

Contractor Legal Management Requirements, Approving Settlements, and Determining the Allowability of Settlement Costs



Guiding Principles:

Close collaboration between Department counsel and Contracting Officers is required to ensure effective management of contractors' legal costs.

Decisions regarding contractors' requests to settle legal claims and the allowability of associated costs may be made simultaneously only in limited circumstances.

[References: 10 CFR Part 719, FAR Subpart 31.2, DEAR Subpart 31, and DEAR Subpart 970.31]

Summary of latest changes

This guide chapter replaces its predecessor (Chapter 70-31C of September 2010 “Contractor Legal Management Requirements”) and significantly expands upon its guidance. The predecessor chapter only briefly discussed two aspects of managing contractor legal costs: contractors’ hiring outside counsel; and contractors’ exercise of prudent business judgement. This guide chapter provides great detail concerning the requirements of the current version of the Contractor Legal Management Requirements at 10 CFR part 719 (reflecting its May 2013 update), addresses considerations for approving settlements, and covers several key facets of determining the allowability of settlement costs.

Overview

This guide chapter deals with three aspects of the Department’s management of contractor legal matters—(1) regulatory requirements regarding contractors’ litigation management and legal expenditures, (2) approving contractors’ requests to settle, and (3) making cost allowability determinations for approved settlements.

Background

DOE has placed special emphasis on managing contractor litigation and its associated costs for over two decades. The first litigation management procedures, issued in March 1994, applied to virtually all cases where DOE might be contractually responsible for contractor litigation costs. These procedures imposed substantive requirements on DOE field counsel, contractor counsel, and outside counsel to ensure that the public funds were not spent imprudently. Contractors’ non-compliance resulted in disallowance of costs. The procedures have been

revised several times and were codified in the Code of Federal Regulations (CFR) in April 2001. These Contractor Legal Management Requirements at 10 CFR part 719 were most recently updated in May 2013. Among other revisions, the 2013 update instituted a requirement that contractors obtain DOE permission to settle certain matters involving contractor payment of \$25,000 and over and clarified that contractors' compliance with the regulations at 10 CFR part 719 is a prerequisite for reimbursement of legal costs covered by the regulations.

Discussion

Contractor Legal Management Requirements (10 CFR part 719)

Title 10 CFR part 719, *Contractor Legal Management Requirements*, "facilitates management of retained legal counsel and contractor legal costs, including litigation and legal matter costs." The requirements cover all M&O contracts; non-M&O cost-reimbursement contracts exceeding \$100,000,000; and non-M&O contracts exceeding \$100,000,000 that include cost-reimbursable elements exceeding \$10,000,000 (e.g., contracts with both fixed-price and cost-reimbursable line items where the cost-reimbursable line items exceed \$10,000,000 or time-and-materials contracts where the materials portions exceed \$10,000,000).

Key requirements include the following:

- Legal Management Plan (LMP) – Each contractor is required to submit this document within 60 days of contract award, describing the contractor's practices for managing legal costs and legal matters for which it procures the services of retained legal counsel. Department counsel generally receives, reviews, and approves the LMP. Department counsel is defined as "the attorney in the DOE or NNSA field office, or Headquarters office, designated as the contracting officer's representative and point of contact for a contractor or for Department retained legal counsel, for purposes of this part." (Note: LMP's may include lower dollar value thresholds for reporting and/or permission requirements than required by 10 CFR part 719.)
- Annual Legal Budget – Contractors must submit an annual legal budget that includes cost projections for significant matters at a level of detail reflective of the types of billable activities and the stage of each such matter. Significant matters include matters involving significant issues as determined by Department counsel and identified to a contractor in writing, and any legal matters where the amount of legal costs over the life of the matter is expected to exceed \$100,000.
- Staffing and Resource Plans – Contractors are required to submit this document prepared by retained legal counsel that describes the method for managing a significant matter in litigation.
- Engagement Letters – Each contractor must submit a copy of an executed engagement letter between it and retained legal counsel to Department counsel when the retained counsel is expected to provide \$25,000 or more in legal services for a particular matter.
- Contractor Initiation of Litigation – Each contractor must provide written notice to Department counsel prior to initiating litigation or appealing from adverse decisions.

A contractor may not initiate litigation for which it seeks reimbursement without prior written authorization of Department counsel.

- Litigation against the Contractor – Contractors must give the contracting officer and Department counsel immediate notice in writing of any legal proceeding, including any proceeding before an administrative agency.
- Settlements – Contractors must obtain permission from Department counsel to enter a settlement agreement if the settlement agreement requires contractor payment of \$25,000 or more.
- Specific categories of costs – The regulations address assessment of the reasonableness of legal fees, outside counsel travel costs, and identify certain costs that require advanced approval to be considered for reimbursement.

Title 10 CFR 719.40 conditions reimbursement of legal costs on contractor compliance with the requirements of Title 10 CFR part 719. Any costs covered by the Contractor Legal Management Requirements that do not comply with them are expressly unallowable.

Any request to deviate from the Contractor Legal Management Requirements must be submitted in writing to Department counsel and approved by the DOE or NNSA General Counsel, as applicable. Even if the Contractor Legal Management Requirements have been followed, to be allowable contractor legal costs must comply with all of the other requirements at FAR 31.201-2(a), i.e., the costs must be reasonable, allocable, Cost Accounting Standards (CAS) (or Generally Accepted Accounting Principles (GAAP) if no CAS apply) compliant, compliant with the terms of the contract, and compliant with any limitations in FAR subpart 31.2.

Settlement Permission Requests Under 10 CFR 719.33

Title 10 CFR 719.33 requires contractors to seek permission from Department counsel to enter into a settlement agreement if the agreement requires contractor payment of \$25,000 or more. In its written request to Department counsel seeking settlement permission, the contractor must provide the background of the case, the history of the settlement discussions, the proposed terms of the settlement, and a description as to why settlement of the matter is in the best interest of the Department. *See* 10 CFR 719.34. Title 10 CFR 719.33 specifically notes that a determination that the contractor may settle the case does not mean that the underlying costs will be considered allowable. As noted above, compliance with all parts of 10 CFR part 719, including DOE/NNSA approval of settlements, is a prerequisite for a legal cost to be allowable.

Allowability of Settlement and Associated Legal Costs

Timing of Settlement and Associated Legal Costs Allowability Decisions. An allowability determination regarding a settlement may occur either 1) simultaneous with the determination as to whether the contractor may settle a case pursuant to 10 CFR 719.33, or 2) after the settlement agreement is executed. In both cases, the contracting officer must coordinate with Department counsel to review the facts surrounding the underlying claim and settlement.

At the time a contractor seeks simultaneous settlement permission from Department counsel under 10 CFR 719.33 and a cost allowability determination, the contractor may be in a position of superior knowledge or may have failed to obtain or deliver reasonably available pertinent information regarding the underlying facts that should factor into a determination of cost allowability. If Department counsel suspects either situation exists, he or she must refrain from considering requests for a cost allowability determination and the contracting officer must not make a cost allowability determination. In addition, as a practical matter, the time between the contractor's request to settle a case pursuant to 10 CFR 719.33 and the point at which the contractor needs an answer regarding permission to settle is often a very short period. In such instances approving simultaneous requests for settlement permission and cost allowability determinations may be impractical. The contracting officer must withhold a determination regarding the allowability of any portion or aspect of settlement related costs until he or she is able to make a fully informed decision on allowability.

Principles Guiding Cost Allowability Determinations. First, the contracting officer, in conjunction with Department counsel must evaluate whether the requirements of 10 CFR part 719 have been adhered to by the contractor. Then, FAR 31.205-47, *Costs related to legal and other proceedings*, should be used to determine whether the settlement and associated legal costs should be allowed under the criteria contained therein. Contracting officers must consider the specific facts surrounding the legal claims settled by the agreement under review.

Section 2.1 of Appendix A to 10 CFR part 719 provides: "While 10 CFR part 719 provides procedures associated with incurring and monitoring legal costs, the evaluation of the reason for the incurrence of the legal costs, e.g., liability, fault or avoidability, is a separate issue. The reason for the contractor incurring costs may affect the allowability of the contractor's legal costs." Such considerations include the following:

- Whistleblower claims – Costs associated with certain settled whistleblower cases are governed by DEAR 931.205-47(h) (non-M&O) or DEAR 970.3102-05-47 (M&O), which require the contracting officer (in consultation with Department counsel) to consider the terms of the contract, relevant cost regulations, and the relevant facts and circumstances, including federal law and policy prohibiting reprisal against whistleblowers, when determining whether defense, settlement, and award costs are allowable. See AL 2016-06, Provisional Reimbursement and Allowability of Costs Associated with Whistleblower Actions, at http://energy.gov/sites/prod/files/2016/08/f33/08-04-16_-_Acquisition_Letter_No._AL-2016-06.pdf.
- Employment Discrimination claims – Costs associated with certain settled employment discrimination lawsuits require the contracting officer (in consultation with Department counsel) to analyze the facts underlying the settled claim and determine whether the plaintiff's claims had more than very little likelihood of success on the merits to determine whether the legal costs and settlement costs are allowable. See AL 2014-03, Allowability of Contractor Litigation Defense and Settlement Costs, at <http://energy.gov/sites/prod/files/2016/02/f29/AL%202014-03.pdf>.
- Contractor Managerial Actions - The DEAR "Insurance-litigation and claims" clauses at DEAR 952.231-71 (non-M&O) and DEAR 970.5228-1 (M&O) provide limitations

on the allowability of costs that result from the willful misconduct, lack of good faith, or failure to exercise prudent business judgment by contractor managerial personnel.

It is essential to keep in mind at all times that even if the settlement is authorized and the settlement costs meet all of the above requirements, to be allowable the costs must comply with all of the other requirements of FAR 31.201-2(a), i.e., the costs must be reasonable, allocable, CAS (or GAAP if no CAS apply) compliant, compliant with the terms of the contract, and compliant with any limitations in FAR subpart 31.2.

Documentation of Settlement Allowability

In all instances, contracting officers must appropriately document determinations regarding contractors' requests for permission to settle and for reimbursement of settlement and associated legal costs. Upon determination that granting settlement permission is appropriate, the contracting officer's review of the allowability of the settlement costs should be performed expeditiously. (As stated earlier, the contracting officer must withhold a determination regarding the allowability of any portion or aspect of settlement related costs until he or she is able to make a fully informed decision on allowability. Additionally, complex litigation may necessitate an extended period of review.) Where the contracting officer, after consulting with Department counsel, is able to provide simultaneous settlement permission and cost allowability determination regarding the allowability of any portion or aspect of settlement related costs, a post-execution review of the associated settlement agreement is not required, unless otherwise required by the Legal Management Plan. Where new information becomes available that should have been provided by the contractor with its request for settlement permission and cost allowability determination, however, contracting officers must consult with Department counsel to determine whether further review is warranted.