

AUGUST 2010



FINAL REPORT:

**STATE PERSPECTIVES ON THE
USE OF PERFORMANCE-BASED
CONTRACTING AT FEDERAL
FACILITIES CLEANUPS**

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ASTSWMO's mission is to enhance and promote effective State and Territorial programs for waste and materials management, to encourage environmentally sustainable practices and to affect relevant national waste and materials management policies

Acknowledgements

The Association of State and Territorial Solid Waste Management Officials (ASTSWMO) is an organization supporting the environmental agencies of the States and Territories (States). ASTSWMO's mission is to enhance and promote effective State and Territorial programs for waste and materials management, to encourage environmentally sustainable practices and to affect relevant national waste and materials management policies.

This document was prepared by the ASTSWMO Federal Facilities Research Center's State Federal Coordination Focus Group, with assistance from the U.S. Environmental Protection Agency (EPA) under Cooperative Agreement RT-83344801. The mission of the State Federal Coordination Focus Group is to investigate issues arising from State involvement in the regulation and remediation of federal facilities. The Focus Group strives to: influence national policy; strengthen State programs; identify and highlight methods to improve and streamline the cleanup process at federal facilities; and enhance communication between the State-Federal partnership.

The comments and views in this document have not been reviewed or adopted by ASTSWMO's Board of Directors, and therefore, the word "States" throughout this document refers to the members of the ASTSWMO Federal Facilities Research Center and other volunteer members. No EPA cooperative agreement funds were used for the actual collection of data.

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EXECUTIVE SUMMARY

Background:

In November 2004, the Association of State and Territorial Solid Waste Management Official's (ASTSWMO's) Base Closure Focus Group released the white paper titled "Performance-Based Remediation Contracts and Compendium of State Lessons Learned-A Guide to Performance-Based Environmental Remediation." The paper defined the different approaches to performance-based contracting (PBC), the overall process the Department of Defense (DoD) components use to implement PBC to address environmental contamination, and the States' and Territories' (henceforth collectively referred to as States) roles in implementing PBC at federal facilities cleanups. The white paper also made it clear that there were inconsistencies within and between the components in defining the types of contracts and how they are implemented, and that the roles of States may change with time as the components' use of PBC expands.

The ASTSWMO white paper provided the following nine recommendations to improve the PBC process:

1. Require State concurrence on which sites will undergo the PBC process;
2. Military components ensure that States receive adequate funding under the Defense State Memorandum of Agreement (DSMOA), including approving new funding levels to address expedited schedules or changes in the project scope of work;
3. Ensure that both DoD and State roles are clearly defined in the PBC process;
4. Ensure that Military Services implement PBC consistently within and between components;
5. Require that States have the opportunity to interview bidding contractors;
6. Ensure that DoD maintains contractor oversight and a presence at the site;
7. Require that PBC contractors ensure adequate State regulatory involvement;
8. Ensure that PBC contractors understand the State's requirements to achieve regulatory closeout;
9. Ensure opportunities for public involvement occur during PBC implementation.

Since the release of the 2004 white paper, DoD and the U.S. Environmental Protection Agency (EPA) have released guidance focused on implementing PBC at federal facilities cleanups. In addition, States have seen a substantial increase in the use of PBC by DoD at federal facilities cleanups in the past five years.

The ASTSWMO State Federal Coordination Focus Group interviewed States in 2009 to gather their perspectives on the use of PBC at federal facilities and to provide further recommendations to improve the PBC process. This report provides an analysis of these States' responses and includes recommendations from the Focus Group designed to enhance State involvement during the PBC process.

Focus of PBC Interviews:

Twenty-nine (29) States provided their experiences and perspectives regarding PBC. States were asked nine questions concerning their PBC experiences:

- Questions 1 and 2 focused on State involvement during the development and execution of contracts.
- Question 3 requested feedback on the impact (if any) of PBC on State workload.
- Question 4 focused on the quality of work produced under PBC.
- Question 5 asked whether or not States experienced problems obtaining oversight funding should a scope of work change during PBC execution.
- Question 6 requested feedback on whether or not the military components are implementing PBC consistently both between and within the components.
- Question 7 focused on working relationships between States and DoD, and between States and the contractors.
- Question 8 requested feedback on changes in States roles and responsibilities during PBC implementation.
- Question 9 requested feedback on state issues or concerns with PBC and suggestions for improvement.

The questions were sequenced to reflect the PBC stages that provide for regulatory involvement. These stages are based on ASTSWMO's 2004 recommendations and DoD's July 2007 guidance document, "Performance-Based Acquisition (PBA) of Environmental Services." Though the questions were designed as yes/no or multiple choice answers, States could also provide additional details and narratives about their experiences. These narratives helped in providing a better understanding of each State's perspective and allowed the Focus Group to identify any specific issues of concern. State comments and narratives quoted or summarized are not attributed to any specific State in this report.

Results of questions 1-4 and 6-8 have the following format:

- Background on the subject of the question;
- Survey results presented in bar graph format with percentages;
- A summary of the results; and,
- Brief recommendations and/or conclusions

Question 9 provides additional issues or problems concerning PBC that were not collected in questions 1-8. While gathering and analyzing results, the Focus Group observed that the great majority of States have not experienced issues with funding. In addition, the remaining States noted that they did not understand the purpose of Question 5 or did not find the question to be applicable. As a result, the Focus Group did not conduct an analysis of Question 5 in this report.

Key Findings:

A majority of State respondents indicated that they have been inadequately involved during development of the PBC-designed contracts. In addition, approximately half of State respondents indicate that DoD components are not implementing the PBC consistently, either within each agency or between agencies. A significant number of States reported increased

workload and a lower quality of work at facilities utilizing PBC-designed contracts. Most States have positive working relationships with both the DoD components and the contractors during the PBC execution. Overall, State responses regarding the impacts of PBC implementation on State roles and responsibilities support a finding of inadequate State participation in the PBC process.

Recommendations:

- DoD components should update their guidance to be consistent with the information in Regulatory Involvement, Chapter 4 in the 2007 DoD PBC guidance.
- To ensure adequate State involvement during PBC development, the DoD components should require mandatory training on regulatory involvement during PBC development.
- DoD components should seek feedback from States on the adequacy of State involvement during contract development and execution.
- DoD components must seriously consider State comments during development stages of the PBC (e.g., DoD components must ensure that the objectives in the PWS reflect State ARARs, etc.).
- PWSs and QASPs must be written to ensure DoD components maintain decision making authority throughout PBC execution.
- As mentioned in the 2007 DoD guidance, the components and their selected contractors should meet with the State during development of the PBC, discuss anticipated workloads, and options available to help States manage increased workload.
- Recommendations for improving quality of work include:
 - Increased involvement of the State during development of the PBC particularly the PWS and QASP;
 - Increased oversight by the DoD components of the contractors;
 - Increased coordination between the contractors and the State especially when developing activity schedules;
 - In contracts, include incentives for high quality work (e.g., limited technical deficiencies cited by the State).
- Regarding consistent implementation of PBCs, the DoD components should engage States early in the PBC process to inform the State of how the component intends to implement PBC and seek feedback and concurrence from the State where applicable.

INTRODUCTION TO PERFORMANCE-BASED CONTRACTING

Federal agencies have implemented performance-based contracting (PBC), also known as performance-based service acquisition (PBSA), for over two decades. To expand use of PBC in Department of Defense (DoD) environmental programs, DoD issued “Performance-Based Contracting for Environmental Cleanup Programs – Department of Defense Statement of Principles” (DoD SOP) in 2004. This SOP affirms that DoD, as a policy, will continue to coordinate with regulators when considering options for PBC and listed examples of opportunities for meaningful State input.

In March 2006, the U.S. Environmental Protection Agency (EPA) issued “OSWER Guidance 9272.0-21: Performance-Based Contracting by Other Federal Agencies at Federal Facilities.” This guidance included ‘guiding principles’ to inform U.S. EPA personnel of their appropriate roles and responsibilities when performing oversight of other Federal agencies utilizing PBC for environmental cleanups. The guiding principles stress that EPA oversight should be separate from contract management and includes instructions on the appropriate lines of communication with both the contracting officer (CO) and the contractor. EPA affirmed its commitment to work with lead Federal agencies in implementing PBC, and reiterated that the Federal agency, not the contractor, retains all responsibility for compliance.

In July 2007, DoD released guidance titled “Performance-Based Acquisition (PBA) of Environmental Services.” The purpose of this guidance is to provide a broad framework for using PBC to effectively address and fulfill environmental restoration responsibilities. The guidance is also designed to familiarize Federal, Tribal and State regulators, contractors, and community members with the PBC process. Chapter 4 of this document covers regulatory involvement during the PBC process. This chapter also stresses the importance of regulatory communication and coordination, and indicated stages of the PBC process where regulatory involvement should occur (Figure 1).

Since DoD released its 2007 guidance, it is not known what effort has been made to ensure that DoD components and contractors receive training on the document’s guidance pertaining



Figure 1
Regulatory Involvement in PBC Process

to regulatory involvement. For further information on the PBC process, please visit the following resources:

- ASTSWMO Base Closure Focus Group. (2004, November). Performance-Based Remediation Contracts and Compendium of State Lessons Learned-A Guide to Performance-Based Environmental Remediation. Retrieved July 28, 2010, at: http://astswmo.org/files/publications/federalfacilities/2004-11_BCFG_PBCs_White_Paper.pdf
- U.S. Army Environmental Command. (2010, July). Performance-Based Acquisitions. Retrieved July 28, 2010, at: <http://aec.army.mil/usaec/cleanup/pba00.html>
- U.S. Air Force Center for Engineering and the Environment. (n.d.). PBC Resources. Retrieved July 28, 2010, at: <http://www.afcee.brooks.af.mil/products/pbc/resources.asp>
- U.S. Department of Commerce and the Office of Federal Procurement Policy (2009). Seven Steps to Performance Acquisition. Retrieved July 28, 2010, at: <https://www.acquisition.gov/sevensteps/home.html>
- Office of the Deputy Under Secretary of Defense (Installations and Environment). (2007, July). Performance-Based Acquisition of Environmental Restoration Services.
- U.S. Environmental Protection Agency. (2006, March). Performance-Based Contracting by Other Federal Agencies at Federal Facilities (OSWER Guidance 9272.0-21). Retrieved July 28, 2010, at: http://www.epa.gov/fedfac/pdf/performance_based.pdf
- U.S. Department of Navy. (2004, October). Performance-Based Contracting Guidelines for Services Acquisitions Under the Environmental Business Line (5090 Ser 0400-211/ENC-RS of 29 Sep 04).

DOD EFFORTS TO ENGAGE STATES

The purpose of question 1 is to determine how well the DoD *components* are performing with respect to involving States in the development and execution of contracts.

Background:

The November 2004 ASTSWMO White Paper recommended that States be involved during PBC implementation. The Base Closure Focus Group specifically recommended that States have a decision-making role on whether a site is appropriate for PBC and that States have the opportunity to interview bidding contractors to ensure that they understand the State regulatory requirements and are capable of implementing the remedy. The July 2007 DoD PBA guidance reiterates the 2004 DoD SOP and supports the Focus Group's 2004 recommendations by instructing components to take the following steps to ensure State participation early in the PBC process:

1. Request Regulator Input for Using PBC for Specific Site(s);
2. Consider Regulator's View of Applicable or Relevant and Appropriate Requirements;
3. Allow Regulators to Present Their Views to Prospective Bidders;
4. Meet with the Regulator and Contractor to Discuss Schedule; and
5. Coordinate Oversight with Regulator

These steps are described in more detail in Section 4.2.1 of the guidance.

Survey Results:

1. Has your State or Territory been invited to participate in the following activities associated with PBCs by DOD COMPONENTS and/or CONTRACTORS? (Check all that apply)		Response Percent	Response Count
Attending the installation and contract team meetings		45%	13
Participating in the development of performance measures and comment on the Performance Work Statement		28%	8
Participating in the Bidder's conference to present regulatory views to prospective contractors		38%	11
Selecting the contractor		7%	2
Establishing performance objectives		38%	11
Maintaining an active role by reviewing remedial activities prior to implementation		76%	22
Providing comments on site documents		86%	25
Concurring with remedy completion		66%	19
Answered question:			26
Provided additional information relevant to State's participation or lack of participation in these activities:			18

Summary of Results:

As indicated in the above graph State responses indicate a high level of participation in several PBC activities including:

- Maintaining an active role by reviewing remedial activities prior to implementation;
- Providing comments on site documents; and
- Concurring with remedy completion.

However, State participation in three key areas of PBC development indicates a much lower participation rate. These areas include:

- Participation in the development of performance measures and the performance work statement (PWS);
- Participation in bidders' conferences; and
- Participation in the development of performance objectives.

Lack of adequate State participation in PBC development is also reflected in the State comments. Several State responders mention the negative consequences that lack of adequate participation has had on project execution. The following State comments illustrate problems between States and the DoD components:

- In one case that included a primary contractor and a subcontractor, the State was restricted to dealing with only the subcontractor who was not allowed to do anything beyond the contract. These restrictions created a “nightmare” for the State when dealing with various issues.
- “We had been promised to be invited to attend pre-contractor meeting and site visit; this happened without us being invited.”
- “In some instances, State involvement was not complete. At some projects, State personnel were more involved during project work (e.g. some State comments/concerns were ignored by the installation POCS during development of the PWS). Due to conflict of interest issues, States are not involved with the selection of the contractor. However, because we are not part of the selection process, the Army/USACE must guess whether or not an approach to the PBC will be acceptable to the state.”
- Another commenter noted that while the State was allowed to comment on the draft PWS and provide regulatory perspective, many State comments went unaddressed in the final PWS. In addition, performance objectives were not tied to regulatory approval, which has stalled cleanup progress for a number of years.

One State noted that the DoD component did tie contractor performance objectives to State document approvals, which benefitted State interactions with the contractor.

Conclusions and Recommendations:

Survey results indicate that a majority of State respondents are not adequately involved in the PBC process. In addition, in certain cases where the State was invited to comment on the PWS, State comments were unaddressed in the PBC, which resulted in subsequent problems during contract execution. These results indicate that DoD components need to improve on involving States in PBC development and execution processes, and that State input must be seriously considered to ensure effective execution of the contract.

CONTRACTOR EFFORTS TO ENGAGE STATES

The purpose of question 2 is to determine how well the DoD *contractors* are performing with respect to involving States in PBC implementation.

Background:

According to the 2007 DoD guidance, “Under [PBC], the contractor takes a greater role in the cleanup process, making decisions on how to meet the contract’s objectives, while the component takes more of an oversight role. The component will continue to remain liable for the cleanup; however, [PBC] provides the contractor with the flexibility to achieve contract objectives under the means it determines to be the most efficient.” The DoD Guidance explains that the component need not be involved in every communication between the contractor and State, as contractors have the most control over how cleanup is conducted. However, the component will interface with the State and contractors on specific tasks, as indicated in Sections 4.2.2 and 4.2.3 in the DoD guidance.

Survey Results:

2. Has your State or Territory been invited to participate in the following activities associated with performance based contracts by the CONTRACTOR? (Check all that apply)		Response Percent	Response Count
Attending important regulator meetings with the contractor		66%	19
Reviewing any potentially precedent-setting decisions or actions by the contractor		52%	15
Reviewing and signing agreements and Decisions Documents		48%	14
Helping conduct community involvement activities		48%	14
Managing and monitoring long-term operations		48%	14
Answered question:			23
Provided additional information relevant to State’s participation or lack of participation in these activities:			16

Summary of Results:

As illustrated in the above figure, responses indicate that a majority of States are involved in major aspects of PBC project execution. However, the percent of positive responses indicates that PBC is not being implemented at a consistently high level of performance. The following State comments illustrate problems between States and the contractors:

- “We would like more involvement with the process and would like for the component to still be in control of the field work and decision-making.”
- There is a lack of meetings, and, for them to be effective, both the prime and sub contractor need to be there. The most important time to meet is before the contract has been written and signed. The State is never privy to the contract.
- At one site, the contractor has only taken the initiative of setting up some meetings and dates for community involvement activities. Precedent-setting decisions and significant actions have been “sprung” on the regulators during the course of document review; little warning or pre-discussion has been conducted.
- In some instances the Army indicates that they cannot dictate how/what the contractor does to meet the contract objectives. That leaves the State responsible for having to argue out approaches/details with the contractor.
- One State mentioned attending some of the original meetings with the component and the contractor, but not until major issues had developed with the contract.
- In some instances, community involvement is not part of PBC, and it seems to slip through the cracks. If the contractor does not have it in their contract, they are not responsible for it, and the installation does not set aside other monies for these outreach activities.

Conclusions and Recommendations:

Results indicate that some States have good working relationships with the contractors. However, a number of States have noted problems working with the contractor. There appear to be two main issues causing difficult relationships between the States and Contractors: 1) The State was not adequately involved during development of contracts, and/or 2) DoD components appear to lack the oversight authority or initiative to provide oversight of their contractors.

Generally, the responses to this question indicate the need for increased DoD component oversight of their contractors and that DoD should maintain decision-making authority to resolve issues that arise.

STATE REGULATOR WORKLOAD

The purpose of this question 3 is to determine if workloads for States have changed at federal facilities that are now being remediated under PBC.

Background:

The 2004 ASTSWMO White Paper noted that PBC could involve a substantial increase in State regulatory oversight if there was an unclear understanding of roles and responsibilities by one or more parties, and a lack in coordination among States, DoD, and contractors. The July 2007 DoD guidance acknowledged that States had concerns that contracts, particularly those with accelerated schedules, would result in increased resource requirements. The guidance proposed four solutions for addressing this concern: engage regulators early in the PBC process, coordinate work schedules with regulators, modify funding agreement to accommodate changes, and develop standardized reporting templates.

Survey Results:

3. How has your workload changed at Federal Facilities utilizing PBCs compared to facilities that utilize other types of contracts?		Response Percent	Response Count
		No Change	56%
Increased Workload	40%	10	
Decreased Workload	4%	1	
Answered question:		25	
Provided additional description of how workload has increased or decreased:		17	

Summary of Results:

Ten of the 25 respondents indicated that their workloads increased for federal facilities using PBC compared to facilities that use other types of contracts. Fourteen States indicated that their workloads did not change due to PBC. Only one State responded that its workloads decreased.

Several States indicated that they had to spend extra time reviewing work plans and reports due to either contractor inexperience and/or poor quality of work, which they attributed to a contractor selection process that tends to award the contract to lowest bidder and not necessarily to the most experienced or qualified contractor. One State mentioned that the component entered a long dispute resolution in order to avoid having to submit a change order, which is supposedly very difficult to do under PBC. One State hired a contractor to help manage the increased workload. However, another State indicated that the complexity of the project did not make it practicable to assign additional staff to the project.

All ten States that said their workloads increased provided written explanations. The following are selected State comments concerning increased workloads:

- “Increased number of documents and requests for shortened review schedules. Documents require additional review because contractor does not adhere to EPA guidance.”
- “PBC creates another level of review and approval on documents and decisions. Contractors trying to make money spend less time on their work products resulting in longer and more substantial work reviews by the State to improve substandard documents.”
- “Timelines are more rigid and requires timely action by State and thus increased workload to keep pace.”
- “PBC takes more oversight because the contractor will take short cuts to make more money.”
- “Workload increases when the contractor gets behind schedule and wants expedited reviews from the State. If the State cannot meet the expedited review schedule, the State may be identified as the reason for the delayed schedule.”
- “Workload increased dramatically and in most cases document development and field work ran on parallel tracks. 5-10 year schedules were compressed into 2-3 year time frames.”
- “Workload has increased due to having to spend more upfront time with the contractors resolving issues. In addition, schedules are compressed, and there is a lot of push from the contractors to reduce review times on documents to meet objectives.”

Only two States of the 14 indicating no change in their workload provided a written explanation. One responded that it did not have enough experience. The second State indicated that its workload did not increase due in large part to the proactive approach taken by the State, installation, and contractors.

Conclusions and Recommendations:

The principal reasons given for increased State workloads were shortened timeframes and rigid schedules imposed by the contracts. As stated in the 2007 DoD guidance, the components and their selected contractor should meet with the State during contract development to discuss anticipated workloads and options available for States to manage workloads.

QUALITY OF WORK

The purpose of question 4 is to analyze the quality of work produced by DoD and the contractor under PBC.

Background:

The 2007 DoD guidance states that PBC is intended to ensure that required performance quality levels are achieved. Section Three of this guidance discusses the nine Stages of PBC. Stage 3(h), Develop a Preliminary Quality Assurance Surveillance Plan (QASP) mentions that, in a true performance-based environment, the contractor is responsible for quality control, allowing the DoD component to focus on performance outcome. This section mentions that the QASP should be developed based on the contractor's Quality Control Plan (QCP), which is intended to ensure the contractor delivers high quality service. Stage Nine, [component] Oversight of Contract Execution, states that the final QASP should include the surveillance methods and tools the DoD component will use to verify the contractor's compliance with the performance standards, including quantity, quality, and timeliness requirements. The 2007 DoD guidance adds that the components should ensure that the QASPs are developed in close coordination with States to establish effective oversight.

Survey Results:

4. How has the quality of work produced under PBCs changed compared to work produced under other types of contracts?		Response Percent	Response Count
No Change		54%	13
Quality of work has Improved		17%	4
Quality of work has Worsened		29%	7
Answered question:			24
Provided examples of how the quality of work has improved or worsened:			16

Summary of Results:

Of the 16 States that provided comments, four States cited examples of improved quality, and seven States indicated quality of work has worsened. Examples of activities that improved quality of work included the addition of quarterly meetings. These meetings aided in streamlining the assessment and/or remediation activities related to a contaminated groundwater plume at closed landfills and allowed the contractor to meet scheduled time frames under PBC. For those States that reported no change, three States indicated it was too early in the process or could not compare for other reasons. One State where quality had improved indicated that the reason was not PBC but that the team instituted other effective safeguards and/or requirements to improve document quality.

Of the seven States that indicated quality of work has worsened, examples include:

- “Additional sampling to delineate the extent of a plume was not conducted due to the looming expiration date of the contract, the state was forced into accepting a substandard product.”
- “The decision document was so incomplete and did not meet CERCLA requirements that the State opted to hold a meeting to discuss a rewrite rather than provide edits.”
- One State has noticed a “decrease in document quality, with diminished readability, consistency, and completeness.”
- “If additional sampling or investigation is needed...the consultant is reluctant to do this as it cuts directly into their profit.”
- “First draft documents have been subpar and usually generated hundreds of comments from regulators...This often made regulator reviews a daunting task. Many documents were therefore very large and quality worsened.”

Conclusions and Recommendations:

Responses indicate a significant number of States have seen a worsening in contractors’ quality of work. Recommendations for improving quality of work include:

- Increased involvement of the State during development of the contract, particularly the QASP;
- Increased oversight of the contractors by the DoD components;
- Increased coordination between the contractors and the State, especially when developing activity schedules;
- Including incentives in contracts for good quality work (e.g., limited technical deficiencies cited by the State); and
- Recommend the components review and incorporate the “Seven Steps to Performance-Based Services Acquisition” in their PBC contracting process. These steps include:
 1. Establish an integrated solutions team;
 2. Describe the problem that needs solving;
 3. Examine private-sector and public-sector solutions;
 4. Develop a PWS or Statement of Objectives (SOO);
 5. Decide how to measure and manage performance;
 6. Select the right contractor; and
 7. Manage Performance.

DoD COMPONENT IMPLEMENTATION

The purpose of question 6 is to document whether or not DoD components are implementing PBC activities consistently within each State.

Background

In 2004, ASTSWMO recommended that DoD address inconsistencies within and between DoD components in implementing PBC as they may delay, impede, or complicate the ability of States to approve remedies. ASTSWMO also recommended that guidance and direction for ensuring that components are implementing PBC consistency should come from DoD. The White Paper concluded that until guidance became available, involving States in the PBC process could also help eliminate inconsistencies or allow States to understand the differences between each component's implementation of PBC.

Survey Results:

6. Per DoD Guidance, are the military Components implementing PBC activities consistently in your State and Territory?		Response Percent	Response Count
Yes		57%	12
No		43%	9
Answered question:			21
Provided explanation of inconsistencies:			14

Summary of Results:

As indicated in the above graph State responses indicate that in the small majority of States that responded (12 of 21), DoD components are implementing PBC consistently. The nine States that indicated that DoD components do not implement PBC activities consistently gave various reasons and examples:

- “Each service seems to have an opinion and different contracting mechanism.”
- “The level of oversight at Army installations is variable. At one Army installation oversight was significantly lacking. At another, the Army Environmental Command is micro-managing the contractor and inhibiting their ability to perform. The amount of oversight provided by the Army influences the amount of input the contractor seeks from the regulators.”
- “The Army allowed us to participate more on the front end of the PBC process than the Air Force.”

- “For some sites, the components work with the State on performance objectives and PWS. However, the state role on determining whether the objectives are met is different between components (Air Force and Army).”

Conclusions and Recommendations:

While the 2007 DoD guidance addresses ASTSWMO’s 2004 recommendation that DoD develop guidance for DoD components, the document fails to provide a consistent approach to implementing PBC between components, and notes that “DoD recognizes that each component has its own procedures for implementing [PBC].” The guidance notes that each component has its own procedures for implementing PBC, and that the guidance should be used as a reference tool for additional information. DoD components should review their current PBC guidance and update it, if necessary, to be consistent with the information in Regulatory Involvement, Chapter 4 of the 2007 DoD PBC guidance

In the meantime, States should be aware that inconsistent implementation of PBC appears to be inherent within DoD. With this understanding, it is recommended that States review Appendix E of the 2007 DoD guidance and other reference materials provided in the Executive Summary of this report to become familiar with each component’s PBC guidance. In addition, DoD components should inform States during the early stages of developing contracts of how the Component intends implement PBC, and the component should seek feedback and concurrence from the States where applicable.

WORKING RELATIONSHIPS WITH DoD COMPONENTS AND CONTRACTORS

Questions 7a and 7b seek feedback on the work relationships that States have with DoD components and contractors under PBC.

Background:

The 2004 DoD SOP on PBCs for Environmental Cleanup Programs states, “Where as, collaboration with federal and State regulators and local communities is essential for successful completion of a quality facility cleanup” and then goes on to further state “the DoD will continue to fully coordinate with regulators and communities per federal and state laws and regulations. In accordance with federal acquisition regulations, the DoD will provide opportunities for meaningful input by regulators in the PBC process. Examples include: Participate in meetings with remedial project managers to plan acquisition strategies, Participate in Bidder’s conferences to present regulatory views to prospective contractors, Maintain active role by reviewing remedial activities prior to implementation, Provide comments on site documents, and Concur with remedy completion”.

The 2007 DoD PBC guidance also states that the DoD component will continue to interface with the regulator throughout the PBC process. This guidance also mentions that, under PBC, the contractor may serve as the primary point of contact for the regulator.

Results and Summary

7a. At sites utilizing PBCs, briefly describe your working relationships with: CONTRACTORS			
		Response Percent	Response Count
Positive		60%	15
Mixed or Neutral		32%	8
Negative		4%	1
Not Applicable		4%	1
Answered question:			25

Fifteen of 25 States that responded to question 7a gave a positive rating to their working relationship with the contractor while eight States gave comments indicating neither a positive or negative relationship or provided certain examples of both positive and negative relationships. In only one instance was a negative response indicated, and one respondent answered Not Applicable (N/A).

Below are State comments on work relationships with the contractor:

- “We have an arrangement with the Air Force wherein the State can contact the contractors directly regarding issues/questions, provided we also copy the Air Force on all communication. This has worked very well for all stakeholders in our projects.”
- “To date the relationships between the State and the PBC contractors [at one Army site and one Air Force site] have been professional.”
- “Contractors seek State ‘buy-in’ of path forward earlier in the remediation process. The contractor functions as a Cleanup Team member, under the supervision of the installation. No adversarial observation has been made to date. There has been little difference in technical discussions; however, contractors may be arguing their position more forcefully. They have become a bigger player at the table as the decisions made could impact profit margins. Thus, the contractors have become more adversarial with the DoD component.”
- “[Relationships are] generally positive. The State Project Managers indicated that more work gets done although more contentious issues appear to arise during project execution.”
- “Contractors tend to have a non-responsive, take-it-or-leave-it attitude. It all revolves around the faster documents are approved the sooner the contractor gets paid and earns a higher profit margin regardless of the quality of work.”
- “[Relationships are] poor – direct communication with the contractor is strictly limited, and we have insisted the Air Force be the POC.”

7b. At sites utilizing PBCs, briefly describe your working relationships with DOD		Response Percent	Response Count
Positive	[REDACTED]	68%	17
Mixed or Neutral	[REDACTED]	28%	7
Negative		0%	0
Not Applicable	[REDACTED]	4%	1
Answered question:			25

Of the 25 respondents to question 7b, 17 gave a positive rating to their working relationship with DoD components, while seven gave comments indicating neither a positive or negative relationship or provided examples of both positive and negative relationships. One respondent answered N/A.

Below State comments on work relationships with DoD components:

- “The relationship between the State and the Air Force at one site remains strong. The relationship between the Army and the State at another site has been acrimonious.”
- “Effective working relationship with DoD that allows for achieving PBC goals. DoD still appears to have final say and have concurred with regulatory position over contractor

position at times. One facility is more hands off than before. They seemingly present less of a voice in the decision process. They're paying the contractor to do that and the goals established in the PBC have already been negotiated between DoD and contractor. The state has an excellent working relationship with both DoD and the contractor.”

- “Working relationships with DoD are generally good. One project manager noted that there has been a slight drop off in direct communication with the DoD project manager, while communication with the contractor has increased.”
- “State has less involvement with DoD component and has more interaction with the contractor. Although relations between the State and installation POC are generally acceptable, the fact that the installation has less control over the contractor can negatively impact progress. For example, in one case where there was a contentious issue between the State and the contractor, the installation POC did not get involved in resolving the dispute.”

Conclusions and Recommendations:

States’ responses to these questions focused on working relationships during PBC execution and not the early stages of contract development. The majority of the States that responded have a good working relationship with both the contractor and the component, regardless of other problems or concerns they may have during the PBC development processes. The fact that a majority of the States participating in this report have good working relationships with components and contractors is encouraging and will be helpful should parties agree to initiate discussions for improvements to the PBC development process.

IMPACTS TO STATE ROLES AND RESPONSIBILITIES

The purpose of this question 8 was to gauge the impact of PBC implementation on State roles and responsibilities.

Background

One of the principles of the 2004 DoD SOP is that collaboration between DoD and State regulators is essential to ensure the successful completion of a quality facility cleanup. PBCs are based on results to be achieved rather than a detailed description of how the work will be performed. Consequently, the roles and responsibilities of the military services, contractors, and regulators are significantly different than under traditional contracts. Cleanups conducted under a PBC include opportunities for regulator involvement in key phases of the contracting process including evaluation of site selection, contract acquisition, and contract execution.

A fundamental difference between PBC and traditional contracting processes is that the PBC uses a PWS rather than a statement of work as the mechanism for accomplishing the desired objective. The PWS must have clear and specific language for mutual understanding of State objectives and milestones, and it should include a QASP, which describes how performance will be measured. The 2007 DoD guidance provides that the military services should consider regulator views on cleanup requirements and, if appropriate, incorporate them into the PWS and QASP.

Survey Results

8. Since 2005, has your State or Territory experienced any changes in your role as a regulator at sites utilizing PBCs?		Response Percent	Response Count
Yes		16%	4
No		84%	21
Answered question:			25
Provided explanation of changes:			11

Summary of Results:

Of the 25 respondents to question 8, 21 indicated no change in their role whereas four indicated there were changes. The high percentage of “no change” responses appears consistent with the responses to other questions, which indicate a fairly low level of State involvement and participation in the development of contracts.

There were no specific notes on the issue of PWSs and QASPs, but some State comments indicate that there is a lack of dialogue between the DoD component/installation and the State on how PBC is being used and defining regulator and component expectations.

- “State involvement includes providing comments and field inspections, routine regulatory functions. However, under PBC our comments often go unaddressed because the scope of work for the PBC is predetermined and the Services are unwilling to amend contracts or scopes of work.”
- “The only minor change we have noted is when the consultant asks us for a letter of completion for a task so they can get paid. We are reluctant to get involved in a contract between the military and their consultant as the only letter we write is a letter of compliance or finding of no further action at the completion of site activities; i.e. we do not write completion letters for every task completed at a site.”
- “Air Force oversight is limited (no representative stationed at the Base) and they are reluctant to direct the contractor. This has resulted in the State playing a more critical oversight role. Our primary focus and one that consumes much of our time has become safety operations. Cost cutting must not be allowed to affect safety. Pushing to achieve clean-up is a low priority issue now, given many sites are way behind schedule and the PBC clock is about to expire.”
- “At some sites, the increased pace that contractors must have to reach DoD goals has not always been a plus. Contractors sometimes cut corners; some quality slippage due to the increased workload and accelerated schedules also results.”
- “The State role of review, comment and approval did not change. However, the level of involvement did increase with greater communication with the PBC contractor. Also, as mentioned previously, the contractor would typically submit more deliverables for regulator review and concurrence.”

State responses indicate the need for greater involvement of States during development of contracts, where roles, responsibilities, lines of communication, resource requirements, performance standards, etc. could be clearly identified and agreed upon in the PWS and QASP. These responses also indicate that the level of collaboration between the military services and regulators is not indicative of a high performing partnership and needs significant improvement.

ADDITIONAL ISSUES OR CONCERNS

Question No. 9 requested additional issues or concerns from States specific to PBC. Overall, 18 of the 29 participants responded to this question, and of those, 15 provided actual issues or concerns. Three responders indicated that they did not have any additional concerns.

The principal concerns expressed by the States were that:

- Quality of work suffers due to emphasis on cost;
- Work plans and schedules are generally inflexible;
- Loss of ability to provide meaningful oversight;
- States are not involved or informed; and
- States are experiencing increased workloads,

The principal suggestions provided by States were:

- Allow States to give more meaningful input and oversight throughout the project, especially at the front end during contractor selection and development of work plans and schedules.
- Improve communications with States and keep States better informed.

Specific concerns and suggestions provided include:

- Be careful not to implement PBC too soon in the remedial process; the remedial investigation must be complete with well defined ARARs. Additionally, contractors may need more flexibility when situations are encountered whereby data gaps must be filled.
- Since a remedy selected under a contract may not be the most effective given the long-term operations and maintenance period, life-cycle effectiveness should be considered during the remedy selection process.
- A stringent system of review, approval, and notifications must be set at the beginning.
- DoD should involve regulators early when developing schedules so that they can better plan for regulators' workload and review response capabilities.
- DoD is considering restricting USACE's role with PBC, which may lead to less efficient system of project management and loss of expertise with munitions and explosives of concern.
- A single large contract may be more effective for several sites rather than separate, smaller contracts so that the contractor can save time and costs from lessons learned on one site and apply the information gained to other sites within the single contract.
- Because of the nature of PBC, the regulators will likely need more time to perform review and approval procedures because contractors are often prone to focus on quick

turnaround, while sacrificing quality and accuracy, and data and other pertinent information may be lost, or unaccounted if work is not thoroughly reviewed.

- The PBC should be setup to allow immediate work stoppage in cases where non-compliance with regulatory requirements are observed.
- The PBC process should include additional contractor screening for qualifications beyond just simply relying on the lowest bid for contractor selection.

OVERALL CONCLUSIONS AND RECOMMENDATIONS

While States report that working relationships with both the DoD components and contractors are generally good, States also note a significant number of issues which negatively impact PBC execution and performance. It is intended that the findings and recommendations listed below be used as a platform for improving the PBC process and meeting the mutual goal of a quality facility cleanup in accordance with the 2004 DoD PBC Statement of Principles and 2007 DoD PBC Guidance.

Findings:

- A majority of State respondents indicated they have not been adequately involved during develop of the PBC.
- State work relations with contractors are generally good. However, some States mention problems working with the contractor. State responses indicate two main issues:
 - The State was not adequately involved during development of contracts; and
 - DoD components appear to lack the oversight authority or initiative to oversee their contractors.
- A significant number of States reported increased workload at facilities using PBC designed contracts, mainly due to shortened timeframes and rigid schedules imposed under the contract.
- A significant number of States report that quality of work has deteriorated under a PBC designed contract. A number of reasons were provided for lack of quality including:
 - Pending contract expiration forced State to accept substandard product;
 - Too much emphasis on cost;
 - Contractor unfamiliar with dealing with regulators and regulations;
 - Presumptive remedies may not be practical for the site;
 - Poor quality may be the result of contract being poorly written and incentivized; and
 - Contractors poorly trained;
- Almost half of State respondents indicated that DoD components are not implementing PBC consistently. This information is not surprising given that each DoD component implements PBC according to its own PBC guidance, and that the 2007 DoD guidance is limited to serving as a reference tool for the components.
- Most States have a positive working relationship with both the contractor and with the DoD component during execution of the contract. (Note: State responses included no comments on work relations during the PBC development process).

- State responses regarding the impact of PBC implementation on State roles and responsibilities support a finding of inadequate State participation in the development of PBCs.

Recommendations:

- DoD components should update their guidance to be consistent with the information in Regulatory Involvement, Chapter 4 in the 2007 DoD PBC guidance.
- To ensure adequate State involvement during PBC development, the DoD components should require mandatory training on regulatory involvement during PBC development.
- DoD components should seek feedback from States on the adequacy of State involvement during contract development and execution.
- DoD components must seriously consider State comments during development stages of the PBC (e.g., DoD components must ensure that the objectives in the PWS reflect State ARARs, etc.).
- PWSs and QASPs must be written to ensure DoD components maintain decision making authority throughout PBC execution.
- As mentioned in the 2007 DoD guidance, the components and their selected contractors should meet with the State during development of the PBC, discuss anticipated workloads, and options available to help States manage increased workload.
- Recommendations for improving quality of work include:
 - Increased involvement of the State during development of the PBC particularly the PWS and QASP;
 - Increased oversight by the DoD components of the contractors;
 - Increased coordination between the contractors and the State especially when developing activity schedules;
 - In contracts, include incentives for high quality work (e.g., limited technical deficiencies cited by the State).
- Regarding consistent implementation of PBCs, the DoD components should engage States early in the PBC process to inform the State of how the component intends to implement PBC and seek feedback and concurrence from the State where applicable.