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January 7, 2019

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The Associated General Contractors of America (AGC) express gratitude to the General Services Administration (GSA) for providing an opportunity to comment on a proposed rule amending the General Services Administration Acquisition Regulation (GSAR) to adopt an additional project delivery method for construction, construction manager as constructor (CMc). AGC is encouraged by GSA's efforts to incorporate best practices from the private construction sector, which allows for early industry engagement by the construction contractor and owner.

AGC is the leading association for the construction industry, representing both union and non-union prime and subcontractor/specialty construction companies. AGC represents more than 26,000 firms including over 6,500 of America's leading general contractors and over 9,000 specialty-contracting firms. More than 10,500 service providers and suppliers are also associated with AGC, all through a nationwide network of chapters. AGC contractors are engaged in the construction of the nation's commercial buildings, shopping centers, factories, warehouses, highways, bridges, tunnels, airports, waterworks facilities, waste treatment facilities, dams, water conservation projects, defense facilities, multi-family housing projects, site preparation/utilities installation for housing development, and more. As such, AGC has a unique knowledge of GSA regulations concerning construction and procurement.

The amount of information in this GSAR Case is extensive and covers many clauses of the GSAR related to the policies of GSA's CMc delivery method. AGC unsuccessfully requested for an extension of the 60-day public comment period. AGC hopes that the GSA will continue to have an open dialogue with industry regarding CMc and other improvements to this project delivery method.

Given the format of this GSAR, AGC has, with permission of GSA and for the ease of the reader, created a redline edit of this GSAR rule and highlighted the changes. AGC comments are highlighted in yellow. Language that AGC suggests being removed are strikethrough and highlighted yellow. Language that AGC suggests should be included are typed in red and highlighted yellow.

Based on that experience and this request, AGC puts forth the following comments for your consideration.

AGENCY:

Office of Acquisition Policy, General Services Administration (GSA).

ACTION:

Proposed rule.

SUMMARY:

The General Services Administration (GSA) is issuing a proposed rule amending the General Services Administration Acquisition Regulation (GSAR) to adopt an additional project delivery method for construction, construction manager as constructor (CMc). The private sector prevalently uses this type of construction project delivery method, which allows for early industry engagement by the construction contractor to provide reduced cost growth, reduced schedule growth and administrative savings. The current Federal Acquisition Regulation (FAR) and GSAR lack detailed coverage differentiating various construction project delivery methods. GSA's policies on CMc have been previously issued through other means. By incorporating CMc into the GSAR and differentiating for various construction methods, the GSAR will provide centralized guidance that eases the burden for industry to understand and execute CMc construction contracts. Centralized guidance will also ensure consistent application of construction project principles across GSA. Additionally, integrating these requirements into the GSAR will allow industry to provide public comments through the rulemaking process.

DATES:

Interested parties should submit written comments to the Regulatory Secretariat Division on or before January 7, 2019 to be considered in the formulation of a final rule.

ADDRESSES:

Submit comments identified by GSAR Case 2015-G503 by any of the following methods:

- *Regulations.gov*: <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for "GSAR Case 2015-G506". Select the link "Comment Now" that corresponds with GSAR Case 2015-G506. Follow the

instructions provided on the screen. Please include your name, company name (if any), and “GSAR Case 2015-G506” on your attached document.

- *Mail:* General Services Administration, Regulatory Secretariat Division, 1800 F Street NW, ATTN: Lois Mandell Washington, DC 20405.

Instructions: Please submit comments only and cite GSAR Case 2015-G506 in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided. To confirm receipt of your comment(s), please check www.regulations.gov, approximately two to three days after submission to verify posting (except allow 30 days for posting of comments submitted by mail).

FOR FURTHER INFORMATION CONTACT:

For clarification about content, contact Mr. Tony O. Hubbard, General Services Acquisition Policy Division, GSA, by phone at 202-357-5810 or by email at tony.hubbard@gsa.gov. For information pertaining to status or publication schedules, contact the Regulatory Secretariat by mail at 1800 F Street NW, Washington, DC 20405, or by phone at 202-501-4755. Please cite GSAR Case 2015-G506, Construction Manager as Constructor Contracting.

SUPPLEMENTARY INFORMATION:

I. Background

CMc refers to a project management and contracting technique that is one of three predominant methods used for acquiring construction services by GSA (*i.e.*, traditional (design-bid-build), design-build, and CMc). The CMc model used by GSA follows industry best practices that have been commonly used in the private sector for many years, and has worked well for numerous GSA construction procurements. While there is ample guidance on traditional and design-build procurements in the FAR, there is no guidance on CMc procurement. By providing specific contracting guidance on CMc, GSA is adopting a major project delivery method used by the private sector and is fundamentally updating the practice of buying construction services within the Federal Government. This move supports the Government's shift toward category management by providing a more robust playbook framework for efficient procurement of construction services.

The General Services Administration (GSA) is amending the General Services Administration Acquisition Regulation (GSAR) to revise sections of GSAR Part 536, Construction and Architect-Engineer Contracts, and corresponding clauses in GSAR Part 552, Solicitation Provisions and Contract Clauses to incorporate CMc contracting, an industry best practice readily used in the private sector for construction. This rule will clarify, update and incorporate existing CMc guidance previously implemented through internal Public Building Service (PBS) policies.

Bringing existing policy into the GSAR will allow for greater transparency and an opportunity for the public to comment on these long-standing procedures. This rule has wide support from industry. In response to GSA's request for public input on acquisition regulatory reform ([82 FR 24653](#)), one leading construction industry association requested that GSA put forward GSAR guidance on the CMc project delivery method. In addition, bringing these policies into one location ensures currency and consistency that will make it easier for companies to do business with the Government and will provide better guidance to contracting officers. The proposed rule includes a total of two new agency unique clauses, three new alternatives to existing clauses, one new definition and one new agency unique subpart to prescribe policies and procedures for CMc contracting.

The CMc project delivery method models those used extensively in the private sector for large complex construction projects. Similar to implementation in the private sector, this delivery method for GSA engages the construction contractor during the design phase of the project and establishes a ceiling on the eventual construction price (*i.e.*, the guaranteed maximum price (GMP)) before construction documents are prepared. While the private sector and GSA share an emphasis on technical qualifications for contractor selection, GSA also includes price competition of the GMP before initial contract award and provides more detail on the GMP elements. The CMc project delivery method creates value through early collaboration between the architect and constructor. In addition to the benefits of design phase services, CMc offers the opportunity to begin construction prior to full completion of the design and to reduce the total project schedule. Similar to the private sector, GSA provides a cost incentive under CMc contracts. Through the cost incentive approach, the

constructor is motivated to promote innovation and efficiencies that reduce costs through the construction phase of the project.

A GSAR rewrite initiative was undertaken by GSA to revise the GSAR starting in 2008. A proposed rule to update GSAR Part 536, Construction and Architect-Engineer Contracts was initially published as GSAR Case 2008-G509 in the **Federal Register** at [73 FR 73199](#), on December 2, 2008. Due to the variety of issues addressed in the GSAR 536 rewrite, and internal stakeholder interest, the agency re-evaluated the implementation plan for the GSAR 536 rewrite and withdrew this initial proposed rule. The initial proposed rule withdrawal was published in the **Federal Register** at [80 FR 6944](#) on February 9, 2015. GSAR Case 2015-G506 is the third of several GSAR cases to separately address the issues and update the GSAR Part 536 text.

II. Discussion and Analysis

The changes to the GSAR included in this proposed rule are summarized below.

1. Two new clauses for construction contracts previously implemented through internal PBS policy and currently in solicitations and contracts will be incorporated into GSAR Parts 536 and 552. The new clauses and a brief description are as follows:

Name and No.	Description	Purpose
552.236-79 Construction Manager as Constructor	Agency unique clause to address requirements including the guaranteed maximum price, conversion to firm-fixed-price, and final settlement	Clause provides guidance specific to a CMc project.
552.236-80 Accounting Records and Progress Payments	Agency unique clause to address requirements including auditing accounts and control systems	Clause provides guidance specific to a CMc project.

2. Three new alternates for existing clauses for construction contracts previously implemented through internal PBS policy and currently in solicitation and contracts will be incorporated into GSAR Parts 536 and 552. The clauses and a brief description of the changes are as follows:

Name and No.	Description	Purpose
552.236-15 Schedules for Construction Contracts	Supplemental clause to FAR 52.236-15 to address milestone events, cost breakdown, and requirements for different project delivery methods	<p>Clause prescription has no dollar threshold, which is more inclusive than the FAR clause that is only required at above simplified, in order to satisfy GSA specific contracting requirements.</p> <p>The base clause provides guidance for any type of construction project. Alternate I of the clause provides guidance specific to a design-bid-build construction project. Alternate II of the clause provides guidance specific to a design-build construction project. Alternate III of the clause provides guidance specific to a CMc project.</p>
552.236-21 Specifications and Drawings for Construction	Supplemental clause to FAR 52.236-21 to address inconsistencies, and clarify definition of terms for different project delivery methods Revised title and clause numbering to better align with the FAR, previously was GSAR 552.236-77, Specifications and Drawings	<p>Clause prescription has no dollar threshold, which is more inclusive than the FAR clause that is only required at above simplified, in order to satisfy GSA specific contracting requirements. The base clause provides guidance for any type of construction project. Alternate I of the clause provides guidance specific to a design-build construction project. Alternate II of the clause provide guidance specific to a CMc project.</p>
552.236-71 Contractor Responsibilities	Agency unique clause to address requirements for different project delivery methods	<p>The base clause provides guidance for any type of construction project. Alternate I of the clause provides guidance specific to a design-build construction project. Alternate II of the clause provide guidance specific to a CMc project.</p>

3. A new definition is incorporated at GSAR Section 536.102 for the construction manager as constructor (CMc) project delivery method.

4. GSAR Subpart 536.71 is added to reflect current practices for construction contracting using the construction manager as constructor (CMc) project delivery method. The sections and a brief description are as follows:

No.	Name	Description
536.7101	Scope of Subpart	Clarifies the scope as the policies and procedures for the use of the CMc project delivery method.
536.7102	Definitions	Provides a definition for guaranteed maximum price and related elements.
536.7103	Construction Contract Solicitation Procedures	Provides policies relating to evaluation factors, price realism, total evaluated price, and release of the Government estimate.
536.7104	Construction Contract Award	Provides procedures for award of separate line items.
536.7105	Construction Contract Administration	Provides policies relating to guaranteed maximum price, open book accounting, incentives, allowances, early work packages, and conversion to firm-fixed-price.
536.7106	Construction Contract Closeout	Provides procedures regarding final settlement and audit for closeout.
536.7107	Contract Clauses	Prescribes clauses when a CMc project delivery method will be followed.

III. Specific Questions for the Public

GSA is seeking public comment on the applicability of Cost Accounting Standards (CAS) and the structure of incentives for CMc contracts. Feedback from industry and interested parties in Government on these issues will be used to help inform revisions to the proposed clauses, prescriptions, and other guidance to implement the rule.

Cost Accounting Standards: FAR Subpart 30.2 requires full CAS compliance, which covers 19 cost accounting principles, for negotiated contracts over \$50 million. Modified CAS compliance, which covers 4 cost accounting principles, is required for negotiated contracts below \$50 million. Currently, contracts using the CMc project delivery method apply these same CAS requirements as well as open book accounting practices for GMP line items. GSA is seeking public comment on industry standards for cost accounting as they relate to

construction projects and the economic impact or cost savings if GSA were to only apply modified CAS compliance to all CMc projects regardless of dollar value.

COMMENT: The use of “modified CAS Compliance” instead of “open book accounting” is an appropriate method for CMc contracts. The open nature of the procurement activities of subcontracts and purchase orders is adequate to validate the make-up (pricing competition) within the GMP. Since subcontracts and materials are procured in a competitive fixed-price method, an open book audit is not relevant. Additionally, the CMc Fees are typically a firm-fixed price component and not subject to open book audit. Modified CAS Compliance and elimination of open book accounting audits will reduce the costs due to the reduced scope of services from the CMa, DCAA and other unnecessary administrative costs.

The following are exempt from CAS in federal contracting: 1) contracts awarded to small businesses, regardless of contract size; 2) contracts less than \$7.5 million (for firms not awarded contracts greater than \$7.5 million); 3) any contract less than \$750,000. And 4) contracts awarded based upon adequate pricing competition. Using these fundamentals combined with the fact that subcontracts generally make-up fifty percent or more of the construction contract further supports comments above. As part of the CMc procurement methodology, during the design phase subcontractor and vendor pricing is reviewed by the Government’s third-party cost consultants as a component of reconciling the estimated cost of the design documents and project. This occurs at each of the design phase deliverable stages. Performing an additional audit, specifically by auditors and not construction cost consultants is redundant, time consuming, expensive and unnecessary given the facts presented by the comments above. Further, 552.236-82 Subcontracts assures there is no privity between the Government and any subcontractor, as such, open book accounting for subcontractors is not supported.

Incentives: Currently, contracts using the CMc project delivery method include a fee for the construction work within the GMP that is a fixed amount for all of the contractor's indirect costs. This fee may include overhead, profit, and general conditions. Current CMc contracts also include a shared savings of the cost reductions realized by the contractor as a result of completing the construction work for less than the GMP. Public comments are invited on the

way the proposed rule structures these elements under the CMc project delivery method, and the types of structures and incentives common in the construction marketplace.

COMMENT: The use of incentives through shared savings is common in private sector contracting and is an effective method to control cost growth and instill high performance. The shared savings incentive should remain and be utilized by the Contracting Officer. Early completion bonuses are also common within the private sector. To have an equitable form of agreement, where liquidated damages are contained in the contract to define the cost associated with late substantial completion, there is a cost benefit to early occupancy and use by the Government and there should be an equitable incentive to Contractor. This rule should contain early completion bonuses or significantly reduce or eliminate liquidated damages. The CMc Contingency Allowance (CCA) is properly defined in 536.7102. However, revisions to this definition are added via the proposed rule and should be removed, see 536.7105-2 (3) (iii).

IV. Expected Economic Impact of This Rule

All three predominant construction project delivery methods have merits (*i.e.*, Design-Bid-Build (D-B-B), Design/Build (D-B), and Construction Manager as Constructor (CMc)). CMc specifically allows for early industry engagement by the construction contractor. A study by the Pankow Foundation [\[1\]](#) as well as GSA's own data analysis have shown that this early engagement can provide reduced cost growth, reduced schedule growth and administrative savings, resulting in a net economic burden reduction compared with the other project delivery methods. GSA welcomes comments on all aspects of this section. An Economic Impact Analysis (EIA) has been prepared consistent with the principles of OMB Circular A-4 and is summarized as follows:

1. *Unquantified Benefits:* There are several important economic benefits specific to CMc that are expected to reduce burden that are difficult to quantify. Although not easily quantifiable they collectively represent meaningful savings to qualify this rule as deregulatory. Early collaboration between the CMc and architect allow for (a) more efficient reviews of architect design submittals, (b) innovation during design that leads to fewer change orders during construction, and (c) identifications of conflicts or errors before work investments are made.

Early work packages under CMc allow for firm-fixed-price conversions and advanced execution of certain elements that provide cost and schedule savings, especially in a tight labor or material market.

As compared with D-B projects, CMc projects will reduce sunk costs **associated with the responding to the RFP** with responding to the RFP and lower barriers to entry for industry to submit proposals and compete in this space.

Finally, codifying CMc requirements into one publicly-posted location, the GSAR, will ease the burden to industry and GSA to understand CMc requirements and execute CMc projects.

COMMENT: The CMc benefits described above are accurate. Under CMc the Government retains control and responsibility for the design development. This is a risk borne by the Government and is not within the control of the CMc (who is solely acting as a consultant to the Government during the Design Phase).

2. *Reduced Schedule Growth:* This rule provides Government administrative savings resulting from reduced schedule growth and the associated increased project management and acquisition management efficiencies.

3. *Final GMP Proposal:* This rule adds minimal burden for contractors to submit and Government to review a revised proposal to establish the final Guaranteed Maximum Price (GMP) of the construction work and convert the contract to firm-fixed-price (FFP).

4. *Regulation Familiarization:* This rule adds minimal burden for contractors and Government to understand new requirements in this GSAR Case 2015-G506 that are different from existing CMc policy in GSA Class Deviation SPE-2012-04-02.

To estimate the economic impacts of reduced schedule growth, cost to finalize the GMP proposal and regulation familiarization, data was analyzed for GSA construction contracts completed between 2009 and 2016 that used the three predominant construction delivery

methods. The results of the analysis showed this rule will provide a net deregulatory savings of \$238,535 annually. A 7 percent discount rate was used for the calculations.

Historic data was gathered and analyzed from GSA's Electronic Planning Module (ePM), an internal system which was mandated as a project management tool for construction starting in 2009. Historic data was also gathered and analyzed from the Federal Procurement Data System (FPDS), the authoritative source for government wide contract award data. Based on historic data, it is assumed that five new CMc projects will be performed each year.

A copy of the EIA may be obtained from the Regulatory Secretariat. GSA invites comments from industry and other interested parties on the expected impact of this rule.

COMMENT: Further alignment of CMc to CM@R within the private sector can promote greater interest and competition from the market for the Government's project(s). Deviations (especially those which are punitive in nature) from private sector models can have the opposite effect and outcome.

Government Economic Impact

The EIA recognizes that Government will have administrative savings from reduced schedule growth. CMc when compared with non-CMc project delivery methods historically saves on average 71 calendar days (or 60 business days). This allows for increased efficiency for a senior project manager (PM), senior CO, and journeyman CS. Based on subject matter expertise, the PM would save 6 hours per day, the CO would save 2.5 hours per day, and the CS would save 5 hours per day. From reduced schedule growth, the annual Government savings is 810 hours (\$275,990).

The EIA also recognizes that Government will have an added burden to review revised proposal submissions from contractors for the final GMP. Based on subject matter expertise, a journeyman CS would spend 20 hours for each proposal review. For the final GMP proposal, the total annual burden to the Government is 100 hours (\$5,430).

Finally, the EIA recognizes that Government will have an added burden to understand the minor policy changes in this rule from existing guidance. The analysis accounts for a senior

contracting officer (CO) and journeyman contract specialist (CS) for each GSA CMC construction project. Based on subject matter expertise, a CO and CS would spend one hour annually reviewing the adjusted language for understanding. For regulation familiarization, the total annual burden to the Government is 10 hours (\$653).

The total annual Government economic impact is a savings of 700 hours (\$269,907), or (\$252,250) when annualized at a 7 percent discount.

Public Economic Impact

The EIA recognizes that contractors will have an added burden to prepare revised proposal submissions for the final GMP. It is assumed that large or small businesses would spend 40 hours for each proposal submission. For the final GMP proposal, the total annual burden to the public is 200 hours (\$10,860).

Finally, the EIA recognizes that contractors will have an added burden to understand the minor policy changes in this rule from existing guidance. The analysis accounts for two hours for large or small business entities to review and understand the new language differences between existing policy. This also assumes that for each of the contracts an estimated five entities will spend time reviewing language during the solicitation phase in order to provide a representative offer. For regulation familiarization, the total annual burden to the public is 50 hours (\$3,815).

The total annual public economic impact is a burden of 250 hours (\$14,675), or (\$13,715) when annualized at a 7 percent discount.

V. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). [E.O. 13563](#) supplements E.O. 12866 and emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory

action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under [5 U.S.C. 804](#).

VI. Executive Order 13771

This proposed rule is expected to be an [E.O. 13771](#) deregulatory action. Details on the estimated cost savings of this proposed rule can be found in the rule's economic impact analysis detailed in Section IV of this proposed rule.

VII. Executive Order 13777

This rule has been identified by GSA's Regulatory Reform Task Force as a rule that improves efficiency by eliminating procedures with costs that exceed the benefits as described in Section IV of this proposed rule.

VIII. Regulatory Flexibility Act

GSA does not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, at [5 U.S.C. 601](#), *et seq.*, because the proposed rule will incorporate clauses that are currently in use in GSA construction solicitations and contracts and contractors are familiar with and are currently complying with these practices. However, since this is the first time these existing policies and procedures that impact the public are being published, an Initial Regulatory Flexibility Analysis (IRFA) has been prepared. The IRFA has been prepared consistent with the criteria of [5 U.S.C. 604](#) and is summarized as follows:

The proposed rule changes will apply to approximately 5 GSA construction contracts per year. Of these, approximately 1 (20 percent) contracts are held by small businesses. The proposed rule is unlikely to affect small businesses awarded GSA CMc construction contracts as it implements clauses currently in use in CMc solicitations and contracts. The proposed rule does not pose any new reporting, recordkeeping or other compliance requirements. The rule does not duplicate or conflict with any other Federal rules. The agency determined that alternative language is necessary for four FAR clauses. The agency determined that supplemental language is necessary for two FAR clauses. No alternatives were determined that will accomplish the objectives of the rule. Bringing these regulations into the GSAR

provides for transparency and allows for public comment. Bringing these regulations into the GSAR also consolidates policy into one area, allowing for more consistency and efficiency in contracting for both businesses and contracting officers.

The Regulatory Secretariat Division has submitted a copy of the IRFA to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. GSA invites comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

GSA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with [5 U.S.C. 610](#). Interested parties must submit such comments separately and should cite [5 U.S.C. 601](#), *et seq.*, (GSAR 2015-G506), in correspondence.

IX. Paperwork Reduction Act

The Paperwork Reduction Act (44 U.S.C. Chapter 35) applies because the proposed rule contains information collection requirements. Accordingly, the Regulatory Secretariat Division has submitted a request for approval of a new information collection requirement concerning this rule to the Office of Management and Budget under [44 U.S.C. 3501](#), *et seq.* The information collected is used by PBS to evaluate contractor's proposals and negotiate contract modifications during contract administration.

Total public reporting burden for this collection of information is estimated to average 200 total hours annually, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. The estimated burden hours to the public for the below clauses are as follows:

The new clause at GSAR 552.236-79, Construction-Contractor-as-Constructor, requires the contractor to submit proposals to establish the final estimated cost of the work, to convert the contract to a firm-fixed-price, and to determine the final settlement.

Respondents: 5.

Responses per Respondent: 1.

Total Annual Responses: 5.

Hours per Response: 40.

Total Response Burden Hours: 200.

The new clause at GSAR 552.236-80, Accounting Records, contains a recordkeeping requirement that is subject to the Paperwork Reduction Act ([44 U.S.C. 3501](#), *et seq.*). The clause requires the contractor to keep all relevant documents for a period of three years after the final payment. However, the clause does not add burden to what is already estimated for the existing FAR clause at 52.215-2, Audit and Records by a previous information collection (see OMB Control Number 9000-0034).

Submit comments, including suggestions for reducing this burden, no later than January 7, 2019. Submit comments to the General Services Administration, Regulatory Secretariat Division, 1800 F Street NW, Washington, DC 20405.

Public comments are particularly invited on: Whether this collection of information is necessary; whether it will have practical utility; whether our estimate of the public burden of this collection of information is accurate, and based on valid assumptions and methodology; ways to enhance the quality, utility, and clarity of the information to be collected; and ways in which we can minimize the burden of the collection of information on those who are to respond, through the use of appropriate technological collection techniques or other forms of information technology.

Requesters may obtain a copy of the information collection supporting statement from the General Services Administration, Regulatory Secretariat Division, 1800 F Street NW, Washington, DC 20405.

Please cite OMB Control No. 3090-XXXX, Construction Manager as Constructor; GSAR Case 2015-G506, in all correspondence.

List of Subjects in [48 CFR Parts 501, 536, and 552.](#)

- Government procurement

Dated: November 1, 2018.

Jeffrey A. Koses,

Senior Procurement Executive, Office of Acquisition Policy, Office of Government-wide Policy.

Therefore, GSA proposes to amend [48 CFR parts 501](#), 536, and 552 as set forth below:

1. The authority citation for [48 CFR parts 501](#), 536, and 552 continues to read as follows:

Authority: [40 U.S.C. 121\(c\)](#).

PART 501—GENERAL SERVICES ADMINISTRATION ACQUISITION REGULATION SYSTEM

[501.106](#)
[Amended]

2. Amend part 501.106 by adding to the table, in numerical order, GSAR references “552.236-79” and “552.236-80” and their corresponding OMB control numbers “3090-XXXX” and “9000-0034”, respectively.

PART 536—CONSTRUCTION AND ARCHITECT- ENGINEER CONTRACTS

3. Amend section 536.102 by adding, in alphabetical order, the definition of “Construction-Manager-as-Constructor” to read as follows:

[536.102](#)
Definitions.

“Construction-Manager-as-Constructor” (CMc) means the project delivery method where design and construction are contracted concurrently through two separate contracts and two separate contractors. Unlike the traditional design-bid-build delivery method, under the CMc delivery method, the Government awards a separate contract to a designer (*i.e.*, architect-engineer contractor) and to a construction contractor (*i.e.*, CMc contractor) prior to the completion of the design documents. The Government retains the CMc contractor during design to work

with the architect-engineer contractor to provide constructability reviews and cost estimating validation. The CMc contract includes design phase services at a firm-fixed-price and an option for construction at a guaranteed maximum price.

4. Add section 536.515 to read as follows:

536.515

Schedules for construction contracts.

Insert the clause at 552.236-15, Schedules for Construction Contracts, in solicitations and contracts if construction, dismantling, demolition, or removal of improvements is contemplated. Use the clause:

(a) With its Alternate I when the contract amount is expected to be above the simplified acquisition threshold and a design-bid-build project delivery method will be followed.

(b) With its Alternate II when the contract amount is expected to be above the simplified acquisition threshold and a design-build project delivery method will be followed.

(c) With its Alternate III when the contract amount is expected to be above the simplified acquisition threshold and a construction-manager-as-constructor project delivery method will be followed.

5. Add section 536.521 to read as follows:

536.521

Specifications and drawings for construction.

Insert the clause at 552.236-21, Specifications and Drawings for Construction, in solicitations and contracts if construction, dismantling, demolition, or removal of improvements is contemplated. Use the clause—

(a) With its Alternate I when a design-build project delivery method will be followed; or

(b) With its Alternate II when a construction-manager-as-constructor project delivery method will be followed.

536.570-1
[Removed]

6. Remove section 536.570-1.

7. Amend section 536.570-2 by redesignating the heading as 536.570-1 and revising the section to read as follows:

536.570-1
Authorities and limitations.

Insert the clause at 552.236-70, Authorities and Limitations, in solicitations and contracts if construction, dismantling, demolition, or removal of improvements is contemplated.

8. Add section 536.571 to read as follows:

536.571
Contractor responsibilities.

Insert the clause at 552.236-71, Contractor Responsibilities, in solicitations and contracts if construction, dismantling, demolition, or removal of improvements is contemplated. Use the clause—

(a) With its Alternate I when a design-build project delivery method will be followed; or

(b) With its Alternate II when a construction-manager-as-constructor project delivery method will be followed.

Subpart 536.70—[Reserved]

9. Add and reserve Subpart 536.70.

10. Add new subpart 536.71 to read as follows:

Subpart 536.71—Construction-Manager-as-Constructor Contracting

536.7101

Scope of Subpart.

536.7102

Definitions.

536.7103

Construction Contract Solicitation Procedures.

536.7104

Construction Contract Award.

536.7105

Construction Contract Administration.

536.7105-1

Responsibilities.

536.7105-2

Guaranteed Maximum Price.

536.7105-3

Accounting and Auditing Requirements.

536.7105-4

Value Engineering.

536.7105-5

Shared Savings Incentive.

536.7105-6

Allowances.

536.7105-7

Early Work Packages.

536.7105-8

Conversion to Firm-Fixed-Price.

536.7106

Construction Contract Closeout.

536.7107

Contract Clauses.

536.7101

Scope of Subpart.

This subpart describes policies and procedures for the use of the CMc project delivery method.

536.7102

Definitions.

As used in this subpart—

“CMc Contingency Allowance” (CCA) is an allowance for the exclusive use of the construction contractor to cover reimbursable costs during construction that are not the basis of a change order. These costs could include estimating, **scheduling**

and planning errors in the final Estimated Cost of the Work (ECW) or other contractor errors.

COMMENT: This the proper definition of the CMc Contingency Allowance (CCA). There are contradictions to this definition added in this proposed rule. These contradictions should be eliminated. *See 536.7105-2 (3) (iii)*

“Early Work Package” means a set of construction activities that can be clearly defined and separately performed from the remainder of the construction work. These packages are typically identified toward the beginning of the project. Demolition is an example of an early work package.

“Estimated Cost of the Work” (ECW) means the estimated direct cost of the construction work. The proposed ECW incorporated at construction contract award is the target ECW. The final ECW is negotiated during the design phase and is incorporated into the construction contract through modification.

COMMENT: It is essential for all parties to recognize that the “proposed ECW” is in fact a “target ECW” and is not a bonded, proposal offer for a fixed scope of work. The target ECW (a critical component of the target ceiling price) is the control element and the variables of building design characteristics, features and spaces are adjusted to align to the target ECW throughout the design development process. The CMc can advise the Owner and its design team on changes to make to adhere the target ECW, but ultimately, CMc has no control over the outcome, quality, coordination and/or completeness of the design.

“Fee for the Construction Work” is a fixed amount established in the construction contract for all of the contractor's indirect costs, including overhead and profit, for the construction work. The fee may be proposed per phase of construction if each phase is a separate option.

COMMENT: The Fee definition needs further clarification. The Fee cannot include ALL the contractor's indirect costs. Some indirect costs are a function of the ECW as a percentage. Therefore, they fluctuate with increases and decreases in price. E.G.: Insurance, bonds. Additionally, there needs to be a clarification between the industry defined General Conditions (staffing related costs) and General Requirements (indirect costs such as hoisting, cranes, field engineering, etc.)

“Guaranteed Maximum Price” (GMP) is the ceiling price described in FAR 16.403-2. At construction contract award, the GMP for the construction contract is established as the sum of the target ECW, the CCA and the fee for the construction work.

536.7103

Construction Contract Solicitation Procedures.

(a) *Procurement Timing.* The request for proposals should be issued **only when the project design requirements have been developed to a sufficient degree of specificity to permit competition with meaningful pricing for the ECW as early as possible in the Design Phase to allow for the maximum benefit to the Government.**

The contracting officer should obtain written documentation for the contract file from the project manager that the project design requirements satisfy the condition stated in this section.

COMMENT: The provision for ... “request for proposals should be issued only when the project design requirements have been developed to a sufficient degree of specificity to permit competition with meaningful pricing for the ECW,” is contrary to successful use of CM@Risk in the private sector and gravitates the Government's CMc model more towards a design-bid-build methodology and delivery. To maximize the Government's benefit (that is enjoyed by the private sector), the CMc should be procured as early as possible in the design phase (ideally prior to the Concept / Schematic Design Phase).

(b) *Proposal Evaluation.*

(1) *Evaluation Factors.*

(i) Except as provided in paragraph (ii) of this subsection, the solicitation shall provide that the technical evaluation factors, when combined, shall be considered significantly more important than cost or price. **A top factor for technical evaluation should include the CMC's proposed approach to maximizing the target ECW within the overall GMP.**

(ii) Subject to the approval of the HCA, the weighting of the technical evaluation factors and cost or price may be different than that required under paragraph (i) of this subsection. Any such written approval shall be documented in the contract file.

(2) *Price Realism.* The contracting officer shall provide for a price realism analysis in the solicitation for the purpose of assessing, among others, whether an offeror's price reflects a lack of understanding of the contract requirements or risk inherent in an offeror's proposal. The solicitation shall provide offerors with notice that the agency intends to perform a price realism analysis.

(3) *Total Evaluated Price.* For purposes of evaluation, the total evaluated price shall include the firm-fixed-price for design phase services, **[SEE (1) (i) above] the construction work GMP option(s), personnel and daily rates** and any other fixed-priced line items. If advance pricing elements such as extended overhead rates and daily delay rates are proposed, those shall also be evaluated as part of the total evaluated price.

COMMENT: the private sector does not include the target ECW (or "the construction work GMP option(s)" as noted above) as part of the price evaluation. This is because the target ECW, target ceiling price, etc. should be the same maximum target value for each of the competing firms, maximizing the benefit to the Owner. Including the target ECW as part of the price evaluation is a distortion

of the CMc methodology and entices firms to take a design-bid-build mentality within the competition phase and the design phase.

(c) *Government Budget (e.g. Prospectus) Information.* Subject to the approval of the contracting director, the solicitation may include information contained or referenced within a prospectus submission to Congress for a project.

COMMENT: each of the Owner's contractors (ie CMa, AE, CMc should be aligned in the requirement to validate square footage(s), program requirements, and compliance with the stated project within the project prospectus prior to advancing from one design phase to the next and certainly before exercising the construction phase.

536.7104

Construction Contract Award.

In accordance with FAR 4.1001, the contracting officer shall use the SF 1442 to identify the services or items to be acquired as separately identified line items on a unit price or lump sum basis including the design phase services, the construction work GMP option(s), and any other work not included in the previously identified items.

536.7105

Construction Contract Administration.

536.7105-1

Responsibilities.

(a) During all phases of the project, the architect-engineer contractor that is providing design services under a separate contract with GSA is contractually responsible for the design in the same manner as under a traditional, design-bid-build project delivery method.

(b) The design phase services provided by the construction contractor can include, but are not limited to, scheduling, systems analysis, subcontractor involvement,

cost-estimating, constructability reviews, cost-reconciliation services, and market analysis.

(c) The scope of work should task the construction contractor with reviewing the design documents and providing pricing information at various defined milestones during the design phase.

(d) During the design phase, the architect-engineer contractor and the construction contractor ~~should~~ **shall** collaborate on the design and constructability issues **with the purpose of aligning the design to adhere the target ECW and overall GMP**. The goal of this collaboration is to establish a final ECW that does not exceed the original target ECW **and GMP**.

(e) No discussions between the architect-engineer contractor and the construction contractor shall be considered as a change to the construction contract or design contract unless incorporated by the contracting officer through a modification.

536.7105-2

Guaranteed Maximum Price.

(a) *General.*

(1) *GMP.* (i) The GMP is established at contract award. The GMP may be established as one option or as multiple options through separate line items, with a separate GMP amount for each line item.

(ii) The GMP is subject to adjustment under various standard contract clauses, including the changes clause, differing site conditions clause, and suspensions clause.

(iii) The contract file shall contain all documents to support any scope changes including a separate analysis to document the rationale for any upward or downward adjustment to the GMP.

(2) *ECW*. (i) The final ECW should be established prior to completion of the design (*i.e.* 100 percent construction documents), generally no earlier than completion of 75 percent construction documents.

(ii) The contracting officer shall negotiate the final ECW and incorporate it into the construction contract through a bilateral modification prior to exercising the GMP option.

(3) *CCA*. (i) The CCA type of allowance may only be used as part of the CMC project delivery method and should not be confused with other types of allowances that may be used with other construction project delivery methods.

(ii) The CCA is adjusted to provide for a contingency relative to a fixed percentage of the ECW set at contract award, except for the requirements at paragraph (c)(2) of this subsection.

~~(iii) The CCA will cover design errors and omissions that do not form the basis of a change order. Design errors and omissions that do form the basis for a change order will be settled in accordance with GSAR 552.243-71 Equitable Adjustments.~~

COMMENT: As noted by 536.7105-1Responsibilities(a) “During all phases of the project, the architect-engineer contractor that is providing design services under a separate contract with GSA is contractually responsible for the design in the same manner as under a traditional, design-bid-build project delivery method. “As such asserting the CMC is responsible for design for which it has no control or responsibility is improper. Paragraph (iii) as written should be eliminated. Design errors and omissions are the responsibility of the Owner and its designers in this procurement model.

(iv) Except as provided in paragraph (a)(3)(v) of this subsection, the CCA should equal 3 percent.

COMMENT: The CCA has been previously defined as 3 percent, not potentially less. It is important to note that when the Government unilaterally establishes any portion of the GMP there is the potential for risk in that action.

(v) Subject to the approval of the HCA, the CCA may be different than that required under paragraph (a)(3)(iv) of this subsection. Any such written approval shall be documented in the contract file.

~~(4) *Fee for the Construction Work.* (i) The fee for the construction work may only be adjusted for scope changes that have an impact on schedule.~~

COMMENT: This is contrary to CM@Risk models in the private sector and is not equitable in nature. The Fee for the construction work is proposed with the initial ECW. The Fee may fluctuate with the final ECW because of costs that are function of dollars; EX: Insurance, bonds and profit.

~~(ii) The fee for the construction work associated with a scope change shall not be driven by a fixed percentage. The contracting officer should determine whether the profit included, if any, in a contractor's proposal is reasonable for the scope change work.~~

COMMENT: The proposal form typically includes a proposed rate (%) for Overhead (Corp G&A), profit and commission for scope changes. This should be used in all CMc RFP's to establish these rates "up-front". The price proposal forms used by the Government are not aligned with the mark-up % provisions of 552.243-71 Equitable Adjustments. Either the pricing form should be changed to include the provisions (especially subparagraph (h)), or the GSAR equitable adjustments mark-ups should be modified to a "flat" rate as currently modeled by the Government's price proposal form.

(b) *Design Phase.* (1) The GMP may be bilaterally modified upward during the design phase only for approved additions to the scope of work.

(2) The GMP shall may be bilaterally modified downward during the design phase for deletions to the scope of work.

(c) *Exercising the GMP Option.* (1) The GMP option shall not be exercised until the final ECW is established.

(2) If the sum of the final ECW, CCA, and fee for construction work is less than the GMP established at contract award, then the contracting officer shall adjust the GMP downward accordingly through a bilateral modification to exercise the GMP option.

COMMENT: This section would be a punitive action. GSA should consider retaining the GMP sum from contract award and retaining the original incentive-based Contract.

(3) If the sum of the final ECW, CCA, and fee for the construction work is greater than the GMP established at contract award at no fault of CMc, then the contracting officer shall reduce the CCA while keeping increase the GMP amount fixed through a bilateral modification to exercise the GMP option.

COMMENT: This is not the correct method to use the CCA. If the ECW, CCA and Fee exceed the GMP at no fault of the CMc, then the ECW should be reduced through Value Engineering and/or scope modifications. The CCA is required to be maintained at 3.0% (or at the bilaterally agreed upon level) at exercising the construction option.

(3)(a) If the sum of the final ECW, CCA and fee for the construction work is greater than the GMP established at contract award as a result of negligence by the CMc, then the contractor shall have the option to not exercise the GMP Option, discontinue CMc services and openly procure the Construction Phase scope of work.

(4) The GMP option shall not be exercised if the final ECW, CCA and fee for the construction work is greater than the GMP established at contract award.

COMMENT: This is not correct. The CCA of 3.0% is required to be funded by the GMP.

(d) *Construction Phase.* (1) After award of the GMP option, changes in scope may be issued as an adjustment to the GMP or as a stand-alone firm-fixed-price line item.

(2) Any changes in scope after award of the GMP option shall be reflected by a written modification to the construction contract in accordance with FAR Part 43.

(e) *Early Work Package.* (1) Early work packages (see 536.7105-7) may be used in the procurement that are priced separately or included in the GMP option.

(2) If any early work package exercised reduces the scope of the construction services under the GMP option, the ECW shall be reduced, and the CCA, fee for the construction work, and GMP shall be adjusted accordingly.

(f) *GMP Adjustment.* (1) Any changes to the total GMP or individual parts of the GMP must be incorporated in the contract through a modification.

(2) Any modification that changes the GMP, including modifications for early work packages and fixed price conversions, must clearly state that it includes a change to the GMP and describe the changes to the individual parts of the GMP components in the modification.

(3) Any modification that changes the total GMP, or individual parts of the GMP, is subject to the requirement for a prenegotiation objectives memo and price negotiation memo, including fair and reasonable price determination, per FAR 15.406.

(4) The contracting officer should consult other members of the acquisition team, including the project manager, to analyze and justify any adjustments to the total GMP, or individual parts of the GMP.

536.7105-3

Accounting and Auditing Requirements.

(a) *Cost Accounting Standards.* (1) Except as provided in paragraph (a)(2) of this subsection or through an exemption at FAR 30.201-1, construction contracts under the CMc project delivery method are subject to the **modified** cost accounting standards (CAS) identified in FAR Part 30.

COMMENT: GSA should use the modified CAS Compliance as discussed in the above comments.

(2) The contracting officer may request a CAS waiver in accordance with the requirements at FAR 30.201-5 and 530.201-5.

(3) If CAS applies, the contract clauses identified at FAR 30.201-4 shall be included in the contract.

(4) If a CAS waiver is granted or if CAS does not apply, the contract clause identified at 536.7107(b) shall be included in the contract.

(b) GMP Option Accounting.

(1) Open Book Accounting. Open book accounting shall be followed for financial tracking of all contract line items that are awarded on a GMP basis. Such financial tracking may be accomplished through an audit in accordance with paragraph (c) of this section.

COMMENT: Eliminate open book accounting and audits. The open procurement method of awarding subcontracts and purchase orders are sufficient to validate the GMP. Audits are not applicable to the components of the GMP because they

are fixed-price (Fees, Subcontracts, Purchase Orders). An audit inefficient use of time and increases costs for an objective that cannot be realized.

(2) *Payments and Reconciliation.* All payments shall be reconciled with the ~~open book accounting records and the~~ schedule of values adjusted, as appropriate. Reconciliation shall occur each month and should be coordinated with monthly progress payments. The reconciliation shall be documented in the contract file.

COMMENT: Open book accounting should be replaced with modified CAS Compliance.

~~(c) *Auditing Requirements.* In accordance with GSAM 542.102(a), for any audit services required by this Subpart 536.71, the contracting officer shall first request such services be performed by or through the Assistant Inspector General for Auditing or the Regional Inspector General for Auditing. If the Office of Inspector General declines to perform such an audit, the contracting officer may obtain audit services from a certified public accountant.~~

COMMENT: Audits are not applicable in this contracting and procurement method. This auditing requirement should be removed from this rule.

536.7105-4 **Value Engineering.**

In accordance with FAR 48.202, the clause at FAR 52.248-3 Value Engineering-Construction does not apply to incentive contracts. Accordingly, value engineering shall not apply to the CMc project delivery method described in this subpart.

COMMENT: Value Engineering is a key component of the CMc contract method. It is the main tool the CMc offers through its design phase owner consultation to assist in aligning the scope with the target ECW . Incorporation of efficiencies, innovation, fast-tracked scheduling and economical materials / systems are critical to the best value approach.

536.7105-5

Shared Savings Incentive.

(a) *General.* The incentive is a shared portion of the cost reductions realized by the construction contractor as a result of completing the construction work for less than the GMP. Cost reductions may result from innovations and efficiencies during the construction phase, such as increased labor productivity or strong material subcontract negotiations.

(b) *Share Ratio.* (1) Except as provided in paragraph (2) of this subsection, the share ratio for the construction contractor shall ~~range from 30 percent to be~~ 50 percent. ~~The share ratio for the construction contractor shall not exceed 50 percent.~~ The complexity of the project and the amount of risk to the construction contractor should be considered when determining the ratio. A project with greater risk to the construction contractor should reflect a greater share ratio for the construction contractor.

(2) Subject to the approval of the HCA, the share ratio may be different than that required under paragraph (b)(1) of this subsection. Any such written approval shall be documented in the contract file.

(c) *Incentive Calculation.* The incentive amount is calculated in accordance with the clause at 552.236-78 Construction-Manager-As-Constructor.

536.7105-6

Allowances.

(a) Establishing a separate allowance in addition to the CCA is only permitted pursuant to a written determination approved by the contracting director supporting the use of any such allowance.

(b) The written determination for a separate allowance in addition to the CCA shall consider—

(1) Alternative contracting structures, such as a separate GMP line item or performing the work as part of the GMP option, and

(2) Ensuring conformance with all applicable rules and procedures relating to allowances, including FAR 11.702.

536.7105-7 Early Work Packages.

(a) Construction services for an early work package must be within the scope of the overall contract.

(b) Early work packages may be part of the initial procurement as a separately priced line item, or the Government and the construction contractor may agree to develop an early work package after award.

(c) Early work packages shall be definitive firm-fixed-price line items in the contract.

(d) *Early Work Packages Developed After Award.* (1) The parties shall bilaterally agree to the scope, schedule, and pricing for any such early work package, and the contract shall be modified in accordance with FAR Part 43.

COMMENT: This can be an effective method to improve schedule and reduce costs.

(2) If any such early work package reduces the scope of the construction services under the GMP option, the ECW shall be reduced, and the CCA, fee for the construction work, and GMP shall be adjusted accordingly.

(3) Any modification to the contract for an early work package is subject to the requirement for a prenegotiation objectives memo and price negotiation memo, including fair and reasonable price determination, per FAR 15.406.

(e) Early work packages are no longer subject to open book accounting, a shared savings incentive, or the need for determination of final settlement.

536.7105-8

Conversion to Firm-Fixed-Price.

(a) At any time after completion of ~~100~~ 75 percent construction documents, the Government and the construction contractor may bilaterally convert the whole contract to firm-fixed-price.

(b) Conversion to firm-fixed-price may occur after the contingency risks, to be covered by the CCA, have been sufficiently reduced in the best interest of the Government. See FAR 16.103(b) for additional guidance for assessing risk management, profit motive, and timing considerations.

(c) Conversion to firm-fixed-price is only permitted pursuant to a written determination from the contracting officer to the contract file supporting the conversion. The contracting officer should consult other members of the acquisition team, including the project manager, to analyze and justify the conversion.

(d) The contracting officer shall not agree to a firm-fixed-price **for the base scope of work** in excess of the GMP **and where CMC is at fault.**

~~(e) In accordance with 536.7105-3(e), the contracting officer shall obtain an independent audit of the construction contractor's costs incurred in the performance of the contract to date.~~

COMMENT: The pricing components are analyzed and reconciled by the Government's independent cost consultants throughout the design phase. Once the Construction Phase is enacted there are typically firm-fixed price subcontracts and potentially a small element of cost reimbursable elements subject to audit. Inserting an audit function to reconcile cost estimating is redundant to processes

and procedures already in place, may potentially delay the work and is not reflective of the spirit of trust and open book processes leading up to the conversion to firm-fixed. Because the majority of the costs will have been incurred under a firm-fixed subcontract, previously authorized firm-fixed sum to CMC or Design Phase fee, what is the intent of the audit? The audit may be perceived as punitive in nature. As previously discussed, an audit is not applicable to firm-fixed priced Fees, Subcontracts and Purchase Orders. All references to an audit should be removed.

(f) When evaluating the construction contractor's proposal for firm-fixed-price definitization, the contracting officer should compare the anticipated final cost to the firm-fixed-price being proposed. It may be reasonable for the construction contractor to include a contingency for assuming the risk associated with agreeing to the firm-fixed-price. The contracting officer should evaluate this contingency to ensure that the proposed amount reasonably reflects the remaining risks being assumed by the construction contractor. This evaluation may be informed by the history of the project, the balance of the CCA, and other factors.

(g) The modification to convert to a firm-fixed-price is subject to the requirement to obtain cost and pricing data unless one of the exceptions in FAR 15.403-1 applies.

(h) The modification to convert to a firm-fixed-price is subject to the requirement for a prenegotiation objectives memo and price negotiation memo, including fair and reasonable price determination, per FAR 15.406.

(i) Upon converting to a firm-fixed-price, the contract is no longer subject to open book accounting, a shared savings incentive, or the need for determination of final settlement.

Unless the contract has been converted to a standard firm-fixed-price contract (see 536.7105-8)—

(a) The contracting officer shall ensure that the construction contractor's proposal for final settlement is accurate and reliable in accordance with the open book accounting practices of the contract.

~~(b) In accordance with 536.7105-3(e), the contracting officer shall obtain an independent audit of the construction contractor's costs.~~

COMMENT: As previously discussed, an audit is not applicable to firm-fixed priced Fees, Subcontracts and Purchase Orders. All references to an audit should be removed.

536.7107

Contract Clauses.

(a) Insert a clause substantially the same as the clause at 552.236-79, Construction-Manager-As-Constructor, in solicitations and contracts if construction, dismantling, or removal of improvements is contemplated when a CMc project delivery method will be followed. This clause is in lieu of the clause at FAR 52.216-17 Incentive Price Revision—Successive Targets.

(b) Insert a clause substantially the same as the clause at 552.236-80, Accounting Records and Progress Payments, in solicitations and contracts if construction, dismantling, or removal of improvements is contemplated when a CMc project delivery method will be followed and cost accounting standards do not apply. This clause is in lieu of the clauses at FAR 52.230-2 Cost Accounting Standards, FAR 52.230-3 Disclosure and Consistency of Cost Accounting Practices, and FAR 52.230-6 Administration of Cost Accounting Standards.

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

11. Add section 552.236-15 to read as follows:

552.236-15

Schedules for Construction Contracts.

As prescribed in 536.515, insert the following clause:

Schedules for Construction Contracts (Date)

The requirements, of the clause entitled “Schedules for Construction Contracts” at FAR 52.236-15, are supplemented as follows:

(a) *Purpose.* The project schedule shall be a rational, reasonable, and realistic plan for completing the work, and conform to the requirements specified in this clause and elsewhere in the contract. The Contractor understands and acknowledges that the preparation and proper management of the project schedule is a material component of the contract.

(b) *Use of the schedule.* The Contracting Officer shall be entitled, but not required, to rely upon the project schedule to evaluate the Contractor's progress, evaluate entitlement to extensions of time, and determine the criticality or float of any activities described in such project schedule.

(c) *Submission.* Prior to notice to proceed, or such other time as may be specified in the contract, the Contractor shall submit the project schedule.

(d) *Milestones.* The project schedule shall incorporate milestone events specified in the contract, including, as applicable, notice to proceed, substantial completion, and milestones related to specified work phases and site restrictions. The project schedule shall also include Contractor-defined milestones to identify target dates for critical events, based upon the Contractor's chosen sequence of work.

(e) *Activities.* The project schedule shall depict all major activities necessary to complete the work.

(f) *Schedule of values.* (1) The Contractor shall prepare and submit for approval a cost breakdown of the Contract price, to be referred to as the “schedule of values”, assigning values to each major activity necessary to complete the work.

(2) Values must include all direct and indirect costs, although a separate value for bond costs may be established.

(3) The schedule of values must contain sufficient detail to enable the Contracting Officer to evaluate payment requests (see FAR 52.232-5 and GSAR 552.232-5).

(g) *Conflicting terms.* (1) If at any time the Contracting Officer finds that the project schedule does not comply with any contract requirement, the Contracting Officer may provide written notice to the Contractor.

(2) Within 30 calendar days of any such written notice, or such other time as may be specified, from the Contracting Officer, the Contractor shall take one of the following actions—

(i) Revise the project schedule;

(ii) Adjust activity progress; or

(iii) Provide sufficient information demonstrating compliance.

(3) If the Contractor fails to sufficiently address the Contracting Officer's exceptions to the project schedule, the Contracting Officer may, in addition to any other remedies set forth in the contract—

(i) Withhold retainage until the project is substantially complete or until such time as the Contractor has complied with project schedule requirements; or

(ii) Terminate the contract for default.

(h) *Revisions to the schedule.* If the Contractor proposes a revision to the project schedule after initial approved submission, the Contractor shall provide in writing

a narrative describing the substance of the revision, the rationale for the revision, and the impact of the revision on the projected substantial completion date and the available float for all activities.

(i) *Updates*. Unless a different period for updates is specified elsewhere, the Contractor shall update the project schedule weekly to reflect actual progress in completing the work, and submit the updated project schedule by the following Monday.

(End of clause)

Alternate I (DATE). As prescribed in 536.515(a), substitute the following paragraphs (c), (e), (h), and (i) for paragraphs (c), (e), (h), and (i) of the basic clause:

(c) *Submission*. Within 30 calendar days of notice to proceed, or such other time as may be specified in the contract, the Contractor shall submit the project schedule, together with a written narrative describing the major work activities, activities on the critical path, and major constraints underlying the sequence and logic of the project schedule.

(e) *Activities*. (1) The Contractor shall use a critical path method project schedule to plan, coordinate, and perform the work.

(2) The project schedule shall depict all activities necessary to complete the work, including, as applicable, all submittal and submittal review activities, all procurement activities, and all field activities, including mobilization, construction, start-up, testing, balancing, commissioning, and punchlist.

(3) Activities shall be sufficiently detailed and limited in duration to enable proper planning and coordination of the work, effective evaluation of the reasonableness and realism of the project schedule, accurate monitoring of progress, and reliable analysis of schedule impacts.

(4) Activity durations shall be based upon reasonable and realistic allocation of the resources required to complete each activity, given physical and logistical constraints on the performance of the work. All logic shall validly reflect physical or logistical constraints on relationships between activities. Except for the first and last activities in the project schedule, each activity shall have at least one predecessor and one successor relationship to form a logically connected network plan from notice to proceed to the contract completion date.

(h) *Revisions to the schedule.* (1) The Contractor should anticipate that the initial submittal of the project schedule will be subject to review and may require revision. The Contractor shall devote sufficient resources for meetings, revisions, and resubmissions of the project schedule to address any exceptions taken to the initial submittal. The Contractor understands and acknowledges that the purpose of the initial review and resolution of exceptions is to maximize the usefulness of the project schedule for contract performance.

(2) If the Contractor proposes a revision to the project schedule after initial approved submission, the Contractor shall provide in writing a narrative describing the substance of the revision, the rationale for the revision, and the impact of the revision on the projected substantial completion date and the available float for all activities.

(i) *Updates.* Unless a different period for updates is specified elsewhere, the Contractor shall update the project schedule monthly to reflect actual progress in completing the work, and submit the updated project schedule within 5 working days of the end of each month.

Alternate II (DATE). As prescribed in 536-515(b), substitute the following paragraphs (c), (e), and (i) for paragraphs (c), (e), and (i) of the basic clause:

(c) *Submission.* (1) Within 30 calendar days of notice to proceed, or such other time as may be specified in the contract, the Contractor shall submit the project schedule, together with a written narrative describing the major design and

construction activities. The project schedule may indicate construction activities in summary form prior to completion of final design documents.

(2) Within 30 calendar days of completion of final design documents, the Contractor shall submit a revised project schedule depicting all activities necessary to complete construction work activities, together with a written narrative describing the major work activities, activities on the critical path, and major constraints underlying the sequence and logic of the project schedule.

(e) *Activities.* (1) The Contractor shall use a critical path method project schedule to plan, coordinate, and perform the work.

(2) Activities shall be sufficiently detailed and limited in duration to enable proper planning and coordination of the work, effective evaluation of the reasonableness and realism of the project schedule, accurate monitoring of progress, and reliable analysis of schedule impacts.

(3) Activity durations shall be based upon reasonable and realistic allocation of the resources required to complete each activity, given physical and logistical constraints on the performance of the work. All logic shall validly reflect physical or logistical constraints on relationships between activities. Except for the first and last activities in the project schedule, each activity shall have at least one predecessor and one successor relationship to form a logically connected network plan from notice to proceed to the contract completion date.

(i) *Updates.* Unless a different period for updates is specified elsewhere, the Contractor shall update the project schedule monthly to reflect actual progress in completing the work, and submit the updated project schedule within 5 working days of the end of each month.

Alternate III (DATE). As prescribed in 536.515(c), substitute the following paragraphs (c), (e), (h), and (i) for paragraphs (c), (e), (h), and (i) of the basic clause:

(c) *Submission*. (1) Within 30 calendar days of contract award, or such other time as may be specified in the contract, the Contractor shall submit the design phase project schedule.

(2) Within 30 calendar days after establishing the final estimated cost of work, the Contractor shall submit the construction phase project schedule, together with a written narrative describing the major work activities, activities on the critical path, and major constraints underlying the sequence and logic of the project schedule.

(e) *Activities*. (1) The design phase project schedule shall depict all activities necessary to complete the design work, including, as applicable, all submittal and submittal review activities, cost reconciliation, and establishing the estimated cost of work for the construction phase.

(2) The Contractor shall use a critical path method project schedule to plan, coordinate, and perform the construction phase work.

(3) The construction phase project schedule shall depict all activities necessary to complete the construction work, including, as applicable, all submittal and submittal review activities, all procurement activities, and all field activities, including mobilization, construction, start-up, testing, balancing, commissioning, and punchlist.

(4) Activities shall be sufficiently detailed and limited in duration to enable proper planning and coordination of the work, effective evaluation of the reasonableness and realism of the project schedule, accurate monitoring of progress, and reliable analysis of schedule impacts.

(5) Activity durations shall be based upon reasonable and realistic allocation of the resources required to complete each activity, given physical and logistical constraints on the performance of the work. All logic shall validly reflect physical or logistical constraints on relationships between activities. Except for the first and last activities in the project schedule, each activity shall have at least one predecessor and one successor relationship to form a logically connected network plan from notice to proceed to the contract completion date.

(h) *Revisions to the schedule.* (1) The Contractor should anticipate that the project schedule will be subject to review and may require revision. The Contractor shall devote sufficient resources for meetings, revisions, and resubmissions of the project schedule to address any exceptions taken. The Contractor understands and acknowledges that the purpose of the review and resolution of exceptions is to maximize the usefulness of the project schedule for contract performance.

(2) If the Contractor proposes a revision to the project schedule after initial approved submission, the Contractor shall provide in writing a narrative describing the substance of the revision, the rationale for the revision, and the impact of the revision on the projected substantial completion date and the available float for all activities.

(i) *Updates.* Unless a different period for updates is specified elsewhere, the Contractor shall update the project schedule monthly to reflect actual progress in completing the work, and submit the updated project schedule within 5 working days of the end of each month.

12. Add section 552.236-21 to read as follows:

552.236-21

Specifications and Drawings for Construction.

As prescribed in 536.521, insert the following clause:

Specifications and Drawings for Construction (Date)

The requirements of the clause entitled “Specifications and Drawings for Construction” at FAR 52.236-21, are supplemented as follows:

(a) In case of difference between small and large-scale drawings, the large-scale drawings shall govern.

(b) Schedules on any contract drawing shall take precedence over conflicting information on that or any other contract drawing.

(c) On any of the drawings where a portion of the work is detailed or drawn out and the remainder is shown in outline, the parts detailed or drawn out shall apply also to all other like portions of the work.

(d) Where the word “similar” occurs on the drawings, it shall have a general meaning and not be interpreted as being identical, and all details shall be worked out in relation to their location and their connection with other parts of the work.

(e) Standard details or specification drawings are applicable when listed, bound with the specifications, noted on the drawings, or referenced elsewhere in the specifications.

(1) Where notes on the specification drawings indicate alterations, such alterations shall govern.

(2) In case of difference between standard details or specification drawings and the specifications, the specifications shall govern.

(3) In case of difference between the standard details or specification drawings and the drawings prepared specifically for this contract, the drawings prepared specifically for this contract shall govern.

(f) Different requirements within the contract documents shall be deemed inconsistent only if compliance with both cannot be achieved.

(g) Unless otherwise noted, the drawings shall be interpreted to provide for a complete construction, assembly, or installation of the work, without regard to the detail with which material components are shown in the drawings.

(End of clause)

Alternate I (DATE). As prescribed in 536.521(a), add the following paragraph to the basic clause:

(h) For the purposes of this clause, specifications and drawings refer only to those included among the contract documents at time of contract award, and not to those produced by the Contractor pursuant to its responsibilities under the contract.

Alternate II (DATE). As prescribed in 536.521(b), add the following paragraph to the basic clause:

(h) For the purposes of this clause, specifications and drawings refer only to the construction documents, meaning the 100 percent complete specifications and construction drawings developed during the design phase.

552.236-70
[Removed]

13. Remove section 552.236-70.

552.236-71
[Redesignated as 552.236-70]

14. Redesignate section 552.236-71 as 552.236-70.

15. Add new section 552.236-71 to read as follows:

552.236-71
Contractor Responsibilities.

As prescribed in 536.571, insert the following clause:

Contractor Responsibilities (Date)

(a) The Contractor shall be responsible for compliance with applicable codes, standards and regulations pertaining to the health and safety of personnel during performance of the contract.

(b) Unless expressly stated otherwise in the contract, the Contractor shall be responsible for all means and methods employed in the performance of the contract.

(c) The Contractor shall immediately bring to the Contracting Officer's attention any hazardous materials or conditions not disclosed in the contract documents discovered by or made known to the Contractor during the performance of the contract.

(d) The Contractor shall be responsible for providing professional design services in connection with performance of the work or portions of the work only if this responsibility is expressly stated in the contract, and the contract documents provide the performance and design criteria that such services will be required to satisfy. In the performance of such work, the Contractor shall be responsible for retaining licensed design professionals, who shall sign and seal all drawings, calculations, specifications and other submittals that the licensed professional prepares. The Contractor shall be responsible for, and GSA shall be entitled to rely upon, the adequacy and completeness of all professional design services provided under the contract.

(e) Where installation of separate work components as shown in the contract will result in conflict or interference between such components or with existing conditions, including allowable tolerances, it is the Contractor's responsibility to bring such conflict or interference to the attention of the Contracting Officer and seek direction before fabrication, construction, or installation of any affected work. If the Contractor fabricates, constructs, or installs any work prior to receiving such

direction, the Contractor shall be responsible for all cost and time incurred to resolve or mitigate such conflict or interference.

(f) Where drawings show work without specific routing, dimensions, locations, or position relative to other work or existing conditions, and such information is not specifically defined by reference to specifications or other information supplied in the contract, the Contractor is responsible for routing, dimensioning, and locating such work in coordination with other work or existing conditions in a manner consistent with contract requirements.

(g) It is not the Contractor's responsibility to ensure that the contract documents comply with applicable laws, statutes, building codes and regulations. If it comes to the attention of the Contractor that any of the contract documents do not comply with such requirements, the Contractor shall promptly notify the Contracting Officer in writing. If the Contractor performs any of the work prior to notifying and receiving direction from the Contracting Officer, the Contractor shall assume full responsibility for correction of such work, and any fees or penalties that may be assessed for non-compliance.

(End of clause)

Alternate I (DATE). As prescribed in 536.571(a), delete paragraphs (d), (e), (f), and (g) of the basic clause, and insert paragraphs (d), (e), (f), and (g) as follows:
(d) The Contractor shall be responsible for providing professional design services unless this responsibility is expressly excluded from the contract. In the performance of such work, the Contractor shall be responsible for retaining licensed design professionals, who shall sign and seal all drawings, calculations, specifications and other submittals that the licensed professional prepares. The Contractor shall be responsible for, and GSA shall be entitled to rely upon, the adequacy and completeness of all professional design services provided under the contract.

(e) The Contractor's responsibilities include the responsibilities of the Architect-Engineer Contractor, as specified in FAR 52.236-23.

(f) The Contractor shall include in all subcontracts that require professional design services express terms establishing GSA as a third party beneficiary. No other person shall be deemed a third party beneficiary of the contract.

(g) The Contractor shall determine whether the information contained in the contract documents complies with applicable laws, statutes, building codes and regulations. If it comes to the attention of the Contractor that any of the contract documents do not comply with such requirements, the Contractor shall promptly notify the Contracting Officer in writing. If the Contractor performs any of the work prior to notifying and receiving direction from the Contracting Officer, the Contractor shall assume full responsibility for correction of such work, and any fees or penalties that may be assessed for non-compliance.

Alternate II (DATE). As prescribed in 536.571(b), delete paragraphs (d), (e), (f), and (g) of the basic clause, and insert paragraphs (d), (e), (f), (g), (h), (i), and (j) as follows:

(d) The Contractor shall be responsible for performing the design phase services in accordance with the statement of work. The Contractor shall submit all deliverables and reports in accordance with the statement of work.

(e) The Contractor shall be responsible to review all design information (*e.g.* draft specifications and drawings) provided. The Contractor shall be responsible for determining that the project as described in the design information is constructible using commercially practicable means and methods; that the construction work is described in the design documents with sufficient completeness to enable pricing of a complete project within the guaranteed maximum price; and that the manner of presentation and organization of information in the design documents enables accurate estimation of the cost of the work.

(f) Prior to establishment of the final estimated cost of work, the Contractor shall bring to the Contracting Officer's attention all instances that it has discovered or has been made aware of where omission of design information affects the Contractor's ability to accurately estimate the cost of the work.

(g) Where installation of separate work components as shown in the contract will result in conflict or interference between such components or with existing conditions, including allowable tolerances, it is the Contractor's responsibility to bring such conflict or interference to the attention of the Contracting Officer and seek direction before fabrication, construction, or installation of any affected work. If the Contractor fabricates, constructs, or installs any work prior to receiving such direction, the Contractor shall be responsible for all cost and time incurred to resolve or mitigate such conflict or interference.

(h) Where drawings show work without specific routing, dimensions, locations, or position relative to other work or existing conditions, and such information is not specifically defined by reference to specifications or other information supplied in the contract, the Contractor is responsible for routing, dimensioning, and locating such work in coordination with other work or existing conditions in a manner consistent with contract requirements.

(i) It is not the Contractor's responsibility to ensure that the contract documents comply with applicable laws, statutes, building codes and regulations. If it comes to the attention of the Contractor that any of the contract documents do not comply with such requirements, the Contractor shall promptly notify the Contracting Officer in writing. If the Contractor performs any of the work prior to notifying and receiving direction from the Contracting Officer, the Contractor shall assume full responsibility for correction of such work, and any fees or penalties that may be assessed for non-compliance.

(j) The Contractor is responsible to construct the project in accordance with the drawings and specifications. The final Estimated Cost of the Construction Work (ECW) may be determined based upon incomplete design documents. In those instances in which the drawings and specifications are not complete at the time the final ECW is established, the Contractor shall exercise reasonable care and judgment to determine the intent of the design and shall calculate the final ECW on the basis of the quality of construction, materials, and finishes that can be reasonably inferred from the design documents or other specified sources.

16. Add sections 552.236-79 and 552.236-80 to read as follows:

552.236-79

Construction-Manager-As-Constructor.

As prescribed in 536.7107(a), insert the following clause:

Construction-Manager-As-Constructor (Date)

(a) *General.* Pricing for the Guaranteed Maximum Price (GMP) for the option for construction services shall be subject to the requirements of this clause.

(b) *Definitions.* The following definitions shall apply to this clause:

“Construction-Manager-as-Constructor (CMc) Contingency Allowance” (CCA) means an allowance to cover reimbursable costs during construction that are not the basis of a change order.

“Costs” means allowable direct costs in accordance with FAR Part 31. Marked up costs paid to subcontractors shall be deemed direct costs of the Contractor.

“Cost of Performance” means the final sum of cost of the construction work and fee for the construction work.

“Estimated Cost of the Work” (ECW) means the estimated direct cost of the construction work.

“Fee for the Construction Work” means a fixed amount for all indirect costs, including overhead and profit.

COMMENT: The Fee definition needs further clarification. The Fee cannot include all the contractor’s indirect costs. Some indirect costs are a function of the ECW as a percentage. Therefore, they fluctuate with increases and decreases in price. EX: Insurance, bonds. Additionally, there needs to be a clarification between General Conditions (staffing related costs) and General Requirements (indirect costs such as hoisting, cranes, field engineering, etc.)

“Guaranteed Maximum Price” (GMP) means the sum of the ECW, CCA, and the fee for the construction work.

(c) *Guaranteed Maximum Price.* This contract at award includes a GMP.

(d) *Estimated Cost of the Work.* The proposed ECW incorporated into the contract at award is a target ECW. A final ECW is negotiated during the design phase and is incorporated into the contract prior to exercise of the GMP option.

(e) *Final Estimated Cost of the Work.*

(1) *Submission Requirements for Final ECW Proposal.* During the design phase, and at a time agreed by the Contracting Officer, the Contractor shall submit the following:

(i) A detailed statement of all firm-fixed-price early work packages in the performance of the construction work to date.

(ii) A proposed final ECW.

(iii) Sufficient data to support the accuracy and reliability of the estimate.

(iv) An explanation of the difference between the proposed final ECW and the target ECW used to establish the GMP.

(v) The Contractor's affirmation that—

(A) The Contractor is satisfied that the project as described in the specifications and construction drawings is constructible using commercially practicable means and methods;

(B) The Contractor is satisfied that the construction work has been sufficiently described to enable it to estimate the cost of the work with reasonable accuracy;

(C) The Contractor has disclosed to the Contracting Officer all of its actual knowledge relating to omissions of design information that may affect the cost of the work; and

(D) The Contractor acknowledges that the final ECW and time established for completion shall not be adjusted on account of cost or time attributable to known design omissions disclosed by the Contractor pursuant to paragraph (e)(1)(v)(C) of this clause. Unknown design errors and omissions that form the basis for a change order may still be settled in accordance with GSAR 552.243-71 Equitable Adjustments.

(2) *Establishment of the Final ECW.* The parties shall negotiate a final ECW based on the data provided under paragraph (e)(1) of this clause. The final ECW shall be established and incorporated into the Contract by bilateral modification. The Contracting Officer will not accept a final ECW proposal that does not include the written affirmation described in this clause. The Contracting Officer will not exercise the GMP option for construction work unless the final ECW has been incorporated into the contract.

(f) *CMc Contingency Allowance*. The CCA shall be ___percent of the ECW [Contracting Officer insert percentage amount].

(g) *Shared Savings Incentive*. The Contractor shall be entitled to ___percent of any cost reductions realized [Contracting Officer insert percentage amount].

(h) *Adjustment of ECW and GMP*. The ECW and GMP shall be subject to adjustment for changes and any other conditions giving rise to entitlement to an adjustment under this contract. The ECW and GMP shall be adjusted down for deletions to the scope of the construction services through a bilateral modification.

(i) *Adjustment of CCA*. ~~If the sum of the final ECW, CCA, and fee for the construction work is greater than the GMP established at contract award, then the contracting officer will reduce the CCA while keeping the GMP amount fixed. Otherwise, t~~

The CCA is adjusted relative to the percentage of the ECW set in paragraph (f) of this clause. Prior to the use of the CCA, the Contractor shall coordinate approval following the procedures identified in the contract.

COMMENT: This is not the correct method to use the CCA. If the ECW, CCA and Fee exceed the GMP, then the ECW should be reduced through Value Engineering and/or scope modifications. The CCA is required to be maintained at 3.0% at exercising the construction option.

(j) *Adjustment of the Fee for the Construction Work*. The fee for the construction work may only be adjusted for scope changes that have an impact on schedule. The fee for the construction work associated with a scope change shall not be driven by a fixed percentage.

COMMENT: This is an inaccurate statement. The Fee for the construction work is proposed with the initial ECW. The Fee will fluctuate if the ECW is increased because of costs that are function of dollars; EX: Insurance, bonds and profit.

(k) *Conversion to Firm-Fixed-Price Prior to Final Settlement.*

(1) *Submission Requirements for Conversion to Firm-Fixed Price.* If the parties agree to negotiate and establish a firm-fixed-price for construction work prior to the exercise of the GMP option, or at the request of the Contracting Officer, the Contractor shall submit the following:

(i) A proposed firm-fixed-price proposal for the completion of the construction work, which shall include all markups, including profit.

(ii) A detailed statement of any costs incurred in the performance of the contract work to date.

COMMENT: This statement is not subject to an audit.

(2) *Establishment of Firm-Fixed-Price.*

(i) *Prior to Exercise of GMP Option.* The parties may negotiate and establish a firm-fixed-price for construction work prior to the exercise of the GMP option based on the data provided under paragraph (k)(1) of this clause; provided that the firm-fixed-price shall not exceed the GMP. The Contracting Officer shall have the right, but not the obligation, to bilaterally exercise the GMP option at the firm-fixed-price within 120 calendar days of the establishment of such price.

(ii) *After Exercise of the GMP Option.* At any time prior to final settlement, the Contracting Officer may request that the Contractor provide a firm-fixed-price proposal for the completion of construction work in accordance with paragraph (k)(1) of this clause. Within 60 calendar days of such request, the Contractor shall provide such data. Within 60 calendar days of receipt of the Contractor's proposal, the Contracting Officer shall have the right, but not the obligation, to convert the contract to a firm-fixed-price contract through a bilateral modification at the proposed fixed-price or as otherwise negotiated by the parties; provided that the

firm-fixed-price, plus any costs incurred in the performance of the construction work, shall not exceed the GMP.

(iii) If any portion of the contract is converted to a firm-fixed-price, then that portion of the contract is no longer subject to ~~open book accounting~~, a shared savings incentive, or the need for final settlement. If the contract is not converted to a firm-fixed-price contract, then the final settlement of the Contractor's compensation shall be determined in accordance with paragraph (l) of this clause.

(3) *Payments.* If this contract is converted to a firm-fixed-price contract, the Contractor shall submit a revised schedule of values for the construction work allocating the unpaid balance of the fixed price to the itemized work activities remaining uncompleted, which shall be the basis for remaining progress payments.

(l) *Final Settlement.* The final settlement amount shall consist of the cost of performance and the Contractor's shared savings incentive, if any, provided that in no event shall the final settlement exceed the GMP. The final settlement amount shall be the Contractor's total compensation due under the contract.

(1) *Submission Requirements for Final Settlement Proposal.* The Contractor shall submit a final settlement proposal within 120 days of substantial completion to determine the cost of the construction work, which shall include the following:

(i) A detailed statement of all costs incurred by the Contractor in performing the construction work.

(ii) A firm-fixed-price proposal for the performance of the remaining work, if any, that may be necessary to complete performance of the construction work.

(iii) An executed release of claims, which shall describe any and all exceptions, including a description of any outstanding claims.

(iv) Any other relevant data that the Contracting Officer may reasonably require.

(2) *Determination of the Cost of the Work.* The cost of the construction work shall be the sum of all costs incurred by the Contractor in performing the construction work, the proposed fixed price for performance of remaining work, if any, less the residual value of any Contractor retained inventory. ~~In order to determine the cost of the construction work, the Contractor shall be subject to an audit of the Contractor's records and/or the Contractor's proposal.~~ Establishment of the cost of the construction work shall be subject to negotiation between the Government and the Contractor. In the event that the parties are unable to reach agreement, the Contracting Officer may unilaterally determine the cost of the construction work, and such determination shall be subject to FAR Clause 52.233-1 Disputes.

(3) *Determination of the Shared Savings Incentive.* If the final cost of performance is equal to or greater than the final GMP, the Contractor is not entitled to any additional compensation. If the final cost of performance is less than the final GMP, the Contractor is entitled to the percentage specified in paragraph (g) of this clause, of the difference between the final GMP and the final cost of performance, as the shared savings incentive.

(m) *Subcontracts.* No subcontract placed under this contract may provide for cost-plus-a-percentage of cost. Any costs incurred by the Contractor as a result of such a subcontract shall not be included in the cost of the construction work or the final settlement.

~~(n) *Open Book Access.* (1) At any time prior to converting to firm fixed price, the Government and its representatives, including designated auditors and accountants, shall have the right, but not the obligation, to attend any and all project meetings and shall have access to any and all records maintained by the Contractor relating to the contract. The Contractor shall include this requirement for open book access by the Government in its subcontracts for the contract.~~

(2) After converting to firm-fixed-price, the Government maintains the right to examine records under GSAR Clause 552.215-70.

(o) *Termination*. If this Contract is terminated, the Contractor shall not be entitled to a shared savings incentive.

(p) The contractor agrees to incorporate the substance of this clause in all subcontracts under this contract.

(End of Clause)

552.236-80

Accounting Records and Progress Payments.

As prescribed in 536.7107(b), insert the following clause:

Accounting Records and Progress Payments (Date)

(a) The Contractor shall keep full and detailed accounts and exercise such controls as may be necessary for proper financial management under this contract. The Contractor's accounting and control systems shall meet Generally Accepted Accounting Principles (GAAP) and provide for the following:

(1) There is proper segregation of direct costs and indirect costs.

(2) There is proper identification and accumulation of direct costs by contract.

(3) There is a labor time distribution system that charges direct and indirect labor appropriately.

~~(b) The Contractor shall afford access to and shall permit any authorized representatives of the Government to audit, examine and copy any records, documents, books, correspondence, instructions, drawings, receipts, subcontracts, purchase orders, vouchers, memoranda, and other data relating to this contract. Records subject to audit, examination, and copying shall include those records~~

necessary to evaluate and verify all direct and indirect costs, including overhead and payroll tax and fringe benefit allocations, as they may apply to costs associated with the contract. The Contractor shall preserve these records for a period of three years after the final payment, or for such longer period as may be required by law.

COMMENT: Eliminate open book accounting and audits. The open procurement method of awarding subcontracts and purchase orders are sufficient to validate the GMP. Audits are not applicable to the components of the GMP because they are fixed-price (Fees, Subcontracts, Purchase Orders). An audit here would not be an efficient use of time and will increase costs for an objective that cannot be realized.

(c) The records identified in paragraphs (b) of this clause shall be subject to inspection and audit by the Government or its authorized representative for, but limited to, evaluating and verifying the following:

(1) Contractor compliance with contract requirements.

(2) Compliance with pricing change orders, invoices, applications for payment, or claims submitted by the contractor or any of its subcontractors at any tier, including vendors and suppliers.

(d) If requested by the Government, the Contractor shall promptly deliver to the Government or its designee copies of all records related to the contract, in a form acceptable to the Government. The Contractor shall provide to the Government or its authorized representative such records maintained in an electronic format in a computer readable format on data disks or suitable alternative computer data exchange formats.

(e) The Government shall have access to the Contractor's facilities, shall be allowed to interview all current and former employees to discuss matters pertinent

to the contract, and shall be provided adequate work space, in order to conduct audits and examinations.

(f) If any ~~audit or~~ examination of the Contractor's records discloses total findings resulting in overpricing or overcharges by the Contractor to the Government in excess of one-quarter percent of the total contract billings, the Contractor shall immediately reimburse the Government for the overcharges. ~~The Contractor shall also reimburse the Government for the costs of the audit unless otherwise agreed to by the Government and the Contractor.~~

COMMENT: This is a punitive measure and should be eliminated. It is not in alignment with this delivery method.

(g) The Government shall be entitled to audit all modifications, including lump-sum modifications, to determine whether the proposed costs, as represented by the Contractor and any of its subcontractors, are in compliance with the contract. If it is determined that the costs proposed under a modification, including lump-sum modifications, are not in compliance with the contract, the Government reserves the right to adjust the amount previously approved and included in the modification.

~~(h) If the Contractor fails to comply with any conditions in this clause, the Contracting Officer may retain a maximum of 10 percent of the amount of each payment request submitted until such deficiencies are corrected.~~

COMMENT: 10% retainage for previously negotiated change orders is not acceptable. This is a punitive measure and should be eliminated. It is not in alignment with this delivery method.

~~(i) These requirements regarding accounting records shall not mitigate, lessen nor change any other requirements in the contract regarding audits, payment submissions, records, or records retention.~~

COMMENT: As previously discussed, an audit is not applicable to firm-fixed priced Fees, Subcontracts and Purchase Orders. All references to an audit should be removed.

~~(j) The contractor agrees to incorporate the substance of this clause in all subcontracts under this contract.~~

COMMENT: Subcontracts are procured as firm-fixed price and not subject to audit or review.

AGC appreciates the opportunity to share our insights with you and to help advance our common goals of fair competition and of economic and efficient performance of GSA construction projects. If you would like to discuss this matter with us further, please do not hesitate to contact AGC of America.

Submitted by:

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