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July 25, 2001

VIA HAND DELIVERY

General Services Administration
FAR Secretariat (MVRS)
1800 F Street, N.W., Room 4035
Washington DC 20405

Attn: Laurie Duarte

Re: FAR Case 2000-013
Proposed Rule: Contract Types for Commercial Items
65 Fed. Reg. 83291 (December 29, 2000)

Dear Ms. Duarte:

On behalf of the Section of Public Contract Law (the "Section") of the American Bar Association ("ABA"), I am submitting comments on the above-referenced matter. The Section consists of attorneys and associated professionals in private practice, industry, and Government service. The Section's governing Council and substantive committees contain members representing these three segments to ensure that all points of view are considered. In this manner, the Section seeks to improve the process of public contracting for needed supplies, services, and public works.

The Section is authorized to submit comments on acquisition regulations under special authority granted by the Association's Board of Governors. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, therefore, should not be construed as representing the policy of the American Bar Association.¹

¹ Mary Ellen Coster Williams, an Officer of the Public Contract Law Section, did not participate in the Section's consideration of these comments, and she abstained from voting to approve and send this letter.

Introduction

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (“Councils”) propose to amend the Federal Acquisition Regulation (“FAR”) in order to provide clarification on the contract types authorized for commercial item acquisitions. The Councils’ intent is to facilitate greater use of FAR Part 12 for the acquisition of commercial services by providing the contract-type flexibility embodied in the Federal Acquisition Streamlining Act (“FASA”), Pub. L. 103-355. Specifically, the Councils propose the following:

- Revise FAR 12.207 to: (1) reflect FASA’s directive to use fixed-price contracts “to the maximum extent practicable”; (2) authorize the use of contracts with noncost-based incentives, such as award fees and performance or delivery incentives; and (3) add coverage on pricing mechanisms for acquiring commercial services that are customarily available on a time-and-material (“T&M”) basis or labor-hour (“LH”) basis.
- Revise FAR 16.202 and 16.203 to indicate that noncost-based incentives (*e.g.*, award fee and performance/delivery incentives) may be used in conjunction with firm-fixed-price (“FFP”) and fixed-price with economic price adjustment (“FP/EPA”) contracts.²

The Section welcomes the Councils’ effort to address the issue of acquiring commercial services under FAR Part 12 using additional contract types. This has been a long-standing goal of the Section since the implementation of FASA. With particular regard to professional, technical, and other commercial services, the Section believes that the current contract-type limitations in FAR are an unnecessary barrier to market entry and deny the Government access to such services from non-traditional commercial suppliers. Indeed, in Senate Report 106-292 (“S. Rep. 106-292”), accompanying the National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, 114 Stat. 1654 *et seq.* (“FY 2001 DoD Auth. Act”), the Senate Armed Services Committee expressed its view that the current limitations on the use of T&M and LH contracts to purchase commercial services is unduly restrictive, especially for

² In a related proposed rule, the Councils previously proposed a revision to the definition of “commercial item” at FAR 2.101. *See* FAR Case No. 2000-303, 65 Fed. Reg. 52283, August 28, 2000.

the acquisition of so-called “ancillary services.”³ Accordingly, in addition to the Councils’ proposed change to the FAR, and consistent with the views expressed by the Senate Committee, the Section recommends an additional change to FAR Part 12 expressly permitting the acquisition of ancillary services using T&M and LH contracts.

Finally, the Section continues to believe that T&M and LH contracts should be used to purchase commercial services generally. Thus, the Section awaits with interest the results of a General Accounting Office (“GAO”) review commissioned by the Senate Armed Services Committee that will examine how commercial products and services are procured in the commercial marketplace.⁴

Discussion

The proposed rule, FAR 12.207-1(b), states that agencies may use indefinite-delivery contracts under FAR Subpart 16.5 only when the task or delivery orders are issued under one of the currently authorized contract types (*i.e.*, FFP or FP/EPA). T&M and LH contracts are contained in FAR Subpart 16.6. The proposed rule (FAR 12.207-2(a)) further states that commercial services available on a T&M or LH basis may be acquired under FAR Part 12 using an indefinite-delivery contract, but only if it provides for placing FFP or FP/EPA orders using established, fixed hourly rates.⁵ Thus, the Section understands that the Councils intend to continue to exclude FAR Subpart 16.6 T&M and LH contracts as authorized contract vehicles for acquiring commercial services generally.

Although the Section generally agrees with the direction of the proposed changes to FAR Parts 12 and 16, we believe that they should go further to promote greater participation in federal procurement by non-traditional contractors. The Section welcomes the recognition by the Councils that professional and technical

³ S. Rep. 106-292 Title VIII, Other Items of Interest.

⁴ *Id.*

⁵ The proposed rule will permit the use of T&M and LH provisions in Indefinite Delivery, Indefinite Quantity contracts, as long as the task or delivery order issued under the contract is FFP or FP/EPA. For the reasons discussed herein, the Section does not believe that it should be necessary to agree on a firm fixed price in task or delivery order to qualify as a commercial item. Rather, a ceiling price, together with market-tested rates and reasonable oversight should provide the Government with the certainty it seeks when it awards T&M and LH orders.

services are commonly sold on a T&M or LH basis in the commercial marketplace and believes that this recognition justifies the use of T&M and LH contracts when acquiring commercial services. Indeed, such a change would be consistent with FAR 12.213, which provides that the Contracting Officer should consider using customary commercial practices (*e.g.*, the use of T&M and LH contracts to acquire commercial services) if he or she considers them appropriate in concluding a satisfactory business arrangement and those practices are not otherwise precluded by law or regulation.

The proposed rule states, “The changes made in this rule are intended to facilitate greater use of FAR Part 12 for commercial services acquisitions by providing the contract type flexibility embodied in statute.”⁶ Although the proposed rule “facilitate[s] greater use of FAR Part 12 for commercial service acquisitions,” the Section does not believe that the statutes need to be interpreted as restrictively as planned in the proposed rule. Rather, as discussed below, the Section believes that the final rule should permit, at a minimum, the use of T&M and LH contracts to acquire ancillary services and should not preclude the use of those contract types for the purchase of commercial services in the future.

A. Ancillary Services May Be Acquired by T&M and LH Contracts

The Section notes that the use of T&M and LH type contracts to acquire commercial items is consistent with the views expressed in S. Rep. 106-292. In the “Other Items of Interest” section of Title VIII of the Report, the committee stated as follows:

It has come to the committee's attention that commercial practice may be to contract for such services on a basis other than firm-fixed prices under certain circumstances. For example, an elevator repair company may contract for the maintenance and repair of building elevators on a time and materials basis. The committee believes that the Department of Defense should utilize the flexibility provided in Section 8002(d) of the Federal Acquisition Streamlining Act -- which requires the use of firm, fixed

⁶ 65 Fed. Reg. 83292 (paragraph A, “Background”).

price contracts “to the maximum extent practicable” -- by authorizing the use of other than firm-fixed price contracts for the acquisition of ancillary commercial services when this is the common practice in sales to the general public.

S. Rep. 106-292 Title VIII.

Thus, the committee did not regard either FASA or the Clinger-Cohen Act (Public Law 104-106) as barring the use of T&M and LH contracts for the acquisition of ancillary commercial services. Moreover, the committee also appeared to recognize that the use of these types of contracts may be appropriate for all types of commercial services and, accordingly, asked the GAO to determine how commercial items were procured in the private sector generally:

At the same time, the committee has requested that the General Accounting Office undertake a broad review of best practices in the private sector for the acquisition of commercial products and services. In addition, this bill contains a number of provisions directed at improving the Department's management of contracts for commercial products and services. The committee does not believe that the Department should revise the current regulation prohibiting the use of other than firm-fixed price contracts under section 8002(d) for the acquisition of categories of commercial products and services other than ancillary services until the GAO review has been completed, the required management changes have been implemented, and the committee has had an opportunity to review the results.

Id.

Although S. Rep 106-292 did not recommend revising the current regulation to expressly allow the use of these T&M and LH contracts to acquire commercial services other than ancillary services at this time, it did appear to recognize that such use may be consistent with best commercial practices. Moreover, the committee's view appears to represent its policy position and not a determination by the committee that the use of T&M and LH contracts to acquire commercial services is prohibited by statute. The Section, like the committee, awaits the results of the GAO study with interest.

B. Other Commercial Services Should Be Acquired Under T&M and LH Contracts.

Since the passage of FASA, there appears to be a generally accepted view that neither FASA nor the accompanying conference report expressly prohibits the use of T&M or LH contracts for acquiring commercial services. Indeed, there is no specific language in FASA that prohibits the use of T&M and LH contracts in the purchase of commercial items:

Commercial item means ... service offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog or market prices for specific tasks performed and *under standard commercial terms and conditions*.⁷ (emphasis added)

Similarly, the FASA conference report only appears to address contracts based on hourly rates without a fixed catalog price for a specific service performed from the types of contracts that may be used to acquire commercial items. Indeed, as the conference committee explained, FASA seems to provide for a broader range of contract types than currently permitted under the FAR:⁸

FASA's Joint Explanatory Statement of the Committee of Conference

The conference agreement would include those commercial services that are offered and sold competitively in substantial quantities in the commercial marketplace, based on established catalog prices for specific tasks performed, and *under standard commercial terms and conditions*.

⁷ FASA, Section 8001(a), as amended by the Federal Acquisition Reform Act or Clinger-Cohen Act (Public Law 104-106), Section 4204.

⁸ FASA requires the use of FFP and FP/EPA in the acquisition of commercial items to the maximum extent practicable. It specifically prohibits only cost-type contracts. T&M and LH contracts are not cost-type contracts under the FAR. Compare FAR Subpart 16.3 with FAR Subpart 16.6. Regardless, FAR 12.207 authorizes only FFP and FP/EPA contracts or indefinite-delivery contracts with FFP or FP/EPA ordering provisions for the acquisition of commercial items.

The definition would only cover those commercial items that are sold based on established catalog prices for specific tasks performed. ***It would not include services that are sold based on hourly rates without a fixed catalog price for a specific service performed.***

140 Cong. Rec. H8879-01 (Aug. 24, 1994) (Joint Explanatory Statement of the Committee Conference), at Title VIII, Subtitle A(1) (emphasis added).

Nonetheless, in implementing FAR Part 12, the Councils appear to have interpreted the conference report to mean that, not only must there be fixed hourly rates for the service being acquired, but that the specific task must have a fixed catalog price.

The Section believes that such an approach is unduly restrictive and does not account for what the proposed rule now expressly recognizes -- services in the commercial market place are purchased using T&M and LH contracts. Accordingly, and notwithstanding S. Rep. 106-292 Title VIII, the Section believes that the FAR should permit the purchase of commercial services under FAR Part 12, where an offeror sells those services on an hourly basis with a fixed catalog price for the service performed, *e.g.*, maintenance and repair services, consulting services, engineering services, and so forth. Although the number of hours necessary to accomplish the service may not be fixed when the contract is awarded, the hours may be fixed during performance. Further, the Government is protected through the use of labor rates that are "market tested" and normal contract administration processes that ensure that the services are being provided efficiently.

The Section also understands that there may be policy concerns that weigh against the use of T&M and LH contracts. For example, FAR§ 16.601(b)(1) discourages the use of these contract types because, allegedly, there is no positive incentive for a contractor to control costs or promote labor efficiency. Nevertheless, as discussed above, the use of T&M and LH contracts for professional and technical services appears to be a recognized and widespread commercial practice, especially in situations where the scope of the work to be performed is uncertain and the specific effort required cannot be predicted with certainty. Neither of the concerns expressed in the FAR justifies precluding the use of T&M and LH contracts for the purchase of commercial items. Rather, the use of these market-tested rates for commercial services -- together with appropriate contract oversight, past performance reviews, and reasonable fiscal control safeguards -- can ensure that the Government's interests are adequately protected. The Section believes that the GAO review of best commercial

Ms. Laurie Duarte
July 25, 2001
Page 8

practices discussed in S. Rep. 106-292 will confirm that the use of T&M and LH contracts to acquire commercial services is appropriate.

Conclusion

In addition to making the changes to the FAR set forth in the proposed rule, the Section believes that the final rule should expressly recognize that ancillary services may be acquired using T&M and LH type contracts. This would implement the intent of the Senate Armed Services Committee, as expressed in S. Rep 106-292, regarding the acquisition of ancillary services. The Section continues to believe that T&M and LH contracts should be permitted when purchasing commercial services, especially professional and technical services. Contracting Officers can include appropriate controls in such contracts to protect the interests of the Government. Thus, the Section awaits with interest the GAO review of best commercial practices for acquiring commercial products and services and believes that this review will provide a sound basis for acquiring commercial services using T&M and LH contracts.

The Section appreciates the opportunity to provide these comments and is available to provide additional information or assistance as you may require.

Sincerely,

Gregory A. Smith
Chair, Section of Public Contract Law

cc: **Norman R. Thorpe**
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Ms. Laurie Duarte
July 25, 2001
Page 9

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