

(Catalog of Federal Domestic Assistance No. 83.100, "Flood Insurance.")
 Issued: November 3, 1997.
Michael J. Armstrong,
Associate Director for Mitigation.
 [FR Doc. 97-29753 Filed 11-10-97; 8:45 am]
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Federal Communications Commission.
William F. Caton,
Acting Secretary.
 [FR Doc. 97-29661 Filed 11-10-97; 8:45 am]
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FEDERAL COMMUNICATIONS COMMISSION

47 CFR Parts 5, 21, 22, 23, 24, 25, 26, 27, 73, 74, 78, 80, 87, 90, 95, 97, and 101

[ET Docket No. 96-2; FCC 97-347]

Arecibo Coordination Zone

AGENCY: Federal Communications Commission.
ACTION: Final rule; correction.

SUMMARY: This document contains a correction to one of the final rules adopted in "Amendment of the Commission's Rules to Establish a Radio Astronomy Coordination Zone in Puerto Rico", which was published Monday, October 27, 1997 (62 FR 55525).

EFFECTIVE DATE: December 26, 1997.

FOR FURTHER INFORMATION CONTACT: Rodney Small, Office of Engineering and Technology, (202) 418-2452.

SUPPLEMENTARY INFORMATION:

Background

This document corrects Section 101.123(d) of the Commission's rules, as modified in "Amendment of the Commission's Rules to Establish a Radio Astronomy Coordination Zone in Puerto Rico," ET Docket 96-2, FCC 97-347 (released October 15, 1997), 62 FR 55525 (October 27, 1997). This rule, which deals with Quiet Zones and Arecibo Coordination Zone was published with a clerical error.

Need for Correction

As published, this final rule contains an error that may be misleading and is in need of clarification.

Correction of Publications

Accordingly, the publication on October 27, 1997, of final rules in ET Docket No. 96-2, which was the subject of FR Doc. 97-28296, is corrected as follows:

§ 101.123 [Corrected]

On page 55536, in the third column, within the regulatory instruction for § 101.123, paragraph (d) is correctly designated as paragraph 101.123(e).

ENVIRONMENTAL PROTECTION AGENCY

48 CFR Parts 1515 and 1552

[FRL-5919-4]

Acquisition Regulation

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: This document revises the EPA Acquisition Regulation (EPAAR) on calculation of profit or fee. Two unrelated administrative corrections are also being made.

EFFECTIVE DATE: November 12, 1997.

ADDRESSES: Environmental Protection Agency, Office of Acquisition Management (3802R), 401 M Street S.W., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Larry Wyborski, Telephone: (202) 564-4369.

SUPPLEMENTARY INFORMATION:

I. Background Information

The proposed rule was published in the **Federal Register** (62 FR 27712-27715) on May 21, 1997, providing for a 60-day comment period.

Interested parties were afforded the opportunity to participate in the making of this rule. The following is a summary of each comment and the Agency disposition of those comments.

1. *Comment:* EPA should make it clear that Subpart 1515.970-2(b)(iv) cannot be interpreted to allow only one profit or fee determination for both the general contractor and subcontractor levels of an acquisition.

Response: Privity of contract is an established principle in Government contracting. The Government's contract is with the prime (general) contractor. Duties such as direction and payment of the subcontractors are solely the responsibility of the prime contractor. Therefore, profit or fee determinations are solely based on the prime contractor's effort.

2. *Comment:* We are concerned about the soundness of "structured approach" policy. We believe the structured approach prevents the Government from receiving best value by adding unnecessary expense to the negotiation process. Further, the structure approach distorts market value in competitive

procurements by substituting private industry competitive determinations of cost and profit with Government notions of what the market "should be."

Response: As stated in EPAAR 1515.902(a)(3), the structured approach is a basis for negotiations, not a final determination. Also, EPAAR 1515.903 is being added by this rule to allow exemption of cost realism evaluations from required use of a structured approach. Cost realism is a factor in best value procurements. Furthermore, EPAAR 1515.902(b) specifies numerous other types of contracts and circumstances where methods other than the structured approach set forth in EPAAR 1515.970 may be used. For instance, the structured approach is not required for construction contracts (EPAAR 1515.902(b)(vi)).

3. *Comment:* We are concerned that Subpart 1515.970-2(b)(2)(iii)(C) of the proposed rule could be misinterpreted by contracting officers. Each construction acquisition, regardless of the contract type or contractor experience, is a unique project which can have significant distinguishing characteristics. Profit or fee weighted guidelines should therefore be considered anew for each acquisition.

Response: We agree that the cited provision may be subject to misinterpretation. It is also unnecessary, since it is not a mandatory requirement and the contracting officer has a certain amount of flexibility in making weighted guideline determinations. The provision at 1515.970-2(b)(2)(iii)(C) will be deleted.

4. *Comment:* EPA should emphasize to contracting officers that weighted guidelines are prenegotiation benchmarks, not unchangeable standards.

Response: See EPAAR 1515.902(a)(3) and the Agency policy at EPAAR 1515.970-1. Both citations provide for a structured approach as a basis for negotiations, rather than as a final determination.

5. *Comment:* EPA should review and update its statement in EPAAR 1515.970-2(a)(3), relating to facilities capital cost of money.

Response: Based on a review of approaches taken by other Agencies on this matter, EPA will reassess EPAAR 1515.970-2, for possible revision in a future action.

II. Executive Order 12866

This is not a significant regulatory action under Executive Order 12866; therefore, no review is required at the Office of Information and Regulatory Affairs within OMB.

III. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because this rule does not contain information collection requirements for the approval of the Office of Management and Budget (OMB) under 44 U.S.C. 3501, *et seq.*

IV. Regulatory Flexibility Act

The EPA certifies that this rule does not exert a significant economic impact on a substantial number of small entities. There are no requirements for contractor compliance under the proposed rule.

V. Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA) Public Law 104-4, establishes requirements for Federal agencies to assess their regulatory actions on State, local, and tribal governments, and the private sector.

EPA has determined that this rule does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and tribal governments, in the aggregate, or the private sector in any one year. Any private sector costs for this action relate to paperwork requirements and associated expenditures that are far below the level established for UMRA applicability. Thus, the rule is not subject to the requirements of sections 202 and 205 of the UMRA.

VI. Regulated Entities

EPA contractors are entities potentially regulated by this action.

Category	Regulated entity
Industry	EPA Contractors.

List of Subjects in 48 CFR Parts 1515 and 1552

Environmental protection, Government procurement.

For the reasons set forth in the preamble, Chapter 15 of Title 48 Code of Federal Regulations 1515 and 1552 is amended as follows:

PARTS 1515 AND 1552—[AMENDED]

1. The authority citation for 1515 and 1552 continues to read as follows:

Authority: Sec. 205(c), 63 Stat. 390 as amended, 40 U.S.C. 486(c).

2. Subpart 1515.9 is revised to read as follows:

Subpart 1515.9—Profit

Table of Contents

- 1515.900 Scope of subpart.
- 1515.902 Policy.

- 1515.903 Cost realism.
- 1515.905 Profit-analysis factors.
- 1515.970 EPA structured approach for developing profit or fee objectives.
- 1515.970-1 General.
- 1515.970-2 EPA structured system.

1515.900 Scope of subpart.

This subpart implements FAR subpart 15.4, and prescribes the EPA structured approach for determining profit or fee prenegotiation objectives.

1515.902 Policy.

(a) *EPA structured approach.* The purpose of EPA's structured approach is:

- (1) To provide a standard method of evaluation;
 - (2) To ensure consideration of all relevant factors;
 - (3) To provide a basis for documentation and explanation of the profit or fee negotiation objective;
 - (4) To allow contractors to earn profits commensurate with the assumption of risk; and
 - (5) To reward contractors who undertake more difficult work requiring higher risks.
- (b) *Other methods.*
- (1) Contracting officers may use methods other than those prescribed in 1515.970 for establishing profit or fee objectives under the following types of contracts and circumstances:
 - (i) Architect-engineering contracts;
 - (ii) Personal service contracts;
 - (iii) Management contracts, e.g., for maintenance or operation of Government facilities;
 - (iv) Termination settlements;
 - (v) Services under labor-hour and time and material contracts which provide for payment on an hourly, daily, or monthly basis, and where the contractor's contribution constitutes the furnishing of personnel.
 - (vi) Construction contracts; and
 - (vii) Cost-plus-award-fee contracts.

(2) Generally, it is expected that such methods will:

- (i) Provide the contracting officer with a technique that will ensure consideration of the relative value of the appropriate profit factors described under "Profit Factors," in 1515.970-2, and
- (ii) Serve as a basis for documentation of the profit or fee objective.
- (c) Under unusual circumstances, the CCO may specifically waive the requirement for the use of the guidelines. Such exceptions shall be justified in writing, and authorized only in situations where the guidelines method is unsuitable. In the event that any of the methods used would result in establishing a fee objective in violation of limitations established by statute (see

FAR 15.404-4(b)(4)(i)), the maximum fee objective shall be the percentage allowed pursuant to such limitations. No administrative ceilings on profits or fees shall be established.

(d) The contracting officer shall not consider any known subcontractor profit/fee as part of the basis for determining the contractor profit/fee.

1515.903 Cost realism.

The EPA structured approach is not required when the contracting officer is evaluating cost realism in a competitive acquisition.

1515.905 Profit-analysis factors.

Profit-analysis factors prescribed in the EPA structured approach for analyzing profit or fee include those prescribed by FAR 15.404-4(d)(1), and additional factors authorized by FAR 15.404-4(d)(d) to foster achievement of program objectives. These profit or fee factors are prescribed in 1515.970-2.

1515.970 EPA structured approach for developing profit or fee objectives.

1515.970-1 General.

(a) The Agency's policy is to utilize profit to attract contractors who possess talents and skills necessary to the accomplishment of the objectives of the Agency, and to stimulate efficient contract performance. In negotiating profit/fee, it is necessary that all relevant factors be considered, and that fair and reasonable amounts be negotiated which give the contractor a profit objective commensurate with the nature of the work to be performed, the contractor's input to the total performance, and the risks assumed by the contractor.

(b) To properly reflect differences among contracts, and to select an appropriate relative profit/fee in consideration of these differences, weightings have been developed for application by the contracting officer to standard measurement bases representative of the prescribed profit factors cited in FAR 15.905 and (EPAAR) 48 CFR 1515.970-2(a)(1). Each profit factor or subfactor, or its components, has been assigned weights relative to their value to the contract's overall effort, and the range of weights to be applied to each profit factor.

1515.970-2 EPA structured system.

(a)(1) *Profit/fee factors.* The factors set forth in the following table, and the weighted ranges listed after each factor, shall be used in all instances where the profit/fee is negotiated.

CONTRACTOR'S INPUT TO TOTAL PERFORMANCE

	Weight range (percent)
Direct material	1 to 5.
Professional/technical labor	8 to 15.
Professional/technical overhead ...	6 to 9.
General labor	5 to 9.
General overhead	4 to 7.
Subcontractors	1 to 4.
Other direct costs	1 to 3.
General and administrative expenses.	5 to 8.
Contractor's assumption of contract cost risk.	0 to 6.

(2) The contracting officer shall first measure the "Contractor's Input to Total Performance" by the assignment of a profit percentage within the designated weight ranges to each element of contract cost. Such costs are multiplied by the specific percentages to arrive at a specific dollar profit or fee.

(3) The amount calculated for facilities capital cost of money (FCCM) shall not be included as part of the cost base for computation of profit or fee (see FAR 15.404-4(c)(3)). The profit or fee objective shall be reduced by an amount equal to the amount of facilities capital cost of money allowed. A complete discussion of the determination of facilities capital cost of money and its application and administration is set forth in FAR 31.205-10, and the Appendix to the FAR (see 48 CFR 9904.414).

(4) After computing a total dollar profit or fee for the Contractor's Input to Total Performance, the contracting officer shall calculate the specific profit dollars assigned for cost risk and performance. This is accomplished by multiplying the total Government cost objective, exclusive of any FCCM, by the specific weight assigned to cost risk and performance. The contracting officer shall then determine the profit or fee objective by adding the total profit dollars for the Contractor's Input to Total Performance to the specific dollar profits assigned to cost risk and performance. The contracting officer shall use EPA Form 1900-2 to facilitate the calculation of the profit or fee objective.

(5) The weight factors discussed in this subsection are designed for arriving at profit or fee objectives for other than nonprofit and not-for-profit organizations. Nonprofit and not-for-profit organizations are addressed as follows:

(i) Nonprofit and not-for-profit organizations are defined as those

business entities organized and operated:

(A) Exclusively for charitable, scientific, or educational purposes;

(B) Where no part of the net earnings inure to the benefit of any private shareholder or individual;

(C) Where no substantial part of the activities is for propaganda or otherwise attempting to influence legislation or participating in any political campaign on behalf of any candidate for public office; and

(D) Which are exempt from Federal income taxation under Section 51 of the Internal Revenue Code (Title 26, United States Code).

(ii) For contracts with nonprofit and not-for-profit organizations where fees are involved, a special factor of -3 percent shall be assigned in all cases.

(b) Assignment of values to specific factors—

(l) *General.* In making a judgment on the value of each factor, the contracting officer should be governed by the definition, description, and purpose of the factors, together with considerations for evaluation set forth in this paragraph.

(2) *Contractor's input to total performance.* This factor is a measure of how much the contractor is expected to contribute to the overall effort necessary to meet the contract performance requirements in an efficient manner. This factor, which is separate from the contractor's responsibility for contract performance, takes into account what resources are necessary, and the creativity and ingenuity needed for the contractor to perform the statement of work successfully. This is a recognition that within a given performance output, or within a given sales dollar figure, necessary efforts on the part of individual contractors can vary widely in both value, quantity, and quality, and that the profit or fee objective should reflect the extent and nature of the contractor's contribution to total performance. Greater profit opportunity should be provided under contracts requiring a high degree of professional and managerial skill and to prospective contractors whose skills, facilities, and technical assets can be expected to lead to efficient and economical contract performance. The evaluation of this factor requires an analysis of the cost content of the proposed contract as follows:

(i) *Direct material (purchased parts and other material).* (A) Analysis of these cost items shall include an evaluation of the managerial and technical effort necessary to obtain the required material. This evaluation shall include consideration of the number of

orders and suppliers, and whether established sources are available or new sources must be developed. The contracting officer shall also determine whether the contractor will, for example, obtain the materials by routine orders or readily available supplies (particularly those of substantial value in relation to the total contract costs), or by detailed subcontracts for which the prime contractor will be required to develop complex specifications involving creative design.

(B) Consideration should be given to the managerial and technical efforts necessary for the prime contractor to administer subcontracts, and to select subcontractors, including efforts to break out subcontracts from sole sources, through the introduction of competition.

(C) Recognized costs proposed as direct material costs such as scrap charges shall be treated as material for profit evaluation.

(D) If intracompany transfers are accepted at price, in accordance with FAR 31.205-26(e), they should be excluded from the profit or fee computation. Other intracompany transfers shall be evaluated by individual components of cost, i.e., material, labor, and overhead.

(E) Normally, the lowest weight for direct material is 2 percent. A weighting of less than 2 percent would be appropriate only in unusual circumstances when there is a minimal contribution by the contractor in relation to the total cost of the material.

(ii) *Professional/technical and general labor.* Analysis of labor should include evaluation of the comparative quality and level of the talents and experience to be employed. In evaluating labor for the purpose of assigning profit dollars, consideration should be given to the amount of notable scientific talent or unusual or scarce talent needed, in contrast to journeyman effort or supporting personnel. The diversity, or lack thereof, of scientific and engineering specialties required for contract performance, and the corresponding need for supervision and coordination, should also be evaluated.

(iii) *Overhead and general and administrative expenses.* (A) Where practicable, analysis of these overhead items of cost should include the evaluation of the individual elements of these expenses, and how much they contribute to contract performance. This analysis should include a determination of the amount of labor within these overhead pools, and how this labor would be treated if it were considered as direct labor under the contract. The allocable labor elements should be given

the same profit consideration as if they were direct labor. The other elements of indirect cost pools should be evaluated to determine whether they are routine expenses such as utilities, depreciation, and maintenance, and therefore given less profit consideration.

(B) The contractor's accounting system need not break down its overhead expenses within the classification of professional/technical overhead, general overhead and general and administrative expenses.

(iv) *Subcontractors.* (A) Subcontract costs should be analyzed from the standpoint of the talents and skills of the subcontractors. The analysis should consider if the contractor normally should be expected to have people with comparable expertise employed as full-time staff, or if the contract requires skills not normally available in an employer-employee relationship. Where the contractor is using subcontractors to perform labor which would normally be expected to be done in-house, the rating factor should generally be at or near 1 percent. Where exceptional expertise is retained, or the contractor is participating in the mentor-protégé program, the assigned weight should be nearer to the high end of the range.

(B) In accordance with (EPAAR) 48 CFR 1515.902(d), whenever the subcontractor profit/fee is known to the contracting officer, that profit/fee shall not be considered as part of the basis for determining the contractor profit/fee.

(v) *Other direct costs.* Items of costs, such as travel and subsistence, should generally be assigned a rating of 1 to 3 percent. The analysis of these costs should be similar to the analysis of direct material.

(3) *Contractor's assumption of contract cost risk.* (i) The risk of contract costs should be shifted to the fullest extent practicable to contractors, and the Government should assign a rating that reflects the degree of risk assumption. Evaluation of this risk requires a determination of

(A) The degree of cost responsibility the contractor assumes,

(B) The reliability of the cost estimates in relation to the task assumed, and

(C) The chance of the contractor's success or failure. This factor is specifically limited to the risk of contract costs. Thus, such risks of losing potential profits in other fields are not within the scope of this factor.

(ii) The first determination of the degree of cost responsibility assumed by the contractor is related to the sharing of total risk of contract cost by the Government and the contractor, depending on selection of contract type.

The extremes are a cost-plus-fixed-fee contract requiring only that the contractor use its best efforts to perform a task, and a firm-fixed-price contract for a complex item. A cost-plus-fixed-fee contract would reflect a minimum assumption of cost responsibility by the contractor, whereas a firm-fixed-price contract would reflect a complete assumption of cost responsibility by the contractor. Therefore, in the first step of determining the value given for the contractor's assumption of contract cost risk, a low rating would be assigned to a proposed cost-plus-fixed-fee best efforts contract, and a higher rating would be assigned to a firm-fixed-price contract.

(iii) The second determination is that of the reliability of the cost estimates. Sound price negotiation requires well-defined contract objectives and reliable cost estimates. An excessive cost estimate reduces the possibility that the cost of performance will exceed the contract price, thereby reducing the contractor's assumption of contract cost risk.

(iv) The third determination is that of the difficulty of the contractor's task. The contractor's task may be difficult or easy, regardless of the type of contract.

(v) Contractors are likely to assume greater cost risks only if the contracting officer objectively analyzes the risk incident to the proposed contract, and is willing to compensate contractors for it. Generally, a cost-plus-fixed-fee contract would not justify a reward for risk in excess of 1 percent, nor would a firm-fixed-price contract normally justify a reward of less than 4 percent. Where proper contract type selection has been made, the reward for risk by contract type would usually fall into the following percentage ranges:

Type of contract	Percentage ranges
Cost-plus-fixed-fee	0 to 1.
Prospective price determination ...	4 to 5.
Firm-fixed-price	4 to 6.

(A) These ranges may not be appropriate for all acquisitions. The contracting officer might determine that a basis exists for high confidence in the reasonableness of the estimate, and that little opportunity exists for cost reduction without extraordinary efforts. The contractor's willingness to accept ceilings on their burden rates should be considered as a risk factor for cost-plus-fixed-fee contracts.

(B) In making a contract cost risk evaluation in an acquisition that involves definitization of a letter contract, consideration should be given

to the effect on total contract cost risk as a result of partial performance under a letter contract. Under some circumstances, the total amount of cost risk may have been effectively reduced by the existence of a letter contract. Under other circumstances, it may be apparent that the contractor's cost risk remained substantially as great as though a letter contract had not been used. Where a contractor has begun work under an anticipatory cost letter, the risk assumed is greater than normal. To be equitable, the determination of a profit weight for application to the total of all recognized costs, both those incurred and those yet to be expended, must be made with consideration to all relevant circumstances, not just to the portion of costs incurred or percentage of work completed prior to definitization.

1552.217-73 [Amended]

3. Section 1552.217-73 is amended by revising the clause heading as follows:

1552.217-73 Option for Increased Quantity—Cost Type Contract (JUN 1997)

1552.217-74 [Amended]

4. Section 1552.217-74 is amended by revising the clause heading as follows:

1552.217-74 Option for Increased Quantity—Cost Plus Award Fee Contract (JUN 1997)

Dated: October 27, 1997

John C. Gherardini,

Acting Director, Office of Acquisition Management.

[FR Doc. 97-29593 Filed 11-10-97; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 679

[Docket No. 970520118-7251-02; I.D. 050197A]

RIN 0648-AJ00

Fisheries of the Exclusive Economic Zone Off Alaska; Individual Fishing Quota Program; Standard Allowances for Ice and Slime

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues a final rule that establishes standard allowances for ice