TRP Contracting

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How do I contract for TRP services?

Can you put out a “contract” on the cat?
Disclaimer

This Module does **NOT** count as Contracts Management Training!
Conducting a Brownfields/128(a) Site Assessment

DECISION: Assessment Needed

Determine Brownfields/128(a) Funding Eligibility (or alternative)

Hire Env. Professional/Contractor
- RFP & Negotiate Contract

Develop Documents:
- Phase I Report
- QAPP/FSP/HSP for Phase II
- Phase II Report

Initiate Public Participation:
- Public Communication
- Results of Assessment(s)

Evaluate Report(s)
- Cleanup Needed?
- Cleanup Plan & Cost Est.? 

Tribal Institutional Controls needed?

CLEANUP DECISION

Seek Cleanup Funding
Implementing a Brownfields/128(a) Cleanup

DECISION: Cleanup Needed

Establish Administrative Record

Determine Brownfields/128(a) Funding Eligibility

Hire Env. Professional/Contractor
  • RFP & Negotiate Contract

Develop Cleanup Documents:
  • Cleanup Alternatives (ABCA)
  • Cleanup Plan/Cost Est.
  • Supporting Docs (QAPP, FSP, H&S Plan)

Initiate Public Participation:
  • Notice of Cleanup Plan
  • Public Communication
  • Results of Cleanup/Controls

Conduct Cleanup
  • Final Cleanup Report

CLEANUP CERTIFICATION

• Oversight
• Verification Sampling
• Implement Controls

Post Cleanup Monitoring/Controls
Funding authorized under CERCLA Section 128(a) is awarded through a cooperative agreement (grant) with a tribe.

All contracts for procurements of goods and services utilizing federal grant funds by a Tribe are subject to the requirements of 40 CFR PART 31—Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments.
Specifically 40 CFR §31.36

These requirements include:

- Grantee will follow the same policies and procedures it uses for procurements from its non-Federal funds.
- Grantee will ensure that every purchase order or other contract includes any clauses required by Federal statutes and executive orders and their implementing regulations.
- Grantee will use their own procurement procedures which reflect applicable tribal laws and regulations, provided that the procurements conform to applicable federal law, the standards identified in this section, and if applicable, §31.38 of the Indian Self Determination Act.
- Grantees will maintain a contract administration system which ensures that contractors perform in accordance with the terms, conditions, and specifications of their contracts or purchase orders.
Grantees will maintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts.

No employee, officer or agent of the grantee shall participate in selection, or in the award or administration of a contract supported by Federal funds if a conflict of interest, real or apparent, would be involved.

{Such a conflict would arise when the employee, officer or agent, any member of his immediate family, his or her partner, or an organization which employs, or is about to employ, any of the above, has a financial or other interest in the firm selected for award.}
40 CFR § 31.38 states that any contract, subcontract, or sub-grant awarded under an EPA grant by an Indian Tribe or Indian Intertribal Consortium shall require to the extent feasible:

- (a) Preferences and opportunities for training and employment in connection with the administration of such contracts or grants shall be given to Indians as defined in the Indian Self Determination Act (25 U.S.C. 450b); and

- (b) Preference in the award of subcontracts and sub-grants in connection with the administration of such contracts or grants shall be given to Indian organizations and to Indian-owned economic enterprises as defined in section 3 of the Indian Financing Act of 1974 (88 Stat. 77) [25 U.S.C. 1452].
When using 128(a) grant funds, in whole or part, for a contract the U.S. EPA may also require and/or recommend that specific wording and/or forms be included in or attached to contracts when using federal funds.

\{Contact your Regional grant project manager for the latest requirements.\}
Will I get a new dog house in this deal?
It is often necessary to procure or “hire” a person or firm to perform certain TRP tasks, services or duties for the tribe. These can include:

- conducting ASTM Environmental Site Assessments,
- remediation or cleanup of contaminated sites,
- drafting tribal codes, laws or policies,
- establishing and maintaining web sites
- reviewing reports and data
- conducting a risk assessment
- etc.
First, decide whether you need to contract out a project, or all of the project tasks. What tasks can be done “in-house”?

- **Use contractor to enhance TRP capacity.** Work closely with the contractor so it can be a learning experience.

- **Get familiar with the procurement requirements.** Know the contracting policies and requirements of your Tribe and 40 CFR Part 31. (When is sole-source OK?)
Second, decide what type of contract will meet your needs:

“Lump Sum” Contract – good for smaller well defined tasks or jobs such as web pages, translations, 3rd party review, etc.

The process of hiring a person or contractor generally involves:

- issuing a Request for Proposals (RFP);
- selection of a contractor from the proposals;
- negotiating the contract terms and costs;
- performance of the work, services or tasks by the contractor; and
- final close out and payment of the contract.
Put as much detail as possible in your RFP and request specific unit costs or cost types.

- you do not want to compare apples and oranges.
- If you want a certain level of experience, including working with tribes, say so in the RFP.

Avoid even the appearance of conflict of interest.
Be sure no-one on your selection committee or the contract team has a conflict of interest.

Make sure your selection process is clear and fair.
Selection criteria and their relative importance should be in the RFP.
Prepare for RFP

- **Estimate time-line from RFP to start of work.**
  The process to complete contracting can take awhile and you may need work to start by a certain date or season.

- **Consult other tribes and the EPA on the Request for Proposal (RFP) format.** Their experience will help you avoid problems.
A solicitation for proposals from contractors should include at a minimum:

- General information about the project or assignment
- Scope of Work statement
- Specific activities or tasks that applicants must address in their proposal
- Due date for proposal submission
- The expected performance period (dates) or time frame(s)
(cont.)

- Expected work products and format(s)
- What the proposal evaluation criteria will be and the relative weight of each criteria
- Contact person
- Ability to visit site(s) or review past reports before making a bid
- Any recommended or required U.S. EPA language (when using U.S. EPA grant funds)
The full detailed RFP can be lengthy and therefore expensive to publish in newspapers. Therefore, it is a common practice to publish a much shorter “Notice of Availability” (NoA) of the RFP. Interested applicants can then request a full copy of the RFP via mail, E:mail, fax or in person.
The RFP or NoA should be published in appropriate sources such as newspapers of local or area circulation; web sites; trade journals; newsletters, etc. to include at least three regional daily newspapers.

Examples of RFPs and NoAs for site assessment and remediation/cleanup can be obtained from the US EPA or another Tribe.
Interview the top-rated applicants. Develop a list of questions and ask the same questions during each interview (Note: You can negotiate final fees and costs during final contract negotiations with the selected applicant.)
AGREEMENT

City/Tribe Brownfields Assessment Project
(an example of a contract to be signed with contractor hired by the City/Tribe
for environmental assessment work)

THIS AGREEMENT is made and entered into as of ________________ by and between the
City/Tribe, a Federally recognized Indian Tribe, and
referred to hereinafter as the “Consultant”.

WHEREAS, Consultant desires to provide certain Brownfields investigation and planning
services for the City/Tribe; and

WHEREAS, City/Tribe desires to engage Consultant for such services;

NOW THEREFORE, in consideration of the promises and covenants hereinafter contained, it
is agreed by and between the parties hereto as follows:

1. Consultant agrees to provide services for the City/Tribe commencing as of the date of execution of
the Agreement and proceeding in accordance with the project schedule as specified in the attached
Schedule of Work (Exhibit A). The time schedule may be subject to change by the City/Tribe to
better coordinate project productivity by the Consultant. A change or modify to the time schedule
must be agreed upon in writing by both the City/Tribe and Consultant.

2. For such services, Consultant shall be paid as specified in Exhibit B - Schedule of Fees, attached an
incorporated by reference for each phase authorized, in writing, by the City/Tribe and Consultant.
Provided, however, that the City/Tribe shall not pay a fee to the Consultant pursuant to this contract
which exceeds a total sum of __________. The final payment shall be paid to the Consultant
when a final inspection is conducted and approved by the City/Tribal government, following work
completion and within 30 days of Consultant’s submission for payment.

3. Consultant agrees to provide services for the City/Tribe and to furnish all plant, labor, materials,
tools, and equipment necessary to accomplish the areas of work stated in the technical specifications
and site plans set forth in the Consultant’s bid package/proposal. (See attached Scope of Work -
Exhibit C)

4. The City/Tribe may, without prejudice to any right or remedy, terminate this Agreement for cause in
the event Consultant fails to fulfill, in a timely or satisfactory manner, any of the Terms and
Conditions set forth in this Agreement, and fails to cure any default after seven (7) days written
notice from the City/Tribe of such default or breach. If the Agreement is canceled or terminated as
provided herein, the City/Tribe shall pay the Consultant on the basis of the actual services
satisfactorily performed and reasonable costs incurred as calculated by the City/Tribe. If the
City/Tribe cancels this Agreement for any reason, and without any liability therefore, it will provide
the Consultant a written notice thirty (30) days prior to such action. Such notice shall be sent to the
last known address of Consultant.

5. (For Tribes only) The Consultant will comply with any TERO regulations. (list specifics)
a. (example: The TERO cost for this project is covered in the Consultant’s bid @ 3% and will be paid
in total on the first payment request as stated in the TERO Ordinance.)
b. (example: consultant will adhere and comply with (Sections ___ of Public Law ___ as
amended ___, governs the Tribal Employment Rights Ordinance in regard to wages,
employment and subcontracting requirements.)

6. Consultant shall carry and submit evidence of the following insurance coverage:
Some tribes have a general or model contract that is recommended, or in some cases is required, to be used by the tribal programs for procurement of services.

Typically such contracts do not include the necessary requirements or flexibility for conducting TRP activities, especially assessments or remediation/cleanup of sites. The TRP may need to work with the tribal contracting office and/or the tribal legal staff to agree on contract language that is appropriate and acceptable to all tribal parties.
Work with your tribal contracting office to develop your contract. Be sure they understand that your grant requires that certain federal requirements as well as technical standards and requirements be included.
The contractor may propose that the TRP utilize their contract. The tribe may take the contractor’s preferred contract terms or language into consideration in the negotiation of a contract but the tribe is under no obligation to use the contractor’s contract.
Contract Requirements

- Include specifics on work products and performance standards.
  - Be sure to clearly specify the number, final form and formats of reports and other documents.
  - For remediation/cleanups you may need to specify performance or cleanup standards to be met.
Establish conditions for final payment. It may be appropriate to reserve a percentage of the total contract fee to be paid upon final review, verification and approval of the contractor work products or accomplishment of remediation/cleanup goals.
How to halt work?

- Discuss “stop work” issues and make sure the contractor understands the process and has all local contact information. Also make sure your contractor knows that any subcontractors are subject to the same contract and tribal/federal requirements as the prime contractor.
Be sure that the contract has provisions for early termination of the contract, including termination for cause, such as inadequate performance. Consult your tribal attorney and/or contracting office for guidance on this.
Have a kick-off meeting with your contractor, environmental director and project team.

- Make sure the overall goals of the project, schedule (especially critical deadlines), tasks, form and format of final products/deliverables, and roles and responsibilities are clear and understood.

(Note: understand the cost of meetings with the contractor)
The TRP project manager is responsible for keeping the project and the contractor on track.

Contractors need your input to do a good job!
Require your contractor to keep you informed on a regular basis about progress. Progress reports should be provided to you on a quarterly basis or more often as appropriate. These reports should include, at a minimum, the work performed, any obstacles encountered to completing the work on-schedule, plans for the coming period, costs incurred and budget remaining.
Implementation & Oversight

- **Get adequate documentation of costs** (names, hours and costs for staff time, detailed expense breakout for supplies, travel, subcontracts, and other items).
Process your contractor’s requests for reimbursement promptly. If there are problems with their request, let the contractor know and try to get the problems resolved.

Keep track of progress and budget. Maintain regular contact with the contractor, respond to calls promptly, review draft and final reports, and make sure any tribal and/or EPA project officer reviews and approvals are sought and obtained as necessary.

{EPA may also need to receive a copy of reports or other documents completed under the contract and may review and comment on draft reports.}
Conduct frequent field oversight. Have a tribal staff person in the field often to observe (and learn from) the contractor. Ask lots of questions, take lots of notes and take LOTS of pictures.
Don’t let problems get out of hand. If you find that contract provisions are not being met, the schedule is falling behind without explanation, un-anticipated problems are being encountered or the project looks like it is going over budget, arrange a meeting or call with your contractor and/or project manager to discuss issues and seek a resolution.
**Document.** Document all meetings, correspondence and discussions with your contractor and other involved parties. Document information and pictures from field oversight. (This may be valuable information later if problems or differences arise or you want to tell the story of the project)

**Review and verify.** Review all final work products to ensure they meet your needs and requirements and are signed/certified, if required, by the appropriate and qualified party.
This is Business!

Remember: This is a business relationship and you are contracting for professional services and results!
As tribes have begun to implement contracting of services for accomplishment of TRP actions and tasks they have often needed to improve and/or develop new tribal contracting processes to include:

- Developed Improved or new “model tribal contracts” specifically suited for TRP work and tasks.
- Conducted proposal review and selection process.
- Needed to amend or expand contract tasks or costs.
- Needed to terminate contractor services for failure to perform.
- Used contractors as a learning tool to improve program capacity.
Lessons Learned

- Use contract that fits the work to be accomplished
- Establish weighted contractor selection criteria that:
  - fit the work/tasks;
  - includes a qualitative criteria;
  - favors experienced and qualified staff;
  - includes experience working with tribes;
  - meets the needs of the tribe; and
  - is not overly biased for the low bidder.
Lessons Learned

- Include ability to adjust tasks, add tasks and/or adjust costs in contract.
- Have ability to address contingencies or “new discoveries”;
- Work with Tribal Attorney in advance to address ability to terminate contractor for cause;
- Consult references and other tribes that have utilized the contractor;
- Conduct field oversight of contractor (often);
Lessons Learned

- Utilize the contractor to provide training and increase knowledge of TRP staff;
- Ensure contract includes specific requirements for providing copies of all necessary reports and documents in appropriate quantity and format(s) (hard copy, bound, digital, digital format, etc.); and
- Start RFP and selection process early enough to make contractor selection and establish a start date before contractors are fully committed for other work, especially if the work is seasonal.
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