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118	C.1.1	Contract Overview: Background	C-2 and C-3	<p>We request the deletion of the last paragraph on page C-2 and the first paragraph on page C-3 of this section. The contractor is not a signatory to the Consent Order between DOE and the State, and compliance with its terms is not within contractor's control, as such compliance depends on the actions of third parties, including DOE. Therefore, the penalties for failure to meet milestones and other requirements of the Consent Order over which the contractor has no consent or approval rights should not be flowed down to the contractor as penalties. The use of performance requirements of the contract in the statement of work and the evaluation of award fee are the appropriate and equitable mechanisms for the Government to achieve performance of its own obligations by use of contractors. In addition, costs incurred in connection with performance of such contract requirements should be allowable. Further, the contractor should not be considered a co-operator of the site for permit purposes, since DOE and other contractors control operations and processes at the same location, as well as responsibility for pre-existing site conditions.</p>	<p>The Offerors must understand that the Consent Order is a regulatory compliance requirement applicable to work performance and site operations. The Contract prescribes the work scope and the Contractor's obligations to DOE. This is no different than at any other DOE/EM cleanup site with compliance orders with regulatory agencies. Compliance with the 2016 Consent Order and work performance are within the Contractor's control with only minimal impact from DOE or outside entities.</p> <p>The Contractor will participate in the process to develop the Consent Order milestones. See Q&A 119.</p> <p>The RFP, Section C 1.1 will be amended to reflect the requirements to comply with the permit provisions outlined in Section J, Attachment J-16. Currently, there are certain permits that designate the M&O Contractor as a "permittee" or "permittee and co-operator". The Contractor's roles and responsibilities under these permits are outlined in Section J, Attachment J-16.</p>

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119	Section H H.22(b)	DOE-H-2014 Contractor Acceptance of Notice of Violations or Alleged Violations, Fines, and Penalties	Page H- 49	<p>Contractor liability and responsibility for violations of the NMED-DOE Consent Order (June 2016) should be capped at the value of earned fee for the contract period in which the violations of the Consent Order occurred. The Contractor is not a party to the Consent Order and it has no right of consent to or approval of the Milestones against which penalties will be assessed under the Consent Order. Moreover, it is fundamentally inconsistent with FAR- based cost-reimbursement contracting for the DOE to transfer to the Contractor financial responsibility for legal duties and obligations of a Consent Order to which the contractor is a stranger. Cost-reimbursement contracts are utilized when (FAR 16.301-2(a)(2)) the uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract. Where complex requirements exist (FAR 16.104(d)), particularly those unique to the Government (as represented by the requirements of the NMED-DOE Consent Order) greater cost risk should shift to the Government and not to the contractor.</p> <p>We welcome the contract scope of work to assist the DOE in executing its Consent Order requirements with the State of New Mexico. However, the contractor's role under a cost-reimbursement contract should be characterized as a 'best efforts' obligation to assist DOE in meeting the goals, milestones and other duties it has negotiated with the State of New Mexico under the Consent Order. The contractor should not be imputed as a third party to, or a guarantor of performance under, the Consent Order. We are willing to put at risk our</p>	<p>The Contract requirements include compliance with 2016 Consent Order milestones, which the Contractor has the opportunity to participate in the process to develop the enforceable milestones. The Contractor is held accountable for regulatory compliance which is consistent with the FAR cost principles and principles of liability law.</p> <p>The Contractor will be a participant in the process to develop enforceable milestones under the 2016 Consent Order as described in Section J, Attachment J-16, Paragraph 12.d. The process for DOE/EM's determination of the Contractor's liabilities to DOE under the Consent Order is described in Section J, Attachment J-16, Paragraph 12.e. This is not inconsistent with the FAR. See FAR 31.205-15.</p>

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119 (continued)				<p>“earned fee for the fee evaluation period” but are not willing to risk our assets as if we were the ”owner” of LANL. Accordingly, we submit the following revised paragraph (b) of clause H-22 for substitution:</p> <p>DOE-H-2014 CONTRACTOR ACCEPTANCE OF NOTICE OF VIOLATIONS OR ALLEGED VIOLATIONS, FINES, AND PENALTIES (b) Liability and responsibility for fines and penalties and associated costs arising from or related to violations of environmental requirements imposed by applicable Federal, state, and local environmental laws and regulations, including, without limitation, statutes, ordinances, regulations, court orders, consent decrees, administrative orders, or compliance agreements, consent orders (to include the Compliance Order of Consent for the Los Alamos National Laboratory dated June 2016), permits, and licenses; and safety, health or quality requirements shall be borne by the party that caused the violation(s), provided that under no circumstances shall the Contractor’s liability and responsibility under this Paragraph exceed the total value of the final fee determination under the Contract for the fee period within which the act or omission that gives rise to the fine or penalty occurred, provided further, that the foregoing limitation of liability and responsibility shall not apply to fines and penalties relating to such violations as have been finally determined to have resulted exclusively from the willful misconduct or lack of good faith on the part of any of the Contractor’s managerial personnel as the term “Contractor’s managerial personnel” is defined in FAR 52.246-23(b). This clause resolves liability for fines and penalties though the cognizant regulatory authority may assess such fines or penalties upon either party or both parties without regard to the allocation of responsibility or liability under this contract. The allocation of liability for such fine or penalty is effective regardless of which party</p>	

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119 (continued)				both parties without regard to the allocation of responsibility or liability under this contract. The allocation of liability for such fine or penalty is effective regardless of which party signs permit application, manifest, reports or other required documents, is assessed a fine or penalty, is a permittee, or is named subject of an enforcement action.	
120	H.68	Environmental Responsibility	H-81	Without the addition of the DEAR Pre-existing Conditions clause, referenced in #1 above, the contractor should not be required to serve as permittee for environmental permits at the site, since compliance with permits is not entirely within the control of the contractor, due to pre-existing conditions outside the control of the contractor and due to acts or omissions of other parties, including DOE. Further, compliance with the Consent Order is not entirely within the control of contractor. Therefore, we request DOE amend the RFP to delete clause H.68.	The Contractor will be required to serve as permittee on environmental permits as the law allows and/or requires. The contract requirements include compliance with 2016 Consent Order. The Contractor is held accountable for regulatory compliance which is consistent with the FAR cost principles and principles of liability law. The process for DOE/EM's determination of the Contractor's liabilities to DOE under the Consent Order is described in Section J. Attachment J-16, paragraph 12.e. See also FAR 31.205-15.
121	J-16	Environmental Permits, Compliance Documents, and Agreements Applicable to the EM Work	J-16-4	We request the deletion of the current subsection 12.a. and the substitution of the following as a new subsection 12.a: "The Contractor's scope of work shall include the support to EM-LA's performance requirements of the 2016 Consent Order between DOE and the State of New Mexico." The Contractor is not a signatory to the Consent Order and DOE has not included assignment of its rights and remedies under the Consent Order to the Contractor.	The clause is a contract requirement for work scope performance, not an assignment of rights and remedies. See also Q&A's 118 and 119.

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122	J-16	Environmental Permits, Compliance Documents, and Agreements Applicable to the EM Work	J-16-4	<p>We request the deletion of subsection 12.e and the substitution of the following language as a new subsection 12.e.: “In its determination of Award Fee, DOE shall take into account the Contractor’s performance of work relating to the milestones and other requirements in the Contract which are in support of DOE’s obligations under the Consent Order. The evaluation shall not reduce the Contractor’s fee for matters that were not caused by or under the control of the Contractor, and shall take into account the responsibilities and actions or inactions of other parties, including DOE and other contractors, and of site conditions the Contractor did not create and over which it had no control.”</p> <p>This approach is consistent with past DOE contracting practices and with the current RFP’s treatment of other DOE obligations, such as NEPA, that are to be supported by contractors.</p>	<p>No change necessary, as the clause itself addresses the concerns raised in the comment. Any decisions on liability are limited to the Contractor’s responsibility.</p>

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123	Section J, Attachment J-16	Environmental Permits Compliance Documents Agreement; Compliance Documents; Item No. 12. Paragraph (e)(iv); Compliance Order on Consent, State of New Mexico Environment Department-U.S. Department of Energy Los Alamos National Laboratory; June 2016	Page J- 16-4&5	It is incompatible for a cost-reimbursement contract to shift the Government's ownership risks, which are complex and not capable of reasonable estimation of cost risk, to the contractor, who is required to deliver a best efforts level of commitment towards completion of the statement of work, and who is not otherwise considered a guarantor of performance. The following represents what we believe is a fair allocation of risks dealing with levels of responsibility for penalties and fines related to violations of the Consent Order: SECTION J, ATTACHMENT J-16; Environmental Permits Compliance Documents Agreement; Page J-16-4&5, Compliance Documents; Item No. 12. Compliance Order on Consent, State of New Mexico Environment Department –U.S. Department of Energy Los Alamos National Laboratory; June 2016 (2016 Consent Order) paragraph (e)(iv) - EM-LA will consider relevant inputs; however, the EM-LA Manager will make a determination on the Contractor's responsibility. The Contracting Officer shall render a final determination of the Contractor's responsibility under the Contract, provided that under no circumstances shall Contractor liability and responsibility for "violations" exceed the total value of the final fee determination under the Contract for the fee period within which the act or omission that gives rise lead to the fine or penalty occurred, provided further, that the foregoing limitation of liability and responsibility shall not apply to fines and penalties relating to such violations as have been finally determined to have resulted exclusively from the willful misconduct or lack of good faith on the part of any of the Contractor's managerial personnel as the term "Contractor's managerial personnel" is defined in FAR 52.246-23(b). The Contracting Officer determination of Contractor responsibility under this provision shall be subject to and appealable in accordance with the	Contractor liability is already limited to only what the Contractor is responsible for. The Contractor does not have liability for others responsibility. The DOE will not hold the Contractor financially responsible for fines and penalties resulting from actions for which the Contracting Officer determines are beyond the Contractor's control. See RFP H. 22, DOE-H-2014 Contractor Acceptance of Notice or Alleged Violations, Fines, and Penalties (Oct 2014) (Revised); and H.68, Environmental Responsibility; RFP J, Attachment J 16, paragraph 12(e).

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123 continu ed				Contractor's managerial personnel as the term "Contractor's managerial personnel" is defined in FAR 52.246-23(b). The Contracting Officer determination of Contractor responsibility under this provision shall be subject to and appealable in accordance with the provisions of the Contract Disputes Act of 1978.	

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124	L.18(v)	Direct Labor	L-36, L-37	<p>Question: The RFP allows for the ability of the Offeror to propose its own direct labor rates, consistent with the terms and conditions of the solicitation, applicable law, including the Wage Rate Requirements (Construction)(formerly known as the Davis-Bacon Act) and 4(c) of the Service Contract Labor Standards (formerly known as the Service Contract Act), as applicable. However, the proposed labor rates shall not be less than the DOE provided direct labor rates included within Attachment L-7 of this solicitation. What if the labor category provided in Attachment L-7 doesn't cover all applicable labor categories for trades such as Carpenter and the Carpenter wage rate (\$22.26) is lower than the lowest labor rate provided in Attachment L-7 (\$38.00)? Should the Offeror add labor category Carpenter at the lowest labor rate provided in Attachment L-7 (\$38.00)?</p>	<p>If a specific classification is required for work, but the classification is not provided on the wage determinations, the contractor should propose a wage rate for the classification. After award, but prior to the end of the transition period, the Contractor must submit a "Request for Additional Classification" on Standard Form 1444. The Contractor proposes a rate plus fringe and submits the form to the CO for submission to the Department of Labor. The Department of Labor may accept the proposed rate, or provide a rate plus fringe that the Contractor must pay to employees performing work in that classification.</p> <p>The Contractor is not to pay less than what is provided in Attachment L-7 for job classifications that are stated on that Attachment. If a classification is set forth on the DBA Wage Determination, but not on L-7, the Contractor would propose the rate set forth on the DBA Wage Determination. If a classification is set forth on the SCA wage determination, but is not set forth in L-7, the Contractor would propose the rate on the SCA wage determination.</p>

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125	H.5 (G)(1)	DOE-H-2001 Employee Compensation: Pay and Benefits (Oct 2014)	H-13	<p>The first sentence requires the Contractor to become a sponsor of the existing defined benefit and defined contribution plans. However, the sentence is unclear because an alternative is provided in a parenthetical addition to the sentence, but there is no close parenthesis.</p> <p>To clarify the requirement, will the DOE confirm that the Contractor will be permitted to join the LANS current defined plans as a signatory for all incumbent employees? To allow for sufficient analysis and costing of this approach, will the DOE provide a copy of the Defined Contribution Plan Summary document and the Actuary Funding Reports for the Defined Pension Plan prior to proposal due date?</p>	<p>The RFP will be changed to insert the closed parenthesis as follows: (or, if continuation of the existing plans is not practicable, comparable plans)</p> <p>Until the Contractor workforce is determined, it cannot be known whether there will be a sufficient number of participants to create a Legacy Cleanup Contractor segment to the LANS Plans. Within the RFP cost instructions at L.18, DOE provided a Fringe Rate for all Offerors to cover legacy benefits. The contractor will be provided appropriate plans during transition.</p> <p>See L.18(x).</p>
126	H.6 (A)(2)	Special Provisions Applicable to Workforce Transition and Employee Compensation: Pay and Benefits	H-18	<p>The paragraph requires the Contractor to provide service credit for leave consistent with applicable collective bargaining agreements.</p> <p>To allow Contractors to adequately calculate benefit, pension, and leave costs, will the DOE make available the Collective Bargaining Agreement with the New Mexico Building and Construction Trades Council prior to the proposal due date?</p>	<p>It is not anticipated that the Contractor will hire a significant number of LANS represented employees to require it to pay wages and fringe under the Collective Bargaining Agreement. The Contractor is not required to become a signatory to the LANS Construction Agreement.</p>