

## Procurement & Property Division Policy Memorandum

<b>Subject: Contract Duration</b>			<b>Number:</b> <b>17-02</b>
<b>Distribution:</b> ARS CSREES ERS NASS PAO's FD PPD	<b>Date:</b> November 29, 2001	<b>This Replaces:</b> 17-01	

### Background

The Federal Acquisition Regulation (FAR) places a 5 year limitation on contracts for services unless it is otherwise approved in accordance with agency procedures (17.204(e)). However, there are occasions when it is practical, economical, or makes good business sense to consider extending service contracts beyond the traditional 5 year period. This Policy Memorandum will discuss these circumstances as well as how and when Contracting Officers (CO's) may use this approach.

### Policy Guidance

FAR Parts 17.204(e) and 22.1002-1, Special Contracting Methods and Application of Labor Laws to Government Acquisitions respectively, restrict the duration of service contracts to no longer than 5 years, unless otherwise approved in accordance with agency procedures. As prescribed by the FAR, the Department of Agriculture has set up such procedures in its Agricultural Acquisition Regulations (AGAR). Under the AGAR, 417.204, the Head of the Contracting Activity Designee (HCAD) is authorized to approve service contracts that exceed the 5 year limitation in FAR Part 17.204(e) and

22.1002-1. Therefore, CO's can obtain authority for establishing or modifying contract actions which exceed the 5 year service contract limitation by submitting an appropriate waiver request to the HCAD and obtaining an approval. The procedures and format for waivers will be discussed in this policy.

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Federal  
Acquisition

The FAR limits service contracts to a total of 5 years. This includes the cumulative total of the base and option year periods. A contract with an overall performance period greater than 5 years may be obtained by observing agency procedures. The FAR specifically states:

Part 17.204(e) Unless otherwise approved in accordance with agency procedures the total other basic and option periods shall not exceed 5 years in the case of services and shall not exceed the requirement for 5 years in the case of supplies...

The FAR further states under this subsection, that other statutes applicable to various classes of contracts, may place additional restrictions on the length of contracts. The McNamara-O'Hara Service Contract Act (SCA) was specifically identified.

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Service Contract  
Act Limitations on  
Service Contracts

As indicated above, the McNamara-O'Hara SCA is applicable to service contracts. The Act limits contract periods to no more than 5 years. However, the concept of contract period between the FAR and SCA are vastly different. Traditionally, most Federal contracting organizations have considered a contract base period and option period being composed of 12 months or one year. For the purposes of the SCA, a contract period can consist of multiple years not exceeding 5 consecutive years. Therefore, under the SCA, theoretically a contract could consist of a 5 year base period with two 5 year option periods (15 year contract). The Agricultural Research Service (ARS) does not envision needing contracts with such prolonged base and option periods. However, ARS does envision establishing or modifying contracts with performance periods greater than 5 years when it makes good business sense and is economical. For instance, establishing a contract with a 7 year performance period (1 base period and 6 one year options). The SCA considers the exercise of a contract as a *new contract* and does not require an exemption from the Department of Labor. The SCA, Title 29, Labor, Part 4, Subpart C, Sec. 4.143, Effects of Changes or Extensions of Contracts, Generally and Sec. 4.145, Extended Term Contracts respectively state:

.143..(b) Also, whenever the term of an existing contract is extended, pursuant to an option clause or otherwise, so that the contractor furnishes services over an extended period of time, rather than being granted extra time to fulfill his original commitment, the contract extension is considered to be a new contract for purposes of the application of the Act's provisions. All such "new" contracts as discussed above require the insertion of a new or revised wage determination in the contract as provided in Sec. 4.5.

.145..In other cases a service contract, entered into for a specific term by a Government agency, may contain a provision such as an option clause under which the agency may unilaterally extend the contract for a period of the length or other stipulated period. Since the exercise of the option results in the rendition of services for a new or different period not included in the term for which the contractor is obligated to furnish services or for which the Government is obligated to pay under the original contract in the absence of such action to extend it, the contract for the additional period is a wholly new contract with respect to application of the Act's provisions and the regulations there under (see Sec. 4.143(b)).

Therefore, to establish or extend a service contract that exceeds the 5 year FAR limitation only requires an approval in accordance with agency procedures (AGAR 417.204).

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Examples of  
Possible Contracts  
Impacted  
By This Policy

The following types of contracts or approaches provide service contract opportunities for periods greater than 5 years. These services are as follows:

- a. operation, maintenance, and support of facilities and installations;
- b. specialized training necessitating high quality instructor skills (for example, pilot and aircrew members and foreign language training); and
- c. base services (for example, ground maintenance, in-plane refueling, bus transportation, refuse collection, and disposal.

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Award Term  
Contracting

Award Term Contracting is a recent Federal acquisition innovation/initiative that has recently come under consideration by many agencies. "Award Term" is a contract performance incentive feature that ties

the length of a contract term to the performance of the contractor. The contract can be extended for “good” performance or reduced for “poor” performance. Therefore, under this acquisition approach, a service contract could be extended beyond 5 years when the contractor provides exceptional performance. This application is consistent with the dynamic nature of Federal acquisition and the need for continued flexibility and innovation.

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HCAD  
Authorization  
to Exceed 5 Year  
Limitation

Based upon the FAR, 17.204(e) service contracts with a proposed overall duration exceeding 5 years must be approved according to agency procedures. The AGAR, Subpart 417.2–Options, 417.204, Contracts, states the following:

The Head of the Contracting Activity is authorized to approve contracts which exceed the 5 year limitation in FAR 17.204(e).

Therefore, ARS has established within this policy, the following procedures for submitting waiver requests to the HCAD for authority to exceed the 5 year service contract limitation cited in FAR 17.204(e).

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Requirements for  
Exceeding the  
Overall 5 Year  
Limitation on  
Service Contracts

1. To exceed the overall 5 year (base and option periods) limitation set by the FAR for service contracts, the contracting activity shall submit a Determination and Findings (D&F) for approval of the HCAD. The D&F shall provide a justification with sufficient detail to allow the HCAD to determine that granting authority to exceed the 5 year restriction is necessary and proper in the public interest or to avoid the serious impairment of government business (Enclosure 1). The D&F should also include the following information:
  - a. Desired performance period including options;
  - b. description of services;
  - c. brief explanation indicating why a long-term contracting technique is in the best interest of the government;
  - d. statement indicating that the SCA will be incorporated into the subject contract and wage rates will be determined on an annual basis;

e. FAR Clauses 52.222-47 (SCA Minimum Wages and Fringe benefits) and 52.222-49 (SCA-Place of Performance Unknown) will be incorporated into the solicitation; and

f. Target award date or modification date.

2. If the waiver request is approved by the HCAD, the contracting activity shall commence with the issuance of the solicitation or contract modification and proceed with the processing of the acquisition or contract action.

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PPD Point of Contact

Policy Branch, 301-504-1725.

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Approved:

/s/

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Larry R. Cullumber, Acting Director  
Procurement and Property Division

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Enclosure

**(Sample)**

**SUBJECT:** Determination and Findings to Exceed Service Contract Act  
5-year Limitation on Service Contracts  
Operations and Maintenance Services

**TO:** Contract File

**THROUGH:** (Name)  
Head of Contracting Activity Designee  
Procurement and Property Division

**FROM:** John M. Smith  
Contracting Officer  
Contracts Branch, PPD

Federal Acquisition Regulation (FAR) Parts 17.204(e) and 22.1002-1, Special Contracting Methods and Application of Labor Laws to Government Acquisitions respectively, restrict the duration of service contracts to no longer than 5 years. Under the AGAR, 417.204, the Head of the Contracting Activity Designee (HCAD) is authorized to approve contracts that exceed the 5 year limitation. However, FAR 17.204(e) also states that other statutes such as the Service Contract Act (SCA) may place additional restrictions on the length of contracts. Since the SCA is an independent and separate statute under the purview of the Department of Labor (DOL), the agency must pursue an exemption from DOL to exceed the overall 5 year limitation for the subject contract. To obtain such an exemption the agency must demonstrate that exceeding the 5 year limitation would be in the best interest of the Government. Based upon an evaluation of the following factors consisting of the complexity of the contract, safety of center personnel and the public, the re-negotiation of a collective bargaining agreement, and the intrinsic interaction of the contractor with the public, it has been determined that it is in the best interest of the Government to exceed the 5 year SCA limitation.

**BACKGROUND:**

The ABC Plant Research Center is a bio-security laboratory. The mission of the center is to conduct research to protect the United States plant/crop commodities and exports against catastrophic economic losses caused by foreign plant disease agents. The operations and maintenance functions are performed by a private contractor. These functions consist of but are not limited to, Heating, Air Conditioning, Waste Water Treatment, Incinerator Service, Power Plant Services, Electrical, Vehicle, and Equipment Services. Due to the complexity of the research mission, associated bio-safety issues and

the highly skilled workforce that operates and maintains the facility, continuity of the service provider is essential. The risks associated with phasing-in a new contractor every 60 months is of great concern to the agency.

Besides the complexity of the agency's mission, there are two other major reasons why this waiver should be granted. One is the safety of the center employees and surrounding citizen areas and the second is the potential disadvantage of new contractors providing operations and maintenance services to the Government in Collective Bargaining Agreement (CBA) negotiations with the Union. As eluded to earlier, the Government conducts bio-research at the ABC Plant Research Center. The center is physically and environmentally secured to prevent unauthorized access to the plant, contamination of the center and surrounding citizen areas. Citizens rely upon the Government to keep the facility secure and to maintain the required personnel to prevent any inadvertent dangers to their communities. Therefore, it is imperative for the Government to keep an experienced, stable, and viable contractor workforce for the operation and maintenance of the facility. By allowing the Government to execute a contract composed of a base year and 6 option year periods, the Government can ensure stability and continuity of services. This action also ensures the safety of the center employees, surrounding areas, and makes a continuing contribution to the goodwill and sense of well being to the public. In addition to the employee and public safety issues, the contract effort includes intense labor laws that must be addressed with each procurement. Because the contractor will be providing labor, the contract is governed by the SCA and a CBA. The CBA identifies the wages to be paid to the majority of the contract workforce at the center. The balance of the employees are subject to the DOL's Wage Determination which is reissued each year. The CBA is negotiated between the Contractor and the Union. Although the results of these negotiations will impact the subsequent contract price to the Government, the Government cannot participate in the negotiation sessions. The CBA has a customary 3 year period. Therefore, a problem arises when the 5 year contract expires and the new contractor has very little performance and cost experience in which to develop a realistic price negotiation. For example, under the usual 5 year contract period, 2 CBA's will be executed. This will provide the new contractor only 1 year to identify historical cost and project costs for the remainder of the contract period. This places the new contractor at a severe disadvantage and endangers the continuous operation and maintenance of the center. For instance, if the contractor proposed price is not sufficient to provide adequate pay raises to employees during the contract performance period, retention of the incumbent contractor workforce may drop dramatically or the employees may strike. If the incumbent employees seek employment elsewhere in the private industry, the agency will lose the benefit of their institutional knowledge of the center and its operations and maintenance functions. Such a predicament has a great likelihood of renewing employee and public safety concerns.

Therefore, it is proposed that the contract period of performance should not run concurrently with the CBA expirations. A 7 year contract will allow the incumbent contractor to negotiate the CBA in option period 5. As an incentive for successfully

negotiating favorable prices in the CBA based upon its technical and price experience, option period 6 will be awarded to the contractor. As a result, when the contract expires, a new contract will phase-in performance with an existing CBA in effect for 2 additional years.

CONCURRENCE:

Based upon the complexity of the requirement, center and public safety concerns and the inherently unfavorable CBA negotiation predicament the 5 year operations and maintenance contracts place new contractors in, a 7 year (base year plus 6 one-year options) as described above are in the best interest of the Government.

DETERMINATION:

This determination is hereby approved one level above the Contracting Officer to support the findings that it is in the best interest of the Government for this requirement to exceed the SCA 5 year limitation. The contracting activity will incorporate the SCA into the subject contract and applicable wage rates shall be determined on an annual basis by obtaining SCA Wage Determinations from the DOL.

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Head of Contracting Activity Designee  
Procurement and Property Division

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Date

Enclosure