

# Guide to Judiciary Policy

Vol. 14: Procurement

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## § 210 Policy

### § 210.10 In General

- (a) Procurement planning is the process by which the efforts of all personnel responsible for significant aspects of a procurement are coordinated and integrated comprehensively. The formality and detail of the planning and preparation process will vary with the size, complexity, mission-criticality, and projected dollar value of the requirement.

- (b) Procurement planning must include the related budget planning. Major purchases must be planned and budgeted consistently with the court's budget process, governance mechanisms and management reporting processes.
- (c) A summary of planned major procurements is included as part of management reports to the chief judge or other judiciary official identified in Guide, Vol. 14, § 120.20.10(b) (Delegation to Chief Judges and Other Judiciary Officials). It includes one-year, two-year, and five-year planning lead times.

### **§ 210.20 Roles and Responsibilities**

- (a) Initiating and planning procurement actions require a team effort. The team must include staff from both the requesting and purchasing offices.
- (b) Purchasing Office
  - (1) For judiciary organizations, excluding the Administrative Office of the U.S. Courts (AO), the purchasing office is the office where the procuring function resides.
  - (2) In the AO, the purchasing office is the AO's Procurement Management Division (PMD).
- (c) Requesting Office
  - (1) The requesting office is the organizational unit that initiates a purchase action by identifying a specific need, such as a judiciary organization's IT staff, chambers staff or facility staff.
  - (2) Although other judiciary organizations play a role in the procurement process, overall responsibility for the contracting aspects within the procurement process lies with the contracting officer (CO).
  - (3) However, the planning for major purchases is the responsibility of the court unit executive or equivalent.

### **§ 210.30 Requesting Office Responsibilities**

The requesting office must identify, prepare, and provide procurement requirements to the purchasing office. The procurement requirements will be in a requirements package that contains documents supporting the requirements. Requesting office staff are responsible for:

- (a) identifying potential procurement requirements;
- (b) initiating discussions with purchasing office staff;
- (c) providing a complete requisition, including, but not limited to:
  - (1) properly approved, in writing, expenditure authority;
  - (2) any required justifications (e.g., preparing a justification for other than full and open competition, if applicable);
  - (3) description of the essential elements of the proposed purchase;
    - (A) a clear and specific description of the products or services required;
    - (B) a schedule for delivery or performance;
    - (C) a list of deliverable data or reports, including:
      - media in which they will be furnished,
      - frequency,
      - due date, and
      - recipients;
- (d) independently developing a government price or cost estimate for the requested products or services, including the base period and all option periods, as applicable; and
- (e) identifying technical evaluation criteria for use in evaluating offers, if appropriate;
- (f) conducting market research and suggesting potential sources of supply;
- (g) recommending additional information/requirements to be incorporated into the solicitation package, including:
  - the need for options,
  - applicability of special payment terms,
  - license prerequisites,
  - insurance or warranty requirements,
  - the need for an indemnity,
  - any special security requirements,
  - limitations on subcontracting, and
  - other requirement-specific contractual provisions; and

- (h) advising on the necessity of conducting a pre-solicitation or pre-offer conference.

### **§ 210.40 Purchasing Office Responsibilities**

The purchasing office will help the requesting office prepare the requirements packages, as needed. COs are responsible for:

- (a) working with the requesting office to identify upcoming requirements, planning how to meet them, and preparing a source selection plan, as applicable;
- (b) ensuring that purchasing office resources will be available once the requesting office has established its requirements;
- (c) maintaining effective working relationships with requesting office staff and other organizations that participate in the procurement process;
- (d) reviewing requirements packages for completeness and clarity;
- (e) conducting market research (**see:** § 210.60 (Market Research)) and ensuring that all firms to be solicited are given a fair and equitable opportunity to provide their most effective and economical products or services;
- (f) working directly with requesting office staff to finalize statements of work and/or specifications and resolve any deficiencies;
- (g) ensuring that any public announcement or advertising requirements are met (**see:** Guide, Vol. 14, § 320 (Contractor Qualifications));
- (h) establishing offer evaluation panels as needed (**see:** § 210.70.40 (Evaluation Panels));
- (i) determining appropriate contract type and terms and conditions;
- (j) sending all procurement actions exceeding the CO's delegation level to PMD for review (judiciary organizations excluding the AO);
- (k) adhering to the procurement milestone schedule to ensure timely award;
- (l) issuing the solicitation package: request for quotations (RFQ); request for proposals (RFP); request for information (RFI) (for definitions of these terms, **see:** Glossary of Procurement Terms);
- (m) serving as the primary point of contact with potential and actual offerors;

- (n) reviewing the reports from the offer evaluation panel, source selection boards, etc., to ensure the evaluation criteria stated in the solicitation are applied properly;
- (o) determining the most advantageous offer (where there is no designated Source Selection Authority (SSA) other than the CO); and
- (p) executing the award.

## **§ 210.50 Procurement Planning Benefits**

Among the benefits of procurement planning are:

- (a) saving the judiciary money by obtaining price reductions through quantity discounts;
- (b) allowing better workload planning and scheduling;
- (c) consolidating requirements for greater economies;
- (d) providing sufficient lead time and resources in the selection of appropriate contract types and development of innovative contracting methods;
- (e) providing sufficient time to obtain required approvals before submission of requisitions;
- (f) identifying and obtaining necessary reviews and approvals throughout the procurement process;
- (g) allowing for early identification and resolution of potential problems;
- (h) ensuring the adequacy of specifications or statements of work;
- (i) identifying a sufficient number of capable sources to promote adequate competition;
- (j) preventing unrealistic delivery or performance schedules; and
- (k) receiving acceptable products and services in a timely manner.

## **§ 210.60 Market Research**

### **§ 210.60.10 In General**

Market research is central to sound procurement planning and must be addressed by the whole procurement team. Market research helps identify:

- (a) products or services that are available to satisfy a requirement;
- (b) whether the judiciary's minimum requirements are practical/realistic;
- (c) source availability to furnish the required products or services;
- (d) how to appropriately describe the requirements; and
- (e) whether cost estimates and schedules are realistic.

**§ 210.60.20 Market Research Methods**

- (a) Market research methods include:
  - (1) conducting industry briefings or presolicitation discussions or conferences with potential contractors to discuss requirements and to obtain recommendations;
  - (2) publicizing new specifications and, when appropriate, issuing solicitations for informational or planning purposes far enough in advance to permit generation and consideration of industry comments;
  - (3) attending industry and scientific conferences and acquiring literature about commercial products, industry trends, product availability, business practices, product/service reliability, and prices;
  - (4) analyzing the purchase history of requirements to determine the level of competition, prices, and performance results;
  - (5) publishing sources-sought notices in accordance with Guide, Vol. 14, § 315 (Publicizing Open Market Procurement Actions); or
  - (6) consulting with AO staff, other judiciary organizations, other government agencies, or non-profit organizations.
- (b) Market research generally does **not** include the temporary "trial" or "demonstration" use of equipment/products delivered to and used within the judiciary organization's facilities. Only if it can be definitely determined that the eventual purchase will not exceed the applicable competition threshold — \$10,000 for open market purchases (\$25,000 for training products); \$3,500 for GSA schedule purchases — may equipment or products be used on a "trial" basis in this manner.
- (c) When a product demonstration is desired as part of the evaluation process of a solicitation, the solicitation must require that all competing offerors

provide a demonstration of their product. The solicitation also may not impose undue costs on offerors to provide demonstrations within the judiciary organization's facilities versus providing the demonstration at the offeror's facilities. For example, requiring each competing offeror to deliver a proposed copier to the court's offices to do a demonstration rather than performing the demonstration at the offeror's facilities would be imposing an undue cost.

- (d) Any solicitation requiring product demonstrations as part of the evaluation process must be approved by PMD.

### **§ 210.60.30 Market Research Results**

Market research results may include:

- (a) assessing the suitability and adaptability of commercially available products or services to satisfy judiciary requirements;
- (b) identifying those elements of the requirements that may pose significant risks and added costs; or
- (c) determining the status of applicable technology and the extent and success of its commercial application.

### **§ 210.60.40 Solicitation Provision**

The CO will insert Provision 2-1, Request for Information or Solicitation for Planning Purposes in solicitations issued for planning or informational purposes, and clearly note on the face of the solicitation that it is for information or planning purposes only. The CO will appropriately fill in the provision's blank spaces.

### **§ 210.70 Source Selection Plans**

#### **§ 210.70.10 General**

The CO will develop a source selection plan for each competitive procurement that is:

- (a) above the judiciary's small purchase threshold (**see:** Guide, Vol. 14, § 325.10 (Applicability)) or
- (b) below the judiciary's small purchase threshold when the CO determines a best value solicitation is appropriate.

#### **§ 210.70.20 Plan Requirements**

The CO will develop the source selection plan in collaboration with the evaluation panel, requesting office, and other advisors as needed.

- (a) The plan must outline the objective of the procurement and address operational requirements, the independent government estimate of the cost, and any special requirements for quality and reliability.
- (b) If using best value, the plan must also include evaluation factors, tailored to the specific needs and nature of the specific procurement. The evaluation factors must address the significant discriminating areas that will be considered in evaluating and determining the best choice. The source selection plan must include:
  - the order of relative importance of the factors, and
  - the evaluation methods and procedures that will be used in evaluating competing offers.

### **§ 210.70.30 Source Selection Processes**

- (a) Technically acceptable lowest price source selection is used when a contract will be awarded to the technically acceptable offeror offering the lowest price. Solicitations using this approach must state the judiciary's minimum technical requirements. For example, a copy machine's technical standard could be the number of pages photocopied per minute. All offers meeting or exceeding these technical requirements will be evaluated based on price. Technically acceptable lowest price:
  - (1) is best suited for procurements where the judiciary is acquiring a product or routine service for which it has a well-defined specification or statement of work; and
  - (2) will include commercial or off-the-shelf products or services where there has been no justification for a best value source selection.
- (b) Best value source selection is used for procurements when the quality of performance above the minimum acceptable level is necessary or will enhance critical mission accomplishment. The best value method:
  - (1) involves an evaluation and comparison of technical, experience and performance factors.
  - (2) is suitable only for certain types of negotiated procurements and is more complicated to conduct than the technically acceptable lowest price approach.
  - (3) is preferred when the judiciary is buying professional and technical services, or a product to be built to a performance specification.



- (4) requires the CO (or other source selection official) to make a meaningful price/technical trade-off decision, which is derived from an analysis of the offers measured against the evaluation criteria.
- (5) requires that the solicitation clearly state:
  - (A) all evaluation factors and significant subfactors that will affect the award decision,
  - (B) their relative importance, and
  - (C) whether all evaluation factors other than cost or price, when combined, are significantly more important, equal to, or significantly less important than cost or price.
- (6) allows award to other than the lowest price offer, but the price/technical trade-off documentation must justify the determination to make award other than to the lowest priced/technically acceptable offer.

#### **§ 210.70.40 Evaluation Panels**

For each source selection plan, the CO must establish an evaluation panel.

- (a) The size and membership depends upon the purchase's:
  - size,
  - scope,
  - complexity, and
  - mission-criticality of the goods or services being procured.
- (b) Evaluation panel responsibilities include the following:
  - (1) assist the CO in developing a source selection plan;
  - (2) evaluate the offers received, efficiently and impartially, in accordance with:
    - the source selection plan, and
    - the evaluation factors included in the solicitation; and
  - (3) present a written report of its findings to the CO or Source Selection Authority. The report will contain narrative statements discussing the major strengths and weaknesses of the various offers as compared to the evaluation factors. This report will be used by the

CO to hold discussions, if necessary, and will be used to select the successful offeror.

- (c) Evaluation panel efforts may be limited to:
  - (1) one panel but two separate reviews:
    - first reviewing the technical offers,
    - then with cost or price evaluated; or
  - (2) subpanels may be established for separate evaluation of:
    - the technical offer, and
    - the proposed price.
- (d) It may occasionally be appropriate to contract with outside consultants to participate in evaluation panels when the necessary expertise does not exist within the judiciary. An outside evaluator must sign a non-disclosure agreement prior to being given access to any offer information.

#### **§ 210.70.50 Evaluation Factors and Sub-Factors**

Properly chosen and clearly stated evaluation factors are essential to effective offer evaluation and proper ratings by evaluation panel members. Evaluation factors to be used for commercial off-the-shelf product solicitations are generally less complex. Evaluation sub-factors may be established under the appropriate factor. For example, under a “management plan” factor, there could be sub-factors for “organization” and “quality control plan.”

- (a) Evaluation factors and sub-factors must be in accordance with the objectives of the purchase. Cost or price related factors or sub-factors and past performance ratings are always evaluated, even if their relative weight (i.e., importance) is low relative to technical factors.
- (b) The appropriate weight must be stated for each factor or sub-factor in relation to the other factors/sub-factors.
- (c) These weights could be stated as:
  - (1) a list of the factors and sub-factors with a statement that they are in descending order of importance;
  - (2) a statement that one factor or sub-factor is more important, or significantly more important, than another; or

- (3) any other expression that clearly communicates the relative weight of the factors or sub-factors and indicates factors or sub-factors which are of equal weight.
- (d) The absence of a statement in the solicitation reflecting the relative weight(s) of evaluation factors or sub-factors will be construed as all factors or sub-factors being of equal weight.
- (e) Use of too many factors and sub-factors can:
  - unduly complicate and extend the evaluation process;
  - dilute essential evaluation elements; and
  - lead to an unintended leveling of the evaluation scores. (**Note:** Leveling of the scores tends to make the offers appear to be equal, when in fact they are not. This will make the final choice more difficult.)
- (f) Examples of evaluation factors other than cost or price that may apply are:
  - a demonstrated understanding of the solicitation requirement;
  - a clearly developed management plan;
  - an effective quality assurance plan;
  - qualified and experienced key personnel;
  - adequate resources;
  - appropriate experience; and
  - excellence of design.

#### **§ 210.70.60 Cost or Price Related Factors**

Cost or price related factors must be treated and evaluated separately from the other evaluation factors. The weight to be given to them must always be stated relative to the other evaluation factors in the solicitation, and may increase in importance if the technical ranking of offerors is close. Cost/price offer specifics, such as the proposed number of hours in each labor category, can also provide insight into an offeror's understanding of the requirement, their resources, or other evaluation factors.

#### **§ 210.70.70 Rating Systems**

Many forms of rating systems are suitable for evaluation purposes, from adjectival ratings (outstanding/excellent/good) to color codes (blue/green/yellow/red) to various forms of numerical scoring. Depending on the specific procurement, one system may be preferable to another. However, the rating system used must be:

- simple,

- practical, and
- applied consistently to all proposals by the evaluation panel members.

## **§ 220 Terms and Conditions**

### **§ 220.10 Quality Control/Assurance Requirements**

#### **§ 220.10.10 In General**

The CO must include the appropriate quality control/assurance requirements in all solicitations and contracts. The type and extent of contract quality control/assurance requirements depend on the complexity, size, and risks for delivery or completion of service or product involved in the procurement. Such requirements range from inspection at time of delivery to the contractor's implementation of a comprehensive quality control program. Solicitations and contracts may provide for alternate inspection methods to promote competition and lower costs. The solicitation may also permit contractor-recommended alternatives.

#### **§ 220.10.20 Small Purchase Procedures**

For products or services purchased using small purchase procedures, the judiciary usually relies on the contractor to accomplish all appropriate inspection and testing to ensure the deliverables conform to contract quality requirements up to the point of delivery to the judiciary for acceptance. For these types of purchases, the rights set forth in paragraph (d) of Clause 3-3, Provisions, Clauses, Terms and Conditions – Small Purchases, are sufficient to protect the judiciary in the event of nonconforming services or products.

#### **§ 220.10.30 Inspection Before Delivery**

When the CO determines that the judiciary needs to test the products or services before delivery, or decides that the contractor's internal work processes are insufficient, the judiciary should not rely on inspection by the contractor. When making these determinations, the CO must consider the:

- (a) nature of the products or services being purchased and their intended use;
- (b) potential losses in the event of defects;
- (c) likelihood of uncontested replacement or correction of defective work; and
- (d) cost of detailed inspection.

**§ 220.10.40 Standard Inspection Terms**

For procurements in excess of the small purchase threshold, both Clause 2-5A, Inspection of Products and Clause 2-5B, Inspection of Services include the following standard inspection terms/requirements:

- (a) the contractor is required to provide and maintain an internal inspection system acceptable to the judiciary;
- (b) the judiciary has the right to make inspections and tests while work is in process, if appropriate; and
- (c) the contractor is required to keep and make available to the judiciary complete records of its inspection system.

**§ 220.10.50 Quality Assurance at Judiciary Site or Destination**

- (a) Quality assurance performed at destination is normally limited to inspection of the products or services. Inspection is appropriate at destination when:
  - (1) products are commercial or off-the-shelf and require no technical inspection;
  - (2) necessary testing equipment is located only at destination;
  - (3) the procurement is for services performed at destination; or
  - (4) it is determined to be in the judiciary's interest.
- (b) For information on remedies available to the judiciary in the event nonconforming goods or services are delivered after award, **see:** Guide, Vol. 14, § 735.30 (Nonconforming Products or Services).

**§ 220.10.60 Quality Assurance at Contractor Site or Origin**

Solicitations and contracts must require that quality assurance, including inspection, be performed at origin (contractor's site) when:

- (a) performance at any other place would require uneconomical disassembly or destructive testing;
- (b) considerable loss would result from the manufacture and shipment of unacceptable products or from a delay in making necessary corrections;
- (c) special required instruments, gauges, or facilities are available only at origin;

- (d) performance at any other place would destroy or require the replacement of costly packing and packaging; or
- (e) it is determined to be in the judiciary's interest.

**§ 220.10.70 Clauses**

The CO will include the following clause(s), as indicated, in the solicitation or contract document:

<b>§ 220.10.70 Clauses for Inclusion in Solicitations or Contracts</b>	
<b>Clause or Provision</b>	<b>is included...</b>
(a) Clause 2-5A, Inspection of Products	In all solicitations and contracts for products, which are expected to exceed the judiciary's small purchase threshold. The CO may include in solicitations and contracts below the judiciary's small purchase threshold if the CO determines inclusion is in the judiciary's interest.
(b) Clause 2-5B, Inspection of Services	In all solicitations and contracts for services, which are expected to exceed the judiciary's small purchase threshold, unless another appropriate inspection clause applies (e.g., Clause 5-10, Inspection of Professional Services). The CO may include in solicitations and contracts below the judiciary's small purchase threshold if the CO determines inclusion is in the judiciary's interest.
(c) Clause 2-10, Responsibility for Products	In solicitations and contracts for (a) products or (b) services involving the furnishing of products, when a fixed-price contract is contemplated and the contract is expected to exceed the small purchase threshold. The CO may include the clause in actions below the small purchase threshold when the CO determines the clause is needed.
(d) Clause 7-95, Contractor Inspection Requirements	In solicitations and contracts for products or services when the contract amount is expected to be at or below the judiciary's small purchase threshold and inclusion of the clause is necessary to ensure an explicit understanding of the contractor's inspection responsibilities.
(e) Clause 7-100A, Limitation of Liability (Products)	In all solicitations and contracts in excess of the judiciary's small purchase threshold requiring delivery of products.
(f) Clause 7-100B, Limitation of Liability (Services)	In all solicitations and contracts in excess of the judiciary's small purchase threshold requiring performance of services.

## **§ 220.15 Acceptance of Products and Services**

### **§ 220.15.10 Definition**

Acceptance constitutes acknowledgment that the products or services provided conform to applicable quality and quantity requirements of the contract.

### **§ 220.15.20 Solicitation and Contract Requirements**

Solicitations and contracts must specify the time, place and criteria for acceptance. Failure to provide clear and unambiguous criteria for acceptance can undermine the judiciary's ability to reject unacceptable products and/or services. Acceptance may take place before delivery, at the time of delivery, or after delivery. Products or services will ordinarily not be accepted before completion of judiciary contract quality assurance actions. Service contracts may include a deduction schedule stating how much or how to calculate what may be deducted from the contractor's invoice for unsatisfactory performance.

### **§ 220.15.30 Transfer of Title and Risk of Loss (Products Only)**

- (a) Title to products will pass to the judiciary upon formal acceptance, regardless of when or where the judiciary takes physical possession, unless the contract specifically provides for earlier transfer of title. An example of when it might be appropriate to specify earlier transfer of title is if it is anticipated that delivery of the product(s) will be significantly in advance of installation and final acceptance, such as when equipment is ordered and delivered during a renovation project and cannot be installed until the renovation is completed, etc. In this instance, if the product will be under the judiciary's control for a lengthy period of time prior to acceptance, specifying earlier transfer of title may be appropriate.
- (b) Unless the contract specifically provides otherwise, inclusion of Clause 2-10, Responsibility for Products means that risk of loss of or damage to products will remain with the contractor until, and will pass to the judiciary upon:
  - (1) delivery of the products to a carrier, if transportation is F.O.B. origin; or
  - (2) acceptance by the judiciary or delivery of the products to the judiciary at the destination specified in the contract, whichever is later, if transportation is F.O.B. destination.
- (c) Paragraph (b) of this section will not apply to products that so fail to conform to contract requirements as to give a right of rejection. The risk of loss of or damage to such non-conforming products remains with the

contractor until cure or acceptance. After cure or acceptance, paragraph (b) of this section will apply. For information on acceptance and rejection and cure, **see:** Guide, Vol. 14, § 735 (Quality Assurance).

- (d) The contractor will not be liable for loss of, or damage to, products which is caused by the negligence of officers, agents, or employees of the judiciary acting within the scope of their employment.

## **§ 220.20 Warranties**

### **§ 220.20.10 In General**

A warranty clause must be used when it is in the judiciary's interest to have the right to assert claims regarding defective products or services after their acceptance. A warranty clause gives the CO additional time after acceptance to require contractor correction of deficiencies or defects, re-performance, an equitable adjustment in the price, or other appropriate remedies. Warranties should generally not be used in cost contracts, labor-hour or time-and-material contracts.

### **§ 220.20.20 Warranty Variables**

- (a) Warranty coverage may begin with delivery or at the occurrence of a specified event, such as installation of equipment.
- (b) This coverage may continue for a given number of days or months or until the occurrence of another specified event.
- (c) The value of a warranty clause depends upon the particular products or services being procured.
- (d) The clause, its use, terms, and conditions are influenced by many factors and must be tailored to fit the specific purchase and individual risks involved.
- (e) It is important to remember that a contractor may factor warranty clause requirements into an item's purchase price, making it more expensive. In addition, there is a cost to the judiciary in administration and enforcement of the warranty.
- (f) For additional information on enforcing warranties, **see:** Guide, Vol. 14, § 735.50 (Express Warranties).

### **§ 220.20.30 Criteria for Requiring a Warranty**

With input from the requesting office as to their needs, the CO decides whether or not to require and use a warranty clause. The clause may be used either for individual



purchases or classes of purchases. Before making this decision, the CO must consider the following:

- (a) cost of the warranty (including the effect of a warranty on pricing and the administrative cost of enforcing the warranty);
- (b) criticality of meeting specifications;
- (c) potential damage to the judiciary in the event of defective performance;
- (d) cost of correction or replacement, either by the contractor or another source, in the absence of a warranty;
- (e) ability to take advantage of the warranty, considering shipping time, distance of the user from the source, and other factors;
- (f) the effect of the warranty as a deterrent against deficiencies;
- (g) the extent to which acceptance is to be based upon contractor inspection or quality control;
- (h) whether the inspection and acceptance system provides adequate protection against deficiencies;
- (i) reliance on brand-name integrity;
- (j) whether a warranty is regularly given for a commercial component of a more complex end item;
- (k) whether the product or service is intended for the safety or protection of employees;
- (l) the stage of development of the item and the state of the art;
- (m) customary trade practices; and
- (n) the level of difficulty of detecting defects prior to acceptance.

#### **§ 220.20.40 Clauses and Provisions**

A warranty clause may be included in solicitations and contracts as indicated in the table below.

<b>§ 220.20.40 Warranty Clauses for Inclusion in Solicitations or Contracts</b>	
<b>Clause or Provision</b>	<b>is included in...</b>
(a) Provision 2-15, Warranty Information	solicitations for products or services, if warranties are customary in the trade.
(b) Clause 2-20A, Incorporation of Warranty	solicitations and contracts when it is anticipated that a contractor's standard commercial warranty will be offered.
(c) Clause 2-20B, Contractor Warranty (Products)	solicitations and contracts for products when the CO has made a written determination for the file that a warranty is appropriate for the products being purchased and that the benefits are expected to outweigh the costs.
(d) Clause 2-20C, Warranty of Services	solicitations and contracts for services when the CO has made a written determination for the file that a warranty is appropriate for the services being purchased and that the benefits are expected to outweigh the costs.

**§ 220.25 Delivery or Performance Schedule**

**§ 220.25.10 In General**

An essential element of the solicitation and contract is a realistic delivery or performance schedule, which must be clearly stated. The solicitation and contract must specify the delivery mode, as well as the time and place of delivery or performance.

**§ 220.25.20 Solicitation Delivery Instructions**

Solicitation delivery instructions must specify the F.O.B. point, defined as follows:

(a) F.O.B. Destination

F.O.B. destination means that the consignor or seller is responsible for delivery of the products to a destination specified in the solicitation, usually a judiciary office. Unless the contract provides otherwise, the cost of shipping and risk of loss are borne by the seller or consignor. Title to the products passes to the judiciary when the products arrive at the stated destination; or

(b) F.O.B. Origin

F.O.B. origin means that the consignor or seller is responsible for delivery of the products to the carrier (e.g., rail station, airport, post office). Unless the contract provides otherwise, the cost of shipping and risk of loss must be borne by the judiciary, either as a separately identifiable invoice amount paid to the contractor over and above the price of the product purchased or through a

separately awarded shipping contract. Title passes to the judiciary when delivery is made to the carrier. The contractor's risk is limited to loss or damage caused by improper marking or packing of the products.

#### **§ 220.25.30 Selecting the F.O.B. Point**

The F.O.B. point must be determined on the basis of overall costs involved. It is important to remember that delivery clauses impact an item's price. The destination shipment expense may be included in an item's purchase price, and make it more expensive. The CO must consider that lower freight rates may be available to the judiciary and that government-controlled transportation may be available.

#### **§ 220.25.40 Acceptance at Destination**

When acceptance of products is at destination, the purchase document delivery terms must specify F.O.B. destination.

#### **§ 220.25.50 Liquidated Damages**

If the judiciary can expect to suffer damage from late delivery or performance, liquidated damages may be included in the solicitation or contract (**see:** § 220.30 (Liquidated Damages)).

#### **§ 220.25.60 Delivery Schedules**

- (a) Delivery or performance schedules may be expressed in terms of:
  - (1) Specific calendar dates;
  - (2) Specific periods from the date of the contract (i.e., from the date of award or from the date shown as the effective date of the contract);
  - (3) Specific periods from the date of receipt by the contractor of the notice of award (including notice by receipt of an executed contract document from the judiciary); or
  - (4) Specific time for delivery after receipt by the contractor of each individual delivery order issued under the contract, as in indefinite delivery type contracts.
- (b) A solicitation's delivery schedule may be a firm date and state that it is based upon an assumption that award will be made by a certain date. In the event that award is made after that date, the delivery schedule must be appropriately adjusted in order not to curtail the delivery time to the prejudice of the contractor because of delay by the judiciary in making an award.

- (c) If the delivery schedule is based on the date of the contract, the contracting officer will mail or otherwise furnish to the contractor the contract, notice of award, or other contract document not later than the date of the contract.
- (d) If the delivery schedule is based on the date the contractor receives the notice of award, or expressed in terms of specific calendar dates on the stated assumption that notice of award will be received by a specified date, the CO will send the contract, notice of award or other contract document by certified mail, return receipt requested, or by any other method that will provide evidence of the date of receipt by the contractor.

**§ 220.25.70 Product-Related Delivery Clauses and Provisions**

The CO will include the following clause(s) as applicable in the solicitation or contract document:

<b>§ 220.25.70 Product-Related Delivery Clauses and Provisions</b>	
<b>Clause or Provision</b>	<b>is included in...</b>
(a) Clause 2-25A, Delivery Terms and Contractor’s Responsibilities	solicitations and contracts for products or services involving the furnishing of products.
(b) Clause 2-25B, Commercial Bill of Lading Notations	cost-reimbursement or fixed price F.O.B. origin solicitations and contracts for products or services involving the furnishing of products anticipated to exceed the judiciary’s small purchase threshold. The CO will appropriately fill in the clause’s blank spaces.
(c) Clause 2-30A, Time of Delivery	solicitations and contracts which specify a required delivery schedule, but the judiciary may consider an earlier delivery advantageous.
(d) Clause 2-30B, Desired and Required Time of Delivery	solicitations and contracts when the judiciary desires delivery by a certain time, but requires delivery by a specified later time, and the delivery schedule is to be based on the date of the contract award.
(e) Clause 2-35, F.O.B. Destination, Within Judiciary’s Premises	solicitations and contracts when delivery term is F.O.B. destination within the judiciary’s premises, for example delivery of heavy equipment by the contractor to a specific room within a building, rather than to a loading dock.
(f) Clause 2-40A, Variation in Quantity	solicitations and contracts when authorizing a variation in quantity in fixed-price contracts for products or for services that involve the furnishing of products. The CO will appropriately fill in the clause’s blank spaces.

<b>§ 220.25.70 Product-Related Delivery Clauses and Provisions</b>	
<b>Clause or Provision</b>	<b>is included in...</b>
(g) Clause 2-40B, Delivery of Excess Quantities	solicitations and contracts when a fixed-price products contract is contemplated and the judiciary may be willing to accept a quantity greater than that specified.
(h) Clause 2-45, Packaging and Marking	all solicitations and contracts for products, or for services involving the furnishing of products.
(i) Clause 2-95, Material Requirements	solicitations and contracts for products which are not commercial or off-the-shelf items.
(j) Provision 2-105, Economic Purchase Quantity-Products	solicitations for products unless: <ul style="list-style-type: none"> <li>• the purchase is being made under a GSA multiple award schedule;</li> <li>• the CO determines the judiciary already has the data;</li> <li>• the data is not otherwise readily available; or</li> <li>• it is impracticable for the judiciary to vary its future requirements to take advantage of economic purchase quantities.</li> </ul>

**§ 220.25.80 Service-Related Provisions and Clauses**

Procurement planning also requires the CO to determine the applicability of various provisions and clauses to the performance of services. Include the following provisions and clauses as indicated:

<b>§ 220.25.80 Service-Related Provisions and Clauses</b>	
<b>Clause or Provision</b>	<b>is included in...</b>
(a) Clause 2-50, Continuity of Services	solicitations and contracts for services, when: <ol style="list-style-type: none"> <li>(1) the services are considered vital to the judiciary;</li> <li>(2) the services must be continued without interruption;</li> <li>(3) a successor (either the judiciary or another contractor), is likely to continue the services upon contract expiration; and</li> <li>(4) the judiciary anticipates difficulties during the transition from one contractor to another, or from the contractor to the judiciary.</li> </ol>
(b) Clause 2-55, Privacy or Security Safeguards	all solicitations and contracts for information technology that require security of information technology, and/or are for the design, development, or operation of a system of records using commercial information technology services or information technology support services.

(c) Clause 2-60, Stop-Work Order	all solicitations and contracts.
(d) Clause 2-65, Key Personnel	solicitations and contracts for services when it is necessary to identify contractor key personnel because they have the required expertise. The CO may determine that this clause is not necessary, either because contractor flexibility is desired, or it is cost prohibitive to pay extra for specific expertise. The CO will appropriately fill in the clause’s blank spaces to identify, for the solicitation, the labor categories or positions considered key and, in the contract award, the individuals identified for these key positions in the successful offeror’s proposal.
(e) Provision 2-70, Site Visit	solicitations for services to be performed in judiciary facilities, when a site visit is deemed appropriate.
(f) Clause 2-140, Judiciary IT Security Standards	solicitations and contracts involving systems integration or software development. The clause may be included in solicitations and contracts for software services if inclusion is determined appropriate after coordination with the AO’s IT Security Office and OGC.

**§ 220.30 Liquidated Damages**

**§ 220.30.10 In General**

Liquidated damages are one of several remedies the judiciary may use when a delay in delivery or performance, attributable to the contractor, will cause damage to the judiciary. The CO must receive written approval from PMD before including a liquidated damages clause in the solicitation. For guidance on imposing liquidated damages after contract award, **see:** Guide, Vol. 14, § 735.25 (Assessing Liquidated Damages).

**§ 220.30.20 Applicability**

Liquidated damages may be included in solicitations and contracts when:

- (a) the time, delivery, or performance is such an important factor in the performance of the contract that the judiciary may reasonably expect to suffer damage if the delivery or performance is delinquent; and
- (b) the amount of actual damages would be difficult or impossible to determine or prove.

**§ 220.30.30 Basis of Liquidated Damages Amount**

Liquidated damages must not be used punitively for a contractor’s failure or as a negative performance incentive, but only as a re-payment of judiciary loss. Any formula for calculating liquidated damages must be based on an analysis of the procurement-

specific anticipated amount of judiciary losses that would directly result from delay in contractor delivery or performance.

#### § 220.30.40 Determination and Documentation

- (a) The CO must determine and document in the file in each case:
  - (1) why the use of liquidated damages is appropriate; and
  - (2) how the rate was determined reasonable, and not punitive.
- (b) The determined rate must, at a minimum, cover the estimated cost of inspection and oversight for each day of delay. Whenever the judiciary is likely to suffer other specific damages due to a contractor-caused delay, the rate must also include an amount for these damages. Examples of specific damages are the:
  - cost of substitute facilities,
  - cost of lost work-hours or productivity, or
  - rental of buildings or equipment.

#### § 220.30.50 Clause

If PMD approves use of liquidated damages, include Clause 2-75, Liquidated Damages in solicitations and contracts, inserting in the blank the dollar amount of the damages to be assessed per day (or per alternate unit of time) in the event of contractor caused delay.

#### § 220.35 Judiciary Property

- (a) The judiciary may provide materials or other property to a contractor for its use in performance of a contract when doing so will result in significant economies, standardization, expedited production, or when it is otherwise in the judiciary's interest.
- (b) Judiciary-furnished property must be specified in the solicitation and the resulting award document in sufficient detail (including inventories or requisitioning procedures) to enable offerors to evaluate the requirement and consider it in their pricing proposal.
- (c) When the judiciary will furnish property, the solicitation and resulting award document must include Clause 2-80, Judiciary Property. **See also:** Guide, Vol. 14, § 720 (Judiciary Property).

## § 220.40 Options

### § 220.40.10 In General

Options are useful tools for soliciting either future periods of performance for services or for soliciting a combination of minimum base (i.e., “must have”) products and optional products that are desired, but could be omitted if they exceed the funding available. Inclusion of an option in a contract provides the judiciary with a unilateral right by which, during a time period specified in the solicitation or contract, the judiciary may elect to purchase additional products or services called for by the solicitation or contract, or may elect to extend the term of the contract. Options may be included in solicitations and contracts when:

- (a) increased requirements during the performance period are anticipated and subsequent competition would be impractical due to such factors as production lead-time and delivery requirements;
- (b) continuing performance past the original performance period may be required; or
- (c) it is unclear that funding will be available for all items solicited, such as when soliciting for furniture, in which case certain items may be listed as optional and awarded only if there are sufficient funds to include them in the award.

**Note:** Options that have been priced and evaluated in a competitive procurement are preferable to negotiating a price for additional quantities or time extensions with the successful contractor after award of a contract. The judiciary will generally receive more favorable pricing when the options are separately identified and priced in the initial offer. If, after award, a need arises for additional quantities or continued performance, the CO must determine whether the new quantity or time extension may be considered to be within the original scope of the contract or not. Additional quantities or continued performance which cannot be considered within scope must be the subject of a new competitive procurement or justified as a sole source procurement. **See:** Guide, Vol. 14, § 335.30 (Justification for Other than Full and Open Competition).

### § 220.40.20 Option Pricing

Solicitations must clearly identify those products or services which are considered to be optional and instruct offerors to price each option separately. Solicitations normally should allow options to be offered without limitation as to price, especially if the option(s) will be considered in the evaluation for award. Any restriction on option pricing, such as requiring option quantities of products to be priced the same as the base quantities, must be approved by PMD prior to issuance of the solicitation.



### **§ 220.40.30 Restrictions**

Option provisions and clauses may not be included in solicitations or contracts when:

- (a) the contractor would be required to incur undue risks (such as when the price or availability of necessary materials or labor cannot be reasonably estimated); or
- (b) market prices for the products or services involved are likely to fluctuate or change substantially. This may occur, for example, in procurement of paper or petroleum or petroleum-based products; or,
- (c) the option represents known firm requirements for which funds are available, unless:
  - (1) the basic quantity is a learning or testing quantity and there is some uncertainty as to contractor or equipment performance, and
  - (2) competition for the option is impracticable once the initial contract is awarded.

### **§ 220.40.40 Limitations on Options**

In the case of options for the performance of services, the total of the base and option periods must not exceed five years for contracts which are subject to the Service Contract Act.

### **§ 220.40.50 Required Contract Terms**

The solicitation and resulting contract must specify:

- (a) the limits of the option(s) as to additional quantities of products and/or services that may be purchased; or
- (b) the duration of the period for which performance may be extended under period of performance option(s); and
- (c) the time period or window within which the option(s) may be exercised. This period must be set to give the contractor adequate notice for performance under the option. In determining the period, consideration must be given to the necessary lead-time to ensure continuous production in a manufacturing context or employee retention in an on-going services context and the time required for additional funding and other approvals. The time period for exercising the option must always be kept to a minimum.

**§ 220.40.60 Option Provisions and Clauses**

- (a) A solicitation that includes options must inform competing offerors of how the option quantity or option period will be evaluated for award. Incorporate one of the following Evaluation of Options provisions, as applicable.

<b>§ 220.40.60(a) Evaluation of Options Provisions</b>	
<b>Provision</b>	<b>is included in solicitations...</b>
(1) Provision 2-85A, Evaluation Inclusive of Options	when price evaluation will include the option prices.
(2) Provision 2-85B, Evaluation Exclusive of Options	when price evaluation will exclude the option prices. <b>Note:</b> Use of this provision may not result in obtaining the most advantageous prices for the option periods or quantities.
(3) Provision 2-85C, Evaluation of Options Exercised at Time of Contract Award	when the CO has determined that there is a reasonable likelihood that the option will be exercised, and it may be desirable to exercise the option at the time of award. For example, the solicitation includes a number of items of furniture, some of which are identified as optional, that will be awarded only if sufficient funds are available at the time of award.

- (b) Include one of the following option clauses as applicable in solicitations and contracts that include options which may be exercised after award. Do not include when the options may only be exercised at the time of award (i.e., the solicitation includes Provision 2-85C, Evaluation of Options Exercised at Time of Contract Award). For guidance on exercising options after contract award, **see:** Guide, Vol. 14, § 745.30 (Exercise of Options).

<b>§ 220.40.60(b) Option Clauses</b>	
<b>Clause</b>	<b>is included in...</b>
(1) Clause 2-90A, Option for Increased Quantity	solicitations and contracts for products which express the option quantity as a percentage of the basic quantity or as an additional quantity of a specific line item.
(2) Clause 2-90B, Option for Increased Quantity – Separately Priced Line Item	solicitations and contracts for products when the option quantity is identified as a separately priced line item having the same nomenclature as a corresponding base line item.
(3) Clause 2-90C, Option to Extend Services	solicitations and contracts for services when it is intended to have the option to extend the period of performance up to six months beyond the resulting award’s period of performance.

<b>§ 220.40.60(b) Option Clauses</b>	
<b>Clause</b>	<b>is included in...</b>
	The CO will appropriately fill in the clause's blank spaces.
(4) Clause 2-90D, Option to Extend the Term of the Contract	<p>solicitations and contracts for products or services when it is necessary to include any or all of the following:</p> <ul style="list-style-type: none"> <li>• a requirement that the judiciary must give the contractor a preliminary written notice of its intent to extend the contract; and/or</li> <li>• a statement that an extension of the contract includes an extension of the option; and/or</li> <li>• a specified limitation on the total duration of the contract.</li> </ul> <p><b>Note:</b> The CO will appropriately fill in the clause's blank spaces.</p>

## **§ 220.45 Equipment Lease or Purchase**

### **§ 220.45.10 In General**

This guidance pertains to the decision to obtain equipment by lease or purchase. It applies to both the initial procurement of equipment and the renewal or extension of existing equipment leases. The judiciary should consider whether to lease or purchase equipment or products based on a case-by-case evaluation of comparative costs and other factors.

### **§ 220.45.20 Timing of Decision**

- (a) Upon receipt of the requirement from the requesting office, the CO will conduct appropriate market research. A decision to lease or purchase may be possible based solely upon the market research results. In that case, a written decision must be documented in the procurement file and the solicitation issued on the basis of that decision.
- (b) If the market research is insufficient to determine whether a lease or a purchase is in the best interest of the judiciary, the solicitation or request for quotes should request offerors to offer both purchase and lease pricing options. In this case, the decision whether to lease or to purchase would then be made at the time of award.
- (c) Whether prior to the issuance of the solicitation, or at the time of award, the CO and requesting office must deliberate the lease-versus-buy decision to determine which is more advantageous to the judiciary, and the procurement file must be documented with the CO's written decision.

### **§ 220.45.30 Factors to Consider**

The following are factors which should be considered:

- (a) estimated length of time the equipment is to be used and the estimated usage within that period;
- (b) financial and operating advantages of alternative types and makes of equipment;
- (c) cumulative rental payments for the estimated period of use, including option periods. Use an inflation factor for the subsequent year(s). A budget analyst will assist in obtaining this factor;
- (d) net purchase price;
- (e) any differences in transportation and installation costs;
- (f) any maintenance and other service costs;
- (g) potential obsolescence of the equipment because of imminent technological improvements;
- (h) availability of purchase options;
- (i) trade-in or salvage value;
- (j) availability of a servicing capability, especially for highly complex equipment (i.e., if it is purchased, whether the equipment will be serviced by the judiciary or other sources). If it will be serviced by the lease contractor, then these costs must be considered;
- (k) cost to terminate the lease if the judiciary no longer needs the equipment; and
- (l) cost for any damage caused to the equipment.

### **§ 220.45.40 Purchase Method**

- (a) Generally, the purchase method is appropriate if the equipment will be used beyond the point in time when cumulative leasing costs exceed the purchase costs. The estimate for cumulative leasing costs will include any proposed option periods, calculated with their inflation factor and any other costs associated with leasing (i.e., cost for termination, maintenance, installation).

- (b) COs should not rule out the purchase method of equipment in favor of leasing merely because of the possibility that future technological advances might make the selected equipment less desirable.

#### **§ 220.45.50 Lease Method**

- (a) The lease method may be appropriate after considering the factors in § 220.45.30 (Factors to Consider) and determining it is in the judiciary's advantage under the circumstances. The lease method may also serve as an interim measure:
  - (1) when the circumstances require immediate use of equipment to meet program or system goals; and
  - (2) the circumstances do not currently support purchase.
- (b) If a lease is justified:
  - (1) a lease with option to purchase is preferable, unless the equipment is needed only temporarily (**see:** § 220.45.50(d), below);
  - (2) a lease may be structured as a base period with options. Option period(s) should be negotiated at the time of initial award for the subsequent year(s) to be exercised at the discretion of the judiciary;
  - (3) advance payment is not authorized for any lease period, except in accordance with § 220.55 (Contract Financing). Payment must be made in arrears in accordance with a mutually agreed upon time period (e.g., monthly, quarterly, annually);
  - (4) the cost to terminate the lease must be negotiated and included in the contract.
- (c) Generally, a lease with numerous option periods should be avoided, but may be appropriate if an option to purchase or other favorable terms are included.
- (d) If a lease with option to purchase is used, the contract will state the purchase price or provide a formula which shows how the purchase price will be established at the time of purchase.

#### **§ 220.45.60 Commercial Agreement**

If the lease includes a commercial agreement, then the procedures in Guide, Vol. 14, § 540 (Commercial Agreements) must be followed.

### § 220.45.70 Clauses

Insert Clause 2-110, Option to Purchase Equipment in solicitations and contracts involving a lease with option to purchase.

## § 220.50 Funding Contract Awards

### § 220.50.10 Policy

All judiciary purchases must be supported by a written contract document that has been signed by a certified judiciary contracting officer, and funds sufficient to make required contractual payments must be obligated in the judiciary accounting system before the contractor begins contract performance. No officer or employee of the judiciary may create or authorize an obligation in excess of the funds available, or in advance of appropriations (Anti-Deficiency Act, 31 U.S.C. § 1341), unless otherwise authorized by law. Before executing any contract, the contracting officer will:

- (a) Ensure that adequate funds are available; or
- (b) Expressly condition the contract upon availability of funds in accordance with § 220.50.90 (Clauses for Contracting in Advance of Appropriation of Funds).
- (c) **See also:** Guide, Vol. 13, § 250.50 (Recording and Monitoring Obligations).

### § 220.50.20 Contract Funding Requirements

The following funding guidance applies regardless of whether or not the funds for a contract are local funds or centrally managed funds. Questions regarding contract funding should be referred to the PE, who will consult with OGC as necessary.

- (a) Firm-fixed-price contracts are generally required to be fully funded, which means obligating funds to cover the entire contract price, even if awarded during a period of a continuing resolution. This includes firm-fixed-price contracts for severable services which cross fiscal years (**see:** § 220.50.60(b) (Contracts Crossing Fiscal Years)). For example, a firm-fixed-price contract for severable services awarded for the period 04/01/2014 through 03/31/2015 would normally be fully funded from FY14 funds for performance through 03/31/2015.
  - (1) A firm-fixed-price contract may be incrementally funded only if the contract (excluding any options) or any exercised option is:
    - (A) For severable services;
    - (B) For a period of one year or less in length;

- (C) Incrementally funded using funds available (unexpired) as of the date the funds are obligated; and
  - (D) Approved by PMD for a one-time delegation of procurement authority.
- (2) An incrementally funded fixed-price contract should be fully funded as soon as funds are available.
- (b) Contracts for non-severable services are required to be fully funded at the time of award, which means obligating funds based upon the established cost ceiling in a cost-reimbursement or labor-hour contract. The proper fiscal year's funds for an increase to the cost ceiling for these types of contracts depends on the reason for the increase.
  - (c) Contracts for severable services awarded on a cost-reimbursement, labor-hour, or time-and-materials basis may be funded up to twelve (12) months at a time, and the funding may cross the fiscal year (**see:** § 220.50.60(b) (Contracts Crossing Fiscal Years)). Alternatively, the award may be funded to cover only what is estimated to be required for performance from award through September 30<sup>th</sup> from the current fiscal year's funds. The contract would then be modified to obligate funds of the next fiscal year to cover the remainder of the twelve month performance period, assuming there is still a bona fide need for the services. In no event may funding for the award or for the exercise of any option period exceed the amount estimated for a twelve (12) month period of performance.
  - (d) Multi-year contracts may be fully funded or funded annually. For information on minimum funding for multi-year contracts, **see:** Guide, Vol. 14, § 410.75.15(b) (Description).
  - (e) The amount obligated when funding a blanket delivery order (BDO) or an unpriced purchase order must be based upon the contracting officer's reasonable best estimate of what services/products will actually be ordered during the period covered by the BDO or unpriced purchase order. The file must contain documentation of the basis of the estimate, such as the average prior annual expenditures over the last 3-5 years for the same or similar services/products. For additional guidance on using these two purchase methods, **see:** Guide, Vol. 14, § 325.45.60 (Ordering under BPAs) and § 325.45.10(e) (Use of Unpriced Purchase Orders). BDOs may also be used under indefinite quantity contracts. **See:** Guide, Vol. 14, § 410.30.60 (Delivery Orders or Task Orders).

**Note:** The period covered by a BDO may not cross fiscal years.

**§ 220.50.30 Fiscal Year Contracts**

The contracting officer may initiate a contract action properly chargeable to funds of the new fiscal year before these funds are available, provided that the solicitation and resulting contract include Clause 7-115, Availability of Funds.

**§ 220.50.40 Indefinite-Quantity Contracts**

A one-year indefinite-quantity contract that is funded by annual appropriations may extend beyond the fiscal year in which it begins; provided, that any specified minimum quantities are certain to be ordered in the initial fiscal year.

**§ 220.50.50 Liability Contingent Upon Obligation of Funds**

The judiciary has no liability to pay for supplies or services under a contract conditioned upon the availability of funds until the CO has given the contractor notice that funds are available, which must be confirmed by a contract modification obligating the funds.

**§ 220.50.60 Contracts Crossing Fiscal Years (Annual Appropriations)**

- (a) A contract that is funded by annual appropriations may not cross fiscal years, except in accordance with statutory authorization (e.g., 28 U.S.C. § 604(g)(4)(A) and (B)), or when the contract calls for non-severable services that cannot feasibly be subdivided for separate performance in each fiscal year.
- (b) The Director is statutorily authorized to enter into a contract, exercise an option, or place an order under a contract for severable services (e.g., equipment maintenance services, court reporting services, interpreter services, etc.) for a period that begins in one fiscal year and ends in the next fiscal year using annual appropriations if the period of the contract awarded, option exercised, or order placed does not exceed one year (28 U.S.C. § 604(g)(4)(A)). Current year funds, available as of the date such an award is made, may be obligated for the total amount of the contract, option, or order entered into under this authority.

**§ 220.50.70 Limitation of Cost or Funds**

- (a) When using cost-reimbursement contracts containing Clause 4-85, Limitation of Cost or Clause 4-90, Limitation of Funds, upon learning that the contractor is approaching the estimated cost of the contract or the limit of the funds obligated, the CO will promptly obtain programming and funding information pertinent to the contract's continuation and notify the contractor in writing of one of the following:
  - (1) Additional funds have been obligated in a specified amount;



- (2) The contract is not to be further funded and the contractor should submit a proposal for an adjustment of fee, if any, based on the percentage of work completed in relation to the total work called for under the contract;
  - (3) The contract is to be terminated; or
  - (4) The judiciary is considering whether to obligate additional funds. In this event, the CO's notice must also include the statements that the contractor is entitled by the contract terms to stop work when the obligated funding is reached and that any work beyond the obligated funding will be at the contractor's risk.
- (b) Upon learning that a partially funded contract containing either of the clauses referenced in § 220.50.70(a) above will receive no further funds, the contracting officer must promptly give the contractor written notice of the decision not to provide funds.

#### **§ 220.50.80 Funding for Changes**

- (a) Under a firm-fixed-price contract, the contracting officer must ensure that funds are available in the appropriate amount before authorizing changes.
- (b) Under a cost-reimbursement or labor-hour contract, the contracting officer may issue a change order, a direction to replace or repair defective items or work, or a termination notice without immediately increasing the funds available. Since a contractor is not obligated to incur costs in excess of the obligated funds in the contract, the contracting officer must ensure availability of funds for directed actions.
  - (1) If, at the time the change is ordered, the contract has a projected underrun (i.e., projected costs for the remainder of the performance are less than the currently obligated funding), funds for the change may be available without any change to the existing funding.
  - (2) Otherwise, the contracting officer must ensure funds are available and obligated to cover the increased cost for the ordered changes. The contracting officer may direct that any increase in the funds obligated on a contract be used for the sole purpose of funding termination or other specified expenses.

**See also:** Guide, Vol. 14, § 745.40.30 (Contractor's Obligation to Perform).

**§ 220.50.90 Clauses for Contracting in Advance of Appropriation of Funds**

- (a) Insert Clause 7-115, Availability of Funds in solicitations and contracts if the contract will be chargeable to funds of the new fiscal year and the contract action will be awarded before the funds are available.
- (b) Insert Clause 7-120, Availability of Funds for the Next Fiscal Year in labor-hour, time-and-materials, or cost-type solicitations and contracts if:
  - (1) the contract is funded using annual appropriations;
  - (2) the performance period will cross fiscal years; and
  - (3) there are insufficient funds in the current year for the initial period of performance.

**§ 220.55 Contract Financing****§ 220.55.10 Definition**

“Contract financing payment” means an authorized judiciary disbursement of monies to a contractor prior to the acceptance of products or services by the judiciary.

- (a) Contract financing payments include:
  - commercial advance payments,
  - performance based payments,
  - progress payments based on cost,
  - progress payments based on a percentage or stage of completion, and
  - interim payments under a cost reimbursement contract.
- (b) Contract financing payments do not include:
  - routine invoice payments for products and services that have been received and accepted,
  - payments for partial deliveries, or
  - lease and rental payments paid in arrears.

**§ 220.55.20 Authority**

The Director has authority under 28 U.S.C. § 604(g)(4)(C) to enter into contracts containing contract financing terms. Of the various types of contract financing listed above in § 220.55.10(a) (Definition), only commercial advance payment is currently authorized for use by judiciary organization contracting officers. This section prescribes

procedures applicable to the inclusion of commercial advance payment terms in purchase orders and contracts.

**Note:** Payment in advance is permitted for publications, whether printed or electronic, under 31 U.S.C. § 3324(d)(2), which is a separate authority from this delegation, and is therefore not subject to any of the limitations of the commercial advance payment delegation described below.

### § 220.55.30 Delegation

- (a) Subject to the following limitations, the Director has delegated to chief judges and other judiciary officials identified at § 120.20.10(b) (Delegation to Chief Judges and Other Judiciary Officials), the authority to use commercial advance payment, subject to the limitations of the bona fide needs rule, in the purchase of services which meet the following conditions:
- (1) the purchase is for:
- telephone service purchased under a contract;
  - commercial training for an individual employee or group of employees;
  - maintenance support services for photocopy equipment, IT equipment, and/or software;
  - extended warranties of commercial items which are ordered at the same time the item is purchased; or
  - parking space (garage or lot) services, regardless of the source (private company, state/local government, etc.), where the advance payment is made the first of the month to cover only that month's service. (**Note:** Advance payment for parking on any other interim, such as quarterly or semi-annually, etc., is not delegated. For additional guidance on parking services, **see:** Guide, Vol. 16, § 630 (Parking).)
  - emergency and transitional housing, child care, and job training related to Second Chance Act. **See:** Guide, Vol. 8L, Ch. 2 (Second Chance Act Guidance).
- (2) the total amount of the commercial advance payment does not exceed \$25,000;

- (3) the period of performance to be paid in advance does not exceed a 12 month period (not applicable to the purchase of extended warranties); and
  - (4) no advance payment is made prior to the end of the first month of the period of performance (not applicable to the purchase of commercial training or extended warranties).
- (b) PMD may approve the inclusion of commercial advance payment terms for transactions outside these limits as one-time delegations of authority for specific purchases.
  - (c) The judiciary may make advance payment to state and local governments where these entities are furnishing noncommercial services which are reasonably available only from the state/local government organization, such as state court fees, etc. Agreements with state/local governments for advance payments for such services are not subject to the conditions of this delegation, and do not require obtaining a one-time delegation of authority. Conversely, advance payment for purchases of services readily available in the commercial market from state/local governments are subject to the limitations of § 220.55.30(a) (Delegation).
  - (d) The judiciary may make advance payment to other federal agencies without any special approvals or authorizations. **See:** Guide, Vol. 14, § 550 (Interagency Agreements and Memoranda of Understanding for Obtaining Products and Services).

#### § 220.55.40 Policy

In approving the use of commercial advance payments, the CO must keep in mind that Congress intended this authority to be used sparingly since it poses certain risks to the judiciary should the contractor declare bankruptcy or fail to perform, for example. The security obtained, the amounts and timing of commercial advance payments, and the anticipated savings to the judiciary must be analyzed as a whole to determine whether making advance payment will be in the best interest of the judiciary. For information on required determinations, **see:** § 220.55.60(e) (Determinations).

#### § 220.55.50 Limitations

- (a) Any proposed use of a commercial advance payment which does not meet all of the conditions in § 220.55.30 (Delegation) above, must be forwarded to PMD, for review prior to award. If the request is approved, PMD will issue a one-time delegation of authority to enter into the contract. For information on required determinations, **see:** § 220.55.60(e) (Determinations).

- (b) Performance is deemed to commence on the first day of the contract period of performance. While actual performance of services under maintenance support service agreements for photocopier equipment, IT equipment and/or software might not occur on the first day of the performance period, for advance payment purposes, performance is deemed to commence on the first day of the contract period of performance. Similarly, when the award is made in advance of the first day of the contract period of performance (such as, for example, contracts awarded in August or September which begin performance in October), performance commences on the first day of the contract period of performance, not as of the date of award, except with regard to commercial training, where performance is deemed to commence on the date of the award.
- (c) The contracting officer must obtain adequate security prior to authorizing a commercial advance payment. **See:** § 220.55.60(c) (Evaluating Adequacy of Security for Advance Pay).

#### § 220.55.60 Procedures

- (a) Solicitations

If an offeror proposes commercial advance payment terms in response to a competitive written solicitation, and the CO is willing to consider the request, the solicitation must be amended to add Clause 2-115, Terms for Commercial Advance Payment of Purchases to the solicitation to notify all offerors of the availability of advance pay, if the clause was not included in the original solicitation.

- (b) Evaluating Offers with Different Payment Terms

An offer stating that the commercial advance payment terms will not be used by the offeror does not alter the evaluation of the offer, nor does it render the offer nonresponsive or otherwise unacceptable. In the event of award to an offeror who declined the proposed advance payment, the advance payment clause(s) may not be included in the resulting contract. Acceptance or refusal of the commercial advance payment term may not be a basis for adjusting offerors' proposed prices, because the effect is reflected in each offeror's proposed prices.

- (c) Evaluating Adequacy of Security for Advance Pay

The following requirements do not apply to the award of delivery or task orders against either judiciary or non-judiciary contracts (e.g.,

GSA schedule contracts, or other Executive branch contracts, such as NASA SEWP, etc.). In these cases, it may be assumed that a review of the contractor's financial condition was made prior to award of such contracts, and that the contracts include appropriate terms authorizing advance payment terms for delivery or task orders issued against them.

- (1) The CO will review the apparent successful offeror's financial condition to determine whether it is acceptable as adequate security for the risk incurred by making advance payment. Assessment of the contractor's financial condition will consider both net worth and liquidity. Other methods of verifying the contractor's financial condition to make this determination include the following:
    - (A) Checking Dun and Bradstreet, if this service is available; and/or
    - (B) Requesting audited financial statements from the offeror
  - (2) If the CO finds the offeror's financial condition to be adequate security, Clause 2-125, Security for Advance Payment must be included in the awarded contract as well as Clause 2-115, Terms for Commercial Advance Payment of Purchases.
  - (3) If the CO does not consider the offeror's financial condition to be adequate security, the offeror must provide an irrevocable letter of credit from a federally insured financial institution as specified in Clause 2-115, Terms for Commercial Advance Payment of Purchases. The letter of credit must be at least equal to the amount of the advance payment requested. If the offeror refuses to provide the required letter of credit, the CO may request pricing based upon payment in arrears. If the revised proposal still is the apparent successful offer in accordance with the solicitation's evaluation procedures, the CO may make award upon the basis of payment in arrears. Any award made based upon payment in arrears should not include any advance payment clauses.
- (d) Contract Administration
- (1) The CO is responsible for receiving, approving, and transmitting all commercial advance payment requests to the payment office. For open market awards involving advance payment, the CO is also responsible for determining that the security provided by the contractor continues to be adequate.

- (2) If the contractor's financial condition was accepted as adequate security, the CO will monitor the contractor's financial condition at least quarterly.
- (3) If information obtained during the CO's periodic monitoring of the contractor's financial condition causes the CO to determine that the contractor's financial condition has become insufficient, the CO must request additional security under Clause 2-115, Terms for Commercial Advance Payment of Purchases. In this situation, in addition to an irrevocable letter of credit from a federally insured financial institution, the following alternative forms of security may be accepted:
  - (A) A lien paramount to all other liens without filing, notice, or other action by the judiciary. The contractor must identify what the lien is upon (e.g., the work in process, the contractor's plant, or the contractor's inventory), and the CO must issue a modification to the contract to reflect the lien and the asset(s) supporting it. The CO also must ensure the contract gives the judiciary a right to verify the existence and value of the asset. In addition, the contractor must certify that the assets subject to the lien are free from any prior encumbrances that may result from such things as capital equipment loans, installment purchases, working capital loans, lines of credit and revolving credit arrangements.
  - (B) A bond guaranteeing repayment of the unliquidated advance payment from a corporate surety listed in Department of Treasury Circular 570 (Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and Acceptable Reinsuring Companies).
  - (C) A guarantee of repayment from a person or corporation of demonstrated liquid net worth, connected by significant ownership to the contractor; or
  - (D) Title to identified contractor assets of adequate worth, such as U.S. Government securities, certificates of deposit, stocks and bonds actively traded on U.S. national stock exchange or real property.
- (4) The additional security obtained must be at least equal to the maximum unliquidated amount of the advance payment already made to the contractor. For example: Advance payment of \$12,000 has been made based on twelve months of performance at \$1,000/month. After seven months of performance the CO

determines additional security is required. The value of that security would be \$5,000 based upon the remaining five months of performance, since the value of the initial seven months of performance (\$7,000) has liquidated that portion of the advance payment. The value of the security may be adjusted periodically during contract performance, as long as it is always equal to or greater than the amount of unliquidated advance payment.

(e) Determinations

The CO must include the following determinations in the contract file:

- (1) A determination that it is appropriate or customary in the commercial marketplace to make commercial advance payments for the specific service being purchased. **Note:** For those types of purchases listed at § 220.55.30(a) (Delegation), this determination has been made and the contracting officer will simply state that the purchase meets the conditions of § 220.55.30(a) (Delegation).
- (2) A determination that authorizing commercial advance payment is in the best interest of the judiciary, which will include an analysis of the demonstrable savings expected to be realized by the use of commercial advance payment. The best interest of the judiciary determination will address the following:
  - (A) A brief summary of the solicitation or contract requirements (e.g., description of services, period of performance, etc.);
  - (B) The contractor's need for commercial advance payments and the potential benefits to the judiciary from providing commercial advance payments;
  - (C) Actions that the contracting officer will take to minimize the judiciary's risk of loss from providing commercial advance payment;
  - (D) The proposed commercial advance payment contract terms; and
  - (E) If the CO accepts the contractor's financial condition to be adequate security, the determination will also include the CO's analysis supporting that decision.



**§ 220.55.70 Commercial Advance Payment Clauses**

The CO will include the following clause(s) in solicitations and contracts offering commercial advance payment, as indicated below:

<b>§ 220.55.70 Commercial Advance Payment Clauses</b>	
<b>Clause</b>	<b>is included in...</b>
(a) Clause 2-115, Terms for Commercial Advance Payment of Purchases	all solicitations and contracts for products or services which authorize commercial advance payment.
(b) Clause 2-115, Alternate I	solicitations and contracts for photocopy equipment maintenance which authorize commercial advance payment.
(c) Clause 2-120, Submission of Invoice	solicitations and contracts which authorize commercial advance payment, except those for commercial training.
(d) Clause 2-125, Security for Advance Payment	all contracts authorizing commercial advance payment when the contractor's financial condition is accepted as adequate security.

**§ 220.60 Energy and Environmental Considerations**

<b>§ 220.60.10 Definitions</b>	
Energy-Efficient Product	<p>A product that:</p> <ul style="list-style-type: none"> <li>• Meets Department of Energy and Environmental Protection Agency criteria for use of the Energy Star trademark label; or</li> <li>• Is in the upper 25 percent of efficiency for all similar products as designated by the Department of Energy's Federal Energy Management Program (FEMP).</li> </ul>
Energy-Efficient Standby Power Devices	<p>Products that use:</p> <ul style="list-style-type: none"> <li>• External standby power devices, or that contain an internal standby power function; and</li> <li>• No more than one watt of electricity in their standby power consuming mode or meet recommended low standby levels as designated by the Department of Energy FEMP.</li> </ul>
Environmentally Preferable	<p>Products or services that have a lesser or reduced effect on human health and the environment when compared with competing products or services that serve the same purpose. This comparison may consider raw materials acquisition, production, manufacturing, packaging, distribution, reuse, operation, maintenance, or disposal of the product or service. This is applicable to FEMP-Designated products.</p>

<b>§ 220.60.10 Definitions</b>	
Personal Computer Product	A notebook computer, a desktop computer, or a computer monitor, and any peripheral equipment that is integral to the operation of such items. For example, the desktop computer together with the keyboard, the mouse, and the power cord would be a personal computer product. Printers, copiers, and fax machines are not included in peripheral equipment, as used in this definition.

### **§ 220.60.20 Statutory Requirement**

Under 42 U.S.C. § 8259B (Federal Procurement of Energy Efficient Products), judiciary purchases of energy-consuming products, including services involving the provision of energy-consuming products, such as courtroom technology projects, must specify products that comply with the requirements of this section. This requirement applies to all purchases of such products regardless of dollar amount, including purchases made using the judiciary purchase card.

### **§ 220.60.30 Statutory Exemption**

The judiciary is not required to purchase an ENERGY STAR® or FEMP-designated product, if the chief judge or other judiciary official identified at § 120.20.10(b) (Delegation to Chief Judges and Other Judiciary Officials) (or Procurement Liaison Officer, if delegated), or PE determines:

- (a) there is no ENERGY STAR® or FEMP-designated product reasonably available which meets the judiciary's requirements; or
- (b) no ENERGY STAR® or FEMP-designated product is cost-effective over the life of the product taking energy cost savings into account.

**See also:** Guide, Vol. 14, § 130.20.60 (Energy Efficiency).

### **§ 220.60.40 Procedure**

When acquiring energy-consuming products listed in the ENERGY STAR® Program or FEMP:

- (a) Judiciary COs must purchase ENERGY STAR® or FEMP-designated products; and
- (b) For products that consume power in a standby mode and are listed on FEMP's Low Standby Power Devices product listing, judiciary COs must:
  - (1) Purchase items which meet FEMP's standby power wattage recommendation or document the reason for not purchasing such items; or

- (2) If FEMP has listed a product without a corresponding wattage recommendation, purchase items which use no more than one watt in their standby power consuming mode. When it is impracticable to meet the one watt requirement, judiciary COs must purchase items with the lowest standby wattage practicable.

#### **§ 220.60.50 Purchasing Personal Computer Products**

- (a) The Institute of Electrical and Electronics Engineers (IEEE) 1680 standard for personal computer products is a voluntary consensus standard which meets EPA-issued guidance on environmentally preferable products and services. The IEEE 1680 standard for personal computer products sets forth both required and optional criteria. An ENERGY STAR® rating is one of the minimum required criteria.
- (b) The Electronic Product Environmental Assessment Tool (EPEAT) is a tool available to the judiciary to assist in the evaluation of personal computer products based upon environmental attributes. EPEAT “Bronze” registered products must meet all of the IEEE 1680 required criteria. EPEAT “Silver” registered products meet all IEEE 1680 required criteria and 50 percent of the optional criteria. EPEAT “Gold” registered products meet all IEEE 1680 required criteria and 75 percent of the optional criteria. For additional information on EPEAT, **see:** [epeat.net](http://epeat.net). EPEAT registration is separate from ENERGY STAR® and FEMP.
- (c) The purchase of EPEAT-registered products is encouraged when such products are reasonably available and are cost-effective over the life of the product. EPEAT Silver or Gold registration may be used as an evaluation factor in solicitations for personal computer products.

#### **§ 220.60.60 Additional Resources**

- (a) ENERGY STAR®
- (b) Federal Energy Management Program

#### **§ 220.60.70 Clauses**

The CO will include the following clause(s) in solicitations and contracts as indicated below:

<b>§ 220.60.70 Clauses</b>	
<b>Clause</b>	<b>is included in ...</b>
(a) Clause 2-130, Energy Efficiency in Energy-Consuming Products	solicitations and contracts when energy consuming products listed in the ENERGY STAR® program or FEMP will be <ul style="list-style-type: none"> <li>• purchased by the judiciary;</li> <li>• purchased by the contractor for use in contractor-performed services within a judiciary facility;</li> <li>• furnished by the contractor for use by the judiciary; or</li> <li>• specified in the design of a project or incorporated during implementation of a project, such as, for example, courtroom technology</li> </ul>
(b) Clause 2-135, IEEE 1680 Standard for the Environmental Assessment of Personal Computer Products	solicitations and contracts for personal computer products when soliciting for EPEAT-registered products. Alternate 1 of the clause may be used when there are a sufficient number of EPEAT Silver registered products available to meet agency needs for meaningful competition

## **§ 230 Specifications, Statements of Work, and Product Descriptions**

### **§ 230.10 Overview**

#### **§ 230.10.10 General Requirements**

All procurement actions require a clear and concise description of the products or services to be procured which is devoid of generalizations, ambiguities, and omissions. For requirements processed under small purchase procedures, the description may be less detailed than for complex requirements processed under formal contracting procedures. However, the CO must ensure that products descriptions, specifications, statements of work (SOW), etc. are prepared in a way that promote competition. Unnecessarily restrictive SOWs or specifications may negatively impact competition. Restrictive product descriptions may require only one, or a limited number of offerors or product choices, when other highly similar products could also be considered if the requirement is stated in less restrictive language.

#### **§ 230.10.20 Avoidance of Ambiguity**

Product descriptions, specifications and SOWs that are susceptible to more than one reasonable interpretation are ambiguous and objectionable. They impede full and open competition by failing to ensure that offerors are competing on a “common” or “equal” basis. The result may lead to contract administration problems or inadequate contractor performance.

## **§ 230.20 Specifications**

### **§ 230.20.10 In General**

Specifications are normally used when purchasing a product rather than a service. Specifications must fully and completely state the judiciary's needs considering the nature of the products being purchased. Specifications may be stated in terms of:

- (a) function, so that a variety of products may be considered as qualified;
- (b) performance, including the range of acceptable characteristics or the minimum acceptable standards; or
- (c) design requirements, providing exact dimensions, materials, or characteristics.

### **§ 230.30 Statements of Work (SOW)**

- (a) Statements of Work (SOW) are most often used when purchasing services rather than end-products. However, a SOW may include specifications or product descriptions. The SOW must describe the work clearly and at a level of detail sufficient to ensure the judiciary obtains the services it requires. After award, the SOW is the standard for measuring performance and is used by both the judiciary and the contractor to determine rights and obligations under the contract.
- (b) Two other methods of defining work in solicitations for services are the Performance Work Statement (PWS) and the Statement of Objectives (SOO). Both of these are structured around the results to be achieved rather than the manner in which the work is to be performed. These two methods are closely linked in that if the judiciary solicits using a SOO, the competing offerors propose the PWS for the contract, instead of the PWS being written by the judiciary.
- (c) The PWS describes the required results in clear, specific and objective terms with measurable outcomes.
- (d) The SOO states the overall performance objectives and is used when the judiciary intends to provide the maximum flexibility to each offeror to propose an innovative approach. The SOO must include the following, at a minimum:
  - Purpose,
  - Scope or mission statement,
  - Period and place of performance,
  - Background,

- Performance objectives (i.e., required results), and
  - Operating constraints.
- (e) Offerors use the SOO to develop a proposed PWS, which must then be evaluated to determine whether the proposed standards (i.e., measurable outcomes) meet judiciary needs. The final contract incorporates the successful offeror's proposed PWS and not the SOO.

## § 230.40 Product Descriptions

### § 230.40.10 In General

Whenever standard or modified commercial products will meet judiciary requirements, product descriptions must be used instead of specifications. Product descriptions may be either the common generic identification of the item, which is the preferred description, or a brand name description, as follows:

- (a) The common generic identification description must include the salient characteristics or function of the product. For example, for a printer, it will be described as having the capability to print a minimum of x pages per minute, in black ink or color, etc.
- (b) The brand name description may include known acceptable brand-name products, identified by model or catalog number, and the commercial catalogs in which they appear. If a product with equal characteristics but a different brand name will also meet the requirements of the judiciary, then the brand name is followed by the phrase "or equal." The CO must then consider other "or equal" products. However, if the brand name is specified without the phrase "or equal," or is defined so as to require a particular "brand name," product, or a feature of a product peculiar to one manufacturer, thereby precluding consideration of a product manufactured by another company, then this is restricting competition to only those who can provide the specified brand name item and a justification for other than full and open competition is required. **See also:** Guide, Vol. 14, § 335.10.50 (Use of Brand Name Descriptions).

### § 230.40.20 Equivalent Product Considerations

If offers for equivalent ("or equal") products will be considered:

- (a) the product description must include a description of the item's essential characteristics, such as material, size or capacity, the equipment with which the items will be used, and any restrictive operating environmental conditions; and

- (b) space must be provided in the solicitation for offerors to identify the manufacturer's brand names and models or catalog numbers of the "equal" product proposed.

**§ 230.40.30 Provision**

Include Provision 2-100, Brand Name or Equal in solicitations when the product description includes a specific brand name and an "equal" product is also acceptable.