



2015

# Construction / Contracting Desk Guide

The Department of Health & Human Services  
Indian Health Service  
Office of Environmental Health & Engineering  
Division of Engineering Services





# Construction Contracting Desk Guide

## IHS/OEHE/Division of Engineering Services

### April, 2015

#### **Introduction:**

The flowcharts and associated texts contained herein are intended to serve as a roadmap for the various acquisition processes conducted by the Division of Engineering Services in accordance with Federal Acquisition Regulations (FAR) and Health and Human Services Acquisition Regulations (HHSAR). The flow charts and associated texts are not intended to articulate each and every step for each process nor is the information contained herein intended to be fully prescriptive in carrying out the duties of the

Contract Specialist/ Contracting Officer. Adhering to the recommendations in the documents that follow and utilizing the file index of samples and templates listed on the DES Shared-Drive as references should guide you through the various acquisition processes in a compliant and efficient manner.

Any questions can be directed to the DES Senior Contracting Officers:

Paul Reed at [Paul.Reed@ihs.gov](mailto:Paul.Reed@ihs.gov), 206-615-2504, or  
Ken Truesdale at [Kenneth.Truesdale@ihs.gov](mailto:Kenneth.Truesdale@ihs.gov),  
214-767-3934.



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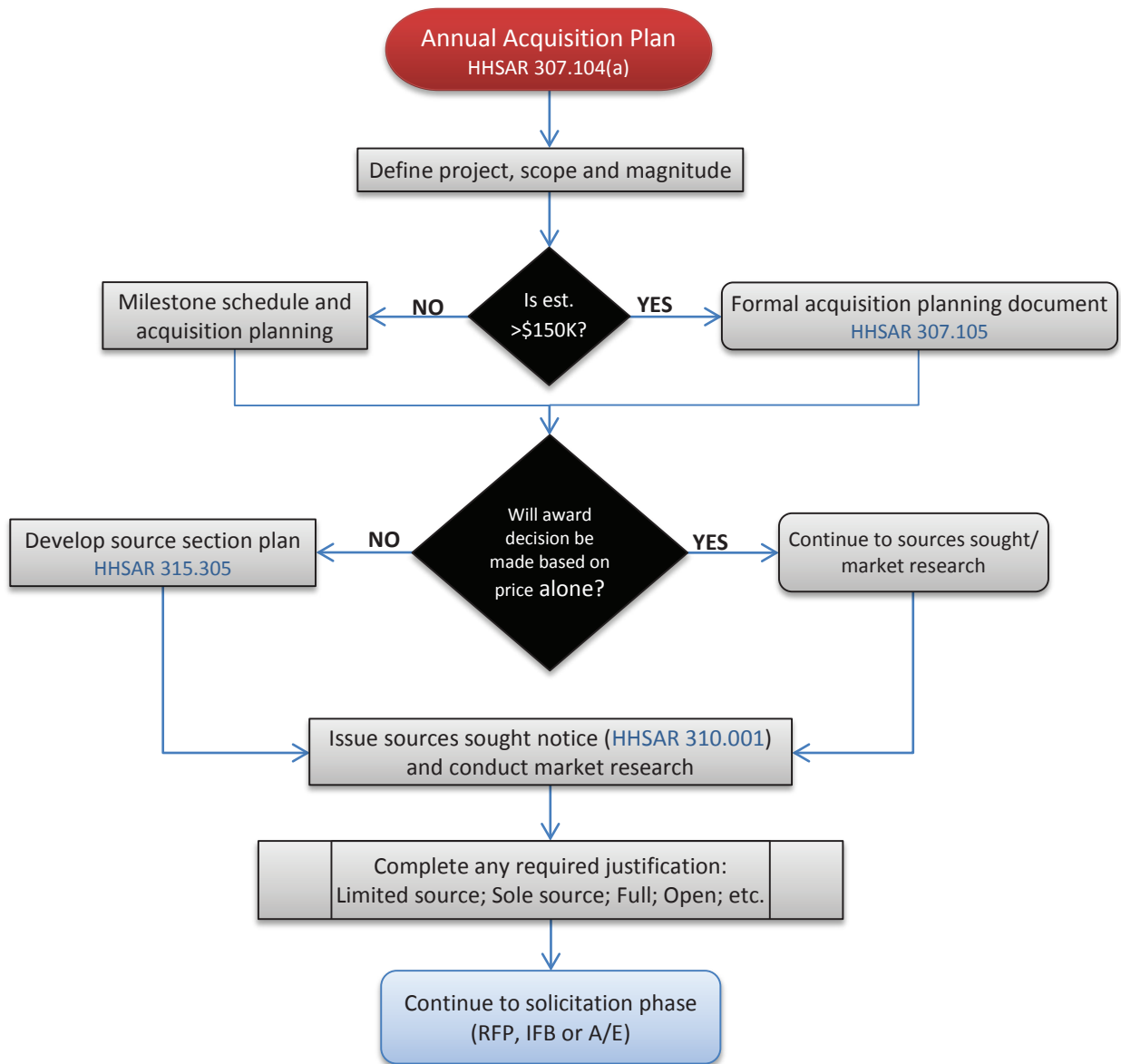
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## Abbreviations Used Throughout This Document

- |  |  |
|--|--|
| (1) Chief of the Contracting Office – CCO    | (9) Technical Evaluation Board – TEB         |
| (2) Contract Specialist – CS                 | (10) Technical Evaluation Plan – TEP         |
| (3) Contracting Officer – CO                 | (11) Design Build – DB                       |
| (4) Contracting Officer Representative – COR | (12) Independent Government Estimate – IGE   |
| (5) Contract Review Board – CRB              | (13) Request for Contract – RFC              |
| (6) Invitation for Bid – IFB                 | (14) Simplified Acquisition Procedures – SAP |
| (7) Project Manager – PM                     | (15) Source Selection Authority – SSA        |
| (8) Request for Proposal – RFP               |  |

Pre-Solicitation





# Pre-Solicitation Phase

## IFBs and RFPs

### (Not Applicable to A-E Services)

#### 1. Annual Acquisition Plan –

The annual acquisition plan (AAP) is a listing of planned acquisitions identified by the program offices and DES compiled as required by HHSAR 307.104(a). This list of requirements includes projects planned by the Areas and Headquarters that are planned for completion by DES. The list is maintained by the CCO and is updated quarterly to help DES accurately and efficiently plan how contracting actions will be completed. New construction is dictated by priority and funding, others as determined by the program office's established procedures depending upon the source of funding. Architecture/Engineering requirements are a direct derivative of prioritized construction needs.

#### 2. Is the planned acquisition greater than \$500,000?

- a. Yes – A formal Acquisition Plan (reference HHSAR 307.7101) is required to be completed. The assigned CS initiates contact with the PM or other cognizant program representative to begin acquisition planning for the specific requirement.
- b. No – the CS and PM work together to complete a milestone plan for completing all pre-award activities to ensure all required pre-award requirements are met and contract award is made timely to meet the program's needs. The level of acquisition planning aside from the milestone schedule should be commensurate with the scope and magnitude of the acquisition. For example, the pre-award activities (Request for Contract through Contract Award) for a simple sealed bid project with a clear set of specifications has significantly less schedule risk than a more complex, best value acquisition with design elements.

#### 3. Will award decision be made based on price?<sup>2</sup>

- a. Yes – If the award decision will be based on price and price related factors only, Sealed Bidding procedures (FAR Part 14) shall be followed. Therefore, a formal source selection plan is not required.

Procurements that are typically competed following sealed bid procedures include detailed, government provided specifications that allow for contract award without the need for discussions. The size, scope and complexity of projects that should be competed utilizing sealed bid procedures are ones that are considered to have low performance risk and can be completed satisfactorily by responsible construction contractors. Sealed bid procedures are an established and proven method for obtaining maximum competition in a very efficient manner.

An IFB shall be issued when following sealed bid procedures and award is typically made to the lowest priced, responsive, responsible bidder.

- b. No – If the award decision will include technical and price tradeoffs (best value), Contracting by Negotiation procedures (FAR Part 15) shall be followed. A best value award decision is one that considers a tradeoff between technical merit and price related factors. Procurements that are typically competed following Contracting by Negotiation procedures are large, complex projects that have a medium to high level of performance risk. Procurements of this type may require discussions and clarifications of an offeror's proposal. Due to the level of performance risk, it may not be in the Government's best interest to award a contract to the lowest priced offeror. The Government must consider tradeoffs between technical capability, past performance, and price when reaching a contract award determination resulting in the best overall value to the Government. A RFP will be issued when contracting by negotiation and a formal source selection plan, including the development of technical evaluation criteria and evaluation approach, must be developed as required by HHSAR 315.305. A TEB shall be developed to evaluate proposals in accordance with the terms and conditions included in the solicitation. The technical evaluation criteria need to be directly

<sup>2</sup> FAR Part 13, Simplified Acquisition Procedures (SAP), should be used when the estimated amount of the acquisition is less than the Simplified Acquisition threshold. The award decision can be based on price alone or can be based on a combination of price and non-price factors (FAR 13.106-2).

related to the scope of work and it is DES policy to use adjectival ratings rather than numerical ratings and rankings. This approach is intended to reduce the risk of sustainable protests.

A majority of members (more than 50%) of the technical evaluation panel must have completed the HHS PM training (see HHSAR 315.305(a)(3)(ii) (A)(3)), and the members of the evaluation board should remain as consistent as possible throughout the process. However, all proposals should be evaluated by the same evaluators.

#### **4. Issue Sources Sought Notice**

It is standard ES practice to issue a sources sought notice to help decide which socio-economic set-aside is most appropriate for the acquisition. The set-aside decision is based on market research conducted. Market research includes but is not limited to responses to the sources sought notice, recent acquisition history, Internet searches, program office input, SBA input, etc. Further, the set-aside decision should take into consideration the status of IHS meeting its established socio-economic set aside goals. When conducting market research, it should be noted by the CS that the IHS has special authority under the Buy Indian Act to set aside acquisitions for Indian-Owned firms.

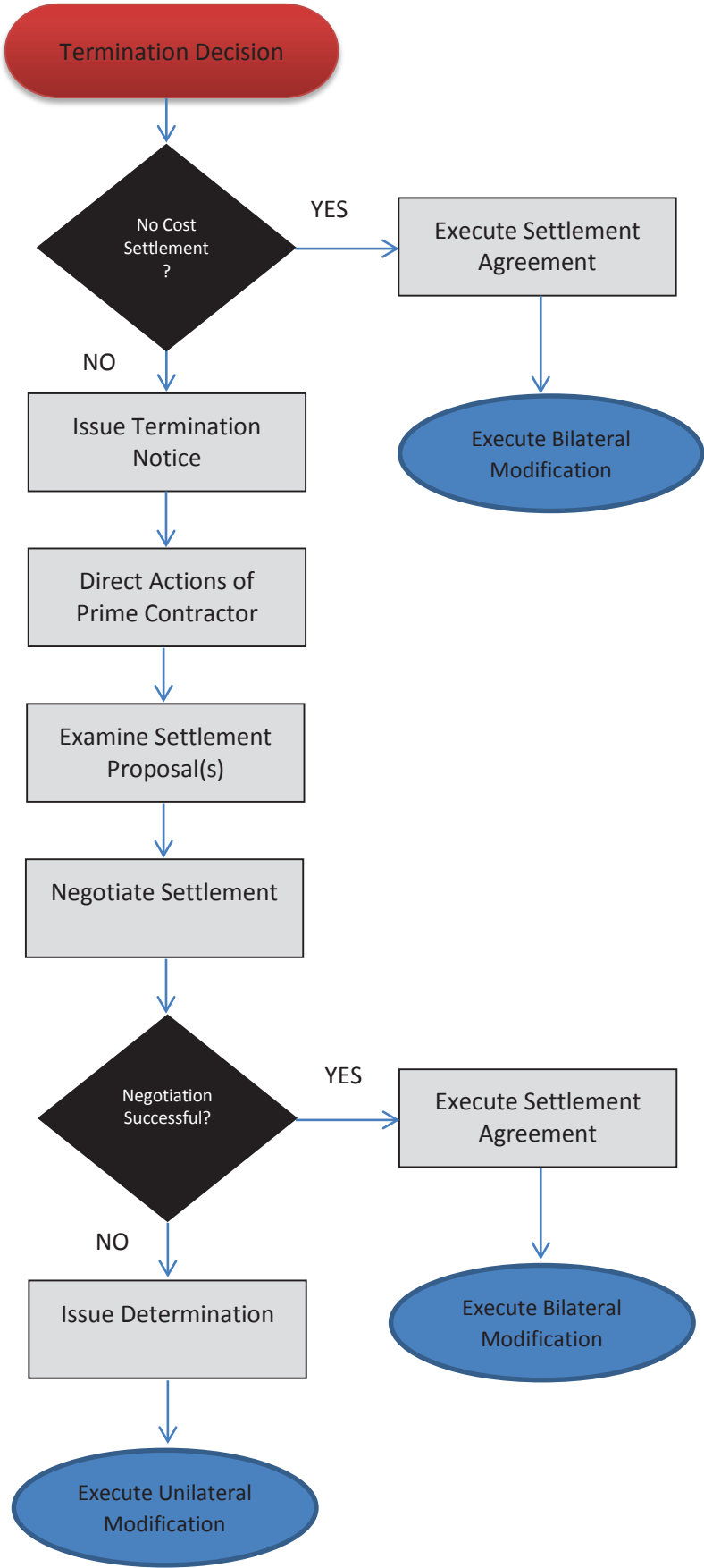
#### **5. Complete any required justifications**

If there is a basis for limiting competition beyond a standard small business or small disadvantaged business set-aside, e.g., only one source, unusual and compelling urgency, etc., FAR Part 6 and HHSAR Part 306 provide the regulatory bases and direction for completing the required justification and approval memoranda. The stated citations (FAR Part 6 and HHSAR Part 306) address applicability, approval thresholds, and minimum information that is required to support limited competition as well as the necessary content and structure of the required Justification and Approval Memoranda.

FAR Part 19 addresses the set-aside basis for any procurement that will be competed. These procurements include those that are subject to full and open competition or any variation of a small business set-aside. It should be noted that no socio-economic set-aside group takes precedence over any other socio-economic set-aside group (parity rule). As of the date of publication of this desk guide, "Indian-Owned" is not a recognized socio-economic group and annuals goals for setting aside acquisitions for Indian Owned firms are not established. It is advisable to review the IHS set-aside goals for each socio-economic group when making the determination to insure that IHS small business goals are being addressed and met.

#### **6. Continue to RFP, IFB or A-E Solicitation Phase**





# Request for Proposal (RFP)-Solicitation

## FAR PART 15 – Contracting By Negotiation

### 1. Project Submittal Package required from Project Manager

A complete Request for Contract (RFC) includes a complete design or performance specification<sup>3</sup>, an independent government estimate (IGE) supported by appropriate backup, evidence of fund availability (identification of accounting information and signature by an authorized program individual or an approved requisition), calculation of liquidated damages (if applicable), completed RFC boilerplate document, proposed price schedule (additive, deductive, including method of price evaluation), option justification (if applicable), list of government furnished property (if applicable), recommended evaluation criteria, completed acquisition planning document<sup>4</sup>, completed technical evaluation plan, and names of suggested TEB members. Evidence of certification or training certificates<sup>5</sup> must be submitted for each proposed panel member. It shall be assumed that the CS and/or CO have worked with the program staff in the formulation of all required documentation listed herein during the planning stage of the project. If program staff has not engaged contracting staff prior to submittal of the listed documents, the packet shall not be considered complete until contracting staff has reviewed all documents and program staff has incorporated or addressed all comments. A milestone plan shall be developed in conjunction with the program in order to effectively plan and efficiently execute the procurement.

### 2. Prepare draft RFP and FedBizOpps Synopsis

The draft RFP shall contain the draft solicitation in Uniform Contract Format (UCF) with all applicable, updated clauses. The draft shall include all project specific information, which includes, but is not limited to the following: RFP due date; set-aside status; finalized Price Schedule; finalized Statement of Work/Specification; Period of Performance; Liquidated Damages (if applicable); progress payment time frames (if extended from 14 days); Government Furnished Material (if applicable); Government Furnished Equipment (if applicable); Mag-

nitude of Construction Range (FAR 36.204); Instructions to Offerors; Evaluation Criteria, and Award Basis. Instruct offerors that all questions must be submitted in writing via email to the contract specialist's attention.

- a. Synopsise in FedBizOpps – All requirements exceeding \$25,000 must be advertised for a minimum of fifteen (15) days at the Government Point of Entry ([www.fbo.gov](http://www.fbo.gov)) prior to solicitation issuance. Proceed to synopsise the requirement in accordance with FAR Part

5.207 while preparing the draft RFP. The synopsis content should be coordinated with the supporting program and shall be reviewed by the CCO prior to posting in FedBizOpps. In addition to the requirements included at FAR 5.207, at a minimum the synopsis shall include the following: expected date of solicitation issuance, set-aside status, NAICS and the anticipated Notice to Proceed and completion dates. For construction, the estimated price range shall be indicated in the synopsis per FAR 36.204. The synopsis must be posted for a minimum of 15 days prior to the posting of the solicitation in FedBizOpps.

### 3. Does the Cost Estimate Exceed \$500,000?

- a. Yes – A Contract Review Board shall be convened in accordance with DES Office policy (reference current Engineering Services “Contract Review Board (CRB) Procedures”).
- b. No – Provide the draft solicitation to the ES Seattle CCO or ES-Dallas CCO for review and comment.

### 4. Develop and finalize Technical Evaluation Plan (TEP)

The TEP shall contain instructions to the TEB members regarding how offers received shall be evaluated. The TEP shall contain the evaluation criteria included in the solicitation, means of rating (adjectival), the definitions of evaluation criteria, the definitions of a strength, weak-

<sup>3</sup> with appropriate stamp/seal, see Indian Health Manual Part 3, Chapter 24; reference [http://www.ihs.gov/ihtm/index.cfm?module=dsp\\_ihm\\_pc\\_p3c24](http://www.ihs.gov/ihtm/index.cfm?module=dsp_ihm_pc_p3c24)

<sup>4</sup> (if applicable; reference <http://dhhs.gov/asfr/ogapa/acquisition/policies/worktool.html#AquisitionTemplates>)

<sup>5</sup> At least 50 percent of the HHS personnel on a TEB shall have successfully completed HHS University's “Basic Contracting Officer's Technical Representative” course or an equivalent course within 4 years before assuming their designated role.

ness, or deficiency, and shall be signed by the contract specialist, CCO, and the program shall concur with its content. The TEP is a critical document that establishes the ground rules for how evaluators are to complete their tasks and adhering to the TEP is the best way to insure the best value is realized and a protest will not be sustained.

#### **5. Finalize RFP as a solicitation**

All CRB and CCO review comments must be incorporated into the solicitation in order for it to be considered final.

#### **6. Post solicitation in FBO**

After ensuring the requirement has been synopsized for at least 15 days, the solicitation can be released to FBO. The solicitation must be posted for a minimum of 30 days. For complex projects or projects exceeding \$500,000, more than 30 days is typically allowed for offeror review of plans and specs. Work with the program to determine if 30 days is sufficient prior to posting the solicitation. For requirements estimated to be under \$150,000, a “reasonable” amount of time must be allowed for posting.

#### **7. If questions, do they warrant amendments?**

All questions and answers must be documented in the contract file.

There is no disadvantage to including all questions and answers in amendments. Failure to include a question and answer in an amendment (even if posted in a public forum) may limit the Government’s ability to enforce the Government’s response. All technical questions shall be presented to the program for their input and a written response must be provided to the contract specialist. The decision to include a question in an amendment is a subjective one. Always consult the CCO if you are unsure. Amendments shall be posted timely as the time frames for proposal submission are necessarily limited and transmission of information is critical to cost estimators. If questions are received that will require additional time for offerors to prepare their proposals, the time for proposal submission shall be extended via the amendment process. All time extensions shall be considered but shall not be granted unless there is a compelling reason, based on the actions or inactions of the Government, to grant one.

- a. Yes – Include an exact copy of the questions posed (even if grammatically incorrect) and answers in the amendment. The amendment shall be reviewed by the CCO prior to posting in FedBizOpps. See

following section.

- b. No – Provide necessary feedback to the inquiring contractor in any appropriate form (phone call, email, letter, etc.).

#### **8. Prepare and post amendment in FBO**

Amendments must be posted at the Government Point of Entry (FedBizOpps) prior to submission of proposals. If an amendment is necessary after the due date and the time for proposals has passed, the amendment is only distributed to offerors who have submitted timely proposals. As stated above, questions must be submitted in writing to the attention of the contract specialist. If a potential offeror calls the contract specialist with a question that is meaningful (i.e. could potentially impact an offer), the CS shall inform the caller to submit the question in writing so that it can be answered formally. Amendments must be issued on a SF-30. If an amendment is to extend the due date and time for offerors, be sure to check the correct box in Box 11 of the SF30. Clear/concise answers are critical when issuing an amendment. Failure to provide clear answers will result in additional questions or misunderstood requirements. It is recommended the PM be consulted on all questions and be given the chance to review the amendment prior to its posting.

#### **9. Receive and login Proposals: Prepare Evaluation material for Technical Evaluation Board (TEB); Minimum Eligibility Review; Responsiveness to Solicitation Requirements**

Proposals shall be time stamped upon receipt and placed in a controlled area until the due date and time for proposal submission. Each proposal shall be recorded on Optional Form 1419, Abstract of Offers – Construction. The CS will review each response and determine responsiveness based on what has been provided and when it was received. A responsiveness check will include whether the offer is signed, the offeror is registered in the System for Award Management<sup>6</sup> (<https://www.sam.gov/portal/public/SAM/>), whether a bid bond has been provided by a surety included on the US Treasury’s List of Approved Sureties (if required), all elements of the technical proposal has been included, the price schedule is complete, etc. If the CS determines a proposal submission to be materially deficient with respect to the requirements of the solicitation, the proposal will be rejected and the TEB will not be required to evaluate the proposal. Offerors submitting materially deficient proposals are to be notified in writing (scanned, emailed letter

<sup>6</sup> <https://www.sam.gov/portal/public/SAM/>

is preferred to establish a record of the communication) within three days of the determination that their proposal will not be considered for award.

#### **10. Separate price information from technical proposal; retain price information; distribute technical proposals to the TEB**

The CS will separate all pricing information from the technical proposal. The TEB shall not be privy to pricing until the technical evaluations have been completed. Technical proposals shall then be provided to the Chair of the TEB for distribution to its members. The contract specialist and/or contracting officer shall convene the TEB to lead a kick off meeting to explain the roles and responsibilities of each TEB member. TEB participation is mandatory. The TEP shall be distributed to all members at this meeting along with evaluation sheets where the TEB members can include all comments and provide ratings in accordance with the TEP. The contract specialist shall distribute, discuss, and collect signed non-disclosure statements, and financial conflict of interest statements from each member of the TEB.

#### **11. TEB convenes w/Contract Specialist oversight; Evaluates technical proposals (FAR 15.404-1)**

The TEB will proceed to evaluate the technical proposal in accordance with solicitation and TEP requirements. The contract specialist shall remain available as an advisor should any questions rise during the technical evaluation process. TEB consensus discussions shall be coordinated with the TEB Chair and CS. If all parties (TEB and CS) are not co-located, the discussions will be held with the group telephonically or via tele-video.

#### **12. Contract Specialist evaluates Business/Price Proposal (FAR 15.4)**

While the TEB is evaluating the technical proposals, the contract specialist will ensure submitted offers are responsive to solicitation requirements and prices are fair and reasonable. The CS shall ensure there are no mathematical errors in the cost or pricing information provided by each offeror. The determination of price reasonableness shall be made in accordance with the requirements of the solicitation and FAR 15.404-1. The CS shall document the basis for the determination of price reasonableness. The contract specialist shall ensure that the bid bond submitted by the offerors are included on the US Treasury's List of Approved Sureties<sup>7</sup>, and that the bond meets all requirements by completing the bond checklist included in the DES-Shared-Drive list

of samples and templates.

The CS shall ensure that offerors are registered and active in the System for Award Management<sup>8</sup> and are currently eligible to receive award of a federal contract. If any offeror is found to be non-responsible, that offer must be rejected.

#### **13. Clarifications or communications**

Clarifications are limited exchanges between the government and offeror that may occur when award without discussions is contemplated. Always consult with the CCO prior to engaging in clarifications with an offeror. If clarifications cross the line into discussions and the government awards a contract without conducting discussions with all offerors, any protest received is likely to be sustained. Communications are exchanges, between the government and other offerors, after receipt of proposals, leading to the establishment of the competitive range. Communications are held when it is unclear whether an offeror should be included in the competitive range. Thoroughly review FAR 15.306(b) and consult the CCO prior to holding communications with any offeror. The CCO should always be briefed if clarifications or communications are to be held with an offeror(s).

#### **14. Discussions or negotiations (FAR 15.405)**

Discussions/negotiations are the exchanges that take place between the government and offerors after the establishment of the competitive range. A pre-negotiation position should be developed and approved by the CCO prior to developing the competitive range and entering into discussions. Discussions must be meaningful and must identify all significant weaknesses, adverse past performance, and deficiencies to each offeror in the competitive range. The purpose of discussions is to maximize the best value to the government. Discussions are very formal and all offerors must be engaged in the same manner (verbal, written, etc.). It is preferred that discussions be performed in writing in order to have a formal, documented record of the exchange. At the conclusion of discussions, the CS shall request final proposal revisions giving each offeror one final chance to revise their proposals. All offerors must be given a common date/time for submission of final proposal revisions. FAR 15.306(c) and 15.306(d) discuss this process in detail. If an offeror is not included in the competitive range or is otherwise eliminated from the competition, that offeror shall be notified in writing that they have been eliminated from the competition and no further revisions to that offeror's proposal will be considered. (FAR 15.307)

<sup>7</sup> Treasury Circular 570 - <http://www.fms.treas.gov/c570/c570.html>

<sup>8</sup> <https://www.sam.gov/portal/public/SAM/>

### **15. Documenting Discussions/Negotiations**

After receipt of Final Proposal Revisions, the TEB shall make any necessary changes to the technical evaluation report and shall finalize it. The CS shall document the principal elements of the discussions/negotiations to the contract file as required in FAR 15.406-3.

### **16. Trade off analysis of technical and price**

This is essentially an assessment of each proposal against the evaluation criteria and how it relates to price. Depending on the tradeoff listed in the solicitation (technical capability is more important than price; technical capability is approximately equal in importance to price; price is more important than technical capability), this discussion is critical to the best value determination. If award is to be made to an offeror with outstanding technical capability and a higher price than other acceptable offerors, this explanation must detail why it is in the government's best interest to award to the higher priced offeror (i.e. reduced performance risk, reduced schedule risk, etc.). This document will be one of the main instruments in any protest decision. This document is prepared by the TEB chair after final proposal revisions have been received, the technical evaluation report has been finalized, and prices have been revealed to the TEB. The Source Selection Authority (typically the CO) has the ability to overrule the best value determination put forth by the TEB.

### **17. Best Value recommendation**

The best value recommendation is a direct result of the tradeoff analysis of technical and price. This is prepared by the contract specialist as part of the Negotiation Memorandum and is reviewed by the CCO if the award is to exceed \$150,000. A tradeoff analysis for an award exceeding \$500,000 shall be approved by the CCO.

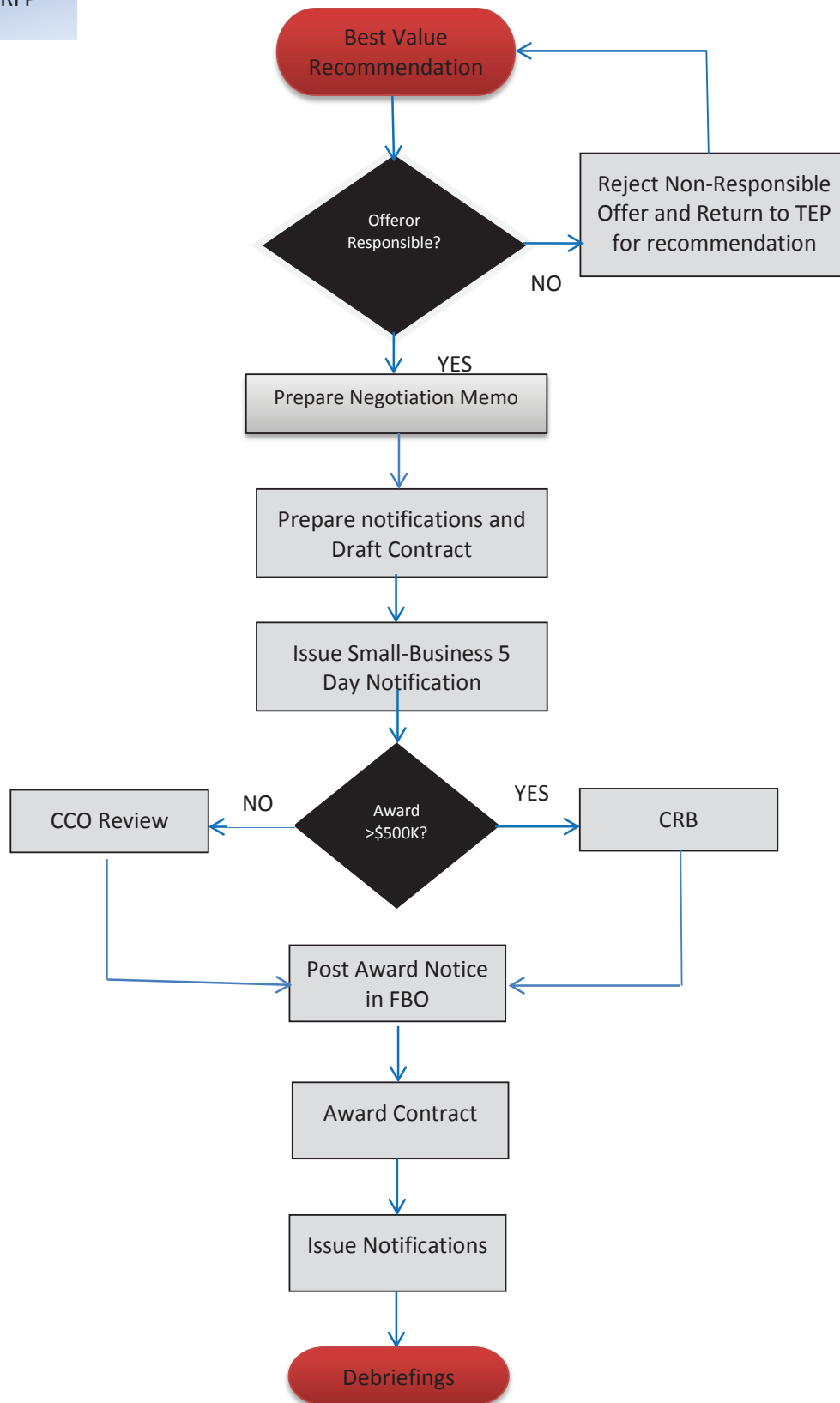
### **18. Award Process:**

Proceed to RFP Award Process instructions.





Award Process - RFP



# Award Process

## FAR PART 15 – Request for Proposals

### **1. Best Value Recommendation from the Technical Evaluation Panel**

Refer to the RFP Solicitation Section 17 for a discussion of the Best Value Recommendation.

### **2. Determine Responsibility of Offeror Selected for Award**

The System for Award Management (SAM) must be checked prior to making award to ensure the recommended Offeror is still eligible for award of federal contracts.

If the offeror recommended for award is found to be non-responsible, that offer must be rejected and the TEB reconvened. The TEB shall then make a new recommendation for award and the steps in the above paragraph shall be repeated.

### **3. Summary of Negotiations**

All required information shall be consolidated into the Negotiation Memorandum in accordance with HHSAR 315.372 and approved DES procedures prior to making award. The Negotiation Memorandum shall be submitted to the CRB if the contract award amount exceeds \$500,000 (see paragraph 5 below). All Negotiation Memoranda shall be reviewed and signed by both the contract specialist and the CCO prior to award of the contract.

### **4. Issue Small-Business 5 Day Notification**

If the acquisition is set-aside for any category of small business concerns, the CS must provide a notice of intent to award to all unsuccessful offerors. The notice shall be distributed at least five business days prior to contract award and must include the name of the apparently successful offeror (see FAR 19.302(d) (1)). The purpose of this notice is to allow time for the unsuccessful offerors to protest the size status of the apparently successful offeror. The letter does not provide any evaluation information (no reference to price shall be included) nor does it offer the unsuccessful offerors the opportunity for a debriefing. If a small business protest is received, immediately refer to FAR 19.302 prior to proceeding with the next section “Prepare Notifications and Draft Contract.”

### **5. Prepare Notifications and Draft Contract**

The notifications include:

- Draft FedBizOpps (FBO) award notice
- Award notification to unsuccessful offerors
- COR Appointment Memorandum
- Tribal Employment Rights Office (TERO) Liaison Notification (if applicable)
- SBA Small Business Subcontracting Plan Notification (if applicable)(Reference FAR 19.705-6)
- Congressional Notification (if applicable (Reference FAR 5.303))

In drafting the contract award, ensure that solicitation amendments, identification of key personnel, and any other issues addressed during negotiation are included in the award alterations page as necessary. Templates of all listed documents can be found on the DES-Shared Drive <sup>10</sup>

### **6. Does the Award amount Exceed \$500,000?**

- a. Yes – A CRB shall be convened in accordance with DES Office policy (reference “Contract Review Board (CRB) Procedures” dated December, 2011). The award document, negotiation memorandum and any other required documentation of award shall be included in the package submitted to the CRB for review and comment.
- b. No – Provide the award document, negotiation memorandum and any other required documentation of award to the CCO for review and comment.

### **7. Post Award Notice in FBO**

The contract specialist must post a notice of award in FedBizOpps no later than three days from the date of contract award. The notice must be reviewed by the CCO or responsible CO prior to its posting.

### **8. Award Contract**

The CCO or responsible CO shall sign the contract and the CS shall send notice of award along with the signed contract document to the successful offeror.

### **9. Issue Notifications**

<sup>10</sup> url TBD

Distribute/post all other notifications identified in paragraph 4 above. The unsuccessful notices shall be signed by the CCO or responsible CO and must be sent no later than three days after award of the contract.

#### **10. Debriefings**

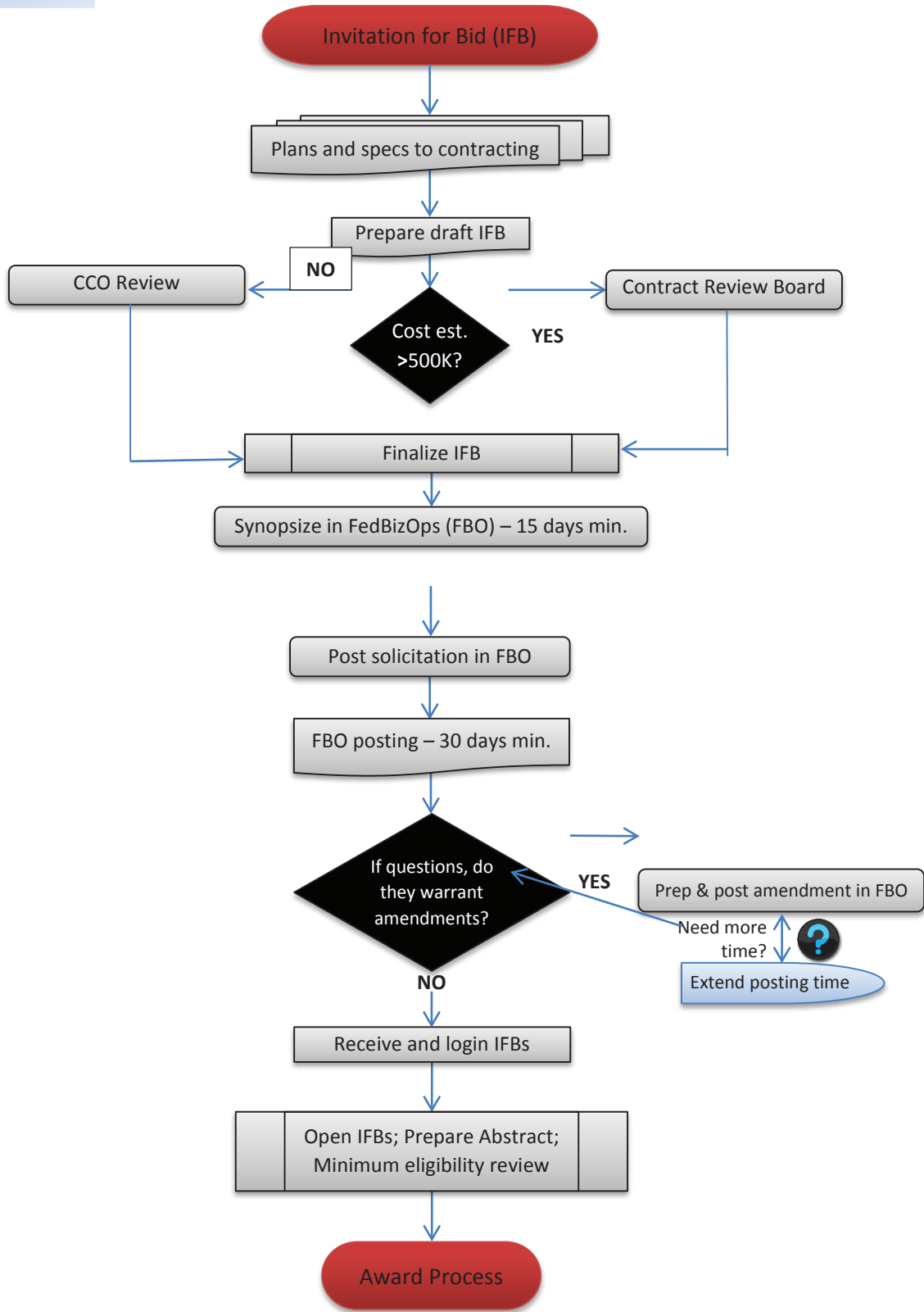
Post-award debriefings shall be conducted in accordance with FAR 15.506. Requests for debriefings must be made by unsuccessful offerors within three days of notification of contract award. Timely requests for debriefings must be honored and shall be provided either in writing or orally at the discretion of the CO. The decision on the method of debriefing delivery (written or oral) should be discussed with the CCO. The TEB chair, CS and CCO should participate in all oral debriefings. Should a debriefing be provided in writing, it shall be prepared by the CS in conjunction with the TEB chair and shall be reviewed and signed by the CCO. If a request for a debriefing is untimely, immediately bring the request to the attention of the CCO prior to responding to the requestor in order to determine if a debriefing shall be offered.

#### **11. Invitation for Bids (IBF)-Solicitation**

Proceed to Invitation to Bid (IFB)-Solicitation



IFB - Solicitation



# Invitation for Bids (IFB)-Solicitation

## FAR PART 14 – Sealed Bidding

### 1. Plans and Specs to Contracting

A complete request for contract includes a complete design or performance specification (with appropriate stamp/seal, see Indian Health Manual Part 3, Chapter 24), an independent government estimate (IGE) supported by appropriate backup, evidence of fund availability (an approved requisition or identification of accounting information and signature by an authorized individual), calculation of liquidated damages (if applicable), completed solicitation boilerplate document, proposed price schedule (additive, deductive, including method of price evaluation), option justification (if applicable), list of government furnished property, completed acquisition planning document (if over \$150,000). It shall be assumed that the CS and CO have worked with the program staff in the formulation of all required documentation listed herein during the planning stage of the project. If program staff has not engaged contracting staff prior to submittal of the listed documents, the packet shall not be considered complete until contracting staff has reviewed all documents and program staff has incorporated or addressed all comments. The milestone schedule, created during the acquisition planning phase, must be updated as necessary. Market research and execution of the HHS 653 shall be completed upon receipt of the information required by this paragraph.

### 2. Prepare Draft IFB and FedBizOpps Synopsis

The draft IFB shall contain the draft solicitation in Uniform Contract Format (UCF) with the appropriate coversheet (SF 33 or SF 1442) with all applicable, updated clauses. If the IFB is for a commercial item, the UCF is not used and the cover sheet utilized is the SF 1449. The draft shall include all project specific information, most of which is included in the boilerplate solicitation document edited by the program office, which includes, but is not limited to the following: IFB due date; set aside status; finalized Price Schedule; finalized Statement of Work/Specification; Period of Performance; Liquidated Damages (if applicable); progress payment time frames (if extended from 14 days); Magnitude of Construction range (FAR 36.204); Government Furnished Material and/or property (if applicable); and Government Furnished Equipment (if applicable). Instruct interested bidders that all questions must be submitted in writing via email to the CS' attention. It is advisable to remind

bidders to clearly identify the outermost envelope or wrapper of the due date and time for receipt of bids and the IFB number.

- a. Synopsise in FedBizOpps – All requirements exceeding \$25,000 must be advertised for a minimum of fifteen (15) days at the Government Point of Entry ([www.fbo.gov](http://www.fbo.gov)) prior to solicitation issuance. Proceed to synopsise the requirement in accordance with FAR Part 5.207 while preparing the draft IFB. The synopsis content should be coordinated with the supporting program and shall be reviewed by the Chief of the Contracting Office prior to posting in FedBizOpps. In addition to the requirements included at FAR 5.207, at a minimum the synopsis shall include the following: expected date of solicitation issuance, set-aside status, North American Industrial Classification System (NAICS) code and the anticipated Notice to Proceed and completion dates. For construction, the estimated price range shall be indicated in the synopsis per FAR 36.204. The synopsis must be posted for a minimum of 15 days prior to the posting of the solicitation in FedBizOpps.

### 3. Does the Cost Estimate Exceed \$500,000?

- a. Yes – A Contract Review Board shall be convened in accordance with DES Office policy (reference “Contract Review Board (CRB) Procedures” dated December, 2011).
- b. No – Provide the draft solicitation to the Chief of the Contracting Office for review and comment.

### 4. Synopsise in FedBizOpps

Proceed to synopsise the requirement in accordance with FAR Part 5.207. The synopsis content should be coordinated with the supporting program and shall be reviewed by the Chief of the Contracting Office prior to posting in FedBizOpps. In addition to the requirements included at FAR 5.207, at a minimum the synopsis shall include the following: expected date of solicitation issuance, set-aside status, and the anticipated Notice to Proceed and completion dates. For construction, the estimated price range shall be indicated in the synopsis per FAR 36.204. The synopsis must be posted for a minimum of 15 days prior to the posting of the solicitation in FedBizOpps.

## 5. Finalize IFB

All CRB and CCO review comments must be incorporated into the solicitation in order for it to be considered final.

## 6. Post solicitation in FedBizOpps

The solicitation must be posted at the Government Point of Entry (FedBizOpps) website for a minimum of 30 days. For complex projects or projects exceeding \$500,000, 30 days may not be sufficient to allow for bidder review of plans and specs. Coordinate with the program official to determine the amount of time necessary to prepare a bid for the work described in the solicitation. For requirements estimated to be under \$150,000, a “reasonable” amount of time must be allowed for posting. The amount of time considered reasonable should be coordinated with the PM.

## 7. If questions, do they warrant Amendments?

Note: Failure to include a question and answer in an amendment, regardless of posting, may limit the Government’s ability to enforce the information provided in the solicitation phase of the acquisition during contract administration. All technical questions shall be presented to the PM for their input. Amendments shall be posted timely as the time frames for bid submission are limited and transmission of information is critical to estimators. If questions are received that will require additional time for bidders to prepare their bids, the time for bid submission shall be extended by the amendment process. All requests for time extension shall be considered but shall not be granted unless there is a compelling reason caused by the Government (including clarification of information previously provided) to grant one.

Note: It is DES policy to include all questions posed by offerors and answers provided by the Government in an amendment to the solicitation.

- a. Yes – Include an exact copy of the questions posed (even if grammatically incorrect and acknowledgment of the error by use of the term [sic] in the amendment) and answers in the amendment. The amendment shall be reviewed by the CCO prior to posting in FedBizOpps. See following section.
- b. No – Provide necessary feedback to the inquiring bidder in any appropriate form (phone call, email, letter, etc.).

## 8. Prepare and post amendment in FBO

Amendments must be posted at the Government Point of Entry (FedBizOpps) prior to the due date for submission of bids. If an amendment is necessary after the due date and time for bids has passed, the amendment is only distributed to bidders who have submitted timely bids. If a potential bidder calls the CS with a question that is

meaningful (i.e. could potentially impact a bid), the CS shall inform the caller to submit the question in writing so that it can be answered formally. The CS will ensure the conversation is documented in the contract file. Amendments must be issued on an SF-30. If an amendment is to extend the due date and time for bidders, check the correct box in Box 11 of the SF30. Clear/concise answers are critical when issuing an amendment. Failure to provide clear answers will result in additional questions or misunderstood requirements. The COR should be given the chance to review the amendment prior to its posting.

## 9. Receive, Open Bids and Prepare Abstract

The contract specialist is responsible for receiving and time stamping all bids in order to ensure that the bid was received prior to the scheduled opening date and time. The contract specialist should coordinate with office administrative staff to ensure they are aware when bids are due and a bid opening is going to occur. The contract specialist shall recruit the services of a “recorder” (usually another contract staff member) to record bids. The contract specialist should contact the mail room or central depository approximately 10 minutes before bids are to be opened in order to ensure all bid packages have been delivered to the contracting office.

Bids shall be opened in a public forum, usually in the contracting office’s conference room. The contract specialist shall ensure there is public access to the room where the bids will be opened. If the contracting office is in a secure building, the contract specialist shall ensure bid opening dates and times are coordinated with building security and shall include requirements for building access in the solicitation.

The contract specialist shall prepare a bid abstract by utilizing the SF-1409 and SF-1410 (if necessary) to prepare for the bid opening. The contract specialist shall ensure there is a clock in the room where bids are to be opened and the time is correct. When the required time for submission of bids has passed, the contract specialist shall announce that no more bids will be accepted and shall proceed to open the bids while the recorder records the bids received on the bid abstract form(s). The contract specialist shall announce if each bid is responsive during opening; that all amendments have been acknowledged and required bid bond is included. At the conclusion of opening and recording of bids, the contract specialist shall identify the apparent low bidder and inform all attendees that a formal award notice will be sent upon completion of award documents. **Any late bids that are received will be date stamped and marked as late and remain unopened.**

Note: As a general rule, it is ill advised to have bid



openings on Mondays or Fridays. Most importantly, the contract specialist must be very cognizant of the duties required to receive bids contained in FAR Subpart 14.3.

#### **10. Minimum Eligibility Review**

The CS will review the bid packages to ensure that the abstract is annotated correctly, that the bid is signed, that any bid bonds has been provided by a surety included on the US Treasury's List of Approved Sureties (if required), pull the contractor's SAM.gov record (to include the Exclusion List information). Annotate any concerns in the file.

If bids appear to be to be so inconsistent with each other or the government estimate that price competition has not been received, immediately consult with the CCO. If only one bid is received in response to the solicitation immediately consult with the CCO.

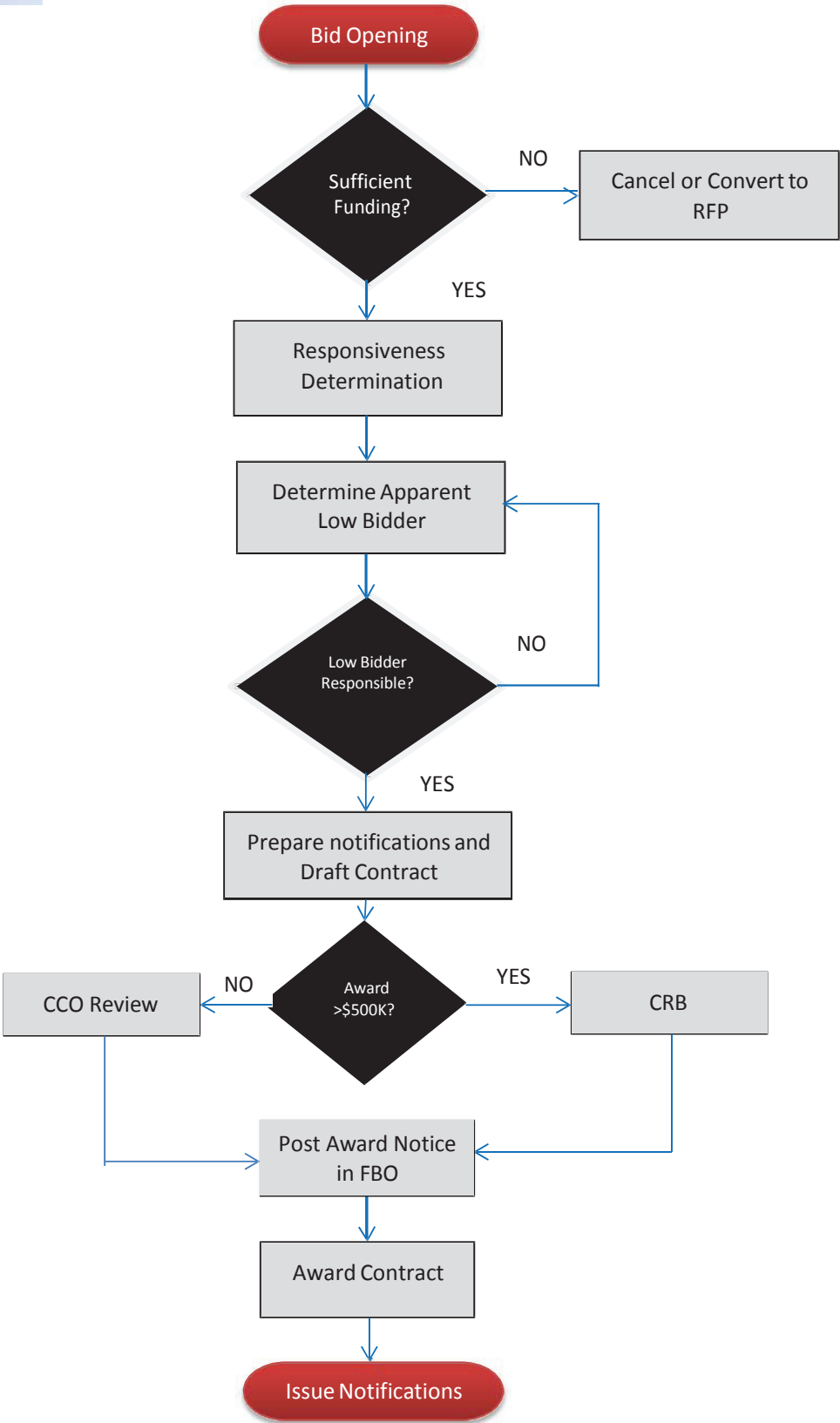
If the acquisition is a small business set-aside, contract award cannot be made for at least five business days after bid opening to allow for small business challenges to the apparent low bidder's size status.

Note: The review of the Abstract is usually done by someone other than the recorder.

#### **11. Award Process**

Proceed to IFB Award Process instructions.

IFB - Award



# Award Process

## FAR PART 14 – Invitation for Bid

### 1. Bids Opened

Refer to the IFB Solicitation section for a discussion of the bid opening process.

### 2. Determine Apparent Low Bidder

The apparent low bidder is announced at bid opening, but may change as a result of the required review performed by the CS during bid evaluation. The CS should add all pricing elements of each submitted bid to confirm that the totals reflected on each bidder's submitted bid documents are accurate. During bid evaluation, the CS will review the bids for mistakes, minor informalities, unreasonable price (FAR 14.404-2(f)) or that the bid is materially unbalanced (FAR 14.404-2(g)). (Also see FAR 14.405 and 14.407). The CS will also review the bid package to ensure that it materially conforms to the requirements of the solicitation; ensuring that there is no information that:

- Fails to conform to the essential requirements of the solicitation
- Does not conform to the applicable specifications
- Fails to conform to the delivery schedule or permissible alternates
- Bidder imposes conditions that modify solicitation/contract requirements.

The CS shall request (in writing) and receive a written confirmation of the total evaluated bid amount from the apparent low bidder prior to proceeding to award. The letter asks the apparent low bidder to confirm their total evaluated bid price and submit subcontracting information to verify that they are meeting minimum performance or subcontracting set aside requirements. In the event of an apparent clerical error, the bidder may be allowed to correct the bid. In the event of a mistake, the bidder may be allowed to withdraw the bid. In either case, the CS must consult with the CCO in making the determination to allow a correction or withdrawal. In the event of an unbalanced bid, it must be rejected. This process continues until a responsive low bid is identified.

### 3. Determine Responsibility of Low Bidder

The CS shall ensure that the apparent low bidder is qualified for award based on the set-aside status of the solicitation. The CS shall then proceed to ensure there

are no mathematical errors in the bid documents. The contract specialist shall ensure that the bid bond for the apparent low bidder is included on the US Treasury's List of Approved Sureties (Treasury Circular 570), and that the bond is otherwise acceptable through use of the Division of Engineering Services (DES) bond checklist. The CS shall ensure that the apparent low bidder is currently registered in the System for Award Management (SAM) at <https://www.sam.gov>.

In addition to reviewing the other elements included at FAR Subpart 14.4, the Contract Specialist shall ensure that the apparent low bidder does not have an unreasonable price (FAR 14.404-2(f)) or that the bid is materially unbalanced (FAR 14.404-2(g)). The CS shall request and receive a statement from the COR stating that the program has reviewed the prices received and the apparent low bid appears to be reasonable. If any information discovered during this process results in the bidder being found non-responsive, the CS will review the remaining bids to determine the next lowest, responsive bidder and repeat the responsibility determination process until the low priced, responsive, responsible bidder is identified. All required information shall be consolidated into a Documentation of Award Memorandum in accordance with HHSAR and DES policy prior to making award. The Documentation of Award Memorandum shall be reviewed by a CRB (if necessary – see Paragraph 7 below) and signed by both the CS and the CCO prior to award of the contract.

Note: Non-responsive bids shall be rejected in accordance with FAR 14.404-2.

### 4. Sufficient Funds Available?

If the lowest bid price received is from a company that is determined to be responsive and responsible (see the following paragraphs) and is for less than the funds available for the project, taking into consideration the need for contingency, the CS may proceed with award. The program or requesting office may or may not have additional funds even if the prices are considered reasonable (see discussion of price reasonableness below). If sufficient funds are not available to make contract award and efficiently administer the contract, there are two options: the IFB may be canceled, or the acquisition may be converted to a negotiated procurement and the CS

should proceed to negotiate with all responsible bidders (award should subsequently be made to the responsible bidder offering the lowest price). Either option must be approved, pursuant to HHSAR 314.404, by either the Head of the Contracting Activity or the CCO. Either option must be discussed with the CCO and the program office prior to taking any action. It is important to maintain the integrity of the acquisition process and the decision to cancel an IFB should not be taken lightly, especially when it is apparent the market prices do not support the IGE (see FAR 14.404-1).

### **5. Draft Contract and Notifications**

In drafting the contract award, ensure that solicitation amendments and any other issues that arise are included in the award alterations page if necessary.

The notifications include:

- Draft FedBizOpps (FBO) award notice
- Notification to unsuccessful bidders
- COR Appointment Memorandum
- TERO Liaison Notification (if applicable)
- SBA Small Business Subcontracting Plan Notification (if applicable)
- Congressional Notification (if applicable)

Templates of all listed documents can be found at the DES-Shared-Drive<sup>9</sup>.

### **6. Does the Award amount Exceed \$500,000?**

- a. Yes – A CRB shall be convened in accordance with DES Office policy (reference “Contract Review Board (CRB) Procedures” dated December, 2011). The award document, bid abstract, negotiation memorandum and any other required documentation of award shall be submitted to the CRB for review and comment.
- b. No – Provide the award document, negotiation memorandum and any other required documentation of award to the CCO for review and comment.

### **7. Award Contract**

The CCO or responsible CO shall sign the contract and the CS shall send Notice of Award along with the signed contract document to the successful bidder.

### **8. Post Award Notice in FBO**

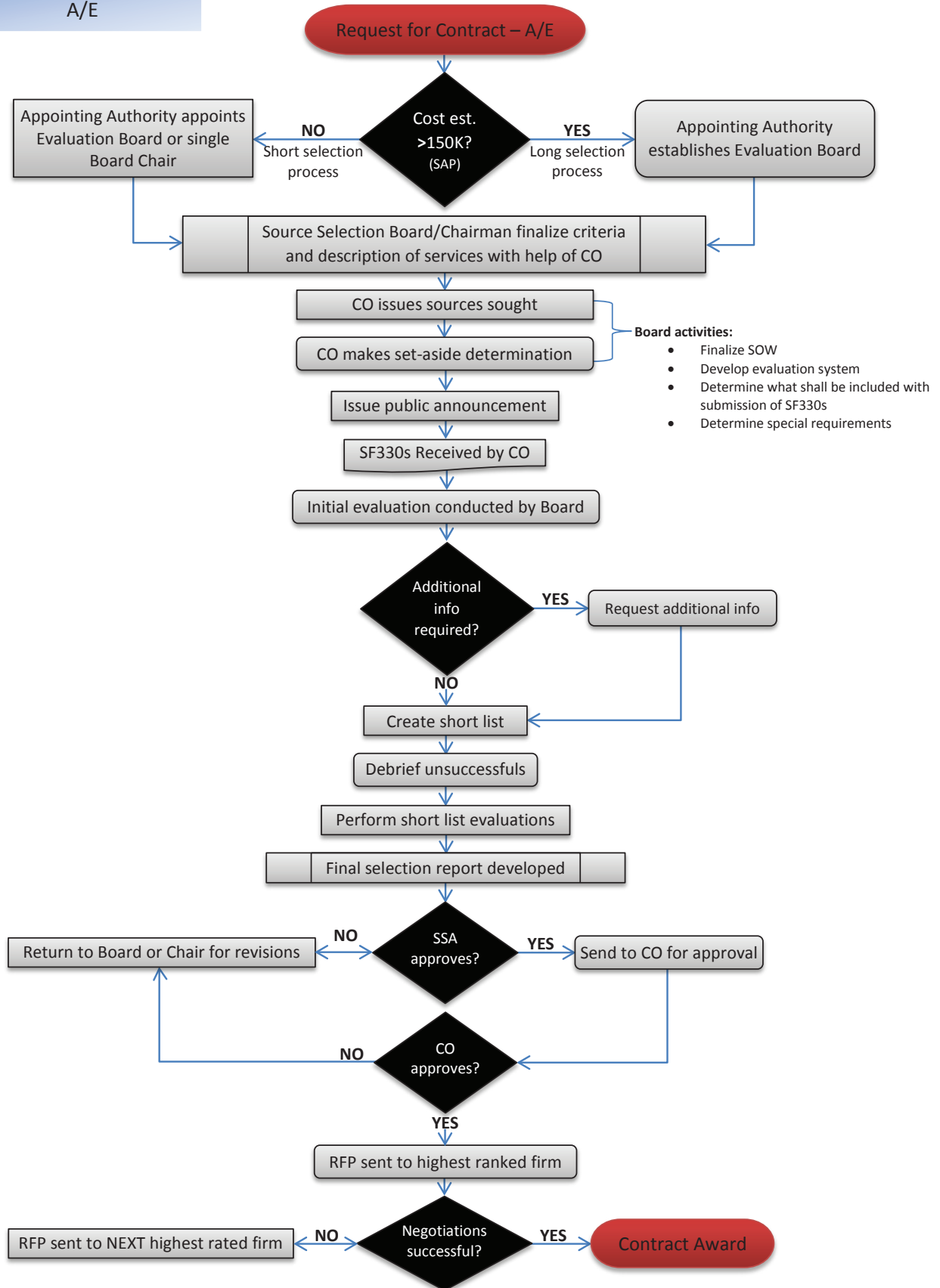
The CS must post a notice of award in FedBizOpps no later than three days from the date of contract award.

### **9. Issue Notifications**

Distribute/post all other notifications identified in paragraph 6, above. The unsuccessful notices shall be in the form of a letter (can be emailed or USPS) and shall be sent no later than three days after award of the contract.

<sup>9</sup> url TBD





# FAR PART 36.6 – Architect-Engineer Services

Introduction: Acquisition of Architect-Engineer Services (A-E) services is somewhat unique, but many principles of FAR Part 15 apply. A detailed discussion of the A-E process is included in the DES A-E Source Selection Guide<sup>1</sup>. Significant differences to the A-E process include:

## Acquisition Plan

An acquisition plan, as described in FAR Part 7 and HHSAR 307, is not required for A-E services. A well thought out milestone schedule and ongoing coordination between members of the acquisition team will help ensure the needs of the agency and the instant acquisition are met.

## Request For Proposal (RFP)

The RFP is not issued to all offerors, only the one selected as the most highly qualified.

Upon identification of an A-E requirement, the COR or Project Manager will work with the assigned CS to complete the A-E Request for Contract (RFC) form that initiates the process. The documents that make up this submission are addressed in more detail below.

### 1. Determine Evaluation Approach – Does the Cost Estimate Exceed \$150,000?

- a. Yes – The Appointing Authority<sup>2</sup> establishes a Source Selection Board (SSB). The SSB should consist of no less than three (3) members and no more than five (5) members. If the Appointing Authority needs a deviation from these limits on the number of SSB members, the request shall be submitted to the Source Selection Authority.
- b. No – The short selection process may be used. The Appointing Authority may appoint a single Board Chairperson (usually the COR) or establish an Evaluation Board. If the Appointing Authority opts for the SSB Chair to complete the evaluation, the final selection must be reviewed and approved by the Appointing Authority. If a board is appointed, the decision of the board requires no further approvals.

In either approach, a majority of the board members must be FAC COR certified, the Chairperson must be a federal employee, and the majority of SSB members must be professional engineers or registered architects.

Non-government employees must sign the same non-disclosure and conflict of interest forms as other board members.

### 2. Source Selection Board/Chairperson finalize RFC Documents

- a. Milestone Schedule – should be reasonable and take into consideration travel time and scheduling SSB meeting times and places.
- b. Accounting data and/or expectation of funds availability – identify accounting data and signature of authorized individual indicating funds are or will be made available for award and a requisition has been approved or will be entered into UFMS in a timely manner upon completion of negotiations. If an approved requisition is not provided as part of the RFC package, the public announcement must indicate the acquisition is subject to the availability of funds with appropriate language.
- c. Program of Requirements (POR)/Project Summary Document (PSD) or Description of Work – a clearly defined description of the work (normally in the form of a Scope of Work(SOW)) must be provided by the requesting office.
- d. Identification of SSB Chairperson and Members – include name, title, contact information and copy of COR certification for each individual.
- e. Evaluation Plan – The evaluation criteria must be consistent with those listed in FAR 36.602-1(a). The evaluation process must be completed using the process described in the IHS A-E Source Selection Guide, Section 2.9 Rating and Ranking System and Section 3 A-E Evaluation and Selection.
- f. Draft Public Announcement – The announcement will be in the form of a Federal Business Opportunities (FBO) synopsis and should include all information necessary for a potential respondent to determine whether they have the expertise, experience and capacity to undertake the services required by the Government. Reference Section 2.8 Public Announcement of the IHS A-E Source Selection Guide for details of the information to be included in the announcement.

<sup>1</sup> [http://www.ihs.gov/des/includes/themes/newihstheme/display\\_objects/documents/AESelectionGuide2014.pdf](http://www.ihs.gov/des/includes/themes/newihstheme/display_objects/documents/AESelectionGuide2014.pdf)

<sup>2</sup> DES Director or Area OEHE Director

### 3. Issue Sources Sought/Set Aside Determination

It is standard DES practice to publish a sources sought notice for up to fifteen days at FBO to help determine which socio-economic set-aside is most appropriate for the acquisition. This decision should also take into consideration how well IHS is achieving its current set-aside goals. Note: a Small Business Review Form (HHS Form 653) must be coordinated on by the appropriate Small Business Specialist and (possibly) the Small Business Administration Procurement Center Representative before the final synopsis is published. The results of this sources sought notice may support the set-aside recommended on the HHS Form 653.

### 4. Issue Synopsis at FBO website

Post the approved synopsis at [fbo.gov](http://fbo.gov) incorporating information obtained from sources sought and resulting set-aside determination. Note that requirements with a value exceeding \$150,000 must be left open for responses at least 30 days. DES practice is to post all requirements exceeding \$15,000 at FBO unless the requirement is covered by an existing IDIQ contract pursuant to FAR 5.201(b). The synopsis shall be reviewed by the CCO prior to posting on FBO.

### 5. Receipt and Screening of SF 330s

After the deadline for submission of A-E qualification statements (SF 330s), the CS will review the responses to ensure they meet any set-aside requirement established in the public announcement, prepare an abstract, clearly identify the information as “source selection information”, and prepare the transmittal memo to the board Chairperson to be signed by the responsible CO or CCO.

### 6. Initial Evaluation

The evaluation is carried out in the manner prescribed in the A-E Source Selection Guide. If resources allow, the first meeting of the SSB should be addressed by the CS and CO to remind the SSB of their responsibilities and obligations. If personal attendance is not feasible and video conferencing is unavailable, the Contracting Officer should provide a cover letter to accompany the responses provided to the SSB for evaluation. Issues that should be addressed either directly or in a cover memo include: confidentiality of information, evaluation of qualifications based only on the criteria detailed in the FBO synopsis and not against any other respondent’s submission, consistency of the evaluation with the evaluation plan, and the need for clear, concise and relevant comments. The comments provided by the evaluators are critical as they form the basis for debriefings and are utilized in defense of any protest submitted. All communication from the SSB to any respondent must be completed through the CS or CO. The SSB should not, under any circumstances,

communicate directly with any firms during the initial evaluation process.

### 7. Short List

Upon completion of the initial evaluation, a short list is compiled of the most highly qualified firms. The list shall contain at least the top three ranking firms unless there were not at least three responses ranked relatively close together at the top of the list of respondents. Any question the SSB may have as to whether or not a firm should be included on the short list shall be discussed with the CS and/or CO.

### 8. Debrief Unsuccessful Firms

In accordance with FAR 15.503(a)(1), debriefings should be offered in writing as soon as firms are eliminated from further consideration. Requests for debriefing must be in writing and received from non-shortlisted respondents within three days of being notified. Respondents may ask that the debriefing be postponed until an award is made pursuant to FAR 15.505(a)(2). Contents of pre-selection debriefings differ from the content of post-selection debriefings as more information can be released in a post-selection debriefing (see FAR 15.505 vs. 15.506). The SSB Chairperson assists the CS in compiling the information for the debriefings. The SSB Chairperson, CS, and CO shall participate in any oral debriefing sessions.

### 9. Perform Short List Evaluations - Interviews

In conjunction with the CS, the SSB Chairperson schedules the interviews with the most highly qualified firms, either in person, video conference, or telephone, but must be conducted in the same manner for all firms. The schedule is confirmed in writing, along with any time limits, requests for further information, and a copy of the agenda for the interview. The agenda is developed by the SSB Chairperson in conjunction with the CS/CO. The rating is completed using the same criteria and approach as the initial evaluation. If during the course of the interviews, the rankings change, there should be adequate written comments and documentation supporting the decision.

### 10. Final Selection Report Developed

The SSB chairperson is responsible for preparing the final selection report. This report includes the information identified in Section 3.5 Final Selection Report of the IHS A-E Source Selection Guide. This report should also address any changes in the composition of the SSB.

The SSB Chairperson is responsible for preparing a file to accompany the Chairperson’s A-E Selection Report with the following:

- Responses of the selected firms to the FBO synopses



- Minutes of all SSB meetings
- SSB appointment memorandum
- Evaluation sheets from each SSB member with the scoring and ranking, and board members' reports in the evaluations with relevant comments
- Special submittals from the selected firms
- FBO Synopses
- List of firms that responded to the FBO synopsis Letters and other documents furnished by others about the short-listed firms
- Copy of approved requisition in i-Procurement
- A list of firms whose qualification statements (SF330's) were evaluated
- The CS reviews the report and makes a recommendation to the CO who will make the final recommendation to the Source Selection Authority.

#### **11. Source Selection Authority (SSA) Approves?**

- a. Yes - IF the SSA approves the report as written, the report is forwarded to the CO for appropriate action.
- b. No – If the SSA does not approve the report, the report is returned to the SSB Chairperson for revisions. The SSA shall provide written comments and concerns to the SSB Chairperson detailing the disapproval of the report.

#### **12. RFP to Highest Ranked Firm**

Upon receipt of the final selection approval by the Source Selection Authority, the CO will send a RFP to the most highly qualified firm. The RFP sent to the most highly qualified firm shall contain all FAR requirements for the type of acquisition intended at the magnitude of construction (FAR 36.204) based on the Government estimate. The format should closely resemble the Uniform Contract Format. The non-selected short listed respondents must be notified in writing that they were not the most highly qualified respondent and offered a debriefing in the same manner as the firms excluded from the short list.

After final selection has been made, the identity of the selected firm may be disclosed. If the acquisition is set aside for small businesses, all firms eliminated from consideration (including those eliminated in the initial evaluation) must be notified in writing of the identity of the apparent successful offeror five business days prior to contract award and to allow them an opportunity to challenge the firm's small business size status (see FAR

19.302(d)(1) and 15.503(a)(2)).

#### **13. Evaluation Team**

The Contracting Officer is responsible for negotiating a fair and reasonable price and obtaining the best value for the government. The Contracting Officer typically forms a team with an engineer or architect to draft the technical portion of the request for proposal, analyze the response, and negotiate a contract. Depending on the size and complexity of the requirement, the negotiation team may also include auditors, attorneys, or other specialists such as the Small Business Technical Advisor.

#### **14. Pre-negotiation**

The Contracting Officer receives the A-E proposal and verifies if the contractor has responded completely to the RFP. This includes verifying that any required certifications are completed and that any requested supporting information, such as cost information (see FAR 15.403) or subcontract plans (see FAR 19.702), have been furnished. The Contracting Officer will obtain any missing information and, if applicable, arrange for audit and forward the subcontracting plan to SBA for review.

The negotiation team reviews the A-E proposal in detail and establishes pre-negotiation objectives, which should be documented in the Negotiation Memo.

A-E profit/fee is limited by statute to less than 6% of the estimated construction amount. See the DES Operating Instructions, Chapter 3, for more information. For the purpose of meeting the 6% fee limit, the offeror may call out specific costs they claim are not applicable to the limitation, however, it is the government's responsibility to make the final determination.

Proposed changes to the Scope of Work (SOW) or the schedule are evaluated for merit and, if acceptable, analyzed for their impact on estimated cost. If necessary, the IGE is revised and compared to the contractor's proposal to identify areas that need to be resolved in negotiation. In the rare event a government estimate is unavailable, the cost information obtained from the contractor should be evaluated against the SOW and a judgment made as to whether the proposed price reasonably reflects the effort required by the SOW. It is always advisable to obtain an IGE from the COR or cognizant program representative as early in the A-E acquisition cycle as possible but no later than issuance of the RFP.

For whatever reason, there may be elements of the proposal that are ambiguous, and dollar amounts may differ drastically from the estimate. These may indicate a misunderstanding of the SOW, and the COR/PM should seek clarifications prior to commencing price negotiations. Both parties should have a mutual understanding of the

SOW before negotiating. Remember that clarifications are not a negotiation; the price or costs should not, under any circumstances, be discussed with any of the A-E firms during the review, scoring, and selection process.

The pre negotiation position should include target pricing and document that the negotiation team understands the proposal, the SOW and has identified areas for discussion that will provide a reasonable opportunity to reach agreement on a fair and reasonable price.

### **15. Negotiations**

The Contracting Officer establishes a date for initiating negotiations with the A-E firm. If discussion of the issues identified in the pre-negotiation analysis results in a mutually agreeable SOW and a fair and reasonable price, the negotiation team documents the agreement in the Negotiation Memorandum, which includes:

- The purpose of the negotiation.
- Description of the acquisition (project title, location, solicitation number).
- Names of negotiating team members for the government and the contractor.
- Whether or not certified cost or pricing data was required and, if required, the extent to which the data was considered in the negotiation and affected the results. This information is important in sustaining any subsequent adjustment based on defective cost or pricing data at any later time, during or after the term of the contract.
- A summary comparison of the contractor's proposal, the pre-negotiation objective, and the negotiated position.
- Principal issues discussed and an explanation of any adjustments made to the pre-negotiation position. If an audit was obtained, a description of how each audit finding was resolved.
- Changes to scope of work and agreements reached. The final scope of work must be modified as necessary to reflect clearly all agreed changes. In legal situations, the courts and boards will enforce the contract as written. The parties' price negotiation memoranda and notes will be used to infer the intent of the contract only if the contract wording is ambiguous.
- The basis for the profit or fee negotiated.
- Documentation of fair and reasonable pricing.
- A calculation demonstrating that the portion

of the fee subject to the fee limit on A E acquisitions is less than 6% of the estimated construction contract cost.

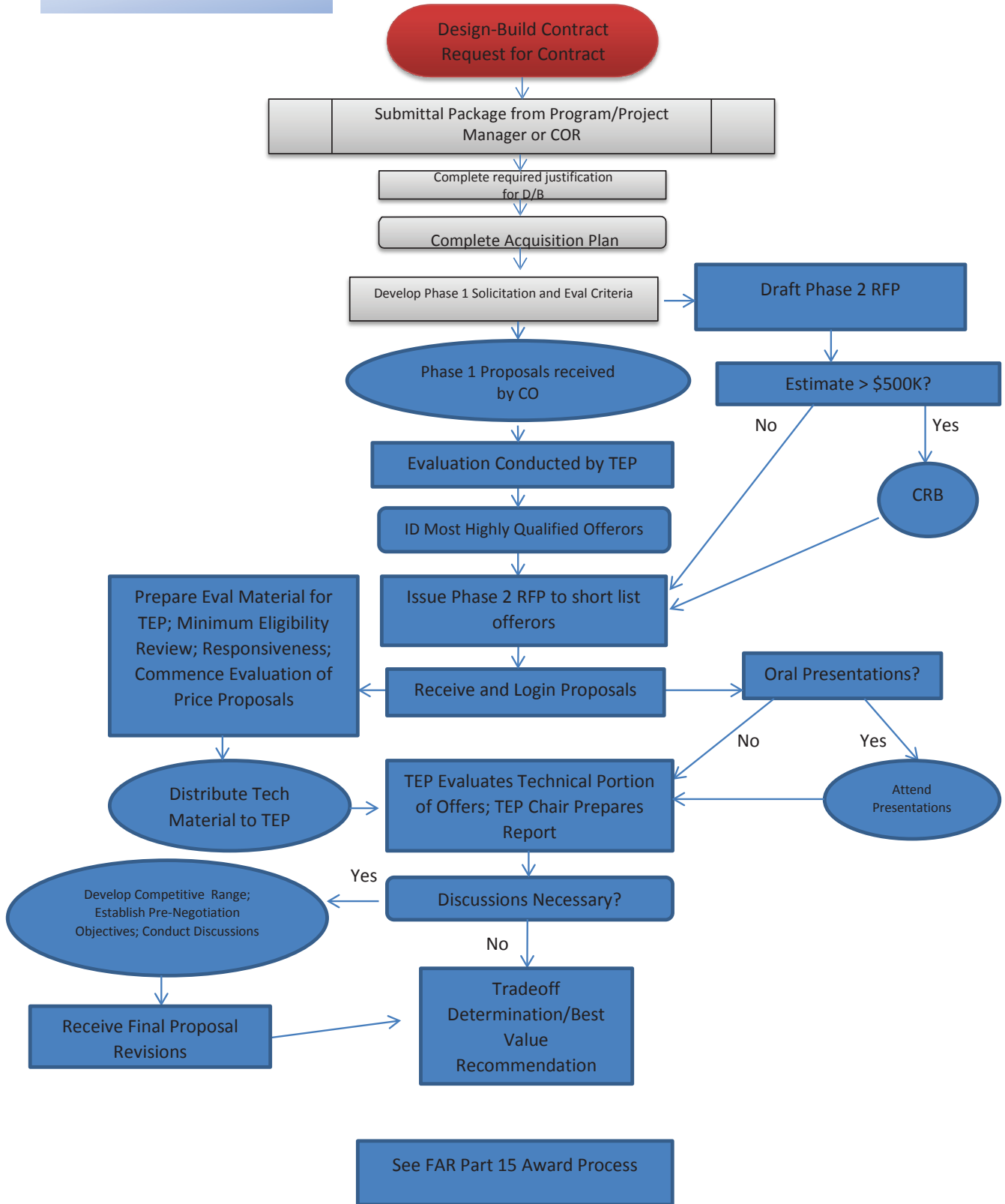
The Negotiation Memorandum is prepared by the SSB Chairperson in conjunction with the CS and is approved by the CO.

### **16. Contract Award**

The Contracting Officer completes a determination of responsibility, drafts the final contract, and prepares the contract file. The draft contract is then sent to the A-E for signature after which the Contracting Officer executes the contract to complete the award. After the A-E contract has been awarded, when it is otherwise appropriate and required for a Notice of Award to be posted at the FBO website, the Contracting Office shall post such notice pursuant to FAR 5.301.



Two Phase Design-Build



# Two-Phase Design-Build Selection

## FAR Part 36.3

Introduction: The Design-Build Acquisition is a two phase acquisition. Phase I consists of evaluation of technical capability resulting in identification of the most highly qualified offerors. Phase II consists of the most highly qualified offerors submitting technical and price proposals that are consistent with, and evaluated utilizing, a best value tradeoff in accordance with FAR Subpart 15.101-1. Before making the determination to pursue a Two-Phase Design Build (DB) acquisition, the parameters at FAR Subpart 36.301 must be considered and evaluated (emphasis added).

**Phase I - Request for Qualifications (RFQ)** – The Phase I RFQ/solicitation shall be posted to the Government Point of Entry ([www.fbo.gov](http://www.fbo.gov)) in accordance with the publicizing requirements in FAR Part 5 and the solicitation shall be structured in accordance with FAR Part 36.303-1.

**Phase II - Request for Proposal (RFP)** – The Phase II RFP/solicitation is not issued to all offerors, only the ones selected as the most highly qualified during the evaluation of Phase I RFQ responses. These offerors identified as the most highly qualified during Phase I evaluations make up the “short list.” Short list offerors may incur significant expense in preparing Phase II proposals and stipends may be authorized. The number of short list offerors cannot exceed the maximum number identified in the Phase I RFQ/solicitation. The Phase II evaluation is largely conducted in accordance with FAR Part 15, Contracting by Negotiation.

### 1. Project Submittal Package required from Program/Project Manager or COR

For purposes of a DB procurement pursuant to FAR Part 36.3, a complete Request for Contract (RFC) includes a Statement of Requirements (performance work statement), an independent government estimate supported by appropriate backup, evidence of fund availability (identification of accounting information and signature by an authorized program individual or an approved requisition), calculation of liquidated damages (if applicable), completed RFC boilerplate document, proposed price schedule (additive, deductive, including method of price evaluation), option justification (if applicable), list of government furnished property (if applicable), recommended evaluation criteria (must be consistent with FAR 36.303-1), completed acquisition planning document, completed technical evaluation plan, and names of sug-

gested technical evaluation members. Evidence of certification or training certificates must be submitted for each proposed panel member. It shall be assumed that the CS and/or CO have worked with the program staff in the formulation of all required documentation listed herein during the planning stage of the project. If program staff has not engaged contracting staff prior to submittal of the listed documents, the packet shall not be considered complete until contracting staff has reviewed all documents and program staff has incorporated or addressed all comments. A milestone plan shall be developed in conjunction with the program in order to effectively plan and efficiently execute the procurement.

- a. Determination to Utilize a DB Acquisition Process – Pursuant to FAR 36.301(b), an evaluation must be conducted by the Contracting Officer prior to determining to pursue a DB acquisition strategy. A memo to the file, prepared and signed by the CS and CO must be executed detailing the analysis of the elements prescribed in FAR 36.301(b).
- b. Acquisition Plan – If the Independent Government Estimate (IGE) exceeds \$500,000, a formal acquisition plan is required, as described in FAR Part 7 and HHSAR 307. If the IGE is less than \$500,000, informal acquisition planning is acceptable. A well thought out milestone schedule and ongoing coordination between members of the acquisition team will help ensure the needs of the agency and the instant acquisition are met.

### 2. Develop Phase I Solicitation and Evaluation Criteria

In a DB acquisition, the Phase I solicitation is not required to be in the Uniform Contract Format. It is highly recommended that the template included on the contracting shared drive be utilized as the format and it must be noted that certain solicitation content is highly prescriptive pursuant to FAR Part 36.303-1.

At a minimum, the Phase I solicitation shall include the following:

- (1) Scope of work (project requirements);
- (2) The Phase I evaluation factors which shall include (1) Technical Approach; (2) Technical Qualifications such as (i) Specialized Experience and technical competence, (ii) Capability to Perform, (iii)

past performance of the offeror's proposed team, and (iv) other appropriate factors (excluding cost or price related factors, which are not permitted in Phase I).

- (3) Phase II evaluation factors
- (4) The maximum number of offerors that shall be selected to submit Phase II proposals.
  - a. Synopsise in FedBizOpps – All requirements exceeding \$25,000 must be advertised for a minimum of fifteen (15) days at the Government Point of Entry ([www.fbo.gov](http://www.fbo.gov)) prior to solicitation issuance. Proceed to synopsise the requirement in accordance with FAR Part 5.207 while preparing the draft RFP. The synopsis content should be coordinated with the supporting program and shall be reviewed by the CCO prior to posting in FedBizOpps. In addition to the requirements included at FAR 5.207, at a minimum the synopsis shall include the following: expected date of solicitation issuance, set-aside status, NAICS and the anticipated Notice to Proceed and completion dates. For construction, the estimated price range shall be indicated in the synopsis per FAR36.204. The synopsis must be posted for a minimum of 15 days prior to the posting of the Phase I solicitation in FedBizOpps.
  - b. Develop and Finalize Technical Evaluation Plan - The TEP shall contain instructions to the TEB members regarding how offers received shall be evaluated. The TEP shall contain the evaluation criteria included in both the Phase I and Phase II solicitations, means of rating (adjectival), the definitions of evaluation criteria, the definitions of a strength, weakness, or deficiency, and shall be signed by the contract specialist, CCO, and the program shall concur with its content. The TEP is a critical document that establishes the ground rules for how evaluators are to complete their tasks and adhering to the TEP is the best way to insure the best value is realized and a protest will not be sustained. It is highly recommended that Phase I and Phase II TEP members are the same to ensure consistency in evaluation through both phases of the evaluation process. The TEP must be completed prior to issuance of the Phase I solicitation. The TEP shall be utilized to formulate the basis of evaluation for both Phase I and Phase II. Hence, the criteria developed in the TEP shall be identified and utilized for both Phase I and Phase II solicitations and evaluations. Once again, the drafter of the TEP must refer to FAR 36.303-1 and 36.303-2 for guidance when developing evaluation criteria.

### 3. Post Phase I Solicitation in FedBizOpps -

After ensuring the requirement has been synopsized for at least 15 days, the acquisition plan is complete and signed, the Technical Evaluation Plan is complete, and the Phase I solicitation has been reviewed the CCO, the Phase I solicitation can be released to FBO. The solicitation must be posted for a minimum of 30 days. As the Phase I solicitation proposals are essentially qualification statements, it would be a rare occasion for offerors to need more than 30 days to prepare and submit their Phase I proposals.

- a. Draft Phase II Solicitation - Concurrent with the posting of the Phase I solicitation, the development of the Phase II solicitation should commence. The Phase II solicitation shall be developed in accordance with the parameters established in FAR Parts 36.303-2 and 15.101-1. The Phase II solicitation shall conform to the Uniform Contract Format. The Phase II

- (1) Does the Cost Estimate for the Project Exceed \$500,000?

**Yes** – A Contract Review Board shall be convened in accordance with DES Office policy (reference current Engineering Services “Contract Review Board (CRB) Procedures”).

**No** – Provide the draft solicitation to the ES-Seattle or ES-Dallas CCO for review and comment.

- a. If questions, do they warrant amendments?

All questions and answers must be documented in the contract file.

There is no disadvantage to including all questions and answers in amendments.

Failure to include a question and answer in an amendment (even if posted in a public forum) may limit the Government's ability to enforce the Government's response. All technical questions shall be presented to the program for their input and a written response must be provided to the contract specialist. The decision to include a question in an amendment is a subjective one. Always consult the CCO if you are unsure. Amendments shall be posted timely as the time frames for proposal submission are necessarily limited and transmission of information is critical to estimators. If questions are received that will require additional time for offerors to prepare their proposals, the time for proposal submission shall be extended via the amendment process. All time extensions shall be considered but shall not be granted unless there is a compelling reason, based on the actions or inactions of the Government, to grant one.

**Yes** – Include an exact copy of the questions posed (even

if grammatically incorrect) and answers in the amendment. The amendment shall be reviewed by the CCO prior to posting in FedBizOpps. See following section.

**No** – Provide necessary feedback to the inquiring contractor in any appropriate form (phone call, email, letter, etc.).

- b. Prepare and Post Amendments - Amendments must be posted at the Government Point of Entry (FedBizOpps) prior to submission of proposals. If an amendment is necessary after the due date and the time for proposals has passed, the amendment is only distributed to offerors who have submitted timely proposals. As stated above, questions must be submitted in writing to the attention of the contract specialist. If a potential offeror calls the contract specialist with a question that is meaningful (i.e. could potentially impact an offer), the CS shall inform the caller to submit the question in writing so that it can be answered formally. Amendments must be issued on a SF-30. If an amendment is to extend the due date and time for offerors, be sure to check the correct box in Box 11 of the SF30. Clear/concise answers are critical when issuing an amendment. Failure to provide clear answers will result in additional questions or misunderstood requirements. It is recommended the PM be consulted on all questions and be given the chance to review the amendment prior to its posting.

#### **4. Phase I Proposals Received by CO**

All proposals shall be submitted by the due date and time listed in the solicitation. The proposals shall be initially reviewed by the CS for responsiveness to the solicitation requirements. No price information should be included in Phase I proposals. Phase I proposals shall then be provided to the Chair of the TEB for distribution to its members. The contract specialist and/or contracting officer shall convene the TEB to lead a kick off meeting to explain the roles and responsibilities of each TEB member. TEB participation is mandatory. The TEP shall be distributed to all members at this meeting along with evaluation sheets where the TEB members can include all comments and provide ratings in accordance with the TEP.

#### **5. TEB Evaluates technical proposals**

The TEB will proceed to evaluate the Phase I proposals in accordance with solicitation and TEP requirements. The contract specialist shall remain available as an advisor should any questions arise during the technical evaluation process. TEB consensus discussions shall be coordinated with the TEB Chair and CS. If all parties (TEB and CS) are not co located, the discussions will be held

with the group telephonically or via tele-video.

#### **6. Identification of Most Highly Qualified Offerors (Short List)**

After evaluating Phase I proposals in accordance with the Phase I solicitation and TEP, the TEB shall provide a recommendation to the Contracting Officer of the most highly qualified offerors. The recommendation shall include a number of offerors commensurate with the maximum number of offerors identified in the Phase I solicitation for inclusion in the Phase II portion of the acquisition. The recommendation shall be accompanied by a Phase I evaluation report fully documenting the relative strengths, weaknesses, risks, and deficiencies that form the basis for the recommendation. The Contracting Officer shall consider the recommendation from the TEB and select the most highly qualified offerors for inclusion in the Phase II portion of the evaluation.

#### **7. Issuance of the Phase II solicitation**

The Phase II solicitation shall be issued to only those offerors identified as the “most highly qualified” during the Phase I evaluation. It is recommended that the solicitation be issued via e-mail to maintain a distribution record. There is no requirement to post a Phase II pre-solicitation notice or to post the Phase II solicitation to Fedbizoppo. Necessary amendments to the Phase II solicitation shall be sent directly to those offerors receiving copies of the Phase II solicitation.

#### **8. Receive and login Proposals: Prepare Evaluation material for Technical Evaluation Board (TEB); Minimum Eligibility Review; Responsiveness to Solicitation Requirements**

Proposals shall be time stamped upon receipt and placed in a controlled area until the due date and time for proposal submission. Each proposal shall be recorded on Optional Form 1419, Abstract of Offers – Construction. The CS will review each response and determine responsiveness based on what has been provided and when it was received. A responsiveness check will include whether the offer is signed, whether a bid bond has been provided by a surety included on the US Treasury’s List of Approved Sureties (if required), all elements of the technical proposal has been included, the price schedule is complete, etc.

#### **9. Separate price information from technical proposal; retain price information; distribute tech proposals to TEB**

The CS will separate all pricing information from the technical proposal. The TEB shall not be privy to pricing until the technical evaluations have been completed. Technical proposals shall then be provided to the Chair

of the TEB for distribution to its members. The CS and/or CO shall convene the TEB to lead a kick off meeting to explain the roles and responsibilities of each TEB member. TEB participation is mandatory. The TEP shall be distributed to all members at this meeting along with evaluation sheets where the TEB members can include all comments and provide ratings in accordance with the TEP. The contract specialist shall distribute, discuss, and collect signed financial disclosure statements and conflict of interest statements from each member of the TEB.

- a. Oral Presentations – Oftentimes oral presentations of offers will be desired in Phase II of DB acquisitions. The Government should consider the cost burden to the offerors as the development of the Phase II proposals can be expensive as some level of design is inevitably required to be provided by the offerors. In person presentations can add to this cost burden. Stipends are allowed and should be considered if in-person oral presentations are to be conducted. Any oral presentations should be attended by the entire TEB and either the CS, CO, or both to ensure consistency and compliance in evaluating proposals.

#### **10. TEB convenes w/Contract Specialist oversight; Evaluates technical proposals (FAR 15.404-1)**

The TEB will proceed to evaluate the technical proposal in accordance with solicitation and TEP requirements. The CS shall remain available as an advisor should any questions rise during the technical evaluation process. TEB consensus discussions shall be coordinated with the TEB Chair and CS. If all parties (TEB and CS) are not co-located, the discussions will be held with the group telephonically or via tele-video. At the conclusion of evaluations, a technical report shall be prepared by the TEB chair documenting relative strengths, weaknesses, risks, and deficiencies and assigned ratings in accordance with the TEP. Also, if there are any desired clarifications or recommendations for discussions these elements should be addressed in the report also.

#### **11. Contract Specialist evaluates Business/Price Proposal (FAR 15.4)**

While the TEB is evaluating the technical proposals, the CS will ensure submitted offers are responsive to solicitation requirements and prices are fair and reasonable. The CS shall ensure there are no mathematical errors in the cost or pricing information provided by each offeror. The determination of price reasonableness shall be made in accordance with the requirements of the solicitation and FAR 15.404-1. The CS shall document the basis for the determination of price reasonableness. The

contract specialist shall ensure that the bid bond submitted by the offerors are included on the US Treasury's List of Approved Sureties, and that the bond meets all requirements by completing the bond checklist included in the DES-Shared-Drive list of samples and templates. The CS shall ensure that offerors are registered and active in the System for Award Management and are currently eligible to receive award of a federal contract. If any offeror is found to be non-responsible, that offer must be rejected.

#### **12. Discussions or negotiations (FAR 15.405)**

Discussions/negotiations are the exchanges that take place between the government and offerors after the establishment of the competitive range. A pre negotiation position should be developed and approved by the CCO prior to developing the competitive range and entering into discussions. Discussions must be meaningful and must identify all significant weaknesses, adverse past performance, and deficiencies to each offeror in the competitive range. The purpose of discussions is to maximize the best value to the government. Discussions are very formal and all offerors must be engaged in the same manner (verbal, written, etc.). It is preferred that discussions be performed in writing in order to have a formal, documented record of the exchange. At the conclusion of discussions, the CS shall request final proposal revisions giving each offeror one final chance to revise their proposals. All offerors must be given a common date/time for submission of final proposal revisions. FAR 15.306(c) and 15.306(d) discuss this process in detail. If an offeror is not included in the competitive range or is otherwise eliminated from the competition, that offeror shall be notified in writing that they have been eliminated from the competition and no further revisions to that offeror's proposal will be considered. (FAR 15.307)

#### **13. Documenting Discussions/Negotiations**

After receipt of Final Proposal Revisions, the TEB shall make any necessary changes to the technical evaluation report and shall finalize it. The CS shall document the principal elements of the discussions/negotiations to the contract file as required in FAR 15.406-3.

#### **14. Trade off analysis of technical and price**

This is essentially an assessment of each proposal against the evaluation criteria stated in the solicitation and taking price into consideration and assessing the relative importance of price to technical competence. Depending on the tradeoff listed in the solicitation (technical capability is more important than price; technical capability is approximately equal in importance to price; price is more important than technical capability), this discussion is critical to the best value determination.



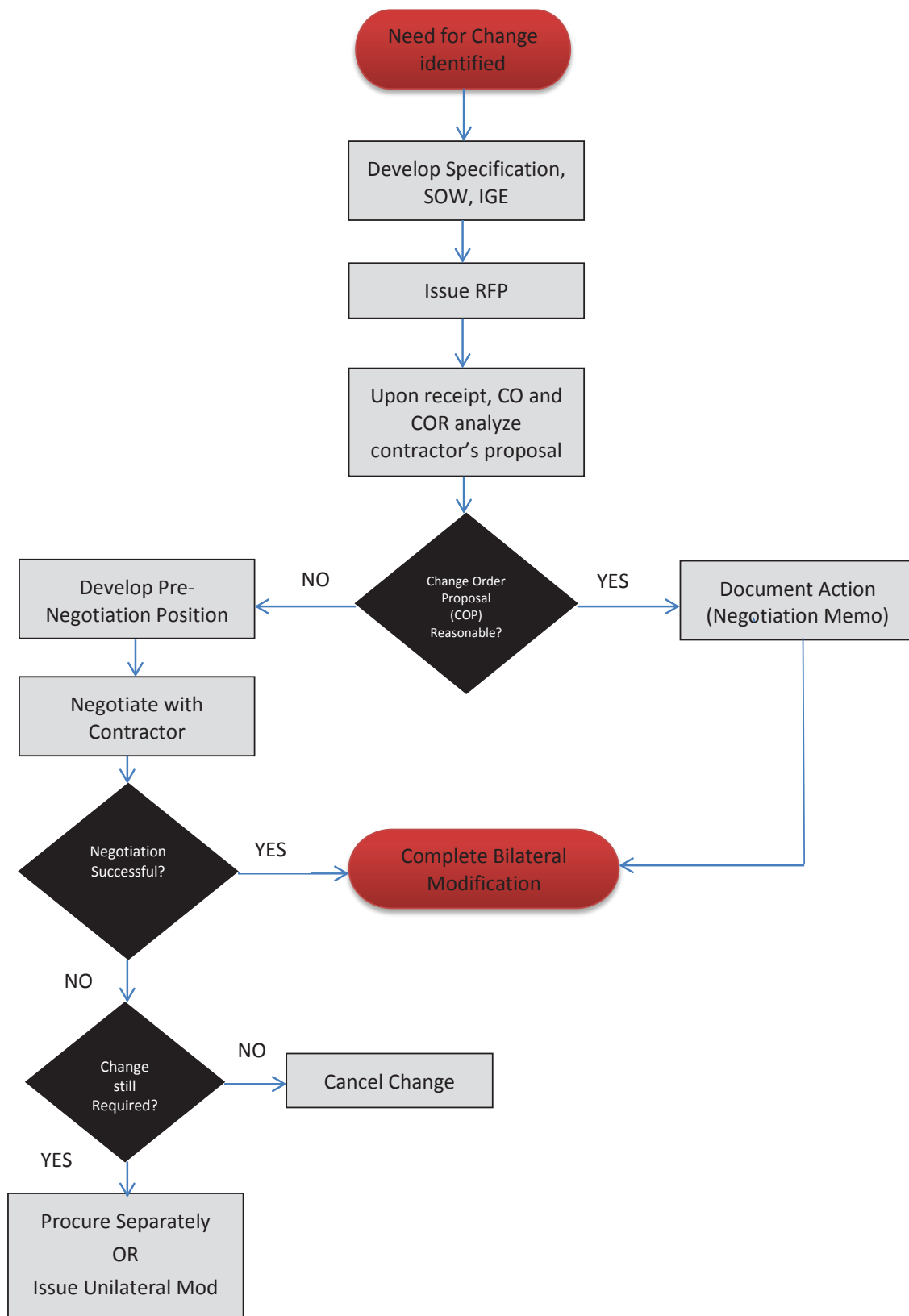
If award is to be made to an offeror with outstanding technical capability and a higher price than other acceptable offerors, this explanation must detail why it is in the government's best interest to award to the higher priced offeror (i.e. reduced performance risk, reduced schedule risk, etc.). This document will be one of the main instruments utilized in defending the Government's position in the event of a protest. This document is prepared by the TEB chair after final proposal revisions have been received, the technical evaluation report has been finalized, and prices have been revealed to the TEB. The Source Selection Authority (typically the CO) has the ability to overrule the best value determination put forth by the TEB.

#### **15. Best Value recommendation**

The best value recommendation is a direct result of the tradeoff analysis of technical and price considerations. This document is prepared by the contract specialist as part of the Negotiation Memorandum and is reviewed by the CCO if the award is to exceed \$150,000. A tradeoff analysis for an award exceeding \$500,000 shall be approved by the CCO.

#### **16. Award Process:**

Proceed to RFP Award Process instructions.



# Government Initiated Changes Process

## FAR Subpart 43.2

### FAR 52.243-4 (Construction)

**NOTE: If time is of the essence as determined by the COR and CO, a unilateral direction to proceed<sup>11</sup> with changed work shall be issued by the CO as either an unpriced change order or as a change order with an assigned not to exceed amount (usually consistent with the Independent Government Estimate).**

#### 1. Need for Change Identified

The COR shall notify the CS that a change to the work is necessary. The notification from the COR must be accompanied or immediately followed by the documents and information identified in Paragraph 2 below.

#### 2. Develop Specification, Statement of Work (SOW), and Development of Independent Government Estimate (IGE)

The COR must develop a defined Specification/SOW and IGE for the proposed change. The Specification/SOW for the change must be defined well enough to allow the contractor to provide a fixed price for the work with a high level of confidence. Further, specification/SOW for the change must be defined well enough to allow the contractor to determine the extent of impacts to schedule (if any). The request should identify the portions of the specifications and drawings that are being revised. The estimate should detail the deleted work, added work and any work in place that needs to be removed. The estimate shall be prepared in sufficient detail as though the Government were independently competing for the work.

#### 3. Issue Request for Proposal (RFP)

Following receipt of the Specification/SOW, IGE, and fund certification, the CS shall provide the Specification/SOW to the contractor for pricing in accordance with contract procedures (if any are specified).

#### 4. Analysis of Contractor Proposal

Upon receipt of the contractor's Change Order Proposal (COP), both the COR and CO shall perform an analysis of the COP. The CO shall examine the COP to determine that it meets all parameters set forth in the contract for markups (overhead, profit, etc.), determine if certified

cost or pricing data is required, and request any further pricing information that is necessary to determine the COP price is reasonable. The COR shall analyze the COP to determine if the number of hours, amount proposed for materials, and any time extensions are reasonable. The COR must compare the COP with the developed IGE as a basis for recommending to the CO that the COP is reasonable as proposed or if negotiations should be entertained.

#### 5. Is the COP Reasonable?

a. Yes –

- If the COP and IGE are comparable (typically within 10% of each other), the COP may be considered reasonable and is incorporated into a bilateral modification at the proposed price. It is important to note that the determination of whether the price is fair and reasonable rests with the CO. The determination of price reasonableness must be documented in a Negotiation Memo that is filed with the modification and included in the contract file. Proceed to step entitled "Complete Bilateral Modification."
- If the COR recommends that the COP is reasonable and there is a discernible difference between the IGE and the COP, the COR must provide the CO a memorandum explaining the differences between the IGE and COP and why the IGE was inaccurate<sup>12</sup>. The determination of price reasonableness must be documented in a Negotiation Memo that is filed with the modification and included in the contract file. Proceed to step entitled "Complete Bilateral Modification."

b. No – Develop Pre-Negotiation Position. If the COR believes that the COP is not reasonable, a pre-negotiation position must be developed to facilitate negotiation with the contractor (typically this is consistent with the developed IGE or Target Price). Proceed to next step.

<sup>11</sup> Direction can be either oral or written. Written notification must follow any oral direction provided. All changes must be codified in a contract modification.

## 6. Negotiate with Contractor

Negotiations are held with the contractor<sup>13</sup>, COR, and CO. The covenant of Good Faith and Fair Dealing requires negotiations be pursued in good faith and the burden on the Government is to be unbiased, honest, and reasonable.

### 7. Is the COP Negotiation Successful?

- a. Yes - If a mutually agreeable price and/or time extension can be reached through negotiation, a determination of price reasonableness must be documented in a Negotiation Memo that is filed with the modification and included in the contract file. The Negotiation Memo must detail the negotiations held, compromises made, and why the agreed upon price is reasonable. Proceed to step entitled "Complete Bilateral Modification."
- b. No - It is not always possible to reach an agreed upon price with the contractor through the negotiation process. The CO shall discuss options with the CCO before continuing. Proceed to step entitled "Is the Change Still Required?"

## 8. Complete Bilateral Modification

A short synopsis of the work and the agreed upon price and time extension (if any) shall be included in a bilateral modification to the contract. Multiple change orders may be included in one modification. The modification shall be issued on a Standard Form 30, Box 13(c) shall be checked and the authority cited shall be FAR 52.243-4 for all construction contracts. The contractor must sign the modification prior to the CO signing the document. The required Negotiation Memo shall be included in the contract file and filed with the modification documenting the rationale for the bilateral modification.

### 9. Is the Change Still Required?

- a. Yes –
  - Issue Unilateral Modification – The IHS has the option to issue a unilateral modification to the contract directing the contractor to proceed with the changed work. The unilateral modification is typically issued at

the IGE amount. Block 13A of the Standard Form 30 shall be checked and FAR 52.243-4<sup>14</sup> shall be cited as authority for issuance of the change. The contractor is required to proceed with the work and may submit a Request for Equitable Adjustment if they continue to believe the price for the change order established via the modification is insufficient to complete the work.<sup>15</sup> If the amount of funding available is limited and the CS/CO determine that it's in the best interest of the government to establish a not to exceed amount for the changed work that the contractor must stop working when the ceiling amount is reached (if a ceiling has been established). At that time, the COR, working with the CO will determine how to proceed, and negotiate the change with the Contractor e.g., reduce scope elsewhere, or reduce/revise the scope of work for the change.

- Procure Separately – Changed work should always be offered to the existing prime contractor. If a fair and reasonable price cannot be reached with the prime contractor, the IHS has the option to procure the changed work independent of the existing contract. The contractor must support any other contractor the IHS chooses to bring on-site (see FAR 52.236-8 Other Contracts).<sup>16</sup>

- b. No - Notify the contractor that the change will not be pursued further.

<sup>12</sup> COR's developing IGE's are not professional estimators and should not be held to that standard.

<sup>13</sup> Major subcontractors may attend and participate in negotiations at the discretion of the CO.

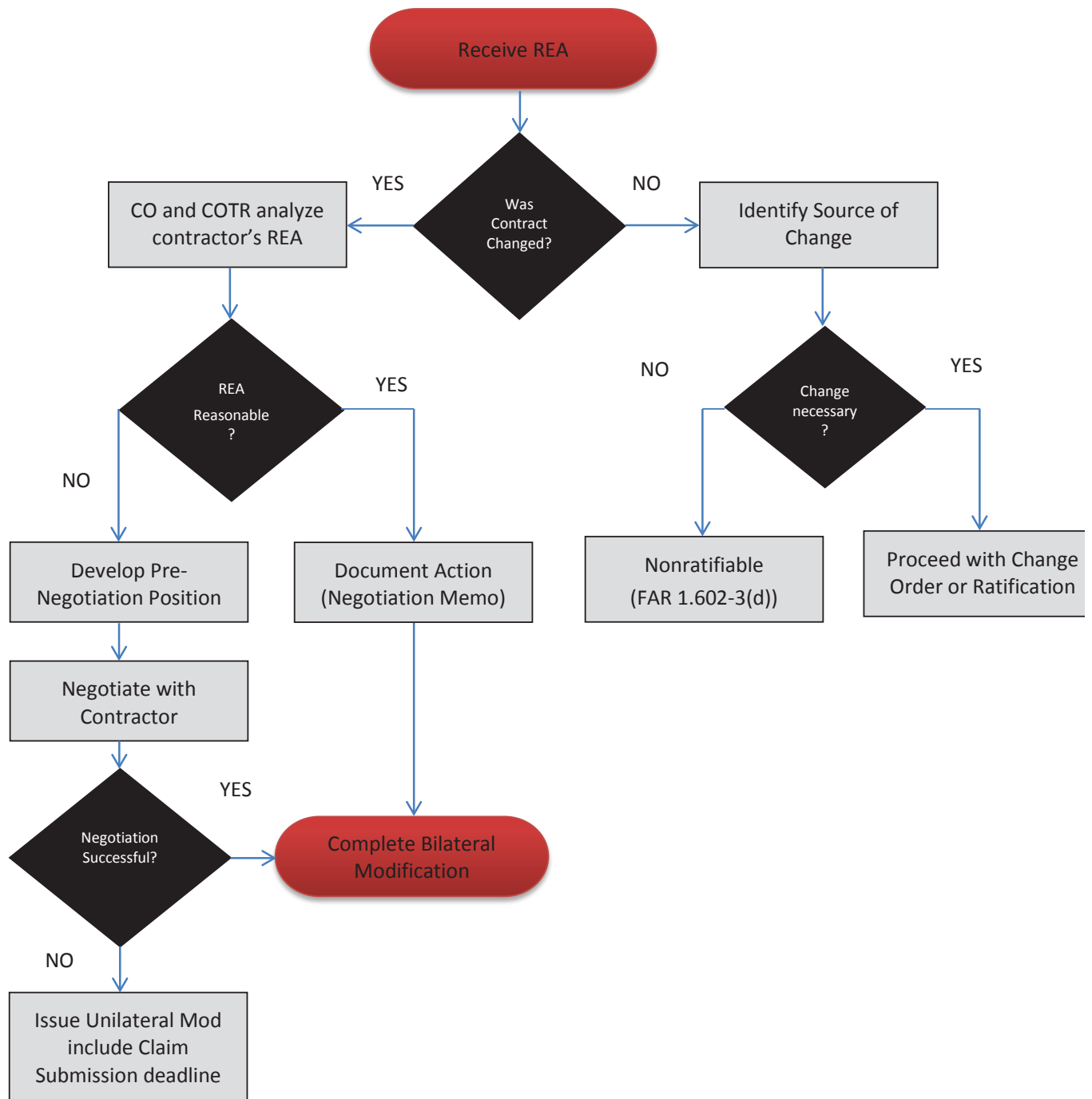
<sup>14</sup> This citation is utilized for changes issued for Construction Contracts.

<sup>15</sup> The contractor is required to proceed if proper direction is provided by the Contracting Officer. Failure to proceed constitutes a breach of contract and the contract may be terminated for default. Consult with your CCO and agency procedures prior to taking any steps toward termination for default.

<sup>16</sup> The decision to procure outside of the prime contract rarely occurs as it can cause serious logistical and contractual issues with the prime contractor. The viability of pursuing this option must be heavily weighed against potentially negative repercussions.



Request for Equitable Adjustment



# Request for Equitable Adjustment

## FAR Subpart 43.2

### FAR 52.243-4 (Construction)

#### 1. Receive Request for Equitable Adjustment

A contractor may submit a request for equitable adjustment (REA) when they believe they have been directed, either explicitly or constructively, to do work beyond the requirements of the contract. Upon receipt of a REA, the COR and CO evaluate the REA to determine whether or not the contractor can be paid for the work, i.e., it is a compensable request caused by a constructive change<sup>1</sup>, valid change orders, differing site conditions, or variations in estimated quantities, suspension of work, etc. If the REA is determined not compensable, the contractor must be notified immediately. The notification will include the basis for denial of the REA. The CCO will sign all REA rejection letters. If the work is considered to be a constructive change and is compensable, proceed to the next step<sup>2</sup>.

#### 2. Was the Contract Changed?

- a. Yes - If the action was authorized (i.e. CO issued direction that resulted in changed work that increased or decreased cost or time or both) or the contractor performed work to the benefit of the government without a change order, an analysis of the REA shall be performed by both the COR and CO. The process followed should be one very similar to the process followed for analyzing a Government requested change. The COR should develop an Independent Government Estimate (IGE) for the change and do a comparison of the REA to the IGE. If it would not benefit the price analysis to develop an IGE, a cost analysis of the REA shall be performed by the COR for reasonableness of proposed hours, material costs, and requested time extensions (if

any). The CO shall analyze the REA for compliance with FAR 52.243-4 and contract requirements for Change Order Proposal submissions including time frames for submittal, allowable markups, etc. Proceed to paragraph 4.

#### b. No – Identify Source of Change

- Only COs, acting within the scope of their authority, are authorized to enter into contracts or make modifications thereto on behalf of the government. If a COR or other government representative directs the contractor to perform changed work that results in an increase in the cost or time of performance, that individual has made an unauthorized commitment<sup>3</sup>. This type of unauthorized commitment is compensable upon ratification<sup>4</sup> by a CO. Proceed to the section entitled “Was the Unauthorized Change Necessary?”
- If the contractor chooses, independently, to perform work that is outside the scope of the contract without direction for the Government, they do so at their own risk and expense. For example, if plans and specifications are sufficient for their intended purpose and the contractor chooses to complete the work in a more expensive manner without direction from the Government, this additional work performed is not compensable. Proceed to the next step.

#### 3. Was the Unauthorized Change Necessary?

- a. **Yes – Process as a Change Order or Ratification–**  
If the changed work performed was necessary and

<sup>1</sup>A constructive change occurs when: (1) the contractor performs work beyond that required by the contract without a formal change order, and (2) it is perceived that the work originated from an informal Government order or is due to Government fault. An informal Government order can be defined as words or deeds excluding advice, comments, suggestions, or opinions.

There are four general categories of constructive changes:

1. Disagreement over contract requirements.
2. Failure of the Government to cooperate during contract performance.
3. Defective specifications and misleading information.
4. Acceleration of contract performance to finish sooner than what is stated in the contract schedule.

<sup>2</sup>FAR 43.204 requires the CO negotiate equitable adjustments in the shortest time practicable.

<sup>3</sup>Unauthorized commitments are agreements that are not binding solely because the government representative who made it lacked the authority to enter into a contract on behalf of the government.

<sup>4</sup>Ratification - The act of approving an unauthorized commitment by an official who has the authority to do so.

the Government received benefit as a result of its completion, the contractor should be compensated for this work. Potentially compensable work can be a result of a direction provided by the Contracting Officer or other government personnel that is not a formal change order. There are many examples of changed work that may be compensable absent a formal change order. Following are two such scenarios.

- An interpretation of a specification by government personnel that is expected to result in no impact to cost or schedule is provided to the contractor. The contractor follows the direction which ultimately results in a change to the contract. The contractor may be entitled to an equitable adjustment even though no formal change has been issued;
- (2) The contractor follows the detailed specification which results in a product that does not function. The contractor performs additional work to correct the government's defective specification without a formal change order. The contractor may be entitled to an equitable adjustment.

If the work is the result of an unauthorized commitment, ratification of the action must be requested by the individual ordering the work and approved by the Contracting Officer to allow the contractor to be compensated for this work by the Government. The Contracting Officer shall refer to FAR 1.602-3 when making the determination whether the action should be ratified or not. The Contracting Officer shall follow the procedures prescribed in FAR 1.602-3 and HHSAR 301.602-3 when processing any ratification action. Although not required, it is strongly recommended the advice of legal counsel is obtained when processing a ratification of an unauthorized commitment.

- b. No – Non-Ratifiable Change –If, after review of FAR 1.602-3, the Contracting Officer determines that the unauthorized commitment is not ratifiable, the procedures at FAR 1.602-3(d) shall be followed. As stated in the cited FAR Subpart, legal advice should always be obtained when processing a non-ratifiable action.

#### **4. Is the REA Proposal Considered Reasonable?**

- a. Yes – Document Action– If the proposal is considered reasonable, a bilateral modification to the contract shall be executed incorporating the price and/or time adjustment and language that establishes that the adjustment is a complete and

final equitable adjustment (see FAR 43.204(c)). Full documentation of the price analysis and price reasonableness determination shall be included as back up to the bilateral modification in the contract file. The documentation shall establish that the Government considered all elements of the change that may have affected cost or schedule in arriving at the conclusion that the adjustment is reasonable, whether or not those elements were specifically identified in the contractor's proposal.

- b. No. Develop a Pre-Negotiation Position– If the REA is not determined reasonable, the COR and CO should develop a pre-negotiation position (i.e. Government Estimate or Target Price) and enter into good faith negotiations in an attempt to reach a mutually agreeable price and/or time adjustment.

#### **5. Negotiate with Contractor**

Negotiations are held with the contractor<sup>5</sup>, COR, and CO. Negotiations must be pursued in good faith and the burden on the Government is to be unbiased, honest, and reasonable.

#### **6. Was the Negotiation Successful?**

- a. Yes - If a mutually agreeable price and time adjustment are reached through negotiations, a bilateral modification shall be executed. Block 12C shall be checked and FAR 52.243-4 shall be cited as authority for the modification. A full summary of the negotiations shall be included as back up to the modification in the contract file and shall include negotiation trade-offs, compromises, and a determination of price reasonableness. Proceed to step entitled "Complete Bilateral Modification."
- b. No - If a compromise cannot be reached, the Contracting Officer shall issue a unilateral modification to the contract to allow for adjustment for the price and/or time determined to be reasonable by the IHS and the contractor should be directed to proceed with the work. The contractor should be advised that their recourse is outlined in the DISPUTES clause of the contract if they believe the contract adjustment made by the IHS is unreasonable.

#### **7. Complete Bilateral Modification**

A short, clear summary of the work and the agreed upon price and time extension (if any) shall be included in a bilateral modification to the contract. Multiple REAs may be included in one modification. The modification shall be issued on a Standard Form 30 and Box 13(c) shall be checked and with the appropriate authority

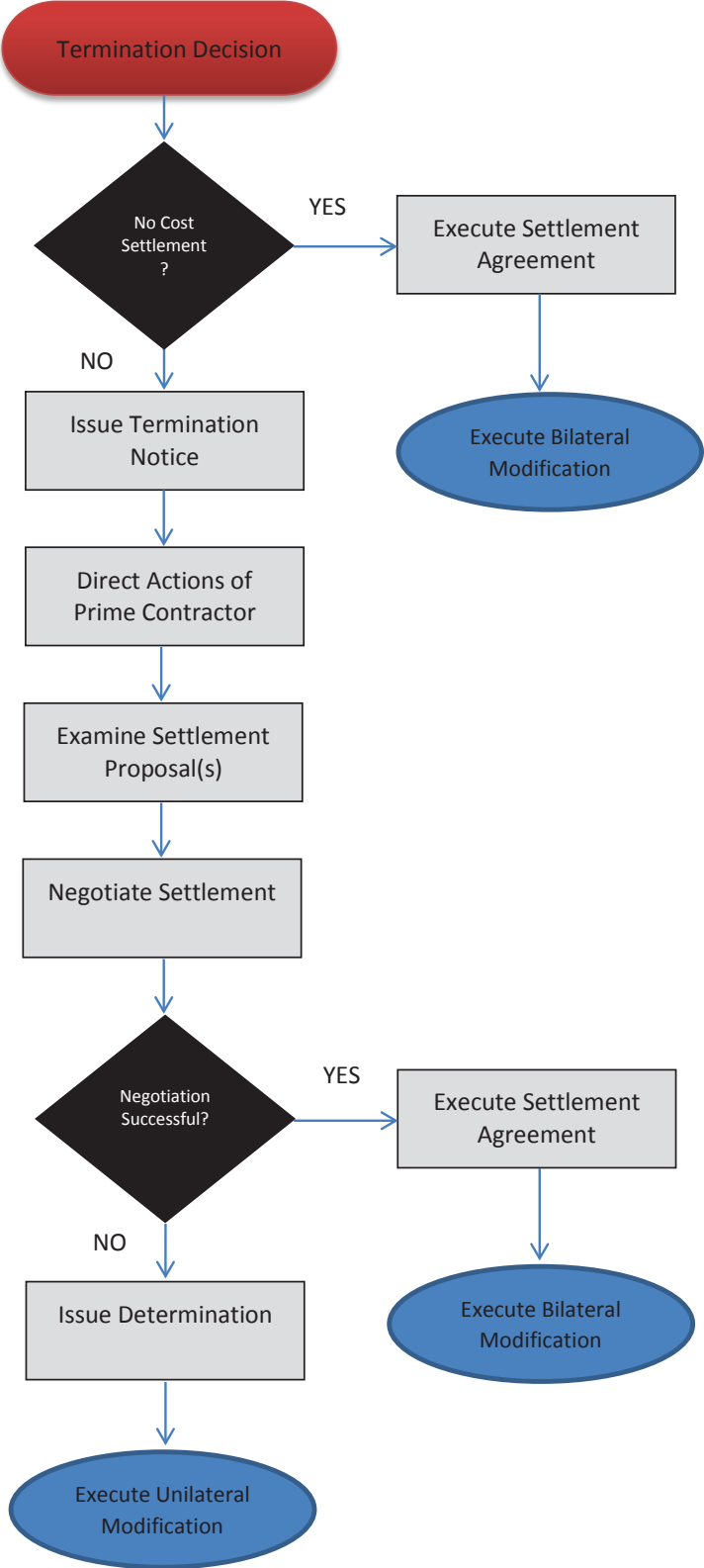


cited. The contractor must sign the modification prior to the CO signing the document. The required negotiation memo documenting the basis for the reasonableness of the contract adjustment (both price and time) shall be included in the contract file with the modification. A release similar to the one included at FAR 43.204(c)<sup>6</sup> shall be included in every bilateral modification executed.

<sup>5</sup> If requested by the contractor, major subcontractors may attend and participate in negotiations concerning their portion of the work at the discretion of the CO.

<sup>6</sup> In consideration of the modification(s) agreed to herein as complete equitable adjustments for the Contractor's (describe) "proposal(s) for adjustment," the Contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances giving rise to the "proposal(s) for adjustment" (except for\_\_\_\_\_).

Termination for Convenience



# Termination for Convenience of the Government

## FAR Part 49

### FAR 52.249-2, Alt. I

#### 1. Termination Decision

The Government's right to terminate a contract is unique in contracting, and imparts "complete authority to escape from contractual obligations" that does not exist elsewhere in contract law (Nash and Cibinic). This guidance will address only actual and not constructive terminations.

Use of the right to terminate a contract should only be exercised when it is in the interest of the Government to do so. Examples of instances when a termination for convenience are appropriate include an improper award (post award protest that appears to have merit), the end product is no longer needed, circumstances surrounding the requirement have changed, or a contractor is in default but has raised possible defenses.

When a termination should not be considered: FAR 49.101 (b) lists those instances when a no cost settlement should be used in lieu of a convenience termination. FAR 49.101 (c) states that contracts that have a remaining balance less than \$5,000 should not be terminated.

All termination possibilities shall be discussed as soon as the possibility arises with the CCO.

#### 2. Will the Contractor accept a No-cost Settlement?

Yes – Execute the Settlement Agreement– FAR 49.101(b) requires the contracting officer to issue a no-cost settlement proposal when the contractor will accept one, no Government property was furnished and the contractor has no outstanding debts or obligations to the Government. See FAR 49.603-6 and 49.603.7 for required statements to be added to the SF30 modification.

No – Proceed with termination notice.

#### 3. Issue Termination Notice

Termination notices need to be in writing, and contain the information required by 49.102(a).

#### 4. Direct Actions of the Prime Contractor

The Terminating Contracting Officer (TCO) must direct the actions of the prime contractor. The Prime contractor has many responsibilities, including but not limited to: immediately stop work and terminate all subcontracts

related to the terminated work, continue any work not covered by the termination, protect and preserve Government property, and keep the TCO informed of any issues or legal proceedings. (see FAR 49.104 for a complete list of the prime contractor's responsibilities.) The notice shall further direct the contractor to submit a settlement proposal with a due date certain.

#### 5. Examine Settlement Proposal

Settlement proposals are required to be submitted in the form and manner identified by the TCO, as prescribed by FAR 49.602-1. Analysis of the settlement proposal shall be consistent with the procedure contained herein entitled "Request for Equitable Adjustment" and FAR Part 49.2.

#### 6. Negotiate Settlement

An IGE based on the submission elements included in FAR Part 49.206 shall be independently be prepared by the COR in conjunction with the CO. The IGE shall form the basis of the pre-negotiation position. Settlements exceeding \$100,000 require audit by the appropriate audit agency (FAR 49.107). The audit requirement also applies to subcontractor settlement proposals. The amount of the settlement cannot exceed the amount remaining under the contract (FAR 49.207). The agreed upon settlement amount must be documented and justified as fair and reasonable by the CO.

#### 7. Negotiations Successful?

- a. **Yes:** Prepare the settlement negotiation memorandum (see FAR 49.110), execute the settlement agreement (see FAR 49.603), and ensure payment is made (see FAR 49.112(a)).
- b. **No:** If agreement is not reached, the TCO may issue a settlement determination. A settlement agreement should be executed for those areas where agreement can be reached.



# Termination for Default

## FAR Part 49.4

### FAR 52.249-10

“A default termination is a traumatic event for both parties. The contractor and the Government are both likely to suffer severe economic and time consequences.” – Administration of Government Contracts, Fourth Edition; Cibinic, Nash, and Nagle (©2006)

termination for default will not be upheld on appeal.

#### **8. General**

This section is intentionally not as prescriptive as the other sections of this guide. The circumstances that can lead to default vary widely and typically, when parties are considering pursuing a default termination, are the result of unique and strained relationships between the government and the contractor. It would be irresponsible to attempt to prescribe one process for executing a termination for default. If a contractor is failing to meet either schedule or technical requirements, contact the Chief of the Contracting Office for Engineering Services immediately.

When considering any termination for default, it must be understood that the process is expensive, time consuming, and will inevitably result in further delays to completion of the project. There will be long term and (likely) severe adverse impacts to both the contractor and the government. The burden in proving a default termination rests solely on the government and, hence, the government’s administration of the project must be without reproach in order for the termination to be upheld. It is not a process that should be entered into lightly or without serious consideration and forethought.

#### **9. Process**

In order to be “successful” in any termination for default, the possibility of late delivery or the knowledge of non-conformance must be brought to the attention of the contractor by IHS as soon as IHS knew or should have known the basis of late delivery or non-conformance. All relevant IHS parties should be consulted (contracting, program, legal counsel, and IHS leadership) prior to starting the process to pursue a termination for default. The first individual that should be contacted is the Chief of the Contracting Office for Engineering Services to ensure the process is being pursued in a compliant manner. If the IHS does not strictly comply with the statutory and regulatory time and notification requirements, the



# Contract Closeout

## FAR Part 4.804-1

### Fixed-Price Construction

#### **1. Physical Completion – aka Mark As Complete in PRISM**

FAR Reference - 4.804-4 Physically completed contracts  
The first step before Contract Closeout.

All work, including options and modifications, required by the contract is complete.

An optimal time to initiate the Mark As Complete status is after the final inspection and final payment have been executed. It should be noted there may be issues with setting Marking As Complete in PRISM before the final payment has cleared through UFMS/PRISM interactions. It's a logical step prior to the actual Closeout Function and can alert you or others to the contract's Complete status.

#### **2. Actual Closeout**

FAR References - 4.804-1 Closeout by the office administering the contract. & 4.804-5 Procedures for closing out contract files.

Issues and elements to be considered prior to closing out the contract in PRISM:

**Warranty Period** - For purposes of Closeout in Prism any warranties tied to the one year Warranty of Construction (FAR 52.246-21) should be complete with prior to Closeout.

**No Funds are remaining on or associated with the Contract** – This should be noted during the Mark As Complete phase.

**De-Obligating Funds** – All funds do not need to be de-obligated when the “Mark at Complete” is executed in PRISM. It may be prudent to maintain obligated funds in PRISM during the warranty period if work identified as warranty is determined to be changed work.

You have the ability to double check for remaining funds in PRISM with the Acceptance button on the main right hand menu in the contracts main page in PRISM.

**Closeout** – in PRISM

There are PRISM help documents in:

<https://workgroups.ihs.gov/sites/UFMSDocs/PRISM/default.aspx> Under Training Documents on this subject.

The closeout function in PRISM establishes closeout for

that contract award within the system – what system – UFMS?.

Once into the PRISM closeout function, after the contract is Marked As Complete, the closeout screen will ask you to use a Closeout Form. The CS can utilize a specialized form or one of the standard forms made available in PRISM.

The CO may complete the closeout form using edit features and click submit. Many features on the general form do not apply thus if they have a check box the user should check “Yes” as there is not option for N/A. Once completed, the form should be printed and placed in the contract file.





# GSA Contracts and Ordering

## FAR Subpart 8.4

### 1. Is placing an order under a GSA contract appropriate for this requirement?

- a. If no, select another contracting method; i.e., FAR Part 13, 14 or 15, and proceed with an in-house acquisition.
- b. If yes, comply with GSA's ordering procedures. FAR Subpart 8.4, Federal Supply Schedules, prescribes procedures that federal government ordering activities must follow when issuing orders using GSA Schedules. Orders placed following these procedures are considered to be issued using full and open competition.
- c. Additional information is contained in GSA's MAS Desk Reference guide and can be accessed on line at: <https://apps.fas.gsa.gov/cmls/flipbook>.

### 2. Definitions unique to GSA

- a. **GSA Advantage** – an online shopping and ordering system.
- b. **GSA eBuy** – an electronic Request for Quote (RFQ) system designed to allow government buyers to request information, find sources, and prepare RFQs, on line, for millions of services and products offered through GSA's Multiple Award Schedule and GSA Technology contracts. GSA Technology contracts include GSA Schedule 70 (Information Technology), Government-wide Acquisition Contracts (GWACs), and Network Services and Telecommunication contracts. GSA eBuy can be accessed via [www.ebuy.gsa.gov](http://www.ebuy.gsa.gov).
- c. **Multiple Award Schedule (MAS)** – a Government-wide contract vehicle for commercial products, services and solutions. It is also known as "GSA Schedules," "VA Schedules" and "Federal Supply Schedule (FSS)." GSA MAS' can be accessed via: [www.gsa.gov/schedules](http://www.gsa.gov/schedules).
- d. **Governmentwide Acquisition Contracts (GWACs)** – are multiple award Indefinite Delivery/Indefinite Quantity (IDIQ) contracts that help agencies meet their technology requirements through a customizable solution. Hardware, software and services can be purchased as a total technology solution.

### 3. What document will be used to make a purchase

### under a GSA Contract; i.e., a Task Order, Delivery Order or a Blanket Purchase Agreement (BPA) Call?

- a. If it's a service, a Task Order should be issued.
- b. If it's a product or supply type item, a Delivery Order should be issued.
- c. A BPA could be established and then a Call placed against that BPA (If a BPA was previously established for the item or service, a BPA Call could be placed).

### 4. Should a BPA be established?

- a. No, if the item or service being acquired is not a recurring need. In this case, issue a Task or Delivery Order as appropriate.
- b. Yes, if there is a recurring need for the item or service and market research/acquisition planning determines that a BPA is the right approach.

### 5. What are the benefits and types of BPA?

- a. A BPA is a vehicle or an acquisition strategy that an ordering activity can use to facilitate the acquisition of recurring needs by establishing agreements with qualified sources of supply to streamline the buying process and promote efficiencies. The benefits of using BPAs include: leveraging buying power, saving administrative time, and reducing paperwork.
- b. BPAs enable ordering activities to prepare for anticipated purchases and become more proactive in their purchasing. It should be noted that a BPA is not a contract, and although it establishes the terms applicable to the placement of orders, it does not obligate funds until an order is placed (how the order is done depends on the type of BPA).
- c. The two types of BPAs are Traditional and GSA Schedule BPAs. Both types may be used to fill anticipated repetitive needs for supplies and services.
  - Traditional BPAs follow FAR Part 13, Simplified Acquisition Procedures. These are essentially "charge accounts" – they often contain no pricing and usually do not identify specific items acquired. They are an

agreement that allows “calls” to be placed by the ordering activity for items the vendor routinely sells. These calls may be done orally.

- d. Schedule BPAs are not governed by FAR Part 13. Instead these BPAs are governed by FAR 8.405-3. Schedule BPAs usually include more favorable pricing than the schedule contract, such as additional discounts. They may have special terms and conditions. BPAs usually involve issuance of task/delivery orders under the schedule contract. Schedule BPAs are constrained by the underlying Schedule contract.

*Note: When establishing BPAs, ordering activities should request discounted pricing; however, schedule holders are not required to discount their prices.*





# Indefinite-Delivery Indefinite-Quantity (IDIQ) Contracts FAR Subpart 16.5

## 1. Is an IDIQ contract appropriate for this requirement?

- a. If no, select another contract type per FAR Part 16.
- b. If yes, decide whether sealed bidding or contracting by negotiation will be used. Follow the applicable procedure for the contracting method chosen (sealed bidding or negotiation).

## 2. Unique requirements for the solicitation.

- a. A minimum and a maximum contract amount are required for IDIQ contracts. The minimum must be more than a nominal amount, but it should not exceed the amount the Government is fairly certain to order. The minimum provides consideration for the contract to be binding. The maximum establishes the ceiling for the contract. The ceiling is important for Competition in Contracting Act (CICA) purposes.
- b. The contract may also specify minimum and maximum amounts that the Government may order under each task order or delivery order during a specified period of time.

Note: Task orders are for services (including construction and architect-engineering) and delivery orders are for products and supplies.

## 3. Multiple Awards Preference.

The Contracting Officer must, to the maximum extent practicable, give preference to multiple awards of IDIQ contracts.

## 4. Issuing Orders.

- a. When multiple award IDIQ contracts are contemplated, the solicitation must state the procedures that will be used in issuing orders, including the ordering media, and the selection criteria the Government will use to provide awardees a fair opportunity to be considered for each order exceeding \$3,000.
- b. There are exceptions to “fair opportunity” but those exceptions require justification in accordance with FAR 16.505(b)(iii)

## 5. Centralized or Decentralized Ordering?

Centralized ordering is done by the Contracting Officer that issued the contracts (or another Contracting Officer within that same office). Decentralized ordering, if allowed, is done by a Contracting Officer at any other location. If decentralized ordering is allowed, the Contracting Officer with overall responsibility for the contract must:

- a. Ensure that adequate control procedures are in place before orders are authorized; and
- b. Exercise oversight of decentralized ordering throughout the period of performance under the contract to ensure that the procedures are followed.

## 6. Some Lessons Learned

- a. Those authorized to place orders should be identified in the contract.
- b. To ensure decentralized ordering control, the Contracting Officer responsible for the contract should require certain information from other ordering Contracting Officers before they are allowed to place orders (such as what they want to order to ensure it is within scope, the amount they require, etc.). When the Contracting Officer responsible for the contract gets the required information, he or she will issue an order number with a not to exceed amount. The decentralized ordering Contracting Officer will also be required to provide a copy of the order when it is issued.
- c. Knowing how much is being ordered under the contract is important for several reasons. The Contracting Officer responsible for the contract needs to know how much work the contractors have to ensure they don't get overloaded, to ensure that fair opportunity is provided as required, to ensure that any minimum and maximum order limitations are adhered to, and to ensure that the maximum contract amount is not exceeded.
- d. When IDIQ contracts approach their maximum amounts (ceilings), customers often to want to increase those amounts. If there is adequate contract performance period remaining, it may

make good business sense to increase the ceiling. However, Contracting Officers must use caution in this area. CICA applies; therefore, a Justification for Other Than Full and Open Competition is required. Of course, increasing the ceiling must also be within scope.

*See FAR 16.506 for applicable solicitation provisions and contract clauses.*





The Department of Health & Human Services  
Indian Health Service  
Office of Environmental Health & Engineering  
Division of Engineering Services

