


Florida Department of  
**Environmental Protection**

**Memorandum**

TO: Agency Term Contractors

FROM: F. Joseph Ullo, P.E., Director   
Division of Waste Management

DATE: December 16, 2016

SUBJECT: Restatement of Memo dated September 25, 2000  
Amending Guidance for Amended & Restated Agency Term Contracts and  
Protocol for Contractor Damage to Petroleum Storage Systems and Utilities<sup>1</sup>  
Effective Date: December 16, 2016

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NOTE: From and after the effective date above, the following provisions shall apply to any and all work performed near storage tanks systems or utilities whether undertaken by Purchase Order (PO) or Task Assignment (TA). If you currently have an open PO or TA with the Department, and you are unwilling to comply with the following provisions, you have until January 9, 2017, to reject the assigned PO or TA requiring such work. This Memorandum has been prepared considering the advice of the Office of General Counsel.

Standards of Care for Work Near Storage Tanks Systems and Utilities

Contractors must perform all work "in a manner consistent with that level of care and skill ordinarily exercised by other professionals under similar circumstances at the time the Services are performed." Performance Standards for Investigations Near Petroleum Storage Systems and Utilities are set out in the Department's guidance memo on that subject dated November 3, 2016; and which are further detailed in attachments, guidance, and updates to those documents associated with the Amended & Restated Agency Term Contracts (ATC) (ATC sub-paragraph 3.A.) Contractor's<sup>2</sup> failure to comply with required performance standards may result in a range of consequences, ranging from negative performance reviews up to and including cancellation of the ATC.

Contractors are responsible for any damage to property caused in the course of performing Work issued under the ATC. (ATC sub-paragraph 17.B.) Moreover, Contractors shall indemnify, defend, and hold Department harmless from suits, claims or actions arising under the ATC for personal injury and/or damage to real or personal tangible property caused in whole or in part by Contractor, its agents, or subcontractors. (ATC paragraph 18). The cost of and liability for such damage must be a covered event under Contractor's required insurance policies. (ATC sub-paragraph #17.B).

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<sup>1</sup> This replaces DEP Guidance Document and Form in Attachment A #44, "Investigations Near Petroleum Storage System" (9/25/00).

<sup>2</sup> All references to "you" or "contractor" throughout this memo apply to your subcontractors which are considered a part of this standard of care and procedures. See ATC paragraph 2.H.

Inadvertent Damage to Petroleum Storage System or Utilities.

If a Contractor, or its subcontractor, damages any part of a storage tank system or utility, Contractor should comply with all of the requirements in this memo. In addition, Contractor must immediately repair the damaged part or system and address any other damages. Initially, this work should be completed **at Contractor's sole expense.**

Request to Modify Assigned Work Near Storage Tanks Systems & Utilities

If Contractor asserts that the work assigned or that the location of such work presents a rare or unreasonable risk to its employees (including subcontractors), the public, or of damaging an active storage tank system (i.e., a system that is not abandoned or closed) or of nearby utilities, the ATC provides the following options:

- A. Contractor has three (3) days from receipt of the WO to reject the entire WO (ATC paragraph 2.F.); or
- B. Prior to beginning the work, Contractor can follow the change order (CO) process to request a modification of the WO. Note, in such instance, Contractor, must contact the Department's site manager and propose alternatives to the WO (ATC paragraph 26). Department will not process a CO request unless and until Contractor provides the site manager any and all documents, photographs (including current photos of the area of concern), and data it has regarding the location of the storage tank system or utilities (whichever is of concern) as well as a list of sources checked during its investigation and the results from each inquiry. The site manager shall confer with Department professionals and management to evaluate any request for a CO.

Contractor's failure to provide research supporting its requested CO will result in rejection of the request. Failure to conduct thorough research in compliance with the standard of care may result in the Department re-assigning the remainder of the work under the WO to another contractor. In addition, failures to investigate and unsupported requests for COs will be considered a failure to perform within quality and technical competence requirements in the Department's evaluation of your performance (Rule 62-772.300(6), F.A.C., questions 6.a. and 6.c. in the Contractor Performance Evaluation Form).

1. If Department grants Contractor's request to modify the WO, a CO will be issued following the normal ATC CO process. Where the issuance of the CO is considered to have reduced the risk of inadvertent damage to the system or utilities, there will be no adverse effect on Contractor's performance evaluation. However, if the WO was originally based upon locations proposed by Contractor, the need to redo, change or amend the proposal will also be considered a failure to perform within quality and technical competence requirements in the Department's evaluation of your performance.

In evaluating Contractor's request, Department will review the research provided and balance the relative need for the information with the site specific clean-up goals (including whether a conditional closure is possible) and any statutory cap on funding.

2. If Department rejects a request to modify the WO or to deviate from the Performance Standards for such work, and instructs Contractor to proceed as originally directed, the site manager will do so in writing with a Department supervisor co-approving or co-signing the authorization.
  - i. Such authorization will require Contractor to take more detailed field notes and photographs or video of the work in progress.
  - ii. If, proceeding as directed, any part of a storage system or utility is inadvertently damaged, the costs for repair and remediation can be recovered under the ATC, provided the Contractor complied with the following:
    1. unchanged portions of the WO,
    2. authorization to proceed,
    3. CO,
    4. standard of care in conducting the work,
    5. rapid response protocol, and
    6. requirement that Department review and approve of a scope of work for response (SOW) and costs prior to or coincident with work beginning by Contractor (including providing site manager SOW and costs as soon as possible during its response, such that the site manager can review and approve the performance of such work).

#### Consequences of Damaging a System or Utility or Failing to Follow Procedures

- a) No negative performance evaluation will result if Contractor repairs any damage to active storage tanks system or utility, at its expense, otherwise complies with the rapid response protocol, and timely addresses any other damage it caused to the property.
- b) Department will not pay to replace or repair any damaged components if Contractor fails to comply with the procedures outlined in paragraph B.2. above, or fails to comply with all of the standard of care requirements.
- c) WOs for work around storage tanks systems and utilities based on Contractor's information, which are then the subject of a request for CO, will result in a negative performance evaluation. The need for multiple COs to address inadequately justified WOs may result in the Department's reconsideration of assignments of work under the ATC or the value of maintaining the ACT.
- d) Frequent damage to active storage tanks systems or utilities by Contractor (e.g. several times per 12-month period) will result in the Department's termination of the ATC for cause (ATC paragraph 23.A.).

- e) In the event Contractor unilaterally modifies the scope of work in a WO, Department may invoke any of the remedial consequences in the ATC, including requiring corrective action or the suspension or termination of the ATC.