

Contracts
DESIGN-BUILD CONTRACTING

1. Purpose. This regulation prescribes authorities and procedures for the use of design-build contracting by the U.S. Army Corps of Engineers (USACE).
2. Applicability. This regulation applies to all USACE organizations engaged in the planning and execution of requirements using the design-build delivery method, except projects using non-appropriated funds (see paragraph 8.g.).
3. References.
 - a. Title 10 United States Code (U.S.C.), Section 2305a
 - b. Title 10 U.S.C., Section 2862
 - c. Title 41 U.S.C., Section 253m
 - d. Federal Acquisition Regulation (FAR), Parts 2, 7, 14, 15, 16, and 36
 - e. Department of Defense (DoD) FAR Supplement (DFARS), and Army FAR Supplement (AFARS), Parts 14, 15, 16, and 36
 - f. DoD Instruction (DODI) 4105.67, Non-Appropriated Fund Procurement Policy
 - g. Army Regulation (AR) 215-4, Non-appropriated Fund Contracting
 - h. Unified Facilities Criteria (UFC) 4-711-01, Family Housing
 - i. UFC 1-300-07A. Design-Build Technical Requirements
 - j. AR 420-1, Army Facilities Management
 - k. Engineering Regulation 415-1-10, Contractor Submittal Procedures
4. Distribution. Approved for public release, distribution is unlimited.
5. Explanation of Terms.

a. "Acquisition planning" involves the consideration of factors indicated in Appendix A as they relate to a project for design and construction or a summary of the salient acquisition factors from a project's acquisition plan prepared in accordance with FAR Part 7.

b. The terms "design," "design-bid-build," (D-B-B) and "design-build" (D-B) are defined in FAR 36.102.

c. "Performance specifications" refer to the government's requirements described in the statement of work or elsewhere in the Request for Proposals (RFP). Performance specifications state the government's requirements in terms of required results, and include the criteria for verifying compliance, without unnecessarily limiting the specific products, means and methods for achieving the required results.

6. Objectives. The objective of this ER is to provide guidance for the project delivery team (PDT) to determine when and how design-build may be appropriately selected and used as the delivery method for design and construction of a project.

7. Policy.

a. USACE commands will consider and evaluate objectively the project requirements, industry capabilities, and the executing USACE organization's capabilities as part of determining the most appropriate delivery method for engineering and construction projects. All applicable delivery methods will be considered. In addition to the project manager and contracting office staff, the executing organization's chief of engineering and the chief of construction will be involved in this analysis and decision-making on selecting the most appropriate method of delivery for a project or program. The rationale for the selection of a specific delivery method will be documented in the Project Management Plan.

b. USACE commands will perform acquisition planning for all project acquisitions and provide project execution recommendations based upon the project's goals and objectives for budget, functional and technical quality, and urgency of need date, using and the most feasible delivery and contracting methods at the lowest sustainable cost.

c. A Military Department, Agency or HQUSACE may provide specific programmatic level policy (e.g., MCA Program) that establishes a preferred or required delivery method(s) for a program or an individual project. Those decisions should be based upon appropriate planning, similar to the planning processes described in this ER.

d. USACE commands must work with their partners at the early stages of program and project planning to ensure a full understanding of the factors relating to method of delivery decisions, and effective, timely determination of the appropriate acquisition methods.

e. The responsible USACE command will evaluate applicable delivery methods and implement the most appropriate delivery method. The evaluation must consider factors as indicated in Appendix A and in UFC-1-300-07A at Reference i., including whether customer requirements have been fully defined, the size and complexity of the project, quality

requirements, time constraints, capabilities and experience of potential contractors, and the executing USACE organization's capabilities and experiences with the proposed delivery method. The contracting officer must make a determination if design-build is appropriate for the acquisition in accordance with FAR 36.104(a), using the criteria in FAR 36.301.

f. If the design-build delivery method is selected, the contracting officer and project delivery team shall select and implement an appropriate contracting method, such as a single award, "C" type D-B contract using the two-phase D-B or one-step D-B, or a task order under a new or existing D-B, Multiple Award or Single Award, "D" Type indefinite delivery contract (IDC).

8. Authorized Use of the Design-Build Method of Delivery.

a. FAR Part 36.104 states that if the traditional design-bid-build (D-B-B) method of delivery (in-house design or design services procured through Brooks Architect Engineers Act procedures (FAR 36.6) and construction contracting (FAR Part 36)) is not used, the two-phase D-B method or another authorized method must be used. As an alternative to the D-B-B method of delivery, two-phase D-B is authorized under 10 U.S.C. 2305a or 41 U.S.C. 253m (implemented in FAR 36.3) and, for military construction type projects, the one-step D-B method is authorized under 10 U.S.C. 2862.

b. A design-build contract is a specialized form of a construction contract (Reference: 10 USC 2862 and Federal Record Doc No: 96-33217, 2 Jan 1997, Item XIII, FAR Case 96-305, Summary of Final Rule to implement two-phase D-B rules in the FAR). A D-B contract is not authorized as an architect-engineer (A-E) contract.

c. D-B contracts should be awarded competitively, using either the two-phase process or the one-step process. Otherwise, a form of the design-bid-build method of delivery must be used with the design services performed either in-house or procured pursuant to the Brooks Act, in accordance with FAR 36.104 and 36.6, with separate contracts to separate firms for design and for construction. A Design-Build indefinite delivery single award task order contract (SATOC) is technically a competitively awarded contract, not a sole source contract, for task orders authorized for use under that type contract. However, Congress has placed strict restrictions on use of single award indefinite delivery contracts (IDC).

d. The FAR at 36.209 prohibits the award of a construction contract (or task order under an IDC) to the firm that designed the project. This provision of the FAR prohibits sequential award of a contract or contract task order to a firm to first design or develop the preliminary design or design criteria, followed by the separate award of the construction contract, construction task order or an option to construct the project. A contract or contract task order to design or provide preliminary design to price the construction of a project must use the Brooks Act selection procedures in accordance with FAR 36.6.

e. Design-Build for Military Mission Projects.

(1) D-B contracting is authorized for military construction (MILCON) and other non-MILCON military construction contracts, such as repair or minor construction projects.

(2) The two-phase selection procedures are described in FAR 36.3. The contracting officer with involvement of the PDT shall make a determination that the design-build procedures are appropriate, using the criteria delineated in FAR 36.301 (b). If appropriate, the contracting officer should use the two-phase selection procedures, unless another design-build acquisition procedure authorized by law is used.

(3) The one-step D-B authority is limited to a competitively selected single contractor on the basis of price and other evaluation criteria to perform both design and construction of a facility using approved "performance specifications" under a firm-fixed-price contract for military construction (10 U.S.C. 2862).

f. Design-Build for Civil Works and Work for Others Projects.

(1) Two-phase D-B contracting is authorized for Civil Works projects and Interagency Support projects. If the contracting officer in coordination with the PDT makes a determination that the design-build method of delivery is appropriate for use, then the use of two-phase selection procedures in FAR 36.3 are required. The one-step method is not authorized for other than Military projects. Civil Works projects, in addition to the specific criteria delineated in FAR 36.301(b), have the following requirements:

(a) An executed Project Cooperation Agreement (PCA) must specifically address use of D-B contracting, or the cost sharing partner must otherwise agree to the use of D-B for a particular part of a project;

(b) Construction must be authorized, and

(c) The decision to use D-B method of delivery must be based on sound acquisition planning, as indicated in Appendix A of this ER. All new D-B contracts must have authorization (see (b) above).

(2) Disciplined planning has been accomplished for the complete design and construction of large, complex civil works projects that occur over many years, as these are typically accomplished using a number of construction contracts that are incrementally funded. The use of D-B is unlikely to be appropriate for the overall project, if it is incrementally funded. Incremental funding often prevents the government from achieving a shorter overall project life cycle which is a major benefit of the design-build method. However, as these types of projects are typically done in stages using a number of separate design and construction projects, fully funded portions of the overall project may be candidates for the D-B method of delivery.

g. Design-Build for Non-Appropriated Fund (NAF) Projects. Authorities, policies, and procedures for NAF projects are prescribed by the authorities having jurisdiction for the respective NAF program (e.g., Army NAF contracting is governed under DODI 4105.67 supplemented by AR 215-4 and other criteria and guidance from the Community Family Support Center). Do not use the policies in this ER for any NAF projects.

h. Design-Build for Military Family Housing. Family Housing construction acquired using the design-build method may use either the one-step approach or the two-phase method. Title 10 U.S.C. Subchapter II, Military Family Housing, Sections 2821 through 2836, provide statutory requirements for family housing. AR 210-50 Housing Management provides essential policies for Army Family Housing management and authorities.

9. Design-Build Contracting Methods.

a. Either a new, single award, C-Type construction contract (FAR 15) or a task order under a new or existing IDC multiple award task order contract (MATOC) or single award task order contract (SATOC) D-Type contract (FAR 16.504) may be used, where appropriate.

b. For new contracts, the solicitation may be advertised and conducted under full and open competition or may be conducted as a competitive Small Business Set-aside for the various small business programs under FAR Part 19. When establishing new IDC MATOCs, a pool or pools of contractors may be established to support appropriate small business awards along with unrestricted contract awards.

c. Two-Phase D-B Source Selection Method. The two-phase D-B source selection method uses FAR 36.3 procedures.

(1) Conduct phase one in accord with FAR 36.303-1 to short-list only those most highly qualified firms to compete for the D-B contract in phase two. The phase one competition is based upon qualifications proposals with no design or price proposal. The solicitation should allow at least 30 calendar days for submission of qualifications proposals. Industry must have adequate time to review the solicitation, decide if their firm is interested, seek out and team with other D-B businesses, and prepare, review, and submit quality proposals.

(2) The Contracting Officer issues the phase two request for proposals only to the most highly qualified short-listed firms, upon conclusion of the first phase. Phase two is conducted using FAR Part 15 procedures as required by FAR 36.303-2. During phase two, offerors submit technical proposals, which may include both preliminary design and remaining qualifications, and submit price proposals.

(3) Per FAR 36.303, the government may use either one solicitation, covering both phases, or two solicitations conducted in sequence. If two solicitations are used, then send the second RFP only to the firms short-listed at end of the first phase.

(4) Many PDTs incorrectly assume that a two-phase source selection will take longer than the one-step process. This is based upon the assumption that the entire phase two RFP package must be finalized by the government prior to issuance of the phase one request for qualifications proposals. There is no technical or regulatory requirement to finalize the phase two statement of work or the Division One specification sections until the phase two solicitation is scheduled to be approved for issuance. The PDT should develop the acquisition schedule in the Project Management Plan so that completion of the phase two, "Ready to Advertise" RFP package,

including necessary reviews, coincides with the conclusion of phase one activities and evaluations.

(5) During phase one, the government must provide industry a general description of the project's scope of work (FAR 36.303-1) that will be finalized for the phase two RFP. This could be a draft statement of work with as much information as known at the time of issuing the phase one request for qualifications. During phase one, the project scope of work should be identified as "Preliminary For Information Only – Final Version to be Provided in Phase Two" (or similar wording), or the scope could be a general description of the scope of the project. The phase one description of the statement of work should be in enough detail for a firm to decide the following:

(a) If the firm is interested in competing for the contract.

(b) Whether the firm believes that it might be considered highly qualified to compete in phase two.

(6) The government should also provide appropriately marked preliminary versions of the other Division One specification sections, so that the firms can get a general impression of the USACE organizations D-B processes for the post-award work under the D-B construction contract. This will aid the firms in preparing their phase one proposal that typically will require firms to describe how they are organized and how they intend to manage the design-build process. The phase one RFP must list the phase two evaluation factors (FAR 36.303-1) but those need not be in the detail that will be later provided in the phase two solicitation.

(7) The phase two RFP should provide firms at least 45-60 calendar days to adequately prepare, review, and submit technical and price proposals.

(8) If the PDT develops and follows this parallel phasing schedule rather than a using a series schedule requiring finalization of the entire phase two RFP package prior to issuance of phase one solicitation, it has been shown that a two- phase source selection can take no more time than that necessary for the one-step process. Using a standardized phase one RFP with the specific project facility type scope as the variable allows the PDT to issue a phase one RFP relatively quickly in the acquisition cycle.

d. One-Step D-B Source Selection Method. The one-step D-B source selection method is conducted using FAR Part 15 procedures, allowing all eligible firms to compete for the award.

(1) Firms submit and the government evaluates the complete technical and price proposals in one-step. Technical proposals include qualifications and may include preliminary designs.

(2) Generally, neither industry nor the government knows before receipt of proposals how many firms will actually submit proposals. Therefore, a firm may invest considerable resources to compete against an unknown number of competitors. Numerous industry forums have made it clear that the D-B firms do not favor one-step source selections that require the offerors to expend considerable resources to prepare a preliminary design, due to the risk of an unknown

number of the firms in the competition. Design firms, in particular, have generally stated that they do not like the one-step method because they don't have the financial resources to compete at unknown levels of risk for D-B contracts. The one-step method has been shown to discourage some highly qualified design and construction firms from competing for USACE D-B contracts.

(3) Even though the one-step process is allowed for design-build of military construction, the two-phase process is USACE's preferred approach if industry would incur considerable expense to develop and submit their technical proposal. Experience shows that the two-phase process attracts more firms and often new firms, when considerable expense would be required to prepare design proposals. Note that the two-phase approach does not necessarily mandate an extensive technical proposal.

e. Multiple Award Task Order Contracts (MATOCs) for D-B. USACE organizations shall use the two-phase D-B procedures in FAR 36.3 to establish MATOC base contract award pools for D-B MATOCs. New MATOC competitions for D-B work generally attract a high number of interested firms. There would be great expenses involved with an uncapped number of firms preparing and submitting technical proposals. Similarly, the time and expense for the government to evaluate an uncapped number of technical proposals would be great. It is common for the short-listed firms to compete for award of base MATOCs using a seed task order, which will be awarded to one of the firms upon award of the MATOCs.

(1) The one-step process described above, although a legally authorized process to establish the base MATOC pool(s) for military construction, is not authorized by the policy in this Engineering Regulation for the reasons explained above.

(2) Price must be a consideration in every source selection (FAR 15.304 (c) (1)). Because phase one does not include price as an evaluation factor, it cannot be used to pre-select phase two base contract awardees. Phase two includes price as a competition factor for award of MATOC base contracts. Therefore, the numbers of firms short-listed in phase one of a D-B acquisition must generally be more than the number of intended IDC base contract awardees in phase two.

(3) MATOCs may be particularly useful for a series of projects that are repetitive or similar in scope, such as Army standard facility types, using highly qualified contractors that have been selected as pool members based upon successful, specialized experience on similar projects.

(4) Follow-on task order competitions under existing MATOCs are not source selections conducted pursuant to FAR Part 15. Task order competitions are conducted in accordance with FAR 16.5 and are not subject to all the same requirements as FAR Part 15, Source Selection.

(5) Design-only or design with an option to construct task orders are not an authorized design-build process under the two authorizing D-B statutes and are not authorized exceptions to the D-B-B project delivery method using the Brooks Act procedures for procuring A-E services.

f. Single Award Task Order Contract (SATOC) for D-B. Competition for a SATOC base contract shall also use the two-phase design-build procedures, similar to that described above. Congress has limited the usage of this method of task order contracting and its use is generally

not encouraged, unless justified and approved as the most appropriate method for some specialized types of D-B programs.

10. Responsibilities and General Procedures.

a. Approvals. The responsible USACE Command may approve the use of the D-B delivery method as appropriate for a project, in accord with acquisition planning policies and procedures current at time of the acquisition plan decision.

b. Establishing Formal D-B Procedures. USACE Commands awarding and executing D-B contracts shall develop and implement formal procedures for controlling the execution of D-B contracts. Those procedures must be consistent with the principles and procedures presented in this ER and other applicable policies.

c. Selecting Appropriate Delivery Method and Contracting Methods. The USACE, when designated as the DoD construction agent for a military project, is responsible for the selection of the appropriate delivery and contracting methods to acquire facilities. USACE commanders are encouraged to take a "corporate approach" in the earliest stages of project planning by partnering with their customers and jointly develop acquisition strategies and plans that clearly address whether the D-B delivery method or another method is the most appropriate for a specific project or program. If the D-B method is selected, the PDT must develop an effective project management plan to implement the D-B delivery process for the project. A customer may request or concur in the use of the D-B method of delivery, but that customer involvement does not relieve the USACE contracting agency from the responsibility of proper acquisition planning in accord with all applicable policies and procedures.

d. Defining Requirements Under D-B Method of Delivery. Defining project requirements for the D-B delivery method is significantly different from requirements definition under the D-B-B method of delivery. Use of the D-B delivery method and contracts requires that the customer be able to define effectively the project's *functional* requirements. The USACE command, with the customers' input, involvement, and concurrence, defines the design *technical* requirements needed to ensure achievement of the project's defined *functional* requirements. Preparation of the technical portion of the RFP for a D-B acquisition is considered design services, which must be performed either by in-house designers or prepared by an A-E firm procured under the Brooks Act procedures.

e. D-B Contract Formats. Prepare D-B solicitations and contracts in accord with the USACE construction contract formats for D-B construction contracts and task orders in lieu of using the Uniform Contract Format.

f. D-B Technical RFP Requirements. Unified Facilities Criteria (UFC) 1-300-07A, "Design-Build Technical Requirements," provides guidance for preparing the technical aspects of a D-B contract Request For Proposal (RFP).

g. Stipends. Appendix B of this ER discusses policies and procedures for the use of stipends in D-B acquisition. The PDT for a project using the D-B method of delivery shall consider whether to use a stipend, in accord with the procedures in Appendix B.

11. Information Sources for Guidance on Use of the D-B Method of Delivery.

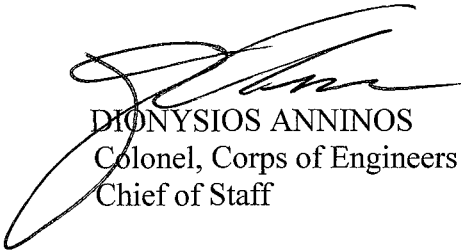
a. Additional guidance on the use of D-B contracting is contained in UFC 1-300-07A. USACE organizations using the D-B method of delivery will submit specific questions related to D-B contracting through their MSC headquarters to the following HQUSACE offices:

- (1) CECC-C for legal issues.
- (2) CECT-P for contracting issues.
- (3) CEMP-CR for real estate issues.
- (4) CECW-CE for technical issues.

b. Most of the detailed aspects and best practices of the life-cycle processes for the design-build method of delivery, including acquisition planning, developing the RFP, contracting and source selection process, and execution of the awarded design-build contract, are beyond the scope of this ER. Individuals who will be members of project delivery teams for design-build projects during part or all of the project life cycle should complete the USACE Proponent Sponsored Engineer Corps Training (PROSPECT), Course #425, Design-Build Construction.

FOR THE COMMANDER:

Appendixes:
Appendix A – Acquisition Strategy Factors
Appendix B – Policy for Use of Stipends


DIONYSIOS ANNINOS
Colonel, Corps of Engineers
Chief of Staff

APPENDIX A

Acquisition Planning Factors

This appendix provides the key factors to assess salient technical, business, management, and other significant considerations that will guide the acquisition delivery method selection. The development of a sound acquisition strategy facilitates the process for selection of the appropriate delivery method for a construction project. This process does not replace any requirements for a formal acquisition plan. Acquisition planning should be performed in accord with FAR Part 7. The customer should be involved as a member of the PDT in the selection of the appropriate project delivery method. The specific content of a project's acquisition plan will vary, depending on a variety of considerations, including the projects complexity and criticality, availability of in-house design capacity, availability of Architect-Engineer contractors, timelines, customer preferences, and other factors. The issues below are the foundation for selecting design-build (D-B) as the appropriate project delivery method.

A-1. Describe the basic characteristics of the project in terms of the building type and size, features of operational requirements, estimated and programmed construction costs, and occupancy or completion date requirements.

A-2. Evaluate feasible acquisition alternative(s) for the project, any related in-house planning, engineering or design efforts, and the effects of the processes relative to the design agency's current workload. Is the design agency experienced in "Design-Build" procurement and administration with on-board personnel that have the administrative and technical capability to successfully execute a "Design-Build" project? Can the project's functional requirements be adequately defined in advance by the customers? Can the needed technical features and quality be assured via the D-B delivery method? Will execution of the project by D-B method of delivery hinder or preclude the design agency from maintaining required design competencies and technical expertise?

A-3. For the D-B method of delivery, assess and document the customers' capabilities and willingness to participate throughout the entire D-B process. Does the customer agree to participate in a D-B delivery process with an understanding of the commitments in terms of time, knowledge, and personnel required to assist in development of fully defined solicitation documentation?

A-4. Perform a market survey of private industry interest and capability in participating in a D-B project. This can be accomplished with an announcement in FedBizOps or a series of telephonic inquiries. Describe the project size, known risks, project requirements, and acquisition processes under consideration, e.g., design-build, in the announcement or inquiry. Are there sufficient potential contractors in the region with experience and willingness to compete for a D-B contract?

A-5. Evaluate the functional and technical requirements of the project by answering key questions, such as:

a. Can the project be fully or sufficiently defined, both functionally and technically, with performance specifications?

b. Are there significant special conditions that would apply to the project, such as requirements for security of the building(s) and site(s) on Army installation(s)? What is the construction industry's ability or inability to provide the required security design and construction; or requirements to follow standard designs, definitive designs, or recently completed designs of similar facilities? What is the government's ability or inability to manage the acquisition and execution processes to ensure the required quality is achieved during design and construction of the design?

c. Do time requirements, constraints or objectives not allow for the time to develop a complete design prior to solicitation of a construction contract?

d. Is fast-track design and construction allowed or desirable? If so, how would fast-tracking affect cost and schedule and what are the risks?

e. Are there special technical aspects of the project that would preclude use of the D-B method of delivery? Examples include environmental issues that include undefined conditions; issues that regulatory agencies will not resolve or issue permit(s) for without a full design being submitted; significant unknown environmental conditions associated with the project site; unfulfilled requirements for an environmental assessment or environmental impact statement; proposed but unapproved resolution of environmental issues; or other environment requirements.

f. Are market conditions highly unstable or are fluctuating prices expected to affect pricing for available materials, labor or subcontracts such that a locked-in government furnished design may not be affordable with the government's budget or programmed amount?

g. Is there more than one design solution available for one or several of the major project features? Are these alternative design solutions readily feasible and acceptable to all parties or is there primarily only one acceptable design solution for most major project features?

A-6. For Civil Works (CW) projects, selection of the D-B method of delivery is appropriate only for contracts where full funding for the complete project is available at contract award.

a. Some examples of CW facilities where D-B may be appropriate are visitor centers, recreational facilities, bridges, pumping stations, roads and parking areas, and similar buildings.

b. When a project's funding is shared, coordination to ensure joint commitment of all funds prior to advertising the D-B RFP of the Civil Works project is extremely important. Full funding is necessary for the estimated D-B contract amount in advance of advertising the RFP for the D-B contract.

APPENDIX B

Policy For Use of Stipends on Military Projects

B-1. Purpose. This appendix provides guidance for the appropriate use of stipends on Military Construction projects procured using two-phase design-build (D-B) selection procedures.

B-2. Reference. Headquarters, U.S. Army Corps of Engineers (HQUSACE) Chief Counsel's memorandum, subject as above, dated 30 September, 2004 (see page B-6).

B-3. Background.

a. At times in the private sector, an owner may pay a monetary "stipend" to encourage participation of highly qualified D-B offerors. Although stipends may offset some costs for proposal preparation, they are not intended to pay for the total cost by the D-B firm to compete.

b. Payment of stipends in D-B acquisitions within USACE has been very limited and no DoD-wide guidance has been issued on the use of stipends in D-B contracting. Stipend payment generally is in response to a customer request regarding improving the number of quality proposal submissions. Per reference, the Chief Counsel has determined it is legal to use stipends to promote or maintain a reasonable level of competition to ensure price competition and program success. Stipend payments will not be made on a routine basis. Stipends are only to be used when they have been determined to be a good business investment and significantly enhance the quality of competitive proposals. There are no separate budgeted sources for stipend payments, so use of stipends will be viewed in the context of each particular program's overall yearly budget.

c. The two-phase D-B selection procedures in FAR 36.3 were developed, in part, to mitigate overall costs to the industry to compete on D-B solicitations by reducing the number of offerors having to prepare detailed technical proposals. These phase-two proposals require substantial design effort, and the majority of phase-two offerors will expend significant proposal preparation costs and not receive a contract award. Accumulation of these "sunk" costs over time discourages many highly qualified firms (particularly the smaller ones) from competing on D-B acquisitions.

d. As the use of D-B has increased in USACE, the industry and some customers have expressed a desire to use stipends as a means of encouraging better and more innovative solutions. Generally, stipends are more appropriate for use on larger, more complex or unique facilities, with special features that entail significant up-front proposal preparation costs. Payment of stipends can encourage participation on D-B projects where creative design solutions are sought.

B-4. The decision to pay a stipend to unsuccessful phase-two offerors is made early in the project's acquisition cycle and documented in the project management plan. The optimum time to include stipend discussion and justification is during the planning charette process where project acquisition strategy is first deliberated. The stipend decision needs to be included in the

formal acquisition plan when such a plan is required by EFARS Part 7 (or its successor policy). Formal acquisition plans are generally not required for single, fixed price discrete construction project and a design-build project is considered a construction project. The exception to this is a determination by the designated Regional PARC that the acquisition is 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.

B-5. Prior written approval from the project's Planning and Design (P&D) funds manager is required to pay a stipend. The following list includes some of the major funds managers for various P&D accounts. For others not listed, a case-by-case approach must be used to assure that the appropriate account manager endorsement is secured prior to payment of the stipend.

a. Account Authority.

Military Construction, Army -- HQUSACE, Programs Integration Division (PID) and Army Family Housing

Military Construction, Air Force -- Air Force Major Command

Military Construction, Army Reserve -- Office of the Chief, Army Reserve

Military Construction, Navy -- Naval Facilities Engineering Command

Military Construction, Defense -- HQUSACE, PID (HQUSACE managed – Energy Conservation Investment Program; TRICARE Management Activity; Chemical Demilitarization)

Military Construction, Defense -- Specific Customer Agency (Customer managed – Defense Logistics Agency; Defense Finance & Accounting Center; DoD Dependents Education Activity; Defense Intelligence Agency; National Security Agency; Washington Headquarters Service)

b. Requests sent to the HQUSACE PID for approval of stipends will be endorsed by the appropriate USACE Regional Business Center to ensure consistent policy. For Army and Defense programs managed by HQUSACE, early annual planning on a regional basis should be accomplished to allow establishment of project priorities for stipends consideration to be included in the P&D Management Plans. For all customer-managed accounts, an information copy of the request and customer approval will be provided to the HQUSACE PID.

B-6. Payment of a stipend is contingent on the following:

- a. The project is funded from a military construction appropriation.
- b. Two-phase D-B selection procedures are used.

- c. A written determination that competition among well qualified offerors is uniquely constrained (see attached legal opinion for sample determinations memo).
- d. Approval of the use of stipends by the customer or the program's funds manager.
- e. The unsuccessful phase two offerors' technical proposal must be technically acceptable and must be rated acceptable in all technical evaluation criteria.
- f. Stipends are to be paid from the appropriate military construction P&D account.
- g. Stipend amounts are to be the same for all qualifying unsuccessful phase two offerors.
- h. Stipends are not to be used to acquire ownership or rights to use unsuccessful proposals.

B-7. Stipends will not to be used as justification to require overly elaborate proposals from D-B offerors. Tailor the phase two proposal submission requirements to the specific project. To determine the best value for contract award, base the required level of technical design information on the minimum required to establish a clear understanding of the offeror's proposed approach to meet the solicitation requirements.

B-8. Stipends may be paid by making multiple awards under the D-B solicitation or by purchase orders when the stipend amount does not exceed the simplified acquisition threshold.

B-9. Paragraph 6 of the enclosed 30 Sep 2004 legal opinion includes sample contract language to use in solicitations where payment of a stipend will be made. Adapt as appropriate to the specific project situation.

B-10. More guidelines are provided in paragraph 5 of the enclosure.



DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

2-0 SEP 2004

CECC-C

MEMORANDUM FOR ALL MAJOR SUBORDINATE COMMAND, DISTRICT
COMMAND, FIELD OPERATING ACTIVITY & LABORATORY COUNSELS

SUBJECT: Use of Stipends in Military Construction-Funded Two-Phase Design Build
Projects.

1. References:

- a. CEHNC-DE Memorandum dated 28 March 2001, subject: National Missile Defense/X-Band Radar-Stipend Payment (Enclosure 1).
- b. CEMP-M/CERM-P Memorandum dated 26 March 2003, subject: Clarification of USACE Policy on Planning and Design, Construction Supervision and Administration (S&A) and Post-Award Engineering and Design Services (DDC).
- c. General Counsel, U.S. General Accounting Office, Principles of Federal Appropriations Law (3rd ed. 2004).
- d. Department of Defense Financial Management Regulations, Vol. 3.
- e. The Purpose Statute, 31 U.S.C. 1301.

2. Background and Purpose: In recent months, I have received a number of inquiries regarding the U.S. Army Corps of Engineers' (USACE) authority to provide payment to unsuccessful offerors in design-build construction procurements. This payment is referred to as a stipend. Industry groups representing the designer, constructor, and design-builder communities favor stipends. Stipends are also supported by certain Air Force major commands. Within USACE, stipends have been paid on a very limited basis, despite the lack of an official agency policy. This legal opinion provides some recommendations regarding implementation of stipends, but does not alone establish USACE policy.

This memorandum provides general guidance to assist local counsel advising an acquisition team that perceives a stipend is needed for a given procurement. Applicability of this memorandum is limited to procurements using two-phase design-build procedures funded by military construction (MilCon) dollars.

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3. Authority:

a. *The necessary expense rule:* The authority to pay a stipend to an unsuccessful offeror is a matter governed by the "necessary expense" rule. See General Counsel, U.S. General Accounting Office, Principles of Federal Appropriations Law 4-21 (3rd ed. 2004) [hereinafter GAO Red Book]. Under the U.S. Constitution, money can only be paid from the Treasury where Congress has made an appropriation. U.S. Const. art.1, sec. 9, cl. 7. The Purpose Statute (31 U.S.C. 1301) requires that funds only be used for the purpose for which they were appropriated. That Purpose Statute does not, however, require that every expenditure be spelled out in an appropriation act. GAO Red Book, 4-20. Rather, an agency has reasonable discretion in determining how to fulfill the objective of an appropriation. *Id.* This is the essence of the "necessary expense" rule.

For purposes of this discussion, the most important element of the tripartite necessary expense rule is that "the expenditure must bear a logical relationship to the appropriation sought to be charged it must make a direct contribution" to accomplishing an authorized agency function. *Id.* The question of an expenditure's link to the appropriation is largely case-specific and agencies are granted broad but reviewable discretion in this regard. *Id.* at 4-23.

Stipends are popular among industry members because they offset the high cost of submitting a complex proposal to a design-build solicitation. Reducing offerors' financial burdens is not, however, a satisfactory justification for an agency to make a stipend payment to unsuccessful offerors.¹

Within USACE, the only legal justification for payment of stipends is to promote or maintain a reasonable level of competition to ensure price competition and program success. This is not to say that stipends are justifiable for all procurements. In fact, stipends are to be used only in rare circumstances where competition is uniquely constrained. A Contracting Officer's decision to use a stipend shall be supported by an approved justification memorandum that clearly articulates the agency's concerns regarding limitations on competition.

In order to provide an equal opportunity for all prospective offerors to be eligible for a stipend, I suggest making the determination whether to use stipends as early in the acquisition process as possible. I recommend the Contracting Officer note his/her decision to use stipends in the acquisition plan, whether formal or informal, with the justification memorandum provided as an attachment. In those instances where a formal acquisition plan is required, the plan and attached justification memorandum should be submitted for approval to the Principal Assistant Responsible for Contracting.

¹ HQUSACE is separately exploring means of reducing the costs for offerors to submit design-build proposals by seeking legislation to employ a full qualifications-based selection process in design-build procurements.

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in accordance with EFARS 7.102 (S-102). Pursuant to EFARS 7.103(h)(S-100)(d), the approval authority for a stipend justification memorandum submitted as an attachment to an informal acquisition plan should be established in local procedures. Where the determination of need for a stipend is made after the acquisition plan is approved, proper procedures shall be followed to seek approval at the appropriate level for a revised acquisition plan with the justification memorandum attached. EFARS 7.103(h)(S-100)(e). The approving authority also should secure the written consent of the project's appropriations manager before using a stipend.

b. The written necessary expense determination: Attached at Enclosure 1 is a model memorandum discussing the justifications for payment of a stipend to unsuccessful offerors. The factual circumstances in the Huntsville Center (HNC) memorandum are exceptional. HNC sought to pay a stipend to unsuccessful firms submitting proposals for a high visibility X-Band radar test bed construction project as an authorized expense of appropriated funds for the highly sensitive National Missile Defense program. In requesting approval to revise the acquisition plan to include a stipend, the memorandum describes the current level of competition as fragile, due to difficulty among the firms in finding specialized subcontractors and a lack of stability regarding the project's political future. HNC held meetings with interested offerors and learned firms were "concerned over costs already invested and the growing risks associated with their continued participation" in the program. By committing to pay a stipend to unsuccessful offerors, HNC hoped to "minimize economic risks sufficiently enough to induce the firms to remain in the competition." Thus, the argument supporting the necessity of the stipend was rooted entirely in the promotion of competition.²

4. **Color of Money:** The question of the type of funds to be used to pay the stipend should be part of the necessary expense analysis. The appropriate fund source for MilCon projects is planning and design (P&D) funds³ because the promotion of competition is a pre-award cost. P&D funds must be used for all pre-award activities up to and including the award of the construction contract. See Reference b.

5. Recommended Guidelines for Using Stipends:

a. Establishing the stipend value: The stipend amount is a matter within the acquisition team's discretion, but realistically will be driven by the amount of funds the customer chooses to make available. I recommend agency estimators approximate the cost to produce a design proposal that meets the minimum solicitation requirements and

² Ultimately, the solicitation for the X-Band Radar project was cancelled and the need for a stipend evaporated. HNC's justification memorandum remains a model, however, in terms of its factual discussion and legal analysis.

³ Planning and design functions are efforts necessary to develop preliminary project cost estimates and may include functions such as A-E services and construction design. DOD Financial Mgmt Reg., Vol. 3, Ch. 17, 17-2.

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then use a percentage of the estimate to establish the stipend amount. The acquisition team should be conscious of the tendency to ask for more than is necessary in the proposal submissions, with the implication that the stipend amount will help defray offerors' costs.

Again I emphasize that a stipend is a means of growing and maintaining competition, not buying design or paying an offeror's proposal preparation costs. Therefore, acquisition team members should take caution to strike a balance in identifying an amount that will be sufficient to encourage offerors to submit responsive, competitive proposals, but not so much as to be seen as covering the offerors' proposal preparation costs.

I also further recommend that in the interest of fairness, all offerors receive the same stipend amount, rather than a scaled amount reflecting the proposal's evaluation. To do otherwise might expose the agency to a demand for some kind of due process to challenge the proposal evaluation by an offeror that otherwise would not have standing to file a bid protest. Moreover, a graduated scale of payments does not logically follow from the purpose of the stipend, which is to maintain competition not improve competitiveness.

b. Proposal must otherwise comply with the solicitation terms: A stipend should not be paid to an offeror whose proposal is not technically acceptable. The Request for Proposals (RFP) should put offerors on notice of this to protect against the firm that submits an incomplete proposal due to an alleged funding shortfall and then claims a stipend. I further recommend the RFP limit eligibility for stipends to Phase Two offerors only.

c. Use of unsuccessful proposals: It is not appropriate in my judgment, to use technical information from the stipend recipient's proposal to modify the contract after award or on future contracts. Design services may be purchased only pursuant to the qualifications based procedures of the Brooks Act.⁴ Taking ownership of unsuccessful proposal design ideas is not proper consideration for the stipend payment, because it would be an acquisition of design services outside the Brooks Act.

d. How to obligate stipend funds: The general rule regarding obligation of funds requires an agency to have a contractual relationship with a recipient of government funds. Thus, where stipends are approved, the RFP should state that the agency intends to make multiple contract awards: one to the successful offeror for the advertised work, and an unspecified number of awards to interested, unsuccessful offerors for a predetermined dollar amount. Purchase orders can be used where the stipend amount does not exceed the simplified acquisition threshold of \$100,000.

⁴ The Brooks Act requires the purchase of design services be conducted using full qualifications-based methods specified at 40 U.S.C. 542.

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6. I recommend the following sample contract language for use in Two Phase Design-Build construction contracts:

(a) This Solicitation provides for payment of a stipend to those unsuccessful Phase Two offerors not selected for award of the resulting contract.

(b) In order to promote increased competition, the Government offers to pay a stipend of \$ _____ to certain Phase Two unsuccessful offerors, in consideration for preparation of a technical proposal, otherwise meeting the minimum requirements described herein.

(c) To be eligible for a stipend, the unsuccessful Phase Two offeror's technical proposal must be rated acceptable in all technical evaluation criteria, essentially meeting this solicitation's Government furnished criteria. Some insignificant, minor deficiencies or weaknesses may be allowed as long as the overall proposal meets the requirements for acceptability.

7. The policy question of whether a stipend should be approved for a particular project is to be determined on a case-by-case basis by the appropriate decision-maker. This memorandum is intended solely to provide a framework for the legal justification required before use of a stipend can be approved, as well as recommendations for policy-maker consideration. This legal opinion does not presume to address the myriad of details that must be considered by policy-makers in establishing a USACE stipend policy.

8. I have coordinated this legal opinion with the Engineering and Construction Community of Practice, Military Programs Program Integration Division, Procurement Law Practice Group and the Authorities & Fiscal Law Practice Group. The points of contact for this matter are Karen Thornton (202-761-8541) and Mark Grammer (202-761-4108). I express my deepest appreciation to Joel Hoffman and the late Laura Meeker for their considerable contributions on the stipend issue.

Enclosure


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