

CHAPTER 53—DEPARTMENT OF THE AIR  
FORCE FEDERAL ACQUISITION REGULATION  
SUPPLEMENT

(Parts 5300 to 5399)

---

<i>Part</i>		<i>Page</i>
5315	Contracting by negotiation .....	220
5316	Types of contracts .....	222
	SUBCHAPTER G—CONTRACT MANAGEMENT	
5350	Extraordinary contractual actions .....	223

## PART 5315—CONTRACTING BY NEGOTIATION

### Subpart 5315.8—Price Negotiation

Sec.

5315.890 Formula pricing agreements (FPA).  
5315.890-1 Description.  
5315.890-2 Policy.  
5315.890-3 Responsibilities.  
5315.890-4 FPAs negotiated by other DOD agencies.

AUTHORITY: 5 U.S.C. 301 and FAR 1.301.

SOURCE: 52 FR 12414, Apr. 16, 1987, unless otherwise noted.

### Subpart 5315.8—Price Negotiation

#### 5315.890 Formula pricing agreements (FPA).

##### 5315.890-1 Description.

Formula pricing agreements (FPAs), sometimes referred to as spare parts pricing agreements, set forth a pricing methodology and the specific rates and factors to be used when pricing items covered by the FPA. An FPA differs from a Forward Pricing Rate Agreement (FPRA) in that an FPA addresses a pricing methodology limited to a specific group of items and its use by different buying activities is optional; whereas FPRAs are generally limited to agreements on individual rates or factors (including Cost Estimating Relationships (CERs)), apply to many items, and are required to be used by all buying activities. Any pricing agreement made with a contractor shall be considered to be an FPA if it contains the following features:

(a) The agreement governs the pricing methodology of more than one future contract action and identifies the category(s) of purchases to be covered (for example, F-100 replenishment spares).

(b) The pricing agreement is expressed in terms which specify the direct cost inputs and the rates and/or factors to be applied to identified bases plus profit or fee.

##### 5315.890-2 Policy.

FPAs should be established as necessary to ease negotiation of large numbers of contract actions and reduce administrative costs and lead time.

However, FPAs shall only be negotiated with contractors having a significant volume of Government business and application normally shall be limited to acquisitions under \$100,000. FPAs anticipating individual acquisitions over \$100,000, shall be approved by the HCA and shall specifically establish the maximum dollar amount for an acquisition priced using the FPA. Proposals received above \$100,000 must be submitted with an SF 1411 and a certificate of current cost or pricing data. All FPAs shall—

(a) Be in writing and signed by a contracting officer;

(b) Only be negotiated with contractors who are under Government in-plant contract administration cognizance and have a resident DCAA auditor. (This requirement may be waived with HCA approval);

(c) Not cover cost elements, such as those portions of direct labor and material costs which require discrete estimating and analysis;

(d) Identify all rates/factors that are a part of the FPA; however, the FPA may reference a FPRA(s) as long as the agreement prescribes the effect and treatment of changes in the FPRA;

(e) Provide specific terms and conditions covering expiration date, application, and data requirements (e.g. actual cost data) for systematic monitoring to assure the continuing validity of the agreement;

(f) Provide for cancellation at the option of either party;

(g) Require the contractor to submit to the contracting officer, and to the cognizant contract auditor, any significant change in cost or pricing data, estimating system, or accounting system and its impact on the FPA;

(h) Require the contractor to identify the FPA and the date of the latest certification of cost or pricing data supporting the FPA in each specific pricing proposal where the formula is used. The contractor shall also be required to identify those items that were not priced with the formula if they are commingled in a proposal that contains items priced with the formula;

(i) Provide that the FPA shall not be used if the contractor's purchasing, estimating, or accounting system are disapproved by the Government;

(j) Provide that the contracting officer, or designated representative, may perform detailed cost or price analysis on random samples of proposed items and/or those items that have units which are significantly higher than previous buys;

(k) Be supported by certified cost or pricing data in accordance with FAR 15.804, including the submission of a signed certificate of current cost or pricing data at the time agreement is reached on the FPA (and on an annual basis thereafter), and shall provide that contractual documents for items priced using the FPA, shall include the clause at FAR 52.215-22, "Price Reduction for Defective Cost or Pricing Data;"

(l) Provide that the price of individual contract actions priced under the FPA shall be adjusted if—

(1) It is found that the cost or pricing data supporting the FPA was not accurate, current, or complete;

(2) The contractor fails to comply with 5315.890-2(g); or

(3) The price was developed through incorrect application of the FPA;

(m) Provide that individual contract actions priced using the FPA shall contain a clause incorporating the FPA by reference; and

(n) Be based on a pricing methodology that ensures that unit prices are in proportion to the item's base cost (see FAR 15.812).

### **5315.890-3 Responsibilities.**

(a) Major commands shall—

(1) Establish appropriate approval level for FPAs;

(2) Maintain a list of FPAs which identifies the company and group of items to be purchased;

(3) Conduct periodic reviews of FPAs and contract actions priced using FPAs; and

(4) Establish agreements with other DOD agency contract administration offices to provide field pricing support, negotiation support, and administrative support of Air Force negotiated FPAs.

(b) Air Force contract administration offices shall—

(1) Comply with the requirements of 5315.890-3(c) for those FPAs negotiated

by the administrative contracting officer (ACO) for their own use;

(2) Make any FPA negotiated by the ACO available to any other buying activity for their use;

(3) Provide field pricing support to contracting officers in the evaluation of FPAs;

(4) Participate in the negotiation of FPAs;

(5) Notify the contracting officer, who negotiated the FPA, when conditions arise that may affect the FPA's validity; for example, changes to an FPRA, disapproval of a contractor's purchasing system, and so forth. When appropriate, recommend the FPA be cancelled and renegotiated;

(6) Periodically validate the contractor's compliance with the FPA; and

(7) Monitor rates and factors incorporated into each FPA.

(c) Contracting officers shall—

(1) Be responsible for the negotiation of the FPA and ensure that it complies with the requirements contained in 5315.890-2 (this responsibility may be delegated to the ACO);

(2) Obtain field pricing support, including contract audit and technical reviews, in the evaluation of FPAs;

(3) Prepare a price negotiation memorandum covering the pricing factors used in the FPA;

(4) Request CAO participation in negotiations;

(5) Semi-annually, through the ACO, request the DCAA resident auditor to determine if the contractor is complying with the FPA procedures;

(6) Annually, review the FPA to determine its validity by evaluating recorded cost data, and renegotiate the FPA if appropriate;

(7) Determine the effect of changed conditions that may affect an FPA's validity, cancel FPAs when appropriate, and notify all interested parties upon cancellation of the FPA;

(8) Not use an FPA that has been cancelled;

(9) At a minimum, conduct the following evaluation of each proposal generated under an FPA;

(i) Determine the applicability of the FPA to the items proposed.

(ii) Determine the reasonableness of direct cost inputs to the formula.

(iii) Determine the reasonableness of any non-covered cost proposed, such as nonrecurring costs.

(iv) Compare prices generated by the FPA to prior prices, government estimates, PR estimates, to ensure reasonableness. The existence of an FPA does not relieve the contracting officer from the responsibility of assuring that a price is fair and reasonable;

(10) Conduct detailed cost analysis on random samples of proposed items and/or those items that have unit prices which are significantly higher than previous buys;

(11) Ensure that individual contract actions priced using the FPA comply with the terms of the FPA; and

(12) Comply with 5315.905-1(b)(7)(C) when pricing an undefinitized contractual action using an FPA.

**5315.890-4 FPAs negotiated by other DOD agencies.**

FPAs negotiated by other agencies shall not be used by any Air Force activity unless they comply with the requirements in 5315.890-2.

**PART 5316—TYPES OF CONTRACTS**

AUTHORITY: 5 U.S.C. 301 and FAR 1.301.

**Subpart 5316.2—Fixed-Price Contracts**

**5316.203-4 Contract clauses.**

(d) *Adjustments based on cost indexes of labor or material.* (3)(iii)(A) When using the abnormal escalation index method, on contracts in excess of \$50,000,000, the clause shall provide that contract adjustments will include the compounding effect of actual indices for future periods. Since predicted economic trends have a compounding effect on the scheduled price, when calculating each economic price adjust-

ment (EPA) for costs within a completed period, a further provisional adjustment shall be made to all future period costs. This provisional adjustment shall be calculated using the same percentage decrease (or increase) as was made in the adjustment for the completed period. Provisional adjustments for each period must be liquidated against the final adjustment for each period. For example, the following formula could be used in computing adjustments:

$$\text{Adjustment} = ((x - y)/y) [z] - s$$

where

x=actual index

y=projected index

z=sum of dollars subject to adjustment for all periods in which a final adjustment has not been made

s=sum of unliquidated provisional adjustments

(B) For those EPA clauses which include a dead band in which no adjustment is made, the upper end of the dead band becomes the projected index value during the times of increasing inflation, and the lower end of the dead band becomes the projected index value during times of decreasing inflation. For those EPA clauses which provide for price adjustments only if the difference between the projected index value exceeds a predetermined threshold (trigger bands), no adjustment will be made for the future periods unless the actual index value exceeds the predetermined threshold. However, when the actual index exceeds the projected index by the predetermined threshold, then an adjustment must be made to future periods.

(C) The above requirement is optional on multinational contracts where the impact of multiple country index recalculations are extremely complex.

[52 FR 6332, Mar. 3, 1987]

## SUBCHAPTER G—CONTRACT MANAGEMENT

### PART 5350—EXTRAORDINARY CONTRACTUAL ACTIONS

#### Subpart 5350.4—Residual Powers

Sec.

5350.401 Standards for use.

5350.401-90 Indemnification under Pub. L. 85-804.

5350.403 Special procedures for unusually hazardous or nuclear risks.

5350.403-1 Indemnification requests.

5350.403-2 Action on indemnification requests.

5350.403-90 Analysis for indemnification requests.

AUTHORITY: 5 U.S.C. 301 and FAR 1.301.

SOURCE: 51 FR 40978, Nov. 12, 1986, unless otherwise noted.

#### Subpart 5350.4—Residual Powers

##### **5350.401 Standards for use.**

##### **5350.401-90 Indemnification under Public Law 85-804.**

(a) Only the Secretary can grant indemnification under Pub. L. 85-804 and E.O. 10789 as amended.

(b) The Air Force will consider indemnifying contractors under this authority when the risk arises out of an instrumentality or activity which is unusually hazardous or nuclear in nature with risk of loss so potentially great that the contractor's financial and productive capabilities would be severely impaired or disrupted. The indemnified risk shall be precisely defined and directly related to the intrinsically hazardous or nuclear nature of the instrumentality or activity, or to the potentially catastrophic loss. Indemnification may extend beyond the period of contract performance only when the potential for devastating financial loss may result from normal use of the product. Indemnification shall not be provided for other forms of "product liability" beyond that resulting from the unusually hazardous or nuclear risks initially defined in the contract.

(c) In addition to paragraph (b) of this section, the Air Force will consider indemnifying contractors against unusually hazardous or nuclear risks

with a potential for catastrophic loss for the purpose of furthering programmatic aims in the interest of the national defense. Providing indemnification to further programmatic aims will be considered for only exceptional compelling circumstances. Programmatic aims include, but are not limited to, assuring or obtaining competition, avoiding prohibitive insurance costs or where obtaining insurance is precluded by the release of classified information. Reducing or eliminating the insurance costs charged directly to a program does not in itself establish that insurance costs are prohibitive. Any request for indemnification for programmatic aims must clearly identify the programmatic purposes to be served and how indemnification will serve those purposes.

##### **5350.403 Special procedures for unusually hazardous or nuclear risks.**

##### **5350.403-1 Indemnification requests.**

Contractor requests for indemnification shall also include the following information:

(a) The risks for which indemnification is sought must be precisely defined and directly related to the intrinsically hazardous or nuclear nature of the instrumentality or activity or to the potentially catastrophic loss. Requests shall focus on only those risks for which insurance is not reasonably available at a reasonable cost or for which indemnification is necessary to further programmatic purposes.

(b) The risks must be related to a specific time-frame for which indemnification is required and must indicate whether the time-frame extends beyond contract performance.

(c) The purposes to be served by indemnifications must be clearly identified and the needs for indemnification substantiated so that the scope and nature of the request may be fully evaluated.

##### **5350.403-2 Action on indemnification requests.**

(a)(1) Prior to recommending indemnification, contracting officers shall

ascertain that the contractor maintains financial protection in the form of liability insurance in amounts considered to be prudent in the ordinary course of business within the industry. In addition, the contractor shall submit evidence, such as a certificate of insurance or other customary proof of insurance, that such insurance is either in force or is available and will be in force during the indemnified period. A copy of the latest report on the contractor's insurance issued by the cognizant Government reviewing activity (i.e., AFPRO, DCAS, etc.) shall be submitted with the request for indemnification. The fact that insurance will be a direct cost to the program will not in itself be cause for a determination that financial protection is not reasonably available, although the cost of such insurance over and above the contractor's usual and customary cost for insurance will be considered.

(2) Notwithstanding paragraph (a)(1) of this section, there may be cases in which the Air Force will determine to indemnify the contractor only against losses in excess of an identified dollar amount.

(3) Whether certain risks are unusually hazardous or nuclear in nature requires a reasoned judgement based on the facts and circumstances of each case. Considerations which will assist in making that determination include—

(i) Understanding the nature of the risk for which indemnification is being requested and its relation to the product or activity;

(ii) Assuring there is a clear, precise definition of the unusually hazardous or nuclear risk;

(iii) Ascertaining the time-frame for indemnification;

(iv) Identifying the programmatic objectives for providing the indemnification requested such as assuring competition, avoiding prohibitive insurance costs, assuring contractor performance for essential services, or assuring protection of contractors from catastrophic loss where, for security reasons, adequate information cannot be disclosed to insuring activities to establish insurance coverage; and

(v) Determining that the indemnification provided serves the identified programmatic purposes.

(4) Contracting officers shall also assure that the contractor has an adequate, existing, and on-going industrial safety program prior to recommending indemnification. If indemnification is to extend into the period of use of the supplies or equipment, the contracting officer shall assure that the contractor has and maintains adequate system design, production engineering, and quality control procedures and systems. A copy of the current safety report issued by the cognizant Government reviewing activity (i.e., AFPRO, DCAS, etc.) shall be submitted with the request for indemnification.

(5) Requests for indemnification shall be considered on a case-by-case basis and must be supported by all of the data required by FAR 50.403 and this Supplement.

(6) Requests that are based on programmatic objectives shall be submitted over the signature of the Commander or not lower than the Vice Commander of the MAJCOM.

(7) Requests for indemnification authority shall be submitted through channels to HQ USAF/RDC.

(b) Upon receipt of authority to indemnify the agreed upon risk, and prior to inclusion of the appropriate indemnification clause in the contract, the contractor shall provide the PCO with a copy of the certificate of insurance, the policy or other binder evidencing that the insurance coverage required is current and in effect.

**5350.403-90 Analysis for indemnification requests.**

The following information and analysis shall be included to supplement the information required by FAR 50.403-2:

(a) A clear, precise definition of the risk in establishing the relationship of the system/equipment to the intrinsically hazardous or nuclear nature of the instrumentality or activity.

(b) For risks arising from instrumentalities or activities which are unusually hazardous or nuclear in nature, elaborate on the "unusually" hazardous versus hazardous nature. Many private sector activities are hazardous and a clear distinction must be shown.

**Department of the Air Force**

**5350.403-90**

(c) Dates or measurable activities (e.g., delivery of the last unit) when indemnification will start and stop.

(d) Define the programmatic objectives that cannot be otherwise accomplished and identify the programmatic consequences if indemnification is not granted.

(e) Discuss any deductibles and apportionment of loss provisions in applicable insurance coverages.

(f) When indemnification is to extend beyond acceptance and into the period of use, requests shall include a determination that the contractor has adequate system design, production engineering, and quality control procedures and systems.

(g) A determination by the Commander of the buying activity that indemnification is required to satisfy the programmatic objectives.



CHAPTER 54—DEFENSE LOGISTICS AGENCY,  
DEPARTMENT OF DEFENSE

(Parts 5400 to 5499)

---

<i>Part</i> 5452	Solicitation provisions and contract clauses .....	<i>Page</i> 228
---------------------	--	--------------------