

Guidance on Alternative Contract Language Regarding Energy Savings Performance Contract Terminations and Cancellations

Prepared by the U.S. Department of Energy
Federal Energy Management Program (FEMP)

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Contacts

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Abbreviations and Acronyms

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| DOE | Department of Energy |
| ESPC | Energy Savings Performance Contract |
| ESCO | Energy Service Company |
| FEMP | Federal Energy Management Program |
| IDIQ | Indefinite Delivery Indefinite Quantity |

1 Introduction

1.1 Purpose

The U.S. Department of Energy (DOE) provides this guidance for Task Orders issued under the DOE Energy Savings Performance Contract (ESPC) indefinite delivery, indefinite quantity (IDIQ) contracts. This guidance relates to alternative Task Order language which could be used to identify, at the time of Task Order award, certain costs that would normally form the basis of a claim following a Cancellation or a claim following a Termination for Convenience after Full Project Acceptance of energy conservation measures and water conservation measures contemplated under a Task Order (post-Acceptance Termination for Convenience). DOE has determined that the alternative language is acceptable and conforms to the legal and contractual requirements for ESPCs.

Federal agencies have the ability to adopt the language provided by DOE contained herein for their Task Orders, or to consider other language acceptable for their agency's Task Orders.

1.2 Background

DOE has been approached by several federal agencies and Energy Services Contractors (ESCOs) that are a party to the DOE IDIQ contracts to provide guidance on the amount and type of costs to be paid by the U.S. Government in the event of a Termination for Convenience or Cancellation of an ESPC Task Order issued under the DOE IDIQ contracts. Although the current DOE IDIQ contracts address these issues through the provision of a cancellation schedule and contractual clauses providing for the review of expenses to be paid at the time of termination, the ESCOs requested further clarification on these issues.

On December 7, 2015, DOE issued and requested comment on draft language addressing ESPC payments associated with certain early contract Termination for Convenience or Cancellation events that federal agencies could consider as guidance for potential inclusion in Task Orders issued under the DOE IDIQ contracts. DOE considered the comments received in response to the draft language and developed the language provided in this guidance for potential inclusion by a federal agency in Task Orders issued under DOE IDIQ contracts.

The language provided in this guidance contemplates a presumption of allowability and reasonableness of certain costs that would normally form the basis of a claim following a Cancellation or a claim following a Termination for Convenience after Full Project Acceptance of energy conservation measures and water conservation measures contemplated under a Task Order. The sample language provides that the costs of remaining unamortized principal, accrued interest and a prepayment fee based on a percentage of the remaining

principal are presumed to be reasonable and allowable in a Cancellation or post-Acceptance Termination for Convenience claim. These costs are to be detailed in a Task Order attachment, Schedule TO-5. The language further clarifies that accrued interest, while presumably allowable, is subject to verification by the Contracting Officer through the Cancellation and/or Termination claims process. The allowability of these costs is based on the guiding ESPC statute (42 U.S.C. § 8287) and the Cost Principles of FAR Part 31. The final determination of the reasonability or allowability of any of these costs is subject to review and verification by a Contracting Officer in accordance with the Cancellation and Termination for Convenience processes outlined in the FAR.

Despite discussing common costs, the sample language applies differently depending on whether it is applied to a Cancellation or a post-Acceptance Termination for Convenience. In the event of Cancellation, the language establishes a ceiling amount subject to the claim process outlined at FAR 52.217-2. In the event of a post-Acceptance Termination for Convenience, the language would identify elements of a claim which can be known and negotiated at the time of Task Order award, and are subject to the claim process outlined at FAR 52.249-2. This language does not limit the Contractor's claim under a post-Acceptance Termination for Convenience to the noted costs, but allows the government and Contractor to detail those costs known at the time of Task Order award and stipulates that a federal agency will negotiate with the Contractor other allowable expenses as part of a post-Acceptance Termination for Convenience Claim, and verify the TO-5 costs.

2 Cancellation and Post-Acceptance Termination for Convenience Alternative Language

2.1 Guidance

The following language is intended for a federal agency to consider as a possible modification to section J-5.1.6 and Task Order Schedule 5 (TO-5) of the DOE IDIQ.

J-5.1.6 Schedule TO-5 - Cancellation Ceiling and Post-Acceptance Termination Schedule -Schedule TO-5 is a presentation of factors to identify some elements that form the basis of a Cancellation or a post-Acceptance Termination for Convenience claim which are presumed to be reasonable and allowable under this Task Order. Actual Cancellation or post-Acceptance Termination for Convenience charges will be negotiated per established FAR requirements depending on the contracting situation. In the event of Cancellation, TO-5 will establish a ceiling amount subject to the claim process outlined at FAR 52.217-2. In the event of a post-Acceptance Termination for Convenience, TO-5 establishes those elements of a claim which can be known and negotiated at the time of Task Order award, and are subject to the claim process outlined at FAR 52.249-2.

The TO-5 Schedule includes amounts of remaining unamortized principal, accrued interest, and a prepayment fee of ___% of the remaining principal balance. In the event of either Cancellation or post-Acceptance Termination for Convenience, each element of cost must be demonstrated in accordance with the applicable FAR claim process. With the exception of the amount of accrued interest, the other amounts on Schedule TO-5 are presumed to be reasonable and allowable. Accrued interest is allowable as a Cancellation or Termination cost, however such amount is subject to verification through the Cancellation or post-Acceptance Termination claims process. The government agrees to negotiate with the Contractor regarding other allowable expenses incurred as part of a Cancellation or post-Acceptance Termination for Convenience claim in accordance with the applicable contract clause.

Pursuant to 42 U.S.C. § 8287(a)(2)(D), subject to the Contracting Officer's verification, the amounts in TO-5 may be accepted in advance of appropriated funds and shall be paid in accordance with FAR 52.217-2 or 52.249-2, as appropriate, and is subject to any rights of offset against the Contractor existing at the time of the post-Acceptance Termination for Convenience or Cancellation.

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SCHEDULE TO-5 CANCELLATION CEILING AND POST-ACCEPTANCE TERMINATION FOR CONVENIENCE SCHEDULE IMPORTANT INFORMATION: (1) Amounts for each time period specified below establish the maximum liability in the event of Cancellation for that time period, and includes the remaining unamortized principal on total amount financed for each time period specified, accrued interest, and a prepayment fee of ___% on unpaid principle. Actual total costs will be negotiated to account for any prepayments, changes in accrued interest due to loan modification, or other incurred expenses related to the Cancellation or post-Acceptance Termination for Convenience, in accordance with the applicable contract clause. (2) The Contractor may attach a monthly Financing Termination Liability Schedule, otherwise annual amounts shall be stated in the schedule but more specific information may be necessary in any Cancellation or post-Acceptance Termination for Convenience claim offered. (3) In the event of Task Order Cancellation or post-Acceptance Termination for Convenience, either FAR 52.217-2 or 52.249.2 will apply, as applicable, and will be subject to any rights of offset against the Contractor existing at the time of the post-Acceptance Termination for Convenience or Cancellation.

3 References

42 U.S.C. § 8287

48 C.F.R. 52.217-2 (Cancellation Under Multiyear Contracts)

48 C.F.R. 52.249.2 (Termination for Convenience of the Government (Fixed Price))

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