

# Reclamation Manual

## Directives and Standards

<b>Subject:</b>	Preparing Bases of Negotiation for New and Amendatory Water Service, Repayment, and Other Water-Related Contracts
<b>Purpose:</b>	This Directive and Standard (D&S) sets forth the basic requirements for the form, content, and preparation of bases of negotiation (BONs) <sup>1</sup> for proposed water-related contract actions. The benefits of this D&S are that it enhances efficiency in the process and consistency in the development of BONs, and ensures the Commissioner's objectives are met in the water-related contracting process.
<b>Authority:</b>	The Reclamation Act of 1902 (ch. 1093, 32 Stat. 388), and acts amendatory and supplementary thereto
<b>Approving Official:</b>	Director, Mission Assurance and Protection Organization (MAPO)
<b>Contact:</b>	Reclamation Law Administration Division, 84-55000

### 1. Introduction.

- A. The Commissioner authorizes water-related contract actions, as stated in Reclamation Manual (RM) Policy *Bases of Negotiation for New and Amendatory Water Service, Repayment, and Related Contracts*, (PEC P06).<sup>2</sup> Regional directors request this authorization by preparing and submitting a BON to the Commissioner. The Commissioner responds to BONs through approval memoranda that establish specific parameters for negotiation, execution, and administration of the contract(s). BONs, therefore, must provide the Commissioner and other Reclamation employees with the information necessary to confirm prospective contract actions will adhere to applicable laws and policies and support Reclamation's objectives.
  - B. Although this D&S covers basic requirements, it does not address unique laws and circumstances that may require variations. Every BON must be prepared in light of all applicable laws and relevant circumstances. Significant variations from this D&S must be noted and justified in the BON.
2. **Applicability.** This D&S applies to all Reclamation employees involved in the water service, repayment, and other water-related contracting process.
  3. **Delegations of Authority and Approval.** Regional directors have been delegated authority to approve some contract actions without additional approval from the Commissioner. See

<sup>1</sup> The acronym "BON" also refers to the singular, i.e. a basis of negotiation, and to the document itself.

<sup>2</sup> See Paragraph 5, "Delegations of Authority and Approval," of this D&S for information regarding general delegations of authority to regional directors.

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RM *Delegations of Authority*.<sup>3</sup> BONs and approval memoranda are required unless the regional director acts pursuant to these existing delegations. In all cases, contract actions must be supported by sufficient documentation to explain and justify the contract to auditors, contract administrators and other interested parties.<sup>4</sup>

#### 4. Required Content.

A. **BON Distribution and Use.** All BONs must be clearly marked “Internal Document – Pre-Decisional – Not for Public Release.” In contrast, proposed and executed contracts are available to the public, as provided by law and regulation.<sup>5</sup>

B. **Purpose of a BON.** The purpose of a BON is to request authority to negotiate, execute, and administer the contract(s) as described in the BON.

#### C. Purpose of the Contracting Action.

- (1) State the objective that the United States and the contractor propose to accomplish with the contract action.
- (2) Specify the type(s) of service(s) or product(s) to be delivered (e.g., sale or lease of water, use of facilities, etc.). For Safety of Dams, the scope of work and cost allocation, as identified in the Modification Approval Documents, must be clearly stated. Refer to RM D&S, *Safety of Dams Repayment and Cost Allocation* (PEC 05-05) for additional information.
- (3) Describe the rationale for the amount of water or capacity to be supplied.
- (4) Specify whether the contractor currently has or will have a full or a supplemental supply from Reclamation.
- (5) Identify the holder of the associated water rights.
- (6) Identify the party responsible for operation, maintenance, and replacement (OM&R) of the facilities.

#### D. The Contractor.

- (1) State the contractor’s name and describe its service area and the services it provides.
- (2) Identify any existing water-related contracts between the contractor and

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<sup>3</sup> Available at <http://www.usbr.gov/recman/delegations/Delegations.pdf>.

<sup>4</sup> The extent of documentation must correspond to the significance and impact of the contract.

<sup>5</sup> 43 CFR 426.22(d).

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Reclamation that are relevant to the proposed contract. Describe how the proposed contract action may affect existing contracts with the contractor.

- (3) Describe the contractor's financial and organizational ability to meet its obligations.
  - (a) Confirm that the contractor is legally authorized to enter into the proposed contract under state law and, if applicable, by its own controlling body (e.g., the Board of Directors).
  - (b) Describe the contractor's payment history and the current status of all outstanding obligations to Reclamation.
- (4) Describe the contractor's intended use of the water supply, including sufficient detail to allow determination of which water use definitions apply.
- (5) Identify the contractor's other sources of water and explain their relationship to the proposed supply.

### E. Contracting Authority.

- (1) Identify the legal authority for the contract and services to be provided, and, if needed, explain how/why the authority is appropriate.
- (2) Identify the authority for the project and its operation, including any project-specific authorities or restrictions that may materially affect the terms of the contract.
- (3) Confirm that the intended use(s) and place(s) of use are permitted under the project's water rights. If appropriate, describe the steps required to make the proposed contract consistent with the water rights.

### F. Negotiating Strategy.

- (1) Outline a plan of action covering the elements of the contract to be negotiated and any other pertinent matters such as renegotiation of existing contracts, water conservation issues, and compliance with applicable Federal laws. Also, describe the legally and practically acceptable range of potential outcomes for the contract terms. The following terms, which are not exhaustive, are typically negotiable and unique to each contract:
  - (a) quantity and type of water supply;
  - (b) water rate, repayment obligation, payment schedule, interest rate, and other fees or charges;

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- (c) term of contract or repayment period;
  - (d) water use build-up and/or development period; and
  - (e) the collection and maintenance of reserve funds and their allowable uses, including OM&R, repayment obligation, and environmental restoration.
- (2) Enumerate the standard terms of the contract including, but not limited to:
- (a) The required standard contract articles for the proposed action.<sup>6</sup> Justify any modifications to, or omissions of, the standard articles.
  - (b) The language that will be used in the water measurement article. For more details on this requirement see RM D&S Requirement of a Water Measurement Article in Contracts and Amendments (PEC 05-04).
  - (c) The irrigation and municipal and industrial use definitions in RM Policy *Water-Related Contracts—General Principles and Requirements*, (PEC P05). Identify and explain any project-specific legislation, existing contracts, or other relevant legal authorities that conflict with these definitions.
- (3) Identify the positions of affected or interested third parties and how they may affect the contracting process and outcome.
- (4) For amended or renewed contracts, describe any existing or potential conversions between water uses and how they will be addressed.
- (5) Describe any other problems or unique issues with the proposed contract action.
- (6) Describe any special circumstances or emergencies that require an expedited contracting process.

### G. Rate Setting and Repayment Procedures.

- (1) Explain the method(s) used to determine water rates and/or ability to pay, and cite the corresponding regulations, policies, and D&S for those methods.
- (2) Explain the determination and allocation of the reimbursable project costs.
- (3) Describe the revenue sources that the contractor will use to meet its obligations to the United States.

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<sup>6</sup> See RM Policy *Reclamation Standard Water-Related Contract Articles* (PEC P10), and RM PEC D&S 10-01 through 10-32.

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- (4) Identify any incidental revenue credits and the effects they may have on repayment.

### H. Compliance with Laws, Regulations, Rules, and Existing Policies.

- (1) Briefly discuss how the proposed contract is consistent with the project authorizing documents, such as definite plan reports and/or feasibility reports, authorizing legislation, environmental requirements, and current contracting policy.
- (2) State that the contracting process is subject to compliance with all applicable laws and regulations, including the National Environmental Policy Act of 1969 (Pub. L. 91-190, as amended and supplemented, 42 USC § 4321, et seq.) (NEPA), the Endangered Species Act (16 U.S.C. 1531, et seq.) and public participation requirements of section 9(f) of the Reclamation Project Act of 1939 (Pub. L. 76-260, as amended and supplemented, 43 U.S.C. § 485h(f)).
- (3) State the anticipated level of NEPA analysis and documentation.
- (4) Identify and explain the application of any recognized exceptions from established policies or procedures.
- (5) Verify that the appropriate field or regional Office of the Solicitor has concurred with the legal sufficiency of the BON.

I. **Omissions.** Some of the content in Paragraph 6 is not applicable to every proposed contract. If a specific element is not applicable, the BON will note the omission<sup>7</sup>. To the extent possible, the layout of the BON must mirror Paragraph 6 of this D&S.

### 5. Process Requirements.

#### A. Approval Memoranda – Issue to Expiration.<sup>8</sup>

- (1) Upon receipt of the BON, the Reclamation Law Administration Division (RLAD)

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<sup>7</sup> If one or several Paragraphs are not applicable to the proposed contract, they will be enumerated in the BON or as an appendix to the BON. For example, “Paragraphs 6.D(3)(a), 6.F(4), ... are not relevant to this contract action.” Further explanation for the omission will be provided as necessary.

<sup>8</sup> Approval memoranda that were issued more than two years prior to the release date of this D&S are automatically valid for one year from the release date of this D&S. With adequate justification those same approvals may be extended an additional year, for a maximum of two years from the release date of this D&S. The process in Paragraphs 7.A.(2)(a-b) will apply to the request for the additional extension. Approval memoranda that were issued within the last two years before the release date of this D&S are automatically valid for four years from the date the approval was signed and issued. Following the extensions described in this footnote, approval memoranda will no longer be valid unless the associated BON is supplemented or amended and approved by the Commissioner.

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will provide the regional staff with an estimated timeframe for reviewing it and preparing an approval memorandum for the Commissioner.

- (2) Unless extended according to Paragraphs 7.A.(2)(a-b), approval memoranda will be valid for 24 months from the date of issue<sup>9</sup>. Approval memoranda will, if authorized, be extended for an additional 24-months as described in Paragraphs 7.A.(2)(a-b). Approval memoranda will not be extended beyond four years from the date of issue. If an approval memorandum is no longer valid, it cannot be used as a basis of authority for negotiating or executing contracts. However, the timeframes in this Paragraph do not apply to a contract that has been fully negotiated but not executed due to litigation.
  - (a) To obtain a 24-month extension, the regional staff will submit a request, along with adequate justification, to the RLAD. The RLAD, acting on behalf of the Commissioner, will evaluate requests and send written notification of a decision to extend to the regional office. Requests for extension will be submitted via email or letter. Only one 24-month extension will be issued.
  - (b) A request for an extension will include, but is not limited to, documentation and information that demonstrates why the contract action has not commenced or been completed, a timeframe for completing negotiations, and other information that confirms the BON and approval memorandum are still relevant and comply with existing policies and the Commissioner's objectives.
- (3) Approved supplements and amendments to BONs will recommence the timeframes in Paragraph (2), above.

### **B. Negotiations and Execution.**

- (1) Technical meetings<sup>10</sup> are permitted in order to discuss factual information. They must be conducted in a manner that will not compromise public negotiations and also be clearly identified in official records as technical meetings. Reclamation staff cannot engage in negotiations at technical meetings nor offer commitments until delegated the appropriate contracting authority.
- (2) Develop and describe a communications plan for public participation. The plan should include outreach through various media (newspaper, direct email, website posting, etc.) and a timeline that will provide for adequate advance notice of negotiations. The regional staff will determine the plan's level of detail.

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<sup>9</sup> The date on which the approval memorandum is signed will begin the 24 month timeframe.

<sup>10</sup> See RM Policy PEC P06.

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- (a) At a minimum, all contract negotiations subject to a BON will be open to public participation and conducted in compliance with the Reclamation Project Act of 1939, section 9(f) [Pub. L. 76-260, as amended by section 226 of the Reclamation Reform Act of 1982 (RRA), Pub. L. 97-293, Title II, 43 U.S.C. § 485h(f)] and applicable RRA rules and regulations (43 CFR 426.22).
  - (b) If discussions between parties occur outside of the public negotiations that influence the negotiation process, the relevant details of those discussions must be presented during the next public negotiation session. The relevant details will be no less than is required to support Reclamation's administrative record.
- (3) Contract negotiating staff will contact the RLAD and discuss appropriate actions for handling issues that arise in negotiations that are outside the terms of the BON and approval memorandum. Substantive issues that are outside the terms of the BON and approval memorandum will require a supplement or amendment to the BON before the contract is executed by a regional director.
  - (4) The Commissioner's Office will review negotiated contracts for conformity to the specific requirements set out in the approval memorandum and BON. In the event a proposed contract does not conform to the specific requirements in the approval memorandum, the RLAD will collaborate with regional staff to develop a remedy.
    - (a) This is not an additional level of approval and will not focus on details or negotiable terms of the contract that are within the regional director's discretion and delegated authority. This review is limited to a determination that the contract does or does not exceed the parameters and requirements specified in the BON and Approval Memorandum. This review will enable the Commissioner's Office to identify and resolve any deviations from the approval memorandum and will strengthen internal controls.
    - (b) This review will normally take place prior to, or concurrent with, the public review process, but in every case prior to contract execution. The RLAD, acting on behalf of the Commissioner, will provide any necessary feedback to the regional staff within five business days following receipt of the contract, or according to an agreed-upon timeframe.
  - (5) Following contract execution, the region will submit a copy of the contract to the RLAD.

## 6. Definitions.

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- A. **Amendment to a BON.** A change, revision, or modification of an existing BON. Generally, the scope of the original BON remains the same.
  - B. **Approval Memorandum.** A document issued by the Commissioner in response to a BON that constitutes an official delegation of authority to the regional director to negotiate, execute, and administer contracts within specific parameters. An approval memorandum is a pre-decisional, internal document and is not available for public release.
  - C. **Bases of Negotiation.** A pre-decisional, deliberative document used to make and justify a recommendation to the Commissioner that a proposed contract action be authorized. BONs are not available for public release. BONs detail the material terms of the proposed contract, the negotiable terms, the parties' respective negotiating positions, and pertinent legal and practical boundaries (e.g., applicable legal and policy limits, and relevant financial circumstances, etc.).
  - D. **Supplement to a BON.** An addition to a BON, which typically expands the original scope.
7. **Review Period.** The originating office will review this release every 4 years.



## RECLAMATION MANUAL TRANSMITTAL SHEET

Effective Date: \_\_\_\_\_

Release No. \_\_\_\_\_

Ensure all employees needing this information are provided a copy of this release.

### Reclamation Manual Release Number and Subject

### Summary of Changes

NOTE: This Reclamation Manual release applies to all Reclamation employees. When an exclusive bargaining unit exists, changes to this release may be subject to the provisions of collective bargaining agreements.

### Filing instructions

Remove Sheets

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All Reclamation Manual releases are available at <http://www.usbr.gov/recman/>

Filed by: \_\_\_\_\_

Date: \_\_\_\_\_