

**252.244-7XXX Contractor purchasing system administration.**

As prescribed in 244.305-7X, insert the following clause:

**Contractor Purchasing System Administration (Date)**

(a) *Definitions.* As used in this clause—  
*Deficiency* means a failure to maintain any element of an acceptable purchasing system.

*Purchasing system* means the Contractor's system or systems for purchasing and subcontracting including make or buy decisions, the selection of vendors, analysis of quoted prices, negotiation of prices with vendors, placing and administering of orders, and expediting delivery of materials. Purchasing system includes, but is not limited to—

(1) Internal audits or management reviews, training, and policies and procedures for the purchasing department to ensure the integrity of the purchasing system;

(2) Policies and procedures to assure purchase orders and subcontracts contain all flow down clauses, including terms and conditions required by the prime contract and any clauses required to carry out the requirements of the prime contract;

(3) An organizational and administrative structure that ensures effective and efficient procurement of required quality materials and parts at the most economical cost from responsible and reliable sources;

(4) Selection processes to ensure the most responsive and responsible sources for furnishing required quality parts and materials and to promote competitive sourcing among dependable suppliers so that purchases are reasonably priced and from sources that meet contractor quality requirements;

(5) Performance of price or cost analysis on purchasing actions; and

(6) Procedures to ensure that proper types of subcontracts are selected and that there are controls over subcontracting, including oversight and surveillance of subcontracted effort.

(b) *General.* The Contractor shall establish and maintain an acceptable purchasing system. Failure to maintain an acceptable purchasing system, as defined in this clause, may result in disapproval of the system by the ACO and/or withholding of payments.

(c) *System requirements.* (1) Have an adequate system description including policies, procedures, and operating instructions that comply with the FAR and DFARS.

(2) Ensure that all applicable purchase orders and subcontracts contain all flow down clauses, including terms and conditions and any other clauses needed to carry out the requirements of the prime contract.

(3) Maintain an organization plan that establishes clear lines of authority and responsibility.

(4) Purchase orders are based on authorized requisitions and include complete history files.

(5) Establish and maintain adequate documentation to provide a complete and accurate history of purchase transactions to support vendors selected and prices paid.

(6) Apply a consistent make or buy policy that is in the best interest of the Government.

(7) Use competitive sourcing to the maximum extent practicable and ensure debarred or suspended contractors are properly excluded from contract award.

(8) Evaluate price, quality, delivery, technical capabilities, and financial capabilities of competing vendors.

(9) Require management level justification and cost/price analysis as applicable for any sole or single source award.

(10) Perform appropriate cost or price analysis and technical evaluation for each subcontractor and supplier proposal or quote.

(11) Document negotiations in accordance with FAR 15.406-3.

(12) Seek, take, and document appropriate purchase discounts, including cash discounts, trade discounts, quantity discounts, rebates, freight allowances, and company-wide volume discounts.

(13) Ensure proper type of contract selection and prohibit issuance of cost-plus-a-percentage-of-cost subcontracts.

(14) Maintain subcontract surveillance to ensure timely delivery of an acceptable product and procedures to notify the Government of potential subcontract problems that may impact delivery, quantity, or price.

(15) Document and justify reasons for subcontract changes that affect cost or price.

(16) Notify the Government of the award of an auditable subcontract and perform adequate audits of those subcontracts.

(17) Enforce adequate policies on conflict of interest, gifts, and gratuities, including the requirements of the Anti-Kickback Act.

(d) *System deficiencies.* (1) The ACO will provide an initial notification to the Contractor of system deficiencies. The initial notification will describe the deficiency in sufficient detail to allow the contractor to understand what actions are necessary to correct the deficiencies.

(2) The Contractor shall respond within 30 days to a written initial notification from the ACO that identifies deficiencies in the Contractor's purchasing system. If the Contractor disagrees with the initial notification, the Contractor shall state in writing its rationale for disagreeing.

(3) The ACO will evaluate the Contractor's response and notify the Contractor of the determination concerning remaining deficiencies, the adequacy of any proposed or completed corrective action, and system disapproval, if applicable.

(e) *Withholding payments.* If the ACO determines the Contractor's purchasing system contains one or more deficiencies, and the contract includes the clause at 252.242-7XXX, Business Systems, the ACO will withhold payments in accordance with that clause.

(End of clause)

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**BILLING CODE 5001-08-P**

**DEPARTMENT OF DEFENSE****Department of the Army****48 CFR Parts 5132, 5136, and 5152**

RIN 0710-AA69

**Continuing Contract for Civil Works Project Managed by the United States Army Corps of Engineers Clauses**

**AGENCY:** U.S. Army Corps of Engineers, Department of the Army, DoD.

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** The U.S. Army Corps of Engineers (USACE) is proposing an interim Continuing Contracts clause for use on specifically authorized Civil Works projects only. This proposal is in response to a recurring statutory provision that requires a change to the clause USACE had previously used.

**DATES:** Comments must be received by March 16, 2010.

**ADDRESSES:** You may submit comments, identified by docket number COE-2009-0065, by any of the following methods:

*Federal eRulemaking Portal:* <http://www.regulations.gov>. Follow the instructions for submitting comments.

*E-mail:*  
[contract.policy@usace.army.mil](mailto:contract.policy@usace.army.mil). Include the docket number, COE-2009-0065, in the subject line of the message.

*Mail:* U.S. Army Corps of Engineers, Attn: CECT-P (Robin A. Baldwin), 441 G Street, NW., Washington, DC 20314-1000.

*Hand Delivery/Courier:* Due to security requirements, we cannot receive comments by hand delivery or courier.

*Instructions:* Direct your comments to docket number COE-2009-0065. All comments received will be included in the public docket without change and may be made available on-line at <http://www.regulations.gov>, including any personal information provided, unless the commenter indicates that the comments includes information claimed to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Do not submit information that you consider to be CBI, or otherwise protected, through [www.regulations.gov](http://www.regulations.gov) or e-mail. The [www.regulations.gov](http://www.regulations.gov) Web site is an anonymous access system, which means we will not know your identity or contact information unless you provide it in the body of your comment. If you send an e-mail directly to the U.S. Army Corps of Engineers without going through <http://www.regulations.gov>, your

e-mail address will be automatically captured and included as part of the comment that is placed in the public docket and made available on the Internet. If you submit an electronic comment, we recommend that you include your name and other contract information in the body of your comment and with any disk or CD-ROM you submit. If we cannot read your comment because of technical difficulties and cannot contact you for clarification, we may not be able to consider your comment. Electronic comments should avoid the use of any special characters, any form of encryption, and be free of any defects or viruses.

*Docket:* For access to the docket to read background documents or comments received, go to <http://www.regulations.gov>. All documents in the docket are listed. Although listed in the index, some information is not publicly available, such as CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form.

**FOR FURTHER INFORMATION CONTACT:** Ms. Robin A. Baldwin, Headquarters U.S. Army Corps of Engineers, Directorate of Contracting, Policy Division, 441 G Street, Washington, DC at 202-761-8645.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

The new funding clause for civil works projects includes alternate language and is designed to give USACE officials options for funding contracts spanning more than one fiscal year after the enactment of statutory restrictions to the Corps' continuing contract authority. The new clause allows Congress more oversight over continuing contracts and better control over the rate at which funds are spent on projects. The end result is contracts that obligate funds in close alignment with prerogatives reflected in budget documents and appropriations acts. USACE has submitted a report to Congress on the overall effects, both positive and negative, of the statutory restriction.

Continuing contracts are authorized by Section 10 of the River and Harbor Act of 1922, 33 U.S.C. 621, which provides as follows: "Any public work on canals, rivers, and harbors adopted by Congress may be prosecuted by direct appropriations, by continuing contracts, or by both direct appropriations and continuing

contracts." The use of continuing contracts permitted large civil work projects, spanning more than one fiscal year, to be accomplished in a comprehensive manner, rather than through a series of yearly work units. Implementation of continuing contract was covered under Engineers Federal Acquisition Regulation Supplement (EFARS) Subpart 32.7—Contract Funding, and through the inclusion of either clause EFARS 52.232-5001, Continuing Contracts, or EFARS 52.232-5002, Continuing Contracts (Alternate).

The Energy and Water Development Appropriations Act of 2006 (06 E&WDA), Public Law 109-103, included provisions that restricted the Corps' authority to reprogram funds and award continuing contracts in Fiscal Year 2006. Section 108 of the 06 E&WDA prohibited the Corps from awarding or modifying an existing continuing contract when doing so would commit an amount in excess of the amount appropriated for that project pursuant to the 06 E&WDA, plus any amounts available from carryover or reprogramming. In light of Section 108 of the 06 E&WDA, USACE changed its implementation of continuing contracts, as well as the clauses it uses to award new continuing contracts that are not fully funded. The restriction in Section 108 has been carried forward into all E&WDAs, and USACE anticipates that Congress will continue to include that restriction in future Acts.

The existing continuing contract clause (EFARS 52.232-5001) permits the contractor to work beyond the amount reserved to the contract for a fiscal year. Doing so creates a legal liability to pay the contractor for such costs, even though—under the existing continuing contract clause—the Corps does not have to make the payments until the next fiscal year. Accordingly, because the clause permits contractors to commit the government in excess of the amount appropriated for that project plus available carryover and reprogramming, use of this clause runs a high risk of violating the new statutory restriction on continuing contracts.

In order to implement the USACE Civil Works program under the new continuing contract restrictions, USACE has drafted a new clause for inclusion in the AFARS. The basic clause, "5152.232-9000 Special Continuing Contract for Civil Works Project Managed by the United States Army Corps of Engineers," permits the Corps to award continuing contracts while only obligating the government's estimate of contractor earnings for the first fiscal year. This basic clause does

not permit the contractor to work beyond the amount reserved, and it also expressly requires the contractor to stop working when funds are exhausted. The alternate language, if appropriate, would limit the government's liability for termination costs to the amount reserved on the contract. In contrast, under the basic clause, the government is responsible for all costs pursuant to the termination for convenience clause regardless of the amount reserved on the contract.

Alternatives to using the new clause include fully funding contracts at award; structuring the work into segments that could be accomplished through options, using multiple fully-funded contracts over multiple years, or using the clause at DFARS 252.232-7007 to incrementally fund a contract. Each of these alternatives is still a viable alternative and the contracting officer must choose which acquisition strategy best suits the requirement. That determination shall be based on an analysis of the possible contracting options with the intent that the Special Continuing Contract for Civil Works Project Managed by the United States Army Corps of Engineers clause be used as a least preferred method.

In light of the legal restrictions on continuing contracts, USACE had to change its implementation of existing continuing contracts, as well as the terms it uses to award new continuing contracts. USACE shall no longer permit the contractor to work beyond the amount reserved in the contract without first reprogramming sufficient funds to cover the contractor's earnings through the end of the fiscal year. The new clause should be used where the true Continuing Contract clause (EFARS 52.232-5001) might have been used in the past and alternative contract options are not viable.

**B. Regulatory Flexibility Act**

This proposed rule may have a significant economic impact upon a substantial number of small entities. The clause differs from the true continuing contract clause (EFARS 52.232-5001) in that they no longer permit the contractor to work beyond the amount reserved to the contract. This change may affect a contractor's ability to schedule work and equipment effectively. Pursuant to authority contained in Section 608(a) of the Act (5 U.S.C. 608(a)) a determination has been made that circumstances require delay in preparation of an initial Regulatory Flexibility Act analysis to bring the USACE continuing contract into compliance with existing statutory authority. Within approximately thirty

days an analysis will be prepared and forwarded to the Chief Counsel for Advocacy of the Small Business Administration. Comments from small entities concerning the affected AFARS Subpart 5152 will be considered in accordance with Section 610 of the Act. Such comments shall be submitted separately and cite the AFARS Proposed Rule on Continuing Contract for Civil Works Project in the correspondence.

### C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed rule does not impose any new information collection burden that requires the approval of the Office of Management and Budget under 44 U.S.C. 3501, et seq.

### List of Subjects in 48 CFR Parts 5132, 5136, and 5152

Government procurement.

Dated: January 7, 2010.

Approved By:

**Robin A. Baldwin,**

*Chief, Contracting Policy Division.*

For the reasons stated in the preamble, the Corps is proposing to amend 48 CFR Chapter 51 as set forth below:

1. Add part 5132 to read as follows:

### PART 5132—CONTRACT FINANCING

#### Subpart 5132.7—Contract Funding

Sec.

5132.703–90 Civil Works Project Appropriations Act Restriction.

5132.705 Contract Clauses [Reserved].

5132.705–90 Clause for Limitation of the Government's Obligation for Civil Works Projects.

**Authority:** 33 U.S.C. 621, 10 U.S.C. 2202, DOD Directive 5000.35, FAR 1.301 and DOD FAR Supplement 201.3.

#### Subpart 5132.7—Contract Funding

##### 5132.703–90 Civil Works Project Appropriations Act Restriction.

(a) The U.S. Army Corps of Engineers (USACE) is authorized by 33 U.S.C. 621 to prosecute its specifically authorized civil works projects on canals, rivers and harbors by direct appropriations or by continuing contract, or both. A continuing contract permits USACE to obligate the government to the entire contract amount at award and fund the contract incrementally until completion.

##### 5132.705 Contract Clauses [Reserved].

##### 5132.705–90 Clause for Limitation of the Government's Obligation for Civil Works Projects.

(a) The clause at 5152.232–9000, Special Continuing Contract for Civil

Works Project Managed by the United States Army Corps of Engineers, may be used in solicitations and contracts for civil works water resource projects that have been specifically adopted by Congress in authorizing legislation and for which future fiscal year funding is provided in the budget. This clause shall be used for all civil works projects when funds are appropriated for the project from either the operation and maintenance (O&M) account in the Energy and Water Development Appropriations Act (E&WDAA) or the O&M portion of the Mississippi River and Tributaries account in the E&WDAA and sufficient funds are not available to complete the contract. The contracting officer must insert the sum being reserved in the clause and reserve this amount stated in subsection (a) of the clause at contract award and modify the contract each fiscal year to reflect the amount reserved. This clause is required through 30 September 2010 in accordance with Section 103 of the Energy and Water Development Appropriations Act, 2010, Public Law 111–85. If future appropriations acts continue in the same manner, the requirement will be extended as appropriate beyond fiscal year 2010.

(b) The Alternate language for clause 5152.232–9000 may be used in solicitations and contracts for civil works water resource projects that have been specifically adopted by Congress in authorizing legislation but for which future fiscal year funding is not provided in the budget or when use of the 5152.232–9000 clause could be used. The contracting officer must insert the sum being reserved in the clause and reserve this amount stated in subsection (a) of the clause at contract award and modify the contract each fiscal year to reflect the amount reserved. Section 103 of the Energy and Water Development Appropriations Act, 2010, Public Law 111–85. If future appropriations acts continue in the same manner, the requirement will be extended as appropriate beyond fiscal year 2010.

2. Add part 5136 to read as follows:

### PART 5136—SPECIAL ASPECTS OF CONTRACTING FOR CONSTRUCTION

#### Subpart 5136.290—Civil Works Construction Contracts

Sec.

5136.290–1 Policy.

5136.290–2 Definition.

**Authority:** 33 U.S.C. 621, 10 U.S.C. 2202, DOD Directive 5000.35, FAR 1.301 and DOD FAR Supplement 201.3.

### Subpart 5136.290—Civil Works Construction Contracts

#### 5136.290–1 Policy.

The Secretary of the Army, acting through the Chief of Engineers, is authorized by 33 U.S.C. 621 to carry out projects for improvement of rivers and harbors (other than surveys, estimates, and gaugings) by contract or otherwise, in the manner most economical and advantageous to the United States. The U.S. Army Corps of Engineers (USACE) is the only contracting organization authorized to contract for civil works construction projects. See AFARS Part 5132.703–90.

#### 5136.290–2 Definition.

As used in this subpart—

“Civil works” means authorized civil functions of the Department of the Army pertaining to rivers and harbors, flood control, shore protection and storm damage reduction, aquatic ecosystem restoration, and related purposes.

### PART 5152—TEXTS AND PROVISIONS OF CLAUSES

3. The authority citation for part 5152 is revised to read as follows:

**Authority:** 10 U.S.C. 2202, 33 U.S.C. 621, DoD Directive 5000.35, FAR 1.301, DoD FAR Supplement 201.301, and DOD FAR Supplement 201.3.

4. Add 51.232–9000 to read as follows:

#### 5152.232–9000 Special Continuing Contract for Civil Works Project Managed by the United States Army Corps of Engineers.

As prescribed in 5132.290–1 and 5132.705–90(a), use the following clause:

(a) Funds are not available at the inception of this contract to cover the entire contract price. The liability of the Government is limited by this clause notwithstanding any contrary provision of the “Payments to Contractor” clause or any other clause of this contract, except the Termination for Convenience clause. The sum of \$ \_\_\_\_\_ [Each fiscal year of contract execution, Contracting Officer shall insert the specific dollar amount that is reserved for this contract and available for payment to the contractor during the current fiscal year. The Contracting Officer shall modify that amount to reflect any funds added to or subtracted from the contract during a current fiscal year.] has been reserved for this contract and is available for payment to the Contractor during the current fiscal year. It is expected that Congress will make appropriations for future fiscal years from which additional funds,

together with funds provided by one or more non-federal project sponsors, will be reserved for this contract.

(b) Failure to make payments in excess of the amount currently reserved, or that may be reserved from time to time, shall not be considered a breach of contract and shall not entitle the Contractor to a price adjustment under the terms of this contract.

(c) The Government may at any time reserve additional funds for payments under the contract if there are funds available for such purpose. The Contracting Officer will promptly notify the Contractor of any additional funds reserved for the contract by issuing an administrative modification to the contract.

(d) If earnings will be such that funds reserved for the contract will be exhausted before the end of any fiscal year, the Contractor shall give written notice to the Contracting Officer of the estimated date of exhaustion and the amount of additional funds which will be needed to meet payments due or to become due under the contract during that fiscal year. This notice shall be given not less than 120 days prior to the estimated date of exhaustion. Unless informed in writing by the Contracting Officer that additional funds have been reserved for payments under the contract, the Contractor shall stop work upon the exhaustion of funds.

(e) No payments will be made after exhaustion of funds except to the extent that additional funds are reserved for the contract.

(f) Any suspension, delay, or interruption of work arising from exhaustion or anticipated exhaustion of funds shall not constitute a breach of this contract and shall not entitle the Contractor to any price adjustment under the "Suspension of Work" clause or in any other manner under this contract.

(g) An equitable adjustment in performance time shall be made for any increase in the time required for performance of any part of the work arising from exhaustion of funds or the reasonable anticipation of exhaustion of funds.

(h) If, upon the expiration of one-hundred (100) days after the beginning of the fiscal year following an exhaustion of funds, the Government has failed to reserve additional funds for this contract sufficient to cover the Government's estimate of funding required for the first quarter of that fiscal year, the Contractor, by written notice delivered to the Contracting Officer at any time before such additional funds are reserved, may elect to treat his right to proceed with the

work as having been terminated. Such a termination shall be considered a termination for the convenience of the Government.

(i) If at any time it becomes apparent that the funds reserved for any fiscal year are in excess of the funds required to meet all payments due or to become due the Contractor because of work performed and to be performed under the contract during the fiscal year, the Government reserves the right, after notice to the Contractor, to reduce said reservation by the amount of such excess.

(j) The term "Reservation" means monies that have been set aside and made available for payments under this contract. Reservations of funds shall be made in writing via an administrative modification issued by the Contracting Officer.

#### Alternate I

If future funding for the specifically authorized civil works project for which use of the continuing contract is contemplated is not included in the following year's President's Budget, substitute the following paragraphs (a) and (h) for paragraphs (a) and (h) of the basic clause:

(a) Funds are not available at the inception of this contract to cover the entire contract price. The liability of the Government is limited by this clause notwithstanding any contrary provision of the "Payments to Contractor" clause or any other clause of this contract. The sum of \$ \_\_\_\_\_ [Each fiscal year of contract execution, Contracting Officer shall insert the specific dollar amount that is reserved for this contract and available for payment to the contractor during the current fiscal year. The Contracting Officer shall modify that amount to reflect any funds added to or subtracted from the contract during a current fiscal year.] has been reserved for this contract and is available for payment to the Contractor during the current fiscal year. It is expected that Congress will make appropriations for future fiscal years from which additional funds, together with funds provided by one or more non-federal project sponsors, will be reserved for this contract.

(h) If, upon the expiration of one-hundred (100) days after the beginning of the fiscal year following an exhaustion of funds, the Government has failed to reserve additional funds for this contract sufficient to cover the Government's estimate of funding required for the first quarter of that fiscal year, the Contractor, by written notice delivered to the Contracting Officer at any time before such

additional funds are reserved, may elect to treat his right to proceed with the work as having been terminated. The Government will not be obligated in any event to reimburse the Contractor for any costs incurred after the exhaustion of funds regardless of anything to the contrary in the clause entitled "Termination for Convenience of the Government."

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## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

#### 49 CFR Part 234

[Docket No. FRA-2009-0032, Notice No. 4]

RIN 2130-AC20

#### State Highway-Rail Grade Crossing Action Plans

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Notice of public hearing and extension of comment period.

**SUMMARY:** By notice of proposed rulemaking (NPRM) published on November 13, 2009 (74 FR 58589), FRA proposed a rule to require the ten States with the most highway-rail grade crossing collisions, on average, over the past three years, to develop State highway-rail grade crossing action plans. This document announces a public hearing to provide interested parties the opportunity to comment on the NPRM and announces a fourteen (14) day extension of the comment period, which closed December 14, 2009, to commence on the date of the public hearing. The extension provides interested parties the opportunity to comment on the NPRM and to respond to matters that arise at the public hearing related to the NPRM.

**DATES:** (1) *Public Hearing:* A public hearing will be held on the date and at the location listed below to provide interested parties the opportunity to comment on the proposed rule contained in the NPRM. A fourteen (14) day extension of the comment period will commence on the date of the hearing. The date of the public hearing is as follows: Monday, February 22, 2010, at 9:30 a.m. in Washington, DC.

(2) *Extension of Comment Period:* The comment period will reopen Monday, February 22, 2010 and written comments must be received by Monday, March 8, 2010. Comments received after that date will be considered to the