

## SUBCHAPTER C—CONTRACTING METHODS AND CONTRACT TYPES

### PART 913—SIMPLIFIED ACQUISITION PROCEDURES

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AUTHORITY: 42 U.S.C. 7101 *et seq.*, 41 U.S.C. 418(b); 50 U.S.C. 2401 *et seq.*

SOURCE: 67 FR 14871, Mar. 28, 2002, unless otherwise noted.

#### Subpart 913.3—Simplified Acquisition Methods

##### 913.307 Forms. (DOE coverage paragraph (b))

(b) Optional Forms 347 and 348, or DOE F 4250.3, may be used for purchase orders using simplified acquisition procedures. These forms shall not be used as the contractor's invoice. See 48 CFR 12.204 regarding the use of SF-1449 for the acquisition of commercial items using simplified acquisition procedures.

#### Subpart 913.4—Fast Payment Procedure

##### 913.402 General.

The fast payment procedure delineated in FAR subpart 13.4 is not to be used by DOE.

### PART 914—SEALED BIDDING

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914.502 Conditions for use.

AUTHORITY: 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418(b); and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 11954, Mar. 28, 1984, unless otherwise noted.

#### Subpart 914.4—Opening of Bids and Award of Contract

##### 914.404-1 Cancellation of invitations after opening.

(c) The Procurement Executive has been delegated authority to make the determination under FAR 14.404-1(c) and (e) and has redelegated this authority to the Heads of Contracting Activities without power of redelegation.

[50 FR 12184, Mar. 27, 1985]

##### 914.407 Mistakes in bids.

##### 914.407-3 Other mistakes disclosed before award.

(e) Pursuant to FAR 14.407-3(e), the Procurement Executive, has been delegated authority by the Secretary to make the determinations under FAR 14.407-3. In the case of mistakes in bids alleged after opening of bids and before award, the Procurement Executive has redelegated this authority to the Heads of Contracting Activities without power of redelegation and to make administrative determinations regarding withdrawal of bids as provided for in FAR 14.407-3, providing that each such determination shall be approved by Legal Counsel.

[49 FR 11954, Mar. 28, 1984, as amended at 56 FR 41964, Aug. 26, 1991; 59 FR 9105, Feb. 25, 1994. Redesignated and amended at 67 FR 14871, Mar. 28, 2002q]

##### 914.407-4 Mistakes after award.

The Procurement Executive has been delegated authority to make the determinations under FAR 14.407-4. Mistakes in bids after award, together with the data set forth in FAR 14.407-

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4(e), shall be submitted to the Procurement Executive for decision.

[49 FR 11954, Mar. 28, 1984. Redesignated and amended at 67 FR 14871, Mar. 28, 2002]

### 914.408-2 Award of classified contracts.

DOE regulations regarding the safeguarding of restricted data and procedures for its destruction are contained at 10 CFR part 1016.

[49 FR 11954, Mar. 28, 1984, as amended at 59 FR 9105, Feb. 25, 1994]

## Subpart 914.5—Two-Step Sealed Bidding

### 914.502 Conditions for use.

(c) Use of the two-step sealed bidding method shall be approved by the Head of the Contracting Activity. The contracting officer shall submit a written request for approval justifying its use in accordance with FAR 14.502.

[50 FR 12184, Mar. 27, 1985]

## PART 915—CONTRACTING BY NEGOTIATION

### Subpart 915.2—Solicitation and Receipt of Proposals and Information

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AUTHORITY: 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418(b); and 50 U.S.C. 2401 *et seq.*

SOURCE: 63 FR 56851, Oct. 23, 1998, unless otherwise noted.

### Subpart 915.2—Solicitation and Receipt of Proposals and Information

#### 915.200 Scope of subpart.

FAR 15.2 is not applicable to Program Opportunity Notices (See 48 CFR 917.72) or Program Research and Development Announcements (See 48 CFR 917.73).

#### 915.201 Exchanges with industry before receipt of proposals. (DOE coverage—paragraph (e)).

(e) Approval for the use of solicitations for information or planning purposes shall be obtained from the Head of the Contracting Activity.

#### 915.207-70 Handling of proposals during evaluation.

(a) Proposals furnished to the Government are to be used for evaluation purposes only. Disclosure outside the Government for evaluation is permitted only to the extent authorized by, and in accordance with, the procedures in this subsection.

(b) While the Government's limited use of proposals does not require that the proposal bear a restrictive notice, proposers should, if they desire to

maximize protection of their trade secrets or confidential or privileged commercial and financial information contained in them, apply the restrictive notice prescribed in paragraph (e) of the provision at 48 CFR 52.215-1 to such information. In any event, information contained in proposals will be protected to the extent permitted by law, but the Government assumes no liability for the use or disclosure of information (data) not made subject to such notice in accordance with paragraph (e) of the provision at 48 CFR 52.215-1.

(c) If proposals are received with more restrictive conditions than those in paragraph (e) of the provision at 48 CFR 52.215-1, the contracting officer or coordinating officer shall inquire whether the submitter is willing to accept the conditions of paragraph (e). If the submitter does not, the contracting officer or coordinating officer shall, after consultation with counsel, either return the proposal or accept it as marked. Contracting officers shall not exclude from consideration any proposals merely because they contain an authorized or agreed to notice, nor shall they be prejudiced by such notice.

(d) Release of proposal information (data) before decision as to the award of a contract, or the transfer of valuable and sensitive information between competing offerors during the competitive phase of the acquisition process, would seriously disrupt the Government's decision-making process and undermine the integrity of the competitive acquisition process, thus adversely affecting the Government's ability to solicit competitive proposals and award a contract which would best meet the Government's needs and serve the public interest. Therefore, to the extent permitted by law, none of the information (data) contained in proposals, except as authorized in this subsection, is to be disclosed outside the Government before the Government's decision as to the award of a contract. In the event an outside evaluation is to be obtained, it shall be only to the extent authorized by, and in accordance with the procedures of, this subsection.

(e)(1) In order to maintain the integrity of the procurement process and to assure that the propriety of proposals

will be respected, contracting officers shall assure that the following notice is affixed to each solicited proposal prior to distribution for evaluation:

GOVERNMENT NOTICE FOR HANDLING  
PROPOSALS

This proposal shall be used and disclosed for evaluation purposes only, and a copy of this Government notice shall be applied to any reproduction or abstract thereof. Any authorized restrictive notices which the submitter places on this proposal shall also be strictly complied with. Disclosure of this proposal outside the Government for evaluation purposes shall be made only to the extent authorized by, and in accordance with, the procedures in DEAR subsection 915.207-70.

(End of notice)

(2) The notice at FAR 15.609(d) for unsolicited proposals shall be affixed to a cover sheet attached to each such proposal upon receipt by DOE. Use of the notice neither alters any obligation of the Government, nor diminishes any rights in the Government to use or disclose data or information.

(f)(1) Normally, evaluations of proposals shall be performed only by employees of the Department of Energy. As used in this section, "proposals" includes the offers in response to requests for proposals, sealed bids, program opportunity announcements, program research and development announcements, or any other method of solicitation where the review of proposals or bids is to be performed by other than peer review. In certain cases, in order to gain necessary expertise, employees of other agencies may be used in instances in which they will be available and committed during the period of evaluation. Evaluators or advisors who are not Federal employees, including employees of DOE management and operating contractors, may be used where necessary. Where such non-Federal employees are used as evaluators, they may only participate as members of technical evaluation committees. They may not serve as members of the Source Evaluation Board or equivalent board or committee.

(2)(i) Pursuant to section 6002 of Pub. L. 103-355, a determination is required for every competitive procurement as

to whether sufficient DOE personnel with the necessary training and capabilities are available to evaluate the proposals that will be received. This determination, discussed at FAR 37.204, shall be made in the memorandum appointing the technical evaluation committee by the Source Selection Official, in the case of Source Evaluation Board procurements, or by the Contracting Officer in all other procurements.

(ii) Where it is determined such qualified personnel are not available within DOE but are available from other Federal agencies, a determination to that effect shall be made by the same officials in the same memorandum. Should such qualified personnel not be available, a determination to use non-Federal evaluators or advisors must be made in accordance with paragraph (f)(3) of this subsection.

(3) The decision to employ non-Federal evaluators or advisors, including employees of DOE management and operating contractors, in Source Evaluation Board procurements must be made by the Source Selection Official with the concurrence of the Head of the Contracting Activity. In all other procurements, the decision shall be made by the senior program official or designee with the concurrence of the Head of the Contracting Activity. In a case where multiple solicitations are part of a single program and would call for the same resources for evaluation, a class determination to use non-Federal evaluators may be made by the DOE Procurement Executive.

(4) Where such non-Federal evaluators or advisors are to be used, the solicitation shall contain a provision informing prospective offerors that non-Federal personnel may be used in the evaluation of proposals.

(5) The nondisclosure agreement as it appears in paragraph (f)(6) of this subsection shall be signed before DOE furnishes a copy of the proposal to non-Federal evaluators or advisors, and care should be taken that the required handling notice described in paragraph (e) of this subsection is affixed to a cover sheet attached to the proposal before it is disclosed to the evaluator or advisor. In all instances, such persons will be required to comply with

nondisclosure of information requirements and requirements involving Procurement Integrity, see FAR 3.104; with requirements to prevent the potential for personal conflicts of interest; or, where a non-Federal evaluator or advisor is acquired under a contract with an entity other than the individual, with requirements to prevent the potential for organizational conflicts of interest.

(6) Non-Federal evaluators or advisors shall be required to sign the following agreement prior to having access to any proposal:

NONDISCLOSURE AGREEMENT

Whenever DOE furnishes a proposal for evaluation, I, the recipient, agree to use the information contained in the proposal only for DOE evaluation purposes and to treat the information obtained in confidence. This requirement for confidential treatment does not apply to information obtained from any source, including the proposer, without restriction. Any notice or restriction placed on the proposal by either DOE or the originator of the proposal shall be conspicuously affixed to any reproduction or abstract thereof and its provisions strictly complied with. Upon completion of the evaluation, it is agreed all copies of the proposal and abstracts, if any, shall be returned to the DOE office which initially furnished the proposal for evaluation. Unless authorized by the Contracting Officer, I agree that I shall not contact the originator of the proposal concerning any aspect of its elements.

Recipient: \_\_\_\_\_

Date: \_\_\_\_\_

(End of agreement)

(g) The submitter of any proposal shall be provided notice adequate to afford an opportunity to take appropriate action before release of any information (data) contained therein pursuant to a request under the Freedom of Information Act (5 U.S.C. 552); and, time permitting, the submitter should be consulted to obtain assistance in determining the eligibility of the information (data) in question as an exemption under the Act. (See also 48 CFR 24.2, Freedom of Information Act.)

**Subpart 915.3—Source Selection****915.305 Proposal evaluation. (DOE coverage—paragraph (d))**

(d) Personnel from DOE, other Government agencies, consultants, and contractors, including those who manage or operate Government-owned facilities, may be used in the evaluation process as evaluators or advisors when their services are necessary and available. When personnel outside the Government, including those of contractors who operate or manage Government-owned facilities, are to be used as evaluators or advisors, approval and nondisclosure procedures as required by 48 CFR (DEAR) 915.207-70 shall be followed and a notice of the use of non-Federal evaluators shall be included in the solicitation. In all instances, such personnel will be required to comply with DOE conflict of interest and nondisclosure requirements.

**Subpart 915.4—Contract Pricing****915.404-2 Information to support proposal analysis. (DOE coverage—paragraphs (a), (c) and (e))**

(a)(1) Field pricing assistance as discussed in FAR 15.404-2(a) is not required for the negotiation of DOE contract prices or modifications thereof. The term “field pricing assistance” refers to the Department of Defense (DOD) system for obtaining a price and/or cost analysis report from a cognizant DOD field level contract management office wherein requests for the review of a proposal submitted by an offeror are initiated and the recommendations made by the various specialists of the management office are consolidated into a single report that is forwarded to the office making the contract award for use in conducting negotiations. In the DOE, such review activities, except for reviews performed by professional auditors, are expected to be accomplished by pricing support personnel located in DOE Contracting Activities. The DOE contracting officer shall formally request the assistance of appropriate pricing support personnel, other than auditors, for the review of any proposal that exceeds \$500,000, unless the contracting officer has sufficient data to determine

the reasonableness of the proposed cost or price. Such pricing support may be requested for proposals below \$500,000, if considered necessary for the establishment of a reasonable pricing arrangement. Contracting officers, however, are not precluded by this section from requesting pricing assistance from a cognizant DOD contract management office, provided an appropriate cross-servicing arrangement for pricing support services exists between the DOE and the servicing agency.

(c)(1) When an audit is required pursuant to 48 CFR 915.404-2-70, “Audit as an aid in proposal analysis,” the request for audit shall be sent directly to the Federal audit office assigned cognizance of the offeror or prospective contractor. When the cognizant agency is other than the Defense Contract Audit Agency or the Department of Health and Human Services, and an appropriate interagency agreement has not been established, the need for audit assistance shall be coordinated with the Office of Policy, within the Headquarters procurement organization.

(2) The request for audit shall establish the due date for receipt of the auditor’s report and in so doing shall allow as much time as possible for the auditor’s review.

(e)(6) Copies of technical analysis reports prepared by DOE technical or other pricing support personnel shall not normally be provided to the auditor. The contracting officer or the supporting price, cost, or financial analyst at the contracting activity shall determine the monetary impact of the technical findings.

**915.404-2-70 Audit as an aid in proposal analysis.**

(a) When a contract price will be based on cost or pricing data submitted by the offerors, the DOE contracting officer or authorized representative shall request a review by the cognizant Federal audit activity prior to the negotiation of any contract or modification including modifications under advertised contracts in excess of:

(1) \$500,000 for a firm fixed-price contract or a fixed-price contract with economic price adjustment provisions; or adjustment provisions; or

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(2) \$1,000,000 for all other contract types, including initial prices, estimated costs of cost-reimbursement contracts, interim and final price redeterminations, and target and settlement of incentive contracts.

(b) The requirement for auditor reviews of proposals which exceed the thresholds specified in paragraph (a) of this section may be waived at a level above the contracting officer when the reasonableness of the negotiated contract price can be determined from information already available. The contract file shall be documented to reflect the reason for any such waiver, provided, however, that independent Government estimates of cost or price shall not be used as the sole justification for any such waiver.

### **915.404-4 Profit. (DOE coverage—paragraphs (c) and (d))**

(c)(4)(i) *Contracting officer responsibilities.* The statutory limitations on profit and fees as set forth in FAR 15.404-4(c)(4)(i) shall be followed, except as exempted for DOE architect-engineer contracts covering Atomic Energy Commission (AEC) and Bonneville Power Administration (BPA) functions. Pursuant to section 602(d) (13) and (20) of the Federal Property and Administration Services Act of 1949, as amended, those former AEC functions, as well as those of the BPA, now being performed by DOE are exempt from the 6 percent of cost restriction on contracts for architect-engineer services. The estimated costs on which the maximum fee is computed shall include facilities capital cost of money when this cost is included in cost estimates.

(c)(6) In cases where a change or modification calls for substantially different work than the basic contract, the contractor's effort may be radically changed and a detailed analysis of the profit factors would be a necessity. Also, if the dollar amount of the change or contract modification is very significant in comparison to the contract dollar amount, a detailed analysis should be made.

(d) *Profit-analysis factors.* A profit/fee analysis technique designed for a systematic application of the profit factors in FAR 15.404-4(d) provides contracting officers with an approach that

will ensure consistent consideration of the relative value of the various factors in the establishment of a profit objective and the conduct of negotiations for a contract award. It also provides a basis for documentation of this objective, including an explanation of any significant departure from it in reaching a final agreement. The contracting officer's analysis of these prescribed factors is based on information available prior to negotiations. Such information is furnished in proposals, audit data, performance reports, preaward surveys and the like.

### **915.404-4-70 DOE structured profit and fee system.**

This section implements FAR 15.404-4(b) and (d).

### **915.404-4-70-1 General.**

(a) *Objective.* It is the intent of DOE to remunerate contractors for financial and other risks which they may assume, resources they use, and organization, performance and management capabilities they employ. Profit or fee shall be negotiated for this purpose; however, when profit or fee is determined as a separate element of the contract price, the aim of negotiation should be to fit it to the acquisition, giving due weight to effort, risk, facilities investment, and special factors as set forth in this subpart.

(b) *Commercial (profit) organization.* Profit or fee prenegotiation objectives for contracts with commercial (profit) organizations shall be determined as provided in this subpart.

(c) *Nonprofit organizations.* It is DOE's general policy to pay fees in contracts with nonprofit organizations other than educational institutions and governmental bodies; however, it is a matter of negotiation whether a fee will be paid in a given case. In making this decision, the DOE negotiating official should consider whether the contractor is ordinarily paid fees for the type of work involved. The profit objective should be reasonable in relation to the task to be performed and the requirements placed on the contractor.

(d) *Educational institutions.* It is DOE policy not to pay fees under contracts with educational institutions.

(e) *State, local and Indian tribal governments.* Profit or fee shall not be paid under contracts with State, local, and Indian tribal Governments.

**915.404-70-2 Weighted guidelines system.**

(a) To properly reflect differences among contracts and the circumstances relating thereto and to select an appropriate relative profit/fee in consideration of these differences and circumstances, weightings have been developed for application by the contracting officer to standard measurement bases representative of the prescribed profit factors cited in FAR 15.404-4(d) and paragraph (d) of this section. This is a structured system, referred to as weighted guidelines. Each profit factor or subfactor, or component thereof, has been assigned weights relative to their value to the contract's overall effort. The range of weights to be applied to each profit factor is also set forth in paragraph (d) of this section. Guidance on how to apply the

weighted guidelines is set forth in 48 CFR 915.404-4-70-8.

(b) Except as set forth in 48 CFR 915.404-4-70-4, the weighted guidelines shall be used in establishing the profit objective for negotiation of contracts where cost analysis is performed.

(c) The negotiation process does not contemplate or require agreement on either estimated cost elements or profit elements. Accordingly, although the details of analysis and evaluation may be discussed in the fact-finding phase of the negotiation process in order to develop a mutual understanding of the logic of the respective positions, specific agreement on the exact weights of values of the individual profit factors is not required and need not be attempted.

(d) The factors set forth in the following table are to be used in determining DOE profit objectives. The factors and weight ranges for each factor shall be used in all instances where the weighted guidelines are applied.

Profit factors	Weight ranges (percent)
I. Contractor Effort (Weights applied to cost):	
A. Material acquisitions:	
1. Purchased parts .....	1 to 3.
2. Subcontracted items .....	1 to 4.
3. Other materials .....	1 to 3.
B. Labor skills:	
1. Technical and managerial:	
a. Scientific .....	10 to 20.
b. Project management/administration .....	8 to 20.
c. Engineering .....	8 to 14.
2. Manufacturing .....	4 to 8.
3. Support services .....	4 to 14.
C. Overhead:	
1. Technical and managerial .....	5 to 8.
2. Manufacturing .....	3 to 6.
3. Support services .....	3 to 7.
D. Other direct costs	3 to 8.
E. G&A (General Management) expenses	5 to 7.
II. Contract Risk (type of contract-weights applied to total cost of items IA thru E) .....	0 to 8.
III. Capital Investment (Weights applied to the net book value of allocable facilities) .....	5 to 20.
IV. Independent Research and Development:	
A. Investment in IR&D program (Weights applied to allocable IR&D costs) .....	5 to 7.
B. Developed items employed (Weights applied to total of profit \$ for items IA thru E) .....	0 to 20.
V. Special Program Participation (Weights applied to total of Profit \$ for items IA thru E) .....	- 5 to +5.
VI. Other Considerations (Weights applied to total of Profits \$ for items 1A thru E) .....	- 5 to +5.
VII. Productivity/Performance (special computation) .....	(N/A).

**915.404-4-70-3 Documentation.**

Determination of the profit or fee objective, in accordance with this subpart shall be fully documented. Since the profit objective is the contracting officer's pre-negotiation evaluation of a

total profit allowance for the proposed contract, the amounts developed for each category of cost will probably change in the course of negotiation. Furthermore, the negotiated amounts will probably vary from the objective

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and from the pre-negotiation detailed application of the weighted guidelines technique to each element of the contractor's input to total performance. Since the profit objective is viewed as a whole rather than as its component parts, insignificant variations from the pre-negotiation profit objective, as a result of changes to the contractor's input to total performance, need not be documented in detail. Conversely, significant deviations from the profit objective necessary to reach a final agreement on profit or fee shall be explained in the price negotiation memorandum prepared in accordance with FAR 15.406-3.

### 915.404-4-70-4 Exceptions.

(a) For contracts not expected to exceed \$500,000, the weighted guidelines need not be used; however, the contracting officer may use the weighted guidelines for contracts below this amount if he or she elects to do so.

(b) For the following classes of contracts, the weighted guidelines shall not be used:

(1) Commercialization and demonstration type contracts;

(2) Management and operating contracts;

(3) Construction contracts;

(4) Construction management contracts;

(5) Contracts primarily requiring delivery of material supplied by subcontractors;

(6) Termination settlements; and

(7) Contracts with educational institutions.

(c) In addition to paragraphs (a) and (b) of this section, the contracting officer need not use the weighted guidelines in unusual pricing situations where the weighted guidelines method has been determined by the DOE negotiating official to be unsuitable. Such exceptions shall be justified in writing and shall be authorized by the Head of the Contracting Activity. The contract file shall include this documentation and any other information that may support the exception.

(d) If the contracting officer makes a written determination that the pricing situation meets any of the circumstances set forth in this section, other methods for establishing the

profit objective may be used. For contracts other than those subject to 48 CFR 917.6, the selected method shall be supported in a manner similar to that used in the weighted guidelines (profit factor breakdown and documentation of profit objectives); however, investment or other factors that would not be applicable to the contract shall be excluded from the profit objective determination. It is intended that the methods will result in profit objectives for noncapital intensive contracts that are below those generally developed for capital intensive contracts.

### 915.404-4-70-5 Special considerations—contracts with nonprofit organizations (other than educational institutions).

(a) For purposes of identification, nonprofit organizations are defined as those business entities organized and operated exclusively for charitable, scientific, or educational purposes, of which no part of the net earnings inure to the benefit of any private shareholder or individual, of which no substantial part of the activities is attempting to influence legislation or participating in any political campaign on behalf of any candidate for public office, and which are exempt from Federal income taxation under section 501 of the Internal Revenue Code.

(b) In computing the amount of profit or fee to be paid, the DOE negotiating official shall take into account the tax benefits received by a nonprofit organization. While it is difficult to establish the degree to which a remuneration under any given contract contributes to an organization's overall net profit, the DOE negotiating official should assume that there is an element of profit in any amount to be paid.

(c) In order to assure consideration of the tax posture of nonprofit organizations during a profit or fee negotiation, the DOE negotiating official shall calculate the fee as for a contract with a commercial concern and then reduce it at least 25 percent. However, depending on the circumstances, the contracting officer may pay profit or fees somewhere between this amount and the appropriate profit or fee as if it were a commercial concern. When this is the

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case, the contract file shall be documented to specifically state the reason or reasons.

(d) Where a contract with a nonprofit organization is for the operation of Government-owned facilities, the fee should be calculated using the procedures and schedules applicable to operating contracts as set forth in 48 CFR part 970.

**915.404-4-70-6 Contracts with educational institutions.**

In certain situations the DOE may contract with a university to manage or operate Government-owned laboratories. These efforts are generally apart from, and not in conjunction with, their other activities, and the complexity and magnitude of the work are not normally found in standard university research or study contracts. Such operating contracts are subject to the applicable provisions set forth in 48 CFR part 970.

**915.404-4-70-7 Alternative techniques.**

(a) Profit or fees to be paid on construction contracts and construction management contracts shall be determined in accordance with the applicable profit/fee technique for such contracts set forth in 48 CFR 915.404-4-71.

(b) Profit and fee to be paid on contracts under \$500,000, not using the weighted guidelines, shall be judgmentally developed by the contracting officer by assigning individual dollar amounts to the factors appropriate to DOE profit considerations discussed in 48 CFR 915.404-4-70-2(d).

(c) Contracts which require only delivery or furnishing of goods or services supplied by subcontractors shall include a fee or profit which, in the best judgment of the contracting officer, is appropriate. It would be expected that there would be a declining relationship of profit/fee dollars in relation to total costs. The higher the cost of subcontracts, for example, the lower the profit/fee ratio to these costs.

(d) Profit/Fee considerations in termination settlements are often a question of equity. They are a matter of negotiation. They should not, however, exceed what would have otherwise been payable under weighted guidelines had the termination not occurred.

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**915.404-4-70-8 Weighted guidelines application considerations.**

The Department has developed internal procedures to aid the contracting officer in the application of weighted guidelines and to assure a reasonable degree of uniformity across the Department.

**915.404-4-71 Profit and fee-system for construction and construction management contracts.**

**915.404-4-71-1 General.**

(a) Business concerns awarded a DOE construction or construction management contract shall be paid a profit or fee if requested or solicited. The profit or fee objective for a construction or construction management contract shall be an amount appropriate for the type of effort contained therein. It is the intent of DOE to

(1) Reward contractors based on the complexity of work,

(2) Reward contractors who demonstrate and establish excellent records of performance and

(3) Reward contractors who contribute their own resources, including facilities and investment of capital.

(b) Standard fees or across-the-board agreements will not be used or made. Profit or fee objectives are to be determined for each contract according to the effort or task contracted for thereunder.

(c) Profit or fee payable on fixed-price and cost-reimbursable construction or construction management contracts shall be established in accordance with the appropriate procedures and schedules set forth in this subpart.

**915.404-4-71-2 Limitations.**

Amounts payable under construction and construction management contracts shall not exceed amounts derived from the schedules established for this purpose. Requests to pay fees in excess of these levels shall be forwarded to the Procurement Executive for review and approval.

**915.404-4-71-3 Factors for determining fees.**

(a) The profit policy stated in 48 CFR 915.404-4-71-1(a) reflects, in a broad

sense, recognition that profit is compensation to contractors for the entrepreneurial function of organizing and managing resources (including capital resources), and the assumption of risk that all costs of performance (operating and capital) may not be reimbursable.

(b) The best approach calls for a structure that allows judgmental evaluation and determination of fee dollars for prescribed factors which impact the need for, and the rewards associated with, fee or profit, as follows.

(1) Management risk relating to performance, including the

- (i) Quality and diversity of principal work tasks required to do the job,
- (ii) Labor intensity of the job,
- (iii) Special control problems, and
- (iv) Advance planning, forecasting and other such requirements;

(2) The presence or absence of financial risk, including the type and terms of the contract;

(3) The relative difficulty of work, including consideration of technical and administrative knowledge, skill, experience and clarity of technical specifications;

(4) Degree and amount of contract work required to be performed by and with the contractor's own resources, including the extent to which the contractor contributes plant, equipment, computers, or working capital (labor, etc.);

(5) Duration of project;

(6) Size of operation;

(7) Benefits which may accrue to the contractor from gaining experience and know-how, from establishing or enhancing a reputation, or from being enabled to hold or expand a staff whose loyalties are primarily to the contractor; and

(8) Other special considerations, including support of Government programs such as those relating to small, small disadvantaged, and women-owned small business in subcontracting, energy conservation, etc.

(c) The total fee objective and amount for a particular negotiation is established by judgmental considerations of the factors in paragraph (b) of this section, assigning fee values as deemed appropriate for each factor and totaling the resulting amounts.

(d) In recognition of the complexities of this process, and to assist in promoting a reasonable degree of consistency and uniformity in its application, fee schedules have been developed which set forth maximum fee amounts that contracting activities are allowed to negotiate for a particular transaction without obtaining prior approval of the Procurement Executive. In addition, the fee negotiation objective established in accordance with 48 CFR 915.404-4-71-3(a), (b), and (c) shall not exceed the applicable fee schedule amounts without prior approval of the Procurement Executive. To facilitate application to a contract, the fee amounts are related to the total cost base which is defined as total operating and capital costs.

**915.404-4-71-4 Considerations affecting fee amounts.**

(a) In selecting final fee amounts for the various factors in 48 CFR 915.404-4-71-3 of this section, the DOE negotiating official will have to make several judgments as discussed in this subsection.

(b) Complexity of a construction project shall be considered by analysis of its major parts. For a project which includes items of work of different degrees of complexity, a single average classification should be considered, or the work should be divided into separate classifications. The following class identifications are appropriate for proper fee determinations.

(1) *Class A*—Manufacturing plants involving operations requiring a high degree of design layout or process control; nuclear reactors; atomic particle accelerators; complex laboratories or industrial units especially designed for handling radioactive materials.

(2) *Class B*—Normal manufacturing processes and assembly operations such as ore dressing, metal working plant and simple processing plants; power plants and accessory switching and transformer stations; water treatment plants; sewage disposal plants; hospitals; and ordinary laboratories.

(3) *Class C*—Permanent administrative and general service buildings, permanent housing, roads, railroads, grading, sewers, storm drains, and water and power distribution systems.

(4) *Class D*—Construction camps and facilities and other construction of a temporary nature.

(c) Normal management elements of principal tasks relating to a construction contract cover several categories of tasks with differing rates of application throughout the construction period. The principal elements of management effort are outlined in this paragraph. Although each project has a total management value equal to 100% for all elements, the distribution of effort among the various elements will be different for each project due to differences in project character or size. The basic management elements and the normal range of efforts expected to apply for a normal sized project are as follows. When the normally expected effort will not be performed by a contractor, this fact should be considered in arriving at appropriate fee amounts.

Management elements	Effort range	
	Min-imum	Max-imum
I. <i>Broad project planning.</i> Overall project planning and scheduling, establishment of key project organization and consultation with the A-E and DOE. Performed by highest level of contractor's officers, technical personnel and project manager .....	15	25
II. <i>Field planning.</i> Mobilization and demobilization of top field organization from the contractor's existing organization and from other sources as necessary. Detailed project planning and scheduling for construction of facilities. Performed by the project manager and top field professional staff .....	18	28
III. <i>Labor supervision.</i> Direct supervision of manual employees. Performed by contractor's subprofessional staff, such as superintendents and foremen (some salaried and some hourly rate). This includes the contractor's personnel to coordinate and expedite the work of Subcontractors .....	12	16
IV. <i>Acquisition and subcontracting.</i> Acquisition of other than special equipment. Selection of subcontractors and execution and administration of subcontracts. Performed by contractor's staff under supervision and direction of elements I and II .....	12	16
V. <i>Labor relations and recruitment (manual).</i> Performed by the contractor's staff under supervision and direction of elements I, II and III. This includes demobilization of work forces .....	7	11

Management elements	Effort range	
	Min-imum	Max-imum
VI. <i>Recruitment of supervisory staff.</i> Staffing required to supplement the organization under elements I and II, and demobilization during completion of the project. Performed by contractor's permanent staff and recruitment personnel under supervision and direction of management elements I and II .....	4	6
VII. <i>Expediting.</i> Expediting contracting performed by contractor's staff and by subcontractors. Performed by contractor's staff under supervision and direction of elements I and II .....	4	6
VIII. <i>Construction equipment operations.</i> This includes mobilization and demobilization. Performed by contractor's staff under supervision, direction and coordination of elements I, II, and IV .....	4	6
IX. <i>Other services.</i> Timekeeping, cost accounting, estimating, reporting, security, etc., by the contractor's staff under supervision and direction of elements I and II .....	4	6

(d) Fee considerations dealing with the duration of a project are usually provided by the consideration given to the degree of complexity and magnitude of the work. In only very unusual circumstances should it be necessary to separately weight, positively or negatively, for the period of services or length of time involved in the project when determining fee levels.

(e) The size of the operation is to a considerable degree a continuation of the complexity factor, and the degree and amount of work required to be performed by and with the contractor's own resources. Generally, no separate weighting, positively or negatively, is required for consideration of those factors.

(f) The degree and amount of work required to be performed by and with the contractor's own resources affect the level of fees. Reasonable fees should be based on expectations of complete construction services normally associated with a construction or construction management contract. In the case of a construction contract, reduced services can be in the form of excessive subcontracting or supporting acquisition actions and labor relations interfaces being made by the government. If an unusual amount of such work is performed by other than the contractor, it will be necessary to

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make downward adjustments in the fee levels to provide for the reduction in services required.

(g) The type of contract to be negotiated and the anticipated contractor cost risk shall be considered in establishing the appropriate fee objective for the contract.

(h) When a contract calls for the contractor to use its own resources, including facilities and equipment, and to make its own cost investment (i.e., when there is no letter-of-credit financing), a positive impact on the fee amount shall be reflected.

**915.404-4-71-5 Fee schedules.**

(a) The schedules included in this paragraph, adjusted in accordance with provisions of this section and 48 CFR 915.404-4-71-6, provide maximum fee levels for construction and construction management contracts. The fees are related to the estimated cost (fee base) for the construction work and services to be performed. The schedule in paragraph (d) of this section sets forth the basic fee schedule for construction contracts. The schedule in paragraph (f) of this section sets forth the basic fee schedule for construction management contracts. A separate schedule in paragraph (h) of this section has been developed for determining the fee applicable to special equipment purchases and to reflect a differing level of fee consideration associated with the subcontractor effort under construction management contracts. (See 48 CFR 915.404-4-71-6(c) and 915.404-4-71-6(d)).

(b) The schedules cited in paragraph (a) of this section provide the maximum fee amount for a CPFF contract arrangement. If a fixed-price type contract is to be awarded, the fee amount set forth in the fee schedules shall be increased by an amount not to exceed 4 percent of the fee base.

(c) The fee schedule shown in paragraphs (d) and (f) of this section assumes a letter of credit financing arrangement. If a contract provides for or requires the contractor to make their own cost investment for contract performance (i.e., when there is no letter-of-credit financing), the fee amounts set forth in the fee schedules shall be increased by an amount equal

to 5 percent of the fee amount as determined from the schedules.

(d) The following schedule sets forth the base for construction contracts:

**CONSTRUCTION CONTRACTS SCHEDULE**

Fee base (dollars)	Fee (dollars)	Fee (per cent)	Incr. (per cent)
Up to \$1 Million .....	.....	.....	5.47
1,000,000 .....	54,700	5.47	3.88
3,000,000 .....	132,374	4.41	3.28
5,000,000 .....	198,014	3.96	2.87
10,000,000 .....	341,328	3.41	2.60
15,000,000 .....	471,514	3.14	2.20
25,000,000 .....	691,408	2.77	1.95
40,000,000 .....	984,600	2.46	1.73
60,000,000 .....	1,330,304	2.22	1.56
80,000,000 .....	1,643,188	2.05	1.41
100,000,000 .....	1,924,346	1.92	1.26
150,000,000 .....	2,552,302	1.70	1.09
200,000,000 .....	3,094,926	1.55	0.80
300,000,000 .....	3,897,922	1.30	0.68
400,000,000 .....	4,581,672	1.15	0.57
500,000,000 .....	5,148,364	1.03	.....
Over \$500 Million .....	5,148,364	.....	0.57

(e) When using the Construction Contracts Schedule for establishing maximum payable basic fees, the following adjustments shall be made to the Schedule fee amounts for complexity levels, excessive subcontracting, normal contractor services performed by the government or another contractor:

(1) The target fee amounts, set forth in the fee schedule, shall not be adjusted for a Class A project, which is maximum complexity. A Class B project requires a 10 percent reduction in amounts. Class C and D projects require a 20 percent and 30 percent reduction, respectively. The various classes are defined in 48 CFR 915.404-4-71-4(b).

(2) The target fee schedule provides for 45 percent of the contract work to be subcontracted for such things as electrical and other specialties. Excessive subcontracting results when such efforts exceed 45 percent of the total contract work. To establish appropriate fee reductions for excessive subcontracting, the negotiating official should first determine the amount of subcontracting as a percentage of the total contract work. Next, the negotiating official should determine a percentage by which the prime contractor's normal requirement (based on a requirement for doing work with its

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own forces) is reduced due to the excessive subcontracting and, finally, multiply the two percentages to determine a fee reduction factor.

(3) If acquisition or other services normally expected of the contractor (see 48 CFR 915.404-4-71-4(c)) are performed by the government, or another DOE prime or operating contractor, a fee reduction may also be required. The negotiating official should first determine what percentage of the total procurement or other required services is performed by others. Then the negotiating official should apply this percentage reduction to the normally assigned weightings for the management services or effort as discussed in 48 CFR 915.404-4-71-4(c) to arrive at the appropriate reduction factor.

(f) The following schedule sets forth the base for construction management contracts:

**CONSTRUCTION MANAGEMENT CONTRACTS SCHEDULE**

Fee base (dollars)	Fee (dollars)	Fee (per cent)	Incr. (per cent)
Up to \$1 Million .....	.....	.....	5.47
1,000,000 .....	54,700	5.47	3.88
3,000,000 .....	132,374	4.41	3.28
5,000,000 .....	198,014	3.96	2.87
10,000,000 .....	341,328	3.41	2.60
15,000,000 .....	471,514	3.14	2.20
25,000,000 .....	691,408	2.77	1.95
40,000,000 .....	984,600	2.46	1.73
60,000,000 .....	1,330,304	2.22	1.56
80,000,000 .....	1,643,188	2.05	1.41
100,000,000 .....	1,924,346	1.92	1.26
150,000,000 .....	2,552,302	1.70	1.09
200,000,000 .....	3,094,926	1.55	0.80
300,000,000 .....	3,897,922	1.30	0.68
400,000,000 .....	4,581,672	1.15	0.57
500,000,000 .....	5,148,364	1.03	.....
Over \$500 Million .....	5,148,364	.....	0.57

(g) When applying the basic Construction Management Contracts Schedule for determining maximum payable fees, no adjustments are necessary to such payable fees for contractor Force account labor used for work which should otherwise be subcontracted until such Force account work exceeds, in the aggregate, 20 percent of the base. Excessive use of Force account work results when such effort exceeds 20 percent of the fee base; and, when this occurs, appropriate fee reductions for such excessive Force account labor shall be computed as follows:

(1) Determine the percentage amount of Force account work to total contractor effort.

(2) Determine the percentage amount of subcontract work reduced due to the use of Force account work.

(3) Multiply the two percentages to determine the fee reduction factor. It is not expected that reductions in the Construction Management Contracts Schedule fee amounts will be made for complexity, reduced requirements and similar adjustments as made for construction contracts.

(h) The schedule of fees for consideration of special equipment purchases and for consideration of the subcontract program under a construction management contract is as follows:

**SPECIAL EQUIPMENT PURCHASES/SUBCONTRACT WORK SCHEDULE**

Fee base (dollars)	Fee (dollars)	Fee (per cent)	Incr. (per cent)
Up to \$1 Million .....	.....	.....	1.64
1,000,000 .....	16,410	1.64	1.09
2,000,000 .....	27,350	1.37	0.93
4,000,000 .....	45,948	1.15	0.77
6,000,000 .....	61,264	1.02	0.71
8,000,000 .....	75,486	0.94	0.66
10,000,000 .....	88,614	0.89	0.61
15,000,000 .....	119,246	0.79	0.53
25,000,000 .....	171,758	0.69	0.47
40,000,000 .....	242,868	0.61	0.43
60,000,000 .....	329,294	0.55	0.39
80,000,000 .....	406,968	0.51	0.37
100,000,000 .....	480,266	0.48	0.28
150,000,000 .....	619,204	0.41	0.23
200,000,000 .....	732,980	0.37	0.13
300,000,000 .....	867,542	0.29	.....
Over \$300 Million .....	867,542	.....	013

[63 FR 56851, Oct. 23, 1998, as amended at 64 FR 12227, Mar. 11, 1999]

**915.404-4-71-6 Fee base.**

(a) The fee base shown in the Construction Contracts Schedule and Construction Management Contracts Schedule represents that estimate of cost to which a percentage factor is applied to determine maximum fee allowances. The fee base is the estimated necessary allowable cost of the construction work or other services which are to be performed. It shall include the estimated cost for, but is not limited to, the following as they may apply in the case of a construction or construction management contract:

- (1) Site preparation and utilities.

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(2) Construction (labor-materials-supplies) of buildings and auxiliary facilities.

(3) Construction (labor-materials-supplies) to complete/construct temporary buildings.

(4) Design services to support the foregoing.

(5) General management and job planning cost.

(6) Labor supervision.

(7) Procurement and acquisition administration.

(8) Construction performed by subcontractors.

(9) Installation of government furnished or contractor acquired special equipment and other equipment.

(10) Equipment (other than special equipment) which is to become Government property (including a component of Government property).

(b) The fee base for the basic fee determination for a construction contract and construction management contract shall include all necessary and allowable costs cited in paragraph (a) of this section as appropriate to the type of contract; except, any home office G&A expense paid as a contract cost per cost principle guidance and procedures shall be excluded from the fee base. The fee base shall exclude:

(1) Cost of land.

(2) Cost of engineering (A&E work).

(3) Contingency estimate.

(4) Equipment rentals or use charges. (See 48 CFR 936.70.)

(5) Cost of government furnished equipment or materials.

(6) Special equipment as defined in 48 CFR 936.7201.

(c) A separate fee base shall be established for special equipment for use in applying the Special Equipment Purchases or Subcontract Work Schedule (see 48 CFR 915.404-4-71-5(h)). The fee base for determination of applicable fees on special equipment shall be based on the estimated purchase price of the equipment.

(d) The fee base under the Construction Management Contracts Schedule for a maximum basic fee determination for a construction management contract shall be comprised of only the costs of the construction manager's own efforts. However, it is recognized that in the case of construction man-

agement contracts, the actual construction work will be performed by subcontractors. In most cases the subcontract awards for the construction work will be made by the construction management contractor. Occasionally the contract may involve management of construction performed under a contract awarded by the Department or by one of the Department's operating contractors. In these cases, the actual cost of the subcontracted construction work shall be excluded from the fee base used to determine the maximum basic fee (under the Construction Management Contracts Schedule) applicable to a construction management contract. A separate fee base for additional allowances (using the Special Equipment Purchases or Subcontract Work Schedule) shall be established, which shall be comprised of those subcontract construction costs, special equipment purchases, and other items' costs that are contracted for or purchased by the construction manager.

### 915.404-4-72 Special considerations for cost-plus-award-fee contracts.

(a) When a contract is to be awarded on a cost-plus-award-fee basis several special considerations are appropriate. Fee objectives for management and operating contracts or other contracts as determined by the Procurement Executive, including those using the Construction, Construction Management, or Special Equipment Purchases/Subcontract Work schedules from 48 CFR 915.404-4-71-5, shall be developed pursuant to the procedures set forth in 48 CFR 970.15404-4-8. Fee objectives for other cost-plus-award-fee contracts shall be in accordance with 48 CFR 916.404-2 and be developed as follows:

(1) The base fee portion of the fee objective of an award fee contract may range from 0% up to the 50% level of the fee amount for a Cost-Plus-Fixed-Fee (CPFF) contract, arrived at by using the weighted guidelines or other techniques (such as those provided in 48 CFR 915.404-4-71 for construction and construction management contracts). However, the base amount should not normally exceed 50% of the otherwise applicable fixed fee. In the event this 50% limit is exceeded, appropriate documentation shall be entered into the

contract file. In no event shall the base fee exceed 60% of the fixed fee amount.

(2) The base fee plus the amount included in the award fee pool should normally not exceed the fixed fee (as subjectively determined or as developed from the fee schedule) by more than 50%. However, in the event the base fee is to be less than 50% of the fixed fee, the maximum potential award fee may be increased proportionately with the decreases in base fee amounts.

(3) The following maximum potential award fees shall apply in award fee contracts: (percent is stated as percent of fee schedule amounts).

Base fee percent	Award fee percent	Maximum total percentage
50 .....	100	150
40 .....	120	160
30 .....	140	170
20 .....	160	180
10 .....	180	190
0 .....	200	200

(b) Prior approval of the Procurement Executive, is required for total fee (base plus award fee pool) exceeding the guidelines in 48 CFR 915.404-72(a)(3).

[63 FR 56851, Oct. 23, 1998, as amended at 64 FR 12229, Mar. 11, 1999]

**915.408-70 Solicitation provision and contract clause.**

The contracting officer (after deleting “under the clause at 48 CFR 970.5203-3, Contractor’s Organization” from paragraph (a) if not a management and operating contract) shall insert the clause at 48 CFR 952.215-70, Key Personnel, in contracts under which performance is largely dependent on the expertise of specific key personnel.

[65 FR 81006, Dec. 22, 2000]

**Subpart 915.6—Unsolicited Proposals**

**915.602 Policy.**

(a) Present and future needs demand the involvement of all resources in exploring alternative energy sources and technologies. To achieve this objective, it is DOE policy to encourage external sources of unique and innovative meth-

ods, approaches, and ideas by stressing submission of unsolicited proposals for government support. In furtherance of this policy and to ensure the integrity of the acquisition process through application of reasonable controls, the DOE:

(1) Disseminates information on areas of broad technical concern whose solutions are considered relevant to the accomplishment of DOE’s assigned mission areas;

(2) Encourages potential proposers to consult with program personnel before expending resources in the development of written unsolicited proposals;

(3) Endeavors to distribute unsolicited proposals to all interested organizations within DOE;

(4) Processes unsolicited proposals in an expeditious manner and, where practicable, keeps proposers advised as discrete decisions are made;

(5) Assures that each proposal is evaluated in a fair and objective manner; and, (6) Assures that each proposal will be used only for its intended purpose and the information, subject to applicable laws and regulations, contained therein will not be divulged without prior permission of the proposer.

(b) Extensions of contract work resulting from unsolicited proposals shall be processed in accordance with the procedures at 48 CFR 943.170.

**915.603 General. (DOE coverage—paragraph (e)).**

(e) Unsolicited proposals for the performance of support services are, except as discussed in this paragraph, unacceptable as the performance of such services is unlikely to necessitate innovative and unique concepts. There may be rare instances in which an unsolicited proposal offers an innovative and unique approach to the accomplishment of a support service. If such a proposal offers a previously unknown or an alternative approach to generally recognized techniques for the accomplishment of a specific service(s) and such approach will provide significantly greater economy or enhanced quality, it may be considered for acceptance. Such acceptance shall, however, require approval of the acquisition of support services in accordance with applicable DOE Directives and be

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processed as a deviation to the prohibition in this paragraph.

### **915.605 Content of unsolicited proposals. (DOE coverage—paragraph (b)).**

(b)(5) Unsolicited proposals for non-nuclear energy demonstration activities not covered by existing formal competitive solicitations or program opportunity notices may include a request for federal assistance or participation, and shall be subject to the cost sharing provisions of 48 CFR 917.70.

### **915.606 Agency procedures. (DOE coverage—paragraph (b)).**

(b) Unless otherwise specified in a notice of program interest, all unsolicited proposals should be submitted to the Unsolicited Proposal Coordinator, U.S. Department of Energy, National Energy Technology Laboratory (PGH), Pittsburgh, PA 15236-0940. If the proposer has ascertained the cognizant program office through preliminary contacts with program staff, the proposal may be submitted directly to that office. In such instances, the proposer should separately send a copy of the proposal cover letter to the unsolicited proposal coordinator to assure that the proposal is logged in the Department's automated tracking system for unsolicited proposals.

[63 FR 56851, Oct. 23, 1998, as amended atq 67 FR 14871, Mar. 28, 2002]

### **915.607 Criteria for acceptance of an unsolicited proposal. (DOE coverage—paragraph (c)).**

(c) DOE's cost participation policy, at 48 CFR 917.70, shall be followed in determining the extent to which the DOE will participate in the cost for the proposed effort.

## **PART 916—TYPES OF CONTRACTS**

### **Subpart 916.2—Fixed-Price Contracts**

Sec.

916.203 Fixed-price contracts with economic price adjustments.

916.203-4 Contract clauses.

### **Subpart 916.3—Cost-Reimbursement Contracts**

916.306 Cost-plus-fixed-fee contracts.

916.307 Contract clauses.

### **Subpart 916.4—Incentive Contracts**

916.404-2 Cost-plus-award-fee contracts.

### **Subpart 916.5—Indefinite-Delivery Contracts**

916.504 Indefinite-quantity contracts.

916.505 Ordering.

### **Subpart 916.6—Time and Materials, Labor Hour, and Letter Contracts**

916.601 Time and Materials (DOE coverage (c)).

AUTHORITY: 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418(b); and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 11972, Mar. 28, 1984, unless otherwise noted.

### **Subpart 916.2—Fixed-Price Contracts**

#### **916.203 Fixed-price contracts with economic price adjustments.**

##### **916.203-4 Contract clauses.**

(d)(2) The Head of the Contracting Activity, or designee, for contracts estimated to be within the limits of their delegated authority, may approve the use of an economic price adjustment clause when appropriate in accordance with (FAR) 48 CFR 16.203-4.

[49 FR 11955, Mar. 28, 1984, as amended at 59 FR 9105, Feb. 25, 1994]

### **Subpart 916.3—Cost-Reimbursement Contracts**

#### **916.306 Cost-plus-fixed-fee contracts.**

(c)(2) The Head of the Contracting Activity, or designee, for contracts estimated to be within their delegated authority, may approve (sign) the determination and findings establishing the basis for application of the statutory price or fee limitations.

[49 FR 11955, Mar. 28, 1984, as amended at 59 FR 9105, Feb. 25, 1994]

##### **916.307 Contract clauses.**

(j) The contracting officer shall insert the clause at FAR 52.216-15, Predetermined Indirect Cost Rates, modified as specified in 952.216-15 in solicitations and contracts when a cost-reimbursement research and development

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contract with a State or local government is contemplated and predetermined indirect cost rates are to be used.

**Subpart 916.4—Incentive Contracts**

**916.404-2 Cost-plus-award-fee contracts.**

(d) *Fee Determination Plans.* Award fee arrangements limited to technical performance considerations are prohibited because they may increase cost disproportionately to any benefits gained. Instead, the award fee arrangement shall include both technical performance (including scheduling as appropriate) and business management considerations tailored to the needs of the particular situation. In addition, in a situation where cost estimating reliability and other factors are such that the negotiation of a separate predetermined incentive sharing arrangement applicable to cost performance is determined both feasible and advantageous, cost incentives may be added. The resulting contract would then be identified as a cost-plus-incentive-fee/award-fee combination type. The goals and evaluation criteria should be results-oriented. The award fee should be concentrated on the end product of the contract, that is, output, be it hardware, research and development, demonstration or services, together with business management considerations. However, input criteria such as equal employment opportunity, small business programs, functional management areas, such as safety, security, etc., should not be disregarded and may be appropriate criteria upon which to base some part of the award fee. Specific goals or objectives shall be established in relation to each performance evaluation criterion against which contractor performance is measured.

[49 FR 11955, Mar. 28, 1984, as amended at 59 FR 9105, Feb. 25, 1994]

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**Subpart 916.5—Indefinite-Delivery Contracts**

**916.504 Indefinite-quantity contracts. (DOE coverage—paragraph (c))**

(c) The contracting officer shall establish minimum ordering guarantees with each awardee for all indefinite-quantity, multiple award contracts to ensure that adequate consideration exists to contractually bind each awardee to participate in the ordering process throughout the term of the multiple award contract. Minimum ordering guarantees should be equal among all awardees, and shall be determined on a case-by-case basis for each acquisition commensurate with the size, scope and complexity of the contract requirements.

[62 FR 53757, Oct. 16, 1997]

**916.505 Ordering. (DOE coverage—paragraph (b))**

(b) (4) The Director, Office of Management Systems, Office of Procurement and Assistance Management, is designated as the DOE Ombudsman for task and delivery order contracts in accordance with 48 CFR 16.505(b)(4).

(5) The Heads of Contracting Activities shall designate a senior manager to serve as the Contracting Activity Ombudsman for task and delivery order contracts. If, for any reason, the Contracting Activity Ombudsman is unable to execute the duties of the position, the Head of the Contracting Activity shall designate an Acting Contracting Activity Ombudsman.

(6) The Contracting Activity Ombudsman shall:

(i) Be independent of the contracting officer who awarded and/or is administering the contract under which a complaint is submitted;

(ii) Not assume any duties and responsibilities pertaining to the evaluation or selection of an awardee for the issuance of an order under a multiple award, task or delivery order contract;

(iii) Review complaints from contractors awarded a task or delivery order contract;

(iv) Collect all facts from the cognizant organizations or individuals that are relevant to a complaint submitted to ensure that the complainant

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and all contractors were afforded a fair opportunity to be considered for the order issued in accordance with the procedures set forth in each awardees' contract;

(v) Maintain a written log to track each complaint submitted from receipt through disposition;

(vi) Ensure that no information is released which is determined to be proprietary or is designated as source selection information; and

(vii) Resolve complaints at the contracting activity for which they have cognizance.

(7) If, upon review of all relevant information, the Contracting Activity Ombudsman determines that corrective action should be taken, the Contracting Activity Ombudsman shall report the determination to the cognizant contracting officer. Issues which cannot be so resolved should be forwarded to the DOE Ombudsman.

[62 FR 53757, Oct. 16, 1997]

### Subpart 916.6—Time and Materials, Labor Hour, and Letter Contracts

#### 916.601 Time and Materials (DOE coverage (c)).

(c) Limitations. The Contracting Officer is not required to execute a separate Determination and Findings as required by FAR 16.601 3(c) if other file documentation adequately justifies contract actions.

[67 FR 14871, Mar. 28, 2002]

## PART 917—SPECIAL CONTRACTING METHODS

### Subpart 917.6—Management and Operating Contracts

Sec.

917.600 Scope of subpart.

917.601 Definitions.

917.602 Policy.

### Subpart 917.70—Cost Participation

917.7000 Scope of subpart.

917.7001 Policy.

### Subpart 917.72—Program Opportunity Notices for Commercial Demonstrations

917.7200 Scope of subpart.

917.7201 Policy.

917.7201-1 General.

### Subpart 917.73—Program Research and Development Announcements

917.7300 Scope of subpart.

917.7301 Policy.

917.7301-1 General.

### Subpart 917.74—Acquisition, Use, and Disposal of Real Estate

917.7401 General.

917.7402 Policy.

917.7403 Application.

AUTHORITY: 42 U.S.C. 7101 *et seq.*; 41 U.S.C. 418(b); and 50 U.S.C. 2401 *et seq.*

SOURCE: 49 FR 11974, Mar. 28, 1984, unless otherwise noted.

### Subpart 917.6—Management and Operating Contracts

#### 917.600 Scope of subpart.

(a) This subpart implements 48 CFR subpart 17.6, Management and Operating Contracts. Departmental policies, procedures, provisions and clauses to be used in the award and administration of management and operating contracts that either implement or supplement the Federal Acquisition Regulation and parts 901 through 952 of this chapter are contained in 48 CFR part 970.

(b) The requirements of this subpart apply to any Department of Energy management and operating contract, including performance-based management contracts as defined in 48 CFR 917.601. References in this subpart to "management and operating contracts" include performance-based management contracts.

[65 FR 81006, Dec. 22, 2000]

#### 917.601 Definitions.

*Performance-based contracting* has the meaning contained in 48 CFR 37.101.

*Performance-based management contract* means a management and operating contract that employs, to the maximum extent practicable, performance-based contracting concepts and methodologies through the application of results-oriented statements of work; clear objective performance standards and measurement tools; and incentives

## 917.602

to encourage superior contractor performance.

[62 FR 34861, June 27, 1997, as amended at 65 FR 81006, Dec. 22, 2000]

### 917.602 Policy.

(a) The use of a management and operating contract must be authorized by the Secretary, Deputy Secretary or Under Secretary.

(b) It is the policy of the Department of Energy to provide for full and open competition in the award of management and operating contracts, including performance-based management contracts.

(c) A management and operating contract may be awarded or extended at the completion of its term without providing for full and open competition only when such award or extension is justified under one of the statutory authorities identified in 48 CFR 6.302 and only when authorized by the Secretary. Documentation and processing requirements for justifications for the use of other than full and open competition shall be accomplished in accordance with internal agency procedures

[65 FR 81006, Dec. 22, 2000, as amended at 67 FR 14871, Mar. 28, 2002]

## Subpart 917.70—Cost Participation

SOURCE: 61 FR 41706, Aug. 9, 1996, unless otherwise noted.

### 917.7000 Scope of subpart.

(a) This subpart sets forth the DOE policy on cost participation by organizations performing research, development, and/or demonstration projects under DOE prime contracts. This subpart does not cover efforts and projects performed for DOE by other Federal agencies.

(b) Cost participation is a generic term denoting any situation where the Government does not fully reimburse the performer for all allowable costs necessary to accomplish the project or effort under the contract. The term encompasses cost sharing, cost matching, cost limitation (direct or indirect), participation in kind, and similar concepts.

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### 917.7001 Policy.

(a) When DOE supports performer research, development, and/or demonstration efforts, where the principal purpose is ultimate commercialization and utilization of the technologies by the private sector, and when there are reasonable expectations that the performer will receive present or future economic benefits beyond the instant contract as a result of performance of the effort, it is DOE policy to obtain cost participation. Full funding may be provided for early phases of development programs when the technological problems are still great.

(b) In making the determination to obtain cost participation, and evaluating present and future economic benefits to the performer, DOE will consider the technical feasibility, projected economic viability, societal and political acceptability of commercial application, as well as possible effects of other DOE-supported projects in competing technologies.

(c) The propriety, manner, and amount of cost participation must be decided on a case-by-case basis.

(d) Cost participation is required for demonstration projects unless exempted by the Under Secretary. Demonstration projects, pursuant to this subpart, include demonstrations of technological advances and field demonstrations of new methods and procedures, and demonstrations of prototype commercial applications for the exploration, development, production, transportation, conversion, and utilization of energy resources.

## Subpart 917.72—Program Opportunity Notices for Commercial Demonstrations

SOURCE: 61 FR 41706, Aug. 9, 1996, unless otherwise noted.

### 917.7200 Scope of subpart.

(a) This subpart discusses the policy for the use of a program opportunity notice solicitation approach to accelerate the demonstration of the technical feasibility and commercial application of all potentially beneficial non-nuclear energy sources and utilization technologies.

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(b) This subpart applies to demonstrations performed by individuals, educational institutions, commercial or industrial organizations, or other private entities, public entities, including State and local governments, but not other Federal agencies. For purposes of this subpart, commercial demonstration projects include demonstrations of technological advances, field demonstrations of new methods and procedures, and demonstration of prototype commercial applications for the exploration, development, production, transportation, conversion, and utilization of non-nuclear energy resources.

### 917.7201 Policy.

#### 917.7201-1 General.

(a) It is DOE's intent to encourage the submission of proposals to accelerate the demonstration of the technical, operational, economic, and commercial feasibility and environmental acceptability of particular energy technologies, systems, subsystems, and components. Program opportunity notices will be used to provide information concerning scientific and technological areas encompassed by DOE's programs. DOE shall, from time to time, issue program opportunity notices for proposals for demonstrations of various forms of non-nuclear energy and technology utilization.

(b) Each program opportunity notice shall as a minimum describe: the goal of the intended demonstration effort; the time schedule for award; evaluation criteria; program policy factors; the amount of cost detail required; and proposal submission information. Program policy factors are those factors which, while not appropriate indicators of a proposal's individual merit (i.e., technical excellence, proposer's ability, cost, etc.), are relevant and essential to the process of choosing which of the proposals received will, taken together, best achieve the program objectives. All such factors shall be predetermined and specified in the notice so as to notify proposers that factors which are essentially beyond their control will affect the selection process.

## Subpart 917.73—Program Research and Development Announcements

SOURCE: 61 FR 41707, Aug. 9, 1996, unless otherwise noted.

### 917.7300 Scope of subpart.

(a) This subpart discusses the policy for the use of a program research and development announcement (PRDA) solicitation approach to obtain and select proposals from the private sector for the conduct of research, development, and related activities in the energy field.

### 917.7301 Policy.

#### 917.7301-1 General.

(a) PRDAs shall be used to provide potential proposers with information concerning DOE's interest in entering into arrangements for research, development, and related projects in specified areas of interest. It is DOE's intent to solicit the submission of ideas which will serve as a basis for research, development, and related activities in the energy field. It is DOE's desire to encourage the involvement of small business concerns, small disadvantage business concerns, and women-owned small business concerns in research and development undertaken pursuant to PRDAs.

(b) The PRDA should not replace existing acquisition procedures where a requirement can be sufficiently defined for solicitation under standard advertised or negotiated acquisition procedures. Similarly, it should not inhibit or curtail the submission of unsolicited proposals. However, a proposal which is submitted as though it were unsolicited but is in fact germane to an existing PRDA shall be treated as though submitted in response to the announcement or returned without action to the proposer, at the proposer's option. Further, the PRDA is not to be used in a competitive situation where it is appropriate to negotiate a study contract to obtain analysis and recommendations to be incorporated in the subsequent request for proposals.

(c) The PRDA is to be used only where:

(1) Research and development is required in support of a specific project area within an energy program with the objective of advancing the general scientific and technological base, and this objective is best achieved through:

(i) A diversity of possible approaches, within the current state of the art, available for solving the problems;

(ii) The involvement of a broad spectrum of organizations in seeking out solutions to the problems posed;

(iii) The application of the unique qualifications or specialized capabilities of many individual proposers which will enable them to perform portions of the research project (without necessarily possessing the qualifications to perform the entire project) so that the overall support may be broken into segments which cannot be ascertained in advance; and,

(iv) The fostering of new and creative solutions.

(2) Consistent with paragraph (c)(1) of this section, it is anticipated that choices will have to be made among dissimilar concepts, ideas, or approaches; and

(3) It is determined that a broad range of organizations exist that would be capable of contributing towards the overall research and development goals identified in paragraph (c)(1) of this section.

(d) Each PRDA shall as a minimum describe: the area(s) of program interest; time schedule for award; proposal submittal information; evaluation criteria; and program policy factors. The PRDA should clearly emphasize to proposers that program policy factors are essentially beyond their control and will affect the selection process. The PRDA should also state that DOE reserves the right to select for award or support any, all, or none of the proposals received in response to an announcement.

#### **Subpart 917.74—Acquisition, Use, and Disposal of Real Estate**

SOURCE: 61 FR 41707, Aug. 9, 1996, unless otherwise noted.

##### **917.7401 General.**

Special circumstances and situations may arise under cost-type contracts

when, in the performance of the contract or subcontract, the performer shall be required, or otherwise find it necessary, to acquire real estate or interests therein by:

(a) Purchase, on DOE's behalf or in its own name, with title eventually vesting in the Government.

(b) Lease, and DOE assumes liability for, or otherwise will pay for the obligation under the lease.

(c) Acquisition of temporary interest through easement, license or permit, and DOE funds the cost of the temporary interest.

##### **917.7402 Policy.**

It is the policy of the Department of Energy that, when real estate acquisitions are made, the following policies and procedures shall be applied to such acquisitions:

(a) Real estate acquisitions shall be mission essential; effectively, economically, and efficiently managed and utilized; and disposed of promptly, when not needed;

(b) Acquisitions shall be justified, with documentation which describes the need for the acquisitions, general requirements, cost, acquisition method to be used, site investigation reports, site recommended for selection, and property appraisal reports; and

(c) Acquisition by lease, in addition to the requirements in paragraphs (a) and (b) of this section:

(1) Shall not exceed a one-year term if funded by one-year appropriations.

(2) May exceed a one-year term, when the lease is for special purpose space funded by no-year appropriations and approved by the Department.

(3) Shall contain an appropriate cancellation clause which limits the Government's obligation to no more than the amount of rent to the earliest cancellation date plus a reasonable cancellation payment.

(4) Shall be consistent with Government laws and regulations applicable to real estate management.

##### **917.7403 Application.**

The clause at 48 CFR 952.217-70 shall be included in contracts or modifications where contractor acquisitions are expected to be made.