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ENGINEERING AND CONSTRUCTION BULLETIN

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SUBJECT: Post-Construction Operations and Maintenance (PC O&M) Services

CATEGORY: Information and Guidance

1. References:

- a. Army Regulation (AR) 420-1, Army Facilities Management, 24 August 2012
- b. Defense Federal Acquisition Regulation Supplement (DFARS) Subpart 217.1, Multiyear Contracting
- c. Department of Defense Financial Management Regulation (DoD FMR) 7000.14-R
- d. Engineering Regulation (ER) 37-1-30, Financial Administration – Accounting and Reporting, Change 11, 28 September 2012
- e. ER 37-3-22, Financial Administration – Carryover Supervision and Administration (S&A), 1 December 2003
- f. ER 415-1-16, Fiscal Management, 30 September 1993
- g. ER 415-345-38, Transfer of Warranties, 30 June 2000
- h. Federal Acquisition Regulation (FAR) Part 7, Acquisition Planning
- i. FAR Part 37, Service Contracting
- j. FAR 52.246-21, Warranty of Construction
- k. Unified Facilities Criteria (UFC) 1-300-08, Criteria for Transfer and Acceptance of DoD Real Property, 16 April 2009 with Change 2, August 2011
- l. United States Code (USC) Title 10 Section 2306c, Multiyear contracts: acquisition of services
- m. USC Title 10 Section 2410a, Contracts for periods crossing fiscal years: severable service contracts; leases of real or personal property

2. **Purpose.** This ECB provides information on Post-Construction Operations and Maintenance (PC O&M) services for construction Contracts and provides guidance on the appropriate use of these services for USACE projects.

3. **Applicability.** This guidance applies to all construction projects executed by USACE.

4. Background.

a. ER 415-345-38 (reference paragraph 6.a) mandates that all construction Contracts include provisions for a Construction Warranty.

b. ER 415-345-38 states there are circumstances where “operations and maintenance of the facility by the construction contractor” (reference paragraph 5.d) are necessary to meet the requirements of the project or customer.

c. Construction Warranties and PC O&M services have distinct purposes and requirements that necessitate different skill sets to execute and manage. ER 415-345-38 identifies project turnover as integral to customer’s overall satisfaction with a USACE executed project. Proper determination of when PC O&M services benefit a project and correctly executing these service is critical to the successful transfer and operation of the facility.

5. Information.

a. Per USC Title 10 Section 2410a, O&M services must be structured as contract options in one-year intervals. Per USC Title 10 Section 2306c, the Contract may include a maximum of five years of services when employing options. For phased projects, each phase of the project must have distinct PC O&M service options in the Contract.

b. The first year option for PC O&M is exercised at beneficial occupancy date (BOD) or substantial completion when the Final – or Interim, depending on the phasing of project turner – DD1354 is signed (Refer to UFC 1-300-08 Section 2-3). The beginning of the Construction Warranty and PC O&M services are synchronous.

c. PC O&M services put O&M responsibilities on the construction Contractor instead of the Instillation Directorate of Public Works (DPW). These responsibilities include:

- (1) Operations of systems in accordance with the Owner’s Project Requirements (OPR);
- (2) Continuous commissioning and balancing of systems to meet OPR;
- (3) Scheduled inspections and routine maintenance;
- (4) Unscheduled and emergency maintenance and repair;

6. Considerations. When making the decision to include PC O&M services in the construction Contract, consider the following factors:

a. Contract type;

(1) FAR 52.246-21 explicitly states that Construction Warranties must use Firm Fixed Price (FFP) Contracts. FFP contract options for PC O&M services incentivize Contractors to

employ higher quality construction practices to reduce their own expense during the O&M period.

(2) Contractors on Design-Build (DB) Contracts have incentives to design systems specifically with operability and maintainability in mind when they are responsible for all of the design, construction, and O&M of the facility.

b. Funding Source;

(1) For Military Construction (MILCON) projects:

(a) MILCON funding cannot pay for O&M activities. Including PC O&M services in the Contract complicates the acquisition strategy. USACE personnel must clearly identify the sources of funding and specify activities for each funding source.

(b) Supervision and Administration (S&A) funding is assessed at a non-negotiable flat rate percentage of contract expenditures by funding source (refer to ER 37-1-30). Supervision of work must be paid for by the S&A assessed on the funding source for that work. This means only O&M funded S&A can pay for supervision of O&M activities, such as PC O&M. Multiple years of PC O&M services may not generate enough S&A income to be commensurate with the USACE personnel cost to administer the Contract. This is especially true when construction is complete and there is no longer a MILCON S&A mission on the site or campus to fund the majority of time for on-site personnel.

(2) For Civil Works (CW) and Interagency and International Services (IIS) projects:

(a) S&A funding is charged on an actual cost basis. USACE personnel must keep records of costs incurred during supervision and administration of the Contract as required by the customer (refer to ER 415-1-16).

c. Size and complexity of the project;

(1) Projects with phased acceptance (e.g. office renovations that must stay in operation, multiple new facilities on a campus) can benefit from construction contractor control of all project components until final project transfer.

(2) PC O&M services may not be cost effective for smaller projects with fewer, simpler systems where the Installation DPW can easily provide O&M services under the profit margin of the construction contractor.

d. Project circumstances;

(1) Construction Warranties occasionally expire before occupancy of facilities due to furniture procurement delays or deployment of the units set to occupy the facility. Options to exercise PC O&M services for multiple years ensure that the Contractor is available beyond the

Construction Warranty period to perform testing-and-balancing (TAB) and commissioning on the systems when occupancy does take place.

e. Capacity of Installation DPW;

(1) If DPW does not have the capacity to perform scheduled, routine maintenance during the Construction Warranty then the contractor's responsibility for the systems can be void. Transferring O&M responsibility during Construction Warranty can avoid disputes over warranty claim resolution.

(2) Latent defects typically present symptoms within the first few years of installation. Options to exercise PC O&M services for multiple years allow the Installation DPW to augment their workforce with the construction Contractor through the most difficult years. At the completion of the PC O&M services, the systems within the facility should be operating at an optimal performance level sustainable with only routine, scheduled maintenance. This reduces the burden of new facilities on the Installation DPW.

f. Capacity of USACE personnel;

(1) Operations and Maintenance is not a USACE core competency. The knowledge, skills, and abilities to monitor an operations and maintenance program are vastly different than those required to monitor the construction of a facility. Ensure that the proper personnel have availability to administer the O&M Contractor to a level that will meet or exceed customer requirements.

(2) Options must be pre-priced and evaluated prior to Contract award. This may be problematic because contractors may not be able to price PC O&M unless the services are clearly defined and biddable. Contractors may also be reluctant to price so far in advance of the actual provisions of the services. It is critical to consider these issues when planning the acquisition of the project and to price the options correctly so that the services can be executed successfully with the desired outcome for both USACE and the customer.

(3) Contract options require extensive oversight to ensure they are exercised with the correct funding at the appropriate time. The Contracting Officer cannot exercise options until there is a bona fide need for the services. The Contracting Officer must have the correct type and year of funds and be prepared to exercise the option at the time that the facility, or portion thereof as noted in the Contract, is ready for turnover and PC O&M to begin. Failure to exercise the option in a timely manner will cause the option to expire and will result in a break in services. This effort takes close monitoring of project progress and schedule.

7. Guidance.

a. PC O&M services are not appropriate for all projects. Due to the aforementioned considerations, PC O&M services can be most effective for construction projects with phased turnover where the customer desires to receive the entire facility or campus at one time or on

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projects where there will be a delay in occupancy of the facility after construction completion. In the former scenario, construction S&A funding should be sufficient to pay for the time of on-site personnel while only using O&M S&A for specific activities supervising the O&M work. In the latter scenario, the PC O&M services will ensure proper system balancing once occupancy takes place without placing a burden on the Installation DPW.

b. A Consolidation Memorandum and a Bundling Memorandum will generally be required prior to solicitation of the Contract. These memoranda must justify why consolidation and/or bundling of requirements and funding sources is necessary and provides substantial benefit to the Government.

c. Provide a comprehensive Scope of Work (SOW) as part of the solicitation to direct the contractor's O&M services and provide a basis for bids. Per FAR Subpart 37, O&M service requirements must be performance based. At a minimum, the SOW should include contractor performance requirements and a list of systems with specific performance requirements. Refer to Attachment A (O&M Performance Work Statement) as an example.

d. Modify the USACE District's Memorandum of Understanding (MOU) or Project/Program Management Plan—for Civil Works projects this may be known as the Project Cooperation Agreement (PCA)—with the customer to define the new roles and responsibilities of each stakeholder. Refer to ER 415-345-38 (paragraph 5.b and Appendix A) for more information.

8. **Update.** All new requirements will be included in the next appropriate policy document update prior the expiration of this ECB.

9. **Point of Contact.** HQUSACE point of contact for this ECB is Scott Wick, CECW-CE, (202) 761-7419.

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Attachments:

A. O&M Performance Work Statement