

ACQUISITION LETTER

This Acquisition Letter is issued under the authority of the Senior Procurement Executive of DOE. It is intended for use by procurement professionals of DOE, primarily Contracting Officers, and other officials of DOE that are involved in the acquisition process. Other parties are welcome to its information, but definitive interpretations of its effect on contracts, and related procedures if any, may only be made by DOE Contracting Officers.

Subject: Incrementally Funding Fixed-Price Actions

References:

FAR Subpart 15.4—Contract Pricing
FAR Subpart 32.7—Contract Funding

When is this Acquisition Letter (AL) effective?

This AL is effective upon issuance.

When does this AL Expire?

This AL remains in effect until cancelled.

Who Is the Intended Audience For this AL?

Department of Energy (DOE) Contracting Officers are the audience for this AL.

Who is the Point of Contact for this AL?

DOE Contracting Officers may contact Michael Righi of the Contracts and Financial Assistance Policy Division, Office of Policy, Office of Acquisition and Project Management by phone at (202) 287-1337 or by email to Michael.Righi@hq.doe.gov.

Need More Information on ALs?

Visit the website at <http://energy.gov/management/office-management/operational-management/procurement-and-acquisition/guidance-procurement> for information on Acquisition Letters and other policy issues.

What is the Purpose of this AL?

This AL defines, discusses, and provides implementing guidance for the concept of incremental funding of fixed-price contract actions. It includes a sample clause.

What Types of Contracts Are Affected by this AL?

This AL applies to all incrementally funded fixed-price actions under any contract type.

What is the Background of this AL?

The Department strives to attain optimal alignment of contract incentives and has established two primary principles—align contractor with taxpayer interests and structure contracts so contractors bear the responsibility for their actions. Two critical aspects of achieving optimal alignment of contract incentives are Improved Upfront Planning and Requirements Definition and Selecting Contract Type. They support the Department’s commitment to using fixed-price contracts to the maximum extent consistent with best business practices, and reflect its rejection of long-standing views that the unique and sometimes unpredictable nature of work performed by the Department justifies limiting, without considered and documented thought, use of fixed-price contracts.

One technique that may be used to attain optimal alignment of contract incentives is incremental funding of fixed-price contract actions, which is a concept neither defined nor discussed in any detail in the Federal Acquisition Regulation (FAR), the Department of Energy Acquisition Regulation (DEAR), or any Department policy. To help reach a common understanding of incremental funding of fixed-price contract actions, following this background section this AL includes guidance, a short discussion of the key aspects underlying the concept (as attachment 1, titled “Key aspects underlying the concept”), and a sample clause (as attachment 2, titled “Sample Clause”). The sample clause assumes a contract with more than two contract line items (CLINs) that includes two fixed-price CLINs that will possibly be incrementally funded. To the extent necessary to meet the specific requirements of their acquisition, Contracting Officers may tailor the clause minimally, but they must retain its essential elements. Procedures for using and modifying the sample clause precede it.

What Guidance is included in this AL?

Applicability

Incremental funding of a fixed-price contract action may be used for an action that does not exceed one year in length (excluding any options) if using time-limited funds of one year duration, two years in length (excluding any options) if using time-limited funds of two years duration, and five years in length (excluding any options) if using no-year funds that:

- 1) is for severable services;
- 2) is funded using funds available (unexpired) as of the date the funds are obligated; and
- 3) is fully funded as soon as funds are available.

Program offices must work with the Office of the Chief Financial Officer and resolve all budgetary issues, such as what funds are required to be set-aside.

Essential Elements

Essential elements of an incrementally funded fixed-price action are—

- After establishing the fixed price of the action, the fixed amount of work the action covers, a funding schedule, and that the Government has no contractual obligation to fully fund the fixed price/work, the Government will allot funds:
 - for a specified amount of work (within the full amount of work covered by the fixed price of the action) that become available for the contractor only as it performs the specified amount of work and only at the price or rate reflecting the specified price or rate for the specified amount of work;
 - per (or earlier than) the funding schedule in the contract; and
 - that will equal cumulatively, if the contract action is funded in accordance with the funding schedule, the total fixed price of the contract action.
- The Government's obligation to pay the contractor at all times—during contract performance, in the event of termination, or at contract completion—will never exceed the funds it has allotted and this limitation on the Government's obligation applies in all cases, regardless of:
 - whatever rate at which the contractor is progressing or the magnitude of profit or loss the contract is experiencing or expects to experience; or
 - whether the Government has met its obligation to allot funds per the funding schedule (if it has not, an equitable adjustment due to the Government's failure may be appropriate).
- The contractor is not authorized to proceed beyond the point where the amount payable by the Government (which is the price of the services the allotted funds cover) equals the amount of funds allotted to the action.
- If the Government provides funding in accordance with the funding schedule, the contractor is required to perform and deliver the entire scope of work covered by the contract action's fixed price per the contract's terms:
 - regardless of the rate at which the contractor progresses, incurs costs, or experiences or expects to experience profit or loss; and
 - the Government will pay the contractor the entire fixed price for the action, subject to other terms and conditions of the contract.

Approval

For actions above his/her approval authority, before employing the technique of incrementally funding a fixed-price contract action, a Head of Contracting Activity must first consider traditional forms of contracting and use one of them if possible in preference to incrementally funding a fixed-price contract

action. If none meet the requirement, the Head of Contracting Activity should prepare a business case, include it in the Acquisition Plan, and submit the Acquisition Plan to the Director of the Office of Contract Management for approval. If deciding to employ the technique of incremental funding a fixed-price contract action after an Acquisition Plan (that did not address the technique) was approved, the Head of Contracting Activity should prepare a business case, include it in a revised Acquisition Plan, and submit the revised Acquisition Plan to the Director of the Office of Contract Management for approval.

- The business case must include:
 - An explanation of why traditional forms of contracting will not meet the Department's needs;
 - The planned structure of the contact;
 - An affirmation that both the program office and Office of the Chief Financial Officer have provided assurance that funds are not available for full funding and that they are aware of the plan to use incremental funding;
 - A summary of the planned contractual obligations of the Government and the contractor that includes the planned funding schedule and the planned delivery schedule; and
 - An affirmation to use the attached sample clause, tailored only as necessary to suit the specific details of the acquisition (a class deviation to the to the FAR is in process; it authorizes limiting the Government's obligation for an incrementally funded fixed-price CLIN to the funds allotted to the CLIN).

For actions within his/her approval authority, before employing the technique of incrementally funding a fixed-price contract action, a Head of Contracting Activity must first consider traditional forms of contracting and use one of them if possible in preference to incrementally funding a fixed-price contract action. If none meet the requirement, the Head of Contracting Activity should follow the same process that applies to actions above his/her approval authority with the exception of submitting the Acquisition Plan to the Director of the Office of Contract Management for approval.

Key aspects underlying the concept:**A Brief Discussion Of
Fixed-Price Actions, Full Funding, Incremental Funding,
Incremental Funding Of A Fixed-Price Action,
Challenges, And Exclusions**

Fixed-price Actions: A fixed-price for a contract action means the contractor must provide a definite amount of supplies/services for a definite price and the price is not subject to any adjustment on the basis of the contractor's cost experience (or in some cases a very limited adjustment, for example, in fixed-price incentive arrangements), that is, the contract places the maximum risk and full responsibility on the contractor for all costs and resulting profit or loss related to the action. (The FAR clauses for fixed-price contracts assume full funding of the price.)

Full Funding: Full funding (per the FAR) means funds are obligated to cover the price of a fixed-price contract or the estimated cost and fee of a cost-reimbursement contract.

Incremental Funding: Incremental funding (per the FAR) means funds are obligated to cover the amount allotted and any corresponding increment of fee. The FAR addresses incremental funding of cost-reimbursement contracts, but not of fixed-price contracts.

Incremental Funding of a Fixed-Price action: Incremental funding of a fixed-price action is neither a standard FAR fixed-price contract concept nor a standard FAR cost-reimbursement contract concept, but uses a hybrid of both. It merges a concept from cost-reimbursement contracting, the Limitation of Funds clause's limit on Government liability to "the total amount allotted by the Government," and a concept from fixed-price contracting, the contractor's complete assumption of cost risk. Until the action is fully funded, the limit of Government liability is not the fixed-price, it is the total amount allotted by the Government. If the Government meets its obligation to fund per the contract's funding schedule, it is entitled to the services for the fixed-price, regardless of the costs the contractor incurs.

Challenges: Establishing, contractually, how the arrangement will work involves meeting a myriad of challenges, such as ensuring the Government is never obligated to pay the contractor more than the amount of funds the Government has allotted, clearly defining the mutual promises, specifying for what and by when the contractor may bill during performance, addressing obligations if the contractor is incurring costs at a higher rate than expected but the Government has been meeting its funding obligation, specifying the Contractor can make or lose money if the Government terminates, and so on.

Exclusions: The following are typical authorized activities that are not incrementally funding.

- Establishing fixed-price options.

- Establishing a multi-year contract with termination liability and initially funding only up to the termination liability for the first year.
- Establishing an indefinite quantity/indefinite delivery contract, initially funding only the minimum obligation of the Government, and subsequently fully funding all orders.
- Establishing multiple CLINs and executing (and funding) them with multiple notices to proceed.

SAMPLE CLAUSE

Procedures for using and modifying the sample clause: Insert the following clause in solicitations and contracts if an incrementally fund fixed-price action in the contract is contemplated. The number of incrementally funded CLINs (and corresponding language) may be varied, but the resulting clause must state to what extent they are separately incrementally funded or are incrementally funded in aggregate. The term SUBCLIN or any other logical term may be substituted for CLIN. If the CLINs are not separately incrementally funded, the clause title must be revised. The 60-day period and the 75 percent in paragraph (h) may be varied as appropriate. If an incrementally funded CLIN is not to be funded at all at contract award, consult with legal Counsel to ensure a binding contractual arrangement can still be established.

LIMITATION OF GOVERNMENT’S OBLIGATION—

**SEPARATE INCREMENTAL FUNDING OF CONTRACT’S FIXED-PRICE FOR CLIN 0001 AND
FIXED-PRICE FOR CLIN 0002; AND**

**SEPARATE FULL FUNDING OF THE FIXED PRICE OF PORTION OF THE WORK FOR WHICH
FUNDS HAVE BEEN ALLOTTED**

- (a) This contract’s CLIN 0001 and CLIN 0002 contain Federal Acquisition Regulation fixed prices and contract terms and conditions as set forth in the contract, with the exceptions that: CLIN 0001, CLIN 0002, or both may be incrementally funded; and if a CLIN is incrementally funded as set forth in the contract, in the event of termination before it is fully funded the Government’s maximum liability for the CLIN will be the lower of the amount of funds allotted to the CLIN or the amount payable to the Contractor per the Termination for Convenience (Fixed-Price) clause of this contract. For each CLIN there is
- 1) a fixed price;
 - 2) a specified scope of work that corresponds to the fixed price;
 - 3) an anticipated funding schedule that corresponds to the fixed price and the specified scope of work (the parties contemplate that the Government will allot some funds upon execution of the contract);
 - 4) a Government maximum obligation to the Contractor equal to the funds allotted to the contract for the CLIN;
 - 5) if the Government incrementally allots funds, both a fixed price for the services the allotted funds cover and a maximum Government obligation, including any termination obligations, to the Contractor equal to the allotted funds; and

- 6) an obligation that the Government will pay the Contractor only for the work the Contractor performed: for which funds were allotted; and based only on the fixed price for the services the allotted funds covered (established when the funds were allotted) and the portion of the services performed, not the costs the Contractor may actually incur.

(b) For each CLIN

- 1) the Government's maximum obligation, including any termination obligations and obligations under change orders, equitable adjustments, or unilateral or bilateral contract modifications, at any time is always less than or equal to the total amount of funds allotted by the Government to the contract for the CLIN and the total amount of funds allotted by the Government to the contract for the CLIN is the fixed price of the work for which the funds are allotted;
- 2) the Contractor explicitly agrees the fixed price in the contract reflects (that is, includes or encompasses any additional amount) and any subsequent negotiated fixed price reflects for each of the fixed-price CLINs included in this contract:
 - i. any additional complexities, challenges, and risks (including all risks, costs or otherwise, associated with any potential termination for convenience, or other risks as articulated in this clause) to which the Contractor is subject due to the incremental funding arrangement established in this clause; and
 - ii. the specific risk that in the event of termination of an incrementally funded CLIN before the CLIN is fully funded, the Contractor could receive less than the amount the Termination for Convenience (Fixed-Price) clause of this contract would usually permit, that is, the Government is only obligated to provide to the contractor the lower of the amount of the allotted funds or the amount as determined under the Termination for Convenience (Fixed-Price) clause of this contract;
- 3) the Contractor is not authorized to continue work beyond the point at which the total amount payable by the Government, which is the price of the services the allotted funds cover, equals the total amount allotted to the contract for the services;
- 4) if additional funds become available and the Government still has a need for the services in the Contract, the Government will allot funds periodically to the CLIN, the Contractor will continue performance and will provide a specified and fixed amount of work for the additional funds allotted, and the Government will pay the Contractor based on the price of the fixed amount work. The Government will not pay the Contractor based on the costs the Contractor incurs in performing the work; and
- 5) the Contractor agrees to provide the specified and fixed amount of work for the fixed price identified in the Contract's Section B, Supplies or services and prices/costs, and in accordance with the delivery schedule identified in the contract's Section F, Deliveries or performance, provided the Government provides the funding per or earlier than the Planned Funding Schedule in paragraph (n) of this clause. At any time, the cumulative

amount of funds allotted is the fixed price for the cumulative fixed amount of work identified with the funds.

(c) For each CLIN

- 1) The fixed price (of both the entire CLIN and of the current cumulative amount of funds allotted to the CLIN at any time during contract performance) is not subject to any adjustment on the basis of the Contractor's cost experience;
- 2) The contract places the maximum risk and full responsibility on the Contractor for all costs and resulting profit or loss; and
- 3) If the Government meets the entire Planned Funding Schedule,
 - i. the cumulative amount of funds allotted will equal the CLIN's fixed price and
 - ii. the Contractor shall provide the entire scope of work the Contract requires for the CLIN.

(d) The fixed price for each CLIN is listed in Section B of this contract.

(e) The Planned Funding Schedule for each CLIN is in paragraph (n) of this clause. The sum of the planned funding for each CLIN equals the fixed price of the CLIN.

(f) The Actual Funding Schedule for each CLIN is in paragraph (o) of this clause. It specifies the actual amount of funds allotted and presently available for payment by the Government separately for CLIN 0001 and for CLIN 0002 and the specific work to be performed for the funds allotted.

- 1) The Contractor may submit an invoice under a CLIN only after the Government has allotted funds to the CLIN and the Contractor has provided services in accordance with the terms and conditions of the Contract. The Contractor may submit an invoice for only the lower of the two preceding amounts, that is, the lower of
 - i. the amount of allotted funds for the specified work (which is the amount of the fixed price of the specified work) or
 - ii. the amount equal to the portion of the fixed price for the specified work the Contractor has earned by providing a portion of the fixed work.

(g) If during the course of this contract the Government is allotting funds to a CLIN per or earlier than the Planned Funding Schedule, this contract to that point will be considered a simple fixed-price contract for that CLIN regardless of the rate at which the Contractor is, or is not, earning amounts payable, and

- 1) The Government's and the Contractor's obligations under the contract for the CLIN—with the exception that the Government's obligation for the CLIN is limited to the total amount of funds allotted by the Government to the CLIN and similarly the Contractor is not authorized to continue work beyond the point at which the total amount payable by the Government equals the total amount allotted—will be as if the CLIN were both fixed price and fully funded at time of contract execution, that is, the Contractor agrees that: it will perform the work of the contract for that CLIN; and neither the fixed-price for the

CLIN nor any other term or condition of the contract will be affected due to the CLIN's being incrementally funded.

- i. The Contractor agrees, for example, if the Government allots funds to a CLIN per or earlier than all of the funding dates in the Planned Funding Schedule for the CLIN, the Government has met all of its obligations just as if the CLIN were fully funded as of the time of contract execution and the Contractor retains all of its obligations as if the CLIN were fully funded as of the time of contract execution, while at the same time the Contractor is not authorized to continue work beyond the point at which the total amount payable by the Government equals the total amount allotted to the contract; consequently, if the Contractor earns amounts payable at any time in performing work for the CLIN that exceed the total amount of funds allotted by the Government to the contract for the CLIN
 - A. it (not the Government) will be liable for those excess amounts payable
 - B. it will remain liable for its obligations under every term or condition of the contract and
 - C. if it fulfills all of its obligations for that CLIN and the Government allots funds to the CLIN equal to the CLIN's fixed price, the Government will pay it the fixed price for the CLIN and no more.
 - ii. The Contractor also agrees, for example, if the Government allots funds to a CLIN by the first funding date in the Planned Funding Schedule, the Government has met all of its obligations up to that point in the contract as if the CLIN were fully funded (that is, as if progress payments based on cost had been agreed to and had been made, or milestone payments had agreed to and been made, etc.) and the Contractor retains all of its obligations up to that point (such as meeting delivery schedules, maintaining quality, etc.) as if the CLIN were fully funded; consequently, if the Government subsequently terminates the CLIN it will pay the Contractor the lower of the following two amounts: the amount allotted by the Government to the CLIN; or the amount payable per the Termination for Convenience (Fixed-Price) clause of this contract.
- (h) The Contractor shall notify the Contracting Officer in writing whenever it has reason to believe that the total amount payable by the Government, which is the portion of the price of the services the allotted funds cover that the Contractor has earned, for the CLIN in the next 60 days, when added to all amounts payable previously earned, will exceed 75 percent of the total amount allotted to the CLIN by the Government.
- 1) The notification is for the Government's planning purposes only and does not change any obligation of either the Government or the Contractor.
 - 2) The Contractor is not authorized to continue work beyond the point at which the total amount payable by the Government equals the total amount allotted to the CLIN.

- 3) The Government may require the Contractor to continue performance of that CLIN for as long as the Government allots funds for that CLIN sufficient to cover the amount payable for that CLIN.
- (i) If the Government does not allot funds to a CLIN per or earlier than its Planned Funding Schedule, the Contractor may be entitled to an equitable adjustment and
 - 1) the Government's maximum obligation, including any termination obligation, to reimburse the Contractor remains limited to the total amount of funds allotted by the Government to the contract for that CLIN;
 - 2) the Contractor is not authorized to continue work beyond the point at which the total amount payable by the Government, equals the total amount allotted to the contract;
 - 3) if the Government subsequently terminates the contract or the CLIN, it will pay the Contractor the lower of the following two amounts: the total amount of funds allotted by the Government to the contract for the CLIN; or the amount payable per the Termination for Convenience (Fixed-Price) clause of this contract.
 - (j) Except as required by either other provisions of this contract specifically citing and stated to be an exception to this clause, or by, among other things, terminations, change orders, equitable adjustments, or unilateral or bilateral contract modifications specifically citing and stated to be an exception to this clause, for each CLIN—
 - 1) The Government is not obligated to reimburse the Contractor in excess of the total amount allotted by the Government to this contract for the CLIN; and
 - 2) The Contractor is not obligated to continue performance under this contract related to the CLIN in excess of the amount allotted to the contract (which is also both the maximum amount payable and the price of the services the allotted funds cover) by the Government until the Contracting Officer notifies the Contractor in writing that the amount allotted by the Government has been increased and specifies an increased amount, which shall then constitute the total amount allotted by the Government to the CLIN.
 - (k) No notice, communication, or representation in any form, including, among other things, change orders, equitable adjustments, or unilateral or bilateral contract modifications, other than that specified in this clause, or from any person other than the Contracting Officer, shall affect the amount allotted by the Government to this contract for a CLIN, which will remain at all times the Government's maximum liability for a CLIN. In the absence of the specified notice, the Government is not obligated to reimburse the Contractor for any amounts payable earned for a CLIN in excess of the total amount allotted by the Government to this contract for a CLIN.
 - (l) Change orders, equitable adjustments, unilateral or bilateral contract modifications, or similar actions shall not be considered increases in the Government's maximum liability or authorizations to the Contractor to exceed the amount allotted by the Government for a CLIN unless they contain a statement increasing the amount allotted.
 - (m) Nothing in this clause shall affect the right of the Government to terminate this contract for convenience or default.

(n) Planned Funding Schedule

CLIN 0001

	Funds To	Work To Be	Cumulative	Cumulative Work
<u>Date</u>	<u>Be Allotted</u>	<u>Accomplished</u>	<u>Funds To Be Allotted</u>	<u>To Be Accomplished</u>

CLIN 0002

	Funds To	Work To Be	Cumulative	Cumulative Work
<u>Date</u>	<u>Be Allotted</u>	<u>Accomplished</u>	<u>Funds To Be Allotted</u>	<u>To Be Accomplished</u>

(o) Actual Funding Schedule

CLIN 0001

	Funds	Work To Be	Cumulative	Cumulative Work
<u>Date</u>	<u>Allotted</u>	<u>Accomplished</u>	<u>Funds Allotted</u>	<u>To Be Accomplished</u>

CLIN 0002

	Funds	Work To Be	Cumulative	Cumulative Work
<u>Date</u>	<u>Allotted</u>	<u>Accomplished</u>	<u>Funds Allotted</u>	<u>To Be Accomplished</u>

(End of clause)