

Chapter 29

Construction Contracting



2014 Contract Attorneys Deskbook

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CHAPTER 29

CONSTRUCTION CONTRACTING

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CHAPTER 29

CONSTRUCTION CONTRACTING

- I. INTRODUCTION.** Following this block of instruction, students should:
- A. Understand the unique clauses and procedures used in construction contracting.
 - B. Understand how to analyze common legal issues that arise in construction contracting.
- II. REFERENCES.**
- A. Federal Regulations.
 - 1. Federal Acquisition Regulation (FAR) Part 36.
 - 2. Defense Federal Acquisition Regulation Supplement (DFARS) Part 236.
 - 3. Army Federal Acquisition Regulation Supplement (AFARS) Part 5136.
 - 4. Air Force Federal Acquisition Regulation Supplement (AFFARS) Part 5336.
 - 5. Navy Marine Corps Acquisition Regulation Supplement (NMCARS) Part 5236.
 - B. Army Regulations (AR).
 - 1. AR 420-1, Army Facilities Management (12 February 2008)(RAR Issue Date 28 March 2009) [hereinafter AR 420-1].
 - 2. AR 415-32, Engineer Troop Unit Construction in Connection with Training Activities (15 April 1998) [hereinafter AR 415-32].
 - 3. DA Pam 420-11, Project Definition and Work Classification (18 March 2010) [hereinafter DA Pam 420-11].
 - C. Air Force Policy Directives (AFPD) and Air Force Instructions (AFI).
 - 1. AFPD 32-90, Real Property Management (6 August 2007) [hereinafter AFPD 32-90].

2. AFI 32-1021, Planning and Programming Military Construction (MILCON) Projects (14 June 2010, amended by memorandum 30 January 2012) [hereinafter AFI 32-1021].
 3. AFI 32-1032, Planning and Programming Appropriated Funded Maintenance, Repair, and Construction Projects (15 October 2003, amended by memorandum 10 February 2012) [hereinafter AFI 32-1032].
 4. AFI 32-6001, Family Housing Management (21 August 2006) [hereinafter AFI 32-6001].
 5. AFI 32-6002, Family Housing Planning, Programming, Design, and Construction (15 January 2008) [hereinafter AFI 32-6002].
 6. AFI 65-601, vol. 1, Budget Guidance and Procedures (16 Aug 2012) [hereinafter AFI 65-601].
- D. Navy Regulation. OPNAVINST 11010.20G CH-1, Facilities Projects Manual (2 September 2010) [hereinafter OPNAVINST 11010.20G].
- E. Richard J. Bednar, John Cibinic, Jr., Ralph C. Nash, Jr., et al., Construction Contracting, published by The George Washington University Government Contracts Program, 1991.
- F. Adrian L. Bastianelli, Andrew D. Ness, Federal Government Construction Contracts, published by the American Bar Association Forum on the Construction Industry, 2003.

III. CONCEPTS.

A. Definitions.

1. Construction.

- a. Statutory Definition. 10 U.S.C. § 2801(a). The term “military construction” includes “any construction, development, conversion, or extension of any kind carried out with respect to a military installation, whether to satisfy temporary or permanent requirements.”¹

b. Regulatory Definitions.

¹ The term “military installation” means “a base, camp, post, station, yard, center, or other activity under the jurisdiction of the Secretary of a military department or, in the case of an activity in a foreign country, under the operational control of the Secretary of a military department or the Secretary of Defense, without regard to the duration of operational control.” 10 U.S.C. § 2801(c)(4).

- (1) FAR 2.101. The term “construction” refers to the construction, alteration, or repair of buildings, structures, or other real property.
 - (a) Construction includes dredging, excavating, and painting.
 - (b) “Buildings, structures, or other real property” includes improvements of all types, such as bridges, streets, sewers, power lines, docks, etc.
 - (c) Construction does not include work performed on vessels, aircraft, or other items of personal property.

- (2) Service Regulations. *See, e.g.*, AR 420-1, paragraph 4-17 and Glossary, sec. II; AR 415-32, Glossary, sec. II; AFI 32-1021, paras. 3.2. and 4.2; AFI 32-1032, para. 5.1.1; AFI 65-601, vol. 1, att. 1; OPNAVINST 11010.20G, ch. 2, para. 2.1.1. The term “construction” includes:
 - (a) The erection, installation, or assembly of a new facility;²
 - (b) The addition, expansion, extension, alteration, conversion, or replacement of an existing facility;
 - (c) The relocation of a facility from one site to another;
 - (d) Installed equipment (e.g., built-in furniture, cabinets, shelving, venetian blinds, screens, elevators, telephones, fire alarms, heating and air conditioning equipment, waste disposals, dishwashers, and theater seats); and
 - (e) Related site preparation, excavation, filling, landscaping, and other land improvements.

2. Military Construction Project. 10 U.S.C. § 2801(b). The term “military construction project” includes “all military construction work . . . necessary to produce a complete and usable facility or a complete and usable improvement to an existing facility”

² The term “facility” means “a building, structure, or other improvement to real property.” 10 U.S.C. § 2801(c)(2).

B. Fiscal Distinctions.

1. As a general rule, the government funds construction projects costing not more than \$750,000 with Operation and Maintenance (O&M) funds; projects costing more than \$750,000, but not more than \$2 million, with Unspecified Minor Military Construction (UMMC) funds; and projects costing more than \$2 million with Military Construction (MILCON) funds. 10 U.S.C. §§ 2802, 2805. See Construction Funding chapter in CONTRACT & FISCAL L. DEP'T, THE JUDGE ADVOCATE GENERAL'S SCHOOL, U.S. ARMY, FISCAL LAW COURSE DESKBOOK (current Edition), available on the Judge Advocate General's Legal Center and School Web Page in the "TJAGLCS Publications" library (<https://www.jagcnet.army.mil/8525754B005076E2>).
2. For fiscal law purposes, "construction" does not include repair or maintenance. Therefore, the government may fund repair and maintenance projects with O&M funds, regardless of the cost. AR 420-1, Glossary, sec. II; AFI 32-1032, para. 1.3.2; OPNAVINST 11010.20G, paras. 3.1.1 and 4.1.1.
3. The government must award construction contracts in accordance with FAR Part 36, DFARS Part 236, and any applicable service supplement, regardless of the funding source.

C. Contracting Procedures.

1. As with most procurements, the government must take certain steps to procure construction properly.
2. These steps normally include:
 - a. Deciding which acquisition method to use;
 - b. Deciding which contract type to use;
 - c. Deciding what, if any, pre-bid communications are required (or otherwise warranted);
 - d. Deciding what information and which clauses to place in the solicitation;
 - e. Deciding which contractor should receive the award; and
 - f. Administering the contract.

3. An Independent Government Estimate, or IGE, is necessary if the proposed contract, or any proposed modification to a construction contract, exceeds the simplified acquisition threshold (SAT), currently \$150,000. The Contracting Officer may require an IGE for contracts less than the SAT. The IGE is not normally disclosed to offerors. FAR 36.203. IGEs will be marked “For Official Use Only,” or “FOUO.” DFARS 236.203.

IV. METHODS OF ACQUIRING CONSTRUCTION.

- A. Sealed Bidding. FAR 6.401; FAR 36.103. Contracting officers must use sealed bidding procedures to acquire construction if:
 1. Time permits;
 2. Award will be made on the basis of price and price-related factors;
 3. Discussions are not necessary; and
 4. There is a reasonable expectation of receiving more than one bid.
- B. Negotiated Procedures. FAR 6.401; FAR 36.103.
 1. Contracting officers should use negotiated procedures to acquire construction if:
 - a. Time does not permit the use of seal bidding procedures;
 - b. Award will not be made on the basis of price and price-related factors;
 - c. Discussions are necessary, **or**
 - d. There is not a reasonable expectation of receiving more than one bid. See Viereck Co., B-222520, Aug. 5, 1986, 86-2 CPD ¶ 152; see also Pardee Constr. Co., B-256414, June 13, 1994, 94-1 CPD ¶ 372.
 2. Contracting officers may use negotiated procedures to acquire construction outside the United States, its possessions, or Puerto Rico, even if sealed bidding is otherwise required. FAR 36.103(a).
 3. Contracting officers must use negotiated procedures to acquire architect-engineer services. FAR 36.103(b).

C. Design-Build Contracting. 10 U.S.C. § 2305a; 41 U.S.C. § 3309; 10 USC §2862 FAR Subpart 36.3.

1. Background. In the past, a contracting officer could not award a contract to build a project to the firm that designed the project unless the agency head or authorized representative approved. FAR 36.209. See Lawlor Corp., B-241945.2, Mar. 28, 1991, 70 Comp. Gen. 375, 91-1 CPD ¶ 335. In 1995, however, Congress established new, two-phase design-build selection procedures that allow the same firm to design and build a project. National Defense Authorization Act of 1996, Pub. L. No. 104-106, 110 Stat. 186 (1995).
2. Definitions. FAR 36.102.
 - a. “Design” is the process of defining the construction requirement, producing the technical specifications and drawings, and preparing the construction cost estimate.
 - b. “Design-bid-build” is the traditional method of construction contracting in which design and construction are sequential and contracted for separately, with two contracts and two contractors.
 - c. “Design-build” is a method of construction contracting in which design and construction are combined in a single contract with a single contractor.
 - d. “Two-phase design-build” is a “design-build” method of construction contracting in which the government selects a limited number of offerors in Phase One to submit detailed proposals in Phase Two.
3. Policy. FAR 36.104. See FAR 36.301(b).
 - a. A contracting officer may use either design-bid-build or design-build procedures to acquire construction.
 - b. Unless a contracting officer decides to use design-bid-build (or another authorized acquisition procedure), the contracting officer must use two-phase design-build procedures to acquire construction³ if:
 - (1) The contracting officer anticipates receiving three or more offers;

³ 10 USC §2862 authorizes use of “turn-key” procedures for military construction within the Department of Defense. As such, DoD military construction may utilize one-phase design build construction instead of two-phase design build specified in FAR Part 36.

- (2) Offerors must perform a substantial amount of design work (and incur substantial expenses) before they can develop their price proposals; and
- (3) The contracting officer has considered the factors set forth in FAR 36.301(b)(2), including:
 - (a) The extent to which the agency has adequately defined its project requirements;
 - (b) The time constraints for delivery;
 - (c) The capability and experience of potential offerors;
 - (d) The suitability of the project for two-phase design-build procedures;
 - (e) The capability of the agency to manage the two-phase selection process;
 - (f) Other criteria established by the head of the contracting activity (HCA).

4. Procedures. FAR 36.303.

- a. The agency may issue one solicitation covering both phases, or two solicitations in sequence.
- b. Phase One. FAR 36.303-1.
 - (1) The agency evaluates Phase One proposals to determine which offerors the agency will ask to submit Phase Two proposals.
 - (2) The Phase One solicitation must include:
 - (a) The scope of work;
 - (b) The Phase One evaluation factors (e.g., technical approach, technical qualifications, etc.);
 - (c) The Phase Two evaluation factors; and

- (d) A statement regarding the maximum number of offerors the government intends to include in the competitive range.⁴
 - c. Phase Two. FAR 36.303-2. The contracting officer awards one contract using competitive negotiation procedures.
- D. Construction as “Acquisition of Commercial Items,” FAR Part 12.
 - 1. On 3 July 2003, the Administrator of the Office of Federal Procurement Policy (OFPP) issued a memorandum stating that FAR Part 12, Acquisition of Commercial Items, "should rarely, if ever be used for new construction acquisitions or non-routine alteration and repair services." Rather, “in accordance with long-standing practice, agencies should apply the policies of FAR Part 36 to these acquisitions.” See Memorandum, Administrator of Office of Federal Procurement Policy, to Agency Senior Procurement Executives, Subject: Applicability of FAR Part 12 to Construction Acquisitions (July 3, 2003).
 - 2. The memorandum stated that Part 12 acquisitions are generally well suited for certain types of construction activities “that lack the level of variability found in new construction and complex alteration and repair,” such as routine painting or carpeting, simple hanging of drywall, everyday electrical or plumbing work, and similar noncomplex services.”

V. CONTRACT TYPES.

- A. Firm Fixed-Price (FFP) Contracts. FAR 36.207.
 - 1. Agencies normally award FFP contracts for construction.
 - 2. The contracting officer may require pricing on a lump-sum, unit price, or combination basis.
 - a. With lump sum pricing, the agency pays a lump sum for:
 - (1) The total project; or
 - (2) Defined portions of the project.
 - b. With unit pricing, the agency pays a unit price for a specified quantity of work units.
 - c. Agencies must use lump-sum pricing unless:

⁴ This number should not exceed 5 unless the contracting officer determines that including more than five offerors in the competitive range is in the government’s best interests. FAR 36.303-1(a)(4).

- (1) The contract involves large quantities of work such as grading, paving, building outside utilities, or site preparation;
- (2) The agency cannot estimate the quantities of work adequately;
- (3) The estimated quantities of work may change significantly during construction; or
- (4) Offerors would have to expend spend a lot of time/money to develop adequate estimates.

B. Fixed-Price Contracts with Economic Price Adjustment Clauses (FP w/EPA). FAR 36.207(c). Agencies may use this type of contract if:

1. The use of an EPA clause is customary for the type of work the agency is acquiring;
2. A significant number of offerors would not bid unless the agency included an EPA clause in the contract; or
3. Offerors would include unwarranted contingencies in their prices unless the agency included an EPA clause in the contract.

C. Cost-Reimbursement Contracts. See Military Construction Appropriations Act, 2002, Pub. L. No. 107-64, § 101, 115 Stat. 474 (2001); DFARS 236.271; DFARS 216.306(c); AFARS 5136.271; AFFARS 5336.271; NAPS 5236.271. The Assistant Secretary of Defense (Production and Logistics) (ASD(P&D)) must approve the award of a cost-plus-fixed-fee contract for construction if:

1. The activity uses military construction appropriations;
2. Performance will occur in the United States (Alaska excluded); and
3. The acquiring activity expects the contract to exceed \$25,000.

D. Incentive and Other “Fee” Contracts. FAR 36.208. Activities cannot use incentive, cost-plus-fixed-fee, or other types of contracts with cost variation or cost adjustment features at the same work site with firm fixed-price contracts without the approval of the HCA.

E. Indefinite Delivery / Indefinite Quantity Contracts. FAR 16.504. Tyler Const. Group v. United States, 83 Fed. Cl. 94 (2008), aff’d 570 F.3d 1329 (Fed. Cir. 2009). The Federal Circuit held that using an ID/IQ contract to procure construction projects was not specifically prohibited by statute or regulation; thus,

it was a permissible innovation under FAR § 1.102(d)⁵. Generally, ID/IQ contracts are used to procure services and supplies, but the Federal Circuit affirmed the Army Corps' of Engineer's "innovative" approach to use ID/IQ contracts to procure large-scale construction projects.

F. Job Order Contracting. AFARS Subpart 5117.90. See Schnorr-Stafford Constr., Inc., B-227323, Aug. 12, 1987, 87-2 CPD ¶ 153; Salmon & Assoc., B-227079, Aug. 12, 1987, 87-2 CPD ¶ 152.

1. A job order contract (JOC) is an indefinite-delivery, indefinite-quantity contract used to acquire real property maintenance/repair and minor construction at the installation level.
2. The government develops task specifications and a unit price book. The contractor then multiplies the government's unit price by its own coefficient (e.g., profit + overhead) to arrive at its bid/proposal price.
3. After contract award, the parties enter into bilateral task orders for individual projects based on the tasks and prices specified in the JOC.⁶
4. JOC Limitations.
 - a. The government should not use a JOC for projects with an estimated value less than \$2,000, or greater than \$750,000. AFARS 5117.9000(a).
 - b. The government cannot use a JOC to acquire installation facilities engineering support services (e.g., custodial or ground maintenance services). AFARS 5117.9002(b).
 - c. The government cannot use a JOC to acquire architect-engineer services. AFARS 5117.9002(b).
 - d. An IGE is required for orders of \$100,000 or more. AFARS 5117.9004-3(c).
 - e. The government should not use a JOC to acquire work:
 - (1) Normally set aside for small and disadvantaged businesses;

⁵ (d) The role of each member of the Acquisition Team is to exercise personal initiative and sound business judgment in providing the best value product or service to meet the customer's needs. In exercising initiative, Government members of the Acquisition Team may assume if a specific strategy, practice, policy or procedure is in the best interests of the Government and is not addressed in the FAR, nor prohibited by law (statute or case law), Executive order or other regulation, that the strategy, practice, policy or procedure is a permissible exercise of authority.

⁶ Each task order becomes a fixed-price, lump sum contract. AFARS 5117.9003-1(e).

- (2) Traditionally covered by requirements contracts (e.g., painting, roofing, etc.);
- (3) Covered by contracts awarded under the Commercial Activities Program; or
- (4) The government can effectively and economically accomplish in-house.

AFARS 5117.9003-3(a).

G. Simplified Acquisition of Base Engineer Requirements (SABER) Program, AFFARS IG5336.9201-ch3.

1. Similar in scope and nature to the Army's JOC program, SABER is an ID/IQ contract vehicle to expedite the execution of non-complex minor construction and maintenance & repair projects. IG5336.9201-ch3, para. 3.2.1.
2. The process of using the SABER is similar to the JOC. An established Unit Price Book and coefficients are combined to price each specific project. IG5336.9201-ch3, para. 3.2.1.1 and 3.2.1.2.
3. SABER Limitations.
 - a. SABER should not be used to replace a traditional construction program, or for large, complex construction projects. SABER should also not be used for projects that are traditionally single skill/materials projects that are more appropriate for competitively bid contracts or single trade ID/IQs. IG5336.9201-ch3, para. 3.4.1.
 - b. Saber shall not be used to acquire architect-engineering (A-E) services. IG5336.9201-ch3, para. 3.4.2.1.
 - c. SABER may not be used to perform non-personal services subject to the Service Contract Act. IG5336.9201-ch3, para. 3.4.2.2.

VI. PRE-BID COMMUNICATIONS.

- A. Presolicitation Notices. FAR 36.213-2; FAR 36.701(a); Presolicitation Notice (Construction Contract).
1. The contracting officer must send presolicitation notices to prospective bidders if the proposed contract is expected to equal or exceed the simplified acquisition threshold.

2. Contents. FAR 36.213-2(b). Among other things, presolicitation notices must:
 - a. Describe the proposed work;⁷
 - b. State the location of the proposed work;
 - c. Include relevant dates (e.g., the proposed bid opening date and the proposed contract completion date);
 - d. State where contractors can inspect the contract plans without charge; *See also* DFARS 252.236-7001.
 - e. Specify a date by which bidders should submit requests for the solicitation;
 - f. State whether the government intends to restrict award to small businesses; and
 - g. Specify the amount the government intends to charge for solicitation documents, if any.
3. Distribution. FAR 36.211.
 - a. The contracting officer should send presolicitation notices to:
 - (1) Reach as many prospective offerors as practicable; and
 - (2) Organizations that maintain display rooms for such information.

⁷ The contracting officer cannot disclose the government cost estimate; however, the contracting officer can state the magnitude of the project in terms of physical characteristics and estimated price range. FAR 36.204; DFARS 236.204. The Estimated price ranges are as follows:

- (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.

FAR 36.204 -- Disclosure of the Magnitude of Construction Projects. The DFARS provides ranges between \$10,000,000 and 500,000,000. (the additional ranges are: \$10M - \$25M, \$25M - \$100 M, \$100M - \$250M, and \$250M - \$500M.) DFARS 236.204.

- b. The contracting officer determines the geographical range of distribution.
- B. Government-wide Point of Entry (GPE). FAR 36.213-2(b)(8), FAR 5.003 and 5.204. The contracting officer must also post the presolicitation notice in the GPE. FedBizOpps.gov (www.fbo.gov)

VII. SOLICITATION.

- A. Forms. FAR 36.701; FAR 53.301-1442, SF 1442, Solicitation, Offer, and Award (Construction, Alteration, or Repair); DFARS 236.701.
 - 1. The contracting officer uses a SF 1442 in lieu of a SF 33.
 - 2. If a bidder fails to return this form with its offer, the offer is nonresponsive. See C.J.M. Contractors, Inc., B-250493.2, Nov. 24, 1992, 92-2 CPD ¶ 376.
- B. Supplemental Documents. The contracting officer may provide drawings, specifications, and maps in either hard-copy or completely in electronic format. DFARS 52.236-7001.
- C. Statutory Limitations. FAR 36.205; DFARS 252.236-7006.
 - 1. The solicitation must include any statutory cost limitations.⁸ See K.C. Brandon Constr., B-245934, Feb. 3, 1992, 92-1 CPD ¶ 139; see also DFARS 252.236-7006(b), Cost Limitation (Jan 1997) (“[a] offeror which

⁸ FAR 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.

does not state separate prices for the items identified in the Schedule as subject to a cost limitation may be considered nonresponsive”).

2. The government must normally reject any offer that:
 - a. Exceeds the applicable statutory limitations;⁹ or
 - b. Is only within the statutory limitations because it is materially unbalanced.

See William G. Tadlock Constr., B-252580, June 29, 1993, 93-1 CPD ¶ 502; H. Angelo & Co., B-249412, Nov. 13, 1992, 92-2 CPD ¶ 344.

3. Some statutory limitations are waivable. See 10 U.S.C. § 2853; see also TECOM, Inc., B-240421, Nov. 9, 1990, 90-2 CPD ¶ 386.

D. Site Familiarization Clauses.

1. Site Investigation and Conditions Affecting the Work. FAR 36.210; FAR 36.503; FAR 52.236-3.
 - a. By submitting a bid, a contractor acknowledges that it has investigated the job site and the conditions affecting the proposed work.
 - b. Among other things, a contractor is supposed to investigate:
 - (1) Conditions bearing upon transportation, disposal, handling, and storage of materials;
 - (2) The availability of labor, water, electric power, and roads;
 - (3) Uncertainties of weather, river stages, tides, and similar physical conditions at the site;
 - (4) The conformation and condition of the ground;
 - (5) The character of needed equipment and facilities;
 - (6) The character, quality, and quantity of discoverable surface and subsurface materials and/or obstacles;

⁹ The contracting officer may award separate contracts for individual items whose prices are within the applicable statutory limitations if: (1) the contracting officer included a provision that permits such awards in the solicitation; and (2) such awards are in the government’s interest. FAR 36.205(c); FAR 52.214-19.

See Aulson Roofing, Inc., ASBCA No. 37677, 91-2 BCA ¶ 23,720; Fred Burgos Constr. Co., ASBCA No. 41395, 91-2 BCA ¶ 23,706.

- c. A contractor need not hire its own geologists or conduct extensive engineering efforts to verify conditions that it can reasonably infer from the solicitation or a site visit. See Michael-Mark Ltd., IBCA No. 2697, 94-1 BCA ¶ 26,453; see also Atherton Constr., Inc., 02-2 BCA ¶ 31,918 (“The duty of bidders to investigate the job site does not require them to conduct time-consuming or costly technical investigations to determine the accuracy of the Government's drawings or other indications in the solicitation documents.”)
 - d. A contractor must perform at the contract price if the contractor could have discovered a condition by a reasonable site investigation. See H.B. Mac, Inc. v. United States, 153 F.3d 1338, 1346 (Fed. Cir. 1998) (“It is well settled that a contractor is charged with knowledge of the conditions that a pre-bid site visit would have revealed.”); see also Conner Brothers Constr. Co., Inc. v. United States, 65 Fed. Cl. 657, 673 (2005) (“A contractor who fails to perform an adequate site investigation bears the risk of any condition that it could have discovered if the investigation had been reasonable.”); Weeks Dredging & Contracting, Inc. v. United States, 13 Cl. Ct. 193 (1987); Avisco, Inc., ENG BCA No. 5802, 93-3 BCA ¶ 26,172; Signal Contracting, Inc., ASBCA No. 44963, 93-2 BCA ¶ 25,877; cf. I.M.I., Inc., B-233863, Jan. 11, 1989, 89-1 CPD ¶ 30.
 - e. The government is not normally bound by the contractor’s interpretation of government data and representations not included in the solicitation. See Eagle Contracting, Inc., AGBCA No. 88-225-1, 92-3 BCA ¶ 25,018.
2. Physical Data. FAR 36.504; FAR 52.236-4.
 - a. The contracting officer may provide physical data for the convenience of the contractor.
 - b. The government is not responsible for a contractor’s erroneous interpretations or conclusions. But see United Contractors v. United States, 177 Ct. Cl. 151, 368 F.2d 585 (Ct. Cl. 1966).
 3. Changes After Bid Closing Date. The government is normally responsible for increased performance costs caused by changes at a site after the date

of bid submission, even if offerors agree to extend the bid acceptance period. See Valley Constr. Co., ENG BCA No. 6007, 93-3 BCA ¶ 26,171.

E. Bid Guarantees. FAR 28.101; FAR 52.228-1; FAR 53.301-24, SF 24, Bid Bond.

1. A bid guarantee ensures that a bidder will:
 - a. Not withdraw its bid during the bid acceptance period; and
 - b. Execute a written contract and furnish other required bonds at the time of contract award.
2. Requirement. FAR 28.101-1.
 - a. The contracting officer must normally require a bid guarantee whenever the solicitation requires performance and payment bonds. Performance and payment bonds are required by the Miller Act, (40 U.S.C. 3131 et seq.) for construction contracts exceeding \$150,000, except as authorized by law. FAR 28.102-1. (See Section IX.B, below.)
 - b. Contracting Officers may still require bid guarantees in construction contracts less than \$150,000. See, Lawson's Enterprises, Inc. Comp. Gen., B-286708, Jan. 31, 2001, 2001 CPD ¶ 36.
 - c. The chief of the contracting office, however, may waive the requirement to provide a bid guarantee if the chief of the contracting office determines that it not in the government's best interest to require a bid guarantee (e.g., for overseas construction, emergency acquisitions, and sole-source contracts).
3. Form.
 - a. The bid guarantee must be in the form required by the solicitation. See HR Gen. Maint. Corp. B-260404, May 16, 1995, 95-1 CPD ¶ 247; Concord Analysis, Inc., B-239730, Dec. 4, 1990, 90-2 CPD ¶ 452. But see Mid-South Metals, Inc., B-257056, Aug. 23, 1994, 94-2 CPD ¶ 78.
 - b. The FAR permits offerors to use surety bonds, postal money orders, certified checks, cashier's checks, irrevocable letters of credit, U.S. bonds, and/or cash. See FAR 52.228-1; see also Treasury Dept Cir. 570 (listing acceptable commercial sureties).

- c. If a bidder uses an individual surety, the surety must provide a security interest in acceptable assets equal to the penal sum of the bond. FAR 28.203. See Paradise Const. Co., Comp. Gen. Dec. B-289144, 2001 CPD ¶ 192.
 - (1) The adequacy of an individual surety's offering is a matter of responsibility, not responsiveness. See Gene Quigley, Jr., B-241565, Feb. 19, 1991, 70 Comp. Gen. 273, 91-1 CPD ¶ 182; see also Tip Top Constr., Inc. v. United States, 2008 WL 3153607 (Fed. Cl. 2008); Harrison Realty Corp., B-254461.2, 93-2 CPD ¶ 345.
 - (2) A bidder may not be its own individual surety. See Astor V. Bolden, B-257038, Apr. 26, 1994, 94-1 CPD ¶ 288.
- 4. Penal Amount. FAR 28.101-2 (b). The bid bond must equal 20% of the bid, but not exceed \$3,000,000. But see FAR 28.101-4(c).
- 5. The contracting officer may not accept a bid accompanied by an apparently unenforceable guarantee. Conservatek Indus., Inc., B-254927, Jan. 26, 1994, 1994 WL 29903; MKB Constructors, Inc., B-255098, Jan. 10, 1994, 94-1 CPD ¶ 10; Arlington Constr., Inc., B-252535, July 9, 1993, 93-2 CPD ¶ 10; Cherokee Enter., Inc., B-252948, June 3, 1993, 93-1 CPD ¶ 429; Hugo Key & Son, Inc., B-245227, Aug. 22, 1991, 91-2 CPD ¶ 189; Techno Eng'g & Constr., B-243932, July 23, 1991, 91-2 CPD ¶ 87; Maytal Constr. Corp., B-241501, Dec. 10, 1990, 90-2 CPD ¶ 476; Bird Constr., B-240002, Sept. 19, 1990, 90-2 CPD ¶ 234.
- 6. Noncompliance with Bid Guarantee Requirements. FAR 28.101-4.
 - a. Noncompliance with bid guarantee requirements normally renders a bid nonresponsive. See Alarm Control Co., B-246010, Nov. 18, 1991, 91-2 CPD ¶ 472.
 - b. The contracting officer, however, may waive the requirement to submit a bid guarantee under nine circumstances. FAR 28.101-4(c). See Rufus Murray Commercial Roofing Sys., B-258761, Feb. 14, 1995, 95-1 CPD ¶ 83; Apex Servs., Inc., B-255118, Feb. 9, 1994, 94-1 CPD ¶ 95.
- F. Pre-Bid Conferences. FAR 14.207. Contracting officers may hold pre-bid conferences when necessary to brief bidders and explain complex specifications and requirements; however, client control is critical. See Cessna Aircraft Co., ASBCA No. 48118, 95-1 BCA ¶ 27,560.

- G. Bid/Proposal Preparation Time. FAR 36.213-3. The contracting officer must give bidders ample time to conduct site visits, obtain subcontractor bids, examine data, and prepare estimates. See Raymond Int'l of Del., Inc., ASBCA No. 13121, 70-1 BCA ¶ 8,341.

VIII. AWARD.

A. Responsiveness Issues.

1. A bid is nonresponsive if it exceeds a statutory dollar limitation. FAR 36.205(c); DFARS 252.236-7006. See Ward Constr. Co., B-240064, July 30, 1990, 90-2 CPD ¶ 87; Wynn Constr. Co., B-220649, Feb. 21, 1986, 86-1 CPD ¶ 184.
2. A bid is nonresponsive if the bidder fails to comply with the bid guarantee requirements. FAR 28.101-4(a). See Maytal Constr. Corp., B-241501, Dec. 10, 1990, 90-2 CPD ¶ 476. But see FAR 28.101-4(c) (listing the nine circumstances under which the contracting officer may waive the requirement to submit a bid guarantee).
3. A bid is nonresponsive if the bidder offers a shorter bid acceptance period than the solicitation requires. See SF 1442, Block 13D.
4. A bid is nonresponsive if the bidder fails to acknowledge a material amendment. See Dutra Constr. Co., B-241202, Jan. 31, 1991, 91-1 CPD ¶ 97; see also MG Mako, Inc., B-404758, April 28, 2011, 2011 CPD ¶ 88 (affirming the agency's rejection of a proposal in response to an RFP for failing to acknowledge a material amendment).
5. A bid is nonresponsive if the bidder fails to acknowledge a Davis-Bacon wage rate amendment unless the offeror is bound by a wage rate equal to or greater than the new rate. See Tri-Tech Int'l, Inc., B-246701, Mar. 23, 1992, 92-1 CPD ¶ 304; Fast Elec. Contractors, Inc., B-223823, Dec. 2, 1986, 86-2 CPD ¶ 627.
6. A bid is nonresponsive if the bidder equivocates on the requirement to obtain permits and licenses. See Bishop Contractors, Inc., B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555.
7. A bid is nonresponsive if it is materially unbalanced. FAR 52.214-19.¹⁰

¹⁰ A bid may be found nonresponsive if the only reason it is below a statutory limitation is because it is materially unbalanced. FAR 36.205(d).

- a. The government may reject a bid if the bid prices are materially unbalanced between line items, or between subline items.
- b. A bid is materially unbalanced when:
 - (1) The bid is based on prices that are significantly less than cost for some work, and significantly greater than cost for other work and there is reasonable doubt that the bid will result in the lowest overall cost to the government; or
 - (2) The bid is so unbalanced that it is tantamount to allowing the contractor to recover money in advance of performing the work. FAR 52.214-19(d).

B. Responsibility Issues.

- 1. Prequalification of Sources. DFARS 236.272. The contracting officer may establish a list of contractors that are qualified to perform a specific contract and limit competition to those contractors.
 - a. The HCA must: (1) determine that the project is so urgent or complex that prequalification is necessary; and (2) approve the prequalification procedures.
 - b. If the contracting officer believes a small business unqualified for responsibility reasons, the contracting officer must refer the matter to the Small Business Administration (SBA) for a preliminary recommendation.
 - c. If the SBA preliminary determination is that the small business is responsible, the contracting officer must allow it to submit a proposal.
 - d. Follow the procedures in FAR 19.6, if the small business is in line for award and is found nonresponsible.
- 2. Performance Evaluation Reports. FAR 36.201; FAR 42.1502 et seq.; FAR 53.301-1420, SF 1420, Performance Evaluation, Construction Contracts; DoD Class Deviation 2011-O0014 Past Performance Reporting, issued on June 27, 2011; AFARS 5136.201; DD Form 2626, Performance Evaluation (Construction).
 - a. Contracting activities must prepare performance evaluation reports for:

- (1) Construction contracts valued at \$650,000 or more;¹¹
- (2) Architect-Engineer services contracts valued at \$30,000 or more; and
- (3) Default terminated construction and A-E contracts regardless of contract value.

FAR 42.1502(e) and (f).

- b. Upon their completion, contracting activities must send performance evaluation reports to: U.S. Army Corps of Engineers, Portland District, ATTN: CENWP-CT-I, P.O. Box 2946, Portland, OR 97208-2946. Available on-line at: <http://www.nwp.usace.army.mil/ct/i/>. You may also reach this data through: www.usace.army.mil.
 - c. Contracting officers may use performance evaluation reports as part of their preaward survey.
3. Small Businesses. FAR 19.602. Before a contracting officer can reject a small business as nonresponsible, the contracting officer must refer the matter to the SBA for a Certificate of Competency (COC).
 4. Performance of Work by Contractor. FAR 36.501; FAR 52.236-1.
 - a. To assure adequate interest in and supervision of all work involved in larger projects, the contractor shall be required to perform a significant part of the contract work with its own forces. The Contracting Officer has discretion to determine the appropriate amount for the specific project, but it is ordinarily not less than 12 percent.
 - b. FAR clause 52.236-1 (Performance of Work by the Contractor) shall be inserted in solicitations and contracts when the fixed-price construction contract is expected to exceed \$1.5 million.
 - c. FAR clause 52.236-1 (Performance of Work by the Contractor) does not apply to small business or 8(a) set-asides. FAR 36.501(b). But see FAR clause 52.219-14 (obligating small business concerns and 8(a) contractors to perform certain percentages of work).

¹¹ In the Army, contracting activities must prepare performance evaluation reports for each order placed under a JOC of \$550,000 or more. AFARS 5136.201(a)(1).

- d. Whether a contractor intends to perform the contractually required percentage of work with its own forces is normally a matter of responsibility, not responsiveness. See Luther Constr. Co., B-241719, Jan. 28, 1991, 91-1 CPD ¶ 76. But see Blount, Inc. v. United States, 22 Cl. Ct. 221 (1990); C. Iber & Sons, Inc., B-247920.2, Aug. 12, 1992, 92-2 CPD ¶ 99.

C. Price Evaluation.

1. The contracting officer must evaluate additive items properly.
2. The contracting officer must award the contract to the bidder who submits the low bid for the base project and the additive items which, in order of priority, provide the most features within the applicable funding constraints.
3. The contracting officer must select the low bidder based on the funding available at the time of bid opening. See Huntington Constr., Inc., B-230604, June 30, 1988, 67 Comp. Gen. 499, 88-1 CPD ¶ 619; Applicators Inc., B-270162, Feb. 1, 1996, 96-1 CPD ¶ 32.

IX. CONTRACT ADMINISTRATION.

A. Preconstruction Orientation. FAR 36.212. See FAR 52.236-26; see also FAR 22.406-1; DFARS 22.406-1 (requirement to provide preconstruction information about labor standards).

1. The contracting officer must inform successful offerors of significant matters of interest (e.g., statutory matters, subcontracting plan requirements, contract administration matters, etc.).
2. The contracting officer may issue an explanatory preconstruction letter or hold a preconstruction conference.

B. Performance and Payment Bonds.

1. Requirements. 40 U.S.C. §§ 3131 et seq.; FAR 28.102-1.
 - a. Contracts Over \$150,000. FAR 28.102-1(a); FAR 28.102-3(a); FAR 52.228-15. The contractor must provide performance and payment bonds before it can begin work. See TLC Servs., Inc., B-254972.2, Mar. 30, 1994, 94-1 CPD ¶ 235.
 - b. Contracts Between \$30,000 and \$150,000. 40 U.S.C. § 3132; FAR 28.102-1(b); FAR 28.102-3(b); FAR 52.228-13.

- (1) The contracting officer must select two or more of the following payment protections:
 - (a) Payment bonds;
 - (b) Irrevocable letters of credit;¹²
 - (c) Tripartite escrow agreements; or
 - (d) Certificates of deposit.
 - (2) The contractor must submit one of the selected payment protections before it can begin work.
2. Performance Bonds. FAR 28.102-2; FAR 52.228-15; FAR 53.301-25, SF 25, Performance Bond.
 - a. Performance bonds protect the government.
 - b. The penal amount of the bond is normally 100% of the original contract price.
 - (1) The contracting officer may reduce the penal amount if the contracting officer determines that a lesser amount adequately protects the government.
 - (2) The contracting officer may require additional protection if the contract price increases.
3. Payment Bonds. FAR 28.102-2; FAR 52.228-15; FAR 53.301-25-A, SF 25-A, Payment Bond.
 - a. Payment bonds protect subcontractors and suppliers.
 - b. The penal amount must equal 100% of the original contract price unless the contracting officer determines, in writing, that requiring a payment bond in that amount is impractical.
 - (1) If the contracting officer determines that requiring a payment bond in an amount equal to 100% of the original contract price is impractical, the contracting officer must set the penal amount of the bond.

¹² The contracting officer is supposed to give “particular consideration” to including irrevocable letters of credit as one of the selected payment protections. FAR 28.102-1(b).

- (2) The amount of the payment bond may never be less than the amount of the performance bond.
4. Noncompliance with Bond Requirements. Failure to provide acceptable bonds justifies terminating the contract for default. FAR 52.228-1. See Pacific Sunset Builders, Inc., ASBCA No. 39312, 93-3 BCA ¶ 25,923; see also Airport Indus. Park, Inc. v. United States, 59 Fed.Cl. 332, 334-35 (2004) (“[F]ailure to furnish adequate bonding [as] required by a government ... contract is a material breach that justifies termination for default.”).
5. Withholding Contract Payments. FAR 28.106-7.
 - a. During Contract Performance. The contracting officer should not withhold payments. FAR 28.106-7(a). But see Balboa Ins. Co. v. United States, 775 F.2d 1158 (Fed. Cir. 1985); National Surety Corp., 31 Fed. Cl. 565 (1994); Johnson v. All-State Constr., 329 F.3d 848 (Fed. Cir. 2003) (Government was entitled to withhold progress payments pursuant to its common-law right to set-off pending liquidated damages).¹³
 - b. After Contract Completion. FAR 28.106-7(b). The contracting officer must withhold final payment if the surety provides written notice regarding the contractor’s failure to pay its subcontractors or suppliers.
 - (1) The surety must agree to hold the government harmless.
 - (2) The contracting officer may release final payment if:
 - (a) The parties reach an agreement; or
 - (b) A court determines the parties’ rights.
 - c. Labor Violations. See generally FAR Part 22.
6. Waiver Provisions. 40 U.S.C. §§3131(d) and 3134; FAR 28.102-1(a).
 - a. The contracting officer may waive the requirement to provide performance and payment bonds if:
 - (1) The contractor performs the work in a foreign country and the contracting officer determines that it is impracticable to require the contractor to provide the bonds; or

¹³ However, see FAR 52.232-5 -- Payments Under Fixed-Price Construction Contracts. Permits withholding from future payments for improper certification of subcontractor payments.

- (2) The Miller Act (or another statute) authorizes the waiver.
 - b. The Service Secretaries may waive the requirement to provide performance and payment bonds for cost-type contracts.
- C. Differing Site Conditions (DSC). FAR 52.236-2.
1. This clause allows for an equitable adjustment if the contractor provides prompt, written notice of a differing site condition.
 2. There are two types of differing site conditions. See Renda Marine, Inc. v. United States, 509 F.3d 1372, 1376 (Fed. Cir. 2007); Consolidated Constr., Inc., GSBICA No. 8871, 88-2 BCA ¶ 20,811.
 - a. Type I Differing Site Conditions. FAR 52.236-2(a)(1). To recover for a Type I condition, the contractor must prove that:
 - (1) The contract either implicitly or explicitly indicated a particular site condition. See H.B. Mac, Inc. v. United States, 153 F.3d 1338 (Fed.Cir.1998); Franklin Pavkov Constr. Co., HUD BCA No. 93-C-C13, 94-3 BCA ¶ 27,078; Glagola Constr. Co., Inc., ASBCA No. 45579, 93-3 BCA ¶ 26,179; Konoike Constr. Co., ASBCA No. 36342, 91-1 BCA ¶ 23,440; cf. Jack L. Olsen, Inc., AGBCA No. 87-345-1, 93-2 BCA ¶ 25,767.
 - (2) The contractor reasonably interpreted and relied on the contract indications. See Nova Group, Inc., ASBCA No. 55408, 10-2 BCA ¶ 34533 (finding that it was reasonable for the contractor to rely upon the boring logs and geotechnical reports to prepare its bid and that the contractor reasonably interpreted the logs and reports as indicating weak subsurface conditions); R.D. Brown Contractors, Inc., ASBCA No. 43973, 93-1 BCA ¶ 25,368.
 - (3) The contractor encountered latent or subsurface conditions that differed materially from those indicated in the contract. See Winter v. Cath-dr/Balti Joint Venture, 497 F.3d 1339 (Fed. Cir. 2007) (upholding a Type I differing site condition claim recovery for encountered roofing materials that differed materially from those anticipated); see also Meredith Constr. Co., ASBCA No. 40839, 93-1 BCA ¶ 25,399; Caesar Constr., Inc., ASBCA No. 41059, 91-1 BCA ¶ 23,639.

- (4) The claimed costs were attributable solely to the differing site condition. See P.J. Dick, Inc., GSBCA No. 12036, 94-3 BCA ¶ 27,073.
 - b. Type II Differing Site Conditions. To recover for a Type II condition, the contractor must prove that:
 - (1) The conditions encountered were unusual physical conditions that were unknown at the time of contract award. See Walser v. United States, 23 Cl. Ct. 591 (1991); Gulf Coast Trailing Co., ENG BCA No. 5795, 94-2 BCA ¶ 26,921; Soletanche Rodio Nicholson (JV), ENG BCA No. 5796, 94-1 BCA ¶ 26,472.
 - (2) The conditions differed materially from those ordinarily encountered. See Green Constr. Co., ASBCA No. 46157, 94-1 BCA ¶ 26,572; Virginia Beach Air Conditioning Corp., ASBCA No. 42538, 92-1 BCA ¶ 24,432; Parker Excavating, Inc., ASBCA No. 54637, 06-01 BCA ¶ 33217 (“A Type II differing site condition requires proof of the recognized and usual physical conditions at the work site, proof of the actual physical conditions, proof that the conditions differed from the known and the usual, and proof that the different conditions caused an increase in contract performance.”)
3. The DSC clause only covers conditions existing at the time of contract award. Acts of nature occurring after contract award are not differing site conditions. See Arundel Corp. v. United States, 96 Ct. Cl. 77, 1942 WL 4438 (Ct.Cl.); Meredith Constr. Co., ASBCA No. 40839, 93-1 BCA ¶ 25,399; PK Contractors, Inc., ENG BCA No. 4901, 92-1 BCA ¶ 24,583. But see Valley Constr. Co., ENG BCA No. 6007, 93-3 BCA ¶ 26,171; but see Kilgallon Constr. Co., Inc., ASBCA No. 51601, 01-2 BCA ¶ 31,621 (“[Plaintiff] must also prove that interaction of the rain with the pre-existing and unknown site condition produced unforeseeable consequences, i.e., in this case, that unknown soils exhibited behavior or properties when saturated that were not reasonably anticipated.”).
4. The contractor may not recover if the contractor could have discovered the condition during a reasonable site investigation. See O.K. Johnson Elec. Co., VABCA No. 3464, 94-1 BCA ¶ 26,505; cf. Urban General Contractors, Inc., ASBCA No. 49653, 96-2 BCA ¶ 28,516; Indelsea, S.A., ENG BCA No. PCC-117, 95-2 BCA ¶ 27,633; Steele Contractors, Inc., ENG BCA No. 6043, 95-2 BCA ¶ 27,653; Operational Serv. Corp.,

ASBCA No. 37059, 93-3 BCA ¶ 26,190; Sagebrush Consultants, 01-1 BCA ¶ 31,159 (IBCA), and American Constr., 01-1 BCA ¶ 31,202.

5. The contractor cannot create its own differing site condition. See Geo-Con, Inc., ENG BCA No. 5749, 94-1 BCA ¶ 26,359.
6. The contractor must prove its damages. See H.V. Allen Co., ASBCA No. 40645, 91-1 BCA ¶ 23,393; see also Praught Constr. Corp., ASBCA No. 39670, 93-2 BCA ¶ 25,896.
7. The contractor must promptly notify the government. See Engineering Tech. Consultants, S.A., ASBCA No. 43376, 92-3 BCA ¶ 25,100.
 - a. Untimely notification may bar a differing site condition claim if the late notice prejudices the government. See Moon Constr. Co. v. General Servs. Admin., GSBCA No. 11766, 93-3 BCA ¶ 26,017; see also Hemphill Contracting Co., ENG BCA No. 5698, 94-1 BCA ¶ 26,491; Meisel Rohrbau, ASBCA No. 35566, 92-1 BCA ¶ 24,434; Holloway Constr., Holloway Sand & Gravel Co., ENG BCA No. 4805, 89-2 BCA ¶ 21,713.
 - b. If the government's defense to a differing site condition claim is made more difficult—but not impossible—by the late notice, courts and boards will normally waive the notice requirement and place a heavier burden of persuasion on the contractor. See Glagola Constr. Co., ASBCA No. 45579, 93-3 BCA ¶ 26,179.
 - c. When the government is on notice of differing site conditions, but takes no exception to the contractor's notice or its corrective actions, the government must pay the contractor's increased costs. See Potomac Marine & Aviation, Inc., ASBCA No. 42417, 93-2 BCA ¶ 25,865; Parker Excavating, Inc., ASBCA No. 54637, 06-1 BCA ¶ 33217 (“The written notice requirements are not construed hyper-technically to deny legitimate contractor claims when the government was otherwise aware of the operative facts.”)
 - d. Lack of notice of a differing site condition will not bar a contractor's recovery when the government breaches its duty to cooperate by failing to designate an inspector to whom the contractor may give notice during scheduled weekend work. See Hudson Contracting, Inc., ASBCA No. 41023, 94-1 BCA ¶ 26,466.
8. No DSC claim if the contract does not contain the DSC clause. See Marine Industries Northwest, Inc., ASBCA No. 51942, 01-1 BCA ¶ 31,201 (board rejected a Type II DSC claims solely on the basis that there

was no DSC clause in the contract. Without the DSC clause, the contractor bears complete risk for any differing conditions encountered); see also Stewartsville Postal Properties, LLC, PSBCA No. 6309, 10-2 BCA ¶ 34559 (“The lease did not include a differing site conditions or changes clause that could result in recovery were Appellant able to prove the required underlying factual conditions.”).

9. Final payment bars an unreserved differing site condition claim. FAR 52.236-2(d).

D. Variations in Estimated Quantity. FAR 52.211-18.

1. A fixed-price contract may include estimated quantities for unit-priced items of work.
2. If the actual quantity of a unit-priced item varies more than 15% above or below the estimated quantity, the contracting officer must equitably adjust the contract based on “any increase or decrease in costs due solely to the variation.” See Clement-Mtarri Cos., ASBCA No. 38170, 92-3 BCA ¶ 25,192, aff’d sub nom., Shannon v. Clement-Mtarri Cos., No. 93-1268, 11 F.3d 1072 (Fed. Cir. 1993); cf. Westland Mechanical, Inc., ASBCA No. 48844, 96-2 BCA ¶ 28,419.
3. Whether a party may demand repricing of work that falls outside the 15% range, or whether the original contract unit price controls, is now settled. Adjustments are based on the difference between the unit cost of the original work, and the unit cost of the work outside the allowable variation range. Foley Co. v. United States, 11 F.3d 1032 (Fed. Cir. 1993). But see TECOM, Inc., ASBCA No. 44122, 94-1 BCA ¶ 26,483.
4. The contractor may request a performance period extension if the variation in the estimated quantity causes an increase in the performance period.

E. Suspension of Work. FAR 52.242-14.

1. The contracting officer may suspend, interrupt, or delay work for the convenience of the government. See Valquest Contracting, Inc., ASBCA No. 32454, 91-1 BCA ¶ 23,381.
2. A government delay is compensable if:
 - a. It is unreasonable. See Southwest Constr. Corp., ENG BCA No. 5286, 94-3 BCA ¶ 27,120; C&C Plumbing & Heating, ASBCA No. 44270, 94-3 BCA ¶ 27,063; Kimmins Contracting Corp., ASBCA No. 46390, 94-2 BCA ¶ 26,869; F.G. Haggerty Plumbing Co., VABCA No. 4482, 95-2 BCA ¶ 27,671.

- b. The contracting officer orders it. See Mergentime Corp., ENG BCA No. 5765, 92-2 BCA ¶ 25,007; Durocher Dock & Dredge, Inc., ENG BCA No. 5768, 91-3 BCA ¶ 24,145. But see Fruehauf Corp. v. United States, 218 Ct. Cl. 456, 587 F.2d 486 (1978); Asphalt Roads & Materials Co., ASBCA No. 43625, 95-1 BCA ¶ 27,544; Henderson, Inc., DOT BCA No. 2423, 94-2 BCA ¶ 26,728; Lane Constr. Corp., ENG BCA No. 5834, 94-1 BCA ¶ 26,358.
 - c. The contractor has not caused the suspension by its (or its subcontractor's) negligence or failure to perform. See Hvac Constr. Co., Inc. v. United States, 28 Fed. Cl. 690 (1993).
 - d. The cost of performance increases. See Missile Sys., Inc., ASBCA No. 46079, 94-3 BCA ¶ 27,091; Frazier-Fleming Co., ASBCA No. 34537, 91-1 BCA ¶ 23,378.
3. The contractor may be entitled to delay costs (even if it finishes work on time) if it proves that it planned to finish the work early, but was delayed by the government. See Oneida Constr., Inc., ASBCA No. 44194, 94-3 BCA ¶ 27,237; Labco Constr., Inc., AGBCA No. 90-115-1, 94-2 BCA ¶ 26,910.
 4. The contractor may not recover delay costs where the government provides greater access to a work site for a portion of the performance period, without binding the government to increased access for the duration of the entire contract, and the government then restricts access to the original contract requirements. See Atherton Constr., Inc., ASBCA No. 48527, 00-2 BCA ¶ 30,968. (In a family housing renovation contract, the government provided access to more than the contractually required 14 dwelling units for a period of 48 days. Unilateral action by the government, no recovery allowed.)
 5. A contractor may be entitled to a performance period extension even if the delay is reasonable. A contractor also may raise government delay as a defense to a default termination or an assessment of liquidated damages. See Farr Bros., Inc., ASBCA No. 42658, 92-2 BCA ¶ 24,991.
 6. If both the contractor and the government contribute to a delay and the causes of the delay are so intertwined that the periods and costs of delay cannot be apportioned clearly, neither party can recover for the delay. See Wilner v. United States, 994 F.2d 783, 786 (Fed. Cir. 1993); cf. G. Bliudzius Contractors, ASBCA No. 42366, 93-3 BCA ¶ 26,074.
 7. Profit is not recoverable and final payment bars unreserved suspension claims. FAR 52.242-14(b)(2).

8. Constructive Suspensions.
 - a. A constructive suspension of work may arise if:
 - (1) The government fails to issue a notice to proceed within a reasonable time after contract award. See Marine Constr. & Dredging, Inc., ASBCA No. 38412, 95-1 BCA ¶ 27,286.
 - (2) The government fails to provide timely guidance following a reasonable request for direction. See Tayag Bros. Enters., Inc., ASBCA No. 42097, 94-2 BCA ¶ 26,962.
 - b. A contractor may not recover delay costs for more than 20 days unless the contractor notifies the government of the delay. FAR 52.242-14. This rule, however, is subject to a prejudice test. See George Sollitt Const. Co. v. U.S., 64 Fed. Cl. 229 (Fed. Cl. 2005).

F. Permits and Responsibilities. FAR 52.236-7.

1. A contractor must obtain applicable permits and licenses (and comply with applicable laws and regulations) at no additional cost to the government. See GEM Eng'g Co., DOT BCA No. 2574, 94-3 BCA ¶ 27,202; C'n R Indus. of Jacksonville, Inc., ASBCA No. 42209, 91-2 BCA ¶ 23,970; Holk Dev., Inc., ASBCA No. 40137, 90-2 BCA ¶ 22,852. But see Hills Materials v. Rice, 982 F.2d 514 (Fed. Cir. 1992); Hemphill Contracting Co., ENG BCA No. 5698, 94-1 BCA ¶ 26,491.
2. Burden on contractor is continuing and applies to requirements arising after contract award. See Shirley Const. Co., ASBCA No. 42954, 92-1 BCA ¶ 24,563 (“It is well established that the Permits and Responsibilities clause requires contractors to comply with laws and regulations issued subsequent to award without additional compensation unless there is another clause in the contract that limits the clause to laws and regulations in effect at the time of award.”).
3. Normally, licensing is a question of responsibility, not responsiveness. See Restec Contractors, Inc., B-245862, Feb. 6, 1992, 92-1 CPD ¶ 154; Chem-Spray-South, Inc., B-400928.2, June 25, 2009, 2009 CPD ¶ 144; Computer Support Sys., Inc., B-239034, Aug. 2, 1990, 69 Comp. Gen. 645, 90-2 CPD ¶ 94. But see Bishop Contractors, Inc., B-246526, Dec. 17, 1991, 91-2 CPD ¶ 555.

4. A contractor assumes the risk of loss or damage to its equipment.¹⁴ In addition, a contractor is responsible for injuries to third persons. See Potashnick Constr., Inc., ENG BCA No. 5551, 92-2 BCA ¶ 24,985; Aulson Roofing, Inc., ASBCA No. 37677, 91-2 BCA ¶ 23,720.
5. A contractor is responsible for work in progress until the government accepts it. See Labco Constr., Inc., ASBCA No. 44945, 93-3 BCA ¶ 26,028; Tyler Constr. Co., ASBCA No. 39365, 91-1 BCA ¶ 23,646; D.J. Barclay & Co., ASBCA No. 28908, 88-2 BCA ¶ 20,741. But see Fraser Eng'g Co., VABCA No. 3265, 91-3 BCA ¶ 24,223; Joseph Beck & Assocs., ASBCA No. 31126, 88-1 BCA ¶ 20,428.

G. Specifications and Drawings. FAR 52.236-21; DFARS 252.236-7001.

1. The omission or misdescription of details of work that are necessary to carry out the intent of the contract drawings and specifications (or are customarily performed) does not relieve a contractor from its obligation to perform the omitted or misdescribed details of work. A contractor must perform as if the drawings and specifications describe the details fully and correctly. See Wood & Co. v. Dep't of Treasury, GSBCA No. 12452-TD, 94-1 BCA ¶ 26,365; Single Ply Sys., Inc., ASBCA No. 42168, 91-2 BCA ¶ 24,032.
2. The contractor must review all drawings before beginning work, and the contractor is responsible for any errors that a reasonable review would have detected. M.A. Mortenson Co., ASBCA 50,383, 00-2 BCA ¶ 30,936, (denying Mortenson's claim based on omissions in construction drawings), But see Wick Constr. Co., ASBCA No. 35378, 89-1 BCA ¶ 21,239.
3. If the specifications contain provisions that conflict with the contract drawings, the specifications govern. The parties may rely on this order of precedence regardless of whether an ambiguity is patent. See Hensel Phelps Constr. Co., 886 F.2d 1296 (Fed. Cir. 1989); Shemya Constructors, ASBCA No. 45251, 94-1 BCA ¶ 26,346; Rohr, Inc., ASBCA No. 44193, 93-2 BCA ¶ 25,871. But see J.S. Alberici Constr. Co v. General Servs. Admin., GSBCA No. 12386, 94-2 BCA ¶ 26,776. Contracts that contain specifications for alternative CLINs are not conflicting. Fort Myer Construction Corporation v. U.S., Fed. Cir. 2000 (unpub. 24 Jan 2000).
4. The government cannot shift the responsibility for defective design specifications to a contractor through the use of a disclaimer. White v.

¹⁴ The contractor may bear similar responsibilities under a Government Furnished Property clause. FAR 52.245-4. See Technical Servs. K.H. Nehlsen GmbH, ASBCA No. 43869, 94-1 BCA ¶ 26,377.

Edsall Const. Co., Inc., 296 F.3d 1081 (Fed. Cir. 2002) (contractor is not obligated to “ferret out” hidden ambiguities and errors in the Government’s specifications and designs.)

H. Liquidated Damages (LDs). FAR 11.502; FAR 36.206; FAR 52.211-12, DFARS Subpart 211.5.

1. The government may assess LDs if:
 - a. The parties intended to provide for LDs;
 - b. Anticipated damages attributable to untimely performance were uncertain or difficult to quantify at the time of award; and
 - c. The LDs bear a reasonable relationship to anticipated government losses resulting from delayed completion.

See K-Con Bldg. Systems, Inc. v. United States, 97 Fed. Cl. 41 (2011) (Contractor failed to establish that the liquidated damages rate of \$551 per day was an unreasonable forecast of the damages that the Government would sustain in the event of contractor’s breach of contract for the design and construction of prefabricated metal building, and therefore, contracted-for liquidated damages clause was enforceable); see also D.E.W., Inc., ASBCA No. 38392, 92-2 BCA ¶ 24,840; Brooks Lumber Co., ASBCA No. 40743, 91-2 BCA ¶ 23,984; JEM Dev. Corp., ASBCA No. 42645, 92-1 BCA ¶ 24,428; Dave’s Excavation, ASBCA No. 35956, 88-3 BCA ¶ 20,911; P&D Contractors, Inc. v. United States, 25 Cl. Ct. 237 (1992).

2. If the damage forecast was reasonable, the government may assess LDs even if it did not incur any actual damages. See Cegers v. United States, 7 Cl. Ct. 615 (1985); American Constr. Co., ENG BCA No. 5728, 91-2 BCA ¶ 24,009. But see Atlantic Maint. Co., ASBCA No. 40454, 96-2 BCA ¶ 28,323. Using a rate from an agency manual that is part of its procurement regulations is presumed reasonable. See Fred A. Arnold, Inc. v. United States, 18 Cl. Ct. 1 (1989), aff’d in part, 979 F.2d 217 (Fed. Cir. 1992); JEM Dev. Corp., ASBCA No. 45912, 94-1 BCA ¶ 26,407.
3. The government may not assess LDs if a project is substantially complete. See Hill Constr. Corp., ASBCA No. 43615, 93-3 BCA ¶ 25,973; Wilton Corp., ASBCA No. 39876, 93-2 BCA ¶ 25,897.
4. The government may not assess LDs if it is partly responsible for the completion delay. See H.G. Reynolds Co., Inc., ASBCA No. 42351, 93-2 BCA ¶ 25,797.

5. A contractor may be excused from LDs if it shows that the delay was: (a) excusable or beyond its control; and (b) without the fault or negligence of it or its subcontractors. See Potomac Marine & Aviation, Inc., ASBCA No. 42417, 93-2 BCA ¶ 25,865; K-Con Bldg. Systems, Inc. v. United States, 97 Fed. Cl. 41, 56 (2011) (“A contractor seeking the remission of liquidated damages on account of excusable delay bears the burden of proving ‘the extent of the excusable delay to which it is entitled.’”) quoting Sauer Inc. v. Danzig, 224 F.3d 1340, 1345 (Fed. Cir. 2000).
 6. Contracting officers must ensure that project completion dates are reasonable to avoid having contractors “pad” their bids to protect against LDs.
 7. Another contract clause that sets an alternate rate of compensation for standby time may be enforceable, even if it is quite high, if it serves a different purpose in the contract than a liquidated damages clause. See Stapp Towing Co., ASBCA No. 41584, 94-1 BCA ¶ 26,465.
- I. Use/Possession Prior to Completion. FAR 52.236-11.
1. The government may take possession of a construction project prior to its completion (beneficial occupancy).
 2. Possession does not necessarily constitute acceptance. See Tyler Constr. Co., ASBCA No. 39365, 91-1 BCA ¶ 23,646. The contractor must complete a project as required by the contract, including all “punch list” items. See Toombs & Co., ASBCA No. 34590, 91-1 BCA ¶ 23,403.
 3. The contractor is not responsible for any loss or damage that the government causes. See Fraser Eng’g Co., *supra*.
 4. The contractor may be due an equitable adjustment if possession by the government causes a delay.

X. CONCLUSION.

ATTACHMENT - DIFFERING SITE CONDITIONS (DSC)

What a Contractor Must Show to Recover for DSCs.

TYPE I	TYPE II
Contract documents either implicitly or explicitly indicate a particular site condition.	Conditions encountered were unusual physical conditions that were not known about at time of contract award.
Contractor reasonably interpreted and relied upon the contract indications.	Conditions differed materially from those ordinarily encountered.
Contractor encountered latent/subsurface conditions that differed materially from the conditions indicated in the contract and were reasonably unforeseeable.	
Contractor incurred increased costs that were solely attributable to the DSC.	Contractor incurred increased costs that were solely attributable to the DSC.
<u>Note:</u> 1. If the government made no representations and provided no information, contractor cannot recover. 2. If the contractor discovers the differing conditions prior to bid opening, reliance is unreasonable.	<u>Examples:</u> unexpected soil conditions, old dump at site, buried hazardous materials

NOTES:

1. DSC clause only covers conditions existing at the time of award. Acts of nature occurring after award are not DSCs.
2. A contractor may not recover if the contractor could have discovered the condition during a reasonable site investigation.
3. Recovery for DSC is not available if the contract does not contain the DSC clause.