

Department of Defense

236.201

235.7003-4 Additional provisions and clauses.

Use of FAR and DFRAS provisions and clauses, and nonstandard provisions and clauses approved for agency use, that are not in the RDSS/C standard format, shall be approved in accordance with agency procedures.

PART 236—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

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Subpart 236.7—Standard and Optional Forms for Contracting for Construction, Architect-Engineer Services, and Dismantling, Demolition, or Removal of Improvements

236.701 Standard and optional forms for use in contracting for construction or dismantling, demolition, or removal of improvements.

AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.

SOURCE: 56 FR 36421, July 31, 1991, unless otherwise noted.

Subpart 236.1—General

236.102 Definitions.

- (1) A-E means architect-engineer.
- (2) *Construction activity* means an activity at any organizational level of the DoD that—
 - (i) Is responsible for the architectural, engineering, and other related technical aspects of the planning, design, and construction of facilities; and
 - (ii) Receives its technical guidance from the Army Office of the Chief of Engineers, Naval Facilities Engineering Command, or Air Force Directorate of Civil Engineering.
- (3) *Marshallese firm* is defined in the provision at 252.236-7012, Military Construction on Kwajalein Atoll—Evaluation Preference.
- (4) *Network analysis system* means recognized scheduling systems that show the duration, sequential relationship, and interdependence of various work activities, e.g., critical path method.
- (5) *United States firm* is defined in the provisions at 252.236-7010, Overseas Military Construction-Preference for United States Firms, and 252.236-7011, Overseas Architect-Engineer Services-Restriction to United States firms.

[56 FR 36421, July 31, 1991, as amended at 62 FR 2857, Jan. 17, 1997; 63 FR 11538, Mar. 9, 1998]

Subpart 236.2—Special Aspects of Contracting for Construction

236.201 Evaluation of contractor performance.

(a) *Preparation of performance evaluation reports.* Use DD Form 2626, Performance Evaluation (Construction), instead of SF 1420.

(c) *Distribution and use of performance reports.* (1) Send each contractor performance evaluation report to the central data base immediately upon its completion.

(A) The central data base—

(1) Is operated by—

U.S. Army Engineer Division, North Pacific, ATTN: CENPD-CT, P.O. Box 2870, Portland, OR 97208-2870, Telephone: (503)326-3459/4910

(2) Keeps reports on file for six years.

(B) For computer access to the files, contact the North Pacific Division for user log-on and procedures.

(2) Use performance records when making responsibility determinations under FAR 9.1.

(A) For each contract expected to exceed \$1,000,000, retrieve all performance records on file in the central data base for all prospective contractors that have a reasonable chance of being selected for award. The central data base will provide—

(1) Overall current performance ratings;

(2) Descriptions of contracts on which ratings are based (e.g., type of facility, contract value, applicable performance elements); and

(3) A telephone number to obtain transcripts and documentation of pertinent evaluation details.

(B) Consider using the performance records in the data base for lower value contracts and to assess a contractor's performance record for reasons other than an award decision, such as subcontractor approval and awards for excellence.

[56 FR 36421, July 31, 1991, as amended at 61 FR 7749, Feb. 29, 1996]

236.203 Government estimate of construction costs.

(c)(i) Designate the Government estimate as "For Official Use Only," unless the information is classified. If it is, handle the estimate in accordance with security regulations.

(ii) For sealed bid acquisitions—

(A) File a sealed copy of the Government estimate with the bids. (In the case of two-step acquisitions, this is done in the second step.)

(B) After the bids are read and recorded, remove the "For Official Use Only" designation and read and record

the estimate as if it were a bid, in the same detail as the bids.

236.204 Disclosure of the magnitude of construction projects.

Additional price ranges are—

(i) Between \$10,000,000 and \$25,000,000;

(ii) Between \$25,000,000 and \$100,000,000;

(iii) Between \$100,000,000 and \$250,000,000;

(iv) Between \$250,000,000 and \$500,000,000; and

(v) Over \$500,000,000.

[61 FR 7749, Feb. 29, 1996]

236.206 Liquidated damages.

See 212.204 for instructions on use of liquidated damages.

236.270 Expediting construction contracts.

(a) 10 U.S.C. 2858 requires agency head approval to expedite the completion date of a contract funded by a Military Construction Appropriations Act, if additional costs are involved. This approval authority may not be re-delegated. The approval authority must—

(1) Certify that the additional expenditures are necessary to protect the National interest; and

(2) Establish a reasonable completion date for the project.

(b) The contracting officer may approve an expedited completion date if no additional costs are involved.

236.271 Cost-plus-fixed-fee contracts.

Annual military construction appropriations acts restrict the use of cost-plus-fixed-fee contracts (see 216.306(c)).

[61 FR 7749, Feb. 29, 1996]

236.272 Prequalification of sources.

(a) Prequalification procedures may be used when necessary to ensure timely and efficient performance of critical construction projects. Prequalification—

(1) Results in a list of sources determined to be qualified to perform a specific construction contract; and

(2) Limits offerors to those with proven competence to perform in the required manner.

(b) The head of the contracting activity must—

(1) Authorize the use of prequalification by determining, in writing, that a construction project is of an urgency or complexity that requires prequalification; and

(2) Approve the prequalification procedures.

(c) For small businesses, the prequalification procedures must require the qualifying authority to—

(1) Request a preliminary recommendation from the appropriate Small Business Administration regional office, if the qualifying authority believes a small business is not responsible;

(2) Permit the small business to submit a bid or proposal if the preliminary recommendation is that the small business is responsible; and

(3) Follow the procedures in FAR 19.6, if the small business is in line for award and is found nonresponsible.

236.273 Network analysis systems.

Use head of the contracting activity approved procedures for preparing and using network analysis systems, whether contractor prepared, or Government prepared.

236.274 Construction in foreign countries.

(a) In accordance with Section 112 of Pub. L. 105-45, military construction contracts funded with military construction appropriations, that are estimated to exceed \$1,000,000 and are to be performed in the United States territories and possessions in the Pacific and on Kwajalein Atoll, or in countries bordering the Arabian Gulf, shall be awarded only to United States firms, unless—

(1) The lowest responsive and responsible offer of a United States firm exceeds the lowest responsive and responsible offer of a foreign firm by more than 20 percent; or

(2) The contract is for military construction on Kwajalein Atoll and the lowest responsive and responsible offer is submitted by a Marshallese firm.

(b) When a technical working agreement with a foreign government is required for a construction contract—

(1) Consider inviting the Army Office of the Chief of Engineers, or the Naval Facilities Engineering Command to participate in the negotiations.

(2) The agreement should, as feasible and where not otherwise provided for in other agreements, cover all elements necessary for the construction that are required by laws, regulations, and customs of the United States and the foreign government, including—

(i) Acquisition of all necessary rights;

(ii) Exeditious, duty-free importation of labor, material, and equipment;

(iii) Payment of taxes applicable to contractors, personnel, materials, and equipment;

(iv) Applicability of workers' compensation and other labor laws to citizens of the U.S., the host country, and other countries;

(v) Provision of utility services;

(vi) Disposition of surplus materials and equipment;

(vii) Handling of claims and litigation; and

(viii) Resolution of any foreseeable problems that can be appropriately included in the agreement.

[56 FR 36421, July 31, 1991, as amended at 62 FR 2856, Jan. 17, 1997; 62 FR 34127, June 24, 1997; 63 FR 11538, Mar. 9, 1998]

Subpart 236.3—Special Aspects of Sealed Bidding in Construction Contracting

236.303 Invitations for bids.

236.303-70 Additive or deductive items.

(a) If it appears that sufficient funds may not be available for all the desired construction features, consider using a bid schedule with—

(1) A first or base bid item covering the work generally as specified; and

(2) A list of priorities that contains one or more additive or deductive bid items which progressively add or omit specified features of the work in a stated order of priority. (Normally, do not mix additive and deductive bid items in the same solicitation.)

(b) Before opening the bids, record in the contract file the amount of funds available for the project.

(c) Determine the low bidder and the bid items to be awarded as follows—

(1) Use the recorded amount of available funds to determine the low bidder, which will be the bidder that—

(i) Is otherwise eligible for award; and

(ii) Offers the lowest aggregate amount for the first or base bid item, plus or minus (in order of listed priority), those additive or deductive bid items that provide the most features within the funds available.

(2) Evaluate all bids, including those using the procedures in 219.7203, on the basis of the same additive or deductive bid items.

(i) If adding another item from the bid schedule list of priorities would make the award exceed the available funds, skip that item and go to the next item from the list of priorities.

(ii) Add the next item if an award can be made that includes the item and is still within the available funds.

(3) Use the list of priorities only to determine the low bidder. After determining the low bidder, an award may be made on any combination if—

(i) It is in the best interests of the Government;

(ii) Funds are available at time of award; and

(iii) The low bidder's price for the combination is less than the price offered by any other responsive, responsible bidder.

[56 FR 36421, July 31, 1991, as amended at 61 FR 18688, Apr. 29, 1996]

Subpart 236.4—Special Procedures for Negotiation of Construction Contracts

236.403 Cost-reimbursement contracts.

(1) For cost-plus-fixed-fee contracts, negotiate the fee for a prime contractor using departmental procedures approved by the Assistant Secretary of Defense (Production and Logistics).

(2) For cost-plus-incentive-fee contracts, negotiate the target fee for a prime contractor using the criteria and fee schedule in departmental procedures to determine—

(i) The reasonableness of the target cost;

(ii) The maximum and minimum fees to be established; and

(iii) The fee adjustment formula.

Subpart 236.5—Contract Clauses

236.570 Additional provisions and clauses.

(a) Use the following clauses in all fixed-price construction solicitations and contracts—

(1) 252.236-7000, Modification Proposals-Price Breakdown; and

(2) 252.236-7001, Contract Drawings, Maps, and Specifications.

(b) Use the following provisions and clauses in fixed-price construction contracts and solicitations as applicable—

(1) 252.236-7002, Obstruction of Navigable Waterways, when the contract will involve work near or on navigable waterways.

(2) When the head of the contracting activity has approved use of a separate bid item for mobilization and preparatory work, use either—

(i) 252.236-7003, Payment for Mobilization and Preparatory Work. Use this clause for major construction contracts that require—

(A) Major or special items of plant and equipment; or

(B) Large stockpiles of material which are in excess of the type, kind, and quantity which would be normal for a contractor qualified to undertake the work; or

(ii) 252.236-7004, Payment for Mobilization and Demobilization. Use this clause for contracts involving major mobilization expense, or plant equipment and material (other than the situations covered in paragraph (b)(2)(i) of this section) made necessary by the location or nature of the work.

(A) Generally, allocate 60 percent of the lump sum price in paragraph (a) of the clause to the cost of mobilization.

(B) Vary this percentage to reflect the circumstances of the particular contract, but in no event should mobilization exceed 80 percent of the payment item.

(3) 252.236-7005, Airfield Safety Precautions, when construction will be performed on or near airfields.

(4) 252.236-7006, Cost Limitation, if the solicitation's bid schedule contains one or more items subject to statutory

cost limitations, and if a waiver has not been granted (FAR 36.205).

(5) 252.236-7007, Additive or Deductive Items, if the procedures in 236.303-70 are being used.

(6) 252.236-7008, Contract Prices—Bidding Schedule, if the contract will contain only unit prices for some items.

(c) Use the following provisions in solicitations for military construction contracts that are funded with military construction appropriations and are estimated to exceed \$1,000,000:

(1) 252.236-7010, Overseas Military Construction—Preference for United States Firms, when contract performance will be in a United States territory or possession in the Pacific or in a country bordering the Arabian Gulf.

(2) 252.236-7012, Military Construction on Kwajalein Atoll—Evaluation Preference, when contract performance will be on Kwajalein Atoll.

(d) Also see 246.710(4) for an additional clause applicable to construction contracts to be performed in Germany.

[56 FR 36421, July 31, 1991, as amended at 57 FR 42632, Sept. 15, 1992; 62 FR 2856, Jan. 17, 1997; 62 FR 34127, June 24, 1997; 63 FR 11538, Mar. 9, 1998]

Subpart 236.6—Architect-Engineer Services

236.601 Policy.

(1) 10 U.S.C. 2807(b) requires notice to Congress 21 days before the initial obligation of funds if a contract is for—

(i) A-E services or construction design for military construction, military family housing, or restoration or replacement of damaged or destroyed facilities; and

(ii) An estimated total contract price of \$500,000 or more.

(2) During the 21 day period, synopsis of the proposed contract action and administrative actions leading to the award may be started.

[56 FR 36421, July 31, 1991, as amended at 63 FR 69008, Dec. 15, 1998]

236.602 Selection of firms for architect-engineer contracts.

236.602-1 Selection criteria.

(a)(i) Establish the evaluation criteria before making the public an-

nouncement required by FAR 5.205(c) and include the criteria and their relative order of importance in the announcement. The evaluation criteria should be project specific. Use the information in the DD Form 1391, FY—Military Construction Project Data, when available, and other pertinent project data in preparing the evaluation criteria.

(4) Use performance evaluation data from the central data base identified in 236.201.

(6) The primary factor in A-E selection is the determination of the most highly qualified firm. Also consider secondary factors such as geographic proximity and equitable distribution of work, but do not attribute greater significance to the secondary factors than to qualifications and past performance. Do not reject the overall most highly qualified firm solely in the interest of equitable distribution of contracts.

(A) Consider the volume of work awarded by DoD during the previous 12 months. In considering equitable distribution of work among A-E firms, include small business concerns; historically black colleges and universities and minority institutions; firms that have not had prior DoD contracts; and small disadvantaged business concerns and joint ventures with small disadvantaged business participants if the Standard Industrial Classification Major Group of the acquisition is one in which use of a price evaluation adjustment is currently authorized (see FAR 19.201(b)).

(1) Use data extracted from the Defense Contract Action Data System (DCADS) compiled from DD Form 350, Individual Contracting Action Report. DCADS data may be obtained from the central data base identified in 236.201(c)(1).

(2) Do not consider awards to overseas offices for projects outside the United States, its territories and possessions. Do not consider awards to a subsidiary if the subsidiary is not normally subject to management decisions, bookkeeping, and policies of a holding or parent company or an incorporated subsidiary that operates under a firm name different from the parent company. This allows greater competition.

(B) Consider as appropriate superior performance evaluations on recently completed DoD contracts.

(C) Consider the extent to which potential contractors identify and commit to small business, to small disadvantaged business (SDB) if the Standard Industrial Classification Major Group of the subcontracted effort is one in which use of an evaluation factor or subfactor for participation of SDB concerns is currently authorized (see FAR 19.210(b)), and to historically black college or university and minority institution performance as subcontractors.

[56 FR 36421, July 31, 1991, as amended at 59 FR 27673, May 27, 1994; 63 FR 41974, Aug. 6, 1998; 63 FR 64430, Nov. 20, 1998]

236.602-2 Evaluation boards.

(a) Preselection boards may be used to identify to the section board the qualified firms that have a reasonable chance of being considered as most highly qualified by the selection board.

[63 FR 11538, Mar. 9, 1998]

236.602-4 Selection authority.

(a) The selection authority shall be at a level appropriate for the dollar value and nature of the proposed contract.

(c) A finding that some of the firms on the selection report are unqualified does not preclude approval of the report, provided that a minimum of three most highly qualified firms remains. The reasons for finding a firm or firms unqualified must be recorded.

[63 FR 11538, Mar. 9, 1998]

236.602-70 Restriction on award of overseas architect-engineer contracts to foreign firms.

In accordance with Section 111 of Public Law 104-32 and similar sections in subsequent military construction appropriations acts, A-E contracts funded by military construction appropriations that are estimated to exceed \$500,000 and are to be performed in Japan, in any North Atlantic Treaty Organization member country, or in countries bordering the Arabian Gulf, shall be awarded only to United States

firms or to joint ventures of United States and host nation firms.

[62 FR 2858, Jan. 17, 1997]

236.604 Performance evaluation.

(a) *Preparation of performance reports.* Use DD Form 2631, Performance Evaluation (Architect-Engineer), instead of SF 1421.

(2) Prepare a separate performance evaluation after actual construction of the project. Ordinarily, the evaluating official should be the person most familiar with the A-E's performance.

(c) Distribution and use of performance reports.

(i) Forward each performance report to the central data base identified in 236.201(c) after completing the review. The procedures in 236.201 also apply to A-E contracts.

(ii) File and use the DD Form 2631, Performance Evaluation (Architect-Engineer), in a manner similar to the SF 254, Architect-Engineer and Related Services Questionnaire.

[56 FR 36421, July 31, 1991, as amended at 61 FR 7749, Feb. 29, 1996; 64 FR 51076, Sept. 21, 1999]

236.606 Negotiations.

236.606-70 Statutory fee limitation.

(a) 10 U.S.C. 4540, 7212, and 9540 limit the contract price (or fee) for A-E services for the preparation of designs, plans, drawings, and specifications to six percent of the project's estimated construction cost.

(b) The six percent limit also applies to contract modifications, including modifications involving—

(1) Work not initially included in the contract. Apply the six percent limit to the revised total estimated construction cost.

(2) Redesign. Apply the six percent limit as follows—

(i) Add the estimated construction cost of the redesign features to the original estimated construction cost;

(ii) Add the contract cost for the original design to the contract cost for redesign; and

(iii) Divide the total contract design cost by the total estimated construction cost. The resulting percentage may not exceed the six percent statutory limitation.

(c) The six percent limit applies only to that portion of the contract (or modification) price attributable to the preparation of designs, plans, drawings, and specifications. If a contract or modification also includes other services, the part of the price attributable to the other services is not subject to the six percent limit.

236.609 Contract clauses.

236.609-70 Additional provision and clause.

(a)(1) Use the clause at 252.236-7009, Option for Supervision and Inspection Services, in solicitations and contracts for A-E services when—

(i) The contract will be fixed price; and

(ii) Supervision and inspection services by the A-E may be required during construction.

(2) Include the scope of such services in appendix A of the contract.

(b) Use the provision at 252.236-7011, Overseas Architect-Engineer Services—Restriction to United States Firms, in solicitations for A-E contracts that are—

(1) Funded with military construction appropriations;

(2) Estimated to exceed \$500,000; and

(3) To be performed in Japan, in any North Atlantic Treaty Organization member country, or in countries bordering the Arabian Gulf.

[56 FR 36421, July 31, 1991, as amended at 62 FR 2858, Jan. 17, 1997; 63 FR 11539, Mar. 9, 1998]

Subpart 236.7—Standard and Optional Forms for Contracting for Construction, Architect-Engineer Services, and Dismantling, Demolition, or Removal of Improvements

236.701 Standard and optional forms for use in contracting for construction or dismantling, demolition, or removal of improvements.

(c) Do not use Optional Form 347, Order for Supplies and Services, (see 213.505-2).

PART 237—SERVICE CONTRACTING

Subpart 237.1—Service Contracts—General

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AUTHORITY: 41 U.S.C. 421 and 48 CFR chapter 1.