

**Army Regulation 215-4**

**Morale, Welfare, and Recreation**

# **Nonappropriated Fund Contracting**

**Headquarters  
Department of the Army  
Washington, DC  
29 July 2008**

**UNCLASSIFIED**

# ***SUMMARY of CHANGE***

AR 215-4

Nonappropriated Fund Contracting

This administrative revision, dated 29 July 2008--

- o Corrects Chief, Acquisition Officer to Chief Acquisition Officer (throughout).
- o Makes administrative changes (throughout).

Effective 18 August 2008

**Morale, Welfare, and Recreation**


**Nonappropriated Fund Contracting**

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By Order of the Secretary of the Army:

GEORGE W. CASEY, JR.  
*General, United States Army*  
*Chief of Staff*

Official:

  
JOYCE E. MORROW  
*Administrative Assistant to the*  
*Secretary of the Army*

**History.** This publication is an administrative revision. The portions affected by this administrative revision are listed in the summary of change.

**Summary.** This regulation contains comprehensive acquisition policy for contracts that are paid with nonappropriated funds. It implements the Assistant Chief of Staff for Installation Management Memorandum dated 11 May 2007, Establishment of Installation Management Command Centralized Army Nonappropriated Fund Contracting Office.

**Applicability.** This regulation applies to U.S. Army Nonappropriated Fund Contracting Activities. It does not apply to

Army and Air Force Exchange Service, the U.S. Army Reserve, the Army National Guard/Army National Guard of the United States, Chaplain's Nonappropriated Funds, the U.S. Army Nonappropriated Fund Employee Retirement Plan Trust, the U.S. Army Nonappropriated Fund Employee 401(k) Savings Plan Trust, or the Army Banking and Investment Fund (investment contracts only).

**Proponent and exception authority.** The proponent of this regulation is the Assistant Chief of Staff for Installation Management. The proponent has the authority to approve exceptions or waivers to this regulation that are consistent with controlling law and regulations. The proponent may delegate this approval authority, in writing, to a division chief within the proponent agency or its direct reporting unit or field operating agency, in the grade of colonel or the civilian equivalent. Activities may request a waiver to this regulation by providing justification that includes a full analysis of the expected benefits and must include formal review by the activity's senior legal officer. All waiver requests will be endorsed by the commander or senior leader of the requesting activity and forwarded through their higher headquarters to the policy

proponent. Refer to AR 25-30 for specific guidance.

**Army management control process.** This regulation does not contain management control provisions.

**Supplementation.** Supplementation of this regulation and establishment of command and local forms are prohibited without prior approval of the Assistant Chief of Staff for Installation Management (DAIM-ZXA), 600 Army Pentagon, Washington, DC 20310-0600.

**Suggested improvements.** Users are invited to send comments and suggested improvements on DA Form 2028 (Recommended Changes to Publications and Blank Forms) directly to U.S. Army Family and Morale, Welfare, and Recreation Command (IMWR-NC), 4700 King Street, Alexandria, VA 22302-4415.

**Distribution.** This regulation is available in electronic media only and is intended for command levels C, D, and E for the Active Army.

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# Chapter 1 Nonappropriated Fund Procurement System

## Section I Purpose, Principals, and Objectives

### 1–1. Purpose

a. This regulation establishes and implements policy governing acquisitions made with nonappropriated funds (NAF) within the Department of the Army (DA). Department of Defense (DOD) policy regarding the execution of NAF procurement is set forth in DOD Directive (DODD) 4105.67 and DOD Instruction (DODI) 4105.71.

b. The goal of the NAF procurement system is to obtain quality supplies, services, and construction in an efficient, cost-effective, and timely manner. The NAF procurement system enables contracting officials to exercise innovative and creative processes while providing policy and guidance for executing contracts and ensuring that the right contractor for the requirement is selected. When obligating NAF, contracting officials (both NAF and appropriated fund (APF)) shall follow the NAF policy and guidance contained herein and, based on prudent discretion and sound business judgment, may employ other appropriate acquisition procedures that do not violate applicable laws, statutes, or regulations. The NAF procurement system promotes and encourages—

- (1) The selection of the contractor with the best overall value to satisfy the nonappropriated fund instrumentality (NAFI) mission.
- (2) The use of discretion, sound business judgment, and flexibility while maintaining fairness and integrity.
- (3) Simplified acquisition methods and innovative processes, as appropriate, to conduct timely and cost-effective procurements.
- (4) Open communication and access to information throughout the procurement process using electronic methods for information exchange.
- (5) Maximum practicable competition in accordance with paragraph 2–12. However, sole-source contracting is permitted when it is in the best interest of the NAFI, in accordance with paragraph 2–13.
- (6) The use of a range of contract types and transactions best suited to a particular procurement.
- (7) High standards of conduct and professional ethics.
- (8) The use of contractors with a record of successful past performance or that demonstrate the ability to perform.
- (9) The use of responsible prospective contractors as defined in the glossary of this regulation. If a policy or particular strategy or practice is in the best interest of the NAFI and is neither specifically addressed in this regulation nor prohibited by law, statute, or other regulation, NAF contracting officers should not assume that it is prohibited. Rather, absence of direction should be interpreted as permitting contracting officers and other acquisition team members to be innovative and use sound business judgment to accomplish the procurement in the most cost-effective manner. The strategy or practice must be documented in the contract file.

### 1–2. References

Required and related publications and prescribed and referenced forms are listed in appendix A.

### 1–3. Explanation of abbreviations and terms

Abbreviations and special terms used in this publication are explained in the glossary. Those abbreviations and terms that are unique to or have special meaning within the context of a chapter are defined within that chapter. For the purposes of this regulation, *shall* and *will* are used interchangeably, as are *exception* and *waiver*.

### 1–4. Responsibilities

Responsibilities are listed in section II of chapter 1.

### 1–5. Authority

Army NAF contracting policies are established and maintained under the sole authority of this regulation.

### 1–6. Exclusions

The following funds and related activities are excluded from the provisions of this regulation unless otherwise stated in other applicable regulations or herein.

- a. The U.S. Army Nonappropriated Fund Employee Retirement Plan Trust.
- b. The U.S. Army Nonappropriated Fund Employee 401(k) Savings Plan Trust.
- c. The Army Banking and Investment Fund (investment contracts only).
- d. Chaplain's Nonappropriated Funds.
- e. The Army and Air Force Exchange Service.
- f. The U.S. Army Reserve.

g. The National Guard Bureau.

### **1-7. Exceptions and clarifications**

a. Requests for exceptions and clarifications to this regulation will be forwarded to the Chief Acquisition Officer at U.S. Army Family and Morale, Welfare, and Recreation Command (FMWRC).

b. Requests for exception must set forth the following information in order to be considered:

- (1) The paragraph of the regulation for which the exception is being requested.
- (2) Reason for the request.
- (3) The NAFI that requires the exception.
- (4) Full explanation of the expected benefits.
- (5) The length of time for which the exception is requested.

c. Requests for exception must include review and endorsement by commander or senior leader of the requesting activity and be forwarded to FMWRC, NAF Contracting Policy Division (IMWR-NCP).

## **Section II**

### **Responsibilities**

#### **1-8. Commanding General, FMWRC**

The Commanding General (CG), FMWRC is responsible for implementing NAF contracting policies and procedures; establishing clear lines of authority, accountability, and responsibility for acquisition decisionmaking; and ensuring the separation of functions to the maximum extent possible in accordance with paragraph 1-15. The CG, FMWRC has authority to grant warrants to contracting officers at any dollar level, provided that the action is otherwise compliant with the requirements of this regulation.

#### **1-9. Chief Acquisition Officer**

The Chief Acquisition Officer (CAO) is responsible to advise and assist senior leadership, NAFIs and MWR activities and the professional contracting workforce with management of acquisition policy and processes. The responsibilities of the CAO include—

- a. Monitoring all NAF acquisition activities.
- b. Evaluating the acquisition system based on applicable performance measures.
- c. Ensuring maximum practicable competition.
- d. Appointing contracting officers up to \$5 million.
- e. Ensuring acquisition decisions are consistent with applicable laws, statute, policies, and executive orders.
- f. Assessing requirements for personnel knowledge and skill in acquisition resource management.
- g. Conducting acquisition strategic planning for assessing opportunities for enterprise contracting.
- h. Developing and maintaining a career management program for NAF contracting professionals.
- i. Ensuring appropriate training is available to contracting professional commensurate with the complexity, type and dollar value of acquisitions to be assigned to them.
- j. Conducting Procurement Management Assistance Program (PMAP) review visits.
- k. Developing, from time to time, strategies and plans for hiring, training and professional development of NAF Contracting professional.

#### **1-10. Contracting officers and their representatives**

Contracting officers have the following responsibilities:

- a. To be proactive to ensure effective and timely procurement and contract administration.
- b. To interpret and ensure compliance with the terms and conditions of the contract and safeguarding the interests of the NAFI in its contractual relationships.
- c. To ensure that all requirements of law, executive orders, regulations, and other applicable procedures, including clearances and approvals, are met. The contracting officer is responsible for ensuring all requirements are met during the entire acquisition process.
- d. To ensure that sufficient funds are available for obligation.
- e. To ensure and document that prices offered are fair and reasonable prior to award.
- f. To ensure and document that prospective contractors are responsive and/or responsible prior to award in accordance with the requirements of this regulation.
- g. To ensure that contractors receive impartial, fair, and equitable treatment.

## **Section III Authority**

### **1-11. Selection and appointment of contracting officers**

*a.* In selecting contracting officers, the appointing official shall consider the complexity and dollar value of the acquisitions to be assigned and the contracting professional's experience, training, education, business acumen, judgment, character, and reputation. Examples of selection criteria include the following:

- (1) Experience in NAFI or Government contracting and administration, commercial purchasing, or related fields.
- (2) Education or specialized training in business administration, law, accounting, engineering, or related fields.
- (3) Knowledge of acquisition policies and procedures, including this and other applicable regulations.
- (4) Specialized knowledge in the particular field of contracting (for example, construction, information technology (IT)).
- (5) Satisfactory completion of acquisition training courses for the level of warrant to be issued.

*b.* Contracting officers shall be appointed, in writing, by means of a certificate of appointment. Warrant appointment limits are set forth in paragraphs 1-8 and 1-9.

*c.* The certificate will state and define the scope of the contracting officer's authority with respect to dollar limitations, legal or regulatory limitations, limitations contained in laws or regulations, and types of contracts which the contracting officer is authorized to enter into.

*d.* The appointing official is the authority for terminating a contracting officer's appointment, in writing, unless the certificate of appointment contains other provisions for automatic termination. Terminations may be for reasons such as reassignment, termination of employment, or unsatisfactory performance. No termination will be retroactive.

### **1-12. Authority of contracting officers and their representatives**

*a.* Contracting officers are the only individuals authorized to enter into NAF contracts. Contracting officers should take the lead in encouraging contracting and business process innovations and ensuring that resulting decisions are sound.

*b.* Contracting officers are allowed wide latitude to exercise sound business judgment and have the authority to—

(1) Negotiate, award, administer, or terminate contracts and make related determinations and findings. Contracting officers shall bind the NAFI only to the extent of the authority delegated to them.

(2) Appoint administrative contracting officers (ACOs), contracting officer's representatives (CORs), blanket purchase agreement (BPA) callers, and ordering officers, in writing, clearly defining responsibilities and the limits of authority. In selecting ACOs, CORs, BPA callers, or ordering officers, the contracting officer will ensure that the individual selected possesses the qualifications, training, and experience necessary to perform the function. The appointment will remain in effect until reassignment, termination of employment, or expiration/termination of the contract. The contracting officer will make terminations of appointment, in writing, unless the appointment letter contains provisions for automatic termination. Contractors will be notified, in writing, of BPA caller, ACO, COR, and ordering officer appointments and terminations.

(a) ACOs may be appointed to administer NAF contracts when it is in the best interest of the NAFI. ACO's must be a warranted contracting officer and will only be appointed within the limits of their warrant (Reference para 6-6.)

(b) A Government or NAFI employee, military or civilian, may be appointed as a COR on a designated contract. The contracting officer will coordinate the selection of the COR with the requiring activity. The COR should be brought in at the inception of the requirement to ensure complete familiarization with the requirement (Reference para 6-5.)

(c) Ordering officers may be authorized task order or delivery order authority for specific contracts and agreements up to \$25,000. (Reference para 6-7.)

(d) BPA callers within the contracting office may have call authority up to the simplified acquisition threshold (Reference paras 3-12g(2) and (3).) BPA callers outside the contracting office shall have call authority only to the competition threshold.

### **1-13. Restrictions**

Contracting officers shall not—

*a.* Award a contract that has a total contract price (including options) over the dollar limitations authorized by his/her warrant.

*b.* Modify a contract if it increases the total contract price (including options) to an amount over the dollar limitation authorized by his/her warrant, even if the modification amount is within the dollar limitation of the warrant.

*c.* Reverse a former contracting officer's decision unless the decision has been proven erroneous and not indicative of fair and reasonable treatment. The decision may be reversed only if approved by an official at least one level above the NAF contracting officer initiating the reversal action, and only if the action is coordinated with appropriate legal counsel.

- d.* Delegate their signature and/or decision-making authority as contracting officer.
- e.* Take action exceeding his/her authority as contracting officer.
- f.* Obligate appropriated funds. Generally, procurements that combine APF and NAF dollars will be accomplished by an APF contracting officer using APF contracting procedures. The exception to this rule is the use of morale, welfare and recreation utilization, support and accountability (MWRUSA) funding. The MWRUSA funding practice is designed to give flexibility to commanders to effectively maintain and improve quality of life for soldiers. Commanders and APF and NAF resource managers can execute a Memorandum of Agreement (MOA) to use NAF to provide APF authorized services in support of morale, welfare, and recreation (MWR) programs, with subsequent payment to the NAFI for these services from APF. For specific guidance on the use of MWRUSA funding, refer to Army Regulation (AR) 215-1.
- g.* Use prohibited acquisition procedures.
- h.* Ratify unauthorized commitments without proper approvals as set forth in paragraph 1-21 of this regulation.

#### **1-14. Ethics**

All individuals involved directly or indirectly in the acquisition process for NAF shall abide by the requirements of the Joint Ethics Regulation (JER) (DOD 5500.7-R).

- a.* Contracting officers and other personnel are responsible for reporting any suspected violations of law or regulation to the proper authorities. Procurement fraud shall be addressed in accordance with AR 27-40.
- b.* The Federal Property and Administrative Services Act (Section 251 et seq., Title 41, United States Code (41 USC 251 et seq.)) and its implementing coverage does not apply to NAF contracts funded solely with NAF regardless of whether the acquisition is accomplished by a NAF or an APF contracting officer.
- c.* As required by the JER, individuals involved in the NAF acquisition process shall receive ethics training.
- d.* Contracting officers and other personnel involved with the NAF acquisition process may be required to file financial disclosure reports.

#### **1-15. Separation of functions**

*a.* The NAF Contracting Offices will be organizationally structured and managed by the CAO to minimize any potential for undue influence, and to protect contracting officers from intra-organizational pressure to perform improper or illegal acts.

*b.* Individuals working with contracting officers must bear in mind that actions exceeding the authority of a contracting officer are not binding on the NAFI. Therefore, they shall not direct, or otherwise exert influence upon a contracting officer(s) to take such actions.

*c.* The integrity of the acquisition system is best protected by separation of functions combined with the basic honesty of those involved. Oversight management and both proactive and detective controls are key to success. The following steps in the acquisition process should be performed by different people to the maximum extent practicable:

- (1) Issuance of the purchase request.
- (2) Approval of the purchase request.
- (3) Certification of availability of funds.
- (4) Execution of a contract document.
- (5) Receipt of goods or services.
- (6) Issuance of payment for the purchase.

*d.* If all the above steps cannot be performed by different people, at a minimum the following steps will be performed by different people:

- (1) Issuance/approval of purchase request.
- (2) Certification of availability of funds.
- (3) Execution of contract documents.
- (4) Issuance of payment for the purchase.

#### **1-16. Ratification of unauthorized commitments**

*a.* Contracting decisions made by unwarranted officials or by warranted officials exceeding their warrant authority are not binding on the NAFI. Accordingly, requiring activities shall forward acquisition requirements to a warranted contracting officer for action in accordance with the policies and principles of this regulation. In the event that an official other than a contracting officer binds the NAFI, that action is an unauthorized commitment and requires ratification.

*b.* Ratification is the act of approving, by an official who has the authority to do so, an unauthorized commitment for the purpose of paying for supplies or services provided to the NAFI. Generally, only contracting officers acting within the scope of their authority may enter into contracts on behalf of the NAFI. Contracting officers do not have the authority to ratify unauthorized commitments without proper approvals. A contractual commitment that is invalid because the individual who made it lacks the authority may be made valid by ratification.

c. Officials shall not encourage unauthorized commitments and shall be proactive to the maximum extent possible to preclude the need for ratification.

d. Ratification approval authorities are as follows:

(1) For unauthorized commitments at or below the simplified acquisitions threshold, the ratification authority is the CAO, with power of delegation.

(2) For unauthorized commitments that exceed the simplified acquisitions threshold, the ratification authority is the CG, FMWRC, without power of delegation.

e. Ratification is permitted only if all of the following requirements are met:

(1) The head of the requiring activity committing the unauthorized commitment shall describe measures to be taken to prevent recurrence of unauthorized commitments to include appropriate disciplinary action to be taken, if any. The explanation shall be provided, in writing, to the contracting officer as soon as the unauthorized commitment is discovered. The contracting officer shall not make a recommendation for or against the ratification until this documentation has been provided by the head of the requiring activity.

(2) The NAFI has obtained a benefit resulting from the unauthorized commitment (in other words, supplies or services must have been provided to and accepted by the NAFI).

(3) The resulting contract would otherwise have been proper if a duly-authorized contracting officer had made it.

(4) The contracting officer determines that the price is fair and reasonable. If the price is not fair and reasonable, the contracting officer will enter into negotiations to obtain the best possible price. If a fair and reasonable price cannot be obtained, the contracting officer shall so document and the ratification will proceed.

(5) Purchase request with funds and approvals to make such payment is available.

f. The contracting officer will recommend for or against ratification and coordinate with legal counsel. Should the contracting officer determine that ratification is inappropriate, the NAFI will generally not make payment to the contractor.

## **Section IV**

### **Legal and Administrative Contracting Requirements**

#### **1–17. Legal review and approval**

a. Legal counsel is available to assist the contracting officer throughout the acquisition process. The contracting officer may use his or her own discretion when deciding to send actions (other than those required, below) for legal review. The contracting officer should consider the complexity of the requirement, the difficulty of the source selection decision, and the innovation of the procurement strategy when deciding whether to send an action for legal review.

b. The following shall be submitted for legal review prior to issuance:

(1) Proposed awards that result from an unsolicited proposal.

(2) Decisions concerning claims, disputes, protests and appeals.

(3) Novations, change-of-name agreements, and assignment of claims.

(4) Termination actions and supporting documentation.

(5) Recommendations for suspension or debarment of any former or current NAF contractor, contractor employee, subcontractor, offeror, and so on.

(6) Decisions concerning requests for release of acquisition information under the Freedom of Information Act (FOIA), unless another office has been designated for review.

(7) Ratification actions.

(8) Congressional inquiries pertaining to NAF contracting actions.

(9) Reported contract-related ethical violations covered in the JER and fraud covered in AR 27–40.

(10) Proposed contractual documents involving the purchase or lease of real estate or license to use real estate.

(11) Questions concerning tax status of NAFIs, when not clearly defined.

(12) Labor irregularities associated with possible labor violations (for example, payroll, immigration issues).

(13) Show cause and cure notices.

(14) Determination of whether a proposed service is for personal or nonpersonal services, when not clearly defined.

(15) Decisions concerning late proposals.

(16) Determination of nonresponsiveness, or nonresponsible offerors or offers.

(17) Prior to initial use, standard formats for BPAs, basic ordering agreements (BOAs), concessionaire contracts, consignment agreements and modifications to the same that result in major changes to standard formats.

(18) When an alternate contract format is used in lieu of the uniform contract format.

(19) All revenue generating contracts not covered by (17), above.

(20) Solicitations and contract awards in excess of the simplified acquisition threshold.

(21) Awards, which involve the use of contractor's terms and conditions.

(22) Indefinite delivery solicitations and contracts, if the aggregate anticipated orders will exceed \$100,000.

- (23) Questions concerning patents, copyrights, rights in data, and licensing agreements.
- (24) Bankruptcy proceedings by a contractor.
- (25) Contracts with Government employees and military personnel.
- (26) Questions concerning Equal Employment Opportunity exemptions.
- (27) Potential contractor conflict(s) of interest.

*c.* Legal review is required for delivery orders or task orders above \$500,000 to include orders against competitively awarded General Services Administration (GSA) and Air Force Nonappropriated Fund Purchasing Office (AFNAFPO) contracts, and task orders against noncompetitively awarded indefinite delivery/indefinite quantity (IDIQ) consolidated contracts or agreements.

*d.* Legal counsel will inform the contracting officer, in writing, whether a proposed action is legally sufficient and will recommend a course of action to overcome any deficiency. If legal counsel has concerns that do not affect legal sufficiency, they shall be stated separately from the legal sufficiency decision.

#### **1-18. Taxes**

*a.* As Federal instrumentalities, NAFIs are generally entitled to the same immunity from state and local taxes as are other parts of the United States Government. NAFIs will not pay any tax to, nor collect tax for, any foreign country or political subdivision unless the United States Government has consented to such a levy or collection.

*b.* Tax questions will be referred to the appropriate legal counsel.

*c.* Independent conferences or direct negotiations with state and local tax authorities will not be undertaken to obtain exemption, refund, or to determine the applicability of any tax, except upon express authority of Office of The Judge Advocate General, ATTN: DAJA-KLT, Tax Advisor, 901 N. Stuart Street, Suite 500, Arlington, VA 22203-1821.

#### **1-19. Acquisition meetings and conferences**

The CAO will conduct conferences, not less than annually, for NAF contracting personnel, key operating personnel and legal counsel. The purpose of these conferences will be to—

- a.* Discuss current and relevant issues in acquisition.
- b.* Furnish guidance on new acquisition procedures and strategies.
- c.* Develop improvements in existing acquisition methods and procedures.
- d.* Resolve acquisition problems.
- e.* Determine the extent to which supplies and services can be consolidated into single purchases.
- f.* Identify sources of supply.
- g.* Discuss any other relevant acquisition topics.
- h.* Ensure new key personnel are briefed on the acquisition process.

#### **1-20. Debarment, suspension, and ineligibility**

*a.* The NAFI shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only. Contractors debarred, suspended, or proposed for debarment are ineligible for contract award. Contractors debarred, suspended, or proposed for debarment are also excluded from conducting business with the NAFI as agents or representatives of other contractors.

*b.* Contractors included on the “List of Parties Excluded from Federal Procurement and Nonprocurement Programs” as having been declared ineligible on the basis of statute or other regulatory procedures, are excluded from receiving contracts and, if applicable, subcontracts under the conditions and for the period set forth in the statute or regulation. NAFIs shall not solicit offers from, award contracts to, or consent to subcontracts with these contractors under those conditions and for that period of exclusion.

*c.* NAFIs may or may not continue contracts or subcontracts in existence at the time the contractor was debarred, suspended, or proposed for debarment. The CG, FMWRC, or designee, with input from contracting, technical personnel, and legal counsel, will make a determination, in writing, as to whether continued performance is in the best interest of the NAFI. Before arriving at a decision, the decision authority should consider factors such as the following:

(1) Whether the contractor has taken appropriate disciplinary action against the individuals responsible for the activity which constitutes cause for debarment, suspension or proposed debarment.

(2) Whether the contractor has implemented or agreed to implement remedial measures, including any identified by the NAFI.

(3) Whether the contractor has instituted or agreed to institute new or revised review and control procedures and ethics training programs.

(4) Whether the contractor has had adequate time to eliminate the circumstances within the contractor’s organization that led to the cause for debarment, suspension, or proposed debarment. If the decision is made not to continue the contract, the contracting officer shall issue a termination.

*d.* NAFIs may continue to place orders against existing contracts, including indefinite delivery contracts, in the absence of termination.

e. NAFIs shall not extend or exercise option to renew contracts or consent to subcontracts with contractors debarred, suspended, or proposed for debarment unless the CG, FMWRC; IMA regional director; garrison commander; or designee, states in writing the compelling reason for the extension or renewal.

f. The NAFI may obtain a subscription of the List of Parties Excluded from Federal Procurement or Nonprocurement Programs from the Superintendent of Documents, U.S. Government Printing Office, 732 North Capitol Street NW, Washington, DC 20401, or view the information on the Internet at <http://www.arnet.gov>.

### **1-21. Contracts with Government employees and military personnel**

a. Contracts are authorized with Government employees and military personnel when such contracts are funded solely with NAF. Contracts with Government employees and military personnel shall be nonpersonal services contracts. Examples of these types of contracts include sports officials and instructors for sports, arts and crafts, and other MWR activities. An employer-employee relationship should not be created as defined in paragraph 7-9d.

b. All such contracts are subject to legal review.

### **1-22. Labor laws**

NAF contracting officers shall comply with the following labor laws when acquiring supplies, services and construction, as applicable:

a. The Davis-Bacon Act (40 USC 3141, et seq.).

b. Copeland Act (18 USC 874 and 40 USC 3145).

c. Walsh-Healey Public Contracts Act (41 USC 35-45).

d. Equal Employment Opportunity (Executive Order 11246, as amended). (See Federal Acquisition Regulation (FAR) 22.807 for list of exemptions as to applicability.) (See also para 1-17 for items requiring legal review.)

e. Service Contract Act of 1965 as amended (41 USC 351, et seq.).

f. Contract Work Hours and Safety Standards Act (40 USC 3701, et seq.).

g. Any other labor laws and regulations applicable to NAFIs.

### **1-23. The Small Business Act**

The provisions of The Small Business Act (15 USC 631 et seq.) do not apply to NAF acquisitions. However, contracting officers may solicit small businesses and minority firms to compete for NAF requirements.

### **1-24. Pollution**

The NAFI will comply with all applicable regulations regarding clean air and water. Consequently, NAF contracting officers will not contract with contractors listed by the U.S. Environmental Protection Agency in Part 32, Title 40, Code of Federal Regulations (40 CFR 32) as having violated the Clean Air Act (42 USC 7401 et seq.) or the Clean Water Act (33 USC 1251 et. seq.).

### **1-25. Foreign acquisition**

NAF contracting officers will comply with the following laws when acquiring foreign supplies and services, as applicable.

a. Buy American Act - Balance of Payment Program (41 USC 10a - 10d).

b. However, for construction contracts, the Buy American Act - Balance of Payment Program (Construction Materials) is not applicable to NAF contracts.

c. The DOD International Balance of Payments Program (DOD Instruction 7060.3).

d. The Trade Agreements Act of 1979 (19 USC 2501, et seq.).

e. The Caribbean Basin Recovery Act (Public Law 98-67, Title II as amended).

f. The Israeli Free Trade Area Implementation Act of 1985 (19 USC 2112 note).

g. The North American Free Trade Agreement Implementation Act of 1993 (19 USC 3301 et seq.).

### **1-26. Electronic formats for NAF contracting**

a. The NAFI shall use electronic commerce, to include electronic data interchange, whenever practicable or cost effective. Contracting officers may supplement electronic transactions by using other media to meet the requirements of any procurement action (for example, transmit hard copies of drawings).

b. The NAFI shall ensure that electronic commerce systems, technologies, procedures, and processes are implemented in the following manner:

(1) Are uniform throughout.

(2) Includes a means of responding to notices or solicitations electronically, to include the use of electronic signatures.

(3) Ensures that the NAFI system is capable of ensuring authentication and confidentiality.

### **1–27. Solicitation provisions and contract clauses**

Each solicitation, purchase order, contract or agreement, to include modifications, shall incorporate all clauses, provisions, and certifications required to comply with Federal laws, statutes, executive orders, DOD requirements, policy, and protecting the interests of the NAFI. In accordance with DODD 4105.67, NAF contracts shall contain clauses governing changes, examination of records, disputes and terminations. Contract clauses, provisions and certifications are prescribed at appendix B. Also, the clauses related to the Buy American Act and the Trade Agreements Act will be used for the procurement of non-resale supplies and equipment as appropriate. Commercial literature and agreements may be incorporated as part of NAF contracts and orders, providing they do not conflict with a Federal requirement or immunity. Legal review shall be obtained when commercial literature/agreements are incorporated into NAF contracts.

### **1–28. Uniform Procurement Instrument Identification Numbers Document Numbering System**

*a.* The Procurement Instrument Identification Numbers (PIIN) system will be used by NAF and APF contracting activities for identifying NAF solicitations and contracts (including purchase orders and agreements) as shown in appendix C.

*b.* The PIIN system consists of 13 alphanumeric characters (see app C).

*c.* Any prescribed supplementary numbers (in other words, activity accounting codes, capital purchase and minor construction project numbers, and so on) will be placed in spaces provided on the applicable contracting forms.

*d.* NAF and APF contracting activities will establish and maintain separate document registers for each of the various NAF procurement instruments. Registers will be maintained on a fiscal year basis and sequential numbers will start over at the beginning of each fiscal year. Registers may be automated.

*e.* All NAF solicitations and contracts (including purchase orders and agreements) will be numbered in the format shown in appendix C. The basic contract number assigned to the document will remain unchanged for the period of the contract, including any extensions.

*f.* Modifications to contracts and agreements will be numbered by use of six (6) position alphanumeric number supplementary to the 13-position basic PIIN, as follows:

(1) The first position will be a capital letter “P” to identify the modification as being issued by the contracting office.

(2) The second through sixth positions will be a serial number commencing with 00001.

*g.* Amendments to each solicitation document will be sequentially numbered by use of a six-position numeric serial number, supplementary to the basic PIIN, commencing with 000001.

### **1–29. Contractor conflict of interest**

*a.* NAFIs should normally prepare their own specifications or statements of work. NAFIs may contract for the development of statements of work (SOWs) and specifications. If a contractor prepares and furnishes SOWs or specifications (in part or in whole) to be used in a competitive acquisition, the contractor shall not be allowed to furnish the item or service, either as a prime contractor or a subcontractor.

*b.* Contracts for providing evaluation services, which involve the evaluation of offers for products or services, shall not be awarded to a contractor that will evaluate its own offer for the same products or services. Also, contractors shall not evaluate offers for products or services of those of a competitor without proper safeguards to ensure objectivity to protect NAFI’s interests and the offeror’s.

*c.* Contracting officers must ensure that restrictions are imposed when a contractor requires proprietary information or intellectual property from another party(ies) to perform a NAFI contract. The contracting officer may use language within the contract to obtain protection for the other party’s propriety information or intellectual property. This is required since the contractor may gain an unfair competitive advantage unless these restrictions are imposed. These restrictions protect the information and encourage companies to provide it when necessary for contract performance. They are not intended to protect information—

(1) Furnished voluntarily without limitations on its use, or

(2) Available to the NAFI/Government or contractor from other sources without restriction.

*d.* A contractor that gains access to proprietary information or intellectual property of other companies in performing advisory and assistance services for the NAFI, must agree with the other companies to protect their information or property from unauthorized use or disclosure for as long as it remains proprietary and refrain from using the information or property for any purpose other than that for which it was furnished. The contracting officer shall obtain copies of these agreements and ensure that they are properly executed.

*e.* For additional information, illustrative examples concerning conflicts of interest can be found in the FAR listed under Part 9.508.

### **1–30. Electronic and information technology**

The NAFI will comply with all regulations regarding Section 508 of the Rehabilitation Act of 1973 (29 USC 794d),



and the Architectural and Transportation Barriers Compliance Board Electronic and Information Technology (EIT) Accessibility Standards (36 CFR 1194).

*a.* Section 508 requires Federal agencies to ensure that—

(1) Federal employees with disabilities have access to and use of information and data that is comparable to the access and use by Federal employees who are not individuals with disabilities.

(2) Members of the public with disabilities seeking information or services from a NAFI have access to and use of information and data that are comparable to the access to and use of information and data by members of the public who are not individuals with disabilities.

*b.* Applicability:

(1) Unless an exception in *c*, below, applies, acquisitions of EIT supplies and services must meet the applicable accessibility standards at 36 CFR 1194.

(*a*) Exception determinations are required prior to contract award, except for indefinite-quantity contracts (see (*b*), below).

(*b*) Exception determinations are not required prior to award of indefinite-quantity contracts, except for requirements that are to be satisfied by initial award. Contracting offices that award indefinite-quantity contracts must indicate to requiring and ordering activities which supplies and services the contractor indicates as compliant, and show where full details of compliance can be found (for example, contractor's or other Web site location).

(2) Requiring and ordering activities must ensure supplies or services meet the applicable accessibility standards at 36 CFR 1194, unless an exception applies, at the time of issuance of task or delivery orders. Accordingly, indefinite-quantity contracts may include noncompliant items; however, any task or delivery order issued for noncompliant items must meet an applicable exception.

(*a*) When acquiring commercial items, a NAFI must comply with those accessibility standards that can be met with supplies or services that are available in the commercial marketplace in time to meet the NAFI's delivery requirements.

(*b*) The requiring official must document, in writing, the nonavailability, including a description of market research performed and which standards cannot be met, and provide documentation to the contracting officer for inclusion in the contract file.

*c.* EIT acquisition exceptions and policy:

(1) The requirements in *b*, above, do not apply to EIT when the acquisition—

(*a*) Is purchased at or below the competition threshold in accordance with paragraph 2–12 of this regulation. However, for purchases below the competition threshold, contracting officers and other individuals designated in accordance with this regulation are strongly encouraged to comply with the applicable accessibility standards to the maximum extent practicable.

(*b*) Is for a national security system.

(*c*) Is acquired by a contractor incidental to a contract.

(*d*) Is located in spaces frequented only by service personnel for maintenance, repair or occasional monitoring of equipment.

(*e*) Would impose an undue burden on the NAFI.

(2) In determining whether compliance with all or part of the applicable accessibility standards in 36 CFR 1194 would be an undue burden, a NAFI must consider—

(*a*) The difficulty or expense of compliance.

(*b*) NAFI resources available to its program or component for which the supply or service is being acquired.

(3) Documentation requirements are as follows:

(*a*) The requiring official must document in writing the basis for an undue burden decision and provide the documentation to the contracting officer for inclusion in the contract file.

(*b*) When acquiring commercial items, an undue burden determination is not required to address individual standards that cannot be met with supplies or service available in the commercial marketplace in time to meet the NAFI delivery requirements (see *b*(2)(*b*), above, regarding documentation of nonavailability).

### **1–31. Recordkeeping requirements**

As required by AR 25–400–2, the recordkeeping requirements created by this regulation are listed in appendix E.

## **Chapter 2 Acquisition Planning and Development**

### **2–1. General**

The purpose of acquisition planning is to ensure that the NAFI obtains the best value for its supply, service, and construction requirements. Such planning serves as a useful tool to help the requiring activity and the contracting

officer collaborate to find the best way to handle a procurement. Regardless of the dollar value or complexity of a requirement, or whether it is deemed commercial or noncommercial, some form of acquisition planning will take place. Acquisition planning is the key to successful development of a requirement and subsequent execution of the procurement. It is the process by which the efforts of all personnel responsible for an acquisition are coordinated and integrated through a comprehensive plan for fulfilling the NAFI's needs in a timely manner and at a reasonable cost. During this process, the needs of the requester should be developed and specified in a manner that will promote competition and will ensure that the NAFI receives the best overall value, price and other factors considered. Acquisition planning should begin as soon as the requiring activity's need is identified, preferably well in advance of when contract award is necessary. Requiring activity personnel should avoid issuing urgent requirements with unrealistic delivery or performance schedules, since this approach may restrict competition and increase price. Contracting personnel shall be involved in all phases of the acquisition process, including acquisition planning. The requiring activity shall coordinate and obtain the concurrence of the contracting officer on all acquisition plans.

*a. Responsibilities of the requiring activity.* As a minimum, the requiring activity is responsible for—

(1) Determining that the supply or service is required and preparing an SOW. Assistance may be obtained from the contracting office in preparation of SOWs.

(2) Providing justification for sole-source or brand-name purchases.

(3) Preparing and submitting a completed purchase request including, at minimum, funds availability, approvals/authorizations, estimated price (on the purchase request) or a separate cost estimate, and defining the period of performance or delivery.

(4) Establishing contractor reporting requirements.

(5) Assisting in the development of evaluation criteria, if applicable.

(6) Participating in evaluation panels, as requested.

(7) Nominating a qualified COR, if necessary.

(8) Participating in pre- and post-award conferences, as requested.

*b. Responsibilities of the contracting office.* At minimum, the contracting office is responsible for—

(1) Providing advice and assistance to the requiring activity or customer.

(2) Assisting the requiring activity in identifying new or competitive sources.

(3) Maintaining source lists, contractor catalogs, and price lists.

(4) Convening source selection panels, as needed.

(5) Determining the appropriate acquisition process and contract type.

(6) Soliciting offers or bids.

(7) Awarding contracts.

(8) Appointing CORs and ACOs, if required.

(9) Conducting and participating in pre- and post-award conferences.

(10) Administering contracts.

(11) Closing out contracts.

*c. Acquisition planning team.* The requiring activity, in conjunction with the contracting officer, should form a team consisting of all individuals responsible for significant aspects of the acquisition. Team participants may include representatives from program or project management, contracting, legal counsel, resource management, outside technical consultants (if required) and the requiring activity.

*d. Acquisition plans.* Program or project managers, with assistance from the contracting officer and other members of the acquisition team, are responsible for the development of acquisition plans. For the FMWRC, NAF major construction program, the project management plan and acquisition plan may be combined into one document. A written acquisition plan, unless it is for a commercial item (supply or service), shall be prepared for all acquisitions over \$100,000, including option years. There are times when it is necessary to prepare acquisition plans for acquisitions under \$100,000, including plans for certain concession and indefinite-delivery type contracts. The decision that an acquisition plan is necessary for commercial items and other types of acquisitions, regardless of the dollar value, is at the discretion of the contracting officer.

*e. Acquisition lead-time.* Each contracting office should establish and publish total acquisition lead time (TALT) service goals. Requiring activities will submit purchase requests to the contracting office in sufficient time to allow for normal procurement lead-time to ensure that supplies or services are delivered by the delivery date. Requiring activities should establish a realistic date for delivery of all supplies and services so that purchases can be accomplished in a timely manner and competition will not be restricted. The actual amount of time required will depend on the individual procurement; the more complex the requirement, the greater the procurement lead-time required. Managers and contracting officers should consult previous contracts and/or industry catalogs for delivery schedules in calculating lead times.

*f. Purchase request and certification of funds.* The purchase request furnishes the contracting officer with documentation that the funds are available and that all required approvals have been obtained. An SOW or purchase description,

an acquisition plan (if applicable), and sole-source or brand-name justification (if applicable) will accompany the purchase request.

(1) No purchase or award can be made without proper certification that adequate funds are available to cover the procurement, including any freight costs. If, for any reason, the originally certified funds are subsequently determined to be insufficient to accomplish the procurement, the availability of additional funds must be certified before the purchase order or contract can be awarded. Otherwise, the procurement shall be canceled.

(2) Purchase requests issued with the statement “subject to availability of funds” may be used to process contracting actions. Contracts shall be awarded stating that “award is subject to availability of funds.” Once funding is certified available, contracts must be modified through a supplemental agreement to incorporate funding.

(3) The bulk funding system establishes a reserve of funds to be used for an approved purpose over an identified period of time. The bulk funding concept enables the contracting officer to purchase ongoing requirements more efficiently. Bulk funding shall be used whenever practicable.

(4) BOAs and BPAs may be established prior to obtaining fund certification because they do not commit the NAFI to make a purchase or an award until a delivery order or a call is issued. Fund certification, either by individual certifications or by bulk funding methods, must be made available prior to placing delivery orders or calls against these agreements.

## **2-2. Market research**

Market research is the collection and analysis of information about capabilities within the market to satisfy the requiring activity’s need. Market research lays the foundation for an effective procurement by providing the requiring activity and contracting officer with information that will enable them to develop the most suitable procurement approach.

*a. Objectives.* There are several objectives of market research, including, but not limited to, the following:

- (1) Identifying products and technologies in the market.
- (2) Identifying sources.
- (3) Assessing competitiveness of the market and its effect on price.
- (4) Identifying commercial practices, such as warranty, financing, and maintenance terms.
- (5) Locating other similar successful procurements.
- (6) Justifying noncompetitive procurements.
- (7) Assessing product quality.

*b. Scope.* The scope of market research performed depends upon the dollar value of the procurement, the complexity of the supply or service being procured, past experience in procuring the item, and the urgency of the procurement. The scope of market research performed is at the discretion and direction of the contracting officer. However, the requiring activity and the contracting officer share the responsibility of conducting market research.

*c. Techniques.* There are several effective market research techniques available, including—

- (1) Obtaining and reviewing source lists and contract files for similar items or services previously procured.
- (2) Contacting Government and industry representatives knowledgeable about the item or service being procured.
- (3) Reviewing previous market research results for similar items or services.
- (4) Publishing requests for information in appropriate publications, such as the *Commerce Business Daily*.
- (5) Performing an Internet search on the item or service being procured.
- (6) Reviewing hard copy or online catalogs or other product literature published by manufacturers, dealers, or distributors.
- (7) Issuing draft solicitations or requests for information (RFIs) and/or holding presolicitation meetings with industry to solicit their comments regarding the proposed procurement.

*d. Unfair competitive advantage.* Requiring activities and contracting officers shall be careful when conducting market research to ensure that one firm does not gain an unfair competitive advantage over another.

## **2-3. Early exchanges of information with industry**

*a.* Exchanges of information with interested parties, from the earliest identification of a requirement through receipt of proposals, are encouraged. Interested parties include potential offerors, end users, NAFI or Government acquisition and supporting personnel, and others involved in the acquisition. Early exchanges of information are encouraged to identify and resolve concerns regarding—

- (1) The acquisition strategy, including proposed contract type, terms, and conditions and acquisition planning schedules.
- (2) The feasibility of the requirement, including performance requirements and SOWs.
- (3) The suitability of the solicitation instructions and evaluation criteria.
- (4) Any other aspect of the procurement.

*b.* Techniques to promote early exchanges of information include industry conferences, market research, draft solicitations, and presolicitation conferences.

c. Requiring activities and contracting officers shall be careful when conducting early exchanges to ensure that one firm does not gain an unfair competitive advantage over another.

#### **2-4. Length of contracts**

a. Contracts written for a period (including options) greater than 5 years must be justified in writing by the contracting officer. However, contracts shall not exceed 10 years. For contracts subject to The Service Contract Act, the contracting officer must request, in writing and prior to solicitation, a variance from the Department of Labor (DOL). Variances will go through appropriate channels to the Army labor advisor for contract periods of more than 5 years. When determining the contract term, the contracting officer will consider market stability, availability of the supply or service being procured, and availability of funds to make contract payments and capital investments for the NAFI and the contractor.

b. Construction contracts or other project-type contracts specifying a completion date, as opposed to a contract period or date of performance, are not subject to the above approval requirements.

c. Public-private venture (PPV) contracts may exceed 10 years with a written determination of contract length, which must be documented by the contracting officer in the contract file. The conditions for Service Contract Act variance requirements in *a*, above, may apply. In accordance with AR 215-1, FMWRC is the sole Army agency authorized to negotiate and award contracts for MWR PPVs.

#### **2-5. Contracting methods**

A variety of contracting methods are available to contracting officers for acquiring supplies or services. Contracting officers shall use sound business judgment in choosing the most effective and efficient contracting method.

##### *a. Simplified acquisition process.*

(1) The simplified acquisition process shall apply when the required supply or service, including construction, is not complex, does not exceed the simplified acquisition threshold, or meets the definition of commercial items at \$250,000 or less, including options.

(2) In most cases, a simplified acquisition can be executed by oral quotations, or a written paper or electronic solicitation to prospective offerors, evaluating price and awarding a contract for the requirement. Other simplified acquisition techniques include use of BPAs, purchase cards and checks, and delivery or task orders against existing contracts or agreements. The simplified acquisition process described in chapter 3 of this regulation shall apply to the maximum extent practicable.

*b. Contracting by negotiation.* The formal negotiation acquisition process is generally for the procurement of complex requirements. Contracting by negotiation is usually executed by issuing a request for proposals (RFP) to prospective offerors, evaluating both technical and price proposals, conducting negotiations, and awarding a contract based on a best value determination. The negotiation process is described in chapter 4 of this regulation.

*c. Sealed bidding.* Sealed bidding is a method of contracting that employs competitive bids, public openings of bids, and awards. Sealed bidding is executed by issuing an invitation for bids (IFB). The sealed bidding process is described in chapter 5 of this regulation.

#### **2-6. Prequalification of sources**

a. The contracting officer may use prequalification procedures. Prequalification—

(1) Results in a list of sources determined to be qualified to perform a specific contract.

(2) Limits offerors to those with proven competence to perform in the required manner.

b. When the contracting officer determines that the use of prequalification procedures is appropriate, the following four major areas should be reviewed:

(1) Past performance.

(2) Financial capacity.

(3) Technical qualifications.

(4) Experience.

#### **2-7. Contractor qualifications**

a. Purchases will be made from, and contracts awarded to, responsible prospective contractors. No purchase or award shall be made unless the contracting officer makes an affirmative determination of responsibility.

b. In order for a prospective contractor to be determined responsible, the contractor must meet all the following criteria:

(1) Have adequate financial resources to perform the contract, or the ability to obtain them.

(2) Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and Governmental business commitments.

(3) Have a satisfactory performance record.

(4) Have a satisfactory record of integrity and business ethics.

(5) Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them.

(6) Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them, if applicable.

(7) Be otherwise qualified and eligible to receive an award under applicable laws and regulations. Prospective contractors shall not be listed on “The List of Parties Excluded from Federal Procurement and Nonprocurement Programs.”

## **2–8. Types of contracts**

*a. Cost-plus-percentage-of-cost contracts.* Cost plus percentage of cost contracts shall not be used. This type of contract provides for reimbursement to contractors for their actual costs plus some fixed percentage of costs. The general criteria for determining whether a contract is a cost-plus-percentage-of-cost contract are as follows:

- (1) Payment is on a predetermined percentage rate.
- (2) The predetermined percentage rate is applied to actual performance costs.
- (3) The contractor’s entitlement is uncertain at the time of contracting.
- (4) The contractor’s entitlement increases commensurately with increased performance costs.

*b. Purchase orders.* Purchase orders are normally used to acquire supplies or services that are noncomplex in nature. Purchase orders contain the item description, unit price, quantity, extended price, delivery date, destination, invoicing instructions, discount terms, and other applicable provisions.

*c. Unpriced purchase orders.* Unpriced purchase orders are orders for supplies or services, the prices of which are not established at the time of issuance of the order.

- (1) An unpriced purchase order may only be used when—

*(a)* It is impractical to obtain pricing in advance of issuance of the purchase order.

*(b)* The purchase is for repairs to equipment requiring disassembly to determine the nature and extent of repairs; material available from only one source and for which cost cannot readily be established; or supplies or services for which prices are known to be competitive, but exact prices are not known (for example, miscellaneous repair parts, maintenance agreements).

(2) Unpriced purchase orders may be issued on paper or electronically. A realistic monetary limitation, either for each line item or for the total order, shall be placed on each unpriced purchase order. The monetary limitation shall be an obligation subject to adjustment when the firm price is established. The contracting officer shall follow up on each order to ensure timely pricing. The contracting officer or the contracting officer’s designated representative shall review the invoice price and, if reasonable, process the invoice for payment.

*d. Firm-fixed-price contracts.* Firm-fixed-price contracts are the preferred contract type for most NAF procurements. A firm-fixed-price contract is suitable for acquiring supplies, services, or construction when functional or detailed specifications are available and the contracting officer can establish fair and reasonable prices. Under a firm-fixed-price contract, a contractor is required to deliver the stated supplies or perform the services at a specified fixed-price. A contractor will be paid the contract price only for successful performance. This arrangement represents the least risk to the NAFI because the total price is predetermined at the time of contract award and is generally not subject to adjustment during contract performance. Accordingly, this places the incentive upon the contractor to manage costs.

*e. Fixed-price with economic price adjustment.* A fixed-price contract with economic price adjustment provides for upward and downward revision of the stated contract price upon the occurrence of specified contingencies. Economic price adjustments are of three general types:

(1) *Adjustments based on established prices.* These price adjustments are based on increases or decreases from an agreed-upon level in published or otherwise established prices of specific contract end items.

(2) *Adjustments based on actual costs of labor or material.* These price adjustments are based on increases or decreases in specified costs of labor or material that the contractor actually experiences during contract performance.

(3) *Adjustments based on cost indexes of labor or material.* These price adjustments are based on increases or decreases in labor or material cost standards or indexes that are specifically identified in the contract.

*f. Indefinite-delivery contracts.* There are three types of indefinite-delivery contracts: definite quantity, requirements, and indefinite quantity.

(1) Definite-quantity contracts provide for delivery of a definite quantity of supplies or services for a fixed period, with deliveries or performance to be scheduled at designated locations upon issuance of an authorized order placed against that contract. This type of contract may be used when it can be determined, in advance, that a definite quantity of supplies or services will be required during the contract period, and that the supplies or services are regularly available or will be available after a short lead time.

(2) Requirements contracts provide for filling all actual purchase requirements of designated NAFI activities for supplies or services during a specified contract period, with deliveries or performance to be scheduled by placing orders with the contractor. This type of contract is appropriate for acquiring supplies or services when the NAFI

anticipates recurring requirements but cannot predetermine the precise quantities of supplies or services that designated NAFI activities will need during a definite period.

(a) The contracting officer shall state a realistic estimated total quantity in the solicitation and resulting contract. This estimate is not a representation to an offeror or contractor that the estimated quantity will be required or ordered or that conditions affecting requirements will be stable or normal.

(b) The contract shall state, if feasible, the maximum limit of the contractor's obligation to deliver and the NAFI's obligation to order. The contract may also specify maximum or minimum quantities that the NAFI may order under each individual order and the maximum that it may order during a specified period of time.

(c) NAFI property furnished for repair: when a requirements contract is used to acquire work (for example, repair, modification, or overhaul) of existing items of NAFI property, the contracting officer shall specify in the schedule that failure of the NAFI to furnish such items in the amounts or quantities described in the schedule as "estimated" or "maximum" will not entitle the contractor to any equitable adjustment in price of the contract.

(3) Indefinite-quantity contracts provide for an indefinite quantity, within stated limits, of supplies or services to be furnished during a fixed period, with deliveries or performance to be scheduled by placing orders with the contractor. This type of contract may be used when the NAFI cannot predetermine, above a specified minimum, the quantity required. Contracts must state a maximum limitation. The contracting officer may obtain information about maximums from previous requirements. An indefinite-quantity contract should be used only when a recurring need is anticipated. Unlike a requirements contract, an indefinite quantity contract does not commit a NAFI to purchase all its requirements from only one source.

(a) The contract shall require the NAFI to order, and the contractor to furnish, at least a stated minimum quantity of supplies or services and, if ordered, the contractor to furnish any additional quantities, not to exceed the stated maximum. The NAFI must fund, at the time of contract award execution, the minimum quantity.

(b) To ensure that the contract is binding, the minimum quantity must be more than a nominal quantity, but it should not exceed the amount that the NAFI is fairly certain to order.

(c) The contracting officer shall, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single solicitation for the same or similar supplies or services to two (2) or more sources.

(d) Multiple awards shall be made unless—

1. The contracting officer determines, in writing and prior to the issuance of the solicitation, that it is not practicable to award more than one contract.

2. The contracting officer determines, in writing and after the evaluation of offers, that only one offeror is capable of providing the supplies or services required at the level of quality that meets the NAFI's requirement.

## **2-9. Types of agreements**

a. *Basic ordering agreement.* A BOA is a written agreement between the NAFI and a contractor. It contains terms and conditions that will apply to orders, pricing, a description of supplies or services to be provided, and the method for issuing orders under the agreement. A BOA is not a contract because it does not require placement of any orders against it. An order placed against a BOA, in accordance with the terms and conditions contained in that BOA, becomes a contractual instrument against which funds are obligated as consideration in exchange for the goods or services specified in the order. At the discretion of the contracting officer, in coordination with the requiring activity, agreements may be established with one or more contractors that have the qualifications and capability to meet anticipated future needs.

b. *Blanket purchase agreement.* A BPA is a simplified method of procurement for filling anticipated, repetitive needs for goods or services. A BPA is not a contract because it neither obligates funds nor requires placement of any orders against it. Once a BPA is established and funds are certified, call orders may be placed by ordering officers or the contracting officer. Ordering procedures are specified in the agreement.

## **2-10. Other contract types**

Other types of contracts (for example, time and material, labor hours) may be used with the approval of the CAO, or his/her designee. A request for approval shall be submitted in writing and must justify the rationale for use of the contract type proposed.

## **2-11. Required sources of supplies and services**

The Federal Prison Industries, Inc. and Nonprofit Agencies Employing People Who Are Blind or Severely Disabled are required sources for NAF acquisitions. Contracting officers and individuals appointed by contracting officers, such as BPA callers and ordering officers, shall follow the policy and procedures set forth in FAR Subparts 8.6 and 8.7.

## **2-12. Competition requirements**

a. The competition threshold is \$5,000. Contracting officers will promote competition by soliciting and awarding

contracts based on the best overall value to the NAFI. The contracting officer will consider price and other factors, such as technical capability or past performance. Competition exists when all of the following conditions are met:

- (1) Offers are solicited from at least three offerors.
- (2) All offers are submitted independently of each other.
- (3) At least two offers are received that are responsive to the requirements of the solicitation or, if only one responsive offer is received, a written determination is included in the file as to why no other responsive offerors responded.

(4) All offerors are provided the same information concerning the procurement.

*b.* Adequate competition does not exist if—

(1) Prices are obtained from a manufacturer and two of the manufacturer's independent marketing representatives, with the exception of brand-name purchases. (For guidance on brand-name purchases, see paras 2-17 and 2-18.)

(2) The price of an item is solicited from an offeror that does not normally supply the type of item requested.

(3) The specifications, descriptions, task statements, or SOWs supplied to potential sources are not identical.

*c.* Purchases made by contracting officers not exceeding \$5,000 may be accomplished without seeking competition, if the price is considered fair and reasonable. The file shall contain documentation that the price is fair and reasonable in accordance with paragraph 2-21.

*d.* Multiple purchase requests for the same supply or service with reasonably concurrent deliveries should be combined for potential quantity discounts and administrative efficiencies. Multiple delivery dates may be negotiated. Under no circumstances will a single purchase request (or two or more concurrent purchase requests for the same item) be split into two or more procurement actions in order to avoid competition requirements or circumvent warrant authority.

### **2-13. Sole source**

*Sole source* means a contract for the purchase of supplies or services that is entered into or proposed to be entered into by a NAFI after soliciting and negotiating with only one source. When the supplies or services required by the NAFI are available from only one responsible source, then competition is not required. A written determination by the requiring activity to that effect is required and should be based on any combination of the following:

*a.* The NAFI's minimum needs can only be satisfied by unique supplies, services, or capabilities available from only one source and no other types or sources of supplies or services will satisfy the NAFI requirement.

*b.* The supplies or services are protected by limited rights in data, patents, copyrights, secret processes, trade secrets, or other proprietary restrictions, warranties, or licenses and are available only from the originating source.

*c.* The requester has determined that only specified makes or models of equipment, components, accessories, or specific academic or professional credentials will satisfy the requirement, and only one source meets the criteria.

*d.* The requirement is for unique repair or replacement parts for existing equipment for which substitutions cannot be made.

*e.* Access to utility services such as electric power or energy, gas, water, or cable television is restricted by local law, custom, or availability, and only one supplier can furnish the service within that geographical area or the contemplated contract is for construction of a part of a utility system and the local utility company is the only source available or authorized to work on the system.

### **2-14. Follow-on sole source**

*a.* Supplies may be deemed to be available only from the original source in the case of a follow-on competitively awarded contract for the continued development or production of equipment or replacement components (for example, additional units, replacement items for integration, sustainment and support with existing systems) when it is likely that award to any other source would result in—

(1) Duplication of cost, both direct and indirect, to the NAFI that is not expected to be recovered through competition, and/or

(2) Unacceptable delays in fulfilling the NAFI's requirements.

*b.* Services may be deemed to be available only from the original source in the case of follow-on contracts for the continued provision of highly specialized services, including professional services, when it is likely that award to any other source would result in—

(1) Duplication of cost to the NAFI that is not expected to be recovered through competition, and/or

(2) Unacceptable delays in fulfilling the NAFI's requirements.

*c.* When applicable, options should be included in contracts to avoid the necessity of follow-on sole-source contracts. (See para 4-3*a* for the use of options.)

### **2-15. Justification and approval of sole source**

*a.* The contracting officer will commence negotiations for noncompetitive contracts if the requiring activity justifies the use of such actions in writing to the satisfaction of the contracting officer.

- b.* In conjunction with this requirement, if technical personnel and requiring activities are recommending a sole source, they are responsible for providing accurate and complete data necessary to support their recommendations.
- c.* Each justification will contain sufficient facts and rationale to justify the noncompetitive or limited competitive nature of the acquisition.
- d.* The contracting officer shall approve or disapprove sole-source justifications.

## **2-16. Unsolicited proposals**

*a.* An unsolicited proposal is a written proposal that is submitted to the NAFI on the initiative of an offeror for the purpose of obtaining a contract with the NAFI and which is not in response to a formal or informal request. Advertising material, commercial product offers, gifts, or technical correspondence are not unsolicited proposals. Unsolicited proposals may be a valuable means of obtaining innovative or unique methods or approaches to accomplishing a mission; however, NAFI personnel are cautioned not to encourage potential contractors to submit such proposals. All unsolicited proposals will be forwarded to the contracting office for coordination, receipt, evaluation, and disposition.

*b.* The contracting office will, in turn, refer the unsolicited proposal to appropriate technical personnel for evaluation. However, if the unsolicited proposal is not related to the mission of the receiving NAFI, it need not be evaluated.

*c.* The criteria below will be considered in evaluating an unsolicited proposal. A valid unsolicited proposal must—

- (1) Be innovative and unique.
- (2) Be independently originated and developed by the offeror.
- (3) Be prepared without NAFI or Government personnel supervision.
- (4) Include sufficient detail to permit a determination that the NAFI would benefit.
- (5) Not be an advance proposal for a known NAFI requirement that can be acquired by competitive methods.

*d.* Contents of a valid unsolicited proposal should include—

- (1) General information as follows:
  - (a)* Offeror's name, address, and the type of organization (for example, profit, nonprofit, or educational).
  - (b)* Names and telephone numbers of technical and business personnel to be contacted for evaluation or negotiation purposes.

*(c)* Identity of proprietary data to be used for evaluation purposes only.

*(d)* Submission date.

*(e)* Signature of authorized agent to represent and contractually obligate the offeror.

(2) Technical information, which should include—

*(a)* Concise title or description and an abstract of the proposed effort.

*(b)* A reasonably complete discussion (abbreviated statement of work) stating the objectives of the effort or activity, the method of approach and extent of the effort to be employed, the nature and extent of the effort to be employed, the nature and extent of the anticipated results, and the manner in which the work will help to support accomplishment of the MWR mission.

*(c)* Names and biographical information on the offeror's key personnel who would be involved, including alternates.

*(d)* Type of support needed from the NAFI (for example, facilities, equipment, materials, or personnel resources).

(3) Supporting information, which may include—

*(a)* Proposed price or total estimated cost for the effort in sufficient detail for meaningful evaluation.

*(b)* Period of time for which the proposal is valid (a 6-month minimum is suggested).

*(c)* Type of contract preferred.

*(d)* Duration of proposed effort.

*(e)* Brief description of the organization, previous experience in the field, and facilities to be used.

(4) Required statements, if applicable, about organizational conflicts of interest, security clearances, and environmental impacts.

*e.* A noncompetitive contract may be awarded for unsolicited proposals upon a determination by the contracting officer that—

(1) The standards in *c*, above, have been met.

(2) Funding for award of the contract, if applicable, is available.

*f.* Approvals must be obtained from CG, FMWRC or designee for contracts resulting from an unsolicited proposal.

## **2-17. Brand name only**

The brand-name-only method is used when only one particular manufacturer's product, and not a substitution or equivalent, meets the essential requirements of the NAFI. Written justification for procurement of items by this method is required from the requiring activity. A brand-name-only purchase may be competed in that the item can be procured at various discounts from the manufacturer or from authorized distributors.



## **2-18. Brand name or equal**

The brand-name-or-equal-method is another procedure for describing a requirement. The purchase description should set forth those salient characteristics of the brand-name product that are essential to the needs of the NAFI. The make or model number or other appropriate nomenclature and all other known acceptable brand-name products, should be listed as a part of the description. The contracting office shall require the offerors to submit information that establishes that the product offered meets the NAFI requirement. Brand-name-or-equal procurements are not accomplished on a sole-source basis. Therefore, no justification or approval is required other than documentation in the file showing that competition was sought, and a determination of fair and reasonable pricing was made, with subsequent award of the contract.

## **2-19. Bonds and other financial protections**

*a. Original contract price* means the “award price” of the contract. For requirements contracts, the original contract price is the price payable for the estimated total quantity; for indefinite-quantity contracts, it is the price payable for a specified minimum quantity. The original contract price does not include the price for any options, unless the options are exercised at the time of contract award.

*b. Performance and payment bonds for construction contracts:*

(1) Performance and payment bonds are required to protect the interest of the NAFI and normally equal to the contract total amount unless the contracting officer makes written findings that a lesser amount adequately protects the NAFI. See chapter 8 for specific bonding requirements for construction contracts.

(2) The payment bond must be equal to the contract total unless the contracting officer makes written findings that this is impractical, in which case the contracting officer can establish the amount of the payment bond. This amount must be at least equal to the amount of the performance bond.

(3) The requirement for such bonds may be waived—

*(a)* By the contracting officer for work to be performed in a foreign country upon finding that it is impractical for the contractor to furnish such bonds; or

*(b)* As otherwise authorized by The Miller Act (40 USC 3131 et seq.) or other laws.

*c. Performance and payment bonds for other than construction contracts:* in general, contracting officers shall not require performance and payment bonds for other than construction contracts. However, performance and payment bonds may be used at the discretion of the contracting officer for contracts over the simplified acquisition threshold to protect the NAFI’s interest. An example of a contract that might require a performance bond is a long-term service contract. The contracting officer shall consider the following items, which may increase the need for performance bonding, when determining the requirement to use performance and payment bonds:

(1) NAFI or Government property or funds are to be provided to the contract or for use in performance of the contract.

(2) Substantial progress payments are made before delivery of end items.

(3) Contract is for dismantling, demolition or removal of improvements.

*d. Requirements for bonds shall be set forth in the solicitation.*

*e. The contracting officer may require additional performance and payment bond protection when the original contract price is increased.*

*f. The contracting officer must determine the contractor’s responsibility even though a bond has been or can be obtained.*

*g. Performance bonds shall be provided by the contractor on Standard Form (SF) 25 (Performance Bond) and payment bonds on SF 25A (Payment Bond) and the continuation sheet at SF 25B (Continuation Sheet). The bonds shall name the NAFI as the insured. To view and obtain these forms, go to [www.whitehouse.gov/omb/egov](http://www.whitehouse.gov/omb/egov) and enter the form number at the search button.*

*h. Bond and other forms of commitment shall be supported by corporate sureties whose names appear on the list contained in Treasury Circular 570 (<http://www.fms.treas.gov/c570/c570.html>) or by other acceptable security such as postal money order, certified check, cashier’s check, irrevocable letter of credit, bonds, or notes of the United States.*

## **2-20. Liquidated damages**

*a. The contracting officer must evaluate the need for liquidated damages for all construction requirements over \$50,000 and entertainment requirements over \$2,500 (see para 7-8). Liquidated damages may be used in solicitations and contracts for supplies and services.*

*b. The contracting officer must consider the potential impact on pricing, competition, and contract administration before using the liquidated damages clause and in the determination of the dollar amount set forth in the clause. Areas of consideration are as follows:*

(1) Is the time of delivery or timely performance so critical that the NAFI may reasonably expect to suffer damage if the delivery or performance is delinquent?

(2) The extent or amount of such damage would be difficult or impossible to estimate accurately or prove.

*c. Liquidated damages are not punitive and are not negative performance incentives. Liquidated damages are used to*

compensate the NAFI for probable damages. The rate of liquidated damages must be a reasonable projection of just compensation for the harm that is caused by late delivery or untimely performance of the particular contract. The file must be documented with the rationale for the dollar amount set forth in the solicitation.

*d.* The contracting officer may set a maximum amount for liquidated damages. The contracting officer may use more than one liquidated damages rate when the contracting officer expects the probable damage to the NAFI to change over the contract period of performance.

## **2-21. Fair and reasonable price determination**

*a.* *Fair and reasonable* means a price that is fair to both parties, considering the agreed upon considerations, and is based on the following considerations:

- (1) The quoted price is acceptable to the buyer and to the seller.
- (2) The quoted price of the supply or service being purchased is not more than the current market value.
- (3) The quoted price is not excessive for the time that delivery is required or the service is to be performed.
- (4) The cost of administering the purchase is not excessive.

*b.* If the price difference among responses lacks true, adequate competition, a statement will be included in the file establishing the basis on which a determination of fair and reasonable price was made.

*c.* *Price reasonableness* addresses the issue of whether the price is too high and may be determined based on one or more of the following:

- (1) Market research.
- (2) Comparison with previous competitive purchase of same or similar item.
- (3) Current catalog/published price list/advertisement.
- (4) Value analysis by buyer.
- (5) Buyer's personal knowledge of item.
- (6) Comparison to an independent cost estimate.

*d.* When only one quotation is received, a written memorandum will be included in the contract file explaining the reason for the absence of competition.

*e.* Contracting personnel will obtain as much knowledge as is practicable of the physical and material characteristics and intended use of the item to be purchased to aid in determining price reasonableness. Administrative costs associated with the NAFI's accomplishment of the procurement should be weighed in conjunction with the base price to determine price reasonableness.

## **2-22. Use of existing contracts and agreements**

*a.* Many Government and NAF contracts or agreements are available for NAFI use. Government sources include, but are not limited to, GSA, Defense Commissary Agency, and Defense Supply Depots. Other NAF sources include, but are not limited to, FMWRC, NAF Contracting, AFNAFPO, Army and Air Force Exchange Service (AAFES), Navy Exchange Command, and Marine Corps Exchange System.

*b.* Orders placed against competitively awarded FMWRC, IDIQ consolidated contracts program, AFNAFPO purchasing program, and the GSA multiple awards schedule (MAS) contracts are considered to have met the competition requirement. Therefore, ordering offices need not seek further competition or make a separate determination of fair and reasonable pricing when using these sources. The contracting officer has already determined the prices to be fair and reasonable.

*c.* Ordering procedures for optional use schedules or contracts that have not been competitively awarded—

(1) *Orders at or below the competition threshold.* Ordering officers can place orders at or below the competition threshold with any source listed in *a* and *b*, above.

(2) *Orders exceeding the competition threshold but not exceeding the maximum order threshold.* Orders should be placed with the schedule contractor that can provide the supply or service that represents the best value. Before placing an order, ordering officers should consider reasonably available information about the supply or service offered under GSA MAS contracts by using the "GSA Advantage!" online shopping service (<https://www.gsaadvantage.gov>) or by reviewing the catalogs/price lists of at least three schedule contractors and selecting the delivery and other options available under the schedule that meets the NAFI's needs. The contracting officer must compare terms and conditions, including prices, available from these and other sources, and place written documentation of such comparison in the contract file.

*d.* In selecting the supply or service representing the best value, the ordering office may consider—

(1) Special features of the supply or service that are required in effective program performance and that are not provided by a comparable supply or service.

(2) Trade-in consideration.

(3) Probable life of the item selected as compared with that of a comparable item.

(4) Warranty considerations.

(5) Maintenance availability.

- (6) Past performance.
- (7) Environmental and energy efficiency considerations.
- e. Contracting and ordering officers should be aware of the terms and conditions of the contract or agreement to be used, and orders shall not exceed the maximum order quantity specified.

## **2-23. Lease or purchase of equipment**

It may occasionally be more economical for the NAFI to lease equipment than to purchase it. The decision to lease rather than to purchase must be made on a case-by-case basis, applying the following criteria:

- a. The NAFI's need is short-term and purchase would be more costly than leasing.
- b. It is likely that the equipment will become obsolete within a short period and replacement will be necessary.
- c. The lessor will provide the equipment, as well as sustainment, restoration, and modernization of service, at a price lower than would otherwise be available to the NAFI.

(1) *Sustainment* means the recurrent, day-to-day, periodic, or scheduled work required to preserve a Government-owned facility, its installed equipment, and its premises in such a condition that it may be used for its designated purpose.

(2) *Restoration* means the repair or replacement work to restore facilities damaged by inadequate sustainment, excessive age, natural disaster, fire, accident, or other causes.

(3) *Modernization* means the alteration or replacement of facilities solely to implement new or higher standards, to accommodate new functions, or to replace building components that typically last more than 50 years (such as the framework or foundation).

## **2-24. Emergency purchase procedures**

a. The use of emergency purchase procedures is intended to provide a means for satisfying unforeseeable emergency requirements. Examples include malfunction of a refrigeration compressor that may cause the imminent loss of perishable subsistence or malfunction of an automated point of sale system that may result in the loss of revenues. It is intended for application when the need will not allow for normal contracting procedures.

b. Emergency purchase procedures for after-duty hours will be established as follows and processed accordingly:

(1) NAF contracting personnel will train activity personnel in emergency purchase procedures. A listing of trained individuals will be maintained in the contracting office.

(2) The emergency purchase action must be received by the NAF contracting office not later than 2 working days following the emergency action. The individual who placed the order will prepare a completed purchase request along with supporting documentation (for example, delivery tickets, invoices, and a statement explaining the emergency action taken).

(3) Upon receipt of the purchase request and supporting documentation, the contracting officer will execute a purchase document to formalize the action and allow for payment.

c. Emergency purchase procedures shall not be used to alleviate the need for planning. In the absence of valid emergency criteria and prompt formalization of the purchase, actions will be handled as unauthorized commitments and will be processed as ratification actions.

## **2-25. Contracting for resale**

a. *Resale* is the act of selling again, or products purchased for that purpose. There are three types of resale items: merchandise, consumable items, and subsistence items.

(1) Resale merchandise examples are sporting goods for pro shops; bowling balls and shoes; gift shop items; t-shirts; sweatshirts; hats; lumber; and automotive care products.

(2) Consumable items are products that lose their identify during use and as a result of the resale process, or are consumed in the course of daily business. Examples of consumables are plastic glasses and cups, paper napkins, cleaning supplies, postage stamps, and aviation fuel.

(3) Subsistence items are food and beverage items, also classified as edible or drinkable items. The purchase of subsistence items must meet U.S. Army Veterinary Command requirements for food consumption and must originate only from approved sources, as defined in AR 40-657 and from the U.S. Army Veterinary Command Circular 40-1, 1 June 2004, Directory of Sanitarily Approved Food Establishments for Armed Forces Procurement.

b. There is no restriction on requests to purchase items for resale purposes on a brand-name basis (Reference paras 2-17 and 2-18). Requirements are generally based on customer preference and/or demand. The requiring activity is responsible for identifying the brand-name item(s) for resale on the purchase request and for submitting a written justification for the purchase of that brand. The written justification will be submitted with the purchase request and state what specific or unusual need makes the required brand-name product(s) necessary.

c. Price competition on requirements for brand-name items(s) will be obtained among qualified suppliers who normally handle that brand. Award is generally made to the supplier who can furnish the desired brand-name items at the best price and within the time required. For purchases of other-than-brand-name resale items, specifications should

reflect the minimum needs of the requiring activity so the NAFI can benefit by obtaining the best value, price, and other factors considered.

## **Chapter 3**

### **Simplified Acquisitions and Commercial Items**

#### **3-1. General**

This chapter sets forth policies for the acquisition of supplies and services, including construction, that do not exceed the simplified acquisition threshold as set forth in paragraph 3-3. NAFIs may use simplified acquisition methods for the purchase of items meeting the definition of commercial items up to \$250,000. Construction is never considered a commercial item.

#### **3-2. Policy**

*a.* NAFIs shall use simplified acquisition procedures to the maximum extent practicable for all purchases of supplies or services not exceeding the simplified acquisition threshold (including purchases at or below the competition threshold). This policy does not apply if a NAFI can meet its requirement using—

- (1) Required sources of supply;
- (2) Existing indefinite delivery contracts; or
- (3) Other established contracts.

*b.* The contracting officer shall use simplified acquisition procedures to acquire supplies and services if the anticipated award will not exceed the simplified acquisition threshold as set forth in paragraph 3-3, or for acquisitions of items meeting the definition of commercial items up to \$250,000, including options. Do not split requirements totaling more than the simplified acquisition threshold, or the commercial item threshold, the competition threshold into several purchases that are less than the applicable threshold merely to—

- (1) Permit use of simplified acquisition procedures; and
- (2) Avoid any law or regulatory requirements that applies to purchases exceeding the competition threshold.

*c.* NAFIs shall use the Army NAF purchase card and electronic purchasing techniques to the maximum extent practicable in conducting simplified acquisitions.

*d.* NAFIs shall maximize the use of electronic commerce when practicable and cost effective. When using electronic commerce, drawings and lengthy specifications can be provided offline in hard copy or through other appropriate means.

*e.* Authorized individuals shall make purchases in the simplified manner that is most suitable, efficient, and economical based on the circumstances of each acquisition. For acquisitions not expected to exceed—

(1) The simplified acquisition threshold for other than commercial items, use any appropriate combination of the procedures set forth in chapters 3 and 4 of this regulation.

(2) The \$250,000 limit for commercial items, use any appropriate combination of procedures set forth in chapters 3 and 4 of this regulation.

*f.* In addition to other considerations, contracting officers shall—

- (1) Promote competition with a reasonable number of sources (at least three) in accordance with paragraph 3-6.
- (2) Establish deadlines for the submission of responses to solicitations that afford suppliers a reasonable opportunity to respond, in accordance with paragraph 4-9.
- (3) Consider all quotations or offers that are received in a timely manner.
- (4) Use innovative approaches in awarding contracts using simplified acquisition procedures, when appropriate.

#### **3-3. Simplified acquisition threshold**

The simplified acquisition threshold is \$100,000.

#### **3-4. Legal effect of quotations**

*a.* A quotation received in response to a DA Form 4067 (Request for Quotations (Nonappropriated Funds)) is not an offer and cannot be accepted by the NAFI to form a binding contract. Issuance by the NAFI of an order for supplies or services in response to a supplier's quotation does not establish a contract. The order is an offer by the NAFI to the supplier to buy certain supplies or services with certain terms and conditions and becomes a contract when the supplier accepts the offer.

*b.* When the NAFI issues an order, the contracting officer may request the supplier to indicate acceptance in writing. The supplier also may indicate acceptance by furnishing the supplies or services ordered or by starting performance of the work.

c. If the NAFI issues an order resulting from a quotation, the NAFI may, by written notice to the supplier at any time before acceptance of the quote occurs, withdraw, amend, or cancel its offer.

### **3-5. Evaluation of quotations/offers**

#### *a. General.*

(1) The contracting officer shall evaluate quotations or offers—

(a) In an impartial manner.

(b) Inclusive of transportation charges from the shipping point of the supplier to the delivery destination.

(c) Against the criteria established in the solicitation.

(2) All quotations or offers that are received by the specified date and time shall be considered.

#### *b. Simplified acquisition evaluation procedures.*

(1) The contracting officer has broad discretion in developing suitable evaluation procedures.

(2) If using price and other factors, contracting officers will ensure that quotations or offers can be evaluated in an efficient fashion. Formal evaluation plans, establishing a competitive range, conducting discussions, and scoring quotations or offers are not required. Contracting officers may conduct comparative evaluations of offers.

(3) Evaluation of other factors, such as past performance, must be based on information such as the contracting officer's knowledge of and previous experience with the supply or service being acquired, customer surveys, or other reasonable basis.

### **3-6. Soliciting competition**

a. The contracting officer shall solicit at least three sources to obtain supplies and services from the source whose offer may be the most advantageous to the NAFI. If the contracting officer determines that there are fewer than three sources available that can meet the requirement, the contracting officer shall document the file explaining why more sources could not be obtained. The contracting officer shall not solicit on a sole-source basis unless the provisions of paragraphs 2-13 or 2-14 apply.

b. When soliciting quotations or offers, the contracting officer shall notify potential quoters or offerors of the basis on which award will be made (price alone or price and other factors, such as past performance and quality). Solicitations may, but are not required to, include the relative importance assigned to each evaluation factor and subfactor, when used.

c. The contracting officer shall solicit quotations orally to the maximum extent practicable if the acquisition does not exceed the simplified acquisition threshold and oral solicitation is more efficient than soliciting through available electronic commerce alternatives. However, an oral solicitation may not be practicable for contract actions exceeding \$25,000.

d. If obtaining electronic or oral quotations is uneconomical or impracticable, the contracting officer should issue written (paper) solicitations for contract actions likely to exceed \$25,000. The contracting officer shall issue a written solicitation for construction requirements exceeding \$2,000.

e. Options may be included in solicitations provided the total value of the acquisition, to include all options, are within the dollar threshold for use of simplified acquisition procedures.

### **3-7. Award and documentation**

a. Before making an award, the contracting officer shall determine, in writing, that the proposed price is fair and reasonable in accordance with paragraph 2-21.

b. Occasionally an item can be obtained only from a supplier that quotes a minimum order price or quantity that is either unreasonable, exceeds stated quantity requirements, or results in an unreasonable price for the quantity required. In these instances, the contracting officer should inform the requiring activity of all facts regarding the quotation or offer and ask the requiring activity to confirm or alter the requirement. The file shall be documented to support the final action taken.

c. File documentation shall be kept to a minimum. However, documentation shall support the contracting officer's process and decisions. The following illustrates the extent to which quotations or offer information should be recorded:

(1) *Oral solicitations.* The contracting officer should establish and maintain records of oral price quotations in order to reflect clearly the propriety of placing the order at the price paid with the supplier concerned. In most cases, this will merely show the names of the suppliers contacted and the prices and other terms and conditions quoted by each. The contracting officer may use DA Form 5567 (Abstract of Offers (Nonappropriated Funds)) to record this information, and if needed DA Form 5567-1 (Abstract of Offers (Nonappropriated Funds, continuation sheet)).

(2) *Written solicitations.* For acquisitions not exceeding the simplified acquisition threshold, limit written records of solicitations or offers to notes or abstracts to show prices, delivery, references to printed price lists used, the supplier or suppliers contacted, and other pertinent data.

(3) *Special situations.* Include additional statements—

(a) Explaining the absence of competition if only one source is solicited and the acquisition does not exceed the simplified acquisition threshold.

(b) Supporting the award decision if other-than-price-related factors were considered in selecting the supplier.

(4) *Notification.* For acquisitions that do not exceed the simplified acquisition threshold, notification to unsuccessful suppliers shall be given only if requested.

(5) *Request for information.* If a supplier requests information on an award that was based on factors other than price alone, a brief explanation of the basis for the contract award decision shall be provided.

(6) *Taxpayer identification number (TIN).* If an oral solicitation is used, the contracting officer shall ensure that the copy of the award document being sent to the payment office does not contain the contractor's TIN and type of organization. The contracting officer shall disclose to the contractor that the TIN may be used by the NAFI to collect and report any delinquent amounts arising out of the contractor's relationship with the NAFI (31 USC 7701(c)(3)). The contractor's TIN and type of organization will be reported separately to the payment office on the W-9 Taxpayer Identification Number and Certification form (<http://www.irs.gov/formspubs>).

### **3-8. Obtaining contractor acceptance and modifying purchase orders**

a. When it is desired to consummate a binding contract between the parties before a contractor starts performance, the contracting officer shall require written acceptance by signature of the contractor of the purchase order by the contractor.

b. Each purchase order modification—DA Form 4073 (Amendment of Solicitation/Modification of Contract (Nonappropriated Funds)—shall identify the order it modifies and shall contain an appropriate modification number.

c. A contractor's written acceptance of a purchase order modification may be required, if determined by the contracting officer to be necessary, to ensure the contractor's compliance with the purchase order as revised. See paragraph 6-2 for policy on signature requirements.

### **3-9. Termination or cancellation of purchase orders**

a. If a purchase order that has been accepted as set forth in paragraph 3-4b by the contractor is to be terminated, the contracting officer shall process the termination in accordance with the termination for convenience clause.

b. If a purchase order that has not been accepted as set forth in paragraph 3-4b by the contractor is to be canceled, the contracting officer shall notify the contractor in writing that the purchase order has been canceled, request the contractor's written acknowledgement of the cancellation, and proceed as follows:

(1) If the contractor accepts the cancellation and does not claim that costs were incurred as a result of beginning performance under the purchase order, no further action is required (in other words, the purchase order shall be considered canceled).

(2) If the contractor does not accept the cancellation or claims that costs were incurred as a result of beginning performance under the purchase order, the contracting officer shall process the termination action as stated in a, above.

### **3-10. Blanket purchase agreement**

A BPA is a simplified method of filling anticipated repetitive needs for supplies or services by establishing "charge accounts" with qualified sources of supply.

a. BPAs should be established for use by the NAFI responsible for providing supplies or services for its own operations or for other offices, installations, projects, or functions.

b. The use of BPAs does not exempt a NAFI from the responsibility for keeping obligations and expenditures within available funds.

### **3-11. Establishment of BPAs**

a. The following are circumstances under which contracting officers may establish BPAs:

(1) There are a variety of items in a broad class of supplies or services that are generally purchased, but the exact items, quantities, and delivery requirements are not known in advance and may vary considerably.

(2) There is a need to provide commercial sources of supply or service for one or more offices or projects in a given area that do not have or need authority to purchase otherwise.

(3) The use of this procedure would avoid the writing of numerous purchase orders.

(4) There is no existing requirements contract for the same supply or service that the contracting activity is required to use.

b. After determining whether a BPA would be advantageous, contracting officers shall—

(1) Establish the parameters to limit purchases to individual items or commodity groups or classes, or permit the supplier to furnish unlimited supplies or services.

(2) Consider suppliers whose past performance has shown them to be dependable, who offer quality supplies or services at consistently lower prices, and who have provided numerous purchases at or below the simplified acquisition threshold.

c. BPAs may be established with—

(1) More than one supplier for supplies or services of the same type to provide maximum practicable competition;

- (2) A single firm from which numerous individual purchases at or below the simplified acquisition threshold will likely be made in a given period; or
- (3) Federal Supply Schedule contractors, if consistent with the terms of the applicable schedule contract.
- d. BPAs should be prepared without a purchase requisition and only after contacting suppliers to make the necessary arrangements for—
  - (1) Securing maximum discounts.
  - (2) Documenting individual purchase transactions.
  - (3) Periodic billings.
  - (4) Incorporating other necessary details.

### 3-12. Preparation of BPAs

a. Prepare BPAs on DA Form 4067-1 (Order for Supplies or Services (Nonappropriated Funds)). Do not cite accounting codes.

b. The following terms and conditions shall be included in the BPA:

(1) *Description of agreement.* A statement that the supplier shall furnish supplies or services, described in general terms, if and when requested by the contracting officer (or the authorized representative of the contracting officer), during a specified period and within a stipulated aggregate amount, if any.

(2) *Extent of obligation.* A statement that the NAFI is obligated only to the extent of authorized purchases actually made under the BPA.

(3) *Purchase limitation.* A statement that specifies the dollar limitation for each individual purchase under the BPA.

(4) *Individuals authorized to purchase under the BPA.* The contracting officer shall furnish the supplier the list of individuals authorized to purchase under the BPA, identified either by title of position or by name of individual, organizational component, and the dollar limitation per purchase for each position title, individual, or organization.

(5) *Delivery tickets.* A requirement that all shipments under the agreement, except those for newspapers, magazines, or other periodicals, shall be accompanied by delivery tickets or sales slips that shall contain the following minimum information:

(a) Name of supplier.

(b) BPA number.

(c) Date of purchase.

(d) Call number.

(e) Itemized list of supplies or services furnished.

(f) Quantity, unit price, and extension of each item, less applicable discounts (unit price and extension need not be shown when incompatible with the use of automated systems, provided that the invoice is itemized to show this information).

(g) Date of delivery or shipment.

(6) *Invoices.*

(a) One of the following statements shall be included on the BPA (except that the statement in (3), below, should not be used if the accumulation of the individual invoices by the NAFI materially increases the administrative costs of this purchase method):

1. A summary invoice shall be submitted at least monthly or upon expiration of this BPA, whichever occurs first, for all deliveries made during a billing period. The summary shall identify the delivery tickets covered therein, setting forth their total dollar value, and supported by receipt copies of the delivery tickets.

2. An itemized invoice shall be submitted at least monthly or upon expiration of this BPA, whichever occurs first, for all deliveries made during a billing period and for which payment has not been received. These invoices need not be supported by copies of delivery tickets.

3. When billing procedures provide for an individual invoice for each delivery, these invoices shall be accumulated, provided that a consolidated payment will be made for each specified period and the period of any discounts will commence on the final date of the billing period, or on the date of receipt of invoices for all deliveries accepted during the billing period, whichever is later.

(b) An invoice for subscriptions or other charges for newspapers, magazines, or other periodicals shall show the starting and ending dates, and shall state either that ordered subscriptions have been placed in effect or will be placed in effect upon receipt of payment.

c. *Limitations.* Purchases under BPAs are subject to the following limitations:

(1) Use BPAs only for purchases that are otherwise authorized by law or regulations.

(2) Individual purchases shall not exceed the simplified acquisition threshold.

(3) The limitation for individual purchases for commercial item acquisitions is \$250,000.

(4) BPA callers are appointed in accordance with paragraph 1-12b(2)(d).

(5) The existence of a BPA does not justify purchasing from only one source.

(6) If, for a purchase greater than the competition threshold, there is an insufficient number of BPAs to ensure adequate competition, the contracting officer shall—

(a) Solicit quotations from other sources and make the purchase as appropriate.

(b) Establish additional BPAs to facilitate future purchases, if there are recurring requirements and qualified sources.

(7) Limit documentation of purchases to essential information and forms as follows:

(a) Purchases generally should be made orally or electronically.

(b) A paper-purchase document may be issued, if necessary, to ensure that the supplier and purchaser agree on the transaction.

(c) Unless a paper document is issued, record essential elements on purchase requisition, in an informal memorandum, or on a form developed for that purpose.

(d) Cite the purchase request and the accounting data.

(8) When delivery is made or the services are performed, the supplier's sales document, delivery document, or invoice may be used for recording receipt and acceptance of supplies or service.

### **3-13. BPA review policy**

The contracting officer or designated representative of the contracting officer shall—

a. Review a sufficient sample of BPA files at least annually to ensure that authorized procedures are being followed and updated when necessary. All BPAs that have a total volume/usage greater than \$100,000 must be reviewed annually.

b. Be appointed in accordance with paragraph 1-12b(2)(d).

c. Maintain awareness of changes in market conditions, sources of supply and other pertinent factors that may warrant writing BPAs with different suppliers or modifying existing BPAs.

### **3-14. Solicitation, contract, and simplified acquisition forms**

a. *Commercial items.* Use DA Form 4066 (Solicitation/Contract/Order for Commercial Items (Nonappropriated Funds)).

b. *Other than commercial items.*

(1) Except when quotations are solicited electronically or orally, DA Form 4067 shall be used.

(2) DA Form 4067-1 is a multipurpose form that shall be used for negotiated purchases of supplies or services, delivery or task orders, inspection and receiving reports, and invoices. A DD Form 250 (Material Inspection and Receiving Report) may be used in lieu of DA Form 4067-1 for inspection and receiving purposes.

c. *Forms used for both commercial and other than commercial items.*

(1) DA Form 4068 (Continuation Sheet) may be used for additional space as needed.

(2) DA Form 4073 shall be used to amend a request for quotation or modify a purchase order.

### **3-15. Contractual documents**

In general, under the simplified acquisition process, a purchase order is used. A formal contract may be used when the contracting officer determines that its use is more appropriate than a purchase order based upon an understanding of the level of the risk involved, complexity of the procurement, time, price, delivery schedule, need for additional clauses, and level of contract administration. There is no dollar threshold mandating the use of a purchase order over a formal contract for the simplified acquisition process.

### **3-16. Army NAF purchase card program**

a. *Army NAF purchase card.* The Army NAF purchase card program provides a method of payment for the purchase of supplies and services for Government/NAFI use. The purchase card program provides procurement and nonprocurement personnel with a simplified method of purchasing commercially available supplies and services that do not exceed their purchase authority. The GSA is the issuing authority for the purchase card program contract.

b. *Program coordinator.* The Army NAF Program Coordinator for the purchase card is the FMWRC, NAF Contracting Directorate, Policy Division. The Army NAF Program Coordinator is the liaison between the Army and DOD Purchase Card Program Management Offices. The NAF Program Coordinator works in conjunction with the DOD Purchase Card Program Management Office.

c. *Policies and procedures.* A standing operating procedure that delineates procedures for use of the card shall be implemented and maintained by the Army NAF Program Coordinator.

d. *Internal controls.* Regional contracting offices shall develop operating procedures that will include guidance on appropriate internal controls for use by regions/installations. Controls shall be documented and will place minimal administrative burdens on cardholders and billing/approving officials.

e. *Use of purchase card with other procurement instruments.* The purchase card may be used in conjunction with other contracting instruments (for example, purchase orders, formal contracts, indefinite delivery contracts, or BPAs) only if prenegotiated or otherwise allowed by the basic contract or agreement.



### **3-17. Delivery orders and task orders**

A delivery or task order is an order for the future delivery of supplies, services, or construction placed against an existing contract or agreement (see para 3-14b(2)). A task order is an order for the future delivery of nonpersonal services or construction placed against an existing contract or agreement. They are binding when signed by the contracting officer. They obligate the NAFI to pay the contractor the amount on the delivery order or task order if they are placed in accordance with the terms and conditions of the basic contract and if the contractor performs according to the terms and conditions of the contract. Specifically—

a. Delivery orders or task orders may be placed against existing contracts and agreements that authorize NAFIs to place delivery orders or task orders.

b. Contract clauses are not used with delivery orders or task orders, since they are already contained in the existing contract or agreement.

c. Delivery orders or task orders have no dollar limitations other than—

(1) Availability of funds.

(2) Limits established by the basic contract or agreement.

### **3-18. Content of simplified acquisition files**

The contracting office will maintain records of all contractual actions and contract files. The contract file (in other words, purchase orders, delivery orders, and all other contracts) will consist of the following, as a minimum:

a. Purchase request and sole-source justification, if applicable, and any relevant documents from the requesting activity.

b. Record of negotiation listing potential offerors contacted and their quoted prices, delivery time, and any other information offered that served as a basis for the determination of the most favorable offeror. DA Form 4072 (Record of Negotiations) may be used for this purpose.

c. The RFP, request for quotations (RFQ), or purchase or delivery order.

d. Legal review, if applicable.

e. The signed original purchase order, delivery order, or contract.

f. All modifications, if any.

g. Any correspondence relating to the purchase.

h. Copies of receiving reports.

i. Evidence of all payments.

## **Chapter 4 Formal Acquisition Process**

### **4-1. Definition**

Negotiation is a means of contracting using either competitive or noncompetitive proposals and discussions. It is a flexible contracting method that permits contracting personnel to hold discussions, and obtain clarification of initial assumptions and positions, and it provides for give and take. Discussions may apply to price, schedule, technical requirements, type of contract, or other terms of a proposed contract. Negotiation allows the contracting officer the widest latitude in arriving at a fair and reasonable price with mutually agreed upon contract terms. Negotiation is the preferred method of contracting for NAF procurements and will be accomplished on a competitive basis to the maximum extent practicable.

### **4-2. Best value**

a. *Best value.* Contracting officers can obtain best value in negotiated procurements by using any one or a combination of source selection approaches. In different types of acquisitions, the relative importance of cost or price may vary. For example, in acquisitions where the requirement is clearly definable and the risk of unsuccessful contract performance is minimal, cost or price may play a dominant role in source selection. The less definitive the requirement, the more development work required, or the greater the performance risk, the more technical or past performance considerations may play a dominant role in source selection. Best value can be achieved through two source selection processes—

(1) *Tradeoff process.* This method is appropriate when the contracting officer is considering award to other than the lowest priced offeror or the highest technically rated offeror. It allows tradeoffs between price and non-price factors. This process permits tradeoffs among cost or price and non-cost factors and allows the NAFI to accept other than the lowest priced proposal. The benefits of the higher priced proposal shall merit the additional cost and the rationale for the tradeoffs must be documented in the file. When using the tradeoff process, the following shall apply:

(a) The solicitation includes all evaluation factors and significant subfactors affecting contract award with their relative importance.

(b) The solicitation reflects whether all evaluation factors other than cost or price, when combined, are significantly more than, approximately equal to, or significantly less important than cost or price.

(2) *Lowest price, technically acceptable process.* This method is appropriate when best value is expected to result from selecting the technically acceptable proposal with the lowest evaluated price. When using the lowest price, technically acceptable process, the following apply:

(a) The evaluation criteria establishing the requirements of acceptability shall be set forth in the solicitation. The solicitations shall specify that award will be made based on the lowest evaluated price of proposals meeting or exceeding the acceptability standards for non-cost factors. Past performance may be used, but not required, as an evaluation factor. If past performance is used as an evaluation factor, then the solicitation must state the approach to be used in past performance evaluation.

(b) Tradeoffs are not permitted.

(c) Proposals are only evaluated for technical acceptability and not ranked.

(d) Exchanges may occur (reference para 4–14).

b. *Evaluation consideration.* The solicitation shall clearly describe the evaluation criteria by which proposals will be evaluated. The solicitation shall clearly state all evaluation criteria and the relationship between the criteria. The criteria to be considered in evaluating offers must—

(1) Be tailored to each acquisition.

(2) Tie directly to requirements in the SOW (although not all requirements must be evaluated).

(3) Represent what is most important to the requiring activity.

(4) Support meaningful comparisons among proposals.

(5) Assist the evaluation team in discriminating among proposals.

c. *Quality.* The quality of the product or service shall be considered in every source selection through examining one or more non-cost evaluation factors such as past performance, compliance with solicitation requirements, technical excellence, management capability, personnel qualifications, or prior experience.

d. *Price.* Price or cost to the NAFI shall be evaluated in every source selection. In evaluating price, any discount offered for quantity of items ordered, any shipping charges, and any minimum order charges should be used to determine the actual price of the supplies or services.

e. *Multiple award evaluation.* The solicitation shall state if multiple awards will be considered. When the contracting officer uses the clause entitled “Evaluation of Multiple Awards,” offers shall be evaluated in accordance with that clause. The evaluation plan shall address the terms of that clause.

#### **4-3. Solicitation terms and conditions**

When developing solicitations, the contracting officer shall consider the following:

a. *Use of options.*

(1) The use of contract options affords the NAFI the unilateral right, for a specified period of time, to purchase additional supplies or services called for in the contract, or to elect to extend the term of the contract. When exercising an option, the contracting officer shall provide the contractor a preliminary written notice of not less than 60 days prior to contract expiration that the option may be exercised. The contracting officer shall follow-up not less than 30 days prior to contract expiration, providing the contractor a definitive position as to whether the option will or will not be exercised. It is the NAFI, not the contractor, who exercises an option. Solicitations containing option provisions shall state the basis of evaluation, either exclusive or inclusive of the option, and, when appropriate, shall inform offerors that it is anticipated that the NAFI may exercise the option at time of award.

(2) Option clauses should not be used when—

(b) The supplies or services are readily available on the open market (except that the contracting officer may use options for extending the term of indefinite delivery type contracts).

(c) The contractor will incur undue risk, such as the inability to estimate the price or determine availability of required materials and labor for future requirements.

(d) Market prices for supplies or services are likely to change substantially.

(e) The option represents known requirements for which funds are available, unless the basic quantity is a learning or testing quantity, and competition for the option is impractical once the initial contract is awarded.

(f) There is no anticipated need to continue similar services beyond the first contract period. Option clauses may be included in service contracts to ensure continued operation and to avoid possible increased cost that might result from interrupted support.

(3) Options in contracts will be priced at the time of initial award. Priced options may be firm dollar amounts or may be tied either to published indices predetermined at the time of solicitation or award or to a maximum percentage increase. When the contract provides for economic price adjustment and the contractor requests a revision of the price, the contracting officer shall determine the effect of the adjustment on prices under the option before the option is exercised. If an informal analysis of prices or an examination of the market indicates that the option price is better than prices available in the market or that the option is the more advantageous offer, the contracting officer may exercise the

option. If the contracting officer determines that option pricing is not more advantageous to the NAFI, then the requirement should be resolicited. This determination should be documented in the contract file.

*b. Delivery and performance time.* The time of delivery or performance is an essential contracting element and will be clearly stated in all contracts. Required delivery or performance times set forth in solicitations should be realistic to avoid restricting competition. The contractor is responsible for timely contract performance. The contracting officer shall determine the extent of surveillance necessary to protect the NAFI's interest.

*c. Quality assurance.* Contracting officers shall include appropriate inspection, acceptance, and other quality requirements, including warranty clauses when appropriate, in solicitations and contracts as determined necessary to protect the NAFI's interest. In general, when acquiring commercial items, standard commercial warranties will be used, although contracting officers have the discretion to use NAFI inspections where appropriate, even if the item being purchased is a commercial item.

*d. Liquidated damages.*

(1) The liquidated damages clause may be used when the following two conditions are met:

(a) The time of delivery or performance is critical and the NAFI may reasonably expect to suffer damage if delivery or performance is late.

(b) The exact amount of such damage would be difficult or impossible to ascertain or prove.

(2) When determining whether to use a liquidated damages clause, the contracting officer should consider its likely effect on pricing, competition, and contract administration. If the decision is made to use a liquidated damages clause, the applicable clause and the appropriate liquidated damage rate will be included in the solicitation.

(3) The rate of liquidated damages used must be reasonable and calculated on a case-by-case basis. Rationale for determining the liquidated damages rate shall be documented, in writing, prior to the release of the solicitation. The resulting contract may include a maximum total dollar amount or period of time, or both, during which liquidated damages may be assessed.

(4) The minimum amount of liquidated damages should be based on the estimated cost of inspection, oversight, loss/profit, and contract administration for each period of delay. If the NAFI will suffer other specific losses due to the failure of the contractor to complete the work on time, an amount for those items also should be included in the total, including potential loss/profits.

(5) Efficient administration of contracts containing a liquidated damages clause is imperative to prevent undue loss to defaulting contractors and to protect the interests of the NAFI.

*e. Performance and payment bonds.* All bonds shall list the NAFI as a party. In some cases it may be appropriate to also list the U.S. Government. See paragraph 2-19 regarding bonding requirements.

#### **4-4. Source selection authority**

The objective of source selection is to select the proposal that best meets the requirements of the solicitation.

*a.* The contracting officer is designated as the source selection authority (SAA) unless the CAO formally appoints another individual for a particular acquisition or group of acquisitions.

*b.* The SSA shall—

(1) Establish an evaluation team, tailored for the particular acquisition, that includes appropriate contracting, legal, logistics, technical, outside advisors in accordance with the guidance in paragraph 7-9 and other expertise to ensure a comprehensive evaluation of offers.

(2) Approve the source selection strategy or acquisition plan, if applicable, before solicitation release.

(3) Ensure consistency among the solicitation requirements, notices to offerors, proposal preparation instructions, evaluation factors and subfactors, solicitation provisions or contract clauses, and data requirements.

(4) Ensure that proposals are evaluated based solely on the factors and subfactors contained in the solicitation.

(5) Consider the recommendations of advisory boards or panels, if any.

(6) Select the source(s) whose proposal(s) offers the best value to the NAFI.

*c.* The contracting officer shall—

(1) After release of a solicitation, serve as the focal point for inquiries from actual or prospective offerors.

(2) After receipt of proposals, control exchanges with offerors.

(3) Award the contract.

#### **4-5. Exchanges with industry prior to receipt of proposals**

*a.* Exchanges of information among interested parties, from the earliest identification of a requirement through receipt of proposals, are encouraged. Any exchange of information must be consistent with NAFI ethical requirements, governing regulations, and statutes. Interested parties include potential offerors, end users, NAFI acquisition and supporting personnel, and others involved in the conduct or outcome of an acquisition.

*b.* The purpose of exchanging information is to improve the understanding of NAFI requirements and industry capabilities, thereby allowing potential offerors to determine how they can satisfy the NAFI's requirements. It enhances

the NAFI's ability to obtain quality supplies and services, including construction, at reasonable prices, and to increase efficiency in proposal preparation, proposal evaluation, negotiation, and subsequent contract award.

*c.* Contracting officers are encouraged to promote early exchanges of information about future acquisitions. An early exchange of information among industry representatives and the program manager, contracting officer, and other participants in the acquisition process can identify and resolve concerns regarding acquisition strategy. These exchanges include proposed contract type, terms and conditions, acquisition planning schedules, the feasibility of the requirement (including performance requirements), statements of work, and data requirements. Some techniques to promote early exchanges of information are—

- (1) Industry conferences.
- (2) Market research.
- (3) One-on-one meetings with potential offerors (those that substantially involve potential contract terms and conditions, should include the contracting officer or contract specialist). Also see paragraph e of this section regarding restrictions on disclosure of information.
- (4) Presolicitation notices.
- (5) Draft RFP.
- (6) RFI.
- (7) Pre-solicitation or pre-proposal conferences.
- (8) Site visits.

*d.* An RFI may be used when the NAFI does not presently intend to award a contract but wants to obtain price, delivery, other market information, or capabilities for planning purposes. Responses to these requests are not offers and cannot be accepted by the NAFI to form a binding contract. There is no required format for RFIs.

*e.* General information regarding the NAFI's mission and future requirements may be disclosed at any time.

(1) After release of the solicitation or an RFI, the contracting officer shall be the focal point of any exchange with potential offerors.

(2) When specific information about a proposed acquisition that would be necessary for the preparation of proposals is disclosed to one or more potential offerors, that information shall be made available to all potential offerors in order to avoid creating an unfair competitive advantage.

(3) Information provided to a particular offeror in response to that offeror's request shall not be disclosed if doing so would reveal the potential offeror's confidential business strategy.

(4) When a presolicitation or proposal conference is conducted, materials distributed at the conference should be made available to all potential offerors upon request.

#### **4-6. Solicitation and offers**

*a.* An RFP is the instrument by which negotiated acquisitions are initiated. An RFP is a written solicitation that provides a potential offeror with the opportunity to offer a price and a plan for accomplishing a particular acquisition and issued on DA Form 4069 (Solicitation/Offer and Award (Nonappropriated Funds)). RFPs are used in negotiated acquisitions to communicate NAFI requirements to prospective offerors and to solicit proposals in meeting those requirements.

*b.* A proposal received in response to an RFP is an offer that may be accepted by the NAFI to create a binding contract with contracting officer signature using DA Form 4069 (see para 4-18).

#### **4-7. Uniform contract format**

Contracting officers will normally prepare solicitations and resulting contracts using the uniform contract format outlined in at appendix D. Alternate contract formats may be used at the discretion of the contracting officer. Rationale for use of alternate contract formats will be documented in the file. Legal review of all solicitations using alternate contract formats shall be obtained to ensure the NAFI's rights are protected. The contracting officer may, when no other reasonable alternative exists, accept and incorporate a contractor's standard terms and conditions into the contract. Legal review of the contract and the contractor's forms must be sought to ensure the rights and remedies to the NAFI are maintained.

#### **4-8. Amending solicitations**

*a.* After the solicitation has been issued, but before the closing date, it may become necessary to change, correct, or provide clarification to the statement of work, specifications, quantities, delivery schedule, or the closing date. This is accomplished by issuing an amendment to the solicitation using DA Form 4073 that is furnished to all of the offerors. Information given to a prospective offeror will be furnished concurrently and promptly to all prospective offerors as a solicitation amendment if the information is necessary for submitting proposals and if the lack of such information may be detrimental or give an unfair advantage to one prospective offeror over other offerors.

*b.* Amendments issued after the closing date of the RFP shall be issued to all offerors that have not been eliminated from the competition.

*c.* The contracting officer will determine whether the closing date will be revised based on the content of the

amendment. This determination will be made in coordination with the requiring activity. If the decision is made to revise the closing date, prospective offerors will be notified simultaneously and in a timely manner. The new closing date for submitting proposals will be indicated in the solicitation amendment. Oral notice may be used when time is of the essence, the file is documented, and a formal amendment is subsequently sent.

*d.* If a proposal involves a departure from the stated requirements (in other words, an offeror proposes an alternate solution), and the NAFI determines this proposal is of interest to the NAFI, the contracting officer shall amend the solicitation. Amendments can be done without revealing to the other offerors the alternate solution proposed or any other information that is entitled to protection.

*e.* If, in the judgment of the contracting officer, an amendment proposed for issuance after offers have been received is so substantial as to exceed what prospective offerors reasonably could have anticipated, so that additional sources likely would have submitted offers had the substance of the amendment been known to them, the contracting officer shall cancel the original solicitation and issue a new one, regardless of the stage of the procurement.

*f.* The contracting officer will not award a contract unless all amendments have been acknowledged by the successful offeror, either listed on the solicitation form or acknowledged on each amendment and submitted with the offeror's proposal.

#### **4-9. Solicitation response time**

The contracting officer shall establish a solicitation response time that will afford potential offerors a reasonable opportunity to respond to the solicitation. The contracting officer should consider the circumstances of the individual acquisition, such as the complexity, commercial availability, or urgency when establishing the solicitation response time. Offerors are normally allowed 30 days or longer to respond to a solicitation. Time frames shorter than 30 days may be used if it is in the best interest of the NAFI and the reason(s) is documented in the contract file.

#### **4-10. Handling proposals**

*a.* When responses to solicitations are received, the contracting officer or designated individual will ensure the submission is promptly marked with date and time received.

*b.* Proposals shall be safeguarded from unauthorized disclosure of information throughout the source selection process. The contents of proposals received from offerors are competition sensitive and are to be held in confidence by all personnel involved in the source selection process. Disclosure by the NAFI of any aspect of one offeror's proposal to another offeror or offerors is strictly prohibited. To avoid unintentional compromise, disclosure of proposal details within the NAFI during the source selection process must likewise be restricted only to those individuals having a bona fide need to know, such as the evaluation team.

*c.* Electronic and facsimile proposals may be authorized in the solicitation. If any portion of a proposal received by the contracting officer electronically or by facsimile is unreadable, the contracting officer shall notify, in a timely manner, the offeror and permit the offeror to resubmit the unreadable portion of the proposal. The method and time for resubmission shall be prescribed by the contracting officer after consultation with the offeror and documented in the file. The resubmission shall be considered as if it were received at the date and time of the original unreadable submission for the purpose of determining timeliness, provided the offeror complies with the time and format requirements for resubmission prescribed by the contracting officer.

#### **4-11. Submission, modification, revision, and withdrawal of proposals**

*a.* Offerors are responsible for submitting offers, and any revision or modification to them and ensuring the offers reach the NAFI office designated in the solicitation on time. If an emergency or unanticipated event interrupts normal delivery to the NAFI or Government so that proposals cannot be received at the office designated for receipt of proposals by the exact time specified in the solicitation, and urgent NAFI or Government requirements preclude amendment of the solicitation closing date, the time specified for receipt of proposals will be deemed to be extended to the same time of day specified in the solicitation on the first work day on which normal NAFI or Government processes resume.

*b.* Proposals, and modifications to them, that are received in the designated NAFI office after the exact time specified are late and shall be considered only if it was received before award and one (or more) of the following applies:

(1) There is evidence that it was sent by U.S. Postal Service or a commercial courier service 5 days, or 10 days for outside the continental United States (OCONUS), before the exact time specified in the solicitation;

(2) There is acceptable evidence to establish that the proposal was received at the activity designated prior to the exact time specified in the solicitation and the contracting officer determines that accepting the late offer would not unduly delay the procurement;

(3) It was transmitted through an electronic commerce method authorized by the solicitation and was received at the initial point of entry to the NAFI not later than 5:00 PM 1 working day prior to the date specified for receipt; or

(4) It is the only proposal received.

c. The contracting officer shall promptly notify any offeror if its proposal, modification, or revision was received late and shall inform the offeror whether it will be considered, unless contract award is imminent.

d. Late proposals and modifications that are not considered shall be held unopened until after award and then retained, unopened, with other unsuccessful proposals.

e. The file shall be documented as to the facts pertaining to why a late proposal or modification was accepted or rejected.

f. Proposals may be withdrawn at any time before award. Written proposals are withdrawn upon receipt by the contracting officer of a written notice of withdrawal. Oral proposals in response to oral solicitations may be withdrawn orally. The contracting officer shall document the contract file when such oral withdrawals are made. One copy of withdrawn proposals should be retained in the contract file. Extra copies of withdrawn proposals may be destroyed or returned to the offeror at the offeror's request. Extremely bulky proposals shall only be returned at the offeror's request and expense.

g. Upon withdrawal of an electronically transmitted proposal, the data received shall not be viewed and shall be purged from primary and backup data storage systems.

#### **4-12. Cancellation of solicitations**

If the solicitation is canceled, all offerors to whom the solicitation was sent will be notified of the cancellation in writing. Proposals received in response to the solicitation will be returned unopened to the offerors. Proposals received by electronic transmission shall be purged from the primary and back-up data storage systems. Each offeror shall be notified that the purge of the information occurred.

#### **4-13. Oral presentations**

a. Oral presentations are an appropriate source-selection method when an offeror's qualifications and capability to perform the work and/or understanding of the requirements are the primary evaluation factors. An oral presentation allows the evaluation team to observe the offeror's technical team and how it functions together. It is appropriate to have both a written and oral component of source selection if the technical requirements are complex. Oral presentations may occur at any time in the evaluation process.

b. The solicitation may require each offeror to submit part of its proposal through oral presentations. The offeror shall submit, in writing, a signed solicitation/contract form (or approved variation), certifications, and representations.

c. Information pertaining to areas such as an offeror's capability, past performance, work plans or approaches, staffing resources, and transition plans may be presented orally. The NAFI must consider the following when deciding to conduct oral presentations:

- (1) The NAFI's ability to adequately evaluate the oral information.
- (2) The need to incorporate any information in the contract.
- (3) The impact on the efficiency of the acquisition.
- (4) The impact on the offeror, to include cost. Alternatives to onsite oral presentations, such as teleconferencing or video teleconferencing, should be considered.

d. When requesting oral presentations, the following information should be included in the RFP:

- (1) Information to be presented.
- (2) Qualifications, by function or job title, of personnel to be giving the oral presentation.
- (3) Limitations on written material, and date prior to the presentation when the written material is to be submitted.
- (4) Location, date, and time for presentation.
- (5) Restrictions on length of presentation.
- (6) Scope and content of exchanges to take place after the presentation.

e. The contracting officer shall control the oral presentations. It is important at the presentation that no additional written materials be accepted that were not previously submitted. The evaluators should rate each offeror directly after its presentation. Any exchanges to be conducted should be clearly stated in the solicitation. If the NAFI intent is to award without discussions, only clarifications may be addressed after the presentation. If awarded with discussions, exchanges can be more extensive, such as a question-and-answer session between the evaluation team and the offeror's team. If discussions are conducted during oral presentations, then the policy set forth in paragraph 4-14 shall be followed.

f. The contracting officer must document the file regarding the presentation. The documentation may be in the form of notes, audiotape, videotape, written record, and/or copies of slides, and so on, at the discretion of the contracting officer.

g. When oral presentations include information that the parties intend to include in the contract as material terms and conditions, the information shall be put in writing. Incorporation by reference of oral statements is not permitted.

#### **4-14. Exchanges with offerors after receipt of proposals**

a. *Definitions.*

(1) *Clarification.* Clarifications are limited exchanges between the contracting officer and the offerors that occur before award. Clarifications can be used to resolve minor or clerical errors.

(2) *Discussions.* Discussions are negotiations that occur after the establishment of the competitive range that may, at the contracting officer's discretion, result in an offeror being allowed to revise its proposal.

(3) *Deficiency.* A deficiency is a material failure of a proposal to meet a solicitation requirement, or a combination of significant weaknesses in a proposal that increases the risk of unsuccessful contract performance to an unacceptable level. A deficient proposal shall not receive contract award.

(4) *Weakness.* A weakness is a flaw in a proposal that increases the risk of unsuccessful performance. A significant weakness in a proposal is a flaw that appreciably increases the risk of unsuccessful contract performance.

*b. Clarifications and award without discussions.*

(1) If award will be made without holding discussions, offerors may be given the opportunity to clarify certain aspects of proposals (for example, the relevance of an offeror's past performance information and adverse past performance information to which the offeror has not previously had an opportunity to respond) or to resolve minor or clerical errors.

(2) Award may be made without discussions if the solicitation states that the NAFI intends to evaluate proposals and make award without discussions. If the solicitation contains such a notice and the NAFI determines it is necessary to conduct discussions, the rationale for doing so shall be documented in the contract file.

*c. Communications with offerors before establishment of the competitive range.* Communications are exchanges between the NAFI and offerors after receipt of proposals, leading to establishment of the competitive range. If a competitive range is to be established, these communications—

(1) Shall be limited to the offerors who submitted proposals in response to the solicitation.

(2) Shall be held with offerors whose past performance information is the determining factor preventing them from being placed within the competitive range. Such communications shall address adverse past performance information to which an offeror has not had a prior opportunity to respond.

(3) May only be held with those offerors whose exclusion from or inclusion in the competitive range is uncertain.

(4) May be conducted to enhance NAFI understanding of the proposal, allow reasonable interpretation of the proposal, or facilitate the NAFI's evaluation process. Such communications shall not be used to cure proposal deficiencies or material omissions, materially alter the technical or cost elements of the proposal, or otherwise revise the proposal. Such communications may be considered in rating proposals for the purpose of establishing the competitive range.

(5) Are for the purpose of addressing issues that must be explored to determine whether a proposal should be placed in the competitive range. Such communications shall not provide an opportunity for the offeror to revise its proposal but may address—

(a) Ambiguities or other concerns (for example, perceived deficiencies, weaknesses, errors, omissions or mistakes).

(b) Information relating to relevant past performance.

(c) Adverse past performance information to which the offeror has not previously had an opportunity to comment.

*d. Competitive range.*

(1) If discussions are to be conducted, a competitive range must be established. Based on the ratings of each proposal against all evaluation criteria, the contracting officer shall establish a competitive range.

(2) After evaluating all proposals, the contracting officer may determine that the number of most highly rated proposals that might otherwise be included in the competitive range exceeds the number on which an efficient competition can be conducted. The contracting officer may limit the number for proposals in the competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals.

(3) If the contracting officer decides that an offeror's proposal should no longer be included in the competitive range, the proposal shall be eliminated from consideration for award. Written notice of this decision shall be provided to unsuccessful offerors in a timely manner.

(4) Offerors excluded or otherwise eliminated from the competitive range may request a debriefing. Debriefings prior to award shall be in accordance with paragraph 4-20.

*e. Exchanges with offerors after establishment of the competitive range.* Negotiations are exchanges, in either a competitive or sole-source environment, between the NAFI and offerors that are undertaken with the intent of allowing the offeror to revise its proposal. These negotiations may include alteration of assumptions and positions and give-and-take and may apply to price, schedule, technical requirements, or other terms of a proposed contract. When negotiations are conducted in a competitive acquisition, they take place after establishment of the competitive range and are called *discussions*.

(1) Discussions are tailored to each offeror's proposal and shall be conducted by the contracting officer with each offeror within the competitive range.

(2) The primary objective of discussions is to maximize the NAFI's ability to obtain best value, based on the requirement and the evaluation factors set forth in the solicitation.

(3) The contracting officer shall indicate to, or discuss with, each offeror still being considered for award the

significant weaknesses, deficiencies, and other aspects of its proposal (such as cost, price, technical approach, past performance, and terms and conditions) that could, in the opinion of the contracting officer, be altered or explained to enhance materially the proposal's potential for award. The scope and extent of discussions are a matter of the contracting officer's judgment.

(4) If, after discussions have begun, an offeror originally in the competitive range is no longer considered to be among the most highly rated offerors being considered for award, that offeror may be eliminated from the competitive range. This is whether or not all material aspects of the proposal have been discussed, or whether or not the offeror has been afforded an opportunity to submit a proposal revision.

*f. Limits on exchanges.* NAFI personnel involved in the acquisition shall not engage in conduct that—

- (1) Favors one offeror over another;
- (2) Reveals the name(s) of other offerors;
- (3) Reveals an offeror's technical solution, including unique technology, innovative and unique uses of commercial items, or any other information that would compromise an offeror's intellectual property to another offeror;
- (4) Reveals an offeror's price to other offerors without that offeror's permission. However, the contracting officer may inform an offeror that its price is considered by the NAFI to be too high or too low and reveal the results of the analysis supporting that conclusion; or
- (5) Reveals the names of individuals providing reference information about an offeror's past performance.

#### **4-15. Proposal revisions**

*a.* If an offeror's proposal is eliminated or otherwise removed from the competitive range, no further revisions to the offeror's proposal shall be accepted or considered.

*b.* The contracting officer may request or allow proposal revisions to clarify and document understandings reached during negotiations. At the conclusion of discussions, each offeror still in the competitive range shall be given an opportunity to submit a final proposal revision. The contracting officer is required to establish a common cut-off date only for receipt of final proposal revisions. Requests for final proposal revisions shall advise offerors that the final proposal revisions shall be in writing and that the NAFI intends to make an award without obtaining further revisions.

#### **4-16. Preaward survey**

*a.* A pre-award survey is normally required when the information on hand or readily available to the contracting officer, including information from commercial sources, is not sufficient to make a determination regarding responsibility. Generally, preaward surveys should not be done for contracts to be awarded at or below \$100,000.

*b.* Information obtained during a pre-award survey may include finances, incorporation details, names and positions of firm's officers, history of the company, and past performance. Information requested should relate directly to the requirements of the solicitation.

*c.* The results of the preaward survey shall be documented in the contract file.

#### **4-17. Source selection decision**

The SSA's decision shall be based on a comparative assessment of proposals against all source selection criteria in the solicitation. While the SSA may use reports and analyses prepared by others, the source selection decision shall represent the SSA's independent judgment. The source selection decision shall be documented. The documentation shall include the rationale for any business judgments and tradeoffs made or relied on by the SSA, including benefits associated with additional costs. Although the rationale for the selection decision must be documented, that documentation need not quantify the tradeoffs that led to the decision.

#### **4-18. Award of contracts**

*a.* The contracting officer shall award a contract to the successful offeror or offerors by furnishing the executed contract or other notice of award to that offeror. The proposal submitted by an offeror in response to the RFP is an offer. No award will be made until the following determinations are made:

- (1) The proposal conforms to the solicitation.
- (2) The price is fair and reasonable.
- (3) The offeror is responsible.

*b.* These determinations, along with a description of the evaluation process and rationale for award, shall be documented in the contract file and signed by the contracting officer.

*c.* The offeror's filled-in representations and certifications (Section K), the instructions, conditions, and notices to offerors and respondents (Section L), and the evaluation factors for award (Section M) shall be withdrawn from the contract document and be so indicated on the cover page of the contract. Sections K, L, and M become part of the contract file.

*d.* The terms and conditions are the means by which the contract will be administered. Therefore, the contracting officer should exhibit great care when incorporating a proposal, or parts of a proposal, into the contract award document. This holds true for both initial proposal and revised proposal information. The information contained in a



proposal does not automatically become part of the contract by virtue of its existence. For the information contained in the proposal to be legally binding, it must become part of the contract. When incorporating information from the offeror's proposal, the contracting officer will need to ensure that the information is relevant and does not conflict with terms and conditions existing elsewhere in the contract. It is not sufficient to simply state that a proposal is hereby incorporated into the contract.

*e.* The offer, including additions and changes resulting from further negotiations, is accepted when the contracting officer signs the contract. If the award includes information different from the latest signed proposal, as amended by the offeror's written correspondence, both the offeror and the contracting officer shall sign the contract. In this case, DA Form 4071 (Award Contract (Nonappropriated Funds)) shall be used to award the contract. Any information received during proposal revisions shall be incorporated, as appropriate, into the contract (see para 4–6).

*f.* The effective date of award will be the date the contract is signed by the contracting officer, unless a future date is given in the contract.

*g.* The contracting officer will provide the executed contract to the successful offeror and shall provide written notice to the unsuccessful offerors that they did not receive award of a contract.

#### **4–19. Contract awards board**

*a. Convening the board.* A Contracts Award Board (CAB) will be convened, as determined by the contracting officer, for supplies, services, and construction contracts. Determination that a CAB is needed will be based on the following criteria:

- (1) Degree of complexity of the proposed contract action (in other words, the extent of detailed technical, management, and professional knowledge required for execution of contract).
- (2) Degree of monetary impact on the NAFI (any monetary ceiling established by local policy).
- (3) Degree of importance (priority) within the command.
- (4) Degree of impact timely award has on successful execution of the contract (in other words, consideration of administrative time involved in conducting the CAB).

*b. Purpose.* The CAB will be conducted in order to ensure that—

- (1) Applicable portions of Army regulations and other DOD directives and procedural requirements are satisfied with regard to project execution, funding, and acquisition approvals.
- (2) The proposed action represents sound business judgment.
- (3) The proposed contract is technically and legally sufficient.
- (4) Adequate competition was obtained.
- (5) An impartial and comprehensive evaluation of offerors' proposals was made.
- (6) Proposed award is made of the offeror whose proposal contains the highest degree of realism and whose performance is expected to best meet the NAFI requirements set forth in the solicitation.

*c. Board members.* The board will consist of senior leadership of the NAFI, contracting, financial, technical, and legal personnel. The board chairperson will be the senior voting member, in terms of grade and rank, and will conduct board proceedings. The board chairperson will only vote in the event of a tie among the voting members. All board members, except contracting and legal personnel, will be voting members.

#### **4–20. Debriefing offerors**

*a.* All unsuccessful offerors, upon request, shall be debriefed and furnished the basis for the selection decision. Request for debriefing shall be made by the offeror by written request within 7 calendar days after receipt of the notice from the contracting officer that the offeror did not receive award.

*b.* Debriefings may be done verbally (including by telephone) or in writing by the contracting officer who may request support from the evaluation team. The contracting officer shall document the debriefing in the contract file.

*c.* A pre-award debriefing shall include—

- (1) The NAFI's evaluation of significant elements of the offeror's proposal.
- (2) A summary of the rationale for eliminating the offeror from the competitive range.
- (3) Reasonable responses to relevant questions about the source selection process contained in the solicitation and applicable regulations that were used.

*d.* A pre-award debriefing shall not disclose—

- (1) The number of offerors.
- (2) The identity of other offerors.
- (3) The contents of other offerors' proposals.
- (4) The ranking of other offerors.
- (5) The evaluation of other offerors.
- (6) Any comparison of offerors.

*e.* A debriefing after award shall include the following:

- (1) Significant deficiencies or weaknesses in the proposal.

- (2) Overall rating of the successful offeror and the debriefed offeror.
  - (3) Past performance information on the debriefed offeror.
  - (4) Overall ranking of all offerors.
  - (5) Rationale for award.
  - (6) Reasonable responses to questions on the source selection process contained in the solicitation and applicable regulations that were used.
- f.* A debriefing after award is not—
- (1) A page-by-page analysis of the proposal.
  - (2) A point-by-point comparison of proposals.
  - (3) A debate over the award decision.
  - (4) A release of any offeror's proprietary information to other offerors.

#### **4-21. Protests**

*a. Protest.* A protest is a written objection by an interested party. An interested party is an actual or prospective offeror whose direct economic interest would be affected by the award of, or failure to award, a particular contract. Protests for contracts awarded using NAF may be protested to the contracting officer. The Government Accountability Office (GAO) generally does not have jurisdiction over contracts obligating NAF, although obligation of NAF by APF contracting officers may result in GAO jurisdiction. All protests to the GAO received by the NAF contracting officer will be promptly forwarded to legal counsel for review and comment. The contracting officer is responsible for answering or resolving all protests received. Protests may be received either before or after contract award. Any protest lodged with other than the contracting officer will be referred to or sent immediately to the contracting officer.

*b. Oral protests.* When a protest is received orally, the contracting officer will advise the protestor that, in order to be considered, the protest must be submitted in writing and forwarded to the contracting officer's attention.

*c. Protests prior to award.*

(1) When a protest is received prior to the award of a contract, the award will be delayed until the protest (including appeals) is resolved, unless one of the following applies (such determination will be made at one level above the contracting officer):

- (a) The supplies or services to be contracted for are urgently required.
- (b) Delivery or performance will be unduly delayed by failure to make a prompt award.
- (c) Expiration of current contract is imminent and continued service is required.
- (d) A timely award will otherwise be advantageous to the NAFI.

(2) Before awarding a contract under the above-cited circumstances, the advice of legal counsel shall be obtained. The contracting officer will document oral advice by placing a memorandum for record in the resulting contract file.

(3) The contracting officer will determine the merits of the protest. When the contracting officer finds a protest has merit (for example, ambiguous specifications, flawed evaluation process), he or she will promptly take action to correct the situation. Such possible actions include, among others, the rejection of all proposals and issuance of a new or amended solicitation or using revised specifications or evaluation criteria. In the event of amended solicitations, the scheduled date for receipt of proposals will be extended accordingly. If the resolution of the protest makes previously ineligible offers eligible for award, appropriate notification will be given to the offerors concerned.

*d. Protests after award.* To be considered, a protest shall be lodged within 10 calendar days of notification of contract award. When a protest is received by the contracting officer after the contract has been awarded, the contract normally will not be terminated. If the protester presents compelling reasons why the award should be invalidated, the contracting officer will attempt to negotiate a mutual agreement with the contractor for performance to be suspended on a no-cost basis until the protest is resolved. If a no-cost suspension cannot be negotiated, the advice of legal counsel will be sought.

*e. Requirement for a written decision.* Protests require a written decision and reply by the contracting officer to the protestor explaining the rationale for the decision, and will include the following statement: "You are advised that you may appeal this decision within 7 calendar days from receipt of this letter by mailing or otherwise furnishing a written appeal addressed to (insert the full mailing address of the office agency issuing the contract (in other words, FMWRC or designee)). The notice should indicate that an appeal is intended and should reference this decision."

*f. Appeals.* An offeror may appeal a contracting officer's decision on a protest to the appropriate authority set forth in *e*, above. The appellant authority shall obtain the written advice of legal counsel before deciding the appeal. The response to the appeal will be in writing and advise the protestor that his/her decision is final and that no further appeals are allowed.

#### **4-22. Mistakes after award**

When a mistake in the successful offeror's proposal is discovered after award, it may be corrected by modification to the contract only if the correction is favorable to the NAFI and if it does not change the essential requirements of the contract. In all other cases, the following procedures will be used:

- a.* The contracting officer will obtain evidence from the contractor to prove that a mistake was actually made and to show what the contractor intended to offer in the proposal.
- b.* The contracting officer will then review the contractor's documents to verify the mistake and to determine whether the contract should be modified, terminated, or allowed to stand as written.
- c.* The contracting officer will obtain the advice of legal counsel.
- d.* After reaching a decision, the contracting officer will prepare a memorandum for the contract file that contains the following:
  - (1) All evidence furnished by the contractor in support of the mistake.
  - (2) A summary of the evidence provided by the contractor and any additional pertinent evidence.
  - (3) A determination as to whether a mistake was made. If a mistake has been made, the contracting officer will also analyze whether—
    - (a)* The effect of correcting the mistake would increase costs to the NAFI, determine whether a revised contract would still represent the lowest offer, and examine any other considerations that the contracting officer deems appropriate.
    - (b)* Not correcting the mistake would affect the contractor's ability to perform under the existing contract and the quality of the supply or service to be delivered.
  - (4) A discussion on the status of the contract in terms of performance, deliveries, and payments.
  - (5) A statement of the contracting officer's recommendation. The contracting officer will issue the written decision.

#### **4-23. Content of files for formal acquisitions**

The examples below are of records normally kept in contract files. The list is not all-inclusive and not all items listed will be applicable to every file.

- a.* The purchase request, acquisition planning information, market research, and other presolicitation documents.
- b.* Evidence of availability of funds, to include any increases or decreases.
- c.* Synopsis of the acquisition as published.
- d.* A list of sources solicited, including additional firms that requested a copy of the solicitation and were furnished it or denied it. Documentation on any denial shall be in the files.
- e.* NAFI estimate of the requirement.
- f.* Record of any exchanges before award. DA Form 4072 may be used.
- g.* A copy of the solicitation, including attachments and any amendments.
- h.* A copy of each offer or quotation received.
- i.* The abstract of offers and record of negotiations.
- j.* Preaward survey reports.
- k.* Evaluation plan.
- l.* Contracting officer's determination of contractor responsibility.
- m.* Cost or pricing data and analysis.
- n.* Packaging and transportation data.
- o.* Legal review(s).
- p.* Notice of award.
- q.* The original of the signed contract and all contract modifications.
- r.* Copies of letters to unsuccessful offerors and records of any debriefings with them.
- s.* Bonds and notices to sureties.
- t.* Proof of required insurance, licenses, and permits.
- u.* Notices to proceed and stop or suspension of work orders.
- v.* Royalty clearances, copyright reports, and so on.
- w.* Contract completion documents, such as payments, receiving reports.
- x.* Documentation concerning termination actions.
- y.* Cross-references to pertinent documents that are filed elsewhere.
- z.* Letters of appointment of CORs and ordering officers, COR reports.
- aa.* Copies of any reports required as a result of the dollar value of the contract.
- bb.* Any additional documents on which action was taken by the contracting officer.
- cc.* Copies of protests, appeals, and documentation supporting decision.
- dd.* Copies of all correspondence between and among all interested parties.
- ee.* Copies of all disputes, claims, audits, and documentation supporting decision.

## **Chapter 5 Sealed Bidding**

### **5-1. Conditions for use**

Sealed bidding is not the preferred method of contracting for NAFIs; however, it may be used when all of the following conditions are present:

- a.* Price is the only evaluation factor.
- b.* Current and accurate purchase descriptions or specifications have been developed.
- c.* Time permits the solicitation, submission and evaluation of bids.
- d.* It is not necessary to conduct discussions with the respective bidders.
- e.* There is a reasonable expectation of receiving more than one bid.

### **5-2. Preparation of invitations for bids**

*a.* IFBs may be prepared using the format contained in appendix D. DA Form 4069 may be used to prepare IFBs.  
*b.* For firm-fixed-price or fixed-price with economic price adjustment contracts for supplies and services, the contracting officer may use a simplified contract format in lieu of the uniform contract format. The contracting officer has flexibility in preparation and organization of the simplified contract format. The solicitation/contract form shall be used as the first page of the solicitation. However, the following information should be included to the maximum practical extent:

- (1) Include the following for each contract line item in the contract schedule:
  - (a)* Contract line item number.
  - (b)* Description of supplies or services, or data sufficient to identify the requirement.
  - (c)* Quantity and unit of issue.
  - (d)* Unit price and extended total amount.
  - (e)* Packaging and marking requirements.
  - (f)* Inspection and acceptance, quality assurance, and reliability requirements.
  - (g)* Place of delivery or performance, delivery dates or period of performance, and free on board (FOB) point.
  - (h)* Other item-peculiar information, as necessary (for example, individual fund citations).
- (2) Include the clauses required by this regulation. Additional clauses may be incorporated when considered necessary to a particular procurement.
  - (3) List of documents and attachments, as necessary.
  - (4) Representations and certifications. Insert those solicitation provisions that require representations, certifications, or the submission of other information by bidders.
  - (5) Instructions, conditions, and notices. Include any solicitation provisions and any other information or instructions necessary to guide bidders.
  - (6) Evaluation factors for award.

### **5-3. Bid submission**

To be considered, bids shall be submitted so that they will be received in the office designated in the IFBs not later than the exact time set for opening of bids.

### **5-4. Bidding time**

Reference paragraph 4-9 of this regulation.

### **5-5. Facsimile bids**

*a.* Contracting officers may authorize facsimile bids. In determining whether or not to authorize facsimile bids, the contracting officer shall consider factors such as—

- (1) Anticipated bid size and volume.
  - (2) Urgency of the requirement.
  - (3) Frequency of price changes.
  - (4) Availability, reliability, speed, and capacity of the receiving facsimile equipment.
  - (5) Adequacy of administrative procedures and controls for receiving, identifying, recording, and safeguarding facsimile bids and ensuring their timely delivery to the bids opening location.
- b.* If facsimile bids are authorized, contracting officers may, after the date set for bid opening, request the apparently successful bidder to provide the complete, original signed bid.

## **5-6. Electronic bids**

Contracting officers may authorize use of electronic commerce for submission of bids. If electronic bids are authorized, the solicitation shall specify the electronic commerce methods(s) that bidders may use.

## **5-7. Records of IFB and abstract of bids**

*a.* The contracting office shall retain a record of each IFB that it issues and each abstract or record of bids. Contracting officers shall review and use information available in connection with subsequent acquisitions of the same or similar items.

*b.* The file for each invitation shall show the distribution that was made and the date the IFB was issued. The names and addresses of prospective bidders who requested the IFB and were not included on the original solicitation list shall be added to the list and made a part of the record.

## **5-8. Release of solicitation mailing list**

*a.* Contracting offices shall provide, upon written request, the IFB mailing list to the public.

*b.* When IFBs for construction contracts have been issued, the IFB mailing list will be made available, upon written request, to trade journals, prospective subcontractors, material suppliers, and so on.

## **5-9. Pre-bid conference**

*a.* A pre-bid conference may be used, generally in a complex acquisition, as a means of briefing prospective bidders and explaining complicated specifications and requirements to them as early as possible after the invitation has been issued and before bids are opened. It shall never be used as a substitute for amending a defective or ambiguous invitation.

*b.* The contracting officer shall decide if a pre-bid conference is required and make the necessary arrangements, including the following:

(1) If notice was not in the IFB, give all prospective offerors who received the solicitation adequate notice of the time, place, nature, and scope of the conference.

(2) If time allows, request prospective bidders to submit written questions in advance. Prepared answers can then be delivered during the conference.

(3) Arrange for technical and legal personnel to attend the conference, if appropriate.

*c.* The contracting officer shall conduct the pre-bid conference, furnish all prospective bidders identical information concerning the proposed procurement, make a complete record of the conference, and promptly furnish a copy of that record to all prospective offerors by amendment. Attendees shall be advised that—

(1) Remarks and explanations at the conference shall not qualify the terms of the IFB.

(2) Terms of an IFB and specifications remain unchanged unless the IFB is amended in writing.

## **5-10. Amendment of IFBs**

*a.* If it becomes necessary to make changes in quantity, specifications, delivery schedules, opening dates, and so on, or to correct a defective or ambiguous invitation, such changes shall be accomplished by amendment using DA Form 4073. The fact that a change was mentioned at a pre-bid conference does not eliminate the necessity for issuing an amendment. Amendments shall be sent, before the time for bid opening, to everyone to whom the IFB was sent.

*b.* Before amending an IFB, the period of time remaining until opening and the need to extend this period shall be considered. When only a short time remains before the time set for bid opening, consideration should be given to notifying bidders of an extension of time by telephone or facsimile. Such extension must be confirmed by written amendment.

*c.* Any information given to a prospective bidder concerning an IFB shall be furnished promptly to all other prospective bidders as an amendment to the IFB if:

(1) Such information is necessary for bidders to submit bids, or

(2) The lack of such information would be prejudicial to uninformed bidders. The information shall be furnished even though a pre-bid conference was held. No award shall be made on the IFB unless such amendment has been issued in sufficient time to permit all prospective bidders time to consider such information in submitting or modifying their bids.

## **5-11. Cancellation of IFBs before opening**

*a.* The cancellation of an IFB usually involves loss of time, effort, and money spent by the NAFI and the bidders. IFBs should not be canceled unless cancellation is in the NAFI's best interest, such as—

(1) Where there is no longer a requirement for the supplies or services.

(2) Where amendments to the IFB would be of such magnitude that a new invitation is desirable.

*b.* If an IFB is canceled, all offerors to whom the IFB was sent will be notified of the cancellation in writing. Bids received in response to the IFB will be returned unopened to the offerors. Bids received by electronic transmission

shall be purged from the primary and back-up systems. Each offeror shall be notified that the purge of the information occurred.

*c.* The notice of cancellation shall—

- (1) Identify the IFB by number and short title or subject matter.
- (2) Briefly explain the reason the IFB is being cancelled.
- (3) Where appropriate, assure prospective bidders that they will be given an opportunity to bid on any resolicitation of bids for any future requirement of the type of supplies or services involved.

#### **5-12. Late bids, late modification of bids, or late withdrawal of bids**

*a.* Bids shall be submitted so that they will be received in the office designated in the IFB not later than the exact time set for opening bids.

*b.* Bidders are responsible for submitting bids, and any modifications or withdrawals, so as to reach the NAF office designated in the IFB by the time specified in the IFB. They may use any transmission method authorized by the IFB (in other words, regular mail, electronic commerce, or facsimile). If no time is specified in the IFB, the time for receipt is 4:30 p.m., local time, for the designated NAFI location on the date that bids are due.

*c.* Any bid, modification, or withdrawal of a bid received at the NAFI office designated in the IFB after the exact time specified for receipt of bids is “late” and will not be considered unless: it was received before award is made; the contracting officer determines that accepting the late bid would not unduly delay the acquisition; and—

(1) It was transmitted through an electronic commerce method authorized by the IFB and it was received at the initial point of entry to the Government/NAFI infrastructure not later than 5:00 p.m. 1 working day prior to the date specified for receipt of bids; or

(2) There is acceptable evidence to establish that the bid was received at the Government installation/NAFI location designated for receipt of bids and was under the Government installation or NAFI's control prior to the time set for receipt of bids.

(3) However, a later modification of an otherwise successful bid, that makes its terms more favorable to the NAFI will be considered at any time it is received and may be accepted.

*d.* Acceptable evidence to establish the time of receipt at the Government installation or NAFI location includes the time/date stamp of that installation on the bid wrapper, other documentary evidence of receipt maintained by installation, oral testimony, or statements of Government/NAFI personnel.

*e.* If any emergency or unanticipated event interrupts normal Government/NAFI processes so that bids cannot be received at the NAFI office designated for receipt of bids by the exact time specified in the IFB, and urgent NAFI requirements preclude amendment of the bid opening date, the time specified for receipt of bids will be deemed to be extended to the same time of day specified in the IFB on the first work day on which normal Government/ NAFI processes resume.

*f.* Bids may be withdrawn by written notice received at any time before the exact time set for receipt of bids. If the IFB authorized facsimile bids, bids may be withdrawn via facsimile received at any time before the exact time set for receipt of bids. A bid may be withdrawn in person by a bidder or its authorized representative if, before the exact time set for receipt of bids, the identity of the person requesting withdrawal is established and the person signs a receipt for the bid. Upon withdrawal of an electronically transmitted bid, the data received must not be viewed and, where practicable, must be purged from primary and backup data storage systems.

*g.* The contracting officer must promptly notify any bidder if its bid, modification, or withdrawal was received late and must inform the bidder whether its bid will be considered, unless contract award is imminent.

#### **5-13. Notification to late bidders**

When a bid, modification of bid, or withdrawal of bid is received late and is clear from available information that it cannot be considered, the contracting officer shall promptly notify the bidder accordingly.

#### **5-14. Disposition of the late submission**

Late bids, modification of bids, or withdrawal of bids that are not considered for award shall be held unopened, unless opened for identification, until after award and then retained with other unsuccessful bids. However, any bid, bond, or guarantee shall be returned promptly.

#### **5-15. Opening bids**

*a.* At the time set for opening of the bids, the contracting officer will publicly open all bids received. The contracting officer may read the bids aloud, if time permits. After opening, the bids will be recorded on an abstract of bids (DA Form 5567, and if needed DA Form 5567-1), and the abstract will be retained in the contract file.

*b.* The time designated for the opening of bids may be postponed when—

- (1) A significant number of bids are known to have been delayed in the mail through no fault of the bidders; or
- (2) An emergency interrupts the normal operation of the contracting office.

## **5-16. Mistakes in bids**

*a. Examination of bids.* After the opening of bids, contracting officers shall examine all bids for mistakes. In cases of apparent mistakes and in cases where the contracting officer has reason to believe a mistake may have been made, the contracting officer shall request from the bidder a verification of the bid, calling attention to the suspected mistake. If the bidder alleges a mistake, the matter shall be processed in accordance with this section. Such action shall be taken before award.

*b. Apparent clerical mistakes.*

(1) Any clerical mistake apparent on its face in the bid may be corrected by the contracting officer before award. The contracting officer first shall obtain from the bidder a verification of the bid intended. Examples of apparent clerical mistakes include:

(a) Obvious misplacement of a decimal point.

(b) Obviously incorrect discounts (for example, 1 percent 10 days, 2 percent 20 days, 5 percent 30 days).

(c) Obvious reversal of the price FOB destination and price FOB origin.

(d) Obvious mistake in designation of unit.

(2) Correction of the bid shall be effected by attaching the verification to the original bid and a copy of the verification to the duplicate bid. Correction shall not be made on the face of the bid; however, it shall be reflected in the award document.

## **5-17. Award**

The award will be made to the lowest responsive and responsible bidder within any time limits that may have been set by the acceptance of the bids on DA Form 4069. The contracting officer will issue a written notice of award. Contracts awarded under this method will be on a firm-fixed-price contract and fixed-price with economic price adjustment basis.

## **5-18. Mistakes after award**

If a contractor's discovery and request for correction of a mistake in bid is not made until after the award, it shall be processed as follows:

*a.* The mistake may be corrected by contract modification, if correcting the mistake would be favorable to the NAFI without changing the essential requirements of the specifications.

*b.* In addition to the cases contemplated in *a*, above, or as otherwise authorized by law, contracting officers are authorized to make a determination—

(1) To rescind a contract;

(2) To modify a contract, deleting the items involved in the mistake or increasing the price if the contract price, as corrected, does not exceed that of the next lowest acceptable bid under the original IFB.

(3) That no change shall be made in the contract as awarded, if the evidence does not warrant a determination under (1) or (2), above.

*c.* Determinations under *b*(1) and (2), above, may be made only on the basis of clear and convincing evidence that a mistake in bid was made. In addition, it must be clear that the mistake was mutual, or if unilaterally made by the contractor, so apparent as to have charged the contracting officer with notice of the probability of the mistake. Each proposed determination shall be coordinated with legal counsel.

*d.* Mistakes alleged or disclosed after award shall be processed as follows:

(1) The contracting officer shall request the contractor to support the alleged mistake by submission of written statement and pertinent evidence of the contractor's bid file, to include the following:

(a) The contractor's original worksheets and other data used in preparing the bid.

(b) Subcontractors' and suppliers' quotations, if any.

(c) Published price lists.

(d) Any other evidence that will serve to establish the mistake, the manner in which the mistake occurred, and the bid actually intended.

(2) The contract file shall contain the following concerning the mistake:

(a) All evidence furnished by the contractor in support of the alleged mistake.

(b) A determination signed by the contracting officer—

1. Describing the supplies or services involved;

2. Explaining how and when the mistake was alleged or disclosed;

3. Summarizing the evidence submitted by the contractor and any additional evidence considered pertinent;

4. Quoting, in cases where only one bid was received, the most recent contract price for the supplies or services involved, or in the absence of a recent comparable contract, the contracting officer's estimate of a fair price for the supplies or services and the basis for the estimate;

5. Setting forth the contracting officer's opinion as to whether a bona fide mistake was made and whether the contracting officer was, or should have been, on notice of the mistake before the award, together with the reasons for, or data in support of, such an opinion;

6. Setting forth the course of action that the contracting officer considers proper on the basis of the evidence, with respect to the alleged mistake, and, if other than a change in contract price is recommended, the manner by which the supplies or services will otherwise be acquired;

7. Disclosing the status of performance and payments under the contract, including—
- Contemplated performance and payments.
  - A signed copy of the bid involved.
  - A copy of the invitation for bid and any specifications or drawings relevant to the alleged mistake.
  - An abstract or written record of the bids received.
  - A written request by the contractor to reform or rescind the contract and copies of all other relevant correspondence between the contracting officer and the contractor concerning the alleged mistake.
  - A copy of the contract and any related change orders or supplemental agreements.

#### **5–19. Two-step sealed bidding**

Two-step sealed bidding is a combination of competitive procedures designed to obtain the benefits of sealed bidding when adequate specifications are not available. The objective is to permit the development of a sufficiently descriptive and not unduly restrictive statement of the NAFI's requirements, including an adequate technical data package. This method is especially useful in acquisitions requiring technical proposals, particularly those for complex items. It is conducted in two steps as follows:

*a.* Step one consists of the request for, submission, evaluation, and (if necessary) discussion of a technical proposal. No pricing is involved. The objective is to determine the acceptability of the supplies or services offered. The word "technical" has a broad connotation and includes, among other things, engineering approach, special manufacturing processes, and special testing techniques. It is the proper step for clarification of questions relating to technical requirements. Conformity to the technical requirements is resolved in this step, but not determination of responsibility.

*b.* Step two involves the submission of sealed priced bids by those who submitted acceptable technical proposals in step one. Bids submitted in step two are evaluated and the awards made in accordance with evaluation factors stated in the solicitation.

#### **5–20. Conditions for use of two-step sealed bidding**

Unless other factors require the use of sealed bidding, two-step sealed bidding may be used in preference to negotiation when all of the following conditions are present:

- a.* Available specifications or purchase descriptions are not definite or complete or may be too restrictive without technical evaluation, and any necessary discussion, of the technical aspects of the requirement to ensure mutual understanding between each source and the NAFI.
- b.* Definite criteria exist for evaluating the technical proposal.
- c.* More than one technically qualified source is expected to be available.
- d.* Sufficient time will be available for use of the two-step method.
- e.* A firm-fixed-price or fixed-price with economic price adjustment contract will be used.

#### **5–21. Issuing a two-step solicitation**

*a.* Requests for technical proposals shall be distributed to firms that can meet the requirements of the stated objectives. Requests for technical proposals may be issued in letter format. The request must include, as a minimum, the following:

- (1) A description of the supplies or services.
- (2) A statement of intent to use the two-step method.
- (3) The requirement of the technical proposal.
- (4) The evaluation criteria, to include all factors and any price significant subfactors.
- (5) A statement that the technical proposals shall not include prices or information.
- (6) The date, or date and hour, by which the proposal must be received.
- (7) A statement that—
  - a.* In the second step, only bids where the technical proposals are determined to be acceptable, either initially or as a result of discussions, will be considered for award.
  - b.* Each bid in the second step must be based on the bidder's own technical proposal(s).
- (8) A statement that—
  - a.* Offerors should submit proposals that are acceptable without additional explanation or information.
  - b.* The NAFI may make a final determination regarding a proposal's acceptability solely on the basis of the proposal as submitted.
  - c.* The NAFI may proceed with the second step without requesting further information from any offeror; however, the NAFI may request additional information from offerors of proposals that it considers susceptible of being made acceptable, and may discuss proposals with the offerors.



(9) A statement that a notice of unacceptability will be forwarded to the offeror upon completion of the proposal evaluation and final determination of unacceptability.

(10) A statement that either a single technical proposal may be submitted by each offeror or multiple technical proposals may be submitted. When specifications permit different technical approaches, it is generally in the NAFI's interest to authorize multiple proposals.

*b.* Information on delivery or performance requirements may be of assistance to bidders in determining whether or not to submit a proposal and should be included in the request, when available. The request shall also indicate that the information is not binding on the NAFI and that the actual delivery or performance requirements will be contained in the invitation issued under step two.

*c.* Upon receipt, the contracting officer shall—

(1) Safeguard proposals against disclosure to unauthorized persons.

(2) Remove any reference to price or cost.

(3) Establish a time period for evaluating technical proposals. The period may vary with the complexity and number of proposals involved. However, the evaluation should be completed quickly.

*(a)* Evaluations shall be based on the criteria in the request for proposals but not consideration of responsibility. Proposals shall be categorized as—

1. Acceptable;

2. Reasonably susceptible of being made acceptable; or

3. Unacceptable.

*(b)* Any proposal that modifies or fails to conform to the essential requirements or specifications of the request for technical proposals may be considered nonresponsive and categorized as unacceptable.

*d.* The contracting officer may proceed directly with step two if there are sufficient acceptable proposals to ensure adequate price competition under step two and if further time, effort, and delay to make additional proposals acceptable and thereby increased competition would not be in the NAFI's interest. If this is not the case, the contracting officer shall request bidders whose proposals may be made acceptable to submit additional clarifying or supplementing information. The contracting officer shall identify the nature of the deficiencies in the proposal or the nature of the additional information required. The contracting officer may also arrange discussions for this purpose. No proposal shall be discussed with any offeror other than the submitter.

*e.* In initiating requests for additional information, the contracting officer shall fix an appropriate time for bidders to conclude any discussions, submit all additional information, and incorporate such additional information as part of their proposals submitted. Such time may be extended at the discretion of the contracting officer. If the additional information incorporated as part of a proposal within the final time fixed by the contracting officer establishes that the proposal is acceptable, it shall be so categorized. Otherwise, it shall be categorized as unacceptable.

*f.* When a technical proposal is found unacceptable (either initially or after clarification), the contracting officer shall promptly notify the offeror of the basis of the determination and that a revision of the proposal will not be considered. The contracting officer shall debrief unsuccessful offerors if requested in writing within 5 calendar days after receipt of notice.

*g.* Late technical proposals are those that are received after the submission date established by the contracting officer in the request for technical proposals letter.

*h.* If it is necessary to discontinue two-step sealed bidding, the contracting officer shall include a statement of the facts and circumstances in the contract file. Each offeror shall be notified in writing. When step one results in no acceptable technical proposal or only one acceptable technical proposal, the acquisition may be continued by negotiation.

## **5-22. Step-two—two-step sealed bidding**

Sealed bidding procedures shall be followed, except that IFBs shall—

*a.* Be issued only to those offerors submitting acceptable technical proposals in step one.

*b.* Include the following provision in the in step two-sealed IFB:

(1) The bid is issued to initiate step two of this two-step sealed bidding procurement.

(2) The only bids that the contracting officer may consider for award of a contract are those received from bidders that have submitted acceptable technical proposals in step one of the acquisition. The contracting officer shall insert the identification of the step one request for technical proposals.

(3) Any bidder that has submitted multiple technical proposals in step one of the acquisition may submit a separate bid on each technical proposal that was determined to be acceptable to the NAFI.

*c.* Prominently state that the bidder shall comply with the specifications and the bidder's technical proposal.

## **5-23. Contract award—two-step sealed bidding**

*a.* The NAFI will evaluate bids in response to this solicitation without discussions and will award a contract to the

responsible bidder whose bid, conforming to the solicitation, will be most advantageous to the NAFI considering only price and the price-related factors specified in the solicitation.

b. The NAFI may reject any or all bids and accept other than the lowest bid. Rejection of bids or the low bid must be documented. Minor irregularities in bids received may be corrected.

## **Chapter 6**

### **Contract Administration**

#### **6-1. Definition**

Contract administration is the management of a contract from the time of award through its expiration and close out. The purpose of contract administration is to ensure that the contractor performs according to the contract; to ensure the contracting officer does not waive any NAFI rights; to ensure that NAFIs receive the quantity and quality of the supplies, services, or construction procured in the contract; and to develop a record of the contractor's past performance. The types of activities included in contract administration are issuing contract modifications, monitoring contract deliveries and performance, reviewing the contractor's invoices for payment, and closing out the contract. The terms and conditions of the contract are used as the guidance in performing these tasks.

#### **6-2. Contract modifications**

a. Contracting officers acting within the scope of their authority may issue modifications to contracts. Other NAFI or Government personnel shall not execute contract modifications nor act in a manner as to cause the contractor to believe they have the authority to bind the NAFI. All modifications will be in writing using DA Form 4073 electronic formats. No modifications involving an increase in the contract price shall be issued without a certification of available funds. Contract modifications, including changes that could be issued unilaterally, shall be priced before execution if this can be done without adversely affecting the interest of the NAFI. There are two types of contract modifications:

(1) *Unilateral*. A unilateral modification is a contract modification that is signed by the contracting officer only. Unilateral modifications are used to make administrative changes, to issue change orders under the changes clause, to make changes authorized by other contract clauses (for example, option clause), and to issue termination notices.

(2) *Bilateral*. Bilateral modifications (also called supplemental agreements) are changes in contracts requiring mutual consent by both the contracting officer and the contractor. The contracting officer signs bilateral modifications after the contractor has signed. Bilateral modifications are used to—

(a) Make negotiated equitable adjustments as a result of issuing a change order under the changes clause, to include a constructive change. For an equitable adjustment, the contracting officer will make a written determination that the new price is fair and reasonable.

(b) Reflect other agreements of the parties that change the terms of the contract.

b. There are limitations in the use of bilateral modifications (supplemental agreements). Supplemental agreements may not be used to expand an existing contract to include additional work of any considerable magnitude. Expansion of an existing contract may result in a constructive change that is discussed in paragraph 6-4. Additional work must be clearly documented and shall include a determination that work was not contemplated at the time of the original contract and is such an inseparable part of the work originally contracted for as to render it prohibitively difficult to be performed by other than the original contractor.

#### **6-3. Change orders**

a. In general, NAF contracts contain a changes clause that permits the contracting officer to make unilateral changes, in designated areas, within the general scope of the contract. The contractor must continue performance of the contract as changed. The contracting officer must make a written determination that the use of the changes clause is the appropriate remedy under the contract terms.

b. A changes clause provides for an equitable adjustment if the change causes an increase or decrease in the cost of the work or in the time required for performance. If the change order contains a price for the change, the change requires only one document: a supplemental agreement reflecting the resulting equitable adjustment in the contract terms. If the change order is not priced, the change requires two documents: the change order and a supplemental agreement reflecting the resulting equitable adjustment in contract terms.

c. Contracting officers will negotiate equitable adjustments resulting from change orders as promptly as possible (preferably less than 30 days after issuance of the change order). The negotiated equitable adjustment will be based on both the NAFI estimated cost of the change and the contractor's estimated cost presented for proposed adjustment in price. If additional funds are required as a result of the change, the contracting officer will obtain a certification of available funds before issuing the supplemental agreement to the contract.

#### **6-4. Constructive changes**

Constructive changes are defined as any conduct by a contracting officer, or other authorized representative, other than

a change order issued under the changes clause or a supplemental agreement, that has the effect of requiring the contractor to perform new work or work different from that required by the contract. Such changes entitle the contractor to relief under the changes clause. Constructive changes can be the result of several occurrences. These occurrences may include that the NAFI requires the contractor to meet a delivery date despite an excusable delay; the NAFI furnishes defective specifications; the NAFI misinterprets the contract; and/or the NAFI requires a more-thorough inspection than prescribed in the contract. When an equitable adjustment is required as a result of a constructive change, the procedures in paragraph 6-3b will be followed.

#### **6-5. Contracting officer's representative**

a. A contracting officer may appoint a Government or NAFI employee, military or civilian, as a COR on a designated contract. In selecting a COR, the contracting officer will ensure and document that the individual selected is trained and possesses the qualifications and experience necessary to perform the function.

b. A COR appointment will be made in writing and designated by name and title of position. Each appointment letter will set forth the authority and limitations applicable to the COR. The COR is not empowered to issue, authorize, agree to, or sign any contract or modification or in any way obligate the payment of funds by the NAFI (see para 1-12b(2)(b)).

#### **6-6. Administrative contracting officer**

ACOs may be appointed by the contracting officer, as set forth in paragraph 1-12b(2)(d). The contracting officer shall appoint a warranted contracting officer as an ACO in writing. The appointment shall specify the scope and limits of the ACO's authority.

#### **6-7. Ordering officers**

a. The contracting officer may appoint ordering officers for the purpose of placing delivery orders against indefinite delivery type contracts awarded by the contracting officer, provided the contract terms allow for the appointment of ordering officers. Ordering officers are limited to the threshold set forth in paragraph 1-12b(2)(c).

b. Ordering officers will be appointed in writing and will be under the technical supervision of the contracting officer. Contracting officers shall review ordering officers' files at least once a year to ensure compliance with appointments and the terms of the contract for which they are appointed as ordering officer.

#### **6-8. Contractor delivery and performance**

a. *Contractor nonconformance.* Contractor nonconformance may be detected during quality inspections, through customer complaints, or failure of a contractor to comply with delivery schedules, performance standards, or other provisions of the contract. The contracting officer must be made aware of the act of nonconformance within the framework of the contract to correct the deficiencies, maintain suspense of all deficiencies noted, follow through with required action until resolved, and document the contract file.

b. *Delays in delivery or performance.*

(1) Excusable delays are due to causes beyond the control of the contractor. For excusable delays, the contracting officer may extend the delivery schedule by a bilateral modification to the contract. If the supplies are needed before the contractor can deliver, the contract may be terminated for convenience.

(2) Inexcusable delays are the contractor's fault, and several courses of action are available. A thorough analysis of the situation and possible courses of action should be made to determine the most efficient and economical method of resolution. If the delivery schedule can be extended, this shall be done by a bilateral modification to the contract, which extends the delivery schedule and may provide for a reduction in the price or other consideration. The contracting officer should seek legal advice for a situation involving an inexcusable delay.

#### **6-9. Suspension of work and stop-work**

a. During contract performance, a situation may arise that requires the NAFI to suspend work or to order a work stoppage. The contracting officer is the only official authorized to suspend or stop a contractor's work.

(1) The contracting officer may order a suspension of work under a construction or architect-engineer contract for a reasonable period of time. If the suspension is unreasonable, the contractor may submit a written claim for any increase in costs (excluding profit) incurred as a result of the suspension.

(2) The contracting officer may issue a stop-work order in any fixed-price supply or service contract when determined by the contracting officer to be appropriate. Work stoppage may be required for reasons such as state-of-the-art advancements, engineering breakthroughs, and realignment of programs.

b. In general, a stop-work order will be issued only if it is advisable to suspend work pending a decision by the NAFI and a bilateral modification providing for the suspension of work is not feasible. Issuance of a stop-work order shall be approved at a level higher than the contracting officer. Stop-work orders shall not be used in place of a termination notice after a decision to terminate has been made.

(1) Stop-work orders will include the following elements:

- (a) A description of the work to be stopped.
- (b) Instructions concerning the contractor's ordering of additional supplies or services.
- (c) Instructions to the contractor concerning any action to be taken on subcontracts.
- (d) Suggestions to the contractor concerning minimizing costs, since the NAFI may be required to pay the contractor an equitable adjustment.

(2) As soon as possible after a stop-work order has been issued, the contracting officer will discuss the stop-work order with the contractor and make any necessary modification to the order.

(3) As soon as possible after a stop-work order has been issued and before it expires, the contracting officer will take one of the following actions:

- (a) Terminate the contract.
- (b) Cancel the stop-work order, with approval one level above the contracting officer.
- (c) Extend the period of the stop-work order, if necessary, and if the contractor agrees to such an extension. Extension of a stop-work order shall be issued by a bilateral modification.

c. Contracting officers may insert a suspension or stop-work order clause substantially the same as stated in appendix B if determined to be in the best interest of the NAFI.

(1) The contracting officer shall insert the suspension of work clause when a fixed-price construction or architect-engineer contract is contemplated.

(2) The contracting officer may insert the stop-work order clause in solicitations and contracts for supplies or services.

## **6-10. Termination of contracts**

a. *Authority.* The termination clauses authorize contracting officers to terminate contracts for convenience or for default and to enter into settlement agreements. The contracting officer may terminate contracts, whether for default or convenience, when it is in the NAFI's best interest. All termination notices will be issued in writing. If the price of the undelivered balance is less than the cost of termination, normally the contract should not be terminated, but should be permitted to run to completion.

### *b. Termination for convenience.*

(1) The contracting officer has the authority to partially or totally terminate a contract for convenience when it is in the best interest of the NAFI. The contracting officer shall not exercise the authority to terminate a contract for convenience until approval is obtained from the requiring activity. The right to terminate for convenience is exercised when the NAFI no longer has a need for the requirement.

(2) The contracting officer will send written notification to the contractor as soon as the decision is made to terminate. The contracting officer will obtain written acknowledgment of the notification from the contractor. The written notice will contain the effective date of termination, details of the termination (in other words, the extent, partial or complete), and the line items terminated.

(a) The contracting officer will simultaneously send the termination notice to any known assignee, guarantor, or surety of the contractor.

(b) The contracting officer may amend a termination notice to add supplemental data or instructions or rescind the notice if it is determined that items terminated had been completed or shipped before the contractor's receipt of the notice.

(3) In the event a contract must be terminated for the convenience of the NAFI, the contracting officer will attempt to terminate the contract on a no-cost basis to either party. If a no-cost settlement is not possible and the contractor desires compensation, the contractor must submit a claim to the contracting officer, in writing. A termination settlement should compensate the contractor fairly for the work done and the preparations made for the terminated portions of the contract, if any, including a reasonable allowance for profit to the date of termination. Fair compensation under an equitable adjustment is a matter of judgment and cannot be measured exactly. In any given case, use of a variety of methods to reach an equitable adjustment may be appropriate in arriving at fair compensation based on factual information including actual cost expended (for example, cost and price analysis). The contracting officer, in negotiating an equitable adjustment, will use sound business judgment and obtain legal advice. If an equitable adjustment cannot be negotiated, the contracting officer will make a final decision concerning the claim, in writing, and notify the contractor in a timely manner, usually 60 days. Any dispute arising as a result of this process will be resolved using the disputes process (see para 6-11).

c. *No-fault termination.* (For use in concession contracts only.) When the contracting officer deems a termination clause appropriate, based on the nature or complexity of the concession requirement, the contracting officer may use either the standard termination for convenience clause or the no-fault termination clause. The contracting officer shall make this determination prior to issuing the solicitation.

(1) When the contracting officer determines it is appropriate to use a no-fault termination clause, the contracting officer must make a determination as to the number of days in which to affect the termination. Normally 30 days written notice is used, but the notice period may be longer or shorter, as agreed to by the parties and depending on such factors as the time required to solicit new sources, the number of possible sources, and the time needed for a new

contractor to start performance. Under the no-fault termination clause, a notice by one party is all that is needed to effect the termination.

(2) Depending on the facts, when issuing the no-fault termination, the termination would normally be at “no cost to the NAFI” or at “no cost to either party.”

*d. Termination for default.*

(1) The contracting officer has the authority to terminate a contract for default, in part or in whole, because of the contractor’s actual or anticipated failure to perform its obligations under the contract. Such failure includes the failure to deliver at the required time, failure to make necessary progress as to endanger performance, and failure to perform any of the other provisions of the contract. Depending on the contract involved and the nature of the failure to perform, it may be more appropriate in some cases for the contracting officer to educate, counsel, admonish, or warn the contractor rather than terminate. The right to terminate for default should only be exercised after careful review by the contracting officer, technical personnel, and legal counsel. The appropriate action is at the contracting officer’s discretion.

(2) When a contractor fails to comply with terms and conditions of the contract and the frequency of noncompliance or the magnitude of contract deficiencies warrants action, two types of notices may lead to termination for default.

(a) *Cure notice.* If a contract is to be terminated for default before the delivery date, a cure notice is normally required by the default clause. Before using this notice, the contracting officer must determine that an amount of time equal to or greater than the period of “cure” remains in the contract delivery schedule or any extension to it. If the time remaining in the contract delivery schedule is not sufficient to permit a realistic cure period, the cure notice should not be issued. A cure notice shall be issued by certified mail, return receipt requested.

(b) *Show-cause notice.* If the time remaining in the contract delivery schedule is not sufficient to allow a realistic “cure” period, a “show-cause notice” may be used. This notice should be sent immediately upon expiration of the delivery period. A show-cause notice shall be issued by certified mail, return receipt requested.

(3) The notice requirement for a termination for default is the same as that for a termination for convenience.

(4) Normally a show cause or a cure notice are required before the notice of actual termination; however, they are not required when circumstances indicate the need for immediate termination.

(5) The contracting officer will consider the following factors in determining whether to terminate a contract:

(a) Terms of the contract and applicable laws and regulations.

(b) Specific failures of the contractor and other sources.

(c) Availability of supplies and services from other sources.

(d) Urgency of need for the supplies or services.

(e) Any other pertinent facts and circumstances.

(6) The contracting officer should consider the following alternative courses of action in lieu of termination for default when assessing what is in the best interest of the NAFI:

(a) Permitting the contractor, surety, or guarantor to continue performance of the contract under a revised delivery schedule, provided the rights of the NAFI are adequately protected.

(b) Permitting the contractor to continue performance of the contract by means of a subcontract or other business arrangement with an acceptable third party, provided the rights of the NAFI are adequately protected.

(c) When the requirement for the supplies or services no longer exists and there are no damages to the NAFI, the contracting officer may execute a no-cost termination agreement.

(d) The contracting officer will make a determination as to whether to repurchase similar supplies or services elsewhere and hold the contractor liable for any excess costs associated with the repurchase. Repurchase should only be considered if supplies or services are still required after termination. Once a determination of repurchase has been made, it must be undertaken within a reasonable time after termination and every effort made to minimize cost. If an award to the next successful offeror from the original solicitation is considered to be fair and reasonable, the offeror is determined to be responsible, and the offeror verifies that the offer is still valid, the contracting officer may proceed with award without further competition.

(7) When a fixed-price supply or service contract is terminated for default, as part of settlement, the contractor may be liable for excess repurchase costs only if a replacement contract is issued within a reasonable period of time after the notice of default is issued. In construction contracts terminated for default, the uncompleted structure may be taken over by the NAFI.

(8) The contracting officer shall document the file explaining the reason for the termination.

(9) If an equitable adjustment cannot be agreed upon, the issue concerning the equitable adjustment may be regarded as a question of fact under the disputes clause.

## **6–11. Contract disputes and appeals**

*a. Policy.* This paragraph prescribes policy for processing disputes and appeals arising from all NAFI contracts and purchase orders. In accordance with the Disputes Clause, The Contract Disputes Act does not apply to NAFI contracts.

*b. Prior to final decision.* Contract disputes may arise over the respective rights and obligations of the parties. The

contracting officer shall make every reasonable attempt, consistent with the provisions of the contract and good business practice, to settle the dispute amicably without resorting to the procedures provided in the disputes clause. The contracting officer will convene whatever meetings or conferences that are necessary and negotiate in good faith concerning the merits of the dispute and the respective positions of the parties.

*c. Requirements for a final decision.* Requirements for a final decision are as follows:

(1) When all attempts to settle a dispute amicably fail, the contracting officer must make a decision under the disputes clause. The contracting officer will request that the contractor submit written evidence substantiating the disputed amount. The contractor has the burden of establishing, to the satisfaction of the contracting officer, the amount proposed. The contracting officer will review all available facts pertinent to the dispute. The contracting officer will obtain assistance of legal, technical and professional experts. The contracting officer will render a final decision after an independent consideration of all relevant facts.

(2) The contracting officer's decision must be in writing. It will include a statement of facts sufficient to enable the contractor to understand both the decision and the basis of the determination. Normally, the decision will be in the form of a statement of the claim or other description of the nature of the dispute, with necessary references to pertinent contract provisions. It will include a statement of the relevant facts to which the parties agree and, as clearly as possible, the area(s) of disagreement. The contracting officer's statement will include his or her decision and the basis thereof.

(3) The contracting officer's decision on a claim shall contain the following paragraph: "This is a final decision of the contracting officer which may be appealed in accordance with the disputes clause of the contract. If you decide to make such an appeal, written notice of the appeal (in triplicate) must be mailed or otherwise furnished to the contracting officer within ninety (90) days from the date you received the final decision. Such notice should indicate it is intended as a "notice of appeal" and should cite this decision and identify the contract. If a notice of appeal is filed, it will be forwarded to the Armed Services Board of Contract Appeals (ASBCA), and the Recorder of the Board will docket the appeal and will forward to you a copy of the Rules of the Armed Services Board of Contract Appeals."

(4) The contracting officer's decision will be mailed to the contractor by certified mail, return receipt requested.

*d. Notice of appeal.* When the contracting officer receives a notice of appeal, he or she will endorse thereon the date of mailing or the date of receipt, if otherwise conveyed. The contracting officer will forward the notice of appeal, together with an envelope showing the postmark, to the IMA regional director or CG, FMWRC, as appropriate, and to the ASBCA. No comment concerning the appeal will be made on the cover letter. A copy of the notice of appeal and letter of transmittal to the ASBCA will be forwarded to the local staff judge advocate. The contracting officer will forward a copy of all appeals to FMWRC, NAF Contracting Directorate, Policy Division.

*e. Preparation of the appeal file.* Within 30 days of receipt of the notice of appeal, the contracting officer, with the advice and assistance of the legal counsel, will compile five copies of the appeal file (ASBCA Rule 4 file) and comply with the direction of the trial attorney at the Contract Appeals Division, who will coordinate with the ASBCA. The appeal file must contain the following information:

(1) The finding of fact and the decision from which the appeal is taken and the letter(s) or other documents of claim in response to which the decision was issued.

(2) The contract and pertinent plans, specifications, modifications, and change orders.

(3) Transcripts of any testimony taken during the course of proceedings and affidavits or statements of any witnesses on the matter in dispute made prior to the filing of the notice of appeals.

(4) Any additional information considered material.

(5) Since the appeal file will be available to the contractor, no privileged information or documents and no analysis of the merits of the appeal or the law applicable thereto will be included.

*f. The comprehensive report.* Within 30 days of receipt of the notice of appeal, the contracting officer, with the advice and assistance of legal counsel, will compile a comprehensive report of the matter in dispute. The objective of the report is to bring to the chief trial attorney's attention all facts affecting the dispute.

(1) The comprehensive report will be forwarded through command channels to the chief trial attorney. It will not be furnished to the ASBCA or to the contractor.

(2) The comprehensive report will include the following:

(a) A factual summary of events leading to the dispute.

(b) The names and addresses of all potential Government/NAFI witnesses—including those of the contractor, if known—having information concerning the facts in dispute.

(c) A signed statement by each Government/NAFI witness reflecting the facts to which the contracting officer will be able to testify (or a summary thereof, if it is impossible to obtain the signed statement) and a statement as to the expected availability of each Government/NAFI witness at the hearing.

(d) An analysis of the contractor's position and a discussion of the validity thereof.

(e) A memorandum by the staff judge advocate or legal advisor to the contracting officer setting forth an analysis of the legal issues involved in the dispute and comments upon the adequacy of the findings of fact and the legal sufficiency of the decision.

*g. Witness expense.* Travel and per diem costs incurred by witnesses concerning the appeal and necessary preparation will be borne by the NAFI in whose name the contract was issued.

*h. Action by the commander for appeals to ASBCA.* With the advice and assistance of the staff judge advocate or legal counsel, the commander or designee should—

(1) Carefully review the appeal file and the comprehensive report.

(2) Ensure that the findings on which the decision is based adequately address the issues involved, that the decision is consistent with the findings, and that it is proper in form and substance.

(3) Ensure that the appeal file and comprehensive report are completed and that the evidence contained in them supports the decision of the contracting officer.

(4) Advise the contracting officer either to furnish additional support for any decision from which a timely appeal has been taken or to withdraw it if it is clear from the contract provisions or the applicable law that the decision is not sufficiently supported by available and competent evidence or is erroneous.

(5) Not more than 10 days after taking the action prescribed in (4), above, notify the chief trial attorney of the nature of the action being taken and an estimated date as to which the additional support will be furnished, or a date that the decision will be withdrawn.

(6) Not more than 10 days after receiving the comprehensive report, forward it and the appeal file to the chief trial attorney with—

(a) Evaluations, conclusions, and recommendations.

(b) Any additional evidence considered essential to enable the chief trial attorney to properly protect the interests of the NAFI before the ASBCA.

(7) Ensure that assistance is rendered to the chief trial attorney in obtaining additional evidence or in making other necessary preparations for presenting the NAFI's position before the Board.

*i. Copies furnished.* When the ASBCA renders an opinion, copies of the opinion will be sent by certified mail to the attorneys for the contracting officer and the contractor. A motion for reconsideration of the decision may be filed with the ASBCA within 30 days of the receipt of the opinion unless the total contract amount is less than \$10,000 and/or the appellant has previously waived the right to appeal. The ASBCA decision is final.

## **6-12. Contract claims**

*a.* Contract claims arising out of the operations of Army installation and regional NAFIs, other than AAFES and Army Civilian Welfare Funds (ACWF), will be paid by the Regional Single Fund.

*b.* Other than claims arising from Army Morale, Welfare, and Recreation Fund contracts, the Army MWR fund will only assume responsibility for payment of contract claims acquired as financial successor-in-interest to residual assets and liabilities of dissolved Army NAFIs. Contract claims arising out of the operations of the ACWF will be settled as directed in AR 215-7.

*c.* Contract claims arising out of operations of the AAFES will be paid as directed in AR 60-20.

## **6-13. OCONUS claims**

*a.* When an agency of the United States, authorized to pay a foreign country which settles claims pursuant to a treaty or an agreement with the United States, receives a statement containing amounts that reflect claims payable from NAFIs, the applicable IMA region will ensure payment to the agency from the appropriate NAFI sources cited above.

*b.* In overseas areas where existing treaties or agreements require an agency of the United States to carry insurance, the local agency head will ensure proper coverage and settlement under the provisions of AR 215-1.

## **6-14. Novation and change-of-name agreements**

*a.* In a novation agreement, a legal instrument is executed by the contractor (transferor), the successor-in-interest (transferee), and the NAFI. In this legal agreement, the transferor guarantees performance of the contract, the transferee assumes all obligations under the contract, and the NAFI recognizes the transfer of the contract and related assets.

*b.* In a change-of-name agreement, a legal instrument is executed by the contractor. The NAFI recognizes the legal change agreement of the contractor's name without disturbing the original contractual rights and obligations of the parties.

*c.* Contracting officers must contact legal counsel for assistance with novation and change-of-name issues and will issue a bilateral modification effecting the change if the novation agreement is accepted by the contracting officer.

## **6-15. Bankruptcy**

Situations may arise where a contractor encounters financial problems during the course of contract execution and must enter bankruptcy proceedings. Upon notice of such proceedings, contracting officers will contact legal counsel.

## **6-16. Prompt Payment Act**

*a.* Prompt payment regulations (5 CFR 1315) require that contractor be paid in a timely manner. NAF contracting officers will comply with the policies and clauses for implementing Office of Management and Budget (OMB) prompt

payment regulations. For additional information on this topic, refer to the FAR, Subpart 32.9. Contracting officers will ensure that the specific prompt payment clause is included in each applicable solicitation.

*b.* When drafting solicitations and contracts, contracting officers must identify for each contract the line item number, subline item number, or exhibit number and the applicable prompt payment clauses that apply to each item if the solicitation or contract contains items that will be subject to different payment terms.

*c.* Contracting officers will ensure that NAF contracts are properly administered to avoid increased costs to operations in the form of added interest by failure to pay on time.

#### **6-17. Assignment of claims**

*a.* Assignment of claims means the contractor's transfer of its right to be paid by the NAFI for contract performance to a bank, trust company, or other financing institution as security for a loan to the contractor.

*b.* The contractor cannot assign any rights or delegate any obligations under NAFI contracts without written permission of the contracting officer.

*c.* Contracting officers will coordinate with legal counsel for assistance on issues involving assignment of claims.

#### **6-18. Payment methods**

*a. Advance payments.* Advance payments may be provided on any type of contract; however, they are the least-preferred method of contract financing. Advance payments are not authorized if other standard payments (partial, progress, and payment on receipt) procedures are available. The authorization for advance payment must be obtained, in writing, from the NAFI fund manager before the purchase is made. The contracting officer shall also justify, in writing, the use of advance payment.

*b. Progress payments.* A progress payment is a payment made as work progresses under a contract on the basis of percentage of work completed or accomplished, or for work performed that is at a particular stage of completion. A progress payment is also a payment made as costs are incurred by the contractor while work progresses under the contract. Progress payments made to construction and architect-engineer contractors on the basis of percentage are considered to be invoice payments that are subject to the Prompt Payment Act. The NAFI must ensure that progress payments are commensurate with work accomplished and that the work meets the quality standards established under the contract. The extent of progress payment supervision, by prepayment review or periodic review, should include consideration of the contractor's experience, performance record, reliability, quality of management and financial strength, and adequacy of the contractor's accounting system. NAFI supervision shall be of a kind and degree sufficient to provide timely knowledge of the need for any actions necessary to protect the NAFI interest. The contracting officer shall not exceed the customary progress payment rate of 80 percent, applicable to the total costs of performing the contract. For the purpose of making progress payments and determining the limitation of progress payments, the contract price shall be the current price plus any unpriced modifications for which funds have been obligated. The contracting officer shall use the clause entitled "Progress Payments" for solicitations that may result in contracts providing for progress payments.

*c. Partial payments.* Partial payment is a payment authorized under a contract for supplies and/or services, to be made upon completion of the delivery of one or more complete units called for, delivered, and accepted by the NAFI under the contract, even though other quantities remain to be delivered. Partial payments are permitted on any contract where the unit of work is priced as a separate contract line item. The Prompt Payment Act requires payment for partial delivery of supplies or partial performance of services unless specifically prohibited by the contract. A payment made against a termination claim before final settlement of the total termination claim is also called a partial payment.

*d. Prompt payment discounts.* Discount time will be computed from the date of delivery at the place of acceptance, or from receipt of the correct invoice at the office specified by the NAFI, whichever is later. In the case of overseas shipments, the invoice is often received far in advance of the goods. The contractor should be advised to furnish, with the invoice, a copy of the receiving ticket obtained when the goods are delivered to port. Payment for the goods may then be made upon receipt of the invoice (even though the goods have not yet been received overseas), and the prompt payment discount will not be lost. Prompt payment discounts are to be taken on the gross amount of the invoice if the goods are delivered "FOB Destination." If the goods are delivered as "FOB Other," and a separate freight charge is involved, the prompt payment discounts will be only be taken on the cost of goods, exclusive of freight or handling charges.

#### **6-19. Electronic funds transfer**

Payment by electronic funds transfer (EFT) is the preferred method of contract payment in normal contracting situations. EFT may be authorized for payments in conjunction with the servicing finance office.

#### **6-20. Warranties**

*a.* When applicable, the appropriate warranty clauses shall be inserted in contracts. The kinds of defects covered under a warranty depend upon the warranty clause. The defects covered in the typical supply warranty clause are those of defects in material and workmanship. If the defect discovered is covered under the warranty, it does not matter



whether it is a patent or a latent defect, since the contractor has warranted the items to be free from defects and is liable for their correction or replacement.

*b.* The contractor is liable under the warranty clause for only the defects covered by the warranty. It is, therefore, necessary that the customer understand the coverage and conditions of the warranty.

*c.* Warranty clauses should state when coverage begins and ends and the time in which notice of a defect must be given to the contractor.

#### **6-21. Transportation for overseas shipment**

*a.* The contracting officer may obtain traffic management advice and assistance from local transportation offices for issues involving the transportation of goods to include transportation control number, transportation control movement documents, and port information.

*b.* Shipments that are sent through the U.S. Postal Service to overseas destinations are generally handled by an Army Post Office. Such shipments will be accepted by the U.S. Postal Service only when they meet the following established requirements:

- (1) The parcel is within the size and weight limits established by the postal authorities.
- (2) The proper amount of postage is paid.
- (3) Markings of commercial freight companies are removed from parcels delivered to the post office by these carriers.
- (4) It is legal to mail the item.

*c.* Shipments that do not meet the criteria in *b*, above, should be transported through the Defense Transportation System (DTS). (See paras 6-23 and 6-24.)

#### **6-22. Transportation insurance**

The determination to buy transportation insurance will be made in accordance with the provisions of AR 215-1 through the Army's MWR Risk Management Program (RIMP). Insurance will be purchased on a per shipment basis. Declaration of Insurance forms can be obtained from the RIMP office or the commercial insurance carrier. Insured NAFIs will report monthly declarations to the commercial insurance carrier, as required in AR 215-1.

#### **6-23. Acceptance of goods**

When cargo is accepted into the DTS, the Government takes custody of the shipment and relieves the contractor of the responsibility for its safety. At the point of Government acceptance, payment should be made to the contractor. However, final acceptance of the goods is not made until the receiving activity has inspected the shipment for conformance to contract requirements. It is at this point that the NAFI takes title. If the point of acceptance is different from the point of delivery, this should be stated in the contract.

#### **6-24. Transportation discrepancies**

*a.* If goods are lost during shipment, a determination must be made concerning where the shipment was lost and who bears responsibility for replacement.

*b.* If a shipment is suspected to be lost, the NAFI should contact the contractor to begin a tracer action. The contractor is responsible for determining whether the shipment was accepted into the DTS. If the shipment is lost prior to acceptance into the DTS, any additional expense to reship is the responsibility of the contractor or carrier in accordance with the terms of the contract. To trace a shipment effectively, transportation personnel at the port must have a transportation control number (TCN) or Government bill of lading number.

#### **6-25. Determination of delivery terms**

Generally, the contracting officer should determine FOB terms based on overall cost. Solicitations shall specify whether offerors must submit offers FOB origin, FOB destination, or both or whether offerors may choose the basis on which they make an offer.

#### **6-26. Shipments originating outside of continental United States**

Acquisition of supplies originating OCONUS for ultimate delivery to destinations within CONUS or elsewhere, regardless of the quantity of the shipments, should be based on FOB origin or FOB destination, whichever is more advantageous to the NAFI.

#### **6-27. Shipment from CONUS to overseas locations**

When NAFI acquisitions involve shipments from CONUS to overseas destinations, delivery FOB origin may afford not only the economies of lower freight rates available to the NAFI within CONUS, but also flexibility for selection of the port of export and the ocean carrier providing the lowest overall cost to the NAFI.

#### **6-28. Contracts crossing fiscal years**

Because Congress does not appropriate NAF monies, funds do not expire at the end of the fiscal year. However,

finance offices may administratively close out actions based on fiscal years. Contracting officers must coordinate with their finance office to keep monies active for those contracts that will cross fiscal years so the funds are not administratively withdrawn.

#### **6–29. Release of information on procurement actions**

Contracting officers shall process requests from the public for specific procurement information through the legal office and the public affairs office, if applicable. In coordination with legal counsel, contracting officers shall ensure that a proper decision on whether to withhold this information is made. Considerations include proprietary data, the protection of procurement sensitive information, internal NAF and Government communications, and information protected by privacy considerations.

#### **6–30. Requests from Members of Congress**

All requests for release of contracting information from Members of Congress shall be processed through the local Congressional Affairs Office and responses will be coordinated through the servicing legal office.

#### **6–31. Freedom of Information Act and Privacy Act**

The FOIA (5 USC 552, as amended) specifies (among other things) how agencies shall make records available upon public request; imposes strict time standards for agency responses; and exempts certain records for public disclosure. Contracting personnel should have knowledge of AR 25-55, The Department of the Army Freedom of Information Act Program and AR 340-21, The Department of the Army Privacy Program. Contracting officers may receive requests for records that are exempt from mandatory public disclosure. The exemptions most often applicable are those relating to classified information, to trade secrets and confidential commercial or financial information, to interagency or intragency memoranda, or to personal information pertaining to an individual. Since these requests often involve complex issues requiring an in-depth knowledge of past and current court rulings and other policy guidance, contracting officers shall consult with legal counsel on procedures for processing FOIA requests before releasing any information.

#### **6–32. Contract close out**

*a.* Contracts shall be closed out in a timely manner and maintained in a filing system in accordance with AR 25–400–2. (See para 1–31 and app E.) Contract files will not be closed if a contract is in litigation or under appeal, or if a termination is involved and the termination actions are not completed. Contracts are considered to be closed when all of the following conditions have occurred:

(1) The contractor has completed the required deliveries and the supplies/services have been inspected and accepted by the NAFI.

(2) The contractor has performed all services, including warranty work.

(3) All option provisions, if any, have expired.

(4) The contracting officer has evidence of final payment.

*b.* Files for firm-fixed-price contracts, other than those using simplified acquisition procedures, should be closed within 6 months after the date on which the contracting officer receives evidence of completion. Files for all other contracts should be closed within 20 months of the month in which the contracting officer receives evidence of completion.

## **Chapter 7**

### **Special Categories of Contracting**

#### **7–1. Concession contracts**

*a. Definition.* Concession contracts are those in which a contractor is authorized to provide goods or services in a designated location for a specified period of time. Concession contracts involve the direct sale of supplies or services to authorized NAFI patrons. Payment provisions of concession contracts shall specify the terms by which the contractor (concessionaire) shall pay the NAFI, either a dollar amount based on percentage of gross sales or a flat fee. ACWFs will follow the requirements of this regulation as set forth in AR 215–7. Concessionaire contracts may be long or short term. Concession contracts may be for retail merchandise, vending machines, amusement machines, special events, food service, or instruction. Detailed guidance on the types of concession contracts is set forth below.

*b. Market survey.* It is highly recommended that a market survey be conducted by the contracting officer and the requiring activity manager prior to issuing long-term or specialized concession contracts. A specialized concession may be for seasonal festivals (such as the Fourth of July), AFRC jewelry or flower shops, or recreational and support activities, all of which may require their own set of unique contract requirements or provisions.

*c. Conditions for use.* Concession contracts may be used when the garrison commander or GM at an AFRC, ARMP, or designee, has determined that the requirement is normally a part of and directly related to the purpose of the MWR

program as specified in AR 215-1 and has authorized in writing the MWR activity to operate a resale activity by concession contract.

*d. Responsibility for obtaining approvals.* The requesting activity is responsible for obtaining the required authorization prior to contracting for a concession. A copy of such approval must accompany the purchase request when it is submitted to the contracting office for action. Purchase requests for concessions do not require the signature of the fund-certifying official since funds are not obligated.

*e. No-fault termination.* When it is in the best interest of the NAFI, the contracting officer has the option to use a “no-fault” termination clause for concession contracts in lieu of the standard termination for convenience clause. (See also para 6-10c.)

*f. Concession contract insurance requirements.*

(1) The contracting officer shall determine the types of insurance coverage. The contracting officer will ensure that the types of insurance protect the interest of the NAF/NAFI/Government. The types of insurance may include, but are not limited to, the following:

- (a) Bodily injury and property damage liability insurance.
- (b) Workmen’s compensation and employer’s liability insurance for employees.
- (c) Property insurance for bailee property under their care, custody, or control.
- (d) Public liability insurance.
- (e) Automotive liability insurance, if applicable.
- (f) Property damage insurance.

(g) Personal injury (including death) insurance in the amounts required by state and local laws of the jurisdiction in which the installation is located, regardless of whether the state or local laws apply on the installation (similar laws in overseas locations also will be observed).

(2) Amusement company contracts shall include requirements for public liability insurance in the amounts specified by the contracting officer.

(3) Certificates of insurance, in the types and amounts determined appropriate by the contracting officer, shall be provided to the contracting officer before the beginning of each contract performance period.

(4) The dollar amount of each type of insurance specified shall be determined by the contracting officer. In determining the appropriate dollar amount, the contracting officer may contact the FMWRC, RIMP office for assistance (riskmanagement@cfsc.army.mil).

## **7-2. Long-term concession contracts**

*a.* Long-term concession contracts are those which cover more than 30 days, even when the days do not run consecutively (for example, every Sunday for 30 weeks). (See para 7-5 for short-term concession contracts.) Contracts shall meet the requirements set forth in paragraph 7-1. Contracting methods, procedures, and terms and conditions are set forth in chapters 3 and 4 of this regulation. In addition, the following requirements shall be included in the appropriate sections of the solicitation and resulting concession contract:

- (1) Identification of the type and extent of records that must be kept by the concessionaire.
- (2) The right of the NAFI to audit or inspect the records, premises, and operations of the concessionaire to ensure contract compliance. At the contracting officer’s discretion, audits and inspections may be accomplished by an independent, outside party.
- (3) That the concessionaire shall safeguard all assets in its possession in which the NAFI or the Government has an interest.
- (4) That the concessionaire shall certify the integrity of its financial records and reports.
- (5) Identification of reports that the concessionaire must provide.
- (6) Identification of the concession fee as a fixed amount or percentage of sales, as appropriate. Concessionaire and commission procedures for ACWFs are contained in AR 215-7.
- (7) That the concessionaire shall clearly price all supplies and services available within the concession. All pricing and information shall be written in English. The contracting office shall approve pricing and changes to pricing and the concessionaire must adhere to the prices.
- (8) Physical inventories in accordance with AR 215-1 and DOD 7000.14-R, volume 13.
- (9) Cash controls and the use of cash registers in accordance with AR 215-1.
- (10) Oversight and verification of cash collection and distribution will be one of the duties of the COR.
- (11) A schedule for prices for any service charges and the fee or commission to be offered to the NAFI. Solicitations will also specify the quality of supplies or services to be provided, terms for customer satisfaction, and the return policy. Price competition may be obtained based on the selling price or concession fee, or both. The evaluation factors must clearly specify the basis for award. The basis for award must be supplied to the contracting officer by the requiring activity and be incorporated into the evaluation plan.

b. When a service over \$2,500 is involved, The Service Contract Act (41 USC 351 et seq.) may apply. See paragraph 7-9 for information on the applicability of The Service Contract Act.

### **7-3. Merchandise concessions**

a. The prices for the supplies or services should be part of the contract and any changes shall be negotiated and agreed to by the concessionaire and contracting officer through supplemental agreement. The decision to change prices shall be documented and should reflect sound business practices.

b. When it is not practical, due to volume of merchandise available at a concession, the contract should address pricing in generic terms. The contracting officer should review pricing of merchandise with the concessionaire not less than once per year to ensure that pricing is at or below market prices. The contract should set the parameters for this review.

c. In addition to the requirements set forth in paragraphs 7-1 and 7-2, the following will be included in the appropriate sections of the solicitation and resulting contract for the operation of a concession involved in selling or renting concessionaire-owned merchandise:

- (1) The party responsible for purchasing the supplies to be sold in the shop.
- (2) The type of supplies and services to be offered in the shop.
- (3) Establishment of reporting procedures for use upon discovery of vandalism or theft.
- (4) The party responsible for maintaining rented equipment in good working condition to ensure customer safety.
- (5) The party responsible for the utilities and procedures for reporting problems with utilities.
- (6) Procedures for the disposition of any unsold merchandise or trade fixtures upon expiration or termination of the contract (see also AR 215-1).
- (7) The party responsible for cleaning up the concession site upon expiration or termination of the contract.
- (8) The deadline for the concessionaire to leave the site upon expiration or termination of the contract.

### **7-4. Vending and amusement machines**

a. Concession contracts for vending and amusement machines shall meet the requirements set forth in paragraphs 7-1 and 7-2. The term "amusement machines" as used in this chapter does not include slot machines, other mechanical, electrical, or electronic machines that enable players to win money. This chapter does not apply to amusement machines operated by the ARMP (See AR 215-1 for guidance concerning the ARMP.) For application of The Randolph-Sheppard Act (20 USC 107, et seq.) criteria, see AR 210-25. Contracts shall include the following requirements in the appropriate sections of each contract:

- (1) Machine type, manufacturer's model number, machine identification number, and number of machines to be provided.
- (2) Locations where the machines will be placed.
- (3) Procedures set forth in AR 215-1 for items such as locking devices and sales accountability.
- (4) Procedures for making refunds to customers for money lost in machines or for damaged merchandise.
- (5) The responsibility of the concessionaire to notify the contracting officer before rotating, removing, or changing machines.
- (6) Capability of coin-counting meters to detect and reject "slugs" and foreign coins.
- (7) Time period required for stocking, repairing, and servicing the machines.
- (8) Requirements for the inspection and handling of food placed in vending machines.
- (9) Establishment of reporting procedures to be used if the concessionaire discovers the machines have been vandalized.
- (10) The concessionaire shall not make any alteration in the physical structure of the area in the NAFI facility provided for placement of the machines, without prior approval from the contracting officer.
- (11) Space, plumbing, and electrical requirements available to the concessionaire.

b. The contracting officer may appoint a COR for cash collections and other internal control procedures.

### **7-5. Short-term concessions**

a. A short term concession contract shall meet the requirements of paragraph 7-1 and comply with the following guidance:

(1) A short-term concession contract is established for a performance period of 30 days or less. The 30 day period of performance does not necessarily mean 30 consecutive days. For example, the contract may specify a period of every Monday for a period of 30 weeks.

(2) All short-term concession contracts shall be in writing, issued by a contracting officer, and signed by the contracting officer and the concessionaire. Short-term concession contracts, when a multitude of vendors are offering their goods at an event, may be negotiated directly with the vendors without seeking competition. Written justification for a noncompetitive action must be in the file.

b. The contracting officer may format a standard short-term concession contract (DA Form 5756 (Short Term

Concessionaire Award)) for a one-time legal sufficiency determination for repetitive short-term concession contracts. At a minimum, a short-term concession contract format will include:

- (1) NAFI-furnished supplies (for example, space allocated, electricity, water).
- (2) Concessionaire furnished supplies and services (for example, signage, canopies, chairs, displays, generators, and uniformed staff).
- (3) Limitations (for example, concessionaire advertisement may not extend beyond assigned booth area; any restrictions on selling beyond booth area; items for resale beyond those stated in contract).
- (4) Days and hours of operation and any other time requirements, as applicable.
- (5) Concessionaire's responsibility for site appearance, including trash disposal and signage.
- (6) NAFI event coordinator and concessionaire points-of-contact, with 24-hour telephone numbers.
- (7) Responsibility for obtaining licenses, passes, and permits; health and safety procedures and requirements.
- (8) Mandatory clauses (in other words, termination and audit).

## **7-6. Consignment agreements**

*a.* A NAF consignment agreement (DA Form 5755 (Consignment Agreement (Nonappropriated Funds)) is an agreement between the NAFI and a contractor (the consignor) in which tickets (or other consigned items) are consigned to the NAFI (the consignee) who will receive the tickets from the consignor and pay for the tickets after they are sold. Title to tickets remains with the consignor until they are sold by the NAFI. The NAFI assumes responsibility for reasonable care of the tickets until they are sold or returned to the consignor. Consignment agreements will be issued by a duly appointed contracting officer.

*b.* NAF consignment agreements obligate the NAFI to pay for consigned tickets sold or not returned to the consignor within a specified period of time. The contracting officer will ensure that accurate records are maintained by the consignor and the NAFI activity that acknowledges receipt of and return of consigned tickets through proper internal management control.

*c.* All NAF consignment agreements will include the following:

- (1) Description of all consigned tickets.
- (2) A specific period of time during which the NAFI will assure full responsibility for the consigned tickets and pay the consignor the price agreed to on the DA Form 5755-1 (Consignment Control Sheet) for all unreturned tickets (see appendix A, section III).
- (3) A disclaimer statement that the agreement does not constitute an endorsement by any element of the NAFI/ Government of the event which the ticket represents.
- (4) Provisions for cancellation of an event (in the case of consigned tickets to a scheduled event), and/or termination of a NAF consignment agreement, including responsibilities for return of consigned tickets.
- (5) Clauses as prescribed by this regulation (see app B).

## **7-7. Amusement companies and traveling shows**

*a. Responsibility.* In addition to the responsibilities outlined in paragraph 7-1, the NAFI manager shall obtain the required approvals to ensure that sufficient military law enforcement personnel are available to maintain order and control. When appropriate, assistance from both local and state law enforcement agencies may be requested.

*b. Approval.* In conjunction with the requirements of paragraph 7-1, any concession requirement that may have a perceived potential risk to the NAFI (for example, circus and rodeo) should be—

- (1) Staffed through the servicing legal office for solicitation and contractual input.
- (2) Coordinated with the FMWRC, RIMP office for verification of applicable insurance requirements.
- (3) Issued as an RFP in accordance with chapter 4 of this regulation.

*c. Sources.* Information on sources for carnival, circus, and rodeo operators; entertainers; and similar amusement companies may be obtained from local and state fair directors or managers, local arena or auditorium managers, county licensing and permit offices, or Army installations that have staged similar events.

*d. Competition.* Competition is required when contracting for amusement and traveling shows unless sole source is justified. The requiring activity shall justify sole-source contracts in accordance with paragraph 2-13.

*e. Determination of contractor responsibility.* The safety record, legitimacy, and reputability of the owner/operator must be verified to avoid nonresponsible contractors. The contracting officer will require at least three references from the owner/operator. These references will include the name, address, and telephone number of a person to contact where the show has recently performed within the last 3 years. References from other military installations and public institutions (such as a county and state Government) are preferred.

*f. Copyright and royalty clearances.* Copyright and royalty clearances may be required for amusement company and traveling show contracts. If they are applicable, the procedures in AR 215-1 will be followed.

*g. Solicitation and contract requirements.*

(1) *General.* The primary considerations in amusement and traveling show contracts involve safety to spectators and performers, property damage, and control of proceeds. Provisions concerning indemnification of the NAFI and the

Government against liability for injury to property or personnel, as well as accountability must be included in all solicitations and resulting contracts.

(2) *Schedule.* Amusement and traveling show solicitations and contracts will contain a schedule for insertion by the offeror of the unit prices for events, exhibits, merchandise, food items, rides, games, admission and/or ticket prices, and the percentage of sales or flat fee offered to the NAFI.

(3) *Statement of work or specifications.* The solicitation and resulting contract should state the amount of time the owner/operator shall have to set up and tear down its operation. Army personnel may not be used to assist the contractor with any required set up and tear down. Safety and inspection requirements must be included. If food is to be sold by the owner/operator at the event, installation food handling and storage requirements must be included in the solicitation and resulting contract. The Service Contract Act may be applicable. (See para 7–9.)

(4) *Cash accountability for percentage-based contracts.* Contracts executed with percentage-based fee will provide the following methods of accountability:

(a) The NAFI fund manager will provide one or more cashiers to exchange cash for tokens, coupons, or serially numbered tickets of various denominations that will be used at concessionaire-operated events and activities. Tokens, coupons, or tickets will be provided by the NAFI and individualized in such a way as to avoid unauthorized reproduction. At each exhibit, show, ride, or admission gate, the coupon, token, or ticket will be deposited into a locked container. This will preclude the handling of cash by concessionaire employees and will facilitate reconciliation of accountability of proceeds, or;

(b) The NAFI fund manager will provide personnel to strictly monitor contractor handling of all sales. All tickets issued for the event will be verified and logged in by the NAFI representative on site and reconciliation will be performed daily. Receipts will be divided based on the percentage established in the contract. Cash collections will be distributed under one of the following methods:

1. Turned over to the NAFI which will issue a check to the concessionaire;
2. Divided at the time of collection between the activity representative and the concessionaire; or
3. Paid to the NAFI by check from the concessionaire.

(c) At the end of each day or performance, the cash and contents of the containers will be collected, counted, and verified by a representative of the NAFI, a representative of the contractor, and a disinterested party. Cash will then be taken to the fund cashier for safekeeping.

(d) If a flat-fee contract is used, then cash may be used as a medium of exchange at events and activities.

(e) All cash collections will be accounted for and reported in accordance with applicable NAFI accounting procedures prescribed in AR 215–1.

*h. Restrictions.* The following statement will appear in the SOW in full text in all contracts for amusement companies and traveling shows: “RESTRICTIONS. The NAFI reserves the absolute right to prohibit the contractor from beginning to operate or continuing to operate any show, riding device, concession, or attraction which the contracting officer or the contracting officer’s authorized representative deems to be objectionable, unethical, unsafe to operate, or contrary to federal laws, Army regulations, and/or the laws of the State of (insert name). The contractor agrees that no beverages with any alcoholic content, illegal drugs, or other controlled substances will be dispensed by the contractor or any of the contractor’s employees to any person on the military installation.”

*i. Other contract considerations.* The following shall be specified into the contract, as applicable:

- (1) Whether a performance bond is required and, if so, in what amount.
- (2) Whether the contractor will be authorized to distribute free samples of food, beverages, or other products to patrons at the event.
- (3) The furnishing of utility services to the contractor and the determination as to who will bear the cost of hook up and usage.
- (4) The location where the contractor’s equipment is to be stored and the determination as to who is responsible for safeguarding it.
- (5) Who will bear the expense of advertising the event and the type of advertising that will be allowed.
- (6) Who provides dumpsters for the deposit of trash, debris, and animal waste, and who will be responsible for transporting the trash containers to the appropriate disposal point.

*j. Special requirements for the care and custody of animals.* When animals are brought onto the Army installation in connection with a circus, carnival, rodeo, or similar event, provisions concerning the following requirements shall be contained in the contract:

- (1) The contractor must present current immunization certificates for all animals to the contracting officer.
- (2) The post veterinarian must have access to all animals in the event examinations are required.
- (3) Any animal normally considered dangerous must be safely secured.
- (4) The animals must be well fed and well cared for, and the contractor shall not be in violation of any laws pertaining to the humane treatment of animals.
- (5) The contractor shall be required to provide the necessary equipment, medication, and personnel capable of

administering medication to tranquilize or subdue any contractor-provided animal brought onto the installation. Medications and types of equipment are subject to inspection by the post veterinary service officer for adequacy. Introduction and safekeeping of such equipment will be coordinated with the post provost marshal.

*k. Type of contract.* Contracts for these events will be negotiated and awarded in terms of a percentage of gross sales or flat fee (or a combination of both) based on market considerations.

*l. Evaluation factors.* The contracting officer, in conjunction with the requiring activity, will determine the evaluation factors and plan.

*m. Contract administration.* Depending upon the size of the event under contract, the contracting officer may appoint one or more CORs for the purpose of coordinating setup and teardown and monitoring contractor performance. In determining who should be appointed as the COR, the contracting officer should consider those individuals who have knowledge in the areas of safety and safety inspections, security, sanitation standards, electrical standards and requirements, construction standards and procedures, and so on, as appropriate, to the type of event under contract.

## **7–8. Entertainment contracts**

Entertainment is any form of activity that provides amusement, enjoyment, interest, or diversion from daily routine activities and promotes the general morale and recreation of soldiers and their families. These types of contracts are referred to as revenue-generating contracts when awarded on a percentage basis. Funding of commercial entertainment contracts shall be in accordance with AR 215–1.

*a. Exclusions.* This section does not apply to the following forms of entertainment: bingo, Monte Carlo-type events, entertainment arranged by authorized patrons of a NAFI for appearances at special parties, and entertainment provided by U.S. military bands performing in their official capacity. The provisions of this section, however, do apply to contracts with individual members of U.S. military bands performing during off-duty hours. Further, contracting officers will not sign labor union contracts for commercial entertainment (for example, contracts for trades such as sound and light technicians).

*b. Selection criteria.* The requesting activity and the contracting officer are responsible for the selection of suitable entertainment in accordance with AR 215–1. Contracts for entertainment will be solicited and awarded based on the following criteria: the popularity of the entertainers or groups, customer preference, availability, participatory draw, profit margin, and past performance. When booking entertainment, the use of agencies is encouraged when feasible. Contracting officers will, in addition to using the criteria above, make price comparisons with similar acts or performers to establish a base from which negotiations may begin with individual entertainers or agencies and to subsequently determine price reasonableness.

*c. Competition.* Since the selection of an entertainer is based in large part on customer preference, competition generally is not required. This, however, does not permit the exclusive use of one entertainer or individual. When there is more than one agent or individual who can provide equivalent quality entertainment at comparable prices in a given geographical area, the sources shall be rotated. Contract files will be documented to reflect the manner by which price was determined to be fair and reasonable based on market conditions.

*d. Solicitation and contract requirements.*

(1) Entertainment contracts generally take two forms, short-term or long-term.

*(a) Short-term entertainment contracts.* Contracts may be issued for \$5,000 or below by the contracting officer for periods not to exceed 6 months and for one time or multiple entertainment engagements or acts (for example, a clown or a band). Ordering officers may be appointed for these contracts.

*(b) Long-term entertainment contracts.* Contracts may be issued by the contracting officer for periods exceeding 6 months which allow for contracts with agents, agencies and individual or multiple performers, multiple days of performance, and multiple activities or performance sites. Ordering officers may be appointed to issue calls not to exceed the competition threshold. Contracting officers may issue calls up to the simplified acquisition threshold. Call numbers will be assigned in the same manner as BPA call numbers.

(2) An entertainment contract with a talent agent may be written for multiple performances and with more than one entertainer or group covered under the same contract. Entertainment contracts with individual entertainers may be written for multiple performance locations covered under the same contract.

(3) Some portion of an entertainment contract may fall under The Service Contract Act in accordance with paragraph 7–9e.

(4) Contracts for entertainment will require that the contractor provide and maintain, during the entire performance period, adequate amounts of insurance for public liability, property damage, motor vehicle liability, and bodily injury insurance as required by state and local law. At minimum, state insurance requirements will be met. The NAFI and the Government shall be named as the coinsured.

(5) Mandatory clauses:

*(a) Cancellation clause.* Entertainment contracts shall contain a cancellation clause substantially the same as the following: "Cancellation Clause. The contractor shall notify the contracting officer, or authorized representative, immediately of any cancellation, or potential cancellation, and make a reasonable effort to obtain substitute entertainment which is, as determined by the contracting officer, equal or better. All such cancellations must be in writing, must

provide satisfactory rationale for cancellation, and must be acceptable to the contracting officer.” The contracting officer shall document the file as to the action taken, including remedies.

(b) *Liquidated damages clause.* In accordance with paragraph 2–20a, a liquidated damages clause, substantially the same as the following, shall be used for entertainment contracts when determined by the contracting officer to be appropriate: "Liquidated Damages. If the performer fails to perform in accordance with this contract, liquidated damages will be assessed at a rate of (insert rate). The contractor will not be charged liquidated damages when the failure to perform arises out of causes beyond the performer’s control and without fault or negligence of the performer (for example, fires, floods, epidemics)." Such damages are invoked only when the contractor fails to perform. Incidences such as late arrivals or performances ending early shall be resolved through other remedies. The rate of liquidated damages used must be reasonable, not be punitive, and be calculated on a case-by-case basis. The amount of liquidated damages shall be specified in the contract at time of award. The rationale for the calculated amount must be documented. The minimum amount of liquidated damages should be based on the estimated cost of oversight and administration. With an entertainment contract, the added costs normally involve lost profits, the costs of refunding tickets, and so on. For contracts over the competition threshold, the amount of liquidated damages may also include specific loss of profits due to the contractor’s failure to perform.

(6) Clearances are required before copyrighted material can be performed on stage. Procedures for obtaining these clearances are contained in AR 215–1. NAF contracting personnel and NAFI managers who are involved in the selection and purchase of commercial entertainment should be familiar with these procedures. Copyright and royalty clearances will be included in the contract file.

(7) Performance evaluations for NAF entertainment contracts will be accomplished in accordance with AR 215–1. Performance evaluations will be used as receiving reports for the purpose of payment.

(8) Payments for entertainment may be made by purchase card or convenience check at the discretion of the contracting officer and in accordance with the standing operating procedures for the purchase card program.

## **7–9. Service contracts**

This paragraph applies to all contracts for services regardless of the type of contract or kind of service being acquired.

### *a. Definitions.*

(1) *Service contract* means a contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end product. A service contract may be either a nonpersonal or personal services contract. It can also cover services performed by either professional or nonprofessional personnel, whether on an individual or organizational basis. Some of the areas in which service contracts are found include the following:

(a) Maintenance, overhaul, repair, servicing, rehabilitation, salvage, modernization, or modification of supplies, systems, or equipment.

(b) Routine recurring maintenance of real property.

(c) Housekeeping and installation services.

(d) Advisory and assistance services.

(e) Operation of NAFI or Government-owned equipment, facilities, and systems.

(f) Communication services.

(g) Architect-engineer. (See para 8–2.)

(h) Transportation and related services.

(i) Instructions and training.

(j) Sports officials.

(2) *Nonpersonal services contract* means a contract under which the personnel rendering the service are not subject, either by the contract’s terms or by the manner of its administration, to the supervision and control usually prevailing in relationships between the Government or the NAFI and its employees.

(3) *Performance-based contracting* means structuring all aspects of an acquisition around the results desired of the work to be performed as opposed to either the manner by which the work is to be performed or by using broad and imprecise statements of work.

(4) *Personal services contract* means a contract that, by its express terms or by the manner of its administration, makes the contractor personnel appear to be, in effect, NAFI or Government employees. Such contracts are generally prohibited. (See *d*, below.)

### *b. Policy.*

(1) Agencies shall use performance-based contracting methods to the maximum extent practicable for the acquisition of services, except—

(a) Construction. (See para 8–1.)

(b) Architect-engineer services. (See para 8–2.)

(c) Utility services.

(d) Services that are incidental to supply purchases.



(2) A NAFI shall not award a contract for the performance of an inherently Governmental function (see AR 215–3).  
(3) Nonpersonal service contracts are allowed. See *d*, below, to establish the differences in the characteristics between personal services and nonpersonal services contracts.

(4) Requiring activities are responsible for accurately describing the need to be filled, or problem to be resolved, through service contracting.

(5) NAFIs shall establish effective management practices to prevent fraud, waste, and abuse in service contracting.

(6) NAFIs shall ensure that sufficiently trained experienced officials are available within the NAFI to manage and oversee the contract administration function.

*c. Contracting officer responsibility.*

(1) The contracting officer is responsible for ensuring that a proposed contract for services is proper. The contracting officer shall determine, in writing, whether the proposed service is for personal or nonpersonal services. In doubtful cases, the contracting officer shall obtain the review of legal counsel and document the file with a memorandum of the facts and rationale supporting the decision as to which type of service is being contracted.

(2) Actions that are clearly nonpersonal services contracts do not require the policy set forth in (1), above.

(3) The contracting officer will ensure that performance-based contracting methods are used to the maximum extent practicable when acquiring services.

*d. Personal services contracts.*

(1) A personal service is characterized by the employer–employee relationship it creates between the NAFI and the contractor’s personnel. The NAFI is normally required to obtain its employees by direct hire under competitive appointment or other procedures (see AR 215–3). Obtaining personal services by contract, rather than by direct hire, circumvents Federal law unless Congress has specifically authorized acquisition of the services by contract.

(2) NAFIs shall not award personal services contracts unless specifically authorized to do so.

(3) An employer–employee relationship under a service contract occurs as a result of—

(a) The contract’s terms, or

(b) The manner of its administration during performance. In other words, contractor personnel are subject to the relatively continuous supervision and control of a NAFI officer or employee. However, giving an order for a specific article or service, with the right to reject the finished product or result, is not the type of supervision or control that converts an individual who is an independent contractor (such as a contractor employee) into a NAFI employee.

(4) Each contract arrangement must be judged in light of its own facts and circumstances. The key question is always: Will the NAFI exercise relatively continuous supervision and control over the contractor personnel performing the contract? The sporadic, unauthorized supervision of only one of a large number of contractor employees might reasonably be considered not relevant, while relatively continuous NAFI supervision of a substantial number of contractor employees would have to be taken strongly into account (see (5), below).

(5) The following should be used as a guide in assessing whether a proposed contract is personal in nature:

(a) Performance on site.

(b) Principal tools and equipment furnished by the NAFI or the Government.

(c) Services are applied directly to the integral efforts of the NAFI in furtherance of its assigned function or mission.

(d) Comparable services, meeting comparable needs, are performed in the same or similar manner as the NAFI using direct-hire personnel.

(e) The need for the type of service provided can reasonably be expected to last beyond 1 year.

(f) The inherent nature of the service, or the manner in which it is provided, reasonably requires, directly or indirectly, NAFI direction or supervision of contractor employees in order to—

1. Adequately protect the NAFI interest;

2. Retain control of the function involved; or

3. Retain full personal responsibility for the function supported in and by a duly authorized NAF or Government employee.

*e. The Service Contract Act.* The Service Contract Act, which is primarily for services and performed by nonexempt service workers, provides for minimum wages and fringe benefits for contracts over \$2,500. The contracting officer is responsible for obtaining wage determinations from the DOL prior to solicitation (see the DOL Employment Standards Administration Wage and Hour Division at <http://www.dol.gov/esa/minwage/america.htm>). The wage determination shall be issued as part of the solicitation. If the term of the contract is more than 1 year, wage rates are subject to adjustment after 1 year and not less than every 2 years. As a result of the updated wage determination, equitable adjustments may be necessary. Questions should be directed to the Agency Labor Advisor.

*f. Extension of services.* Awards of contracts for recurring and continuing service requirements may be delayed due to circumstances beyond the control of the contracting officer, such as protests. In order to avoid negotiation of short extensions to existing contracts, the contracting officer may include an option clause in solicitations and contracts, which will enable the NAFI to require continued performance of any services within the limits and at the rates specified in the contract. However, these rates may be adjusted only as a result of revision to prevailing labor rates

provided by the DOL. The option provision may be exercised more than once, but total extension or performance thereunder shall not exceed 6 months beyond the total contact term.

*g. NAFI use of private sector temporaries.* Contracting officers may enter into contracts with temporary help service firms for the brief or intermittent use of skills of private sector temporaries. Services furnished by temporary help firms shall not be regarded or treated as personal services. These services shall not be used in lieu of regular recruitment under civil service laws, Army policy for the administration of NAF employees in accordance with AR 215-3, or to displace a NAF or Government employee.

*h. Advisory and assistance services.* Advisory and assistance services means those services provided under contract by nonGovernmental sources to support or improve organizational policy development; decision-making; management and administration; program and/or project management and administration. It also may mean the furnishing of professional advice or assistance rendered to improve the effectiveness of management processes or products, including those of an engineering and technical nature. In rendering the foregoing services, outputs may take the form of information, advice, opinions, alternatives, analyses, evaluations, recommendations, training, or the day-to-day aid to support personnel needed for the successful performance of ongoing NAFI operations. All advisory and assistance services are to be classified as one of the following:

(1) Management and professional support services (in other words, contractual services that provide assistance, advice, or training for the efficient and effective management and operation of organizations, activities, or systems). These services normally are closely related to the basic responsibilities and mission of the activity originating the requirement for the acquisition of services by contract. Included are efforts that support or contribute to improve the organization of program management, logistics management, project monitoring and reporting data collection, budgeting, accounting, performance auditing, and administrative/technical support for conferences and training programs.

(2) Studies, analyses, and evaluations (in other words, contracted services that provide organized, analytical assessments/evaluation, which include the acquisition of models, methodologies, and related software supporting studies, analyses, or evaluations).

(3) Engineering and technical services (in other words, contractual services used to support the program office).

*i. Limitations.* The acquisition of advisory and assistance services is a legitimate way to improve NAFI services and operations. Accordingly, advisory and assistance may be used at all organizational levels to help managers achieve effectiveness or economy in their operations. The NAFI may contract for advisory and assistance services, when essential to the NAFI's mission, to—

- (1) Obtain outside points of view on critical issues;
- (2) Obtain advice regarding developments in industry, university, or foundation research;
- (3) Obtain the opinions, special knowledge, or skills of noted experts;
- (4) Enhance the understanding of, and develop alternative solutions to, complex issues;
- (5) Support and improve the organizational operations; or
- (6) Ensure the efficient or effective operation of managerial or hardware systems.

*j. Prohibited advisory and assistance services.* Advisory and assistance services shall not be—

- (1) Used in performing work of a policy, decision-making, or managerial nature that is the direct responsibility of NAFI officials;
- (2) Used to bypass or undermine personnel ceilings, pay limitations, or competitive employment procedures;
- (3) Contracted for on a preferential basis to former NAFI or Government employees;
- (4) Used under any circumstances, specifically to aid in influencing or enacting legislation; or
- (5) Used to obtain professional or technical advice that is readily available within the NAFI or another Federal agency.

*k. Limitation on payment for advisory and assistance services.* Contractors may not be paid for services to conduct evaluations or analyses of any aspect of a proposal submitted for an initial contract award unless neither personnel from the requesting NAFI nor from another NAFI, with adequate training and capabilities to perform the required proposal evaluation, are readily available and a written determination is made by the contracting officer.

*l. Dismantling, demolition, or removal of improvements.* Contracts for dismantling, demolition or removal of improvements are subject to either The Service Contract Act or The Davis-Bacon Act. If the contract is solely for dismantling, demolition, or removal of improvements, the Service Contract Act applies unless further work, which will result in the construction, alteration, or repair of a public building or public work at that location, is contemplated. If such further construction work is intended, even though by separate contract, The Davis-Bacon Act applies to a contract for dismantling, demolition, or removal.

*m. Bonds or other security.* When a contract is solely for dismantling, demolition, or removal of improvements, The Miller Act does not apply. However, the contracting officer may require the contractor to furnish a performance bond or other security in an amount that the contracting officer considers adequate to:

- (1) Ensure completion of the work.
- (2) Protect property to be retained by the NAFI.
- (3) Protect property to be provided as compensation to the contractor.

(4) Protect the NAFI and U.S. Government against damage to adjoining property.

*n. Performance-based contracting.* Performance-based contracting methods are intended to ensure that required performance quality levels are achieved and that total payment is related to the degree that services performed meet contract standards. Performance-based contracts—

(1) Describe the requirements in terms of results required rather than the methods of performance of the work.

(2) Use measurable performance standards (in other words, terms of quality, timeliness, quantity, and so on) and quality assurance surveillance plans.

(3) Specify procedures for reductions of fee or contract price when services are not performed or do not meet contract requirements; and include performance incentives, where appropriate.

*o. Statements of work.*

(1) Generally, an SOW defines requirements in clear, concise language identifying specific work to be accomplished. SOWs must be individually tailored to consider the period of performance. In the case of task order contracts, the SOW for the basic contract need only define the scope of the overall contract. The SOW for each task issued under a task order contract shall comply with (2), below. To achieve the maximum benefits of performance based contracting, task order contracts should be awarded on a multiple award basis.

(2) When preparing SOWs, NAFIs shall, to the maximum extent practicable:

(a) Describe the work in terms of “what” is to be the required output rather than either “how” the work is to be accomplished or the “number of hours” to be provided.

(b) Enable assessment of work performance against measurable performance standards.

(c) Rely on the use of measurable performance standards and financial incentives in a competitive environment to encourage competitors to develop and institute innovative and cost-effective methods of performing the work.

(d) Avoid combining requirements into a single acquisition that is too broad for the NAFI or a prospective contractor to manage effectively.

*p. Quality assurance.* NAFIs shall develop quality assurance surveillance plans when acquiring services. These plans shall recognize the responsibility of the contractor to carry out its quality control obligations and shall contain measurable inspection and acceptance criteria corresponding to the performance standards contained in the SOW. The quality assurance surveillance plans shall focus on the level of performance required by the SOW rather than the on methodology used by the contractor to achieve that level of performance.

## **7–10. Insurance contracts**

*a.* Quotations for property and casualty insurance may be solicited only when authorized by AR 215–1. Health maintenance organization (HMO) and group life insurance agreements may be established as authorized by AR 215–3.

*b.* The following words are required on all insurance contracts: “The insured herein is a nonappropriated fund instrumentality of the United States Government. No appropriated funds of the United States shall become due or be paid to the insurer as a result of this contract. The legal status of the insured NAFI as an instrumentality of the United States Government will not be interposed by the contractor as a defense in any claim against the contractor in which the contractor’s liability is in any way concerned.” General negotiation procedures are outlined in chapters 3 and 4. These procedures will be followed in selecting an insurance carrier.

## **7–11. Acquisition of information technology requirements**

*a. Information technology (IT)* means any equipment, or interconnected system(s) or subsystem(s) of equipment that is used in the automatic acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data for information by the NAFI. For purposes of this definition, equipment is used by the NAFI if the equipment is used by the NAFI directly or is used by a contractor under a contract with the NAFI which—

(1) Requires the use of such equipment; or

(2) Requires the use, to a significant extent, of such equipment in the performance of a service or the furnishing of a product.

*b.* IT includes computers, ancillary equipment, software, firmware and similar procedures, services (including support services), and related sources.

*c.* IT does not include—

(1) Any equipment that is acquired by a contractor incidental to a contract; or

(2) Any equipment that contains imbedded information technology that is used as an integral part of the product, but the principal function of which is not the acquisition, storage, manipulation, management, movement, control, display, switching, interchange, transmission, or reception of data or information. For example, HVAC (heating, ventilation, and air conditioning) equipment such as thermostats or temperature control devices, and medical equipment where information technology is integral to its operation, is not information technology.

*d. Definitions.*

(1) *Commercial off-the-shelf item.* Commercial items that require no unique Government modifications or maintenance over the life cycle of the product to meet the requirements of the NAFI.

(2) *Modular contracting.* Modular contracting means the use of one or more contracts to acquire IT systems in successive, interoperable increments.

(3) *IT products and services.* IT items include computers, ancillary equipment, software, firmware and similar procedures, services (including support services), and related resources.

*e. Requirement determination.* In acquiring IT, NAFIs shall identify their requirements pursuant to current IT policies and regulations, including consideration of security of resources, protection of privacy, accommodations for individuals with disabilities and energy efficiency. When developing acquisition strategy, contracting officers should consider the rapidly changing nature of IT through market research and the application of technology refreshment.

*f. Management of risk.* Prior to entering into a contract for IT, a NAFI should analyze the risks, benefits, and cost. Reasonable risks are acceptable as long as risks are controlled and mitigated. Contracting and program office officials are jointly responsible for assessing, monitoring and controlling risk when selecting projects for investment and program implementation. Types of risks may include schedule risks, technical obsolescence, cost risks, risks implicit in contract type, technical feasibility, funding risks and program management risks. Appropriate techniques should be put in place to manage and mitigate risk.

*g. Coordination of IT requirements.* All IT requirements that may result in use as a standard Army-wide MWR system must be coordinated through the Configuration Control Board (CCB), or its successor, prior to procurement action. The purpose of the coordination is to ensure compatibility with current standard Army MIS supported systems and to prevent the procurement of duplicate IT products.

*h. Signing of license agreements.* Contracting officers are authorized to sign software license agreements. Legal review must be obtained on any agreement prior to execution.

*i. DOD IT licensing.* The CIO/G6 and Defense Information Systems Agency have DOD licensing available on a variety of IT products and these products are available to NAFIs. Prior to soliciting a procurement action, contracting officers should contact these organizations for availability.

*j. Solicitation and contract requirements—*

(1) Contains provisions requiring commercial warranty.

(2) Ensures that appropriate licensing requirements are covered in the solicitation, especially when contracting for multiple sites.

(3) Ensures software conforms to all Government, DOD, and Army standards for security.

(4) Ensures that contracts for IT address protection of privacy in accordance with the Privacy Act (5 USC 552a).

(5) If applicable, include software source and object code escrow requirements.

## **Chapter 8 Construction Contracting**

### **8-1. Construction contracts**

*a. General.* This chapter prescribes policies relating to general construction contracting, including minor construction and major construction.

*b. Policy.* Acquisitions for construction shall be in accordance with this chapter and other parts of this regulation, as applicable. When a requirement in this chapter is inconsistent with a requirement in another part of the regulation, this chapter shall take precedence.

*c. Definitions.*

(1) *Construction* means to build, alter or repair (including dredging, excavating and painting) buildings, structures, or other real property. For purposes of clarity, “buildings, structures, or other real property” includes, but are not limited to, improvements of all types of MWR facilities. Construction does not include the manufacture, production, furnishing, construction, alteration, repair, processing, or assembling of vessels, aircraft, or other kinds of personal property. The DOL excludes small amounts of painting from the definition of construction.

(2) A *construction project* is a single undertaking involving construction applicable to real property. Real property facility projects include maintenance, repair, construction, demolition, restoration, and similar undertakings. This includes all construction work as defined in (1), above; land acquisition and items such as built-in equipment needed to produce a complete and usable facility; or a complete and usable improvement to a real property facility.

(3) *Major construction* is any NAF construction project for which the total cost is estimated to be \$750,000 and above, or as defined in AR 215-1.

(4) *Minor construction* is any NAF construction project for which the total cost is estimated to be less than \$750,000, or as defined in AR 215-1.

(5) *Design-bid-build* is a project delivery system that uses two separate contract actions, one for an architect-

engineer firm and the other for a construction contractor. The two actions are sequential; the architect-engineer firm designs the facility and generates the documentation needed for solicitation and award of a construction contract.

(6) *Design-build* (D-B) is a project delivery system that uses a single contractor (or two contractors working in a partnership) to perform both the design and construction of a project. D-B is a specialized type of construction contract. D-B construction contracts integrate the primary services of the contract that calls for construction of a complete and usable facility with incidental design and design-related services. These are not "architect-engineer" contracts. The contract does not include most of the formal architect-engineer contract clauses. However, it is necessary to address some of the topics normally covered by standard architect-engineer contract clauses in a D-B construction contract. Generally, D-B construction contracts include all the standard construction clauses and special contract requirements, except several clauses may need to be modified or adapted to address the nontraditional roles in D-B construction.

(7) *Plans and specifications* means drawings, specifications, and other data for and preliminary to the construction.

(8) An *irrevocable letter of credit* (ILC) is a written commitment by a federally insured financial institution to pay all or part of a stated amount of money, until the expiration date of the letter, upon presentation by the NAFI (the beneficiary), or a written demand thereof. Neither the financial institution nor the offeror or the contractor can revoke or condition the letter of credit.

(9) *Performance and payment bonds* are written instruments executed by a contractor and a surety, to ensure fulfillment of the contractor's obligation to the NAFI and subcontractors. If the contractor's obligations are not met, the bond ensures payment, to the extent stipulated, of any loss by the NAFI or subcontractors (see para 2-19g).

*d. Specifications.*

(1) Construction specifications shall conform to MIL-STD-3007, including dealings with force protection or unique military specifications.

(2) When "brand name or equal" descriptions are required, specifications must clearly identify and describe the particular physical, functional, or other characteristics of the brand-name items considered essential to satisfying the requirement. (See para 2-18 of this regulation.)

(3) When the contracting officer determines the use of D-B contracting is in the best interest of the NAFI, the RFP allows the offeror D-B choices in its approach to the design and construction solution. Where the scope of work is performance oriented or otherwise allows such choices, the RFP will disclose the NAFI's budget for design and construction in order to assist offerors to develop proposals to funding. This is very similar to the standard practice of directing architect-engineer firms to design the full scope of a project within a ceiling cost. Disclosure of available funding in D-B is not prohibited and is not tantamount to revealing the NAFI estimate, prohibited for other procurements. In identifying the funding, the RFP will include the following statement: "COST LIMITATION—AVAILABLE FUNDING. The available funding for contract award for design and construction is \$ (insert amount)." This number will be based on the estimated costs of construction and the estimated cost of design taken off the DD Form 1391 (Project Programming Document) based on the funds made available for this project. The NAFI cannot guarantee that additional funds will be made available for award.

*e. NAFI's estimate of construction costs.*

(1) The requiring activity will prepare an independent construction cost estimate. This estimate will be provided to the contracting officer at the time the fund certification and project requirements are received. An independent construction cost estimate will also be required for each contract modification anticipated to exceed \$25,000. The contracting officer may require an independent estimate when the price of the required work is anticipated to be \$25,000 or less. The estimate will contain sufficient detail to allow the contracting officer to make a determination of price reasonableness.

(2) Access to information concerning the NAFI's cost estimate will be limited to NAFI personnel whose official duties require knowledge of the estimate. An exception to this rule may be made during contract negotiations. The contracting officer may identify a specialized task and disclose the associated cost breakdown figures in the NAFI's cost estimate, but only to the extent deemed necessary to arrive at a fair and reasonable price.

(3) Advance notices and solicitations will state the magnitude of the requirement in terms of physical characteristics. The contracting officer will determine when the use of an estimated price range is appropriate. In no event will the statement of magnitude disclose the NAFI's cost estimate. Therefore, it is recommended that the estimated price, when used, be described in terms of the following price ranges:

- (a) Less than \$25,000.
- (b) Between \$25,000 and \$100,000.
- (c) Between \$100,000 and \$150,000.
- (d) Between \$150,000 and \$250,000.
- (e) Between \$250,000 and \$350,000.
- (f) Between \$350,000 and \$500,000.
- (g) Between \$500,000 and \$750,000.
- (h) Between \$750,000 and \$1,000,000.

(i) Between \$1,000,000 and \$5,000,000.

(j) Between \$5,000,000 and \$10,000,000.

(k) More than \$10,000,000.

f. *Fixed price contracts with economic price adjustment.* See paragraph 2–8e.

g. *Prequalification of sources.*

(1) Prequalification procedures may be used, when necessary, to ensure timely and efficient performance of construction projects. Prequalification procedures—

(a) Result in a list of sources determined to be qualified to perform a specific construction contract.

(b) Limit offerors to those with proven competence and experience to perform in the required manner.

(2) The contracting officer will determine when the use of prequalification procedures is appropriate. When prequalifying sources, the following four major areas will be reviewed:

(a) Past performance.

(b) Financial capacity.

(c) Qualifications of offeror’s team members.

(d) Experience.

h. *Construction contracts with architect engineer firms.* See paragraph 8–2.

i. *Inspection of site and examination of data.* The contracting officer should make arrangements for prospective offerors to inspect the work site and to have the opportunity to examine data available to the NAFI concerning the performance of the work. The site inspection and examination of data may include boring samples, original boring logs, and the records and plans of previous construction projects. The solicitation should notify offerors of the time and place for the site inspection and data examination. If it is not feasible for offerors to inspect the site or examine the data on their own, the solicitation will include a point of contact for coordinating an alternate time and place for the site inspection and data examination. Significant site information and the data should be made available to all offerors. A record should be kept of the date, identity, and affiliation of all offerors that inspect the site and/or examine the data.

j. *Distribution of advance notices and solicitations.* Advance notices and solicitations should be distributed to a sufficient number of prospective offerors to obtain adequate competition in accordance with paragraph 2–12. Contracting officers may send notices and solicitations to organizations that maintain, without charge to the public, display rooms for the benefit of prospective offerors, subcontractors, and material suppliers.

k. *Price negotiation.*

(1) The contracting officer will evaluate proposals based on criteria stated in the solicitation and by comparing proposals to the construction cost estimate. When a proposed price is significantly lower or higher than the construction cost estimate, the contracting officer will ensure that both the offeror and the NAFI estimator completely understand the scope of the work. If negotiation reveals errors in the construction cost estimate, the estimate will be corrected and the changes documented in the contract file.

(2) When appropriate, proposed prices may be compared to current prices for similar types of work and adjusted for differences in the work site and the specifications. Also, rough yardsticks may be developed and used, such as cost per cubic foot for structures, cost per linear foot for utilities, and cost per cubic yard for excavation or concrete.

l. *Labor standards provisions.* The labor standards provisions applying to construction contracts exceeding \$2,000 include The Davis-Bacon Act; Withholding of Funds, Payroll and Basic Records; Apprentices and Trainees; Compliance with Copeland Act Requirements; Subcontracts (Labor Standards); Labor Standards for Construction Work—Facilities Contracts; Contract Termination-Debarment, Compliance with Davis-Bacon and Related Act Regulations; Dispute Concerning Labor Standards; and Certification of Eligibility. It is important that the contractor be fully informed by the contracting officer of all applicable labor law requirements before starting work.

m. *Construction contractor insurance.* Liability and worker’s compensation insurance must be obtained by the contractor in amounts specified in the contract. In no event will the amount be less than the minimum requirements established by applicable state and local regulations and laws. The contracting officer should also consider requesting builders’ risk insurance. The contractor shall provide proof of the insurance policies prior to proceeding with work under the contract.

n. *Liquidated damages.* The use of liquidated damages must be evaluated on all construction contracts over \$50,000. Contracting officers may use liquidated damages for contracts under \$50,000. See paragraph 2–20b for considerations to be assessed when determining the need for and the amount of liquidated damages to be placed in solicitations. The contracting officer shall place a written determination on the basis of use or nonuse of liquidated damages in the solicitation file.

o. *Bond requirements.*

(1) Performance and payment bonding requirements for construction are addressed in paragraph 2–19.

(2) For construction contracts up to and including \$100,000, the contracting officer should select two or more of the following payment protections, giving particular consideration to inclusion of an ILC as one of the selected alternatives.

(a) A payment bond.

(b) An ILC.

(c) A tripartite escrow agreement. The prime contractor establishes an escrow account in a federally insured financial institution, and enters into an escrow agreement with an escrow agent and all of the suppliers of labor and material. The escrow agreement shall establish the terms of payment under the contract and of resolution of disputes among the parties. The NAFI makes payments to the contractor's escrow account. The escrow agent distributes payments in accordance with the agreement or triggers dispute resolution procedures, if required.

(d) Certificates of deposit. The contractor furnishes certificates of deposit from a federally insured financial institution to the contracting officer, in an acceptable form, executable by the contracting officer.

(e) Other payment protections. The deposit of United States bonds or notes and certified or cashier's checks, bank drafts, money orders, or currency.

(3) The contractor shall submit to the contracting officer evidence of one of the payment protections selected by the contracting officer.

(4) The contractor shall furnish all bonds or alternative payment protections, including any necessary reinsurance agreements, before receiving a notice to proceed with the work or being allowed to start work.

*p. Bond amounts required.*

(1) For contracts over \$100,000, the penal amount of performance and payment bonds shall be 100 percent of the original contract price, unless the contracting officer determines, in writing, that a lesser amount would be adequate to protect the NAFI. If the contract price increases, the contracting officer may secure additional protection equal to 100 percent of the increase by directing the contractor to increase the penal amount of the existing bonds or obtain additional bonds. The amount of the payment bond must be no less than the amount of the performance bond.

(2) For contracts between \$25,000 and \$100,000, the penal amount of the payment bond or the alternative payment protection shall be 100 percent of the original contract price, unless the contracting officer determines, in writing, that a lesser amount would be adequate to protect the NAFI. If the contract price increases, the contracting officer may secure additional protection equal to 100 percent of the increase by directing the contractor to increase the penal amount of the existing bond; obtain an additional bond; or furnish additional alternative payment protection.

## **8-2. Architect-engineer contracts**

*a. Definition.* Architect-engineer services means professional services of an architectural or engineering nature as defined by State law, if applicable, which are required to be performed or approved by a person licensed, registered, or certified to provide such services. Architect-engineer services also include research, planning, development, design, construction, alterations, repair to real property, studies, investigations, surveying, mapping, tests, evaluations, program management, conceptual designs, plans and specifications, soil engineering, drawing review, preparation of operating and maintenance manuals, and other related services.

*b. General.* The general policy to negotiate contracts for architect-engineer services will be based on demonstrated competence and qualifications of prospective contractors at fair and reasonable prices.

*c. Policy.* Acquisition of architect-engineer services shall be in accordance with policies prescribed in this chapter and other parts of this regulation, when applicable. When a requirement in this chapter is inconsistent with another part of this regulation, this chapter shall take precedence, if the acquisition is for architect-engineer services.

*d. SOW requirements.* When appropriate, an SOW shall require the architect-engineer to consider energy conservation, environmental considerations, and waste reduction to the maximum extent practicable in developing the construction design specifications.

*e. Evaluation.* NAFIs shall evaluate each offeror in terms of the following:

(1) Professional qualifications necessary for satisfactory performance of required services.

(2) Specialized experience and technical competence in the type of work required, to include areas contained in *a*, above, when appropriate.

(3) Capacity to accomplish the work in the required time.

(4) Past performance on contracts with NAFI or Government agencies and private industry in terms of cost control, quality of work, and compliance with performance schedules.

(5) General geographical area of the project and knowledge of the locality of the project.

(6) Other evaluation criteria, as appropriate.

*f. Evaluation board.*

(1) When acquiring architect-engineer services, the contracting officer will establish an architect-engineer board composed of members who are highly qualified and have experience in architecture, engineering, construction, and NAFI-related acquisitions. One member of the board will be designated as the chairperson.

(2) The contracting officer may include members of the board who are professionals outside the Government or NAFI.

(3) No firm shall be eligible for the award of an architect-engineer contract during a period in which any of its principals or associates are participating as members of an evaluation board for the NAFI.

*g. Evaluation board functions.* In accordance with the evaluation criteria and evaluation plan, the evaluation board will perform the following functions:

- (1) Review past performance information.
- (2) Evaluate the firm(s) for technical merit in accordance with established criteria, as set forth in *e*, above.
- (3) If required, the contracting officer, in conjunction with the evaluation board, will hold discussions with the most highly qualified firms regarding concepts and the use of alternative methods of furnishing the required services. Architect-engineer fees will not be considered in these discussions.
- (4) Prepare an evaluation report for the contracting officer recommending, in order of preference, at least three firms that are considered the most highly qualified to perform the required services. The report will include a description of the discussions and evaluations conducted by the board to allow the contracting officer to review the considerations upon which the recommendations are based.

*h. Contracting officer functions.*

(1) The contracting officer will conduct negotiations with the most highly rated firm(s) and, with the advice of technical and staff representatives, make the final selection. Negotiations are held with only one firm at a time, based on order of technical merit. The negotiations will only commence upon receipt of the evaluation report.

(2) If a mutually satisfactory contract cannot be negotiated, the contracting officer shall notify the firm that negotiations have been terminated. The contracting officer shall then initiate negotiations with the next most highly rated firm as set forth in the evaluation report. This process shall be continued until a mutually satisfactory contract has been negotiated.

*i. Qualifications.* To be considered for architect-engineer contracts, a firm must file with the contracting officer an SF 254 (Architect-Engineer and Related Services Questionnaire) and an SF 255 (Architect-Engineer and Related Services Questionnaire for Specific Project).

*j. Subcontracting.* Because selection of architect-engineer firms is based upon qualifications, the extent of any subcontracting is an important negotiation topic. The clause entitled "Subcontractors and Outside Associates and Consultants" limits a firm's subcontracting to firms agreed upon during negotiations.

*k. Architect-engineer liability and insurance.* Architect-engineer contractors shall be responsible for the quality, technical accuracy, and coordination of services required under its contracts. Architect-engineer firms shall be required to carry Professional Liability Insurance-General Coverage (Errors and Omissions) in an amount not less than \$500,000, to include work performed under the D-B method. The architect-engineer shall be fully responsible to the NAFI for work performed by his associates, subcontractors, and professional consultants. An architect-engineer firm may be liable for NAFI costs resulting from errors, omissions, or deficiencies in designs furnished under its contract. Therefore, when a modification to a construction contract is required because of an error, omission or deficiency in the service provided by an architect-engineer contractor, the contracting officer, with the advice of technical personnel and legal counsel, will consider the extent to which the architect-engineer contractor may be reasonably liable.

*l. Cost of corrections.* Under architect-engineer contracts, contractors shall be required to make necessary corrections at no cost to the NAFI when designs, drawings, specifications, or other items or services furnished contain any errors, deficiencies, or inadequacies. If the NAFI does not require a firm to correct errors, the contracting officer shall make a written determination of the decision in the contract file.

*m. Design within funding limitations.* The NAFI may require the architect-engineer contractor to design the project so that construction costs will not exceed a contractually specified funding limit. If the price of construction proposed in response to a NAFI solicitation exceeds the construction funding limitation in the architect-engineer contract, the architect-engineer shall be solely responsible for redesigning the project within the funding limit. These additional services shall be performed at no increase in the contract price. The contracting officer shall insert the clause entitled "Design Within Funding Limitations" in the fixed-price architect-engineer contracts. The amount of the construction funding limitation is to be established during negotiations between the contractor and the NAFI. The amount agreed upon is inserted in paragraph c of the clause.

*n. Prohibitions.* No contract for the construction project shall be awarded to the firm, or its subsidiaries or affiliates, that designed the project, except for the D-B construction method or with the approval of the CAO.

### **8-3. Interior design**

*a.* Acquisitions for all interior and kitchen design requirements funded by the NAFI, regardless of whether the design was done in house or by contract (for example, architect-engineer or interior design firm) or as part of a construction project, should be treated as a brand name only procurement. (Reference para 2-17.)

*b.* Items specified for purchase will be accomplished without further comparison or substitution unless such a substitution is required due to non availability (for example, obsolescence, out-of-production, excessive delivery time). Any substitution of items shall be approved by the designer. The interior design package integrity shall be maintained during the acquisition process to the maximum extent possible.

*c.* During the development stages of an interior design project, the designer will consider quality and life cycle costs. Designers will ensure selected items comply with applicable laws and regulations.



## **Appendix A References**

### **Section I Required Publications**

#### **AR 25–55**

The Department of the Army Freedom of Information Act Program. (Cited in para 6–31.)

#### **AR 25–400–2**

The Army Records Information Management System (ARIMS). (Cited in para 1–36.)

#### **AR 27–40**

Litigation. (Cited in paras 1–19*a* and 1–22*b*(9).)

#### **AR 40–657**

Veterinary/Medical Food Safety, Quality Assurance, and Laboratory Service. (Cited in para 2–25*a*(3).)

#### **AR 60–20**

Army and Air Force Exchange Service Operating Policies. (Cited in para 6–12*c*.)

#### **AR 215–1**

Military Morale, Welfare, and Recreation Programs and Nonappropriated Fund Instrumentalities. (Cited in paras 1–18*f*, 2–4*c*, 6–13*b*, 6–22, 7–1*c*, 7–2*a*(8), 7–2*a*(9), 7–3*c*(6), 7–4*a*, 7–4*a*(3), 7–7*f*, 7–7*g*(4)(*e*), 7–8, 7–8*b*, 7–8*d*(6), 7–8*d*(7), 7–10*a*, 8–1*c*(3), 8–1*c*(4), and C–2*a*.)

#### **AR 215–3**

Nonappropriated Funds and Personnel Policy. (Cited in paras 7–9*b*(2), 7–9*d*(1), 7–9*g*, and 7–10*a*.)

#### **AR 215–7**

Civilian Nonappropriated Funds and Morale, Welfare, and Recreation Activities. (Cited in paras 6–12*b*, 7–1*a*, and 7–2*a*(6).)

#### **AR 340–21**

The Army Privacy Program. (Cited in paras 6–31.)

#### **DOD 5500.7–R**

Joint Ethics Regulation (JER). (Cited in paras 1–19 and 1–22*b*(9).) (Available at <http://www.dtic.mil/whs/directives>.)

#### **DOD 7000.14–R, Vol. 13**

DOD Financial Management Regulations (FMRs)—Nonappropriate Funds Policy and Procedures. (Cited in para 7–2*a*(8).) (Available at <http://www.dtic.mil/whs/directives>.)

#### **DODD 4105.67**

Nonappropriated Fund (NAF) Procurement Policy. (Cited in paras 1–1*a* and 1–27.) (Available at <http://www.dtic.mil/whs/directives>.)

#### **DODI 7060.3**

International Balance of Payments Program—Nonappropriated Fund Activities. (Cited in para 1–30*c*.) (Available at <http://www.dtic.mil/whs/directives>.)

#### **DODI 4105.71**

Nonappropriated Fund (NAF) Procurement Procedure. (Cited in para 1–1*a*.) (Available at <http://www.dtic.mil/whs/directives>.)

#### **FAR**

Federal Acquisition Regulation. (Cited in paras 1–22, 1–29, 2–11, and 6–16*a*.) (Available at <http://www.arnet.gov/far/>.)

### **Section II Related Publications**

A related publication is a source of additional information. The user does not have to read a related reference to

understand this publication. The United States Code is available at <http://www.gpoaccess.gov/uscode/index.html> and the Code of Federal Regulations is available at <http://www.gpoaccess.gov/cfr/index.html>.

#### **AFARS**

Army Federal Acquisition Regulation Supplement. (Available at <http://farsite.hill.af.mil.VFAFAR1.htm>.)

#### **AR 11-2**

Management Controls

#### **AR 210-25**

Vending Facility Program for the Blind on Federal Property

#### **DFARS**

Department of Defense Federal Acquisition Regulation Supplement. (Available at <http://farsite.hill.af.mil.VDFAR1.htm>.)

#### **Executive Order 11246**

Equal Employment Opportunity. (Available at [http://www.archives.gov/federal\\_register/executive\\_orders/disposition\\_tables.html](http://www.archives.gov/federal_register/executive_orders/disposition_tables.html).)

#### **MIL-STD-3007F**

Unified Facilities Criteria and Unified Facilities Guide Specifications. (Available at <http://dodssp.daps.dla.mil/>.)

#### **Treasury Circular 570**

Department of the Treasury's Listing of Approved Sureties. (Available at <http://www.fms.treas.gov/c570/c570.html>.)

#### **U.S. Army Veterinary Command Circular 40-1**

Worldwide Directory of Sanitarily Approved Food Establishments for Armed Forces Procurement. (Available at <http://vets.amedd.army.mil/vetsvcs/approved.nsf>.)

### **Section III**

#### **Prescribed Forms**

Unless otherwise indicated DA forms are available on the U.S. Army Publishing Directorate Web site (<http://www.apd.army.mil>); DD forms are available at <http://www.dior.whs.mil>; SF forms are available at <http://www.gsa.gov>. Approved forms/prescriptions will be accessed electronically via the Army NAF automated procurement system.

(1) Approved forms/prescriptions will be accessed electronically via the Army NAF automated procurement system. Authorized users of this system will be able to access these documents from Web site <https://www.mwrportal.army.mil/>. The matrix will be accessed from the Army NAF Automated Procurement System either at Web site <https://www.mwrportal.army.mil/> or at the NAF Contracting Web site <http://www.armymwr.biz/clauses.htm>.

(2) For other individuals that are not authorized users of the NAF automated procurement system (for example, prospective offerors or contractors), access is provided from the NAF Contracting Web site <http://www.armymwr.biz/clauses.htm>.

#### **DA Form 4066**

Solicitation/Contract/Order for Commercial Items (Nonappropriated Funds). (Prescribed in para 3-14.)

#### **DA Form 4067**

Request for Quotations (Nonappropriated Funds). (Prescribed in paras 3-4 and 3-14.)

#### **DA Form 4067-1**

Order for Supplies or Services (Nonappropriated Funds). (Prescribed in paras 3-12, 3-14.)

#### **DA Form 4068**

Continuation Sheet (Nonappropriated Funds). (Prescribed in para 3-14.)

#### **DA Form 4069**

Solicitation/Offer and Award (Nonappropriated Funds). (Prescribed in paras 4-6, 5-2, and D-2.)

#### **DA Form 4071**

Award/Contract (Nonappropriated Funds). (Prescribed in para 4-18.)

**DA Form 4072**

Record of Negotiations (NAF). (Prescribed in paras 3–18, and 4–23.)

**DA Form 4073**

Amendment of Solicitation/Modification of Contract (Nonappropriated Funds). (Prescribed in paras 3–8, 3–14, 4–8, 5–10, and 6–2.)

**DA Form 5567**

Abstract of Offers (Nonappropriated Funds). (Prescribed in paras 3–7c(1) and 5–15a.)

**DA Form 5567–1**

Abstract of Offers (Continuation Sheet). (Prescribed in paras 3–7c(1) and 5–15a.)

**DA Form 5755**

Consignment Agreement (Nonappropriated Funds). (Prescribed in para 7–6.)

**DA Form 5755–1**

Consignment Control Sheet. (Prescribed in para 7–6.)

**DA Form 5756**

Concessionaire Contract—Short Term (Nonappropriated Funds). (Prescribed in para 7–5.)

**Section IV****Referenced Forms****DA Form 2028**

Recommended Changes to Publications and Blank Forms.

**DD Form 250**

Material Inspection and Receiving Report.

**DD Form 1391**

Military Construction Project Data.

**SF 25**

Performance Bond.

**SF 25A**

Payment Bond.

**SF 25B**

Continuation Sheet (for SF 24, 25 and 25A).

**SF 254**

Architect-Engineer and Related Services Questionnaire.

**SF 255**

Architect-Engineer and Related Services Questionnaire for Specific Project.

**Appendix B****Nonappropriated Fund (NAF) Clauses, Matrix and Prescribed Forms****B–1. NAF Solicitation Provisions and Contract Clause Matrix**

*a.* The matrix can be accessed from either the Army NAF Automated Procurement System at <http://prism-web.mwr.mil/prism> or at the NAF Contracting Web page at [http://www.armymwr.org/home/Show\\_file.asp?fileID=736](http://www.armymwr.org/home/Show_file.asp?fileID=736).

*b.* The matrix listing contains a column for each principal type and/or purpose of contract (for example, fixed-price supply, construction, commercial item). The matrix lists—

- (1) Required solicitation provision.

- (2) Required-when-applicable solicitation provisions.
  - (3) Required contract clauses.
  - (4) Required-when-applicable contract clauses.
  - (5) Optional contract clauses.
- c.* For each provision or clause listed, the matrix provides information on—
- (1) Whether incorporation by reference is or is not authorized.
  - (2) The section of the Uniform Contract Format (UCF) in which it is to be located, if it is used in an acquisition that is subject to the UCF.
  - (3) Its title.
- d.* Since the matrix does not provide sufficient information to determine the applicability of a provision or clause in the "required-when-applicable" and "optional" categories, contracting officers shall refer to the prescriptions.
- e.* Each provision or clause in the matrix has a prescription. The prescription includes all the conditions, requirements, and instructions for using the provision or clause and its alternates, if any. Contracting officers shall comply with all prescriptions. The contracting officer must not modify provisions and clauses unless the prescription authorizes their modification.
- f.* Provisions and clauses will be made available to contracting officers and vendors and contractors through electronic format. Contracting personnel will have a link to the provisions and clauses through the automated procurement system. The FMWRC NAF Contracting Directorate, Policy Division, is responsible for maintaining the provisions and clauses.

## **B–2. Solicitation provisions and contract clauses**

- a.* Each solicitation, purchase order, contract or agreement, to include modifications, shall incorporate all clauses, provisions and certifications as set forth in this regulation (see para 1–27 of this regulation).
- b.* Access to NAF solicitation provisions and contract clauses and prescribed forms. These documents can be accessed in one of the two ways outlined below:
- (1) Authorized users of the Army NAF automated procurement system may access these documents from [www.mwrportal.army.mil](http://www.mwrportal.army.mil).
  - (2) For other individuals that are not authorized users of the NAF automated procurement system (for example, prospective offerors or contractors), access is provided from the NAF Contracting Web page at <http://www.armymwr.biz/clauses.htm>.

## **Appendix C Uniform Procurement Instrument Identification Numbers**

### **C–1. PIIN document numbering system**

The PIIN document numbering system will be used by NAF and APF contracting activities to identify NAF solicitations and contracts (see para 1–28 of this regulation).

### **C–2. PINN configuration**

The PINN system consists of 13 alphanumeric characters positioned as shown below:

- a.* The first six (6) positions will identify the contracting activity. The first three positions will be “NAF” to denote NAF. The fourth and fifth positions will be taken from AR 215–1, appendix C. The sixth position will designate the issuing office as follows:
- (1) 1 - will denote the NAF contracting office.
  - (2) 2 - will denote the APF contracting office.
  - (3) 3 - and all subsequent numbers will be locally assigned to identify any satellite contracting offices.
- b.* The seventh and eighth positions will be the last two digits of the fiscal year in which the PIIN is assigned.
- c.* The ninth position will be a capital letter assigned to indicate the type of instrument code, as demonstrated in table C–1.

**Table C-1  
Instrument codes**

Type of instrument code	Description
A	Blanket purchase agreements (BPA)
B	Invitation for bids (IFB) (sealed bidding)
C	Contracts, including letter contracts and contracts incorporating basic agreements but excluding indefinite delivery type contracts
D	Indefinite delivery type contracts
F	Delivery orders placed with or through other Government departments or agencies or against contracts or agreements placed by such departments or agencies when placement of orders is allowed. May also be used for task orders.
G	Basic ordering agreements (BOA)
H	Agreements including basic agreements
L	Lease agreements
M	Purchase orders
Q	Request for quotations (RFQ)
R	Request for proposals (RFP)
S	Entertainment contracts
T	Revenue generating contracts or agreements
V	Army NAF purchase card

d. The tenth through thirteenth positions will be the serial number of the instrument. Each series of serial numbers will commence with the number 0001 at the start of each fiscal year. Alphanumeric serial numbers will be used when more than 9999 numbers are required (in other words, A001 through A999, then B001 through B999, and so on, on to Z001 through Z999 (the letters I and O will not be used)).

e. Table C-2 illustrates the configuration of the PIIN (for example: NAFBA1-04-M-0001).

**Table C-2  
PIIN configuration**

Position	Contents	Components of PIIN
1-6	The letters "NAF" denote the nonappropriated funds. The remaining digits identify the contracting office	NAFBA1
7-8	Last two digits of the fiscal year in which the PIIN is assigned	04
9	Type of procurement instrument code	M
10-13	Four position serial number	0001

## Appendix D Uniform Contract Format (UCF)

### D-1. Uniform Contract Format

Normally, solicitations and resulting contracts will be prepared using the uniform contract format outlined in table D-1 (also see paragraph 4-7 of this regulation).

**Table D-1  
Uniform contract format**

Section	Title
Part I—The schedule	
A	Solicitation/contract form
B	Supplies or services and prices/costs
C	Description/specifications/statement of work
D	Packaging and Marking
E	Inspection and acceptance
F	Deliveries or performance
G	Contract administration data
H	Special contract requirements
Part II—Contract clauses	
I	Contract clauses
Part III—List of documents, exhibits, and other attachments	
J	List of attachments
Part IV—Representations and instructions	
K	Representations, certifications, and other statements of offerors or respondents
L	Instructions, conditions, and notices to offerors or bidders
M	Evaluation factors for award

**D-2. Uniform contract format requirements**

a. *Part I—The Schedule.* The contracting officer shall prepare the Schedule as follows:

- (1) *Section A, Solicitation/contract form.* DA Form 4069 may be used to prepare RFPs.
- (2) *Section B, Supplies or services and prices/costs.* Include a brief description of the supplies or services (for example, item number, stock number or part number, if applicable, nomenclature, and quantities). This includes incidental deliverables such as manuals, reports, and presentations.
- (3) *Section C, Description/specifications/statement of work.* Include any description or specifications needed in addition to Section B.
- (4) *Section D, Packaging and marking.* Provide packaging, packing, preservation, and marking requirements, if any.
- (5) *Section E, Inspection and acceptance.* Include inspection, acceptance, and quality assurance requirements.
- (6) *Section F, Deliveries or performance.* Specify the requirements for time, place, and method of delivery or performance.
- (7) *Section G, Contract administration data.* Include any required accounting and funding data and any necessary contract administration information or instructions, other than those on the solicitation form. Add a statement that the offeror should include the payment address in the proposal, if it differs from the mailing address.
- (8) *Section H, Special contract requirements.* Include a clear statement of any special contract requirements that are not included in Section I, contract clauses, or in other sections of the uniform contract format.

b. *Part II—Contract Clauses.* The contracting officer shall include as Section I, the clauses required by this regulation and any additional clauses expected to be included in any resulting contract, if these clauses are not required in any other section of the uniform contract format.

c. *Part III—List of Documents, Exhibits, and Other Attachments.* Section J, List of attachments. The contracting officer shall list the title, date, and number of pages for each document, exhibit, and other attachments. Cross-references to material in other sections may be inserted, as appropriate.

d. *Part IV—Representations and Instructions.* The contracting officer shall prepare the representations and instructions as follows:

- (1) *Section K, Representations, certifications, and other statements of offerors.* Include in this section those solicitation provisions that require representations, certifications, or the submission of other information by offerors.
- (2) *Section L, Instructions, conditions, and notices to offerors.* Insert in this section solicitation provisions and other information and instructions not required elsewhere to guide offerors or bidders in preparing proposals.

(3) *Section M, Evaluation factors for award.* Identify all significant factors and any significant subfactors that will be considered in awarding the contract and their relative importance.

## **Appendix E**

### **Recordkeeping Requirements**

#### **E-1. Requirements**

*a. K (Keep) records.*

- (1) RN: 215-4a2 - NAF debarred bidder lists - Offices other than Office responsible for final determination as to whether or not a bidder is placed on the list.
- (2) RN: 215-4b - NAF vendor mailing lists.
- (3) RN: 215-4d - NAF procurement registers.
- (4) RN: 215-4e - NAF procurement inspections.
- (5) RN: 315-4g - NAF small purchase categories.

*b. T (Transfer) Records.*

- (1) RN: 215-4a1 - NAF debarred bidder lists - Office responsible for final determination as to whether or not a bidder is placed on the list.
- (2) RN: 215-4c1 - NAF master, open-end and call-type contracts - Offices administering contract.
- (3) RN: 215-4c2 - NAF master, open-end and call-type contracts - Offices administering contract: records relating to contracts involved in appeals handled by a Board of Contract Appeals.
- (4) RN: 215-4f - NAF contracting officer designations.
- (5) RN: 215-4h - NAF contract actions.
- (6) RN: 215-4i - NAF award protest files - Offices authorized to perform final review.
- (7) RN: 215-4j - NAF contract appeals.

#### **E-2. Detailed record information**

Detailed information about the above records is located on the RRS-A Module of ARIMS located at <http://www.arims.army.mil>.

## **Glossary**

### **Section I**

#### **Abbreviations**

**AAFES**

Army and Air Force Exchange Service

**ACO**

Administrative Contracting Officer

**ACSIM**

Assistant Chief of Staff for Installation Management

**ACWF**

Army Civilian Welfare Fund

**AFNAFPO**

Air Force Nonappropriated Fund Purchasing Office

**AFRC**

Armed Forces Recreation Centers

**APF**

appropriated fund

**AR**

Army regulation

**ARMP**

Army Recreation Machine Program

**ASBCA**

Armed Services Board of Contract Appeals

**BOA**

basic ordering agreement

**BPA**

blanket purchase agreement

**CAB**

Contract Awards Board

**CAO**

Chief Acquisition Officer

**CCB**

Configuration Control Board

**CFR**

Code of Federal Regulations

**CG**

Commanding General

**CONUS**

continental United States

**COR**

contracting officer's representative



**DA**

Department of the Army

**D-B**

design-build

**DOD**

Department of Defense

**DODD**

Department of Defense directive

**DODI**

Department of Defense instruction

**DOL**

Department of Labor

**DTS**

Defense Transportation System

**EFT**

electronic funds transfer

**EIT**

electronic and information technology

**FAR**

Federal Acquisition Regulation

**FMWRC**

U.S. Army Family Morale, Welfare, and Recreation Command

**FOB**

free on board

**FOIA**

Freedom of Information Act

**GAO**

Government Accountability Office

**GM**

general manager

**GSA**

General Services Administration

**HMO**

health maintenance organization

**IFB**

invitation for bids

**ILC**

irrevocable letter of credit

**IMA**

Installation Management Agency

**IDIQ**

indefinite delivery/indefinite quantity

**IT**

information technology

**JER**

Joint Ethics Regulation

**MAS**

multiple awards schedule

**MOA**

Memorandum of Agreement

**MWR**

morale, welfare, and recreation

**MWRUSA**

morale, welfare and recreation utilization, support, and accountability

**NAF**

nonappropriated fund(s)

**NAFI**

nonappropriated fund instrumentality

**OCONUS**

outside the continental United States

**OMB**

Office of Management and Budget

**OTJAG**

Office of The Judge Advocate General

**PIIN**

Procurement Instrument Identification Numbers

**PMAP**

Procurement Management Assistance Program

**PPV**

public-private ventures

**RFI**

request for information

**RFP**

request for proposals

**RFQ**

request for quotations

**RIMP**

Risk Management Program

**SF**

standard form

**SOW**

statement of work

**SSA**

source selection authority

**TALT**

total acquisition lead time

**TCN**

transportation control number

**TIN**

taxpayer identification number

**USC**

United States Code

**USMEPCOM**

United States Military Entrance Processing Command

**Section II****Terms**

As used throughout this regulation, the following definitions, terms and abbreviations are used as defined below unless (a) the context in which they are used clearly requires a different meaning or (b) a different definition is prescribed for a particular paragraph or subparagraph.

**acquisition**

Acquiring, by contract with NAF, supplies or services (including construction) by and for the use of the NAFI through purchase or lease (excluding real estate), whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated. Acquisition begins at the point when user needs are established and includes the description of requirements to satisfy the NAFI needs, solicitation and selection of sources, award of contracts, contract performance, contract administration, and those technical and management functions directly related to the process of fulfilling NAFI needs by contract.

**administrative contracting officer (ACO)**

May be appointed by the contracting officer to administer a specific contract. The contracting officer shall appoint a warranted contracting officer as an ACO in writing. The appointment shall specify the scope and limits of the ACO's authority. The ACO's warrant shall allow for the scope and the limits specified by the contracting officer (for example, type of contract, dollar amount). The contracting officer may rescind or recall the delegation to administer a contract.

**bond**

A written instrument executed by an offeror or contractor (the "principal"), and a second party (the "surety" or "sureties"), to ensure fulfillment of the principal's obligations to a third party (the "obligee" or the "Fund"), identified in the bond. If the principal's obligations are not met, the bond ensures payment, to the extent stipulated, of any loss sustained by the obligee. The types of bonds and related documents are as follows:

- a. A payment bond assures payments to all persons supplying labor or materials in the work provided for in the contract.
- b. A performance bond secures performance and fulfillment of the contractor's obligations under the contract.

**bulk funding**

A method which establishes a reserve of funds to be used for an approved purpose over an identified period of time rather than obtaining individual obligation authority on each purchase document.

**Buy American Act**

A federal law that generally requires that only domestic end products may be procured in purchasing supplies for public use, unless the items (1) are for use outside the United States, (2) would be unreasonable in cost, or (3) are not mined, produced, or manufactured domestically in sufficient and reasonable available commercial quantities of satisfactory quality. There are separate regulations for the purchase of supplies and construction materials. With regard to supplies, the law provides a preference evaluation system for domestic end products for public use inside the United States over foreign end products. See FAR 25.104 for a list of approximately 100 materials and supplies exempted

from the Act. Products are considered to be not of foreign origin if the cost of the foreign products used in them accounts for 50 percent of the total cost.

**capital purchases/minor construction**

- a. Capital purchases: items ranging in cost from \$1,000 to \$199,999.99, whether or not construction is involved, and up to \$200,000 and over where there is no construction involved; (for example, bulk purchase of like items, or single projects such as a telephone system).
- b. Minor construction: projects ranging in cost from \$200,000 to \$750,000.

**change order**

A written order, signed by the contracting officer, directing the contractor to make a change that the changes clause authorizes the contracting officer to order without the contractor's consent. Change orders shall be accomplished by issuing a unilateral modification to the contract.

**changes**

A change includes—

- a. Cardinal: A major modification of a contract, which changes the general scope of the contract. Cardinal changes cannot be made by the issuance of a change order, under the Change Clause. They must be affected through the use of a supplemental agreement that allows for an equitable adjustment for the contractor.
- b. Permissive: A minor modification to a contract, such as a change in accounting data, which can be effected through the use of an administrative change.
- c. The changes clause permits the contracting officer to make unilateral changes, in designated areas, within the general scope of the contract. These changes are accomplished by issuing a written, unilateral modification. Upon receipt of a change order, the contractor must continue performance of the contract as changed.

**Chief Acquisition Officer**

The official responsible for administering NAF contracting policy and for managing NAF acquisitions and personnel Army wide.

**claim**

A written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to the contract. A claim arising under a contract, unlike a claim relating to that contract, is a claim that can be resolved under a contract clause that provides for the relief sought by the claimant. A voucher, invoice, or other routine request for payment that is not in dispute when submitted is not a claim. A submission may be converted to a claim, by written notice to the contracting officer as provided, if it is disputed either as to liability or amount or is not acted upon in a reasonable time.

**clause**

A term or condition used in contracts, or in both solicitations and contracts, and applying after contract award, or both before and after award. A term used only in a solicitation is called a "provision."

**commercial item**

A product or a service (for example, items, supplies, materials, and components) sold or traded to the general public in the course of conducting normal business operations at established catalog or market prices.

**communications**

Exchanges between the NAFI and offerors held after receipt of proposals that lead to the establishment of the competitive range.

**competitive range**

A range based on the ratings of each proposal against all evaluation criteria, price and other factors that were stated in the RFP. The purpose of establishing a competitive range is to conduct written or oral discussions. The contracting officer may limit the number of proposals in competitive range to the greatest number that will permit an efficient competition among the most highly rated proposals.

**continental United States (CONUS)**

The 48 contiguous States and the District of Columbia. The definition may change depending on the context (for example, the Service Contract Act). Refer to the statute for specific definition.

**contingent fee**

Any commission, percentage, brokerage, or other fees which are paid contingent upon the success of that person or concern has in securing a NAFI contract.

**contract**

A mutually binding legal relationship obligating the seller to furnish the supplies or services and the buyer to pay for them. There are elements of a contract that must be present if the contract is to be binding (in other words, it must include an offer, acceptance, consideration, execution by competent parties, legality of purpose, and clear terms and conditions). Contracts include all types of commitments that obligate the NAFI to an expenditure of NAF, except as otherwise authorized, in writing. In addition to bilateral instruments, contracts include (but are not limited to) awards and notices of awards; job orders or task letters issued under basic ordering agreements; letter contracts; orders, such as purchase orders or delivery orders, under which the contract becomes effective by written acceptance or performance; and bilateral contract modifications.

**contracting**

The means of purchasing, renting, leasing, or otherwise obtaining supplies or services. Contracting includes description (but not determination) of supplies and services required selection and solicitation of sources, preparation and award of contracts, and all phases of contract administration. It does not include making grants or cooperative agreements.

**contracting officer**

A person with the authority to enter into, administer, and/or terminate contracts and make related determinations and findings. This authority is granted through the means of a certificate of appointment (warrant). The term includes certain authorized representatives of the contracting office acting within the limits of their warrant authority as delegated by the contracting officer. Administrative contracting officer (ACO) refers to a contracting officer who is administering contracts. Termination contracting officer (TCO) refers to a contracting officer who is settling terminated contracts. A single contracting officer may be responsible for duties in any or all of these areas. Reference in this regulation to an ACO or TCO does not (a) require that a duty be performed at a particular office or activity or (b) restrict in any way a contracting officer in the performance of any duty properly assigned.

**contracting officer's representative (COR)**

Serves as the liaison between the contractor and the contracting officer and is appointed by the contracting officer, in writing. The COR is responsible for the technical and administrative monitoring of the contract as described in the COR appointment letter. The COR has no authority to change the terms and conditions of the contract, only the contracting officer may do this. The COR's appointment will remain in effect until reassignment, termination of employment, or expiration/termination of the contract. Contractors shall be provided a copy of the COR's appointment letter.

**cost**

The total amount paid or required in payment for a purchase.

**cost analysis**

The review and evaluation of a contractor's costs or pricing data, and of the judgmental factors applied in projecting from the data to the estimated costs, for the purpose of determining the degree to which the contractor's proposed costs represent what contract performance should cost, assuming reasonable economy and efficiency. Simply, cost analysis is the method by which the individual cost elements (for example, labor, materials, overhead, G&A, and so on), of a potential contractor's offer or claim are analyzed to determine whether the cost is reasonable.

**day**

Unless otherwise specified, a calendar day.

**debarment**

Action taken by a debarring official to exclude a contractor from Government/NAF contracting and Government/NAF approved subcontracting for a specified period; a contractor so excluded is "debarred." (See also "List of Parties Excluded from Federal Procurement and Nonprocurement Programs.")

**defects**

See "latent" and "patent."

**electronic commerce**

Electronic techniques for accomplishing business transactions, including electronic mail or messaging, World Wide

Web technology, electronic bulletin boards, purchase cards, electronic funds transfer, electronic data interchange and other similar electronic techniques for accomplishing business transactions.

**electronic data interchange (EDI)**

A technique for electronically transferring and storing formatted information between computers utilizing established and published formats and codes.

**electronic funds transfer (EFT)**

Any transfer of funds, other than transactions originated by cash, check, or paper instrument, that is initiated through an electronic terminal, telephone, computer, or magnetic tape, for the purpose of ordering, instructing, or authorizing a financial institution to debit or credit an account.

**equitable adjustment**

A fair price adjustment under a contract clause for changed work, including an adjustment in profit, a change in the delivery schedule, if appropriate, and a change in any other affected terms of the contract. Equitable adjustments can result in price increases for the contractor for increased work or price reductions for the NAFI for reduced work.

**exceptions**

When related to this regulation, are approved departures from the established policies found in this regulation.

**facility**

A building, structure, or improvement to real property.

**facsimile**

The electronic equipment that communicates and reproduces both printed and handwritten material. If used in conjunction with a reference to a document (for example, facsimile proposal/bid) the term refers to a document (in the example given, a proposal/bid that has been transmitted to and received by the NAFI via facsimile).

**fair market price**

A price based on reasonable costs under normal competitive conditions, and not on lowest possible cost.

**formal acquisition process**

Contracting by negotiation.

**free on board (FOB)**

Delivered free to a specified point (used with goods and services). FOB is the term used with the designation of a physical point to determine the responsibility and basis for payment of freight charges and, unless otherwise agreed, the point at which "title" for supplies passes to the buyer or consignee.

**FOB destination**

Free on board at destination (in other words, the seller or consignor delivers the goods on seller's or consignor's conveyance at destination). The seller places the goods on the conveyance by which they are to be transported. Unless the contract provides otherwise, the cost of shipping and the risk of loss are borne by the seller or consignor.

**FOB origin**

Free on board at origin (in other words, the seller or consignor places the goods on the conveyance by which they are to be transported). The seller delivers the goods on the seller's conveyance at destination. Unless the contract provides otherwise, the cost of shipping and the risk of loss are borne by the buyer or consignee.

**Government-furnished property (GFP)**

Property in the possession of or directly acquired by the Government (or an authorized transfer of NAFI property to Government property records) that is subsequently made available to the contractor. GFP is included in the broad term "Government Property."

**garrison operating entity**

A nonappropriated fund instrumentality established for the purpose of providing support services to the installation/community MWR activities. These services include food and beverage, retail, recreation, and community support services.

**Government property**

Property owned by and on the property records of the U.S. Government and acquired with appropriated funds or an authorized transfer of NAFI property to Government property records.

**ineligible**

Exclusion from Government contracting (and subcontracting, if appropriate) in accordance with the List of Parties Excluded from Federal Procurement and Nonprocurement Programs.

**inspection**

Examining and testing supplies or services (including, when appropriate, raw materials, components, and intermediate assemblies) to determine whether they conform to contract requirements.

**insurance**

A contract that provides that for a stipulated consideration, one party undertakes to indemnify another against loss, damage, or liability arising from an unknown or contingent event.

**irrevocable letter of credit (ILC)**

A written commitment by a federally insured financial institution to pay all or part of a stated amount of money, until the expiration date of the letter, upon presentation by the NAFI (the beneficiary) of a written demand therefore. Neither the financial institution nor the offeror/contractor can revoke or condition the letter of credit.

**latent**

A type of deficiency that is not readily discoverable by observation on inspection; hidden or concealed. "Latent" can refer to a type of deficiency potentially found in solicitations or contracts (a latent ambiguity) or in contract performance (latent defect). "Latent" is the antonym of "patent."

**latent defect**

A defect in the contract work at the time of acceptance that is not discoverable by the NAFI by the use of reasonable inspection methods. A "latent" defect overcomes the finality of acceptance in the "Inspection of Supplies" and "Inspection of Construction" clauses.

**liquidated damages**

An express provision in a contract providing for the assessment of damages for which one of the parties will be liable upon "breach of contract" or failure to comply with certain performance or delivery requirements of the contract. This provision is generally used only when both the time of delivery and the performance is of such importance that the NAFI may reasonably expect to suffer damages if the delivery and performance is delinquent; and the extent or amount of damage would be difficult or impossible to ascertain or prove.

**List of Parties Excluded from Federal Procurement and Nonprocurement Programs**

A list compiled, maintained and distributed by the GSA containing the names and other information about parties debarred, suspended, or voluntarily excluded under the Nonprocurement Common Rule or the Federal Acquisition Regulation, parties who have been proposed for debarment under the Federal Acquisition Regulation, and parties determined to be ineligible.

**may**

Denotes the permissive.

**minor informalities or irregularities in bids**

Immaterial defects or variations from the exact requirements of an invitation for bid that can be corrected or waived without prejudice to other bidders. A defect or variation is immaterial when the effect on prices, quantity, quality, or delivery is negligible in comparison with the total cost or scope of the supplies or services being acquired.

**modifications**

Any written change in the terms of a contract. Includes bilateral modifications (supplemental agreements) signed by the contractor and the contracting officer and unilateral modifications signed only by the contracting officer (change orders, administrative changes, changes authorized by the contract clauses, or termination notices).

**nonappropriated fund instrumentality (NAFI)**

An integral DOD organizational entity that performs an essential Government function. It acts in its own name to provide or assist other DOD organizations providing morale, welfare, and recreational programs for military personnel and civilians. It is established and maintained individually or jointly by the heads of the DOD components. As a fiscal

entity, it maintains custody of the control over its nonappropriated funds. It is responsible for the prudent administration, safeguarding, preservation, and maintenance of those appropriated fund resources made available to carry out its function. With its nonappropriated funds, the NAFI contributes to the morale, welfare, and recreation programs of other authorized organizational entities when so authorized. It is not incorporated under the laws of any State or the District of Columbia and enjoys the legal status of an instrumentality of the United States.

**nonappropriated funds (NAF)**

Cash and other assets received by NAFIs from sources other than monies appropriated by the Congress of the United States. NAFI's are Government funds used for the collective benefit of those who generate them: military personnel, their dependents and authorized civilians. These funds are separate and apart from funds that are recorded in the books of the Treasurer of the United States.

**nonpersonal service contract**

A service contract that provides for the contractor to hire and supervise individuals who will perform the service. Under this type contract, NAFI personnel have no authority to instruct or supervise the contractor's employees.

**option**

A unilateral right in a contract by which, for a specified time, the NAFI may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract.

**ordering officer**

An individual appointed by a contracting officer to place delivery orders against indefinite delivery type contracts, up to the \$25,000 competition threshold, providing the contract terms allow it.

**organizational conflict of interest**

Because of other activities or relationships with other persons, a person is unable or potentially unable to render impartial assistance or advice to the NAFI, or the person's objectivity in performing the contract work is or might be otherwise impaired, or a person has an unfair competitive advantage.

**outside the continental United States (OCONUS)**

Locations other than those identified as being a part of the continental United States (CONUS).

**partial termination**

Termination of a part, but not all, of the work that has not been completed and accepted under a contract.

**patent**

A type of deficiency that is readily discoverable by observation or inspection. The adjective "patent" can refer to the type of deficiency potentially found in solicitations or contracts (patent ambiguity) or in contract performance (patent defect). Patent means open or manifest and is an antonym for latent.

**patent defect**

A defect in the contract work that is discoverable by the NAFI by the use of reasonable inspection methods. In accordance with "Inspection of Supplies" and "Inspection of Construction" clauses the NAFI's acceptance of work containing defects is conclusive on the NAFI, with the result that the NAFI cannot require the contractor to correct such defective work at the contractor's own expense. The fact that the NAFI did not inspect the work is not relevant to the determination of whether a defect was patent. The issue is whether the defect could have been discovered had the NAFI conducted a reasonable inspection. If the defect was actually known to the NAFI at the time of acceptance, it is patent, even if it might otherwise not have been discoverable by a reasonable inspection.

**personal services contract**

A contract that, by its express terms or as administered, makes the contractor personnel appear, in effect, as Government employees.

**plans and specifications**

Drawings, specifications, and other data related to a requirement.

**possessions**

The Virgin Islands, Johnston Island, American Samoa, Guam, Wake Island, Midway Island, and the Guano Islands, but not Puerto Rico, leased bases, or trust territories.



**preaward survey**

An evaluation, by a surveying activity, of a prospective contractor's capability to perform a proposed contract.

**price**

Cost plus any fee or profit applicable to the contract type.

**price analysis**

The process of examining and evaluating a prospective price without evaluation of the separate cost elements and proposed profit of the individual offer. Price analysis evaluates an offer by comparing it with indicators of reasonableness. Primary comparisons include competitive analysis and published prices. Secondary comparisons include comparative analysis (previous contracts, prior quotations), market data, price index, Government price lists, Government/NAFI estimates, discounts, and so on. Auxiliary techniques include value analysis and visual analysis.

**Procurement Management Assistance Program (PMAP)**

A review of NAF procurement offices for the purpose of validating the organization's ability to perform its procurement missions successfully; and to review its compliance with the rules, practices and procedures set forth in this regulation and other pertinent regulations.

**provision**

A written term or condition used only in solicitations and applying only before contract award. Solicitation provisions are distinguished from "clauses" which are terms and conditions in a contract.

**real property**

Land and rights in land, ground improvements, utility distribution systems, and buildings and other structures. It does not include foundations and other work necessary for installing special tooling, special test equipment, or plant equipment.

**reasonable**

A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business.

**reasonable price**

A business decision reached jointly by a buyer and seller, a product of judgment influenced by bargaining strength and economic realities dictated by the marketplace.

**record drawings**

Drawings submitted by a contractor or subcontractor, at any tier, to show the construction of a particular structure or work as actually completed under the contract.

**responsible prospective contractor**

To be determined responsible, a prospective contractor must—

- a. Have adequate financial resources to perform the contract, or the ability to obtain them.
- b. Be able to comply with the required or proposed delivery or performance schedule, taking into consideration all existing commercial and Governmental business commitments.
- c. Have a satisfactory performance record.
- d. Have a satisfactory record of integrity and business ethics.
- e. Have the necessary organization, experience, accounting and operational controls, and technical skills, or the ability to obtain them.
- f. Have the necessary production, construction, and technical equipment and facilities, or the ability to obtain them.
- g. Be otherwise qualified and eligible to receive an award under applicable laws and regulations.
- h. Not be debarred.

**responsive prospective contractor**

A bid that meets, without any material deviation, the expressed requirements of a solicitation. When a bidder fully complies with and does not materially deviation from the terms, conditions, and specifications set forth in an IFB (sealed-bid method), it is deemed responsive. The concept of responsiveness applies only to IFBs, not to procurements by negotiation.

**responsiveness**

Complying with all material respects of an IFB. To be considered for award, a bid must comply in all material respects

with the IFB. Such compliance enables bidders to stand on an equal footing and maintain the integrity of the sealed bidding system.

**Schedule**

Part 1, Sections A through H of the Uniform Contract Format.

**sealed bidding**

A method of contracting that, through an IFB, solicits the submission of competitive bids, followed by a public opening of the bids. A contract award is made to the responsive and responsible bidder whose bid is most advantageous to the NAFI, considering price and price-related factors.

**settlement agreement**

Written agreement in the form of an amendment to a contract settling all or a severable portion of a settlement proposal.

**settlement proposal**

A proposal for effecting settlement of a contract claim or a contract terminated in whole or in part, submitted by a contractor or subcontractor in the proper form, and supported by the data.

**shall**

Denotes the imperative. See “will.”

**should**

An expected course of action or policy that is to be followed unless inappropriate for a particular circumstance.

**signature or signed**

The discrete, verifiable symbol of an individual which, when affixed to in writing with the knowledge and consent of the individual, indicates a present intention to authenticate the writing. This includes electronic signatures.

**sole-source acquisition**

A contract for the purchase of supplies or services that is entered into or proposed to be entered into by a NAFI after soliciting only one source.

**source selection authority (SSA)**

The NAFI official in charge of selecting a source or sources in a competitive negotiated acquisition. The title is most often used in the formal source selection process, when the official is someone higher than the contracting officer. The SSA is responsible for ensuring that the entire source selection process is properly and efficiently conducted (in other words, establishes an evaluation group structure, approves a source selection plan, and considers the recommendations of evaluation and advisory groups in make the source selection decision).

**specification**

A document intended primarily for use in acquisition that clearly describes the essential technical requirements for items, materials, or services, including the criteria for determining that requirements have been met.

**specifications**

Description of the technical requirements for a material, product, or service that includes the criteria for determining whether the requirements are met.

**State and local taxes**

Taxes levied by the States, the District of Columbia, Puerto Rico, any territories or possessions of the United States, or their political subdivisions.

**subcontractor**

Any person, other than the prime contractor, who offers to furnish or furnishes any supplies, materials, equipment, or services of any kind under a prime contract or a subcontract entered into in connection with such prime contract; includes any person who offers to furnish or furnishes general supplies to the prime contractor or a higher tier subcontractor.

**supplemental agreement**

Also called bilateral modifications for changes in contracts that must be accomplished, in writing, by the mutual consent of the parties.

**suspension**

Action taken by a suspending official to disqualify a contractor temporarily from Government contracting and Government-approved subcontracting.

**task order**

An order for a service against an established contract that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.

**taxpayer identification number (TIN)**

The number required by the IRS to be used by the awardee in reporting income tax and other returns. The TIN may be either a social security number or an employer identification number.

**terminated portion of the contract**

The portion of a terminated contract that relates to work or end items not completed and accepted before the effective date of termination that the contractor is not to continue to perform. For construction contracts that have been completely terminated for convenience, it means the entire contract, notwithstanding the completion of, and payment for, individual items of work before termination.

**termination contracting officer**

A contracting officer who is settling terminated contracts.

**unauthorized commitment**

An agreement that is not binding on a NAFI unless ratified solely because the NAF representative who made it lacked the authority to enter into that agreement on behalf of the NAFI.

**value analysis**

A systematic and objective evaluation of the function of a product and its related costs; a pricing tool that provides insight into the inherent worth of a product. Value analysis assumes that the value is a function of three variables: demand, use, and aesthetics.

**will**

Required. See "shall."

**Section III  
Special Abbreviations and Terms**

This section contains no entries.

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