

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

WASHINGTON, D. C. 20544

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GUIDE TO JUDICIARY POLICY

TRANSMITTAL 14-005 VOLUME/PART 14 CHAPTER(S) 1, 2, 5-7

TO: Circuit Executives
Federal Public/Community Defenders
District Court Executives
Clerks, United States Courts
Chief Probation Officers
Chief Pretrial Services Officers
Bankruptcy Administrators
Circuit Librarians
Certified Contracting Officers

FROM: Judge Thomas F. Hogan



RE: PROCUREMENT

This transmittal provides notice of changes to the *Guide to Judiciary Policy*, Vol. 14 (Procurement):

[Appendix 1B – Solicitation Provisions and Contract Clauses](#)
[Appendix 1C – Matrix of Solicitation Provisions and Clauses \(Including Key\)](#)
[Chapter 2 – Procurement Planning and Preparations](#)
[Chapter 5 – Special Categories of Procurements](#)
[Chapter 6 – Bonds, Insurance, Taxes, and Intellectual Property](#)
[Chapter 7 – Contract Administration](#)
[Appendix 7E – Sample COR Appointment Memorandum](#)

Significant changes in Appendix 1B include the following:

- Addition of two new clauses: Clause 2-140, Judiciary IT Security and Clause 6-105, California E-Waste Fee.
- Addition of a new alternate version of Provision 3-100.
- Revision of Clause 7-45, Travel, to add a reference to Vol. 19 and clarify that costs reimbursable under the clause may only be paid based upon actually incurred costs.
- Revision of Clause 7-135, Payments, to clarify that payment is not authorized more often than once monthly unless payment on a more frequent basis is specifically authorized elsewhere in the contract.
- Revision of Clause 7-185, Changes, and addition of alternate versions of this clause.

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- Terminology changes as follows, shown in the Redline Comparison below, only when in conjunction with other more substantive changes:
 - Changing the word “schedule” — a term of art referring to certain sections of the Uniform Contract Format (UCF) — to “contract” in numerous clauses/provisions to ensure they remain meaningful when used in solicitations/contracts that are not required to use the UCF.
 - Changing “installation” to “office” or “facility” in several clauses/provisions.
 - Changing the word “government” to “judiciary” wherever appropriate in the context.
 - Changing references to the Central Contractor Registration (CCR) to the System for Award Management (SAM), which replaced the CCR.
 - Changing references to the Contracting Officer's Technical Representative to Contracting Officer's Representative (COR).

Appendix 1C has been converted from Excel to WordPerfect and updated for the new clauses/provisions incorporated in Appendix 1B. Notations have been added to Matrix Key to clarify that the columns for fixed-price and cost-reimbursement services and products apply to open market procurements over \$100,000.

Significant changes in Chapter 2 include:

- New guidance on accepting free “trial use” or “demonstration use” offers as part of market research.
- Removal of post-award inspection suggestions from material titled “Quality Assurance at Judiciary Site or Destination,” since post-award guidance is more appropriately addressed in Chapter 7.
- New text to prescribe when to use Clause 2-140, Judiciary IT Security.
- New guidance on the use of options.
- New/revised guidance on funding requirements for contracts.
- Addition of parking contracts, when paid on a monthly basis, to the general advance payment delegation requiring no PMD approval.
- Clarification that the Energy Policy Act of 2005 has no statutory exemptions based upon dollar amount or purchase method (i.e., use of the purchase card).

Significant changes in Chapter 5 include:

- Clarification that temporary help services contracts are not considered personal services.
- Clarification of the distinctions between various statutory authorities regarding personal services and expert services, and which involve contracts as opposed to personnel appointments.
- Reorganizing the commercial agreement terms and conditions materials, including moving “Governing Law” to the list of prohibited terms and conditions, and adding new guidance on negotiating cancellation terms for meeting/conference facilities.

Significant changes in Chapter 6 include:

- New text to prescribe when to use Clause 6-105, California E-Waste Fee.

Significant changes in Chapter 7 include:

- New guidance on records retention using other than paper files.
- Clarification of what procurement file contents should be considered sensitive with restricted access.
- New guidance on appointment of a Contracting Officer's Representative.

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- Clarification of guidance that written notification to the contractor is required when products or services are rejected as non-conforming and the remedies available to the contracting officer in such situations.
- Clarification that fraud or gross mistake amounting to fraud are legal determinations which must be made by a court of law and remedies for these situations are only available after a court has determined they are applicable.
- Incorporation of guidance regarding money transfer services, such as PayPal, previously issued under Procurement Bulletin 2004-12.
- Clarification that any contract price increase must have a legal basis of support.
- Revision of materials on determining what is “within scope” for contract modifications.
- New materials, including examples, on use and exercise of options.
- Prescriptive text addressing when to use the new alternate versions of Clause 7-185, Changes.
- New sample release of claims language for use in settlement modifications.
- Clarification of the importance of following the novation process to ensure payment is made to the correct party.
- Authorization of alternate documentation to stockholder minutes for novation agreements.
- Clarification that the termination clauses at § 755.20.60 and § 755.25.60 are only prescribed for open market procurements.
- Removal of materials regarding various types of damages which may result from a termination for default (incidental, etc.).
- Revision of the criteria for the two differing record retention periods from award procedure used to the dollar amount of the contract, based upon the judiciary small purchase threshold amount.
- Clarification of guidance regarding retention of unsuccessful offers.
- Addition of a sample COR appointment memorandum as Appendix 7E.

The significant changes are detailed in the Redline Comparison below. Throughout these chapters, wording was revised to improve clarity. Terminology changes within the chapters include changing the word “vendor” to “offeror” or “contractor” depending on the context, and changing references to Contracting Officer’s Technical Representative to Contracting Officer’s Representative. These minor terminology changes have been included in the Redline Comparison only where they appear in conjunction with other more substantive changes.

Questions regarding this transmittal may be directed to the Office of Finance and Budget, Procurement Management Division, at 202-502-1330.

REDLINE COMPARISON REFLECTING CHANGES

[Significant changes in Appendix 1B (Solicitation Provisions and Contract Clauses) follow:]

Provisions and Clauses (B and Chapter 1)

B.1.1 Definitions

Provision

A term or condition used only in solicitations and applying only before award, e.g., provisions which provide information about how offers will be evaluated. These are generally incorporated at the end of solicitation documents in order to easily omit them from the award document.

[. . .]

REDLINE COMPARISON REFLECTING CHANGES

B.1.3 Numbering of Provisions and Clauses

[. . .]

Beneath each clause or provision title are instructions on where in this volume of the *Guide* the prescription for the usage of that clause or provision is located. ~~The instructions also say in which section of the UCF (A through M) to insert the clause or provision if UCF applies. The prescription will indicate the circumstances for use of the provision or clause, e.g., "Clause X-X is included in all solicitations and contracts."~~

The Appx 1C (Matrix of Solicitation Provisions and Clauses) ~~(Appx 1C)~~ is a quick reference document to help COs:

- find clauses, provisions, and their prescription(s), ~~and the applicable UCF section;~~ It also provides guidance as to:
 - the required UCF section for each clause/provision, when UCF is applicable;
- [. . .]
- ~~determine~~ whether the clause or provision is always required (R) for a specific type of procurement or only required when certain conditions apply (A).

B.2.1 Solicitation Provisions and Contract Clauses Prescribed in Appendix B.

[. . .]

- (c) Clause B-20, Computer Generated Forms is included in all solicitations and contracts that require the contractor to submit data on standard or optional forms ~~prescribed by this manual.~~

Clause 2-5A, Inspection of Products

[. . .]

Inspection of Products (JANMAR 20013)

- (a) The contractor shall use and maintain a written inspection or quality control system acceptable to the judiciary for the products under this contract. The contractor shall tender to the judiciary for acceptance only products which have been inspected in accordance with the acceptable inspection system and have been found by the contractor to be in conformity with contract requirements. As part of the system, the contractor shall prepare records evidencing all inspections made under the system and the outcome. These records shall be kept complete and made available to the judiciary during contract performance and for at least three years after acceptance. The judiciary has the right to evaluate the acceptability and effectiveness of the contractor's inspection system before award and during contract performance. This evaluation may be used to determine the extent of judiciary inspection and testing, but this does not waive its right to inspect and test all items. The right of review, whether exercised or not, does not relieve the contractor of the obligations under the contract. ~~As a minimum, the contractor's inspection/quality control system shall reflect controls and record keeping in the following functional areas:~~
- (1) ~~receiving inspection;~~
 - (2) ~~in-process inspection;~~
 - (3) ~~final inspection and test (including packaging);~~
 - (4) ~~calibration of inspection or test equipment; and~~
 - (5) ~~control or disposition of nonconforming material.~~

[. . .]

REDLINE COMPARISON REFLECTING CHANGES

Clause 2-5A [cont'd]

- (c) If requested by the judiciary, the contractor shall provide, ~~without charge,~~ all reasonable facilities and assistance to the judiciary inspectors. If the judiciary performs inspections or tests on the premises of the contractor or a subcontractor, the contractor shall furnish, and shall require subcontractors to furnish, at no increase in contract price, all reasonable facilities and assistance for the safe and convenient performance of these duties. Except as otherwise provided in the contract, the judiciary shall bear the expense of judiciary inspections or tests made at other than the contractor's or subcontractor's premises; provided, that in case of rejection, the judiciary shall not be liable for any reduction in the value of inspection or test samples.
- (d) The judiciary may require the contractor to correct or replace any products that fail to comply with the requirements of this contract. Products are nonconforming when they are defective in material or workmanship or are otherwise not in conformity with contract requirements. The judiciary may reject ~~defective products which do not conform to the contract requirements and~~ nonconforming supplies with or without disposition instructions. Upon determining that the products are nonconforming, the judiciary may, at its discretion:
- (1) require replacement or correction of the ~~defects~~ defective products;
- [. . .]
- (3) accept the nonconforming products at a reduced price.
- (e) ~~Any remedy such as replacement, correction, or reimbursement for re-procurement will be determined by~~ The contractor shall remove supplies rejected or required to be corrected. However, the contracting officer may require or permit correction in place, promptly after notice, by and at the expense of the contractor. Corrected or replaced products may not be tendered again unless the former tender and the requirement for correction or replacement are disclosed.—
- (f) If the contractor fails to proceed with reasonable promptness to ~~perform replacement or correction, and if it can be performed within a ceiling price~~ remove, replace or correct rejected products, the judiciary may:
- [. . .]
- (fg) If the contractor does not correct or replace the products within the contract delivery schedule, the contracting officer may require an equitable price reduction as consideration for late delivery.
- (h) Acceptance shall be conclusive, except for latent defects, fraud, gross mistakes amounting to fraud, or as otherwise provided in the contract.
- (i) The contracting officer may ~~negotiate~~ require a ~~deduction~~ price reduction for consideration ~~from the contract for reimbursement to the~~ any judiciary ~~for any~~ costs incurred for:
- [. . .]
- ~~(3) Charges other than these, for any retesting caused by rejection, will be computed as the actual laboratory cost obtained from the National Bureau of Standards or other testing laboratory.~~

[. . .]

REDLINE COMPARISON REFLECTING CHANGES

Clause 2-5B, Inspection of Services

[. . .]

Inspection of Services (~~AUGMAR 2004~~MAR 2013)

- (a) The contractor shall provide ~~to the judiciary for acceptance only services which conform to the contract requirements. As part of the~~and maintain an inspection system; acceptable to the judiciary covering the performance of services under this contract. Complete records of all inspection work performed by the contractor shall ~~prepare records evidencing all inspections made under the system and the outcome. These records shall be kept complete~~be maintained and made available to the judiciary during contract performance and for at least three years after acceptance. ~~The judiciary has the right to evaluate the acceptability and effectiveness of the contractor's inspection system before award and during contract performance. This evaluation may be used to determine the extent of judiciary inspection and testing, but this does not waive its right to inspect and test all services. The right of review, whether exercised or not, does not relieve the contractor of the obligations under the contract.~~
- [. . .]
- (c) If ~~requested by the judiciary, the contractor shall provide, without charge, all reasonable facilities and assistance to the judiciary inspectors. If~~ the judiciary performs inspections or tests on the premises of the contractor or a subcontractor, the contractor shall furnish, and shall require subcontractors to furnish, at no increase in contract price, all reasonable facilities and assistance for the safe and convenient performance of these duties.
- (d) If any of the services do not conform with contract requirements, the judiciary may require the contractor to perform the services again in conformity with contract requirements, at no increase in contract amount. When the ~~defects in~~ services cannot be corrected by re-performance, the judiciary may:
- [. . .]
- (e) If the contractor fails to promptly perform the services again or to take the necessary action to ensure future performance in conformity with contract requirements, the judiciary may:
- (1) by contract or otherwise, ~~perform~~obtain performance of the services and charge to the contractor any cost incurred by the judiciary that is directly related to the performance of such service; or
- [. . .]

Clause 2-30A, Time of Delivery

[. . .]

Time of Delivery (~~JANMAR 2001~~MAR 2013)

- (a) The judiciary requires ~~delivery to be made according to the delivery schedule specified in Section F of the contract schedule. all items to be delivered by no later than~~ . The offeror proposes delivery of all items by no later than .
- (b) The judiciary will evaluate ~~offerors' equally, as regards time of delivery, offers that~~ proposed ~~delivery schedules to determine the offer with the most advantageous delivery time to the judiciary within the period specified above.~~ Offers that propose delivery that will not clearly fall within the required delivery period will be deemed unacceptable. The judiciary reserves the right to award on the basis of either the required delivery schedule or the proposed delivery schedule when an offeror proposes an earlier delivery schedule than required above. If the offeror proposes no other delivery schedule, the required delivery schedule above will apply.
- (b) [. . .]

REDLINE COMPARISON REFLECTING CHANGES

Clause 2-90C, Option to Extend Services

Include the following clause as prescribed in § 220.40.60(b)(3) (Option Provisions and Clauses).

Option to Extend Services (~~JAN~~MAR 20013)

The judiciary may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months. The contracting officer may exercise the option by written notice to the contractor ~~within~~no later than _____ calendar days prior to the ~~then contract's~~ current expiration date ~~of this contract~~ [insert the period of time within which the contracting officer may exercise the option].

[. . .]

Clause 2-90D, Option to Extend the Term of the Contract

Include the following clause as prescribed in § 220.40.60(b)(4) (Option Provisions and Clauses).

Option to Extend the Term of the Contract (~~JAN~~MAR 20013)

- (a) The judiciary may extend the term of this contract by written notice to the contractor ~~within~~no later than _____ calendar days prior to the ~~then contract's~~ current expiration date ~~of this contract~~ [insert the period of time within which the contracting officer may exercise the option]; provided that the judiciary gives the contractor a preliminary written notice of its intent to extend at least _____ calendar days [60 days unless a different number of days is inserted] before the contract expires. The preliminary notice does not commit the judiciary to an extension.

[. . .]

Clause 2-140, Judiciary IT Security Standards

Include the following clause as prescribed in § 220.25.80(f) (Service-Related Provisions and Clauses).

Judiciary IT Security Standards (MAR 2013)

(a) Policy

Contractors developing information systems on behalf of the judiciary are required to implement reasonable and effective security safeguards to protect the confidentiality, integrity, and availability of judiciary information. To ensure judiciary IT security, the contractor shall comply with the requirements below and incorporate this clause in any subcontracts involving the systems integration, software development, or the provision of software services.

(b) Contractor Responsibilities

The contractor shall:

- (1) provide the contracting officer's representative (COR) or designee access to and information regarding the contractor's information security program and the systems used in performance of this contract when requested in connection with judiciary efforts to ensure compliance with all the contractor's security requirements, and shall otherwise cooperate in assuring adequate security for judiciary data.

REDLINE COMPARISON REFLECTING CHANGES

Clause 2-140 *[cont'd]*

- (2) secure and maintain any computer system, including mobile devices, which it uses in the performance of this contract as further described below. This includes ensuring that security and other applications software is kept up-to-date and patched; anti-virus software is installed and current; security events are detected and addressed via a formal incident response program; physical security of assets is maintained; judiciary data is isolated from other customer or contractor data in such a manner that data leakage cannot occur between data sets and destruction of judiciary data is not impeded; transmissions of sensitive information taking place over insecure networks (such as the internet) are secure; and business continuity assured in the event of a system failure.
- (3) develop, maintain, and periodically provide to the COR a master asset inventory list that reflects all assets, government furnished equipment (GFE) or non-GFE that were used to process judiciary information. The initial version shall be provided to the COR within six months of contract award and updated versions shall be provided at the end of each six month period thereafter (or a period mutually agreed upon between the COR and the contractor, not to exceed 12 months).
- (4) ensure that contractor-owned removable media such as removable hard drives, flash drives, CDs, and laptops, containing judiciary data, are encrypted using a NIST FIPS 140-2 (or its successor) approved product.
- (5) ensure that rules of behavior, approved by the COR, are signed by all contractor employees assigned to work on the judiciary contract and address at a minimum: authorized and official use; prohibition against unauthorized users; and protection of sensitive data and personally identifiable information.
- (6) use secure coding practices in a manner that minimizes security flaws within the software for any software developed in support of the contract. Prior to the execution of a software development task, the contractor shall provide the COR a copy of the contractor's secure coding best practices policy and upon delivery of the software, the contractor shall certify in writing that the contractor complied with the policy in the performance of its obligations under the contract or task order.
- (7) represent and warrant that any software developed under a statement of work issued by the judiciary shall be free from all computer viruses, worms, time-outs, time bombs, back doors, disabling devices and other harmful or malicious code intended to or which may damage, disrupt, inconvenience or permit access to the software user's or another's software, hardware, networks, data or information.
- (8) correct security-related errors in contractor developed software and applicable documentation that are not commercial off the shelf that are reported by the COR or discovered by the contractor. If the system is in production, such corrections shall be completed within one working day of the date the contractor discovers or is notified of the error (or a date mutually agreed upon between the COR and the contractor not to exceed 30 working days). If the system is not in production, such corrections shall be made within five working days of the date the contractor discovers or is notified of the error (or a date mutually agreed upon between the COR and the contractor, not to exceed 30 days). Latent defects will be handled in the same manner, as soon as they are discovered. If this is a task order contract, the requirement applies to any task order issued under the contract.

REDLINE COMPARISON REFLECTING CHANGES

Clause 2-140 [cont'd]

- (9) follow NIST 800-53A Revision 1, Guide for Assessing the Security Controls in Federal Information Systems and Organizations, NIST 800-18 Revision 1, Guide for Developing Security Plans for Federal Information Systems, the Judiciary Information Security Framework, version 1.0, the Guide to Implementing the Judiciary Information Security Framework, version 1.0, and other Administrative Office of the US Courts security policies and guidelines, as well as industry best security practices, standards, and guidance, to ensure that the information system will be or has been developed with reasonable and effective security safeguards in place to protect the confidentiality, integrity, and availability of judiciary information. If the aforementioned versions and revisions numbers have been superseded by a more recent version or revision of the cited publication, the most recent version shall be used.
- (10) work with the COR in performing Security Risk Assessments (SRA). This includes identifying risks related to the design and functionality of a new system against compliance with the judiciary's security risk management model. Activities performed during this phase shall include analyzing how the security architecture protects the security of judicial information, identifying the system boundary, and assessing how management, operational, and technical security safeguards are implemented by the software and hardware, how the system interconnects with other networks while maintaining security, and lastly analyzing other inherent design features. Procedures, including a checklist, shall be developed by the contractor and used to document compliance with baseline security requirements and existing guidance from the Administrative Office of the US Courts.
- (11) initiate a Systems Security Plan (SSP) consistent with NIST 800-18 Revision 1 (or its successor publication) during the planning phase of the contractor's systems development life cycle and update the SSP regularly until it accurately reflects the production state of the information system. The contractor shall submit all drafts to the COR for review and comment. Comments shall be addressed to the satisfaction of the COR within five business days (or a date mutually agreed upon between the COR and the contractor, not to exceed 30 working days) of receipt. After a system is in production, the SSP must be updated the lesser of: within 30 calendar days of a major change to the system or every two years.
- (12) provide a requirements traceability matrix at the end of analysis phase, design phase, build phase, and deployment phase that designates the security requirements in a separate section so that they can be traced through the development life cycle. The contractor shall also provide the application designs and test plan documentation, and source code, if applicable, to the COR for review. Lastly, the contractor shall ensure that appropriate security management tools are in place to allow for the review of security configurations, user identities, etc., so that the implementation of security safeguards can be validated.
- (13) have in place configuration management and change control processes to prevent unauthorized modifications or additions to the information system and to ensure that any changes made to the information system are attributable to the individual who implemented the change.
- (14) without exception, prior to making changes that may produce a negative impact on security, perform a risk assessment that documents the purpose of the change, its security impact, and any compensating safeguards that need to be implemented to reduce residual risk. The risk assessment documentation shall be provided to the COR prior to change implementation.

REDLINE COMPARISON REFLECTING CHANGES

Clause 2-140 [cont'd]

- (15) perform self-testing of the contractor's implemented security controls, and continuously monitor all testing activities and report on the performance and effectiveness of the information system's security safeguards to the COR. The specific assessments procedures as outlined in draft NIST Special Publication 800-53A (or its successor), shall be used by the contractor to assess the effectiveness of implemented security safeguards. The contractor shall provide security test plans and proposed test methods to the project manager within fifteen business days of test execution for review and approval.
- (16) provide a determination statement describing the results of each tested security safeguard within ten days of security test execution. When the results indicate that a safeguard is operating in a partially satisfied or otherwise not satisfied condition, the contractor shall document the security risk associated with the applicable condition, indicating which portions of the security safeguard have not been implemented or applied.
- (17) take corrective action to remedy any deficiencies impeding the successful implementation of a security safeguard. Corrective action must be taken within ten business days (or a date mutually agreed upon between the COR and the contractor not to exceed 30 working days) of discovery.
- (18) include verification and validation to ensure that the corrective action successfully remedies any safeguard failures identified during security testing.
- (19) provide a determination, in a written form agreed to by the COR, on whether the implemented corrective action was adequate to resolve the identified information security weaknesses and provide the reasons for any exceptions or risk-based decisions.
- (20) report to the COR, within 24 hours of discovery, any suspected or confirmed security incidents relative to the systems and data used in fulfillment of this contract and to cooperate in the investigation and resolution thereof. If a data breach occurs or is discovered outside of regular business hours and the COR cannot be reached, the contractor shall call the Judiciary Automated Systems Incident Response Capability (JASIRC) via phone on (202) 502-4370 or via an email message to either SOC@ao.uscourts.gov or JASIRC@ao.uscourts.gov.

(c) Personally Identifiable Information Notification and Use Requirement

If the contractor has access to sensitive personally identifiable information (PII), the contractor shall certify that it has a security policy in place that contains procedures to promptly notify any individual whose PII was, or is reasonably believed to have been, breached. Any notification shall be coordinated with the COR, for both method and content of notification, before the notification is released. The contractor assumes full responsibility for taking corrective action, which may include offering credit monitoring when appropriate.

(d) Pass-through of Security Requirements to Subcontractors

For each subcontractor whose work requires access to judiciary facilities, IT resources, or data, the contractor must certify that it has incorporated this clause in the subcontract. Any breach by a subcontractor of any of the provisions set forth in this clause will be attributed to the contractor.

REDLINE COMPARISON REFLECTING CHANGES

Clause 2-140 [cont'd]

(e) Certification of Destruction/Sanitization

At the expiration of the contract, the contractor shall return all judiciary information and IT resources provided to the contractor during the contract, and provide a certification that all contractor assets, e.g., laptops, thumb drives, servers, and databases, containing or used to process judiciary information have been sanitized or destroyed. Upon submission of the final invoice (or sooner upon COR request), the contractor will certify in writing that sanitization and/or destruction has been performed pursuant to a method allowable under the NIST Special Publication 800-88, Guidelines for Media Sanitization (or its successor). This certification shall be in a form substantially similar to AO Form 553 and shall include a description of the data and the asset on which it was stored, the date and method of destruction/sanitization, and by whom. The contractor's final invoice is due and payable only when it has complied with the requirements of this paragraph.

(end)

Clause 3-3, Provisions, Clauses, Terms and Conditions - Small Purchases

[. . .]

Provisions, Clauses, Terms and Conditions ~~==~~ Small Purchases (~~JANMAR~~ 201~~23~~)

[. . .]

(b) The contractor shall comply with the following clauses incorporated by reference:

[. . .]

(4) Clause 7-20, Security Requirements (~~JANMAR~~ 201~~03~~)

[. . .]

(6) Clause 7-35, Disclosure or Use of Information (~~APRMAR~~ 201~~03~~)

[. . .]

(13) Clause 7-185, Changes (~~JANMAR~~ 20~~01~~3)

[. . .]

(15) Clause 7-210, Payment for Emergency Closures (~~AUGMAR~~ 20~~04~~13)

[. . .]

(c) The contractor shall comply with the following clauses, incorporated by reference, unless the stated circumstances do not apply:

[. . .]

(4) Clause 2-115, Terms for Commercial Advance Payment of Purchases (~~OCTMAR~~ 20~~06~~13)
(Applies if advance payment will be authorized.)

[. . .]

(7) The following apply to services only:

[. . .]

e) Clause 7-65, Protection of Judiciary Buildings, Equipment and Vegetation (~~JANMAR~~ 20~~01~~3) (Applies when services are performed at a judiciary ~~facility~~building.)

f) Clause 7-205, Payment for Judiciary Holidays (~~JANMAR~~ 20~~01~~3) (Applies to time-and-materials or labor-hour contracts.)

[. . .]

REDLINE COMPARISON REFLECTING CHANGES

Clause 3-3 [cont'd]

(d) Inspection/Acceptance

The contractor shall tender for acceptance only those products and/or services that conform to the requirements of this contract. The judiciary reserves the right to inspect or test any products or services that have been tendered for acceptance. The judiciary may require repair or replacement of nonconforming products or re-performance of nonconforming services at no increase in contract price. The judiciary must exercise ~~its post-acceptance~~these rights:

- (1) within a reasonable period of time after the defect or non-conformance was discovered or should have been discovered; and

[. . .]

Provision 3-100, Instructions to Offerors

[. . .]

Instructions to Offerors (~~APR~~MAR 2014~~3~~)

[. . .]

(b) Amendments to Solicitations

If this solicitation is amended, all terms and conditions that are not amended remain unchanged. Offerors shall acknowledge receipt of any amendment to this solicitation by the date and time specified in the amendment(s). An offeror's failure to acknowledge amendments affecting price, quantity, quality or delivery may result in the offeror's proposal being determined unacceptable where award is made without discussions.

(c) [. . .]

(3) Submission, Modification, Revision, and Withdrawal of Offers

[. . .]

- (ii) (A) Any offer, modification, or revision received at the judiciary office designated in the solicitation after the exact time specified for receipt of offers is "late" and will not be considered unless it is received before award is made, the contracting officer determines ~~it's~~it is in the judiciary's best interest, the contracting officer determines that accepting the late offer would not unduly delay the procurement, and:

[. . .]

Clause 3-300, ~~Central Contractor~~ Registration in the System for Award Management (SAM)

[. . .]

~~Central Contractor~~ Registration in the System for Award Management (~~APR~~SAM) (MAR 2014~~3~~)

(a) Definitions. As used in this clause –

"System for Award Management (SAM)" means the federal government owned and operated free website that replaced the Central Contractor Registration (CCR) database" ~~means~~and is the primary ~~G~~government repository for contractor information required for the conduct of business with the ~~G~~government.

[. . .]

REDLINE COMPARISON REFLECTING CHANGES

Clause 3-305, Payment by Electronic Funds Transfer – ~~Central Contractor~~System for Award Management (SAM) Registration

[. . .]

Payment by Electronic Funds Transfer – ~~Central Contractor~~System for Award Management (SAM) Registration (~~JUNMAR~~ 201223)

[. . .]

(f) EFT and Assignment of Claims

If the ~~E~~Ccontractor assigns the proceeds of this contract as provided for in the assignment of claims terms of this contract, the ~~E~~Ccontractor shall require as a condition of any such assignment, that the assignee shall register separately in the ~~ECRSAM~~ database and shall be paid by EFT in accordance with the terms of this clause. Notwithstanding any other requirement of this contract, payment to an ultimate recipient other than the ~~E~~Ccontractor, or a financial institution properly recognized under ~~an~~a proper assignment of claims ~~pursuant to § 740.50~~, is not permitted. In all respects, the requirements of this clause shall apply to the assignee as if it were the ~~E~~Ccontractor. EFT information that shows the ultimate recipient of the transfer to be other than the ~~E~~Ccontractor, in the absence of a proper assignment of claims acceptable to the ~~Government~~judiciary, is incorrect EFT information within the meaning of paragraph (d) of this clause.

[. . .]

(h) Payment Information

The ~~insert court payment office name~~judiciary will not provide EFT payment information. Payment information may be obtained by registering as a payee vendor with the United States Department of the Treasury at <https://www.ipp.gov/>. Registered vendors may retrieve and/or review check stub advice each time an EFT payment is received.

If the ~~Government~~judiciary makes payment by check in accordance with paragraph (a) of this clause, the ~~Government~~judiciary shall mail the check and any other payment information to the remittance address contained in the ~~ECRSAM~~ database.

[. . .]

Clause 3-310, Payment by Electronic Funds Transfer – Other Than ~~Central Contractor~~System for Award Management (SAM) Registration

[. . .]

Payment by Electronic Funds Transfer – Other Than ~~Central Contractor~~System for Award Management (SAM) Registration (~~JUNMAR~~ 201223)

[. . .]

(h) Payment Information

The ~~insert court payment office name~~judiciary will not provide EFT payment information. EFT payment information may be obtained by registering as a payee vendor with the United States Department of the Treasury at <https://www.ipp.gov/>. Registered vendors may retrieve and/or review check stub advice each time an EFT payment is received. ~~The Treasury registration web site is: www.fms.treas.gov/paid/PAIDfaq.asp.~~

[. . .]

REDLINE COMPARISON REFLECTING CHANGES

Clause 6-25, Insurance – Liability to Third Persons

[. . .]

Insurance – Liability to Third Persons (~~JAN~~MAR 20013)

[. . .]

(e) The contractor will not be reimbursed for liabilities (and expenses incidental to such liabilities):

(1) for which the contractor is otherwise responsible under the express terms of any clause ~~specified in the schedule or elsewhere in the contract~~incorporated in the contract, whether incorporated by reference or in full text;

[. . .]

(f) The provisions of paragraph (e) of this clause will not restrict the right of the contractor to be reimbursed for the cost of insurance maintained by the contractor in connection with the performance of this contract, other than insurance required in accordance with this clause; *provided*, that such cost is allowable under ~~the “Allowable~~Clause 4-60, Allowable ~~Cost and Payment” clause (Clause 4-60) of this contract~~Payment.

[. . .]

Clause 6-35, Errors and Omissions

Include the following clause as prescribed in § 630.40.50 (Clauses) and § 520.75(j) (Provisions and Clauses).

Errors and Omissions (~~JAN~~MAR 20013)

(a) The contractor warrants that it is insured for _____ (~~\$200,000-~~unless a differentgreater amount is ~~set forth in~~entered by the ~~schedule~~contracting officer) for errors and omissions per claim in an amount in excess of the minimum set forth in the schedule in the performance of this contract.

[. . .]

Clause 6-105, California E-Waste Fee

Include the following clause as prescribed in § 640.30.70(c) (Clauses).

California E-Waste Fee (MAR 2013)

(a) The State of California enacted the Electronic Waste Recycling Act of 2003 (as amended) establishing a statewide program to promote and fund the collection and recycling for “covered electronic devices”. The Act, among other provisions, establishes a charge applicable to purchase of such devices that will cover the cost of the ultimate disposal of such devices (e-waste recycling fee).

(b) The U. S. Government Accountability Office (GAO) has analyzed the California E-Waste Recycling fee and determined it to be a state tax from which the federal government is exempt in Administrative Office of the U.S. Courts – California E-Waste Recycling Fee, B-320998, May 4, 2011, and has so informed the State of California. The government, including the judiciary, may not pay this fee.

(c) The contractor shall not charge or attempt to collect the California E-Waste Recycling Fee under this contract.

(end)

REDLINE COMPARISON REFLECTING CHANGES

Clause 7-45, Travel

[. . .]

Travel (~~JAN~~MAR 20103)

The contractor may propose travel costs ~~based on Judiciary~~ if travel is required for performance of the contract and is an authorized reimbursable expense under the contract. The extent of reimbursement for incurred travel costs will be subject to the limitations set forth in the Guide to Judiciary Policy, Vol 19, Ch 4 (Judiciary Staff Travel Regulations (JTR) if travel is allowable and required by the contract. Proposed per diem and automobile expense will be based on JTR.

[. . .]

Clause 7-70, Judiciary Property Furnished "As Is"

[. . .]

Judiciary Property Furnished "As Is" (~~JAN~~MAR 20013)

[. . .]

~~(d) — Except as otherwise provided in this clause, judiciary property furnished "as is" shall be governed by the Judiciary Property clause of this contract.~~

[. . .]

Clause 7-135, Payments

[. . .]

Payments (~~JAN~~MAR 20013)

[. . .]

Unless authorized elsewhere in this contract, payments will not be made more often than monthly.

[. . .]

Clause 7-185, Changes

[. . .]

Changes (~~JAN~~MAR 20013)

[. . .]

~~(b) — Any other written or oral order (including direction, instruction, interpretation, or determination) from the contracting officer that causes a change will be treated as a change order under this clause, provided that the contractor gives the contracting officer written notice stating (1) the date, circumstances, and source of the order and (2) that the contractor regards the order as a change order.~~

~~(cb)~~ [. . .]

(end)

Alternate I (MAR 2013): In accordance with § 745.40.40(b) (Clauses), substitute the following paragraphs (b) and (d) for the same numbered paragraphs of the basic clause in cost-reimbursement contracts.

(b) If any such change causes an increase or decrease in the estimated cost of, or the time required for, performance of any part of the work under this contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this contract, the contracting officer will make an equitable adjustment in the:

(1) estimated cost, delivery or completion schedule, or both;

(2) amount of any fixed fee; and

(3) other affected terms and shall modify the contract accordingly.

REDLINE COMPARISON REFLECTING CHANGES

Clause 7-185 [cont'd]

(d) Notwithstanding the terms and conditions of paragraphs (a) and (b) of this clause, the estimated cost of this contract and, if this contract is incrementally funded, the funds allotted for the performance of this contract, shall not be increased or considered to be increased except by specific written modification of the contract indicating the new contract estimated cost and, if this contract is incrementally funded, the new amount allotted to the contract. Until this modification is made, the contractor shall not be obligated to continue performance or incur costs beyond the point established in either Clause 4-85, Limitation of Cost, or Clause 4-90, Limitation of Funds, of this contract, whichever is applicable.

Alternate II (MAR 2013): In accordance with § 745.40.40(c) (Clauses), substitute following for paragraph (b) of the basic clause in time-and-materials or labor-hour contracts.

(b) If any change causes an increase or decrease in the hourly rates, the ceiling price, or the time required for performance of any part of the work under this contract, whether or not changed by the order, or otherwise affects any other terms and conditions of this contract, the contracting officer will make an equitable adjustment in any one or more of the following and will modify the contract accordingly:

(1) ceiling price;

(2) hourly rates;

(3) delivery schedule or completion date; and

(4) other affected terms.

Alternate III (MAR 2013): In accordance with § 745.40.40(d) (Clauses), substitute following for paragraph (a) of the basic clause in firm-fixed-price architect-engineer contracts and add paragraph (f).

(a) The contracting officer may at any time, by written order, and without notice to the sureties, if any, make changes within the general scope of this contract in the services to be performed.

(f)(g) No ~~products or~~ services for which an additional cost or fee will be charged by the contractor ~~will~~ shall be furnished without the prior written authorization of the contracting officer.

(end)

Clause 7-205, Payment for Judiciary Holidays

[. . .]

Payment for Judiciary Holidays (~~JAN~~MAR 20013)

On judiciary holidays, on-site contractors are not entitled to compensation unless: 1) the contract requires the contractor to be on-site at the judiciary facility during the holiday; 2) the contract specifically provides for compensation to the contractor on ~~J~~udiciary holidays; or 3) the contractor obtains approval from the ~~C~~ontracting ~~O~~fficer or designated ~~C~~ontracting ~~O~~fficer's ~~Technical~~ ~~R~~epresentative (COR) to perform work at an off-site location. The following holidays are observed by the judiciary: New Years Day, Birthday of Martin Luther King's Birthday, Jr., Presidential Inauguration Day (metropolitan DC area only), President's ~~D~~Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day, Christmas Day.

[. . .]

REDLINE COMPARISON REFLECTING CHANGES

Clause 7-210, Payment for Emergency Closures

[. . .]

Payment for Emergency Closures (~~AUGMAR 2004~~13)

During an emergency closure of the ~~government~~judiciary, or any individual judiciary office, taken in its sovereign capacity for the public good, the ~~j~~iudiciary is not obligated to compensate contractors during the emergency closure, unless: 1) the contract specifically requires the contractor to be on-site at the ~~j~~iudiciary facility during an emergency closure; 2) the contract specifically provides for compensation to the contractor even when the government acts in its sovereign capacity; or 3) the contractor obtains approval from the ~~C~~ontracting ~~O~~officer or designated ~~C~~ontracting ~~O~~officer's ~~Technical R~~epresentative (COR) to perform work at an off-site location.

[. . .]

Clause 7-225, Termination (Cost-Reimbursement)

[. . .]

Termination (Cost-Reimbursement) (JAN 2010)

[. . .]

(m) [. . .]

(2) If the total payments exceed the amount finally determined to be due, the contractor shall repay the excess to the judiciary upon demand, together with interest computed at the rate established by the Secretary of the Treasury under the criteria established by the Renegotiation Act of 1971 (P.L. 92-41 (85 Stat. 97) 50 U.S.C. App. 1215(b)(2), 85 Stat. 97), and published at http://www.treasurydirect.gov/govt/rates/tcir/tcir_opdprmt2.htm. [. . .]

[. . .]

(end)

[Significant changes in Appendix 1C (Matrix of Solicitation Provisions and Clauses (Including Key)) follow:]

Key to Matrix

[. . .]

UCF Sec= Uniform Contract Format Section (open market over \$100,000 or certain special delegated programs)

FP PROD= Fixed-Price Product (open market over \$100,000)

CR PROD= Cost-Reimbursement Product (open market over \$100,000)

FP SERV= Fixed-Price Service (open market over \$100,000)

CR SERV= Cost-Reimbursement Service (open market over \$100,000)

[. . .]

SM PUR= Small Purchase (~~O~~open ~~M~~market under \$100,000~~up to the judiciary's small purchase threshold~~)

OFACGSA/FSS/GWAC-Other Federal Agency Contract —= ~~Inclusion~~Include in delivery/task orders ~~under these types of contracts at any dollar level that are issued using contracts awarded by federal agencies outside of the judiciary, e.g., GSA schedule orders, orders under NASA SEWP contracts, orders under a BATF weapons contract, etc.~~

[. . .]

OFACGSA/FSS/GWAC-Other Federal Agency Contract —= ~~Inclusion~~Include in delivery/task orders ~~under these types of contracts at any dollar level that are issued using contracts awarded by federal agencies outside of the judiciary, e.g., GSA schedule orders, orders under NASA SEWP contracts, orders under a BATF weapons contract, etc.~~

[. . .]

Note 1: The following clauses are ~~prescribed~~required for Experts or Consulting Services in addition to all other Required and Required When Applicable clauses:

[. . .]

Note 2: The following clauses are ~~prescribed~~required for Letter Contracts in addition to all other Required and Required When Applicable clauses:

[. . .]

REDLINE COMPARISON REFLECTING CHANGES

| Clause or Provision # | Title | Presc. (all references are to Volume 14) | Prov or Cls | IBR ? | UCF Sec | FP-PRODGR-PRODFFP SERVGR-SERVOpen Market over \$100,000 | | | | T&M LH | A&E | IND DEL | SM PUR | GSA/ FSS/ GWAG OFAC |
|--------------------------------|---|--|-------------|-------------------------|----------|---|-----------|-----------|-----------|-----------|-----------|-----------|----------------------|---------------------|
| | | | | | | FP PROD | CR PROD | FP SVC | CR SVC | | | | | |
| 2-10 | Responsibility effor Products | § 220.10.70(c) | C | Yes | E | R | | A | | | | A | | |
| 2-140 | Judiciary IT Security Standards | § 220.25.80(f) | <u>C</u> | <u>Yes</u> | <u>I</u> | <u>A</u> | <u>A</u> | <u>A</u> | <u>A</u> | <u>A</u> | <u>A</u> | <u>A</u> | <u>A</u> | <u>A</u> |
| 3-15 | Place of Performance | § 330.10.30(c) | P | Yes | K | R | R | <u>RA</u> | <u>RA</u> | <u>RA</u> | R | <u>RA</u> | | |
| 3-100 | Instructions to Offerors | § 330.10.30(t) | P | Yes | L | R | R | R | R | R | R | R | | <u>A</u> |
| 3-100, Alt I | | § 330.10.30(t)(1) | P | Yes | L | A | A | A | A | A | A | A | | <u>A</u> |
| 3-100, Alt II | | § 330.10.30(t)(2) | P | Yes | L | A | A | A | A | A | A | A | | <u>A</u> |
| 3-100, Alt III | | § 330.10.30(t)(3) | <u>P</u> | <u>Yes</u> | <u>L</u> | <u>A</u> | <u>A</u> | <u>A</u> | <u>A</u> | <u>A</u> | <u>A</u> | <u>A</u> | | <u>A</u> |
| 3-160 | Service Contract Act of 1965, as Amended | § 325.25.80(a) | C | Yes | I | | | A | A | A | A | A | * | |
| 3-210 | Protests | § 330.10.30(II) | P | <u>No</u> <u>Yes</u> | L | R | R | R | R | R | R | R | <u>*</u> <u>=</u> | |
| 4-5 | Ordering | § 410.30.705(a) | C | Yes | I | <u>A</u> | <u>A</u> | <u>A</u> | <u>A</u> | <u>A</u> | <u>A</u> | R | | <u>A</u> |
| 4-10 | Order Limitations | § 410.30.705(b) | C | No | I | <u>A</u> | <u>A</u> | <u>A</u> | <u>A</u> | <u>A</u> | <u>A</u> | R | | |
| 4-20 | Requirements | § 410.30.705(c) | C | Yes | I | <u>A</u> | <u>A</u> | <u>A</u> | <u>A</u> | <u>A</u> | <u>A</u> | <u>RA</u> | | |
| 4-25 | Indefinite Quantity | § 410.30.705(d) | C | Yes | I | | | | | | | A | | |
| 4-35 | Execution and Commencement of Work (Letter Contract) (<u>See</u> Note 2) | § 410.50.80(a) | C | No | I | <u>RA</u> | <u>RA</u> | <u>RA</u> | <u>RA</u> | <u>RA</u> | <u>RA</u> | <u>RA</u> | | |
| 4-40 | Limitation of Judiciary Liability (Letter Contract) (<u>See</u> Note 2) | § 410.50.80(b) | C | No | I | <u>RA</u> | <u>RA</u> | <u>RA</u> | <u>RA</u> | <u>RA</u> | <u>RA</u> | <u>RA</u> | | |
| 4-45 | Contract Definitization (<u>See</u> Note 2) | § 410.50.80(c) | C | No | I | <u>RA</u> | <u>RA</u> | <u>RA</u> | <u>RA</u> | <u>RA</u> | <u>RA</u> | <u>RA</u> | | |
| 4-50 | Payments of Allowable Costs Before Definitization (<u>See</u> Note 2) | § 410.50.80(d) | C | Yes | I | | <u>RA</u> | | <u>RA</u> | A | A | A | | |
| 5-30 | Authorization and Consent | § 330.10.30(mm) and § 530.70.60(a) and § 660.10(a) | C | Yes | I | | | | | | A | | | |
| 5-30, Alt I | | § 330.10.30(comm) | C | Yes | I | | | | | | A | | | |
| 6-60 | Rights in Data = General | § 650.65(b) | C | <u>No</u> <u>Yes</u> | I | A | A | A | A | A | A | A | * | |
| 6-60 Alt I | | § 650.65(c) | C | <u>No</u> <u>Yes</u> | I | A | A | A | A | A | A | A | * | |
| 6-60 Alt II | | § 650.65(d) | C | <u>No</u> <u>Yes</u> | I | A | A | A | A | A | A | A | * | |
| 6-105 | California E-Waste Fee | § 640.30.70(c) | <u>C</u> | <u>No</u> | <u>I</u> | <u>A</u> | <u>A</u> | <u>A</u> | <u>A</u> | <u>A</u> | | <u>A</u> | <u>A</u> | <u>A</u> |
| 7-5 | Contracting Officer's Technical Representative | § 715.55(b) | C | Yes | G | R | R | R | R | R | R | R | | A |
| 7-15 | Observance of Regulations/Standards of Conduct | § 715.55(d) | C | Yes | I | <u>RA</u> | <u>RA</u> | <u>RA</u> | <u>RA</u> | <u>RA</u> | <u>RA</u> | <u>RA</u> | | A |
| 7-125, Alt I | | § 520.75(f) | C | Yes | G | <u>R</u> | <u>R</u> | <u>R</u> | <u>RA</u> | <u>RA</u> | <u>RA</u> | <u>RA</u> | | A |
| 7-185 | Changes | § 745.40.40(a) | C | Yes | I | R | <u>R</u> | R | <u>R</u> | <u>R</u> | <u>R</u> | R | * | |
| 7-185, Alt I | | § 745.40.40(b) | <u>C</u> | <u>Yes</u> | <u>I</u> | | <u>R</u> | | <u>R</u> | | | <u>A</u> | | |
| 7-185, Alt II | | § 745.40.40(c) | <u>C</u> | <u>Yes</u> | <u>I</u> | | | | | <u>R</u> | | <u>A</u> | | |
| 7-185, Alt III | | § 745.40.40(d) | <u>C</u> | <u>Yes</u> | <u>I</u> | | | | | | <u>R</u> | <u>A</u> | | |
| 7-235 | Disputes | § 7550.250.60(b)70 | C | Yes | I | R | R | R | R | R | R | R | * | R |

REDLINE COMPARISON REFLECTING CHANGES

[Significant changes in Chapter 2 (Procurement Planning and Preparations) follow:]

§ 210 Policy

[. . .]

§ 210.20 Roles and Responsibilities

Initiating and planning procurement actions requires a team effort. The team must include ~~those~~staff from both the requesting and purchasing offices. For a court unit, federal public defender organization (FPDO), or the Federal Judicial Center (FJC), the purchasing office is the office where the procuring function resides; in the Administrative Office (AO), it is the Procurement Management Division (PMD). The requesting office is the organizational unit which initiates a purchase action by identifying a specific need, such as a court unit's IT staff, chambers staff or facility staff. Although other judiciary offices play a role in the procurement process, overall responsibility for the contracting aspects within the procurement process lies with the ~~Contracting~~Officer (CO). However, the planning for major purchases is the responsibility of the court unit executive.

§ 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 ~~representatives~~staff are responsible for:

[. . .]

- (d) ~~an~~-independently developeding 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;

[. . .]

- (g) recommending additional ~~information~~information/requirements to be incorporated into the solicitation package, including:

[. . .]

- any special security requirements.

[. . .]

§ 210.60 Market Research

[. . .]

§ 210.60.20 Market Research Methods

- (a) Market research methods include:

[. . .]

- (b) Market research generally does not include the temporary "trial" or "demonstration" use of equipment/products delivered to and used within the court unit facilities. Only if it can be definitely determined that the eventual purchase will not exceed the applicable competition threshold – \$5,000 for open market purchases; \$3,000 for GSA schedule purchases – may equipment or products be used on a "trial" basis in this manner.

REDLINE COMPARISON REFLECTING CHANGES

§ 210.60.20 [cont'd]

- (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 court unit offices vs. 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 the PE.

§ 210.70 Source Selection Plans

[. . .]

§ 210.70.50 Evaluation Factors and Sub-Factors

[. . .]

- (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 ~~satisfactory~~ past performance ratings are always evaluated, even if their relative weight, i.e., importance, is low relative to technical factors.

[. . .]

§ 220 Terms and Conditions

§ 220.10 Quality Control/Assurance Requirements

[. . .]

§ 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.

§ 220.10.40 Standard Inspection Terms

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

[. . .]

REDLINE COMPARISON REFLECTING CHANGES

§ 220.10.50 Quality Assurance at Judiciary Site or Destination

[. . .]

- (b) ~~The following suggestions will assist~~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)~~inspecting for the purposes of accepting or rejecting the product or service. The judiciary program representative will routinely examine products or services for the purposes of acceptance at the time of delivery or when an invoice is presented on a monthly basis. Where more complex services or products are involved, the program representative must be a qualified Contracting Officer's Technical Representative (COTR) formally appointed by the Contracting Officer. At this time, the representative/COTR will inspect the effectiveness of the delivery or performance to determine its acceptance. When the CO receives a report from the representative/COTR which indicates that the delivery or performance is not in conformance with the contract requirements, then a deduction from the invoice may be negotiated for an appropriate amount, or the item may be re-delivered or re-performed if it is in the judiciary's best interest, considering time and expense.~~

§ 220.15 Acceptance of Products and Services

[. . .]

§ 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 ~~period~~prior to acceptance, specifying earlier transfer of title may be appropriate.
- (b) Unless the contract specifically provides otherwise, ~~under~~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:
[. . .]

§ 220.20 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 ~~vendor~~ pricing and the administrative cost of enforcing the warranty);
[. . .]

REDLINE COMPARISON REFLECTING CHANGES

§ 220.25 Delivery or Performance Schedule

[. . .]

§ 220.25.20 Solicitation Delivery Instructions

Solicitation delivery instructions must specify the f.o.b. point, defined as follows:

[. . .]

(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, i.e., to the rail station, airport, post office, etc. 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 ~~use of a Government Bill of Lading or~~ 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.

§ 220.25.70 Product-Related Delivery Clauses and Provisions *[table]*

| Clause or Provision | is included in... |
|---|---|
| [. . .] (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 vendor <u>contractor</u> to a specific room within a building, rather than to a loading dock. |

§ 220.25.80 Service-Related Provisions and Clauses *[table]*

| Clause or Provision | is included in... |
|--|---|
| (a) Clause 2-50, Continuity of Services | solicitations and contracts for services, when: [. . .] (2) <u>the services</u> must be continued without interruption; (3) if, upon contract expiration, a successor (either the judiciary or another contractor), is likely to continue the services <u>upon contract expiration</u> ; and [. . .] |
| (e) Provision 2-70, Site Visit | solicitations for services to be performed on <u>in</u> judiciary installations <u>facilities</u> , when a site visit is <u>deemed</u> appropriate. |
| <u>(f) Clause 2-140, Judiciary IT Security Standards</u> | <u>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 IT Security Office and OGC.</u> |

REDLINE COMPARISON REFLECTING CHANGES

§ 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 which are desired, but which may 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:

[. . .]

- (c) both 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 ~~option quantities~~ options to be offered without limitation as to price, especially if the option ~~quantity is to(s) will~~ be considered in the evaluation for award. An ~~exceptional circumstance when the solicitation may require~~ restriction on option pricing, such as requiring option quantities of products to be priced the same as the base quantities ~~is when future competition for, must be approved by the option quantity is impracticable~~ PE prior to issuance of the solicitation.

§ 220.40.50 Required Contract Terms

The solicitation and resulting contract must specify:

[. . .]

- (b) the duration of the period for which performance may be extended under ~~the period of~~ performance option(s); and

[. . .]

§ 220.40.60 Option Provisions and Clauses

- (a) A solicitation that includes options must inform competing ~~vendors~~ 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.

REDLINE COMPARISON REFLECTING CHANGES

§ 220.40.60(a) Evaluation of Options Provisions *[table]*

| Provision | is included in solicitations... |
|--|--|
| [. . .] (2) Provision 2-85B, Evaluation Exclusive of Options | when price evaluation will exclude the option prices. <u>Note: Use of this provision may not result in obtaining the most advantageous prices for the option periods or quantities.</u> |
| (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. <u>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.</u> |

- (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 \(Exercise of Options\)](#).

[. . .]

§ 220.45 Equipment Lease or Purchase

[. . .]

§ 220.45.20 Timing of 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 vendors~~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.

[. . .]

§ 220.45.50 Lease Method

[. . .]

- (b) If a lease is justified:

[. . .]

- (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 ~~government~~judiciary;

[. . .]

§ 220.50 Funding Contract Awards

[. . .]

§ 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.

REDLINE COMPARISON REFLECTING CHANGES

§ 220.50.20 [cont'd]

- (a) Firm-fixed-price contracts are 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 04/01/2011 through 03/31/2012 ~~should~~may be fully funded from FY11 funds for performance through 03/31/2012.
- (b) ~~The estimated total amount of a labor-hour or time-and-materials contract for the entire awarded period of performance; or the estimated cost and the fee (if any) of a cost-reimbursement contract, may be fully funded if the contract is~~Contracts for non-severable services ~~and the funds are available to do so. Where the contract is for a~~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 service, funding may not~~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 30th 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 that amount estimated to be required for a twelve (12) month period of performance. Alternatively, these types of contracts, whether severable or non-severable, may be incrementally funded at the discretion of the judiciary organization awarding or administering the contract.~~
- [. . .]
(~~de~~) 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 ~~information on unpriced purchase orders, see: § 325.45.60~~

NOTE:~~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.~~For additional information on BDOs, see: Vol 14, § 325.45.10(e) and § 410.30.60.~~

REDLINE COMPARISON REFLECTING CHANGES

§ 220.50.60 Contracts Crossing Fiscal Years

- (a) A contract that is funded by annual appropriations may not cross fiscal years, except in accordance with statutory authorization (e.g., ~~31 U.S.C. § 1308 and~~ 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.

[. . .]

§ 220.50.70 Limitation of Cost or Funds

[. . .]

- (b) Upon learning that a partially funded contract containing either of the clauses referenced in § 220.50.~~4070~~ (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 estimated cost 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.

- ~~(b) — Under a firm fixed price contract, the contracting officer must ensure that funds are available in the appropriate amount before authorizing changes.~~

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 ~~initiated~~ awarded before the funds are available.

[. . .]

REDLINE COMPARISON REFLECTING CHANGES

§ 220.55 Contract Financing

[. . .]

§ 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 ~~for the purchase of commercial item products and services~~. Of the various types of contract financing listed above in § 220.55.10(a) (Definition), only commercial advance payment is currently authorized for ~~judiciary usage~~ use by court unit contracting officers. This section prescribes procedures applicable to the inclusion of commercial advance payment terms in purchase orders and contracts.
[. . .]

§ 220.55.30 Delegation

- (a) Subject to the following limitations, the Director has delegated to chief judges, FPDs, and the FJC Director 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:

[. . .] 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).

[. . .]

- (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) The ~~Procurement Executive~~ PE may approve the inclusion of commercial advance payment terms for transactions outside these limits as one-time ~~specific~~ delegations of authority for specific purchases.

- (c) The judiciary may make advance payment to state and local governments; where these entities are furnishing ~~products or noncommercial~~ services which are reasonably available only from the state/local government organization, such as ~~user state court~~ fees, ~~sewer service charges~~; etc. ~~Advance payment to a~~ Agreements with state/local ~~government governments for advance payments~~ for such ~~products or~~ services ~~is are~~ not subject to the conditions of this delegation. ~~However, this authority does not extend to the purchase of services from a state/local government which are also readily available in the open market, such as parking. Purchases of this nature, where the court proposes make, and do not require obtaining a one-time delegation of authority. Conversely,~~ advance payment ~~to a state/local government for purchases of~~ services readily available in the ~~open commercial~~ market; from state/local governments are subject to the ~~conditions~~ limitations of ~~this d~~ § 220.55.30(a) (Delegation).

[. . .]

REDLINE COMPARISON REFLECTING CHANGES

§ 220.55.50 Limitations

[. . .]

- (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 photocopy 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. ~~For, except with regard to~~ commercial training, where performance is deemed to commence on the date of the award.

[. . .]

§ 220.55.60 Procedures

- (a) Solicitations

If an offeror proposes commercial advance payment terms in response to a competitive written solicitation ~~for the services authorized in § 220.55.30(a)(1) above~~, 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 provisions 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. ~~If awarding under a GSA schedule, the CO may consider that GSA has previously determined the contractor to be responsible, which includes a finding that the contractor has adequate financial resources to perform.~~ Other methods of verifying the contractor's financial condition to make this determination include the following:

[. . .]

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§ 220.55.60 *[cont'd]*

(d) Contract Administration

(1) The CO is responsible for receiving, approving, and transmitting all commercial advance payment requests to the payment office.

~~(2) The~~ For open market awards involving advance payment, the CO is also responsible for ~~approving requests for commercial advance payment(s) will also be responsible for~~ determining that the security provided by the contractor continues to be adequate.

~~(32)~~ If the contractor's financial condition ~~is the judiciary's~~ was accepted as adequate security, the CO will monitor the contractor's financial condition at least quarterly.

~~(4)(3) If the CO determines~~ 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 ~~F~~federally insured financial institution, the following alternative forms of security may be accepted:

[. . .]

(B) A bond guaranteeing repayment of the unliquidated advance payment from a corporate surety listed in Department of Treasury Circular 570, "Companies (Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and Acceptable Reinsuring Companies)" ~~(note: the bond must guarantee repayment of the unliquidated advance payment)~~ Companies.

[. . .]

§ 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:

§ 220.55.70 Commercial Advance Payment Clauses for Inclusion in Solicitations and Contracts Offering Commercial Advance Payment *[table]*

| Clause | is included in... |
|---|--|
| <p>[. . .]</p> <p>(a) <u>Clause 2-115, Terms for Commercial Advance Payment of Purchases</u></p> <p>[. . .]</p> | <p>all solicitations and contracts <u>for products or services</u> which authorize commercial advance payment.</p> |

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§ 220.60 Energy and Environmental Considerations

§ 220.60.10 Definitions *[converted into table format and alphabetized]*

| | |
|--|---|
| [. . .] (d) Environmentally Preferable [. . .] | 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. <u>This is applicable to FEMP-Designated products.</u> |
|--|---|

§ 220.60.20 Statutory Requirement

Under ~~the Energy Policy Act of 2005, 42 U.S.C. § 8259b~~ § 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.

[Significant changes in Chapter 5 (Special Categories of Procurements) follow:]

§ 510 Personal Services Contracts

§ 510.10 Definition

A personal services contract is one in which the personnel performing the services are subject, either by the terms of the contract or by the manner of its administration, to supervision and/or direction ~~characteristic of~~ by a judiciary employee that creates an employer/employee relationship.

Note: Services furnished by temporary help firms for the brief or intermittent need for the skills of private sector temporaries shall not be regarded or treated as personal services. These services shall not be used in lieu of regular recruitment under civil service laws or to displace a Federal employee. For additional guidance and restrictions on the use of temporary help support services, see: Guide, Vol 12, § 560 (Temporary Help Service Firms).

§ 510.20 Prohibition

Personal service contracts are strictly prohibited, ~~with limited exceptions (as described below in § 510.10.30 and § 520)~~ the absence of specific statutory authority. The judiciary is required to obtain employees by direct hire under competitive appointment or ~~under other personnel procedures. Thus, when the judiciary engages the services of a contractor to perform identifiable tasks, the nature of the relationship between the judiciary and the contractor must be as an independent contractor. It must not, in effect, create an employer-employee relationship subject to the supervision by a judiciary employee. Also the contractor must not be placed in a position that requires contractor supervision of any judiciary employees., unless a statutory exception applies.~~

REDLINE COMPARISON REFLECTING CHANGES

§ 510.30 Statutory Exceptions to Prohibition

- (a) Under 28 U.S.C. § 612(a), the ~~Personal service contracts are only authorized under limited circumstances that have the requisite statutory authority. The~~ Director of the Administrative Office (AO) has statutory authority to procure contract for personal services ~~only in the following circumstances:~~
- ~~(a)~~ Under 28 U.S.C. § 602(c), personal services are authorized by 5 U.S.C. § 3109 for an “expert” or “consultant” for services that are not available within the judiciary. ~~See: § 520.10. However, this circumstance does not allow the use of contractors to perform the duties judiciary employees would normally perform.~~
- ~~(b)~~ Under 28 U.S.C. § 612(a), personal services are authorized for the effective management, coordination, operation, and use of information technology equipment, purchased by the Judiciary Information Technology (JIT) fund. There are no other statutory authority exceptions for personal services contracts applicable to the judiciary.
- (b) Under 28 U.S.C. § 602(c), the Director of the AO has statutory authority to obtain personal services of experts or consultants as authorized by 5 U.S.C. § 3109 at rates not to exceed the highest rate of pay established under 5 U.S.C. § 5332. Obtaining personal services of experts or consultants under this authority, however, must be through a personnel appointment rather than through an independent contract and is outside the scope of Vol 14. For a discussion of obtaining expert or consultant services through award of a contract, see: § 520 (Expert and Consultant Nonpersonal Services Contracts).

§ 510.40 Personal Services Indicators

~~When considering a service procurement, the Contracting Officer (CO) must consider all the~~

- (a) The personal services indicators by answering the determination is largely based on the degree of supervision by the government over the individual's work. The fact that the individual may work independently does not in itself satisfy the independent contractor test. The essence of the test is whether judiciary employees, on a close and continuous basis, control what is done and how the individual performs the work.
- (b) There is no “acid test” for how many indicators must be present to result in a conclusion that personal services exist. Instead, this is necessarily a subjective judgment that the CO makes, based on the individual circumstances. If there is a reasonable question as to whether a specific contract involves the performance of personal services, the CO should document the file as to the analysis performed to reach a determination.
- (c) The following questions are useful indicators in determining whether a service contract is an improper personal services contract, either in how the contract is written or in how it is administered on a day-to-day basis. A “yes” answer to any of the following questions, may indicate that the proposed procurement is “personal” in nature. The existence of any of these elements may indicate the likelihood that supervision exists. However, the existence of any one indicator alone must not necessarily lead the CO to conclude that services are “personal.” ~~There is no “acid test” for how many indicators must be present to result in a conclusion that personal services exist. Instead, this is necessarily a subjective judgment that the CO makes, based on the individual circumstances, and documents in the file.~~

REDLINE COMPARISON REFLECTING CHANGES

§ 510.40 [cont'd]

- ~~(a)~~ Will the individual(s) require frequent direction and supervision?
- ~~(b)~~ Will the services be performed on the judiciary site?
- ~~(c)~~ Will the principal tools and equipment necessary for performance of the services be provided by the judiciary?
- ~~(d)~~ Will the services be applied directly to the integral effort of the judicial organization, and are they in direct furtherance of its assigned function or mission?
- ~~(e)~~ Will comparable services, meeting comparable needs, be performed elsewhere in the judiciary using judiciary employees?
- ~~(f)~~ Will the need for the type of provided services be reasonably expected to last beyond one year?
- ~~(g)~~ Will the inherent nature of the service, or the manner in which it is provided, reasonably require direct or indirect judiciary supervision of contractor employees to:
 - ~~(1)~~ adequately protect the judiciary's interest;
 - ~~(2)~~ retain control of the function involved; or
 - ~~(3)~~ retain full personal responsibility for the function supported in a duly authorized judiciary officer or employee?

§ 510.50 Clause

Include [Clause 5-1, Payments under Personal and Professional Services Contracts](#) in those solicitations and contracts for personal services that are permissible under the exception stated in § 510.30(a) (Exceptions to Prohibition).

§ 520 Expert and Consultant Nonpersonal Services Contracts

§ 520.10 Authority

The judiciary is authorized to obtain contract for expert and consultant services on a nonpersonal services basis under [5 U.S.C. § 3109](#).

§ 520.20 Competition and Advertising Exceptions

These services are not required to be competed or advertised. When retaining contracting for the services of a consultant or expert under [5 U.S.C. § 3109](#), the CO is not required to prepare a sole source justification, since there is no competition requirement. However, the file documentation must reflect that these services are acquired under the authority of [5 U.S.C. § 3109](#) so that anyone reviewing the contract file will understand why the requirement was not competed or advertised.

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§ 520.30 Statutory Qualification

Before ~~acquiring~~contracting for the services of an individual or business entity as an expert or consultant, the CO must determine that the individual or business entity qualifies as an “expert” or “consultant” under 5 U.S.C. § 3109 and document this determination in the file.

§ 520.35 Limitations

~~The use~~Contracting for the services of consultants or experts under 5 U.S.C. § 3109 is only appropriate when:

- (a) the work ~~of the position~~ is temporary or intermittent, as ~~opposed to continuous and full time~~defined below.

- (1) Temporary

Continuous performance over a period not exceeding one year. ~~Therefore~~Because of the period limitation, it is not appropriate to include options to extend the period of performance beyond one year in contracts for temporary expert or consultant services.

- (2) Intermittent

Occasional or irregular work on cases, programs, projects, and problems requiring intermittent services as distinguished from continuous. An intermittent service contract cannot exceed 130 days of work in a service year, but may be renewed from year to year;

[. . .]

§ 520.40 Applicability

Advice to the government from experts or consultants must include the alternatives considered and the rationale for the chosen recommendations. The recommendations may include suggestions for a decision or course of action, but judiciary personnel make the ultimate decision. The following examples of the purposes for which procuring expert and consulting services is appropriate include, but are not limited to, obtaining:

[. . .]

- (e) ~~the skills of~~ specialized ~~persons whose~~skills that are not needed continuously.

§ 520.45 Restrictions

- (a) A CO cannot contract for expert or consulting services for any of the following purposes:

[. . .]

- (2) to bypass, circumvent, or undermine personnel ceilings, pay limitations, or competitive employment procedures. ~~Also a consultant or expert may not be hired in anticipation of career appointments;~~

- (3) to perform duties ~~which~~that otherwise would be duties required of a judiciary employee, ~~even if the judiciary position is considered as an expert or consultant;~~ or;

REDLINE COMPARISON REFLECTING CHANGES

§ 520.45 [cont'd]

- (4) ~~to perform full-time, continuous work or~~ to perform a job that can be done by judiciary employees.
- (b) The CO must ensure that a contract for expert or consulting services does not establish or allow:
 - [. . .]
 - (2) supervision of judiciary employees, or of employees of other contractors, by the contractor.
- (c) Services of experts or consultants may not be procured under a succession of short-term contracts for full or part-time services where the resulting continuous employmentperformance would exceed one year.

§ 520.55 Services Exceeding One Year

~~Since~~Contracts for intermittent expert or consultant services may include options to extend the period of performance for additional years. See: Guide, Vol 14, § 220.40 (Options). However, since temporary services, by definition, are not to exceed one year, a contract for temporary expert ~~and/or~~ consulting services must not include an option to extend the period of performance beyond one year and cannot be extended by modification. When additional services are required, a new contract must be awarded subject to the requirements and limitations of this section. ~~If, in fact, the requesting office is interested in procuring services that will be more than a year, they are probably not appropriate under 5 U.S.C. § 3109. However, contracts for intermittent services may include options and can be renewed from year to year. See: Guide, Vol 14, § 520.35. See: § 520.35 (Limitations).~~

§ 520.60 Former Government Employees

- [. . .]
- (c) ~~If the individual satisfies~~Although former government employees may satisfy the 5 U.S.C. § 3109 criteria as an “expert” or “consultant,” the ~~nature of the relationship may, in fact, be~~CO must guard against contracting with such individuals when it will result in a personal services rather than that of an independent contractor. ~~This is largely determined by the degree of supervision by the government over the individual's work. The fact that the individual may work independently, does not alone satisfy the independent contractor test. The essence of the test is whether the government, on a close and continuous basis, controls what is done and how the individual contractor employee performs the work.~~contract, i.e., an employer/employee relationship. See: § 510.30(b) (Statutory Exceptions to Prohibition).

§ 520.65 Travel Reimbursement

~~The~~Any travel required for performance of the contract which cannot be defined at the time of award must be approved in advance by the Contracting Officer's Representative (COR) and the contract must establish theincorporate Clause 7-45, Travel, which limits reimbursement ~~terms agreed to by the parties. As a practical matter, however, contractors must not be reimbursed at levels greater than judges to that allowed under the judiciary staff travel regulations. See also: Guide, Vol 19, § 410.20(c) (Applicability), regarding contractor eligibility for government travel discounts.~~

REDLINE COMPARISON REFLECTING CHANGES

§ 520.70 Professional Licenses

When ~~purchasing~~obtaining expert or consulting services for which individuals are normally required to be professionally licensed (such as medical, legal, accounting, and architecture), the solicitation must require aproof of the license as a prerequisite to award. ~~Acceptable licenses may be limited to those issued by, for example, a copy of the membership card issued by the respective bar association showing that membership is current for an attorney, or similar credentials for other professionals. The solicitation may also specify that the individual must be licensed in a particular state or by a particular entity, but only when it is necessary for successful contract performance to limit the award to local expertise.~~

§ 520.80 Contract Type

Firm-~~fixed-price~~d contracts are preferred. When a firm-~~fixed-price~~ contract is not suitable, the CO must first document the reasons. A labor-hour contract may be used (~~see: Guide, Vol 14, § 410.40.20~~), subject to the limitations stated ~~at~~in Guide, Vol 14, § 410.40.30 (Limitations). For additional information on the use of this contract type, ~~see: Guide, Vol 14, § 410.40 (Labor-Hour Contracts)~~.

§ 530.30 Architect-Engineer Evaluation Board Functions

The evaluation board must perform the following functions under the PE's general direction, or, if a one-time delegation is granted to court organizations outside PMD to procure this type of service, under the general direction of the Chief Judge, FPD, FJC Director, or PLO:

- (a) review the ~~firms furnishing~~firms' qualification statements furnished in response to any notice publicizing the contemplated ~~contract~~project, as well as any information available within the judiciary's current data existing files on eligible firms;
- [. . .]

§ 530.40 Architect-Engineer Selection

[. . .]

§ 530.40.30 File Documentation

If the firm listed as the most preferred is not recommended as the most highly qualified by the evaluation board, the CO must include in the contract file a written explanation of the reason for the ~~selection~~preference. All firms on the final selection report list must be considered "selected firms" with which the CO may negotiate.

§ 540.20(a) Prohibited Terms and Conditions *[table]*

| Term or Condition | Deletion Mandatory |
|---|--|
| [. . .] (6) Damage Deposits | Any damage deposit (see: § 540.20(a)(8) regarding <u>For</u> Indemnification and/or Hold Harmless terms, <u>see: § 540.20(a)(8) (Prohibited Terms and Conditions)</u>). |
| [. . .] (8) Indemnification and/or Hold Harmless | Delete any proposed vendor provisions <u>commercial term or provision stating that the judiciary will indemnify the contractor</u> and replace with the following: [. . .] |

REDLINE COMPARISON REFLECTING CHANGES

| (9) <u>Clause making State Court Jurisdiction/ State Law applicable</u> | <u>Replace with “Federal law applies.”</u> |
|--|---|
| § 540.20(b) Terms and Conditions Recommended for Deletion or Modification [table] | |
| Term or Condition | Recommended Action |
| <p>(1) — Governing Law</p> <p>• The agreement should contain a choice of law clause that makes federal law applicable. However, often the agreement lists the governing law as the law of the particular state where the agreement is being performed. If the CO is unable to negotiate the applicability of federal law, and state law remains the governing law, then the CO should ensure that the Chief Judge or Court Unit Executive is aware that any litigation concerning the agreement against the court would be decided based on state law.</p> <p>(21) Interest</p> | <p>• Any interest charges should be negotiated out because the government is not liable for interest in the absence of express provisions in statutes or a lawful contract. If the requirement to pay interest remains in the agreement, then sufficient funds must be available to pay any such interest charges to avoid violation of the Anti-Deficiency Act, 31 U.S.C § 1341(a)(1), and the agreement should stipulate that the interest rate may not exceed that allowed under the Prompt Payment Act.</p> |
| <p>(3) — Cancellation</p> <p>(1) — Any schedule or fixed rate of liquidated damages or fees associated with the cancellation or reduction of the service should be negotiated out (but see: Guide, Vol 14, § 410.75 regarding cancellation charges on multi-year contracts);</p> <p>(2) — If the vendor insists on damages for cancellation, replace any schedule of damages with language that states:</p> <p>— “In the event of cancellation or reduction, the vendor agrees to make every effort to resell the cancelled or reduced product or service, and any revenue received by the vendor from the resale will be deducted from the amount owed by the judiciary. In the event the vendor is unable to resell all the cancelled or reduced products or services, the judiciary will be responsible for such amounts that reflect the actual losses sustained by the vendor.”</p> <p>(42) Subject to Change Without Notice</p> | <p>Any language that indicates that the terms of the agreement are subject to change by the vendor without notice to the judiciary should be negotiated out.</p> |
| (3) <u>Taxes</u> | <p><u>Generally, the judiciary is immune from paying taxes imposed by state and local governments. However, for additional information regarding taxes on telecommunications services, see: Guide, Vol 15, § 555 (Applicability of Taxes on Telecommunications Services).</u></p> |

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| | |
|--|--|
| <p><u>(4)</u> <u>Cancellation</u></p> | <p><u>Any schedule or fixed rate of liquidated damages or fees associated with the cancellation or reduction of the service should be negotiated out. Regarding cancellation charges on multi-year contracts, see: Guide, Vol 14, § 410.75 (Multi-Year Contracts).</u></p> <p><u>Regarding cancellation terms in agreements with hotels or other conference/meeting facilities, see: § 540.20(b)(5)(E) (Cancellation).</u></p> |
| <p>(5) Provisions Specific to Commercial Meeting or Conference Facilities:</p> | |
| <p>[. . .] (D) Deposit</p> | <p>The judiciary can provide a “reasonable” deposit in exchange for the hotel or facility to reserve or guarantee a space.—</p> <p>Note:— <u>The funddeposit amount must be obligated foron a purchase order prior to paying any deposit paid.</u></p> |
| <p><u>(6E)</u> Taxes The judiciary is immune from paying taxes imposed by state and local governments<u>Cancellation</u></p> | <p><u>If the contractor insists on damages for cancellation of a hotel booking, replace any schedule of damages with language similar to the following:</u></p> <p><u>A. “Cancellation or reduction” refers to either a complete cancellation of the room block or a reduction of more than 20% of the original room block. No penalty will apply to a cancellation or reduction when the judiciary gives written notice of such cancellation or reduction, via email, facsimile, or hard copy, at least 60 days prior to the date of the event, or if the event is cancelled as a result of catastrophic events (i.e., airport closure, major snow storm, hurricane, tornado, flood, etc.).</u></p> <p><u>In the event of a cancellation or reduction less than 60 days before the date of the event, the contractor agrees to make every effort to resell the cancelled room block. In the event the contractor is unable to resell all the cancelled or reduced products or services, the judiciary will be responsible for such amounts that reflect the actual losses sustained by the contractor.</u></p> <p><u>B. If the judiciary agrees to re-schedule the same event within six months from the date of the cancelled event, any cancellation fee will be waived.</u></p> <p><u>C. In the event that the booking is cancelled by the hotel, without limiting the judiciary’s rights and remedies under law or in equity, the hotel shall be held responsible for excess costs incurred by the judiciary to arrange equivalent accommodations for the event.</u></p> |
| <p>(c) In addition to the above mandatory and recommended changes to vendor proposed <u>commercial</u> terms and conditions, when the contract is being awarded in the current fiscal year to be delivered or performed in a future fiscal year, the CO must incorporate a statement that the agreement is subject to the availability of funds and incorporate <u>Clause 7-115, Availability of Funds</u> by reference.</p> | |

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§ 540.30 Procedures

[. . .]

- (c) In the event the CO is unable to negotiate the provisions in [§ 540.20\(b\) \(Terms and Conditions Recommended for Deletion or Modification\)](#) as recommended and proceeds with the agreement, then the CO must calculate any potential ~~increase in costs~~ that may be incurred to obtain or use the products, services, commercial meeting or conference facility under such terms that may not be favorable to the judiciary. The cost will be calculated using a “worst case” scenario.”

Note: Sufficient funds must be reserved to cover the costs of the worst case scenario at the time the purchase order is awarded.

§ 550 Interagency Agreements and Memoranda of Understanding for Obtaining Products and Services

§ 550.10 In General

Under some circumstances, judiciary units may wish to acquire goods or services from or through other federal entities. The Director has authority to enter into interagency agreements (IAs) and memoranda of understanding (MOUs) for this purpose and has delegated this authority to all chief judges, FPDs, and the FJC Director as part of the COCP Level 3 general delegation. See: [28 U.S.C. § 604\(a\)\(10\)\(c\)](#) and [31 U.S.C. § 1535 § 1535](#); ~~and~~ [Guide, Vol 14, § 140.30.30\(h\) \(Level 3 Delegation\)](#) and [Guide, Vol 1, § 630\(c\) \(Procurement\)](#). This section prescribes procedures applicable to these IAs and MOUs for obtaining products and services from other federal agencies ~~for amounts not to exceed their delegation authority~~.

Note: This section does not apply to the purchase of duplication/printing services (see: Guide, Vol 23, Ch 2 (Printing)) or to the placement and administration of Reimbursable Work Authorizations (RWAs) (see: Guide, Vol 16 (Space and Facilities)).

§ 550.20 Types of IAs and MOUs

The judiciary may enter into ~~any of several~~ the following types of IA or MOU transactions with other federal agencies. ~~Types of IA or MOU transactions include:~~

[. . .]

- ~~(b) IAs or MOUs under which the judiciary will perform work for, or provide services to, another federal agency (referred to as the receiving agency) and receive reimbursement from the receiving agency for such work or services. As with the first type, the judiciary may contract for performance of the work, in which case the judiciary pays the contractor and then receives reimbursement from the receiving agency.~~

[. . .]

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§ 550.30 Limitations

[. . .]

§ 550.30.20 Content

An IA or MOU must be in writing. As in any contract situation, the agreed upon written terms establish the scope of the undertaking and the rights and obligations of the parties. Also, the written IA or MOU can establish a not-to-exceed amount on the judiciary's financial obligation. If the other agency does not provide an agreement ~~or if the judiciary is the providing agency, then~~ [Form AO 368 \(Interagency Agreement\)](#) may be used. The IA or MOU should specify at least the following:

[. . .]

(i) procedures for the resolution of disagreements that may arise under an IA or MOU, including resolution by the PE~~;~~;

(j) ~~It should also include the a~~ requirement ~~and procedures~~ for the providing agency to notify the judiciary if it appears that performance will exceed estimated costs and procedures to cease or curtail performance as may be necessary~~;~~ and

(Note: This is an important safeguard to protect the judiciary from a potential Anti-Deficiency Act violation~~;~~ and.)

(ik) [. . .]

§ 550.30.30 Approval Requirements

(a) IAs or MOUs issued by the AO are subject to PMD's internal approval procedures. The use of IAs or MOUs by other judiciary organizations to obtain products or services from another federal agency is subject to approval by the ~~The~~ chief judge, FPD, FJC Director, or the PLO, if delegated, ~~must approve the use of IAs or MOUs for obtaining products or services from another federal agency~~ subject to the following limitations:

[. . .]

(eb) ~~There~~ All judiciary IAs and MOUs must ~~be adherence~~ adhere to applicable statutory and/or regulatory requirements, including appropriations law. This means, for example, that the judiciary may not enter into IAs or MOUs that obligate funds from ~~fiscal years that are before a~~ future or ~~after the current~~ previous fiscal year. However, the IA or MOU may include yearly option periods that, if the CO exercises the option, will require the obligation of fiscal year funds available for the option period through the execution of a new order with the providing agency.

§ 550.30.40 Authority Not Delegated

Authority is not delegated:

~~—— (1) —— to the Courts, the FJC, or Federal Public Defenders to be providers of products or services to another federal agency;~~

(21) for the detail of personnel ~~between~~ to the judiciary ~~and from~~ another federal agency, whether paid or unpaid; or

(32) for any IA or MOU exceeding the general delegation authority amount (**see:** Guide, Vol 14, § 140.30.30(h) (Level 3 Delegation)).

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§ 550.30.60 Non-Procurement IAs and MOUs

The judiciary may enter into IA or MOU transactions with other federal agencies that do not involve obtaining products or services, such as:

- (1) IAs or MOUs under which the judiciary is the provider of products or services to another federal agency; and
- (2) IAs or MOUs for the detail of personnel by the judiciary to another federal agency, whether paid or unpaid; and
- (3) IAs or MOUs establishing agreed procedures between the judiciary and another federal agency that do not involve the expenditure of appropriated funds by either party.

Non-procurement MOUs and IAs are outside the scope of Vol 14.

§ 550.40 Requirements for IAs and MOUs

[. . .]

§ 550.40.40 Economy Act Determination and Finding

- (a) Before entering into an IA or MOU under the Act, the CO must prepare and sign a D&F. If the providing agency requires a copy of the judiciary's D&F, this should be provided with the IA or MOU. The D&F must determine:
 - (1) that use of an IA or MOU for obtaining products or services, under the Economy Act ([31 U.S.C. § 1535](#)), is in the best interest of the judiciary; and
 - (2) the products or services cannot be provided by contract as conveniently or cheaply by contracting with a commercial enterprise.
- [. . .]
- (c) For IAs and MOUs within the court unit's delegated procurement authority (**see:** [-Guide, Vol 14, § 140.30.30\(h\) \(Level 3 Delegation\)](#)), the D&F must be approved by the chief judge, FPD, or FJC Director (or PLO, if delegated).
- (d) For IAs and MOUs above the court unit's delegated procurement authority the D&F must be approved by the PE before a one-time delegation of procurement authority will be issued.

§ 550.50.20 [Reserved] IAs or MOUs under the Economy Act

~~If the IA or MOU is under the Economy Act, see: § 550.40.30.~~

§ 550.50.30 Recording IA or MOU Obligations

In most instances, an IA, MOU, or an order placed directly with another agency's contractor obligates the judiciary's appropriations and is recorded as an obligation. If this is an Economy Act transaction, then the original amount obligated must be reduced, i.e., deobligated, at the end of the fiscal year to the extent that the providing agency has not incurred costs or made expenditures, before the end of the period of availability of the appropriation, in:

[. . .]

REDLINE COMPARISON REFLECTING CHANGES

[Significant changes in Chapter 6 (Bonds, Insurance, Taxes, and Intellectual Property) follow:]

§ 610 Bonds

§ 610.10 In General

- (a) A bond is a written instrument executed ~~for the judiciary's benefit as security for the offeror's or contractor's obligations, and to assure payment of any bond loss.~~ contractor by a bidder or contractor (the "principal") and a second party (the "surety" or "sureties") to assure fulfillment of the principal's obligations to a third party (the "obligee" or "judiciary") identified in the bond. If the principal's obligations are not met, the bond assures payment, to the extent stipulated in the bond, of any loss sustained by the obligee.

- ~~(b) A bond is executed by an offeror or identified in the instrument as the principal, with a second party identified as the surety.~~

- ~~(e)(b)~~ Bonds and performance guarantees will be obtained only when needed to protect the interest of the judiciary.

§ 610.20 Performance Bonds for Other than Construction Contracts

[. . .]

§ 610.20.30 Clauses

[. . .]

- (b) Clause 6-1 ~~with its Alternate I~~ is included when only a performance bond is required.

[. . .]

§ 610.40 Fidelity Bonds

[. . .]

- (c) The CO will ~~include~~ indicate the amount of the bond required by filling in the ~~contract's schedule~~ blank in Clause 6-5, Fidelity Bond Requirements.

§ 620 Sureties and Bond Alternatives

§ 620.10 Sureties

[. . .]

§ 620.10.20 Corporate Sureties

Any corporate or individual surety offered for a bond furnished the judiciary must appear on the list contained in Treasury Department Circular 570 (Circular 570), which may also be obtained from the following address: Companies Holding Certificates of Authority as Acceptable Sureties on Federal Bonds and as Acceptable Reinsuring Companies).

~~U.S. Department of the Treasury~~

~~Financial Management Service~~

~~Surety Bond Branch~~

~~401 14th St., SW, 2nd Floor — West Wing~~

~~Washington, D.C. 20227~~

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§ 620.20 Deposit of Assets Instead of Surety Bonds

[. . .]

§ 620.20.50 Clauses/Provisions

- (a) ~~For all contracts involving the furnishing of bonds, Provision 6-10, Deposit of Assets Requirements~~ must be included in ~~the solicitations~~ solicitations if the resulting contract will require furnishing of bonds.

[. . .]

§ 630.40.20 Amount

Insurance coverage must be at least \$200,000. However, the CO may determine that a ~~different limit~~ greater amount is needed to protect the interest of the judiciary. ~~This limit is then set forth in the schedule of the contract.~~ Any greater amount determined necessary may be indicated by filling in the blank in Clause 6-35, Errors and Omissions.

§ 640 Taxes

§ 640.10 In General

Contract tax problems are essentially legal in nature and vary widely. Specific tax questions must be resolved by reference to the applicable contract terms and pertinent tax laws and regulations. Therefore, when tax questions arise, COs generally must confer with the PE, who will consult with OGC.

Note: Telecommunications services are a special case. For guidance on these taxes, **see:** Guide, Vol 15, § 555 (Applicability of Taxes and Fees on Telecommunications Services and Computers).

§ 640.20 Federal Excise Taxes

§ 640.20.10 Applicability

Federal excise taxes are levied on the sale or use of particular products and services. The judiciary is subject to the federal excise tax on firearms and ammunition, and vendors for these items may charge this tax. The judiciary is not subject to the federal excise tax on telecommunications (**see:** Guide, Vol 15, § 555 (Applicability of Taxes and Fees on Telecommunications Services and Computers)). Questions on the applicability of other federal excise taxes must be directed to the PE, who will consult with OGC.

REDLINE COMPARISON REFLECTING CHANGES

§ 640.30.30 Exemptions for Contractors

- (a) Prime contractors and subcontractors may not normally be designated as agents of the judiciary for the purpose of claiming exemption from state and local taxes. Such designation, when appropriate, must be accomplished in the solicitation and only after coordination with the PE, who will consult with OGC.
- (b) Similarly, when contractors purchase goods or services for the performance of a judiciary contract, the right to an exemption of the transaction from a state or local sales or use tax may not be based on the judiciary immunity from direct taxation by states and localities. If an exemption exists, it must be based upon the provisions of the particular state or local law involved.

§ 640.30.40 Exemption from Tax

[. . .]

- (b) ~~If the~~In fixed-price solicitation ~~or contracts and contracts which~~ includes Clause 6-40, Federal, State and Local Taxes or Clause 6-45, Federal, State and Local Taxes (Noncompetitive Contract); it is the offeror's responsibility to determine to what extent state and local taxes are applicable to its offer. The CO must make no representations concerning the applicability of any state or local tax and, except as provided in paragraph (c) below, the judiciary will have no involvement in resolving any dispute between the contractor and a taxing authority concerning tax applicability.

[. . .]

§ 640.30.50 Evidence of Exemption

Evidence ~~of exemption~~needed to establish exemption from state or local taxes, if an exemption is available, depends on the grounds for the exemption claimed, the parties to the transaction, and the requirements of the taxing jurisdiction. Such evidence may include:

[. . .]

- (b) copies of other documents ~~(, such as shipping documents or, credit card imprinted sales slips, invoices)~~ or similar documents identifying the judiciary as the buyer;
- (c) a U.S. Tax Exemption ~~Certificate (SF 1094), which may be obtained from the Federal Supply Service, 1-800-525-8027.~~ Form (SF 1094);

[. . .]

§ 640.30.70 Clauses

[. . .]

- (c) Clause 6-105, California E-Waste Fee is included in all solicitations and contracts for electronic products purchased in the State of California.

REDLINE COMPARISON REFLECTING CHANGES

[Significant changes in Chapter 7 (Contract Administration) follow:]

§ 710 Maintaining Records

§ 710.10 Procurement Files (Purchase/Delivery/Task Order or Contract Files)

§ 710.10.10 In General

- (a) A file must be established and maintained for every purchase action, solicitation, and contract.
 - (1) Procurement files may be retained in any medium (paper, electronic, microfilm, etc.) or any combination of media, as long as the requirements of this chapter are satisfied.
 - (2) When the original medium is changed to facilitate storage, the process used to create and store records must record and reproduce the original document, including signatures and other written and graphic images completely, accurately, and clearly. Data transfer, storage, and retrieval procedures must protect the original data from alteration. Signed originals may be destroyed after verification by the Procurement Liaison Officer (PLO) (or designee) that record copies on alternate media and copies reproduced from the record copy are accurate, complete, and clear representations of the originals.
 - (3) Procedures for contract file disposal must ensure that the documents specified in this chapter may not be destroyed before the times indicated in § 760.30 (Disposition of Contract Files), and may be retained longer if the PLO determines that the files have future value to the judiciary. When original documents have been converted to alternate media for storage, the requirements of § 760.30 (Disposition of Contract Files) also apply to the record copies in the alternate media.
- (b) Procurement ~~files~~file content deemed to be sensitive information, e.g., proposal information or proposal evaluation information, must be maintained in a secured area and otherwise not left unattended nor in open view when personnel without a need-to-know are present.
- (c) Access to procurement ~~files and related documents~~file content deemed to be sensitive, e.g., proposal information or proposal evaluation information, must be limited to authorized judiciary procurement and audit personnel. For a discussion on obtaining and disclosing procurement documents according to the Procurement Integrity Act, **see:** Guide, Vol 14, § 150.20 (Procurement Integrity Act).
- (d) Purchases made with the purchase card are exempt from the requirement to establish files for each individual transaction, since there is generally minimal documentation — either pre-award or post-award — associated with these procurements. However, ~~the transaction~~each purchase must be recorded ~~in either as~~an electronic or manual purchase card logobligation in FAS₄T. **See:** Judiciary Purchase Card Program Manual.

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§ 710.10.10 *[cont'd]*

- ~~(e) The type of file depends on the dollar amount and award type. For contract types, **see:** Guide, Vol 14, Ch 4.~~
- ~~(f) Purchases that are less than the judiciary's small purchase threshold (**see:** Guide, Vol 14, § 325.10.30) are awarded using a purchase order for open market purchases.~~
- ~~(g) Delivery orders are used for products and task orders are used for services according to the contract (e.g., GSA federal supply schedules, other federal agency contract, indefinite delivery contracts).~~
- ~~(h) If the estimated purchase is over the judiciary's small purchase threshold (**see:** Guide, Vol 14, § 325.15.20) or whenever formal contract procedures are required to be used (such as for expert or consultant services), then a contract file is required.~~
- ~~(i) When placing orders against a GSA federal supply schedule or another federal agency contract, the judiciary must comply with the other federal agency's competition threshold and the other federal agency's contract terms and conditions.~~
- ~~(j) Files for each procurement must contain the documentation identified below in § 710.10.20: (Required Documentation). **See also:** Guide, Vol 11, § 340.30 (Appropriate Records and Documentation).~~

§ 710.10.20 Required Documentation

- (a) ~~Open Market~~ Purchases Below the Applicable Competition Threshold (Judiciary open market, GSA Schedule, etc.), require the following documentation:
 - (1) ~~r~~Requisition (electronic or hard copy) or statement of need with the authorizing official's signature or reference to the court unit's approved spending plan for certain types of purchases such as office supplies;
 - [. . .]
 - (3) ~~s~~Supporting documentation for each purchase/delivery/task order modification; including the documentation required in Guide, Vol 14, § 310.50.70 for GSA schedule orders; (**see:** § 745 (Contract Modifications));
 - (4) Documentation that products or services have been received and accepted, e.g., copies of receiving reports for products with annotation indicating inspection and acceptance, or Contracting Officer Representative (COR) signature on invoices signifying services were performed satisfactorily;
 - [. . .]
 - (6) ~~a~~Any other pertinent information ~~(, e.g., documented phone conversations with offerors/contractors, evaluation worksheets, correspondence to and from offerors, commercial agreements); and, documentation of follow-up on late deliveries or unsatisfactory performance, etc.;~~
- (b) ~~Small~~ Purchases Greater than the Applicable Competition Threshold (Judiciary, GSA Schedule, etc.) require the following documentation:

REDLINE COMPARISON REFLECTING CHANGES

§ 710.10.20 [cont'd]

- (1) ~~determination~~Requisition (electronic or hard copy) or statement of need with the authorizing official's signature; or reference to the court unit's approved spending plan for certain types of purchases, such as office supplies;
- (2) ~~r~~Rationale for selection of the source of supply; (low price/technically acceptable or best value, including documentation of evaluation process);
- (3) For competitively awarded delivery orders or task orders under judiciary or non-judiciary contracts, including GSA schedule contracts or other Executive Branch contracts, such as NASA's SEWP (Solutions for Enterprise-Wide Procurement) contracts, evidence of the level of competition required ~~by~~for use of the specific contract ~~in its terms of use;~~justification if other than full and open competition;
- (4) Where competition was not obtained, a copy of the approved Form AO 370, Justification for Other Than Full and Open Competition, including required written approvals (see: copy of the one-time delegation from the Procurement Management Division (PMD) (see: Guide, Vol 14, § 335 (Other Than Full and Open Competition));
- (5) ~~e~~Copy of any other applicable one-time delegation of procurement authority from ~~the PE; PMD;~~
- ~~(6) — copies of solicitation, amendments, questions, clarifications, all correspondence with prospective offerors and their replies;~~
- ~~(7) — copies of unsuccessful quotes;~~
- ~~(8) — determination of fair and reasonable price and basis of selection;~~
- Note:** If price is not the basis of selection, the required PMD written approvals must be included.
- ~~(9) — signed purchase/delivery/task order and any signed modifications with the supporting documentation;~~
- ~~(10) — copies of receiving documents;~~
- ~~(11) — copies of all invoices or vouchers;~~
- ~~(12) — if multiple payments, a log of payments made and balances remaining; and~~
- ~~(13) — any other pertinent information (e.g., documented phone conversations with offerors, evaluation worksheets, commercial agreements, records of the prospective offerors site visits, post-award correspondence);~~
- ~~(6)14) and copies~~Copies of the advertisement of the requirement and/or documentation that the requirement was advertised locally or on FedBizOpps (or the approved exception from advertising);

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§ 710.10.20 [cont'd]

(c) ~~Formal Competitive Open Market Contracts – Over the Judiciary's Small Purchase Threshold~~

- ~~(1) determination of need with the authorizing official's signature;~~
- ~~(2) rationale for selection of source of supply;~~
- ~~(3) any applicable one-time delegation of procurement authority from the PE;~~
- ~~(4) copy of the issued solicitation and any amendments to it;~~
- ~~(5) justification to use other than full and open competition, including required written approvals (~~see: Guide, Vol 14, § 335~~);~~
- ~~(6) copies of the advertisement of the requirement and/or documentation that the requirement was advertised on FedBizOpps (or the approved exception from advertising);~~
- ~~(7) copies of all offers received;~~
- ~~(8)(7) copies of Copies of any written solicitation, amendments, questions, clarifications, all correspondence to~~with~~ prospective offerors and their replies;~~
- ~~(8) Copies of unsuccessful offers, or, where award is based on oral quotes, a record of each quote obtained and who provided it;~~
- ~~(9) d~~D~~etermination of fair and reasonable price and basis of selection ~~f~~;~~
Note: If price is not the basis of selection, ~~include~~ the required PMD written approvals ~~;~~;
- ~~(10) copy of the contract and all modifications and, for – the pre-solicitation approval to use best value source selection as well as the one-time delegation granted after review of the evaluation of offers – must be included.~~
- ~~(10) Signed award (contract or purchase/delivery/task order) and any signed modifications with the supporting documentation (~~see: § 745 (Contract Modifications)~~);~~
- ~~(11) For Blanket Purchase Agreements (BPAs), indefinite delivery/indefinite-quantity (IDIQ) or requirements contracts, copies of all ~~delivery orders/task~~BPA calls or delivery/task orders and all other documents supporting them (e.g., copies of task order solicitations, competitive range determinations, memo of negotiations, pre-negotiation positions, post performance assessment, contractor reports and copies of deliverables, ~~if appropriate~~);as applicable;~~
- ~~(11) copies of unsuccessful offers;~~
- ~~(12) copies of debriefing from unsuccessful offerors and documentation of debriefing, if any;~~
- ~~(13) documentation of protests, if any;~~

REDLINE COMPARISON REFLECTING CHANGES

§ 710.10.20 [cont'd]

- (~~44~~12) Documentation that products or services have been received and accepted, e.g., copies of receiving documents; reports for products with annotation indicating inspection and acceptance, or COR signature on invoices signifying services were performed satisfactorily;
- (~~45~~13) Copies~~copies~~ of all invoices or vouchers; ~~and~~
- (~~16~~4) a~~A~~ny other pertinent information (e.g., ~~designation of the contracting officer technical representative,~~ documented phone conversations with ~~potential/actual~~ offerors, evaluation worksheets, commercial agreements, records of site visits by ~~contractors;~~ logs of payments or to prospective offerors, post-award correspondence, documentation of follow-up on late deliveries or unsatisfactory performance, etc.);
- (15) Copies of debriefing requests and documentation of debriefing, if any;
- (16) Documentation of protests, if any, and of required coordination with the PE (see: Guide, Vol 14, § 350 (Judiciary Protest Procedures)).

§ 715 Responsibilities

§ 715.10 Contract Administration Process

§ 715.10.10 In General

Once a contract is awarded, the contract administration process begins. Every contract-related issue that arises after the contract is awarded becomes part of the contract administration process. Contract administration encompasses a broad range of functions that, together, ensure that the judiciary obtains exactly what it has contracted to purchased. For contract administration involving sureties, **see:** Guide, Vol 14, § 620.30 (Irrevocable Letter of Credit). The contract administration process includes:

[. . .]

- (b) monitoring the contractor's progress, making sure ~~deliverable schedules~~contractual delivery dates are ~~maintained~~met and that products and services are of acceptable quality;

[. . .]

- (d) placing orders under ~~some~~indefinite-delivery contract types and treating those orders as ~~mini-contracts~~contracts that must be separately administered (see: Guide, Vol 14, § 410.30 (Indefinite-Delivery Contracts));

- (e) ~~providing guidance,~~ answering questions; and addressing contractor issues;

[. . .]

- (h) ~~ensuring that other functional specialists provide assistance to the contracting officer~~obtaining assistance from other offices in addressing unusual contract actions when necessary, such as protests, disputes or terminations; and

[. . .]

~~There are many individuals involved in the contract administration process. Each of these individuals or groups has specific functions, responsibilities, and accountability.~~

REDLINE COMPARISON REFLECTING CHANGES

§ 715.15 Participants in the Contract Administration Process

There are many individuals involved in the contract administration process. Each of these individuals or groups has specific functions, responsibilities, and accountability.

§ 715.15.10 Contracting Officer

[. . .]

- (b) The CO is supported by other individuals in the judiciary. One of the support individuals is the contracting officer's ~~technical~~ representative (COTR). ~~This individual is appointed by the CO after the person completes the required COTR training.~~COR).
- (c) ~~Appointments~~CO appointments are evidenced by a signed Form AO 375 (Procurement Liaison Officer's Appointment of Contracting Officer) or a signed ~~certificates~~certificate (applicable to PMD).
- (d) ~~Such~~COCP Level 3 appointments ~~may be renewed only if refresher training is completed every three years~~are subject to continuing education training requirements and are valid until rescinded or until a new PLO is appointed. See: Guide, Vol 14, § 120.20.60(c) (When Delegations Must be Re-Issued).

§ 715.15.20 Designation of ~~COTR~~COR

- (a) The CO delegates specific contract administration responsibilities to the CO~~T~~R through a written designation. Through this memo of designation, the CO~~T~~R is empowered to fulfill the delegated responsibilities on a specific contract and/or delivery or task order, as appropriate. For a sample COR designation memo, see: Appx 7E (Sample Contracting Officer Representative Appointment Memo). For more detail on the respective roles of the CO and CO~~T~~R, see: § 715.25 (Functions of the CO and COR).
- (b) To be eligible for designation as a COR by the CO, prospective CORs must complete, at a minimum, the online COR training available through CourtsLearn University.
- (c) For routine purchases of non-complex, off-the-shelf products, e.g., office supplies, formal appointment of a COR is not required and acceptance may consist of merely confirming receipt of the ordered items in undamaged condition. For more complex purchases, such as IT hardware or software which must be tested prior to acceptance, installation of furniture, or complex, non-routine types of services performed on a labor-hour or time-and-materials basis, where there may be extended communications between the contractor and the judiciary during installation, testing or over the period of performance, formal appointment of a COR is recommended.
- (d) The contractor must be provided a copy of any formal appointment of a COR to ensure the contractor understands the limits of the COR's authority.

REDLINE COMPARISON REFLECTING CHANGES

§ 715.15.30 Other Participants

- (a) AO Office of General Counsel (OGC) staff ~~members~~ provide ~~s~~ essential requested essential legal reviews and guidance.
- (b) Financial and budget officials ~~provide the funding that may be required~~ establish budgets and reprogram funds when necessary to exercise options, make changes, and settle claims.
- (c) The CO, or the CO~~TR~~ when authorized, tracks expenditures against contracts/orders, ~~weighs~~ determines the adequacy and accuracy of vouchers and invoices, and ultimately approves payments to the contractor.
- (d) Other financial officials ultimately ~~provide~~ process payments to the contractor after written approval ~~off from~~ the CO or CO~~TR~~. They may also track expenditures against contracts/orders, and ~~weigh~~ provide advice to the CO as to the adequacy and accuracy of vouchers and invoices.

§ 715.20 Distinctions between Contracting Officer (CO) and Contracting Officer's ~~Technical~~ Representative (CO~~TR~~)

- (a) The CO is the only person with the legal authority to commit the judiciary to a ~~business arrangement~~ legally binding contract and obligate appropriated funds for that purpose. ~~It is the sole responsibility of the CO to administer~~ This legal authority cannot be delegated to the COR. Although certain contract administration functions may be delegated to the COR, the CO remains ultimately responsible for the administration of each contract.
- (b) The CO~~TR~~ assists the CO by providing specific services as directed by the CO. However, the CO ~~has~~ makes the final ~~word~~ decisions and retains signature authority in the contracting matter.
- (c) The CO and the CO~~TR~~ are the primary members of a team which provides proper contract administration and oversight. This team's efforts ensure that tax dollars are being wisely and efficiently expended, and that the judiciary and, in particular, the customer organization that generates each requirement, ~~is~~ are receiving the full measure of the products and/or services ~~which it has~~ purchased.

§ 715.25 Functions of the CO and CO~~TR~~

§ 715.25.10 Monitoring Pro~~gress~~

- ~~(a)~~ Monitoring the progress of a contractor and making sure ~~deliverable schedules~~ contractual due dates are ~~maintained~~ met ~~are~~ shared ~~responsibility~~ responsibilities. However, the CO and the CO~~TR~~ often look at different aspects of the contractor's performance.
- ~~(b)~~ The CO will examine delivery and reporting ~~schedules~~ due dates and consult with the CO~~TR~~ to determine if the contractor is making all deliveries according to the contract delivery schedule.

[. . .]

REDLINE COMPARISON REFLECTING CHANGES

§ 715.25.15 ~~Enforcing~~Ensuring Judiciary Contractual Commitments Are Met

(a) Making sure that the judiciary is meeting its contractual commitments is a shared responsibility. For ~~instance, when the judiciary is required by the contract to provide the contractor with equipment or publications for the contractor to do its work, it must be done~~example, when performance of the work requires the use of judiciary property, or access to judiciary data or information technology, etc., such property or access must be provided within the time frame set forth in the contract. This is generally a COR responsibility.

~~(b) If the judiciary is required to provide equipment or publications as in this example, the COTR provides the material or, in some circumstances, oversees the provision of this material by other employees. The CO, in turn, manages the contract to ensure that the judiciary meets all of its contractual responsibilities.~~

~~(c)~~(b) If the judiciary is failing to meet its responsibilities in making data, property, physical or virtual access, etc. available within the contractually required time frames, the contractor may be entitled to an equitable adjustment. The CO ~~may then have to negotiate~~is responsible for negotiating a changeany such adjustment with the contractor, which may ultimately cause the expenditure of further judiciary funds and/or a delay in delivery or other contract performance.

§ 715.25.20 Placing Orders

The CO is responsible for the placement of orders, since it normally involves a binding contract and obligating judiciary funds. Administering each of these orders requires similar actions as the administration for the contracts under which the orders were issued, ~~as they are. See: Guide, in effect Vol 14, mini-~~contracts § 410.30.60 (Delivery Orders or Task Orders).

§ 715.25.25 Receipt, Inspection and Acceptance of DeliverablesPerformance

The CO~~TR~~ recommends acceptance or rejection of performance, including any deliverables required. If applicable, the CO~~TR~~ will normally provide this recommendation to the CO only after consulting with customer organizations to confirm ~~their satisfaction~~the contractor has performed in accordance with the ~~contractor's performance. Tcontract. The COR performs this isfunction~~ because the CO~~TR~~ is generally on-site and either observes the provisionperformance of services first-hand or is the delivery point for material ~~deliverables~~deliveries. The CO has the final decision for acceptance or rejection after discussing the delivery or performance with the CO~~TR~~.

REDLINE COMPARISON REFLECTING CHANGES

§ 715.25.30 Providing Technical Direction

- (a) The CO~~TR~~ provides technical direction, ~~consisting of guidance, including~~ answering questions, and addressing other issues that the contractor may have, ~~without “changing” the contract.~~

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- (~~eb~~) The CO~~TR~~ may provide ~~guidance~~technical direction only within the general scope of the contract and only if the ~~guidance~~direction does **not** alter any of the contract specifications or the statement of work, or terms and conditions of the contract.

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- (~~bc~~) Only the CO can change a contract. This is a vital area for both the CO and the ~~CO~~TR~~~~COR to understand, since open communication between the contractor and the judiciary can mean the difference between success and failure.

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- (d) ~~Guidance and/or direction~~Requesting changes that ~~is~~are outside the scope of the contract or which ~~alters~~alter the specifications, terms, or conditions would be considered new work, and subject to competition and advertising requirements.

[. . .]

§ 715.25.35 Changing or Modifying the Contract

As discussed above, this is a function strictly reserved for the CO and it may not be delegated. However, the CO~~TR~~ will~~may~~ be asked to support this process ~~by~~in, for ~~instance~~example, evaluating offers~~change order price proposals~~ or ~~participating in negotiation~~technical aspects of proposed changes.

§ 715.25.45 Maintaining Procurement Files

- (a) Both the CO and the CO~~TR~~ must maintain files for every purchase action, solicitation, and contract. ~~The~~For file requirements for the CO ~~are located in § 710.10. The CO~~TR~~, see: § 710.10 (Procurement Files (Purchase Delivery/Task Order or Contract Files)). The COR~~ must maintain a contract work file.
- (b) ~~The CO files, the CO~~TR~~ files, and other~~Any procurement documents relating to offer evaluation, including the offers themselves, must be maintained in a secured area and otherwise not left unattended nor in open view when personnel without a need-to-know are present. Access to pre-award procurement files and related documents, as well any post-award documents which contain confidential contractor information (for example, invoices which include indirect rates), must be limited to authorized judiciary procurement and audit personnel. ~~For a discussion on obtaining and disclosing procurement documents according to~~Disclosure of offeror information prior to award can result in penalties under the Procurement Integrity Act. For additional information, see: Guide, Vol 14, § 150.20 (Procurement Integrity Act) and Guide, Vol 14, § 170 (Release of Information).

[. . .]

§ 715.25.50 Closing out Contracts and Orders

- (a) This is a shared function. First, the CO~~TR~~ ~~ascertains that~~confirms final receipt and acceptance of all products and services ~~has occurred~~, ensures the return of contractor employee badges and judiciary property, if applicable, and recommends that the contractor be relieved of any further performance responsibilities under the contract.

[. . .]

REDLINE COMPARISON REFLECTING CHANGES

§ 715.25.55 Supporting ~~Unusual~~ Contract Actions ~~When Necessary~~, Such As ~~Protests~~, Disputes, or Terminations

~~This is~~ These types of contract actions are always a joint function of the CO and COR, but with a clear separation of responsibilities. The CO~~TR~~ plays a major part in the program related aspects of the action, including providing supporting information which ~~impacts~~relates to the specificationss or statement of work. The CO has sole responsibility for any negotiations and the business and financial aspects of the transaction, such as deciding whether any payments will be made to the contractor. The CO also has responsibility for ensuring any required coordination with the PE on such matters is done.

§ 715.30 ~~CO~~TR~~'s Obligations~~COR Responsibilities to the Judiciary End User

§ 715.30.10 In General

- (a) Aside from the CO~~TR~~ responsibilities to the CO, the CO~~TR~~ also has concurrent responsibilities to the judiciary end user, if the COR is not the end user. The CO~~TR~~ must work closely with end users during contract delivery or performance to ensure that the end user is receiving satisfactory products and services according to the contract.
- [. . .]
- (c) Under certain types of contracts, the CO~~TR~~ will also be responsible to draft work requirements, which will be ~~assigned to~~awarded by the ~~contractor~~CO through task orders.
- (d) ~~As requested by the CO~~TR~~~~As requested by the CO, the ~~CO~~TR~~ may~~COR may review and approve technical offers and quotations ~~that the contractor may be required to submit~~, and ~~will~~ participate in negotiations.

§ 715.40 Becoming a CO~~TR~~

[. . .]

§ 715.40.20 Designation is for Specific Contracts

- (a) The CO ~~will subsequently~~ designate ~~thes a~~a CO~~TR~~ for specific contracts, delivery orders, and task orders. Formal designation to act as a CO~~TR~~ on a specific contract, delivery order, and/or task order is evidenced by a letter of designation, signed by the CO. A copy of this designation will be furnished to the CO~~TR~~'s immediate supervisor, and to the contractor.
- (b) The designation letter will describe the exact functions the CO~~TR~~ will be required to perform on the particular ~~contract~~or order. Separate letters of designation ~~will be~~are required for each contract, delivery order, or task order assigned to the CO~~TR~~. CO~~TR~~ designations expire automatically at the conclusion of the specific contract, delivery order, or task order underfor which the CO~~TR~~ was ~~designated~~appointed.

REDLINE COMPARISON REFLECTING CHANGES

§ 715.50 Relationship Between Judiciary and Contractor Representatives

§ 715.50.10 Objective of Purchase Actions

- (a) The objective of any purchase action is performance or delivery of the contract requirements, not control of the contractor's business. Judiciary ~~administrative~~ personnel must devote their efforts to tasks associated with that requirement, such as:
[. . .]
- (b) ~~They~~Judiciary personnel may not:
- direct the contractor's ~~management~~ activities, or
[. . .]

§ 720 Judiciary Property

§ 720.10 In General

[. . .]

§ 720.10.20 Property Liability and Contract Type

Generally, contractors are not held liable for loss, damage, destruction or theft of judiciary property under the following contract types, absent evidence of gross negligence on the part of the contractor:
[. . .]

§ 720.10.30 ~~Property Control Systems Review~~

~~(a) If Judiciary Property Used Outside Judiciary Facilities~~

- (a) The CO must obtain approval from the PE prior to the award of any contract which authorizes judiciary property ~~isto be~~ provided for a contractor to use in performance of a contract, and it is anticipated that such property will be removed from outside of judiciary facilities for such use, t. The CO must ~~review~~obtain and provide to the PE information on the contractor's property control systems to ensure compliance with the contract's property clauses.
- (b) In the event that ~~such a review~~the PE finds deficiencies in the contractor's property control system, the CO must notify the contractor in writing, requesting prompt correction of deficiencies. If the contractor does not correct the deficiencies within a reasonable period, the CO may, subject to PE approval:
- [. . .]
- (c) Where judiciary property is authorized for removal from and use outside judiciary facilities, the contractor's records of the property, established and maintained under the terms of the contract, constitute the judiciary's official property records.

§ 720.20 Property Records

§ 720.20.10 ~~[Reserved]~~In General

~~Contractor records of judiciary property, established and maintained under the terms of the contract, are the judiciary's official records.~~

REDLINE COMPARISON REFLECTING CHANGES

§ 720.20.20 Judiciary Maintenance of Official Records

~~Contracts must provide for the official records to be maintained by the judiciary~~The judiciary will maintain the official property records when judiciary property is furnished to a contractor:

(a) for repair or servicing and return to the ~~shipping organization~~judiciary;

(b) for use at a judiciary ~~installation~~facility/office;

~~(c) under a local support service contract;~~

~~(d)~~ under a contract with a short performance period or involving judiciary property having a contract cost of \$50,000 or less; or

~~(e)~~ when otherwise determined by the CO to be in the judiciary's interest.

§ 725 Subcontracting

§ 725.10 In General

§ 725.10.10 Notification Requirement

When a contract contains Clause 7-75, Subcontracts, the contractor must give the CO advance notice of its intent to subcontract. The clause authorizes the contractor ~~may~~to proceed to enter into a subcontract unless notice of disapproval is received from the CO within 15 days from the date the CO was notified. The CO must:

[. . .]

§ 725.10.30 Subcontracting Situations Requiring Special Care

Particularly careful and thorough consideration is necessary when:

[. . .]

(b) close working relationships or ownership affiliation between the prime and subcontractor may preclude ~~free~~ competition or result in higher prices;

[. . .]

REDLINE COMPARISON REFLECTING CHANGES

§ 730 Contract Performance

§ 730.10 ~~Contract Performance~~

~~§ 730.10.10~~ Postaward Orientation

§ 730.10.10 In General

Postaward orientation is conducted by the CO. It is optional and is ~~normally conducted~~recommended in cases of complex service contracts. It is a planned and structured discussion between judiciary and contractor representatives that focuses on:

[. . .]

(b) ensuring ~~the~~mutual understanding of the technical aspects of the contract;

(c) ~~identifying and resolving~~discussing judiciary oversight ~~issues~~approach;

[. . .]

§ 730.10.20 When to Schedule a Postaward Orientation

The CO decides whether postaward orientation is necessary. The CO must consider the following factors:

[. . .]

(c) requirements for ~~spare parts and related equipment~~judiciary-provided property, if applicable;

(d) urgency of the contract delivery schedule and relationship of the products or services to critical judiciary programs;

~~(e) length of the planned production cycle;~~

[. . .]

(ih) any financing arrangements contemplated.

§ 730.10.30 Timing of Postaward Orientation

When the CO decides a postaward orientation is ~~conducted~~appropriate, it must be held promptly after award. The CO must prepare an agenda before the orientation, provide copies to all appropriate parties, and summarize by memorandum the actual topics covered in the orientation session. The CO and the contractor, and, whenever possible, all other principal parties ~~must attend any post-award conference (~~for example, COFRs, project officers, program managers, and other appropriate subject matter experts), must attend any postaward orientation.

§ 730.10.40 Contract Changes

A postaward orientation may not be used to change the contract. However, if any changes are identified in a postaward orientation, and are determined by the CO to be necessary, they must be ~~made~~confirmed by the CO ~~in~~by issuance of a contract modification.

REDLINE COMPARISON REFLECTING CHANGES

§ 730.30 Performance Monitoring

[. . .]

§ 730.30.20 Judiciary Policy on Performance Monitoring

Judiciary policy requires that the CO ensure that:

[. . .]

- (b) procedures for assuring that the contract requirements are ~~met~~fulfilled are ~~performed~~followed before acceptance of products or services under the contract; and
- (c) no contract clause or term precludes the judiciary from performing inspection.

§ 730.30.50 Review of Contractor Deliverables

- (a) Review of contractor ~~deliveries~~deliverables is an important method of enforcing contract requirements ~~and e.~~ Contract terms which require submission and written approval and thus of interim deliverables before proceeding with subsequent performance, for example, a requirement for approval of a design prior to proceeding with installation of equipment for a courtroom technology project, must be strictly enforced.
- (b) The CO will ensure that contractor ~~deliveries~~deliverables are disapproved only for failure to meet a material requirement of the contract.
- (c) If a contractor ~~delivery~~deliverable fails to meet judiciary expectations because the contract specifications are inadequate, the CO must determine the appropriate correction to the specifications with the assistance of technical personnel and modify the contract to reflect those revised specifications.

§ 735 Quality Assurance

[. . .]

§ 735.20 Types of Remedies

[. . .]

§ 735.20.10 Remedies Other than Termination

The judiciary has several methods at its disposal to remedy a given situation without resorting to terminating the contract. Remedies include:

[. . .]

- (b) invoking written warranties, if provided for in the contract;

[. . .]

- (e) imposing liquidated damages if provided for in the contract (see: Guide, Vol 14, § 220.30 (Liquidated Damages) and § 735.25 (Assessing Liquidated Damages)); and

[. . .]

REDLINE COMPARISON REFLECTING CHANGES

§ 735.25 Assessing Liquidated Damages

§ 735.25.10 In General

When the contract includes a liquidated damages clause, such as Clause 2-75, Liquidated Damages, assessment of liquidated damages must be reasonable and considered in light of contract requirements and done on a case-by-case basis. Any ~~rate~~ amount established without reference to probable actual damages may be interpreted as punitive and thus unenforceable. Before making any assessment of liquidated damages, the CO must obtain PE approval of the action.

§ 735.25.25 Discussion with the Contractor

After the CO has determined the judiciary is entitled to assess liquidated damages, the CO must discuss the situation with the contractor. Before the actual assessment of liquidated damages, the CO will advise the contractor of the:

[. . .]

- (c) amount of the planned liquidated damages assessment, detailing including the reasons for any reduction in at the specified amount for liquidated damages stated in the contract.

§ 735.25.30 Liquidated Damages Notice

A liquidated damages notice must indicate:

- (a) the specific reason for assessing the damages provided in the clause;

[. . .]

§ 735.25.40 Determination of “Substantial Completion”

~~Liquidated~~Assessment of liquidated damages ~~are~~is generally not appropriate after the work can be considered substantially complete. ~~Substantial completion occurs on the day the product or service is delivered to the place required by the contract, ready for use in the manner intended by the judiciary.~~

§ 735.25.45 CO Actions

Based on the evidence, the CO ~~needs to decide to either~~, with approval from the PE, may:

[. . .]

§ 735.25.50 [Reserved]~~Avoiding Unreasonable Assessment~~

~~If appropriate to reflect the probable damages, the assessment of liquidated damages may be in two or more increments as the delay continues. To prevent an unreasonable assessment of liquidated damages, the CO may also include:~~

- ~~• an overall maximum dollar amount;~~
- ~~• a specified period of time during which liquidated damages may be assessed; or~~
- ~~• both.~~

REDLINE COMPARISON REFLECTING CHANGES

§ 735.30 Nonconforming Products or Services

§ 735.30.10 In General

[. . .]

See: § 735.55 (Fraud, Gross Mistake, or Latent Defects)

§ 735.30.20 Opportunity to Correct or Replace

Contractors may be given an opportunity to correct or replace nonconforming products or to re-perform nonconforming services. Unless the CO specifies otherwise, correction, replacement or re-performance must be at no additional cost to the judiciary. In addition, the CO must reserve the right of the judiciary to charge the contractor the cost of reinspection and retesting needed because of a prior rejection.

(a) For Products

(1) The judiciary's rights when delivered products are defective are set forth in Clause 2-5A, Inspection of Products. Similar language appears in paragraph (d) of Clause 3-3, Provisions, Clauses, Terms and Conditions - Small Purchases.

REDLINE COMPARISON REFLECTING CHANGES

§ 735.30.20 [cont'd]

(2) Notice of rejection of~~The CO may reject~~ defective products ~~which do not conform to the contract requirements and require~~must be provided by the CO in writing, at which time the CO must inform the contractor whether the judiciary requires replacement or correction of the defects; will acquire replacement products from another source and charge the contractor for any excess costs incurred by the judiciary; or will accept the products at a reduced price. ~~The choice of remedy — replacement, correction, or reimbursement for re-procurement — will be determined by the CO.~~

(3) [. . .]

(4) If the contractor fails to proceed with reasonable promptness to perform replacement or correction, the CO may, by contract, or otherwise, remove, replace, or correct the products and charge the cost to the contractor, or terminate the contract for default. ~~For termination procedures, see: Clause 2-5A, Inspection of Products and § 755.~~

(b) For Services

~~¶~~(1) The judiciary's rights when services do not meet contract requirements are set forth in Clause 2-5B, Inspection of Services. Similar language appears in paragraph (d) of Clause 3-3, Provisions, Clauses, Terms and Conditions - Small Purchases.

(2) Notice of rejection of defective services must be provided by the CO in writing, at which time the CO may require the contractor to perform the services again in conformity with the requirements; at no increase in contract amount.

(3) When the ~~defects in~~ services are of such a nature that they cannot be corrected by re-performance, the CO may require the contractor to take necessary action to ensure that future performance conforms to contract requirements; and reduce the contract price to reflect the reduced value of the services performed.

(4) If the services are of a nature which can be corrected by re-performance and the contractor fails to promptly perform the services again, the CO may, by contract or otherwise, ~~perform~~obtain performance of the services and charge to the contractor any cost incurred by the judiciary that is directly related to the performance of such service; or terminate the contract for default. ~~For~~

(c) For either products or services, the choice of remedy — replacement or correction of products, re-performance of services, negotiation of a reduced price, or reprocurement from another source — is generally within the discretion of the CO. Where the rejected products or services constitute the majority of the contract's required deliveries, acquiring replacement products or re-performance of services should follow termination of the contract for default which requires approval of the PE. For additional information about termination procedures, **see:** Clause 2-5B, Inspection of Services and § 755 (Contract Termination).

REDLINE COMPARISON REFLECTING CHANGES

§ 735.30.30 Minor Nonconformances

- (a) The CO ~~can~~may accept a nonconforming product or service when the nonconformance is minor. In such instances, when the savings realized by the contractor by not conforming does not exceed the administrative cost to the judiciary for processing a formal modification, the nonconformance may be accepted without consideration. [. . .]

[. . .]

§ 735.30.40 Substantial Nonconformance

The CO may not accept products or services whose nonconformance is substantial and adversely affects satisfaction of a basic contract requirement, unless acceptance is clearly in the judiciary's interest. The CO's determination to accept the products or services must be in writing and must be based on:

[. . .]

- (b) advice of the technical activity that products or services are safe and will perform or meet the intended purpose;
- (c) the contractor's request for acceptance of the nonconforming products or service;
- (d) a recommendation for acceptance by the intended user organization on whose behalf the products or services are being purchased (i.e., the end user), with supporting rationale; and

[. . .]

§ 735.40 Responsibility for Acceptance

- (a) Product or service acceptance ~~must be specified in the contract and~~ is the responsibility of the CO.
- (b) When this responsibility is ~~re delegated~~delegated to a CO~~T~~R or another judiciary employee, acceptance by that person is binding on the judiciary.

[. . .]

- ~~(d) The CO is also responsible for ensuring that the COTR is performing inspection of the goods or services received.~~

§ 735.45 Place of Acceptance

[. . .]

- (c) Products accepted at a place other than destination may not be reinspected at destination for acceptance purposes. However, but they must be examined for at destination to confirm quantity; and that there has been no damage in transit; and possible. Destination examination also includes ensuring there has been no substitution or fraud following acceptance which would invalidate such acceptance.

REDLINE COMPARISON REFLECTING CHANGES

§ 735.55 Fraud, Gross Mistake, or Latent Defects

§ 735.55.10 In General

The judiciary's acceptance of contractor products and services is final unless:

[. . .]

- (b) ~~there is evidence of fraud; or~~ it is proven in litigation in a court of law there was fraud involved;
or
- (c) ~~there is evidence of~~ it is proven in litigation in a court of law there was a gross mistake amounting to fraud.

Note: Any situation involving suspected fraud or gross mistake amounting to fraud must be referred to the PE for review and appropriate action.

§ 735.55.30 ~~Determining~~Proving Fraud or Gross Mistake Amounting to Fraud

[. . .]

§ 735.55.40 Evidence of Fraud

~~A finding of facts for~~To prove fraud, the judiciary must show evidence of:

[. . .]

§ 735.55.50 Remedies ~~for~~if Fraud is Proven

~~The~~If fraud or gross mistake amounting to fraud is proven in a court of law, the contractor can be forced to repair or replace the product or reperform the service at its own cost any time after acceptance ~~when fraud is proven. The judiciary can avail itself of all other remedies, including termination for default.~~

§ 735.60 Bankruptcy

[. . .]

§ 735.60.20 Procedures

Upon notification that a contractor is in bankruptcy proceedings, the CO must:

- (a) furnish the notice of bankruptcy to the PE with a copy to the Procurement Liaison Officer (PLO) ~~(in courts, FPDOs and FJC);~~

[. . .]

REDLINE COMPARISON REFLECTING CHANGES

§ 740 Payments

§ 740.10 In General

§ 740.10.10 Payment Categories

Payments fall into two general categories:

[. . .]

- (b) Partial Payment

A partial payment is a method of payment based on acceptance of a particular individually priced portion of the contract deliverables.

§ 740.10.20 Partial Payments

- (a) A partial payment is any payment for accepted products or services that are only a part of the total requirement (e.g., payment for delivery of less than the full quantity of computers ordered, or for completion of one month of a fixed price service out of a one year contract). Contractors may be paid for partial delivery of products or performance of services unless the contract specifically prohibits partial payments. Partial payment is a method of payment, not a method of contract financing. Partial payments can assist contractors to participate in judiciary contracts with minimal or no contract financing. ~~Partial payments are a method of payment, not a method of contract financing.~~ For contract financing, see: Guide, Vol 14, § 220.55 (Contract Financing).
- (b) When delivery or performance is authorized in installments or when a number of items of work are called for by the contract, partial payment of a portion of the price may be made ~~beforefor~~ the ~~entire work is completely~~items delivered or ~~performed~~performed and accepted.
- (c) ~~The schedule of payments must be negotiated and incorporated into the contract~~In firm-fixed-price contracts, the pricing section of the contract establishes unit prices for each ordered product or service, and payment may be made for any product or services listed in the pricing section which has been delivered and accepted. However, contracts should generally not authorize payment more often than monthly.
- (d) A payment should reflect the complete value of the ~~deliverable (e.g., product, report) or a time frame of a delivered service (i.e. monthly)~~product or service accepted, so that if the contract is terminated the CO will know the value of the payments for finished work, as well as the value of the terminated work.
- (e) ~~Partial payments are not based on amounts which have been expended by the contractor~~Contracts should not authorize contractors to invoice partial performance based on the contractor's expenditures, since this may or may not reflect the value of the partial delivery. For example, the contractor may have underestimated the labor required for performance and incur expenditures of 50% of the contract price when only 25% of the contract work has been performed.

REDLINE COMPARISON REFLECTING CHANGES

§ 740.10.30 Advance or Pre-payments

The judiciary has limited authority to make advance or pre-payments. In addition to commercial advance payment ~~(see: Guide, Vol 14, § 220.55)~~, the judiciary may make payment in advance for the purchase of publications and, when making payment to other federal agencies, and when paying state and local governments, where these entities are furnishing products or services which are reasonably available only from the state/local government organization. See: Guide, Vol 14, § 550 (Interagency Agreements (IAs) and Memoranda of Understanding (MOUs) for Obtaining Products and Services) and Guide, Vol 14, § 220.55 (Contract Financing).

§ 740.30 Payment

§ 740.30.10 Means of Payment

Payment may be made by check or electronic funds transfer (EFT) (if available). Use of an on-line money transfer service, such as PayPal, for making contract payments is not authorized. An exception may be made where there is only one source of a needed product or service which will not accept payment by any method except PayPal. In such cases, the file should be thoroughly documented to show the efforts made to reach agreement with the contractor to pay by other methods before resorting to PayPal.

§ 740.40.40 Contractor Response

If the contractor disagrees with the deduction from current payments, the contractor may:

- (a) request in writing that the CO ~~consider whether the unreimbursed costs must be paid and discuss the matter with the contractor; and/or reconsider the deduction; and/or~~
[. . .]

§ 740.50 Assignment of Claims

§ 740.50.10 In General

A contractor may assign monies coming due under a judiciary contract to a ~~single~~ bank, trust company or other financial institution ~~or other party approved by the PE;~~ with the written approval of the CO. Any other attempted assignment may be treated as a breach of contract.

§ 740.50.60 Filing

- (a) The assignee must file the notice of assignment and copy of the instrument of assignment with:
 - (1) the CO; and
 - (2) the surety on any bond applicable to the contract; ~~and;~~
 - ~~(3) the disbursing officer designated in the contract to make payment.~~

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§ 740.50.60 [cont'd]

- (b) The assignee must forward to each party specified above an original and three copies of the notice of assignment together with one true copy of the instrument of assignment. The true copy must be a certified duplicate or photostat copy of the original assignment. The CO must provide a copy of the notice of assignment to the payment office.

§ 740.50.70 Format for Notice of ~~Assessment~~Assignment [. . .]

§ 745 Contract Modifications

§ 745.10 Policy

[. . .]

§ 745.10.20 Pricing of Contract Modifications

[. . .]

- (b) If a significant price increase could result from a contract modification and time does not permit negotiation of a definitive price, at least a maximum cost ceiling must be established in the modification.
- (c) For additional guidance on analyzing contractor requests for price adjustments, see: § 745.45 (Equitable Adjustments).

§ 745.10.60 Contractor-Requested Modifications

[. . .]

Note: Any contractor request for a price increase must have some legal basis for the requested increase, especially when the contract is firm-fixed-price. A mere notification from the contractor after award that a mistake was made in the price is generally not sufficient legal basis for agreeing to a requested increase.

§ 745.10.70 Submission of Modification Requests

Contractor requests for modification must provide all necessary documentation as required by the CO. The CO will review the request and its related documentation, and either process a modification; or make a determination that the change is not warranted.

§ 745.15 Types of Modifications

§ 745.15.10 Bilateral Modification ~~Within the Scope of the Contract~~

[. . .]

§ 745.15.20 Unilateral Modification ~~Within the Scope of the Contract~~

- (a) A unilateral modification is a modification that is signed only by the CO as permitted within the operation of an existing contract clause. Unilateral modifications are of three basic types:
[. . .]
(2) Change Orders

REDLINE COMPARISON REFLECTING CHANGES

§ 745.15.20 [cont'd]

This term “change order” refers to the actual issuance of a change authorized by Clause 7-185, Changes. ~~A change order is, usually as a written order, signed by the CO, directing unilateral modification. It directs~~ the contractor to make a change, without the contractor's prior consent, within the general scope of the contract; ~~including~~. See: § 745.20.20 (Determination of “Within Scope”). Clause 7-185, Changes, authorizes the CO to change the following things in this manner:

- (A) ~~— changes to the~~ drawings, designs, or specifications, when the products to be furnished are to be specially manufactured for the judiciary according to the drawings, designs, or specifications;

[. . .]

Note: A change order is the least preferred method of changing a contract. A supplemental agreement is the preferred method. See: § 745.15.10 (Bilateral Modification Within the Scope of the Contract). The Changes clause is cited as the authority for the modification in Block 13.A of the SF 30 (Amendment of Solicitation/Modification of Contract). Change orders ~~must~~may be used only when there is not enough time to negotiate with the contractor and/or the change must be put into effect immediately. ~~Under the terms of the e Clause 7-185, Change order, s requires that~~ the contractor ~~is required to submit~~assert its ~~proposal for~~right to an equitable adjustment within 30 days after receipt of a change order. See also: § 745.40 (Changes) and § 745.45 (Equitable Adjustments).

(3) Changes Authorized by Other Contract Clauses

Although these are not termed change orders, unilateral modifications may be issued under other contract clauses. Examples are the issuance of a stop work order or termination notice, obligation of additional funding for a contract which is being funded incrementally, or exercise of an option. Clause 7-185, Changes, only authorizes ~~changes~~change orders within the scope of the contract and within the conditions specified in the clause. For additional information on contract modifications in general, Ssee also: § 745.20.10 (In General) and § 745.40 (Changes).

[. . .]

§ 745.20 Notification of Contract Changes

[. . .]

§ 745.20.20 Determination of “Within Scope”

- (a) Before issuing any contract modification, the CO must determine whether the contract change, initiated by either the judiciary or the contractor, is “within the scope” of the contract. ~~Factors indicating~~A “within scope” changes are: change does not materially change the contract. The types of factors examined when determining whether a modification is “within scope” include:
- (1) ~~the function of the product or service has not changed;~~whether there is a change to the type of work required;
 - (2) ~~the basic contract purpose has not changed;~~whether there is a major cost impact to make the change;

REDLINE COMPARISON REFLECTING CHANGES

§ 745.20 [cont'd]

- (3) ~~the dollar magnitude of the change is proportionate to the price of the contract;~~whether the change impacts the period of performance, and the length of the extension period relative to the original period of performance; and
- (4) ~~competitive factors of whether the solicitation are the same; and~~for the original contract adequately advised offerors of the potential for the type of changes found in the modification, and thus whether the modification would have materially changed the field of competition
- ~~(5) specification or statement of work changes are not extensive.~~

(b) Another way of analyzing whether a change is within scope is to ask the following questions. If all these questions can be answered in the affirmative, the change can be considered within scope.

- (1) ~~Does~~Is the changed work ~~represent~~within what both parties would have reasonably contemplated at the time of award? For example, at the time of award, parties would likely contemplate a change to a component in a courtroom technology upgrade involving many components; however, parties would not reasonably contemplate adding an upgrade to another courtroom not identified in the solicitation.

[. . .]

- (4) Would this type of change normally be expected for this kind of requirement ~~(e.g.?~~For example, sophisticated; more changes would be expected for complex requirements)? , such as development of a software system such as the Jury Management System than would be expected for a requirement for copier maintenance.

§ 745.30 Exercise of Options

§ 745.30.10 In General

- (a) Options provide the judiciary with firm prices for additional quantities or periods of performance, ~~but only for a specific period of time. That time period for the exercise of the option may extend beyond the basic contract period and must be.~~ Depending on the terms of the solicitation leading to the contract, certain options may only be exercised at the time of contract award. For example, additional items of furniture identified in the basic contract, a solicitation as optional, to be awarded depending on available funds at the time of award. For additional information on options exercised at the time of award, see: Guide, Vol 14, § 220.40 (Options).

Examples of options which may be exercised after award include:

- (1) options for additional periods of performance for service contracts;
- (2) options to extend the ordering period for indefinite contracts (see: Guide, Vol 14, § 410.30 (Indefinite-Delivery Contracts)); and

REDLINE COMPARISON REFLECTING CHANGES

§ 745.30.10 [cont'd]

(3) options for additional work, such as adding another courtroom to a courtroom technology contract.

(b) The judiciary is under no legal obligation to exercise an option and the contractor has no recourse against the judiciary when an option is not exercised. Options may be exercised by issuance of a unilateral modification, i.e., without the contractor's signature, but only if the option is exercised exactly in accordance with the terms of the contract.

§ 745.30.20 Notice Requirement

(a) The option clause ~~will normally require to extend service contracts or indefinite delivery ordering contracts requires~~ that the CO provide advance notification of ~~any~~ the judiciary's intent to exercise an option ~~at a specified period before the option would take effect.~~

~~(b) The CO will normally be required to provide notice 60 days before the contract expires (or within another stated time frame in the clause), or at~~ no later than a specified time ~~in advance of the required delivery of additional quantities, or the judiciary will lose its unilateral, usually 60 days prior to expiration of the current period of performance.~~

(b) In the event that the CO fails to provide the notice of intent by the specified time, the judiciary forfeits its right to exercise the option without the contractor's agreement or signature on the modification. The notice requirement is for the benefit of the contractor, and may be waived by the contractor either expressly or by its conduct in performing in response to a unilateral option exercise. However, it is recommended that the CO obtain the contractor's signature on the modification if the notice was late.

(c) ~~This~~ notification of intent does not bind the judiciary to exercise the option.

(d) ~~E~~ In addition to the required time for providing the advance notice of intent to exercise an option, every option clause will must state a date before which the CO may exercise an option: "no later than" time by which the judiciary must exercise the option.

~~(e) The modification is generally signed 30 days before the expiration of the contract.~~

§ 745.30.30 Exercising Options

Options must be exercised exactly as they are stated in the contract. The CO may not change quantities, for instance, unless the option itself authorizes the specific change. ~~Options are generally exercised unilaterally by the CO~~ Changes to a Statement of Work also cannot be combined with the unilateral exercise of an option. Unilateral exercise of an option is considered to be a best practice, where the CO has provided the advance notice in a timely manner and issues the modification exercising the option within the required time frame.

REDLINE COMPARISON REFLECTING CHANGES

§ 745.30.40 Written Determinations

Before exercising an option, the CO must sign and place a written determination in the official contract file. This written determination must show that:

[. . .]

- (b) exercise of the option is the most advantageous alternative, price and other factors considered (~~"other factors" include~~se.g., any need for continuity of operations and potential costs to the judiciary of disrupting operations);

[. . .]

§ 745.30.50 Reviewing Option Prices

A determination that the option price is ~~the most advantageous~~fair and reasonable must be based on one of the following:

- (a) an informal investigation of prices, or other examination of the market, indicates ~~clearly that a better price than that offered by the option cannot be obtained~~that the option pricing is more advantageous than market prices;

[. . .]

- ~~(c)~~ . The CO may take into consideration ~~of~~ such factors as market stability and a comparison of the time since award with the usual duration of contracts for such products and services; or

- ~~(d)~~ a new solicitation faileds to produce a better price than that offered by the option.

§ 745.35 Correction of Mistakes

§ 745.35.10 In General

A contract may be modified to correct or mitigate the effect of a mistake such as the following:

- (a) a mistake, ambiguity, or unclear expression in a written contract of the ~~agreement~~contract terms as both parties understood ~~it~~them;

[. . .]

§ 745.35.20 Procedure

A claim of mistake asserted by the contractor after award is a claim subject to the procedures of [Clause 7-235, Disputes](#). A decision by the CO to deny, in whole or in part, a claim of mistake asserted after award is a final decision under the clause.

§ 745.40 Changes

[. . .]

§ 745.40.20 Constructive Change

A constructive change is an implied change. It occurs when judiciary officials, ~~without~~who are not appointed as a CO ~~authority~~, change the contract via verbal or written action. Constructive changes are considered unauthorized commitments. If the unauthorized commitment is ratified, the CO may issue a modification to the contract confirming the change and making an appropriate equitable adjustment.

REDLINE COMPARISON REFLECTING CHANGES

§ 745.40.40 Clauses [table]

| Clause | Include in ... |
|---|--|
| (a) <u>Clause 7-185, Changes</u> | all <u>firm-fixed-price</u> solicitations and contracts |
| (b) <u>Clause 7-185, Changes Alternate I</u> | <u>all cost-reimbursement solicitations and contracts</u> |
| (c) <u>Clause 7-185, Changes Alternate II</u> | <u>all time-and-materials or labor-hour solicitations and contracts</u> |
| (d) <u>Clause 7-185, Changes Alternate III</u> | <u>all fixed-price architect-engineer contracts</u> |
| (be) <u>Clause 7-190, Change Order Accounting</u> | solicitations and contracts for products of significant technical complexity if numerous changes are anticipated |

§ 745.45 Equitable Adjustments

§ 745.45.10 In General

[. . .]

§ 745.45.25 Settlement of Change Orders

To avoid controversies that may ~~result from~~ arise after a supplemental agreement making an equitable adjustment, the CO must ensure:

[. . .]

- (b) a release of claims is included in the supplemental agreement, similar to the following, stating sufficient information to identify the specific proposals and any exceptions to the settlement. If it is not possible to resolve all issues, the CO should add the statement “This release is final except for _____.” and list the specific issues which could not be resolved and are excepted from the release.

Contractor's Statement of Release

In consideration of the modification(s) agreed to herein as complete equitable adjustments for the Contractor's “proposal(s) for adjustment” dated _____, subject _____, the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the “proposal(s) for adjustment”.

REDLINE COMPARISON REFLECTING CHANGES

§ 745.55 Novation and Change of Name Agreements

§ 745.55.10 Policy

[. . .]

(b) If the judiciary agrees to recognize a successor in interest, the procedures of this chapter must be followed to ensure that payments are made to the proper party. Failure to follow the procedures at § 745.55.20 (Recognizing Novation/Change of Name Executed by Another Agency) or § 745.55.30 (Procedures When Judiciary Is Responsible Contracting Officer), may result in making payment to the wrong party, for which the Certifying Officer may be personally liable. See Guide, Vol 13 § 1310.40(b) (Improper Payment).

(bc) Examples of situations in which novation may be permitted include, but are not limited to:
[. . .]

NOTENote: The decision of a sole proprietor to obtain a Employer Identification Number (EIN) from the IRS for business purposes instead of using a Social Security Number (SSN) is not considered to require a novation agreement, although it may require a change to the financial system's vendor table record, provided that the business entity remains a sole proprietorship.

[. . .]

§ 745.55.40 Novation Agreements

[. . .]

(b) Except as provided in § 745.55.40(c) (Novation Agreements), the contractor must submit to the CO one copy of each of the following applicable documents as the documents become available:

[. . .]

(3) a certified copy of the minutes of each corporate party's stockholder meeting necessary to approve the transfer of assets, or, if no minutes were kept, other certified documentation demonstrating the respective stockholder approval of such transfer;

[. . .]

§ 750 Claims and Disputes

[. . .]

§ 750.20 Decisions and Appeal

§ 750.20.10 CO Authority and Responsibility

(a) Judiciary COs are authorized to decide or settle ~~all~~ disputes under the Disputes clause, within the limits of their COCP appointment. This authority does not extend to -

(1) A claim or dispute for penalties or forfeitures prescribed by statute or regulation that another Federal agency is specifically authorized to administer, settle, or determine; or

(2) The settlement, compromise, payment, or adjustment of any claim involving potential fraud. See: § 735.55 (Fraud, Gross Mistake, or Latent Defects).

[. . .]

(c) If the CO ~~can not~~ is unable to render a determination within 60 days, the CO will notify the ~~vendor~~ contractor of the date on which a determination will be made.

REDLINE COMPARISON REFLECTING CHANGES

§ 750.20.10 *[cont'd]*

- (d) The claim may be denied when the CO determines that the contractor is unable to support any part of the claim ~~and/or~~ there is evidence that the inability is attributable to either misrepresentation of fact or potential fraud on the contractor's part. CO decisions to deny a claim, in whole or in part, must be coordinated with the PE, who will consult with OGC as to the legal basis of the claim and its denial.

[. . .]

§ 750.20.20 Issuance of CO Determination

When a claim by or against a contractor cannot be resolved by agreement and a determination to deny or assert the claim, in whole or in part, under Clause 7-235, Disputes is necessary, the CO must:

[. . .]

§ 750.20.60 Appeal

Contractors may appeal the CO's final determination to a court of competent jurisdiction. The contractor must comply with the final determination of the CO unless such determination is overturned by a court of competent jurisdiction. If the contractor fails to continue contract performance while the claim is being settled or fails to comply with the final determination of the CO, the CO may terminate the contract for default ~~or~~and/or impose other available remedies.

§ 750.20.70 Clause

Include Clause 7-235, Disputes in all open market solicitations and contracts over the judiciary small purchase threshold.

§ 755 Contract Termination

§ 755.10 In General

[. . .]

§ 755.10.20 Applicability

This section applies to contracts that contain Clause 3-3, Provisions, Clauses, Terms and Conditions – Small Purchases, or other clauses permitting termination for the convenience of the judiciary or for contractor default. For other clauses and when they should be included in a contract, Ssee: § 755.20.60- (Clauses) and § 755.25.60 (Clause). ~~It~~ This section establishes uniform procedures for the complete or partial termination of such contracts.

§ 755.10.30 [Reserved] ~~Subcontract Termination Settlements~~

~~The provisions of this section must be used by the CO as a guide in evaluating settlement of a subcontract terminated for the convenience of a contractor whenever the settlement could be the basis of a contractor claim for reimbursement by the judiciary:~~

REDLINE COMPARISON REFLECTING CHANGES

§ 755.20 Termination for Convenience

[. . .]

§ 755.20.40 Subcontractor Settlements

The reasonableness of the contractor's settlement with a subcontractor must be measured by the aggregate amount that would be due under an equivalent judiciary termination clause. The CO may allow reimbursement to the prime in excess of that amount only in unusual cases, and then only when satisfied that the subcontract terms were negotiated in good faith and did not unreasonably increase the subcontractor's rights. The provisions of this section must be used as a guide in evaluating settlement of a subcontract terminated for the convenience of a contractor whenever the settlement could be the basis of a prime contractor claim for reimbursement by the judiciary.

§ 755.20.45 Delay in Settlement of Subcontractor Claims

When a contractor's inability to reach settlement with a subcontractor delays the settlement of the judiciary contract, the CO may settle with the prime contractor for all amounts except the subcontractor settlement offer, and reserve judiciary and contractor rights as to the subcontractor settlement offer.

§ 755.20.50 Assistance in Subcontract Settlements

In unusual cases, the CO may determine that it is in the interest of the judiciary to offer to assist the prime contractor in the settlement of a particular subcontract. The judiciary, the prime contractor, and the subcontractor may then enter into an agreement covering settlement of the subcontract. In such case, the subcontractor must be paid ~~throughby~~ the prime contractor as part of the overall settlement.

§ 755.20.60 Clauses *[table]*

| Clause | Include in ... |
|---|--|
| (a) <u>Clause 7-220, Termination for Convenience of the Judiciary (Fixed-Price)</u> | <u>open market</u> solicitations and contracts when a fixed-price contract is contemplated and the contract amount is expected to be over the judiciary's small purchase threshold, except in contracts for architect-engineer services, which are required to include <u>Clause 5-70, Termination (Fixed-Price Architect-Engineer)</u> . |
| (b) <u>Clause 7-223, Termination for Convenience of the Judiciary (Short Form)</u> | <u>open market</u> solicitations and contracts when the contract is expected to be at or less than the judiciary's small purchase threshold, except when the contracting officer has determined that another termination for convenience clause is appropriate (i.e., <u>Clause 3-3-for-s, Provisions, Clauses, Terms and Conditions – Small pPurchases</u> , <u>Clause 5-70-for architect and engineer contracts, Termination (Fixed-Price Architect-Engineer)</u> , or <u>Clause 7-220, Termination for situationsConvenience of the Judiciary (Fixed-Price)</u> when a CO believes the longer form is more appropriate, or <u>Clause 7-225, Termination (Cost-Reimbursement)</u> for cost reimbursement contracts). |
| (c) <u>Clause 7-225, Termination (Cost-Reimbursement)</u> | <u>open market</u> solicitations and contracts when a cost-reimbursement contract is contemplated. |
| (d) <u>Clause 7-225, Termination (Cost-Reimbursement)</u> Alternate I | <u>open market</u> solicitations and contracts when a time-and-materials or labor-hour contract is contemplated. |

REDLINE COMPARISON REFLECTING CHANGES

§ 755.25 Termination for Default

[. . .]

§ 755.25.20 Waiver and Reinstatement of Termination Rights

- (a) When ~~the CO has the right to terminate a contract~~termination for default is warranted, the total undelivered contract quantity, whether delinquent or not, may be terminated for default.
- (b) Failure of the CO to terminate a contract within a reasonable time when a contractor fails to make timely delivery may result in a waiver of the right of the judiciary to terminate for default. In this event, a new delivery date must be established by ~~bilateral or unilateral contract~~modification of the contract. The new delivery date must be reasonable considering all the circumstances of contract performance. When the new date is established, the right to terminate for default is reinstated. In extreme cases, where the judiciary and the contractor cannot agree upon a new delivery date, or the contractor refuses to commit to a new date, the CO may unilaterally establish a new date.

§ 755.25.60 Clauses ~~s~~ [table]

| Clause | Include in <u>...</u> |
|---|--|
| (a) — <u>Clause 7-230, Termination for Default (Fixed-Price – Products and Services)</u> | <u>open market</u> fixed-price solicitations and contracts expected to exceed the judiciary's small purchase threshold |
| (b) — <u>Clause 7-235, Disputes</u> | <u>all solicitations and contracts</u> |

§ 755.30.10 Issuing Delinquency and Termination Notices [table]

| If ... | the CO should issue ... |
|---|--|
| [. . .] (b) the contract's required delivery date <u>or date for completion of services</u> has been passed without delivery or with delivery that has been rejected [. . .] | a show cause notice (see: <u>§ 755.30.40 (Issuing a Show Cause Notice)</u>) |
| (d) a show cause notice has been issued, and the contractor has failed to respond or to correct the performance issue, or the contractor's response does not show that the failure to perform was excusable | a notice of termination (see: <u>sample at Appx 7D</u>) Note: <u>While a cure Appx 7D (Sample Contract Termination Notices)</u> |

Note: While a cure notice or show cause notice is not mandatory when termination is based upon failure to meet a contract delivery date(s), issuance of a show cause notice is advised to allow the contractor the opportunity to assert any alleged excusable delay. If the CO ~~determines that termination for default is proper, including analyzing, after consultation with the PE to analyze~~ any potential waiver of the right to terminate and any excusable delays asserted by the contractor, determines that termination for default is proper, the CO must issue a termination notice at once.

REDLINE COMPARISON REFLECTING CHANGES

§ 755.30.20 Issuing a Cure Notice

- (a) A written cure notice must be issued when the CO determines that the contractor is failing to make satisfactory progress to a degree that this failure endangers contract performance, or determines that some other failure, under the contract or otherwise (other than failure to make timely delivery) is cause for concern. Coordination of the cure notice with the PE is required. See: § 735.20.20 (Remedies Involving Cure Notice or Show Cause).

[. . .]

§ 755.30.30 Actions Following Issuance of Cure Notice

After a cure notice has been issued, the contract generally cannot be terminated until the ten day “cure” period (or other time period specified in the cure notice) has elapsed ~~unless there is evidence of wrongful conduct, failure to cure the problem, or repudiation of the contract by the contractor.~~

§ 755.30.40 Issuing a Show Cause Notice

- (a) When the CO makes a preliminary determination that termination for default is appropriate, ~~the contractor should be notified in writing of the government's intent to terminate. The CO must issue this~~ sa written show cause notice should be provided to the contractor of the judiciary's intent to terminate. The CO must issue this ~~issuance of a written show cause notice, if practicable,~~ s particularly critical when termination is based upon causes other than failure to make timely delivery. ~~Use~~ issuance of the show cause notice is optional when the proposed termination is based upon failure to make timely delivery. Its use is, however, encouraged before any termination for default as it affords the contractor an opportunity to provide evidence the delinquency was beyond its control or was the fault of the judiciary, or other defenses should the termination result in contract litigation.
- (b) A show cause notice is used:
- (1) after a cure notice time elapses without a satisfactory response from the contractor ~~or~~
 - (2) without a preceding cure notice when there is insufficient time remaining in the contract delivery schedule for the contractor to cure or correct the delinquency ~~;~~ or
 - (3) when the time for delivery or completion of services has passed without performance.

Note: The PE must approve a show cause notice in writing before it is issued. Usually a show cause notice is issued when there is less than ten days remaining in the contract delivery schedule, or when the delivery date has passed. However, it can be used at any time when it is determined there is an “insufficient amount of time left.”

[. . .]

REDLINE COMPARISON REFLECTING CHANGES

§ 755.30.50 Evaluate Contractor's Response

A contractor's response to a delinquency notice can take several forms:

(a) Cure Notice Response

A contractor is not necessarily required to respond to a cure notice since the contractor is told to correct the problem before the contract becomes delinquent. Often, however, the contractor will respond in writing with its detailed plans to cure performance. Such a response does not absolve the contractor of actually curing the delinquency within the period specified in the cure notice. ~~However, unless~~ If the problem is not actually cured, the judiciary, upon expiration of the ~~delivery~~cure period specified in the cure notice, has the option of issuing either a show cause notice or a termination notice. A show cause notice may also be issued if the contractor's response to the cure notice is considered inadequate.

(b) Show Cause Notice Response

If the CO chooses to issue a show cause (either with or without a prior cure notice), the contractor has ten days to respond. =

~~(c)~~ The CO must evaluate the contractor's response and take one of the following actions, based on that evaluation:

- 1) defer termination action (appropriate when the contractor's response shows that timely completion of the work is assured or when the response adequately addresses other issues such as quality of work, which were the basis of the ~~cure notice or~~ show cause notice);
- (2) modify the contract (appropriate when the COs analysis shows there has been excusable delay or waiver, in which case a modification is required to establish a new delivery date and to reinstate the judiciary's termination rights); ~~or,~~
- (3) issue a ~~show cause if the response to a cure notice is inadequate, or issue a~~ notice of termination when the response to a show cause notice is determined to be inadequate. ~~-~~

(c) The PE must review and approve all proposed terminations for default, as well as issuance of cure notices and show cause notices. When a CO proposes to ~~terminate a contract~~initiate termination for default, the CO must prepare for the contract file a memorandum that fully explains the proposed action ~~taken~~. This memorandum must be submitted to the PE for written concurrence ~~at the same time approval of the termination action is requested prior to~~ issuance of a cure notice, show cause notice or notice of termination. Any contractor response, and the court CO's analysis of that response, must also be provided to the PE.

§ 755.45 Actions Following Issuance of Termination

[. . .]

§ 755.45.40 Completed Products

The CO may direct the contractor to transfer title and deliver to the judiciary completed products. The judiciary must pay the contractor the contract price for any products completed ~~and,~~ delivered and accepted.

REDLINE COMPARISON REFLECTING CHANGES

§ 755.50 Remedies and Damages Following Termination for Default

[. . .]

§ 755.50.30 Damages

[. . .]

- (b) When the CO has accepted defective products, and such acceptance has been revoked on the basis of latent defect, fraud, ~~for instance~~ or gross mistake amounting to fraud (see: § 735.55 (Fraud, Gross Mistake, or Latent Defects)), the judiciary may recover as damages for any nonconformity the loss resulting in the ordinary course of events from the contractor's breach as determined in any reasonable manner.

[. . .]

- (d) The CO must obtain concurrence of the PE prior to any demand for damages following a termination for default.

§ 755.50.40 ~~[Reserved]~~Incidental Damages

~~Incidental damages may be chargeable against the contract. Incidental damages include those resulting from the contractor's breach, such as expenses reasonably incurred in inspection, receipt, transportation, and care and custody of products rightfully rejected; any commercially reasonable charges; expenses in connection with repurchase; and any other reasonable expense incident to the delay or other breach.~~

§ 755.50.50 ~~[Reserved]~~Consequential Damages

~~Consequential damages may be chargeable against the contract. Consequential damages include those resulting from the contractor's breach and include:~~

- ~~—— (a) —— any loss resulting from general or particular requirements and needs of which the contractor at the time of contracting had reason to know and which could reasonably be prevented, and~~
- ~~—— (b) —— injury to person or property proximately resulting from any breach of warranty.~~

§ 755.50.60 ~~[Reserved]~~Deduction of Damages from the Price

~~The CO, after notifying the contractor, may deduct all or any part of the damages resulting from any breach of the contract, or from late delivery or delay not subject to liquidated damages, from any part of the contract price still due to the contractor.~~

§ 755.50.70 ~~[Reserved]~~Damages for Non-Delivery or Repudiation

~~The measure of damages for non-delivery or repudiation by the contractor when repurchase is not possible is the difference between the market price at the time when the CO learned of the breach and the contract price, together with any incidental and consequential damages, but less expenses as a consequence of the contractor's breach.~~

§ 755.50.80 ~~[Reserved]~~Market Price

~~Market price is to be determined as of the place of acceptance or, in cases of rejection after arrival or revocation of acceptance, as the place of arrival.~~

REDLINE COMPARISON REFLECTING CHANGES

§ 760 Contract Closeout

§ 760.10 Closeout of Contract Files

§ 760.10.10 In General

Contract closeout refers to the procedure of verifying that all administrative matters have been concluded on a contract that is physically complete. ~~That~~A contract is ~~physically complete when~~ the contractor has delivered the required products or performed the required services and the judiciary has inspected and accepted the products or services. A physically complete contract may not have had the final payment made, in which case final payment would be part of the contract closeout.

§ 760.10.40 Physically Completed Contracts

- (a) Except for rental, use, and storage agreements, a contract is physically complete when one of two events has occurred:
- (1) all required products or services have been delivered or performed~~;~~ as well as inspected and accepted; and all existing options have been exercised or have expired; or
- [. . .]

§ 760.20 Contract Closeout Procedures

§ 760.20.10 Administrative Closeout

The CO is responsible for initiating administrative closeout of the contract after receiving evidence of its physical completion. At the outset of this process, the CO must review the contract funds status and determine whether or not there are payments to be made, claims to be settled, or excess funds to be deobligated. When complete, the administrative closeout procedures must ensure that, as appropriate:

[. . .]

- (j) excess funds are deobligated~~;~~ and;
- (k) either a final release of claims has been obtained from the contractor or a bilateral modification has been completed to effect the final closeout with the contractor's statement of release as follows:

This modification is intended to and does constitute a full and final settlement and disposition of all matters relating to this contract (including all of its modifications) and is a full release, accord~~;~~ and satisfaction of any and all claims, demands~~;~~ or causes of action that the contractor has against the judiciary arising out of or related to this contract.

and

- (l) the contractor's final invoice has been paid (where a release of claims is required, final payment must not be made until the release of claims has been received).

REDLINE COMPARISON REFLECTING CHANGES

§ 760.30 Disposition of Contract Files

§ 760.30.10 In General

Contract files, including requisitions, and purchase/delivery/task orders, including correspondence and ~~related papers~~other documents pertaining to award, administration, receipt, inspection, acceptance, claims, disputes, and payment ~~must~~may be destroyed no earlier than shown in the following ~~instructions~~:

~~— (a) — transactions that use small purchase procedures: three~~guidance:

(a) Transactions That Do Not Exceed the Judiciary Small Purchase Threshold

Three years after final payment, or after the judiciary audit, whichever is later.

~~(b) Transactions that use other than s~~Exceed the Judiciary Small p~~urchase procedures:~~
~~six~~Threshold

Six years and three months after final payment, or after the judiciary audit, whichever is later.

For the definition of the judiciary small purchase threshold, see: Guide, Vol 14, § 325.10 (Applicability).

§ 760.30.20 Solicited and Unsolicited Offers

(a) Successful Offers

Destroy copies upon award of a contract. Destroy original with related contract files.

(b) Unsuccessful Offers

Destroy copies upon award of a contract. If originals are filed separately from the contract file, destroy no earlier than one year after ~~final decision of not awarding~~award of the related contract. If originals are not filed separately from the contract file, destroy with related contract file. Unsuccessful, unsolicited proposals may be destroyed no earlier than one year after the decision not to award a contract. See: Guide, Vol 14, § 340 (Unsolicited Offers).

§ 760.30.30 Canceled Solicitations

(a) Formal solicitations of offers to provide products or services may be canceled before award of a contract. The files include presolicitation documentation on the requirement, any offers ~~that were opened~~receive before the cancellation, documentation on any judiciary action up to the time of cancellation, and evidence of the cancellation.

(a) Canceled solicitation files, including any proposals received if cancellation was after the due date for receipt of proposals, must be destroyed no earlier than ~~ea~~n five years after date of cancellation, ~~and~~

~~— (b) — Unopened offers must be returned to the offeror.~~