

Case 59-192 - Construction Contracts, Standard Forms, Clauses, and Terms for IFBs - Federal Procurement Regulations. The members were advised that the Bureau of the Budget had approved the proposed revision of Standard Form 23A, and that the Federal Procurement Regulations prescribing the new forms had been approved by the Administrator, GSA. The material is now being processed for printing by GSA. In this respect, the members noted that Section II and Section XVI would probably require changes upon the issuance of the new construction forms.

RECEIVED JAN 19 1961

(18 Jan 61)

Case 59-192 - Construction Contracts, Standard Forms, Clauses, and Terms for IFBs - Federal Procurement Regulations. The Chairman distributed to the members copies of a memorandum, dated 14 Dec 59, entitled "Construction Contracts, General Provisions, Standard Form 23A, Case 58-112; Construction Contracts, Standard Forms 20-23 (Rev), Case 58-159; and Construction Solicitation and Contract Forms, Standard Forms (Rev), Case 58-50," with the information that copies were being distributed to the members only and that the item had been included on the agenda for the 30 Dec 59 meeting under the three 1958 case numbers. The members were advised that the material attached to the memorandum presented final recommendations with respect to the Terms and Clauses for Standard Construction Forms, and the Federal Procurement Regulations, and requested the Committee to develop a DOD position on the attachments. The Committee concluded that inasmuch as the papers were available, a Subcommittee should be established to review the Forms, Clauses, and Terms for Invitations for Bids, as well as the proposed language of the Federal Procurement Regulations. Members designated to the Subcommittee were:

Army - Mr. Malcolm P. McGregor, ENG

Navy - Mr. Wm. H. Speck, OGC (Y&D) (Chairman)

Mr. Walter S. Evans, Y&D

AF - Lt. Col. J. M. Devereaux, AFMPP

Col. James H. Courtney, AFOCE

The Subcommittee was authorized to contact representatives of GSA to facilitate the completion of this assignment. The Subcommittee was requested to provide a report by 1 Feb 60.

The Navy Legal member was designated as the ASPR Committee liaison to the Subcommittee.

(16 Dec 59)

4. Case 59-192 - Construction Contracts, Standard Forms, Clauses, and Terms for IFBs - Federal Procurement Regulations. The Committee considered a report from the Special Subcommittee, dated 29 Jan 60, which presented comments and recommendations on the new forms and circular proposed by the General Services Administration with respect to:

- a. Standard Form 20 - Invitation for Bids.
- b. Standard Form 21 - Bid Form.
- c. Standard Form 22 - Instruction to Bidders.
- d. Standard Form 23 - Construction Contract, and
- e. Standard Form 23A - General Provisions, (Construction Contract).

Prior to undertaking consideration of the report on a detailed basis, the Army member suggested that the forms be considered by the Contract Forms Subcommittee to determine whether the forms could be made parallel with other standard procurement forms. The members expressed agreement with the Army members suggestion, but determined that the time available did not permit such a course of action. In this respect, the Committee suggested that our reply to GSA express concern over the fact that the forms differ from the standard procurement forms and recommend that an effort be made by GSA, now or at a later date, to have the forms adopt the terminology used in the standard procurement forms. As examples of areas in which uniformity can be achieved between the construction and standard procurement forms, the members noted that:

next page

Feb 17 1960

59-192
a. In Standard Form 21 and throughout the construction forms the word "addendum" is used where the word "amendments" is used in the standard procurement forms.

b. In Standard Form 20 there is a wide discrepancy between the proposed coverage with respect to receipt and opening of bids, from the format used in Standard Form 30.

c. Standard Form 22 utilizes the words "time specified for receipt of bids." In the formal advertising section agreement was reached between Defense and GSA to use the phrase "time set for opening of bids."

Other than the above comments, the Committee had no comment or recommendation for change in Standard Form 20 or Standard Form 21.

Standard Form 22 - Instruction to Bidders. The Committee then considered and agreed in the majority recommendations of the Subcommittee providing suggestions to revise Standard Form 22, as set forth below:

In paragraph 1 line 4 delete "him," "his," and "bid" and substitute "bidders," "their," and "bids" to make the phrases read in the plural as follows: "Any explanation ... must be requested in writing and with sufficient time allowed for a reply to reach bidders [him] before the submission of their bids [his bid]." (Words added are underlined, and words deleted are in brackets.) The succeeding sentence expressly states that any interpretations will be issued in the form of an addendum "to all bidders" so that sufficient time must be allowed for the reply (that is, the addendum) to reach "bidders" and not merely the bidder (usually one only) who may submit the question.

In paragraph 2 line 2 delete "on which information is reasonably available and" and "in any way" to make the first sentence read: "Bidders should ascertain the nature and location of the work, and the general and local conditions [on which information is reasonably available and] which can [in any way] affect the work or cost thereof." The requirement that bidders should only ascertain information "reasonably available" is indefinite and suggests by negative implication that they are not responsible for information not "reasonably available." In fact, bidders should expect and plan to complete the work for the contract price subject only to excuses allowed by law (such as, impossibility) or by the contract terms (such as the "Changed Conditions" clause). Very often, both the facts as to and effect of conditions such as construction complexities, availability of labor, or weather are plausibly not "reasonably available," but contractors should nevertheless estimate their effect in their prices by contingencies or otherwise and should not expect the Government to be responsible. The words "in any way" are deleted in order to eliminate an unnecessary and undue emphasis. Similar changes are recommended in S.F. 23A clause 13.

FEB 17 1960

Continued
next page

59-192

Also, in paragraph 5, delete the last sentence: "[A modification must be signed (or a telegram submitted) by a person authorized to sign bids.]" In the case of every submittal from a private party, whether bid, acknowledgement of addenda, modification of bid, etc., the submittal will not bind the private party unless authorized, and the contracting officer must be reasonably satisfied in the light of all the circumstances that the submittal is authorized. But to mention this necessity only for modifications seems a **distorting emphasis upon only one type of submittal.** And the Subcommittee members do not know how a contracting officer can establish from the documents that "a telegram [has been] submitted by a person authorized to sign bids."

In paragraph 6 "Submission of Bids" the second sentence should read: "Failure to submit as directed may result in [There may be] a premature opening of, or a failure to open, such bid [a bid not properly addressed and identified]." This change is suggested because as written the sentence does not expressly state what is apparently intended.

In paragraph 10 "Award of Contract" omit the words "with reasonable promptness" to make read: "Any contract award will be made [with reasonable promptness] to that responsible bidder whose conforming bid is most advantageous to the Government, price and other factors considered." The bid form specifies a time for acceptance with a space in which the bidder may specify a different time, and the Government should have the right to accept within the time so specified. In many instances acceptance may be delayed (e.g. to obtain more funds) to the maximum limit so that the bidder might consider and a judge might find that award was not made with "reasonable promptness."

Standard Form 23 - Construction Contract. The Committee suggested that under the Alterations paragraph the word "changes" be revised to read "alterations," on the basis that the word "changes" might possibly be misconstrued under the Changes clause.

Standard Form 23A - General Provisions (Construction Contracts). The Committee agreed with the majority recommendations of the Subcommittee, providing suggestions to revise Standard Form 23A, as set forth below:

In clause 6 "Disputes" line 10 restore the words "by a court of competent jurisdiction" to make the sentence read: "The decision of the head of the Federal agency or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence." These words are included in the Disputes clauses of the current S.F. 23A and the current S.F. 32 (Oct. 1957 edition). They accord with the intent of Public Law 356, 83rd Congress, 41 U.S.C. 321-2, in which the concern was to insure judicial review of disputes decisions. The deletion was apparently made on suggestion

FEB 17 1960

Continued
next page

59-192 of the Comptroller General; but that officer does not review decisions of the ASBCA or contracting officers, and his powers of audit and criticism do not oblige him to set aside decisions under the "Disputes" clause and are not jeopardized by the words "by a court of competent jurisdiction." To change the clause in this respect now after five years of operation suggests a change in scope of review by nonjudicial agencies which apparently is not necessary or intended.

In addition, the ASPR Committee noted that agreement had been reached with representatives of GSA in the development of language for inclusion in Standard Form 32, utilizing the word "Secretary" in lieu of the words "head of the Federal agency." The Committee recommended that 23A be revised to conform to the language used in Standard Form 32.

In clause 7 "Payments to Contractors," line 11 of subparagraph (a), delete the words "as originally executed" to make read: "Material delivered to the Contractor at locations other than the site may also be taken into consideration (1) if specifically authorized by the contract [as originally executed], and (2) if the Contractor furnishes satisfactory evidence that he has acquired title thereto and that the material will be utilized on the work covered by this contract." The effect of the words "as originally executed" appears to be to eliminate change orders; but a need for progress payments on material delivered to points away from the site often develops during the course of the work, and a change order authorizing such payment with a credit to the Government for the interest saving seems as appropriate as a provision in the original contract for such payment.

In clause 12 "Permits and Responsibilities" line 8 delete "completion of all work including correction of defects and omissions" and substitute "completion and final acceptance." This change restores the current language. The term "completion of all the work" is indefinite; and even after completion, tests may have been specified before acceptance. On the other hand, acceptance is a definite event indicated by a letter to the contractor, and the contractor's responsibilities should cease at that time.

In clause 13 "Conditions Affecting the Work" delete "on which information is reasonably available and" and "in any way" to make the first sentence read: "The Contractor shall be responsible for having ascertained the nature and location of the work, and the general and local conditions [on which information is reasonably available and] which can [in any way] affect the work or the cost thereof." The reasons for this recommendation are those discussed under paragraph 2 of S.F. 22 Instructions to Bidders.

The Subcommittee also recommends that the authority to delete "unforeseeable" and to add "other than normal weather" in clause 5(d)(1) during periods of national emergency be retained as is now the case. This authority should be indicated in the promulgating directive, as was done in General Regulation No. 13. Otherwise, the Subcommittee has no comments or recommendations on the promulgating circular.

The Committee recommended that the foregoing comments be forwarded to GSA for consideration, and that the letter transmitting the comments contain a request that in the event the Defense recommendations are not adopted, an opportunity for further discussions on these points be afforded Defense representatives. CASE CLOSED.

(17 Feb 60)

Page 8. (17 Feb 60). Item 4. Case 59-192 - Construction Contracts, Standard Forms, Clauses, and Terms for IFBs - Federal Procurement Regulations. In approving subparagraph a. covering Standard Form 21 the Committee noted that the word "addendum" is used throughout the Subcommittee recommendations quoted in the minutes under Standard Forms 22 and 23A. The Committee recommended that the same recommendation made with respect to the word "addendum" under Standard Form 21 be made equally applicable to Standard Forms 22 and 23A.

In approving the minutes under Standard Form 23A with respect to clause 12, the Committee further suggested that the question of deleting the word "final" be raised with GSA in order to correspond with the action previously taken on inspection for supply contracts.

(2 Mar 60)

- a. The minutes of the 2 Mar 60 meeting were approved with the following modifications:

Page 2. The correction to the 17 Feb 60 minutes on case 59-192 was further corrected to revise the last sentence to read:

"In approving the minutes under Standard Form 23A with respect to clause 12, the Committee further suggested that the question of deleting the word 'final' be raised with GSA in order to correspond with the action previously taken on the inspection clause for supply contracts."

(16 Mar 60)

Case 59-192 - Construction Contracts, Standard Forms, Clauses, and Terms for IFBs - Federal Procurement Regulations. Information copies of a letter to the Assistant Commissioner for Procurement Policy, General Services Administration, from the ASPR Committee Chairman, dated 25 Mar 60, presenting the Committee's comments on the proposed Standard Construction Forms (SF 20, 21, 22, 23, and 23A), were distributed to the members.

(1 Apr 60)

Case 59-192 - Construction Contracts, Standard Forms, Clauses, and Terms for IFBs - Federal Procurement Regulations. The Chairman advised the members that GSA had requested an opportunity to meet with representatives of the Committee to discuss certain of the Defense comments for revision of the construction contract forms which have not been accommodated to date by GSA. Lt. Col. Donald T. Ruby, JAGC, and Mr. Herbert L. Brewer, ONM, were requested to represent the Committee on this matter, and to arrange for the meeting with representatives of GSA.

(1 Jun 60)

Case 59-192 - Construction Contracts, Standard Forms, Clauses, and Terms for IFBs - Federal Procurement Regulations. The Committee's representatives advised of the discussions with GSA representatives on the subject forms and apprised the members of certain areas still requiring resolution. These areas involve:

- a. Bid Bonds. GSA is awaiting a response from the GAO on this problem. GSA intends to correspond with the Chairman of the ASPR Committee, setting forth a draft of their policy in this area.
- b. The proposed change in the Termination for Default - Damages for Delay - Time Extensions clause.
- c. The proposed change in the Definitions clause, and
- d. The desirability of including the Utilization of Small Business Concerns clause in Standard Form 23A.

The Committee provided their representatives with direction for further discussions with GSA representatives on the foregoing.

(6 Jul 60)

Case 59-192 - Construction Contracts, Standard Forms, Clauses, and Terms for IFBs - Federal Procurement Regulations. Copies of the definition with respect to "head of the agency" or "Secretary" agreed to by the Committee's representatives and representatives of GSA for inclusion in Standard Form 23A were distributed to the members for information. The definition reads:

"(a) The term 'head of the agency' or 'Secretary' means the Secretary, the Under Secretary, or any Assistant Secretary of the Department, or the head or any assistant head of the agency; and the term 'his duly authorized representative' means any person or persons or board (other than the Contracting Officer) authorized to act for the head of the agency or the Secretary as the case may be."

(29 Jul 60)

6. Case 60-66 - Inspection and Acceptance - Construction Contracts.
Case 59-192 - Construction Contracts, Standard Forms, Clauses, and Terms for IFBs - Federal Procurement Regulations.

Lt. Col. Donald T. Ruby, JAGC, reported that the principal differences between the proposed DOD Inspection clause and the GSA revised Inspection clause to be included in the Standard Form 23A were:

- (i) DOD required contractor to have an "inspection system" and to make records available to Government of inspections performed under its system, whereas the GSA had none;
- (ii) the GSA version retain such language as "final acceptance" which DOD had eliminated in its inspection clause because of inability to clearly define that expression; and
- (iii) GSA Form 23A has for years provided for cost plus 15% reimbursement to the contractor for minor Government required alterations made for inspection purposes and the DOD had not so provided.

Other differences between the GSA proposed revision of Standard Form 23A and the DOD proposed Inspection clause for Section VII of ASPR, were of an editorial nature.

The Assistant Commissioner for Procurement Policy, GSA, distributed copies of a draft of the proposed Inspection clause, dated 18 Nov 60, and stated that in addition to the above differences the sequence within the clause had been somewhat changed. There was a lengthy discussion of final inspection and acceptance, the DOD position being that acceptance cannot be made at the place of manufacture since there is only one acceptance and that is final. It was agreed there could be an inspection at the place of manufacture which would be determinative of the materials involved in conformity with contract requirements, except insofar as the contracting officer indicates such inspection does not apply. The GSA representatives agreed with the general concept of the DOD position, and the following language was developed at the meeting and proposed as a possible alternative to paragraph (d) of the GSA 18 Nov 60 draft:

"(d) Government inspection of materials and workmanship required by this contract shall be at the site of the work unless the Contracting Officer determines that Government inspection of materials which are to be incorporated in the work shall be made at the place of production, manufacture or shipment any such inspection shall, to the extent specified by the Government, be determinative of the materials involved being in conformity with the contract requirements. Further Government inspection and test of any material does not relieve the Contractor from any responsibility regarding latent defects, fraud or such gross mistakes as may amount to fraud or to restrict the Government's right under any warranty or guarantee."

Continued
next page

NOV 18 1960

The suggestion was made that the term "Government" be used in lieu of "Contracting Officer" in the clause so as to conform to the Inspection clause previously adopted for Standard Form 32.

With respect to paragraph (e) of the DOD draft, dated 23 Sep 60, the GSA representatives stated that while they did not wish to adopt it for the Standard Form at this time, they would interpose no objection to DOD including the paragraph as a schedule provision or in "Additional General Provisions." GSA is interested in getting the benefit of DOD experience with this requirement, and would be willing to consider its adoption at some later date when the form is again being revised. Paragraph (e) was revised to read as follows:

"(e) The Contractor shall (i) maintain an adequate inspection system and perform such inspections as will assure that the work performed under the contract conforms to contract requirements, and (ii) maintain and make available to the Government adequate records of such inspections."

The above replaces paragraph (e) of Tab B of the 23 Sep 60 Editing Subcommittee report. It was noted that in the introductory language to the clause in proposed 7-601 the figure "\$2,000" should read "\$10,000."

With respect to the 15 percent rate in paragraph (c) of the DOD 23 Sep 60 draft and paragraph (f) of the 18 Nov 60 GSA draft, the Committee agreed to its inclusion, with the understanding that the clause would be coordinated with GAO prior to issuance.

(18 Nov 60)

Case 60-66 - Inspection and Acceptance - Construction Contracts.

Case 59-192 - Construction Contracts, Standard Forms, Clauses, and Terms for IFBs - Federal Procurement Regulations.

Copies of a memorandum from the Committee's representative designated to discuss the subject problems with GSA, dated 22 Nov 60, presenting a draft of the Inspection clause to be used in Standard Form 23A which had been agreed to by the Committee's representatives and the representatives of GSA, were distributed for information. The members noted that this action CLOSES BOTH THE SUBJECT CASES.

(23 Nov 60)

Page 6. (18 Nov 60). Item 6. Case 60-66 - Inspection and Acceptance - Construction Contracts.

Case 59-192 - Construction Contracts, Standard Forms, Clauses, and Terms for IFBs - Federal Procurement Regulations.

In the first paragraph, (iii) was revised to read:

"GSA Form 23A has for years provided for cost plus 15% reimbursement to the contractor for minor Government required alterations made for inspection purposes."

(30 Nov 60)

Case 59-192 - Construction Contracts, Standard Forms, Clauses and Terms for IFBs - Federal Procurement Regulations.

The Chairman advised the members that GSA currently was seeking Bureau of the Budget approval of the proposed revision to Standard Form 23A. The members noted that issuance of the revised form would require action by the Committee to make appropriate changes in the ASPR involving:

- (i) "Buy American" coverage in Section VI with respect to construction contracts.
- (ii) Section XIV with respect to inspection, and
- (iii) Inclusion of the Construction Contract clauses in Section VII.

(11 Jan 61)

JAN 29 1960

REPORT FOR THE ASPR COMMITTEE, Case No. 59-192

Subj: Construction Contracts, Standard Forms, Clauses, and Terms
for IFBs -- Federal Procurement Regulations.

The Special Subcommittee studied the new forms and the circular proposed by the General Services Administration and makes the recommendations and comments which follow. These are made in succession upon each form or paragraph of a form, and the discussion explains each recommendation.

S.F. 20, Invitation for Bids. No comment or recommendation.

S.F. 21, Bid Form. No comment or recommendation.

S.F. 22, Instructions to Bidders.

In paragraph 1 line 4 delete "him," "his", and "bid" and substitute "bidders", "their", and "bids" to make the phrase read in the plural as follows: "Any explanation ... must be requested in writing and with sufficient time allowed for a reply to reach bidders /him/ before the submission of their bids /his bid/." (Words added are underlined, and words deleted are in brackets.) The succeeding sentence expressly states that any interpretations will be issued in the form of an addendum "to all bidders" so that sufficient time must be allowed for the reply (that is, the addendum) to reach "bidders" and not merely the bidder (usually one only) who may submit the question.

In paragraph 2 line 2 delete "on which information is reasonably available and" and "in any way" to make the first sentence read: "Bidders should ascertain the nature and location of the work, and the general and local conditions /on which information is reasonably available and / which can /in any way/ affect the work or cost thereof." The requirement that bidders should only ascertain information "reasonably available" is indefinite and suggests by negative implication that they are not responsible for information not "reasonably available." In fact, bidders should expect and plan to complete the work for the contract price subject only to excuses allowed by law (such as, impossibility) or by the contract terms (such as the "Changed Conditions" clause). Very often, both the facts as to and effect of conditions such as construction complexities, availability of labor, or weather are plausibly not "reasonably available", but contractors should nevertheless estimate their effect in their prices by contingencies or otherwise and should not expect the Government to be responsible. The words "in

any way" are deleted in order to eliminate an unnecessary and undue emphasis. Similar changes are recommended in S.F. 23A clause 13.

In paragraph 3 "Bidder's Qualifications" the Air Force AFOCE member recommends the addition of the sentence:

"Where the invitation explicitly requires the bidder to submit evidence of his demonstrated capability to perform work of the magnitude and complexity of the work in the proposed contract within the time allowed, failure to submit such evidence will disqualify the bid."

This sentence is proposed to emphasize and declare the effect of requirements that bidders demonstrate their qualifications for the work. Army and Navy members object to such a sentence in the Standard Form; they doubt that such qualification will be or should be required for most work. However, if the occasion does arise, both the qualifications and the effect of failure to submit can be stated in the IFB.

In paragraph 5 "Preparation of Bids" the Air Force AFOCE member also recommends the addition of a sentence:

"Where the invitation explicitly requires that the bidder submit with his bid for approval by the Contracting Officer his proposed detailed progress schedule for accomplishing the work, failure to do so will disqualify the bid."

This sentence is proposed to emphasize and declare the effect of requirements for bidders to demonstrate that they have developed feasible plans to accomplish the work within the time specified. The Army and Navy members object to such a sentence in the Standard Form; they doubt the feasibility of such a requirement before award of the contract. However, if the occasion arises requiring such a procedure, it could be stated in the Invitation for Bids.

Also, in paragraph 5, delete the last sentence: "A modification must be signed (or a telegram submitted) by a person authorized to sign bids. 7" In the case of every submittal from a private party, whether bid, acknowledgement of addenda, modification of bid, etc., the submittal will not bind the private party unless authorized, and the contracting officer must be reasonably satisfied in the light of all the circumstances that the submittal is authorized. But to mention this necessity only for modifications seems a distorting emphasis upon only one type of submittal. And the subcommittee members do not know how a contracting officer can establish from the documents

that "a telegram /has been/ submitted by a person authorized to sign bids."

In paragraph 6 "Submission of Bids" the second sentence should read: "Failure to submit as directed may result in /There may be/ a premature opening of, or a failure to open, such bid /a bid not properly addressed and identified/." This change is suggested because as written the sentence does not expressly state what is apparently intended.

In paragraph 10 "Award of Contract" omit the words "with reasonable promptness" to make read: "Any contract award will be made /with reasonable promptness/ to that responsible bidder whose conforming bid is most advantageous to the Government, price and other factors considered." The bid form specifies a time for acceptance with a space in which the bidder may specify a different time, and the Government should have the right to accept within the time so specified. In many instances acceptance may be delayed (e.g. to obtain more funds) to the maximum limit so that the bidder might consider and a judge might find that award was not made with "reasonable promptness."

S. F. 23, Construction Contract. No comment or recommendation.

S. F. 23A, General Provisions (Construction Contract).

In clause 5, probably as a new subparagraph 5(b), the Air Force AFCE member recommends the following:

"Where the invitation explicitly requires the submission of a detailed proposed progress schedule for approval of the Contracting Officer, such schedule is an essential part of and is incorporated in the contract. If the contractor refuses or fails to prosecute the separable elements of the work in accordance with the approved progress schedule, the contractor may be required in writing by the Contracting Officer to make such additional work effort, entirely at the expense of the contractor, as may be necessary to bring the completed work on the separable elements of the work into agreement with the approved progress schedule. If the contractor within 30 days after receipt of the written notice fails to bring the completed work back on schedule, the Government may take action under paragraph 5a above."

This subparagraph is proposed to insure that the Government may insist upon orderly and prompt completion of the work as scheduled.

Army and Navy members object to this addition to the Standard Form. However, where scheduling is critical it could be utilized on a case basis.

In clause 6 "Disputes" line 10 restore the words "by a court of competent jurisdiction" to make the sentence read: "The decision of the head of the Federal agency or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence." These words are included in the Disputes clauses of the current S.F. 23A and the current S.F. 32 (Oct. 1957 edition). They accord with the intent of Public Law 356, 83rd Congress, 41 U.S.C. 321-2, in which the concern was to insure judicial review of disputes decisions. The deletion was apparently made on suggestion of the Comptroller General; but that officer does not review decisions of the ASBCA or contracting officers, and his powers of audit and criticism do not oblige him to set aside decisions under the "Disputes" clause and are not jeopardized by the words "by a court of competent jurisdiction." To change the clause in this respect now after five years of operation suggests a change in scope of review by non-judicial agencies which apparently is not necessary or intended.

In clause 7 "Payments to Contractors", line 11 of subparagraph (a), delete the words "as originally executed" to make read: "Material delivered to the Contractor at locations other than the site may also be taken into consideration (1) if specifically authorized by the contract as originally executed, and (2) if the Contractor furnishes satisfactory evidence that he has acquired title thereto and that the material will be utilized on the work covered by this contract." The effect of the words "as originally executed" appears to be to eliminate change orders; but a need for progress payments on material delivered to points away from the site often develops during the course of the work, and a change order authorizing such payment with a credit to the Government for the interest saving seems as appropriate as a provision in the original contract for such payment.

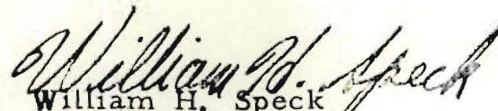
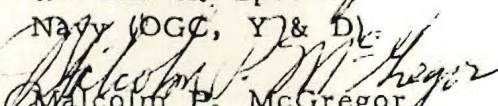
In clause 12 "Permits and Responsibilities" line 8 delete "completion of all the work including correction of defects and omissions" and substitute "completion and final acceptance". This change restores the current language. The term "completion of all the work" is indefinite; and even after completion, tests may have been specified before acceptance. On the other hand, acceptance is a definite event indicated by a letter to the contractor, and the contractor's

responsibilities should cease at that time.

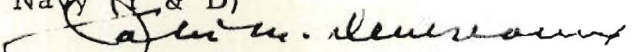
In clause 13 "Conditions Affecting the Work" delete "on which information is reasonably available and" and "in any way" to make the first sentence read: "The Contractor shall be responsible for having ascertained the nature and location of the work, and the general and local conditions [on which information is reasonably available and] which can [in any way] affect the work or the cost thereof." The reasons for this recommendation are those discussed under paragraph 2 of S. F. 22 Instructions to Bidders.

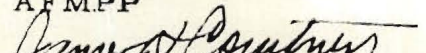
The subcommittee also recommends that the authority to delete "unforeseeable" and to add "other than normal weather" in clause 5(d) (1) during periods of national emergency be retained as is now the case. This authority should be indicated in the promulgating directive, as was done in General Regulation No. 13. Otherwise, the subcommittee has no comments or recommendations on the promulgating circular.

The subcommittee realizes that these forms are being circulated for final review after being circulated among all federal agencies. However, many of the comments are editorial, and some of the items commented upon were only added after the circularization, so that these comments do not seem out of order at this time.


William H. Speck
Navy (OGC, Y) & D)

Malcolm P. McGregor
Army, Corps of Engineers

Walter S. Evans
Navy (Y & D)


Lt. Col. J. M. Devereaux
AFMPP


Col. James H. Courtney
AFOCE

23 February 1961

Department of Defense Comments on Omission from the "Disputes" Clause in Standard Form 23A of Reference to "Court of Competent Jurisdiction"

1. The Disputes clause in the present (March 1953) edition of Standard Form 23A reads in part -

"... the decision of the head of the department or his duly authorized representatives for the hearings of such appeals shall, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith, be final and conclusive . . ." (emphasis added).

The January 1961 edition of Standard Form 23A would omit the words "by a court of competent jurisdiction." This omission has been urged by the General Accounting Office.

2. The words "by a court of competent jurisdiction" should be restored to the SF 23A Disputes clause immediately, notwithstanding that the January 1961 edition has been fully approved. Omitting them can do no good; it may do some harm.

3. The following points constrain us to press for immediate restoration of the words in question.

a. The omission bespeaks bad drafting - it may raise unnecessary questions. The omission leaves a dangling passive - "... unless determined . . .". Determined by whom? The contractor? The head of the contracting agency? The Comptroller General? Auditors of the contracting agency? A Congressman's assistant? There is no sound reason to leave to argument and construction the intention of the contracting parties. We should say what we mean.

b. The omission invites contractor distrust of the Disputes procedure. If the omission is not intended to work any change in the meaning of the Disputes clause, there is no point in making it. If it is made, it will be understood to work some change in the present meaning of the clause. In view of the GAO's having alone urged the omission and in view of the history of the "Wunderlich" Act, the most likely construction given the omission will be that the GAO is to begin

Department of Defense Comments on Omission from the "Disputes" Clause in Standard Form 23A of Reference to "Court of Competent Jurisdiction" (cont)

reviewing determinations of questions of fact which have been final, except on challenge in the courts, under the present clause. The point here is neither to predict whether the GAO will increase the scope of its review nor to debate the present dimensions of the GAO's power to review - it is simply that contractors may understand the omission as foretelling greater GAO activity in reviewing and disapproving determinations under the disputes procedure. They may also understand that a departure from such cases as James Graham Mfg. Co., 91 F. Supp 715 (D. C. N. D. Cal. S. D., 1950) is intended. The result may be to impair contractor confidence in the impartiality of the disputes procedure and in its efficacy in providing timely and definite settlements of contractual disputes.

c. The omission would appear to be inconsistent with the intent of the Wunderlich Act. The highly ambivalent legislative history of the Wunderlich Act (41 U.S.C. 321, 322) may be cited for several mutually inconsistent propositions. But the fairest construction to be put on it is that the Congress did not intend to affect the GAO's jurisdiction one way or the other - the legislation was intended to recognize the jurisdiction which the GAO already had. Since that jurisdiction was virtually nil, insofar as review of determinations under the existing disputes procedure were concerned, and since at the hearings Defense and industry spokesmen had vigorously protested against legislative language giving the GAO powers of review equal to those to be given by the courts, it seems that Congress did not intend to prolong uncertainties by permitting the GAO to intrude into the process of determining contractual disputes.

d. The omission may require exhaustion of additional administrative remedies. The omission of the words "by a court of competent jurisdiction" after they have been used so long and so commonly may be understood as requiring review of RCA decisions by the GAO - and even by the agency head - before a contractor can go to the Court of Claims. The addition of such reviews would impose substantial administrative burdens on Government contracting activities - they would have to make a full report and file full documentation with the GAO. It would impose a concomitant burden on contractors - one way or another, most of the expense would be passed on to the Government. It would be contrary to the thrust of the Wunderlich Act - Congress apparently intended to assure effective judicial review of questionable decisions of the contracting agency; judicial review that can be won only at the end of a tortuous succession of slow bureaucratic proceedings is seldom truly effective judicial review.

e. The omission is not justified by any experience under the present clause. We are not aware of any case where inclusion of the words

Department of Defense Comments on Omission from the "Disputes" clause in Standard Form 23A of Reference to "Court of Competent Jurisdiction" (cont)

"by a court of competent jurisdiction" has worked in any way to the disadvantage of the Government. The words have been included in SF 23A, SF 32, and other standard contract forms for many years. At least in the case of SF 32, they were included after an unusually extensive process of "industry coordination" in the development of the form. Although they were omitted - perhaps erroneously - from SF 19 (which is only used in construction contracts of less than \$10,000), that omission is no precedent for SF 23A; many of the SF 19 provisions are compressed and simplified versions of provisions that are more fully stated in SF 23A; the full intent of the SF 19 Disputes language regarding finality can be gleaned from other standard Disputes clauses so long as the reference to "court of competent jurisdiction" remains in these other clauses. Nor can we regard omission of the words from the new SF 114 as a precedent; so far as we have been able to discover, the Department of Defense at no point agreed to the omission from the new SF 114 Disputes clause. So the situation is pretty much one of proven language about to be dropped for no good reason.

f. The omission may be inconsistent with efficient contract management. The contracting agencies have an obvious stake in a disputes procedure that is as fair and as speedy as feasible. If the omission were to lead to increased non-judicial reviews of disputes determinations by agencies outside the contracting agency concerned, the considerable investment of time, people, and money which we make in the disputes procedure would be significantly diluted. That part of the Government that is in the best position to determine the facts in a dispute - the contracting agency - in effect would be to some extent dislodged from the position of making such determinations. Moreover, it is likely that increased non-judicial review would presage increased litigation.

3. The foregoing outlines the principal reasons for insisting on immediate restoration to the SF 23A Disputes clause of the words "by a court of competent jurisdiction." It has been suggested that the omission really wouldn't make much difference. (If so, why omit?) This suggestion seems too speculative to be reliable. But even if the omission would make no difference in the minds of those in the Government, we should strongly oppose it. We must be concerned with how the other party to our contracts will view the matter. We need the best contractors we can get. We need their confidence in the fairness and efficacy of our contract procedures so that we can have their unstinted willingness to compete for our business. To omit the words in question from the Disputes clause would run counter to these interests of the Government. The words must be retained.

Captain John M. Malloy

To facilitate identification of the changes made in the drafts forwarded with our letter of November 30, we are attaching three (3) additional copies on which the above listed changes have been indicated in ink.

The changes have been discussed with Mr. Herbert L. Brewer who felt the ASPR Committee would have no objection, and, on that assumption, we are proceeding with plans for publication. If there is objection, we would appreciate being advised as soon as possible.

Sincerely yours

Phil W. Jordan
Deputy Assistant Commissioner
for Procurement Policy

ENCLOSURES

Carl
59-192

C
O
P
Y

GENERAL SERVICES ADMINISTRATION

Federal Supply Service
Washington 25, D. C.

30 December 1960

Captain John M. Malloy
SC, USN
Staff Director, ASPR Division
Office of Procurement Policy
Department of Defense
Washington 25, D. C.

Dear Captain Malloy:

Since we wrote to you on November 30, enclosing our latest drafts of revised standard construction contract forms, we have discussed them with representatives of a number of civilian agencies. As a result, it appears desirable to make the changes outlined below:

Standard Form 21.

1. Substitute the word "different" for the word "shorter" in the seventh line from the bottom on the face of the form.
2. Enlarge the spaces provided at the bottom on the face of the form for insertion of the number of calendar days for commencement and completion of the work.

Standard Form 23a.

1. Revise Clause 1(a), line 3, to read "head or assistant head of the executive or military department or Federal agency;"
2. Insert in Clause 4, line 8, the word "Contractor's" before the word "cost" to conform to Clause 3.
3. Revise the last sentence of Clause 10, paragraph (e), to read: "If, however, such work is found to meet the requirements of the contract, an equitable adjustment shall be made in the contract price to compensate the contractor for the additional services involved in such examination and reconstruction and, if completion of the work has been delayed thereby, he shall, in addition, be granted a suitable extension of time."
4. Omit from the last line of Clause 12, the word "finally".
5. Omit Clause 22.

GENERAL SERVICES ADMINISTRATION

59-192



Federal Supply Service
Washington 25, D. C.

DEC 31 1960

Captain John M. Malloy
SC, USN
Staff Director, ASPR Division
Office of Procurement Policy
Department of Defense
Washington 25, D. C.

Dear Captain Malloy:

Since we wrote to you on November 30, enclosing our latest drafts of revised standard construction contract forms, we have discussed them with representatives of a number of civilian agencies. As a result, it appears desirable to make the changes outlined below:

Standard Form 21.

1. Substitute the word "different" for the word "shorter" in the seventh line from the bottom on the face of the form.
2. Enlarge the spaces provided at the bottom on the face of the form for insertion of the number of calendar days for commencement and completion of the work.

Standard Form 23a.

1. Revise Clause 1(a), line 3, to read "head or assistant head of the executive or military department or Federal agency;"
2. Insert in Clause 4, line 8, the word "Contractor's" before the word "cost" to conform to Clause 3.
3. Revise the last sentence of Clause 10, paragraph (e), to read: "If, however, such work is found to meet the requirements of the contract, an equitable adjustment shall be made in the contract price to compensate the contractor for the additional services involved in such examination and reconstruction and, if completion of the work has been delayed thereby, he shall, in addition, be granted a suitable extension of time."
4. Omit from the last line of Clause 12, the word "finally".
5. Omit Clause 22.

Captain John M. Malloy

To facilitate identification of the changes made in the drafts forwarded with our letter of November 30, we are attaching three (3) additional copies on which the above listed changes have been indicated in ink.

The changes have been discussed with Mr. Herbert L. Brewer who felt the ASPR Committee would have no objection, and, on that assumption, we are proceeding with plans for publication. If there is objection, we would appreciate being advised as soon as possible.

Sincerely yours

Phil W. Jordan
Deputy Assistant Commissioner
for Procurement Policy

Enclosures

59-192

*Rice
Bauer
Leiby
Carr
Boyer
GSA*

GENERAL SERVICES ADMINISTRATION



Federal Supply Service
Washington 25, D.C.

NOV 30 1960

Captain John M. Malloy
SC, USN
Staff Director, ASPR Division
Office of Procurement Policy
Department of Defense
Washington 25, D. C.

Dear Captain Malloy:

Enclosed are several sets of our latest drafts of revised standard construction contract forms (Standard Forms 20, 21, 22, 23, and 23A). These drafts incorporate all of the agreements reached with Mr. Herbert L. Brewer and Lt. Col. Donald T. Ruby representing the ASPR Committee.

As you know, we plan to obtain a quick review of these drafts by certain of the civilian agencies and, unless such review indicates changes must be made, to process them for publication in FPR at the earliest possible date.

Sincerely yours

Charles W. Gasque, Jr.
Charles W. Gasque, Jr.
Assistant Commissioner
for Procurement Policy

Enclosures

59-192

Office Memorandum • UNITED STATES GOVERNMENT

TO :

DATE: 6/2

FROM :

Brewer & Don Ruby to

SUBJECT:

discuss this case with
ASA in response to a
Gasque request.

JHD

Case 59-192

Mar 25 1960

CF

Dear Mr. Gasque:

This is in connection with the project formerly under consideration by the Task Force for Review of Government Procurement Policies and Procedures, numbered 26, entitled "Proposed Revision of Construction Contracting Forms." At the time the Task Force ended its activities as such, the status of this project (as of September 4, 1959) was that the proposed forms and a Draft of an FPR circular were submitted to the Task Force members for final consideration.

The ASPR Committee has considered the package previously submitted to the Task Force members, and we have agreed upon the following comments.

1. General.

The Committee expressed concern over the fact that the forms differ from the standard procurement forms and recommend that an effort be made by GSA, now or at a later date, to have the forms adopt the terminology used in the standard procurement forms. As examples of areas in which uniformity can be achieved between the construction and standard procurement forms, the members noted that:

- a. In Standard Form 21 and throughout the construction forms the word "addendum" is used where the word "amendments" is used in the standard procurement forms.
- b. In Standard Form 20 there is a wide discrepancy between the proposed coverage with respect to receipt and opening of bids, from the format used in Standard Form 30.
- c. Standard Form 22 utilizes the words "time specified for receipt of bids." In the formal advertising section agreement was reached between Defense and GSA to use the phrase "time set for opening of bids."

Other than the above comments, the Committee had no comment or recommendation for change in Standard Form 20 or Standard Form 21.

2. Standard Form 22 - Instruction to Bidders.

In paragraph 1 line 4 delete "his," "his," and "bid" and substitute "bidders," "their," and "bids" to make the phrases read in the plural as follows: "Any explanation ... must be requested in writing and with sufficient time allowed for a reply to reach bidders [his] before the submission of their bids [his bid]." (Words added are underlined, and words deleted are in brackets.) The succeeding sentence expressly states that any interpretation will be issued in the form of an addendum "to all bidders" so that sufficient time must be allowed for the reply (that is, the addendum) to reach "bidders" and not merely the bidder (usually one only) who may submit the question.

In paragraph 2 line 2 delete "on which information is reasonably available and" and "in any way" to make the first sentence read: "Bidders should ascertain the nature and location of the work, and the general and local conditions [on which information is reasonably available and] which can [in any way] affect the work or cost thereof." The requirement that bidders should only ascertain information "reasonably available" is indefinite and suggests by negative implication that they are not responsible for information not "reasonably available." In fact, bidders should expect and plan to complete the work for the contract price subject only to excuses allowed by law (such as, impossibility) or by the contract terms (such as the "Changed Conditions" clause). Very often, both the facts as to and effect of conditions such as construction complexities, availability of labor, or weather are plausibly not "reasonably available," but contractors should nevertheless estimate their effect in their prices by contingencies or otherwise and should not expect the Government to be responsible. The words "in any way" are deleted in order to eliminate an unnecessary and undue emphasis. Similar changes are recommended in S.F. 23A clause 13.

Also, in paragraph 5, delete the last sentence: "[A modification must be signed (or a telegram submitted) by a person authorized to sign bids.]" In the case of every submittal from a private party, whether bid, acknowledgement of addenda, modification of bid, etc., the submittal will not bind the private party unless authorized, and the contracting officer must be reasonably satisfied in the light of all the circumstances that the submittal is authorized. But to

mention this necessity only for modifications seems a distorting emphasis upon only one type of submittal. We also feel that a contracting officer cannot establish from the documents that "a telegram [has been] submitted by a person authorized to sign bids."

In paragraph 6 "Submission of Bids" the second sentence should read: "Failure to submit as directed may result in [There may be] a premature opening of, or a failure to open, such bid [a bid not properly addressed and identified]." This change is suggested because as written the sentence does not expressly state what is apparently intended.

In paragraph 10 "Award of Contract" omit the words "with reasonable promptness" to make read: "Any contract award will be made [with reasonable promptness] to that responsible bidder whose conforming bid is most advantageous to the Government, price and other factors considered." The bid form specifies a time for acceptance with a space in which the bidder may specify a different time, and the Government should have the right to accept within the time so specified. In many instances acceptance may be delayed (e.g. to obtain more funds) to the maximum limit so that the bidder might consider and a judge might find the award was not made with "reasonable promptness."

3. Standard Form 23 - Construction Contract. It is suggested that under the Alterations paragraph the word "changes" be revised to read "alterations," on the basis that the word "changes" might possibly be misconstrued under the Changes clause.

4. Standard Form 23A - General Provisions (Construction Contracts).

In clause 6 "Disputes" line 10 restore the words "by a court of competent jurisdiction" to make the sentence read: "The decision of the head of the Federal agency or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence." These words are included in the Disputes clauses of the current S.F. 23A and the current S.F. 32 (Oct. 1957 edition). They accord with the intent of Public Law 356, 83rd Congress, 41 U.S.C. 321-2, in which the concern was to insure judicial review of disputes decisions. The deletion was apparently made on suggestion

of the Comptroller General; but that officer does not review decisions of the ASBCA or contracting officers, and his powers of audit and criticism do not oblige him to set aside decisions under the "Disputes" clause and are not jeopardized by the words "by a court of competent jurisdiction." To change the clause in this respect now after five years of operation suggests a change in scope of review by nonjudicial agencies which apparently is not necessary or intended.

In addition, the ASER Committee noted that agreement had been reached with representatives of GSA in the development of language for inclusion in Standard Form 32, utilizing the word "Secretary" in lieu of the words "head of the Federal agency." The Committee recommended that 23A be revised to conform to the language used in Standard Form 32.

In clause 7 "Payments to Contractors," line 11 of subparagraph (a), delete the words "as originally executed" to make read: "Material delivered to the Contractor at locations other than the site may also be taken into consideration (1) if specifically authorized by the contract [as originally executed], and (2) if the Contractor furnishes satisfactory evidence that he has acquired title thereto and that the material will be utilized on the work covered by this contract." The effect of the words "as originally executed" appears to be to eliminate change orders; but a need for progress payments on material delivered to points away from the site often develops during the course of the work, and a change order authorizing such payment with a credit to the Government for the interest saving seems as appropriate as a provision in the original contract for such payment.

In clause 12 "Permits and Responsibilities" line 8 delete "completion of all work including correction of defects and omissions" and substitute "completion and final acceptance." This change restores the current language. The term "completion of all the work" is indefinite; and even after completion, tests may have been specified before acceptance. On the other hand, acceptance is a definite event indicated by a letter to the contractor, and the contractor's responsibilities should cease at that time.

In clause 13 "Conditions Affecting the Work" delete "on which information is reasonably available and" and "in any way" to make the first sentence read:

"The Contractor shall be responsible for having ascertained the nature and location of the work, and the general and local conditions [on which information is reasonably available and] which can [in any way] affect the work or the cost thereof." The reasons for this recommendation are those discussed under paragraph 2 of S.F. 22 Instructions to Bidders.

It is also recommended that the authority to delete "unforeseeable" and to add "other than normal weather" in clause 5(d)(1) during periods of national emergency be retained as is now the case. This authority should be indicated in the promulgating directive, as was done in General Regulation No. 13. Otherwise, we have no comments or recommendations on the promulgating circular.

In the event the foregoing recommendations are not adopted, it is requested that an opportunity for further discussions be afforded Defense representatives.

Sincerely yours,

(Signed)

J. M. MALLON
Cdr (SC) USN
Chairman, ASFA Committee

Mr. Charles W. Gasque, Jr.
Assistant Commissioner for
Procurement Policy
General Services Administration

Mar 25 1960

CF

Dear Mr. Gasque:

This is in connection with the project formerly under consideration by the Task Force for Review of Government Procurement Policies and Procedures, numbered 26, entitled "Proposed Revision of Construction Contracting Forms." At the time the Task Force ended its activities as such, the status of this project (as of September 4, 1959) was that the proposed forms and a Draft of an FPR circular were submitted to the Task Force members for final consideration.

The ASPR Committee has considered the package previously submitted to the Task Force members, and we have agreed upon the following comments.

1. General.

The Committee expressed concern over the fact that the forms differ from the standard procurement forms and recommend that an effort be made by GSA, now or at a later date, to have the forms adopt the terminology used in the standard procurement forms. As examples of areas in which uniformity can be achieved between the construction and standard procurement forms, the members noted that:

- a. In Standard Form 21 and throughout the construction forms the word "addendum" is used where the word "amendments" is used in the standard procurement forms.
- b. In Standard Form 20 there is a wide discrepancy between the proposed coverage with respect to receipt and opening of bids, from the format used in Standard Form 30.
- c. Standard Form 22 utilizes the words "time specified for receipt of bids." In the formal advertising section agreement was reached between Defense and GSA to use the phrase "time set for opening of bids."

Other than the above comments, the Committee had no comment or recommendation for change in Standard Form 20 or Standard Form 21.

2. Standard Form 22 - Instruction to Bidders.

In paragraph 1 line 4 delete "him," "his," and "bid" and substitute "bidders," "their," and "bids" to make the phrases read in the plural as follows: "Any explanation ...must be requested in writing and with sufficient time allowed for a reply to reach bidders [him] before the submission of their bids [his bid]." (Words added are underlined, and words deleted are in brackets.) The succeeding sentence expressly states that any interpretations will be issued in the form of an addendum "to all bidders" so that sufficient time must be allowed for the reply (that is, the addendum) to reach "bidders" and not merely the bidder (usually one only) who may submit the question.

In paragraph 2 line 2 delete "on which information is reasonably available and" and "in any way" to make the first sentence read: "Bidders should ascertain the nature and location of the work, and the general and local conditions [on which information is reasonably available and] which can [in any way] affect the work or cost thereof." The requirement that bidders should only ascertain information "reasonably available" is indefinite and suggests by negative implication that they are not responsible for information not "reasonably available." In fact, bidders should expect and plan to complete the work for the contract price subject only to excuses allowed by law (such as, impossibility) or by the contract terms (such as the "Changed Conditions" clause). Very often, both the facts as to and effect of conditions such as construction complexities, availability of labor, or weather are plausibly not "reasonably available," but contractors should nevertheless estimate their effect in their prices by contingencies or otherwise and should not expect the Government to be responsible. The words "in any way" are deleted in order to eliminate an unnecessary and undue emphasis. Similar changes are recommended in S.F. 23A clause 13.

Also, in paragraph 5, delete the last sentence: "[A modification must be signed (or a telegram submitted) by a person authorized to sign bids.]" In the case of every submittal from a private party, whether bid, acknowledgement of addenda, modification of bid, etc., the submittal will not bind the private party unless authorized, and the contracting officer must be reasonably satisfied in the light of all the circumstances that the submittal is authorized. But to

mention this necessity only for modifications seems a distorting emphasis upon only one type of submittal. We also feel that a contracting officer cannot establish from the documents that "a telegram [has been] submitted by a person authorized to sign bids."

In paragraph 6 "Submission of Bids" the second sentence should read: "Failure to submit as directed may result in [There may be] a premature opening of, or a failure to open, such bid [a bid not properly addressed and identified]." This change is suggested because as written the sentence does not expressly state what is apparently intended.

In paragraph 10 "Award of Contract" omit the words "with reasonable promptness" to make read: "Any contract award will be made [with reasonable promptness] to that responsible bidder whose conforming bid is most advantageous to the Government, price and other factors considered." The bid form specifies a time for acceptance with a space in which the bidder may specify a different time, and the Government should have the right to accept within the time so specified. In many instances acceptance may be delayed (e.g. to obtain more funds) to the maximum limit so that the bidder might consider and a judge might find the award was not made with "reasonable promptness."

3. Standard Form 23 - Construction Contract. It is suggested that under the Alterations paragraph the word "changes" be revised to read "alterations," on the basis that the word "changes" might possibly be misconstrued under the Changes clause.

4. Standard Form 23A - General Provisions (Construction Contracts).

In clause 6 "Disputes" line 10 restore the words "by a court of competent jurisdiction" to make the sentence read: "The decision of the head of the Federal agency or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence." These words are included in the Disputes clauses of the current S.F. 23A and the current S.F. 32 (Oct. 1957 edition). They accord with the intent of Public Law 356, 83rd Congress, 41 U.S.C. 321-2, in which the concern was to insure judicial review of disputes decisions. The deletion was apparently made on suggestion

of the Comptroller General; but that officer does not review decisions of the ASBCA or contracting officers, and his powers of audit and criticism do not oblige him to set aside decisions under the "Disputes" clause and are not jeopardized by the words "by a court of competent jurisdiction." To change the clause in this respect now after five years of operation suggests a change in scope of review by nonjudicial agencies which apparently is not necessary or intended.

In addition, the ASPR Committee noted that agreement had been reached with representatives of GSA in the development of language for inclusion in Standard Form 32, utilizing the word "Secretary" in lieu of the words "head of the Federal agency." The Committee recommended that 23A be revised to conform to the language used in Standard Form 32.

In clause 7 "Payments to Contractors," line 11 of subparagraph (a), delete the words "as originally executed" to make read: "Material delivered to the Contractor at locations other than the site may also be taken into consideration (1) if specifically authorized by the contract [as originally executed], and (2) if the Contractor furnishes satisfactory evidence that he has acquired title thereto and that the material will be utilized on the work covered by this contract." The effect of the words "as originally executed" appears to be to eliminate change orders; but a need for progress payments on material delivered to points away from the site often develops during the course of the work, and a change order authorizing such payment with a credit to the Government for the interest saving seems as appropriate as a provision in the original contract for such payment.

In clause 12 "Permits and Responsibilities" line 8 delete "completion of all work including correction of defects and omissions" and substitute "completion and final acceptance." This change restores the current language. The term "completion of all the work" is indefinite; and even after completion, tests may have been specified before acceptance. On the other hand, acceptance is a definite event indicated by a letter to the contractor, and the contractor's responsibilities should cease at that time.

In clause 13 "Conditions Affecting the Work" delete "on which information is reasonably available and" and "in any way" to make the first sentence read:

"The Contractor shall be responsible for having ascertained the nature and location of the work, and the general and local conditions [on which information is reasonably available and] which can [in any way] affect the work or the cost thereof." The reasons for this recommendation are those discussed under paragraph 2 of S.F. 22 Instructions to Bidders.

It is also recommended that the authority to delete "unforeseeable" and to add "other than normal weather" in clause 5(d)(1) during periods of national emergency be retained as is now the case. This authority should be indicated in the promulgating directive, as was done in General Regulation No. 13. Otherwise, we have no comments or recommendations on the promulgating circular.

In the event the foregoing recommendations are not adopted, it is requested that an opportunity for further discussions be afforded Defense representatives.

Sincerely yours,

(Signed)

J. M. MALLOY
Cdr (SC) USN
Chairman, ASFR Committee

Mr. Charles W. Gasque, Jr.
Assistant Commissioner for
Procurement Policy
General Services Administration



HEADQUARTERS
DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON 25, D. C.

59-192
6 January 1960

MEMORANDUM FOR CHAIRMAN, ASPR COMMITTEE

SUBJECT: GSA Drafts of Revised Standard Construction Contract Forms

1. Pursuant to your request Mr. Brewer and I reviewed the original file of the latest GSA drafts of revised Standard Contract Forms on or about 13 December 1960, and found that they concided with our previous agreements reached with Mr. Gasque and his staff.

2. We have one comment however, with respect to the use of the term "Amendment" used in Standard Form 21. The use of this word resulted from your request made in a letter to Mr. Gasque, dated 25 March 1960, wherein it was requested that this term be used instead of the terms "Addenda" and "Addendum". While this is contrary to ASPR's present practice of using the terms "Modification" and "Supplemental Agreement" we do not believe that we can now ask FPR to change this term.

3. Since our original review GSA has received comments from their agencies, which resulted in changes to several of the forms, which are reflected in the covering letter from Mr. Gasque to Captain Malloy, Staff Director, ASPR Division, Office of Procurement Policy, dated 30 December 1960, and in the inked in changes made on the copies of the forms attached. Since submission of these changed forms, the undersigned has been advised by Mr. Gasque that the forms have been submitted to the Bureau of the Budget for approval and that unless any proposed change was legally required, Mr. Gasque would not like to request withdrawal of the documents submitted to the Bureau of the Budget for approval.

4. As no such changes are required, it is my belief that the Case 60-66 and 59-192 may now be closed with respect to those areas of responsibility which the Committee imposed upon Mr. Brewer and myself. In case there is any question concerning areas of "Bid Bonds" see Minutes, 6 July 1960, Case 59-192, unscheduled items, this matter has been handled under Case 59-151, see Minutes, 30 September 1960. This material accepted by GSA has been cleared with GAO and the Federal Procurement Regulations now contains appropriate coverage in FPR 1-10.102-4(a)(2).

Donald T. Ruby
DONALD T. RUBY
Lieutenant Colonel, JAGC
Contract Law Branch
Procurement Law Division

OFFICE OF THE ASSISTANT SECRETARY OF DEFENSE
WASHINGTON 25, D. C.

Supply and Logistics

Case 59-192
DEC 14 1959

MEMORANDUM FOR THE ASPR COMMITTEE

SUBJECT: Construction Contracts, General Provisions, Standard Form
23A Case 58-112


Construction Contracts, Standard Forms 20-23 (Rev)
Case 58-159

Construction Solicitation and Contract Forms, Standard
Forms (Rev) Case 58-50

Attached is a set of papers which includes final recommendations for publication of Standard Forms and FPR paragraphs on the above subjects.

This was formerly an Interagency Task Force project.

It is requested that the Committee develop a DOD position with regard to the subject matter, coordinated insofar as possible with the Office of Procurement Policies, GSA, for transmittal to GSA.


J. M. MALLOY
Cdr. (SC) USN
Chairman, ASPR Committee

Members, Task Force for Review of Government Procurement
Policies and Procedures

for Executive Director for the Task Force Staff

Julius Silverstein

Proposed Revision of Construction Contracting Forms - Task Force
Project No. 26

Attached (Tab I) for consideration by the Task Force are proposed revisions of the following forms:

1. Invitation for Bids (Construction Contract), Standard Form 20.
2. Bid Form (Construction Contract), Standard Form 21.
3. Instructions to Bidders (Construction Contract), Standard Form 22.
4. Construction Contract, Standard Form 23.
5. General Provisions (Construction Contract), Standard Form 23A.

It is recommended that the Task Force approve these forms for recommendation to the Administrator for issuance.

Upon approval by the Administrator, the revised forms will be prescribed through appropriate changes in the Federal Procurement Regulations. The area of required use set forth in FPR 1-16.402 will remain unchanged.

Also attached for use by the Task Force in considering the proposed revised forms are the following:

1. Letter from the Administrator dated February 4, 1958 and digest and evaluation of agency responses (Tab II).
2. Task Force letter dated August 21, 1958 and digest and evaluation of responses from agencies and the Associated General Contractors (Tab III).
3. Task Force letter dated December 3, 1958 and digest and evaluation of responses from agencies and the Associated General Contractors (Tab IV).
4. Draft of FPR Circular explaining the changes to be made in the regulations and the principal changes that have been made in the forms themselves. (The revised FPR pages are not attached in view of the explanation given of the changes to be made therein.)

Enclosures - 3

Receipt of Addenda: The undersigned acknowledges receipt of the following addenda to the invitation for bids, drawings, and/or specifications, etc. (Give number and date of each):

The undersigned represents (Check appropriate boxes):

- (1) That he ☐ is, ☐ is not, a small business concern. (For this purpose, a small business concern is one that (a) is independently-owned and operated, (b) is not dominant in its field of operation, and (c) with affiliates, had average annual receipts for the preceding three years of \$5,000,000 or less. For additional information see governing regulations of the Small Business Administration.)
- (2) (a) That he ☐ has, ☐ has not, employed or retained any company or person (other than a full-time bona fide employee working solely for the bidder) to solicit or secure this contract; and
- (b) That he ☐ has, ☐ has not, paid or agreed to pay any company or person (other than a full-time bona fide employee working solely for the bidder) any fee, commission, percentage or brokerage fee contingent upon or resulting from the award of this contract, and agrees to furnish information relating thereto as requested by the Contracting Officer. (For interpretation of this representation, including the term "bona fide employee," see Code of Federal Regulations, Title 41, Subpart 1-1.5.)
- (3) That he operates as an ☐ individual, ☐ partnership, ☐ joint venture, ☐ corporation, incorporated in State of _____

Enclosed is bid guarantee, consisting of

in the amount of

NAME OF BIDDER (Type or print)	FULL NAME OF ALL PARTNERS (Type or print)
BUSINESS ADDRESS (Type or print)	
BY (Signature in ink. Type or print name under signature)	
TITLE (Type or print)	

DIRECTIONS FOR SUBMITTING BIDS

Envelopes containing bids, guarantee, etc., must be sealed, marked, and addressed as follows:

CAUTION: Bids should not be qualified by exceptions to the bidding conditions.

BID FORM
(CONSTRUCTION CONTRACT)

FOR DISCUSSION PURPOSE ONLY

REFERENCE

*Read the Instructions to Bidders (Standard Form 22)
This form to be submitted in*

DATE OF INVITATION

NAME AND LOCATION OF PROJECT

NAME OF BIDDER (Type or print)

(Date)

TO:

In compliance with the above-dated invitation for bids, the undersigned hereby proposes to perform all work for

in strict accordance with the General Provisions (Standard Form 23A), Labor Standards Provisions Applicable to Contracts in Excess of \$2,000 (Standard Form 19A), specifications, schedules, drawings, and conditions, for the following amount(s)

The undersigned agrees that, upon written acceptance of this bid, mailed or otherwise furnished within calendar days (calendar days unless a shorter period be inserted by the bidder) after the date of opening of bids, he will within calendar days (unless a longer period is allowed) after receipt of the prescribed forms, execute Standard Form 23, Construction Contract, and give performance and payment bonds on Government standard forms with good and sufficient surety.

The undersigned agrees, if awarded the contract, to commence the work within calendar days after the date of receipt of notice to proceed, and to complete the work within calendar days after the date of receipt of notice to proceed.

(Continue on other side)

RECEIVED

INVITATION FOR BIDS
(CONSTRUCTION CONTRACT)

DATE

NAME AND LOCATION OF PROJECT

DEPARTMENT OR AGENCY

BY (Issuing office)

Sealed bids in

for the work described herein will be received until

in

and then publicly opened.

Information regarding bidding material, bid guarantee, and bonds

Description of work

Part I

Standard Form 22

edition

General Services Administration

Fed. Proc. Reg. (41 CFR) 1-16.401

INSTRUCTIONS TO BIDDERS
(CONSTRUCTION CONTRACT)

(These instructions are not to be incorporated in the contract)

1. **Explanations to Bidders.** Any explanation desired by a bidder regarding the meaning or interpretation of the invitation for bids, drawings, specifications, etc., must be requested in writing and with sufficient time allowed for a reply to reach him before the submission of his bid. Any interpretation made will be in the form of an addendum to the invitation for bids, drawings, specifications, etc., and will be furnished to all bidders. Its receipt by the bidder must be acknowledged in the space provided on the Bid Form (Standard Form 21) or by letter or telegram received before the time specified for receipt of bids. Oral explanations or instructions given before the award of the contract will not be binding.

2. **Conditions Affecting the Work.** Bidders should ascertain the nature and location of the work, and the general and local conditions on which information is reasonably available and which can in any way affect the work or the cost thereof. Failure to do so will not relieve bidders from responsibility for estimating properly the difficulty or cost of successfully performing the work. The Government will assume no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of the contract, unless included in the invitation for bids, the specifications, or related documents.

3. Bidder's Qualifications. Before a bid is considered for award, the bidder may be requested by the Government to submit a statement regarding his previous experience in performing comparable work, his business and technical organization, financial resources, and plant available to be used in performing the work.

4. Bid Guarantee. (The provision agreed upon in connection with the Bid Guarantees in Construction Contracts project (Task Force Project 31) will be inserted here.)

5. Preparation of Bids. (a) Bids shall be submitted on the forms furnished, or copies thereof, and must be manually signed. If erasures or other changes appear on the forms, each erasure or change must be initialed by the person signing the bid. Unless specifically authorized in the invitation for bids, telegraphic bids will not be considered.

(b) The bid form will provide for quotation of a price or prices for one or more items, which may be lump sum bids, alternate prices, scheduled items resulting in a bid on a unit of construction or a combination thereof, etc. Where the bid form explicitly requires that the bidder quote on all items, failure to do so will disqualify the bid. When quotations on all items are not required, bidders should insert the words "no bid" in the space provided for any item on which no quotation is made.

(c) Unless called for, alternate bids will not be considered.

(d) Modifications of bids already submitted will be considered if

received at the office designated in the invitation for bids by the time specified for receipt of bids. Telegraphic modifications will be considered, but should not reveal the amount of the original or revised bid. A modification must be signed (or a telegram submitted) by a person authorized to sign bids.

6. Submission of Bids. Bids must be submitted as directed on the bid form. There may be a premature opening of, or a failure to open, a bid not properly addressed and identified.

7. Late Bids and Modifications or Withdrawals. Bids and modifications or withdrawals thereof received at the office designated in the invitation for bids after the exact time specified for receipt of bids will not be considered, unless they are received before award and are (a) submitted by mail (or by telegraph, if authorized) and (b) it is determined by the Government that late receipt was due solely to either (1) delay in the mails (or by the telegraph company) for which the bidder was not responsible or (2) mishandling by the Government after receipt at the Government installation. However, a modification which is received from an otherwise successful bidder and which makes the terms of the bid more favorable to the Government will be considered at any time it is offered.

8. Withdrawal of Bids. Bids may be withdrawn by written or telegraphic request received from bidders prior to the time fixed for receipt of bids.

9. Public Opening of Bids. Bids will be publicly opened at the time fixed in the invitation for bids. Their content will be made public for the

information of bidders and others interested, who may be present either in person or by representative.

10. Award of Contract. (a) Any contract award will be made with reasonable promptness to that responsible bidder whose conforming bid is most advantageous to the Government, price and other factors considered.

(b) The Government may waive any informality in bids received when such waiver is in its interest. In case of error in the extension of prices, the unit price will govern except where it is patently clear that the unit price is erroneous.

(c) The Government may accept any item or combination of items of a bid, unless precluded by the invitation for bids or the bidder includes in his bid a restrictive limitation.

11. Rejection of Bids. The Government may reject any or all bids when in its interest.

12. Contract and Bonds. The bidder whose bid is accepted will, within the time established in the bid, enter into a written contract with the Government and, if required, furnish performance and payment bonds on Government standard forms. The bonds will be in the amounts indicated in the invitation for bids or the specifications.

CONSTRUCTION CONTRACT
(See instructions on reverse)

FOR DISCUSSION PURPOSES ONLY

CONTRACT NO. _____

DATE OF CONTRACT _____

NAME AND ADDRESS OF CONTRACTOR _____

CHECK APPROPRIATE BOX

- ☐ Individual
☐ Partnership
☐ Joint Venture
☐ Corporation, incorporated in the
State of _____

DEPARTMENT OR AGENCY _____

CONTRACT FOR (Work to be performed)

PLACE _____

AMOUNT OF CONTRACT (Express in words and figures)

ADMINISTRATIVE DATA (Optional)

The United States of America (hereinafter called the Government), represented by the Contracting Officer executing this contract, and the individual, partnership, joint venture, or corporation named above (hereinafter called the Contractor), mutually agree to perform this contract in strict accordance with the General Provisions (Standard Form 23A), Labor Standards Provisions Applicable to Contracts in Excess of \$2,000 (Standard Form 19A), and the following designated specifications, schedules, drawings, and conditions:

WORK SHALL BE STARTED

WORK SHALL BE COMPLETED

Alterations. The following changes were made in this contract before was signed by the parties hereto:

In witness whereof, the parties hereto have executed this contract as of the date entered on the first page hereof.

THE UNITED STATES OF AMERICA

CONTRACTOR

By _____

(Name of Contractor)

(Official title)

By _____

(Signature)

(Title)

INSTRUCTIONS

1. This form shall be used, as required by GSA regulations, for contracts for the construction, alteration, or repair of public buildings or works.

2. The full name and business address of the Contractor must be inserted in the space provided on the face of the form. The Contractor shall sign in the space provided above with his usual signature and typewrite or print his name under the signature.

3. An officer of a corporation, a member of a partnership, or an agent signing for the Contractor shall place his signature and title after the word "By" under the name of the Contractor. A contract executed by an attorney or agent on behalf of the Contractor shall be accompanied by two authenticated copies of his power of attorney or other evidence of his authority to act on behalf of the Contractor.

edition

General Services Administration

Fed. Proc. Reg. (41 C.F.R) 1-16.401

GENERAL PROVISIONS
(CONSTRUCTION CONTRACT)

1. DEFINITIONS

(a) The term "head of the Federal agency" as used herein means the Secretary, Under Secretary, or any Assistant Secretary or any comparable chief official or assistant chief officials of the executive department or independent agency involved; and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the head of the Federal agency.

(b) The term "Contracting Officer" as used herein includes his duly appointed successor or his authorized representative.

2. SPECIFICATIONS AND DRAWINGS

The Contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In any case of discrepancy either in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Any adjustment by the Contractor without this determination shall be at his own risk and expense. The

Contracting Officer shall furnish from time to time such detail drawings and other information as he may consider necessary, unless otherwise provided.

3. CHANGES

The Contracting Officer may, at any time, by written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract if within its general scope. If such changes cause an increase or decrease in the Contractor's cost of, or time required for, performance of the contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the Contractor of the notification of change unless the Contracting Officer grants a further period of time before the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the dispute shall be determined as provided in Clause 6 hereof; but nothing provided in this clause shall excuse the Contractor from proceeding with the prosecution of the work as changed. Except as otherwise provided in this contract, no charge for any extra work or material will be allowed.

4. CHANGED CONDITIONS

The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (a) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (b) unknown physical conditions at the site, of an unusual nature, differing materially from those ordinarily encountered and generally

recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; provided that the Contracting Officer may, if he determines the facts so justify, consider and adjust any such claim asserted before the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6.

5. TERMINATION FOR DEFAULT - DAMAGES FOR DELAY - TIME EXTENSIONS

(a) If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within such time, the Contractor and his sureties shall be liable for any resulting damage to the Government. Also, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor.

(b) If the Government so terminates the Contractor's right to proceed and fixed and agreed liquidated damages are provided in the contract, the resulting damage will consist of such liquidated damages, until such reasonable time as may be required for final completion of the work, together with any increased costs occasioned the Government in completing the work.

(c) If the Government does not so terminate and fixed and agreed liquidated damages are provided in the contract, the resulting damage will consist of such liquidated damages until the work is completed or accepted.

(d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damages if:

(1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to, acts of God, acts of the public enemy, acts of the Government (in its sovereign or contractual capacity), acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers; and

(2) The Contractor, within 10 days from the beginning of any such delay (unless the Contracting Officer grants a further period of time before the date of final settlement of the contract), notifies the Contracting Officer in writing of the causes of delay.

The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension, and his findings of fact shall be final and conclusive on the parties, subject only to appeal as provided in Clause 6.

(c) The rights and remedies of the Government provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

6. DISPUTES

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the head of the Federal agency. The decision of the head of the Federal agency or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending

final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This Disputes clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above: Provided, That nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

7. PAYMENTS TO CONTRACTORS

(a) The Government will make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates approved by the Contracting Officer. If requested by the Contracting Officer, the Contractor shall furnish a breakdown of the total contract price showing the amount included therein for each main branch of the work, in such detail as requested, to provide a basis for determining progress payments. In the preparation of estimates the Contracting Officer, at his discretion, may authorize material delivered on the site and preparatory work done to be taken into consideration. Material delivered to the Contractor at locations other than the site may also be taken into consideration (1) if specifically authorized by the contract as originally executed, and (2) if the Contractor furnishes satisfactory evidence that he has acquired title thereto and that the material will be utilized on the work covered by this contract.

(b) In making such progress payments, there shall be retained 10 percent of the estimated amount until final completion and acceptance of the

contract work. However, the Contracting Officer, at any time after 50 per cent of the work has been completed, if he finds that satisfactory progress is being made, may (1) make any of the remaining progress payments in full, and (2) upon determination by the Contracting Officer that the work is substantially complete, if he considers the amount of retained percentages to be in excess of the amount adequate for the protection of the Government, at his discretion the Contracting Officer may release to the Contractor such excess amount. Furthermore, on completion and acceptance of each separate building, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made therefor without retention of a percentage.

(c) All material and work covered by progress payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the Contractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work, or as a waiver of the right of the Government to require the fulfillment of all of the terms of the contract.

(d) Upon completion and acceptance of all work, the amount due the Contractor under this contract shall be paid upon the presentation of a properly executed voucher and after the Contractor shall have furnished the Government with a release, if required, of all claims against the Government arising by virtue of this contract, other than claims in stated amounts as may be specifically excepted by the Contractor from the operation of the release. If the Contractor's claim to amounts payable under the contract has been

assigned under the Assignment of Claims Act of 1940, as amended (31 U.S.C. 203, 41 U.S.C. 15), a release may also be required of the assignee.

8. ASSIGNMENT OF CLAIMS

(a) Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended (31 U.S.C. 203, 41 U.S.C. 15), if this contract provides for payments aggregating \$1,000 or more, claims for monies due or to become due the Contractor from the Government under this contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, and may thereafter be further assigned and reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Notwithstanding any provisions of this contract, payments to an assignee of any monies due or to become due under this contract shall not, to the extent provided in said Act, as amended, be subject to reduction or set-off. (The preceding sentence applies only if this contract is with the Department of Defense, the General Services Administration, the Atomic Energy Commission, the National Aeronautics and Space Administration, or any other department or agency of the United States designated by the President pursuant to clause 4 of the proviso of section 1 of the Assignment of Claims Act of 1940, as amended by the Act of May 15, 1951, 65 Stat. 41.)

(b) In no event shall copies of this contract or of any plans, specifications, or other similar documents relating to work under this contract, if marked "Top Secret, " "Secret, " or "Confidential, " be furnished to any assignee of any claim arising under this contract or to any other person not entitled to receive the same: Provided, That a copy of any part or all of this contract so marked may be furnished, or any information contained therein may be disclosed, to such assignee upon the prior written authorization of the Contracting Officer.

9. MATERIAL AND WORKMANSHIP

(a) Unless otherwise specifically provided in this contract, all equipment, material, and articles incorporated in the work covered by this contract are to be new and of the most suitable grade for the purpose. Unless otherwise specifically provided in this contract, reference to any equipment, material, article, or patented process, by trade name, make, or catalog number shall be regarded as establishing a standard of quality and shall not be construed as limiting competition, and the Contractor may, at his option, use any equipment, material, article, or process which, in the judgment of the Contracting Officer, is equal to that named. The Contractor shall furnish to the Contracting Officer for his approval the name of the manufacturer, the model number, and other identifying data and information respecting the performance, capacity, nature, and rating of the machinery and mechanical and other equipment which the Contractor contemplates incorporating in the work. When required by this contract

or when called for by the Contracting Officer, the Contractor shall furnish the Contracting Officer for approval full information concerning the material or articles which he contemplates incorporating in the work. When so directed, samples shall be submitted for approval at the Contractor's expense, with all shipping charges prepaid. Machinery, equipment, material, and articles installed or used without required approval shall be at the risk of subsequent rejection.

(b) All work under this contract shall be performed in a skillful and workmanlike manner. The Contracting Officer may, in writing, require the Contractor to remove from the work any employee the Contracting Officer deems incompetent, careless, insubordinate, or otherwise objectionable.

10. INSPECTION

(a) Except as otherwise provided in this contract, including paragraph (d) hereof, all workmanship and material furnished under this contract shall be subject to inspection, examination, and test by the Contracting Officer at any and all times during manufacture and/or construction and at any and all places where such manufacture and/or construction is carried on. The Contractor shall furnish promptly, without additional charge, all facilities, labor, and material reasonably needed for performing such safe and convenient inspection and tests as may be required by the Contracting Officer. All inspection and tests by the Government shall be performed in such manner as not unnecessarily to delay the work. Special, full size, and performance tests shall be performed as described in this contract. The Contractor

shall be charged with any additional cost of inspection when material and workmanship are not ready at the time inspection is requested by the Contractor.

(b) Should it be considered necessary or advisable by the Government at any time before final acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the Contractor shall, on request, promptly furnish all necessary facilities, labor, and material. If such work is found to be defective or nonconforming in any material respect, due to fault of the Contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, the actual direct cost of labor and material necessarily involved in the examination and replacement, plus 15 percent, shall be allowed the Contractor and he shall, in addition, if completion of the work has been delayed thereby, be granted a suitable extension of time on account of the additional work involved.

(c) The Government may reject any workmanship or material which does not conform to the requirements of the contract and may, at its option, require correction or replacement without additional charge. Rejected material shall be promptly segregated and removed from the premises by the Contractor. If the Contractor fails to proceed at once with such correction or replacement, the Government may, by contract or otherwise, correct or replace such workmanship or material at the Contractor's expense, or may terminate the right of the Contractor to proceed, and the

Contractor shall be liable for resulting damage, to the extent provided in Clause 5 of this contract.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the contracting officer determines such inspection is justified, unless otherwise stated in this contract; and such inspection and written or other formal acceptance, unless otherwise stated in the contract, shall be final, except as regards latent defects, departures from specific requirements of the contract, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Except as provided in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site. Nothing contained in this paragraph (d) shall in any way restrict the Government's rights under any warranty or guarantee.

11. SUPERINTENDENCE BY CONTRACTOR

The Contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the Contracting Officer, on the work at all times during progress, with authority to act for him.

12. PERMITS AND RESPONSIBILITIES

The Contractor shall be responsible, without additional expense to the Government, in connection with the prosecution of the work, for obtaining any necessary licenses and permits, for complying with any applicable Federal, State, and municipal laws, codes, or regulations, and for all

damage to persons or property that occur as a result of his fault or negligence.

He shall take proper safety and health precautions to protect the work, the workers, the public, and the property of others. He shall also be respon-

sible for all material delivered and work performed until completion of ^{and acceptance} all the

^{entire construction}
A

work, including correction of defects and omissions, in accordance with the

contract requirements as determined by the Government, except for any completed unit thereof which theretofore may have been finally accepted.

13. CONDITIONS AFFECTING THE WORK

The Contractor shall be responsible for having ascertained the nature and location of the work, and the general and local conditions on which information is reasonably available and which can in any way affect the work or the cost thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully performing the work without additional expense to the Government. The Government assumes no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of this contract, unless such understanding or representations by the Government are expressly stated in the contract.

14. OTHER CONTRACTS

The Government may undertake or award other contracts for additional work, and the Contractor shall fully cooperate with such other contractors and Government employees and carefully fit his own work to such additional work as may be directed by the Contracting Officer. The Contractor shall

not commit or permit any act which will interfere with the performance of work by any other contractor or by Government employees.

15. PATENT INDEMNITY

Except as otherwise provided, the Contractor agrees to indemnify the Government and its officers, agents, and employees against liability, including costs and expenses, for infringement upon any Letters Patent of the United States (except Letters Patent issued upon an application which is now or may hereafter be, for reasons of national security, ordered by the Government to be kept secret or otherwise withheld from issue) arising out of the performance of this contract or out of the use or disposal by or for the account of the Government of supplies furnished or construction work performed hereunder.

16. ADDITIONAL BOND SECURITY

If any surety upon any bond furnished in connection with this contract becomes unacceptable to the Government, or if any such surety fails to furnish reports as to his financial condition from time to time as requested by the Government, the Contractor shall promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by this contract.

17. COVENANT AGAINST CONTINGENT FEES

The Contractor warrants that no person or selling agency has been employed or retained to solicit or secure this contract upon an agreement or

understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

18. OFFICIALS NOT TO BENEFIT

No member of Congress, or resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

19. BUY AMERICAN ACT

(New clause will be included here -- see FPR 1-6.205)

20. CONVICT LABOR

In connection with the performance of work under this contract, the Contractor agrees not to employ any person undergoing sentence of imprisonment at hard labor.

21. NONDISCRIMINATION IN EMPLOYMENT

(a) In connection with the performance of work under this contract, the Contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin. The aforesaid provision shall include, but not be limited to, the following: Employment,

upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post hereafter in conspicuous places, available for employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of the nondiscrimination clause.

(b) The Contractor further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.

GENERAL SERVICES ADMINISTRATION

Washington 25, D.C.

February 4, 1958



Proposed for your consideration are the following recommended changes in standard forms for construction contracts.

There has been no revision of standard forms for construction contracts since the issuance of General Regulation No. 13, with the exception of the change with respect to bid representations in Standard Form 21, promulgated by Supplement No. 2 of General Regulation No. 13.

A study group of the Task Force for Review of Government Procurement Policies and Procedures is engaged in a long-range project of reviewing all standard forms for construction contracts, particularly Standard Form 23A, with the objective of possible amendments by deletions or additions to effect standardization.

In order to bring up to date the general provisions of Standard Form 23A, we recommend the substitution of the following Disputes Clause similar to that recently approved for Standard Form 32, General Provisions, Supply Contract:

"11. Disputes

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the head of the department. The decision of the head of the department or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined by a court of competent jurisdiction to have been fraudulent, or capricious, or arbitrary, or so

Tab II

grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This 'Disputes' clause does not preclude consideration of law questions in connection with decisions provided for in paragraph (a) above: Provided, That nothing in this contract shall be construed as making final the decision of any administrative official, representative, or board on a question of law."

The revised nondiscrimination clause, as promulgated by Executive Order 10557, will be incorporated in Standard Form 23A.

With respect to certification required under clause 7(d) of Standard Form 23A, we propose the deletion of the words "and duly certified" in line 4 of the clause, which is in accordance with the recent GAO General Regulations No. 134.

We recommend incorporating in Standard Form 23A the Assignment of Claims clause similar to that approved for Standard Form 32, General Provisions, Supply Contract:

"Assignment of Claims

(a) Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended (31 U.S. Code 203, 41 U.S. Code 15), if this contract provides for payments aggregating \$1,000 or more, claims for monies due or to become due the Contractor from the Government under this contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, and may thereafter be further assigned and reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Notwithstanding any provisions of this contract, payments to an assignee of any monies due or to become due under this contract shall not, to the extent provided in said Act, as amended, be subject to reduction or set-off. (The preceding sentence

applies only if this contract is with the Department of Defense, the General Services Administration, the Atomic Energy Commission, or any other department or agency of the United States designated by the President pursuant to clause 4 of the proviso of section 1 of the Assignment of Claims Act of 1940, as amended by the Act of May 15, 1951, 65 Stat. 41.)

(b) In no event shall copies of this contract or of any plans, specifications, or other similar documents relating to work under this contract, if marked 'Top Secret,' 'Secret,' or 'Confidential,' be furnished to any assignee of any claim arising under this contract or to any other person not entitled to receive the same: Provided, That a copy of any part or all of this contract so marked may be furnished, or any information contained therein may be disclosed, to such assignee upon the prior written authorization of the Contracting Officer."

These proposed changes in Standard Form 23A are submitted for your review and consideration. May we have your comments by not later than March 21, 1958.

Information concerning the proposed changes may be obtained by communicating with Charles L. Madison, Real Property Division, Office of General Counsel, General Services Administration, Room 6308, General Services Building, Washington 25, D. C., Telephone Executive 3-4900 (Government dial code 183), extension 4354.

Sincerely yours

/s/ Franklin Floete

FRANKLIN FLOETE
Administrator

DIGEST AND EVALUATION OF AGENCY COMMENTS
IN RESPONSE TO LETTER DATED FEBRUARY 4,
1958

PART A - LIST OF RESPONDING AGENCIES

Agency	Substantive Comment Received	Concurrence or No Objection
Agriculture Department		x
Atomic Energy Commission		x
Bureau of the Budget		x
Central Intelligence Agency		x
Civil Service Commission		x
Commerce Department	x	
Comptroller General	x	
Defense Department	x	
Federal Communications Commission		x
Federal Deposit Insurance Corp.		x
Federal Home Loan Bank Bd.		x
Foreign Claims Settlement Comm.		x
Health, Education & Welfare		x
Housing & Home Finance Agency		x
Interior Department		x
International Cooperation Admin.		x
Interstate Commerce Comm.		x
Justice Department		x
Librarian of Congress		x
Panama Canal Company		x
Post Office Department		x
Railroad Retirement Board		x
Renegotiation Board		x
Securities & Exchange Comm.		x
Selective Service System		x
Small Business Administration	x	
Smithsonian Institution		x
State Department		x
Subversive Activities Contract Bd.		x
Tennessee Valley Authority		x
Treasury Department		x
U. S. Information Agency		x
Veterans Administration	x	

PART B - DIGEST AND EVALUATION OF SUBSTANTIVE COMMENTS

Assignment of Claims

Comment (Veterans Administration) - Feels inclusion in SF 23A not essential, although clause not objectionable.

Evaluation. Inclusion will reduce by one the number of clauses being added by agencies elsewhere in contract documents. Although, as stated by VA, this will lengthen SF 23A, the overall length of contract documents will not be changed and uniformity will be increased.

Disputes

Comment (DOD) - Substitute "Secretary" for "head of the department."

Evaluation. SF 19 contains "head of the Federal agency" and this term has been included in SF 23A. This is desirable as both forms are for use in the construction industry. However, the Definitions clause has been revised in an attempt to meet the Department of Defense wishes. It is believed no problem exists with ASPR as no clauses are prescribed therein for construction contracts.

Comment (GAO) - Delete "determined by a court of competent jurisdiction to have been."

Evaluation. Deletion would be consistent with SF 19 and would not change the intended meaning of the clause. T/L 1-83 to GSA Regulation Title 1, explains that this phrase, although contained in Standard Form 32, is not intended to affect the jurisdiction of the General Accounting Office.

Comment (SBA) - Paragraph (b) is somewhat ambiguous.

Evaluation. Discussion with representatives of SBA elicited no specific suggestions as to the basis upon which the paragraph was considered ambiguous nor were any suggestions for revision offered.

GENERAL SERVICES ADMINISTRATION



Washington 25, D. C.

August 21, 1958

Attached for your review and comment are proposed changes in Standard Form 23A, General Provisions (Construction Contracts) and an explanation thereof. This material was prepared by the interagency Task Force for Review of Government Procurement Policies and Procedures.

The proposed revisions of SF 23A circulated for agency review and comment on February 4, 1958, had a limited objective involving only the Disputes, Payments to Contractors, Assignment of Claims, and Nondiscrimination in Employment clauses. A revised edition incorporating these changes was not issued because of the progress made by the Procurement Task Force toward developing a comprehensive revision of the form. The changes set forth herein supplement those proposed last February. It is contemplated that separate additional submissions for agency comment will be made covering the Buy American clause and a proposed Price Adjustment for Suspension, Delay, or Interruption of the Work clause.

Your review of the attached material and advice of concurrence or recommendations for changes by October 31, 1958, will be appreciated.

Members of your staff may obtain information concerning this material by communicating with Herbert H. Spencer, Procurement Task Force Staff (Code 183, Ext. 3167).

Sincerely yours

PHIL W. JORDAN, Chairman
Task Force for Review of Government
Procurement Policies and Procedures

Enclosure

Tab III

PROPOSED REVISIONS OF SF 23A, GENERAL PROVISIONS
(CONSTRUCTION CONTRACTS)

(Explanatory Note: The new language in the clauses is underscored; and language to be deleted is bracketed [] .)

1. Clause 3 - CHANGES

The second sentence of this clause is revised as follows to adopt similar language as is used in Clause 4, Changed Conditions. Since the same method is used in determining price adjustments under both of these clauses, it is desirable to use like language. Furthermore, the "cost of" performance, rather than the "amount due", is the deciding factor in the determination of the price adjustment, if any, to be made.

If such changes cause an increase or decrease in the /amount due under this contract /cost of, or /in the time required for, /its performance of this contract, an equitable adjustment shall be made and the contract /shall be modified in writing accordingly.

2. Clause 5 - TERMINATION FOR DEFAULT - DAMAGES FOR DELAY-TIME EXTENSIONS

Paragraph (c) is revised to make it clear that delays of subcontractors or suppliers, to be considered excusable, must be unforeseeable, beyond the control and without fault or negligence of the prime contractor and his subcontractors or suppliers. A similar change was made in the 1955 edition of Standard Form 32, General Provisions (Supply Contract).

Paragraph (d) has been added to make this default clause consistent with a similar clause in the current edition of SF 32, which was originally included in the earlier (1949) edition of SF 32, to clarify the Government's alternative rights on default terminations.

(c) The right of the Contractor to proceed shall not be terminated, as provided in paragraph (a) hereof, nor the Contractor charged with liquidated or actual damages, as provided in paragraph (b) hereof because of any delays in the completion of the work due to unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including, but not restricted to, acts of God, or of the public enemy, acts of the Government, in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, and unusually severe

weather, or delays of subcontractors or suppliers due to /such/ unforeseeable causes beyond their control and without their fault or negligence: PROVIDED, That the Contractor shall within 10 days from the beginning of any such delay, unless the Contracting Officer shall grant a further period of time prior to the date of final settlement of the contract, notify the Contracting Officer in writing of the causes of delay. The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal as provided in Clause 6 hereof.

(d) The rights and remedies of the Government provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

3. Clause 7 - PAYMENTS TO CONTRACTORS

In addition to the changes proposed in this clause by the letter of February 4, 1958, additional changes are recommended. Wherever the term "partial payments" is used in the present clause, the term "progress payments" will be substituted. The text showing these changes in paragraphs (b) and (c) is not included. Payments of this type are defined in GSA Personal Property Management Regulation No. 33 as "progress payments" and this change will establish consistency in the use of these terms.

The second sentence of paragraph (a) is added to provide an agreed basis for progress payments and to achieve uniformity since similar provisions are frequently included by contracting agencies. The fourth sentence of paragraph (a) is added to permit using agencies to authorize, if desired, payment for materials not delivered to the site. A provision of this kind has been used by some agencies on larger contracts to enable contractors to finance the work more easily.

(a) /Unless otherwise provided in the specifications, partial/ Progress payments will be made monthly as the work /progresses at the end of each calendar month, or as soon thereafter as practicable/ proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates /made and/ approved by the Contracting Officer. If requested by the Contracting Officer, the Contractor shall furnish the estimated costs of the various elements of work to be performed in such detail as requested and for the purpose of estimating progress payments. In preparing estimates the material delivered on the site and preparatory work done may be taken into consideration. Undelivered material may be considered only if authorized by the contract.

4. Clause 8 - MATERIALS AND WORKMANSHIP

This clause has been subdivided to treat "materials" and "workmanship" in paragraphs (a) and (b), respectively. The new language is intended to make it clear that, unless otherwise provided, references to equipment, materials, etc. are not to be construed to limit competition but only to establish a standard of quality. The clause also states specifically that the expense of submitting samples shall be borne by the Contractor.

(a) Unless otherwise specifically provided for in the specifications / this contract, all equipment, materials, and articles incorporated in the work covered by this contract are to be new, and of the most suitable grade of their respective kinds for the purpose / and all workmanship shall be first class / . / Where equipment, materials, or articles are referred to in the specifications as "equal to" any particular standard, the Contracting Officer shall decide the question of equality. / Unless otherwise specifically provided for in this contract, reference to any equipment, materials, articles, or type of construction, by name, make or catalogue number shall be interpreted as establishing a standard of quality and shall not be construed as limiting competition, and the Contractor, in such cases may at his option, use any equipment, materials, articles, or type of construction, which in the judgment of the Contracting Officer is equal to that named. The Contractor shall furnish to the Contracting Officer for his approval the name of the manufacturer of machinery, mechanical and other equipment which he contemplates incorporating in the work, together with their performance capacities and other pertinent information. When required by the specifications / this contract, or when called for by the Contracting Officer, the Contractor shall furnish the Contracting Officer for approval full information concerning the materials or articles which he contemplates incorporating in the work. Samples / of materials / shall be submitted for approval when so directed, at the Contractor's expense, with all shipping charges prepaid. Machinery, equipment, materials, and articles installed or used without / such / required approvals shall be at the risk of subsequent rejection.

(b) All work performed under this contract shall be first class. The Contracting Officer may, in writing, require the Contractor to remove from the work such employee as the Contracting Officer deems incompetent, careless, insubordinate, or otherwise objectionable, or whose continued employment on the work is deemed by the Contracting Officer to be contrary to the public interest.

5. Clause 9 - INSPECTION

Paragraph (a) is revised to make it clear that the Government may reject or require correction of material and/or workmanship that is defective, or that does not conform to the contract, whether or not defective. Paragraph (d) is revised to clarify the language concerning finality of off-site inspection.

(a) Except as otherwise provided in paragraph (d) hereof, all material and workmanship, if not otherwise designated by the specifications, shall be subject to inspection, examination, and test by the Contracting Officer at any and all times during manufacture and/or construction and at any and all places where such manufacture and/or construction are carried on. The Government shall have the right to reject, defective material and workmanship or require its the correction of, material and/or workmanship which is defective or which does not conform to the contract. Rejected workmanship shall be satisfactorily corrected and rejected material shall be satisfactorily replaced with proper material without charge therefor, and the Contractor shall promptly segregate and remove the rejected material from the premises. If the Contractor fails to proceed at once with the replacement of rejected material and/or the correction of defective rejected workmanship the Government may, by contract or otherwise, replace such material and/or correct such workmanship and charge the cost thereof to the Contractor, or may terminate the right of the Contractor to proceed as provided in Clause 5 of this contract, the Contractor and surety being liable for any damage to the same extent as provided in said Clause 5 for terminations thereunder.

(d) Inspection of material and finished articles to be incorporated in the work at the site shall be made at the place of production, manufacture, or shipment, whenever the quantity justifies it, unless otherwise stated in the specifications; and such inspection and written or other formal acceptance, unless otherwise stated in the specifications, shall be final, except as regards latent defects, departures from specific requirements of the contract, damage or loss in transit, fraud, or such gross mistakes as amount to fraud. Subject to the requirements contained Except as provided in the preceding sentence, the inspection of material and workmanship for final acceptance as a whole or in part shall be made at the site. Nothing contained in this paragraph (d) shall in any way restrict the Government's rights under any warranty or guarantee.

6. Clause 11 - PERMITS AND RESPONSIBILITY FOR WORK, ETC.

For simplification, it is proposed that the heading of this clause be changed to "Permits and Responsibilities."

As revised, the clause clarifies that the Contractor is responsible, without additional expense to the Government - (1) for obtaining "any necessary," as distinguished from "all," licenses and permits; (2) for complying with any applicable Federal, State, and Municipal laws, codes or regulations; and (3) for damages to persons or property. The revision also requires the Contractor to take proper safety and health precautions. This is desirable as sound construction practice.

The last sentence changes the language from "final acceptance" to "final inspection." This will relieve the Contractor of responsibility during the period which intervenes between the date of final inspection of work at the site and the date of final settlement.

PERMITS AND /RESPONSIBILITY FOR WORK, ETC./
RESPONSIBILITIES

The Contractor shall be responsible, without additional expense to the Government, in connection with the prosecution of the work, for obtaining /all/ any necessary licenses and permits /required for the prosecution of the work, /, for complying with any applicable Federal, State, and Municipal laws, codes or regulations, and for /He shall be responsible for/ all damages to persons or property that occur as a result of his fault or negligence /in connection with the prosecution of the work/. He shall take proper safety and health precautions to protect the work, the workers and the public. He shall also be responsible for all materials delivered and work performed until completion and final /acceptance/ inspection, except for any completed unit thereof which theretofore may have been finally accepted.

7. PROPOSED NEW CLAUSE ENTITLED "OTHER CONDITIONS AFFECTING THE WORK"

This clause is added for the purpose of including specific terms setting forth the contractor's responsibility for ascertaining conditions concerning the performance of the work. It will serve to standardize similar clauses currently used by individual agencies. It is based, somewhat, on paragraph 2 of Standard Form 22, Instructions to Bidders (Construction Contracts).

OTHER CONDITIONS AFFECTING THE WORK

The Contractor shall be responsible for having ascertained the nature and location of the work, the general and local conditions, and all other matters which can in any way affect the work or the cost thereof under this contract. Any failure by the Contractor to acquaint himself with all the available information concerning these conditions will not relieve him from responsibility for estimating properly the difficulty or cost of successfully performing the work.

The Government assumes no responsibility for any understanding or representations concerning conditions at the site made by any of its officers or agents prior to the execution of this contract, unless such understanding or representations by the Government are expressly stated in the contract.

Digest and Evaluation of Comments Received from Agencies and from the Associated General Contractors of America, Inc., in Response to Letter dated August 21, 1958.

Part A - List of Responding Agencies

<u>Agency</u>	<u>Substantive Comment Received</u>	<u>Concurrence or No Objection</u>
Agriculture Department	X	
Atomic Energy Commission	X	
Bureau of the Budget	X	
Central Intelligence Agency		X
Civil Aeronautics Board		X
Civil Service Commission		X
Civil and Defense Mobilization		X
Commerce Department	X	
Comptroller General	X	
Defense Department	X	
Federal Communications Commission		X
Federal Deposit Insurance Corporation		X
Federal Home Loan Bank Board		X
Federal Mediation & Conciliation Service		X
Federal Power Commission		X
Federal Trade Commission		X
Foreign Claims Settlement Commission		X
Health, Education, and Welfare Department		X
Housing and Home Finance Agency	X	
Interior Department	X	
International Cooperation Administration		X
Interstate Commerce Commission		X
Justice Department		X
Librarian of Congress		X
National Capital Housing Authority	X	
National Mediation Board		X
Panama Canal Company	X	
Post Office Department	X	
Railroad Retirement Board		X
Renegotiation Board		X
Securities and Exchange Commission		X
Selective Service System		X
Small Business Administration	X	
Smithsonian Institution		X
State Department		X
Tennessee Valley Authority		X
Treasury Department		X
United States Information Agency		X
Veterans Administration		X

Part B - Digest and Evaluation of Substantive Comments

Clause 3 - CHANGES

Comment (Agriculture): Substitution of "cost of" for "amount due" precludes allowance of profit.

Evaluation: Change in cost is established as a prerequisite for an equitable adjustment and not as the basis upon which the adjustment will be made.

Comment (Commerce-Public Roads): Recommends clarification of first two sentences; also, that methods for making equitable adjustments be prescribed.

Evaluation: Language clarified. Adoption of remainder of recommended changes not considered appropriate.

Clause 4 - CHANGED CONDITIONS

Comment (GSA-General Counsel): Transmits July 1958 issue of Government Contracts Review containing an article concerning this clause and recommends its study by Task Force. Suggests, if nothing more, a change in title might tend to eliminate the filing of many spurious claims alluded to by the author.

Evaluation: Determined that change in title would be confusing, unless clause is revised, it would lead contractors to believe a change has been made.

Comment (Commerce-Public Roads): Recommends revision of second sentence to provide for (1) price adjustment only where conditions differ from those indicated, or (2) where they differ from those ordinarily encountered to such a degree that a change order is issued; to provide for a time adjustment in such cases and, also, where performance of the work is delayed by unusual conditions (covered by (2)) even though no change order issues. Except as provided above, the contractor would be required to perform the work without adjustment of the contract price or time for performance.

Evaluation: This suggestion would shift a portion of the burden from the Government to the contractor and presumably result in increased bid prices. Accordingly, clause not changed.

Clause 5 - TERMINATION FOR DEFAULT-DAMAGES FOR DELAY-TIME EXTENSIONS

Comment (AEC): Delete "unforeseeable" from (c). Not included in Standard Form 32 and see no reason for difference in construction.

OK

Evaluation: Deletion was considered in developing the 1953 edition of Standard Form 23A. It was decided, at that time, to retain the word and to provide by regulation for its deletion in periods of national emergency. As AEC has not indicated that a problem exists, and as no similar suggestion was received from any other source, no change has been made.

Comment (Commerce-Weather Bur., Comp. Gen., DOD, GSA-Gen. Counsel, Interior): Propose clarifying language changes in (c) re delays of subcontractors or suppliers.

Evaluation: Suggestion of Comptroller General adopted.

Comment (Commerce-Public Roads): Proposes inclusion in (c) of definition of unusually severe weather; also suggests, if definition included, that GSA make arrangements with Weather Bureau for development of forms of reports and maintenance of data to facilitate its application.

Evaluation: Discussion with Dr. H. E. Landsberg, of the Weather Bureau, indicates data needed, should the definition be adopted, is not available at all stations; also, that any change in reporting would require consultation to determine extent of change and burden which would be placed upon Weather Bureau. Inclusion of proposed definition should not be considered unless and until arrangements have been made to assure that data would be available for its application. It would be advisable to obtain the opinions of the procurement agencies with respect to the need for the proposed definition before making any arrangements with the Weather Bureau that might place a burden upon that Bureau greater than the usefulness of the definition might warrant.

Comment (Associated General Contractors): Change "strikes" to "labor disputes."

Evaluation: Mr. William Dunn, of AGC, attended a Meeting of the study group at which this proposal, previously made by AGC, was discussed, and the minutes state AGC withdrew its suggestion. Although the proposal was repeated in the AGC letter, Mr. Dunn advised informally that they were not pursuing the matter. (As a practical matter, the proposal would change only the list of examples of causes of delay rather than the basic criteria.)

Comment (AEC): Word (d) exactly as same provision in Standard Form 32.

Evaluation: Standard Form 32 clause contains the words "shall not be exclusive and" which do not appear in proposed (d). Addition of these words would not increase clarity and would add unnecessary length.

Clause 7 - PAYMENTS TO CONTRACTORS

OK

OK
not good
by hand

Paragraph (a)

Comment (Commerce): Object to absolute requirement for monthly payments on contracts under \$10,000, or where monthly earnings are insignificant.

Evaluation: Standard Form 19, used on contracts up to \$10,000, contains no mandatory requirement for progress payments. On larger contracts, contractors should be assured of payment for work performed.

Comment (AEC, BOB, GSA-Comptroller, SBA): Suggest revision of proposed new second sentence. Reasons given include possibility of construction as authority for advance payments.

Evaluation: Sentence has been revised to meet objections.

Comment (Associated General Contractors): Add, at end of third sentence, "by the contractor" as the revision of (a) provides for preparation of estimates by the contractor.

Evaluation: It was not intended that discretion be transferred to the contractor and the third sentence has been revised to make this clear.

Comment (BOB, Comp. Gen.): Recommend deletion of proposed new fourth sentence.

Evaluation: The sentence has been revised to meet objections.

Paragraph (b)

Comment (AEC, Commerce-Public Roads, Panama Canal Co.): Recommend provision for payment, upon substantial completion of work, of that portion of retained percentage in excess of amount determined by the contracting officer to be adequate for protection of the Government.

Evaluation: Such a provision is in use in Army, GSA (PBS), and Interior (Reclamation), and informal inquiry indicates Navy and VA would have no objection. Accordingly, provision included.

Comment (DOD): Recommend provision, in contracts estimated to exceed one year, permitting reduction, after 50% completion, of retained percentage to not less than 10% of the estimated value of the work remaining to be done or 1-1/2% of the total contract amount.

Evaluation: DOD states use authorized in DOD and Interior. Informal inquiry in Interior indicates not used generally. Objections raised by other similar agencies, as well as Interior. Determined not to include in standard form.

Clause 8 - MATERIALS AND WORKMANSHIP

Paragraph (a)

Comment (Interior): Suggests reference in line 10 to "type of construction, by name" be changed to read "patented process, by trade name."

Evaluation: Informal discussion with representative of Interior indicates feeling that "type of construction" is too broad - that contractor should be given option only if patented process has been named as a standard. Change made to meet objection.

Comment (Commerce-Public Roads): Suggests revision of sentence beginning, in line 15, with the words "The Contractor".

Evaluation: Adopted.

Comment (Commerce-Maritime): Suggests addition, after "work" in 5th line from bottom, of "however, such approval does not relieve the contractor of his responsibility for furnishing material to conform to the specifications."

Evaluation: Considered unnecessary in view of requirement of Standard Form 23 for strict compliance with the specifications.

Comment (SBA): Suggests specific statement that dispute as to equality is subject to Disputes clause.

Evaluation: Need has not been apparent under present language and revision makes no substantive change as to decisions on equality. There are numerous areas where appeal is possible although no specific reference may not be made to the Disputes clause.

Paragraph (b)

Comment (Commerce-Public Roads, Interior, AGC): Question use of term "first Class" as susceptible of interpretation to mean "best".

Evaluation: Term changed to "skillful and workmanlike manner".

Clause 9 - INSPECTION

Paragraph (a)

Comment (AGC): Takes exception to changes, suggesting possibility of rejection on basis of faulty design or failure to produce satisfactory result even though contract requirements are met. Questions absence of mention of right of appeal.

Evaluation: In informal discussion with representative of AGC, it was agreed that comment was directed not at the proposed changes but at the clause itself. The comment was that of a member firm and did not represent a problem to AGC.

Paragraph (d)

Comment (Comp. Gen., GSA-General Counsel): Suggest substitute language for "whenever the quantity justifies it."

Evaluation: GSA language adopted.

Clause 11 - PERMITS AND RESPONSIBILITIES

Comment (Commerce, GSA-General Counsel): Suggest clarifying language changes.

Evaluation: Adopted in part.

Comment (NCHA): Add to next to last sentence "and the property of others."

Evaluation: Adopted.

Comment (AEC, Agriculture, BOB, Commerce, GAO, GSA, HHFA, Interior, NCHA):

Object to substitution of "inspection" for "acceptance."

Evaluation: Language suggested by GSA adopted to accomplish desired result.

Clause 15 - COVENANT AGAINST CONTINGENT FEES

Comment (AEC): Conform to Standard Form 32.

Evaluation: Adopted.

016

PROPOSED NEW CLAUSE - OTHER CONDITIONS AFFECTING THE WORK

Comment (SBA): To avoid ambiguity, this clause should indicate relief under clause 4 is not restricted by this clause.

Evaluation: Adopted.

Comment (AGC): The phrase "and all other matters which can in any way affect the work or the cost thereof under this contract" is most serious. It is ambiguous, does not spell out the exact responsibility so that the cost thereof can be accurately determined. Almost certainly will increase costs of construction by reason of increased contingencies. Reference to "all available" information is objectionable on grounds that contractors may not rely on information provided but must obtain background data.

Evaluation: Clause revised to meet objections.

Comment - PROPOSED ADDITIONAL CLAUSE FOR PRICE ADJUSTMENT FOR CHANGES IN WAGE RATES

Comment (Post Office): Suggests clause providing for price adjustment where wage rates predetermined by Secretary of Labor are not firm for duration of contract.

Evaluation: Discussion with representative of Department of Labor confirms that there is no need for such a clause. Only by "inadvertences" are rates changed after award and, under decisions of Comptroller General, price adjustment can be made in such cases without contract provision if costs are increased.

GENERAL SERVICES ADMINISTRATION

Washington 25, D. C.

December 3, 1958



The Honorable
The Secretary of Defense
Washington 25, D. C.

Dear Mr. Secretary:

Attached for your review and comment are proposed changes in certain construction contracting forms, Standard Forms 20, Invitation for Bids; 21, Bid Form; 22, Instructions to Bidders; and 23, Construction Contract.

These proposed changes are a part of an effort to achieve simplicity and uniformity of forms and procedures employed in Government construction contracting. The changes have been developed by the interagency Task Force for Review of Government Procurement Policies and Procedures, partially on the basis of suggestions made by Government agencies in response to a letter dated March 31, 1958, from the Administrator of General Services.

Additional changes are anticipated with respect to Late Bids and the Buy American Act. Agency comments on proposed regulations on these subjects were requested by letters dated June 20 and September 8, 1958, respectively.

Your review of the attached material and advice of concurrence, or recommendations for changes therein, by March 13, 1959, will be appreciated.

Members of your staff may obtain information concerning the enclosures by communicating with Herbert H. Spencer, Procurement Task Force (Code 183, Ext. 3167).

Sincerely yours


PHIL W. JORDAN, Chairman

Task Force for Review of Government
Procurement Policies and Procedures

Enclosures

PROPOSED CHANGES IN STANDARD FORMS
20, 21, 22, and 23

Standard Form 20, Invitation for Bids (Construction Contract).

Changes in this form are shown on the accompanying proposed revision thereof. The change in the language following the words "Sealed bids" is intended to avoid any misunderstanding that bids are limited to furnishing the items enumerated, i. e., labor, equipment, etc. Several agencies suggested inclusion of additional words, such as tools, utilities, and services, to avoid such misunderstanding.

The words which appear at the bottom of the current edition of the form concerning information regarding liquidated damages, etc. have been deleted as being unnecessary.

Standard Form 21, Bid Form.

Several changes will be observed on the accompanying proposed revised Standard Form 21, for which no explanation is deemed necessary. The words "furnish all labor, equipment, and materials and", following the words "the undersigned hereby proposes to", have been deleted for the same reason as is given above for the similar change in Standard Form 20, and to maintain consistency in these related standard forms. Spaces have been provided on the face, rather than on the reverse (as on the current edition), for insertion of dates of commencement and completion of the work because of the importance of these items. The small business representation has been revised to reflect the most recent definition of small business prescribed by the Small Business Administration for purposes of procurement in the construction industry.

Standard Form 22, Instructions to Bidders.

(Explanatory Note: Only those paragraphs proposed to be changed are set forth herein. New language in the paragraphs is underscored; and language deleted is bracketed [] .)

1. Paragraph 1 - Explanation to Bidders.

The words "invitation for bids" have been added to make it clear that the paragraph applies to any part of the invitation for bids, rather than only to the drawings and specifications. Directions for acknowledgment of addenda have been provided.

Explanations to Bidders. Any explanation desired by a bidder / s / regarding the meaning or interpretation of the invitation for bids, drawings , / and / specifications , etc. must be requested in writing and with sufficient time allowed for a reply to reach / them / him before the submission of / their / his bid / s /. / Oral explanations or instructions given before the award of the contract will not be binding. / Any interpretation made will be in the form of an addendum to the / specifications or / invitations for bids, drawings , specifications, etc., and will be furnished to all bidders , and its receipt by the bidder shall be acknowledged in the space provided on the Bid Form (Standard Form 21) or by letter or telegram received prior to bid opening. Oral explanations or instructions given before the award of the contract will not be binding.

2. Paragraph 2 - Conditions at Site of Work.

This paragraph is revised to broaden its scope by directing bidders to ascertain the nature and location of the work, the general and local conditions, and all other matters which can affect the work or the cost thereof. The change in title is made to indicate the broader scope of the paragraph.

/ Conditions at Site of Work / Other Conditions Affecting the Work. / Bidders should visit the site to ascertain pertinent local conditions readily determined by inspection and inquiry, such as the location, accessibility and general character of the site, labor conditions, the character and extent of existing work within or adjacent thereto, and any other work being performed thereon. / Bidders should ascertain the nature and location of the work, the general and local conditions, and all other matters which can in any way affect the work or the cost thereof. Failure to do so will not relieve bidders from responsibility for estimating properly the difficulty or cost of successfully performing the work. The Government will assume no responsibility for any understanding or representations concerning conditions at the site made by any of its officers or agents prior to the execution of the contract.

3. Paragraph 4 - Bid Guaranty.

In the interests of simplification and because the language is considered unnecessary, the proviso in the last sentence of the first subparagraph is omitted.

Where security is required, failure to submit the same with the bid may be cause for rejection. The bidder, at his option, may furnish

a bid bond, postal money order, certified check, or cashier's check, or may deposit, in accordance with Treasury Department regulations, bonds or notes of the United States (at par value) as security in the amount required. /: Provided, That where the total amount of the bid is \$2,000 or less, the contracting agency may declare a bid bond unacceptable by so stating in the specifications or Invitations for Bids. /

No changes are proposed in the remainder of Paragraph 4.

4. Paragraph 5 - Preparation of Bids.

This paragraph is revised to state that bids should be manually signed (rather than must), and to include reference to telegraphic bids in (a) rather than (d); to provide in (b) that where the bid form explicitly requires bidders to quote on all items, failure to do so will, rather than may, disqualify the bid; and to make the language of (d) applicable to all modifications rather than only to telegraphic modifications.

- (a) Bids shall be submitted on the forms furnished, or copies thereof, and /must/ should be manually signed. If erasures or other changes appear on the forms, each /such/ erasure or change must be initialed by the person signing the bid. Unless specifically called for, telegraphic bids will not be considered.
- (b) The bid form /of bid/ will provide for quotation of a price /, / or prices /, / for one or more items, which may be lump sum bids, alternate prices, scheduled items resulting in a bid on a unit of construction or a combination thereof, etc. /Where required on the bid form, bidders must quote on all items and they are warned that failure to do so may disqualify the bid. / Where the bid form explicitly requires that the bidder quote on all items, failure to do so will disqualify the bid. When quotations on all items are not required, bidders should insert the words "no bid" in the space provided for any item on which no quotation is made.
- (c) Unless called for, /Alternate/alternate bids will not be considered. /unless called for. /
- (d) /Unless specifically called for, telegraphic bids will not be considered. / Modifications /by telegraph/ of bids already submitted will be considered if received prior to the time fixed in the Invitation for Bids for receiving bids. Telegraphic modifications will be considered, but /shall/ should not reveal the amount of the original or revised bid.

5. Paragraph 7 - Receipt and Opening of Bids.

The title of this paragraph is changed to "Receipt and Public Opening of Bids" to reflect the new subparagraph (d) discussed below.

Revision of subparagraphs (a) and (b) is deferred pending determination of the Governmentwide policy with respect to Late Bids concerning which agencies were requested to comment by letter dated June 20, 1958. No change is proposed in subparagraph (c).

Subparagraph (d) is added as the subject matter is closely related to that of paragraph 7. It appears as paragraph 9 of the current edition.

- (d) At the time fixed for the opening of bids, their content/s will be made public for the information of bidders and others properly/interested, who may be present either in person or by representative.

6. Paragraph 8 - Withdrawals of Bids.

This paragraph is revised to make it clear that a bid may not be withdrawn after the time fixed for opening rather than after the particular bid has been opened.

Bids may be withdrawn on written or telegraphic request received from bidders prior to the time fixed for opening. Negligence on the part of the bidder in preparing the bids confers no right for the withdrawal of the bid thereof after it has been opened. the time fixed for the opening of bids.

7. Paragraph 9 - Bidders Present.

This paragraph is to be omitted as a separate paragraph but appears as paragraph 7 (d).

8. Paragraph 10 - Bidders Interested in More than One Bid.

This paragraph is to be omitted. While problems of double bidding may require special handling in agency procedures, for the reasons set forth below it is considered undesirable to include general policy on this subject in Standard Form 22.

The first sentence may be interpreted to require that bids received from two or more bidders must be rejected if such bidders are divisions, sub-

sidlaries, or affiliates of a parent firm, even though such divisions, etc., ordinarily compete with one another in their normal business operations (e. g., divisions of General Motors Corporation, subsidiaries of U. S. Steel). It is to be noted that the language of this sentence is substantially the same as that of a Navy statute repealed in 1948 (R. S. 3722).

The second sentence limits the application of the first sentence and, with the omission of the first sentence, becomes unnecessary.

9. Paragraph 11 - Award of Contract.

The paragraph is renumbered as paragraph 9 and is changed as follows:

9 - Award of Contract.

- (a) /The contract will be awarded as soon as practicable to the lowest/ Award of contract, if any, will be made with reasonable promptness to that responsible bidder, whose conforming bid is most advantageous to the Government, price and other factors considered. /provided his bid is reasonable and it is to the interest of the Government to accept it./
- (b) The Government /reserves the right to/ may waive any informality in bids received when such waiver is in /the/ its interest /of the Government/. In case of error in the extension of prices, the unit price will govern.
- (c) The Government /further reserves the right to/ may accept /or reject/ any /or all/ item/s /or combination of items of /any/ a bid, unless precluded by the invitation for bids or the bidder /qualifies such bid by specific/ includes in his bid a restrictive limitation. /; also to make an award to the bidder whose aggregate bid on any combination of bid items is low./

10. Paragraph 12 - Rejection of Bids.

The paragraph is renumbered as paragraph 10 and is editorially changed as follows:

10 - Rejection of Bids.

The Government /reserves the right to/ may reject any and all bids when /Such rejection is/ in /the/ its interest

/of the Government/; /to reject/ the bid of a bidder who has previously failed to perform properly or complete on time contracts of a similar nature; /and to reject/ or the bid of a bidder who is not, in the opinion of the Contracting Officer, in a position to perform the contract.

11. Paragraph 13 - Contract and Bonds.

The paragraph is renumbered as paragraph 11 and is editorially changed as follows:

11 - Contract and Bonds.

The bidder to whom award is made /shall/ will , within the time established in the bid, /and when required/ enter into a written contract with the Government and , when required, furnish performance and payment bonds on Government standard forms. The bonds /shall/ will be in the amounts indicated in the specifications or the Invitation for Bids.

Standard Form 23, Construction Contract.

Several self-explanatory changes will be observed on the accompanying proposed revised Standard Form 23. The words "furnish all labor, equipment, and materials and" have been deleted from the "statement of work" for the same reason as is given previously for the similar change in Standard Form 20, and to maintain consistency in these related standard forms.

STANDARD FORM 20
REVISED NOVEMBER 1958
GENERAL SERVICES ADMINISTRATION
GENERAL REGULATION NO. 13

FOR DISCUSSION PURPOSES ONLY

REFERENCE

INVITATION FOR BIDS
(CONSTRUCTION CONTRACT)

DATE

NAME AND LOCATION OF PROJECT

DEPARTMENT OR AGENCY

BY (Issuing office)

Sealed bids in

for the work described herein will be received until

in

and then publicly opened.

Information regarding bidding material, bid guarantee, and bonds

Description of work

STANDARD FORM 21
REVISED NOVEMBER 1958
GENERAL SERVICES ADMINISTRATION
GENERAL REGULATION NO. 13

BID FORM
(CONSTRUCTION CONTRACT)

FOR DISCUSSION PURPOSES ONLY

REFERENCE

*Read the Instructions to Bidders (Standard Form 22)
This form to be submitted in*

DATE OF INVITATION

NAME AND LOCATION OF PROJECT

NAME OF BIDDER (Type or print)

(Date)

TO:

In compliance with the above-dated invitation for bids, the undersigned hereby proposes to perform all work for

In strict accordance with the General Provisions (Standard Form 23A), specifications, schedules, drawings, and conditions, for the following amount(s)

The undersigned agrees that, upon written acceptance of this bid, mailed or otherwise furnished within _____ calendar days (_____ calendar days unless a shorter period be inserted by the bidder) after the date of opening of bids, he will within _____ calendar days (unless a shorter period is allowed) after receipt of the prescribed forms, execute Standard Form 23, Construction Contract, and give performance and payment bonds on Government standard forms with good and sufficient surety.

The undersigned agrees, if awarded the contract, to commence the work within _____ calendar days after the date of receipt of notice to proceed, and to complete the work within _____ calendar days after the date of receipt of notice to proceed.

(Continue on other side)

The undersigned acknowledges receipt of the following addenda to the invitation for bids, drawings, and/or specifications, etc. (Give number and date of each)

The undersigned represents (Check appropriate boxes):

- (1) That he ☐ is, ☐ is not, a small business concern. (For this purpose, a small business concern is one that (a) is independently-owned and operated, (b) is not dominant in its field of operation, and (c) with affiliates, had average annual receipts for the preceding three years of \$5,000,000 or less. See Code of Federal Regulations, Title 13, Part 103, as amended, for additional information.)
- (2) (a) That he ☐ has, ☐ has not, employed or retained any company or person (other than a full-time bona fide employee working solely for the bidder) to solicit or secure this contract; and
(b) That he ☐ has, ☐ has not, paid or agreed to pay any company or person (other than a full-time bona fide employee working solely for the bidder) any fee, commission, percentage or brokerage fee contingent upon or resulting from the award of this contract, and agrees to furnish information relating thereto as requested by the Contracting Officer. (For interpretation of this representation, including the term "bona fide employee," see Code of Federal Regulations, Title 44, Chapter I, Part 150.)
- (3) That he operates as an ☐ individual, ☐ partnership, ☐ joint venture, ☐ corporation, incorporated in State of _____

Enclosed is bid guarantee, consisting of

in the amount of

NAME OF BIDDER (Type or print)	FULL NAME OF ALL PARTNERS (Type or print)
BUSINESS ADDRESS (Type or print)	
BY (Signature in ink. Type or print name under signature)	
TITLE (Type or print)	

DIRECTIONS FOR SUBMITTING BIDS

Envelopes containing bids, guarantee, etc., must be sealed, marked, and addressed as follows:

CAUTION: Bids should not be qualified by exceptions to the bidding conditions.

STANDARD FORM 23
REVISED NOVEMBER 1958
GENERAL SERVICES ADMINISTRATION
GENERAL REGULATION NO. 13

CONSTRUCTION CONTRACT

(See instructions on reverse)

CONTRACT NO.

DATE OF CONTRACT

NAME AND ADDRESS OF CONTRACTOR

CHECK APPROPRIATE BOX

- ☐ Individual
☐ Partnership
☐ Joint Venture
☐ Corporation, incorporated
in the State of _____

DEPARTMENT OR AGENCY

CONTRACT FOR (Work to be performed)

PLACE

AMOUNT OF CONTRACT (Express in words and figures)

ADMINISTRATIVE DATA (Optional)

THIS CONTRACT, entered into this date by The United States of America, hereinafter called the Government, represented by the Contracting Officer executing this contract, and the individual, partnership, joint venture, or corporation named above, hereinafter called the Contractor, witnesseth that the parties hereto do mutually agree as follows:

Statement of Work. In consideration of payment by the Government of the amount stated above, the Contractor shall perform the above described work in strict accordance with the General Provisions (Standard Form 23A), specifications, schedules, drawings, and conditions all of which are made a part hereof and designated as follows:

WORK SHALL BE STARTED

WORK SHALL BE COMPLETED

Alterations. The following changes were made in this contract before it was signed by the parties hereto:

In witness whereof, the parties hereto have executed this contract as of the date entered on the first page hereof.

THE UNITED STATES OF AMERICA

CONTRACTOR

By _____

(Name of Contractor)

By _____
(Signature)

(Official title)

(Title)

INSTRUCTIONS

1. This form shall be used, as required by GSA regulations, for contracts for the construction, alteration, or repair of public buildings or works.

2. The full name and business address of the Contractor must be inserted in the space provided on the face of the form. The Contractor shall sign in the space provided above with his usual signature and typewrite or print name under all signatures to the contract and bonds.

3. An officer of a corporation, a member of a partnership, or an agent signing for the Contractor shall place his signature and title after the word "By" under the name of the Contractor. A contract executed by an attorney or agent on behalf of the Contractor shall be accompanied by two authenticated copies of his power of attorney, or other evidence of his authority to act on behalf of the Contractor.

DIGEST AND EVALUATION OF COMMENTS RECEIVED FROM AGENCIES AND
ASSOCIATED GENERAL CONTRACTORS OF AMERICA, INC. IN RESPONSE
TO LETTER DATED DECEMBER 3, 1958

PART A - LIST OF RESPONDING AGENCIES

<u>Agency</u>	<u>Substantive Comment Received</u>	<u>Concurrence or No Objection</u>
Agriculture Department	x	
Atomic Energy Commission	x	
Bureau of the Budget		x
Civil Aeronautics Board		x
Central Intelligence Agency		x
Civil and Defense Mobilization		x
Civil Service Commission		x
Commerce Department	x	
Comptroller General	x	
Defense Department	x	
Federal Communications Commission		x
Federal Power Commission		x
Health, Education and Welfare	x	
Housing and Home Finance Agency	x	
Interior Department	x	
International Cooperation Administration		x
Interstate Commerce Commission		x
Justice Department		x
Librarian of Congress		x
Panama Canal Company	x	
Post Office Department	x	
Railroad Retirement Board		x
Renegotiation Board		x
Securities and Exchange Commission		x
Selective Service System		x
Small Business Administration	x	
Smithsonian Institution		x
State Department		x
Subversive Activities Control Board		x
Tennessee Valley Authority		x
Treasury Department		x
U. S. Information Agency		x
Veterans Administration	x	

PART B - DIGEST AND EVALUATION OF SUBSTANTIVE COMMENTS

Standard Form 20 - Invitation for Bids

Comment (Commerce; Maritime, Public Roads): Question change proposed in line following "Sealed Bids." Same question applies to like changes in SF's 21 and 23.

Evaluation: Absence of any other comment indicates changes proposed are satisfactory to the majority of agencies.

Standard Form 21 - Bid Form

Comment (HHFA): For purposes of consistency with use elsewhere of "award", and to avoid ambiguity such as discussed in 38 C.G. 376, delete "upon written acceptance of this bid" from next to last paragraph on face of form, and substitute "upon written award of the contract."

Evaluation: Use of "acceptance" is designed to create a contract upon placing an acceptance of the bid in the mails. This is extremely desirable from an administrative viewpoint as it eliminates the necessity of assuring receipt by the bidder of an award within the time allowed for acceptance. It is to be noted that the ambiguity discussed in 38 C.G. 376 arose from the wording of the acceptance.

Comment (Commerce): Delete from last paragraph on face, in the two places where they appear, the words "after the date of receipt of" and substitute therefor the words "from the effective date of the."

Evaluation: Present language is unambiguous. "Effective date" is open to question as to whether it is the date notice to proceed is issued, received, or another date stated therein.

Comment (AEC). Include heading at top of page 2 - "Receipt of Addenda."

Evaluation: Adopted.

Comment: (Commerce, FAA): Delete provision for acknowledgement of addenda.

Evaluation: Most agencies desire this provision. It does not preclude use of other methods of acknowledgement and representative of FAA advised informally that retention thereof presented no difficulty.

Comment (DOD): Conform definition of small business to 13 CFR 103.3(f) (correctly 121.3-3(f)).

Evaluation: Definition used is identical to that on Standard Form 19 and is in conformity with the published SBA definition.

(NOTE: Reference in Contingent Fee Representation changed to refer to FPR.)

Standard Form 22 - Instructions to Bidders

Numbers and titles assigned to instructions are those used in the current edition of this form.

Instruction No. 1 - Explanation to Bidders

Comment (Commerce, FAA). Delete language specifying manner in which addenda should be acknowledged.

Evaluation: Representative of FAA informally agreed to our disregarding this comment stating that they had used SF 22 without difficulty in the past. (As a practical matter, FAA can obtain acknowledgement by return of addenda, as they prefer, by so providing in the addenda.)

Instruction No. 2 - Conditions at Site of Work

Comment (AEC, DOD). Delete "Other" from title.

Evaluation: Adopted.

Comment (Commerce): Revise second sentence to state failure to ascertain conditions will not relieve contractor from performance nor form a basis for additional compensation.

Evaluation: Revision considered unnecessary as the thought is conveyed by existing language.

Comment (AEC, SBA, Associated General Contractors): Avoid possible construction that this clause limits Changed Conditions clause of Standard Form 23A.

Evaluation: Adopted.

Comment (AEC, Commerce, GAO). Clarify relationship to Instruction No. 1.

Evaluation: Adopted.

Comment (Associated General Contractors). Calls attention to previously expressed opposition to contractual counterpart proposed in letter of August 21, 1958.

Evaluation: Changes made to meet objections.

Instruction No. 5 - Preparation of Bids

Comment (Commerce, DOD): Object to proposed substitution of "should" for "must" in paragraph (a).

Evaluation: "Must" reinstated.

Comment (AEC): Add at end of second sentence, paragraph (a) "or by a duly authorized representative of the bidder."

Evaluation: Although there may be occasions where the person signing the bid may not be available to initial a change there has been no indication of a problem. The present requirement has the advantage that it permits ready identification of the person initialing a change.

Comment (AEC): In the 3d sentence, paragraph (a), change "called for" to "authorized" to permit authorization of either written or telegraphic bids.

Evaluation. Adopted.

Comment (Commerce): Add sentence in paragraph (d) requiring modifications to be signed by a person authorized to sign bids.

Evaluation: Adopted.

Comment (Interior): Substitute "opening" for "receiving" in line 4, paragraph (d).

Evaluation: Adoption would be inconsistent with FPR 1-2.302-1(b).

Instruction 6-Submission of Bids

Note: Change in Instruction 7 prompted addition to this instruction of the substance of the language in paragraph 7 (c) of the current edition.

Instruction 7 - Receipt and Opening of Bids

Note: This instruction has been limited to late bids, modifications, or withdrawals and conforms to FPR 1-2.302.

Instruction No. 10 - Bidders interested in more than one bid

Comment (HEW): Recommend retention of a provision covering double bidding to avoid establishment of conflicting policies by various agencies.

Evaluation: See evaluation of SBA comment.

Comment(SBA): States omission is undesirable. Cites criticism of Committee on Government Operations, House of Representatives (House Report No. 1163, 85th Congress, 1st Session); also certain decisions of the Comptroller General.

Evaluation: Review of the references cited indicates that there are situations where multiple bidding is unobjectionable. The provision proposed to be omitted is objectionable as it does not recognize this fact. Since any case involving multiple bidding should be considered on the basis of the facts in that particular case, it is considered appropriate to exclude reference to the subject from this form.

Instruction No. 11 - Award of Contract

Comment (Commerce): Suggests statement in paragraph (a) that any factors specifically stated in the invitation will be considered and that where none are stated, other factors will be considered.

Evaluation. Where specific factors are stated they must, of course, be considered. However, this may not preclude consideration of factors not stated also. Language proposed by Task Force has been retained.

Comment (Commerce): Add at end of paragraph (b) "except where it is patently clear that the unit price is erroneous."

Evaluation: Adopted as in keeping with GAO decisions (e.g., 36 CG 429).

Comment (GAO): Recommend regulatory material state language does not preclude claim of error.

Evaluation: Objective is substantially attained by adoption of Commerce comment immediately above.

Instruction No. 12 - Rejection of Bids

Comment (AEC; BOB; Commerce, P.R., FAA; HHFA, Interior, Panama Canal Company; Post Office; VA). Collectively these comments suggest clarification of the proposed language. Some suggest that additional specific bases for rejection be included (i.e., unreasonableness (AEC); unbalanced (Commerce, PR)). HHFA suggests no specific bases be included - that reliance be placed upon simple statement that the Government may reject any and all bids.

Evaluation: This provision is reduced to a statement that the Government may reject any and all bids when in its interest. This statement will permit rejection of a bid by a bidder who previously failed to perform properly; who is not in a position to perform; a bid which is unreasonable, etc. Furthermore, greater consistency with SF 33 will be achieved.

Comment (SBA). Suggests statement that bid of a small business concern that has defaulted on past contracts may not be rejected, if the unsatisfactory performance were due solely to lack of capacity or credit, without first referring case to SBA.

Evaluation: As this would constitute an instruction to contracting officers rather than to bidders it has not been included. However, the point is adequately covered in FPR 1-1.709.

Instruction No. 13 - Contract and Bonds

Comment (Agriculture). Suggests statement that bidder, in the event of failure to execute contract and bonds, shall be liable to the Government for excess costs and the bid guarantee shall be subject to forfeiture to the extent of such excess costs.

Evaluation: Being considered in separate project on Bid Guarantees.

Comment (AEC): To avoid inference that reference is to time, substitute "if" for "when" in line 3.

Evaluation: Adopted.

Comment (Commerce, FAA). Substitute "whose bid is accepted" for "to whom award is made", in line 1.

Evaluation: Adopted for consistency with SF 21.

Comment (HHFA): Suggests revision of last sentence to conform to proposed revision of Instruction No. 1.

Evaluation: Adopted.

Standard Form 23 - Construction Contract

Comment (AEC): Expand Instruction No. 3 to cover execution by joint venture.

Evaluation: Present instruction is adequate.

Comment (GAO): If form is to be used for negotiated procurement, should provide for inclusion of actual date contract was signed, for purposes of properly recording obligations pursuant to section 1311 (a), 68 Stat. 830.

Evaluation: It is believed undesirable to provide for additional date on form. However, objective will be achieved by adding to FPR 1-16.403 the following:

"Whenever either Standard Form 19 or 23 is used for a negotiated contract, the actual date on which the contract is signed shall be shown thereon."

Comment: (Panama Canal Co.): Provide space below signature of contracting officer for higher approval.

Evaluation: Move line for "official title" up 1/2 inch.

Comment: (GSA, General Counsel): Recommends revision of Statement of Work to read:

"The Contractor shall perform the above described work, and the Government will make payment therefor in the amount stated above, in strict accordance with the General Provisions (Standard Form 23A), specifications, schedules, drawings and conditions, all of which are made a part hereof and designated as follows:"

Evaluation: Adopted in principle.

OK

GENERAL SERVICES ADMINISTRATION

FPR CIRCULAR NO. _____

Washington 25, D. C.

FEDERAL PROCUREMENT REGULATIONS

1. Material Transmitted. The attached pages contain revisions to section 1-1.503; Subpart 1-16.4; and sections 1-16.901-20, 1-16.901-21, 1-16.901-22, 1-16.901-23, and 1-16.901-23A.

2. Summary of Additions or Revisions.

(a) Section 1-1.503 is revised to conform the Covenant Against Contingent Fees as recently changed in Standard Form 32.

(b) Section 1-16.401 is revised to prescribe new editions of certain standard construction contract forms (Standard Forms 20, 21, 22, 23, and 23A); section 1-16.402-3 is revised to include reference to Standard Form 19A; and certain self-explanatory changes are made in sections 1-16.403, 1-16.404, and 1-16.406. Sections 1-16.402-4 and 1-16.404-1 are omitted as no longer necessary.

(c) Sections 1-16.901-20 through 1-16.901-23A are revised to substitute the new editions for the former editions of the standard forms prescribed in such sections.

(d) Standard Forms 20, Invitation for Bids (Construction Contract); 21, Bid Form (Construction Contract); and 23, Construction Contract, are revised to incorporate changes indicated to be desirable by operating experience

Tab V

with these forms. It will be noted that Standard Forms 21 and 23 incorporate by reference Standard Form 19A, Labor Standards Provisions Applicable to Contracts in Excess of \$2,000. Use of Standard Form 19A in this manner permits omission of the labor provisions from Standard Form 23A, thus allowing identification of specific labor clauses by the same numbers in all contracts over \$2,000, and enabling contractors more easily to incorporate the labor clauses in subcontracts as required by Department of Labor regulations. Furthermore, a change in the labor clauses will no longer require reprinting the entire Standard Form 23A.

(e) Standard Form 22, Instructions to Bidders (Construction Contract), is rather substantially changed. The principal changes are outlined in the following paragraphs:

(1) Explanations to Bidders - enlarged to cover possible questions as to the meaning of any portion of the bidding documents; also, to state the manner in which receipt of addenda is to be acknowledged.

(2) Conditions Affecting the Work - enlarged to state in clearer terms the need for ascertaining conditions which may affect performance of the work and the effect of bidder's failure to do so.

(3) Bid Guarantee - reflects the most recently established Government policy (see FPR).

(4) Preparation of Bids - provides that failure to quote on all items where bid form explicitly so requires will disqualify the bid.

(5) Late Bids and Modifications or Withdrawals - reflects the most recent Government policy (see FPR).

(6) Award of Contract - revised to reflect the language of the Federal Property and Administrative Services Act of 1949.

(7) The provision "Bidders Interested in More than One Bid," which appeared in the previous edition, is omitted. It is believed the provision has served little, if any, useful purpose. However, agencies that have problems of double bidding may develop provisions to meet such problems.

(f) Standard Form 23A, General Provisions (Construction Contract), is also rather substantially changed. The principal changes are discussed below:

(1) Clause 1, Definitions - revised to define the term "head of the Federal agency" conformably to FPR 1-1.204. Use of the term "head of the Federal agency," in this form as well as in Standard Form 19, Invitation, Bid, and Award (Construction, Alteration, or Repair), establishes a single term in Government construction.

(2) Clause 5, Termination for Default-Damages for Delay-Time Extensions - revised to make it more easily understood; also, to establish that delays of subcontractors and suppliers, to be excusable to the prime contractor, must be unforeseeable and beyond the control and without the fault or negligence of both the contractor and such subcontractors or suppliers.

(3) Clause 6, Disputes - revised to conform substantially to the Disputes clause in Standard Form 32, General Provisions (Supply

Contract). It limits the finality of administrative decisions in accordance with Public Law 356, 83d Congress; also, while permitting consideration of related law questions, it is made clear that decisions thereon are subject to the statutory limitation on the finality of law determinations by administrative officials.

(4) Clause 7, Payments to Contractors - revised to liberalize payment provisions. Under certain conditions, payment may be made for material delivered at locations other than the site; also, upon substantial completion of the work, payment may be made of any retained percentages in excess of the amount needed for the Government's protection.

(5) Clause 8, Assignment of Claims - is added. Reference is included to the National Aeronautics and Space Administration pursuant to Executive Order 10824, June 2, 1959.

(6) Clause 9, Material and Workmanship - revised to state clearly that brand names, etc., unless otherwise provided, are to be regarded only as establishing standards. Work is required to be performed "in a skillful and workmanlike manner," a term which is believed more meaningful than the former term "first class."

(7) Clause 12, Permits and Responsibilities - changed to refer to any "necessary" licenses, etc.; to "applicable" laws, codes, etc.;

also, to add a requirement on safety precautions, and to clarify the date at which the contractor's responsibility for the work ceases.

(8) Clause 13, Conditions Affecting the Work - included as the contractual counterpart of the similar provision in the Instructions to Bidders, Standard Form 22.

(9) Clause 19, Buy American Act - revised to conform to the most recent regulations on this subject (see FPR Subpart 1-6.2).

(10) Clause 21, Nondiscrimination in Employment - changed to substitute the latest required clause.

(11) Clauses 20 through 26 of the 1953 edition of Standard Form 23A are omitted. (See discussion concerning use of Standard Form 19A in paragraph 2(d) above.)

3. Effective Date. The material transmitted herewith is effective but may be observed earlier.

FRANKLIN FLOETE
Administrator of General Services

COPY

COMPTROLLER GENERAL OF THE UNITED STATES
Washington 25

7 May 1959

B-130714

February 21, 1958

Dear Mr. Secretary:

Further reference is made to your letter of May 15, 1955, requesting our decision relative to an appeal from a determination by the contracting officer that Bearson Radio & Phonograph Corporation should refund approximately \$176,000, representing overpayments received by it on account of overhead claimed under certain research and development contracts entered into with the National Bureau of Standards. Our decision on the questions presented was addressed to you August 4, 1955, B-130714, 35 Comp. Gen. 63.

You were advised in the decision (1) that under the contracts involved and the facts of record in this case the contracting officer was well within his authority in determining the amount of the overpayments and requesting repayment by the contractor, and that he would have been remiss in his duty had he not taken the action indicated inasmuch as the administrative agency concerned is primarily responsible for recovering payments illegally or erroneously made under its contracts; (2) that the contractor, having submitted his records and papers for examination, is legally obligated to refund the amount of the payments which had been illegally or erroneously received by it from the Government as requested by the contracting officer, (3) that the contracting officer was acting reasonably and within his authority in demanding that the contractor compute the overhead chargeable on the basis of the contractor's own cost-accounting system, established and used by it in determining the actual overhead costs incurred and distributed to the contracts and, further, that the record adequately supports the conclusion that, had the contractor properly advised and informed the contracting officer regarding its cost-accounting practices, as it was legally obligated to do, appropriate adjustments would have been made pursuant to the terms of the contracts on a more current basis.

In response to his letter of November 23, 1955, with further reference to this matter, Mr. Bernard A. Hall, Assistant General Counsel of your Department, was advised that the decision was conclusive, on your Department as to the questions of law involved but it was understood that the normal appeal procedure would be followed and that the ultimate determination presumably would be based upon a review of the entire matter. He was advised further that a reconsideration of the decision might be requested in the event you so desired.

Following a number of conferences held in your Department during 1955 and 1956, attended by representatives of our Office, hearings on the contractor's appeal were begun May 1, 1957, by the Appeals Board

of the Department of Commerce, Appeals Board Docket No. HHS-1, and representatives of our Office were called and appeared before the Board. The Board issued its opinion and decision dated August 14, 1957, which granted the contractor's appeal and included an order that appropriate steps be taken by National Bureau of Standards to relieve the contractor from "any further obligation under the Bureau's letter to Bureau dated September 22, 1954, and under any other document constituting a demand for refund within the area covered by the aforementioned \$176,312.17."

A copy of the Board's decision was transmitted informally to our Office and also a copy of a letter dated September 5, 1957, from the contracting officer to the contractor. In this letter the contracting officer referred to the opinion and decision of the Appeals Board of August 14, 1957, and stated that "In compliance with the order contained in the findings of the Appeals Board it is the purpose of this letter to relieve the Bureau Radio & Phonograph Corporation from any further obligation under my letter to you dated September 22, 1954, and any other documents which may constitute a demand for refund within the area covered by the aforementioned \$176,312.17."

We are enclosing a copy of a report on the opinion and decision of the Board in this letter which contains an analysis by representatives of our Office of the findings and conclusions of the Board. After a careful examination of the entire record available here we are unable to agree with the conclusions of the Board and are of the opinion that the Board's decision is erroneous and that it is not supported by substantial evidence. Therefore, the Board's opinion and decision may not be regarded as final and conclusive or as affording any proper basis for relieving the contractor from liability for the overpayments received by it on account of the performance of the contracts involved as determined by the contracting officer. In this connection, your attention is invited to the case of Maritime Aircraft, Inc. v. United States, 130 C. Cls. 686 (1955).

Accordingly, appropriate steps necessary to effect collection of the amount due the Government on account of these overpayments in the sum of \$176,312.17 should be taken promptly. It is requested that you advise us of the action taken by your Department to accomplish this collection.

Sincerely yours,

/s/ Joseph Campbell

Comptroller General
of the United States

The Honorable
The Secretary of Commerce

Enclosure

MEMO ROUTING SLIP

NEVER USE FOR APPROVALS, DISAPPROVALS,
CONCURRENCES, OR SIMILAR ACTIONS

1 NAME OR TITLE <i>Captain Jm Malloy</i>	INITIALS	CIRCULATE
ORGANIZATION AND LOCATION <i>Rm 3 D 774 Pentagon</i>	DATE	COORDINATION
2		FILE
		INFORMATION
3		NECESSARY ACTION
		NOTE AND RETURN
4		SEE ME
		SIGNATURE

REMARKS

Rete:

*Here's the definition we
agreed on over at
BSA last Thursday for
use in Form 33A
"Construction Contracts" —*

*There are no other problems
in this area*

FROM NAME OR TITLE

Dr. Kelly

DATE

16 July 60

ORGANIZATION AND LOCATION

TELEPHONE

77932

DD FORM 1 FEB 50

95

Replaces DA AGO Form 895, 1 Apr 48, and AFHQ
Form 12, 10 Nov 47, which may be used.

16-48487-1 GPO *

Case 59-192

July 27, 1960

Language of Clause 1(a) of SF 23A as agreed to in discussion with Mr. Vecchietti and Lt. Col. Ruby on July 21:

(a) The term "head of the agency" or "Secretary" means the Secretary, the Under Secretary, or any Assistant Secretary of the Department, or the head or any assistant head of the agency; and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the head of the agency or the Secretary as the case may be.

Explanation of Accompanying Drafts of Standard Construction
Contract Forms - Standard Forms 20, 21, 22, 23 and 23A

These drafts differ from the currently prescribed editions in that several clauses have been added while others have been omitted, substantive changes have been made in certain of the provisions, and others have been rewritten to improve their readability. The principal changes are set forth below.

Standard Form 20 - Invitation for Bids (Construction Contract)

Few changes have been made in this form. One of the changes is the omission of the note at the bottom of the current edition which will facilitate continuance of the invitation, where necessary, on the reverse of the form or on succeeding pages.

Standard Form 21 - Bid Form (Construction Contract)

References to Standard Form 19A, Labor Standards Provisions Applicable to Contracts in Excess of \$2,000, and Standard Form 23A, General Provisions (Construction Contract), have been included. SF 19A is to be used in conjunction with SF 23A. This will eliminate the need for duplicating the identical labor standards provisions in both forms. In addition, the bidder's representations on the reverse of the form have been revised to conform to current regulations.

Standard Form 22 - Instructions to Bidders (Construction Contract)

The statement immediately below the title, "These instructions are not to be incorporated in the contract," has been omitted. The quoted sentence improperly suggests that the instructions are not effective except during the bidding period.

Instruction No. 2 has been enlarged to state that bidders should visit the site and, in addition, take such other steps as may be reasonably necessary to ascertain conditions which may affect performance of the contract.

with some change,

Instruction No. 4, Bid Guarantee, has been revised to substitute ~~the~~ provision prescribed in the Federal Procurement Regulations, section 1-10.102-4(a)(2).

Instruction No. 5, Preparation of Bids, provides in paragraph (b) that where the bid form explicitly requires the bidder to bid on all items, failure to do so will disqualify the bid. Disqualification does not result from such failure in the absence of an explicit requirement.

Instruction No. 7, Late Bids and Modifications or Withdrawals, has been revised to substitute the provision prescribed in the Federal Procurement Regulations, section 1-2.201(a)(23), with a minor change.

Instruction No. 10 of the current edition, Bidders Interested in More Than One Bid, which prohibits submission of more than one bid by the same firm, has been omitted. There are a number of situations under which a firm properly may submit more than one bid.

Standard Form 23, Construction Contract

This form has been revised to state more clearly than the current edition that the Government as well as the contractor agrees to perform the contract. In addition, as in the Bid Form (SF 21), references to SF's 19A and 23A have been included.

Standard Form 23A, General Provisions (Construction Contract)

Clause 1, Definitions

Both the terms "head of the agency" and "Secretary" have been defined. This will permit use by Government agencies of whichever term the particular agency deems most suitable in its operations.

Clause 3, Changes

Reference to the "cost of performance" has been substituted for the reference to "the amount due under this contract" in the second sentence. This change conforms the language of Clauses 3 and 4. In both instances, an equitable adjustment in the contract price is to be made if the cost of performance is increased or decreased. In addition, the term "final payment" has been substituted for "final settlement" in this, as in other clauses, including Clause 4. It is considered that the date of final payment is a readily understandable term and a date that can be precisely established.

Clause 5, Termination for Default-Damages for Delay-Time Extensions

This clause has been generally redrafted for easier understanding. Paragraph (d) provides that delays of subcontractors or suppliers, to be excusable, must be unforeseeable, beyond the control and without the fault or negligence of both the contractor and the subcontractors or suppliers. Paragraphs (e) and (f), although not included in the current edition, require no explanation.

Clause 6, Disputes

As the appeals procedure is the same in both construction and supply procurement,

this clause has been revised to conform more nearly with the Disputes clause of SF 32, General Provisions (Supply Contract). It will be noted, however, that no reference is made to a determination by a court of competent jurisdiction.

Clause 7, Payments to Contractors

This clause has been enlarged to provide for (1) submission by the contractor of a breakdown of the contract price for purposes of determining progress payments, (2) providing elsewhere in the contract for payment for material delivered at locations other than the site, and (3) payment, when the work is substantially completed, of amounts retained in excess of the Government's needs.

Clause 8, Assignment of Claims

This clause is not contained in the current form. As written, it provides that moneys assigned under contracts with the listed agencies are not subject to "set-off" by the Government. However, provision is made in the clause for any such agency to provide otherwise. Also, a statement is included that the "no set-off" provision is inapplicable unless the contract is made in time of war or national emergency.

Clause 10, Inspection and Acceptance

This clause has been rearranged for easier reading. An attempt has been made to clarify the extent to which off-site inspection by the Government will be final and conclusive upon the Government. Paragraph (b) establishes a basis for acceptance of material or workmanship which does not conform to contract requirements, with an appropriate adjustment in contract price, when such acceptance is in the public interest. Paragraph (f) provides for acceptance promptly after completion and inspection of the work and sets forth the extent to which such acceptance is conclusive upon the Government.

Clause 12, Permits and Responsibilities

This clause includes a requirement for complying with applicable Federal, State and municipal laws, codes and regulations; also, it introduces a requirement that the contractor take proper safety and health precautions.

Clause 13, Provisions Affecting the Work

This clause is not in the current edition. It is the contractual counterpart of Instruction No. 2 of SF 22, Instructions to Bidders (Construction Contract),

Clause 19, Buy American

This clause is the same as that prescribed in FPR 1-6.205.

Clause 21, Nondiscrimination in Employment

This clause is the same as that prescribed in FPR 1-16.404-1(b).

~~Clause 22, Utilization of Small Business Concerns~~

~~This clause is not contained in the current edition and is included to foster subcontracting with small business concerns.~~

NOTE: Clauses 20 through 26 of the current edition are omitted in view of the decision to utilize SF 19A, which contains the identical clauses, in conjunction with SF 23A in Construction Contracts.

OCTOBER 1960

OR DISCUSSION PURPOSES ONLY

STANDARD FORM 20
EDITION
GENERAL SERVICES ADMINISTRATION
FED. PROC. REG. (41 CFR) 101-11.601

REFERENCE

INVITATION FOR BIDS
(CONSTRUCTION CONTRACT)

DATE

NAME AND LOCATION OF PROJECT

DEPARTMENT OR AGENCY

BY (*Issuing office*)

Sealed bids in

for the work described herein will be received until

at

and at that time publicly opened.

Information regarding bidding material, bid guarantee, and bonds

Description of work

Receipt of Amendments: The undersigned acknowledges receipt of the following amendments of the invitation for bids, drawings, and/or specifications, etc. (Give number and date of each):

The bidder represents (Check appropriate boxes):

- (1) That he ☐ is, ☐ is not, a small business concern. (For this purpose, a small business concern is a business concern, including its affiliates, which (a) is independently-owned and operated, (b) is not dominant in its field of operation, and (c) had average annual receipts for the preceding three fiscal years not exceeding \$5,000,000. For additional information see governing regulations of the Small Business Administration.)
- (2) (a) That he ☐ has, ☐ has not, employed or retained any company or person (other than a full-time bona fide employee working solely for the bidder) to solicit or secure this contract, and (b) that he ☐ has, ☐ has not, paid or agreed to pay any company or person (other than a full-time bona fide employee working solely for the bidder) any fee, commission, percentage or brokerage fee, contingent upon or resulting from the award of this contract; and agrees to furnish information relating to (a) and (b) above as requested by the Contracting Officer. (For interpretation of the representation, including the term "bona fide employee," see Code of Federal Regulations, Title 41, Subpart 1-1.5.)
- (3) That he operates as an ☐ individual, ☐ partnership, ☐ joint venture, ☐ corporation, incorporated in State of _____.

Enclosed is bid guarantee, consisting of

in the amount of

NAME OF BIDDER (Type or print)	FULL NAME OF ALL PARTNERS (Type or print)
BUSINESS ADDRESS (Type or print)	
BY (Signature in ink. Type or print name under signature)	
TITLE (Type or print)	

DIRECTIONS FOR SUBMITTING BIDS

Envelopes containing bids, guarantee, etc., must be sealed, marked, and addressed as follows:

CAUTION: Bids should not be qualified by exceptions to the bidding conditions.

OCTOBER 1960

FOR DISCUSSION PURPOSES ONLY

STANDARD FORM 21
EDITION
GENERAL SERVICES ADMINISTRATION
FED. PROC. REG. (41 CFR) 1-16.401

BID FORM
(CONSTRUCTION CONTRACT)

REFERENCE

*Read the Instructions to Bidders (Standard Form 22)
This form to be submitted in*

DATE OF INVITATION

NAME AND LOCATION OF PROJECT

NAME OF BIDDER (Type or print)

(Date)

TO:

In compliance with the above-dated invitation for bids, the undersigned hereby proposes to perform all work for

in strict accordance with the General Provisions (Standard Form 23A), Labor Standards Provisions Applicable to Contracts in Excess of \$2,000 (Standard Form 19A), specifications, schedules, drawings, and conditions, for the following amount(s)

different

The undersigned agrees that, upon written acceptance of this bid, mailed or otherwise furnished within calendar days (calendar days unless a shorter period be inserted by the bidder) after the date of opening of bids, he will within calendar days (unless a longer period is allowed) after receipt of the prescribed forms, execute Standard Form 23, Construction Contract, and give performance and payment bonds on Government standard forms with good and sufficient surety.

The undersigned agrees, if awarded the contract, to commence the work within ↑ calendar days after the date of receipt of notice to proceed, and to complete the work within ↑ calendar days after the date of receipt of notice to proceed.

(spaces to be enlarged)

(Continue on other side)

INSTRUCTIONS TO BIDDERS
(CONSTRUCTION CONTRACT)

1. **Explanations to Bidders.** Any explanation desired by a bidder regarding the meaning or interpretation of the invitation for bids, drawings, specifications, etc., must be requested in writing and with sufficient time allowed for a reply to reach bidders before the submission of their bids. Any interpretation made will be in the form of an amendment of the invitation for bids, drawings, specifications, etc., and will be furnished to all prospective bidders. Its receipt by the bidder must be acknowledged in the space provided on the Bid Form (Standard Form 21) or by letter or telegram received before the time set for opening of bids. Oral explanations or instructions given before the award of the contract will not be binding.
2. **Conditions Affecting the Work.** Bidders should visit the site and take such other steps as may be reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work or the cost thereof. Failure to do so will not relieve bidders from responsibility for estimating properly the difficulty or cost of successfully performing the work. The Government will assume no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of the contract, unless included in the invitation for bids, the specifications, or related documents.

3. **Bidder's Qualifications.** Before a bid is considered for award, the bidder may be requested by the Government to submit a statement regarding his previous experience in performing comparable work, his business and technical organization, financial resources, and plant available to be used in performing the work.

4. **Bid Guarantee.** Failure to furnish a required bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid.

A bid guarantee shall be in the form of a firm commitment, such as a bid bond, postal money order, certified check, cashier's check, irrevocable letter of credit or, in accordance with Treasury Department regulations, bonds or notes of the United States. Bid guarantees, other than bid bonds, will be returned (a) to unsuccessful bidders as soon as practicable after the opening of bids, and (b) to the successful bidder upon execution of such further contractual documents and bonds as may be required by the bid as accepted.

If the successful bidder withdraws his bid within the period specified therein for acceptance (60 days if no period is specified) or, upon acceptance thereof by the Government, fails to enter into the contract and give bonds within the time specified (10 days if no period is specified) after the forms are presented to him, he shall be liable for any difference by which the cost of procuring the work exceeds the amount of his bid, and the bid guarantee shall be available toward offsetting such difference.

5. **Preparation of Bids.** (a) Bids shall be submitted on the forms furnished, or copies thereof, and must be manually signed. If erasures or other changes

appear on the forms, each erasure or change must be initialed by the person signing the bid. Unless specifically authorized in the invitation for bids, telegraphic bids will not be considered.

(b) The bid form may provide for submission of a price or prices for one or more items, which may be lump sum bids, alternate prices, scheduled items resulting in a bid on a unit of construction or a combination thereof, etc. Where the bid form explicitly requires that the bidder bid on all items, failure to do so will disqualify the bid. When submission of a price on all items is not required, bidders should insert the words "no bid" in the space provided for any item on which no price is submitted.

(c) Unless called for, alternate bids will not be considered.

(d) Modifications of bids already submitted will be considered if received at the office designated in the invitation for bids by the time set for opening of bids. Telegraphic modifications will be considered, but should not reveal the amount of the original or revised bid.

6. Submission of Bids. Bids must be sealed, marked, and addressed as directed in the invitation for bids. Failure to do so may result in a premature opening of, or a failure to open, such bid.

7. Late Bids and Modifications or Withdrawals. Bids and modifications or withdrawals thereof received at the office designated in the invitation for bids after the exact time set for opening of bids will not be considered unless received before award and (a) they are submitted by mail (or by telegraph, if authorized) and (b) it is determined by the Government that late receipt was due solely to either (1) delay in the mails (or by the telegraph company, if

telegraphic bids are authorized) for which the bidder was not responsible or (2) mishandling by the Government after receipt at the Government installation. However, a modification which is received from an otherwise successful bidder and which makes the terms of the bid more favorable to the Government will be considered at any time it is received and may thereafter be accepted.

8. **Withdrawal of Bids.** Bids may be withdrawn by written or telegraphic request received from bidders prior to the time set for opening of bids.

9. **Public Opening of Bids.** Bids will be publicly opened at the time set for opening in the invitation for bids. Their content will be made public for the information of bidders and others interested, who may be present either in person or by representative.

10. **Award of Contract.** (a) Award of contract will be made to that responsible bidder whose bid, conforming to the invitation for bids, is most advantageous to the Government, price and other factors considered.

(b) The Government may, when in its interest, reject any or all bids or waive any informality in bids received.

(c) The Government may accept any item or combination of items of a bid, unless precluded by the invitation for bids or the bidder includes in his bid a restrictive limitation.

11. **Contract and Bonds.** The bidder whose bid is accepted will, within the time established in the bid, enter into a written contract with the Government and, if required, furnish performance and payment bonds on Government standard forms in the amounts indicated in the invitation for bids or the specifications.

OCTOBER 1960

FOR DISCUSSION PURPOSES ONLY

STANDARD FORM 23
EDITION
GENERAL SERVICES ADMINISTRATION
FED. PROC. REG. (41 CFR) 1-16.401

CONSTRUCTION CONTRACT
(See instructions on reverse)

CONTRACT NO. _____

DATE OF CONTRACT _____

NAME AND ADDRESS OF CONTRACTOR _____

CHECK APPROPRIATE BOX

- ☐ Individual
☐ Partnership
☐ Joint Venture
☐ Corporation, incorporated in the
State of _____

DEPARTMENT OR AGENCY _____

CONTRACT FOR (Work to be performed) _____

PLACE _____

CONTRACT PRICE (Express in words and figures) _____

ADMINISTRATIVE DATA (Optional) _____

The United States of America (hereinafter called the Government), represented by the Contracting Officer executing this contract, and the individual, partnership, joint venture, or corporation named above (hereinafter called the Contractor), mutually agree to perform this contract in strict accordance with the General Provisions (Standard Form 23A), Labor Standards Provisions Applicable to Contracts in Excess of \$2,000 (Standard Form 19A), and the following designated specifications, schedules, drawings, and conditions:

WORK SHALL BE STARTED _____

WORK SHALL BE COMPLETED _____

Alterations. The following alterations were made in this contract before it was signed by the parties hereto:

TO APPEAR IN THE
FEDERAL REGISTER
JANUARY 1, 1964

In witness whereof, the parties hereto have executed this contract as of the date entered on the first page hereof.

THE UNITED STATES OF AMERICA

CONTRACTOR

By _____

(Name of Contractor)

(Official title)

By _____

(Signature)

(Title)

INSTRUCTIONS

1. The full name and business address of the Contractor must be inserted in the space provided on the face of the form. The Contractor shall sign in the space provided above with his usual signature and typewrite or print his name under the signature.

2. An officer of a corporation, a member of a partnership, or an agent signing for the Contractor shall place his signature and title after the word "By" under the name of the Contractor. A contract executed by an attorney or agent on behalf of the Contractor shall be accompanied by two authenticated copies of his power of attorney or other evidence of his authority to act on behalf of the Contractor.

GENERAL PROVISIONS
(CONSTRUCTION CONTRACT)

1. DEFINITIONS

(a) The term "head of the agency" or "Secretary" as used herein means the Secretary, the Under Secretary, any Assistant Secretary, or any other head or assistant head of the Executive or military Federal department or agency; and the term "his duly authorized representative" means any person or persons or board (other than the Contracting Officer) authorized to act for the head of the agency or the Secretary.

(b) The term "Contracting Officer" as used herein means the person executing this contract on behalf of the Government and includes a duly appointed successor or authorized representative.

2. SPECIFICATIONS AND DRAWINGS

The Contractor shall keep on the work a copy of the drawings and specifications and shall at all times give the Contracting Officer access thereto. Anything mentioned in the specifications and not shown on the drawings, or shown on the drawings and not mentioned in the specifications, shall be of like effect as if shown or mentioned in both. In case of difference between drawings and specifications, the specifications shall govern. In case of discrepancy either in the figures, in the drawings, or in the specifications, the matter shall be promptly submitted to the Contracting Officer, who shall promptly make a determination in writing. Any adjustment by the Contractor without such a determination shall be at his own risk and expense. The Contracting Officer shall furnish from time to time such

detail drawings and other information as he may consider necessary, unless otherwise provided.

3. CHANGES

The Contracting Officer may, at any time, by written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract if within its general scope. If such changes cause an increase or decrease in the Contractor's cost of, or time required for, performance of the contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment under this clause must be asserted in writing within 30 days from the date of receipt by the Contractor of the notification of change unless the Contracting Officer grants a further period of time before the date of final payment under the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 of these General Provisions; but nothing provided in this clause shall excuse the Contractor from proceeding with the prosecution of the work as changed. Except as otherwise provided in this contract, no charge for any extra work or material will be allowed.

4. CHANGED CONDITIONS

The Contractor shall promptly, and before such conditions are disturbed, notify the Contracting Officer in writing of: (a) subsurface or latent physical conditions at the site differing materially from those indicated in this contract, or (b) unknown physical conditions at the site, of an unusual nature, differing

materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in this contract. The Contracting Officer shall promptly investigate the conditions, and if he finds that such conditions do so materially differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performance of this contract, an equitable adjustment shall be made and the contract modified in writing accordingly. Any claim of the Contractor for adjustment hereunder shall not be allowed unless he has given notice as above required; or unless the Contracting Officer grants a further period of time before the date of final payment under the contract. If the parties fail to agree upon the adjustment to be made, the dispute shall be determined as provided in Clause 6 of these General Provisions.

5. TERMINATION FOR DEFAULT-DAMAGES FOR DELAY-TIME EXTENSIONS

(a) If the Contractor refuses or fails to prosecute the work, or any separable part thereof, with such diligence as will insure its completion within the time specified in this contract, or any extension thereof, or fails to complete said work within such time, the Government may, by written notice to the Contractor, terminate his right to proceed with the work or such part of the work as to which there has been delay. In such event the Government may take over the work and prosecute the same to completion, by contract or otherwise, and may take possession of and utilize in completing the work such materials, appliances, and plant as may be on the site of the work and necessary therefor. Whether or not the Contractor's right to proceed with the work is terminated, he and his sureties shall be liable for any damage to the Government resulting from his refusal or failure to complete the work within the specified time.

(b) If fixed and agreed liquidated damages are provided in the contract and if the Government so terminates the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until such reasonable time as may be required for final completion of the work together with any increased costs occasioned the Government in completing the work.

(c) If fixed and agreed liquidated damages are provided in the contract and if the Government does not so terminate the Contractor's right to proceed, the resulting damage will consist of such liquidated damages until the work is completed or accepted.

(d) The Contractor's right to proceed shall not be so terminated nor the Contractor charged with resulting damage if:

(1) The delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor, including but not restricted to, acts of God, acts of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another contractor in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the Contractor and such subcontractors or suppliers; and

(2) The Contractor, within 10 days from the beginning of any such delay (unless the Contracting Officer grants a further period of time before the date of final payment under the contract), notifies the Contracting Officer in writing of the causes of delay.

The Contracting Officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of fact justify such an extension, and his findings of fact shall be final and conclusive on the parties, subject only to appeal as provided in Clause 6 of these General Provisions.

(e) If, after notice of termination of the Contractor's right to proceed under the provisions of paragraph (a) of this clause, it is determined that the delay is excusable under the provisions of paragraph (d) of this clause, such notice of termination shall be deemed to have been issued pursuant to the clause of this contract entitled "Termination for Convenience of the Government," and the rights and obligations of the parties hereto shall in such event be governed by such clause. (This paragraph (e) applies only if this contract contains such termination clause.)

(f) The rights and remedies of the Government provided in this clause are in addition to any other rights and remedies provided by law or under this contract.

6. DISPUTES

(a) Except as otherwise provided in this contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to the Contractor. The decision of the Contracting Officer shall be final and conclusive unless, within 30 days from the date of receipt of such copy, the Contractor mails or otherwise furnishes to the Contracting Officer a written appeal addressed to the head of the agency involved. The decision of the head of the agency or his duly authorized representative for the determination of such appeals shall be final and conclusive unless determined to have been fraudulent, or capricious, or arbitrary, or so grossly erroneous as necessarily to imply bad faith, or not supported by substantial evidence. In connection with any appeal proceeding under this clause, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of his appeal. Pending final decision of a dispute hereunder, the Contractor shall proceed diligently with the performance of the contract and in accordance with the Contracting Officer's decision.

(b) This Disputes clause does not preclude consideration of questions of law in connection with decisions provided for in paragraph (a) above. Nothing in this contract, however, shall be construed as making final the decision of any administrative official, representative, or board on a question of law.

7. PAYMENTS TO CONTRACTOR

(a) The Government will pay the contract price as hereinafter provided.

(b) The Government will make progress payments monthly as the work proceeds, or at more frequent intervals as determined by the Contracting Officer, on estimates approved by the Contracting Officer. If requested by the Contracting Officer, the Contractor shall furnish a breakdown of the total contract price showing the amount included therein for each principal category of the work, in such detail as requested, to provide a basis for determining progress payments. In the preparation of estimates the Contracting Officer, at his discretion, may authorize material delivered on the site and preparatory work done to be taken into consideration. Material delivered to the Contractor at locations other than the site may also be taken into consideration (1) if such consideration is specifically authorized by the contract and (2) if the Contractor furnishes satisfactory evidence that he has acquired title to such material and that it will be utilized on the work covered by this contract.

(c) In making such progress payments, there shall be retained 10 percent of the estimated amount until final completion and acceptance of the contract work. However, if the Contracting Officer, at any time after 50 percent of the work has been completed, finds that satisfactory progress is being made, he may authorize any of the remaining progress payments to be made in full. Also, whenever the work is substantially complete, the Contracting Officer, if he considers the amount retained to be in excess of the amount adequate for the protection of the Government, at his discretion, may release to the Contractor all or a portion of such excess amount. Furthermore, on completion and acceptance of each separate building, public work, or other division of the contract, on which the price is stated separately in the contract, payment may be made therefor

without retention of a percentage.

(d) All material and work covered by progress payments made shall thereupon become the sole property of the Government, but this provision shall not be construed as relieving the Contractor from the sole responsibility for all material and work upon which payments have been made or the restoration of any damaged work, or as waiving the right of the Government to require the fulfillment of all of the terms of the contract.

(e) Upon completion and acceptance of all work, the amount due the Contractor under this contract shall be paid upon the presentation of a properly executed voucher and after the Contractor shall have furnished the Government with a release, if required, of all claims against the Government arising by virtue of this contract, other than claims in stated amounts as may be specifically excepted by the Contractor from the operation of the release. If the Contractor's claim to amounts payable under the contract has been assigned under the Assignment of Claims Act of 1940, as amended (31 U.S.C. 203, 41 U.S.C. 15), a release may also be required of the assignee.

8. ASSIGNMENT OF CLAIMS

(a) Pursuant to the provisions of the Assignment of Claims Act of 1940, as amended (31 U.S.C. 203, 41 U.S.C. 15), if this contract provides for payments aggregating \$1,000 or more, claims for moneys due or to become due the Contractor from the Government under this contract may be assigned to a bank, trust company, or other financing institution, including any Federal lending agency, and may thereafter be further assigned and reassigned to any such institution. Any such assignment or reassignment shall cover all amounts payable under this

contract and not already paid, and shall not be made to more than one party, except that any such assignment or reassignment may be made to one party as agent or trustee for two or more parties participating in such financing. Unless otherwise provided in this contract, payments to an assignee of any moneys due or to become due under this contract shall not, to the extent provided in said Act, as amended, be subject to reduction or set-off. (The preceding sentence applies only if this contract is made in time of war or national emergency as defined in said Act and is with the Department of Defense, the General Services Administration, the Atomic Energy Commission, the National Aeronautics and Space Administration, the Federal Aviation Agency, or any other department or agency of the United States designated by the President pursuant to clause 4 of the proviso of section 1 of the Assignment of Claims Act of 1940, as amended by the Act of May 15, 1951, 65 Stat. 41.)

(b) In no event shall copies of this contract or of any plans, specifications, or other similar documents relating to work under this contract, if marked "Top Secret," "Secret," or "Confidential," be furnished to any assignee of any claim arising under this contract or to any other person not entitled to receive the same. However, a copy of any part or all of this contract so marked may be furnished, or any information contained therein may be disclosed, to such assignee upon the prior written authorization of the Contracting Officer.

9. MATERIAL AND WORKMANSHIP

(a) Unless otherwise specifically provided in this contract, all equipment, material, and articles incorporated in the work covered by this contract are to

be new and of the most suitable grade for the purpose intended. Unless otherwise specifically provided in this contract, reference to any equipment, material, article, or patented process, by trade name, make, or catalog number shall be regarded as establishing a standard of quality and shall not be construed as limiting competition, and the Contractor may, at his option, use any equipment, material, article, or process which, in the judgment of the Contracting Officer is equal to that named. The Contractor shall furnish to the Contracting Officer for his approval the name of the manufacturer, the model number, and other identifying data and information respecting the performance, capacity, nature, and rating of the machinery and mechanical and other equipment which the Contractor contemplates incorporating in the work. When required by this contract or when called for by the Contracting Officer, the Contractor shall furnish the Contracting Officer for approval full information concerning the material or articles which he contemplates incorporating in the work. When so directed, samples shall be submitted for approval at the Contractor's expense, with all shipping charges prepaid. Machinery, equipment, material, and articles installed or used without required approval shall be at the risk of subsequent rejection.

(b) All work under this contract shall be performed in a skillful and workmanlike manner. The Contracting Officer may, in writing, require the Contractor to remove from the work any employee the Contracting Officer deems incompetent, careless, or otherwise objectionable.

10. INSPECTION AND ACCEPTANCE

(a) Except as otherwise provided in this contract, inspection and test by

the Government of material and workmanship required by this contract shall be made at reasonable times and at the site of the work, unless the Contracting Officer determines that such inspection or test of material which is to be incorporated in the work shall be made at the place of production, manufacture, or shipment of such material. To the extent specified by the Contracting Officer at the time of determining to make off-site inspection or test, such inspection or test shall be conclusive as to whether the material involved conforms to the contract requirements. Such off-site inspection or test shall not relieve the Contractor of responsibility for damage to or loss of the material prior to acceptance, nor in any way affect the continuing rights of the Government after acceptance of the completed work under the terms of paragraph (f) of this clause, except as hereinabove provided.

(b) The Contractor shall, without charge, replace any material or correct any workmanship found by the Government not to conform to the contract requirements, unless in the public interest the Government consents to accept such material or workmanship with an appropriate adjustment in contract price. The Contractor shall promptly segregate and remove rejected material from the premises.

(c) If the Contractor does not promptly replace rejected material or correct rejected workmanship, the Government (1) may, by contract or otherwise, replace such material or correct such workmanship and charge the cost thereof to the Contractor, or (2) may terminate the Contractor's right to proceed in accordance with Clause 5 of these General Provisions.

(d) The Contractor shall furnish promptly, without additional charge, all facilities, labor, and material reasonably needed for performing such safe and convenient inspection and test as may be required by the Contracting Officer. All inspection and test by the Government shall be performed in such manner as not unnecessarily to delay the work. Special, full size, and performance tests shall be performed as described in this contract. The Contractor shall be charged with any additional cost of inspection when material and workmanship are not ready at the time specified by the Contractor for its inspection.

(e) Should it be considered necessary or advisable by the Government at any time before acceptance of the entire work to make an examination of work already completed, by removing or tearing out same, the Contractor shall, on request, promptly furnish all necessary facilities, labor, and material. If such work is found to be defective or nonconforming in any material respect, due to the fault of the Contractor or his subcontractors, he shall defray all the expenses of such examination and of satisfactory reconstruction. If, however, such work is found to meet the requirements of the contract, ^{an equitable} ~~the actual direct~~ adjustment shall be made in the contract price to compensate the Contractor for the additional services involved ~~in such examination and reconstruction and, if completion of the work has been delayed thereby, he shall, in addition, be granted a suitable extension of time on account of the additional work involved.~~

(f) Unless otherwise provided in this contract, acceptance by the Government shall be made as promptly as practicable after completion and inspection of all work required by this contract. Acceptance shall be final

and conclusive except as regards latent defects, fraud, or such gross mistakes as may amount to fraud, or as regards the Government's rights under any warranty or guarantee.

11. SUPERINTENDENCE BY CONTRACTOR

The Contractor shall give his personal superintendence to the work or have a competent foreman or superintendent, satisfactory to the Contracting Officer, on the work at all times during progress, with authority to act for him.

12. PERMITS AND RESPONSIBILITIES

The Contractor shall, without additional expense to the Government, be responsible for obtaining any necessary licenses and permits, and for complying with any applicable Federal, State, and municipal laws, codes, and regulations, in connection with the prosecution of the work. He shall be similarly responsible for all damages to persons or property that occur as a result of his fault or negligence. He shall take proper safety and health precautions to protect the work, the workers, the public, and the property of others. He shall also be responsible for all materials delivered and work performed until completion and acceptance of the entire construction work, except for any completed unit of construction thereof which theretofore may have been ~~finally~~ accepted.

13. CONDITIONS AFFECTING THE WORK

The Contractor shall be responsible for having taken steps reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work or the cost thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully

performing the work without additional expense to the Government. The Government assumes no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of this contract, unless such understanding or representations by the Government are expressly stated in the contract.

14. OTHER CONTRACTS

The Government may undertake or award other contracts for additional

work, and the Contractor shall fully cooperate with such other contractors and Government employees and carefully fit his own work to such additional work as may be directed by the Contracting Officer. The Contractor shall not commit or permit any act which will interfere with the performance of work by any other contractor or by Government employees.

15. PATENT INDEMNITY

Except as otherwise provided, the Contractor agrees to indemnify the Government and its officers, agents, and employees against liability, including costs and expenses, for infringement upon any Letters Patent of the United States (except Letters Patent issued upon an application which is now or may hereafter be, for reasons of national security, ordered by the Government to be kept secret or otherwise withheld from issue) arising out of the performance of this contract or out of the use or disposal by or for the account of the Government of supplies furnished or construction work performed hereunder.

16. ADDITIONAL BOND SECURITY

If any surety upon any bond furnished in connection with this contract becomes unacceptable to the Government, or if any such surety fails to furnish reports as to his financial condition from time to time as requested by the Government, the Contractor shall promptly furnish such additional security as may be required from time to time to protect the interests of the Government and of persons supplying labor or materials in the prosecution of the work contemplated by this contract.

17. COVENANT AGAINST CONTINGENT FEES

The Contractor warrants that no person or selling agency has been employed

or retained to solicit or secure this contract upon an agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the Contractor for the purpose of securing business. For breach or violation of this warranty the Government shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration, or otherwise recover, the full amount of such commission, percentage, brokerage, or contingent fee.

18. OFFICIALS NOT TO BENEFIT

No member of Congress or resident Commissioner shall be admitted to any share or part of this contract, or to any benefit that may arise therefrom; but this provision shall not be construed to extend to this contract if made with a corporation for its general benefit.

19. BUY AMERICAN

(a) Agreement. In accordance with the Buy American Act (41 U. S. C. 10a-10d) and Executive Order 10582, December 17, 1954 (3 CFR Supp.), the Contractor agrees that only domestic construction material will be used (by the Contractor, subcontractors, materialmen, and suppliers) in the performance of this contract, except for nondomestic material listed in the contract.

(b) Domestic construction material. "Construction material" means any article, material, or supply brought to the construction site for incorporation in the building or work. An unmanufactured construction material is a "domestic construction material" if it has been mined or produced in the United States. A manufactured construction material is a "domestic construction material" if it

has been manufactured in the United States and if the cost of its components which have been mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. "Component" means any article, material, or supply directly incorporated in a construction material.

(c) Domestic component. A component shall be considered to have been "mined, produced, or manufactured in the United States" (regardless of its source in fact) if the article, material, or supply in which it is incorporated was manufactured in the United States and the component is of a class or kind determined by the Government to be not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

20. CONVICT LABOR

In connection with the performance of work under this contract, the Contractor agrees not to employ any person undergoing sentence of imprisonment at hard labor.

21. NONDISCRIMINATION IN EMPLOYMENT

(a) In connection with the performance of work under this contract, the Contractor agrees not to discriminate against any employee or applicant for employment because of race, religion, color, or national origin. The aforesaid provision shall include, but not be limited to, the following: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. The Contractor agrees to post hereafter in

conspicuous places, available for employees and applicants for employment, notices to be provided by the Contracting Officer setting forth the provisions of the nondiscrimination clause.

(b) The Contractor further agrees to insert the foregoing provision in all subcontracts hereunder, except subcontracts for standard commercial supplies or raw materials.

~~UTILIZATION OF SMALL BUSINESS CONCERNS~~

(a) It is the policy of the Government as declared by the Congress that a fair proportion of the purchases and contracts for supplies and services for the Government be placed with small business concerns.

(b) The Contractor agrees to accomplish the maximum amount of subcontracting to small business concerns that the Contractor finds to be consistent with the efficient performance of this contract.