

Construction Contracting Guideline - 5.5.G (10/19/04)

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This guideline was extensively revised to address administrative changes throughout the document. This guideline was also revised to incorporate the Davis Bacon electronic process and the Contractor prequalification process.

Definitions

Construction is the act of building, erecting, or fabricating a structure such that it will become real property. Construction includes alteration or repair (to include painting and decorating) of buildings, structures, or other real property. Buildings, structures, or other real property include, but are not limited to, improvements of all types, such as bridges, dams, highways, streets, tunnels, sewers, mains, power lines, pumping stations, railways, airport facilities, terminals, docks, piers, levees, canals and channels. Construction does not include manufacture, production, furnishing, alteration, repair, processing, or assembling of personal property.

The **Construction Registration Database** is a list of qualified suppliers. Qualified means that these suppliers have a Sandia approved safety plan on file and that their three (3) year average Occupational Safety and Health Administration (OSHA) incident rate is at or below the published national average.

The **Davis-Bacon Act**, 40 USC 276, provides that government contracts must set forth the minimum wages to be paid to all classes of laborers and mechanics to be employed in the contract work. The Davis-Bacon Act is applicable to every Sandia construction contract over \$2,000.

Line Item Construction, for the purpose of this guideline, is the construction of the facility or building associated with a congressionally-approved line item construction project.

The **Miller Act**, 40 USC 270 b(a), requires a government Contractor to post a surety bond for the protection of all persons supplying labor and material in the prosecution of the work under the contract if the contract is for more than \$100K.

A **payment bond** provides protection of persons supplying labor and material under a construction contract. Payment bonds, usually furnished by a surety, guarantee to make payments for labor and material furnished in furtherance of the contract work (see Miller Act).

A **performance bond** provides a guarantee, usually furnished by a surety, to make Sandia or the government whole for any loss they may sustain as a result of a construction Contractor's failure to perform in accordance with the terms, conditions, and agreements of the contract.

Personal property generally includes everything subject to ownership that is not real property. Personal property includes, but is not limited to, goods, chattels, money, and moveable trailers, equipment and facilities.

Preproposal Conference - A conference held with prospective bidders prior to the submission of a bid for the purpose of:

- visiting the proposed construction site,
- clarifying any ambiguous situations,
- answering bidder questions, and
- ensure that all bidders have a common basis of understanding regarding the bid.

Public Plan Room Utilization - Public plan rooms are locations, within each specific geographic region, accessible to construction Contractors and subcontractors. Plans submitted to the plan rooms are available to any person in the construction trade.

A **quotation bond** (bid bond) is a guarantee, usually furnished by a surety, that quotations will not be withdrawn within the time for acceptance and that, if successful, the Contractor will execute a written contract and furnish additional bonds as required by the contract.

Real property is land, and generally whatever is erected or affixed to the land.

Acquisition Planning for Construction - 5.5.G.1

Acquisition planning:

- must be completed prior to issuing the solicitation and a formal acquisition plan is mandatory for individual requirements over \$10 million, including the values of all options or complex procurements, and
- a formal acquisition plan is optional but encouraged for any acquisitions that are critical or time sensitive, regardless of dollar value, where the Sandia Contracting Representative (SCR) and user believe this planning is necessary.

Note: Refer to Guideline 1.1 – Acquisition Planning for additional information on acquisition planning.

Acquisition planning is the single most important phase of the procurement process for large construction projects as the decisions made during the planning phase shape the entire direction and eventual outcome and success of the procurement. Following are some acquisition planning considerations especially applicable to construction contracting that should be addressed in the acquisition in addition to the considerations discussed in Guideline 1.1.

- What types of Contractors are required?
 - Can the requirement be set-aside for any category of small business?
 - General, mechanical, or electrical Contractors?
 - Specialty Contractor?
- What funding is available for the project?
- Should progress payments be made?
- Should the project be broken down into phases, milestones, options, or any combination of the above?
- What measures need to be taken to identify qualified quoters on each phase of the project?
- Are there special security considerations?
 - Isolation of the construction area.
 - Availability of guards/escorts.
 - Security clearance requirements.

- Are special construction equipment or utilities needed?
- Are there any special Environmental, Safety and Health (ES&H) constructions?
- Is there a need for special quotation procedures?
 - Use of Public Plan Rooms
 - Preproposal Conference

The SCR, with assistance from other members of the Facilities organization, is responsible for writing the acquisition plan and for updating the plan throughout the procurement process. Participants in the planning process should concur with the plan.

Davis-Bacon Act Requirements - 5.5.G.2

Obtaining DOE/NNSA Determinations and Approvals - 5.5.G.2.a

Any Purchase Requisition (PR) for a procurement which may possibly involve Davis-Bacon Act coverage, the SCR must obtain the applicable wage decision through the Department of Labor's (DOL) wage determinations online website located at <http://192.239.92.108/>. After obtaining the wage decision, the SCR must e-mail a copy of the decision, copy of the Statement of Work (SOW), and the estimated amount of the procurement to the Department of Energy/National Nuclear Security Administration/Sandia Site Office (DOE/NNSA/SSO). In those cases where it is determined that the act does apply, the SCR shall document the contract file regarding its applicability.

Procurement Action Summary (PAS) Requirements - 5.5.G.2.b

The PAS shall state that the provisions of the Davis-Bacon Act were considered and deemed applicable or nonapplicable.

Labor Standards Provisions - 5.5.G.2.c

Acceptable Labor Standards Provisions are covered in Section II Terms and Conditions (Ts&Cs). These provisions are self-incorporating.

Davis-Bacon Wage Decisions - 5.5.G.2.d

The Labor Standards Provisions require the Contractor to pay employees at rates no less than the rates specified in the wage decision of the Secretary of Labor for that geographical area.

Wage Decisions and Modifications can be found on the DOL's wage determination website located at <http://192.239.92.108/>.

For all work covered by the Davis-Bacon Act, the SCR shall incorporate the applicable wage decision with the solicitation and the resulting contract, identifying it by number and providing the DOL's website address. Since new or modified wage decisions may be issued at any time, care shall be taken that the latest decision is incorporated in a solicitation and the resulting contract. Modifications to wage decisions made within ten (10) days prior to the proposal submission date are not effective, except when the SCR finds that there is a reasonable time in which to notify Contractors of the modification.

There are two types of wage decisions:

- General Building and Heavy Engineering Construction, and
- Streets, Highway, Utility and Light Engineering Construction.

It is the responsibility of the SCR to specify in the solicitation and resulting contract, which wage decision(s) applies. If the work is split, where both types are applicable, both wage decisions would be incorporated only if the smaller type of work is greater than 20 percent of the total job. Otherwise, if the portion of the smaller type of work is less than 20 percent, then only the wage decision for the larger type of work would apply.

Weekly Payrolls and Statements of Compliance - 5.5.G.2.e

The Labor Standards provisions require the Contractor to submit to the SCR at least once a month a certified copy of all weekly payrolls together with a statement of compliance. The approved format for Contractor's Weekly Statement of Compliance is set forth in 29 CFR, Part 3.

Solicitation Contents for Construction Contracts 5.5.G.3

Selecting Prospective Contractors - 5.5.G.3.a

The SCR is responsible for securing adequate competition for Sandia construction contracts. As applicable, the SCR may consult the Procurement Supplier Information and Relations (SIR) Department for assistance in identifying sources for Sandia construction contracting needs (see below).

Line Item Construction - 5.5.G.3.a.1

The following options are available for securing adequate competition on all line item

construction requirements or construction requirements valued at \$5 million and over:

- Procurement's SIR Department furnished lists and referrals;
- prospective qualified Contractors identified at Sandia Outreach Programs; and/or
- prospective qualified Contractors responding to notices in the Fedbizopps, newspapers, and/or appropriate trade journals.

Note: Advertising is optional, and may be used at the SCR's discretion, for all construction-related projects (e.g., landscaping, occupancy, line item construction).

Nonline Item Construction - 5.5.G.3.a.2

To be a supplier for a nonline item construction procurement, suppliers must be registered in the Construction Registration Database. It is for this reason that procurements for construction services need not go through Procurement's SIR Department. The only exception is when a sufficient number of suppliers do not exist in the registration database to promote adequate competition. The above is stipulated given the following:

- The Architect-Engineer (A&E) and Construction Procurement Department maintains a registration database.
- Contractors are continually offered the opportunity to complete the registration process and become a "registered supplier."
- A&E and Construction Procurement Department must work with the SIR Department on a regular basis to encourage the involvement of suppliers for areas in which there are insufficient suppliers in the database to produce meaningful competition.
- For any construction category where only one source is "registered," solicitation will include sources from outside of the registration database. However, the requirement to complete the registration process will be required prior for award.

Mandatory Contractor Qualifications - 5.5.G.3.b

If prospective Contractors must meet mandatory requirements, the SCR shall set forth those requirements in a Request for Information (RFI) or the solicitation. In the case of joint ventures, at least one of the parties must possess all of the mandatory requirements. Contractors that do not meet mandatory requirements shall be considered nonresponsive.

Best-Value Analysis – 5.5.G.3.c

The SCR may elect to utilize a best-value analysis to select the successful Contractor. Best-value evaluation factors selected should provide the greatest ability to differentiate between the Offerors. The evaluation factor of past performance may merit a significant weighting. Choose

evaluation factors carefully. Having too many factors will dilute the evaluation results. The evaluation factors should be tailored to each individual construction project giving considerations to factors such as:

- has the Contractor demonstrated experience on a reasonable number of successfully completed projects of similar size and complexity;
- has the Contractor indicated adequate organizational and management skills;
- has the Contractor shown the necessary technical skills to successfully complete the project, and/or ES&H skills and abilities;
- has the Contractor presented an adequate record or listing of successfully completed construction projects over the past three (3) to five (5) years without recourse to sureties;
- has the Contractor exhibited the necessary resources (personnel, equipment and financial) to complete the project when required by Sandia; and
- other relevant factors as determined by the SCR.

Site Inspection - 5.5.G.3.d

The SCR should encourage prospective Contractors to inspect the site and the surrounding site conditions. The SCR should emphasize that the Contractors will be held responsible for the performance of the SOW whether or not they have inspected the site per Site Investigation and Conditions Affecting the Work clause.

Normally, only the SCR should be in contact with prospective Contractors during the quotation period; however, the SCR may approve Facilities Center (Plant Engineering at Sandia/CA) personnel discussing, meeting or corresponding with prospective Contractors. However, the SCR must ensure that all prospective Contractors are treated equally and fairly. If such approval is given, the SCR should remind Sandia personnel that representations concerning site conditions that are ascertainable by a site visit should not be made. Conditions known to Sandia but not ascertainable by a site inspection should be described in the solicitation, or an incorporation to the solicitation, if the conditions would affect the contract work.

Caution: The SCR should not make any representations concerning site conditions that can affect the work.

Special Solicitation Procedures - 5.5.G.3.e

The SCR should fully describe in the solicitation any special procedures that will be used, and the evaluation criteria should be clearly presented. Special procedures available to the SCR at the SCR's option include:

- preproposal conferences, and
- public plan room utilization.

Administration - 5.5.G.3.f

The SCR is responsible for the integrity of the solicitation process. While it is not possible to cover all situations during the solicitation phase in this guideline, the SCR should always allow adequate time for Contractor quotation and coordinate all responses to questions raised by individual Contractors during this process.

The SCR shall document in the PAS any exceptions to solicitation provisions that a prospective Contractor has included in their offer. If the SCR has determined that a Contractor does not meet the mandatory requirements, the SCR shall discuss the evidence used as a basis for the finding in the PAS.

Awarding a Construction Contract - 5.5.G.4

The SCR shall select the successful Contractor in strict accordance with the award criteria contained in the solicitation. The SCR shall then complete the Procurement Action Summary (PAS) or Procurement Action Documentation (PAD). (See Guideline 10.4 – Procurement Action Summaries for PAS approval levels.)

Contract Execution and Follow-up - 5.5.G.4.a

The SCR shall submit the contract documents to the successful Contractor, together with instructions to the Contractor for the submission of payment and performance bonds and other required documentation. The SCR is responsible for verifying that the Contractor has returned all required contract documents and bonds.

Contract Schedules - 5.5.G.4.b

The SCR may consider requiring written contract schedules appropriate to the size and complexity of the construction project. The type and format of the schedule required normally is determined by the Contract Sandia Facilities Engineer (Plant Engineer at Sandia/CA). The schedule required can range from a simple bar or Gantt chart for a small project to a Critical Path Method (CPM) plan. Whatever type is used, the SCR should be able to determine the effect of a delay in any particular resource used in the contract work on the scheduled completion date. If required, provisions requiring the Contractor to submit the initial schedule together with periodic updates should be incorporated into the contract.

Quotation Guarantee Bond Default - 5.5.G.4.c

If the solicitation contained the requirement for a Quotation Guarantee Bond and the SCR finds that the contract awardee refuses to execute the contract documents and submit the required

payment and performance bonds, the SCR shall notify their cognizant Department Manager and send a letter, certified mail, return receipt requested, to the quotation bond surety. The letter should notify the surety that the contract awardee has refused to execute the contract documents and indicate that Sandia intends to submit a claim for an amount equal to the difference between the cost to Sandia of acquiring the work and the amount of the defaulted quotation (reprocurement costs). Copies of the letter to the surety shall be sent to the cognizant Procurement Department Manager, Sandia Legal, and the defaulting Contractor.

Construction Contract Administration - 5.5.G.5

The SCR is responsible for administering the contract to assure that:

- construction changes are managed appropriately and effectively,
- the Contractor is adhering to their Small Business Subcontracting Plan, and
- contract work meets the contract schedule and specifications.

SCR must depend on the support of many individuals for assistance in fulfilling this responsibility, including the Sandia Facilities Project Manager, Sandia Delegated Representative (SDR) and the Construction Observers. The contractual authority of any individual with the authority to direct contract work should be fully described as provided below to avoid misunderstandings about authorized contract changes.

Payment and Performance Bonds - 5.5.G.5.a

Payment and performance bonds are required on Firm Fixed-Price (FFP) construction contracts valued in excess of \$100K. Section II SF 6432-CN, Standard Terms and Conditions for Fixed-Price Commercial Construction contracts covers the bonding requirements and provides that both bonds must be submitted to the SCR prior to the commencement of work. The bonds must cover the period of contract performance plus the warranty period. The SCR should keep a copy of the bonds in the contract file. For external requests regarding the Contractor's bonding information, the SCR should only provide the bonding company's contact information and not an actual copy of the bond.

Contractual Authority - 5.5.G.5.b

The SCR should clearly define the contract authority of each individual associated with the contract either in the contract itself or in a letter signed by both the SCR and the Contractor. The listing should include the name, title, telephone number, contract authority (or absence thereof) for the:

- SCR,
- Sandia Construction Observer(s),
- SDR, and
- Sandia Facilities Project Manager (Plant Engineer at Sandia/CA) or representatives of such organizations.

Payments to Contractors - 5.5.G.5.c

The Payment clause in Section II, SF 6432-CN, provides that the Contractor shall be paid upon completion and acceptance of all contract work after Sandia receives an invoice together with an executed Contractor's Release Under Contract form, SF 6432-J. When the SCR incorporates optional SC 229-PC, Progress Payments - Construction, in the contract, the Contractor is paid interim amounts upon invoicing depending upon the portion of the contract work completed. Clause 229-PC provides for a 10 percent retainage that may be increased unilaterally by the SCR to 50 percent if the SCR considers that the contract work is not proceeding satisfactorily. Once the work is substantially complete, the SCR may reduce the retainage to an appropriate amount commensurate with the degree of completion.

Construction Contract Dispute Mediation - 5.5.G.5.d

The Dispute clause in Section II, SF 6432-CN, provides the remedies that are available to the Contractor should a dispute on a contract claim arise between Sandia and the Contractor. The SCR should attempt to negotiate and resolve most claims through Sandia's Acquisition Conflict Resolution process (see Guideline 5.8 – Acquisition Conflict Resolution); however, when a claim is made on which there is a disagreement between the SCR and the Contractor that cannot be resolved through the Acquisition Conflict Resolution process, the SCR may invoke nonbinding mediation when the SCR:

- receives the written claim,
- believes that negotiations are not leading to an agreement on a contract claim, or
- receives notice that the Contractor intends to pursue a judicial remedy.

Usually, there will be only one mediation per claim, and several claims can be combined for the purpose of mediation. The SCR shall direct all requests for mediation support to Legal.

Construction Contract Changes - 5.5.G.6

There are more contract changes inherent in construction contracts than any other type of contracting at Sandia. The SCR should handle revisions in the contract price or schedule

promptly and document the contract file to support the rationale for the change. Depending on the complexity of the revision this could be accomplished using either the PAD or the PAS. Although changes are discussed in Guideline 4.1 – Contract Revisions, a brief discussion is included here because of the importance of changes in construction contracting.

Information Management - 5.5.G.6.a

The SCR should consider setting up a procedure on larger construction contracts to assure that the SCR has up-to-date information on contract progress and problems. The SCR may consider:

- requiring the Contractor to send status reports periodically,
- requiring the Construction Observers to send a short report covering any unusual problems encountered during contract performance, and/or
- visiting the site periodically to observe first-hand the staffing, progress, and condition of the work site.

Cardinal Changes - 5.5.G.6.b

A cardinal change is generally a change under which the essential identity of the work contracted for is altered or when the method or manner of anticipated performance is so drastically and unforeseeably changed that essentially a new agreement is created. Cardinal changes may not be directed under the Changes clause of the contract.

Equitable Price and Schedule Changes - 5.5.G.6.c

The Changes clause authorizes the SCR unilaterally to order changes in the contract work in the following areas:

- specifications, drawings and designs,
- method and manner of work performance,
- furnished equipment, material, services or site of work, and
- contract schedules.

The Changes clause notifies the Contractor that they may make a claim for an equitable adjustment to the contract price or schedule. The SCR must consider the merits of the claim; however, if the SCR determines that no change in either price and/or schedule is appropriate, the claim may be rejected. The change can result in an increase and/or a decrease in the contract price and an adjustment in the contract schedule if the change affects the Contractor's critical path.

For all change orders to a construction contract, it is important to note that while the SCR receives input from one or more sources as to the reasonableness of a change and the price of that change, it is ultimately the responsibility of the SCR to determine:

- the validity of the change, and
 - sufficiently document the associated change.
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Applicable Clauses - 5.5.G.7

This section identifies the required and recommended clauses at applicable thresholds.

Optional Clauses - 5.5.G.7.a

The following clauses are not included in Section II, SF 6432-CN, but may be considered for inclusion in the solicitation.

- SC 229-PC - Progress Payments - Construction
 - SC 230-PB - Price Breakdown
 - SC 263-QB - Quotation Guarantee Bond
 - SC 264-CE - Contractor-Owned Equipment
 - SC 404-KDB - Delegation of Authority
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References - 5.5.G.8

- Guideline 1.1 - Acquisition Planning
 - Guideline 1.4 - Contract Types
 - Guideline 2.1 - Solicitation Document
 - Guideline 2.6 – Supplier Diversity Program
 - Guideline 3.1 – Best-Value Source Selection/Commercial-Like Practice
 - Guideline 4.1 - Contract Revisions
 - Guideline 5.8 - Acquisition Conflict Resolution
 - Guideline 10.4 - Procurement Action Summaries
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Send feedback on ideas and information on this page to the Process Expert, Adolph Bachicha.



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Karen Archibeque

