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SUBPART 1.1 — PURPOSE, AUTHORITY, ISSUANCE

1.101 Purpose.

The Engineer Federal Acquisition Regulation Supplement (EFARS) is issued pursuant to Subpart 1.3, Federal Acquisition Regulation (FAR), by the Chief of Engineers, United States Army Corps of Engineers, under authority of the Secretary of the Army. The EFARS implements and supplements the FAR, the Defense FAR Supplement (DFARS), and the Army Federal Acquisition Regulation Supplement (AFARS).

1.103 Applicability.

The FAR, DFARS, AFARS, and the EFARS apply to all USACE acquisitions.

1.104 Issuance.

1.104-2 Arrangement of Regulations.

(a) *General.* The arrangement and numbering of EFARS conforms to the FAR, DFARS and AFARS.

(b) *Numbering.* Numbered divisions (parts, subparts, sections, or paragraphs, etc. and lettered appendices) of this Supplement correspond to the same numbered division in the FAR, DFARS and AFARS. Numbered divisions of this Supplement with a suffix in the "100" series (e.g. 1.601-100) contain subject matter related to but not contained in a FAR, DFARS, or AFARS numbered division. Omission from the EFARS of a numbered division which appears in FAR, DFARS or AFARS denotes that there is no additional coverage in EFARS.

(c) *References and Citations.* This Supplement shall be referred to as the Engineer FAR Supplement (EFARS). Any numbered division may be cited as "EFARS" followed by the division number. Thus, this section would be cited as "EFARS 1.104-2", but within this supplement, it would be cited as "1.104-2".

SUBPART 1.2 — ADMINISTRATION

1.201 Maintenance of the EFARS.

1.201-100 Amendment of the EFARS.

(a) The EFARS will be maintained by the Principal Assistant Responsible for Contracting (PARC), code CEPR-ZA. All revisions to the EFARS will be prepared by the PARC. Proposed revisions to the EFARS shall be submitted to the PARC, ATTN: CEPR-P, through normal command channels.

(b) The EFARS will normally be amended by PARC Instruction Letters (PIL) which will contain replacement pages and be distributed electronically.

SUBPART 1.4 — DEVIATIONS FROM THE FAR

1.403 Individual Deviations.

(1) Requests for deviations from the EFARS shall be submitted to the PARC for approval.

(2) Requests for deviations from the FAR, DFARS, or AFARS, shall be submitted through the PARC.

SUBPART 1.6 — CONTRACTING AUTHORITY AND RESPONSIBILITIES

1.601 General.

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PART 1 — FEDERAL ACQUISITION REGULATIONS SYSTEM

1.601-93 Responsibility of commanders.

Functional Coordination. The Contracting officer is responsible for all contract decisions, as prescribed by FAR 1.602. Major contract decisions will be staffed with functional coordination among staff elements.

Command Involvement in Award Decisions. Some architect-engineer (A-E), construction, design-build, hazardous toxic and radioactive waste (HTRW), and federal information processing (FIP) contracts are so critically important that the commander should be the source selection official or approval authority. HQUSACE will determine source selection authorities on Total Environmental Restoration Contracts (TERCs). FAR clause 52.204-1, Approval of Contract shall be placed in solicitations where the source selection approval is above the contracting officer or in solicitations when a formal acquisition plan is required in accordance with EFARS 7.102(S-102)(b). FAR clause 52.204-1 is not applicable to post award contract actions regardless of its use in the award of the initial contract.

Command Oversight of Post Award Contract Decisions. Some contracts are so critically important that commanders should be fully involved in the key post award decisions. However, management oversight of post award decisions must be more limited.

Consequently, to preserve the contracting officer's independence, the commander's review of key post award decisions is limited to concurring with the proposed decision or to returning it with questions (not disapproving and not directing another particular decision).

Command procedures. Each command should develop standards to identify critical contracts that may require approval of award decisions or post award oversight by commanders as stated above. For award or post award decisions, the standards may include complexity, local sponsor interest, type of contract (such as HTRW), and unresolved differences of opinion resulting from functional coordination among staff elements. Key post award decisions may also include sizable contract claims, terminations for default and alternative dispute resolutions (ADR).

HQUSACE will assure that USACE complies with the requirements of AFARS 7.103, Agency Head Responsibilities.

MSC commanders shall nominate individuals to be designated source selection authorities (SSAs) for IDCs over the thresholds in 7.102(S-102)(b)(i) and (ii). Nominations shall be sent to HQUSACE (attn: PARC), and the PARC will approve/disapprove the appointments.

Each MSC Resource Management Board (RMB) shall review the plans of subordinate commands as described in Subpart 7.1 at least twice annually. The MSC RMB shall report its review to the MSC commander with recommendations for approval.

Each district shall prepare the acquisition plans and strategies required in Subpart 7.1.

1.601-100 Civil Works construction contracts.

The Secretary of the Army, acting through the Chief of Engineers, is authorized by 33 U.S.C. 622 et seq. to carry out projects for improvement of rivers and harbors (other than surveys, estimates, and gagings) by contract or otherwise, in the manner most economical and advantageous to the United States.

ENGINEER FAR SUPPLEMENT (EFARS)

PART 1 — FEDERAL ACQUISITION REGULATIONS SYSTEM

1.602 Contracting officers.

1.602-1 Authority

1.602-1-100 Administrative contracting officer authority.

(a) Individuals may be delegated administrative contracting officer (ACO) authority as set forth below. Less authority than that specified below may be delegated.

(i) Execute unilateral administrative modifications under FAR 43.103 (b)(1). Modify construction contracts within the scope of the contract under any of the following contract clauses unique to construction contracts, provided that no individual contract modification exceeds \$500,000 (the sum of deletions and additions): FAR 52.212-11, Variation in Estimated Quantity; EFARS 52.212-5001, Variations in Estimated Quantities - Subdivided Items; FAR 52.212-12, Suspension of Work; FAR 52.236-2, Differing Site Conditions; FAR 52.243-4, Changes; and FAR 52.248-3, Value Engineering — Construction.

(ii) Modify construction contract performance periods under FAR clause 52.249-10, Default (Fixed-Price Construction), when a delay is due to unforeseeable causes beyond the control and without the fault of the contractor.

(iii) Modify purchase orders under FAR clause 52.243-5, Changes and Changed Conditions, provided that the modification does not cause the total value of the purchase order to exceed the simplified acquisition procedures limitation described at FAR 13.101.

(iv) Perform any of the contract administration functions in FAR 42.302, subject to the limitations in (i) through (iii) above.

(b) ACOs appointed under (a) above shall not modify construction contracts under any clause not specified in (i) through (iii) above, including (but not limited to) terminations for convenience or for default.

1.602-2 Responsibilities.

(c)(ii) Legal counsel is an integral member of the USACE acquisition team and process. Consequently, legal counsel shall review all contract actions over \$500,000 and all contractual issues that may lead to a claim, regardless of dollar amount. Although not mandatory, contracting officers and administrative contracting officers are encouraged to seek legal counsel for complex or unusual contract actions under the \$500,000 threshold.

(iii) Differences between the contracting officer and legal counsel as to legal sufficiency that cannot be satisfactorily resolved within the command shall be referred to PARC (Attn: CEPR-ZA) for resolution.

1.602-2-91 Appointment of ordering officers.

(b) In accordance with AFARS 1.603-1(I) chiefs of contracting offices are hereby delegated authority to appoint ordering officers under their jurisdiction, without power of redelegation.

(c) All ordering officer appointments shall be in compliance with AFARS 1.602-2-91.

1.602-3 Ratification of unauthorized commitments.

ENGINEER FAR SUPPLEMENT (EFARS)

PART 1 — FEDERAL ACQUISITION REGULATIONS SYSTEM

(b)(3) The following ratification authorities are delegated, without authority to redelegate:

(A) PARC for amounts of \$100,000 or less;

(B) Chiefs of Contracting offices for amounts of \$10,000 or less.

1.603 Selection, appointment, and termination of appointment.

1.603-1 General.

(2) Requests for contracting officer and ACO appointments shall be submitted to HQUSACE, ATTN: CEPR.

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2.101 Definitions.

ENGINEER FAR SUPPLEMENT (EFARS)

PART 2 — DEFINITIONS OF WORDS AND TERMS

SUBPART 2.1 — DEFINITIONS

2.101 Definitions.

"Chief of Contracting Office" means the Chief of the Contracting Division at a District, or the Director of Contracting at a Division, Center, Laboratory, or other support activity.

"Command" means each USACE Division, each USACE District, The U.S. Army Engineering and Support Center (HNC), Transatlantic Programs Center (TAC), Transatlantic Programs Center (Europe) (TAE), Topographic Engineer Center (TEC), Cold Regions Research and Engineering Laboratory (CRREL), Construction Engineering Research Laboratory (CERL), Humphreys Engineering Center Support Activity (HECSA), and Waterways experiment Station (WES).

"Commander" means the commanding officer of each USACE district and each USACE division, and the director or commander of HNC, TAC, TAE, ETL, CRREL, CERL, HECSA and WES.

"Head of the Contracting Activity (HCA)" for USACE means the Chief of Engineers.

Centers. For determining contracting authority levels for this regulation, Centers (HNC, and TAC) will equate to a Division. As a subordinate unit to TAC, TAE's contracting authority will therefore equate to that of a district.

Level higher than the contracting officer. When a District or TAE chief of contracting is the contracting officer, a "level higher than the contracting officer" means the Division or Center Director of Contracting. When an operating Division, Center or Laboratory Director/Chief of Contracting is the contracting officer a "level higher than the contracting officer" means the PARC.

Local Cooperation Agreements (LCAs). See Project Cooperation Agreements.

Project Cooperation Agreements. Formerly referred to as Local Cooperation Agreements, these are agreements under 31 U.S.C. 6305 and 42 U.S.C. 1962d-5b. They are not contracts as defined by the FAR.

"USACE and HQUSACE" means the United States Army Corps of Engineers and its headquarters, respectively.

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ENGINEER FAR SUPPLEMENT (EFARS)

PART 4 — ADMINISTRATIVE MATTERS

SUBPART 4.8 — CONTRACT FILES

4.802 Contract files.

(c) Official contract files shall be maintained by the awarding/administering/command contracting office. All actions shall be recorded on Engineer Forms 3726, 3726-1, and 3726-2, and maintained in the official contract file.

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5.502 Authority.

ENGINEER FAR SUPPLEMENT (EFARS)

PART 5 — PUBLICIZING CONTRACT ACTIONS

SUBPART 5.5 — PAID ADVERTISEMENTS

5.502 Authority.

(a) The Chief of Engineers delegates the authority to approve the publication of advertisements, notices or proposals in newspapers, subject to the limitations in 44 U.S.C. 3701, 3702, and 3703, to the following individuals (See AFARS 1.9101(b)(1)):

- a. Deputy Chief of Engineers
- b. PARC
- c. Commanders

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PART 6 — COMPETITION REQUIREMENTS

SUBPART 6.3 — OTHER THAN FULL AND OPEN COMPETITION

6.303 Justifications.

6.303-91 Format of the Justification and Approval (J&A).

An equivalent Justification Review Document in electronic format may be used instead. The Chief of Contracting (or designee in the Chief's absence), shall sign the Justification Review Document.

6.304 Approval of the justification.

(a)(1) Proposed contracts utilizing other than full and open competition not exceeding \$500,000 will be approved by the Chief of Contracting.

(2) Division Directors of Contracting are delegated the authority to approve proposed contracts utilizing other than full and open competition exceeding \$500,000 but not exceeding \$10,000,000. The Justification Review Document and the J&A for actions over \$10,000,000 but not exceeding \$50,000,000 shall be forwarded to HQUSACE ATTN: CEPR for approval by the PARC.

(3) Proposed contracts utilizing other than full and open competition exceeding \$50,000,000 shall be forwarded to CEPR with the Justification Review Document.

(4) All justifications shall be reviewed by the Office of Counsel, and the field competition advocate.

SUBPART 6.5 — COMPETITION ADVOCATES

6.501 Requirement.

Division Directors of Contracting are appointed as Special Competition Advocates.

(S-100) Field Competition Advocates shall be appointed in writing by Commanders and be a supervisory level above the Chief of Contracting. Field Competition Advocates will perform the duties and responsibilities listed in FAR 6.502.

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PART 7 — FEDERAL ACQUISITION REGULATIONS SYSTEM

SUBPART 7.1 — ACQUISITION PLANS

7.102 Policy.

(S-100) General.

In general, there are two levels of acquisition planning:

(a) The annual overall acquisition strategy for the district or center contracting activity's total anticipated workload (see (S-101) below); and

(b) A formal or informal acquisition plan, as appropriate, for an individual acquisition (see 7.102 (S-102) and (S-103) below).

(S-101) Overall Acquisition Strategies.

(a) Prior to the beginning of each fiscal year, the Program and Project Management Division (PPMD), with the assistance of contracting and the small business office, at each district or center shall develop a written overall acquisition strategy (OAS) covering all anticipated contracts over \$1 million. The OAS may be based on historical trends and shall include all known work, as well as reasonably expected work. The OAS shall be updated in the middle of the fiscal year and when major new projects are identified. Short notice acquisitions will be added to the OAS at the next regular update and will not delay processing the acquisition.

(b) The OAS shall address and document all major technical and business issues. The anticipated workload will be compared to the remaining capacities of ongoing contracts to determine the need to award new contracts. Any new contracts needed shall be scheduled and their terms established based on a case-by-case analysis considering factors such as the following:

- (i) Type of work
- (ii) Anticipated workload
- (iii) Impact on competition,
- (iv) Most effective contract type (including, for example, fixed-price, cost-reimbursement, incentive, and indefinite delivery contracts (IDCs)),
- (v) Overall mix of contract sizes, and
- (vi) Impact on small business and other business participation (see (c) below) and socio-economic concerns.

(c) The OAS shall assure a mix of large and small contracts, including IDCs of various types and sizes, to provide meaningful opportunities for small business firms to participate in the work. The OAS shall incorporate and include a copy of the Small Business Forecast required annually by letter by the DoD and Army Directors, SADBUs.

(d) See 36.601-3-90 for additional guidance concerning IDCs.

(S-102) Formal Acquisitions Plans.

ENGINEER FAR SUPPLEMENT (EFARS)

PART 7 — FEDERAL ACQUISITION REGULATIONS SYSTEM

(a) See FAR 7.105 and DFARS 207.105, which contain requirements for the contents of formal acquisition plans. DFARS 207.105 requirements for formal acquisition plans will be required at the thresholds set forth in FAR and AFARS, with additional lower thresholds as considered appropriate by USACE, as identified in paragraph b below.

(b) A formal acquisition plan shall be prepared for:

(i) Acquisitions for development, as defined in FAR 35.001, when the total cost of all contracts for the acquisition program is estimated at \$10 million or more (DFARS 207.103(d)(i)(A));

(ii) Acquisition for production or services (to include A-E and construction), when the total cost of all contracts for the acquisition program is estimated at \$50 million or more for all years or at \$25 million or more for any fiscal year;

(iii) Nationwide projects or projects that exceed the MSC's geographical boundaries; and

(iv) Acquisition determined by the designated Regional PARC to be nationally significant, such as, impacting a major USACE initiative, raising serious or unique environmental matters, implementing a deviation from the FAR, and/or concerning significant Congressional or political interest beyond normal constituent service.

(c) The requirements in (b)(ii) above, does not apply to a single, fixed price discrete construction project.

(d) The project management plan required in ER 5-1-11, Business Process, paragraph 7.b (2), shall include the Formal Acquisition Plan for that project, as an attachment. Nationwide projects or projects that exceed the MSC's geographical boundaries are required to show coordination on how the work will be handled.

(S-103) Informal Acquisition Plans.

An informal acquisition plan shall be prepared according to designated Regional PARC for all acquisitions not requiring a formal acquisition plan. The documentation and level of detail in the informal acquisition plan will be commensurate with the dollar value, complexity, and significance of the acquisition. The project management plan required by ER 5-1-11, Business Process, paragraph 7.b, shall include the informal acquisition plan for that project, as an attachment.

(S-104) Acquisition Plan Training and Assistance:

The Regional PARCs maintain a website with samples and templates for formal and informal acquisition plans at: <http://swfteam.swf.ds.usace.army.mil/PARC/>. The Regional PARCs will offer periodic and on-demand training on acquisition plans.

7.103 Agency-head responsibilities.

(S-100) Reviewing and Approving Acquisition Plans and Revisions.

ENGINEER FAR SUPPLEMENT (EFARS)

PART 7 — FEDERAL ACQUISITION REGULATIONS SYSTEM

(a) Each OAS and formal acquisition plan shall be fully coordinated with all staff elements, including the Deputy for Small Business and local legal counsel. If coordination results in an unresolved difference of opinion, elevate the disagreement through command channels.

(b) The MSC Commander is the approval authority for any district OAS. HQUSACE is the approval authority for any OAS prepared by a Region, Center or HECSA.

(c) The Regional PARC is the approval authority for all formal acquisition plans.

(d) The Regional PARC shall establish the approval authority for informal acquisition plans.

(e) An amended acquisition plan shall require approval at the same level as the original plan.

(S-101) Overall Acquisition Strategy Panel.

(a) Each District, Center, Region and HECSA shall establish an Overall Acquisition Strategy Panel, which may be an existing group, such as the Project Review Board (PRB), provided it includes all staff elements (including the Contracting Officer or District/Center Chief of Contracting; Deputy for Small Business; and local legal counsel). The Panel shall be responsible to the District, Center, and/or Division Commander to assure that the requirements of 7.102 (S-101) above are met.

(b) The Panel may establish separate, subordinate boards, if appropriate, to review requirements for breakout, analysis of bundled requirements, set asides, as well as the appropriate balance of acquisition methods, contract types and contract sizes.

(c) The regional PARCs maintain a Document Approval Matrix on their website. The following matrix, from the Regional PARC website, shows the approval authority for acquisition strategies.

DOCUMENT (REGULATORY CITE)	DOLLAR THRESHOLD	APPROVAL AUTHORITY
Acquisition Strategy (AFARS 5137.590-4(d)) – required for services	\$500M or more	DASA (P&P)
Acquisition Strategy (AFARS 5137.590-4(e)) – required for services	\$250M < \$500M	HCA
Acquisition Strategy (AFARS 5137.590-4(f)) – required for services	>\$10M <\$250M	PARC
Acquisition Strategy (AFARS 5137.590-4(g)) – required for services	>\$100K <\$10M	DCC
Acquisition of Services - not performance based (DFARS 237.170-2 (a)(1))	>\$78.5M	SPE
Acquisition of Services - not performance based (DFARS 237.170-2 (a)(2))	≤ \$78.5M	HCA

- DASA (P&P) = Deputy Assistant Secretary of the Army Office for Privatization and Partnership
- HCA = Head of the Contracting Activity
- PARC = Principal Assistant Responsible for Contracting
- DCC = District Chief of Contracting
- SPE = Senior Procurement Executive

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11.703 Contract clauses.

ENGINEER FAR SUPPLEMENT (EFARS)

PART 11 — FEDERAL ACQUISITION REGULATIONS SYSTEM

SUBPART 11.7 — VARIATION IN QUANTITY

11.702 Construction contracts.

When a variation in estimated quantities results in an increase in the total contract dollar amount in a fixed price contract, the contracting officer shall execute a unilateral modification on an SF 30 to add an appropriate amount of funding to the contract. To document final quantities and costs, a closeout modification shall also be executed on all construction contracts having unit-priced estimated quantity items

11.703 Contract clauses.

(c) The contracting officer shall insert the provision at 52.211-5000, Evaluation of Subdivided Items, and the statement at 52.211-5001, Variations in Estimated Quantities – Subdivided Items, in solicitations and contracts when a fixed-price construction contract is contemplated and when subdivided items are to be separately priced for payment purposes.

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SUBPART 13.6 — MICRO PURCHASE

13.603 Soliciting competition, evaluation of quotes, and award.

(S-100) See 36.601-3(S-100) and 36.602-5(a) for A-E services.

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PART 14 — SEALED BIDDING

SUBPART 14.2 — SOLICITATION OF BIDS

14.201 Preparation of invitation for bids.

14.201-1 Uniform contract format (UCF).

(a)(1) For USACE construction contracts, the following USACE format shall be used in lieu of the UCF. The UCF's corresponding section is shown parenthetically below each USACE section to illustrate the relationship between the two formats.

USACE Contract Format

00010. Solicitation/Contract Form (SF 1442)
(UCF Sections A & B)
00100. Schedule/Instruction to Offerors
(UCF Sections L & M)
00600C. Representations & Certifications
(UCF Section K)
00700. Contract Clauses
(UCF Section I)
00800. Special Contract Requirements
(UCF Section H)
01000. Division 1, General Requirements
(UCF Section C)
16999. Division 2-16, Technical Provisions
(UCF Section C)

Uniform Contract Format

A. Solicitation/Contract Form
B. Supplies or Services & Prices/Costs
C. Description/Specs./Work Statement
D. Packaging & Marking
E. Inspection & Acceptance
F. Deliveries or Performance
G. Contract Administration Data
H. Special Contract Requirements
I. Contract Clauses
J. List of Attachments
K. Representations, Certifications & Other Statements
of Offeror
L. Instructions, Conditions & Notices to Offeror
M. Evaluation Factors for Award

SUBPART 14.4 — OPENING OF BIDS AND AWARD OF CONTRACT

14.407 Mistakes in bids.

14.407-2 Apparent Clerical Mistakes.

Insert the statement at 52.214-5000 in each solicitation with a bid schedule containing both unit prices and extended amounts based on those unit prices and in each solicitation with a bid schedule containing two or more bid items (or sub-items) that are totalled to arrive at a lump sum price:

14.407-3 Other mistakes disclosed before award.

(e)(1)(i) Authority. If a bidder requests permission to withdraw a bid and not correct it, Commanders are hereby delegated without power of redelegation the authority to approve such requests for withdrawal. If, however, a bidder requests correction or relief, (that is, either correction or withdrawal) the request shall be submitted to the Division Commander for determination, who shall exercise the authority in coordination with the Division Counsel.

(g)(3)(S-100) Also include the following:

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(i) Sworn affidavit(s) as to the authenticity of the worksheets and other documents, that is, affidavits from the person(s) who prepared the worksheets that the documents submitted are all the working papers used to compute the bid, that the documents were all created before bid opening, and that the worksheets have not been altered since bid opening; and

(ii) Sworn affidavit(s) as to the mistake, the manner in which it was made, and the intended bid price, including the affidavit(s) of the person(s) who computed the amount allegedly omitted from the bid.

(iii) The statement by legal counsel should include citation to pertinent decisions of the Comptroller General.

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PART 15 — CONTRACTING BY NEGOTIATION

SUBPART 15.2—SOLICITATION AND RECEIPT OF PROPOSALS AND INFORMATION

15.204 – Contract format.(a) For Architect-Engineer contracts, use the Uniform Contract Format (UCF). For construction contracts, use the USACE format at EFARS 14.201-1(a)(1) in lieu of the UCF.

SUBPART 15.4 — CONTRACT PRICING

15.404-4 — Profit.

15.404-73 Alternate structured approaches.

(b)(2)(S-100) Facilities capital cost of money shall not apply to contracts where reimbursement is provided to contractors through construction equipment use rates or allowances (see FAR 31.105(d)). In other situations where facilities capital cost of money is proposed and verified, follow the offset procedure in DFARS 215.404-73(b)(2).

15.404-73-100 Alternate structured approach for construction contracts.

(a) The following alternate structured approach shall be used for all fixed-price construction contract actions. For cost reimbursement contracts, the weighted guidelines method described at DFARS 215.404-71 shall be used.

Factor	Rate	Weight	Value
Degree of risk	20		
Relative difficulty of work	15		
Size of job	15		
Period of performance	15		
Contractor's investment	5		
Assistance by Government	5		
Subcontracting	25		
TOTAL	100%		

(b) Based on the circumstances of the procurement action, each of the above factors shall be weighted from .03 to

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.12 as indicated below. "Value" shall be obtained by multiplying the rate by the weight. The Value column when totaled indicates the fair and reasonable profit percentage under the circumstances of the particular procurement.

(1) Degree of risk. Where the work involves no risk or the degree of risk is very small, the weighting should be .03; as the degree of risk increases, the weighting should be increased up to a maximum of .12. Lump sum items shall generally have a higher weight than unit price items. Consider the nature of the work and where it is to be performed. Also consider the portion of the work to be done by subcontractors, amount and type of labor included in costs and whether the negotiation is before or after performance of the work. Modifications settled before the fact have much greater risk than those settled after the fact. A weight of .03 is appropriate for after the fact equitable adjustments and/or settlements.

(2) Relative Difficulty of Work. If the work is difficult and complex, the weight should be .12 and should be proportionately reduced to .03 on the simplest of jobs. This factor is tied in to some extent with the degree of risk. Other things to consider are the nature of the work, by whom it is to be done (i.e., subcontractors, consultants), etc.

(3) Size of Job. Work of \$100,000 shall be weighted at .12. Work estimated between \$100,000 and \$5,000,000 shall be proportionately weighted from .12 to .05. Work from \$5,000,000 to \$10,000,000 shall be weighted at .04. Work in excess of \$10,000,000 shall be weighted at .03. It should be noted that control of fixed expenses generally improves with increased job magnitude.

(4) Period of Performance. Work not to exceed 1 month is to be proportionately weighted at .03. Durations between 1 and 24 months are to be proportionately weighted between .03 and .12. Work in excess of 24 months is to be weighted at .12.

(5) Contractor's Investment. To be weighted from .03 to .12 on the basis of below average, average and above average. Consider the amount of subcontracting, Government-furnished property or data such as surveys, method of making progress payments, and any mobilization payment items.

(6) Assistance by Government. To be weighted from .12 to .03 on the basis of average to above average. Consider use of Government-owned property, equipment and facilities, expediting assistance, etc.

(7) Subcontracting. To be weighed inversely proportional to the amount of subcontracting. Where 80% or more of the work is to be subcontracted use .03. The weighting should be increased proportionately to .12 where all the work is performed by the contractor's own forces.

15.404-73-101 Alternate structured approach for architect-engineer contracts.

(a) The pre-negotiation profit objective for a firm-fixed-price architect-engineer (including surveying and mapping) contract, contract modification, or task order will be determined as described below. The profit objective for all other types of A-E contracts will be determined in accordance with DFARS 215.404-71.

Profit Objective = Cost x (Technical Complexity Factor + Length Factor + Support of Socioeconomic Program Factor)

Where:

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(1) Cost is the total estimated costs, including general and administrative costs, of the prime contractor and any subcontractors, exclusive of any profit. However, normal profit need not be deducted from the prices for commercial supplies and services (such as airfares, reproduction, lab tests, express mail and materials) in developing the cost base.

(2) Technical complexity factor will vary from 0.05 for low complexity (design of simple road repaving or routine boundary survey verification) to 0.10 for high complexity (design of nuclear chemistry laboratory or the design of the remediation of a very unusual and complex hazardous waste site). Consider the nature of the work, degree of management involvement required, schedule constraints, amount of Government assistance, and availability of design criteria.

(3) Length factor is .02 for a contract action of 1 month or less, and increases proportionately to 0.04 for a contract action of 21 months or longer. Consider the time necessary to complete the substantive portion of work, including option periods.

(4) Support of socioeconomic programs factor will vary from 0.0 for a prime contractor (including a small business prime contractor) who plans no subcontracting, to 0.02 for a contractor who demonstrates exceptional program support. Consider the contractor's past record as well as the instant contract with regard to mentoring and subcontracting with small businesses, small disadvantaged businesses, and historically black colleges and universities and minority institutions.

(b) When the facilities capital cost of money is proposed by the contractor and verified, reduce the profit objective as described in DFARS 215.404-73(b)(2).

15.406 —Documentation.

15.406-1 -- Prenegotiation objectives.

(a) AFARS 15.406-1 requires a Prenegotiation Objective Memorandum (POM), which is the prenegotiation portion of a Price Negotiation Memorandum (PNM). Each Chief of Contracting shall establish local procedures for preparation, review and approval of POMs subject to the following: Review and approval shall be at the lowest practicable level appropriate for the complexity, risk and dollar value of the action. Ordinarily, review and approval of a POM for a small or routine action prior to negotiation is not required. Conversely, review and approval of the POM for complex, risky, and/or high dollar value actions shall be accomplished prior to negotiation.

15.406-3 – Documenting the negotiation.

(a) FAR 15.406-3 requires a Price Negotiation Memorandum (PNM). Each Chief of Contracting shall establish local procedures for preparation, review and approval of PNMs subject to the following: For contract actions valued at more than \$500,000, PNMs shall be approved at a level above the contract negotiator. Ordinarily, review and approval of a PNM should be concurrent with the review and approval of the final contract action.

15.490 – Follow-up on contract audit reports.

15.490 – 1 Responsibilities.

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PART 15 — CONTRACTING BY NEGOTIATION

(b)(2) Directors/Chiefs of Contracting shall ensure that contracting officers, both Procuring Contracting Officers (PCOs) and Administrative Contracting Officers (ACOs), the Contract Audit Followup (CAF) Monitor and the Monitor's supervisor (at least one level above) must have a factor (related to the follow-up duties described immediately below) included in their performance objectives and resulting performance appraisal(s).

(c) Chiefs of Contracting shall –

(1) Demonstrate personal interest in all contract audit reports, tracking and assisting subordinate contracting officers (PCO and ACO) in the resolution and disposition of those audit recommendations which appear unlikely to be resolved within six months of the date of an audit report.

(2) Establish a system where both PCOs and ACOs, on a routine basis, directly report their Contract Audit Followup related actions and seek advisement from the Chief of Contracting.

15.490-2 Tracking of contract audit report recommendations.

(a) The Chiefs of Contracting shall be responsible for centralized tracking of all contract audit reports.

15.490-3 Reporting.

(a) Electronic transmission of the report must be received by HQ, USACE, ATTN: CEPR-A no later than the fifth calendar day following the end of March and September. Reports shall be transmitted using the "IG SEMIANNUAL" (DELIMITED ASCII TEXT) screen prompt.

(b) Audits reported as 6-12 months old, unresolved or overage in the "Status Report on Specified Contract Audit Reports," shall have an Overage Audit Review Board Reportable Audit Action Plan prepared and forwarded through successively higher headquarters to HQ, USACE, ATTN: CEPR-A no later than ten calendar days following the end of March and September. The action plan shall be sufficiently detailed to include all requirements stated in AFARS 15.890-4(c)(2).

15.490-4 Overage Audit Review Boards.

(c)(2)(vi) Each audit brought forward to the Overage Audit Review Board shall in the Overage Audit Review Board Reportable Audit Action Plan include a milestone plan to achieve proper resolution and disposition.

SUBPART 15.5 — PREAWARD, AWARD, AND POSTAWARD NOTIFICATIONS, PROTESTS, AND MISTAKES

15.503 Notifications to unsuccessful offerors.

(a) Preaward notices. See 36.607(a) for architect-engineer contracts.

15.505 Preaward debriefing of offerors. See 36.607(b) for architect-engineer contracts.

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PART 17 — SPECIAL CONTRACTING METHODS

SUBPART 17.74 — UNDEFINITIZED CONTRACT ACTIONS

17.7403 Policy.

(S-100) Each command shall establish procedures (including management controls on definitization) to ensure the proper use of undefinitized contract actions (UCAs). See 43.102(b).

17.7404-1 Authorization

(S-100) In accordance with deviation 88-DEV-50 granted by SARD-PP dated 21 Dec 87, Division Commanders are delegated the authority to approve undefinitized contract actions (UCA) (new procurements) not exceeding \$3,000,000 during emergencies such as mobilizations, natural disasters or civil disturbances. An emergency/disaster is defined as any situation where loss of life or property is imminent and the use of normal letter contract approval procedures could result in such a loss. Division Commanders are authorized to make a written determination that such an emergency exists and that no other contract type is suitable. This authority is not redelegatable.

SUBPART 17.75 – ACQUISITION OF REPLENISHMENT PARTS.

17.7503(b) See 43.102.

SUBPART 17.90 – JOB ORDER CONTRACTING (JOC)

17.9003-3 Planning and coordination.

(e) USACE contracting officers awarding and administering JOCs in support of installations will make appropriate plans to ensure that effective, efficient contract administration is maintained throughout the duration of the contract. USACE contracting offices may appoint qualified district staff (within the district office or field construction office) or qualified installation staff as ordering officers. Individuals to be nominated as ordering officers shall be identified during the acquisition planning process and receive appropriate training. Ordering officers at installations shall be kept informed about changing rules and policies during the period of their appointments and shall receive appropriate guidance from the contracting officer.

17.9004-3 Ordering.

(a) Summary of ordering process. See 16.505(b)(4) regarding multiple award contracts.

17.9005 Contract administration.

(b) Prior to establishing ordering officer capabilities within an installation, the contracting officer will ensure there is in operation an adequately staffed organization having complete documented procedures in effect which support effective processing of JOC orders and field administration of the JOC.

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PART 19 — SMALL BUSINESS PROGRAMS

SUBPART 19.2 — POLICIES

19.201 General policy.

(c)(6) The USACE Director of Small Business shall be afforded an opportunity to comment upon and contribute to the performance evaluation of Deputies for Small Business at Divisions, TAC, HNC, and HECSA. Deputies for Small Business at Divisions shall be afforded the same opportunity for the Deputies for Small Business at Districts.

(9)(B) Deputies for Small Business shall make the review and document it on DD Form 2579, Small Business Coordination Record, prior to synopsis of a requirement for A-E services in the Commerce Business Daily.

(S-91) Commanders shall forward the nominee for Deputy for Small Business, along with a summary of qualifications, to the headquarters Director of Small Business for review and consultation.

19.201-100 USACE Small Business Council.

The USACE Small Business Council is chaired by the USACE Director of Small Business. Its members are the Deputy for Small Business of the Divisions and HNC. The council shall meet at least annually at the call of the chairperson.

SUBPART 19.7 — THE SMALL BUSINESS SUBCONTRACTING PROGRAM

19.705 Responsibilities of the contracting officer under the subcontracting assistance program.

19.705-4 Reviewing the subcontracting plan.

(d) Before accepting a subcontracting plan with a small disadvantaged business goal of less than five percent, the contracting officer shall prepare an explanatory statement and include it, along with the approval request, and a copy of the evaluation cited at AFARS 5119.705-4.

SUBPART 19.8 — CONTRACTING WITH THE SMALL BUSINESS ADMINISTRATION (THE 8(a) PROGRAM)

19.800(b) General.

Architect-Engineer services may be obtained through the 8(a) Program using competitive procedures. See 36.602 (S-101).

19.803 Selecting acquisitions for the 8(a) Program.

(a) Deputies for Small Business are redelegated the authority to respond to SBA requests for commitments to support business plans of 8(a) firms in accordance with local procedures.

(c) Deputies for Small Business are redelegated the authority to identify to the SBA, after coordination and approval in accordance with local procedures, candidate projects for being accomplished by 8(a) firms. Each command shall review planned acquisitions every fiscal year to determine which acquisitions are suitable for the 8(a) program.

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PART 19 — SMALL BUSINESS PROGRAMS

SUBPART 19.10 — SMALL BUSINESS COMPETITIVENESS DEMONSTRATION PROGRAM

19.1001 General.

Section 401 of Public Law 105-135 (the Small Business Reauthorization Act of 1997) permanently extends the Small Business Competitiveness Demonstration Program originally authorized in 1989 by sections 711 through 718 of Public Law 100-656.

Section 404 of Public Law 105-135 also permanently extends the program to expand small business participation in dredging also originally authorized in 1989 by section 722 of Public Law 100-656.

19.1003 Purpose.

(a) The purpose of the Section 722 is to expand the participation of small business (SB) concerns and emerging small business (ESB) concerns in contracting opportunities for dredging. The SB program goal is not less than 20% to SB, including 5% to ESB companies. The dollar value of contracts which are performed exclusively by dustpan and sea-going hopper dredges are excluded in calculating the percentage of small business attainment.

(b) Contracting opportunities for dredging shall be reserved for competition among ESB concerns if the estimated award value is below an amount specified by the Administrator for Federal Procurement Policy (Administrator), upon recommendation by the Secretary of the Army (Secretary). The reserve amount is established at the level reasonably expected to result in the Army attaining the goal for ESB.

(c) The reserve amount threshold is reviewed by the Secretary and adjusted by the Administrator to the extent necessary on a semiannual basis. The review is based on the aggregate of contract awards for the four fiscal year quarters preceding the review. Contract award data is compiled by the Navigation Data Center, Water Resources Support Center, 7701 Telegraph Road, Alexandria, VA. 22310-3868.

19.1005 Applicability.

The program applies to dredging activities under SIC 1629 (Dredging), limited to Federal Procurement Data Systems codes Y216 (new work) and Z216 (maintenance dredging).

19.1006 Procedures.

A. Reserve threshold for ESBs in the dredging industry is \$400,000.

B. All acquisitions for dredging shall be reserved for exclusive competition among ESBs when the estimated award value is below the emerging small business reserve amount, provided the contracting officer determines that there is a reasonable expectation of obtaining offers from two or more responsible ESB, and award will be made at fair market price.

C. Contracting officers shall restrict for competition among all eligible small business concerns, contracting opportunities for dredging in such numbers and at such estimated award values as necessary for the contracting activity to attain the goal for small business concerns.

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PART 19 — SMALL BUSINESS PROGRAMS

D. Nothing under the Small Business Competitiveness Demonstration Program shall impair the award of dredging contracts pursuant to section 8(a) of the Small Business Act or section 1207 of the National Defense Authorization Act for Fiscal Year 1987.

E. Contracting officers shall provide information on contract awards for dredging to the POC for Navigation Data for Dredging Information System.

19.1007 Solicitation provisions.

The contracting officer shall insert in full text the provision at FAR 52-219-19, Small Business Concern Representation for the Small Business Competitiveness Demonstration Program, in all dredging solicitations.

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PART 22 — APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

SUBPART 22.3 — CONTRACT WORK HOURS AND SAFETY STANDARDS ACT

22.302 Liquidated damages and overtime pay.

(c)(1)The Chief Counsel and Deputy Chief Counsel, HQUSACE, are delegated authority to waive or adjust Contract Work Hours and Safety Standards Act (CWHSSA) liquidated damages totaling \$500 or less, when such damages are nonwillful, inadvertent, and occurred despite the exercise of due care by the contractor or its agent.

SUBPART 22.4 — LABOR STANDARDS FOR CONTRACTS INVOLVING CONSTRUCTION

22.407 Contract clauses.

(b) Commanders are hereby delegated the authority to approve wage rates submitted under the procedures of FAR clause 52.222-16, Approval of Wage Rates.

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PART 25 — FOREIGN ACQUISITION

SUBPART 25.2 — BUY AMERICAN ACT-CONSTRUCTION MATERIALS

25.202 Policy.

(a)(1) The HCA is delegated authority to make the determination that the use of a particular domestic construction material is impracticable for use in particular contracts. This authority has been redelegated as follows:

(i) to Chiefs of Contracting Offices if the cost of the domestic material is less than \$10,000.

(ii) to Division Directors of Contracting if the cost of the domestic material is \$10,000 or more, but less than \$100,000.

(iii) to the PARC or designee at HQUSACE if the cost of the domestic material is \$100,000 or more.

(2) The HCA is delegated authority to determine that a particular construction material is not reasonably available (that is, not mined, produced or manufactured in the United States in sufficient and reasonably available commercial quantities of a satisfactory quality). In accordance with the delegation from the ASA(ALT), this determination is not further redelegated for acquisitions estimated to exceed \$2 million.

(3) The HCA is delegated authority to make the determination that the cost for construction materials to be used in a particular contract is unreasonable. This determination may be made by the Chiefs of Contracting Offices by applying the 6 percent evaluation factor in 25.203 without regard to the cost of the domestic material.

25.203 Evaluation of Offers

DoD has determined that the cost of a particular construction material is unreasonable when the cost of such material exceeds the cost of foreign material by more than 6 percent (including duty).

SUBPART 25.3 — BALANCE OF PAYMENTS PROGRAM

25.302 Policy.

(b)(ii)(a) The authority to make determinations of non-availability for procurements under \$500,000 is delegated to the following:

(1) Commander, Pacific Ocean Division;

(2) Commander, TransAtlantic Programs Center;

(3) Commander, South Atlantic Division;

(4) Commander, North Atlantic Division for Greenland;

(5) Commanders, Far East and Japan Districts.

(b) Requests for approval of non-availability determinations for procurements exceeding the delegated threshold shall be forwarded to HQUSACE, ATTN: CEPR.

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PART 26 — OTHER SOCIOECONOMIC PROGRAMS

SUBPART 26.72 — BASE CLOSURE AND REALIGNMENTS

26.7200 Scope.

(b)(S-100) Full and open competition is required unless a small business or 8(a) set-aside applies. For competitive negotiated procurement, it is permissible to have evaluation factors for the utilization of local business as either a prime or subcontractor. The basis for award of a sealed bid procurement shall be price or price related factors; no percentage shall be added to non local bids.

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PART 31 — CONTRACT COST PRINCIPLES AND PROCEDURES

SUBPART 31.1 — APPLICABILITY

31.105 Construction and Architect-Engineer contracts.

(d)(2)(i)(b) In this case, equipment ownership and operating costs shall be determined using the Construction Equipment Ownership and Operating Expense Schedule published by the U.S. Army Corps of Engineers.

31.105-100 Contract statement.

The contracting officer shall insert the statement at 52.231-5000 in all solicitations and contracts for construction within the United States that are expected to exceed the small purchase threshold.

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PART 32 — CONTRACT FINANCING

SUBPART 32.1 — GENERAL

32.111 Contract clauses.

(S-100) When the contracting officer determines that payment for materials delivered to a location other than the work site during a construction contract is in the Government's best interest, the contracting officer shall insert the statement at 52.232-5000, Payment for Material Delivered Off-Site, in solicitations and contracts.

SUBPART 32.7 — CONTRACT FUNDING

32.703-2-100 Civil works contracts conditioned upon the availability of funds - continuing contracts.

(a) 33 U.S.C. 621 authorizes the use of civil works contracts for Congressionally-mandated projects that have a portion of the contract price dependent upon reservation of funds from future appropriations. In addition, ER 1105-2-100 authorizes the use of civil works incrementally-funded contracts where contracting authority does not exist to obligate the entire contract price in advance of appropriations.

(b) For continuing contracts, contracting officers should ensure that funds are kept available for necessary superintendence up to the probable resumption of work, and for any expected end of contract clean-up.

32.705 Contract clauses.

32.705-100 Clauses for civil works continuing contracts.

(a) The clause at 52.232-5001, Continuing Contracts, shall be used in solicitations and contracts for civil works water resource projects, but only for projects that have been specifically adopted by Congress in authorizing legislation. This clause may also be used for civil works operation and maintenance (O&M) contracts for projects that have previously been specifically adopted by Congress. For projects that are under the continuing authorities described in ER 1105-2-100, use the clause described at (b) below.

(b) The clause at 52.232-5002, Continuing Contracts (Alternate), may be used in solicitations and contracts funded incrementally by civil works appropriations when no contracting authority exists to obligate the entire contract price in advance of appropriations (i.e. contracts under the continuing authorities program described in ER 1105-2-100 for construction and studies, including General Investigation Studies, advance engineering and design, and architect-engineer services).

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PART 33 — PROTESTS, DISPUTES, AND APPEALS

SUBPART 33.1 — PROTESTS

33.102 General.

(a)(1) Contracting Officers retain the inherent authority to resolve protests by taking corrective action. Contracting Officers may also communicate with the protester in an attempt to convince them to withdraw.

(2) All communication to the Office of the Chief Counsel shall be addressed to HQUSACE, (Attn: CECC-C).

(b)(2) In the event an agency protest is sustained, the protester shall be advised of its right to file a claim for costs to the Contracting Officer within 60 days after receipt of the agency's decision. Failure to file the claim within that time may result in forfeiture of the protester's right to recover its costs. The Contracting Officer will evaluate the claim and submit to the Chief Counsel through channels, within 30 days, a recommendation as to payment of appropriate agency protest costs.

33.102-100 Corps of Engineers Automated Legal System Matter Tracking System.

The field office attorney assigned to each agency or GAO bid protest shall ensure that the protest data is entered into the Corps of Engineers Automated Legal System-Matter Tracking System (CEALS-MTS) Procurement Bid Protest Notebook, as soon as practicable. The attorney is further responsible for promptly updating and ultimately closing the protest's MTS file, as appropriate.

33.103 Protests to the agency.

(c) Where appropriate, alternative dispute resolution procedures may be used to resolve protests, as permitted by law.

33.103(d)(3)-100 Authority.

(1)(i) The USACE agency protest process provides an independent review at a level above the Contracting Officer. Procedures for processing an agency protest are set out below. In response to each agency protest, the appropriate Contracting Officer shall submit an agency protest report, with the analysis and documentation set forth in FAR 33.104(a)(3) and EFARS 33.190-102.

(ii) The Chief Counsel is authorized to decide all agency protests with power of delegation.

(2) The Chief Counsel has delegated the authority to decide agency-level protests to the following Division or Center Counsels: Great Lakes and Ohio River Division, Mississippi Valley Division, North Atlantic Division, Northwestern Division, South Atlantic Division, Southwestern Division, South Pacific Division, Pacific Ocean Division, Huntsville Engineering and Support Center, and the Transatlantic Programs Center. Such authority is without the power of redelegation except that Northwestern Division Counsel may redelegate to the Missouri River Region.

(3) The Chief Counsel has retained authority to decide agency level protests in the Humphreys Engineer Center Support Activity, and the Engineer Research Development Center.

(4) Divisions, Regions, and Centers with delegated authority shall furnish copies of all final agency decisions to the Office of the Chief Counsel, within five days after the decision is signed.

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(5) The Office of the Chief Counsel shall be advised of any protest of national significance or precedential nature. The Chief Counsel may choose to intervene in any case, to include removing the case from the general delegation. The Division, Regional, and Center Counsel have the discretionary authority to consult with the Office of the Chief Counsel in any protest as deemed necessary.

(6) In those cases in which the Chief Counsel has retained the authority to decide the agency bid protest, the District shall submit the Contracting Officer's report to the Division Counsel for review and comment. The Division Counsel then furnishes the report with comments to the Office of the Chief Counsel (attn: CECC-C) for final decision. Center Counsels shall submit the Contracting Officer's report directly to CECC-C for final decision. CECC-C requires two copies of the Contracting Officer's report be furnished.

33.103 (f) Action upon receipt of protest.

(1) Upon receipt of a protest before award, a contract may not be awarded, pending agency resolution of a protest, unless contract award is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the government. Such justification or determination shall be approved by the Head of the Contracting Activity on a non-delegable basis.

(3) Upon receipt of a protest within 10 days after contract award or within five days after a debriefing date offered to the protester under a timely debriefing request in accordance with FAR 15.505 or 15.506, whichever is later, the Contracting Officer shall immediately suspend performance pending resolution of the protest within the agency, unless continued performance is justified, in writing, for urgent and compelling reasons or is determined, in writing, to be in the best interest of the Government. Such justification or determination shall be approved by the Head of the Contracting Activity on a non-delegable basis.

33.103-90-100 Annual Agency Bid Protest Report.

A year-end report of all agency and GAO bid protest cases decided during the fiscal year shall be submitted to the Office of the Chief Counsel by each Division and Center Counsel. Such report should include a summary and analysis identifying the number of protests by District, types of decisions, repetitive issues, trends, and any emerging guidance or patterns of decisions. The year end report shall be submitted, no later than 15 October to:

U.S. ARMY CORPS OF ENGINEERS
ATTN: CECC-C
441 G STREET, NW
WASHINGTON, DC 20314-1000

33.103-100 Disclosure of Government Estimate

If an apparent low bidder protests the reasonableness of the Government estimate, the Command shall provide the details of the Government estimate to the protester upon receipt of complete details of the protester's estimate. The details of the Government and protester's estimates are not to be disclosed to third parties.

33.104 Protests to GAO.

33.104-100 (a) General Procedures. The Chief Counsel has the authority to determine the final agency position for GAO protests with power of delegation.

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(1) The Chief Counsel has delegated authority to determine the final agency position for GAO protests to the following Division or Center Counsels: Great Lakes and Ohio River Division, North Atlantic Division, Northwestern Division, Pacific Ocean Division (for Alaska District only), South Atlantic Division, South Pacific Division, Southwestern Division, Engineer Research and Development Center, Transatlantic Program Center, and Huntsville Engineering and Support Center. Such authority includes the power for Division or Center Counsel to redelegate to the Districts and/or Region. Delegated protests shall be processed in accordance with procedures established by the respective Division or Center Counsels.

(i) Offices with delegated authority must furnish copies of all final agency positions (excluding exhibits) to the Office of the Chief Counsel, as soon as practicable after the position is signed. At the discretion of the Chief Counsel, draft copies may be requested for review prior to transmission to GAO.

(ii) Final agency positions include the agency report and agency response to protester comments, as well as any other dispositive motion submitted by the agency.

(iii) Division Counsels who have redelegated their authority should determine oversight requirements and issue policies to effect those requirements.

(2) The Chief Counsel has retained authority to determine the final agency position for GAO bid protests in the Mississippi Valley Division, Humphreys Engineer Center Support Activity and Pacific Ocean Division (for all Districts except Alaska). Counsel at such offices shall forward the Contracting Officer's report directly to the Office of the Chief Counsel within 15 days of the telephone notification, for determination of the final agency position on the protest. A copy shall be simultaneously sent to the Division Counsel for review and comment. Each Contracting Officer's report submitted shall include the analysis and documentation set forth in 33.190-100.

(3) The Office of the Chief Counsel shall be advised of any protest of national significance or precedential nature. The Chief Counsel may choose to intervene in any case, to include removing the case from the general delegation. The Division, Regional, and Center Counsel have the discretionary authority to consult with the Office of the Chief Counsel in any protest as deemed necessary.

(4) Immediately after receipt of a complete copy of the protest, counsel assigned to the case should consider whether a request for summary dismissal is appropriate. If summary dismissal of the protest or certain grounds of the protest is warranted, a request must be submitted to the GAO within three days.

(i) The written request should clearly indicate the protest number, the grounds of the protest that should be dismissed, and the reasons for dismissal. The request should also assert the Corps' intent to submit a full agency report within the normal deadline in the event the GAO declines to summarily dismiss the protest.

(ii) Counsel who have been delegated bid protest authority should contact the GAO Administrative Office by telephone to inform them that a request for summary dismissal is being prepared. Subsequently, the request and supporting documents should be faxed and mailed to the GAO attorney assigned to the case.

(iii) Counsel who have not been delegated bid protest authority should communicate to the attorney in CECC-C assigned to the protest that a summary dismissal is appropriate. Supporting documents for justification of the summary dismissal request should be faxed, or transmitted electronically as appropriate, to Office of the Chief Counsel, as needed.

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PART 33 — PROTESTS, DISPUTES, AND APPEALS

(5)(i) Each office of counsel responsible for responding to protests at the GAO must fax a written notice of appearance to the GAO, protester, CECC-C, and intervenor if any, not later than three days after being notified of the protest by the Office of the Chief Counsel.

(ii) The notice shall include the name, address, phone number, facsimile number, and e-mail address of the attorney who will represent USACE in the protest.

33.104 (b)(1) Protests before award. All requests to the Office of the Deputy Assistant Secretary of the Army (Procurement) (SAAL-PS) for approval to award a contract or issue a notice to proceed, notwithstanding a protest, shall be forwarded through channels to the Chief Counsel for processing and transmittal to SAAL-PS. Generally such request shall be forwarded to the Chief Counsel within three days of notice of the protest. The request shall include a complete explanation for the need to award or proceed with performance of the contract, including costs and other impacts, and the Contracting Officer's report with the analysis and documentation set forth in FAR 33.104(a)(3).

(c)(2) Protests after award. The findings for authorization of contract performance should be processed in accordance with the requirements provided at 33.104 (b)(1), Protests before award.

33.190-100 Reporting and analysis of bid protests.

33.190-101 Bid protest after action report.

The requirement for after action reporting will be satisfied by entering the required data in the CEALS-MTS Bid Protest Notebook, described in 33.102-100, as soon as practicable. GAO bid protest decisions are posted on the Internet within 24 hours after they are issued (unless subject to protective order), at: <http://www.gao.gov/decisions/bidpro/bidpro.htm>

33.190-102 Contracting officer's reports on GAO and agency protests.

(a) In addition to the documents described in FAR 33.103(d) and 33.104(a)(3), each Contracting Officer's report on an agency or GAO protest shall include:

(1) Findings of fact prepared with complete documentation and including all the facts, both favorable and unfavorable, to the Contracting Officer's position.

(2) Review by legal counsel with citation to pertinent decisions of the Comptroller General.

(b) The Contracting Officer's report shall not be released to any member of the public, including the protestor and other interested parties, without the prior approval of the office having authority to decide an agency protest or to determine the final agency position on a GAO protest.

(c) Administrative report.

(1) The administrative report prepared in response to a protest should include, at a minimum:

- (i) The Contracting Officer's signed statement of relevant facts;
- (ii) the protest itself;
- (iii) the solicitation;
- (iv) the protester's bid or proposal;

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- (v) the successful bid or proposal;
- (vi) an abstract of bids;
- (vii) all evaluation documents;
- (viii) any other relevant documents; and
- (ix) an index to all documents submitted.

(2) The administrative report should be assembled in a secure binder fastened at the left side with a fastener that will permit the full page to be read. The index of all documents should be placed as the first page. Each document should be separated by a divider with a tab attached. The Contracting Officer's statement should be paginated. Sizable files should be divided into two or more volumes. The cover of the report should identify it as the protest file and include the file number. Drawings should be folded and placed into an envelope in the binder. The solicitation/contract should be enclosed as a separate exhibit if it is voluminous in size.

SUBPART 33.2 — DISPUTES AND APPEALS

33.203 Applicability.

33.203-100 Agency board of contract appeals for civil works contracts.

The Armed Services Board of Contract Appeals is the agency board having jurisdiction over appeals arising from final decisions of the contracting officer on Corps of Engineers contracts. The procedures for handling contract appeals are set forth in EFARS Appendix A, Part 3 – Contract Requests, Claims, and Appeals.

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SUBPART 36.1 — GENERAL

36.102 Definitions.

“Metric Ombudsman” as defined by Public Law 104-289, Savings in Construction Act of 1996 is the advocate responsible for reviewing and responding to complaints from prospective bidders, subcontractors, suppliers, or their designated representatives regarding the use of metric standards and materials.

36.104 Policy.

The deputy Assistant Secretary of the Army (OASA(I,L&E)) in a 19 May 1997 memorandum, appointed the USACE PARC (CEPR-ZA) as the DA Metric Ombudsman and the Chief of Contracting Policy Division, Office of the PARC (CEPR-P), USACE as the alternate DA Metric Ombudsman. This responsibility extends to the U.S. Army Reserve (USAR) and the Army National Guard (ARNG) projects under the execution of USACE. The Metric Ombudsman is to enforce PL 104-289 and both DOD metric design policy by offering prime contractors the option of using metric concrete masonry units and recessed lighting fixtures or inch-pound substitutes so that the selection can be based on the total installation price.

SUBPART 36.2 — SPECIAL ASPECTS OF CONTRACTING FOR CONSTRUCTION

36.201 Evaluation of contractor performance.

(a) Preparation of Performance Evaluation Reports.

(1) The contracting officer shall notify the contractor at the pre-construction conference of the elements that will be used to evaluate performance. This notification shall be documented in the contract file. Documentation to support the evaluation shall be collected and evaluated throughout the span of the contract. Follow the dollar thresholds for evaluations in ER 415-1-17.

(3)(a) An interim performance evaluation shall be prepared on contracts where a contractor's performance has been generally unsatisfactory for any element for a period of three months, or as appropriate. A new evaluation need not be prepared if unsatisfactory performance continues for additional periods, but the files should be fully documented. An interim performance evaluation shall also be prepared whenever the contractor's performance has been unsatisfactory for any period that could affect overall contract performance. An interim performance evaluation shall be submitted in the same manner as for completed contracts.

(b) Prior to issuance of an interim unsatisfactory evaluation, the contractor shall be advised of the basis for the evaluation and offered an opportunity to submit comments.

(c) After the issuance of an interim unsatisfactory rating, the ACO shall continue to document and to re-evaluate the contractor's performance. Documentation used in the re-evaluation process shall address all new instances of unsatisfactory performance, as well as efforts made by the contractor to improve performance deficiencies. Should the contractor's performance on any evaluation element change, the original interim rating may be amended with a written addendum which reflects the change.

(d) The final report may be supplemented or amended as necessary through the contract closeout and warranty period to reflect changes in the evaluation of performance elements caused by resolution of contractor claims or compliance with warranty requirements.

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(e) Following issuance of a final unsatisfactory evaluation, the contracting officer shall promptly assess the circumstances to determine whether pursuit of a suspension or debarment action under FAR Subpart 9.4 is appropriate. The contracting officer's rationale for or against such an action shall be documented in writing.

36.203 Government estimate of construction costs.

36.203-100 Civil works contracts.

(a) Government estimates shall be based on the estimated comparable cost of doing the work by Government plant (see 33 USC 624) under the following conditions:

(1) if suitable Government plant is reasonably available for use within the time limits that would be allowed a contractor, or

(2) if, in the judgment of the commander, the work could be done at a reasonable cost with plant purchased or leased for the project and if the commander is prepared, if bids are rejected, to recommend doing the work with Government plant and labor.

(b) In estimating the cost of doing the work under (a)(1) above, proper charges for labor and materials, plant depreciation, all supervision and overhead expenses, and interest on the capital invested in the Government plant shall be taken into account (the rate of interest shall not exceed the maximum prevailing rate being paid by the Government on current issues of bonds).

(c) Under any other conditions, Government estimates shall be based on the fair and reasonable estimated cost of a well-equipped contractor doing the work. Proper charges for labor and materials, plant depreciation, all expenses for supervision, overhead, worker's compensation, general liability insurance, and interest on capital invested in plant shall be taken into account. An allowance for profit shall not be included.

36.203-102 Revision of Government estimate.

When the Government estimate is changed during or subsequent to conferences or negotiation, the basis for the revision or changes in price or prices shall be fully explained and documented in the price negotiation memorandum.

36.205 Statutory cost limitations.

(a) In accordance with 33 U.S.C. 622 and 624, no civil works construction contract shall be awarded if the contract price exceeds the Government estimate prepared in accordance with 36.203-100 by more than 25 percent.

36.205-100 Cost limitations in military construction contracts.

(a) Award of a contract for military construction shall be approved by the District or Center Commander when the lowest qualifying bid exceeds the Government's estimate by more than 15 percent. The estimate shall include an allowance for contractor profit.

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(b) Military installation support for O&M construction. Installation Commander or designee approval shall be obtained prior to award of a contract if the proposed contract price exceeds (1) the Government estimate by more than 15 percent, or (2) the funds initially made available by the installation.

36.209 Construction contracts with architect-engineer firms.

Division commanders are authorized to approve the award of a construction contract to the firm that designed the project. Approval must be obtained prior to publicly announcing the required A-E services and the announcement must state that a construction contract may be awarded to the firm that designed the project, its subsidiaries or affiliates.

36.213 — Special procedures for sealed bidding in construction contracting

36.213-2 Presolicitation notices.

(a) Effective 1 January 2000, Federal Acquisition Regulation 36.213-2, Presolicitation Notices are waived for all construction contracts which are synopsisized electronically through the Government-wide Point of Entry (FedBizOpps) and/or District or Center web pages posted on the internet.

36.271 Cost-plus-fixed-fee contracts.

Requests to use cost-plus-fixed-fee contracts for construction or A-E services funded by annual military construction appropriations shall be forwarded to HQUSACE, ATTN: CEPR, through normal command channels. See FAR 16.306(c) and DFARS 236.271.

SUBPART 36.5 — CONTRACT CLAUSES

36.516 Quantity surveys.

36.516-100 Hydrographic quantity surveys.

The clause at FAR 52.236-16 shall be used for dredging or underwater material placement when payment is to be based on quantity surveys. Alternate I of clause 52.236-16 may be used only in exceptional circumstances with the prior approval of the Commander. The preferred methods of performing hydrographic quantity surveys (in descending order) are as follows:

(1) The Government shall perform quantity surveys by using qualified in-house survey crews, if available.

(2) The Government shall provide quantity surveys by contracting directly with qualified independent hydrographic survey contractors.

(3) The Government shall permit, in exceptional circumstances only, the use of the dredging contractor's surveys if the contracting officer determines that such surveys are adequate and reasonable for payment purposes, and a Government inspector, qualified in hydrographic surveying, is present during the collection of the survey data.

36.570 Additional provisions and clauses.

(b)(2) Director/Chief of Contracting are hereby authorized, without power of redelegation, to approve the use of either of the clauses at DFARS 252.236-7003 (Payment for Mobilization and Preparatory work), or DFARS 252.236-7004 (Payment for Mobilization and Demobilization) in solicitations and contracts for construction.

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36.5100 Plant and material removal after contract termination.

Insert the clause at 52.236-5000, Plant and Material Removal after Contract Termination, in solicitations and contracts when a civil works "continuing contract" (see 32.703-2-100) that also contains the clause at DFARS 252.236.7003, Payment for Mobilization and Preparatory Work, is contemplated.

SUBPART 36.6 — ARCHITECT-ENGINEER SERVICES

36.600-90 Authority for architect-engineer contracting.

Only centers and districts are authorized to procure A-E services. Other USACE commands will obtain contracting support for A-E services from a center or district.

36.601 Policy.

36.601-3 Applicable contracting procedures.

(S-100) The Directors/Chiefs of Contracting may, at their discretion, designate individuals to purchase A-E services by Government purchase card. Small business firms shall be used, unless there are fewer than three highly qualified small businesses that can perform the work. A-E selection must be conducted in accordance with FAR 36.602 and its supplements. The short selection processes in 36.602-5 may be used.

(S-101) The guidance and procedures in EP 715-1-7, Architect-Engineer Contracting, will be followed. Any variations must be documented in the contract file, provided the variations do not violate the acquisition regulations.

36.601-3-90 Applicable contracting procedures.

(a) Indefinite delivery contracts (IDCs) for A-E services shall comply with Subpart 7.1 and Subpart 16.5.

(b) DELETED

(c) For any task order expected to exceed \$500,000, document the contract file to justify why a task order was used instead of publicly announcing the requirements.

(d) The contracting officer may include option periods in the contract (see FAR 17.2 Options) provided --

(1) The option(s) is publicized with the basic contract requirement in accordance with FAR Part 5;

(2) The scope of work under the option(s) is specified in the basic contract;

(3) The prices for services under the option(s) are specified in the basic contract; and

(4) There is a reasonable anticipation of the need for similar services beyond the basic contract period.

(e) Requests for individual or class waivers to the monetary limit in (b) may be submitted for approval, provided --

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(1) The basis for the waiver is justified by a formal or informal acquisition plan (see 7.102) and is supported by quantitative information concerning specific anticipated requirements.

(2) The approval is obtained prior to the public announcement.

(3) Waivers of the five year term limit will typically not be granted, due to the adverse impact on competition.

(f) Waivers for increases in the term limit should be approved by the PARC prior to public announcement.

(g) Waivers approved after the issuance of the public announcement must be reflected in an amended public announcement.

(h) A change in the terms of an IDC after the closing date of a public announcement requires a J&A in accordance with FAR 6.303 and 6.404.

(i) The USACE procuring contracting officer shall provide written instructions to the installation contracting officer and facilities engineering personnel regarding the limitations and procedures for the negotiation, issuance and administration of task orders. These instructions will address USACE and installation responsibilities under FAR 36.604, 36.605, 36.606, 36.608, 36.609-1, and 36.609-2, and DFARS 236.606-70.

36.601-4 Implementation.

(a)(4)(A) In USACE "surveying and mapping services" includes activities associated with measuring, locating and preparing maps, charts, or other graphical or digital presentations depicting natural and man-made physical features, phenomena, and legal boundaries of the earth, such as:

(1) Topographic Engineering Surveying, which includes acquisition of topographic oriented surveying and mapping data for design, construction, master planning, operations, as-built conditions, precise structure stability studies utilizing conventional and electronic instrumentation, photogrammetric, remote sensing, inertial, satellite, and other survey methods as applicable.

(2) Hydrographic Engineering Surveying, which includes acquisition of hydrographic oriented surveying and mapping data for design, construction, dredging, master planning, operations, and as-built conditions utilizing conventional and electronic instrumentation, and photogrammetric, remote sensing, inertial, satellite, side scan sonar, subbottom profiling, and other surveying methods as applicable.

(3) Land Surveying, which includes property and boundary surveys, monumentation, marking and posting, preparation of tract descriptions, etc., utilizing conventional, electronic instrumentation, photogrammetric, inertial, satellite, and other survey methods as applicable.

(4) Geodetic Surveying, which includes 1st, 2nd, and 3rd order horizontal and vertical control surveys, geodetic astronomy, gravity and magnetic surveys utilizing conventional, electronic instrumentation, photogrammetric, inertial, satellite, and other survey methods as applicable.

(5) Cartographic Surveying, which includes acquisition of topographic and hydrographic oriented surveying and mapping data for construction of maps, charts, and similar products for general use other than those for engineering,

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construction, and/boundary or geodetic purposes - utilizing conventional and electronic instrumentation, photogrammetric, inertial, satellite, and other survey methods as applicable.

(6) Mapping, charting, and related geospatial database development, which includes the design, compilation, digitizing, attributing, scribing, drafting, printing and dissemination of printed or digital map, chart, and related geospatial database products associated with planning, engineering, operations, and related real estate activities utilizing photogrammetric, geographic information systems, and other manual and computer assisted methods as applicable.

(7) Technical Operations, such as aerial photography, are not considered surveying and mapping services unless they are an integral part of a broader-scoped contract that results in a surveying or mapping product.

(B) The performance of surveying and mapping services will not be limited to registered or licensed architect-engineer firms, but will also include surveying and mapping professionals such as licensed surveyors, geodesists, and cartographers.

36.602 Selection of firms for architect-engineer contracts.

(S-100) Advance selection process. The advance selection process described in Appendix U of EP 715-1-7, A-E Contracting, may be used when two or more A-E contracts for the same type of work are reasonably anticipated in a given period in a particular geographic area. This process does not apply to indefinite delivery contracts.

(S-101) 8(a) and HUBZone Programs. A-E procurements reserved for the 8(a) and HUBZone programs must follow the selection procedures in the Brooks A-E Act; sole source procedures cannot be used. There must be adequate competition (such that at least three most highly qualified firms can be identified), determination of the three most highly qualified 8(a) or HUBZone firms, discussions (interviews) with the most highly qualified firms, and ranking of the most highly qualified firms. SBA approval is not required to do a competitive procurement for 8(a) A-E awards below \$3,000,000.

36.602-2 Evaluation boards.

(a)(i) USACE commanders are authorized to appoint preselection and selection evaluation boards for all contracts.

(ii) All USACE Federal and non-Federal customers may be invited to nominate representatives, including private practitioners of architecture, engineering and related professions, as members of the evaluation boards for their projects. The customer representative(s) shall be appointed by the respective evaluation board chairperson, and voting representative(s) shall meet the qualifications in FAR 36.602-2(a).

(S-100) The purpose of a preselection board is to recommend to the selection board only the highly qualified firms that have a reasonable chance of being considered as most highly qualified by the selection board.

36.602-4 Selection authority.

(a) Division or Center commanders shall be the selection authority. This authority may be re delegated, including, but not limited to, their deputies, district commanders, contracting officers, directors or chiefs of engineering, or other appropriate officials who do not have a conflict of interest.

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36.602-5 Short selection process for contracts not to exceed the simplified acquisition threshold.

(a) Selection by the Board. One person with the appropriate expertise may constitute the selection board for an A-E selection that does not exceed the micro-purchase threshold. A brief selection report will be prepared for the file listing at least three most highly qualified firms that were considered and the reason(s) the firm selected for negotiations was the highest qualified.

36.603 Collecting data on and appraising firms' qualifications.

(b) All SFs 254 and 255 received from firms in response to a public announcement shall be retained at least 30 days after the last debriefing is held. Only the SFs 254 and 255 of the selected firms (see FAR 36.602-4(b)) need to be retained in the contract files to satisfy the requirements of FAR 4.803(a)(10).

36.604 Performance evaluation.

(S-100) The performance evaluation process shall be discussed with an A-E firm during contract negotiations and this discussion recorded in the price negotiation memorandum. A firm shall be kept apprised in writing of the quality of its work at appropriate times throughout contract performance.

(3) An interim evaluation should be prepared at any time the A-E's performance is marginal or unsatisfactory during the design or construction phases. Any interim evaluation shall be sent to the Architect-Engineer Contract Administration Support System (ACASS; see DFARS 236.201(c)). Interim evaluations in ACASS will be replaced by the final evaluation for that phase of work. The final evaluation will record any interim evaluation(s) and the actions taken by the firm to remedy any significant deficiencies.

(4) The contracting officer shall notify a firm in writing of the Government's intent to issue an interim or final marginal or unsatisfactory performance evaluation. Include the proposed evaluation with documentation supporting the basis for the evaluation and offer an opportunity to comment. The firm shall also be advised of its right to appeal its evaluation in accordance with the procedures in Chapter 6, EP 715-1-7, Architect-Engineer Contracting. Marginal or unsatisfactory interim or final evaluations that are contested by a firm shall not be sent to ACASS until the appeal process has been completed.

(c) A copy of each performance evaluation shall be sent to the firm, to ACASS, and included in the official contract file.

(S-101) Prepare an individual evaluation for each IDC task order over \$30,000 after the completion of the engineering or design services and after the completion of construction, if applicable. An interim or final evaluation covering an entire IDC is not required.

(S-102) Prepare an interim evaluation at least annually for each contract and for each IDC task order with a performance period anticipated to exceed 18 months.

36.605 Government cost estimate for architect-engineer work.

(a) The intent of an independent Government estimate is to determine a price for the required work that is fair and reasonable to the Government. Except for a task order, an estimate shall be prepared independently of any cost or pricing data provided by the firm, and will use labor and overhead rates representative of the class of A-E firms that have been

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selected as most highly qualified to perform the required work. Class factors include firm size, market area, specialization and capabilities. For example, rates for national "top 100" firms would be used for the design of a major military command headquarters, while the rates for local, medium-to-small size firms would be used for the design of a maintenance building. A Government estimate for a task order will use the labor, overhead and other rates established in the indefinite delivery contract.

36.606 Negotiations.

36.606-70 Statutory fee limitation.

(c) The following are examples of services that, for the purpose of this section only, are not considered an integral part of the preparation of designs, plans, drawings, and specifications, and may be excluded from the A-E fee when determining compliance with the statute.

(i) Initial site visits.

(ii) Field, topographic, property, boundary, utility, and right-of-way surveys.

(iii) Subsurface explorations and borings; soils and materials testing and resultant reports.

(iv) Feasibility, functional, and economic studies.

(v) Flow gaugings, model testing.

(vi) Preparation or verification of as-built drawings.

(vii) Preparation of general and development criteria.

(viii) Preparation of general and feature design memoranda.

(ix) The services of consultants, where not specifically applied to the preparation of designs, plans, drawings or specifications.

(x) Preparation of environmental impact assessments, statements, and supporting data.

(xi) Construction phase services.

(xii) Models, renderings, or photographs.

(xiii) Reproduction of designs for review purposes.

(xiv) Travel and per diem allowances in connection with services that are not directly related to the preparation of designs, plans, drawings, or specifications.

36.607 Release of information on firm selection.

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PART 36 — CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

(a) The selection board chairperson shall notify, in writing or electronically, all firms of their selection status within 10 days after approval of the selection. Notifications shall not be made after a preselection board. The notification shall indicate to the firm that it is: (i) The highest rated, (ii) Among the most highly qualified firms but not the highest rated, or (iii) Not among the most highly qualified firms. The notification shall also inform each firm that it may request a debriefing in accordance with paragraph (b) below. Within 10 days after contract award, all remaining most highly qualified firms shall be so notified.

(b) A written or electronic request for a debriefing must be received by the selection chairperson within 10 days after the date on which the firm received the notification. Debriefing should occur within 14 days after receipt of the written request, unless impractical and the reason is documented in the contract file. Debriefing will be conducted by the selection board chairperson or his/her designee.

36.609 Contract clauses.

36.609-1 Design within funding limitations.

(c) Insert this clause in indefinite-delivery contracts, when applicable. In place of a specific construction funding limitation, insert "as specified in individual task orders."

(c)(1) Commanders are authorized to make the determination.

36.609-2 Redesign responsibility for design errors or deficiencies.

(b) Insert this clause in indefinite-delivery contracts.

36.609-3 Work oversight in architect-engineer contracts.

Insert this clause in Indefinite-delivery contracts.

36.609-4 Requirements for registration of designers.

Insert this clause in indefinite-delivery contracts.

36.702 Forms for use in contracting for architect-engineer services.

(a) Use Standard Form 252 also to award indefinite-delivery contracts for architect-engineer services.

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37.104 Personal services contracts.

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PART 37 — SERVICE CONTRACTING

SUBPART 37.1 — SERVICE CONTRACTS - GENERAL

37.104 Personal services contracts.

(f) 33 U.S.C. 569a authorizes the Chief of Engineers to procure the temporary services of consultants in connection with the civil works functions of USACE without regard to 5 U.S.C. 5101-5115 and 5521-5527; provided that the highest rate of pay for each day of services does not exceed the daily equivalent of the rate for grade GS-18.

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PART 42 — CONTRACT ADMINISTRATION

SUBPART 42.2 — ASSIGNMENT OF CONTRACT ADMINISTRATION

42.202 Assignment of contract administration.

(b) Civil works supply contracts for items that require inspection during manufacture shall be assigned for administration, except that the following functions shall be retained by USACE and not be assigned:

(i) Responsibility for payments under the contract.

(ii) Responsibility for contract changes, shop drawing approvals, approval of shop and model tests, and approval of delivery schedules.

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PART 43 — CONTRACT MODIFICATIONS

43.102 Policy

(b) The policy and procedures at DFARS 217.74 shall be used to the maximum extent practicable for contract modifications within the scope of the contract that are not "undefinitized contract actions" as defined by DFARS 217.7401(d), (e.g. unpriced change orders). The contract file for contract modifications not subject to the requirements of DFARS 217.74 shall contain a statement signed by the contracting officer that, as a minimum, provides the following information:

- (1) The reason normal contract modification procedures and lead times are not practicable;
- (2) The date the requirement was first identified;
- (3) The consequences of missing the required delivery date;
- (4) The definitization schedule for the contract modification;
- (5) An explanation for any deviation from the definitization schedule;
- (6) The percentage of contract modification work completed by the contractor prior to definitization;
- (7) If a not-to-exceed price was not established, an explanation why it was considered impracticable. A not-to-exceed price should be agreed upon whenever practicable.

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45.190 Leasing of Personal Property.

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PART 45 — GOVERNMENT PROPERTY

SUBPART 45.1 — GENERAL

45.190 Leasing Personal Property.

(b)(1) The Chief of Engineers redelegates the authority to lease personal property to the PARC without power of redelegation.

(2) The Chief of Engineers redelegates authority to the Deputy Chief of Engineers to enter into leases of personal property.

(3) The Chief of Engineers redelegates the authority to Division Commanders, with the power to redelegate to District Commanders, and to the Commander and Director, WES, to lease personal property when such a lease will be in the public interest, when such property is not excess to the needs of the Department of the Army and is not at the time required for public use.

(d) Leases of personal property that do not comply with the terms and conditions in the delegation in AFARS 45.190(c) shall, prior to execution, be submitted through the PARC, ATTN: CEPR-P, to ASA(RDA) for approval.

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PART 46 — QUALITY ASSURANCE

SUBPART 46.7 — WARRANTIES

46.710 Contract clauses.

(e) FAR clause 52.246-21, Warranty of Construction, shall not be used in solicitations or contracts that are solely for dredging, excavation, grubbing or clearing.

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PART 49 — TERMINATION OF CONTRACTS

SUBPART 49.113 COST PRINCIPLES

49.113(100) Construction Equipment Costs.

The contracting officer shall insert the statement at 52.249-5000 in solicitation and contracts for construction expected to exceed \$25,000.

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- 52.212-5000 Evaluation of subdivided items.
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PART 52 — SOLICITATION PROVISIONS AND CONTRACT CLAUSES

SUBPART 52.1 — INSTRUCTIONS FOR USING PROVISIONS AND CLAUSES

52.101 Using Part 52.

(b)(2)(ii)(B) In accordance with AFARS policy, the sequential number for EFARS clauses will be in the 5000 series.

52.102-1 Incorporation by reference.

If solicitation provisions or contracts clauses are incorporated by reference, the reference must include the exact date of the provision or clause.

SUBPART 52.2 — TEXTS OF PROVISIONS AND CLAUSES

52.211-5000 Evaluation of subdivided items.

As prescribed at 11.703(c), insert the following provision:

EVALUATION OF SUBDIVIDED ITEMS (MAR 1995) — EFARS

Item Nos. _____ are subdivided into two or more estimated quantities and are to be separately priced. The Government will evaluate each of these items on the basis of total price of its sub-items.

(End of provision)

52.211-5001 Variations in estimated quantities — subdivided items.

As prescribed at 11.703(c), insert the following clause in solicitations and contracts for fixed-price construction contracts when subdivided items are to be separately priced for payment purposes.

VARIATIONS IN ESTIMATED QUANTITIES — SUBDIVIDED ITEMS (MAR 1995) — EFARS

This variation in estimated quantities clause is applicable only to Items Nos.____.

(a) Variation from the estimated quantity in the actual work performed under any second or subsequent sub-item or elimination of all work under such a second or subsequent sub-item will not be the basis for an adjustment in contract unit price.

(b) Where the actual quantity of work performed for items Nos.____ is less than 85% of the quantity of the first sub-item listed under such item, the contractor will be paid at the contract unit price for that sub-item for the actual quantity of work performed and, in addition, an equitable adjustment shall be made in accordance with the clause FAR 52.212-11, Variation in Estimated Quantities.

(c) If the actual quantity of work performed under Items Nos. _____ exceeds 115% or is less than 85% of the total estimated quantity of the sub-item under that item and/or if the quantity of the work performed under the second sub-item or any subsequent sub-item under Items Nos.____ exceeds 115% or is less than 85% of the estimated quantity of any such sub-item, and if such variation causes an increase or a decrease in the time

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required for performance of this contract the contract completion time will be adjusted in accordance with the clause FAR 52.211-18, Variation in Estimated Quantities.

(End of clause)

52.214-5000 Apparent clerical mistakes.

As prescribed at 14.406-2 insert the following statement in solicitation and contracts.

ARITHMETIC DISCREPANCIES

(a) For the purpose of initial evaluations of bids, the following will be utilized in the resolving arithmetic discrepancies found on the face of bidding schedule as submitted by the bidder:

- (1) Obviously misplaced decimal points will be corrected;
- (2) Discrepancy between unit price and extended price, the unit price will govern;
- (3) Apparent errors in extension of unit prices will be corrected;
- (4) Apparent errors in addition of lump-sum and extended prices will be corrected.

(b) For the purpose of bid evaluation, the government will proceed on the assumption that the bidder intends his bid to be evaluated on basis of the unit prices, the totals arrived at by resolution of arithmetic discrepancies as provided above and the bid will be so reflected on the abstract of bids.

(c) These correction procedures shall not be used to resolve any ambiguity concerning which bid is low.

(End of statement)

52.231-5000 Equipment ownership and operating expense schedule.

As prescribed in 31.105-100, insert the following clause in all solicitations and contracts for construction that are expected to exceed the small purchase threshold.

EQUIPMENT OWNERSHIP AND OPERATING EXPENSE SCHEDULE (MAR 1995) — EFARS

(a) This clause does not apply to terminations. See 52.249-5000, Basis for settlement of proposals and FAR Part 49.

(b) Allowable cost for construction and marine plant and equipment in sound workable condition owned or controlled and furnished by a contractor or subcontractor at any tier shall be based on actual cost data for each piece of equipment or groups of similar serial and series for which the Government can determine both ownership and operating costs from the contractor's accounting records. When both ownership and operating costs cannot be determined for any piece of equipment or groups of similar serial or series equipment from the contractor's accounting records, costs for that equipment shall be based upon the applicable provisions of EP 1110-1-8, Construction Equipment Ownership and Operating Expense Schedule, Region [*insert Roman numeral for the appropriate region of the schedule*]. Working

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conditions shall be considered to be average for determining equipment rates using the schedule unless specified otherwise by the contracting officer. For equipment not included in the schedule, rates for comparable pieces of equipment may be used or a rate may be developed using the formula provided in the schedule. For forward pricing, the schedule in effect at the time of negotiations shall apply. For retroactive pricing, the schedule in effect at the time the work was performed shall apply.

(c) Equipment rental costs are allowable, subject to the provisions of FAR 31.105(d)(ii) and FAR 31.205-36. Rates for equipment rented from an organization under common control, lease-purchase arrangements, and sale-leaseback arrangements, will be determined using the schedule, except that actual rates will be used for equipment leased from an organization under common control that has an established practice of leasing the same or similar equipment to unaffiliated lessees.

(d) When actual equipment costs are proposed and the total amount of the pricing action exceeds the small purchase threshold, the contracting officer shall request the contractor to submit either certified cost or pricing data, or partial/limited data, as appropriate. The data shall be submitted on Standard Form 1411, Contract Pricing Proposal Cover Sheet.

(End of clause)

52.232-5000 Payment for materials delivered off-site.

As prescribed in 32.111(S-100), insert the following clause in solicitations and contracts for construction.

PAYMENT FOR MATERIALS DELIVERED OFF-SITE (MAR 1995) — EFARS

(a) Pursuant to FAR clause 52.232-5, Payments Under Fixed Priced Construction Contracts, materials delivered to the contractor at locations other than the site of the work may be taken into consideration in making payments if included in payment estimates and if all the conditions of the General Provisions are fulfilled. Payment for items delivered to locations other than the work site will be limited to: (1) materials required by the technical provisions; or (2) materials that have been fabricated to the point where they are identifiable to an item of work required under this contract.

(b) Such payment will be made only after receipt of paid or receipted invoices or invoices with canceled check showing title to the items in the prime contractor and including the value of material and labor incorporated into the item. In addition to petroleum products, payment for materials delivered off-site is limited to the following items: [*List items for which payments will be made for off-site delivery*]

(End of clause)

52.232-5001 Continuing contracts.

As prescribed at 32.705-100(a), insert the following clause in civil works solicitations and contracts:

CONTINUING CONTRACTS (MAR 1995) — EFARS

(a) This is a continuing contract, as authorized by Section 10 of the River and Harbor Act of September 22, 1922 (33 U.S. Code 621). The payment of some portion of the contract price is dependent upon reservations of funds from future

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appropriations, and from future contribution to the project having one or more non-federal project sponsors. The responsibilities of the Government are limited by this clause notwithstanding any contrary provision of the "Payments to Contractor" clause or any other clause of this contract.

(b) The sum of \$_____ has been reserved for this contract and is available for payments to the contractor during the current fiscal year. It is expected that Congress will make appropriations for future fiscal years from which additional funds together with funds provided by one or more non-federal project sponsors will be reserved for this contract.

(c) Failure to make payments in excess of the amount currently reserved, or that may be reserved from time to time, shall not entitle the contractor to a price adjustment under the terms of this contract except as specifically provided in paragraphs (f) and (i) below. No such failure shall constitute a breach of this contract, except that this provision shall not bar a breach-of-contract action if an amount finally determined to be due as a termination allowance remains unpaid for one year due solely to a failure to reserve sufficient additional funds therefore.

(d) The Government may at any time reserve additional funds for payments under the contract if there are funds available for such purpose. The contracting officer will promptly notify the contractor of any additional funds reserved for the contract by issuing an administrative modification to the contract.

(e) If earnings will be such that funds reserved for the contract will be exhausted before the end of any fiscal year, the contractor shall give written notice to the contracting officer of the estimated date of exhaustion and the amount of additional funds which will be needed to meet payments due or to become due under the contract during that fiscal year. This notice shall be given not less than 45 nor more than 60 days prior to the estimated date of exhaustion.

(f) No payments will be made after exhaustion of funds except to the extent that additional funds are reserved for the contract. The contractor shall be entitled to simple interest on any payment that the contracting officer determines was actually earned under the terms of the contract and would have been made except for exhaustion of funds. Interest shall be computed from the time such payment would otherwise have been made until actually or constructively made, and shall be at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41, 85 STAT 97, as in effect on the first day of the delay in such payment.

(g) Any suspension, delay, or interruption of work arising from exhaustion or anticipated exhaustion of funds shall not constitute a breach of this contract and shall not entitle the contractor to any price adjustment under the "Suspension of Work" clause or in any other manner under this contract.

(h) An equitable adjustment in performance time shall be made for any increase in the time required for performance of any part of the work arising from exhaustion of funds or the reasonable anticipation of exhaustion of funds.

(i) If, upon the expiration of sixty (60) days after the beginning of the fiscal year following an exhaustion of funds, the Government has failed to reserve sufficient additional funds to cover payments otherwise due, the contractor, by written notice delivered to the contracting officer at any time before such additional funds are reserved, may elect to treat his right to proceed with the work as having been terminated. Such a termination shall be considered a termination for the convenience of the Government.

(j) If at any time it becomes apparent that the funds reserved for any fiscal year are in excess of the funds required to meet all payments due or to become due the contractor because of work performed and to be performed

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under the contract during the fiscal year, the Government reserves the right, after notice to the contractor, to reduce said reservation by the amount of such excess.

(End of clause)

52.232-5002 Continuing contracts (alternate).

As prescribed at 32.705-100(b), insert the following clause in civil works solicitations and contracts:

CONTINUING CONTRACTS (ALTERNATE) (MAR 1995) — EFARS

(a) Funds are not available at the inception of this contract to cover the entire contract price. The sum of \$_____ has been reserved for this contract and is available for payment to the contractor during the current fiscal year. It is expected that Congress will make appropriations for future fiscal years from which additional funds, together with funds provided by one or more non-federal project sponsors will be reserved for this contract. The liability of the United States for payments beyond the funds reserved for this contract is contingent on the reservation of additional funds.

(b) Failure to make payments in excess of the amount currently reserved, or that may be reserved from time to time, shall not be considered a breach of this contract, and shall not entitle the contractor to a price adjustment under the terms of this contract except as specifically provided in paragraphs (e) and (h) below.

(c) The Government may at any time reserve additional funds for payments under the contract if there are funds available for such purpose. The contracting officer will promptly notify the contractor of any additional funds reserved for the contract by issuing an administrative modification to the contract.

(d) If earnings will be such that funds reserved for the contract will be exhausted before the end of any fiscal year, the contractor shall give written notice to the contracting officer of the estimated date of exhaustion and the amount of additional funds which will be needed to meet payments due or to become due under this contract during that fiscal year. This notice shall be given not less than 45 nor more than 60 days prior to the estimated date of exhaustion.

(e) No payments will be made after exhaustion of funds except to the extent that additional funds are reserved for the contract. If and when sufficient additional funds are reserved, the contractor shall be entitled to simple interest on any payment that the contracting officer determines was actually earned under the terms of this contract and would have been made except for exhaustion of funds. Interest shall be computed from the time such payment would otherwise have been made until actually or constructively made, and shall be at the rate established by the Secretary of the Treasury pursuant to Public Law 92-41, 85 STAT 97, as in effect on the first day of the delay in such payment.

(f) Any suspension, delay, or interruption of work arising from exhaustion or anticipated exhaustion of funds shall not constitute a breach of this contract and shall not entitle the contractor to any price adjustment under a "Suspension of Work" or similar clause or in any other manner under this contract.

(g) An equitable adjustment in performance time shall be made for any increase in the time required for performance of any part of the work arising from exhaustion of funds or the reasonable anticipation of exhaustion of funds.

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PART 52 — SOLICITATION PROVISIONS AND CONTRACT CLAUSES

(h) If, upon the expiration of sixty (60) days after the beginning of the fiscal year following an exhaustion of funds, the Government has failed to reserve sufficient additional funds to cover payments other wise due, the contractor, by written notice delivered to the contracting officer at any time before such additional funds are reserved, may elect to treat his right to proceed with the work as having been terminated. Such a termination shall be at no cost to the Government, except that, to the extent that additional funds to make payment therefore are allocated to this contract, it may be treated as a termination for the convenience of the Government.

(i) If at any time it becomes apparent that the funds reserved for any fiscal year are in excess of the funds required to meet all payments due or to become due the contractor because of work performed and to be performed under this contract during the fiscal year, the Government reserves the right, after notice to the contractor, to reduce said reservation by the amount of such excess.

(j) The term "Reservation" means monies that have been set aside and made available for payments under this contract.

(End of clause)

52.236-5000 Plant and material removal after contract termination.

As prescribed at 36.5100, insert the following clause in solicitations and contracts for civil works "continuing contracts" that also provide for payment of mobilization and preparatory work.

PLANT AND MATERIAL REMOVAL AFTER CONTRACT TERMINATION (MAR 1995) — EFARS

Should this contract be terminated as provided in clause 52.232-5001 because of the failure of Congress to provide additional funds for its completion, the contractor may be permitted to remove plant and material on which payments for preparatory work have been made, subject to an equitable deduction from the amounts due the contractor to reimburse the United States for the unabsorbed value of such plant and material.

(End of clause)

52.249-5000 Basis for settlement of proposals.

As prescribed at 49.113(100) insert the following statement in solicitations and contracts.

BASIS FOR SETTLEMENT OF PROPOSALS

"Actual costs will be used to determine equipment costs for a settlement proposal submitted on the total cost basis under FAR 49.206-2(b). In evaluating a terminations settlement proposal using the total cost basis, the following principles will be applied to determine allowable equipment costs:

(1) Actual costs for each piece of equipment, or groups of similar serial or series equipment, need not be available in the contractor's accounting records to determine total actual equipment costs.

(2) If equipment costs have been allocated to a contract using predetermined rates , those charges will be adjusted to actual costs.

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(3) Recorded job costs adjusted for unallowable expenses will be used to determine equipment operating expenses.

(4) Ownership costs (depreciation) will be determined using the contractor's depreciation schedule (subject to the provisions of FAR 31.205-11).

(5) License, taxes, storage and insurance costs are normally recovered as an indirect expense and unless the contractor charges these costs directly to contracts, they will be recovered through the indirect expense rate."

(End of Statement)

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APPENDIX A, PART 3 - CONTRACT REQUESTS, CLAIMS AND APPEALS

SUBPART 100 – AUTHORITIES

A3-100 Scope of Subpart.

This subpart sets forth the authorities of contracting officers, Division Commanders, the Armed Services Board of Contract Appeals (ASBCA or Board), and Federal courts to decide contract requests, claims and appeals. Further, the authority for Corps of Engineers' trial attorneys to represent the Government before the Board is stated.

A3-101 Contracting Officers.

The contracting officer's authority to decide or settle all claims relating to a contract is contained in FAR 33.210. A contracting officer's decision is final and conclusive and not subject to review by any forum, tribunal, or Government agency, unless an appeal or suit is timely commenced. 41 U.S.C. § 605(b). Further, in FAR 33.210, contracting officers are authorized to use Alternative Dispute Resolution (ADR) procedures under FAR 33.214 to resolve contract claims.

A3-102 Division Commanders.

In appeals to the Board, the Division Commander has command management responsibility. In exercising this responsibility, the Division Commander has authority to review military and civil works contract appeals and to participate in alternative dispute resolution (ADR).

A3-103 Armed Services Board of Contract Appeals.

(a) Contract Disputes. The Contract Disputes Act of 1978, as amended, 41 U.S.C. § 601-613, provides that a contractor may appeal a contracting officer's final decision to the appropriate board of contract appeals or to the United States Court of Federal Claims. A contractor has ninety days from receipt of a contracting officer's final decision to file an appeal with the appropriate Board of Contract Appeals. 41 U.S.C. § 606. The ASBCA has been designated by the Secretary of the Army as the appropriate board for the Corps of Engineers. The charter and rules of the ASBCA are found in DFARS, Appendix A.

(b). Real Estate Leases. The ASBCA has jurisdiction under the Contract Disputes Act for leases where the government is the lessee. In cases not covered by the contract Disputes Act, the Secretary of the Army has delegated authority to the Board.

(c). Correspondence. All correspondence with the ASBCA will be addressed to the Recorder, Armed Services Board of Contract Appeals, Skyline Six, 5109 Leesburg Pike, Falls Church, Virginia 22041-3208. Copies of all significant correspondence addressed to the ASBCA Recorder will be sent to the Engineer Chief Trial Attorney, HQUSACE.

(d). The Engineer Chief Trial Attorney under a delegation from the Secretary of the Army is the authorized representative of the Secretary of the Army and has the sole authority and responsibility for the conduct and control of litigation of contract disputes for all Corps of Engineers cases docketed with the ASBCA of a value less than \$3 million. AFARS 33.212- 90(a)(ii). The Assistant Judge Advocate General for Civil Law may determine on a case by case basis to delegate Corps of Engineers cases of a value of \$3 million or more to the Engineer Chief Trial Attorney. AFARS 33.212-90(a)(iii). The Engineer Chief Trial Attorney also has the authority to settle such cases with the concurrence of either the contracting officer, the Head of Contracting Activity, or the Assistant Secretary of the Army (Research, Development and Acquisition). AFARS 33.212-90-7. All official correspondence with the Engineer Chief Trial Attorney will

be addressed to the current Engineer Chief Trial Attorney (by name), CECC-C, U.S. Army Corps of Engineers, Washington, D.C. 20314-1000.

A3-104 Federal Courts.

The Federal Courts Improvement Act of 1982, Public Law 97-164, 96 Stat. 25, abolished the U.S. Court of Claims and established the United States Court of Appeals for the Federal Circuit and the U.S. Claims Court with jurisdiction over contract disputes formerly within the jurisdiction of the U.S. Court of Claims. This act was amended by the Court of Federal Claims Technical and Procedural Improvements Act of 1992, Public Law 102-572, 106 Stat. 4516, which changed the name of the United States Claims Court to the United States Court of Federal Claims.

a. U.S. Court of Federal Claims. Under the Contract Disputes Act, a contractor may, in lieu of appealing a contracting officer's final decision to a Board, bring an action directly on a claim in the U.S. Court of Federal Claims within one year of receipt of the contracting officer's final decision. 41 U.S.C. § 609(a)(3). The Department of Justice is responsible for the litigation of such cases and will be assisted by a Corps of Engineers attorney.

b. U.S. Court of Appeals for the Federal Circuit. A decision of a Board of Contract Appeals may be appealed by the Contractor or the Government to the U.S. Court of Appeals for the Federal Circuit within 120 days. 41 U.S.C. § 607(g)(1)(A). A decision of the U.S. Court of Federal Claims may be appealed within 60 days after the date of entry of judgment. FED. R. APP. P. 4(a)(1). In an appeal from a Board decision, the decision of the Board on any question of law is not final or conclusive, but the U.S. Court of Appeals for the Federal Circuit will not set aside conclusions on questions of fact unless the decision is fraudulent, or arbitrary, or capricious, or so grossly erroneous as to necessarily imply bad faith, or if such decision is not supported by substantial evidence. 41 U.S.C. § 609(b).

c. Correspondence with the Department of Justice. The litigation report on contract claims and appeals for the Department of Justice will be addressed to the Engineer Chief Trial Attorney, HQUSACE, except in those instances when time does not permit and prior telephonic approval of deviation from this procedure is obtained from the Engineer Chief Trial Attorney. Copies of all other significant correspondence will be sent to the Engineer Chief Trial Attorney.

SUBPART 200 – CLAIMS

A3-200 Scope of Subpart.

This subpart sets forth procedures for considering and processing contract requests and claims.

A3-201 Background.

The Contract Disputes Act establishes procedures and requirements for asserting and resolving contract claims subject to the Act. The Act provides for a final written decision of the contracting officer when the claim cannot be resolved by agreement of the contracting parties. The contractor may appeal a contracting officer's final decision to the appropriate Board of Contract Appeals within 90 days of receiving the decision. Alternatively, the contractor may also bring an action directly in the U.S. Court of Federal Claims within 12 months of the contracting officer's final decision. These time limitations are jurisdictional and there is no authority for an extension of these time limitations. A contracting officer may change, modify or recall the decision within the appeal period. If the decision is changed or modified, a new appeal period begins to run. Policies and procedures for processing contract claims, as well as the definition of key terms, are set forth in FAR 33.2, and DFARS 233.70.

A3-202 Policy.

As set forth in FAR 33.204, the Government's policy is to attempt to resolve all contractual issues in controversy at the contracting officer level. Reasonable efforts should be made to resolve controversies prior to submission of a claim. Agencies are encouraged to use Alternative Dispute Resolution (ADR) procedures to the maximum extent practicable.

A3-203 Claim Processing Procedures.

Any written request by a contractor for the payment of money, granting of time adjustment or interpretation of contract terms or other relief arising under or relating to the contract, even if the amount of money or time requested is unstated, may become a contract claim against the Government. If not included in the original request, the contractor should immediately be asked to furnish documentation: e.g., facts, cost breakdown, or the contract clause underlying the claim. Some requests can be resolved in a relatively short period of time. Every effort should be made to resolve such requests as soon as possible.

a. Certification Requirements. A contractor is required to certify all claims exceeding \$100,000. The Administrative Dispute Resolution Act of 1996, Public Law 104-320, 110 Stat. 3870, amended the previous Alternative Dispute Resolution Act and eliminated the additional certification requirement when a dispute resolution procedure is used. The certification should state as follows:

I certify that the claim is made in good faith; that the supporting data are accurate and complete to the best of my knowledge and belief; that the amount requested accurately reflects the contract adjustment for which the contractor believes the Government is liable; and that I am duly authorized to certify the claim on behalf of the contractor.

b. Initial Investigation of a Claim. A contract claim for which all certification requirements have been met shall be subject to a thorough fact finding investigation conducted by appropriate staff members, including an attorney from the Office of Counsel. During this investigation, the attorney will determine the scope of the review, evaluate the relevancy and materiality of the facts considered, and take appropriate measures to preserve the documentation, including written statements and affidavits. After the investigation has been completed and the staff recommendations have been considered, the contracting officer should offer the contractor an opportunity to attend a conference to discuss the claim. An attorney from the Office of Counsel should participate in this conference. If the contract claim has merit in whole or part, an attempt should be made to negotiate quantum, either at the conference or at a later time agreed to by the parties.

c. Alternative Dispute Resolution (ADR). Contracting officers and trial attorneys are strongly encouraged to consider the use of ADR techniques in all claims at the earliest possible time. These ADR techniques include, but are not limited to, nonbinding arbitration, mediation, and mini-trial. The policy of the Corps of Engineers is not to use binding arbitration. The use of ADR shall be timely recorded in the Matter Tracking System. See A3-207.

d. Unresolved Claims. When a claim by or against a contractor cannot be settled, the contracting officer shall issue a written decision on the claim. On claims by a contractor, the decision will be issued within 60 days of the receipt of the written request for a decision from the contractor for claims under \$100,000; for claims over \$100,000 the contracting officer will, within 60 days, either issue a decision or notify the contractor of the date on which a decision will be issued. For claims over \$100,000, the contracting officer's final decision shall be issued within a reasonable period after the receipt of the claim. 41 U.S.C. § 605(c)(3).

1. Contracting Officer's Final Decision. The written decision of the contracting officer may be in any appropriate form. The basic requirements are that the decision include a description of the claim, a reference to the pertinent contract terms, a statement of the factual areas of agreement and disagreement, and a statement of the contracting officer's final decision with supporting rationale. The decision must also include a demand for payment in cases where the decision results in a finding that the contractor is indebted to the Government (affirmative Government claim). The decision must be written to inform the contractor of the facts and reasons upon which the contracting officer's conclusion is based and that the decision is final. To

adequately meet the above requirements the facts shall be separately presented in a Findings of Fact section as part of the decision.

(a) Findings of Fact. The proposed Findings of Fact with supporting data properly tabbed will be drafted by an Office of Counsel attorney with technical assistance from other appropriate staff members. When a claim in excess of \$100,000 involves a factual dispute, the contracting officer may send the contractor a copy of the proposed Findings of Fact and advise that the supporting data may be reviewed at the office of the contracting officer. The contractor should be requested to indicate in writing whether it concurs in the proposed Findings of Fact and, if not, to indicate specifically which facts it is not in agreement with and submit material in rebuttal. After reviewing the contractor's comments and making any appropriate corrections in the Findings of Fact, the contracting officer shall then issue the decision. If an appeal is filed, the appeal file should include the contractor's response to the request for comment on proposed Findings of Fact.

(b) Decision. The contracting officer's final decision will be drafted by an Office of Counsel attorney. Prior to issuing the decision, the contracting officer will become familiar with all facts and proposed conclusions contained in the draft and either adopt them as the Findings of Fact and decision or make such changes as deemed appropriate.

(1) The first paragraph of the decision is appropriate for introductory matter, including a reference to the contract number and date and a brief description of the contract work and the location thereof.

(2) The next part of the decision should be a summary of the contractor's claim(s), including any revisions. Each claim document mentioned will reference a tab number where the document can be located in the potential appeal file. In arranging the tabs for the potential appeal file, the first two tabs should be reserved for the notice of appeal and the contracting officer's final decision.

(3) The third part of the decision should be the Findings of Fact, in narrative form. Conclusions or arguments should not be included. The Findings of Fact will consist of (a) a statement of facts relevant to the claim, and (b) a reference to the pertinent bidding documents and contract provisions. Quotations from standard contract clauses should normally be avoided; however, non-standard clauses relied upon by the contracting officer should be quoted. All documents mentioned should be referred to by a tab number where they can be found in the potential appeal file. If possible, agreed and disputed facts should be so identified.

(4) The fourth part should be the contracting officer's analysis or conclusions based upon the Findings of Fact. New facts and case citations should normally not be included in this part. After an appropriate discussion and analysis, the contracting officer should make a clear, simple statement which sets forth the determination on the contract claim.

(5) The last paragraph of the decision should clearly state that the writing is the contracting officer's final decision and advise the contractor of its appeal rights.

2. Notification of Appeal Rights. This paragraph should be included at the end of a contracting officer's final decision:

"This is the final decision of the Contracting Officer. This decision may be appealed to the Armed Services Board of Contract Appeals (Address). If you decide to appeal, you must mail or otherwise furnish written notice thereof to the Armed Services Board of Contract Appeals within 90 days from the date you receive this decision. A copy thereof shall be furnished to the contracting officer from whose decision the appeal is taken. The notice shall indicate that an appeal is intended, shall include a copy of this decision, and identify the contract by number. The notice shall also include a copy of this decision. With regard to appeals to the Armed Services Board of Contract Appeals you may, solely at your election, proceed under the Board's small claims procedure for claims of \$50,000 or less or its accelerated procedures for claims of \$100,000 or less. In lieu of appealing to the Armed Services Board of Contract Appeals, you may bring an action directly in the U.S. Court of Federal Claims (except as provided in the Contract Disputes Act, 41 U.S.C. § 603, regarding Maritime Contracts) within 12 months of the date you receive this decision."

3. Transmittal of the Contracting Officer's Final Decision. The contracting officer's final decision with the Findings of Fact shall be transmitted by certified or registered mail, return receipt requested, to the contractor's address shown on the initial contract page or by another reasonable method that evidences receipt by the contractor. The contractor may request, in writing, that a different address be utilized if the specific purpose is identified, i.e., receipt of formal contracting officer's final decision.

A3-204 Affirmative Government Claims.

Contract claims by the Government should also be processed under these guidelines.

A3-205 Maritime Contract Claims.

The Contract Disputes Act contains a separate provision for the consideration of claims and appeals of maritime contracts.

a. Contracts for the repair of ships are maritime contracts under the Contract Disputes Act. Appeals arising out of maritime contracts are covered separately by the Suits in Admiralty Act. Jurisdiction to hear these appeals is in the U.S. district courts, not the U.S. Court of Federal Claims. When rendering a decision on a claim arising out of a maritime contract, contracting officers must advise the contractor of its right to appeal the decision to a U.S. district court.

b. Contracts for the construction of ships – as opposed to contracts for the repair of ships - are not considered maritime contracts. Claims and appeals arising out of contracts for the construction of ships will be administered in the same manner as other claims and appeals subject to the Contract Disputes Act.

A3-206 Maintenance of Records.

a. All Government personnel must exercise care to prevent premature destruction of contract administration and finance records that are involved in claims and appeals before Boards and Federal courts. Contract files containing these records are sometimes retired or destroyed before all claims and appeals have been fully resolved. In the process of retiring records, documents that do not appear to have a permanent value are often discarded, such as handwritten memoranda and preliminary drafts. Therefore, it is important to identify such material during the investigation required by A3-203(b) and to provide for its retention. See DFARS 204.804.

b. To avoid closeout of an official contract file prior to completion of a pending appeal, all contract files involving an appeal shall be retained intact for seven years after the date of the final Board or Federal court decision in the case. In an appeal dismissed by the Board or Federal court with prejudice based on stipulation of the parties, or request of the contractor following the settlement of the appeal, this requirement does not apply.

A3-207 Claims Management and Case Tracking.

Each Office of Counsel is required to enter all its claims more than 90 days old, including affirmative government claims, into the USACE Legal Services' Matter Tracking System. The following information must be entered for every claim: the name of the contractor, the contract number, the project and location, the date relief was requested or the certification date, the relief requested, the attorney assigned to the claim, and a brief narrative description of the facts and issues. The database should be updated as significant events occur. When the contracting officer renders a final decision or a claim is settled, the claim should be closed on the database and the following information entered within 5 working days: the disposition of the claim (whether it was decided, settled, or withdrawn); the date of disposition, the nature of the disposition (whether relief was denied or granted in whole or in part); and a summary of any relief granted.

SUBPART 300 - PROCEDURES FOR HANDLING APPEALS AT THE ARMED SERVICES BOARD OF CONTRACT APPEALS

A3-300 Scope of Subpart.

This subpart sets forth the procedures for handling contract appeals before the ASBCA. Throughout this subpart, the term local counsel shall mean District Counsel, Operating Division Counsel, Center Counsel, Laboratory Counsel, or FOA Counsel.

A3-301 Notice of Appeal.

Normally, the contractor will send a Notice of Appeal directly to the Board and will furnish a copy to the contracting officer. If the original Notice of Appeal is received by the contracting officer, however, it should be promptly forwarded to the Board and a copy sent to the Division and to the Engineer Chief Trial Attorney. Specifically, any notice of appeal received directly shall be promptly forwarded to the Chairman, Armed Services Board of Contract Appeals, 5109 Leesburg Pike, Suite 703, Falls Church, VA 22041-3208 and include the envelope showing the postmark when the notice of appeal was received by mail. AFARS 33.212-90-1(a).

A3-302 Nature of Appeals - General.

a. Signature Block. For all trial documents which require the signature of the Engineer Chief Trial Attorney, the signature block shall read "Engineer Chief Trial Attorney."

b. Appeals under \$3 million. The Engineer Chief Trial Attorney is the authorized representative of the Secretary of the Army and has sole authority and responsibility for the conduct and control of litigation of contract disputes for all Corps of Engineers cases docketed with the ASBCA of a value of less than \$3 million. AFARS 33.212-90(a)(ii).

c. Appeals of \$3 million or more. The Assistant Judge Advocate General (TAJAG) for Civil Law may determine, on a case by case basis, to delegate Corps of Engineers cases of a value of \$3 million or more to the Engineer Chief Trial Attorney. AFARS 33.212 90(a)(iii). Within 14 days of receipt of a Notice of Appeal in an ASBCA case of \$3 million or more, the assigned trial attorney shall transmit to the Engineer Chief Trial Attorney, a memorandum describing the nature of the claim and recommending whether the Engineer Chief Trial Attorney should seek delegation from TAJAG under AFARS 33.212(a)(iii). A copy of the contracting officer's final decision, if issued, shall accompany this memorandum. The Engineer Chief Trial Attorney shall forward a recommendation to TAJAG.

A3-303 Appeal File (Rule 4).

a. General. In Rule 4 of the ASBCA, the contracting officer is responsible for assembling and transmitting to the Board an appeal file consisting of all documents pertinent to the appeal. Normally,

appeal files are prepared by the Office of Counsel. The appeal file shall include the compilation of documents described in Rule 4 and shall be prepared in accordance with this section.

b. Filing Procedure.

1. General. The appeal file shall be forwarded directly to the Board. At the time the appeal file is forwarded, the contracting officer will furnish the appellant a copy of each document except the contract. The letter of transmittal to the Board shall state that this has been done. An abbreviated copy of the appeal file consisting only of the transmittal letter, contracting officer's final decision, and claim letter shall be forwarded to the Engineer Chief Trial Attorney. A copy of the appeal file shall be provided by the trial attorney to Division Counsels in Command and Control Divisions as required.

2. Minimum Number of Copies Unless otherwise directed by the Board, one copy of the complete appeal file shall be forwarded to the Board.

3. Appeal File Supplements. Additional material may be submitted as a supplement to the appeal file and a copy simultaneously furnished to the appellant. Any supplements to the appeal file will be forwarded to the Board in the same manner as the original appeal file. Tab numbers in an appeal file supplement shall begin with "S."

c. Form. Appeal files will be assembled in either secure binders fastened at the top or left side with acco or similar type fasteners, three-ring binders, or as otherwise directed by the Board. Each document will be separated by a divider with a tab attached. In accordance with Board rules, the tabs should be numbered sequentially. The tab numbers may be preprinted, hand printed, or typed on the tab. If the appeal file is voluminous, it should be divided into two or more volumes. The cover of each volume shall identify it as the appeal file and include the appeal caption, contract number, docket number, and volume number. Additionally, an index of documents shall be placed in the front of all volumes of the appeal file. Drawings may be placed in a separate volume. Generally, drawings should be placed in the appeal file in the following or other comparable manner: (1) insert a sealed manila envelope into the assembly, punching holes at the top, or left side, so that the top, left side and bottom are even with the remaining documents; (2) cut the right envelope side open, parallel to the right edge of the remaining documents; and (3) fold the drawings so that they can be inserted and removed from the right side of the envelope. When a complete set of specifications or drawings is furnished, it should be identified as an appendix to the appeal file which can be easily reviewed, e.g., a complete set of specifications similar to the basic appeal file; a complete set, or several drawings clearly marked, rolled, and placed in a shipping tube. Specifications and drawings need only be submitted to the Board. When large documentary exhibits are included in the appeal file, such exhibits shall be paginated for easier reference.

A3-304 Trial Attorneys.

a. The Trial Attorney Qualification Program.

1. Establishment. On 9 May 1997, the Chief Counsel established the Trial Attorney Qualification Program. The effective date of the Program was 1 July 1997.

2. Policy. In order to represent the Corps of Engineers as lead counsel in Type II and Type III contract appeals, a trial attorney must be designated as qualified under the Program. The Engineer Chief Trial Attorney is authorized to designate a trial attorney as qualified.

3. Criteria. The standards for qualification as a Type II and Type III lead counsel include litigation experience, training courses, and special skills for Type III cases. These requirements are available at the Corps of Engineers Legal Services Home Page at <http://www.hq.usace.army.mil/cecc/maincc.htm>.

4. Procedures. A request for qualification designation will be initiated by the trial attorney. The procedures for submission of the request to the Engineer Chief Trial Attorney are also specified on the Legal Services Home Page.

b. Appointment. The local counsel shall assign the Government Trial Attorney. Only Type III qualified trial attorneys may be assigned as lead counsel on appeals of Type III cases. For every appeal, the Engineer Chief Trial Attorney and the Chief Counsel reserve the authority to disapprove the assignment of a particular trial attorney or to remove the trial attorney once assigned.

c. Duties. The trial attorney is expected to personally prepare and present the Government's case. The trial attorney is expected to follow all of the customary rules of professional conduct, including the duty to ensure that documents and pleadings which require the signature of the Engineer Chief Trial Attorney are forwarded to the Engineer Chief Trial Attorney so that they may be timely filed. The trial attorney will review the appeal file to ascertain if the Government's position is adequately supported and the appeal is timely. In the event the appeal is untimely, the trial attorney shall immediately follow the procedure discussed in A3-306(b) for filing a Motion to Dismiss.

1. Prior to Hearings. Prior to a hearing before the ASBCA, the trial attorney shall seek to obtain a written stipulation from a pro se appellant or a represented appellant's counsel which states whether or not quantum will be an issue at the hearing.

2. Upon Discovery of New Evidence or Facts. If, before or during the presentation of the Government's case, the trial attorney discovers or is informed of new facts or evidence which require re-evaluation of the Government's potential liability, a prompt and direct review shall be made and the contracting officer advised. The trial attorney shall inform the contracting officer of the previously unknown facts or evidence, provide an initial determination of the impact upon the Government's case, and make a recommendation to the contracting officer as to possible settlement or other action.

3. All Government Personnel. The contracting officer and other Government personnel shall assist the trial attorney in case preparation and presentation as requested by the trial attorney.

A3-305 Pleadings.

a. Answer.

1. Style. An answer should conform to the Federal Rules of Civil Procedure, i.e., admit, deny, or allege according to each specific allegation in the complaint; followed by a second section which outlines the Government's affirmative defenses. An answer shall be neatly typed, double spaced, and prepared on letter size paper. If appellant's complaint is in letter form, as opposed to traditional numbered paragraph form, the trial attorney should assign paragraph numbers to each paragraph contained in the letter, and base the answer on these numbered paragraphs.

2. Procedures. The original and two copies of the answer shall be filed directly by the trial attorney with the ASBCA. The answer shall be signed by the trial attorney and local counsel. The trial attorney shall also forward a copy of the answer and the complaint to the Engineer Chief Trial Attorney and to Division Counsels in Command and Control Divisions as each requires.

b. Government Complaints. In appeals of affirmative Government claims, the Board may require the Government to file the complaint. A Government complaint shall conform to the Federal Rules of Civil Procedure. The trial attorney shall follow the filing procedures described above.

A3-306 Motions.

Motions will be neatly typed, double spaced, and prepared on letter size paper. Motions should be supported by an accompanying memorandum, prepared according to the above guidelines, which states relevant facts and identifies the statutes, regulations, and other legal authorities which support the motion. The memorandum shall have the same signatures as the motion and be filed according to the procedures outlined below. The memorandum should conform to the customary style and professional standards covering presentation, argument, and citation of authorities.

a. Non-Dispositive Motions. Most non-dispositive motions shall be filed directly by the trial attorney with the ASBCA. These include: motion for an extension of time; motion to compel; motion to amend; motion to strike; and motion to suspend proceeding. The motion shall be signed by the trial attorney and local counsel. A copy of the motion shall be provided by the trial attorney to Division Counsels in Command and Control Divisions as each requires and to the Engineer Chief Trial Attorney. Pursuant to Rule 16 of the ASBCA, the trial attorney is responsible for forwarding a copy of the motion to the Appellant's counsel (or Appellant where pro se). The correspondence transmitting the motion to the Board shall indicate that this has been done.

b. Dispositive Motions and Motions Raising Significant Issues. Jurisdictional motions, motions invoking executive privilege, dispositive motions, motions for reconsideration, and motions for sanctions shall be signed by the trial attorney. The original and two copies shall be forwarded to the Engineer Chief Trial Attorney for signature and filing with the ASBCA. A copy of such a motion shall be provided by the trial attorney to Division Counsels in Command and Control Divisions as each requires. The correspondence transmitting the motion to the Engineer Chief Trial Attorney shall indicate the date, if any, the motion must be received by the Board and include an envelope addressed to the Appellant's counsel (or Appellant where pro se). Pursuant to Rule 16 of the ASBCA, the Engineer Chief Trial attorney is responsible for forwarding a copy of the motion to the Appellant's counsel (or Appellant where pro se).

A3-307 Briefs.

a. Style. Briefs shall be neatly typed, double spaced on letter size paper, and bound by a front and back cover made of plastic, cardboard, or heavy paper. All briefs should conform to the customary style and professional standards covering presentation, argument, and citation of authorities.

b. Procedures.

1. Type I and Type II Appeals. Briefs in Type I and Type II appeals shall be signed by the trial attorney and local counsel and filed directly with the ASBCA. The trial attorney shall provide a copy of the brief to the Engineer Chief Trial Attorney and to Division Counsels in Command and Control Divisions as each requires.

2. Type III Appeals. Briefs in Type III appeals shall be signed by the trial attorney and the original and two copies forwarded to the Engineer Chief Trial Attorney for signature and filing with the Board. A copy of the brief shall be provided by the trial attorney to Division Counsels in Command and Control Divisions as each requires. The correspondence transmitting the brief to the Engineer Chief Trial Attorney shall indicate the date the brief must be received by the Board and include an envelope addressed to the Appellant's counsel (or Appellant where pro se).

A3-308 Discovery.

Discovery is covered by Rule 14 of the ASBCA and should generally follow the Federal Rules of Civil Procedure. All Government personnel are encouraged to assist the trial attorney in voluntary discovery procedures. Any deposition or discovery procedure, however, that is designed to annoy, embarrass, harass, or place an undue burden upon the Government will be vigorously opposed.

A3-309 Alternative Dispute Resolution (ADR).

Trial attorneys are encouraged to engage in ADR of contract claims and appeals to the maximum extent practicable.

a. Third Party Assisted. Neutral and impartial third parties may be used in mediation, mini-trial, non-binding arbitration, and dispute review boards. The policy of the Corps of Engineers is not to use binding arbitration.

b. Board Assisted. ASBCA administrative judges are available for ADR. At the inception of an appeal, the Board provides its notice regarding ADR to the parties. The notice describes Board ADR policies and procedures. The ADR procedures used by the Board include: settlement judge, minitrial, summary trial with binding decision, and other agreed methods. Prior to agreeing to participate in a summary trial with binding decision process, the trial attorney must request and receive from the Chief Counsel a waiver of the Government's right to appeal the decision. The memorandum requesting waiver shall be forwarded to the Chief Counsel through the Engineer Chief Trial Attorney and shall briefly set forth the factual background of the appeal.

A3-310 Settlement.

a. Authority. The authority and responsibility to settle contract appeals docketed with the ASBCA remain with the contracting officer. AFARS 33.212-90-7(a); J.W. Bateson Co., Inc., ASBCA No. 24425, 84-1 BCA (C.C.H.) P16,942. The contracting officer shall advise the trial attorney of all offers of settlement from a contractor, whether such offer is made by the contractor or through the contractor's attorney. The contracting officer shall consult with the trial attorney before accepting a contractor's offer of settlement and before making a settlement offer to the contractor. Additionally, the Engineer Chief Trial Attorney has the independent authority to settle ASBCA cases with the concurrence of either the contracting officer, the Head of the Contracting Activity, or the Assistant Secretary of the Army (Research, Development and Acquisition).

b. Procedure. A stipulation of dismissal shall be prepared for all settled appeals. This should be submitted by the trial attorney directly with the Board. A copy of this document shall be provided by the trial attorney to Division Counsels in Command and Control Divisions as each requires and to the Engineer Chief Trial Attorney.

A3-311 Decisions.

a. Notice. The trial attorney is responsible for notifying the Engineer Chief Trial Attorney of all decisions rendered by the ASBCA. The notification should be made by telephone or electronic mail within one day of receiving the decision, and a copy should be faxed or mailed to the Engineer Chief Trial Attorney. A copy of the decision shall be provided by the trial attorney to Division Counsels in Command and Control Divisions as each requires.

b. Motion for Reconsideration. Under Rule 29 of the ASBCA, either party may file a motion for reconsideration within 30 days of receipt of the decision. Prior to preparing such a motion, the trial attorney must receive authorization from the Engineer Chief Trial Attorney. The motion and its supporting memorandum shall be prepared in accordance with Board Rule 29 and A3-306.

c. Appeals to the U.S. Court of Appeals for the Federal Circuit. When the trial attorney wants to appeal a Board's decision to the U.S. Court of Appeals for the Federal Circuit, a request to initiate such an action should be made through command channels to the Engineer Chief Trial Attorney within ten calendar days after receipt of the decision. The request shall state the bases for the appeal pursuant to the review standard of the Contract Disputes Act, 41 U.S.C. § 609(b). The Engineer Chief Trial Attorney shall coordinate with the Office of the Army General Counsel, and the Chief Counsel shall make the final agency recommendation decision to the Department of Justice. The appeal must be made by the Department of Justice within 120 days of receipt of the decision by the Government. 41 U.S.C. § 607(g)(1)(B).

d. Payment. A payment to an appellant from a Board decision shall be made promptly from available project appropriations. If projects funds are not readily available or extraordinary circumstances exist, the Judgment Fund as provided for in the Contract Disputes Act, 41 U.S.C. § 612, may be used. Such use requires the prior approval of the Chief Trial Attorney. A request to use the Judgment Fund will be submitted with supporting documentation to the Engineer Chief Trial Attorney.

A3-312 Attorney Fee Claims.

Pursuant to the Equal Access to Justice Act (EAJA), 5 U.S.C. § 504, a qualifying appellant may recover fees and other expenses incurred in connection with the appeal if it prevails either through a favorable settlement or Board decision and when the Government's position was not substantially justified. As a jurisdictional matter, EAJA requires that a Board receive an appellant's application for an award of fees and other expenses within 30 days of final disposition of the matter. An EAJA claim may be settled by the contracting officer pursuant to A3-310. Upon receipt of a request for fees and expenses under EAJA, the trial attorney responsible for the appeal should review the appellant's qualifications and follow the Board's procedures for award of fees and expenses under EAJA.

A3-313 Appeals Management and Case Tracking.

The Office of Counsel is required to enter and update all its appeals in the USACE Legal Services' Matter Tracking System (MTS). The trial attorney is responsible for ensuring that MTS has current and accurate information in all assigned cases.

a. New Appeals. In most instances, the basic information concerning the claim which is the subject of the appeal is already in the database. In such cases, the trial attorney shall update the information by changing the category of the entry from (claim) to (appeal) and adding the ASBCA as the forum and the docket number. A new, separate case should not be entered. If the claim was not entered into the database during the claim stage, the following information must be entered for each appeal: the name of the appellant/contractor, the forum and docket number, the contract number, the project and location, the relief requested, the date of the contracting officer's final decision, the trial attorney assigned to the appeal, and a brief narrative description of the facts and issues.

b. Updating Appeal Information. The database should be updated as significant events occur, including the filing of pleadings, dispositive motions and briefs, and the scheduling of hearings, and ADR procedures. When the ASBCA renders a decision or a case is settled and dismissed by the Board, the appeal should be closed on the database and the following information should be entered within 5 working days: the disposition of the appeal (whether it was decided, settled, or withdrawn); the date of disposition, the nature of the disposition (whether relief was denied or granted in whole or in part); and a summary of any relief granted.

SUBPART 400 - DIRECT ACTIONS IN THE UNITED STATES COURT OF FEDERAL CLAIMS

A3-400 Scope of Subpart.

This subpart sets forth procedures for handling Contract Disputes Act litigation before the U.S. Court of Federal Claims. See 41 U.S.C. § 609. Throughout this subpart, the term "local counsel" shall mean District Counsel, Operating Division Counsel, Center Counsel, Laboratory Counsel, or FOA Counsel.

A3-401 Responsibilities.

a. Department of Justice (DOJ). DOJ is responsible for Contract Disputes Act cases in the U.S. Court of Federal Claims. 28 U.S.C. § 518.

b. Corps of Engineers. The District, Laboratory, or FOA Counsel will assign a trial attorney to prepare a litigation report and to assist the DOJ attorney assigned to the case.

A3-402 Notice of Filing.

a. Department of Justice. When a complaint is filed, DOJ notifies the agency by sending a transmittal letter stating the name and telephone number of the DOJ attorney assigned to the case and requesting that the Corps trial attorney assigned to the case contact the DOJ attorney. The letter also requests a litigation report and draft answer.

b. Corps of Engineers. The Engineer Chief Trial Attorney will forward the DOJ letter and complaint to the Corps District, Operating Division, Laboratory, Center, or FOA responsible for administration of the contract at issue, with a copy to the Division Counsel where applicable. The Engineer Chief Trial Attorney's letter will establish a suspense for submitting the litigation report and contain instructions for complying with DOJ's requests.

A3-403 Litigation Report.

a. Procedures. Except in those instances when time does not permit and prior telephonic approval of deviation from this procedure is obtained from the Engineer Chief Trial Attorney, two copies of the litigation report and exhibits, one for the DOJ attorney and one for the Engineer Chief Trial Attorney, will be submitted directly to the Engineer Chief Trial Attorney. An additional copy should be sent to the Division Counsel in Command and Control Divisions as each requires. Bulky or voluminous exhibits may be omitted from the Engineer Chief Trial Attorney's copy of the report with prior permission of the Engineer Chief Trial Attorney.

b. Form. The litigation report shall contain (1) a narrative statement of facts and listing of exhibits; (2) a suggested answer; (3) a list of witnesses; (4) a legal analysis; and (5) information concerning any known counterclaim, set-off, or other cause of action which may be asserted against the plaintiff by the Government. The statement of facts may be summarized from the contracting officer's final decision. A legal memorandum prepared for the contracting officer's use in considering the claim may be used as the required legal analysis if it addresses all of the relevant legal points. The exhibits shall consist of a compilation of documents prepared in the same manner as an appeal file before the Board. See generally A3-303.

A3-404 Significant Events.

The Corps trial attorney assigned to the case is responsible for keeping the Engineer Chief Trial Attorney fully informed of all significant events that occur as the case progresses. This requirement includes furnishing the Engineer Chief Trial Attorney a copy of all pleadings, motions, and briefs filed; keeping the Matter Tracking System completely updated (see A3-408); and advising the Engineer Chief Trial Attorney by telephone or electronic mail when hearings are scheduled.

A3-405 Alternative Dispute Resolution (ADR).

a. Third party assisted. Executive Order 12988 concerning civil justice reform, encourages litigation attorneys to use ADR. The Corps trial attorney will assist the DOJ attorney in using ADR.

b. Court assisted. General Order 13 of the U.S. Court of Federal Claims, as amended, established three methods of ADR for use in cases before the court: settlement judges, mini-trials, and third party neutrals. The settlement judge procedure contemplates a frank, in-depth discussion of each party's case before a neutral advisor. The mini-trial is a flexible, expedited procedure where each party presents an abbreviated version of its case to a neutral advisor (a judge other than the presiding judge), who then assists the parties in negotiating a settlement. The third party neutral procedure consists of a private third party appointed by the court to assist in ADR. Corps trial attorneys are strongly encouraged to work with the DOJ attorney in utilizing these procedures to the maximum extent practicable.

A3-406 Settlement.

Authority to settle the case is vested solely in the Department of Justice. 28 U.S.C. § 516, 519; Exec. Order No. 6166, June 10, 1933, reprinted in 5 U.S.C. § 901. Once litigation is docketed before a Federal court, the contracting officer loses all authority to settle the case. See United States v. Newport News Shipbuilding & Dry Dock Co., 571 F.2d 1283 (4th Cir. 1978). All recommendations concerning settlement of cases in the U.S. Court of Federal Claims will be made by the Chief Counsel to DOJ. The Corps trial attorney assigned to the case, in collaboration with the contracting officer, is responsible for forwarding the settlement recommendation, including an explanation of the proposed terms and the reasons why the Government should or should not agree to them, through the command channels, to the Engineer Chief Trial Attorney. The Engineer Chief Trial Attorney will prepare the recommendation for the Chief Counsel to send to DOJ. An exception will be made when, pursuant to General Order 13, as amended, the court requests that the agency representative have full settlement authority.

A3-407 Decisions.

a. Notice. The Corps trial attorney assigned to a case is responsible for notifying the Engineer Chief Trial Attorney of all decisions rendered by the U.S. Court of Federal Claims. The notification should be made by telephone or electronic mail within one day of receiving the decision, and a copy should be faxed or mailed to the Engineer Chief Trial Attorney. A copy of the decision shall be provided by the trial attorney to Division Counsels in Command and Control Divisions as each requires.

b. Motion for Reconsideration. A motion for reconsideration is governed by Rule 59 of the Rules of the U.S. Court of Federal Claims. The motion must be filed within 10 days of the entry of judgment. The Corps trial attorney assigned to the case should forward any recommendations concerning the Government's filing a motion for reconsideration through command channels to the Engineer Chief Trial Attorney within 5 days of the entry of judgment. The Engineer Chief Trial Attorney will prepare the agency recommendation for the Chief Counsel to forward to DOJ.

c. Appeal. Recommendation for appeal of an adverse decision will be made by the Chief Counsel to DOJ. When the trial attorney assigned to the case believes an appeal is warranted, the trial attorney and the local counsel will contact the Chief Trial Attorney informally to discuss whether an appeal is appropriate. If an appeal is warranted, the trial attorney shall forward a written appeal recommendation, including a thorough analysis of the facts and law, through command channels to the Engineer Chief Trial Attorney. The Engineer Chief Trial Attorney will coordinate with the Office of the Army General Counsel and prepare the agency recommendation for the Chief Counsel to send to DOJ.

d. Payment. In cases where the U.S. Court of Federal Claims issues a decision sustaining the appeal, payment will be made in accordance with Judgment Fund procedures.

A3-408 Case Management and Tracking.

The Office of Counsel is required to enter and update all cases in the USACE Legal Services' Matter Tracking System. The trial attorney is responsible for ensuring that MTS has current and accurate information in all assigned cases.

a. New Cases. In most instances, the basic information concerning the case is already in the database. In such cases, the trial attorney shall update the information by changing the category of the entry from "claim" to "appeal" and adding the U.S. Court of Federal Claims as the forum and the court's docket number. A new, separate case should not be entered. If the claim was not entered into the database during the claim stage, the following information must be entered for each case: the name of the plaintiff/contractor, the forum and docket number, the contract number, the project and location, the relief requested, the date of the contracting officer's final decision, the trial attorney assigned to the case, and a brief narrative description of the facts and issues.

b. Updating Case Information. The database should be updated as significant events occur, including the filing of pleadings, dispositive motions and briefs, and the scheduling of hearings, trials, and ADR. When the court renders a decision or a case is settled and dismissed by the court, the case should be

closed on the database and the following information entered within 5 working days: the disposition of the case (whether it was decided, settled, or withdrawn); the date of disposition, the nature of the disposition (whether relief was denied or granted in whole or in part); and a summary of any relief granted.

SUBPART 500 - APPEALS TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

A3-500 Scope of Subpart.

This subpart sets forth procedures for handling appeals at the U.S. Court of Appeals for the Federal Circuit pursuant to the Contract Disputes Act, 41 U.S.C. § 607(g)(1)(A).

A3-501 Notice of Appeal.

a. Contractor Appeals.

1. Department of Justice (DOJ). When an appeal is filed, the DOJ notifies the agency by sending a transmittal letter stating the name and telephone number of the DOJ attorney assigned to the case and requesting that the Corps trial attorney contact the DOJ attorney. The letter indicates that upon filing of appellant's brief, the DOJ attorney will promptly furnish a copy with a request for comments to the trial attorney. The letter also requests that the trial attorney provide advice as to which parts of the record should be included in the appendix.

2. Corps of Engineers. The Engineer Chief Trial Attorney will forward the DOJ letter and notice of appeal to the Corps District, Operating Division, Laboratory, Center, or FOA responsible for administration of the contract at issue, with a copy to the Division. The Engineer Chief Trial Attorney's letter will direct the assigned attorney to comply with DOJ's requests for advice, to keep the Engineer Chief Trial Attorney informed of significant developments in the case, and to keep the appeal updated on the Matter Tracking System.

b. Government Appeals. Appeals of ASBCA decisions shall be made according to the procedure set forth in A3-311(c). Appeals of U.S. Court of Federal Claims decisions shall be made according to A3-407(c).

A3-502 Responsibilities.

a. Department of Justice (DOJ). DOJ is responsible for Contract Disputes Act cases in the U.S. Court of Appeals for the Federal Circuit. 28 U.S.C. § 518(a). The DOJ attorney assigned to the case is responsible for representing the Government to include preparing and filing the Government's brief and participating in oral arguments.

b. Corps of Engineers. The assigned trial attorney shall provide assistance to the DOJ attorney in preparing the Government's brief and conducting oral argument. The trial attorney shall also have the responsibility of notifying the Engineer Chief Trial Attorney of significant events in the case as defined below.

A3-503 Significant Events.

The assigned trial attorney is responsible for keeping the Engineer Chief Trial Attorney fully informed of all significant events that occur as the case progresses. This requirement includes furnishing the Engineer Chief Trial Attorney a copy of dispositive motions and briefs filed and keeping the Matter Tracking System completely updated (see A3-506).

A3-504 Oral Argument.

When oral argument is scheduled, the assigned trial attorney shall inform the Engineer Chief Trial Attorney of the date and indicate who will be attending.

A3-505 Decision.

The assigned trial attorney is responsible for notifying the Engineer Chief Trial Attorney of the decision rendered by the U.S. Court of Appeals for the Federal Circuit. The notification should be made by telephone or electronic mail within one day of receiving the decision, and a copy should be faxed or mailed to the Engineer Chief Trial Attorney.

A3-506 Appeals Management and Tracking.

The Office of Counsel is required to enter and update all appeals at the U.S. Court of Appeals for the Federal Circuit in the USACE Legal Services' Matter Tracking System. The trial attorney is responsible for ensuring that MTS has current and accurate information in all assigned cases.

a. New Appeals. The basic information concerning the appeal is already in the database. The trial attorney shall update the information by changing the forum to the U.S. Court of Appeals for the Federal Circuit and adding the appellate docket number. A new, separate case should not be entered.

b. Updating Appeal Information. The database should be updated as significant events occur including the filing of motions, briefs, and the scheduling of oral arguments. If the appeals court renders a decision remanding the case to a Board or the U.S. Court of Federal Claims, the decision should be recorded in MTS, and the forum and docket number in the case file should be changed to show where the case is now pending. When the appellate court renders a final decision or a case is settled, the appeal should be closed and the following information should be entered within 5 working days: the disposition of the (whether it was decided, settled, or withdrawn); the date of disposition, the nature of the disposition (whether relief was denied or granted in whole or in part); and a summary of any relief granted.