

CHAPTER 1

INTRODUCTION

1-1. Purpose. This pamphlet is to serve as a training guide for USACE personnel to evaluate the most appropriate contract type for architectural and engineering services, consistent with governing laws and regulations. Selection of the final contract type will lie with the contracting officer. This guide is intended to assist noncontracting personnel who must decide which contracting tool to use in order to accomplish the USACE HTRW mission. This is not a policy regulation or directive.

1-2. Applicability. This pamphlet applies to HQUSACE/OCE elements, major subordinate commands, districts, laboratories, and field operating activities (FOA).

1-3. References

- a.* Public Law (PL) 96-83
- b.* PL 92-582
- c.* 10 U.S.C. 2306(a)
- d.* 10 U.S.C. 2306(c)
- e.* 10 U.S.C. 2306(d)
- f.* 10 U.S.C. 2310(b)
- g.* 10 U.S.C. 2311
- h.* 10 U.S.C. 254(b)
- i.* 10 U.S.C. 4540
- i* 10 U.S.C. 7212
- k.* 10 U.S.C. 9540
- l.* 40 U.S.C. 541 et seq

m. 41 U.S.C. 254(b)

n. 41 U.S.C. 501 et seq.

o. 5 U.S.C. 3109

p. *Armed Services Procurement Manual*

q. *Army Federal Acquisition Regulation Supplement (AFARS)*

r. *Engineer Federal Acquisition Regulation Supplement (EFARS)*

s. *Federal Acquisition Regulation (FAR) [Note: FAR-related references are grouped under "Solicitation Provisions" and "Contract Clauses" and listed in Appendix A]*

The above citations are included in this guide for information only. Their inclusion in no way supplements HQUSACE procurement policy. Please refer to the current appropriate and applicable statute or regulation in use at the time of your query.

1-4. Suggested Improvements. Users are invited to send comments and suggested improvements on ENG Form 3078.

1-5. Perceptions and Attitudes. As facility design and construction requirements grow in complexity, contracting philosophy and procedures should be reevaluated to assure that they continue to serve the best interests of the Government and still remain attractive to the design and construction industry. Firm fixed-price contracting has served for many years. The "mind set" that this is the only way to go must give way to a more objective approach to contract type selection. Effective pricing and sound business procurement practices require discrimination and judgement in selecting the right contract type. Cost type contracting lends itself to fast-tracking or phased construction, thus greatly reducing the project duration. The fixed-price contract requires that work be specified and the final price and schedule agreed to before work is started.

For environmental (HTRW) cleanup work that is part of a continuing program, preplacing indefinite delivery cost-reimbursement contracts should be considered so this type can be used when appropriate. See Appendix D.

1-6. Background

a. The U.S. Army Corps of Engineers (USACE) accomplishes much of its engineering and design work through professional A-E firms in the private sector. Further, USACE policy prescribes that management of services obtained from private A-E firms be accomplished by Corps personnel who are on a professional level comparable with that of the technical counterparts in the A-E firm.

b. USACE personnel must therefore be proficient not only in the skills of their profession but also in business matters relating to A-E firms, i.e., from negotiating the contract terms to monitoring performance under the contract to ensuring that all contractual requirements are complete. The participation of acquisition team members in this process is obvious.

c. For over 50 years, USACE's predominant approach to acquiring A-E services has been by using firm-fixed-price (FFP) contracts (and additionally FFP delivery orders under indefinite delivery contracts). While FFP contracting has served USACE well for many years for our traditional engineering and design work, more objective approaches to contract type selection are needed for USACE environmental work.

d. The Federal Acquisition Regulation (FAR) states that FFP contracting is preferable if the circumstances are appropriate, because under it the contractor assumes most of the risk and has the greatest motivation to control costs. However, FFP contracting is not always the correct contract type. The *Armed Services Procurement Manual* for contract pricing says the following:

Sound procurement requires use of the right contract type. The best, most realistic and reasonable price in the world (for the particular requirement at hand) may turn sour if the contract type is wrong.

e. USACE personnel need to be knowledgeable of all viable options available to them prior to discussing selection of contract types for particular projects particularly in the hazardous, toxic, and radioactive waste (HTRW) arena. This engineer pamphlet will help them make that decision.

1-7. Architect-Engineer Contracts

a. The Federal Government has not always employed A-E firms. Before World War II, the in-house capabilities of Government agencies generally satisfied their needs for A-E services. In 1939, however, with the fear of war becoming stronger, Congress

enacted legislation launching a vigorous military construction (MILCON) program to improve existing facilities and construct new ones on military bases. That legislation, known as the Public Works Act of 1939, is codified in Title 10, United States Code, sections 7212, 4540, and 9540 (10 U.S.C. §§ 7212, 4540, and 9540).

b. That legislation authorized the Secretaries of the War and Navy Departments to contract with practicing A-Es to produce and deliver “designs, plans, drawings, and specifications” for public works and utilities projects, overriding statutes that required advertising and competitive bidding. As a safeguard, the legislation limited fees for such A-E services to 6 percent of the facility’s estimated construction cost.

c. The current procurement procedures for selecting A-E firms are governed by Public Law (PL) 92-582, known as the Brooks Act (40 U.S. C. § 541 et seq.), which became law in 1972. The Brooks Act applies to all A-E services: research, planning, development, design, construction, alteration, and repair of real property. Professional services covered under the Brooks Act include services of an architectural or engineering nature or incidental services that members of the architectural and engineering professions may logically or justifiably perform (see Table 1-1).

Table 1-1

Relationship of professional services to the Brooks Act

| Services:covered under the Brooks Act | Services not covered under the Brooks Act |
|---|--|
| <p>Conceptual designs</p> <p>preparation of construction plans and specifications</p> <p>Preparation of plans and specifications for facility support contracts</p> <p>Engineering cost estimates</p> <p>Value engineering analyses</p> <p>Post design services</p> <p>Preparation of record drawings ("as-built" drawings)</p> <p>Comprehensive master plans</p> <p>Environmental engineering and environmental impact assessments (when they include technical engineering considerations)</p> <p>Land surveying and mapping</p> <p>Professional engineering inspection services</p> <p>Technical engineering studies</p> <p>Technical engineering consultations</p> <p>Engineering field investigations</p> <p>Material sample analysis and recommendations</p> <p>System safety or other safety analyses</p> <p>Life-cycle cost studies</p> <p>Soils engineering</p> <p>Preparation of construction guide specifications</p> <p>Preparation of technical engineering manuals</p> <p>Expert architectural or engineering witness service</p> | <p>Studies having minimal need for engineering interpretation and primarily requiring counting, tabulating, inventorying, cataloging, organizing, indexing, and collating</p> <p>Environmental impact assessments and studies that are largely free of technical engineering considerations</p> <p>Studies regarding business or financial considerations</p> <p>Studies involving purely social, economic, or psychological phenomena</p> <p>Personnel analyses</p> <p>Management consulting services</p> <p>Auditing or accounting analyses/ investigations</p> <p>Training instruction and training material preparation not involving subject matter of a technical engineering nature</p> <p>Routine laboratory material testing services</p> |

d. The Brooks Act requires—

- (1) Public announcement of all requirements for A-E services.
- (2) That A-E contracts be negotiated on the basis of demonstrated competence and qualification for the type of professional services required.
- (3) Discussions with no fewer than three firms regarding anticipated concepts.
- (4) Ranking of the three best qualified firms in order of preference.
- (5) Negotiations with the best qualified firms in order of preference until a fair and reasonable price agreement is reached.

e. Brooks Act selection criteria are implemented in FAR 36.602-1, which requires that A-E firms be selected on the basis of the following considerations:

- (1) Professional qualifications necessary for satisfactory performance of required services.
- (2) Specialized experience and technical competence in the type of work required.
- (3) Capacity to accomplish the work in the required time.
- (4) Past performance on contracts with Government agencies and private industry in terms of cost control, quality of work, and compliance with performance schedules.
- (5) Location in the general geographical area of the project and knowledge of the locality of the project – provided that application of this criterion produces at least three qualified firms, given the nature and size of the project.
- (6) Acceptability under other appropriate evaluation criteria.

f. The primary factor in A-E selection is the determination of the most highly qualified firm. Secondly, factors such as geographic proximity and equitable distribution of work must also be considered. However, those other factors should not take on greater significance than qualifications and past performance. To that end, if several firms are otherwise equally qualified, the equitable distribution factor can become a significant element in the selection. When a firm has a past record of exceptional

performance or has received a Department of Defense (DoD) or Service design award, that fact must be fully recognized in judging that firm against other qualified firms. The following A-E selection guidance is consistent with public law and existing DoD/FAR policies and is intended to provide clarification and greater consistency in the process without restricting the final selection.

(1) For purposes of considering the volume of DoD work previously awarded an A-E firm, the A-E Contract Administration Support System (ACASS) will be the source for data indicating A-E contract award volume during the previous 12 months. The ACASS data base is kept current by monthly updates from Defense Contract Action Data System (DCADS).

(2) Awards to overseas offices of A-E firms for projects outside the United States and its territories and possessions will not be considered when computing volume of DoD contract awards for purposes of equitable distribution.

(3) Awards to A-E subsidiaries not normally subject to management decisions, bookkeeping, and policies of a holding company are to be treated as awards to individual firms when considering equitable distribution, pursuant to Defense FAR Supplement (DFARS) 236.602-1. Incorporated subsidiaries operating under a name different from that of the parent company are in this category. Following this procedure allows greater competition and avoids removing capable local subsidiaries from consideration because of awards made to the holding company or to its other subordinate entities in different locations.

(4) Past performance evaluations of recently completed DoD contracts should be given appropriate consideration.

g. Price is not a factor in selecting A-E firms. Subsequent fee negotiations, however, must result in fair and reasonable prices. Otherwise, the Government is required to terminate negotiations with the most highly qualified firm and begin negotiations with the second most highly qualified firm.

1-7. Contract Basics

a. A contract is a mutually binding legal relationship obligating the seller (contractor) to furnish supplies or services (including design) and the buyer to pay for them. It includes all types of written commitments that obligate the Government to an

expenditure of appropriated funds (and occasionally non-appropriated funds as well). In addition to bilateral instruments, contracts include (but are not limited to)–

- (1) Awards and notices of award.
- (2) Job orders or task letters issued under basic ordering agreements.
- (3) Letter contracts.
- (4) Orders, such as purchase orders, which under the contract becomes effective by written acceptance or performance.
- (5) Bilateral contract modifications.

b. Contracts do not include grants and cooperative agreements covered by 41 U.S.C. § 501 et seq.

1-8. Contractor Motivations. Not every Government contract is sought by contractors because it holds the promise of immediate profit. While profit is an undeniably strong and enduring motivation of business enterprise, it is not the only one. Aside from an expressed type of contract that provides dollars for work, the following factors may influence a contractor's judgment and willingness to accept a Government contract:

- a.* Company growth and development.
- b.* Expansion through sales growth.
- c.* Opportunities for follow-on business.
- d.* Development of existing capabilities and technology.
- e.* Opportunities for spinoffs.
- f.* Advancement in levels of technical knowledge.
- g.* Coverage of fixed costs (e.g., overhead and general and administrative).
- h.* Enhancement of image in private and public sectors.
- i.* Survival until better economic times.

1-9. Basic Contract Forms

a. Completion form. The contract form usually used by USACE is the completion form. Completion-form contracts, either cost-reimbursement or fixed-price, require the contractor to furnish a specified end product. The end product could be a set

of construction drawings and specifications, a complete and functional facility, equipment, a specified service, a study, or a report. Upon delivery and formal acceptance by the Government of the specified end product, the contract is considered “complete” and the contractor receives the final payment.

b. Term form. This contract form is used most often for early research and development efforts where it is difficult to predict the technical outcome and there is *no* certainty of success. The contractor is contractually obligated to apply an agreed-upon level of effort over a stated period of the time. When that time expires, the contractor is paid its costs and fee and the contract illegally “complete.” In this contract, there is no *required end product*. (However, to comply with the statutory prohibition against personal services, some physical end product must be identified and submitted for the level of effort expended.)

1-10. Prohibited Type of Government Contract. Cost-plus-a-percentage-of-cost contracts are prohibited by 10 U.S. C. § 2306(a) and 41 U.S.C. § 254(b). Aside from being prohibited, this type of contract is among the most reckless and improvident of contracting methods; it encourages contractors to expend funds and incur costs without discipline. Under it, the more the contractor spends, the greater the profit it receives. The incentive is to spend dollars, not manage costs, since profit is tied to increased expenditures and not to their control or reduction.

1-11. Personal Services Contracts

a. A personal services contract is characterized by the employer-employee relationship it creates between the Government and the contractor’s personnel. The Government is normally required to obtain its employees by direct hire under competitive appointment or other procedures mandated by the civil service laws. Obtaining personal services by contract, rather than by direct hire, circumvents those laws unless Congress has specifically authorized acquisition of the services by contract.

b. USACE contracting officers shall not award personal services contracts unless specifically authorized by statute (e.g., 5 U.S.C. § 3109) to do so.

c. To determine whether or not a contract is personal in nature, the contract arrangement must be judged in the light of its own facts and circumstances, the key question being *Will the Government exercise relatively continuous supervision and control over the contractor personnel performing the contract?* Occasional supervision

of a few contractor personnel does not necessarily create a personal services situation, but a pattern of issuance of instructions directly to a relatively large number of contractor personnel very well might.

d. If the following criteria are met, consideration should be given to determining that a proposed contract is personal in nature.

(1) Performance on site.

(2) Principal tools and equipment are furnished by the Government.

(3) Services are applied directly to the integral effort of the agency or an organizational subpart in furtherance of assigned function or mission.

(4) Comparable services, meeting comparable needs, are performed in the same or similar agencies using civil service personnel.

(5) The need for the type of service provided can reasonably be expected to last beyond 1 year.

(6) The inherent nature of the service, or the manner in which it is provided, reasonably requires, directly or indirectly, Government direction or supervision of contractor employees.

e. Personal services contracts for the services of individual experts or consultants are limited by the Classification Act. In addition, the Office of Personnel Management has established requirements that apply in acquiring the personal services of experts or consultants in this manner (e.g., benefits, taxes, conflicts of interest). Therefore, the contracting officer shall effect necessary coordination with the cognizant civilian personnel office.

1-12. Statutes and Regulations. Government acquisition of supplies and services is controlled by many rules contained in statutes and regulations. The regulations governing USACE acquisition of A-E services are discussed below in descending order of importance. Much but not all of the material in these regulations is derived from statute.

a. Federal Acquisition Regulation (FAR). The FAR is a single Government-wide procurement regulation mandated by the Office of Federal Procurement Policy Act of 1974, as amended by PL 96-83. Ten years later and after more than 5 years of effort to

consolidate the Defense and Federal acquisition regulations, the FAR went into effect on 1 April 1984. Although a great improvement on the procurement regulations that preceded it, the FAR is not an easy guide to A-E contracting, per se. The FAR part (Part 36) dealing with construction and A-E contracts is relatively brief and does not cover everything about them, only those matters peculiar to construction and A-E contracting. Also, because A-E services are a comparatively small part of Federal contracting, the FAR lends itself more to contracting for equipment, supplies, and other services than it does to contracting for A-E services.

b. Defense FAR Supplement (DFARS). The DFARS is issued by the Assistant Secretary of Defense (Production and Logistics) by direction of the Secretary of Defense and in coordination with the Secretaries of the Army, Navy, and Air Force and the Director of the Defense Logistics Agency. The DFARS establishes uniform policies and procedures for DoD that implement and supplement the FAR. It is codified in the Code of Federal Regulations as Chapter 2 of Title 48. Its Subpart 236.6 expands on the FAR A-E coverage.

c. Army Federal Acquisition Regulation Supplement (AFARS). The AFARS is issued by the Assistant Secretary of the Army (Research, Development and Acquisition) pursuant to Subpart 1.3 of the FAR. The AFARS implements and supplements the FAR and DFARS and establishes Department of the Army uniform policies and procedures for acquiring supplies and services. The AFARS is applicable to military and civil works design and construction.

d. Engineer Federal Acquisition Regulation Supplement (EFARS). The EFARS is a regulation published by USACE; the Principal Assistant Responsible for Contracting (PARC) is its proponent. The EFARS implements and supplements the FAR, DFARS, and AFARS and establishes uniform policies and procedures for the Corps of Engineers relative to the administration and legal aspects of its contracts.