

May 24, 2012

Ms. Nancy Gunderson

Deputy Assistant Secretary Office of Grants and Acquisition Policy and Accountability
Department of Health and Human Services

Ref: OGAPA June 2010 Memorandum on Severable and Non-Severable Services Contracts

Dear Ms. Gunderson:

We are writing to request a meeting with you to discuss ways to bring needed clarity and consistent implementation to the rules pertaining to severable and non-severable contracted work. On June 28, 2010, the Office of Grants and Acquisition Policy and Accountability (OGAPA) issued centralized guidance on this important issue¹ and we are highly supportive of the careful, consistent approach to procurement as described in the OGAPA memorandum. The purpose of that memorandum was to clarify the differences between severable and non-severable contracts and how agencies should properly classify projects based on their scope of work into one of these two categories. However, contractors are still seeing variations in how the policies are being applied, in some cases to the detriment of DHHS. This experience suggests that details about the policies are still evolving or need further clarification.

The severability feature has great importance for ensuring that contracts meet applicable procurement rules and fiscal law requirements and for how contractors can deliver agency-required products and services. PSC member companies, as well as the undersigned organizations, have seen some variation in how the rules have been applied within DHHS which limits the companies' ability to respond to DHHS program needs. Throughout DHHS, contracting officers and specialists have been implementing a number of changes in the way procurements are administered, in part as a result of guidance provided by the June 28, 2010 OGAPA memo.

Among the key points in that memo are the following:

- Severable services are continuing and recurring in nature (e.g., systems development support provided on a level-of-effort basis). "Severable" means tasks can be separated into components that independently meet a separate and ongoing need of the Government.
 - Example: A contract for janitorial services, generally awarded at a firm-fixed price and paid in monthly installments. Contracts for severable services typically establish a base period funded from the current year's appropriation, with one or more option years that reflect a bona-fide need of separate future fiscal years. As options are exercised, the option year funding must be charged to the fiscal-year appropriation available for the year covered by the option.
- Services are non-severable when they constitute an entire job or single undertaking with a defined end-product that cannot feasibly be subdivided for separate performance in each fiscal year. Non-severable services must be funded entirely out of the appropriation current at the time of award, notwithstanding that performance may extend into future fiscal years. Thus, contracts for non-severable services cannot be incrementally funded.
 - Example: a contract with a consulting firm to evaluate a DHHS program. Within 18 months of award, the firm must conduct interviews with several program participants, develop case studies, and prepare a final report with findings and

¹ "AMP Guidance Regarding Funding of Contracts Exceeding One Year of Performance," (June 28, 2010)

recommendations for program improvement. While the contract may require interim products, the purpose of the contract is to produce the final report, which constitutes the core of the value to DHHS. The services constitute a specific, entire job that cannot be subdivided for separate performance in each fiscal year. Accordingly, the contract must be fully funded from an appropriation current at the time of contract award, notwithstanding that performance extends into the following fiscal year.

- No-cost extension in non-severable contracts: Generally, a no-cost extension may be used to extend the period of performance for non-severable contracts. This assumes that the original obligation represented a bona-fide need in the fiscal year in which the contract was executed. If the completion of the end product(s) will require more time than originally established, a no-cost extension may be granted if it is determined to be in the Government's best interests.
- No-cost extension in severable contracts: Under an annual appropriation, a modification to authorize a no-cost extension of a contract for severable services is permitted only if it is for the continuation of the same services and would not extend the period of performance beyond 12 months. This limitation includes situations involving an excusable delay or Government-caused delay—neither justifies a no-cost extension that would extend the funded period of performance beyond 12 months. Given the above, and the common DHHS practice to structure contracts for severable services with a base period and option periods of 12 months each, the use of a no-cost extension under a contract for severable services should be a very rare occurrence. Further, a no-cost extension cannot be used to add work that is outside the scope of the original contract.

Notwithstanding the clarity in the memo, various contracts offices within DHHS appear to be inconsistent in their application of the guidance in the memo (or are not specifically addressed by the memo) in ways that are counter-productive to the goals of the projects under contract. In particular, we are aware of avoidable problems related to three key ways in which contracting officers across multiple DHHS Agencies interpret this guidance:

1. *The difficulty in operationally defining severability seems to have resulted in some contracts that had previously been handled as non-severable (and that generally fit the definition and examples of non-severable contracts per the original OGAPA memo) now being let as severable contracts.*

We recognize that it is in the interest of many agencies to have projects that are incrementally funded out of multiple appropriation years (and thus contracted on a severable basis). In many instances, however, projects that have highly interrelated tasks are broken up in ways that are not conducive to effective management of the project. For example, many large evaluation projects require multiple years to complete from the design phase, to instrument development, OMB clearance, data sampling, site election, instrument testing, survey implementation and final report writing; the product and timing of each act is dependent on the completion of the prior act. While it is possible to conceptualize this process into phases and prepare a budget for each phase, the reality is that the process is, even with the best project management available, often much more fluid than what can be specified in advance. Some flexibility in timing and budgeting is necessary to ensure both product quality and cost containment.

2. *Very strong reluctance to grant no-cost extensions on ongoing work even when unanticipated and unavoidable delays prevent the work from being completed during the original period of performance.*

The OGAPA memo offers very reasonable examples of when no-cost extensions may be granted under both types of contracts, precisely the types of situations in which most DHHS contractors require such no-cost extensions. In those situations with unavoidable delays (a good example is when OMB takes longer than anticipated to review and approve a Paperwork Reduction Act package) it is often

impossible to complete the work without a no-cost extension. If no-cost extensions are refused even when they are clearly needed to address issues outside contractor control, it will make it more difficult for DHHS to contract for important work. Also, appropriated, obligated money may be unavailable to meet intended project requirements.

3. Incorrect categorizing of contracts as severable services.

We recognize that by designating a project as non-severable it then becomes difficult for an agency to use multiple appropriations to cover the costs of an especially large procurement. We believe that projects that can and should be designated as non-severable are incorrectly being procured as severable contracts, and thereby increasing management costs and expense on the project.

We appreciate the hard work of contracting officials throughout DHHS and hope that efforts to clarify the contracting processes will enable both the government contracting staff and the contractors to work together more effectively. The contractors are all highly customer-focused organizations operating in a very competitive marketplace who endeavor to serve DHHS clients as capably as possible. Consistent with that goal is the need to manage projects on DHHS's behalf at very high levels of effectiveness and efficiency, but there are circumstances that make it increasingly challenging.

A productive next step would be to meet with you and other DHHS contracting officials. The meeting would provide an opportunity for us to provide further details on the issues we describe in this letter, hear about any plans HHS has to clarify the rules, and discuss possible options for making the entire process as efficient as possible. In particular, we believe that the follow-up discussions and communications with Agency contracting officers and specialists have the potential to substantially increase the value of contract work to the government. We are aware that the senior leaders at a number of DHHS Agencies are also concerned about the issues we have described above.

We appreciate your attention to this matter and look forward to promptly scheduling our meeting. Please contact Alan Chvotkin at the Professional Services Council (Chvotkin@pscouncil.org, 703-875-8059); Daniel Gaylin at NORC (gaylin-dan@norc.org, 301-634-9417); or Pam Tapscott at Mathematica (ptapscott@mathematica-mpr.com, 202-484-3294) for this purpose.

Sincerely,

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