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Subpart 216.1 - SELECTING CONTRACT TYPES

216.102 Policies.

In accordance with section 811 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239), use of any cost-reimbursement line item for the acquisition of production of major defense acquisition programs is prohibited, unless the exception at 234.004(2)(ii) applies.

216.104 Factors in selecting contract type.

Contracting officers shall follow the principles and procedures in Principal Director, Defense Pricing, Contracting, and Acquisition Policy memorandum dated April 1, 2016, entitled "Guidance on Using Incentive and Other Contract Types," when selecting and negotiating the most appropriate contract type for a given procurement. See PGI 216.104 Factors in selecting contract type..

216.104-70 Research and development.

Follow the procedures at PGI 216.104-70 for selecting the appropriate research and development contract type, and see 235.006 (b) for additional approval requirements.

Subpart 216.2 - FIXED-PRICE CONTRACTS

216.203 Fixed-price contracts with economic price adjustment.

216.203-4 Contract clauses.

(1) Generally, use the clauses at FAR 52.216-2, Economic Price Adjustment—Standard Supplies, FAR 52.216-3, Economic Price Adjustment—Semistandard Supplies, and FAR 52.216-4, Economic Price Adjustment—Labor and Material, only when—

(i) The total contract price exceeds the simplified acquisition threshold; and

(ii) Delivery or performance will not be completed within 6 months after contract award.

(2) Follow the procedures at PGI 216.203-4 when using an economic price adjustment clause based on cost indexes of labor or material.

216.203-4-70 Additional provisions and clauses.

(a) *Price adjustment for basic steel, aluminum, brass, bronze, or copper mill products.*

(1) (i) The price adjustment clause at 252.216-7000 , Economic Price Adjustment—Basic Steel, Aluminum, Brass, Bronze, or Copper Mill Products, may be used in fixed-price supply solicitations and contracts for basic steel, aluminum, brass, bronze, or copper mill products, such as sheets, plates, and bars, when an established catalog or market price exists for the particular product being acquired.

(ii) The 10 percent figure in paragraph (d)(1) of the clause shall not be exceeded unless approval is obtained at a level above the contracting officer.

(2) Use the price adjustment provision at 252.216-7007 , Economic Price Adjustment—Basic Steel, Aluminum, Brass, Bronze, or Copper Mill Products—Representation, in solicitations that include the

clause at 252.216-7000 , Economic Price Adjustment—Basic Steel, Aluminum, Brass, Bronze, or Copper Mill Products.

(b) *Price adjustment for nonstandard steel items.*

(1) The price adjustment clause at 252.216-7001 , Economic Price Adjustment—Nonstandard Steel Items, may be used in fixed-price supply contracts when—

(i) The contractor is a steel producer and actually manufacturers the standard steel mill item referred to in the "base steel index" definition of the clause; and

(ii) The items being acquired are nonstandard steel items made wholly or in part of standard steel mill items.

(2) When this clause is included in invitations for bids, omit Note 6 of the clause and all references to Note 6.

(3) Solicitations shall instruct offerors to complete all blanks in accordance with the applicable notes.

(4) When the clause is to provide for adjustment on a basis other than "established price" (see Note 6 of the clause), that price must be verified.

(5) The 10 percent figure in paragraph (e)(4) of the clause shall not be exceeded unless approval is obtained at a level above the contracting officer.

(c) *Price adjustment for wage rates or material prices controlled by a foreign government.*

(1)(i) The price adjustment clause at 252.216-7003 , Economic Price Adjustment—Wage Rates or Material Prices Controlled by a Foreign Government, may be used in fixed-price supply and service solicitations and contracts when—

(A) The contract is to be performed wholly or in part in a foreign country; and

(B) A foreign government controls wage rates or material prices and may, during contract performance, impose a mandatory change in wages or prices of material.

(ii) Verify the base wage rates and material prices prior to contract award and prior to making any adjustment in the contract price.

(2) Use the provision at 252.216-7008 , Economic Price Adjustment–Wage Rates or Material Prices Controlled by a Foreign Government—Representation, in solicitations that include the clause at 252.216-7003 , Economic Price Adjustment–Wage Rates or Material Prices Controlled by a Foreign Government. If the solicitation includes the provision at FAR 52.204-7, do not separately list the provision 252.216-7008 in the solicitation.

Subpart 216.3 - COST-REIMBURSEMENT CONTRACTS

216.301 RESERVED

216.301-3 Limitations.

For contracts in connection with a military construction project or a military family housing project, contracting officers shall not use cost-plus-fixed-fee, cost-plus-award-fee, or cost-plus-incentive-fee contract types (10 U.S.C. 3323). This applies notwithstanding a declaration of war or the declaration by the President of a national emergency under section 201 of the National Emergencies Act (50 U.S.C. 1621) that includes the use of the Armed Forces.

216.306 Cost-plus-fixed-fee contracts.

(c) *Limitations*. For contracts in connection with a military construction project or military family housing project, see the prohibition at 216.301-3 .

(i) Except as provided in paragraph (c)(ii) of this section, annual military construction appropriations acts prohibit the use of cost-plus-fixed-fee contracts that—

(A) Are funded by a military construction appropriations act;

(B) Are estimated to exceed $25,000; and

(C) Will be performed within the United States, except Alaska.

(ii) The prohibition in paragraph (c)(i) of this section does not apply to contracts specifically approved in writing, setting forth the reasons therefor, in accordance with the following:

(A) The Secretaries of the military departments are authorized to approve such contracts that are for environmental work only, provided the environmental work is not classified as construction, as defined by 10 U.S.C. 2801.

(B) The Secretary of Defense or designee must approve such contracts that are not for environmental work only or are for environmental work classified as construction.

216.307 Contract clauses.

(a) As required by section 827 of the National Defense Authorization Act for Fiscal Year 2013 (Pub. L. 112-239), use the clause at 252.216-7009 , Allowability of Costs Incurred in Connection With a Whistleblower Proceeding—

(1) In task orders entered pursuant to contracts awarded before September 30, 2013, that include the clause at FAR 52.216-7, Allowable Cost and Payment; and

(2) In contracts awarded before September 30, 2013, that—

(i) Include the clause at FAR 52.216-7, Allowable Cost and Payment; and

(ii) Are modified to include the clause at DFARS 252.203-7002 , Requirement to Inform Employees of Whistleblower Rights, dated September 2013 or later.

Subpart 216.4 - INCENTIVE CONTRACTS

216.401 General.

(c) See PGI 216.401 (c) for information on the Defense Acquisition University Award and Incentive Fees Community of Practice.

(d) The determination and findings justifying that the use of an incentive- or award-fee contract is in the best interest of the Government, may be signed by the head of contracting activity or a designee—

(i) No lower than one level below the head of the contracting activity for award-fee contracts; or

(ii) One level above the contracting officer for incentive-fee contracts.

(e) Award-fee plans required in FAR 16.401(e) shall be incorporated into all award-fee type contracts. Follow the procedures at PGI 216.401 (e) when planning to award an award-fee contract.

216.401-71 Objective criteria.

(1) Contracting officers shall use objective criteria to the maximum extent possible to measure contract performance. Objective criteria are associated with cost-plus-incentive-fee and fixed-price-incentive contracts.

(2) When objective criteria exist but the contracting officer determines that it is in the best interest of the Government also to incentivize subjective elements of performance, the most appropriate contract type is a multiple-incentive contract containing both objective incentives and subjective award-fee criteria (i.e., cost-plus-incentive-fee/award-fee or fixed-price-incentive/award-fee).

(3) See PGI 216.401 (e) for guidance on the use of award-fee contracts.

216.402 Application of predetermined, formula-type incentives.

216.402-2 Performance incentives.

(1) See PGI 216.402-2 for guidance on establishing performance incentives.

(2) Contracting officers shall ensure requirements about the payment of incentive fees or the imposition of penalties are included in the solicitation for a contract for the engineering and manufacturing development or production of a weapon system, including embedded software, if the program manager or comparable requiring activity official exercising program manager responsibilities includes—

(i) Provisions for the payment of incentive fees to the contractor, based on achievement of design specification requirements for reliability and maintainability of weapons systems under the contract; or

(ii) The imposition of penalties to be paid by the contractor to the Government for failure to achieve such design specification requirements (10 U.S.C. 4328).

216.403 Fixed-price incentive contracts.

216.403-1 Fixed-price incentive (firm target) contracts.

(b) *Application.*

(1) The contracting officer shall give particular consideration to the use of fixed-price incentive (firm target) contracts, especially for acquisitions moving from development to production.

(2) The contracting officer shall pay particular attention to share lines and ceiling prices for fixed-price incentive (firm target) contracts, with a 120 percent ceiling and a 50/50 share ratio as the point of departure for establishing the incentive arrangement.

(3) See PGI 216.403-1 for guidance on the use of fixed-price incentive (firm target) contracts.

216.403-2 Fixed-price incentive (successive targets) contracts.

See PGI 216.403-2 for guidance on the use of fixed-price incentive (successive targets) contracts.

216.405 Cost-reimbursement incentive contracts.

216.405-1 Cost-plus-incentive-fee contracts.

See PGI 216.405-1 for guidance on the use of cost-plus-incentive-fee contracts.

216.405-2 Cost-plus-award-fee contracts.

(1) *Award-fee pool.* The award-fee pool is the total available award fee for each evaluation period for the life of the contract. The contracting officer shall perform an analysis of appropriate fee distribution to ensure at least 40 per cent of the award fee is available for the final evaluation so that the award fee is appropriately distributed over all evaluation periods to incentivize the contractor throughout performance of the contract. The percentage of award fee available for the final evaluation may be set below 40 per cent if the contracting officer determines that a lower percentage is appropriate, and this determination is approved by the head of the contracting activity (HCA). The HCA may not delegate this approval authority.

(2) *Award-fee evaluation and payments.* Award-fee payments other than payments resulting from the evaluation at the end of an award-fee period are prohibited. (This prohibition does not apply to base-fee payments.) The fee-determining official’s rating for award-fee evaluations will be provided to the contractor within 45 calendar days of the end of the period being evaluated. The final award-fee payment will be consistent with the fee-determining official’s final evaluation of the contractor’s overall performance against the cost, schedule, and performance outcomes specified in the award-

fee plan.

(3) *Limitations.*

(i) The cost-plus-award-fee contract shall not be used—

(A) To avoid—

(1) Establishing cost-plus-fixed-fee contracts when the criteria for cost-plus-fixed-fee contracts apply; or

(2) Developing objective targets so a cost-plus-incentive-fee contract can be used; or

(B) For either engineering development or operational system development acquisitions that have specifications suitable for simultaneous research and development and production, except a cost-plus-award-fee contract may be used for individual engineering development or operational system development acquisitions ancillary to the development of a major weapon system or equipment, where—

(1) It is more advantageous; and

(2) The purpose of the acquisition is clearly to determine or solve specific problems associated with the major weapon system or equipment.

(ii) Do not apply the weighted guidelines method to cost-plus-award-fee contracts for either the base (fixed) fee or the award fee.

(iii) The base fee shall not exceed three percent of the estimated cost of the contract exclusive of the fee.

(4) See PGI 216.405-2 for guidance on the use of cost-plus-award-fee contracts.

216.405-2-70 Award fee reduction or denial for jeopardizing the health or safety of Government personnel.

(a) *Definitions*.

“Covered incident” and “serious bodily injury,” as used in this section, are defined in the clause at 252.216-7004, Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel.

(b) The contracting officer shall include in the evaluation criteria of any award-fee plan, a review of contractor and subcontractor actions that jeopardized the health or safety of Government personnel, through gross negligence or reckless disregard for the safety of such personnel, as determined through—

(1) Conviction in a criminal proceeding, or finding of fault and liability in a civil or administrative proceeding (in accordance with section 823 of the National Defense Authorization Act for Fiscal Year 2010 (Pub. L. 111-84)); or

(2) If a contractor or a subcontractor at any tier is not subject to the jurisdiction of the U.S. courts, a final determination of contractor or subcontractor fault resulting from a DoD investigation (in accordance with section 834 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L.

111-383)).

(c) In evaluating the contractor's performance under a contract that includes the clause at 252.216-7004, Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel, the contracting officer shall consider reducing or denying award fees for a period, if contractor or subcontractor actions cause serious bodily injury or death of civilian or military Government personnel during such period. The contracting officer's evaluation also shall consider recovering all or part of award fees previously paid for such period.

216.405-2-71 Award fee reduction or denial for failure to comply with requirements relating to performance of private security functions.

(a) In accordance with section 862 of the National Defense Authorization Act for Fiscal Year 2008, as amended, the contracting officer shall include in any award-fee plan a requirement to review contractor compliance with, or violation of, applicable requirements of the contract with regard to the performance of private security functions in an area of contingency operations, complex contingency operations, or other military operations or exercises that are designated by the combatant commander (see 225.370).

(b) In evaluating the contractor's performance under a contract that includes the clause at 252.225-7039 , Defense Contractors Performing Private Security Functions Outside the United States, the contracting officer shall consider reducing or denying award fees for a period if the contractor fails to comply with the requirements of the clause during such period. The contracting officer's evaluation also shall consider recovering all or part of award fees previously paid for such period.

216.406 Contract clauses.

(e) Use the clause at 252.216-7004, Award Fee Reduction or Denial for Jeopardizing the Health or Safety of Government Personnel, in all solicitations and contracts containing award-fee provisions.

216.470 Other applications of award fees.

See PGI 216.470 for guidance on other applications of award fees.

Subpart 216.5 - INDEFINITE-DELIVERY CONTRACTS

216.500 Scope of subpart.

(d)(i) When awarding task orders or delivery orders for architect-engineer services under a multiple-award contract, follow the procedures for the selection of contractors and placement of orders at FAR 36.6 to implement 10 U.S.C. 3406(h)(1).

(ii) Contracting officers shall not request additional information related to contractor qualifications, unless it is necessary to determine the most highly qualified contractor for the particular task order

or delivery order (10 U.S.C. 3406(h)(2)).

216.501 RESERVED

216.501-2-70 General.

(a)(i) For items with a shelf-life of less than six months, consider the use of indefinite-delivery type contracts with orders to be placed either—

(A) Directly by the users; or

(B) By central purchasing offices with deliveries direct to users.

(ii) Whenever an indefinite-delivery contract is issued, the issuing office must furnish all ordering offices sufficient information for the ordering office to complete its contract reporting responsibilities under 204.670-2. This data must be furnished to the ordering activity in sufficient time for the activity to prepare its report for the action within three working days of the order.

(b) See 217.204 (e)(i) for limitations on the period for task order or delivery order contracts awarded by DoD pursuant to 10 U.S.C. 3403.

216.504 Indefinite-quantity contracts.

(c) *Multiple award preference—*

(1) *Planning the acquisition.*

(ii)(D)*(1)* The senior procurement executive has the authority to make the determination authorized in FAR 16.504(c)(1)(ii)(D)*(1)*.

(*i*) In accordance with 10 U.S.C. 3403(d)(3), when making the determination at FAR 16.504(c)(1)(ii)(D)(*1*)(*i*), the senior procurement executive shall determine that the task or delivery orders expected under the contract are so integrally related that only a single source can "efficiently perform the work," instead of "reasonably perform the work" as required by the FAR.

(*2*) The congressional notification requirement at FAR 16.504(c)(1)(ii)(D)(2) does not apply to DoD.

(*3*) In accordance with 10 U.S.C. 3403(d)(3), the determination at FAR 16.504 (c)(1)(ii)(D) is not required if a justification has been executed, in accordance with FAR subpart 6.3 and subpart 206.3.

216.505 Ordering.

(a) *General.*

(6) Orders placed under indefinite-delivery contracts may be issued on DD Form 1155, Order for Supplies or Services.

(S-70) Departments and agencies shall comply with the review, approval, and reporting

requirements established in accordance with subpart 217.7 when placing orders under non-DoD contracts in amounts exceeding the simplified acquisition threshold.

(S-71) See 204.7603 for procedures on the required use of the Supplier Performance Risk System (SPRS) risk assessments.

(i) The contracting officer shall ensure SPRS assessments of price risk and supplier risk are considered as a part of the award decision.

(ii) When placing an order for an end product identified by a material identifier that is available as described at PGI 204.7603, and item risk was not previously considered during award of the contract, the contracting officer shall also consider SPRS assessments of item risk in the award decision.

(iii) Use the provision at 252.204-7024, Notice on the Use of the Supplier Performance Risk System, as prescribed in 204.7604 to the extent permitted by the contract.

(b) *Orders under multiple-award contracts.*

(1) *Fair opportunity.*

(A) See 215.101-2-70 for the limitations and prohibitions on the use of the lowest price technically acceptable source selection process, which are applicable to orders placed against multiple award indefinite delivery contracts.

(B) See 217.7801 for the prohibition on the use of reverse auctions for personal protective equipment and aviation critical safety items.

(2) *Exceptions to the fair opportunity process.* For an order exceeding the simplified acquisition threshold, that is a follow-on to an order previously issued for the same supply or service based on a justification for an exception to fair opportunity citing the authority at FAR 16.505(b)(2)(i)(B) or (C), follow the procedures at 216.505(b)(2).

(6) *Postaward notices and debriefing of awardees for orders exceeding $7.5million.* In addition to the notice required at FAR 16.505(b)(6), a written or oral postaward debriefing of successful and unsuccessful awardees is required for task orders and delivery orders valued at $15 million or more (section 818 of the National Defense Authorization Act for Fiscal Year 2018 (Pub. L. 115-91)).

(ii) Follow the procedures at 215.506 and 215.506-70 when providing the postaward debriefing to successful and unsuccessful awardees for task orders or delivery orders valued at $15 million or more.

216.505-70 Orders under multiple award contracts.

If only one offer is received in response to an order exceeding the simplified acquisition threshold that is placed on a competitive basis, the contracting officer shall follow the procedures at 215.371 .

216.506 Solicitation provisions and contract clauses.

216.506-70 Additional solicitation provisions and contract clause.

(a) Use the provisions at 252.215-7007 , Notice of Intent to Resolicit, and 252.215-7008 , Only One Offer, as prescribed at 215.371-6 and 215.408 (3), respectively.

(b) Use the clause at 252.216-7010, Postaward Debriefings for Task Orders and Delivery Orders, in competitive negotiated solicitations and contracts, including solicitations and contracts using FAR part 12 procedures for the acquisition of commercial products and commercial services, when a multiple-award contract is contemplated and task orders or delivery orders placed under the contract may be valued at $15 million or more.

Subpart 216.6 - TIME-AND-MATERIALS, LABOR-HOUR, AND LETTER CONTRACTS

216.601 Time-and-materials contracts.

(d) *Limitations.*

(i)(A) *Approval of determination and findings for time-and-materials or labor-hour contracts.*

(*1*) *Base period plus any option periods is three years or less.*

(*i*) For contracts (including indefinite-delivery contracts) and orders in which the portion of the requirement performed on a time-and-materials or labor-hour basis exceeds $1 million, the approval authority for the determination and findings shall be the senior contracting official within the contracting activity. This authority may not be delegated.

(*ii*) For contracts (including indefinite-delivery contracts) and orders in which the portion of the requirement performed on a time-and-materials or labor-hour basis is less than or equal to $1 million, the determination and findings shall be approved one level above the contracting officer.

(*2*) *Base period plus any option periods exceeds three years.* The authority of the head of the contracting activity to approve the determination and findings may not be delegated.

(3) Exception. The approval requirements in paragraphs (d)(i)(A)(1) and (2) of this section do not apply to contracts that, as determined by the head of the contracting activity—

(i) Support contingency or humanitarian or peacekeeping operations; or

(ii) Facilitate defense against or recovery from conventional, cyber, nuclear, biological, chemical or radiological attack;

(*iii*) Facilitate the provision of international disaster assistance;

Or

(*iv*) Support response to an emergency or major disaster.

(B) *Content of determination and findings.* The determination and findings shall contain sufficient

facts and rationale to justify that no other contract type is suitable. At a minimum, the determination and findings shall—

(*1*) Include a description of the market research conducted;

(*2*) Establish that it is not possible at the time of placing the contract or order to accurately estimate the extent or duration of the work or to anticipate costs with any reasonable degree of certainty;

(*3*) Address why a cost-plus-fixed-fee term or other cost-reimbursement, incentive, or fixed-price contract or order is not appropriate; for contracts (including indefinite-delivery contracts) and orders for other than commercial products or commercial services awarded to contractors with adequate accounting systems, a cost-plus-fixed-fee term contract type shall be preferred over a time-and-materials or labor-hour contract type;

(*4*) Establish that the requirement has been structured to minimize the use of time-and-materials and labor-hour requirements (e.g., limiting the value or length of the time-and-materials or labor-hour portion of the contract or order; establishing fixed prices for portions of the requirement); and

(*5*) Describe the actions planned to minimize the use of time-and-materials and labor-hour contracts on future acquisitions for the same requirements.

(C) *Indefinite-delivery contracts*. For indefinite-delivery contracts, the contracting officer shall structure contracts that authorize time-and-materials orders to also authorize orders on a cost-reimbursement, incentive, or fixed-price basis, to the maximum extent practicable.

(e) *Solicitation provisions*. Use the provision at FAR 52.216-29, Time-and-Materials/Labor-Hour Proposal Requirements – Other Than Commercial Acquisition with Adequate Price Competition, with 252.216-7002 , Alternate A, in solicitations contemplating the use of a time-and-materials or labor-hour contract type for other than commercial products or commercial services if the price is expected to be based on adequate competition.

216.603 Letter contracts.

216.603-2 Application.

(c)(3) In accordance with 10 U.S.C. 3372, establish definitization schedules for letter contracts following the requirements at 217.7404-3 (a) instead of the requirements at FAR 16.603-2(c)(3).

216.603-3 Limitations.

See Subpart 217.74 for additional limitations on the use of letter contracts.

216.603-4 Contract clauses.

(b)(2) See 217.7405 (a) for additional guidance regarding use of the clause at FAR 52.216-24, Limitation of Government Liability.

(3) Use the clause at 252.217-7027, Contract Definitization, in accordance with its prescription 217.7406 (b), instead of the clause at FAR 52.216-25, Contract Definitization.

Subpart 216.7 - AGREEMENTS

216.703 Basic ordering agreements.

(c) *Limitations.* The period during which orders may be placed against a basic ordering agreement may not exceed 5 years.

(d) *Orders.* Follow the procedures at PGI 216.703 (d) for issuing orders under basic ordering agreements.