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**COMMERCE ACQUISITION MANUAL
1316.1**

DEPARTMENT OF COMMERCE
SELECTING CONTRACT TYPES

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SELECTING CONTRACT TYPES

SECTION 1 – OVERVIEW

1.1 Background

There is a wide selection of contract types available in order to provide needed flexibility in acquiring supplies and services. Contract types vary according to the degree and type of responsibilities assumed by the contractor for the costs of performance and the amount and nature of the profit incentive offered for achieving or exceeding specified standards or goals. Government contracts should be structured to minimize risk and maximize value for the taxpayer. Generally, fixed-price contracts are best suited for achieving this goal because they provide the contractor with the greatest incentive for efficient and economical performance.

Contract types are grouped into two broad categories: fixed-price and cost-reimbursement. The spectrum of cost-type contracts include various incentive contracts in which the contractor's responsibility for performance, costs, and profit or fee incentives are tailored to the uncertainties involved in contract performance. In circumstances where there is considerable uncertainty regarding the requirement, other contract types such as cost-reimbursement, time-and-materials or labor-hour contracts may provide a more effective allocation of risk between the Government and contractor, with proper management and oversight.

The Office of Management and Budget (OMB) issued a memorandum entitled *Increasing Competition and Structuring Contracts for the Best Results* dated October 27, 2009, which provides guidelines for selecting the most appropriate contract type and maximizing competition. This memorandum also cautioned against the improper use of high-risk contract authorities such as: noncompetitive, cost-reimbursement, time-and-materials and labor-hour contracts.

1.2 Purpose

This Commerce Acquisition Manual (CAM) Chapter provides policy and guidance for effective use and management of contracts using high-risk contracting authorities.

1.3 Applicability

The requirements of this chapter are applicable to all acquisitions within the Department of Commerce (DOC).

1.4 Policy

It is the policy of DOC to take appropriate actions to maximize competition, minimize the use of high-risk contracting authorities, mitigate risk when utilizing high-risk contracts, and employ sound practices to ensure the effective use, management, and oversight of all contracts.

1.5 High-Risk Contracting Authorities

The contracting authorities listed below are considered high-risk due to the potential of misuse or overspending when used inappropriately or without proper oversight and management:

- a. Noncompetitive Contracts. Noncompetitive contracts present a risk to the Government due to the position the Government faces when negotiating contracts without the benefit of a direct market mechanism to help establish pricing.

- b. Single Offer Contracts. Competitions that yield only one offer in response to a solicitation deprive the Government of the ability to consider alternative solutions in a reasoned and structured manner.
- c. Cost-reimbursement Contracts. Cost-reimbursement contracts are suitable for use only when uncertainties involved in contract performance do not permit cost to be estimated with sufficient accuracy to use any type of fixed-price contract. They provide limited direct incentive for contractors to control costs because they bind the contractor to making “best efforts”.
- d. Time-and-Materials Contracts. Time-and-materials contracts are a form of cost-reimbursement type contracts. Since time-and-materials contracts provide no positive profit incentive to the contractor for cost control or labor efficiency, this contract type 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 anticipate costs with any reasonable degree of confidence.
- e. Labor-Hour Contracts. Labor-hour contracts are a variation of a time-and materials contract differing only in that the materials are not supplied by the contractor. Labor-hour contracts provide no positive profit incentive to the contractor for cost control or labor efficiency and 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 anticipate costs with any reasonable degree of confidence.
- f. Incentive Contracts. Incentive contracts 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, improved delivery or technical performance, by relating the amount of profit or fee payable under the contract to the contractor’s performance.
- g. Indefinite-Delivery Contracts. Indefinite-delivery contracts for very broadly stated Professional and Management Support services where it is intended that individual task orders will provide more specific direction on the actual services to be provided exposes the government to greater performance risk.

1.6 Roles and Responsibilities

1.6.1 Senior Procurement Executive (SPE)

The Senior Procurement Executive has overall responsibility for:

- a. Developing and implementing policies and procedures for acquisitions throughout the Department of Commerce;
- b. Overseeing the use of high-risk contracting authorities through normal oversight reviews of procurement offices;
- c. Approving Justifications for Other than Full and Open Competition (JOFOC) for proposed noncompetitive acquisitions in excess of \$62.5 million; and
- d. Approving an exception to the one-year limitation for contracts awarded using unusual and compelling urgency authority.

1.6.2 Head of Contracting Activity (HCA)

The Head of Contracting Activity is responsible for approving Justifications for Other than Full and Open Competition for proposed noncompetitive acquisitions above \$12.5 million but not exceeding \$62.5 million.

1.6.3 Senior Bureau Procurement Official (BPO)

The Senior Bureau Procurement Official is responsible for:

- a. Ensuring guidance for effective use and management of contracts using high-risk authorities is effectively implemented and used;
- b. Delegating justification and approval determinations for cost-reimbursement contracts, time-and-material or labor-hour contracts, and incentive contracts to the Head of Contracting Office (HCO)¹;
- c. Approving justification and approval determinations for cost-reimbursement contracts, time-and-material or labor-hour contracts, and incentive contracts when:
 - The HCO is also the Contracting Officer of the acquisition; or
 - The acquisition meets the Acquisition Review Board threshold or is subject to the major investment oversight process.
- d. Ensuring proper oversight of HCO's justification and approval determinations are in accordance with Bureau-level policy;
- e. Serving as the Fee Determining Official on the Award-Fee Board; and
- f. Implementing mechanisms such as contract review or peer review boards to facilitate analysis in determining the most appropriate contract type.

1.6.4 Fee-Determining Official (FDO)

The Fee-Determining Official is responsible for reviewing the recommendations of the Award-Fee Board in determining the amount of award-fee to be earned by the contractor for each evaluation period.

1.6.5 Head of Contracting Office (HCO)

The Head of Contracting Office is responsible for:

- a. Approving justification and approval determinations for cost-reimbursement contracts, time-and-material or labor-hour contracts, and incentive contracts.

1.6.6 Office of Acquisition Management (OAM)

The Office of Acquisition Management is responsible for:

- a. Monitoring the Department's use and management of high-risk contracting authorities;

¹ OAM will monitor use of high-risk acquisition authorities. High percentages of high-risk acquisition authorities use may trigger an Acquisition Management Review by OAM and possible rescission of this delegation authority.

- b. Tracking and monitoring all department contracts and orders containing award-fee, award-term and incentive provisions; and
- c. Reviewing Government Accountability Office (GAO) or the Office of Inspector General (OIG) issued reports related to the Department's use of high-risk contracting authorities, and monitoring corrective actions; and
- d. Establishing goals for reducing use of high-risk acquisition authorities and monitoring performance against those goals.

1.6.7 Agency Competition Advocate

The Agency Competition Advocate is responsible for:

- a. Promoting full and open competition of commercial items;
- b. Challenging barriers to the acquisition of commercial items and full and open competition such as unnecessarily restrictive statements of work, unnecessarily detailed specifications, and unnecessarily burdensome contract clauses;
- c. Challenging requirements that are not stated in terms of functions to be performed, performance required or essential physical characteristics;
- d. Making recommendations to increase full and open competition;
- e. Approving Justifications for Other than Full and Open Competition for proposed noncompetitive acquisitions in excess of \$650,000 but not exceeding \$12.5 million; and
- f. Preparing the Department's annual competition report.

1.6.8 Operating Unit Competition Advocate

The Operating Unit Competition Advocate is responsible for:

- a. Promoting full and open competition of commercial items;
- b. Challenging requirements that are unnecessarily restrictive or present barriers to full and open competition;
- c. Challenging requirements that are not stated in terms of functions to be performed, performance required or essential physical characteristics;
- d. Making recommendations to increase full and open competition;
- e. Approving Justifications for Other than Full and Open Competition for proposed noncompetitive acquisitions up to \$650,000; and
- f. Preparing the Department's annual competition report.

1.6.9 Contracting Officer (CO)

The Contracting Officer is responsible for:

- a. Entering into, administering, and closing-out or terminating contracts;
- b. Promoting and providing for full and open competition;
- c. Determining what contract type is appropriate for an acquisition;
- d. Preparing justification and approval determinations or JOFOCs when high-risk contracting authorities are used;
- e. Ensuring the contractor's accounting system will permit timely development of all necessary cost data in the form required by the proposed contract type;
- f. Developing a Surveillance Plan in collaboration with the acquisition team;
- g. Ensuring all required reporting including the Federal Procurement Data System accurately reflects the contract type used;
- h. Designating a properly trained Contracting Officer Representative or Contracting Officer Technical Representative prior to award; and
- i. Taking appropriate actions to mitigate risk and ensure the effective use and management of high-risk contracting authorities.

1.6.10 Task and Delivery Order Ombudsman

The Task and Delivery Order Ombudsman is responsible for:

- a. Ensuring contractors are afforded a fair opportunity to be considered, consistent with the procedures in the contract.

END OF SECTION 1

SECTION 2 – CONTRACT TYPE DECISIONS

2.1 Contract Type Selection

The contract type should be commensurate with the level of risk, degree of uncertainty and best strategic incentive to stimulate outstanding performance and control costs. Selection of contract type should be unique to the circumstances of each individual requirement with the exception of sealed bidding. Contracts awarded using sealed bidding must be either firm-fixed-price, or fixed-price with economic adjustments.

A fixed-price contract type places maximum risk upon the contractor and imposes minimum risk and administrative burden on the Government. In a fixed-price arrangement, the contractor has full responsibility for all costs and resulting profit or loss and, therefore, has maximum incentive to control costs and perform effectively.

In contrast, cost-reimbursement contract types place minimum risk upon the contractor and impose increased risk and administrative burden on the Government. Under cost-reimbursement contracts, the contractor agrees to use its “best efforts” to achieve the specified requirement, within the estimated amount established in the contract. If the contract is not fully performed by the time the contractor expends the funds, the contractor has no obligation for further performance, unless the contract is modified to increase costs.

The level of uncertainty within a requirement has a direct correlation to the level of risk. Requirements that are complex and unique to the Government create the likelihood of changes in technical direction and performance uncertainties, normally placing greater risk assumptions on the Government. Therefore, greater uncertainties would likely result in cost-reimbursement type contracts as costs risk shifts from the contractor to the Government.

2.2 Considerations

In accordance with FAR Subpart 16.104, the contracting officer should consider the following factors in selecting contract type:

- a. Price competition – Effective price competition normally results in realistic pricing, and a fixed-price contract is usually 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.
- 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 basis for negotiating contract pricing arrangements. Uncertainties involved in performance and the possible impact upon costs should be identified and evaluated in order to negotiate a contract type that places a reasonable degree of cost responsibility upon the contractor.
- 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 make 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 transition to a fixed-price contract

should be considered.

- e. Combining contract types – If the entire contract cannot be firm-fixed price, the contracting officer shall consider whether or not a portion of the contract can be established on a firm-fixed-price basis.
- f. Urgency of the requirement – If urgency is a primary factor, the Government may choose to assume a greater proportion of risk or it may offer incentives tailored to performance outcomes to ensure timely contract performance.
- g. Period of performance or length of production run – In times of economic uncertainty, contracts extending over a relatively long period may require economic price adjustment or price redetermination clauses.
- h. Contractor's technical capability and financial responsibility – Contracting officers may conduct a Pre-award Survey to establish contractor's responsibility and financial and technical capability.
- i. Adequacy of the contractor's accounting system – Before agreeing on a contract type other than firm-fixed-price, the contracting officer shall ensure the contractor's accounting system will permit timely development of all necessary cost data in the form required by the proposed contract type.
- j. Concurrent contracts – If performance under the proposed contract involves concurrent operations under other contracts, the impact of those contracts, including their pricing arrangements, should be considered.
- k. Extent and nature of proposed subcontracting – If the contractor proposes extensive subcontracting, a contract type reflecting the actual risks to the prime contractor should be selected.
- l. Acquisition history – Contractor risk usually decreases as the requirement is repetitively acquired. In addition, product descriptions or descriptions of services to be performed can be defined more clearly.

2.2.1 Level of Uncertainty

The decision of selecting the most appropriate contract type is the principle method of allocating costs and performance risk between the Government and the contractor and requires careful consideration of the level of uncertainty regarding the requirement. The use of fixed-price contracts is preferred unless considerable uncertainty of the necessary resources to achieve the Government's objective and risks associated with adequately fulfilling the requirement cannot be managed by the contractor within economically reasonable parameters. The use of cost-reimbursement contracts allows the Government to absorb a greater portion of the risk and avoid costly contingencies that a contractor may be forced to offer on a fixed-price basis.

2.2.2 Hybrid Contracts

The use of a hybrid contract may offer an appropriate balance between the requirement, how fulfilling the requirement is priced and the level of risk the Government and contractor bear. In a hybrid contract, increments for which there is a basis for firm pricing can be awarded as firm-fixed-price while factors for which there remains considerable uncertainty can be acquired on a cost-reimbursement or time-and-material or labor-hour basis.

2.2.3 Use of Incentives to Motivate

Incentives enable the Government to reduce exposure to risk by tying payment of fees to contractor performance. Incentives should be considered to motivate effective cost control and encourage quality, timely performance, taking into consideration factors that are within the contractor's controls.

During the acquisition planning process, the acquisition team shall consider the type of incentives that will most likely motivate efficient and economical performance. The contracting officer should work in collaboration with the Program Manager and/or Contracting Officer Representative in developing incentive arrangements.

2.3 Analysis of Contract Type Decisions

In addition to appropriate Departmental review boards, Senior Bureau Procurement Officials shall utilize acquisition review processes and/or peer reviews to facilitate stronger analysis to determine the best contract type. The review process should include contracting personnel, as well as, Program Managers and other technical personnel. The reviews should produce constructive ideas and alternatives to test whether the basis cited to support the use of a high-risk contract type, such as complexity of the requirements, uncertain duration of the work, or lack of meaningful spend data exist and, if so, whether reasonable mitigation steps have been taken.

2.4 Transition to Lower Risk Contract Types

Over time, experience generally enables the Government to address uncertainties, making it possible to convert to more competitive and lower risk contract types that create a better incentive to provide the desired products or services within time and on budget. In addition, changing circumstances may make a lower risk contract type appropriate in later periods. FAR Subpart 16.103 cautions contracting officers to avoid protracted use of cost-reimbursement or time-and-materials and/or labor-hour contracts after experience provides a basis for firmer pricing.

When re-competing a requirement, if a decision is made that it is premature to transition to a lower risk contract type, contracting officers shall document and support their rationale not to transition. The documentation shall include a rationale explaining why it remains difficult to define the requirements with a reasonable degree of certainty; market research results identifying barriers to competition; and results of spend analysis that does not support firm-fixed pricing and/or competitive practices.

END OF SECTION 2

SECTION 3 – NONCOMPETITIVE AND SINGLE OFFER CONTRACTS

3.1 Overview

Obtaining full and open competition when acquiring goods and services increases the Government's buying power, as competition can drive down costs and potentially heighten performance, innovation and overall value. When an award is made noncompetitively or only one offer is received, the Government's risk of overspending or negotiating less desirable terms and conditions significantly increases. Therefore, to the maximum extent practicable, contracting officers shall promote and provide for full and open competition in awarding Government contracts.

3.2 Limitations

Contracting without providing for full and open competition or full and open competition after exclusion of sources is prohibited unless:

- a. Only one responsible source is available and no other supply or service will satisfy the requirement;
- b. The need is of such unusual and compelling urgency that the Government would be seriously injured if the supplies or services were not immediately acquired;
- c. Awarding to a specific source is necessary in order to maintain continuity of operations in the case of a national emergency or to achieve industrial mobilization; establish or maintain engineering, research or development capabilities; or acquire expert services;
- d. Precluded by the terms of an international agreement or treaty between the United States and a foreign government or international organization;
- e. Authorized or required by law or statute;
- f. National security would be compromised in disclosing the Government's requirements; or
- g. The agency head determines it is not in the public interest.

The lack of advance planning does not permit contracting without providing for full and open competition and this justification is not acceptable.

3.3 Documentation

The following documentation is required for awards to be made on a noncompetitive basis:

- a. Justification for Other than Full and Open Competition. A JOFOC fully explaining the rationale for making an award on a noncompetitive basis with supporting documentation is required in accordance with FAR Subpart 6.303 (for other than full and open competition), Subpart 8.405-6 (for orders under the Federal Supply Schedules) and Subpart 16.505(b) (5) (for orders placed under a multiple award contract without providing a fair opportunity to be considered). If a brand name specification is used, the justification must fully explain why a suitable substitute does not meet, or cannot be modified to meet, the needs of the requirement.

- b. Surveillance Plan. The contracting officer shall work with the acquisition team to develop a surveillance plan that describes how the Government will monitor, control, and mitigate risk of contract performance. The surveillance plan shall provide reasonable assurance that efficient methods and effective cost controls are utilized, and outline the roles and responsibilities of the Government personnel involved in surveillance and demonstrate the skills and capacity of the personnel to perform adequate contract award, management and oversight. The plan shall be signed by the Contracting Officer Representative (COR), Program Manager and Contracting Officer. Appendix B provides a suggested Surveillance Plan template.

3.4 Effective Use and Management

Noncompetitive and single offer contracts present a risk to the Government as they deprive the Government of the ability to consider alternative solutions in a reasoned and structured manner. The contracting officer shall take the following actions to mitigate risk when making awards on a noncompetitive basis or when a single offer is received:

- a. Ensure the Agency or Operation Unit Competition Advocate is actively involved in reviewing the requirement and recommendations provided by the Agency or Operation Unit Competition Advocate is implemented.
- b. Conduct market research, utilizing a variety of research tools, and clearly explain with supporting documentation why adequate competition is not attainable.
- c. Focus on requirements development and outreach to potential vendors to promote effective competition. Use of Requests for Information, pre-solicitation notices and conducting an Industry Day to elicit marketplace capabilities to aid in identifying potential solutions available commercially as well as potential barriers to competition.
- d. Limit the period of performance to the minimum period necessary to meet the requirement. The period of performance for actions awarded using unusual and compelling urgency shall not exceed the minimum period necessary for meeting the unusual and compelling urgency requirements, but no longer than one year or such period as specified by law, unless a longer period for performance is approved by the Senior Procurement Executive, in accordance with FAR 6.302-2.
- e. Ensure fair and reasonable pricing by obtaining the information and data needed, consistent with FAR Subpart 15.4.
- f. Regularly assess and report contractor's quality, timeliness, cost control, and concern for the customer in order to motivate quality contractor performance during the life of the contract.
- g. Engage the marketplace to determine how barriers to competition can be removed. Communicate with sources, including leading competitors and sources that expressed interest in the procurement (e.g., responded to a request for information, participated in an industry day, or contacted the OSDDBU) but ultimately did not submit offers to understand the basis for their decision not to participate and obtain recommendations that would encourage future competition.
- h. Conduct a spend analysis to evaluate the strength of competitive practices and identify opportunities for improvement for acquisitions in excess of \$150,000.

- i. Develop a strategy to migrate to more competitive contracting.

END OF SECTION 3

SECTION 4 – COST-REIMBURSEMENT CONTRACTS

4.1 Overview

Cost-reimbursement contracts require the Government to reimburse the contractor for costs that are reasonable, allocable and allowable. The Government assumes the greatest performance risk with cost-reimbursement contracts since the contractor is only required to put forth its “best effort” in the performance of the contract. For this reason, cost-reimbursement contracts shall only be used when circumstances do not allow the requirement to be sufficiently defined or uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy to benefit from the use of a fixed-price contract. The major types of cost – reimbursement contracts are:

- a. Cost-Sharing (FAR Subpart 16.303) – In a cost-sharing contract, the contractor is reimbursed for an agreed-upon portion of its allowable costs and agrees to absorb the rest of its cost. The contractor receives no fee in this arrangement; instead, it anticipates other benefits for performing the contract.
- b. Cost-Plus-Incentive-Fee (FAR Subpart 16.304) – A cost-plus-incentive-fee (CPIF) 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. Under a CPIF contract, the contractor has the opportunity to increase its fee (profit) for meeting Government cost targets.
- c. Cost-Plus-Award-Fee (FAR Subpart 16.305) – A cost-plus-award-fee (CPAF) contract is a cost-reimbursement contract that provides for a fee that consists of a base fee amount (which may be zero) that is negotiated prior to award, and an award fee amount, which is based on the Government’s subjective evaluation of contract performance. The award-fee is designed to motivate excellence in areas of cost, schedule, and technical performance.
- d. Cost-Plus-Fixed-Fee (FAR Subpart 16.306) – A cost-plus-fixed-fee (CPFF) contract is a cost-reimbursement contract that pays the contractor a negotiated fee that is fixed at the inception of the contract. Although the fixed-fee does not vary with actual cost, it 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, however, it provides the contractor minimal incentive to control costs. CPFF contracts can be one of two basic forms – completion form, which states a definitive target and specifies an end product, or a term form, which obligates the contractor to devote a specified level of effort for a stated time period.

4.2 Limitations

Limitations on the use of cost-reimbursement contracts include:

- a. Cost-reimbursement contracts may only be used when:
 - i. The contractor’s accounting system is adequate for determining costs related to the contract;
 - ii. Adequate Government resources are available to award and manage the contract type; and

- iii. An appropriate Government surveillance plan is in place that provides reasonable assurance efficient methods and effective cost controls are utilized.
- b. The use of cost-reimbursement contracts is prohibited for the acquisition of commercial items.
- c. Where a CPFF contract type is used, the fee shall not exceed the statutory limitations outlined in FAR 15.404-4(c)(4)(i).
- d. When using CPAF, fees shall directly link to costs, timeliness, and quality of the Contractor's performance results as opposed to effort; and both payment of award-fees for unsatisfactory contractor performance and the practice of "roll over", where a Contractor is given a second chance to earn fees in a subsequent performance period that were not earned initially, is prohibited.
- e. The use of a CPAF contract shall not be permitted if either a CPIF or CPFF contract type is feasible.
- f. The Government's determination of award-fee amount earned by the contractor is not subject to the "Disputes" clause.

4.3 Documentation

Contracting officers shall ensure the acquisition plan provides necessary rationale to support the decision to use cost-reimbursement contracts or in the absence of an acquisition plan, the contract file shall document at a minimum:

- a. Justification and Approval. A justification and approval determination documenting the rationale of why the use of other than a firm-fixed price contract is appropriate.
- b. Contractor Accounting System. A determination and the basis for that determination, that the contractor's accounting system is adequate for determining costs related to the contract.
- c. Transition Plan. A discussion of the actions planned to minimize the use of other than firm-fixed price contracts on future acquisitions for the same requirement.
- d. Surveillance Plan. A surveillance plan that describes how the Government will monitor, control and mitigate the impact of any adverse contract performance. The surveillance plan shall: provide reasonable assurance that efficient methods and effective cost controls are utilized; outline the roles and responsibilities of the Government personnel involved in surveillance; and demonstrate the skills and capacity of Government personnel to perform adequate contract award, management and oversight. The plan shall be signed by the COR, Program Manager and Contracting Officer.

4.4 Effective Use and Management

Risks associated with cost-reimbursement contracts are high because they are utilized in circumstances where requirements are difficult to define with sufficient specificity to measure objectively. In addition, the development, negotiation, and management of cost-reimbursement contracts demand more in-depth programmatic knowledge and experience, a higher level and broader range of skills and greater resources than required for competitively awarded fixed-price contracts. Contracting officers shall take the following actions to mitigate risk and ensure the effective use and management of cost-reimbursement contracts:

- a. Designate an appropriately certified COR, prior to award, and ensure the COR has the skills and capacity to perform adequate contract management and oversight, including invoice reviews.
- b. Ensure the acquisition team is well trained in the proper role and use of cost-reimbursement contracts (e.g., monitoring level of effort, fee payments, applying progress payments, etc.).
- c. Implement appropriate Government surveillance to provide reasonable assurance that efficient methods and effective cost controls are in place.
- d. When cost, schedule, or performance variances are identified, increase management attention to ensure variances are eliminated or otherwise addressed.
- e. Link payment to performance on cost-plus-award-fee contracts. This shall include: tying fees to cost, timeliness, and quality of the contractor's performance; following prescribed standards for differentiating between levels of performance and the corresponding percentage of available award fee that can be earned; and prohibiting both the payment of award fees for unsatisfactory contractor performance and the practice of "roll over".
- f. Update the contractor accounting system determination every two years throughout the life of the contract to ensure the contractor's accounting system remains adequate for determining costs related to the contract.
- g. Develop a strategy to migrate to a lower risk contract type.
- h. Specify contract invoicing instructions that clearly detail supporting documentation necessary to validate and approve submitted invoices.
- i. Ensure that all required reporting, including the Federal Procurement Data System, accurately reflects the contract type.

END OF SECTION 4

SECTION 5 – TIME-AND-MATERIALS AND LABOR-HOUR CONTRACTS

5.1 Overview

Time-and-materials and labor-hour contracts are a form of cost-reimbursement contracts, therefore, they shall be used only when it is impossible to accurately, or with any degree of confidence define the effort, time, or cost required to provide a product or service. Since time-and-materials and labor-hour contracts provide no incentive to the contractor to control costs or improve labor efficiency, increased government surveillance of the contractor's performance is required to ensure the contractor is employing effective, cost-efficient methods.

Time-and-materials contracts have two price components: fixed hourly rates for direct labor hours, which include overhead, general and administrative expenses, profit, and wages; and materials at cost (including material handling costs, if appropriate).

Labor-Hour contracts are a variant of time-and-materials contracts differing only in that the materials are not furnished by the contractor. Labor-hour contracts provide fixed hourly rates that include overhead, G&A, profit, and wages for direct labor hours worked. Labor-hour contract types shall be used only to acquire services.

5.2 Limitations

A time-and-materials or labor-hour contract may be used only if:

- a. A justification and approval stating that no other contract type is suitable is prepared by the contracting officer and approved by the BPO or delegated HCO.
- b. The contract includes a ceiling price that the contractor exceeds at its own risk.

5.3 Documentation

Contracting officers shall ensure the contract file contains documentation to support the decision to use time-and-material or labor-hour contracts. The contract file shall document at a minimum:

- a. Justification and Approval. A justification and approval that no other contract type is suitable. The justification and approval must demonstrate the need for a time-and-material and/or labor-hour contract and explain why it is not possible at the time of placing the contract or order to estimate accurately the extent or duration of work or anticipated costs with any reasonable degree of confidence; include a description of the market research conducted; and describe actions planned to maximize the use of firm-fixed-price or fixed-price with economic price adjustment contracts on future acquisitions for the same requirement.
 - i. When acquiring commercial items, the justification and approval must explain how the requirement has been structured to maximize the use of firm-fixed price or fixed-price with economic price adjustment contracts (e.g., by limiting the value or length of the time-and-material/labor-hour contract or order; establishing fixed prices for portions of the requirement) on future acquisitions for the same or similar requirements.
- b. Surveillance Plan. Surveillance plan outlining how the Government will monitor, control, and mitigate the impact of any adverse contract performance. The surveillance plan shall: provide reasonable assurance that efficient methods and effective cost controls

are utilized; outline the roles and responsibilities of the Government personnel involved in surveillance; and demonstrate the skills and capacity of Government personnel to perform adequate reviews before payment is made. The plan shall be signed by the COR, Program Manager and Contracting Officer.

- c. Contractor Accounting System. Determination and the basis for that determination, that the contractor's accounting system is adequate for determining costs related to the contract.
- d. Ceiling Price. Justification for changes to the established ceiling price shall be documented in the contract file.

5.4 Effective Use and Management

Time-and-materials and labor-hour contracts can increase the risk of overspending to the Government. Therefore the contracting officer shall take the following actions to mitigate risk and ensure effective use and management of time-and-materials and/or labor-hour contracts:

- a. Ensure the requirement is well defined with a clear vision of the desired end product with measurable milestones and deliverables.
- b. Designate an appropriately certified COR prior to award and ensure the COR has the skills and capacity to perform adequate invoice reviews.
- c. Ensure the acquisition team is well trained in the use of time-and-materials and/or labor-hour contracts (e.g. assessing pass through or indirect costs, understanding labor rates, etc.).
- d. Implement appropriate Government surveillance of contractor performance to give reasonable assurance that efficient methods and effective cost controls are used.
- e. Ensure that all required reporting, including the Federal Procurement Data System, accurately reflects the contract type as time-and-materials or labor-hour.
- f. Update the contractor accounting system determination every two years throughout the life of the contract to ensure the contractor's accounting system remains adequate for determining costs related to the contract.
- g. Develop a strategy to migrate to a lower risk contract type.
- h. Specify contract invoicing instructions that clearly detail supporting documentation necessary to validate and approve submitted invoices.

END OF SECTION 5

SECTION 6 – INDEFINITE-DELIVERY CONTRACTS

6.1 Overview

The use of an indefinite-delivery contract is suitable for commercial supplies or services when the need is recurring. 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.

A definite-quantity contract may be used when the quantity of supplies or services can be determined in advance for a definite period and it is anticipated that the supplies or services are regularly available, or will be available after a short lead time. Deliveries or performance at designated locations can also be determined in advance of ordering.

When the Government anticipates recurring requirements but cannot predetermine the quantity of supplies or services needed during the contract period, a requirements contract may be appropriate. Requirements contracts contain an estimated total quantity, a maximum limit of contractor's liability, and a limit to the government's ordering obligation. Funds are obligated by each order and NOT by the contract.

In instances when it is not possible to determine the precise quantities of the requirement and the Government does not wish to commit itself for more than a minimum quantity, an indefinite-quantity contract may be suitable. With the use of indefinite-quantity contracts, the contractor provides (within stated limits), specified supplies or services, during a specified contract period. The contract contains the minimum Government obligation and a stated maximum order quantity.

6.2 Limitations

Limitations on the use of indefinite-delivery contracts are:

- a. A solicitation proposing an indefinite-delivery type contract for advisory and assistance services in excess of three years and \$12.5 million (including all options) may not be issued unless a justification and approval determination is executed that provides a rationale which justifies that the advisory and assistance services required are so unique or highly specialized that it is not practicable to make multiple awards; or the services are necessarily incident to, and not a significant component of the contract.
- b. A solicitation and contract for an indefinite-quantity contract must:
 - i. Specify provisions for the Government's minimum quantity obligation, which the contractor must furnish up to a stated maximum;
 - ii. Specify the period of the contract, including the number of options, and the period for which the Government may extend the contract under each option;
 - iii. Specify the total minimum and maximum quantities of supplies or services the Government will acquire under the contract;
 - iv. Include a statement of work, specifications, or other description, that reasonably describes the general scope, nature, complexity, and purpose of the supplies or services being acquired;

- v. State the ordering procedures, (including activities authorized for issuing orders and if applicable, authorization for placing oral orders), and the selection criteria that the Government intends to use to provide fair opportunity to awardees; and
 - vi. To the maximum extent practicable, indefinite-quantity contracts (except for advisory and assistance services) must give preference to making multiple awards under a single solicitation for the same or similar supplies or services to two or more sources.
- c. Requirements contracts require the Government to provide a reasonable estimated total quantity in the solicitation and resulting contract. Exceeding the stated estimated quantity in a requirements-type contract by more than 20% is considered **outside the scope** of the contract. Any additional quantities in excess of 20% of the order must be acquired under a new procurement.
- d. No requirements contracts in an amount estimated to exceed \$103 million (including options) may be awarded to a single source unless a determination is executed in accordance with FAR Subpart 16.504(c)(1)(ii)(D).

6.3 Documentation

Contracting officers shall ensure the contract file contains documentation to support the decision to use the contract type selected. When using an indefinite-delivery contract, the contract file shall include the following:

- a. Justification and Approval. A justification and approval determination approved by the Senior Bureau Procurement Official or delegated Head of Contracting Office with a copy provided to the Senior Procurement Executive shall be prepared if:
 - i. The solicitation for advisory and assistance services exceeds three years and \$12.5 million (including all options).
 - ii. A task or delivery order contract is awarded in an amount estimated to exceed \$103 million (including all options) to a single source, unless a determination is executed in accordance with FAR 16.504(c)(1)(ii)(D).
 - iii. The acquisition provides only for time-and-materials and/or labor-hour pricing and the base period and any option periods exceed three (3) years.
 - iv. The task order awarded under an indefinite-delivery contract for services closely supports the performance of inherently governmental functions. The justification and approval must provide an assessment of current and potential technical, cost, schedule and performance risks, the level of those risks and a mitigation plan.
- b. Mitigation Plan. The contracting officer shall work with the acquisition team to develop a mitigation plan that describes how the Government will monitor, control, and mitigate risk of contract performance, as well as steps to be taken when an identified risk occurs. The mitigation plan shall outline the roles and responsibilities of the Government personnel involved in oversight and demonstrate the skills and capacity of the personnel to perform adequate contract award, management and oversight. The mitigation plan shall be signed by the COR, Program Manager and Contracting Officer.

- c. Performance Metrics. When placing a task order under an indefinite-delivery contract for Professional and Management Support services, the actual task order shall identify specific performance metrics and outcomes that the oversight personnel will use to measure acceptability of contractor performance.

6.4 Effective Use and Management

The contracting officer shall take the following actions to mitigate risk and ensure effective use and management of indefinite delivery contracts:

- a. Ensure at least one properly trained and certified Assistant or Alternate Contracting Officer Representative (ACOR) or Point of Contact/Order Contact (P/OC) is designated for individual task orders under IDIQ contracts where someone other than the COR will have responsibility for monitoring performance on individual tasks.
- b. Provide guidance to inform the oversight personnel of the need for greater scrutiny and an enhanced degree of management oversight and surveillance when contracting for services that closely support inherently governmental functions – this should include an assessment of risks, mitigation plans for those risks, the actual occurrence of identified risks and steps to be taken when they are identified.
- c. Ensure consistent maximization of competition at the task and delivery order level.
- d. Require greater competitive rigor through the disclosure of significant factors and subfactors and their relative importance when conducting the “fair opportunity” process for orders over \$5 million.
- e. Use Federal Procurement Data System reports to evaluate the extent to which task and delivery order competition is being achieved.

6.5 Task and Delivery Order Ombudsman

In accordance with FAR Subpart 16.5, which requires agencies to designate an official who is independent of the contracting officer to serve as task order and delivery order ombudsman, the authority to serve as task and delivery order Ombudsman for the Department of Commerce has been delegated to the Director, Risk Management. Task and delivery order ombudsman issues shall be directed to:

Director, Risk Management Division
Office of Acquisition Management
1401 Constitution Avenue, NW – Room 1854
Washington, DC 20230
202-482-3780

END OF SECTION 6

SECTION 7 – INCENTIVE CONTRACTS

7.1 Overview

In accordance with Federal Acquisition Regulation Subpart 16.4, incentive contracts should be used to achieve specific performance objectives established prior to contract award, such as delivering products and services on-time, within costs goals, and with promised performance outcomes. Incentive contracts include cost, performance and delivery incentives, which can be combined into a multiple incentive-fee contract that combines objectively and subjectively measured criteria to reward contractor performance while maximizing the Government's ability to use performance metrics that are predetermined, measurable, and targeted to desired contract outcomes. Awards provided in incentive contracts must be tied to demonstrated results, as opposed to effort, in meeting or exceeding specified performance standards.

An incentive-fee contract should be used when cost and performance targets are objective and can be predetermined, allowing a formula to adjust the negotiated fee based on variations relative to the targets. In contrast, award-fee contracts are a type of incentive contract to be used when it is not feasible to devise predetermined objective incentive targets based on cost, technical performance, or schedule, with the focus instead being on subjective criteria.

Incentive contracting is encouraged to the extent that it provides benefit and enhances contractor performance. As part of acquisition planning, the program office and contracting officer should consider whether incentive contracting is appropriate and, if so, determine which incentive method is most appropriate for the acquisition. The program office and contracting officer must work together to establish the goals/targets subject to the incentive; the criteria for attaining the goals/targets, and the process for evaluating and rewarding the contractor.

7.2 Limitations

Limitations on the use of incentive contracts are:

- a. Incentive- and award-fees must be directly tied to demonstrated acquisition outcomes such as cost, schedule, and performance results, as opposed to effort, in meeting or exceeding specific performance standards.
- b. The contractor's accounting system must be adequate for determining cost data applicable to the incentive contract type.
- c. The practice of providing a contractor with additional opportunities to obtain unearned fees that were initially unearned (also known as roll-over fees), is prohibited.
- d. Incentive fees shall not be paid if the contractor's performance has been determined to be below satisfactory or does not meet the requirements of the contract.
- e. Incentive contracts may not provide for other incentives without also providing a cost incentive (or constraint).

7.3 Documentation

Contracting officers shall ensure the contract file contains documentation to support the decision to use an incentive contract. The contract file shall document at a minimum:

- a. Justification and Approval. A justification and approval shall be completed for all incentive- and award-fee contracts justifying that the use of the contract type is in the

best interest of the Government based on findings from the risk and cost benefit analysis conducted during acquisition planning, and ensuring all suitability items in FAR Subpart 16.401(e) (1) are addressed for award-fee contracts. The justification and approval shall be approved by the Senior Bureau Procurement Official or delegated Head of Contracting Office with a copy provided to the Senior Procurement Executive.

- b. Acquisition Plan. All acquisitions with award term, award fee, or incentive arrangements require development of a formal acquisition plan that must be approved by the appropriate Bureau or Departmental review board. The acquisition plan shall document analysis of market research data, and sufficiently state desired outcomes, performance requirements, milestones, risks and cost benefits for the contract type.
- c. Surveillance Plan. Surveillance plan outlining how the Government will monitor, control, and mitigate the impact of any adverse contract performance. The surveillance plan shall: provide reasonable assurance that efficient methods and effective cost controls are utilized; outline the roles and responsibilities of the Government personnel involved in surveillance; and demonstrate the skills and capacity of Government personnel to perform adequate reviews before payment is made. The plan shall be signed by the COR, Program Manager and Contracting Officer.
- d. Award-Fee Plan. All contracts and orders providing for award-fees shall be supported by an Award-Fee Plan that establishes the procedures for evaluating award-fee and an Award-Fee Board for conducting the award-fee evaluation. The Award-Fee Board shall at a minimum include the designated Program Manager, COR and Contracting Officer and chaired by a senior-level Program Official, preferably above the level of the Program Manager. The Award-Fee Plan shall be approved by the Bureau Procurement Official, serving as the Fee Determining Official, and a copy provided to the Senior Procurement Executive. The Award-Fee Plan shall:
 - i. Identify the award-fee evaluation criteria and how they are linked to acquisition objectives;
 - ii. Describe how the contractor's performance will be measured against the award-fee evaluation criteria;
 - iii. Document the adjectival rating and associated description as well as the award-fee pool earned percentages;
 - iv. Prohibit earning any award-fee when a contractor's overall cost, schedule, and technical performance is below satisfactory;
 - v. Provide for evaluation period(s) to be conducted at stated intervals during the contract period of performance so that the contractor will periodically be informed of the quality of its performance and the areas in which improvement is expected (e.g. six months, nine months, twelve months, or at specific milestones); and
 - vi. Define the total award-fee pool amount and how this amount is allocated across each evaluation period.

7.4 Effective Use and Management

The contracting officer shall take the following actions to mitigate risk and ensure effective use and management of incentive contracts:

- f. Directly link incentive fees to acquisition outcomes (i.e. cost, schedule, and performance results); and ensure fees are not earned if the contractor's performance is judged to be below satisfactory or does not meet the basic requirements of the contract.
- g. Designate an appropriately certified COR prior to award and ensure the COR has the skills and capacity to perform responsibilities.
- h. Ensure the acquisition team is prepared to effectively monitor and document costs, schedule, and performance as determined by established baselines and has sufficient resources to take corrective action if significant variances are identified.
- i. Implement appropriate Government surveillance of contractor performance to give reasonable assurance that efficient methods and effective cost controls are used.
- j. Develop a strategy to migrate to a lower risk contract type.

7.5 Tracking and Oversight

The Office of Acquisition Management will maintain a database of all contracts and orders containing award fee, award term and incentive provisions. This information will be utilized to respond to inquiries and to monitor the use and execution of such provisions. OAM will periodically review Federal Procurement Data System records to validate that required documents have been submitted.

Contracting officers shall submit the following documents to OAM:

- a. Copy of all contracts or orders awarded under FAR Parts 8, 12, 13, 14, 15, 19, and 36 containing any award-fee, award-term, or incentive provisions;
- b. Copy of all management plans governing the operation of the award fee, award term, or incentive process;
- c. Copy of all fee/term determination decisions (with supporting documentation) and implementing contract modification; and
- d. Copy of all Government Accountability Office or Office of Inspector General reports reflecting audit or investigation of any award containing award fee, award term or incentive provisions and the Operating Unit's response to such reports the Bureau's response.

The documents shall be submitted to the Senior Procurement Executive electronically or in hard copy to:

U. S. Department of Commerce
Office of Acquisition Management
Senior Procurement Executive
1401 Constitution Ave., NW
HCHB Room 6422
Washington, DC 20230

END OF SECTION 7
END OF CAM 1316.70

APPENDICES

APPENDIX A - DEFINITIONS

Acquisition - The acquiring by contract, interagency and other special agreement, blanket purchase agreement, or task/delivery order with appropriated funds of supplies or services (including construction) by and for the use of the Federal Government through purchase or lease, whether the supplies or services are already in existence or must be created, developed, demonstrated, and evaluated.

Acquisition Plan - A detailed strategy outlining the recommended method of procurement, including documentation of the decisions made related to such matters as recommended period of performance, socio-economic program set-asides, market research findings, and whether the requirement constitutes bundling.

Acquisition Planning - The process by which the efforts of all personnel responsible for an acquisition are coordinated and integrated through a comprehensive plan for fulfilling the agency's need in a timely manner and at a reasonable cost. It includes developing the overall strategy for managing the acquisition.

Acquisition Strategy – Identifying the proposed contract type, terms and conditions, and acquisition planning schedules; the feasibility of the requirement, including performance requirements, statements of work, and data requirements; the suitability of the proposal instructions and evaluation criteria, including the approach for assessing past performance information; and related program documents.

Acquisition Team -The team of individuals formed to prepare the individual elements of an acquisition plan and execute the acquisition. The team should be comprised of representatives from Acquisitions, Budget, Legal, technical offices, small business and any other areas as necessary.

Award Fee – An amount of money added to a contract, which a contractor may earn in whole or in part by meeting or exceeding the criteria stated in the award-fee plan. These criteria typically relate to subjective areas within quality, technical, costs efficiency, program management, and other areas that may have unquantifiable behaviors.

Award Fee Plan – A document that identifies the award-fee strategy, detailing procedures for implementing the award-fee structure and the method the Contractor's performance will be evaluated during each evaluation period.

Award-Fee Board - The team of individuals identified in the award-fee plan who have been designated to assist the Fee-Determining Official in making award-fee determinations and evaluates the Contractor's overall performance during the evaluation period in accordance with the award-fee plan.

Commercial Item - Any item, other than real property, that is of a type customarily used by the general public or by non-governmental entities for purposes other than governmental purposes and has either been offered or actually sold, leased, or licensed to the general public (see FAR Subpart 12.1).

Delivery Order - An order for supplies placed against an established contract or with Government sources.

Direct Materials – Those materials that enter directly into the end product, or are used or consumed directly in connection with the furnishing of the end product or service.

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

High-Risk Acquisition Authorities - Includes the use of other than full and open competition, Cost-Reimbursement, Labor Hour and Time-and-Material type contracts.

Hourly Rate – The rate(s) prescribed in the contract for payment for labor that meets the labor category qualifications of a labor category specified in the contract that are – 1) performed by the contractor; 2) performed by the subcontractor; or 3) transferred between divisions, subsidiaries, or affiliates of the contractor under a common control.

Market Research – Collecting and analyzing information about capabilities within the market to determine the breadth and scope of concerns available to satisfy Federal agency needs.

Noncompetitive Contract – A contract for the purchase of supplies or services that is entered into or proposed to be entered into after soliciting and negotiating with only one source.

Operating Unit - The following entities as defined in Department Organizational Order (DOO) 1-1 are considered operating units: Bureau of Economic Analysis, Bureau of Industry and Security, Bureau of Census, Economic Development Administration, Economics and Statistics Administration, International Trade Administration, Minority Business Development Agency, National Institute of Standards & Technology, National Oceanic & Atmospheric Administration, National Telecommunications & Information Administration, National Information Service, Patent and Trademark Office and the Office of the Secretary.

Program Office – The entity responsible for defining acquisition requirements and providing funding allocations for the acquisitions.

Rollover of Unearned Award Fee – The process of transferring unearned award-fee, which the contractor had an opportunity to earn, from one evaluation period to a subsequent evaluation period, thus allowing the contractor an additional opportunity to earn that previously unearned award fee.

Service Contract - A contract that directly engages the time and effort of a contractor whose primary purpose is to perform an identifiable task rather than to furnish an end item of supply. Some areas in which service contracts are found include maintenance, janitorial, advisory, communications, architect-engineering, transportation, and research and development.

Task Order - An order for services placed against an established contract or with Government sources.

APPENDIX B – Surveillance Plan Template

The Surveillance Plan shall at a minimum include the following:

Introduction

[Provide background information regarding the purpose of the requirement, general description total estimated cost, etc.]

Contract Type and Requirements

[Provide information on the type of contract and tasks to be performed under the contract.]

Surveillance Plan Objectives

[Provide information of the objectives of the surveillance plan.]

Roles and Responsibilities

[Outline roles and responsibilities of all members of the surveillance team and any limitations of authority.]

Team Members and Qualifications

[Identify team members and provide information regarding their qualifications. The section should demonstrate that personnel involved in the surveillance have demonstrated skills and capacity to perform effective management and oversight.]

Performance Standards

[Provide description of performance standards that will be used to evaluate contractor performance.]

Deliverables and Schedule

[Provide information regarding contract deliverables and delivery schedule.]

Performance Monitoring

[Provide description of how contractor performance will be monitored against the identified performance standards. The monitoring plan should provide reasonable assurance that efficient methods and effective cost controls are utilized.]

Risk Mitigation

[Provide plan for mitigating cost, schedule and performance risk.]