

Response to Comments to Pay-for-Performance Agreement

1. Revise Paragraph #4, General Terms to read:

Contractor shall indemnify the RP, the DEC and the State (the “Indemnitees”) for any loss or damage actually sustained and incurred by the Indemnitees, or for which the Indemnitees are legally liable, which is directly caused by the negligent acts, errors or omissions of Contractor, its employees, subcontractors, or agents in connection with the performance of services under this Agreement; provided, however, that such indemnity shall not exceed Contractor’s insurance coverage as set forth above.

Comments by the Sites Management Section (SMS):

This agreement is between the site owner and the contractor. If the site owner wants to assume the liability for any incident which exceeds the coverage limits of the contractor’s insurance policy, then that is between the owner and the contractor. However, the SMS does not have the authority on behalf of the State to limit a contractor’s liability to only the insurance coverage limits. Therefore, the SMS is not willing to make this change to the general terms of the contract. The SMS would not be involved with any discussions that would lead to a separate agreement between the owner and the contractor.

2. Revise Paragraph #5, General Terms to read:

Any material dispute relating to or arising out of this Agreement shall be a neutral, third-party mutually agreed upon by the DEC and the Contractor. The Contractor and the DEC shall make good faith efforts to resolve any such dispute within a period of thirty (30) days (the “Negotiation Period”) of written receipt of a notice of dispute filed by either party; provided however, that such Negotiation Period shall be extended for seventy-five (75) days if the dispute relates to whether the Contractor has attained a milestone under this Agreement. If the Contractor and the DEC are not able to resolve the dispute within the Negotiation Period, the Arbitrator shall resolve the dispute. The decision of the Arbitrator shall be final and binding on the Contractor and the DEC.

ACKNOWLEDGEMENT OF ARBITRATION. AS REQUIRED UNDER 12 V.S.A. § 5652 (b) , EACH PARTY ACKNOWLEDGES THAT THIS AGREEMENT CONTAINS AN AGREEMENT TO ARBITRATE . AFTER SIGNING THIS AGREEMENT EACH PARTY UNDERSTANDS THAT IT WILL NOT BE ABLE TO BRING A LAWSUIT CONCERNING ANY DISPUTE THAT MAY ARRISE WHICH IS COVERED BY THE ARBITRATION AGREEMENT, UNLESS IT INVOLVES A QUESTION OF CONSTITUTIONAL OR CIVIL RIGHTS. INSTEAD, THE PARTIES AGREE TO SUBMIT ANY SUCH DISPUTE TO AN IMPARTIAL ARBITRATOR, AS HERIN DEFINED.

Comments by the SMS:

The SMS is not opposed to the notion of using an arbitrator to resolve a dispute under the Agreement. The SMS wants to make sure we maintain the flexibility to resolve any issue in a timely manner, and with the proper expertise for the particular dispute. The SMS believes the current language in the agreement allows for that flexibility and does not preclude the use of an arbitrator. For cases where this issue is important, the SMS is willing to draft a separate agreement that provides more detail outlining this process, if all parties so desire.

3. Add the following to the second-to-last sentence of Paragraph 8 of Attachment A:

and will not be considered in breach of this Agreement or subject to the three-year prohibition from doing PCF reimbursement work as set forth in Paragraph 20 of this Agreement

Comments by the SMS:

The SMS has no objections to this comment and will add this language to Paragraph 8 of Attachment A.

4. *Definitions - It is suggested to add a definitions section to preclude protracted or unnecessary discussions and perhaps disputes. There are several terms that are not clearly defined.*

Comments by the SMS:

The SMS does not feel that a definitions section is necessary in these agreements, however, during the development of any future agreement we would be willing to provide clarification on any term where necessary.

5. Revise Paragraph #7, General Terms as follows:

Change “they” in last paragraph to “the Contractor” to eliminate ambiguity.

Comments by the SMS:

The SMS has no objections to this comment and will add this language to Paragraph 7 of the General Terms.

5. Revise Paragraph #7.a., General Terms as follows:

a. identification of an undiscovered source, undiscovered petroleum contaminated area or nonpetroleum contaminant beyond the contamination already discovered that affects attainment of a milestone.

Current underground storage tank regulations allow 0.1 to 0.2 gallons per hour leakage from leak detection methods available and the system remains in compliance. There are

several sites we are aware of that have met all compliance requirements and have been found to be leaking. The Contractor should not be held responsible for such a situation as there is no practical way to determine if this is the case at the time a PFP Agreement is signed. There is no practical way to ascertain that no leaks are occurring below the regulated values at this time.

Comments by the SMS:

The SMS is not willing to agree to this comment. First off, the Agreement states that the Contractor agrees with the site characterization, so there should be no undiscovered source. Most importantly, as in any site cleanup, it is important for any new release to be detected and reported as soon as possible, so it can be stopped. We understand the limitations of certain leak detection tests, but it must be understood that the DEC does not allow any tanks to leak.

Under a PFP Agreement, the Contractor must be on top of the site data to ensure a new leak is not preventing the attainment of a milestone. We believe there are many practical ways to do this but under time and materials cleanup there has not been the incentive to be as diligent in this area. We feel this is one of the benefits of PFP is that there will now be that incentive, as no Contractor wants to have a milestone payment prevented due to an ongoing release.

6. Revise Paragraph #8., General Terms as follows:

First sentence- 75 days is too long from a payment/ management point of view. Griffin suggests changing it to more than 30 days and preferably shorter. It should be evident whether arbitration would be necessary after this time period.

Arbitrations should be defined as being one supplied by the National Arbitration Association. There is no need to agree on the arbitrator if supplied this way. The way this is written provides no closing opportunity if the sides disagree on an arbitrator, the job could go into limbo. There must be language added to prevent this from becoming an un-resolved issue. This Agreement is a very formal and binding document and should eliminate such eventualities.

Comments by the SMS:

The SMS does not believe that 75 days is too long if the SMS decides that confirmatory wells are required. Within that 75 days, the SMS would have to hire a contractor to drill the confirmatory wells, collect and analyze water samples, and receive and review analytical data. This time frame is much shorter than it typically takes consultants to submit a site investigation report after a work plan is approved. However, the SMS understands the importance in reaching a prompt decision on milestone attainment in fairness to the contractor. If a disagreement for milestone attainment would not result in the need for confirmatory wells, then the SMS agrees that the need for arbitration would likely become evident prior to 75 days. The SMS will make every effort to address disagreements before

the deadlines specified in paragraph 8 are met.

The SMS is not opposed to using an arbitrator from the National Arbitration Association. However, the SMS does not want to make this the only method to resolve a dispute, and therefore is reluctant to make it a standard condition. There may be other methods that RPs and Contractors desire. On a case by case basis, the SMS is willing to draft a separate agreement that provides more detail outlining this process and who will be used to resolve the dispute, if all parties so desire.

7. Revise Paragraph #14., General Terms as follows:

Add a second sentence. "If, despite the best efforts of the Contractor to obtain needed permits to proceed, one or more necessary permits are denied that make it not possible to complete the Agreement without prejudice on the part of the owner or the State of Vermont until the agreement is equitably adjusted as mutually agreed by the parties involved. If work ceases, the PCF shall pay the Contractor for all work up to and until the time of cessation." Permits are clearly not under the control of the Contractor or any other party, including the DEC. This should be recognized. This does not mean that the Contractor should be allowed to opt out of using best efforts to obtain required permits.

Comments by the SMS:

The SMS agrees that this is a legitimate concern but does not feel it is necessary to add this language. This is already covered under paragraph 7d of the general terms which reads:

- "7. The Agreement will be final and will not be increased, canceled or renegotiated....., with the exception of the following conditions:
- d. events beyond the control of the parties that make the performance or timely performance impossible;"

8. Revise Paragraph #16., General Terms as follows:

By reserving the right to perform other investigations to "confirm the cleanup of the site", the DEC could inadvertently be reserving the right to change the terms of the Agreement unilaterally. If the DEC installs additional monitoring points not specifically included in Attachment A#, and if the DEC determines that the milestone levels have not been met in one of the monitoring points included in Attachment A, the DEC apparently intends to utilize those data to deny milestone approvals, even though all of the milestone criteria as defined in the Agreement have been met. This could lead to a dispute.

To view this situation conversely, it is analogous to the Contractor adding monitoring points if milestone criteria are not met until average levels become acceptable, a situation that is also unacceptable.

Current language referring to the DEC's right to enter and investigate should be changed to make sure that by doing so will not change the milestone requirements in the Agreement.

Comments by the SMS:

The SMS appreciates this comment and agrees that our intention of the use of confirmatory monitoring wells was not clear. The SMS believes the goal of the site remediation is to cleanup the contamination mass within the source area (area of concern). We are using the reduction of contaminants in groundwater as a measure of the success of the cleanup, and the key and perimeter wells are used as the indicator of this success. It is the desire of the SMS that the source area be remediated, not just the area directly surrounding a key or perimeter monitoring wells. This is especially important if the cleanup technique includes the injection of such compounds as ORC. As a result of this comment we have changed the language in the Agreement to read as follows:

2. **Target Levels:** The cleanup goal at this site is to protect receptors and reduce risk to human health and the environment by reducing the contamination mass within the area of concern (as shown in Figure 1). The attainment of this goal is achieved at this site by focusing the remediation within the source area (as shown in Figure 1), and using key and perimeter monitoring wells as the primary indicators of the level of contamination within the area of concern. However, the groundwater target levels are for the entire area of concern, not just the key and perimeter wells. Therefore, the DEC may consider the installation of confirmatory monitoring wells to ensure the target levels, as defined below, have been met throughout the entire area of concern.

c) **DEC Confirmatory Monitoring Wells (If Installed as specified under Paragraph #16, General Terms):** The DEC may install, at its sole discretion and cost, additional monitoring wells and borings to confirm the attainment of any milestone in Attachment A, "9". If three or more confirmatory monitoring wells are installed, then the milestone to be confirmed will be considered met when the following occurs:

- the average groundwater concentration of the total CoC among the confirmatory monitoring wells is below the average CoC concentration specified for a given milestone; and
- no confirmatory monitoring well has a total CoC concentration that exceeds the maximum allowable concentration for attaining that milestone.

If one or two confirmatory monitoring wells are installed, then the milestone to be confirmed will be considered met when the following occurs:

- no confirmatory monitoring well has a total CoC concentration that exceeds the maximum allowable concentration for attaining that milestone.

9. Revise Paragraph #20., General Terms as follows:

Does the term “future” mean new work or does it mean that ongoing PCF work a contractor has cannot be further pursued? The problems stopping ongoing PCF work may create for RPs, and the State, if a contractor is barred from PCF work, may cause more harm than good to the overall goal of PCF work. Although no company wants to lose business we must be realistic and understand that companies will scale back their employment if work is lost and the end result may not be as desired. In other words, I am quite sure that enforcement of this paragraph as written will affect Contractor employees, the RP and the State more than it will any Contractor. More thought needs to be put into the pros and cons of this hammer.

Comments by the SMS:

The SMS will clarify the term “future” as it is our intention that this would apply to both new work and ongoing work. We realize that this is a significant penalty, and that the ramifications of enforcing this paragraph would be severe to the Contractor, its employees, the RP and the State. We hope that this will never happen, however we feel we are justified in this penalty. We believe our policy of choosing a realistic timeframe for the cleanup, with only one additional year for the Contractor to stay on the job if milestones are not met, should limit the likelihood that a Contractor will just stop the work at a site. In at least one other state doing PFP, the Contractor is not allowed to ever cease the cleanup until milestones are met.

As an alternative to the three year ban from PCF work, the SMS will also allow the use of Performance Bonds as an alternative penalty to stopping work on a site before the cleanup is completed.

9. Revise Paragraph #1.b. and 1.c., Attachment A as follows:

It is possible that significant issues outside the Contractor’s control will be raised that could force significant revisions or outright rejection of the CAP. There is no mechanism to amend the cost and schedule of the Agreement for such changes that are outside the control of the Contractor. Such a mechanism needs to be added to the Agreement.

Comments by the SMS:

The SMS agrees that this is a concern but does not feel it is necessary to add this language. This is already covered under paragraph 7d of the general terms which

reads:

“7. The Agreement will be final and will not be increased, canceled or renegotiated....., with the exception of the following conditions:

d. events beyond the control of the parties that make the performance or timely performance impossible;”

Also, if property access becomes an issue, this is covered under the next paragraph following #7 (e)., which begins with the statement:

“If a property owner denies unfettered access.....”

10. Revise Paragraph #1.g., Attachment A as follows:

Does the DEC intend to make collection of a trip and duplicate sample discretionary on the part of the Contractor? The word “should” in the last paragraph is permissive and not mandatory.

Comments by the SMS:

We agree with this comment and will change the word “should” to “shall”. In addition, to clarify QA/QC concerns, we have added the following to Attachment A, #1 (f):

- All sampling and sample handling shall be in accordance with standard industry practices of quality assurances (QA) and quality control (QC) and the Contractor’s standard operating procedures (SOPs) at the time the agreement is signed. This should include trip and duplicate samples. Contractor must maintain proof that these procedures are followed for up to three years after the final payment for this work. For milestone sampling events, the sample collection must be consistent with procedures employed to collect the baseline data, and the samples must be analyzed for the CoCs in a laboratory using EPA Method 8021b. For non-milestone events, field methods, such as a field gas chromatograph, are acceptable as long as standard industry practices of QA/QC and the Contractor’s SOPs are followed. If a field gas chromatograph is used for non-milestone sampling events, then a minimum of ten percent of the field samples must be confirmed by laboratory analysis using EPA Method 8021b.

11. Revise Paragraph #1.h., Attachment A as follows:

The DEC should impose a deadline on itself to answer reports.

Comments by the SMS:

We agree that it is important to communicate to the Contractor on a regular basis, and

that feedback on reports may be of value to the Contractor. We have agreed with a deadline on our self to determine if we accept a milestone report, and thus authorize payment. We may not choose to comment on certain reports, such as O&M reports, and thus we do not feel we are in a position to impose a deadline on report reviews. We will always be available to discuss the progress on any given site within a reasonable time frame.

12. Revise Paragraph #7., Attachment A as follows:

Percentages can only be agreed to after the quote and schedule are developed in conjunction with expected achievements.

Comments by the SMS:

We agree with this comment. The percentages in the Agreement that was open to public review included percentages for discussion purposes only and was not meant to be the standard to be used in future Agreements.

13. Revise Paragraph #8., Attachment A as follows:

What is the form of the warranty? Warranties need to cover specific conditions and cannot be open ended.

"...includes but is not limited to..." is too open ended and the wording should be eliminated or strictly defined.

The warranty should be better defined.

Comments by the SMS:

We have no objection to changing this statement to read as follows:

9. **Performance Product and Warranty Commitment:** The Contractor's performance product includes, ~~but is not limited to~~ the following responsibilities: **the implementation of all remedial and reporting activities specified in this agreement;** all reports required by Regulations; all reports necessary to obtain payment; and a warranty of meeting the cleanup target levels within 4 years of signing this agreement. If at the end of the 4-year cleanup period target levels have not been reached, the Contractor will continue the site cleanup and monitoring for an additional one (1) year at no additional cost to the DEC. If, at the end of the additional performance period, cleanup levels have still not been achieved, the Contractor will be released from any further obligation under this agreement. However, payment for any unachieved milestones will not be due the Contractor.

14. Revise Paragraph #9., Attachment A as follows:

The first paragraph of this section is between the RP and the DEC and should not be part of an agreement between the RP and the Contractor.

The second paragraph of this agreement should be modified to leave ownership up to the RP and the Contractor to decide. It should not be mandatory that the Contractor own equipment.

Comments by the SMS:

The SMS agrees with these comments and feels that each negotiated Agreement may result in differences in approaches to equipment ownership. We are willing to address this issue on a case-by-case basis.