

SUBPART 17.92 - REOPENER REQUIREMENTS

(Revised February 17, 2017 through PROCLTR 2017-10)

Parent topic: PART 17 - SPECIAL CONTRACTING METHODS

17.9201 General.

(a) A reopener requirement creates a right for an equitable adjustment in the contract price at a specified time or due to the occurrence or non-occurrence of an event or contingency of the type specified in FAR 31.205-7(c)(2).

(b) A reopener requirement provides a means of achieving an equitable resolution of the treatment of a significant contingent cost during both the initial pricing of a contract as well as at any time an equitable adjustment to such price is called for under the provisions of the requirement. Its use requires care to avoid a shift in risk from the contractor to the Government. It should be used only in extraordinary circumstances involving high dollar value procurements and rarely less than the TINA threshold where the uncertainty associated with particular cost element(s) substantially impacts the contract price.

(c) Circumstances in which its use may be appropriate include, but are not limited to, the following:

(1) A forward pricing rate agreement (FPRA) or forward pricing rate recommendation (FPRR) is not achievable, because of uncertainties having a significant impact such as:

(i) Supporting contractor budgetary data was not submitted;

(ii) A substantial portion of the business base has not yet materialized; or,

(iii) A potential for purchase, merger, or sale of part of a contractor's operations exists-

(2) The price impact of a change in a requirement, term, or condition made during negotiations is significant but cannot be reasonably quantified and resolved prior to award.

(3) The offeror's estimating system contains significant deficiencies (DFARS 215.811-70(g)(2)(vi) and (3)).

17.9202 Policy.

(a) The contracting officer must document that the use of a reopener requirement is the most appropriate means of overcoming a contingency that will significantly affect the contract price.

(b) The contracting officer must—

- (1) Ask the ACO to provide a recommended reopener requirement, if applicable.
- (2) Query CBAR and the ACO, regarding the adequacy of the contractor's accounting system to provide all necessary cost data in the form required to price adjustments. (Obtain a review of the adequacy of the accounting system if necessary.)
- (3) Obtain cost or pricing data applicable to the cost element and markup factors, to establish the base level from which adjustment will be made.
- (4) Prepare proposed schedule for each affected CLIN, which identifies each specific rate, factor, element of cost, profit, etc., to be covered by the reopener requirement; and explicitly describes or provides an example of the precise methodology to be used to calculate any resulting price adjustment. Consider whether it is appropriate to retroactively apply a price, as subsequently finalized, to items already delivered on time and to late deliveries.
- (5) If the reopener provides for an upward adjustment, advise the budget office to commit funds over and above the contract price to the amount of the ceiling established. If the award is funded by a Military Inter-Departmental Purchase Request, obtain confirmation from the requiring activity that funds have been set aside to cover the potential increase.
- (6) Obtain HCA approval of the reopener requirement prior to conclusion of negotiations. The approval includes basis and limitations for use.
- (7) Incorporate amounts and methods reached through preaward discussions or negotiations with the contractor in a document executed by both parties and attached to the PNM; or incorporate calculations supporting the contracting officer's interpretation of negotiations in the PNM. Ensure confidential contractor information is not included in the contract.
- (8) Indicate in a contract administration delegation letter if the award contains a reopener requirement. Advise the ACO of any awards retained for administration that will be affected by a prospective forward pricing rate agreement (FPRA) or forward pricing rate recommendation (FPRR).

17.9204 Reopener requirements.

The contracting officer must, at a minimum, include the following in a reopener requirement:

- (a) Title that clearly identifies it as a reopener requirement.
- (b) Statement of purpose.
- (c) Identification of the items, amounts, and event triggering the reopener procedure.
- (d) Requirement for certified cost or pricing data, and applicability of the Disputes clause.
- (e) Adjustment pricing methodology in the following order of preference:
 - (1) Pre-established pricing formula;
 - (2) If the nature of the contingency is such that its price impact can only be anticipated to fall within a broad range of prices instead of one or several alternative price outcomes, identify the range within which the amount for that cost element may be revised through negotiations; or

(3) If the contingency is such that its price impact cannot be anticipated to fall within a broad range, or the original price negotiations did not involve cost or pricing data, the reopener may specify that the parties will enter into good faith negotiations and include an option for terminating performance within a specified number of days following receipt of written notice by either party in the event of a failure to agree.

(f) A provision for a downward or upward adjustment as appropriate. An exception is authorized only when necessary to achieve final agreement on price. For contracts allowing an upward adjustment above the contract price, establish a firm, not-to-exceed ceiling, on an aggregate basis (and per unit basis if applicable), above which no price adjustment must be made.

(g) The method of adjusting any option quantity or period prices, if any, which may result from operation of the reopener.

(h) If the contract is not subject to the Cost Accounting Standards (FAR Part 30), the treatment of accounting system changes that impact the price adjustment under the reopener.

(i) The contractor must confirm the award price does not include any amount for the specified contingency except as provided for in the reopener requirement.