



Partners in Excellence Workshop

June 17, 2020

Disclaimer

This work of authorship and those incorporated herein were prepared by Consolidated Nuclear Security, LLC (CNS) as accounts of work sponsored by an agency of the United States Government under Contract DE-NA0001942. Neither the United States Government nor any agency thereof, nor CNS, nor any of their employees, makes any warranty, express or implied, or assumes any legal liability or responsibility to any non-governmental recipient hereof for the accuracy, completeness, use made, or usefulness of any information, apparatus, product, or process disclosed, or represents that its use would not infringe privately owned rights. Reference herein to any specific commercial product, process, or service by trade name, trademark, manufacturer, or otherwise, does not necessarily constitute or imply its endorsement, recommendation, or favoring by the United States Government or any agency or contractor thereof. The views and opinions of authors expressed herein do not necessarily state or reflect those of the United States Government or any agency or contractor (other than the authors) thereof.

Nothing contained herein shall be construed as legal advice or modify any agreement, understanding or relationship you have with CNS. This presentation is for general information purposes only. You should accept legal advice only from a licensed legal professional with whom you have an attorney-client relationship.

This document has been reviewed and confirmed to be UNCLASSIFIED and contains no UCNI.

Name: Roger Dollar

Date: 07/16/2020

CNS eDC/RO ID: 219225

Call Agenda

2:05-2:10	Welcome - Ryan Johnston
2:10-2:30	Introductions and Capabilities
2:30-3:30	Terms and Conditions that Implement Change - Kayla Towe and Jeffrey Gillmore
3:30-3:50	Q/A Session
3:50-4:00	Closing Remarks

General Webex Information

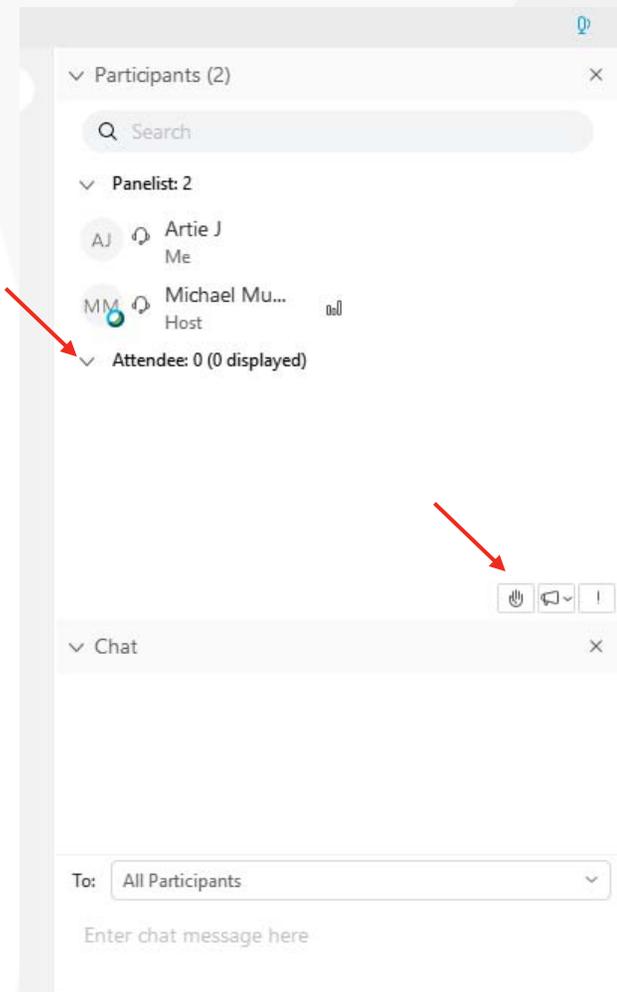
Important Notes to Remember:

- Please keep your mic on **mute** during the presentation to avoid feedback and background noise
 - The mute button () is located on the bottom of the screen
- Please do not speak out during the presentations with question unless requested by a panelist or presenter
- Slow or Questionable Internet Connection? Dial in:
 - **Audio Conference:** US Toll +1-415-527-5035
 - **Access Code:** 199 074 1075
 - **Event Password:** 4233 8848 (for phone connection only)

General Webex Information

Important Buttons to Take Note of:

- In the list of participants you will see those who are designated as panelist and yourself within the attendee section.
 - If you wish to view other attendees, select the blue “**view all attendees**” button located under your name in the attendees section of the list
- If you have a question that you would like to ask, select the **raise hand button** located at the bottom right side of the participants list on the right side of your screen.
- If you would like to say “**Yes**” or “**No**” you may select the response button located at the bottom of the participants list on the right side of your screen (directly next to the raise hand icon)



General Webex Information

Chat Functions within Webex:

- Under the list of participants, there will be a chat menu (may be collapsed at the bottom, if so select “Chat” and the menu should be revealed)
- Selecting the “To” button within the chat menu will designate who will receive your message
 - **To all Participants:** Everyone in the meeting will be able to view your chat message (Should not be used unless directed too)
 - **To all Panelists:** Only all the panelists will be able to view your chat message
 - **To Host:** Your message will only be visible to the host
 - **To Presenter:** Only the individual currently presenting will be able to view your chat message
 - **To Host and Presenter:** The host and the presenter will be able to view your message
 - **Selecting Individuals Name:** Selecting an individual’s name will make your chat message only visible to the individual that you have selected
 - **Note:** There will be a designated question mediator that all questions should be sent to for discussion, **if questions are sent to another individual or group, they may not be see.**

Safety Message – Walk Downs

- **Walk downs are learning opportunities:**
 - Participate in all walk downs in your work areas.
 - Ask questions you have pertaining to a job before beginning work.
 - Develop new safe innovative work practices through a questioning attitude.
 - Never assume; always verify



Introductions

- Please remember to unmute yourself before you speak, and mute yourself afterwards.
- When introducing yourself please provide:
 - Your name
 - The company you represent
 - A brief capabilities of your company
 - If you are currently looking for partners or subtiers and if so in what field





Terms and Conditions that Implement Change

Kayla Towe
Kayla.Towe@cns.doe.gov
Procurement Compliance

Jeffrey Gillmore
Jeffrey.Gillmore@cns.doe.gov
Purchasing Supervisor

CNS's NNSA-Approved Purchasing System

- CNS is the prime contractor to the Department of Energy, National Nuclear Security Administration (“DOE/NNSA”) under Contract No. DE-NA0001942 (“Prime Contract”) for the Management and Operation (“M&O”) of the Pantex Plant in Amarillo, Texas and the Y-12 National Security Complex in Oak Ridge, Tennessee.
- As an M&O contractor CNS has been selected for its technical and managerial expertise and is **expected to bring to bear** these technical and managerial skills to accomplish the significant Federal mission(s) described in its contract with, and work plans approved by, DOE. **Purchasing** is one area in which the particular skills of CNS will be brought to bear in order to more readily accomplish its assigned mission. CNS’s contracting procedures form the basis for the development of a purchasing system and methods that will comply with its contract with NNSA/DOE.
- **CNS purchases are not Federal procurements**, and are not directly subject to the Federal Acquisition Regulations. However, certain **Federal laws, Executive Orders, and regulations may affect contractor purchasing, as required by statute, regulation, or contract terms and conditions.**
- CNS’s submits its purchasing system to NNSA for review and approval.



Working Within the Confines of CNS's Purchasing System – The Purchase Order

- **Common Restrictions/Requirements:**
 - Prime Contract Flowdowns
 - Contractor Purchasing Clause
 - DOE Orders and Directives
 - Federal laws and regulations
- **Needed Flexibility:**
 - Contractor purchasing systems shall identify and **apply the best in commercial purchasing practices** and procedures (although nothing precludes the adoption of Federal procurement practices and procedures)
- **CNS attempts to balance its requirements with commercial practices through its NNSA-approved purchasing system.**
 - The Schedule (the Schedule's sections form the body of the Purchase Order)
 - General Terms & Conditions (always incorporated in the Purchase Order)
 - Forms (can be incorporated in the Purchase Order)



Working Within the Confines of CNS's Purchasing System – The Topic of Indemnification

- **CNS's M&O Prime Contract is a cost reimbursable plus fee contract type and all purchases of goods and services by CNS under the Prime Contract are:**
 - (a) made on behalf of DOE/NNSA,
 - (b) paid with Government Funds appropriated by Congress through the U.S. Treasury's Modified Letter of Credit Program, and
 - (c) are effectively owned by DOE/NNSA.
- **The M&O contracting model used by DOE/NNSA is quite different from the routine Federal Government/prime contractor model, in that DOE/NNSA considers that **a written contractual indemnification** offered by an M&O prime contractor **would likely result in a violation of the Anti-Deficiency Act.****
- **Thus, under its M&O contract, CNS is effectively precluded from providing such indemnification, of any type, to any subcontractor, vendor or supplier.** CNS's position on not providing such indemnification is not a negotiating tactic or contracting policy choice in order to limit CNS liability. In fact, CNS fully recognizes and accepts its "at law" liability for its actions, negligent or otherwise. CNS is simply not able to provide any such written contractual indemnification.

Where's the commercial balance? – CNS's General Terms & Conditions

Access:

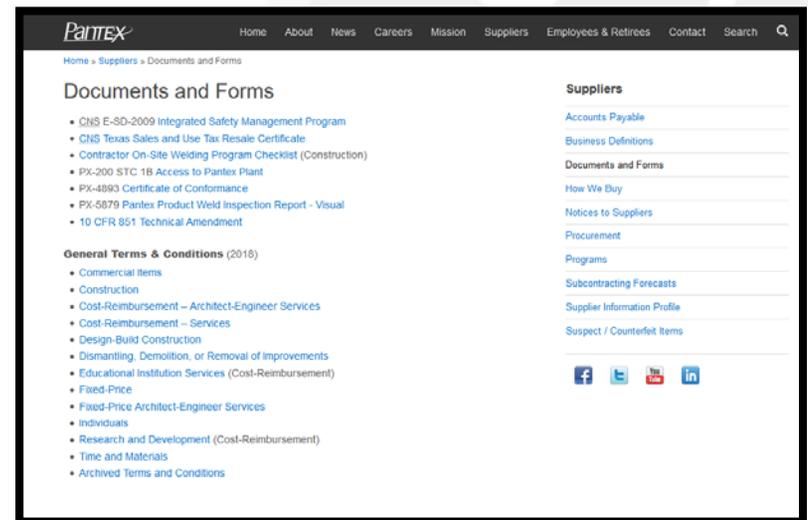
- <https://pantex.energy.gov/suppliers/documents-and-forms>

Theme:

- Prevent Project Disruption and Disputes
- Mitigate Loss
- Establish a Clear and Mutual Understanding Between the Parties

Solutions:

- Establish Clear and Concise Requirements
- Promote Timely and Equitable Resolutions
- Create Transparency Between the Parties
- Incentivize Joint Resolutions



Differing Site Conditions

Benefits:

- Clear about conditions clause covers
- Prompt and timely written notice
- Prompt investigation required
- If conditions materially differ an equitable adjustment shall be made



Clause:

(a) Seller shall promptly, and before the conditions are disturbed, give a **written notice** to Company of (1) subsurface or latent physical conditions at the site which **differ materially** from those **indicated in this Agreement**, or (2) unknown physical conditions at the site, **of an unusual nature**, which **differ materially** from those **ordinarily encountered** and **generally recognized** as inherent in work of the character provided for in this Agreement.

(b) **Company shall investigate** the site conditions promptly after receiving the notice. If the conditions do **materially so differ** and **cause an increase or decrease in Seller's cost of**, or the **time required** for, performing any part of the work under this Agreement, whether or not changed as a result of the conditions, **an equitable adjustment shall be made** under this clause and the Agreement modified in writing accordingly.

(c) No request by Seller for an equitable adjustment under this clause shall be allowed unless (1) the written notice required in paragraph (a) above is **timely given** and (2) the **request is made in writing before final payment** under this Agreement.

Suspension of Work

Benefits:

- Promotes good subcontract administration
- Period of time Procurement Representative determines appropriate
- Provides for adjustment
- Accounts for intervening causes and concurrent delays
- Accounts for an equitable adjustment provided or excluded under any other terms and conditions of the Agreement

Excerpt of Clause:

(a) The Procurement Representative may order the Seller, in writing, to **suspend, delay, or interrupt all or any part of the work** of this Agreement **for the period of time that the Procurement Representative determines appropriate.**

(b) If the performance of all or any part of the work is, for an **unreasonable period of time**, suspended, delayed, or interrupted (1) by an act of the Company in the administration of this Agreement, or (2) by the Company's failure to act within the time specified in this Agreement (or within a reasonable time if not specified), **an adjustment shall be made for any increase in the cost of performance of this Agreement (excluding profit)** necessarily caused by the unreasonable suspension, delay, or interruption, and the Agreement modified in writing accordingly. However, **no adjustment shall be made** under this clause for any suspension, delay, or interruption to the extent that **performance would have been so suspended, delayed, or interrupted by any other cause**, including the fault or negligence of the Seller, or for which an **equitable adjustment is provided** or excluded under any other term or condition of this Agreement.



Suspension of Work Continued

Benefits:

- Requires prompt notice in writing
 - 14 calendar days
- Seller waives requests for adjustment not submitted before final payment and within the 180-day period

Excerpt of Clause:

(c) A request for adjustment under this clause shall **not be allowed**—

(1) For any costs incurred more than **14 calendar days** before the Seller shall have notified the Procurement Representative **in writing** of the act or failure to act involved (but this requirement shall not apply as to a request for adjustment resulting from a suspension order); and,

(2) Unless the request for adjustment, in an amount stated, is submitted in writing as soon as practicable, but no later than the **earlier of final payment under this Agreement or 180 calendar days after the termination of the suspension, delay, or interruption.**

Requests for adjustment not submitted before final payment and within the 180-day period are waived.



Stop Work Authority

Benefits:

- Promotes good subcontract administration
- 90 calendar days unless extended by mutual agreement
- Minimizes incurrence of costs
- Provides for equitable adjustment if the order results in an increase in time required for, or cost allocable to, performance
- Timely submittal of request for equitable adjustment
 - 30 calendar days



Excerpt of Clause:

(a) Unless the provisions for stop work under the “Environmental, Safety and Health” clause apply, the Procurement Representative, may under this clause, at any time, by **written order**, require Seller to **stop all or any portion of the work** called for by this Agreement for **90 calendar days**, and **for any other further period to which the parties may agree**. Seller shall immediately comply with the order and take all reasonable steps to minimize the incurrence of costs allocable to the work covered by the order during the work stoppage.

...

(c) If the **order is canceled or expires**, the **Seller shall resume work**. The Company shall make an **equitable adjustment in the delivery schedule or price, or both**, and the Agreement shall be modified, in writing, accordingly, if the stop-work order results in an increase in the time required for, or cost properly allocable to, performance of this Agreement. As a condition precedent to an equitable adjustment, Seller shall submit its request for equitable adjustment in writing to the Procurement Representative **within 30 calendar days after the work stoppage ends**.

...

Delays

Benefits:

- Allows for price adjustment or schedule extensions
- Conditions Precedent are clearly identified
- Specific written notice required
 - 14 calendar days
- CPM schedule included with claim

Excerpt of Clause:

(a) **Conditions Precedent**—As conditions precedent for **entitlement to any price adjustment or schedule extension:**

(1) **Written Notice**—For each separate delay, Seller shall give prompt written notice of the delay-causing event to the Procurement Representative. Such written notice **must be given even if Company has independent knowledge of the delay-causing event.** Seller proposed revisions to the Schedule (e.g., Fragmentary Networks or “Fragnets”), “Daily Logs,” “Daily Reports,” meeting minutes and the like do NOT constitute the required notice. On the basis of the most accurate information available to the Seller, **the notice shall state:**

- (i) “This notice is submitted pursuant to the Article titled, “Delays,” or equivalent specific reference to this Article;
- (ii) date, cause, and circumstances regarding the delay;
- (iii) name and function of Seller and Company individuals knowledgeable about the delay;
- (iv) identification of documents and substance of oral communications involving the delay; and
- (v) the particular elements of performance impacted by the delay, including
 - (a) adjustment in labor and/or materials,
 - (b) estimated resulting price and schedule adjustments, and
 - (c) time by which Company must respond to minimize cost, delay, or disruption to performance of the work. **In no event shall Seller recover any delay costs incurred prior to 14 calendar days before Seller gives such written notice.**

(2) **CPM**—Seller shall include with any delay claim a Critical Path Method (CPM) schedule that shows the delay is on the critical path affecting the subcontract’s overall completion date.



Delays Continued

Benefits:

- Clearly identifies exclusions
- Addresses Excusable Delays and provides for corresponding schedule extension
- Article, Termination for Default, is where you would find the corresponding clause for the Seller (“The Seller’s right to proceed shall not be terminated . . .”)
 - 10 calendar day notice from beginning of delay

Excerpt of Clause:

- (b) Notwithstanding any other provision in this Agreement, Seller shall not be entitled to recover:
- (i) **profit for delay costs of any kind**, including, but not limited to acceleration, extended costs, and loss of efficiency or productivity, regardless of the theory of recovery; or
 - (ii) **home office overhead**, whether unabsorbed, under-absorbed, extended, or other basis.
- (c) Excusable Delays—
- (1) **Company shall not be liable to Seller** if Company’s nonperformance is caused by an **occurrence beyond its reasonable control and without its fault or negligence**, such as Acts of God or the public enemy, fires, floods, epidemics, quarantine restrictions, strikes, unusually severe weather, and delays of common carriers. Seller’s sole remedy shall be a **schedule extension** to this Agreement if the facts support the extension requested by Seller.
 - (2) This provision is in addition to, and does not derogate from, the Article titled, “**Termination for Default.**”



Changes

Benefits:

- Delineated list in subsection (a)
- Provides equitable adjustment (subject to submission requirements)
- Submission requirements clearly specified in subsection (d)

Excerpt of Clause:

(a) The Procurement Representative may at any time, by written order, and without notice to the sureties, if any, make changes within **the general scope of this Agreement in any one or more of the following:**

...

(b) If any such **change causes a difference in the cost, or the time** required for performance, the **Company shall, subject to the submission requirement in paragraph (d), make an equitable adjustment in the price, delivery/performance schedule, or both,** and modify the Agreement in writing. If Seller's proposal includes the cost of property made obsolete or excess by the change, the Company has the right to prescribe the manner of disposition of the property.

....



Changes Continued

Benefits:

- Only Procurement Representative (PR) authorized to issue a change
- PR can provide written confirmation of oral direction or instruction from any CNS personnel by directing Seller to perform as stated in the oral direction or instruction
- Subsection (d) discusses issued (or deemed) orders
- For written changes, submit request for equitable adjustment within 30 days

Excerpt of Clause:

(c) Only the Procurement Representative is authorized on behalf of the Company to issue a change, which **must be in writing and clearly designated as a change order**. If Seller considers that any oral direction or instruction by any Company personnel (including the Procurement Representative) constitutes a change, or if Seller considers that any written direction or instruction by any Company personnel (other than a designated change order issued by the Procurement Representative) constitutes a change, Seller shall not rely upon such direction or instruction and shall **not be eligible for an equitable adjustment arising there from, without prior written confirmation from the Procurement Representative directing Seller to perform as stated** in the direction or instruction. If such written confirmation from the Procurement Representative to perform also **confirms the direction or instruction to be a change, the confirmation shall be deemed a change order for purposes of paragraph (d)**. **If, however,** such written confirmation from the Procurement Representative to perform **does not confirm** the direction or instruction to be a change, any request by Seller for an equitable adjustment arising from such direction or instruction shall comply with **paragraph (e)**.

(d) If the Procurement Representative **issues** a change order, any request for equitable adjustment by Seller **must be submitted in writing to the Procurement Representative within 30 calendar days of receiving the Company's change order**. If the request is not submitted within such time, **the request shall be late and may be denied by the Procurement Representative** whether or not the Company is prejudiced by the late request. If the Company, in its sole discretion, decides to act upon a particular late request submitted prior to final payment, such action shall not constitute or be deemed to be a waiver of this submission requirement with regards to any other late request, nor shall such action be considered in any way in interpreting this provision as a course of dealing or in any other manner.



Changes Continued

Benefits:

- Subsection (e) addresses constructive changes (“Seller considers a change to occur”)
- Promotes timely subcontract administration
 - Submit notice in writing within 14 days of belief
 - Submit request for equitable adjustment in writing within 30 days of notice

Excerpt of Clause:

(e) (1) If the Procurement Representative has not issued a written change order but the **Seller considers a change to this Agreement has occurred because**, for example: . . . , then as a condition precedent for entitlement to an equitable adjustment, Seller shall notify the Procurement Representative, **in writing**, that a change has occurred for which Seller intends to **seek an equitable adjustment and identify**: (i) date, nature and circumstances regarding the change, (ii) name of each person knowledgeable about the change, (iii) documents and substance of oral communications involving the change, and (iv) the particular elements of performance impacted by the change, including (a) adjustment in labor and/or materials, (b) delay or disruption caused, (c) estimated resulting price and schedule adjustments and (d) time by which Company must respond to minimize cost, delay, or disruption to performance of the work.

(2) In no event shall Seller recover any costs caused by the change incurred **prior to 14 calendar days** before Seller gives such written **notice**.

(3) Any **request for equitable adjustment** by Seller must be submitted in writing to the Procurement Representative no later than **30 calendar days after Seller gives the written notice** specified in subparagraph (e)(1). If the request is not submitted within such time, the request shall be late and may be denied by the Procurement Representative whether or not the Company is prejudiced by the late request. If the Company, in its sole discretion, decides to act upon a particular late request submitted prior to final payment, such action shall not constitute or be deemed to be a waiver of this submission requirement with regards to any other late request, nor shall such action be considered in any way in interpreting this provision as a course of dealing or in any other manner.



Adjustments

- **Supplements clauses in the Agreement that provide for an adjustment or equitable adjustment**
- **Provides more detail as to what must be included in a request for adjustment or request for equitable adjustment**
- **Certification by originator required if over \$50,000, unless the change to the Agreement price was agreed upon prior to commencement of the changed work**
- **Identifies cost principles and procedures that govern allowability of all costs claimed (FAR Part 31)**
- **Addresses proposal preparation costs**
- **Identifies overhead, profit and commission percentages for requests over \$50,000**
- **Procurement Representative may make adjustments by unilateral modification**
- **Provides right to audit requests exceeding \$100,000**



Resolution of Disputes

Benefits:

- Promotes joint resolution through discussion and negotiation
- Mandates considering the use of Alternate Dispute Resolution
- A request for payment that is not in dispute when submitted is not a Claim
- Must be in writing
- Certification required for Claims that exceed \$50,000
- Clear procedure for processing claims



Excerpt of Clause:

(a) Seller and Company agree to make **good-faith efforts to settle any dispute or Claim** that arises under this Agreement **through discussion and negotiation**. If such efforts fail to result in a mutually agreeable resolution, **the parties shall consider the use of Alternative Dispute Resolution (ADR)**. . . .

(b) “Claim,” as used in this Article, means a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of Agreement terms, or other relief arising from or relating to this Agreement, or its breach. However, a written demand or written assertion by Seller seeking the payment of money is not a Claim until certified, if certification is required by paragraph (d) below. **A request for payment** (e.g., a voucher, invoice, or other routine request for payment, a termination settlement proposal, or a request for an adjustment or equitable adjustment) **that is not in dispute when submitted is not a Claim**. An initially undisputed request for payment may be converted to a Claim by the Seller by complying with the submission and applicable certification requirements in paragraphs (c) and (d) below.

. . .



Question and Answer Session



Closing Remarks

Disclaimer

This work of authorship and those incorporated herein were prepared by Consolidated Nuclear Security, LLC (CNS) as accounts of work sponsored by an agency of the United States Government under Contract DE-NA0001942. Neither the United States Government nor any agency thereof, nor CNS, nor any of their employees, makes any warranty, express or implied, or assumes any legal liability or responsibility to any non-governmental recipient hereof for the accuracy, completeness, use made, or usefulness of any information, apparatus, product, or process disclosed, or represents that its use would not infringe privately owned rights. Reference herein to any specific commercial product, process, or service by trade name, trademark, manufacturer, or otherwise, does not necessarily constitute or imply its endorsement, recommendation, or favoring by the United States Government or any agency or contractor thereof. The views and opinions of authors expressed herein do not necessarily state or reflect those of the United States Government or any agency or contractor (other than the authors) thereof.