

SUBCHAPTER G—CONTRACT MANAGEMENT

PART 342—CONTRACT ADMINISTRATION

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SOURCE: 66 FR 4252, Jan. 17, 2001, unless otherwise noted.

Subpart 342.7—Indirect Cost Rates

342.705 Final indirect cost rates.

(a) The Director, Division of Cost Allocation of the Program Support Center, within each servicing HHS regional office, has been delegated the authority to establish indirect cost rates, research patient care rates, and, as necessary, fringe benefit, computer, and other special costing rates for use in contracts and grants awarded to State and local governments, colleges and universities, hospitals, and other non-profit organizations.

(b) The Division of Financial Advisory Services of the National Institutes of Health has the authority to establish indirect cost rates, fringe benefit rates, etc., for use in contracts and grants awarded to commercial organizations.

[71 FR 76504, Dec. 20, 2006]

Subpart 342.70—Contract Monitoring

342.7001 Purpose.

Contract monitoring is an essential element of contract administration and is performed jointly by the Project Officer and the Contracting Officer. This subpart describes the Department's operating concepts.

[71 FR 76504, Dec. 20, 2006]

342.7002 Contract monitoring responsibilities.

(a) The contract establishes the obligations of both the Government and the contractor. The Contracting Officer is the only person authorized to make changes to the contract. The Contracting Officer must confirm all changes in writing.

(b) The Contracting Officer is responsible for assuring compliance with all the terms and conditions of the contract. The Contracting Officer shall inform the contractor by letter (if not already stipulated in the contract) of the authorities and responsibilities of the Government personnel involved with the contract.

(c) The Contracting Officer must depend on program, technical, and other personnel for assistance and advice in monitoring the contractor's performance, and in other areas of postaward administration. The Contracting Officer must assure that these individuals understand and carry out their assigned responsibilities. The individual roles and corresponding responsibilities typically involve, but are not limited to, the following:

(1) The role of program and technical personnel in monitoring the contract is to assist and/or advise the Contracting Officer or act as his/her representative when so designated by the Contracting Officer. Activities may include:

(i) Providing technical monitoring during contract performance, and issuing letters to the contractor and Contracting Officer relating to delivery, acceptance, or rejection in accordance with the terms of the contract;

(ii) Assessing contractor performance, including inspection and testing of products and evaluation of reports and data;

(iii) Recommending necessary changes to the schedule of work and period of performance in order to accomplish the objectives of the contract. Program officials must provide the Contracting Officer a written request along with an appropriate justification and a funding document if additional funds are needed;

(iv) Reviewing invoices/vouchers and recommending approval/disapproval action by the Contracting Officer, to include comments regarding anything unusual discovered in the review;

(v) Reviewing and recommending approval or disapproval of subcontractors, overtime, travel, and key personnel changes; and

(vi) Participating, as necessary, in various phases of the contract closeout process.

(2) The role of the Project Officer in monitoring the contract includes the applicable activities set forth in paragraph (c)(1) of this section. The Project Officer also shall do the following:

(i) Submit periodic reports to the Contracting Officer that concisely explain the status of the contract, and include recommended actions for any problems reported. Provide the Contracting Officer with written notification of evaluation and approval/disapproval of contract deliverables and of completion of tasks or phases. The Contracting Officer or designee will provide the contractor with written notification of approval or disapproval and include a copy in the contract file;

(ii) Monitor the technical aspects of the contract, identify existing and potential problems that threaten performance, and immediately inform the Contracting Officer of deviations from contract objectives or from any technical or delivery requirements;

(iii) Immediately notify the head of the program office whenever it is determined that objectives are not being met and provide specific recommendations of actions to be taken. The Contracting Officer shall receive a copy of the Project Officer's report and recommendations;

(iv) Within 120 days after contract completion, submit a final written assessment report to the Contracting Officer. The report should include analysis of the contractor's performance, including the contract and program objectives achieved and missed. A copy of the final assessment report shall be forwarded to the head of the program office responsible for the program for management review and follow-up, as necessary; and

(v) Accompany and/or provide, when requested, technical support to the HHS auditor in the conduct of visual inspections.

(3) The roles of the contract administrator, auditor, cost analyst, and property administrator are to assist and/or advise the Contracting Officer in postaward administration activities such as:

(i) Evaluation of contractor systems and procedures, to include accounting policies and procedures, purchasing policies and practices, property accounting and control, wage and salary plans and rate structures, personnel policies and practices, etc.;

(ii) Processing of disputes under the Disputes clause and any resultant appeals;

(iii) Modification or termination of the contract; and

(iv) Determination of the allowability of cost charges to incentive or cost-reimbursement type contracts and progress payments under fixed-price contracts. This is especially important when award is made to new organizations or those with financial weaknesses.

(d) The Contracting Officer is responsible for assuring that contractor performance and contract monitoring conform with contract terms. If performance is not satisfactory or if problems are anticipated, it is essential that the Contracting Officer take immediate action to protect the Government's rights under the contract. The Contracting Officer shall notify his/her immediate supervisor of problems that cannot be resolved within contract limitations and whenever contract or program objectives are not met. The notification shall include a statement of

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action being taken by the Contracting Officer.

[71 FR 76504, Dec. 20, 2006]

342.7003 Withholding of contract payments.

342.7003-1 Policy.

(a) All solicitations and resultant contracts (other than awards made using simplified acquisition procedures) shall contain the withholding of contract payments clause at 352.232-9, and an excusable delays clause, or a clause which incorporates the definition of excusable delays. Use the excusable delays clause at 352.249-14 when the solicitation and resultant contract (other than purchase orders) does not contain a default or other excusable delays clause.

(b) When appropriate, the Contracting Officer may withhold any contract payment when a required report is overdue, or the contractor fails to perform or deliver required work or services.

[71 FR 76505, Dec. 20, 2006]

342.7003-2 Procedures.

(a) The Contracting Officer is responsible for initiating immediate action to protect the Government's rights whenever the contractor fails to comply with either the delivery or reporting terms of the contract. Compliance with the reporting terms includes those reports to be submitted directly to the payment office. The payment office shall notify the Contracting Officer promptly when such a report is not submitted on time.

(b) When the contract contains a termination for default clause, the contractor's failure to submit any report, perform services, or deliver work when required by the contract is considered a default in performance. The Contracting Officer shall immediately issue a formal ten-day cure notice pursuant to FAR 49.607. The notice shall include a statement to the effect that payments will be withheld if the default is not cured within the time frame specified in the notice or if the default is not determined to be excusable.

(1) If the default is cured or is determined to be excusable, the Contracting Officer shall not initiate the withholding action.

(2) If the default is not determined to be excusable or a response is not received within the allotted time, the Contracting Officer shall initiate withholding action on all contract payments and shall determine whether termination for default or other action would be in the best interest of the Government.

(c) When the contract does not contain a termination for default clause, the contractor's failure to submit any required report, perform services, or deliver work when required by the contract shall be considered a failure to perform. The Contracting Officer shall immediately issue a written notice to the contractor specifying the failure and providing a ten-day period (or longer period if the Contracting Officer deems it necessary) in which the contractor shall cure the failure or provide reasons for an excusable delay. The notice shall include a statement to the effect that payments will be withheld if the default is not cured within the time specified in the notice or if the default is not determined to be excusable.

(1) If the failure is cured or is determined to be excusable, the Contracting Officer shall not initiate the withholding action.

(2) If the failure is not determined to be excusable or a response is not received within the allotted time, the Contracting Officer shall initiate withholding action on all contract payments and shall determine whether termination for convenience or other action would be in the best interest of the Government.

(d) The Contracting Officer should consult FAR subpart 49.4 for further guidance before taking any of the actions described in this section.

[71 FR 76505, Dec. 20, 2006]

342.7003-3 Withholding payments.

(a) When making the determination that contract payments should be withheld in accordance with the Withholding of Contract Payments clause,

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the Contracting Officer shall immediately notify the servicing finance office in writing of the determination to withhold payments. The notice of suspension shall contain all information necessary for the finance office to identify the contract, *i.e.*, contract number, task/delivery order number, contractor name and address, etc.

(b) The Contracting Officer shall immediately notify the contractor in writing that payments have been suspended until the default or failure is cured.

(c) When the contractor cures the default or failure, the Contracting Officer shall immediately notify, in writing, all recipients of the notice of suspension that the suspension is to be lifted and contract payments are to be resumed.

(d) When exercising actions regarding the withholding of payment procedures, the Contracting Officer must be careful not to waive any of the Government's rights when corresponding with the contractor or when taking any other actions.

[71 FR 76505, Dec. 20, 2006]

Subpart 342.71—Administrative Actions for Cost Overruns

342.7100 Scope of subpart.

This subpart sets forth the procedures to follow when a cost overrun is anticipated. A cost overrun occurs when the allowable actual cost of performing a cost-reimbursement type contract exceeds the total estimated cost specified in the contract.

[71 FR 76506, Dec. 20, 2006]

342.7101 Contract administration.

342.7101-1 General.

Upon receipt of information that a contractor's accumulated cost and projected expenditures will exceed the limit of funds obligated by the contract, the contracting officer shall coordinate immediately with the appropriate program office to determine whether the contract should be modified or terminated. If the contracting officer receives information from a source other than the contractor that a cost overrun is anticipated, the con-

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tracting officer shall verify the information with the contractor, and remind the contractor of the notification requirements of the Limitation of Cost clause.

342.7101-2 Procedures.

(a) Upon notification that a cost overrun is anticipated, the Contracting Officer shall inform the contractor to submit a request for additional funds which shall include:

(1) Name and address of contractor.
(2) Contract number and expiration date.

(3) Contract item(s) and amount(s) creating overrun.

(4) The elements of cost which changed from the original estimate (*i.e.*, labor, material, travel, overhead, etc.) to be furnished in the following format:

(i) Original estimate,
(ii) Costs incurred to date,
(iii) Estimated cost to completion,
(iv) Revised estimate, and
(v) Amount of adjustment.

(5) The factors responsible for the increase, *i.e.*, error in estimate, changed conditions, etc.

(6) The latest date by which funds must be available for commitment to avoid contract slippage, work stoppage, or other program impairment.

(b) When the contractor submits a notice of an impending overrun, the contracting officer shall:

(1) Immediately advise the appropriate program office and furnish a copy of the notice and any other data received;

(2) Request audit or cost advisory services, and technical support, as necessary, for evaluation of information and data received; and

(3) Maintain continuous follow-up with the program office to obtain a timely decision as to whether the work under the contract should continue and additional funds be provided, or the contract terminated. An appropriate written statement and funding authority, or a formal request for termination, must support the decision of the program office. After receiving the decision by the program office, the Contracting Officer shall promptly notify the contractor in writing of the following:

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(i) The specified amount of additional funds allotted to the contract; or

(ii) Work will be discontinued when the allotted funds are exhausted, and any work performed after that date is at the contractor's risk; or

(iii) The Government is considering whether to allot additional funds to the contract and will notify the contractor as soon as possible, but that any work performed after the currently allotted funds are exhausted is at the contractor's risk. Timely, formal notification of the Government's intention is essential in order to preclude loss of contractual rights in the event of dispute, termination, or litigation.

(c) If program requirements permit, contracting officers should refrain from issuing any contractual documents which will require new work or an extension of time, pending resolution of an overrun or additional fund request.

[66 FR 4252, Jan. 17, 2001, as amended at 71 FR 76506, Dec. 20, 2006]

342.7102 Contract modifications.

(a) Modifications to contracts containing the Limitation of Cost clause shall include either:

(1) A provision increasing the estimated or ceiling amount referred to in the Limitation of Cost clause of the contract and stating that the clause will thereafter apply in respect to the increased amount; or

(2) A provision stating that the estimated or ceiling amount referred to in the contract is not changed by the modification and that the Limitation of Cost clause will continue to apply with respect to the amount in effect prior to the modification.

(b) A fixed-fee provided in a contract shall not be changed when funding a cost overrun. Changes in fixed-fee will be made only to reflect changes in the scope of work which justify an increase or decrease in fee.