

(i) The amount of the offeror's indirect costs and profit/fee applicable to the work to be performed by the subcontractor(s); and

(ii) A description of the added value provided by the offeror as related to the work to be performed by the subcontractor(s).

(3) If any subcontractor proposed under the contract, task order, or delivery order intends to subcontract to a lower-tier subcontractor more than 70 percent of the total cost of work to be performed under its subcontract, the offeror shall identify in its proposal—

(i) The amount of the subcontractor's indirect costs and profit/fee applicable to the work to be performed by the lower-tier subcontractor(s); and

(ii) A description of the added value provided by the subcontractor as related to the work to be performed by the lower-tier subcontractor(s).

(End of provision)

#### 52.215–23 Limitations on Pass-Through Charges.

As prescribed in 15.408(n)(2), use the following clause:

#### LIMITATIONS ON PASS-THROUGH CHARGES (OCT 2009)

(a) *Definitions.* As used in this clause—

*Added value* means that the Contractor performs subcontract management functions that the Contracting Officer determines are a benefit to the Government (e.g., processing orders of parts or services, maintaining inventory, reducing delivery lead times, managing multiple sources for contract requirements, coordinating deliveries, performing quality assurance functions).

*Excessive pass-through charge*, with respect to a Contractor or subcontractor that adds no or negligible value to a contract or subcontract, means a charge to the Government by the Contractor or subcontractor that is for indirect costs or profit/fee on work performed by a subcontractor (other than charges for the costs of managing subcontracts and any applicable indirect costs and associated profit/fee based on such costs).

*No or negligible value* means the Contractor or subcontractor cannot demonstrate to the Contracting Officer that its effort added value to the contract or subcontract in accomplishing the work performed under the contract (including task or delivery orders).

*Subcontract* means any contract, as defined in FAR 2.101, entered into by a subcontractor to furnish supplies or services for performance of the contract or a subcontract. It includes but is not limited to purchase orders, and changes and modifications to purchase orders.

*Subcontractor*, as defined in FAR 44.101, means any supplier, distributor, vendor, or firm that furnishes supplies or services to or for a prime Contractor or another subcontractor.

(b) *General.* The Government will not pay excessive pass-through charges. The Contracting Officer shall determine if excessive pass-through charges exist.

(c) *Reporting.* Required reporting of performance of work by the Contractor or a subcontractor. The Contractor shall notify the Contracting Officer in writing if—

(1) The Contractor changes the amount of subcontract effort after award such that it exceeds 70 percent of the total cost of work to be performed under the contract, task order, or delivery order. The notification shall identify the revised cost of the subcontract effort and shall include verification that the Contractor will provide added value; or

(2) Any subcontractor changes the amount of lower-tier subcontractor effort after award such that it exceeds 70 percent of the total cost of the work to be performed under its subcontract. The notification shall identify the revised cost of the subcontract effort and shall include verification that the subcontractor will provide added value as related to the work to be performed by the lower-tier subcontractor(s).

(d) *Recovery of excessive pass-through charges.* If the Contracting Officer determines that excessive pass-through charges exist;

(1) For other than fixed-price contracts, the excessive pass-through charges are unallowable in accordance with the provisions in FAR subpart 31.2; and

(2) For applicable DoD fixed-price contracts, as identified in 15.408(n)(2)(i)(B), the Government shall be entitled to a price reduction for the amount of excessive pass-through charges included in the contract price.

(e) *Access to records.* (1) The Contracting Officer, or authorized representative, shall have the right to examine and audit all the Contractor's records (as defined at FAR 52.215–2(a)) necessary to determine whether the Contractor proposed, billed, or claimed excessive pass-through charges.

(2) For those subcontracts to which paragraph (f) of this clause applies, the Contracting Officer, or authorized representative, shall have the right to examine and audit all the subcontractor's records (as defined at FAR 52.215–2(a)) necessary to determine whether the subcontractor proposed, billed, or claimed excessive pass-through charges.

(f) *Flowdown.* The Contractor shall insert the substance of this clause, including this paragraph (f), in all cost-reimbursement subcontracts under this contract that exceed the simplified acquisition threshold, except if the contract is with DoD, then insert in all

cost-reimbursement subcontracts and fixed-price subcontracts, except those identified in 15.408(n)(2)(i)(B)(2), that exceed the threshold for obtaining cost or pricing data in accordance with FAR 15.403–4.

(End of clause)

*Alternate I* (OCT 2009). As prescribed in 15.408(n)(2)(iii), substitute the following paragraph (b) for paragraph (b) of the basic clause:

(b) *General.* The Government will not pay excessive pass-through charges. The Contracting Officer has determined that there will be no excessive pass-through charges, provided the Contractor performs the disclosed value-added functions.

[FR Doc. E9–24586 Filed 10–13–09; 8:45 am]

BILLING CODE 6820–EP–S

## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Part 16

[FAC 2005–37; FAR Case 2008–008; Item VI; Docket 2009–0036, Sequence 1]

RIN 9000–AL42

#### Federal Acquisition Regulation; FAR Case 2008–008, Award Fee Language Revision

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are issuing an interim rule amending the Federal Acquisition Regulation (FAR) to implement section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007, section 867 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009, and the Office of Federal Procurement Policy guidance memorandum dated December 4, 2007, entitled *Appropriate Use of Incentive Contracts*.

**DATES:** *Effective Date:* October 14, 2009.

*Comment Date:* Interested parties should submit written comments to the Regulatory Secretariat on or before December 14, 2009 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAC 2005–37, FAR case 2008–008, by any of the following methods:

- Regulations.gov: <http://www.regulations.gov>.

Submit comments via the Federal eRulemaking portal by inputting “FAR Case 2008–008” into the field “Keyword”. Select the link that corresponds with FAR Case 2008–008. Follow the instructions provided to submit your comment. Please include your name, company name (if any), and “FAR Case 2008–008” on your attached document.

- Fax: 202–501–4067.

- Mail: General Services

Administration, Regulatory Secretariat (VPR), 1800 F Street, NW., Room 4041, ATTN: Hada Flowers, Washington, DC 20405.

*Instructions:* Please submit comments only and cite FAC 2005–37, FAR case 2008–008, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

**FOR FURTHER INFORMATION CONTACT:** Mr. Edward N. Chambers, Procurement Analyst, at (202) 501–3221 for clarification of content. Please cite FAC 2005–37, FAR case 2008–008. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755.

#### **SUPPLEMENTARY INFORMATION:**

##### **A. Background**

This rule implements the provisions of section 814 of the John Warner National Defense Authorization Act for Fiscal Year 2007 (Public Law 109–364), section 867 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Public Law 110–417), and the Office of Federal Procurement Policy guidance memorandum dated December 4, 2007, entitled *Appropriate Use of Incentive Contracts*, which deal with award and incentive fee contract types, by amending and/or integrating where appropriate, FAR part 7, Acquisition Planning, and FAR part 16, Contract Types, to improve agency use and decision making when using incentive contracts.

FAR part 16 has been amended to provide further guidance relative to: (1) Award fees being linked to acquisition objectives in the areas of cost, schedule, and technical performance, (2) The percentage of award fee available for prescribed narrative ratings, (3) Award fees not being earned if the contractor’s

overall performance is judged to be below satisfactory, (4) The analysis required in determining whether to use an award or incentive fee type contract or not, (5) Award-fee plan content, (6) The prohibition of the use of the award fee rollover concept, (7) The requirements relative to award and incentive fee data collection and performance measures to evaluate such data, and a reference to FAR 7.105 for consideration of this information in acquisition planning, and (8) The publishing of best practices.

The Councils are revising the following FAR provisions:

(1) FAR 16.001 is revised to add definitions for the terms “Rollover of unearned award fee”, “Award-Fee Board,” and “Fee-Determining Official (FDO)”. This change is made to ensure that all parties understand what is meant by these terms, which are used in the new FAR 16.401(e).

(2) FAR 16.404(a) and FAR 16.404(a)(1) have been combined into 16.404. FAR 16.404(a)(2) has been deleted from this section and is now covered in FAR 16.401(e)(3).

(3) FAR 16.401(d) was changed with the existing content of this section being moved to FAR 16.401(e) and new content being added. This new content requires that a determination and finding be made justifying the use of an incentive or award-fee type contract.

(4) FAR 16.401(e) has been added to require that award fees be linked to acquisition objectives in the areas of cost, schedule, and technical performance; that award fees not be earned if the contractor’s overall performance is judged to be below satisfactory; that award-fee determinations be documented in the contract file; that the determination and methodology for determining the award fee are unilateral decisions made solely at the discretion of the Government; and that all award-fee contracts have an award-fee plan that establishes the procedures and award-fee board for evaluating award-fee determinations. This new section also delineates what the required content shall be for all award-fee plans to include the use of adjectival ratings and associated descriptions as well as award-fee pool earned percentages now incorporated into the FAR in Table 16–1. This new paragraph also provides guidance relative to the use of the “rollover” concept. The “rollover” of unearned award fee from one evaluation period to another evaluation period is now prohibited. The Councils believe “rollover” diminishes the effectiveness of the award-fee rating given for a specific evaluation period, since the

unearned award fee could be earned by the contractor in a subsequent evaluation period. Further, the “rollover” concept is used sparingly across the Federal Government and its limited use has been trending downward.

(5) FAR 16.404(b) was deleted and the core content of this section is now included in FAR 16.401(e). The revisions require that a determination and finding be made based upon the criteria in FAR 16.401(e)(1) before utilizing an award-fee type contract.

(6) FAR 16.405–2(a) is now FAR 16.405–2 and it was revised to clarify that base fee can be included in a cost-plus-award-fee (CPAF) type contract at the discretion of the contracting officer.

(7) FAR 16.405–2(b)(1) has been deleted in its entirety. The language relative to when an award-fee contract is suitable for use is in FAR 16.401(e)(1).

(8) FAR 16.405–2(b)(2) has been deleted in its entirety. The language relative to award-fee criteria motivating contractor performance has been revised and moved to FAR 16.401(e)(3)(ii).

(9) FAR 16.405–2(b)(3) has been deleted in its entirety. The language relative to award-fee evaluation intervals has been revised and moved to 16.401(e)(3)(vi).

(10) FAR 16.405–2(c) has been deleted and the intent of this section is now included in FAR 16.401(e)(5). The revision requires that no award-fee contract shall be awarded unless the limitations cited in this section are met. The limitations include compliance with FAR 16.301–3, FAR 16.401(e)(3), and a determination and finding that justifies the use of this contract type in accordance with the suitability items in FAR 16.401(e)(1).

(11) The references utilized in FAR 16.305 and FAR 16.402–1 were updated to accurately point to the correct FAR sections based upon the changes herein.

(12) FAR 16.401(f) was added to require the collection of incentive- and award-fee data within the Federal Government.

(13) FAR 16.401(g) was added to provide the Federal workforce with best practice type information relative to incentive- and award-fee contracting.

These changes will affect contracts newly awarded. Any changes to existing contracts would be handled in accordance with FAR 1.108(d).

This is a significant regulatory action and, therefore, was subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

## B. Regulatory Flexibility Act

The interim rule is not expected to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the guidance largely covers a broad range of aspects of award-fee contracting, whose upshot will be a more consistent use and administration of award fees Governmentwide which will provide a small benefit to all entities both large and small. In addition, the changes promulgated in this interim rule do not directly affect the current business processes of Federal contractors. In the matter of the rule's prohibition on the rollover of unearned award fee, the Councils believe this will have a negligible impact on small businesses for the following reasons. First, award-fee contracts are largely the province of large businesses with large dollar contracts. Second, the ability to rollover unearned award fee may have caused evaluators in the past to be more conservative in their ratings because of their awareness that contractors may have a second opportunity to earn unearned award fees.

Therefore, an Initial Regulatory Flexibility Analysis has not been performed. The Councils will consider comments from small entities concerning the affected FAR part 16 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAC 2005–37, FAR case 2008–008), in all correspondence.

## C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. Chapter 35, *et seq.*

## D. Determination to Issue an Interim Rule

A determination has been made under the authority of the Secretary of Defense (DoD), the Administrator of General Services (GSA), and the Administrator of the National Aeronautics and Space Administration (NASA) that urgent and compelling reasons exist to promulgate this interim rule without prior opportunity for public comment. This action is necessary because section 867 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (Public Law 110–417), enacted on October 14, 2008, requires that the FAR be revised to implement this provision

by October 14, 2009. However, pursuant to Public Law 98–577 and FAR 1.501, the Councils will consider public comments received in response to this interim rule in the formation of the final rule.

### List of Subjects in 48 CFR Part 16

Government procurement.

Dated: October 5, 2009.

**Al Matera,**

*Director, Acquisition Policy Division.*

■ Therefore, DoD, GSA, and NASA amend 48 CFR part 16 as set forth below:

### PART 16—TYPES OF CONTRACTS

■ 1. The authority citation for 48 CFR part 16 continues to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

■ 2. Add section 16.001 to read as follows:

#### 16.001 Definitions.

As used in this part—

*Award-Fee Board* means 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.

*Fee-Determining Official (FDO)* means the designated Agency 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.

*Rollover of unearned award fee* means 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.

■ 3. Amend section 16.305 by revising the third and fourth sentences to read as follows:

#### 16.305 Cost-plus-award-fee contracts.

\* \* \* See 16.401(e) for a more complete description and discussion of the application of these contracts. See 16.301–3 and 16.401(e)(5) for limitations.

■ 4. Amend section 16.401 by revising paragraph (d); and adding paragraphs (e) through (g) to read as follows:

#### 16.401 General.

\* \* \* \* \*

(d) A determination and finding, signed by the head of the contracting activity, shall be completed for all incentive- and award-fee contracts justifying that the use of this type of

contract is in the best interest of the Government. This determination shall be documented in the contract file and, for award-fee contracts, shall address all of the suitability items in 16.401(e)(1).

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

(1) *Application.* An award-fee contract is suitable for use when—

(i) The work to be performed is such that it is neither feasible nor effective to devise predetermined objective incentive targets applicable to cost, schedule, and technical performance;

(ii) The likelihood of meeting acquisition objectives will be enhanced by using a contract that effectively motivates the contractor toward exceptional performance and provides the Government with the flexibility to evaluate both actual performance and the conditions under which it was achieved; and

(iii) Any additional administrative effort and cost required to monitor and evaluate performance are justified by the expected benefits as documented by a risk and cost benefit analysis to be included in the Determination and Findings referenced in 16.401(e)(5)(iii).

(2) *Award-fee amount.* The amount of award fee earned shall be commensurate with the contractor's overall cost, schedule, and technical performance as measured against contract requirements in accordance with the criteria stated in the award-fee plan. Award fee shall not be earned if the contractor's overall cost, schedule, and technical performance is below satisfactory. The basis for all award-fee determinations shall be documented in the contract file to include, at a minimum, a determination that overall cost, schedule and technical performance is or is not at a satisfactory level. This determination and the methodology for determining the award fee are unilateral decisions made solely at the discretion of the Government.

(3) *Award-fee plan.* All contracts 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. Award-fee plans shall—

(i) Be approved by the FDO unless otherwise authorized by agency procedures;

(ii) Identify the award-fee evaluation criteria and how they are linked to acquisition objectives which shall be defined in terms of contract cost, schedule, and technical performance. Criteria should motivate the contractor to enhance performance in the areas rated, but not at the expense of at least minimum acceptable performance in all other areas;

(iii) Describe how the contractor's performance will be measured against the award-fee evaluation criteria;

(iv) Utilize the adjectival rating and associated description as well as the award-fee pool earned percentages shown below in Table 16-1. Contracting

officers may supplement the adjectival rating description. The method used to determine the adjectival rating must be documented in the award-fee plan;

TABLE 16-1

Award-Fee Adjectival Rating	Award-Fee Pool Available To Be Earned	Description
Excellent .....	91%—100% .....	Contractor has exceeded almost all of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.
Very Good .....	76%—90% .....	Contractor has exceeded many of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.
Good .....	51%—75% .....	Contractor has exceeded some of the significant award-fee criteria and has met overall cost, schedule, and technical performance requirements of the contract as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.
Satisfactory .....	No Greater Than 50% .....	Contractor has met overall cost, schedule, and technical performance requirements of the contract as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.
Unsatisfactory .....	0% .....	Contractor has failed to meet overall cost, schedule, and technical performance requirements of the contract as defined and measured against the criteria in the award-fee plan for the award-fee evaluation period.

(v) Prohibit earning any award fee when a contractor's overall cost, schedule, and technical performance is below satisfactory;

(vi) 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

(vii) Define the total award-fee pool amount and how this amount is allocated across each evaluation period.

(4) *Rollover of unearned award fee.* The use of rollover of unearned award fee is prohibited.

(5) *Limitations.* No award-fee contract shall be awarded unless—

(i) All of the limitations in 16.301-3, that are applicable to cost-reimbursement contracts only, are complied with;

(ii) An award-fee plan is completed in accordance with the requirements in 16.401(e)(3); and

(iii) A determination and finding is completed in accordance with 16.401(d) addressing all of the suitability items in 16.401(e)(1).

(f) *Incentive- and Award-Fee Data Collection and Analysis.* Each agency shall collect relevant data on award fee and incentive fees paid to contractors and include performance measures to evaluate such data on a regular basis to determine effectiveness of award and incentive fees as a tool for improving contractor performance and achieving

desired program outcomes. This information should be considered as part of the acquisition planning process (see 7.105) in determining the appropriate type of contract to be utilized for future acquisitions.

(g) *Incentive- and Award-Fee Best Practices.* Each agency head shall provide mechanisms for sharing proven incentive strategies for the acquisition of different types of products and services among contracting and program management officials.

**16.402-1 [Amended]**

■ 4. Amend section 16.402-1 by removing from paragraph (b) “16.405-2” and adding “16.401(e)” in its place.

■ 5. Revise section 16.404 to read as follows:

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

Award-fee provisions may be used in fixed-price contracts when the Government wishes to motivate a contractor and other incentives cannot be used because contractor performance cannot be measured objectively. Such contracts shall establish a fixed price (including normal profit) for the effort. This price will be paid for satisfactory contract performance. Award fee earned (if any) will be paid in addition to that fixed price. See 16.401(e) for the requirements relative to utilizing this contract type.

■ 6. Revise section 16.405-2 to read as follows:

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

A cost-plus-award-fee contract is a cost-reimbursement contract that provides for a fee consisting of (1) a base amount fixed at inception of the contract, if applicable and at the discretion of the contracting officer, and (2) an award amount that the contractor may earn in whole or in part during performance and that is sufficient to provide motivation for excellence in the areas of cost, schedule, and technical performance. See 16.401(e) for the requirements relative to utilizing this contract type.

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Part 18**

[FAC 2005-37; FAR Case 2009-003; Item VII; Docket 2009-0037; Sequence 1]

RIN 9000-AL37

**Federal Acquisition Regulation; FAR Case 2009-003, National Response Framework**

**AGENCIES:** Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).