

GENERAL SERVICES ADMINISTRATION

48 CFR Parts 501, 536, and 552

[GSAR Case 2015–G506; Docket No. GSAR–2018–0013; Sequence No. 1]

RIN 3090–AJ64

General Services Administration Acquisition Regulation (GSAR); Adoption of Construction Project Delivery Method Involving Early Industry Engagement—Construction Manager as Constructor (CMc)

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

ACTION: Final rule.

SUMMARY: The General Services Administration (GSA) is issuing a final rule amending the General Services Administration Acquisition Regulation (GSAR) to adopt an additional project delivery method for construction, known as “construction manager as constructor” (CMc). The private sector commonly uses a similar construction project delivery method, which allows for early industry engagement by the construction contractor to enable reduced cost growth, reduced schedule growth, and administrative savings. The current Federal Acquisition Regulation (FAR) lacks coverage of the CMc project delivery method. GSA has previously issued policies on CMc through other means. Incorporating CMc into the GSAR provides centralized guidance to industry and ensures consistent application of construction project principles across GSA. Additionally, integrating these requirements into the GSAR allowed for revision and improvement of the requirements through public comments in the rulemaking process.

DATES: *Effective Date:* This final rule is effective on January 21, 2020.

FOR FURTHER INFORMATION CONTACT: Ms. Christina Mullins, General Services Acquisition Policy Division, Procurement Analyst, by email at gsarpolicy@gsa.gov. For information pertaining to status or publication schedules, contact the Regulatory Secretariat Division by mail at 1800 F Street NW, Washington, DC 20405, or by phone at 202–501–4755.

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. The other two methods are design-bid-build and design-build. The CMc model

used by GSA follows many industry best practices 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 that is similar to one commonly 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. Additionally, incorporating CMc into the GSAR provides centralized guidance to industry that makes it easier to do business with the Government and ensures consistent application of construction project principles across GSA that provides for greater compliance with requirements.

II. Discussion and Analysis

The GSAR Case 2015–G506 proposed rule was published in the **Federal Register** at 83 FR 55838 on November 8, 2018 and provided details on how GSA is amending the General 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. The proposed rule clarified, updated, and incorporated existing CMc guidance previously implemented through internal Public Building Service (PBS) policies.

Bringing this existing CMc policy into the GSAR allows for greater transparency and provided an opportunity for the public to comment on these long-standing procedures. In addition, bringing CMc policies into one location ensures clarity and consistency that will make it easier for companies to do business with the Government and will provide better guidance to contracting officers.

The CMc project delivery method is similar to project delivery models used extensively in the private sector for large complex construction projects. The CMc method 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. The CMc method emphasizes technical qualifications for contractor selection, and 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, which include constructability reviews and cost estimating validation by the constructor, CMc offers the opportunity to begin construction prior to full completion of the design which reduces the total project schedule. GSA also provides a cost incentive through shared savings that are split between the constructor and the Government under CMc contracts which promotes constructor innovation and efficiencies to reduce costs through the construction phase of the project, see GSAR 536.7105–5.

A. Summary of Significant Changes

The General Services Administration has reviewed all comments submitted in the development of this final rule.

This final rule makes the following two significant changes from the proposed rule:

1. CMc Contingency Allowance (CCA)

The definition at 536.7102 for CCA was revised to include scheduling error costs. The description in 536.7105–2 subparagraph (a)(3)(iii) regarding design errors and omissions has been deleted to more closely align with the definition provided for CCA in 536.7102. The text at 536.7105–2 was also revised to clarify that the CCA may be adjusted through negotiation at the time of GMP option exercise, and to provide additional CCA flexibility up to 5 percent with HCA approval.

2. Fee for Construction Work

The definition at 536.7102 of “Fee” was revised to clarify that this definition encompasses solely profit and home office overhead costs. The description at 536.7105–2 was revised to allow adjustment to the Fee for scope changes and Government-caused delays. Additionally, GSA revised the definition of cost to mean all allowable costs per FAR Part 31, removing the limitation for direct cost only.

A full discussion of all the comments received and the changes made to the rule as a result of those comments is provided below.

B. Analysis of Public Comments

GSA received comments on the proposed rule from five respondents. Comments are grouped into categories in order to provide clarification and to better respond to the issues raised.

1. Economic Impact

i. *Comment:* As a supporting statement, an industry group representing general contractors recognized that many aspects of the

CMc project delivery method are aligned with the private sector, including early collaboration between the construction contractor and the architect, early work packages for things like demolition, and the use of shared savings incentives. The commenter noted that further alignment of CMc to the private sector model can increase interest and competition from the market for Government projects. They further explained that deviations from private sector models, especially those that are punitive in nature, such as audit requirements, can have the opposite effect and outcome.

Response: GSA recognizes that there are differences between CMc and the private sector, and believes that the CMc model as presented in the rule strikes the right balance of adopting industry best practices for construction while adhering to the constraints of Government statutory requirements and ensuring appropriate risk management in the best interests of the Government. No changes were made to the proposed rule as a result of these comments.

ii. Comment: As a supporting statement, an industry group representing general contractors suggested changes to the text to clarify that a reduction in specific sunk costs is attributable to lower costs associated with the solicitation process.

Response: The final rule was revised to clarify that sunk costs associated with price proposal preparation efforts may be lower with CMc as compared with the design-build.

iii. Comment: An industry group representing architects noted that the CMc method as drafted did not take into account the increased time and effort expended by the architect-engineer contractor in design reviews and cost saving option reviews under a CMc project that goes above and beyond “normal” responsibilities.

Response: GSA does not believe that design reviews and cost saving option reviews under a CMc project are beyond normal responsibilities of a typical architect-engineer contract. As such, no additional costs need to be taken into account. Design reviews are not unique to the CMc project delivery method and any early collaboration under CMc should only result in cost saving options being identified earlier in the project when such options are more easily addressed.

2. Miscellaneous

i. Comment: A model building code industry respondent provided comments to the proposed rule specifically commenting on building code requirements and application to

this rule. The respondent noted that they take no position on the proposed rule language, but make general notes regarding compliance provisions, and whether those provisions should be codified in the CFR.

Response: The GSA PBS P-100 Guide provides considerable details on implementing building code compliance, and is incorporated in GSA construction contracts. Codifying building codes in the CFR is beyond the scope of this rule. No changes were made to the proposed rule as a result of these comments.

ii. Comment: An industry group representing general contractors suggested that GSA should mandate collaboration between the architect-engineer and CMc contractors during the design phase.

Response: The final rule further clarifies the expectation that the architect-engineer and CMc contractor must collaborate during the design phase. The final rule clarifies at GSAR 536.7105-1(d), that “During the design phase, the architect-engineer contractor and the construction contractor shall collaborate on the design and constructability issues”.

iii. Comment: An industry group representing design-build contractors recommends the use of the progressive design-build project delivery method.

Response: The design-build project delivery method is already addressed in the FAR (see FAR 36.3) and is beyond the scope of this rule. No changes were made to the proposed rule as a result of this comment.

iv. Comment: A few other suggestions and comments were made by industry groups representing architects and general contractors, including: 1. Suggestion to allow conversion to FFP after 75 percent versus 100 percent of the construction documents were completed, 2. Comment that the use of alternates across clauses is inconsistent and may be confusing, 3. Comment that the order of precedence is not consistent with typical practice, and 4. Suggestion to review an industry organization’s CMc contracts more specifically.

Response: GSA considered allowing conversion to FFP after 75 percent completion of the construction documents, but concluded that to more effectively protect taxpayer dollars, 100 percent as presented in the proposed rule was more appropriate. Prior to 100 percent construction documents, a GMP type contract allocates risk more appropriately between the Government and contractor since the design is not complete and details may still change that materially affect the price, limiting the ability to establish good firm prices.

GSA believes the structure of alternates for clauses is appropriate. Any differences between industry models or typical practices and the GSA CMc model were driven by unique statutory or regulatory requirements, including the Competition in Contracting Act of 1984 (CICA), 41 U.S.C. 3301. No changes were made to the proposed rule as a result of these comments.

3. Value Engineering

Comment: An industry association representing general contractors provided a comment on value engineering. The comment notes that 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.

Additionally, an industry group representing general contractors suggested that when exercising the GMP option, if the ECW, CCA and Fee exceed the GMP, then the ECW should be reduced through value engineering and/or scope modifications.

Response: While the CMc may suggest the incorporation of efficiencies, innovation, fast-tracked scheduling and economical materials/systems, value engineering is a formal technique described at FAR Part 48, and is different from the design phase services contracted from a general contractor under CMc. In accordance with FAR 48.202, the clause at FAR 52.248-3 Value Engineering—Construction, shall not be included in incentive-type construction contracts. Accordingly, value engineering shall not apply to the CMc project delivery method described in this subpart. No changes were made to the proposed rule as a result of this comment. Additionally, GSAR 536.7105-2(c)(3) has been revised to state that “If the sum of the final ECW, CCA, and fee for the construction work is greater than the GMP as established at contract award or as adjusted in accordance with FAR Part 43, then the contracting officer should work with the contractor to identify measures to reduce the overall GMP. Such measures may include reducing the CCA, reducing the fee, or as a last resort, reducing the scope of the project.

4. Managing Risks

Comment: An industry group representing general contractors provided comments related to managing risk. They provided suggestions to significantly reduce or eliminate

liquidated damages, to remove reimbursement of certain audit costs, and to remove the ability to withhold 10 percent of payment requests if the contractor fails to comply with GSAR 552.236–80, Accounting Records and Progress Payments. The respondent noted that these elements are not in alignment with this delivery method.

Response: While CMC is viewed more as a partnership between GSA and CMC contractor, GSA maintains that additional audit and accountability risk management measures are appropriate to manage risk or are required by existing laws and regulations. Similar to other government delivery methods, CMC includes these measures to protect the Government and its partners. Liquidated damages and other risk management tools are used to appropriately mitigate issues and concerns that could arise. Similarly, the Government provides remedies for contractors to collect equitable adjustments for changes that could arise. GSA maintains the text at 552.236–80 regarding audits and retainage as appropriate risk management. This clause provides clear details on how the audit and retainage requirements apply.

5. Procurement Timing

Comment: Three respondents provided comments regarding procurement timing. An industry group representing general contractors commented that CMC should be procured as early as possible in the design phase, ideally prior to the concept design. A construction industry commenter recommended that GSA require, at a minimum, the programming, schematics and concepts be complete. An industry group representing architects commented that when the CMC is not brought on early enough, the architect is then forced to adjust when the design is over budget. They affirmed that the request for proposal should be issued early in the design phase, preferably during concept design to allow early cost savings suggestions from the CMC.

Response: The rule includes flexible language so that each project can individually balance the goal of early collaboration with the ability to permit meaningful price competition (see GSAR 536.7103(a)).

6. A/E Role and Compensation

Comment: An industry group representing architects provided comments related to the role and compensation of the architect/engineer under a CMC project. The respondent commented that CMC increases the time

and effort expended by the architect-engineer contractor in design reviews and cost saving options. Also, the respondent noted that clarity is needed to ensure the architect/engineer retains control of the design decision making. The industry group representing architects noted that GSA should inform the architect/engineer of the construction project delivery method prior to design fee negotiations, so that the architect-engineer can prepare appropriately. The industry group representing architects also commented that there is no defined liability for who is responsible for design changes that are due to constructor contractor issues. Additionally, a construction industry commenter recommended that GSA should consider adding a provision requiring the designer to design to the Target ECW that the CMC proposes.

Response: GSA reviewed and appreciates the comments provided. The rule is written to provide sufficient guidance on CMC and coordination with the architect/engineer. GSA believes that informing the architect/engineer of the construction project delivery method prior to design fee negotiations, when possible, is a good practice. GSA believes the existing architect/engineer contract clauses appropriately detail the responsibilities and requirements for changes. The clause at FAR 52.243–1, Changes—Fixed-Price (Alternate III), provides a mechanism for the A/E to request an equitable adjustment, if appropriate. GSA's Design Excellence policy is still applicable and Government personnel should be involved in all design decision making. Lastly, the A/E contract is established prior to CMC offerors proposing a Target ECW. However, the A/E contract already contains the clause at FAR 52.236–22, Design Within Funding Limitations. No changes to the regulatory text were made as a result of these comments.

7. Accounting and Auditing Requirements

Comment: An industry group representing general contractors provided comments to adjusting the text at 536.7105–3 Accounting and Auditing Requirements. Several suggestions are provided to revise the GSAR text provided in the proposed rule noting that “Audits are not applicable in this contracting and procurement method. This auditing requirement should be removed from this rule.”

Response: GSA did not adopt suggested changes to the text in the proposed rule. GSA maintains that open book accounting and audit requirements are appropriate in this procurement method. For example, the amount, if

any, of the shared savings incentive, is determined by the difference between the final GMP and the final cost of performance (see 536.7105–5(a)). To protect the public interest, an audit of the CMC's costs is required before determining the amount of shared savings, if any.

8. Cost Accounting Standards (CAS)

Comment: Two respondents provided a comment on the application of CAS and its applicability to CMC. An industry organization representing general contractors noted that modified CAS should be applied and do away with open book accounting, and an industry construction commenter noted that full CAS should be applied as it is currently noted and referenced in FAR Part 30.

Response: GSA has determined that the application of open book accounting and auditing requirements provides the Government the best flexibility to review and maintain cost elements. The requirements allow for maximum competition amongst all qualified contractors looking to service the Government through CMC contracting. Based on the variation in comments provided, GSA is confident that the requirements in FAR Subpart 30.2¹ for full CAS compliance for applicable negotiated contracts over \$50 million, modified CAS compliance for applicable negotiated contracts below \$50 million, and open book accounting practices are appropriate for CMC contracting.

9. Incentives

Comment: Two respondents provided comments on performance incentives and the element of shared savings. An industry group representing general contractors provided suggestions for early completion bonuses or successive targets. Both the industry group representing general contractors and an industry group representing architects suggested that GSA include a shared savings incentive for the architect/engineer.

Response: GSA reviewed and appreciates the comments provided. Regarding an early completion bonus for the CMC, the CMC contract already contains a shared savings incentive (see GSAR 536.7105–5). Early completion

¹ FAR 30.201 states that “Title 48 CFR 9903.201–1 (FAR Appendix) describes the rules for determining whether a proposed contract or subcontract is exempt from CAS. Negotiated contracts not exempt in accordance with 48 CFR 9903.201–1(b) shall be subject to CAS. A CAS-covered contract may be subject to either full or modified coverage. The rules for determining whether full or modified coverage applies are in 48 CFR 9903.201–2 (FAR Appendix).”

may be one way the CMc is able to reduce costs and increase the potential for shared savings. Regarding an incentive for the architect/engineer, GSA does not believe that is necessary to successfully implement and experience the benefits of CMc. No changes to the regulatory text were made as a result of these comments.

10. Contingency Allowance (CCA)

Comments: An industry group representing general contractors suggested adjustment to the definition of CCA provided at 536.7102 by including the word “scheduling” as an included cost element. They also suggested that GSA set the minimum CCA at 3 percent. A commenter from the construction industry questioned the CCA’s purpose and whether the CCA is meant to be a true “allowance”. This same industry commenter noted that CCAs should not include design errors and omissions.

Response: GSA adopted the suggestion to adjust the definition of CCA at 536.7102. GSA adopted the suggestion for proper alignment with 536.7102 by deleting 536.7105–2(a)(3)(iii) regarding design errors and omissions. GSA also provided additional CCA flexibility up to 5 percent with HCA approval.

11. Fee for Construction Work

i. Comment: Two respondents provided comments on the structure and definition of “Fee for Construction Work”. An industry group representing general contractors noted that the Fee cannot include all of 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. They also add, 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.). A construction industry commenter believes that GSA’s proposed fee structure raises several issues. First, they note that general conditions typically are not part of a contractor’s fee, but instead, are actual costs. Thus, including them as part of the fee will create confusion during an audit. Second, they note that the definition’s reference to overhead is unclear as it does not specify whether “overhead” means field office overhead or home office overhead.

Response: GSA has revised the definition of fee to specifically mean profit and home office overhead costs. GSA revised fee guidance to allow adjustment to the fee for scope changes

and Government-caused delays. Additionally, GSA revised the definition of cost.

ii. Comment: An industry group representing general contractors noted that 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 percent 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.”

Response: The rule provides flexibility by not providing a “required proposal form”, however, GSAR 536.7105–2(a)(4)(iv), notes that “The limitations of GSAR 552.243–71, especially markups, still apply for any changes.”

12. Guaranteed Maximum Price

i. Comment: An industry group representing general contractors and a construction contractor provided comments on the GMP guidance at 536.7105–2. These comments included a suggestion that GSA adjust the language to say GMP “may” be modified downward for deletions during the design phase. They provided further suggested adjustments to the language to allow for an increase to the GMP for “no fault of CMc” issues. Another comment requests GSA provide additional guidance on how the various evaluation criteria must be weighted and expressed concern that the pricing structure effectively incentivizes contractors to submit an artificially low price and further assumes that the lowest price proposal will be selected absent a compelling reason to select a higher priced proposal. Lastly, they noted that the evaluation should consider contractor approach to maximize the project within the GMP.

Response: GSA has reviewed and appreciates the comments provided. GSA has adopted the suggestion to provide greater flexibility for GMP modifications for deletions during the design phase. GSA notes that the GMP is subject to adjustment under various standard contract clauses, including the changes clause, differing site conditions clause, and suspensions clause. GSAR 536.7103(b)(1)(i) provides that the technical evaluation factors, when combined, shall be considered

significantly more important than cost or price. The rule provides flexibility by not establishing required technical evaluation factors or specific weights for technical evaluation factors. Additionally, the commenter’s assumption that the lowest price proposal will always be selected is not consistent with the flexibility provided by FAR 15.101–1, Tradeoff Process. Regarding the concern that that the pricing structure effectively incentivizes contractors to submit an artificially low price, see GSAR 536.7103(b)(2), which states that a price realism analysis is required “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.”

ii. Comment: An industry group representing general contractors commented that the target ECW is not bonded and that while the CMc can advise the Owner and its design team on changes to make to adhere to the target ECW, the CMc has no control over the outcome, quality, coordination and/or completeness of the design.

Response: As stated in GSAR 536.7105–1(d), “During the design phase, the architect-engineer contractor and the construction contractor shall collaborate on the design and constructability issues. The goal of this collaboration is to establish a final ECW that does not exceed the original target ECW.” No changes to the regulatory text were made as a result of this comment.

iii. Comment: An industry group representing general contractors commented that each of the Owner’s contractors should validate program requirements with the project prospectus prior to advancing from one design phase to the next and certainly before exercising the construction phase.

Response: GSA appreciates the comment. Under CMc, the Government has flexibility to adopt appropriate project management techniques. No changes to the regulatory text were made as a result of this comment.

III. Expected Economic Impact of This Rule

All three predominant construction project delivery methods, Design-Bid-Build (D–B–B), Design/Build (D–B), and Construction Manager as Constructor (CMc), have merit. CMc specifically allows for early industry engagement by the construction contractor that can provide a net economic burden reduction compared with the other project delivery methods. An Economic Impact Analysis (EIA) reflecting the data and benefits of CMc has been prepared

consistent with the principles of OMB Circular A-4 and is summarized as follows:

A study by the Pankow Foundation² as well as GSA's own data analysis, further detailed herein, have shown that early engagement by the construction contractor under a CMc project can provide reduced cost growth, reduced schedule growth and administrative savings, resulting in a net economic burden reduction compared with other project delivery methods.

All economic impact estimate calculations were based on discussions with GSA subject matter experts from the PBS Office of Design and Construction and PBS Office of Acquisition Management, and the following data. Historic data was gathered and analyzed from GSA's Electronic Planning Module (ePM),³ 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),⁴ the authoritative source for government wide contract award data.

The results of the analysis showed this rule will provide a net deregulatory savings of 9,405 hours (\$659,011), or (\$488,710) when annualized at a 7 percent discount. These savings are a result of the following elements:

A. Reduced Schedule Growth: Under a CMc project delivery method, the general contractor (GC) for construction work is engaged through a separate contract during the design phase of the project, sometimes as early as 30 percent design completion. By comparison, under a design-bid-build (D-B-B) project delivery method, the GC is not engaged through a separate contract until the design is 100 percent complete. Under a design-build (D/B) project delivery method, the GC and the architect are part of the same contract with the Government. The early engagement of the GC under CMc may create collaboration between the architect and the GC. This early engagement also offers the opportunity to begin advanced work on certain elements of the project while the design is finalized. For example, an early work package may be defined to allow for demolition work to be done, which is not typically impacted by the final touches of a design. Similarly, site preparation work to clear the land for a project may be started. This concurrent work while the design is completed can result in meaningful schedule savings. Analysis of the GSA capital

construction project data from ePM showed that on average the reduced schedule growth potential for CMc projects is 75 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. Based on the historic ePM data, GSA estimated that 10 capital projects funded annually would use the CMc method. Given this population, the total annual savings to the Government is 10,125 hours (\$701,343). Similar savings to the public may be realized and may be reflected as direct cost savings in the contract, but cannot be quantified.

B. Final GMP Proposal: For CMc projects, the contract begins as a fixed price incentive contract type where the guaranteed maximum price (GMP) negotiated at the outset is the price ceiling for the contract. This contract type is necessary because the design is not complete and all the costs for the construction work cannot be determined. However, once the design for a project is completed, the final GMP for the construction work can be established and the contract can be converted to a firm fixed price (FFP) contract type. This may be attractive to both industry and Government. A conversion to FFP allows the contractor to end cost accounting standard (CAS) compliance efforts. Conversion to FFP also allows the Government to further mitigate risk by placing the full responsibility for all costs on the contractor. In order to execute this conversion, the contractor must submit a revised proposal for the final GMP. Based on subject matter expertise within GSA, it is assumed that the contractor will require 40 hours of effort to obtain subcontractor quotes, adjust costs and submit a new proposal for the final GMP element. It is assumed that the Government will require 20 hours of effort to review and negotiate the final GMP. The total annual burden to the public is 400 hours (\$22,076) and to the Government is 200 hours (\$11,038).

C. Regulation Familiarization: GSA Class Deviation SPE-2012-04-02 has been in place for several years and provides the existing policies and procedures for CMc construction projects. GSAR Case 2015-G506 essentially incorporates these existing policies and procedures. However, there are some clarifications and updates to these policies that reflect on lessons learned and best practices over the years. These changes include: clarification on the level of design development required for CMc procurement competition, further details as to what is included in the fee for construction work, and guidance for establishing separate allowance items. The rule contains minimal changes from existing policies and procedures for CMc methods, and thus, should result in minimal burden to understand new requirements. Based on subject matter expertise within GSA, it is assumed that industry and Government alike will require two additional hours during the solicitation phase to review and understand the differences between the existing policy and this rule in order to provide a representative proposal. Based on the historic

FPDS data, GSA estimated that 5 offers would be received for each CMc project. Given this population, the total annual burden to the public is 100 hours (\$7,755) and to the Government is 20 hours (\$1,464).

D. Unquantified Benefits: There are several economic benefits specific to CMc that are expected to reduce burden that are difficult to quantify. Although not easily quantifiable they collectively represent additional meaningful savings to qualify this rule as deregulatory.

1. Direct cost savings may result from potential reduced schedule growth for CMc projects. Construction projects include general conditions and other costs that are calculated by a daily rate. If a CMc project finishes earlier, the total direct costs will be lower.

2. Early collaboration between the CMc and architect allows for (a) innovation during design that leads to fewer change orders during construction, and (b) identification of conflicts or errors before work investments are made.

3. As compared with design-build projects, CMc projects will reduce sunk costs associated with price proposal preparation efforts and lower barriers to entry for industry to submit proposals and compete in this space. Design-build project solicitations often require a detailed concept level design submission as part of the proposal. Offerors must partner with an architecture-engineering firm at great expense to obtain these design concepts in order to prepare and submit an offer to the Government.

4. Early work packages under CMc allow for advanced execution of certain elements while the design is finalized, such as demolition or site preparation work, which are not typically impacted by the final touches of a design. These early work package elements can be removed from the GMP and converted to separate firm-fixed-price (FFP) line items. Conversion to a FFP may allow the Government to lock-in lower prices and allow the CMc to subcontract labor trades earlier. In a tight labor or material market, this may translate to meaningful cost and schedule savings.

Interested parties may obtain a copy of the complete EIA from the Regulatory Secretariat Division.

IV. 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 a significant regulatory action and, therefore, was subject to review under section 6(b) of E.O. 12866, Regulatory

² Leicht, R.M., Molenaar, K.R., Messner, J.I., Franz, B.W., and Esmaeili, B. (2015). Maximizing Success in Integrated Projects: An Owner's Guide. Version 0.9, May. Available at <http://bim.psu.edu/delivery>.

³ A total of 124 GSA capital construction contracts (i.e. over prospectus) were completed between 2009 and 2016. Capital construction contracts were selected as they were determined to be the most likely to be suitable for the CMc project delivery method.

⁴ A total of 283 construction contracts (i.e. PSC of Y1xx or Z2xx) over the current prospectus threshold of \$3M were awarded by GSA between 2009 and 2016. On average 4.4 offers were received for each solicitation. Of the total population, 125 (44%) were large business awards and 158 (56%) were small business awards.

Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Executive Order 13771

This rule is considered an E.O. 13771 deregulatory action. Details on the estimated savings of this final rule can be found in the rule’s economic impact analysis detailed in Section III.

VI. 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 III.

VII. Regulatory Flexibility Act

GSA does not expect this final 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 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, a Final Regulatory Flexibility Analysis (FRFA) has been prepared. There were no comments submitted in response to the initial regulatory flexibility analysis provided in the proposed rule. The FRFA has been prepared consistent with the criteria of 5 U.S.C. 604 and is summarized as follows:

The final rule amends the General Services Administration Acquisition Regulation (GSAR) coverage on construction contracts, including clauses for solicitations and resultant contracts, to clarify, update, and incorporate existing guidance on the construction manager as constructor (CMc) project delivery method.

There were no comments submitted and therefore no significant issues raised by the public in response to the initial regulatory flexibility analysis provided in the proposed rule.

The final rule changes will apply to approximately 10 GSA construction contracts per year. Of these, approximately 6 (60 percent) contracts may be held by small businesses. The final 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 final rule does not pose any new reporting, recordkeeping or other compliance requirements.

The Regulatory Secretariat Division has submitted a copy of the FRFA to the Chief Counsel for Advocacy of the Small Business Administration. Interested parties may obtain a copy of the FRFA from the Regulatory Secretariat Division.

VIII. Paperwork Reduction Act

There are two information collection requests associated with this rule.

First, this rule requires contractors to keep all relevant documents for a period of three years after the final payment. This requirement is currently covered by existing OMB Control Number 9000–0034, titled: Examination of Records by Comptroller General and Contract Audit; Sections Affected: FAR 52.215–2; FAR 52.212–5; FAR 52.214–26.

Second, this rule requires contractors to submit revised proposals and negotiate contract modifications during contract administration. OMB has cleared this information collection requirement⁵ under OMB Control Number 3090–0320, titled: Construction Manager as Constructor (CMc); GSAR Section Affected: 552.236–79, in the amount of 400 burden hours. No comments were received on the information collection requirement that was provided in the proposed rule; however, due to the use of more current data to calculate the burden, revisions were made to the burden estimate associated with the collection.

List of Subjects in 48 CFR Parts 501, 536, and 552

Government procurement.

Jeffrey A. Koses,

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

Therefore, GSA amends 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

■ 2. Amend section 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 “3090–0320” and “9000–0034” to read as follows:

501.106 OMB approval under the Paperwork Reduction Act.

GSAR reference	OMB control No.
*	*
*	*
*	*
*	*
552.236–79	3090–0320
552.236–80	9000–0034

⁵ The 30-day Federal Register Notice associated with IC 3090–0320 was published at 84 FR 42917 on August 19, 2019.

GSAR reference	OMB control No.
*	*
*	*
*	*
*	*

PART 536—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS

■ 3. Add section 536.102 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. Amend section 536.515 by—

- a. Removing from the introductory text “Use the clause—” and adding “Use the clause:” in its place;
- b. Removing from paragraph (a) “will be followed; or” and adding “will be followed.” in its place; and
- c. Adding paragraph (c) to read as follows:

536.515 Schedules for construction contracts.

* * * * *

(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. Revise 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.

(b) With its Alternate II when a construction-manager-as-constructor

project delivery method will be followed.

■ 6. Revise 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.

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

Subpart 536.70—[Reserved]

■ 7. Add and reserve Subpart 536.70.

■ 8. Add subpart 536.71 to read as follows:

Subpart 536.71—Construction-Manager-as-Constructor Contracting

Sec.

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) means 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.

Cost means allowable costs in accordance with FAR Part 31.

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

Early Work Package means a set of construction activities that can be

clearly defined and separately performed from the remainder of the construction work. Demolition is an example of an early work package.

Estimated Cost of the Work (ECW) means the estimated cost of the construction work, not including home office overhead.

Fee for the Construction Work means the amount established in the construction contract for the contractor's profit and home office overhead costs, as described in FAR part 31, for the construction work.

Guaranteed Maximum Price (GMP) means the sum of the ECW, 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. 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.

(b) *Proposal Evaluation.*

(1) *Evaluation Factors.*

(i) Except as provided in paragraph (ii) of this section, the solicitation shall provide that the technical evaluation factors, when combined, shall be considered significantly more important than cost or price.

(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 section. 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, the construction work GMP option(s), 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.

(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.

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 shall collaborate on the design and constructability issues. The goal of this collaboration is to establish a final ECW that does not exceed the original target ECW.

(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 the ceiling price described by FAR 16.403–2.

(ii) 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.

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

(iv) 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 proposed ECW incorporated at construction contract award is the target ECW.

(ii) 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.

(iii) 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 provides for a contingency relative to a fixed percentage of the ECW, except for the requirements at paragraph (c)(3) of this section. The CCA at time of GMP option exercise is subject to negotiation between the contractor and the contracting officer and may be different than the amount at time of contract award.

(iii) The amount of the CCA will depend on the status of design and construction, as well as the complexity and uncertainties of the project. Early phase designs usually include less defined scope and, accordingly, may require a higher initial CCA at time of contract award. Later phase designs may remove uncertainties and reduce risk, allowing for a lower CCA at time of GMP option exercise.

(iv) The CCA shall not exceed 3 percent of the ECW, unless approved in writing by the HCA for a higher amount not to exceed 5 percent of the ECW.

(4) *Fee for the Construction Work*.

(i) The fee may be proposed per phase of construction if each phase is a separate option.

(ii) At time of proposal submission, the offeror shall submit a list of the items included within the offeror's home office overhead.

(iii) At time of proposal submission, the fee elements may be expressed as a percentage of the ECW, but shall be

converted to a fixed amount prior to executing the GMP option.

(iv) The fee for the construction work is not increased or decreased based on fluctuations in the actual costs of the work. The fee may, however be adjusted for changes that are the basis for a change order, including scope changes, differing site conditions, and Government-caused delays.

(v) Any fee for the construction work associated with a change order 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, see FAR 15.404-4 for additional guidance. The limitations of GSAR 552.243-71, especially markups, still apply for any changes.

(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 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 as established at contract award or as adjusted in accordance with FAR Part 43, then the contracting officer shall adjust the GMP downward accordingly through a bilateral modification to exercise the GMP option.

(3) If the sum of the final ECW, CCA, and fee for the construction work is greater than the GMP as established at contract award or as adjusted in accordance with FAR Part 43, then the contracting officer should work with the contractor to identify measures to reduce the overall GMP. Such measures may include reducing the CCA, reducing the fee, or as a last resort, reducing the scope of the project.

(4) The GMP option shall not be exercised if the final ECW, CCA, and fee for the construction work is greater than the GMP as established at contract award or as adjusted in accordance with FAR Part 43.

(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 section or through an exemption at FAR 30.201-1, construction contracts under the CMc project delivery method are subject to the cost accounting standards (CAS) identified in FAR Part 30.

(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.

(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.

(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.

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, as that term is used and described in FAR Part 48, shall not apply to the CMc project delivery method described in this subpart.

536.7105-5 Shared savings incentive.

(a) *General.* The incentive is a shared portion of the difference between the final GMP and the final cost of performance. Cost reductions may be realized by the construction contractor as a result of 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 section, the share ratio for the construction contractor shall range from 30 percent to 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 section. 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 552.236-79 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 the following:

(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, typically identified toward the beginning of the project.

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.

(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.

(d) Early work packages that are firm-fixed-price are not 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 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 in excess of the GMP.

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

(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.

536.7106 Construction contract closeout.

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(c), the contracting officer shall obtain an independent audit of the construction contractor's costs.

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 used when 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 do not apply.

PART 552—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

■ 11. Amend section 552.236–15 by adding Alternate III to read as follows:

552.236–15 Schedules for Construction Contracts.

* * * * *

Alternate III (JAN 2020). 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. Amend section 552.236–21 by adding Alternate II to read as follows:

552.236–21 Specifications and Drawings for Construction.

* * * * *

Alternate II (JAN 2020). 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.

■ 13. Amend section 552.236–71 by adding Alternate II to read as follows:

552.236–71 Contractor Responsibilities.

* * * * *

Alternate II (JAN 2020). 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 design errors and omissions affect 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.

■ 14. 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 (JAN 2020)

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

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

Construction-Manager-as-Constructor (CMc) Contingency Allowance (CCA) means 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.

Cost means allowable costs in accordance with FAR Part 31.

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

Early Work Package means a set of construction activities that can be clearly defined and separately performed from the remainder of the construction work. Demolition is an example of an early work package.

Estimated Cost of the Work (ECW) means the estimated cost of the construction work, not including home office overhead.

Fee for the Construction Work means the amount established for the contractor's profit and home office overhead costs, as described in FAR Part 31, for the construction work.

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 construction costs, including early work packages in the performance of the construction work to date;

(ii) A detailed breakdown of home office overhead costs and a statement that the accounting practices used for the allocation of home office overhead on this contract is in accordance with the Contractor's established cost accounting practices;

(iii) A proposed final ECW;

(iv) Sufficient data to support the accuracy and reliability of the estimate;

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

(vi) 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 design errors and omissions 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 errors and 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 the difference between the final GMP and the final cost of performance [*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 may 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 as established at contract award or as adjusted in accordance with FAR Part 43, then the Contractor should work with the Contracting Officer to identify measures to reduce the overall GMP, including reducing the CCA, reducing the fee, or as a last resort, reducing the scope of the project. At any time, the parties may agree to a different CCA than the amount expressed at time of contract award. Prior to the use of the CCA, the Contractor shall coordinate approval following the procedures identified in the contract. For approved CCA uses, the CCA shall be reduced and the ECW shall be adjusted accordingly.

(j) *Adjustment of the Fee for the Construction Work.* The fee for the construction work may be adjusted for changes that are the basis for a change order, including scope changes, differing site conditions, and Government-caused delays. The fee for the construction work associated with a change order shall not be driven by a fixed percentage. The fee for the construction work is not increased or decreased based on fluctuations in the actual costs of the work. At time of proposal submission, the fee elements may be expressed as a percentage of the ECW, but shall be converted to a fixed amount prior to executing the GMP option.

(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.

(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; and

(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 (JAN 2020)

(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.

(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 not limited to, evaluating and verifying:

(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.

(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.

(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.

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

(End of Clause)

[FR Doc. 2019-26367 Filed 12-18-19; 8:45 am]

BILLING CODE 6820-21-P