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Subpart O—Cooperative Agreements and Superfund State Contracts for Superfund Response Actions

AUTHORITY: 42 U.S.C. 9601 *et seq.*

SOURCE: 72 FR 24504, May 2, 2007, unless otherwise noted.

GENERAL

§ 35.6000 Authority.

This subpart is issued under section 104(a) through (j) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (CERCLA)(42 U.S.C. 9601 *et seq.*).

§ 35.6005 Purpose and scope.

(a) This subpart codifies recipient requirements for administering Cooperative Agreements awarded pursuant to section 104(d)(1) of CERCLA. This subpart also codifies requirements for administering Superfund State Contracts (SSCs) for non-State-lead remedial responses undertaken pursuant to section 104 of CERCLA.

(b) 40 CFR part 31, ''Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments,'' establishes consistency and uniformity among Federal agencies in the administration of grants and Cooperative Agreements to State, local, and Indian Tribal governments. For CERCLA-funded Cooperative Agreements, this subpart supplements the requirements contained in part 31 for States, political subdivisions thereof, and Indian Tribes. This subpart references those sections of part 31 that are applicable to CERCLA-funded Cooperative Agreements.

(c) Superfund monies for remedial actions cannot be used by recipients for Federal facility cleanup activities. When a cleanup is undertaken by another Federal entity, the State, political subdivision or Indian Tribe can pursue funding for its involvement in response activities from the appropriate Federal entity.

§ 35.6010 Indian Tribe and intertribal consortium eligibility.

(a) Indian Tribes are eligible to receive Superfund Cooperative Agreements only when they are federally recognized, and when they meet the criteria set forth in 40 CFR 300.515(b) of the National Oil and Hazardous Substances Pollution Contingency Plan (the National Contingency Plan or NCP), except that Indian Tribes shall not be required to demonstrate jurisdiction under 40 CFR 300.515(b)(3) of the NCP to be eligible for Core Program Cooperative Agreements, and those support agency Cooperative Agreements for which jurisdiction is not needed for the Tribe to carry out the support agency activities of the work plan.

(b) Although section 126 of CERCLA provides that the governing body of an Indian Tribe shall be treated substantially the same as a State, the subpart O definition of ''State'' does not include Indian Tribes because they do not need to comply with all the statutory requirements addressed in subpart O that apply to States.

(c) Intertribal consortium: An intertribal consortium is eligible to receive a Cooperative Agreement from EPA only if the intertribal consortium demonstrates that all members of the consortium meet the eligibility requirements for the Cooperative Agreement, and all members authorize the consortium to apply for and receive assistance.

§ 35.6015 Definitions.

(a) As used in this subpart, the following words and terms shall have the following meanings:

Activity. A set of CERCLA-funded tasks that makes up a segment of the sequence of events undertaken in determining, planning, and conducting a response to a release or potential release of a hazardous substance. These include Core Program, pre-remedial (*i.e.*, preliminary assessments and site inspections), support agency, remedial investigation/feasibility studies, remedial design, remedial action, removal, and enforcement activities.

Allowable costs. Those project costs that are: Eligible, reasonable, necessary, and allocable to the project;

permitted by the appropriate Federal cost principles; and approved by EPA in the Cooperative Agreement and/or Superfund State Contract.

Architectural or engineering (A/E) services. Consultation, investigations, reports, or services for design-type projects within the scope of the practice of architecture or professional engineering as defined by the laws of the State or territory in which the recipient is located.

Award official. The EPA official with the authority to execute Cooperative Agreements and Superfund State Contracts and to take other actions authorized by EPA Orders.

Budget period. The length of time EPA specifies in a Cooperative Agreement during which the recipient may expend or obligate Federal funds.

CERCLA. The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended (42 U.S.C. 9601—9657).

Change order. A written order issued by a recipient, or its designated agent, to its contractor authorizing an addition to, deletion from, or revision of, a contract, usually initiated at the contractor's request.

Claim. A demand or written assertion by a contractor seeking, as a matter of right, changes in contract duration, costs, or other provisions, which originally have been rejected by the recipient.

Closeout. The final EPA or recipient actions taken to assure satisfactory completion of project work and to fulfill administrative requirements, including financial settlement, submission of acceptable required final reports, and resolution of any outstanding issues under the Cooperative Agreement and/or Superfund State Contract.

Community Relations Plan (CRP). A management and planning tool outlining the specific community relations activities to be undertaken during the course of a response. It is designed to provide for two-way communication between the affected community and the agencies responsible for conducting a response action, and to assure public input into the decision-making process related to the affected communities.

Construction. Erection, building, alteration, repair, remodeling, improvement, or extension of buildings, structures or other property.

Contract. A written agreement between an EPA recipient and another party (other than another public agency) or between the recipient's contractor and the contractor's first tier subcontractor.

Contractor. Any party to whom a recipient awards a contract.

Cooperative Agreement. A legal instrument EPA uses to transfer money, property, services, or anything of value to a recipient to accomplish a public purpose in which substantial EPA involvement is anticipated during the performance of the project.

Core Program Cooperative Agreement. A Cooperative Agreement that provides funds to a State or Indian Tribe to conduct CERCLA implementation activities that are not assignable to specific sites but are intended to develop and maintain a State's or Indian Tribe's ability to participate in the CERCLA response program.

Cost analysis. The review and evaluation of each element of contract cost to determine reasonableness, allocability, and allowability.

Cost share. The portion of allowable project costs that a recipient contributes toward completing its project (i.e., non-Federal share, matching share).

Equipment. Tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of $5,000 or more per unit.

Fair market value. The amount at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of the relevant facts. Fair market value is the price in cash, or its equivalent, for which the property would have been sold on the open market.

Health and safety plan. A plan that specifies the procedures that are sufficient to protect on-site personnel and surrounding communities from the physical, chemical, and/or biological hazards of the site. The health and safety plan outlines:

(i) Site hazards;

(ii) Work areas and site control procedures;

(iii) Air surveillance procedures;

(iv) Levels of protection;

(v) Decontamination and site emergency plans;

(vi) Arrangements for weather-related problems; and

(vii) Responsibilities for implementing the health and safety plan.

In-kind contribution. The value of a non-cash contribution (generally from third parties) to meet a recipient's cost sharing requirements. An in-kind contribution may consist of charges for real property and equipment or the value of goods and services directly benefiting the CERCLA-funded project.

Indian Tribe. As defined by section 101(36) of CERCLA, any Indian Tribe, band, nation, or other organized group or community, including any Alaska Native village but not including any Alaska Native regional or village corporation, which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians. For the purposes of this subpart, the term, ''Indian Tribe,'' includes an intertribal consortium consisting of two or more federally recognized Tribes.

Intergovernmental Agreement. Any written agreement between units of government under which one public agency performs duties for or in concert with another public agency using EPA assistance. This includes substate and interagency agreements.

Intertribal consortium. A partnership between two or more federally recognized Indian Tribes that is authorized by the governing bodies of those Indian Tribes to apply for and receive assistance agreements. An intertribal consortium must have adequate documentation of the existence of the partnership, and the authorization to apply for and receive assistance.

Lead agency. The Federal agency, State agency, political subdivision, or Indian Tribe that has primary responsibility for planning and implementing a response action under CERCLA.

National Priorities List (NPL). The list, compiled by EPA pursuant to CERCLA section 105, of uncontrolled hazardous substance releases in the United States that are priorities for long-term remedial evaluation and response. The NPL is published at Appendix B to 40 CFR Part 300.

Operable unit. A discrete action, as described in the Cooperative Agreement or Superfund State Contract, that comprises an incremental step toward comprehensively addressing site problems. The cleanup of a site can be divided into a number of operable units, depending on the complexity of the problems associated with the site. Operable units may address geographical portions of a site, specific site problems, or initial phases of an action, or may consist of any set of actions performed over time or any actions that are concurrent but located in different parts of a site.

Operation and maintenance. Measures required to maintain the effectiveness of response actions.

Personal property. Property other than real property. It includes both supplies and equipment.

Political subdivision. The unit of government that the State determines to have met the State's legislative definition of a political subdivision.

Potentially Responsible Party (PRP). Any individual(s) or company(ies) identified as potentially liable under CERCLA for cleanup or payment for costs of cleanup of Hazardous Substance sites. PRPs may include individual(s), or company(ies) identified as having owned, operated, or in some other manner contributed wastes to Hazardous Substance sites.

Price analysis. The process of evaluating a prospective price without regard to the contractor's separate cost elements and proposed profit. Price analysis determines the reasonableness of the proposed contract price based on adequate price competition, previous experience with similar work, established catalog or market price, law, or regulation.

Profit. The net proceeds obtained by deducting all allowable costs (direct and indirect) from the price. (Because this definition of profit is based on applicable Federal cost principles, it may vary from many firms' definition of profit, and may correspond to those firms' definition of ''fee.'')

Project. The activities or tasks EPA identifies in the Cooperative Agreement and/or Superfund State Contract.

Project manager. The recipient official designated in the Cooperative Agreement or Superfund State Contract as the program contact with EPA.

Project officer. The EPA official designated in the Cooperative Agreement as EPA's program contact with the recipient. Project officers are responsible for monitoring the project.

Project period. The length of time EPA specifies in the Cooperative Agreement and/or Superfund State Contract for completion of all project work. It may be composed of more than one budget period.

Quality Assurance Project Plan. A written document, associated with remedial site sampling, which presents in specific terms the organization (where applicable), objectives, functional activities, and specific quality assurance and quality control activities and procedures designed to achieve the data quality objectives of a specific project(s) or continuing operation(s).

Real property. Land, including land improvements, structures, and appurtenances thereto, excluding movable machinery and equipment.

Recipient. Any State, political subdivision thereof, or Indian Tribe which has been awarded and has accepted an EPA Cooperative Agreement.

Services. A recipient's in-kind or a contractor's labor, time, or efforts which do not involve the delivery of a specific end item, other than documents (e.g., reports, design drawings, specifications). This term does not include employment agreements or collective bargaining agreements.

Simplified acquisition threshold. The dollar amount specified in the Office of Federal Procurement Policy Act, 41 U.S.C. 403. The threshold is currently set at $100,000.

Small business. A business as defined in section 3 of the Small Business Act, as amended (15 U.S.C. 632).

State. The several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, American Samoa, the Virgin Islands, the Commonwealth of Northern Marianas, and any territory or possession over which the United States has jurisdiction.

Statement of Work (SOW). The portion of the Cooperative Agreement application and/or Superfund State Contract that describes the purpose and scope of activities and tasks to be carried out as a part of the proposed project.

Subcontractor. Any first tier party that has a contract with the recipient's prime contractor.

Superfund State Contract (SSC). A joint, legally binding agreement between EPA and another party(ies) to obtain the necessary assurances before an EPA-lead remedial action or any political subdivision-lead activities can begin at a site, and to ensure State or Indian Tribe involvement as required under CERCLA section 121(f).

Supplies. All tangible personal property other than equipment as defined in this section.

Support agency. The agency that furnishes necessary data to the lead agency, reviews response data and documents, and provides other assistance to the lead agency.

Task. An element of a Superfund response activity identified in the Statement of Work of a Superfund Cooperative Agreement or a Superfund State Contract.

Title. The valid claim to property that denotes ownership and the rights of ownership, including the rights of possession, control, and disposal of property.

Unit acquisition cost. The net invoice unit price of the property including the cost of modifications, attachments, accessories, or auxiliary apparatus necessary to make the property usable for the purpose for which it was acquired. Other charges, such as the cost of installation, transportation, taxes, duty, or protective in-transit insurance, shall be included or excluded from the unit acquisition cost in accordance with the recipient's regular accounting practices.

Value engineering. A systematic and creative analysis of each contract term or task to ensure that its essential function is provided at the overall lowest cost.

(b) Those terms not defined in this section shall have the meanings set forth in section 101 of CERCLA, 40 CFR

part 31, and 40 CFR part 300 (the National Contingency Plan).

[72 FR 24504, May 2, 2007, as amended at 73 FR 15922, Mar. 26, 2008]

§ 35.6020 Requirements for both applicants and recipients.

Applicants and recipients must comply with the applicable requirements of 40 CFR part 32, ''Governmentwide Debarment and Suspension (Non-procurement); and Statutory Disqualification under the Clean Air Act and Clean Water Act,'' and of 40 CFR part 36, ''Governmentwide Requirements for Drug-Free Workplace (Financial Assistance).''

§ 35.6025 Deviation from this subpart.

On a case-by-case basis, EPA will consider requests for an official deviation from the non-statutory provisions of this subpart. Refer to the requirements regarding additions and exceptions described in 40 CFR 31.6 (b), (c), and (d).

PRE-REMEDIAL RESPONSE COOPERATIVE AGREEMENTS

§ 35.6050 Eligibility for pre-remedial Cooperative Agreements.

States, political subdivisions, and Indian Tribes may apply for pre-remedial response Cooperative Agreements.

§ 35.6055 State-lead pre-remedial Cooperative Agreements.

(a) To receive a State-lead pre-remedial Cooperative Agreement, the applicant must submit an ''Application for Federal Assistance'' (SF–424) for non-construction programs. Applications for additional funding need include only the revised pages. The application must include the following:

(1) *Budget sheets* (SF–424A).

(2) *A Project narrative statement*, including the following:

(i) *A list of sites* at which the applicant proposes to undertake pre-remedial tasks. If the recipient proposes to revise the list, the recipient may not incur costs on a new site until the EPA project officer has approved the site;

(ii) *A Statement of Work (SOW)* which must include a detailed description, by task, of activities to be conducted, the projected costs associated with each task, the number of products to be completed, and a quarterly schedule indicating when these products will be submitted to EPA; and

(iii) *A schedule of deliverables*.

(3) *Other applicable forms and information* authorized by 40 CFR 31.10.

(b) *Pre-remedial Cooperative Agreement requirements*. The recipient must comply with all terms and conditions in the Cooperative Agreement, and with the following requirements:

(1) *Health and safety plan*. (i) Before beginning field work, the recipient must have a health and safety plan in place providing for the protection of on-site personnel and area residents. This plan need not be submitted to EPA, but must be made available to EPA upon request.

(ii) The recipient's health and safety plan must comply with Occupational Safety and Health Administration (OSHA) 29 CFR 1910.120, entitled ''Hazardous Waste Operations and Emergency Response,'' unless the recipient is an Indian Tribe exempt from OSHA requirements.

(2) *Quality assurance*. (i) The recipient must comply with the quality assurance requirements described in 40 CFR 31.45.

(ii) The recipient must have an EPA-approved non-site-specific quality assurance plan in place before beginning field work. The recipient must submit the plan to EPA in adequate time (generally 45 days) for approval to be granted before beginning field work.

(iii) The quality assurance plan must comply with the requirements regarding split sampling described in section 104(e)(4)(B) of CERCLA, as amended.

§ 35.6060 Political subdivision-lead pre-remedial Cooperative Agreements.

(a) If the Award Official determines that a political subdivision's lead involvement in pre-remedial activities would be more efficient, economical and appropriate than that of a State, based on the number of sites to be addressed and the political subdivision's history of program involvement, a pre-remedial Cooperative Agreement may be awarded under this section.