

**15.1007 Protests against award.**

(a) Before filing a protest, prior to award of a contract, of the exclusion of an offeror from the competitive range (or otherwise from further consideration), use of alternative dispute resolution techniques is encouraged (see subpart 33.2).

(b) Protests against award in negotiated acquisitions shall be treated substantially the same as in sealed bidding (see subpart 33.1).

(c) If, within one year of contract award, a protest causes the agency to issue either a new solicitation or a new request for best and final offers on the protested contract award, the agency shall make available to all prospective offerors for the new solicitation, or original offerors that are requested to submit new best and final offers—

(1) Information provided in any debriefings conducted on the original award about the successful offeror's proposal; and

(2) Other nonproprietary information provided to the original offerors.

**15.1008 Discovery of mistakes.**

For treatment of mistakes in an offeror's proposal that are discovered before award, see 15.607. Mistakes in a contractor's proposal that are disclosed after award shall be processed in accordance with 14.407-4.

**PART 16—TYPES OF CONTRACTS**

Sec.

16.000 Scope of part.

**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.
- 16.501-1 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**

- 16.601 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.

## 16.000

48 CFR Ch. 1 (10-1-97 Edition)

16.603-4 Contract clauses.

### Subpart 16.7—Agreements

- 16.701 Scope.
- 16.702 Basic agreements.
- 16.703 Basic ordering agreements.

AUTHORITY: 40 U.S.C. 486(c); 10 U.S.C. Chapter 137; and 42 U.S.C. 2473(c).

SOURCE: 48 FR 42219, Sept. 19, 1983, unless otherwise noted.

### 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.

[48 FR 42219, Sept. 19, 1983, as amended at 60 FR 34756, July 3, 1995; 61 FR 39197, July 26, 1996]

### 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. 2306(a) and 41 U.S.C. 254(a)). 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. 2306(a) and 41 U.S.C. 254(b)). 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.

[48 FR 42219, Sept. 19, 1983, as amended at 50 FR 1741, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985]

#### 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) Each contract file shall include documentation to show why the particular contract type was selected. Exceptions to this requirement are:

(1) Fixed-price acquisitions made under simplified acquisition procedures,

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

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

[48 FR 42219, Sept. 19, 1983, as amended at 50 FR 1742, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 54 FR 5054, Jan. 31, 1989; 60 FR 34756, July 3, 1995; 60 FR 48260, Sept. 18, 1995; 61 FR 39198, July 26, 1996]

#### **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) *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 to ensure timely contract performance.

(f) *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 terms.

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

(h) *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 when the contract type requires price revision while performance is in progress, or when a cost-reimbursement contract is being considered and all current or past experience with the contractor has been on a fixed-price basis.

(i) *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.

(j) *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.

(k) *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.

[48 FR 42219, Sept. 19, 1983, as amended at 50 FR 1742, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 62 FR 44814, Aug. 22, 1997; 62 FR 51270, Sept. 30, 1997]

EFFECTIVE DATE NOTES: 1. At 62 FR 44814, Aug. 22, 1997, section 16.104 was amended by adding paragraph (k), effective Oct. 21, 1997.

2. At 62 FR 51270, Sept. 30, 1997, in section 16.104, in paragraph (b), “15.808-2” was amended to read “15.404-1(b)”, effective Oct. 10, 1997.

#### **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.

[60 FR 34756, July 3, 1995, as amended at 61 FR 39198, July 26, 1996]

### **Subpart 16.2—Fixed-Price Contracts**

#### **16.201 General.**

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 items.

[48 FR 42219, Sept. 19, 1983, as amended at 60 FR 48248, Sept. 18, 1995]

#### **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.

##### **16.202-2 Application.**

A firm-fixed-price contract is suitable for acquiring commercial items (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 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.

[48 FR 42219, Sept. 19, 1983, as amended at 60 FR 48248, Sept. 18, 1995]

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

##### **16.203-1 Description.**

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:

(a) *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.

(b) *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.

(c) *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.

#### **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 cost or pricing data, the contracting officer shall obtain adequate information to establish the base level from which adjustment will be made and may require verification of data submitted.

[48 FR 42219, Sept. 19, 1983, as amended at 50 FR 1742, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 60 FR 34739, July 3, 1995]

#### **16.203-3 Limitations.**

A fixed-price contract with economic price adjustment shall not be used un-

less 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 subparagraph (2) below, 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 subparagraph (a)(1) above 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.)

(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 subparagraph (2) below, 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 subparagraph (b)(1) above 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 contract 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.

(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 (2) below, in solicitation 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 subparagraph (c)(1) above 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.

(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 subparagraphs (1) and (2) below.

(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.

[48 FR 42219, Sept. 19, 1983, as amended at 52 FR 19803, May 27, 1987; 60 FR 48217, Sept. 18, 1995; 62 FR 259, Jan. 2, 1997]

#### **16.204 Fixed-price incentive contracts.**

A fixed-price incentive contract is a fixed-price contract that provides for

## Federal Acquisition Regulation

## 16.206-2

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.

[48 FR 42219, Sept. 19, 1983, as amended at 59 FR 11387, Mar. 10, 1994; 62 FR 12695, Mar. 17, 1997]

### **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 \$100,000 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 \$100,000 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 \$100,000 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.**

Cost-reimbursement contracts are suitable for use only when uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract.

**16.301-3 Limitations.**

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

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

(2) Appropriate Government surveillance during performance will provide reasonable assurance that efficient methods and effective cost controls are used.

(3) See 15.404-4(c)(4)(i) for statutory limitations on price or fee.

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

[48 FR 42219, Sept. 19, 1983, as amended at 50 FR 1742, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 59 FR 64785, Dec. 15, 1994; 60 FR 48248, Sept. 18, 1995; 62 FR 51270, Sept. 30, 1997]

EFFECTIVE DATE NOTE: At 62 FR 51270, Sept. 30, 1997, in section 16.301-3, in paragraph (a)(3), "15.903(d)" was amended to read "15.404-4(c)(4)(i)", effective Oct. 10, 1997.

#### **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, and for facilities contracts.

(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.

[48 FR 42219, Sept. 19, 1983, as amended at 62 FR 12695, Mar. 17, 1997]

#### **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 16.405-2 for a more complete description and discussion of application of these contracts. See 16.301-3 and 16.405-2(c) for limitations.

[48 FR 42219, Sept. 19, 1983, as amended at 62 FR 12695, Mar. 17, 1997]

#### **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 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.

[48 FR 42219, Sept. 19, 1983, as amended at 50 FR 1742, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 60 FR 37777, July 21, 1995; 62 FR 236, Jan. 2, 1997; 62 FR 51258, Sept. 30, 1997]

EFFECTIVE DATE NOTE: At 62 FR 51258, Sept. 30, 1997, section 16.306 was amended by revising paragraph (c), effective Oct. 10, 1997. For the convenience of the user, the superseded text is set forth as follows:

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

\* \* \* \* \*

(c) *Limitations.* No cost-plus-fixed-fee contract shall be awarded unless—

(1) All limitations in 16.301-3 are complied with; and

(2) The contracting officer has signed a determination and findings establishing the basis for application of the statutory price or fee limitation (see 15.903(d)).

\* \* \* \* \*

#### 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 (other than a facilities contract) is contemplated. If the contract is with an educational institution, modify the clause by deleting from paragraph (a) the words “subpart 31.2” and substituting for them “subpart 31.3.” If the contract is with a State or local government, modify the clause by deleting from paragraph (a) the words “subpart 31.2” and substituting for them “subpart 31.6.” If the contract is with a nonprofit organization other than an educational institution, a State or local government, or a nonprofit organization exempted under OMB Circular No. A-122, modify the clause by deleting from paragraph (a) the words “subpart 31.2” and substituting for them “subpart 31.7.”

(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.

(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 facilities contract or 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

(other than a facilities 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 or a facilities 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 (other than a facilities 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)(1) The contracting officer shall insert the clause at 52.216-13, Allowable Cost and Payment—Facilities, in solicitations and contracts when a cost-reimbursement consolidated facilities contract or a cost-reimbursement facilities acquisition contract (see 45.302-6) is contemplated.

(2) If a facilities acquisition contract is contemplated and, in the judgment of the contracting officer, it may be necessary to withhold payment of an amount to protect the Government's interest, the contracting officer shall use the clause with its Alternate I.

(h) The contracting officer shall insert the clause at 52.216-14, Allowable Cost and Payment—Facilities Use, in solicitations and contracts when a facilities use contract is contemplated.

(i) The contracting officer shall insert the clause at 52.216-15, Predetermined Indirect Cost Rates, in solicitations and contracts when a cost-reim-

bursement research and development contract with an educational institution (see 42.705-3(b)) is contemplated and predetermined indirect cost rates are to be used. If the contract is a facilities contract, modify paragraph (c) by deleting the words "Subpart 31.1" and substituting for them "section 31.106."

[48 FR 42219, Sept. 19, 1983, as amended at 50 FR 23606, June 4, 1985; 61 FR 31622, June 20, 1996; 61 FR 67419, Dec. 20, 1996]

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

[48 FR 42219, Sept. 19, 1983, as amended at 62 FR 12695, Mar. 17, 1997]

**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 16.405-2), 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.

[48 FR 42219, Sept. 19, 1983, as amended at 62 FR 12696, Mar. 17, 1997; 62 FR 51379, Oct. 1, 1997]

**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.

[48 FR 42219, Sept. 19, 1983, as amended at 62 FR 44815, Aug. 22, 1997]

EFFECTIVE DATE NOTE: At 62 FR 44815, Aug. 22, 1997, section 16.402-2 was amended by revising the section heading and paragraph (a); by redesignating paragraphs (b) through (g) as paragraphs (c) through (h); by adding a new paragraph (b); and by revising newly designated paragraph (e), effective Oct. 21, 1997. For the convenience of the user, the superseded text is set forth as follows:

**16.402-2 Technical performance incentives.**

(a) Technical 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 tailor profit or fee to results achieved by the contractor, compared with specified target goals.

\* \* \* \* \*

(e) Performance tests 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.

\* \* \* \* \*

**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.

[48 FR 42219, Sept. 19, 1983, as amended at 59 FR 64785, Dec. 15, 1994]

**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.

[48 FR 42219, Sept. 19, 1983, as amended at 59 FR 64785, Dec. 15, 1994]

**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.

[48 FR 42219, Sept. 19, 1983, as amended at 59 FR 64785, Dec. 15, 1994]

#### **16.404 Fixed-price contracts with award fees.**

(a) 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—

(1) 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; and

(2) Provide for periodic evaluation of the contractor's performance against an award-fee plan.

(b) A solicitation contemplating award of a fixed-price contract with award fee shall not be issued unless the following conditions exist:

(1) The administrative costs of conducting award-fee evaluations are not expected to exceed the expected benefits;

(2) Procedures have been established for conducting the award-fee evaluation;

(3) The award-fee board has been established; and

(4) An individual above the level of the contracting officer approved the fixed-price-award-fee incentive.

[62 FR 12696, Mar. 17, 1997]

#### **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.

[48 FR 42219, Sept. 19, 1983. Redesignated at 62 FR 12696, Mar. 17, 1997]

#### **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 may also 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.

[48 FR 42219, Sept. 19, 1983. Redesignated at 62 FR 12696, Mar. 17, 1997, as amended at 62 FR 44815, Aug. 22, 1997]

EFFECTIVE DATE NOTE: At 62 FR 44815, Aug. 22, 1997, section 16.405-1 was amended by revising paragraph (b)(1) introductory text and the last sentence of paragraph (b)(2), effective Oct. 21, 1997. For the convenience of the user, the superseded text is set forth as follows:

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

\* \* \* \* \*

(b) *Application.* (1) A cost-plus-incentive-fee contract is appropriate for development and test programs when

(2) \* \* \* This approach may also apply to other development programs, if the use of both cost and technical performance incentives is desirable and administratively practical.

\* \* \* \* \*

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

(a) *Description.* 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 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 such areas as

quality, timeliness, technical ingenuity, and cost-effective management. The amount of the award fee to be paid is determined by the Government's judgmental evaluation of the contractor's performance in terms of the criteria stated in the contract. This determination is made unilaterally by the Government and is not subject to the Disputes clause.

(b) *Application.* (1) The cost-plus-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, technical performance, or schedule;

(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.

(2) The number of evaluation criteria and the requirements they represent will differ widely among contracts. The criteria and rating plan should motivate the contractor to improve performance in the areas rated, but not at the expense of at least minimum acceptable performance in all other areas.

(3) Cost-plus-award-fee contracts shall provide for evaluation at stated intervals during performance, so that the contractor will periodically be informed of the quality of its performance and the areas in which improvement is expected. Partial payment of fee shall generally correspond to the evaluation periods. This makes effective the incentive which the award fee can create by inducing the contractor to improve poor performance or to continue good performance.

(c) *Limitations.* No cost-plus-award-fee contract shall be awarded unless—

(1) All of the limitations in 16.301-3 are complied with;

(2) The maximum fee payable (i.e., the base fee plus the highest potential

award fee) complies with the limitations in 16.301-3; and

(3) The contract amount, performance period, and expected benefits are sufficient to warrant the additional administrative effort and cost involved.

[48 FR 42219, Sept. 19, 1983. Redesignated at 62 FR 12696, Mar. 17, 1997]

#### **16.406 Contract clauses.**

(a) The contracting officer shall 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) The contracting officer shall 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) The contracting officer shall 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 excludes from the operation of the Disputes clause any dis-

agreement by the contractor concerning the amount of the award fee.

[48 FR 42219, Sept. 19, 1983. Redesignated and amended at 62 FR 12696, Mar. 17, 1997]

### **Subpart 16.5—Indefinite-Delivery Contracts**

#### **16.500 Scope of subpart.**

This subpart prescribes policies and procedures for making awards of indefinite-delivery contracts and establishes a preference scheme for making multiple awards of indefinite-quantity contracts. This subpart does not limit the use of other than competitive procedures authorized by part 6. Nothing in this subpart shall be construed to limit, impair, or restrict 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. This subpart may be used to acquire information technology requirements that are not satisfied under the Federal Supply Schedule program. The multiple award preference scheme established 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 is consistent with subpart 36.6.

[61 FR 39203, July 26, 1996, as amended at 61 FR 41469, Aug. 8, 1996]

#### **16.501-1 Definitions.**

As used in this subpart—

*Advisory and assistance services* has the same meaning as set forth in 37.201.

*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

## 16.501-2

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.

[60 FR 49725, Sept. 26, 1995]

### 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. 2304d and section 303K of the Federal Property and Administrative Services Act of 1949, 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

## 48 CFR Ch. 1 (10-1-97 Edition)

the appropriate procedures of this subpart.

[48 FR 42219, Sept. 19, 1983. Redesignated and amended at 60 FR 49725, Sept. 26, 1995]

### 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.

[48 FR 42219, Sept. 19, 1983, as amended at 60 FR 49725, Sept. 26, 1995]

### 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, 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.* 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.

(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 \$10,000,000 (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.

[48 FR 42219, Sept. 19, 1983, as amended at 56 FR 15150, Apr. 15, 1991; 60 FR 49725, Sept. 26, 1995]

#### **16.504 Indefinite-quantity contracts.**

(a) *Description.* An indefinite-quantity contract provides for an indefinite quantity, within stated limits, of supplies or services to be furnished during a fixed period, with deliveries or performance to be scheduled by placing orders with the contractor.

(1) The contract shall require the Government to order and the contractor to furnish at least a stated minimum quantity of supplies or services and, if and as ordered, the contractor to furnish any additional quantities, not to exceed a stated maximum. The contracting officer may obtain the basis for the maximum from records of previous requirements and consumption, or by other means, but the maximum quantity should be realistic and based on the most current information available.

(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) In addition to other required provisions and clauses, a solicitation and contract for an indefinite quantity shall—

(i) Specify the period of the contract, including the number of options and the period for which the contract may be extended under each option, if any;

(ii) Specify the total minimum and maximum quantity or dollar value of supplies or services to be acquired 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 to be acquired under the contract in a manner that will enable a prospective offeror to decide whether to submit an offer;

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

(v) If multiple awards may be made, include the provision at 52.216-27, Single or Multiple Awards, to notify offerors that more than one contract may be awarded; and

(vi) If an award of a task order contract for advisory and assistance services in excess of three years and \$10,000,000 (including all options) is anticipated, include the provision at 52.216-28, Multiple Awards for Advisory and Assistance Services, unless a determination to make a single award is made under paragraph (c)(2)(i)(A) of this section.

(b) *Application.* An indefinite-quantity contract may be used when the Government cannot predetermine, above a specified minimum, the precise quantities of supplies or services that will be required during the contract period, and it is inadvisable for the Government to commit itself for more than a minimum quantity. An indefinite-quantity contract should be used only when a recurring need is anticipated.

(c) *Multiple award preference—(1) General preference.* Except for indefinite-quantity contracts for advisory and assistance services as provided in paragraph (c)(2) of this section, the contracting officer shall, 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. In making a determination as to whether multiple awards are appropriate, the contracting officer shall exercise sound business judgment as part of acquisition planning. No separate written determination to make a single award is necessary when the determination is contained in a written acquisition plan or when a class determination has been made in accordance with subpart 1.7. Multiple awards should not be made if the contracting officer determines that—

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

(ii) 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;

(iii) The cost of administration of multiple contracts may outweigh any

potential benefits from making multiple awards;

(iv) The tasks likely to be ordered are so integrally related that only a single contractor can reasonably perform the work;

(v) The total estimated value of the contract is less than the simplified acquisition threshold; or

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

(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 will not exceed three years and \$10,000,000, including all options, a contracting officer may, but is not required to, give preference to making multiple awards. If an indefinite-quantity contract for advisory and assistance services exceeds three years and \$10,000,000, including all options, multiple awards shall be made unless—

(A) The contracting officer or other official designated by the head of the agency determines in writing, prior to the issuance of the solicitation, that the services required under the task order contract are so unique or highly specialized that it is not practicable to award more than one contract. This determination may also be appropriate when the tasks likely to be issued are so integrally related that only a single contractor can reasonably perform the work;

(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 are 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.

[48 FR 42219, Sept. 19, 1983, as amended at 56 FR 15150, Apr. 15, 1991; 60 FR 49725, Sept. 26, 1995; 61 FR 39190, 39203, July 26, 1996]

#### **16.505 Ordering.**

(a) *General.* (1) When placing orders under this subpart, a separate notice under 5.201 is not required.

(2) The contracting officer or duly appointed ordering officer shall ensure that individual orders clearly describe all services to be performed or supplies to be delivered. Such officer shall also ensure that orders are within the scope, period, and maximum value of the contract.

(3) The contracting officer shall include in the contract Schedule the names of the activity or activities authorized to issue orders.

(4) If appropriate, authorization for placing oral orders may be included in the contract Schedule; provided, that procedures have been established for obligating funds and that oral orders are confirmed in writing.

(5) Orders may be placed by facsimile or by electronic commerce methods, if provided for in the contract.

(6) Orders placed under indefinite-delivery contracts shall contain the following information:

- (i) Date of order.
- (ii) Contract number and order number.
- (iii) Item number and description, quantity, and unit price or estimated cost or fee.
- (iv) Delivery or performance date.
- (v) Place of delivery or performance (including consignee).
- (vi) Packaging, packing, and shipping instructions, if any.
- (vii) Accounting and appropriation data.
- (viii) Any other pertinent information.

(7) 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 for a protest on the grounds that the order increases the scope, period, or maximum value of the contract.

(b) *Orders under multiple award contracts.* (1) Except as provided for in paragraph (b)(2) of this section, for orders issued under multiple delivery order contracts or multiple task order contracts, each awardee shall be provided a fair opportunity to be considered for each order in excess of \$2,500. In determining the procedures for providing awardees a fair opportunity to be considered for each order, contracting officers shall exercise broad discretion. The contracting officer, in making decisions in the award of any individual task order, should consider factors such as past performance on earlier tasks under the multiple award contract, quality of deliverables, cost control, price, cost, or other factors that the contracting officer believes are relevant to the award of a task order to an awardee under the contract. In evaluating past performance on individual orders, the procedural requirements in subpart 42.15 are not mandatory. The procedures and selection criteria that will be used to provide multiple awardees a fair opportunity to be considered for each order must be set forth in the solicitation and contract. The procedures for selecting awardees for the placement of particular orders need not comply with the competition requirements of part 6. However, agencies shall not use any method (such as allocation) that would not result in fair consideration being given to all awardees prior to placing each order. Formal evaluation plans or scoring of quotes or offers are not required. Agencies may use oral proposals and streamlined procedures when selecting an order awardee. In addition, 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.

(2) Awardees need not be given an opportunity to be considered for a particular order in excess of \$2,500 under multiple delivery order contracts or multiple task order contracts if the contracting officer determines that—

(i) The agency need for such supplies or services is of such urgency that providing such opportunity would result in unacceptable delays;

(ii) Only one such contractor is capable of providing such supplies or services required at the level of quality required because the supplies or services ordered are unique or highly specialized;

(iii) The order should be issued on a sole-source basis in the interest of economy and efficiency as a logical follow-on to an order already issued under the contract, provided that all award-ees were given a fair opportunity to be considered for the original order; or

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

(3) The Ocompeting independentlyO requirement of 15.403-1(c)(1) is satisfied for orders placed under multiple delivery order contracts or multiple task order contracts when—

(i) The price for the supplies or services is established in the contract at the time of contract award; or

(ii) The contracting officer solicits offers from two or more awardees for order placement when the price for the supplies or services is not established in the contract at the time of contract award.

(4) The head of the agency shall designate a task order contract and delivery order contract ombudsman who shall be responsible for reviewing complaints from contractors on task order contracts and delivery order contracts. The ombudsman shall review complaints from the contractors and ensure that all contractors are afforded a fair opportunity to be considered, consistent with the procedures in the contract. The ombudsman shall be a senior agency official who is independent of the contracting officer and may be the agency's competition advocate.

(c) *Limitation on ordering period for task order contracts for advisory and assistance services.* (1) Except as provided for in paragraph (c)(2) of this section, the ordering period of a task order contract for advisory and assistance services, including all options or modifications, may not exceed five years, unless a longer period is specifically authorized by a statute that is applicable to such a contract. Notwithstanding the

five-year limitation or the requirements of Part 6, a task order contract for advisory and assistance services may be extended on a sole-source basis only once for a period not to exceed six 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.

(2) The limitation on ordering period contained in paragraph (c)(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.

[60 FR 49726, Sept. 26, 1995, as amended at 61 FR 39203, July 26, 1996; 62 FR 51270, Sept. 30, 1997]

EFFECTIVE DATE NOTE: At 62 FR 51270, Sept. 30, 1997, in section 16.505, in paragraph (b)(3), "15.804-1(b)(1)" was amended to read "15.403-1(c)(1)", effective Oct. 10, 1997.

#### **16.506 Solicitation provisions and contract clauses.**

(a) The contracting officer shall 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) The contracting officer shall 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) The contracting officer shall insert the clause at 52.216-20, Definite Quantity, in solicitations and contracts when a definite-quantity contract is contemplated.

(d) (1) The contracting officer shall 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, the contracting officer shall 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, the contracting officer shall 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, the contracting officer shall use the clause with its Alternate III (but see subparagraph (5) below).

(5) If the contract (i) includes subsistence for both 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, the contracting officer shall use the clause with its Alternate IV.

(e) The contracting officer shall insert the clause at 52.216-22, Indefinite Quantity, in solicitations and contracts when an indefinite-quantity contract is contemplated.

(f) The contracting officer shall insert the provision at 52.216-27, Single or Multiple Awards, in solicitations for indefinite quantity contracts that may result in multiple contract awards. This provision shall not be used for advisory and assistance services contracts that exceed three years and \$10,000,000 (including all options). Contracting officers may modify the provision to specify the number of awards the Government reasonably estimates that it may make.

(g) In accordance with 16.504(a)(4)(vi), the contracting officer shall 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 three years and \$10,000,000 (including all options) unless a determination has been made under 16.504(c)(2)(i)(A). Contracting officers may modify the provision to specify

the number of awards the Government reasonably estimates that it may make.

[48 FR 42219, Sept. 19, 1983; 60 FR 48260, Sept. 18, 1995. Redesignated and amended at 60 FR 49726, 49727, Sept. 26, 1995]

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

### 16.601 Time-and-materials contracts.

(a) *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) materials at cost, including, if appropriate, material handling costs as part of material costs.

(b) *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.

(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) *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.

(3) *Optional method of pricing material.* When the nature of the work to be performed requires the contractor to furnish material that it regularly sells to the general public in the normal course of its business, the contract may provide for charging material on a basis other than at cost if—

(i) The total estimated contract price does not exceed \$25,000 or the estimated price of material so charged does not exceed 20 percent of the estimated contract price;

(ii) The material to be so charged is identified in the contract;

(iii) No element of profit on material so charged is included as profit in the fixed hourly labor rates; and

(iv) The contract provides (A) that the price to be paid for such material shall be based on an established catalog or list price in effect when material is furnished, less all applicable discounts to the Government, and (B) that in no event shall the price exceed the contractor's sales price to its most-favored customer for the same item in like quantity, or the current market price, whichever is lower.

(c) *Limitations.* A time-and-materials contract may be used (1) only after the contracting officer executes a determination and findings that no other contract type is suitable and (2) only if the contract includes a ceiling price that the contractor exceeds at its own risk. The contracting officer shall document the contract file to justify the reasons for and amount of any subsequent change in the ceiling price.

**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 16.601(b) and 16.601(c) for application and limitations, respectively.

**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 con-

tracting 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 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.

[48 FR 42219, Sept. 19, 1983, as amended at 60 FR 48248, Sept. 18, 1995; 62 FR 51270, Sept. 30, 1997]

EFFECTIVE DATE NOTE: At 62 FR 51270, Sept. 30, 1997, in section 16.603-2, in paragraph (c)(3), "15.8" was amended to read "15.4", effective Oct. 10, 1997.

**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.

[48 FR 42219, Sept. 19, 1983, as amended at 50 FR 1742, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 51 FR 31426, Sept. 3, 1986]

**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 cost or pricing data, the words “and cost or pricing data supporting its proposal” may be deleted from paragraph (a) of the clause. If the letter contract is being awarded on the basis of price competi-

tion, 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.

[48 FR 42219, Sept. 19, 1983, as amended at 60 FR 48217, Sept. 18, 1995; 62 FR 51270, Sept. 30, 1997]

EFFECTIVE DATE NOTE: At 62 FR 51270, Sept. 30, 1997, in section 16.603-4, in paragraph (b)(3), “15.804-1” was amended to read “15.403-1”, effective Oct. 10, 1997.

**Subpart 16.7—Agreements****16.701 Scope.**

This subpart prescribes policies and procedures for establishing and using basic agreements and basic ordering agreements. (See subpart 13.2 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 modifica-

tion 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) below) 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 13.303.

(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, in accordance with 1.602-1(b), and comply with other requirements, 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.

[48 FR 42219, Sept. 19, 1983, as amended at 50 FR 1742, Jan. 11, 1985; 50 FR 52429, Dec. 23, 1985; 61 FR 39198, July 26, 1996]

## PART 17—SPECIAL CONTRACTING METHODS

Sec.

17.000 Scope of part.

### Subpart 17.1—Multiyear Contracting

17.101 Authority.

17.102 Applicability.

17.103 Definitions.

17.104 General.

17.105 Policy.

17.105-1 Uses.

17.105-2 Objectives.

17.106 Procedures.

17.106-1 General.

17.106-2 Solicitations.

17.106-3 Special procedures applicable to DoD, NASA, and the Coast Guard.

17.107 Options.

17.108 Congressional notification.

17.109 Contract clauses.

### Subpart 17.2—Options

17.200 Scope of subpart.

17.201 Definition.