

**CLASS DEVIATION
FINDINGS AND DETERMINATION
FEDERAL ACQUISITION REGULATION (FAR) PART 36 - CONSTRUCTION AND
ARCHITECT-ENGINEER CONTRACTS**

Findings

1. The objective of this class deviation is to implement the Federal Acquisition Regulatory Council's model deviation text to the Federal Acquisition Regulation (FAR) Part 36 - *Construction and Architect-Engineer Contracts*, and applicable sections of FAR Part 52 - *Solicitation Provisions and Contract Clauses*.
2. On April 15, 2025, President Donald J. Trump issued Executive Order (E.O.) 14275, *Restoring Common Sense to Federal Procurement*. Section 2 of the E.O. established the policy that the FAR "should only contain provisions required by statute or essential to sound procurement, and any FAR provisions that do not advance these objectives should be removed."
3. On May 2, 2025, the Office of Management and Budget (OMB) issued memorandum M-25-26, *Overhauling the Federal Acquisition Regulation*, initiating a major overhaul of the FAR (Revolutionary FAR Overhaul, or "RFO"). The memorandum tasked the Office of Federal Procurement Policy (OFPP) with leading the RFO, in coordination with the other members of the Federal Acquisition Regulatory Council – i.e., the General Services Administration (GSA), the Department of Defense (DOD), and the National Aeronautics and Space Administration (NASA) and federal buying agencies. The goal is refocusing the FAR on its statutory roots. To that end, the FAR is being updated to:
 - Remove language that is not required by statute
 - Remove duplicative or outdated language
 - Clarify or provide more plain language
 - Revise language for the new FAR framework
 - Retain language necessary for governmentwide acquisition standards

The OMB memorandum M-25-26 established a two phased approach to implementing enterprise deregulation as follows: Phase one, FAR Council deviation guidance, and phase two, formal rulemaking. Phase one involves the FAR Council issuing guidance on a rolling basis with clear, plain language model deviation text organized by FAR part. The goal is streamlining the regulation by aligning it more closely to its statutory base. According to the memorandum, agencies should adopt this model deviation text within 30 days by issuing either individual or class deviations.

4. On May 2, 2025, the FAR Council issued further implementing guidance in a memorandum titled *Deviation Guidance to Support the Overhaul of the Federal Acquisition Regulation*. Pursuant to the FAR Council's memorandum, "agencies that adopt the Council's RFO class deviation text without change, or require different text

only to address statutory direction unique to the agency, do not need to coordinate with the Council.”

5. On July 24, 2025, the FAR Council issued model deviation text for FAR Part 36 and corresponding clauses at FAR Part 52. The RFO FAR Part 36 model deviation text has been updated to include a complete structural reorganization to align with the acquisition lifecycle, enhanced clarity, and a strategic consolidation of policies coupled with the elimination of outdated requirements. Statutory requirements retained in the RFO FAR Part 36 model deviation include, but are not limited to, the following:

- 10 U.S.C. § 3241 and 41 U.S.C. § 3309, Design-Build Selection Procedures
- 15 U.S.C. § 644(w), Administration of Construction Change Orders
- Pub. L. 92-582, Brooks Act of 1972
- Pub. L. 103-355, Federal Acquisition Streamlining Act of 1994
- Pub. L. 108-136, Services Acquisition Reform Act of 2003

In addition, the following table provides a non-exhaustive list of non-statutory requirements that have been revised and retained, or removed from Part 36:

Change	Description
Retained	<ul style="list-style-type: none">• The scope of the part is simplified to define the part's coverage to “construction, which includes dismantling, demolition or removal of improvements; and architect-engineer services.”• The definition of “Firm” is retained in the part.• The section titled “Policy” is moved from 36.104 to 36.002 and revised to consolidate critical high-level requirements:<ul style="list-style-type: none">○ Agencies must require the use of Project Labor Agreement for Federal construction projects with a total estimated construction cost at or above \$35 million unless an exception applies.○ Market research for construction contracts valued at or above \$35 million must involve a current and proactive examination of the market conditions in the project area.○ For design and construction selection, the contracting officer must use either design-bid-build procedures, two-phase design-build procedures, or another acquisition procedure authorized by law.○ Agencies must implement high-performance sustainable building practices.• New subparts 36.1, Pre-Solicitation, 36.2, Evaluation and Award and 36.3, Postaward create logical organization in alignment with the acquisition lifecycle, creating clear points of reference.• The timing of requirement to prepare and furnish the Government estimate of construction costs to the contracting

	<p>officer is clarified to be done “before receipt of proposals” instead of what was previously “at the earliest practicable time.” The instructions were also moved from 36.203 to 36.101-6.</p> <ul style="list-style-type: none"> • The “Procedures” section for two-phased design-build selection, previously at 36.303, has been moved to 36.101-2 and significantly streamlined. The contracting activity retains discretion to issue one or two solicitation documents for the procurement phases. • The contracting officer is required to evaluate the need for liquidated damages during acquisition planning. The FAR was previously silent as to the timing of this evaluation.
Removed	<ul style="list-style-type: none"> • Definitions previously scattered between 36.001 and 36.102 are removed, leaving only a single definition, "Firm," at 36.001. • The “Applicability” section, previously at 36.101, is removed. • The reference to evaluation of contract performance, previously at 36.201, has been removed. The new subpart 36.3, Postaward, refers contracting officers to FAR Part 42 for general contract administration functions. • The section titled “Disclosure of the magnitude of construction projects”, previously at 36.204, is removed. This information may still be disclosed based on the strategy needs of the acquisition team. • Supplemental procedures for sealed bidding are removed. Acquisition teams desiring to utilize sealed bidding should review Part 14. • The requirements for a site inspection during the solicitation phase, previously at 36.210 and 36.523, and conducting a preconstruction conference after award, previously at 36.212 and 36.522, are removed. • The section titled, "Performance of Work by the Contractor", formerly located at 36.501 and the implementing clause at 52.236-1 are removed. This requirement, often referred to as the "12 percent rule," mandated that prime contractors perform a specified minimum percentage of the total contract work with their own forces. This requirement is separate from the clause at 52.219-14, Limitations of Subcontracting. • Specific evaluation requirements for architect-engineer contracts, previously at 36.602-1 and 36.603, are removed. Contracting activities now have additional flexibility in evaluating offeror qualifications

The RFO Part 52 model deviation text also makes the following changes:

Adjustments to clauses 52.236-2 *Differing Site Conditions*, 52.236-3 *Site Investigation and Conditions Affecting the Work*, 52.236-5 *Material and Workmanship*, 52.236-6 *Superintendence by the Contractor*, 52.236-7 *Permits and Responsibilities*, 52.236-8

Other Contracts, 52.236-9 Protection of Existing Vegetation, Structures, Equipment, Utilities, and Improvements, 52.236-10 Operations and Storage Areas, 52.236-11 Use and Possession Prior to Completion, 52.236-12 Cleaning Up, 52.236-13 Accident Prevention, 52.236-14 Availability and Use of Utility Services, 52.236-15 Schedules for Construction Contracts, 52.236-16 Quantity Surveys, 52.236-17 Layout of Work, 52.236-21 Specifications and Drawings for Construction, 52.236-22 Design Within Funding Limitations, and 52.236-23 Responsibility of the Architect-Engineer Contractor.

The following clause are retained without any revisions: 52.236-13 *Accident Prevention Alternate I*, 52.236-16 *Quantity Surveys Alternate I*, 52.236-18 *Work Oversight in Cost-Reimbursement Construction Contracts*, 52.236-21 *Specifications and Drawings for Construction Alternates I and II*, 52.236-24 *Work Oversight in Architect-Engineer Contracts*, and 52.236-25 *Requirements for Registration of Designers*.

The RFO Part 52 model deviation text also removes and reserves the following: Clauses 52.236-4 *Physical Data*, 52.236-19 *Organization and Direction of the Work*, 52.236-26 *Preconstruction Conference*, and provisions 52.236-27 *Site Visit (Construction)*, 52.236-28 *Preparation of Proposals-Construction*. Clause 52.236-20 remains reserved.

Determination

In accordance with RFO 1.304 *Class deviations* and Department of Energy Acquisition Regulation (DEAR) 901.404 *Class deviations*, to fully comply with the requirement of E.O. 14275 and the revised FAR Parts 36 and 52, it is hereby determined that a class deviation is appropriate pursuant to OMB memorandum M-25-26 (Attachment 1) and the FAR Council memorandum (Attachment 2) issued on May 2, 2025, using the RFO model deviation text for Part 36 and applicable sections of Part 52 (Attachment 3). Specifically, DOE/NNSA will use the RFO model deviation text for Part 36 in lieu of 48 Code of Federal Regulations (CFR) Part 36, and the RFO model deviation text for the applicable sections of Part 52 in lieu of the corresponding applicable sections at 48 CFR 52.236-1 through 52.236-28. Once approved, the Department will share the deviation widely among its workforce to ensure full awareness of and compliance with the revisions to the affected regulations. This class deviation is effective upon issuance, and will remain effective until cancelled or incorporated into the FAR.

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Attachments:

OMB Memorandum M-25-26, *Overhauling the Federal Acquisition Regulation*

FAR Council Memorandum, *Deviation Guidance to Support the Overhaul of the Federal Acquisition Regulation*

RFO Parts 36 and 52 Model Deviation Text