

c. An appeal under this paragraph must address reasons why the Government's in-house cost estimate is erroneous or reasons why fair and reasonable prices will not be obtainable.

d. Appeals must be timely:

(1) For mixed-funded or DOD-funded activities, the appeal must be filed within 30 days of the date of a CBD notice of the decision to convert to contract.

(2) For civil works funded activities, the appeal must be filed within 30 days of the date of a CBD notice of the decision to convert to contract or 15 working days of bid opening, whichever is later.

3-49. GAO and Agency Protests. GAO and agency protests are subject to FAR Part 33 and EFARS Part 14 and are not covered in this regulation.

#### Section IX. Personnel Considerations

3-50. Reduction-in-force (RIF). The goal of RIF planning is to place all affected employees. Every reasonable effort will be made to avoid involuntary separation through planning, placement and retraining efforts. Separation by RIF may be unavoidable in some instances even after all reasonable efforts have been exhausted. In that event every effort will be made to help separated employees find continuing employment elsewhere, particularly through first refusal rights with the CA contractor.

a. General guidance for RIF planning is contained in Federal Personnel Manual (FPM), Chapter 351; and AR 690-300, Chapter 351. These regulations apply to USACE employees regardless of their method of funding. In planning a RIF based on conversion of in-house activities to contract operation, the factors in subparagraphs b through g must be considered:

b. The conduct of several CA studies over an extended period of time at an FOA may result in successive RIFs. When feasible, CA study milestone planning should be coordinated to permit a single RIF action to reduce the turbulence created by separate RIF actions.

c. The Personnel Officer will provide the Contracting Officer a list of all employees who are expected to be displaced by conversion to contract. The list will be sent to the Contracting Officer at the time of contract award or at least no later than 45 days before the effective date of the RIF. The Contracting Officer will give this list to the contractor.

d. RIF notices required as a result of conversion to contract may not be issued until HQUSACE approval of the final decision is received and a notice to proceed on the contract is issued.

e. Issuance of RIF notices should be coordinated with the Contracting Officer to ensure correct timing and enable the Contracting Officer to determine the effective date of the contract. A reasonable amount of time must be made available between the date of initial decision and the date of conversion to minimize adverse actions affecting employees.

f. Career and career-conditional employees affected by a RIF must be given advance notice of at least 60 days while in a work status.

g. The Personnel Office will inform separating employees of possible obligations to file defense-related employment reports prescribed in AR 600-47.

### 3-51. Right of First Refusal.

a. FAR clause 52.207-3 will be included in all contracts awarded as a result of a CA study. This clause provides that employees displaced as a result of conversion to contract performance will have the right of first refusal for employment openings under the contract in positions for which they are qualified (consistent with Government post-employment conflict of interest standards). The right of first refusal applies to employees in the activity converted to contract and to employees outside of the activity who are affected adversely by conversion.

b. The Personnel Officer will assist the Contracting Officer as needed in determining the contractor's compliance with the provision of the contract on the right of first refusal. The contractor is solely responsible for determining qualifications of displaced employees. Such determinations are not subject to review by the USACE.

(1) The timing of the presentation and content of the right of first refusal list are important. Providing a comprehensive list too early may be harmful if only a small number of personnel are actually considering employment with the contractor. The status of affected employees will be better known after responses have been received from the initial RIF notices.

(2) The right of first refusal list will distinguish between permanent and temporary employees. Permanent employees should be encouraged to schedule interviews with the contractor as early as possible during the recruiting period.

c. The Personnel Officer and the affected employees should be encouraged to provide the contractor with information about all of their work experience and skills for which the contractor may be recruiting.

### 3-52. Out-placement Programs/Severance Pay.

#### a. Outplacement.

(1) Besides placement rights provided by RIF regulations and FAR clause 52.207-3, priority placement efforts for displaced employees will be extended under DOD 1400.20-1-M and FPM Chapter 330. The provisions of AR 690-400, Chapter 410 will govern the retraining of all career employees.

(2) Allowable travel and transportation costs for displaced employees who accept continued Federal employment outside the commuting area will be determined according to Joint Travel Regulations, Volume II.

(3) Guidance to preclude overpayments of severance pay when an employee's entitlement to such payments ends is contained in Section 550.701(b)(5), (6), and (7), Title 5, Code of Federal Regulations, and Section 5595(d), Title 5, United States Code, as implemented in FPM Supplement 990-2, Book 550, subchapter 7.

b. The following unique severance pay provisions apply to RIF separations caused by CA actions:

(1) Otherwise eligible employees who accept employment with the contractor within 90 days of conversion to contractor performance are not entitled to severance pay beyond the date they go to work for the contractor. This

restriction applies regardless of how the accepted position compares to their former Government position.

(2) Employees who are offered comparable employment by the contractor on or before the date of the transfer of the function to the contractor are not entitled to severance pay. This is true whether they accept or refuse the offer. An offer of comparable employment made after the date of transfer may be declined without affecting severance pay eligibility.

(3) Part IV of the Supplement to OMB Circular A-76 specifies that a factor of two percent of total personnel base pay costs be used to estimate separation costs for inclusion in the total for one-time conversion costs (ENG Form 4843A-R, line 10). Appendix E of this regulation provides some additional guidance on computations for this category of costs. However, circumstances may exist in which a strict application of this percentage could result in a substantial overstatement or understatement of severance costs. In those circumstances, request for deviation from the two percent standard must be submitted by the FOA through channels to CDR USACE (CERM-MC) WASH DC 20314-1000.

(4) Justification for the deviation may include alternative methodologies based on prior experiences with RIF actions and informed judgment on the expected disposition of the affected work force. In these cases, associated cost estimates can be prepared in consultation with the Personnel Office, DOD Priority Placement Program Administrator, and management of the studied activity.

(5) These alternative estimates will consider all possible dispositions of the work force, to include employees who are expected to retire, work for the contractor, be placed in another Government job without relocation at the same or different grade, relocate to another Government job, or be separated from Government service. Requests for deviation must be submitted for approval at least six weeks prior to the scheduled arrival of the independent reviewer. The request must contain the alternative methodology, the supporting documentation, and a detailed justification supporting the deviation. A survey of employees on their anticipated plans will not, in itself, constitute sufficient justification. DOD experience has shown substantial differences between such plans and what employees actually do under RIF circumstances. Therefore, supplemental information must be

furnished to further support the likelihood that severance pay will exceed the two percent level.

e. Comparable employment is not limited to an offer of a job with equal pay. It must also include the offer of substantially equal leave, life insurance, health, and retirement benefits. In almost all instances in which the contractor makes an employment offer, experience shows that the offer does not constitute comparable employment. FOA will not deny severance pay on the basis of comparable job offers without HQUSACE approval. If questions exist on the comparability of the offer, all pertinent information will be submitted through channels to CDR USACE (CEPE-ZA) WASH DC 20314-1000 for a determination.

f. An employee will be responsible for the repayment of any severance pay overpayments occurring as the result of failure to terminate such payments when entitlement ends. To eliminate overpayments of severance pay, the Personnel Office hiring an employee in receipt of severance pay will immediately notify the paying agency of the hire. The notification should be by telephone and confirmed at a later date by providing the paying agency with a copy of the appointment SF 50 (Notification of Personnel Action).

g. When an in-house activity is converted to contract, the Personnel Office will supply the Contracting Officer, within three workdays of the contract start date, a list of separated employees who are entitled to receive severance pay. The contractor will be required by the terms of the contract to provide the names of former employees on the list who accept positions with the contractor during the 90 days after the conversion to contractor performance. This notification is to occur within five days of the date the person goes to work for the contractor. The Personnel Office should ensure employees entitled to severance pay are advised, at the time of separation, that it is in their best interest to notify the paying agency of any reemployment that might affect their entitlement.

#### Section X. Final Decisions

##### 3-53. Economic Effects Analysis.

a. If the initial decision in a CA study is to convert to contract and more than 75 military and civilian employees will be directly affected (their jobs contracted out), the FOA must prepare an Economic Effects Analysis for inclusion with the Final Decision Report (paragraph 3-55).