

16.103 Negotiating contract type.

(a) Selecting the contract type is generally a matter for negotiation and requires the exercise of sound judgment. Negotiating the contract type and negotiating prices are closely related and *should* be considered together. The objective is to negotiate a contract type and price (or estimated cost and fee) that will result in reasonable contractor risk and provide the contractor with the greatest incentive for efficient and economical performance.

(b) A firm-fixed-price contract, which best utilizes the basic profit motive of business enterprise, *shall* be used when the risk involved is minimal or can be predicted with an acceptable degree of certainty. However, when a reasonable basis for firm *pricing* does not exist, other contract types *should* be considered, and negotiations *should* be directed toward selecting a contract type (or combination of types) that will appropriately tie profit to contractor performance.

(c) In the course of an *acquisition* program, a series of contracts, or a single long-term contract, changing circumstances *may* make a different contract type appropriate in later periods than that used at the outset. In particular, *contracting officers should* avoid protracted use of a cost-reimbursement or time-and-materials contract after experience provides a basis for firmer *pricing*.

(d)

(1) Each contract file *shall* include documentation to show why the particular contract type was selected. This *shall* be documented in the *acquisition* plan, or in the contract file if a written *acquisition* plan is not required by agency procedures.

(i) Explain why the contract type selected *must* be used to meet the agency need.

(ii) Discuss the Government's additional risks and the burden to manage the contract type selected (*e.g.*, when a cost-reimbursement contract is selected, the Government incurs additional cost risks, and the Government has the additional burden of managing the contractor's costs). For such instances, *acquisition* personnel *shall* discuss -

(A) How the Government identified the additional risks (*e.g.*, pre-award survey, or *past performance* information);

(B) The nature of the additional risks (*e.g.*, inadequate contractor's accounting system, weaknesses in contractor's internal control, non-compliance with Cost Accounting Standards, or lack of or inadequate *earned value management system*); and

(C) How the Government will manage and mitigate the risks.

(iii) Discuss the Government resources necessary to properly plan for, award, and administer the contract type selected (*e.g.*, resources needed and the additional risks to the Government if adequate resources are not provided).

(iv) For other than a firm-fixed price contract, at a minimum the documentation *should* include -

(A) An analysis of why the use of other than a firm-fixed-price contract (*e.g.*, cost reimbursement, time and materials, labor hour) is appropriate;

(B) Rationale that detail the particular facts and circumstances (*e.g.*, complexity of the requirements, uncertain duration of the work, contractor's technical capability and financial responsibility, or adequacy of the contractor's accounting system), and associated reasoning essential to support the contract type selection;

(C) An assessment regarding the adequacy of Government resources that are necessary to properly plan for, award, and administer other than firm-fixed-price contracts; and

(D) A discussion of the actions planned to minimize the use of other than firm-fixed-price contracts on future *acquisitions* for the same requirement and to transition to firm-fixed-price contracts to the maximum extent practicable.

(v) A discussion of why a level-of-effort, price redetermination, or fee provision was included.

(2) Exceptions to the requirements at (d)(1) of this section are -

(i) Fixed-price *acquisitions* made under *simplified acquisition procedures*;

(ii) Contracts on a firm-fixed-price basis other than those for *major systems* or research and development; and

(iii) Awards on the set-aside portion of sealed bid partial set-asides for small business.

Parent topic: Subpart 16.1 - Selecting Contract Types