

**COMMERCE ACQUISITION MANUAL
1328.102**

DEPARTMENT OF COMMERCE
SHIP CONSTRUCTION, ALTERATION, AND REPAIR BOND WAIVERS

COMMERCE ACQUISITION MANUAL 1328.102

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SHIP CONSTRUCTION, ALTERATION, AND REPAIR BOND WAIVERS

SECTION 1 – OVERVIEW

1.1 Background

40 U.S.C. § 3131 et seq., as implemented at Federal Acquisition Regulation (FAR) 28.102-1, requires prime contractors to furnish performance and payment bonds for contracts in excess of \$150,000, for the construction, alteration, or repair of any public building or public work of the Federal government, including ship construction, alterations, and repairs. The National Oceanic and Atmospheric Administration's (NOAA) Office of Marine and Aviation Operations (OMAO) operates a fleet of hydrographic survey, oceanographic research and fisheries survey vessels, consistent with its mission to perform offshore and deep-sea survey operations, coastal mapping, oceanographic research, and other functions that ensures public safety and the preservation of the Nation's property and natural resources.

NOAA ships enter into either a dry docking or dockside repair period typically in the first or second quarter of every fiscal year. In addition, it is often necessary for emergency repairs to be made to NOAA's vessels without delay for safety purposes and to ensure that the ships can carry on their missions involving the collection of mission sensitive data, as well as immediate response capabilities for extreme weather-related events involving hurricanes. Prime contractors performing the maintenance activities on NOAA's vessels have been required to provide performance and payment bonds for that work. The bonding requirement has hindered competition, and limited NOAA's ability to meet mission objectives, obtain the most advantageous price competition and meet its socio-economic goals.

Pursuant to the Department of Commerce Appropriations Act for Fiscal Year 2015, the Secretary of Commerce has been granted the authority to waive the performance and payment bond requirement under 40 U.S.C. § 3131 et seq., for the construction, alteration, or repair of ships in NOAA's fleet of vessels. The waiver authority aligns the Department of Commerce's (DOC) authorities with those of other Federal agencies, including the U.S. Department of the Navy and the U.S. Coast Guard, and is expected to address significant difficulties NOAA has experienced in obtaining competitive bids for ship repairs.

1.2 Purpose

This Commerce Acquisition Manual (CAM) chapter provides policy and procedures relevant to waiving the requirement in 40 U.S.C. § 3131 et seq. to impose payment and performance bonds on ship construction, alteration, and repair contracts.

1.3 Applicability

The requirements of this chapter are applicable to all NOAA ship construction, alteration, and repair acquisitions subject to 40 U.S.C. § 3131 et seq. and Federal

Acquisition Regulation (FAR) Subpart 28.1, performance and payment bonds and alternative payment protections, having a value greater than \$150,000.

1.4 Effective Date

Waiver authority and the procedures outlined in this CAM chapter are effective upon issuance through the duration of Fiscal Year 2015, and continue for any years in which Congress reauthorizes the authority.

END OF SECTION 1

SECTION 2 – ROLES AND RESPONSIBILITIES

2.1 Secretary of Commerce

The Secretary of Commerce is responsible for ensuring proper use of bond waiver authority pursuant to Section 111 of the Department of Commerce Appropriations Act, 2015, Division B, Title I of Pub. L. 113-325 (Dec. 16, 2014) (Appropriations Act) and as reauthorized each year thereafter.

2.2 Senior Procurement Executive

The Senior Procurement Executive is responsible for:

- a. Developing and implementing regulations, policies and guidance to implement the bond waiver authority for ship construction, alteration, and repair; and
- b. Conducting oversight on implementation of the bond waiver authority.

2.3 NOAA Deputy Under Secretary for Operations

Pursuant to its delegated authority, the NOAA Deputy Under Secretary for Operations is responsible for:

- a. Approving the annual class waiver for ship repairs;
- b. Approving all individual waivers of bond requirements for ship construction, alterations and repairs;
- c. Submitting required reports to Congress; and
- d. Working with NOAA's Budget Office to notify the appropriate congressional committee 15 days prior to approving any waiver requests.

2.4 NOAA Senior Bureau Procurement Official (BPO)

The BPO is responsible for the following:

- a. Establishing bureau-level policies and guidance, as necessary;
- b. Reviewing all requests for waivers and providing recommendation to the NOAA Deputy Under Secretary for Operations;
- c. Submitting all notifications of emergency ship repairs where bonds are waived to the NOAA Deputy Under Secretary for Operations; and
- d. Providing the Office of Acquisition Management (OAM) with copies of all approved individual and class waivers.

2.5 Head of the Contracting Office

2.5.1 The Acquisition and Grants Office (AGO), Eastern Acquisition Division (EAD), Head of the Contracting Office (HCO)

The AGO EAD Head of the Contracting Office is responsible for:

- a. Submitting NOAA's Office of Marine and Aviation Operations (OMAO) Annual Class Ship Waiver request to the BPO for review;
- b. Submitting any individual requests for waivers associated with the construction, alteration, or repair of NOAA's fleet of vessels in the eastern region to the BPO for review; and
- c. Submitting required written notification of any emergency ship repairs where bonds are waived to the BPO for review.

2.5.2 The Acquisition and Grants Office (AGO), Western Acquisition Division (WAD), Head of the Contracting Office (HCO)

The AGO WAD Head of the Contracting Office is responsible for:

- a. Submitting any individual requests for waivers associated with the construction, alteration, or repair of NOAA's fleet of vessels in the western region to the BPO for review; and
- b. Submitting required written notification of any emergency ship repairs where bonds are waived to the BPO for review.

2.6 Contracting Officer

2.6.1 Designated Contracting Officer - Acquisition and Grants Office (AGO), Eastern Acquisition Division (EAD)

The EAD Designated Contracting Officer is responsible for:

Preparing and submitting NOAA's Office of Marine and Aviation Operations (OMAO) Annual Class Ship Waiver request to the HCO for review.

2.6.2 Contracting Officer - Acquisition and Grants Office (AGO)

The AGO contracting officer, with assistance of NOAA's Office of Marine and Aviation Operations (OMAO), is responsible for the following:

- a. Preparing individual ship construction, alteration, and repair waiver requests to the HCO for review;
- b. Including CAR Clause 1352.228-77, Contractor Assurance of Subcontractor Payments-Certification (Appendix A) in all solicitations and contracts where a waiver from payment and performance bonds is granted;
- c. Preparing for review by the HCO the required written notification of any emergency ship repairs where bonds are waived;
- d. Documenting the contract file when the waiver authority is used;
- e. Notifying the contractor of non-compliance with CAR Clause 1352.228-77 and pursuing available remedies; and

- f. Documenting non-compliance with CAR Clause 1352.228-77 in the Contractor Performance Assessment Reports System (CPARS) as appropriate.

END OF SECTION 2

SECTION 3 – Waiver Authority and Policy

3.1 Waiver Authority

The requirements of 40 U.S.C. § 3131 et seq. and FAR Subpart 28.1 for contract surety bonds on Federal construction projects are generally not necessary with respect to the construction, alteration, and repair of NOAA's vessels to protect the public, including the Government, material, men and laborers working as subcontractors on these projects. The past requirement for bonds on NOAA ship repair contracts has hindered competition, and limited NOAA's ability to meet mission objectives, and meet its socio-economic goals.

To alleviate the negative impacts that bonds have on NOAA, the requirement to require prime contractors to furnish performance and payment bonds for contracts in excess of \$150,000 for NOAA ship construction, alteration, and repair contracts may be waived on an annual class basis for planned ship repair projects and on an as needed- individual basis for ship construction, alteration and repair.

Contracting officers may not issue a solicitation waiving the requirements for bonds until a class or individual waiver request is approved.

3.2 Annual Class Ship Waiver – Ship Repair

A request for an Annual Class Ship Waiver of performance and payment bonds for ship repair contracts shall be prepared on an annual basis and submitted for review and approval. The request for waiver must be in writing and shall include a schedule of all planned ship repair projects where waivers are sought, as well as a justification demonstrating that requirements for bonds are not in the best interest of the Government. The request for a class waiver shall also include a request to make emergency repairs to NOAA's vessels that need to be made without delay to ensure the safety of the ship's crew and to minimize the impact on the ship's schedule, as well as a justification as to why bonds may be disadvantageous in cases of emergency.

3.3 Individual Waivers – Ship Construction, Alteration, and Repair

A request for a waiver of performance and payment bonds for individual ship construction, alteration, or repair of a NOAA vessel shall be prepared and submitted for review and approval. The request for waiver must be in writing and shall include a description of the project as well as a justification demonstrating that bonding requirements are not in the best interest of the Government.

END OF SECTION 3

SECTION 4 – Waiver Request Procedures

4.1 Annual Class Ship Waiver – Ship Repair

An Annual Class Ship Waiver request for ship repairs shall be prepared annually. The request shall be in writing and clearly demonstrate why requiring bonds is not in the best interest of the Government. The request shall include a list of planned ship repair availabilities (drydock/dockside) to be covered by the class waiver (OMAO's Fleet Allocation Plan, (draft or final), will serve this purpose). In addition, the request for a class waiver shall also include a request to make emergency repairs to NOAA's vessels that need to be made without delay to ensure the safety of the ship's crew and to minimize the impact on the ship's schedule, as well as a justification as to why bonds may be disadvantageous in cases of emergency.

On January 1st of each calendar year, NOAA's OMAO shall provide the Fleet Allocation Plan to the designated AGO acquisition division for preparation of the class waiver request. The designated contracting officer shall prepare the waiver request with the assistance of OMAO and submit it to the designated AGO acquisition division for review. The designated AGO acquisition division shall submit the waiver request to the BPO for final review.

No later than February 1st of each year, the BPO shall submit the waiver request package for approval to the NOAA Deputy Under Secretary for Operations. See Appendix B for a sample of an Annual Request for Class Waiver.

4.2 Individual Waiver - Ship Construction, Alteration, and Repair

Individual ship construction, alteration, or repair waiver requests shall be prepared in writing and shall clearly articulate the basis for the request. The request shall be submitted well in advance of the planned solicitation issue date to allow sufficient time for all required reviews and approvals.

The contracting officer shall prepare the waiver request with the assistance of OMAO and submit it to the appropriate AGO acquisition division for review. The AGO acquisition division shall submit the waiver request to the BPO for final review.

The BPO shall submit the waiver request package for approval to the NOAA Deputy Under Secretary for Operations.

END OF SECTION 4

SECTION 5 – Use of Bond Waiver Authority

5.1 Best Interest Determination - Waiver of Bonds

The requirement for contract bonds is generally not necessary with respect to the construction, alteration, and repair of NOAA's vessels to protect the public, including the Government, material, men and laborers working as subcontractors on these projects.

Notwithstanding any approved annual ship repair class waiver, contracting officers shall consider any unusual circumstances that may arise in which either payment or performance bonds, or both, will be advantageous to the Government in connection with ship repair contracts prior to issuing solicitations.

In making this assessment, the Contracting Officer shall consider all the circumstances of the procurement including, but not limited to, the complexity of the work, the level of competition in the region where the work will be performed, the interests of subcontractors and the need to protect the Government from loss. If the Contracting Officer determines that bonds are not appropriate, this determination should be documented in the contract file in the form of the approved bond waiver (class or individual).

5.2 Issuance of Solicitation

Contracting officers shall not issue a solicitation waiving the requirements for bonds until a class or individual waiver request is approved by the NOAA Deputy Under Secretary for Operations and required notification has been provided to Congress.

5.3 Contract Clause

The contracting officer shall insert the clause at 1352.228-77, "CONTRACTOR ASSURANCE OF SUBCONTRACTOR PAYMENTS" in solicitations and contracts when bonds are waived. See Appendix A for the clause in full text.

5.4 Emergency Repairs - Notification

The contracting officer shall prepare a written notification to the NOAA Deputy Under Secretary for Operations, as soon as practicable, when an emergency repair is solicited and bonds are waived, consistent with the terms of the class waiver as approved by the NOAA Deputy Under Secretary for Operations. The contracting officer shall submit the notification to the BPO for final review through his/her HCO.

END OF SECTION 5

SECTION 6 – Reporting Requirements

6.1 Congressional Committee Reporting

6.1.1 Notification on Use of Waiver Authority

Not less than 15 days prior to any waiver issued under the authority granted to the Department of Commerce to waive bonds, the NOAA Deputy Under Secretary for Operations shall notify the appropriate Congressional committee. To initiate this notification process the NOAA Deputy Under Secretary for Operations shall promptly notify the Director of NOAA's Budget Office of its intent to approve a class waiver or individual waiver. The waiver request to be approved by the Deputy Under Secretary for Operations shall be provided to the NOAA Budget Office for use in notifying the Congressional committee consistent with Section 111 of the Department of Commerce Appropriations Act, 2015.

Upon execution of this notification and the passage of fifteen days the NOAA Deputy Under Secretary for Operations shall grant approval to the requestor to waive the requirement for bonds.

6.1.2 Annual Report to Congress

Not later than 120 days after the date of enactment of the Department of Commerce Appropriations Act, 2015, the NOAA Deputy Under Secretary for Operations shall prepare a report including the actual costs of repairing, rehabilitating and replacing vessels in fiscal year 2012, 2013 and 2014, and annually thereafter, including an indication of those vessels for which NOAA waived the requirement for bonds. To initiate this reporting process the OMAO shall prepare the report for the NOAA Deputy Under Secretary for Operations, for further processing through the NOAA Budget Office, for use in notifying the Congressional committee consistent with Section 111 of the Department of Commerce Appropriations Act, 2015.

6.2 Reporting to Office of Acquisition Management

Annually, not later than October 30th of each year, the BPO shall provide a copy of all approved bond waivers (class and individual) for the previous fiscal year to the Senior Procurement Executive. Copies of approved waivers shall be submitted electronically to the OAM mailbox at OAM_Mailbox@doc.gov.

**END OF SECTION 6
END OF CAM 1328.102**

APPENDICES

APPENDIX A – CONTRACT CLAUSE

1352.228-01 CONTRACTOR ASSURANCE OF SUBCONTRACTOR PAYMENTS

(a) To protect the interests of subcontractors participating in the performance of this contract, the Government requires the assurance that all monies due to subcontractors is timely and properly made *prior to* the submission of the contractor’s final invoice.

(b) *By accepting this award, in writing or by performance*, the offeror/contractor represents that—it will provide full payment to all subcontractors utilized in the performance of the resultant contract prior to the submission of its final invoice.

(c) No later than five (5) days after contract award the contractor shall provide the Contracting Officer with a list of all subcontractors to be utilized in the performance of this contract. The contractor must provide updates to the Contracting Officer throughout the contract, should changes be made.

(d) The following shall be completed and provided accordingly:

SUBCONTRACTOR LIST – CONTRACT NO. _____			
<i>Name of Subcontractor Business</i>	<i>Subcontractor Point of Contact with contact information (number/e-mail)</i>	<i>Contract Line Item(s) to which subcontract work is tied</i>	<i>Applicable Trade (electrical, mechanical, etc.)</i>

(e) Reports by subcontractors of delayed or non-payment during the performance of the contract may impact the Government’s continued payment of contractor invoices on a percentage of completion basis. (CAR clause, 1352.271-71, Method of Payment and Invoicing Instructions for Ship Repair).

(f) The contractor shall include the following statement on its final invoice -

“By submission of this invoice, assurance is herein provided that all monies due to any and all subcontractors used in the performance of this contract have been paid in full prior to the submission of this final invoice.”

(g) Failure to pay subcontractors could adversely affect the contractor's past performance evaluation for this contract and have a negative impact on its eligibility for future contract awards.

(h) The Government may seek any available remedies in the event the contractor fails to comply with the provisions of this clause.

APPENDIX B – ANNUAL REQUEST FOR CLASS WAIVER - SAMPLE

XXXX XX, 2015

MEMORANDUM FOR: XXXXXXXXXXXXXXXXXXXXXXXXXXXX
Deputy Under Secretary for Operations
NOAA

FROM: XXXXXXXXXXXXXXXXXXXXXXXXXXXX
Director and Head of the Contracting Office
NOAA Eastern Acquisition Division (EAD)

THRU: XXXXXXXXXXXXXXXXXXXXXXXXXXXX
Director and Senior Bureau Procurement Official
Acquisition and Grants Office

SUBJECT: Annual Request for Class Waiver Approval – Payment and
Performance Bonds on NOAA Ship Repair Contracts – Repair Season
FY16

1. PURPOSE: The Acquisition and Grants Office (AGO), Eastern Acquisition Division (EAD) is seeking waiver approval from the requirement to require prime contractors to furnish performance and payment bonds for contracts in excess of \$150,000 for repair of NOAA Ships. Specifically, this request for waiver approval is for all NOAA Ships planned to enter into a repair period during the FY16 repair season and identified in the attached FY16 Fleet Allocation Plan, to include emergency dry-dock or dockside repairs needed for any of the ships identified.

2. AUTHORITY PERMITTING BOND WAIVER: Commerce Acquisition Regulation 1328.102, Waiver of Performance and Payment Bonds for Contracts Involving the Construction and Repair of NOAA's Fleet of Vessels.

3. BASIS FOR REQUEST: NOAA ships enter into either a dry-dock or dockside repair period every fiscal year, typically in the first and second quarter. Each vessel is equipped with highly advanced survey instruments, state of the art electronics, computers, and navigational and communication systems, which must be kept operational to ensure the safety of the crew and the ship's schedule.

It is well documented that the requirement for bonds on NOAA ship repair contracts have long since hindered competition and limited NOAA's ability to meet mission objectives, obtain the most advantageous price competition and meet its socio-economic goals. To improve and strength NOAA's competitive market base in the FY16 repair season and increase opportunities for small business participation while safeguarding mission schedules and at the best price,

waiver of the bonding requirement for the NOAA ships identified is deemed in the best interest of the Government.

Additionally, to ensure that these ships can carry on with only minimal disruption to their missions of sensitive data collection and rapid response deployment related to extreme weather-related events such as hurricanes, it is paramount that this waiver include emergency repairs to NOAA vessels. To do otherwise could adversely impact the safety of the ship's crew as well as severely jeopardize the very time-critical, cyclical data collection needs of those ships. For example, lost data has long term consequences on NOAA and its ability to meet requirements of the Magnuson-Stevens Fishery Conservation and Management Act.

4. **WAIVER APPROVAL RISK MITIGATION:** Adverse effects to waiving bonds is not anticipated; however, with respect to payment due subcontractors performing on NOAA ship repair contracts, in accordance with clause, CAR 1352.228-77, "Contractor Assurance of Subcontractor Payments", prime contractors must assure the Government at submission of its proposal and subsequently provide assurance at award that all monies due to any and all subcontractors used in the performance of the contract are paid in full prior to the submission of its final invoice. This clause will be included in any solicitation, to include emergency acquisitions issued where waiver authority is exercised. Further, best value procedures are used to evaluate and award ship repair contracts and include past performance as one of the factors for evaluation. The Past Performance Information Reporting System (PPIRS) will be used, among other means, to assess a prime contractor's subcontractor payment record.

Similarly, no known negative affects to performance are anticipated as a result of not requiring bonds. Best value decisions for award include an assessment of a contractor's overall performance record from a timely, quality and business relations standpoint. Making sound business decisions at the forefront when selecting the contract awardee, coupled with the appropriate level of contract administration and oversight goes a long way in abating issues in the area of performance.

Should a contractor be found not in compliance with CAR Clause 1352.228-77, appropriate contract remedies will be pursued and such non-compliance will be appropriately documented in the Contractor Performance Assessment Reports System (CPARS).

5. **RECOMMENDATION:** Based on the above, it is requested that bond waiver approval be granted by the Deputy Under Secretary for Operations for the FY16 NOAA Ship Repair Season.

6. **CONCURRENCE:**

XXXXXXXXXXXXXXXXXXXX
Director, Marine Operations

Date

7. APPROVAL:

Approved

This waiver approval lasts the duration of fiscal year 2015 and carries through any years in which Congress reauthorizes the authority.

Disapproved

Further Discussion Required

XXXXXXXXXXXXXXXXXXXX
Deputy Under Secretary for Operations

Date

