

Procurement Guidance - (7/2014)

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T3.8.7 Construction Contracting Revised 8/2009

A Construction Contracting Added 7/2007

1 General Added 7/2007

- a. Guidance in this section applies to construction contracts, contracts for dismantling, demolition, or removal of improvements, and to the construction portion of contracts for products or services. In the event that the portions of multipurpose contracts are so commingled that priced deliverables for construction, service, or supply cannot be segregated, AMS guidance applicable to the predominant purpose of the contract applies.
- b. "Construction" means construction, alteration, or repair of buildings, structures, or other real property. For purposes of this definition, the terms "buildings, structures, or other real property" include but are not limited to improvements of all types, such as maintenance facilities, duct banks, air traffic control facilities, communication towers, radar facilities, office facilities, airport facilities, and navigational aids.
- c. When performing construction, alteration, or repair work in FAA-leased space, the Contracting Officer (CO) must consult with his or her local Real Estate Contracting Officer (RECO) to determine FAA's alteration rights and responsibilities.

2 Dismantling, Demolition and Removal of Improvements Added 7/2007

- a. If a contract is solely for dismantling, demolition, or removal of improvements and will exceed \$2,500, the Service Contract Act applies unless further work is contemplated that will result in the construction, alteration or repair of a public building or public work at that location is contemplated. If further construction work is intended, even though by separate contract, then the Davis-Bacon Act applies to the contract for dismantling, demolition, or removal.

3 Salvageable Property Added 7/2007

- a. The procurement team (CO, program official, legal counsel, and other support staff) should consider the usefulness to FAA of all salvageable property. Any of the property having a salvage value that is less than its usefulness to FAA should be expressly designated in the contract for retention by FAA. The contract may provide that:
 - (1) The FAA pays the contractor for the reasonable costs of the dismantling or demolition of the structure(s);
 - (2) The contractor pays FAA for the right to salvage and remove the materials resulting from the dismantling or demolition operation; or

(3) A combination of both. Both the FAA and contractor must ensure compliance with environmental laws and regulations, including handling of hazardous waste.

b. The procurement team should determine the fair market value of any property not to be retained by FAA, because the contractor may receive title to this property. Its value will therefore be important in determining what payment, if any, should be made to the contractor, and whether additional compensation will be made if the contract is terminated. Personal Property Managers, in conjunction with the procurement team, must approve the disposition of Government property to be transferred to contractors under dismantling, demolition or removal of improvements contracts.

4 Laws, Regulations and Standards Added 7/2007

a. *Davis-Bacon Act.* The Davis-Bacon Act applies to construction contracts valued at \$2,000 or more.

b. *State Regulation of Federal Construction Projects.*

(1) FAA contractors may encounter requests from State and local governments for the FAA's contractors to obtain building permits, zoning approval, sanitation approval, etc. Based on the "Supremacy" clause of Article 6 of the United States Constitution, construction contractors are not required to obtain most permits or approvals for work done on Federal construction projects. The States do have enforcement authority for safety and environmental protection as specified by the Occupational Safety and Health Administration (OSHA), the Comprehensive Environmental Response, compensation and Liability (Superfund) Act (CERCLA), and the Resource Conservation and Recovery Act (RCRA).

(2) Contractors who encounter attempts by State or local government entities to assess various types of fees against a FAA construction project should be advised to inform the CO immediately if the assessing entity attempts in any way to prevent or hinder the contractor at the job site. The CO should seek legal advice from either Regional Counsel or AGC-500.

c. *Local Employment in Construction Contracts.* Occasionally, efforts are made by State or local governments to have FAA limit employment on construction projects to local residents or firms. Such a restriction has been held to be improper, and should not be used in FAA contracts (reference Washington State Supreme Court case Laborers Local Union No. 374 v. Felton Construction Co., Nov. 24, 1982, and 42 Comp. Gen. 1, B-198952, 81-1 CPD 467). FAA recognizes that Tribal Employment Rights Ordinances (TERO) which affects projects on or near certain Indian reservations may have an affect on contractor labor. FAA should inform offerors of the existence of a TERO in the screening information request (SIR).

d. *Domestic Materials.* The Buy American Act applies to construction, alteration, and repair

contracts performed in the United States. It requires contractors to use domestic materials, except under specific circumstances. Also, the Buy American provisions of the Aviation Safety and Capacity Expansion Act of 1990 require FAA to use domestic steel and manufactured products, unless an exception applies. (See AMS Procurement Guidance T3.6.4)

5 Design-Build Added 4/2008

a. *General.* Design-build is a contracting technique that allows a single procurement for both design and construction of a project. Design-build allows the contractor flexibility, to the extent allowable or reasonable, for innovation in design, materials, and construction methods utilized in a construction project.

b. *Considerations for Using Design-Build.*

(1) When planning a design-build, the procurement team (Contracting Officer (CO), program official, legal counsel and others supporting a project) should consider the following factors:

- (a) Extent to which requirements are defined;
- (b) Time constraints;
- (c) The potential for delays, modifications, and scope changes;
- (d) Potential regulatory or environmental issues;
- (e) Construction issues, including differing site conditions and schedules;
- (f) Risks to FAA, including potential liabilities and meeting stipulated performance standards;
- (g) Availability and type of funding, including funding issues that may arise from a large design-build project that covers multiple fiscal years; and
- (h) Availability of qualified design-build contractors.

(2) When considering design-build, the procurement team must judge who is in the best position, FAA or a contractor, to manage and control potential issues or risks for a particular project. Under a design-build, the contractor assumes the greater responsibility and risk. Claims for design errors or delays are not allowed and the potential for other types of claims are greatly reduced.

c. *Design-Build Source Selection.*

(1) *Two-Phase SIR*. While a CO may choose to award a contract based on one SIR requiring a single offer (that includes an offeror's technical and pricing information), the CO may instead issue a two-phase SIR that allows the CO to screen technical proposals and down-select offerors prior to requesting a price proposal.

(a) Phase one involves the request for and evaluation of technical proposals from offerors, and no pricing is involved. The goal is to determine the acceptability of the technical proposals prior to the submission of pricing. Technical information that may be requested from offerors includes, but is not limited to:

- (i) Technical capabilities;
- (ii) Experience/past performance (such as experience in a given field or industry or on-airport experience);
- (iii) Engineering approach;
- (iv) Special manufacturing processes; and
- (v) Joint experience of design and construction management teams.

(b) Phase two involves the submission of pricing proposals by only those offerors determined to be technically acceptable in step one. Trade-offs in phase 2 are allowable.

(c) Factors the CO should consider for using a two-phase SIR include:

- (i) Specifications or descriptions are not definite or complete;
- (ii) Definite criteria exist for the evaluation of technical proposals, experience, or past performance;
- (iii) Two or more sources are expected; and
- (iv) FAA personnel (ie CO, engineers, etc) are available to evaluate/manage a two-phase SIR.

(2) *Cost-Reimbursement Contract*. When a design-build project involves numerous uncertainties or the project has yet to be fully developed, a cost-reimbursement, rather than a fixed-price, contract may be appropriate. Rare situations that may warrant a cost-reimbursement design-build contract are:

(a) Highly technical or next generation projects that do not have an effective design benchmark; and

(b) Projects with multiple uncertainties, to include:

- (i) Site conditions or locations that create unique and unplanned impacts to the project;
- (ii) New technology that may create integration issues when introduced to current systems; and
- (iii) Hazardous waste remediation where the scope of the clean-up cannot be completely defined.

(3) *Design Competition*. Design-build may include “design competition” as a basis for selecting a vendor for the project. FAA provides general design requirements or constraints and offerors prepare a preliminary design or specification for FAA evaluation. Depending on the scope of the project and availability of funding, FAA may authorize a fixed payment to compensate offerors for work done during the design competition.

6 Liquidated Damages Added 7/2007

a. Liquidated damages clauses should be used only when: (1) the time of completion or performance is such an important factor in the award of the construction contract that FAA may reasonably expect to suffer damage if the completion or performance is delinquent; and (2) the extent or amount of the actual damage sustained by the FAA would be difficult or impossible to calculate or prove. In deciding whether to include a liquidated damages provision in a construction contract, the procurement team should consider the probable effect of that provision on other issues, such as contract price, competition, and the costs and difficulties of contract administration.

b. When administering contracts that include liquidated damages, the CO should take all reasonable steps to notify contractors of the pending assessment when concern of late completion develops. If a basis for termination for default exists, the CO should advise the contractor that it may be liable for liquidated damages assessed until the effective date of termination, in addition to procurement costs. If completion or performance is desired after termination for default, efforts must be made to obtain the completion or performance elsewhere within a reasonable time.

c. The rate of liquidated damages used must be reasonable and based upon probable actual damages to FAA. Liquidated damages are assessed on a per project basis. The liquidated damages rate should be determined by the procurement team (and documented by the program official), and should, at a minimum, cover the estimated cost of contract administration, including inspection, for each day of delay in completion. In addition, other specific losses anticipated to be incurred as a direct result of the failure of the contractor to complete the work on time should be included. Examples of specific losses are:

- (1) Additional inspection costs;
- (2) The cost of substitute facilities;
- (3) The rental of buildings; or
- (4) The cost of FAA crews, or hourly paid contract employees, forced on standby.

Liquidated damages assessed without consideration of actual costs are considered penalties, and are unenforceable.

d. When the "Liquidated Damages" clause is included in the SIR/contract and different completion dates are specified in the contract for separate parts or stages of the work (milestones), the CO may revise the clause to state the amount of liquidated damages for late completion of each part or stage of the work. Separate calculation and documentation of the estimated damages should be developed for each amount specified with a differing basis.

e. The program official must document the basis for the assessment rate for liquidated damages. This documentation should describe the assumptions, data, and formula used to derive the rate of assessment.

7 Planning and Pre-Solicitation Revised 7/2013

a. *Independent Government Cost Estimate.* For anticipated procurement actions (to include modifications) for construction of \$100,000 or more, a signed and rationally supported Independent Government Cost Estimate (IGCE) will be prepared by the requiring organization and submitted to the CO with the purchase request. The CO may require an IGCE for those procurement actions (to include modifications) for construction anticipated to be \$100,000 or less.

b. *Type of Contract and Pricing.* Generally, construction should be acquired on a firm-fixed price basis. Pricing may be on a lump sum basis (when a lump sum is paid for the total work or defined parts of the work), on a unit price basis (when a unit price is paid for a specified quantity of work units), or using a combination of the two.

c. *Security.*

- (1) The CO must ensure that the form was approved by the Servicing Security Element (SSE) responsible for the site of the project.

- (2) The CO must include in the solicitation, and complete where necessary, the applicable security clauses for the project based upon the determination(s) approved by security on FAA Form 1600.77.

- (3) *Sensitive Unclassified Information (SUI).* At times construction projects may

require the contractor to have access to information or data that has been determined by FAA to be withheld from public release. SUI includes the categories For Official Use Only (FOUO) and Sensitive Security Information (SSI), and may involve items such as security system specifications or emergency response plans. When any items, such as data, plans, or specifications, have been designated as SUI, COs must ensure the release of such information to contractors is done according to FAA standards and procedures. Refer to AMS Procurement Guidance T3.14.1, FAA Order 1600.75, or SSE for applicable standards and procedures for the proper release of SUI.

d. *Options.* If in FAA's best interest, COs may include options in construction contracts. Solicitations must state whether options will or will not be evaluated for purposes of award. Appropriate use of options in construction contracts includes:

(1) Additional work is anticipated but sufficient funds are not anticipated or available prior to the time of award, and it would not be in FAA's best interest to award a separate contract or have another contractor work on the site; and

(2) If fixed building equipment is installed under the contract and it would be in FAA's best interest to have the installer maintain and service the equipment during the warranty period.

e. *Property.* Before issuing the solicitation, the CO must document if materials for the project will be Government Furnished Property (GFP) or furnished by the contractor. The requiring organization prepares the GFP list, and the list must be included in the solicitation to ensure that any proposals received account for the source of project material.

f. *Insurance.* If in the best interest of FAA, the CO may require the contractor to carry insurance, especially if the work is to be done on an FAA facility or FAA property is involved. The CO must ensure the contractor submits all required insurance documents and the documents are acceptable before issuing the notice to proceed (NTP). An original copy of the proof of insurance must be retained in the contract file.

g. *Bonds.* Per the Miller Act (40 U.S.C.A Section 3131), performance and payment bonds are required for all construction contracts that exceed \$150,000. The amount of the bonds should reflect the minimum amount required to protect FAA interests. An original copy of any bond must be retained in the contract file. The CO will not issue the NTP until required bonds have been received.

h. *Source Evaluation Plan.* The CO's method of selection and evaluation criteria must be documented in the contract file. This may be done by establishing an evaluation plan as described under Complex and Noncommercial Source Selection (See AMS 3.2.2.3).

i. *Basis for Award.* Award may be based on the lowest price, technically acceptable offer when best value is expected to result from a technically acceptable proposal with the lowest price.

- (1) All evaluation factors (non-cost) that will be used to determine if an offeror is technically acceptable will be set forth in the solicitation.
- (2) The solicitation must specify that award will be made to the lowest priced offer meeting or exceeding the acceptability standards for non-cost factors.
- (3) Tradeoffs are not permitted.
- (4) Non-cost factors are used to evaluate acceptability and not to rank proposals.
- (5) Discussions regarding proposals may occur.

j. *Differing Site Conditions.* The purpose of the "Differing Site Conditions" clause is to encourage offerors to limit inclusion of contingency costs in their offers for conditions that are not reasonably foreseeable. The clause will also assist FAA and the contractor in complying with the Archaeological Resources Protection Act of 1979 (36 CFR 1214).

k. *Construction Moratoriums.* When in the planning stages of a construction project, the procurement team must consider any impacts construction moratoriums may have upon the project and its related schedule.

l. *Disclosure of the Size of Construction Projects.* When the estimated price of the proposed construction project is \$100,000 or more, public announcement (if required) and SIRs should state the size of the requirements in terms of a physical description of the project and the estimated price. The estimated price may be described in a price range as determined by the procurement team or in terms of one of the following price ranges:

- (1) Between \$50,000 and \$100,000; (2)
Between \$100,000 and \$250,000; (3)
Between \$250,000 and \$500,000; (4)
Between \$500,000 and \$1,000,000;
- (5) Between \$1,000,000 and \$5,000,000;
- (6) Between \$5,000,000 and \$10,000,000; or
- (7) More than \$10,000,000.

m. *Environment and Conservation.*

- (1) If a CO becomes aware of contractor noncompliance with environmental standards (to include clean air and water standards), the CO is to notify FAA

officials and the Environmental Protection Agency (EPA).

(2) The CO has a responsibility to help coordinate and ensure that any hazardous materials present or introduced during the performance of a contract are appropriately managed and tracked.

(3) Products used for a project must adhere to agency goals established in FAA's Green Procurement Plan (GPP), and each contract must include GPP compliance provisions to ensure the contractor understands applicable FAA energy conservation and recovered material, or recycled content product, standards.

(4) Refer to AMS Procurement Guidance T3.6.3 for additional guidance on the protection of the environment and proper conservation during construction contracts, and AMS Real Estate Guidance 2.4.16.3 for information regarding the Guiding Principles for Federal Leadership in High Performance and Sustainable Buildings.

n. *Subcontracting Plan.* When a project is expected to exceed \$1 million and subcontracting opportunities exist, the CO should include provisions for a small business subcontracting plan in the solicitation.

o. *Patent and Data Rights.* The CO should ensure appropriate patent and data rights clauses are included in the solicitation when the project is for other than standard types of construction and may involve unique products, materials, or processes.

p. *Value Engineering.* Value engineering provisions in the solicitation may be appropriate to allow the contractor to initiate changes in design, specifications, or other requirements and share in any savings that may result.

8 Pre-Award Added 7/2007

a. *Public Announcement.* All procurements, including construction, over \$100,000 must be publicly announced on the Internet or through other means. For example, the announcement could be placed on the FAA Contracting Opportunities website.

b. *Inspection of Site and Examination of Data.*

(1) The procurement team should make appropriate arrangements for prospective offerors to inspect the work site prior to submission of offers. The procurement team should also allow prospective offerors the opportunity to examine data in the possession of FAA that may provide information concerning the performance of the work, such as boring samples, original boring logs, geology reports, and record and plans of previous construction. The SIR should notify offerors of the time(s) and place(s) for the site inspection and data examination, as well as the name and telephone number of the

contact point at the facility. The procurement team should keep a record of the identity and affiliation of all offerors' representatives who inspect the site or examine FAA site information.

(2) Significant site information should be made available to all offerors, including information regarding any utilities to be furnished during construction. FAA personnel must not provide information that conflicts with the provisions of the SIR.

(3) The CO must notify all potential offerors of any clarification or correction to the SIR package.

c. Past Performance. Past performance can aid in selecting the contractor who is most likely to perform satisfactorily. Key to the successful use of past performance in the screening process is establishing a clear relationship between the statement of work (SOW), the instructions to offerors, and the evaluation criteria. Past performance information that is not important to the current acquisition should not be included.

d. Pre-Award Survey. COs may use pre-award surveys to aid in gathering past performance information. The pre-award survey can give the CO a sense of how the contractor will perform, especially if concentrating on projects that are similar in type and scope to the one being solicited. The scope of the pre-award survey is at the discretion of the CO as it may be affected by the size and complexity of the solicitation and project.

9 Post-Award Revised 4/2012

a. Assignment of Inspection and Contract Administration.

(1) Due to the locations and complexity of most construction projects, COs often accomplish their administrative and inspection functions through utilization of Contracting Officer's Representatives (COR). These personnel are normally present at the job site each day, and are in the best position to observe day-to-day activities and performance. CORs on site perform such delegated duties as daily performance inspections, Department of Labor wage rate interviews with contractor personnel, provide minor clarifications of specifications and drawings, and insure contractor compliance with all safety and labor requirements on site. The duties of these individuals must be clearly annotated by the CO in a designation letter. A copy of the designation letter is provided to the COR and the contractor. See AMS Procurement Guidance T3.10.1 for sample designation letter.

(2) Only the CO, or person delegated specific authority to execute contract modifications, may authorize a change to the original contract.

b. Notice to Proceed (NTP). The NTP is issued to give notice to the contractor when on-site work can be started, when the project is to be completed based upon the performance time in the

contract, and any other information deemed pertinent by the CO. Prior to its issuance, the CO must ensure all required submittals have been delivered to and approved by the FAA, that all required insurance and bonding documents have been submitted and are acceptable, and other coordination or applicable documentation has been completed.

c. Preconstruction Conference. The CO may conduct a preconstruction conference (to discuss matters such as applicable labor standards, the authority of various personnel, safety, and environmental considerations) prior to the start of a construction or demolition contract. Preconstruction conferences are not a requirement for each project. When deciding on a conference, the CO should weigh the administrative costs, time, and possible travel expenses for all parties involved, against the complexity of the requirement, the impact of the requirement on entities involved with the site, and the past performance and technical knowledge of the contractor. For a preconstruction conference agenda and checklist, see AMS Procurement Forms.

d. Use and Possession Prior to Completion. Beneficial occupancy occurs when the Government takes possession of, or puts to use, a completed or partially completed part of the work. It does not constitute acceptance of the facility as constructed. The clause "Use and Possession Prior to Completion" addresses some of the issues associated with beneficial occupancy. If it is foreseen prior to contract inception that beneficial occupancy will become an issue, or if it becomes an issue during contract performance, the CO should consider negotiating contract terms which cover relevant issues for that contract, e.g., date of warranty, builder's risk coverage, coordination with the contractor, etc. Legal counsel should be consulted on the legal ramifications of beneficial occupancy. Phased (partial) acceptance can be used as an alternative to beneficial occupancy, if the need can be identified sufficiently in advance to structure the contract accordingly, and it is determined in the best interests of the parties.

e. Airport Coordination. Local airport authorities and/or other Federal agencies may have requirements and regulations outside of those imposed by the FAA that a contractor is required to adhere to when completing a construction project on an airport. These additional requirements may include additional security, insurance, and safety requirements. It is the responsibility of the contractor to coordinate with other authorities or agencies prior to performance to ensure they satisfy any applicable local regulations.

f. Property Protection. The FAA must ensure that the contractor understands that throughout the performance of the contract, care must be taken by the contractor to protect FAA and/or other property that may be affected during construction.

g. Prime Contractor Performance. The use of subcontractors by a prime contractor during the performance of a construction contract is inevitable and at times presents a savings to the FAA through the contract. For example, the prime contractor may lack the internal capability to provide specific trades required to meet all the terms and conditions of the contract. The CO should assure adequate interest in and supervision of work involved in projects. The contractor shall be required to perform a significant part of the contract with its own work force and express this requirement in terms of a percentage of the total work.

(1) The prime contractor must perform at least 15 percent of the cost of the contract, not including the cost of materials, with its own employees on site.

(2) Construction by special trade contractors: The prime contractor must perform at least 25 percent of the cost of the contract, not including the cost of materials, with its own employees on site.

h. *Contractor's Daily Log*. For any construction contract of \$2,000 or more, the contractor is required to submit to the CO a "Daily Log" of activity on the site. The logs must include the workers used by classification, construction equipment moved on and off the site, materials and equipment delivered to the site, inspections and tests performed, and total cumulative hours worked.

i. *Suspension of Work*. The COR should notify the CO when a suspension order is necessary to prevent the contractor from proceeding with work that will have to be removed or changed. Only the CO can order a suspension of work; when possible, the CO should use partial, rather than, total suspension orders.

j. *Warranties*. The CO should obtain information about any warranties from the contractor. This information should include effective dates and names, addresses, and contacts. A list of warranty or guarantee expiration dates is made and retained, and copies are provided to the user.

10 Contract Acceptance Inspection (CAI) Revised 4/2012

a. Definitions:

(1) *Contract Acceptance Inspection (CAI)*: Formal inspection by the Project Implementer of a constructed facility when work under the contract is considered to be substantially complete. The CAI is typically requested by the prime contractor and coordinated with the Project Implementer.

(2) *Joint Acceptance Inspection (JAI)*: The JAI is an activity to gain consensus of all involved groups that projects for facility, system, or equipment establishment, improvement, or relocation are completed in accordance with national criteria and that the facility is capable of performing its advertised functions.

(3) *Project Implementer (PI)*: The PI is the FAA organization implementing the project, although funding may be provided by other organizations. In most cases this will be ATO Technical Operations (ATO-W) Engineering Services.

b. *Contract Acceptance Inspection (CAI)*. The Project Implementer, usually a Contracting Officer's Representative (COR) appointed in ATO-W Engineering Services and delegated by the Contracting Officer (CO), is responsible for formally inspecting a constructed facility from the construction or equipment installation contractor and recommending acceptance or non-acceptance to the CO. This inspection is typically conducted before the beginning of JAI.

c. The CO's responsibility is to formally accept the constructed facility. The CO must notify the contractor when a CAI has been completed and work under a contract has been either accepted or rejected. This should be done through the CAI letter (see Procurement Forms) that describes:

- (1) What is being accepted from the contractor (item and description);
- (2) The acceptance date of the item; and
- (3) Any outstanding commitments the contractor has for the item (e.g. punch list items, warranties, etc.).

d. All CAI letters and associated information should be filed in the official contract file. This documentation is used to support completion of the contract, and to provide data to properly capitalized items.

11 Contract Completion/Closeout Revised 8/2009

a. A construction or installation project must be considered physically and financially complete and funds deobligated, when necessary, within one year after the final acceptance and inspection (e.g., CAI) has been completed.

b. Prior to final payment, the CO must ensure:

- (1) Receipt of all required warranty documentation;
- (2) Return of issued ID media (Badges, etc);
- (3) Receipt of any state tax exemption certificates or completion statements as required from the contractor;
- (4) Certification that all government property has either been utilized in the performance of the contract or returned to the FAA;
- (5) Confirmation from the requiring organization that the job has been completed as contracted;
- (6) Receipt of any other applicable items required from the contractor that are unique to the procurement; and
- (7) Receipt of a final release of claims on file signed by the contractor for the final amount of the contract.

B Clauses Added 7/2007

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C Forms Added 7/2007

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