



ACQUISITION,
TECHNOLOGY
AND LOGISTICS

OFFICE OF THE UNDER SECRETARY OF DEFENSE

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WASHINGTON, DC 20301-3000

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DPAP/P

MEMORANDUM FOR ASSISTANT SECRETARY OF THE ARMY
(ACQUISITION, LOGISTICS AND TECHNOLOGY)
ASSISTANT SECRETARY OF THE NAVY
(RESEARCH, DEVELOPMENT AND ACQUISITION)
ASSISTANT SECRETARY OF THE AIR FORCE
(ACQUISITION)
DIRECTORS OF DEFENSE AGENCIES

SUBJECT: Utilities Privatization – Contract Pricing

The purpose of this memorandum is to provide instructions for contracting officers to apply in pricing contracts for privatization of utilities in accordance with the provisions at 10 U.S.C. § 2688, "Utility Systems, Conveyance Authority".

In an October 9, 2002, memorandum, the DEPSECDEF stated that utilities privatization is the preferred method for improving utility systems and services. Enclosure 1 to this memorandum provides instructions to Government personnel for pricing contracts under the utilities privatization program. Contracting Officers shall follow these instructions in pricing and negotiating utilities privatization contracts.

Some of the major sectors of the utilities industry have expressed concerns regarding the application of the Cost Accounting Standards and the provisions at FAR Part 31. On September 2, 2004, the Department was granted a waiver from the Cost Accounting Standards provided certain conditions are met. In addition, on October 14, 2004, my office granted a deviation from FAR Part 31 provided certain conditions are met. The FAR deviation and the CAS waiver are included as Attachments A and B to Enclosure 2, respectively.

The Head of the Contracting Agency shall report to this office, on a quarterly basis (beginning with the quarter ended December 31, 2004) any use of the FAR deviations and/or CAS waivers in accordance with the authority provided for in Attachments A and B of Enclosure 2. The report shall be submitted electronically to Mr. David Capitano at david.capitano@osd.mil. within 30 days of the end of the quarter and shall include, at a minimum, the following information:



1. Contract Number
2. Contractor Name
3. Date of Contract Award
4. Amount of the Contract Award

If you have any questions regarding this memorandum, please contact Mr. Capitano, Senior Procurement Analyst, at 703-847-7486.



Deidre A. Lee
Director, Defense Procurement
and Acquisition Policy

Enclosures:
As stated

Instructions for Pricing Utilities Privatization Contracts

A. Considerations in Selecting the Type of Contract:

The type of contract should be carefully selected in each contracting situation. The following describes several pricing methods provided for under FAR Part 16. It also discusses the applicability of the Cost Accounting Standards (CAS) and FAR Part 31 for each of these pricing methods. Note that other pricing methods than those listed herein are also available. When using these other methods, the Contracting Officer should review FAR Part 16 to determine whether the method is appropriate, and also review pertinent requirements to determine the applicability of CAS and FAR Part 31.

1. Firm Fixed Price (FFP):

Use: FFP contracts are the preferred contracting method when the conditions described at FAR 16.202-2 exist. The term of this contract will generally be much shorter than the maximum allowable term of 50 years provided for utilities privatization contracts under 10 U.S.C. 2688(c)(3).

CAS Application: CAS normally applies to FFP contracts, unless one of the exemptions listed at 48 CFR 9903.201-1(b) exist. These exemptions include the one at 48 CFR 9903.201-1(b)(15), which exempts CAS for any FFP contract awarded on the basis of adequate price competition and without the submission of cost or pricing data. In addition, the CAS Board has granted a waiver for FFP contracts awarded under the utilities privatization program when certain conditions exist (see Attachment B of Enclosure 2).

FAR Part 31 Application: The provisions of FAR Part 31 do not apply to FFP contracts that are priced using price analysis. The provisions of FAR Part 31 normally do apply to FFP contracts that are priced on the basis of cost analysis. However, the Director, Defense Procurement and Acquisition Policy (DPAP) has granted a class deviation from many of the provisions of FAR Part 31 for FFP contracts awarded under the utilities privatization program, provided certain conditions are met (see Attachment A of Enclosure 2).

2. Fixed price with economic price adjustment (where the price adjustment is based on an index or established prices, not based on actual costs incurred) (FPEPA):

Use: This contract type may be used when (i) the conditions in FAR 16.203-2 exist; (ii) the limitations in FAR 16.203-3 are met; and (iii) there is an established index or indices that can serve as a basis for adjusting the contract price.

CAS Application: CAS normally applies to FPEPA contracts, unless one of the exemptions listed at 48 CFR 9903.201-(b)(1) exists. However, the CAS Board has granted a waiver from CAS for FPEPA contracts awarded under the utilities privatization program, provided certain conditions exist (see Attachment B of Enclosure 2).

FAR Part 31 Application: The provisions of FAR Part 31 do not apply to FPEPA contracts when they are awarded on the basis of price analysis, rather than cost analysis. The provisions of FAR Part 31 normally do apply to FPEPA contracts when they are awarded on the basis of cost analysis. However, DPAP has granted a class deviation from many of the provisions of FAR Part 31 for FPEPA contracts awarded under the utilities privatization program, provided certain conditions are met (see Attachment A of Enclosure 2).

3. Fixed price with prospective price redetermination (where the price adjustment is based on actual costs incurred) (FPPPR):

Use: This contract type may be used when the conditions described in FAR 16.205-2 exist and the limitations in FAR 16.205-3 are met.

CAS Application: CAS normally applies to FPPPR contracts, unless one of the exemptions listed at 48 CFR 9903.201-(b)(1) exists. However, the CAS Board has granted a waiver from CAS for FPPPR contracts awarded under the utilities privatization program, provided certain conditions exist (see Attachment B of Enclosure 2).

FAR Part 31 Application: The initial pricing of these contracts are not subject to FAR Part 31, provided that the contract price is determined on the basis of price analysis. The initial pricing of these contracts is subject to FAR Part 31 when the contract price is determined on the basis of cost analysis. The price redetermination is also subject to FAR Part 31, since it is determined on the basis of actual costs incurred (this is cost analysis). However, DPAP has granted a class deviation from many of the provisions of FAR Part 31 for FPEPA contracts awarded under the utilities privatization program, provided certain conditions are met (see Attachment A of Enclosure 2).

4. Cost reimbursable:

Use: This contract type may be used in those situations when the conditions described in FAR 16.301-2 exist and the limitations in FAR 16.301-3 are met.

CAS Application: CAS applies to cost reimbursable contracts, unless one of the exemptions listed at 48 CFR 9903.201-(b)(1) exists. A waiver from CAS *has not* been granted for these types of contracts.

FAR Part 31 Application: FAR Part 31 applies to all cost reimbursable contracts. A deviation from FAR Part 31 *has not* been granted for these types of contracts.

B. Profit:

When negotiating utilities privatization contracts for which the price is determined based on cost analysis, FAR 15.404 requires that the Contracting Officer use a structured approach in determining profit. This structured approach shall utilize the weighted guidelines method, as required by DFARS 215.404-71 (this requires consideration of performance risk, contract type risk, facilities capital employed, and cost efficiency) in determining an appropriate profit amount.

C. Contract Management:

By their complex, long term nature, utilities privatization contracts require specialized expertise to effectively manage the contracts, control cost growth and ensure quality of contract performance. Procuring Contracting Officers (PCOs) must ensure that a plan for developing and maintaining the required contracting and technical expertise throughout the life of the acquisition is established and adequately supported. When the PCO utilizes another DoD component or government agency to provide that expertise, a Memorandum of Understanding should be developed to ensure the component or agency provides professional support over the long term.

Contracting Activities should provide written policies to guide members of the acquisition team to ensure issues can be effectively and consistently resolved. Training and briefings to the team should be provided to ensure knowledge transfer of the best business practices and consistent procedures within the DoD component. DoD components should also use the Utilities Privatization Working Group to encourage knowledge sharing among contracting activities involved in utilities privatization.

Contracting officers shall meet the following guidelines in procuring DoD utilities privatization contracts.

1. Issue an RFP package that is clear and complete.
2. Produce a technical data package that accurately reflects the system and provides data on the condition and past performance of the system.
3. Assure that the service performance standards expected for utility service are clear. The difference between local utility standards and the contract standard should also be identified.
4. Develop a quality assurance plan prior to contract award.
5. Develop an acquisition plan that includes post award contract administration and cost growth control.