

Contracting Questions and NEPA Analyses

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Three recent participants in a Shipley Group NEPA training session opened the session with questions about contracting procedures. These three participants were newly appointed agency project managers for three Environmental Impact Statement's (EISs). One participant was from the Army Corps of Engineers. A second was from the Department of Energy. The third was from a Native American tribe, which is preparing an EIS for the Bureau of Indian Affairs. Despite coming from different agencies, the participants had similar questions.

Their questions seemed relevant enough to merit brief discussions in this Shipley newsletter. Many recent Shipley participants have had similar concerns because their agencies are relying on consultants/contractors for major NEPA work.

Here, then, are the questions from these three newly appointed NEPA project managers:

- 1. Why does an agency project manager prepare a Statement of Work (SOW)?**
- 2. How detailed should a SOW be?**
- 3. Why does an agency contracting officer need estimated days (or weeks) for tasks listed in the SOW?**
- 4. What NEPA analysis information should the agency provide to the contractor as agency-generated information in the SOW?**
- 5. Are the contractor's employees participating members of the agency's NEPA interdisciplinary team?**
- 6. What are some considerations in the choice of a contractor for an EIS?**

I discuss each of the questions in the following newsletter. Examples I mention come primarily from my experience as a consultant/contractor on NEPA projects. I have also discussed these same questions with participants in many Shipley NEPA training sessions. I am indebted to these participants for sharing their contracting experiences with me.

- 1. Why does an agency project manager prepare a Statement of Work (SOW)?**

Who better than an agency NEPA manager to prepare the detailed project-specific SOW?

Many agency contracting officers routinely defer to their agency's NEPA experts. Contracting

officers know legal contracting provisions, but they rarely have enough first-hand NEPA experience to identify SOW tasks for a comprehensive NEPA analysis.

These NEPA tasks are the basis for a useful Statement of Work (SOW). Without a clear detailed description of projected tasks, the agency is asking a NEPA contractor to bid on vague, unspecified tasks. Such bids are often wildly high or low, and the contract deliverables need ongoing changes and adjustments, even major rewriting before they are adequate. Such changes cause costly delays and cost overruns.

Let me begin with a simple example. Assume that the agency's NEPA person wants a contractor to conduct a single public scoping meeting. Often the SOW merely states this task as follows: **"The contractor shall conduct one public scoping meeting in Portland, Oregon."** In one Shipley session tailored for contracting officers, I asked them to list tasks to meet this single-sentence statement. As might be expected, listed tasks (and associated hours) ranged from lows of 10 or 12 hours up to 40, 50, or more hours. Estimated dollar bids also ranged from ridiculously low to excessively high.

As a contractor/bidder faced with such a vague sentence of SOW direction, I still have to arrive at a competitive bid. To do so, I need to make some assumptions. For example, a simple assumption is captured in the following sentences: **"Complete the necessary supporting tasks for the public scoping meeting in Portland, Oregon. The estimated time assumes up to 40 professional hours."** As in this sample response from a contractor, the uncertainty forces the contractor to stipulate a potential maximum level of effort. If the actual hours used exceed this estimate, the agency is often unhappy and might blame the contractor for low-balling the initial bid estimates. Conversely, if the actual hours equal only 20, then payments to the contractor become confusing and, perhaps even subject to disputes.

What are the unspecified tasks in this request for help with a single scoping meeting? Here is the start for a list of unspecified subtasks:

- Assistance with the writing of the Notice of Intent (announcing work on the EIS and the site and time for the initial public meeting). [The agency is legally responsible for this Notice, but a contractor might assist the agency to polish and then to circulate the Notice.]
- Assembling a mailing list for an initial newsletter explaining the site and agenda for the upcoming meeting.
- Sending letters or emails, plus the initial newsletter, to known interested or affected parties.

- Planning for the meeting agenda and materials, including maps, PowerPoint slides, and survey/response questionnaires.
- Conducting the meeting, using one or more contractor facilitators and/or agency representatives. And then recording all responses, either in informal minutes or in a formal verbatim transcript of all comments. [Agency preferences vary as to the degree of formality required.]
- Compilation of all input from the meeting and the preparation and mailing of a follow-up summary to all interested and affected parties.

Contracting uncertainties have now entered the process, based on the vague, incomplete information in the original SOW sentence. Even two or three sentences of early SOW clarification would help—for example, **“The contractor shall assist the agency with the drafting of the Notice of Intent and the mailing of public notices to interested and affected parties. The contractor shall plan and conduct the public meeting and shall be responsible for arranging for a formal transcript of the meeting. The contractor shall prepare, with agency guidance, a newsletter (both hard copy and electronic, for the agency’s website) summarizing the meeting.”**

Remember: Pay now with early work writing the SOW or pay later! Each hour spent early on the SOW likely saves two, three, or many more hours later working through contract specifics with the contractor. An early and clear SOW helps avoid contracting surprises and disputes about tasks not included in the contractor’s bid or about insufficient contract payments.

So, I repeat my initial question: **Who better than an agency NEPA manager to prepare the detailed project-specific SOW?**

2. How detailed should a SOW be?

The answer to Question 1 partially answers this question. **A detailed SOW is essential.** As with the example in Question 1, vague or unspecified expectations limit the usefulness of the SOW. The example in Question 1 dealt with only a single minor NEPA task. A detailed SOW would necessarily list all major NEPA tasks and dozens of subtasks.

It is beyond the scope of this newsletter to list these major tasks or the host of minor subtasks. Most agencies have lists of NEPA tasks available. Check with your agency’s NEPA coordinator for such a list. Optionally, ask the coordinator for a good recent agency-specific NEPA SOW. An existing SOW likely has weaknesses, but it is at least a starting point.

As the answer to Question 1 argues, a detailed SOW is the minimum starting point for a NEPA contracting process. Such a process should begin with a comprehensive list of tasks and enough details about subtasks to be useful throughout the contracting process. Also, the agency should provide known project information about the proposed agency action—for example, the agency’s purpose and need, a range of reasonable alternatives, and adequately documented discussions of direct, indirect, and cumulative impacts.

A detailed SOW is the key to an efficient contracting process. And a detailed SOW would provide all of the agency’s existing project information, as listed at the end of the prior paragraph.

In some cases an agency states in the SOW that the contractor is responsible for developing crucial NEPA content. Such delegations of NEPA responsibilities are possible as long as the agency retains careful oversight and remembers that its decision makers and its NEPA practitioners are legally responsible for the validity of the contractor’s NEPA analysis.

Examples of crucial NEPA conceptual delegations are not common. One case, however, might be if the agency asks a contractor to design a “range of reasonable alternatives” to the agency’s (or proponent’s) proposed action. The quoted phrase captures a major NEPA legal requirement. As such, most agencies do not and often should not allow a contractor to design alternatives. See my discussion below of Question 4 for more information about such delegation actions.

If an agency does make such a deliberate delegation to a contractor, then the agency needs to remember two things:

- 1. The agency is legally responsible for reviewing and then approving the contractor’s proposed alternatives.** An approval necessarily relies on the contractor’s skill at describing why the proposed alternatives represent the legally required “range of reasonable alternatives.” [Notice that the contractor is summarizing the agency’s decision making process.]
- 2. The agency (or, more likely, the project proponent) will be paying more, perhaps substantially more, to the contractor for this additional conceptual work.**

Such additional payments to the contractor are why I suggested in Shipley Group newsletters 50 (April 2006) and 62 (January 2009) that contracting an entire NEPA analysis and its documentation may not be a cost effective option. An archive of Shipley Group newsletters is available at: <http://www.shipleygroup.com/environmental/index.html?pg=news>

Remember that agency reviews of a contractor's work often require days or even weeks of staff time from the agency's resource specialists and, as appropriate, the agency's NEPA specialists and legal counsels. Such internal staff hours need to be added to contractor's project costs when agency decision makers cite total project costs for the preparation of the EIS.

3. Why does an agency contracting officer need estimated days (or weeks) for tasks listed in the SOW?

An agency's contracting officer wants estimated days (or weeks) for two purposes:

- An estimated schedule, with major deadlines and milestones
- A projected estimate of bid amounts for each major task in the schedule

Both of these estimates allow a contracting officer to judge if a contractor's proposed level of effort and associated dollar bids are reasonable. Contracting officers can and should reject bids that are clearly too low to be reasonable or, conversely, too high to reflect the agency's need for NEPA compliance information.

In one instance, I heard a contracting officer ask agency specialists to estimate how much time each of a contractor's resource specialists would need to spend to complete their NEPA tasks. Agency specialists were surprised and almost at a loss as to how to respond. They were not accustomed to making such time estimates for NEPA resource investigations. They needed to be reminded that **in the contracting world time and task estimates are essential starting points for any contracting negotiations.**

So if you are leading a contracted NEPA project, expect to provide your contracting officer with tasks, times, and your assumptions behind your estimates. Notice that a good SOW lists tasks and subtasks and even sub-subtasks.

Agency SOWs rarely list projected task times (as in days or weeks). But a contractor is expected to provide such time estimates in its submitted bid materials.

Sometimes an agency contracting officer will ask agency NEPA specialists for rough time estimates, such as those that would appear in a separate work breakdown schedule (WBS) for the proposed NEPA effort. A WBS is essentially a spread sheet listing tasks, subtasks, and, if appropriate, sub-subtasks. Then for each task, a professional level of worker is listed—for example, project manager, senior resource specialist, technical assistant, or clerical assistant. Finally the WBS gives projected hours or days for these workers to complete the listed tasks. Agency contracting officers rarely request or prepare an internal WBS for each contracted

project. However, all contractors will prepare some version of the WBS, but with varying level of specific information.

A good internal WBS, even a sketchy one, leads to a tentative project schedule. Again, your contracting officer will want to have such a tentative schedule in hand as a tool for judging a bidder's response to the tasks listed in the SOW. This step is especially important because an agency bid announcement might ask a contractor to prepare a proposed schedule for completing the tasks listed in the SOW.

Without a rough internal schedule (from the NEPA manager), an agency contracting officer will have no basis for judging conflicting schedules from contractors bidding on a project.

4. What NEPA analysis information should the agency provide to the contractor as agency-generated information in the SOW?

In recent years, concerns have increased about the extent and nature of governmental contracting. The crux of such concerns focuses on the difference between routine tasks and tasks legally specific to the agency and its mission.

Routine tasks include such things as building maintenance or ongoing wildlife surveys. These tasks do not require an agency decision related to its mission. These tasks merely maintain the agency in its daily activities. Other routine activities would include servicing motor vehicles or cutting grass around the district office. Contractors can easily perform such tasks. Whether such contractor duties are cost effective is not clear, but decisions about the use of contractors is within an agency's discretion.

Non-routine, legally important decisions are ones central to an agency's mission. Such decisions would include the earlier budgetary decision to renovate the building as mentioned in the prior paragraph. Or, the Forest Service or the Bureau of Land Management might use data from ongoing wildlife surveys to adjust grazing practices on a grazing allotment. Both the Forest Service and the Bureau of Land Management have, as agency missions, stewardship of federal land and of the resources on it. Adjustments of grazing levels is just one example of their stewardship role. Stewardship decisions cannot be delegated, but as in this wildlife example, they often rely on valid data from outside the agency.

In the NEPA context, I would suggest that agencies should not routinely delegate major NEPA conceptual tasks, such as these:

- The scope and intent of the agency's Proposed Action
- The purpose and need for this Proposed Action and alternatives
- The alternatives to be analyzed in detail under NEPA

- The scope and adequacy of the direct, indirect, and cumulative impacts considered during NEPA analysis
- Findings of non-significance of impacts, leading to an agency's Finding of No Significant Impacts
- The managerial rationale for choosing an alternative, as derived from the "range of reasonable alternatives" analyzed in an EIS or EA
- The identification and rationale for the "environmentally preferable" alternative in Record of Decision for an EIS

Each of the tasks in the preceding list is properly linked to the agency's legal responsibilities under the National Environmental Policy Act (and other laws). As such, contractors can and often do provide supporting information, but the governmental agency is legally responsible for both the validity of the supporting information and for rationales leading to final agency decisions.

5. Are the contractor's employees participating members of the agency's NEPA interdisciplinary team?

Neither the contractor nor the contractor's employees should participate in the agency's interdisciplinary team. Such participation would be a potential conflict of interest. In some cases, a contractor is even warned not to communicate with the project's proponent. These cases are rare, but they do show that conflicts of interest or biased processes have been and are a concern.

Also, members from the public are never members of an agency's interdisciplinary team. Under the Federal Advisory Committee Act, agencies may not seek or accept advice from an individual or from a public interest group without following all FACA provisions carefully. In summary, FACA provisions mandate that all public meetings be announced, no parties be given preferential treatment (so if one group attends a meetings, then all are invited), and the results of all meetings appear in the public record.

If another governmental agency is given cooperating agency status, then that agency's employees can be participants in the lead agency's interdisciplinary team. Such arrangements should be formalized in a memo of agreement between the governmental agencies involved. Note that at least one of the lead agencies must be a federal agency. State or county governments can be either joint lead agencies or cooperating agencies.

Agency guidelines about NEPA contractors are clear. An agency can choose to contract any NEPA tasks it needs to, but the agency remains responsible for the legal adequacy of all NEPA information a contractor provides. If the final NEPA decision is challenged in court, the named

defendant is the decision maker for the agency and the agency itself. A contractor is not the defendant. The contractor often submits files of project information, but the contractor is not a named defendant to the formal litigation under NEPA.

For EISs, the agency has final authority to choose a contractor even if a Proposed Action is coming from a proponent, as in a proposed mine project by a private mining company. The project proponent for a project-specific EIS is not allowed to prepare the EIS. In some cases agencies give the proponent a short list of approved contractors. In other cases, the agency chooses a final contractor from a list already screened by the proponent. **The final choice is, however, the agency's.** In most cases, the chosen contractor even submits a signed statement that it does not and will not work for the proponent. So the chosen contractor for the mine project would not be involved in current or subsequent work for the mining company.

For EAs, the proponent can prepare the EA or the proponent can hire its own contractor. Whoever prepares the EA must satisfy the agency that the information in the EA is valid and in compliance with NEPA. The agency remains responsible for all substantive decisions, including the ultimate decisions recorded in the agency's Finding of No Significant Impact.

Uncertainties do arise, and in such cases, NEPA practitioners should always be talking with the agency's legal counsels. One such uncertainty came up in the training session I described in the opening to this newsletter. A Native American tribe wanted to have a tribal member attend EIS sessions as an observer. Ordinarily, this would not have been a problem, but the observer was a de facto proponent because the tribe was proposing an action that required BIA approval. I suspect that the tribe (as a sovereign nation) could choose to have an observer present, but I did suggest to the tribal member that she check with the legal counsel for the Bureau of Indian Affairs (BIA). I made this suggestion because the BIA is the federal agency responsible for the EIS (and its associated ROD) and the BIA is responsible for the validity of all NEPA activities, including team activities related to the preparation of the EIS.

6. What are some considerations in the choice of a contractor for an EIS?

Choice of a contractor is often difficult. I usually recommend that the agency's contracting officer and the NEPA project manager jointly prepare a list of criteria for choosing the best contractor.

Contracting in the NEPA area is especially tricky because it presumes that the contractor's employees know both NEPA requirements and how to write clear NEPA disclosure documents. Many employees bring one of these two skills but not both. Additionally, contributors need to know how to work as team contributors, not individual writers.

All of the preceding requirements mean that first-rate, productive NEPA contributors are not easy to find. (As a personal aside, my own success rate in the choice of productive NEPA writers has been spotty, at best. Often a good person from the items in his or her resume is a good talker at meetings, but not a productive or skillful writer. So, from my experience, choosing a qualified contractor, along with its team of writers, is difficult.)

Federal agencies have also had mixed luck contracting out NEPA tasks. The most common complaint is that agency folks have to edit draft documents extensively. Occasionally, documents require complete rewriting. In some instances, contracting turns out to be more time consuming than efficient. And even worse, the final costs often exceed initial estimates.

Given these possible problems, I usually recommend that agencies look at a number of things before choosing a contractor. Here are some of the most important such items for agency NEPA project managers to consider before they agree to hire a potential contractor:

- The contractor's performance record on EIS projects of a similar size and complexity. Often an agency asks for several references (that is, the name of contact persons who can vouch for the contractor's past work).
- The credentials of the suggested project manager (and several alternate managers, if possible). Contractors usually include a statement that the project managers listed will be available if the contractor receives the contract. If possible, interview one or more suggested project managers.
- Solid resumes for well-qualified resource specialists for all resources of interest or likely to be of interest in the proposed project.
- Samples of prior work—that is, copies of actual EISs or EAs that the contractor or the proposed project manager worked on recently. As appropriate, ask for samples from the lead editor or writer for the proposed project. Electronic samples are now usually available.
- A well-described management plan and associated schedule for major activities.

A final recommendation: Don't rely on unexplained assumptions. If you want the contractor to do something, carefully describe that something in your SOW.

As an example, several years ago a seasoned NEPA manager inserted this sentence in a SOW: "The contractor shall provide text that meets the best academic standards." The manager did not list the standards. Actually no universal list of academic standards even exists. Academic standards regarding style and the arrangement of information vary greatly, even within a single academic department.

As might be expected, the initial contract deliverables did not conform to any list of standard writing standards. So the agency NEPA manager listed desired standards in a contract amendment. Such revised expectations are all too often the norm. Don't assume that the contractor or the contractor's writers will follow any writing standards unless the SOW actually lists them.

As one example of a stated writing standard that would apply to NEPA text: **Move major NEPA conclusions to the opening line or sentence in paragraphs, sections, or chapters. Follow each conclusion with a clear rationale (that is, a list of understandable reasons).** [This is one of the major standards from the Shipley Group's workshop on *Clear Writing for NEPA Specialists*. Sessions of this workshop are regularly scheduled in major cities.]

Note that the preceding writing standard is not present in such standard references as the *Government Printing Office Style Manual*. The GPO leaves matters of organization and the arrangement of content to the writer's discretion. GPO is, of course, an excellent reference for answering questions about punctuation, abbreviations, or the format consistencies for tables.