

(4) The statement of work is specific and is defined by separate phases or increments so that, at the completion of each, progress can be effectively measured.

[71 FR 76501, Dec. 20, 2006]

332.703 Contract funding requirements.

332.703-1 General.

(b) The following general guidelines are applicable to incrementally funded contracts:

(1) The estimated total cost of the project (all planned phases or increments) is to be taken into consideration when determining the requirements which must be met before entering into the contract; *i.e.*, justification for noncompetitive acquisition, approval of award, etc.

(2) The RFP and resultant contract are to include a statement of work which describes the total project covering the proposed multiple year period of performance and indicating timetables consistent with planned phases or increments and corresponding allotments of funds.

(3) Offerors' technical and cost proposals must include the entire project and shall show distinct phases or increments and the multiple year period of performance.

(4) Negotiations will be conducted based upon the total project, including all planned phases or increments, and the multiple year period of performance.

(5) Sufficient funds must be obligated under the basic contract to cover no less than the first year of performance, unless the Contracting Officer determines it is advantageous to the Government to fund the contract for a lesser period. In that event, the Contracting Officer shall ensure that the obligated funds are sufficient to cover a complete phase or increment of performance representing a material and measurable part of the total project and the period of time that the funds cover shall be stated in the contract.

(6) An incrementally funded contract must contain precise requirements for progress reports to be sent to the Project and Contracting Officers. These reports will enable the contract to be

effectively monitored. The Project Officer shall prepare periodic performance evaluation reports and provide them to the Contracting Officer.

[71 FR 76502, Dec. 20, 2006]

332.704 Limitation of cost or funds.

See subpart 342.71, "Administrative Actions for Cost Overruns," for procedures for handling anticipated cost overruns.

[71 FR 76502, Dec. 20, 2006]

332.705-2 Clauses for limitation of costs or funds.

(c)(1) When using the Limitation of Funds clause (FAR 52.232-22) in the solicitation and resultant incrementally funded contract, the contracting officer shall insert the following legend between the clause title and the clause text:

(This clause supersedes the Limitation of Cost clause found in the General Provisions of this contract.)

(2) The contracting officer shall also include a clause reading substantially as that shown in 352.232-74 in the Special Provisions of the resultant incrementally funded contract.

(3) The request for proposals must inform prospective offerors of the Department's intention to enter into an incrementally funded contract. Therefore, the contracting officer shall include the provision at 352.232-75 in the request for proposals whenever the use of incremental funding is contemplated.

Subpart 332.9—Prompt Payment [Reserved]

PART 333—PROTESTS, DISPUTES, AND APPEALS

Subpart 333.1—Protests

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AUTHORITY: 5 U.S.C. 301; 40 U.S.C. 486(c).

SOURCE: 66 FR 4249, Jan. 17, 2001, unless otherwise noted.

Subpart 333.1—Protests

333.102 General.

(g)(1) The Office of Acquisition Management (Division of Acquisition Policy (DAP)) has been designated as the headquarters office to serve as the liaison for protests lodged with GAO. Within the Division of Acquisition Policy (DAP), the Departmental Protest Control Officer (DPCO) has been designated as the individual to be contacted by GAO.

(2) Each contracting activity shall designate a protest control officer to serve as an advisor to the contracting officer and to monitor protests from the time of initial notification until the protest has been resolved. The protest control officer should be a senior acquisition specialist in the headquarters acquisition staff office. In addition, contracting activities should designate similar officials within their principal components to the extent practicable and feasible. A copy of each appointment and termination of appointment of protest control officers shall be forwarded to the Director, Division of Acquisition Policy (DAP).

[66 FR 4249, Jan. 17, 2001, as amended at 71 FR 76502, Dec. 20, 2006]

333.103 Protests to the agency.

(f)(1) The contracting officer is authorized to make the determination, using the criteria in FAR 33.104(b), to award a contract notwithstanding the protest after obtaining the concurrence of the contracting activity's protest control officer and the Office of General Counsel—Business and Administrative Law Division (OGC-BAL). If the protest has been lodged with the Secretary, is addressed to the Secretary, or requests referral to the Secretary, approval shall also be obtained from the Director, Division of Acquisition Policy (DAP) before making the award.

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(2) The contracting officer shall require written confirmation of any oral protest. To be considered timely, the written confirmation must be filed in accordance with the applicable provisions in 333.102(a). In the following cases, written protests received by the contracting officer before award shall be forwarded, through acquisition channels, to the DPCO for processing. Files concerning these protests shall be submitted in duplicate, or as otherwise specified by the DPCO and sent in the most expeditious manner, marked "IMMEDIATE ACTION—PROTEST BEFORE AWARD", and contain the documentation referenced in 333.104(a)(3).

(i) The protestant requests referral to the Secretary of Health and Human Services;

(ii) The protest is known to have been lodged with the Comptroller General or the Secretary, or is addressed to either; or

(iii) The contracting officer entertains some doubt as to the proper action regarding the protest or believes it to be in the best interest of the Government that the protest be considered by the Secretary or the Comptroller General. Otherwise, protests addressed to the contracting officer may be answered by the contracting officer, with the concurrence of the contracting activity's protest control officer and OGC-BAL.

(3) Protests received after award shall be treated as indicated in FAR 33.103(f)(3).

[66 FR 4249, Jan. 17, 2001, as amended at 71 FR 76502, Dec. 20, 2006]

333.104 Protests to GAO.

(a) *General procedures.* (3)(ii) The DPCO shall process protests filed with GAO, whether pre- or post award. Protest files shall be prepared by the contracting office and distributed as follows: Two copies to the DPCO, one copy to the contracting activity's protest control officer, and one copy to OGC-GLD. In addition to the items listed in 33.104(a)(3)(ii)(A) through (G), the protest file shall include the following documents:

(H) The current status of award. When award has been made, this shall

include whether performance has commenced, shipment or delivery has been made, or a stop work order has been issued.

(I) A copy of any mutual agreement to suspend work on a no-cost basis, when appropriate (see FAR 33.104(c)(4)).

(J) Copies of the notice of protest given offerors and other parties when the notice is appropriate (see FAR 33.104(a)(2)).

(K) A copy of the negotiation memorandum, when applicable.

(L) The name and telephone number of the person in the contracting office who may be contacted for information relevant to the protest.

(M) A copy of the competitive range memorandum.

(N) The contracting officer's statement of facts and circumstances, including a discussion of the merits of the protest, and conclusions and recommendations, including documentary evidence on which they are based. The files shall be assembled in an orderly manner and shall have an index of enclosures and any document referred to therein.

(4) The DPCO is responsible for making the necessary distributions referenced in FAR 33.104(a)(4).

(5) The Contracting Officer shall furnish the protest file containing the documentation specified in paragraph (a)(3)(ii) of this section (with the exception of the contracting officer statement of facts and circumstances) and FAR 33.104(a)(3)(ii)(A) through (G) to the DPCO within fourteen (14) calendar days from receipt of the protest. The contracting officer shall submit the contracting officer's statement of facts and circumstances within twenty-one (21) calendar days from receipt of the protest. Since the statute allows only a short time period in which to respond to protests lodged with GAO, the Contracting Officer shall handle each protest on a priority basis. The DPCO shall submit copies of the protest file to GAO, the protestor, and any intervenors in accordance with FAR 33.104(a)(4)(i).

(6) Since the DPCO will furnish the protest file to GAO, the protestor, and any intervenors, comments on the file from the protestor and any intervenors will be sent to the DPCO.

(7) The DPCO, Division of Acquisition Policy (DAP), shall serve as the GAO point of contact for protests lodged with GAO.

(b) *Protests before award.* (1) To make an award notwithstanding a protest, the Contracting Officer shall prepare a finding using the criteria in FAR 33.104(b)(1), have it executed by the HCA (not delegable), and forward it, along with a written request for approval to make the award, to the Deputy Assistant Secretary for Acquisition Management and Policy (DASAMP).

(2) If the request to make an award notwithstanding the protest is approved by the Deputy Assistant Secretary for Acquisition Management and Policy (DASAMP), the DPCO shall notify GAO. Whether the request is approved or not, the DPCO shall telephonically notify the contracting activity's protest control officer of the decision of the Deputy Assistant Secretary for Acquisition Management and Policy (DASAMP), and the contracting activity's protest control officer shall immediately notify the Contracting Officer. The DPCO shall confirm the decision by memorandum to the contracting activity's protest control officer.

(c) *Protests after award.* (2) If the Contracting Officer believes performance should be allowed to continue notwithstanding the protest, a finding shall be prepared by the Contracting Officer using the criteria in FAR 33.104(c)(2), executed by the HCA (not delegable), and forwarded, along with a written request for approval, to the Deputy Assistant Secretary for Acquisition Management and Policy (DASAMP). The same procedures for notification stated in paragraph (b)(2) of this section shall be followed.

(d) *Findings and notice.* The written notice required by FAR 33.104(d) shall be provided to the protestor and any intervenors by the DPCO.

(g) *Notice to GAO.* The Deputy Assistant Secretary for Acquisition Management and Policy (DASAMP) shall be the official to comply with the requirements of FAR 33.104(g).

[71 FR 76502, Dec. 20, 2006]

Subpart 333.2—Disputes and Appeals

333.203 Applicability.

(c) The Secretary has designated the Armed Services Board of Contract Appeals (ASBCA) as the authorized “Board” to hear and determine disputes for the Department.

[71 FR 76503, Dec. 20, 2006]

333.209 Suspected fraudulent claims.

The contracting officer shall submit any instance of a contractor’s suspected fraudulent claim to the Office of the Inspector General for investigation.

333.211 Contracting officer’s decision.

(a)(2) The contracting officer shall refer a proposed final decision to the Office of General Counsel-General Law Division (OGC-GLD), for advice as to the legal sufficiency and format before sending the final decision to the contractor. The contracting officer shall provide OGC-GLD with the pertinent documents with the submission of each proposed final decision.

(a)(4)(v) When using the paragraph in FAR 33.211 (a)(4)(v), the contracting officer shall insert the words “Armed Services” before each mention of the term “Board of Contract Appeals”.

(h) At any time within the period of appeal, the contracting officer may modify or withdraw his/her final decision. If an appeal from the final decision has been taken to the ASBCA, the contracting officer will forward his/her recommended action to OGC-GLD with the supplement to the contract file which supports the recommended correction or amendment.

[71 FR 76503, Dec. 20, 2006]

333.212 Contracting officer’s duties upon appeal.

(a) Appeals shall be governed by the rules set forth in the “Rules of the Armed Services Board of Contract Appeals,” or by the rules established by the U.S. Court of Federal Claims, as appropriate.

(b) The Office of General Counsel-General Law Division (OGC-GLD) is designated as the Government Trial Attorney to represent the Government

in the defense of appeals before the ASBCA. A decision by the ASBCA will be transmitted by the Government Trial Attorney to the appropriate contracting officer for compliance in accordance with the ASBCA’s decision.

(c) If an appeal is filed with the ASBCA, the contracting officer shall assemble a file within 30 days of receipt of an appeal, or advice that an appeal has been filed, that consists of all documents pertinent to the appeal, including:

(1) The decision and findings of fact from which the appeal is taken;

(2) The contract, including specifications and pertinent modifications, plans and drawings;

(3) All correspondence between the parties pertinent to the appeal, including the letter or letters of claim in response to which the decision was issued;

(4) Transcripts of any testimony taken during the course of proceedings, and affidavits or statements of any witness on the matter in dispute made prior to the filing of the notice of appeal with the Board; and

(5) Any additional information considered pertinent. The contracting officer shall furnish the appeal file to the Government Trial Attorney for review and approval. After approval, the contracting officer shall prepare four copies of the file, one for the ASBCA, one for the appellant, one for the Government Trial Attorney, and one for the contracting office.

(d) At all times after the filing of an appeal, the contracting officer shall render whatever assistance is requested by the Government Trial Attorney. When an appeal is set for hearing, the concerned contracting officer shall be responsible for providing Government witnesses and specified physical and documentary evidence to the Trial Attorney. The Trial Attorney shall ensure the presence of all witnesses and documentary evidence at both the pre-hearing conference and hearing.

(e) If a contractor which has filed an appeal with the ASBCA elects to accept fully the decision from which the appeal was taken, or any modification to it, and gives written notification of acceptance to the Government Trial Attorney or the concerned contracting

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333.215-70

officer, the Government Trial Attorney will notify the ASBCA of the disposition of the dispute in accordance with Rule 27 of the ASBCA.

(f) If the contractor has elected to appeal to the U.S. Court of Federal Claims, the U.S. Department of Justice will represent the Department. However, the contracting officer shall still coordinate all actions through OGC-GLD.

[71 FR 76503, Dec. 20, 2006]

333.212-70 Formats.

(a) The following format is suggested for use in transmitting appeal files to the ASBCA:

Your reference:
(Docket No.)
(Name)
Recorder, Armed Services Board of Contract Appeals
Skyline Six 5109 Leesburg Pike
Falls Church, Virginia 22041

Dear (Name):
Transmitted herewith are documents relative to the appeal under Contract No. _____ with the _____
(Name of contractor)

in accordance with the procedures under Rule 4. The Government Trial Attorney for this case is

(Insert General Law Division, Office of General Counsel, Department of Health and Human Services, 330 Independence Avenue, SW., Washington, DC 20201).

The request for payment of charges resulting from the processing of this appeal should be addressed to:

(Insert name and address of cognizant finance office.)

Sincerely yours,
Contracting Officer
Enclosures

(b) The following format is suggested for use in notifying the appellant that

the appeal file was submitted to the ASBCA:

(Contractor Address)

Dear _____:

An appeal file has been compiled relative to the appeal under Contract No. _____, and has been submitted to the Armed Services Board of Contract Appeals (ASBCA). The enclosed duplicate of the appeal file is identical to that submitted to the Board, except that contract documents which you already have been excluded. You may furnish or suggest any additional information deemed pertinent to the appeal to the Armed Services Board of Contract Appeals according to their rules.

The ASBCA will provide you with further information concerning this appeal.

Sincerely yours,
Contracting Officer
Enclosure

[66 FR 4249, Jan. 17, 2001, as amended at 71 FR 76503, Dec. 20, 2006]

333.213 Obligation to continue performance.

(a) The Disputes clause at FAR 52.233-1 shall be used without the use of Alternate I. However, if the contracting officer determines that the Government's interest would be better served by use of paragraph (i) in Alternate I, he/she must request approval for its use from the chief of the contracting office.

333.215-70 Additional contract clause.

Use the clause at 352.333-7001, Choice of Law (Overseas), in solicitations and contracts when contract performance will be outside the United States, its possessions, and Puerto Rico, except as otherwise provided for in a government-to-government agreement.

[70 FR 40, Jan. 3, 2005]