



**US Army Corps
of Engineers®**

ENGINEERING AND CONSTRUCTION BULLETIN

No. 2005-7

Issuing Office: CECW-E

Issued: 19 May, 2005

Subject: Use of Stipends in Military Construction-Funded Two-Phase Design Build Projects

Applicability: Guidance

1. Purpose. This bulletin provides guidance for the appropriate use of stipends on Military Construction projects procured using two-phase design-build selection procedures.

2. Reference. HQUSACE Chief Counsel's memorandum, subject as above, dated 30 September, 2004. (Enclosure)

3. Background.

a. It is not unusual in the private sector for an owner to pay a monetary "stipend" to encourage participation by highly qualified design-build offerors. Although stipends may offset some costs for proposal preparation they are not intended to pay for the total cost to compete.

b. Payment of stipends within the USACE has been on a very limited basis and there has been no corporate guidance issued on the subject. Stipend payment has almost always been pursuant to a customer request in the interest of improving the number of quality proposal submissions. Per reference, the Chief Counsel has determined it is legal to use stipends to promote or maintain a reasonable level of competition to ensure price competition and program success. Stipend payments will not be made on a routine basis. They are only to be used when determined to be a good business investment to significantly enhance the quality of competitive proposals. There are no separate budgeted sources for stipend payments so use of stipends will be viewed in the context of each particular program's overall yearly budget.

c. The two-phase design-build selection procedures in FAR 36.3 were developed, in part, to mitigate overall costs to the industry to compete on design-build solicitations by reducing the number of offerors having to prepare technical proposals. These Phase 2 proposals usually involve substantial design effort and those few Phase 2 offerors may still expend significant proposal preparation costs and not receive a contract award. Accumulation of these "sunk" costs over time discourages many highly qualified firms (particularly the smaller ones) from competing on our design-build acquisitions.

d. As the use of design-build has increased in USACE, the industry and some customers have expressed a desire to use stipends as a means of encouraging better and more innovative solutions. Generally speaking, stipends are more appropriate for use on larger, more complex or unique facilities with special features that would entail significant up front proposal preparation

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costs. Payment of stipends can encourage participation on design-build projects where creative design solutions are sought as part of well developed technical proposal submissions.

4. The decision to pay a stipend to unsuccessful Phase 2 offerors is made early in the project's acquisition cycle and documented in the project management plan. The optimum time to include stipend discussion and justification is during the planning charrette process where project acquisition strategy is first deliberated. The decision needs to be included in the formal acquisition plan when such a plan is required by EFARS Part 7. Formal acquisition plans are not generally required for single project design-build acquisitions unless specifically requested by HQUSACE.

5. Written approval from the project's Planning and Design (P&D) funds manager is required to pay a stipend. The following information addresses some of the major funds managers for various P&D accounts. For others not listed, a case-by-case approach must be used to assure that the appropriate account manager endorsement is secured prior to payment of the stipend.

ACCOUNT

AUTHORITY

Military Construction, Army
And Army Family Housing

HQUSACE, Programs Integration Division (PID)

Military Construction, Air Force

Air Force Major Command

Military Construction, Army Reserve

Office of the Chief, Army Reserve

Military Construction, Navy

Naval Facilities Engineering Command

Military Construction, Defense
(HQUSACE managed - Energy Conservation
Investment Program; TRICARE Management
Activity; Chemical Demilitarization)

HQUSACE, PID

Military Construction, Defense
(Customer managed – Defense Logistics
Agency; Defense Finance & Accounting
Center; DoD Dependents Education
Activity; Defense Intelligence Agency;
National Security Agency; Washington
Headquarters Service)

Specific Customer Agency

Requests sent to the HQUSACE Programs Integration Division (PID) for approval will be endorsed by the appropriate USACE Regional Business Center to insure consistent policy. For Army and Defense programs managed by HQUSACE early annual planning on a regional basis should be accomplished to allow establishment of project priorities for stipends consideration to

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be included in the P&D Management Plans (P&DMPs). For all customer managed accounts, an information copy of the request and customer approval will be provided to the HQUSACE PID.

6. Payment of a stipend is contingent on the following.

- a. The project is funded from a military construction appropriation.
- b. Two-phase design-build selection procedures are used.
- c. A written determination that competition among well qualified offerors is uniquely constrained (see attached legal opinion for sample determinations memo).
- d. Approval by the customer or the program's funds manager.
- e. The unsuccessful Phase 2 offeror's technical proposal must meet the solicitation requirements.
- f. Stipends are to be paid from the military construction planning and design (P&D) account.
- g. Stipend amounts are to be the same for all qualifying unsuccessful Phase 2 offerors.
- h. Stipends are not to be used to acquire ownership or rights to use unsuccessful proposals.

7. Stipends will not to be used as justification to require overly elaborate proposals from design-build offerors. Tailor the Phase 2 proposal submission requirements to the specific project. Base the required level of technical design information on what is necessary to establish a clear understanding of the offeror's proposed approach to meet solicitation requirements so that the Government can determine which design-build contractor offers the best value for contract award. Keep proposal submission requirements to the minimum necessary.

8. Stipends may be paid by making multiple awards under the design-build solicitation or by purchase orders when the stipend amount does not exceed the simplified acquisition threshold.

9. Paragraph 6. of the enclosure includes sample contract language to use in solicitations where payment of a stipend will be made. Adapt as appropriate to the specific project situation.

10. More guidelines are provided in paragraph 5. of the enclosed legal opinion.

11. This bulletin was coordinated with the Office of the Chief Counsel and the Office of the Principal Assistant Responsible for Contracting. Point of contact for this bulletin is Mark Grammer, CECW-SAD, 202-761-4108.

Enclosure

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Subject: **Use of Stipends in Military Construction-Funded Two-Phase Design Build Projects**



DONALD L. BASHAM, P.E.
Chief, Engineering and Construction Division
Directorate of Civil Works



J. JOSEPH TYLER, P.E.
Chief, Programs Management Division
Directorate of Military Programs



DEPARTMENT OF THE ARMY
U.S. Army Corps of Engineers
WASHINGTON, D.C. 20314-1000

REPLY TO
ATTENTION OF:

80 SEP 2004

CECC-C

MEMORANDUM FOR ALL MAJOR SUBORDINATE COMMAND, DISTRICT
COMMAND, FIELD OPERATING ACTIVITY & LABORATORY COUNSELS

SUBJECT: Use of Stipends in Military Construction-Funded Two-Phase Design Build
Projects.

1. References:

- a. CEHNC-DE Memorandum dated 28 March 2001, subject: National Missile
Defense/X-Band Radar-Stipend Payment (Enclosure 1).
- b. CEMP-M/CERM-P Memorandum dated 26 March 2003, subject: Clarification of
USACE Policy on Planning and Design, Construction Supervision and Administration
(S&A) and Post-Award Engineering and Design Services (DDC).
- c. General Counsel, U.S. General Accounting Office, Principles of Federal
Appropriations Law (3rd ed. 2004).
- d. Department of Defense Financial Management Regulations, Vol. 3.
- e. The Purpose Statute, 31 U.S.C. 1301.

2. Background and Purpose: In recent months, I have received a number of inquiries regarding the U.S. Army Corps of Engineers' (USACE) authority to provide payment to unsuccessful offerors in design-build construction procurements. This payment is referred to as a stipend. Industry groups representing the designer, constructor, and design-builder communities favor stipends. Stipends are also supported by certain Air Force major commands. Within USACE, stipends have been paid on a very limited basis, despite the lack of an official agency policy. This legal opinion provides some recommendations regarding implementation of stipends, but does not alone establish USACE policy.

This memorandum provides general guidance to assist local counsel advising an acquisition team that perceives a stipend is needed for a given procurement. Applicability of this memorandum is limited to procurements using two-phase design-build procedures funded by military construction (MilCon) dollars.

3. Authority:

a. *The necessary expense rule:* The authority to pay a stipend to an unsuccessful offeror is a matter governed by the "necessary expense" rule. See General Counsel, U.S. General Accounting Office, Principles of Federal Appropriations Law 4-21 (3rd ed. 2004) [hereinafter GAO Red Book]. Under the U.S. Constitution, money can only be paid from the Treasury where Congress has made an appropriation. U.S. Const. art.1, sec. 9, cl. 7. The Purpose Statute (31 U.S.C. 1301) requires that funds only be used for the purpose for which they were appropriated. That Purpose Statute does not, however, require that every expenditure be spelled out in an appropriation act. GAO Red Book, 4-20. Rather, an agency has reasonable discretion in determining how to fulfill the objective of an appropriation. *Id.* This is the essence of the "necessary expense" rule.

For purposes of this discussion, the most important element of the tripartite necessary expense rule is that "the expenditure must bear a logical relationship to the appropriation sought to be charged it must make a direct contribution" to accomplishing an authorized agency function. *Id.* The question of an expenditure's link to the appropriation is largely case-specific and agencies are granted broad but reviewable discretion in this regard. *Id.* at 4-23.

Stipends are popular among industry members because they offset the high cost of submitting a complex proposal to a design-build solicitation. Reducing offerors' financial burdens is not, however, a satisfactory justification for an agency to make a stipend payment to unsuccessful offerors.¹

Within USACE, the only legal justification for payment of stipends is to promote or maintain a reasonable level of competition to ensure price competition and program success. This is not to say that stipends are justifiable for all procurements. In fact, stipends are to be used only in rare circumstances where competition is uniquely constrained. A Contracting Officer's decision to use a stipend shall be supported by an approved justification memorandum that clearly articulates the agency's concerns regarding limitations on competition.

In order to provide an equal opportunity for all prospective offerors to be eligible for a stipend, I suggest making the determination whether to use stipends as early in the acquisition process as possible. I recommend the Contracting Officer note his/her decision to use stipends in the acquisition plan, whether formal or informal, with the justification memorandum provided as an attachment. In those instances where a formal acquisition plan is required, the plan and attached justification memorandum should be submitted for approval to the Principal Assistant Responsible for Contracting,

¹ HQUSACE is separately exploring means of reducing the costs for offerors to submit design-build proposals by seeking legislation to employ a full qualifications-based selection process in design-build procurements.

in accordance with EFARS 7.102 (S-102). Pursuant to EFARS 7.103(h)(S-100)(d), the approval authority for a stipend justification memorandum submitted as an attachment to an informal acquisition plan should be established in local procedures. Where the determination of need for a stipend is made after the acquisition plan is approved, proper procedures shall be followed to seek approval at the appropriate level for a revised acquisition plan with the justification memorandum attached. EFARS 7.103(h)(S-100)(e). The approving authority also should secure the written consent of the project's appropriations manager before using a stipend.

b. The written necessary expense determination: Attached at Enclosure 1 is a model memorandum discussing the justifications for payment of a stipend to unsuccessful offerors. The factual circumstances in the Huntsville Center (HNC) memorandum are exceptional. HNC sought to pay a stipend to unsuccessful firms submitting proposals for a high visibility X-Band radar test bed construction project as an authorized expense of appropriated funds for the highly sensitive National Missile Defense program. In requesting approval to revise the acquisition plan to include a stipend, the memorandum describes the current level of competition as fragile, due to difficulty among the firms in finding specialized subcontractors and a lack of stability regarding the project's political future. HNC held meetings with interested offerors and learned firms were "concerned over costs already invested and the growing risks associated with their continued participation" in the program. By committing to pay a stipend to unsuccessful offerors, HNC hoped to "minimize economic risks sufficiently enough to induce the firms to remain in the competition." Thus, the argument supporting the necessity of the stipend was rooted entirely in the promotion of competition.²

4. Color of Money: The question of the type of funds to be used to pay the stipend should be part of the necessary expense analysis. The appropriate fund source for MilCon projects is planning and design (P&D) funds³ because the promotion of competition is a pre-award cost. P&D funds must be used for all pre-award activities up to and including the award of the construction contract. See Reference b.

5. Recommended Guidelines for Using Stipends:

a. Establishing the stipend value: The stipend amount is a matter within the acquisition team's discretion, but realistically will be driven by the amount of funds the customer chooses to make available. I recommend agency estimators approximate the cost to produce a design proposal that meets the minimum solicitation requirements and

² Ultimately, the solicitation for the X-Band Radar project was cancelled and the need for a stipend evaporated. HNC's justification memorandum remains a model, however, in terms of its factual discussion and legal analysis.

³ Planning and design functions are efforts necessary to develop preliminary project cost estimates and may include functions such as A-E services and construction design. DOD Financial Mgmt Reg., Vol. 3, Ch. 17, 17-2.

then use a percentage of the estimate to establish the stipend amount. The acquisition team should be conscious of the tendency to ask for more than is necessary in the proposal submissions, with the implication that the stipend amount will help defray offerors' costs.

Again I emphasize that a stipend is a means of growing and maintaining competition, not buying design or paying an offeror's proposal preparation costs. Therefore, acquisition team members should take caution to strike a balance in identifying an amount that will be sufficient to encourage offerors to submit responsive, competitive proposals, but not so much as to be seen as covering the offerors' proposal preparation costs.

I also further recommend that in the interest of fairness, all offerors receive the same stipend amount, rather than a scaled amount reflecting the proposal's evaluation. To do otherwise might expose the agency to a demand for some kind of due process to challenge the proposal evaluation by an offeror that otherwise would not have standing to file a bid protest. Moreover, a graduated scale of payments does not logically follow from the purpose of the stipend, which is to maintain competition not improve competitiveness.

b. *Proposal must otherwise comply with the solicitation terms:* A stipend should not be paid to an offeror whose proposal is not technically acceptable. The Request for Proposals (RFP) should put offerors on notice of this to protect against the firm that submits an incomplete proposal due to an alleged funding shortfall and then claims a stipend. I further recommend the RFP limit eligibility for stipends to Phase Two offerors only.

c. *Use of unsuccessful proposals:* It is not appropriate in my judgment, to use technical information from the stipend recipient's proposal to modify the contract after award or on future contracts. Design services may be purchased only pursuant to the qualifications based procedures of the Brooks Act.⁴ Taking ownership of unsuccessful proposal design ideas is not proper consideration for the stipend payment, because it would be an acquisition of design services outside the Brooks Act.

d. *How to obligate stipend funds:* The general rule regarding obligation of funds requires an agency to have a contractual relationship with a recipient of government funds. Thus, where stipends are approved, the RFP should state that the agency intends to make multiple contract awards: one to the successful offeror for the advertised work, and an unspecified number of awards to interested, unsuccessful offerors for a predetermined dollar amount. Purchase orders can be used where the stipend amount does not exceed the simplified acquisition threshold of \$100,000.

⁴ The Brooks Act requires the purchase of design services be conducted using full qualifications-based methods specified at 40 U.S.C. 542.

CECC-C

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6. I recommend the following sample contract language for use in Two Phase Design-Build construction contracts:

(a) This Solicitation provides for payment of a stipend to those unsuccessful Phase Two offerors not selected for award of the resulting contract.

(b) In order to promote increased competition, the Government offers to pay a stipend of \$_____ to certain Phase Two unsuccessful offerors, in consideration for preparation of a technical proposal, otherwise meeting the minimum requirements described herein.

(c) To be eligible for a stipend, the unsuccessful Phase Two offeror's technical proposal must be rated acceptable in all technical evaluation criteria, essentially meeting this solicitation's Government furnished criteria. Some insignificant, minor deficiencies or weaknesses may be allowed as long as the overall proposal meets the requirements for acceptability.

7. The policy question of whether a stipend should be approved for a particular project is to be determined on a case-by-case basis by the appropriate decision-maker. This memorandum is intended solely to provide a framework for the legal justification required before use of a stipend can be approved, as well as recommendations for policy-maker consideration. This legal opinion does not presume to address the myriad of details that must be considered by policy-makers in establishing a USACE stipend policy.

8. I have coordinated this legal opinion with the Engineering and Construction Community of Practice, Military Programs Program Integration Division, Procurement Law Practice Group and the Authorities & Fiscal Law Practice Group. The points of contact for this matter are Karen Thornton (202-761-8541) and Mark Grammer (202-761-4108). I express my deepest appreciation to Joel Hoffman and the late Laura Meeker for their considerable contributions on the stipend issue.

Enclosure


CRAIG R. SCHMAUDER
Acting Chief Counsel