# Part 16 - Types of Contracts

16.000 Scope of part.

16.001 Definitions.

Subpart 16.1 - Selecting Contract Types

16.101 General.

16.102 Policies.

16.103 Negotiating contract type.

16.104 Factors in selecting contract types.

16.105 Solicitation provision.

Subpart 16.2 - Fixed-Price Contracts

16.201 General.

16.202 Firm-fixed-price contracts.

16.202-1 Description.

16.202-2 Application.

16.203 Fixed-price contracts with economic price adjustment.

16.203-1 Description.

16.203-2 Application.

16.203-3 Limitations.

16.203-4 Contract clauses.

16.204 Fixed-price incentive contracts.

16.205 Fixed-price contracts with prospective price redetermination.

16.205-1 Description.

16.205-2 Application.

16.205-3 Limitations.

16.205-4 Contract clause.

16.206 Fixed-ceiling-price contracts with retroactive price redetermination.

16.206-1 Description.

16.206-2 Application.

16.206-3 Limitations.

16.206-4 Contract clause.

16.207 Firm-fixed-price, level-of-effort term contracts.

16.207-1 Description.

16.207-2 Application.

16.207-3 Limitations.

Subpart 16.3 - Cost-Reimbursement Contracts

16.301 General.

16.301-1 Description.

16.301-2 Application.

16.301-3 Limitations.

16.302 Cost contracts.

16.303 Cost-sharing contracts.

16.304 Cost-plus-incentive-fee contracts.

16.305 Cost-plus-award-fee contracts.

16.306 Cost-plus-fixed-fee contracts.

16.307 Contract clauses.

Subpart 16.4 - Incentive Contracts

16.401 General.

16.402 Application of predetermined, formula-type incentives.

16.402-1 Cost incentives.

16.402-2 Performance incentives.

16.402-3 Delivery incentives.

16.402-4 Structuring multiple-incentive contracts.

16.403 Fixed-price incentive contracts.

16.403-1 Fixed-price incentive (firm target) contracts.

16.403-2 Fixed-price incentive (successive targets) contracts.

16.404 Fixed-price contracts with award fees.

16.405 Cost-reimbursement incentive contracts.

16.405-1 Cost-plus-incentive-fee contracts.

16.405-2 Cost-plus-award-fee contracts.

16.406 Contract clauses.

Subpart 16.5 - Indefinite-Delivery Contracts

16.500 Scope of subpart.

16.501 [Reserved]

16.501-1 Definitions.

16.501-2 General.

16.502 Definite-quantity contracts.

16.503 Requirements contracts.

16.504 Indefinite-quantity contracts.

16.505 Ordering.

16.506 Solicitation provisions and contract clauses.

Subpart 16.6 - Time-and-Materials, Labor-Hour, and Letter Contracts

16.600 Scope.

16.601 Time-and-materials contracts.

16.602 Labor-hour contracts.

16.603 Letter contracts.

16.603-1 Description.

16.603-2 Application.

16.603-3 Limitations.

16.603-4 Contract clauses.

Subpart 16.7 - Agreements

16.701 Scope.

16.702 Basic agreements.

16.703 Basic ordering agreements.

# 16.000 Scope of part.

This part describes types of contracts that *may* be used in *acquisitions*. It prescribes policies and procedures and provides guidance for selecting a contract type appropriate to the circumstances of the *acquisition*.

# 16.001 Definitions.

As used in this part-

*Award-Fee Board* means the team of individuals identified in the award-fee plan who have been designated to assist the *Fee-Determining Official* in making award-fee determinations.

*Established price* means a price that—

(1) Is an established catalog or market price for a *commercial product* sold in substantial quantities to the general public; and

(2) Is the net price after applying any standard trade discounts offered by the contractor.

*Fee-Determining Official (FDO)* means the designated Agency official(s) who reviews the recommendations of the *Award-Fee Board* in determining the amount of award fee to be earned by the contractor for each evaluation period.

*Rollover of unearned award fee* means the process of transferring unearned award fee, which the contractor had an opportunity to earn, from one evaluation period to a subsequent evaluation period, thus allowing the contractor an additional opportunity to earn that previously unearned award fee.

# Subpart 16.1 - Selecting Contract Types

## 16.101 General.

(a) A wide selection of contract types is available to the Government and contractors in order to provide needed flexibility in acquiring the large variety and volume of *supplies* and services required by agencies. Contract types vary according to-

(1) The degree and timing of the responsibility assumed by the contractor for the costs of performance; and

(2) The amount and nature of the profit incentive offered to the contractor for achieving or exceeding specified standards or goals.

(b) The contract types are grouped into two broad categories: fixed-price contracts (see subpart 16.2) and cost-reimbursement contracts (see subpart 16.3). The specific contract types range from firm-fixed-price, in which the contractor has full responsibility for the performance costs and

resulting profit (or loss), to cost-plus-fixed-fee, in which the contractor has minimal responsibility for the performance costs and the negotiated fee (profit) is fixed. In between are the various incentive contracts (see subpart 16.4), in which the contractor's responsibility for the performance costs and the profit or fee incentives offered are tailored to the uncertainties involved in contract performance.

## 16.102 Policies.

(a) Contracts resulting from sealed bidding *shall* be firm-fixed-price contracts or fixed-price contracts with economic price adjustment.

(b) Contracts negotiated under part 15 *may* be of any type or combination of types that will promote the Government's interest, except as restricted in this part (see 10 U.S.C. 3321(a) and 41 U.S.C. 3901). Contract types not described in this regulation *shall* not be used, except as a deviation under subpart 1.4.

(c) The cost-plus-a-percentage-of-cost system of *contracting shall* not be used (see 10 U.S.C. 3322(a) and 41 U.S.C. 3905(a)). Prime contracts (including letter contracts) other than firm-fixed-price contracts *shall*, by an appropriate clause, prohibit cost-plus-a-percentage-of-cost subcontracts (see clauses prescribed in subpart 44.2 for cost-reimbursement contracts and subparts 16.2 and 16.4 for fixed-price contracts).

(d) No contract *may* be awarded before the execution of any determination and findings (D&F's) required by this part. Minimum requirements for the content of D&F's required by this part are specified in 1.704.

## 16.103 Negotiating contract type.

(a) Selecting the contract type is generally a matter for negotiation and requires the exercise of sound judgment. Negotiating the contract type and negotiating prices are closely related and *should* be considered together. The objective is to negotiate a contract type and price (or estimated cost and fee) that will result in reasonable contractor risk and provide the contractor with the greatest incentive for efficient and economical performance.

(b) A firm-fixed-price contract, which best utilizes the basic profit motive of business enterprise, *shall* be used when the risk involved is minimal or can be predicted with an acceptable degree of certainty. However, when a reasonable basis for firm *pricing* does not exist, other contract types *should* be considered, and negotiations *should* be directed toward selecting a contract type (or combination of types) that will appropriately tie profit to contractor performance.

(c) In the course of an *acquisition* program, a series of contracts, or a single long-term contract, changing circumstances *may* make a different contract type appropriate in later periods than that used at the outset. In particular, *contracting officers should* avoid protracted use of a cost-reimbursement or time-and-materials contract after experience provides a basis for firmer *pricing*.

(d)

(1) Each contract file *shall* include documentation to show why the particular contract type was selected. This *shall* be documented in the *acquisition* plan, or in the contract file if a written

*acquisition* plan is not required by agency procedures.

(i) Explain why the contract type selected *must* be used to meet the agency need.

(ii) Discuss the Government's additional risks and the burden to manage the contract type selected (*e.g.*, when a cost-reimbursement contract is selected, the Government incurs additional cost risks, and the Government has the additional burden of managing the contractor's costs). For such instances, *acquisition* personnel *shall* discuss –

(A) How the Government identified the additional risks (*e.g.*, pre-award survey, or *past performance* information);

(B) The nature of the additional risks (*e.g.*, inadequate contractor's accounting system, weaknesses in contractor's internal control, non-compliance with Cost Accounting Standards, or lack of or inadequate *earned value management system*); and

(C) How the Government will manage and mitigate the risks.

(iii) Discuss the Government resources necessary to properly plan for, award, and administer the contract type selected (*e.g.*, resources needed and the additional risks to the Government if adequate resources are not provided).

(iv) For other than a firm-fixed price contract, at a minimum the documentation *should* include –

(A) An analysis of why the use of other than a firm-fixed-price contract (*e.g.*, cost reimbursement, time and materials, labor hour) is appropriate;

(B) Rationale that detail the particular facts and circumstances (*e.g.*, complexity of the requirements, uncertain duration of the work, contractor's technical capability and financial responsibility, or adequacy of the contractor's accounting system), and associated reasoning essential to support the contract type selection;

(C) An assessment regarding the adequacy of Government resources that are necessary to properly plan for, award, and administer other than firm-fixed-price contracts; and

(D) A discussion of the actions planned to minimize the use of other than firm-fixed-price contracts on future *acquisitions* for the same requirement and to transition to firm-fixed-price contracts to the maximum extent practicable.

(v) A discussion of why a level-of-effort, price redetermination, or fee provision was included.

(2) Exceptions to the requirements at (d)(1) of this section are –

(i) Fixed-price *acquisitions* made under *simplified acquisition procedures*;

(ii) Contracts on a firm-fixed-price basis other than those for *major systems* or research and development; and

(iii) Awards on the set-aside portion of sealed bid partial set-asides for small business.

## 16.104 Factors in selecting contract types.

There are many factors that the *contracting officer should* consider in selecting and negotiating the contract type. They include the following:

(a) *Price competition*. Normally, effective price competition results in realistic *pricing*, and a fixed-price contract is ordinarily in the Government's interest.

(b) *Price analysis*. Price analysis, with or without competition, *may* provide a basis for selecting the contract type. The degree to which price analysis can provide a realistic *pricing* standard *should* be carefully considered. (See 15.404-1(b).)

(c) *Cost analysis*. In the absence of effective price competition and if price analysis is not sufficient, the cost estimates of the *offeror* and the Government provide the bases for negotiating contract *pricing* arrangements. It is essential that the uncertainties involved in performance and their possible impact upon costs be identified and evaluated, so that a contract type that places a reasonable degree of cost responsibility upon the contractor can be negotiated.

(d) *Type and complexity of the requirement*. Complex requirements, particularly those unique to the Government, usually result in greater risk assumption by the Government. This is especially true for complex research and development contracts, when performance uncertainties or the likelihood of changes makes it difficult to estimate performance costs in advance. As a requirement recurs or as quantity production begins, the cost risk *should* shift to the contractor, and a fixed-price contract *should* be considered.

(e) *Combining contract types*. If the entire contract cannot be firm-fixed-price, the *contracting officer shall* consider whether or not a portion of the contract can be established on a firm-fixed-price basis.

(f) *Urgency of the requirement*. If urgency is a primary factor, the Government *may* choose to assume a greater proportion of risk or it *may offer* incentives tailored to performance outcomes to ensure timely contract performance.

(g) *Period of performance or length of production run*. In times of economic uncertainty, contracts extending over a relatively long period *may* require economic price adjustment or price redetermination clauses.

(h) *Contractor's technical capability and financial responsibility*.

(i) *Adequacy of the contractor's accounting system*. Before agreeing on a contract type other than firm-fixed-price, the *contracting officer shall* ensure that the contractor's accounting system will permit timely development of all necessary cost data in the form required by the proposed contract type. This factor *may* be critical–

(1) When the contract type requires price revision while performance is in progress; or

(2) When a cost-reimbursement contract is being considered and all current or past experience with the contractor has been on a fixed-price basis. See 42.302(a)(12).

(j) *Concurrent contracts*. If performance under the proposed contract involves concurrent operations under other contracts, the impact of those contracts, including their *pricing* arrangements, *should* be considered.

(k) *Extent and nature of proposed subcontracting*. If the contractor proposes extensive subcontracting, a contract type reflecting the actual risks to the prime contractor *should* be

selected.

(l) *Acquisition history.* Contractor risk usually decreases as the requirement is repetitively acquired. Also, product descriptions or descriptions of services to be performed can be defined more clearly.

### 16.105 Solicitation provision.

The *contracting officer shall* complete and insert the provision at 52.216-1, Type of Contract, in a *solicitation* unless it is for-

(a) A fixed-price *acquisition* made under *simplified acquisition procedures*; or

(b) Information or planning purposes.

## Subpart 16.2 - Fixed-Price Contracts

### 16.201 General.

(a) Fixed-price types of contracts provide for a firm price or, in appropriate cases, an adjustable price. Fixed-price contracts providing for an adjustable price *may* include a ceiling price, a target price (including target cost), or both. Unless otherwise specified in the contract, the ceiling price or target price is subject to adjustment only by operation of *contract clauses* providing for equitable adjustment or other revision of the contract price under stated circumstances. The *contracting officer shall* use firm-fixed-price or fixed-price with economic price adjustment contracts when acquiring *commercial products* and *commercial services*, except as provided in 12.207(b).

(b) Time-and-materials contracts and labor-hour contracts are not fixed-price contracts.

### 16.202 Firm-fixed-price contracts.

#### 16.202-1 Description.

A firm-fixed-price contract provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. This contract type places upon the contractor maximum risk and full responsibility for all costs and resulting profit or loss. It provides maximum incentive for the contractor to control costs and perform effectively and imposes a minimum administrative burden upon the *contracting* parties. The *contracting officer may* use a firm-fixed-price contract in conjunction with an award-fee incentive (see 16.404) and performance or delivery incentives (see 16.402-2 and 16.402-3) when the award fee or incentive is based solely on factors other than cost. The contract type remains firm-fixed-price when used with these incentives.

#### 16.202-2 Application.

A firm-fixed-price contract is suitable for acquiring *commercial products* or *commercial services* (see

parts 2 and 12) or for acquiring other *supplies* or services on the basis of reasonably definite functional or detailed specifications (see part 11) when the *contracting officer* can establish fair and reasonable prices at the outset, such as when-

(a) There is adequate price competition;

(b) There are reasonable price comparisons with prior purchases of the same or similar *supplies* or services made on a competitive basis or supported by valid *certified cost or pricing data*;

(c) Available cost or *pricing* information permits realistic estimates of the probable costs of performance; or

(d) Performance uncertainties can be identified and reasonable estimates of their cost impact can be made, and the contractor is willing to accept a firm fixed price representing assumption of the risks involved.

## 16.203 Fixed-price contracts with economic price adjustment.

### 16.203-1 Description.

(a) A fixed-price contract with economic price adjustment provides for upward and downward revision of the stated contract price upon the occurrence of specified contingencies. Economic price adjustments are of three general types:

(1) *Adjustments based on established prices.* These price adjustments are based on increases or decreases from an agreed-upon level in published or otherwise established prices of specific items or the contract end items.

(2) *Adjustments based on actual costs of labor or material*. These price adjustments are based on increases or decreases in specified costs of labor or material that the contractor actually experiences during contract performance.

(3) *Adjustments based on cost indexes of labor or material*. These price adjustments are based on increases or decreases in labor or material cost standards or indexes that are specifically identified in the contract.

(b) The *contracting officer may* use a fixed-price contract with economic price adjustment in conjunction with an award-fee incentive (see 16.404) and performance or delivery incentives (see 16.402-2 and 16.402-3) when the award fee or incentive is based solely on factors other than cost. The contract type remains fixed-price with economic price adjustment when used with these incentives.

### 16.203-2 Application.

A fixed-price contract with economic price adjustment *may* be used when (i) there is serious doubt concerning the stability of market or labor conditions that will exist during an extended period of contract performance, and (ii) contingencies that would otherwise be included in the contract price can be identified and covered separately in the contract. Price adjustments based on established prices *should* normally be restricted to industry-wide contingencies. Price adjustments based on

labor and material costs *should* be limited to contingencies beyond the contractor's control. For use of economic price adjustment in sealed bid contracts, see 14.408-4.

(a) In establishing the base level from which adjustment will be made, the *contracting officer shall* ensure that contingency allowances are not duplicated by inclusion in both the base price and the adjustment requested by the contractor under economic price adjustment clause.

(b) In contracts that do not require submission of *certified cost or pricing data*, the *contracting officer shall* obtain adequate data to establish the base level from which adjustment will be made and *may* require verification of data submitted.

**16.203-3 Limitations.**

A fixed-price contract with economic price adjustment *shall* not be used unless the *contracting officer* determines that it is necessary either to protect the contractor and the Government against significant fluctuations in labor or material costs or to provide for contract price adjustment in the event of changes in the contractor's established prices.

**16.203-4 Contract clauses.**

(a) Adjustment based on established prices-standard *supplies*.

(1) The *contracting officer shall*, when *contracting* by negotiation, insert the clause at 52.216-2, Economic Price Adjustment-Standard *Supplies*, or an agency-prescribed clause as authorized in paragraph (a)(2) of this subsection, in *solicitations* and contracts when all of the following conditions apply:

(i) A fixed-price contract is contemplated.

(ii) The requirement is for standard *supplies* that have an established catalog or market price.

(iii) The *contracting officer* has made the determination specified in 16.203-3.

(2) If all the conditions in paragraph (a)(1) of this subsection apply and the *contracting officer* determines that the use of the clause at 52.216-2 is inappropriate, the *contracting officer may* use an agency-prescribed clause instead of the clause at 52.216-2.

(3) If the negotiated unit price reflects a net price after applying a trade discount from a catalog or list price, the *contracting officer shall* document in the contract file both the catalog or list price and the discount. (This does not apply to prompt payment or cash discounts.)

(4) The *contracting officer may* modify the clause by increasing the 10 percent limit on aggregate increases specified in 52.216-2(c)(1), upon approval by the chief of the *contracting office*.

(b) Adjustment based on established prices-semistandard *supplies*.

(1) The *contracting officer shall*, when *contracting* by negotiation, insert the clause at 52.216-3, Economic Price Adjustment-Semistandard *Supplies*, or an agency-prescribed clause as authorized in

paragraph (b)(2) of this section, in *solicitations* and contracts when all of the following conditions apply:

(i) A fixed-price contract is contemplated.

(ii) The requirement is for semistandard *supplies* for which the prices can be reasonably related to the prices of nearly equivalent standard *supplies* that have an established catalog or market price.

(iii) The *contracting officer* has made the determination specified in 16.203-3.

(2) If all conditions in paragraph (b)(1) of this subsection apply and the *contracting officer* determines that the use of the clause at 52.216-3 is inappropriate, the *contracting officer may* use an agency-prescribed clause instead of the clause at 52.216-3.

(3) If the negotiated unit price reflects a net price after applying a trade discount from a catalog or list price, the *contracting officer shall* document in the contract file both the catalog or list price and the discount. (This does not apply to prompt payment or cash discounts.)

(4) Before entering into the contract, the *contracting officer* and contractor *must* agree *in writing* on the identity of the standard *supplies* and the corresponding *line items* to which the clause applies.

(5) If the *supplies* are standard, except for preservation, packaging, and packing requirements, the clause prescribed in 16.203-4(a) *shall* be used rather than this clause.

(6) The *contracting officer may* modify the clause by increasing the 10 percent limit on aggregate increases specified in 52.216-3(c)(1), upon approval by the chief of the *contracting office*.

(c) Adjustments based on actual cost of labor or material.

(1) The *contracting officer shall*, when *contracting* by negotiation, insert a clause that is substantially the same as the clause at 52.216-4, Economic Price Adjustment -Labor and Material, or an agency-prescribed clause as authorized in subparagraph (c)(2) of this section, in *solicitations* and contracts when all of the following conditions apply:

(i) A fixed-price contract is contemplated.

(ii) There is no major element of design engineering or development work involved.

(iii) One or more identifiable labor or material cost factors are subject to change.

(iv) The *contracting officer* has made the determination specified in 16.203-3.

(2) If all conditions in paragraph (c)(1) of this section apply and the *contracting officer* determines that the use of the clause at 52.216-4 is inappropriate, the *contracting officer may* use an agency-prescribed clause instead of the clause at 52.216-4.

(3) The *contracting officer shall* describe in detail in the contract Schedule-

(i) The types of labor and materials subject to adjustment under the clause;

(ii) The labor rates, including fringe benefits (if any) and unit prices of materials that *may* be increased or decreased; and

(iii) The quantities of the specified labor and materials allocable to each unit to be delivered under the contract.

(4) In negotiating adjustments under the clause, the *contracting officer shall*-

(i) Consider work in process and materials on hand at the time of changes in labor rates, including fringe benefits (if any) or material prices;

(ii) Not include in adjustments any *indirect cost* (except fringe benefits as defined in 31.205-6(m)) or profit; and

(iii) Consider only those fringe benefits specified in the contract Schedule.

(5) The *contracting officer may* modify the clause by increasing the 10 percent limit on aggregate increases specified in 52.216-4(c)(4), upon approval by the chief of the *contracting office*.

(d) *Adjustments based on cost indexes of labor or material*. The *contracting officer should* consider using an economic price adjustment clause based on cost indexes of labor or material under the circumstances and subject to approval as described in paragraphs (d)(1) and (d)(2) of this section.

(1) A clause providing adjustment based on cost indexes of labor or materials *may* be appropriate when-

(i) The contract involves an extended period of performance with significant costs to be incurred beyond 1 year after performance begins;

(ii) The contract amount subject to adjustment is substantial; and

(iii) The economic variables for labor and materials are too unstable to permit a reasonable division of risk between the Government and the contractor, without this type of clause.

(2) Any clause using this method *shall* be prepared and approved under agency procedures. Because of the variations in circumstances and clause wording that *may* arise, no standard clause is prescribed.

## 16.204 Fixed-price incentive contracts.

A fixed-price incentive contract is a fixed-price contract that provides for adjusting profit and establishing the final contract price by a formula based on the relationship of final negotiated total cost to total target cost. Fixed-price incentive contracts are covered in subpart 16.4, Incentive Contracts. See 16.403 for more complete descriptions, application, and limitations for these contracts. Prescribed clauses are found at 16.406.

## 16.205 Fixed-price contracts with prospective price redetermination.

### 16.205-1 Description.

A fixed-price contract with prospective price redetermination provides for-

(a) A firm fixed price for an initial period of contract deliveries or performance; and

(b) Prospective redetermination, at a stated time or times during performance, of the price for subsequent periods of performance.

### 16.205-2 Application.

A fixed-price contract with prospective price redetermination *may* be used in *acquisitions* of quantity production or services for which it is possible to negotiate a fair and reasonable firm fixed price for an initial period, but not for subsequent periods of contract performance.

(a) The initial period *should* be the longest period for which it is possible to negotiate a fair and reasonable firm fixed price. Each subsequent *pricing* period *should* be at least 12 months.

(b) The contract *may* provide for a ceiling price based on evaluation of the uncertainties involved in performance and their possible cost impact. This ceiling price *should* provide for assumption of a reasonable proportion of the risk by the contractor and, once established, *may* be adjusted only by operation of *contract clauses* providing for equitable adjustment or other revision of the contract price under stated circumstances.

### 16.205-3 Limitations.

This contract type *shall* not be used unless-

(a) Negotiations have established that-

(1) The conditions for use of a firm-fixed-price contract are not present (see 16.202-2); and

(2) A fixed-price incentive contract would not be more appropriate;

(b) The contractor's accounting system is adequate for price redetermination;

(c) The prospective *pricing* periods can be made to conform with operation of the contractor's accounting system; and

(d) There is reasonable assurance that price redetermination actions will take place promptly at the specified times.

### 16.205-4 Contract clause.

The *contracting officer shall*, when *contracting* by negotiation, insert the clause at 52.216-5, Price Redetermination-Prospective, in *solicitations* and contracts when a fixed-price contract is contemplated and the conditions specified in 16.205-2 and 16.205-3(a) through (d) apply.

## 16.206 Fixed-ceiling-price contracts with retroactive price redetermination.

### 16.206-1 Description.

A fixed-ceiling-price contract with retroactive price redetermination provides for-

(a) A fixed ceiling price; and

(b) Retroactive price redetermination within the ceiling after completion of the contract.

### 16.206-2 Application.

A fixed-ceiling-price contract with retroactive price redetermination is appropriate for research and development contracts estimated at the *simplified acquisition threshold* or less when it is established at the outset that a fair and reasonable firm fixed price cannot be negotiated and that the amount involved and short performance period make the use of any other fixed-price contract type impracticable.

(a) A ceiling price *shall* be negotiated for the contract at a level that reflects a reasonable sharing of risk by the contractor. The established ceiling price *may* be adjusted only if required by the operation of *contract clauses* providing for equitable adjustment or other revision of the contract price under stated circumstances.

(b) The contract *should* be awarded only after negotiation of a billing price that is as fair and reasonable as the circumstances permit.

(c) Since this contract type provides the contractor no cost control incentive except the ceiling price, the *contracting officer should* make clear to the contractor during discussion before award that the contractor's management effectiveness and ingenuity will be considered in retroactively redetermining the price.

### 16.206-3 Limitations.

This contract type *shall* not be used unless-

(a) The contract is for research and development and the estimated cost is the *simplified acquisition threshold* or less;

(b) The contractor's accounting system is adequate for price redetermination;

(c) There is reasonable assurance that the price redetermination will take place promptly at the specified time; and

(d) The *head of the contracting activity* (or a higher-level official, if required by agency procedures) approves its use *in writing*.

### 16.206-4 Contract clause.

The *contracting officer shall*, when *contracting* by negotiation, insert the clause at 52.216-6, Price Redetermination-Retroactive, in *solicitations* and contracts when a fixed-price contract is

contemplated and the conditions in 16.206-2 and 16.206-3(a) through (d) apply.

## 16.207 Firm-fixed-price, level-of-effort term contracts.

### 16.207-1 Description.

A firm-fixed-price, level-of-effort term contract requires-

(a) The contractor to provide a specified level of effort, over a stated period of time, on work that can be stated only in general terms; and

(b) The Government to pay the contractor a fixed dollar amount.

### 16.207-2 Application.

A firm-fixed-price, level-of-effort term contract is suitable for investigation or study in a specific research and development area. The product of the contract is usually a report showing the results achieved through application of the required level of effort. However, payment is based on the effort expended rather than on the results achieved.

### 16.207-3 Limitations.

This contract type *may* be used only when-

(a) The work required cannot otherwise be clearly defined;

(b) The required level of effort is identified and agreed upon in advance;

(c) There is reasonable assurance that the intended result cannot be achieved by expending less than the stipulated effort; and

(d) The contract price is the *simplified acquisition threshold* or less, unless approved by the chief of the *contracting office*.

# Subpart 16.3 - Cost-Reimbursement Contracts

## 16.301 General.

### 16.301-1 Description.

Cost-reimbursement types of contracts provide for payment of allowable incurred costs, to the extent prescribed in the contract. These contracts establish an estimate of total cost for the purpose of obligating funds and establishing a ceiling that the contractor *may* not exceed (except at its own risk) without the approval of the *contracting officer*.

### 16.301-2 Application.

(a) The *contracting officer shall* use cost-reimbursement contracts only when-

(1) Circumstances do not allow the agency to define its requirements sufficiently to allow for a fixed-price type contract (see 7.105); or

(2) Uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract.

(b) The *contracting officer shall* document the rationale for selecting the contract type in the written *acquisition* plan and ensure that the plan is approved and signed at least one level above the *contracting officer* (see 7.103(j) and 7.105).

### 16.301-3 Limitations.

(a) A cost-reimbursement contract *may* be used only when

(1) The factors in 16.104 have been considered;

(2) A written *acquisition* plan has been approved and signed at least one level above the *contracting officer*;

(3) The contractor's accounting system is adequate for determining costs applicable to the contract or order; and

(4) Prior to award of the contract or order, adequate Government resources are available to award and manage a contract other than firm-fixed-priced (see 7.104(e)). This includes appropriate Government surveillance during performance in accordance with 1.602-2, to provide reasonable assurance that efficient methods and effective cost controls are used.

(b) The use of cost-reimbursement contracts is prohibited for the *acquisition* of *commercial products* and *commercial services* (see parts 2 and 12).

## 16.302 Cost contracts.

(a) *Description.* A cost contract is a cost-reimbursement contract in which the contractor receives no fee.

(b) *Application*. A cost contract *may* be appropriate for research and development work, particularly with nonprofit educational institutions or other nonprofit organizations.

(c) *Limitations*. See 16.301-3.

## 16.303 Cost-sharing contracts.

(a) *Description.* A cost-sharing contract is a cost-reimbursement contract in which the contractor receives no fee and is reimbursed only for an agreed-upon portion of its allowable costs.

(b) *Application*. A cost-sharing contract *may* be used when the contractor agrees to absorb a portion of the costs, in the expectation of substantial compensating benefits.

(c) *Limitations*. See 16.301-3.

## 16.304 Cost-plus-incentive-fee contracts.

A cost-plus-incentive-fee contract is a cost-reimbursement contract that provides for an initially negotiated fee to be adjusted later by a formula based on the relationship of total allowable costs to total target costs. Cost-plus-incentive-fee contracts are covered in subpart 16.4, Incentive Contracts. See 16.405-1 for a more complete description and discussion of application of these contracts. See 16.301-3 for limitations.

## 16.305 Cost-plus-award-fee contracts.

A cost-plus-award-fee contract is a cost-reimbursement contract that provides for a fee consisting of (a)a base amount (which *may* be zero) fixed at inception of the contract and (b)an award amount, based upon a judgmental evaluation by the Government, sufficient to provide motivation for excellence in contract performance. cost-plus-award-fee contracts are covered in subpart 16.4, Incentive Contracts. See 16.401(e) for a more complete description and discussion of the application of these contracts. See 16.301-3 and 16.401(e)(5) for limitations.

## 16.306 Cost-plus-fixed-fee contracts.

(a) *Description.* A cost-plus-fixed-fee contract is a cost-reimbursement contract that provides for payment to the contractor of a negotiated fee that is fixed at the inception of the contract. The fixed fee does not vary with actual cost, but *may* be adjusted as a result of changes in the work to be performed under the contract. This contract type permits *contracting* for efforts that might otherwise present too great a risk to contractors, but it provides the contractor only a minimum incentive to control costs.

(b) Application.

(1) A cost-plus-fixed-fee contract is suitable for use when the conditions of 16.301-2 are present and, for example-

(i) The contract is for the performance of research or preliminary exploration or study, and the level of effort required is unknown; or

(ii) The contract is for development and test, and using a cost-plus-incentive-fee contract is not practical.

(2) A cost-plus-fixed-fee contract normally *should* not be used in development of *major systems* (see part 34) once preliminary exploration, studies, and risk reduction have indicated a high degree of probability that the development is achievable and the Government has established reasonably firm performance objectives and schedules.

(c) *Limitations*. No cost-plus-fixed-fee contract *shall* be awarded unless the *contracting officer* complies with all limitations in 15.404-4(c)(4)(i) and 16.301-3.

(d) *Completion and term forms*. A cost-plus-fixed-fee contract *may* take one of two basic forms-completion or term.

(1) The completion form describes the scope of work by stating a definite goal or target and specifying an *end product*. This form of contract normally requires the contractor to complete and deliver the specified *end product* (*e.g.,*a final report of research accomplishing the goal or target) within the estimated cost, if possible, as a condition for payment of the entire fixed fee. However, in the event the work cannot be completed within the estimated cost, the Government *may* require more effort without increase in fee, provided the Government increases the estimated cost.

(2) The term form describes the scope of work in general terms and obligates the contractor to devote a specified level of effort for a stated time period. Under this form, if the performance is considered satisfactory by the Government, the fixed fee is payable at the expiration of the agreed-upon period, upon contractor statement that the level of effort specified in the contract has been expended in performing the contract work. Renewal for further periods of performance is a new *acquisition* that involves new cost and fee arrangements.

(3) Because of the differences in obligation assumed by the contractor, the completion form is preferred over the term form whenever the work, or specific milestones for the work, can be defined well enough to permit development of estimates within which the contractor can be expected to complete the work.

(4) The term form *shall* not be used unless the contractor is obligated by the contract to provide a specific level of effort within a definite time period.

## 16.307 Contract clauses.

(a)

(1) The *contracting officer shall* insert the clause at 52.216-7, Allowable Cost and Payment, in *solicitations* and contracts when a cost-reimbursement contract or a time-and-materials contract (other than a contract for a *commercial product* or *commercial service*) is contemplated. If the contract is a time-and-materials contract, the clause at 52.216-7 applies in conjunction with the clause at 52.232-7), but only to the portion of the contract that provides for reimbursement of materials (as defined in the clause at 52.232-7) at actual cost. Further, the clause at 52.216-7 does not apply to labor-hour contracts.

(2) If the contract is a *construction* contract and contains the clause at 52.232-27, Prompt Payment for *Construction* Contracts, the *contracting officer shall* use the clause at 52.216-7 with its *Alternate* I.

(3) If the contract is with an educational institution, the *contracting officer shall* use the clause at 52.216-7 with its *Alternate* II.

(4) If the contract is with a State or local government, the *contracting officer shall* use the clause at 52.216-7 with its *Alternate* III.

(5) If the contract is with a nonprofit organization other than an educational institution, a State or local government, or a nonprofit organization exempted under the OMB Uniform Guidance at 2 CFR part 200, appendix VIII, the *contracting officer shall* use the clause at 52.216-7 with its *Alternate* IV.

(b) The *contracting officer shall* insert the clause at 52.216-8, Fixed Fee, in *solicitations* and contracts when a cost-plus-fixed-fee contract (other than a *construction* contract) is contemplated.

(c) The *contracting officer shall* insert the clause at 52.216-9, Fixed-Fee-*Construction*, in *solicitations* and contracts when a cost-plus-fixed-fee *construction* contract is contemplated.

(d) The *contracting officer shall* insert the clause at 52.216-10, Incentive Fee, in *solicitations* and contracts when a cost-plus-incentive-fee contract is contemplated.

(e)

(1) The *contracting officer shall* insert the clause at 52.216-11, Cost Contract-No Fee, in *solicitations* and contracts when a cost-reimbursement contract is contemplated that provides no fee and is not a cost-sharing contract.

(2) If a cost-reimbursement research and development contract with an educational institution or a nonprofit organization that provides no fee or other payment above cost and is not a cost-sharing contract is contemplated, and if the *contracting officer* determines that withholding of a portion of allowable costs is not required, the *contracting officer shall* use the clause with its *Alternate* I.

(f)

(1) The *contracting officer shall* insert the clause at 52.216-12, Cost-Sharing Contract-No Fee, in *solicitations* and contracts when a cost-sharing contract is contemplated.

(2) If a cost-sharing research and development contract with an educational institution or a nonprofit organization is contemplated, and if the *contracting officer* determines that withholding of a portion of allowable costs is not required, the *contracting officer shall* use the clause with its *Alternate* I.

(g) The *contracting officer shall* insert the clause at 52.216-15, Predetermined *Indirect Cost Rates*, in *solicitations* and contracts when a cost-reimbursement research and development contract with an educational institution (see 42.705-3(b)) is contemplated and predetermined *indirect cost rates* are to be used.

# Subpart 16.4 - Incentive Contracts

## 16.401 General.

(a) Incentive contracts as described in this subpart are appropriate when a firm-fixed-price contract is not appropriate and the required *supplies* or services can be acquired at lower costs and, in certain instances, with improved delivery or technical performance, by relating the amount of profit or fee payable under the contract to the contractor’s performance. Incentive contracts are designed to obtain specific *acquisition* objectives by-

(1) Establishing reasonable and attainable targets that are clearly communicated to the contractor; and

(2) Including appropriate incentive arrangements designed to-

(i) motivate contractor efforts that might not otherwise be emphasized; and

(ii) discourage contractor inefficiency and waste.

(b) When predetermined, formula-type incentives on technical performance or delivery are included, increases in profit or fee are provided only for achievement that surpasses the targets, and decreases are provided for to the extent that such targets are not met. The incentive increases or decreases are applied to performance targets rather than minimum performance requirements.

(c) The two basic categories of incentive contracts are fixed-price incentive contracts (see 16.403 and 16.404) and cost-reimbursement incentive contracts (see 16.405). Since it is usually to the Government's advantage for the contractor to assume substantial cost responsibility and an appropriate share of the cost risk, fixed-price incentive contracts are preferred when contract costs and performance requirements are reasonably certain. Cost-reimbursement incentive contracts are subject to the overall limitations in 16.301 that apply to all cost-reimbursement contracts.

(d) A determination and finding, signed by the *head of the contracting activity*, *shall* be completed for all incentive- and award-fee contracts justifying that the use of this type of contract is in the best interest of the Government. This determination *shall* be documented in the contract file and, for award-fee contracts, *shall* address all of the suitability items in 16.401(e)(1).

(e) Award-fee contracts are a type of incentive contract.

(1) *Application*. An award-fee contract is suitable for use when-

(i) The work to be performed is such that it is neither feasible nor effective to devise predetermined objective incentive targets applicable to cost, schedule, and technical performance;

(ii) The likelihood of meeting *acquisition* objectives will be enhanced by using a contract that effectively motivates the contractor toward exceptional performance and provides the Government with the flexibility to evaluate both actual performance and the conditions under which it was achieved; and

(iii) Any additional administrative effort and cost required to monitor and evaluate performance are justified by the expected benefits as documented by a risk and cost benefit analysis to be included in the Determination and Findings referenced in 16.401(e)(5)(iii).

(2) *Award-fee amount*. The amount of award fee earned *shall* be commensurate with the contractor's overall cost, schedule, and technical performance as measured against contract requirements in accordance with the criteria stated in the award-fee plan. Award fee *shall* not be earned if the contractor's overall cost, schedule, and technical performance in the aggregate is below satisfactory. The basis for all award-fee determinations *shall* be documented in the contract file to include, at a minimum, a determination that overall cost, schedule and technical performance in the aggregate is or is not at a satisfactory level. This determination and the methodology for determining the award fee are unilateral decisions made solely at the discretion of the Government.

(3) *Award-fee plan*. All contracts providing for award fees *shall* be supported by an award-fee plan that establishes the procedures for evaluating award fee and an *Award-Fee Board* for conducting the

award-fee evaluation. Award-fee plans *shall*-

(i) Be approved by the FDO unless otherwise authorized by agency procedures;

(ii) Identify the award-fee evaluation criteria and how they are linked to *acquisition* objectives which *shall* be defined in terms of contract cost, schedule, and technical performance. Criteria *should* motivate the contractor to enhance performance in the areas rated, but not at the expense of at least minimum acceptable performance in all other areas;

(iii) Describe how the contractor's performance will be measured against the award-fee evaluation criteria;

(iv) Utilize the adjectival rating and associated description as well as the award-fee pool earned percentages shown below in Table 16-1. *Contracting officers may* supplement the adjectival rating description. The method used to determine the adjectival rating *must* be documented in the award-fee plan;

Table 16-1

| **Award-Fee Adjectival Rating** | **Award-Fee Pool Available To Be Earned** | **Description** |
|---|---|---|
| Excellent | 91%-100% | Contractor has exceeded almost all of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period. |
| Very Good | 76%-90% | Contractor has exceeded many of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period. |
| Good | 51%-75% | Contractor has exceeded some of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period. |
| Satisfactory | No Greater Than 50% | Contractor has met overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period. |

| Award-Fee Adjectival Rating | Award-Fee Pool Available To Be Earned | Description |
|---|---|---|
| Unsatisfactory | 0% | Contractor has failed to meet overall cost, schedule, and technical performance requirements of the contract in the aggregate as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period. |

(v) Prohibit earning any award fee when a contractor's overall cost, schedule, and technical performance in the aggregate is below satisfactory;

(vi) Provide for evaluation period(s) to be conducted at stated intervals during the contract period of performance so that the contractor will periodically be informed of the quality of its performance and the areas in which improvement is expected (*e.g.* six months, nine months, twelve months, or at specific milestones); and

(vii) Define the total award-fee pool amount and how this amount is allocated across each evaluation period.

(4) *Rollover of unearned award fee*. The use of *rollover of unearned award fee* is prohibited.

(5) *Limitations*. No award-fee contract *shall* be awarded unless-

(i) All of the limitations in 16.301-3, that are applicable to cost-reimbursement contracts only, are complied with;

(ii) An award-fee plan is completed in accordance with the requirements in 16.401(e)(3); and

(iii) A determination and finding is completed in accordance with 16.401(d) addressing all of the suitability items in 16.401(e)(1).

(f) *Incentive- and Award-Fee Data Collection and Analysis*. Each agency *shall* collect relevant data on award fee and incentive fees paid to contractors and include performance measures to evaluate such data on a regular basis to determine effectiveness of award and incentive fees as a tool for improving contractor performance and achieving desired program outcomes. This information *should* be considered as part of the *acquisition planning* process (see 7.105) in determining the appropriate type of contract to be utilized for future *acquisitions*.

(g) *Incentive- and Award-Fee Best Practices*. Each *agency head shall* provide mechanisms for sharing proven incentive strategies for the *acquisition* of different types of *products* and services among *contracting* and program management officials.

## 16.402 Application of predetermined, formula-type incentives.

### 16.402-1 Cost incentives.

(a) Most incentive contracts include only cost incentives, which take the form of a profit or fee adjustment formula and are intended to motivate the contractor to effectively manage costs. No incentive contract *may* provide for other incentives without also providing a cost incentive (or constraint).

(b) Except for award-fee contracts (see 16.404 and 16.401(e)), incentive contracts include a target cost, a target profit or fee, and a profit or fee adjustment formula that (within the constraints of a price ceiling or minimum and maximum fee) provides that-

(1) Actual cost that meets the target will result in the target profit or fee;

(2) Actual cost that exceeds the target will result in downward adjustment of target profit or fee; and

(3) Actual cost that is below the target will result in upward adjustment of target profit or fee.

**16.402-2 Performance incentives.**

(a) Performance incentives *may* be considered in connection with specific product characteristics (*e.g.,*a missile range, an aircraft speed, an engine thrust, or a vehicle maneuverability) or other specific elements of the contractor's performance. These incentives *should* be designed to relate profit or fee to results achieved by the contractor, compared with specified targets.

(b) To the maximum extent practicable, positive and negative performance incentives *shall* be considered in connection with service contracts for performance of objectively measurable tasks when quality of performance is critical and incentives are likely to motivate the contractor.

(c) Technical performance incentives *may* be particularly appropriate in *major systems* contracts, both in development (when performance objectives are known and the fabrication of prototypes for test and evaluation is required) and in production (if improved performance is attainable and highly desirable to the Government).

(d) Technical performance incentives *may* involve a variety of specific characteristics that contribute to the overall performance of the end item. Accordingly, the incentives on individual technical characteristics *must* be balanced so that no one of them is exaggerated to the detriment of the overall performance of the end item.

(e) Performance tests and/or assessments of work performance are generally essential in order to determine the degree of attainment of performance targets. Therefore, the contract *must* be as specific as possible in establishing test criteria (such as testing conditions, instrumentation precision, and data interpretation) and performance standards (such as the quality levels of services to be provided).

(f) Because performance incentives present complex problems in contract administration, the *contracting officer should* negotiate them in full coordination with Government engineering and *pricing* specialists.

(g) It is essential that the Government and contractor agree explicitly on the effect that contract changes (*e.g.,* pursuant to the Changes clause) will have on performance incentives.

(h) The *contracting officer must* exercise care, in establishing performance criteria, to recognize that the contractor *should* not be rewarded or penalized for attainments of Government-furnished

*components*.

### 16.402-3 Delivery incentives.

(a) Delivery incentives *should* be considered when improvement from a required delivery schedule is a significant Government objective. It is important to determine the Government's primary objectives in a given contract (*e.g.,* earliest possible delivery or earliest quantity production).

(b) Incentive arrangements on delivery *should* specify the application of the reward-penalty structure in the event of Government-caused delays or other delays beyond the control, and without the fault or negligence, of the contractor or subcontractor.

### 16.402-4 Structuring multiple-incentive contracts.

A properly structured multiple-incentive arrangement *should*-

(a) Motivate the contractor to strive for outstanding results in all incentive areas; and

(b) Compel trade-off decisions among the incentive areas, consistent with the Government's overall objectives for the *acquisition*. Because of the interdependency of the Government's cost, the technical performance, and the delivery goals, a contract that emphasizes only one of the goals *may* jeopardize control over the others. Because outstanding results *may* not be attainable for each of the incentive areas, all multiple-incentive contracts *must* include a cost incentive (or constraint) that operates to preclude rewarding a contractor for superior technical performance or delivery results when the cost of those results outweighs their value to the Government.

## 16.403 Fixed-price incentive contracts.

(a) *Description*. A fixed-price incentive contract is a fixed-price contract that provides for adjusting profit and establishing the final contract price by application of a formula based on the relationship of total final negotiated cost to total target cost. The final price is subject to a price ceiling, negotiated at the outset. The two forms of fixed-price incentive contracts, firm target and successive targets, are further described in 16.403-1 and 16.403-2 below.

(b) *Application*. A fixed-price incentive contract is appropriate when-

(1) A firm-fixed-price contract is not suitable;

(2) The nature of the *supplies* or services being acquired and other circumstances of the *acquisition* are such that the contractor's assumption of a degree of cost responsibility will provide a positive profit incentive for effective cost control and performance; and

(3) If the contract also includes incentives on technical performance and/or delivery, the performance requirements provide a reasonable opportunity for the incentives to have a meaningful impact on the contractor's management of the work.

(c) *Billing prices*. In fixed-price incentive contracts, billing prices are established as an interim basis for payment. These billing prices *may* be adjusted, within the ceiling limits, upon request of either

party to the contract, when it becomes apparent that final negotiated cost will be substantially different from the target cost.

### 16.403-1 Fixed-price incentive (firm target) contracts.

(a) *Description*. A fixed-price incentive (firm target) contract specifies a target cost, a target profit, a price ceiling (but not a profit ceiling or floor), and a profit adjustment formula. These elements are all negotiated at the outset. The price ceiling is the maximum that *may* be paid to the contractor, except for any adjustment under other *contract clauses*. When the contractor completes performance, the parties negotiate the final cost, and the final price is established by applying the formula. When the final cost is less than the target cost, application of the formula results in a final profit greater than the target profit; conversely, when final cost is more than target cost, application of the formula results in a final profit less than the target profit, or even a net loss. If the final negotiated cost exceeds the price ceiling, the contractor absorbs the difference as a loss. Because the profit varies inversely with the cost, this contract type provides a positive, calculable profit incentive for the contractor to control costs.

(b) *Application*. A fixed-price incentive (firm target) contract is appropriate when the parties can negotiate at the outset a firm target cost, target profit, and profit adjustment formula that will provide a fair and reasonable incentive and a ceiling that provides for the contractor to assume an appropriate share of the risk. When the contractor assumes a considerable or major share of the cost responsibility under the adjustment formula, the target profit *should* reflect this responsibility.

(c) *Limitations*. This contract type *may* be used only when-

(1) The contractor’s accounting system is adequate for providing data to support negotiation of final cost and incentive price revision; and

(2) Adequate cost or *pricing* information for establishing reasonable firm targets is available at the time of initial contract negotiation.

(d) *Contract schedule*. The *contracting officer shall* specify in the contract schedule the target cost, target profit, and target price for each item subject to incentive price revision.

### 16.403-2 Fixed-price incentive (successive targets) contracts.

(a) Description.

(1) A fixed-price incentive (successive targets) contract specifies the following elements, all of which are negotiated at the outset:

(i) An initial target cost.

(ii) An initial target profit.

(iii) An initial profit adjustment formula to be used for establishing the firm target profit, including a ceiling and floor for the firm target profit. (This formula normally provides for a lesser degree of contractor cost responsibility than would a formula for establishing final profit and price.)

(iv) The production point at which the firm target cost and firm target profit will be negotiated (usually before delivery or shop completion of the first item).

(v) A ceiling price that is the maximum that *may* be paid to the contractor, except for any adjustment under other *contract clauses* providing for equitable adjustment or other revision of the contract price under stated circumstances.

(2) When the production point specified in the contract is reached, the parties negotiate the firm target cost, giving consideration to cost experience under the contract and other pertinent factors. The firm target profit is established by the formula. At this point, the parties have two alternatives, as follows:

(i) They *may* negotiate a firm fixed price, using the firm target cost plus the firm target profit as a guide.

(ii) If negotiation of a firm fixed price is inappropriate, they *may* negotiate a formula for establishing the final price using the firm target cost and firm target profit. The final cost is then negotiated at completion, and the final profit is established by formula, as under the fixed-price incentive (firm target) contract (see 16.403-1 above).

(b) *Application*. A fixed-price incentive (successive targets) contract is appropriate when-

(1) Available cost or *pricing* information is not sufficient to permit the negotiation of a realistic firm target cost and profit before award;

(2) Sufficient information is available to permit negotiation of initial targets; and

(3) There is reasonable assurance that additional reliable information will be available at an early point in the contract performance so as to permit negotiation of either (i)a firm fixed price or (ii) firm targets and a formula for establishing final profit and price that will provide a fair and reasonable incentive. This additional information is not limited to experience under the contract, itself, but *may* be drawn from other contracts for the same or similar items.

(c) *Limitations*. This contract type *may* be used only when-

(1) The contractor's accounting system is adequate for providing data for negotiating firm targets and a realistic profit adjustment formula, as well as later negotiation of final costs; and

(2) Cost or *pricing* information adequate for establishing a reasonable firm target cost is reasonably expected to be available at an early point in contract performance.

(d) *Contract schedule*. The *contracting officer shall* specify in the contract schedule the initial target cost, initial target profit, and initial target price for each item subject to incentive price revision.

## 16.404 Fixed-price contracts with award fees.

Award-fee provisions *may* be used in fixed-price contracts when the Government wishes to motivate a contractor and other incentives cannot be used because contractor performance cannot be measured objectively. Such contracts *shall* establish a fixed price (including normal profit) for the effort. This price will be paid for satisfactory contract performance. Award fee earned (if any) will be paid in addition to that fixed price. See 16.401(e) for the requirements relative to utilizing this contract type.

## 16.405 Cost-reimbursement incentive contracts.

See 16.301 for requirements applicable to all cost-reimbursement contracts, for use in conjunction with the following subsections.

### 16.405-1 Cost-plus-incentive-fee contracts.

(a) *Description*. The cost-plus-incentive-fee contract is a cost-reimbursement contract that provides for the initially negotiated fee to be adjusted later by a formula based on the relationship of total allowable costs to total target costs. This contract type specifies a target cost, a target fee, minimum and maximum fees, and a fee adjustment formula. After contract performance, the fee payable to the contractor is determined in accordance with the formula. The formula provides, within limits, for increases in fee above target fee when total allowable costs are less than target costs, and decreases in fee below target fee when total allowable costs exceed target costs. This increase or decrease is intended to provide an incentive for the contractor to manage the contract effectively. When total allowable cost is greater than or less than the range of costs within which the fee-adjustment formula operates, the contractor is paid total allowable costs, plus the minimum or maximum fee.

(b) Application.

(1) A cost-plus-incentive-fee contract is appropriate for services or development and test programs when-

(i) A cost-reimbursement contract is necessary (see 16.301-2); and

(ii) A target cost and a fee adjustment formula can be negotiated that are likely to motivate the contractor to manage effectively.

(2) The contract *may* include technical performance incentives when it is highly probable that the required development of a *major system* is feasible and the Government has established its performance objectives, at least in general terms. This approach also *may* apply to other *acquisitions*, if the use of both cost and technical performance incentives is desirable and administratively practical.

(3) The fee adjustment formula *should* provide an incentive that will be effective over the full range of reasonably foreseeable variations from target cost. If a high maximum fee is negotiated, the contract *shall* also provide for a low minimum fee that *may* be a zero fee or, in rare cases, a negative fee.

(c) *Limitations*. No cost-plus-incentive-fee contract *shall* be awarded unless all limitations in 16.301-3 are complied with.

### 16.405-2 Cost-plus-award-fee contracts.

A cost-plus-award-fee contract is a cost-reimbursement contract that provides for a fee consisting of (1) a base amount fixed at inception of the contract, if applicable and at the discretion of the *contracting officer*, and (2) an award amount that the contractor *may* earn in whole or in part during performance and that is sufficient to provide motivation for excellence in the areas of cost, schedule,

and technical performance. See 16.401(e) for the requirements relative to utilizing this contract type.

### 16.406 Contract clauses.

(a) Insert the clause at 52.216-16, Incentive Price Revision-Firm Target, in *solicitations* and contracts when a fixed-price incentive (firm target) contract is contemplated. If the contract calls for *supplies* or services to be ordered under a provisioning document or Government *option* and the prices are to be subject to the incentive price revision under the clause, the *contracting officer shall* use the clause with its *Alternate* I.

(b) Insert the clause at 52.216-17, Incentive Price Revision-Successive Targets, in *solicitations* and contracts when a fixed-price incentive (successive targets) contract is contemplated. If the contract calls for *supplies* or services to be ordered under a provisioning document or Government *option* and the prices are to be subject to incentive price revision under the clause, the *contracting officer shall* use the clause with its *Alternate* I.

(c) The clause at 52.216-7, Allowable Cost and Payment, is prescribed in 16.307(a) for insertion in *solicitations* and contracts when a cost-plus-incentive-fee contract or a cost-plus-award-fee contract is contemplated.

(d) The clause at 52.216-10, Incentive Fee, is prescribed in 16.307(d) for insertion in *solicitations* and contracts when a cost-plus-incentive-fee contract is contemplated.

(e) Insert an appropriate award-fee clause in *solicitations* and contracts when an award-fee contract is contemplated, provided that the clause-

(1) Is prescribed by or approved under agency *acquisition* regulations;

(2) Is compatible with the clause at 52.216-7, Allowable Cost and Payment; and

(3) Expressly provides that the award amount and the award-fee determination methodology are unilateral decisions made solely at the discretion of the Government.

## Subpart 16.5 - Indefinite-Delivery Contracts

### 16.500 Scope of subpart.

(a) This subpart prescribes policies and procedures for making awards of indefinite-delivery contracts and establishes a preference for making multiple awards of indefinite-quantity contracts.

(b) This subpart does not limit the use of other than competitive procedures authorized by part 6.

(c) Nothing in this subpart restricts the authority of the General Services Administration (GSA) to enter into schedule, multiple award, or task or *delivery order* contracts under any other provision of law. Therefore, GSA regulations and the coverage for the Federal Supply Schedule program in subpart 8.4 and part 38 take precedence over this subpart.

(d) The statutory multiple award preference implemented by this subpart does not apply to architect-

engineer contracts subject to the procedures in subpart 36.6. However, agencies are not precluded from making multiple awards for *architect-engineer services* using the procedures in this subpart, provided the selection of contractors and placement of orders are consistent with subpart 36.6.

(e) See subpart 19.5 for procedures to set aside part or parts of *multiple-award contracts* for small businesses; to reserve one or more awards for small business on *multiple-award contracts*; and to set aside orders for small businesses under *multiple-award contracts*.

## 16.501 [Reserved]

### 16.501-1 Definitions.

As used in this subpart-

*Delivery-order contract* means a contract for *supplies* that does not procure or specify a firm quantity of *supplies* (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of *supplies* during the period of the contract.

*Task-order contract* means a contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.

### 16.501-2 General.

(a) There are three types of indefinite-delivery contracts: definite-quantity contracts, requirements contracts, and indefinite-quantity contracts. The appropriate type of indefinite-delivery contract *may* be used to acquire *supplies* and/or services when the exact times and/or exact quantities of future deliveries are not known at the time of contract award. Pursuant to 10 U.S.C. 3401 and 41 U.S.C. 4101, requirements contracts and indefinite-quantity contracts are also known as *delivery-order contracts* or *task-order contracts*.

(b) The various types of indefinite-delivery contracts *offer* the following advantages:

(1) All three types permit-

(i) Government stocks to be maintained at minimum levels; and

(ii) Direct *shipment* to users.

(2) Indefinite-quantity contracts and requirements contracts also permit-

(i) Flexibility in both quantities and delivery scheduling; and

(ii) Ordering of *supplies* or services after requirements materialize.

(3) Indefinite-quantity contracts limit the Government’s obligation to the minimum quantity specified in the contract.

(4) Requirements contracts *may* permit faster deliveries when production lead time is involved,

because contractors are usually willing to maintain limited stocks when the Government will obtain all of its actual purchase requirements from the contractor.

(c) Indefinite-delivery contracts *may* provide for any appropriate cost or *pricing* arrangement under part 16. Cost or *pricing* arrangements that provide for an estimated quantity of *supplies* or services (*e.g.,* estimated number of labor hours) *must* comply with the appropriate procedures of this subpart.

## 16.502 Definite-quantity contracts.

(a) *Description*. A definite-quantity contract provides for delivery of a definite quantity of specific *supplies* or services for a fixed period, with deliveries or performance to be scheduled at designated locations upon order.

(b) *Application*. A definite-quantity contract *may* be used when it can be determined in advance that-

(1) A definite quantity of *supplies* or services will be required during the contract period; and

(2) The *supplies* or services are regularly available or will be available after a short lead time.

## 16.503 Requirements contracts.

(a) *Description*. A requirements contract provides for filling all actual purchase requirements of designated Government activities for *supplies* or services during a specified contract period (from one contractor), with deliveries or performance to be scheduled by placing orders with the contractor.

(1) For the information of *offerors* and contractors, the *contracting officer shall* state a realistic estimated total quantity in the *solicitation* and resulting contract. This estimate is not a representation to an *offeror* or contractor that the estimated quantity will be required or ordered, or that conditions affecting requirements will be stable or normal. The *contracting officer may* obtain the estimate from records of previous requirements and consumption, or by other means, and *should* base the estimate on the most current information available.

(2) The contract *shall* state, if feasible, the maximum limit of the contractor's obligation to deliver and the Government's obligation to order. The contract *may* also specify maximum or minimum quantities that the Government *may* order under each individual order and the maximum that it *may* order during a specified period of time.

(b) *Application*.

(1) A requirements contract *may* be appropriate for acquiring any *supplies* or services when the Government anticipates recurring requirements but cannot predetermine the precise quantities of *supplies* or services that designated Government activities will need during a definite period.

(2) No requirements contract in an amount estimated to exceed $150 million (including all *options*) *may* be awarded to a single source unless a determination is executed in accordance with 16.504(c)(1)(ii)(D).

(c) *Government property furnished for repair*. When a requirements contract is used to acquire work (*e.g.,* repair, modification, or overhaul) on existing items of Government property, the *contracting officer shall* specify in the Schedule that failure of the Government to furnish such items in the amounts or quantities described in the Schedule as "estimated" or "maximum" will not entitle the contractor to any equitable adjustment in price under the Government Property clause of the contract.

(d) Limitations on use of requirements contracts for *advisory and assistance services*.

(1) Except as provided in paragraph (d)(2) of this section, no *solicitation* for a requirements contract for *advisory and assistance services* in excess of three years and $20 million (including all *options*) *may* be issued unless the *contracting officer* or other official designated by the *head of the agency* determines *in writing* that the services required are so unique or highly specialized that it is not practicable to make multiple awards using the procedures in 16.504.

(2) The limitation in paragraph (d)(1) of this section is not applicable to an *acquisition* of *supplies* or services that includes the *acquisition* of *advisory and assistance services*, if the *contracting officer* or other official designated by the *head of the agency* determines that the *advisory and assistance services* are necessarily incident to, and not a significant *component* of, the contract.

## 16.504 Indefinite-quantity contracts.

(a) *Description*. An indefinite-quantity contract provides for an indefinite quantity, within stated limits, of *supplies* or services during a fixed period. The Government places orders for individual requirements. Quantity limits *may* be stated as number of units or as dollar values.

(1) The contract *must* require the Government to order and the contractor to furnish at least a stated minimum quantity of *supplies* or services. In addition, if ordered, the contractor *must* furnish any additional quantities, not to exceed the stated maximum. The *contracting officer should* establish a reasonable maximum quantity based on *market research*, trends on recent contracts for similar *supplies* or services, survey of potential users, or any other rational basis.

(2) To ensure that the contract is binding, the minimum quantity *must* be more than a nominal quantity, but it *should* not exceed the amount that the Government is fairly certain to order.

(3) The contract *may* also specify maximum or minimum quantities that the Government *may* order under each task or *delivery order* and the maximum that it *may* order during a specific period of time.

(4) A *solicitation* and contract for an indefinite quantity *must*-

(i) Specify the period of the contract, including the number of *options* and the period for which the Government *may* extend the contract under each *option;*

(ii) Specify the total minimum and maximum quantity of *supplies* or services the Government will acquire under the contract;

(iii) Include a statement of work, specifications, or other description, that reasonably describes the general scope, nature, complexity, and purpose of the *supplies* or services the Government will acquire under the contract in a manner that will enable a prospective *offeror* to decide whether to

submit an *offer*;

(iv) State the procedures that the Government will use in issuing orders, including the ordering media, and, if multiple awards *may* be made, state the procedures and selection criteria that the Government will use to provide awardees a fair opportunity to be considered for each order (see 16.505(b)(1));

(v) Include a description of the activities authorized to issue orders; and

(vi) Include authorization for placing oral orders, if appropriate, provided that the Government has established procedures for obligating funds and that oral orders are confirmed *in writing*.

(b) *Application*. *Contracting officers may* use an indefinite-quantity contract when the Government cannot predetermine, above a specified minimum, the precise quantities of *supplies* or services that the Government will require during the contract period, and it is inadvisable for the Government to commit itself for more than a minimum quantity. The *contracting officer should* use an indefinite-quantity contract only when a recurring need is anticipated.

(c) Multiple award preference-

(1) Planning the *acquisition*.

(i) Except for indefinite-quantity contracts for *advisory and assistance services* as provided in paragraph (c)(2) of this section, the *contracting officer must*, to the maximum extent practicable, give preference to making multiple awards of indefinite-quantity contracts under a single *solicitation* for the same or similar *supplies* or services to two or more sources.

(ii)

(A) The *contracting officer must* determine whether multiple awards are appropriate as part of *acquisition planning*. The *contracting officer must* avoid situations in which awardees specialize exclusively in one or a few areas within the statement of work, thus creating the likelihood that orders in those areas will be awarded on a sole-source basis; however, each awardee need not be capable of performing every requirement as well as any other awardee under the contracts. The *contracting officer should* consider the following when determining the number of contracts to be awarded:

(1) The scope and complexity of the contract requirement.

(2) The expected duration and frequency of task or *delivery orders*.

(3) The mix of resources a contractor *must* have to perform expected task or *delivery order* requirements.

(4) The ability to maintain competition among the awardees throughout the contracts' period of performance.

(B) The *contracting officer must* not use the multiple award approach if-

(1) Only one contractor is capable of providing performance at the level of quality required because the *supplies* or services are unique or highly specialized;

(2) Based on the *contracting officer*'s knowledge of the market, more favorable terms and conditions, including *pricing*, will be provided if a single award is made;

(3) The expected cost of administration of multiple contracts outweighs the expected benefits of making multiple awards;

(4) The projected *task orders* are so integrally related that only a single contractor can reasonably perform the work;

(5) The total estimated value of the contract is at or below the *simplified acquisition threshold*; or

(6) Multiple awards would not be in the best interests of the Government.

(C) The *contracting officer must* document the decision whether or not to use multiple awards in the *acquisition* plan or contract file. The *contracting officer may* determine that a class of *acquisitions* is not appropriate for multiple awards (see subpart 1.7).

(D)

(1) No task or *delivery order* contract in an amount estimated to exceed $150 million (including all *options*) *may* be awarded to a single source unless the *head of the agency* determines *in writing* that-

(i) The task or *delivery orders* expected under the contract are so integrally related that only a single source can reasonably perform the work;

(ii) The contract provides only for firm-fixed price (see 16.202) task or *delivery orders* for-

(*A*) *Products* for which unit prices are established in the contract; or

(*B*) Services for which prices are established in the contract for the specific tasks to be performed;

(iii) Only one source is qualified and capable of performing the work at a reasonable price to the Government; or

(iv) It is necessary in the public interest to award the contract to a single source due to exceptional circumstances.

(2) The *head of the agency must* notify Congress within 30 days after any determination under paragraph (c)(1)(ii)(D)(*1*)(*iv*) of this section.

(3) The requirement for a determination for a single-award contract greater than $150 million-

(i) Is in addition to any applicable requirements of subpart 6.3; and

(ii) Is not applicable for *architect-engineer services* awarded pursuant to subpart 36.6.

(2) Contracts for *advisory and assistance services*.

(i) Except as provided in paragraph (c)(2)(ii) of this section, if an indefinite-quantity contract for *advisory and assistance services* exceeds 3 years and $20 million, including all *options*, the *contracting officer must* make multiple awards unless-

(A) The *contracting officer* or other official designated by the *head of the agency* determines *in writing*, as part of *acquisition planning*, that multiple awards are not practicable. The *contracting officer* or other official *must* determine that only one contractor can reasonably perform the work because either the scope of work is unique or highly specialized or the tasks so integrally related;

(B) The *contracting officer* or other official designated by the *head of the agency* determines *in writing*, after the evaluation of *offers*, that only one *offeror* is capable of providing the services required at the level of quality required; or

(C) Only one *offer* is received.

(ii) The requirements of paragraph (c)(2)(i) of this section do not apply if the *contracting officer* or other official designated by the *head of the agency* determines that the *advisory and assistance services* are incidental and not a significant *component* of the contract.

## 16.505 Ordering.

(a) *General*.

(1) In general, the *contracting officer* does not synopsize orders under indefinite-delivery contracts; except see 16.505(a)(4) and (11), and 16.505(b)(2)(ii)(D).

(2) Individual orders *shall* clearly describe all services to be performed or *supplies* to be delivered so the full cost or price for the performance of the work can be established when the order is placed. Orders *shall* be within the scope, issued within the period of performance, and be within the maximum value of the contract.

(3) *Performance-based acquisition* methods *must* be used to the maximum extent practicable, if the contract or order is for services (see 37.102(a) and subpart 37.6).

(4) The following requirements apply when procuring items peculiar to one manufacturer:

(i) The *contracting officer must* justify restricting consideration to an item peculiar to one manufacturer (*e.g.*, a particular brand-name, product, or a feature of a product that is peculiar to one manufacturer). A brand-name item, even if available on more than one contract, is an item peculiar to one manufacturer. Brand-name specifications *shall* not be used unless the particular brand-name, product, or feature is essential to the Government's requirements and *market research* indicates other companies' similar *products*, or *products* lacking the particular feature, do not meet, or cannot be modified to meet, the agency's needs.

(ii) Requirements for use of items peculiar to one manufacturer *shall* be justified and approved using the format(s) and requirements from paragraphs (b)(2)(ii)(A), (B), and (C) of this section, modified to show the brand-name justification. A justification is required unless a justification covering the requirements in the order was previously approved for the contract in accordance with 6.302-1(c) or unless the base contract is a single-award contract awarded under *full and open competition*. Justifications for the use of brand-name specifications *must* be completed and approved at the time the requirement for a brand-name is determined.

(iii)

(A) For an order in excess of $40,000, the *contracting officer shall*—

(1) Post the justification and supporting documentation on the agency website used (if any) to solicit *offers* for orders under the contract; or

(2) Provide the justification and supporting documentation along with the *solicitation* to all contract awardees.

(B) The justifications for brand-name *acquisitions may* apply to the portion of the *acquisition* requiring the brand-name item. If the justification is to cover only the portion of the *acquisition* which is brand-name, then it *should* so state; the approval level requirements will then only apply to that portion.

(C) The requirements in paragraph (a)(4)(iii)(A) of this section do not apply when disclosure would compromise the national security (*e.g.*, would result in disclosure of *classified information*) or create other security risks.

(D) The justification is subject to the screening requirement in paragraph (b)(2)(ii)(D)(*4*) of this section.

(5) When acquiring *information technology* and related services, consider the use of modular *contracting* to reduce program risk (see 39.103(a)).

(6) Orders *may* be placed by using any medium specified in the contract.

(7) Orders placed under indefinite-delivery contracts *must* contain the following information:

(i) Date of order.

(ii) Contract number and order number.

(iii) For *supplies* and services, *line item number*, *subline item* number (if applicable), description, quantity, and unit price or estimated cost and fee (as applicable). The corresponding *line item number* and *subline item* number from the base contract *shall* also be included.

(iv) Delivery or performance schedule.

(v) Place of delivery or performance (including consignee).

(vi) Any packaging, packing, and shipping instructions.

(vii) Accounting and appropriation data.

(viii) Method of payment and payment office, if not specified in the contract (see 32.1110(e)).

(ix) North American Industry Classification System code (see 19.102(b)(3)).

(8) Orders placed under a task-order contract or delivery-order contract awarded by another agency (*i.e.*,a *Governmentwide acquisition contract*, or *multi-agency contract*)—

(i) Are not exempt from the development of *acquisition* plans (see subpart 7.1), and an *information technology acquisition* strategy (see part 39);

(ii) *May* not be used to circumvent conditions and limitations imposed on the use of funds (*e.g.,* 31

U.S.C. 1501(a)(1)); and

(iii) *Shall* comply with all FAR requirements for a consolidated or bundled contract when the order meets the definition at 2.101 of "consolidation" or "*bundling*".

(9) In accordance with section 1427(b) of Public Law 108-136 (40 U.S.C. 1103 note), orders placed under multi-agency contracts for services that substantially or to a dominant extent specify performance of *architect-engineer services*, as defined in 2.101, *shall—*

(i) Be awarded using the procedures at subpart 36.6; and

(ii) Require the direct supervision of a professional architect or engineer licensed, registered or certified in the State, Federal District, or outlying area, in which the services are to be performed.

(10)

(i) No protest under subpart 33.1 is authorized in connection with the issuance or proposed issuance of an order under a task-order contract or delivery-order contract, except—

(A) A protest on the grounds that the order increases the scope, period, or maximum value of the contract; or

(B)

(1) For agencies other than DoD, NASA, and the Coast Guard, a protest of an order valued in excess of $10 million (41 U.S.C. 4106(f)); or

(2) For DoD, NASA, or the Coast Guard, a protest of an order valued in excess of $25 million (10 U.S.C. 3406(f)).

(ii) Protests of orders in excess of the thresholds stated in 16.505(a)(10)(i)(B) *may* only be filed with the Government Accountability Office, in accordance with the procedures at 33.104.

(iii) For protests of small business size status for set-aside orders, see 19.302.

(11) Publicize orders funded in whole or in part by the American Recovery and Reinvestment Act of 2009 (Pub. L. 111-5) as follows:

(i) Notices of proposed orders *shall* follow the procedures in 5.704 for posting orders.

(ii) Award notices for orders *shall* follow the procedures in 5.705.

(12) When using the Governmentwide commercial purchase card as a method of payment, orders at or below the *micro-purchase threshold* are exempt from verification in the *System for Award Management* as to whether the contractor has a delinquent debt subject to collection under the Treasury Offset Program (TOP).

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

(1) *Fair opportunity.*

(i) The *contracting officer must* provide each awardee a fair opportunity to be considered for each order exceeding the *micro-purchase threshold* issued under multiple delivery-order contracts or multiple task-order contracts, except—

(A) As provided for in paragraph (b)(2) of this section; or

(B) Orders issued under 19.504(c)(1)(ii).

(ii) The *contracting officer may* exercise broad discretion in developing appropriate order placement procedures. The *contracting officer should* keep submission requirements to a minimum. *Contracting officers may* use streamlined procedures, including oral presentations. If the order does not exceed the *simplified acquisition threshold*, the *contracting officer* need not contact each of the multiple awardees under the contract before selecting an order awardee if the *contracting officer* has information available to ensure that each awardee is provided a fair opportunity to be considered for each order. The competition requirements in part 6 and the policies in subpart 15.3 do not apply to the ordering process. However, the *contracting officer shall*—

(A) Develop placement procedures that will provide each awardee a fair opportunity to be considered for each order and that reflect the requirement and other aspects of the *contracting* environment;

(B) Not use any method (such as allocation or designation of any preferred awardee) that would not result in fair consideration being given to all awardees prior to placing each order;

(C) Tailor the procedures to each *acquisition*;

(D) Include the procedures in the *solicitation* and the contract;

(E) Consider price or cost under each order as one of the factors in the selection decision;

(F)Except for DoD, ensure the criteria at 15.101-2(c)(1)-(5) are met when using the lowest price technically acceptable source selection process; and

(G)Except for DoD, avoid using the lowest price technically acceptable source selection process to acquire certain *supplies* and services in accordance with 15.101-2(d).

(iii) Orders exceeding the *simplified acquisition threshold*.

(A) Each order exceeding the *simplified acquisition threshold shall* be placed on a competitive basis in accordance with paragraph (b)(1)(iii)(B) of this section, unless supported by a written determination that one of the circumstances described at 16.505(b)(2)(i) applies to the order and the requirement is waived on the basis of a justification that is prepared in accordance with 16.505(b)(2)(ii)(B);

(B) The *contracting officer shall*—

(1) Provide a fair notice of the intent to make a purchase, including a clear description of the *supplies* to be delivered or the services to be performed and the basis upon which the selection will be made to all contractors offering the required *supplies* or services under the *multiple-award contract*; and

(2) Afford all contractors responding to the notice a fair opportunity to submit an *offer* and have that

*offer* fairly considered.

(iv) *Orders exceeding $7.5 million*. For task or *delivery orders* in excess of $7.5 million, the requirement to provide all awardees a fair opportunity to be considered for each order *shall* include, at a minimum—

(A) A notice of the task or *delivery order* that includes a clear statement of the agency's requirements;

(B) A reasonable response period;

(C) Disclosure of the significant factors and subfactors, including cost or price, that the agency expects to consider in evaluating proposals, and their relative importance;

(D) Where award is made on a *best value* basis, a written statement documenting the basis for award and the relative importance of quality and price or cost factors; and

(E) An opportunity for a postaward debriefing in accordance with paragraph (b)(6) of this section.

(v) The *contracting officer should* consider the following when developing the procedures:

(A)

(1) *Past performance* on earlier orders under the contract, including quality, timeliness and cost control.

(2) Potential impact on other orders placed with the contractor.

(3) Minimum order requirements.

(4) The amount of time contractors need to make informed business decisions on whether to respond to potential orders.

(5) Whether contractors could be encouraged to respond to potential orders by outreach efforts to promote exchanges of information, such as—

(i) Seeking comments from two or more contractors on draft statements of work;

(ii) Using a multiphased approach when effort required to respond to a potential order *may* be resource intensive (*e.g.,* requirements are complex or need continued development), where all contractors are initially considered on price considerations (*e.g.,* rough estimates), and other considerations as appropriate (*e.g.,*proposed conceptual approach, *past performance*). The contractors most likely to submit the highest value solutions are then selected for one-on-one sessions with the Government to increase their understanding of the requirements, provide suggestions for refining requirements, and discuss risk reduction measures.

(B) Formal evaluation plans or scoring of quotes or *offers* are not required.

(2) *Exceptions to the fair opportunity process*.

(i) The *contracting officer shall* give every awardee a fair opportunity to be considered for a *delivery order* or *task order* exceeding the *micro-purchase threshold* unless one of the following statutory

exceptions applies:

(A) The agency need for the *supplies* or services is so urgent that providing a fair opportunity would result in unacceptable delays.

(B) Only one awardee is capable of providing the *supplies* or services required at the level of quality required because the *supplies* or services ordered are unique or highly specialized.

(C) The order *must* be issued on a sole-source basis in the interest of economy and efficiency because it is a logical follow-on to an order already issued under the contract, provided that all awardees were given a fair opportunity to be considered for the original order.

(D) It is necessary to place an order to satisfy a minimum guarantee.

(E) For orders exceeding the *simplified acquisition threshold*, a statute expressly authorizes or requires that the purchase be made from a specified source.

(F) In accordance with section 1331 of Public Law 111-240 (15 U.S.C. 644(r)), *contracting officers may*, at their discretion, set aside orders for any of the small business concerns identified in 19.000(a)(3). When setting aside orders for small business concerns, the specific small business program eligibility requirements identified in part 19 apply.

(G) For DoD, NASA, and the Coast Guard, the order satisfies one of the exceptions permitting the use of other than *full and open competition* listed in 6.302 (10 U.S.C. 3406(c)(5)). The public interest exception *shall* not be used unless Congress is notified in accordance with 10 U.S.C. 3204(a)(7).

(ii) The justification for an exception to fair opportunity *shall* be *in writing* as specified in paragraph (b)(2)(ii)(A) or (B) of this section. No justification is needed for the exception described in paragraph (b)(2)(i)(F) of this section.

(A) *Orders exceeding the micro-purchase threshold, but not exceeding the simplified acquisition threshold*. The *contracting officer shall* document the basis for using an exception to the fair opportunity process. If the *contracting officer* uses the logical follow-on exception, the rationale *shall* describe why the relationship between the initial order and the follow-on is logical (*e.g.*, in terms of scope, period of performance, or value).

(B) Orders exceeding the *simplified acquisition threshold*. As a minimum, each justification *shall* include the following information and be approved in accordance with paragraph (b)(2)(ii)(C) of this section:

(1) Identification of the agency and the *contracting activity*, and specific identification of the document as a "Justification for an Exception to Fair Opportunity."

(2) Nature and/or description of the action being approved.

(3) A description of the *supplies* or services required to meet the agency's needs (including the estimated value).

(4) Identification of the exception to fair opportunity (see 16.505(b)(2)) and the supporting rationale, including a demonstration that the proposed contractor's unique qualifications or the nature of the *acquisition* requires use of the exception cited. If the *contracting officer* uses the logical follow-on exception, the rationale *shall* describe why the relationship between the initial order and the follow-on is logical (*e.g.*, in terms of scope, period of performance, or value).

(5) A determination by the *contracting officer* that the anticipated cost to the Government will be fair and reasonable.

(6) Any other facts supporting the justification.

(7) A statement of the actions, if any, the agency *may* take to remove or overcome any barriers that led to the exception to fair opportunity before any subsequent *acquisition* for the *supplies* or services is made.

(8) The *contracting officer*'s certification that the justification is accurate and complete to the best of the *contracting officer*'s knowledge and belief.

(9) Evidence that any supporting data that is the responsibility of technical or requirements personnel (*e.g.*, verifying the Government's minimum needs or requirements or other rationale for an exception to fair opportunity) and which form a basis for the justification have been certified as complete and accurate by the technical or requirements personnel.

(10) A written determination by the approving official that one of the circumstances in paragraphs (b)(2)(i)(A) through (E) and (G) of this section applies to the order.

(C) *Approval*.

(1) For proposed orders exceeding the *simplified acquisition threshold*, but not exceeding $900,000, the ordering activity *contracting officer*'s certification that the justification is accurate and complete to the best of the ordering activity *contracting officer*'s knowledge and belief will serve as approval, unless a higher approval level is established in accordance with agency procedures.

(2) For a proposed order exceeding $900,000, but not exceeding $20 million, the justification *must* be approved by the advocate for competition of the activity placing the order, or by an official named in paragraph (b)(2)(ii)(C)( 3) or ( 4) of this section. This authority is not delegable.

(3) For a proposed order exceeding $20 million, but not exceeding $90 million (or, for DoD, NASA, and the Coast Guard, not exceeding $150 million), the justification *must* be approved by—

(i) The head of the *procuring activity* placing the order;

(ii) A designee who—

(*A*) If a member of the armed forces, is a general or flag officer;

(*B*) If a civilian, is serving in a position in a grade above GS-15 under the General Schedule (or in a comparable or higher position under another schedule); or

(iii) An official named in paragraph (b)(2)(ii)(C)*(4)*of this section.

(4) For a proposed order exceeding $90 million (or, for DoD, NASA, and the Coast Guard, over $150 million), the justification *must* be approved by the *senior procurement executive* of the agency placing the order. This authority is not delegable, except in the case of the Under Secretary of Defense for *Acquisition* and Sustainment, acting as the *senior procurement executive* for the Department of Defense.

(D) Posting.

(1) Except as provided in paragraph (b)(2)(ii)(D)*(5)* of this section, within 14 days after placing an order exceeding the *simplified acquisition threshold* that does not provide for fair opportunity in accordance with 16.505(b), the contract officer *shall*—

(i) Publish a notice in accordance with 5.301; and

(ii) Make publicly available the justification required at of this section.

(2) The justification *shall* be made publicly available—

(i) At the GPE https://www.sam.gov;

(ii) On the Web site of the agency, which *may* provide access to the justifications by linking to the GPE; and

(iii) *Must* remain posted for a minimum of 30 days.

(3) In the case of an order permitted under paragraph (b)(2)(i)(A) of this section, the justification *shall* be posted within 30 days after award of the order.

(4) *Contracting officers shall* carefully screen all justifications for contractor proprietary data and remove all such data, and such references and citations as are necessary to protect the proprietary data, before making the justifications available for public *inspection*. *Contracting officers shall* also be guided by the exemptions to disclosure of information contained in the Freedom of Information Act (5 U.S.C. 552) and the prohibitions against disclosure in 24.202 in determining whether other data *should* be removed. Although the submitter notice process set out in Executive Order 12600 "Predisclosure Notification Procedures for Confidential Commercial Information" does not apply, if the justification appears to contain proprietary data, the *contracting officer should* provide the contractor that submitted the information an opportunity to review the justification for proprietary data before making the justification available for public *inspection*, redacted as necessary. This process *must* not prevent or delay the posting of the justification in accordance with the timeframes required in paragraphs (b)(2)(ii)(D)(1) and (3) of this section.

(5) The posting requirement of this section does not apply—

(i) When disclosure would compromise the national security (*e.g.*, would result in disclosure of *classified information*) or create other security risks; or

(ii) To a small business set-aside under paragraph (b)(2)(i)(F)

(3) *Pricing orders*. If the contract did not establish the price for the supply or service, the *contracting officer must* establish prices for each order using the policies and methods in subpart 15.4.

(4) *Cost reimbursement orders.* For additional requirements for cost-reimbursement orders, see 16.301-3.

(5) *Time-and-materials or labor-hour orders.* For additional requirements for time-and-materials or labor-hour orders, see 16.601(e).

(6) *Postaward notices and debriefing of awardees for orders exceeding $7.5 million.*The *contracting officer shall* notify unsuccessful awardees when the total price of a task or *delivery order* exceeds $7.5 million.

(i) The procedures at 15.503(b)(1) *shall* be followed when providing postaward notification to unsuccessful awardees.

(ii) The procedures at 15.506 *shall* be followed when providing postaward debriefing to unsuccessful awardees.

(iii) A summary of the debriefing *shall* be included in the task or *delivery order* file.

(7) *Decision documentation for orders*.

(i) The *contracting officer shall* document in the contract file the rationale for placement and price of each order, including the basis for award and the rationale for any tradeoffs among cost or price and non-cost considerations in making the award decision. This documentation need not quantify the tradeoffs that led to the decision.

(ii) The contract file *shall* also identify the basis for using an exception to the fair opportunity process (see paragraph (b)(2) of this section).

(iii)Except for DoD, the *contracting officer shall* document in the contract file a justification for use of the lowest price technically acceptable source selection process, when applicable.

(8) *Task-order and delivery-order ombudsman*. The *head of the agency shall* designate a task-order and delivery-order ombudsman. The ombudsman *must* review complaints from contractors and ensure they are afforded a fair opportunity to be considered, consistent with the procedures in the contract. The ombudsman *must* be a senior agency official who is independent of the *contracting officer* and *may* be the agency's advocate for competition.

(9) *Small business.*The *contracting officer should* rely on the small business representations at the contract level (but see 19.301-2(b)(3) for order rerepresentations).

(c) Limitation on ordering period for task-order contracts for *advisory and assistance services*.

(1) Except as provided for in paragraphs (c)(2) and (3) of this section, the ordering period of a task-order contract for *advisory and assistance services*, including all *options* or modifications, normally *may* not exceed 5 years.

(2) The 5-year limitation does not apply when—

(i) A longer ordering period is specifically authorized by a statute; or

(ii) The contract is for an *acquisition* of *supplies* or services that includes the *acquisition* of *advisory and assistance services* and the *contracting officer*, or other official designated by the *head of the agency*, determines that the *advisory and assistance services* are incidental and not a significant *component* of the contract.

(3) The *contracting officer may* extend the contract on a sole-source basis only once for a period not to exceed 6 months if the *contracting officer*, or other official designated by the *head of the agency*, determines that—

(i) The award of a follow-on contract is delayed by circumstances that were not reasonably foreseeable at the time the initial contract was entered into; and

(ii) The extension is necessary to ensure continuity of services, pending the award of the follow-on contract.

## 16.506 Solicitation provisions and contract clauses.

(a) Insert the clause at 52.216-18, Ordering, in *solicitations* and contracts when a definite-quantity contract, a requirements contract, or an indefinite-quantity contract is contemplated.

(b) Insert a clause substantially the same as the clause at 52.216-19, Order Limitations, in *solicitations* and contracts when a definite-quantity contract, a requirements contract, or an indefinite-quantity contract is contemplated.

(c) Insert the clause at 52.216-20, Definite Quantity, in *solicitations* and contracts when a definite-quantity contract is contemplated.

(d)

(1) Insert the clause at 52.216-21, Requirements, in *solicitations* and contracts when a requirements contract is contemplated.

(2) If the contract is for nonpersonal services and related *supplies* and covers estimated requirements that exceed a specific Government activity's internal capability to produce or perform, use the clause with its *Alternate* I.

(3) If the contract includes subsistence for both Government use and resale in the same Schedule, and similar *products may* be acquired on a brand-name basis, use the clause with its *Alternate* II (but see paragraph (d)(5) of this section).

(4) If the contract involves a partial small business set-aside, use the clause with its *Alternate* III (but see paragraph (d)(5) of this section).

(5) If the contract-

(i) Includes subsistence for Government use and resale in the same schedule and similar *products may* be acquired on a brand-name basis; and

(ii) Involves a partial small business set-aside, use the clause with its *Alternate* IV.

(e) Insert the clause at 52.216-22, Indefinite Quantity, in *solicitations* and contracts when an indefinite-quantity contract is contemplated.

(f) Insert the provision at 52.216-27, Single or Multiple Awards, in *solicitations* for indefinite-quantity contracts that *may* result in multiple contract awards. Modify the provision to specify the estimated number of awards. Do not use this provision for *advisory and assistance services* contracts that exceed 3 years and $20 million (including all *options*).

(g) Insert the provision at 52.216-28, Multiple Awards for *Advisory and Assistance Services*, in *solicitations* for task-order contracts for *advisory and assistance services* that exceed 3 years and $20 million (including all *options*), unless a determination has been made under 16.504(c)(2)(i)(A). Modify the provision to specify the estimated number of awards.

(h) See 10.001(d) for insertion of the clause at 52.210-1, *Market Research*, when the contract is over $7.5 million for the *procurement* of items other than *commercial products* or *commercial services*.

(i) See 7.107-6 for use of 52.207-6, *Solicitation* of *Offers* from Small Business Concerns and *Small Business Teaming Arrangement* or Joint Ventures (*Multiple-Award Contracts*) in *solicitations* for *multiple-award contracts* above the substantial *bundling* threshold of the agency.

(j) Insert the clause at 52.216-32, Task-Order and Delivery-Order Ombudsman, in *solicitations* and contracts when a multiple-award indefinite-delivery indefinite-quantity contract is contemplated. Use the clause with its *Alternate* I when the contract will be available for use by multiple agencies (e.g., Governmentwide *acquisition* contracts or multi-agency contracts). When placing orders under the *multiple-award contract* available for use by multiple agencies, the ordering activity's *contracting officer shall* complete paragraph (d)(2) and include *Alternate* I in the notice of intent to place an order, and in the resulting order.

# Subpart 16.6 - Time-and-Materials, Labor-Hour, and Letter Contracts

## 16.600 Scope.

Time-and-*materials* contracts and labor-hour contracts are not fixed-price contracts.

## 16.601 Time-and-materials contracts.

(a) Definitions for the purposes of Time-and-*Materials* Contracts.

*Direct materials* means those *materials* that enter directly into the *end product*, or that are used or consumed directly in connection with the furnishing of the *end product* or service.

*Hourly rate* means the rate(s) prescribed in the contract for payment for labor that meets the labor category qualifications of a labor category specified in the contract that are-

(1) Performed by the contractor;

(2) Performed by the subcontractors; or

(3) Transferred between divisions, subsidiaries, or *affiliates* of the contractor under a common control.

*Materials* means-

(1) *Direct materials*, including *supplies* transferred between divisions, subsidiaries, or *affiliates* of the contractor under a common control;

(2) Subcontracts for *supplies* and incidental services for which there is not a labor category specified in the contract;

(3) Other *direct costs* (*e.g.*, incidental services for which there is not a labor category specified in the

contract, travel, computer usage charges, etc.); and

(4) Applicable *indirect costs*.

(b) *Description*. A time-and-*materials* contract provides for acquiring *supplies* or services on the basis of-

(1) Direct labor hours at specified fixed *hourly rates* that include wages, overhead, general and administrative expenses, and profit; and

(2) Actual cost for *materials* (except as provided for in 31.205-26(e) and (f)).

(c) *Application*. A time-and-*materials* contract *may* be used only when it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence. See 12.207(b) for the use of time-and-material contracts for certain *commercial services*.

(1) *Government surveillance*. A time-and-*materials* contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, appropriate Government surveillance of contractor performance is required to give reasonable assurance that efficient methods and effective cost controls are being used.

(2) *Fixed hourly rates*.

(i) The contract *shall* specify separate fixed *hourly rates* that include wages, overhead, general and administrative expenses, and profit for each category of labor (see 16.601(f)(1)).

(ii) For *acquisitions* of other than *commercial products* or *commercial services* awarded without adequate price competition (see 15.403-1(c)(1)), the contract *shall* specify separate fixed *hourly rates* that include wages, overhead, general and administrative expenses, and profit for each category of labor to be performed by-

(A) The contractor;

(B) Each subcontractor; and

(C) Each division, subsidiary, or affiliate of the contractor under a common control.

(iii) For contract actions that are not awarded using competitive procedures, unless exempt under paragraph (c)(2)(iv) of this section, the fixed *hourly rates* for services transferred between divisions, subsidiaries, or *affiliates* of the contractor under a common control-

(A) *Shall* not include profit for the transferring organization; but

(B) *May* include profit for the prime contractor.

(iv) For contract actions that are not awarded using competitive procedures, the fixed *hourly rates* for services that meet the definition of "*commercial service*" that are transferred between divisions, subsidiaries, or *affiliates* of the contractor under a common control *may* be the established catalog or market rate when-

(A) It is the established practice of the transferring organization to price interorganizational transfers at other than cost for commercial work of the contractor or any division, subsidiary or

affiliate of the contractor under a common control; and

(B) The *contracting officer* has not determined the price to be unreasonable.

(3) *Material handling costs*. When included as part of material costs, material handling costs *shall* include only costs clearly excluded from the labor-hour rate. Material handling costs *may* include all appropriate *indirect costs* allocated to *direct materials* in accordance with the contractor's usual accounting procedures consistent with part 31.

(d) *Limitations*. A time-and-*materials* contract or order *may* be used only if-

(1) The *contracting officer* prepares a determination and findings that no other contract type is suitable. The determination and finding *shall* be-

(i) Signed by the *contracting officer* prior to the execution of the base period or any *option* periods of the contracts; and

(ii) Approved by the *head of the contracting activity* prior to the execution of the base period when the base period plus any *option* periods exceeds three years; and

(2) The contract or order includes a ceiling price that the contractor exceeds at its own risk. Also see 12.207 (b) for further limitations on use of time-and-*materials* or labor-hour contracts for *acquisition* of *commercial products* and *commercial services*.

(e) Post award requirements. Prior to an increase in the ceiling price of a time-and-*materials* or labor-hour contract or order, the *contracting officer shall*-

(1) Conduct an analysis of *pricing* and other relevant factors to determine if the action is in the best interest of the Government;

(2) Document the decision in the contract or order file; and

(3) When making a change that modifies the general scope of-

(i) A contract, follow the procedures at 6.303;

(ii) An order issued under the Federal Supply Schedules, follow the procedures at 8.405-6; or

(iii) An order issued under multiple award task and *delivery order* contracts, follow the procedures at 16.505(b)(2).

(f) *Solicitation provisions*.

(1) The *contracting officer shall* insert the provision at 52.216-29, Time-and-*Materials*/Labor-Hour Proposal Requirements—Other Than Commercial *Acquisition* With Adequate Price Competition, in *solicitations* contemplating use of a time-and-*materials* or labor-hour type of contract for the *acquisition* of other than *commercial products* or *commercial services*, if the price is expected to be based on adequate price competition. If authorized by agency procedures, the *contracting officer may* amend the provision to make mandatory one of the three approaches in paragraph (c) of the provision, and/or to require the identification of all subcontractors, divisions, subsidiaries, or *affiliates* included in a blended labor rate.

(2) The *contracting officer shall* insert the provision at 52.216-30, Time-and-*Materials*/Labor-Hour

Proposal Requirements—Other Than Commercial *Acquisition* Without Adequate Price Competition, in *solicitations* for the *acquisition* of other than *commercial products* or *commercial services* contemplating use of a time-and-*materials* or labor-hour type of contract if the price is not expected to be based on adequate price competition.

(3) The *contracting officer shall* insert the provision at 52.216-31, Time-and-*Materials*/Labor-Hour Proposal Requirements—Commercial *Acquisition*, in *solicitations* contemplating use of a commercial time-and-*materials* or labor-hour contract.

## 16.602 Labor-hour contracts.

*Description.* A labor-hour contract is a variation of the time-and-*materials* contract, differing only in that *materials* are not supplied by the contractor. See 12.207(b),16.601(c), and 16.601(d) for application and limitations, for time-and-*materials* contracts that also apply to labor-hour contracts. See 12.207(b) for the use of labor-hour contracts for certain *commercial services*.

## 16.603 Letter contracts.

### 16.603-1 Description.

A letter contract is a written preliminary contractual instrument that authorizes the contractor to begin immediately manufacturing *supplies* or performing services.

### 16.603-2 Application.

(a) A letter contract *may* be used when (1) the Government’s interests demand that the contractor be given a binding commitment so that work can start immediately and (2) negotiating a definitive contract is not possible in sufficient time to meet the requirement. However, a letter contract *should* be as complete and definite as feasible under the circumstances.

(b) When a letter contract award is based on price competition, the *contracting officer shall* include an overall price ceiling in the letter contract.

(c) Each letter contract *shall*, as required by the clause at 52.216-25, Contract Definitization, contain a negotiated definitization schedule including (1) dates for submission of the contractor's price proposal, required *certified cost or pricing data* and *data other than certified cost or pricing data*; and, if required, make-or-buy and subcontracting plans, (2) a date for the start of negotiations, and (3) a target date for definitization, which *shall* be the earliest practicable date for definitization. The schedule will provide for definitization of the contract within 180 days after the date of the letter contract or before completion of 40 percent of the work to be performed, whichever occurs first. However, the *contracting officer may*, in extreme cases and according to agency procedures, authorize an additional period. If, after exhausting all reasonable efforts, the *contracting officer* and the contractor cannot negotiate a definitive contract because of failure to reach agreement as to price or fee, the clause at 52.216-25 requires the contractor to proceed with the work and provides that the *contracting officer may*, with the approval of the *head of the contracting activity*, determine a reasonable price or fee in accordance with subpart 15.4 and part 31, subject to appeal as provided in the Disputes clause.

(d) The maximum liability of the Government inserted in the clause at 52.216-24, Limitation of Government Liability, *shall* be the estimated amount necessary to cover the contractor's requirements for funds before definitization. However, it *shall* not exceed 50 percent of the estimated cost of the definitive contract unless approved in advance by the official that authorized the letter contract.

(e) The *contracting officer shall* assign a priority rating to the letter contract if it is appropriate under 11.604.

**16.603-3 Limitations.**

A letter contract *may* be used only after the *head of the contracting activity* or a designee determines *in writing* that no other contract is suitable. Letter contracts *shall* not-

(a) Commit the Government to a definitive contract in excess of the funds available at the time the letter contract is executed;

(b) Be entered into without competition when competition is required by part 6; or

(c) Be amended to satisfy a new requirement unless that requirement is inseparable from the existing letter contract. Any such amendment is subject to the same requirements and limitations as a new letter contract.

**16.603-4 Contract clauses.**

(a) The *contracting officer shall* include in each letter contract the clauses required by this regulation for the type of definitive contract contemplated and any additional clauses known to be appropriate for it.

(b) In addition, the *contracting officer shall* insert the following clauses in *solicitations* and contracts when a letter contract is contemplated:

(1) The clause at 52.216-23, Execution and Commencement of Work, except that this clause *may* be omitted from letter contracts awarded on SF 26;

(2) The clause at 52.216-24, Limitation of Government Liability, with dollar amounts completed in a manner consistent with 16.603-2(d); and

(3) The clause at 52.216-25, Contract Definitization, with its paragraph (b) completed in a manner consistent with 16.603-2(c). If at the time of entering into the letter contract, the *contracting officer* knows that the definitive contract will be based on adequate price competition or will otherwise meet the criteria of 15.403-1 for not requiring submission of *certified cost or pricing data*, the words "and certified *cost or pricing data* in accordance with FAR 15.408, Table 15-1 supporting its proposal" *may* be deleted from paragraph (a) of the clause. If the letter contract is being awarded on the basis of price competition, the *contracting officer shall* use the clause with its *Alternate* I.

(c) The *contracting* officer *shall* also insert the clause at 52.216-26, Payments of Allowable Costs Before Definitization, in *solicitations* and contracts if a cost-reimbursement definitive contract is contemplated, unless the *acquisition* involves conversion, alteration, or repair of ships.

# Subpart 16.7 - Agreements

## 16.701 Scope.

This subpart prescribes policies and procedures for establishing and using basic agreements and basic ordering agreements. (See 13.303 for blanket purchase agreements (BPA's) and see 35.015(b) for additional coverage of basic agreements with educational institutions and nonprofit organizations.)

## 16.702 Basic agreements.

(a) *Description*. A basic agreement is a written instrument of understanding, negotiated between an agency or *contracting activity* and a contractor, that (1) contains *contract clauses* applying to future contracts between the parties during its term and (2) contemplates separate future contracts that will incorporate by reference or attachment the required and applicable clauses agreed upon in the basic agreement. A basic agreement is not a contract.

(b) *Application*. A basic agreement *should* be used when a substantial number of separate contracts *may* be awarded to a contractor during a particular period and significant recurring negotiating problems have been experienced with the contractor. Basic agreements *may* be used with negotiated fixed-price or cost-reimbursement contracts.

(1) Basic agreements *shall* contain-

(i) Clauses required for negotiated contracts by statute, executive order, and this regulation; and

(ii) Other clauses prescribed in this regulation or agency *acquisition* regulations that the parties agree to include in each contract as applicable.

(2) Each basic agreement *shall* provide for discontinuing its future applicability upon 30 days' written notice by either party.

(3) Each basic agreement *shall* be reviewed annually before the anniversary of its effective date and revised as necessary to conform to the requirements of this regulation. Basic agreements *may* need to be revised before the annual review due to mandatory statutory requirements. A basic agreement *may* be changed only by modifying the agreement itself and not by a contract incorporating the agreement.

(4) Discontinuing or modifying a basic agreement *shall* not affect any prior contract incorporating the basic agreement.

(5) *Contracting officers* of one agency *should* obtain and use existing basic agreements of another agency to the maximum practical extent.

(c) *Limitations*. A basic agreement *shall* not-

(1) Cite appropriations or obligate funds;

(2) State or imply any agreement by the Government to place future contracts or orders with the

contractor; or

(3) Be used in any manner to restrict competition.

(d) Contracts incorporating basic agreements.

(1) Each contract incorporating a basic agreement *shall* include a scope of work and price, delivery, and other appropriate terms that apply to the particular contract. The basic agreement *shall* be incorporated into the contract by specific reference (including reference to each amendment) or by attachment.

(2) The *contracting officer shall* include clauses pertaining to subjects not covered by the basic agreement, but applicable to the contract being negotiated, in the same manner as if there were no basic agreement.

(3) If an existing contract is modified to effect new *acquisition*, the modification *shall* incorporate the most recent basic agreement, which *shall* apply only to work added by the modification, except that this action is not mandatory if the contract or modification includes all clauses required by statute, executive order, and this regulation as of the date of the modification. However, if it is in the Government's interest and the contractor agrees, the modification *may* incorporate the most recent basic agreement for application to the entire contract as of the date of the modification.

## 16.703 Basic ordering agreements.

(a) *Description*. A basic ordering agreement is a written instrument of understanding, negotiated between an agency, *contracting activity*, or *contracting office* and a contractor, that contains (1) terms and clauses applying to future contracts (orders) between the parties during its term, (2)a description, as specific as practicable, of *supplies* or services to be provided, and (3) methods for *pricing*, issuing, and delivering future orders under the basic ordering agreement. A basic ordering agreement is not a contract.

(b) *Application*. A basic ordering agreement *may* be used to expedite *contracting* for uncertain requirements for *supplies* or services when specific items, quantities, and prices are not known at the time the agreement is executed, but a substantial number of requirements for the type of *supplies* or services covered by the agreement are anticipated to be purchased from the contractor. Under proper circumstances, the use of these procedures can result in economies in ordering parts for equipment support by reducing administrative lead-time, inventory investment, and inventory obsolescence due to design changes.

(c) *Limitations*. A basic ordering agreement *shall* not state or imply any agreement by the Government to place future contracts or orders with the contractor or be used in any manner to restrict competition.

(1) Each basic ordering agreement *shall*-

(i) Describe the method for determining prices to be paid to the contractor for the *supplies* or services;

(ii) Include delivery terms and conditions or specify how they will be determined;

(iii) List one or more Government activities authorized to issue orders under the agreement;

(iv) Specify the point at which each order becomes a binding contract (*e.g.,* issuance of the order, acceptance of the order in a specified manner, or failure to reject the order within a specified number of days);

(v) Provide that failure to reach agreement on price for any order issued before its price is established (see paragraph (d)(3) of this section) is a dispute under the Disputes clause included in the basic ordering agreement; and

(vi) If fast payment procedures will apply to orders, include the special data required by 13.403.

(2) Each basic ordering agreement *shall* be reviewed annually before the anniversary of its effective date and revised as necessary to conform to the requirements of this regulation. Basic ordering agreements *may* need to be revised before the annual review due to mandatory statutory requirements. A basic ordering agreement *shall* be changed only by modifying the agreement itself and not by individual orders issued under it. Modifying a basic ordering agreement *shall* not retroactively affect orders previously issued under it.

(d) *Orders*. A *contracting officer* representing any Government activity listed in a basic ordering agreement *may* issue orders for required *supplies* or services covered by that agreement.

(1) Before issuing an order under a basic ordering agreement, the *contracting officer shall*-

(i) Obtain competition in accordance with part 6;

(ii) If the order is being placed after competition, ensure that use of the basic ordering agreement is not prejudicial to other *offerors*; and

(iii) Sign or obtain any applicable justifications and approvals, and any determination and findings, and comply with other requirements in accordance with 1.602-1(b), as if the order were a contract awarded independently of a basic ordering agreement.

(2) *Contracting officers shall*-

(i) Issue orders under basic ordering agreements on Optional Form (OF) 347, Order for *Supplies* or Services, or on any other appropriate contractual instrument;

(ii) Incorporate by reference the provisions of the basic ordering agreement;

(iii) If applicable, cite the authority under 6.302 in each order; and

(iv) Comply with 5.203 when synopsis is required by 5.201.

(3) The *contracting officer shall* neither make any final commitment nor authorize the contractor to begin work on an order under a basic ordering agreement until prices have been established, unless the order establishes a ceiling price limiting the Government's obligation and either-

(i) The basic ordering agreement provides adequate procedures for timely *pricing* of the order early in its performance period; or

(ii) The need for the *supplies* or services is compelling and unusually urgent (*i.e.,* when the Government would be seriously injured, financially or otherwise, if the requirement is not met sooner than would be possible if prices were established before the work began). The *contracting officer shall* proceed with *pricing* as soon as practical. In no event *shall* an entire order be priced

retroactively.