

**37.501 Definition.**

*Best practices*, as used in this subpart, means techniques that agencies may use to help detect problems in the acquisition, management, and administration of service contracts. Best practices are practical techniques gained from experience that agencies may use to improve the procurement process.

**37.502 Exclusions.**

(a) This subpart does not apply to services that are

- (1) Obtained through personnel appointments and advisory committees;
- (2) Obtained through personal service contracts authorized by statute;
- (3) For construction as defined in 36.102; or
- (4) Obtained through interagency agreements where the work is being performed by in-house Federal employees.

(b) Services obtained under contracts below the simplified acquisition threshold and services incidental to supply contracts also are excluded from the requirements of this subpart. However, good management practices and contract administration techniques should be used regardless of the contracting method.

**37.503 Agency-head responsibilities.**

The agency head or designee should ensure that—

- (a) Requirements for services are clearly defined and appropriate performance standards are developed so that the agency's requirements can be understood by potential offerors and that performance in accordance with contract terms and conditions will meet the agency's requirements;
- (b) Service contracts are awarded and administered in a manner that will provide the customer its supplies and services within budget and in a timely manner;
- (c) Specific procedures are in place before contracting for services to ensure compliance with OFPP Policy Letters 92-1, Inherently Governmental Functions, 91-2, Service Contracting, and 89-1, Conflicts of Interest Policies Applicable to Consultants; and
- (d) Strategies are developed and necessary staff training is initiated to ensure effective implementation of the policies in 37.102.

**37.504 Contracting officials' responsibilities.**

Contracting officials should ensure that "best practices" techniques are used when contracting for services and in contract management and

administration (see OFPP Policy Letter 93-1).

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**DEPARTMENT OF DEFENSE****GENERAL SERVICES  
ADMINISTRATION****NATIONAL AERONAUTICS AND  
SPACE ADMINISTRATION****48 CFR Parts 16 and 52**

[FAC 90-46; FAR Case 93-603; Item IV]

RIN 9000-AH07

**Federal Acquisition Regulation;  
Performance Incentives for Fixed-Price  
Contracts**

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

**ACTION:** Final rule.

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to permit the use of award-fee provisions as performance incentives in fixed-price contracts. This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993. This is not a major rule under 5 U.S.C. 804.

**DATES:** Effective May 16, 1997.

**FOR FURTHER INFORMATION CONTACT:** Mr. Ralph DeStefano at (202) 501-1758 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4037, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-46, FAR case 93-603.

**SUPPLEMENTARY INFORMATION:****A. Background**

The FAR currently provides for the use of performance incentives when used with cost incentives. This FAR revision allows the use of performance incentives alone. This revision will allow agencies to recognize and reward contractors who exceed minimum standards in terms of quality, timeliness, technical ingenuity, and effective management.

A proposed rule was published in the Federal Register at 61 FR 31798, June 20, 1996. One comment was received from one respondent. The comment was considered in developing the final rule.

**B. Regulatory Flexibility Act**

The Department of Defense, the General Services Administration, and the National Aeronautics and Space Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule merely authorizes the use of performance incentives for contractors under fixed-price contracts. The rule authorizes the Government to reward a contractor for exceeding minimum performance standards.

**C. Paperwork Reduction Act**

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose recordkeeping or information collection requirements, or collections of information from offerors, contractors, or members of the public which require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 16 and 52

Government procurement.

Dated: March 7, 1997.

Edward C. Loeb,

Director, Federal Acquisition Policy Division.

Therefore, 48 CFR Parts 16 and 52 are amended as set forth below:

1. The authority citation for 48 CFR Parts 16 and 52 continues to read as follows:

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

**PART 16—TYPES OF CONTRACTS****16.204 [Amended]**

2. Section 16.204 is amended in the last sentence by removing the citation "16.405" and inserting "16.406".

**16.304 [Amended]**

3. Section 16.304 is amended by removing "16.404-1" and inserting "16.405-1".

**16.305 [Amended]**

4. Section 16.305 is amended by removing "16.404-2" and inserting "16.405-2" each time it appears.

5. Section 16.401 is amended in paragraph (c) by revising the first sentence; and adding paragraph (d) to read as follows:

**16.401 General.**

\* \* \* \* \*

(c) The two basic categories of incentive contracts are fixed-price incentive contracts (see 16.403 and

16.404) and cost-reimbursement incentive contracts (see 16.405). \* \* \*

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

**16.402-1 [Amended]**

6. Section 16.402-1 is amended in paragraph (b) by removing "16.404-2" and inserting "16.405-2".

**16.404 and 16.405 [Redesignated as 16.405 and 16.406]**

7. Sections 16.404 and 16.405 are redesignated as 16.405 and 16.406, respectively.

8. A new section 16.404 is added to read as follows:

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

(a) Award-fee provisions may be used in fixed-price contracts when the Government wishes to motivate a contractor and other incentives cannot be used because contractor performance cannot be measured objectively. Such contracts shall—

(1) Establish a fixed price (including normal profit) for the effort. This price will be paid for satisfactory contract performance. Award fee earned (if any) will be paid in addition to that fixed price; and

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

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

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

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

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

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

**16.404-1 and 16.404-2 [Redesignated as 16.405-1 and 16.405-2].**

9. Sections 16.404-1 and 16.404-2 are redesignated as 16.405-1 and 16.405-2, respectively.

10.-11. The newly designated section 16.406 is amended by revising the introductory text of paragraph (e) to read as follows:

**16.406 Contract clauses.**

\* \* \* \* \*

(e) The contracting officer shall insert an appropriate award-fee clause in solicitations and contracts when an award-fee contract is contemplated, provided that the clause—

\* \* \* \* \*

**PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES**

12. Section 52.216-16 is amended by revising the introductory paragraph, and Alternate I introductory text to read as follows:

**52.216-16 Incentive Price Revision—Firm Target.**

As prescribed in 16.406(a), insert the following clause:

\* \* \* \* \*

*Alternate I* (APR 1984). As prescribed in 16.406(a), add the following paragraph (o) to the basic clause:

\* \* \* \* \*

13. Section 52.216-17 is amended by revising the introductory paragraph, and Alternate I introductory text to read as follows:

**52.216-17 Incentive Price Revision Successive Targets.**

As prescribed in 16.406(b), insert the following clause:

\* \* \* \* \*

*Alternate I* (APR 1984). As prescribed in 16.406(b), add the following paragraph (q) to the basic clause:

\* \* \* \* \*

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**DEPARTMENT OF DEFENSE**

**GENERAL SERVICES ADMINISTRATION**

**NATIONAL AERONAUTICS AND SPACE ADMINISTRATION**

**48 CFR Parts 23 and 52**

[FAC 90-46; FAR Case 92-054B; Item V]  
RIN 9000-AH39

**Federal Acquisition Regulation; Federal Compliance With Right-To-Know Laws and Pollution Prevention Requirements**

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

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

**SUMMARY:** The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council have agreed on an interim rule amending the Federal Acquisition Regulation (FAR) to implement Executive Order 12856 of August 3, 1993, "Federal Compliance with Right-To-Know Laws and Pollution Prevention Requirements." This Executive order requires that Federal facilities comply with the planning and

reporting requirements of the Pollution Prevention Act of 1990 (42 U.S.C. 13101-13109), and the Emergency Planning and Community Right-to-Know Act of 1986 (42 U.S.C. 11001-11050). This regulatory action was not subject to Office of Management and Budget review under Executive Order 12866, dated September 30, 1993, and is not a major rule under 5 U.S.C. 804.

**DATES:** Effective Date: March 17, 1997.

*Comment Date:* Comments should be submitted to the FAR Secretariat at the address shown below on or before May 16, 1997, to be considered in the formulation of a final rule.

**ADDRESSES:** Interested parties should submit written comments to: General Services Administration, FAR Secretariat (MVR), 18th & F Streets, NW., Room 4035, Attn: Ms. Beverly Fayson, Washington, DC 20405.

E-Mail comments submitted over the Internet should be addressed to:

92-054B@www.ARNET.gov

Please cite FAC 90-46, FAR case 92-054B in all correspondence related to this case.

**FOR FURTHER INFORMATION CONTACT:** Mr. Paul Linfield at (202) 501-1757 in reference to this FAR case. For general information, contact the FAR Secretariat, Room 4035, GS Building, Washington, DC 20405 (202) 501-4755. Please cite FAC 90-46, FAR case 92-054B.

**SUPPLEMENTARY INFORMATION:**

**A. Background**

This interim rule implements Executive Order 12856 of August 3, 1993, "Federal Compliance with Right-To-Know Laws and Pollution Prevention Requirements." The Executive Order requires that Federal facilities comply with the planning and reporting requirements of the Pollution Prevention Act of 1990 (PPA) and the Emergency Planning and Community Right-to-Know Act of 1986 (EPCRA).

The amendments at FAR Parts 23 and 52 require that contracts to be performed on a Federal facility provide for the contractor to supply to the Federal agency all information the Federal agency deems necessary to comply with the reporting requirements of the PPA and EPCRA.

**B. Regulatory Flexibility Act**

This interim rule may have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, because this rule will apply to any contractor that uses certain hazardous or