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Part 836 - Construction and Architect-Engineer Contracts

AUTHORITY: 40 U.S.C. 121(c) and 48 CFR 1.301-1.304.

Subpart 836.2 - Special Aspects of Contracting for Construction

836.202 Specifications.

(a) The procedures described in [Part 811](#) are applicable to construction specifications.

(b) During the design stage, contract architect-engineers must not use “brand name or equal” or other restrictive specifications without the prior written approval of the contracting officer. The contracting officer must inform prospective architect-engineers of this requirement during the negotiation phase, prior to award of a contract for design.

(c) If VA has determined that only one product will meet the Government’s minimum needs and VA will not allow the submission of “equal” products, the contracting officer must include the clause found at [852.236-90, Restriction on Submission and Use of Equal Products](#), in the solicitation and complete the clause by listing the items to which the clause applies. This clause places bidders on notice that the “brand name or equal” provisions of the clause found at [FAR 52.236-5, Materials and Workmanship](#) , and any other provision that may authorize the submission of an “equal” product, will not apply to the specific items listed.

836.203 Government estimate of construction costs.

The overall amount of the Government estimate must not be disclosed until after award of the contract. After award, the contracting officer may disclose the overall amount upon request.

836.204 Disclosure of the magnitude of construction projects.

In lieu of the estimated price ranges described in [FAR 36.204](#) , the contracting officer must identify the magnitude of a VA project in advance notices and solicitations 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 \$2,000,000.
- (g) Between \$2,000,000 and \$5,000,000.
- (h) Between \$5,000,000 and \$10,000,000.
- (i) Between \$10,000,000 and \$20,000,000.
- (j) Between \$20,000,000 and \$50,000,000.
- (k) Between \$50,000,000 and \$100,000,000.
- (l) More than \$100,000,000

836.206 Liquidated damages.

The contracting officer may include a liquidated damages provision in a construction contract when the criteria of [FAR 11.501](#) and [811.501](#) are met. If partial performance may be accepted and used to the advantage of the Government, the contracting officer must include the clause substantially as set forth in [852.211-74, Liquidated Damages](#), in addition to the clause set forth in [FAR 52.211-12](#) .

836.209 Construction contracts with architect-engineer firms.

(a) When the contracting officer considers it necessary or advantageous to award a contract for construction of a design-bid-build project, as defined at [FAR 36.102](#) , to a firm or person that designed the project, the contracting officer must request prior approval from one of the following:

(1) The facility or VISN director, as appropriate, or, for National Cemetery Administration contracts, the Director, Technical Support Service, for contracts involving nonrecurring maintenance (NRM) funds.

(2) The Director, Office of Construction and Facilities Management, for contracts involving construction funds.

(b) The contracting officer must furnish complete justification in the request.

(c) This section does not apply to design-build contracts, as defined at [FAR 36.102](#) .

836.213 Special procedures for sealed bidding in construction contracting.

836.213-4 Notice of award.

The contracting officer must provide to the contractor a notice of award (letter of acceptance) for any contract award in excess of \$25,000.

836.213-70 Notice to proceed.

(a) The contracting officer must provide construction contractors with a written notice to proceed for the work. A notice to proceed will normally be sent only after the contractor has provided performance and payment bonds or payment protection and the completed contract forms, where applicable, and the contracting officer has accepted them. If the urgency of the work or other proper reason requires the contractor to begin work immediately, the contracting officer may include in the award letter a notice to proceed, with the reservation that payments are contingent upon receipt and approval of the required bonds or payment protection.

(b) If the contract provides for liquidated damages, the contracting officer must send the notice to proceed by certified mail, return receipt requested, or any other method that provides signed evidence of receipt. The notice to proceed will advise the contractor that the work must be completed within ____ (insert contract time for completion) calendar days from the date of receipt shown on the certified mail receipt card returned by the post office or on the proof of delivery provided by the delivery service.

(c) If the contract does not provide for liquidated damages, certified mail is not required. In notices to proceed for these contracts, the contracting officer must establish a date for completion

that takes into consideration the time required for the notice to arrive by regular mail.

(d) At the time the notice to proceed is sent to the contractor, the contracting officer must furnish a copy to the resident engineer or the Chief, Engineering Service.

(e) The contracting officer must file a copy of the notice to proceed with copy A of the contract. When certified mail or other method of certified delivery is used, the contracting officer must attach the certified mail receipt card returned by the post office or the proof of delivery provided by the delivery service to the copy of the notice to proceed. The contracting officer must file copies of the notice to proceed with copies C and D of the contract after the date of receipt has been established and indicated on the notice to proceed.

Subpart 836.5 - Contract Clauses

836.500 Scope of subpart.

(a) The clauses and provisions prescribed in this subpart are set forth for use in fixed-price construction contracts in addition to those in [FAR Subpart 52.2](#) .

(b) Additional clauses and provisions not inconsistent with those in FAR Subparts [36.5](#) and [52.2](#) and those prescribed in this subpart are authorized when determined necessary or desirable by the contracting officer, and when approved as provided in [Subpart 801.4](#).

(c) Clauses and provisions that differ from those contained in FAR Subparts [36.5](#) and [52.2](#) and this subpart, but considered essential to the procurement of VA requirements, shall not be used unless the deviation procedure set forth in [Subpart 801.4](#) has been complied with.

836.501 Performance of work by the contractor.

The contracting officer shall insert the clause at [852.236-72, Performance of work by the contractor](#), in solicitations and contracts for construction that contain the FAR clause at [52.236-1, Performance of Work by the Contractor](#) . When the solicitations or contracts include a section entitled "Network Analysis System (NAS)," the contracting officer must use the clause with its [Alternate I](#).

836.513 Accident prevention.

The contracting officer must insert the clause at [852.236-87, Accident Prevention](#), in solicitations and contracts for construction that contain the clause at [FAR 52.236-13, Accident Prevention](#) .

836.521 Specifications and drawings for construction.

The contracting officer shall insert the clause at [852.236-71, Specifications and drawings for construction](#), in solicitations and contracts for construction that include the FAR clause at [52.236-21, Specifications and Drawings for Construction](#) .

836.570 Correspondence.

The contracting officer shall insert the clause at [852.236-76, Correspondence](#), in solicitations and contracts for construction expected to exceed the micro-purchase threshold for construction (currently \$2,000).

836.571 Reference to "standards."

The contracting officer shall insert the clause at [852.236-77, Reference to “standards,”](#) in solicitations and contracts for construction expected to exceed the micro-purchase threshold for construction.

836.572 Government supervision.

The contracting officer shall insert the clause at [852.236-78, Government supervision,](#) in solicitations and contracts for construction expected to exceed the micro-purchase threshold for construction.

836.573 Daily report of workers and materials.

The contracting officer shall insert the clause at [852.236-79, Daily report of workers and materials,](#) in solicitations and contracts for construction expected to exceed the simplified acquisition threshold. The contracting officer may, when in the best interest of the Government, insert the clause in solicitations and contracts for construction when the contract amount is expected to be at or below the simplified acquisition threshold.

836.574 Subcontracts and work coordination.

The contracting officer shall insert the clause at [852.236-80, Subcontracts and work coordination,](#) in solicitations and contracts for construction expected to exceed the micro-purchase threshold for construction. When the solicitations or contracts are for new construction work with complex mechanical-electrical work, the contracting officer may use the clause with its [Alternate I.](#)

836.575 Schedule of work progress.

The contracting officer shall insert the clause at [852.236-84, Schedule of work progress,](#) in solicitations and contracts for construction that are expected to exceed the micro-purchase threshold for construction and that do not contain a section entitled “Network Analysis System (NAS).”

836.576 Supplementary labor standards provisions.

The contracting officer shall insert the clause at [852.236-85, Supplementary labor standards provisions,](#) in solicitations and contracts for construction that are expected to exceed the micro-purchase threshold for construction.

836.577 Worker’s compensation.

The contracting officer shall insert the clause at [852.236-86, Workers’ compensation,](#) in solicitations and contracts for construction that are expected to exceed the micro-purchase threshold for construction.

836.578 Changes - supplement.

(a) The contracting officer shall insert the clause at [852.236-88, Contract changes - supplement,](#) in solicitations and contracts for construction that are expected to exceed the micro-purchase threshold for construction. (This section has been promulgated as a deviation from the [FAR](#) as provided in [801.4.](#))

(b) When negotiated changes exceed \$500,000, paragraph (a) of the clause at [852.236-88](#) will apply. Because paragraph (a) does not provide ceiling rates for indirect expenses, the contractor

must furnish cost breakdowns and other supporting data on its rates for indirect expenses as part of its price proposal. The contracting officer must negotiate the rates for indirect expenses with the contractor and may request an audit in accordance with [FAR 15.404-2](#) .

(c) When the negotiated change will be \$500,000 or less, paragraph (b) of the clause at [852.236-88](#) will apply. Because the indirect cost rates in paragraph (b) of the clause at [852.236-88](#) are ceiling rates, the contracting officer must negotiate indirect expense rates within the ceiling limitations.

836.579 Special notes.

The contracting officer shall insert the clause at [852.236-91, Special notes](#), in solicitations and contracts for construction that are expected to exceed the micro-purchase threshold for construction.

Subpart 836.6 - Architect-Engineer Services

836.602 Selection of firms for architect-engineer contracts.

836.602-1 Selection criteria.

(a) In addition to the evaluation criteria set forth in [FAR 36.602-1](#) , the evaluation board must consider the factors set forth in paragraph (b) of this section as they apply to the project or purpose of the selection. Values must be assigned to each factor in determining the relative qualifications of the firms identified as qualified through the pre-selection process. The board may adjust the assigned values after its discussions.(b) The following factors must be considered:

(1) Reputation and standing of the firm and its principal officials with respect to professional performance, general management, and cooperativeness.

(2) Record of significant claims against the firm because of improper or incomplete architectural and engineering services.

(3) Specific experience and qualifications of personnel proposed for assignment to the project and their record of working together as a team.

836.602-2 Evaluation boards.

(a) The Director, Office of Construction and Facilities Management, shall appoint an evaluation board to select architect-engineer contractors for Office of Construction and Facilities Management projects. The Director, Office of Construction and Facilities Management, shall appoint an evaluation board to select architect-engineer contractors for National Cemetery Administration projects. The facility or VISN director, as appropriate, shall appoint an evaluation board to select architect-engineer contractors for field facility projects.

(b) The Director, A/E Evaluation and Program Support Service, will chair the evaluation board for Office of Construction and Facilities Management architect-engineer contracts. The Chair may designate the Project Director or Project Manager to act as Chair when necessary. When appointing the board's members, the Director, Office of Construction and Facilities Management, must include the appropriate Project Manager and as many qualified professional architects or engineers from the Office of Construction and Facilities Management technical services as may be considered

appropriate for the particular project. The Director, Office of Construction and Facilities Management may designate additional members from the Office of Construction and Facilities Management or from other Department administrations and staff offices when appropriate.

(c) The Director, Office of Construction and Facilities Management, shall ensure that the board consists of no fewer than three members, one of whom must be a National Cemetery Administration senior level contracting officer. The Director shall designate one of the board members as the Chair.

(d) The evaluation board for a VA field facility must consist of no fewer than two members, one of whom will be the HCA (or the senior contracting officer at the facility if there is no HCA on site) and the other will be the Chief, Engineering Service, or their alternates. Where a facility has two or more engineers on its staff, the facility or VISN director must appoint an additional engineer to the board. The Chair of the board will be the senior engineer.

836.602-4 Selection authority.

The Director, Office of Construction and Facilities Management (for Central Office contracts), the Director, Office of Construction Management (for National Cemetery Administration contracts), and the facility or VISN director (for field facility contracts), as appropriate, or persons acting in those capacities, are designated as the approving officials for the recommendations of the respective evaluation boards.

836.602-5 Short selection process for contracts not to exceed the simplified acquisition threshold.

Either of the procedures provided in [FAR 36.602-5](#) may be used to select firms for architect-engineer contracts that are not expected to exceed the simplified acquisition threshold.

836.603 Collecting data on and appraising firms qualifications.

The Director, Office of Construction and Facilities Management, for Central Office; the Director, Office of Construction Management, for National Cemetery Administration; and the Chief, Engineering Service, for field facilities, are responsible for collecting Standard Forms 330 and maintaining a data file on architect-engineer qualifications.

836.606 Negotiations.

836.606-70 General.

To assure that the fee limitation is not violated, the contracting officer must maintain suitable records to be able to isolate the amount in the total fee to which the 6-percent limitation applies.

836.606-71 Architect-engineer's proposal.

(a) When the contract price is estimated to be \$50,000 or more, the contracting officer must use VA Form 10-6298, Architect-Engineer Fee Proposal, to obtain the proposal and supporting cost data from the proposed contractor and subcontractor in the negotiation of an architect-engineer contract for design services.

(b) In obtaining architect-engineer services for research study, seismic study, master planning study, construction management and other related services contracts, the contracting officer must use VA Form 10-6298 supplemented or modified as needed for the particular project type.

836.606-72 Contract price.

(a) Where negotiations with the top-rated firm are unsuccessful, the contracting officer shall, after authorization by the Director, Office of Construction and Facilities Management, the Director, Office of Construction Management, or the facility or VISN director, as appropriate, terminate the negotiations and undertake negotiations with the firm next in order of preference.

(b) The contracting officer shall submit a recommendation for award of the contract at the negotiated fee to the Director, Office of Construction and Facilities Management, the Director, Office of Construction Management, or the facility or VISN director, as appropriate. A copy of the negotiation memorandum prepared in accordance with [FAR 15.406-3](#) and, whenever a field pricing report has been received, a copy of the report must accompany the recommendation.

836.606-73 Application of 6 percent architect-engineer fee limitation.

(a) The total cost of the architect or engineer services contracted for must not exceed 6 percent of the estimated cost of the construction project plus any fees for related services and activities such as those shown in paragraph [\(c\)](#) of this section.

(b) To support project submissions, the engineering officer or project engineer must use VA Form 10-1193, Application for Health Care Facility Project, and Form 10-6238, EMIS Construction Program Estimate Worksheet, and must show the proposed technical services where necessary and applicable.

(c) The 6 percent fee limitation does not apply to the following architect or engineer services:

(1) Investigative services including but not limited to:

(i) Determination of program requirements, including schematic or preliminary plans and estimates;

(ii) Determination of feasibility of proposed project;

(iii) Preparation of measured drawings of existing facility;

(iv) Subsurface investigation;

(v) Structural, electrical, and mechanical investigation of existing facility; and

(vi) Surveys: topographic, boundary, utilities, etc.

(2) Special consultant services that are not normally available in organizations of architects or engineers and that are not specifically applied to the actual preparation of working drawings or specifications of the project for which the service are required.

(3) Other:

(i) Reproduction of approved designs through models, color renderings, photographs, or other presentation media;

(ii) Travel and per diem allowances other than those required for the development and review of working drawings and specifications;

(iii) Supervision or inspection of construction, review of shop drawings or samples, and other services performed during the construction phase; and

(iv) All other services that are not an integral part of the production and delivery of plans, designs, and specifications.

(4) The cost of reproducing drawings and specifications for bidding and their distribution to prospective bidders and plan file rooms.