

# Subpart 36.2 - Special Aspects of Contracting for Construction

**Parent topic:** [Part 36 - Construction and Architect-Engineer Contracts](#)

## 36.201 Evaluation of contractor performance.

See [42.1502\(e\)](#) for the requirements for preparing *past performance* evaluations for *construction* contracts.

## 36.202 Specifications.

(a) *Construction* specifications *shall* conform to the requirements in [part 11](#) of this regulation.

(b) Whenever possible, *contracting officers shall* ensure that references in specifications are to widely recognized standards or specifications promulgated by governments, industries, or technical societies.

(c) When "brand name or equal" descriptions are necessary, specifications *must* clearly identify and describe the particular physical, functional, or other characteristics of the brand-name items which are considered essential to satisfying the requirement.

## 36.203 Government estimate of construction costs.

(a) An independent Government estimate of *construction* costs *shall* be prepared and furnished to the *contracting officer* at the earliest practicable time for each proposed contract and for each *contract modification* anticipated to exceed the *simplified acquisition threshold*. The *contracting officer may* require an estimate when the cost of required work is not anticipated to exceed the *simplified acquisition threshold*. The estimate *shall* be prepared in as much detail as though the Government were competing for award.

(b) When two-step sealed bidding is used, the independent Government estimate *shall* be prepared when the contract requirements are definitized.

(c) Access to information concerning the Government estimate *shall* be limited to Government personnel whose official duties require knowledge of the estimate. An exception to this rule *may* be made during contract negotiations to allow the *contracting officer* to identify a specialized task and disclose the associated cost breakdown figures in the Government estimate, but only to the extent deemed necessary to arrive at a fair and reasonable price. The overall amount of the Government's estimate *shall* not be disclosed except as permitted by agency regulations.

## **36.204 Disclosure of the magnitude of construction projects.**

Advance notices and *solicitations shall* state the magnitude of the requirement in terms of physical characteristics and estimated price range. In no event *shall* the statement of magnitude disclose the Government's estimate. Therefore, the estimated price *should* be described in terms of one of the following price ranges:

- (a) Less than \$25,000.
- (b) Between \$25,000 and \$100,000.
- (c) Between \$100,000 and \$250,000.
- (d) Between \$250,000 and \$500,000.
- (e) Between \$500,000 and \$1,000,000.
- (f) Between \$1,000,000 and \$5,000,000.
- (g) Between \$5,000,000 and \$10,000,000.
- (h) More than \$10,000,000.

## **36.205 Statutory cost limitations.**

(a) Contracts for *construction shall* not be awarded at a cost to the Government-

- (1) In excess of statutory cost limitations, unless applicable limitations can be and are waived *in writing* for the particular contract; or
- (2) Which, with allowances for Government-imposed contingencies and overhead, exceeds the statutory authorization.

(b) *Solicitations* containing one or more items subject to statutory cost limitations *shall* state-

- (1) The applicable cost limitation for each affected item in a separate schedule;
- (2) That an *offer* which does not contain separately-priced schedules will not be considered; and
- (3) That the price on each schedule *shall* include an approximate apportionment of all estimated *direct costs*, allocable *indirect costs*, and profit.

(c) The Government *shall* reject an *offer* if its prices exceed applicable statutory limitations, unless laws or agency procedures provide pertinent exemptions. However, if it is in the Government's interest, the *contracting officer may* include a provision in the *solicitation* which permits the award of separate contracts for individual items whose prices are within or subject to applicable statutory limitations.

(d) The Government *shall* also reject an *offer* if its prices are within statutory limitations only because it is materially unbalanced. An *offer* is unbalanced if its prices are significantly less than

cost for some work, and overstated for other work.

### **36.206 Liquidated damages.**

The *contracting officer* must evaluate the need for liquidated damages in a *construction* contract in accordance with [11.502](#) and agency regulations.

### **36.207 Pricing fixed-price construction contracts.**

(a) Generally, firm-fixed-price contracts *shall* be used to acquire *construction*. They *may* be priced-

- (1) On a lump-sum basis (when a lump sum is paid for the total work or defined parts of the work),
- (2) On a unit-price basis (when a unit price is paid for a specified quantity of work units), or
- (3) Using a combination of the two methods.

(b) Lump-sum *pricing shall* be used in preference to unit *pricing* except when-

- (1) Large quantities of work such as grading, paving, building outside utilities, or site preparation are involved;
- (2) Quantities of work, such as excavation, cannot be estimated with sufficient confidence to permit a lump-sum *offer* without a substantial contingency;
- (3) Estimated quantities of work required *may* change significantly during *construction*; or
- (4) *Offerors* would have to expend unusual effort to develop adequate estimates.

(c) Fixed-price contracts with economic price adjustment *may* be used if such a provision is customary in contracts for the type of work being acquired, or when omission of an adjustment provision would preclude a significant number of firms from submitting *offers* or would result in *offerors* including unwarranted contingencies in proposed prices.

### **36.208 Concurrent performance of firm-fixed-price and other types of construction contracts.**

In view of potential labor and administrative problems, cost-plus-fixed-fee, price-incentive, or other types of contracts with cost variation or cost adjustment features *shall* not be permitted concurrently, at the same work site, with firm-fixed-price, lump sum, or unit price contracts except with the prior approval of the *head of the contracting activity*.

### **36.209 Construction contracts with architect-engineer firms.**

No contract for the *construction* of a project *shall* be awarded to the firm that designed the project or its subsidiaries or *affiliates*, except with the approval of the *head of the agency* or authorized representative.

### **36.210 Inspection of site and examination of data.**

The *contracting officer* *should* make appropriate arrangements for prospective *offerors* to inspect the work site and to have the opportunity to examine data available to the Government which *may* provide information concerning the performance of the work, such as boring samples, original boring logs, and records and plans of previous *construction*. The data *should* be assembled in one place and made available for examination. The *solicitation* *should* notify *offerors* of the time and place for the site *inspection* and data examination. If it is not feasible for *offerors* to inspect the site or examine the data on their own, the *solicitation* *should* also designate an individual who will show the site or data to the *offerors*. Significant site information and the data *should* be made available to all *offerors* in the same manner, including information regarding any utilities to be furnished during *construction*. A record *should* be kept of the identity and affiliation of all *offerors'* representatives who inspect the site or examine the data.

### **36.211 Distribution of advance notices and solicitations.**

(a) Advance notices and *solicitations* *should* be distributed to reach as many prospective *offerors* as practicable. *Contracting officers* *may* send notices and *solicitations* to organizations that maintain, without charge to the public, display rooms for the benefit of prospective *offerors*, subcontractors, and material suppliers. If requested by such organizations, this *may* be done for all or a stated class of *construction* projects on an annual or semiannual basis. *Contracting officers* *may* determine the geographical extent of distribution of advance notices and *solicitations* on a case-by-case basis.

(b) As required by 15 U.S.C. 644(w), the *contracting officer* *shall* transmit to the *Governmentwide point of entry (GPE)* a notice (see 5.205(h), in *solicitation* notices posted at the GPE for *construction* contracts anticipated to be awarded to a small business pursuant to part 19. The notice *shall* include certain information regarding the agency's definitization of equitable adjustments for *change orders* under *construction* contracts. This information includes:

(1) A description of agency policies or procedures, in addition to that outlined in FAR 43.204, that apply to definitization of equitable adjustments for *change orders* under *construction* contracts. This description *may* be provided in a notice by including an address of an agency-specific, publicly accessible website containing this information. If no agency-specific additional policies and procedures exist, the notice *shall* include a statement to that effect.

(2) Data on the agency's *past performance*, for the prior 3 fiscal years, regarding the time required to definitize equitable adjustments for *change orders* under *construction* contracts (see 43.204). If fewer than 3 fiscal years of data are available, agencies *shall* provide data for the number of fiscal years that are available. Data *shall* be provided in the *solicitation* notice as shown in the following table, or provide the address of an agency-specific, publicly accessible website containing this information. An adequate *change order* definitization proposal *shall* contain sufficient information to enable the *contracting officer* to conduct meaningful analyses and audits of the information contained in the proposal.

Table 1 to Paragraph (b)(2)

**Time to definitize after receipt of an adequate *change order* definitization proposal under *construction* contracts**

**Number of *change order* proposals definitized under *construction* contracts**

30 days or less

31 to 60 days

61 to 90 days

91 to 180 days

181 to 365 days

366 or more days

After completion of contract performance via a *contract modification* addressing all undefinitized equitable adjustments received during contract performance

## **36.212 Preconstruction orientation.**

(a) The *contracting officer* will inform the successful *offeror* of significant matters of interest, including-

(1) Statutory matters such as labor standards (subpart 22.4), and subcontracting plan requirements (subpart 19.7); and

(2) Other matters of significant interest, including who has authority to decide matters such as contractual, administrative (*e.g.*, security, safety, and fire and environmental protection), and *construction* responsibilities.

(b) As appropriate, the *contracting officer* may issue an explanatory letter or conduct a preconstruction conference.

(c) If a preconstruction conference is to be held, the *contracting officer* shall-

(1) Conduct the conference prior to the start of *construction* at the work site;

(2) Notify the successful *offeror* of the date, time, and location of the conference (see 36.522); and

(3) Inform the successful *offeror* of the proposed agenda and any need for attendance by subcontractors.

## **36.213 Special procedures for sealed bidding in construction contracting.**

### **36.213-1 General.**

*Contracting officers* shall follow the procedures for sealed bidding in part 14, as modified and supplemented by the requirements in this subpart.

### **36.213-2 Presolicitation notices.**

(a) Unless the requirement is waived by the *head of the contracting activity* or a designee, the *contracting officer shall* issue presolicitation notices on any *construction* requirement when the proposed contract is expected to exceed the *simplified acquisition threshold*. Presolicitation notices *may* also be used when the proposed contract is not expected to exceed the *simplified acquisition threshold*. These notices *shall* be issued sufficiently in advance of the invitation for bids to stimulate the interest of the greatest number of prospective bidders.

(b) Presolicitation notices *must*-

(1) Describe the proposed work in sufficient detail to disclose the nature and volume of work (in terms of physical characteristics and estimated price range) (see [36.204](#));

(2) State the location of the work;

(3) Include tentative dates for issuing invitations, opening bids, and completing contract performance;

(4) State where plans will be available for *inspection* without charge;

(5) Specify a date by which requests for the invitation for bids *should* be submitted;

(6) State whether award is restricted to small businesses;

(7) Specify any amount to be charged for *solicitation* documents; and

(8) Be publicized through the *Governmentwide point of entry* in accordance with [5.204](#).

### **36.213-3 Invitations for bids.**

(a) Invitations for bids for *construction shall* allow sufficient time for bid preparation (*i.e.*, the period of time between the date invitations are distributed and the date set for opening of bids) (but see [5.203](#) and [14.202-1](#)) to allow bidders an adequate opportunity to prepare and submit their bids, giving due regard to the *construction* season and the time necessary for bidders to inspect the site, obtain subcontract bids, examine data concerning the work, and prepare estimates based on plans and specifications.

(b) invitations for bids *shall* be prepared in accordance with [subpart 14.2](#) and this section using the forms prescribed in [part 53](#).

(c) *Contracting officers should* assure that each invitation for bids includes the following information, when applicable. The appropriate wage determination of the Secretary of Labor (see [subpart 22.4](#)), or, if the invitation for bids *must* be issued before the wage determination is received, a notice that the schedule of minimum wage rates to be paid under the contract will be issued as an amendment to the invitation for bids before the opening date for bids (see [14.208](#) and [subpart 22.4](#)).

(1) The Performance of Work by the Contractor clause (see [36.501](#) and [52.236-1](#)).

(2) The magnitude of the proposed *construction* project (see [36.204](#)).

- (3) The period of performance (see [subpart 11.4](#)).
- (4) Arrangements made for bidders to inspect the site and examine the data concerning performance of the work (see [36.210](#)).
- (5) Information concerning any facilities, such as utilities, office space, and warehouse space, to be furnished during *construction*.
- (6) Information concerning the prebid conference (see [14.207](#)).
- (7) Any special qualifications or experience requirements that will be considered in determining the responsibility of bidders (see [subpart 9.1](#)).
- (8) Any special instructions concerning bids, *alternate* bids, and award.
- (9) Any instructions concerning reporting requirements.
- (d) The *contracting officer shall* send invitations for bids to prospective bidders who requested them in response to the presolicitation notice, and *should* send them to other prospective bidders upon their specific request (see [5.102\(a\)](#)).

### **36.213-4 Notice of award.**

When a notice of award is issued, it *shall* be done *in writing* or electronically, *shall* contain information required by [14.408](#), and *shall*-

- (a) Identify the invitation for bids;
- (b) Identify the contractor's bid;
- (c) State the award price;
- (d) Advise the contractor that any required payment and performance bonds *must* be promptly executed and returned to the *contracting officer*;
- (e) Specify the date of commencement of work, or advise that a notice to proceed will be issued.

### **36.214 Special procedures for price negotiation in construction contracting.**

- (a) Agencies *shall* follow the policies and procedures in [part 15](#) when negotiating prices for *construction*.
- (b) The *contracting officer shall* evaluate proposals and associated *certified cost or pricing data* and *data other than certified cost or pricing data* and *shall* compare them to the Government estimate.
- (1) When submission of *certified cost or pricing data* is not required (see [15.403-1](#) and [15.403-2](#)), and any element of proposed cost differs significantly from the Government estimate, the *contracting officer should* request the *offeror* to submit cost information concerning that element

(e.g., wage rates or fringe benefits, significant materials, equipment allowances, and subcontractor costs).

(2) When a proposed price is significantly lower than the Government estimate, the *contracting officer shall* make sure both the *offeror* and the Government estimator completely understand the scope of the work. If negotiations reveal errors in the Government estimate, the estimate *shall* be corrected and the changes *shall* be documented in the contract file.

(c) When appropriate, additional *pricing* tools *may* be used. For example, proposed prices *may* be compared to current prices for similar types of work, adjusted for differences in the work site and the specifications. Also, rough yardsticks *may* be developed and used, such as cost per cubic foot for structures, cost per linear foot for utilities, and cost per cubic yard for excavation or concrete.

### **36.215 Special procedure for cost-reimbursement contracts for construction.**

*Contracting officers may* use a cost-reimbursement contract to acquire *construction* only when its use is consistent with [subpart 16.3](#) and [part 15](#) (see [15.404-4\(c\)\(4\)\(i\)](#) for fee limitation on cost-reimbursement contracts).