

Small Business Issues for Environmental Restoration Acquisitions

The Department of Energy's best practices to reduce and eliminate barriers to small businesses entering into prime contracts for major environmental remediation acquisitions are as follows:

- Withholding of Payments
- Billing Cycles
- Allowability of Insurance
- Bonding Requirements

WITHHOLDING OF PAYMENTS

Under a cost reimbursement contract, the Federal Government makes payments conditionally, subject to a final audit. Typically, in a cost reimbursement contract, the Federal Government retains a portion of the payments made to the contractor so that, at the end of the contract, when the final audit is completed and actions are taken to close out the contract, any overpayments made by the Government might be recovered from the amounts retained. For instance, if the final audit shows that the contractor's indirect billing rates were higher than the indirect costs actually incurred, payments paid in excess of the actual indirect costs as determined by the audit would be due the Government, and would be withheld by the Government from the retainage, with the remainder paid to the contractor upon close out.

The small business companies in attendance stated that large amounts of retainage by the Government may cause significant, negative impact on the contractor's cash flow, inhibiting its ability to secure commercial financing of the contract. Further, depending upon the period of performance of the contract, and the time taken to secure a final audit and to close out the contract, such retainage makes the contract less profitable.

The small businesses requested that the Government set a maximum retainage, close out contracts quicker, release withholding amounts after annual audits, and, in the case of task orders issued under an indefinite quantity, indefinite delivery contract, close out each task and release retainage.

DEPARTMENT OF ENERGY PRACTICE

The Department of Energy will cap the amount of withholding for the entire contract at \$100,000, irregardless of the size of the contract. In establishing this retained amount, all allowable and allocable costs incurred by the contractor in the performance of the contract will be paid to the contractor. Any fee earned by the contractor will be paid by the Government up to 85% of the total fee due, at which time the Government will

withhold further payment of fee until an amount of \$100,000, or 15% of the fee, whichever is less, has been reserved.

Regarding task orders under indefinite delivery, indefinite quantity contracts, the contracting officer will use quick close out procedures to close out tasks as they are completed in order that retainage might be released as practicably as possible.

The Department of Energy believes that this cap of no more than \$100,000 ameliorates the need for annual release of retainage, which DOE feels would increase the administrative burden on the contracting officer, as well as set an expectation that Government auditors have the resources to annually audit the contract, which most likely is not the case, thus setting up the possibility of contract disputes. As for quicker closing out of contracts, contracting officers have the authority to use quick close out procedures as set out in the Federal Acquisition Regulation, and DOE sets annual close out targets for its contracting officers which motivate the use of such procedures.

INSURANCE

The small businesses present at the meeting stated that they were unable, in many cases, to secure general liability insurance, professional liability insurance, and pollution liability insurance. This, of course, greatly increases the risk to the small business in undertaking work for any client.

The small businesses requested that the Government lower its insurance requirements commensurate with the work and risk involved in the contract, to revise flow down requirements to avoid layering of multiple insurance policies, or, in the best case, for the Government to self insure.

DEPARTMENT OF ENERGY PRACTICE

The Department of Energy will self insure the environmental restoration contracts. That is, the clause found at Federal Acquisition Regulation 52.228-7, Insurance – Liability to Third Persons, will be included in cost reimbursement contracts. If, however, the contractor wishes to secure insurance, the reasonable cost of such insurance is an allowable cost under the contract.

BONDING

The small businesses in attendance identified bonding as an impediment to their contracting with DOE for environmental restoration projects. That is, bonds in many cases are not available, and if they are, impact the ability of small businesses to secure commercial financing of the contract. Also, from the Government's perspective, the costs of bonding are added to the contract price, thus increasing the cost to the Government.

DEPARTMENT OF ENERGY PRACTICE

The Department of Energy will not require bonds for cost reimbursement contracts.

BILLING CYCLE

Minimizing the time between the time the contractor pays costs and when the contractor is reimbursed by the Government for such paid costs, greatly reduces the contractor's interest costs. Depending upon the size of the contract, the small business may not be able to secure commercial financing to cover the normal billing cycle, nor the costs of start up and major capital expenditures.

DEPARTMENT OF ENERGY PRACTICE

To minimize the time for reimbursed costs from the Government, contracts can be structured to provide for payments more often than every two weeks, in accordance with the FAR 52.216-7. That is, the small business contractor could be allowed to invoice the Government weekly. Further, experience has shown that DOE finance offices typically require about 7 days to process a payment once an invoice is approved by the Contracting Officer (CO) or the Contracting Officer's Technical Representative (COTR). Therefore it is possible that, if the contract is structured to provide for accelerated payments, a 14 to 21 day payment cycle is quite possible.