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## **Title 10 —Energy**

### **Chapter III —Department of Energy**

#### **Part 719 Contractor Legal Management Requirements**

##### **Subpart A General Provisions**

- § 719.1** What is the purpose of this part?
- § 719.2** What are the definitions of terms used in this part?
- § 719.3** What contracts are covered by this part?
- § 719.4** Are law firms that are retained by contract by the Department covered by this part?
- § 719.5** What contracts are not covered by this part?
- § 719.6** Are there any types of legal matters not included in the coverage of this part?
- § 719.7** Is there a procedure for exceptions or deviations from this part?
- § 719.8** Does the provision of protected documents from the contractor to the Department constitute a waiver of privilege?

##### **Subpart B Legal Management Plan, Staffing and Resource Plan and Annual Legal Budget**

- § 719.10** Who must submit a Legal Management Plan?
- § 719.11** When must a Legal Management Plan be submitted or revised?
- § 719.12** What information must be included in the Legal Management Plan?
- § 719.13** Who at the Department receives and reviews the Legal Management Plan?
- § 719.14** Will the Department notify the contractor concerning the adequacy or inadequacy of the submitted Legal Management Plan?
- § 719.15** What are the requirements for a Staffing and Resource Plan?
- § 719.16** When must the Staffing and Resource Plan be submitted?
- § 719.17** Are there any budgetary requirements?

##### **Subpart C Engagement Letter**

- § 719.20** When must an engagement letter be submitted to Department Counsel?
- § 719.21** What are the required elements of an engagement letter?

##### **Subpart D Requests From Contractor Counsel To Initiate, Defend, and Settle Legal Matters**

- § 719.30** In what circumstances may the contractor initiate litigation, including appeals from adverse decisions?
- § 719.31** When must the contractor initiate litigation against third parties?
- § 719.32** What must the contractor do when it receives notice that it is a party to litigation?
- § 719.33** In what circumstances must the contractor seek permission from the Department to enter a settlement agreement?
- § 719.34** What documentation must the contractor provide to Department Counsel when it

seeks permission to enter a settlement agreement?

**§ 719.35** When must the contractor provide a copy of an executed settlement agreement?

**Subpart E** Reimbursement of Costs Subject to This Part

**§ 719.40** What effect do the regulations of this part have on cost allowability?

**§ 719.41** How does the Department determine whether fees are reasonable?

**§ 719.42** What categories of costs are unallowable?

**§ 719.43** What is the treatment of travel costs?

**§ 719.44** What categories of costs require advance approval?

**§ 719.45** Are there any special procedures or requirements regarding subcontractor and retrospective insurance carrier legal costs?

**§ 719.46** Are costs covered by this part subject to audit?

**§ 719.47** What happens when more than one contractor is a party to a matter?

**Subpart F** Department Counsel

**§ 719.50** What authority does Department Counsel have?

**§ 719.51** What information must be forwarded to the General Counsel's Office concerning contractor submissions to Department Counsel under this part?

**§ 719.52** What types of field actions must be coordinated with the General Counsel?

**Appendix A to Part 719**

Guidance for Legal Resource Management

## **PART 719—CONTRACTOR LEGAL MANAGEMENT REQUIREMENTS**

**Authority:** 42 U.S.C. 2201, 5814, 5815 and 7101, et seq.; 50 U.S.C. 2401, et seq.

**Source:** 78 FR 25809, May 3, 2013, unless otherwise noted.

### **Subpart A—General Provisions**

#### **§ 719.1 What is the purpose of this part?**

This part facilitates management of retained legal counsel and contractor legal costs, including litigation and legal matter costs. It requires the contractor to develop a Legal Management Plan, to document the analysis used to decide when to utilize outside counsel, and to document what law firm or individual attorney will be engaged as outside counsel. This part also requires the contractor to document the terms of the engagement with retained legal counsel. Payment of Department-retained law firm invoices and reimbursement of contractor legal costs under covered contracts are subject to compliance with this part.

#### **§ 719.2 What are the definitions of terms used in this part?**

For purposes of this part:

*Alternative dispute resolution* includes, but is not limited to, processes such as mediation, neutral evaluation, mini-trials and arbitration.

**Contractor** means any person or entity with whom the Department contracts for the acquisition of goods or services.

**Covered contracts** means those contracts described in § 719.3 of this part.

**Days** means calendar days.

**Department** means the Department of Energy (DOE), including the National Nuclear Security Administration (NNSA).

**Department Counsel** means the attorney in the DOE or NNSA field office, or Headquarters office, designated as the contracting officer's representative and point of contact for a contractor or for Department retained legal counsel, for purposes of this part.

**General Counsel** means the DOE General Counsel for DOE legal matters and the NNSA General Counsel for NNSA legal matters.

**Legal costs** means, but is not limited to, administrative expenses associated with the provision of legal services by retained legal counsel; the costs of legal services provided by retained legal counsel; the costs of the services, if the services are procured in connection with a legal matter, of accountants, consultants, experts or others retained by the contractor or by retained legal counsel; and any similar costs incurred by retained legal counsel or in connection with the services of retained legal counsel.

**Legal Management Plan** means a document required by subpart B of this part describing the contractor's practices for managing legal costs and legal matters for which it procures the services of retained legal counsel.

**Litigation** means a proceeding arising under or related to a contract between the contractor and the Department to which the contractor is a party in a State, tribal, territorial, foreign, or federal court or before an administrative body or an arbitrator.

**Retained legal counsel** means a licensed attorney working in the private sector who is retained by a contractor or the Department to provide legal services.

**Retrospective insurance** means any insurance policy under which the premium is not fixed but is subject to adjustments to reimburse the insurance carrier for actual losses incurred or paid (e.g. claims, settlements, damages, and legal costs). Retrospective insurance includes service-type insurance policies as described in 48 CFR 928.370.

**Settlement agreement** means a written agreement between a contractor and one or more parties pursuant to which one or more parties waives the right to pursue a legal claim in exchange for something of value.

**Significant matters** means legal matters involving significant issues as determined by Department Counsel and identified to a contractor in writing, and any legal matters where the amount of any legal costs, over the life of the matter, is expected to exceed \$100,000.

**Staffing and Resource Plan** means a statement prepared in accordance with subpart B of this part by retained legal counsel that describes the method for managing a Significant Matter in litigation.

### § 719.3 What contracts are covered by this part?

(a) Unless excluded under § 719.5, this part covers the following three categories of contracts:

(1) All management and operating contracts;

(2) Non-management and operating cost reimbursement contracts exceeding \$100,000,000; and

- (3) Non-management and operating contracts exceeding \$100,000,000 that include cost reimbursable elements exceeding \$10,000,000 (e.g., contracts with both fixed-price and cost-reimbursable line items where the cost-reimbursable line items exceed \$10,000,000 or time and materials contracts where the materials portions exceed \$10,000,000).
- (b) This part also covers contracts otherwise not covered by paragraph (a) of this section but which contain a clause requiring compliance with this part.
- (c) This part also covers any contract the Department awards directly to retained legal counsel exceeding \$100,000.

#### **§ 719.4 Are law firms that are retained by contract by the Department covered by this part?**

Legal counsel retained under fixed rate or other type of contract or other agreement by the Department to provide legal services must comply with the following if the legal costs over the life of the matter for which counsel has been retained are expected by the Department to exceed \$100,000 and retained legal counsel are so notified by the Department:

- (a) Requirements related to Staffing and Resource Plans in subpart B of this part;
- (b) Cost guidelines in subpart E of this part; and
- (c) Engagement letter requirements in subpart C of this part if the retained legal counsel subcontracts legal work valued at \$25,000 or more (e.g., a law firm retained by the Department subcontracts with another law firm to provide \$26,000 in discovery-related legal work).

#### **§ 719.5 What contracts are not covered by this part?**

This part does not cover any contract under which the Department is not responsible for directly reimbursing the contractor for legal costs, such as fixed price contracts.

#### **§ 719.6 Are there any types of legal matters not included in the coverage of this part?**

Legal matters not covered by this part include:

- (a) Matters handled by counsel retained by an insurance carrier, except under retrospective insurance in accordance with § 719.45;
- (b) Routine intellectual property law support services; and
- (c) Routine workers and unemployment compensation matters.

#### **§ 719.7 Is there a procedure for exceptions or deviations from this part?**

- (a) Requests for exceptions or deviations from this part must be made in writing to Department Counsel and approved by the General Counsel. If an alternate procedure is proposed for compliance with an individual requirement in this part, that procedure must be included in the written request by the contractor. The General Counsel or his/her delegee shall provide a written response to such requests; however the response shall not require a justification of the Department's exercise of its discretion.
- (b) The General Counsel may authorize exceptions or deviations requested under paragraph (a) of this section. The General Counsel may also establish exceptions to this part based on current field office and contractor practices that satisfy the purpose of these requirements.

- (c) Exceptions to this part that are also a deviation from the Department of Energy Acquisition Regulation (DEAR) cost principles (see subpart D of this part) must be approved in accordance with applicable DOE procurement policy. See, e.g., DOE Acquisition Guide chapter 1.1, requiring approval by the Senior Procurement Executive of DOE or NNSA as applicable. In any event, the written request from a contractor for a deviation from a cost principle relating to this part must be submitted to the contracting officer, with a copy provided to Department Counsel.

### **§ 719.8 Does the provision of protected documents from the contractor to the Department constitute a waiver of privilege?**

Contractors are required to provide detailed information about third-party claims and litigation to the Department. The Department and its contractors typically share common legal and strategic interests relating to pending or threatened litigation. The common interest between the parties is primarily rooted in the fact that the Department reimburses contractors for allowable costs incurred when litigation is threatened or initiated against contractors. However, other sources of the common interest between the Department and its contractors may include, but are not limited to, an interest in completion of the agency's important mission work and an interest in safe and efficient operation of the Department's facilities. To the extent documents associated with compliance with this part (e.g., Staffing and Resource Plans, invoices, engagement letters, settlement authority requests, and draft pleadings) are protected from disclosure to third parties because the items constitute attorney work product and/or involve attorney client communications, the contractor's provision of these items to the Department does not constitute a waiver of privilege. As long as the Department and the contractor share a common interest in the outcome of legal matters, this mutual legal interest permits the parties to share privileged material without waiving any applicable privilege.

## **Subpart B—Legal Management Plan, Staffing and Resource Plan and Annual Legal Budget**

### **§ 719.10 Who must submit a Legal Management Plan?**

Contractors who are parties to contracts identified under § 719.3(a) and (b) must submit a Legal Management Plan.

### **§ 719.11 When must a Legal Management Plan be submitted or revised?**

- (a) Contractors must submit a Legal Management Plan to Department Counsel within 60 days following award of the contract. The deadline for submitting the Legal Management Plan may be extended by Department Counsel.
- (b) Contractors must submit a revised Legal Management Plan upon request of Department Counsel within 60 days of receipt of the Department Counsel's request. The request for a revised Legal Management Plan shall include an explanation of the request. The deadline for submitting the Legal Management Plan may be extended by the Department Counsel.

### **§ 719.12 What information must be included in the Legal Management Plan?**

The Legal Management Plan must include the following items:

- (a) A description of the contractor's in-house counsel resources at the time the Legal Management Plan is submitted, including areas of expertise and an explanation of the types of matters expected to be handled in-house.
- (b) A description of the legal matters that may necessitate engagement of retained legal counsel.

- (c) A description of the factors the contractor will consider in determining whether to handle a particular matter utilizing retained legal counsel.
- (d) An outline of the factors the contractor must consider in selecting retained legal counsel, including:
  - (1) Cost;
  - (2) Past performance of previously retained counsel;
  - (3) Particular expertise in a specific area of the law;
  - (4) Familiarity with the Department's activity at the particular site and the prevalent issues associated with facility history and current operations;
  - (5) Location of retained legal counsel relative to:
    - (i) The site involved in the matter,
    - (ii) Any forum in which the matter will be processed, and
    - (iii) The location where a significant portion of the work will be performed;
  - (6) Experience as an advocate in alternative dispute resolution procedures such as mediation;
  - (7) Actual or potential conflicts of interest; and
  - (8) The means and rate of compensation (e.g., hourly billing, fixed fee, blended fees).
- (e) A description of the system that the contractor will use to review each matter in litigation to determine whether and when alternative dispute resolution is appropriate.
- (f) A description of the role of in-house counsel in cost management.
- (g) A description of the contractor's process for review and approval of invoices for legal costs.
- (h) A description of the contractor's strategy for interaction with, and supervision of, retained legal counsel.
- (i) A description of the procedures the contractor will employ in order to seek timely approval from Department Counsel to settle any legal matters as required by § 719.34 of this part;
- (j) A description of the contractor's strategy for keeping Department Counsel apprised of all legal matters covered by this part (e.g., regularly scheduled meetings and written communications).

### **§ 719.13 Who at the Department receives and reviews the Legal Management Plan?**

Contractors must submit a Legal Management Plan to Department Counsel. If the contractor has not been notified of the assignment of Department Counsel, the contractor must submit the Legal Management Plan to the contracting officer and the DOE Deputy General Counsel for Litigation and Enforcement or the NNSA Deputy General Counsel as appropriate.

### **§ 719.14 Will the Department notify the contractor concerning the adequacy or inadequacy of the submitted Legal Management Plan?**

The Contracting Officer or Department Counsel will notify the contractor of any non-compliance or inadequate information relating to requirements in § 719.12 within 30 days of the contractor's submission of the plan. The contractor must either correct matters identified within 30 days of notification or file a letter with the General Counsel disputing the determination of a deficiency.

### § 719.15 What are the requirements for a Staffing and Resource Plan?

- (a) For significant matters in litigation, the contractor must require retained legal counsel to prepare a Staffing and Resource Plan. The contractor must then forward the Staffing and Resource Plan to Department Counsel.
- (b) Retained legal counsel retained directly by the Department subject to this part must prepare a Staffing and Resource Plan and forward it to Department Counsel.
- (c) A Staffing and Resource Plan must describe the following:
  - (1) Major phases likely to be involved in the handling of the matter;
  - (2) Timing and sequence of such phases;
  - (3) Projected cost for each phase of the representation; and
  - (4) Detailed description of resources that the retained legal counsel intends to devote to the representation.
- (d) A Staffing and Resource Plan must include a budget, broken down by phases, including at a minimum the following phases:
  - (1) Matter assessment, development and administration;
  - (2) Pretrial pleadings and motions;
  - (3) Discovery;
  - (4) Trial preparation and trial; and
  - (5) Appeal.
- (e) The contractor must notify Department Counsel before incurring retained legal counsel costs in excess of costs listed in the budget developed pursuant to paragraph (d) of this section.

### § 719.16 When must the Staffing and Resource Plan be submitted?

- (a) The contractor or retained legal counsel must submit the Staffing and Resource Plan to Department Counsel within 30 days after the filing of an answer or a dispositive motion in lieu of an answer, 30 days after a determination that the cost is expected to exceed \$100,000, or 30 days after notification from Department Counsel that a matter is considered significant, whichever is sooner. The deadline for submitting the Staffing and Resource Plan may be extended by Department Counsel.
- (b) Department Counsel may state objections to the Staffing and Resource Plan within 30 days of receipt of a Staffing and Resource Plan. When an objection is stated, the contractor or retained legal counsel must either revise the Staffing and Resource Plan to satisfy the objection within 30 days or file a letter with the General Counsel disputing the objection.
- (c) Contractors must require retained legal counsel to update Staffing and Resource Plans annually or more frequently if there are significant changes in the matter. The contractor must submit the Staffing and Resource Plan updates to Department Counsel. Similarly, Department retained legal counsel must submit to Department Counsel annual Staffing and Resource Plan updates or more frequent updates if there are significant changes in the matter.

### **§ 719.17 Are there any budgetary requirements?**

- (a) Contractors required to submit a Legal Management Plan must also submit an annual legal budget to Department Counsel.
- (b) The annual legal budget must include cost projections for significant matters at a level of detail reflective of the types of billable activities and the stage of each such matter.
- (c) For informational purposes for both the contractor and Department Counsel, the contractor must submit a report to Department Counsel comparing its budgeted and actual legal costs within 30 days of the conclusion of the period covered by each annual legal budget. The Department recognizes, however, that there may be departures from the annual budget beyond the control of the contractor.

## **Subpart C—Engagement Letter**

### **§ 719.20 When must an engagement letter be submitted to Department Counsel?**

Contractors must submit a copy of an executed engagement letter between it and retained legal counsel to Department Counsel when the retained counsel is expected to provide \$25,000 or more in legal services for a particular matter. A copy of the executed engagement letter must be submitted to Department Counsel upon execution.

### **§ 719.21 What are the required elements of an engagement letter?**

- (a) The engagement letter must require retained legal counsel to assist the contractor in complying with this part and any supplemental guidance distributed under this part.
- (b) At a minimum, the engagement letter must include the following:
  - (1) A process for review and documented approval of all billing by a contractor representative including the timing and scope of billing reviews.
  - (2) A statement that provision of records to the Government is not intended to constitute a waiver of any applicable legal privilege, protection, or immunity with respect to disclosure of these records to third parties. An exemption for specific records may be obtained where contractors can demonstrate that a particular situation may provide grounds for a waiver.
  - (3) A requirement that the contractor, the Department, and the Government Accountability Office have the right, upon request, and at reasonable times and locations to inspect, copy, and audit all records documenting billable fees and costs.
  - (4) A statement that all records must be retained for a period of six (6) years and three (3) months after the final payment or after final case disposition, whichever is later.
  - (5) Identification of all attorneys and staff who are assigned to the matter and the rate and basis of their compensation (i.e., hourly rates, fixed fees, contingency arrangement) and a process for obtaining approval of temporary adjustments in staffing levels or identified attorneys.
  - (6) An initial assessment of the matter by retained legal counsel, along with a commitment to provide updates as necessary.
  - (7) A description of billing procedures, including frequency of billing and billing statement format.



- (8) A statement setting forth an agreement that the retained legal counsel will prepare a Staffing and Resource Plan in accordance with the requirements of § 719.15.
  - (9) A statement setting forth an agreement to consider alternative dispute resolution at the earliest possible stage and thereafter as appropriate where litigation is involved.
  - (10) A statement setting forth an agreement that retained legal counsel must comply with the cost guidelines in subpart E of this part.
  - (11) A statement setting forth an agreement that retained legal counsel will provide a certification concerning the costs submitted for reimbursement. The certification that must be included in bills or invoices submitted by retained legal counsel must appear as follows: "Under penalty of law, [the representative] acknowledges the expectation that the bill will be paid by the contractor and that the contractor will be reimbursed by the Federal Government through the U.S. Department of Energy, and, based on personal knowledge and a good faith belief, certifies that the bill is truthful and accurate, and that the services and charges set forth herein comply with the terms of engagement and the policies set forth in the Department of Energy's regulation and guidance on contractor legal management requirements, and that the costs and charges set forth herein are appropriate and related to the representation of the client." The certification must be signed and dated by a representative of the retained legal counsel. Invoices must contain all elements (e.g., date of service, description of service, name of attorney, etc.) set forth in the model bill format in Appendix A to this part.
  - (12) A statement setting forth agreement to identify and address promptly any professional conflicts of interest.
- (c) There may be additional requirements for an engagement letter based on the needs of the contractor or the Departmental element requiring the services of the Department retained legal counsel.

## **Subpart D—Requests From Contractor Counsel To Initiate, Defend, and Settle Legal Matters**

### **§ 719.30 In what circumstances may the contractor initiate litigation, including appeals from adverse decisions?**

- (a) The contractor must provide written notice to Department Counsel prior to initiating litigation or appealing from adverse decisions.
- (b) The contractor may not initiate litigation for which it seeks reimbursement without prior written authorization of Department Counsel.
- (c) The following information must be provided to Department Counsel by the contractor prior to initiating litigation or appealing an adverse decision:
  - (1) Identification of the proposed parties;
  - (2) The nature of the proposed action;
  - (3) Relief sought;
  - (4) Venue;
  - (5) Proposed representation and reason for selection;

- (6) An analysis of the issues and the likelihood of success, and any time limitation associated with the requested approval;
- (7) The estimated costs associated with the proposed action, including whether outside counsel has agreed to a contingent fee arrangement;
- (8) Whether, for any reason, the contractor will assume any part of the costs of the action;
- (9) A description of any attempts to resolve the issues that would be the subject of the litigation, such as through mediation or other means of alternative dispute resolution; and
- (10) A discussion regarding why initiating litigation would prove beneficial to the contractor and to the Department.

### **§ 719.31 When must the contractor initiate litigation against third parties?**

The contractor must initiate litigation, upon the request of the contracting officer, against third parties including proceedings before administrative agencies, in connection with the contract. The contractor shall proceed with such litigation in good faith and as directed from time to time by Department Counsel.

### **§ 719.32 What must the contractor do when it receives notice that it is a party to litigation?**

- (a) The contractor shall give the contracting officer and Department Counsel immediate notice in writing of any legal proceeding, including any proceeding before an administrative agency and any claim which will be handled by a retrospective insurance carrier if costs (including Legal costs, settlements, claims paid, damages, etc.) are likely to be \$100,000 or more, filed against the contractor arising out of the performance of the contract and shall provide a copy of all relevant filings and any other documents that may be requested by the contracting officer and/or Department Counsel. The Department Counsel will direct the contractor as to:
  - (1) Whether the contractor must authorize the Government to defend the action;
  - (2) Whether the Government will take charge of the action; or
  - (3) Whether the Government must receive an assignment of the contractor's rights.
- (b) The contractor shall proceed with such litigation in good faith and as directed from time to time by the Department Counsel.
- (c) If the costs and expenses associated with the legal proceeding against the contractor are potentially allowable under the contract, the contractor shall:
  - (1) Authorize Department representatives to collaborate with contractor in-house counsel or Department Counsel-approved outside counsel in settling or defending the legal proceeding; or counsel for any associated insurance carrier in settling or defending the claim if retrospective insurance applies or the amount of liability claimed exceeds the amount of insurance coverage; and
  - (2) Authorize Department representatives to settle the legal proceeding or to defend or represent the contractor in and/or to take charge of any litigation, if required by the Department, except where the liability is covered by bond or is insured by an insurance policy other than retrospective insurance.

**§ 719.33 In what circumstances must the contractor seek permission from the Department to enter a settlement agreement?**

The contractor must obtain permission from Department Counsel to enter a settlement agreement if the settlement agreement requires contractor payment of \$25,000 or more. Obtaining this approval does not represent a determination that the settlement amount and/or the legal costs incurred in connection with the underlying legal matter will be determined to be allowable.

**§ 719.34 What documentation must the contractor provide to Department Counsel when it seeks permission to enter a settlement agreement?**

The contractor must provide a written statement to the Department Counsel that includes the following information, as applicable:

- (a) The amount of any proposed monetary settlement payment.
- (b) Titles and docket numbers associated with the case(s) for which the contractor is seeking approval to settle;
- (c) The procedural history of the case(s) or issue(s);
- (d) A narrative description of the legal claims or allegations at issue in the matter and any background information that explains events that precipitated the initiation of the matter;
- (e) A description of the history of the settlement discussions;
- (f) A description of the terms of the proposed settlement agreement or requested settlement authority and the rationale for the contractor entering into the proposed agreement;
- (g) If the proposed total monetary settlement amount would be allocated among multiple plaintiffs, a list of the plaintiffs and the amount of money each would receive pursuant to the proposed settlement agreement as well as an explanation as to why the settlement amount is different for any particular plaintiff, if appropriate;
- (h) A description as to why settlement of the matter is in the best interest of the Department; and
- (i) Any additional supporting documents requested by Department Counsel.

**§ 719.35 When must the contractor provide a copy of an executed settlement agreement?**

A contractor must provide a copy of an executed settlement agreement within seven (7) days of execution.

**Subpart E—Reimbursement of Costs Subject to This Part**

**§ 719.40 What effect do the regulations of this part have on cost allowability?**

Contractor and retained legal counsel compliance with this part is a prerequisite for allowability of legal costs. However, compliance with this part does not guarantee that legal costs will be determined to be allowable. Only the contracting officer has the authority to determine allowability of costs in accordance with 48 CFR (FAR) part 31 and (DEAR) part 931 and all other applicable contract terms and conditions.

### § 719.41 How does the Department determine whether fees are reasonable?

In determining whether fees or rates charged by retained legal counsel are reasonable, the Department may consider among other things:

- (a) Whether the lowest reasonably achievable fees or rates (including any currently available or negotiable discounts) were obtained from retained legal counsel;
- (b) Whether lower rates from other firms providing comparable services, at appropriate competency and experience levels, were available;
- (c) Whether alternative rate structures such as flat, contingent, and other innovative proposals, were considered; and
- (d) The complexity of the legal matter and the expertise of the law firm in this area.

### § 719.42 What categories of costs are unallowable?

- (a) Specific categories of unallowable costs are contained in the cost principles at 48 CFR (FAR) part 31 and 48 CFR (DEAR) part 931 and 48 CFR 970.31. See also 41 U.S.C. 4304.
- (b) Costs that are customarily or already included in billed hourly rates are not separately reimbursable.
- (c) Interest charges that a contractor incurs on any outstanding (unpaid) bills from retained legal counsel are not reimbursable.

### § 719.43 What is the treatment of travel costs?

- (a) Travel and related expenses must at a minimum comply with the restrictions set forth in 48 CFR 31.205-46, or 48 CFR (DEAR) 970.3102-05-46, as appropriate, to be reimbursable.
- (b) Travel time may be allowed at a full hourly rate for the portion of time during which retained legal counsel performs legal work for which it was retained; any remaining travel time shall be reimbursed at 50 percent of the full hourly rate, except that in no event will travel time spent working for other clients be allowable. Also, for long distance travel that could be completed by various methods of transportation, e.g., car, train, or plane, costs charged by retained legal counsel or any agent of retained legal counsel will be considered reasonable only if the individuals charge no more travel time than it would take to utilize the fastest mode of transportation that is cost-effective. For example, if retained legal counsel travels for 10 hours by train when a cost-effective flight that would take two hours to get to the same destination is available, the attorney may charge a maximum of two hours for the time spent traveling.

### § 719.44 What categories of costs require advance approval?

- (a) To be considered for reimbursement, costs incurred by retained legal counsel for the following require advance written approval from Department Counsel or the submission of subsequent specific justification to Department Counsel when circumstances out of the contractor's control make advance approval unobtainable:
  - (1) Computers or general application software, or non-routine computerized databases, if they are specifically created for a particular matter. For costs associated with the creation and use of computerized databases, contractors and retained legal counsel must ensure that the creation and use of computerized databases is necessary and cost-effective. Use of databases originally created by the Department or its contractors for other purposes, but that can be used to assist a contractor or retained legal counsel in connection with a particular matter, should be considered. Contractors

and retained legal counsel must ensure that DOE is provided the discretion to obtain unlimited access to and dominion over any computers or general application software, or non-routine computerized databases specifically created for a particular matter;

- (2) Secretarial and support services, word processing, or temporary support personnel;
  - (3) Attendance by more than one attorney at a deposition, court hearing or interview;
  - (4) Expert witnesses and consultants;
  - (5) Trade publications, books, treatises, background materials, and other similar documents;
  - (6) Professional or educational seminars and conferences;
  - (7) Preparation of bills or time spent responding to questions about bills from either the Department or the contractor;
  - (8) Food and beverages when the attorney or consultant is not on travel status and away from the home office;
  - (9) Pro hac vice admissions; and
  - (10) Time charged for law students' or interns' services.
- (b) Requests for fee increases by retained legal counsel, other than those under contract directly with the Department, must be sent in writing to the contractor, who will review the request for reasonableness. If the contractor determines the request is reasonable, the contractor must seek approval for the increase from Department Counsel before it authorizes any increase. Contractors should attempt to lock in rates for partners, associates and paralegals for at least a two year period.

**§ 719.45 Are there any special procedures or requirements regarding subcontractor and retrospective insurance carrier legal costs?**

- (a) The contractor shall establish a monitoring system for significant matters in litigation which are handled by subcontractors other than retrospective insurance carriers whose contracts provide for the reimbursement of legal costs. The purpose of this monitoring system is to enable the contractor to be regularly informed of the progress of the Significant Matter, to monitor the associated costs and help ensure that they are reasonable, and to report on the progress of the Significant Matter and the associated costs to Department Counsel.
- (b) The contractor shall require retrospective insurance carriers and other subcontractors whose contracts provide for the reimbursement of legal costs to request prior permission from the contractor to enter into a settlement agreement with, or make any payments to, claimants or third-parties if:
  - (1) In the case of a subcontractor other than a retrospective insurance carrier, the settlement or payment amount is likely to reach \$25,000 or more; or
  - (2) In the case of a retrospective insurance carrier, the settlement or payment amount is likely to reach \$100,000 or more.
- (c) The contractor shall require the insurance carrier or other subcontractor to submit all documentation described in § 719.34 and to provide the contractor with a copy of the executed settlement agreement within seven days of execution, which the contractor will promptly forward to Department Counsel. The

contractor shall not authorize the subcontractor to enter into a settlement agreement or make a payment to a claimant or third-party that is likely to reach or exceed the above-stated threshold amounts without first obtaining the approval of the Department Counsel.

- (d) Upon request from Department Counsel, the Contracting Officer, or other authorized representative of the Department, the contractor shall provide detailed cost information regarding particular legal matters handled by retrospective insurance carriers or other subcontractors whose contracts provide for the reimbursement of legal costs.
- (e) The contractor shall provide reviewed costs and status updates for all significant matters in litigation handled by subcontractors whose contracts provide for the reimbursement of legal costs in accordance with § 719.51. The contractor is not required to provide cost and status updates for matters handled by retrospective insurance carriers except upon the written request of the cognizant Contracting Officer or Department Counsel.

#### **§ 719.46 Are costs covered by this part subject to audit?**

All costs covered by this part are subject to audit by the Department, its designated representative, or the Government Accountability Office. See § 719.21.

#### **§ 719.47 What happens when more than one contractor is a party to a matter?**

- (a) If more than one contractor is a party in a particular matter and the issues involved are similar for all the contractors, a single legal counsel designated by the General Counsel must either represent all of the contractors or serve as lead counsel, when the rights of the contractors and the Government can be effectively represented by a single legal counsel, consistent with the standards for professional conduct applicable in the particular matter. Contractors may propose to the General Counsel their preference for the individual or law firm to perform as the lead counsel for a particular matter.
- (b) If a contractor, having been afforded an opportunity to present its views concerning joint or lead representation, does not acquiesce in the designation of one retained legal counsel to represent a number of contractors, or serve as lead counsel, then the legal costs of such contractor are not reimbursable by the Department, unless the contractor demonstrates that it was reasonable for the contractor to incur such expenses.

### **Subpart F—Department Counsel**

#### **§ 719.50 What authority does Department Counsel have?**

- (a) Department Counsel will receive written delegated authority from the contracting officer to serve as the contracting officer's representative for legal matters.
- (b) Actions by Department Counsel may not exceed the responsibilities and limitations as delegated by the contracting officer. Delegated contracting officer representative authority shall not be construed to include the authority to execute or modify the contract or resolve any contract dispute arising under the contract. Additional discussion of the authority and limitation of contracting officers can be found at 48 CFR 1.602-1, and contracting officer's representatives at 48 CFR (DEAR) 942.270-1. The clause, Technical Direction, 48 CFR (DEAR) 952.242-70, also discusses the responsibilities and authority of a contracting officer's representative.

### **§ 719.51 What information must be forwarded to the General Counsel's Office concerning contractor submissions to Department Counsel under this part?**

Department Counsel must submit through the General Counsel reporting system, the reviewed costs and status updates for all matters involving retained counsel, including but not limited to contractor litigation. The reports are to be received by the 15th day of the month following the end of each quarter of the fiscal year.

### **§ 719.52 What types of field actions must be coordinated with the General Counsel?**

- (a) Requests from contractors for exceptions or deviations from this part must be submitted to the contracting officer and Department Counsel, and approved by the General Counsel or his/her delegee.
- (b) Requests from contractors for approval to initiate or defend litigation, or to appeal from adverse decisions, where legal issues of first impression, sensitive issues, issues of national significance to the Department or of broad applicability to the Government that might adversely impact its operations are involved must be coordinated by Department Counsel with the General Counsel or his/her delegee.
- (c) Department Counsel must inform the General Counsel of any Significant Matter, as defined in this part, and must coordinate any action involving a Significant Matter with the General Counsel, or his/her delegee, as directed by the General Counsel or his/her delegee.

## **Appendix A to Part 719—Guidance for Legal Resource Management**

### **Management and Administration of Outside Legal Services**

- 1.0 Alternative Dispute Resolution
- 2.0 Cost Allowability Issues
  - 2.1 Underlying Cause for Incurrence of Costs

Attachment—Contractor Litigation and Legal Costs, Model Bill Format

### **Management and Administration of Outside Legal Services**

This guidance is intended to assist contractors, contracting officers and retained legal counsel in managing the costs of outside legal services.

#### **1.0 Alternative Dispute Resolution**

Contractors are expected to evaluate all matters for appropriate alternative dispute resolution (ADR) at various stages of an issue in dispute, e.g., before a case is filed, during pre-discovery, after initial discovery and during pretrial. This evaluation should be done in coordination with the Department's ADR liaison if one has been established or appointed or Department Counsel if an ADR liaison has not been appointed. Contractors, contractor counsel, and Department Counsel are also encouraged to consult with the Department's Director of the Office of Conflict Prevention and Resolution. The Department anticipates that mediation will be the principal and most common method of alternative dispute resolution. Agreement to arbitrate should generally be consistent with the Administrative Dispute Resolution Act

(incorporated in part at 5 U.S.C. 571, et seq.) and Department guidance issued under that Act. When a decision to arbitrate is made, a statement fixing the maximum award amount should be agreed to in advance by the participants.

## 2.0 Cost Allowability Issues

A determination of cost reasonableness depends on a variety of considerations and circumstances. 48 CFR 31.201-3 establishes that no presumption of reasonableness is attached to the incurrence of costs by a contractor.

### 2.1 Underlying Cause for Incurrence of Costs

While 10 CFR part 719 provides procedures associated with incurring and monitoring legal costs, the evaluation of the reason for the incurrence of the legal costs, e.g., liability, fault or avoidability, is a separate issue. The reason for the contractor incurring costs may affect the allowability of the contractor's legal costs. In some cases, the final determination of allowability of legal costs cannot be made until a matter is fully resolved. In certain circumstances, contract and cost principle language may permit conditional reimbursement of costs pending the outcome of the legal matter. Whether the Department makes conditional reimbursements or withholds any payment pending the outcome, legal costs ultimately reimbursed by the Department must comply with the applicable cost principles, the terms of the contract, and part 719.

## Attachment—Contractor Litigation and Legal Costs, Model Bill Format



## 1. Model Bill Format

### I—FOR FEES

Date of service	Description of service	Name or initials of attorney	Approved rate	Time charged	Amount (rate × time)
(See Note 1 to this table).					

### II—FOR DISBURSEMENTS

Date	Description of disbursement	Amount
(See Note 1 to this table).		

Note 1—Description of Service: All fees must be itemized and described in sufficient detail and specificity to reflect the purpose and nature of the work performed (e.g., subject matter researched or discussed; names of participants of calls/meetings; type of documents reviewed).

Note 2—Description of Disbursement: Description should be in sufficient detail to determine that the disbursement expense was in accordance with all applicable Department policies on reimbursement of contractor legal costs and the terms of engagement between the contractor and the retained legal counsel. The date the expense was incurred or disbursed should be listed rather than the date the expense was processed. The following should be itemized: copy charge (i.e., number of pages times the price per page); fax charges (date, phone number and actual amount); overnight delivery (date and amount); electronic research (date and amount); extraordinary postage (e.g., bulk or certified mail); court reporters; expert witness fees; filing fees; outside copying or binding charges; temporary help (assuming prior approval).

Note 3—Receipts: Receipts for all expenses equal to or above \$75 must be attached.