

## SUBCHAPTER F—SPECIAL CATEGORIES OF CONTRACTING

### PART 334—MAJOR SYSTEM ACQUISITION

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

#### **334.003 Agency head responsibilities.**

The Department's implementation of OMB Circular No. A-109 may be found in Chapter 1-150 of the General Administration Manual.

[49 FR 14020, Apr. 9, 1984]

### PART 335—RESEARCH AND DEVELOPMENT CONTRACTING

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AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 49 FR 14020, Apr. 9, 1984, unless otherwise noted.

#### **335.070 Cost-sharing.**

##### **335.070-1 Policy.**

(a) In addition to utilizing cost-sharing type contracts when required by statute, the desirability of utilizing this type of contract, when authorized should also be considered under certain circumstances when not required by statute. Contractors should be encouraged to contribute to the cost of performing research where there is a probability that the contractor will receive present or future benefits from participation, such as, increased technical know-how, training to employees, acquisition of equipment, use of background knowledge in future contracts, etc. Cost-sharing is intended to serve the mutual interest of the Government and the performing organization by helping to assure efficient utilization of the resources available for the conduct of research projects and by promoting sound planning and prudent fiscal policies by the performing organization. If cost-sharing is not required

by statute, encouragement should be given to organizations to contribute to the cost of performing research under research contracts unless the contracting officer determines that a request for cost-sharing would not be appropriate because of the following circumstances:

(1) The particular research objective or scope of effort for the project is specified by the Government rather than proposed by the performing organization. This would usually include any formal Government requests for proposals for a specific project.

(2) The research effort has only minor relevance to the non-Federal activities of the performing organization, and the organization is proposing to undertake the research primarily as a service to the Government.

(3) The organization has little or no non-Federal sources or funds from which to make a cost contribution. Cost-sharing should generally not be requested if cost-sharing would require the Government to provide funds through some other means (such as fees) to enable the organization to cost-share. It should be recognized that those organizations which are predominantly engaged in research and development and have little or no production or other service activities may not be in a favorable position to make a cost contribution.

(b) Cost-sharing may be negotiated in either of two ways. When cost-sharing is negotiated on a contract by contract basis, the responsibility for negotiating the cost-sharing arrangement is that of the contracting officer. In the case of institutional cost-sharing arrangements (see 335.070-4), the responsibility for negotiating cost-sharing is that of the Office of the Assistant Secretary for Health. Each research contract file should show whether the contracting officer considered cost-sharing appropriate for that particular contract and, except when an institutional cost-sharing agreement is applicable, in what amount. If cost-sharing was not considered appropriate, the file must indicate the factual basis for that decision, e.g., "Because the contractor will derive no

benefits from this award that can be applied to its commercial activities, cost-sharing is not considered appropriate.” The contracting officer may wish to coordinate with the project officer before documenting this decision.

(c) If the contracting officer considers cost-sharing to be appropriate for a research contract and the contractor refuses to accept this type of contract, the award may be made without cost-sharing, except when cost-sharing is required by statute, if the contracting officer concludes that payment of the full cost of the research effort is necessary in order to obtain the services of that particular contractor.

[49 FR 14020, Apr. 9, 1984; 49 FR 36110, Sept. 14, 1984]

#### **335.070-2 Amount of cost-sharing.**

When cost-sharing is required by statute or determined to be appropriate, the following guidelines shall be utilized in determining the amount of cost participation by the contractor, except where an institutional cost-sharing agreement is applicable:

(a) Cost participation by educational institutions and other not-for-profit or nonprofit organizations should normally be at least 1 percent of the total project cost. In many cases, cost-sharing of less than 5 percent of the total project cost would be appropriate in view of the organizations’ nonprofit status and their normally limited ability to recover the cost of such participation from non-Federal sources. However, in some cases, it may be appropriate for educational institutions to provide a higher degree of cost-sharing, such as when the cost of the research consists primarily of the academic year salary of faculty members (or when the equipment acquired by the institution for the project will be of significant value to the institution in its educational activities). The percentages stated above are not intended as a substitution for those set forth in any legislation and are not to be used in lieu of those contained in that legislation.

(b) The amount of cost participation by commercial or industrial organizations should depend to a large extent on whether the research effort or results are likely to enhance the per-

forming organization’s capability, expertise, or competitive position, and the value of such enhancement to the performing organization. It should be recognized that those organizations which are predominantly engaged in research and development and have little or no production or other service activities may not be in a favorable position to derive a monetary benefit from their research under Federal agreements. Therefore, cost participation by commercial or industrial organizations could reasonably range from as little as 1 percent or less of the total project cost, to more than 50 percent of the total project cost.

(c) If the performing organization will not acquire title to or the right to use inventions, patents, or technical information resulting from the research project, it would generally be appropriate to obtain less cost-sharing than in cases in which the performer acquires such rights.

(d) When cost-sharing is required by statute, cost participation of less than 1 percent may be appropriate if consistent with the provisions of the statute, and:

(1) A formal request for proposal is issued;

(2) The contractor proposes to perform the research primarily as a service to the Government; or

(e) The contractor has little or no non-Federal sources of funds from which to make a cost contribution.

(3) A fee or profit will usually not be paid to the performing organization if the organization is to contribute to the cost of the research effort, but the amount of cost-sharing may be reduced to reflect the fact that the organization is foregoing its normal fee or profit in the research. However, if the research is expected to be of only minor value to the performing organization and if cost-sharing is not required by statute, it may be appropriate for the performer to make a contribution in the form of a reduced fee or profit rather than sharing the costs of the project.

(f) The organization’s participation may be considered over the total term of the project so that a relatively high contribution in one year may be offset

by a relatively low contribution in another.

(g) A relatively low degree of cost-sharing may be appropriate if, in the view of the operating divisions or their subordinate elements, an area of research requires special stimulus in the national interest.

(h) In the final analysis, the amount of cost participation should reflect the mutual agreement of the parties, provided that it is consistent with any statutory requirements.

### **335.070-3 Method of cost-sharing.**

Cost-sharing on individual contracts may be accomplished either by a contribution of part or all of one or more elements of allowable cost of the work being performed, or by a fixed amount or stated percentage of the total allowable costs of the project. Costs so contributed may not be charged to the Government under any other grant or contract (including allocations to other grants or contracts as part of any independent research and development program).

[49 FR 14020, Apr. 9, 1984. Correctly designated at 49 FR 36110, Sept. 14, 1984]

### **335.070-4 Institutional cost-sharing agreements.**

(a) An institutional cost-sharing agreement covers the aggregate of some or all of the research projects supported by HHS research contracts and grants at a given performing organization. With respect to contracts, these agreements will apply only to cost-sharing type contracts resulting from unsolicited proposals and awarded without fee or profit. Eligibility for institutional cost-sharing agreements is limited to nonprofit institutions of higher education and other public or private nonprofit or not-for-profit organizations. Usually, a single agreement will cover all applicable research projects at a given performing organization; however, in unusual cases, separate agreements for individual departments or locations of the performing organization may be negotiated if deemed advantageous.

(b) The institutional cost-sharing agreements establish an overall sharing ratio applicable to the aggregate of all covered projects. Individual awards

will incorporate the institutional agreement by reference, but will not establish a specific sharing ratio for the individual project. The amount of sharing on any particular project will therefore be left to the discretion of the performing organization, and relatively high contributions on some projects may offset relatively low contributions on other projects, provided that the agreed aggregate contribution is made during each of the contractor's fiscal years, and a contribution, even if nominal, is made to each covered project.

(c) The Public Health Service shall be responsible for negotiating all HHS institutional cost-sharing agreements. Agreements, when negotiated, will be binding upon all HHS activities. Eligible contractors wishing to negotiate institutional cost-sharing agreements should contact the Division of Grants and Contracts, Office of Resource Management, Public Health Service, Room 18 A 19, Parklawn Building, 5600 Fishers Lane, Rockville, Maryland 20857.

(1) All necessary implementing instructions to cover matters such as content of proposals, format of agreements, documentation, etc. shall be issued by the Public Health Service, subject to the prior approval of the Office of Acquisition and Grants Management.

(2) The Public Health Service shall provide the Office of Acquisition and Grants Management, and the Department's operating divisions with current listings of all institutional cost-sharing agreements, indicating the date on which they became effective with respect to contracts. Copies of individual agreements will be made available to the Department's other activities upon request. Each activity shall designate only one individual who shall be authorized to make such requests.

(d) The amount of cost-sharing negotiated under an institutional cost-sharing agreement will be determined in accordance with the appropriate guidelines contained in "A Guide to Institutional Cost Sharing Agreements" issued by the Office of Resource Management, PHS. The extent to which the performing organization shared in the costs of HHS-sponsored research in the

past, and its anticipated ability to do so in the future, should also be taken into account.

[49 FR 14020, Apr. 9, 1984, as amended at 54 FR 24344, June 7, 1989]

#### **335.070-5 Contract clauses.**

Clauses for cost sharing in individually negotiated contracts or under institutional agreements are set forth in 352.232-71.

#### **335.070-6 Contract award.**

In consonance with the Department's objectives of competition and support of the small business program, award of contracts should not be made solely on the basis of ability or willingness to cost-share. Awards should be made primarily on the contractor's competence and only after adequate competition has been obtained among large and small business organizations whenever possible. The offeror's willingness to share costs should not be considered in the technical evaluation process but as a business consideration, which is secondary to selecting the best qualified source.

### **PART 337—SERVICE CONTRACTING**

#### **Subpart 337.1—Service Contracts— General**

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AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 49 FR 14022, Apr. 9, 1984, unless otherwise noted.

#### **Subpart 337.1—Service Contracts—General**

##### **337.101 Definitions.**

*Service contract.* A contract may require the furnishing of both property and services, such as a research and development contract which requires a final report. In a case such as this, this

subpart will apply to the extent that the furnishing of services is involved. Other examples of service contracts include training and education, surveys and data collection, data processing, medical services, and stenographic services.

##### **337.103 Contracting officer responsibility.**

(b) Contract actions for the services of experts and consultants are also exempt from the requirements of FAR Part 37.103(a)(3); they are to be certified in accordance with the provisions in General Administration Manual Chapter 8-15.

(c) For negotiated acquisitions, the determination shall be included as a statement in the negotiation memorandum. For sealed bid acquisitions, the determination shall be included as a separate statement in the contract file.

(d) In most cases, gathering the information and data on which to base the determination should be a joint effort between contracting and program personnel. The contracting officer shall request the advice of the Office of General Counsel and/or the personnel office before processing any request to acquire services if there is doubt as to whether an employer-employee relationship would be involved in performance of the contract.

[49 FR 14022, Apr. 9, 1984, as amended at 50 FR 23126, May 31, 1985; 50 FR 38004, Sept. 19, 1985]

##### **337.104 Personal services contracts.**

(a) As indicated in FAR 37.104, the paramount consideration in determining if an employer-employee relationship exists is the presence of direction or supervision by Government personnel of contractor employees, as a result of either the inherent nature of the service or the manner in which the service is provided. A personal service relationship exists if this direction or supervision is necessary to:

- (1) Adequately protect the Government's interest;
- (2) Retain control of the function involved; and/or
- (3) Retain full personal responsibility by a duly authorized Federal officer or employee for the function supported.

(c)(2) The degree of supervision necessary to establish an employer-employee relationship is relatively continuous, close supervision. Sporadic supervision is not sufficient to constitute an employer-employee relationship. (In determining whether the Government rather than the contractor exercises “relatively continuous, close supervision” of contractor personnel, the fact that an engineer, for example, may require less supervision and may exercise more independence of judgment than a food service worker is not itself determinative. If the Government takes over that degree of supervision that the contractor would otherwise exercise over either individual, the relationship created between the Government and either individual is tantamount to that of employer and employee.)

(d) The likelihood of the existence of an employer-employee relationship increases as the number and extent of the elements in FAR 37.104(d) increases. However, the mere existence of these elements does not constitute an employer-employee relationship unless continuous, close supervision exists. In determining the presence of the referenced elements, relevant factors including the following shall be considered:

(1) *The nature of the work.* (i) If the Government can use Federal personnel to perform the required work, or if the Government has rights to the specialized knowledge or equipment which is needed to perform the work;

(ii) Whether the services represent the discharge of a Government function which calls for the exercise of personal judgment and discretion on behalf of the Government. (This factor, if present in sufficient degree, may alone render the service personal in nature.); and/or

(iii) If the services are to be a one-time occurrence (or a continuing requirement of short term duration).

(2) *Contractual provisions concerning the contractor’s employees.* (i) To what extent the Government specifies the qualifications of, or has the right to approve, individual contractor employees (other than the Government’s right to approve or disapprove new key personnel, remove key personnel, grant or

deny security clearances, and provide for necessary health qualifications). (Also, it is permissible for the Government to specify the technical and experience qualifications of contractor employees, if this is necessary to assure satisfactory performance.);

(ii) To what extent the Government can assign tasks to, and prepare work schedules for, contractor employees during performance of the contract. (This does not preclude inclusion in the contract of work schedules for the contractor—but not individual employees—or the establishment of a time of performance for orders issued under a requirement or other indefinite delivery-type contract.);

(iii) To what extent the Government can supervise or control the method in which the contractor performs the service, the number of people that will be employed, the specific duties of individual employees, and similar details. (However, it is permissible to require that contractor employees comply with regulations for the protection of life and property. Also, it is permissible to recommend a specific number of people the contractor may employ, if this is necessary to assure performance; but in that event, the contract must specify that this does not in any way minimize the contractor’s obligation to use as many employees as are necessary for proper contract performance.);

(iv) If the Government can review performance of each individual contractor employee (as opposed to reviewing the final product after completion of the work.); and/or

(v) If the Government has the right to have contractor employees removed from the job for reasons other than misconduct or security.

(3) *Other provisions of the contract.* (i) Whether the contractor undertakes a specific task or project that is definable either at the inception of the contract or at some point during performance, or whether the work is defined on a day-to-day basis. (However, this does not preclude use of a requirement or other indefinite delivery-type contract, provided the nature of the work is specifically described in the contract, and orders are formally issued to the contractor rather than to individual employees.);

(ii) Whether payment will be for results accomplished or solely according to time worked. (This is a factor which might be useful in a doubtful case, but should not in itself create doubt about services which are otherwise clearly nonpersonal.); and/or

(iii) Whether Government office or working space, facilities, equipment, and supplies will be used for contract performance. (This is a factor which might be useful in a doubtful case, but should not in itself create doubt about services which are otherwise clearly nonpersonal.).

(4) *Administration of the contract.* (i) If contractor employees are used interchangeably with Government personnel; and/or

(ii) If contractor employees are integrated into the Government's organizational structure.

(e) and (f) Reserved.

(g) The following are examples of personal and nonpersonal services, but are illustrative only and are not to be used as the basis for determination in any specific case.

(1) The following are examples of personal services contracts:

(i) A contract to furnish ordinary, day-to-day, stenographic and secretarial services in a Government office under direct Government supervision.

(ii) A contract for the testing of a substance where the project officer visits the contractor's facility several times each week to consult with the principal investigator, review data, specify methods of quality control, specify testing to be done, and provide instruction to investigators.

(iii) A contract for the performance of a function which management must perform in order to retain essential control over the conduct of agency programs (e.g., negotiating contract amounts).

(2) The following are examples of nonpersonal services contracts:

(i) A contract for technical assistance work requiring specialized equipment and trained personnel unavailable to the Government. The contractor performs work described in the contract free of Government supervision, and does not act on behalf of the Government.

(ii) A contract with an individual for delivery of lectures without Government supervision (even if they are to be given on specific dates, or on specialized subjects, or if payment will be by the hour).

(iii) A fixed price contract for janitorial services which provides for specific tasks to be performed in specific places, free of Government direction, supervision, and control over the contractor's employees.

(iv) A research and development contract providing for a level of effort which will be performed by the contractor independent of Government direction, supervision, and control.

#### **337.109 Services of quasi-military armed forces.**

As distinguished in FAR 37.109, solicitations for protective services shall include the following certification:

The bidder/offeror certifies it is not a detective agency, nor an employee of such agency as contemplated by 5 U.S.C. 3108.

### **Subpart 337.2—Consulting Services**

#### **337.204 Policy.**

General Administration Manual Chapter 8-15 prescribes policies and procedures concerning approvals required before contracting for expert or consulting services.

(e) Services of experts or consultants may be acquired by contract only when:

(1) The services will be nonpersonal in nature, are critical to the planning, development, operation, or evaluation of a Department program, cannot be accomplished by Government employees, and are economically available from the private sector; or

(2) The performance of the work by a consultant is directed by statute.

#### **337.270 Consulting services reporting.**

The clause set forth in 352.237-70 shall be included in every contract for expert or consulting services.

**PART 339—MANAGEMENT, ACQUISITION, AND USE OF INFORMATION RESOURCES**

**Subpart 339.70—ADP Clearances and Systems Security**

Sec.

339.7001 ADP Clearances.

339.7002 ADP systems security.

AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486 (c).

SOURCE: 49 FR 14023, Apr. 9, 1984, unless otherwise noted.

**Subpart 339.70—ADP Clearances and Systems Security**

**339.7001 ADP clearances.**

In accordance with Chapter 4-10 of the HHS Information Resources Management (IRM) Manual, the Office of Information Resources Management (OIRM), OASMB-OS, is responsible for the review and approval of all requests for proposed automatic data processing (ADP) systems and modifications to existing ADP systems which require the acquisition of ADP hardware, software packages, and services, and telecommunications equipment, which exceed the dollar thresholds stated in Chapter 4-10.

(a) It is the responsibility of the program office to obtain written approval from OIRM on proposed ADP acquisitions which exceed the thresholds stated in Exhibit 4-10-A of Chapter 4-10 prior to submitting the request for contract to the contracting activity.

(b) The OIRM approval document (delegation of procurement authority (DPA)) is to be attached to the request for contract when it is submitted by the program office to the contracting activity. The contracting activity shall not issue a solicitation based on the request for contract until a properly executed approval document (DPA) is obtained.

[49 FR 14023, Apr. 9, 1984, as amended at 53 FR 43208, Oct. 26, 1988]

**339.7002 ADP systems security.**

(a) *Program responsibilities.* Whenever a proposed contract action requires the design, development, maintenance, or use of an ADP system or the use of ADP resources, the program office is

required to designate a responsible individual to serve as the ADP system manager who is to ensure, in coordination with the cognizant systems security officer, that ADP security requirements are met and that each contractor maintains an acceptable security program. The project officer is responsible for setting forth the specific portions of Part 6, ADP Systems Security, of the HHS IRM Manual which are applicable to the instant acquisition.

(b) *Contracting responsibilities.* (1) The contracting officer is responsible for ensuring that a certification of ADP systems security requirements, signed by both the ADP system manager and the ADP systems security officer, is submitted with the request for contract. The contracting officer shall not initiate action on the request for contract until the properly executed certification is received. The certification will state that the security requirements specified are reasonably sufficient for the intended application and that they comply with current Federal and HHS computer security policies, procedures, standards, and guidelines.

(2) When developing the request for proposals, the contracting officer shall include in the technical proposal instructions a statement requiring that the offeror present a detailed outline of its proposed ADP system security program which complies with the requirements of the statement of work and applicable portions of Part 6, ADP Systems Security, of the HHS IRM Manual.

(3) The contracting officer shall include a special provision reading substantially as follows in all applicable solicitations and resultant contracts:

The Contractor agrees to comply with the ADP system security requirements set forth in the system of work and applicable portions of Part 6, ADP Systems Security, of the HHS IRM Manual. The Contractor further agrees to include this provision in any subcontract awarded pursuant to this prime contract.

(4) The contracting officer shall ensure that a properly executed certification confirming that the offerors comply with the necessary security requirements is attached to the technical evaluation report received from the evaluation panel before proceeding

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with the acquisition process. This certification must be countersigned by the officials designated in paragraph (b)(1)

above and must contain a similar statement of compliance.

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