

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 12 and 16**[FAC 2001–13; FAR Case 2000–013;
Item I]

RIN 9000–AJ03

**Federal Acquisition Regulation;
Contract Types for Commercial Item
Acquisitions**

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 (Councils) have agreed on a final rule amending the Federal Acquisition Regulation (FAR) to clarify the use of award fees and performance or delivery incentives in firm-fixed-price contracts and fixed-price with economic price adjustment contracts. These changes are intended to clarify how award fees and performance or delivery incentives may be used in commercial item acquisitions where statute prohibits use of cost-type contracts and requires use of firm-fixed-price contracts and fixed-price contracts with economic price adjustment to the maximum extent practicable.

DATES: *Effective Date:* April 17, 2003.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC 20405, (202) 501–4755, for information pertaining to status or publication schedules. For clarification of content, contact Ms. Victoria Moss, Procurement Analyst, at (202) 501–4764. Please cite FAC 2001–13, FAR case 2000–013.

SUPPLEMENTARY INFORMATION:**A. Background**

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 65 FR 83292, December 29, 2000, that proposed to amend FAR 12.207 and Subpart 16.2 to clarify the contract-type requirements for commercial item acquisitions derived from Section 8002(d) of the Federal Acquisition Streamlining Act (FASA) (Pub. L. 103–355). FASA states that agencies must use firm-fixed-price (FFP) contracts and fixed-price contracts with economic price adjustments (FP/EPA) to the maximum extent practicable for

commercial item acquisitions. FASA also prohibits the use of cost-type contracts.

The proposed rule would have amended Part 12 to address pricing mechanisms for acquiring commercial services available on a time-and-materials or labor-hour basis within FAR Part 12 contract-type restrictions. Additionally, the proposed rule contained revisions to FAR 16.202–1 and 16.203–1 to indicate that award fee and performance or delivery incentives based solely on factors other than cost may be used in conjunction with FFP and FP/EPA contracts without changing the FFP or FP/EPA nature of the contract.

The 60-day comment period for the proposed rule ended February 27, 2001. Ten sources submitted comments on the proposed rule. All comments received were considered in the formulation of this final rule. The comments indicated significant confusion concerning the proposed revisions to Part 12 regarding the intended application of the proposed time-and-materials and labor-hour pricing mechanism coverage. Consequently, the FAR Council decided that only the changes associated with using non-cost based award fee and delivery or schedule incentives in conjunction with FFP and FP/EPA contracts should be finalized.

Although this rule does not address the use of time-and-materials and labor-hour contracts for commercial item acquisitions, the Administrator, Office of Federal Procurement Policy, intends to work with the other FAR Council members to develop appropriate revisions to current FAR coverage to address their use, including safeguards that are needed to effectively protect taxpayer interests when these contractual arrangements are used under Part 12.

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

B. Regulatory Flexibility Act

The Regulatory Flexibility Act does not apply to this rule. This final rule does not constitute a significant FAR revision within the meaning of FAR 1.501 and Public Law 98–577, and publication for public comments is not required. However, the Councils will consider comments from small entities concerning the affected FAR Parts 12 and 16 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5

U.S.C. 601, *et seq.* (FAC 2001–13, FAR case 2000–013), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 12 and 16

Government procurement.

Dated: March 12, 2003.

Laura G. Smith,

Director, Acquisition Policy Division.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 12 and 16 as set forth below:

1. The authority citation for 48 CFR parts 12 and 16 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 12—ACQUISITION OF
COMMERCIAL ITEMS**

2. In section 12.207, add the following sentence to the end of the paragraph to read as follows:

12.207 Contract type.

* * * These contract types may be used in conjunction with an award fee and performance or delivery incentives when the award fee or incentive is based solely on factors other than cost (*see* 16.202–1 and 16.203–1).

PART 16—TYPES OF CONTRACTS

3. In section 16.202–1, add the following sentences to the end of the paragraph to read as follows:

16.202–1 Description.

* * * The contracting officer may use a firm-fixed-price contract in conjunction with an award-fee incentive (*see* 16.404) and performance or delivery incentives (*see* 16.402–2 and 16.402–3) when the award fee or incentive is based solely on factors other than cost. The contract type remains firm-fixed-price when used with these incentives.

4. In section 16.203–1, redesignate the introductory text as paragraph (a), and paragraphs (a) through (c) as (1) through (3), respectively; and add paragraph (b) to read as follows:

16.203–1 Description.

* * * * *

(b) The contracting officer may use a fixed-price contract with economic