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Federal Communications Commission.

**Trent B. Harkrader,**

*Division Chief, Telecommunications Access Policy Division, Wireline Competition Bureau.*

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## DEPARTMENT OF DEFENSE

### GENERAL SERVICES ADMINISTRATION

### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

#### 48 CFR Parts 8, 12, 16, and 52

[FAR Case 2011-025; Docket 2011-0025; Sequence 1]

RIN 9000-AM28

#### Federal Acquisition Regulation; Changes to Time-and-Materials and Labor-Hour Contracts and Orders

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

**ACTION:** Proposed rule.

**SUMMARY:** DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to provide additional guidance when raising the ceiling price or otherwise changing the scope of work for a time-and-materials (T&M) or labor-hour (LH) contract or order.

**DATES:** Interested parties should submit written comments to the Regulatory Secretariat at one of the addressees shown below on or before September 24, 2012 to be considered in the formation of the final rule.

**ADDRESSES:** Submit comments in response to FAR Case 2011-025 by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by searching for "FAR Case 2011-025". Select the link "Submit a Comment" that corresponds with "FAR Case 2011-025." Follow the instructions provided

at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2011-025" on your attached document.

- *Fax:* 202-501-4067.
- *Mail:* General Services

Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street NE., 7th Floor, Washington, DC 20417.

*Instructions:* Please submit comments only and cite FAR Case 2011-025, in all correspondence related to this case. All comments received will be posted without change to <http://www.regulations.gov>, including any personal and/or business confidential information provided.

#### FOR FURTHER INFORMATION CONTACT:

Mr. Michael O. Jackson, Procurement Analyst, at 202-208-4949, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at 202-501-4755. Please cite FAR Case 2011-025.

#### SUPPLEMENTARY INFORMATION:

##### I. Background

DoD, GSA, and NASA are proposing to revise the FAR to implement a policy that provides additional guidance to address actions required when raising the ceiling price for a T&M or LH contract or order. FAR Case 2009-043, "Time-and-Materials and Labor-Hour Contracts for Commercial Items", was published as a final rule in the **Federal Register** at 77 FR 194 on January 3, 2012. As a result of FAR case 2009-043, the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) were concerned that contracting officers may erroneously conclude that a Determination and Findings (D&F) is always sufficient to justify a change in the ceiling price.

##### II. Discussion and Analysis

This FAR case provides additional guidance to address actions required when raising the ceiling price or otherwise changing the general scope of a T&M or LH contract or order. The case provides guidance to address this issue for the respective parts of the FAR addressing T&M and LH contracts or orders, such as FAR 8.404, 12.207, and 16.601.

The Government Accountability Office stated within Matter of Specialty Marine, Inc., B-293871, B-293871.2, 2004 Comp. Gen. Proc. Dec. P130, (June 17, 2004) that: "When a protester alleges that an order is outside the scope of the contract, we analyze the protest in essentially the same manner as those in which the protester argues that a

contract modification is outside the scope of the underlying contract. The fundamental issue is whether issuance of the task or delivery order in effect circumvents the general statutory requirement under the Competition in Contracting Act (CICA) that agencies 'obtain full and open competition through the use of competitive procedures' when procuring their requirements. See 10 U.S.C. 2304(a)(1)(A) (2000).

In determining whether a task or delivery order (or modification) is outside the scope of the underlying contract, and thus falls within CICA's competition requirement, our Office examines whether the order is materially different from the original contract. Evidence of a material difference is found by reviewing the circumstances attending the original procurement; any changes in the type of work, performance period, and costs between the contract as awarded and the order as issued; and whether the original solicitation effectively advised offerors of the potential for the type of orders issued. Overall, the inquiry is whether the order is one which potential offerors would have reasonably anticipated."

The Councils propose the following changes:

*FAR 8.404(h)(3)(iv).* This paragraph is revised to require analysis and documentation for changes in T&M or LH orders and to clarify that changes in the general scope should be justified as non-competitive new work. In addition, a clarification is added that if modifying an order to add open market items, the contracting officer must also comply with the requirements at FAR 8.402(f).

*FAR 12.207(b)(1)(ii)(C).* This paragraph is revised to require analysis and documentation for changes in T&M or LH contracts or orders and to clarify that changes in the general scope should be justified as non-competitive new work. The new proposed language distinguishes between changes that modify the general scope of a contract and changes that modify the general scope of an order. For the changes that modify the general scope of the contract, contracting officers are advised to follow the procedures at FAR 6.303. For the changes that modify the general scope of an order, contracting officers are advised to follow the procedures at FAR 8.405-6 for orders issued under the Federal Supply Schedules. For the orders issued under multiple award task and delivery order contracts, contracting officers are advised to follow the procedures at FAR 16.505(b)(2).

*FAR 16.505(b)(4) and (5).* These paragraphs are added to reference

additional requirements for cost reimbursement, T&M or LH orders.

*FAR 16.601.* This section is revised to require analysis and documentation for changes in T&M or LH contracts or orders and to clarify that changes in the general scope should be justified as non-competitive new work. FAR 16.601(d) has also been amended to make it clear that a D&F is required for T&M orders. This FAR change will clarify that a T&M D&F is required for each non-commercial item T&M order under a part 16 indefinite-delivery indefinite-quantity (IDIQ) contract. This change is necessary both to keep part 16 parallel with part 8 (which requires a D&F for each part 8 T&M order) and to clarify an unintended lack of clarity in the 2006 FAR changes that rewrote much of the T&M policies in the FAR (see FAC 2005–15, published in the **Federal Register** at 71 FR 74656 on December 12, 2006). Currently, only part 12 includes a direct requirement for T&M orders to be authorized by a T&M D&F, but this applies only to commercial items. This FAR case is adding a clarification to part 8 to repeat that policy to ensure that part 8 T&M orders are also each authorized by a T&M D&F. With this case, part 16 is also being changed to explicitly require T&M D&Fs for orders.

*FAR 16.601(e).* The new proposed language distinguishes between changes that modify the general scope of a contract and changes that modify the general scope of an order. For the changes that modify the general scope of the contract, contracting officers are advised to follow the procedures at FAR 6.303. For the changes that modify the general scope of an order, contracting officers are advised to follow the procedures at FAR 8.405–6 for orders issued under the Federal Supply Schedules. For the orders issued under multiple award task and delivery order contracts, contracting officers are advised to follow the procedures at FAR 16.505(b)(2).

### III. Executive Order 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 not a significant regulatory action and, therefore, was not

subject to review under section 6(b) of E.O. 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 change may 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.* The Initial Regulatory Flexibility Analysis (IRFA) is summarized as follows:

The purpose of this case is to clarify the procedures necessary to raise the ceiling price of a time-and-materials (T&M) or labor-hour (LH) contract or order.

In finalizing FAR rule 2009–043 “Time-and-Materials and Labor-Hour Contracts for Commercial Items” it became apparent that the guidance in the FAR on raising the ceiling price for a T&M or LH contract or order was not clear or consistent throughout the FAR. This case was opened to clarify the process and necessary documentation when raising the ceiling price for these contracts or orders.

This rule deals with the administration of T&M and LH contracts and orders and most likely will not have a direct effect on contractors. In FY 2011, the Federal Government awarded 23,023 T&M and LH contracts and orders of which 6,315 went to small businesses. This rule is not likely to affect how many large and small businesses are awarded this type of contract.

This rule does not add any new information collection requirements.

The rule does not duplicate, overlap, or conflict with any other Federal rules.

No alternatives were determined that will accomplish the objectives of the rule.

The Regulatory Secretariat will be submitting a copy of the Initial Regulatory Flexibility Analysis (IRFA) to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the IRFA may be obtained from the Regulatory Secretariat. The Councils invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by this rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 610 (FAR Case 2011–025) in correspondence.

### V. Paperwork Reduction Act

The proposed 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, 16, and 52

Government procurement.

Dated: July 20, 2012.

**Laura Auletta,**

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

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 8, 12, 16, and 52 as follows:

1. The authority citation for 48 CFR parts 8, 12, 16, and 52 is revised to read as follows:

**Authority:** 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 51 U.S.C. 20113.

### PART 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES

2. Amend section 8.404 by revising paragraph (h)(3)(iv) to read as follows:

#### 8.404 Use of Federal Supply Schedules.

\* \* \* \* \*

(h) \* \* \*

(3) \* \* \*

(iv) Prior to an increase in the ceiling price of a time-and-materials or labor-hour order, the ordering activity shall—

(A) Conduct an analysis of pricing and other relevant factors to determine if the action is in the best interest of the Government and document the order file;

(B) Follow the procedures at 8.405–6 for a change that modifies the general scope of the order; and

(C) Comply with the requirements at 8.402(f) when modifying an order to add open market items.

### PART 12—ACQUISITION OF COMMERCIAL ITEMS

3. Amend section 12.207 by revising paragraph (b)(1)(ii)(C) to read as follows:

#### 12.207 Contract type.

\* \* \* \* \*

(b)(1) \* \* \*

(ii) \* \* \*

(C) Prior to increasing the ceiling price of a time-and-materials or labor-hour contract or order, shall—

(1) Conduct an analysis of pricing and other relevant factors to determine if the action is in the best interest of the Government;

(2) Document the decision in the contract or order file; and

(3) When making a change that modifies the general scope of—  
(i) A contract, follow the procedures at 6.303;

(ii) An order issued under the Federal Supply Schedules, follow the procedures at 8.405–6; or

(iii) An order issued under multiple award task and delivery order contracts, follow the procedures at 16.505(b)(2).

PART 16—TYPE OF CONTRACTS

16.504 [Amended]

4. Amend section 16.504 by removing from paragraph (a)(4)(v) “(see 16.505(b)(6))” and adding “(see 16.505(b)(8))” in its place.

- 5. Amend section 16.505 by—
a. Removing from paragraph (b)(1)(iv)(E) “paragraph (b)(4)” and adding “paragraph (b)(6)” in its place;
b. Redesignating paragraphs (b)(4) through paragraphs (b)(6) as paragraphs (b)(6) through (b)(8), respectively; and
c. Adding new paragraphs (b)(4) and (b)(5).

The additions read as follows:

16.505 Ordering.

(b) \* \* \*

(4) For additional requirements for cost reimbursement orders see 16.301–3.

(5) For additional requirements for time-and-materials or labor-hour orders, see 16.601(e).

\* \* \* \* \*

- 6. Amend section 16.601 by—
a. Removing from paragraph (c)(2)(i) “(see 16.601(e)(1))” and adding “(see 16.601(f)(1))” in its place;
b. Revising paragraph (d) introductory text and paragraph (d)(2);
c. Redesignating paragraph (e) as paragraph (f); and
d. Adding a new paragraph (e).

The revisions and addition read as follows.

16.601 Time-and-materials contracts.

\* \* \* \* \*

(d) Limitations. A time-and-materials contract or order may be used only if—

- (2) The contract or order includes a ceiling price that the contractor exceeds at its own risk. Also see 12.207(b) for further limitations on use of time-and-materials or labor-hour contracts for acquisition of commercial items.
(e) Post award requirements. Prior to an increase in the ceiling price of a time-and-materials or labor-hour contract or order, the contracting officer shall—
(1) Conduct an analysis of pricing and other relevant factors to determine if the action is in the best interest of the Government;
(2) Document the decision in the contract or order file; and
(3) When making a change that modifies the general scope of—

- (i) A contract, follow the procedures at 6.303;
(ii) An order issued under the Federal Supply Schedules, follow the procedures at 8.405–6; or
(iii) An order issued under multiple award task and delivery order contracts, follow the procedures at 16.505(b)(2).

\* \* \* \* \*

PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

52.216–29 [Amended]

7. Amend section 52.216–29 by removing from the introductory paragraph “16.601(e)(1)” and adding “16.601(f)(1)” in its place.

52.216–30 [Amended]

8. Amend section 52.216–30 by removing from the introductory paragraph “16.601(e)(2)” and adding “16.601(f)(2)” in its place.

52.216–31 [Amended]

9. Amend section 52.216–31 by removing from the introductory paragraph “16.601(e)(3)” and adding “16.601(f)(3)” in its place.

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DEPARTMENT OF THE INTERIOR

Office of the Secretary

48 CFR Parts 1401, 1452, and 1480 RIN 1090–AB03

Acquisition Regulations; Buy Indian Act; Procedures for Contracting

AGENCY: Assistant Secretary for Policy, Management and Budget, Interior.

ACTION: Proposed rule.

SUMMARY: The Department of the Interior proposes to issue regulations guiding implementation of the Buy Indian Act, which provides the Bureau of Indian Affairs with authority to set aside procurement contracts for Indian-owned and controlled businesses. This rule supplements the Federal Acquisition Regulation (FAR) and the Department of the Interior Acquisition Regulations (DIAR).

DATES: Comments must be received on or before September 24, 2012. Tribal consultation meetings to discuss this rule will take place on Tuesday, August 14, 2012, from 8 a.m. to noon; Wednesday, August 15, 2012, from 3 p.m. to 6 p.m.; Tuesday, August 21, 2012, from 8 a.m. to noon; and Thursday, August 23, 2012, from 8 a.m. to noon.

ADDRESSES: You may submit comments, identified by the Number by any of the following methods:

- Federal rulemaking portal: http://www.regulations.gov.
• Email: consultation@bia.gov.
• Mail or hand-delivery: Elizabeth Appel, Office of Regulatory Affairs & Collaborative Action—Indian Affairs, U.S. Department of the Interior, 1849 C Street NW., MS–4141, Washington, DC 20240

• See the SUPPLEMENTARY INFORMATION section of this notice for the locations of the tribal consultation meetings.

FOR FURTHER INFORMATION CONTACT: Jonodev Chaudhuri, Office of the Assistant Secretary—Indian Affairs, (202) 208–7163; jonodev.chaudhuri@bia.gov; or David Brown, Office of Acquisitions—Indian Affairs, (703) 390–6605, David.Brown@bia.gov.

SUPPLEMENTARY INFORMATION:

- I. Background
II. Tribal Consultations Planned
III. Statutory Authority
IV. Overview of Proposed Rule
V. Development of Proposed Rule
A. Prior Publication and Comment Solicitation
B. Summary of Comments
1. Goals for Set-Asides
2. Consistency With the Federal Acquisition Regulation (FAR)
3. Definitions
4. Indian Economic Enterprise Definition and Representation
5. Restrictions on Construction
6. Deviations
7. Subcontracting
8. Indian Preference Requirements
9. Buy Indian Implementation by Other Bureaus
10. Other
VI. Procedural Requirements
A. Regulatory Planning and Review (Executive Order 12866)
B. Regulatory Flexibility Act
C. Small Business Regulatory Enforcement Fairness Act (SBREFA)
D. Unfunded Mandates Reform Act
E. Takings Implications (Executive Order 12630)
F. Federalism (Executive Order 13132)
G. Civil Justice Reform (Executive Order 12988)
H. Consultation With Indian Tribes (Executive Order 13175)
I. Paperwork Reduction Act
J. National Environmental Policy Act
K. Effects on the Energy Supply (E.O. 13211)
L. Clarity of This Regulation
M. Public Availability of Comments

I. Background

The Bureau of Indian Affairs has obtained services and supplies from Indian sources using the Buy Indian Program since 1965, based on policy