5/15/2014 and 3/6/2014
*Pedestrian changes made to the directive appear in blue ink.

FDIC

FEDERAL DEPOSIT INSURANCE CORPORATION

DIRECTIVE SYSTEM

TYPE AND NUMBER	
Circular 3700.16	
CONTACT	TELEPHONE NUMBER
Elizabeth A. Walker	703-562-6295
DATE	
August 22, 2008	
DATE OF CANCELLATION *(Bulletins Only)*	

TO: All FDIC Divisions and Offices

FROM: Arleas Upton Kea
Director, Division of Administration

SUBJECT: FDIC Acquisition Policy Manual (APM)

1. Purpose

To establish new policies and procedures for the acquisition of goods and services by the Division of Administration, Acquisition Services Branch (ASB) in support of FDIC requirements.

2. Revision

FDIC Circular 3700.16, FDIC Acquisition Policy Manual, Revision 3, dated May 31, 2004, is hereby revised and superseded.

3. Scope

The policies and procedures in this APM, and the accompanying Procedures, Guidance, and Information (PGI) apply to all procurement actions awarded in the corporate, receivership, or conservatorship capacity by the Division of Administration, Acquisition Services Branch, and to actions accomplished under the FDIC Purchase Card Program.

4. Applicability

The policy and procedures in this APM, and the supplemental PGI document, apply to:

a. Contracting Officers and other ASB personnel involved with procuring goods and services on behalf of the Corporation;

b. Oversight Managers and Technical Monitors involved with monitoring contractor performance;

c. FDIC Cardholders and Approving Officials, and

d. Other Division and Office personnel that participate in any aspect of the procurement process.

5. Summary of Changes	See Overview of the Acquisition Policy Manual (APM) and the Procedures, Guidance, and Information (PGI) Document for changes.
6. Additional Information	Questions regarding the information contained in this manual or the PGI may be directed to the Assistant Director, Policy and Systems Section, Acquisition Services Branch, Division of Administration at (703) 562-6295.
7. Effective Date	The provisions outlined in this circular are effective immediately.

Overview of the Acquisition Policy Manual (APM) and the Procedures, Guidance, and Information (PGI) Document

The APM is being issued as a corporate directive, with a supplemental procedures, guidance, and information document maintained outside the directives system. The APM will remain the official policy document, with the PGI implementing and supplementing the APM by providing procedures, guidance, and information. Therefore, the APM and PGI located at http://www.fdic.gov/buying/goods/acquisition/index.html must be read concurrently.

The APM and PGI present information in six modules, with contract clauses found in Module 7 of the PGI. These include:

Module 1 - Guiding Principles, authority, Ethics, and Controls
Module 2 - Acquisition Planning and Competition
Module 3 - Contracting Methods and Types
Module 4 - Special Categories of Contracting
Module 5 - General Contracting Requirements
Module 6 - Contract Management and Oversight
Module 7 - Contract Clauses and Solicitation Provisions (PGI only)

Additionally, the PGI has four appendices, including:

Appendix A - Acronyms
Appendix B - Approvals Memorandum and Matrix
Appendix C - FDIC Purchase Card Guide, which may be used as a stand-alone document
Appendix D – Record of PGI Changes

Both documents contain hyperlinks to forms, template, directives, and other information.

In addition to this change in format of the APM and PGI, policies and procedures for several major topic areas have been added or revised, including:

1. A discussion of controls against personal services contracts and inherently governmental functions
2. Introduction of a new contract type, Receivership Basic Ordering Agreements
3. Implementation of formal procedures for the use of task assignments
4. Procedures for emergency and expedited contracting in support of potential financial institution failures
5. Procedures for contracting in emergency situations
6. A discussion of special issues surrounding Receivership contracting
7. Performance Based Acquisitions
8. Protection of Sensitive Information
9. Fitness and integrity certification process for prime and subcontractors
10. Buy American Act and the Trade Agreements Act of 1979
11. Legal review of acquisition documents and contract actions
12. The use of contract clauses and solicitation provisions versus contract standard documents and general provisions
13. Oversight Manager/Technical Monitor nomination and appointment process

Federal Deposit Insurance Corporation

Acquisition Policy Manual

August 2008

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MODULE 1: GUIDING PRINCIPLES, AUTHORITY, ETHICS, AND CONTROLS

APM Chapter 1.1 Guiding Principles

1.101 Scope

This chapter covers the guiding principles of the Federal Deposit Insurance Corporation (FDIC) *Acquisition Policy Manual* (APM) and the associated *Procedures, Guidance and Information* (PGI) document, and how these affect the FDIC acquisition process.

1.102 Definitions

Acquisition Team – Consists of the Contracting Officer; supporting Contract Specialists and other support staff in the Acquisition Services Branch (ASB); the responsible officials of the Program Office, particularly including the Oversight Manager and Technical Monitor; the Legal Division Contracting Law Unit (CLU); and, as appropriate, the supporting officials and staff of the Office of Minority and Women Inclusion and the ASB, Policy and Systems Section staff.

1.103 Key Attributes

There are five key attributes of professional acquisition management that are promoted throughout the APM. These key attributes are:

(1) **Effectiveness**: The timely and cost-effective procurement of goods and services that work well for the customer;

(2) **Flexibility**: The ability to make good decisions based on best practices for particular circumstances, rather than rigid adherence to standard procedures;

(3) **Efficiency**: Simple processes that achieve good results without undue oversight or waste of resources;

(4) **Responsibility**: The role of each member of the FDIC Acquisition Team is to exercise personal initiative and sound business judgment; and

(5) **Public Trust**: Achieved through fairness and open and honest communications with contractors and the public.

1.104 Key Policies

The policies set forth in the APM apply to all members of the FDIC Acquisition Team, including ASB and Program Office personnel, as well as the clients they serve and the contractors who provide the goods and services. These policies allow FDIC to:

(1) Establish reasonable competition as the preferred method of source selection;

(2) Enable innovative and creative tailoring of procurement processes to meet individual requirements, so that the right contractor is selected for each requirement;

(3) Select contractors on the basis of the best value to FDIC;

(4) Strive to provide small disadvantaged businesses and minority and women-owned businesses with attainable and reasonable opportunities to participate as contractors and subcontractors; and

(5) Resolve protests and contract disputes fairly and expeditiously at the lowest level possible.

APM Chapter 1.2 Authority

1.201 Scope

This chapter covers the parameters of FDIC contracting authority, describes the contracting capacities unique to FDIC, details those federal statutes and regulations that apply and do not apply to FDIC contracting, and describes Contracting Officer authority and responsibilities.

1.202 Definitions

Board of Directors – The governing body of FDIC, empowered to elect and appoint officers and agents to act on matters on behalf of, and affecting, the corporation.

Ratification – The act of approving an unauthorized commitment by an official who has the authority to do so.

Unauthorized Commitment – An agreement that is not binding solely because the government representative who made it lacked the authority to enter into that agreement on behalf of the government.

1.203 Procurement Policy

The APM establishes the procurement policy of FDIC. The procedures used to implement the policy and to conduct the business of contracting with the private sector for goods and services are set out in the accompanying FDIC *Procedures, Guidance, and Information* (PGI) document. Additionally, the FDIC ASB, Policy and Systems Section, provides interim policy as required, and other tools as appropriate, to keep the FDIC Acquisition Team fully informed and supported.

1.204 Application of Procurement Policy

The FDIC procurement policy applies to all acquisitions of goods and services by the Corporation, acting in its various capacities, except:

(1) Acquisitions by the Office of Inspector General, which are governed by the Inspector General Act of 1978, as amended;

(2) Acquisition of legal services by the Legal Division, which has independent contracting authority;

(3) Leasing of office and warehouse space by the Corporate Services Branch of the Division of Administration (DOA), which is governed by the *Leasing Policy Manual*; and

(4) Establishment of depository accounts at financial institutions by the Chief Financial Officer, including setting the terms of the accounts, such as the designation of signatories, acquiring ancillary services for the processing of receipts and disbursements, and purchasing and selling investments.

Interagency agreements (IAA) and memoranda of understanding (MOU) are not addressed in this manual. Guidance on IAAs and MOUs is addressed in FDIC Circular 3800.10, *Memoranda of Understanding and Interagency Agreements,* which is available at http://fdic01/division/doa/adminservices/records/directives/3000/index.html.

1.205 Modification of Procurement Policy

Modifications and revisions to the APM are effected by corporate directives issued by the DOA Director. The ASB Deputy Director, DOA, is authorized to approve one-time deviations to policy and to issue interim policy memoranda when policies are permanently revised, pending issuance of a revision of the APM. Suggestions for modification of procurement policy should be directed to the ASB Assistant Director, Policy and Systems Section.

1.206 Contracting Authority

The Federal Deposit Insurance Act (FDI Act) –12 U.S.C. § 1819 et seq., empowers FDIC to enter into contracts for goods or services with private sector firms. The FDI Act authorizes FDIC to establish policies and procedures to administer the powers granted to it, including the power to enter into contracts.

The FDIC Board of Directors has delegated the authority to establish policies and procedures for the contracting program to the DOA Director. The delegations appoint the DOA Director as the FDIC Chief Contracting Officer, with authority to develop contracting policy; solicit proposals; and enter into, modify, and terminate contracts on behalf of FDIC in any of its capacities.

The DOA Director, in turn, delegates this authority to the ASB Deputy Director. This includes the authority to appoint Contracting Officers. The ASB Deputy Director re-delegates authority to issue Purchase Card (P-Card) Appointment Letters to the ASB Assistant Director, Policy and Systems Section, and the FDIC P-Card Program Agency Coordinator. The authority to contract on behalf of FDIC is only granted to individuals who have been appointed as Contracting Officers, or who have been appointed as FDIC P-Card holders. Any FDIC employee who solicits proposals or enters into, modifies, or terminates contracts without the delegated contracting authority to do so, is acting outside the scope of their authority. Within DOA, ASB is responsible for issuing the policies governing the contracting program and the procedures for implementing those policies.

1.207 Operating Capacities

FDIC operates in three distinct capacities: corporate, receivership and conservatorship. The specific capacity in which FDIC is operating when it enters into a contract for goods or services must be stated in the contract and the contract must be executed in that capacity.

1.207(a) Corporate Capacity

In its corporate capacity, FDIC conducts all its main functions, except those associated with the resolution of failed financial institutions. Thus, the majority of contracts are entered into by FDIC in its corporate capacity. Examples of this type of contract are contracts for information technology, office supplies, furniture, delivery services, library services and construction services.

1.207(b) Receivership Capacity

In its receivership capacity, FDIC becomes an organizational entity appointed to wind up the affairs of a failed insured depository institution by managing and liquidating its assets, collecting monies due, and paying its creditors. FDIC as receiver succeeds to all the rights, titles, powers, and privileges of the institution and its stockholders. In this capacity, FDIC contracts for the purpose of fulfilling its receivership responsibilities, i.e., to perform liquidation activities of receivership assets and to complete the business of closed institutions.

1.207(c) Conservatorship Capacity

In its conservatorship capacity, FDIC becomes an organizational entity appointed to preserve the assets of a depository institution for the benefit of the depositors and other creditors. The conservator takes possession of the books, records, liabilities and assets of the institution, and takes whatever action is necessary to preserve the business of the institution as a going concern. In this capacity, FDIC contracts for the sole purpose of fulfilling its conservatorship responsibilities on behalf of an open institution that is operating under FDIC management and control. Contracts are likely to include those for the performance of day-to-day operations or asset management and disposition.

1.208 Application of Federal Statutes to the FDIC Contracting Program

1.208(a) Overview

As part of acquisition planning, the Contracting Officer and Program Office must decide which of the several federal laws that apply to the FDIC procurement

program apply to their particular requirement. For instance, does the acquisition require application of the Service Contract Act, the Trade Agreements Act, or Section 508 of the Rehabilitation Act? Refer to PGI 1.208, *Application of Federal Statutes to the FDIC Contracting Program*, for discussion of the scope of the federal laws and their application to particular procurements; refer to Module 5 for in-depth coverage of the procedures to follow to comply with those federal laws the Contracting Officer encounters most frequently in fulfilling FDIC acquisitions.

1.208(b) Non-Applicable Statutes and Regulations

The federal statutes and regulations that establish government procurement policies and procedures and govern procurement by agencies funded through congressional appropriations do not apply to FDIC. Among these are:

(1) Federal Procurement Policy Act – 41 USC §402;

(2) Competition in Contracting Act of 1984 – 40 USC §472 et seq.;

(3) Federal Acquisition Streamlining Act of 1994 – Public Law 103-355,108 Stat. 3245;

(4) Contract Disputes Act – 41 USC §601;

(5) Tucker Act – 28 USC §1419(a); and

(6) Federal Acquisition Regulation (FAR) – 48 CFR Parts 1 through 53

These federal statutes touching on elements of the procurement process, also do not apply to FDIC:

(1) Brooks Architects and Engineers Act – 40 USC §1101;

(2) Economy Act – 31 USC §1535; and

(3) Veterans Benefit Act of 2003, Section 308 – 15 USC §1657f.

1.208(c) Applicable Statutes and Executive Orders

There are many federal statutes that touch on elements of procurement that apply to FDIC, such as wage and hour laws, certain laws establishing socio-economic programs and laws governing ethics, privacy and information security. Whether a particular federal statute applies to the FDIC contracting program usually depends on whether FDIC falls within the definition of the agencies to which a statute is directed. Occasionally, FDIC voluntarily complies with a statute which does not apply to it because doing so generally conforms to FDIC policy, or promotes important new policy. Consult the CLU for additional guidance on the applications of federal statutes to the FDIC contracting program.

All of the federal statutes and executive orders listed below apply to FDIC when it contracts in its corporate capacity, but many do not apply when FDIC contracts in its receivership or conservatorship capacities. The notation "corporate capacity only" distinguishes those statutes that do not apply to receivership and conservatorship contracts. The contract thresholds and other factors that trigger application of a given statute are described in the PGI.

(1) *Labor Laws:*

- Service Contract Act of 1965 – 41 USC §351 et seq. (corporate capacity only);
- Contract Work Hours and Safety Standards Act – 40 USC §3701 et seq. (corporate capacity only);
- Davis-Bacon Act – 40 USC §3141 et seq. (construction contracts) (corporate capacity only);
- 40 USC §3131 et seq. – formerly known as the Miller Act – (construction contracts) (corporate capacity only); and
- Walsh-Healey Public Contracts Act – 41 USC §§35-45 (corporate capacity only).

(2) *Socio-Economic Programs:*

- Buy American Act – 41 USC §10a et seq. (partial);
- Trade Agreements Act of 1979 – 19 USC §2501 et seq.;
- Rehabilitation Act of 1973 – 29 USC §794d (commonly known as Section 508);
- Javits-Wagner-O'Day Act – 41 USC §46 et seq.;
- Rehabilitation Act of 1973 – 29 USC §793 (partial) (voluntary compliance)(prohibits employment discrimination based on physical or mental disabilities);
- Executive Order 11246 – Equal Opportunity;
- FDIC Minority and Women Outreach Program for Contracting – 12 USC §1833e and 12 CFR Part 361;
- Vietnam Era Veterans Rehabilitation Act of 1972 – 38 USC §4212;
- Executive Order 12564 – Drug Free Work Place (voluntary compliance);
- Federal Prison Industries - 18 USC §4124 (corporate capacity only); and
- Small Business Act – 15 USC §644(e) (commonly known as the contract bundling provision) (corporate capacity only).

(3) *Privacy and Payment Laws:*

- Privacy Act of 1974 – 5 USC §552a;

- Prompt Payment Act – 31 USC §3901-05 (corporate capacity only); and
- Assignment of Claims Act – 31 USC §3727.

(4) *Ethics and Integrity Laws:*

- Anti-Kickback Act of 1986 – 41 USC §§51-58;
- Byrd Amendment – 31 USC §1352(b) (corporate capacity only);
- Copeland (Anti-Kickback) Act – 40 USC §3145 and 18 USC §874 (construction contracts) (corporate capacity only);
- FDI Act – 12 USC 1822 (f); and
- Integrity and fitness standards for contractors – 12 CFR Part 366.

(5) *Environmental Laws:*

- Clean Air Act (CAA) of 1990 – 42 USC 7401 et seq., specifically 42 USC §7414 (air quality and emissions limitations; inspection and monitoring of facilities related to development of implementation plans for the control of emissions or detection of violations of CAA standards) (construction contracts only); and 42 USC §7671g, §7671h and §7671j (obligations related to refrigeration equipment, air conditioning and ozone-depleting substances); and
- Clean Water Act (CWA) – 33 USC §1251 et seq., specifically 33 USC §1318 (water pollution prevention and control; maintenance of records and monitoring equipment at facilities to assist in developing limitations on and treatment of effluence or detection of violations of CWA standards) (construction contracts only).

(6) *Information Security Law:* Federal Information Security Management Act of 2002 – 44 USC §§ 3541-49.

(7) *Tax Law:* FDI Act - 12 USC §1825 - exempts FDIC from all federal, state and local taxes, except taxes on real property.

(8) *Suspension and Exclusion of Contractors:* The standards and process for the suspension and exclusion of contractors are described in 12 CFR Part 367.

(9) *Claims Process:* Disputes arising from certain receivership contracts are handled under the claims process set out in 12 USC §1821(d).

(10) *The Paperwork Reduction Act of 1980:* Pub. L. 96-511 - In compliance with the Paperwork Reduction Act, FDIC has obtained all required Office of Management and Budget information collection approvals. Details are provided at PGI 1.208(c)(8).

(11) *Other Federal Regulations:* The federal regulations (except the FAR) implementing the statutes listed above apply to FDIC procurements, as well

1.209 Contracting Officer Authority

1.209(a) Delegation of Contracting Authority

Contracts may be entered into and signed on behalf of FDIC only by duly appointed Contracting Officers. Contracting Officers operate under the authority of Certificates of Appointment issued by the ASB Deputy Director. The certificate establishes the scope and limits of a Contracting Officer's authority. Contracting authority is delegated to named individuals, rather than to positions, based on the individual's education, experience and training.

1.209(b) General Responsibilities

Contracting Officers have the exclusive authority to enter into, administer, and terminate contracts and to make related decisions. Contracting Officers are responsible for ensuring the performance of all actions necessary for efficient and effective contracting, ensuring compliance with the terms of contracts, and with protecting the interests of FDIC in all of its contractual relationships.

The Contracting Officer may not enter into any contract unless all requirements of this APM and the PGI, law, executive orders, regulations, and all other applicable procedures and approvals have been met. Operating under these guidelines (and, when necessary, seeking and gaining approval for deviations from them), Contracting Officers have latitude to exercise sound business judgment based on the competitive and business needs of FDIC. In meeting these responsibilities, Contracting Officers are expected to consult and confer with the Program Office, CLU and others.

Contracting Officers are also responsible for managing contractor relationships by overseeing the integrity and effectiveness of the contracting process, ensuring that all contractors are treated in a business-like and objective manner, and maintaining effective communications with contractors during contract performance.

Lastly, Contracting Officers must cooperate with the Office of Inspector General as required by FDIC Circular 12000.1, *Cooperation with the Office of Inspector General*, which is available at http://fdic01/division/doa/adminservices/records/directives/12000/index.html.

1.209(c) Procurement Request Authority

Contracting Officers may award contracts or orders against FDIC contractual agreements subject to the limitations of their *Contracting Officer Certificate of Appointment*, and up to the amount provided to them through appropriately approved procurement requests, Accordingly, Contracting Officers must ensure

that an appropriately funded and approved procurement request is received prior to releasing a solicitation.

1.209(d) Contracting Officer Warrant Program

Contracting Officers must be fully qualified by education, experience and training in order to be appointed as Contracting Officers, and to solicit, negotiate, award, and administer contracts on behalf of FDIC. Continuous learning requirements must also be met to maintain that appointment.

The ASB, Policy and Systems Section, is responsible for management of the FDIC Contracting Officer Warrant Program detailed at PGI 1.209(d).

1.210 Oversight Managers and Technical Monitors

The Contracting Officer may delegate certain responsibilities to individuals to act on behalf of the Contracting Office in overseeing general contractor performance and the technical work of the contractor. These individuals are referred to as Oversight Managers and Technical Monitors. The policies and procedures discussed herein regarding Oversight Managers and Technical Monitors also apply to Task Order Oversight Managers. Because Oversight Managers and Technical Monitors are not duly appointed Contracting Officers, they may not authorize contractors to perform work or incur costs which are not specified in the contract. Further information on contract oversight management and the roles of the Oversight Manager and Technical Monitor may be found at APM 6.4, *Contract Administration and Oversight Management*.

1.211 Unauthorized Contractual Commitments

A contract is not binding when the FDIC representative who made it lacked the authority to enter into that contract on behalf of FDIC. This is otherwise known as an unauthorized commitment. Unauthorized commitments may only be ratified when:

(1) The goods or service have been provided to and accepted by FDIC, or FDIC has obtained or will obtain a benefit resulting from performance of the unauthorized commitment;

(2) The Contracting Officer who ratifies the unauthorized commitment has the authority to enter into a contractual commitment;

(3) The resulting contract would otherwise have been proper if made by an appropriate Contracting Officer;

(4) The Contracting Officer reviewing the unauthorized commitment determines the price to be fair and reasonable;

(5) The Contracting Officer recommends payment and CLU concurs with the recommendation; and

(6) Funds are available.

Procedures for ratification of unauthorized commitments are found at PGI 1.211.

1.212 Purchase Card Authority

The ASB Assistant Director, Policy and Systems Section, is responsible for the overall management of the FDIC P-Card Program and for issuing policy and guidance for the program. Day-to-day management of the program is the responsibility of the FDIC P-Card Agency Program Coordinator. Contracting authority, limited to P-Card use, is delegated to cardholders by the ASB Assistant Director, Policy and Systems Section, and the FDIC P-Card Agency Program Coordinator, dependent upon the dollar level. Policy and procedures for use of the card and associated products are found at PGI Appendix C, *FDIC Purchase Card (P-Card) Guide*.

*1.213 Conduct of Business by Electronic Means *

| It is the policy of the FDIC to conduct acquisition business by electronic means as |
| a preferred business practice to the maximum extent possible. Acquisition business |
| is defined as the all-inclusive steps in the acquisition process, including market |
| research, solicitation, proposal submission, proposal review, contract award, |
* contract administration/contract modification and contract closeout. *

Ethics

1.2013 Scope

This chapter covers FDIC policy on ethics matters applicable to contractors, and Contracting Officers and the Program Offices they support.

1.2014 Definitions

Reserved

1.2015 Ethics Policy

Contracting Officers and the Program Offices they support must comply with the policy surrounding the ethics issues discussed in this chapter in the award of contracts for FDIC.

1.2016 Minimum Standards of Contractor Integrity and Fitness

FDIC business is to be conducted in a manner above reproach and, except as authorized by statute or regulation, with complete impartiality and with preferential treatment for none. The general rule is to avoid any conflict of interest or even the appearance of a conflict of interest in FDIC-contractor relationships. While many federal laws and regulations place restrictions on the actions of government personnel, their official conduct must, in addition, be such that they would have no reluctance to make a full public disclosure of their actions.

The ethical standards to which FDIC holds its contractors and subcontractors are delineated in 12 CFR §366, which is available at http://www.access.gpo.gov/nara/cfr/waisidx_08/12cfr366_08.html. While this codification applies specifically to those contractors and subcontractors performing service contracts, FDIC expects all contractors and subcontractors to perform using the highest ethical standards, reflecting the integrity necessary to support and retain public trust and confidence in our acquisition process.

1.2017 Disqualifying Conditions

FDIC does not contract for services with anyone who has committed an act deemed to be a disqualifying condition. The disqualifying conditions are set out in the Federal Deposit Insurance Act at 12 USC §1822(f) (4) and are restated in the regulations at 12 CFR §366.3. They are:

(1) Conviction of a felony;

(2) Removal from or being prohibited from participation in the affairs of an insured depository institution as a result of a federal banking agency final enforcement action;

(3) Demonstration of a pattern or practice of defalcation or embezzlement on financial obligations to insured depository institutions; or

(4) Causing a substantial loss to a federal deposit insurance fund.

1.2018 Conflicts of Interest

The FDIC does not enter into, or continue contracts with individuals or organizations that present an unmitigated conflict of interest. If a conflict of interest exists, it precludes a contractor from performing the contract unless the conflict is waived by FDIC or the contractor eliminates it. Conflicts of interest can be either individual or organizational. They most frequently arise when a personal, business or financial interest of a contractor (or its employee or subcontractor) is such that the contractor's judgment and loyalty in performing services for FDIC might be compromised by concerns for pursuit of its own interest. Other conditions that FDIC has identified as creating conflicts of interest are:

(1) Involvement in litigation adverse to FDIC, as a party or representative of a party;

(2) Offering to buy an asset from FDIC for which services were performed in the three years prior to the offer, unless provided for in the contract for services; or

(3) Engaging in an activity that would cause FDIC to question the integrity of the services a contractor has performed, is performing, or offers to perform.

Conflicts of interest are covered in 12 CFR §366.10, which is available at http://www.access.gpo.gov/nara/cfr/waisidx_08/12cfr366_08.html.

1.2019 Suspension and Exclusion of Contractors

FDIC policy is to award contracts only to those firms that meet the minimum standards set forth in APM 1.301-1.304. FDIC has the authority, under 12 USC Section 1822(f), to suspend and to exclude a contractor or a subcontractor from providing services to FDIC, if, upon notice and hearing, FDIC determines the contractor has violated the integrity and fitness standards or through other acts has shown itself to be unsuitable to perform services or functions for FDIC. The specific acts of ethical misconduct that give rise to suspension actions and to

exclusion actions are laid out in 12 CFR Part 367, specifically Section 367.6 (exclusions) and Section 367.8 (suspensions), which is available at http://www.access.gpo.gov/nara/cfr/waisidx_08/12cfr367_08.html.

1.2020 Other Consequences for Violation of Part 366

Besides the administrative sanctions of suspension and exclusion from contracting with FDIC, a contractor or any other party covered by Part 366 who violates Part 366 is subject to other actions or sanctions, depending on the circumstance of the violation. Other actions include criminal sanctions, civil actions for damages, and rescission or termination of a contract.

1.2021 Roles and Responsibilities - Contractor Integrity and Fitness Review

12 CFR Part 366 requires FDIC service contractors to meet the minimum standards of integrity and fitness. Contracting Officers must include clauses and provisions that convey the requirements of Part 366 in FDIC solicitations and contracts as prescribed by the *Policies, Guidance and Information* (PGI) document, except for contracts entered into by FDIC in which it operates as an insured depository institution as a conservator or as a bridge bank (12 CFR 366.2, which is available at http://www.access.gpo.gov/nara/cfr/waisidx_08/12cfr366_08.html).

For guidance on *Roles and Responsibilities – Contractor Integrity and Fitness*, see PGI 1.309.

1.222 **Roles and Responsibilities – Contractor Suspension and Exclusion**

The FDIC Legal Division, Contracting Law Unit, the Security Management Section, the FDIC Inspector General and the FDIC designated Ethics Counselor have key roles and responsibilities along with the ASB in matters pertaining to suspension and exclusion of contractors. See PGI 1.310 for further guidance and information.

1.223 Standards of Conduct for FDIC Employees

FDIC employees are held to the highest standards of conduct in performing their duties. The standards of conduct are set out in FDIC Circular 2410.6 – *Standards of Ethical Conduct For Employees of the FDIC* – which incorporates the government-wide standards of conduct in 5 CFR Part 2635. It is the employee's responsibility to become familiar with, and to comply with, these standards. Employees who have questions regarding standards of conduct may

consult their Deputy Ethics Counselor or the corporation's Ethics Office, which can be accessed at http://fdic01/division/legal/ethics/index.html.

1.224 Duty of Non-Disclosure

A contractor, and anyone else who performs services on the behalf of FDIC, is obligated to maintain as confidential any information it receives from FDIC. This means the contractor may not use the information or disclose it to a third party, unless:

(1) The contract or FDIC authorizes disclosure;

(2) The information is generally available to the public; or

(3) FDIC makes the information available to the general public.

The contractor's duty of non-disclosure is set out in 12 CFR Section 366.13. Further information on this subject may be found at APM 5.1and PGI 5.1.

APM Chapter 1.3 Controls against Personal Services Contracts and Inherently Governmental Functions

1.301 Scope

The chapter covers FDIC policy on contracts for personal services and performance of inherently governmental functions.

1.302 Definitions

Inherently Governmental Function – A function that is so intimately related to the public interest as to mandate performance by government employees. These functions include those activities that require either the exercise of discretion in applying government authority or the making of value judgments in making decisions for the government. Inherently governmental functions normally fall into two categories: (1) the act of governing, i.e., the discretionary exercise of government authority, and (2) monetary transactions and entitlements.

Inherently governmental functions do not normally include gathering information for or providing advice, opinions, recommendations, or ideas to government officials. They also do not include functions that are primarily ministerial and internal in nature, such as building security; mail operations; operation of cafeterias; housekeeping; facilities operations and maintenance, warehouse operations, motor vehicle fleet management and operations, or routine electrical or mechanical services.

Personal Services Contract – A contract that, either by its terms or the way it is administered, makes contractor personnel appear to be FDIC employees.

1.303 Contracts for Performance of Personal Services and Inherently Governmental Functions Policy

The policies regarding contracts for personal services, and the use of contractors to perform services in support of the performance of inherently governmental functions, are detailed in APM 1.404 and 1.405, respectively.

1.304 Personal Services Contracts

The award of contracts for personal services is prohibited, unless specifically authorized by statute. A contract for personal services can arise when the terms of the contract or its actual performance create a situation where:

(1) FDIC employees are providing day-to-day supervision of contractor personnel; or

(2) Contractor personnel are performing or engaging in a function that is inherent to the mission of FDIC, that is, a function that is inherently governmental.

1.404(a) Pre-Award Responsibilities

The Contracting Officer is required to review all requirement packages for services from the Program Office to ensure that a contract for personal services is not created. Further, both the Contracting Officer and the Oversight Manager are required to periodically review contracts for services to ensure that employer-employee relationships are not established by FDIC with contractor personnel at any point during the life of the contract. The following questions should be considered when assessing whether a proposed contract for services could be characterized as one for personal services:

(1) Are the services to be performed on site at an FDIC office or facility?

(2) Are the principal tools and equipment used to perform the services furnished by FDIC?

(3) Do the services apply directly to the integral effort of FDIC, or one of its organizational subparts, in carrying out its mission or its essential functions?

(4) Are comparable services, meeting comparable needs, performed by civil service personnel at FDIC or at other agencies similar to FDIC?

(5) Is the need for the services in question reasonably expected to last beyond one (1) year?

(6) Does the inherent nature of the services in question, or the manner in which they are provided, reasonably require FDIC to direct or supervise contractor personnel, directly or indirectly, in order to:

- Adequately protect FDIC interests;
- Retain control of the function involved; or
- Keep full personal responsibility for the function - being performed by contractor personnel - in a duly authorized federal officer or employee?

Any one of the factors outlined above does not in itself define a requirement as one for personal services. However, the combination of two or more of these factors in a requirement may raise the specter that the services in question are personal services. The Contracting Officer must carefully analyze the factors and make a determination whether a contract for personal services should be created. The Contracting Officer consults the Contracting Law Unit (CLU) when questions arise regarding whether proposed services are considered personal in nature.

1.404(b) Post Award Responsibilities

To further preclude the creation of a prohibited employer-employee relationship between FDIC and contractor personnel, and to preserve the independent status of contractor personnel, the following precautions must be observed:

(1) FDIC employees must not directly or indirectly supervise contractor personnel;

(2) Contractor personnel work stations must be separated from FDIC employee work stations to the maximum extent practicable;

(3) Contractor personnel are required to wear badges on site at FDIC offices or facilities, display office signs that identify them as contractor personnel, and take other measures, as appropriate, to clearly identify themselves as contractor personnel;

(4) Contractor personnel must not be invited to attend regular FDIC staff meetings; and

(5) Contractor personnel, in general, may not participate in services provided for the benefit of FDIC employees, e.g., counseling and referral services or FDIC-employee recreational activities, e.g., office picnics and holiday parties.

If an FDIC employee knows of facts in a particular services contract that suggest the relationship between one or more FDIC employees and contractor personnel is such that it appears a contract for personal services may be created, that individual should refer the matter to the Contracting Officer. The Contracting Officer then seeks CLU review.

1.305 Inherently Governmental Functions

It is the policy of FDIC to:

(1) Prohibit the use of service contracts for the performance of inherently governmental functions; and

(2) Provide greater scrutiny and an appropriate enhanced degree of management oversight when contracting for functions that are not inherently governmental, but closely support the performance of inherently governmental functions. In using the products of contracts that closely support the performance of inherently governmental functions, the ASB and Program Office must ensure that:

- Any final agency action complies with the laws and policies of the United States and reflects the independent conclusions of FDIC officials and not those of contractors who may have interests that are not in concert with the public interest, and who may be beyond the reach of management controls otherwise applicable to public employees; and
- Reasonable identification of contractors and the contractors' work product is made whenever there is a risk that the public, congress, or other persons outside of FDIC might confuse them with FDIC officials or with an FDIC work product, respectively.

1.405(a) Inherently Governmental Functions

Inherently governmental functions include such things as:

(1) The determination of agency policy, such as determining the content and application of regulations, among other things;

(2) The determination of federal program priorities or budget requests;

(3) The direction and control of federal employees;

(4) The selection or non-selection of individuals for Federal Government employment;

(5) The approval of position descriptions and performance standards for federal employees;

(6) The determination of what government property is to be disposed of and on what terms (although an agency may give contractors authority to dispose of property at prices with specified ranges and subject to other reasonable conditions deemed appropriate by the agency);

(7) In federal procurement activities with respect to prime contracts:

- Determining what supplies or services are to be acquired by the government (although an agency may give contractors authority to acquire supplies at prices within specified ranges and subject to other reasonable conditions deemed appropriate by the agency);
- Participating as a voting member on any source selection boards;
- Approval of any contractual document, to include documents defining requirements, incentive plans and evaluation criteria;
- Awarding contracts;
- Performing contract administration functions that involve ordering changes in contract performance or contract quantities, taking actions based on evaluations of contractor performance, and accepting or rejecting contractor products or services);

- Terminating contracts; and
- Determining whether contract costs are reasonable, allocable and allowable.

(8) The approval of agency responses to Freedom of Information Act requests (other than routine responses that, because of statute, regulation or agency policy, do not require the exercise of judgment in determining whether documents are to be released or withheld), and the approval of agency responses to the administrative appeals of denials of Freedom of Information Act requests;

(9) The conduct of administrative hearings to determine the eligibility of any person for a security clearance, or involving actions that affect matters of personal reputation or eligibility to participate in government programs; and.

(10) The determination of budget policy, guidance, and strategy.

1.405(b) Not Inherently Governmental Functions

A list of services and actions that are considered not to be inherently governmental functions follows. While not considered to be inherently governmental functions, these services and actions may approach being in that category because of the way in which the contractor performs the contract or the manner in which FDIC administers contractor performance. When contracting for such services and actions, FDIC must be fully aware of the terms of the contract, contractor performance and contract administration to ensure that appropriate FDIC control is preserved.

This is an illustrative listing, and is not intended to promote or discourage their use:

(1) Services that involve or relate to budget preparation, including workload modeling, fact finding, efficiency studies, and should-cost analyses, etc.;

(2) Services that involve or relate to reorganization and planning activities;

(3) Services that involve or relate to analyses, feasibility studies, and strategy options to be used by agency personnel in developing policy;

(4) Services that involve or relate to the development of regulations;

(5) Services that involve or relate to the evaluation of another contractor's performance;

(6) Services in support of acquisition planning;

(7) Contractors' providing assistance in contract management (such as where the contractor might influence official evaluations of other contractors);

(8) Contractors' providing technical evaluation of contract proposals;

(9) Contractors' providing assistance in the development of statements of work;

(10) Contractors' providing support in preparing responses to Freedom of Information Act requests;

(11) Contractors' working in any situation that permits or might permit them to gain access to confidential business information and/or any other sensitive information;

(12) Contractors' providing information regarding agency policies or regulations, such as attending conferences on behalf of an agency, conducting community relations campaigns, or conducting agency training courses;

(13) Contractors' participating in any situation where it might be assumed that they are agency employees or representatives;

(14) Contractors' participating as technical advisors to a source selection board or participating as voting or nonvoting members of a source evaluation board;

(15) Contractors' serving as arbitrators or providing alternative methods of dispute resolution;

(16) Contractors' constructing buildings or structures intended to be secure from electronic eavesdropping or other penetration by foreign governments;

(17) Contractors' providing inspection services;

(18) Contractors' providing legal advice and interpretations of regulations and statutes to government officials; and

(19) Contractors' providing special non-law enforcement, security activities that do not directly involve criminal investigations, such as prisoner detention or transport and non-military national security details.

Office of Management and Budget Circular No A-76, while not specifically applicable to FDIC, provides detailed guidance on the identification of inherently governmental activities. The Office of Federal Procurement Policy Letter 92-1, *Inherently Governmental Functions,* provides background information regarding inherently governmental functions which assists Program Offices and Contracting Officers in making decisions regarding whether a function may be performed by contractor personnel.

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MODULE 2: ACQUISITION PLANNING AND COMPETITION

APM Chapter 2.1 Acquisition Planning

2.101 Scope

This chapter covers the policy on acquisition planning.

2.102 Definitions

Reserved

2.103 Acquisition Planning Policy

The policies for acquisition planning are set forth in the following paragraphs.

2.104 Early Acquisition Planning

Program Offices must coordinate with the ASB as soon as a potential procurement need is identified and support the acquisition planning process. Close coordination and early planning between the Program Office, Contracting Officer, and other members of the Acquisition Team are essential for effective and efficient procurement.

2.105 Market Research

FDIC Program Offices and the Contracting Officer must work together to conduct market research to support all acquisition planning. Market research involves obtaining information and knowledge about the different types of goods or services in the commercial marketplace, and their availability and pricing. Market research can also identify the type and extent of competition that may exist for a product or service. This is done to keep abreast of marketplace changes and trends when there is no specific procurement identified, or to identify firms that may offer the goods and/or services required by FDIC for current or future procurements.

Market research also plays an important role in obtaining the approvals for capital investment projects by supporting the development of a cost benefit analysis and determining the extent of competition for the required products or services. If market research identifies only one potential source for requirements estimated above $5,000, non-competitive contracting procedures, as discussed in PGI 2.206 may be used.

2.106 Acquisition Plan Documentation

The Acquisition Plan documents the course of action for the procurement and is developed jointly by the Program Office and the Contracting Officer beginning with early acquisition planning, as described above. Written Acquisition Plans must be prepared for all acquisitions $1,000,000 or more using the format at PGI 2.106. While written plans are not required below that level, reasonable planning is expected for all procurement actions.

2.107 Requirements Package

A significant part of acquisition planning is assembling the requirements package. The requirements package consists of all the documents and information needed to produce a solicitation or contract to fulfill a requirement. The core documents in the requirements package are the approved requisition; the statement of work or statement of objectives; and the independent FDIC cost estimate. The Program Office must provide ASB with the complete requirements package, including other documents identified by ASB as essential to initiate the procurement action. Program Office officials should hold early strategy sessions with ASB Contracting Officers to identify the other types of documentation needed to support a specific procurement action. Particular attention should be given to early coordination if the action involves information security and business continuity requirements. The requirements package checklist must be completed for every requirement over $100,000 and filed in the official contract file. The checklist may be found on the ASB website at http://fdic01/division/DOA/buying/acquisitiondocuments/acqdocs.html.

Further guidance on requirements packages may be found at PGI 2.107.

2.108 Socioeconomic Programs

FDIC policy is to encourage use of minority and women-owned businesses (MWOBs), and small disadvantaged businesses (SDBs) concerns in the acquisition of goods and services, whether as contractors or subcontractors. ASB includes these types of business concerns in FDIC acquisition planning and contracting opportunities whenever practical.

The Office of Minority and Women Inclusion has corporate-wide responsibility for oversight of the FDIC MWOB and SDB Outreach Program. The goal of the program is to increase the number of MWOB, and SDB. firms available to meet FDIC contracting requirements. The Outreach Program identifies qualified MWOB and SDB firms that are interested in providing goods and services used by FDIC.

APM Chapter 2.2 Competition

2.201 Scope

This chapter covers FDIC policy regarding competition in contracting.

2.202 Definitions

Bundling – The consolidation of two or more requirements for goods or services, previously provided or performed under *separate smaller contracts*, into a solicitation for a *single contract* that is likely to be unsuitable for award to a small business concern due to:

(1) The diversity, size, or specialized nature of the elements of the performance specified;

(2) The aggregate dollar value of the anticipated award;

(3) The geographical dispersion of the contract performance sites; or

(4) Any combination of the factors described above.

Separate smaller contract*,* as used in ”bundling,” is a contract that has been performed by one or more small business concerns or that was suitable for award to one or more small business concerns.

Single contract*,* as used in “bundling,” includes:

(1) Multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two or more sources; and

(2) An order placed against an indefinite quantity contract under a Federal Supply Schedule contract; or task-order contract or delivery-order contract awarded by another agency, i.e., government-wide acquisition contract or multi-agency contract.

Substantial Bundling – Any bundling that results in a contract or order that is equal to, or greater than $2,000,000. This definition does not apply to a contract that is awarded and performed entirely outside of the United States.

2.203 Competition Policy

Contracting Officers and Program Offices must use competition in acquisitions to the maximum extent possible. Contracting Officers should look for competitive opportunities when procuring goods and services valued at over $5,000. Competitive procedures are preferred as they bring market forces to bear. Through competition, FDIC is able to compare the value of competing technical proposals and prices in order to determine which proposal affords the best value. Reasonable competition also means soliciting a sufficient number of sources to obtain an adequate market response so that an analysis of the fairness and reasonableness of individual offers can be performed.

2.204 Contract Bundling

Bundling related requirements into one large contract is generally discouraged, unless the benefits to FDIC are clear. In some instances, bundling may provide substantial benefits to FDIC. However, because of the potential impact on small business participation, the Contracting Officer participates with the Program Office in conducting market research to determine whether bundling is necessary and justified. The definition of "bundling" and related terms is in APM 2.202. Additional requirements for acquisitions involving bundling follow.

2.204(a) Acquisition Strategy Requirements

When a proposed acquisition strategy involves substantial bundling, the acquisition strategy must:

(1) Identify the specific benefits anticipated to be derived from bundling;

(2) Include an assessment of the specific impediments to participation by small business concerns that result from bundling;

(3) Specify actions designed to maximize small business participation as contractors, including provisions that encourage small business teaming;

(4) Specify actions designed to maximize small business participation as subcontractors (including suppliers) at any tier under the contract, or order, that may be awarded to meet the requirements;

(5) Include a specific determination that the anticipated benefits of the proposed bundled contract or order justify its use; and

(6) Identify alternative strategies that would reduce or minimize the scope of the bundling, and the rationale for not choosing those alternatives.

2.204(b) Contracting Officer Responsibilities Involving Bundling

When a proposed acquisition strategy involves substantial bundling, the Contracting Officer must:

(1) Justify bundling in the acquisition strategy documentation;

(2) Consider the cost that has been charged or, where data is available, could be charged by small business concerns for the same or similar work in assessing whether cost savings would be achieved through bundling;

(3) Notify the small businesses currently performing separate smaller contracts of FDIC intent to bundle them into a single, larger requirement prior to proceeding with bundling; and

(4) Notify the Small Business Administration area office thirty (30) days prior to issuing any solicitation for bundled requirements.

2.204(c) Program Office Responsibilities Involving Bundling

(1) When the Program Office believes that the benefits of bundling are substantial, it must support the Contracting Officer in developing the acquisition strategy and the Acquisition Plan and must prepare a decision package to be forwarded through the appropriate levels of management to the Chairman of FDIC for approval.

(2) Measurably substantial benefits may include, individually or in any combination or aggregate, cost savings or price reduction, quality improvements that save time or improve or enhance performance or efficiency, reduction in acquisition cycle times, better terms and conditions, and any other benefits. The agency must quantify the identified benefits and explain how their impact would be measurably substantial. Except as provided in paragraph (4) of this section, the agency may determine bundling to be necessary and justified if, as compared to the benefits that it would derive from contracting to meet those requirements if not bundled, it would derive measurably substantial benefits equivalent to:

- Ten (10) percent of the estimated contract order value (including options) if the value is $75,000,000 or less; or
- Five (5) percent of the estimated contract order value (including options) or $75,000,000, whichever is greater, if the value exceeds $75,000,000.
- For multiple award contracts, these same dollar thresholds apply and are based on cumulative contract value.

(3) The Chairman of FDIC may determine that bundling is necessary and justified when:

- The expected benefits do not meet the thresholds in paragraph (2) of this section, but are critical to the agency's mission success; and
- The acquisition strategy provides for maximum practicable participation by small business concerns.

The Chairman's decision regarding bundling does not preclude the FDIC from notifying the SBA of a solicitation for bundled requirements

(4) Reduction of administrative or personnel costs alone is not sufficient justification for bundling unless the cost savings are expected to be at least ten (10) percent of the estimated contract or order (including options) of the bundled requirements.

2.205 Prohibition on Splitting Requirements

Requirements must not be split to circumvent thresholds for application of statute or FDIC policy. Specific exceptions for recurring services using the FDIC purchase card (P-Card) are outlined in the *FDIC Purchase Card (P-Card) Guide* at PGI Appendix C.

2.206 Non-Competitive Acquisitions

All contracting actions estimated to exceed $5,000, which are not competed, must be justified prior to award in accordance with PGI 2.206.

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MODULE 3: CONTRACTING METHODS AND TYPES

APM Chapter 3.1 Simplified Procurement

3.101 Scope

This chapter covers the policy for the procurement of goods and services using simplified procurement procedures.

3.102 Definitions

Commercial Goods – Those goods determined to be in the commercial marketplace, as documented by market research, sold in substantial quantities to the general public in the course of normal business operations, at prices based upon established catalog or market prices.

Commercial Services – Services of a type offered and sold competitively in substantial quantities in the commercial marketplace, based on established catalog or market prices for specific tasks performed, or specific outcomes to be achieved, and under standard commercial terms and conditions.

Request for Quotation *(RFQ)* – A solicitation document used in simplified procurements to communicate requirements to prospective contractors and to solicit quotations from them. An RFQ may be oral or written.

Simplified Procurement – A streamlined method of buying goods and services valued at $100,000 or less, or for commercial goods or services valued at less than $5,000,000.

3.103 Simplified Procurement Policy

Simplified procurements are used in lieu of formal contracts when buying commercial goods or commercial services valued at less than $5,000,000, or when buying other goods and services valued at $100,000 or less. In exceptional circumstances it may be appropriate to use simplified procurement for requirements normally subject to formal contracting procedures when only limited technical evaluations are necessary. (See APM 3.203, *Formal Contracting Policy*).

This simplified procurement policy does not apply when FDIC can meet its requirements using:

(1) Required sources of supply, e.g., Federal Prison Industries and

AbilityOne (formerly Javits-Wagner-O'Day Act);

(2) Federal Supply Schedule contracts;

(3) Existing FDIC contracts; or

(4) Other established contracts.

3.104 Competition in Simplified Procurements

FDIC uses competition to procure goods and services for all simplified procurements valued over $5,000. Non-competitive awards of simplified procurements valued over $5,000 may be made, but must be justified. See APM 2.203 and PGI 2.203, *Competition Policy*. Procurements valued at $5,000 or less may be awarded without competition and do not require justification.

3.105 Identifying Potential Sources

The Contracting Officer must identify potential sources to solicit, depending upon what a particular procurement may require. The Contracting Officer must provide the Office of Minority and Women Inclusion the opportunity to furnish a list of potential sources for all actions greater than $100,000.

3.106 Request for Quotation

To solicit quotations, the Contracting Officer may use either an oral or a written RFQ.

3.106(a) Oral Request for Quotation

At the Contracting Officer's discretion, oral RFQs may be used when:

(1) The acquisition does not exceed the simplified procurement threshold;

(2) The award is based on price only; and

(3) Any required representations and certifications and any necessary information to complete background investigations are provided in writing.

3.106(b) Written Request for Quotation

The Contracting Officer must use written RFQs when oral RFQs are not permitted.

3.107 Communications with Offerors

Communications with offerors must not afford any offeror an unfair competitive advantage. Once a solicitation has been identified for competitive procurement, communications with offerors must be handled through the Contracting Officer.

3.108 Receipt of Quotations

The Contracting Officer is responsible for the receipt and safeguarding of all quotations.

3.109 Evaluation of Quotations

The Contracting Officer evaluates quotations in accordance with the criteria cited in the RFQ and selects the best quotation relative to the needs of FDIC and the reasonableness of the proposed price.

3.110 Contract Award

3.110(a) Pre-Award Reviews

Prior to making an award, the Contracting Officer must document the following pre-award reviews of the successful offeror, as required:

(1) Excluded parties;

(2) System for Award Management (SAM);

(3) New Financial Environment vendor file review;

(4) Contractor representations and certifications, as applicable;

(5) Integrity and fitness representations and certifications, if over $100,000;

(6) Background investigations completed by the Security and Emergency Preparedness Section; and

(7) Financial capability review.

3.110(b) Award Decision Documentation

The Contracting Officer must document the results of the evaluation of quotations, including the determination of price reasonableness in the official contract file.

3.110(c) Advance Authorization Letter

An advance authorization letter may only be used in unusual or urgent circumstances as addressed in APM 3.409 and APM 3.507, unless approved by the respective ASB Assistant Director.

3.110(d) Notification of Unsuccessful Offerors and Debriefings

As a general rule under simplified procurements, the Contracting Officer is not required to notify an unsuccessful offeror of the award or offer debriefings, unless requested. If a debriefing is requested use the procedures at PGI 3.216(b).

There is an exception for acquisitions covered by the World Trade Organization - Government Procurement Agreement or a Free Trade Agreement, as discussed in APM 5.12. In these cases, notification of the award through FedBizOpps is required. Contracting Officers must submit a synopsis of the award to FedBizOpps in sufficient time to permit its publication not later than sixty (60) days after award.

3.111 Simplified Procurement Award Types

The Contracting Officer awards simplified procurements using simplified procurement orders, blanket purchase agreements, or purchase cards.

APM Chapter 3.2 Formal Contracting

3.201 Scope

This chapter covers the policy for acquiring goods and services using formal contracting procedures.

3.202 Definitions

Advance Authorization Letter – A letter issued by the Contracting Officer authorizing the contractor to begin performance prior to a formal contract being executed. It contains the key aspects of an engagement, such as a description of the work, the limits on costs to be incurred, and the period of performance. It does not contain all the terms, conditions, and clauses required for the final formal contract, which is negotiated and executed as soon as possible after the contractor begins work under the advance authorization letter.

Commercial Goods – See definition at APM 3.102.

Commercial Services – See definition at APM 3.102.

Competitive Range – Those offerors determined by the Contracting Officer to have a reasonable chance of being selected for award of a contract, based on initial technical and price evaluations.

Price Analysis – The process of examining and evaluating a proposed price without evaluating its separate cost elements and proposed profit. Price analysis includes price realism, when appropriate. The final objective of price analysis is to determine a fair and reasonable price.

Price Realism – The analysis performed on a price proposal to determine whether the price proposed is realistic for the work to be performed and consistent with the technical proposal.

Request for Proposal *(RFP)* – A document sent to prospective offerors to request a formal proposal to provide the goods or services required by FDIC, under stated terms and conditions.

Source Selection Plan *(SSP)* – A key document which specifies how source selection activities are organized, initiated, and conducted. It specifically

defines the evaluation factors to be used to analyze proposals and serves as the guide for conducting the analysis of proposals and the selection of source(s) that will receive an award.

3.203 Formal Contracting Policy

The Contracting Officer must use formal contracting procedures for the acquisition of goods or services valued above the limits for simplified procurements (less than $5,000,000 for commercial goods or services, or $100,000 or less for non-commercial). When only limited technical evaluations are necessary, it may be appropriate to use simplified procurement for requirements normally subject to formal contracting procedures.

3.204 Competition in Formal Contracting

Contracting Officers must provide for and promote competition in soliciting offers and awarding contracts, where practicable. See the policy on competition addressed in APM 2.203. In the case of non-competitive awards and modifications, the Program Office must justify the lack of competition, using a Justification for Non-Competitive Procurement (JNCP), as addressed in APM 2.206. The JNCP template may be found on the ASB website at http://fdic01/division/DOA/buying/acquisitiondocuments/acqdocs.html.

3.205 Identifying Potential Sources

The Contracting Officer must select an appropriate number of potential sources, normally a minimum of three (3), to ensure adequate competition and must prepare a solicitation list that identifies the firms to be solicited. The methods for identifying potential sources are outlined in PGI 3.105. The Contracting Officer must provide the Office of Minority and Women Inclusion (OMWI) the opportunity to furnish a list of potential sources for actions greater than $100,000.

Before including any firm on a solicitation list, the Contracting Officer must consult the Debarred Vendors List, *FDIC Division of Administration: Debarred Vendors,* found at http://fdic01/division/DOA/buying/fitness/debarredvendors.html and the System for Award Management (companies labelled as “Exclusion”) at http://www.sam.gov, to ensure that none of the firms being solicited are suspended or excluded from FDIC contracting.

3.206 Source Selection Planning

The Contracting Office must ensure that the contract is awarded to the offeror whose proposal provides the best value. To help accomplish this, the Contracting Officer and the Program Office must jointly develop a SSP. The SSP must clearly and succinctly express the source selection methodology, the

evaluation factors, including their relative order of importance, and identify Technical Evaluation Panel (TEP) members, if known.

A separate SSP is not required, if all required elements of the SSP can be adequately defined in the Acquisition Plan, as discussed in APM 2.1.

3.207 Technical Evaluation Panel

When the acquisition requires a technical evaluation, the Program Office must identify a TEP to review and evaluate proposals received in response to an RFP. The TEP members are appointed by the Contracting Officer. At a minimum, the TEP must be identified prior to the receipt of proposals. The size and membership of the TEP are at the discretion of the Contracting Officer, and depends upon the size and complexity of the requirement.

3.207(a) Voting/Non-Voting Members

The TEP is usually made up of three voting members, although more or less may be designated. One member must be designated as the TEP Chairperson. If the Program Office requests the use of a single evaluator, or if a supervisor of a TEP member serves on the TEP, the Contracting Officer must obtain approval of the
* respective ASB Assistant Director. The TEP may also include, representatives from *
| outside the Division(s) acquiring the goods or services, such as representatives from |
| the Contracting Law Unit, OMWI, the Division of Information Technology, and others, |
| as necessary for the procurement. These representatives shall be non-voting TEP |
| members, except for OMWI representatives who, at the discretion of OMWI, may be |
| voting TEP members. TEP members must be available for the duration of the |
* evaluation process. *

3.207(b) Technical Evaluation Panel Advisors

When the acquisition requires specific technical expertise, the Contracting Officer may name individuals inside or outside FDIC as TEP advisors. All TEP advisors are non-voting.

3.207(c) Confidentiality and Conflicts of Interest

Each member of the TEP must read and sign the *Confidentiality Agreement* and a *Conflict of Interest Certificatio*n, (found on the ASB website at http://fdic01/division/DOA/buying/acquisitiondocuments/acqdocs.html) and submit them to the Contracting Officer for inclusion in the official contract file, prior to beginning the technical evaluation process. If for any reason, a member cannot evaluate a proposal objectively, that member must alert the Contracting Officer immediately and be removed from the panel.

3.208 Request for Proposals

The purpose of the RFP is to provide potential offerors the information they need to respond to FDIC requirements. The RFP must provide guidance to potential offerors on both proposal format and content, and must contain guidance on the evaluation factors that is consistent with the SSP.

3.209 Receipt of Proposals

3.209(a) Due Date

Each solicitation specifies a date and time for receipt of proposals. Proposals must be submitted by the date and time specified in the RFP to be considered for award.

3.209(b) Handling Proposals and Information

The Contracting Officer is responsible for all proposals in the possession of FDIC and must safeguard them from unauthorized disclosure throughout the source selection process. This includes disclosure to FDIC employees who are not TEP members, other offerors, or other individuals not involved in the source selection process. The Contracting Officer must prepare and maintain a list of the proposals received, including the date and time received, for the official contract file.

3.209(c) Late Proposals

Proposals received after the due date and time specified in the RFP are late and are not to be considered unless received before award is made and the Contracting Officer, with approval of the respective ASB Assistant Director, determines that accepting the late proposal is in the best interest of FDIC. The Contracting Officer must document all exceptions in the official contract file. If the proposal is late and not accepted, the Contracting Officer must notify the offeror in writing.

Proposals received after the date and time specified in the RFP are not considered late if:

(1) It was sent by registered or certified mail not later than the fifth (5th) calendar day prior to the date specified for receipt of offers (e.g., an offer submitted in response to a RFP requiring receipt of offers by the twentieth (20th) of the month must have been mailed on the fifteenth (15th) or earlier); or

(2) It was sent by mail and it is determined by FDIC that the late receipt was due solely to mishandling by FDIC after receipt at an FDIC installation.

(3) 3.209(d) Non-Responsive Proposals

Offerors are required to meet all solicitation requirements, such as terms and conditions, representations and certifications, and technical requirements, in addition to those identified as evaluation factors or sub-factors. Failure to meet a requirement may result in an offer being ineligible for award. The Contracting Officer has the right to reject proposals that do not comply with the solicitation. The Contracting Officer must document the reasons for deeming a proposal non-responsive, and obtain the respective ASB Assistant Director's approval before eliminating it from consideration.

3.209(e) Solicitation Cancellation

With Program Office concurrence, the Contracting Officer may cancel a solicitation. The Contracting Officer must send a written notice, in the form of an amendment to the RFP, to every offeror on the solicitation list.

3.209(f) Proposal Withdrawal

Offerors may withdraw proposals by written notice to the Contracting Officer at any time prior to award.

3.210 Proposal Evaluation

The purpose of the proposal evaluation process is to assess each offeror's capability to successfully perform the requirements specified in the RFP.

The Contracting Officer must review each proposal for responsiveness to the RFP requirements, eliminating from further consideration any non-responsive proposals. The Contracting Officer then briefs the TEP regarding the technical evaluation process.

The Contracting Officer must ensure that the evaluation of proposals is completed in a timely manner and is consistent with source selection methodology and evaluation factors stated in the RFP and SSP. Awards may be made to the offeror that represents (a) the best value, or (b) the lowest price technically acceptable solution, depending on which evaluation methodology is specified in the SSP. Awards must be made within the acceptance period specified by the proposal.

3.210(a) Mission Capability (Technical) Evaluation

The objective of the mission capability (technical) evaluation is to determine which of the offerors is most qualified to perform. The factors and sub-factors are the means to accomplishing that objective. Mission capability ratings are assigned based on the strengths and weaknesses in the offeror's proposal. Mission capability is evaluated using the approaches discussed in PGI 3.210(a).

3.210(b) Past Performance Evaluation

The Contracting Officer and the Program Office must evaluate past performance in all procurements using formal contracting procedures. Past performance information may be obtained through a number of methods:

(1) Information provided by the offeror with its proposal;

(2) Information provided by other government agencies and/or commercial entities using the *FDIC Past Performance Questionnaire* found on the ASB website at http://fdic01/division/DOA/buying/acquisitiondocuments/acqdocs.html;

(3) Previous evaluation reports on past FDIC contracts, located in the FDIC Contractor Performance Evaluation System (see PGI 6.408(f));

(4) It is mandatory that the TEP review and consider any recent/relevant information that is available in this system;

(5) Previous evaluation reports on other government contracts, located in the National Institute of Health Contractor Performance System;

(6) Dunn and Bradstreet found at http://www.dnb.com/us; and

(7) Any other sources deemed appropriate.

3.210(c) Price Evaluation

Price evaluation is always required to assure the validity and reasonableness of an offeror's price proposal. Price evaluation includes a determination of reasonableness and realism of the proposed prices. The preferred method of determining price reasonableness is through effective competition.

The Contracting Officer is responsible for determining price reasonableness. The TEP is responsible for determining price realism and documenting its analysis in either the TEP Report or a written memorandum to the Contracting Officer.

3.211 Communications with Offerors

The Contracting Officer communicates with offerors through two different levels of exchanges, clarifications and discussions. The level of exchange is determined by the degree of interaction necessary for the Contracting Officer to make the award.

3.212 Competitive Range Determination

If the award is not made based on the initial offers, then the Contracting Officer must establish a competitive range and hold discussions. The competitive range is based on the ratings of each proposal against all evaluation factors. It is comprised of the most highly rated proposals that have a reasonable chance of being selected for award, unless the range is further reduced for purposes of efficiency. If the Contracting Officer determines that a proposal is not in the competitive range, the Contracting Officer must promptly notify the offeror in writing that its proposal will not be evaluated further. The notice must include the basis for the determination and that a proposal revision will not be considered.

3.213 Best and Final Offers

FDIC preference is to make an award based on initial offers. Following the initial evaluation, if there is no one successful offeror, the Contracting Officer must establish a competitive range and hold technical or price discussions, or both, with offerors. At the conclusion of discussions the Contracting Officer requests best and final offers (BAFOs).

BAFO evaluations may include a re-evaluation of the related technical proposal, or revisions or clarifications submitted by the offerors, and any changes to terms and conditions.

Once the BAFO is requested, the Contracting Officer may not re-open discussions unless available information is not adequate for contractor selection and award, or unless it is in the best interest of FDIC. Request for a second round of BAFOs requires approval by the respective ASB Assistant Director.

3.214 Documenting the Source Selection Decision

The Contracting Officer must document the principal elements of the source selection decision in the official contract file. The documentation includes the TEP Report and Selection Recommendation Report (SRR).

3.214(a) Technical Evaluation Panel Report

The TEP Chairperson provides the Contracting Officer a report (TEP Report), which documents the panel's consensus ratings of each technical proposal, and the strengths and weaknesses of each by factor and subfactor. If BAFOs are received, the TEP provides an addendum to its initial TEP Report addressing the BAFO evaluation results. The TEP Report includes the price realism analysis discussed in APM 3.210, unless the TEP chooses to address its price realism review in a separate written memorandum to the Contracting Officer.

3.214(b) Selection Recommendation Report

The Contracting Officer must prepare the SRR, using the TEP Report, price analysis, and any other relevant decision-making factors, such as determination of financial responsibility. The SRR explains the basis for the award recommendation.

3.215 Contract Award

The Contracting Officer must ensure all pre-award reviews addressed in PGI 3.215 are accomplished, and then prepare and submit the SRR for approval. Once all reviews are completed, the Contracting Officer notifies the successful offeror, and fully executes the contract with the awardee. An advance authorization letter may only be used in unusual or urgent circumstances as addressed in APM chapters 3.4 and 3.5, unless approved by the respective ASB Assistant Director.

3.216 Notification to Unsuccessful Offerors and Debriefings

Within fifteen (15) calendar days after award, the Contracting Officer must send a written or electronic notice of the award to all unsuccessful offerors, and provide procedures for requesting a debriefing. The debriefing provides the offerors feedback on the rationale for the source selection decision. Debriefings are not required for price-only competitions.

3.217 Contract Types and Pricing Arrangements

The Contracting Officer must select the type of contract and pricing arrangement that represents the most prudent and reasonable relationship with the contractor and minimizes cost and other risks to FDIC. Available contract types include, but are not limited to, contracts or basic ordering agreements (BOAs). Receivership basic ordering agreements, a unique type of contract which is similar to a BOA, may only be used for contracts in support of the Division of Resolutions and Receiverships's efforts related to failing or failed financial institutions.

Available pricing arrangements include, but are not limited to firm fixed price, fixed unit prices, time and materials, and labor hours. Any of these types of pricing arrangements may include some cost reimbursement features, where the contractor is reimbursed for actual costs, and may also include performance incentives such as monetary and contract extension incentives, as addressed in PGI 5.7.

The Contracting Officer may use any combination of contract type and pricing arrangement suitable to the procurement. The objective is to select a contract type and pricing arrangement that results in reasonable contractor risk and provides the contractor with the greatest incentive for efficient and economical performance.

APM Chapter 3.3 Other Contracting Methods

3.301 Scope

This chapter covers the policies associated with other contracting methods available to FDIC Contracting Officers, including use of mandatory sources (Federal Prison Industries, Inc. [FPI] and AbilityOne), and optional awards under Federal Supply Schedules (FSS).

3.302 Definitions

Federal Prison Industries*, Inc.* – The FPI (commonly referred to by its trade name, UNICOR), is a wholly-owned government corporation established by the United States Congress on June 23, 1934. Its mission is to employ and provide job skills training to the greatest practicable number of inmates confined within the Federal Bureau of Prisons. It utilizes prisoners to make products and provide services, mainly for the United States Government.

Federal Supply Schedule – The FSS program (also known as the General Services Administration (GSA) Schedules Program or the Multiple Award Schedule Program) is directed and managed by GSA and provides federal agencies with a simplified process for obtaining commercial supplies and services at prices associated with volume buying.

AbilityOne (formerly known as the Javits-Wagner-O'Day *[JWOD])* – A program under JWOD (41 U.S.C. §§46-48c) that requires federal agencies to purchase certain goods and services from qualified workshops that employ people who are blind or severely disabled.

3.303 Other Contracting Methods Policy

Besides simplified procurement and formal contracting, Contracting Officers may use a number of other contracting methods to award contracts, including awards through mandatory sources (FPI and AbilityOne), or optional sources such as FSS.

3.304 Purchases from Mandatory Sources

FDIC is required to comply with laws that outline mandatory sources for particular purchases. These include:

(1) FPI (18 U.S.C. §4124); and

(2) JWOD (41 U.S.C. §§46-48c) (AbilityOne).

3.304(a) Contracting with the Federal Prison Industries

Title 18 USC §4124 directs federal departments and agencies to purchase "prison-made products," at not to exceed current market prices, if available and meet the agencies requirements. The Contracting Officer must ensure that prices paid for goods or services available from FPI do not exceed current market prices. If the FPI item is not comparable to goods available from the private sector, the Contracting Officer may purchase the item from any other available source.

3.304(b) AbilityOne (Formerly Javits-Wagner-O'Day Act) Program

JWOD (41 U.S.C. §46-48c) requires that federal agencies purchase certain goods and services from qualified workshops that employ people who are blind or severely disabled. The Committee for Purchase from People Who Are Blind or Severely Disabled determines which supplies and services must be purchased and their price.

Goods and services must be ordered from the central nonprofit agency designated on the Procurement List found on the AbilityOne website at http://www.abilityone.gov/jwod/index.html, or from the workshops concerned, and may not be purchased from commercial sources unless authorized by the agency or the Committee for Purchase from People Who Are Blind or Severely Disabled, which is authorized to grant an exception based on time and volume requirements. When the Contracting Officer and Program Office determine that the goods available through AbilityOne do not satisfy FDIC requirements, the Contracting Officer may request an exception using the procedures at PGI 3.304(b).

Once a product or service is on the Procurement List, FDIC must buy it from the organization designated by the Committee for Purchase from People Who Are Blind or Severely Disabled, until FDIC no longer has requirements for that item, or until a nonprofit agency employing people with severe disabilities can no longer furnish that item.

The policies and procedures of this section do not apply to goods that are available from both AbilityOne and FPI. If goods are available from both mandatory sources, the Contracting Officer must procure them from FPI, as addressed in APM 3.304(a) and PGI 3.304(a).

3.305 Federal Supply Schedule Contracts

FDIC is an optional user of GSA FSS contracts and may place orders against them when it is in the best interest of FDIC. In order to ensure fair opportunity among FSS contractors, the Contracting Officer must follow the procedures provided at PGI 3.305 when placing orders against FSS contracts. Orders placed against FSS contracts must comply with all terms and conditions of the FSS contract.

APM Chapter 3.4 Contracting in Support of Potential Financial Institution Failures

3.401 Scope

This chapter covers the roles, responsibilities and authorities of FDIC Contracting Officers and other officials who support the FDIC Division of Resolutions and Receivership (DRR), as it plans for the resolution of a financial institution that may fail, conducts the resolution upon the closing, or performs the duties of receiver in the immediate post-closing period. It also provides the policy to be used to expedite awards in support of the related DRR efforts. Contracts under this chapter may be awarded in either the corporate or receivership capacity.

3.402 Definitions

Advance Authorization Letter – See definition at APM 3.202.

Closing – Removal of a financial institution's charter by its chartering authority, due to insolvency and/or its operating in an unsafe and unsound manner. The chartering authority usually appoints FDIC as receiver. FDIC arranges for the transfer of the deposit liabilities to a healthy financial institution, or begins the payment of the insured deposit liabilities. If a purchase and assumption agreement is reached with the assuming institution, some or all of the assets of the failed institution may be included. As receiver, FDIC then begins liquidating the remaining assets.

Receiver – The role FDIC assumes, when appointed by a chartering authority, to liquidate the assets of a failed institution and distribute the proceeds to the approved creditors.

Resolution – The FDIC process for managing its deposit insurance and other statutory obligations related to failing financial institutions. FDIC acts to dispose of the assets and liabilities of a failing financial institution through sale (to the maximum extent possible) and at the least cost to the insurance fund. It spans a period from the time FDIC receives notification of a potential financial institution failure, through the time the institution is closed by its primary regulator and FDIC is appointed to act as receiver.

3.403 Contracting in Support of Potential Financial Institution Failures Policy

The FDIC mission requires it to minimize the effect that a failed financial institution has on the nation's economy and financial system. DRR is responsible for the effective and efficient resolution of financial institution failures.

Delays in awarding contracts could increase the risk of negative impact on the nation's economy. Therefore, in addition to using existing contracts, two types of accelerated contracting procedures have been developed for meeting the contracting needs related to financial institution failures when insufficient time is available to follow established contracting procedures; one is expedited contracting, the other is emergency contracting. Which procedure is used depends on the urgency of the financial institution failure, that is, the amount of time DRR has to prepare before the closing of the financial institution occurs. The Contracting Officer has the discretion, based on exchanges with DRR officials, to choose the most appropriate contracting approach. Both are treated in this chapter and the related PGI chapter.

Both DRR and the ASB rely on advance planning to reduce the need for expedited or emergency contracting procedures to award contracts. While emergencies can arise that require their use, expedited and emergency contracting procedures are not to be used when there is sufficient time to follow established contracting procedures.

3.404 Notification

The DRR Director, or a Deputy Director, must initiate the process for implementing expedited or emergency contracting in support of potential financial institution failures by a notification to the ASB Deputy Director, or an ASB Assistant Director. No activity under these categories of contracting is authorized without DRR notification.

3.405 Use of Existing Contracts and Purchase Cards/ Convenience Checks

In order to obtain the goods and services needed to support DRR efforts in relation to the anticipated closing of a failed financial institution, Contracting Officers must use existing contracts to the maximum extent practical. Contracts put in place as part of DRR and ASB advance planning, such as the Receivership Assistance Contract, are the tools of choice for Contracting Officers to use to most quickly and efficiently award task orders and supply DRR with the contractor support critical to its mission. Both expedited and emergency procedures may also be used with existing contracts.

Contracting Officers and others with delegated authority can also use purchase cards and convenience checks to obtain the goods and services needed to support the anticipated closing of a failed financial institution.

3.406 Expedited Contracting Policy

Expedited contracting is the ASB process for accelerating the award of contracts in support of DRR activities when either the timeframe for resolution, or the closing of a failing financial institution, does not call for emergency contracting procedures, or there is adequate time to accomplish a streamlined competition in support of the DRR requirement.

Contracting Officers use expedited contracting procedures in support of DRR when existing contracts cannot meet the need for goods and services and when time and other constraints do not allow for the use of established FDIC contracting practices. Expedited procedures focus on providing optimum contract support for DRR's critical mission, while using competition to award contracts to the extent that time allows, as discussed in PGI 3.406.

3.407 Emergency Contracting Policy

Contracting Officers use emergency contracting procedures when the time constraints associated with a resolution or a potential closing do not allow for use of expedited or normal contracting procedures, as discussed in PGI 3.407.

3.408 Contracting Policy Applicable to both Expedited and Emergency Contracting

The contracting procedures described in this chapter and the PGI may be used with expedited or emergency contracting, as required. These procedures are not intended to limit ideas or creativity in designing a contracting process to meet the immediate need. The Contracting Officer has full discretion to determine the appropriate procedures unique to each requirement.

3.409 Advance Authorization Letter

An advance authorization letter may be issued under either expedited or emergency contracting procedures to speed the award process and initiate critical performance.

3.410 The Formal Contract

A formal contract must be issued within sixty (60) calendar days to replace an advance authorization letter, if one is used.

3.411 File Documentation

In the case of emergency contracting procedures, documentation requirements, including preparation of the Justification for Non-Competitive Procurement and Price Evaluation Memorandum or Selection Recommendation Report, are suspended for the immediate crisis period. PGI 3.411 details further documentation requirements.

APM Chapter 3.5 Contracting in Emergency Situations

3.501 Scope

This chapter covers the policies relating to the roles, responsibilities and authorities of Contracting Officers and other officials when issuing contracts under emergency situations as defined below. These contracts are generally issued under corporate capacity, however, in unique circumstances may be issued under other authorities.

3.502 Definitions

Emergency Situation –

(1) Instances where the President of the United States, United States Congress or similar authorities declare an incident of:

- National emergency (terrorist attacks as in 9/11/01, nuclear, biological, chemical or radiological attacks);
- Contingency operation (military operations);
- Major emergency (hurricane, earthquake, flood, tornado or major fire);
- Emergency (severe snow storms); or
- National significance (Hurricane Katrina).

(2) Certain of the above emergencies may be declared by the Secretary of Homeland Security or the Secretary of Defense; and

(3) Emergencies related specifically to FDIC operations may be declared by the FDIC Chairman, FDIC Chief Operating Officer or FDIC Chief Financial Officer, or designee. FDIC-specific emergencies may come in the form of serious fire or flooding at FDIC facilities, major utility system failures (heat, air conditioning, electrical), large-scale computer system failures or any occurrence that halts or seriously impedes day-to-day FDIC operations.

3.503 Contracting in Emergency Situations Policy

The contracting procedures of PGI Chapter 3.5, *Contracting in Emergency Situations*, must be followed in emergency situations, when using the established competitive contracting procedures would cause delays in awarding contracts and thus jeopardize rapid, effective and efficient response to an emergency situation.

In an emergency situation, FDIC Contracting Officers must consider using pre-established contracts to the maximum extent practical to satisfy emergency contracting needs. If a pre-established contract is not available, then FDIC Contracting Officers may acquire goods and services using purchase cards and simplified acquisition procedures with expanded limits designated in advance by the ASB.

3.504 Planning for Contracting in Emergency Situations

ASB managers must plan for the continuity of effective procurement support during periods of emergency. Emergency planning in the procurement arena is under the larger construct of FDIC-wide emergency planning, as outlined in FDIC Circular 1500.5, *Emergency Preparedness Program* and the related Business Continuity Plan, and must be fully coordinated with the FDIC officials responsible for that program. Contract planning for emergency situations includes special provisions for the temporary suspension of APM policies or procedures.

3.505 Notification of Emergency

In an emergency situation, the Division of Administration (DOA) Director, or designee, confirms the situation and then notifies the respective ASB Assistant Directors. The notification includes:

(1) A summary description of the emergency situation and the anticipated impact on FDIC operations; and

(2) A summary description of the goods or services that may be required to respond to the emergency situation, to the extent these can be determined at the time of the notification.

3.506 Modified Procedures and Authorities

The temporary adjustments, waivers and suspensions of procurement requirements detailed in PGI 3.506 become automatically effective on notification of an emergency situation by the DOA Director, or designee. Any procurement action that uses modified procedures or authorities authorized by this chapter must be documented in the official contract file during, or immediately after, the emergency situation.

3.507 Advance Authorization Letter

An advance authorization letter may be issued under emergency contracting procedures to speed the award process and initiate critical performance. Such letters include not-to-exceed ceiling amounts and performance periods, but do

not have the full complement of provisions and clauses. A final contract must be negotiated and executed within sixty (60) calendar days of issuance of the advance authorization letter.

3.508 Short Term Manual Operations

The ASB must coordinate with its client Program Offices, and counterparts in FDIC Divisions of Finance and Administration, to ensure the ability of FDIC to operate in a short-term manual mode if the related procurement and financial systems are not accessible in an emergency.

3.509 Emergency Contracting Kits

Emergency Contracting Kits, as described at PGI 3.509, are maintained by ASB to facilitate rapid and effective contracting support where FDIC facilities, computers and communications might not be readily available.

3.510 Receipt and Acceptance of Goods and Services

Oversight Managers must ensure that the goods and services acquired under emergency contracting conditions are properly received and recorded.

3.511 Documenting Contracting Actions

While urgency is a foremost concern during an emergency situation, properly documenting each contract action is critically important to the integrity of the contracting process and the longer-term, historical view of FDIC performance during the event. The key documentation elements are addressed at PGI 3.511.

3.512 Restoring Normal Operations

The ASB Deputy Director, or designee, restores normal operations after an emergency situation is over. All practical steps must be taken to restore all established procurement policies/procedures and management controls immediately upon termination of the emergency situation.

APM Chapter 3.6 Receivership Contracting – Special Issues

3.601 Scope

This chapter covers special issues of contracting that arise at failed financial institutions to which the FDIC has been appointed receiver.

3.602 Definitions

Reserved

3.603 Receivership Contracting Policy

Contracting Officers and the Program Offices they support must comply with the policies regarding receivership contracting discussed in this chapter in the award of contracts for FDIC.

3.604 Subsidiary Contracting Policy

The FDIC Board of Directors and officers of a subsidiary of a failed financial institution in receivership, not FDIC or the receivership, is responsible for managing the business and affairs of the subsidiary. Policies and procedures otherwise applicable to the receivership do not apply to the subsidiary. However, the directors of a subsidiary may determine, in the exercise of both their fiduciary duties to the subsidiary and their business judgment, to use the services of the Receiver to manage and dispose of assets. In this case, any contracting with third parties for services is subject to the policies and procedures in the APM and PGI.

3.605 Contracts Entered into by Failed Financial Institutions

For contracts the Receiver inherits from a failed financial institution and decides to retain, rather than repudiate, it is FDIC policy to negotiate a bilateral modification of these contracts to conform them, as nearly as can be, to standard FDIC contract clauses.

MODULE 4: SPECIAL CATEGORIES OF CONTRACTING

APM Chapter 4.1 Performance-Based Acquisition

4.101 Scope

This chapter covers FDIC policies for performance-based acquisition (PBA) and performance-based management.

4.102 Definitions

Performance-Based Acquisition – An acquisition structured around the results to be achieved, as opposed to the manner in which the work is to be performed. PBA methods give prospective contractors an opportunity to propose: (1) services and solutions that achieve the overall objective; and (2) the methods for evaluating the progress of the work and the end product/results/deliverables.

Performance-Based Management *(PBM)* – A documented, systematic approach to acquisition management. Like traditional project management, PBM involves planning and defining (Planning Phase), implementing and assessing (Measure and Monitor Phase), and changing (Evaluate and Adjust Phase). These disciplines are not sequential, but come into play throughout the pre- and post-award phases of the acquisition cycle. Unlike traditional project management, PBM applies these disciplines in a holistic way to facilitate project success.

4.103 Performance-Based Acquisition Policy

The PBA policies addressed in this chapter do not replace the usual procurement practices addressed elsewhere in the APM and PGI, except in the areas specifically addressed below. Contracting Officers should incorporate PBA methods when appropriate to encourage contractor innovation and efficiency, and to help ensure contractors provide timely, cost-effective, and quality performance with measurable outcomes. Among the appropriate contracting situations to consider for PBA are:

(1) Service contracts over $1,000,000;

(2) Software/system development contracts; and

(3) Any other initiative where the Contracting Officer and Program Office need to use contractor innovation to reduce costs or performance time, and/or to enhance quality of the final product or service.

Some service contracts are not good PBA candidates – services such as off-the-shelf training and utilities are not good fits. FDIC requirements for the contract must be considered when deciding whether or not to use a PBA approach. PBA contracts do not dictate how the work is to be done, nor do they include an overly broad statement of objectives (SOO). Instead they describe what needs to be done in terms of the objectives, i.e., what outcome or result is required.

4.104 Performance-Based Management

4.104(a) Planning

In planning for effective management of a PBA contract, the Contracting Officer and Oversight Manager must build the overall performance measurement and management approach based on the success determinants developed in the initial PBA process. Developing an approach to measuring and managing performance is a complex process that requires the consideration of many factors: performance standards and measurement techniques, performance management approach, incentives, and more. This component of PBA is as important as developing the SOO or performance work statement (PWS), because this step establishes the strategy of managing the contract to achieve its stated performance objectives.

4.104(b) Measuring and Documenting Performance

In addition to the responsibilities set out in the Contract Management Plan, the Oversight Manager on a PBA contract effort is responsible for measuring and documenting contractor performance against the standards and metrics as stated in the PWS, and/or Quality Assurance Plan/Quality Assurance Surveillance Plan. The Oversight Manager is responsible for monitoring and documenting performance following the PWS and QAP/QASP, thereby protecting FDIC rights under the contract and better assuring project success.

Documentation of contractor performance must occur as the performance data are compiled, not after the fact. Validation of the data must be timely to be effective.

APM Chapter 4.2 Acquisition of Information Technology

4.201 Scope

This chapter covers additional FDIC policies specific to the acquisition of information technology (IT) goods and services, including privacy and security concerns and earned value management (EVM).

4.202 Definitions

Earned Value Management *(EVM)* – A program management tool that uses an integrated management system to coordinate the work, schedule, scope and cost goals of a program or contract, and objectively measures progress towards these goals.

Information Technology – Refers to any equipment or interconnected system or subsystem of equipment, that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. It includes computers, ancillary equipment, software, firmware and similar goods and services (including development and support services). IT also includes all desktop/laptop hardware and software, printers, personal digital assistants, telephones, pager and facsimile hardware and software, as well as all Internet, electronic mail (email), and telephonic services.

4.203 Information Technology Acquisition Policy

The acquisition of IT follows the policy outlined in APM 3.2, *Formal Contracting*, and applicable FDIC IT directives. Specific IT security and privacy requirements must be included in all contracts and are based on the particular nature of the IT services and the information/data requirements of the contract. APM 5.1 and PGI 5.1 provide guidance on privacy requirements applicable to IT. PGI 4.2 provides guidance on acquiring IT goods and services.

4.204 Earned Value Management

EVM must be considered for all awards that fall above the threshold for review by the Capital Investment Review Committee (currently $3,000,000) or are considered high risk and of high visibility. However, due to the fact that EVM can increase contract costs, it should be undertaken for projects of lesser dollar value only when reasonable and cost effective, and when its application will improve planning, application and execution of the project.

APM Chapter 4.3 Construction Contracting

4.301 Scope

This chapter covers policy on those aspects of the contracting process unique to the design and subsequent new construction of FDIC buildings or facilities. The acquisition of construction follows the policy outlined in APM 3.2, *Formal Contracting*, and applicable FDIC directives.

4.302 Definitions

Reserved

4.303 Construction Contracting Policy

Contracting Officers who are contracting for the design and subsequent new construction of FDIC buildings or facilities, other architect-engineer services, or renovation or refurbishing of existing facilities, follow the contracting procedures in APM Module 3. Such contracts must include applicable construction-specific clauses, such as the Davis-Bacon Act, Contract Work Hours and Safety Standards Act, and Miller Act. Specific procedures that must be used when contracting for the design and subsequent new construction of FDIC buildings or facilities are found at PGI 4.3.

MODULE 5: GENERAL CONTRACTING REQUIREMENTS

APM Chapter 5.1 Protection of Sensitive Information

5.101 Scope

This chapter covers policy for maintaining confidentiality, and the protection of sensitive and personally identifiable information (PII) in the acquisition process and throughout the life of the contract.

5.102 Definitions

Personally Identifiable Information – Any information about an individual maintained by FDIC which can be used to distinguish or trace that individual's identity, such as full name, home address, email address (non-work), telephone numbers (non-work), social security number (SSN), driver's license/state identification number, employee identification number, date and place of birth, mother's maiden name, photograph, biometric records (e.g., electronic fingerprint, voice print, retinal scan, face scan), etc. This also includes, but is not limited to, education, financial information (e.g., account number, access or security code, password, and personal identification number), medical information, investigation report or database, criminal or employment history or information, or any other personal information which is linked or linkable to an individual. See FDIC Circular 1360.9, *Protecting Sensitive Information*, available at http://fdic01/division/doa/adminservices/records/directives/1000/index.html.

Sensitive Information – Any information, the loss, misuse, or unauthorized access to, or modification of which, could adversely impact the interests of FDIC in carrying out its programs or the privacy to which individuals are entitled. It includes the following:

(1) Information that is exempt from disclosure under the Freedom of Information Act (FOIA) such as trade secrets and commercial or financial information, information compiled for law enforcement purposes, personnel and medical files, and information contained in bank examination reports (see FDIC Rules and Regulations, 12 C.F.R. Part 309, for further information);

(2) Information under the control of FDIC contained in a Privacy Act system of record that is retrieved using an individual's name or by other criteria that identifies an individual (see FDIC Rules and Regulations, 12 C.F.R. Part 310, for further information);

(3) PII about individuals maintained by FDIC that, if released for unauthorized use, may result in financial or personal damage to the individual to whom such information relates. Sensitive PII, a subset of PII, may be comprised of a single item of information (e.g., SSN) or a combination of two or more items (e.g., full name along with, financial, medical, criminal, or employment information). Sensitive PII presents the highest risk of being misused for identity theft or fraud; and

(4) Information about insurance assessments, resolution and receivership activities, as well as enforcement, legal, and contracting activities.

System of Records – A group of any records under the control of FDIC, or a contractor providing a service to FDIC, from which information is retrieved by the name or by some identifying number, symbol, or other identifying particular assigned to an individual.

5.103 Protection of Sensitive Information Policy

Contracting Officers and the Program Offices they support must comply with the policy regarding protection of sensitive information discussed in applicable directives, and this chapter in the award of contracts for FDIC.

5.104 Sensitive Information and Confidentiality Agreements Policy

5.104(a) Sensitive Information

FDIC policy is to protect sensitive information, which includes PII. FDIC only collects and maintains sensitive information that is necessary to satisfy an FDIC business requirement. Contractors, or any person who performs services on behalf of FDIC, must maintain as confidential any sensitive information FDIC provides, and may not use the information or disclose it to a third party, unless:

(1) The contract or FDIC specifically authorizes its use and disclosure;

(2) The information is generally available to the public; or

(3) A court order directs disclosure.

Further policies on sensitive information and personally identifiable information are detailed in FDIC Circular 1360.9, *Protecting Sensitive information,* which is available at http://fdic01/division/doa/adminservices/records/directives/1000/index.html.

5.104(b) Contractor Confidentiality Agreement

In awards in which the contractor, its personnel or its subcontractors, may have access to FDIC facilities or systems, or otherwise may have access to FDIC sensitive information, an authorized representative of the contractor and all personnel must sign confidentiality agreements (FDIC Form 3700/46, *Confidentiality Agreement (for Contractors/Subcontractors/Consultants)* and FDIC Form 3700/46A, *Confidentiality Agreement (for Contractor/Subcontractor /Consultant Personnel*)), which are available at http://fdic01/division/doa/adminservices/records/forms/3000/index.html, prior to receiving or collecting sensitive information. Confidentiality agreement are maintained in the official contact file. Contractors must take reasonable measures to ensure their employees, agents, or attorneys, do not disclose sensitive information to any unauthorized person.

A contractor's general obligation regarding confidentiality is described in 12 CFR Part 366, *Minimum Standards of Integrity and Fitness for an FDIC Contractor* Section 366.13, *What is my obligation regarding confidential information?* Any contractor personnel, who are required to sign a confidentiality agreement but fail to do so, may be prohibited from working on the contract.

5.105 Application of the Privacy Act

FDIC is subject to the Privacy Act of 1974 (5 USC §552a), which addresses the Federal Government's collection and use of information about individuals. 12 CFR Part 310 and FDIC Circular 1031.1, *Administration of the Privacy Act,* available at http://fdic01/division/doa/adminservices/records/directives/1000/index.html), contain FDIC regulations and rules governing application of the Privacy Act of 1974. In general, the Privacy Act of 1974 helps to protect the confidentiality of personal information by restricting agency disclosure of records, and by requiring agencies to publish how they collect, maintain, use and disseminate agency records.

When FDIC contracts for goods or services that include information on individuals maintained in an electronic and information technology or paper-based system determined to be a system of records by the FDIC, the requirements of the Privacy Act of 1974 apply. Any contractor who designs, develops, maintains or operates a system of records, or otherwise has access to

such systems containing personal information to accomplish an FDIC function, must comply with the Privacy Act.

5.106 Protection of Contractor Proposals and Source Selection Information

All persons engaged in the solicitation, evaluation, and award of contracts have an obligation to protect the information offerors submit in their proposals and the information generated throughout the source selection process. The obligation encompasses information: (1) from the proposals received from offerors, (2) through the evaluations conducted by the Technical Evaluation Panel, and (3) through the source selection recommendation. This obligation of confidentiality emanates from several sources:

(1) 18 USC §1905 – Disclosure of confidential information, including criminal penalties;

(2) 5 USC §552a – The Privacy Act of 1974;

(3) 12 CFR Part 309 – FDIC regulation on *Disclosure of Information*;

(4) 5 CFR §2635.1103 – The Office of Government Ethics' regulation on Use of Non-Public Information; and FDIC Circular 2410.6 – *Standards of Ethical Conduct for Employees of FDIC*.

Procurement sensitive information, with respect to FDIC employees involved in the acquisition process, is:

(1) Business information included in proposals submitted in response to FDIC solicitations that the offeror marks confidential;

(2) Information generated by FDIC during its analysis of contractor proposals (e.g., source selection information);

(3) PII subject to the Privacy Act;

(4) Sensitive PII as defined in FDIC Circular 1360.9; and

(5) Information otherwise marked by a third party as confidential, company confidential, procurement sensitive, or with a similar marking.

Additional information on protection of procurement sensitive information, including contractor proposals and source selection information, is available at the Legal Division's Ethics Section web page at: http://fdic01.prod.fdic.gov/division/legal/ethics/Library/Confidentiality.html.

5.107 Freedom of Information Act

The FOIA is a pro-disclosure statute that requires all records or information in the possession of the Federal Government to be disclosed, unless the information can be withheld under one of the nine exemptions the act defines. Contracting Officers must cooperate with the FDIC Legal Division FOIA-Privacy Act (PA) Group, in any FOIA requests.

PGI Section 5.107 describes the roles and responsibilities of the Legal Division and the ASB in processing FOIA requests.

APM Chapter 5.2 Security

5.201 Scope

This chapter covers FDIC policy for the application and incorporation of security requirements for awards except information technology security plans, which are covered in Chapter 4.2.

5.202 Definitions

Reserved

5.203 Contract Security Policy

FDIC has established security measures designed to protect its confidential and sensitive data and the integrity of its information systems, as well as provide for the physical safety of its employees. All FDIC employees involved in the contracting process must comply with the measures found in the following directives:

(1) FDIC Circular 1360.9, *Protecting Sensitive information,* available at http://fdic01/division/doa/adminservices/records/directives/1000/index.html; and

(2) FDIC Circular 1610.2, as amended by Circular 1610-2, CH-1 – *Security Policy and Procedures for FDIC Contractors and Subcontractors,* available at http://fdic01/division/doa/adminservices/records/directives/1000/index.html. Circular 1610.2 is the FDIC statement of policy governing the security risks associated with using contractors to provide services to FDIC. The provisions of Circular 1610.2 apply to:

- All contracts for services valued greater than $100,000;
- Contracts where a contractor, its employees, its subcontractors or subcontractors' employees ("contractor personnel") have access to FDIC facilities or its network systems; or
- Any other contract, at the discretion of FDIC.

For contracts covered by Circular 1610.2, the security-risk level must be established either by labor category or for the entire contract.

The Security and Emergency Preparedness Section conducts background investigations in accordance with FDIC Circular 1610.2, commensurate with the security-risk level established for the particular contract. Background investigations are not required for:

(1) Contractors working on contracts that arise at the inception of the receivership of a failed financial institution, unless contractor personnel will have access to FDIC network or information systems;

(2) Contractors who conduct business at, make deliveries to, or do repairs at FDIC offices on an intermittent or “as needed” basis; or

(3) Contracts for the purchase of goods.

APM Chapter 5.3 Compliance with Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d)

5.301 Scope

This chapter covers policies for all FDIC contracts that include electronic and information technology (EIT) equipment or services.

5.302 Definitions

Electronic and Information Technology – Any equipment or interconnected system or subsystem of equipment that is used in the creation, conversion, or duplication of data or information. EIT includes, but is not limited to, software, operating systems, desktop and portable computers, telecommunication products (such as telephones and teleconferencing services), information kiosks and transaction machines, World Wide Web sites, multimedia (such as video production and webcasting services), and office equipment (such as copiers and fax machines).

5.303 Section 508 Compliance Policy

All FDIC contracts for EIT must conform to, and be compliant with, the applicable provisions of Section 508 of the Rehabilitation Act of 1973 (29 U.S.C. 794d), as implemented by the following:

(1) The EIT accessibility standards published by the Architectural and Transportation Barriers Compliance Board (Access Board) are found at 36 CFR Part 1194). http://www.access-board.gov/sec508/standards.htm;

(2) FDIC regulation 12 CFR §352.5 - http://www.fdic.gov/regulations/laws/rules/2000-7400.html#2000part352.5; and

(3) FDIC Circular 2711.1, *Electronic and Information Technology (EIT) Accessibility Pursuant to Section 508 of the Rehabilitation Act,* provides guidance for implementation of Section 508. The circular is available at http://fdic01/division/doa/adminservices/records/directives/2000/index.html.

APM Chapter 5.4 Intellectual Property

5.401 Scope

This chapter covers FDIC procurement policies regarding acquiring, protecting and using intellectual property as part of the acquisition process.

5.402 Definitions

Intellectual Property – Knowledge, mostly explicit, which is protected by standard legal constructs, including copyright and patents. It is further characterized by being amenable to valuation, allowing for pricing agreements and contractual arrangements by licensing. Intellectual property includes, but is not limited to, inventions, patents, trade secrets, copyrights, software, computer programs and related documentation and other works of authorship.

5.403 Intellectual Property Rights Policy

5.403(a) Acquisition of Intellectual Property Rights

FDIC policy is to acquire from contractors only those intellectual property rights (in works created under contract) that are necessary to accomplish the mission of FDIC. FDIC acquisition of patents, copyrights, and other rights in data is done only when it is necessary to:

(1) Enhance the competitive process;

(2) Ensure the ability to use, maintain, repair, and modify products procured under FDIC contracts;

(3) Recoup development costs of, and fund improvements in, products and equipment; and

(4) Develop products for FDIC and public use.

5.403(b) Retention of Intellectual Property Rights Created under FDIC Contracts

Patents, data and copyrights have intrinsic intellectual property value to their creators, along with monetary value for those patented or copyrighted materials that can be sold or licensed to multiple customers. To the extent possible, rights to intellectual property developed under contract by contractors of FDIC are fully vested in the contractors, with FDIC retaining its own non-exclusive, paid-up, royalty-free, irrevocable license throughout the world, allowing FDIC to (a) use, disclose and reproduce the work in any medium of expression now known or subsequently developed, or (b) use the invention for FDIC purposes.

There may be instances where FDIC requires a contractor to assign all of its intellectual property rights to FDIC. This is done for works that are commissioned entirely by FDIC or in which the work has been jointly created by a contractor and FDIC employees. In particular, FDIC normally obtains complete ownership interests in software or computer programs funded and developed solely for FDIC. The Contracting Officer must fully coordinate with the Contracting Law Unit (CLU) on any solicitation involving intellectual property and any exceptions to this policy.

5.403(c) License Agreements

Contracting Officers must ensure that CLU has reviewed and approved any license agreement before signing and incorporating it into a contract.

5.404 Rights in Data and Copyrights

In contracts where data, including computer software, is used by or developed for FDIC, clear language must be included regarding FDIC rights of use. In those instances where data and pre-existing computer software is further developed or used under an FDIC contract, FDIC recognizes that contractors with legitimate proprietary interests in that data or software are entitled to be protected from unauthorized use and disclosure. The Contracting Officer must fully coordinate with CLU on any solicitation involving rights in data and copyrights and any exceptions to this policy.

APM Chapter 5.5 Options

5.501 Scope

This chapter covers the policy for use of options in FDIC awards.

5.502 Definitions

Option – The FDIC unilateral right to extend the period of performance of a contract or to purchase additional quantities of specified goods or services under predetermined conditions, as defined in the contract.

5.503 Options Policy

The Contracting Officer must include options in contracts when it is in the best interest of FDIC and when the need for an option is supported by the Program Office in its requirements package. Option prices must be evaluated for price reasonableness at the time of initial award.

APM Chapter 5.6 Subcontracting

5.601 Scope

This chapter covers the policy regarding the use of subcontracting.

5.602 Definitions

Prime Contractor – The contractor with which FDIC has a contract.

Subcontract – A contract that a contractor enters into with a subcontractor for the purpose of obtaining goods or services.

5.603 Subcontracting Policy

Subcontracting is encouraged on FDIC contracts to the extent that it provides support for minority and women-owned businesses and small disadvantaged businesses or enhances contract performance. As a part of acquisition planning, the Program Office identifies in the requirements package whether subcontracting is permitted. The Program Office must provide justification when recommending that subcontracting not be allowed. If the Contracting Officer agrees that subcontracting is not feasible for the requirement, the decision must be documented in the official contract file.

5.603(a) Approval to Subcontract

In order for a prime contractor to subcontract under an FDIC contract, the prime contractor must receive written consent from the Contracting Officer. FDIC acceptance of a firm's proposal with proposed subcontracting constitutes consent to such subcontracting. The Contracting Officer must screen all proposed subcontractors against the Debarred Vendors List found at http://fdic01/division/DOA/buying/fitness/debarredvendors.html and the System for Award Management (companies labelled as "Exclusion") at http://www.sam.gov before approving subcontractors.

5.603(b) Subcontractor Submission of FDIC Integrity and Fitness Representations and Certifications

All subcontractors with subcontracts over $100,000 must meet the provisions of the *FDIC Integrity and Fitness Representations and Certifications*. The prime contractor is responsible for:

(1) Obtaining the required certifications from subcontractors;

(2) Reviewing them for accuracy and completeness;

(3) Ensuring no subcontracts are issued to third parties who do not meet the requirements addressed in the representations and certifications;

(4) Referring any conflicts revealed by the certifications, or that arise during the course of performing work, to the Contracting Officer;

(5) Maintaining the representations and certifications; and

(6) Making the representations and certifications available to the Contracting Officer upon request.

5.603(c) Subcontracting Plan

The Contracting Officer must include in the solicitation a requirement for a written subcontracting plan, when the value of the prime contract is over $500,000 and subcontracting is permitted.

5.603(d) Subcontracting Plan Evaluation

The Technical Evaluation Panel evaluates subcontracting plans during proposal evaluations using the criteria in PGI 5.603(d).

5.603(e) Approving Subcontractors after Award

If subcontracting is proposed after award, or a new or different subcontractor is to be utilized, a subcontracting plan, or revised subcontracting plan, must be submitted by the contractor and approved by the Oversight Manager and the Contracting Officer in accordance with the criteria in PGI 5.603(e) prior to the subcontractor beginning work. If the plan is approved, the Contracting Officer must issue a modification to the contract.

5.603(f) Subcontracting Plan Compliance

The Oversight Manager and the Contracting Officer are responsible for monitoring compliance with the approved subcontracting plan and any approved plan revisions.

5.603(g) Subcontracting Reports

If subcontracting is approved, the Contracting Officer must include a requirement
* in the contract for the contractor to submit a subcontracting report quarterly. *

5.603(h) Subcontractor Markup

The Contracting Officer may allow prime contractors to apply subcontractor markup to subcontractor effort reimbursed under time-and-material and labor-hour contracts. A solicitation which permits subcontracting must also identify whether or not subcontractor markup is permitted.

APM Chapter 5.7 Incentive Contracting

5.701 Scope

This chapter covers policy regarding the use of incentive contracting, as it applies to FDIC. It pertains to various contractual mechanisms which are applicable to firm fixed price, labor hour, and time and materials contracts and are used to encourage contractors to perform efficiently and effectively; thereby motivating excellent performance.

5.702 Definitions

Monetary Incentive – A price addition to or price reduction from the contract's negotiated price(s) in firm fixed price contracts, or a price addition to or deletion from the contractor's incurred dollar amount for labor and material in labor hour or time and materials contracts.

Contract Extension Incentive – An increase to the contract's negotiated period of performance or ordering period, which either provides the contractor with additional work or the opportunity to compete for future additional work.

Award Term – A contractual mechanism used as a contract extension incentive. It is a process by which FDIC evaluates a contractor's performance and determines if it was accomplished at such a sufficient level as to have earned an extension to the contract's period of performance.

5.703 Incentive Contracting Policy

Incentive contracting is encouraged on FDIC contracts to the extent that it provides benefit to FDIC and enhances contractor performance. As part of acquisition planning, the Program Office and Contracting Officer should consider whether incentive contracting is appropriate and, if so, determine which incentive method is most appropriate for the acquisition. The Program Office and Contracting Officer must work together to establish the goals/targets that are subject to the incentive; the criteria for attaining the goals/targets, and the process for evaluating and rewarding the contractor. Typically, the incentives are established for goals/targets involving control over the amount of dollars incurred for labor and/or material, technical performance, and delivery.

Incentive contracting is designed to obtain specific acquisition objectives by:

(1) Establishing reasonable and attainable goals/targets that are clearly communicated to the contractor; and

(2) Including appropriate incentive arrangements designed to:

- Motivate contractor efforts that might not otherwise be emphasized; and
- Discourage contractor inefficiency and waste.

5.703(a) Monetary Incentives

The use of a monetary incentive must be approved by the Program Office. The purchase requisition and the FDIC cost estimate must include the estimated maximum amount of the monetary incentive, and a memorandum to file must be provided by the Program Office supporting the rationale for its use.

The procedures and formula for determining the monetary incentive must be established and contractually incorporated prior to the start of performance, i.e., pre-determined. The contract must separately identify the amount of the contract's total ceiling that represents the maximum dollar amount subject to monetary incentive. FDIC follows the contract's monetary incentive procedures to determine if an incentive has been earned. The Contracting Officer must notify the contractor in writing with the basis for the incentive results, along with any dollar increases or decreases applicable to the contract price. However, prior to notifying the contractor, approval of any incentive payment must be obtained from the respective ASB Assistant Director.

5.703(b) Contract Extension Incentive (Award Term)

Award term is considered a non-monetary contract extension incentive. It can stand alone as the only incentive mechanism on the contract or may be used in combination with monetary incentives. The award term process involves the evaluation of the contractor's performance against established criteria and rewards excellent performance by extending the contract without competition.

APM Chapter 5.8 Bonds and Insurance

5.801 Scope

This chapter covers use of bonds and insurance for financial protection against losses under contracts.

5.802 Definitions

Bond – A written promise to pay money or do some act if certain circumstances occur or a certain time elapses. The distinguishing feature of a bond is that it is an obligation to pay a fixed sum of money, at a definite time, with a stated interest, usually executed by the person with the primary obligation, the principal, and a second party, identified as the surety. Types of bonds include*:*

(1) Payment bond – A bond that assures payments are made to all persons working on, or supplying material for, a construction contract;

(2) Performance bond – A bond that guarantees completion of work that is required by the contract; and

(3) Fidelity bond – A bond to assure the faithful performance of an employee's duties to his or her employer and the employer's clients. The bond is used to cover losses from theft or embezzlement by an employee or other person holding a position of trust.

Insurance – A financial product with the promise of reimbursement in the event of loss.

Penal Amount – The amount specified in a bond (expressed in terms of dollars or a percentage of the contract price) as the maximum payment for which the surety is obligated.

Surety – An individual or corporation legally liable for the debt, default, or failure of a contractor to satisfy the contractual obligation.

5.803 Bonds and Insurance Policy

The policies in APM 5.804, *Bond*s and APM 5.805, *Insurance*, govern solicitations and contracts requiring bonds or insurance.

5.804 Bonds

5.804(a) Payment and Performance Bonds

The Miller Act (40 U.S.C. § 3131-3134) requires payment and performance bonds for construction contracts expected to exceed $100,000. It also requires a pledge of assets where the party acting as the surety is an individual.

The contractor must furnish payment and performance bonds before the Contracting Officer issues a notice to proceed with the work. When a contract price is increased, FDIC may require additional bond protection in an amount adequate to protect subcontractors or suppliers.

FDIC must require contractors to provide payment or performance bonds, or both. As a general rule, the penal amount of payment bonds should be equal to fifty (50) percent of the original amount of the contract; the penal amount of performance bonds should be equal to 100 percent of the original amount of the contract.

5.804(b) Fidelity Bonds

A fidelity bond in a reasonable amount, as determined by the Program Office, is required to cover potential losses to FDIC for contracts where the contractor handles funds for the FDIC or have access to financial accounts for which FDIC is responsible. A fidelity bond protects the bonded party against losses caused by the dishonest (intentional) acts of its employees, such as embezzlement, theft and fraud. FDIC must be named as a “loss payee” and as an “additional insured” on the fidelity bond. Frequently, when fidelity bonds are required, errors and omissions liability insurance as discussed in APM 5.805(b) may also be required.

The contractor may, in lieu of a fidelity bond, obtain and deliver to FDIC an unconditional, irrevocable letter of credit issued in favor of FDIC, by a financial institution acceptable to FDIC, in the dollar amount required for coverage.

5.804(c) Adequate Security in Lieu of Sureties

FDIC must obtain adequate security for bonds. Acceptable forms of security are:

(1) Corporate or individual sureties; or

(2) Any other types of security authorized in lieu of sureties as prescribed in PGI 5.804(c).

Any corporate surety of a bond offered by a contractor to FDIC must appear on the Treasury Sureties List maintained by the Treasury Department – see Treasury Department Circular 570 at http://www.fms.treas.gov/c570. The amount of the bond may not exceed the underwriting limit stated for the surety on that list. Bonds from individuals acting as sureties must be backed by assets

pledged to secure payment; either an escrow account containing cash, certificates of deposit or securities, or a recorded lien on real estate.

5.805 Insurance

5.805(a) Insurance Requirements

A contractor, before commencing work or permitting any subcontractor to commence work, must procure and maintain the insurance listed below, at no expense to FDIC:

(1) Worker's Compensation and Employer's Liability Insurance;

(2) Comprehensive Bodily Injury and Property Damage Liability Insurance (general liability);

(3) Automobile Public Liability and Property Damage Insurance (if vehicles are to be used in connection with work under the contract); and

(4) Other insurance as may be required elsewhere in the agreement documents.

Sole proprietors with no employees are exempt from the above insurance requirement.

FDIC must be named as an additional insured on the contractor's comprehensive general liability and comprehensive automobile liability insurance policies for contracts with a value of $100,000 or more.

5.805(b) Additional Forms of Insurance

Errors and omissions liability insurance coverage may be required for contracts where the services involve handling money for FDIC or FDIC is engaging professionals (e.g., accountants) and there is a risk of harm to FDIC should the contractor or its employees negligently perform services under the contract. As the term "errors and omissions" implies, such a policy provides coverage for losses sustained because of a mistake or oversight made by the contractor (the insured), i.e., a negligent act; it does not provide coverage for intentional wrongdoing. The Program Office decides what type and the amount of coverage it requires, depending on the nature of the particular contract.

The contractor may, in lieu of insurance coverage, obtain and deliver to FDIC an unconditional, irrevocable letter of credit issued in favor of FDIC, by a financial institution acceptable to FDIC, in the dollar amount required for insurance coverage.

5.805(c) Evidence of Insurance

The Contracting Officer must ensure that the contractor is in full compliance with the insurance requirements stated in the contract. The contractor must provide the Contracting Officer with certificates of insurance no later than ten (10) days after execution of the contract, unless otherwise granted an extension of time by the Contracting Officer. Other evidence of insurance the Contracting Officer may obtain from the contractor includes a binder or a copy of the original insurance policy.

5.806 Indemnification

When there is a higher than average risk of liability to third parties, resulting from acts by the contractor, the Contracting Officer must require the contractor to provide indemnification to the FDIC. The contractor must indemnify, hold harmless and defend the FDIC against all claims and costs that result from any act or omission constituting negligence, willful misconduct or breach of fiduciary duty in connection with the contractor's performance of the contract, committed or made by any officer, director, employee or agent of the contractor or its subcontractors. The term "claims and costs" includes losses, penalties, fines, forfeitures, amounts paid in settlement, judgments, reasonable attorneys' fees, court costs and related litigation expenses, e.g. expert witness fees. This obligation to FDIC extends to FDIC in all of its capacities and to all of its officers, directors and employees.

Any requests from contractors regarding indemnification must be referred to Contracting Law Unit for resolution.

APM Chapter 5.9 Taxes

5.901 Scope

This chapter covers policies for FDIC Contracting Officers and the Program Offices they support regarding federal, state and local taxes and duties.

5.902 Definitions

Reserved

5.903 Tax Policy

FDIC is exempt from taxation by federal, state, and local taxing authorities, with the exception of taxes assessed on its real property by states and local governments (12 USC §1825). FDIC is not required to pay sales tax on invoices submitted to it and it may be deducted from the total amount invoiced.

While FDIC itself is tax-exempt, its contractors generally are not tax-exempt. Sales taxes charged to a contractor on goods or services used in performing the contract are paid as part of the contract costs, unless there is a basis under a particular state's law for claiming an exemption.

APM Chapter 5.10 Warranties

5.1001 Scope

This chapter covers the policies on use of warranties in FDIC solicitations and contracts.

5.1002 Definitions

Warranty – A promise or affirmation given by a contractor to FDIC regarding the nature, usefulness, or condition of the goods or performance of services furnished under the contract.

5.1003 Warranty Policy

The Contracting Officer takes advantage of commercial warranties, including extended warranties, offered by the contractor for the repair and replacement of goods and services, where appropriate and in the best interests of FDIC. To determine whether use of a custom, modified or extended warranty is in the best interest of FDIC, an analysis must be performed to compare the benefits to be derived from the warranty with its acquisition and administrative costs.

For construction contracts, the Contracting Officer must use a warranty clause to ensure that performance and delivery conforms to the contract requirements and is free of any defect in equipment; material; or design furnished or workmanship performed by contractor, or any subcontractor or supplier, at any tier. The warranty for construction contracts must be for no less than one (1) year from the date of FDIC final acceptance of the work.

5.1004 Criteria for Use of Warranties

Contracting Officers and Program Offices must consider the guidance in PGI 5.1004 in evaluating non-standard warranties.

5.1005 Custom Warranty Clauses

The Contracting Officer must give careful attention to any special warranty terms and conditions beyond normal commercial warranties. These may include defects in material and workmanship, timely replacement/repair, the start and end of the warranty period, transportation costs in relation to warranty coverage, and any limitation on the total dollar amount of the contractor's exposure.

5.1006 Warranty Implementation Policy

Procedures, guidance and information for implementing warranties are at PGI 5.1006.

APM Chapter 5.11 Labor Laws - Service Contract Act and Davis-Bacon Act

5.1101 Scope

This chapter covers FDIC policies for Contracting Officers and Program Offices in implementing the Service Contract Act (SCA) and the Davis-Bacon Act (DBA).

5.1102 Definitions

Service Contract (As defined by the SCA of 1965) – Any government contract, the principal purpose of which is to furnish services in the United States through the use of service employees, except as exempted under section 7 of the SCA (41 U.S.C. §356) (http://uscode.house.gov/search/criteria.shtml), or any subcontract at any tier there under. See 29 CFR 4.130 for a partial list of services covered by the SCA at http://www.access.gpo.gov/nara/cfr/waisidx_06/29cfr4_06.html.

Service Employee – Any person engaged in the performance of a service contract other than any person employed in a bona fide executive, administrative, or professional capacity, as those terms are defined in 29 CFR Part 541, which is available at http://www.access.gpo.gov/nara/cfr/waisidx_06/29cfr541_06.html. The term "service employee" includes all such persons, regardless of any contractual relationship that may be alleged to exist between a contractor or subcontractor and such persons.

United States – The fifty (50) states, the District of Columbia, Puerto Rico, the Northern Mariana Islands, American Samoa, Guam, the U.S. Virgin Islands, Johnston Island, Wake Island, and Outer Continental Shelf lands, as defined in the Outer Continental Shelf Lands Act (43 U.S.C. §1331, et seq.), found at http://uscode.house.gov/search/criteria.shtml, but does not include any other place subject to United States jurisdiction or any United States base or possession in a foreign country (29 CFR 4.112). 29 DFR 4.112 is available at http://www.access.gpo.gov/nara/cfr/waisidx_06/29cfr4_06.html.

5.1103 Service Contract Act Policy

The SCA of 1965 applies to non-professional services; it requires contractors to pay their non-professional service employees' wages and fringe benefits not less than those prevailing in the region, as determined by the Secretary of the United States Department of Labor (DOL), Wage and Hour Division or in keeping with a collective bargaining agreement (CBA). The SCA applies to service contracts for non-professional services in excess of $2,500, performed in the United States, and entered into by FDIC in its corporate capacity. The SCA prescribes wage rates and benefits by locality and through CBAs. There are multiple exemptions to the application of the SCA See PGI 5.1103(b).

5.1104 Davis-Bacon Act Policy

The DBA (40 U.S.C. §3141 et seq.) requires contractors to pay salary and fringe benefits in amounts not less than the prevailing wage rates, as determined by the Secretary of the United States, DOL, or in keeping with a CBA, to workers who work on construction, alteration or repair of public buildings or public works. It applies to contracts in excess of $2,000, but does not apply where the construction work is: (1) incidental to the furnishing of supplies, equipment or services; or (2) so merged with non-construction work it can't be segregated as a separate contractual requirement. For FDIC purposes, this applies to FDIC-owned buildings or to leased buildings when FDIC is responsible for maintenance or repair contracts.

APM Chapter 5.12 Buy American Act; Trade Agreements Act of 1979

5.1201 Scope

This chapter covers FDIC policies relating to how FDIC Contracting Officers and Program Office implement the Buy American Act (BAA) and the Trade Agreements Act (TAA) of 1979 and the related trade agreements.

5.1202 Definitions

Reserved

5.1203 Buy American Act 41 USC §10a - 10d et seq. Policy

The BAA, under section 10a, requires FDIC to buy American made goods when it procures goods for use in the United States. The BAA applies to contracts with a value greater than the micropurchase threshold established by section 807 of P.L. 108-375 (currently $3,000) and applies to contracts entered into by FDIC in its corporate capacity only. In practice, the application of the BAA to FDIC procurements is significantly limited by several factors (see PGI 5.1203 for further guidance).

Section 10b of the BAA, covering construction contracts, does not apply to FDIC.

5.1204 Trade Agreements Act. of 1979 - 19 USC §2501 et seq. Policy

The TAA is the statutory authority for the trade agreements to which the United States is a party. The most significant of these is the World Trade Organization's Government Procurement Agreement (WTO GPA). Executive Order 12260, which implements the Government Procurement Agreement (GPA), lists FDIC as one of the executive agencies to which the obligations of the GPA apply. The GPA's purpose is to open up government procurement to international competition. It is designed to make the laws, regulations, procedures and practices of government procurement more transparent and to ensure they do not protect domestic products or suppliers, or discriminate against foreign products or suppliers.

The WTO GPA and other free trade agreements (FTAs) (such as the North American Free Trade Agreement and the Central American Free Trade Agreement) apply to contracts for goods, services and construction and they apply to FDIC when it contracts in its corporate capacity only. There are different

dollar thresholds that trigger application of the GPA and the other free trade agreements to the various types of contracts, and certain types of goods, services and construction are exempt from coverage (see PGI 5.12 for further guidance and the procedures to follow).

The special procedures mandated by the TAA and the various FTAs, the varying thresholds and the many exceptions to be considered in their application, coupled with the significant interplay between the BAA and the TAA in goods contracts (see below), create a level of complexity that makes the application of TAA requirements to procurements quite challenging. Therefore, whenever the TAA is indicated in the Acquisition Plan, the Contracting Officer should seriously consider using the General Services Administration's (GSA's) Federal Supply Schedule (FSS) to fill the requirement, because the GSA has covered the TAA requirements in its FSS solicitation.

If, however, the Contracting Officer and the Program Office believe a better value can be obtained for FDIC by FDIC conducting the solicitation itself, the Contracting Officer is required to consult with the ASB, Policy and Systems Section, and the Contracting Law Unit in the Legal Division, during the acquisition planning to assure that all the TAA solicitation requirements are met, the evaluation factors are correctly implemented and the specialized TAA clauses are included in the contract.

5.1205 Interplay of the Buy American Act and the Trade Agreements Act in Goods Contracts

There is significant interplay between the BAA and the TAA; both need to be considered when planning an acquisition of goods. In general, the BAA applies to a goods contract with a value of less than $25,000 (excluding micropurchases - currently $3,000 or less, as defined in the statute). For goods contracts with a value of $25,000 or greater, the TAA may apply, in which case the BAA does not apply. The application of the TAA must be analyzed at this juncture. If it is determined that the particular requirement is not covered by the TAA, then the BAA generally applies. See PGI 5.1203 and 5.1204 for further guidance on BAA and TAA procedures.

APM Chapter 5.13 Contract Payment

5.1301 Scope

This chapter covers the roles and responsibilities of the Contracting Officer and the Program Office regarding contract payments.

5.1302 Definitions

Advance Payments – Any payment of funds to an FDIC contractor before receiving goods or services under the contract or before the contractor begins performance and incurs costs under the contract. They differ from partial, progress, or other payments, which are based on the performance or partial performance of a contract.

Partial Payments – Payments for partial deliveries accepted by FDIC.

Performance-Based Payments – Payments made on the basis of:

(1) Performance measured by objective, quantifiable methods;
(2) Accomplishment of defined events; or
(3) Other quantifiable measures of results.

Progress Payments – Payments based on the estimate of work accomplished that meets the standard of quality established under the contract.

5.1303 Contract Payment Policy

The following policies apply to payments related to FDIC corporate and receivership contracts.

5.1303(a) Advance Payments

Advance payments represent an unusual contracting practice and require special consideration, approval, and administration. Therefore, advance payments for other than the exceptions listed below are not to be authorized, unless; the need is adequately justified and in the best interests of FDIC, the contract is to be competitively awarded, and the advance does not exceed 25 percent of the base year contract price (exclusive of option year prices). Advance payments are not authorized for paying contractor commissions or anticipated profits.

The following are exempt from the advance payment restriction:

(1) Post office box rentals;
(2) Tuition;
(3) Authorized insurance premiums;
(4) Extension or connection of public utilities for FDIC facilities;
(5) Subscriptions to online or hard-copy periodicals; and
(6) Software maintenance and licenses.

If a Program Office considers advance payments necessary for any requirement other than those listed above, the request must be included in the requirements package and approved by the respective ASB Assistant Director.

5.1303(b) Performance-Based Payments

Contracting Officers may use performance-based payments when in the best interest of FDIC. Performance-based payments are fully recoverable, in the same manner as progress payments, in the event of default.

Performance-based incentive payments are not subject to the interest penalty under the Prompt Payment Act (PPA); however, they must still be paid timely.

5.1303(c) Progress Payments

FDIC normally permits contractors to invoice on a monthly basis; however, FDIC may make progress payments more or less often when provided for by the contract. This form of contract payment includes:

(1) Payments based on the percentage or stage of work completed; or
(2) Partial payments based on deliverables accepted by FDIC.

5.1303(d) Withholding

The Contracting Officer has a responsibility to protect the interests of FDIC, and at the same time, not to act in an arbitrary or improper manner in violation of the contractor's rights. However, under the following circumstances, payment to contractors may be withheld:

(1) The contract contains a payment withholding provision, such as retention fees;
(2) A material breach of the contract by the contractor has occurred;

(3) Collection of an amount owed by the contractor under the same or any other contract has occurred;

(4) The Contracting Officer or Oversight Manager has been notified in writing of an allegation of fraud against the contractor or subcontractor by the Office of the Inspector General, or otherwise has reason to suspect fraud; or

(5) The contractor's performance is nonconforming or not acceptable.

Contracting Law Unit concurrence is required before withholding payments to the contractor other than when authorized in the contract.

5.1304 Invoices

Electronic invoicing is the preferred method of invoicing. Procedures for electronic invoicing are found at PGI 5.1304. Payments are normally made by electronic funds transfer, but may be made by check at the option of FDIC.

The Division of Finance (DOF) receives contractor invoices and processes them in the New Financial Environment (NFE). Oversight Managers must review and approve invoices in NFE in compliance with the terms of the contract and the PPA. DOF and the Oversight Manager must reject invoices that are incomplete or otherwise unacceptable.

5.1305 Prompt Payment Act

The PPA requires FDIC, in its corporate capacity, to pay proper invoices, either on the date specified in the contract, or if there is no such date, within thirty (30) calendar days after receipt of an acceptable invoice. In the event the invoices are not paid in the allotted time, interest begins to accrue at a rate set by the United States Department of the Treasury. FDIC is obligated to pay such interest automatically, until the invoice is paid, without request from the contractor.

The following payments are exempt from the PPA:

(1) Invoices (costs) related to contracts written in the receivership capacity or contracts with costs billed back to receiverships; or

(2) Incentive payments under performance-based contracts.

5.1305(a) Proper Invoice

The DOF reviews invoices for compliance with the PPA and FDIC electronic invoicing instructions prior to processing in NFE.

(1) A proper invoice under the PPA must be received in the proper format, and include the following items:

- Name and address of the contractor;
- Invoice date and invoice number (contractors should date invoices as close as possible to the date of mailing or transmission.);
- Contract and/or task/delivery order number;
- Line item number(s) as identified in the contract describing the goods or services, and the amount invoiced for each line item number;
- Description, quantity, unit of measure, unit price, extended price of goods delivered or services performed, and total invoice amount;
- Payment terms (discount for prompt payment terms);
- Remittance address (must be the same as that in the contract or in a proper notice of assignment);
- Name (where practicable), title, phone number, and mailing address of person to notify in the event of a defective invoice;
- Shipping information (e.g., shipment number, date of shipment, bill of lading number and weight of shipment. Shipping charges, if any, must be shown as a separate item on the invoice; and
- Any other information or documentation required by the contract.

(2) Additional invoice documentation that may be required by the contract, includes:

- For time and materials or labor hour contracts, copies of time sheets in support of direct labor charges; and
- While not subject to the PPA, invoices for contracts entered into in the receivership capacity, must include allocation of all hours and expenses to financial institution number and asset name/number, if applicable.

5.1305(b) Interest Penalties

(1) *Late Payment*: FDIC pays an interest penalty automatically, without request from the contractor, when all of the following conditions have been met:

- Division of Finance/Accounts Payable (DOF/AP) received a proper invoice;
- The Oversight Manager authorized payment;
- In the case of a final invoice, the payment amount is not subject to further contract settlement actions between FDIC and the contractor;
- The payment is not an incentive payment under a performance based contract; and

- DOF/AP paid the contractor after the due date.

(2) *Improperly Taken Discount:* FDIC pays an interest penalty automatically, without request from the contractor, if FDIC improperly takes a discount for prompt payment. The interest penalty is calculated on the amount of *discount* taken for the period beginning with the first day after the end of the discount period, through the date the contractor is paid.

(3) *Failure to Pay Interest:*

- FDIC pays a penalty amount, in addition to the interest penalty amount, only if:
  - FDIC owes an interest penalty of $1 or more;
  - FDIC does not pay the interest penalty within ten (10) days after the date the invoice amount is paid; and
  - The contractor makes a written demand, postmarked not later than forty (40) days after the date the invoice amount is paid, to DOF/AP for additional penalty payment.
- Contractors must support written demands for additional penalty payments. FDIC must not request additional data. Contractors must:
  - Specifically assert that late payment interest is due under a specific invoice, and request payment of all overdue late payment interest penalties and such additional penalties as may be required;
  - Attach a copy of the invoice on which the unpaid late payment interest is due; and
  - State that payment of the principal has been received, including the date of receipt.
- If there is no postmark or the postmark is illegible:
  - DOF/AP annotates it with the date of receipt, provided the demand is received on or before the 40th day after payment was made; or
  - If DOF/AP fails to make the required annotation, FDIC determines the demand's validity based on the date of the contractor demand; provided such date is no later than the 40th day after payment was made.

(4) *Disagreements:*

- DOF/AP does not pay interest penalties if payment delays are due to a disagreement between FDIC and the contractor concerning the payment amount, contract compliance, or amounts temporarily withheld or retained in accordance with the terms of the contract; and

- The FDIC and the contractor must resolve claims involving disputes, and any interest that may be payable in accordance with the disputes clause addressed in PGI 5.14.

(5) *Interest Penalty Computation*: FDIC computes interest penalties in accordance with Office of Management and Budget prompt payment regulations at 5 CFR Part 1315. http://www.fms.treas.gov/prompt.

APM Chapter 5.14 Protests, Claims, Disputes and Appeals

5.1401 Scope

This chapter covers all protests, claims, disputes and appeals of FDIC contracting actions and decisions affecting contractor performance.

5.1402 Definitions

Appeal – A request for reconsideration of a Contracting Officer's final decision.

Claim – A written demand or assertion for payment of money, a request for adjustment or interpretation of contract terms, or for other relief arising under or relating to an FDIC contract. Either FDIC or a contractor may make claims.

Dispute – A disagreement between a contractor and FDIC (contractor claim) regarding the rights of the parties. It originates when FDIC denies a claim. A contractor's claim becomes a dispute if the claim remains unresolved after the Contracting Officer has made a final decision.

Interested Party – Any contractor who is included on the solicitation list and has submitted a proposal in response to the solicitation.

Protest – A written objection to a solicitation for proposals, the cancellation of a solicitation, or the proposed award of a contract.

5.1403 Protest Policy

FDIC provides interested parties a formal administrative review of protests and resolves these issues expeditiously and at the Contracting Officer level to the maximum extent possible.

5.1403(a) Filing a Protest

Only an offeror who is an interested party may file a protest. A protest must be filed within ten (10) business days after the facts that form the basis of the protest are known, or should have been known. In order to be considered, the protest must contain:

(1) The interested party's name, address, telephone number, email address, facsimile number, and taxpayer identification number;

(2) Identification of the solicitation or contract at issue;

(3) A complete and concise statement of the protest, supported by relevant documents;

(4) Identification of all persons with information germane to the protest;

(5) Identification of the individuals in the ASB office who issued the solicitation or made the award, along with a chronology of efforts to resolve the matter prior to filing the protest; and

(6) A statement of the relief requested.

5.1403(b) Contracting Officer's Decision

The Contracting Officer must coordinate with the Contracting Law Unit (CLU) to develop and issue a final decision on a protest within ten (10) business days from the date the protest was received, following the procedures in PGI 5.1403. The decision must be transmitted to the contractor by U.S. Postal Service (USPS) certified mail, return receipt requested. The decision must include the notice of the right to appeal the decision to the ASB Deputy Director.

5.1403(c) Protest Appeal Process

The protestor has ten (10) business days after receiving the Contracting Officer's decision to submit an appeal. The ASB Deputy Director issues a final decision within twenty (20) business days of receipt of the appeal. The decision of the ASB Deputy Director on the appeal is final and must be transmitted to the contractor by USPS certified mail, return receipt requested.

5.1403(d) Protest and Appeals Policy for Office of Inspector General Contracts

The protest and appeals policies for Office of Inspector General (OIG) contracts are the same except the personnel designated for the review and appeals process. See PGI 5.1403(d) for specific designations.

5.1403(e) Remedies

If FDIC determines that a protest is valid, FDIC at its sole discretion may:

(1) Issue a new or amended solicitation or award the contract (consistent with applicable statutes, regulations, policies and procedures), if the protest is filed before the Contracting Officer awards the contract;

(2) Refrain from exercising options under the contract or awarding additional task orders, if the protest occurs post-contract award;

(3) Take any other action permitted by law to promote compliance with FDIC policies; or

(4) Take no further action.

5.1404 Claims, Disputes and Appeals Policy

FDIC provides interested parties a formal administrative review of claims or disputes and resolves these issues expeditiously at the Contracting Officer level by mutual consent to the maximum extent possible.

5.1404(a) Filing a Claim

A contractor must file any claim within the time period the contract specifies. If the contract is silent regarding the time period, then:

(1) For corporate contracts, the contractor files a claim according to the Statue of Limitations of the state in which the contract was executed; or

(2) For receivership contracts, the contractor files a claim within six (6) months of completion of the contract or within ninety (90) days following notice of FDIC intent to terminate the receivership, whichever date occurs first.

Claim Contents: A contractor's claim must contain:

(1) The name, address, telephone, email address, and facsimile number of the claimant;

(2) The contract or purchase order number;

(3) The specific relief the contractor requests;

(4) A summary of the pertinent facts and discussion of the specific contract provision under which the contractor is seeking relief, supported by all relevant documents (correspondence, reports, invoices, deliverables, etc.);

(5) A list of names, addresses, titles, telephone number(s) and email addresses of all persons who have knowledge of any facts relevant to the claim (FDIC employees, contractor employees, contractor's legal counsel); and

(6) Senior contractor official's certification that:

- The claim is made in good faith;
- The supporting data are accurate and complete to the best of the their knowledge and belief; and
- The amount of relief requested accurately reflects the contract adjustment for which the contractor believes FDIC is liable.

5.1404(b) Contracting Officer's Decision

The Contracting Officer must develop an interim decision in coordination with CLU and then discuss it with the contractor as appropriate in an effort to reach agreement on the final decision.

The Contracting Officer must issue a final decision on a claim on a corporate contract within sixty (60) days from the date the claim was received. For receivership contracts, the Contracting Officer must issue a final decision within one hundred eighty (180) days, as required by the Federal Deposit Insurance Act. The final decision must be transmitted to the contractor by USPS certified mail, return receipt requested. The Contracting Officers final decision must include the notice of the right to appeal the decision to the ASB Deputy Director.

5.1404(c) Claims Appeal Process

The contractor has sixty (60) days after receiving the Contracting Officer's decision to submit an appeal to the ASB Deputy Director, at which point the claim becomes a dispute. The ASB Deputy Director issues a final decision on the dispute within thirty 30 days of receipt of the appeal. The decision of the ASB Deputy Director is final and not subject to further FDIC administrative review. The contractor may then take the appeal to the appropriate federal court within six (6) months of the date of receipt of the ASB Deputy Director's final

decision. The decision of the ASB Deputy Director must be transmitted to the contractor by USPS certified mail, return receipt requested.

5.1404(d) Claims and Disputes Policy for OIG Contracts

The claims and disputes policies for OIG contracts are the same except for the personnel designated for the review and appeals process. See PGI 5.1404(d) for specific designations.

5.1404(e) Remedies

If FDIC determines that a dispute or claim is valid and the contract is active, FDIC at its sole discretion may issue a bilateral modification in the amount determined payable under the decision, less any portion already paid. If the contract has expired, FDIC must issue a settlement agreement to document the resolution. The Contracting Officer provides CLU the information necessary to prepare the settlement agreement.

APM Chapter 5.15 Legal Review of Acquisition Documents and Contract Actions

5.1501 Scope

This chapter covers policy on the requirements for the legal review of acquisition documents and contract actions through all phases of the acquisition process.

5.1502 Definitions

Reserved

5.1503 Legal Review Policy

The Contracting Law Unit (CLU) of the Legal Division provides legal advice and counsel to Contracting Officers to ensure that acquisitions and other contract actions are conducted in accordance with governing laws and FDIC policy. This policy does not relieve the Contracting Officer of the responsibility of ensuring that all contract actions and documents are in compliance with the APM and PGI.

5.1503(a) Solicitations $1,000,000 or Greater

Contracting Officers must obtain CLU review of solicitation and draft contractual documents (contracts, blanket purchase agreements, basic ordering agreements, receivership basic ordering agreements, task orders and delivery orders) for legal sufficiency when the acquisition is $1,000,000 or greater.

5.1503(b) Other Legal Reviews

Contracting Officers must additionally obtain legal review in the following instances:

(1) Ratifications of unauthorized contractual commitments; (see APM 1.211);

(2) All offeror/contractor conflict-of-interests issues;

(3) Any cases of suspected procurement fraud or criminal violation;

(4) Requests to deviate from acquisition policy, procedures and standard clauses and provisions when, after consultation with ASB policy, it is determined legal review is required;

(5) All solicitations in which the Trade Agreements Act is implicated (see APM 5.1204);

(6) All solicitations requiring payment or performance bonds (see PGI 5.804(a);

(7) All contracts involving software licenses, rights in technical data, copyrights or patents or otherwise involving intellectual property (see PGI 5.4;

(8) All requests for indemnification;

(9) Modifications to contracts involving major changes in specifications or requirements;

(10) Any proposed modification that, in the opinion of the Contracting Officer, adds work outside the scope of the original award;

(11) All consents to assignment, novations, and assignment of claims or release of claims;

(12) Any notice to the contractor of a delinquency or deficiency in performance that could lead to a stop work order, show cause letter, cure notice, termination for convenience or termination for default;

(13) Any response by FDIC to a protest (see APM 5.14 and PGI 5.14);

(14) Any response by FDIC to a dispute or claim (see APM 5.14 and PGI 5.14);

(15) All matters relating to settlement agreements; and

(16) All tax questions (see PGI 5.903(b)).

These prescriptions for legal review do not preclude the Contracting Officer from seeking advice from the CLU on matters that, in the judgment of the Contracting Officer, constitute a greater than normal risk to the FDIC or present novel issues that may raise legal concerns or have legal ramifications. Contracting Officers are encouraged to consult with CLU as the need arises.

5.1504 Contracting Officer Responsibilities

The Contracting Officer is responsible for obtaining legal review when it is required. When determining the dollar threshold of an acquisition, the value is its cumulative value, including the base period and all options. The

Contracting Officer must include a copy of the legal review request and CLU's determination of legal sufficiency, or other advice or legal opinion given, in the official contract file.

The Contracting Officer must abide by any determination provided by CLU regarding legal sufficiency. However, if the Contracting Officer receives legal advise, as opposed to a determination of legal sufficiency, and determines there is adequate justification not to follow the advise, the action must be approved by the respective ASB Assistant Director. The Contracting Officer must notify CLU of the final resolution. The decision, approval, and all related documentation must be placed in the official contract file.

5.1505 Contracting Law Unit Responsibilities

The CLU must provide timely review and response to requests for review of the legal sufficiency of documents or requests for a legal opinion. A legal sufficiency review encompasses consideration of both: (1) the laws governing the contract, including the application of the general principles of contract law found in case law, e.g., the adequacy of consideration, the effect of ambiguities in the documents, the legal capacity of the contractor, and the like; and (2) the contracting policies and procedures in the APM and the PGI. A legal opinion analyzes the application of relevant law to a particular set of facts, answers the questions raised and gives advice and counsel.

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MODULE 6: CONTRACT MANAGEMENT AND ADMINISTRATION

APM Chapter 6.1 FDIC Automated Procurement System

6.101 Scope

This chapter covers use of the FDIC Automated Procurement System (APS) by Contracting Officers and other authorized users.

6.102 Definitions

Reserved

6.103 FDIC Automated Procurement System Policy

FDIC Contracting Officers must use the FDIC APS for all functional areas. The Legal Division's Contracting Law Unit must use APS for review and approval of solicitations when legal review is required. Members of the Office of Minority and Women Inclusion may use APS to review solicitations for the purpose of providing suggested sources for the solicitation list.

APM Chapter 6.2 Contract File Management

6.201 Scope

This chapter covers the contract file management policies to be used by FDIC Contracting Officers and the Program Offices they support.

6.202 Definitions

CEFile - CEFile stands for Contract Electronic File. CEFile is a utility that automates the official contract files through the use of Documentum and the FDIC Digital Library (FDL).

Contracting Officers use the CEFile Utility to create electronic contract files with standard subfolders in FDL. The files are then maintained in FDL by Contracting Officers, Oversight Managers and Technical Monitors. The CEFile Utility and FDL combined are referred to as CEFile.

Official Contract File – A file that is stored electronically in CEFile and contains the official contract records for an award.

6.203 Contract File Management Policy

Contracting Officers, Oversight Managers and Technical Monitors must ensure that their contract file is maintained in CEFile and is current, accurate, and complete throughout the life of the contract. Documentation in CEFile must provide a complete history of all procurement related actions and the basis for informed decisions at each step in the acquisition and contract oversight process (see PGI Chapter 6.2 for further guidance on contract file management.

APM Chapter 6.3 Contract Reporting

6.301 Scope

This chapter covers the policies applicable to contract reporting by the ASB.

6.302 Definitions

Reserved

6.303 Contract Reporting Policy

ASB, Policy and Systems Section, is responsible for preparing and submitting the following reports. Contracting Officers and P-Card holders must assist in the collection of data for these reports:

(1) *Buy American Act Place of Manufacture Report*: Section 837 of the Consolidated Appropriation Act requires the head of each federal agency to submit an annual report to congress relating to acquisitions of articles, materials, or supplies that are manufactured outside the United States;

(2) *The Contract Assessment Report*: The FDIC Board resolution dated December 5, 2006, discussing Procurement and Payment Authority, requires a semi-annual report to the Board of Directors which summarizes FDIC contracting activity. The report includes all contracts (including task orders) and interagency agreements with a value of $5,000,000 or more;

(3) *Internal Revenue Service Reports*:

- All contract awards made with appropriated funds. (e.g., Office of Inspector General contracts); and
- Convenience checks purchases. Certain convenience check transactions must be reported to the Department of Treasury - Internal Revenue Service. The information is for the completion of Department of Treasury - Internal Revenue Service *Form 1099-MISC*. Purchase card holders must obtain contractor information at the time of sale in order to complete the convenience check log for the end-of-year 1099 report.

(4) *Minority and Women-Owned Business Activity Report*: ASB must provide to the Office of Minority and Women Inclusion the dollar value of all contracts awarded to minority and women-owned businesses (MWOBs) and small disadvantaged businesses (SDBs), including MWOB and SDB subcontract dollar values.

FDIC is exempt from reporting contract award data in the Federal Procurement Data System - Next Generation.

APM Chapter 6.4 Contract Administration and Oversight Management

6.401 Scope

This chapter covers the roles and responsibilities of Contracting Officers, Oversight Managers and others in the administration of FDIC contracts.

6.402 Definitions

Contract Administration – The process of ensuring that all aspects of a contract are fulfilled, beginning after the award of the contract and continuing through the closeout of the contract.

Oversight Management – The management of the technical performance requirements of the contract, which is primarily a responsibility of the Oversight Manager. Oversight management ensures that the contractor delivers the required goods or performs the work according to the delivery schedule in the contract. It also includes the monitoring of funds expenditure in relation to the contract ceiling. The Program Office is responsible for ensuring that adequate resources are available for monitoring contractor performance.

Oversight Manager – The FDIC employee nominated by the Program Office, and appointed by the Contracting Officer, whose responsibility it is to monitor and evaluate contractor performance under an FDIC contract.

Technical Monitor – The FDIC employee nominated by the Program Office, and appointed by the Contracting Officer, whose responsibility it is to assist the Oversight Manager in monitoring and evaluating contractor performance under an FDIC contract

6.403 Contract Administration and Oversight Management Policy

The Contracting Officer is responsible for overall contract administration. Contract administration begins after the contract has been awarded, and continues through acceptance of the goods or services, final payment, and ends when the contract has been closed out.

All procurement actions require some level of administrative management (contract administration), as well as performance monitoring and management (oversight management) by the Contracting Officer and the Program Office. The extent varies based upon many factors, including contract type, the complexity of the requirement, and the dollar amount of the contract action.

The Contracting Officer and Oversight Manager jointly perform contract administration and oversight. Other organizations, including the Contracting Law Unit of the Legal Division, the Office of Minority and Women Inclusion, the Security Management Section, and the Accounts Payable Processing Unit also play a role in contract administration.

6.404 Contract Management Plan

The Contracting Officer and the Oversight Manager must develop a Contract Management Plan (CMP) for the acquisition of services having a total estimated value of $1,000,000 and greater. This $1,000,000 threshold applies to all contracts. For task order, the $1,000,000 threshold applies at either the BOA/RBOA/BPA level or at the task order level, depending on the nature of the task orders. If the combined value of the task orders is expected to be $1,000,000 or greater and the task orders will all involve the same administration approach, a single CMP may be processed at the BOA, RBOA, or BPA level. The processing of a single CMP thereby avoids redundancy and unnecessary paperwork. Any task order with a value of $1,000,000 or greater which does not meet the conditions for inclusion under a single CMP at the BOA/RBOA/PBA level, requires a separate CMP. The objective of the CMP is to ensure that the Contracting Officer, Oversight Manager, and Technical Monitor have a common Understanding of both contractor and FDIC obligations under the contract. The Contracting Officer is responsible for initiating the CMP and ensuring a signed copy is filed in the official contract file. In situations where a CMP is prepared at the BOA/RBOA/PBA level instead of the task order level, a copy of the CMP must also be included in the official contract file for each task order to which it pertains.

6.405 Nomination and Appointment of Oversight Manager and Technical Monitor

Only a Contracting Officer may enter into a contract or change a contractual commitment. The Contracting Officer is responsible for ensuring compliance with the contract and may delegate certain authorities to other qualified personnel. In order to facilitate proper contract administration, the Contracting Officer appoints an Oversight Manager (and Technical Monitor if required) to monitor contract performance for all contracts over $100,000, or other contracts where appropriate. Training requirements for Oversight Managers and Technical Monitors and the nomination and appointment process are detailed in PGI 6.405. For awards less than $100,000 of a non-technical nature, the Contracting Officer is not required to use an official appointment memorandum to appoint an Oversight Manager, but the Oversight Manager must still be identified in the FDIC Automated Procurement System.

6.406 Post-Award Conference

A post-award conference is convened if needed to ensure there is a mutual understanding of all contract terms and conditions, and for clarification of any potential issues between FDIC and the contractor.

The Contracting Officer and Oversight Manager must determine the need for a post-award conference. Their determination is based on the dollar value of the award, the complexity of the work, any projected difficulties in contractor performance and other factors relating to successful and timely contract performance. The Contracting Officer is responsible for convening post-award conferences, and is supported by the Oversight Manager.

6.407 Oversight Manager Responsibilities

The Oversight Manager monitors the contractor's performance of the contract, acts as a technical liaison between FDIC and the contractor and ensures technical compliance with the contract by all parties. The Oversight Manager does not have contractual authority and thus must not:

(1) Solicit proposals or approve changes to the contract;

(2) Modify contract terms and conditions;

(3) Approve changes in cost, schedule, delivery, quality, or other terms and conditions;

(4) Render a decision on any contractual dispute or express an opinion to the contractor on dispute matters; and/or

(5) Discuss future contract plans or other advance information, which may provide preferential treatment of one contractor over another.

6.408 Monitoring Contract Performance

The Oversight Manager and Technical Monitor appointment memorandums delegate responsibilities and detail information on these responsibilities, as found in the PGI. These include, but are not limited to:

(1) Clear and frequent communications with the contractor and the Contracting Officer;

(2) Maintaining independent status of contractors;

(3) Contractor personnel qualifications and access;

(4) Site visits;

(5) Inspection and acceptance;

(6) Completing contractor performance evaluation (s) for each contract with a total value of $1,000,000 or more, and

(7) Protecting sensitive information.

6.409 Ratification of Unauthorized Contractual Commitments

Ratification policy is discussed at APM 1.211 and ratification procedures, guidance and information is covered at PGI 1.211(c).

APM Chapter 6.5 Contract Modifications

6.501 Scope

This chapter covers policies for preparing and processing contract modifications for all types of contracts.

6.502 Definitions

Administrative Change – A unilateral contract modification that does not substantially affect the rights of the parties, e.g., a change in the paying office or accounting office.

Bilateral Modification – A contract modification that is signed by the contractor and the Contracting Officer.

Constructive Change – An act or failure to act by the Contracting Officer (or representative of the Contracting Officer), which is construed as if a change was actually issued.

Contract Modification – A written alteration in the specifications, delivery point, rate of delivery, contract period, cost, quantity, or other provisions of an existing contract which creates a unilateral (under a provision in the contract) or bilateral (by agreement of the parties) change to the contract.

Novation – A process for changing the name of the contractor on a contract when the responsible contractor is bought out by another firm, merged into another firm or otherwise changes its business name in the ordinary course of commerce.

Option – The unilateral right of FDIC to extend the period of performance of a contract or to purchase additional quantities of a specific product or service under predetermined conditions as defined in the contract.

Substantive Change – A bilateral contract modification that generally involves changes in the rights or obligations of the parties to the contract, e.g., extensions to the period of performance.

Unilateral Modification – A contract modification that is signed only by the Contracting Officer.

6.503 Contract Modification Policy

Only Contracting Officers acting within the scope of their authority are empowered to execute contract modifications. No other FDIC personnel have the authority to:

(1) Execute contract modifications;

(2) Act in such a manner as to cause the contractor to believe that it has authority to bind FDIC; or

(3) Direct or encourage the contractor to perform work that should be the subject of a contract modification, i.e., work outside of the scope of the requirements stated in the contract.

6.504 Types of Contract Modifications

There are two types of contract modifications, unilateral and bilateral. Modifications to incorporate administrative changes or other changes permitted by contract clauses are generally unilateral. Substantive changes are bilateral.

6.504(a) Unilateral Changes

Unilateral changes are of a nature that does not require agreement of the contractor. Examples of unilateral changes include:

(1) Appointment or change in either the Contracting Officer, Oversight Manager or Technical Monitor;

(2) Changes permitted by specific contract clauses, such as the changes clause or the exercising of an option period; and

(3) Administrative changes, such as corrections of typographical errors not affecting the substance of the contract, or changes in billing instructions or address.

6.504(b) Bilateral Changes

Bilateral changes are substantive in nature and alter the rights and obligations of the parties. The Oversight Manager identifies the need and provides the Contracting Officer with the requirements documentation and funding. The Contracting Officer is responsible for issuing a modification to the contract. Examples of bilateral (substantive) changes include:

(1) A change in the dollar amount;

(2) A change in the delivery schedule;

(3) A change in the quantity and nature of deliverables;

(4) An extension of the contract not contemplated by the contract;

(5) A change in performance requirements; or

(6) Changes to key personnel.

6.505 Constructive Changes

FDIC policy is to manage contracts carefully and professionally to eliminate the cost and inefficiencies caused by constructive changes. A constructive change is an act or failure to act by the Contracting Officer, Oversight Manager or other FDIC official that the contractor construes as an order under the contract. Both the Contracting Officer and Oversight Manager are responsible for guarding against the possibility of constructive changes by careful contract administration and oversight.

6.506 Consent-to-Assignment: Novation

A contractor cannot assign its contract with FDIC without the consent of FDIC. Requests to assign a contract usually come from contractors when:

(1) A contractor changes its form of doing business, e.g., from a sole proprietorship to a corporation;

(2) A contractor sells its business or merges with another company; or

(3) A contractor proposes to add a joint venture partner to the contract.

FDIC consents to assignment of a contract and to enter into a novation with the current contractor, and the substituted contractor, when it is in the best interest of FDIC to do so. A novation must meet the requirements of FDIC and must not increase its liability. The Contracting Officer, in consultation with the Oversight Manager and the Contracting Law Unit (CLU), completes this assessment, using the guidance in PGI 6.506.

6.507 Assignment of Claims

A contractor may assign its claims for monies due or to become due under a contract to an institution providing financing to it, such as a bank, trust company or federal lending agency. Reassignment for the same purpose is permitted, as well. Any assignment or reassignment must be for the entire remaining amount payable under the contract. An assignment may be made to one party only; if more than one party provides financing, payment may be made to an agent or trustee for the parties participating in the financing.

The assignee must provide the Contracting Officer with a written notice of the assignment and a copy of the assignment document. The Contracting Officer

must consult with CLU before processing the assignment and modifying the contract.

6.508 Stop Work Orders

Stop work orders may be used, when appropriate, in any contract for goods or services if work stoppage is in the best interest of FDIC. Stop work orders require the contractor to immediately comply with the terms of the stop work order and take all reasonable steps to minimize costs associated with the contract during the period of the stop work order.

Generally, a stop work order will be issued only if it is advisable to suspend work pending a decision by FDIC and a negotiated modification providing for the suspension is not feasible. Issuance of a stop work order must be approved by the respective ASB Assistant Director. Stop work orders must not be used in place of a termination notice after a decision to terminate has been made.

As soon as feasible after a stop work order is issued, but before its expiration, the Contracting Officer must take appropriate action to:

(1) Terminate the contract;

(2) Cancel the stop work order (any cancellation of a stop work order is subject to the same approval level as was required for its issuance); or

(3) Extend the period of the stop-work order if it is necessary and if the contractor agrees.

APM Chapter 6.6 Contract Termination

6.601 Scope

This chapter covers the authority and responsibility of Contracting Officers to terminate contracts, in whole or in part, for the convenience of FDIC or for default. It also covers the duties of the contractor and the Contracting Officer after issuance of the notice of termination.

6.602 Definitions

Termination for Convenience – The cancellation of all or any portion of the unfinished remainder of the performance obligations set forth in a contract for the convenience of FDIC.

Termination for Default – The termination of a contract where the contractor has failed to perform a material obligation under the contract (such as failing to deliver within the prescribed time or failing to make satisfactory progress) or where an unresolved conflict of interest exists or an ethics violation has occurred.

6.603 Termination Policy

FDIC may terminate contracts under two different procedures. The decision to terminate a contract for default or convenience is made by the Contracting Officer, after consultation with, and concurrence from the Contracting Law Unit (CLU).

6.604 Termination for Convenience

Termination for convenience most often is done when complete performance by the contractor may not be needed, or when FDIC requirements have changed to such an extent that continued performance is not in the interest of FDIC. This right is generally not used for off-the-shelf items, or for contracts with short delivery times. When a contract is terminated for the convenience of FDIC, the Contracting Officer must negotiate a settlement which compensates the contractor for work performed, and reimburses the contractor's reasonable termination expenses incurred prior to the effective date of the termination. The Contracting Officer must obtain written concurrence from the Oversight Manager and CLU before proceeding with a termination for convenience.

6.605 Termination for Default

FDIC has the right to terminate the contract completely or partially for default, if the contractor fails to:

(1) Deliver the goods or perform the services within the time specified in the contract or any extension;

(2) Make progress, so as to endanger performance of the contract;

(3) Perform any of the other provisions of the contract; or

(4) Resolve a conflict of interest or other ethics violations.

After a contract has been terminated for default, FDIC may assess the contractor any excess cost incurred in re-procurement of the contract items or services from another source.

Any termination for default requires the written concurrence of the Oversight Manager and the CLU. If the termination involves a minority and woman-owned business or small-disadvantaged business, the Contracting Officer notifies the Office of Minority and Women Inclusion prior to the termination.

APM Chapter 6.7 FDIC-Furnished Property

6.701 Scope

This chapter covers the policies for providing FDIC property to contractors for their use and management in performing FDIC contracts. It also covers the reporting, redistribution, and disposal of contractor property inventory.

6.702 Definitions

Contractor-Acquired Property – Property acquired or otherwise provided by the contractor for performing a contract and to which FDIC has title.

FDIC-Furnished Property – Property in the possession of, or directly acquired by, FDIC and subsequently made available to the contractor.

FDIC Property – All property owned by or leased to FDIC, or acquired by FDIC under the terms of the contract. It includes both FDIC-furnished property and contractor-acquired property as defined in this section.

Property – Furniture, materials, fixtures and equipment.

6.703 FDIC-Furnished Property Policy

Contractors are ordinarily required to furnish all property necessary to perform FDIC contracts. FDIC provides property to a contractor when necessary to achieve significant economy, standardization, expedited production, or when it is otherwise in the interest of FDIC. Solicitations must specify the material that FDIC furnishes, how it is controlled and returned to FDIC or otherwise disposed of.

If contractors possess FDIC property, FDIC must:

(1) Require contractors to be responsible for, and to keep official records of, FDIC property in their possession or control, as provided for in the contract property provision;

(2) Determine whether FDIC property is to be returned to FDIC upon completion of the contract. If the property is not to be returned upon contract completion, the contract must either state the disposition of the property or stipulate that the Contracting Officer provide disposition instructions for the property upon contract completion; and

(3) Require the FDIC Oversight Manager to maintain a record of all FDIC property in the possession of the contractor.

6.704 Contracting Officer Responsibilities

After contract award, the Oversight Manager monitors FDIC property in possession of the contractor and advise the Contracting Officer of any issues. Periodically, the Contracting Officer must collect information on the status of any FDIC-furnished property. This can be done through contract progress meetings, briefings and/or reports, at the discretion of the Contracting Officer.

6.705 Oversight Manager Responsibilities

The Oversight Manager must work with the contractor in controlling FDIC-furnished property in accordance with the Contracting Officer's instructions. The Program Office maintains the official FDIC property records when FDIC property is furnished to a contractor. FDIC property records established and maintained by the contractor, under the terms of the contract, must be reconciled periodically with the official FDIC property records. The Oversight Manager must monitor and document disposition of FDIC property throughout the life of the contract.

6.706 Transfer of FDIC Property to the Contractor

(1) The FDIC Contracting Officer may authorize the transfer of title of FDIC-funded, contractor-acquired property to the contractor when the value of the property at the end of the contract is minimal, the technology is obsolete, or the equipment is of such a specialized nature that it would be of no use to FDIC; or

(2) Contractor-acquired FDIC property may be transferred to the contractor either at the time of acquisition or at contract completion when it has been determined by the Program Office and the Contracting Officer that it is in the best interest of FDIC to do so. Whenever possible, this determination should be made prior to contract award. The material to be transferred and the time of transfer must be specified in the contract.

6.707 Property Disposition Options

Disposition of FDIC property under contractor control must be in accordance with the guidance at PGI 6.707.

APM Chapter 6.8 Contract Closeout

6.801 Scope

This chapter covers the requirements for closing out contract files and the roles and responsibilities of the Contracting Officer and Oversight Manager.

6.802 Definitions

Contract Closeout – The final contract administration process undertaken to complete a contract and close out the official contract file.

6.803 Contract Closeout Policy

The purpose of contract closeout is to verify that both parties to the contract have fulfilled their contract obligations, and there are no open issues or responsibilities remaining. It requires close coordination and teamwork between the Oversight Manager and Contracting Officer.

A contract is completed when all goods or services have been received and accepted; all reports have been delivered and accepted; all administrative actions have been accomplished; all FDIC-furnished equipment and materials have been returned when required and been accounted for by the Program Office; and final payment has been made to the contractor.

A contract file must not be closed if:

(1) Outstanding performance or payment is due;

(2) The contract is in litigation or under appeal;

(3) Audit activities are pending; or

(4) In the case of a termination, all termination actions have not been completed.

6.804 Disposition of Contract Files

Disposition of FDIC contract files is pursuant to the FDIC records management procedures and the guidance in PGI 6.804.

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