970.1504-103 Fee determination.

(a) *General.* Determining the fee of an M&O contract requires considering the:

(1) Magnitude of the effort;

(2) Type of the effort;

(3) Nature, difficulty, complexity, and importance of the work; and

(4) Specific circumstances of the procurement.

(b) *Maximum total available fee amount for the contract, annual fee bases, and allocation of the maximum total available fee amount.*

(1) Determining the maximum total available fee amount of an M&O contract, which is based upon the fee base (among other things) in each of the one-year periods of the M&O contract, is a separate action from allocating that amount to the evaluation periods of the contract, which is based upon what best motivates the M&O contractor's superior performance. The Government's objective is to allocate incentives in a manner that will result in reasonable contractor risk and provide the contractor with the greatest incentive for efficient and economical performance.

(2) The maximum total available fee amount in an M&O contract is the sum of the maximum total available fee amounts in the contract's one-year periods. (See 970.1504-104 for a complete explanation of the calculation of the maximum total available fee amount for a one-year period and an example.)

(3) The maximum total available fee amount for a one-year period is based on the fee base for that one-year period. The fee base is an estimate of the allowable costs (with some exclusions) for that one-year period.

(4) The fee base is a basic component of the fee schedules, which link the fee base to fee. A fundamental aspect of fee calculations is the amount of the fee base and the amount of fee in the fee schedules are annual amounts. Calculating the maximum total available fee amount for a one-year period starts with determining the fee base for the one-year period. Consequently, a contract's maximum total available fee amount is based on the contract's one-year periods and their fee bases.

(5) Usually (but not necessarily) once the maximum total available fee amount for a one-year period is calculated, it is allocated (that is, made available to be earned by the M&O contractor) to the same one-year period. Additionally, when a maximum total available fee amount is established for longer than a year, it is subject to adjustment in the event of a significant change (greater than plus or minus ten percent or a lesser percent if appropriate) to the budget or work scope.

(6) In summary, while the maximum total available fee amount for a one-year period is based on the fee base for the one-year period, the evaluation period in which the contractor may earn all, or part of that fee need not be the same one-year period or even a single evaluation period. Usually, the length of an evaluation period is one year, mirroring the one-year period used in the calculation of the maximum total available fee amount for a one-year period. In fact, the SPE's or designee's approval is required to do otherwise. Nonetheless, the Government's objective is to allocate incentives in a manner that will provide the contractor with the greatest incentive for efficient and economical performance. Consequently, there may be occasions where after calculating the

maximum total available fee amount for a year, part or all of it should be allocated to a subsequent one-year evaluation period, an evaluation period of greater than a year, or to several evaluation periods.

(7) Before each year (or other appropriate period), at any time before the year (or period), including as early as the time of contract award, the Contracting Officer and M&O contractor will enter negotiations to establish the requirements for the year (or other appropriate period), including evaluation areas, individual requirements, and the maximum total available fee that the contractor can earn for its performance. If the parties cannot agree, the Contracting Officer will unilaterally establish the requirements and the maximum total available fee. The maximum total available fee allocated to an evaluation period must be apportioned among a base fee amount (which is usually zero) and a performance fee amount. The performance fee amount may consist of an incentive fee component for objective performance requirements, an award fee component for subjective performance requirements, or both. Both performance fee components are "incentives" per FAR subpart 16.4 and both are performance based. The performance fee must be tied to objective measures to the maximum extent appropriate. Performance incentive fee is preferable to performance award fee because it uses objective performance requirements rather than subjective performance requirements. Performance fee that is award fee may be used when: objective measures are not feasible (that is, when it is not feasible to devise effective predetermined objective measures applicable to cost, technical performance, or schedule); and the likelihood of meeting acquisition objectives will be enhanced by using incentives that effectively motivate the contactor toward exceptional performance and provide the Government with the flexibility to evaluate both actual performance and the conditions under which it was achieved.

(8) Within the maximum total available fee, Contracting Officer may include a type of incentive fee component, often labeled "performance based incentive (PBI)," that includes a target fee for a target level of performance. Each PBI must be tied to a specific portion of the total available fee pool. PBIs may only be used when—

(i) A target level of performance can be established that the contractor can reasonably be expected to reach;

(ii) Factors likely to impede the target performance are clearly within the control of the contractor; and

(iii) The contract indicates clearly a level below which performance is not acceptable.

(c) *Determining the maximum total available fee for each one-year period of the contract.*

(1) Determining the maximum total available fee for each one-year period of the contract is a function of the:

(i) Magnitude of the effort (reflected by the total fee base for the year; see 970.1504-105);

(ii) Type of the effort (reflected by the allocation of the total fee base to the three fee schedules—production, research and development, and environmental restoration; see 970.1504-106);

(iii) Nature, difficulty, complexity, and importance of the work (reflected by the choice of classification factors; see 970.1504-107); and

(iv) Specific circumstances of the procurement (reflected by the appropriate percentages derived from considering significant factors; see 970.1504-108).

(2) Calculating the maximum total available fee for a one-year period entails determining the total fee base for the year, allocating it to the fee schedules based on the type of effort, using the fee schedules to determine a fee subtotal for each type of effort, multiplying those fee subtotals by classification factors, multiplying the resulting products by appropriate percentages, and summing those products. (See 970.1504-104 for a complete explanation and an example.)

(d) *Conditional payment of fee, profit, and other incentives.*

(1) In addition to other performance requirements specified in their contracts, M&O contractors are subject to performance requirements relating to: environment, safety, and health (ES&H), including worker safety and health (WS&H) and safeguarding of Restricted Data and other classified information. Performance requirements relating to ES&H will be set forth in the contract's ES&H terms and conditions, including a DOE-approved Integrated Safety Management System (ISMS), or similar document. Performance requirements relating to the safeguarding of Restricted Data and other classified information will be set forth in the clauses of the contract at 952.204-2, “Security Requirements,” and 970.5204-2, “Laws, Regulations, and DOE Directives,” as well as in other terms and conditions that prescribe requirements for the safeguarding of Restricted Data and other classified information. (If the contract does not include the clause at 952.204-2, “Security Requirements,” the safeguarding of Restricted Data and other classified information requirements of the clause at 970.5215-3, “Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts,” do not apply.)

(2) If the contractor does not meet the performance requirements of the contract relating to ES&H or to the safeguarding of Restricted Data and other classified information, otherwise earned fee, fixed fee, profit, or other incentives may be unilaterally reduced by the Contracting Officer in accordance with the clause at 970.5215-3, “Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts.”

(3) The clause at 970.5215-3, entitled “Conditional Payment of Fee, Profit, and Other Incentives—Facility Management Contracts,” provides for reductions of earned fee, fixed fee, profit, or other incentives under the contract depending upon the severity of the contractor's performance failure relating to ES&H requirements, and relating to the safeguarding of Restricted Data and other classified information. When reviewing performance failures that would otherwise warrant a reduction of earned fee, fixed fee, profit, or other incentives, the Contracting Officer must consider mitigating factors that may warrant a reduction below the applicable range specified in the clause. Some of the mitigating factors that must be considered are included in the clause.

(4) The Contracting Officer must obtain the concurrence of the cognizant Program Secretarial Officer—

(i) Prior to effecting any reduction; and

(ii) Prior to determining that a reduction is not warranted for a particular performance failure or a group of performance failures.

(5) The Contracting Officer must coordinate with the Office of Enforcement within the Office of Enterprise Assessments (or with any designated successor office) before pursuing a contract fee reduction in the event of a violation by the contractor or any contractor employee of any DOE regulation relating to worker safety and health concerns. See 970.2303-2.

(e) *Types of contracts and fee arrangements.*

(1) Contracts that are a combination of types or include work elements with fee arrangements that

are a combination of contract types must—

(i) Conform to the requirements of parts 915 and 916 and FAR parts 15 and 16; and

(ii) Where appropriate to the type, be supported by:

(A) Negotiated costs subject to the requirements of the 41 U.S.C. chapter 35;

(B) A pre-negotiation memorandum; and

(C) A plan describing how each contract type or fee arrangement will be administered.

(2) [Reserved]

(f) *Establishing contract type.* Operations and field offices shall take the lead in establishing the most appropriate contract type for their requirements. Before establishing contract types and fee arrangements, operations and field offices must ensure the necessary resources exist within the contractor's and the Government's organizations to administer them.

Parent topic: Subpart 970.15—Contracting by Negotiation