

# Guide to Judiciary Policy

Vol. 14: Procurement

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## § 410 Contract Types

### § 410.10 In General

- (a) The terms "contract type" and "type of contract" refer to the contract compensation arrangement (i.e., the method of determining the amount which the judiciary must pay to the contractor under the contract). There is no single contract type that is right for every contracting situation.
- (b) The choice of contract type should be based on the allocation of risks and responsibility between the judiciary and the contractor. Under a firm-fixed-price contract, the contractor assumes full cost and performance responsibility. The contractor undertakes less cost and performance risk from uncertainties under cost-reimbursement, labor-hour and time-and-material contracts. Where the contractor does not take on the cost and performance risk, it must be assumed by the judiciary (i.e., the contractor may be legally entitled to payment exceeding the original amount of the contract).
- (c) The profit or fee calculations will also reflect the cost and performance cost responsibilities resulting from the contract type selected. Generally, a contractor may realize greater profit as it assumes increased cost risks and performance risks. For example, in a firm-fixed-price contract, the contractor usually realizes an additional dollar of profit for every dollar reduction in the cost of performance. At the opposite end of the risk spectrum, in a cost-plus-fixed-fee contract, the contractor does not realize any increase in profit if the actual cost of performance is less than estimated at the time of contract award.

#### § 410.10.20 Required Documentation

The use of firm-fixed-price contracts requires no documentation explaining why that contract type was chosen. The use of any other contract type requires that the procurement file include a written determination, signed by the contracting officer (CO), explaining why a different contract type was chosen. The determination of contract type is one of the first steps in the procurement process, since most solicitations are required to notify prospective offerors of the planned contract type. **See:** § 410.15.20 (Solicitation Requirements).

### **§ 410.10.30 Authorized Contract Types**

This chapter describes different contract types that are authorized for use in the judiciary. Contract types that require the prior approval of the Procurement Management Division (PMD) of the AO's Budget, Accounting, Procurement Office (BAPO) are listed in § 410.20.10 (Written Approval). Any contract type not described in this chapter is not authorized for use in the judiciary. The most commonly used contract types include:

- (a) firm-fixed-price (**see:** § 410.25 (Firm-Fixed-Price Contracts));
- (b) indefinite-delivery (**see:** § 410.30 (Indefinite-Delivery Contracts))
  - indefinite-quantity and
  - requirements;
- (c) blanket purchase agreement (**see:** § 410.35 (Blanket Purchase Agreements));
- (d) labor-hour (**see:** § 410.40 (Labor-Hour Contracts)); and
- (e) time-and-materials (**see:** § 410.45 (Time-And-Materials Contracts)).

### **§ 410.10.35 Prohibited Contract Type**

A cost-plus-a-percentage-of-cost contract may never be used.

## **§ 410.15 Selecting Contract Type**

### **§ 410.15.10 Responsibility**

The CO is responsible for selecting the contract type appropriate to the circumstances of the procurement.

### **§ 410.15.20 Solicitation Requirements**

Provision 4-1, Type of Contract, with the appropriate contract type inserted as indicated, must be included in all solicitations except:

- (a) firm-fixed-price procurements which do not exceed the judiciary's small purchase threshold (**see:** Guide, Vol. 14, § 140 (Contracting Officers Certification Program) and § 325.10 (Applicability)), and
- (b) solicitations for information or planning purposes.

**§ 410.15.30 Firm-Fixed-Price Contract Preference**

A firm-fixed-price contract is generally preferred because it makes the contractor fully responsible for cost control and performance, and minimizes the need for judiciary monitoring of cost performance. However, when there is no reasonable basis for firm fixed pricing, a solicitation requiring a firm-fixed-price contract may reduce competition. It may also lead to higher prices because offerors will include greater allowances for contingencies in their fixed price to protect themselves from real or perceived cost risks. Whenever the probable cost of performance cannot be reasonably estimated, a firm-fixed-price contract should not be used.

**Note:** For example, where it is difficult to completely identify requirements prior to award of a contract, such as in developing a large information technology system like the Case Management/Electronic Case Files (CM/ECF) system, the labor to perform the work cannot be predicted with a sufficient degree of certainty for contractors to be willing to accept the risk of a firm-fixed-price contract. In these circumstances, other contract types should be considered.

**§ 410.15.40 [Reserved]****§ 410.15.50 Factors in Selecting Contract Type**

Factors to be considered include the following:

- (a) reliability of cost estimate;
- (b) extent of expected competition;
- (c) nature of the required product or service (e.g., commercial or developmental);
- (d) performance risks and uncertainties;
- (e) complexity of the requirement;
- (f) adequacy and firmness of specifications;
- (g) likelihood of changes;
- (h) prior experience (pricing and production);
- (i) extent of subcontracting;
- (j) adequacy of contractor's cost estimating and accounting system; and
- (k) urgency of the requirement.

## **§ 410.20 Limitations**

### **§ 410.20.10 Written Approval**

COs must obtain the PE's written approval before using any of the following contract types:

- (a) indefinite-delivery (**see:** § 410.30 (Indefinite-Delivery Contracts));
- (b) labor-hour (for exceptions to the requirement for PE written approval, **see:** § 410.40.30 (Limitations));
- (c) time-and-materials (**see:** § 410.45 (Time-and-Materials Contracts));
- (d) letter contract (**see:** § 410.50 (Letter Contract));
- (e) fixed-price award fee (**see:** § 410.55 (Fixed-Price Award Fee Contract));
- (f) fixed-price incentive contract (**see:** § 410.60 (Fixed-Price Incentive Contract));
- (g) fixed-price contract with economic price adjustment (**see:** § 410.65 (Fixed-Price Contract with Economic Price Adjustment)); and
- (h) all cost reimbursement contracts (**see:** § 410.70 (Cost-Reimbursement Contracts)).

### **§ 410.20.20 Requesting Approval**

If a situation develops where the CO determines that one of the contract types listed above would benefit a particular procurement, a justification for the use of the specific contract type, along with a statement of work for the proposed procurement must be forwarded to the PE for review and written approval.

### **§ 410.20.30 Exceptions**

The PE approval requirement does not apply to COCP Level 6 or COCP Level 7 appointees.

## **§ 410.25 Firm-Fixed-Price Contracts**

### **§ 410.25.10 Description**

- (a) A firm-fixed-price (FFP) contract is one in which the price is not subject to change or adjustment based on the contractor's actual cost of performance, provided the specified requirements are not changed during performance, and both parties fulfill their obligations under the contract.

The contractor assumes full responsibility for all costs and resulting profits or losses, maximizing the motive to control costs and perform effectively, economically, and efficiently. It is the least burdensome type of contract for the judiciary to administer when requirements are stable. However, if frequent changes are likely, administration will be difficult.

- (b) The obligation amount to be recorded is usually the full amount of the contract, delivery order, and/or task order price using funds available in the period awarded, regardless of whether or not performance will continue into future fiscal years. Incrementally funded FFP contracts must specifically authorize incremental funding by incorporation of Clause 4-170, Rights and Obligations Under an Incrementally Funded Contract. For additional guidance on the use of incrementally funded FFP contracts, and approval requirements, **see:** Guide, Vol. 14, § 220.50.20(b) (Contract Funding Requirements).

#### **§ 410.25.20 Application**

An FFP contract is suitable for:

- (a) commercial products or services;
- (b) modified commercial products or services; or
- (c) products or services having reasonably definitive specifications or statements of work; and
- (d) whenever fair and reasonable prices can be reasonably estimated at the procurement outset, such as when:
  - (1) adequate price competition is anticipated;
  - (2) there are reasonable price comparisons with prior purchases of the same or similar products or services made on a competitive basis;
  - (3) in noncompetitive procurement situations, it is anticipated that submission of detailed cost information will be adequate to permit realistic and reasonable estimates of the costs of performance; or
  - (4) the cost impact of performance uncertainties can be estimated closely enough to reach agreement on a reasonable price representing appropriate assumption of the risks involved.

## § 410.30 Indefinite-Delivery Contracts

### § 410.30.10 Description

- (a) An indefinite-delivery contract is used for the procurement of supplies and/or services when the exact times and/or exact quantities of future requirements are not known at the time of award. It permits great flexibility in quantities, delivery scheduling and delivery points as well as the ability to order supplies and/or services only after specific requirements materialize.
- (b) The judiciary uses two types of indefinite-delivery contracts – indefinite-delivery/indefinite-quantity (IDIQ) contracts and requirements contracts.

### § 410.30.20 Application

An IDIQ contract may be used when it is known or anticipated that there will be a recurring need for products or services over a period of time, but specific quantities, times, and/or places of delivery are not known at the time of contract award.

### § 410.30.30 Indefinite Quantity Contracts

- (a) An IDIQ contract provides for an indefinite quantity of specific products or services, within contract specified minimum and maximum limits, to be delivered during the contract period to designated locations when ordered. The judiciary must order the stated minimum, whether stated as a quantity or a dollar amount. However, the total estimated quantity or dollar amount is not guaranteed. This type is for use when precise quantities for products or services during the contract period, above known minimum requirements, cannot be determined before contract award.
- (b) Funding for the guaranteed minimum quantity or amount must be obligated at contract award. As additional quantities are needed – up to the stated contract maximum – funds are obligated on individual delivery orders or task orders. Fixed-price orders must be obligated to the full amount of the order at the time it is issued, unless incremental funding is approved as appropriate and necessary in accordance with Guide, Vol. 14, § 220.50.20(b) (Contract Funding Requirements). Labor-hour or time-and-materials orders may be incrementally funded. For additional information on incremental funding, **see:** Guide, Vol. 14, § 220.50.20(b) (Contract Funding Requirements).
- (c) Maximum contract limits may be stated on an individual order basis or for the contract as a whole or both. Minimums and maximums may be stated in terms of quantities or in terms of dollars.

- (d) The contract must require the judiciary to order, and the contractor to deliver, at least a stated minimum quantity or minimum dollar value of products or services during the contract period and require the contractor to deliver any additional quantities ordered, not to exceed a stated maximum quantity or dollar value. If the judiciary does not order the guaranteed minimum as stated in the terms of the contract, the contractor is entitled to payment of the guaranteed amount regardless of the circumstances.
- (e) Therefore, the established minimum quantity or dollar value must not exceed known requirements and the maximum quantity or dollar value must be realistic. The contract may specify minimums or maximums for individual delivery orders and a maximum that may be ordered during a specified time. The contractor is not legally obligated to deliver or perform beyond the stated maximum amounts.

#### **§ 410.30.40 Requirements Contracts**

- (a) A requirements contract is one in which the contractor agrees to provide all the requirements for a specific product or service and the judiciary agrees to purchase the specific product or service exclusively from the one contractor. It is for use when recurring requirements are anticipated during the contract period, but precise quantities cannot be determined before contract award. **Note:** This contract type must be used cautiously, as it obligates the designated judiciary office to place all of their orders for the specific products or services during the life of the contract with the contractor.
- (b) The solicitation and contract must state an estimated total quantity or dollar value, and, if feasible, the maximum quantity or dollar amount the contractor is obligated to deliver. The total quantity or dollar estimate must be as realistic as possible, based on records of previous requirements and current information. The contract may specify minimums or maximums for individual delivery orders and a maximum that may be ordered during a specified period. The estimates of a requirements contract are not a commitment that the estimated quantity or dollar value will be ordered and there is no minimum order requirement.
- (c) When a requirements contract is for repair, modification, or overhaul of items of judiciary property, the solicitation must state that failure of the judiciary to furnish such items in the amounts described as "estimated" or "maximum" will not entitle the contractor to any price adjustment under any "Property" clause of the contract.

**§ 410.30.50 Contract Terms**

- (a) Both IDIQ contracts and requirements contracts must identify the period of time during which orders may be issued, as well as who is authorized to issue orders. The contract may restrict all ordering to a single contracting office or allow placement of orders by any judiciary CO with appropriate delegated authority. The contract must also state estimated quantities and describe the scope of the products or services to be provided. In addition to the clauses required by § 410.30.75 (Clauses), the contract must include all other appropriate terms and conditions, e.g., those listed at Guide, Vol. 14, § 330.10.30 (Provisions and Clauses). Where an indefinite contract authorizes individual orders to be issued on either a FFP basis or a labor-hour basis, terms applicable to both contract types must be included and the order must identify which contract type applies to the individual order.
- (b) IDIQ solicitations must state whether a single award or multiple awards are anticipated. In the case of multiple awards, the solicitation and resulting contracts must state the basis for competing delivery or task orders under the contracts. For instructions on use of Provision 3-135, Single or Multiple Awards, **see:** Guide, Vol. 14, § 330.10.30(z) (Provisions and Clauses).

**§ 410.30.60 Delivery Orders or Task Orders**

- (a) Orders placed under indefinite contracts are generally referred to as delivery orders (for products) or task orders (for services). In either case, orders are generally placed using the Official Form (OF) 347 (Order for Supplies and Services) or FAS<sub>4</sub>T equivalent form.
- (b) Each order must be within the scope of the contract and issued within an authorized ordering period.
- (c) When necessary, orders may be placed orally if they are promptly confirmed in writing. Orders must contain the following information:
  - (1) date of order, contract number of the indefinite contract, and order number;
  - (2) item number and description, unit price, and total price. Task orders for services may include a Statement of Work, rather than an item number and description. The price may be established either by the contract itself or through competition and negotiation where there are multiple awards, such as the courtroom technology multiple award installation IDIQ contracts.

- (3) place and date of delivery or performance;
- (4) packaging, packing, and shipping instructions (if these are not already defined in the indefinite contract);
- (5) accounting and fiscal data;
- (6) any other pertinent information; and
- (7) a ceiling price limiting the judiciary’s obligation if the unit and total price in (2) above cannot be negotiated before issuance of the order. The definitive price must be negotiated as soon as practicable.

(d) **Blanket Delivery Orders**

A blanket delivery order (BDO) may be used when an office anticipates there will be repetitive fixed price requirements within a single fiscal year, with little variation in the orders. The contract establishes the applicable prices and the BDO obligates funds on a not-to-exceed basis to cover all orders placed over a specified period of time. BDOs must include the following information:

- (1) date of order, contract number of the indefinite contract, and order number;
- (2) the period of time covered by the BDO (**Note:** BDOs may not cross fiscal years due to the bona fide need rule);
- (3) a high level description of the products or services covered by the BDO;
- (4) the named individuals who are authorized to order the delivery of products or services covered by the BDO; and
- (5) the applicable not-to-exceed ceiling amount and related accounting and fiscal data.

**§ 410.30.70 Limitation**

Indefinite delivery contracts may be used only when approved in writing by the PE. For exceptions, **see:** § 410.20.30 (Exceptions).

<b>§ 410.30.75 Clauses</b>	
<b>Clause</b>	<b>Include in ...</b>
(a) Clause 4-5, Ordering	Requirements and IDIQ solicitations and contracts

<b>§ 410.30.75 Clauses</b>	
<b>Clause</b>	<b>Include in ...</b>
(b) Clause 4-10, Order Limitations	Requirements and IDIQ solicitations and contracts
(c) Clause 4-20, Requirements	Requirements solicitations and contracts
(d) Clause 4-25, Indefinite Quantity	IDIQ solicitations and contracts

**§ 410.35 Blanket Purchase Agreements**

**§ 410.35.10 Description**

- (a) A blanket purchase agreement (BPA) does not constitute a legally binding contract at the time of award. Therefore, there is never an obligation of funds recorded based on the award of a BPA. It is a written agreement negotiated between a purchasing office and a contractor that contains terms and conditions applying to future transactions between the parties and provides a simplified way of buying products and services for which repetitive purchases are anticipated. The BPA contains the agreed upon terms and conditions that will apply if and when an order (or “call”) is placed against the BPA for products or services.
- (b) The terms of a BPA may authorize orders/calls to be placed informally by telephone, fax, letter, email, etc. Any call placed orally must be followed up promptly with a written order confirming the oral order. Regardless of how the call is placed, an obligation of funds should be recorded in the financial system at the time the call is placed, or as soon thereafter as possible.

**§ 410.35.20 Application**

BPAs are very useful for requirements that are expected to be repetitive over a period of time. There are two sources for BPAs — open market and GSA — and two types — single and multiple. For further information on awarding BPAs and placing orders, **see:** Guide, Vol. 14, § 325.45.15 (Blanket Purchase Agreement (BPA)).

**§ 410.35.30 Limitations**

- (a) A BPA may not state or imply any obligation or agreement by the judiciary to place future calls or orders with the contractor.
- (b) A BPA may be changed only by modifying the BPA itself and not by individual orders issued under it. Modifying a BPA does not retroactively affect calls or orders previously issued under it.

- (c) A BPA extending for more than one year must be reviewed annually to determine whether there is a continuing need for the products or services covered by the agreement and whether any revisions to the agreement are necessary.

#### **§ 410.35.40 Content of Agreement**

A BPA must include the following information:

- (a) a description of the products and/or services to be provided;
- (b) pricing for the products or services or describe the method for determining prices to be paid to the contractor for the products or services;
- (c) delivery terms and conditions or a statement of how they will be determined;
- (d) a list of the ordering officers authorized to issue orders under the agreement;
- (e) the point at which each order becomes a binding contract (e.g., issuance of the order, acceptance of the order in a specified manner, or failure to reject the order within a specified number of days); and,
- (f) the appropriate contract type clauses for the orders to be placed (i.e., fixed-price, labor-hour or time-and-materials). **Note:** For clauses that are prescribed according to dollar amount, the aggregate value of orders expected to be placed under the agreement over its full life must be estimated.

#### **§ 410.35.50 Ordering**

A CO or an authorized ordering officer listed in a BPA may issue orders for products or services covered by that agreement. **See:** Guide, Vol. 14, § 325.45.60 (Ordering Under BPAs). Orders issued under BPAs must include the same content as orders under indefinite contracts. **See:** § 410.30.60 (Delivery Orders or Task Orders).

#### **§ 410.35.60 Competition**

Solicitations for the award of BPAs must clearly describe the process for issuing orders against the BPA, including competition requirements. If individual orders or calls under the awarded BPA are required to be issued on the basis of competition, the solicitation may specify that competition may be by oral or written solicitation, and:

- (a) limited to firms holding BPAs for the same products or services;

- (b) competed on the open market subject to the estimated dollar value of the requirement and the terms and conditions of the BPA; or
- (c) both (a) and (b).

### **§ 410.35.70 Pricing**

Ordinarily, the CO may not authorize the contractor to begin work on an order under a BPA until prices have been established. However, if urgency precludes advance pricing and the order establishes a ceiling price limiting the judiciary's obligation, the CO may place an unpriced order **after** getting the PE's written approval. Pricing must be established as soon as possible after issuance of an unpriced order.

## **§ 410.40 Labor-Hour Contracts**

### **§ 410.40.10 Description**

- (a) A labor-hour contract provides for skill categories at fixed hourly rates that include actual wages plus overhead, general and administrative expense, and profit in the fixed rate. It purchases labor hours only and is used when the requirement does not involve any materials to be provided by the contractor.
- (b) Labor-hour contracts include a description of services ordered and a not to exceed ceiling amount, which may be fully funded at the time of award or may be incrementally funded, provided that:
  - (1) the funding balance is always at least equal to the cumulative value of the services ordered, and
  - (2) a clause reserving the right to fund incrementally is contained in the contract.

For additional information on incremental funding, **see:** Guide, Vol. 14, § 220.50.20(b) (Contract Funding Requirements).

### **§ 410.40.20 Application**

A labor-hour contract is for use only when it is not possible to estimate in advance the extent or duration of the work required or to anticipate costs with any reasonable degree of confidence. This contract type does not encourage effective contractor management or control of costs. Therefore, it may be used only when provision is made for adequate monitoring by judiciary personnel during performance, to give reasonable assurance that efficient methods and effective cost controls are being used. Examples of situations in which this type of contract might be appropriate are:

- (a) work to be done in emergency situations;

- (b) development of custom computer software;
- (c) development of specialized training programs;
- (d) contracts for personal services or for expert or consultant services (**see:** Guide, Vol. 14, § 520 (Expert and Consultant Nonpersonal Services Contracts)); or
- (e) contracts for temporary help support services. For additional restrictions on the use of temporary help support services, **see:** Guide, Vol. 12, § 560 (Temporary Help Service Firms).

#### § 410.40.30 Limitations

This type of contract may be used only if no other type of contract will meet the judiciary's needs. Use of this contract type requires a one-time delegation of authority from PMD prior to issuance of the solicitation, **except** if:

- (a) the contract is for temporary help support services;
- (b) the contract is for expert services where the solicitation and contract are based upon approved templates, such as FPD case-related expert services, or employee dispute resolution services; or
- (c) the contracting officer is appointed at COCP Level 6 or COCP Level 7.

The contract must include a stated ceiling price which the contractor exceeds at its own risk. Any contract modification to increase the ceiling amount must be supported by file documentation showing the reason for the change and how the new ceiling amount was determined.

#### § 410.40.35 Solicitation Considerations

- (a) To ensure that fair and reasonable prices are being paid under labor-hour and time-and-materials contracts, the CO must determine at the time of solicitation the extent of price competition, since this will determine the proposal instructions with respect to hourly rates. The use of "blended" rates for the specified labor categories (i.e., a single rate per category without distinction as to whether the labor is performed by the prime contractor or a subcontractor) is not authorized when the contract is expected to be awarded without adequate price competition. Solicitations for labor-hour or time-and-materials contracts when there is not adequate price competition must require submission of separate hourly rates for each labor category for labor to be performed by:
  - the contractor;

- each subcontractor; and
  - each division, subsidiary, or affiliate of the contractor under a common control. **Note:** The fixed hourly rates for services transferred between divisions, subsidiaries, or affiliates of the contractor under a common control shall not include profit for the transferring organizations, but may include profit for the prime contractor.
- (b) For clauses and provisions applicable to labor-hour contracts, **see:** § 410.45.50 (Provisions and Clauses – Labor-Hour and Time-and-Materials Contracts).

#### § 410.40.40 [Reserved]

### § 410.45 Time-and-Materials Contracts

#### § 410.45.10 Description

- (a) Time-and-materials contracts provide for payment to the contractor for labor at fixed hourly rates and for materials at cost. The contract must contain a not-to-exceed ceiling amount. It may be fully funded at the time of award or incrementally funded provided that:
- (1) the funding balance is always at least equal to the cumulative value of the services and materials ordered, and
  - (2) a clause reserving the right to fund incrementally is contained in the contract.

For additional information on incremental funding, **see:** Guide, Vol. 14, § 220.50.20(b) (Contract Funding Requirements).

- (b) A time-and-materials contract is similar to a labor-hour contract, except that it includes reimbursement at cost for materials. It provides for the purchase of:
- (1) labor hours at fixed hourly rates, which include wages plus overhead, general and administrative expense, and profit; and
  - (2) materials at actual cost. **Note:** No profit is allowed on the material component of a time-and-materials contract. When appropriate, material-handling costs are reimbursed as a part of material costs. Material-handling costs may include all indirect costs, including general and administrative expenses, allocated to direct materials in accordance with the contractor's usual accounting practices.

Such material-handling costs may only include costs clearly not included in the fully-burdened hourly labor rate.

#### **§ 410.45.20 Application**

A time-and-materials contract is for use only when it is not possible to estimate in advance the extent or duration of the work required or to anticipate costs with any reasonable degree of confidence. Because it does not encourage effective management control of costs by the contractor, this contract type may be used only when there will be adequate monitoring by judiciary personnel during performance to give reasonable assurance that efficient methods and effective cost controls are being used. Examples of situations in which this type of contract might be appropriate are:

- (a) repair, maintenance, and overhaul work in which the extent of the labor required and parts needed cannot be determined in advance; and
- (b) work to be done in emergency situations.

#### **§ 410.45.30 Limitations**

- (a) This type of contract may be used only if no other type of contract will meet the judiciary's needs. Use of this contract type for situations outside of the two examples above requires a one-time delegation of authority from PMD prior to issuance of the solicitation. For exceptions, **see**: § 410.20.30 (Exceptions).
- (b) The contract must include a stated ceiling price that the contractor exceeds at its own risk. Any contract modification to increase the ceiling amount must be supported by file documentation showing the reason for the change and how the new ceiling amount was determined.
- (c) The additional requirements at § 410.40.35 (Solicitation Considerations) also apply to time-and-materials contracts.

#### **§ 410.45.40 Optional Method of Pricing Material**

When the work to be performed requires the contractor to furnish material that is regularly sold to the public in the normal course of business by the contractor, the contract may authorize charging and reimbursement of material on a basis other than at cost if:

- (a) the total estimated contract price does not exceed \$25,000 or the estimated price of material so charged does not exceed 20 percent of the estimated contract price;
- (b) the material to be so charged is identified in the contract;

- (c) no element of profit on material so charged is included in the profit in the fixed hourly labor rates; and
- (d) the contract requires that the price to be paid for such material is, or is based on, an established catalog or list price, in effect when material is furnished, less all applicable discounts, and not exceeding the contractor's price to its most favored customer for the same item in like quantity, or the current market price, whichever is lower.

<b>§ 410.45.50 Provisions and Clauses – Labor-Hour and Time-and-Materials Contracts</b>	
<b>Provision or Clause</b>	<b>Include in ...</b>
(a) Provision 4-27, Time-and-Materials/Labor-Hour Proposal Requirements – Competitive Pricing	solicitations for labor-hour or time-and-materials contracts when the award is expected to be based on competitive quotes or proposals. The contracting officer may amend this provision to make one of the three approaches in paragraph (c) of the provision mandatory, and/or to require the identification of all subcontractors, divisions, subsidiaries, or affiliates included in a blended labor rate.
(b) Provision 4-28, Time-and-Materials/Labor-Hour Proposal Requirements – Non-Competitive Pricing	solicitations for labor-hour or time-and-materials contracts when the award is not expected to be based on competitive quotes or proposals. This provision requires the offeror to establish separate individual labor-hour rates for prime contractor employees, employees of each subcontractor and employees from affiliates of the offeror. Use of a “blended” rate is not permissible.
(c) Clause 4-30, Payment (Time-and-Materials and Labor-Hour Contracts)	all time-and-materials solicitations and contracts (base clause) and all labor-hour solicitations and contracts (with Alternate I)

## **§ 410.50 Letter Contracts**

### **§ 410.50.10 Description**

A letter contract is a written preliminary contractual instrument that authorizes the contractor to begin work immediately, before negotiation of definitive contract terms (e.g., contract price and schedule). It generally includes a Statement of Work or specifications and an initial set of clauses and specifies the type of contract the parties anticipate (fixed-price, labor-hour, etc.). It obligates an initial funding amount pending final negotiation of the price and schedule.

### **§ 410.50.20 Application**

A letter contract is for use when:

- (a) the requirement demands that the contractor be given a binding commitment so that work can commence immediately; and
- (b) it is not possible to negotiate all of the terms and conditions necessary for a definitive contract in sufficient time to meet the requirement.

For example, a letter contract may be appropriate in an emergency, such as a natural disaster, when the urgency of the work required does not allow time for the normal solicitation process.

#### **§ 410.50.30 In General**

Each letter contract must be as complete and definitive as possible under the circumstances.

#### **§ 410.50.40 Definitization Schedule**

Definitizing a letter contract means negotiating each of the unsettled terms. Usually, at least the contract price, and often other terms, such as the schedule, may require negotiation. Each letter contract must contain a definitization schedule, negotiated with the contractor at the time of award, including the following information:

- (a) date for submission of the contractor's priced offer;
- (b) date for the start of negotiation; and
- (c) target date for definitization, which must be the earliest practicable date.
  - (1) The target date for definitization must be within 180 days after the date of the letter contract or before completion of 40 percent of the work to be performed, whichever occurs first.
  - (2) The PE may, in extreme cases, authorize an additional period if, after exhausting all reasonable efforts, the CO and the contractor cannot negotiate a definitive contract agreement because of failure to agree on price or fee. In this case, Clause 4-45, Contract Definitization requires the contractor to proceed with the work and provides that the CO may unilaterally determine a reasonable price or fee, subject to appeal as provided in Clause 7-235, Disputes.

#### **§ 410.50.50 Maximum Liability**

Each letter contract must state the maximum liability of the judiciary. This is the estimated amount needed to cover performance before contract definitization. This amount may not exceed 50 percent of the total estimated cost of the contract.

**§ 410.50.60 Definitization of the Contract**

Upon completion of negotiations of all the terms of the contract, a letter contract is definitized by issuance of a contract modification, using the Standard Form (SF) 30 (Amendment of Solicitation/Modification of Contract).

**§ 410.50.70 Limitations**

A letter contract:

- (a) may be used only if no other type of contract is suitable and if prior written approval is given by the PE;
- (b) may not commit the judiciary to a definitive contract in excess of the funds available at the time the letter contract is executed; and
- (c) may not be modified to add new work unless the work added is inseparable from the work being performed under the letter contract.

**§ 410.50.80 Clauses**

A letter contract must include all clauses required for the type of definitive contract contemplated (e.g., firm-fixed-price, cost-reimbursement, etc.) and any clauses required by Guide, Vol. 14, § 330.10.30 (Provisions and Clauses). In addition, all letter contracts must also include the following clauses:

<b>§ 410.50.80 Clauses</b>	
<b>Clause</b>	<b>Notes</b>
(a) Clause 4-35, Execution and Commencement of Work (Letter Contract)	The CO will appropriately fill in the clause’s blank spaces
(b) Clause 4-40, Limitation of Judiciary Liability (Letter Contract)	The maximum liability in the clause is the amount necessary to cover the contractor’s performance before definitization. The CO will appropriately fill in the clause’s blank spaces.
(c) Clause 4-45, Contract Definitization	The CO must enter the contract type and definitization schedule established according to § 410.50.40 (Definitization Schedule).
(d) Clause 4-50, Payment of Allowable Costs Before Definitization	Include when the letter contract is expected to result in a definitive cost-reimbursement contract.

## § 410.55 Fixed-Price Award Fee Contracts

### § 410.55.10 Application

A fixed-price award fee contract is used in fixed-price contracts when the judiciary wishes to motivate a contractor and another incentive cannot be used because contractor performance cannot be measured objectively. Such contracts must:

- (a) establish a fixed price (including normal profit) for the effort. This price will be paid for satisfactory contract performance. The award fee earned (if any) will be paid in addition to the fixed price; and
- (b) provide for periodic evaluation of the contractor's performance against an award-fee plan.

### § 410.55.20 Limitations

A fixed-price award fee contract type may be used only when:

- (a) the administrative costs of conducting award-fee evaluations are not expected to exceed the expected benefits;
- (b) procedures have been established for conducting the award-fee evaluation;
- (c) the award-fee board has been established; and
- (d) no other type of contract is suitable and a one-time delegation of procurement authority has been issued by PMD. For exceptions to the one-time delegation requirement, **see**: § 410.20.30 (Exceptions).

## § 410.60 Fixed-Price Incentive Contracts

### § 410.60.10 Description

- (a) A fixed-price incentive (FPI) contract is a fixed-price contract that provides for adjusting profit and establishing the final contract price by application of a formula based on the relationship of total final negotiated cost to total target cost.
- (b) The profit adjustment formula may be applied either at a pre-determined mid-point of performance (successive targets) or upon completion of performance to establish the final contract price (firm target). For each item subject to incentive price revision, the contract must specify a target cost, a target profit, a target price, a price ceiling, and a profit adjustment formula. The price ceiling is the maximum that may be paid to the

contractor, except for adjustments specially provided for under other contract clauses, e.g., Clause 3-160, Service Contract Act of 1965.

#### **§ 410.60.20 Application**

An FPI contract is appropriate when the parties can negotiate at the outset an initial target cost, target profit, and profit adjustment formula that will provide a fair and reasonable incentive and a ceiling that provides for the contractor to assume an appropriate share of the risk. When the contractor assumes a considerable or major share of the cost responsibility under the adjustment formula, the target profit must reflect this responsibility.

#### **§ 410.60.30 Limitations**

This contract type may be used only when:

- (a) the nature of the products or services being procured and other circumstances of the procurement make it advantageous for the judiciary to offer the contractor an economic incentive to establish effective cost control and efficient performance;
- (b) the performance requirements offer a reasonable opportunity for the incentives to have a meaningful impact on the contractor's management of the work where the contract also includes incentives on technical performance or delivery;
- (c) the contractor's accounting system is adequate for providing data for negotiating firm targets and a realistic profit adjustment formula, and later negotiation of final costs;
- (d) adequate cost or pricing information for establishing a firm target is reasonably expected to be available for contract negotiations;
- (e) the CO determines that this type of contract would be less costly than another type or that it is impractical to obtain products or services of the kind or quality required without the use of this contract type; and
- (f) no other type of contract is suitable and PMD has issued a one-time delegation of procurement authority. For exceptions to the one-time delegation requirement, **see:** § 410.20.30 (Exceptions).

#### **§ 410.60.40 Fixed-Price Incentive – Firm Target**

An FPI contract with a firm target must, at the outset of the contract, specify these negotiated elements:

- (a) a target cost;

- (b) a target profit;
- (c) a price ceiling (but not a profit ceiling or floor);
- (d) a profit adjustment formula that results in the following:
  - (1) when the final cost is less than the target cost, application of the formula will result in a final profit greater than the target profit;
  - (2) when the final cost is more than the target cost, application of the formula will result in a final profit less than the target profit or net loss; and
  - (3) if the final negotiated cost exceeds the price ceiling, the contractor will absorb the difference as a loss.
- (e) the price ceiling must be the maximum that may be paid to the contractor, except for any adjustment under other contract clauses; and
- (f) when the contractor completes contract performance, the CO and the contractor must negotiate the contractor's final cost and establish the final price by applying the profit adjustment formula.

**§ 410.60.50 Fixed-Price Incentive – Successive Targets**

- (a) An FPI contract with successive targets must, at the outset of the contract, specify these negotiated elements:
  - (1) an initial target cost;
  - (2) an initial target profit;
  - (3) an initial profit adjustment formula to be used for establishing the firm target profit, including a ceiling and floor for the firm target profit;
  - (4) the production point at which the firm target cost and firm target profit will be negotiated;
  - (5) a ceiling price that is the maximum that may be paid to the contractor, except for any adjustment under any other contract clauses providing for equitable adjustment or other revision of the contract price under stated conditions.
- (b) When the production point specified in the contract is reached, the parties negotiate the firm target cost, giving consideration to cost experience

under the contract and other pertinent factors. The firm target profit is established by the formula.

## **§ 410.65 Fixed-Price Contracts with Economic Price Adjustment**

### **§ 410.65.10 Description**

A fixed-price contract with economic price adjustment (EPA) provides for the upward and downward revision of the contract price based upon the occurrence of contingencies that are defined in the contract.

### **§ 410.65.15 Application**

This type of contract is appropriate when there is serious doubt as to the stability of market and labor conditions that will exist during an extended period of contract performance and contingencies that would otherwise be included in a firm-fixed-price contract are identifiable and can be covered separately. Its usefulness is limited by the difficulties of its administration.

### **§ 410.65.20 Limitation**

This contract type may be used only when:

- (a) the CO determines that it is necessary to protect the contractor and the judiciary against significant fluctuations in labor or material costs or to provide for contract price adjustment in the event of changes in the contractor's established prices;
- (b) there is no major element of design engineering or development work involved;
- (c) there are identifiable labor or material cost factors subject to change;
- (d) no other type of contract is suitable; and
- (e) PMD has issued a one-time delegation of procurement authority. For exceptions to this requirement, **see**: § 410.20.30 (Exceptions).

### **§ 410.65.25 Types of Adjustments**

An EPA may authorize contract price adjustments, upward or downward, based upon one of the following:

- (a) increases or decreases from an agreed-upon level in published or otherwise established prices of specific items (e.g., the price of crude oil);

- (b) increases or decreases in specified costs of labor or material that the contractor actually experiences during contract performance; or
- (c) increases or decreases in labor or material cost standards or indices that are specifically identified in the contract (e.g., Consumer Price Index).

#### **§ 410.65.30 Price Adjustments Based on Published Prices**

Price adjustments based on published or otherwise established prices must be restricted to industry-wide contingencies. Industry-wide contingencies must be those affecting a particular industry as a whole and not be dependent on circumstances within the contractor's control.

#### **§ 410.65.35 Price Adjustments Based on Costs**

Price adjustments based on labor and material costs must be limited to contingencies beyond the contractor's control.

#### **§ 410.65.40 Base Level Establishment**

When establishing the base level from which price adjustments may be made, the CO must ensure that contingency allowances are not duplicated by inclusion in both the base price and the adjustment requested by the contractor. In contracts that do not require submission of detailed cost information, the CO must obtain adequate information to establish the base level from which adjustments will be made and may require verification of data submitted.

#### **§ 410.65.45 [Reserved]**

#### **§ 410.65.50 Clauses**

A solicitation for a fixed-price contract with EPA for standard products that have an established catalog or market price must include Clause 4-55, Economic Price Adjustment – Standard Products. The offeror must appropriately fill in the blank in paragraph (a) of the clause.

### **§ 410.70 Cost-Reimbursement Contracts**

#### **§ 410.70.10 Description**

- (a) Cost-reimbursement contracts may be incrementally funded, as long as the amount obligated is always in excess of the cumulative cost that it is anticipated the contractor will accrue during the following voucher period. For additional information on incremental funding, **see:** Guide, Vol. 14, § 220.50.20(b) (Contract Funding Requirements).

- (b) These contracts establish an estimate of the total cost for the purpose of obligating funds. They also establish a total estimated reimbursement cost. The contractor may not exceed the total funded amount of the contract, except at its own risk, without the prior written approval of the CO.
- (c) Cost-reimbursement contracts are suitable for use only when uncertainties involved in contract performance do not permit the establishment of fixed prices. There are several types of cost-reimbursement contracts as described below. A cost-plus-percentage-of-cost contract type is not an authorized contract type under any circumstances.

#### **§ 410.70.20 Limitations**

Any of the cost-reimbursement contracts described below may be used only when:

- (a) the contractor's accounting system is adequate for recording and segregating costs applicable to the contract;
- (b) appropriate judiciary monitoring during performance will provide reasonable assurance that efficient methods and effective cost controls are used;
- (c) the CO determines in writing, that:
  - (1) the use of a cost-reimbursement type contract is likely to be less costly than any other type; or
  - (2) it is impractical to obtain products or services of the kind or quality required without the use of this contract type;
- (d) no other type of contract is suitable; and
- (e) PMD has issued a one-time delegation of procurement authority. For exceptions to this requirement, **see:** § 410.20.30 (Exceptions).

#### **§ 410.70.30 Cost Contract**

A cost contract is a cost-reimbursement contract under which the contractor receives no fee (profit).

#### **§ 410.70.40 Cost-Sharing Contract**

A cost-sharing contract is a cost-reimbursement type contract under which the contractor does not receive a fee and is reimbursed only for an agreed upon portion of its allowable costs. It is suitable for use where there is a high probability that the

contractor will receive substantial commercial benefits as a result of contract performance.

#### **§ 410.70.50 Cost-Plus-Incentive-Fee Contract**

(a) Description

A cost-plus-incentive-fee contract is a cost-reimbursement contract that provides for the initially negotiated fee to be adjusted later by application of a formula based on the relationship of total allowable performance costs to target costs. This contract type specifies a target cost, a target fee, minimum and maximum fees, and a fee adjustment formula.

(b) Application

A cost-plus-incentive-fee contract is suitable when a cost-reimbursement contract is appropriate and a target cost and fee adjustment formula likely to motivate the contractor to manage the contract effectively can be negotiated. The fee adjustment formula must provide an incentive effective over the full range of reasonably foreseeable variations from target cost. If a high maximum fee is negotiated, the contract must provide for a low minimum fee, or even a zero or negative fee.

#### **§ 410.70.60 Cost-Plus-Fixed-Fee Contract**

(a) Description

A cost-plus-fixed-fee contract is a cost-reimbursement contract that provides for payment to the contractor of a negotiated fee in a fixed amount. The fixed fee amount does not vary with actual performance costs incurred, but may be adjusted as a result of changes made in contract requirements. This contract type gives the contractor only a minimum incentive to control costs.

(b) Application

The CO may use a cost-plus-fixed-fee contract when contracting for efforts that might otherwise present too great a risk to the contractor, such as when the contract is for a study and the level of effort cannot be reasonably estimated.

(c) Completion or Term Form

A cost-plus-fixed-fee contract must be in one of two basic forms: the completion form, or the level-of-effort or term form.

(1) Completion Form

The completion contract form describes the scope of work by stating a definite goal or target and specifying an end product deliverable. This form of contract normally requires the contractor to complete and deliver the specified end product within the estimated cost, if possible, as a condition for payment of the entire fixed fee. If the work cannot be completed within the estimated cost, the judiciary may require more effort with an appropriate increase in the estimated cost and associated funding, but without any increase in fee.

(2) Term Form

The term form describes the scope of work in general terms and obligates the contractor to devote a specified level of effort for a stated time period. Under this form, if performance is satisfactory, the fixed fee is payable at the expiration of the agreed upon period, upon contractor certification that the level of effort specified in the contract has been expended in performing the contract work. It does not require a deliverable end product. Renewal for further periods of performance requires new cost and fee arrangements and is treated as a new purchase.

(d) Preference

Because of the greater risks and obligation assumed by the contractor, the completion form is preferred over the term form whenever the work can be defined well enough to permit a reasonable cost estimate within which the contractor can be expected to complete the work.

**§ 410.70.70 Cost-Plus-Award-Fee Contract**

(a) Description

A cost-plus-award-fee contract is a cost-reimbursement contract that provides for a fee consisting of:

- (1) a base fee amount (which may be zero) fixed at inception of the contract; and
- (2) an award fee amount that the contractor may earn in whole or in part during performance and that is sufficient to provide motivation

for excellence in such areas as quality, timeliness, technical ingenuity, and cost-effective management. The amount of the award fee to be paid is determined by the judiciary's judgmental evaluation of the contractor's performance in terms of the criteria stated in the contract. This determination and the methodology for determining the award fee are unilateral decisions made solely at the discretion of the judiciary.

(b) Application

- (1) The cost-plus-award-fee contract is suitable for use when:
  - (A) the work to be performed is such that it is neither feasible nor effective to devise predetermined, objective incentive targets applicable to cost, technical performance, or schedule;
  - (B) the likelihood of meeting procurement objectives will be enhanced by using a contract that effectively motivates the contractor toward exceptional performance and provides the judiciary with the flexibility to evaluate both actual performance and the conditions under which it was achieved; and
  - (C) any additional administrative effort and cost required to monitor and evaluate performance are justified by the expected benefits.
- (2) The number of award-fee evaluation criteria and the requirements they represent will differ widely among contracts. The criteria and rating plan must motivate the contractor to improve performance in the areas rated, but not at the expense of at least minimum acceptable performance in all other areas.
- (3) Cost-plus-award-fee contracts must provide for evaluation at stated intervals during performance, so that the contractor will periodically be informed of the quality of its performance and the areas in which improvement is expected. Partial payment of fee must generally correspond to the evaluation periods. Payment of the fee in this manner can induce the contractor to improve poor performance or to continue good performance.

(c) Additional Limitation

In addition to the general limitations on cost-reimbursement contracts in § 410.70.20 (Limitations), when using cost-plus-award-

fee contracts, the contract amount, performance period, and expected benefits must be sufficient to warrant the additional administrative effort and cost involved.

<b>§ 410.70.80 Cost Contract Clauses</b>	
<b>Clause</b>	<b>Include in ...</b>
(a) Clause 4-60, Allowable Cost and Payment	All cost reimbursement solicitations and contracts.
(b) Clause 4-65, Fixed Fee	Solicitations and contracts when a cost-plus-fixed-fee contract is contemplated.
(c) Clause 4-70, Incentive Fee	Solicitations and contracts when a cost-plus-incentive-fee contract is contemplated. The CO will appropriately fill in the clause's blank spaces.
(d) Clause 4-75, Cost Contract – No Fee	Solicitations and contracts when a cost contract with no fee is contemplated.
(e) Clause 4-80, Cost-Sharing Contract – No Fee	Solicitations and contracts when a cost-sharing contract is contemplated.
(f) Clause 4-85, Limitation of Cost	Solicitations and contracts when a fully funded cost reimbursable contract is contemplated, whether or not the contract provides for payment of a fee.
(g) Clause 4-90, Limitation of Funds	Solicitations and contracts when an incrementally funded cost reimbursable contract is contemplated.

## § 410.75 Multi-Year Contracts

### § 410.75.10 Definition

- (a) A multi-year contract is defined as one which – at the time of award – purchases more than one year’s requirement of a product or service, without having to exercise an option for each year after the first. Multi-year contracts may be awarded for known requirements for a period of up to five years. Multi-year contracts are considered an exception to the bona fide needs rule. Use of this contract type by the judiciary is authorized by 28 U.S.C. § 604(g)(4)(B) and 28 U.S.C. § 612(e)(2).
- (b) A multi-year contract is **not**:
- an indefinite quantity or requirements contract (**see**: § 410.30 (Indefinite-Delivery Contracts: Indefinite Quantity and Requirements));
  - a contract for a non-severable requirement that will take more than one year to complete, such as construction of a new courthouse;
  - a contract for 12 months (or less) that includes one or more options to extend the period of performance for additional periods of up to 12 months each (**see**: Guide, Vol. 14, § 220.40 (Options)); or

- a contract for less than 12 months that starts in one fiscal year and is completed in the following fiscal year.

#### **§ 410.75.20 Terminology Unique to Multi-Year Contracts**

(a) Cancellation

Cancellation results when the contracting officer notifies the contractor that funds will not be made available for contract performance for a subsequent contract year. A cancellation of any one year results in cancellation of all remaining contract years.

(b) Cancellation Ceiling

The maximum cancellation charge that the contractor can receive in the event of cancellation. The cancellation ceiling must be established and fully funded at the time of contract award.

#### **§ 410.75.30 Limitations on Use of Multi-Year Contracts**

(a) One-Time Delegation of Procurement Authority

With the exception of awards meeting the criteria stated at § 410.75.30(c) (Exception to One-Time Delegation), all multi-year contract awards require a one-time delegation of procurement authority from PMD. Obtaining this delegation is a two-step process and only after both of the steps are completed will the one-time delegation of procurement authority be issued.

- (1) Prior to issuing the solicitation, the CO must request PMD approval of the solicitation document.
- (2) Upon receipt and evaluation of offers, the CO must provide the evaluation and the determination and finding required by § 410.75.30(b) (Determination and Finding) for PMD approval.

(b) Determination and Finding

All multi-year contracts, including those meeting the criteria stated at § 410.75.30(c) (Exception to One-Time Delegation), must be supported by a determination and finding signed by the CO confirming:

- (1) The need for the products or services is reasonably firm and is expected to continue over the entire period of the contract; and

- (2) The use of a multi-year contract will result in a definite cost savings of at least 5% for the judiciary over issuance of annual orders or of a contract with options to extend beyond a base period. The specific pricing information demonstrating the savings must be included in the determination and finding.
- (c) Exception to One-Time Delegation
- (1) A one-time delegation is not required for a multi-year award for services where the award will be funded with no year funds, e.g., the Judiciary Information Technology Fund; and –
    - (A) the award is an order under a Judiciary-Wide BPA or contract, a GSA schedule, or a contract awarded under another agency's multi-award authority, such as SEWP or NITAAC; or
    - (B) the total amount for all years is less than the judiciary's competition threshold. **See:** Guide, Vol. 14, § 325.15.10 (Competition Threshold).
  - (2) The above exception does not apply to multi-year awards for products, which are always subject to the one-time delegation requirement.
  - (3) Procurement files for awards made under the exceptions to the one-time delegation requirement must include the contracting officer's determination and finding required by § 410.75.30(b) (Determination and Finding).

(d) Congressional Notification

A multi-year contract that includes a cancellation ceiling in excess of \$10.0 million may not be awarded until the AO Director provides written notification to Congress of the proposed contract and the proposed cancellation ceiling for that contract. The contract may not be awarded until the thirty-first day after the date of Congressional notification.

**§ 410.75.40 Competitive Multi-Year Solicitation Requirements**

- (a) Competitive multi-year solicitations must require dual price proposals from all offerors, one price proposal based upon a multi-year award and one based on pricing for award of a base year and options for each subsequent year. The sole exception is the purchase of commercial services where published catalog prices clearly show lower pricing for a

multi-year term versus contracting on an annual basis. In this case, the solicitation may require only multi-year pricing.

- (b) Competitive multi-year solicitations must identify all the evaluation factors to be used in selecting offer(s) for award. Price must always be included as an evaluation factor. The cancellation ceiling must not be used as an evaluation factor.

#### **§ 410.75.50 Multi-Year Contract Administration**

- (a) Funding and Payment

- (1) Multi-year contracts may either be fully funded for the entire multi-year period at the time of award or may be funded annually. When the contract is funded annually, the funding must include the maximum liability incurred by the judiciary each year. This means fully funding the cancellation ceiling amount which would apply under Clause 4-160, Cancellation Ceilings, if the contract were cancelled during the year being funded.

- (2) Authority to award a multi-year contract requirement and fully fund it at the time of award does not automatically include authority to pay the contractor in advance. For limitations on advance payment, **see:** Guide, Vol. 14, § 220.55.50 (Limitations).

- (b) Cancellation Procedures.

All contract years except the first are subject to cancellation. The contract award must state a cancellation ceiling for each contract year subject to cancellation in Clause 4-160, Cancellation Ceilings.

- (c) Payment of Cancellation Charges

If a multi-year contract is cancelled, the judiciary's liability shall be determined in accordance with Clause 4-150, Cancellation Under Multi-Year Contracts, but in no case may it exceed the cancellation ceiling established at the time of contract award in Clause 4-160, Cancellation Ceilings. Final agreement on a cancellation settlement must be reviewed and approved by the PE.

- (d) Termination for Convenience or Default

Multi-year contracts are subject to termination for convenience or default. Unlike cancellation, which can only be effective at the end of a contract year, termination for convenience or default may be done at any time during the life of the contract. In addition, a

termination for convenience may be issued for less than the entire remainder of the contract, whereas cancellation must be for the entirety of all subsequent contract years. PE review and approval is required for any termination. **See:** Guide, Vol. 14, § 755.10.40 (Review and Approval).

**§ 410.75.60 Contract Clauses and Provisions**

Include the following clauses in solicitations and contracts for multi-year contracts unless the prescription indicates otherwise:

<b>§ 410.75.60 Contract Clauses and Provisions</b>	
<b>Provision or Clause</b>	<b>Include in ...</b>
(a) Clause 4-150, Cancellation Under Multi-Year Contracts	All multi-year solicitations and contracts.
(b) Clause 4-55, Economic Price Adjustment - Standard Products	Fixed-price multi-year solicitations and contracts when the CO considers inclusion appropriate under § 410.65 (Fixed-price Contract with Economic Price Adjustment).
(c) Clause 3-175, Fair Labor Standards Act and Service Contract Act – Price Adjustment (Multi-Year and Option Contracts)	Multi-year solicitations and contracts when contracting for services on a fixed-price, labor-hour or time-and-materials basis and the contract includes Clause 3-160 (Service Contract Act of 1965).
(d) Provision 4-155, Alternate Awards	All multi-year solicitations.
(e) Clause 4-160, Cancellation Ceilings	All multi-year solicitations and contracts. The clause may be tailored as appropriate to fit the actual number of years of a specific multi-year award. The ceilings shall be incorporated at the time of award based upon information provided in the offeror’s proposal.
(f) Provision 4-165, Price Proposal Instruction – Multi-Year Contract	All multi-year solicitations.

**§ 420 Technical Analysis**

**§ 420.10 In General**

- (a) A technical analysis may be necessary to assist in price and/or cost analysis. The CO will rely on the technical expertise of the requesting activity’s designated expert(s) or other appropriate advisors.

- (b) Technical analysis of offers may range from evaluating technical offers according to evaluation factors specified in the solicitation (competitive offers) to extensive analysis of materials, number of labor hours and the proposed mix of labor categories, special tooling and facilities, and other factors. At a minimum, the technical analysis should examine the types and quantities of material proposed and the need for the types and quantities of labor hours and the proposed mix of labor categories. Any other data that may be pertinent to an assessment of the offeror's ability to accomplish the technical requirements or to the cost or price analysis of the service or product being proposed should also be included in the analysis.

## **§ 430 Price Evaluation**

### **§ 430.10 In General**

This section describes procedures for evaluating initial prices, subcontract prices, and pricing modifications. COs are responsible for ensuring that prices are fair and reasonable. To carry out this responsibility, COs must:

- (a) evaluate proposed prices using the methods of price or cost analysis described in this chapter; and
- (b) evaluate the proposed price of each contract separately and independently without considering:
  - (1) proposed price reductions under other contracts held by the same contractor; or
  - (2) losses or profits on other contracts held by the same contractor.

### **§ 430.20 Offer Analysis**

- (a) The CO exercises sole responsibility for the final pricing decision with advice and assistance appropriately obtained according to the complexity and dollar value of the offer to be analyzed. As circumstances warrant, the CO must obtain and evaluate the advice of specialists, including, but not limited to, specialists in contracting, finance, law, audit, quality assurance, engineering, and pricing.
- (b) The CO must coordinate the team effort involved in the analysis. When complex problems involving significant matters will be addressed, the CO must have appropriate specialists in attendance for advice during the negotiations. The CO may assign responsibility to a negotiator or price analyst for:

- (1) determining the necessary extent of specialists' advice;
- (2) evaluating the specialists' advice;
- (3) coordinating a team of experts;
- (4) consolidating pricing data;
- (5) developing a pre-negotiation objective; and
- (6) conducting negotiations.

## **§ 430.30 Adequate Price Competition**

### **§ 430.30.10 General**

Price competition exists when:

- (a) at least three offers are solicited;
- (b) two or more independent and responsible offerors submit priced offers meeting the solicitation's requirements; and
- (c) the solicitation identifies price as an evaluation factor for award.

### **§ 430.30.20 Presumption of Adequacy**

If price competition exists, it is presumed as adequate unless:

- (a) the solicitation is made under conditions that unreasonably deny one or more known and qualified offerors an opportunity to compete;
- (b) the low offeror has such a decided advantage that it is practically immune from competition; or
- (c) the CO determines that the lowest price is not fair and reasonable.

## **§ 440 Price Analysis**

### **§ 440.10 In General**

Price analysis (**see:** Guide, Vol. 14, § 345.40 (Price Analysis)), rather than cost analysis (**see:** Guide, Vol. 14, § 345.50 (Cost Analysis)), is the preferred method of evaluating and negotiating pricing for the following:

- (a) firm-fixed-price contracts;

- (b) the unit prices of many indefinite delivery contracts;
- (c) the burdened hourly rates contained in labor-hour and time-and-material contracts; and
- (d) other contract instruments where prices can be compared to prices for the same or similar products or services sold in substantial quantities in the same time frame elsewhere in the market place.

It is a method of determining that the overall price is fair and reasonable without a detailed analysis of its cost and profit components.

### **§ 440.20 Price Analysis Techniques**

The CO is responsible for selecting and using appropriate price analysis techniques to ensure a fair and reasonable price. One or more of the following techniques may be used to perform price analysis:

- (a) comparison of proposed prices received from two or more offerors in response to the solicitation;
- (b) comparison of prior proposed prices with current proposed prices for the same or similar end items in comparable quantities;
- (c) comparison with similar products or services purchased previously;
- (d) comparison with similar products or services purchased at other federal agencies;
- (e) application of estimating metrics (such as dollars per pound or per horsepower, or other units) to highlight significant inconsistencies that may warrant additional pricing inquiry;
- (f) comparison with competitive published catalogs or price lists, published market prices or commodities, similar indices, and discount or rebate arrangements;
- (g) comparison of proposed prices with independent judiciary estimates (**see:** Guide, Vol. 14, § 210.30(d) (Requesting Office Responsibilities)); or
- (h) ascertaining that the price is set by law or regulation.

Comparison of competed prices will ordinarily suffice to meet price analysis requirements. If a determination of fair and reasonable price is based solely upon paragraph (g) above, significant differences between the price awarded and the independent judiciary estimate must be explained in the negotiation memorandum.

## **§ 450 Cost Analysis**

### **§ 450.10 In General**

Cost analysis must be performed when it is necessary to examine individual cost elements, such as labor or material prices and indirect cost rates and profit, to determine the reasonableness of price. Cost analysis and requests for supporting data must be limited only to those cost elements that the CO decides need analysis.

### **§ 450.20 Cost Analysis Techniques**

Cost analysis involves the following techniques and procedures as appropriate:

- (a) Verifying and evaluating of individual cost elements, including:
  - (1) the necessity for, and reasonableness of, proposed costs, including allowances for contingencies;
  - (2) projection of the offeror's cost trends, on the basis of current and historical detailed cost information;
  - (3) a technical appraisal of the estimated labor, material, tooling, and facilities requirements and of the reasonableness of scrap and spoilage factors; and
  - (4) the application of audited or negotiated indirect cost rates and labor rates.
- (b) Evaluating the effect of the offeror's current practices on future costs. In conducting this evaluation, the CO must ensure that the effects of inefficient or uneconomical past practices are not projected into the future. In pricing the production of recently developed, complex equipment, the CO must make a trend analysis of basic labor and materials even in periods of relative price stability.
- (c) Comparing costs proposed by the offeror for individual cost elements with:
  - (1) actual costs previously incurred by the same offeror;
  - (2) previous cost estimates from the offeror or from other offerors for the same or similar items;
  - (3) independent judiciary cost estimates; and
  - (4) forecasts of planned expenditures.

- (d) Analyzing contractor make-or-buy decisions in evaluating subcontract costs.
- (e) Verifying that the offeror's cost submissions comply with the cost principles in this section.
- (f) Reviewing the offer to determine if the contractor has neglected to submit or identify in writing any detailed cost information necessary to make the offer accurate, complete, and current. If the contractor has omitted such data, the CO must attempt to obtain it. If the CO cannot obtain it, satisfactory allowance for the incomplete information must be made in negotiations.

## **§ 450.30 Detailed Cost Information**

### **§ 450.30.10 Exceptions**

The CO may determine that detailed cost information is not required if:

- (a) the price reasonableness can be determined by adequate competitive offers;
- (b) prices are set by law or regulation;
- (c) the prices are based on established catalog or market prices; or
- (d) a waiver is granted by the CO.

### **§ 450.30.20 In General**

- (a) The CO may obtain detailed cost information before the award of any competitive contract or contract modification if required for the analysis and determination of price reasonableness. Only the detailed information needed to make that determination will be obtained. Requesting detailed cost information is not necessary if the price reasonableness can be determined by one of the following factors:
  - (1) adequate price competition;
  - (2) prices are set by law or regulation; or
  - (3) a commercial item is being acquired.
- (b) When warranted, and before an agreement on price can be reached, the CO must require the contractor to update the cost information as of the latest dates for which information is reasonably available.

### **§ 450.30.30 Subcontracts**

The CO must require offerors or contractors to obtain detailed cost information for proposed subcontracts or subcontract modifications only when necessary to determine the reasonableness of the proposed subcontract price, including negotiated final pricing actions (such as termination settlements and total final price agreements for fixed-price incentive contracts).

### **§ 450.30.40 Subcontract Offer Analysis**

As part of its detailed cost information, the offeror or contractor is responsible for submitting to the CO its price analysis or cost analysis on subcontract offers, including the results of its subcontract price reviews and analysis. In unusual circumstances, to ensure that adequate analysis is performed, the CO may require the offeror or contractor to submit, along with its own detailed cost information, detailed cost information obtained from its subcontractor(s). This in no way diminishes the offeror's or contractor's responsibility to perform subcontract cost or price analysis and negotiate fair and reasonable subcontract prices.

### **§ 450.30.50 Refusal to Provide Data**

If the offeror or contractor refuses to provide detailed cost information, in spite of repeated requests, the CO must withhold the award or contract modification and refer the matter to the PE. The CO must document the ultimate disposition of the matter.

## **§ 450.40 Profit**

### **§ 450.40.10 In General**

- (a) Except for architect-engineer contracts (**see:** Guide, Vol. 14, § 530 (Architect-Engineer Contracts)), predetermined percentages or limitations on profit or fee must not be used. However, for cost-plus-fixed-fee contracts, the fee must not exceed 10 percent of the contract's estimated cost, excluding fee.
- (b) When adequate price competition is obtained or price analysis techniques are sufficient to ensure a fair and reasonable price, then analysis of profit is not appropriate.

### **§ 450.40.20 Including Profit in Cost Analysis**

When cost analysis is required for price negotiations, profit must also be analyzed. Profit must be analyzed with the objective of rewarding contractors for:

- (a) financial and other risks they assume;
- (b) resources they use; and

- (c) organization, performance, and management capabilities they employ.

### **§ 450.40.30 Profit Considerations**

Due consideration must be given to:

- (a) the complexity of materials requirements;
- (b) the extent of subcontracting;
- (c) the ratio of indirect costs to direct costs;
- (d) the contribution of capital investments to contract performance; and
- (e) profit analysis.

### **§ 450.40.40 Contract Changes**

If the pricing action involves a contract change or modification that requires essentially the same type and mix of work as the basic contract, and is of relatively small dollar value compared to the total contract amount, then the profit or fee may be established on the basis of the basic contract's profit or fee rate.

## **§ 460 Cost Principles**

### **§ 460.10 In General**

This section contains the principles for determining or negotiating the allowability of costs. When the CO determines that price analysis is not sufficient, then the CO will request detailed cost information and analyze all cost elements to determine the allowability of each proposed element of cost. These principles apply to the:

- (a) determination of allowable costs under cost-reimbursement contracts and subcontracts;
- (b) determination or negotiation of cost or price when required by a contract clause;
- (c) pricing or estimation of costs in change orders or contract modifications; and
- (d) settlement of contract costs for contracts which have been terminated.

## **§ 460.20 Contract Costs**

### **§ 460.20.10 In General**

The total cost of a contract is the sum of the allowable direct and indirect costs allocable to the contract, incurred or to be incurred, less any allowable credits. Total cost does not include profit, or fee.

### **§ 460.20.20 Cost Estimating Methodology**

A contractor may use any consistently applied, generally accepted method of determining or estimating costs that is equitable under the circumstances.

### **§ 460.20.30 Pricing or Cost Estimating Requirements**

Whenever a contractor is required by the judiciary to submit a detailed cost proposal, the contractor must:

- (a) estimate costs in a manner consistent with generally accepted cost accounting principles;
- (b) consistently apply the cost accounting principles to its pricing;
- (c) be in accordance with its DCAA audited rates; and
- (d) be consistent with the provisions of this chapter.

### **§ 460.20.40 Direct Cost**

- (a) A direct cost is any cost that can be specifically identified directly with delivery or performance of a specific contract.
- (b) Direct costs are segregated from other costs, recorded into separate accounts, and are identified as costs for a particular contract. They are not mingled with costs associated with other contracts, nor with indirect, administrative or management costs of the business.

### **§ 460.20.50 Indirect Costs**

- (a) Indirect costs are those costs that, because of their incurrence for common or joint contractor objectives, are neither readily segregable nor subject to treatment as direct costs. Indirect costs are generally allocated to contracts as a percentage of direct cost and are allowable based on necessity to the overall operation of the contractor's business.
- (b) An indirect cost must not be allocated to a judiciary contract if –

- (1) other costs incurred for the same purpose, in like circumstances, have been included as a direct cost of that contract or any other contract; or
  - (2) the costs have been included as any final cost objective not related to the judiciary contract.
- (c) Indirect costs must be accumulated into logical groupings known as “indirect cost pools.”
- (d) The contractor’s method of allocating indirect costs must comply with generally accepted accounting principles that are consistently applied according to the provisions of this chapter.
- (e) The CO must examine the contractor’s method of allocating indirect costs when any of the following apply:
  - (1) a substantial difference exists between the cost patterns of work performed under the contract and the contractor’s other work;
  - (2) a significant change occurs in:
    - the nature of the contractor’s business;
    - extent of subcontracting;
    - fixed asset improvement programs;
    - inventories;
    - volume of sales and production;
    - manufacturing processes;
    - products; or
    - other relevant circumstances;
  - (3) indirect cost groups developed for a contractor’s primary location are applied to off-site locations. Then separate cost groups for costs allocable to off-site locations may be necessary to distribute the contractor’s costs on the basis of the benefits accruing to the appropriate cost objective.
- (f) The CO must consider the base period for indirect cost allocation as the one in which the costs are incurred and accumulated for distribution to work performed in that period.

### **§ 460.20.60 Credits**

A credit is the applicable portion of any income, rebate, allowance, or other credit relating to any allowable cost and received by or accruing to the contractor.

## **§ 470 Cost Allowability**

### **§ 470.10 Determining Cost Allowability**

#### (a) Allowability Factors

When determining whether an incurred cost is allowable, the CO must consider the following factors:

- reasonableness;
- allocability;
- consistency with generally accepted accounting principles and practices appropriate to the particular circumstances;
- consistency with the requirements and terms of the contract; and
- consistency with the limitations set forth in this chapter.

#### (b) Inconsistent Practices

If a contractor's accounting practices are inconsistent with this chapter, the CO must not allow costs resulting from those practices in excess of the amount that would have resulted from using practices consistent with this chapter.

## **§ 470.20 Determining Reasonableness**

### **§ 470.20.10 Definition**

A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business.

### **§ 470.20.20 Reviewing Specific Costs**

In determining the reasonableness of a specific cost, matters to consider include:

- #### (a)
- whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or contract performance;

- (b) the restraints or requirements imposed by such factors as:
  - generally accepted sound business practices;
  - arm's-length bargaining; or
  - federal and state laws and regulations.
- (c) the action that a prudent business person would take under the circumstances considering responsibilities to:
  - the owners of the business;
  - employees;
  - customers;
  - the judiciary; or
  - the public at large.
- (d) any deviations from the established practices of the contractor that may unjustifiably increase the contract costs; and
- (e) any other relevant factors.

## **§ 470.30 Determining Allocability**

### **§ 470.30.10 In General**

An incurred cost is allocable to a contract if it:

- (a) is incurred specifically for performance of the contract;
- (b) benefits both the contract and other work, and can be distributed to them in reasonable proportion to the benefits received; or
- (c) is necessary to the overall operation of the business, even though a direct relationship to the contract cannot be shown.

### **§ 470.30.20 Advance Agreements**

- (a) Because the reasonableness or allocability of costs may be difficult to determine in some cases, the contracting parties must reach advance agreement on the treatment of special or unusual costs to avoid later disputes and disallowances.
- (b) Advance agreements may be negotiated before or during a contract, but must be negotiated before contractor incurrence of the costs involved. The agreements must be in writing, signed by both parties, and incorporated into applicable current and future contracts. An advance agreement must contain a statement of its applicability and duration.

- (c) Advance agreements may be negotiated with a particular contractor for a single contract, a group of contracts, or all the contracts of one or more purchasing activities.
- (d) Advance agreements may not provide for treatment of costs inconsistent with this chapter.
- (e) The absence of an advance agreement on any cost will not, in itself, affect the reasonableness or allocability of that cost.
- (f) Examples of costs for which advance agreements may be particularly important are:
  - (1) compensation for personal service, including but not limited to, allowances for off-site pay, incentive pay, relocation allowances, hardship pay, and cost-of-living differentials;
  - (2) use charges for fully depreciated assets;
  - (3) deferred maintenance costs;
  - (4) pre-contract costs;
  - (5) independent research and development and bid and proposal costs;
  - (6) royalties and other costs for use of patents;
  - (7) selling and distribution costs;
  - (8) travel and relocation costs;
  - (9) costs of idle facilities and idle capacity;
  - (10) costs of information technology;
  - (11) severance pay to employees on support services contracts;
  - (12) professional services (for example, legal, accounting, and engineering);
  - (13) general administrative costs (such as corporate, division, or branch allocations attributable to the general management, supervision, and conduct of the contractor's business as a whole, particularly in construction, job-site, architect-engineer, and facilities contracts);
  - (14) costs of construction plant and equipment; and

- (15) costs of public relations and advertising.

### **§ 470.40 Selected Costs**

This section discusses certain types of costs and whether or not they are allowable. It does not cover every element of cost, nor does the omission of a specific type of cost from this section imply that it is either allowable or unallowable. A determination of allowability must be based upon the principles and standards of this chapter and treatment of similar or related items.

#### **§ 470.40.10 Public Relations and Advertising Costs**

Incurred public relations and advertising costs are unallowable, except costs of:

- (a) responding to inquiries concerning company policies and activities;
- (b) essential communication with the public, press, stockholders, creditors, and customers, including communication on matters of public concern;
- (c) participation in community service activities, such as blood bank drives, charity drives, and disaster assistance (but not contribution to civil defense funds and projects);
- (d) recruitment of personnel needed for contract performance;
- (e) acquiring scarce items for contract performance; and
- (f) disposing of scrap or surplus materials acquired for contract performance.

#### **§ 470.40.15 Bad Debt**

Bad debt costs, including actual or estimated losses arising from uncollectible accounts receivable due from customers and other claims, and any directly associated costs such as collection costs and legal costs are not allowable.

#### **§ 470.40.20 Contributions or Donations**

Contractor contributions or donations, including cash, property, and services, except as provided in § 470.40.10(c) (Public Relations and Advertising Costs), are not allowable.

#### **§ 470.40.25 Dividends**

Dividend provisions or payments and distribution of profits are not allowable when part of an employee's compensation if that compensation is based on changes in stock prices or corporate ownership.

#### **§ 470.40.30 Entertainment Costs**

- (a) Contractor costs of amusement, diversion, social activities, and directly associated costs such as tickets to shows or sports events, meals, lodging, rentals, transportation, and gratuities are not allowable.
- (b) Costs of membership in social, dining, or country clubs or other organizations having the same purposes are not allowable, regardless of whether or not the cost is reported as taxable income to the employees.

#### **§ 470.40.35 Fines and Penalties**

Contractor costs of fines and penalties resulting from violations of, or failure of, the contractor to comply with, federal, state, local, or foreign laws and regulations are not allowable, unless incurred because of compliance with specific terms and conditions of the contract or written instructions from the CO.

#### **§ 470.40.40 Life Insurance**

Contractor costs for insurance on the lives of officers, partners, or proprietors are not allowable, unless the insurance represents additional compensation.

#### **§ 470.40.45 Interest and Other Financial Costs**

Contractor interest costs on borrowings (however represented), bond discounts, costs of financing and refinancing capital, and the costs of preparing and issuing prospectuses and stock rights, are not allowable.

#### **§ 470.40.50 Lobbying Costs**

- (a) Contractor costs associated with attempts to influence the outcome of any federal, state, or local election, referendum, initiative, or similar procedure through contributions, endorsements, publicity, or similar activities are not allowable.
- (b) Costs associated with establishing, administering, contributing to, or paying the expenses of a political party, campaign, political action committee, or other organization established to influence the outcomes of elections are not allowable.
- (c) Costs associated with any attempt to influence (1) the introduction of federal or state legislation, or (2) the enactment or modification of any pending federal or state legislation through communication with any member or employee of the Congress or state legislature (including efforts to influence state or local officials to engage in similar lobbying activity), or with any government official or employee about a decision to sign or veto enrolled legislation are not allowable.

- (d) Costs associated with any attempt to influence the introduction of federal or state legislation, or the enactment or modification of pending federal or state legislation by preparing, distributing, or using publicity or propaganda, or by urging members of the public to contribute to or participate in any mass demonstration, march, rally, fund-raising drive, lobbying campaign, or letter-writing or telephone campaigns are not allowable.
- (e) Costs associated with legislation liaison activities, including attendance at legislative sessions or committee hearings, gathering information regarding legislation, and analyzing the effect of legislation, when such activities are carried on in support of, or knowledge of preparation, for an effort to engage in activities for which the unallowable costs are not allowable.
- (f) The costs of providing a technical and factual presentation of information on a topic directly related to the performance of a contract through hearing testimony, statements, or letters to the Congress or state legislature, or subdivision, member, or cognizant staff member thereof, in response to a documented request (including a Congressional Record notice requesting testimony or statements for the record at a regularly scheduled hearing) made by the recipient member, legislative body or subdivision, or a cognizant staff member thereof are allowable.
- (g) The costs for transportation, lodging or meals in connection with the activities authorized under § 470.40.50 (Lobbying Costs) must not be allowable unless incurred offering testimony at a regularly scheduled congressional hearing in response to a written request for such presentation made by the chair or ranking minority member of the committee or subcommittee conducting such hearing.
- (h) The costs of lobbying to influence state legislation to directly reduce contract cost, or to avoid material impairment of the contractor's authority to perform the contract are allowable.
- (i) The costs of any activity specifically authorized by statute to be undertaken with funds from the contract are allowable.

#### **§ 470.40.55 Losses on Other Contracts**

An excess of costs over income under any other contract (including the contractor's contributed portion under cost-sharing contracts) are not allowable.

#### **§ 470.40.60 Taxes**

The following costs are not allowable:

- (a) federal income and excess-profits taxes;
- (b) taxes in connection with financing, refinancing, refunding operations, or reorganizations;
- (c) taxes from which exemptions are available to the contractor directly, or available to the contractor based on an exemption afforded the judiciary, except when the CO determines that the administrative burden incident to obtaining the exemption outweighs the corresponding benefits accruing to the judiciary. The term "exemption" means freedom from taxation in whole or in part and includes a tax abatement or reduction resulting from mode of assessment, method of calculation, or otherwise;
- (d) special assessments on land that represent capital improvements;
- (e) taxes (including excises) on real or personal property, or on the value, use, possession or sale thereof, which is used solely in connection with work other than on judiciary contracts;
- (f) taxes on accumulated funding deficiencies of, or prohibited transactions involving, employee deferred compensation plans; and
- (g) income tax accruals designed to account for the tax effect of differences between taxable income and pretax income as reflected by the books of account and financial statements.

#### **§ 470.40.65 Defense of Fraud Proceedings**

Contractor costs incurred in connection with defense of any of the following are not allowable:

- (a) criminal or civil investigation, grand jury proceeding, or prosecution;
- (b) civil litigation; or
- (c) administrative proceedings such as suspension or debarment, or any combination of the foregoing, brought by the judiciary against a contractor, its agents or employees, are unallowable when the charges that are the subject of the investigation, proceedings, or prosecution involve fraud or similar criminal offenses (including filing of a false certification) on the part of the contractor, its agents or employees, and result in conviction (including conviction entered on a plea of *nolo contendere*), judgment against the contractor, its agents or employees, or decision to debar or suspend, or are resolved by consent or compromise. When the charges of fraud are resolved by consent or compromise, the parties may agree on the extent of allowability of such costs as a part of such resolution.

## § 470.40.70 Termination Costs

### (a) General

Contract terminations generally give rise to the occurrence of costs or the need for special treatment of costs that would not have arisen if the contract had not been terminated. This part describes the cost principles peculiar to termination situations to be used in conjunction with the other cost principles.

### (b) Common Items

The costs of items reasonably usable on the contractor's other work are not allowable unless the contractor submits evidence that the items could not be retained at cost without sustaining a loss. The CO must consider the contractor's plans and orders for current and planned production when determining if items can reasonably be used on other work of the contractor.

### (c) Costs Continuing after Termination

Costs that cannot be discontinued immediately after the effective date of termination are generally allowable. However, any costs continuing after the effective date of the termination because of the negligent or willful failure of the contractor to discontinue them are unallowable.

### (d) Start-Up Costs

Reasonable start-up and preparatory costs are generally allowable. When included in the settlement offer as a direct charge, they must not also be included in overhead. Start-up costs for one contract must not be allocated to others.

### (e) Loss of Useful Value

Loss of useful value of special tooling and special machinery and equipment is generally allowable provided the:

- (1) special tooling or special machinery and equipment is not reasonably capable of use in the other work of the contractor;
- (2) judiciary's interest is protected by transfer of title or by other means deemed appropriate by the CO; and
- (3) loss of useful value for any one terminated contract is limited to that portion of the equipment cost which bears the same ratio to the

total cost as the terminated portion of the contract bears to the entire terminated contract and to other judiciary contracts for which the special tooling or special machinery and equipment were acquired.

(f) Rental Costs Under Unexpired Leases

Rental costs under unexpired leases, less the residual value of such leases, are generally allowable when shown to have been reasonably necessary for the performance of the terminated contract when the:

- (1) amount of rental claimed does not exceed the reasonable use value of the property leased for the period of the contract and such further period as may be reasonable; and
- (2) the contractor makes all reasonable efforts to terminate, assign, settle, or otherwise reduce the cost of such lease.

(g) Alterations of Leased Property

The cost of alterations and reasonable restorations required by the lease may be allowed when the alterations are necessary for performing the contract.

(h) Settlement Expenses

Settlement expenses, including the following are generally allowable:

- (1) accounting, legal, clerical, and similar costs reasonably necessary for the:
  - preparation and presentation, including supporting data, of settlement claims to the CO; and
  - termination and settlement of subcontracts.
- (2) reasonable costs for storage, transportation, protection and disposition of property acquired or produced for the contract;
- (3) indirect costs related to salary and wages incurred as settlement expenses under (a) and (b) above. Normally, such indirect costs must be limited to payroll taxes, fringe benefits, occupancy costs, and immediate supervision costs.

**Note:** If settlement expenses are significant, a cost account or work order must be established to identify and accumulate them separately.

(i) Subcontractor Claims

Subcontractor claims, including the allocable portion of the claims common to the contract and to other work of the contractor are generally allowable. An appropriate share of the contractor's indirect expenses may be allocated to the amount of settlements with subcontractors, provided that the amount allocated is reasonably proportionate to the relative benefits received and is otherwise consistent with the principles of this chapter. The indirect expense so allocated must exclude the same and similar costs claimed directly or indirectly as settlement expenses.

#### § 470.40.75 Self-Insurance Costs

- (a) Programs of self-insurance covering a contractor's insurable risks, including the deductible portion of purchased insurance, may be approved and the costs considered allowable when examination of a program indicates that its application is in the judiciary's interest.
- (b) However, programs of self-insurance for catastrophic risks or to protect a contractor against the costs of correcting its own defects in materials or workmanship are not allowable. Should performance of a judiciary contract create the risk of catastrophic losses, the judiciary may, to the extent authorized by law, agree to indemnify the contractor or recognize an appropriate share of premiums for purchased insurance, or both.

#### § 470.50 Accounting for Unallowable Costs

The CO must identify and exclude from each billing, claim, and offer those costs that are expressly unallowable under this chapter or as mutually agreed to be unallowable under an advance cost agreement. **See:** § 470.30.20 (Advance Agreements).

- (a) When costs are identified as unallowable or mutually agreed to be unallowable, all directly associated costs are also unallowable.
- (b) Costs and directly associated costs specifically designated as unallowable as a result of a written decision by a CO must be identified when included in or used in computing any billing, claim, or offer applicable to a judiciary contract.
- (c) For those costs that have been identified as unallowable, the CO must require records as support for claims, billings, and offers. These must be

adequate to establish and maintain visibility of those costs and directly associated costs.

- (d) The CO must identify unallowable costs involved in determining rates used for standard costs, indirect cost offers, or billings at the time rates are proposed, established, revised, or adjusted.