

January 27, 2006

**OFFICE OF FACILITIES MANAGEMENT
EVALUATION OF ARCHITECT-ENGINEER PROJECT PERFORMANCE AND
ARCHITECT-ENGINEER LIABILITY FOR DESIGN AND CONSTRUCTION
PERIOD SERVICES DEFICIENCIES**

1. PURPOSE: This Veterans Health Administration (VHA) Directive provides Office of Facilities Management policy for the administration of the Architect-Engineer (AE) evaluation process.

2. BACKGROUND

a. The AE Contract incorporates Federal Acquisition Regulation (FAR) clauses 52.236-23, Responsibility of the Architect-Engineer Contractor, 36.609-2, Redesign responsibility for design errors or deficiencies, and 52.236-24, Work Oversight in Architect-Engineer Contracts. FAR 52.236-23, states in part:

(1) "The Contractor shall be responsible for the professional quality, technical accuracy, and the coordination of all designs, drawings, specifications, and other services furnished by the Contractor under this contract. The Contractor shall without additional compensation, correct or revise any errors or deficiencies in its designs, drawings, specifications, and other services;

(2) Neither the Government's review, approval or acceptance of, nor payment for, the services required under this contract shall be construed to operate as a waiver of any rights under this contract or of any cause of action arising out of the performance of this contract, and the Contractor shall be and remain liable to the Government in accordance with applicable law for all damages to the Government caused by the contractor's negligent performance of any of the services furnished under this contract;

(3) The rights and remedies of the Government provided for under this contract are in addition to any other rights and remedies provided by law;

(4) If the Contractor is comprised of more than one legal entity, each such entity shall be jointly and severally liable hereunder."

b. **Definitions**

(1) **Design Error.** A design error is a contract document that calls for items which are incorrect (wrong dimensions; incorrectly sized pipe, duct, and equipment; conflicts and interferences; etc.).

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(2) **Design Omission.** A design omission is a contract document that fails to include items necessary to the project, of which the architect-engineer (AE) should have been aware (utilities to equipment, missing architectural details, etc.).

(3) **Unknown Condition.** An unknown condition is an existing physical condition that conflicts with new work (underground utilities and rock, conflicts concealed in wall or ceiling), which could not reasonably have been determined by the AE during design.

(4) **Program Change.** A program change is a change initiated by the Department of Veterans Affairs (VA) resulting from new and/or revised criteria, mission change, etc.

(5) **Technical or Administrative Decision.** A technical or administrative decision is a change that results in a finished product equivalent to that originally required, where the original design is correct (relocating doors or equipment, changing types of material or equipment, etc.).

(6) **Phase Design and/or Construction.** A phase design and/or construction is a change made to the original scope of work of the various construction contracts within a project (to be used primarily for new or replacement hospital projects).

(7) **Value Engineering.** Value engineering is a change initiated by the construction contractor under the value engineering clause.

(8) **VA Medical Center Requested Changes.** A VA medical center requested change is initiated by a VA medical center to make the building more suitable to the particular method of operation.

3. POLICY: It is VHA policy that the contract provisions contained within the AE Contract including, but not limited to FAR clause 52.236-23, Responsibility of the Architect-Engineer Contractor, must be enforced.

4. ACTION

a. Evaluation of Architect-Engineer (AE) Project Performance

(1) The Project Manager is responsible for initiating and maintaining reports evaluating the quality of work performed by private AE firms. The pertinent Contracting Officer is responsible for evaluating and compiling evaluations, and notifying the AE firms of their performance.

(2) Evaluations must be completed at the end of each of the following project milestones: master or space planning and programming, schematic design (SD), design development (DD), construction documents (CD), and construction period services (CPS). During design and up to completion of CD, the Project Manager, with input from the appropriate Indefinite Delivery Indefinite Quantity Architect Engineer (IDIQAE) who performed the peer review, must initiate this process for each design phase. At the

completion of construction, the Project Manager and the Resident Engineer are responsible for evaluating the AE performance as a whole. A copy of the evaluation is sent to the Contracting Officer.

(3) At the completion of each designated milestone, Standard Form 1421, Performance Evaluation (Architect Engineer), is completed and sent to the responsible Contracting Officer for review and action.

(4) The IDIQAE professional staff, at the end of each design phase, provides their input to the Project Manager. All evaluations must include a narrative pointing out both the strengths and weaknesses of the rated firm. When all of these evaluations have been received, the Project Manager forwards them to the Contracting Officer.

(5) Similar evaluations of the IDIQAE firms are also performed by the Project Manager at the completion of each individual Task Order. Copies of the evaluations are forwarded for the record to the Contracting Officer and the Chairman, AE Evaluation Board. The Contracting Officer utilizes them in a yearly evaluation of the IDIQAE as a determinant (to exercising the option year in the contract).

(6) The Contracting Officer evaluates input from the Project Manager and peer reviewers and prepares a narrative appraisal summarizing the AE's performance. The Contracting Officer must inform the AE in writing of the AE's overall performance rating emphasizing the AE's strengths and weaknesses. All appraisal forms and summaries must be forwarded to the Project Manager and the Chairman, AE Evaluation Board. All evaluations are kept on file in the Project Manager's and the Chairman, AE Evaluation Board's offices and may be reviewed by the evaluated firm upon request to the Chairman, AE Evaluation Board. Upon request, the AE firm is allowed to meet with the Contracting Officers to discuss the evaluations.

(7) The Project Manager and the Chairman, AE Evaluation Board maintain a file of the completed forms and summaries, as well as any comments received from the AE regarding the evaluations. These files are available for the AE Evaluation Boards' use in the selection of AE's for future projects. Before considering the evaluation of an AE from a previous project in a new selection, the evaluation must be carefully considered with regard to changes in personnel, experience, or any other extenuating factors that may have impact on the evaluation made at the earlier date.

(8) These evaluation records must be retained for 6 years and 3 months after final settlement of the construction contract(s), pursuant to the VHA Records Control Schedule 10-1.

b. AE Responsibility and Liability for Design and Construction Period Services Deficiencies

(1) During contract pre-negotiation meetings, the AE must be told that it is VA's intention to hold the AE responsible for "any errors or omissions in its designs, drawings,

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specifications, and other services.” Such errors or omissions must be corrected without additional compensation. Furthermore, the AE must be and remain liable to the Government for all damages caused by the AE’s negligent performance of any services furnished under the contract, notwithstanding the Office of Facilities Management reviews of AE work.

(2) All change orders (design and construction), supplemental agreements (design and construction), and completion items must be analyzed by the Contracting Officer upon execution and assigned an Issuance Code as to the basis for their issuance (e.g., design error or omission, program change, unknown condition, etc.). This record becomes part of the project files. If the errors or omissions exceed 2 percent of the costs of the construction contract, the Contracting Officer must begin an independent review of the underlying facts to determine if any negligence is involved, and after consultation with the Office of General Counsel, take appropriate action to address any deficiencies in the AE services.

(3) Notwithstanding the 2 percent trigger threshold mentioned in subparagraph 4b(2), the Contracting Officer can review any individual item (i.e., a major construction change order, construction supplemental agreement, or completion item that has been identified as resulting from a design error or omission), and, with the concurrence of the Chief Facilities Management Officer and the Office of General Counsel, notify the AE firm immediately that VA considers the AE partially or completely responsible.

(4) The Contracting Officer monitors the AE’s performance in providing services during construction and must notify the AE whenever VA considers that the AE’s contract responsibilities are deficient. If such deficiencies result in additional costs to VA, then the Contracting Officer must notify the AE of its possible liability.

(5) Prior to the final settlement of an AE contract, the Contracting Officer will analyze the AE Performance Evaluations Standard Form 1421 submitted upon completion of each major project milestone (see subpar. 4a(2)) and determine whether or not there are any unresolved issues which require a legal opinion from the Office of General Counsel concerning AE liability. If liability is determined, the Contracting Officer must notify the AE firm of a VA finding-of-fault.

(6) Whenever a VA finding-of-fault is issued, the Contracting Officer will attempt to negotiate a settlement with the AE. If no agreement with the AE can be reached, the Contracting Officer must document the efforts and consult with the Office of General Counsel to determine the further course of action against the AE.

(7) All decisions rendered by the Board of Contract Appeals on a construction contract dispute against the Government must be reviewed by the Contracting Officer to determine if AE deficiencies are involved and, if so, with the concurrence of the Office of General Counsel and the Chief Facilities Management Officer, the Contracting Officer notifies the AE firm of a VA finding-of-fault.

5. REFERENCES

- a. FAR clause 52.236-23, Responsibility of the Architect-Engineer Contractor.
- b. FAR clause 36.609-2, Redesign Responsibility for Design Errors or Deficiencies.
- c. FAR clause 52.236-24, Work Oversight in Architect-Engineer Contracts.

6. FOLLOW-UP RESPONSIBILITY: The Office of Facilities Management (18) is responsible for the contents of this Directive. Questions are directed to the Office of Project Management Service (183B) at 202-565-9259.

7. RECISSIONS: Office of Facilities Management Memorandum No. 08-89-01 titled, "Policies and Procedures for Evaluation of Architect-Engineer Project Performance and for Determining Architect-Engineer Liability for Design and Construction Services Deficiencies," dated February 14, 1989 is rescinded. This VHA Directive expires January 31, 2011.

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