

PART 16—TYPES OF CONTRACTS

- 9. Amend section 16.505 by—
- a. Revising paragraph (a)(1);
- b. Redesignating paragraphs (a)(4) through (a)(10) as paragraphs (a)(5) through (a)(11), respectively; and
- c. Adding a new paragraph (a)(4).

The revised and added text reads as follows:

16.505 Ordering.

(a) * * *

(1) In general, the contracting officer does not synopsise orders under indefinite-delivery contracts; except see 16.505(a)(4) and (11), and 16.505(b)(2)(ii)(D).

* * * * *

(4) The following requirements apply when procuring items peculiar to one manufacturer:

(i) The contracting officer must justify restricting consideration to an item peculiar to one manufacturer (e.g., a particular brand-name, product, or a feature of a product that is peculiar to one manufacturer). A brand-name item, even if available on more than one contract, is an item peculiar to one manufacturer. Brand-name specifications shall not be used unless the particular brand-name, product, or feature is essential to the Government's requirements and market research indicates other companies' similar products, or products lacking the particular feature, do not meet, or cannot be modified to meet, the agency's needs.

(ii) Requirements for use of items peculiar to one manufacturer shall be justified and approved using the format(s) and requirements from paragraphs (b)(2)(ii)(A), (B), and (C) of this section, modified to show the brand-name justification. A justification is required unless a justification covering the requirements in the order was previously approved for the contract in accordance with 6.302-1(c) or unless the base contract is a single-award contract awarded under full and open competition. Justifications for the use of brand-name specifications must be completed and approved at the time the requirement for a brand-name is determined.

(iii)(A) For an order in excess of \$25,000, the contracting officer shall—

- (1) Post the justification and supporting documentation on the agency Web site used (if any) to solicit offers for orders under the contract; or
- (2) Provide the justification and supporting documentation along with the solicitation to all contract awardees.

(B) The justifications for brand-name acquisitions may apply to the portion of

the acquisition requiring the brand-name item. If the justification is to cover only the portion of the acquisition which is brand-name, then it should so state; the approval level requirements will then only apply to that portion.

(C) The requirements in paragraph (a)(4)(iii)(A) of this section do not apply when disclosure would compromise the national security (e.g., would result in disclosure of classified information) or create other security risks.

(D) The justification is subject to the screening requirement in paragraph (b)(2)(ii)(D)(4) of this section.

* * * * *

PART 18—EMERGENCY ACQUISITIONS**18.105 [Amended]**

- 10. Amend section 18.105 by removing “(see 16.505(a)(7))” and adding “(see 16.505(a)(8))” in its place.

PART 36—CONSTRUCTION AND ARCHITECT-ENGINEER CONTRACTS**36.600 [Amended]**

- 11. Amend section 36.600 by removing “(see 16.505(a)(8))” and adding “(see 16.505(a)(9))” in its place.

[FR Doc. 2011-33417 Filed 12-30-11; 8:45 am]

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DEPARTMENT OF DEFENSE**GENERAL SERVICES ADMINISTRATION****NATIONAL AERONAUTICS AND SPACE ADMINISTRATION****48 CFR Parts 8, 12, and 16**

[FAC 2005-55; FAR Case 2009-043; Item IV; Docket 2010-0100, Sequence 1]

RIN 9000-AL74

Federal Acquisition Regulation; Time-and-Materials and Labor-Hour Contracts for Commercial Items

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA are issuing a final rule amending the Federal Acquisition Regulation (FAR) to implement Government Accountability Office (GAO) recommendations to: ensure that time-and-materials and labor-hour contracts are used to acquire commercial services only when no other contract type is suitable; and instill

discipline in the determination of contract type with a view toward managing the risk to the Government.

DATES: *Effective Date:* February 2, 2012.

FOR FURTHER INFORMATION CONTACT: Ms. Lori Sakalos, Procurement Analyst, at (202) 208-0498, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAC 2005-55, FAR Case 2009-043.

SUPPLEMENTARY INFORMATION:**I. Background**

DoD, GSA, and NASA published a proposed rule in the **Federal Register** at 75 FR 59195 on September 27, 2010. The due date for public comments was November 26, 2010.

Eleven comments were received from four respondents. The comments are separated into eight categories, addressed in the following sections.

II. Discussion and Analysis

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (the Councils) reviewed the comments in the development of the final rule.

A. Summary of Significant Changes

Changes were made to the proposed rule as a result of the public comments and the publication of FAR Case 2007-012 in the **Federal Register** at 76 FR 14548 on March 16, 2011. Specifically, all text in the proposed rule under FAR 8.405-2(e) has been relocated to FAR 8.404(h). FAR Case 2007-012 strengthened competition requirements for orders placed under the Federal Supply Schedules. As a result, FAR 8.405-2(e)(2)(ii) has been deleted and references to FAR part 12 at FAR subpart 8.4 have been removed.

Additional changes were made during deliberation of the final rule to require these same safeguards on the use of time-and-materials (T&M) and labor-hour (LH) orders for Blanket Purchase Agreements awarded under the Federal Supply Schedule Program.

B. Analysis of Public Comments

Respondents submitted comments covering the following seven categories: (1) Cross references; (2) Combine guidance from this case with FAR Case 2007-012; (3) Eliminate redundant material; (4) Clarify contract types; (5) Potential for rule to limit the use of T&M contracts; (6) Requirement for determination and findings at the order level; and (7) Address fixed-price level-of-effort (FP LOE) contracts.

1. Cross References

Comment: One respondent stated that there is a contradiction between FAR 12.207 and proposed FAR 16.201, which states that the contracting officer shall use firm-fixed-price or fixed-price with economic price adjustment contracts when acquiring commercial items. The respondent recommended revising FAR 16.201 to reference FAR 12.207(b), which states the conditions for use of T&M or LH contracts to acquire commercial services, which are a subset of commercial items.

Response: A cross-reference to FAR 12.207(b) has been added at FAR 16.201, to reference the exception to the required use of fixed-price contracts for acquisition of commercial items.

Comment: A respondent noted that FAR 8.405–2(e)(2)(ii) would require the contracting officer to follow the competitive procedures at FAR 8.405–2(c), but, in contrast, FAR 12.207(b)(1)(i)(B) provides that procedures for other than full and open competition may be used if the agency receives at least two offers. The respondent believed that it would be consistent with the latter approach to give an agency the discretion to use other than the competitive procedures at FAR 8.405–2(c) if at least two quotes are received for the task order.

Response: FAR Case 2007–012, which was published in the **Federal Register** at 76 FR 14548 on March 16, 2011 (FAC 2005–50), provides an interim rule that sets forth the requirements for the use of limited sources and strengthens competition rules in FAR subpart 8.4. FAR 8.405–2(c) does not preclude the acquisition of commercial services under T&M and LH contracts on other than a competitive basis under 8.405–2(c)(3)(i), provided the procedures outlined in FAR 8.405–6 are followed. The references to FAR part 12 in the proposed rule will be deleted.

Comment: One respondent stated that, with regard to orders placed under the Federal Supply Schedule program and indefinite-delivery contracts, FAR 12.207(c)(2) references both FAR subparts 8.4 and 16.5, while FAR 12.207(c)(3) references only FAR subpart 16.5. The respondent recommended that, for the sake of clarity, either (a) only FAR 12.207 should include all guidance regarding T&M or LH orders or (b) guidance should be included in both FAR subparts 8.4 and 16.5.

Response: It is not necessary to cross-reference to FAR subpart 8.4 at FAR 12.207(c)(3) because the requirement for a determination and findings does not apply to individual orders when the

basic contract allows only for T&M or LH orders, which is not the case for Federal Supply Schedule contracts.

2. Combine Guidance From This Case With FAR Case 2007–012

Comment: A respondent noted that DoD, GSA, and NASA will be issuing guidance implementing section 863 of the National Defense Authorization Act for FY 2009 and recommended that any guidance regarding the use of T&M or LH orders be included in that rule, not in this case, FAR Case 2009–043. Such an approach, according to the respondent, would provide for clarity in the process and allow for a comprehensive review by all the stakeholders.

Response: FAR Case 2007–012 implements a statutory requirement. The basis for FAR Case 2009–043 is not statutory; rather, the case was opened in response to a June 2009 GAO report entitled: “Minimal Compliance with New Safeguards for Time-and-Materials Contracts for Commercial Services and Safeguards Have Not Been Applied to GSA Schedules Program” (GAO–09–579, June 2009). Given the different purposes of the two cases, combining them would not be practical.

3. Eliminate Redundant Material

Comment: One respondent recommended deletion of the proposed language at FAR 8.405–2(e)(2)(i), which states that a T&M or LH order may only be used when it is not possible to accurately estimate the extent or duration of the work or anticipated costs with any degree of confidence. The respondent stated that the proposed language at FAR 8.405–2(e)(2)(i) is redundant to the proposed language at FAR 8.405–2(e)(4)(ii), which describes the content requirements of a determination and findings that, among other things, it is not possible at the time of placing the order to accurately estimate the extent or duration of the work or anticipate the costs with any reasonable degree of certainty.

Response: The proposed language at FAR 8.405–2(e)(2)(i) (which has been relocated to FAR 8.404(h)(3)(i)) is not redundant with language at FAR 8.405–2(e)(4)(ii) (which has been relocated to 8.404(h)(3)(iii)(B)).

- The proposed language at FAR 8.405–2(e)(2)(i) (relocated to FAR 8.404(h)(3)(i)) describes one of the policy conditions that must be met before a T&M order may be placed.

- The proposed language at FAR 8.405–2(e)(4)(ii) (relocated to FAR 8.404(h)(3)(iii)(B)) describes the circumstances under which the T&M or LH order may be placed, and FAR

8.405–2(e)(3)(i) (relocated to FAR 8.404(h)(3)(ii)(A)) describes an element of the documentation that must be prepared by the contracting officer to support the decision.

Although the two sections share the same idea and similar words, their separate citations serve two distinct purposes.

4. Clarify Contract Types

Comment: Two respondents expressed concern that the proposed language at FAR 16.600, which states that T&M and LH contracts are not fixed-price contracts, may create confusion or be taken out of context because it does not state that T&M and LH contracts are not cost-reimbursement contracts. The respondents believe that this could blur the lines between T&M and LH contracts and cost-reimbursement contracts, creating confusion on how to administer T&M and LH contracts and orders. The respondents recommended revising the FAR to clarify the nature of the T&M and LH contracts as a hybrid contract type that is neither fixed-price nor cost-reimbursement but does include elements of each; or to describe the attributes and cross-reference to the applicable FAR subparts.

Response: T&M and LH contracts are neither fixed-price contracts nor cost-reimbursement contract types. T&M and LH contracts comprise unique contract types and are described in a separate FAR subpart, 16.6.

This rule addresses the use of T&M and LH contracts for the acquisition of commercial services. The revisions made in this rule are intended to clarify the requirement to use fixed-price contract types for the acquisition of commercial items, unless specific requirements and conditions are documented to support the decision to use the T&M and LH contracts to acquire commercial services, a subset of commercial items.

5. Potential for Rule To Limit the Use of T&M Contracts

Comment: One respondent expressed concern that the proposed rule could curtail the use of T&M and LH contracts in circumstances where those contract types would be the most advantageous to the Government.

Response: There are circumstances warranting the use of T&M and LH contracts and orders. This rule is intended to clarify and appropriately limit their use to those circumstances.

6. Requirement for Determination and Findings at the Order Level

Comments: The respondents strongly recommended that the Government reconsider requiring agencies to execute a new determination and findings prior to issuing each T&M or LH order placed under the Federal Supply Schedules program. The respondent noted that Congress has not legislated such an approach. The respondent pointed out that the Federal Acquisition Streamlining Act, as amended, requires issuance of a determination and findings at the contract level, not at the order level.

Response: The Federal Acquisition Streamlining Act does require the issuance of a determination and findings at the contract level, but note that a requirement for a determination and findings at the order level is not precluded by that statute. In situations where the basic contract allows for the issuance of individual orders using more than one contract type, the over-reliance on T&M and LH pricing has resulted in increased risk to the Government (see GAO Report 09–579, June 2009). The GAO has recommended this change to FAR subpart 8.4 explicitly to require the same safeguards for the acquisition of commercial services acquired on a T&M or LH basis as required by FAR 12.207 and FAR 16.601(d) (*i.e.*, require a detailed determination and findings stating that no other contract type is suitable). Further, Federal Supply Schedules generally are long-term contracts, and a determination and findings generated at the initiation of a schedule contract may no longer reflect current market conditions. The intent is to ensure that this contract type is used only when no other contract type is suitable and to instill discipline in the determination of contract type with a view toward managing the risk to the Government.

7. Address Fixed-Price Level-of-Effort Contracts

Comment: One respondent expressed concern that the proposed language at FAR 16.600 stating T&M and LH contracts are not fixed-price contracts does not clarify the issue or address the fact that what is actually happening is the contracting officer is using a FP LOE contract without the appropriate approval. The respondent recommended adding a definition to FAR part 16 that clearly defines a LOE contract and identifies that a LOE contract type is considered to be either T&M/LH, FP LOE, or a cost-plus term. Otherwise, the respondent thinks contracting officers are likely to read the proposed change

to FAR part 16 as something they already knew and continue calling LOE contracts firm-fixed price.

Response: T&M and LH contracts are neither fixed-price contracts nor cost-reimbursement contract types. It is for this reason that the FAR addresses T&M and LH contracts in a separate subpart, FAR subpart 16.6. This rule addresses the use of T&M and LH contracts for commercial items; therefore, the respondent's request to define LOE contracts is outside the scope of this case.

C. Other Changes

The Councils have also amended the language proposed for FAR part 8 (now set forth at FAR 8.404(h)(3)(iv)) addressing increases in the ceiling price of T&M contracts to more closely track the language set forth in FAR 12.207(b)(1)(ii)(C). Section 1423 of the Services Acquisition Reform Act of 2003 provides that any change in the ceiling price of a T&M or LH contract is authorized only upon a determination, documented in the contract file, that it is in the best interest of the procuring agency to change such ceiling price.

The Councils have opened FAR Case 2011–025 for the purpose of considering additional guidance addressing the actions required when raising the ceiling price or otherwise changing the scope of work for a T&M or LH contract or order. The case will consider appropriate guidance to address this issue for the respective parts of the FAR addressing T&M or LH contracts or orders, such as FAR 8.404, FAR 12.207, and FAR 16.601.

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was subject to review under section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

IV. Regulatory Flexibility Act

The Department of Defense, the General Services Administration, and the National Aeronautics and Space

Administration certify that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because the rule does not impose any requirements on small entities. An Initial Regulatory Flexibility Analysis was not conducted. No comments were received from small entities in response to the proposed rule.

V. Paperwork Reduction Act

The final rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 8, 12, and 16

Government procurement.

Dated: December 21, 2011.

Laura Auletta,

Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy, Office of Governmentwide Policy.

Therefore, DoD, GSA, and NASA amend 48 CFR parts 8, 12, and 16 as set forth below:

■ 1. The authority citation for 48 CFR parts 8, 12, and 16 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

■ 2. Amend section 8.404 by adding paragraph (h) to read as follows:

8.404 Use of Federal Supply Schedules.

* * * * *

(h) *Type-of-order preference for services.* (1) The ordering activity shall specify the order type (*i.e.*, firm-fixed price, time-and-materials, or labor-hour) for the services offered on the schedule priced at hourly rates.

(2) Agencies shall use fixed-price orders for the acquisition of commercial services to the maximum extent practicable.

(3)(i) A time-and-materials or labor-hour order may be used for the acquisition of commercial services only when it is not possible at the time of placing the order to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence.

(ii) Prior to the issuance of a time-and-materials or labor-hour order, the contracting officer shall—

(A) Execute a determination and findings (D&F) for the order, in

accordance with paragraph (h)(3)(iii) of this section that a fixed-price order is not suitable;

(B) Include a ceiling price in the order that the contractor exceeds at its own risk; and

(C) When the total performance period, including options, is more than three years, the D&F prepared in accordance with this paragraph shall be signed by the contracting officer and approved by the head of the contracting activity prior to the execution of the base period.

(iii) The D&F required by paragraph (h)(3)(ii)(A) of this section shall contain sufficient facts and rationale to justify that a fixed-price order is not suitable. At a minimum, the D&F shall—

(A) Include a description of the market research conducted (see 8.404(c) and 10.002(e));

(B) Establish that it is not possible at the time of placing the order to accurately estimate the extent or duration of the work or anticipate costs with any reasonable degree of confidence;

(C) Establish that the current requirement has been structured to maximize the use of fixed-price orders (e.g., by limiting the value or length of the time-and-materials/labor-hour order; or, establishing fixed prices for portions of the requirement) on future acquisitions for the same or similar requirements; and

(D) Describe actions to maximize the use of fixed-price orders on future acquisitions for the same requirements.

(iv) The contracting officer shall authorize any subsequent change in the order ceiling price only upon a determination, documented in the order file, that it is in the best interest of the ordering activity to change the ceiling price.

■ 3. Amend section 8.405–2 by redesignating paragraph (e) as paragraph (f); and adding a new paragraph (e) to read as follows:

8.405–2 Ordering procedures for services requiring a statement of work.

* * * * *

(e) *Use of time-and-materials and labor-hour orders for services.* When placing a time-and-materials or labor-hour order for services, see 8.404(h).

* * * * *

■ 4. Amend section 8.405–3 by revising paragraphs (b)(2)(ii) and (c)(3) to read as follows:

8.405–3 Blanket purchase agreements (BPAs).

* * * * *

- (b) * * *
- (2) * * *

(ii) *Type-of-order preference.* The ordering activity shall specify the order type (i.e., firm-fixed price, time-and-materials, or labor-hour) for the services identified in the statement of work. The contracting officer should establish firm-fixed priced orders to the maximum extent practicable. For time-and-materials and labor-hour orders, the contracting officer shall follow the procedures at 8.404(h).

* * * * *

(c) * * *

(3) *BPAs for hourly-rate services.* If the BPA is for hourly-rate services, the ordering activity shall develop a statement of work for each order covered by the BPA. Ordering activities should place these orders on a firm-fixed price basis to the maximum extent practicable. For time-and-materials and labor-hour orders, the contracting officer shall follow the procedures at 8.404(h). All orders under the BPA shall specify a price for the performance of the tasks identified in the statement of work.

* * * * *

PART 12—ACQUISITION OF COMMERCIAL ITEMS

■ 5. Amend section 12.207 by removing from paragraph (b)(2)(ii) “degree of certainty” and adding “degree of confidence” in its place; and adding paragraph (b)(4) to read as follows:

12.207 Contract type.

* * * * *

(b) * * *

(4) See 8.404(h) for the requirement for determination and findings when using Federal Supply Schedules.

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PART 16—TYPES OF CONTRACTS

■ 6. Revise section 16.201 to read as follows:

16.201 General.

(a) Fixed-price types of contracts provide for a firm price or, in appropriate cases, an adjustable price. Fixed-price contracts providing for an adjustable price may include a ceiling price, a target price (including target cost), or both. Unless otherwise specified in the contract, the ceiling price or target price is subject to adjustment only by operation of contract clauses providing for equitable adjustment or other revision of the contract price under stated circumstances. The contracting officer shall use firm-fixed-price or fixed-price with economic price adjustment contracts when acquiring commercial items, except as provided in 12.207(b).

(b) Time-and-materials contracts and labor-hour contracts are not fixed-price contracts.

■ 7. Add section 16.600 to read as follows:

16.600 Scope.

Time-and-materials contracts and labor-hour contracts are not fixed-price contracts.

[FR Doc. 2011–33418 Filed 12–30–11; 8:45 am]

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DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 1, 9, 12, 42, and 52

[FAC 2005–55; FAR Case 2010–016; Item V; Docket 2010–0016, Sequence 1]

RIN 9000–AL94

Federal Acquisition Regulation; Public Access to the Federal Awardee Performance and Integrity Information System

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Final rule.

SUMMARY: DoD, GSA, and NASA have adopted as final, with changes, an interim rule amending the Federal Acquisition Regulation (FAR) to implement a section of the Supplemental Appropriations Act, 2010. This section requires that the information in the Federal Awardee Performance and Integrity Information System (FAPIS), excluding past performance reviews, shall be made publicly available. The interim rule notified contractors of this new statutory requirement for public access to FAPIS.

DATES: *Effective Date:* January 3, 2012.

FOR FURTHER INFORMATION CONTACT: Mr. Edward Loeb, Procurement Analyst, at (202) 501–0650, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAC 2005–55, FAR Case 2010–016.

SUPPLEMENTARY INFORMATION:

I. Background

DoD, GSA, and NASA published an interim rule in the **Federal Register** at 76 FR 4188 on January 24, 2011, to