UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 7
901 NORTH 5TH STREET
KANSAS CITY, KANSAS 66101

May 21, 2010

MEMORANDUM

SUBJECT: Appointment of Task Order Project Officer
Contract: EP-S7-09-08
Task Order: 0016
Contractor: Chenega Global Services, LLC

TO: Katy Miley

FROM: James E. Price
Contracting Officer

1. You are hereby appointed as the Task Order Project Officer (TOPO) under the contract identified above. As the TOPO, you will function as my primary representative under Contract EP-S7-09-08, Task Order 0016. Your duties include interfacing with the contractor, Chenega Global Services LLC, in various areas such as administration of all contract tasks, providing technical clarification and monitoring the performance of work under both the contract and with respect to the contract Statement of Work/Specifications. Additionally, you will function as primary liaison between Region 7 and myself to insure coordinated and cohesive actions to support program needs. I refer you to Chapter 7 (29 Jan 03) of the EPA Contracts Management manual for additional insight into this assignment. I will ensure Contract EP-S7-09-08, Task Order 0016 reflects this appointment. I have listed specific duties and responsibilities of this assignment in this memorandum.

2. The duties delegated in this letter are not redelegable. You may be personally liable for actions taken or direction given beyond the authorities delegated in this letter. In accomplishing your duties, you are cautioned to carefully review and comply with EPA Order 1900.1, Use of Contractor Services, dated April 14, 1994, and EPA Order 1900.2, Contracting at EPA, dated October 22, 1990.

3. The following authority and responsibilities are hereby delegated to you as TOPO:

(a) Provide the contracting officer statement of work, independent government cost estimate, purchase request, and other required documentation prior to issuance or modification.

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(b) Monitor contract performance and immediately report any problems to the contracting officer. Keep the contracting officer informed, both orally and in writing, of the status of the contract and performance of its requirements. No periodic reports to the contracting officer are required, but care should be taken to promptly report any potential disagreement or controversy which may arise.

(c) Ensure that the contractor complies with the contract statement of work. Assist the contracting officer in interpreting technical requirements of the contract statement of work. Differences of opinion between the Government and the contractor shall be referred to the contracting officer for resolution.

(d) Ensure copies of all appropriate government technical correspondence (i.e., action memorandum amendments, request for statement of work changes) are forwarded to the contracting officer for placement in the contract file.

(e) Review any technical reports required under the contract.

(f) In the event of contractor delay, or failure to perform, determine the cause and make recommendations for appropriate corrective and/or preventive measures to the contracting officer.

(g) Periodically check contractor performance to ensure that the individual contractor employees are of the skill levels required and are actually performing at the levels charged during the period covered.

(h) Compare the contractor's progress to expenditures and advise the contracting officer of any disparity indicating excess or deficient funding. Monitor contractor costs and promptly report, in writing, wasteful contractor practices to the contracting officer .

(i) Review contractor invoices and recommend approval/disapproval for payment as appropriate.

(j) Recommend in writing to the contracting officer any changes desired in the contract statement of work. YOU ARE NOT DELEGATED AUTHORITY TO MAKE ANY CHANGES IN THE STATEMENT OF WORK OR SPECIFICATIONS OR DUTIES OF THE PARTIES AS STATED IN THE CONTRACT.

(k) Ensure that the contract is modified by the contracting officer before the contractor proceeds with any changes in the work or services to be performed(verify with contracting officer).

(l) Perform inspection of completed work and/or services and certify acceptance or nonacceptance of work.

(m) Inform the contracting officer of any potential or real conflict of interest which may arise under the contract. Recommend possible mitigation or avoidance strategies.

(n) As requested, prepare and forward to the contracting officer cost estimates for any proposed increase or decrease in the work and/or services to be performed. Obtain certified funds when necessary for proposed increases.

4. This delegation as TOPO does not in any way alter or supersede your existing relationship with your supervisor.

5. You are reminded that you have not been granted any contracting authority. You are not authorized to issue delivery orders, task orders, consent to subcontracts, issue notices to proceed (EPA Form 1900-49), orders for services (EP A Form 1900-48), letter contracts (EPA Form 1900-56), authorize the purchase of property, or issue stop work orders in conjunction with this contract.

6. This appointment is effective from the date of this letter and shall remain in effect until closeout and final payment of the assigned contract or until terminated in writing by the contracting officer .

7. If you have any questions, please call me at (913) 551-7239.

EPA

ORDER

Classification No.: **1900.1A CHG 2**
Approval Date: **December 13, 2005**
Review Date: **December 13, 2008**

Interacting With Contractors

1. **PURPOSE.** This Order provides general guidance to Federal employees on maintaining proper relationships with contractors. The Order highlights issues that may arise in an environment where Federal employees and contractors work closely together. It is not a substitute for contracts, ethics, or legal advice. Please obtain advice on specific issues from the cognizant CO, ethics official or legal counsel. Many issues require an extensive review of the facts and circumstances as well as a detailed knowledge of the terms of the contracts and the applicable regulations.

2. **APPLICABILTY.** The Order applies to all contracts funded with Agency appropriations, including contracts awarded by Agency contracting officers and Government wide acquisition contracts and multiple agency contracts, which may be accessed through an interagency agreement.

3. **BACKGROUND.**

a. EPA spends over a billion dollars a year for contractor services. A large number of contractor employees perform a variety of tasks in support of the Agency mission. Many of these contractor employees work on-site at Agency facilities. As a result, all employees must understand the acquisition, appropriation, ethics, and other regulations that apply to interacting with contractors to avoid any problems or improper relationships.

b. This order was originally issued in April 1994, during the period in which the Agency experienced substantial contract management weaknesses. These weaknesses included improper interaction between EPA and contractor employees. Agency contract management practices, especially as related to the technical direction of, and social interactions with, on-site contractors have improved significantly since then. This revised order reinforces the continuing need for diligent contract management, especially over contractors performing work on-site. It also clarifies the degree to which Federal employees and contractor employees may interact, and includes timely and relevant examples of appropriate interaction with contractor employees.

4. **DEFINITIONS**.

a. **Contracting Officers (CO)**. The Federal Acquisition Regulation (FAR) Subpart 2.1 states "Contracting officer" means a person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. FAR Subpart 1.6 and the EPA Contracts Management Manual (CMM), Section 1.2, cover the appointment and authorities of COs.

b. **Contracting Officer's Representative (COR)** - The requirements to be a COR and corresponding responsibilities are listed in the CMM, Section 42.1. The COR is an authorized representative of a contracting officer. A COR may be an employee of either EPA or another Federal agency. CORs are nominated by the program office and appointed to the contract by the CO. At EPA, the term "COR" is used as a generic title covering project officer, work assignment manager, delivery order project officer, task order project officer, task monitor, and so forth.

c. **Inherently Governmental Function (IGF)** FAR Subpart 2.1 states "Inherently governmental function" means, as a matter of policy, a function that is so intimately related to the public interest as to mandate performance by Government employees. Contracts shall not be used for the performance of inherently governmental functions. A list of examples of functions considered to be inherently governmental functions or which shall be treated as such, is available in the FAR, Subpart 7.5.

d. **Personal Services Contract** - FAR 37.104 provides guidance on personal services contracts. A personal services contract is a contract which, by its terms or as administered, results in contractor employees being subject to relatively continuous supervision and direct control by a Government official or employee. A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor employees. When not specifically authorized, personal services contracts inappropriately augment Agency staff without proper legislative review. Inappropriate personal services circumvent the civil service laws which require the Government to obtain its employees through direct hire in accordance with ceilings established by the Office of Management and Budget (OMB).

e. **Technical Communication** - The informal exchange of information between Federal employees and contractors. Such communication includes information exchanged on a broad range of topics such as, but not limited to: scientific information, research information, or information technology. Technical communication is more general in nature than technical direction; it does not direct the contractor, and is not binding on the contractor.

f. **Technical Direction** - The Environmental Protection Agency Acquisition Regulation (EPAAR) contract clause 1552.237-71, Technical Direction, defines technical direction, who can issue it, its limits, and procedures for issuing it. Technical direction is instruction to the

contractor that approves approaches, solutions, designs, or refinements; fills in details; completes the general description of work or documentation items; shifts emphasis among work areas or tasks; or provides similar guidance. It includes evaluation of contractor performance and comments on deliverables. Technical direction is binding on the contractor. Only the CO or the COR is authorized to give technical direction.

5. **RESPONSIBILITIES:**

a. All Federal employees interacting with contractors are responsible for ensuring their interactions are fair, impartial, and in compliance with Federal and Agency acquisition and ethics policy. Maintaining proper business relationships with contractor employees is a cooperative effort involving the CO and the program personnel involved in contract management.

b. The CO is responsible for determining, prior to award, that a contract does not include inherently governmental functions or unauthorized personal services and that controls are in place to protect against contract management vulnerabilities. COs are responsible for investigating any claims of inappropriate interaction with contractors and for taking appropriate action to ensure that contracts are managed to maintain proper contractual relationships.

c. CORs are responsible for providing technical direction and ensuring the contractor does not perform inherently governmental functions or unauthorized personal services, and that contract management controls are enforced.

d. As required by Section 3.2 of the CMM, program and regional offices are responsible for performing biannual Management Effectiveness Review on contracts susceptible to improper contractor relationships. Section 3.2 of the CMM also provides additional information on maintaining proper relationships with contractor employees.

6. **AUTHORITY TO INTERACT WITH CONTRACTOR PERSONNEL**

a. The contract always governs contract performance. This can best be accomplished with a well-structured contract that clearly sets forth the responsibilities of the Government and the contractor. To the maximum extent possible, contracts shall be performance-based, describing the desired results (outcomes) and allowing the contractor to innovate in meeting the requirements. Because it is results rather than process oriented, this type of contract lessens the Government's involvement in the contractor's daily operations, thus protecting against inappropriate interactions in contractor personnel issues.

b. Technical direction shall be issued by the CO or the COR only. Technical direction must be within the scope of the contract and must be issued in a manner that avoids unauthorized personal services.

c. Contractor employees working on-site, frequently side-by-side with Federal employees, creates a unique situation where interaction is unavoidable. Federal employees must recognize the limitations on interaction with contractor employees and guard against improper relationships. Federal employees may engage in technical communication with contractor employees, where appropriate. Although it is permissible for Federal employees to engage in technical communication, they must use discretion to ensure their communication does not interfere with contractor performance.

d. The following table summarizes the responsibilities of Federal employees and the extent of their authority to interact with contractors.

Position	Authority to initiate or modify contracts	Authority to issue technical direction	May engage in technical communication
CO	**YES**	**YES**	**YES**
COR	**NO**	**YES**	**YES**
Other Federal employees	**NO**	**NO**	**YES**

Please see Appendices A and B for examples of permissible interactions with contractors, with an emphasis on distinguishing technical communication from technical direction. Appendix C gives examples of prohibited interactions between Federal employees and contractors.

7. GENERAL RULES GOVERNING INTERACTIONS WITH CONTRACTORS

a. **Mixed Teams of Contractor and Federal Employees are Permissible.** Agency offices may utilize Mixed Teams, comprised of contractors and Federal employees, which are formed when they are the most efficient way to implement a required project and task. Mixed Teams facilitate the exchange of technical information within the scope of work for a specific task or project. The COR may authorize the formation of the team, in collaboration with the contractor's point of contact. But, because the COR is not required to be a member of the team, other Federal employee team members must guard against engaging in technical direction to contractor members. Both the CO and COR may provide Federal employees with the contractor's work plan when needed to implement a required task. In these instances, the cost proposal and any applicable contract rate information should be excluded. Due to the complexities of some Mixed Teams, it may be necessary to develop internal control procedures that ensure proper exchange between team members.

b. **Government Business Must Be Conducted in a Manner Above Reproach with Complete Impartiality and Without Preferential Treatment.** All Federal employees are governed by the Standards of Ethical Conduct for Employees of the Executive Branch. This document is available at the United States Office of Government Ethics Internet site, http://www.usoge.gov. The Standards of Ethical Conduct include rules related to personal and

business relations, accepting gifts, conflicting financial interests, and other areas employees who interact with contractors must follow.

(1) Care must be exercised to avoid conflicts of interest, especially for employees managing an organization or a contract. Agency employees should limit social interactions with contractor employees performing work for their office.

(2) Federal employees participating personally and substantially in a Federal procurement (see FAR 3.104-1 for a definition this phrase), shall use discretion in their interactions with potential offers and shall not disclose procurement information unless specifically authorized to do so.

(3) If you are unsure of how to interpret an ethics rule or how it applies in your situation, ask your ethics official for help.

c. **Respect the Employer-Employee Relationship Between Contractors and Their Employees**. Federal employees are not permitted to intervene in a contractor's personnel activities, including hiring, firing, or promoting of contractor employees, assigning particular employees to specific tasks, or rewarding individual contractor employees.

(1) Note, in some cases, such as under the Key Personnel clause or other contract terms, the contractor is required to submit resumes for individuals the firm proposes to use on the contract. In these cases, the resume is reviewed against the qualifications listed in the contract. This is not the same as directing the contractor to hire a specific individual which constitutes personal services.

(2) Federal employees are prohibited from asking contractors to hire, in a "holding pattern," individuals who may be candidates for Agency positions, pending completion of competitive civil service procedures.

(3) Federal employees must not participate in resolving personnel matters for contractors. Contractor employees must be directed to their appropriate points of contact within their corporation for resolution of these issues in accordance with the contractor's policies.

(4) Evaluation of contractor performance, whether positive or negative, must be provided through the contract past performance process, or the incentive fee process, if applicable.

d. **Safeguard Procurement, Privacy Act, Confidential Business, and Other Non-public Information.** Federal employees are responsible for protecting sensitive information. Sensitive information includes:

- Confidential Business Information (CBI)
- Confidential Agency Information (CAI)
- Privacy Act and other personal information
- Enforcement-confidential information
- Budgetary information prior to Office of Management and Budget release
- Other information that is exempt from disclosure under the Freedom of Information Act (FOIA)
- National security information

For a definition of these types of information and more detailed guidance, see the Office of Environmental Information's Information Sensitivity Compendium available at http://intranet.epa.gov/oic/compendium/compendium.htm. Sensitive information shall not be released to contractors unless it is allowed under the contract and all contract management controls and applicable statutory procedures are followed. Consult with the Office of General Counsel on issues related to CBI, the Trade Secrets Act, or the Privacy Act. Your organization's Information Security Officer can also assist with questions on safeguarding sensitive information.

(1) Contractors should not be provided with copies of EPA internal correspondence, except by the CO or the COR when providing this information is within the scope of the contract or when it affects the conditions of the facility in which the contractor's employees are working (e.g., scheduled repair work to be performed or building closings).

(2) To protect sensitive information from being inadvertently seen or overheard by contractors, appropriate management controls must be in place and enforced. These controls may include limiting contractors' access to EPA office areas, fax machines, copiers, computers, or file rooms where the Agency receives, copies, or stores sensitive or confidential information. Contracts which allow contractors access to sensitive information shall include appropriate safeguards to ensure adequate protection of this information, such as security clearances and signed confidentiality statements.

e. **Distinguish Contractor Employees from Federal Employees.** There are fundamental legal and ethical distinctions between contractor employees and Federal employees. Controls must be in place to identify contractor employees.

(1) When in EPA facilities, contractor employees must display badges that identify them as contractors. In meetings, on the phone, and in systems such as voice-mail and e-mail, contractor employees must identify themselves as such and provide the name of their firm. Contractor employees listed in EPA telephone and building directories must be differentiated from Federal employees.

(2) Contractor work areas must be specifically identified with the name of the

firm.

(3) Contractors shall not attend meetings as the official representative of an EPA organization.

(4) Contractor employees shall not attend EPA meetings unless the contractor's participation is required for performance of the contract and this requirement is documented in the statement of work or technical direction.

8. **ADDITIONAL GUIDANCE AND ASSISTANCE**. For guidance in the following areas, contact the official listed.

a. Questions concerning a specific contract, such as the scope of the contract, contract clauses, contractor conflicts of interest, technical direction versus technical communication, should be referred to the CO and COR. Always keep the CO advised of issues relating to interactions with the contractor.

b. The Office of General Counsel (OGC) can provide guidance regulations covering sensitive information, such CBI, and the Trades Secrets Act. OGC can also assist with questions concerning appropriations law.

c. Report any information or allegations of criminal wrongdoing to the Office of Inspector General's (OIG) Hotline or the Office of Investigations directly. The OIG can assist with questions concerning criminal activity, on the part of a contractor or Federal employee, and fraud, waste or abuse.

d. Your organization's ethics official can assist with ethics issues such as social interactions with contractors, financial conflicts of interest, and accepting gifts.

e. Your organization's Information Security Officer can assist with issues related to safeguarding sensitive information.

APPENDIX A

Examples of Technical Direction
Limited to Contracting Officers (CO) and Contracting Officer Representatives (COR)

Governing Principle: Technical direction shall be issued by the CO or by the COR in accordance with EPAAR Clause 1552.237-71, Technical Direction. Technical direction is the clarification of important technical requirements within the scope of a contract. It does not create new work or change the contract.

1. A CO/COR provides specific direction on a work assignment to a contractor such as anticipated delivery date(s) of samples, composition of samples or their matrix, and resolution of problems with samples such as interferences. (Conversely, the contractor asks these questions of the CO/COR).

2. While conducting fieldwork, a CO/COR provides specific direction to the contractor, such as locations for well installation, sampling locations, and technical corrective actions; all requirements are within the scope of the work.

3. After reviewing a draft report, which is a contract deliverable, the CO/COR requests the contractor to change the title on the report cover and to reorder two sections presented on two pages of a 50-page report.

4. A CO/COR meets with a contractor and provides specific contents of a briefing package which was identified as a task in the work assignment. No change in the task is made.

5. A CO/COR meets with a contractor to provide direction on a contract deliverable.

6. A CO/COR provides the contractor with new or updated information (with no cost impact) related to drawings which are referenced in the statement of work.

APPENDIX B

Examples of Technical Communication and Permissible Interactions with Contractors

Governing Principle: Technical communication is the informal exchange of information between Federal employees and contractors. It does not provide contract direction to a contractor. These activities do not require the presence of a CO or COR.

1. A Federal employee meets with a contractor and discusses capabilities and limitations of the organic analysis techniques used by the contractor.

2. A Federal employee discovers a contractor performing a task which the Federal employee knows is not being done according to protocol; the Federal employee identifies the discrepancy and suggests the contractor contact contract management or the COR. The Federal employee immediately contacts the COR to alert him to the incident.

3. A Federal employee requests and receives information and literature from various contractor-operated Agency hot lines and help lines.

4. A Federal employee requests computer support from a contractor-operated help desk. Examples of computer support services are personal computer or Local Area Network troubleshooting support, software support, personal computer training, data recovery assistance, and disk archiving and other similar information technology (IT) support as defined in a specific contract.

5. A Federal employee requests technical assistance, graphic and website design, or IT user support services where the technical assistance is mandated and monitored under an existing contract.

6. A contractor participates in discussions at professional meetings attended by both Federal employees and contractor employees (peer-to-peer exchanges).

7. A Federal employee and a contractor ride together in a Government-owned vehicle or the Federal employee's privately owned vehicle to a field site on official business. (Also see Appendix C, number 8, for a related, prohibited activity.)

8. Contractor employees attend an Agency office's holiday party. The contractor's time is not being billed to the Government. The event may be on-site or off-site. The party is not paid for with appropriated funds.

APPENDIX C

Examples of Prohibited Interactions with Contractors

1. A Federal employee requests to have specific contractor employees assigned to work on a delivery order or work assignment.

2. A Federal employee suggests a promotion or other performance award for certain contractor employees.

3. A Federal employee sits in on an interview for potential contractor employees and offers suggestions on whom to hire, or is otherwise involved in the hiring of such employees.

4. A Federal employee invites contractor employees to attend an EPA meeting or other work session not related to his or her contract performance.

5. A Federal employee invites contractor employees to attend a holiday party or recreational activity while the contractor is on official time that is being billed to the Government.

6. A contractor employee participates as a decision-making member of the EPA committee planning an EPA award ceremony.

7. A Federal employee negotiates price or contract terms and conditions with contractor employees during the course of market research.

8. A Federal employee accepts a ride with a contractor to a field site for a work-related purpose in a contractor-owned vehicle or a vehicle owned by a contractor employee. Such a practice raises conflict of interest concerns and would improperly augment the Agency's appropriations. (See Appendix B, example 7, for a related, permissible activity.)

EPA ORDER

Classification No.: 1900.2

Approval Date: October 22, 1990

CONTRACTING AT EPA

1. PURPOSE. This Order establishes Agency policy that (1) prohibits contracting for certain activities at EPA and (2) implements special management and control measures when contracting for certain sensitive services.

2. BACKGROUND. EPA relies heavily on contractor support. Nearly every EPA employee is involved with the contracting community in one way or another. Thus, in a very real sense, most EPA employees, including senior management, can be considered contract managers.

Agency responsibility and accountability begin when a decision is made to use contract support. And, having accepted a final product from a contractor, EPA becomes responsible for its content and for how it may be used in reaching Agency decisions.

The extent of the Agency's contracting, coupled with its regulatory nature, create a strong potential for conflict of interest with members of the contracting community. This problem is magnified when a limited number of contractors provide support in a variety of potentially sensitive areas. EPA must consider these facts when developing its contract requirements. It must be judicious in deciding the most effective ways to use its contractors and look for ways of reducing the potential for conflicts of interest. And, if contract support has been used, EPA must play a proactive role in ensuring a final Agency product that is unbiased and represents Agency thinking. The final product provided under a contract may assist EPA in reaching a decision; however, a contractor should not make the decision for the Agency.

OMB Circular A-76 defines inherently governmental activities as those "being so intimately related to the public interest as to mandate performance only by Federal employees." Agency employees must ensure that inherently governmental activities are performed only by EPA employees.

NOTE: For purposes of this Order, "active contract managers" are defined as Project Officers, Deputy Project Officers, Work Assignment Managers, Remedial Project Officers, On-Scene Coordinators, Delivery Order Officers, and Delivery Order Project Officers. "EPA managers" consist of senior management not directly involved in contract management.

3. POLICY.

a. EPA will not allow any of the following to be performed under its contracts:

(1) The actual preparation of Congressional testimony.

Although it is permissible for a contractor to perform basic research and retrieve factual data for the Agency in its development of Congressional testimony, it is the ultimate responsibility of EPA to develop and issue it. The Agency spokesperson must present testimony that is free from any contractor bias and any real or potential conflicts of interest. Therefore, even if preliminary research is performed by a contractor, it must be carefully examined by Agency personnel for any contractor partiality, favoritism, and conflicts of interest, prior to its incorporation into the testimony. The final document must be prepared by Agency personnel to ensure that it fully represents the Agency's position. The same rationale should be used when providing briefing materials to congressional staffers. Finally, if work is issued to a contractor for testimony support, it is important that the statement of work for the assignment reflect that these Agency limitations have been established.

(2) The interviewing or hiring of individuals for employment at EPA.

Both of these activities are inherently governmental duties involving judgment and discretion and a legal commitment on the part of the Government. They must remain under the sole authority of EPA.

(3) Developing and/or writing of Position Descriptions and Performance Standards.

These activities are key to the effective staffing and operation of EPA and are supervisory/management responsibilities. Outside technical expertise specific to a certain profession may sometimes be necessary but contractors should not write our position descriptions. Similarly, contractors should not be used to determine how the performance of EPA employees should be evaluated.

(4) The actual determination of Agency policy.

This prohibition does not preclude contractors from providing support in the policy development process. However, it does preclude contractors from participating in the final phases of policy development, i.e., being involved in the actual decision-making of what Agency policy will be. Contractors may appropriately be used in the stages of policy development which involve doing background research or performing options analyses. If such support is provided by a contractor, it must be carefully examined by Agency personnel for partiality, favoritism, and any contractor conflict of interest. In all cases, there should be a clear record that the contractor's work was reviewed and that final decisions were made by Agency personnel. Such a record could be demonstrated through notes from reviews of draft and final documents by EPA personnel, minutes from progress meetings with contractors, reports from EPA peer and board reviews, etc.

(5) Participating as a voting member on a Performance Evaluation Board; participating in and/or attending Award Fee meetings.

The assignment of an evaluation score and the making of recommendations of profit/fee payments by one contractor for another are clearly conflicts of interest. All functions relating to the decisions of award fees are inherently governmental and should be performed exclusively by Agency staff. However, contractors may provide specialized technical expertise as input to the Board prior to the actual evaluation meeting discussions. The key determining factor is the nature of the support; in all cases, it should be non-judgmental, i.e., free from opinions regarding the quality of a contractor's performance. For confidentiality reasons, no contractor may be present during the Board meeting. Any opinions expressed as the result of a Performance Evaluation Board should be those of the Government. Additionally, due to the subjective and confidential nature of the Board reports, their typing should remain an in-house function.

(6) Preparing Award Fee Letters, even under typing services contracts.

Because Award Fee Letters contain significantly sensitive and confidential information that could possibly have a detrimental effect on a firm's reputation, it is inappropriate to allow outside entities, even those contractors performing typing services, access to such information.

(7) The actual preparation of Award Fee Plans.

This is an inherently governmental function that details the discretionary and judgmental decisions behind the process the Government will be using in its evaluation of a contractor's performance. It would be inappropriate for any contractor to advise the Agency on what should be important to it. Provided that all confidential business information has been removed, a contractor may type award fee plans since there is no judgment associated with the performance of that task.

(8) The preparation of documents on EPA letterhead other than routine administrative correspondence.

In this instance, "routine" is synonymous with "non-judgmental" or "non-decisional." This prohibition is designed to prevent the following situation from occurring. A contractor is asked by EPA to perform certain policy analysis tasks. The contractor then performs the research and develops a position on the policy which it prepares on EPA letterhead. EPA then signs it, thereby making it EPA policy. Even though EPA may have made the final decision, there is no indication of EPA involvement up until that time. The development of inherently governmental decision documents mandates significant Agency involvement and this restriction ensures the Agency's participation in the decision process. Records should be kept demonstrating EPA's involvement. This prohibition does not apply to contracts which are providing typing services, on condition that the contractor providing such typing services was not involved in any other capacity in the development of the decisional or judgmental document.

(9) Reviewing vouchers and invoices for the purposes of determining whether costs, hours, and work performed are reasonable.

This prohibition is directed specifically at the Project Officer's monthly review and approval of a contractor's invoice submitted to EPA for payment purposes. Contractors may perform non-judgmental duties, such as checking mathematics or reviewing invoices for administrative accuracy, but should not render opinions in lieu of EPA on the reasonableness of professional staffing levels and hours used to perform work. That is an inherently governmental function generally delegated by the Contracting Officer to the Project Officer. This item in no way prohibits the Office of Inspector General from contracting for financial auditing and services, and compliance auditing.

(10) The preparation of Statements of Work, Work Assignments, Technical Direction Documents, Delivery Orders, or any other work issuance document under a contract that the contractor is performing or may perform.

Authorizing a contractor to do any of these activities creates a clear conflict of interest situation since they essentially allow the contractor to assign itself its own work. Similarly, it is inappropriate for contractors to complete their work issuance forms. This prohibition does not restrict contractors from preparing work plans which are, in fact, their own responsibility. Additionally, EPA prime contractors should be responsible for preparing the statements of work for their own subcontracts.

(11) On behalf of EPA, actually preparing responses to audit reports from the Inspector General, General Accounting Office, or other auditing entities

and

(12) On behalf of EPA, preparing responses to Congressional correspondence.

Both of these items are analogous to the situation discussed under Item (1), above. Although it is permissible for contractors to perform in a research or fact-finding capacity, the final document should be produced by EPA personnel to ensure that it is free from outside bias and that it truly represents Agency thinking.

(13) The actual preparation of responses to Freedom of Information Act requests, other than routine, non-judgmental correspondence -- in all cases, EPA must sign it.

The key word here is "non-judgmental," being synonymous with "non-decisional." We do not want contractors to decide what is releasable under FOIA since that is an inherently governmental function involving the interpretation of statutes and Agency regulations. Recognizing that some FOIA work is non-judgmental or non-decisional, it is permissible for contractors to be used in those areas. For example, provided all conflict of interest, confidential business information (CBI), and Privacy Act regulations have been followed, contractors may be used to collect data for the Agency as long as they are not deciding what data is releasable. Similarly, if conflict of interest, CBI, and Privacy Act regulations have been addressed, contractors may be used to redact documents provided that decisions on what to

redact are made exclusively by Agency personnel. Questions concerning interpretation of CBI and Privacy Act regulations should be referred to the Office of General Counsel. Questions concerning conflicts of interest should be referred to the Procurement and Contracts Management Division.

(14) Any contract which authorizes a contractor to represent itself as EPA to outside parties.

No contract may contain such an authorization. There may be times when contractors are assumed to be EPA personnel, but, in those situations, firms must explain that they are Agency contractors.

(15) Conducting administrative hearings.

Administrative hearings are primarily conducted by Administrative Law Judges (ALJs) who, in accordance with 40 CFR, Part 22, bear cases involving disputes between EPA and other parties regarding regulations, permitting, etc. The ALJs are EPA employees performing quasi-judicial and, therefore, inherently governmental functions such as assessing penalties. This is distinguishable from contracting for professional arbiters when the Agency requires outside, independent judgment.

(16) Reviewing findings concerning the eligibility of EPA employees for security clearances.

This has been included as a prohibition because it is inherently governmental and may also involve the disclosure of very sensitive and personal information regarding EPA employees.

(17) The actual preparation of an office's official budget request.

The prohibition here is very similar to Items (1), (11), and (12). Whereas research and fact-finding of a purely technical nature are permissible assignments under a contract as preliminary steps to budget development, the responsibilities of establishing Agency priorities or determining how Agency money should be spent may not be delegated to Agency contractors. These are inherently governmental duties involving judgment and discretion and must be performed by Agency staff. Prior to its use, any support work provided by a contractor must be very carefully reviewed by EPA staff to remove any contractor bias and to substantiate the reliability of the data, analyses, etc.

b. Certain other activities when performed under contracts may place EPA in a vulnerable or sensitive position if adequate controls are not implemented. In those cases, a justification must be prepared by the requesting program office which describes the type of work to be performed under the contract, why the work cannot be performed internally, and what will be done to ensure a final Agency product that is unbiased and represents Agency thinking.

If a new contract award valued at $25,000 or greater is contemplated, the justification must be signed by the cognizant Assistant Administrator, Associate Administrator, or Regional Administrator. For new contracts valued at less than $25,000, the justification must be signed by a program official at least one organizational level above the initiating office but no lower than the Branch level, e.g., a document generated at the Section level or lower must be approved at the Branch level, a document generated at the Branch level must be approved at the Division level, etc.

The following are contract work areas necessitating this justification:

(1) Budget preparation support including, but not limited to, workload modeling, fact-finding, efficiency studies, and should-cost analyses,

(2) Reorganization and planning support,

(3) Support services such as analyses, feasibility studies, etc., to be used by EPA personnel in developing policy,

(4) Regulation development support,

(5) Any support in the in-house evaluation of another contractor's performance,

(6) Involvement in strategic acquisition planning,

(7) Support on improving contract management,

(8) Providing specialized expertise in the contractor selection process,

(9) Providing specialized expertise in the development of Statements of Work, Work Assignments, and other contract-ordered tasks,

(10) Any support involving EPA policy or regulatory interpretation, such as staffing hotlines, attending conferences on behalf of EPA, community relations efforts, conducting EPA training courses, etc., and

(11) Independently providing technical guidance concerning EPA policies or regulations on EPA's behalf to outside parties.

NOTE: In no event shall any contract requiring the performance of any legal services be entered into without the approval of the Office of General Counsel.

c. Certain other activities if contracted for, although not sufficiently sensitive to require justifications, do necessitate the establishment of special EPA control measures. If a new procurement is contemplated involving any of the activities or situations listed below, a special discussion detailing control procedures to be enforced must be included within the pre-award procurement request rationale document. This would be required in the following instances:

(1) Situations where contractors share office space with EPA employees.

Control measures must be established to prevent the performance of personal services, to ensure that contractors do not have inappropriate access to privileged or sensitive information, etc.

(2) Support in preparing responses to Freedom of Information Act requests.

Control measures must be established to ensure that contractors are in compliance with all regulations involving FOIA, the Privacy Act, and confidential business information.

(3) Any situation where a contractor has access to confidential business information and/or any other sensitive information.

Control measures must be established to ensure that contractors do not have inappropriate access to privileged and sensitive information, to ensure that security systems are in place preventing the release of sensitive information to non-designated contractor employees, etc.

(4) Any situation where it can be assumed that the contractor is EPA, without specifically identifying itself as a contractor.

Control measures must be established to ensure that contractor employees are clearly identified through the use of badges, posted signs, etc.

d. In determining how best to contract for these sensitive services, organizations must consider ways to reduce the potential for conflict of interest. Procurement strategies should be considered that break the requirements into smaller components, thereby broadening contractor resources available to a particular office. If possible, small and minority business participation should be considered, provided these firms do not have conflicts of interest. The procurement request rationale document must address how the particular procurement request fits into the requesting office's overall procurement strategy.

e. In order to assure contract accountability at all levels of the Agency, all EPA managers must have written into their performance standards language emphasizing strong contract management and controls.

f. Contract management training classes will be revised to include discussions of the essential elements of this EPA Order. Additionally, all active contract managers will be required to take a one-day refresher course in contract management every three years in order to maintain certification.

4. RESPONSIBILITIES.

a. The Procurement and Contracts Management Division (PCMD) is responsible for the following:

(1) Including language within all future contracts to prohibit contractor performance of the activities listed in Paragraph 3.a., above.

(2) Notifying all current contract holders of those prohibitions listed in Paragraph 3.a., above.

(3) Revising the Contracts Management Manual (CMM) to incorporate the provisions of this Order, specifically highlighting:

(a) The prohibited activities listed in Paragraph 3.a., above,

(b) The requirement for justifications for the purchase of any of the services listed in Paragraph 3.b., above,

(c) The requirement for a control element discussion in the procurement request rationale document if any of the activities listed in Paragraph 3.c., above, are contemplated,

(d) The requirement for a procurement strategy discussion element in the procurement request rationale document, and

(e) The requirement to include in all EPA managers' performance standards language emphasizing strong contract management and control.

(4) Reviewing the justifications for the purchases of any of the services listed in Paragraph 3.b., above, and making a determination that adequate control measures will be employed.

(5) Revising the current contract management training classes to include discussions of this Order.

(6) Instituting a one-day contract management refresher course to be taken every three years by active contract managers in order to maintain their certification.

b. EPA offices employing contract support are responsible for the following:

(1) Preparing the justification for the purchase of any of the services listed in Paragraph 3.b., above, and obtaining the signature of the appropriate approving official on the justification.

(2) Including a control element discussion within the procurement rationale document if any of the activities listed in Paragraph 3.c., above, are contemplated.

(3) Considering ways to break up requirements for the procurement of sensitive services into smaller components, thereby reducing the potential for conflicts of interest.

(4) Along with the performance standard requirements for active contract managers discussed within the CMM, including in all other EPA managers' performance standards language, as included within the CMM, emphasizing strong contract management and control.

(5) In accordance with guidance established in the CMM, requiring active contract managers to attend the contract management refresher course once every three years, in order to maintain their certified status.

c. All Agency employees are responsible for the following:

(1) Being aware of the content of this Order and bringing any suspected violations to the attention of the cognizant Contracting Officer.