

AMENDMENT OF SOLICITATION/MODIFICATION OF CONTRACT		1. CONTRACT ID CODE K		PAGE 1 OF 8	
2. AMENDMENT/MODIFICATION NO. 0005		3. EFFECTIVE DATE April 11, 2001		4. REQUISITION/PURCHASE REQ. NO. SCO600-00-0710	
5. PROJECT NO. (If applicable)		6. ISSUED BY SCO600  DEFENSE ENERGY SUPPORT CENTER 8725 JOHN J. KINGMAN ROAD, SUITE 4950 FORT BELVOIR, VA 22060-6222 BUYER/SYMBOL – Lisa Lombard DESC-APP PHONE - (703) 767-9406 FAX 703-767-8757 llombard@desc.dla.mil P.P. : 8.2		7. ADMINISTERED BY (If other than Item 6) CODE SCO600	
8. NAME AND ADDRESS OF CONTRACTOR (NO., street, city, county, State, and ZIP Code)		9a. AMENDMENT OF SOLICITATION NO. SP0600-00-R-0059		9b. DATED (SEE ITEM 11) April 28, 2000	
BIDDER CODE:		CAGE CODE:		10a. MODIFICATION OF CONTRACT/ORDER NO.	
				10b. DATED (SEE ITEM 13)	
<b>11. THIS ITEM ONLY APPLIES TO AMENDMENTS OF SOLICITATIONS</b>					
<p><input type="checkbox"/> The above numbered solicitation is amended as set forth in Item 14. The hour and date specified for receipt of Offers <input checked="" type="checkbox"/> is extended, <input type="checkbox"/> is not extended to <b>May 2, 2001 at 3:00 pm Eastern Standard Time (EST) Fort Belvoir, VA 22060</b></p> <p>Offers must acknowledge receipt of this amendment prior to the hour and date specified in the solicitation or as amended, by one of the following methods: (a) By completing Items 8 and 15, and returning <u>1</u> copy of the amendment;(b) By acknowledging receipt of this amendment on each copy of the offer submitted; or(c) By separate letter or telegram which includes a reference to the solicitation and amendment numbers.</p> <p><b>FAILURE OF YOUR ACKNOWLEDGMENT TO BE RECEIVED AT THE PLACE DESIGNATED FOR THE RECEIPT OF OFFERS PRIOR TO THE HOUR AND DATE SPECIFIED MAY RESULT IN REJECTION OF YOUR OFFER.</b> If by virtue of this amendment you desire to change an offer already submitted, such change may be made by telegram or letter, provided each telegram or letter makes reference to the solicitation and this amendment, and is received prior to the opening hour and date specified.</p>					
<b>12. ACCOUNTING AND APPROPRIATION DATA (If required)</b>					
<b>13. THIS ITEM APPLIES ONLY TO MODIFICATIONS OF CONTRACTS/ORDERS, IT MODIFIES THE CONTRACT/ORDER NO. AS DESCRIBED IN ITEM 14.</b>					
A. THIS CHANGE ORDER IS ISSUED PURSUANT TO: (Specify authority) THE CHANGES SET FORTH IN ITEM 14 ARE MADE IN THE CONTRACT ORDER NO. IN ITEM 10A.					
B. THE ABOVE NUMBERED CONTRACT/ORDER IS MODIFIED TO REFLECT THE ADMINISTRATIVE CHANGES (such as changes in paying office, appropriation date, etc.) SET FORTH IN ITEM 14, PURSUANT TO THE AUTHORITY OF FAR 43.103(b)					
C. THIS SUPPLEMENTAL AGREEMENT IS ENTERED INTO PURSUANT TO AUTHORITY OF:					
D. OTHER (Specify type of modification and authority)					
<b>E. IMPORTANT:</b> Contractor <input type="checkbox"/> is not, <input type="checkbox"/> is required to sign this document and return _____ copies to the issuing office.					
14. DESCRIPTION OF AMENDMENT/MODIFICATION (Organized by UCF section headings, including solicitation/contract subject matter where feasible.)					
<p><b>All offerors who submitted a timely proposal on October 20, 2000, shall prepare and resubmit Volume IV: Price Proposal in accordance with the instructions of this amendment.</b></p>					
Except as provided herein, all terms and conditions of the document referenced in Item 9A or 10A, as heretofore changed, remains unchanged and in full force and effect.					
15A. NAME AND TITLE OF SIGNER (Type or print)			16A. NAME OF CONTRACTING OFFICER LAURA C. WELSH		
15B. NAME OF CONTRACTOR/OFFEROR BY _____ (Signature of person authorized to sign)		15C. DATE SIGNED	16B. UNITED STATES OF AMERICA BY <u>Laura Welsh</u> (Signature of Contracting Officer)		16C. DATE SIGNED April 11, 2001

The purpose of this amendment is to address questions received by offerors, delete all references to interest, add additional FAR Clauses, provide changes page and request revised Volume IV: Price Proposal to Solicitation SP0600-00-R-0059

## 1. Offeror's questions/comments with Government response:

**a). Allowability of Financing Costs:** The principal issue that we wish to address relates to the ability of the contractor to have the costs associated with privately financing capital upgrades and renewals and replacements work under Section H.10 ("Accounting for Capital Upgrades/Purchase Price") recognized as allowable (and, therefore, chargeable) costs under the contract. As you are undoubtedly aware, FAR 31.205-20 ("Interest and Other Financial Costs") specifically provides that the costs of financing capital are unallowable. Accordingly, a contractor arguably would not be permitted to include an allocable portion of these significant expenses as part of its fixed monthly charge to the government under Sub-CLIN AB. Moreover, since Section B.6 and I.7 ("Price Redetermination-Prospective") expressly recognize only costs deemed "allowable" under FAR Part 31, such expenses could never be recoverable in future years after price redetermination. See also, provisions dealing with pricing modifications that also limit recovery to costs that are allowable under FAR Part 31: Section I.3, DFARS 252.243-7001 ("Pricing of Contract Modifications") and 252.243-7002 ("Requests for Equitable Adjustment"). Even the government's price realism analysis for award limits their inquiry to FAR Part 31 allowable costs. See Section M.4.6.1 ("Price Realism"). Finally, the contractor could not recover such expenses in the event of a termination for convenience, because termination costs are generally limited to those deemed allowable under the FAR cost principles. See Section I.2, 52.249-2.

We do not believe that the government intended to limit contractor's financing options or allocable expenses, particularly when the utilization of private financing could result in the lowest cost and best value to the government. In fact, your example for completing Schedule B-2 (Attachment J-40) appears to envision the recovery of such costs. We also believe that recognition of financing costs will encourage large numbers of lenders and contractors to avidly pursue this and subsequent RFP's for DOD utility system privatization. We also wish to note that there is precedent both within DOD and other executive agencies (notably, DOE) for expressly recognizing and allowing such expenses in privatization projects.

Modifying the Solicitation to expressly allow financing costs should not engender a significant effort by DOD. As recognized by Section B.2.2. and B.2.4.2., portions of this Solicitation are not subject to the FAR and, thus, DOD may not need to seek a deviation from the FAR to effectuate the revision. We believe that a clear statement in the RFP that, notwithstanding FAR Part 31 and any references thereto in this Solicitation, the costs of financing (including, but not limited to, interest expenses, legal and underwriting fees, breakage costs, etc.) are allowable under this procurement, may be sufficient.

We also believe that it is appropriate that capital invested in the project and any associated costs of financing be recoverable in the event of a termination for default. We are concerned that the lending community will not be willing to commit large amounts of capital unless they are assured that they will recover such investments and associated expenses in the event of a performance default for which they had no responsibility. Again, there is ample precedent both within DOD and DOE to permit lenders to obtain such relief.

**Response:** FAR 31.205-20, Interest and Other Financial Costs, states that "Interest on borrowings (however represented) . . . cost of financing and refinancing capital . . . are unallowable." We have revised the solicitation to remove all reference to interest as a separately priced component of the bid schedule. As stated in the Request for Proposal (RFP), initial capital upgrades are Fixed Price (FP) and are not subject to re-determination. Competitive FP

efforts are not subject to cost principles and will be evaluated utilizing price analysis. The cost principles also may not apply to offerors proposing a tariff subject to rate regulation. Offerors should revise their price proposals to reflect a single monthly recovery for each proposed capital upgrade in place of separately stated interest and principle. The cost principles may apply to price redetermination under Clause I.7.1.

**b). Limiting Government Set-Off Rights:** Lenders also will insist that they must be protected against government set offs of contractor debts and obligations against the contract, for claims that are unrelated to contractor performance under this procurement. For this reason, it is common that the government includes Alternative I to FAR 52.232-23 ("Assignment of Claims") that restricts the government's ability to set off against the contract for unrelated claims. Modifying the Solicitation to incorporate this provision will send a message to the lending community that the government is sensitive to their concerns and that this project is an attractive investment. Without such protection, lenders either will decline to participate or charge additional fees or higher rates to cover the set off risk - correspondingly increasing the government's costs for service.

**Response:** FAR clause 52.232-23, Assignment of Claims, Alternate I, is incorporated in this amendment.

**c). Additional Revisions That Would Facilitate Financing:** The following are other revisions to the solicitation that would greatly facilitate the attraction of less expensive private capital to the project, and correspondingly reduce the government's cost of service. These suggested changes have been adopted on other government privatization projects, including those for DOD.

First, with respect to termination for default, to protect their investment lenders typically want the ability to replace a contractor that is defaulting with a substitute contractor before an official default is issued ("step-in rights"), similar to the rights of a surety. Also, they want to retain title to the property whether there is a termination for default or for convenience, because it is the principal collateral for their loan. These options are not currently available under the standard termination provisions. Giving lenders these rights will eliminate their need to "reallocate" the risk of lost collateral (through higher costs) to the contractor, thereby reducing the government's ultimate cost for service. Similarly, lenders will want some priority of payment in the event of termination, at least to the extent that they would like to take payment precedence over the government for government claims arising out of contract performance.

Second, we need some clarification regarding clauses H-10 and I.7.1., ("Price Redetermination"), and we have a related suggested revision. Under Paragraph H.10.1 and H.10.2, the contractor is prevented from recovering the cost of capital upgrades until the upgrade is put into "useful service," requiring the contractor to carry those costs for a potentially prolonged period of time. We intend to accrue all construction-related interest costs while a capital upgrade task is being performed (these interest costs will be accrued on a monthly basis using market based interest rates). At the completion of the task, if the government decides not to pay for the task in a lump sum, we plan to finance the cost of the task, including accrued interest, and amortize it at a fixed rate over a fixed period of time (this fixed rate will be determined based on market rates at the time of a project's completion). We need clarification that the costs of accrued interest may be charged to the government in this manner and confirmation that this interest is allowed (see question A of this letter).

Similarly, prohibiting any monthly charge price changes for the first two years of performance, as noted in Section I.7.1., and then effectively fixing the rates for three year periods after price redetermination mean that the contractor is more likely to obtain fixed rate financing, rather than financing with potentially lower cost., "floating" interest rates because it would have to bear the risk of rate "spikes" for the initial two year period and for the subsequent three year "price redetermined" periods. We propose that the government permit an exception to the two-year price cap and for the

fixed three year periods of price redetermination to allow for monthly charge modifications due to interest rate fluctuations.

**Response:** In respect to termination provisions, the FAR is clear as to the rights of both parties. The termination process is well defined with deliberate steps to resolving performance issues. At this time, it is not in the government's interest to deviate from the existing FAR coverage. In regard to retaining title to the property, the bill of sale will formally convey ownership of the utility system to the contractor. Upon the effective date of the bill of sale, the Air Force will no longer have an interest in the utility system, except that portion represented by the Right of Way. Finally, the government does not desire a variable cost on upgrades to the utility service. The requirement still remains for the contractor to propose a fixed price for upgrades to the existing utility system.

**d). Recommended Addition of Limitations of Liability Clause:** Because the contract is primarily for services, FAR 46.805(a)(4) would appear to require the inclusion of FAR 52.246-25 ("Limitation of Liability - Services (Feb 1997)"). The government would benefit from the incorporation of this clause because of a corresponding lower monthly service charge that results from a more equitable distribution of risk.

**Response:** The government has reconsidered this clause and believes it is not applicable to this effort. The services provided under the resulting contract are considered to be maintenance and rehabilitation of real property. The contract clauses prescribed under FAR 46.805 are not applicable to this type of contract.

**e). Recommended Addition of "Force Majeure" Provision:** Currently, the solicitation does not contain any clauses that clearly recognize that the contractor should not be liable for delays or a failure to perform that do not reach the level of a default, because of causes beyond its control and without its fault or negligence. We suggest that the Government add FAR 52.249-14 ("Excusable Delays") or equivalent language to recognize the absence of contractor liability in these circumstances. If you believe that there are clauses presently in the solicitation that provide such relief, please identify them for us.

**Response:** The government has reconsidered this clause and believes it is not applicable to this effort. This clause is used in cost reimbursement contracts. This is not a cost reimbursement contract. Delays resulting from causes beyond the contractor's control or without its fault or negligence can be handled through normal contract administration efforts. In addition, FAR clause 52.233-1, Disputes, gives contractors a mechanism for seeking relief concerning disputes relating to the contract.

**f). Recommended Addition of "Differing Site Conditions" Clause:** Similarly, the solicitation does not include any provision that clearly provides relief to the contractor in the event it encounters surface or subsurface conditions that differ from those indicated in the contract documents or those typically encountered in the area of performance. Since this contract will require a good deal of construction work, we suggest adding FAR 52.236-2 ("Differing Site Conditions") or equivalent language to clearly provide for equitable relief to the contractor in the event it encounters a differing site condition during performance. If you believe that the Solicitation presently provides for such relief, please identify such remedy-granting clauses for us.

**Response:** This clause is incorporated in this amendment.

2). The following changes are for the purpose of deleting all reference to interest and revising the corresponding areas of the RFP based on this change:

- (1) Page 8, Schedule B-2, Sub-CLINS AA, delete "...at an interest rate that is (specify either of the following) \_\_\_ percentage points above or \_\_\_ percentage points below the annual interest rate on U.S. Treasury Bonds in effect at the time of award." Also, delete subscript b at the bottom of the page "The interest rate on U.S. Treasury Bonds (30 years) is as established in the most recent 30 year bond issue prior to the time of award, and published in the Federal Register. (<http://www.federalreserve.gov/releases/H15/update/>)"
- (2) Page 9, Paragraph B.5.2. Service Charges, delete "...and at an annual interest rate."
- (3) Page 31, Paragraph H.10.1 Initial Capital Upgrades (ref. Paragraph C.11.2.2.1), delete "...at the term and interest rate..." and "...the applicable interest rate and the remaining principal."
- (4) Page 31, Paragraph H.10.2 Future Capital Upgrades (ref. C.11.2.2.2), delete "...the applicable interest rate and the remaining principal."
- (5) Page 31, Paragraph H.10.3 Recoverable Portion of the Purchase Price, delete "...at the term and interest rate..." and "...the applicable interest rate and the remaining principal."
- (6) Page 66, Schedule L-2, Capital Upgrades and Recoverable Portion of the Purchase Price, first paragraph, delete "...and the interest rate...". Second paragraph, delete "...and interest rate...".
- (7) Page 68, Schedule L-3, Schedule L-3, Additions to the Fixed Monthly Charge (i.e., variable monthly charges), Schedule B-2, SubCLIN AA, delete "... and at the annual interest rate...".
- (8) Page 79, paragraph M.4.6.3, Schedule B-2, Sub-CLIN AA Monthly Credit as Payment..... delete from second sentence.....annual interest rate.

**Paragraph B.5 and B.5.1 Price Proposal**

Schedule B-2 is amended to remove any references to interest. Prospective offerors shall complete Schedule B-2.

**SCHEDULE B-2**

Utility Service Payment by the Government

(Installation Name)

CLIN	Utility System			
_____	_____			
Sub-CLINS	SUPPLIES/SERVICES	UNIT	MONTHLY SERVICE CHARGE	TOTAL CONTRACT AMOUNT
AA	Monthly Credit as Payment for Purchase Price. Dollar amount shown shall include all applicable Taxes (see B.5.2.1, <i>Monthly Credit as Payment for Purchase Price</i> ). \$_____ amortized over the first _____ months of service. . <sup>a,b</sup>	MO	\$(_____)	\$(_____)
AB	Fixed Monthly Charge (see B.5.2.2, <i>Service Charges</i> ) The Contractor shall provide utility service in accordance with Section C, <i>Descriptions, Specifications, and Work Statement</i> . <sup>c, d</sup>	MO	\$ _____	\$ _____
AC	Monthly Credit to the Government for Delayed Response Times When Servicing the Utility System. (See B.5.2.3, <i>Monthly Credit to the Government</i> ) <sup>e</sup> . \$ _____/hour			

<sup>a</sup> The Purchase Price (Sub-CLIN AA), and amortization schedule as proposed by the Offeror.

<sup>b</sup>The total contract amount is calculated by multiplying the monthly service charge by number of months over which the purchase price is amortized.

<sup>c</sup> The Offeror should enter the Fixed Monthly Charge, as computed in Schedule L-1. Additions to the Fixed Monthly Charge will be handled in accordance with Section H.10 and Schedule L-3, but should not be included in the price offered for Sub-CLIN AB.

<sup>d</sup> The total contract amount is calculated by multiplying the monthly service charge by 600.

<sup>e</sup> For proposal purposes the Offeror shall propose only a dollar per hour credit to the Government. During contract performance the hours per month will be determined for each month of service and the total monthly credit will be calculated and credited against the monthly invoice.

**B.5.2 Service Charges**

**B.5.2.1 Sub-CLIN AA – Monthly Credit as Payment for the Purchase Price:** The purchase price for the system shall be credited to the Government through a monthly credit against the fixed monthly charge. Monthly credits will be calculated by amortizing the purchase price over the number of months as proposed by the Offeror. The total contract amount is calculated by multiplying the monthly service charge by number of months over which the purchase price is amortized. After the time period proposed by the Offeror expires, this portion of the monthly fixed payment will be

removed from the cash-flow projection. The price for each initial capital upgrade is **fixed** and is not subject to renegotiation under Clause I.7.1.

## **H.10 Accounting for Capital Upgrades/Purchase Price**

### **H.10.1 Initial Capital Upgrades (ref. Paragraph C.11.2.2.1)**

The price of each initial capital upgrade proposed by the offeror in Schedule L-3 of the Price Proposal will be added to the Fixed Monthly Charge, for the number of months indicated, when the upgrade is put in useful service. The Fixed Monthly Charge is the monthly service charge for the relevant utility system (the utility system of which the upgrade is a part) stated in Schedule B-2.

The price for each initial capital upgrade is **fixed** and is not subject to renegotiation under Clause I.7.1. The price for each upgrade will be amortized at the term proposed by the offeror in Schedule L-3 of the Price Proposal. With every monthly invoice that includes a request for payment for a capital upgrade identified in Schedule L-3, the Contractor shall submit an amortization schedule. The amortization schedule shall specify for each upgrade the additional monthly payment to be included in the Fixed Monthly Charge, the number of the payment (of the total payments required).

### **H.10.2 Future Capital Upgrades (ref. C.11.2.2.2)**

Future capital upgrades for which the Government agrees to pay in accordance with Paragraph C11.2.2.2 will be added to the Fixed Monthly Charge for the number of months agreed upon when the upgrade is put in useful service. With every monthly invoice that includes a request for payment for such an upgrade, the contractor will include an amortization schedule. The amortization schedule shall specify for each upgrade the additional monthly payment included in the Fixed Monthly Charge, the number of the payment (of the total payments required).

### **H.10.3 Recoverable Portion of the Purchase Price**

The recoverable portion of the utility system purchase price will be added to the Fixed Monthly Charge for the relevant utility system. The recoverable portion of the purchase price will be amortized at the term proposed by the offeror in Schedule L-3. With every monthly invoice that includes a request for payment of the recoverable portion of the purchase price, the contractor shall submit an amortization schedule which shall specify the additional monthly payment included in the Fixed Monthly Charge, the number of the payment (of the total payments required).

## **L.9.6 Detailed Instructions for Price Proposal, Section 2- Cost Proposal, Introduction and, Pricing Assumptions (See Schedule L-3)**

### **Capital Upgrades and Recoverable Portion of the Purchase Price**

The Offeror shall provide cost information for capital upgrades listed in the Capital Upgrades and Renewals and Replacements Plan provided in their proposal in accordance with C.11.2, *Capital Upgrades and Renewals and Replacements Plan*. Information to support the price proposed for capital upgrades shall include total upgrade price, estimated completion date, number of months the price will be amortized, as proposed by the Offeror. This information should be provided in Schedule L-3.

The recoverable portion of the purchase price is the portion of the purchase proposed for recovery by the Offeror. The dollar amount proposed must be between zero and 100 percent of the purchase price offered in Schedule B-2.

The proposed portion of the purchase price shall be amortized over the number of months as proposed by the Offeror. After the time period proposed by the Offeror expires, this portion of the monthly fixed payment will be removed from the cash-flow projection. This information should be provided in Schedule L-3.

A separate Schedule L-3 shall be provided for each utility system included in the proposal.

### Schedule L-3 - Additions to the Fixed Monthly Charge

Component Name	Component Cost	Expected Month of Completion	Number of Months to Amortize Component	Monthly Charge
<b>1. Initial Capital Upgrades</b>				
Project 1				
Project 2				
Project n				
<b>2. Recoverable Portion of Purchase Price</b>		NA		

### Section M

#### M.4.6.3 Comparison of offered Prices with the Government estimate

#### Schedule B-2

Each Sub-CLIN will be extended according to the following to arrive at an annual value:

**Sub-CLIN AA – Monthly Credit as Payment for Purchase Price:** (Amortization of the purchase price calculated as a monthly credit against the Fixed Monthly Charge of the utility service). Monthly amortization values will be calculated for the time period as proposed by the Offeror. The monthly rate will be multiplied by 12 months to reach the annual cost. After the time period proposed by the Offeror expires, this portion of the monthly fixed rate will be removed from the cash-flow projection.

#### 3). Add the following FAR Clauses:

Section I.2 FAR Clause 52.232.23 Assignment of Claims ALT I (Apr 1984)

FAR Clause 52.236-2 Differing Site Conditions (Apr 1984)

4). Attachment J-40 Example Completion Schedule B-2 is deleted. Attachment J-40 is marked **RESERVED**.

5). All offerors are required to identify changes in the revised proposal.

6). Revised Volume IV Price Proposal is due not later than 3:00 pm EST at Fort Belvoir, VA on May 4, 2001.