in all solicitations and contracts. If a cost reimbursement contract is contemplated, the contracting officer shall use the clause with its *Alternate I*.

[50 FR 25681, June 20, 1985, as amended at 60 FR 34759, July 3, 1995]

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## **Subpart 33.2—Disputes and Appeals**

SOURCE: 48 FR 42349, Sept. 19, 1983, unless otherwise noted. Redesignated at 50 FR 2270, Jan. 15, 1985.

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### **33.201 Definitions.**

As used in this subpart—

*Accrual of a claim* means the date when all events, that fix the alleged liability of either the Government or the contractor and permit assertion of the claim, were known or should have been known. For liability to be fixed, some injury must have occurred. However, monetary damages need not have been incurred.

*Alternative dispute resolution (ADR)* means any type of procedure or combination of procedures voluntarily used to resolve issues in controversy. These procedures may include, but are not limited to, conciliation, facilitation, mediation, fact-finding, minitrials, arbitration, and use of ombudsmen.

*Defective certification* means a certificate which alters or otherwise deviates from the language in 33.207(c) or which is not executed by a person authorized to bind the contractor with respect to the claim. Failure to certify shall not be deemed to be a defective certification.

*Issue in controversy* means a material disagreement between the Government and the contractor that (1) may result in a claim or (2) is all or part of an existing claim.

*Misrepresentation of fact* means a false statement of substantive fact, or any conduct which leads to the belief of a substantive fact material to proper understanding of the matter in hand, made with intent to deceive or mislead.

[48 FR 42349, Sept. 19, 1983. Redesignated and amended at 50 FR 2270, Jan. 15, 1985; 56 FR 67417, Dec. 30, 1991; 59 FR 11381, Mar. 10, 1994; 60 FR 48230, Sept. 18, 1995; 63 FR 58594, Oct. 30, 1998; 66 FR 2132, Jan. 10, 2001; 67 FR 43514, June 27, 2002; 79 FR 24212, Apr. 29, 2014]

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### **33.202 Disputes.**

41 U.S.C. chapter 71, Disputes, establishes procedures and requirements for asserting and resolving claims subject to the Disputes statute. In addition, the Disputes statute provides for— (a) the payment of interest on contractor claims; (b) certification of contractor claims; and (c) a civil penalty for contractor claims that are fraudulent or based on a misrepresentation of fact.

[56 FR 67417, Dec. 30, 1991, as amended at 59 FR 11381, Mar. 10, 1994; 79 FR 24212, Apr. 29, 2014]

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### **33.203 Applicability.**

(a) Except as specified in paragraph (b) below, this part applies to any express or implied contract covered by the Federal Acquisition Regulation.

(b) This subpart does not apply to any contract with

(1) A foreign government or agency of that government; or

(2) an international organization or a subsidiary body of that organization, if the agency head determines that the application of the Disputes statute to the contract would not be in the public interest.

(c) This part applies to all disputes with respect to contracting officer decisions on matters "arising under" or "relating to" a contract. Agency Boards of Contract Appeals (BCAs) authorized under the Disputes statute continue to have all of the authority they possessed before the Disputes statute with respect to disputes arising under a contract, as well as authority to decide disputes relating to a contract. The clause at 52.233-1, Disputes, recognizes the "all disputes" authority established by the Disputes statute and states certain requirements and limitations of the Disputes statute for the guidance of contractors and contracting agencies. The clause is not intended to affect the rights and obligations of the parties as provided by the Disputes statute or to constrain the authority of the statutory agency BCAs in the handling and deciding of contractor appeals under the Disputes statute.

[48 FR 42349, Sept. 19, 1983. Redesignated and amended at 50 FR 2270, Jan. 15, 1985; 79 FR 24212, Apr. 29, 2014]

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### **33.204 Policy.**

The Government's policy is to try to resolve all contractual issues in controversy by mutual agreement at the contracting officer's level. Reasonable efforts should be made to resolve controversies prior to the submission of a claim. Agencies are encouraged to use ADR procedures to the maximum extent practicable. Certain factors, however, may make the use of ADR inappropriate (see 5 U.S.C. 572(b)). Except for arbitration conducted pursuant to the Administrative Dispute Resolution Act (ADRA), (5 U.S.C. 571, *et seq.*), agencies have authority which is separate from that provided by the ADRA to use ADR procedures to resolve issues in controversy. Agencies may also elect to proceed under the authority and requirements of the ADRA.

[59 FR 11381, Mar. 10, 1994, as amended at 63 FR 58595, Oct. 30, 1998]

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### **33.205 Relationship of the Disputes statute to Pub. L. 85-804.**

(a) Requests for relief under Pub. L. 85-804 (50 U.S.C. 1431-1435) are not claims within the Disputes statute or the Disputes clause at 52.233-1, Disputes, and shall be processed under Subpart 50.1, Extraordinary Contractual Actions. However, relief



formerly available only under Pub. L. 85-804; i.e., legal entitlement to rescission or reformation for mutual mistake, is now available within the authority of the contracting officer under the Disputes statute and the Disputes clause. In case of a question whether the contracting officer has authority to settle or decide specific types of claims, the contracting officer should seek legal advice.

(b) A contractor's allegation that it is entitled to rescission or reformation of its contract in order to correct or mitigate the effect of a mistake shall be treated as a claim under the Dispute statute. A contract may be reformed or rescinded by the contracting officer if the contractor would be entitled to such remedy or relief under the law of Federal contracts. Due to the complex legal issues likely to be associated with allegations of legal entitlement, contracting officers shall make written decisions, prepared with the advice and assistance of legal counsel, either granting or denying relief in whole or in part.

(c) A claim that is either denied or not approved in its entirety under paragraph (b) above may be cognizable as a request for relief under Pub. L. 85-804 as implemented by subpart 50.1. However, the claim must first be submitted to the contracting officer for consideration under the Disputes statute because the claim is not cognizable under Public Law 85-804, as implemented by subpart 50.1, unless other legal authority in the agency concerned is determined to be lacking or inadequate.

[48 FR 42349, Sept. 19, 1983, as amended at 72 FR 63030, Nov. 7, 2007; 79 FR 24212, Apr. 29, 2014]

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### **33.206 Initiation of a claim.**

(a) Contractor claims shall be submitted, in writing, to the contracting officer for a decision within 6 years after accrual of a claim, unless the contracting parties agreed to a shorter time period. This 6-year time period does not apply to contracts awarded prior to October 1, 1995. The contracting officer shall document the contract file with evidence of the date of receipt of any submission from the contractor deemed to be a claim by the contracting officer.

(b) The contracting officer shall issue a written decision on any Government claim initiated against a contractor within 6 years after accrual of the claim, unless the contracting parties agreed to a shorter time period. The 6-year period shall not apply to contracts awarded prior to October 1, 1995, or to a Government claim based on a contractor claim involving fraud.

[60 FR 48230, Sept. 18, 1995]

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### **33.207 Contractor certification.**

(a) Contractors shall provide the certification specified in paragraph (c) of this section when submitting any claim exceeding \$100,000.



when submitting any claim exceeding \$100,000.

(b) The certification requirement does not apply to issues in controversy that have not been submitted as all or part of a claim.

(c) The certification shall state as follows:

I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

(d) The aggregate amount of both increased and decreased costs shall be used in determining when the dollar thresholds requiring certification are met (see example in 15.403-4(a)(1)(iii) regarding certified cost or pricing data).

(e) The certification may be executed by any person authorized to bind the contractor with respect to the claim.

(f) A defective certification shall not deprive a court or an agency BCA of jurisdiction over that claim. Prior to the entry of a final judgment by a court or a decision by an agency BCA, however, the court or agency BCA shall require a defective certification to be corrected.

[59 FR 11381, Mar. 10, 1994, as amended at 60 FR 48218, 48230, Sept. 18, 1995; 62 FR 51271, Sept. 30, 1997; 63 FR 58595, Oct. 30, 1998; 75 FR 53149, Aug. 30, 2010; 79 FR 24212, Apr. 29, 2014]

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### **33.208 Interest on claims.**

(a) The Government shall pay interest on a contractor's claim on the amount found due and unpaid from the date that—

- (1) The contracting officer receives the claim (certified if required by 33.207(a)); or
- (2) Payment otherwise would be due, if that date is later, until the date of payment.

(b) Simple interest on claims shall be paid at the rate, fixed by the Secretary of the Treasury as provided in the Disputes statute, which is applicable to the period during which the contracting officer receives the claim and then at the rate applicable for each 6-month period as fixed by the Treasury Secretary during the pendency of the claim. (See the clause at 52.232-17 for the right of the Government to collect interest on its claims against a contractor).

(c) With regard to claims having defective certifications, interest shall be paid from either the date that the contracting officer initially receives the claim or October 29, 1992, whichever is later. However, if a contractor has provided a proper certificate prior to October 29, 1992, after submission of a defective certificate, interest shall be paid from the date of receipt by the Government of a proper certificate.

[59 FR 11381, Mar. 10, 1994, as amended at 60 FR 48230, Sept. 18, 1995; 73 FR 54005, Sept. 17, 2008; 79 FR 24212, Apr. 29, 2014]

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### **33.209 Suspected fraudulent claims.**

If the contractor is unable to support any part of the claim and there is evidence that the inability is attributable to misrepresentation of fact or to fraud on the part of the contractor, the contracting officer shall refer the matter to the agency official responsible for investigating fraud.

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### **33.210 Contracting officer's authority.**

Except as provided in this section, contracting officers are authorized, within any specific limitations of their warrants, to decide or resolve all claims arising under or relating to a contract subject to the Disputes statute. In accordance with agency policies and 33.214, contracting officers are authorized to use ADR procedures to resolve claims. The authority to decide or resolve claims does not extend to—

(a) A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine; or

(b) The settlement, compromise, payment or adjustment of any claim involving fraud.

[48 FR 42349, Sept. 19, 1983. Redesignated and amended at 50 FR 2270, Jan. 15, 1985; 51 FR 36972, Oct. 16, 1986; 59 FR 11381, Mar. 10, 1994; 79 FR 24212, Apr. 29, 2014]

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### **33.211 Contracting officer's decision.**

(a) When a claim by or against a contractor cannot be satisfied or settled by mutual agreement and a decision on the claim is necessary, the contracting officer shall—

(1) Review the facts pertinent to the claim;

(2) Secure assistance from legal and other advisors;

(3) Coordinate with the contract administration officer or contracting office, as appropriate; and

(4) Prepare a written decision that shall include—

(i) A description of the claim or dispute;

(ii) A reference to the pertinent contract terms;

- (iii) A statement of the factual areas of agreement and disagreement;
- (iv) A statement of the contracting officer's decision, with supporting rationale;
- (v) Paragraphs substantially as follows:

"This is the final decision of the Contracting Officer. You may appeal this decision to the agency board of contract appeals. If you decide to appeal, you must, within 90 days from the date you receive this decision, mail or otherwise furnish written notice to the agency board of contract appeals and provide a copy to the Contracting Officer from whose decision this appeal is taken. The notice shall indicate that an appeal is intended, reference this decision, and identify the contract by number.

With regard to appeals to the agency board of contract appeals, you may, solely at your election, proceed under the board's—

(1) Small claim procedure for claims of \$50,000 or less or, in the case of a small business concern (as defined in the Small Business Act and regulations under that Act), \$150,000 or less; or

(2) Accelerated procedure for claims of \$100,000 or less.

Instead of appealing to the agency board of contract appeals, you may bring an action directly in the United States Court of Federal Claims (except as provided in 41 U.S.C. 7102(d), regarding Maritime Contracts) within 12 months of the date you receive this decision"

(vi) Demand for payment prepared in accordance with 32.604 and 32.605) in all cases where the decision results in a finding that the contractor is indebted to the Government.

(b) The contracting officer shall furnish a copy of the decision to the contractor by certified mail, return receipt requested, or by any other method that provides evidence of receipt. This requirement shall apply to decisions on claims initiated by or against the contractor.

(c) The contracting officer shall issue the decision within the following statutory time limitations:

(1) For claims of \$100,000 or less, 60 days after receiving a written request from the contractor that a decision be rendered within that period, or within a reasonable time after receipt of the claim if the contractor does not make such a request.

(2) For claims over \$100,000, 60 days after receiving a certified claim; *provided, however,* that if a decision will not be issued within 60 days, the contracting officer shall notify the contractor, within that period, of the time within which a decision will be issued.

(d) The contracting officer shall issue a decision within a reasonable time, taking into account—

- (1) The size and complexity of the claim;
- (2) The adequacy of the contractor's supporting data; and
- (3) Any other relevant factors.

(e) The contracting officer shall have no obligation to render a final decision on any claim exceeding \$100,000 which contains a defective certification, if within 60 days after receipt of the claim, the contracting officer notifies the contractor, in writing, of the reasons why any attempted certification was found to be defective.

(f) In the event of undue delay by the contracting officer in rendering a decision on a claim, the contractor may request the tribunal concerned to direct the contracting officer to issue a decision in a specified time period determined by the tribunal.

(g) Any failure of the contracting officer to issue a decision within the required time periods will be deemed a decision by the contracting officer denying the claim and will authorize the contractor to file an appeal or suit on the claim.

(h) The amount determined payable under the decision, less any portion already paid, should be paid, if otherwise proper, without awaiting contractor action concerning appeal. Such payment shall be without prejudice to the rights of either party.

[48 FR 42349, Sept. 19, 1983. Redesignated at 50 FR 2270, Jan. 15, 1985, and amended at 54 FR 34755, Aug. 21, 1989; 59 FR 11382, Mar. 10, 1994; 60 FR 48230, Sept. 18, 1995; 73 FR 21800, Apr. 22, 2008; 73 FR 54005, Sept. 17, 2008; 79 FR 24212, Apr. 29, 2014]

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### **33.212 Contracting officer's duties upon appeal.**

To the extent permitted by any agency procedures controlling contacts with agency BCA personnel, the contracting officer shall provide data, documentation, information, and support as may be required by the agency BCA for use on a pending appeal from the contracting officer's decision.

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### **33.213 Obligation to continue performance.**

(a) In general, before passage of the Disputes statute, the obligation to continue performance applied only to claims arising under a contract. However, the Disputes statute, at 41 U.S.C. 7103(g), authorizes agencies to require a contractor to continue contract performance in accordance with the contracting officer's decision pending a final resolution of any claim arising under, or relating to, the contract. (A claim arising under a contract is a claim that can be resolved under a contract clause, other than the clause at 52.233-1, Disputes, that provides for the relief sought by the claimant; however, relief for such claim can also be sought under the clause at 52.233-1. A claim relating to a contract is a claim that cannot be resolved under a contract clause other than the clause at 52.233-1.) This distinction is recognized by the clause with its *Alternate I* (see 33.215).

(b) In all contracts that include the clause at 52.233-1, Disputes, with its *Alternate I*, in the event of a dispute not arising under, but relating to, the contract, the contracting officer shall consider providing, through appropriate agency procedures, financing of the continued performance *provided* that the Government's interest is properly secured

continued performance, provided, that the Government's interest is properly secured.  
 [48 FR 42349, Sept. 19, 1983. Redesignated at 50 FR 2270, Jan. 15, 1985, as amended at 64 FR 72451, Dec. 27, 1999; 67 FR 43514, June 27, 2002; 79 FR 24212, Apr. 29, 2014]

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### **33.214 Alternative dispute resolution (ADR).**

(a) The objective of using ADR procedures is to increase the opportunity for relatively inexpensive and expeditious resolution of issues in controversy. Essential elements of ADR include—

- (1) Existence of an issue in controversy;
- (2) A voluntary election by both parties to participate in the ADR process;
- (3) An agreement on alternative procedures and terms to be used in lieu of formal litigation; and
- (4) Participation in the process by officials of both parties who have the authority to resolve the issue in controversy.

(b) If the contracting officer rejects a contractor's request for ADR proceedings, the contracting officer shall provide the contractor a written explanation citing one or more of the conditions in 5 U.S.C. 572(b) or such other specific reasons that ADR procedures are inappropriate for the resolution of the dispute. In any case where a contractor rejects a request of an agency for ADR proceedings, the contractor shall inform the agency in writing of the contractor's specific reasons for rejecting the request.

(c) ADR procedures may be used at any time that the contracting officer has authority to resolve the issue in controversy. If a claim has been submitted, ADR procedures may be applied to all or a portion of the claim. When ADR procedures are used subsequent to the issuance of a contracting officer's final decision, their use does not alter any of the time limitations or procedural requirements for filing an appeal of the contracting officer's final decision and does not constitute a reconsideration of the final decision.

(d) When appropriate, a neutral person may be used to facilitate resolution of the issue in controversy using the procedures chosen by the parties.

(e) The confidentiality of ADR proceedings shall be protected consistent with 5 U.S.C. 574.

(f)(1) A solicitation shall not require arbitration as a condition of award, unless arbitration is otherwise required by law. Contracting officers should have flexibility to select the appropriate ADR procedure to resolve the issues in controversy as they arise.

(2) An agreement to use arbitration shall be in writing and shall specify a maximum award that may be issued by the arbitrator, as well as any other conditions limiting the range of possible outcomes.

(g) Binding arbitration, as an ADR procedure, may be agreed to only as specified in agency guidelines. Such guidelines shall provide advice on the appropriate use of binding arbitration and when an agency has authority to settle an issue in controversy through binding arbitration.

[56 FR 67417, Dec. 30, 1991, as amended at 59 FR 11382, Mar. 10, 1994; 60 FR 48230, Sept. 18, 1995; 63 FR 58595, Oct. 30, 1998]

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### **33.215 Contract clauses.**

(a) Insert the clause at 52.233-1, Disputes, in solicitations and contracts, unless the conditions in 33.203(b) apply. If it is determined under agency procedures that continued performance is necessary pending resolution of any claim arising under or relating to the contract, the contracting officer shall use the clause with its *Alternate I*.

(b) Insert the clause at 52.233-4 in all solicitations and contracts.

[69 FR 59700, Oct. 5, 2004]

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**ELECTRONIC CODE OF FEDERAL REGULATIONS****e-CFR data is current as of April 5, 2021**

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**PART 49—TERMINATION OF CONTRACTS**

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  - 49.602-2 Inventory forms.
  - 49.602-3 Schedule of accounting information.
  - 49.602-4 Partial payments.
  - 49.602-5 Settlement agreement.
- 49.603 Formats for termination for convenience settlement agreements.
  - 49.603-1 Fixed-price contracts—complete termination.
  - 49.603-2 Fixed-price contracts—partial termination.
  - 49.603-3 Cost-reimbursement contracts—complete termination, if settlement includes cost.
  - 49.603-4 Cost-reimbursement contracts—complete termination, with settlement limited to fee.
  - 49.603-5 Cost-reimbursement contracts—partial termination.
  - 49.603-6 No-cost settlement agreement—complete termination.
  - 49.603-7 No-cost settlement agreement—partial termination.
  - 49.603-8 Fixed-price contracts—settlements with subcontractors only.
  - 49.603-9 Settlement of reservations.
- 49.604 Release of excess funds under terminated contracts.

- 49.605 Request to settle subcontractor settlement proposals.
  - 49.606 Granting subcontract settlement authorization.
  - 49.607 Delinquency notices.
- 

AUTHORITY: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

SOURCE: 48 FR 42447, Sept. 19, 1983, unless otherwise noted.

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## **49.000 Scope of part.**

This part establishes policies and procedures relating to the complete or partial termination of contracts for the convenience of the Government or for default. It prescribes contract clauses relating to termination and excusable delay and includes instructions for using termination and settlement forms.

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### **49.001 Definitions.**

As used in this part—

*Other work* means any current or scheduled work of the contractor, whether Government or commercial, other than work related to the terminated contract.

*Plant clearance period*, as used in this subpart, means the period beginning on the effective date of contract completion or termination and ending 90 days (or such longer period as may be agreed to) after receipt by the contracting officer of acceptable inventory schedules for each property classification. The final phase of the plant clearance period means that period after receipt of acceptable inventory schedules.

*Settlement agreement* means a written agreement in the form of a contract modification settling all or a severable portion of a settlement proposal.

*Settlement proposal* means a proposal for effecting settlement of a contract terminated in whole or in part, submitted by a contractor or subcontractor in the form, and supported by the data, required by this part. A settlement proposal is included within the generic meaning of the word *claim* under false claims acts (see 18 U.S.C. 287 and 31 U.S.C. 3729).

*Unsettled contract change* means any contract change or contract term for which a definitive modification is required but has not been executed.

[48 FR 42443, Sept. 19, 1983, as amended at 51 FR 2666, Jan. 17, 1986; 66 FR 2134, Jan. 10, 2001; 67 FR 43514, June 27, 2002; 69 FR 17748, Apr. 5, 2004]

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### **49.002 Applicability**

**49.002 Applicability.**

(a)(1) This part applies to contracts that provide for termination for the convenience of the Government or for the default of the contractor (see also 12.403 and 13.302-4).

(2) This part does not apply to commercial item contracts awarded using part 12 procedures. See 12.403 for termination policies for contracts for the acquisition of commercial items. However, for contracts for the acquisition of commercial items, this part provides administrative guidance which may be followed unless it is inconsistent with the requirements and procedures in 12.403, Termination, and the clause at 52.212-4, Contract Terms and Conditions—Commercial Items.

(b) Contractors shall use this part, unless inappropriate, to settle subcontracts terminated as a result of modification of prime contracts. The contracting officer shall use this part as a guide in evaluating settlements of subcontracts terminated for the convenience of a contractor whenever the settlement will be the basis of a proposal for reimbursement from the Government under a cost-reimbursement contract.

(c) The contracting officer may use this part in determining an equitable adjustment resulting from a modification under the Changes clause of any contract, except cost-reimbursement contracts.

(d) When action to be taken or authority to be exercised under this part depends upon the *amount* of the settlement proposal, that amount shall be determined by deducting from the gross settlement proposed the amounts payable for completed articles or work at the contract price and amounts for the settlement of subcontractor settlement proposals. Credits for retention or other disposal of termination inventory and amounts for advance or partial payments shall not be deducted.

[48 FR 42447, Sept. 19, 1983, as amended at 62 FR 64927, Dec. 9, 1997; 75 FR 82577, Dec. 30, 2010]

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## **Subpart 49.1—General Principles**

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### **49.100 Scope of subpart.**

(a) This subpart deals with—

(1) The authority and responsibility of contracting officers to terminate contracts in whole or in part for the convenience of the Government or for default;

(2) Duties of the contractor and the contracting officer after issuance of the notice of termination;

(3) General procedures for the settlement of terminated contracts; and

(4) Settlement agreements.

(b) Additional principles applicable to the termination for convenience and settlement of fixed-price and cost-reimbursement contracts are included in subparts 49.2 and 49.3. Additional principles applicable to the termination of contracts for default are included in subpart 49.4.

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#### **49.101 Authorities and responsibilities.**

(a) The termination clauses or other contract clauses authorize contracting officers to terminate contracts for convenience, or for default, and to enter into settlement agreements under this regulation.

(b) The contracting officer shall terminate contracts, whether for default or convenience, only when it is in the Government's interest. The contracting officer shall effect a no-cost settlement instead of issuing a termination notice when (1) it is known that the contractor will accept one, (2) Government property was not furnished, and (3) there are no outstanding payments, debts due the Government, or other contractor obligations.

(c) When the price of the undelivered balance of the contract is less than \$5,000, the contract should not normally be terminated for convenience but should be permitted to run to completion.

(d) After the contracting officer issues a notice of termination, the termination contracting officer (TCO) is responsible for negotiating any settlement with the contractor, including a no-cost settlement if appropriate. Auditors and TCO's shall promptly schedule and complete audit reviews and negotiations, giving particular attention to the need for timely action on all settlements involving small business concerns.

(e) If the same item is under contract with both large and small business concerns and it is necessary to terminate for convenience part of the units still to be delivered, preference shall be given to the continuing performance of small business contracts over large business contracts unless the chief of the contracting office determines that this is not in the Government's interest.

(f) The contracting officer is responsible for the release of excess funds resulting from the termination unless this responsibility is specifically delegated to the TCO.

[48 FR 42447, Sept. 19, 1983, as amended at 55 FR 52797, Dec. 21, 1990; 56 FR 67134, Dec. 27, 1991]

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#### **49.102 Notice of termination.**

(a) *General.* The contracting officer shall terminate contracts for convenience or default only by a written notice to the contractor (see 49.601). The notice of termination may be expedited by means of electronic communication capable of providing



may be expected by means of electronic communication capable of providing confirmation of receipt by the contractor. When the notice is mailed, it shall be sent by certified mail, return receipt requested. When the contracting office arranges for hand delivery of the notice, a written acknowledgment shall be obtained from the contractor. The notice shall state—

(1) That the contract is being terminated for the convenience of the Government (or for default) under the contract clause authorizing the termination;

(2) The effective date of termination;

(3) The extent of termination;

(4) Any special instructions; and

(5) The steps the contractor should take to minimize the impact on personnel if the termination, together with all other outstanding terminations, will result in a significant reduction in the contractor's work force (see paragraph (g) of the notice in 49.601-2). If the termination notice is by telegram, include these *steps* in the confirming letter or modification.

(b) *Distribution of copies.* The contracting officer shall simultaneously send the termination notice to the contractor, and a copy to the contract administration office and to any known assignee, guarantor, or surety of the contractor.

(c) *Amendment of termination notice.* The contracting officer may amend a termination notice to—

(1) Correct nonsubstantive mistakes in the notice;

(2) Add supplemental data or instructions; or

(3) Rescind the notice if it is determined that items terminated had been completed or shipped before the contractor's receipt of the notice.

(d) *Reinstatement of terminated contracts.* Upon written consent of the contractor, the contracting office may reinstate the terminated portion of a contract in whole or in part by amending the notice of termination if it has been determined in writing that—

(1) Circumstances clearly indicate a requirement for the terminated items; and

(2) Reinstatement is advantageous to the Government.

[48 FR 42447, Sept. 19, 1983, as amended at 81 FR 83099, Nov. 18, 2016]

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### **49.103 Methods of settlement.**

Settlement of terminated cost-reimbursement contracts and fixed-price contracts terminated for convenience may be effected by (a) negotiated agreement, (b) determination by the TCO, (c) costing-out under vouchers using SF 1034, Public Voucher for Purchases and Services Other Than Personal, for cost-reimbursement contracts (as prescribed in subpart 49.3), or (d) a combination of these methods. When possible, the TCO should negotiate a fair and prompt settlement with the contractor. The TCO shall settle a settlement proposal by determination only when it cannot be settled by agreement.

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#### **49.104 Duties of prime contractor after receipt of notice of termination.**

After receipt of the notice of termination, the contractor shall comply with the notice and the termination clause of the contract, except as otherwise directed by the TCO. The notice and clause applicable to convenience terminations generally require that the contractor—

- (a) Stop work immediately on the terminated portion of the contract and stop placing subcontracts thereunder;
- (b) Terminate all subcontracts related to the terminated portion of the prime contract;
- (c) Immediately advise the TCO of any special circumstances precluding the stoppage of work;
- (d) Perform the continued portion of the contract and submit promptly any request for an equitable adjustment of price for the continued portion, supported by evidence of any increase in the cost, if the termination is partial;
- (e) Take necessary or directed action to protect and preserve property in the contractor's possession in which the Government has or may acquire an interest and, as directed by the TCO, deliver the property to the Government;
- (f) Promptly notify the TCO in writing of any legal proceedings growing out of any subcontract or other commitment related to the terminated portion of the contract;
- (g) Settle outstanding liabilities and proposals arising out of termination of subcontracts, obtaining any approvals or ratifications required by the TCO;
- (h) Promptly submit the contractor's own settlement proposal, supported by appropriate schedules; and
- (i) Dispose of termination inventory, as directed or authorized by the TCO.

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#### **49.105 Duties of termination contracting officer after issuance of notice of termination.**



.....  
(a) Consistent with the termination clause and the notice of termination, the TCO shall—

- (1) Direct the action required of the prime contractor;
- (2) Examine the settlement proposal of the prime contractor and, when appropriate, the settlement proposals of subcontractors;
- (3) Promptly negotiate settlement with the contractor and enter into a settlement agreement; and
- (4) Promptly settle the contractor's settlement proposal by determination for the elements that cannot be agreed on, if unable to negotiate a complete settlement.

(b) To expedite settlement, the TCO may request specially qualified personnel to—

- (1) Assist in dealings with the contractor;
- (2) Advise on legal and contractual matters;
- (3) Conduct accounting reviews and advise and assist on accounting matters; and
- (4) Perform the following functions regarding termination inventory (see subpart 45.6):

- (i) Verify its existence.
- (ii) Determine qualitative and quantitative allocability.
- (iii) Make recommendations concerning serviceability.
- (iv) Undertake necessary screening and redistribution.
- (v) Assist the contractor in accomplishing other disposition.

(c) The TCO should promptly hold a conference with the contractor to develop a definite program for effecting the settlement. When appropriate in the judgment of the TCO, after consulting with the contractor, principal subcontractors should be requested to attend. Topics that should be discussed at the conference and documented include—

- (1) General principles relating to the settlement of any settlement proposal, including obligations of the contractor under the termination clause of the contract;
- (2) Extent of the termination, point at which work is stopped, and status of any plans, drawings, and information that would have been delivered had the contract been completed;
- (3) Status of any continuing work;

(4) Obligation of the contractor to terminate subcontracts and general principles to be followed in settling subcontractor settlement proposals;

(5) Names of subcontractors involved and the dates termination notices were issued to them;

(6) Contractor personnel handling review and settlement of subcontractor settlement proposals and the methods being used;

(7) Arrangements for transfer of title and delivery to the Government of any material required by the Government;

(8) General principles and procedures to be followed in the protection, preservation, and disposition of the contractor's and subcontractors' termination inventories, including the preparation of termination inventory schedules;

(9) Contractor accounting practices and preparation of SF 1439 (Schedule of Accounting Information (49.602-3);

(10) Form in which to submit settlement proposals;

(11) Accounting review of settlement proposals;

(12) Any requirement for interim financing in the nature of partial payments;

(13) Tentative time schedule for negotiation of the settlement, including submission by the contractor and subcontractors of settlement proposals, termination inventory schedules, and accounting information schedules (see 49.206-3 and 49.303-2);

(14) Actions taken by the contractor to minimize impact upon employees affected adversely by the termination (see paragraph (g) of the letter notice in 49.601-2); and

(15) Obligation of the contractor to furnish accurate, complete, and current cost or pricing data, and to certify to that effect in accordance with 15.403-4(a)(1) when the amount of a termination settlement agreement, or a partial termination settlement agreement plus the estimate to complete the continued portion of the contract exceeds the threshold in 15.403-4.

[48 FR 42447, Sept. 19, 1983, as amended at 61 FR 39221, July 26, 1996; 62 FR 51271, Sept. 30, 1997]

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#### **49.105-1 Termination status reports.**

When the TCO and contracting officer are in different activities, the TCO will furnish periodic status reports on termination actions to the contracting office upon request. The contracting office shall specify the information required.

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#### **49.105-2 Release of excess funds.**

(a) The TCO shall estimate the funds required to settle the termination, and within 30 days after the receipt of the termination notice, recommend the release of excess funds to the contracting officer. The initial deobligation of excess funds should be accomplished in a timely manner by the contracting officer, or the TCO, if delegated the responsibility. The TCO shall not recommend the release of amounts under \$1,000, unless requested by the contracting officer.

(b) The TCO shall maintain continuous surveillance of required funds to permit timely release of any additional excess funds (a recommended format for release of excess funds is in 49.604). If previous releases of excess funds result in a shortage of the amount required for settlement, the TCO shall promptly inform the contracting officer, who shall reinstate the funds within 30 days.

[56 FR 67134, Dec. 27, 1991]

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#### **49.105-3 Termination case file.**

The TCO responsible for negotiating the final settlement shall establish a separate case file for each termination. This file will include memoranda and records of all actions relative to the settlement (see 4.801).

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#### **49.105-4 Cleanup of construction site.**

In the case of terminated construction contracts, the contracting officer shall direct action to ensure the cleanup of the site, protection of serviceable materials, removal of hazards, and other action necessary to leave a safe and healthful site.

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#### **49.106 Fraud or other criminal conduct.**

If the TCO suspects fraud or other criminal conduct related to the settlement of a terminated contract, the TCO shall discontinue negotiations and report the facts under agency procedures.

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#### **49.107 Audit of prime contract settlement proposals and subcontract settlements.**

(a) The TCO shall refer each prime contractor settlement proposal valued at or above the threshold for obtaining certified cost or pricing data set forth in FAR 15.403-

4(a)(1) to the appropriate audit agency for review and recommendations. The TCO may submit settlement proposals of less than the threshold for obtaining certified cost or pricing data to the audit agency. Referrals shall indicate any specific information or data that the TCO considers relevant and shall include facts and circumstances that will assist the audit agency in performing its function. The audit agency shall develop requested information and may make any further accounting reviews it considers appropriate. After its review, the audit agency shall submit written comments and recommendations to the TCO. When a formal examination of settlement proposals valued under the threshold for obtaining certified cost or pricing data is not warranted, the TCO will perform or have performed a desk review and include a written summary of the review in the termination case file.

(b) The TCO shall refer subcontract settlements received for approval or ratification to the appropriate audit agency for review and recommendations when—

(1) The amount exceeds the threshold for obtaining certified cost or pricing data; or

(2) The TCO determines that a complete or partial accounting review is advisable. The audit agency shall submit written comments and recommendations to the TCO. The review by the audit agency does not relieve the prime contractor or higher tier subcontractor of the responsibility for performing an accounting review.

(c)(1) The responsibility of the prime contractor and of each subcontractor (see 49.108) includes performance of accounting reviews and any necessary field audits. However, the TCO should request the Government audit agency to perform the accounting review of a subcontractor's settlement proposal when—

(i) A subcontractor objects, for competitive reasons, to an accounting review of its records by an upper tier contractor;

(ii) The Government audit agency is currently performing audit work at the subcontractor's plant, or can perform the audit more economically or efficiently;

(iii) Audit by the Government is necessary for consistent audit treatment and orderly administration; or

(iv) The contractor has a substantial or controlling financial interest in the subcontractor.

(2) The audit agency should avoid duplication of accounting reviews performed by the upper tier contractor on subcontractor settlement proposals. However, this should not preclude the Government from making additional reviews when appropriate. When the contractor is performing accounting reviews according to this section, the TCO should request the audit agency to periodically examine the contractor's accounting review procedures and performance, and to make appropriate comments and recommendations to the TCO.

(d) The audit report is advisory only, and is for the TCO to use in negotiating a settlement or issuing a unilateral determination. Government personnel handling audit reports must be careful not to reveal privileged information or information that will jeopardize the negotiation position of the Government, the prime contractor, or a higher tier subcontractor. Consistent with this, and when in the Government's interest, the TCO may furnish audit reports under paragraph (c) above to prime and higher tier subcontractors for their use in settling subcontract settlement proposals.

[48 FR 42447, Sept. 19, 1983, as amended at 55 FR 52797, Dec. 21, 1990; 83 FR 19150, May 1, 2018]

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#### **49.108 Settlement of subcontract settlement proposals.**

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##### **49.108-1 Subcontractor's rights.**

A subcontractor has no contractual rights against the Government upon the termination of a prime contract. A subcontractor may have rights against the prime contractor or intermediate subcontractor with whom it has contracted. Upon termination of a prime contract, the prime contractor and each subcontractor are responsible for the prompt settlement of the settlement proposals of their immediate subcontractors.

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##### **49.108-2 Prime contractor's rights and obligations.**

(a) Termination for convenience clauses provide that after receipt of a termination notice the prime contractor shall, unless directed otherwise by the TCO, terminate all subcontracts to the extent that they relate to the performance of prime work terminated. Therefore, prime contractors should include a termination clause in their subcontracts for their own protection. Suggestions regarding use of subcontract termination clauses are in subpart 49.5.

(b) The failure of a prime contractor to include an appropriate termination clause in any subcontract, or to exercise the clause rights, shall not—

- (1) Affect the Government's right to require the termination of the subcontract; or
- (2) Increase the obligation of the Government beyond what it would have been if the subcontract had contained an appropriate clause.

(c) In any case, the reasonableness of the prime contractor's settlement with the subcontractor should normally be measured by the aggregate amount due under paragraph (f) of the subcontract termination clause suggested in 49.502(e). The TCO shall allow reimbursement in excess of that amount only in unusual cases and then only

to the extent that the terms of the subcontract did not unreasonably increase the rights of the subcontractor.

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#### **49.108-3 Settlement procedure.**

(a) Contractors shall settle with subcontractors in general conformity with the policies and principles relating to settlement of prime contracts in this subpart and subparts 49.2 or 49.3. However, the basis and form of the subcontractor's settlement proposal must be acceptable to the prime contractor or the next higher tier subcontractor. Each settlement must be supported by accounting data and other information sufficient for adequate review by the Government. In no event will the Government pay the prime contractor any amount for loss of anticipatory profits or consequential damages resulting from the termination of any subcontract (but see 49.108-5).

(b) Except as provided in 49.108-4, the TCO shall require that—

(1) All subcontractor termination inventory be disposed of and accounted for in accordance with the procedures contained in paragraph (j) of the clause at 52.245-1, Government Property; and

(2) The prime contractor submit, for approval or ratification, all termination settlements with subcontractors.

(c) The TCO shall promptly examine each subcontract settlement received to determine that the subcontract termination was made necessary by the termination of the prime contract (or by issuance of a change order—see 49.002(b)). The TCO will also determine if the settlement was arrived at in good faith, is reasonable in amount, and is allocable to the terminated portion of the contract (or, if allocable only in part, that the proposed allocation is reasonable). In considering the reasonableness of any subcontract settlement, the TCO shall generally be guided by the provisions of this part relating to the settlement of prime contracts, and shall comply with any applicable requirements of 49.107 and 49.111 relating to accounting and other reviews. After the examination, the TCO shall notify the contractor in writing of (1) approval or ratification, or (2) the reasons for disapproval.

[48 FR 42424, Sept. 19, 1983, as amended at 62 FR 237, Jan. 2, 1997; 69 FR 17748, Apr. 5, 2004; 72 FR 27389, May 15, 2007]

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#### **49.108-4 Authorization for subcontract settlements without approval or ratification.**

(a)(1) The TCO may, upon written request, give written authorization to the prime contractor to conclude settlements of subcontracts terminated in whole or in part without



approval or ratification when the amount of settlement (see 49.002(d)) is \$100,000 or less, if—

(i) The TCO is satisfied with the adequacy of the procedures used by the contractor in settling settlement proposals, including proposals for retention, sale, or other disposal of termination inventory of the immediate and lower tier subcontractors (the TCO shall obtain the advice and recommendations of (A) the appropriate audit agency relating to the adequacy of the contractor's audit administration, including personnel, and (B) the cognizant plant clearance officer relating to the adequacy of the contractor's procedures and personnel for the administration of property disposal matters);

(ii) Any termination inventory included in determining the amount of the settlement will be disposed of as directed by the prime contractor, except that the disposition of the inventory shall not be subject to—

(A) Review by the TCO under 49.108-3(c); or

(B) The screening requirements in 45.602-3; and

(iii) A certificate similar to the certificate in the settlement proposal form in 49.602-1(a) will accompany the settlement.

(2) Except as provided in subparagraph (4) below, authority granted to a prime contractor under subparagraph (1) above by any TCO shall apply to all Executive agencies' prime contracts that are terminated, or modified by change orders.

(3) Except as provided in subparagraph (4) below, the TCO shall accept, as part of the prime contractor's settlement proposal, settlements of terminated lower tier subcontracts concluded by any of the prime contractor's immediate or lower tier subcontractors who have been granted authority as prime contractors to settle subcontracts; *provided*, that the settlement is within the limit of the authority. Authorization to settle proposals of lower tier subcontractors shall not be granted directly to subcontractors. However, a prime contractor authorized to approve subcontractor settlements may also exercise this authority in its capacity as a subcontractor, with respect to its terminated subcontracts and orders. When exercising this authority as a subcontractor, the contractor shall notify the purchaser.

(4) The provisions of subparagraphs (1), (2), and (3) above shall not apply to contracts under the administration of any contracting officer if the contracting officer so notifies the prime contractor concerned. This notice shall (i) be in writing, and (ii) if subparagraph (3) above is involved, specify any subcontractor affected.

(b) Section 45.602 shall apply to disposal of completed end items allocable to the terminated subcontract. However, these items may be disposed of without review by the TCO under 49.108-3 and without screening under 45.602-3, if the items do not require demilitarization and the total amount (at the subcontract price) when added to the amount of the settlement does not exceed the amount authorized under this subsection.



(c) A TCO granting the authorization in subparagraph (a)(1) above shall periodically (at least annually) make a selective review of settlements and settlement procedures to determine if the contractor is making adequate reviews and fair settlements, and whether the authorization should remain in effect. The TCO shall obtain the advice and recommendations of the appropriate audit agency and the cognizant plant clearance officer. When it is determined that the contractor's procedures are not adequate, or that improper settlements are being made, or when the authority has not been used in the preceding 2 years, the TCO shall revoke the authorization by written notice to the contractor, effective on the date of receipt.

(d) The contractor may make any number of separate settlements with a single subcontractor but shall not divide settlement proposals solely to bring them under an authorization limit. Separate settlement proposals that would normally be included in a single proposal, such as those based on a series of separate orders for the same item under one contract, shall be consolidated whenever possible.

(e) Upon written request of the contractor, the TCO may increase an authorization granted under subparagraph (a)(1) of this subsection to authorize the contractor to conclude settlements under a particular prime contract. The TCO may limit the increased authorization to specific subcontracts or classes of subcontracts.

(f) Authorizations granted under this 49.108-4 shall not authorize the settlement of requisitions or orders placed with any unit within the contractor's corporate entity.

(g) Recommended formats for a request to settle subcontractor settlement proposals and the TCO's letter of authorization to the contractor are in 49.605 and 49.606, respectively.

[48 FR 42447, Sept. 19, 1983, as amended at 55 FR 52797, Dec. 21, 1990; 69 FR 17748, Apr. 5, 2004]

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#### **49.108-5 Recognition of judgments and arbitration awards.**

(a) When a subcontractor obtains a final judgment against a prime contractor, the TCO shall, for the purposes of settling the prime contract, treat the amount of the judgment as a cost of settling with the contractor, to the extent the judgment is properly allocable to the terminated portion of the prime contract, if—

(1) The prime contractor has made reasonable efforts to include in the subcontract a termination clause described in 49.502(e), 49.503(c), or a similar clause excluding payment of anticipatory profits or consequential damages;

(2) The provisions of the subcontract relating to the rights of the parties upon its termination are fair and reasonable and do not unreasonably increase the common law rights of the subcontractor;

(3) The contractor made reasonable efforts to settle the settlement proposal of the subcontractor;

(4) The contractor gave prompt notice to the contracting officer of the initiation of the proceedings in which the judgment was rendered and did not refuse to give the Government control of the defense of the proceedings; and

(5) The contractor diligently defended the suit or, if the Government assumed control of the defense of the proceedings, rendered reasonable assistance requested by the Government.

(b) If the conditions in subparagraphs (a)(1) through (5) above are not all met, the TCO may allow the contractor the part of the judgment considered fair for settling the subcontract settlement proposal, giving due regard to the policies in this part for settlement of proposals.

(c) When a contractor and a subcontractor submit the subcontractor's settlement proposal to arbitration under any applicable law or contract provision, the TCO shall recognize the arbitration award as the cost of settling the proposal of the contractor to the same extent and under the same conditions as in paragraphs (a) and (b) above.

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#### **49.108-6 Delay in settling subcontractor settlement proposals.**

When a prime contractor's inability to settle with a subcontractor delays the settlement of the prime contract, the TCO may settle with the prime contractor. The TCO shall except the subcontractor settlement proposal from the settlement in whole or part and reserve the rights of the Government and the prime contractor with respect to the subcontractor proposal.

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#### **49.108-7 Government assistance in settling subcontracts.**

In unusual cases the TCO may determine, with the consent of the prime contractor, that it is in the Government's interest to provide assistance to the prime contractor in the settlement of a particular subcontract. In these situations, the Government, the prime contractor, and a subcontractor may enter into an agreement covering the settlement of one or more subcontracts. In these settlements, the subcontractor shall be paid through the prime contractor as part of the overall settlement with the prime contractor.

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#### **49.108-8 Assignment of rights under subcontracts.**

(a) The termination for convenience clauses in 52.249, except the short-form clauses, obligate the prime contractor to assign to the Government, as directed by the

TCO, all rights, titles, and interest under any subcontract terminated because of termination of the prime contract. The TCO shall not require the assignment unless it is in the Government's interest.

(b) The termination for convenience clauses (except the short-form clauses) also provide the Government the right, in its discretion, to settle and pay any settlement proposal arising out of the termination of subcontracts. This right does not obligate the Government to settle and pay settlement proposals of subcontractors. As a general rule, the prime contractor is obligated to settle and pay these proposals. However, when the TCO determines that it is in the Government's interest, the TCO shall, after notifying the contractor, settle the subcontractor's proposal using the procedures for settlement of prime contracts. An example in which the Government's interest would be served is when a subcontractor is a sole source and it appears that a delay by the prime contractor in settlement or payment of the subcontractor's proposal will jeopardize the financial position of the subcontractor. Direct settlements with subcontractors are not encouraged.

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#### **49.109 Settlement agreements.**

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##### **49.109-1 General.**

When a termination settlement has been negotiated and all required reviews have been obtained, the contractor and the TCO shall execute a settlement agreement on Standard Form 30 (Amendment of Solicitation/Modification of Contract) (see 49.603). The settlement shall cover (a) any setoffs that the Government has against the contractor that may be applied against the terminated contract and (b) all settlement proposals of subcontractors, except proposals that are specifically excepted from the agreement and reserved for separate settlement.

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##### **49.109-2 Reservations.**

(a) The TCO shall—

(1) Reserve in the settlement agreement any rights or demands of the parties that are excepted from the settlement;

(2) Ensure that the wording of the reservation does not create any rights for the parties beyond those in existence before execution of the settlement agreement;

(3) Mark each applicable settlement agreement with "This settlement agreement contains a reservation" and retain the contract file until the reservation is removed;

(4) Ensure that sufficient funds are retained to cover complete settlement of the reserved items: and

reserved items, and

(5) At the appropriate time, prepare a separate settlement of reserved items and include it in a separate settlement agreement.

(b) A recommended format for settlement of reservations appears in 49.603-9.

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#### **49.109-3 Government property.**

Before execution of a settlement agreement, the TCO shall determine the accuracy of the Government property account for the terminated contract. If an audit discloses property for which the contractor cannot account, the TCO shall reserve in the settlement agreement the rights of the Government regarding that property or make an appropriate deduction from the amount otherwise due the contractor.

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#### **49.109-4 No-cost settlement.**

The TCO shall execute a no-cost settlement agreement (see 49.603-6 or 49.603-7, as applicable) if (a) the contractor has not incurred costs for the terminated portion of the contract or (b) the contractor is willing to waive the costs incurred and (c) no amounts are due the Government under the contract.

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#### **49.109-5 Partial settlements.**

The TCO should attempt to settle in one agreement all rights and liabilities of the parties under the contract except those arising from any continued portion of the contract. Generally, the TCO shall not attempt to make partial settlements covering particular items of the prime contractor's settlement proposal. However, when a TCO cannot promptly complete settlement under the terminated contract, a partial settlement may be entered into if (a) the issues on which agreement has been reached are clearly severable from other issues and (b) the partial settlement will not prejudice the Government's or contractor's interests in disposing of the unsettled part of the settlement proposal.

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#### **49.109-6 Joint settlement of two or more settlement proposals.**

(a) With the consent of the contractor, the TCO or TCO's concerned may negotiate jointly two or more termination settlement proposals of the same contractor under different contracts, even though the contracts are with different contracting offices or agencies. In such cases, accounting work shall be consolidated to the greatest extent practical. The resulting settlement may be evidenced by one settlement agreement covering all contracts involved or by a separate agreement for each contract involved.



(b) When the settlement agreement covers more than one contract, it shall (1) clearly identify the contracts involved, (2) assign an amendment modification number to each contract, (3) apportion the total amount of the settlement among the several contracts on some reasonable basis, (4) have attached or incorporated a schedule showing the apportionment, and (5) be distributed and attached to each contract involved in the same manner as other contract modifications.

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#### **49.109-7 Settlement by determination.**

(a) *General.* If the contractor and TCO cannot agree on a termination settlement, or if a settlement proposal is not submitted within the period required by the termination clause, the TCO shall issue a determination of the amount due consistent with the termination clause, including any cost principles incorporated by reference. The TCO shall comply with 49.109-1 through 49.109-6 in making a settlement by determination and with 49.203 in making an adjustment for loss, if any. Copies of determinations shall receive the same distribution as other contract modifications.

(b) *Notice to contractor.* Before issuing a determination of the amount due the contractor, the TCO shall give the contractor at least 15 days notice by certified mail (return receipt requested) to submit written evidence, so as to reach the TCO on or before a stated date, substantiating the amount previously proposed.

(c) *Justification of settlement proposal.* (1) The contractor has the burden of establishing, by proof satisfactory to the TCO, the amount proposed.

(2) The contractor may submit vouchers, verified transcripts of books of account, affidavits, audit reports, and other documents as desired. The TCO may request the contractor to submit additional documents and data, and may request appropriate accountings, investigations, and audits.

(3) The TCO may accept copies of documents and records without requiring original documents unless there is a question of authenticity.

(4) The TCO may hold any conferences considered appropriate (i) to confer with the contractor, (ii) to obtain additional information from Government personnel or from independent experts, or (iii) to consult persons who have submitted affidavits or reports.

(d) *Determinations.* After reviewing the information available, the TCO shall determine the amount due and shall transmit a copy of the determination to the contractor by certified mail (return receipt requested), or by any other method that provides evidence of receipt. The transmittal letter shall advise the contractor that the determination is a final decision from which the contractor may appeal under the Disputes clause, except as shown in paragraph (f) below. The determination shall specify the amount due the contractor and will be supported by detailed schedules conforming generally to the forms for settlement proposals prescribed in 49.602-1 and by additional information, schedules, and analyses as appropriate. The TCO shall explain each major

item of disallowance. The TCO need not reconsider any other action relating to the terminated portion of the contract that was ratified or approved by the TCO or another contracting officer.

(e) *Preservation of evidence.* The TCO shall retain all written evidence and other data relied upon in making a determination, except that copies of original books of account need not be made. The TCO shall return books of account, together with other original papers and documents, to the contractor within a reasonable time.

(f) *Appeals.* The contractor may appeal, under the Disputes clause, any settlement by determination, except when the contractor has failed to submit the settlement proposal within the time provided in the contract and failed to request an extension of time. The pendency of an appeal shall not affect the authority of the TCO to settle the settlement proposal or any part by negotiation with the contractor at any time before the appeal is decided.

(g) *Decision on the contractor's appeal.* The TCO shall give effect to a decision of the Claims Court or a board of contract appeals, when necessary, by an appropriate modification to the contract. When appropriate, the TCO should obtain a release from the contractor. TCO's are authorized to modify the formats of settlement agreements in 49.603 to agree with this provision.

[48 FR 42447, Sept. 19, 1983, as amended at 52 FR 19805, May 27, 1987]

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#### **49.110 Settlement negotiation memorandum.**

(a) The TCO shall, at the conclusion of negotiations, prepare a settlement negotiation memorandum describing the principal elements of the settlement for inclusion in the termination case file and for use by reviewing authorities. Pricing aspects of the settlement shall be documented in accordance with 15.406-3. The memorandum shall be distributed in accordance with 15.406-3.

(b) If the settlement was negotiated on the basis of individual items, the TCO shall specify the factors considered for each item. If the settlement was negotiated on an overall lump-sum basis, the TCO need not evaluate each item or group of items individually, but shall support the total amount of the recommended settlement in reasonable detail. The memorandum shall include explanations of matters involving differences and doubtful questions settled by agreement, and the factors considered. The TCO should include any other matters that will assist reviewing authorities in understanding the basis for the settlement.

[48 FR 42447, Sept. 19, 1983, as amended at 56 FR 67135, Dec. 27, 1991; 62 FR 51271, Sept. 30, 1997]

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#### **49.111 Review of proposed settlements.**

#### 49.111-1 Review of proposed settlements.

Each agency shall establish procedures, when necessary, for the administrative review of proposed termination settlements. When one agency provides termination settlement services for another agency, the agency providing the services shall also perform the settlement review function.

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### 49.112 Payment.

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#### 49.112-1 Partial payments.

(a) *General.* If the contract authorizes partial payments on settlement proposals before settlement, a prime contractor may request them on the form prescribed in 49.602-4 at any time after submission of interim or final settlement proposals. The Government will process applications for partial payments promptly. A subcontractor shall submit its application through the prime contractor which shall attach its own invoice and recommendations to the subcontractor's application. Partial payments to a subcontractor shall be made only through the prime contractor and only after the prime contractor has submitted its interim or final settlement proposal. Except for undelivered acceptable finished products, partial payments shall not be made for profit or fee claimed under the terminated portion of the contract. In exercising discretion on the extent of partial payments to be made, the TCO shall consider the diligence of the contractor in settling with subcontractors and in preparing its own settlement proposal.

(b) *Amount of partial payment.* Before approving any partial payment, the TCO shall obtain any desired accounting, engineering, or other specialized reviews of the data submitted in support of the contractor's settlement proposal. If the reviews and the TCO's examination of the data indicate that the requested partial payment is proper, reasonable payments may be authorized in the discretion of the TCO up to—

(1) 100 percent of the contract price, adjusted for undelivered acceptable items completed before the termination date, or later completed with the approval of the TCO (see 49.205);

(2) 100 percent of the amount of any subcontract settlement paid by the prime contractor if the settlement was approved or ratified by the TCO under 49.108-3(c) or was authorized under 49.108-4;

(3) 90 percent of the direct cost of termination inventory, including costs of raw materials, purchased parts, supplies, and direct labor;

(4) 90 percent of other allowable costs (including settlement expense and manufacturing and administrative indirect costs) allocable to the terminated portion of the contract and not included in subparagraphs (1), (2), or (3) above; and

(5) 100 percent of partial payments made to subcontractors under this section.



(c) *Recognition of assignments.* When an assignment of claims has been made under the contract, the Government shall not make partial payments to other than the assignee unless the parties to the assignment consent in writing (see 32.805(e)).

(d) *Security for partial payments.* If any partial payment is made for completed end items or for costs of termination inventory, the TCO shall protect the Government's interest. This shall be done by obtaining title to the completed end items or termination inventory, or by the creation of a lien in favor of the Government, paramount to all other liens, on the completed end items or termination inventory, or by other appropriate means.

(e) *Deductions in computing amount of partial payments.* The TCO shall deduct from the gross amount of any partial payment otherwise payable under 49.112-1(b)—

(1) All unliquidated balances of progress and advance payments (including interest) made to the contractor, which are allocable to the terminated portion of the contract; and

(2) The amounts of all credits arising from the purchase, retention, or sale of property, the costs of which are included in the application for payment.

(f) *Limitation on total amount.* The total amount of all partial payments shall not exceed the amount that will, in the opinion of the TCO, become due to the contractor because of the termination.

(g) *Effect of overpayment.* If the total of partial payments exceeds the amount finally determined due on the settlement proposal, the contractor shall repay the excess to the Government on demand, together with interest. The interest shall be computed at the rate established by the Secretary of the Treasury under 50 U.S.C. App. 1215(b)(2) from the date the excess payment was received by the contractor to the date of repayment. However, interest will not be charged for any (1) excess payment attributable to a reduction in the settlement proposal because of retention or other disposition of termination inventory, until 10 days after the date of the retention or disposition, or a later date determined by the TCO, or (2) overpayment under cost-reimbursement research and development contracts without profit or fee if the overpayments are repaid to the Government within 30 days after demand.

(h) *Certification and approval of partial payments.* (1) The contractor shall place the following certification on vouchers or invoices for partial payments:

The payment covered by this voucher is a partial payment on the Contractor's settlement proposal under contract No. \_\_\_\_ made under part 49 of the Federal Acquisition Regulation.

(2) The TCO shall approve the invoice or voucher by noting on it the following:

Payment of \$\_\_\_\_\_ is approved.

**49.112-2 Final payment.**

(a) *Negotiated settlement.* After execution of a settlement agreement, the contractor shall submit a voucher or invoice showing the amount agreed upon, less any portion previously paid. The TCO shall attach a copy of the settlement agreement to the voucher or invoice and forward the documents to the disbursing officer for payment.

(b) *Settlement by determination.* If the settlement is by determination and—

(1) There is no appeal within the allowed time, the contractor shall submit a voucher or invoice showing the amount determined due, less any portion previously paid; or

(2) There is an appeal, the contractor shall submit a voucher or invoice showing the amount finally determined due on the appeal, less any portion previously paid. Pending determination of any appeal, the contractor may submit vouchers or invoices for charges that are not directly involved with the portion being appealed, without prejudice to the rights of either party on the appeal.

(c) *Construction contracts.* In the case of construction contracts, before forwarding the final payment voucher, the contracting officer shall ascertain whether there are any outstanding labor violations. If so, the contracting officer shall determine the amount to be withheld from the final payment (see subpart 22.4).

(d) *Interest.* The Government shall not pay interest on the amount due under a settlement agreement or a settlement by determination. The Government may, however, pay interest on a successful contractor appeal from a contracting officer's determination under the Disputes clause at 52.233-1.

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**49.113 Cost principles.**

The cost principles and procedures in the applicable subpart of part 31 shall, subject to the general principles in 49.201, (a) be used in asserting, negotiating, or determining costs relevant to termination settlements under contracts with other than educational institutions, and (b) be a guide for the negotiation of settlements under contracts for experimental, developmental, or research work with educational institutions (but see 31.104).

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**49.114 Unsettled contract changes.**

(a) Before settlement of a completely terminated contract, the TCO shall obtain from the contracting office a list of all related unsettled contract changes. The TCO shall settle, as part of final settlement, all unsettled contract changes after obtaining the recommendations of the contracting office concerning the changes.

(b) When the contract has been partially terminated, any outstanding unsettled contract changes will usually be handled by the contracting officer. However, the contracting officer may delegate this function to the TCO.

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#### **49.115 Settlement of terminated incentive contracts.**

(a) *Fixed-price incentive contracts.* The TCO shall settle terminated fixed-price incentive (FPI) contracts under the provisions of paragraph (j) of the clause at 52.216-16, Incentive Price Revision—Firm Target, and 52.249-2, Termination for Convenience of the Government (Fixed-Price).

(1) *Partial termination.* Under a partially terminated contract, the TCO shall negotiate a settlement as provided in the termination clause of the contract, and paragraph (j) of the clause at 52.216-16, Incentive Price Revision—Firm Target, or paragraph (1) of the clause at 52.216-17, Incentive Price Revision—Successive Targets. The contracting officer shall apply the incentive price revision provisions to completed items accepted by the Government, including any for which the contractor may request reimbursement in the settlement proposal. The TCO shall reimburse the contractor at target price for completed articles included in the settlement proposal for which a final price has not been established. The TCO shall incorporate in the settlement agreement an appropriate reservation as to final price for these completed articles.

(2) *Complete termination.* If any items were delivered and accepted by the Government, the contracting officer shall establish prices under the incentive provisions of the contract. On the terminated portion of the contract, the provisions of the termination clause (see 52.249-2, Termination for Convenience of the Government (Fixed-Price)) shall govern and the provisions of the incentive clause shall not apply. The TCO responsible for the termination settlement will ensure, on the basis of evidence considered proper (including coordination with the contracting officer), that no portion of the costs considered in the negotiations under the incentive provisions are included in the termination settlement.

(b) *Cost-plus-incentive-fee contracts.* The TCO shall settle terminated cost-plus-incentive-fee contracts under the clause at 52.249-6, Termination (Cost-Reimbursement).

(1) *Partial termination.* Under a partial termination, the TCO shall limit the settlement to an adjustment of target fee as provided in paragraph (e) of the clause at 52.216-10, Incentive Fee. The settlement agreement shall include a reservation regarding any adjustment of target cost resulting from the partial termination. The contracting officer shall adjust the target cost, if required.

(2) *Complete termination.* The parties shall negotiate the settlement under the provisions of subpart 49.3 and the clause at 52.249-6, Termination (Cost-Reimbursement). The fee shall be adjusted on the basis of the target fee, and the incentive provisions shall not be applied or considered.

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## **Subpart 49.2—Additional Principles for Fixed-Price Contracts Terminated for Convenience**

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### **49.201 General.**

(a) A settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, including a reasonable allowance for profit. Fair compensation is a matter of judgment and cannot be measured exactly. In a given case, various methods may be equally appropriate for arriving at fair compensation. The use of business judgment, as distinguished from strict accounting principles, is the heart of a settlement.

(b) The primary objective is to negotiate a settlement by agreement. The parties may agree upon a total amount to be paid the contractor without agreeing on or segregating the particular elements of costs or profit comprising this amount.

(c) Cost and accounting data may provide guides, but are not rigid measures, for ascertaining fair compensation. In appropriate cases, costs may be estimated, differences compromised, and doubtful questions settled by agreement. Other types of data, criteria, or standards may furnish equally reliable guides to fair compensation. The amount of recordkeeping, reporting, and accounting related to the settlement of terminated contracts should be kept to a minimum compatible with the reasonable protection of the public interest.

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### **49.202 Profit.**

(a) The TCO shall allow profit on preparations made and work done by the contractor for the terminated portion of the contract but not on the settlement expenses. Anticipatory profits and consequential damages shall not be allowed (but see 49.108-5). Profit for the contractor's efforts in settling subcontractor proposals shall not be based on the dollar amount of the subcontract settlement agreements but the contractor's efforts will be considered in determining the overall rate of profit allowed the contractor. Profit shall not be allowed the contractor for material or services that, as of the effective date of termination, have not been delivered by a subcontractor, regardless of the percentage of completion. The TCO may use any reasonable method to arrive at a fair profit.

(b) In negotiating or determining profit, factors to be considered include—

(1) Extent and difficulty of the work done by the contractor as compared with the total work required by the contract (engineering estimates of the percentage of completion ordinarily should not be required, but if available should be considered);



(2) Engineering work, production scheduling, planning, technical study and supervision, and other necessary services;

(3) Efficiency of the contractor, with particular regard to—

(i) Attainment of quantity and quality production;

(ii) Reduction of costs;

(iii) Economic use of materials, facilities, and manpower; and

(iv) Disposition of termination inventory;

(4) Amount and source of capital and extent of risk assumed;

(5) Inventive and developmental contributions, and cooperation with the Government and other contractors in supplying technical assistance;

(6) Character of the business, including the source and nature of materials and the complexity of manufacturing techniques;

(7) The rate of profit that the contractor would have earned had the contract been completed;

(8) The rate of profit both parties contemplated at the time the contract was negotiated; and

(9) Character and difficulty of subcontracting, including selection, placement, and management of subcontracts, and effort in negotiating settlements of terminated subcontracts.

(c) When computing profit on the terminated portion of a construction contract, the contracting officer shall—

(1) Comply with paragraphs (a) and (b) above;

(2) Allow profit on the prime contractor's settlements with construction subcontractors for actual work in place at the job site; and

(3) Exclude profit on the prime contractor's settlements with construction subcontractors for materials on hand and for preparations made to complete the work.

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#### **49.203 Adjustment for loss.**

(a) In the negotiation or determination of any settlement, the TCO shall not allow profit if it appears that the contractor would have incurred a loss had the entire contract been completed. The TCO shall negotiate or determine the amount of loss and make an

adjustment in the amount of settlement as specified in paragraph (b) or (c) below. In estimating the cost to complete, the TCO shall consider expected production efficiencies and other factors affecting the cost to complete.

(b) If the settlement is on an inventory basis (see 49.206-2(a)), the contractor shall not be paid more than the total of the amounts in subparagraphs (1), (2), and (3) below, less all disposal credits and all unliquidated advance and progress payments previously made under the contract:

(1) The amount negotiated or determined for settlement expenses.

(2) The contract price, as adjusted, for acceptable completed end items (see 49.205).

(3) The remainder of the settlement amount otherwise agreed upon or determined (including the allocable portion of initial costs (see 31.205-42(c)), reduced by multiplying the remainder by the ratio of (i) the total contract price to (ii) the total cost incurred before termination plus the estimated cost to complete the entire contract.

(c) If the settlement is on a total cost basis (see 49.206-2(b)), the contractor shall not be paid more than the total of the amounts in subparagraphs (1) and (2) below, less all disposal and other credits, all advance and progress payments, and all other amounts previously paid under the contract:

(1) The amount negotiated or determined for settlement expenses.

(2) The remainder of the total settlement amount otherwise agreed upon or determined (lines 7 and 14 of SF 1436, Settlement Proposal (Total Cost Basis)) reduced by multiplying the remainder by the ratio of (i) the total contract price to (ii) the remainder plus the estimated cost to complete the entire contract.

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#### **49.204 Deductions.**

From the amount payable to the contractor under a settlement, the TCO shall deduct —

(a) The agreed price for any part of the termination inventory purchased or retained by the contractor, and the proceeds from any materials sold that have not been paid or credited to the Government;

(b) The fair value, as determined by the TCO, of any part of the termination inventory that, before transfer of title to the Government or to a buyer under part 45, is lost or so damaged as to become undeliverable (normal spoilage is excepted, as is inventory for which the Government has expressly assumed the risk of loss); and

(c) Any other amounts as appropriate in the particular case.

[48 FR 42447, Sept. 19, 1983, as amended at 77 FR 12944, Mar. 2, 2012]

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#### **49.205 Completed end items.**

(a) Promptly after the effective date of termination, the TCO shall (1) have all undelivered completed end items inspected and accepted if they comply with the contract requirements, and (2) determine which accepted end items are to be delivered under the contract. The contractor shall invoice accepted and delivered end items at the contract price in the usual manner and shall not include them in the settlement proposal. When completed end items, though accepted, are not to be delivered under the contract, the contractor shall include them in the settlement proposal at the contract price, adjusted for any saving of freight or other charges, together with any credits for their purchase, retention, or sale.

(b) Work in place accepted by the Government under a construction contract is not considered a completed item even though that work may have been paid for at unit prices specified in the contract.

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#### **49.206 Settlement proposals.**

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##### **49.206-1 Submission of settlement proposals.**

(a) Subject to the provisions of the termination clause, the contractor should promptly submit to the TCO a settlement proposal for the amount claimed because of the termination. The final settlement proposal must be submitted within one year from the effective date of the termination, unless the period is extended by the TCO. Termination charges under a single prime contract involving two or more divisions or units of the prime contractor may be consolidated and included in a single settlement proposal.

(b) The settlement proposal must cover all cost elements including settlements with subcontractors and any proposed profit. With the consent of the TCO, proposals may be filed in successive steps covering separate portions of the contractor's costs. Such interim proposals shall include all costs of a particular type, except as the TCO may authorize otherwise.

(c) Settlement proposals must be on the forms prescribed in 49.602 unless the forms are inadequate for a particular contract. Settlement proposals must be in reasonable detail supported by adequate accounting data. Actual, standard (appropriately adjusted), or average costs may be used in preparing settlement proposals if they are determined under generally recognized accounting principles consistently followed by the contractor. When actual, standard, or average costs are not reasonably available, estimated costs may be used if the method of arriving at the estimates is approved by the TCO.



Contractors shall not be required to maintain unduly elaborate cost accounting systems merely because their contracts may subsequently be terminated.

(d) The contractor may use the Settlement Proposal (Short Form), SF 1438 (see 49.602-1(d) and 53.249), when the total proposal is less than \$10,000, unless otherwise instructed by the TCO. Settlement proposals that would normally be included in a single settlement proposal; e.g., those based on a series of separate orders for the same item under one contract, should be consolidated whenever possible and not divided to bring them below \$10,000.

(e) The Schedule of Accounting Information, SF 1439, must be submitted for each termination under a contract for which a settlement proposal is submitted, except when the Standard Form 1438 is used. Although several interim proposals may be submitted, SF 1439 need be submitted only once unless, subsequent to filing the original form, major changes occur in the information submitted.

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#### **49.206-2 Bases for settlement proposals.**

(a) *Inventory basis.* (1) Use of the inventory basis for settlement proposals is preferred. Under this basis, the contractor may propose only costs allocable to the terminated portion of the contract, and the settlement proposal must itemize separately—

(i) Metals, raw materials, purchased parts, work in process, finished parts, components, dies, jigs, fixtures, and tooling, at purchase or manufacturing cost;

(ii) Charges such as engineering costs, initial costs, and general administrative costs;

(iii) Costs of settlements with subcontractors;

(iv) Settlement expenses; and

(v) Other proper charges.

(2) An allowance for profit (49.202) or adjustment for loss (49.203(b)) must be made to complete the gross settlement proposal. All unliquidated advance and progress payments and all disposal and other credits known when the proposal is submitted must then be deducted.

(3) This inventory basis is also appropriate for use under the following circumstances:

(i) The partial termination of a construction or related professional services contract.

(ii) The partial or complete termination of supply orders under any terminated construction contract.

(iii) The complete termination of a unit-price (as distinguished from a lump-sum) professional services contract.

(b) *Total cost basis.* (1) When use of the inventory basis is not practicable or will unduly delay settlement, the total-cost basis (SF-1436) may be used if approved in advance by the TCO as in the following examples:

(i) If production has not commenced and the accumulated costs represent planning and preproduction or *get ready* expenses.

(ii) If, under the contractor's accounting system, unit costs for work in process and finished products cannot readily be established.

(iii) If the contract does not specify unit prices.

(iv) If the termination is complete and involves a letter contract.

(2) When the total-cost basis is used under a complete termination, the contractor must itemize all costs incurred under the contract up to the effective date of termination. The costs of settlements with subcontractors and applicable settlement expenses must also be added. An allowance for profit (49.202) or adjustment for loss (49.203(c)) must be made. The contract price for all end items delivered or to be delivered and accepted must be deducted. All unliquidated advance and progress payments and disposal and other credits known when the proposal is submitted must also be deducted.

(3) When the total-cost basis is used under a partial termination, the settlement proposal shall not be submitted until completion of the continued portion of the contract. The settlement proposal must be prepared as in subparagraph (2) above, except that all costs incurred to the date of completion of the continued portion of the contract must be included.

(4) If a construction contract or a lump-sum professional services contract is completely terminated, the contractor shall—

(i) Use the total cost basis of settlement;

(ii) Omit Line 10 "Deduct-Finished Product Invoiced or to be Invoiced" from Section II of Standard Form-1436) Settlement Proposal (Total Cost Basis); and

(iii) Reduce the gross amount of the settlement by the total of all progress and other payments.

(c) *Other basis.* Settlement proposals may not be submitted on any basis other than paragraph (a) or (b) above without the prior approval of the chief of the contracting or contract administration office.

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#### **49.206-3 Submission of inventory disposal schedules.**

#### **49.206 Termination or inventory disposal schedule.**

Subject to the terms of the termination clause, and whenever termination inventory is involved, the contractor shall submit complete inventory disposal schedules to the TCO reflecting inventory that is allocable to the terminated portion of the contract. The inventory disposal schedules shall be submitted within 120 days from the effective date of termination unless otherwise extended by the TCO based on a written justification to support the extension. The inventory schedules shall be prepared on Standard Form 1428, Inventory Disposal Schedule.

[69 FR 17748, Apr. 5, 2004]

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#### **49.207 Limitation on settlements.**

The total amount payable to the contractor for a settlement, before deducting disposal or other credits and exclusive of settlement costs, must not exceed the contract price less payments otherwise made or to be made under the contract.

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#### **49.208 Equitable adjustment after partial termination.**

Under the termination clause, after partial termination, a contractor may request an equitable adjustment in the price or prices of the continued portion of a fixed-price contract. The TCO shall forward the proposal to the contracting officer except when negotiation authority is delegated to the TCO. The contractor shall submit the proposal in the format of Table 15-2 of 15.408.

(a) When the contracting officer retains responsibility for negotiating the equitable adjustment and executing a supplemental agreement, the contracting officer shall ensure that no portion of an increase in price is included in a termination settlement made or in process.

(b) The TCO shall also ensure that no portion of the costs included in the equitable adjustment are included in the termination settlement.

[48 FR 42447, Sept. 19, 1983, as amended at 60 FR 48218, Sept. 18, 1995; 62 FR 51259, Sept. 30, 1997]

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### **Subpart 49.3—Additional Principles for Cost-Reimbursement Contracts Terminated for Convenience**

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#### **49.301 General.**

Termination clauses for cost-reimbursement contracts (see 49.503(a)) provide for the settlement of costs and fee, if any. The contract clauses governing costs shall determine what costs are allowable.

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#### **49.302 Discontinuance of vouchers.**

(a) When the contract has been completely terminated, the contractor shall not use Standard Form 1034 (Public Voucher for Purchases and Services Other than Personal) after the last day of the sixth month following the month in which the termination is effective. The contractor may elect to stop using vouchers at any time during the 6-month period. When the contractor has vouchered out all costs within the 6-month period, a proposal for fee, if any, may be submitted on SF 1437 (see 49.602-1) or by letter appropriately certified. The contractor must submit a substantiated proposal for fee to the TCO within 1 year from the effective date of termination, unless the period is extended by the TCO. When the use of vouchers is discontinued, the contractor shall submit all unvouchered costs and the proposed fee, if any, as specified in 49.303.

(b) When the contract is partially terminated, 49.304 shall apply.

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#### **49.303 Procedure after discontinuing vouchers.**

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##### **49.303-1 Submission of settlement proposal.**

The contractor shall submit a final settlement proposal covering unvouchered costs and any proposed fee to the TCO within 1 year from the effective date of termination, unless the period is extended by the TCO. The contractor shall use the form prescribed in 49.602-1, unless the TCO authorizes otherwise. The proposal shall not include costs that have been—

(a) Finally disallowed by the contracting officer; or

(b) Previously vouchered and formally questioned by the Government but not yet decided as to allowability.

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##### **49.303-2 Submission of inventory disposal schedules.**

Subject to the terms of the termination clause, and whenever termination inventory is involved, the contractor shall submit complete inventory disposal schedules to the TCO reflecting inventory that is allocable to the terminated portion of the contract. The inventory disposal schedules shall be submitted within 120 days from the effective date of termination unless otherwise extended by the TCO based on a written justification to

support the extension. The inventory disposal schedules shall be prepared on Standard Form 1428, Inventory Disposal Schedule.

[69 FR 17748, Apr. 5, 2004]

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#### **49.303-3 Audit of settlement proposal.**

The TCO shall submit the settlement proposal to the appropriate audit agency for review (see 49.107). However, if the settlement proposal is limited to an adjustment of fee, no referral to the audit agency is required.

[48 FR 42447, Sept. 19, 1983. Redesignated at 61 FR 39221, July 26, 1996]

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#### **49.303-4 Adjustment of indirect costs.**

(a) If the contract contains the clause at 52.216-7, Allowable Cost and Payment, and it appears that adjustment of indirect costs will unduly delay final settlement, the TCO, after obtaining information from the appropriate audit agency, may agree with the contractor to—

(1) Negotiate the amount of indirect costs for the contract period for which final indirect cost rates have not been negotiated, or to use billing rates as final rates for this period if the billing rates appear reasonable; or

(2) Reserve any indirect cost adjustment in the final settlement agreement, pending establishment of negotiated rates under subpart 42.7.

(b) When an amount of indirect cost is negotiated under subparagraph (a)(1) above, the contractor shall eliminate the indirect cost and the related direct costs on which it was based from the total pool and base used to compute indirect costs for other contracts performed during the applicable accounting period.

[48 FR 42447, Sept. 19, 1983. Redesignated at 61 FR 39221, July 26, 1996]

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#### **49.303-5 Final settlement.**

(a) The TCO shall proceed with the settlement and execution of a settlement agreement upon receipt of the audit report, if applicable, and the contract audit closing statement covering vouchered costs.

(b) The TCO shall adjust the fee as provided in 49.305.

(c) The final settlement agreement may include all demands of the Government and proposals of the contractor under the terminated contract. However, no amount shall be



allowed for any item of cost disallowed by the Government, nor for any other item of cost of the same nature.

(d) If an overall settlement of costs is agreed upon, agreement on each element of cost is not necessary. If appropriate, differences may be compromised and doubtful questions settled by agreement. An overall settlement shall not include costs that are clearly not allowable under the terms of the contract.

[48 FR 42447, Sept. 19, 1983. Redesignated at 61 FR 39221, July 26, 1996]

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#### **49.304 Procedure for partial termination.**

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##### **49.304-1 General.**

(a) In a partial termination, the TCO shall limit the settlement to an adjustment of the fee, if any, and with the concurrence of the contracting office, to a reduction in the estimated cost. The TCO shall adjust the fee as provided in 49.304-2 and 49.305, unless

—

(1) The terminated portion is clearly severable from the balance of the contract; or

(2) Performance of the contract is virtually complete, or performance of any continued portion is only on subsidiary items or spare parts, or is otherwise not substantial.

(b) In the case of the exceptions in paragraph (a), the procedures in 49.302 and 49.303 apply.

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##### **49.304-2 Submission of settlement proposal (fee only).**

The contractor shall limit the settlement proposal to a proposed reduction in the amount of fee. The final settlement proposal shall be submitted to the TCO within one year from the effective date of termination, unless the period is extended by the TCO. The proposal may be submitted in the form prescribed in 49.602-1 or by letter appropriately certified. The contractor shall substantiate the amount of fee claimed (see 49.305).

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##### **49.304-3 Submission of vouchers.**

When a partial termination settlement is limited to adjustment of fee, the contractor shall continue to submit the SF 1034, Public Voucher for Purchases and Services Other

than Personal, for costs reimbursable under the contract. The contractor shall not be reimbursed for costs of settlements with subcontractors unless required approvals or ratifications have been obtained (see 49.108).

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#### **49.305 Adjustment of fee.**

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##### **49.305-1 General.**

(a) The TCO shall determine the adjusted fee to be paid, if any, in the manner provided by the contract. The determination is generally based on a percentage of completion of the contract or of the terminated portion. When this basis is used, factors such as the extent and difficulty of the work performed by the contractor (e.g., planning, scheduling, technical study, engineering work production and supervision, placing and supervising subcontracts, and work performed by the contractor in (1) stopping performance, (2) settling terminated subcontracts, and (3) disposing of termination inventory) shall be compared with the total work required by the contract or by the terminated portion. The contractor's adjusted fee shall not include an allowance for fee for subcontract effort included in subcontractors' settlement proposals.

(b) The ratio of costs incurred to the total estimated cost of performing the contract or the terminated portion is only one factor in computing the percentage of completion. This percentage may be either greater or less than that indicated by the ratio of costs incurred, depending upon the evaluation by the TCO of other pertinent factors.

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##### **49.305-2 Construction contracts.**

(a) The percentage of completion basis refers to the contractor's total effort and not solely to the actual construction work. Generally, the effort of a contractor under a cost-reimbursement construction or professional services contract can be segregated into factors such as (1) mobilization including organization, (2) use of finances, (3) contracting for and receipt of materials, (4) placement of subcontracts, (5) preparation of shop drawings, (6) work in place performed by own forces, (7) supervision of subcontractors' work (8) job administration, and (9) demobilization.

(b) Each of the applicable factors in paragraph (a) above shall be assigned a weighted value depending on its importance and difficulty. The total weight value of all factors should be easily divisible (e.g., by 100) to determine percentages. The percentage of completion of each factor must be established based upon the specific facts of each contract. When totaled, the percentage of completion of each factor applied to the weighted value of each factor results in the overall percentage of contract completion. The percentage of completion is then applied to the total contract fee or to



the fee applicable to the terminated portion of the contract to arrive at an equitable adjustment.

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## **Subpart 49.4—Termination for Default**

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### **49.401 General.**

(a) Termination for default is generally the exercise of the Government's contractual right to completely or partially terminate a contract because of the contractor's actual or anticipated failure to perform its contractual obligations.

(b) If the contractor can establish, or it is otherwise determined that the contractor was not in default or that the failure to perform is excusable; i.e., arose out of causes beyond the control and without the fault or negligence of the contractor, the default clauses prescribed in 49.503 and located at 52.249 provide that a termination for default will be considered to have been a termination for the convenience of the Government, and the rights and obligations of the parties governed accordingly.

(c) The Government may, in appropriate cases, exercise termination or cancellation rights in addition to those in the contract clauses (see for example, paragraph (h) of the Default clause at 52.249-8).

(d) For default terminations of orders under Federal Supply Schedule contracts, see subpart 8.4.

(e) Notwithstanding the provisions of this 49.401, the contracting officer may, with the written consent of the contractor, reinstate the terminated contract by amending the notice of termination, after a written determination is made that the supplies or services are still required and reinstatement is advantageous to the Government.

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### **49.402 Termination of fixed-price contracts for default.**

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#### **49.402-1 The Government's right.**

Under contracts containing the Default clause at 52.249-8, the Government has the right, subject to the notice requirements of the clause, to terminate the contract completely or partially for default if the contractor fails to (a) make delivery of the supplies or perform the services within the time specified in the contract, (b) perform any other provision of the contract, or (c) make progress and that failure endangers performance of the contract.

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#### **49.402-2 Effect of termination for default.**

(a) Under a termination for default, the Government is not liable for the contractor's costs on undelivered work and is entitled to the repayment of advance and progress payments, if any, applicable to that work. The Government may elect, under the Default clause, to require the contractor to transfer title and deliver to the Government completed supplies and manufacturing materials, as directed by the contracting officer.

(b) The contracting officer shall not use the Default clause as authority to acquire any completed supplies or manufacturing materials unless it has been ascertained that the Government does not already have title under some other provision of the contract. The contracting officer shall acquire manufacturing materials under the Default clause for furnishing to another contractor only after considering the difficulties the other contractor may have in using the materials.

(c) Subject to paragraph (d) below, the Government shall pay the contractor the contract price for any completed supplies, and the amount agreed upon by the contracting officer and the contractor for any manufacturing materials, acquired by the Government under the Default clause.

(d) The Government must be protected from overpayment that might result from failure to provide for the Government's potential liability to laborers and material suppliers for lien rights outstanding against the completed supplies or materials after the Government has paid the contractor for them. To accomplish this, before paying for supplies or materials, the contracting officer shall take one or more of the following measures:

(1) Ascertain whether the payment bonds, if any, furnished by the contractor are adequate to satisfy all lienors' claims or whether it is feasible to obtain similar bonds to cover outstanding liens.

(2) Require the contractor to furnish appropriate statements from laborers and material suppliers disclaiming any lien rights they may have to the supplies and materials.

(3) Obtain appropriate agreement by the Government, the contractor, and lienors ensuring release of the Government from any potential liability to the contractor or lienors.

(4) Withhold from the amount due for the supplies or materials any amount the contracting officer determines necessary to protect the Government's interest, but only if the measures in subparagraphs (d)(1), (2), and (3) above cannot be accomplished or are considered inadequate.

(5) Take other appropriate action considering the circumstances and the degree of the contractor's solvency.

(e) The contractor is liable to the Government for any excess costs incurred in acquiring supplies and services similar to those terminated for default (see 49.402-6), and for any other damages, whether or not repurchase is effected (see 49.402-7).

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#### **49.402-3 Procedure for default.**

(a) When a default termination is being considered, the Government shall decide which type of termination action to take (i.e., default, convenience, or no-cost cancellation) only after review by contracting and technical personnel, and by counsel, to ensure the propriety of the proposed action.

(b) The administrative contracting officer shall not issue a show cause notice or cure notice without the prior approval of the contracting office, which should be obtained by the most expeditious means.

(c) Subdivision (a)(1)(i) of the Default clause covers situations when the contractor has defaulted by failure to make delivery of the supplies or to perform the services within the specified time. In these situations, no notice of failure or of the possibility of termination for default is required to be sent to the contractor before the actual notice of termination (but see paragraph (e) below). However, if the Government has taken any action that might be construed as a waiver of the contract delivery or performance date, the contracting officer shall send a notice to the contractor setting a new date for the contractor to make delivery or complete performance. The notice shall reserve the Government's rights under the Default clause.

(d) Subdivisions (a)(1)(ii) and (a)(1)(iii) of the Default clause cover situations when the contractor fails to perform some of the other provisions of the contract (such as not furnishing a required performance bond) or so fails to make progress as to endanger performance of the contract. If the termination is predicated upon this type of failure, the contracting officer shall give the contractor written notice specifying the failure and providing a period of 10 days (or longer period as necessary) in which to cure the failure. When appropriate, this notice may be made a part of the notice described in subparagraph (e)(1) below. Upon expiration of the 10 days (or longer period), the contracting officer may issue a notice of termination for default unless it is determined that the failure to perform has been cured. A format for a cure notice is in 49.607.

(e)(1) If termination for default appears appropriate, the contracting officer should, if practicable, notify the contractor in writing of the possibility of the termination. This notice shall call the contractor's attention to the contractual liabilities if the contract is terminated for default, and request the contractor to show cause why the contract should not be terminated for default. The notice may further state that failure of the contractor to present an explanation may be taken as an admission that no valid explanation exists. When appropriate, the notice may invite the contractor to discuss the matter at a conference. A format for a show cause notice is in 49.607.

(2) When a termination for default appears imminent, the contracting officer shall provide a written notification to the surety. If the contractor is subsequently terminated for default, a copy of the notice of default shall be sent to the surety.

(3) If requested by the surety, and agreed to by the contractor and any assignees, arrangements may be made to have future checks mailed to the contractor in care of the surety. In this case, the contractor must forward a written request to the designated disbursing officer specifically directing a change in address for mailing checks.

(4) If the contractor is a small business firm, the contracting officer shall immediately provide a copy of any cure notice or show cause notice to the contracting office's small business specialist and the Small Business Administration Regional Office nearest the contractor. The contracting officer should, whenever practicable, consult with the small business specialist before proceeding with a default termination (see also 49.402-4).

(f) The contracting officer shall consider the following factors in determining whether to terminate a contract for default:

(1) The terms of the contract and applicable laws and regulations.

(2) The specific failure of the contractor and the excuses for the failure.

(3) The availability of the supplies or services from other sources.

(4) The urgency of the need for the supplies or services and the period of time required to obtain them from other sources, as compared with the time delivery could be obtained from the delinquent contractor.

(5) The degree of essentiality of the contractor in the Government acquisition program and the effect of a termination for default upon the contractor's capability as a supplier under other contracts.

(6) The effect of a termination for default on the ability of the contractor to liquidate guaranteed loans, progress payments, or advance payments.

(7) Any other pertinent facts and circumstances.

(g) If, after compliance with the procedures in paragraphs (a) through (f) of this 49.402-3, the contracting officer determines that a termination for default is proper, the contracting officer shall issue a notice of termination stating—

(1) The contract number and date;

(2) The acts or omissions constituting the default;

(3) That the contractor's right to proceed further under the contract (or a specified portion of the contract) is terminated;

(4) That the supplies or services terminated may be purchased against the contractor's account, and that the contractor will be held liable for any excess costs;

(5) If the contracting officer has determined that the failure to perform is not excusable, that the notice of termination constitutes such decision, and that the contractor has the right to appeal such decision under the Disputes clause;

(6) That the Government reserves all rights and remedies provided by law or under the contract, in addition to charging excess costs; and

(7) That the notice constitutes a decision that the contractor is in default as specified and that the contractor has the right to appeal under the Disputes clause.

(h) The contracting officer shall make the same distribution of the termination notice as was made of the contract. A copy shall also be furnished to the contractor's surety, if any, when the notice is furnished to the contractor. The surety should be requested to advise if it desires to arrange for completion of the work. In addition, the contracting officer shall notify the disbursing officer to withhold further payments under the terminated contract, pending further advice, which should be furnished at the earliest practicable time.

(i) In the case of a construction contract, promptly after issuance of the termination notice, the contracting officer shall determine the manner in which the work is to be completed and whether the materials, appliances, and plant that are on the site will be needed.

(j) If the contracting officer determines before issuing the termination notice that the failure to perform is excusable, the contract shall not be terminated for default. If termination is in the Government's interest, the contracting officer may terminate the contract for the convenience of the Government.

(k) If the contracting officer has not been able to determine, before issuance of the notice of termination whether the contractor's failure to perform is excusable, the contracting officer shall make a written decision on that point as soon as practicable after issuance of the notice of termination. The decision shall be delivered promptly to the contractor with a notification that the contractor has the right to appeal as specified in the Disputes clause.

[48 FR 42447, Sept. 19, 1983, as amended at 54 FR 48990, Nov. 28, 1989]

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#### **49.402-4 Procedure in lieu of termination for default.**

The following courses of action, among others, are available to the contracting officer in lieu of termination for default when in the Government's interest:



(a) Permit the contractor, the surety, or the guarantor, to continue performance of the contract under a revised delivery schedule.

(b) Permit the contractor to continue performance of the contract by means of a subcontract or other business arrangement with an acceptable third party, provided the rights of the Government are adequately preserved.

(c) If the requirement for the supplies and services in the contract no longer exists, and the contractor is not liable to the Government for damages as provided in 49.402-7, execute a no-cost termination settlement agreement using the formats in 49.603-6 and 49.603-7 as a guide.

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#### **49.402-5 Memorandum by the contracting officer.**

When a contract is terminated for default or a procedure authorized by 49.402-4 is followed, the contracting officer shall prepare a memorandum for the contract file explaining the reasons for the action taken.

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#### **49.402-6 Repurchase against contractor's account.**

(a) When the supplies or services are still required after termination, the contracting officer shall repurchase the same or similar supplies or services against the contractor's account as soon as practicable. The contracting officer shall repurchase at as reasonable a price as practicable, considering the quality and delivery requirements. The contracting officer may repurchase a quantity in excess of the undelivered quantity terminated for default when the excess quantity is needed, but excess cost may not be charged against the defaulting contractor for more than the undelivered quantity terminated for default (including variations in quantity permitted by the terminated contract). Generally, the contracting officer will make a decision whether or not to repurchase before issuing the termination notice.

(b) If the repurchase is for a quantity not over the undelivered quantity terminated for default, the Default clause authorizes the contracting officer to use any terms and acquisition method deemed appropriate for the repurchase. However, the contracting officer shall obtain competition to the maximum extent practicable for the repurchase. The contracting officer shall cite the Default clause as the authority. If the repurchase is for a quantity over the undelivered quantity terminated for default, the contracting officer shall treat the entire quantity as a new acquisition. If the repurchase is for a quantity over the undelivered quantity terminated for default, the contracting officer shall treat the entire quantity as a new acquisition.

(c) If repurchase is made at a price over the price of the supplies or services terminated, the contracting officer shall, after completion and final payment of the repurchase contract, make a written demand on the contractor for the total amount of the



excess, giving consideration to any increases or decreases in other costs such as transportation, discounts, etc. If the contractor fails to make payment, the contracting officer shall follow the procedures in subpart 32.6 for collecting contract debts due the Government.

[48 FR 42447, Sept. 19, 1983, as amended at 50 FR 1745, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

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#### **49.402-7 Other damages.**

(a) If the contracting officer terminates a contract for default or follows a course of action instead of termination for default (see 49.402-4), the contracting officer promptly must assess and demand any liquidated damages to which the Government is entitled under the contract. Under the contract clause at 52.211-11, these damages are in addition to any excess repurchase costs.

(b) If the Government has suffered any other ascertainable damages, including administrative costs, as a result of the contractor's default, the contracting officer must, on the basis of legal advice, take appropriate action as prescribed in subpart 32.6 to assert the Government's demand for the damages.

[48 FR 42447, Sept. 19, 1983, as amended at 56 FR 15154, Apr. 15, 1991; 60 FR 48250, Sept. 18, 1995; 65 FR 46066, July 26, 2000]

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#### **49.402-8 Reporting information.**

The contracting officer, in accordance with agency procedures, shall ensure that information relating to the termination for default notice and a subsequent withdrawal or a conversion to a termination for convenience is reported in accordance with 42.1503(h).

[75 FR 60260, Sept. 29, 2010, as amended at 78 FR 46792, Aug. 1, 2013]

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#### **49.403 Termination of cost-reimbursement contracts for default.**

(a) The right to terminate a cost-reimbursement contract for default is provided for in the Termination for Default or for Convenience of the Government clause at 52.249-6. A 10-day notice to the contractor before termination for default is required in every case by the clause.

(b) Settlement of a cost-reimbursement contract terminated for default is subject to the principles in subparts 49.1 and 49.3 the same as when a contract is terminated for convenience, except that—

(1) The costs of preparing the contractor's settlement proposal are not allowable (see subparagraph (h)(3) of the clause); and

(2) The contractor is reimbursed the allowable costs, and an appropriate reduction is made in the total fee, if any, (see subparagraph (h)(4) of the clause).

(c) The contracting officer shall use the procedures in 49.402 to the extent appropriate in considering the termination for default of a cost-reimbursement contract. However, a cost-reimbursement contract does not contain any provision for recovery of excess repurchase costs after termination for default (but see paragraph (g) of the clause at 52.246-3 with respect to failure of the contractor to replace or correct defective supplies).

[48 FR 42447, Sept. 19, 1983, as amended at 61 FR 39222, July 26, 1996]

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#### **49.404 Surety-takeover agreements.**

(a) The procedures in this section apply primarily, but not solely, to fixed-price construction contracts terminated for default.

(b) Since the surety is liable for damages resulting from the contractor's default, the surety has certain rights and interests in the completion of the contract work and application of any undisbursed funds. Therefore, the contracting officer must consider carefully the surety's proposals for completing the contract. The contracting officer must take action on the basis of the Government's interest, including the possible effect upon the Government's rights against the surety.

(c) The contracting officer should permit surety offers to complete the contract, unless the contracting officer believes that the persons or firms proposed by the surety to complete the work are not competent and qualified or the proposal is not in the best interest of the Government.

(d) There may be conflicting demands for the defaulting contractor's assets, including unpaid prior earnings (retained percentages and unpaid progress estimates). Therefore, the surety may include a "takeover" agreement in its proposal, fixing the surety's rights to payment from those funds. The contracting officer may (but not before the effective date of termination) enter into a written agreement with the surety. The contracting officer should consider using a tripartite agreement among the Government, the surety, and the defaulting contractor to resolve the defaulting contractor's residual rights, including assertions to unpaid prior earnings.

(e) Any takeover agreement must require the surety to complete the contract and the Government to pay the surety's costs and expenses up to the balance of the contract price unpaid at the time of default, subject to the following conditions:

(1) Any unpaid earnings of the defaulting contractor, including retained percentages and progress estimates for work accomplished before termination, must be subject to debts due the Government by the contractor, except to the extent that the unpaid earnings may be used to pay the completing surety its actual costs and expenses incurred in the completion of the work, but not including its payments and obligations under the payment bond given in connection with the contract.

(2) The surety is bound by contract terms governing liquidated damages for delays in completion of the work, unless the delays are excusable under the contract.

(3) If the contract proceeds have been assigned to a financing institution, the surety must not be paid from unpaid earnings, unless the assignee provides written consent.

(4) The contracting officer must not pay the surety more than the amount it expended completing the work and discharging its liabilities under the defaulting contractor's payment bond. Payments to the surety to reimburse it for discharging its liabilities under the payment bond of the defaulting contractor must be only on authority of—

(i) Mutual agreement among the Government, the defaulting contractor, and the surety;

(ii) Determination of the Comptroller General as to payee and amount; or

(iii) Order of a court of competent jurisdiction.

[65 FR 46067, July 26, 2000]

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#### **49.405 Completion by another contractor.**

If the surety does not arrange for completion of the contract, the contracting officer normally will arrange for completion of the work by awarding a new contract based on the same plans and specifications. The new contract may be the result of sealed bidding or any other appropriate contracting method or procedure. The contracting officer shall exercise reasonable diligence to obtain the lowest price available for completion.

[48 FR 42447, Sept. 19, 1983, as amended at 50 FR 1746, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

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#### **49.406 Liquidation of liability.**

The contract provides that the contractor and the surety are liable to the Government for resultant damages. The contracting officer shall use all retained percentages of progress payments previously made to the contractor and any progress payments due for work completed before the termination to liquidate the contractor's and the surety's

liability to the Government. If the retained and unpaid amounts are insufficient, the contracting officer shall take steps to recover the additional sum from the contractor and the surety.

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## **Subpart 49.5—Contract Termination Clauses**

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### **49.501 General.**

This subpart prescribes the principal contract termination clauses. This subpart does not apply to contracts that use the clause at 52.213-4, Terms and Conditions—Simplified Acquisitions (Other Than Commercial Items). In appropriate cases, agencies may authorize the use of special purpose clauses, if consistent with this chapter.

[75 FR 82577, Dec. 30, 2010]

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### **49.502 Termination for convenience of the Government.**

(a) *Fixed-price contracts that do not exceed the simplified acquisition threshold (short form)*—(1) *General use.* The contracting officer shall insert the clause at 52.249-1, Termination for Convenience of the Government (Fixed-Price) (Short Form), in solicitations and contracts when a fixed-price contract is contemplated and the contract amount is not expected to exceed the simplified acquisition threshold, except (i) if use of the clause at 52.249-4, Termination for Convenience of the Government (Services) (Short Form) is appropriate, (ii) in contracts for research and development work with an educational or nonprofit institution on a no-profit basis, (iii) in contracts for architect-engineer services, or (iv) if one of the clauses prescribed or cited at 49.505(a) or (c), is appropriate.

(2) *Dismantling and demolition.* If the contract is for dismantling, demolition, or removal of improvements, the contracting officer shall use the clause with its *Alternate I*.

(b) *Fixed-price contracts that exceed the simplified acquisition threshold*—(1)(i) *General use.* The contracting officer shall insert the clause at 52.249-2, Termination for Convenience of the Government (Fixed-Price), in solicitations and contracts when a fixed-price contract is contemplated and the contract amount is expected to exceed the simplified acquisition threshold, except in contracts for (i) dismantling and demolition, (ii) research and development work with an educational or nonprofit institution on a no-profit basis, or (iii) architect-engineer services; it shall not be used if the clause at 52.249-4, Termination for Convenience of the Government (Services) (Short Form), is appropriate (see 49.502(c)), or one of the clauses prescribed or cited at 49.505(a), (b), or (e), is appropriate.

(ii) *Construction*. If the contract is for construction, the contracting officer shall use the clause with its *Alternate I*.

(iii) *Partial payments*. If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate, the contracting officer shall use the clause with its *Alternate II*. In such contracts for construction, the contracting officer shall use the clause with its *Alternate III*.

(2) *Dismantling and demolition*. The contracting officer shall insert the clause at 52.249-3, Termination for Convenience of the Government (Dismantling, Demolition, or Removal of Improvements) in solicitations and contracts for dismantling, demolition, or removal of improvements, when a fixed-price contract is contemplated and the contract amount is expected to exceed the simplified acquisition threshold,. If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate, the contracting officer shall use the clause with its *Alternate I*.

(c) *Service contracts (short form)*. The contracting officer shall insert the clause at 52.249-4, Termination for Convenience of the Government (Services) (Short Form), in solicitations and contracts for services, regardless of value, when a fixed-price contract is contemplated and the contracting officer determines that because of the kind of services required, the successful offeror will not incur substantial charges in preparation for and in carrying out the contract, and would, if terminated for the convenience of the Government, limit termination settlement charges to services rendered before the date of termination. Examples of services where this clause may be appropriate are contracts for rental of unreserved parking space, laundry and drycleaning, etc.

(d) *Research and development contracts*. The contracting officer shall insert the clause at 52.249-5, Termination for the Convenience of the Government (Educational and Other Nonprofit Institutions), in solicitations and contracts when either a fixed-price or cost-reimbursement contract is contemplated for research and development work with an educational or nonprofit institution on a no-profit or no-fee basis.

(e) *Subcontracts*—(1) *General use*. The prime contractor may find the clause at 52.249-1, Termination for Convenience of the Government (Fixed-Price) (Short Form), or at 52.249-2, Termination for Convenience of the Government (Fixed-Price), as appropriate, suitable for use in fixed-price subcontracts, except as noted in subparagraph (2) below; *provided*, that the relationship between the contractor and subcontractor is clearly indicated. Inapplicable conditions (e.g., paragraph (d)) in 52.249-2 should be deleted and the periods reduced for submitting the subcontractor's termination settlement proposal (e.g., 6 months), and for requesting an equitable price adjustment (e.g., 45 days).

(2) *Research and development*. The prime contractor may find the clause at 52.249-5, Termination for the Convenience of the Government (Educational and Other Nonprofit



Institutions), suitable for use in subcontracts placed with educational or nonprofit institutions on a no-profit or no-fee basis; *provided*, that the relationship between the contractor and subcontractor is clearly indicated. Inapplicable conditions (e.g., paragraph (h)) should be deleted, the period for submitting the subcontractor's termination settlement proposal should be reduced (e.g., 6 months), the subcontract should be placed on a no-profit or no-fee basis, and the subcontract should incorporate or be negotiated on the basis of the cost principles in part 31 of the Federal Acquisition Regulation.

[48 FR 42447, Sept. 19, 1983, as amended at 61 FR 39222, July 26, 1996; 71 FR 57368, Sept. 28, 2006; 72 FR 27389, May 15, 2007]

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#### **49.503 Termination for convenience of the Government and default.**

(a) *Cost-reimbursement contracts*—(1) *General use*. Insert the clause at 52.249-6, Termination (Cost-Reimbursement), in solicitations and contracts when a cost-reimbursement contract is contemplated, except contracts for research and development with an educational or nonprofit institution on a no-fee basis.

(2) *Construction*. If the contract is for construction, the contracting officer shall use the clause with its *Alternate I*.

(3) *Partial payments*. If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate, the contracting officer shall use the clause with its *Alternate II*. In such contracts for construction, the contracting officer shall use the clause with its *Alternate III*.

(4) *Time-and-material and labor-hour contracts*. If the contract is a time-and-material or labor-hour contract, the contracting officer shall use the clause with its *Alternate IV*. If the contract is with an agency of the U.S. Government or with State, local, or foreign governments or their agencies, and if the contracting officer determines that the requirement to pay interest on excess partial payments is inappropriate, the contracting officer shall use the clause with its *Alternate V*.

(b) Insert the clause at 52.249-7, Termination (Fixed-Price Architect-Engineer), in solicitations and contracts for architect-engineer services, when a fixed-price contract is contemplated.

(c) *Subcontracts*. The prime contractor may find the clause at 52.249-6, Termination (Cost-Reimbursement), suitable for use in cost-reimbursement subcontracts; *provided*, that the relationship between the contractor and subcontractor is clearly indicated. Inapplicable conditions (e.g., paragraphs (e), (j) and (n)) should be deleted and the period for submitting the subcontractor's termination settlement proposal should be reduced (e.g., 6 months).



[48 FR 42447, Sept. 19, 1983, as amended at 61 FR 39222, July 26, 1996; 64 FR 51845, Sept. 24, 1999]

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#### **49.504 Termination of fixed-price contracts for default.**

(a)(1) *Supplies and services.* The contracting officer shall insert the clause at 52.249-8, Default (Fixed-Price Supply and Service), in solicitations and contracts when a fixed-price contract is contemplated and the contract amount is expected to exceed the simplified acquisition threshold. The contracting officer may use the clause when the contract amount is at or below the simplified acquisition threshold, if appropriate (e.g., if the acquisition involves items with a history of unsatisfactory quality).

(2) *Transportation.* If the contract is for transportation or transportation-related services, the contracting officer shall use the clause with its *Alternate I*.

(b) *Research and development.* The contracting officer shall insert the clause at 52.249-9, Default (Fixed-Price Research and Development), in solicitations and contracts for research and development when a fixed-price contract is contemplated and the contract amount is expected to exceed the simplified acquisition threshold, except those with educational or nonprofit institutions on a no-profit basis. The contracting officer may use the clause when the contract amount is at or below the simplified acquisition threshold, if appropriate (e.g., if the contracting officer believes that key personnel essential to the work may be devoted to other programs).

(c)(1) *Construction.* The contracting officer shall insert the clause at 52.249-10, Default (Fixed-Price Construction), in solicitations and contracts for construction, when a fixed-price contract is contemplated and the contract amount is expected to exceed the simplified acquisition threshold. The contracting officer may use the clause when the contract amount is at or below the simplified acquisition threshold, if appropriate (e.g., if completion dates are essential).

(2) *Dismantling and demolition.* If the contract is for dismantling, demolition, or removal of improvements, the contracting officer shall use the clause with its *Alternate I*.

(3) *National emergencies.* If the contract is to be awarded during a period of national emergency, the contracting officer may use the clause (i) with its *Alternate II* when a fixed-price contract for construction is contemplated, or (ii) with its *Alternate III* when a contract for dismantling, demolition, or removal of improvements is contemplated.

[48 FR 42447, Sept. 19, 1983, as amended at 60 FR 34760, July 3, 1995]

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#### **49.505 Other termination clauses.**

(a) *Personal service contracts.* The contracting officer shall insert the clause at 52.249-12, Termination (Personal Services), in solicitations and contracts for personal

services (see Part 37).

(b) *Excusable delays.* The contracting officer shall insert the clause at 52.249-14, Excusable Delays, in solicitations and contracts for supplies, services, construction, and research and development on a fee basis, when a cost-reimbursement contract is contemplated. The contracting officer shall also insert the clause in time-and-material contracts, and labor-hour contracts.

(c) *Communication service contracts.* This regulation does not prescribe a clause for the cancellation or termination of orders under communication service contracts with common carriers because of special agency requirements that apply to these services. An appropriate clause, however, shall be prescribed at agency level, within those agencies contracting for these services.

[48 FR 42447, Sept. 19, 1983, as amended at 72 FR 27389, May 15, 2007; 75 FR 34291, June 16, 2010]

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## **Subpart 49.6—Contract Termination Forms and Formats**

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### **49.601 Notice of termination for convenience.**

(See 49.402-3(g) for notice of termination for default.)

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#### **49.601-1 Electronic notice.**

The contracting officer may provide expedited notice of termination by electronic means that includes a requirement for the contractor to confirm receipt. If the contractor does not confirm receipt promptly, the contracting officer shall resend the notice electronically, and expedite the letter notice described in 49.601-2. If confirmation of the electronic notice is received, and the electronic notice includes all content in 49.601-2, the contracting officer need not send the letter notice described in 49.601-2.

(a) *Complete termination.* The following electronic notice is suggested for use if a supply contract is being completely terminated for convenience. If appropriately modified, the notice may be used for other than supply contracts.

DATE \_\_\_\_\_

XYZ Corporation

New York, NY 12345

Contract No. \_\_\_\_\_ is completely terminated under clause \_\_\_\_\_, effective \_\_\_\_\_ [insert "immediately, (today's date)" or "on \_\_\_\_\_, 20\_\_\_\_", or "as soon as you have delivered, including prior deliveries, the following items:" (list)]. Immediately stop all work, terminate subcontracts, and place no

further orders except to the extent *[insert if applicable "necessary to complete items not terminated or"]* that you or a subcontractor wish to retain and continue for your own account any work-in-process or other materials. Provide by electronic means similar instructions to all subcontractors and suppliers. Detailed instructions follow.

---

Contracting Officer

(b) *Partial termination.* The following electronic notice is suggested for use if a supply contract is being partially terminated for convenience. If appropriately modified, the notice may be used for other than supply contracts.

DATE \_\_\_\_\_

XYZ Corporation

New York, NY 12345

Contract No. \_\_\_\_\_ is partially terminated under clause \_\_\_\_\_, effective \_\_\_\_\_ *[insert "immediately, (today's date)" or "on \_\_\_\_\_, 20\_\_"]*. Reduce items to be delivered as follows: *[insert instructions]*. Immediately stop all work, terminate subcontracts, and place no further orders except as necessary to perform the portion not terminated or that you or a subcontractor wish to retain and continue for your account any work-in-process or other materials. Provide by electronic means similar instructions to all subcontractors and suppliers. Detailed instructions follow.

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Contracting Officer

[48 FR 42447, Sept. 19, 1983, as amended at 65 FR 36031, June 6, 2000; 81 FR 83099, Nov. 18, 2016]

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#### **49.601-2 Letter notice.**

The following letter notice of termination is suggested for use if a contract for supplies is being terminated for convenience. With appropriate modifications, it may be used in terminating contracts for other than supplies and in terminating subcontracts. This notice shall be sent by certified mail, return receipt requested, or electronically, provided evidence of receipt is received by the contracting officer. If no prior electronic notice was issued, or if no confirmation of an electronic notice was received, use the alternate notice that follows this notice.

*line items, etc."*

*[At the top of the notice, set out all special details relating to the particular termination; e.g., name and address of company, contract number of terminated contract, items, etc.]*

(a) *Effective date of termination.* This confirms the Government's electronic notice to you dated \_\_\_\_\_, 20\_\_, terminating \_\_\_\_\_ *[insert "completely" or "in part"]* Contract No. \_\_\_\_\_ (referred to as "the contract") for the Government's convenience under the clause entitled \_\_\_\_\_ *[insert title of appropriate termination clause]*. The termination is effective on the date and in the manner stated in the electronic notice.

(b) *Cessation of work and notification to immediate subcontractors.* You shall take the following steps:

(1) Stop all work, make no further shipments, and place no further orders relating to the contract, except for—

(i) The continued portion of the contract, if any;

(ii) Work-in-process or other materials that you may wish to retain for your own account; or

(iii) Work-in-process that the Contracting Officer authorizes you to continue (A) for safety precautions, (B) to clear or avoid damage to equipment, (C) to avoid immediate complete spoilage of work-in-process having a definite commercial value, or (D) to prevent any other undue loss to the Government. (If you believe this authorization is necessary or advisable, immediately notify the Contracting Officer by telephone or personal conference and obtain instructions.)

(2) Keep adequate records of your compliance with subparagraph (1) above showing the—

(i) Date you received the Notice of Termination;

(ii) Effective date of the termination; and

(iii) Extent of completion of performance on the effective date.

(3) Furnish notice of termination to each immediate subcontractor and supplier that will be affected by this termination. In the notice—

(i) Specify your Government contract number;

(ii) State whether the contract has been terminated completely or partially;

(iii) Provide instructions to stop all work, make no further shipments, place no further orders, and terminate all subcontracts under the contract, subject to the exceptions in subparagraph (1) above;

(iv) Provide instructions to submit any settlement proposal promptly; and

(v) Request that similar notices and instructions be given to its immediate subcontractors.

(4) Notify the Contracting Officer of all pending legal proceedings that are based on subcontracts or purchase orders under the contract, or in which a lien has been or may be placed against termination inventory to be reported to the Government. Also, promptly notify the Contracting Officer of any such proceedings that are filed after receipt of this Notice.

(5) Take any other action required by the Contracting Officer or under the Termination clause in the contract.

(c) *Termination inventory.* (1) As instructed by the Contracting Officer, transfer title and deliver to the Government all termination inventory of the following types or classes, including subcontractor termination inventory that you have the right to take: [*Contracting Officer insert proper identification or "None"*].

(2) To settle your proposal, it will be necessary to establish that all prime and subcontractor termination inventory has been properly accounted for. For detailed information, see part 45.

(d) *Settlements with subcontractors.* You remain liable to your subcontractors and suppliers for proposals arising because of the termination of their subcontracts or orders. You are requested to settle these settlement proposals as promptly as possible. For purposes of reimbursement by the Government, settlements will be governed by the provisions of part 49.

(e) *Completed end items.* (1) Notify the Contracting Officer of the number of items completed under the contract and still on hand and arrange for their delivery or other disposal (see 49.205).

(2) Invoice acceptable completed end items under the contract in the usual way and do not include them in the settlement proposal.

(f) *Patents.* If required by the contract, promptly forward the following to the Contracting Officer:

(1) Disclosure of all inventions, discoveries, and patent applications made in the performance of the contract.

(2) Instruments of license or assignment on all inventions, discoveries, and patent applications made in the performance of the contract.

(g) *Employees affected.* (1) If this termination, together with other outstanding terminations, will necessitate a significant reduction in your work force, you are urged to—

(i) Promptly inform the local State Employment Service of your reduction-in-force schedule in numbers and occupations, so that the Service can take timely action in assisting displaced workers;

(ii) Give affected employees maximum practical advance notice of the employment reduction and inform them of the facilities and services available to them through the local State Employment Service offices;

(iii) Advise affected employees to file applications with the State Employment Service to qualify for unemployment insurance, if necessary;

(iv) Inform officials of local unions having agreements with you of the impending reduction-in-force; and

(v) Inform the local Chamber of Commerce and other appropriate organizations which are prepared to offer practical assistance in finding employment for displaced workers of the impending reduction-in-force.

(2) If practicable, urge subcontractors to take similar actions to those described in subparagraph (1) above.

(h) *Administrative.* The contract administration office named in the contract will identify the Contracting Officer who will be in charge of the settlement of this termination and who will, upon request, provide the necessary settlement forms. Matters not covered by this notice should be brought to the attention of the undersigned.

(i) Please acknowledge receipt of this notice as provided below.

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(Contracting Officer)

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(Name of Office)

---

(Address)

*Acknowledgment of Notice*

The undersigned acknowledges receipt of a signed copy of this notice on \_\_\_\_\_, 20\_\_\_\_. Two signed copies of this notice are returned.

---

(Name of Contractor)

By \_\_\_\_\_

(Name)

---

(Title)

(End of notice)

*Alternate notice.* Substitute the following paragraph (a) for paragraph (a) of 49.601-2, Notice of Termination to Prime Contractors, if no prior electronic notice was issued, or if no confirmation of an electronic notice was received:

(a) *Effective date of termination.* You are notified that Contract No. \_\_\_\_\_ (referred to as "the contract") is terminated \_\_\_\_\_ [insert "completely" or "in part"] for the Government's convenience under the clause entitled \_\_\_\_\_ [insert title of appropriate termination clause]. The termination is effective \_\_\_\_\_ [insert either "immediately upon receipt of this Notice" or "on \_\_\_\_\_, 20\_\_\_\_," or "as soon as you have delivered, including prior deliveries, the following items:" (list)]. Reduce items to be delivered as follows: [insert instructions].

[48 FR 42447, Sept. 19, 1983, as amended at 65 FR 36031, June 6, 2000; 81 FR 83099, Nov. 18, 2016; 82 FR 4714, Jan. 13, 2017]

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## **49.602 Forms for settlement of terminated contracts.**

The standard forms listed below shall be used for settling terminated prime contracts. The forms at 49.602-1 and 49.602-2 may also be used for settling terminated subcontracts. A listing of the Standard forms is located in subpart 53.3.

[48 FR 42447, Sept. 19, 1983, as amended at 83 FR 42574, Aug. 22, 2018]

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### **49.602-1 Termination settlement proposal forms.**

(a) Standard Form 1435, Settlement Proposal (Inventory Basis), shall be used to submit settlement proposals resulting from the termination of fixed-price contracts if the proposals are computed on an inventory basis (see 49.206-2(a)).

(b) Standard Form 1436, Settlement Proposal (Total Cost Basis), shall be used to submit settlement proposals resulting from the termination of fixed-price contracts if the proposals are computed on a total cost basis (see 49.206-2(b)).

(c) Standard Form 1437, Settlement Proposal for Cost-Reimbursement Type Contracts, shall be used to submit settlement proposals resulting from the termination of cost-reimbursement contracts (see 49.302).



(d) Standard Form 1438, Settlement Proposal (Short Form), shall be used to submit settlement proposals resulting from the termination of fixed-price contracts if the total proposal is less than \$10,000 (see 49.206-1(d)).

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#### **49.602-2 Inventory forms.**

Standard Form (SF) 1428, Inventory Disposal Schedule, and SF 1429, Inventory Disposal Schedule—Continuation Sheet, shall be used to support settlement proposals submitted on the forms specified in 49.602-1(b) and (d).

[69 FR 17748, Apr. 5, 2004]

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#### **49.602-3 Schedule of accounting information.**

Standard Form 1439, Schedule of Accounting Information, shall be filed in support of a settlement proposal unless the proposal is filed on Standard Form 1438, Settlement Proposal (Short Form) (see 49.206-1(e)).

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#### **49.602-4 Partial payments.**

Standard Form 1440, Application for Partial Payment, shall be used to apply for partial payments (see 49.112-1).

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#### **49.602-5 Settlement agreement.**

Standard Form 30 (SF 30), Amendment of Solicitation/Modification of Contract, shall be used to execute a settlement agreement (see 49.109-1).

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#### **49.603 Formats for termination for convenience settlement agreements.**

The formats to be used for termination for convenience settlement agreements should be substantially as shown in this section (see 49.109). Termination contracting officers (TCO's) may, however, modify the contents of these agreements to conform with special termination clauses prescribed or authorized by their agencies (e.g., see 49.501 and 49.505(c)).

[48 FR 42447, Sept. 19, 1983, as amended at 72 FR 27389, May 15, 2007]

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**49.603-1 Fixed-price contracts—complete termination.**

*[Insert the following in Block 14 of SF 30 for settlements of fixed-price contracts completely terminated.]*

(a) This supplemental agreement settles the settlement proposal resulting from the Notice of Termination dated \_\_\_\_\_.

(b) The parties agree to the following:

(1) The Contractor certifies that all contract termination inventory (including scrap) has been retained or acquired by the Contractor, sold to third parties, returned to suppliers, delivered to or stored for the Government, or otherwise properly accounted for, and that all proceeds and retention credits have been used in arriving at this agreement.

(2) The Contractor certifies that each immediate subcontractor, whose settlement proposal is included in the proposal settled by this agreement, has furnished the Contractor a certificate stating (i) that all subcontract termination inventory (including scrap) has been retained or acquired by the subcontractor, sold to third parties, returned to suppliers, delivered to or stored for the Government, or otherwise properly accounted for, and that all proceeds and retention credits were used in arriving at the settlement of the subcontract, and (ii) that the subcontractor has received a similar certificate from each immediate subcontractor whose proposal was included in its proposal.

(3) The Contractor certifies that all items of termination inventory, the costs of which were used in arriving at the amount of this settlement or the settlement of any subcontract settlement proposal included in this settlement, (i) are properly allocable to the terminated portion of the contract, (ii) do not exceed the reasonable quantitative requirements of the terminated portion of the contract, and (iii) do not include any items reasonably usable without loss to the Contractor on its other work. The Contractor further certifies that the Contracting Officer has been informed of any substantial change in the status of the items between the dates of the termination inventory schedules and the date of this agreement.

(4) The Contractor transfers, conveys, and assigns to the Government all the right, title, and interest, if any, that the Contractor has received, or is entitled to receive, in and to subcontract termination inventory not otherwise properly accounted for.

(5) The Contractor shall, within 10 days after receipt of the payment specified in this agreement, pay to each of its immediate subcontractors (or their respective assignees) the amounts to which they are entitled, after deducting any prior payments and, if the Contractor so elects, any amounts due and payable to the Contractor by those subcontractors.

(6)(i) The Contractor has received \$\_\_\_\_\_ for work and services performed, or items delivered, under the completed portion of the contract. The Government confirms the right of the Contractor, subject to paragraph (7) below, to retain this sum and agrees that it constitutes a portion of the total amount to which the Contractor is entitled in settlement of the contract.

(ii) Further, the Government agrees to pay to the Contractor or its assignee, upon presentation of a proper invoice or voucher, the sum of \$\_\_\_\_\_ *[insert net amount of settlement]*, arrived at by deducting from the sum of \$\_\_\_\_\_ *[for proposals on an inventory basis insert gross amount of settlement; for proposals on a total cost basis, insert gross amount of settlement less amount shown in subdivision (6)(i) above]*, (A) the amount of \$\_\_\_\_\_ for all unliquidated partial or progress payments previously made to the Contractor or its assignee and all unliquidated advance payments (with any interest) and (B) the amount of \$\_\_\_\_\_ for all applicable property disposal credits *[insert if appropriate, "and (C) the amount of \$\_\_\_\_\_ for all other amounts due the Government under this contract, except as provided in paragraph (7) below"]*.

(iii) The net settlement of \$\_\_\_\_\_ in subdivision (ii) above, together with sums previously paid, constitutes payment in full and complete settlement of the amount due the Contractor for the complete termination of the contract and of all other demands and liabilities of the Contractor and the Government under the contract except as provided in paragraph (7) below.

(7) Regardless of any other provision of this agreement, the following rights and liabilities of the parties under the contract are reserved:

*[The following list of reserved or excepted rights and liabilities is intended to cover those that should most frequently be reserved and that should be scrutinized at the time a settlement agreement is negotiated (see 49.109-2). The suggested language of the excepted items on the list may be varied at the discretion of the contracting officer. If accuracy or completeness can be achieved by referencing the number of a contract clause or provision covering the matter in question, then follow that method of enumerating reserved rights and liabilities. Omit any of the following that are not applicable and add any additional exceptions or reservations required.]*

- (i) All rights and liabilities, if any, of the parties, as to matters covered by any renegotiation authority.
- (ii) All rights of the Government to take the benefit of agreements or judgments affecting royalties paid or payable in connection with the performance of the contract.
- (iii) All rights and liabilities, if any, of the parties under those clauses inserted in the contract because of the requirements of Acts of Congress and Executive Orders, including, without limitation, any applicable clauses relating to: labor law, contingent fees, domestic articles, and employment of aliens." *[If the contract contains clauses of this character inserted for reasons other than requirements of Acts of Congress or Executive Orders, the suggested language should be appropriately modified.]*
- (iv) All rights and liabilities of the parties arising under the contract and relating to reproduction rights, patent infringements, inventions, or applications for patents, including rights to assignments, invention reports, licenses, covenants of indemnity against patent risks, and bonds for patent indemnity obligations, together with all rights and liabilities under the bonds.
- (v) All rights and liabilities of the parties, arising under the contract or otherwise, and concerning defects, guarantees, or warranties relating to any articles or component parts furnished to the Government by the Contractor under the contract or this agreement.
- (vi) All rights and liabilities of the parties under the contract relating to any contract termination inventory stored for the Government.
- (vii) All rights and liabilities of the parties under agreements relating to the future care and disposition by the Contractor of Government-owned property remaining in the Contractor's custody.
- (viii) All rights and liabilities of the parties relating to Government property furnished to the Contractor for the performance of this contract.
- (ix) All rights and liabilities of the parties under the contract relating to options (except options to continue or increase the work under the contract), covenants not to compete, and covenants of indemnity.
- (x) All rights and liabilities, if any, of the parties under those clauses of the contract relating to price reductions for defective certified cost or pricing data.

(End of agreement)

[48 FR 42447, Sept. 19, 1983, as amended at 60 FR 37773, July 21, 1995; 60 FR 49723, Sept. 26, 1995; 75 FR 53150, Aug. 30, 2010]

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#### **49.603-2 Fixed-price contracts—partial termination.**

*[Insert the following in Block 14 of SF 30 for settlements of fixed-price contracts partially terminated.]*

(a) This supplemental agreement settles the settlement proposal resulting from the Notice of Termination dated

(b) The parties agree to the following:

(1) The terminated portion of the contract is as follows: *[specify the terminated portion clearly as to (i) line item numbers, (ii) descriptions, (iii) quantity terminated, (iv) unit price of items, (v) total price of terminated items, and (vi) any other explanation necessary to avoid uncertainty or misunderstanding]*.

(2) The Contractor certifies that all contract termination inventory (including scrap) has been retained or acquired by the Contractor, sold to third parties, returned to suppliers, delivered to or stored for the Government, or otherwise properly accounted for, and that all proceeds and retention credits have been used in arriving at this agreement.

(3) The Contractor certifies that each immediate subcontractor, whose settlement proposal is included in the proposal settled by this agreement, has furnished the Contractor a certificate stating (i) that all subcontract termination inventory (including scrap) has been retained or acquired by the subcontractor, sold to third parties, returned to suppliers, delivered to or stored for the Government, or otherwise properly accounted for, and that all proceeds and retention credits were used in arriving at the settlement of the subcontract, and (ii) that the subcontractor has received a similar certificate from each immediate subcontractor whose proposal was included in its proposal.

(4) The Contractor certifies that all items of termination inventory, the costs of which were used in arriving at the amount of this settlement or the settlement of any subcontract settlement proposal included in this settlement, (i) are properly allocable to the terminated portion of the contract, (ii) do not exceed the reasonable quantitative requirements of the terminated portion of the contract, and (iii) do not include any items reasonably usable without loss to the Contractor on its other work. The Contractor further certifies that the Contracting Officer has been informed of any substantial change in the status of the items between the dates of the termination inventory schedules and the date of this agreement.

(5) The Contractor transfers, conveys, and assigns to the Government all the right, title, and interest, if any, that the Contractor has received, or is entitled to receive, in and to subcontract termination inventory not otherwise properly accounted for.

(6) The Contractor shall, within 10 days after receipt of the payment specified in this agreement, pay to each of its immediate subcontractors (or their respective assignees) the amounts to which they are entitled, after deducting any prior payments and, if the Contractor so elects, any amounts due and payable to the Contractor by those subcontractors.

(7)(i) The Government agrees to pay to the Contractor or its assignee, upon presentation of a proper invoice or voucher, the sum of \$\_\_\_\_\_ *[insert net amount of settlement]*, arrived at by deducting from \$\_\_\_\_\_ *[insert gross amount of settlement]*, (A) the amount of \$\_\_\_\_\_ for all unliquidated partial or progress payments previously made to the Contractor or its assignee and all unliquidated advance payments (with any interest) applicable to the terminated portion of the contract and (B) the amount of \$\_\_\_\_\_ for all applicable property disposal credits.

(ii) The net settlement of \$\_\_\_\_\_ in subdivision (i) above, together with sums previously paid, constitutes payment in full and complete settlement of the amount due the Contractor for the terminated portion of the contract, except as provided in subparagraph (8) below.

(iii) Upon payment of the net settlement of \$\_\_\_\_\_, all obligations of the Contractor to perform further work or services or to make further deliveries under the terminated portion of the contract and all obligations of the Government to make further payments or carry out other undertakings concerning the terminated portion of the contract shall cease; *provided*, that nothing in this agreement shall impair or affect any covenants, terms, or conditions of the contract relating to the completed or continued portion of this contract.

(8) Regardless of any other provision of this agreement, the following rights and liabilities of the parties under the contract are reserved:

*[The following list of reserved or excepted rights and liabilities is intended to cover those that should most frequently be reserved and that should be scrutinized at the time a settlement agreement is negotiated (see 49.109-2). The suggested language of the excepted items on the list may be varied at the discretion of the contracting officer. If accuracy or completeness can be achieved by referencing the number of a contract clause or provision covering the matter in question, then follow that method of*

*number of a contract clause or provision covering the matter in question, then follow that method of enumerating reserved rights and liabilities. Omit any of the following that are not applicable and add any additional exceptions or reservations required.]*

- (i) All rights and liabilities, if any, of the parties, as to matters covered by any renegotiation authority.
- (ii) All rights of the Government to take the benefit of agreements or judgments affecting royalties paid or payable in connection with the performance of the contract.
- (iii) All rights and liabilities, if any, of the parties under those clauses inserted in the contract because of the requirements of Acts of Congress and Executive Orders, including, without limitation, any applicable clauses relating to: labor law, contingent fees, domestic articles, and employment of aliens. *[If the contract contains clauses of this character inserted for reasons other than requirements of Acts of Congress or Executive Orders, the suggested language should be appropriately modified.]*
- (iv) All rights and liabilities of the parties arising under the contract and relating to reproduction rights, patent infringements, inventions, or applications for patents, including rights to assignments, invention reports, licenses, covenants of indemnity against patent risks, and bonds for patent indemnity obligations, together with all rights and liabilities under the bonds.
- (v) All rights and liabilities of the parties, arising under the contract or otherwise, and concerning defects, guarantees, or warranties relating to any articles or component parts furnished to the Government by the Contractor under the contract or this agreement.
- (vi) All rights and liabilities of the parties under the contract relating to any contract termination inventory stored for the Government.
- (vii) All rights and liabilities, if any, of the parties under those clauses of the contract relating to price reductions for defective certified cost or pricing data.

(End of agreement)

[48 FR 42447, Sept. 19, 1983, as amended at 60 FR 37773, July 21, 1995; 60 FR 49723, Sept. 26, 1995; 75 FR 53150, Aug. 30, 2010; 82 FR 4714, Jan. 13, 2017]

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### **49.603-3 Cost-reimbursement contracts—complete termination, if settlement includes cost.**

*[Insert the following in Block 14 of SF 30 for settlement of cost-reimbursement contracts that are completely terminated, if settlement includes costs.]*

(a) This supplemental agreement settles the settlement proposal resulting from the Notice of Termination dated \_\_\_\_\_.

(b) The parties agree to the following:

(1) The Contractor certifies that all contract termination inventory (including scrap) has been retained or acquired by the Contractor, sold to third parties, returned to suppliers, delivered to or stored for the Government, or otherwise properly accounted for, and that all proceeds and retention credits have been used in arriving at this agreement.

(2) The Contractor certifies that each immediate subcontractor, whose settlement proposal is included in the proposal settled by this agreement, has furnished the Contractor a certificate stating (i) that all subcontract termination inventory (including scrap) has been retained or acquired by the subcontractor, sold to third parties, returned to suppliers, delivered to or stored for the Government, or otherwise properly accounted for, and that all proceeds and retention credits were used in arriving at the settlement of the subcontract, and (ii) that the subcontractor has received a similar certificate from each immediate subcontractor whose proposal was included in its proposal.



(3) The Contractor certifies that all items of termination inventory, the costs of which were used in arriving at the amount of this settlement or the settlement of any subcontract settlement proposal included in this settlement, (i) are properly allocable to the terminated portion of the contract, (ii) do not exceed the reasonable quantitative requirements of the terminated portion of the contract, and (iii) do not include any items reasonably usable without loss to the Contractor on its other work. The Contractor further certifies that the Contracting Officer has been informed of any substantial change in the status of the items between the dates of the termination inventory schedules and the date of this agreement.

(4) The Contractor transfers, conveys, and assigns to the Government all the right, title, and interest, if any, that the Contractor has received, or is entitled to receive, in and to subcontract termination inventory not otherwise properly accounted for.

(5) The Contractor shall, within 10 days after receipt of the payment specified in this agreement, pay to each of its immediate subcontractors (or their respective assignees) the amounts to which they are entitled, after deducting any prior payments and, if the Contractor so elects, any amounts due and payable to the Contractor by those subcontractors.

(6)(i) The Contractor has received \$\_\_\_\_\_ for work and services performed, or articles delivered, under the contract before the effective date of termination. The Government confirms the right of the Contractor, subject to paragraph (7) below, to retain this sum and agrees that it constitutes a portion of the total amount to which the Contractor is entitled in complete and final settlement of the contract.

(ii) Further, the Government agrees to pay to the Contractor or its assignee, upon presentation of a proper invoice or voucher, the sum of \$\_\_\_\_\_ [insert net amount of settlement], arrived at by deducting from the sum of \$\_\_\_\_\_ [insert gross amount of settlement less amount shown in subdivision (6)(i) above] (A) the amount of \$\_\_\_\_\_ for all unliquidated partial or progress payments previously made to the Contractor or its assignee and all unliquidated advance payments (with any interest), (B) the amount of \$\_\_\_\_\_ for all applicable property disposal credits [insert if appropriate, "and (C) the amount of \$\_\_\_\_\_ for all other amounts due the Government under this contract, except as provided in paragraph (7) below."]

(iii) The net settlement of \$\_\_\_\_\_ in subdivision (ii) above, together with sums previously paid, constitutes payment in full and complete settlement of the amount due the Contractor for the complete termination of the contract and of all other demands and liabilities of the Contractor and the Government under the contract, except as provided in paragraph (7) below.

(7) Regardless of any other provision of this agreement, the following rights and liabilities of the parties under the contract are reserved:

*[The following list of reserved or excepted rights and liabilities is intended to cover those that should most frequently be reserved and that should be scrutinized at the time a settlement agreement is negotiated (see 49.109-2). The suggested language of the excepted items on the list may be varied at the discretion of the contracting officer. If accuracy or completeness can be achieved by referencing the number of a contract clause or provision covering the matter in question, then follow that method of enumerating reserved rights and liabilities. Omit any of the following that are not applicable and add any additional exceptions or reservations required.]*

(i) All rights and liabilities, if any, of the parties, as to matters covered by any renegotiation authority.

(ii) All rights of the Government to take the benefit of agreements or judgments affecting royalties paid or payable in connection with the performance of the contract.

(iii) All rights and liabilities, if any, of the parties under those clauses inserted in the contract because of the requirements of Acts of Congress and Executive Orders, including, without limitation, any applicable clauses relating to: labor law, contingent fees, domestic articles, and employment of aliens." *[If the contract contains clauses of this character inserted for reasons other than requirements of Acts of Congress or Executive Orders, the suggested language should be appropriately modified.]*

(iv) All rights and liabilities of the parties arising under the contract and relating to reproduction rights, patent infringements, inventions, or applications for patents, including rights to assignments, invention reports, licenses, covenants of indemnity against patent risks, and bonds for patent indemnity obligations, together with all rights and liabilities under the bonds.



(v) All rights and liabilities of the parties, arising under the contract or otherwise, and concerning defects, guarantees, or warranties relating to any articles or component parts furnished to the Government by the Contractor under the contract or this agreement.

(vi) All rights and liabilities of the parties under the contract relating to any contract termination inventory stored for the Government.

(vii) All rights and liabilities of the parties under agreements relating to the future care and disposition by the Contractor of Government-owned property remaining in the Contractor's custody.

(viii) All rights and liabilities of the parties relating to Government property furnished to the Contractor for the performance of this contract.

(ix) All rights and liabilities of the parties under the contract relating to options (except options to continue or increase the work under the contract), covenants not to compete, and covenants of indemnity.

(x) Unresolved demands or assertions by the Contractor against the Government for costs under Government Accountability Office exceptions or other costs of the same nature that are excluded from the settlement without prejudice to the rights of either party, as follows: *[Insert amount and describe charges not waived.]*

(xi) Claims by the Contractor against the Government, when the Contractor's rights of reimbursement are disputed, that are excluded without prejudice to the rights of either party are as follows: *[Insert the amounts and describe the claims on which the Contracting Officer has made findings and has disallowed and on which the Contractor has taken, or intends to take, timely appeal.]*

(xii) Unresolved demands or assertions by the Contractor against the Government that are unknown in amount and involve costs alleged to be reimbursable under the contract are as follows: *[Insert the estimated amounts and describe the charges.]*

(xiii) Unknown amounts alleged by the Contractor against the Government, based upon responsibility of the Contractor to third parties that involve costs reimbursable under the contract.

(xiv) Debts due the Government by the Contractor that are based on refunds, rebates, credits, or other amounts not now known to the Government, with interest, now due or that may become due the Contractor from third parties, if the amounts arise out of transactions for which reimbursement has been made to the Contractor under the contract. The Contractor shall pay to the Government, within 30 days after receipt, any of these amounts that become due from any third party or any other source. Interest at the rate established by the Secretary of the Treasury under 50 U.S.C. (App.) 1215(b)(2) shall accrue and shall be paid to the Government on any amounts that remain unpaid after the 30-day period.

(xv) All rights and liabilities, if any, of the parties under those clauses of the contract relating to price reductions for defective certified cost or pricing data.

(End of agreement)

[48 FR 42447, Sept. 19, 1983, as amended at 60 FR 37773, July 21, 1995; 60 FR 49723, Sept. 26, 1995; 71 FR 57380, Sept. 28, 2006; 75 FR 53150, Aug. 30, 2010]

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#### **49.603-4 Cost-reimbursement contracts—complete termination, with settlement limited to fee.**

*[Insert the following in Block 14 of SF 30 for settlement of cost-reimbursement contracts that are completely terminated, if settlement is limited to fee.]*

(a) This supplemental agreement settles the amount of fee due under the contract, terminated in its entirety by Notice of Termination dated \_\_\_\_.

(b) The parties agree to the following:

(1) The Contractor has received \$\_\_\_\_\_ on account of its fee under the contract before the effective date of termination.

(2) The Government agrees to pay to the Contractor or its assignee, upon presentation of a proper invoice or voucher, \$\_\_\_\_\_ *[insert net amount to be paid on account of fee]*. This sum, with sums previously paid, constitutes payment in full and complete settlement of the amount due the Contractor on account of its fee under the contract.

(3) The Contractor's allowable costs under the contract will be paid under the terms and conditions of the contract and parts 31 and 49 of the Federal Acquisition Regulation.

*[Insert subparagraph (3) only if there are costs to be vouchered out (see 49.302) or if there are costs to be covered later by a separate settlement agreement.]*

(4) Regardless of any other provision of this agreement, the following rights and liabilities of the parties under the contract are reserved:

*[The following list of reserved or excepted rights and liabilities is intended to cover those that should most frequently be reserved and that should be scrutinized at the time a settlement agreement is negotiated (see 49.109-2). The suggested language of the excepted items on the list may be varied at the discretion of the contracting officer. If accuracy or completeness can be achieved by referencing the number of a contract clause or provision covering the matter in question, then follow that method of enumerating reserved rights and liabilities. Omit any of the following that are not applicable and add any additional exceptions or reservations required.]*

(i) All rights and liabilities, if any, of the parties, as to matters covered by any renegotiation authority.

(ii) All rights and liabilities, if any, of the parties under those clauses inserted in the contract because of the requirements of Acts of Congress and Executive Orders, including, without limitation, any applicable clauses relating to: labor law, contingent fees, domestic articles, and employment of aliens. *[If the contract contains clauses of this character inserted for reasons other than requirements of Acts of Congress or Executive Orders, the suggested language should be appropriately modified.]*

(iii) All rights and liabilities of the parties arising under the contract and relating to reproduction rights, patent infringements, inventions, or applications for patents, including rights to assignments, invention reports, licenses, covenants of indemnity against patent risks, and bonds for patent indemnity obligations, together with all rights and liabilities under the bonds.

(iv) All rights and liabilities of the parties, arising under the contract or otherwise, and concerning defects, guarantees, or warranties relating to any articles or component parts furnished to the Government by the Contractor under the contract or this agreement.

(v) All rights and liabilities of the parties under agreements relating to the future care and disposition by the Contractor of Government-owned property remaining in the Contractor's custody.

(vi) All rights and liabilities of the parties relating to Government property furnished to, or acquired by, the Contractor for the performance of the contract.

(vii) All rights and liabilities of the parties under the contract relating to options (except options to continue or increase the work under the contract), covenants not to compete, and covenants of indemnity.

(viii) All rights and liabilities, if any, of the parties under those clauses of the contract relating to price reductions for defective certified cost or pricing data.

(End of agreement)

[48 FR 42447, Sept. 19, 1983, as amended at 60 FR 37773, July 21, 1995; 60 FR 49723, Sept. 26, 1995; 75 FR 53150, Aug. 30, 2010]

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#### **49.603-5 Cost-reimbursement contracts—partial termination.**

*[Insert the following in Block 14 of SF 30, Amendment of Solicitation/Modification of Contract, for settlement agreements for cost-reimbursement contracts as a result of partial termination.]*

(a) This supplemental agreement settles the termination settlement proposal resulting from the Notice of Termination dated \_\_\_\_\_.

(b) The parties agree as follows:

(1) The contract is amended by deleting the terminated portion as follows: *[specify the terminated portion clearly as to (i) line item numbers, (ii) descriptions, (iii) quantity terminated, (iv) unit and total price of terminated items, and (v) any other explanation necessary to avoid uncertainty or misunderstanding].*

(2) The fee stated in the contract is decreased by \$\_\_\_\_\_, from \$\_\_\_\_\_ to \$\_\_\_\_\_.

*[Insert, if appropriate, "(3) The estimated cost of the contract is decreased by \$\_\_\_\_\_, from \$\_\_\_\_\_ to \$\_\_\_\_\_.".]*

(c) The Contractor's allowable costs and earned fee, if any, for the terminated portion of the contract will continue to be reimbursed on SF 1034, Public Voucher for Purchase and Services Other Than Personal, under the applicable provisions of the contract and part 31 of the Federal Acquisition Regulation.

(End of agreement)

[48 FR 42447, Sept. 19, 1983, as amended at 82 FR 4714, Jan. 13, 2017]

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#### **49.603-6 No-cost settlement agreement—complete termination.**

*[Insert the following in Block 14 of SF 30 if a no-cost settlement agreement, under a complete termination, is to be executed.]*

(a) This supplemental agreement \_\_\_\_\_ *[insert "modifies the contract to reflect a no-cost settlement agreement with respect to the Notice of Termination dated \_\_\_\_\_" or, if not previously terminated, "terminates the contract in its entirety".]*

(b) The parties agree as follows:

The Contractor unconditionally waives any charges against the Government because of the termination of the contract and, except as set forth below, releases it from all obligations under the contract or due to its termination. The Government agrees that all obligations under the contract are concluded, except as follows:

*[List reserved or excepted rights and liabilities. See 49.109-2 and 49.603-1(b)(7).]*

(End of agreement)

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#### **49.603-7 No-cost settlement agreement—partial termination.**

*[Insert the following in Block 14 of SF 30 if a no-cost settlement agreement, under a partial termination, is to be executed.]*

(a) This supplemental agreement modifies the contract to reflect a no-cost settlement agreement with respect to the Notice of Termination dated \_\_\_\_.

(b) The parties agree as follows:

(1) The terminated portion of the contract is as follows: *[Specify (i) line item numbers, (ii) descriptions, (iii) quantity terminated, (iv) unit and total price of terminated items, and (v) any other explanation necessary to avoid uncertainty or misunderstanding.]*

(2) The Contractor unconditionally waives any charges against the Government arising under the terminated portion of the contract or by reason of its termination, including, without limitation, all obligations of the Government to make further payments or to carry out any further undertakings under the terminated portion of the contract. The Government acknowledges that the Contractor has no obligation to perform further work or services or to make further deliveries under the terminated portion of the contract. Nothing in this paragraph affects any other covenants, terms, or conditions of the contract. Under the terminated portion of the contract, the following rights and liabilities of the parties are reserved:

*[List reserved or excepted rights and liabilities. See 49.109-2 and 49.603-1(b)(7).]*

(End of agreement)

[48 FR 42447, Sept. 19, 1983, as amended at 82 FR 4714, Jan. 13, 2017]

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#### **49.603-8 Fixed-price contracts—settlements with subcontractors only.**

*[Insert the following in Block 14 of SF 30 for settlements of fixed-price contracts covering only settlements with subcontractors.]*

(a) This agreement settles that portion of the settlement proposal of the Contractor that is based upon termination of the following subcontracts entered into in performing this contract:

*[Insert a list of the terminated subcontracts included in this settlement.]*

(b) The parties agree to the following:

(1) The Contractor certifies that each immediate subcontractor, whose settlement proposal is included in the proposal settled by the agreement, has furnished the Contractor a certificate stating (i) that all subcontract termination inventory (including scrap) has been retained or acquired by the subcontractor, sold to third parties, returned to suppliers, delivered to or stored for the Government, or otherwise properly accounted for, and that all proceeds and retention credits were used in arriving at the settlement of the subcontract, and (ii) that the subcontractor has received a similar certificate from each immediate subcontractor whose proposal was included in its proposal.

(2) The Contractor certifies that all items of termination inventory, the costs of which were used in arriving at the amount of this settlement or the settlement of any subcontract settlement proposal included in this settlement, (i) are properly allocable to the terminated portion of the contract, (ii) do not exceed the reasonable quantitative requirements of the terminated portion of the contract, and (iii) do not include any items reasonably usable without loss to the Contractor on its other work. The Contractor further certifies that the Contracting Officer has been informed of any substantial change in the status of the items between the dates of the termination inventory schedules and the date of this agreement.

(3) The Contractor transfers, conveys, and assigns to the Government all the right, title, and interest, if any, that the Contractor has received or is entitled to receive, in and to subcontract termination inventory not otherwise properly accounted for.

(4) The Contractor shall, within 10 days after receipt of the payment specified in this agreement, pay to each of its immediate subcontractors (or their respective assignees) the amounts to which they are entitled, after deducting any prior payments and, if the Contractor so elects, any amounts due and payable to the Contractor by those subcontractors.

(5) The Government agrees to pay the Contractor or its assignee, upon presentation of a proper invoice or voucher, \$\_\_\_\_\_ [insert net amount of settlement], which, together with the amount of \$\_\_\_\_\_ previously paid the Contractor as partial, progress, or advance payments, constitutes payment in full and complete settlement, except as provided in subparagraph (b)(6) below, of the amount due the Contractor for that portion of its settlement proposal that is based upon termination of the subcontracts listed above.

(6) Regardless of any other provision of this agreement, the following rights and liabilities of the parties under the contract are reserved: [List reserved or excepted rights and liabilities. See 49.109-2 and 49.603-1(b)(7).]

(End of agreement)

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#### **49.603-9 Settlement of reservations.**

*[Insert the following in Block 14 of SF 30 for settlement of reservations.]*

(a) Supplemental Agreement No. \_\_\_\_\_, dated \_\_\_\_\_, was executed to reflect the settlement of the termination of this contract. The supplemental agreement excepted from the settlement certain items described in the agreement including the items described in paragraph (b) below. This supplemental agreement settles those items listed in paragraph (b) below.

(b) The parties agree to the following:

(1) The Government agrees to pay the Contractor \$\_\_\_\_\_ for the following reserved or excepted items:\* [List items.]

(2) The Contractor releases and forever discharges the Government from all liability and from all existing and future claims and demands that it may have under this contract, insofar as it pertains to the contract, for the items described in subparagraph (1) above.\*

[\*When payment is due the Government, reverse the words Government and Contractor in subparagraphs (b)(1) and (b)(2).]

(End of agreement)

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#### **49.604 Release of excess funds under terminated contracts.**

The following format shall be used to recommend the release of excess funds under terminated contracts, except if the contracting office retains responsibility for settlement of the termination:

FROM: Termination Contracting Officer \_\_\_\_ [address]

TO: Contracting office \_\_\_\_ [address]

SUBJ: Terminated Contract No. \_\_\_\_ with \_\_\_\_ [Contractor]

Refs:



(a) [Cite termination notice and effective date.]

(b) [Cite prior letters releasing excess funds, if any.]

1. Referenced termination notice, \_\_\_\_ [insert "completely" or "partially"] terminated contract \_\_\_\_.

2. Based on the best information available, it is estimated that the gross settlement cost will be \$\_\_\_\_\_. The amount available for release as excess to the contract is \$\_\_\_\_\_. Any payments previously made to the Contractor for terminated items have been considered in arriving at the above amounts.

[If prior letters recommending release of excess funds are cited, use the following as paragraph 2:

"The estimated settlement costs previously reported by reference (b) in the amount of \$\_\_\_\_\_ are revised. On the best evidence now available, it is estimated that the settlement costs will be \$\_\_\_\_\_. The additional amount available for release is \$\_\_\_\_\_".]

3. The related appropriations and amounts involved are:

Appropriations	Allocated Amounts	

Copies to:

Paying Office

Accounting and Finance Office

Other

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#### **49.605 Request to settle subcontractor settlement proposals.**

Contractors requesting authority to settle subcontractor settlement proposals shall furnish applicable information from the list below and any additional information required by the contracting officer:

(a) Name of contractor and address of principal office.

(b) Name and location of divisions of the applicant's plant for which authorization is requested.

(c) An explanation of the necessity and justification for the authorization requested.

(d) A full description of the applicant's organization for handling terminations, including the names of the officials in charge of processing and settling proposals.

(e) The number and dollar amount (estimated if necessary) of uncompleted contracts with Government agencies and the percentage applicable to each agency.

(f) The number and dollar amount (estimated if necessary) of uncompleted subcontracts under Government contracts and the percentage applicable to each agency.



(g) The extent of the applicant's experience in termination matters, including the handling of proposals of subcontractors.

(h) The approximate amount and general nature of terminations of the applicant currently in process.

(i) A statement that no other application has been made for any division of the applicant's plant covered by the application or, if one has been made, a full statement of the facts.

(j) The limit of authorization requested.

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#### **49.606 Granting subcontract settlement authorization.**

Contracting officers shall use the following format when granting subcontract settlement authorization:

##### **LETTER OF AUTHORIZATION**

(a) Your request of \_\_\_\_ (date) is approved, and you are authorized, subject to the limitations of subsection 49.108-4 and those stated below, to settle, without further approval of the Government, all subcontracts and purchase orders terminated by you as a result of a Government contract being terminated or modified (1) for the convenience of the Government or (2) under any other circumstances that may require the Government to bear the cost of their settlement.

(b) This authorization does not extend to the disposition of Government-furnished material or articles completed but undelivered under the subcontract or purchase order, as these require screening and approval of disposal actions by the Government, except that allocable completed articles may be disposed of without Government approval or screening if the total amount (at subcontract price) when added to the amount of settlement (as computed below) does not exceed \$\_\_\_\_\_ [*insert limit of authorization being granted*].

(c) This authorization is subject to the following conditions and requirements:

(1) The amount of the subcontract termination settlement does not exceed \$\_\_\_\_\_ [*insert limit of authorization being granted*], computed as follows:

(i) Do not deduct advance or partial payments or credits for retention or other disposal of termination inventory allocated to the settlement proposal.

(ii) Deduct amounts payable for completed articles or work at the contract price or for the settlement of termination proposals of subcontractors (except those settlements that have not been approved by the Government).

(2) Any termination inventory involved has been disposed of under subsection 49.108-4, except that screening and Government approval of scrap and salvage determinations are not required.

(3) The Contracting Officer may incorporate into each Notice of Termination specific instructions about the disposition of specific items of termination inventory, or the Contracting Officer may, at any time before final settlement, issue specific instructions. These instructions will not affect any disposal action taken by you or your subcontractors before their receipt.

(4) The settlements made by you with your subcontractors and suppliers under this authorization, including sales, retention, or other dispositions of property involved in making these settlements, are

reimbursable under part 49 and the Termination clause of the contract, and do not require approval of the Contracting Officer.

(5) Any number of separate settlements of \$\_\_\_\_\_ [insert limit of authorization granted] or less may be made with a single subcontractor. Settlement proposals that would normally be included in a single proposal; e.g., those based on a series of separate orders for the same item under one contract, should be consolidated whenever possible and shall not be divided to bring them within the authorization.

(6) This authorization does not apply if a subcontractor or supplier is affiliated with you. For this purpose, you should consider a contractor to be affiliated with you if you are under common control or if there is any common interest between you by reason of stock ownership, or otherwise, that is sufficient to create a reasonable doubt that the bargaining between you is completely at arm's length.

(7) A representative of this office will, from time to time, review the methods used in negotiating settlements with your subcontractors and will make a selective examination of the settlements made by you. If the review indicates that you are not adequately protecting the Government's interest, this delegation will be revoked.

(End of letter)

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#### **49.607 Delinquency notices.**

The formats of the delinquency notices in this section may be used to satisfy the requirements of 49.402-3. All notices will be sent with proof of delivery requested. (See subpart 42.13 for stop-work orders.)

(a) *Cure notice.* If a contract is to be terminated for default before the delivery date, a *Cure Notice* is required by the Default clause. Before using this notice, it must be ascertained that an amount of time equal to or greater than the period of *cure* remains in the contract delivery schedule or any extension to it. If the time remaining in the contract delivery schedule is not sufficient to permit a realistic *cure* period of 10 days or more, the *Cure Notice* should not be issued. The *Cure Notice* may be in the following format:

#### **CURE NOTICE**

You are notified that the Government considers your \_\_\_\_ [specify the contractor's failure or failures] a condition that is endangering performance of the contract. Therefore, unless this condition is cured within 10 days after receipt of this notice [or insert any longer time that the Contracting Officer may consider reasonably necessary], the Government may terminate for default under the terms and conditions of the \_\_\_\_ [insert clause title] clause of this contract.

(End of notice)

(b) *Show cause notice.* If the time remaining in the contract delivery schedule is not sufficient to permit a realistic *cure* period of 10 days or more, the following *Show Cause Notice* may be used. It should be sent immediately upon expiration of the delivery period.

#### **SHOW CAUSE NOTICE**

Since you have failed to \_\_\_\_ [insert "perform Contract No. \_\_\_\_ within the time required by its terms", or "cure the conditions endangering performance under Contract No. \_\_\_\_ as described to you in the Government's letter of \_\_\_\_ (date)"], the Government is considering terminating the contract under the provisions for default of this contract. Pending a final decision in this matter, it will be necessary to

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determine whether your failure to perform arose from causes beyond your control and without fault or negligence on your part. Accordingly, you are given the opportunity to present, in writing, any facts bearing on the question to \_\_\_\_ *[insert the name and complete address of the contracting officer]*, within 10 days after receipt of this notice. Your failure to present any excuses within this time may be considered as an admission that none exist. Your attention is invited to the respective rights of the Contractor and the Government and the liabilities that may be invoked if a decision is made to terminate for default.

Any assistance given to you on this contract or any acceptance by the Government of delinquent goods or services will be solely for the purpose of mitigating damages, and it is not the intention of the Government to condone any delinquency or to waive any rights the Government has under the contract.

(End of notice)

[48 FR 42447, Sept. 19, 1983, as amended at 60 FR 48250, Sept. 18, 1995]

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Need assistance?



## 2008 04 24 NPS press release 2 announcing allocation of FY08 centennial challenge funds for 110 NPS projects

[U.S. Department of the Interior](#)



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National Park Service  
U.S. Department of the Interior

Office of Communications  
and Public Affairs

1849 C Street NW  
Washington DC 20240

### Centennial Initiative

202 208-6843 phone  
202 219-0910 fax

Release date:

Immediate

Contact(s):

David Barna or Jeffrey Olson - NPS  
Chris Paolino – Department of the Interior

Phone number:

NPS – (202) 208-6843, DOI – (202) 208-6416

Date:

April 24, 2008

## Secretary Kempthorne announces first round of National Park Centennial projects \$50 million public-private partnership will improve national parks nationwide this year

**(Washington)** – Secretary of the Interior Dirk Kempthorne today unveiled the 110 national park improvement projects and programs that will get underway this spring, funded by an equal combination of public and private funds, under President Bush's National Park Centennial Initiative. The Initiative, announced in 2006, proposed an innovative federal Centennial Challenge matching fund that would be used to match philanthropic contributions for the benefit of our national parks between now and the 100th anniversary of the National Park Service in 2016.

The more than \$50 million in projects announced today on the steps of the U.S. Capitol, overlooking the National Mall, result from the combination of \$24.6 million in federal funds that match nearly \$27 million in philanthropic contributions.

"I am pleased to announce the first round of National Park Centennial Projects that will be undertaken with the first round of funding appropriated by Congress in the 2008 budget," Kempthorne said at the event supported by the National Park Foundation. "Ground will be broken and work underway very soon. This first round of projects will improve parks nationwide – large and small, urban and rural, natural and historical.

"And that's just for this year," said National Park Service Director Mary A. Bomar. "Congress continues its work on legislation to create the President's National Park Centennial Challenge Matching Fund, an annual fund to match up to \$100 million a year of donations through our centennial in 2016."

The first round of Centennial Challenge projects range from expansion of a popular outdoor stewardship education outreach program for teen-agers in the Washington, D.C. area to saving endangered sea turtles along the Texas coast at Padre Island to renovation of Yosemite National Park's iconic Tunnel View Overlook to citizen scientist and citizen naturalist projects at national parks across the country.

"For example, park rangers at Lewis and Clark National Historical Park in Oregon, will adopt the Class of 2016 and bring the students to the park for special programs and events until they graduate from high school," Kempthorne said. "I can see that as a program that is undertaken by every national park in America and a great way to engage young people and share with them the legacy and heritage of national parks."

"There is even a project that will unfold right behind you on the National Mall," Kempthorne said as he looked from the U.S. Capitol steps westward toward the Washington Monument. "We'll soon install new, modern interpretive signs near important monuments and memorials on the Mall, as well as new way-finder signs to help guide visitors to other downtown locations near the Mall. Both will improve the visitor experience so that our visitors take away a more lasting and enjoyable memory of their visit to our nation's capital."

National Park Service Director Mary A. Bomar said, "Today we celebrate getting the first Centennial Challenge projects



## 2008 04 24 NPS press release 2 announcing allocation of FY08 centennial challenge funds for 110 NPS projects

off the drawing board and into the parks. We also look forward to the day Congress passes Centennial Challenge legislation so that through 2016 there will be federal money available to match up to \$100 million a year of donations. There are many more worthy projects partners are ready to support for the Centennial.

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"I want to emphasize today, however, my personal gratitude to the President and the Secretary for the centennial initiative," Bomar said. "I also offer my thanks and congratulations to our many partners who have provided overwhelming support for these projects so that we are able to reach so far just this first year of Centennial Challenge projects and programs."

Bomar said park superintendents will begin these projects almost immediately. "We really have to get cracking," she said. "Many of our parks have a short construction season for the brick and mortar and trail projects and our park rangers will need to quickly learn and add new programs for the big rush of visitors that return to the parks in a few short months."

Other highlighted Centennial Challenge projects and programs:

- Restoration of disturbed lands in Everglades National Park.
- A national effort to discover and record all living things in national parks with BioBlitzes and all-taxa biodiversity inventories in nine parks across the country.
- Upgraded and new interpretive trails at San Antonio Missions National Historical Park, Valley Forge National Historical Park, Kennesaw Mountain National Battlefield Park, Hagerman Fossil Beds National Monument, Point Reyes National Seashore and other parks.
- Restoration of ancient redwood forest and watershed in Redwood National Park.
- Water quality enhancement, restoration of endangered mussels, reintroduction of Trumpeter Swans and wetland habitat learning experiences for visitors at Buffalo National River.
- Creation of The Institute at the Golden Gate to advance preservation and global sustainability at Golden Gate National Recreation Area in San Francisco.
- Development and expansion of Junior Ranger programs at several national parks.
- Expansion of ranger interpretation at C&O Canal National Historical Park and the George Washington Memorial Parkway with new technology including podcasts and videocasts.
- For a complete list of the 2008 National Park Service Centennial Challenge Projects and Programs please visit [www.nps.gov/2016](http://www.nps.gov/2016)

For Centennial Initiative photos please visit [www.nps.gov/pub\\_aff/2016photos/index.htm](http://www.nps.gov/pub_aff/2016photos/index.htm)

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**2008 04 24 NPS press release announcing allocation of \$3 million  
of FY08 centennial challenge funds for four Florida projects**

**National Park Service<sup>(f)</sup>**

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# South Florida to Receive \$6 million in Centennial Challenge Grants!



## 2008 04 24 NPS press release announcing allocation of \$3 million of FY08 centennial challenge funds for four Florida projects

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/sendemail.cfm?o=478CD5BF9CECA9AE9DBA018FF707B8E3419250&r=/ever/learn

/news/centennialchallengegrants.htm), 305-242-7714

Homestead and Ochopee Florida— The National Park Service (NPS) announced today that south Florida's National Parks and Preserve will receive \$6 million in additional funding for four projects in 2008! Half of this will support a significant restoration project in Everglades National Park and the rest will provide the parks and preserve the ability to increase environmental education, recruit and train volunteers to become citizen scientists, and to support resource protection and restoration efforts. (These projects are summarized in the table below.)

Big Cypress National Preserve, Biscayne, Dry Tortugas, and Everglades National Parks in south Florida have all been selected to receive federal matching funds for their proposed 2008 Centennial Challenge Projects. The federal funds will match \$3 million in private donations already identified from local partners and the National Park Foundation. This additional funding is part of the NPS Centennial Challenge Initiative, a 10-year program to reinvigorate and highlight the importance of America's national parks as they prepare to celebrate their 100th Anniversary in 2016. The initiative includes a focus on increased funding for park operations plus a President's Challenge: up to \$100 million a year in federal funds to match \$100 million a year in philanthropic donations to the National Park Service.

Superintendents Karen Gustin from Big Cypress, Mark Lewis from Biscayne, and Dan Kimball from Everglades and Dry Tortugas are each thrilled to be part of a collaborative effort to preserve the natural resources they are charged with managing and enhance the environmental education programs available for the community. Each superintendent would like to congratulate the parks and thank their partners for such a significant investment to the national parks and preserve of south Florida.

National Park Service Director Mary A. Bomar said, "With the nearly \$25 million Congress has appropriated and nearly \$27 million of matching commitments from our park partners, the Centennial Challenge Initiative today moves onto the landscape and into people's lives. It's a great day for the National Park Service and a great day for the citizens of south Florida and managers of Big Cypress National Preserve, and Biscayne and Everglades National Parks."

"This is how we put our Centennial goals on the ground and it's quite a beginning," Bomar said. "We have 110 programs and projects involving more than 130 individual, public and non-profit partners at 76 national park units in 38 states and the District of Columbia."

The environmental education proposal, collaboratively submitted by all four Park Service units, will allow for continuation and expansion of very popular programs at each of these parks to teach local children how the



## 2008 04 24 NPS press release announcing allocation of \$3 million of FY08 centennial challenge funds for four Florida projects

ecosystems of these four parks are interrelated and the importance of their role in becoming good stewards of the resources. The additional funding from this proposal will allow the parks and preserve collectively to hire additional seasonal and temporary park rangers and fund transportation and supplies for a program that serves as many as 25,000 school children annually. The partners for this program are the South Florida National Parks Trust and Toyota USA Foundation who are the primary funding partners. Friends of Big Cypress, and the Everglades Association are also sponsors of this project. Not only will the funds provided help to sustain and improve the education programs offered this year, but the results achieved should ensure these parks a place in the competition for similar grants for years to come.

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Over half of the \$6 million grant for 2008 will go towards the Everglades National Park 's restoration project, sponsored by the National Park Foundation. On completion of this 2008 project 600 acres of highly disturbed, exotic plant infested former farmland in the Hole-in-the-Donut region of the park will be restored to high quality wetland and soils removed during this restoration will be used to fill 3 borrow pits to natural conditions in 2008 through this grant. T

Two other projects at Biscayne National Park have been approved to receive Centennial Challenge funding. One project, sponsored by the Florida Fish and Wildlife Conservation Commission and Tropical Audubon, will provide training for local youth to assist scientists in obtaining baseline monitoring information of coastal birds. A second project, funded by the South Florida National Parks Trust and the Hoover Foundation, will enlist the help of the University of Miami students and volunteers from Cordis Corporation to grow corals as part of a state of the art coral nursery program for reintroduction on to the reef tract.

The National Park Centennial Challenge Initiative provides a framework for the National Park Service to engage the public in its mission. Its goals and strategies will embrace new constituents and gain support from a broad array of public and private partners to ensure America's national parks continue to thrive into the next 100 years. The projects identified and funded for the south Florida Parks and Preserve are designed to meet this goal and to strengthen the connection between these nationally significant resources, park neighbors and the visiting public.

In celebration of the 100th anniversary of the National Park Service in 2016, America invites the world to discover the meaning of national parks.

What parks mean in people's lives.

What inspires people to experience parks

What inspires people to become devoted to these special places

For a complete list of the 2008 National Park Service Centennial Challenge Projects and Programs please visit [www.nps.gov/2016](http://www.nps.gov/2016) (<https://www.nps.gov/2016>)

-NPS-

**2008 04 24 NPS press release announcing allocation of \$3 million  
of FY08 centennial challenge funds for four Florida projects**

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Last updated: April 14, 2015

**CONTACT THE PARK**

**Mailing Address:**

40001 State Road 9336  
Homestead, FL 33034

**Phone:**

(305) 242-7700



([www.nps.gov](http://www.nps.gov))  
National Park Service

U.S. Department of the Interior



Keith Whisenant/EVER/NPS  
08/20/2008 05:10 PM

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To Jonathan E Taylor/EVER/NPS@NPS  
cc Dan Kimball/EVER/NPS@NPS, Kym  
Sigler/EVER/NPS@NPS, Carol Mitchell/EVER/NPS@NPS,  
David Hallac/EVER/NPS@NPS  
Subject HID Centennial Challenge

Jonathan

Frank Dean called to let me know that we would NOT be getting additional centennial challenge funds in FY08. The \$2 million from JAZZ evaporated when political pressure from LA politicians occurred protesting pulling of funds. This left only \$400,000 to be obligated and it was distributed around the service; so we dropped out of consideration because we had a large amount to begin with. He felt we would be a strong candidate for FY09 but they won't know until after the Continuing Resolution is passed if NPS will be allowed to go forward with Centennial Challenge since the CC is an easy cut for OMB. The service may have to wait for an appropriation bill to be passed.

Keith A. Whisenant  
Deputy Superintendent  
Everglades & Dry Tortugas National Parks  
305 242-7713





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United States Department of the Interior  
NATIONAL PARK SERVICE

Everglades and Dry Tortugas National Parks  
40001 State Road 9336  
Homestead, Florida 33034



In Reply Refer to:

September 8, 2008

To: Contracting Officer

From: Jonathan Taylor, Technical Evaluation Panel Chairperson

Reference: Land Clearing and Land Restoration Contract, Everglades National Park

Subject: Report from Technical Evaluation Panel

This memorandum documents the process and analysis leading up to the source selection decision on the referenced project. The National Park Service (NPS) issued the synopsis on the FedBizOpps website on May 30, 2008. Issuance of the solicitation followed on the FedBizOpps website on June 16, 2008, with a proposal submission date of July 21, 2008. A total of seven (7) amendments were issued with the proposal submission due date extended until July 30, 2008. The NPS received and evaluated seven (7) proposals. On The Technical Evaluation Panel (TEP) began review and evaluation of proposals on August 4, 2008. The panel consisted of the following individuals:

Voting Members:

Jonathan Taylor, Chairperson, Everglades National Park  
Tom Murphy, Panel Member, Project Manager, Denver Service Center  
Jeff Kline, Panel Member, Everglades National Park

All evaluators signed non-disclosure forms and submitted them to contracting. Joelle Mascarenas, Contracting Officer, and Contracting Specialist Katie Hoover discussed the selection process followed by a question and answer period.

Following this introductory discussion, the panel performed a preliminary pre-screening of all seven (7) proposals submitted in accordance with Clause M.1 – Minimum Technical Qualifications of the Solicitation:

- Central Florida Equipment Rentals Inc.
- Westwind Contracting, Inc.
- Oklawaha Farms, Inc.
- A<sup>2</sup> Group, Inc.
- Sayar Enterprises, Inc.
- Bul-Hed Corporation
- Optimum Services, Inc.

### **Responsiveness to the Minimum Technical Qualifications**

The TEP applied the minimum technical qualifications to determine if the proposals submitted by the firms identified were responsive to the solicitation. Contractor's needed to demonstrate that they met all the minimum technical qualifications. Proposals that did not demonstrate any one of the minimum technical qualifications were considered unresponsive and eliminated from competition. The minimum technical qualifications were as follows:

1. Past experience in on-site ecological restoration work as prime contractor on projects between 100 and 1200 acres.
2. Past experience in on-site land clearing projects as prime contractor on projects between 100 acres and 1200 acres.
3. Past experience in meeting technical written reporting requirements for projects, including, but not limited to, scheduling update reports, monthly progress reports, or final reports that are similar to those that will be required for this project (see Statement of Work for suggested content of report submittal requirements). The reports shall be from the contractor to their clients.

After review of all of the technical proposals the TEP determined that the following companies were unresponsive. Each voting member of the technical evaluation panel provided the CO with their conclusions regarding this step of the process. See attached.

- **Central Florida Equipment Rentals Inc.**
- **Oklawaha Farms, Inc.**
- **A2 Group, Inc.**
- **Sayar Enterprises, Inc.**

The TEP proceeded with evaluating the remaining technical proposals from the companies determined to be responsive. The technical proposals were evaluated in accordance with the evaluation factors stated in Section M of the solicitation. The responsive companies were:

- **Westwind Contracting, Inc.**
- **Bul-Hed Corporation**
- **Optimum Services, Inc.**

Each technical proposal was reviewed independently by each panelist. Maximum points for each factor were established prior to the start of the evaluation process and documented in the Source Selection Plan.

### **TECHNICAL EVALUATION FACTORS – 60 Total Points**

**Technical Approach and Capability:** The technical capability of the offerors was evaluated using the following subfactors which are listed below. **(60 Points Maximum)**



Subfactor 1 - Project Plan, Management and Coordination and Previous Related Experience: (20 pts)

Subfactor 2 - Scheduling, Cost Control and Quality Control Management: (20 pts)

Subfactor 3 - Qualifications and Experience of Key Personnel: (20 pts)

Table 1 shows the technical evaluation panels combined average technical scores for companies determined to be responsive. Both Optimum and Westwind provided very good technical proposals. Their scores were virtually equal. The strength of Westwind's technical proposal was based on the fact that they were the incumbents and knew the project very well. However, Westwind's proposal did not completely address some of the requirements of the solicitation. If they had done so their technical proposal would have scored higher. As an example, Westwind's technical proposal did not take the equipment list included in their technical proposal and apply/describe how and when they would use the equipment and personnel as the scale of a project changed (100 to 1200 acres), or, what amount of equipment or labor that they would apply per task undertaken. Conversely the strength of Optimum's technical proposal was due to the effort they put in to responding to the requirements of the solicitation. The technical proposal demonstrated how their plan would adjust to different scales and what equipment and personnel they anticipated using on each task. It was a very well written proposal.

Bul-Hed's Technical proposal scored very low. The only explanation we have is that the proposal is missing a section. Their technical proposal was clearly put together to meet the minimum technical requirements. It states that clearly on the first page of section 2. Bul-Hed clearly does meet the minimum technical requirements. They clearly demonstrated past experience with projects similar in scope and scale. However, the technical proposal basically lacked a specific plan addressing the tasks to be executed in this contract. There were very few specific details regarding methodologies, logistics, quantities and types of equipment, and staffing for the base year and each of the option years. This shortcoming in the technical proposal adversely affected Bul-Hed's score in all of the technical sub-factors for the Criterion of Technical approach and capability described in the solicitation. See Panel Members' scoring sheets for specific strengths and weaknesses of each offeror.

### **Price Proposal**

In coordination with the CO and CS, the price proposals for Westwind, Optimum and Bul-Hed were evaluated by the TEP. The CO, CS and TEP found that all three companies provided price proposals, with total dollar values very close to or below the Government Estimate. Bul-Hed's price proposal was the highest, then Westwind's, and Optimum had the lowest price proposal. Initial ranking of the companies was based primarily on their total dollar values. As such it was initially felt that Optimum's price proposal should be ranked in first place, Westwind's second and Bul-Hed's last in third place. However, Optimum's price proposal had 3 line items that raised some concerns. They seem unbalanced. So, at that point, it was determined to go back to Optimum and Westwind to ask them to verify and clarify the prices in their price proposals and request final revised proposals. Essentially, the TEP was interested to know how the companies (Optimum in particular) were determining their prices. Bul-Hed was not included in this process. Given that their technical score was so



low and that their price proposal was the highest it was determined that they should not be included in the competitive range. Therefore they were removed from competition and further evaluation.

In coordination with the CO, the TEP reviewed the revised price proposals provided by Optimum and Westwind. Both companies lowered their prices to some extent but neither company provided any additional information that demonstrated how they had actually arrived at their prices. The CO and the TEP applied each company's unit prices to some likely task orders scenarios to evaluate price realism. The result of these exercises was that the TEP began to consider Westwind's price proposal as a "better value". This is because for some of the core tasks (tasks that would be used regularly or would be essential to almost all Task Orders over the lifetime of the contract) Westwind's unit prices resulted in better overall value to the NPS. See attached scenario estimates. Furthermore, Westwind's original price proposal did demonstrate how they arrived at their prices, all of their prices were very close to the government estimate and Westwind's price proposal contained no unbalanced line items. Optimum provided little detailed backup on their pricing, so it was difficult to determine if their proposed prices were reasonable.

Nonetheless, the CO and the TEP asked Optimum to again explain specifically how they arrived at the line items in their price proposal that seemed unbalanced. When Optimum's information was provided to the CO, the TEP in coordination the CO determined that Optimum was anticipating more effort for the unbalanced line items than was required. Given that at least one of Optimum's unbalanced line items was a core task (as described above), the TEP and CO's concluded that Optimum's price proposal was not the best value for the government. Therefore the CO and TEP concluded that Westwind's price proposal ranked the highest with Optimum's price proposal coming in second.

### **Past Performance**

The Source Selection Plan specified adjectival ratings for this evaluation factor. No point assignments were made for past performance as it would be difficult to assign a neutral numerical rating to an offeror with no past performance information. Consequently, only the adjectival ratings were used (excellent, good, acceptable/satisfactory, neutral, marginal, and unacceptable/unsatisfactory).

Jonathan Taylor the Chair of the TEP made contact with at least two, and where possible more than two, of the references provided by each offeror (many of the references provided were unreachable or outdated). The information provided during these past performance reference checks were recorded on Past Performance Questionnaire forms. All three companies were assigned an adjectival rating of superior (Table 1).

Table 1. Technical Evaluation of Responsive Companies

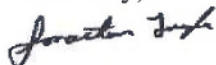
<u>Firm</u>	<u>Avg Score</u>	<u>Past Performance</u>	<u>Tech Rank</u>	<u>Initial Price Rank</u>	<u>Revised/Final Price Rank</u>
Optimum	56.7	Superior	1	1	2
Westwind	56	Superior	2	2	1
Bul-Hed	26	Superior	3	3	N/A

**Award Recommendation**

Upon concluding the evaluation of Optimum's, Bul-Hed's and Westwind's technical proposals, past performance and price proposals it was decided that the contract would be awarded to Westwind because their overall proposal was of best value to the Government

If you have any questions concerning this report, please contact Jonathan Taylor (305) 242-7876.

Sincerely,



Jonathan Taylor  
TEP Chairperson

## 2008 09 18 NPS Source Selection Memo

(part of Agency Report tab 11)



IN REPLY REFER TO:

D5215 (DSC-CS)

EVER-137534

Contract No. C5297080232

Contract Award

NATIONAL PARK SERVICE  
DENVER SERVICE CENTER  
12795 W. ALAMEDA PARKWAY  
P.O. BOX 25287  
DENVER, COLORADO 80225-0287



September 18, 2008

To: Contract Files, Denver Service Center

From: Contracting Officer, Denver Service Center (Source Selection Official)

Reference: Everglades National Park, Dade County, Florida, Solicitation No. 1443N5297080232, Land Restoration and Land Clearing, Package No. EVER-137534

Subject: Source Selection Memorandum

Encl: (1) Offerors' Responsiveness to Min Tech Req.  
(2) Source Selection Plan  
(3) TEP Report  
(4) Abstract of Initial Offers  
(5) Abstract of Final Offers

**1. Purpose:**

This memorandum documents the rationale for award of subject Indefinite Delivery/Indefinite Quantity Contract No. C5297080232 to Westwind Contracting, Inc. (Westwind) for Land Restoration and Land Clearing at the Everglades National Park, Dade County, Florida. The scope includes work to ecologically restore areas and manage vegetation though land clearing or some combination thereof where anthropogenically derived soils and/or altered hydrology are controlling vegetation. After consulting with legal and technical advisors, the Source Selection Official/Contracting Officer determined that multiple awards would not be practical for this requirement. The minimum guarantee amount is \$2 million worth of services during the life of the contract, including the base and all options exercised. The total quantity of services ordered in all orders shall not exceed \$24 million worth of services during the base year, and shall not exceed \$26 million during each of the option year periods.

**2. Background:**

a. Secretarial approval and/or Director's approval are not required for this project since this is a Centennial project and per the WASO Solicitor (see emails in the file). Current available funds for award total [REDACTED] PR #R5297080232). Another approximately [REDACTED] is expected to be made available for award prior to the end of the fiscal year. The Scope of

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## 2008 09 18 NPS Source Selection Memo

## (part of Agency Report tab 11)

Work, Government Estimate, and Purchase Request were received from the Project Manager (PM, Tom Murphy) and the Park COR (COR, Jonathan Taylor). The Independent Government Estimate (IGE) for this project ranges from [REDACTED] for the base year and from [REDACTED] over five years (base and all options). The IGE was based on historical prices, market research, and previous Government contract prices.

b. The SBA screening process was performed for the subject requirement on 6/10/08. The results of the SBA searches are included in the table that follows:

8(a)	54 firms	
HUBZone	10 firms (Florida only)	183 nationwide
Service-Disabled Veteran	33 firms (Florida only)	5 nationwide

Although the SBA search resulted in contractors being found in each category, the anticipated service contract resulting from the subject solicitation is estimated for a not-to-exceed amount of \$120 million total for the base and options [REDACTED] which far exceeds to size standard of \$13 million for NAICS code 562910. Additionally, a review of some of the firms that were listed in the searches revealed that a few of the firms had annual revenues up to [REDACTED] but most of them only had annual revenues of approximately [REDACTED] or less. Consequently, the Contracting Officer determined that it would be unlikely that a small business could successfully handle a contract of the magnitude required for this requirement.

Contrary to the above determination, the SBA would not authorize full and open competition or sign the DI-1886 unless the contract was set aside for small business. NAICS code 542910 contained a dual size standard. In addition to the dollar standard, the NAICS code also specified an employee size standard of 500 employees. SBA directed us to set the requirement aside for small businesses subject to this 500 employee size standard. By doing so, competition would not be overly restricted and small businesses would have the opportunity to compete for this contract.

Based on the above, on 6/12/08, the Small Business Administration approved Form DI-1886 setting the procurement aside for small businesses. This procurement was advertised/synopsized for a small business set-aside via FedBizOpps and the National Business Center websites on 5/30/08.

c. On June 16, 2008, Solicitation No. N5297080232, was issued electronically via the FedBizOpps and National Business Center websites with a proposal submission deadline of July 21, 2008 at 3:00 pm MT.

d. The Contract Specialist (CS, Katie Hoover), Contracting Officer (CO, Joelle Mascarenas), and the Contracting Officer's Representative (COR, Jonathan Taylor) attended a pre-proposal conference held at Everglades National Park on June 26 and 27, 2008. The meeting minutes were posted in Amendment 0003 on FedBizOpps and the National Business Center websites.

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- e. The following amendments were issued prior to the solicitation closing:

Amendment 0001, dated 6/17/08, incorporated the attachments that were inadvertently not attached to the solicitation in the original posting.

Amendment 0002, dated 6/18/08, clarified/corrected some of the contract clauses.

Amendment 0003, dated 7/2/08, incorporated changes/clarifications and included information from the pre-proposal meeting. A revised Contract Price Schedule was included.

Amendment 0004, dated 7/10/08, incorporated changes/clarifications and responses to potential offerors' questions. A revised Contract Price Schedule was included and the proposal submission deadline was extended until 7/25/08.

Amendment 0005, dated 7/21/08, incorporated more clarifications and responses to potential offerors' questions. A revised Contract Price Schedule was included.

Amendment 0006, dated 7/22/08, incorporated more clarifications and responses to potential offerors' questions. The proposal submission deadline was extended until 7/30/08.

Amendment 0007, dated 7/28/08, incorporated a final round of clarifications and responses to potential offerors questions.

- f. The solicitation closed on 7/30/08 at 3:00 pm MDT. Seven proposals were received by the closing time. One proposal (Earth Balance) was received two hours after the proposal submission deadline. A Late Proposal Notification letter was sent to the offeror on 8/20/08 in response to their request for consideration.

Of the offers submitted, only three offerors (Bul-Hed Corp, Westwind Contracting, and Optimum Services) met the minimum technical qualifications and those proposals were evaluated. The other four firms (Central Florida Equipment Rentals, Oklawaha Farms, Sayar Enterprises, and A<sup>2</sup> Group) failed to meet the minimum technical qualifications as detailed below and, therefore, were deemed not responsible and were not evaluated. The TEP detailed its review of the offerors' minimum technical qualifications in a memo to the file (see enclosure (1)).

### **3. Initial Evaluation**

- a. From 8/4/08 through 8/12/08, a technical evaluation was conducted by the following individuals appointed to the Technical Evaluation Panel (TEP):

Jonathan E. Taylor, EVER, Technical Evaluation Panel (Chair)  
Tom Murphy, DSC, Technical Evaluation Panel (Voting Member)  
Jeff Kline, EVER, Technical Evaluation Panel (Voting Member)

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Prior to the evaluation, the CO reviewed the evaluation factors and the requirements of the Source Selection Plan (SSP, enclosure (2)) developed for this acquisition. The TEP was advised to review the proposals and develop technical ratings based on the rating system established in the SSP. Non-disclosure agreements were obtained from all members of the panel.

The TEP Report documents the results of the initial evaluation. The rating system with defining narratives used in evaluating technical ability and past performance, and proposal and performance risk is contained in the SSP. A summary of ratings and risks from the Source Selection Plan are as follows:

**Evaluation Factor I – Technical Approach and Capability. 60 points max.**

**Subfactor 1 – Project Plan, Management and Coordination and Previous Related Experience. 20 points max.**

Rating	Definition / Standard
16-20 points	Proposal element indicates <u>extensive related experience and superior project management and coordination</u> and competence with related land restoration and land clearing work. Characteristics of comparable contracts are addressed completely and clearly. No apparent weaknesses or deficiencies.
11-15 points	Proposal element indicates <u>moderate related experience and average project management and coordination</u> and competence with related land restoration and land clearing work. Many characteristics of comparable contracts are addressed. Weaknesses, if any, are minor and are more than offset by strengths.
6-10 points	Proposal element indicates <u>minimal related experience and minimal project management and coordination</u> and competence with related land restoration and land clearing work. Characteristics of a comparable contract are addressed. Weaknesses outweigh strengths.
0-5 points	Proposal element indicates a <u>lack of related experience and little to no project management and coordination</u> and competence with related land restoration and land clearing work. Characteristics of a comparable contract are lacking or not evident.

**Subfactor 2 – Scheduling, Cost Control, and Quality Control Management. 20 points max.**

Rating	Definition / Standard
16-20 points	Proposal element indicates <u>extensive experience</u> and competence in Scheduling, Cost Control, and Quality Control Management. CPMS meets or exceeds requirements. Demonstrated excellent Cost Control and Quality Control Management. No apparent weaknesses or deficiencies.
11-15 points	Proposal element indicates <u>moderate experience</u> and competence in Critical Path Method Scheduling, Cost Control, and Quality Control Management. CPMS meets requirements. Demonstrated good Cost Control and Quality Control Management. Weaknesses, if any, are minor and are more than offset by strengths.
6-10 points	Proposal element indicates <u>minimal related experience</u> and competence in Scheduling, Cost Control, and Quality Control Management. CPMS not well documented or may not meet project requirements. Cost Control and Quality Control Management weak. Weaknesses outweigh strengths.
0-5 points	Proposal element indicates a <u>lack of related experience</u> and competence in Scheduling, Cost Control, and Quality Control Management. Characteristics of a comparable contract are lacking or not evident.

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**Subfactor 3 – Qualifications and Experience of Key Personnel. 20 points max.**

Rating	Definition / Standard
16-20 points	Proposal element indicates <u>extensive experience</u> and competence of Key Personnel and trades proposed. Excellent breadth, depth and relevance of previous work. Committed to comply with the Key personnel requirements of the Contract. No apparent weaknesses or deficiencies.
11-15 points	Proposal element indicates <u>moderate experience</u> and competence of Key Personnel and trades proposed. Good breadth, depth and relevance of previous work. Will comply with the Key personnel requirements of the Contract. Weaknesses, if any, are minor and are more than offset by strengths.
6-10 points	Proposal element indicates <u>minimal related experience</u> and competence of Key Personnel and trades proposed. Breadth, depth and relevance of previous work are weak. Probably will comply with the Key personnel requirements of the Contract. Weaknesses outweigh strengths.
0-5 points	Proposal element indicates a <u>lack of related experience</u> and competence in of Key Personnel and trades proposed. Lacking depth and relevance of previous work. No indication they will comply with the Key personnel requirements of the Contract. Characteristics of a comparable contract are lacking or not evident.

**Evaluation Factor II – Price.**

A price evaluation will be performed to determine the reasonableness of the proposed price. Reasonableness will be determined by considering other offered prices received and comparison to the independent government cost estimate. Prices will be evaluated to determine whether any line items are unbalanced. Prices will be requested for each task as listed on the Contract Price Schedule based on minimum and maximum estimated quantities. Prices for options will be evaluated to determine the reasonableness of the proposed price and whether the options are unbalanced when compared with the base price. Prices, including detailed backup documentation, will be requested for each task as listed on the Contract Price Schedule based on the minimum and maximum estimated quantities.

**Evaluation Factor III — Past Performance.**

Rating	Definition / Standard
Superior	Proposal element indicates <u>extensive customer satisfaction</u> . Documentation and references are addressed completely and clearly. No apparent weaknesses or deficiencies.
Acceptable	Proposal element indicates <u>moderate customer satisfaction</u> . Documentation and references are satisfactorily addressed. Weaknesses, if any, are minor and are more than offset by strengths.
Neutral	Past performance information is not available for this offeror either by submittal as part of its proposal or on any Government past performance system.
Unacceptable	Proposal element indicates <u>minimal or lack of customer satisfaction</u> . Documentation and references are addressed, but inadequate to assist in evaluation. Weaknesses outweigh strengths. Documentation and references are clearly unacceptable.

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**b. Proposal Analysis**

Technical ability was evaluated in accordance with the factors in the solicitation. The strengths and weaknesses of each of the three offerors are detailed in the Encl (3). The average technical scores (Evaluation Factor I) are shown below:

Offeror	Subfactor 1 (20)	Subfactor 2 (20)	Subfactor 3 (20)	Total Avg Score (60)
Bul-Hed				
Optimum				
Westwind				

Optimum and Westwind were found to be technically equal. Bul-Hed did not score very well technically in comparison with the other two offers.

c. To evaluate Evaluation Factor III - Past Performance, the TEP reviewed information or contacted at least two (2) past performance references for each offeror. In some instances, the TEP contacted more references to verify information provided. Past performance ratings are shown below:

<u>Offeror</u>	<u>Rating</u>
Bul-Hed	
Optimum	
Westwind	

All three evaluated offerors offer higher quality performance. The performance risk is minimal for all offerors evaluated.

d. To evaluate Evaluation Factor III, the TEP reviewed the price proposals separately from the technical proposals for each offeror. Additional review and analysis was performed and is described in the paragraphs to follow. Enclosure (4) is the complete abstract of initial offers. A summary of initial price rankings are as follows and described below:



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<u>Firm</u>	<u>Price Rank</u>
Bul-Hed	
Optimum	
Westwind	

In accordance with FAR 15.404-1(b) for price analysis, the price proposals were analyzed for reasonableness. The proposed prices of the three evaluated offers are all below the IGE. These initial rankings are largely based on the bottom line total price proposed, although there were some concerns with individual line items, particularly in Optimum's proposal despite it being the lowest priced overall. In Optimum's proposal, the main concern was with their proposed price for Line Item 0001 (Identifying and Protecting Native Vegetation). It was unclear whether the proposed unit price for that line item contained a typographical error or if it was unbalanced based on comparison with the IGE and the other offerors' proposals. Optimum's proposed unit price was significantly higher than the IGE and other proposals. Since Optimum did not provide much detailed backup explaining how they arrived at their proposed prices as requested in the RFP, it was difficult to ascertain if the pricing for Line Item 0001 was indeed fair and reasonable. The TEP's initial suspicion was that Optimum front-loaded their general conditions and other costs into this first line item to ensure that the costs were recovered. Line Items 0009C and 0009D (Earthmoving-Dewatering and Culverts, respectively) were also notably higher than the IGE and other proposed prices, but did not cause the same level of concern as Line Item 0001. All of Optimum's other proposed prices were comparable to the IGE and competitors' proposals and posed no major concerns. Westwind's prices seemed reasonable in comparison with the IGE and other proposed prices.

pending the clarification of the aforementioned concerns in Optimum's price proposal.

**e. Competitive Range Determination:**

Based on the initial evaluation, a competitive range of two firms, including Optimum and Westwind, was recommended. Although three offerors were evaluated, it was recommended that because the third offeror, Bul-Hed, had scored so low technically and had a higher price than the two other offerors, they would not have a reasonable chance of receiving award following clarifications and should not be included in the competitive range. The CO concurred with the TEP's recommendations based on the findings and following rankings/comparisons:

<u>Offeror</u>	<u>Eval Factor I – Tech Approach &amp; Capability</u>	<u>Eval Factor II – Price</u>	<u>Eval Factor III – Past Performance</u>	<u>Overall Rank</u>
Bul-Hed				
Optimum				

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Westwind

Based on the initial offers and prior to holding discussions and/or clarifications with any of the offerors, the most highly rated firms included both Optimum and Westwind because they offered the best value to the government considering non-price and price tradeoffs. The firms' proposals were effectively equal technically and were both competitively priced in comparison with Bul-Hed, who scored extremely low technically, and proposed a higher price than the other two offerors.

f. Discussions/Clarifications

Discussions/Clarifications were opened on August 26, 2008. In a letter to the offerors in the competitive range, the Government requested final revised proposals by September 3, 2008, to include clarification/verification of Line Item 0001, since proposed pricing substantially differed from the IGE. Offerors were given the opportunity to revise pricing. Both offerors submitted timely responses. The TEP evaluated the additional information and revised price proposals submitted by Optimum and Westwind.

4. Final Revised Proposal Analysis

Even after revised proposals had been requested and received from the offerors in the competitive range, there was still some concern with Optimum's proposal. Both offerors reduced their initial proposed prices, but Optimum's unit prices for Line Items 0001, 0009C and 0009D still seemed significantly high. Optimum confirmed their pricing on Line Item 0001 so the suspicion that the initial proposed price perhaps being a typographical error was rejected. Westwind's revised prices still seemed reasonable in comparison with the IGE and other proposed prices.

On September 8, 2008, the government held a conference call with Optimum to get clarifications on the pricing of some of the questionable line items on their revised proposal. Optimum personnel included Rick Evans and Dan Eastman and the government representatives included Joelle Mascarenas, Tom Murphy, and Jonathan Taylor. Clarifications concerning scope and detailed backup were requested for Line Items 0001, 0009C, and 0009D. Optimum did confirm on this call that they were not front loading Line Item 0001 and that their general conditions and other costs were indeed spread over the line items. Optimum submitted detailed backup showing their unit cost calculations later that same afternoon for review by the government.

The backup submitted by Optimum shows that they do not understand the scope and level of effort required for Line Items 0001 and 0009D. Westwind and the other offeror, Bul-Hed, proposed unit prices of around [REDACTED] respectively for Line Item 0001, indicating the requirements of the task were clear in the RFP and validating the realism of the IGE for this line item. Optimum proposed a unit price of around [REDACTED] ten times higher than each of the other proposals. Although Optimum reduced their proposed unit price for Line Item 0001 slightly after discussions, they were still ten times higher than the IGE and other offers. Furthermore, Task 1 (Line Item 0001) is a requirement on every task order. At Optimum's unit

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price of approximately [REDACTED] this proportionately higher price would eat up all the funding and would not allow any meaningful work to be done (other than Task 1), especially on small task orders. Likewise on Line Item 0009D, after discussions, Optimum's revised unit price, even after such reduction, was still significantly high compared to the IGE and other offers. For these reasons, award of the contract to Optimum would not achieve best value for the government.

Enclosure (5) is the complete abstract of final revised offers. A summary of final price rankings are as follows:

Optimum	[REDACTED]	
Westwind	[REDACTED]	

In determining the rankings, Optimum's and Westwind's proposed revised unit prices were applied to two likely task order scenarios. In fact, the scopes of work used for the scenarios are the actual draft SOWs for the first two task orders to be awarded following issuance of the base contract. The first task order scenario involves new restoration work for approximately 600 acres in the Hole-In-the-Donut (HID). The second task order scenario involves remedial scraping of a restored area that was done in 2004. This includes approximately 300 acres in the HID.

The results of the two scenarios are presented below:

Task Order #1:

- Contractor Comparison - overall - Westwind
- 1 Identifying and Protecting Native Vegetation (Task 1)
  - 2 Vegetation Clearing (Task 2, and 4)
  - 3 Creating Haul Roads and Transects (Task 3)
  - 5 Windrow Bulk Vegetation Scrape Substrate (Task 6A)
  - 6 Load and Haul Bulk Substrate (Task 6B)
  - 7 Final Scrape and Sweeping (Task 7)
  - 8 Vacuum Truck (Task 7A)
  - 9 Disposal Mound (Back Filling) (Task 8)

Unit Price      Unit      Value

[REDACTED]
------------

- Contractor Comparison - overall - Optimum
- 1 Identifying and Protecting Native Vegetation (Task 1)
  - 2 Vegetation Clearing (Task 2, and 4)
  - 3 Creating Haul Roads and Transects (Task 3)
  - 5 Windrow Bulk Vegetation Scrape Substrate (Task 6A)

Unit Price      Unit      Value

[REDACTED]
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6A)

- 6 Load and Haul Bulk Substrate (Task 6B)
- 7 Final Scrape and Sweeping (Task 7)
- 8 Vacuum Truck (Task 7A)
- 9 Disposal Mound (Back Filling) (Task 8)

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## Task Order #2:

### Contractor Comparison - overall - Westwind

- 1 Identifying and Protecting Native Vegetation (Task 1)
- 3 Creating Haul Roads (Task 3)
- 5 Windrow Bulk Vegetation Scrape Substrate (Task 6A)
- 6 Load and Haul Bulk Substrate (Task 6B)
- 7 Final Scrape and Sweeping (Task 7)
- 9 Disposal Mound (Back Filling) (Task 8)

<u>Unit Price</u>	<u>Contract Quantity</u>	<u>value</u>
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### Contractor Comparison - overall - Optimum

- 1 Identifying and Protecting Native Vegetation (Task 1)
- 3 Creating Haul Roads (Task 3)
- 5 Windrow Bulk Vegetation Scrape Substrate (Task 6A)
- 6 Load and Haul Bulk Substrate (Task 6B)
- 7 Final Scrape and Sweeping (Task 7)
- 9 Disposal Mound (Back Filling) (Task 8)

<u>Unit Price</u>	<u>Contract Quantity</u>	<u>Value</u>
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In the first task order, Westwind is almost [REDACTED] lower than Optimum. However, in the second task order, the prices are comparable. Further analysis reveals that this is due to the mix of tasks that are involved. When core tasks are needed (core tasks include Tasks 1, 4, 6a, 6b, 7), Westwind represents a better value than Optimum. This is because Westwind's unit pricing is lower than Optimum's on most of the core tasks and these are the unit prices that will be used the most (i.e. have the largest estimated quantities). Based on this value analysis, Westwind offers the best value to the government over the life of the contract.

Both Optimum and Westwind offer [REDACTED] technical ability, higher quality performance, and minimal performance risk. The offerors' are essentially equal technically as demonstrated by the negligible [REDACTED] point difference in their technical scores. Furthermore, the offerors are likewise basically equal in terms of past performance, with both receiving [REDACTED] past performance ratings. In terms of non-price factors, the offerors are considered equal. As such, the determining factor is price.

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Price proposals for the base and all options from both offerors are less than the IGE. However, while Optimum's overall price was slightly lower than Westwind's (generally within 10% or less difference annually) and the government estimate, several of their line items were significantly unbalanced and therefore, are considered riskier than Westwind's. Westwind's prices are largely comparable to the IGE and there was no evidence of unbalanced line items. Westwind's high level of ability and quality of work coupled with their low performance risk justifies the price difference as compared to Optimum. Furthermore, although Westwind's overall price is slightly higher than Optimum's it is still less than, but comparable to, the IGE.

In summary, Westwind and Optimum have equal non-price ratings, and therefore offer the same amount of technical ability and level of past performance. Optimum's total price is lower than Westwind's total price. However, when the unit prices are considered, Westwind's proposed unit prices are the better value for the government because their unit prices are considered reasonable based on comparison with the government estimate, other offerors' unit prices, and pricing on previous Government contracts. Conversely, Optimum's unit price for Line Item 0001 was excessively high and the unit prices for Line Items 0004, 0007, 0009C and 0009D which were also high when compared to the IGE and competitors' prices, and therefore cannot be determined reasonable. Westwind's overall price and unit prices present less performance risk to the government, and, as the pricing scenarios demonstrated, is a better value over the life of the contract.

In accordance with Clause M.3 of the RFP, "The SSA will then consider all technical and price factors, including assessing the degree of risk associated with the proposal to determine the offer that provides the overall best value to the Government." Furthermore, the clause also states, "The Government may elect to accept other than the lowest priced proposal when the perceived benefits of a higher priced proposal merit the additional cost." Consequently, based on the final rankings and considering tradeoffs between non-price factors (technical ability and past performance) and price, the TEP recommended award to Westwind Contracting, Inc.

Considering tradeoffs between non-price factors and price, and based on the TEP report and analysis above, Westwind Contracting Inc. offers the best value to the Government.

**5. Fair and Reasonable Pricing Determination:**

Prices are determined fair and reasonable as adequate competition was achieved and founded on the information detailed in the above discussion. Audits, field pricing support, and certified cost and pricing data are not required.

**6. Other Information:**

a. Westwind is determined responsible pursuant to FAR Part 9.104-1 based on the following:

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(1) Westwind is not listed as a debarred firm on the Procurement, or Procurement or Non-Procurement listings.

(2) Interviews with Westwind's references and the Past Performance investigations conducted by the TEP reveal that Westwind has continually exhibited favorable technical performance, integrity, business ethics, and organization/experience, and has adequate available financial resources.

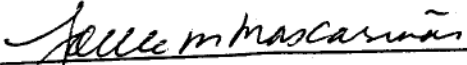
b. Westwind's completed Representations and Certifications have been received and reviewed.

c. A subcontracting plan is not required. The proposed awardee is not a large business concern.

**7. Recommendation:**

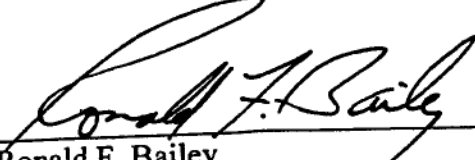
Based on the attached information and the data contained herein, I recommend the award of Contract 1443CX5297080232 to Westwind Contracting Inc. using the negotiated tasks and associated pricing as contained in the Contract Price Schedule dated 9-2-08 as they were determined to be fair and reasonable by the undersigned.

Prepared by:

  
Joelle M. Mascarenas  
Contracting Officer

9/18/08  
Date

Approved By:

  
Ronald F. Bailey  
Contracting Officer  
Source Selection Official

9/18/08  
Date

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Restoration Contract: Offeror Responsiveness to Minimum Technical Requirements

Contractor's proposal must demonstrate that they meet all the minimum technical qualifications. Proposals that do not demonstrate any one of the minimum technical qualifications will be considered unresponsive and eliminated from competition. The minimum technical qualifications are as follows:

Offeror: **Central Florida Equipment Rentals Inc.**

1. Past experience in on-site ecological restoration work as prime contractor on projects between 100 and 1200 acres.  
[REDACTED]
  2. Past experience in on-site land clearing projects as prime contractor on projects between 100 acres and 1200 acres.  
[REDACTED]
  3. Past experience in meeting technical written reporting requirements for projects, including, but not limited to, scheduling update reports, monthly progress reports, or final reports that are similar to those that will be required for this project (see Statement of Work for suggested content of report submittal requirements). The reports shall be from the contractor to their clients.  
[REDACTED]
- [REDACTED]

Offeror: **Westwind Contracting, Inc.**

1. Past experience in on-site ecological restoration work as prime contractor on projects between 100 and 1200 acres.  
[REDACTED]
2. Past experience in on-site land clearing projects as prime contractor on projects between 100 acres and 1200 acres.  
[REDACTED]
3. Past experience in meeting technical written reporting requirements for projects, including, but not limited to, scheduling update reports, monthly progress reports, or final reports that are similar to those that will be required for this project (see Statement of Work for suggested content of report submittal requirements). The reports shall be from the contractor to their clients.  
[REDACTED]

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This company as incumbent, clearly meets the minimum requirements for this solicitation.

Offeror: **Oklawaha Farms, Inc.**

1. Past experience in on-site ecological restoration work as prime contractor on projects between 100 and 1200 acres.  
[REDACTED]
2. Past experience in on-site land clearing projects as prime contractor on projects between 100 acres and 1200 acres.  
[REDACTED]
3. Past experience in meeting technical written reporting requirements for projects, including, but not limited to, scheduling update reports, monthly progress reports, or final reports that are similar to those that will be required for this project (see Statement of Work for suggested content of report submittal requirements). The reports shall be from the contractor to their clients.  
[REDACTED]

Offeror: **A2 Group, Inc.**

1. Past experience in on-site ecological restoration work as prime contractor on projects between 100 and 1200 acres.  
[REDACTED]
2. Past experience in on-site land clearing projects as prime contractor on projects between 100 acres and 1200 acres.  
[REDACTED]
3. Past experience in meeting technical written reporting requirements for projects, including, but not limited to, scheduling update reports, monthly progress reports, or final reports that are similar to those that will be required for this project (see Statement of Work for suggested content of report submittal requirements). The reports shall be from the contractor to their clients.  
[REDACTED]

Offeror: **Sayar Enterprises, Inc.**

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1. Past experience in on-site ecological restoration work as prime contractor on projects between 100 and 1200 acres.  
[REDACTED]
  2. Past experience in on-site land clearing projects as prime contractor on projects between 100 acres and 1200 acres.  
[REDACTED]
  3. Past experience in meeting technical written reporting requirements for projects, including, but not limited to, scheduling update reports, monthly progress reports, or final reports that are similar to those that will be required for this project (see Statement of Work for suggested content of report submittal requirements). The reports shall be from the contractor to their clients.
- [REDACTED]

Offeror: **Bul-Hed Corporation**

1. Past experience in on-site ecological restoration work as prime contractor on projects between 100 and 1200 acres.  
[REDACTED]
  2. Past experience in on-site land clearing projects as prime contractor on projects between 100 acres and 1200 acres.  
[REDACTED]
  3. Past experience in meeting technical written reporting requirements for projects, including, but not limited to, scheduling update reports, monthly progress reports, or final reports that are similar to those that will be required for this project (see Statement of Work for suggested content of report submittal requirements). The reports shall be from the contractor to their clients.
- [REDACTED]

Offeror: **Optimum Services, Inc.**

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1. Past experience in on-site ecological restoration work as prime contractor on projects between 100 and 1200 acres.  
[REDACTED]
2. Past experience in on-site land clearing projects as prime contractor on projects between 100 acres and 1200 acres.  
[REDACTED]
3. Past experience in meeting technical written reporting requirements for projects, including, but not limited to, scheduling update reports, monthly progress reports, or final reports that are similar to those that will be required for this project (see Statement of Work for suggested content of report submittal requirements). The reports shall be from the contractor to their clients.  
[REDACTED]

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**Source Selection Plan**

Everglades National Park, Dade County, Florida  
Land Restoration and Land Clearing  
June 13, 2008

## I. INTRODUCTION

Description of Requirement – The government plans to solicit for, and award, an Indefinite Deliveries Indefinite Quantities Services Contract with a Base Year and four (4) Option Years to provide for Land Restoration and Land Clearing at Everglades National Park in Homestead, Florida. The solicitation will be competed as a Set-aside for Small Business Concerns. The estimated minimum cost for this effort is approximately \$2 M.

A. The government will use a tradeoff process for this source selection. Award will be made to the responsible offeror whose offer conforms to the solicitation requirements and provides the best value to the government considering the stated technical factors and price. For this solicitation, all evaluation factors other than price, when combined, are more important than price. The following evaluation factors, listed in descending order of importance, will be considered:

1. Evaluation Factor I – Technical Approach and Capability
  - a) Subfactor 1 – Project Plan, Management and Coordination and Previous Related Experience
  - b) Subfactor 2 – Scheduling, Cost Control and Quality Control Management
  - c) Subfactor 3 – Qualifications and Experience of Key Personnel
2. Evaluation Factor II - Price
3. Evaluation Factor III - Past Performance

## II. PURPOSE

A. This Source Selection Plan (SSP):

1. Establishes the organizational responsibilities, procedures, evaluation factors and evaluation factors weights for the selection of a contractor.
2. Addresses the composition and duties of the source selection organization that will conduct the technical, past performance, and price evaluations.
3. Addresses the evaluation factors and rating system that will be used in the evaluation of the offers.
4. Addresses the procedures for conducting the evaluation and the security measures that must be maintained to ensure that proprietary source selection information is safeguarded from unauthorized disclosure.

B. Implementation of this plan is intended to:

1. Ensure impartial, comprehensive and timely evaluation of proposals.
2. Ensure that each participant has a clear understanding and an overall view of the evaluation process.
3. Provide an official record of the evaluation process.
4. Provide the Contracting Officer with usable findings to assist him/her with making the award decision.

## III. ORGANIZATION AND RESPONSIBILITIES



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- A. The Source Selection Authority consists of the Source Selection Authority (SSA), the Technical Evaluation Panel (TEP), and the Business/Cost Panel (BCP) consisting of the Contracting Officer and the Contract Specialist.
- B. Source Selection Authority. The Contracting Officer serves as the SSA and as the procuring Contracting Officer. The SSA will perform the following duties:
  1. Review and approve the SSP and any revisions to ensure that the source selection process is properly and effectively conducted.
  2. Approves and appoints TEP members.
  3. Provides the TEP members with guidance and any special instructions to conduct the evaluation process.
  4. Ensures that conflicts of interest, or appearances thereof, are avoided.
  5. Ensures that premature or unauthorized release of Source Selection Information is avoided.
  6. Reviews the technical evaluation report from the TEP and either:
    - a) Returns the report to the TEP for additional clarification and input, or
    - b) Determines if discussions are required, who the apparent awardee is, and prepares the Source Selection Memorandum to document the award decision.
  7. Serves as a nonvoting advisor to the TEP.
  8. Assures that the technical and past performance evaluation factors, as set forth in the solicitation, are proper.
  9. Assures that all aspects of the solicitation are clearly and properly addressed.
  10. Determines price reasonableness.
  11. Evaluates proposals for price realism.
  12. Determines technical and financial responsibility of the offerors.
  13. Awards the contract on the basis of initial offers without negotiations when provided for by the solicitation and if warranted by the results of the evaluation of the TEP.
  14. If discussions are required, establishes the competitive range and provides written determination of the range and items of discussion required.
  15. Instructs all persons receiving information or data on source selection activities to comply with FAR 3.101, Standards of Conduct.
  16. Prepares contract documents, ensures that legal review is obtained, proper notifications are made and awards the contract.
- C. Contract Specialist (CS). The CS:
  1. Serves as nonvoting advisor to the TEP.
  2. Assures that the technical and past performance evaluation factors as set forth in the solicitation is proper.
  3. Assures that all aspects of the solicitation are clearly and properly addressed.
  4. Recommends price reasonableness.
  5. Evaluates proposals for price realism.
  6. Recommends technical and financial responsibility of offerors.
  7. Prepares contract on the basis of initial offers without negotiations when provided for by the solicitation and if warranted by the results of the evaluation of the TEP.
  8. If discussions are required, coordinates and participates in discussions.
  9. Instructs all persons receiving information or data on source selection activities to comply with FAR 3.101, Standards of Conduct.

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10. I prepares all necessary contract documents, ensures that legal review is obtained, and that the proper notifications are made.
- D. TEP Chairperson. The TEP Chairperson shall:
1. Ensure that the TEP members understand and adhere to the evaluation factors for evaluation of the proposals and any directions from the SSA so that there is a uniform approach to the evaluation effort.
  2. Review the SSP to ensure that the plan, the technical proposal requirements, and the evaluation factors are compatible.
  3. Coordinate the activities of the TEP.
  4. Provide guidance to members of the TEP.
  5. Ensure that all source selection information, including proposals and evaluation results, are protected from release to unauthorized persons.
  6. Review TEP individual member's findings and scoring for completeness, consistency and adequate documentation.
  7. Arbitrate any major differences between the individual TEP member's scoring.
  8. After completion of initial proposal evaluations and any subsequent evaluations of any revised proposals, prepare a comprehensive technical evaluation report. The report shall:
    - a) Fully describe specific strengths and weaknesses of each offeror's proposal.
    - b) Include a discussion of whether or not the offerors' price proposals adequately reflect their respective technical proposals and the requirements of the solicitation.
    - c) If, at a stage leading to discussions with offerors, identify specific questions to offers required for clarification and/or information required to supplement previously submitted proposals.
  9. Participate in debriefing of offerors.
- E. TEP Members. The members of the TEP are responsible for determining the extent to which a technical proposal satisfies the requirements of the Request for Proposals (RFP). The individual members are nominated by the TEP Chairperson and approved by the SSA. The TEP may utilize the expertise of nonvoting advisors to assist them in evaluating each proposal. These advisors are subject-matter experts and have specific valuable experience that relates to the effort being procured. Advisors are not responsible for rating proposals. The TEP members shall:
1. Become thoroughly familiar with the SSP and the solicitation requirements.
  2. Perform detailed evaluation of each offer in accordance with the SSP and Section M of the solicitation. Each member shall initially score each proposal and do so independently of other TEP members. All notable strengths and weaknesses shall be identified and documented. Provide thorough and complete score sheets to TEP chairperson. All scoring shall be completed prior to reviewing offered prices.
  3. Determine if additional information/clarification is required from offerors and, if needed, draft appropriate questions to offerors.
- F. The TEP shall be comprised of:

<u>Role</u>	<u>Name</u>	<u>Office / Title</u>
Chairperson	Jonathan Taylor	Ever – Project Specialist/COTR
Voting Member	Tom Murphy	DSC – Project Manager
Voting Member	Craig Smith	EVER–Restoration Manager

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Non Voting Member: [Redacted] DSC-CO  
Non Voting Member: Katie Hoover DSC-CS

**IV. SOURCE SELECTION EVALUATION PROCESS (BEST VALUE)**

- A. Proposals will be evaluated in accordance with the factors as established in Section M of the RFP. The TEP will evaluate price proposals independent of the technical evaluation. The TEP will not have access to price information until completion of the technical evaluation.
- B. After completion of the technical and price evaluations, the TEP will report the results to the Source Selection Authority (SSA). The SSA will then consider all technical and price factors to determine the offer that provides the overall best value to the Government. The SSA's decision will be based on a comparative assessment of the proposals against the source selection factors specified in the solicitation and detailed below under Evaluation Factors.
- C. The Government may elect to accept other than the lowest priced proposal when the perceived benefits of a higher priced proposal merit the additional cost.
- D. Offeror's Responsibility: It shall be the offeror's responsibility to demonstrate that they meet all the minimum technical qualifications and to provide a detailed work plan and schedule that addresses the tasks herein. Complying with all specifications herein shall be the responsibility of the Contractor unless specifically stated as being the responsibility of the Park. In all cases where responsibility as to the Park is not explicitly stated it shall be deemed to be the responsibility of the Contractor.

**V. MINIMUM TECHNICAL QUALIFICATIONS**

Contractor's proposal must demonstrate that they meet all the minimum technical qualifications. Proposals that do not demonstrate any one of the minimum technical qualifications will be considered unresponsive and eliminated from competition. The minimum technical qualifications are as follows:

1. Past experience in on-site ecological restoration work (see Statement of Work for definition of "on-site ecological restoration" and "on-site landclearing") as prime contractor on projects between 100 and 1200 acres.
2. Past experience in on-site land clearing projects as prime contractor (see Statement of Work for definition of "land clearing") on projects between 100 acres and 1200 acres.
3. Past experience in meeting technical written reporting requirements for projects, including, but not limited to, scheduling update reports, monthly progress reports, or final reports that are similar to those that will be required for this project (see Statement of Work for suggested content of report submittal requirements). The reports shall be from the contractor to their clients.

**VI. EVALUATION FACTORS**

All evaluation factors other than price, when combined, are more important than price. Technical subfactors are of equal importance.

- A. Evaluation Factor I – Technical Approach and Capability



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1. **(part of Agency Report tab 11)** **Factor: Project Management and Coordination and Previous Related Experience:** The offeror shall submit its technical proposal addressing a project management and coordination plan for conducting on-site land restoration and land clearing. The proposal shall describe how work will be conducted without significant interference with Park operations and visitors. The technical proposal must describe how the offeror intends to accomplish each task. The technical proposal shall demonstrate awareness that some tasks describe anticipated limits and requirements however that as tasks are ordered the adaptive management process might identify new limits and requirements that need to be incorporated into the work. For example some tasks have seasonal constraints (winter dry season, from approximately December through May). Specific details regarding methodologies, logistics, the quantities and types of equipment, staffing and work schedules must be provided for the base year and each option year. Without limiting the generality of the foregoing, technical proposals shall include a section setting forth the ability to conduct a pre-work planning and development phase.

The technical proposal shall address but is not limited to, the following:

- a. The proposed approach for supplying on-site restoration projects with all equipment and personnel. Demonstrate the amounts and types of equipment per task undertaken based on scale (100 acres to 1200 acres). The contractor shall demonstrate what equipment is owned and can provide for work under this contract and what percentage and types of equipment will be secured through other means in order to provide equipment of sufficient quantity and type to meet the requirements of the tasks within this Statement of Work.
- b. Describe the plan and approach for staffing the project based on scale (100 acres to 1200 acres).
- c. Describe the plan for preparation of disruption of work due to severe storms or other emergency. Include how the project site, work and equipment will be secured or protected, logistical planning for personnel and resumption of work once the event is over.
- d. Identify the effort that the contractor will perform with its own personnel and the work that will be subcontracted out to major subcontractors and include the reason(s) for selecting the particular subcontractor for the proposed effort (e.g., subcontractor's experience, management, key personnel, etc.).
- e. Provide the offeror's proposed plan, approach and method of demolition of cinder block structures (350 to 3600 SQYD) with a slab on grade. Refuse is to be hauled to dump.
- f. The proposed approach for performing land restoration and land clearing activities in proximity to sensitive natural resources, and potential conflicts with adjacent visitor activity and park operations.
- g. Demonstrate a plan to address environmental protection of work sites (erosion control, spill control and cleanup, dust control on site fuel storage permits, etc.).
- h. This part of the proposal shall clearly demonstrate a proposed project management and coordination plan, and the offeror's capability to manage and coordinate land restoration and land clearing as well as general scheduling and

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reporting experience. The contractor shall demonstrate the ability to provide an electronically derived schedule detailing the timing of activities including mobilization, landclearing activities, and demobilization. The contractor shall demonstrate the ability to promptly provide monthly reports and alternative schedules that reflect unforeseen contingencies. The proposal shall also include the types and quantities of equipment that will be assigned to tasks within the proposal. The contractor shall demonstrate the ability to provide a monthly reports and a final report upon completion of the Task Order by providing 3 examples of reports for past projects with similar requirements from the contractor to their clients.

- i. Describe previous related experience in detail with On-Site Ecological Restoration Work as Prime. Examples shall be between 100 and 1200 acres.
  - j. Describe previous related experience in detail with on-site Land Clearing Projects as Prime. Examples shall be between 100 acres and 1200 acres.
  - k. Each example provided of previous related experience shall include reference contact information including name and telephone number (a minimum of 1 reference per example submitted).
  - l. The contractor's plan shall include coordinating with the Park's COTR to minimize the impacts of the contractor's operations such as mobilization vegetation clearing, earth moving, and soil and bulk vegetation disposal operations on known or projected Park operations.
  - m. Proposed communication plan as described in the Statement of Work.
2. Subfactor 2 - Scheduling, Cost Control and Quality Control Management:
- a. Submit as a component of your proposal, a preliminary, realistic schedule that demonstrates an understanding of the sequencing required for the tasks described in the SOW with a clear understanding that the performance period (for a typical December-May restoration season) on this project cannot be extended. Submit schedules for two scenarios - 100 acres and 1,200 acres. The schedule should allow for possible delays that might be expected based upon the Offeror's experience. Include a clear explanation of how these schedules will be maintained. If the offeror is submitting alternate proposals, separate schedules shall be required for the alternate proposal.
  - b. Provide documentation of 3 past projects, with references and contact information, that demonstrate the offeror's ability to provide effective project management, including but not limited to: working within constrained project site conditions; monitoring and reporting of progress schedules; subcontractor control and coordination; contract modification history; and monitoring of work forces to ensure high quality completion of projects in accordance with contract requirements.
  - c. Proposed Plan and Approach for achieving quality control measures for (a) ensuring at a technical level the restoration of wetland function, form, and long-term ecological stability, (b) preservation of the natural environment, and (c) meeting all contract provisions.



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- d. Ecological Restoration: The offeror shall describe its understanding of on-site ecological restoration as defined in the SOW, in particular, prior experience in working on ecological restoration projects.
  - e. Preservation of the natural environment: Plan shall describe cleaning of equipment to prevent contamination and introduction of exotic species, noise control, protecting surrounding natural areas and water quality, and air/dust control.
3. Subfactor 3 - Qualifications and Experience of Key Personnel: The offeror shall provide its proposed team (key personnel) qualifications and experience including the breadth, depth and relevance of their previous work as it relates to land restoration and land clearing and experience working together. The offeror shall include resumes of proposed key personnel. As a minimum, the offeror shall identify the key personnel for the following positions. These individuals' names and titles shall be inserted in Clause 1489.237-72 in Section H for the successful offeror's contract; and the offeror shall commit to these individuals being the parties to perform these functions for a period of 90 calendar days after the award is made in accordance with this clause.

Project Manager  
 Superintendent  
 Quality Control Supervisor  
 Foremen

The offeror shall identify who will provide the programming, day to day technical support and data management of the Geographic Positioning System (GPS) units used to guide equipment and personnel and whether the effort will be performed with its own staff or by an identified subcontractor in this section of its technical proposal.

Note: Key Personnel Qualifications (Form 4) in the proposal package may be used for submitting this information. However, the offeror may submit its own format as long as the applicable information is included.

- B. Evaluation Factor II - Price: A price evaluation will be performed to determine the reasonableness of the proposed price. Reasonableness will be determined by considering other offered prices received and comparison to the independent government cost estimate. Prices will be evaluated to determine whether any line items are unbalanced. Prices will be requested for each task as listed on the Contract Price Schedule based on minimum and maximum estimated quantities. Prices for options will be evaluated to determine the reasonableness of the proposed price and whether the options are unbalanced when compared with the base price. (Prices, including detailed backup documentation, will be requested for each task as listed on the Contract Price Schedule based on the minimum and maximum estimated quantities.)
- C. Evaluation Factor III - Past Performance: The offeror shall provide a copy of the form entitled "Experience and Past Performance" that is part of the proposal package attached to the solicitation, for land restoration and land clearing projects of the same scope and complexity as the contemplated contract. Past performance on contracts with the Federal

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 Government, other public agencies, or private organizations will be considered, but projects with government agencies are preferred. The past performance of the offeror and/or its proposed subcontractors on projects similar in scope and complexity will be evaluated in the areas of quality, timeliness, and business relations. Offerors demonstrating a higher level of successful past performance in the evaluated areas will be more favorably rated. In the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror will be evaluated neither favorably nor unfavorably.

Complete Sections I and II of each form to provide applicable information for each contract.

1. The offeror should disclose any instances in which its past performance on a particular contract may be considered by others to be less than fully satisfactory by attaching a narrative to the applicable Past Performance Questionnaire. The offeror should relate pertinent facts and circumstances and describe any remedial action taken or to be taken to correct the deficiency. Failure to disclose such instances may result in a determination that the offeror has been less than candid with the Government, which could result in an unfavorable assessment of the offeror's past performance record.
2. Documentation should demonstrate customer satisfaction relative to the following:
  - a. Offeror's capability, efficiency, and effectiveness conducting on-site land restoration and land clearing as defined in the SOW.
  - b. Offeror's conformance to the terms and conditions of the contract
  - c. Offeror's reasonableness and cooperativeness during performance
  - d. Offeror's commitment to customer satisfaction
  - e. Offeror's capability to provide customer satisfaction.
  - f. Offeror's capability to produce reports documenting progress, problems, and potential solutions and scheduling updates.
  - g. Offeror's capability to work independently with little guidance.

Note: The aforementioned items are likely the types of questions that the references will be asked. The references provided should be willing and able to confirm customer satisfaction in the specified areas.

3. Outline the number of years of experience you have working with the subcontractors proposed for this project and provide data on the types of projects where this association has occurred.

Note: The offeror may use Experience and Past Performance (Form 2) and Subcontractor Reference (Form 5) in the proposal package for submitting this information or may use its own format as long as it contains all information included in the forms.

VII. EVALUATION FACTOR WEIGHTS & RATING PLAN – A rating system will be utilized as described below:

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A. Evaluation Factor I – Technical Approach and Capability. 60 points max.

Subfactor 1 – Project Plan, Management and Coordination and Previous Related Experience. 20 points max.

Rating	Definition / Standard
16-20 points	Proposal element indicates <u>extensive related experience and superior project management and coordination</u> and competence with related land restoration and land clearing work. Characteristics of comparable contracts are addressed completely and clearly. No apparent weaknesses or deficiencies.
11-15 points	Proposal element indicates <u>moderate related experience and average project management and coordination</u> and competence with related land restoration and land clearing work. Many characteristics of comparable contracts are addressed. Weaknesses, if any, are minor and are more than offset by strengths.
6-10 points	Proposal element indicates <u>minimal related experience and minimal project management and coordination</u> and competence with related land restoration and land clearing work. Characteristics of a comparable contract are addressed. Weaknesses outweigh strengths.
0-5 points	Proposal element indicates a <u>lack of related experience and little to no project management and coordination</u> and competence with related land restoration and land clearing work. Characteristics of a comparable contract are lacking or not evident.

Subfactor 2 – Scheduling, Cost Control, and Quality Control Management. 20 points max.

Rating	Definition / Standard
16-20 points	Proposal element indicates <u>extensive experience</u> and competence in Scheduling, Cost Control, and Quality Control Management. CPMS meets or exceeds requirements. Demonstrated excellent Cost Control and Quality Control Management. No apparent weaknesses or deficiencies.
11-15 points	Proposal element indicates <u>moderate experience</u> and competence in Critical Path Method Scheduling, Cost Control, and Quality Control Management. CPMS meets requirements. Demonstrated good Cost Control and Quality Control Management. Weaknesses, if any, are minor and are more than offset by strengths.
6-10 points	Proposal element indicates <u>minimal related experience</u> and competence in Scheduling, Cost Control, and Quality Control Management. CPMS not well documented or may not meet project requirements. Cost Control and Quality Control Management weak. Weaknesses outweigh strengths.
0-5 points	Proposal element indicates a <u>lack of related experience</u> and competence in Scheduling, Cost Control, and Quality Control Management. Characteristics of a comparable contract are lacking or not evident.

Subfactor 3 – Qualifications and Experience of Key Personnel. 20 points max.



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Rating	Definition / Standard
16-20 points	Proposal element indicates <u>extensive experience</u> and competence of Key Personnel and trades proposed. Excellent breadth, depth and relevance of previous work. Committed to comply with the Key personnel requirements of the Contract. No apparent weaknesses or deficiencies.
11-15 points	Proposal element indicates <u>moderate experience</u> and competence of Key Personnel and trades proposed. Good breadth, depth and relevance of previous work. Will comply with the Key personnel requirements of the Contract. Weaknesses, if any, are minor and are more than offset by strengths.
6-10 points	Proposal element indicates <u>minimal related experience</u> and competence of Key Personnel and trades proposed. Breadth, depth and relevance of previous work are weak. Probably will comply with the Key personnel requirements of the Contract. Weaknesses outweigh strengths.
0-5 points	Proposal element indicates a <u>lack of related experience</u> and competence in of Key Personnel and trades proposed. Lacking depth and relevance of previous work. No indication they will comply with the Key personnel requirements of the Contract. Characteristics of a comparable contract are lacking or not evident.

## B. Evaluation Factor II – Price.

A price evaluation will be performed to determine the reasonableness of the proposed price. Reasonableness will be determined by considering other offered prices received and comparison to the independent government cost estimate. Prices will be evaluated to determine whether any line items are unbalanced. Prices will be requested for each task as listed on the Contract Price Schedule based on minimum and maximum estimated quantities. Prices for options will be evaluated to determine the reasonableness of the proposed price and whether the options are unbalanced when compared with the base price. Prices, including detailed backup documentation, will be requested for each task as listed on the Contract Price Schedule based on the minimum and maximum estimated quantities.

## C. Evaluation Factor III — Past Performance.

Rating	Definition / Standard
Superior	Proposal element indicates <u>extensive customer satisfaction</u> . Documentation and references are addressed completely and clearly. No apparent weaknesses or deficiencies.
Acceptable	Proposal element indicates <u>moderate customer satisfaction</u> . Documentation and references are satisfactorily addressed. Weaknesses, if any, are minor and are more than offset by strengths.
Neutral	Past performance information is not available for this offeror either by submittal as part of its proposal or on any Government past performance system.
Unacceptable	Proposal element indicates <u>minimal or lack of customer satisfaction</u> . Documentation and references are addressed, but inadequate to assist in

## 2008 09 18 NPS Source Selection Memo

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evaluation. Weaknesses outweigh strengths. Documentation and references are clearly unacceptable.

## VIII. SECURITY

A. The technical evaluation process demands absolute security throughout the entire process. Inadvertent disclosure of source selection information may jeopardize the success of the procurement and put the government at unnecessary increased risk of protest.

1. TEP members will accomplish their assigned work in a private and secured work area with controlled access.
2. The proposals will be stored safely to protect against inadvertent disclosure to others outside of the TEP.
3. No document will be removed from the evaluation area for any reason without specific authorization from the TEP Chairperson with the concurrence of the SSA. At the conclusion of the technical evaluation, TEP members will not be permitted to retain any work papers, or any part of the proposals they had access to during the review.
4. The TEP Chairperson must ensure that all proposals and any related material are returned to the SSA.
5. It is the responsibility of each source selection participant to ensure the confidentiality of the evaluation process. Discussions among the source selection team members shall only be conducted in a secure work area. No discussions on any aspects of the evaluation will occur with any other persons not formally involved in the source selection. If at any time during the evaluation process it is found that there has been unauthorized disclosure or release of source selection information, the matter will be brought to the attention of the SSA and the TEP Chairperson.
6. Refer all attempted communication from offerors to the SSA.

B. This plan was prepared by Jonathan Taylor (COTR and TEP Chair), Joelle Mascarenas (Contracting Officer and SSA).

\_\_\_\_\_  
Jonathan Taylor

\_\_\_\_\_  
Date

Concur:

\_\_\_\_\_  
Tom Murphy

\_\_\_\_\_  
Date



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Approved: Joelle M. Mascarenas

Joelle M. Mascarenas  
Source Selection Authority

6/13/08

Date

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**2008 09 18 NPS Source Selection Memo**  
**(part of Agency Report tab 11)**

**TECHNICAL RATING SHEET**

**Solicitation:** 1443N5297080232

**Offeror:** \_\_\_\_\_

Rate each item below.

<b><u>Factor I – Technical Approach and Capability</u></b>	
<b><u>Subfactor 1 – Project Plan, Management and Coordination and Previous Related Experience – 20 Points Maximum</u></b>	<b>Rating</b>
<p>The offeror shall submit its technical proposal addressing a project management and coordination plan for conducting on-site land restoration and land clearing. The proposal shall describe how work will be conducted without significant interference with Park operations and visitors. The technical proposal must describe how the offeror intends to accomplish each task. The technical proposal shall demonstrate awareness that some tasks describe anticipated limits and requirements however that as tasks are ordered the adaptive management process might identify new limits and requirements that need to be incorporated into the work. For example some tasks have seasonal constraints (winter dry season, from approximately December through May). Specific details regarding methodologies, logistics, the quantities and types of equipment, staffing and work schedules must be provided for the base year and each option year. Without limiting the generality of the foregoing, technical proposals shall include a section setting forth the ability to a conduct a pre-work planning and development phase (Task 10A1).</p> <p>The technical proposal shall address but is not limited to, the following:</p> <ul style="list-style-type: none"><li>a. The proposed approach for supplying on-site restoration projects with all equipment and personnel. Demonstrate the amounts and types of equipment per task undertaken based on scale (100 acres to 1200 acres). The contractor shall demonstrate what equipment is owned and can provide for work under this contract and what percentage and types of equipment will be secured through other means in order to provide equipment of sufficient quantity and type to meet the requirements of the tasks within this Statement of Work.</li><li>b. Describe the plan and approach for staffing the project based on scale (100 acres to 1200 acres).</li><li>c. Describe the plan for preparation of disruption of work due to severe</li></ul>	

## 2008 09 18 NPS Source Selection Memo

(part of Agency Report tab 11)

- storms or other emergency. Include how the project site, work and equipment will be secured or protected, logistical planning for personnel and resumption of work once the event is over.
- d. Identify the effort that the contractor will perform with its own personnel and the work that will be subcontracted out to major subcontractors and include the reason(s) for selecting the particular subcontractor for the proposed effort (e.g., subcontractor's experience, management, key personnel, etc.).
  - e. Provide the offeror's proposed plan, approach and method of demolition of cinder block structures (350 to 3600 SQYD) with a slab on grade. Refuse is to be hauled to dump.
  - f. The proposed approach for performing land restoration and land clearing activities in proximity to sensitive natural resources, and potential conflicts with adjacent visitor activity and park operations.
  - g. Demonstrate a plan to address environmental protection of work sites (erosion control, spill control and cleanup, dust control on site fuel storage permits, etc.).
  - h. This part of the proposal shall clearly demonstrate a proposed project management and coordination plan, and the offeror's capability to manage and coordinate land restoration and land clearing as well as general scheduling and reporting experience. The contractor shall demonstrate the ability to provide an electronically derived schedule detailing the timing of activities including mobilization, landclearing activities, and demobilization. The contractor shall demonstrate the ability to promptly provide monthly reports and alternative schedules that reflect unforeseen contingencies. The proposal shall also include the types and quantities of equipment that will be assigned to tasks within the proposal. The contractor shall demonstrate the ability to provide a monthly reports and a final report upon completion of the Task Order by providing 3 examples of reports for past projects with similar requirements. The reports must be from the contractor to the clients.
  - i. Describe previous related experience in detail with On-Site Ecological Restoration Work as Prime. Examples shall be between 100 and 1200 acres.
  - j. Describe previous related experience in detail with on-site Land Clearing Projects as Prime. Examples shall be between 100 acres and 1200 acres.
  - k. Each example provided of previous related experience shall include reference contact information including name and telephone number (a minimum of 1 reference per example submitted).
  - l. The contractor's plan shall include coordinating with the Park's COTR to minimize the impacts of the contractor's operations such as mobilization vegetation clearing, earth moving, and soil and bulk vegetation disposal operations on known or projected Park operations.

## 2008 09 18 NPS Source Selection Memo

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m. Proposed communication plan as described in the Statement of Work

STRENGTHS AND/OR WEAKNESSES (Include all comments relating to the ratings assigned. Identify comments by the corresponding evaluation criteria numbers above. Use additional sheets as necessary for comments):

SIGNATURE PANEL MEMBER

DATE

Source Selection Plan  
Land Restoration and Land Clearing  
Solicitation No. N5297080232

CBCA 4968 Rule 4

Appx 35522 Redacted for Public Version  
June 13, 2008  
Everglades National Park

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**TECHNICAL RATING SHEET**

**Solicitation:** 1443N5297080232

**Offeror:** \_\_\_\_\_

Rate each item below.

<b>Factor I – Technical Approach and Capability</b>	
<b>Subfactor 2 – Scheduling, Cost Control and Quality Control Management – 20 Points Maximum</b>	<b>Rating</b>
<p>a. Submit as a component of your proposal, a preliminary, realistic schedule that demonstrates an understanding of the sequencing required for the tasks described in the SOW with a clear understanding that the performance period on this project cannot be extended. The schedule should allow for possible delays that might be expected based upon the Offeror's experience. Include a clear explanation of how this schedule will be maintained. If the offeror is submitting an alternate proposal, a separate schedule shall be required for the alternate proposal.</p> <p>b. Provide documentation of 3 past projects, with references and contact information, that demonstrate the offeror's ability to provide effective project management, including but not limited to: working within constrained project site conditions; monitoring and reporting of progress schedules; subcontractor control and coordination; contract modification history; and monitoring of work forces to ensure high quality completion of projects in accordance with contract requirements.</p> <p>c. Proposed Plan and Approach for achieving quality control measures for (a) ensuring at a technical level the restoration of wetland function, form, and long-term ecological stability, (b) preservation of the natural environment, and (c) meeting all contract provisions: Ecological Restoration: The offeror shall describe its understanding of on-site ecological restoration as defined in the SOW. In particular, prior experience in working on ecological restoration projects.</p> <p>d. Preservation of the natural environment: Plan shall describe cleaning of equipment to prevent contamination and introduction of exotic species, noise control, protecting surrounding natural areas and water quality, and air/dust control.</p>	



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STRENGTHS AND/OR WEAKNESSES (include all comments relating to the ratings assigned. Identify comments by the corresponding evaluation criteria numbers above. Use additional sheets as necessary for comments):

\_\_\_\_\_  
SIGNATURE PANEL MEMBER

\_\_\_\_\_  
DATE

2008 09 18 NPS Source Selection Memo  
(part of Agency Report tab 11)

**TECHNICAL RATING SHEET**

**Solicitation:** 1443N5297080232

**Offeror:** \_\_\_\_\_

Rate each item below.

<p><b>Factor I – Technical Approach and Capability</b></p>	
<p><b>Subfactor 3 – Qualifications and Experience of Key Personnel – 20 Points Maximum</b></p>	<p><b>Rating</b></p>
<p>The offeror shall provide its proposed team (key personnel) qualifications and experience including the breadth, depth and relevance of their previous work as it relates to land restoration and land clearing and experience working together. The offeror shall include resumes of proposed key personnel. As a minimum, the offeror shall identify the key personnel for the following positions. These individuals' names and titles shall be inserted in Clause 1489.237-72 in Section H for the successful offeror's contract; and the offeror shall commit to these individuals being the parties to perform these functions for a period of 90 calendar days after notice to proceed is issued in accordance with this clause.</p> <ul style="list-style-type: none"> <li>▪ Project Manager</li> <li>▪ Superintendent</li> <li>▪ Quality Control Supervisor</li> <li>▪ Foremen</li> </ul> <p>The offeror shall identify who will provide the programming, day to day technical support and data management of the Geographic Positioning System (GPS) units used to guide equipment and personnel and whether the effort will be performed with its own staff or by an identified subcontractor in this section of its technical proposal.</p>	

**STRENGTHS AND/OR WEAKNESSES** (Include all comments relating to the ratings assigned. Identify comments by the corresponding evaluation criteria numbers above. Use additional sheets as necessary for comments):

\_\_\_\_\_  
SIGNATURE PANEL MEMBER

\_\_\_\_\_  
DATE

## 2008 09 18 NPS Source Selection Memo

RATING SHEET (part of Agency Report tab 11)Solicitation: 1443N5297080232Offeror: \_\_\_\_\_

Rate each item below.

<u>Factor II – Price</u>	Rating
<p>A price evaluation will be performed to determine the reasonableness of the proposed price. Reasonableness will be determined by considering other offered prices received and comparison to the independent government cost estimate. Prices will be evaluated to determine whether any line items are unbalanced. Prices will be requested for each task as listed on the Contract Price Schedule based on minimum and maximum estimated quantities. Prices for options will be evaluated to determine the reasonableness of the proposed price and whether the options are unbalanced when compared with the base price. Prices, including detailed backup documentation, will be requested for each task as listed on the Contract Price Schedule based on the minimum and maximum estimated quantities.</p>	

STRENGTHS AND/OR WEAKNESSES (Include all comments relating to the ratings assigned. Identify comments by the corresponding evaluation criteria numbers above. Use additional sheets as necessary for comments):

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(part of Agency Report tab 11)

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SIGNATURE PANEL MEMBER

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DATE

## 2008 09 18 NPS Source Selection Memo

(part of Agency Report tab 11)

TECHNICAL PROPOSAL SUBJECTSolicitation: 1443N5297080232Offeror: \_\_\_\_\_

Rate each item below.

<b>Factor III – Past Performance – Unacceptable, Acceptable, Superior or Neutral</b>	<b>Rating</b>
<p>A. The offeror shall provide a copy of the form entitled "Experience and Past Performance" that is part of the proposal package attached to the solicitation, for land restoration and land clearing projects of the same scope and complexity as the contemplated contract. Past performance on contracts with the Federal Government, other public agencies, or private organizations will be considered, but projects with government agencies are preferred. The past performance of the offeror and/or its proposed subcontractors on projects similar in scope and complexity will be evaluated in the areas of quality, timeliness, and business relations. Offerors demonstrating a higher level of successful past performance in the evaluated areas will be more favorably rated. In the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror will be evaluated neither favorably nor unfavorably.</p> <p>Complete Sections I and II of each form to provide applicable information for each contract.</p> <ol style="list-style-type: none"> <li>1. The offeror should disclose any instances in which its past performance on a particular contract may be considered by others to be less than fully satisfactory by attaching a narrative to the applicable Past Performance Questionnaire. The offeror should relate pertinent facts and circumstances and describe any remedial action taken or to be taken to correct the deficiency. Failure to disclose such instances may result in a determination that the offeror has been less than candid with the Government, which could result in an unfavorable assessment of the offeror's past performance record.</li> <li>2. Documentation should demonstrate customer satisfaction relative to the following: <ol style="list-style-type: none"> <li>a. Offeror's capability, efficiency, and effectiveness conducting on-site land restoration and land clearing as defined in the SOW.</li> <li>b. Offeror's conformance to the terms and conditions of the contract</li> </ol> </li> </ol>	



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- c. Offeror's reasonableness and cooperativeness during performance
- d. Offeror's commitment to customer satisfaction
- e. Offeror's capability to provide customer satisfaction.
- f. Offeror's capability to produce reports documenting progress, problems, and potential solutions and scheduling updates.
- g. Offeror's capability to work independently with little guidance.

Note: The aforementioned items are likely the types of questions that the references will be asked. The references provided should be willing and able to confirm customer satisfaction in the specified areas.

- 3. Outline the number of years of experience you have working with the subcontractors proposed for this project and provide data on the types of projects where this association has occurred.
- 4. Limited exchanges between the Government and offerors may occur in order to give offerors the opportunity to clarify certain aspects of offeror's adverse past performance information to which the offeror has not previously had an opportunity to respond or to resolve minor or clerical errors.
- 5. If joint venture without previous experience, explain provisions to ensure success.

STRENGTHS AND/OR WEAKNESSES (Include all comments relating to the ratings assigned. Identify comments by the corresponding evaluation criteria numbers above. Use additional sheets as necessary for comments):

SIGNATURE PANEL MEMBER

DATE

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**(part of Agency Report tab 11)**  
United States Department of the Interior  
NATIONAL PARK SERVICE



Everglades and Dry Tortugas National Parks  
40001 State Road 9336  
Homestead, Florida 33034

In Reply Refer to:

September 8, 2008

To: Contracting Officer

From: Jonathan Taylor, Technical Evaluation Panel Chairperson

Reference: Land Clearing and Land Restoration Contract, Everglades National Park

Subject: Report from Technical Evaluation Panel

This memorandum documents the process and analysis leading up to the source selection decision on the referenced project. The National Park Service (NPS) issued the synopsis on the FedBizOpps website on May 30, 2008. Issuance of the solicitation followed on the FedBizOpps website on June 16, 2008, with a proposal submission date of July 21, 2008. A total of seven (7) amendments were issued with the proposal submission due date extended until July 30, 2008. The NPS received and evaluated seven (7) proposals. On The Technical Evaluation Panel (TEP) began review and evaluation of proposals on August 4, 2008. The panel consisted of the following individuals:

**Voting Members:**

Jonathan Taylor, Chairperson, Everglades National Park  
Tom Murphy, Panel Member, Project Manager, Denver Service Center  
Jeff Kline, Panel Member, Everglades National Park

All evaluators signed non-disclosure forms and submitted them to contracting. Joelle Mascarenas, Contracting Officer, and Contracting Specialist Katie Hoover discussed the selection process followed by a question and answer period.

Following this introductory discussion, the panel performed a preliminary pre-screening of all seven (7) proposals submitted in accordance with Clause M.1 – Minimum Technical Qualifications of the Solicitation:

- Central Florida Equipment Rentals Inc.
- Westwind Contracting, Inc.
- Oklawaha Farms, Inc.
- A<sup>2</sup> Group, Inc.
- Sayar Enterprises, Inc.
- Bul-Hed Corporation
- Optimum Services, Inc.

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**CBCA 4968 Rule 4**

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**Responsiveness to the Minimum Technical Qualifications**

The TEP applied the minimum technical qualifications to determine if the proposals submitted by the firms identified were responsive to the solicitation. Contractor's needed to demonstrate that they met all the minimum technical qualifications. Proposals that did not demonstrate any one of the minimum technical qualifications were considered unresponsive and eliminated from competition. The minimum technical qualifications were as follows:

1. Past experience in on-site ecological restoration work as prime contractor on projects between 100 and 1200 acres.
2. Past experience in on-site land clearing projects as prime contractor on projects between 100 acres and 1200 acres.
3. Past experience in meeting technical written reporting requirements for projects, including, but not limited to, scheduling update reports, monthly progress reports, or final reports that are similar to those that will be required for this project (see Statement of Work for suggested content of report submittal requirements). The reports shall be from the contractor to their clients.

After review of all of the technical proposals the TEP determined that the following companies were unresponsive. Each voting member of the technical evaluation panel provided the CO with their conclusions regarding this step of the process. See attached.

- Central Florida Equipment Rentals Inc.
- Oklawaha Farms, Inc.
- A2 Group, Inc.
- Sayar Enterprises, Inc.

The TEP proceeded with evaluating the remaining technical proposals from the companies determined to be responsive. The technical proposals were evaluated in accordance with the evaluation factors stated in Section M of the solicitation. The responsive companies were:

- Westwind Contracting, Inc.
- Bul-Hed Corporation
- Optimum Services, Inc.

Each technical proposal was reviewed independently by each panelist. Maximum points for each factor were established prior to the start of the evaluation process and documented in the Source Selection Plan.

**TECHNICAL EVALUATION FACTORS – 60 Total Points**

**Technical Approach and Capability:** The technical capability of the offerors was evaluated using the following subfactors which are listed below. (60 Points Maximum)

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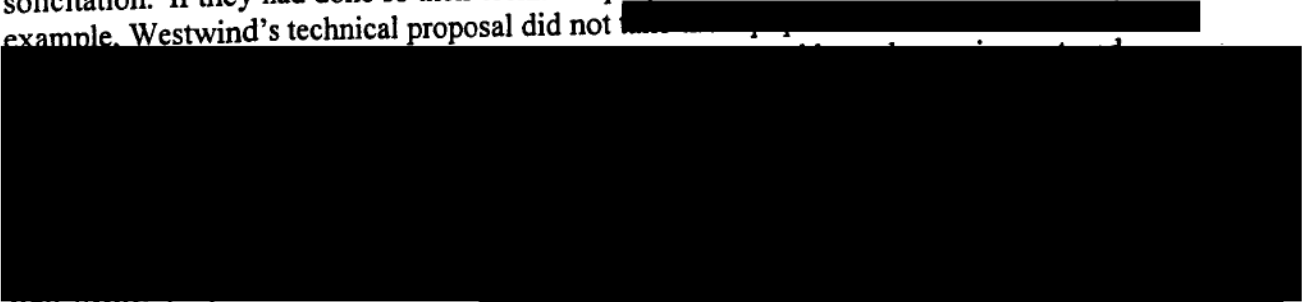
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Subfactor 1 - Project Plan, Management and Coordination and Previous Related Experience: (20 pts)

Subfactor 2 - Scheduling, Cost Control and Quality Control Management: (20 pts)

Subfactor 3 - Qualifications and Experience of Key Personnel: (20 pts)

Table 1 shows the technical evaluation panels combined average technical scores for companies determined to be responsive. Both Optimum and Westwind provided very good technical proposals. Their scores were virtually equal. The strength of Westwind's technical proposal was based on the fact that they were the incumbents and knew the project very well. However, Westwind's proposal did not completely address some of the requirements of the solicitation. If they had done so their technical proposal would have scored higher. As an example, Westwind's technical proposal did not

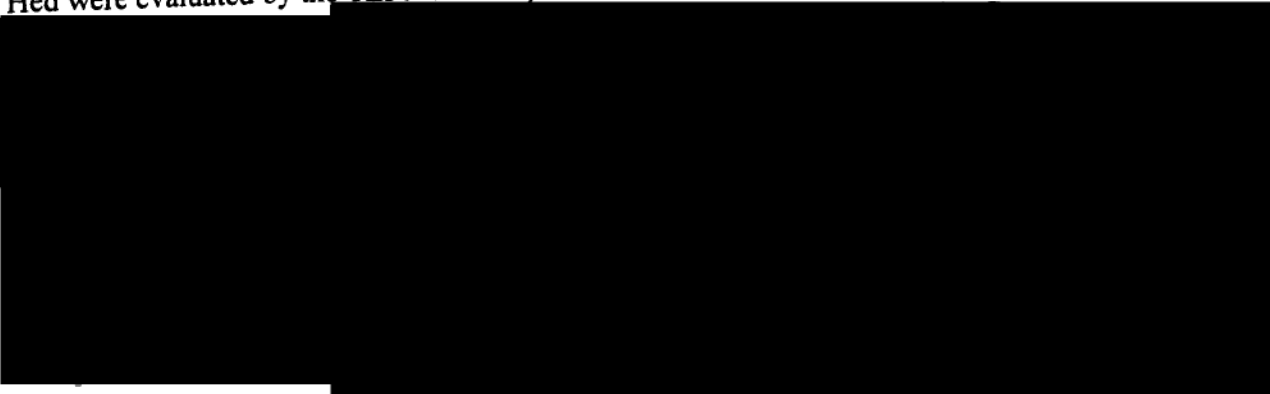


Bul-Hed's Technical proposal scored



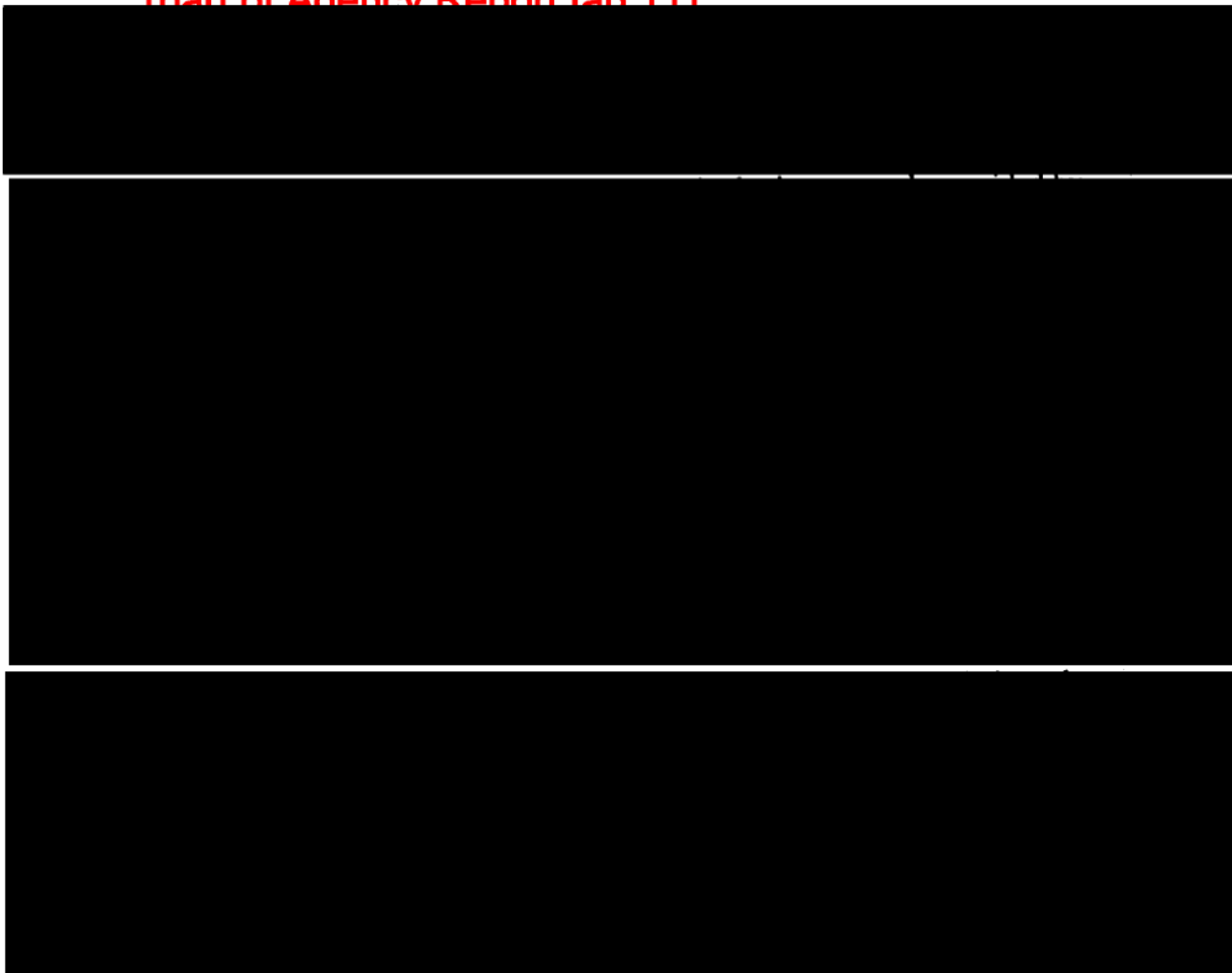
#### **Price Proposal**

In coordination with the CO and CS, the price proposals for Westwind, Optimum and Bul-Hed were evaluated by the TEP. The CO, CS and TEP found that all three companies





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### **Past Performance**

The Source Selection Plan specified adjectival ratings for this evaluation factor. No point assignments were made for past performance as it would be difficult to assign a neutral numerical rating to an offeror with no past performance information. Consequently, only the adjectival ratings were used (excellent, good, acceptable/satisfactory, neutral, marginal, and unacceptable/unsatisfactory).

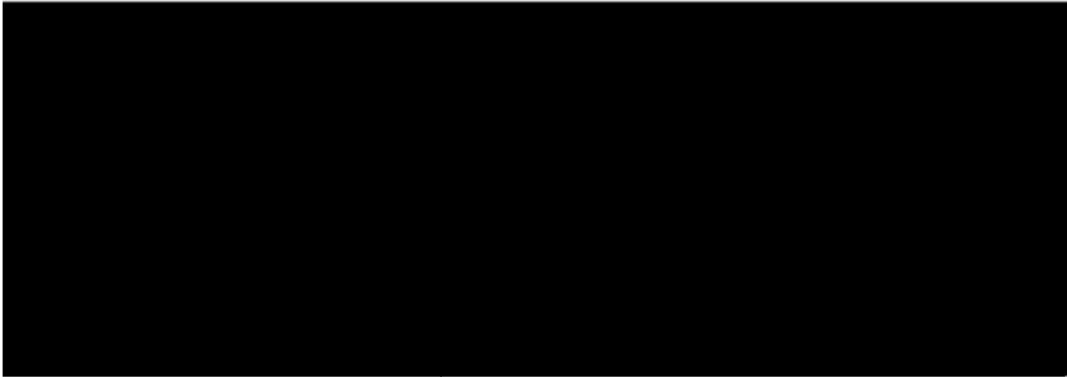
Jonathan Taylor the Chair of the TEP made contact with at least two, and where possible more than two, of the references provided by each offeror (many of the references provided were unreachable or outdated). The information provided during these past performance reference checks were recorded on Past Performance Questionnaire forms. All three companies were assigned an adjectival rating of superior (Table 1).

Table 1. Technical Evaluation of Responsive Companies

*Appx3564 Redacted for Public Version*

233a

**2008 09 18 NPS Source Selection Memo**  
**(part of Agency Report tab 11)**

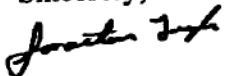
<u>Firm</u>	<u>Avg Score</u>	<u>Past Performance</u>	<u>Tech Rank</u>	<u>Initial Price Rank</u>	<u>Revised/Final Price Rank</u>
Optimum					
Westwind					
Bul-Hed					

**Award Recommendation**

Upon concluding the evaluation of Optimum's, Bul-Hed's and Westwind's technical proposals, past performance and price proposals it was decided that the contract would be awarded to Westwind because their overall proposal was of best value to the Government

If you have any questions concerning this report, please contact Jonathan Taylor (305) 242-7876.

Sincerely,



Jonathan Taylor  
TEP Chairperson

**2008 09 18 NPS Source Selection Memo  
(part of Agency Report tab 11)**



IN REPLY REFER TO:

United States Department of the Interior

NATIONAL PARK SERVICE  
DENVER SERVICE CENTER  
12795 W. ALAMEDA PARKWAY  
P.O. BOX 25287  
DENVER, COLORADO 80225-0287



D5215 (DSC-CS)  
1443C5297080232

Westwind Contracting Inc  
Robert Parks III  
2779 North Airport Road Suite 209  
Ft Myers FL 33907

SEP 18 2008

Dear Mr. Parks:

Reference: Indefinite Quantity Contract No. 1443C5297080232  
for Land Restoration and Clearing, Everglades National Park.

Subject: Transmittal of Signed Contract

Congratulations! Enclosed is an executed copy of the above referenced contract. The effective date of your contract is September 18, 2008.

This contract is for land restoration and clearing. Specific projects and requirements will be competed among Indefinite Delivery, Indefinite Quantity (IDIQ) contract holders and awarded via task order.

We will conduct an orientation meeting in the near future to explain the process in more detail and answer any questions you may have.

You may access, at no cost to you, invoice payment information on-line through the US Department of the Treasury's Payment advice Internet Delivery (PAID) system (<http://fms.treas.gov/paid>). Please note that your contract award number is 1443C5297080232; however, for billing purposes your reference number will be C5297080232. Each task order associated with this contract will have specific billing information.

We are pleased to have you working on this project with the National Park Service, and look forward to a good working relationship with your firm.

Please contact Katie Hoover, Contract Specialist, at (303)969-2286 if you have any questions.

Sincerely,

Joelle Mascarenas  
Contracting Officer

Enclosure

Appx2125

<b>AWARD/CONTRACT</b>		1. <del>THIS</del> CONTRACT IS A RATED ORDER UNDER DPAS (15 CFR 350)		Rating	Page 1 of 90
2. CONTRACT (Proc. Inst. Ident.) NO. C5297080232		3. EFFECTIVE DATE 09/15/2008		4. REQUISITION/PURCHASE REQUEST PROJECT NO.	
6. ISSUED BY DSC-CS Contracting Services Division National Park Service P.O. Box 25267  Denver, CO 80226-		5. ADMINISTERED BY (If other than Item 6)  CODE		CODE	
7. NAME AND ADDRESS OF CONTRACTOR (No., street, city, county, State and ZIP Code)  Westwind Contracting, Inc. 3501 West Hallandale Beach Blvd. Pembroke Park, FL 33023-6732				8. DELIVERY <input type="checkbox"/> FOB Origin <input checked="" type="checkbox"/> Other (See below)	
				9. DISCOUNT FOR PROMPT PAYMENT	
				10 days % 20 days % 30 days % days %	
11. SHIP TO/MARK FOR No Shipping Information				12. PAYMENT WILL BE MADE BY NPS-ACCOUNTING OPERATIONS CENTER 13461 Sunrise Valley Drive, Suite 201  HERNDON, VA 20171-	
13. AUTHORITY FOR USING OTHER THAN FULL AND OPEN COMPETITION: <input type="checkbox"/> 10 U.S.C. 2304(c) ( ) <input type="checkbox"/> 41 U.S.C. 253(c) ( )				14. ACCOUNTING AND APPROPRIATION DATA No Funding Information	
15A. ITEM NO.	15B. SUPPLIES/SERVICES	15C. QUANTITY	15D. UNIT	15E. UNIT PRICE	15F. AMOUNT
	SEE LINE ITEM DETAIL				
15G. TOTAL AMOUNT OF CONTRACT					0.00
16. TABLE OF CONTENTS					
( )	SEC	DESCRIPTION	PAGE(S)	( )	SEC
PART I - THE SCHEDULE			PART II - CONTRACT CLAUSES		
	A	SOLICITATION CONTRACT FORM		I	CONTRACT CLAUSES
	B	SUPPLIES OR SERVICES AND PRICES/COSTS		PART III - LIST OF DOCUMENTS, EXHIBITS AND OTHER ATTACH.	
	C	DESCRIPTIONS/SPECS/WORK STATEMENT		J	LIST OF ATTACHMENTS
	D	PACKAGING AND MARKING		PART IV - REPRESENTATIONS AND INSTRUCTIONS	
	E	INSPECTION AND ACCEPTANCE		K	REPRESENTATIONS, CERTIFICATIONS, AND OTHER STATEMENTS OF OFFERORS
	F	DELIVERIES AND PERFORMANCE		L	INSTRS., CONDS., AND NOTICES TO OFFERORS
	G	CONTRACT ADMINISTRATION DATA		M	EVALUATION FACTORS FOR AWARD
	H	SPECIAL CONTRACT REQUIREMENTS			
CONTRACTING OFFICER WILL COMPLETE ITEM 17 OR 18 AS APPLICABLE					
17. <input checked="" type="checkbox"/> CONTRACTOR'S NEGOTIATED AGREEMENT (Contractor is required to sign this document and return 3 copies to issuing office) Contractor agrees to furnish and deliver all items or perform all the services set forth or otherwise identified above and on any continuation sheets for the consideration stated herein. The rights and obligations of the parties to this contract shall be subject to and governed by the following documents: (a) this award/contract, (b) the solicitation, if any, and (c) such provisions, representations, certifications, and specifications, as attached or incorporated by reference herein.  (Attachments are listed herein.)			18. <input type="checkbox"/> AWARD (Contractor is not required to sign this document.) Your offer on Solicitation Number _____ including the additions or changes made by you which additions or changes are set forth in full above, is hereby accepted as to the items listed above and on any continuation sheets. This award consummates the contract which consists of the following documents: (a) the Government's solicitation and your offer, and (b) this award/contract. No further contractual document is necessary.		
19A. NAME AND TITLE OF SIGNER (Type or print) MARION L. MOSELY, PRESIDENT			20A. NAME OF CONTRACTING OFFICER RONALD F. BAILEY		
19B. NAME OF CONTRACTOR By <u>[Signature]</u> (Signature of person authorized to sign)		19C. DATE SIGNED 9/14/08	20B. UNITED STATES OF AMERICA By <u>[Signature]</u> (Signature of Contracting Officer)		20C. DATE SIGNED 9/18/08

NSN 7540-01-102-9009  
PREVIOUS EDITION UNUSABLE

STANDARD FORM 26 (REV 4-85)  
Prescribed by GSA  
FAR (48 CFR) 53.214(a)



<b>Line Item Summary</b>	<b>Document Number</b> CS297080232	<b>Title</b> EVER IDIQ	<b>Page</b> 2 of 90
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<b>Line Item Number</b>	<b>Description</b>	<b>Delivery Date (Start Date to End Date)</b>	<b>Quantity</b>	<b>Unit of Issue</b>	<b>Unit Price</b>	<b>Total Cost (Includes Discounts)</b>
0001	Land Restoration and Land Clearing	09/14/2009	0.00		\$ .000	\$ 0.00
	(09/15/2008 to 09/14/2009)					
	<p>The following items become a part of this contract:</p> <ol style="list-style-type: none"> <li>1. The base contract and all option year prices as set forth in the attached Contract Price Schedule.</li> <li>2. RFP bidding requirements, contract terms and conditions of the solicitation (N5297080232) issued on June 16, 2008.</li> <li>3. Amendments 0001 thru 0007.</li> <li>4. Initial proposal dated July 30, 2008, and all proposal revisions thru September 2, 2008.</li> </ol>					
<b>Total Cost:</b>						<b>\$0.00</b>

Points of contact:  
Contracting Officer-Joelle Mascarenes 303-969-2677  
Contract Specialist-Katie Hoover 303-969-2286



United States Department of the Interior

NATIONAL PARK SERVICE  
DENVER SERVICE CENTER

12795 W. Alameda Parkway  
P.O. Box 25287  
Denver, Colorado 80225-0287

IN REPLY REFER TO:

D5217 (DSC-CS)  
EVER-137534  
1443C5297080232

September 18, 2008

Richard Evans  
Optimum Services, Inc.  
208 N. Parrot Ave.  
Okeechobee, FL 34972

Dear Mr. Evans:

Reference: Everglades National Park, Dade County, Florida, Solicitation No. 1443N5297080232,  
Land Restoration and Land Clearing, Package No. EVER-137534

Subject: Unsuccessful Proposal

Thank you for your proposal submitted in response to the above-referenced project.

The Technical Evaluation Panel has completed their evaluation of the proposals received on this solicitation. Your firm was not selected because some of your unit prices were considered unbalanced and price reasonableness could not be established. The National Park Service has awarded this contract to Westwind Contracting, Inc., Pembroke Park, Florida. The maximum contract amount is estimated to be up to \$24 million for the base year through the issuance of task orders.

Should you desire a debriefing, please provide a written request via Facsimile No. 303-987-6646 pursuant to Federal Acquisition Regulations 15.506. If you do not submit a timely request, you may not be given a debriefing. You are entitled to no more than one debriefing for each proposal.

We sincerely appreciate the time and effort your firm has expended in competing for this project. We encourage you to submit proposals on future National Park Service projects.

If you have any questions, please contact me at (303) 969-2677.

Sincerely,

Joelle M. Mascarenas  
Contracting Officer



IN REPLY REFER TO:

## United States Department of the Interior

NATIONAL PARK SERVICE  
DENVER SERVICE CENTER  
12795 W. ALAMEDA PARKWAY  
P.O. BOX 25287  
DENVER, COLORADO 80225-0287



### MEMORANDUM FOR THE RECORD

To: Contracting Files

From: Contracting Officer

Ref: Indefinite Quantity Contract No. 1443C5297080232, Everglades National Park, Dade County, Florida, Land Restoration and Land Clearing, Restoration Work HID, Package No. EVER-137534

Subject: Post-Award Debrief, Optimum Services, Inc.

1. An oral post-award debriefing was conducted by teleconference with Optimum Services, Inc. (Optimum), an unsuccessful offeror on the referenced Contract, at 1:00 p.m. MT on Tuesday, September 23, 2008. The following individuals attended the debriefing:

Optimum: Richard Evans, Vice President  
Neil Shelton

Government: Joelle Mascarenas, DSC Contracting Officer  
Jonathan Taylor, EVER, TEP Chair

2. Pursuant to FAR 15.506, the debriefing consisted of the following:

Items included in accordance with part (d):

(d) At a minimum, the debriefing information shall include—

- (1) The Government's evaluation of the significant weaknesses or deficiencies in the offeror's proposal, if applicable;
- (2) The overall evaluated cost or price (including unit prices) and technical rating, if applicable, of the successful offeror and the debriefed offeror, and past performance information on the debriefed offeror;
- (3) The overall ranking of all offerors, when any ranking was developed by the agency during the source selection;
- (4) A summary of the rationale for award;
- (5) For acquisitions of commercial items, the make and model of the item to be delivered by the successful offeror; and

(6) Reasonable responses to relevant questions about whether source selection procedures contained in the solicitation, applicable regulations, and other applicable authorities were followed.

Items NOT included in accordance with part (e):

(e) The debriefing shall not include point-by-point comparisons of the debriefed offeror's proposal with those of other offerors. Moreover, the debriefing shall not reveal any information prohibited from disclosure by 24.202 or exempt from release under the Freedom of Information Act (5 U.S.C. 552) including—

- (1) Trade secrets;
- (2) Privileged or confidential manufacturing processes and techniques;
- (3) Commercial and financial information that is privileged or confidential, including cost breakdowns, profit, indirect cost rates, and similar information; and
- (4) The names of individuals providing reference information about an offeror's past performance.

FAR 15.506 (d) and (e) were reviewed with Optimum at the start of the debriefing.

3. Significant strengths and weakness in the offeror's proposal were identified as follows:

Optimum did pass the pre-screening for meeting the minimum technical qualifications as specified in the solicitation and received a full evaluation of their proposal. There were no significant weaknesses identified in Optimum's technical proposal or past performance. Optimum scored very high technically. The one weakness that was identified was that the proposal did not address owned vs. rented equipment, but this was not noted as a significant weakness. Optimum received an average overall technical score of 56.7 points out of 60 points total. Past performance was not an issue as Optimum received a superior rating for this criterion.

The evaluation mainly came down to the price proposals. Optimum's price proposal contained three (3) areas of concern regarding the proposed unit prices. Line Item 0001 was of significant concern since the proposed unit price was ten (10) times higher than the government estimate and other offerors' prices. The proposed unit prices for Line Items 0009C and 0009D were also high in comparison to the government estimate and other offerors' prices, but were not as significant/concerning as the proposed unit price for Line Item 0001. The rest of Optimum's proposed unit prices were comparable to the government estimate and other offerors' prices. Additionally, the proposed unit prices of both the offerors in the competitive range were applied to Task Order #1 and #2 scopes of work to analyze price reasonableness and price realism. Optimum received an overall ranking of 2<sup>nd</sup> in the price evaluation due to the aforementioned reasons.

4. The rationale for award was a best value tradeoff considering both technical and price factors. Since the two firms in the competitive range were essentially equal technically, the selection mainly came down to price.

5. In general, Mr. Evans was interested in if there were any blaring deficiencies in his proposal that excluded his firm. The evaluation did not reveal any obvious problems with his proposal

other than some of his proposed unit prices were considered high compared to the government estimate and other offers and not deemed the best value for the government. Mr. Evans asked what the successful offeror's technical score was, but this information was not provided as it is considered source selection sensitive.

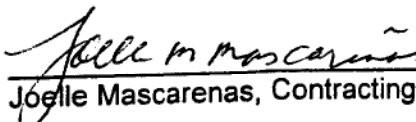
6. Optimum was thanked for its interest in NPS projects and encouraged to submit proposals on future projects. They were advised that any additional questions following the official debriefing could be directed to the Contracting Officer.

7. The debriefing concluded at approximately 1:30 pm MT.

8. On several occasions following the formal debriefing, Richard Evans of Optimum contacted the Contracting Officer for further discussion regarding the debriefing. On September 24 and 25, 2008, there were calls placed back and forth between Optimum and the Contracting Officer. Optimum made many of the same points that were eventually set forth in their protest. Richard Evans emailed the Contracting Officer two cases (Ashe Facility Services, Inc. and Consolidated Engineering Services Inc.) that he felt were relevant to the solicitation. The Contracting Officer reviewed the cases, but did not feel they were particularly applicable. The Contracting Officer in turn provided several FAR citations regarding proposal analysis (FAR 15.404) and price reasonableness (FAR 15.305). Moreover, several of the contract clauses were pointed out to Optimum, including Clause L.2 52.215-01 Alt II Instructions to Offerors—Competitive (Jan 2004) – Alternate II, Section (f)(8) and (9) and Clause M.3 Evaluation Factors for Award as part of these discussions.

9. On October 3, 2008, Optimum filed a protest with the GAO, a copy of which was received by the Contracting Officer via fax. On October 6, 2008, Richard Evans of Optimum called the Contracting Officer to verify receipt of the protest.

Prepared by:

  
Joelle Mascarenas, Contracting Officer      10/8/08  
Date





**OPTIMUM SERVICES, INC.**

208 N. Parrott Avenue  
Okeechobee, FL 34972

State Certified General Contractor - CG-C060961

Phone (863) 467-2572 ~ Fax (863) 467-8067 ~ Email info@optsvc.com

SEP 24 2008

September 22, 2008

United States Department of the Interior  
National Park Service  
Denver Service Center  
12795 W. Alameda Parkway  
P. O. Box 25287  
Denver, Colorado 80225-0287

VIA FACSIMILE 303-987-6646

Attn: Ms. Joelle M. Mascarenas  
Contracting Officer

Re: Everglades National Park, Dade County, FL Solicitation #1443N5297080232,  
Land Restoration & Land Clearing, Package # EVER-137534

Dear Ms. Mascarenas,

In response to your letter regarding the above referenced project and dated September 18, 2008 -  
Unsuccessful Proposal, Optimum Services, Inc. formally requests a debriefing pursuant to  
Federal Acquisition Regulations 15-506.

Thank you for your prompt response to this letter and please let us know if you require any  
further information with regards to this request.

A handwritten signature in black ink, appearing to read "Richard Evans", written over a horizontal line.

Richard Evans, Vice President

RE/ca

**U.S. DEPARTMENT OF THE INTERIOR**

**BRANCH OF ACQUISITIONS AND INTELLECTUAL PROPERTY  
DIVISION OF GENERAL LAW  
OFFICE OF THE SOLICITOR  
1849 C STREET NW, MS 6456  
WASHINGTON, D.C. 20240-1050**

**TO:** Robert Parks, III **FAX:** 239-337-9510

**FROM:** Emily E. Parkhurst (202) 208-6201

**NUMBER OF PAGES (INCLUDING COVER SHEET):** 25

**DATE:** October 7, 2008

**RE:** Optimum Services, Inc., B-400677

**COMMENTS:** Attached is a copy of the bid protest filed by Optimum Services, Inc. with the General Accounting Office (GAO) on October 3, 2008. This bid protest concerns Solicitation No. N5297080232 and has been docketed as B-400677. If you wish to participate in this matter as an interested party, please notify GAO at the following address:

Procurement Law Control Group  
U.S. General Accounting Office  
441 G Street, NW  
Washington, D.C. 20548

You should also advise agency counsel at the following address:

Emily Parkhurst  
Attorney-Adviser  
Office of the Solicitor  
U.S. Department of the Interior  
1849 C Street, NW MS 6456  
Washington, D.C. 20240

All correspondence should include the docket number, B-400677. If you elect to participate in this protest, you will be furnished a copy of the agency report and will have 10 days from receipt of the report in which to file your comments with GAO, the protester, and agency counsel.

**TRANSMISSION NUMBER:** (202) 219-1790

10/07/2008 14:22 FAX 202 208 8475  
10/06/2008 09:28 FAX

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**SALTMAN & STEVENS, P.C.**

1801 K Street, N.W., Suite M-110, Washington, D.C. 20006

(202) 452-2140

Fax: (202) 775-8217

E-mail: [asaltman@saltmanandstevens.com](mailto:asaltman@saltmanandstevens.com)  
[rdger@saltmanandstevens.com](mailto:rdger@saltmanandstevens.com)  
[epohiner@saltmanandstevens.com](mailto:epohiner@saltmanandstevens.com)  
[joeppen@saltmanandstevens.com](mailto:joeppen@saltmanandstevens.com)

B-400677

Agency Rpt. 11/5/08

Decision Due: 1/12/09

October 3, 2008

**VIA EMAIL**

General Counsel  
Government Accountability Office  
441 G Street, N.W.  
Washington, D.C. 20548  
Attn: Procurement Law Control Group

**PROTECTED MATERIAL TO BE  
DISCLOSED ONLY IN ACCORDANCE  
WITH GAO PROTECTIVE ORDER**

RE: Protest of Optimum Services, Inc. regarding solicitation N5297080232

Dear Sir or Madam:

On behalf of our client, Optimum Services, Inc., 208 N. Parrott Avenue, Oksechobee, Florida 34972, telephone (863) 467-2572, fax (863) 467-8067, email [REvans@optscv.com](mailto:REvans@optscv.com), we protest the selection by the Department of the Interior's National Park Service ("NPS") of Westwind Contracting, Inc. ("Westwind") to perform land restoration and clearing services in Everglades National Park under the subject solicitation.

Optimum has standing to file this protest as an interested party because it is an offeror whose direct economic interest would be affected by the award and performance of the contract. 31 U.S.C. § 3551(2); 4 C.F.R. § 21.0. This protest is timely under 4 C.F.R. § 21.2(a)(2) as it is

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Government Accountability Office  
Attn: Procurement Law Control Group  
October 3, 2008  
Page 2

being submitted within ten (10) days of September 23, 2008, the date upon which NPS held a required debriefing requested by Optimum.

## I INTRODUCTION

The NPS issued the referenced Request for Proposals ("RFP") on June 16, 2008. The RFP sought proposals for land restoration and clearing at Everglades National Park. The resulting contract was to be a firm-fixed price indefinite delivery service contract. Among other things the RFP provided:

1. Offerors should submit proposals on the basis of a base year plus four one-year options. In this regard, the RFP set out a Contract Pricing Schedule for each year. Each such Schedule set forth a number of tasks with each task having its own Contract Line Item Number (CLIN). For each CLIN, the RFP set forth both an estimated minimum and a maximum quantity;
2. Pursuant to RFP Amendment #5 offerors should "provide the minimum and maximum pricing scenarios for each task listed in the Contract Price Schedule for the base year only" and "The minimum and maximum scenarios will be used for evaluation purposes in accordance with Section M of the contract clauses for the award of the base contract ONLY." Amend. 5, Answer to Question 28;

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3. Except when it is determined in accordance with FAR § 17.206(b) not to be in the Government's best interests, the Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement. RFP § M.2;
4. Award will be made to the responsible offeror whose offer conforms to the solicitation requirements and provides the best value to the Government considering the stated technical factors and price. RFP § M.3(A);
5. The three evaluation factors were
  - I. Technical Factors
  - II. Price
  - III. Past performance. RFP § M.3;
6. All evaluation factors other than price, when combined, are more important than price. RFP § M.3(D);
7. With regard to Evaluation Factor II – Price, an evaluation will be performed to determine the reasonableness of the proposed price. RFP § M.3(C);



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October 3, 2008  
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8. Price reasonableness will be determined by considering other offered prices received and comparison to the independent Government cost estimate. Id.;
9. Prices will be evaluated to determine whether any line items are unbalanced. Id.;  
and,
10. The Government intends to award a contract without discussions with offerors; however, the Government reserves the right to conduct discussions if later deemed necessary. RFP § L.11(A)(3).

Pursuant to the RFP as amended, Optimum submitted its proposal prior to the deadline for receipt of proposals. Notwithstanding having advised offerors that award was to be made based on initial proposals, apparently concluding that discussions were in fact necessary, by letter dated August 26, 2008, NPS advised Optimum that NPS had established a competitive range, Optimum had been included within it and that Optimum should submit a final proposal revision no later than 5:00 p.m. EST September 3, 2008.

Optimum did so. In its revised proposal, Optimum reduced its unit and extended prices for several CLINs. As a result its total price was reduced. Thereafter on September 8, 2008, Optimum received a request from NPS to clarify its offer with respect to CLINs 001 and 009D,

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October 3, 2008  
Page 5

the detailed pricing for which had already been laid out in Optimum's proposal in some substantial detail. CLIN 001 (Identifying and Protecting Native Vegetation) involves the contractor marking those landscape features and remnant vegetation identified by NPS to be protected. The estimated quantity set forth in the RFP for CLIN 001 in the base year was a minimum of 1 and a maximum of 5.<sup>1</sup>

Shortly thereafter, by letter of September 18, 2008, Optimum was advised by NPS that it had made an award to Westwind, the company that has been performing this work for the agency in the Everglades for at least the past five years. The stated basis as to why Optimum was not selected for award was that "Optimum's prices were considered unbalanced and price reasonableness could not be established." NPS also stated that "the maxim contract amount is estimated to be up to \$24 million for the base year." A similar statement was set forth in the initial notice issued by the agency regarding the RFP. Ironically, however, the stated maximum of \$24 million is substantially in excess of the total maximum price proposed by Optimum for the base year.

<sup>1</sup>CLIN 009D involved the installation of culverts under existing roads in order to improve water flow. The estimated quantity set forth in the RFP for CLIN 009D in the base year was a minimum of 1 and a maximum of 8. RFP Amend. 5, Contract Price Schedule.

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By letter dated September 22, 2008, Optimum requested a debriefing. During the debriefing, which was held on September 23rd, Optimum was advised that:

- Optimum and Westwind were basically equal in Technical Factors.
- The two offerors were pretty close in price too, although Optimum's total price was less than Westwind's.
- Optimum's unit price for CLIN 001; however, was many times higher than Westwind's.<sup>2</sup>
- Optimum's proposal for CLIN 001 was "way overscoped."<sup>3</sup>
- In addition to comparing Optimum's proposed price with the Government estimate NPS conducted another price evaluation pursuant to which it used a few of each offeror's unit prices and applied them to the work contained in the undisclosed first two task orders NPS expected to issue under the contract. Westwind was purportedly \$500,000 cheaper than Optimum on one and \$100,000 cheaper on the other.

<sup>2</sup>Optimum's price for CLIN 001 was approximately 9/10 of 1% of Optimum's maximum total price for the base year

<sup>3</sup>Since the RFP required NPS to disclose "the agency's evaluation of the significant weak or deficient factors in the debriefed offeror's offer," NPS must have perceived that Optimum's putatively having overscoped CLIN 001 was a substantial weakness. RFP at L.2(F)(11)(i).

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Based on these facts, and for the reasons set forth below NPS' decision to not make award to Optimum, the technically equal offeror who submitted the lowest total price, was improper and without a rational basis.

## II. ARGUMENT

### A. NPS Failed To Comply With The Stated Terms Of The RFP Because It Ignored The Fact That Optimum, Which Was Technically Equal With Westwind, Submitted The Lowest Total Price And Thus Represented The Best Value To The Government

NPS' evaluation of Optimum's proposal was unreasonable because NPS failed to find that Optimum's proposal represented the best value to the Government, even though it was the lowest cost, technically equal or technically superior proposal. When one of two offerors in a best value procurement proposes the lowest price, technically superior proposal, it is so obvious that the offeror represents the best value to the Government, an agency need not bother doing a cost/technical tradeoff analysis. Gentex Corp., B-291793, B-291793.2, B-291793.3, Mar. 25, 2003, 2003 CPD ¶ 66. The same is true when an agency must decide between offers that are essentially equal under non-price factors. DIT-MCO Int'l Corp., B-311403, June 18, 2008, 2008 CPD ¶ 127. In those situations, price properly may become the determining factor in making award, notwithstanding that the solicitation may have assigned price less importance than technical factors. Id.; Firestorm Wildland Fire Suppression, Inc., B-310136, Nov. 26, 2007, 2007 CPD ¶ 218 at \*5 n.10 & accompanying text (it is improper to make award to higher-priced,

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technically equal proposal). Here, Optimum and Westwind were the only two offerors in the competitive range. When evaluated in accordance with provisions of the solicitation, i.e., the price of the base year plus all options, Optimum's proposed price was low. Additionally, NPS rated Optimum's proposal with a technical score that not only was close to the highest possible but, more importantly, also approximately equal to or higher than Westwind's technical score. Indeed, at the debriefing, NPS stated that Optimum's proposal had no significant weakness and that NPS had to look hard to even find minor ones. Under these circumstances, it is clear that Optimum's proposal represented the best value to the Government. NPS was unreasonable in concluding otherwise and in making award to a higher priced offeror.

- B. To The Extent That The Agency's Price Analysis (Pursuant To Which It Used A Few Of Each Offeror's Unit Prices And Applied Them To The Work Contained In The Undisclosed First Two Task Orders NPS Expected To Issue Under The Contract) Constituted An Attempt To Determine Price Reasonableness, It Was Arbitrary And Inconsistent With The Terms Of The RFP

As set forth above, the RFP indicated that "[a] price evaluation will be performed to determine the reasonableness of the proposed price." RFP § M.3(C) (emphasis added). Consistent with the provisions of FAR § 15.404-1, in this instance NPS decided that the technique by which this price reasonableness analysis would be accomplished was "by considering other offered prices received and comparison to the independent Government cost estimate." RFP § M.3(C); ~~see~~ FAR § 15.404-1(b)(2)(v) (comparison of proposed prices with



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independent Government estimate). These specifics notwithstanding, when Optimum's proposed price proved to be both low and less than the Government's estimate, NPS switched to a wholly different means to determine price reasonableness in order to reach the erroneous and unsupportable conclusion that Optimum's proposed price was unreasonable. Doing so was arbitrary, inconsistent with the terms of the RFP and without any rational basis.

As noted above, Optimum's price for the maximum quantity in the base year was substantially less than the \$24 million estimated by NPS for the maximum quantity in the base year. This telling fact notwithstanding, NPS somehow felt the need to go beyond the evaluation techniques set forth in the RFP – comparing Optimum's proposed price with the Government's estimate – and conduct an additional "evaluation" to determine if Optimum's low price was unreasonably high. This in and of itself was improper and constitutes a basis on which to sustain Optimum's protest. Moreover, the additional evaluation, upon which NPS apparently concluded that Optimum's price, which was the lowest received, was unreasonably high, was totally arbitrary and wholly inconsistent with the most basic premise of the RFP itself.

The RFP's Contract Price Schedule for the base year of the contract sets forth 16 separate CLINs of work. For each of these 16 items of work the Schedule provided a maximum and a minimum estimated quantity. The RFP did the same thing for each of the option years. The RFP also provided that the Government would evaluate offers by adding the total price for all

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options to the total price for the basic requirement. RFP § M.2. Moreover, offerors were required to submit unit prices for both the maximum and minimum quantities in the base year and for the minimum quantities in each of the option years. RFP Amend. #5 (Answer to Question 28). Amendment 5 also stated, "The minimum and maximum scenarios will be used for evaluation purposes in accordance with Section M of the contract clauses for the award of the base contract ONLY." *Id.* Based on the above, the proposed price to be evaluated was each offeror's price for the maximum estimated quantity in the base year plus its price for the minimum estimated quantity in each of the four option years.

Notwithstanding the fact that Optimum's proposed price for the maximum estimated quantity in the base year plus its price for the minimum estimated quantity in each of the four option years was low, and was less than the Government's estimate, NPS concluded that an additional evaluation was required to assess the reasonableness of Optimum's price. The means by which the agency conducted this "evaluation" was to take the first two task orders to be issued under the new contract, insert the applicable prices from Optimum and Westwind and see if Optimum's total price for each task order was low. Notwithstanding the fact that Optimum submitted the lowest proposed price for the estimated quantity to be ordered over the proposed five-year term of the contract and that price was less than the Government's estimate, because Optimum was not low on these two task orders, NPS concluded that Optimum's proposed price

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was unreasonably high. Aside from being contrary to the terms of the RFP, the agency's "evaluation" was itself unreasonable and its conclusion lacked a rational basis.

While the RFP indicated that over the course of a year (and indeed the entire five-year period) the agency would be ordering some 16 different types of work, it is highly improbable that either individually or even collectively the two task orders in question required the performance of all 16 types of work. Likewise, it is virtually impossible to believe that the two task orders required the performance of anywhere near the estimated quantity of any item that would be ordered over the course of a single year (let alone a five-year period). As such, the "evaluation" that occurred through the use of these two task orders was based on a small subset of work that may not have had any relationship whatsoever to the much larger total quantity of work to be performed in a given year or during the entire term of the contract as set forth in the RFP. Using such an ad hoc array of items to be ordered on just these two task orders does nothing to establish that the price submitted by Optimum was somehow unreasonably high.

Indeed, in stark contrast to the two task order "evaluation" of price, under the RFP the computation of the lowest proposed price was based on each and every one of the 16 items of work that NPS indicated it was likely to order and an accurate estimate of the quantity of each of those items that would be ordered. If, as appears to be the case, NPS believes that the items and quantities set forth in the two task orders is more representative of the items and quantities of

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**C. Optimum's Unit Price For CLIN 001 Was Not Unbalanced Nor Did It Create An Unacceptable Risk That The Government Would Pay An Unreasonably High Price For The Total Contract**

Optimum's proposal neither contained unbalanced unit prices nor did it represent an unacceptable risk to the Government of paying an unreasonably high price for contract performance. By letter dated September 18, 2008, NPS advised Optimum that it was not selected for award because some of its unit prices were unbalanced. During the required debriefing, Optimum learned that NPS' concern in this regard related only to CLIN 001. First, Optimum's unit price for CLIN 001 (identifying and protecting landscape features and native vegetation) was not unbalanced because it was adequately supported by the cost data Optimum provided to NPS. Second, even assuming that the unit price for CLIN 001 were somehow unbalanced, Optimum's pricing posed no risk to the Government that it would pay an unreasonably high total contract price because Optimum proposed the lowest total price under the RFP's estimate of the work that NPS would order. Accordingly, NPS was unreasonable for rejecting Optimum's proposal for being unbalanced.

Neither the FAR's definition of unbalancing nor its concerns regarding the risks of unbalancing apply to the subject solicitation generally or Optimum's proposal specifically. The FAR provides, "Unbalanced pricing exists when . . . the price of one or more contract line items is significantly over or understated as indicated by the application of cost or price analysis techniques." FAR § 15.404-1(g)(1). If a proposal contains unbalanced pricing, the contracting

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officer is not permitted simply to reject the proposal. Instead, the contracting officer must consider the risk to contract performance and the risk that the Government will pay "unreasonably high prices for contract performance." FAR § 15.404-1(g)(2). If the contracting officer determines that the level of risk is "unacceptable," then and only then is the contracting officer permitted, but not required, to reject the proposal. See FAR § 15.404-1(g)(3).

Here, NPS was unreasonable for determining that Optimum's unit price for CLIN 001 was unbalanced. The FAR instructs that prices for CLINs "shall reflect the intrinsic value of an item or service and shall be in proportion to an item's base cost (e.g., manufacturing or acquisition costs)." FAR § 15.404-1(f). From both Optimum's description in its final proposal revision of the work to be performed under CLIN 001 and the cost detail report later provided to NPS, it either was or should have been clear to NPS that Optimum's price for CLIN 001, although much higher than Westwind's, was not overstated.

Optimum's unit price for CLIN 001 was proportionate to Optimum's own costs for the work; therefore the price for CLIN 001 was not unbalanced. To accomplish CLIN 001, Optimum proposed to use a bulldozer to clear a path through the impassable vegetation surrounding the protected areas<sup>4</sup> and then have laborers install large markers to delineate the

<sup>4</sup>While use of the bulldozer doubled Optimum's costs (and consequently its price for CLIN 001), a bulldozer was necessary to clear a path through the dense vegetation surrounding



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protected areas. Optimum Final Proposal Revision at 6-7. After submission of final proposal revisions and at NPS' request, Optimum submitted to NPS a cost detail report for the work to be performed under CLIN 001.<sup>4</sup> This cost detail report showed both Optimum's direct costs for all of the pay items that went into CLIN 001 – the cost of the bulldozer, bulldozer operator, laborers, and delineation material – as well as Optimum's indirect costs, overhead, and profit markups. The cost detail report clearly supported the cost proportionality of Optimum's price for CLIN 001. In short, Optimum's price for CLIN 001 was high because its costs for performing the proposed work was high and not because its price was unbalanced. NPS' cost analysis of Optimum's CLIN 001 price was unreasonable for failing to recognize this; NPS therefore unreasonably determined that Optimum's price for CLIN 001 was unbalanced.

Even assuming that Optimum's unit price for CLIN 001 was unbalanced, NPS was unreasonable for determining that the unbalancing would result in an unacceptable risk to the Government that it would pay an unreasonably high price for Optimum to perform the contract. In Indefinite Delivery/Indefinite Quantity contracts, like the one here, "unbalancing generally does not present a risk that the Government will pay unreasonably high prices for contract performance." Accumark, Inc., B-310814, Feb. 13, 2008, 2008 CPD ¶ 68 (citing Neale Janitorial

the protected areas that otherwise would have been impassable to the workers attempting to install the delineation material.

<sup>4</sup>Optimum also provided a cost detail report for CLIN 009C, earthmoving and dewatering, and CLIN 009D, culverts.

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Serv., B-279633, June 3, 1998, 98-1 CPD ¶ 156). The key factor is whether the agency's quantity estimates contained in the solicitation are "reasonably accurate." *Id.* That is, an "unbalanced bid will only become less advantageous than it appears if the government ultimately requires a greater quantity of the overpriced items and/or a lesser quantity of the underpriced items." Allstate Van & Storage, Inc., B-247463, May 22, 1992, 92-1 CPD ¶ 465. Moreover, where, as here, a putatively overstated CLIN represents a very minor portion of the offeror's total price, without more, there is no evidence "to create any concern of risk to the government." Weber Cafeteria Servs., Inc., B-290085.2, June 17, 2002, 2002 CPD ¶ 99.

The estimated quantities in the solicitation were reasonably accurate and therefore ensured that the "overstated" unit price for CLIN 001 would not result in NPS paying an unreasonably high price for the contract overall. NPS estimated in the solicitation that it would order a minimum of one and a maximum of five quantities of work per year under CLIN 001. These estimates were not previously protested by anyone as being unreasonable and Optimum does not challenge them now. Therefore, when NPS found that Optimum proposed the lowest total contract price for the estimated quantities, it knew or should have known that that determination could not be proven false through NPS ordering more than the maximum five quantities of work under CLIN 001.

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Moreover, Optimum's "overstated" unit price for CLIN 001 could not create any concern of risk to the Government because CLIN 001 represented only a tiny fraction of Optimum's total price. GAO has previously found that even though an awardee proposed a price for a CLIN that was twice that of the second-low bidder, there was no risk that the Government would pay an unreasonably high price for the contract overall because the overstated CLIN represented 32% of the awardee's total price. Weber, 2002 CPD ¶ 99. Here, Optimum's price for CLIN 001 made up 2.2% of its total price for the base year under the minimum estimated quantity just 0.88% of Optimum's total price under the maximum estimated quantity<sup>6</sup> and 1.2% of its total price using the maximum quantity base year plus minimum quantity option years. While these percentages are greater than those in Weber, they nevertheless represent only a tiny fraction of Optimum's overall price. Accordingly, NPS was unreasonable in making its apparent determination that Optimum's price for CLIN 001 created an unacceptable risk of paying an unreasonable price for the contract as a whole.

- D. While The Agency Conducted Negotiations With All Offerors In The Competitive Range, It Failed To Have Meaningful Discussions With Optimum Because It Did Not Point Out That Optimum Had "Overstated" CLIN 001

As noted above, NPS' initial intention was to award a contract without any discussions to the responsible offeror whose proposal offers the best value to the Government. RFP § L.11 (A-

<sup>6</sup>Both of these percentages remain the same even when their respective four option years are included.

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3). However, NPS changed its mind, concluded that discussions were in fact necessary, and by letter dated August 26, 2008, advised Optimum that it had established a competitive range, Optimum had been included within the competitive range and that Optimum should submit a final proposal revision. Given the above, NPS was required to, but failed to, conduct meaningful discussions.

As the FAR provides, "Discussions are negotiations that occur after establishment of the competitive range that may, at the Contracting Officer's discretion, result in the offeror being allowed to revise its proposal." FAR § 15.306(d)(3). GAO has long held that "the acid test for whether discussions have occurred is whether the agency has afforded an offeror an opportunity to revise or modify its proposal." Computer Sciences Corp., B-298494, May 10, 2007, 2007 CPD ¶ 103 at 7; see Global Analytic Information Tech. Serv., Inc., B-298840, Feb. 6, 2007, 2007 CPD ¶ 57 (citing TDS, Inc., B-292674, Nov. 12, 2003, 2003 CPD ¶ 204); see also RFP § L.2. As such, there is little question but that NPS' request that offerors revise their proposals constituted discussions. However, as outlined below, the discussions that occurred with Optimum certainly were not meaningful as required.

The purpose of discussions is to maximize the Government's ability to obtain the best value based on its requirements and the solicitation. FAR § 15.306(d)(2). As GAO has held, in order to achieve this purpose discussions must be meaningful, meaning they "must identify

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agency apparently viewed as being well in excess of what was necessary to accomplish the task,  
NPS improperly failed to hold meaningful discussions with Optimum.

#### V. CONCLUSION

For the reasons set forth above, NPS failed to conduct a proper best value analysis, evaluated the reasonableness of Optimum's prices in a manner that was arbitrary and contrary to the RFP, unreasonably determined that Optimum's unit price for CLIN 001 was unbalanced and posed an unacceptable risk to the Government, and failed to conduct meaningful discussions with Optimum.

Optimum respectfully requests that GAO sustain this protest, direct the NPS to, if necessary, conduct meaningful discussions with Optimum and resolicit another round of final proposal revisions, evaluate Optimum's prices in accordance with the FAR and the stated criteria and methods specified in the RFP and conduct a proper best value analysis to determine the best value to the Government, and, if Optimum is found to represent the best value to the Government, terminate Westwind's contract for convenience and make contract award to Optimum. Optimum also requests that it be granted the costs of filing and pursuing this protest, including reasonable attorneys' fees, and such further relief as the Comptroller General deems just and proper.



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#### VI. REQUEST FOR A PROTECTIVE ORDER

Pursuant to 4 C.F.R. § 21.4 and in anticipation of the submission of documents from the agency which contain privileged information and/or information which, if released, would result in competitive harm, Optimum respectfully requests that GAO issue a protective order.

#### VII. REQUEST FOR THE PRODUCTION OF DOCUMENTS

Pursuant to 4 C.F.R. § 21.3(c) and (d), Optimum requests copies of documents of whatever nature, whether formal or informal, written or electronic, that relate to the issues in this protest. This request specifically includes:

- (1) Any and all documents constituting the Independent Government cost estimate;
- (2) Any and all documents used in attempts to determine the reasonableness of the proposed prices, including option prices, of Optimum and/or Westwind;
- (3) Any contemporaneous finding that Optimum's price was unreasonable, any statement of facts supporting such a contemporaneous finding, and any document(s) constituting an approval of any such finding at a level above the contracting officer;

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(9) Any other documents relevant to the issues in this protest.

A copy of this protest is being served upon the contracting officer today via facsimile.

Respectfully submitted,

SALTMAN & STEVENS, P.C.

  
Alan I. Saltman  
Ruth G. Tiger  
Eric J. Pohlner  
Jonathan D. Tepper

AIS/RGT/EJP/JDT/eh

cc(via fax): Joelle M. Mascarenas  
National Park Service  
12795 W. Alameda Parkway  
Lakewood, CO 80225  
Telephone 303-969-2677  
Fax 303-987-6646

**U.S. DEPARTMENT OF THE INTERIOR**

**BRANCH OF ACQUISITIONS AND INTELLECTUAL PROPERTY  
DIVISION OF GENERAL LAW  
OFFICE OF THE SOLICITOR  
1849 C STREET NW, MS 7308  
WASHINGTON, D.C. 20240-1050**

**TO:** Edward Goldstein, Esq., GAO FAX: 202-512-9749

Alan I. Saltman, Ruth G. Tiger, Eric J. Pohlner,  
and Jonathan D. Tepper  
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Joseph C. Staak and Thomas J. Kelleher  
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Ronald Bailey and Joelle Mascarenas  
National Park Service, FAX: 303-987-6646

**FROM:** Emily E. Parkhurst (202) 208-6201

**NUMBER OF PAGES (INCLUDING COVER SHEET):** 3

**DATE:** November 12, 2008

**RE:** Optimum Services, Inc., B-400677

**COMMENTS:** Please see attached letter.

**TRANSMISSION NUMBER:** (202) 219-1790

OPT11G 2011-6-17 001215

**United States Department of the Interior****OFFICE OF THE SOLICITOR**

Washington, D.C. 20240

November 12, 2008

**VIA FACSIMILE**

Edward Goldstein  
Deputy Assistant General Counsel  
U.S. Government Accountability Office  
Washington, D.C.

Re: Optimum Services, Inc., B-400677

Dear Mr. Goldstein:

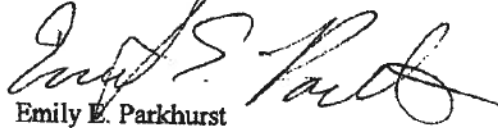
In consideration of the conference call discussion on Monday, November 10, 2008, regarding this procurement, the National Park Service, U.S. Department of the Interior, concluded that it is appropriate to take corrective action in response to the bid protest of Optimum Services, Inc. The National Park Service notified the parties of decision to take corrective action on Monday, November 10, 2008.

Our corrective action will consist of reevaluating the price proposals of the offerors within the competitive range in accordance with the price evaluation criteria in the Request for Proposals. The National Park Service will conduct discussions and request final price proposals. The National Park Service will then make a new source selection decision. Pending this action, the National Park Service will not issue a notice to proceed for the two task orders previously issued to Westwind Contracting, Inc. ("Westwind"). In the event an offeror other than Westwind becomes the successful offeror, we will terminate Westwind's contract for convenience and award a new contract.

OPT11G 2011-6-17 001216

Our proposed corrective action renders Optimum Services, Inc.'s bid protest academic. Accordingly, we ask GAO to dismiss the bid protest since it is not GAO's practice to consider academic questions. *See Dyna-Air Eng'g Corp.*, B-278037, Nov. 7, 1997, 97-2 CPD ¶ 132.

Sincerely yours,



Emily E. Parkhurst  
Attorney-Adviser  
Branch of Acquisitions and  
Intellectual Property  
Division of General Law

Cc: Alan I. Saltman, Ruth G. Tiger, Eric J. Pohlner, and Jonathan D. Tepper  
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Admitted in Georgia, Alabama  
 Florida & District of Columbia

Certified by the Florida Bar in  
 Construction Law

November 17, 2008

**VIA FACSIMILE  
 AND UPS OVERNIGHT**

**AGENCY LEVEL PROTEST**

**INCLUDES PROTECTED INFORMATION NOT TO BE DISCLOSED**

Joelle M. Mascarenas  
 Contracting Officer  
 National Park Service  
 Denver Service Center  
 12795 West Alameda Parkway  
 P. O. Box 25287  
 Denver, Colorado 80225-0287

Re: Agency Level Protest of Solicitation No. 1443N5297080232,  
 Land Restoration and Land Clearing,  
 Contract Package No. EVER-137534  
 Agency Protest of Westwind Contracting, Co., Inc. pursuant to FAR §33.103

Dear Ms. Mascarenas:

This law firm represents Westwind Contracting, Inc. ("Westwind") in connection with the above-referenced Solicitation. Westwind was awarded a contract pursuant to this Solicitation on or about September 18, 2008. On October 3, 2008, a protest was filed with the General Accountability Office by Optimum Services, Inc. ("Optimum"), another offeror on the Solicitation. Optimum challenged the award of the contract to Westwind.

**I. Identity of Protestor**

The name and address of the Agency level Protestor is:

Westwind Contracting, Inc.  
 3501 West Hallandale Beach Boulevard  
 Pembroke Park, FL 33023  
 Phone: 954-961-7200  
 Fax: 954-961-7222

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Joelle M. Mascarenas  
November 17, 2008  
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## **II. Background**

On November 10, 2008, the National Parks Service ("NPS"), through Emily E. Parkhurst, its counsel at the Department of the Interior, wrote the GAO in connection with the Optimum protest and stated that NPS:

"has concluded that it is appropriate to take corrective action in response to the bid protest of Optimum Services, Inc. The nature of our corrective action will be further specified by a letter on Wednesday, November 12, 2008."

This was the first time that Westwind was informed that its contract was in jeopardy. Westwind was being told that NPS had decided to take some unspecified action to correct problems with the solicitation and award of the contract to Westwind that had been identified by Optimum in its protest.

Thereafter, Ms Parkhurst, on behalf of NPS, forwarded a second letter dated November 12, 2008 and informed Westwind and Optimum of the corrective action NPS intended to take. Ms Parkhurst stated that the corrective action:

"will consist of reevaluating the price proposals of the offerors within the competitive range in accordance with the price evaluation criteria in the Request for Proposals. The National Parks Service will conduct discussions and request final price proposals. The National Parks Service will then make a new source selection decision. Pending this action, the National Park Service will not issue a notice to proceed for the two task orders previously issued to Westwind Contracting, Inc. ("Westwind"). In the event an offeror other than Westwind becomes the successful offeror, we will terminate Westwind's contract for convenience and award a new contract."

The November 12, 2008 letter stated that the only evaluation factor to be considered in these new discussions between NPS and the offerors within the competitive range was Evaluation Factor II - Price. This was confirmed in a phone call with Ms Parkhurst on Friday November 14, 2008.

## **III. Basis of Protest**

Westwind protests the NPS decision to reopen discussions with offerors within the competitive range on price issues only and not also reevaluate the Past Performance of affected offerors in accordance with the Solicitation requirements. The NPS has determined that it did



Joelle M. Mascarenas  
November 17, 2008  
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not evaluate pricing factors (Evaluation Factor II) consistent with the evaluation criteria of the Solicitation (Section M). NPS has communicated its intent to reopen discussions on this single evaluation factor. However, NPS also did not properly evaluate Past Performance (Evaluation Factor III) under the defined criteria in the Solicitation. The various ways that NPS failed to properly evaluate past performance is described in this protest letter. Westwind protests NPS' stated intent to reevaluate only price issues when past performance also was erroneously considered during the original evaluation of proposals. It would be error at this point for NPS to reopen discussions on price alone under an assumption that the offerors in the competitive range scored equally on Past Performance.

Westwind also protests the decision to reevaluate proposals at this point under this Solicitation. Since at least two of the three Evaluation Factors were not applied correctly by NPS, the only reasonable and realistic action to take at this point is to re-solicit. Westwind requests that this Solicitation be cancelled and the existing contract be terminated for convenience, consistent with the recommendations made in our letter to Ms. Parkhurst of November 11. It is not possible at this point to have a fair evaluation of competing proposals when there have been multiple irregularities on the evaluation process. As stated in our previous letter, we recommend that the two previously issued task orders be performed under the authority of FAR 6.6.302-2.

#### **IV. NPS Failed to Properly Evaluate Evaluation Factor III - Past Performance**

Westwind protests NPS' actions in how it evaluated Evaluation Factor III - Past Performance, during the original evaluation of proposals on the Solicitation. Westwind also protests NPS' expressed intent to only consider price in any renewed discussions with offerors within the competitive range.

During the original evaluation of proposals, NPS failed to follow the published criteria for evaluating Past Performance as established in Section M of the Solicitation. In addition, NPS failed to properly follow the evaluation procedures for past performance set forth in NPS' own internal Source Selection Plan.

A review of the original past performance reviews by the Technical Evaluation Panel ("TEP") establishes that the TEP failed to follow the criteria for the Past Performance evaluation in at least the following ways:

1. Section M of the Solicitation requires each offeror fill out and submit forms referred to as "Experience and Past performance." The Solicitation included forms titled "Past Performance Questionnaire." (Attached as Exhibit A)



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The Solicitation requested each offeror to provide information on all prior land restoration and land clearing projects of the same scope and complexity as the solicited project. Section M instructed each Offeror to fill out Sections 1 and 2 of the "Past Performance Questionnaire".

Both Westwind and Optimum submitted multiple "Past Performance Questionnaire" forms on their prior projects, filling out Sections 1 and 2 as directed by the Solicitation. However, NPS never "scored" any of these forms in accordance with the scoring criteria set forth in Part 3 of the Questionnaires. These Questionnaires identified the three issues (Quality, Timeliness, and Business Relations) listed in Section M to be evaluated, as well as a number of sub-issues. According to the Past Performance Questionnaire, these issues and sub-issues were to be scored using a rating scale from E (Excellent) to U (Unsatisfactory). No one on the TEP ever evaluated the three primary issues identified in Section M and listed on the Past Performance Questionnaire (Quality, Timeliness, and Business Relations) or the sub-issues also listed on these Questionnaires.

Section M of the Solicitation stated that:

"the past performance of the Offeror and its proposed subcontractors in projects similar in scope and complexity will be evaluated in the areas of quality, timeliness, and business relations. Offerors demonstrating a higher level of successful past performance in the evaluated areas will be more favorably rated."

The Past Performance Questionnaires were consistent with the requirement of Section M that Quality, Timeliness, and Business Relations were to be evaluated. However, there is no evidence that NPS, using the Past Performance Questionnaire or otherwise, ever evaluated quality, timeliness, and business relations with regard to the projects submitted by Westwind or Optimum. Moreover, there is no evidence of any determination of which offeror demonstrated a higher level of successful past performance in these identified areas to be given a more favorable rating.

2. The evaluation worksheets developed for the TEP included a Project Reference Questionnaire (attached as Exhibit B). This work form was intended to be used by members of the TEP to assist in contacting references identified by offerors in their respective Past Performance Questionnaires. This reference form had specific topics to be covered during each contact. The form was obviously designed for use in evaluating the past performance of each offeror on specific projects, specifically the identified criteria of quality, timeliness, and business relations. There is no evidence that any of these project reference questionnaires were ever completed on jobs listed by either Westwind or Optimum.



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3. The Source Selection Plan (Attached as Exhibit C) developed by NPS for this Solicitation identified evaluation criteria to be used to evaluate past performance. However, these evaluation criteria were different from the evaluation criteria set forth in Section M of the Solicitation. On page 10 of 22 of the Source Selection Plan, NPS set forth definitions for the following terms: "Superior", "Acceptable", "Neutral", and "Unacceptable". These evaluation criteria were different from what was identified in Section M of the Solicitation and inconsistent with the evaluation criteria as set forth in the Past Performance Questionnaires.

4. The Source Selection Plan did not address the factors that were identified in Section M investigating past performance - Quality, Timeliness and Business Relations. Rather, the criteria set forth in the Source Selection Plan identified customer satisfaction as the only criteria. This was different from what was identified in the Solicitation.

5. Under NPS' Source Selection Plan, each member of the TEP was required to evaluate each offeror separately. However, members of the TEP did not separately evaluate past performance for the offerors. The record demonstrates that only the chairman made any effort to evaluate past performance and his evaluation was not consistent with the Solicitation.

The chairman of the TEP rated both Optimum and Westwind as being "Superior" under the evaluation criteria set forth in the Source Selection Plan (as opposed to Section M of the Solicitation). However, panel member Jeff Kline did not evaluate either Optimum or Westwind on past performance. Rather this evaluator gave each a "neutral rating - reference checking is tasked to TEP lead". In essence, he deferred to the Chairman and apparently never looked at the results of any references that actually were checked. The third member of the panel, Mr. Tom Murphy, left his forms on Evaluation Factor III - Past Performance, blank.

From the documentation provided by NPS, only one person, the chairman of the panel, considered the Past Performance of the offerors. Neither he nor any member of the panel completed the Past Performance Rating of the Past Performance Questionnaires submitted by the offerors. Neither he nor any member of the panel filled out the Project Reference Questionnaires provided to the members to assist in the interview process. Finally there is no evidence that the other two members of the panel did anything to evaluate past performance.

6. There is no record that any references were actually contacted and questioned for either Westwind or Optimum regarding the identified criteria of quality, timeliness, and business relations.

7. There was no effort to determine which offeror demonstrated a higher level of successful past performance in the evaluated areas so as to be ranked higher, as required by the Solicitation.



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Simply stated, the NPS did little to evaluate past performance of any of the offerors and did not evaluate past performance in accordance with the criteria and documentation set forth in the Solicitation.

**V. Request for Agency Ruling and Form of Relief Requested**

Westwind requests a ruling by the Agency on its protest. Specifically, Westwind seeks a ruling that NPS failed to properly evaluate "Evaluation Factor III- Past Performance" in accordance with the criteria listed in the Solicitation. Westwind also requests a ruling that the corrective action announced in the letter from Ms Parkhurst of November 12 will not solve the problems in the original evaluation of offerors' Past Performance. Further, Westwind seeks a ruling that the two previously issued task orders under the existing contracts be performed under the authority of FAR §6.302-2. Finally, subject to the performance of the two identified task orders, Westwind seeks a ruling that the current solicitation be cancelled, that a new solicitation be developed, and that the existing contract be terminated for convenience.

Very truly yours,

SMITH, CURRIE & HANCOCK LLP

  
Joseph C. Spaak

JCS:nd  
Enclosures

Cc: Emily E. Parkhurst Esq. (via Facsimile w Enclosures)

# PAST PERFORMANCE QUESTIONNAIRE

(COMPLETE SECTIONS I AND II AND SUBMIT WITH THE TECHNICAL PROPOSAL)

I. CONTRACT IDENTIFICATION	
CONTRACTOR NAME:	CONTRACT NO:
CONTRACTOR ADDRESS:	CONTRACT TYPE: <input type="checkbox"/> FIRM-FIXED-PRICE <input type="checkbox"/> COST REIMBURSEMENT <input type="checkbox"/> OTHER: (specify) <input type="checkbox"/> ACTIVE <input type="checkbox"/> COMPLETED <input type="checkbox"/> ROUTINE <input type="checkbox"/> COMPLEX
DATES OF PERFORMANCE:	AWARD AMOUNT: \$ TOTAL WITH MODS \$
PROJECT DESCRIPTION:	
II. AGENCY (CUSTOMER) IDENTIFICATION	
AGENCY (CUSTOMER) NAME:	
POC NAME/TITLE/PHONE:	
III. PAST PERFORMANCE RATING	
Rating Scale: E = Excellent. Considerably surpassed requirements/expectations. G = Good. Surpassed requirements/expectations. S = Satisfactory. Met requirements/expectations M = Marginal. Met some requirements/expectations U = Unsatisfactory. Did not meet requirements/expectations	
<b>1. QUALITY:</b> (Circle applicable rating)	
a. Conformance with contract requirements	E G S M U
b. Quality of workmanship (including subcontractors)	E G S M U
c. General oversight by project manager and superintendent	E G S M U
d. Coordination with and control of subcontractors	E G S M U
e. Compliance with Davis-Bacon wage rate and labor usage requirements	E G S M U
f. Avoidance of accidents/safety violations	E G S M U





**PROJECT REFERENCE QUESTIONNAIRE**  
**EVER PMIS 137534**

Offeror: \_\_\_\_\_

Reference Name: \_\_\_\_\_ Business: \_\_\_\_\_

Telephone No.: \_\_\_\_\_

1. Please describe the referenced project:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

2. Was the project completed on time (including time extensions)?

\_\_\_\_\_  
\_\_\_\_\_

3. How would you rate the quality of workmanship (including subwork)?

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

4. Did the general contractor do a good job of coordinating and controlling subcontractors?

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

5. Did the general contractor satisfactorily resolve any disputes?

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

6. Were you aware of any labor violations and/or nonpayment issues?

\_\_\_\_\_  
\_\_\_\_\_

B



7. Was the contractor capable, efficient, and effective? How about the key personnel (project manager, superintendent, others)?

8. Did the contractor conform to the terms of the contract?

9. Was the contractor reasonable, cooperative, and committed to customer satisfaction?

10. Are you aware of any other projects involving this contractor? If so, how successful were they?

Reviewer: \_\_\_\_\_

Date: \_\_\_\_\_

**NON-DISCLOSURE OF PROPOSAL INFORMATION:** After receipt of proposals, NO information about the names, ranking, number, and/or prices of proposals received will be divulged by the issuing office until after award. Disclosure of information under this method of negotiated acquisition prior to award is prohibited by Federal Acquisition Regulations and may also be considered a violation of law or Executive Order. The award process may take approximately three to six weeks after receipt of priced proposals. Within three days after award, unsuccessful offerors will be provided written notice containing the name of the offeror receiving the award and the award price, as well as be given the opportunity to request a debriefing.



Source Selection Plan

Everglades National Park, Dade County, Florida  
Land Restoration and Land Clearing  
June 13, 2008

**I. INTRODUCTION**

Description of Requirement – The government plans to solicit for, and award, an Indefinite Deliveries Indefinite Quantities Services Contract with a Base Year and four (4) Option Years to provide for Land Restoration and Land Clearing at Everglades National Park in Homestead, Florida. The solicitation will be competed as a Set-aside for Small Business Concerns. The estimated minimum cost for this effort is approximately \$2 M.

A. The government will use a tradeoff process for this source selection. Award will be made to the responsible offeror whose offer conforms to the solicitation requirements and provides the best value to the government considering the stated technical factors and price. For this solicitation, all evaluation factors other than price, when combined, are more important than price. The following evaluation factors, listed in descending order of importance, will be considered:

1. Evaluation Factor I – Technical Approach and Capability
  - a) Subfactor 1 – Project Plan, Management and Coordination and Previous Related Experience
  - b) Subfactor 2 – Scheduling, Cost Control and Quality Control Management
  - c) Subfactor 3 – Qualifications and Experience of Key Personnel
2. Evaluation Factor II - Price
3. Evaluation Factor III - Past Performance

**II. PURPOSE****A. This Source Selection Plan (SSP):**

1. Establishes the organizational responsibilities, procedures, evaluation factors and evaluation factors weights for the selection of a contractor.
2. Addresses the composition and duties of the source selection organization that will conduct the technical, past performance, and price evaluations.
3. Addresses the evaluation factors and rating system that will be used in the evaluation of the offers.
4. Addresses the procedures for conducting the evaluation and the security measures that must be maintained to ensure that proprietary source selection information is safeguarded from unauthorized disclosure.

**B. Implementation of this plan is intended to:**

1. Ensure impartial, comprehensive and timely evaluation of proposals.
2. Ensure that each participant has a clear understanding and an overall view of the evaluation process.
3. Provide an official record of the evaluation process.
4. Provide the Contracting Officer with usable findings to assist him/her with making the award decision.

**III. ORGANIZATION AND RESPONSIBILITIES**

Source Selection Plan  
Land Restoration and Land Clearing  
Solicitation No. N5297080232

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June 13, 2008  
Everglades National Park

Appeal File Tab 93

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- A. The Source Selection Organization consists of the Source Selection Authority (SSA), the Technical Evaluation Panel (TEP), and the Business/Cost Panel (BCP) consisting of the Contracting Officer and the Contract Specialist.
- B. Source Selection Authority. The Contracting Officer serves as the SSA and as the procuring Contracting Officer. The SSA will perform the following duties:
1. Review and approve the SSP and any revisions to ensure that the source selection process is properly and effectively conducted.
  2. Approves and appoints TEP members.
  3. Provides the TEP members with guidance and any special instructions to conduct the evaluation process.
  4. Ensures that conflicts of interest, or appearances thereof, are avoided.
  5. Ensures that premature or unauthorized release of Source Selection Information is avoided.
  6. Reviews the technical evaluation report from the TEP and either:
    - a) Returns the report to the TEP for additional clarification and input, or
    - b) Determines if discussions are required, who the apparent awardee is, and prepares the Source Selection Memorandum to document the award decision.
  7. Serves as a nonvoting advisor to the TEP.
  8. Assures that the technical and past performance evaluation factors, as set forth in the solicitation, are proper.
  9. Assures that all aspects of the solicitation are clearly and properly addressed.
  10. Determines price reasonableness.
  11. Evaluates proposals for price realism.
  12. Determines technical and financial responsibility of the offerors.
  13. Awards the contract on the basis of initial offers without negotiations when provided for by the solicitation and if warranted by the results of the evaluation of the TEP.
  14. If discussions are required, establishes the competitive range and provides written determination of the range and items of discussion required.
  15. Instructs all persons receiving information or data on source selection activities to comply with FAR 3.101, Standards of Conduct.
  16. Prepares contract documents, ensures that legal review is obtained, proper notifications are made and awards the contract.
- C. Contract Specialist (CS). The CS:
1. Serves as nonvoting advisor to the TEP.
  2. Assures that the technical and past performance evaluation factors as set forth in the solicitation is proper.
  3. Assures that all aspects of the solicitation are clearly and properly addressed.
  4. Recommends price reasonableness.
  5. Evaluates proposals for price realism.
  6. Recommends technical and financial responsibility of offerors.
  7. Prepares contract on the basis of initial offers without negotiations when provided for by the solicitation and if warranted by the results of the evaluation of the TEP.
  8. If discussions are required, coordinates and participates in discussions.
  9. Instructs all persons receiving information or data on source selection activities to comply with FAR 3.101, Standards of Conduct.



10. Prepares all necessary contract documents, ensures that legal review is obtained, and that the proper notifications are made.
- D. TEP Chairperson. The TEP Chairperson shall:
1. Ensure that the TEP members understand and adhere to the evaluation factors for evaluation of the proposals and any directions from the SSA so that there is a uniform approach to the evaluation effort.
  2. Review the SSP to ensure that the plan, the technical proposal requirements, and the evaluation factors are compatible.
  3. Coordinate the activities of the TEP.
  4. Provide guidance to members of the TEP.
  5. Ensure that all source selection information, including proposals and evaluation results, are protected from release to unauthorized persons.
  6. Review TEP individual member's findings and scoring for completeness, consistency and adequate documentation.
  7. Arbitrate any major differences between the individual TEP member's scoring.
  8. After completion of initial proposal evaluations and any subsequent evaluations of any revised proposals, prepare a comprehensive technical evaluation report. The report shall:
    - a) Fully describe specific strengths and weaknesses of each offeror's proposal.
    - b) Include a discussion of whether or not the offerors' price proposals adequately reflect their respective technical proposals and the requirements of the solicitation.
    - c) If, at a stage leading to discussions with offerors, identify specific questions to offers required for clarification and/or information required to supplement previously submitted proposals.
  9. Participate in debriefing of offerors.
- E. TEP Members. The members of the TEP are responsible for determining the extent to which a technical proposal satisfies the requirements of the Request for Proposals (RFP). The individual members are nominated by the TEP Chairperson and approved by the SSA. The TEP may utilize the expertise of nonvoting advisors to assist them in evaluating each proposal. These advisors are subject-matter experts and have specific valuable experience that relates to the effort being procured. Advisors are not responsible for rating proposals. The TEP members shall:
1. Become thoroughly familiar with the SSP and the solicitation requirements.
  2. Perform detailed evaluation of each offer in accordance with the SSP and Section M of the solicitation. Each member shall initially score each proposal and do so independently of other TEP members. All notable strengths and weaknesses shall be identified and documented. Provide thorough and complete score sheets to TEP chairperson. All scoring shall be completed prior to reviewing offered prices.
  3. Determine if additional information/clarification is required from offerors and, if needed, draft appropriate questions to offerors.
- F. The TEP shall be comprised of:

<u>Role</u>	<u>Name</u>	<u>Office / Title</u>
Chairperson	Jonathan Taylor	Ever - Project Specialist/COTR
Voting Member	Tom Murphy	DSC - Project Manager
Voting Member	Craig Smith	EVER-Restoration Manager



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Non Voting Member Joelle Mascarenas DSC-CO  
Non Voting Member Katie Hoover DSC-CS

#### IV. SOURCE SELECTION EVALUATION PROCESS (BEST VALUE)

- A. Proposals will be evaluated in accordance with the factors as established in Section M of the RFP. The TEP will evaluate price proposals independent of the technical evaluation. The TEP will not have access to price information until completion of the technical evaluation.
- B. After completion of the technical and price evaluations, the TEP will report the results to the Source Selection Authority (SSA). The SSA will then consider all technical and price factors to determine the offer that provides the overall best value to the Government. The SSA's decision will be based on a comparative assessment of the proposals against the source selection factors specified in the solicitation and detailed below under Evaluation Factors.
- C. The Government may elect to accept other than the lowest priced proposal when the perceived benefits of a higher priced proposal merit the additional cost.
- D. Offeror's Responsibility: It shall be the offeror's responsibility to demonstrate that they meet all the minimum technical qualifications and to provide a detailed work plan and schedule that addresses the tasks herein. Complying with all specifications herein shall be the responsibility of the Contractor unless specifically stated as being the responsibility of the Park. In all cases where responsibility as to the Park is not explicitly stated it shall be deemed to be the responsibility of the Contractor.

#### V. MINIMUM TECHNICAL QUALIFICATIONS

Contractor's proposal must demonstrate that they meet all the minimum technical qualifications. Proposals that do not demonstrate any one of the minimum technical qualifications will be considered unresponsive and eliminated from competition. The minimum technical qualifications are as follows:

1. Past experience in on-site ecological restoration work (see Statement of Work for definition of "on-site ecological restoration" and "on-site landclearing") as prime contractor on projects between 100 and 1200 acres.
2. Past experience in on-site land clearing projects as prime contractor (see Statement of Work for definition of "land clearing") on projects between 100 acres and 1200 acres.
3. Past experience in meeting technical written reporting requirements for projects, including, but not limited to, scheduling update reports, monthly progress reports, or final reports that are similar to those that will be required for this project (see Statement of Work for suggested content of report submittal requirements). The reports shall be from the contractor to their clients.

#### VI. EVALUATION FACTORS

All evaluation factors other than price, when combined, are more important than price. Technical subfactors are of equal importance.

##### A. Evaluation Factor I - Technical Approach and Capability



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1. **Subfactor 1 - Project Plan, Management and Coordination and Previous Related Experience:** The offeror shall submit its technical proposal addressing a project management and coordination plan for conducting on-site land restoration and land clearing. The proposal shall describe how work will be conducted without significant interference with Park operations and visitors. The technical proposal must describe how the offeror intends to accomplish each task. The technical proposal shall demonstrate awareness that some tasks describe anticipated limits and requirements however that as tasks are ordered the adaptive management process might identify new limits and requirements that need to be incorporated into the work. For example some tasks have seasonal constraints (winter dry season, from approximately December through May). Specific details regarding methodologies, logistics, the quantities and types of equipment, staffing and work schedules must be provided for the base year and each option year. Without limiting the generality of the foregoing, technical proposals shall include a section setting forth the ability to conduct a pre-work planning and development phase.

The technical proposal shall address but is not limited to, the following:

- a. The proposed approach for supplying on-site restoration projects with all equipment and personnel. Demonstrate the amounts and types of equipment per task undertaken based on scale (100 acres to 1200 acres). The contractor shall demonstrate what equipment is owned and can provide for work under this contract and what percentage and types of equipment will be secured through other means in order to provide equipment of sufficient quantity and type to meet the requirements of the tasks within this Statement of Work.
- b. Describe the plan and approach for staffing the project based on scale (100 acres to 1200 acres).
- c. Describe the plan for preparation of disruption of work due to severe storms or other emergency. Include how the project site, work and equipment will be secured or protected, logistical planning for personnel and resumption of work once the event is over.
- d. Identify the effort that the contractor will perform with its own personnel and the work that will be subcontracted out to major subcontractors and include the reason(s) for selecting the particular subcontractor for the proposed effort (e.g., subcontractor's experience, management, key personnel, etc.).
- e. Provide the offeror's proposed plan, approach and method of demolition of cinder block structures (350 to 3600 SQYD) with a slab on grade. Refuse is to be hauled to dump.
- f. The proposed approach for performing land restoration and land clearing activities in proximity to sensitive natural resources, and potential conflicts with adjacent visitor activity and park operations.
- g. Demonstrate a plan to address environmental protection of work sites (erosion control, spill control and cleanup, dust control on site fuel storage permits, etc.).
- h. This part of the proposal shall clearly demonstrate a proposed project management and coordination plan, and the offeror's capability to manage and coordinate land restoration and land clearing as well as general scheduling and



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reporting experience. The contractor shall demonstrate the ability to provide an electronically derived schedule detailing the timing of activities including mobilization, landclearing activities, and demobilization. The contractor shall demonstrate the ability to promptly provide monthly reports and alternative schedules that reflect unforeseen contingencies. The proposal shall also include the types and quantities of equipment that will be assigned to tasks within the proposal. The contractor shall demonstrate the ability to provide a monthly reports and a final report upon completion of the Task Order by providing 3 examples of reports for past projects with similar requirements from the contractor to their clients.

- i. Describe previous related experience in detail with On-Site Ecological Restoration Work as Prime. Examples shall be between 100 and 1200 acres.
- j. Describe previous related experience in detail with on-site Land Clearing Projects as Prime. Examples shall be between 100 acres and 1200 acres.
- k. Each example provided of previous related experience shall include reference contact information including name and telephone number (a minimum of 1 reference per example submitted).
- l. The contractor's plan shall include coordinating with the Park's COTR to minimize the impacts of the contractor's operations such as mobilization vegetation clearing, earth moving, and soil and bulk vegetation disposal operations on known or projected Park operations.
- m. Proposed communication plan as described in the Statement of Work.

2. Subfactor 2 - Scheduling, Cost Control and Quality Control Management:

- a. Submit as a component of your proposal, a preliminary, realistic schedule that demonstrates an understanding of the sequencing required for the tasks described in the SOW with a clear understanding that the performance period (for a typical December-May restoration season) on this project cannot be extended. Submit schedules for two scenarios - 100 acres and 1,200 acres. The schedule should allow for possible delays that might be expected based upon the Offeror's experience. Include a clear explanation of how these schedules will be maintained. If the offeror is submitting alternate proposals, separate schedules shall be required for the alternate proposal.
- b. Provide documentation of 3 past projects, with references and contact information, that demonstrate the offeror's ability to provide effective project management, including but not limited to: working within constrained project site conditions; monitoring and reporting of progress schedules; subcontractor control and coordination; contract modification history; and monitoring of work forces to ensure high quality completion of projects in accordance with contract requirements.
- c. Proposed Plan and Approach for achieving quality control measures for (a) ensuring at a technical level the restoration of wetland function, form, and long-term ecological stability, (b) preservation of the natural environment, and (c) meeting all contract provisions.



- d. **Ecological Restoration:** The offeror shall describe its understanding of on-site ecological restoration as defined in the SOW, in particular, prior experience in working on ecological restoration projects.
  - e. **Preservation of the natural environment:** Plan shall describe cleaning of equipment to prevent contamination and introduction of exotic species, noise control, protecting surrounding natural areas and water quality, and air/dust control.
3. **Subfactor 3 - Qualifications and Experience of Key Personnel:** The offeror shall provide its proposed team (key personnel) qualifications and experience including the breadth, depth and relevance of their previous work as it relates to land restoration and land clearing and experience working together. The offeror shall include resumes of proposed key personnel. As a minimum, the offeror shall identify the key personnel for the following positions. These individuals' names and titles shall be inserted in Clause 1489.237-72 in Section H for the successful offeror's contract; and the offeror shall commit to these individuals being the parties to perform these functions for a period of 90 calendar days after the award is made in accordance with this clause.

Project Manager  
 Superintendent  
 Quality Control Supervisor  
 Foremen

The offeror shall identify who will provide the programming, day to day technical support and data management of the Geographic Positioning System (GPS) units used to guide equipment and personnel and whether the effort will be performed with its own staff or by an identified subcontractor in this section of its technical proposal.

**Note:** Key Personnel Qualifications (Form 4) in the proposal package may be used for submitting this information. However, the offeror may submit its own format as long as the applicable information is included.

- B. **Evaluation Factor II – Price:** A price evaluation will be performed to determine the reasonableness of the proposed price. Reasonableness will be determined by considering other offered prices received and comparison to the independent government cost estimate. Prices will be evaluated to determine whether any line items are unbalanced. Prices will be requested for each task as listed on the Contract Price Schedule based on minimum and maximum estimated quantities. Prices for options will be evaluated to determine the reasonableness of the proposed price and whether the options are unbalanced when compared with the base price. (Prices, including detailed backup documentation, will be requested for each task as listed on the Contract Price Schedule based on the minimum and maximum estimated quantities.)
- C. **Evaluation Factor III - Past Performance:** The offeror shall provide a copy of the form entitled "Experience and Past Performance" that is part of the proposal package attached to the solicitation, for land restoration and land clearing projects of the same scope and complexity as the contemplated contract. Past performance on contracts with the Federal



Government, other public agencies, or private organizations will be considered, but projects with government agencies are preferred. The past performance of the offeror and/or its proposed subcontractors on projects similar in scope and complexity will be evaluated in the areas of quality, timeliness, and business relations. Offerors demonstrating a higher level of successful past performance in the evaluated areas will be more favorably rated. In the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror will be evaluated neither favorably nor unfavorably.

Complete Sections I and II of each form to provide applicable information for each contract.

1. The offeror should disclose any instances in which its past performance on a particular contract may be considered by others to be less than fully satisfactory by attaching a narrative to the applicable Past Performance Questionnaire. The offeror should relate pertinent facts and circumstances and describe any remedial action taken or to be taken to correct the deficiency. Failure to disclose such instances may result in a determination that the offeror has been less than candid with the Government, which could result in an unfavorable assessment of the offeror's past performance record.
2. Documentation should demonstrate customer satisfaction relative to the following:
  - a. Offeror's capability, efficiency, and effectiveness conducting on-site land restoration and land clearing as defined in the SOW.
  - b. Offeror's conformance to the terms and conditions of the contract
  - c. Offeror's reasonableness and cooperativeness during performance
  - d. Offeror's commitment to customer satisfaction
  - e. Offeror's capability to provide customer satisfaction.
  - f. Offeror's capability to produce reports documenting progress, problems, and potential solutions and scheduling updates.
  - g. Offeror's capability to work independently with little guidance.

Note: The aforementioned items are likely the types of questions that the references will be asked. The references provided should be willing and able to confirm customer satisfaction in the specified areas.

3. Outline the number of years of experience you have working with the subcontractors proposed for this project and provide data on the types of projects where this association has occurred.

Note: The offeror may use Experience and Past Performance (Form 2) and Subcontractor Reference (Form 5) in the proposal package for submitting this information or may use its own format as long as it contains all information included in the forms.

**VII. EVALUATION FACTOR WEIGHTS & RATING PLAN** – A rating system will be utilized as described below:



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## A. Evaluation Factor I – Technical Approach and Capability. 60 points max.

## Subfactor 1 – Project Plan, Management and Coordination and Previous Related Experience. 20 points max.

Rating	Definition / Standard
16-20 points	Proposal element indicates <u>extensive related experience and superior project management and coordination</u> and competence with related land restoration and land clearing work. Characteristics of comparable contracts are addressed completely and clearly. No apparent weaknesses or deficiencies.
11-15 points	Proposal element indicates <u>moderate related experience and average project management and coordination</u> and competence with related land restoration and land clearing work. Many characteristics of comparable contracts are addressed. Weaknesses, if any, are minor and are more than offset by strengths.
6-10 points	Proposal element indicates <u>minimal related experience and minimal project management and coordination</u> and competence with related land restoration and land clearing work. Characteristics of a comparable contract are addressed. Weaknesses outweigh strengths.
0-5 points	Proposal element indicates a <u>lack of related experience and little to no project management and coordination</u> and competence with related land restoration and land clearing work. Characteristics of a comparable contract are lacking or not evident.

## Subfactor 2 – Scheduling, Cost Control, and Quality Control Management. 20 points max.

Rating	Definition / Standard
16-20 points	Proposal element indicates <u>extensive experience</u> and competence in Scheduling, Cost Control, and Quality Control Management. CPMS meets or exceeds requirements. Demonstrated excellent Cost Control and Quality Control Management. No apparent weaknesses or deficiencies.
11-15 points	Proposal element indicates <u>moderate experience</u> and competence in Critical Path Method Scheduling, Cost Control, and Quality Control Management. CPMS meets requirements. Demonstrated good Cost Control and Quality Control Management. Weaknesses, if any, are minor and are more than offset by strengths.
6-10 points	Proposal element indicates <u>minimal related experience</u> and competence in Scheduling, Cost Control, and Quality Control Management. CPMS not well documented or may not meet project requirements. Cost Control and Quality Control Management weak. Weaknesses outweigh strengths.
0-5 points	Proposal element indicates a <u>lack of related experience</u> and competence in Scheduling, Cost Control, and Quality Control Management. Characteristics of a comparable contract are lacking or not evident.

## Subfactor 3 – Qualifications and Experience of Key Personnel. 20 points max.



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Rating	Definition / Standard
16-20 points	Proposal element indicates <u>extensive experience</u> and competence of Key Personnel and trades proposed. Excellent breadth, depth and relevance of previous work. Committed to comply with the Key personnel requirements of the Contract. No apparent weaknesses or deficiencies.
11-15 points	Proposal element indicates <u>moderate experience</u> and competence of Key Personnel and trades proposed. Good breadth, depth and relevance of previous work. Will comply with the Key personnel requirements of the Contract. Weaknesses, if any, are minor and are more than offset by strengths.
6-10 points	Proposal element indicates <u>minimal related experience</u> and competence of Key Personnel and trades proposed. Breadth, depth and relevance of previous work are weak. Probably will comply with the Key personnel requirements of the Contract. Weaknesses outweigh strengths.
0-5 points	Proposal element indicates a <u>lack of related experience</u> and competence in of Key Personnel and trades proposed. Lacking depth and relevance of previous work. No indication they will comply with the Key personnel requirements of the Contract. Characteristics of a comparable contract are lacking or not evident.

#### B. Evaluation Factor II – Price.

A price evaluation will be performed to determine the reasonableness of the proposed price. Reasonableness will be determined by considering other offered prices received and comparison to the independent government cost estimate. Prices will be evaluated to determine whether any line items are unbalanced. Prices will be requested for each task as listed on the Contract Price Schedule based on minimum and maximum estimated quantities. Prices for options will be evaluated to determine the reasonableness of the proposed price and whether the options are unbalanced when compared with the base price. Prices, including detailed backup documentation, will be requested for each task as listed on the Contract Price Schedule based on the minimum and maximum estimated quantities.

#### C. Evaluation Factor III — Past Performance.

Rating	Definition / Standard
Superior	Proposal element indicates <u>extensive customer satisfaction</u> . Documentation and references are addressed completely and clearly. No apparent weaknesses or deficiencies.
Acceptable	Proposal element indicates <u>moderate customer satisfaction</u> . Documentation and references are satisfactorily addressed. Weaknesses, if any, are minor and are more than offset by strengths.
Neutral	Past performance information is not available for this offeror either by submittal as part of its proposal or on any Government past performance system.
Unacceptable	Proposal element indicates <u>minimal or lack of customer satisfaction</u> . Documentation and references are addressed, but inadequate to assist in



evaluation. Weaknesses outweigh strengths. Documentation and references are clearly unacceptable.

### VIII. SECURITY

- A. The technical evaluation process demands absolute security throughout the entire process. Inadvertent disclosure of source selection information may jeopardize the success of the procurement and put the government at unnecessary increased risk of protest.
1. TEP members will accomplish their assigned work in a private and secured work area with controlled access.
  2. The proposals will be stored safely to protect against inadvertent disclosure to others outside of the TEP.
  3. No document will be removed from the evaluation area for any reason without specific authorization from the TEP Chairperson with the concurrence of the SSA. At the conclusion of the technical evaluation, TEP-members will not be permitted to retain any work papers, or any part of the proposals they had access to during the review.
  4. The TEP Chairperson must ensure that all proposals and any related material are returned to the SSA.
  5. It is the responsibility of each source selection participant to ensure the confidentiality of the evaluation process. Discussions among the source selection team members shall only be conducted in a secure work area. No discussions on any aspects of the evaluation will occur with any other persons not formally involved in the source selection. If at any time during the evaluation process it is found that there has been unauthorized disclosure or release of source selection information, the matter will be brought to the attention of the SSA and the TEP Chairperson.
  6. Refer all attempted communication from offerors to the SSA.
- B. This plan was prepared by Jonathan Taylor (COTR and TEP Chair), Joelle Mascarenas (Contracting Officer and SSA).

Jonathan Taylor

Date

Concur:

Tom Murphy

Date

Approved:

Joelle M. Mascarenas  
Joelle M. Mascarenas  
Source Selection Authority

6/13/08

Date



289a

**TECHNICAL RATING SHEET****Solicitation:** 1443N5297080232**Offeror:** \_\_\_\_\_

Rate each item below.

<b><u>Factor 1 - Technical Approach and Capability</u></b>	<b>Rating</b>
<b><u>Subfactor 1 - Project Plan, Management and Coordination and Previous Related Experience - 20 Points Maximum</u></b>	
<p>The offeror shall submit its technical proposal addressing a project management and coordination plan for conducting on-site land restoration and land clearing. The proposal shall describe how work will be conducted without significant interference with Park operations and visitors. The technical proposal must describe how the offeror intends to accomplish each task. The technical proposal shall demonstrate awareness that some tasks describe anticipated limits and requirements however that as tasks are ordered the adaptive management process might identify new limits and requirements that need to be incorporated into the work. For example some tasks have seasonal constraints (winter dry season, from approximately December through May). Specific details regarding methodologies, logistics, the quantities and types of equipment, staffing and work schedules must be provided for the base year and each option year. Without limiting the generality of the foregoing, technical proposals shall include a section setting forth the ability to a conduct a pre-work planning and development phase (Task 10A1).</p>	
<p>The technical proposal shall address but is not limited to, the following:</p>	
<ol style="list-style-type: none"> <li>a. The proposed approach for supplying on-site restoration projects with all equipment and personnel. Demonstrate the amounts and types of equipment per task undertaken based on scale (100 acres to 1200 acres). The contractor shall demonstrate what equipment is owned and can provide for work under this contract and what percentage and types of equipment will be secured through other means in order to provide equipment of sufficient quantity and type to meet the requirements of the tasks within this Statement of Work.</li> <li>b. Describe the plan and approach for staffing the project based on scale (100 acres to 1200 acres).</li> <li>c. Describe the plan for preparation of disruption of work due to severe</li> </ol>	



- storms or other emergency. Include how the project site, work and equipment will be secured or protected, logistical planning for personnel and resumption of work once the event is over.
- d. Identify the effort that the contractor will perform with its own personnel and the work that will be subcontracted out to major subcontractors and include the reason(s) for selecting the particular subcontractor for the proposed effort (e.g., subcontractor's experience, management, key personnel, etc.).
  - e. Provide the offeror's proposed plan, approach and method of demolition of cinder block structures (350 to 3600 SQYD) with a slab on grade. Refuse is to be hauled to dump.
  - f. The proposed approach for performing land restoration and land clearing activities in proximity to sensitive natural resources, and potential conflicts with adjacent visitor activity and park operations.
  - g. Demonstrate a plan to address environmental protection of work sites (erosion control, spill control and cleanup, dust control on site fuel storage permits, etc.).
  - h. This part of the proposal shall clearly demonstrate a proposed project management and coordination plan, and the offeror's capability to manage and coordinate land restoration and land clearing as well as general scheduling and reporting experience. The contractor shall demonstrate the ability to provide an electronically derived schedule detailing the timing of activities including mobilization, landclearing activities, and demobilization. The contractor shall demonstrate the ability to promptly provide monthly reports and alternative schedules that reflect unforeseen contingencies. The proposal shall also include the types and quantities of equipment that will be assigned to tasks within the proposal. The contractor shall demonstrate the ability to provide a monthly reports and a final report upon completion of the Task Order by providing 3 examples of reports for past projects with similar requirements. The reports must be from the contractor to the clients.
  - i. Describe previous related experience in detail with On-Site Ecological Restoration Work as Prime. Examples shall be between 100 and 1200 acres.
  - j. Describe previous related experience in detail with on-site Land Clearing Projects as Prime. Examples shall be between 100 acres and 1200 acres.
  - k. Each example provided of previous related experience shall include reference contact information including name and telephone number (a minimum of 1 reference per example submitted).
  - l. The contractor's plan shall include coordinating with the Park's COTR to minimize the impacts of the contractor's operations such as mobilization vegetation clearing, earth moving, and soil and bulk vegetation disposal operations on known or projected Park operations.

291a

m. Proposed communication plan as described in the Statement of Work	
----------------------------------------------------------------------	--

**STRENGTHS AND/OR WEAKNESSES** (Include all comments relating to the ratings assigned. Identify comments by the corresponding evaluation criteria numbers above. Use additional sheets as necessary for comments):

\_\_\_\_\_  
SIGNATURE PANEL MEMBER\_\_\_\_\_  
DATE

Source Selection Plan  
Land Restoration and Land Clearing  
Solicitation No. N5297080232

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Everglades National Park

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**TECHNICAL RATING SHEET****Solicitation:** 1443N5297080232**Offeror:** \_\_\_\_\_

Rate each item below.

<b>Factor I – Technical Approach and Capability</b>	
<b>Subfactor 2 – Scheduling, Cost Control and Quality Control Management – 20 Points Maximum</b>	<b>Rating</b>
<p>a. Submit as a component of your proposal, a preliminary, realistic schedule that demonstrates an understanding of the sequencing required for the tasks described in the SOW with a clear understanding that the performance period on this project cannot be extended. The schedule should allow for possible delays that might be expected based upon the Offeror's experience. Include a clear explanation of how this schedule will be maintained. If the offeror is submitting an alternate proposal, a separate schedule shall be required for the alternate proposal.</p> <p>b. Provide documentation of 3 past projects, with references and contact information, that demonstrate the offeror's ability to provide effective project management, including but not limited to: working within constrained project site conditions; monitoring and reporting of progress schedules; subcontractor control and coordination; contract modification history; and monitoring of work forces to ensure high quality completion of projects in accordance with contract requirements.</p> <p>c. Proposed Plan and Approach for achieving quality control measures for (a) ensuring at a technical level the restoration of wetland function, form, and long-term ecological stability, (b) preservation of the natural environment, and (c) meeting all contract provisions: Ecological Restoration: The offeror shall describe its understanding of on-site ecological restoration as defined in the SOW. In particular, prior experience in working on ecological restoration projects.</p> <p>d. Preservation of the natural environment: Plan shall describe cleaning of equipment to prevent contamination and introduction of exotic species, noise control, protecting surrounding natural areas and water quality, and air/dust control.</p>	

**STRENGTHS AND/OR WEAKNESSES** (Include all comments relating to the ratings assigned. Identify comments by the corresponding evaluation criteria numbers above. Use additional sheets as necessary for comments):

\_\_\_\_\_  
SIGNATURE PANEL MEMBER

\_\_\_\_\_  
DATE

Source Selection Plan  
Land Restoration and Land Clearing  
Solicitation No. N5297080232

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**TECHNICAL RATING SHEET****Solicitation:** 1443N5297080232**Offeror:** \_\_\_\_\_

Rate each item below.

<b>Factor I – Technical Approach and Capability</b>	
<b>Subfactor 3 – Qualifications and Experience of Key Personnel – 20 Points Maximum</b>	<b>Rating</b>
<p>The offeror shall provide its proposed team (key personnel) qualifications and experience including the breadth, depth and relevance of their previous work as it relates to land restoration and land clearing and experience working together. The offeror shall include resumes of proposed key personnel. As a minimum, the offeror shall identify the key personnel for the following positions. These individuals' names and titles shall be inserted in Clause 1489.237-72 in Section H for the successful offeror's contract; and the offeror shall commit to these individuals being the parties to perform these functions for a period of 90 calendar days after notice to proceed is issued in accordance with this clause.</p> <ul style="list-style-type: none"> <li>▪ Project Manager</li> <li>▪ Superintendent</li> <li>▪ Quality Control Supervisor</li> <li>▪ Foremen</li> </ul> <p>The offeror shall identify who will provide the programming, day to day technical support and data management of the Geographic Positioning System (GPS) units used to guide equipment and personnel and whether the effort will be performed with its own staff or by an identified subcontractor in this section of its technical proposal.</p>	

**STRENGTHS AND/OR WEAKNESSES** (Include all comments relating to the ratings assigned. Identify comments by the corresponding evaluation criteria numbers above. Use additional sheets as necessary for comments):

\_\_\_\_\_  
SIGNATURE PANEL MEMBER\_\_\_\_\_  
DATE

**RATING SHEET****Solicitation:** 1443N5297080232**Offeror:** \_\_\_\_\_

Rate each item below.

<b><u>Factor II – Price</u></b>	<b><u>Rating</u></b>
A price evaluation will be performed to determine the reasonableness of the proposed price. Reasonableness will be determined by considering other offered prices received and comparison to the independent government cost estimate. Prices will be evaluated to determine whether any line items are unbalanced. Prices will be requested for each task as listed on the Contract Price Schedule based on minimum and maximum estimated quantities. Prices for options will be evaluated to determine the reasonableness of the proposed price and whether the options are unbalanced when compared with the base price. Prices, including detailed backup documentation, will be requested for each task as listed on the Contract Price Schedule based on the minimum and maximum estimated quantities.	

**STRENGTHS AND/OR WEAKNESSES** (Include all comments relating to the ratings assigned. Identify comments by the corresponding evaluation criteria numbers above. Use additional sheets as necessary for comments):



SIGNATURE PANEL MEMBER

DATE

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Appx3298

**TECHNICAL RATING SHEET****Solicitation:** 1443NS297080232**Offeror:** \_\_\_\_\_

Rate each item below.

<b><u>Factor III – Past Performance – Unacceptable, Acceptable, Superior or Neutral</u></b>	<b>Rating</b>
<p>A. The offeror shall provide a copy of the form entitled "Experience and Past Performance" that is part of the proposal package attached to the solicitation, for land restoration and land clearing projects of the same scope and complexity as the contemplated contract. Past performance on contracts with the Federal Government, other public agencies, or private organizations will be considered, but projects with government agencies are preferred. The past performance of the offeror and/or its proposed subcontractors on projects similar in scope and complexity will be evaluated in the areas of quality, timeliness, and business relations. Offerors demonstrating a higher level of successful past performance in the evaluated areas will be more favorably rated. In the case of an offeror without a record of relevant past performance or for whom information on past performance is not available, the offeror will be evaluated neither favorably nor unfavorably.</p> <p>Complete Sections I and II of each form to provide applicable information for each contract.</p> <ol style="list-style-type: none"> <li>1. The offeror should disclose any instances in which its past performance on a particular contract may be considered by others to be less than fully satisfactory by attaching a narrative to the applicable Past Performance Questionnaire. The offeror should relate pertinent facts and circumstances and describe any remedial action taken or to be taken to correct the deficiency. Failure to disclose such instances may result in a determination that the offeror has been less than candid with the Government, which could result in an unfavorable assessment of the offeror's past performance record.</li> <li>2. Documentation should demonstrate customer satisfaction relative to the following: <ol style="list-style-type: none"> <li>a. Offeror's capability, efficiency, and effectiveness conducting on-site land restoration and land clearing as defined in the SOW.</li> <li>b. Offeror's conformance to the terms and conditions of the contract</li> </ol> </li> </ol>	



- c. Offeror's reasonableness and cooperativeness during performance
- d. Offeror's commitment to customer satisfaction
- e. Offeror's capability to provide customer satisfaction.
- f. Offeror's capability to produce reports documenting progress, problems, and potential solutions and scheduling updates.
- g. Offeror's capability to work independently with little guidance.

Note: The aforementioned items are likely the types of questions that the references will be asked. The references provided should be willing and able to confirm customer satisfaction in the specified areas.

- 3. Outline the number of years of experience you have working with the subcontractors proposed for this project and provide data on the types of projects where this association has occurred.
- 4. Limited exchanges between the Government and offerors may occur in order to give offerors the opportunity to clarify certain aspects of offeror's adverse past performance information to which the offeror has not previously had an opportunity to respond or to resolve minor or clerical errors.
- 5. If joint venture without previous experience, explain provisions to ensure success.

**STRENGTHS AND/OR WEAKNESSES** (Include all comments relating to the ratings assigned. Identify comments by the corresponding evaluation criteria numbers above. Use additional sheets as necessary for comments):

SIGNATURE PANEL MEMBER

DATE

Source Selection Plan  
Land Restoration and Land Clearing  
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Everglades National Park

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Appx3300

**2011 11 21 NPS letter denying Westwind protest  
(is Agency Report tab 18, RFD Ex. E) PROTECTED**

299a



IN REPLY REFER TO:

**United States Department of the Interior**

NATIONAL PARK SERVICE  
DENVER SERVICE CENTER  
12795 W. ALAMEDA PARKWAY  
P.O. BOX 25287  
DENVER, COLORADO 80225-0287



**INCLUDES PROTECTED INFORMATION NOT TO BE DISCLOSED**

**TO:** Westwind Contracting, Inc.  
C/O Joseph C. Staak,  
Smith, Currie & Hancock LLP,  
Attorneys At Law  
2700 Marquis One Tower  
245 Peachtree Center Avenue, NE  
Atlanta, GA 30303-1227

**FROM:** National Park Service  
Denver Service Center  
12795 W. Alameda Pkwy  
Lakewood, Co 80225

**DATE:** November 21, 2008

**SUBJECT:** Contracting Officer's Protest Decision

**RE:** Agency Level Protest of Solicitation No. 1443N5297080232,  
Land Restoration and Land Clearing, PMIS No. EVER-137534

The Contracting Officer received the referenced protest dated November 17, 2008, on November 18, 2008. In accordance with FAR 33.103(e), the deadline for filing this protest calculates to be not later than November 10, 2008. Therefore, we find that this protest was untimely and may be denied simply on those grounds. The FAR citation states that other than before bid opening or the closing date for receipt of proposals, "...protest shall be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier." The agency contends that the protester should have known the basis of its protest no later than October 31, 2008, the date that they received the documents from NPS that were later included in the agency report. The documents included in that package contained the information used as a basis for this agency level protest. Consequently, the protest was required to be filed by November 10, 2008, thereby making this protest untimely.



**2011 11 21 NPS letter denying Westwind protest  
(is Agency Report tab 18, RFD Ex. E) PROTECTED**

**300a**

Even though the protest is considered untimely, the Government, in good faith, wishes to address in this letter the issues and concerns brought up in the protest. Any information provided herein, or attached hereto, is subject to the GAO Protective Order under Protest #B-400677.

In your protest, you assert that the NPS failed to properly evaluate Evaluation Factor III - Past Performance. The NPS followed the criteria it laid out for past performance as specified in the solicitation. The NPS refutes Westwind's allegations with the following information:

1. The Government complied with the terms of the solicitation. The "Past Performance Questionnaire" forms submitted by both Westwind and Optimum were scored by the TEP in the areas of Quality, Timeliness, and Business Relations as specified in Section M. At least two references were contacted per offeror. However, these documents were inadvertently omitted from the agency report and index. (*See Westwind's and Optimum's Past Performance Questionnaires" attached.*)
2. The Source Selection Plan set forth definitions for Evaluation Factor III using the terms "Superior", "Acceptable", "Neutral", and "Unacceptable". The Past Performance Questionnaire used the terms "Excellent", "Good", "Satisfactory", "Marginal", and "Unsatisfactory". These adjectival ratings are considered synonymous for the highest ratings, that is, "Superior" and "Excellent." Furthermore, both Westwind and Optimum received mostly "Excellent" ratings on the questionnaires (with a few "Good" ratings on individual sub-elements) but, overall, both were ranked "Excellent". This simply translates to the equivalent highest rating of "Superior" in terms of the Source Selection Plan. For this reason, whether the term "Excellent" or "Superior" is used was not inconsistent with the intent of the solicitation documents and didn't cause harm to Westwind. We remind you that the Past Performance Questionnaire is only one of the sources of information that the selection process looks at to develop the overall past performance rating. This is discussed later in this document.
3. Section VII of the Source Selection Plan, which addresses customer satisfaction, is not a description of the criterion itself, rather, the section defines the different adjectival ratings. This section is entitled "EVALUATION FACTOR WEIGHTS & RATING PLAN". In regards to quality, timeliness, and business relations, the degree of customer satisfaction in those areas would define what adjectival rating would be received for Evaluation Factor III. For instance, extensive customer satisfaction in the areas of quality, timeliness, and business relations would earn the offeror a "Superior" rating. The actual description of Evaluation Factor III begins on page 10 of the Source Selection Plan.
4. Past performance was adequately and appropriately evaluated by the TEP. The TEP Chairperson, Jonathan Taylor, took the lead in conducting the past performance phone interviews for the purpose of documenting the references' responses to the questions on the past performance questionnaires. Mr. Taylor then briefed the other

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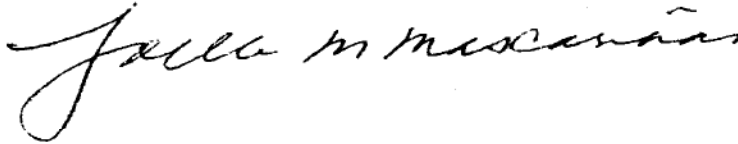
TEP members on the findings. As a matter of standard procurement practice and practicality, each TEP member does not individually contact every reference provided. The TEP conducts the entire past performance evaluation as a team. This past performance evaluation includes the information provided and documented on the Past Performance Questionnaires, as well as other past performance information that might be available. For example, the Government utilizes other sources of past performance information such as data from Past Performance Information Retrieval System products, internet searches, Dun and Bradstreet information applicable to the individual firms, or other public records. Having considered all the information obtained, the TEP then summarizes the past performance evaluation by determining a consensus past performance rating for each offeror .

5. Item #5 of Westwind's protest contends that each member of the TEP was required to evaluate each offeror separately and cited a line from the Source Selection Plan that states, "[The TEP members shall] perform detailed evaluation of each offer in accordance with the SSP and Section M of the solicitation. Each member shall initially score each proposal and do so independently of other TEP members." The primary responsibility of the TEP members is to evaluate the technical proposals as referenced in section III of the source selection plan which states "The members of the TEP are responsible for determining the extent to which a **technical proposal** satisfies the requirements of the Request For Proposals (RFP)." The Source Selection Plan and Section M of the solicitation clearly define that only Evaluation Factor I and its subfactors are considered for the evaluation of the offerors' technical proposal. Since Evaluation Factor I (Technical Approach and Capability) is considered a technical factor, each TEP member initially scored each proposal independently. The TEP members are not required to evaluate the past performance independently since this is not considered to be a part of their technical proposal. Again, past performance and price are not technical factors. This intent is clearly demonstrated in the fact that past performance and price were identified as wholly-separate evaluation factors and past performance was not made a sub-factor under Evaluation Factor I.

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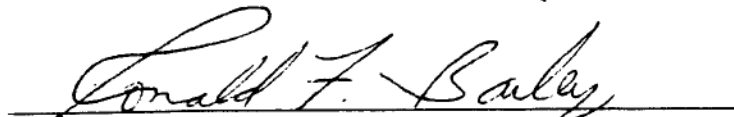
**CONTRACTING OFFICER'S PROTEST DECISION**

For the reasons cited in this Contracting Officer's statement, and as stated earlier in this document, this protest was determined to be untimely. Additionally, we have shown that the Government's evaluation and rating of Evaluation Factor III – Past Performance was conducted properly. Consequently, there are no issues to be resolved in the original evaluation of the offerors' past performance. We stand by the corrective action plan announced in Ms. Parkhurst's November 12, 2008, letter. We deny the protest of Westwind Contracting, Inc. This determination may be appealed to the GAO or CBCA. All appeals to either the GAO or the CBCA must include a copy of the CO's protest decision.



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JOELLE M. MASCARENAS  
Contracting Officer  
Department of the Interior  
National Park Service  
Denver Service Center  
Lakewood, CO 80225



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RONALD F. BAILEY  
Contracting Officer – Source Selection Authority (SSA)  
East Team Branch Chief  
Department of the Interior  
National Park Service  
Denver Service Center  
Lakewood, CO 80225

303a  
Westwind

THIS INFORMATION COVERED BY  
PROTECTIVE ORDER

## PAST PERFORMANCE QUESTIONNAIRE

(COMPLETE SECTIONS I AND II AND SUBMIT WITH THE TECHNICAL PROPOSAL)

I. CONTRACT IDENTIFICATION	
CONTRACTOR NAME: National Park Service	CONTRACT NO:
CONTRACTOR ADDRESS: Everglades National Park South Florida Natural Resource Center 40001 State Road 9336 Homestead, Florida 33034-673	CONTRACT TYPE: <input checked="" type="checkbox"/> FIRM-FIXED-PRICE Negotiated <input type="checkbox"/> COST REIMBURSEMENT <input type="checkbox"/> OTHER: (specify) <input type="checkbox"/> ACTIVE <input checked="" type="checkbox"/> COMPLETED <input type="checkbox"/> ROUTINE <input checked="" type="checkbox"/> COMPLEX
DATES OF PERFORMANCE: 1997 thru 2004	AWARD AMOUNT: \$ 33,000,000 TOTAL WITH MODS \$
PROJECT DESCRIPTION: See Attached	

## II. AGENCY (CUSTOMER) IDENTIFICATION

AGENCY (CUSTOMER) NAME: National Park Service, Everglades National Park

POC NAME/TITLE/PHONE: Jonathan Taylor, COTR, 305-242-7876

## III. PAST PERFORMANCE RATING

Rating Scale: E = Excellent. Considerably surpassed requirements/expectations.  
G = Good. Surpassed requirements/expectations.  
S = Satisfactory. Met requirements/expectations  
M = Marginal. Met some requirements/expectations  
U = Unsatisfactory. Did not meet requirements/expectations

### 1. QUALITY:

(Circle applicable rating)

- |                                                                       |             |
|-----------------------------------------------------------------------|-------------|
| a. Conformance with contract requirements                             | (E) G S M U |
| b. Quality of workmanship (including subcontractors)                  | (E) G S M U |
| c. General oversight by project manager and superintendent            | (E) G S M U |
| d. Coordination with and control of subcontractors                    | E (G) S M U |
| e. Compliance with Davis-Bacon wage rate and labor usage requirements | (E) G S M U |
| f. Avoidance of accidents/safety violations                           | (E) G S M U |



304a  
Westwind

(E)	G	S	M	U
(E)	G	S	M	U
(B)	G	S	M	U
(E)	G	S	M	U
(B)	G	S	M	U
(E)	G	S	M	U

E	G	S	M	U
E	G	S	M	U
E	G	S	M	U
E	G	S	M	U

[illegible]

08/06/08

305a

*Westwind***PAST PERFORMANCE QUESTIONNAIRE**

(COMPLETE SECTIONS I AND II AND SUBMIT WITH THE TECHNICAL PROPOSAL)

<b>I. CONTRACT IDENTIFICATION</b>	
<b>CONTRACTOR NAME:</b> Broward County Parks & Recreation (Eng: Miller Legg)	<b>CONTRACT NO:</b> 0-06-90-360F
<b>CONTRACTOR ADDRESS:</b> 1800 N. Douglas Road Suite 200 Pembroke Pines, FL 33024	<b>CONTRACT TYPE:</b> <input type="checkbox"/> FIRM-FIXED-PRICE <input type="checkbox"/> COST REIMBURSEMENT <input checked="" type="checkbox"/> OTHER: (specify) Unit Price <input type="checkbox"/> ACTIVE <input checked="" type="checkbox"/> COMPLETED <input type="checkbox"/> ROUTINE <input checked="" type="checkbox"/> COMPLEX
<b>DATES OF PERFORMANCE:</b> 1992-1993	<b>AWARD AMOUNT:</b> \$ 4,500,000 <b>TOTAL WITH MODS</b> \$
<b>PROJECT DESCRIPTION:</b> The Environmental Enhancement of approximately 250 acres of vegetated highlands, wetland and canals. Contract comprises construction layout, clearing and grubbing, muck removal, stockpiling and hauling, canal excavation, scrape-down excavation, rough grading, hauling from site, installation of culverts and head walls installation of bridges and road construction, the purpose of this project is to fulfill the mitigation requirements stated in the work plan of the Florida Department of Environmental Regulation Permit and the U.S. Army Corps of Engineers Permit	
<b>II. AGENCY (CUSTOMER) IDENTIFICATION</b>	
<b>AGENCY (CUSTOMER) NAME:</b> Miller Legg & Associates	
<b>POC NAME/TITLE/PHONE:</b> David John, Chairman, 954-436-7000	
<b>III. PAST PERFORMANCE RATING</b>	
<b>Rating Scale:</b> E = Excellent. Considerably surpassed requirements/expectations. G = Good. Surpassed requirements/expectations. S = Satisfactory. Met requirements/expectations M = Marginal. Met some requirements/expectations U = Unsatisfactory. Did not meet requirements/expectations	
<b>1. QUALITY:</b> (Circle applicable rating)	
a. Conformance with contract requirements	<u>E</u> G S M U
b. Quality of workmanship (including subcontractors)	<u>E</u> G S M U
c. General oversight by project manager and superintendent	<u>E</u> G S M U
d. Coordination with and control of subcontractors	<u>E</u> G S M U

Westwind 306a

e. Compliance with Davis-Bacon wage rate and labor usage requirements

NA

E G S M U

f. Avoidance of accidents/safety violations

(E) G S M U

2. TIMELINESS:

a. Adherence to project delivery schedules

(E) G S M U

b. Submission of change proposals

E (G) S M U

c. Response to technical direction and change orders

(E) G S M U

d. Response to correction of identified problems

(E) G S M U

e. Submission of timely/accurate/complete billings

(E) (G) S M U

f. Submission of materials/other submittals

NA E G S M U

3. BUSINESS RELATIONS:

a. Flexibility and cooperativeness in resolving problems

(E) G S M U

b. Tenacity and innovativeness in resolving problems

E (G) S M U

c. Relationships with subcontractors, including prompt payment

E (G) S M U

d. End user was satisfied with services performed

(E) G S M U

IV. COMMENTS

Required for ratings of C (Considerably Surpassed Requirements) or D (Did Not Meet Requirements)

Item No.	Comment
	Very responsive - working in total areas very challenging work area very pleased (19 years) - Owner may encourage creativity
	- laid out expectations very clearly in kick off meeting. They took the kick off meeting seriously.
	- Progress reports / field reports provided.

Sep 10 2008 12:21p

2011 11 21 NPS letter denying Westwind protest  
(is Agency Report tab 18, RFD Ex. E) PROTECTED

p.14

Westwind

Technical Evaluation Panel Member: <i>Jonathan J. [Signature]</i>	Date: <i>08/07/08</i>



Westwind<sup>308a</sup>

## PAST PERFORMANCE QUESTIONNAIRE

(COMPLETE SECTIONS I AND II AND SUBMIT WITH THE TECHNICAL PROPOSAL)

### I. CONTRACT IDENTIFICATION

CONTRACTOR NAME: Southwest Florida Wetlands Joint Venture

CONTRACT NO: Panther Island Collier Co.

CONTRACTOR ADDRESS:

SW Florida Wetlands Joint Venture  
814 South Military Trail, Building 6,  
Deerfield Beach, FL 33442

CONTRACT TYPE:

- ☐ FIRM-FIXED-PRICE  
☐ COST REIMBURSEMENT  
☒ OTHER: (specify) Unit Price per acre  
☐ ACTIVE ☒ COMPLETED  
☐ ROUTINE ☒ COMPLEX

DATES OF PERFORMANCE:

1999 through 2000

AWARD AMOUNT: \$ 2,284,000

TOTAL WITH MODS \$

PROJECT DESCRIPTION:

*Panther*  
Stripping of 0-9" of organic topsoil layer, scrapedown underlying soil to contour elevations (less thickness for reinstalling topsoil layer), and reinstalling the topsoil layer to +/- .2 foot of the contours as shown on the plans for approximately 462 acres.

### II. AGENCY (CUSTOMER) IDENTIFICATION

AGENCY (CUSTOMER) NAME: Southwest Florida Wetlands Joint Venture

POC NAME/TITLE/PHONE: Robert Miller, Chief Operating Officer 954-596-2411

### III. PAST PERFORMANCE RATING

Rating Scale: E = Excellent. Considerably surpassed requirements/expectations.  
G = Good. Surpassed requirements/expectations.  
S = Satisfactory. Met requirements/expectations  
M = Marginal. Met some requirements/expectations  
U = Unsatisfactory. Did not meet requirements/expectations

#### 1. QUALITY:

(Circle applicable rating)

- |                                                                       |     |   |   |   |   |   |
|-----------------------------------------------------------------------|-----|---|---|---|---|---|
| a. Conformance with contract requirements                             | (E) | G | S | M | U |   |
| b. Quality of workmanship (including subcontractors)                  | (E) | G | S | M | U |   |
| c. General oversight by project manager and superintendent            | (E) | G | S | M | U |   |
| d. Coordination with and control of subcontractors                    | (E) | G | S | M | U |   |
| e. Compliance with Davis-Bacon wage rate and labor usage requirements | N/A | E | G | S | M | U |

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(E) G S M U

(E) G S M U

(E) G S M U

**E G S M U**

**(E) G S M U**

**(E) G S M U**

**E G S M U**

(E) G S M U

**E G S M U**

EGSMU

**E G S M U**

**Required for ratings of C (Considerably Surpassed Requirements) or D (Did Not Meet Requirements)**

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Sep 10 '08 12:22p

p.17

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Westwind

Technical Evaluation Panel Member:

*Jonathan J. [Signature]*

Date:

08/06/08

2011 11 21 NPS letter denying Westwind protest  
(is Agency Report tab 18, RFD Ex. E) PROTECTED

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**CCR Detail Search Results**

Not to be used as certifications and representations. See ORCA for official certification.

**Current Registration Status:** Active in CCR; Registration valid until  
07/03/2009.

**DUNS:** 152616801

**DUNS PLUS4:**

**CAGE/NCAGE:** 0VND1

**Legal Business Name:** WESTWIND CONTRACTING, INC.

**Doing Business As (DBA):**

**Division Name:**

**Division Number:**

**Company URL:**

**Physical Street Address 1:** 3501 W HALLANDALE BEACH BLVD

**Physical Street Address 2:**

**Physical City:** HOLLYWOOD

**Physical State:** FL

**Physical Foreign Province:**

**Physical Zip/Postal Code:** 33023-5732

**Physical Country:** USA

**Mailing Name:** WESTWIND CONTRACTING, INC.

**Mailing Street Address 1:** 3501 WEST HALLANDALE BEACH BLVD.

**Mailing Street Address 2:**

**Mailing City:** PEMBROKE PARK

**Mailing State:** FL

**Mailing Foreign Province:**

**Mailing Zip/Postal Code:** 33023-5732

**Mailing Country:** USA

**Business Start Date:** 03/06/1986

**CORPORATE INFORMATION****Type of Organization**

Corporate Entity, Not Federal Tax Exempt  
(State of Incorporation is FL)

**Business Types/Grants**

2X - For-Profit Organization

B1 - Construction Firm

VN - Contracts

XS - S Corporation



312a

**GOODS / SERVICES**

**North American Industry Classification System (NAICS)**

212312 - Crushed and Broken Limestone Mining and Quarrying  
212321 - Construction Sand and Gravel Mining  
212322 - Industrial Sand Mining  
237110 - Water and Sewer Line and Related Structures Construction  
237210 - Land Subdivision  
237310 - Highway, Street, and Bridge Construction  
237990 - Other Heavy and Civil Engineering Construction  
562910 - Remediation Services

**Standard Industrial Classification (SIC)**

1541 - INDUSTRIAL BUILDINGS AND WAREHOUSES  
1542 - NONRESIDENTIAL CONSTRUCTION, NEC

**Product Service Codes (PSC)**

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**Federal Supply Classification (FSC)**

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**SMALL BUSINESS TYPES**

SDB, 8A and HubZone certifications come from the Small Business Administration and are not editable by CCR vendors.

**Business Types Expiration Date**

---

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North American Industry Classification System (NAICS)			
The small business size status is derived from the receipts, number of employees, assets, barrels of oil, and/or megawatt hours entered by the vendor during the registration process.			
NAICS Code	Description	Small Business	Emerging Small Business
212312	Crushed and Broken Limestone Mining and Quarrying	Yes	No
212321	Construction Sand and Gravel Mining	Yes	No
212322	Industrial Sand Mining	Yes	No
237110	Water and Sewer Line and Related Structures Construction	No	No
237210	Land Subdivision	No	No
237310	Highway, Street, and Bridge Construction	No	No
237990	Other Heavy and Civil Engineering Construction	No	No
562910	Remediation Services General \$14m small business size standard: [No] Special 500 employees size standard for	See Description	No

313a		
Environmental Remediation Services: [Yes]		

## CCR POINTS OF CONTACT

## Government Business Primary POC

Name: ROBERT PARKS III

Address Line 1: 3501 WEST HALLANDALE  
BEACH BLVD

Address Line 2:

City: PEMBROKE PARK

State: FL

Foreign  
Province:Zip/Postal 33023-5732  
Code:

Country: USA

U.S. Phone: 954-804-9196

Non-U.S.  
Phone:

Fax: 954-961-7222

## Government Business Alternate POC

Name: HAROLD OROZCO

Address Line 1: 3501 WEST HALLANDALE  
BEACH BLVD

Address Line 2:

City: PEMBROKE PARK

State: FL

Foreign  
Province:Zip/Postal 33023-5732  
Code:

Country: USA

U.S. Phone: 954-961-7200

Non-U.S.  
Phone:

Fax: 954-961-7222

## Past Performance Primary POC

Name:

Address Line 1:

Address Line 2:

City:

State:

Foreign  
Province:Zip/Postal  
Code:

Country:

U.S. Phone:

Non-U.S.  
Phone:

Fax:

## Past Performance Alternate POC

Name:

Address Line 1:

Address Line 2:

City:

State:

Foreign  
Province:Zip/Postal  
Code:

Country:

U.S. Phone:

Non-U.S.  
Phone:

Fax:

## Electronic Business Primary POC

Name: HAROLD OROZCO

Address Line 1: 3501 WEST HALLANDALE  
BEACH BLVD

Address Line 2:

City: PEMBROKE PARK

State: FL

Foreign  
Province:Zip/Postal 33023-5732  
Code:

Country: USA

U.S. Phone: 954-961-7200

## Electronic Business Alternate POC

Name: MARION MOSELY

Address Line 1: 3501 WEST HALLANDALE  
BEACH BLVD

Address Line 2:

City: PEMBROKE PARK

State: FL

Foreign  
Province:Zip/Postal 33023-5732  
Code:

Country: USA

U.S. Phone: 954-961-7200

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*optimum*

Use or disclosure of data contained on this sheet is subject to the restriction on the title page of this proposal.

### III. PAST PERFORMANCE RATING

Rating Scale: E = Excellent. Considerably surpassed requirements/expectations.  
G = Good. Surpassed requirements/expectations.  
S = Satisfactory. Met requirements/expectations  
M = Marginal. Met some requirements/expectations  
U = Unsatisfactory. Did not meet requirements/expectations

#### 1. QUALITY:

(Circle applicable rating)

- |                                                                       |          |   |   |   |   |   |
|-----------------------------------------------------------------------|----------|---|---|---|---|---|
| a. Conformance with contract requirements                             | <u>E</u> | G | S | M | U |   |
| b. Quality of workmanship (including subcontractors)                  | <u>E</u> | G | S | M | U |   |
| c. General oversight by project manager and superintendent            | <u>E</u> | G | S | M | U |   |
| d. Coordination with and control of subcontractors                    | <u>E</u> | G | S | M | U |   |
| e. Compliance with Davis-Bacon wage rate and labor usage requirements | NA       | E | G | S | M | U |
| f. Avoidance of accidents/safety violations                           | <u>E</u> | G | S | M | U |   |

#### 2. TIMELINESS:

- |                                                      |          |   |   |   |   |   |
|------------------------------------------------------|----------|---|---|---|---|---|
| a. Adherence to project delivery schedules           | <u>E</u> | G | S | M | U |   |
| b. Submission of change proposals                    | <u>E</u> | G | S | M | U |   |
| c. Response to technical direction and change orders | <u>E</u> | G | S | M | U |   |
| d. Response to correction of identified problems     | <u>E</u> | G | S | M | U |   |
| e. Submission of timely/accurate/complete billings   | <u>E</u> | G | S | M | U |   |
| f. Submission of materials/other submittals          | NA       | E | G | S | M | U |

#### 3. BUSINESS RELATIONS:

- |                                                                |          |   |   |   |   |
|----------------------------------------------------------------|----------|---|---|---|---|
| a. Flexibility and cooperativeness in resolving problems       | <u>E</u> | G | S | M | U |
| b. Tenacity and innovativeness in resolving problems           | <u>E</u> | G | S | M | U |
| c. Relationships with subcontractors, including prompt payment | <u>E</u> | G | S | M | U |
| d. End user was satisfied with services performed              | <u>E</u> | G | S | M | U |

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*optimum*

Use or disclosure of data contained on this sheet is subject to the restriction on the title page of this proposal

IV. COMMENTS	
Required for ratings of C (Considerably Surpassed Requirements) or D (Did Not Meet Requirements)	
Item No.	Comment
	- Weekly surface water quality plans
	- Weekly meeting w/ project manager and super very cooperative. Surface water protection plans very timely.
	<del>Hydrology</del> - NPS permit?!!? Surface water <del>SWR</del> decision within
	Used on two projects
	It was an exposed area - guide to identified area - walked eventum. within budget and schedule
Technical Evaluation Panel Member:	
Date:	

Key details and surface -



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**CCR Detail Search Results**Not to be used as certifications and representations. See ORCA for official certification.**Current Registration Status:** Active in CCR; Registration valid until  
07/28/2009.**DUNS:** 138444539**DUNS PLUS4:****CAGE/NCAGE:** 1P0F7**Legal Business Name:** OPTIMUM SERVICES, INC.**Doing Business As (DBA):****Division Name:****Division Number:****Company URL:****Physical Street Address 1:** 208 N PARROTT AVE**Physical Street Address 2:****Physical City:** OKEECHOBEE**Physical State:** FL**Physical Foreign Province:****Physical Zip/Postal Code:** 34972-7900**Physical Country:** USA**Mailing Name:** OPTIMUM SERVICES, INC.**Mailing Street Address 1:** 208 N. PARROTT AVENUE**Mailing Street Address 2:****Mailing City:** OKEECHOBEE**Mailing State:** FL**Mailing Foreign Province:****Mailing Zip/Postal Code:** 34972-2931**Mailing Country:** USA**Business Start Date:** 04/02/1997**CORPORATE INFORMATION****Type of Organization**Corporate Entity, Not Federal Tax Exempt  
(State of Incorporation is FL)**Business Types/Grants**2X - For-Profit Organization  
A5 - Veteran Owned Business  
B1 - Construction Firm  
VW - Contracts and Grants

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XS - S Corporation

**GOODS / SERVICES****North American Industry Classification System (NAICS)**

212321 - Construction Sand and Gravel Mining  
237110 - Water and Sewer Line and Related Structures Construction  
237310 - Highway, Street, and Bridge Construction  
237990 - Other Heavy and Civil Engineering Construction  
238910 - Site Preparation Contractors  
562910 - Remediation Services

**Standard Industrial Classification (SIC)**

1411 - DIMENSION STONE  
1422 - CRUSHED AND BROKEN LIMESTONE  
1429 - CRUSHED AND BROKEN STONE, NEC  
1481 - NONMETALLIC MINERALS SERVICES  
1611 - HIGHWAY AND STREET CONSTRUCTION  
1623 - WATER, SEWER, AND UTILITY LINES  
1629 - HEAVY CONSTRUCTION, NEC  
1771 - CONCRETE WORK  
1794 - EXCAVATION WORK  
1795 - WRECKING AND DEMOLITION WORK  
3531 - CONSTRUCTION MACHINERY  
4212 - LOCAL TRUCKING, WITHOUT STORAGE  
4953 - REFUSE SYSTEMS  
5032 - BRICK, STONE, & RELATED MATERIALS  
5082 - CONSTRUCTION AND MINING MACHINERY  
7353 - HEAVY CONSTRUCTION EQUIPMENT RENTAL

**Product Service Codes (PSC)**

F006 - LAND TREATMENT PRACTICES  
F012 - SURVEY LINE CLEARING  
P400 - DEMOLITION OF BUILDINGS  
P500 - DEMOLITION OF STRUCTURES/FACIL  
Y211 - CONSTRUCT/DAMS  
Y212 - CONSTRUCT/CANALS  
Y219 - CONSTRUCT/OTHER CONSERVATION  
Y221 - CONSTRUCT/AIRPORT SERVICE ROAD  
Y224 - CONSTRUCT/PARKING FACILITIES

**Federal Supply Classification (FSC)**

---

**SMALL BUSINESS TYPES**

SDB, 8A and HubZone certifications come from the Small Business Administration and are not editable by CCR vendors.

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Business Types

Expiration Date

XX - SBA Certified Hub Zone Firm

--

North American Industry Classification System (NAICS)			
The small business size status is derived from the receipts, number of employees, assets, barrels of oil, and/or megawatt hours entered by the vendor during the registration process.			
NAICS Code	Description	Small Business	Emerging Small Business
212321	Construction Sand and Gravel Mining	Yes	No
237110	Water and Sewer Line and Related Structures Construction	Yes	Yes
237310	Highway, Street, and Bridge Construction	Yes	Yes
237990	Other Heavy and Civil Engineering Construction	Yes	Yes
238910	Site Preparation Contractors	Yes	No
562910	Remediation Services	Yes	No

## CCR POINTS OF CONTACT

## Government Business Primary POC

Name: RICHARD EVANS

Address Line 1: 208 N. PARROTT AVENUE

Address Line 2:

City: OKEECHOBEE

State: FL

Foreign  
Province:Zip/Postal 34972  
Code:

Country: USA

U.S. Phone: 863-467-2572

Non-U.S.  
Phone:

Fax: 863-467-8067

## Government Business Alternate POC

Name: DAN EASTMAN

Address Line 1: 208 N. PARROTT AVENUE

Address Line 2:

City: OKEECHOBEE

State: FL

Foreign  
Province:Zip/Postal 34972  
Code:

Country: USA

U.S. Phone: 863-467-2572

Non-U.S.  
Phone:

Fax: 863-467-8067

## Past Performance Primary POC

Name: RICHARD EVANS

Address Line 1: 208 N. PARROTT AVENUE

Address Line 2:

City: OKEECHOBEE

State: FL

Foreign  
Province:Zip/Postal 34972  
Code:

Country: USA

U.S. Phone: 863-467-2572

Non-U.S.  
Phone:

## Past Performance Alternate POC

Name: DAN EASTMAN

Address Line 1: 208 N. PARROTT AVENUE

Address Line 2:

City: OKEECHOBEE

State: FL

Foreign  
Province:Zip/Postal 34972  
Code:

Country: USA

U.S. Phone: 863-467-2572

Non-U.S.  
Phone:

**2011 11 21 NPS letter denying Westwind protest  
(is Agency Report tab 18, RFD Ex. E) PROTECTED**

**Fax: 863-467-8067 319a**

**Fax: 863-467-8067**

**Electronic Business Primary POC**

**Name: RICHARD EVANS**

**Address Line 1: 208 N. PARROTT AVENUE**

**Address Line 2:**

**City: OKEECHOBEE**

**State: FL**

**Foreign**

**Province:**

**Zip/Postal 34972**

**Code:**

**Country: USA**

**U.S. Phone: 863-467-2572**

**Non-U.S.**

**Phone:**

**Fax: 863-467-8067**

**Electronic Business Alternate POC**

**Name: DAN EASTMAN**

**Address Line 1: 208 N. PARROTT AVENUE**

**Address Line 2:**

**City: OKEECHOBEE**

**State: FL**

**Foreign**

**Province:**

**Zip/Postal 34972**

**Code:**

**Country: USA**

**U.S. Phone: 863-467-2572**

**Non-U.S.**

**Phone:**

**Fax: 863-467-8067**



320a  
**SMITH, CURRIE & HANCOCK LLP**  
**ATTORNEYS AT LAW**  
A LIMITED LIABILITY PARTNERSHIP THAT INCLUDES PROFESSIONAL CORPORATIONS

Direct Dial: (404) 582-8026  
Facsimile: (404) 688-0671  
jestaak@smithcurrie.com

Reply to:  
**JOSEPH C. STAAK**  
2700 Marquis One Tower  
245 Peachtree Center Avenue, NE  
Atlanta, Georgia 30303-1227

Admitted in Georgia, Alabama  
Florida & District of Columbia

Certified by the Florida Bar  
Construction Law

November 21, 2008

**VIA FACSIMILE  
AND UPS OVERNIGHT**

**SUPPLEMENT TO AGENCY LEVEL PROTEST**

**INCLUDES PROTECTED INFORMATION NOT TO BE DISCLOSED**

Joelle M. Mascarenas  
Contracting Officer  
National Park Service  
Denver Service Center  
12795 West Alameda Parkway  
P. O. Box 25287  
Denver, Colorado 80225-0287

Re: Supplement to Agency Level Protest of Solicitation No. 1443N5297080232,  
Land Restoration and Land Clearing,  
Contract Package No. EVER-137534  
November 17, 2008 Agency Protest of Westwind Contracting, Co., Inc. pursuant  
to FAR §33.103

Dear Ms. Mascarenas:

This letter is a Supplement to the Agency Level Protest initiated by Westwind Contracting by a letter from our firm dated November 17, 2008. Our firm represents Westwind Contracting, Inc. ("Westwind") on the above-referenced Solicitation.

Westwind's original agency level protest challenged both the original review of proposals regarding Evaluation Factor III - Past Performance, and the notice of corrective action from the National Park Service ("NPS"), through its counsel's letter of November 12, 2008. That notice of corrective action was a response to a pending GAO protest. It stated that the corrective action would be a new round of pricing competition on the Solicitation between the two firms found to be in the competitive range, Westwind and Optimum Services, Inc. Westwind protested that corrective action on the grounds that NPS did not include the reevaluation of Evaluation Factor III - Past Performance. Westwind asserted that NPS had failed to correctly evaluate the past performance of offerors under the Solicitation.

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Appeal File Tab 95

1  
1022  
**Appx3305**

Joelle M. Mascarenas  
November 21 2008  
Page 2 of 3

Our protest letter of November 17 summarized the grounds for its agency level protest. This letter incorporates that original protest letter by reference and adds another issue that supports the need to re-evaluate Evaluation Factor III - Past Performance.

#### **I. Identity of Protestor**

The name and address of the Agency level Protestor is:

Westwind Contracting, Inc.  
3501 West Hallandale Beach Boulevard  
Pembroke Park, FL 33023  
Phone: 954-961-7200  
Fax: 954-961-7222

#### **II. Supplemental Grounds of Protest**

The Solicitation was for a project to Perform Remediation Services. This was emphasized at numerous locations in the Solicitation, including in Section K - Representations, Certifications and Other Statements of Offerors, in which The North American Industry Classification System (NAICS) code was designated as 562910 for this project. (See Attached Exhibit A)

Questions were raised prior to the submission of Proposals about the proper NAICS classification for this project, and an NPS Clarification was issued by NPS in Amendment 6. In that Amendment, NPS emphasized that this Solicitation was not one for site preparation but was for land restoration and thus NAICS 562910 properly applied. (See attachment B)

Optimum has not, did not, and does not list itself as a restoration contractor under NAICS 562910. The representations Optimum made at the time of the Solicitation were as a heavy and highway contractor under NAICS codes 212321, 237110, 237310, 237990, and 238910. (Attached Exhibit C)

Under Evaluation Factor III - Past Performance, the Solicitation stated that offerors would be evaluated on their prior experience on "land restoration and land clearing projects of the same scope and complexity as the contemplated contract." The contemplated contract was a land restoration contract under a specific NAICS code, a code that Optimum does not even list itself under.

NPS failed to consider that Optimum did not represent itself under the NAICS system for land restoration. It is not possible for a contractor that doesn't hold itself out under the NAICS system as a land restoration contractor to be evaluated equal to a contractor (Westwind) that has



Joelle M. Mascarenas  
November 21 2008  
Page 3 of 3

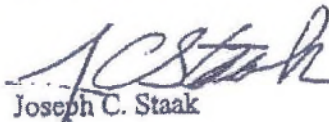
been doing land restoration work on major projects for at least 10 years. The evaluation of past performance under the Solicitation must focus on experience in restoration contracts and NPS did not do that. We therefore protest the manner and method NPS used to evaluate Past Performance. Westwind further protests the corrective action announced by NPS that consists of only pricing competition and not reopening the proper evaluation of past performance.

### III. Request for Agency Ruling and Form of Relief Requested

Westwind requests a ruling by the Agency on its protest, including its supplemental protest. Specifically, Westwind seeks a ruling that NPS failed to properly evaluate "Evaluation Factor III- Past Performance" in accordance with the criteria listed in the Solicitation. Westwind also requests a ruling that the corrective action announced in the letter from Ms Parkhurst of November 12 will not solve the problems in the original evaluation of offerors' Past Performance. Further, Westwind seeks a ruling that the two previously issued task orders under the existing contracts be performed under the authority of FAR §6.302-2. Finally, subject to the performance of the two identified task orders, Westwind seeks a ruling that the current solicitation be cancelled, that a new solicitation be developed, and that the existing contract be terminated for convenience.

Very truly yours,

SMITH, CURRIE & HANCOCK LLP



Joseph C. Staak

JCS:nd  
Enclosures  
Cc: Emily E. Parkhurst Esq. (via Facsimile w Enclosures)



# United States Department of the Interior

NATIONAL PARK SERVICE  
DENVER SERVICE CENTER  
12795 W. Alameda Parkway  
P.O. Box 25287  
Denver, Colorado 80225-0287

IN REPLY REFER TO:  
D5217 (DSC)  
1443N5297080232  
EVER-137534

December 4, 2008

Optimum Services, Inc.  
ATTN: Richard Evans  
208 N Parrott Avenue  
Okeechobee, FL 34972

Reference: Everglades National Park, Monroe County, Florida, Solicitation No. 1443N5297080232,  
Land Restoration and Land Clearing Contract, EVER-137534

Subject: Re-opening of Discussions and Request for Final Revised Price Proposals

1. This request is consistent with the bid protest corrective action plan submitted by the National Park Service to the GAO (Judge Edward Goldstein) regarding the Optimum Services, Inc., bid protest # B-400677. The corrective action plan was submitted on November 12, 2008, to the GAO. Neither party formally disagreed with the corrective action plan. The protest was subsequently dismissed by Judge Goldstein. The corrective action plan called for re-opening of discussions with the two firms in the competitive range (i.e., Optimum Services, Inc. and Westwind Contracting, Inc.) and for a request for final revised price proposals. Discussions regarding technical issues and past performance are not being held.
2. The Government is, therefore, requesting your firm to consider the issues detailed below and to submit your final revised price proposal not later than 4:00 p.m. MST, December 15, 2008.
3. You are cautioned to ensure that all bid items reflect unit prices that have been developed from only those costs that are directly allocable to each respective bid item plus any applicable markups for overhead and profit.
4. The Government reminds offerors that all bid items will be reviewed for price reasonableness and that the Government will review the unit prices in accordance with the terms of the RFP as stated in FAR 15.404 to avoid awarding to an offeror with unbalanced pricing that might subject the government to excessive price risk.
5. The Government is providing you with an Excel spreadsheet file called "Price Schedule" which you should use to summarize your price proposal. This spreadsheet is to be used to present your final revised prices. You are required to submit a completed hardcopy and electronic version of the spreadsheet fully-populated with your offered unit prices. The spreadsheets provided contain formulas to calculate the extended final prices of each bid item and as such, the contractor is only required to edit (input data) into the yellow highlighted spaces (Company Name, and Unit Price). The contractor shall maintain the existing calculation formulas as input by the Government in all

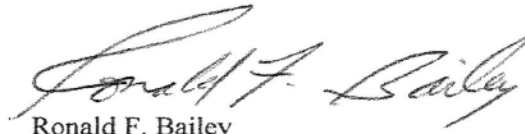
OPT11G 2011-6-17 001219



**2008 12 04 NPS letter to Optimum requesting revised price proposal**

other fields. It is suggested that you save a back-up copy of the spreadsheet prior to beginning your input in case there is an error and the spreadsheet and/or formulas become corrupted. If you have problems with the spreadsheet, contact us immediately.

6. As shown in the spreadsheet previously discussed, the total evaluated price for this award will be the sum of all extended prices (i.e., "Quantity Used For Price Evaluation" multiplied by the offered "Unit Price") for each line item, for each year, in total for the Base Year and Option Years 1-4. The "Quantity Used For Price Evaluation" in the spreadsheet reflects the rounded mid-point between the estimated range minimum and maximum.
7. In addition to the items above, the Government would like to draw your attention to some specific items noted after review of the your most recent proposal:
  - a. Please review the requirement and your estimating assumptions for Bid Item 1 – Identifying and Protecting Native Vegetation. The Government has concerns as to your offered unit price given the significantly higher price difference between it and the Independent Government Cost Estimate (IGCE).
  - b. You must comply with the solicitation requirement to propose only one unit price for each bid item. In your proposed pricing for Bid Item 9b (Earthmoving – Hauling), you proposed one unit price for the minimum quantity and a different unit price for the maximum quantity. The intent of the solicitation was for offerors to propose one single unit price that was applicable to any quantity within the designated minimum-maximum range.
  - c. While your price, in the aggregate, for all of Bid Item 9 (i.e., 9a1, 9a2, 9b, 9c, and 9d) appears to be reasonable, there is some concern as to the disparity between the individual unit prices, particularly the prices for 9b and 9c (see "3." above.)
8. If you would like to schedule a conference call to discuss the items identified in this letter, please contact the Darrin Knapp @ (303)969-2055 no later than the 2:00 PM Mountain, 4:00 PM Eastern Time, Tuesday December 9, 2008.
9. If you have any questions, please don't hesitate to contact the Contract Specialist, Darrin Knapp @ (303)969-2055 or the Contracting Officer, Joelle Mascarenas @ (303)969-2677.

  
Ronald F. Bailey  
Contracting Officer

OPT11G 2011-6-17 001220

Solicitation No. 1443N5297-08-0232

Everglades National Park

Land Restoration and Land Clearing

BASE YEAR

Offeror -

ABC Company

Bid Item No.	Description	Unit of Measure	Range		Quantity Used For Price Evaluation (Midpoint - Rounded)	Unit Price (*)	Extended Price (**)
			Min	Max			
					(A)	(B)	(A) times (B)
1	Identifying and Protecting Native Vegetation	EA	1	5	3		\$ -
2	Preparation of Disposal Site(s)	AC	1	100	51		\$ -
3a	Creating Haul Roads	MI	9	9	9		\$ -
3b	Creating Transects	MI	9	9	9		\$ -
4	Vegetation Clearing	AC	100	1,200	650		\$ -
5	Demolition	SQ YD	350	3,588	1,969		\$ -
6a	Windrowing and Scraping	CY	120,000	1,440,000	780,000		\$ -
6b	Hauling Bulk Vegetation and Substrate	CY	120,000	1,440,000	780,000		\$ -
7	Restoration - Final Scrape Down & Sweeping for Complete Removal of Substrate	AC	100	1,200	650		\$ -
8	Disposal Mound (Back Filling)	CY	120,000	1,440,000	780,000		\$ -
9a1	Earthmoving - Excavation	CY	67,662	619,738	343,700		\$ -
9a2	Earthmoving - Back Filling and Grading	CY	67,662	619,738	343,700		\$ -
9b	Earthmoving - Hauling	CY MI	676,620	12,394,760	6,535,690		\$ -
9c	Earthmoving - Dewatering	AC FT	2	421	211		\$ -
9d	Culverts	EA	1	8	5		\$ -
TOTAL BASE (Items 1-9d)							\$ -
10	OPTION 1: Vacuuming of Substrate	MO	1	5	3		\$ -
TOTAL PRICE (Items 1-10)							\$ -

(\*) - Unit prices shall be proposed and not greater than two decimal places.

(\*\*) - Do not round results when calculating the extended prices.

OPT11G 2011-6-17 001221



IN REPLY REFER TO:

## United States Department of the Interior

NATIONAL PARK SERVICE  
DENVER SERVICE CENTER  
12795 W. ALAMEDA PARKWAY  
P.O. BOX 25287  
DENVER, COLORADO 80225-0287

**INCLUDES PROTECTED INFORMATION NOT TO BE DISCLOSED**

**TO:** Westwind Contracting, Inc.  
C/O Joseph C. Staak,  
Smith, Currie & Hancock LLP,  
Attorneys At Law  
2700 Marquis One Tower  
245 Peachtree Center Avenue, NE  
Atlanta, GA 30303-1227

**FROM:** National Park Service  
Denver Service Center  
12795 W. Alameda Pkwy  
Lakewood, Co 80225

**DATE:** December 18, 2008

**SUBJECT:** Contracting Officer's Protest Decision

**RE:** Agency Level Protest of Solicitation No. 1443N5297080232,  
Land Restoration and Land Clearing, PMIS No. EVER-137534

The Contracting Officer received the referenced supplement to agency level protest dated November 21, 2008, on November 26, 2008. The government received the original agency protest on November 18, 2008 and in accordance with FAR 33.103(e), the deadline for filing this protest calculates to be not later than November 10, 2008. Therefore, we find that this supplement to agency level protest is also untimely and may be denied simply on those grounds. The FAR citation states that other than before bid opening or the closing date for receipt of proposals, "...protest shall be filed no later than 10 days after the basis of protest is known or should have been known, whichever is earlier." The agency contends that the protester should have known the basis of its protest no later than October 31, 2008, the date that they received the documents from NPS that were later included in the agency report. The documents included in that



package contained the information used as a basis for this agency level protest. Consequently, the protest was required to be filed by November 10, 2008, thereby making this protest untimely.

Even though the supplement to agency protest is considered untimely, the Government, in good faith, wishes to address in this letter the issues and concerns brought up in the protest. Any information provided herein, or attached hereto, is subject to the GAO Protective Order under Protest #B-400677.

In your supplement to agency protest, you assert that the NPS failed to properly evaluate Evaluation Factor III - Past Performance. The NPS followed the criteria it laid out for past performance as specified in the solicitation. The NPS refutes Westwind's supplemental allegations with the following information:

1. The Government complied with the terms of the solicitation. The allegation the NPS failed to ensure that Optimum was certified as a Small Business under NAICS 562910 is without standing for several reasons; The Central Contractor Registration (CCR) information (see attached) the NPS relied upon was current as of August 5, 2008 and clearly reflects the 562910 NAICS code as self certified by Optimum in CCR. Furthermore, the SBA validates a NAICS certifications of Optimum as a small business for this NAICS in CCR and is clearly reflected on the CCR print out. Editing of this field is only available to the SBA and therefore is considered accurate data. The Government also relied on the completed Section K "Representations and Certifications" section submitted by Optimum certifying they were in fact a small business under the NAICS Code 562910. The argument that Optimum is not considered small due to an omission in the ORCA system is not considered to be a valid reason to re-open past performance evaluations and would not result in a different evaluation outcome.

#### CONTRACTING OFFICER'S PROTEST DECISION

For the reasons cited in this Contracting Officer's statement, and as stated earlier in this document and the original contracting officer's protest decision, this protest was determined to be untimely. Additionally, we have shown that the Government's evaluation and rating of Evaluation Factor III - Past Performance was conducted properly. Consequently, there are no issues to be resolved in the original evaluation of the offerors' past performance. We stand by the corrective action plan announced in Ms. Parkhurst's November 12, 2008, letter. We deny the protest of Westwind Contracting, Inc. This determination may be appealed to the GAO or CBCA. All appeals to either the GAO or the CBCA must include a copy of the CO's protest decision.



*Joelle M. Mascarenas*

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JOELLE M. MASCARENAS  
Contracting Officer  
Department of the Interior  
National Park Service  
Denver Service Center  
Lakewood, CO 80225

*Ronald F. Bailey*

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RONALD F. BAILEY  
Contracting Officer – Source Selection Authority (SSA)  
East Team Branch Chief  
Department of the Interior  
National Park Service  
Denver Service Center  
Lakewood, CO 80225



IN REPLY REFER TO:

D5215/DSC-CS)  
1443N5297080232  
EVER-137534

## United States Department of the Interior

NATIONAL PARK SERVICE  
DENVER SERVICE CENTER  
12795 W. ALAMEDA PARKWAY  
P.O. BOX 25287  
DENVER, COLORADO 80225-0287



December 18, 2008

To: Contract File, Denver Service Center

From: Contract Specialist, Denver Service Center

Thru: Contracting Officer, Denver Service Center

Reference: Everglades National Park, Dade County, Florida, Solicitation No. 1443N5297080232, Land Restoration and Land Clearing, Package No. EVER-137534

Subject: Addendum to Source Selection Decision

I. As part of the Government's corrective action plan (CAP) resulting from the protest of award filed by Optimum Services, Inc. (Optimum), with GAO (Ref protest #B-400677), discussions were re-opened by letter dated December 4, 2008. Discussions were held with each of the two offerors in the competitive range. This included Optimum and Westwind Contracting, Inc. (Westwind). Westwind had previously been awarded this contract on September 18, 2008. This memorandum serves to document the discussions held and to provide the Contracting Officer's rationale for reversing the previous award of this contract, terminating the Westwind contract for convenience and awarding the new contract to Optimum.

II. The corrective action plan required re-opening of discussions with Optimum and Westwind. Discussions were to be limited to pricing and price-related factors only since there were no unresolved issues on technical qualifications or past performance. Discussions were held with each offeror on December 10, 2008. Westwind elected to have their discussions with the Government in person. Optimum chose to have their discussions done by conference call. Final proposals were due on December 15, 2008. Both offerors responded with timely submissions of their final revised price proposals.

### III. Background:

1. This requirement consists of work to ecologically restore areas and manage vegetation through land clearing or some combination thereof where anthropogenically derived soils and/or altered hydrology are controlling vegetation.
2. A competitive range was determined on August 22, 2008, to include Optimum and Westwind.

3. Discussions were subsequently held with both offerors in the competitive range.
4. The solicitation concluded with the award of an Indefinite Delivery Indefinite Quantity (IDIQ) Contract to Westwind on September 18, 2008.
5. Optimum filed a protest with the GAO on October 3, 2008. Optimum protested the award of the IDIQ contract to Westwind based on the assertion the Government failed to conduct meaningful discussions with the plaintiff and that the plaintiff was the overall low offeror. On November 12, 2008, in response to the GAO proceedings, the National Park Service proposed a CAP, which resulted in a dismissal of the protest.
  - a. The corrective action plan directed the re-opening of discussions concerning price and price related factors with the two firms in the competitive range (i.e., Optimum, and Westwind) and for final revised price proposals. Furthermore, it was determined that discussions regarding technical issues and past performance would not be held. The corrective active plan, absent a dispute from either of the interested offerors, was accepted.
6. On December 4, 2008, letters went out to the two offerors in the competitive range. The letter requested final revised price proposals for submission to the office identified in the original solicitation for receipt of offers no later than 4:00 pm MST on December 15, 2008. The letters reminded the offerors about directly allocating their costs to individual contract line item numbers (CLINs) and restated that the evaluation would be conducted in accordance with the Request for Proposal (RFP) and FAR 15.404. Each offeror's letter included several items of concern from their last revised proposal that the Government felt should be reviewed and/or addressed in their final revised price proposal. Westwind's letter drew attention to CLINs 0008 and 0009 (including sub-CLINs). Optimum's letter drew attention to CLINs 0001 and 0009 (including sub-CLINs). An Excel spreadsheet was also provided for entry of their revised prices to eliminate calculation errors.
7. Both offerors were directed to contact the project contracting officer or contract specialist to arrange an appointment for the purpose of discussions.
  - a. Westwind requested an in-person meeting with the government team for 9:00 a.m. MST, December 10, 2008. Westwind agreed to the on-site meeting with the government team at Westwind's expense.
  - b. Optimum requested a teleconference for 12:30 p.m. MST, December 10, 2008. Optimum was provided the same opportunity to meet in person with the Government team at Optimum's expense, but declined to do so.

#### IV. Westwind Negotiation Details:

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**SOURCE SELECTION INFORMATION – SEE FAR 3.104**

1. Attendees:

- a. Ron Bailey – NPS Contracting Officer (\*)
- b. Joelle Mascernas – NPS Contracting Officer
- c. Darrin Knapp – NPS Contract Specialist
- d. Tom Murphy – NPS Project Manager
- e. Robert Parks III – Westwind Contracting Executive Vice President (\*\*)
- f. Marion Mosely – Westwind Contracting CEO

(\*) Principal Government Negotiator

(\*\*) Principal Westwind Negotiator

2. Location:

- a. Denver Service Center, 12795 W Alameda Parkway, Lakewood, CO 80225
- b. All attendees were present at the discussions
- c. Meeting began promptly at 9:00 a.m.

3. Discussions:

a. The Government reiterated that there were to be no discussions about past performance and technical aspects of the solicitation. The contractor agreed.

b. Mr. Parks relayed that the requirements for CLIN #0009 (including sub-CLINS) were new to Westwind. The Government stated (Mr. Bailey) that the overall costs in CLIN #0009 are not considered out of line as a whole, but that the Government was looking to clarify the methodology used to compile the individual sub-CLINS.

c. Mr. Parks further relayed that it was Westwind's contention that they had the most experience with this project, the firm's equipment and expertise are geared to the type of work covered by the requirement, and they were very excited for this opportunity. The Government reminded everyone that past performance was not open to discussion in this forum.

d. Mr. Parks stated that CLIN #0008, Disposal Mound (Back Filling) is part of the old project terminology, but that they had also noted the Government had separated the line to remove the preparation and they understood they needed to show the difference.

e. Mr. Mosely stated that Westwind has been in this business several years and conducted many wetlands projects, in their experience, it isn't accurate to average costs, and they don't do it.

f. Mr. Parks pointed out that Jonathan Taylor had stated during the pre-proposal site visit that it was the park's desire to have equipment on hand and not have to wait for a contractor to rent the equipment from another location.

g. The Government inquired about the contractor's escalation; stating that it seemed low (2-3%) over the five year span of the contract. Mr. Parks stated that they felt that it was adequate for the market conditions, and that they had a lot of experience with this type of

3

**SOURCE SELECTION INFORMATION – SEE FAR 3.104**



work, and considering that much of the work has been in the park, they felt very comfortable with the limited escalation.

h. Mr. Parks wanted to confirm the Government would accept the revised proposal by e-mail. The Government confirmed that receipt of proposals by e-mail would be acceptable, and recommended Westwind' follow-up to ensure the Government received the proposal documents. Mr. Parks agreed.

i. Mr. Parks confirmed his understanding of each line item;

i. 0001 – The requirement is done mainly from the air, as it is impossible to drive to and around the site. They have determined that flying is the most appropriate.

ii. 0002 – The contractor states that the Preparation of Disposal Site(s) is very easy, and they have much experience in this area.

iii. 0003a and b – Mr. Parks states that they take great care in setting up the haul roads and transects and then ensuring that they maintain them throughout the life of the project.

iv. 0004 – Mr. Parks states that they have found it most effective to mow the peppers with a tracked mower first then come through with a rubber tired mower to finish up. He stated that most of the equipment is owned by his firm, but that they do sub-contract this type of work out to a specialized equipment operator, and have been using the sub-contractor for a long time.

v. 0005 – Mr. Parks states that this line is a shot in the dark to them, but that the requirement is small so risk is minimal to the firm.

vi. 0006 – Mr. Parks considers this a big ticket item to them in the park; they have developed equipment and technical knowledge to do this line efficiently.

vii. 0007 – Mr. Parks considers this line to be the Park's baby (his perception). He states that he is not able to utilize a small grader for this line because it will not hold-up to the requirement.

viii. 0008 – Mr. Parks considers this self-explanatory.

ix. 0009 – The first two sub-CLINS are self explanatory. For 9b, Mr. Parks states that he is confident that they know what it takes to do this portion, they don't average, and he has sub-contractors and a plan to keep this profitable. He acknowledges that the letter addresses this line item and some of the issues he has to deal with here are the fuel tanks, overhead and bonding requirements.

#### SOURCE SELECTION INFORMATION – SEE FAR 3.104

j. Mr. Parks inquired about the Government's final decision; is it to take the overall 5 years into consideration for award. ANSWER: The Government indicates that yes, the entire offer will be evaluated for award. Furthermore, the Government intends to have all the issues wrapped up before the Christmas holiday.

k. Mr. Mosely stated that he was concerned the issue will come down to a bidding war. The Government responded that it has a responsibility to ensure offerors are submitting responsible prices and that no award will be made to a firm that appears to drop the pricing too low during this phase.

l. Mr. Mosely questions whether the Government would expect to renegotiate the current task orders in light of the revised pricing? The Government stated that that issue hadn't been determined at this point.

m. The Government provided clarification on the following questions:

i. CLIN 0009b, can the Government narrow down the haul distance for this CLIN? ANSWER: The Government refers the contractor to Amendment #0005 of the solicitation for the answer.

ii. CLIN 0009c, would the contractor be able to submit for additional costs in the event the initial de-watering was accomplished and then there was a significant storm event, which caused the area to require additional de-watering? ANSWER: The Government would consider re-negotiating the unforeseen event if there was work, which couldn't be completed.

n. The meeting adjourned at 10:15 a.m. MST.

#### V. Optimum Negotiation Details:

##### 1. Attendees:

- a. Ron Bailey – NPS Contracting Officer (\*)
- b. Joelle Mascernas – NPS Contracting Officer
- c. Darrin Knapp – NPS Contract Specialist
- d. Jonathan Taylor – NPS Technical Representative (Everglades)
- e. Rick Evans – Optimum Vice President (\*\*)
- f. Dan Eastman – Optimum President
- g. Neil Shelton - Estimator

(\*) Principal Government Negotiator

(\*\*) Principal Optimum Negotiator

##### 2. Location:

5

**SOURCE SELECTION INFORMATION – SEE FAR 3.104**

- a. Teleconference
  - b. All attendees participated in the discussion by calling the Government provided toll free teleconference center phone line.
  - c. Meeting began promptly at 12:30 p.m. MST
3. Discussions:
- d. The Government reiterated that there were to be no discussions about past performance and technical aspects of the solicitation. The contractor agreed, but queried if they change the price would they be responsible to identify revised technical information? The Government would expect technical clarifications if affected by the different pricing.
  - e. Mr. Evans requested clarification on whether the Government would accept e-mailed proposals. The Government confirmed that e-mailed proposals were acceptable and directed the contractor to confirm receipt by the Government. Optimum agreed.
  - f. Mr. Evans inquired about if CLIN #0001 and the efforts to clear to the edges prior to setting up will be paid for under CLIN #0001 or CLIN #0004? The Government states that the costs for clearing are more appropriate under CLIN #0004. Optimum indicates that they had made an assumption that was incorrect and that CLIN #0001 would reflect a reduction in costs that were already covered under CLIN #0004 and as such, they would not show an increase to another CLIN due to this reduction. The Government indicated to Optimum that during the initial round of discussions that a page must have been missing as the assumptions were not readily apparent. Optimum agreed their assumptions were not apparent in the last round of pricing.
  - g. Mr. Evans questioned how the Government would identify unbalanced pricing? ANSWER: The Government will follow the FAR guidance at 15.404 as it applies to the RFP, utilizing methods such as, but not limited to, market comparison, comparison to the independent Government cost estimate, and historical data.
  - h. Mr. Evans questioned why the revised spreadsheet provided by the Government is missing the unit of issue? ANSWER: The Government will review the spreadsheet and make a determination to include the unit of issue for each CLIN.
  - i. Mr. Evans questioned how the final evaluation would be conducted. ANSWER: The Government is not sure if there is a certain price break for a final determination.
  - j. Will Government apply some technical to final evaluation? The Government is not going to say – response reasonable price is winning – Government needs reasonable price looking at the numbers to feed the 5-year totals to come to final evaluated price.

**SOURCE SELECTION INFORMATION – SEE FAR 3.104**

k. The Government noted errors in the original Optimum pricing and asked that Optimum review the final submissions for similar errors. Optimum agreed to scrutinize their final offer.

l. The Government cautioned Optimum against submitting multiple unit prices.

m. The Government provided clarification on the following questions:

i. CLIN 0009b, can the Government narrow down the haul distance for this CLIN? ANSWER: The Government refers the contractor to Amend #0005 of the solicitation for the answer.

ii. CLIN 0009c, would the contractor be able to submit for additional costs in the event the initial de-watering was accomplished and then there was a significant storm event, which caused the area to require additional de-watering? ANSWER: The Government would consider re-negotiating the unforeseen event if there was work, which couldn't be completed.

iii. Mr. Evans inquired if there was anything else to provide? ANSWER: The Government would like to see the cost detail for unit prices. Optimum indicates that there was a level of breakdown in the technical proposal.

iv. Would the Government allow Optimum to obtain the line items used in the first two task orders? ANSWER: The Government will remove the pricing and cost data from the schedules for the first two task orders and provide them to Optimum.

v. What are limits of boundaries to identify a task order? ANSWER: The funding level is the biggest limitation.

vi. Are the first two task orders an accurate representation of the work under the proposed contract action? ANSWER: The work proposed under the first two task orders is historically accurate, but not necessarily accurate for future task orders. The requirement of the current proposed action (IDIQ Contract) is structured to meet future anticipated requirements.

vii. The redacted task order schedules were provided to Optimum immediately following the discussions.

viii. The meeting adjourned at 1:32 p.m. MST

#### VI. Proposals:

1. Both offerors submitted their final revised proposals by the specified due date/time.

**SOURCE SELECTION INFORMATION – SEE FAR 3.104**



2. Final revised prices from each offeror and detailed analyses of such are detailed in the spreadsheets identified below:

Optimum: Exhibits A-1 thru A-6:

- A-1: Total Five-Year Evaluated Prices
- A-2: Base Year Price Analyses
- A-3: Option Year 1 Price Analyses
- A-4: Option Year 2 Price Analyses
- A-5: Option Year 3 Price Analyses
- A-6: Option Year 4 Price Analyses

Westwind: Exhibits B-1 thru B-6

- B-1: Total Five-Year Evaluated Prices
- B-2: Base Year Price Analyses
- B-3: Option Year 1 Price Analyses
- B-4: Option Year 2 Price Analyses
- B-5: Option Year 3 Price Analyses
- B-6: Option Year 4 Price Analyses

3. Pricing Summary:

The overall pricing is summarized below:

	<u>Optimum</u>	<u>Westwind</u>	<u>IGCE</u>
Total Evaluated Price For All Five Years Using Mid-Point Quantities	\$47,332,562.52	\$51,103,286.15	\$66,945,195.28

4. This represents a price advantage for Optimum over Westwind in the amount of \$3,770,723.62, or eight percent (rounded).

5. The attached exhibits show that, over all line items combined, Optimum was able to reduce their total evaluated price by 22 percent while Westwind lowered their price by 10 percent.

6. The price proposals were reviewed by the members of the TEP and contracting personnel. It was confirmed that neither offeror proposed any prices that seemed unbalanced or that their proposed prices were too low to reasonably accomplish the work.

**SOURCE SELECTION INFORMATION – SEE FAR 3.104**

#### VII. Recommendation:


1. Prices are determined fair and reasonable as adequate price competition was achieved and founded on the information detailed in the above discussion. Audits, field pricing support, and certified cost and pricing data are not required.
2. Westwind is determined responsible pursuant to FAR Part 9.104-1 based on the following:
  - a. Westwind is not identified as a debarred firm on the Procurement, or Procurement or Non-Procurement listings.
  - b. Westwind maintains a current registration status in the Central Contractor Registration database.
  - c. A review of Westwind's comprehensive business report produced by the Dun & Bradstreet doesn't reveal any significant weaknesses.
3. Optimum is determined responsible pursuant to FAR Part 9.104-1 based on the following:
  - a. Optimum is not identified as a debarred firm on the procurement, or non-procurement listings.
  - b. Optimum maintains a current registration status in the Central Contractor Registration database.
  - c. A review of Optimum's comprehensive business report produced by the Dun & Bradstreet doesn't reveal any significant weaknesses.

#### VIII. Source Selection Decision:

1. It is recommended that Contract 1443C5297080232 and the two task orders previously awarded under that contract (T5297080232 and T5297080556) to Westwind be terminated for the convenience of the Government.
2. A new IDIQ contract should be awarded to Optimum using the negotiated tasks and associated pricing as contained in their Contract Price Schedule submitted on December 15, 2008, as Optimum now represents the best value to the Government.
3. Two task orders shall be awarded to Optimum, as previously awarded to Westwind, upon execution of the termination for convenience using Optimum's negotiated IDIQ prices.

**SOURCE SELECTION INFORMATION – SEE FAR 3.104**

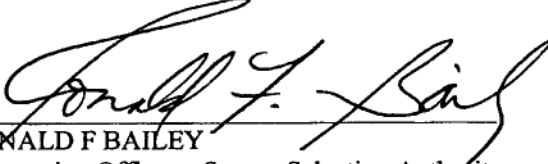
Prepared by:

  
DARRIN KNAPP  
Contract Specialist

Approved by:

  
JOELLE M MASCARENAS  
Contracting Officer

Approved by:

  
RONALD F BAILEY  
Contracting Officer – Source Selection Authority

Attach: Exhibits A-1 thru A-6 (Price Analyses for Optimum)  
Exhibits B-1 thru B-6 (Price Analyses for Westwind)

**SOURCE SELECTION INFORMATION – SEE FAR 3.104**

Solicitation No. 1443N5297-08-0232  
Everglades National Park  
Land Restoration and Land Clearing

## Total Five-Year Evaluated Price

Exhibit A - 1

### Offeror - Optimum Services Inc.

Bid Item No.	Description	Extended Price Total (Base plus OP YR 1-4)	Changes From Previous Proposal				Difference From IGCE				Difference From Westwind Services, Inc.			
			Previous Proposal	Amount Changed	Percent Changed		IGCE	Dollar Amount Difference	Percent Difference		Westwind's Price	Dollar Amount Difference	Percent Difference	
					> 10 % change > 50 % change				> 10 % diff > 50 % diff				> 10 % diff > 50 % diff	
1	Identifying and Protecting Native Vegetation	\$ 80,182.80	\$ 581,325.09	\$ (501,142.29)	(86)		\$50,238.20	\$19,944.60	33		\$ 58,161.00	\$ 22,021.80	38	
2	Preparation of Disposal Site(s)	\$ 601,668.93	\$ 867,185.13	\$ (265,516.20)	(31)		\$481,989.78	\$119,679.15	25		\$ 482,562.00	\$ 119,106.93	25	
3a	Creating Haul Roads	\$ 317,398.32	\$ 349,044.94	\$ (31,646.62)	(9)		\$771,344.22	(\$453,943.90)	(59)		\$ 869,410.00	\$ (552,011.68)	(63)	
3b	Creating Trusscots	\$ 185,149.12	\$ 196,439.28	\$ (11,290.16)	(6)		\$46,703.62	\$138,445.50	296		\$ 283,138.00	\$ (97,988.88)	(35)	
4	Vegetation Clearing	\$ 7,668,329.50	\$ 8,612,227.00	\$ (943,897.50)	(11)		\$6,143,007.00	\$1,525,322.50	25		\$ 6,891,300.00	\$ 777,029.50	11	
5	Demolition	\$ 443,438.49	\$ 375,035.43	\$ 68,403.06	18		\$1,753,670.16	(\$1,310,231.67)	(75)		\$ 686,978.65	\$ (237,540.16)	(35)	
6a	Windrowing and Scrapping	\$ 2,932,800.00	\$ 3,018,600.00	\$ (85,800.00)	(3)		\$5,070,000.00	(\$2,137,200.00)	(42)		\$ 4,812,600.00	\$ (1,879,800.00)	(39)	
6b	Hauling Bulk Vegetation and Substrate	\$ 11,239,800.00	\$ 13,049,400.00	\$ (1,809,600.00)	(14)		\$12,222,600.00	(\$982,800.00)	(8)		\$ 13,782,600.00	\$ (2,542,800.00)	(18)	
7	Restoration - Final Scarpe Down & Sweeping for Complete Removal of Substrate	\$ 3,938,727.00	\$ 4,019,463.50	\$ (80,736.50)	(2)		\$1,357,733.00	\$2,580,994.00	190		\$ 4,464,200.00	\$ (525,473.00)	(12)	
8	Disposal Mound (Back Filling)	\$ 5,850,000.00	\$ 6,021,600.00	\$ (171,600.00)	(3)		\$5,384,800.00	\$265,200.00	5		\$ 2,496,000.00	\$ 3,354,000.00	134	
9a1	Earthmoving - Excavation	\$ 1,185,765.00	\$ 1,330,119.00	\$ (144,354.00)	(11)		\$2,512,447.00	(\$1,326,682.00)	(53)		\$ 1,666,945.00	\$ (481,180.00)	(29)	
9a2	Earthmoving - Back Filling and Grading	\$ 842,065.00	\$ 952,049.00	\$ (109,984.00)	(12)		\$4,856,481.00	(\$4,014,416.00)	(83)		\$ 1,666,945.00	\$ (824,880.00)	(49)	
9b	Earthmoving - Hauling	\$ 9,803,535.00	\$ 11,404,779.05	\$ (1,601,244.05)	(14)		\$25,162,406.50	(\$15,358,871.50)	(61)		\$ 12,091,026.50	\$ (2,287,491.50)	(19)	
9c	Earthmoving - Dewatering	\$ 1,127,237.96	\$ 8,363,683.41	\$ (7,236,445.45)	(87)		\$144,511.79	\$982,726.17	680		\$ 332,325.00	\$ 794,912.96	239	
9d	Culverts	\$ 120,655.45	\$ 196,811.45	\$ (76,156.00)	(39)		\$38,551.85	\$82,103.60	213		\$ 126,155.00	\$ (5,499.55)	(4)	
Item 9 Combined Subtotal		\$ 13,079,258.41	\$ 22,247,441.91	\$ (9,168,183.50)	(41)		\$ 32,714,398.14	\$ (19,635,139.73)	(60)		\$ 15,883,396.50	\$ (2,804,138.09)	(18)	
TOTAL BASE (Items 1-9d)		\$ 46,336,752.57	\$ 59,337,762.28	\$ (13,001,009.71)	(22)		\$66,206,482.12	(\$19,869,729.55)	(30)		\$ 50,704,346.15	\$ (4,367,593.58)	(9)	
10	OPTION 1: Vacuuming of Substrate	\$ 995,809.95	\$ 1,026,109.74	\$ (30,299.79)	(3)		\$738,713.16	\$257,096.79	35		\$ 398,940.00	\$ 596,869.95	150	
TOTAL PRICE (Items 1-10)		\$ 47,332,562.52	\$ 60,363,872.02	\$ (13,031,309.50)	(22)		\$66,944,195.28	(\$19,612,632.76)	(29)		\$ 51,103,286.15	\$ (3,770,723.63)	(7)	

339a



Exhibit A - 2

Solicitation No. 144NS197-08-0232  
 Everglades National Park  
 Land Restoration and Land Clearing

**BASE YEAR**

Officer - Optimum Services Inc.										Previous Proposal				Amount Changed				Percent Changed				IGCE				Dollar Variance From IGCE				Percent Variance From IGCE			
Bid Item No.	Description	Unit of Measure	Range		Quantity Used For Price Evaluation (Quantity Awarded)	(B)		(A) Item (B)		Extended Price		Unit Price		Extended Price		Unit Price		Extended Price		Unit Price		Extended Price		Unit Price		Extended Price							
			Min	Max		Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price																		
1	Identifying and Protecting Native Vegetation	EA	1	5	3	\$	4,954.20	\$	14,952.60																								
2	Preparation of Disposal Site(s)	AC	1	100	51	\$	2,200.00	\$	112,200.00																								
3a	Creating Haul Roads	MI	9	9	9	\$	7,000.00	\$	63,000.00																								
3b	Creating Treatment	MI	9	9	9	\$	7,000.00	\$	63,000.00																								
4	Vegetation Clearing	AC	100	1,200	650	\$	2,200.00	\$	1,430,000.00																								
5	Demolition	SQ YD	350	3,388	1,969	\$	42.00	\$	82,698.00																								
6a	Windrowing and Scrublag	CY	120,000	1,440,000	780,000	\$	0.70	\$	546,000.00																								
6b	Hauling Bulk Vegetation and Substrate	CY	120,000	1,440,000	780,000	\$	2.69	\$	2,098,200.00																								
7	Restoration - Final Scraper Downs & Sweeping for Complete Removal of Substrate	AC	100	1,200	650	\$	1,130.00	\$	734,500.00																								
8	Disposal Material (Back Filling)	CY	120,000	1,440,000	780,000	\$	1.40	\$	1,092,000.00																								
9a1	Earthmoving - Excavation	CY	67,662	619,718	343,700	\$	0.65	\$	223,402.50																								
9a2	Earthmoving - Back Filling and Grading	CY	67,662	619,718	343,700	\$	0.45	\$	154,665.00																								
9b	Earthmoving - Hauling	CY MI	676,602	12,394,760	6,535,690	\$	0.28	\$	1,829,993.20																								
9c	Earthmoving - De-watering	AC FT	2	421	211	\$	996.25	\$	210,208.75																								
9d	Culverts	EA	1	8	5	\$	4,500.00	\$	22,500.00																								
TOTAL BASE (Items 1-9d)												\$	8,774,312.45																				
10	OPTION 1: Vacuuming of Substrate	MO	1	5	3	\$	61,900.00	\$	185,700.00																								
TOTAL PRICE (Items 1-10)												\$	8,960,022.45																				

Exhibit A - 3

Solicitation No. 1443N5297-08-0232  
 Everglades National Park  
 Land Restoration and Land Clearing

## OPTION YEAR 1

Optimum Services Inc.										Previous Proposal		Amount Changed		Percent Changed		IGCE		Dollar Variance From IGCE		Percent Variance From IGCE	
Bid Item No.	Description	Unit of Measure	Range		Quantity Used For Price Evaluation (Proposed - Assumed)	(B)		(A) Unit (B)		Unit Price		Extended Price		Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price
			Min	Max		Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price										
1	Identifying and Protecting Native Vegetation	EA	1	5	3	\$ 5,198.65	\$	15,475.95	(86)		(\$1,694.35)	(\$9,089.03)	(86)		\$3,892.91	\$11,678.73	\$1,265.74	\$3,797.22	33	33	
2	Preparation of Disposal Site(s)	AC	1	100	51	\$ 2,277.00	\$	116,127.00	(20)		(\$957.00)	(\$48,807.00)	(20)		\$1,833.50	\$9,558.50	\$443.59	\$22,618.50	24	24	
3a	Creating Haul Roads	MI	4	4	4	\$ 12,420.00	\$	49,680.00	(8)		(\$1,125.00)	(\$4,500.00)	(8)		\$30,281.52	\$121,126.08	(\$17,466.98)	(\$71,466.98)	(39)	(39)	
3b	Creating Traverses	MI	4	4	4	\$ 7,245.00	\$	28,980.00	(5)		(\$378.00)	(\$1,512.00)	(5)		\$1,833.50	\$7,334.00	\$5,411.50	\$21,666.00	295	295	
4	Vegetation Clearing	AC	100	1,200	650	\$ 2,277.00	\$	1,480,050.00	(10)		(\$12,450.00)	(\$17,965.00)	(10)		\$1,833.50	\$1,191,775.00	\$443.50	\$288,375.00	24	24	
5	Demolition	SQ YD	350	3,588	1,969	\$ 43.47	\$	85,592.43	20		\$7.24	\$14,355.56	20		\$172.79	\$340,223.51	(\$139.32)	(\$254,631.08)	(75)	(75)	
6a	Widening and Scraping	CY	120,000	1,440,000	780,000	\$ 0.72	\$	561,600.00	(3)		(\$6.02)	(\$15,600.00)	(3)		\$1.26	\$982,800.00	(\$0.54)	(\$431,200.00)	(43)	(43)	
6b	Hauling Bulk Vegetation and Substrate	CY	120,000	1,440,000	780,000	\$ 2.78	\$	2,108,400.00	(15)		(\$9.48)	(\$374,400.00)	(15)		\$3.03	\$2,363,400.00	(\$0.25)	(\$195,000.00)	(8)	(8)	
7	Restoration - Final Scarpe Downs & Sweeping for Complete Removal of Substrate	AC	100	1,200	650	\$ 1,169.55	\$	760,207.50	8		\$88.05	\$57,332.50	8		\$405.24	\$262,666.00	\$764.31	\$496,801.50	189	189	
9a1	Earthmoving - Excavation	CY	120,000	1,440,000	780,000	\$ 1.45	\$	1,131,000.00	(1)		(\$0.02)	(\$15,600.00)	(1)		\$1.39	\$1,064,200.00	\$0.06	\$48,800.00	4	4	
9a2	Earthmoving - Back Filling and Grading	CY	67,662	619,738	343,700	\$ 0.67	\$	230,279.00	(9)		(\$0.07)	(\$24,839.00)	(9)		\$1.42	\$488,054.00	(\$0.75)	(\$327,775.00)	(53)	(53)	
9b	Earthmoving - Hauling	CY MI	676,620	12,394,760	6,535,690	\$ 0.47	\$	1,615,350.10	(11)		(\$0.06)	(\$30,022.00)	(11)		\$2.74	\$941,738.00	(\$2.27)	(\$790,199.00)	(83)	(83)	
9c	Earthmoving - Dewatering	AC FT	2	421	211	\$ 1,093.12	\$	217,566.32	(12)		(\$8.04)	(\$1,674.60)	(12)		\$0.75	\$4,901,367.50	\$0.46)	(\$3,066,417.40)	(81)	(81)	
9d	Calverts	EA	1	8	5	\$ 4,657.50	\$	23,287.50	(46)		(\$6,807.88)	(\$1,373,162.68)	(46)		\$132.87	\$28,033.57	\$898.25	\$199,510.75	676	676	
TOTAL BASE (Items 1-9d)												(\$2,829.09)	(\$14,145.00)	(34)		\$1,509.47	\$7,547.35	\$3,148.03	\$15,746.15	209	209
TOTAL BASE (Items 1-9d)													(\$2,335,386.27)	(21)		\$12,826,594.24		(\$3,901,459.44)		(30)	
10	OPTION 1: Vacuuming of Substrate	MO	1	5	3	\$ 64,066.50	\$	192,199.50	(1)		(\$978.50)	(\$2,785.50)	(1)		\$47,771.40	\$143,114.20	\$16,295.10	\$48,885.30	34	34	
TOTAL PRICE (Items 1-10)												(\$1,455,906.07)	(\$3,338,171.77)	(20)		\$2,969,898.44		(\$1,852,174.14)		(30)	

## Exhibit A - 4

Solicitation No. 1443N5297-08-0232  
 Everglades National Park  
 Land Restoration and Land Clearing

## OPTION YEAR 2

Optimum Services Inc.										Previous Proposal				Amount Changed				Percent Changed				IGCE				Dollar Variance From IGCE				Percent Variance From IGCE			
Officer -	Bid Item No.	Description	Unit of Measure	Range		Quantity Used For Price Evaluation (per item - included)	(B)		(A) Unit (B)	Previous Proposal		Amount Changed		Percent Changed		IGCE		Dollar Variance From IGCE		Percent Variance From IGCE													
				Min	Max		Unit Price	Extended Price		Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price												
	1	Identifying and Protecting Native Vegetation	EA	1	5	3	\$ 3,339.20	\$	16,017.60	\$38,697.75	\$116,093.25	(\$33,338.55)	(\$100,075.65)	(86)	(86)	\$4,009.70	\$13,039.10	\$1,329.56	\$3,984.50	33	33												
	2	Preparation of Disposal Site(s)	AC	1	100	51	\$ 2,356.70	\$	120,191.70	\$3,395.70	\$173,180.70	(\$1,039.00)	(\$32,989.00)	(31)	(31)	\$1,888.50	\$96,613.50	\$468.26	\$31,878.20	25	25												
	2a	Creating Haul Roads	MI	4	4	4	\$ 12,854.70	\$	51,418.80	\$14,222.25	\$56,889.00	(\$1,367.55)	(\$5,470.20)	(10)	(10)	\$31,189.97	\$124,799.88	(\$13,335.27)	(\$73,341.08)	(39)	1												
	2b	Creating Trunkways	MI	4	4	4	\$ 7,498.58	\$	29,994.32	\$8,004.15	\$32,016.60	(\$505.57)	(\$2,022.28)	(6)	(6)	\$1,888.50	\$7,554.00	\$5,610.08	\$22,440.32	297	297												
	4	Vegetation Clearing	AC	100	1,200	650	\$ 2,356.70	\$	1,531,825.00	\$1,646.00	\$1,719,500.00	(\$389.30)	(\$18,045.00)	(11)	(11)	\$1,888.50	\$1,227,525.00	\$468.20	\$394,330.00	25	25												
	5	Demolition	SQ YD	350	3,588	1,969	\$ 44.99	\$	88,383.31	\$18.04	\$74,900.76	\$6.95	\$13,684.55	18	18	\$177.97	\$350,422.93	(\$132.98)	(\$261,837.62)	(75)	(75)												
	6a	Windrowing and Scrubbing	CY	120,000	1,440,000	780,000	\$ 0.75	\$	\$81,000.00	\$0.77	\$600,600.00	(\$0.02)	(\$15,600.00)	(3)	(3)	\$1.29	\$1,006,300.00	(\$0.54)	(\$421,200.00)	(42)	(42)												
	6b	Hauling Bulk Vegetation and Substrate	CY	120,000	1,440,000	780,000	\$ 2.88	\$	2,246,400.00	\$3.42	\$2,667,600.00	(\$0.54)	(\$411,300.00)	(16)	(16)	\$3.12	\$2,435,600.00	(\$8.24)	(\$187,200.00)	(8)	(8)												
	7	Restoration - Final Strappe Down & Sweeping for Complete Removal of Substrate	AC	100	1,200	650	\$ 1,210.48	\$	786,812.00	\$1,135.58	\$738,127.00	\$74.90	\$48,683.00	7	7	\$417.40	\$271,310.00	\$793.08	\$515,502.00	190	190												
	8	Disposal Material (Black Filling)	CY	120,000	1,440,000	780,000	\$ 1.50	\$	1,170,000.00	\$1.54	\$1,201,200.00	(\$0.04)	(\$31,200.00)	(3)	(3)	\$1.43	\$1,115,400.00	\$0.07	\$54,600.00	5	5												
	9a1	Earthmoving - Excavation	CY	67,662	619,738	343,700	\$ 0.69	\$	237,153.00	\$6.77	\$264,649.00	(\$0.09)	(\$27,496.00)	(10)	(10)	\$1.46	\$501,802.00	(\$0.77)	(\$264,649.00)	(53)	(53)												
	9a2	Earthmoving - Back Filling and Grading	CY	67,662	619,738	343,700	\$ 0.49	\$	168,413.00	\$0.55	\$189,035.80	(\$0.06)	(\$20,622.00)	(11)	(11)	\$2.82	\$969,234.00	(\$3.33)	(\$800,821.00)	(83)	(83)												
	9b	Earthmoving - Hauling	CY MI	676,620	12,394,760	6,535,690	\$ 0.30	\$	1,960,707.00	\$0.35	\$2,287,491.50	(\$0.05)	(\$336,784.50)	(14)	(14)	\$0.77	\$5,032,481.30	(\$0.47)	(\$3,071,774.30)	(61)	(61)												
	9c	Earthmoving - Dewatering	AC FT	2	421	211	\$ 1,067.21	\$	225,181.31	\$7,915.95	\$1,670,265.45	(\$6,848.74)	(\$1,445,084.14)	(87)	(87)	\$138.86	\$78,877.46	\$930.33	\$196,303.55	680	680												
	9d	Churns	EA	1	8	5	\$ 4,820.51	\$	24,102.55	\$7,860.83	\$39,304.15	(\$3,040.33)	(\$15,201.60)	(39)	(39)	\$1,381.99	\$6,909.95	\$3,438.53	\$17,192.60	249	249												
	TOTAL BASE (Items 1-9d)									\$11,821,232.41		(\$2,589,420.82)		(22)		\$13,184,419.12		(\$3,940,587.53)		(30)													
	10	OPTION 1: Vacuuming of Substrate	MO	1	5	3	\$ 66,308.83	\$	198,926.49	\$68,244.75	\$204,734.25	(\$1,935.92)	(\$5,807.76)	(3)	(3)	\$49,204.54	\$147,613.62	\$17,044.29	\$51,312.87	35	7												
	TOTAL PRICE (Items 1-10)									\$12,035,986.66		(\$2,595,228.58)		(22)		\$13,332,032.74		(\$3,891,274.66)		(29)													

## Exhibit A - 5

Solicitation No. 1443N5297-08-0233  
 Everglades National Park  
 Land Restoration and Land Clearing

## OPTION YEAR 3

Optimum Services Inc.										Previous Proposal				Amount Changed				Percent Changed				IOCE				Dollar Variance From IOCE				Percent Variance From IOCE			
Offeror -	Bid Item No.	Description	Unit of Measure	Range		Quantity Used For Price Evaluation (Average - Based)	(B)		(A) times (B)	Previous Proposal		Amount Changed		Percent Changed		IOCE		Dollar Variance From IOCE		Percent Variance From IOCE													
				Min	Max		Unit Price	Extended Price		Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price														
	1	Identifying and Protecting Native Vegetation	EA	1	5	3	5	5,526.07	\$	16,578.21	\$40,632.64	\$131,897.92	(\$55,106.57)	(\$165,119.71)	(46)	(46)	\$4,129.99	\$13,389.97	\$1,396.08	\$4,188.24	34	34											
	2	Preparation of Disposal Site(s)	AC	1	100	51	5	2,439.18	\$	124,398.18	\$3,566.49	\$181,839.99	(\$1,126.31)	(\$57,441.81)	(32)	(32)	\$1,845.16	\$99,303.16	\$494.02	\$25,195.02	25	25											
	3a	Creating Haul Roads	MI	4	4	4	5	13,304.61	\$	53,218.44	\$14,933.36	\$59,733.44	(\$5,638.75)	(\$65,515.00)	(11)	(11)	\$32,125.67	\$138,502.48	(\$18,821.06)	(\$75,384.20)	(59)	( )											
	3b	Creating Trunkline	MI	4	4	4	4	7,761.03	\$	31,044.12	\$4,404.36	\$23,617.44	(\$443.33)	(\$2,573.32)	(8)	(8)	\$1,845.16	\$7,780.64	\$5,815.87	\$23,263.48	299	299											
	4	Vegetation Clearing	AC	100	1,200	650	5	2,439.18	\$	1,585,467.00	\$2,778.30	\$1,805,895.00	(\$239.12)	(\$210,428.00)	(12)	(12)	\$1,845.16	\$1,264,354.00	\$494.02	\$231,113.00	25	25											
	5	Demolition	SQ YD	350	3,588	1,969	5	46.56	\$	91,676.64	\$39.94	\$78,641.86	\$6.62	\$13,034.78	17	17	\$183.31	\$360,977.39	(\$136.75)	(\$269,360.75)	(75)	(79)											
	6a	Windrowing and Striping	CY	120,000	1,440,000	780,000	5	0.78	\$	608,400.00	\$0.81	\$631,400.00	(\$0.03)	(\$23,400.00)	(4)	(4)	\$1.33	\$1,037,400.00	(\$0.55)	(\$429,000.00)	(44)	(41)											
	6b	Hauling Bark Vegetation and Substrate	CY	120,000	1,440,000	780,000	5	2.98	\$	2,324,400.00	\$3.59	\$2,800,300.00	(\$5.61)	(\$475,900.00)	(17)	(17)	\$3.21	\$2,503,000.00	(\$0.22)	(\$179,400.00)	(7)	(7)											
	7	Restoration - Final Scarpe Down & Sweeping for Complete Removal of Substrate	AC	100	1,200	650	5	1,252.85	\$	814,322.50	\$1,192.35	\$775,027.50	\$60.50	\$39,325.00	5	5	\$428.92	\$279,448.00	\$822.93	\$594,904.50	191	191											
	8	Disposal Mound (Back Filling)	CY	120,000	1,440,000	780,000	5	1.55	\$	1,209,000.00	\$1.62	\$1,263,600.00	(\$0.07)	(\$54,600.00)	(4)	(4)	\$1.47	\$1,146,000.00	\$0.08	\$62,600.00	5	5											
	9a1	Earthmoving - Excavation	CY	67,662	618,738	343,700	5	0.71	\$	244,027.00	\$0.81	\$278,397.00	(\$0.10)	(\$34,370.00)	(12)	(12)	\$1.50	\$515,550.00	(\$0.79)	(\$271,322.00)	(53)	(53)											
	9a2	Earthmoving - Back Filling and Grading	CY	67,662	618,738	343,700	5	0.51	\$	175,287.00	\$0.58	\$199,346.00	(\$0.07)	(\$24,059.00)	(12)	(12)	\$2.91	\$1,000,167.00	(\$2.40)	(\$524,880.00)	(82)	(82)											
	9b	Earthmoving - Hauling	CY MI	676,620	12,984,760	6,535,690	5	0.31	\$	2,035,063.90	\$0.37	\$2,385,326.85	(\$0.06)	(\$359,462.95)	(15)	(15)	\$0.79	\$5,163,195.10	(\$0.48)	(\$3,137,131.20)	(61)	(61)											
	9c	Earthmoving - Devolving	AC FT	2	421	211	5	1,104.56	\$	233,062.16	\$8,311.75	\$1,753,779.25	(\$7,207.19)	\$1,502,317.09	(87)	(87)	\$146.97	\$29,744.67	\$963.59	\$203,317.49	684	684											
	9d	Calverts	EA	1	8	5	5	4,989.23	\$	24,946.15	\$8,253.87	\$41,899.35	(\$3,264.44)	(\$16,323.20)	(40)	(40)	\$1,601.39	\$8,006.95	\$3,387.64	\$16,599.20	212	212											
	TOTAL BASE (Items 1-9d)										\$12,410,571.60		\$2,848,650.30		(23)			\$13,557,079.56		(\$3,995,158.26)		(29)											
	10	OPTION 1: Vacuuming of Substrate	MO	1	5	3	5	68,629.64	\$	203,888.92	\$71,656.99	\$214,970.97	(\$3,077.33)	(\$9,082.05)	(4)	(4)	\$50,680.68	\$1,042,042.04	\$17,948.96	\$3,846.88	35	3											
	TOTAL PRICE (Items 1-10)										\$12,625,542.57		\$2,857,732.35		(23)			\$13,706,121.60		(\$3,941,311.38)		(29)											



Solicitation No. 1443N5297-08-0232  
Everglades National Park  
Land Restoration and Land Clearing

OPTION YEAR 4

Offeror - Optimum Services Inc.

Bid Item No.	Description	Unit of Measure	Range		Quantity Used Per Price Estimation (Average - rounded)	(A)		(B)		(A) times (B)	
			Min	Max							
1	Identifying and Protecting Native Vegetation	EA	1	5	3	5	\$ 5,719.48	\$		17,158.44	
2	Preparation of Disposal Site(s)	AC	1	100	51	5	\$ 2,324.55	\$		128,752.05	
3a	Creating Haul Roads	MI	4	4	4	4	\$ 13,770.27	\$		55,081.08	
3b	Creating Trunklines	MI	4	4	4	4	\$ 8,032.67	\$		32,130.68	
4	Vegetation Clearing	AC	100	1,200	650	650	\$ 2,524.55	\$		1,640,957.50	
5	Demolition	SQ YD	350	3,588	1,969	1,969	\$ 48.19	\$		94,886.11	
6a	Windrowing and Scrubbing	CY	120,000	1,440,000	780,000	780,000	\$ 0.81	\$		631,800.00	
6b	Hauling Bulk Vegetation and Substrate	CY	120,000	1,440,000	780,000	780,000	\$ 3.08	\$		2,402,400.00	
7	Restoration - Final Scarps Down & Sweeping for Complete Removal of Substrate	AC	100	1,200	650	650	\$ 1,296.70	\$		842,855.00	
8	Disposal Mound (Back Filling)	CY	120,000	1,440,000	780,000	780,000	\$ 1.60	\$		1,248,000.00	
9a1	Earthmoving - Excavation	CY	67,662	619,734	343,700	343,700	\$ 0.70	\$		240,590.00	
9a2	Earthmoving - Back Filling and Grading	CY	67,662	619,734	343,700	343,700	\$ 0.33	\$		182,161.00	
9b	Earthmoving - Hauling	CY MI	676,620	12,194,760	6,535,690	6,535,690	\$ 0.32	\$		2,091,420.80	
9c	Earthmoving - Dewatering	AC FT	2	421	211	211	\$ 1,143.22	\$		241,219.42	
9d	Calverts	EA	1	8	5	5	\$ 5,163.85	\$		25,819.25	
TOTAL BASE (Items 1-9d)											\$ 9,885,542.33
10	OPTION 1: Vaccuming of Substrate	MO	1	5	3	3	\$ 71,071.68	\$		213,095.04	
TOTAL PRICE (Items 1-10)											\$ 10,098,637.37

Previous Proposal		Amount Changed		Percent Changed		ICCE		Dollar Variance From ICCE		Percent Variance From ICCE	
Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price
\$42,664.27	\$127,990.81	(\$36,944.79)	(\$10,824.37)	(87)	(87)	\$4,233.89	\$12,761.67	\$1,465.59	\$4,396.77	34	34
\$3,743.76	\$190,931.76	(\$1,219.21)	(\$62,179.71)	(33)	(33)	\$2,003.52	\$103,179.52	\$321.02	\$36,572.53	26	26
\$15,880.03	\$62,720.12	(\$1,909.76)	(\$7,639.04)	(12)	(12)	\$13,089.43	\$132,357.72	(\$19,319.16)	(\$7,276.60)	(15)	(15)
\$8,824.58	\$32,298.32	(\$791.91)	(\$3,167.64)	(9)	(9)	\$2,003.52	\$8,014.08	\$6,029.15	\$24,116.60	301	301
\$2,917.22	\$1,896,193.00	(\$392.67)	(\$355,235.59)	(13)	(13)	\$2,003.52	\$1,302,288.00	\$221.02	\$338,669.50	26	26
\$41.93	\$82,560.17	\$6.26	\$12,325.94	15	15	\$188.81	\$37,176.49	(\$140.62)	(\$276,830.78)	(74)	(74)
\$0.85	\$663,000.00	(\$0.04)	(\$31,200.00)	(5)	(5)	\$1.37	\$1,068,600.00	(\$0.56)	(\$476,800.00)	(41)	(41)
\$3.77	\$2,946,600.00	(\$0.69)	(\$538,200.00)	(18)	(18)	\$3.31	\$2,581,800.00	(\$0.23)	(\$178,400.00)	(7)	(7)
\$1,251.97	\$813,780.50	\$44.73	\$20,074.50	4	4	\$442.82	\$287,833.00	\$853.88	\$355,022.00	193	193
\$1.70	\$1,376,000.00	(\$6.10)	(\$78,000.00)	(6)	(6)	\$1.52	\$1,185,600.00	\$0.08	\$62,400.00	5	5
\$0.85	\$292,145.00	(\$0.12)	(\$41,244.00)	(14)	(14)	\$1.55	\$332,735.00	(\$0.82)	(\$311,334.00)	(53)	(53)
\$0.61	\$209,657.00	(\$0.08)	(\$77,696.00)	(13)	(13)	\$3.00	\$1,031,100.00	(\$2.47)	(\$848,519.00)	(82)	(82)
\$0.39	\$2,516,240.65	(\$0.07)	(\$424,819.85)	(17)	(17)	\$0.81	\$2,293,908.90	(\$0.49)	(\$2,302,488.10)	(60)	(60)
\$8,727.33	\$1,841,466.63	(\$7,384.11)	(\$1,600,247.41)	(87)	(87)	\$145.19	\$30,035.09	\$998.03	\$210,384.33	687	687
\$8,666.56	\$43,332.80	(\$3,502.71)	(\$17,513.55)	(40)	(40)	\$1,649.43	\$8,247.15	\$2,514.42	\$17,572.10	213	213
\$11,041,918.76		(\$3,156,376.43)		(24)		\$13,948,827.02		(\$4,064,384.69)		(29)	
\$75,239.84	\$325,719.52	(\$4,208.16)	(\$72,624.48)	(6)	(6)	\$52,201.10	\$196,003.50	\$18,830.58	\$56,491.74	36	36
\$11,267,638.28		(\$3,160,000.91)		(24)		\$14,106,839.32		(\$4,007,792.95)		(28)	

## Exhibit B-1

## Total Five-Year Evaluated Price

Solicitation No. 1443NS197-08-0232  
 Everglades National Park  
 Land Restoration and Land Clearing

## Offeror - Westwind Contracting, Inc.

Bid Item No.	Description	Extended Price Total (Base plus OP YR 1-4)	Changes From Previous Proposal			Difference From IGCE			Difference From Optimum Services, Inc.		
			Previous Proposal	Dollar Amount Changed	Percent Changed	IGCE	Dollar Amount Difference	Percent Difference	Optimum's Price	Dollar Amount Difference	Percent Difference
					> 30 % change > 50 % change			> 30 % diff > 50 % diff			> 30 % diff > 50 % diff
1	Identifying and Protecting Native Vegetation	\$ 58,161.00	\$ 56,241.00	\$ 1,920.00	3	\$ 60,238.20	\$ (2,077.20)	(3)	\$ 80,182.80	\$ (22,021.80)	(27)
2	Preparation of Disposal Site(s)	\$ 482,562.00	\$ 470,730.00	\$ 11,832.00	3	\$ 481,989.78	\$ 572.22	0	\$ 601,668.93	\$ (119,106.93)	(20)
3a	Creating Haul Roads	\$ 869,410.00	\$ 845,510.00	\$ 23,900.00	3	\$ 771,342.22	\$ 98,067.78	13	\$ 317,398.32	\$ 552,011.68	174
3b	Creating Transects	\$ 283,138.00	\$ 275,450.00	\$ 7,688.00	3	\$ 46,703.62	\$ 236,434.38	506	\$ 183,149.12	\$ 97,988.88	53
4	Vegetation Clearing	\$ 6,891,300.00	\$ 6,600,750.00	\$ 290,550.00	4	\$ 6,143,007.00	\$ 748,293.00	12	\$ 7,668,329.50	\$ (777,025.50)	(10)
5	Demolition	\$ 680,978.65	\$ 923,461.00	\$ (242,482.35)	(26)	\$ 1,753,670.16	\$ (1,072,691.51)	(61)	\$ 443,438.49	\$ 237,540.16	54
6a	Windrowing and Scraping	\$ 4,812,600.00	\$ 4,602,000.00	\$ 210,600.00	5	\$ 5,070,000.00	\$ (257,400.00)	(5)	\$ 2,932,800.00	\$ 1,879,800.00	64
6b	Hauling Bulk Vegetation and Substrate	\$ 13,782,600.00	\$ 13,353,600.00	\$ 429,000.00	3	\$ 12,222,600.00	\$ 1,560,000.00	13	\$ 11,239,800.00	\$ 2,542,800.00	23
7	Restoration - Final Scarpe Down & Sweeping for Complete Removal of Substrate	\$ 4,464,200.00	\$ 4,320,550.00	\$ 143,650.00	3	\$ 1,357,733.00	\$ 3,106,467.00	229	\$ 3,938,727.00	\$ 525,473.00	13
8	Disposal Mound (Back Filling)	\$ 2,496,000.00	\$ 2,418,000.00	\$ 78,000.00	3	\$ 5,584,800.00	\$ (3,088,800.00)	(55)	\$ 5,850,000.00	\$ (3,354,000.00)	(57)
9a1	Earthmoving - Excavation	\$ 1,666,945.00	\$ 2,134,377.00	\$ (467,432.00)	(22)	\$ 2,512,447.00	\$ (845,502.00)	(34)	\$ 1,185,765.00	\$ 481,180.00	41
9a2	Earthmoving - Back Filling and Grading	\$ 1,666,945.00	\$ 2,134,377.00	\$ (467,432.00)	(22)	\$ 4,856,481.00	\$ (3,189,536.00)	(66)	\$ 842,065.00	\$ 824,880.00	98
9b	Earthmoving - Hauling	\$ 12,091,026.50	\$ 17,646,363.00	\$ (5,555,336.50)	(31)	\$ 25,162,406.50	\$ (13,071,380.00)	(52)	\$ 9,803,535.00	\$ 2,287,491.50	23
9c	Earthmoving - Dewatering	\$ 332,325.00	\$ 650,302.00	\$ (317,977.00)	(49)	\$ 144,511.79	\$ 187,813.21	130	\$ 1,127,237.96	\$ (794,912.96)	(71)
9d	Culverts	\$ 126,155.00	\$ 128,775.00	\$ (2,620.00)	(2)	\$ 38,351.85	\$ 87,603.15	227	\$ 120,655.45	\$ 5,499.55	5
	Item 9 Combined Subtotal	\$ 15,883,396.50	\$ 22,694,194.00	\$ (6,810,797.50)	(30)	\$ 32,714,398.14	\$ (16,831,001.64)	(51)	\$ 13,079,258.41	\$ 2,804,138.09	21
	TOTAL BASE (Items 1-9d)	\$ 50,704,346.15	\$ 56,560,486.00	\$ (5,856,139.85)	(10)	\$ 66,206,482.12	\$ (15,502,135.97)	(23)	\$ 46,336,752.57	\$ 4,367,593.58	9
10	OPTION 1 Vacuuming of Substrate	\$ 398,940.00	\$ 385,875.00	\$ 13,065.00	3	\$ 738,713.16	\$ (339,773.16)	(46)	\$ 995,809.95	\$ (596,869.95)	(60)
	TOTAL PRICE (Items 1-10)	\$ 51,103,286.15	\$ 56,946,361.00	\$ (5,843,074.85)	(10)	\$ 66,945,195.28	\$ (15,841,909.13)	(24)	\$ 47,332,562.52	\$ 3,770,723.63	8

Exhibit B-2

Solicitation No. 1443N5297-08-0233  
 Everglades National Park  
 Land Restoration and Land Clearing

BASE YEAR

Offeror - Westwind Contracting, Inc.

Bid Item No.	Description	Unit of Measure	Range	Quantity Unit for Price Evaluation (A)	Unit Price (B)	Extended Price (A times B)	Previous Proposal		Amount Charged		Percent Charged		ICCTE		Dollar Variance From LOCE		Percent Variance From LOCE	
							Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price
1	Identifying and Protecting Native Vegetation	EA	1	5	3	\$ 1,600.00	\$ 10,800.00		\$0.00	\$0.00	0	0	\$1,792.91	\$11,378.73	(\$192.91)	(\$178.73)	(3)	(5)
2	Preparation of Disposal Site(s)	AC	1	100	31	\$ 1,760.00	\$ 89,760.00	\$1,760.00	\$0.00	\$0.00	0	0	\$1,700.10	\$90,765.10	(\$20.10)	(\$1,025.10)	(1)	(1)
3a	Clearing Fuel Roads	MI	9	9	9	\$ 31,250.00	\$ 394,250.00	\$31,250.00	\$0.00	\$0.00	0	0	\$20,399.54	\$264,595.86	\$1,350.46	\$30,154.14	11	11
3b	Clearing Transverse	MI	9	9	9	\$ 10,670.00	\$ 96,030.00	\$10,670.00	\$0.00	\$0.00	0	0	\$1,780.10	\$16,020.90	\$4,889.90	\$98,009.10	499	499
4	Vegetation Clearing	AC	100	1,200	650	\$ 1,950.00	\$ 1,267,500.00	\$1,950.00	\$0.00	\$0.00	0	0	\$1,780.10	\$1,157,065.00	\$169.90	\$110,435.00	10	10
5	Demolition	SQ YD	350	3,588	1,069	\$ 64.75	\$ 127,495.75	\$90.00	\$25.25	(\$40,717.25)	(24)	(24)	\$167.76	\$330,319.44	(\$103.01)	(\$202,826.69)	(61)	(61)
6a	Undercutting and Scraping	CY	120,000	1,440,000	780,000	\$ 1.14	\$ 889,200.00	\$1.14	\$0.00	\$0.00	0	0	\$1.25	\$975,000.00	(\$0.11)	(\$85,800.00)	(9)	(9)
6b	Heaving Bulk Vegetation and Solenaceae	CY	120,000	1,440,000	780,000	\$ 3.38	\$ 2,558,400.00	\$3.38	\$0.00	\$0.00	0	0	\$3.00	\$2,340,000.00	\$0.38	\$218,400.00	9	9
7	Remediation - Final Scarpe Ditch & Sweeping for Complete Removal of Solenaceae	AC	100	1,200	650	\$ 1,275.00	\$ 825,750.00	\$1,275.00	\$0.00	\$0.00	0	0	\$393.44	\$251,736.00	\$881.56	\$573,014.00	224	224
8	Disposal Mound (Back Filling)	CY	120,000	1,440,000	780,000	\$ 0.60	\$ 468,000.00	\$0.60	\$0.00	\$0.00	0	0	\$1.35	\$1,057,000.00	(\$0.75)	(\$589,000.00)	(56)	(56)
9a	Earthmoving - Excavation	CY	67,662	619,738	343,700	\$ 0.91	\$ 312,767.00	\$1.20	\$0.29	(\$99,673.00)	(24)	(24)	\$1.36	\$474,306.00	(\$0.47)	(\$161,539.00)	(34)	(34)
9b	Earthmoving - Back Filling and Grading	CY	67,662	619,738	343,700	\$ 0.91	\$ 312,767.00	\$1.20	\$0.29	(\$99,673.00)	(24)	(24)	\$2.66	\$914,242.00	(\$1.75)	(\$601,475.00)	(66)	(66)
9c	Earthmoving - Hauling	CY MI	676,620	12,394,760	6,515,690	\$ 0.35	\$ 2,287,491.50	\$0.52	\$0.17	(\$1,111,067.30)	(33)	(33)	\$0.73	\$4,771,033.70	(\$0.38)	(\$2,483,562.30)	(52)	(52)
9d	Earthmoving - Dewatering	AC FT	2	421	211	\$ 295.00	\$ 62,245.00	\$396.00	\$0.00	(\$62,245.00)	(10)	(10)	\$129.00	\$27,219.00	\$166.00	\$35,026.00	129	129
9e	Calverts	EA	1	8	5	\$ 4,750.00	\$ 23,750.00	\$4,950.00	\$0.00	(\$1,000.00)	(4)	(4)	\$1,568.09	\$7,840.45	\$3,181.91	\$15,999.35	203	203
TOTAL BASE (Items 1-9d)							\$11,053,078.90	\$11,053,078.90	\$1,423,375.55		(13)		\$12,688,562.18		(\$1,635,483.28)		(24)	
10	OPTION 1: Vacuuuming of Solenaceae	MO	1	5	3	\$ 24,700.00	\$ 74,100.00	\$24,700.00	\$0.00	\$0.00	0	0	\$46,380.00	\$139,140.00	(\$21,680.00)	(\$65,040.00)	(47)	(47)
TOTAL PRICE (Items 1-10)							\$11,127,178.90	\$11,127,178.90	\$1,423,375.55		(13)		\$12,827,702.18		(\$1,700,523.28)		(24)	

Exhibit B-3

Solicitation No. 1443N5297-08-0232  
 Everglades National Park  
 Land Restoration and Land Clearing

OPTION YEAR 1

Officer -

Westwind Contracting, Inc.

Westwind Contracting, Inc.																					
Bid Item No.	Description	Unit of Measure	Range		Quantity Used Per Price Evaluation (Notes 1-4)	(A)		(B)		Previous Proposal		Amount Changed		Percent Changed		IGCE		Dollar Variance From IGCE		Percent Variance From IGCE	
			Min	Max				Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price		
1	Identifying and Protecting Native Vegetation	EA	1	5	3	3	3,745.00	\$	11,235.00	\$3,672.00	\$11,016.00	\$73.00	\$219.00	2	2	\$3,892.91	\$11,678.73	(\$147.91)	(\$443.73)	(4)	(4)
2	Preparation of Disposal Site(s)	AC	1	100	51	51	1,830.00	\$	91,310.00	\$1,800.00	\$91,800.00	\$20.00	\$1,510.00	2	2	\$1,833.50	\$91,508.50	(\$3.50)	(\$178.50)	(9)	(9)
3a	Creating Haul Roads	MT	4	4	4	4	34,060.00	\$	136,240.00	\$33,405.00	\$123,620.00	\$655.00	\$2,620.00	2	2	\$30,281.52	\$121,126.08	\$3,778.48	\$15,113.92	12	12
3b	Creating Traverses	MT	4	4	4	4	11,097.00	\$	44,388.00	\$10,885.00	\$43,540.00	\$212.00	\$848.00	2	2	\$1,833.50	\$7,334.00	\$5,283.50	\$37,054.00	505	505
4	Vegetation Clearing	AC	100	1,200	650	650	2,028.00	\$	1,318,200.00	\$1,990.00	\$1,292,500.00	\$38.00	\$24,700.00	2	2	\$1,833.50	\$1,191,775.00	\$194.50	\$126,425.00	11	11
5	Demolition	SQ YD	350	3,488	1,969	1,969	5	67.00	\$	\$91.80	\$180,754.20	(\$24.80)	(\$48,831.20)	(27)	(27)	\$172.79	\$340,223.51	(\$105.79)	(\$208,300.51)	(61)	(61)
6a	Windrowing and Scrubbing	CY	120,000	1,440,000	780,000	780,000	5	1.19	\$	\$1.16	\$904,800.00	\$0.03	\$23,400.00	3	3	\$1.26	\$982,100.00	(\$0.07)	(\$54,600.00)	(6)	(6)
6b	Hauling Bulk Vegetation and Substrate	CY	120,000	1,440,000	780,000	780,000	5	3.41	\$	\$3.35	\$2,613,000.00	\$0.06	\$46,800.00	2	2	\$3.03	\$2,363,400.00	\$0.38	\$796,400.00	13	13
7	Restoration - Final Scarpe Down & Sweeping for Complete Removal of Substrate	AC	100	1,200	650	650	5	1,326.00	\$	\$1,300.00	\$845,000.00	\$26.00	\$16,900.00	2	2	\$405.24	\$263,406.00	\$200.76	\$598,494.00	227	227
8	Disposal Mound (Back Filling)	CY	120,000	1,440,000	780,000	780,000	5	0.62	\$	\$0.61	\$475,800.00	\$0.01	\$7,800.00	2	2	\$1.39	\$1,084,300.00	(\$0.77)	(\$600,600.00)	(53)	(53)
9a1	Earthmoving - Excavation	CY	67,662	619,738	341,700	341,700	5	0.94	\$	\$1.22	\$419,314.00	(\$0.28)	(\$96,236.00)	(23)	(23)	\$1.42	\$488,054.00	(\$9.48)	(\$164,976.00)	(34)	(34)
9a2	Earthmoving - Back Filling and Grading	CY	67,662	619,738	341,700	341,700	5	0.94	\$	\$1.22	\$419,314.00	(\$0.28)	(\$96,236.00)	(23)	(23)	\$2.74	\$941,738.00	(\$1.80)	(\$618,660.00)	(66)	(66)
9b	Earthmoving - Hauling	CY MT	676,620	12,394,740	6,335,690	6,335,690	5	0.36	\$	\$0.53	\$3,463,915.70	(\$0.17)	(\$111,067.30)	(32)	(32)	\$0.75	\$4,901,767.50	(\$0.39)	(\$2,548,918.10)	(52)	(52)
9c	Earthmoving - Dewatering	AC FT	2	421	211	211	5	305.00	\$	\$602.00	\$127,022.00	(\$297.00)	(\$62,667.00)	(49)	(49)	\$132.87	\$28,035.57	\$172.13	\$38,319.43	130	130
9d	Culverts	EA	1	8	5	5	5	4,895.00	\$	\$5,090.00	\$25,250.00	(\$155.00)	(\$775.00)	(3)	(3)	\$1,509.47	\$7,347.33	\$3,385.33	\$16,927.65	224	224
TOTAL BASE (Items 1-9d)										\$11,047,645.90	(\$1,290,995.50)		(12)	(12)	\$12,326,594.24		(\$3,065,943.84)		(24)		
10	OPTION 1: Vacuuming of Substrate	MO	1	5	3	3	25,690.00	\$	77,070.00	\$25,200.00	\$75,600.00	\$490.00	\$1,470.00	2	2	\$47,771.40	\$143,314.20	(\$22,081.40)	(\$66,244.20)	(46)	(46)
TOTAL PRICE (Items 1-10)										\$11,123,245.90	(\$1,289,525.50)		(12)	(12)	\$12,969,984.44		(\$3,135,188.94)		(24)		



Exhibit B-4

Solicitation No. 1443N5397-JB-0232  
Everglades National Park  
Land Restoration and Land Clearing

## OPTION YEAR 2

Bid Item No.	Description	Unit of Measure	Range	Quantity Used For Price Determination (Assumed)	Previous Proposal		Amount Changed		Percent Changed		IGCE		Dollar Variance From IGCE		Percent Variance From IGCE	
					Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price
1	Identifying and Protecting Native Vegetation	EA	1	5		\$3,750.00	\$11,250.00	\$145.00	\$435.00	4	\$4,009.79	\$12,029.10	(\$114.79)	\$244.10	(3)	(1)
2	Preparation of Disposal Site(s)	AC	1	100		\$1,850.00	\$94,350.00	\$50.00	\$2,550.00	3	\$1,881.50	\$96,313.50	\$11.50	\$366.50	1	
3a	Creating Head Roads	MI	4	4		\$34,075.00	\$136,300.00	\$1,465.00	\$5,860.00	4	\$31,189.97	\$124,759.88	\$4,350.03	\$17,400.12	14	
3b	Creating Traverses	MI	4	4		\$11,105.00	\$44,400.00	\$440.00	\$1,760.00	4	\$1,881.50	\$7,554.00	\$9,651.50	\$38,606.00	511	511
4	Vegetation Clearing	AC	100	1,200		\$2,030.00	\$1,219,500.00	\$80.00	\$52,000.00	4	\$1,881.50	\$1,227,520.00	\$221.50	\$143,975.00	12	12
5	Demolition	SQ YD	350	3,588		\$53.75	\$194,593.75	(\$24.75)	(\$88,732.75)	(26)	\$177.97	\$350,422.93	(\$108.97)	(\$214,561.93)	(61)	(61)
6a	Windrowing and Striping	CY	120,000	1,440,000		\$1.18	\$932,400.00	\$0.06	\$46,800.00	5	\$1.29	\$1,908,000.00	(\$60.03)	(\$39,000.00)	(4)	(4)
6b	Hauling Bulk Vegetation and Substrate	CY	120,000	1,440,000		\$3.42	\$2,667,600.00	\$0.13	\$101,400.00	4	\$3.12	\$2,433,600.00	\$0.43	\$334,400.00	14	14
7	Restoration - Final Strippe Drives & Sweeping for Complete Removal of Substrate	AC	100	1,200		\$1,370.00	\$864,500.00	\$50.00	\$37,500.00	4	\$417.40	\$271,310.00	\$962.60	\$625,690.00	231	231
8	Disposal Mound (Back Filling)	CY	120,000	1,440,000		\$0.62	\$483,600.00	\$0.02	\$15,600.00	3	\$1.43	\$1,115,400.00	(\$98.78)	(\$616,200.00)	(55)	(55)
9a1	Earthmoving - Excavation	CY	67,662	619,738		\$1.34	\$426,118.00	(\$0.27)	(\$92,799.00)	(22)	\$1.46	\$501,800.00	(\$99.49)	(\$108,433.00)	(34)	(34)
9a2	Earthmoving - Back Filling and Grading	CY	67,662	619,738		\$1.34	\$426,118.00	(\$0.27)	(\$92,799.00)	(22)	\$2.82	\$949,234.00	(\$1.85)	(\$635,845.00)	(66)	(66)
9b	Earthmoving - Hauling	CY MI	676,620	12,394,760		\$0.54	\$3,529,272.60	(\$0.17)	(\$1,111,067.30)	(31)	\$0.77	\$5,032,481.30	(\$8.40)	(\$2,614,276.00)	(52)	(52)
9c	Earthmoving - De-watering	AC FT	2	421		\$615.00	\$129,765.00	(\$300.00)	(\$63,300.00)	(49)	\$136.86	\$28,877.46	\$178.14	\$37,587.54	130	130
9d	Culverts	EA	1	8		\$5,150.00	\$25,760.00	(\$108.00)	(\$540.00)	(2)	\$1,381.99	\$6,999.95	\$3,660.01	\$18,300.05	265	265
TOTAL BASE (Items 1-9d)						\$11,255,657.35		(\$1,150,333.05)		(10)		\$13,104,419.12		(\$3,071,094.12)		(23)
10	OPTION 1: Vacuuming of Substrate	MO	1	5		\$22,700.00	\$77,100.00	\$1,020.00	\$3,660.00	4	\$49,204.54	\$147,615.62	(\$22,484.54)	(\$67,433.62)	(46)	
TOTAL PRICE (Items 1-10)						\$11,340,757.35		(\$1,473,733.65)		(10)		\$13,332,032.74		(\$3,138,548.44)		(24)

Exhibit B-5

Solicitation No. 1443N537-08-0232  
Everglades National Park  
Land Restoration and Land Clearing

## OPTION YEAR 3

Offeror - Westwind Contracting, Inc.

Bid Item No.	Description	Unit of Measure	Range		Quantity Used For Price Estimation (A)	Unit Price	Extended Price	Previous Proposal		Amount Changed		Percent Changed		ICCE		Dollar Variance From ICCE		Percent Variance From ICCE	
			Min	Max				Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price
1	Identifying and Protecting Native Vegetation	EA	1	5	3	\$ 4,012.00	\$ 12,036.00												
2	Preparation of Disposal Site(s)	AC	1	100	51	\$ 1,957.00	\$ 99,807.00												
3a	Creating Haul Roads	MI	4	4	4	\$ 36,485.00	\$ 145,940.00												
3b	Creating Trusscuts	MI	4	4	4	\$ 11,890.00	\$ 47,560.00												
4	Vegetation Clearing	AC	100	1,200	650	\$ 2,174.00	\$ 1,413,100.00												
5	Demolition	SQ YD	350	3,588	1,969	\$ 71.10	\$ 139,995.90												
6a	Windrowing and Striping	CY	120,000	1,440,000	780,000	\$ 1.28	\$ 998,400.00												
6b	Hauling Bulk Vegetation and Substrate	CY	120,000	1,440,000	780,000	\$ 3.66	\$ 2,854,800.00												
7	Restoration - Final Scarpe Drove & Sweeping for Complete Removal of Substrate	AC	100	1,200	650	\$ 1,422.00	\$ 934,300.00												
8	Disposal Mound (Back Filling)	CY	120,000	1,440,000	780,000	\$ 0.66	\$ 514,800.00												
9a1	Earthmoving - Excavation	CY	67,602	619,738	343,700	\$ 1.00	\$ 343,700.00												
9a2	Earthmoving - Back Filling and Grading	CY	67,602	619,738	343,700	\$ 1.00	\$ 343,700.00												
9b	Earthmoving - Hauling	CY MI	676,620	12,394,760	6,535,690	\$ 0.38	\$ 2,483,562.20												
9c	Earthmoving - Dewatering	AC FT	2	421	211	\$ 325.00	\$ 68,575.00												
9d	Calvers	EA	1	8	5	\$ 5,194.00	\$ 25,970.00												
TOTAL BASE (Items 1-9d)							\$ 10,166,244.10												
10	OPTION 1: Viewpoint of Substrate	MO	1	5	3	\$ 27,520.00	\$ 82,560.00												
TOTAL PRICE (Items 1-10)							\$ 10,098,406.10												

Exhibit B-6

Solicitation No. 1443N5297-08-0232  
 Everglades National Park  
 Land Restoration and Land Clearing

## OPTION YEAR 4

Westwind Contracting, Inc.									
Bid Item No.	Description	Unit of Measure	Range		Quantity Used Per Price Evaluation Amount	Unit Price	Extended Price	(A) times (B)	
			Min	Max					
1	Identifying and Protecting Native Vegetation	EA	1	5	3	\$ 4,135.00	\$ 12,405.00		
2	Preparation of Disposal Site(s)	AC	1	100	51	\$ 2,015.00	\$ 102,765.00		
3a	Clearing Hard Roads	M1	4	4	4	\$ 37,330.00	\$ 150,220.00		
3b	Clearing Traverses	M1	4	4	4	\$ 12,250.00	\$ 49,000.00		
4	Vegetation Clearing	AC	100	1,200	650	\$ 2,340.00	\$ 1,521,000.00		
5	Demolition	SQ YD	350	3,548	1,969	\$ 74.00	\$ 145,796.00		
6a	Windrowing and Scrubbing	CY	120,000	1,440,000	780,000	\$ 1.32	\$ 1,039,600.00		
6b	Hauling Bulk Vegetation and Substrate	CY	120,000	1,440,000	780,000	\$ 3.77	\$ 2,940,600.00		
7	Restoration - Final Scrape Down & Sweeping for Complete Removal of Substrate	AC	100	1,200	650	\$ 1,465.00	\$ 952,250.00		
8	Disposal Mound (Sick Filling)	CY	120,000	1,440,000	780,000	\$ 0.68	\$ 530,400.00		
9a1	Earthmoving - Excavation	CY	67,662	616,738	343,700	\$ 1.03	\$ 354,011.00		
9a2	Earthmoving - Back Filling and Grading	CY	67,662	616,738	343,700	\$ 1.03	\$ 354,011.00		
9b	Earthmoving - Hauling	CY MI	676,620	12,394,760	6,335,090	\$ 0.39	\$ 2,548,919.10		
9c	Earthmoving - Dewatering	AC FT	2	421	211	\$ 335.00	\$ 70,685.00		
9d	Calvera	EA	1	8	5	\$ 5,350.00	\$ 26,750.00		
TOTAL BASE (Items 1-9d)							\$ 10,784,421.10		
10	OPTION 1: Viewmowing of Substrate	MO	1	5	3	\$ 28,350.00	\$ 85,050.00		
TOTAL PRICE (Items 1-10)							\$ 10,872,471.10		

Previous Proposal		Amount Changed		Percent Changed		IGCE		Dollar Variance From IGCE		Percent Variance From IGCE	
Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price	Unit Price	Extended Price
\$3,900.00	\$11,700.00	\$235.00	\$705.00	6	6	\$4,135.89	\$12,761.67	(\$118.89)	(\$366.67)	(7)	(3)
\$1,930.00	\$58,430.00	\$85.00	\$4,335.00	4	4	\$2,005.52	\$102,179.52	\$11.48	\$85.48	1	1
\$33,450.00	\$141,800.00	\$2,130.00	\$8,520.00	6	6	\$33,085.43	\$132,857.72	\$4,490.57	\$17,962.28	14	14
\$11,550.00	\$46,200.00	\$700.00	\$2,800.00	6	6	\$2,003.52	\$8,014.08	\$10,246.48	\$40,993.52	511	511
\$2,115.00	\$1,374,750.00	\$235.00	\$146,250.00	11	11	\$2,003.52	\$1,302,288.00	\$336.48	\$218,712.00	17	17
\$97.70	\$192,371.30	(\$23.70)	(\$66,663.30)	(24)	(24)	\$188.81	\$371,766.89	(\$114.81)	(\$226,060.89)	(65)	(65)
\$1.22	\$951,600.00	\$9.10	\$78,000.00	8	8	\$1.37	\$1,068,600.00	(\$0.83)	(\$79,000.00)	(4)	(4)
\$3.57	\$2,784,600.00	\$0.20	\$156,000.00	6	6	\$3.31	\$2,581,800.00	\$0.46	\$38,800.00	14	14
\$1,385.00	\$900,250.00	\$80.00	\$32,000.00	6	6	\$442.82	\$287,833.00	\$1,022.18	\$664,417.00	231	231
\$0.64	\$499,200.00	\$0.04	\$3,200.00	6	6	\$1.52	\$1,185,600.00	(\$0.84)	(\$635,200.00)	(55)	(55)
\$1.39	\$443,373.00	(\$0.36)	(\$89,362.00)	(20)	(20)	\$1.55	\$532,735.00	(\$0.32)	(\$178,724.00)	(34)	(34)
\$1.29	\$443,373.00	(\$0.36)	(\$89,362.00)	(20)	(20)	\$3.00	\$1,031,100.00	(\$1.97)	(\$877,089.00)	(66)	(66)
\$0.56	\$3,659,984.40	(\$0.17)	\$1,111,067.30	(30)	(30)	\$0.81	\$5,393,908.00	(\$0.42)	(\$2,744,989.80)	(52)	(52)
\$645.00	\$136,095.00	(\$310.00)	(\$85,410.00)	(48)	(48)	\$145.19	\$20,635.09	\$189.81	\$46,049.91	131	131
\$5,355.00	\$26,775.00	(\$5.00)	(\$25.00)	(9)	(9)	\$1,649.43	\$8,247.15	\$3,700.57	\$18,502.85	224	224
TOTAL BASE (Items 1-9d)							\$13,949,837.02		(\$3,161,404.92)		(23)
\$26,775.00	\$80,325.00	\$1,275.00	\$4,725.00	6	6	\$52,201.10	\$156,603.30	(\$23,851.10)	(\$71,553.30)	(46)	(46)
TOTAL PRICE (Items 1-10)							\$14,106,430.32				(23)

Optimum Escalation
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		<u>Base to OP1</u>	<u>OP1 to OP2</u>	<u>OP2 to OP 3</u>	<u>OP3 to OP4</u>
1	Identifying and Protecting Native Vegetation	3.50%	3.50%	3.50%	3.50%
2	Preparation of Disposal Site(s)	3.50%	3.50%	3.50%	3.50%
3a	Creating Haul Roads	3.50%	3.50%	3.50%	3.50%
3b	Creating Transects	3.50%	3.50%	3.50%	3.50%
4	Vegetation Clearing	3.50%	3.50%	3.50%	3.50%
5	Demolition	3.50%	3.50%	3.49%	3.50%
6a	Windrowing and Scraping	2.86%	4.17%	4.00%	3.85%
6b	Hauling Bulk Vegetation and Substrate	3.35%	3.60%	3.47%	3.36%
7	Restoration - Final Scrape Down & Sweeping for Complete Removal of Substrate	3.50%	3.50%	3.50%	3.50%
8	Disposal Mound (Back Filling)	3.57%	3.45%	3.33%	3.23%
9a1	Earthmoving - Excavation	3.08%	2.99%	2.90%	2.82%
9a2	Earthmoving - Back Filling and Grading	4.44%	4.26%	4.08%	3.92%
9b	Earthmoving - Hauling	3.57%	3.45%	3.33%	3.23%
9c	Earthmoving - Dewatering	3.50%	3.50%	3.50%	3.50%
9d	Culverts	3.50%	3.50%	3.50%	3.50%
10	OPTION 1: Vacuuming of Substrate	3.50%	3.50%	3.50%	3.50%