



MAY THE CLAUSE BE WITH YOUSM

**16.207; Firm-Fixed-Price,
Level-of-Effort Term Contracts**

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Cy leads PilieroMazza’s Government Contracts Group, serving as Chair of the Firm’s largest practice group. He counsels clients on a broad range of government contracting matters before government agencies and federal courts, which includes overall regulatory compliance with the Small Business Administration’s (SBA) small business programs.

Cy represents small and mid-sized government contractors looking to structure compliant teaming, joint venture, and mentor-protégé agreements. He also handles the prosecution and defense of small-business size and status protests; appeals before the SBA and the Office of Hearings and Appeals; as well as bid protests before the Government Accountability Office, the Court of Federal Claims, and the U.S. Court of Appeals for the Federal Circuit.

About PilieroMazza

PilieroMazza—a business law firm—serves as a strategic partner to government contractors and commercial businesses from across the United States.

We deliver results for our clients by implementing legal and business solutions that take the client's best interests into consideration. Moreover, PilieroMazza's efficient operational structure and lean approach to staffing matters translates into competitive pricing for our clients, while providing the highest standard of client service and legal acumen.

PilieroMazza is privileged to represent clients in the following areas:

- Audits & Investigations
- Bid Protests
- Business & Transactions
- Business Succession Planning
- Construction
- Corporate and Organizational Governance
- Cybersecurity & Data Privacy
- Debt Financing
- Employee Incentive and Bonus Plans
- False Claims Act
- Fund Formation & Structuring
- Government Contracts
- Government Contract Claims & Appeals
- Intellectual Property & Technology Rights
- Labor & Employment
- Litigation & Dispute Resolution
- Mergers & Acquisitions
- Native American Law & Tribal Advocacy
- Nonprofits
- Private Equity & Venture Capital

Overview

Contract Types

- FAR 16.207-1: Description
- FAR 16.207-2: Application
- FAR 16.207-3: Limitations
 - (a) – work cannot otherwise be clearly defined
 - (b) – level of effort is identified and agreed advance
 - (c) – result cannot be achieved by less than stipulated effort
 - (d) – price less than SAT
- FAR 46.304: Fixed-Price-Service Contracts
- FAR 52.246-4: Inspection of Services-Fixed-Price

Contract Types (Refresher)

- Firm Fixed Price
- Cost Reimbursement
- Cost-Plus Incentive Contracts
- IDIQ: Indefinite Delivery / Indefinite Quantity
- BOA: Basic Ordering Agreement
- T&M: Time and Materials

FAR 16.2 – Firm-Fixed-Price Contracts

Fixed-price types of contracts provide for a firm price or, in appropriate cases, an adjustable price. Fixed-price contracts providing for an adjustable price may include a ceiling price, a target price (including target cost), or both. Unless otherwise specified in the contract, the ceiling price or target price is subject to adjustment only by operation of contract clauses providing for equitable adjustment or other revision of the contract price under stated circumstances.

Burden Is on the Contractor

URS Federal Support Services, Inc., B-4047573 (Jan. 14, 2013)

- “[M]aximum risk and full responsibility for all costs and resulting profit and loss associated with performing the required work is placed on the contractor.”

Pacific Coast Community Services, Inc. v. United States, 858 F. App’x 343 (Fed. Cir. 2021)

- Highlights the problem with FFP that even if contractors are efficient, they won’t reap the benefits.

Cost Principles and FFP Contracts

Tolliver Group, Inc. v. United States, 161 Fed. Cl. 324 (2022)

- Fixed-price contracts are not immune from cost principles.
- FAR 31.102 applies to fixed-price contracts ‘whenever (a) cost analysis is performed or (b) a fixed-price contract clause requires the determination or negotiation of costs.’
- Tolliver survived a Motion to Dismiss and granted Summary Judgment because
- Cost principles applied because the contract required a cost analysis and the reimbursement of legal fees represented “a significant or deeply ingrained aspect of a fixed-price, level-of-effort development contract.”

FAR 16.207-1: Description

A Firm-Fixed-Price, Level-of-Effort Contract requires:

1. Contractors must “provide a specified level of effort, over a stated period of time, on work that can be stated only in general terms”
2. The Government must pay Contractors a fixed amount

FAR 16.207-2: Application

“A firm-fixed-price, level-of-effort term contract is suitable for investigation or study in a specific research and development area. The product of the contract is usually a report showing the results achieved through application of the required level of effort. However, payment is based on the effort expended rather than on the results achieved.”

FAR 16.207-3: Limitations

“This contract type may be used only when-

- (a) The work required cannot otherwise be clearly defined;
- (b) The required level of effort is identified and agreed upon in advance;
- (c) There is reasonable assurance that the intended result cannot be achieved by expending less than the stipulated effort; and
- (d) The contract price is the simplified acquisition threshold or less, unless approved by the chief of the contracting office.”

FAR 16.207-3(a): Work Cannot Otherwise Be Clearly Defined

Digital Systems Group, Inc., B-257899 (Nov. 15, 1994)

- “A level-of-effort contract is one in which the contractor provides a specified level-of-effort over a stated period of time, on work that can be stated only in general terms.”

URS Federal Support Services, Inc., B-4047573 (Jan. 14, 2013)

- “A fixed-price, level-of-effort contract is generally intended for use in contracts for studies in research and development areas where the work required cannot be clearly defined.”
- “[W]ork required is clearly defined insofar as it describes the types of tasks that the contractor’s personnel are to perform.”

FAR 16.207-3(b): Level of Effort Is Identified & Agreed Advance

General Dynamics Information Technology, Inc., B-421525 (May 26, 2023)

- GDIT argued the FFP, LOE term task order contemplated by the solicitation is outside the scope of the underlying contract
- GAO agreed and sustained the protest because the solicitation was ambiguous and does not comply with FAR 16.207-1
- “[A]s a specified level of effort must be agreed upon in advance as a prerequisite to using a firm-fixed-price, level-of-effort term type of contract, the patently ambiguous solicitation here fails to comport with the regulatory requirements for use of such a task order.”

FAR 16.207-3(b): Level of Effort Is Identified & Agreed Advance

URS Federal Support Services, Inc., B-4047573 (Jan. 14, 2013)

- “As the required level of effort is not identified and agreed upon in advance, but left up to the discretion of each offeror, we find that the CLIN here does not represent a fixed-price, level-of-effort contract as the protester claims.”

FAR 16.207-3(c): Result Cannot Be Achieved by Less Than Stipulated Effort

Pacific Coast Community Services, Inc. v. United States, 858 F. App'x 343 (Fed. Cir. 2021)

- Contract provision:
 - Invoices must reflect services provided monthly of 1,888 hours
- Agency made deductions from invoices and PCCS sued for underpayment
 - PCCS argued FFP did not require adjustment unless it is converted to an FFP, LOE contract
- Federal Circuit found that “because productive hours were a specific deliverable,” the deductions are permitted

McDonnell Douglas Corp. v. United States, 37 Fed. Cl. 295 (1997)

- “[P]ayment is based on the effort expended rather than on results achieved.”

FAR 16.207-3(d): Price Less Than SAT

URS Federal Support Services, Inc., B-407573 (Jan. 14, 2013)

- “A fixed-price, level-of-effort contract requires the approval of the chief of the contracting office if the price is over \$[250,000].”

The Firm-Fixed-Price Reductions of Profits Clause

FAR 46.304 states that “[t]he contracting officer shall insert the clause at 52.246-4, Inspection of Services-Fixed-Price, in solicitations and contracts for services, or supplies that involve the furnishing of services, when a fixed-price contract is contemplated and the contract amount is expected to exceed the simplified acquisition threshold. The contracting officer may insert the clause in such solicitations and contracts when the contract amount is expected to be at or below the simplified acquisition threshold and inclusion is in the Government’s interest.”

FAR 52.246-4: Inspection of Services-Fixed-Price

- “(a) Definition. ‘Services,’ as used in this clause, includes services performed, workmanship, and material furnished or utilized in the performance of services.
- (b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the services under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Government during contract performance and for as long afterwards as the contract requires.
- (c) The Government has the right to inspect and test all services called for by the contract, to the extent practicable at all times and places during the term of the contract. The Government shall perform inspections and tests in a manner that will not unduly delay the work.
- (d) If the Government performs inspections or tests on the premises of the Contractor or a subcontractor, the Contractor shall furnish, and shall require subcontractors to furnish, at no increase in contract price, all reasonable facilities and assistance for the safe and convenient performance of these duties.
- (e) If any of the services do not conform with contract requirements, the Government may require the Contractor to perform the services again in conformity with contract requirements, at no increase in contract amount. When the defects in services cannot be corrected by reperformance, the Government may-
- (1) Require the Contractor to take necessary action to ensure that future performance conforms to contract requirements; and
 - (2) Reduce the contract price to reflect the reduced value of the services performed.
- (f) If the Contractor fails to promptly perform the services again or to take the necessary action to ensure future performance in conformity with contract requirements, the Government may-
- (1) By contract or otherwise, perform the services and charge to the Contractor any cost incurred by the Government that is directly related to the performance of such service; or
 - (2) Terminate the contract for default.”

Questions?



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