

(4) State or local laws, ordinances, regulations or procedures which are designed or which operate to give local or in-State bidders preference over other bidders shall not be employed in evaluating bids.

(5) If an unresolved procurement review issue or a protest relates only to award of a subcontract or procurement of a subitem under the prime contract, and resolution of that issue or protest is unduly delaying performance of the prime contract, the Regional Administrator may authorize award and performance of the prime contract before resolution of the issue or protest, if the Regional Administrator determines that:

(i) Resolution of the protest—

(A) Will not affect the placement of the prime contract bidders; and

(B) Will not materially affect initial performance of the prime contract; and that

(ii) Award of the prime contract—

(A) Is in the Government's best interest;

(B) Will not materially affect resolution of the protest; and

(C) Is not barred by State law.

(6) The grantee shall not reject a bid as nonresponsive for failure to list or otherwise indicate the selection of a subcontractor(s) or equipment, unless the grantee has unambiguously stated in the solicitation documents that such failure to list shall render a bid non-responsive and shall cause rejection of a bid.

§ 35.938-5 Negotiation of contract amendments (change orders).

(a) *Grantee responsibility.* Grantees are responsible for negotiation of construction contract change orders. This function may be performed by the grantee directly or, if authorized, by his engineer. During negotiations with the contractor the grantee shall:

(1) Make certain that the contractor has a clear understanding of the scope and extent of work and other essential requirements;

(2) Assure that the contractor demonstrates that he will make available or will obtain the necessary personnel, equipment and materials to accomplish the work within the required time; and

(3) Assure a fair and reasonable price for the required work.

(b) *Changes in contract price or time.* The contract price or time may be changed only by a change order. When negotiations are required, they shall be conducted in accordance with paragraph (c) or (d) of this section, as appropriate. The value of any work covered by a change order or of any claim for increase or decrease in the contract price shall be determined by the method set forth in paragraphs (b) (1) through (3) of this section which is most advantageous to the grantee.

(1) *Unit prices—(i) Original bid items.* Unit prices previously approved are acceptable for pricing changes of original bid items. However, when changes in quantities exceed 15 percent of the original bid quantity and the total dollar change of that bid item is significant, the grantee shall review the unit price to determine if a new unit price should be negotiated.

(ii) *New items.* Unit prices of new items shall be negotiated.

(2) A lump sum to be negotiated.

(3) *Cost reimbursement—*the actual cost for labor, direct overhead, materials, supplies, equipment, and other services necessary to complete the work plus an amount to be agreed upon to cover the cost of general overhead and profit to be negotiated.

(c) For each change order not in excess of \$100,000 the contractor shall submit sufficient cost and pricing data to the grantee to enable the grantee to determine the necessity and reasonableness of costs and amounts proposed, and the allowability and eligibility of costs proposed.

(d) For each change order in excess of \$100,000, the contractor shall submit to the grantee for review sufficient cost and pricing data as described in paragraphs (d) (1) through (6) of this section to enable the grantee to ascertain the necessity and reasonableness of costs and amounts proposed, and the allowability and eligibility of costs proposed.

(1) As a minimum, proposed change order costs shall be presented on EPA Form 5700-41 on which the contractor shall certify that proposed costs reflect complete, current, and accurate cost

and pricing data applicable to the date of the change order.

(2) In addition to the specific elements of cost, the estimated amount of profit shall be set forth separately in the cost summary for fixed price change orders and a specific total dollar amount of profit will be set forth separately in the cost summary for cost reimbursement change orders.

(3) The grantee may require more detailed cost data than the form requires in order to substantiate the reasonableness of proposed change order costs. EPA normally requires more detailed documentation only when the contractor is unable to certify that proposed change order cost data are complete, current, and accurate. EPA may, on a selected basis, perform a detailed cost analysis on any change order.

(4) Appropriate consideration should be given to §30.710 of this subchapter which contains general cost principles which must be used for the determination and allowability of costs under grants. The contractor's actual costs, direct and indirect, allowable for Federal participation shall be determined in accordance with the terms and conditions of the contract, this subpart and the cost principles included in 41 CFR 1-15.2 and 1-15.4. Examples of costs which are not allowable under those cost principles include, but are not limited to, entertainment, interest on borrowed capital and bad debts.

(5) For costs under cost reimbursement change orders, the contractor shall have an accounting system which accounts for such costs in accordance with generally accepted accounting principles. This system shall provide for the identification, accumulation and segregation of allowable and unallowable change orders. Allowable change order costs shall be determined in accordance with paragraph (d)(4) of this section. The contractor must propose and account for such costs in a manner consistent with his normal accounting procedures.

(6) Change orders awarded on the basis of review of a cost element summary and a certification of complete, current, and accurate cost and pricing data shall be subject to downward renegotiation or recoupment of funds

where subsequent audit substantiates that such certification was not based on complete, current and accurate cost and pricing data and on costs allowable under the appropriate FPR cost principles (41 CFR 1-15.2 and 1-15.4) at the time of change order execution.

(e) *EPA review.* In addition to the requirements of §§35.935-10 (copies of contract documents) and 35.935-11 (project changes), the grantee shall submit, before the execution of any change order in excess of \$100,000, to the EPA Project Officer for review:

(1) The cost and pricing data the contractor submitted;

(2) A certification of review and acceptance of the contractor's cost or price; and

(3) A copy of the proposed change order.

(f) *Profit.* The objective of negotiations shall be the exercise of sound business judgment and good administrative practice including the determination of a fair and reasonable profit based on the contractor's assumption of risk and input to total performance and not merely the application of a predetermined percentage factor. For the purpose of negotiated change orders to construction contracts under EPA grants, profit is defined as the net proceeds obtained by deducting all allowable costs (direct and indirect) from the price. The grantee should review the estimate or profit as he reviews all other elements of price.

(g) *Related work.* Related work shall not be split into two amendments or change orders merely to keep it under \$100,000 and thereby avoid the requirements of paragraph (d) of this section. For change orders which include both additive and deductive items:

(1) If any single item (additive or deductive) exceeds \$100,000, the requirements of paragraph (d) of this section shall be applicable.

(2) If no single additive or deductive item has a value of \$100,000, but the total price of the change order is over \$100,000, the requirements of paragraph (d) of this section shall be applicable.

(3) If the total of additive items of work in the change order exceeds \$100,000, or the total of deductive items of work in the change order exceeds \$100,000, and the net price of the change

order is less than \$100,000, the requirements of paragraph (d) of this section shall apply.

§ 35.938-6 Progress payments to contractors.

(a) *Policy.* EPA policy is that, except as State law otherwise provides, grantees should make prompt progress payments to prime contractors and prime contractors should make prompt progress payment to subcontractors and suppliers for eligible construction, material, and equipment costs, including those of undelivered specifically manufactured equipment, incurred under a contract under an EPA construction grant.

(b) *Conditions of progress payments.* For purposes of this section, progress payments are defined as follows:

(1) Payments for work in place.

(2) Payments for materials or equipment which have been delivered to the construction site, or which are stockpiled in the vicinity of the construction site, in accordance with the terms of the contract, when conditional or final acceptance is made by or for the grantee. The grantee shall assure that items for which progress payments have been made are adequately insured and are protected through appropriate security measures. Costs of such insurance and security are allowable costs in accordance with § 35.940.

(3) Payments for undelivered specifically manufactured items or equipment (excluding off-the-shelf or catalog items), as work on them progresses. Such payments must be made if provisions therefor are included in the bid and contract documents. Such provisions may be included at the option of the grantee only when all of the following conditions exist:

(i) The equipment is so designated in the project specifications;

(ii) The equipment to be specifically manufactured for the project could not be readily utilized on nor diverted to another job; and

(iii) A fabrication period of more than 6 months is anticipated.

(c) *Protection of progress payments made for specifically manufactured equipment.* The grantee will assure protection of the Federal interest in progress payments made for items or equipment

referred to in paragraph (b)(3) of this section. This protection must be acceptable to the grantee and must take the form of:

(1) Securities negotiable without recourse, condition or restrictions, a progress payment bond, or an irrevocable letter of credit provided to the grantee through the prime contractor by the subcontractor or supplier; and,

(2) For items or equipment in excess of \$200,000 in value which are manufactured in a jurisdiction in which the Uniform Commercial Code is applicable, the creation and perfection of a security interest under the Uniform Commercial Code reasonably adequate to protect the interests of the grantee.

(d) *Limitations on progress payments for specifically manufactured equipment.*

(1) Progress payments made for specifically manufactured equipment or items shall be limited to the following:

(i) A first payment upon submission by the prime contractor of shop drawings for the equipment or items in an amount not exceeding 15 percent of the contract or item price plus appropriate and allowable higher tier costs; and

(ii) Subsequent to the grantee's release or approval for manufacture, additional payments not more frequently than monthly thereafter up to 75 percent of the contract or item price plus appropriate and allowable higher tier costs. However, payment may also be made in accordance with the contract and grant terms and conditions for ancillary onsite work before delivery of the specifically manufactured equipment or items.

(2) In no case may progress payments for undelivered equipment or items under paragraph (d)(1)(i) or (d)(1)(ii) of this section be made in an amount greater than 75 percent of the cumulative incurred costs allocable to contract performance with respect to the equipment or items. Submission of a request for any such progress payments must be accompanied by a certification furnished by the fabricator of the equipment or item that the amount of progress payment claimed constitutes not more than 75 percent of cumulative incurred costs allocable to contract performance, and in addition, in the case of the first progress payment request, a certification that the amount