[redacted]

JUSTIFICATION REVIEW DOCUMENT
OTHER THAN FULL AND OPEN COMPETITION

PROJECT: Class Justification and Approval (J&A) to allow Contracting Officers to issue solicitations for construction contracts, where "brand name or equal" references are necessary to effectively communicate interior color and finish selections.

AUTHORITY: 10 U.S.C § 3204(a)(1)(effective January 1, 2022) (formerly 10 U.S.C. § 2304(c)(1), amended by Pub. L. No. 117-81, 135 Stat. 154); Federal Acquisition Regulation (FAR) 6.302-1(c) Only one responsible source and no other supplies or services will satisfy agency requirements; and Defense Federal Acquisition Regulation Supplement (DFARS)206.302-1(c)(2) and (S-70).

[redacted]

SIGNATURES ARE REQUIRED BELOW:

I have reviewed this J&A and find the justification adequate to support other than full and open competition.

[redacted]

[redacted]

[redacted]

Justification and Approval
for Other than Full and Open Competition

1. **Contracting Agency:**

U.S. Army Corps of Engineers (USACE), Louisville District, 600 Martin Luther King, Jr. Place, Room 821, Louisville, KY 40201. Louisville District has prepared this document in support of construction contracts across the entire USACE Enterprise.

2. **Description of Action:**

USACE requests a Class Justification and Approval (J&A) for Other than Full and Open Competition to allow Contracting Officers to issue solicitations for construction contracts, where "brand name or equal" references are necessary to effectively communicate interior color and finish selections. The estimated cost for the Class J&A is [redacted] which covers future projects from Fiscal Year (FY) 22 through FY 26.

3. **Description of Supplies/Services:**

a. In order to sufficiently define the scope of work to be performed by a construction contractor, a Basis of Design (BOD) is prepared to document the principles, assumptions, rationale, criteria, and considerations used for calculations and decisions required during design. The BOD may include text, catalog cuts and manufacturer information used to set the minimum levels of quality or performance set by the design. While the BOD largely covers the construction aspects of a project, it also sets forth required "finishes," which are the surface treatments to horizontal surfaces (floors and ceilings) and vertical surfaces (walls) fixed to the main structural elements of the building. These finishes, such as paint, carpeting and window coverings, complete or enhance the aesthetic experience of interior and exterior parts of a building. For interior design and architectural purposes, these finishes include colors, patterns, textures and textile designs.

b. When preparing a BOD for a construction project, it is not practicable to convey the required finishes to potential offerors using mere descriptions. For example, it is not feasible to adequately describe a particular shade of gray paint that must be used in order to provide aesthetic compatibility with other buildings within a complex; however, the intended hue can be conveyed by referencing a particular manufacturer's proprietary color, and that color can then be replicated in any brand of paint. Therefore, the use of brand name references is necessary to convey requirements, but is not intended to restrict competition. The identified brand name items or proprietary specifications are intended to solely relay the BOD for the interior finishes. The specification for a certain interior finish will include the manufacturer's name, product line, model number, etc. along with all salient

[redacted]

characteristics necessary for "equal" products to meet contract performance requirements. While it is possible for many manufacturers to produce finishes that are functionally equivalent to these designated finishes, the finish descriptions themselves are nonetheless proprietary specifications unique to particular manufacturers. The contract performance requirements are not proprietary, and can be met by all established manufacturers. Manufacturer(s) and product line(s) are identified only to establish a color and aesthetic BOD.

c. The entire construction program to be undertaken by USACE in FY22 has an estimated annual value of [redacted] These projects typically range in size from [redacted], and on an annual basis, approximately 750 out of 2,500 projects involve the designation of finish colors and aesthetic requirements. The funding for these projects encompasses all funds USACE obligates for construction, including the Civil Works Mission, the Military Construction Mission and all projects executed by USACE contracting in support of International and Interagency Missions. The value of the construction program that involves projects with required finishes is estimated to be [redacted] of the overall construction cost of a project. This percentage was validated using three different methods. The first method was based on cost estimates for interior finishes prepared by interior designers on recent projects. The second method was an analysis of the interior finish portions of cost estimates for USACE building projects prepared by cost engineering professionals. The third was an analysis of commercially available unit cost data from the RS Means 2020 Square Foot Costs Book for interior finishes for facilities typical to the USACE construction program (e.g. schools, medical centers, office buildings, laboratories, data centers, daycares, fire stations and repair garages). For FY22, this calculation results in an estimated total cost of [redacted] in finishes. After applying a [redacted] for FY23 through FY26, this results in an overall class J&A for five years in the estimated amount of [redacted] Rounding up, the requested value of this J&A is [redacted]

4. Authority Cited:

10 U.S.C § 3204(a)(1)(effective January 1, 2022) (formerly 10 U.S.C. § 2304(c)(1), *amended by* Pub. L. No. 117-81, 135 Stat. 154), as implemented by FAR 6.302-1(c), and DFARS 206.302-1(c)(2) and (S-70), "Only One Responsible Source and No Other Supplies or Services Will Satisfy Agency Requirements." This class justification applies only to the brand name or equal products and proprietary specifications describing finishes, including interior colors, as specified in USACE construction contract documents.

5. Reasons for Authority Cited:

a. Background:

(1) Section 888(a) of the FY17 National Defense Authorization Act (NDAA) (Pub.

L. 114-328) requires that competition on Department of Defense (DoD) contracts not be limited through the use of brand name or equal descriptions or proprietary specifications or standards, in solicitations, unless a justification is approved in accordance with 10 USC 2304(f). In accordance with DASA(P) Alert 19-108, use of Brand Name or Equal references requires a J&A for Other than Full and Open Competition, and DoD subsequently issued a final rule effective 31 May 2019 that amended the DFARS to implement section 888 of the NDAA for FY2017 (Pub. L. 113-291).

(2) The Structural Interior Design (SID) of a facility includes building-related design elements and components as part of the building construction, such as wall paint or coverings, ceiling paint or finish, floor coverings (e.g. tile, carpet, etc.), primary window treatments (e.g. blinds, shades and drapery hardware, etc.), signage and built-in casework. The interior designer must determine the desired interior finish materials based on the respective aesthetic, durability and maintenance qualities, and characteristics applicable to each space within the facility. The SID is designed by a qualified interior designer in accordance with Unified Facilities Criteria (UFC) 3-120-10 Interior Design, Chapter 2 paragraph "Interior Designer Qualifications."

It is necessary for the government to include brand names or proprietary specifications for finishes to have a complete design that can be properly conveyed to the construction contractor. UFC Requirements: (reference UFC 3-120-10, paragraph 4-5.1).

> *The interior designer must provide all finish and color selections including finish code, manufacturer's materials, textures, patterns, color names and numbers for all interior finishes and specialties which will be exposed to view in the finished construction. The Government will direct which of the following methods to use.*

It is noted that the UFC stipulates use of the following disclaimer: (reference paragraph 4-5.1.2):

> *The Government prohibits the use of proprietary materials, finishes and colors. A disclaimer must be used on the drawings or in the specifications indicating materials and colors are shown for reference only. However, it is important to use specific manufacturer, finish and color information to establish a frame of reference in the development of the [Structural Interior Design] SID. Reference UFGS 09 06 00 Schedules for Finishes for the appropriate disclaimer to use that addresses this issue when developing the SID.*

b. <u>Justification</u>:

(1) Under the current UFC, the SID of a building is to be fully coordinated by a qualified interior designer in order to be considered fully designed. The selection of the basis of design, the color aesthetic and visual integrity will be upheld and

coordinated throughout the facility. The finishes chosen are fully synchronized to provide a cohesive interior to support the building requirements. Per UFC 3-120-10, Chapter 2;

> *"Designers must consider interior design compatibility with the local environment, functional requirements, economy of construction, energy conservation, interior details, sustainable design and life cycle costs. Additionally, the interior design must be designed in harmony with the architectural character of existing facilities that are to remain, especially those that are considered historically or architecturally significant and must comply with the installation aesthetic. Design excellence must not add substantial project costs but balance the functionality, aesthetics, quality, sustainability and maintainability of facilities."*

(2) As required by the UFC, specifications are developed to identify the performance characteristics of the respective required design elements. Manufacturer and product names are identified solely to provide and convey a basis for the color, pattern and visual integrity of the respective finishes. By providing this basis, the contractor can determine if the product submitted for approval will conform to the intended aesthetic of the design. This will lead to an overall coordinated, structural interior design for the entire building as intended by the qualified interior designer. Again, it is important to note that the specifications and manufacturer names are illustrative for coordinated design aesthetics only. While the total value of the material costs is used as the basis for this J&A, the actual cost differential among the manufacturers is minimal. Typically, any manufacturer of finish products has a full palette of colors and textures to choose from and can provide an equivalent product while meeting the technical specifications without giving any bidding advantage to a particular manufacturer. The contractors will select material vendors that meet the specification salient features and their equivalent color identifier based on competitive market pricing.

Example: Carpet tiles come in a variety of colors and patterns. The technical specifications, such as ounce weight, durability, coloring, and tufting, etc., can all be described as non-proprietary performance criteria. However, color and pattern of each carpet's unique characteristics of the manufacturer and product line are difficult to describe without visual examples. If the manufacturer and product line is provided with the solicitation, the offeror will have a basis for color and visual of the intended aesthetic.

(3) By listing the basis of design for the intended SID finishes, the designer can verify that the performance specifications and visual requirements are met for the overall building. Alternates may be submitted and approved if these meet the requirements of the specifications and overall color and building aesthetic. Interior design is a necessity to a project as it vitally improves facility operating efficiency, livability, functionality, life-cycle economics, and the productivity of the users.

(4) For construction contracts, FAR Clause 52.236-5, Materials and Workmanship, addresses any potential competition concerns associated with including a basis of design on the plans or in the specifications and has been well-defined and well-understood by the construction contracting community for decades. In part, this clause states: "References in the specifications to equipment, material, articles, or patented processes by trade name, make, or catalog number, shall be regarded as establishing a standard of quality and shall not be construed as limiting competition. The Contractor may, at its option, use any equipment, material, article, or process that, in the judgment of the Contracting Officer, is equal to that named in the specifications, unless otherwise specifically provided in this contract."

(5) The identified brand/manufacturer items or proprietary specifications are intended to be examples for the basis of interior design to help ensure visual integrity of the building's interior finishes. Interior finishes will be procured and installed as part of firm-fixed-price, design-bid-build construction contracts and will be solicited in accordance with all applicable policies, procedures, guidance, and laws related to competition. Typically, for design-build (also called turnkey) projects, basis of design is not necessary as only specifications are provided for proposal preparation. In the event plans are provided as part of a design-build solicitation package, interior finishes identified as basis of design items will be considered covered under this J&A.

c. Alternatives: There is no alternative method to complete a 100% design suitable for those requirements that require a design-bid-build contract. Utilizing a basis of design is a critical component of designing complete and coordinated structural interior design under the current UFC. It is impossible to fully design a system to meet requirements without assumptions of material specifications, especially given the numerous individual subcontractors supplying their respective items. The only potential alternative is to convert all solicitations into a design-build procurement without complete designs and require the effort of a qualified interior designer who must meet the requirements set forth in UFC 3-120-10 Interior Design, Chapter 2 paragraph "Interior Designer Qualifications." This alternative does not meet the government's interests in providing complete designs for facilities where the government has determined a design-bid-build procurement is in the best interests of the government pursuant to FAR Part 36 "Construction and Architect-Engineer Contracts" and Engineer Regulations (ER)1180-1-9.

The only alternative to this Class J&A would be the preparation and approval of individual J&As for each construction project involving interior finishes, which would be inefficient and time consuming.

d. Impact: Providing SID as the basis of design is an industry standard necessary to complete a 100% design needed for a Design-Bid-Build procurement. Design-Bid-Build procurements ensure that the government has maximum control over the design of the requirement and at the same time, maximizes competition. If the basis of design elements here were not permitted to be used, it would effectively limit the

ability of the government to control the aesthetic design of government facilities which will lead to uncoordinated and clashing project finishes.

6. Efforts to Obtain Competition:

The interior designers perform extensive market research for the non-proprietary structural interior design items to identify a minimum of three manufacturers for each finish item. The use of proprietary SID colors, finishes, and textiles will still allow the maximum competition among entities with comparable products. These subcontractors reflect a small percentage, approximately 3.5%, as described above, of the total value of the construction contracts to which they are a part, which will continue to be procured using full-and-open competition (absent separate justification to limit competition) thereby maximizing competition to the greatest extent practicable while meeting the government's requirements. Approval of this J&A will have no impact on small business, and will not preclude small business from any contract opportunity.

7. Actions to Increase Competition:

This Class J&A anticipates the requirement for interior finishes related to USACE construction projects between FY22 and FY26. The proposed basis of the design process is not considered to negatively impact the opportunity for competition on the manufacturing or supply of interior finish products. No specific actions are needed to increase future competition.

8. Market Survey:

a. Market research related to this effort was conducted using direct outreach to trade organizations for manufacturers and suppliers of interior finish products, specifically floor coverings and paint. The initial outreach to the Carpet Research Institute (CRI) and the Master Painters Institute (MPI), was based on recommendations from the USACE interior design community (Louisville (CELRL), Kansas City (CENWK), Omaha (CENWO), and Los Angeles (CESPL) Districts along with South Pacific Division (CEPOD). MPI's Executive Director provided a response stating that the institute's testing of paints and coatings is based on requests from manufacturers. MPI's Executive Director referred USACE to the Director of Field Relations at the Paint Technology Center who provided some information about the technical process for specifying paint.

b. After reaching out to trade organizations, USACE conducted further market research. USACE's interior design community, along with Architect / Engineer firms currently working on projects, provided recommendations of specific manufacturers that could provide feedback regarding the intended basis of design approach. The following manufacturers were contacted: Shaw (carpet), Interface (carpet), Virginia Tile which includes Crossville Ceramics and American Olean (Wall and Floor Tile), Armstrong (ceiling), and Benjamin Moore (paint). In response to the direct outreach,

every manufacturer was supportive of USACE's basis of design position and agreed that the inclusion of a basis of design as part of a project's design package does not unfairly limit competition. Shaw Industries' response stated, "By allowing a basis of design to be designated, this allows all persons involved to understand the design intent, see color and pattern, ultimately allowing anyone to submit alternate products while still being confident these products meet the original intent."

c. Market research during the project design is conducted for each solicitation by qualified interior design professionals. An Internet search is typically used to identify three vendors for each finish for the purpose of market research. The research consists of reviewing the product catalogs, sample books and websites for similar finishes and colors. The minimum of three vendors identified for each finish can provide comparable products which met the performance and visual specifications of the solicitation. Should another vendor's product be chosen, the qualified interior designer will be required to approve the submittal to verify coordination with all other SID finishes.

d. A Notice of Intent to Sole Source was posted on the SAM.gov website as described in the following paragraph, and no other sources have expressed interest.

9. **Interested Sources**:

a. Following outreach to industry trade associations and individual manufacturers of various interior design products, each respondent was supportive of USACE's basis of design position and agreed that the inclusion of a basis of design as part of a project's design package does not unfairly limit competition.

b. On 13 October 2021, the Louisville District posted (on behalf of the US Army Corps of Engineers enterprise) a Notice of Intent (NOI) to Sole Source on SAM.gov website. Responses to the NOI were to be received no later than 29 October 2021. No responses were received.

10. **Other Factors:**

On 4 January 2022, USACE issued Engineering and Construction Bulletin (ECB) Number 2022-1, Subject: Prohibitions in the Use of Brand Name (or Equal) References in Solicitations. This ECB provides guidance to the engineering community to clarify the policy and requirements regarding the use of brand name or equal references in US Army Corps of Engineers (USACE) designs and specifications, and explains the requirement for a Justification and Approval for Other than Full and Open Competition where brand name references are necessary.

[redacted]

11. Technical Certification:

I certify the supporting data under my cognizance which are included in the J&A is accurate and complete to the best of my knowledge and belief.

[redacted]

12. Small Business Certification:

I certify the supporting data under my cognizance which are included in the J&A is accurate and complete to the best of my knowledge and belief.

[redacted]

13. Requirement Certification:

I certify the supporting data under my cognizance which are included in the J&A is accurate and complete to the best of my knowledge and belief.

[redacted]

14. Contracting Officer Certification and Approval:

I certify that this justification is accurate and complete to the best of my knowledge and belief. A determination of fair and reasonable price will be made for each individual contract executed under the authority provided by this Class J&A.

[redacted]

[redacted]

[redacted]

[redacted]

Approval

Based on the foregoing Class Justification and Approval (J&A) for Other than Full and Open Competition, I hereby approve the use of "brand name or equal" references in U.S. Army Corps of Engineers solicitations for construction contracts, where these references are necessary to effectively communicate interior color and finish selections within the basis of design. This J&A is approved pursuant to DFARS 206.302-1(c)(2) and S-70, and the authority of Title 10, United States Code (U.S.C.), Section 3204(a)(1) (effective January 1, 2022) (formerly Title 10, U.S.C., Section 2304(c)(1), *amended by* Pub. L. No. 117-81, 135 Stat. 154) as implemented by FAR 6.302-1(c), "Only one responsible source and no other supplies or services will satisfy agency requirements." This Class J&A is approved in the amount of [redacted] which has been calculated as a percentage of the estimated project costs for the future projects during the five-year period of Fiscal Years 2022 through 2026.

[redacted]

[redacted]