



Operational Order

16 AUG 2006

This operational order establishes the policy for performance accountability for a Most Efficient Organization (MEO) whether such is the result of a public-private competition or Business Process Re-Engineering (BPR) effort under the USACE Strategic Sourcing Program.

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Delegated Competitive Sourcing Official



1. Requirements for Performance Accountability

1.1 National Defense Authorization Act for Fiscal Year 2004

Section 337, High-Performing Organization (HPO) Business Process Re-engineering (BPR) Pilot Program requires reviews and reports for organizations designated as pilots. The Office of the Secretary of Defense (OSD) is the program proponent and promulgates reporting requirements.

1.2 Federal Acquisition Regulation

Subpart 52.207-1(c) of the Federal Acquisition Regulation (FAR) stipulates that the Contracting Officer (KO) shall establish a Most Efficient Organization (MEO) Letter of Obligation (LOO) or a fee-for-service agreement if the performance decision favors an agency or public reimbursable tender.

1.3 Office of Management and Budget Circular A-76

Attachment B, paragraph E of Office of Management and Budget (OMB) Circular A-76, Performance of Commercial Activities, 29 May 2003 (hereafter "the Circular") requires post competition accountability.

1.4 Army Regulation 5-20

Paragraph 8-3 of Army Regulation (AR) 5-20, Competitive Sourcing Program, 23 May 2005 (hereafter "the Regulation") requires post competition accountability.

1.5 Memorandum of Understanding between Acting Assistant Secretary of the Army for Installations and Environment and Assistant Secretary of the Army for Civil Works

Under the authority of this memorandum, the Deputy Commanding General (DCG) is the USACE Delegated Competitive Sourcing Official (DCSO).

1.6 Operational Order No. 1 – Letters of Obligation

Establishes the requirement for and provides the LOO template.

2. Decisions Influencing Performance Accountability

Two Government Accountability Office (GAO) decisions influence performance accountability.

2.1 B-293590.2 et al., April 29, 2004

In this decision, the GAO determined that, *"The letter of obligation is not a mutually binding legal relationship between two signatory parties – there is no contractual legal relationship between the MEO and the agency."*

2.2 B-295529.6, February 21, 2006

In this decision, the GAO indicated that through its amendment to the Competition in Contracting Act (CICA), the Congress expanded the definition of an "interested party." As such, an interested party *"includes the official responsible for submitting the Federal agency tender in a public-private competition under Office of Management and Budget Circular A-76 regarding an activity or function of a Federal agency performed by more than 65 full time equivalent employees of the agency."* The CICA amendment and resulting change to GAO Bid Protest Regulations recognizes the Agency Tender Official (ATO) as an "interested party."

3. Performance Accountability Roles and Responsibilities

3.1 Delegated Competitive Sourcing Official

The DCSO is the command authority for performance accountability. It is USACE policy that the DCSO

Sign the LOO on behalf of the agency,

Is responsible for performance accountability,

Charter a Customer Board of Advisors (or expands the charter of an existing board), and

Chair the Customer Board of Advisors.

3.2 Strategic Sourcing Program Office

The Strategic Sourcing Program Office (SSPO) is the staff support arm of the DCSO for performance accountability. It is USACE policy that the SSPO

Is the liaison office with higher authorities for all competitive sourcing policy and reporting,

Is responsible for day-to-day performance accountability policy compliance,

Maintains the LOO on behalf of the agency,

Provides advice and staff support to the Customer Board of Advisors (or an existing board with regard to performance accountability), and

Chairs the Customer Board of Advisors in the absence of the DCSO (where the Strategic Sourcing Program Manager shall perform this duty for the SSPO).

3.3 Head of the Continuing Government Organization

The head of the Continuing Government Organization (CGO) is the agency proponent for the Federal policies governing the requirements for activities and functions under their command. It is USACE policy that the head of the CGO

Is responsible for day-to-day requirements compliance monitoring, and

Represents the CGO on the Customer Board of Advisors.

3.4 Agency Tender Official

The ATO signing the agency tender is the official responsible for the MEO. It is USACE policy that the ATO

Is responsible for overall MEO compliance with requirements,

Signs the LOO on behalf of the MEO, and

Represents the MEO on the Customer Board of Advisors.

3.5 Head of the Most Efficient Organization

The head of the MEO is the official responsible for day-to-day MEO operations. It is USACE policy that the head of the MEO

Is responsible for day-to-day MEO compliance with requirements, and

Assists the ATO in responding to Customer Board of Advisors questions.

3.6 Customer Board of Advisors

A LOO and its attendant documents translate the requirements for MEO products and services. The DCSO on behalf of the agency and the ATO on behalf of the MEO are parties to the LOO. It is USACE policy that

A Customer Board of Advisors (or an existing board) shall address those issues that arise regarding performance accountability that the DCSO deems requiring attention or resolution in support of the LOO outside of the normal day-to-day performance accountability process.

4. Performance Accountability Compliance with Higher Authority Requirements

4.1 OMB Circular A-76

4.1.1 Attachment B, paragraph D.6.f.(3)

The KO is to, *"incorporate appropriate portions of the solicitation and the agency tender into the MEO letter of obligation and distribute the letter to appropriate individuals"* including the ATO. GAO has determined that a LOO is not enforceable under the Federal Acquisition Regulation (FAR). It is USACE policy that

A LOO is required for an MEO (see Operational Order No. 1), and

Where it makes sense to do so, FAR procedures serve as a *program management tool* to aid in performance accountability.

4.1.2 Attachment B, paragraph E

Establishes post competition accountability requirements:

(1) Best Practices and Lessons Learned – requires agencies to post best practices and lessons learned to "SHARE A-76!" It is USACE policy that the CGO provides lessons learned to the SSPO to fulfill this requirement.

(2) Execution Tracking of Competitions – requires agencies to maintain a database to track competition execution. The Defense Commercial Activities Management Information System (DCAMIS) is the automated system used to track competition execution. It is USACE policy that the CGO provides information to the SSPO to carry out this requirement.



Competitive Sourcing Operational Order No. 3 Performance Accountability

Competitive Sourcing Quarterly Report – requires agencies to submit a quarterly report (December, March, June, and September) to OMB. Information in DCAMIS is the source for this report. It is USACE policy that the CGO provides information to the SSPO to carry out this requirement.

Performance Monitoring – requires agencies regardless of the service provider to :

(1) Monitor performance for all performance periods stated in the solicitation. It is USACE policy that the CGO uses a Quality Assurance Surveillance Plan to monitor performance

(2) Implement the Quality Assurance Surveillance Plan (QASP). It is USACE policy that the CGO develops and uses a QASP to monitor performance

(3) Retain the solicitation and any other documentation from the competition as part of the competition file. It is USACE policy that the KO maintains the solicitation from the competition and contract files

(4) Maintain a current contract file on all contracts, Letters of Obligation, and fee-for service agreements consistent with Federal Acquisition Regulation (FAR) Subpart 4.8. It is USACE policy that the SSPO maintains the LOO

(5) Record the actual cost of performance-by-performance period. It is USACE policy that the CGO provides information to the SSPO to carry out this requirement¹

(6) Monitor, collect, and report performance information, consistent with FAR Subpart 42.15 for past-performance evaluation in a follow-on competition. It is USACE policy that the CGO provides the SSPO this information, when required

4.1.3 Option Years – Paragraph E.5.a.

This paragraph requires the KO to make option year exercise determinations in accordance with FAR 17.207. Performance periods that exceed the total number of years specified in the solicitation are not permitted. It is USACE policy that the DCSO makes this determination based on the GAO decision cited in Section I-4.1 and consistent with public law and higher authority policy.²

¹For this requirement, the circular indicates that in recording the actual cost of performance for a specific performance period, an agency is to adjust actual costs for scope, inflation, and wage rate adjustments made during a specific performance period. Actual costs are to be compared against the costs recorded on Standard Competition Form lines 6 and 7 when the performance decision was made.

²Section 647(c) of the Transportation, Treasury, and Independent Agencies Appropriations Act (Division F of the Consolidated Appropriations Act, FY2004, P.L. 108-199) states that regulations, directives, or policies including the circular may not require the head of an agency to automatically limit to five years or



4.1.4 Follow-on Competitions – Paragraph E.5.b.

This paragraph provides that unless a specific exemption is granted by the Competitive Sourcing Official (CSO)³, without delegation and before the end of the last performance period, an agency is required to complete another competition of the activity by the end of the last performance period. (Because of Public Law 108-199, Section 647(c), OMB amended this policy in OMB M-04-12, April 30, 2004, subject: Performance Periods in Public-Private Competitions, indicating the limitation shall no longer apply. Under the revised OMB policy agencies are, “required to continue to incorporate performance periods in their contracts and letters of obligation.” OMB advises agencies that “in determining an appropriate performance period, agencies should consider the nature and risk associated with the services to be provided.” It is USACE policy that the DCSSO makes determinations on follow-on competitions.

4.1.5 Terminations – Paragraph E.6.a.

Terminations based on failure to perform - must be consistent with FAR Part 49. The KO is required to provide notification pursuant to FAR Part 49, of poor performance through cure notices and show cause notices. In the event of a termination for default, the KO is required to issue a notice of termination consistent with FAR Part 49.⁴ It is USACE policy that the DCSSO shall identify appropriate corrective action in consultation with the CSO.

Terminations based on reasons other than failure to perform - the CSO (without delegation) is the approval authority for such terminations. The termination must be in writing and a copy of the approval must be provided to OMB before the termination.⁵ It is USACE policy that the DCSSO makes decisions on whether or not to request CSO approval of such terminations.

less the performance period in a letter of obligation or other agreement with federal employees to provide commercial activities for the agency. There remains a possible Service Contract Issue with extending beyond a five year period and will depend on the scope of services for the specific competition.

³ The Deputy Under Secretary of Defense for Installations and Environment (DUSD(I&E)) is the Department of Defense CSO.

⁴ An MEO termination also results in recording the Federal Activity Inventory Reform (FAIR) Act report to reflect that the activity is no longer performed by an MEO and that the agency will perform a competition.

⁵ Examples of terminations based on reasons other than failure to perform include, but are not limited to, elimination of an agency requirement through divestiture, privatization, reorganization, restructuring, national defense, or homeland security.



4.2 AR 5-20

The regulation addresses Post-MEO performance review at paragraph 8-3.

4.2.1 Post-MEO Performance Review

The regulation requires a post-MEO performance review of the MEO at the end of each full year of performance and stipulates that if the review reveals failure to implement the MEO in accordance with the agency tender and deficiencies are not corrected, the MEO letter of obligation will be terminated in accordance with OMB Circular A-76. It is USACE policy that the

CGO will conduct a post-MEO performance review at the end of each full year of performance, and

DCSO shall identify appropriate corrective action in consultation with the CSO where the Army requirement regarding termination appears to be in conflict with the GAO decision in Section I-4.1. and P.L. 108-199, Section 647(c).

4.2.2 Post-MEO Performance Review Audit

The regulation indicates that the U.S. Army Audit Agency (AAA), when approved by the Auditor General, will typically audit the completeness and accuracy of post-MEO performance reviews for competitions involving over 65 spaces conducted by Army organizations. Army organizations are responsible for performing the post-MEO performance reviews. It is USACE policy that the SSPO will audit post-MEO performance reviews.

4.2.3 MEO Organization and Staffing

Army policy is that, "The organization, position structure, and staffing of the reorganized activity (MEO) will not normally be altered for at least one year after implementation of the MEO. The exception is that the MEO may be changed in the first year if significant workload in the PWS changes. After the activity is reorganized into the MEO, it will operate under the performance standards established by the PWS and solicitation just as an offeror would have been expected to do. The performance standards should not be modified when changes in activities or workloads occur after the initial reorganization. Any reorganization or change to the MEO during the performance periods will be fully documented in the competition records, to include a revised PWS and the reasons for the change (workload increase/decrease, mission changes, performance standard change, and so on). The MEO should operate like an offeror and should document any significant changes (increases or decreases) to workload, mission or other changes that impact on the MEO or costs to perform the



work required by the PWS." It is USACE policy that the SSPO will monitor and assure appropriate documentation to MEO organization and staffing.

4.2.4 Performance Reviews

The Army regulation requires an annual performance review on (1) All MEOs with more than 65 FTE and (2) 50% of those MEOs with 65 or fewer FTE. It is USACE policy that

All CGOs will conduct annual performance reviews, and

The SSPO will audit all performance reviews.

5. Customer Board of Advisors Charter

The DCSO will charter a Customer Board of Advisors for each MEO or will expand the charter of an existing board for performance accountability purposes as identified in paragraph 3.6 above. It is USACE policy that a Customer Board of Advisors charter will follow the enclosed template.

CHARTER
<Activity Title>
Customer Board of Advisors

ESTABLISHMENT

The board serves as a forum to address performance accountability issues involving the **<MEO or HPO Title>**.

SPONSOR

The Strategic Sourcing Program Office (SSPO) is the staff arm for the Delegated Competitive Sourcing Official (DCSO), advises the board, and provides administrative support.

CHAIR

The DCSO chairs board meetings. In the absence of the DCSO, the Strategic Sourcing Program Manager (SSPM) serves as chair.

ADVISORS

Agency Tender Official (ATO)
Head of the Continuing Government Organization (CGO)

MEMBERS

<indicate members appointed by the DCSO>

AUTHORITY

The board shall carry out responsibilities defined by the DCSO.

On matters involving the commitment and expenditure of resources, voting members are the Directors of Civil Works, Military Programs, and Research and Development.

SUNSET

This charter expires when the **<Activity Title is recompeted>** or **<authority for the High-Performing Organization (HPO) no longer applies>**

<Approved> <Title of DCSO> <Date>