

**SUBPART 236.2—SPECIAL ASPECTS OF CONTRACTING FOR
CONSTRUCTION**
(Revised June 21, 2005)

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 Corps of Engineers, Portland
District
ATTN: CENWP-CT-I
PO Box 2946
Portland, OR 97208-2946
Telephone: (503) 808-4590.

(2) Keeps reports on file for six years.

(B) For computer access to the files, contact the Portland District 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.

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.

236.206 Liquidated damages.

See 211.503 for instructions on use of liquidated damages.

236.213 Special procedures for sealed bidding in construction contracting.

236.213-70 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 that 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—

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(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 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.

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 redelegated. 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)).

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

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(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 and similar sections in subsequent military construction appropriations acts, 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 outlying areas 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

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laws, regulations, and customs of the United States and the foreign government, including—

- (i) Acquisition of all necessary rights;
- (ii) Expeditious, 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 United States, 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 other foreseeable problems that can be appropriately included in the agreement.