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Nation's Environmental Stewardship Since 1974

ASTSWMO POSITION ON PERFORMANCE-BASED CONTRACTING AT FEDERAL FACILITIES

I. INTRODUCTION

Performance-based contracting (PBC) is frequently used for implementing environmental cleanup work at federal facilities under the Defense Environmental Restoration Program (DERP). The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) has produced two white papers on the subject: *“Performance Based Remediation Contracts and Compendium of State Lessons Learned – A Guide to Performance Based Environmental Remediation, November 2004,”* and *“State Perspectives on the Use of Performance-Based Contracting at Federal Facilities Cleanups, August 2010.”* Both papers provide recommendations for improving the PBC process.

Department of Defense (DoD) guidance and direction have been helpful in addressing issues associated with PBC, but these efforts have not always translated into effective and consistent implementation of PBC. In the development of this paper, ASTSWMO received information and cases from 12 States within six different U.S. Environmental Protection (EPA) Regions concerning the use of these contracts in their States. Mixed comments were received: most States have both positive and negative experiences with PBC, often depending on the contractor hired; while other States indicated that regulator participation in the PBC process, oversight by the DoD Components, and utilizing PBC at appropriate sites are important in improving the contracts. This paper identifies challenges States continue to face and highlights areas still needing attention. It also recommends the use of a checklist to assist all parties involved in the development and implementation of performance-based contracts and improve the PBC process at federal facility cleanups.

I. SUMMARY OF PREVIOUS ASTSWMO RECOMMENDATIONS

Though ASTSWMO previously developed two separate papers on PBC implementation (referenced above), several of the recommendations in the two papers are consistent with the recommendations contained within this position paper. In general, both the 2004 and 2010 papers stress the need for early and increased State involvement when sites will be investigated and remediated using the PBC process. These two papers also recommend that DoD coordinate with States to both ensure that there is adequate DSMOA funding for State involvement and that the State has adequate resources to meet the accelerated schedules usually associated with contracts. Lastly, these papers emphasize the need for DoD contractor oversight, including ensuring that the contractors are consistently following DoD guidance specific to PBC.

II. CHALLENGES REMAINING

Since 2010, PBC has become the norm for response actions under DERP, and DoD has had guidance in place since 2007 clarifying both State and DoD roles in PBC. However, the inconsistent application of DoD guidance on PBC creates ongoing challenges for States. The most common challenges States continue to encounter include: (1) lack of early regulator involvement, (2) use of PBC for all sites, regardless if appropriate for the project, (3) lack of contractor oversight, and (4) project delays due to contract modifications.

Lack of Early Regulator Involvement. One of ASTSWMO's recommendations in both 2004 and 2010 is early State participation in the PBC process (e.g., pre-scoping, development of the Performance Work Statement (PWS), pre-bid meetings, and kick-off meetings). In addition, both DoD and Air Force guidance documents recommend that the States be included early in the PBC process to communicate expectations, and to have input on schedules and site selection. Since 2010, States have reported being invited by the DoD Components to participate early on in the PBC process; however, the amount of regulator involvement reported varies from DoD component to component, and even installation to installation. Some States are only invited to the pre-bid meetings, others are invited to comment on the PWS, and others have spent time answering questions from each contractor bidding on the project. Many issues directly related to inadequate planning are encountered during contract implementation in States that are not invited to participate early in the PBC contract. The resulting inefficiencies and delays can be attributed to:

- *Contractors not familiar with State regulatory requirements and/or expectations.* DoD and Air Force guidance documents consistently recommend that the expectations of each party (DoD Component, contractor, and regulator) involved be communicated clearly in meetings and in writing. PBC is more successful with contractors who have had experience or who are familiar with working with the State, but regardless, expectations should be communicated.
- *Contract schedule does not include enough time for regulator reviews.* The regulator's ability to handle the anticipated workload is paramount to the success of the contracts. Some States cite document quality as a problem for performance-based contracts. Under rigid performance-based contract schedules, many States have been inundated with substandard documents requiring more review time (e.g. State requirements or consideration for State regulations as ARARs are overlooked), thus, becoming a bottleneck for contractors trying to meet milestones and making progress in delineating and investigating sites.
- *Underestimating the amount of characterization needed for each site.* States report that if the contractor's bid does not provide for adequate characterization, regulators are often engaged in lengthy discussions with the contractor on how much data is needed, potentially wasting time on contract modifications to adjust to site conditions.

Inappropriate Site Selection for PBC. States are concerned that sites without any characterization (e.g. no identification of all the source areas or delineation of extent of contamination) are being included in performance-based contracts. Mandates from the Air Force and others that a certain percentage of all sites must be handled under PBC do not help to ensure that only appropriate sites use this contracting mechanism. PBC is more successful when there is less uncertainty. Without knowing the extent and type of contamination at a site, the contractor takes on risks and may not be willing to perform more work than what they planned for if that means cutting into their profit. This predicament places a burden on the regulator to argue its case for full characterization.

Lack of Contractor Oversight. Strong oversight of the contract by DoD is key to ensuring that the contract is successful. States report that some contractors tend to skip steps or cut corners by: (1) selecting the cheapest remedy, which may not be effective in remediating the contamination; (2) choosing not to completely delineate contamination; and (3) choosing to spend minimal time on preparation of documents and not perform quality assurance review of documents. States have also reported that some contractors send documents directly to the regulator and DoD Component at the same time, and therefore, the Component cannot review the document prior to submittal to the regulator.

Delays Due to Modifications of Contracts. States report that contracts lack the flexibility to deal with unexpected work. When unexpected work is required, the contractor may ask the DoD Component to modify the contract. Many contract modifications take an extended period to draft, negotiate, and finalize, thus delaying important work.

II. POSITION AND RECOMMENDATIONS

It is ASTSWMO's position that PBC has great potential for moving sites through the environmental restoration process efficiently for all stakeholders, both with respect to time and money. The success of the PBC process depends heavily on regulator involvement during the contract scoping process and throughout the implementation of the contract. To overcome some of the challenges referenced above, ASTSWMO recommends that:

- States be given an opportunity to present bidding contractors with their requirements and expectations to ensure that documents meet with their concurrence.
- Draft schedule of document submittals be provided to the regulator for review so that the regulator can (1) have input on whether the timeframes in the schedule are reasonable; (2) evaluate whether document reviews can be accomplished within a reasonable timeframe with current available resources, and if not, can plan to have the resources available; and (3) determine whether the time periods for review are appropriate for the complexity and size of the document (the same timeframe may not be appropriate for every document).
- States be given the opportunity to provide input during the bidding process on each site included in the PBC process. This input should include any data gaps in characterization or expected work to meet requirements.

- DoD or the contractor provide thorough site characterization to ensure that PBC is the appropriate contracting mechanism for remediating each site.
- DoD provide strong oversight of contractor performance, including reviewing each document prior to submittal to the regulator to ensure that quality documents are submitted.
- Contracts be written to provide for a certain amount of flexibility should unexpected circumstances arise, so that investigations and remediation can continue expeditiously.
- DoD scrutinize each contractor during the selection process to determine whether they have the technical, planning, and communication skills to carry a PBC to success. Once implemented, it is important to involve the States during transition to ensure the project goes smoothly.

ASTSWMO created a template PBC checklist provided in Appendix A. ASTSWMO recommends that States and DoD adopt and use the checklist at each site under consideration for PBC, which will help ensure that PBC is implemented consistently according to DoD guidance and help resolve the challenges encountered during the PBC process. The Air Force utilizes these concepts as part of their contracting process and should be a reference for other federal agencies.

III. RESOURCES

Air Force Center for Engineering and the Environment. (2012). *Performance-Based Remediation Guidebook*.

Association of State and Territorial Solid Waste Management Officials (ASTSWMO). (2004). *Performance Based Remediation Contracts and Compendium of State Lessons Learned – A Guide to Performance Based Environmental Remediation*. Base Closure Focus Group.

ASTSWMO. (2010). *State Perspectives on the Use of Performance-Based Contracting at Federal Facilities Cleanups*. State Federal Coordination Focus Group.

Office of the Deputy Under Secretary of Defense (Installations and Environment). (2007). *Performance-Based Acquisition of Environmental Restoration Services*.

U.S. Army Environmental Command. (2010). *Performance-Based Acquisition Guidebook (Revision 2)*.

U.S. Environmental Protection Agency. (2006). *Performance Based Contracting by Other Federal Agencies at Federal Facilities*. (OSWER Guidance 9272.0-21).

U.S. Government Accountability Office. (2010). Interagency Agreements and Improved Project Management Needed to Achieve Cleanup Progress at Key Defense Installations. (GAO Publication No. 10-348). Washington, D.C.: U.S. Government Printing Office.

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APPENDIX A: PBC CHECKLIST

Federal Facilities Performance-Based Contracting Checklist¹

___1. Pre-contract development meeting with the regulator(s)

- Ensure all site information is obtained and shared with the regulator.
- Identify the desired site close-out condition, including an understanding of the future intended use.
- Discuss anticipated workloads and amend DSMOA Joint Execution Plan as needed.

___2. Develop the Performance Work Statement with consideration of the views and requirements from the regulator(s)

- Identify project objectives for the contract work to be executed (i.e., investigation, remediation, site closeout, etc.).
- Establish a clear understanding of clean-up requirements (i.e., ARARs).

___3. Performance-Based Kick-Off Meeting with the regulator(s)

- Go over project schedules for field work and deliverables.
- Achieve a mutual understanding of expected review times.
- Identify standards, criteria, and guidance to be used during site characterization and remediation.
- Identify potential points of compliance.
- Identify regulatory processes and other applicable state agency programs (i.e., Water Protection, Department of Health, Air Pollution, etc.).
- Identify site constraints and dependencies (i.e., site access, right of entry, security, on-going site activities, topography, slope stability, etc.).
- Determine potential community interests.

___4. Performance-Based Technical Project Planning Meeting with the regulator(s)

- Identify a Preliminary Site Conceptual Model as a simple model of the relationships between chemicals detected at a site and potential exposure pathways to site receptors.
- Identify media of potential concern affected by site contaminants.
- Reach agreement on Site/Operable Unit prioritization for investigation and remediation.
- Determine data needs.
- Develop data collection options (soil, groundwater, surface water, indoor air).

___5. Ensure that deliverables are of quality and NCP compliant before being submitted for regulator review

¹ This checklist is not intended to be comprehensive but to emphasize key points in the PBC process for regulator involvement consistent with DoD Guidance.