

Procurement Advisory 134

Incrementally Funded Fixed-Price Contracts

1. SUMMARY

This Advisory provides guidance for incrementally funding fixed-price contracts.

2. REFERENCES

FAR 32.7, Contract Funding

3. DEFINITIONS

“Severable services” means services that are continuing and ongoing in nature—such as help-desk support, maintenance, or janitorial services—for which benefit is received each time the service is rendered.

“Non-severable services” means work that results in a final product or end-item and for which benefit is received only when the entire project is complete, such as systems design, building conversion, or environmental study.

4. ACTIONS

Fixed-price contracts shall be fully funded except as permitted below:

1. A fixed-price contract may be incrementally funded only if the contract (excluding any options) or any exercised option:
 - a. Is for severable services;
 - b. Does not exceed one year in length; and
 - c. Is incrementally funded using funds available (unexpired) as of the date the funds are obligated; or
2. The contract uses funds available from multiple (two or more) fiscal years and Congress has otherwise authorized incremental funding.

An incrementally funded fixed-price contract shall be fully funded as soon as funds are available.

Use the attached clause “Limitation of Government's Obligation”, in solicitations and resultant incrementally funded fixed-price contracts. The contracting officer may revise the contractor's notification period, in paragraph (c) of the clause, from “ninety” to “thirty” or “sixty” days, as appropriate.

Upon receipt of the contractor's notice under paragraph (c) of the clause "Limitation of Government's Obligation", the contracting officer shall promptly provide written notice to the contractor that the Government is—

1. Allotting additional funds for continued performance and increasing the Government's limitation of obligation in a specified amount;
2. Terminating the contract; or
3. Considering whether to allot additional funds; and
 - a. The contractor is entitled by the contract terms to stop work when the Government's limitation of obligation is reached; and
 - b. Any costs expended beyond the Government's limitation of obligation are at the contractor's risk.
4. Upon learning that the contract will receive no further funds, the contracting officer shall promptly give the contractor written notice of the Government's decision and terminate for the convenience of the Government.

The contracting officer shall ensure that, in accordance with paragraph (b) of the clause "Limitation of Government's Obligation", sufficient funds are allotted to the contract to cover the total amount payable to the contractor in the event of termination for the convenience of the Government.

This advisory is effective as dated and shall remain in effect until the direction is included in the AGAR or rescinded.

Questions regarding this advisory should be directed to Procurement.Policy@dm.usda.gov.

ATTACHMENT A

LIMITATION OF GOVERNMENT’S OBLIGATION (SEPT 2018)

(a) Contract line item(s) listed below is/are incrementally funded. For this/these item(s), the sum of \$ [Contracting Officer insert after negotiations] of the total price is presently available for payment and allotted to this contract. An allotment schedule is set forth in paragraph (j) below.

Line Item	Price	Currently Allotted Funding	Funds Required for Complete Funding

(b) For item(s) identified in paragraph (a) as not fully funded, the Contractor agrees to perform up to the point at which the total amount payable by the Government, including reimbursement of authorized termination costs in the event of termination of those item(s) for the Government’s convenience, does not exceed the total amount currently allotted to the items not fully funded under the contract. The Contractor is not authorized to continue work on those item(s) beyond that point. The Government will not be obligated in any event to reimburse the Contractor in excess of the amount allotted to the contract for those item(s) regardless of anything to the contrary in the clause entitled “Termination for Convenience of the Government.” The total amount payable by the Government in the event of termination of applicable contract line item(s) for convenience includes costs, profit, and estimated termination settlement costs for those item(s).

(c) Notwithstanding the dates specified in the allotment schedule in paragraph (j), the Contractor will notify the Contracting Officer in writing at least [thirty, sixty, or ninety, as appropriate] days prior to the date when, in the Contractor’s best judgment, the work will reach the point at which the total amount payable by the Government, including any cost for termination for convenience, will approximate 85 percent of the total amount currently allotted to the contract for performance of the applicable item(s). The notification will state (1) the estimated date when that point will be reached and (2) an estimate of additional funding, if any, needed to continue performance of applicable line items up to the next scheduled date for allotment of funds identified in paragraph (j), or to a mutually agreed upon substitute date. The notification will also advise the Contracting Officer of the estimated amount of additional funds that will be required for the timely performance of the item(s) funded, for a subsequent period as may be specified in the allotment schedule in paragraph (j) or otherwise agreed to by the parties. If after such notification additional funds are not allotted by the date identified in the Contractor’s notification, or by an agreed substitute date, the Contracting Officer will terminate any item(s) for which additional funds have not been allotted, pursuant to the clause of this contract entitled “Termination for Convenience of the Government.”

(d) When additional funds are allotted for continued performance of the contract line item(s) identified in paragraph (a) above, the parties will agree as to the period of contract performance which will be covered by the funds. The provisions of paragraphs (b) through (d) will apply similarly to the additional allotted funds and agreed substitute date, and the contract will be modified accordingly.

(e) If, solely by reason of failure of the Government to allot additional funds, by the dates indicated below, in amounts sufficient for timely performance of the contract line item(s) identified in paragraph (a), the Contractor incurs additional costs or is delayed in the performance of the work under this contract and if additional funds are allotted, an equitable adjustment will be made in the price or prices (including appropriate target, billing, and ceiling prices where applicable) of the item(s), or in the time of delivery, or both. Failure to agree to any such equitable adjustment hereunder will be a dispute concerning a question of fact within the meaning of the clause entitled "Disputes."

(f) The Government may at any time prior to termination allot additional funds for the performance of the contract line item(s) identified in paragraph (a) above.

(g) The termination provisions do not limit the rights of the Government under the clause entitled "Default" or "Termination for Cause". The provisions are limited to the work and allotment of funds for the contract line item(s) set forth in paragraph (a) above. These terms no longer apply once the contract is fully funded except with regard to the rights or obligations of the parties concerning equitable adjustments negotiated under paragraphs (e) and (f) above.

(h) Nothing herein affects the right of the Government to terminate this contract pursuant to the clause of this contract entitled "Termination for Convenience of the Government."

(i) Nothing herein shall be construed as authorization of voluntary services whose acceptance is otherwise prohibited under 31 U.S.C. 1342.

(j) The parties agree that the Government will allot funds to this contract in accordance with the following schedule:

On execution of contract	\$ _____
(month) (day), (year)	\$ _____
(month) (day), (year)	\$ _____
(month) (day), (year)	\$ _____

[END]