

**FEDERAL ACQUISITION CIRCULAR 2004-15
AND ADDENDUM**

Item I — Federal Acquisition Regulation FAR Case 2003-027, Additional Commercial Contract Types 48 CFR Parts 2, 10, 12, 16, and 52.

Background.

This final rule amends the Federal Acquisition Regulation to implement section 1432 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108-136). Title XIV of the Act, referred to as the Services Acquisition Reform Act of 2003 (SARA), amended section 8002(d) of the Federal Acquisition Streamlining Act of 1994 (FASA) (Pub. L. 103-355, 41 U.S.C. 264) to expressly authorize the use of time-and-materials (T&M) and labor-hour (LH) contracts for commercial services under specified conditions.

Section 8002(d)(3) of the Act limits use of T&M and LH contracts to the following categories of commercial services:

Commercial services procured for support of a commercial item, as described in 41 U.S.C. 403(12)(E).

Any other category of commercial services that is designated by the Administrator of the Office of Federal Procurement Policy (OFPP) on the basis that--

1. The commercial services in such category are of a type of commercial services that are commonly sold to the general public through use of T&M or LH contracts; and

2. It would be in the best interests of the Federal Government to authorize use of T&M or LH contracts for the purchase of the commercial services in such category. [Following public comments and consultation with the Acquisition Advisory Panel (established pursuant to the Services Acquisition Reform Act of 2003) and the Government Accountability Office, OFPP determined that it would not designate specific categories of services but would allow the use of time and materials/labor hour contracts for any commercial services as that reflects commercial practice.]

Significant Changes in FAR text.

FAR 12.207, Contract type, was changed to allow the acquisition of commercial items by use of a time-and-materials or labor-hour contract when--

(i) The service is acquired under a contract awarded using--

(A) Competitive procedures (e.g., the procedures in 6.102, the set-aside procedures in Subpart 19.5, or competition conducted in accordance with Part 13);

(B) The procedures for other than full and open competition in 6.3, provided the agency receives offers that satisfy the Government's expressed requirement from two or more responsible offerors; or

(C) The fair opportunity procedures in 16.505, if placing an order under a multiple award delivery-order contract; and

(ii) The contracting officer--

(A) Executes a determination and findings (D&F) for the contract, that no other contract type is suitable;

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

(C) Authorizes any subsequent change in the ceiling price only upon a determination, documented in the contract file, that it is in the best interest of the procuring agency to change the ceiling price.

FAR 16.601, Time-and-materials contracts, was changed to require a Determinations and Findings that a time-and-materials contract for commercial services may be used only if it is determined that no other contract type is suitable. The determination and finding shall be--

(i) Signed by the contracting officer prior to the execution of the base period or any option periods of the contracts; and

(ii) Approved by the head of the contracting activity prior to the execution of the base period when the base period plus any option periods exceeds three years.

FAR 16.601 further requires that any such contract must include a ceiling price that the contractor exceeds at its own risk and the contract file must be documented to justify the reasons for and amount of any subsequent change in the ceiling price.

FAR 52.212-4, Contract Terms and Conditions--Commercial Items, has been amended at paragraphs (a), (e), (i) and (l) to accommodate the use of a time and materials or labor hour type contract.

Item II — Federal Acquisition Regulation; FAR Case 2004-015, Payments under Time-and-Materials and Labor-Hour Contracts for Non-Commercial Services.

Background.

The amendments made under this case are applicable to non-commercial item contracts. The amendments to FAR 16.307, 16.601, 16.602, 32.111, and 52.232-7 are to amend the underlying policies and increase the clarity of the affected FAR language. The

FAR amendments address the areas related to payments made under T&M and LH contracts for non-commercial items.

The primary difference in this revised coverage is the pricing and payment for labor. If a contract is not based on competition, the contractor must separately identify and price labor rate categories for itself and each subcontractor furnishing labor. If a contract is based on competition, the contractor may, instead, use blended rates which are valid regardless of the source providing the labor.

Discussion and Analysis — Payment for labor

Payment for labor performed by subcontractors is treated differently depending on whether a contract action is awarded under adequate price competition or not. If a contract is not awarded on the basis of adequate price competition, the contract must separately identify labor rate categories for each subcontractor, in addition to the labor rates for the contractor. If the price of a contract is based on adequate price competition, the CO is not required to include separate rates for subcontractors, but may use blended rates that apply to any labor meeting the qualifications of the contract, regardless of whether provided by the contractor or a subcontractor.

The FAR adopted the philosophy on treatment of subcontractor labor that was developed under FAR Case 2003-027 and applied it to noncommercial T&M contracts awarded on the basis of adequate price competition. That is, FAR case 2003-027 requires no special treatment of labor provided by subcontractors. Any labor that meets the labor hour qualifications of the contract is to be paid at the labor hour rate specified in the contract, regardless if it provided by individual working for the prime contractor or a subcontractor. This approach was developed under FAR case 2003-027 for commercial items because it was felt that competitive pressure would produce fair and reasonable prices and eliminate potential abuses related to subcontractor labor. Competition for commercial items is the same as competition for noncommercial items and the approach should be the same for both FAR cases.

However, for noncommercial T&M contracts awarded without adequate price competition, competitive pressures are substantially diminished and the Government must take a much more cautious approach with respect to labor provided by subcontractors. Labor hour rates for these types of actions are largely based on cost information provided by the prime contractor. In order to avoid potential for issues arising after award of a noncompetitive T&M contract, each subcontractor must have its labor hour rates specified in the prime contract. This will be required in FAR Part 16 and offerors will be required to include such rates in their offer by a solicitation provision.

The FAR amendment includes three new solicitation provisions to be used for noncommercial T&M/LH solicitations. These provisions serve several purposes. First, they communicate plainly that labor hour rates for subcontractors are a potential major issue that must be addressed by the CO and by the offerors. Second, they communicate that contracts awarded on the basis of adequate price competition may be approached in a

much more flexible way than may be used for contracts not awarded competitively. Finally, they provide a structure to CO's that can be used to eliminate issues related to potential abuse of subcontract labor hour rates.

FAR 52.216-29, Time-and-Material/Labor-Hour Proposal Requirements-- Noncommercial Item Acquisitions with Adequate Price Competition, instructs offerors that they may identify the labor rates they are proposing in either one of three different manners. First, offerors may propose blended rates under which labor hours will be paid at the same rate, regardless of whether the individual performing the labor works for the prime contractor or a subcontractor. Second, offerors may offer labor hour rates that include two sets of rates, one set for individuals employed by the offeror and a second set for individuals employed by subcontractors. Third, offerors may offer multiple sets of labor hour rates, one set for individuals employed by the offeror and additional sets for each subcontractor for individuals employed by different subcontractors. If CO's are authorized by agency procedures, the contracting officer may amend this provision to pre-select a single method from among those three methods that every offeror must use. [The DOE Acquisition Guide will be amended to add such procedures.]

FAR 52.216-30, Time-and-Material/Labor-Hour Proposal Requirements-- Noncommercial Item Acquisitions without Adequate Price Competition, instructs offerors that they must offer multiple sets of labor hour rates, one set for individuals employed by the offeror and additional sets for each subcontractor for individuals employed by different subcontractors. The purpose of this solicitation provision is to enforce the policy in Part 16 which requires acquisitions awarded on the basis other than adequate price competition to include individual labor hour rates for each subcontractor.

FAR 52.216-31, Time-and-Material/Labor-Hour Proposal Requirements--Commercial Item Acquisitions, instructs offerors that they must identify for each labor hour rate if the rate applies to only the offeror, a subcontractor, and affiliate of the offeror, or any combination.

Addendum — Technical Amendments, Parts 12, 22, 31, 32, and 52

These are merely corrections of errors made in FAC 2005-15.