

Environmental Protection Agency

§ 35.6585

(i) The item is available only from a single source;

(ii) The public exigency or emergency for the requirement will not permit a delay resulting from competitive solicitation (a declaration of an emergency under State law does not necessarily constitute an emergency under the EPA Superfund program's criteria);

(iii) The award official authorized noncompetitive proposals; or

(iv) After solicitation of a number of sources, competition is determined to be inadequate.

(2) When using noncompetitive procurement, the recipient must conduct a cost analysis in accordance with the requirements described in § 35.6585.

§ 35.6570 Use of the same engineer during subsequent phases of response.

(a) If the public notice clearly stated the possibility that the firm or individual selected could be awarded a contract for follow-on services and initial procurement complied with the procurement requirements, the recipient of a CERCLA remedial response Cooperative Agreement may use the engineer procured to conduct any or all of the follow-on engineering activities without going through the public notice and evaluation procedures.

(b) The recipient may also use the same engineer during subsequent phases of the project in the following cases:

(1) Where the recipient conducted the RI, FS, or design activities without EPA assistance but is using CERCLA funds for follow-on activities, the recipient may use the engineer for subsequent work provided the recipient certifies:

(i) That it complied with the procurement requirements in § 35.6565 when it selected the engineer and the code of conduct requirements described in 40 CFR 31.36(b)(3).

(ii) That any CERCLA-funded contract between the engineer and the recipient meets all of the other provisions as described in the procurement requirements in this subpart.

(2) Where EPA conducted the RI, FS, or design activities but the recipient will assume the responsibility for subsequent phases of response under a Co-

operative Agreement, the recipient may use, with the award official's approval, EPA's engineer contractor without further public notice or evaluation provided the recipient follows the rest of the procurement requirements to award the contract.

§ 35.6575 Restrictions on types of contracts.

(a) *Prohibited contracts.* The recipient's procurement system must not allow cost-plus-percentage-of-cost (e.g., a multiplier which includes profit) or percentage-of-construction-cost types of contracts.

(b) *Removal.* Under a removal Cooperative Agreement, the recipient must award a fixed-price contract (lump sum, unit price, or a combination of the two) when procuring contractor support, regardless of the procurement method selected, unless the recipient obtains the award official's prior written approval.

(c) *Time and material contracts.* The recipient may use time and material contracts only if no other type of contract is suitable, and if the contract includes a ceiling price that the contractor exceeds at its own risk.

§ 35.6580 [Reserved]

§ 35.6585 Cost and price analysis.

(a) *General.* The recipient must conduct and document a cost or price analysis in connection with every procurement action including contract modification.

(1) *Cost analysis.* The recipient must conduct and document a cost analysis for all negotiated contracts over the simplified acquisition threshold and for all change orders regardless of price. A cost analysis is not required when adequate price competition exists and the recipient can establish price reasonableness. The recipient must base its determination of price reasonableness on a catalog or market price of a commercial product sold in substantial quantities to the general public, or on prices set by law or regulation.

(2) *Price analysis.* In all instances other than those described in paragraph (a)(1) of this section, the recipient must perform a price analysis to

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determine the reasonableness of the proposed contract price.

(b) *Profit analysis.* For each contract in which there is no price competition and in all cases in which cost analysis is performed, the recipient must negotiate profit as a separate element of the price. To establish a fair and reasonable profit, consideration will be given to the complexity of the work to be performed, the risk borne by the contractor, the contractor's investment, the amount of subcontracting, the quality of its record of past performance, and industry profit rates in the surrounding geographical area for similar work.

§ 35.6590 Bonding and insurance.

(a) *General.* The recipient must meet the requirements regarding bonding described in 40 CFR 31.36(h). The recipient must clearly and accurately state in the contract documents the bonds and insurance requirements, including the amounts of security coverage that a bidder or offeror must provide.

(b) *Accidents and catastrophic loss.* The recipient must require the contractor to provide insurance against accidents and catastrophic loss to manage any risk inherent in completing the project.

§ 35.6595 Contract provisions.

(a) *General.* Each contract must be a sound and complete agreement, and include the following provisions:

- (1) Nature, scope, and extent of work to be performed;
- (2) Time frame for performance;
- (3) Total cost of the contract; and
- (4) Payment provisions.

(b) *Other contract provisions.* Recipients' contracts must include the following provisions:

(1) *Energy efficiency.* A contract must comply with mandatory standards and policies on energy efficiency contained in the State's energy conservation plan, which is issued under 10 CFR part 420.

(2) *Patents inventions, and copyrights.* All contracts must include notice of EPA requirements and regulations pertaining to reporting and patent rights under any contract involving research, developmental, experimental or demonstration work with respect to any

discovery or invention which arises or is developed while conducting work under a contract. This notice shall also include EPA requirements and regulations pertaining to copyrights and rights to data contained in 40 CFR 31.34.

(3) *Labor standards.* The recipient must comply with 40 CFR 31.36(i)(3) through (6).

(4) *Conflict of interest.* The recipient must include provisions pertaining to conflict of interest as described in § 35.6550(b)(2)(ii).

§ 35.6600 Contractor claims.

(a) *General.* The recipient must conduct an administrative and technical review of each claim before EPA will consider funding these costs.

(b) *Claims settlement.* The recipient may incur costs (including legal, technical and administrative) to assess the merits of or to negotiate the settlement of a claim by or against the recipient under a contract, provided:

(1) The claim arises from work within the scope of the Cooperative Agreement;

(2) A formal Cooperative Agreement amendment is executed specifically covering the costs before they are incurred;

(3) The costs are not incurred to prepare documentation that should be prepared by the contractor to support a claim against the recipient; and

(4) The award official determines that there is a significant Federal interest in the issues involved in the claim.

(c) *Claims defense.* The recipient may incur costs (including legal, technical and administrative) to defend against a contractor claim for increased costs under a contract or to prosecute a claim to enforce a contract provided:

(1) The claim arises from work within the scope of the Cooperative Agreement;

(2) A formal Cooperative Agreement amendment is executed specifically covering the costs before they are incurred;

(3) Settlement of the claim cannot occur without arbitration or litigation;

(4) The claim does not result from the recipient's mismanagement;