

12.3: Contract Components

Learning Objectives

- Owner-contractor contracts
- Fixed-price, competitively bid contracts
- Standard forms-of-contract
- Federal government construction contract
- AIA contracts
- EJCDC contract
- State highway department contracts
- Other agency contracts
- One-of-a-kind contracts
- Bidding documents
- General conditions
- Supplementary conditions
- Specifications
- Drawings or plans
- Reports of investigations of physical conditions

Continuing the overview of construction-related prime contracts presented in Chapter 3, this chapter focuses on the *particular* construction-related prime contract of interest to construction contractors—that is, **owner–contractor contracts** for construction services. This focus will be concentrated even further by confining the discussion to **fixed-price contracts arrived at by competitive bidding**.

Generally, someone who is knowledgeable and comfortable operating in the competitively bid, fixed-price contract environment usually finds little difficulty when operating under other forms of construction contracts. The reverse is not always true.

Standard Forms of Contract

A number of **standard forms-of-contract** for fixed-price, competitively bid prime construction contracts are widely used today. A discussion of the more prominent of these follows.

Federal Government Construction Contract

Foremost among standard forms-of-contract is the **federal government construction contract**. This form of contract is normally used by all branches of the federal government for construction work. Prominent examples of different federal agencies using this contract include the General Services Administration, the Bureau of Reclamation, the U.S. Army Corps of Engineers, the U.S. Navy Facilities Engineering Command, the U.S. Bureau of Public Roads, and the National Park Service. The actual contracts, depending on the particular federal agency, all differ slightly in the wording of the basic provisions, and the titles used for the contract document divisions vary. However, the contracts are of the same type and contain the same basic provisions.

A typical instance where this form-of-contract was used is the U.S. Army Corps of Engineers Lock and Dam No. 26 project on the Mississippi River. This immense public works project, north of St. Louis, Missouri, involved a series of major contracts beginning in the early 1980s. Bids were taken for the third contract of the series on August 23, 1985, three to four months after it was advertised, so that bidding contractors would have time to prepare their fixed-price bids. The bidding documents consisted of two four-inch-thick volumes of technical specifications, four two-inch-thick volumes of drawings, and seven or eight extensive addendums, each of which made numerous changes in all of the other documents, including previously issued addendums. Obviously, preparing a fixed-price bid for this contract was a complicated matter requiring hundreds of hours. Smaller projects entail fewer documents and require less effort to prepare a bid. But regardless of the size of the federal project, the essential contract provisions under which the project is to be built will be the same. The larger, fixed-price federal contracts that contain a schedule of bid items are the most complex and offer the best example of the variety of problems that can occur. Five bids were received for this Lock and Dam No. 26 contract, ranging from a low bid of \$227 million to a high of \$288 million.

American Institute of Architects Contracts

A second important standard form-of-contract is the **American Institute of Architects (AIA) Standard Form of Agreement Between Owner and Contractor**. The two companion documents necessary to form the complete contract are AIA Form A-101

and AIA Form A-201. This contract is by far the most widely used form for fixed-price building construction work in both the public and private sectors, particularly the private sector. Entire texts have been written by legal scholars on this particular contract.
[1]

Associated General Contractors Contracts

The *AGC Standard Form Prime Contract Between Owner and Contractor* is recommended for use by the Associated General Contractors of America (AGC). This contract is commonly used on private work and is suitable for both building construction and engineered construction projects. Its usage is less broad than that of the AIA contract.

Engineers Joint Contract Documents Committee Contract

Another form-of-contract, the **Engineers Joint Contract Document Committee (EJCDC) Contract**, is used primarily for engineered construction in the private sector. Its use has also been endorsed by the Associated General Contractors of America.

State Highway Department Contracts

Another broad class of competitively bid, fixed-price contracts consists of the **state highway department contracts** of the various states. These contracts tend to be similar in format, no doubt because the construction work within each state is similar. The influence of the Federal Highway Administration (FHWA) has forced this similarity. The format usually consists of an infrequently published “bible,” which contains all general provisions and standard technical specifications of the state. Often a revision manual will be periodically published with changes. Then, in addition to the “bible” and its revision manual, each particular project will have its own set of “special provisions” that apply to that particular project. The special provisions contain site-specific provisions and information and any further changes to the “bible” as it relates to that specific project. The technical requirements of these state highway department contracts tend to be similar, even though some general provisions may vary. These contracts, like most others, are written by the owner agencies. From the standpoint of the legal rights afforded the contractor, these contracts vary considerably. Contractors who bid frequently in a particular state are aware of the provisions of that state’s contract and know what to expect.

Other Agency Contracts

Many **other agencies** traditionally build infrastructure systems over time through a series of recurring contracts for similar construction work. Examples are the rapid transit districts and water and sewer districts of the large metropolitan centers, as well as state agencies (other than highway departments), such as the California Department of Water Resources and the California Department of Architecture. Each agency tends to create its own unique form of prime construction contract, often based on the federal government contract, which it then uses over and over. Construction contractors who frequently bid to one or more of these agencies become familiar with the terms of the particular form that each agency uses.

One-of-a-Kind Contracts

Occasionally, contracts are created for a particular project. These **one-of-a kind contracts** tend to vary widely. Little about them is standard or traditional, either in format or detailed provisions. Since contracting parties can agree to anything that is not contrary to law, these isolated, individual, one-of-a-kind contracts can take almost any hybrid form that the parties concoct. They are limited only by the imagination of the parties who draft them, each of whom attempts to secure the most favorable agreement possible from that party’s point of view. Disputes that arise from one-of-a-kind contracts are usually more difficult to resolve because there is no past pattern of experience, as is the case with one of the “tried-and-true” standard forms-of-contract.

Typical Documents Comprising the Contract

Fixed-price, competitively bid contracts are comprised of certain, fairly typical documents. With the exception of one-of-a-kind contracts, the major categories of most contracts of this type consist of the following list:

- Bidding documents, consisting of the “Invitation to Bid,” the “Instructions to Bidders,” and the “Bid Form”
- General Conditions of Contract
- Supplementary Conditions of Contract
- Specifications
- Drawings
- Reports of investigations of physical conditions

Some contracts may not contain all of these categories but, with the exception of one-of-a-kind contracts, none is likely to contain material that won’t logically fit into one category or another.

Bidding Documents

The first category, **bidding documents**, normally begins with an *advertisement*, originally discussed in Chapter 1. The back section of contemporary industry periodicals, such as the *Engineering News Record*, contains a plethora of bid advertisements with every new issue. The advertisement identifies the project for which bids are desired, the owner, the time and place of the bid opening, and instructions to potential bidders on how to obtain a full set of contract documents.

The second document in the bidding group is usually the *Invitation for Bids (IFB)* or, sometimes, a *Request for Proposals (RFP)*. The federal government and some other owners use the IFB when bidders must strictly conform to the drawings and specifications and the RFP when bidders may propose variations for the project. Both typically include the following:

- A description of the contract work
- The identity of the owner
- The place, date, and precise time of the bid opening
- The penal sum of the required bonds (bid bond, performance bond, and labor and material payment bond)^[2]
- A description of the drawings and specifications, their cost, and where they may be obtained
- The length of time after bid opening that bids will be deemed good (duration of bids)
- Rules regarding the withdrawal or modification of bids and late bids
- Information regarding any planned pre-bid conferences and pre-bid site inspections
- Particular requirements of law of which the owner wants bidders to be aware
- Any special instructions, other requirements, or other information that the owner wants to point out to bidders

In addition to the IFB or RFP, the contract documents may also contain a section called *Instructions to Bidders*. When used, this section is an adjunct to the instruction portion of the IFB or RFP. Sometimes all necessary instructions are contained within the IFB or RFP, and there is no separate Instructions to Bidders section. More logically, the Instructions to Bidders is a separate document, and the IFB or RFP contains all of the other necessary but noninstructional information that a bidder needs.

In every case, the contract documents contain the *Bid Form*. Bidders complete this document, sign, seal, and turn it in at the appointed place, prior to the deadline set for the submittal of bids. The fully executed Bid Form constitutes the “offer” element necessary for contract formation, discussed in Chapter 2. Note that the Bid Form must be completely filled out, signed, and sealed, all in accordance with the IFB or RFP and the Instructions to Bidders to constitute a responsive bid. The contents of the Bid Form usually include the following:

- *A definitive statement of the general terms and conditions of the offer.* This statement is normally unilaterally determined by the owner and is preprinted on the form.
- *The format of the commercial terms applying to the offer.* Again, this format is normally determined unilaterally by the owner either as a single lump sum total price or as a schedule of bid-item prices. In the first case, the bid form contains a single blank space in which the bidder is instructed to enter a single lump sum price for the entire project. In the second case, the form contains a numbered series of all bid items for the project, each consisting of a description of the work for discrete parts of the project and either blanks for unit prices and extensions against a preprinted quantity of work or a single blank for a lump sum price. The total bid in this case is the sum of the unit price extensions and lump sum prices. With either a single lump sum format or a schedule-of-bid-items format, the bidder fills in the blanks for defining the precise commercial terms of the bid.
- *Supplementary information that the owner may want to know about the bidder.* This usually consists of information about the bidder’s financial strength and past experience.
- *Additional information for federal bids.* The bid form for federal contracts contains a number of “Certifications and Representations” in affidavit form, such as noncollusion and nonsegregated facilities affidavits, required to comply with federal law.
- *Affirmative action requirements for public projects.* Bid Forms for public projects usually require written goals and timetables for meeting the requirements of equal opportunity legislation and minority business enterprise/women business enterprise requirements.
- *Bid security.* Finally, the Bid Form must contain the required bid security, usually in the form of a bid bond issued by an approved surety. Sometimes, a certified check must be presented for the bid security.

Oddly enough, private sector bids often require much more supplementary information on the Bid Form than do public sector bids. And, among public projects, Bid Forms for federal contracts usually require less supplementary information than the average.

A final interesting point concerning bidding documents is that the AIA approach excludes the bidding documents from the contract. Article 1 of AIA A-201, General Conditions of the Contract for Construction, states:

The Contract Documents do not include Bidding Documents such as the Advertisement or Invitation to Bid, the Instructions to Bidders, sample forms, the Contractor's Bid or portions of Addenda relating to any of these, or any other documents, unless specifically enumerated in the Owner–Contractor Agreement.

Why would the AIA wish to exclude the bidding documents from the contract? The rationale seems to be that the eventual contract is considered to be the end result of a negotiation, not the result of a binding firm-price bid. The bid is regarded as merely the starting point for the ensuing negotiation. Most other forms-of-contract include the bidding documents as part of the contract.

General Conditions of Contract

The second section of the documents that normally comprise the contract is the *General Conditions of Contract*, often referred to simply as the **General Conditions**, or sometimes, **General Provisions**. Here are found very definitive statements, clause by clause, of all general terms and conditions that govern the performance of the contract work. In the case of the federal government and other agencies that frequently contract for construction work, the general concept of this section of the documents is to include all clauses that will remain the same, contract after contract, changing very infrequently. Many of these standard clauses in federal contracts pertain to the requirements of the Federal Acquisition Regulations, which by law must be included in every federal construction contract.

Supplementary Conditions of Contract

In addition to the General Conditions or General Provisions, most construction contracts contain a section called **Supplementary Conditions** or *Special Conditions*. The idea of this section is to include clauses dealing with general matters that apply to the instant contract only—that is, those that are either site-specific or in some other way apply only to the specific contract. Such matters might better be called “project-specific” matters. Some forms of contract do not have a Special (or Supplementary) Conditions section. Instead they include all general matters, whether standard or project-specific, in the General Provisions section. It is also common to include general project-specific matters in Division 1 of the Specifications section. In the Uniform Construction Index (UCI) form of technical specifications, which is widely used, Division 1 is titled “General Requirements.” Thus, to be entirely sure that nothing of a general nature has been overlooked in a particular case, it is necessary to carefully read the General Conditions, the Supplementary Conditions (if included), and Division 1 of the Technical Specifications.

One important area of the Supplementary Conditions for contracts where federal funds are involved is the Davis-Bacon Wage Determination originally discussed in Chapter 1. By federal law, wages paid the workers on any such project must be at least as high as listed in the Davis-Bacon Determination for each trade classification involved in the work. Even where federal funds are not required, many states require that prevailing wages be paid on public work. These rates are set by a commissioner on a project-to-project basis at a level he or she has determined through investigation to equal the “prevailing” wage for each classification of work in the locality of the project. This determination is obviously significant to contractors interested in submitting a bid. For example, if the determination is set at low “open-shop” rates, potential bidding contractors, bound by union labor agreements that require payment of higher rates, know that they are competing at a disadvantage and might be well advised not to bid at all. On the other hand, if the Davis-Bacon commissioner has determined the “prevailing” rates to be union labor agreement rates, all bidders are on a more equal footing. Open-shop or merit-shop contractors will have to pay the same rates as union contractors.

Specifications

The technical requirements for each division of work in the contract will be completely detailed in that section of the contract document called the **Specifications**. The format usually conforms to the Uniform Construction Index, which is understood by virtually every segment of the industry. Depending on size of contract, the Specifications can be voluminous. It is necessary that completely definitive requirements be carefully stated so that both parties to the contract have a mutual understanding of the precise technical standards the project work must meet.

Drawings

The next important section of the contract documents is the **Drawings**, which complement the Specifications. The Drawings must be sufficiently complete to adequately show exactly what is to be built. Certain features of the work may be shown in fairly general terms, with the requirement stated that the contractor must prepare detailed shop drawings that conform to and augment the general contract drawings. These must be submitted to the owner or the owner's engineer for approval prior to fabrication of the material covered by the shop drawings. For example, a contractor may supply detailed bar-bending schedules and placing drawings for

reinforcing steel and structural steel fabrication and erection drawings, including the connections. However, the basic contract drawings advertised for fixed-price bids must be sufficiently clear and accurate so that, if contractors carefully conform to them, a satisfactorily constructed product will result. If either the Drawings or Specifications do not meet this standard, the owner may incur severe liability under the Spearin Doctrine, which is discussed in Chapter 13.

Reports of Investigations of Physical Conditions

An additional and final section that may or may not be included as an integral part of the contract documents consists of various **reports of investigations of physical conditions** at the project site. These reports often concern geotechnical aspects of subsurface soil or rock conditions. They usually appear in the form of written evaluations and soil boring logs describing subsurface conditions. Other examples are weather records and, in the case of projects on or near streams and rivers, stream flow hydrographs. These reports are probably the more common examples of this type of information, but basically any included information describing physical conditions at the site falls into this category. A more detailed discussion of these kinds of reports and whether or not they are considered to be part of the contract is included in Chapter 5.

Conclusion

This chapter focused on the format and the general contents of the major component sections of prime contracts between owners and general contractors for the performance of construction work. The prominent forms-of-contract commonly used today were also briefly discussed.

Chapter 5 will show why contractors need to understand the nature of the potential contract before they commit to any particular construction project. Also, the details of the critical or “red flag” clauses contained in such contracts will also be analyzed from the point of view of the bidding contractor.

Questions and Problems

1. What is the historic, traditional form of contract upon which the present-day construction industry is based? What are the seven forms of contract discussed in this chapter? Why might a one-of-a-kind contract cause later trouble?
2. What major categories could you expect to find in the documents particularly related to bidding for a typical competitively bid fixed-price contract and what type of information or requirements are contained in each? Would every set of contract documents be likely to contain a General Conditions section? A Supplementary or Special Conditions section? In what three possible places in a set of typical contract documents would you look to be certain that all matters of general importance (other than technical matters and details on the drawings) were examined and noted? Which document part defines the offer element necessary for contract formation?
3. Why is the Davis-Bacon Determination important in a set of contract documents? Where would you expect to find it? Would documents for every project be expected to contain a Davis-Bacon Determination? If not, in which category of projects would you expect to find it?
4. What is the attitude concerning bidding documents held by the AIA? Do most other forms of contract reflect the AIA attitude? Questions 5 and 6 assume that the reader has access to a set of typical federal contract documents for an actual project and to AIA Document A-201 (General Conditions of Contract).
5. With respect to the federal contract, determine the following and cite the section of the documents from which you obtained the answer (place the appropriate abbreviation from the following list in parentheses at the end of each answer):
[table id=1 /]
 - a. What is the date and time of bid opening?
 - b. What is the penal sum of the required performance bond?
 - c. Will there be a pre-bid conference?
 - d. What is the number of days that bids must be held open for acceptance?
 - e. Do bidders have to state whether they are a small business concern?
 - f. Do bidders have to certify that they do not maintain segregated facilities?
 - g. How many milestone completion dates are there?
 - h. What is the amount of liquidated damages for each day that each milestone is late?
 - i. Is there a clause pertaining to suspension of work?
 - j. Does the government have the right to occupy a completed part of the work?
 - k. Is there a clause dealing with variations in work quantities?
 - l. What is the date of the Davis-Bacon Determination?

- m. How long does the contractor have to perform the entire project?
 - n. How many bid items are there?
 - o. Is there a clause pertaining to changes in the work?
 - p. Is there a clause dealing with differing site conditions?
 - q. How often can the contractor expect to receive progress payments?
 - r. Is there a clause pertaining to default terminations and excusable delay?
 - s. Is there a clause for termination of the contract for the convenience of the government?
 - t. Is there a clause concerning contract disputes?
6. With respect to the AIA document A-201 (General Conditions of Contract), determine the following and indicate where in the document you obtained the answer. At the end of each answer, cite the source in the document by writing in parentheses the article and subarticle.
- a. Is the owner empowered to stop the work?
 - b. Is the owner empowered to terminate the contract?
 - c. Does this form of contract contemplate or imply a fixed time for completion of the work?
 - d. Is the contractor required to indemnify and hold harmless the owner?
 - e. Does this contract contemplate changes in the work?
 - f. Does this contract provide relief for the contractor's failure to perform due to conditions beyond the contractor's control?
 - g. Does this contract provide that either the owner or contractor can make a claim against the other for damages suffered?
 - h. Is the contractor likely to be liable to the owner for damages caused by late completion?
 - i. Does the contract contain the equivalent of the differing site conditions clause found in a federal contract?
 - j. Is the contractor required to carry insurance?
 - k. Does the contract imply that there could be payments made to the contractor by the owner in the event of owner-caused delays?
 - l. Does the contract provide for progress payments?

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- 1. See Sweet, Justin, *Sweet on Construction Industry Contracts: Major AIA Documents* (New York: John Wiley & Sons, 1987). ↩
 - 2. Bond requirements for fixed-price, competitively bid contracts are discussed in Chapter 9. ↩
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