NOV 19 2004

GSA Office of the Chief Acquisition Officer

MEMORANDUM FOR RONALD POUSSARD
DIRECTOR
DEFENSE ACQUISITION REGULATIONS COUNCIL

FROM: RALPH DESTEFANO, DIRECTOR
REGULATORY AND FEDERAL ASSISTANCE
PUBLICATIONS DIVISION

SUBJECT: FAR Case 2003-027, Additional Commercial Contract Types

Attached are comments received on the subject FAR case published at 69 FR 56316; September 20, 2004. The comment closing date was November 19, 2004.

Response Number	Date Received	Comment Date	Commenter
2003-027-1	09/21/04	09/21/04	Xcalibur Software, Inc.
2003-027-2	09/25/04	09/25/04	Jennifer Jones (ACA SRCC)
2003-027-3	09/30/04	09/30/2004	J. Jones
2003-027-4	10/01/04	10/01/04	D.J. Ludwig Rockwel ICollins
2003-027-5	10/04/04	10/04/04	AIA
2003-027-6	10/21/04	10/21/04	NCMA
2003-027-7	11/01/04	11/01/04	National Science Foundation
2003-027-8	11/03/04	11/03/04	The Coalition Government Procurement
2003-027-9	11/09/04	11/09/04	Boeing

U.S. General Services Administration
1800 F Street, NW
Washington, DC 20405-0002
www.gsa.gov

Response Number	Date Received	Comment Date	Commenter
2003-027-10	11/16/04	11/5/04	DOD/IG
2003-027-11	11/18/04	11/18/04	ABA
2003-027-12	11/18/04	11/18/04	SSA
2003-027-13	11/18/04	11/18/04	EPA
2003-027-14	11/18/04	11/17/04	HAD
2003-027-15	11/19/04	11/19/04	AFGE/AFL-CIO
2003-027-16	11/19/04	11/19/04	Price Warterhouse Coopers
2003-027-17	11/19/04	11/19/04	GSA/OIG
2003-027-18	11/19/04	11/19/04	Distributed Solutions, Inc.
2003-027-19	11/24/04	11/14/04	CSA, ITAA, PSC, GEIA
2003-027-20	11/24/04	11/23/04	CODSIA
2003-027-21	11/24/04	10/14/04	GFP Enterprises, Inc.
2003-027-22	11/24/04	11/19/04	Preston/Gates/Ellis & Rouvelas Meeds
2003-027-23	11/24/04	11/19/04	POGO

Attachments

2003-027-1

"Parry, Paul"
<pparry@xcalibur.com
>

09/21/2004 12:29 PM

To: ANPR.2003-027@gsa.gov
cc:
Subject: 2003-027: Additional Commercial Contract Types

I am writing to enthusiastically support the proposed rule change, allowing time-and-materials (T&M) and labor hour (LH) contracts for commercial services. Our small business, a software development and consulting services firm, currently operates a mixture of firm-fixed-price (FFP) and cost-plus-fixed-fee (CPFF) contracts with various Federal Agencies, as well as many T&M contracts with commercial clients. CPFF services contracts, compared to T&M, result in additional overhead and decreased productivity of our employees.

For example, we have a software design architect who splits his time between a CPFF project for NIH and a similar T&M project for a commercial client. By bringing current knowledge from the pharmaceutical industry into the government, and vice versa, this arrangement benefits both projects immensely. However, because of the nature of CPFF accounting, there is a heavy burden on this employee for planning his schedule to ensure an exact 50% split in his hours each pay period, resulting in missed opportunities if either client has last minute needs. Under T&M, the employee could simply record hours spent on each project as they are worked, and those hours would be billed to the appropriate client. The employee would be more productive, both clients would receive better service, and our accounting staff could use the same procedures across both contracts.

With the not-to-exceed (NTE) requirement of this proposed rule, and continued auditing of our labor rates and internal costs by DCAA, the long-standing fears about T&M contracts are unrealistic. There would be little opportunity to take unfair advantage of a client through a T&M contract. Also, there is a clear separation in our business between projects that are obviously suited for FFP (defined-scope development or implementation) and those that are suited for T&M (design consulting services, quality assurance, security auditing, etc), and we see little chance that this rule would drive contracts away from FFP.

I urge you to approve this rule, and to encourage the abandonment of CPFF contracts for commercial services in favor of T&M.

Paul H. Parry
Chief Technology Officer
Xcalibur Software, Inc.
13461 Sunrise Valley Drive, Suite 300
Herndon, VA 20171
pparry@xcalibur.com
703-654-5232
Fax: 703-783-8892

2003-027-2

"Jones, Jennifer L. - ACA SRCC" <Jennifer.Jones@forscom.army.mil>

To: ANPR.2003-027@gsa.gov
cc:
Subject: COMMENTS ON PROPOSED RULE TO ALLOW T&M and LH commercial contract s

09/25/2004 03:55 PM

Examples of typical commercial services provided on a T&M/LH basis:
Repairs (car, home, computer, HVAC, etc., etc.)
Legal services
Accounting services
Cleaning Services
Consulting Services
Training (also sometimes done fixed price or by the student)
Certain building trades, such as painters (may be fixed price per job or LH)

Comment on restricting it to competitive circumstances. While I understand the intent (since we cannot obtain certified cost and pricing data, it allows some cost control/visibility), there are other situations beyond competition when sufficient controls would be in place. Examples include contractors with DCAA approved labor rates or with rates awarded on other contracts, or contractors with DCAA approved loads when the work is subject to the Service Contract or Davis Bacon Acts, and there are wage determinations controlling must of the cost in the rates and the loads are approved.

Nevertheless, this will be an enormous improvement and is a long sought change. Thank you!

Jennifer Jones

2003-027-3

"jjones"
<jjones@shentel.net>
09/30/2004 01:03 PM
Please respond to jjones

To: ANPR.2003-027@gsa.gov
cc:
Subject: Comments

Attached is a comment for consideration by the councils. FAR ANPR Case.doc

2003-027-3

FAR ANPR Case

A measure for consideration, as the councils address the matter of contract types when acquiring commercial services, is the customary pricing structures used to make such procurements.

One facet of commercial services involves the growing arena of contact centers. The Federal government, as evidenced by GSA's recent multi channel contact center contract, is significantly involved in obtaining such services. A typical commercial method of pricing these type services, as well as other telecommunication related services, is using a price per unit, usually price per minute (as with the pricing in segments of the FTS series contracts).

Currently, Part 12 of the FAR encourages the government to consider commercial practices when making such acquisitions. The adoption and/or encouragement of commercial pricing concepts would be consistent with the spirit and tenets of the existing statutes.

As the councils consider the appropriate use of additional contract types for commercial services, it is recommended that the councils also consider appropriate contract pricing concepts.

2003-027-4

djludwig@rockwellcollins.com

10/01/2004 04:44 PM

To: ANPR.2003-027@gsa.gov
cc:
Subject: ANPR, FAR case 2003-027

01 October 2004

General Services Administration
Regulatory Secretariat (VR)
1800 F Street, NW, Room 4035
ATTN: Laurie Duarte
Washington, DC 20405

re: ANPR, FAR case 2003-027.

Dear Laurie Duarte,

The undersigned appreciates the opportunity to comment on the proposed revision of the Federal Acquisition Regulation (FAR) that was published in the Federal Register on 20 September 2004. The intent of these amendments is to authorize the use of T&M and Labor Hour contracts for the acquisition of commercial services.

We support and applaud the intent of this change.

The notice contains preliminary thoughts about rules for implementing the Services Acquisition Reform Act (SARA). Some of these thoughts need to be revised during the rule making process.

Following are Rockwell Collins Inc's (RCI) comments about some of the preliminary thoughts that need to be revised:

Preliminary Thought:

Add a new FAR section, 12.216, requiring the contractor to obtain the consent of the CO before awarding certain subcontracts.

RCI's Comments:

Requiring a contractor to obtain the CO's consent to award subcontracts in a commercial item contract is contrary to the intended purpose of FASA which was to simplify commercial item contracting. Implementation of this change will add administrative effort and cost with no value added for contractors and little if any benefit to the government given that the proposed language relates to commercial item contracting.

Preliminary Thought:

Revise FAR 12.403 to specify the amounts recoverable upon termination for convenience of a T&M or labor hour contract for commercial services.

RCI's Comments:

The proposed rule does not adequately address a contractor's need to recover material costs related to a termination for convenience.

2003-027-4

Preliminary Thought:

Add an Alternate I to FAR 52.212-4 for use in T&M and labor hour contracts for commercial services.

RCI's Comments:

The draft language included in Alternate I creates issues related to the government's audit rights such as whether the government has the right to interview contractor employees about work they have performed.
Again, thank you for providing the "preliminary thinking" of the Councils on SARA and the opportunity to respond with comments.

Best regards,

D. J. Ludwig
Rockwell Collins

2003-0275

AEROSPACE INDUSTRIES ASSOCIATION

FACSIMILE TRANSMISSION

PROCUREMENT & FINANCE DEPARTMENT
GOVERNMENT DIVISION
FAX No. 703-358-1013

Date: 10/4/04

PAGES: Cover + 1

FROM:	**Terry Marlow**	**703-358-1040**	____	**Information**	____
	Patrick Sullivan	**703-358-1045**	____	**Action**	____
	Richard Powers	**703-358-1042**	____	**Reply Requested**	____
	Kirsten Koepsel	**703-358-1044**	____	**As Requested**	✓
	Suzette Strickland	**703-358-1041**	✓		

TO: ANPR, FAR 2003-027 **FAX #** 202-501-4067

Thank you for the opportunity to provide comments.

Aerospace Industries Association of America, Inc.
1000 Wilson Blvd., Suite 1700, Arlington. VA 22209-3901
(703) 358-1000 www.aia-aerospace.org

Aerospace Industries Association's Suggested Topics for Discussion at Public Meeting

- T&M should not be thought of as an all or nothing matter. The government should not assume that the only place for T&M contracts is where the entire effort is to be procured on a T&M basis. While that is done in the commercial world, T&M provisions are also included in major engine overhaul and component repair efforts where it is possible to FFP the majority of the effort, but it makes good business sense to allow the flexibility of T&M for unexpected work.

- One potential issue is how the government will establish the ceiling prices on these T&M and LH contracts. If the contractor is under no obligation to continue performance of the services when the ceiling price is reached as the applicable clause states, there is no concern. However, if ceiling prices are established with the expectation of service completion, this could be an issue.

- While this change is clearly a step in the right direction, it does not appear that the government has come up with any innovative ways for dealing with the commercial marketplace. For example, it still wants consent to issue subcontracts, access to employees and timecards, labor distributions, material and subcontractor invoices. – all of which are not a part of the commercial contracting process.

Recommend that these comments be addressed at the public meeting.

2003-027-6

Erulemaking@epamail.epa.gov
Sent by:
Moghis.Asfara@epamail.epa.gov

To: ANPR.2003-027@gsa.gov
cc: Erulemaking@epamail.epa.gov
Subject: Docket Comments - October 20, 2004

10/21/2004 01:56 PM

Greetings from the Regulations.gov website!

As part of our public service to increase participation in federal government
regulatory activities, the federal government's central online rulemaking portal,
Regulations.Gov, accepts public comments on federal agency rulemakings open for
public comment and transmits these comments once per day to the proper agency.

This message transmits public comments and related documentation submitted
on your agency's rulemakings through the Regulations.Gov website. Comment
files and attachments have been compressed into a zip file to ease transmission through agency e-mail systems. An Unzip program will be required to extract the attached files.

Please distribute these comments to the appropriate rulemaking dockets.

If you have questions, please send e-mail to:
comments@comments.regulations.gov.

Thank You!

(See attached file: DOD-04-21040-102004.zip) DOD-04-21040-102004.z

2003-027-6

National Contract Management Association

POSITION PAPER

Use of
Time and Materials (T&M) and Labor Hours (LH) Contracts
for
Procurement of Commercial Services
under
Part 12 of the Federal Acquisition Regulation (FAR)

Methodology:

In preparing this position paper the National Contract Management Association (NCMA) took an informal sample of senior contract managers and executives from Fortune 500 companies that are engaged primarily in commercial, business-to-business (B2B) work, though each of the companies surveyed also do business with the Federal government under FAR rules. The sample questions used are attached. This paper also incorporates the views and experience of NCMA's senior staff and association leadership.

Background:

On November 24, 2003, President Bush signed the National Defense Authorization Act for Fiscal Year 2004, P.L. 108-136, 117 Stat. 1392 (Nov. 24, 2003). Included within this Act is the Services Acquisition Reform Act of 2003 (SARA), which contains a number of provisions authorizing federal agencies to purchase commercial services in a manner similar to the private sector. The Act authorizes the use of a time and materials or labor-hour contract for government purchase of commercial services commonly sold to the public, if the contract is awarded on a competitive basis, no other contract type is suitable, the contract includes a ceiling price, and the commercial services are either procured for support of a commercial item or are of a type designated by the Office of Federal Procurement Policy. On September 20, 2004, the FAR Council issued a proposed rule for implementation of this statute. The proposed FAR rule may be found at http://www.acqnet.gov/far/ProposedRules/2003-027.pdf.

Findings:

Each of the responding firms indicated that they used T&M and LH contracts and that their company entered into T&M or LH contracts in B2B settings on both the buy side and the sell side of the transaction. The responses indicated that T&M and LH contracts are commonly used in the commercial market and generally do not carry the same stigma as in the Federal community. FAR rules specify that T&M or LH contracts can be used only when "no other contract type is suitable". This may in part be due to the differences

Rec'd 10/21/04

027-6

in how Federal courts and State courts interpret crucial performance aspects of the contracts, especially ability of the buyer to enforce firm deliverables and warranties. Federal courts have often found that the buyer cannot enforce firm deliverables or warranties under T&M or LH contracts, making these contract types inherently risky for the government buyer. In contrast, State courts (applying the principles of the Uniform Commercial Code (UCC)) typically do not make a distinction between T&M/LH contracts and Firm Fixed Price (FFP) contracts in regard to the buyer's rights to firm deliverables and warranty protections. Further adding to the reluctance among Federal buyers to use T&M/LH contracts is the fact that informal or formal disputes often arise surrounding deliverables and warranties. This is an important distinction that should be well understood as the Federal government implements the use of T&M/LH contracts for the first time under Part 12 procedures.

The general circumstances under which the sample firms believed the use of T&M/LH contracts to be appropriate were similar to the circumstances prescribed by the FAR. A representative industry response was,

> "We believe it is appropriate to use T&M contracts when the expertise to resolve an issue/problem and the time required to troubleshoot and resolve the issue cannot be determined in advance on a fixed price basis. T&M contracts are also appropriate when the task to be performed is not well defined."

Other comments made reference to the appropriateness of T&M/LH contracts when the resources required to accomplish the work, the extent of work required, or the duration of the work activity could not be defined in advance.

Each of the surveyed companies was asked to describe the type of commodities, supplies or services they bought or sold using T&M/LH contracts. The responses varied to some degree based upon the nature of the products and services that the responding company produced or used in its production. However, there was also a high degree of commonality in the responses. All cited professional, consulting, and certain technical services (system integration, program management) as being a suitable application. Repairs not suitable for coverage under a maintenance agreement, software development and certain facilities services were also mentioned.

Respondents were asked to describe any special surveillance, oversight, quality assurance, or financial controls required when using T&M/LH contracts in a B2B setting. While some stated that such controls inherently added cost to the task and therefore should be avoided, the majority cited the need for enhanced controls. Commonly cited was the need for verification of: labor hours performed versus billed; labor categories utilized versus billed; and adequate accounting systems on the part of the seller in order for the buyer to validate costs billed.

"Best Practices" reported in the use of T&M/LH contracts included: close communication and cooperation between buyer and seller; using a project management team that is well-versed in the types of services involved; and establishing Forward

Pricing Rate Agreements (FPRA) with firms that one frequently engages in T&M/LH contracts to reduce the time and effort involved in contract formation and administration.

The surveyed companies were asked what types of services they believed were appropriate for the Federal government to acquire with T&M/LH contracts under FAR Part 12 procedures. Across the board the response was: the same types of services that we (the responding firm) buy and sell in the B2B environment using T&M/LH contracts. To reiterate, this includes: professional, consulting, and certain technical services (system integration, program management); repairs not suitable for coverage under a maintenance agreement; software development; and certain facilities services.

Finally, the survey asked what limitations (if any) should be imposed on Federal agency's authority to use T&M/LH contracts for the procurement of commercial items under FAR part 12. Those cited included: ensuring that the services were truly commercial in nature and commonly sold in commercial markets; and that the requirement not includes a large material component. Respondents cautioned against use of mandated "most favorable customer" terms. And respondents generally believed that controls similar to those already in place for Federal procurements of non-commercial services using T&M/LH contracts were sufficient for use in procurement of commercial services under FAR Part 12.

Conclusion:

T&M and LH contracts are commonly used in the commercial B2B environment, and generally without the stigma attached currently to Federal use of these contract instruments. However, key differences in Federal versus State court interpretation of the FAR versus the UCC must be noted. Hence, a continued bias in favor of fixed price contracts for acquisition of commercial services under FAR Part 12 is in order. However, there are circumstances where commercial services cannot reasonably be acquired by the Federal government under a fixed price arrangement, therefore the authority to use T&M/LH contracts under Part 12 procedures is a welcome change.

The definition of what qualifies as a commercial service should be broad in scope. The key is not to try to develop a comprehensive list, but rather to require an affirmative determination by the contracting officer (through market research of other means) that the services are truly commercial in nature and supported by a commercial market. Any such list of qualifying services should include, but not be limited to: professional services, consulting, engineering, technical services, and maintenance.

T&M and LH contracts do represent more risk to the buyer than firm fixed price contracts. As such, additional controls and oversight, especially in labor hours and labor categories is appropriate. Existing oversight methods and controls for Federal non-commercial T&M/LH contracts are a good basis for crafting the methods and controls to apply to Part 12 T&M/LH contracts. The proposed FAR rule (FAR Case 2003-027) appears to have carefully examined those terms and conditions from FAR Part 16 and FAR Part 52 that should be applied to the new authority under FAR Part 12.

027-6

Enclosure: **Survey Questions**

1. Does your company use T&M/LH contracts with other commercial firms?

2. If YES to question 1, does your firm use these contracts as the seller?

3. If YES to question 1, does your firm use these contracts as the buyer?

4. Please describe the circumstances under which you believe it is appropriate to use T&M/LH contracts in a B2B setting?

5. Please describe the types of supplies, commodities, or services for which you believe the use of a T&M/LH contract in a B2B setting is appropriate?

6. Please describe any special surveillance, oversight, quality assurance, or financial controls that you believe are necessary when using a T&M/LH contract in a B2B setting?

7. Please describe any "best practices" that your firm uses for T&M/LH contracts in a B2B setting?

8. What type of commercial items (supplies, commodities, services) do you believe are appropriate for Federal agencies to procure using T&M/LH contracts?

9. What limitations, if any, do you believe should be imposed on Federal agencies authority to use T&M/LH contracts for the procurement of commercial items?

10. Please provide any other comments you'd like to make on this subject.

2003-027-7

"Jones, Marion M." <mjones@nsf.gov>

11/01/2004 03:07 PM

To: "'ANPR.2003-027@gsa.gov'" <ANPR.2003-027@gsa.gov>
cc:
Subject: Appropriate Use

Hi;

What happen to the question under Appropriate Use that the gentlemen asked about Market Research at the Public Meeting on October 19, 2004, see below:

Appropriate Use

I. Type of commercial services sold to the general public using T&M or LH contracts

a. What type of services are predominately sold on T&M or LH basis?

>Public comment: repairs, legal services, accounting services, cleaning services, consulting services, training,

certain building trades, quality assurance.

What happen to the answer that was given: moving services, installation services, and may Trade-ins

Appropriate Use

III. Establishing suitability of T&M and LH contacts

ANPR: D&F must --
(i) include a description of the market research conducted;

I think the person was having a hard time as to how he would determine T&M and LH contract to be suitable for the opportunity in market research or what are the things to include when you are looking for a T&M and LH contract? He wanted to know the process to determine a T&M and LH contract?

Help me out hear. He asked how would he conduct or know when to conduct a Market Research, something like that, I didn't take notes - because someone stated it would be in the minutes.

Maybe be it is an unimportant issue, if so that ok with me.

Seem like some things was address and answers was given, but not included on the public meeting minutes.

Thanks, M

Marion M. Jones
Contract Administrator
Division of Acquisition & Cost Support
National Science Foundation
703.292.5398 (Office)
703.292.9140/9141 (Fax)

2003-027-8

25
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The Coalition for Government Procurement

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www.coalgovpro.org

(E-mail: ANPR.2003-027@gsa.gov)

November 19, 2004

General Services Administration
Regulatory Secretariat (VR)
1800 F Streets, NW, Room 4035
Washington, D.C. 20405
ATTN: Laurie Duarte

RE: ANPR, Far Case 2003-027

Dear Ms. Duarte:

The Coalition for Government Procurement appreciates the opportunity to comment on the ANPR dated September 10, 2004, including time & material and labor hours as types of commercial contracts. It is important that this rule reflect the original intent of Congressman Davis' SARA legislation. It is our belief that as currently drafted, this rule instead puts much of what was intended in jeopardy. This ANPR has the potential to substantially limit time-and-materials (T&M) and labor-hour (LH) contracts, valuable tools to the government.

The Coalition is a multi-industry association of over 330 companies selling commercial services and products to the federal government. Our association is comprised of firms of all sizes accounting for approximately half of the commercial item sales made to the federal government and over 70% of the sales made through the General Services Administration's Multiple Award Schedules program each year. The Coalition has worked with government decision-makers for over 25 years to ensure a common sense procurement environment.

Section 1432 of the Services Acquisition Reform Act (SARA) of 2004 specifically authorizes the use of T&M and LH contracts to procure commercial services. This is a ringing Congressional endorsement of the use of these types of acquisition processes and the government's intent for wide use of both vehicles. Therefore the Coalition is troubled by the tone of OFPP's comments seeking to limit T&M utility. This is not the intent of

the original legislation but rather the antithesis. The intent was to promote and protect T&M use.

Too long and too frequently, it has been assumed that firm fixed price contracts automatically delivered best value. In reality, a great number of T&M contracts get the government better prices than do firm fixed price contracts. This happens for several reasons. In a firm fixed price
environment, no company is going to bid lower than that which will give them the opportunity to make a profit. Therefore, in the many cases that jobs are completed ahead of schedule, the government pays more than for the actual work that has been done. T&M, on the other hand, would provide the government the opportunity to pay for only the exact quantity of work done. It is incorrect for OFPP to believe that T&M contracts consistently result in a financial loss for the government. Rather they are a valuable tool and should be utilized openly when fit.

Many have also testified to the fact that the rigid arrangements surrounding firm fixed price contracts often times cost the government more in terms of price and quality because of the emphasis on staying within a predetermined dollar ceiling. This approach deprives the parties of the flexibility to account for the cost of services as they are consumed in the execution of tasks for the client agency, which in many cases may have been well below fixed price cost.

While the Congress has articulated support for the use of T&M and LH contracts, it has not done so without imposing certain requirements. These requirements are articulated in the legislation. While some see a need for the requirements to be further refined, it is crucial that in turn the original intent of the legislation in not compromised. SARA specifically aims to strengthen T&M and LH contract use, and instead, we believe an attempt is being made to restrict their use in the form of ANPR FAR Case 2003-027. Due to the confusion surrounding this issue, we understand the Councils' desire to establish a reasonable set of guidelines for implementing Congressional intent in its passage of SARA. But in turn, we would like to suggest that a few refinements be made to enhance the effectiveness of the final rule, protect the intent of the original legislation, and thereby deliver better value to the government.

Following are our comments and suggestions, grouped under the same categories as were used in the public meeting of October 19, 2004.

Appropriate Use

1. Determination and Findings: This was included in the original legislation. However, the regulation can be drafted to make this somewhat less onerous in developing and approving. 12.207(b)(3)(iii) "Establish that the requirement has been structured to minimize the use of T&M and LH contracts to the maximum extent practicable (e.g. by limiting the value or length of the contract or order)." This comes close to defeating the purpose.

Types of commercial services sold to the general public using T&M or LH contracts

- We agree that the rule should not go beyond the statutory language in describing the type of service(s) that may be procured under a T&M contract. We suggest therefore, that "predominantly" not be used in lieu of the term, "commonly," since they have distinctively different meanings.
- Commercial offerors should be allowed the flexibility to propose both fixed price and T&M solutions. The authorized contracting officer can analyze and decide which, among all offers, is most cost effective and advantageous to the government. In this regard it should be made clear that a determination and finding (D&F) will not be required prior to issuing a solicitation inviting either or both T&M and LH proposals; it should be required only if the ultimate award is done on a T&M or LH basis and is above an established dollar threshold, if permissible under the statute.

Conditions for use

- Once an authorized determination has been made to allow a T&M contract type to be used, further authorizations for T&M should not be required for subcontracts under an approved overall contract. It should be presumed that approval of T&M for the primary contract flows to all subcontracts under it. This would not preclude the use of firm fixed price subcontracts, if the authorized procurement official decided that doing so was in the government's best interest.
- The authorized contracting official should be permitted discretion in making an award on the basis of an overall evaluation on the proposals, which presumably will include rates, technical approach to performing the work, price, etc. Price, alone, should not be the deciding factor.

Establishing suitability of T&M and LH contracts

- The ANPR requires a description of the market research undertaken to evaluate options and the rationale for not using fixed- prices for delivery of the services. If this requirement is to be successfully met, contracting officers should be provided guidance on sources and specific instructions on conducting market research. The rule also should be recast to emphasize that the market research is being performed to establish why T&M is the appropriate contract type for a particular requirement.
- SARA articulates the sense of Congress that the government's requirements for commercial service should *maximize* the use of fixed price contracts. The ANPR indicates that the D&F is to demonstrate that a government requirement is described in such a way as to *minimize* the use of T&M and LH contracts. The rule's emphasis is misplaced and should be revised to convey Congressional intent.
- If a D&F for approved IDIQ contract provides for the use of both FP and T&M contracts it should not be necessary to conduct a D&F for each order

issued under the IDIQ. This appears to be redundant and wasteful. Likewise, it should not be necessary for a D&F to be approved at a level above the CO when an IDIQ permits the use of only T&M and LH orders.

- As a general matter, rather than layering the use of T&M and LH with redundant oversight levels, we believe that existing agency review mechanisms to ensure procurement integrity should be used to validate the appropriate use of T&M and LH contracts.

Terms and Conditions

Payments

- The proposed rule would not allow the government to reimburse a contractor under a T&M contract for any burden applied to its direct materials costs - apparently because it is believed it would violate the long-standing statutory prohibition on making any contracts or payments on a cost plus a percentage of cost (cost plus) basis. We believe this is an incorrect interpretation of the statute. Congress has long prohibited contracts based on a cost plus compensation basis. Under such contracts, a contractor would be paid an amount computed by first calculating what its actual costs were and then paid an additional amount (a fee) that is computed with respect to the amount of cost incurred. The statute does not allow additional compensation paid over and above actual cost. In the context of the proposed rule, and as has long been the case with T&M contracts, the amounts paid to the contractor with respect to the materials portion of the arrangement would be the contractor's *full* cost of the materials- that is, both the direct out-of-pocket costs paid to external providers *plus* any allocations of indirect costs that, in accordance with the contractor's normal and disclosed accounting practices, are consistently and appropriately applied to such direct costs. This additional amount would not be a "fee" of the type Congress has long prohibited. The proposed rulemaking would not recognize the contractor's actual full cost for materials, which creates an unfair and unreasonable position with respect to the practice of indirect cost allocation - something that has nothing at all to do with the cost plus practice.

Many contractors who may receive FAR Part 12 contracts on a T&M basis are in full compliance with the Cost Accounting Standards (CAS), and their disclosed accounting practices show that they apply indirect cost allocations to the costs of goods or services acquired from others as a part of their normal practices. Such contractors, operating under a FAR Part 12 T&M contract, will have to allocate indirect costs to the direct costs of materials, whether such allocations are recognized or allowed to be considered in the amount of compensation they are to receive under the materials portion of their contract. In the end, these contractors must show the full cost of the materials portion of the work on their books, but the Government will pay them only for the direct costs, thus reimbursing them less than their true full costs for that portion of their contract effort. Depending upon the mix

of labor and material costs incurred under a specific T&M contract, this non-recognition and nonpayment for the material costs of the work as currently expressed in the proposed rule, could actually create an overall loss for the contractor.

For the purposes of T&M commercial companies maintain systems of varying types to record time worked on projects. These are not the basis for accounting systems as anticipated by the regulation. It is clear from the comments and the proposed rule that the drafters believe that any labor charging system has to be tied to a CAS compliant accounting system with all time recorded. The government and major primes are "shocked" to find that commercial companies do not require ALL employees to record ALL time worked. In fact that is the case. Remember, T&M contracts are a common commercial practice. Requiring compliance of CAS for commercial contracts flies in the face of commercial item reforms.

Clearly this was not what the Congress expected or intended with the passage of the SARA legislation, and we believe this is not a sound or reasonable policy position for the rule to adopt. Therefore, we recommend that the tone and terminology of the proposed rule be changed to recognize that reimbursement of a contractor's material costs can and should include all appropriately applied indirect cost allocations.

Conclusion

The Coalition would be pleased to meet with OFPP or other government officials to discuss the issues covered in these comments. We believe there are significant concerns in the ANPR that merit further discussion before a new rule is introduced.

We appreciate the opportunity to submit comments. Please feel free to contact the Coalition any time at 202-331-0975 if we can be of further assistance. We look forward to working with you on this issue.

Sincerely,

Kathryn Coulter

Kathryn A. Coulter
Director of Policy

The Boeing Company
100 N. Riverside
Chicago, IL 60606-1596

2003-027-9

October 28, 2004

General Services Administration
Regulatory Secretariat (V)
1800 F Street, NW, Room 4035
Attention: Ms. Laurie Duarte
Washington, DC 20405

Subject: Federal Acquisition Regulation; Additional Commercial Contract Types

Reference: Advance Notice of Proposed Rulemaking, FAR Case 2003-027, 69 FR 56316, September 20, 2004.

Dear Ms. Duarte:

The Boeing Company appreciates this opportunity to provide comments to the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) on the referenced proposed regulation relating to the applicability of commercial contract types.

As you are aware, Title XIV of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136), referred to as the Services Acquisition Reform Act (SARA), includes a provision, section 1432, which expressly authorizes the use of T&M and LH contracts for the procurement of commercial services. Section 1432 amends section 8002(d) (41 U.S.C. 264 note) of FASA. As amended, section 8002(d) places certain conditions on the use of T&M and LH contracts for purchases of commercial services under FAR Part 12, namely: (1) The purchase must be made on a competitive basis; (2) The service must fall within certain categories as prescribed by section 8002(d); (3) The contracting officer must execute a determination and findings (D&F) that no other contract type is suitable; and (4) The contracting officer must include a ceiling price that the contractor exceeds at its own risk and that may be changed only upon a determination documented in the contract file that the change is in the best interest of the procuring agency. The Councils are issuing this ANPR to seek the public's input for how best to implement the requirements and authorities of section 8002(d).

Many aspects of the ANPR are inconsistent with standard commercial practices in the aviation industry. Commercial companies like Boeing Commercial Airplanes will not change their business systems to comply with such government-unique requirements because there is no valid business case to do so. In our view, the ANPR as presently drafted will fail its purpose, i.e., of enticing commercial firms to enter into Time & Materials or Labor Hour agreements with the Government.

However, as always, we remain hopeful at this early stage in the regulatory process that a constructive discussion may be held between the Government and industry representatives in preparation of any future proposed rule to be published for public comment. Therefore, in the interest of providing a constructive critique, we have provided the detailed comments enclosed below, for the Government's consideration.

rcvd 11-9-04

The Councils asked for specific replies to a series of detailed questions:

"a. What, if any, types of commercial services are sold to the general public predominantly on a T&M or LH basis?"

See Attachment A enclosed below an August 5, 1996 Memorandum prepared by Danella Hastings of The Boeing Company, describing the services in the aviation industry that are usually provided on a T&M or LH basis. This description is still valid today.

Terms and Conditions:

a. What type of surveillance is conducted under T&M and LH commercial contracts (e.g., quality control and inspections)?

None. Boeing, the airline, or the party performing repairs on commercial airplanes must certify that repairs were performed in accordance with the requirements of all regulatory authorities (e.g., under Boeing's Production Certificate issued by the FAA). The contracts between Boeing Commercial Airplanes (BCA) and its airline and other commercial customers include normal commercial warranties that cover workmanship and materials. The customer can make a warranty claim if the services are deficient. If Boeing deems the warranty claim to be valid, Boeing will re-perform the work at no charge. Airline customers do not conduct surveillance of the price charged, for the reasons stated below (see discussion of 12.207 (b)(1)(iii)(B) below).

b. What responsibility should the contractor bear for correction of non-conforming services under T&M and LH commercial contracts (e.g., who should bear the cost of correction or re-performance)? Does the burden of responsibility depend on whether the Government has accepted the service?

See previous comment.

c. What oversight is used to ensure work is being properly charged under T&M and LH contracts (e.g., what type of information is required to substantiate payment requests)?

None. (See discussion of 12.207 (b)(1)(iii)(B) below).

d. Is consent to subcontract required for subcontracts not identified in the original proposal?

No. BCA's T&M and LH contracts do not require customer consent for any subcontracts.

e. How are material handling or subcontract administration rates charged under T&M commercial contracts? If material handling or subcontract administration rates are reimbursed based on actual rates, how can this be done without application of FAR Subpart 31.2?

In BCA's T&M contracts, if spare parts are necessary for the airplane repair, the customer is charged the spares catalog price. There is no additional material handling charge.

f. What is the impact if Cost Accounting Standards apply to these contracts?

BCA business systems are set up to support commercial transactions, and are not set up to comply with the requirements of CAS clauses in Government contracts. Therefore such clauses would not be accepted.

g. How often and under what circumstances does the customer provide property on a T&M or LH contract? How is the property managed and controlled?

In T&M contracts for airplane repairs, the customer does not normally furnish property.

The ANPR's major inconsistencies with commercial practices are listed below:

12.207 (b)(1)(iii)(B); (Page 56319) 52.212-4, Alt. 1, (Page 56320) Paragraphs. (u)(iv) Total Cost (and reporting when contractor exceeds 85% of the ceiling price); and (v) Ceiling Price

A ceiling price in a T&M or LH contract is inconsistent with commercial practices in the aviation industry. BCA's current business systems permit reporting in terms of hours, but such reporting is after the fact; there are no controls that would permit reporting at 85% of the original estimate, or that would permit stopping work at an estimated "ceiling value." BCA cannot change its business systems to accommodate these government-unique requirements, unless there was a business case to support the expenditure of significant resources and the incurrence of additional costs imposed by these requirements. A business case justification is unlikely as there is no other commercial customer that needs a ceiling price in T&M agreements (or that needs notification at 85%).

Boeing bills commercial customers on an agreed to rate per hour; there are no ceiling prices included in the T&M agreements with commercial customers; and accordingly there is no interim tracking or reporting of costs against a not-to-exceed value. Boeing sometimes provides quotes or estimates of the total price prior to starting work when requested by a customer, but they are only estimates, not price ceilings. Airline customers accept this practice because: airplane support services are furnished immediately in order to put the airplane back into revenue service as quickly as possible; the T&M agreements are small in dollar value relative to the potential lost revenue; and all parties understand that the OEM (original equipment manufacturer) has every incentive to deliver high-quality support services at a reasonable price, i.e., to retain the competitive advantages that come with keeping total airplane ownership costs low and with maintaining a reputation for responsive, high quality customer support.

Page 56320, 12.216 – Consent to Subcontracts:

Commercial contractors are not likely to have government-approved purchasing systems. Accordingly, many subcontracts would be subject to the proposed subcontract consent provisions. This is not practicable in commercial contracts, and is not a commercial practice in our industry.

Page 56320, 52.212-4, Paragraph (a) and Alt. I, Paragraph (a) – Repair and Replacement.

BCA T&M agreements include a warranty and a disclaimer of any other remedies, as permitted under the Uniform Commercial Code (UCC). Paragraph (a) of the proposed

clause provides for other remedies (e.g., consideration) that are not consistent with UCC warranty provisions.

Page 56320, 52.212-4, Paragraph (i) - Payments.

This section, and others, would require substantiation of the invoice, such as time cards, and actual material and subcontract costs. The proposed alternate payment provision requires the contractor to provide access to employees and their timecards, labor distributions, and material and subcontract invoices. These are all inconsistent with commercial practices. BCA does not provide any access to records to commercial customers. This access would not be provided to the Government or even to other segments of The Boeing Company.

The ANPR limits "allowable material costs" to actual costs. Focusing on "costs," rather than price, for the purposes of invoicing is fundamentally inconsistent with commercial practices.

The ANPR requires advance PCO consent for payment of overtime. This is inconsistent with commercial practice. Boeing employees on a repair team or airplane-on-ground (AOG) team are expected by customers to work as necessary to complete repairs expeditiously. The need for overtime is often unforeseen and unpredictable. Airline customers pay for overtime, with no requirement to obtain their consent in advance.

The payment provision also states that "the contractor shall give credit to the Government for cash and trade discounts, rebates, scrap, commissions, and other amounts that have accrued to the benefit of the Contractor." This would be inconsistent with Boeing's commercial practices. BCA applies commercial pricing standards for its labor, and applies its spares catalog pricing for materials.

Paragraph (D) permits charging for materials at catalog prices, but only if the Government receives the "most favored customer" price. Government "MFC" clauses pose numerous compliance risks; and are inconsistent with commercial practices. Boeing bills for spare parts at the published spares catalog price, and cannot ensure that the catalog price for the part is no higher than the market price or the "MFC" price.

Page 56322, 52.212-4, Alt. I, paragraph (L), Termination for the Government's Convenience:

The concept of termination for convenience is inconsistent with commercial practices. The proposed regulation is based on the assumption that commercial contractors can stop work immediately upon notice of termination for convenience. First, commercial contracts do not permit termination for convenience. Any such termination would be a breach of contract, entitling the other party to damages. Second, in practice, the damages amount would be negotiated or established in a lawsuit; the regulation, however, limits damages to "reasonable charges the Contractor can demonstrate to the satisfaction of the Government using its standard record keeping system."

Tailoring:

We presume that the proposed clause at FAR 52.212-4, Alt. 1, paragraph (u), "Subcontracts." can be tailored to conform to commercial practices in the industry, as provided under FAR 12.302(b). There should be some acknowledgement in any final rule that such tailoring is permitted.

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In summary, the proposed language does not seem to be consistent with commercial practices and it does not seem like a contracting mechanism that would be advantageous for commercial contractors to accept.

Thank you again for the opportunity to comment on this important issue. For further information, please contact Mark Olague at (253) 773-2173 or Kris Campbell at 206-766-2319.

Sincerely,

Warren L. Reece
Director,
Contract Policy & Process

Attachment A -- August 5, 1996 Boeing Memorandum re: aviation industry services provided on a T&M or LH basis

Boeing Commercial Airplane Group
P.O. Box 3707
Seattle, WA 98124-2207

027-9

Attachment A

August 5, 1996
6-1171-DEH-1640

To: W. F. Rupinski - for further distribution as required

Subject: Commercial Contracting on a Time & Materials Basis

BOEING

Many of the services which are offered in support of the maintenance, repair and operation of aircraft are sold commercially on a fixed rate per day or hour basis. The following are a few examples of commercial services regularly sold by Boeing Commercial Airplane Group.

Support & Engineering Services

A wide variety of services are offered such as On Site Troubleshooting, Maintenance Technicians, Aircraft Repair Services, and Specialized Consultation Services. The enclosed page excerpted from Boeing's 1996 Customer Services & Material Support (CSMS)Catalog provides more detailed descriptions.

These services are sold at a fixed rate per day with per diem included in the rate. Generally airfare to the customer's location and parts, if any, are separate charges. Boeing maintains internal price lists and pricing standards for these fixed rates which meet the standard under FASA in FAR 15-804-1 for "Catalog Items" in that those prices *"are recorded in a catalog, price list, schedule, or other verifiable and established record that (A) are regularly maintained by the manufacturer or vendor; and (B) are published or otherwise available for customer inspection."* There are discrete rates for various skills. A pilot, a technician, an engineering specialist all have separate daily rates and a specific hourly overtime premium identified. In addition we maintain a standard rate schedule for per diem for worldwide locations.

When a request for assistance is received, we consult our internal fixed price schedules and quote a firm fixed price per day rate which includes per diem. The per diem charge is not separately identified. If the service includes materials, those are separately charged. No audit rights or pricing details are provided to commercial customers nor would such rights be applicable to these catalog prices under the Federal Acquisition Streamlining Act.

Simulator Usage

Simulator time is an example of a service where there is an obvious advantage to providing the time at a fixed rate per hour. Since each student has different flying experience and learning capabilities their needs for time in the simulator vary significantly and accordingly simulator time and pilot instructors for the simulator are sold at a fixed rate per hour so that the customer pays *only* for the usage necessary to train to proficiency.

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Pilots

Boeing sells pilot services to meet many needs including ferrying customer aircraft, flying in revenue service, flying the customer's aircraft for test purposes, and for training. Again these rates are standard fixed rates per day which include a standard per diem charge based on the location.

Wind Tunnel & Miscellaneous Testing Services

BOEING

Boeing offers extensive test facilities including aerodynamics testing of articles in wind tunnels. The set-up and removal of items may be on fixed price basis, but the facilities themselves, which are costly, are on any hourly basis. In addition we offer engineering services and laboratory facilities for environmental testing, acoustics, materials, structures, and propulsion testing. These facilities are offered at a fixed rate per day or hour.

The inherent nature of testing is that it confirms the expected results and discovers the unknown. T&M contracts recognize that models, facilities, electronics, customers, and test operators are all variables. Making changes to tests while in progress gives customers more useful data while minimizing cost by taking advantage of the existing setup. T&M contracting helps to manage those variables.

Rationale for Time & Materials Contracting

The commercial marketplace regularly acquires support on a fixed rate per day or hour because it is the method is both *flexible and predictable*. The commercial customer knows in advance the fixed rate per day or hour, but may not, in many instances, be able to determine how long the services will be required. Troubleshooting is a good example of an instance where you cannot predict how long it will take to identify a problem. T&M contracting allows for rapid response and administratively is much simpler for both buyer and seller because changes can be easily accommodated. *The customer is comfortable that he will pay only for the effort required and that the services can be terminated or extended at his discretion. These are seen to be positive cost control measures*. The competitive forces of the marketplace also demand that quality services are provided and that unnecessary days/hours are not spent. Companies must maintain a reputation for good service in a reasonable amount of time or they will soon be out of the running!

Audit rights into timekeeping records are not provided for "verification" of time spent. This is generally not an issue for the commercial environment. Customers order services and control the number of days spent and respond to a standard commercial invoice identifying the days/hours of services.

Please let me know if you need further information. It is important for the government to recognize that they will significantly limit their access to commercial services if they cannot procure commercially on a T&M basis where this is the industry practice for certain services.

BOEING COMMERCIAL AIRPLANE GROUP
(a division of The Boeing Company)

D. E. Hastings

D. E. Hastings, Director
Government and Diversification Contracts

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027-10

INSPECTOR GENERAL
DEPARTMENT OF DEFENSE
400 ARMY NAVY DRIVE
ARLINGTON, VIRGINIA 22202–4704

NOV 15 2004

Ms. Laurie Duarte
General Services Administration
FAR Secretariat (MVA)
1800 F Street, NW, Room 4035
Washington, DC 20405

Dear Ms. Duarte:

We have reviewed the proposed Federal Acquisition Regulation (FAR) Case No. 2003-027, "Additional Commercial Contract Types," that would implement section 1432 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136). Section 1432 amends section 8002(d) of the Federal Acquisition Streamlining Act to expressly authorize the use of time-and-materials and labor-hour contracts for the procurement of commercial services. Enclosed are our general comments addressing the application of Cost Accounting Standards to contracts and subcontracts awarded for the acquisition of commercial items, and specific comments recommending changes to the proposed wording for FAR Part 12, "Acquisition of Commercial Items," and FAR Part 52, "Solicitation Provisions and Contract Clauses."

Thank you for the opportunity to comment on the proposed rule. If you have any questions, please contact Ms. Pat Bartron at (703) 604-8753.

Patricia A. Brannin
Assistant Inspector General
Audit Policy and Oversight

Enclosure

cc: DAR Council

Rec'd 11-16-04 me

027-10

Inspector General of the Department of Defense
Comments on Federal Acquisition Case Number 2003-027
"Additional Commercial Contract Types"

- **General Comments Addressing Application of Cost Accounting Standards.**

1. Supplemental Information: Regulatory Amendments Under Consideration Subsection C.3. "Application of Cost Accounting Standards." In considering Amendments to the Application of Cost Accounting Standards, the council should consider that when a contractor who already has contracts subject to the Cost Accounting Standards (CAS) is awarded a time-and-materials (T&M) or labor-hour (LH) contract under Part 12, then the commercial (Part 12) T&M or LH contract should also be subject to CAS if it would otherwise qualify to be so.

Justification. The extension of the CAS coverage to commercial contracts is needed to maintain consistency within a contractor's existing accounting and estimating systems. However, if a contractor elects to set up a new division solely for commercial contracts and establishes a new or different accounting or estimating system, then CAS does not need to be applicable to the commercial contracts.

- **Specific Comments Recommending Changes to FAR Part 12 and FAR Part 52**

1. Subpart 12.201, "General." Amend FAR 12.201(g) as follows:

> (3) Not withstanding paragraph (g)(1), a contracting officer may not procure applied research by using Part 12 procedures.

Justification. Under "Supplementary Information: Section B, Solicitation of Public Comment, Suitability of T&M and LH contracts," the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council requested comments addressing the appropriate use of T&M and LH contracting in commercial item acquisitions. The Deputy Inspector General (DIG) for Auditing has previously identified the inappropriate use of FAR Part 12 in procurement of applied research. Report No. D2001-051, "Use of Federal Acquisition Regulation (FAR) Part 12 Contracts for Applied Research," February 15, 2001, explained that applied research contracts are inappropriate for use as commercial contracts because the primary objective of the research and development is to advance the state of scientific knowledge that does not exist in the marketplace.

The main objective is, therefore, inconsistent with the Part 12 requirement that the contracting officer must be able to determine fair and reasonable prices based on a commercial market and established catalog and market prices. When scientific knowledge does not exist in the marketplace, established catalog or market prices also cannot exist. We consider this a serious issue that needs to be addressed in the FAR.

2. Subpart 12.207, "Contract type." Add to the proposed FAR 12.207(b)(1) the following:

> (iv) The service is for a follow-on procurement that will extend or renew the contract beyond five years and the D&F required in paragraph (iii) is approved by a level above the contracting officer.

Justification. The DIG for Auditing has previously identified a problem with service contracts such as T&M and LH contracts, that have been annually extended or renewed for 10, 20, and even 30 years with no attempt to use available historical information to transform the T&M or LH contract to fixed-price. The continued use of T&M and LH contracts for a recurring service beyond a set time period should require the approval of an official at least one level above the contracting officer.

3. Paragraph 12.207(b)(2)(ii)(A). Revise the proposed paragraph by eliminating the phrase "of a type of" from the second line.

Justification. The phrase "of a type of" confuses the reader and cannot be uniformly defined. The problem also exists in the current definition of "commercial" items. Eliminating it from the definition of commercial services will assist contracting officials and ensure that the services being purchased are truly commercial and not just a stretch of someone's imagination.

4. Paragraph 12.207(b)(3)(ii)(A). Revise the proposed paragraph by inserting either the word "some" or "certain" in front of "costs" at the beginning of the fifth line.

Justification. The proposed wording implies that total costs or price may be unknown. Therefore, a contracting officer could be required to make somewhat contradictory statements in the contract documentation. The proposed paragraph would require the contracting officer to justify the use of a T&M or LH contract instead of a firm-fixed-price contract when the period of performance or the costs were uncertain. However, FAR 12 also requires the contracting officer to determine that the contract award amount was fair and reasonable.

By specifying that only some or certain costs are unknown, the revised wording clarifies to what extent costs cannot be anticipated. A contracting officer would have difficulty determining that a contract price was fair and reasonable when all costs could not be anticipated or evaluated.

5. Paragraph 12.216, "Subcontracts." Revise the proposed paragraph by adding the following sentence after the second sentence.

> Any subcontract with a foreign company where the work will be physically performed outside of the United States or Canada requires the contracting officer's consent prior to award.

Add the following phrase at the end of the proposed last sentence.

> ...except for subcontracts with foreign companies as described above.

Justification. All contractors should be required to get the contracting officer's consent prior to using foreign subcontractors. By requiring the contracting officer's advance consent, a contractor will be precluded from negotiating labor hours and rates based upon its local workforce and subsequently contracting with a foreign subcontractor to have the work performed overseas at labor rates costing a fraction of the negotiated amounts. Mandatory approval of all foreign subcontracts will ensure that the contracting officer is aware of this practice and can take the appropriate action to protect the Government's interests.

6. Paragraph 52.212-4 (a). Revise the proposed wording in the third and sixth lines by replacing the word "may" with "should."

Justification. Government officials should be encouraged to seek consideration when supplies and services do not conform to the contract requirements. Additionally, Government officials should be required to ensure that the contractor's future performance conforms to the contract requirements. The word "should" still permits a Government official some leeway in deciding whether either action is needed to protect the Government's interests.

7. Paragraph 52.212-4, Alternate I (a) "Inspection/Acceptance." Revise the proposed wording in the seventh, twelfth, and fifteenth lines by replacing the word "may" with "should."

Justification. See justification for number 7 above.

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8. Paragraph 52.212-4, Alternate I (u) "Subcontracts." Insert a new subitem number (2) and renumber the remaining subitem numbers accordingly. The new subitem should read:

> (2) The Contractor must obtain the Contracting Officer's written consent for any subcontract with a foreign company when the work will be performed outside of the United States or Canada.

Justification. The addition to the contract clause will enact the revised wording suggested in number 6 above.

2003-027-11

Defending Liberty
Pursuing Justice

AMERICAN BAR ASSOCIATION

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November 18, 2004

VIA FACSIMILE AND FIRST CLASS MAIL

General Services Administration
Regulatory Secretariat (VR)
Attn: Ms. Laurie Duarte
1800 F Street, N.W.
Room 4035
Washington, D.C. 20405

Re: FAR Case 2003-027, Advance Notice of Proposed Rulemaking, Additional Commercial Contract Types 69 Fed. Reg. 56316 (September 20, 2004)

Dear Ms. Duarte:

On behalf of the Section of Public Contract Law of the American Bar Association ("the Section"), 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. By presenting their consensus view, 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.

Rec'd 11-18-04

027-11

Introduction

The Advance Notice of Proposed Rulemaking ("ANPR"), published in the Federal Register on September 20, 2004, solicits comments to help the FAR Councils implement part of the Services Acquisition Reform Act ("SARA"), which was enacted in Title IV of the National Defense Authorization Act for Fiscal Year 2004, Pub. L. No. 108-136. Section 1432 of SARA amended section 8002(d) of the Federal Acquisition Streamlining Act ("FASA") (Pub. L. No. 103-355, Oct. 13, 1994, *codified* at 41 U.S.C. § 264 note) to expressly authorize the use of time-and-materials ("T&M") and labor-hour ("LH") contracts for commercial services acquisitions.

As amended, section 8002(d) imposes certain requirements to use T&M or LH contracts to procure commercial services under the commercial item procedures of Part 12 of the Federal Acquisition Regulation ("FAR"). FAR Part 12; 48 C.F.R. Part 12. Specifically, (1) the contract or order must be issued on a competitive basis; (2) the service must be a commercial service as defined in certain categories prescribed in section 8002(d), including any categories of services determined to be commercial by the Administrator of the Office of Federal Procurement Policy ("OFPP"); (3) the contracting officer must prepare a determination and findings ("D&F") that no other contract type is suitable; and (4) the contracting officer must include a ceiling price that the contractor would exceed at its own risk and that can only be increased when the contracting officer determines that it is in the best interests of the agency.

The Councils have provided in the ANPR a preliminary draft of revisions to the FAR's current commercial items policies and associated contract clauses, which were originally intended only to support acquisitions through firm fixed-price or fixed-price with economic price adjustment contracts. The ANPR requests public comments on how best to implement these revisions to ensure that they address the risks associated with T&M and LH contracting.

As we did in our comments on July 25, 2001, on the Proposed Rule for Contract Types for Commercial Items (FAR Case 2000-013), the Section supports the implementation of T&M and LH contracts for commercial services and generally applauds the Councils' efforts in this regard in this ANPR. We have, however, several comments and suggestions, as well as responses to some of the specific questions posed in the ANPR, each of which is addressed below.

While our comments are primarily concerned with implementing new rules and contract clauses for T&M and LH commercial services in a way that is consistent with commercial buying practices, we do not presume to identify all the

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standard commercial services buying practices across all industries. Nor do we offer an opinion regarding which industries or which types of services OFPP should conclude are commercial. Instead, for purposes of these comments, we have in mind those services that have traditionally fallen within the definition of a commercial item in FAR 2.201. Recognizing that the definition of a commercial service will be evolving (pursuant to OFPP's identification of other categories of commercial services), our commentary is aimed at giving the contracting officer sufficient discretion to implement contract terms and conditions that are appropriate for the particular commercial services that are being purchased. Rather than implementing a one-size-fits-all approach to commercial buying practices, we believe that our approach best suits the policy of enabling the Government to purchase commercial services under more commercial-like terms and conditions.

Discussion

1. Application of the Final Rule to Existing Contracts and Orders

As an initial matter, we note that the Councils' preliminary draft does not address how or whether the new regulations and contract clauses for procuring T&M and LH commercial services would apply to contracts and task orders that are in effect before implementation of the final rules. We believe application of any final rules and regulations to outstanding contracts and orders would be administratively burdensome to both contractors and the Government, and would add unnecessary confusion and uncertainty to the ongoing projects. Accordingly, we recommend that the final rules explicitly state that they apply to contracts and orders that are executed on or after the effective date of those rules.

Where a task order contract is involved, however, we recommend that the Councils consider allowing contractors to request contracting officers to modify existing contracts to allow for T&M and LH task orders, so that implementation is not delayed. Thus, a task order awarded after the effective date of the rule could be on a T&M or LH basis even though the underlying contract was awarded prior to the effective date, if the underlying contract was so modified. Such modifications should be by mutual agreement without consideration. If a limitation on such authority is deemed necessary, such an avenue could be limited, for example, to contracts awarded subsequent to passage of SARA.

2. Draft Revisions of Contract Clauses

As part of the implementation of T&M and LH contracts for commercial services, the Councils have drafted preliminary revisions to the standard FAR Part 12 clauses that are used in commercial item acquisitions. The current FAR Part 12

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clauses are intended to be used only for fixed price contracts. *See* FAR 12.207; 48 C.F.R. § 12.207. The draft revisions, which are based largely on the standard clauses for non-commercial services that are acquired on a T&M or LH basis, would be in the form of an alternative clause that modifies FAR 52.212-4 by replacing the provisions for fixed-price work with the alternative provisions for T&M or LH work.

Although we generally agree with that approach, we nevertheless have a few comments and suggestions to make the new rules and contract provisions more consistent with commercial buying practices. FASA mandates that government agencies rely to the maximum extent practicable on commercial products and services to fill the Government's needs. FASA §§ 8002, 8104. FASA also requires that an agency impose only those terms and conditions in commercial item contracts that are required by law or that are customary in the commercial marketplace. *Id.*; *see also* FAR 12.302; 48 C.F.R. § 12.302.

a. Implementation of T&M and LH Contract Clauses

The Councils' draft contemplates that the changes to FAR 52.212-4 to implement T&M and LH contracts would be in an alternative clause that the contracting officer would include in the contract if T&M or LH work were being performed. The implication in using an alternative clause is that it would replace certain provisions in FAR 52.212-4 that apply to fixed-price contracts. This suggests that a contract would not include *both* the provisions necessary for fixed-price services *and* T&M and LH services. If this is indeed the case, the contracting officer would be unable to issue fixed-price task orders under the same contract that contemplates T&M or LH task orders, and vice versa. We believe it would be in the best interests of contractors and the Government if the parties had the flexibility to perform fixed-price or T&M and LH orders as appropriate under the same contract. Accordingly, we suggest that implementing guidance make clear that standard and alternate clauses can be used in the same contract. Alternatively, rather than prescribing an alternative clause, the FAR Councils could prescribe a separate clause for use with T&M and LH contracts and orders so that the clause can be used with the standard provisions for fixed price work in contracts where work may be performed pursuant to fixed price and T&M or LH orders.

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b. Ceiling Price

The payment provision in the ANPR's draft alternative clause to FAR 52.212-4 requires the contracting officer to establish a ceiling price, within which the contractor must use "best efforts" to complete the work. It is not clear, however, how the ceiling price is to be established or what it should be based upon. This may cause a practical problem if the ceiling price is intended to be based on the estimated total cost of the T&M or LH work rather than simply being based on the availability of appropriated funds.

One of the primary reasons for T&M and LH work is that an accurate estimate of the total cost cannot be reasonably pre-determined with any degree of confidence. *See* FAR 16.601(b); 48 C.F.R. § 16.601(b). Indeed, if an accurate calculation of the total cost were possible, it would eliminate one of only two justifications available under the draft rules for issuing a T&M or LH contract instead of a fixed price contract. Under the ANPR's draft rules, which closely mirror the current rules for non-commercial T&M and LH services, the contracting officer must first execute a D&F stating that either (1) it is impossible to accurately estimate the extent or duration of the work, or to anticipate costs with any degree of certainty; or (2) fixed pricing would unduly inflate the Government's costs or impose unreasonable risk on the contractor. If contracting officers were required to establish the ceiling price according to the anticipated costs, the first justification may be effectively nullified: How could a contracting officer on one hand state in the D&F that the total cost cannot be estimated with confidence, while on the other hand base a ceiling price on the estimated cost? The Section, therefore, suggests revising the draft payment clause so that the ceiling price is simply based on the availability of appropriated funds rather than the cost of performance. This solution has the benefits of being straightforward and preserving the availability of the first justification for issuing a T&M or LH contract; *i.e.*, that an accurate estimate of the cost of the work is impossible to ascertain with a reasonable degree of confidence.

c. Inspection/Acceptance

The draft inspection and acceptance provision in the ANPR makes a significant change from the standard inspection and acceptance provision used for non-commercial T&M and LH services. *See* FAR 52.246-6(f); 48 C.F.R. § 52.246-6(f). Specifically, the new provision requires contractors to repair or replace rejected supplies or reperform rejected services at no cost to the Government. This change may make the new inspection/acceptance provision *less* consistent with standard commercial practices and imposes *more* contract risk on the contractor than under the non-commercial clause, which does *not* require repair or

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reperformance at no cost to the Government. *Id.* Rather, FAR 52.246-6 specifically provides for the payment of costs (but not profit) incurred to perform corrective work.

Under the ANPR's draft clauses, contractors will likely view the possibility of having to reperform services or repair supplies at no cost as requiring them to bear a level of risk that is similar to that of fixed-price work. This is especially so where, as here, the draft clauses combine (1) a ceiling price that contractors exceed at their own risk (rather than an estimate, which as explained below is more common in some commercial industries), and (2) a requirement that the contractor use "best efforts" to perform within the ceiling price (which may be a different standard of performance than contractors routinely provide under commercial warranties). Under the draft clauses, contractors may interpret a commercial T&M or LH contract to require accomplishment of a certain result, *i.e.*, "performance of the work specified in the Schedule," within a specified dollar amount, *i.e.*, the ceiling price. Having to reperform any work that does not accomplish the required result (*i.e.*, deficient) without additional compensation may well be viewed by commercial contractors as an unacceptable allocation of the parties' respective contract risks for T&M or LH work. Several adverse consequences could result:

- contractors will propose higher profit margins to cover the additional risk;
- contractors, during negotiations, may insist that the Government set artificially high ceiling amounts; and/or
- contractors, during contract performance, will have little incentive to complete the work under the ceiling amount because they will choose instead to perform quality assurance and testing beyond standard commercial practice in order to mitigate the risk of suffering losses resulting from having to reperform rejected work for free.

None of these scenarios is favorable to the Government's interests. To avoid these possibilities – and to ensure that T&M and LH work is an effective alternative to fixed-price work for commercial services – we suggest allowing the contracting officer, where appropriate, to provide that the contractor will be compensated for reperformance or repair of deficient services or supplies, respectively, up to the ceiling amount, but not including profit. This would be consistent with the non-commercial T&M and LH clauses and would give the Government the ability to more accurately reflect standard commercial practices.

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Additionally, the term "best efforts" is normally associated with a standard of effort to meet required performance rather than a standard for cost containment. In this regard, if a standard of effort to achieve cost containment is deemed necessary, "reasonable efforts" or "all reasonable efforts" would be a better choice.

3. **Dollar Threshold for Filing a D&F**

Consistent with the requirements of SARA, the ANPR requires that the contracting officer execute a D&F stating that no other contract type is suitable before making a purchase on a T&M or LH basis. Neither SARA nor the ANPR establishes a dollar threshold for this requirement. Accordingly, a D&F would be required for every T&M or LH transaction *no matter how small*. This may unduly hamper the Government's ability to procure commercial services efficiently. Contracting officers may find it necessary or more efficient to quickly issue small task orders for T&M or LH work. For example, it may be necessary due to time constraints for a contractor to begin work immediately rather than waiting until a more definitive, fixed-price statement of work can be developed. In that case, a relatively small T&M or LH order for that interim period would be the most efficient way to proceed. Requiring a D&F for such small orders would eliminate this kind of flexibility. Accordingly, the Section recommends that there be abbreviated requirements for filing a D&F for contracts or orders below a certain dollar threshold. For example, the requirement to conduct market research could be eliminated for orders below the $100,000 limit set for the simplified acquisition threshold. *See* FAR 2.101; 48 C.F.R. § 2.101. Establishing a truncated D&F process for orders below a dollar threshold would be consistent with the Councils' discretion to implement SARA. *See Chevron, U.S.A. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984) (holding that an executive agency's construction of statutory scheme is entitled to considerable deference).

4. **Competition Requirements**

Section 1432 of SARA requires that T&M and LH commercial services be purchased "on a competitive basis." Echoing this requirement, the ANPR requires that the contract be awarded "using competitive procedures." The Section requests clarification that this requirement would be satisfied when task orders are issued using the FAR's "fair opportunity" requirements. FAR 16.505(b)(1); 48 C.F.R. § 16.505(b)(1). Otherwise, the new rules for commercial T&M and LH services might be construed to require the use of full and open competition, which ordinarily applies to contract awards, not task orders. *See* FAR Part 6; 48 C.F.R. Part 6.

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5. **Answers to Questions Posed by the Councils in the ANPR**

The ANPR poses a number of questions to assist the Councils in preparing new rules and contract clauses for T&M and LH commercial services. The Section responds to some of those questions below. Some of the questions posed in the ANPR, however, are not well suited for the Section to answer because they request industry-specific viewpoints and input.

a. *What steps should a contracting officer be required to take to establish that a fixed-price contract is not suitable?*

Section 1432 of SARA requires the contracting officer to determine that a fixed price contract is not suitable before purchasing T&M or LH services. The Section commends the approach taken by the Councils in the ANPR of requiring a contracting officer to conduct market research according to the procedures established in FAR Part 10 (48 C.F.R. Part 10). Because the contracting officer will be procuring commercial services, the descriptions and types of services the Government wants will likely be sold in substantial quantities in the marketplace and, therefore, already be well understood by both the Government and the contractors. Thus, the market research procedures in FAR Part 10 will be an effective way to determine whether it is feasible to purchase such services on a fixed price basis or a T&M or LH basis.

b. *What responsibility should the contractor bear for correction of non-conforming services under T&M and LH commercial contracts (e.g., who should bear the cost of correction or re-performance)? Does the burden of responsibility depend on whether the Government has accepted the service?*

As explained above, in most cases it is more consistent with commercial buying practices under T&M or LH contracts to pay for reperformance of deficient services or repair of defective goods. *See* FAR 52.246-6; 48 C.F.R. § 52.246-6. Thus, the contracting officer should have the ability to enter into contracts that provide for payments (not including profit) for reperformed services.

As an alternative approach, rather than having to compensate contractors for reperformance of defective work, the parties' respective allocation of contract risk can be adjusted to better approximate commercial practices. As mentioned above, standard practice in some industries is to establish cost estimates, not ceiling prices. These estimates are often not guarantees; neither party has the right to rely on the estimates, and the contractor does not have a duty to use "best efforts" to achieve a

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defined goal within the stated dollar amount.[1] Instead of the contractor using "best efforts" to perform the statement of work within the ceiling price, the contractor is obligated to perform the services according to the same performance standard provided in the contract warranty. So, for example, if the contract warranty provides that the services will be provided "in a professional manner consistent with industry standards" – a common warranty for commercial services in several industries – then the contractor would have to provide the services according to that standard until the ceiling price is reached. When the ceiling price is reached, the contractor could not continue working (unless the contracting officer raises the ceiling price) and would only be required to reperform the services that did not satisfy the contract warranty.[2]

Implementation of the commercial T&M and LH contract clauses in this way would better allocate the parties' contract risk so that it would be fair to require the contractor to bear the cost of correcting deficient performance.[3] The Government's interests are also protected by the competitive nature of the commercial services, that, by definition, are also widely offered in the commercial marketplace. The forces of competition give contractors an added performance incentive, thereby reducing the Government's risk in non-commercial contracts that unscrupulous contractors will "run up" the time or labor hours. This approach is

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[1] This is similar to the situation when the Government provides an estimate of the amount of work it will order under a given Indefinite Delivery Indefinite Quantity contract. The Government's estimate is no guarantee of the amount of work that will be ordered. Instead, the Government is merely required to order the minimum amount stated in the contract, and unless the estimate was prepared in bad faith, the contractor many not recover damages, no matter how great the difference between the minimum amount and the estimated total. *See, e.g., J. Cooper & Assocs. v. United States*, 53 Fed. Cl. 8 (2002), *aff'd* 2003 U.S. App. LEXIS 13088 (Fed. Cir. 2003).

[2] This solution also requires that the new contract clauses for T&M and LH commercial services permit the parties to replace the current warranty prescribed in FAR clause 52.212-4 with a warranty that is more suitable to commercial services. The current warranty in FAR clause 52.212-4 is better suited for the acquisition of goods rather than commercial services because it provides that *the items delivered* will be merchantable and fit for use for the particular purpose described in the contract. FAR 52.212-4(o); 48 C.F.R. § 52.212-4(o).

[3] This is commonly implemented in commercial T&M or LH services contracts in one of two ways:

- The services are accepted upon performance (or delivery if the contract calls for deliverables), in which case the Government, rather than rejecting the services for being deficient, would have a warranty claim, thereby obligating the contractor to reperform the deficient services at no additional cost to the Government; or
- The contract provides an acceptance period for the services, but (1) the standard for determining whether the services are deficient is the same standard that is provided in the warranty, and (2) the warranty's validity period is reduced by whatever amount of time is allocated to the acceptance period.

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also consistent with the statutory requirements set forth in SARA. SARA does not require the contractors to bear the risk of not being able to accomplish the work described in the contract under the ceiling price. Instead, it requires that a ceiling price be established so that a contractor that continues working past that point does so at its own risk. SARA § 1432 (amending FASA § 8002(d)(2)(B)(ii)).

c. *What oversight is used to ensure work is being properly charged under T&M and LH contracts (e.g., what type of information is required to substantiate payment requests)?*

The ANPR's draft payment clause gives the Government audit rights that are broader in significant respects than the audit rights provided under the standard non-commercial clause for T&M and LH services. The standard T&M and LH payment clause requires that contractors provide "invoices or vouchers and substantiating material." FAR 52.232-7; 48 C.F.R. § 52.232-7. The ANPR payment clause, however, goes further and is much more specific: it requires the contractor to provide access to the following for purposes of verifying labor hours: (1) the original timecards; (2) the contractor's timekeeping procedures; (3) contractor reports that show the distribution of labor between jobs or contracts; and (4) "employees whose time has been included in any invoice for the purpose of verifying that these employees have worked the hours shown on the invoices." Additional categories of information are specified for purposes of verifying material costs and subcontract costs.

The Section applauds the Councils' approach of being more specific with respect to the types of information that may be audited rather than merely repeating the vague "substantiating material" description. We do, however, have concerns with the requirement that contractors give the Government access to the contractor's employees to interview them regarding the hours they charged to the contract. This right, in our view, is substantially broader than the Government's rights under the existing T&M payment clause and is inconsistent with commercial business practices. Moreover, it is not necessary. In the absence of some indicia of fraud or wrongdoing, the employees' timecards will be sufficient evidence of the hours actually worked. Indeed, due to the time and expense conducting interviews would entail, in practice, the Government would likely interview employees only when there was a basis to investigate alleged wrongdoing. In those cases, the Government would not need a contract clause to interview employees because the same information can be obtained through

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subpoenas that are issued pursuant to an investigative body's specific powers; *e.g.*, the Inspector General Act of 1978, as amended, 5 U.S.C. App.[4]

d. Is consent to subcontract required for subcontracts not identified in the original proposal?

The Section agrees with the ANPR's requirement that contractors obtain the contracting officer's consent to subcontract, and with the procedures in the ANPR to obtain such consent. When professional services are being purchased on a T&M or LH basis, the Government should know what entity is providing the services. We suggest, however, that the requirement to obtain consent to subcontract be clarified to make clear that it applies only to charges that are directly charged to the contract, as opposed to overhead expenses and general and administrative expenses. Many commercial companies have corporate-wide agreements with vendors to perform those functions.

e. How are material handling or subcontract administration rates charged under T&M commercial contracts? If material handling or subcontract administration rates are reimbursed based on actual rates, how can this be done without application of FAR Subpart 31.2?

With respect to material handling and subcontract costs, the Section shares the Councils' concern over avoiding the application of FAR Part 31 (48 C.F.R. Part 31), which establishes specific cost principles and procedures for determining the allowability of contractor costs. Wholesale application of FAR Part 31 to commercial services contractors would be inconsistent with the policy of procuring commercial items using practices customarily used in the commercial marketplace. *See* FAR 12.201; 48 C.F.R. § 12.201. Thus, we commend the Councils' recommendation that material handling costs be limited to direct costs, thereby precluding allowability of indirect material costs and, therefore, application of FAR Part 31.

With respect to subcontract costs, however, we do not believe it is necessary or in the Government's interest to limit subcontract costs to the contractor's actual cost of subcontracting where, as here, the work is awarded competitively. In other words, we believe it would be in the Government's interest in certain cases to allow contractors to mark-up their subcontractor's T&M or LH

[4] Moreover, in the absence of a subpoena, companies may be reluctant to expose an employee to potential personal liability and may have a duty to provide legal counsel to the employee upon request.

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service rates, but *only if*: (1) the amount of the mark-up is fully disclosed to the Government, and (2) the total rate, including the mark-up, does not exceed the contractor's own rate for the same services. This practice would not require application of FAR Part 31 because the contractor would not be applying any indirect costs. Nor would it implicate concerns regarding the prohibition on cost plus percentage of cost contracting because the contractor would be adding a fixed charge to the subcontractor's rates that is not based on cost. Moreover, any issues concerning cost principles are ameliorated by the fact that the work will be awarded competitively. Consistent with this reasoning, the FAR explicitly recognizes that cost and pricing data is not required when awards are based on adequate price competition. *See* FAR 15.403-1(b)(1); 48 C.F.R. § 15.403-1(b)(1).

Allowing contractors to mark-up the subcontractor's service rates would preserve the Government's ability on large projects to have a prime contractor, such as an IT services integrator, coordinate the work of several parties and shoulder the administrative burden of doing so. If the prime contractor were unable to mark up the subcontractors' rates, the prime contractor would have little incentive to undertake complex projects that involve managing the work of several parties. The result would be that the Government would be unable to avail itself of the expertise large commercial contractors have in managing large complex projects

f. What is the impact if Cost Accounting Standards apply to these contracts?

The Section recommends that the Cost Accounting Standards ("CAS") be amended so that commercial services purchased under T&M or LH contracts are exempted from CAS coverage. CAS regulations prescribe certain types of contracts that are exempt from CAS coverage. 48 C.F.R. § 9903.201-1. Currently, fixed-price and fixed-price with economic adjustment contracts for commercial items are exempt, but T&M and LH commercial services are not. *Id; see also* FAR 12.214; 48 C.F.R. § 12.214. We believe that including within the exemption commercial services purchased under T&M and LH terms would be consistent with the original intent to exclude commercial items from coverage. We further believe that application of CAS to T&M or LH commercial contracts is not only unnecessary, but would have adverse consequences to the commercial services contractors and to the Government. Commercial contractors that sell exclusively in the commercial marketplace most likely do not have accounting systems configured to comply with CAS. Reconfiguring a company's entire accounting architecture to comply with CAS would require substantial investment and would likely also require significant internal policy and organizational changes. If accepting T&M or LH orders for commercial services requires previously exempt

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contractors to comply with CAS, those contractors may decline to perform any commercial services on a T&M or LH basis. Accordingly, the Section recommends that the exemption for commercial items be extended to include commercial services that are purchased on a T&M or LH basis.

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

Sincerely,

Patricia H. Wittie

Patricia H. Wittie
Chair, Section of Public Contract Law

cc: Hubert J. Bell, Jr.
Robert L. Schaefer
Michael A. Hordell
Patricia A. Meagher
Mary Ellen Coster Williams
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Council Members
Co-Chairs and Vice Chairs of the
Commercial Products and Services Committee
David Kasanow

2003-027-12

"Cronin, Dan"
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>

11/18/2004 10:22 AM

To: "'ANPR.2003-027@gsa.gov'" <ANPR.2003-027@gsa.gov>
cc:
Subject: Comments on ANPR, FAR Case 2003-027

> I have attached the subject comments from the Social Security
> Administration.
>
> Dan Cronin, Director
> Division of Policy and Information Management
> Office of Acquisition and Grants
> 410-965-9540
> dan.cronin@ssa.gov
>
> <<FARCase2003-027;SSACOMMENTS.doc>>

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027-12

SOCIAL SECURITY ADMINISTRATION COMMENTS

Additional Commercial Contract Types

Federal Acquisition Regulation (FAR) Case 2003-027

1) In response to the question regarding what types of commercial services are commonly sold to the general public through both a T&M/L-H and fixed price basis: Information Technology (IT) services fall into this category.

We believe that a clear definition of a commercial service with concrete examples is needed.

2) We agree that the clause at 52.232-7 is not appropriate for commercial purchases, and that the Payment paragraph (i) in the proposed, 52.212-4, *Alternate I* is acceptable. For example, we agree that the stipulation for withholding a portion of the labor dollars until final payment from clause 52.232-7 should not be applicable, and that payment of separate indirect rates for material or subcontracts should not be allowed for commercial purchases.

We agree also that the proposed Subcontractor consent paragraph (u) is needed and that, consent to subcontractor is necessary in these circumstances.

However, we feel that the proposed *Alternate I* should also contain a provision that any property or equipment submitted for reimbursement under the contract as an ODC shall be designated as Government property and treated as such.

3) If travel is required and reimbursed as a support cost, will this still fall within the definition of a commercial purchase? Since travel is usually reimbursed at cost (with applicable G&A, when allowed), would this fall within the definition of "materials" under a T&M contract type? Or would it be perceived as bringing in elements of a cost-reimbursement contract type, thus requiring non-commercial purchase procedures?

2003-027-13

Wyborski.Larry@epamail.epa.gov

11/18/2004 08:21 AM

To: ANPR.2003-027@gsa.gov
cc: Humphries.Daniel@epamail.epa.gov
Subject: EPA Comments - Additional Commercial Item Types; Proposed Rule (FAR Case 2003-027)

EPA has the following comment:

Consider making the following change to FAR 52.212-4, Alternate I (a)(i)(B), last sentence:

(B) Invoices may be submitted once each month (or at more frequent intervals, if approved by the Contracting Officer) to the Contracting Officer or designee. When requested by the Contracting Officer, the contractor shall substantiate invoices by evidence of daily job timecards or other substantiation specified in the contract. required by the Contracting Officer.

The rationale for the change is that the specific type of substantiation necessary may not be apparent until during contract administration, and therefore, would not be specified in the contract.

2003-027-14

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11/17/2004 03:49 PM

To: ANPR.2003-027@gsa.gov
cc: "Bory, Laurence" <Laurence.Bory@hdrinc.com>, "Harvey, Matt" <Matt.Harvey@hdrinc.com>, "Ewing, Gloria E." <Gloria.Ewing@hdrinc.com>, "Ardura, Gus E." <Gus.Ardura@hdrinc.com>, "Hunsicker, Mark" <Mark.Hunsicker@hdrinc.com>, "Hunter, Nicole" <Nicole.Hunter@hdrinc.com>, "Yentzer, David A." <David.Yentzer@hdrinc.com>
Subject: ANPR, FAR case 2003 - 027

<<04-11-17.doc>>

Ronald G. Hughbanks
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04-11-17.doc

2003-027-14

November 17, 2004

The Civilian Agency Acquisition Council and
The Defense Acquisition Council

Re: ANPR, FAR case 2003-027
Comments: Time & Material and Labor Hour Contracts for Commercial Services

Dear Sir or Madam:

In response to your solicitation for public comments we offer the following for your consideration:

2a. What, if any, types of commercial services are sold to the general public predominately on a T&M or LH basis?

Primarily services where the extent of the work effort to complete the assignment is extremely difficult or impossible to determine at the time the contract is executed. In addition, commercial services where the client does not have a complete definition of the final result (e.g., where the client does not have a complete and certain understanding of exactly what they want from the service provider).

2b. What types of commercial services are rarely, if ever, sold to the general public on a T&M or LH basis?

Primarily those services where the extent of the work effort to complete the assignment is clearly understood and definable. In a similar manner, assignments where the client is able to define exactly what they expect from the service provider.

2c. What types of commercial services are commonly sold to the general public through both a T&M or LH and fixed-price basis?

Professional architectural and engineering design and consulting services.

2d. What conditions typically exist when services are commonly sold to the general public through the use of T&M or LH contracts?

The conditions defined in question 2a above; where the extent of the work effort to complete the assignment is extremely difficult or impossible to

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determine at the time the contract is executed. In addition, commercial services where the client does not have a complete definition of the final result (e.g., where the client does not have a complete and certain understanding of exactly what they want from the service provider).

2e. Should this rule adopt the same policy set forth in the FAR for non-commercial items and in GSA's special ordering procedures for acquiring commercial services under the Multiple Award Schedules (MAS) that restricts T&M and LH contracts to situations where it is not possible at the time of placing the contract to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence? Why or why not?

No. The reason why not is that T&M and LH contracts have the advantage for the Government that the amount of profit is defined and limited, whereas on fixed price work it is possible for the contractor to achieve a profit level higher than that negotiated. These potentially higher profit levels on fixed price work reflects the fact that the contractor is accepting a risk that the fixed fee is adequate.

2f. What steps should a contracting officer be required to take to establish that a fixed-price contract is not suitable?

The process currently defined, as modified by the proposed amendments, for Determination and Findings (D&F) appear to be adequate and appropriate, with one addition. We would recommend that an analysis of the need for the ability to definitively control the profit level needs to be included in the D&F.

3a. What type of surveillance is conducted under T&M and LH commercial contracts (e.g., quality control and inspections)?

Surveillance / Quality Control / Inspections for T&M and LH commercial contracts vs. those of commercial fixed price contracts do not vary. The contractor is consistently charged with the responsibility to perform the defined services to specific minimum levels of completion and quality. The reviews of the contractors work and efforts to verify compliance with these standards remains the same regardless of the type of contract executed.

3b. What responsibilities should the contractor bear for correction of non-conforming services under T&M and LH contracts (e.g., who should bear the cost of correction or re-performance)? Does the burden of responsibility depend on whether the Government has accepted the service?

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Regardless of the type of contract, it is reasonable to expect the contractor to be responsible for the correction or re-performance of their work provided the reason for the correction or re-performance is the fault of the contractor. If the contractor was following the Governments instructions or directions and correction or re-performance was required, the cost would then be born by the Government.

3c. What oversight is used to ensure work is being properly charged under T&M and LH contracts (e.g., what type of information is required to substantiate payment request)?

It is normal practice for the client to request copies of time cards along with detailed invoices outlining which individual performed the services; the amount of time that individual spent on those services during the period of the invoice. In addition, the time card would have respective supervisor of that individuals signature indicating that the time was properly recorded. The client's also normally require that they have the ability to audit the contractors records if they so choose.

3d. Is consent to subcontract required for subcontracts not identified in the original proposal?

The normal practice is that the contractor is not allowed to assign any portion of its responsibilities or rights under the contract without first obtaining the written approval of the client. Most commercial agreements also indicate that such approval from the client shall not be unreasonably withheld.

3e. How are material handling or subcontract administration rates charged under T&M commercial contracts? If material handling or subcontract administration rates are reimbursed based on actual rates, how can this be done without application of FAR Subpart 31.2?

Material handling or subcontract administration cost are normally marked up a percentage rate as mutually agreed to and negotiated by the contractor and client. In the case of subcontract administration such percentage rate is normally about 15% to recognize the risk / responsibility that the contractor is accepting for the subcontractor. Material handling rate percentages are normally about 10% and represent primarily the management and record keeping efforts associated with such items.

3f. What is the impact if Cost Accounting Standards apply to these contracts?

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We see no particular differences between the contract types as to the applicability of the Cost Accounting Standards.

3g. How often and under what circumstances does the customer provide property on a T&M or LH contract? How is the property managed and controlled?

This does not occur often on professional architectural and engineering service contracts. When it does occur it normally is in the form of Project Record Documents for existing facilities which the customer wishes us to remodel or modify. Such Project Record Documents are managed and controlled by our staff as if they were our own. Upon completion of the contract such documents are returned to the customer in their original condition. Depending upon the age of the facility for which such Project Record Documents were prepared such documents may actually be electronic files which the customer can provide to us as a copy on a disc or via internet connections.

If after reviewing these responses you have any questions or would like to obtain any clarifications or additional input please feel free to contact me.

Respectfully,
HDR Architecture, Inc.

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AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO

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15/147114

November 19, 2004

General Services Administration
Regulatory Secretariat (VR)
Attn: Ms. Laurie Duarte
1800 F Street, NW
Room 4035
Washington, DC 20405

Re: FAR Case 2003-027, Advance Notice of Proposed Rulemaking, Additional Commercial Contract Types
69 Fed. Reg. 56316 (September 20, 2004)

Dear Ms. Duarte:

On behalf of the American Federation of Government Employees ("AFGE"), I am submitting comments on FAR Case 2003-027, Advance Notice of Proposed Rulemaking ("ANPRM") published in *Federal Register* on September 20, 2004. Under the false pretense of adopting so-called "commercial-like" practices for the federal government, this ANPRM opens billions of taxpayer dollars to fraud, waste and abuse at the hands of federal contractors that choose to bill by the hour for their services. This rulemaking, historic in its proposed breath, would sanction and promote the use of time-and-materials ("T&M") and labor-hour ("LH") contracts for the purchase of commercial services for the first time in the history of federal procurement.

Currently and only with extraordinary constraints and cost protections for the taxpayer, does the current FAR allow federal agencies to execute T&M/LH contracts for non-commercial services. The FAR is clear that these contracts are only for unusual circumstances requiring the purchase of non-commercial services and only when the government is given extensive audit authority to ensure that the taxpayer is protected. The regulations have appropriately limited the use of T&M/LH contracts because these contracts provide no incentive for contractors to hold down costs and the contractor has no obligation to actually accomplish anything. As the current FAR provisions for non-commercial T&M/LH contracts explicitly recognizes: "[a] time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency." FAR 16.601(b). The Inspector General for the Department of Defense recently explained: "T&M/LH contracts are the highest risk and least preferred contract types . .

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"We believe the use of these types of contracts should be discouraged . . . ." Inspector General, Department of Defense, Comments on the Service Acquisition Reform Act (H.R. 3832), March 12, 2002.

Moreover, this proposed rulemaking would indefinitely halt federal efforts to measure and pay contractors on the basis of the quality of work they perform for the federal government using performance-based service contracts. Contractors will now be paid based on the number of hours they work, not the results they achieve. Instead of requiring federal agencies to do the hard work of determining what type of work they need and how much they require using a performance-based contract that pays the contractor based on the quality of work performed, this rulemaking will allow federal agencies to take the lazy way out by executing contracts that pay by the hour. The monetary and ethical cost of this irresponsible rulemaking will be high: The federal government will be paying excessive prices for goods and services and taxpayers' already shaky confidence in the procurement system will face further erosion. In one rulemaking, the FAR Council will be fundamentally shifting the performance risk for everyday commercial services to the federal government.

AFGE believes this rulemaking should be rescinded. However, should the Councils decide to move forward, AFGE recommends significant revisions to the ANPRM to limit the current and future use of these contract vehicles to emergency procurement situations. Specifically, AFGE believes (1) this rulemaking should be designated as "major rule" under the Congressional Review Act and "economically significant" under Executive Order 12866; (2) these contracts, like any other flexibly price contract, should continue to be subject to the Cost Accounting Standards; (3) the government should conduct a thorough review of actual commercial buying practices using T&M/LH contracts; (4) significant oversight mechanisms should be added to the rulemaking to protect taxpayer interests; and (5) current and illegal T&M/LH contracts for commercial services should be voided until the rulemaking is complete.

I. This Rulemaking Should be Designated as a "Major Rule" under the Congressional Review Act and "Economically Significant" under Executive Order 12866.

Under Executive Order 12866, "Regulatory Planning and Review," and the Congressional Review Act, this ANPRM proposes a "major rule" that is "economically significant" and as a result must be subject to a Regulatory Impact Analysis ("RIA"). Section 3(f)(1) of Executive Order 12866 and the Congressional Review Act defines an "economically significant" or "major" rule as one likely to "have an annual effect on the economy of $100 million or more . . ." Because the Inspector General for the Department of Defense recently reported that during a review of 84 non-commercial T&M/LH contracts, the Department experienced cost growth of $80 million on 25% of

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the contracts reviewed, there is clear reason to believe the broad expansion of this type of contracting will result in more than $100 million in cost growth for federal contracting.

As required by law and Executive Order, this RIA must provide an assessment of benefits, costs, and potentially effective and reasonably feasible alternatives to the planned regulatory action (see section 6(a)(3)(C)). The RIA must be submitted to Office of Information and Regulatory Affairs ("OIRA") along with the applicable draft regulatory action. OIRA also recommends that the draft rule and RIA be reviewed by agency economists, engineers, and scientists, as well as by agency attorneys, prior to submission. The assessment should be conducted under two sets of assumptions, including both the assumption of the applicability of Cost Accounting Standards ("CAS") to T &M/LH contracts, and the assumption of the inapplicability of CAS, as the ANPRM contemplates removing CAS applicability.

II The Cost Accounting Standards Should Continue to Apply to All T&M/LH Contracts

Under current regulations, the Cost Accounting Standards apply to federal contracts in excess of $7.5 million. 48 C.F.R. § 9903.201-1. These accounting standards serve to protect taxpayer interests by ensuring consistent accounting treatment for the measurement, assignment and allocation of costs to contracts. These standards "enhance the likelihood that comparable transactions are treated alike " and "facilitate the preparation of reliable cost estimates used in pricing a proposal and their comparison with the costs of performance of the resulting contract." 48 C.F.R. § 9908.401-20. "Such comparisons provide one important basis for financial control over costs during contract performance and aid in establishing accountability for costs in the manner agreed to by both parties at the time of contracting." *Id.*

For a number of years, the Cost Accounting Board ("the Board") has exempted firm fixed-priced contracts and subcontracts for the acquisition of commercial items from CAS-compliance based on a determination that a fixed price contract for a commercial item is (1) easy to compare to commercial contracts for similar items and (2) places the risk of performance on the contractor. In addition, applying CAS assures that the contractor does not pass on to the government any non-allocable costs, including costs the contractor incurs in the course of providing services to other customers. However, significant concerns about fraud and abuse, caused the Board to appropriately determine that CAS should apply to flexibly-priced contracts for commercial items, including T&M/LH contracts, exceeding $7.5 million. Since this initial determination by the CAS Board, nothing has changed to reduce the risk of fraud, waste or abuse presented by T&M/LH contracts. Therefore, CAS should continue to apply to all T&M/LH contracts exceeding $7.5 million.

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In the ANPRM, the Councils ask "[w]hat is the impact if Cost Accounting Standards apply to these contracts?" It should be noted that eliciting comments on the application of Cost Accounting is exclusively within the statutory purview of the Cost Accounting Standards Board. By statute, the Board has the "exclusive authority to make, promulgate, amend, and rescind cost accounting standards and interpretations thereof." 41 U.S.C. § 422. Because the Councils have no authority to amend the CAS or provide interpretations of the CAS, the Councils have significantly overstepped their bounds in this rulemaking. The provision of 48 C.F.R. § 9903.201-1 that requires the application of CAS to T&M/LH contracts can only be changed by a rulemaking initiated by the Cost Accounting Standards Board. The Councils question incorrectly implies (1) that the CAS may not apply to T&M/LH contracts and (2) that the Councils have some authority to alter or interpret the CAS.

III. The Government Should Conduct a Thorough Review of Actual Commercial Buying Practices to Determine the Extent and Methods of Using T&M/LH Contracts in the Private Sector rather than assume and assert that the use of T&M/LH contracts are a standard commercial practice

The Councils ask for public comment on "how T&M and LH contracts are used commercially and when their use is in the best interest of the Government." Unfortunately, as evidenced by the October 19, 2004 public meeting, the only information about "commercial" practice that the Councils will receive in response to this ANPRM is information about what federal contractors want the Government to believe is "commercial" practice. At the public meeting, there was not a single individual or company in attendance that could supply information about the "buying" practices (as opposed to the federal selling practices) of commercial companies. It is equally unlikely that private sector companies will be providing much, if any, useful information about real commercial buying practices in response to this ANPRM.

Before moving forward with this rulemaking based on "anecdotal" evidence of commercial buying practices, the FAR Council should conduct an in-depth study of the commercial marketplace's use of T&M and LH contracts. We believe the Council will find that in transactions with private purchasers, private sellers execute firm-fixed price contracts and are held to firm contract ceilings more far more often than commercial companies execute open-ended hourly contracts. Indeed, on the rare occasion when open-ended contracts are executed, commercial companies usually negotiate significant discounts based on volume. These contracts are also open to significant post-performance and post-billing negotiations when commercial companies do not believe they received appropriate value on an hourly basis. Without a significant study of the marketplace, the FAR Council cannot substantiate a rulemaking that purports to implement commercial buying practices.

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It would be irresponsible of the Councils to move forward with this rulemaking using only the comments of private sector companies that only stand to benefit from a significant expansion of the use of T&M/LH contracts to commercial services. We believe that an objective study of the commercial marketplace will conclude that the federal contractors aggressively pushing this rulemaking forward are demanding that the federal government purchase goods and services using contracting methods that these same companies would never agree to use for their own purchases.

IV The ANPRM Fails to Include Sufficient Oversight Mechanisms to Protect the Taxpayers Interests.

The ANPRM lacks an accountable process to limit the use of T&M/LH contracts to situations where no other type of contract is suitable. Instead, the ANPRM relies on an outdated mechanism that would require the contracting officer to execute a determination and findings ("D&F") for the contract file stating that no other type of contract is suitable. Unfortunately, everyone in the contracting arena realizes that the D&F process is a paperwork exercise, rarely followed by contracting officers, with absolutely no oversight. To ensure that T&M/LH contracts are only utilized when no other contracts are suitable, the ANPRM should require written concurrence by the head of the contracting authority before a T&M/LH contract is executed. Alternatively, the ANPRM could require periodic audits and reporting requirements on the use of D&F for T&M/LH contracts.

Once a T&M/LH contract is executed, the current FAR explicitly recognizes that T&M and LH contracts require extensive government oversight:

A time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, appropriate Government surveillance of contractor performance is required to give reasonable assurance that efficient methods and effective cost controls are being used.

FAR 16.601(b)(2). In contrast, the ANPRM contains NO mechanism to allow government surveillance of contractor performance.

To conduct surveillance effectively, the government must have access to contractor books and records. The only mechanism to ensure an appropriate level of access is to require the inclusion of FAR 52.215-2 in all T&M/LH contracts. Under this provision, the contractor will be required to maintain and the Government will "have the right to examine and audit all records and other evidence sufficient to reflect properly all costs claimed to have been incurred directly or indirectly in performance" of the contract. As drafted, the ANPRM only allows Government access to "timecards, labor distributions, and material and subcontract invoices." These limited auditing rights will only allow the government to verify that the contractor has maintained a record of the number of hours

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billed. This limited right does not sufficiently protect the taxpayer interests because the government will have no insight into whether the government is being charged excessive costs through the hourly rate, including the charging of unallowable costs billed to the government through an hourly rate and excessive contractor profit billed through an hourly rate.

To ensure that the government does not pay excessive hourly rates, T&M/LH contracts should also be subject the "cost principles" contained in FAR Part 31. These provisions provide important criteria for determining the allowability, reasonableness, and allocation of costs in most firm and flexibly priced federal contracts. Importantly, these provisions ensure that the taxpayers do not pay private corporations for items of costs like alcohol, lobbying, parties, excessive compensation, or the defense of lawsuits for criminal fraud. By excluding these constraints on pass-through charges, the taxpayers will now be funding the social entertainment and lobbying activities of private companies through an hourly rate.

V. The ANPRM Fails to Eliminate the Current Illegal Use of T&M/LH Contracts by the General Services Administration

Current regulations prohibit the use of T&M/LH contracts to acquire a commercial product or service. Specifically, FAR 12.207 provides: "Agencies shall use firm-fixed-price contracts or fixed-price contracts with economic price adjustment for the acquisition of commercial items. . . . Use of any other contract type to acquire commercial items is prohibited." Commercial services cannot be acquired using a T&M or LH contract. In violation of this explicit prohibition on the use of T&M/LH contracts, T&M/LH contracts are being used extensively for purchases off the General Services Administration's Multiple Award Schedules ("MAS") Program. Given the recent widespread problems with contracting at GSA, this clear violation of explicit regulatory authority is not surprising. Indeed, the ANPRM admits that the proposed rule is " not intended to affect the special ordering procedures issued by the GSA pursuant to FAR 8.402 for the procurement of services under the Multiple Award Schedules (MAS) Program. MAS policies regarding the placement of orders on a T&M and LH basis will be conformed to the FAR when FAR coverage is finalized."

Like the multitude of other contracting problems at the GSA, the Councils have chosen to condone GSA's illegal practices. Until a final rule is issued, the FAR Council has given GSA, and other federal agencies wholesale authority to violate this FAR provision, and by implication any other FAR provisions that may not be "convenient" to use. Nothing in the statutes, FAR, including FAR 8.402, or GSA special ordering procedures gives GSA or any other federal agency the authority to execute T&M/LH contracts for the purchase commercial items. Instead of condoning this illegal practice until a rulemaking is complete, the Councils should act immediately to declare T&M/LH contracts for commercial items, executed in violation of FAR 12.207, null and void.

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VI Conclusion

Unless this rulemaking is rescinded or significant changes made, this ANPRM will place billions of federal procurement dollars at risk for fraud, waste and abuse through the use of T&M/LH contracting. The risk of failed performance will land squarely on the shoulders of federal agencies and taxpayers, not on federal contractors profiting handsomely from hourly work performed. Frankly, through this rulemaking, the Councils have abrogated their responsibility to protect taxpayer interests, instead acting to fulfill the procurement wish-list of private sector interests.

Sincerely,

John Gage

John Gage
National President

PRICEWATERHOUSECOOPERS

2003-027-16

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November 19, 2004

VIA ELECTRONIC MAIL AND REGULAR MAIL

Ms. Laurie Duarte
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1800 F Street, N.W., Room 4035
Washington, D.C. 20405
Attention: ANPR, FAR Case 2003–027

Re: FAR Case 2003-027, Advanced Notice of Proposed Rulemaking
Additional Commercial Contract Types, 69 Fed. Reg. 56316

Dear Ms. Duarte:

PricewaterhouseCoopers LLP (PwC) is part of the world's largest professional service organization, with approximately 130,000 employees operating in a global network of offices located in over 140 countries. We build relationships based on quality and integrity by helping our private and public sector clients build value, manage risk, and improve performance. We offer a broad range of accounting, auditing, and business advisory services to a wide variety of commercial as well as federal, state, and local government clients.[1] We appreciate the opportunity extended by the Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (hereafter, the "Councils") to comment upon the Advanced Notice of Proposed Rulemaking (ANPR) concerning the additional contract types that can be used for commercial item acquisitions.

As noted in the ANPR, section 1432 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108–136) expressly authorizes the use of time-and-materials (T&M) and labor hour (LH) contracts for the procurement of commercial services.[2] The existing acquisition regulations concerning procurement of commercial services needed to be

[1] See Attachment A for a listing of commercial services that PwC offers on a fixed price, time and materials ("T&M"), or labor hour rate ("LH") basis to its commercial and government clients.

[2] Section 1432 of the NDAA amends section 8002(d) of the Federal Acquisition Streamlining Act of 1994.

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revised as they only specifically addressed purchases made using firm-fixed price contracts and fixed-price contracts with economic price adjustments.[3]

Implementation of section 8002(d) requires revisions to the Federal Acquisition Regulation's (FAR's) commercial item policies and associated clauses to ensure that they effectively cover the types of commercial services commonly sold to the general public through the use of T&M and LH contracts and address the related risks associated with T&M and LH contracting. Implementation of section 8002(d) will also require revisions of the Cost Accounting Standards (CAS) regulations relating to exempting certain commercial contracts and subcontracts from the application of CAS.

Our comments do not specifically respond to each of the six questions raised by the Councils in the ANPR. Instead, we only comment upon certain specific issues and questions that we believe may be of concern to numerous commercial companies interested in competing for commercial T&M and LH commercial item contracts and task orders.

A. Prospective Application of the New Regulations

The ANPR does not specify whether the proposed, interim, or final rule and associated FAR clauses will apply to commercial item contracts and/or task orders under Indefinite Delivery Indefinite Quantity (IDIQ) contracts on a prospective basis, or to contracts and orders in existence as of the rule's effective date. We recommend the rule as issued contain language expressly limiting its application to T&M and LH commercial contracts entered into after the rule's effective date. As to IDIQ commercial contracts in existence at the time of the rule's effective date, we recommend that no task order issued thereafter be subject to the rule unless application of the rule to such T&M or LH task order is mutually agreed to in writing by the parties.

Both the government and the contractor would encounter significant administrative burden and cost if the rule were to apply retroactively to existent contracts and prospectively to new task orders under existent contracts. Applying the rule retroactively would also alter

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[3] It is important to note that when FASA was enacted in 1994, it mandated only that the "the Federal Acquisition Regulation [FAR] . . . include, for acquisition of commercial items -- (1) a requirement that firm, fixed price contracts or fixed price with economic price adjustment contracts be used to the maximum extent practicable; and (2) a prohibition on use of cost type contracts". Pub. L. No. 103-355, Section 8002(d) (emphasis added). This statute didn't preclude the use of T&M or LH contracts for commercial item acquisitions. In implementing FASA in 1995, however, the Councils went further than what Congress mandated, by specifying in the FAR that "[a]gencies shall use" only these two types of contracts; and the "[u]se of any other contract type to acquire commercial items is prohibited". *See* FAR 12.207. In a Senate Report (S. Report 106-292, at 330) for the National Defense Authorization Act for FY 2001, the Committee on the Armed Services expressly noted that commercial practice may be to contract for commercial services on a basis other than firm fixed prices under certain circumstances; and it suggested the use of T&M contracts when this is a common practice in sales to the general public. In this regard, the GSA Schedule Program has long recognized and permitted the use of T&M and LM contracts in the acquisition of commercial services.

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the original agreement entered into between the parties. Such an application would require either a bilateral modification or a termination for convenience of the contract or task order. Either option would be costly and burdensome; both should be avoided.

B. Determining When T&M and LH Contracting is Appropriate

1. The Factors to be Used

One of the questions posed in the ANPR is "what steps should a contracting officer be required to take to establish that a fixed-price contract is not suitable?" 69 Fed. Reg. 56317. This question may be phrased in the affirmative to ask "when would it be appropriate to use T&M and LH contracting?" We believe a contracting officer (CO) should be free to rely upon T&M and LH contracting acquisition methods when he or she finds, based upon market analysis, that the required services are typically sold in the commercial market on a similar basis. T&M and LH contracting would also be appropriate when the CO believes the scope of work or the duration is not sufficiently clear to permit a fixed-price contract. Finally, T&M and LH contracting should be available if the CO determines that use of that contracting mechanism will enhance competition or prevent inflated contract pricing which may result from a solicitation that requests firm fixed priced proposals only.

2. Dollar Threshold for Execution of the Required Determination and Findings (D&F)

Section 8002(d) as amended, as well as the ANPR, require the CO to execute a Determination and Findings (D&F) that no other contract type is suitable before proceeding with a purchase on a T&M or LH basis. *See* Section C.1., 69 Fed. Reg. 56317; *see also* FAR 12.207(b)(1)(iii)(A) & (b)(3), 69 Fed. Reg. 56319. The ANPR also requires a D&F be executed for each task order placed on a T&M or LH basis under an IDIQ services contract. *See* FAR 12.207(c)(3), 69 Fed. Reg. 56319. A D&F should be required for task orders only if the IDIQ contract from which it is issued provides the CO with the ability to choose whether to purchase the commercial services on a fixed priced, T&M, or LH basis. A separate D&F should not be required for task orders issued under an IDIQ contract that informs offerors that task orders will be issued on a T&M or LH basis only.[4]

Additionally, a D&F should not be required for contracts or task orders that fall below a certain dollar threshold. To require issuance of a detailed D&F for every T&M or LH contract or task order purchase, no matter how small in value, would not only be unduly burdensome for the CO but would likely cause a chilling effect on the use of T&M or LH contracting methods. This chilling effect would hamper the government's ability to efficiently procure commercial services in a cost effective manner.

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[4] If the IDIQ contract only allows for issuance of task orders on a T&M or LH basis, the proposed FAR would require the D&F to be approved one level above the CO. *See* proposed FAR 12.207(c)(3), 69 Fed. Reg. 56320. We support this proposed approach.

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Currently, FAR Part 13 provides simplified procedures for acquisitions falling below a certain dollar threshold. We recommend adoption of the Simplified Acquisition Threshold (SAT) figure as the amount above which the D&F would be required. Currently, this SAT amount is $100,000. Accordingly, a detailed D&F would need to be issued only if the T&M or LH commercial contract or task order is estimated to exceed the SAT set forth in FAR 2.101 or in an agency's supplemental acquisition regulation. By tying the dollar amount to "the SAT set forth in FAR 2.101," the D&F requirement would be associated with an index. As the SAT increases over time, the D&F dollar threshold would also increase.

Use of a triggering threshold would vest COs with the flexibility to acquire relatively small purchases of commercial services on a T&M or LH basis, using the simplified and economic procedures of FAR Part 13, without the need to first prepare a formidable D&F. This dollar threshold would maximize efficiency and minimize the burden and administrative costs for both the Government and industry, as was intended in FAR Part 13 acquisitions. Furthermore, any Government risk in using a T&M or LH contract or task order for low dollar amount acquisitions would be minimal.

C. Types or Categories of Commercial Services Commonly Sold to the General Public on a T&M or LH Basis

Section 8002(d) as amended authorizes "commercial services procured for support of a commercial item" to be acquired on a T&M or LH basis. This section also authorizes the Office of Federal Procurement Policy (OFPP) Administrator to designate:

> [a]ny other category of commercial services. . . in the Federal Acquisition Regulation . . . on the basis that –
>
> (i) The commercial services in such category are of a type of commercial services that are commonly sold to the general public through use of time-and-materials or labor-hour contracts; and
>
> (ii) it would be in the best interests of the Federal Government to authorize use of time-and-materials or labor-hour contracts for purchases of the commercial services in such category. Section 1432, NDAA for Fiscal Year 2004 (P.L. 108-136).

To assist the OFPP in designating these "other category of commercial services," the Councils requested public comments that addressed the appropriate use of T&M and LH contracting in commercial item acquisitions. PwC has routinely provided accounting, auditing, and other business advisory services, to the general public on either a fixed price or on a T&M or LH basis for over 150 years. PwC (or its predecessor entities Pricewaterhouse and Coopers & Lybrand) has also provided such accounting, auditing, and business advisory services under

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GSA's Multiple Award Schedule (MAS) Program, for the past twelve years.[5] Currently, PwC holds:

- A Financial and Business Solutions (FABS), Group 520 Schedule Contract (Financial & Performance Audits, SIN 520-7; Complementary Audit Services, SIN 520-8); Accounting Services, SIN 520-11; and Complementary Financial Management Services, SIN 520-13;

- A Management, Organizational and Business Improvement Services (MOBIS), Group 874 Schedule Contract (Consulting Services, SIN 874-1; Facilitation Services, SIN 874-2; Survey Services, SIN 874-3; Privatization Support Services and Documentation (A-76), SIN 874-6; Program Integration and Project Management Services, SIN 874-7; and Alternate Dispute Resolution Services, SIN 874-8); and

- An Information Technology (IT) Professional Services, Group 70 Schedule Contract (IT Professional Services, SIN 132-51).[6]

GSA has already determined that the accounting, auditing and business advisory services offered under these schedules are commercial items and the Council should explicitly recognize these same categories as commercial for purposes of applying this regulatory action. Government agencies enter into highly competitive negotiated procurements for these services from PwC and its major competitors, such as KPMG, Deloitte & Touche, Grant Thorton, Ernst & Young, Accenture, Bearing Point, and Booz, Allen Hamilton, nearly every day on a T&M or LH basis under GSA and other contract vehicles. The continued ability to purchase these services in this manner is efficient, cost effective, and in the best interest of the Government.

As such, we see no reason why the commercial item T&M or LH contracting method considered by this ANPR should deviate significantly from the procurement practices already in place and used effectively by contracting officers every day to the benefit of the government.

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5 See Attachment B for GSA's definition/description (by SIN) of each of the commercial services PwC offers or provides to the Government under the GSA MAS Program. We recommend OFPP consider using GSA's category of commercial service descriptions as a starting point for the purpose of identifying the categories of work that should be applicable to this proposed regulation and request that contractors affirm whether these services are provided on a T&M or LH basis to their commercial customers.

6 Many other GSA Schedule contracts (e.g., the Professional Engineering Services (PES) Schedule, Group 871) provide commercial services routinely sold in the commercial world. We recommend that the OFPP review these other GSA Schedule contracts for listing of particular commercial service categories in the FAR.

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D. Alternate Terms and Conditions for Commercial Contract Acquisitions Made on a T&M or LH Basis

According to the ANPR, the Councils are considering an alternate to the standard FAR 52.212-4 clause used in commercial item contracts, for incorporation into T&M and LH contracts for commercial services. This alternate would tailor certain terms and conditions in 52-212-4. *See* 69 Fed. Reg. 56318-56319, 56320-56322.

However, the Federal Acquisition Streamlining Act (FASA) and the FAR mandate that contracts for the acquisition of commercial items include, to the maximum extent practicable, only those clauses: (1) required to implement provisions of law or executive orders applicable to commercial items; or (2) determined to be consistent with customary commercial practice. FASA 8002(b)(1); FAR 12.301(a). With this directive in mind, we provide the following comments on the proposed alternate FAR clause and related modifications. As noted below, certain of the alternate terms and conditions are inconsistent with customary commercial practice and will likely be considered quite burdensome by commercial contractors.

1. Subcontracting Issues

a. Consent to Subcontract

The ANPR raises a number of questions regarding subcontracting under T&M and LH contracts. The first of these is whether consent to subcontract is "required for subcontracts not identified in the original proposal." 69 Fed. Reg. 56317. As a general rule, commercial firms do not incorporate a subcontractor consent term in their engagement letters. In our experience, however, customers at times do request the inclusion of notice of subcontracting provision under certain circumstances. This requirement is generally limited and does not apply when a prime contractor requires subcontracting to an affiliate.

b. Treatment of Subcontract Costs

The proposed alternate for the "payments" term (paragraph (i)), in substantial part, is the standard FAR T&M and LH contracts noncommercial item clause. *See* FAR 52.232-7. The "payments" term (paragraph (i)) of the alternate FAR 52.212-4 clause intends to include language that governs the treatment of subcontractor costs. In this regard, the ANPR states:

> [P]aragraphs (b)(1) and (b)(4)(iii) of FAR clause 52.232–7 allow for the reimbursement of reasonable and allocable material handling costs and/or subcontract administration costs arising from the handling of materials and/or the administration of subcontracts (provided these indirect costs are not included in the loaded hourly rate). As a result, T&M and LH contracts for noncommercial items are generally subject to the provisions of FAR Part 31 and the negotiation of final indirect rates. Since

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> commercial item contracts are not subject to FAR Part 31 and final indirect rates, the Councils have discussed the possibility of using a predetermined rate not subject to any audit and adjustment. However, concerns were raised that this would violate the prohibition on cost plus a percentage of cost (CPPC) contracting if the factor is any amount greater than the actual overhead rate the contractor incurs. (Emphasis added.)

In response to these concerns, the ANPR included the following suggested language for use in the "payments" term (paragraph (i)) of alternate FAR 52.212-4, to address the treatment of subcontractor costs:

> (iii) Subcontract costs. The Government shall reimburse the Contractor for the actual costs of direct subcontract costs that are authorized under paragraph (u), Subcontracts, of this clause, provided the Contractor has made or will make payments determined due of cash, checks, or other forms of payment to the subcontractor— (A) In accordance with the terms and conditions of the subcontract; and (B) Ordinarily within 30 days of the submission of the Contractor's payment request to the Government. (Emphasis added.) FAR 52.212-4, Alternate I, Paragraph (i)(1)(iii).

This proposed term is not consistent with commercial practices and we recommend that the Councils modify the proposed language to permit the prime contractor to charge the government the agreed upon price for the service provided, regardless of whether the service is provided by contractor employees or through a subcontractor.[7]

The government enters into a prime contract at the labor rates proposed by the prime and accepted by the government. The government should not alter the bargain reached by the parties merely because subcontractor labor is used. Presumably, competition and the government's required price analysis will ensure that the prime contractor's labor (which may include a subcontractor mark-up) are fair and reasonable and mitigate against any concern that they are not.

It is commonplace in the commercial market place for vendors to negotiate and be paid one hourly rate per labor category regardless of whether work is performed by prime contractor or subcontractor employees. To require a contractor to differentiate rates charged

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[7] As a general rule a prime contractor's rate is tied to a labor category which can only be filled by a worker who possesses a certain level of education, skill or experience. As long as the worker meets those qualifications – regardless of who employs them – the government receives the benefit of the original bargain (i.e. a service provider with sufficient education and experience) and the contractor should be paid under that same bargain (e.g. the prime contract's agreed upon labor category rate).

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for work by a contractor and a subcontractor employee under a government T&M and LH commercial item contract deviates substantially from the commercial model and, as such, contradicts FASA's guidance to "impose only those terms and conditions in its commercial item contracts that are either required by law or executive order or are customary in the commercial market place."

Additionally, reimbursement of only "actual" subcontractor cost would force the prime contractor to either shoulder the burden and risk of any subcontracting effort without compensation or charge additional hours for supervisory or contract administration activities. Neither choice is in the government's best interest.

Such a requirement would also greatly diminish any incentive to subcontract. This chilling effect would mostly have a disproportionate affect on 8(a), small businesses, or other commercial entities new to the federal marketplace -- that would otherwise benefit from subcontracting with an established large federal contractor. Such a result runs contrary to the government's socioeconomic goals and desire to increase its pool of qualified large and small contractors.

The government's current use of GSA Schedule contracts reflects the commercial market place's pricing model. Under those contracts, fixed hourly rates for services offered in response to a Request for Quotation are often developed by a contractor using "blended rates." These blended rates are derived from the fixed hourly rates of the prime and its teaming partners. To allow recovery of only actual subcontractor costs would greatly diminish private industry's willingness to provide teaming solutions and competitive hourly rates. It might also effect small business participation opportunities. The GSA has not required in its Federal Supply Schedule Program that contractors charge only the actual subcontractor costs. We recommend that the Councils consider a similar approach and make T&M and LH contracts and task orders consistent with the commercial marketplace and GSA's practice.

As noted above, the Councils expressed a concern about violating the prohibition on cost plus a percentage of cost (CPPC) contracting if the difference between the subcontractor rate is any amount greater than the actual overhead rate the contractor incurs. We respectfully submit that there is no valid concern that the CPPC prohibition will be violated. The issue is one of risk allocation, not a percentage of cost issue. The prime is at risk that it will not be able to provide the required services at the T&M and LH agreed upon rates. It shoulders the risk that labor will not be available or that the cost that must be paid is not consistent with the quoted T&M or LH rates. The prime contractor cannot, under a commercial item T&M or LH contract, vary its rates based on its actual costs. It, therefore, takes on a significant risk that its subcontractor prices (which vary depending on market forces) will be at or below its prime contract rate. In the event the prime can enter into a contract where the subcontractor rate is less than that of the prime, the difference reflects compensation for the risk taken. In the event that the prime cannot negotiate a rate with the subcontractor that is less than the prime rate, it must shoulder the overage and related risk. In this pricing model, there is no pre-determined

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rate or percentage of cost that can be applied to subcontractor costs. As a result, the subcontractor pricing does not and will not violate the CPPC prohibition.

Finally, the Councils expressed a concern that the non-commercial item FAR clause 52.232–7 permits reimbursement of reasonable and allocable material handling costs and/or subcontract administration costs arising from the handling of materials and/or the subcontract administration which would implicate the cost principles of FAR Part 31. To this concern, we would point out that many commercial contractors do not add a separate material handling fee or subcontract administration costs on top of their fully burdened labor rates. Because the fixed labor rates – under these circumstances -- include such costs (if any), and the rates are based upon market prices as opposed to a contractor's costs, the cost principles never become relevant to the pricing process nor should they be applied to the contract or order.

2. Inspection, Acceptance and Oversight of Performance

The ANPR proposes an alternate "inspection/acceptance" term (paragraph (a)) that gives the government the right to require:

> [R]epair or replacement of nonconforming supplies or reperformance of nonconforming services at no increase in the cost to the Government. If reperformance will not correct the defects or is not possible, the Government may require the Contractor to ensure that future performance conforms to contract requirements and may seek consideration for acceptance of nonconforming supplies or services. (Emphasis added.) 69 Fed. Reg. 56320.

A common practice in the accounting, auditing, and business advisory industries is to require the contractor on a T&M or LH contract to perform the services up to the established fee estimate (or ceiling price) and according to an industry performance standard specified in the warranty. The warranty that we see commonly in the commercial marketplace is as follows:

> Vendor agrees to provide its services in a professional and workmanlike manner and in accordance with [an established industry standard such as that established by the American Institute for Certified Public Accountants]. VENDOR DISCLAIMS ALL OTHER WARRANTIES EXPRESSED OR IMPLIED INCLUDING THE IMPLIED WARRANTIES OF MERCHANTIBILITY AND FITNESS FOR A PARTICULAR PURPOSE.[8]

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[8] The Councils have not proposed to change the current FAR warranty used in a commercial item acquisition. See FAR 52.212.4(o). We, however, believe that such warranty is not suitable for commercial services.

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Under such a warranty, the contractor is required to perform the services according to the referenced industry standard and until any estimated fee or ceiling price is reached. The services are considered accepted upon completion or within a reasonable period of time after delivery and, if re-performance of work is required, such additional work may or may not be paid for by the customer.

The Council's proposed requirement to repair or replace nonconforming services at no cost to the Government is not even consistent with the current non-commercial item FAR "Inspection -- T&M and LH" clause. This clause requires the contractor to replace or correct services that, at time of delivery, failed to meet contract requirements. *See* FAR 52.246-6(f). This FAR clause also states that the hourly fixed price rate for labor hours incurred in the replacement or correction shall be reduced to exclude that portion of the rate attributable to profit. FAR 52.246-6(f). This FAR clause does not shift the risk of nonconforming services entirely to the contractor as the proposed alternate term does. Instead, the risk is appropriately shared by the parties. In the ANPR's proposal, the contractor would unfairly absorb the entire cost of reperformance.

We recommend the Councils consider using the current FAR commercial item term governing "inspection/acceptance," which requires "replacement of nonconforming supplies or reperformance of nonconforming services at no increase in contract price." FAR 52.212-4(a). The contractor would thus reperform nonconforming services up to the agreed upon ceiling price limitation. The Government, at its option, could increase the ceiling price to accommodate any further reperformance. The use of the commercial FAR 52.212-4(a) "inspection/acceptance" term for commercial T&M and LH contracts and task orders would be more consistent with commercial practices. It is also unclear why the inspection and acceptance requirements in a commercial T&M and LH contract or task order should differ from a commercial fixed-price contract.

The ANPR also poses the following questions regarding industry practices as to work surveillance, performance oversight, and payment requests:

> a. What type of surveillance is conducted under T&M and LH commercial contracts (e.g., quality control and inspections)?
>
> * * *
>
> c. What oversight is used to ensure work is being properly charged under T&M and LH contracts (e.g., what types of information is required to substantiate payment requests)? (69 Fed. Reg. 56317.)

That warranty is only appropriate for the acquisition of supplies or products (*i.e.*, "the items delivered hereunder are merchantable and fit for use for the particular purpose described in this Contract"). We propose a warranty similar to that set forth above which establishes an industry standard to which such services are measured.

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In the industry in which we conduct our accounting, auditing, and business advisory business, it is traditional for customers to require monthly or periodic status reports of the T&M or LH effort performed as a measure of quality control or surveillance. Another common commercial practice is to conduct regular/periodic meetings with the client to review status and progress. Performance may also be measured at regular intervals, against estimated completion dates specified in the contract.

Concerning payment, contractors like PwC invoice clients periodically for actual or estimated hours of service provided during a period of contract performance.[9] On very limited occasions, a client may request information to support the hours or expenses billed. In response, we provide descriptions of work performed and a listing of expenses by individual. However, further client access to records or audit rights are very uncommon, limited in scope, or nonexistent. Any allowable audit would be limited strictly to only verification of time sheets or expense reports.

3. Access to Records: Audit Rights

The ANPR proposes an alternate "payments" term concerning "Access to Records" which includes an audit right permitting the government to have access to contractor employees. See Alternate I, Paragraph (i)(2), 69 Fed. Reg. 56321. This proposed requirement is overreaching and not consistent with standard commercial practices. Contracts between commercial suppliers do not permit access to employees for audit purposes.

The current noncommercial item "Audit and Records – Negotiation" FAR clause provides the government with a "right to examine and audit all records and other evidence sufficient to reflect properly all costs claimed . . . This right of examination shall include inspection at all reasonable times of the Contractor's plants, or parts of them, engaged in performing the contract." FAR 52.215-2(b). This FAR clause does not expressly give the government access to employees. And it is unclear why a more stringent and risky requirement should be imposed on a commercial item contract using T&M or LH pricing.

E. Application of the Cost Accounting Standards (CAS)

Another question raised in the ANPR is "what is the impact if Cost Accounting Standards apply to [T&M or LH] contracts?" As set forth in more detail below, if CAS is applied, the government will effectively eliminates most commercial contractors from competition for these types of contracts. Most commercial contractors who are not presently exempt from CAS (e.g., small businesses) are unwilling to invest the money or administrative time necessary to establish a government compliant cost accounting system as the size of their government business does not justify such an investment. Finally, such a requirement is directly contrary to FASA's guidance that the Government purchase goods and services on a commercial basis.

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[9] Estimated hours are reconciled at the end of the engagement with actual hours incurred prior to final billing.

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We recommend that commercial item T&M and LH contracts and task orders be expressly excluded from the application of CAS. We recognize that the Cost Accounting Standards Board (CAS Board) is responsible for the revision of CAS regulations. However, we appreciate that the Councils have volunteered to forward any public comments addressing CAS regulations to the CAS Board for review.

The CAS Board Review Panel (Review Panel) was commissioned by Congress to review a variety of issues regarding the CAS, the CAS Board, and other related matters. In its 1999 report (Report), the Review Panel addressed the rationale behind exempting firm fixed-price contracts from the CAS requirements. The Report noted "that some of the cost or pricing risks to the government inherent in cost-reimbursement contracts are not present in firm fixed-price contracts and subcontracts . . . because firm fixed-price contracts do not provide for adjustment of the agreed price based on changes in a contractor's costs during contract performance." 1999 CAS Board Review Panel Report at 32. As a result, the Review Panel concluded that firm fixed-price contracts and subcontracts should be exempt from CAS coverage when the government does not obtain certified cost or pricing data at the time of award.

We believe the same rationale is applicable to T&M and LH contracts or task orders. Specifically, we recommend that FAR 12.214 and CAS 9903.201-1(b)(6) be amended to include commercial T&M and LH contracts or task orders in the list of contracts, subcontracts and task orders to which CAS does not apply. Similar to fixed-price contracts, the cost or pricing risks to the government associated with T&M and LH contracts or task orders is low. Unlike traditional government contractors, commercial contractor's T&M and LH rates are typically not derived from a cost build-up or analysis of cost elements; and many commercial companies do not include material handling fees in their prices to the government. Instead, these contractors derive their rates by determining what a customer will pay under economic market forces such as demand, supply, and competition. It is these market forces combined with an adequate price analysis and aggressive price negotiation on the part of the government – and not simply saddling commercial contractors with an expensive and time consuming cost accounting administration requirement -- that will ensure the government receives a fair and reasonable price for the services that it requires.

Additionally, contractors that currently have a GSA Federal Supply Schedule contract will likely use their GSA schedule pricing – and government COs should encourage offerors to do so -- as a baseline for pricing their commercial T&M or LH contracts or task orders. "GSA has already determined the prices of supplies and fixed-price services, and rates for services offered at hourly rates, under schedule contracts to be fair and reasonable." FAR 8.404(d). As such, prices derived from further price negotiations result in even more favorable pricing to the government and historically provides significantly lower pricing than would otherwise be offered in a non-GSA cost type contract procurement.

As noted by the Review Panel, the Truth in Negotiations Act (TINA) generally prohibits the CO from requiring submission of cost or pricing data to support a contract when

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a commercial item (including services) is being acquired. The Review Panel stated "[i]n these situations, the risk to the government in negotiating contract prices is not considered high enough to warrant obtaining certified cost or pricing data." The Review Panel ultimately concluded "this risk assessment should be equally applicable to the CAS. That is, where a . . . price can be established without obtaining certified cost or pricing data, the risk to the government of not applying the CAS to these contracts and subcontracts is relatively low." 1999 CAS Board Review Panel Report at 32. Therefore, the items being procured by a CO under a commercial T&M or LH contract or task order would be subject to the same prohibition against obtaining cost or pricing data and should, using the same rationale as the 1999 Review Panel, be exempt from CAS coverage.

Applying CAS to the government's procurement of commercial services would be contrary to the current practice in the commercial market place and very costly to contractors. Relatively few (if any) commercial providers of services have CAS compliant systems. To require commercial T&M or LH contracts or task orders to be CAS compliant would dissuade commercial contractors from competing. In fact, the Review Panel recognized that CAS compliancy often represents a barrier to competition: "[s]ome predominantly commercial firms . . . refuse or limit business with the government rather than become CAS compliant." 1999 CAS Board Review Panel Report at 23. The basis for this refusal is that "CAS create substantial administrative burdens and require changes to accounting practices and systems, increasing the product costs with no commercial advantage . . . and reduce a company's ability to react to changing market conditions by imposing rigid requirements." 1999 CAS Board Review Panel Report at 21. While applying CAS requirements to commercial T&M and LH contracts and task orders would discourage large businesses from competing, the CAS requirements would have a disproportional effect on small business: "[m]any smaller companies do not have the resources to deal with the CAS, which can require the maintenance of government-unique accounting practices at considerable cost." Id. at 22. In sum, if commercial T&M and LH contracts and task orders are not exempted from CAS requirement, there may be a chilling effect against the use of these new types of commercial item contracts.

We appreciate the opportunity to comment upon this ANPR. Please do not hesitate to contact Stephen M. Daoust (PwC Assistant General Counsel) at (202) 414-1850 or stephen.m.daoust@us.pwc.com if you require any further information about PwC's commercial practices and their applicability to this proposed regulation.

Sincerely,

PricewaterhouseCoopers, LLP

PricewaterhouseCoopers LLP

Attachments: A and B

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ATTACHMENT A

PricewaterhouseCoopers List of Services

Financial Management

- Financial & Performance Audit
- Audit Readiness & Remediation
- Budget and Performance Integration
- Financial Reporting & Controls
- Business & Financial Planning
- Property & Asset Management
- Grants and Credit Management
- Fraud Investigation & Recovery

Risk and Compliance

- Enterprise Risk Management
- Continuity of Operations
- Ethics and Compliance
- Privacy
- Regulatory Function Management
- Regulatory Reporting and Assurance

Operational Effectiveness

- Benefits Realization
- Performance Metrics & Management
- Business Process and Controls
- Sourcing and Alliance Management
- Privatization & Outsourcing Advisory
- Economic Advisory
- Human Capital Change Management

Program Management

- Program and Project Management Office Design & Implementation
- Organizational, Program and Project Management Assessment
- Project Portfolio Management Support Services
- Feasibility & Business Case Development & Monitoring
- Acquisition Management Support

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- Performance Assessment & Benefits Realization
- Dispute and Investigations Support

Security and Data Management

- Threat & Vulnerability Management including in-depth Penetration Analysis
- Controls & Identity Management including Single Sign-on, User Provisioning, and Access Management
- Incident Response, Event Correlation, and Computer Forensics
- Crisis & Incident Planning and Response
- Data Planning, Management and Quality Services
- Information Security Strategy and Architectural Services
- FISMA and Certification/Accreditation Services

Dispute Analysis & Investigations

- Economic Analysis
- Environmental, Construction, Insurance and Government Contracts
- Forensic Technology Solutions
- Electronic Discovery
- Systems Failure/IT Liability Expert Services
- Investigation and Forensic Services
- Healthcare Fraud and Abuse Investigations

Web Assurance

- SysTrust attestation
- WebTrust seal of assurance
- SAS No. 70 Services

Complementary Financial Management Systems

- Assess and improve financial management systems

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Information Technology Professional Services

- IT Systems Development Services
- IT Systems Analysis Services
- Automated Information Systems Design and Integration Services
- Programming Services
- IT Backup and Security Services
- Other Information Technology Services, Not Elsewhere Classified

Consulting Services

- Business process efficiency/effectiveness assessments
- Cross enterprise process redesign, alignment, integration and implementation services
- Workforce transformation
- HR processes alignment and improvement
- Governance, regulatory and other compliance reviews
- Strategic planning and policy advisory services
- Real estate valuation, economic analyses and research
- Transaction and transition management
- Strategic, business and action planning
- Program assessments and audits
- High performance work
- Change management consultation
- Knowledge management
- Policy, procedures and role definition documentation
- Benchmarking
- Enterprise risk and value management assessments
- Leadership systems
- Performance measures and indicators
- Cycle time
- Systems alignment
- Organizational assessments including restructuring, privatization and public-private partnerships
- Process and productivity improvement
- Training analysis, design, development, delivery and evaluation
- E-learning and virtual classroom
- Competency diagnostics
- Performance measurement consultation and development of appropriate metrics, controls and reporting mechanisms
- Cost reduction and budget maximization
- Global Best Practices® consultation

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- Organizational assessments
- Program audits, and evaluations
- Consultation regarding continuity of operations and critical infrastructure protection

Facilitation Services

- The use of problem solving techniques
- Planning and preparation of facilitated group meetings
- Observations and recommendations stemming from facilitated meetings resolving disputes, disagreements, and divergent views
- Defining and refining the agenda
- Logistical meeting/conference support when performing technical facilitation
- Facilitation of all types of group meetings
- Providing a draft for the permanent record
- Debriefing and overall meeting planning
- Convening and leading large and small group briefings and discussions
- Preparing draft and final reports for dissemination
- Recording discussion content and focusing decision-making

Survey Services

- Planning survey design
- Survey design and implementation
- Survey data collection methodology/techniques
- Communication of survey results through reports and presentations defining and refining the agenda
- Production of reports to include, but not limited to: description and summary of results with associated graphs, charts, and tables; description of data collection and survey administration methods; discussion of sample characteristics and the representative nature of data; analysis of non-response; and briefings of results to include discussion of recommendations and potential follow-up actions
- Sampling; survey development
- Survey database administration
- Survey data analysis (quantitative and qualitative)
- Determining proper survey data collection methodology
- Analyses of quantitative and qualitative survey data
- Pre-test/pilot surveying
- Assessing reliability and validity of data
- Survey data reliability and validity assessments
- Administering surveys using various types of data collection methods

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Privatization Support Services and Documentation (A-76)

- Strategic, tactical, and operational level planning support
- Competitive sourcing analysis
- Organizational assessments including restructuring, privatization and public-private partnerships
- Consultation regarding continuity of operations and critical infrastructure protection Comparison of in-house bids to proposed Interservice Support Agreement (ISSA) prices;
- Development of Quality Assurance Surveillance Plans (QASP);
- Performance of management studies to determine the Government's Most Efficient Organization (MEO)
- Administrative appeal process support
- Development of in-house Government cost estimates
- Development of Performance Work Statements (PWS)
- Public-private partnership support
- Initial study planning
- Assessments and or studies of potential privatization initiatives

Program Integration and Project Management Services

- Program management
- Program assessments and audits
- Program oversight and integration
- Program oversight
- Project management planning and related assistance
- Project management
- Program integration (team leader)
- Program/project management

Alternative Dispute Resolution (ADR) Services

- Facilitated, preventative, fact-finding, advisory, or imposed ADR
- Economic damages modeling
- Cost impact assessments
- Statistical analysis
- Antitrust matters
- Cyber crime prevention, detection and response
- General fact finding and investigations in connection with all types of alternate dispute resolution proceedings

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- Healthcare fraud and abuse investigations
- Business/intellectual property valuations
- Licensing management and revenue recovery

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ATTACHMENT B

Description Of Commercial Services Provided By PricewaterhouseCoopers Under Its GSA Schedule Contracts

Contract No.	Group No./Title	SIN No./Title	SIN Description
1. GS-23F-0165N	520, "Financial and Business Solutions (FABS)"	520-7, "Financial and Performance Audits"	Perform financial statement audits, financial-related audits and performance audits. An independent assessment of an audited entity's (a) financial statements in conformity with generally accepted accounting principles, (b) financial information, adherence to financial compliance requirements and internal controls, or (c) organization or program performance to identify areas for improvement.
		520-8, "Complementary Audit Services"	Other services performed by auditors including assist in developing questions for use at hearings, develop methods and approaches in evaluating a new or proposed program and forecast potential program outcomes.
		520-11, "Accounting Services"	Transaction analysis, transaction processing, data analysis and summarization, technical assistance in devising new or revised accounting policies and procedures, classifying accounting transactions, special studies to improve accounting operations.
		520-13, "Complementary Financial Management Services"	Assess and improve financial management systems, financial reporting and analysis, strategic financial planning, financial policy formulation and development. Devise and implement performance measures, conduct special cost studies, perform actuarial services, perform economic and regulatory analysis, assist with financial quarterly assurance efforts, perform benchmarking.

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2. GS-10F-0466N	**874, "Management, Organization, and Business Improvement Services (MOBIS)"**	**874-1, "Consulting Services"**	**Services may include providing expert advice, assistance, guidance or counseling in support of agencies' management, organizational, and business improvement efforts. This may also include studies, analyses and reports documenting any proposed developmental, consultative or implementation efforts. Examples of consultation include but are not limited to: strategic, business and action planning; high performance work; process and productivity improvement; systems alignment; leadership systems; organizational assessments; cycle time; performance measures and indicators; program audits, and evaluations.**
		874-2, "Facilitation Services"	**Includes facilitation and related decision support services to agencies engaging in collaboration efforts, working groups, or integrated product, process, or self-directed teams. Agencies bringing together diverse teams and/or groups with common and divergent interests may require a neutral party to assist them in: the use of problem solving techniques; defining and refining the agenda; debriefing and overall meeting planning; resolving disputes, disagreements, and divergent views; logistical meeting/conference support when performing technical facilitation; convening and leading large and small group briefings and discussions; providing a draft for the permanent record; recording discussion content and focusing decision-making; and preparing draft and final reports for dissemination.**

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		874-3, "Survey Services"	Services shall provide expert consultation, assistance, and deliverables associated with all aspects of surveying within the context of MOBIS. Contractors shall assist with, and/or perform all phases of the survey process to include, but not limited to: planning survey design; sampling, survey development; pretest/pilot surveying; defining and refining the agenda; survey database administration; assessing reliability and validity of data; determining proper survey data collection methodology; administering surveys using various types of data collection methods; and analyses of quantitative and qualitative survey data. Production of reports to include, but not limited to: description and summary of results with associated graphs, charts, and tables; description of data collection and survey administration methods; discussion of sample characteristics and the representative nature of data; analysis of non-response; and briefings of results to include discussion of recommendations and potential follow-up actions.
		874-6, "Privatization Support Services and Documentation"	May include, but are not limited to, support, assistance and documentation generation required in the conduct of OMB Circular A-76 studies such as development of Performance Work Statements (PWS), development of Quality Assurance Surveillance Plans (QASP), performance of management studies to determine the Government's Most Efficient Organization (MEO), development of in-house Government cost estimates, comparisons of in-house bids to proposed SSA prices, and Administrative Appeal Process Support.
		874-7, "Program Integration and Project Management Services"	Contractors shall provide services in the management, integration, and programs and projects. These services may include, but are not limited to: program management, program oversight,

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			project management and program integration (team leader).
		874-8, "Alternative Dispute Resolution (ADR) Services"	**Expert services supporting agency Alternative Dispute Resolution (ADR) programs both formal and informal. ADR of EEO disputes is excluded and is covered under a separate GSA schedule. Services could include ombudsmen, negotiated rule-making, special masters, early neutral evaluation, non-binding arbitration, mediation, partnering, magistrates, private judging, binding arbitration, conciliation, consensus building, and neutral experts.**
3. GS-35F-0263P	**70, "General Purpose Commercial Information Technology Equipment, Software, and Services"**	**132-51, "Information Technology Professional Services"**	**Includes resources and facilities management, database planning and design, systems analysis and design, network services, programming, millennium conversion services, conversion and implementation support, network services project management, data/records management, subscriptions/publications (electronic media), and other services.**

U.S. GENERAL SERVICES ADMINISTRATION
Office of Inspector General

2003-027-17

November 19, 2004

General Services Administration
Regulatory Secretariat (VR)
1800 F Street, NW
Room 4035
Washington, D.C. 20405
Attn: Laurie Duarte

Re: Comments on ANPR, FAR Case 2003-027, Additional Commercial Contract Types

Dear Ms. Duarte:

This transmits the comments of the General Services Administration, Office of Inspector General (GSA OIG) on the above-captioned advance notice of proposed rulemaking (ANPR). The rulemaking, which would implement Section 1432 of the Services Acquisition Reform Act (SARA), authorizes the use of time & materials and labor-hour (T&M/LH) contracts for the acquisition of commercial services. Our comments relate largely to the list of services suitable to be purchased using these new vehicles; substantiation and audit requirements attendant to payment under such vehicles; the definition and treatment of material costs or other direct costs (ODCs) under such task orders; whether sole-source or noncompetitive task orders should be within the scope of the rule; and the treatment of subcontracting under such vehicles. We have concerns in many of these areas, which arise both out of provisions of the current ANPR and various comments made at the October 19 public meeting. We note that T&M/LH task orders have been authorized for a number of years under GSA's Multiple Award Schedule (MAS), and we have some experience with reviewing such task orders.

Appropriate Categories of Commercial Services

SARA provided that stand-alone commercial services would be eligible to be procured on a T&M basis only when OFPP designates them as being commonly sold to the general public through T&M/LH vehicles, and where such a procurement would be in the Government's best interests. In this connection, OFPP has solicited comments on what services are typically sold on a T&M/LH basis commercially, and has further asked whether formulating a list of types of services would be practical. We believe that it is advisable, and statutorily-required, for OFPP to formulate such a list. First, contracting officers (COs) are not always in a position to determine whether a particular service is sold commercially on a T&M/LH basis; individual COs' access to relevant market research in this area may be limited. OFPP is in a much better position to do the broad-

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based market research required to formulate such guidance, and such an OFPP-formulated list would serve as general guidance and a solid starting point for COs. In addition, such a list, which could include categories of services as well as factors or conditions to consider, would aid a CO when drafting the statutorily-required determination and findings document that establishes that no other contract type is suitable.

We note that several comments were made (we believe by industry representatives) at the public meeting to the effect that such a list would be too restrictive and impractical. We disagree with that view, and reiterate that OFPP is uniquely positioned (and statutorily-tasked) to conduct the upfront market research required to provide a list of services. We also believe that such a list can only serve to be helpful to COs conducting an ever-increasing number of services procurements. We endorse the suggestion, made in the ANPR, that the OFPP list contain both a list of eligible services and guidance on factors present in any particular procurement that would militate towards it being suitable or not suitable to be awarded on a T&M/LH basis. In this connection, we think it may be wise, as suggested by a FAR Council member at that meeting, to include a final "other" category that would capture services that would not otherwise typically be included, but where the circumstances of the individual procurement -- in the CO's view -- make it appropriate to be let using a T&M/LH vehicle. This would certainly afford COs with a reasonable amount of flexibility.

Next, we would advocate that the FAR Council adopt the current standard, stated in the FAR and adopted for MAS task orders, for letting task orders on a T&M/LH basis. See FAR § 16.601(b). This standard requires that T&M/LH task orders be used only when COs cannot reasonably estimate the extent or duration of the work required. It is useful in that it requires COs to analyze and allocate performance risk in each procurement, and leads to use of T&M/LH only where it would be impracticable to expect a vendor to perform on a firm-fixed price award basis.

Finally, we note that we believe a determination that purchasing on a T&M/LH basis -- as to task orders under indefinite quantity indefinite delivery (IDIQ) or MAS contracts -- is required both by law and by common sense *as to each task order*. Task orders are not defined until the Government determines its needs and a statement of work is developed. MAS contracts, for example, are awarded for broad categories of work such as information technology services. Contrary to comments made at the public meeting, we fail to see how a meaningful analysis can be done of whether purchasing on a T&M/LH basis is appropriate without an understanding of the specific scope of work involved in the context of a specific task order.

Records Access Requirements

We believe it is wise to include protections, above those currently required in commercial items purchases, for commercial services bought on a T&M/LH basis. We note that GSA has included, for T&M/LH task orders awarded under MAS contracts, the Payments

under Time-and-Materials Contracts clause (48 C.F.R. § 52.232-7) in its entirety for several years now. This practice was instituted in recognition of the fact that T&M/LH task orders present unique concerns regarding cost-risk and cost overruns, that are not present in either purchases of commercial products or firm-fixed price services task orders. Building on the records access provided for in the current payments clause, the ANPR would include access to records (new subsection (i)(2)) within 48 C.F.R. § 52.212-4 (Contract Terms and Conditions -- Commercial Items), which would authorize the CO or a designee to request substantiation for hourly rates charged under task orders. The provision would allow, for substantiation of hours worked, access to original timecards, timekeeping procedures, labor distribution reports, and assigned employees. For substantiation of direct material costs and subcontract costs, the ANPR would allow access to invoices, payment information, and subcontract agreements. As a general matter, we believe such access to records is warranted where the Government is purchasing services on a T&M/LH basis, and the essence of what the Government is buying is hours of work -- not a particular outcome. The ANPR's proposed access to records provision would at least ensure that the hours of work were in fact accomplished.

In addition, we would recommend that several additional categories of documents be made available for Government review, including resumes for employees and subcontractor employees (where significant work is performed by subcontractor employees). Our recent audit work has indicated numerous instances of employees not having the requisite education or experience qualifications on T&M/LH MAS task orders. This could be accomplished by adding a new subsection (2)(i)(E) that would provide access to "resumes or other personnel records of employees whose time has been included in any invoice for the purpose of verifying that these employees have the contractually-required qualifications and experience." Also, the provision would give access to labor distribution reports at subsection (2)(i)(C). We note that vendors sometimes do not have formal reports as such, but have records relating to labor distribution generally which should be made available for Government review. Subsection (2)(i)(C) could be amended to provide access to "(C) Contractor reports **or records** that show the distribution of labor . . . "

We note that, for material costs, the T&M/LH payments clause requires contractors 1) to give the Government the benefit of all discounts and rebates and 2) for situations where a contractor regularly sells a material to the public, to furnish such material at the lower of the catalog or list price or the price paid to its most-favored customer. Since the CO is responsible for enforcing this obligation, it may be advisable to consider allowing the CO to require supporting information from the contractor.

Finally, we endorse the provision in the rule that allows a CO to negotiate access to other types of documents where the task order's individual circumstances merit such access, such as for very large dollar task orders, for task orders incorporating unique direct or material costs or features. We feel this authority is warranted, and allows a CO maximum flexibility to incorporate safeguards on an individual task order basis.

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Other Direct Costs & Material Costs

In the context of our recent audit work on MAS T&M/LH task orders, we have seen a number of irregularities or inconsistencies centering on the charging of other direct costs (ODCs). In some instances, we have seen ODCs charged on task orders that eclipse, in dollar amount, the value of the services procured or that do not appear to be directly in support of the service purchased. In other instances, we have seen types of ODCs charged directly that would normally be included as an element of overhead in the labor rate (i.e. depreciation); this practice has raised concerns about costs overcharging or double charging on ODCs under these task orders.

The ANPR appears to only allow materials costs and subcontract costs to be charged as other direct costs (ODCs). We believe having a clearly limited definition of materials costs is advisable as it would clearly preclude intangible types of costs from being charged directly, and would force vendors to include such costs only in their loaded labor rates. We also believe the ANPR's proposed prohibition on mark-ups on materials costs would help to alleviate costs overcharging questions in this area -- especially given the limited visibility and audit access of the Government to such costs and charges under commercial services task orders.

Sole-Source Task Orders

The FAR Council solicited responses at the public meeting regarding whether commercial services task orders awarded on a noncompetitive basis should be eligible to be awarded under T&M/LH vehicles. We have legal and policy objections to such procurements being authorized and included in the scope of this rulemaking. First, the plain language of SARA extends only to purchases "made on a competitive basis." This appears to pretty clearly disqualify any sole-source or noncompetitive task orders from the rule's scope. Sole-source or noncompetitive task orders would be awarded without their hourly labor rates having been competed. This lack of competition, in a T&M/LH context where the Government is really only buying a number of hours worked (without an outcome), clearly increases the Government's exposure to overpaying in the first instance, and also magnifies any concerns regarding cost overruns or unwarranted ceiling increases.

Subcontracting Provisions

Currently, the ANPR requires CO written consent for vendors to subcontract under T&M/LH task orders where 1) the vendor does not have an approved purchasing system and 2) the subcontract will either be on a cost-reimbursement or T&M/LH basis, or will be a large dollar (5% of the prime contract cost) fixed-price task order. We believe this is a sensible term to incorporate into T&M/LH task orders. Our recent audit work has indicated that MAS vendors sometimes subcontract out much of their task orders. In T&M/LH task orders, ordering agencies, when making a best value award decision, often consider the reputation or good will associated with a particular vendor. It makes eminent sense, therefore, to allow the CO to approve on the extent of subcontracting in a

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particular T&M/LH task order -- particularly since the Government agency is not purchasing a particular outcome or result. In the context of T&M/LH task orders, the extent and nature of subcontracting becomes almost a quality issue that Government buyers should be entitled to review and approve.

Please feel free to call my counsel, Kathleen S. Tighe, on (202) 501-1932 with any questions or concerns you may have regarding these comments.

Sincerely,

Daniel R. Levinson
Inspector General

2003-027-18

"Tuttle, Peter" <PeterT@distributedinc.com>

11/19/2004 12:25 PM

To: ANPR.2003-027@gsa.gov
cc: "Falcone, Ron" <RonF@distributedinc.com>, "DiBenedetto, Anthony" <TonyD@distributedinc.com>
Subject: ANPR FAR Case 2003-027, Additional Commercial Contract Types

Distributed Solutions Inc. (DSI) is a small business founded in 1992 in Northern Virginia specializing in the manufacture of a robust contract management software solution suite of products called the Automated Acquisition Management System (AAMS). AAMS is currently deployed in more than fifteen federal agencies.

First of all, thank you for the opportunity to participate and provide comments in the 10/19/2004 Public Meeting. The following is our input concerning the proposed rule on Additional Commercial Contract Types (FAR Case 2003-027):

1. Government question on appropriate use (Page 7 of Public Meeting handout): What types of services are predominately sold on T&M or LH basis? DSI response: We suggest adding the type(s) of service to the general list of subject areas that needs to be considered when choosing T&M or LH. Use of T&M or LH will be highly dependent upon the specific situation and the type of requirement that needs to be satisfied. The Contracting Officer (CO) can discuss why a particular type of service must be purchased via T&M or LH in the specific situation in a Determination and Findings (D&F). We don't, however, recommend providing a list of examples (e.g. consulting, training and etc.) in any discussion of appropriate usage. Including a specific list of services may lead to a premature decision as to the applicability of T&M or LH to satisfy the Government's needs.

2. Government question on appropriate use (Page 9 of Public Meeting handout): "Should the rule restrict use of T&M and LH contracts to situations where it is not possible at the time of award to estimate accurately the extent or duration of work....?" DSI response: We suggest adding the "type of work" or "type of skills needed" to the list of considerations. Many times the Government's requirements quickly evolve after award. The actual nature of the task and the skills required to fulfill the task may not fully be discerned until after the work has begun and both Government and contractor realize that the "real" requirements are different than what was originally anticipated or intended.

3. Government question on establishing suitability of T&M and LH contracts (Page 11 of Public Meeting handout): "What steps should a contracting officer (CO) be required to take....?" DSI response: If a D&F is going to be required, we suggest adding a requirement for the D&F to address the specific reasons that FFP was eliminated from consideration, instead of allowing the use of any high-level generalities as explanations. Also any D&F should explain how the scope of a T&M or LH requirement has been bounded in order to reduce the Government's exposure to performance risk as well as limiting the value or length of the contract.

4. Government ANPR comment on establishing suitability of T&M and LH contracts (Page 13 of Public Meeting handout): "When an indefinite delivery contract is to be used, agencies are encouraged to provide ...." DSI response: The Government should attempt to limit the proliferation of D&F's, since many requirements will be hybrid in nature (e.g. a mixture of FFP, T&M or LH CLINS on contracts or orders, or separate T&M or LH Orders under ID/IQ contracts which may also have FFP orders). Writing a D&F each time a T&M or LH CLIN or order is required would be unduly burdensome on agency CO's. The existing acquisition planning process and associated documentation should address the possibility or probability for using T&M or LH if those possibilities exist based on the analysis of the requirements and the market research conducted early-on in the acquisition process. The planning documentation should also provide details on how the use of T&M or LH will be limited in order to mitigate risk on those specific procurements.

5. Government proposed terms and conditions (Page 14 of Public Meeting handout): "52.212-4(a) Defects language" DSI response: It may be extremely difficult for the Government to enforce defects

language when using T&M or LH, since they are essentially purchasing labor and any associated materials. Once the contractor invoices for the labor and the Government accepts the labor (as opposed to accepting the tangible products generated by the labor), it will be hard after the fact to claim that the labor provided was defective or otherwise unacceptable. Most vendors attach some proof that the labor was provided to their invoices, such as copies of timesheets. Some contractors have Government personnel initial off on those timesheets or enter their time into a Government-sponsored automated system (e.g. the USPS' Program Cost Tracking System). Unless the Government can prove fraudulent timekeeping practices or sloth on the part contractor or its employees, it will be difficult for the Government to claim that the labor provided was defective.

6. Government question on material handling and subcontract administration costs (Page 20 of Public Meeting handout): "How should material handling and subcontract administration costs be charged?" DSI response: We recommend allowing the use of loaded rates or a fixed charge for material handling and subcontract administration costs. Different contractors handle these charges in different ways.

7. Government question on other direct costs (Page 21 of Public Meeting handout): "Does material and subcontracts adequately cover all other direct costs?" DSI response: It depends. Other direct costs (ODC), depending on the requirements, or how individual agencies or contractors categorize costs, may include travel, software license fees and/or software subscription fees, for example. We suggest leaving any language somewhat open-ended so that an ODC that doesn't fit the normal situation may be proposed and evaluated.

8. Government ANPRM list under access to records (Page 23 of Public Meeting handout): This list includes subcontract agreement and subcontractor invoices. DSI response: We recommend that the Government hold the prime contractor accountable for proper record-keeping and invoicing. Since the Government does not have privity with a subcontractor in the vast majority of cases, requiring copies of a prime's commercial subcontracting agreements and subcontractor invoices is clearly inappropriate. Prior to any award, the Government has presumably evaluated and accepted a prime's proposal and conducted any required pre-award reviews, so they should have no need to routinely obtain and review a subcontractor's documentation.

9. Government question on oversight (Page 25 of Public Meeting handout): "Should commercial T&M contracts be subject to Contractor Purchasing System Reviews?" DSI response: It depends if the Government wishes to eliminate a large number of contractors from providing T&M or LH services to the Government. Many small businesses and small disadvantaged businesses currently provide commercial services to the Government and may or may not need nor have the sophisticated infrastructure required to successfully complete a Contractor Purchasing System Review (CPSR). The decision on requiring contractors to be subject to CPSR's should be on a case by case basis and documented as part of the agency's procurement plan that supports a specific requirement.

10. Government questions (FR Vol 69, No 181): "What responsibility should the contractor bear for correction of non-conforming services under T&M and LH commercial contracts? Does the burden of responsibility depend on whether the Government has accepted the service?" DSI response: If the contractor provides personnel who have the mix of labor skills that the Government requires, and those personnel provide services in accordance with the requirements as articulated in the Statement of work, then, no, the contractor should bear no burden for corrections. Additionally, in many cases, Government representatives review contractor resumes or require some type of interview with the contractor's candidates as part of a proposal evaluation process. Once the Government approves these candidates, it will be hard for the Government to later prove that the services provided were non-conforming short of timekeeping fraud or unprofessional behavior on the part of the contractor's personnel. Since most T&M or LH efforts are invoiced monthly, it will also be difficult for the Government to reject those services or claim some nonconformance sometime after the invoices had been paid if the work products generated by the contractor's personnel were not what was desired.

11. Government questions (FR Vol 69, No 181): "How often and under what circumstances does the customer provide property on a T&M or LH contract? How is the property managed or controlled? DSI

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response: One likely scenario is when T&M or LH contracting is used to obtain supplemental staff for a Government organization – call it what you like, it is still essentially supplemental staff. These personnel can be issued laptop computers or other equipment that is required for them to perform their support duties. Many times this equipment is issued with no contractual documentation. Any GFP should be issued by listing it in the contract in some manner, as well as being tracked by the agency's property management process.

12. DSI recommends that use of T&M and LH be addressed in Part 7and Part 37 of the FAR. Government personnel must evaluate the existing requirements and market conditions, and adapt the contracting strategy to address them.

Please call either Ron Falcone or Peter Tuttle at (703) 471-7530 if you have any questions or require additional input.

Thanks.

Peter Tuttle, CPCM
Distributed Solutions, Inc.

Response Number	Date Received	Comment Date	Commenter
2003-027-10	11/16/04	11/5/04	DOD/IG
2003-027-11	11/18/04	11/18/04	ABA
2003-027-12	11/18/04	11/18/04	SSA
2003-027-13	11/18/04	11/18/04	EPA
2003-027-14	11/18/04	11/17/04	HAD
2003-027-15	11/19/04	11/19/04	AFGE/AFL-CIO
2003-027-16	11/19/04	11/19/04	Price Warterhouse Coopers
2003-027-17	11/19/04	11/19/04	GSA/OIG
2003-027-18	11/19/04	11/19/04	Distributed Solutions, Inc.
2003-027-19	11/24/04	11/14/04	CSA, ITAA, PSC, GEIA
2003-027-20	11/24/04	11/23/04	CODSIA
2003-027-21	11/24/04	10/14/04	GFP Enterprises, Inc.
2003-027-22	11/24/04	11/19/04	Preston/Gates/Ellis & Rouvelas Meeds
2003-027-23	11/24/04	11/19/04	POGO

Attachments

2003-027-19

November 24, 2004

General Services Administration
Regulatory Secretariat (VR)
1800 F Street, N.W.
Room 4035
Washington, D.C. 20405

ATTN: Ms. Laurie Duarte

RE: ANPR, FAR case 2003-027, Additional Commercial Contract Types

Dear Ms. Duarte:

On behalf of the member firms of our respective associations, we appreciate the opportunity to submit comments on the advance notice of proposed rulemaking published in the Federal Register (69 F.R. 56316-56322) on September 20, 2004, implementing Section 1432 of the Services Acquisition Reform Act of 2003, enacted on November 24, 2003.

By way of background, the *Contract Services Association of America* is an industry trade association representing service contractors involved in everything from maintenance contracts to high technology services. The *Information Technology Association of America* represents firms ranging from the smallest IT start-ups to industry leaders in the Internet, software, IT services, ASP, and systems integration fields. The *Professional Services Council* is a national trade association whose members provide professional and technical services to the Federal government. And, the *Government Electronics and Information Technology Association* is a national trade association that represents the interests of U.S. electronics and information technology firms conducting business with the Federal government. Our associations represent firms of all sizes, employing over 3 million workers, that provide a wide array of services to both the military and civilian Federal agencies, as well as the commercial sector.

We compliment the FAR Council on its issuance of the Notice and for conducting the public meeting on October 19. However, the Notice contains preliminary discussions about a proposed rule that need to be revised during the rulemaking process. We support the Council's determination to avoid applying the cost principles and broad audit rights in the contemplated clauses. However, there are parts in the proposed FAR changes, such as the requirement to obtain contracting officer consent to subcontract that overreach requirements, while other aspects do not go far enough to implement the statutory authority to permit the use of Time and Material (T&M) and Labor Hour (LH) contracts. Finally, we believe the statute is clear that the cost accounting standards do not apply to T&M contracts for commercial services that meet the requirements of Section 1432.

We have attached a document providing specific responses to the questions posed by the FAR Council to assist them in determining the appropriate use of such contracts for the purchase of commercial items or services. We believe that a proper answer to most of the questions should begin with an acknowledgement that the rules to be adopted will be applied only when two threshold requirements are satisfied – the acquisition involves commercial services and competition for those services is obtained. When so viewed, with the exception of certain statutory and regulatory requirements, the Government customer should be treated much the same as its commercial counterpart, if this rule is going to work. We also have addressed the proposed regulatory changes under consideration, as well as the specific FAR changes that the FAR Council is considering.

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We also have participated in the preparation of the comments submitted by the Council on Defense and Space Industry Associations. We endorse the comments made in that letter.

We appreciate the opportunity to provide these additional comments on this Advance Notice. If you have any questions, please contact Alan Chvotkin of the Professional Services Council (703-875-8059), Bruce Leinster of the Information Technology Association of America (301-803-1071), Cathy Garman of the Contract Services Association of America (703-243-2020), or Jim Serafin of the Government Electronics and Information Technology Association (703-907-7585).

Sincerely,

Christopher Jahn
President
Contract Services Association of America

Stan Z. Soloway
President
Professional Services Council

Harris N. Miller
President and CEO
Information Technology Association of America

Dan C. Heinemeier
President, GEIA Division
Electronic Industries Alliance

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ATTACHMENT

Detailed Comments of Contract Services Association of America, Information Technology Association of America, Professional Services Council and Government Electronics and Information Technology Association on September 20, 2004 Advance Notice of Proposed Rulemaking on Additional Commercial Contract Types

Section 1432 of the 2003 Services Acquisition Reform Act (SARA) authorizes the use of Time and Material (T&M) and Labor Hour (LH) contracts for the procurement of commercial services. Section 1432 amends section 8002(d) of the 1994 Federal Acquisition Streamlining Act (FASA). As amended, section 8002(d) places certain conditions on the use of T&M and LH contracts for purchases of commercial services under FAR Part 12, namely: (1) The purchase must be made on a competitive basis; (2) The service must fall within certain categories as prescribed by section 8002(d); (3) The contracting officer must execute a determination and findings (D&F) that no other contract type is suitable; and (4) The contracting officer must include a ceiling price that the contractor exceeds at its own risk and that may be changed only upon a determination documented in the contract file that the change is in the best interest of the procuring agency.

The FAR Council has requested input to assist them in "successfully achieving these goals as they develop regulations to implement section 8002(d)." In addition to comments from Government contractors such as those represented by our associations, we would encourage the FAR Council to obtain input from companies who do business solely in the commercial marketplace.

RESPONSE TO DISCUSSION QUESTIONS

1. *Suitability of T&M and LH contracts.*

As we noted during the October 19 public meeting, we strongly recommend that the Office of Federal Procurement Policy (OFPP) implement broadly, through categories such as the Federal supply code (FSC) or three-digit NAICS codes, the requirement to identify the types of services that can be procured under a T&M contract. As the history of T&M contracting in both the commercial and Government marketplaces have demonstrated, there are innumerable services that, under the proper situation or set of circumstances, are appropriately procured on a time and materials basis. Similarly, many of these same services are sold in the commercial and Government marketplaces on a fixed price basis. We urge the FAR Council and OFPP to not artificially constrain agencies' ability to use T&M contracting in appropriate transactions at this threshold stage.

2. Appropriate use of T&M and LH contracting.

a. *What, if any, types of commercial services are sold to the general public predominantly on a T&M or LH basis?*
b. *What types of commercial services are rarely, if ever, sold to the general public on a T&M or LH basis?*
c. *What types of commercial services are commonly sold to the general public through both a T&M or LH and fixed-price basis?*

We did not conduct a formal survey of our membership that would address these three sub-questions. We have, however, informally asked our member firms to help identify the categories of services that are – to use the statute's language – "commonly sold to the general public." Most, if not almost all, categories of services are "commonly" sold to the general public on either a T&M or LH basis. However, many of these same categories of services also are commonly sold on a firm-fixed price basis. The real issue has

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much less to do with the specific category of the service than with the specific needs of each customer. The more a customer can describe with specificity its needs and an outcome desired, and in such a way that the risk of the project can readily be ascertained, the greater the likelihood that a commercial service will be priced on a firm-fixed price basis. Conversely, the extent to which a customer's needs cannot be defined with specificity regarding scope or volume, or if satisfying the need poses significant complexity or risk, the more likely that the service will be sold on a T&M or LH basis. T&M or LH contracts are also often used as a transition to fixed-price contracting.

With the exception for where a category of service is purchased on essentially a commodity basis, we would recommend that the Office of Federal Procurement Policy (OFPP) and the FAR Council adopt a framework that recognizes that the Product Service Codes (i.e. the "A-to-Z" codes) or similar high-level description be used to identify the largest number of categories of commercial services that can be procured on a T&M or LH basis. Consistent with the ANPR's Determination and Findings (D&F) requirement, we suggest that the focus for the specific acquisition be on the market research function and the procuring agency's conclusion with respect to the complexity and the types of offers (fixed price/T&M) likely to be received. Not only is this approach practical, it ensures that the Government obtains the greatest degree of competition (by attracting firms from the commercial market) when the agency performs the market research function properly.

d. What conditions typically exist when services are commonly sold to the general public through the use of T&M or LH contracts?

The conditions that typically exist in the commercial marketplace for using T&M and LH contracts are no different than already contemplated by the Government at FAR 16.601. A T&M contract is appropriate when it is not possible for the buyer and/or seller to estimate accurately the resources required to perform the specified statement of work. In that situation, neither buyer nor seller can reasonably assume the financial risks for performance.

The conditions that make T&M and LH contracts appropriate could be common to all types of services. For example, installation services are dependent upon knowing the time and place of performance, as well as the physical characteristics of the facilities where the installation is to occur. Routine maintenance services can be regularly scheduled and accordingly be offered on a fixed price per machine or similar basis. However, unscheduled maintenance or repair/replace services frequently involve unknowns, such as condition of equipment and nature of problem. In some industries, such as aircraft maintenance, this is referred to as "over and above" work. Finally, professional and technical services often involve providing problem solutions where the nature and scope of the problem cannot be initially determined. In all of these cases, the resources needed might not be reasonably estimated at the time of award. Thus, the flexibility inherent in T&M and LH contracts is necessary and perhaps the only contracting vehicle available for obtaining an agreement among the parties for satisfying agency requirements.

e. Should this rule adopt the same policy set forth in the FAR for non-commercial items and in GSA's special ordering procedures for acquiring commercial services under the Multiple Award Schedules

Yes, the criteria for using T&M and LH contracts for commercial items should be the same conditions as contemplated by the Government at FAR 16.601 for the reasons discussed in Question 2d. We do not believe that a different set of criteria for qualifying for T&M and LH contracts should be applied to commercial services or to set aside certain types of commercial services. Instead, we have recommended using T&M and LH contract types where conditions warrant and under the circumstances already prescribed in regulation.

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f. What steps should a contracting officer be required to take to establish that a fixed-price contract is not suitable?

As with other D&F requirements, the contracting officer should be able to undertake sufficient market research to ascertain whether the specific acquisition is suitable for a fixed-price contract and/or for use of T&M techniques. No additional requirements or special burdens are required to implement the law and should not be imposed in the implementing regulations. Federal agencies should seriously consider the option of limiting market research to a determination of whether the desired services are commercial, and (assuming they are commercial services) the solicitation of both FFP and T&M offers. If sufficient FFP offers are received from responsible sources, then the issues related to T&M contracts can be avoided.

3. Terms and conditions.

a. What type of surveillance is conducted under T&M and LH commercial contracts (e.g., quality control and inspections)?

b. What responsibility should the contractor bear for correction of non-conforming services under T&M and LH commercial contracts (e.g., who should bear the cost of correction or re-performance)? Does the burden of responsibility depend on whether the Government has accepted the service?

c. What oversight is used to ensure work is being properly charged under T&M and LH contracts (e.g., what type of information is required to substantiate payment requests)?

T&M or LH contracts require the same administrative oversight as a cost reimbursement contract. As with cost reimbursement contracts, the Government cannot rely on after-the-fact audits to ensure efficient contract performance. However, as with cost reimbursement contracts, incentives should be considered to minimize costs/hours, and meet or exceed performance objectives and scheduled milestones to help assure the contractor's incentives align with the Government's objectives.

The commercial marketplace has the same concerns with T&M and LH contracts as expressed by the Government. For that reason, the customary commercial practice is to closely monitor the contractor's performance against expectations. This involves making sure that the contractor has frequently billed for services rendered on a timely basis, and has provided an adequate description of the status of such services. In this way, the buyer can assess project or task progress against billings and take rapid remedial or corrective action as circumstances require. This is the most important part of the oversight process.

With regard to work being properly charged, in the commercial marketplace the contractor is responsible for providing sufficient information to support billings for hours charged, materials used, and subcontracts performed. The information necessary varies according to the size and scope of the project or task, as customary commercial practice dictates. For example, hours charged are typically supported with time sheets or other form of recording time, although in some cases the hours charged are based on a pre-established engineering estimate for the task (e.g., book of standards). Materials used are commonly supported by invoices or expense reimbursement receipts (e.g., travel, lodging, other direct costs). To the extent that information provided is not sufficient, the customer requests additional information or explanation. If still not sufficient, the matter becomes a billing dispute and is resolved in the ordinary course of business, which might include terminating the effort. A firm's past performance is also affected.

It is a customary commercial practice for the seller to grant limited access to records and limited audit rights. Such access is almost always limited to available documentation, and does not extend to financial

accounting or cost accounting records or other proprietary information. This customary commercial practice is reflected in FAR 52.215-20/21; the Government is granted rights to examine books, records, documents, or other directly pertinent records to verify any request for determining the reasonableness of price, although such access does not extend to cost or profit information. Industry accepts that limited access to records and audit rights would be appropriate on Government T&M and LH contracts. However, the record retention requirements related to such limited access to records and audit rights need to be consistent with customary commercial practice.

d. *Is consent to subcontract required for subcontracts not identified in the original proposal?*

The FAR generally requires approval of subcontracts under cost reimbursement and T&M contracts now (FAR 52.244-2; subpart 44.2). However, these requirements do not apply to commercial item procurements and the FAR prefers that subcontracts be for commercial items (FAR 44.402). As discussed above, the experience of our member firms does not suggest a need to change these policies based on commercial practices with T&M contracts. In other words, if commercial services are being procured through a T&M contract, we do not believe the consent to subcontract requirement applies.

e. *How are material handling or subcontract administration rates charged under T&M commercial contracts? If material handling or subcontract administration rates are reimbursed based on actual rates, how can this be done without application of FAR Subpart 31.2?*

T&M contracts should be available to procure services. Materials generally should be only a small part of a T&M contract and be interrelated to the services being provided. If the materials needed are known at the time of the solicitation, they should be specified and separately priced for a fixed amount. It is conceivable, that unit prices for some cost would be appropriate. This eliminates all the complications arising from reimbursing material costs and assures the materials are subject to some competition. If such materials pre-dominate the procurement and the difficult to price services are interrelated, it may be that competitors can more readily provide fixed prices for that material.

Furthermore, charging material handling and subcontract administration fees will vary according to customary commercial practice. In most cases where such fees are charged, the contractor supports the fees using commercial pricing techniques, such as standard price lists, catalog prices, etc. For Government contracting purposes, the contractor could provide information about fees other commercial customers have paid in same or similar circumstances. For example, the fees could be supported with contracts specifying such fees and/or invoices submitted to commercial customers charging such fees. Where commercial pricing techniques can be used, it would not be necessary to apply FAR Subpart 31.2. Basing material handling or subcontract administration fees on actual costs incurred is rare in the commercial marketplace. There should be few instances where it is necessary to develop material handling and subcontract administration fees using a cost build-up approach, as opposed to applying commercial pricing techniques. If it is necessary to use a cost build-up approach, given that the fees would be a relatively minor portion of the T&M or LH contract, the contractor could still provide "information other than cost or pricing data" that would be adequate for these purposes. Ideally, the negotiated fee would be a fixed fee.

The ANPR raises the question of cost-plus-percentage-of-cost (CPPC) type contracting if a predetermined rate were to be applied to actual material costs and/or subcontract costs. CPPC-type contracting is prohibited by law, even if it is a customary commercial practice in some service industries or circumstances. As a result, the proposed payment terms and conditions do not provide for material handling or subcontract administration fees. While we understand the Government's perspective in this area, there may be other options that provide the contractor recovery for resources applied.

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f. What is the impact if Cost Accounting Standards apply to these contracts?

In our view, CAS does not apply to T&M and LH contracts for commercial services awarded under the authority of Section 1432 of SARA. The 1996 Clinger-Cohen Act provided a broad exemption for contracts and subcontracts for the acquisition of commercial items (ref. Section 4205).

Unfortunately, the CAS Board issued a more limited exemption under its own rules - firm fixed-priced and fixed-price with economic price adjustment (provided that price adjustment is not based on actual costs incurred) contracts and subcontracts for the acquisition of commercial items (ref. FAR 9903-301-1(b)(6)). Industry had objected to the CAS Board's action because it more narrowly defined contracts than had been permitted by FASA. This conflict must be remedied in favor of full implementation of the statute.

Setting aside the question of applicability, the Government gains little from the application of CAS in this area. From an accounting standpoint, a T&M and LH contractor is mostly concerned with labor charging and material charging. There is little concern, if any, with cost measurement, assignment, and allocation, which are the principal accounting concerns of CAS. All that should be required is that the contractor has an adequate accounting system for recording hours and material purchases.

g. How often and under what circumstances does the customer provide property on a T&M or LH contract? How is the property managed and controlled?

We suggest that in most instances the contractor supplies materials unless the owner can get it much less expensively or the material is such a small dollar amount that it is expendable. If property is supplied, it would be provided under the owner's standard procedures or some sort of lease or rental agreement even if payments were zero. Commonly, material and property are only a small part of the contract, or the material is supplied on a fixed price basis. For example, parts might be supplied based on a manufacturer's price list or some discount off of it while labor to install the parts was paid on a per hour basis. This also would be somewhat unusual though because the labor to install particular parts can usually be set at a fixed price.

An exception would be where the contract is for outsourced services performed at the owner's facility, where the contractor is given the use of owner-owned onsite equipment that does not leave the owner's facility.

COMMENTS ON REGULATORY AMENDMENTS UNDER CONSIDERATION

1. Determination and findings (D&F)

The contracting officer should execute a D&F to use T&M and LH contracts, as is now required at FAR 16.601(c). For indefinite-delivery contracts that contain T&M and LH ordering provisions, it is not unreasonable to require a D&F at the contract level. However, the statute does not require a D&F for each order placed, nor does it require D&F approval one level above the contracting officer as specified in the ANPR. The rule should not impose such a restrictive provision except in exceptional circumstances.

2. Terms and conditions.

Inspection/acceptance.

The draft coverage is a significant departure from the standard inspection and acceptance provision for non-commercial T&M and LH contracts (at FAR 52.246-6(f)) because it requires the contractor to repair

or replace rejected supplies or re-perform rejected services at no cost to the Government. While we can appreciate the difficulty of reconciling acceptance criterion with the "best efforts" nature of a T&M contract, particularly with a ceiling price, we strongly recommend that the regulatory coverage require the agency to specifically address the results required or outcomes to be achieved and that the contractor be able to be compensated for any required re-performance, up to the established (or revised) ceiling amount. Our approach is also more consistent with customary commercial practices.

Payment

Industry agrees that a separate payments clause for commercial services should be developed. While the basic structure of the current payment clause at FAR 52.232-7 can be maintained, it will be important to make adjustments for differences in customary commercial practices. The access to records and audit rights provision being considered is too broad. A contractor's commercial customers are typically not given access to employees and their timecards (or be subjected to floor checks). Instead, the contractor accepts that the commercial customer needs to be provided information to support billings for hours charged and materials used. This is usually worked out between the parties.

Another issue that needs to be addressed is subcontracts. In recent years there has been a considerable amount of confusion about how subcontracts should be treated under a T&M contract. That is, do subcontracts fall under the "T" or "M" payment provisions? Adding to the confusion was the recent audit guidance issued by the Defense Contract Audit Agency (ref. "DCAA Audit Guidance on Review of Orders under GSA Schedule Contracts," April 9, 2004). The audit guidance is based on faulty premises and potentially undermines the bargain reached between the contracting officer and contractor. In our view, subcontractors should be treated under the "T" payment provisions for work performed under labor categories specified in the T&M or LH contract.

Termination for convenience.

3. Application of Cost Accounting Standards (CAS).

As already stated, in light of Section 1432 of SARA further modifying Section 8002(d), the CAS should not apply to T&M and LH contracts for commercial services. In our view, CAS is inapplicable to T&M contracts for commercial items.

PROPOSED FAR CHANGES

FAR 12.207 Contract Type.

FAR 12.207(a) is too restrictive and does not provide the flexibility needed to acquire commercial items.

We generally agree with the new provisions at FAR 12.207(b) and (c), except that they are too complicated and need to be simplified. Moreover, refinements to the commercial item definition, as it applies to services, are being considered under another project. That definition needs to be changed to eliminate the bifurcation of services at paragraphs (5) and (6), as well as other changes.

FAR 52.212-4 Alt I (i)(1) and FAR 52.212-4 Alt I (i)(A) – payments on services accepted and hour rate. An important element of internal control is to obtain contractor invoices as frequently as necessary. In this way, the contracting officer is made aware of the Government's obligations and is in a position to make an assessment of progress. We would recommend that invoices be required not less frequently than monthly.

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FAR 52.212-4 Alt I (i)(1)(iv) and FAR 52.212-4 Alt I (i)(1)(v) – Total Cost & Ceiling Price. We generally agree with this provision.

FAR 52.212-4 Alt I (i)(3) – Overpayments/underpayments. We generally agree with this provision

FAR 52.212-4 Alt I (i)(5) – Refunds, Rebates, and Credits. We do not agree with this provision. In essence, the Government is applying the FAR Subpart 31.2 contract cost principles in an area where it should not be applicable. The provision requires creation of contract specific cost accounting practices that may not exist.

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November 23, 2004
CODSIA Case No. 08-04

General Services Administration
Regulatory Secretariat (VR)
1800 F Street, N.W.
Room 4035
Washington, D.C. 20405

ATTN: Ms. Laurie Duarte

RE: ANPR, FAR case 2003-027, Additional Commercial Contract Types

Dear Ms. Duarte:

The undersigned members of the Council on Defense and Space Industry Associations (CODSIA) appreciates the opportunity to submit comments on the advance notice of proposed rulemaking published in the Federal Register (69 F.R. 56316-56322) on September 20, 2004.

Formed in 1964 by the industry associations with common interests in the defense and space fields, CODSIA currently is composed of six associations representing over 4,000 member firms across the nation. Participation in CODSIA projects is strictly voluntary. A decision by any member association to abstain from participating in a particular activity is not necessarily an indication of dissent.

CODSIA member associations have long supported broadening the available contract types Federal agencies may use in acquiring commercial items to include standard commercial-type contract vehicles.

Broadening commercial type contracts was supported by the Senate Armed Services Committee in its report accompanying the Senate version of the FY01 National Defense Authorization Act. The Committee recommended that the Department of Defense (DOD) utilize the flexibility provided by the 1994 Federal Acquisition Streamlining Act (FASA) to allow the use of other than firm-fixed price contracts for the acquisition of commercial services when this is the customary practice in sales to the general public.

Since no independent action was taken on this direction by the Federal agencies, Congress statutorily enacted this recommendation with the passage of the 2003 Services Acquisition Reform Act (P.L. 108-136). Section 1432 of that act specifically authorizes the use of time and materials and labor hour (T&M/LH) contracts to acquire services as commercial items in enumerated circumstances.

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CODSIA member associations applaud the FAR Council on its issuance of the Notice. However, we note that the Notice contains preliminary discussions about a proposed rule to implement Section 1432 that are problematic and need to be revised during the rulemaking process. CODSIA member associations support the Council in its determination to avoid applying the cost principles and broad audit rights in the contemplated clauses. However, there are parts in the proposed Federal Register changes, such as the requirement to obtain contracting officer consent to subcontract, which appear to be overreaching, while other aspects do not go far enough in permitting the use of T&M/LH contracts. Finally, we believe the CAS Board needs to re-examine the exception for commercial items from the application of the CAS. In this regard, Congress has made it clear that all contracts for commercial items, not just firm-fixed price or fixed price with economic price adjustment contracts, are exempt from all CAS requirements.

In general, we would note that in the commercial marketplace, services are regularly acquired on a fixed rate per hour or day because the method is flexible and predictable. The commercial customer knows in advance the fixed rate per day or hour basis but may not, in many instances, be able to precisely determine how long the services will be required. For example, Otis Elevator contracts with thousands of building managers to maintain and repair, as necessary, building elevators. Since there is no way to determine, prior to trouble-shooting, exactly what the problem is and what parts will be required to repair the elevator and get it back into running order, a traditional fixed-price contract is not appropriate. Commercial contracts generally provide for repair parts at fixed prices but do not limit the number or type of parts for individual repairs. Similarly, flight simulator training time is typically sold at a fixed rate per hour. Since each student has different experience and learning capabilities, their needs for flight simulator time vary significantly. Flight simulator time and instructors for the simulator are sold at a fixed rate per hour so that the customer pays *only* for the use necessary to train to the desired proficiency. Pilot services are similarly sold on an hourly or daily rate.

Time and Material (T&M) contracting allows for a rapid response and is administratively simple for both the buyer and the seller. T&M contracts are particularly useful when the scope of work cannot be definitively established so as to permit a firm-fixed price proposal. The customer will pay only for the effort required and both parties know that the services can be terminated or extended at the customer's discretion. *Each of these options is seen as a positive cost control measure.* The competitive forces of the commercial marketplace demand that quality services are provided in an efficient manner so that unnecessary days/hours are not spent.

In the attached document, we have outlined some specific concerns related to the FAR changes under consideration, along with issues related to cost accounting standards.

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We appreciate the opportunity to comment on this Advance Notice. If you have any questions, please contact Alan Chvotkin of the Professional Services Council (703-875-8059) or Cathy Garman of the Contract Services Association of America (703-243-2020).

Sincerely,

Chris Jahn
President
Contract Services Association

Alan Chvotkin
Senior Vice President & Counsel
Professional Services Council

Dan Heinmeier
President
GEIA Division
Electronic Industries Alliance

Peter Steffes
Vice President, Government Policy
National Defense Industrial Association

Cynthia Brown
President
American Shipbuilding Association

ATTACHMENT

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ATTACHMENT

Detailed CODSIA Comments on September 20, 2004 Advance Notice of Proposed Rulemaking on Additional Commercial Contract Types

Proposed FAR Changes

FAR 12.207(a) is too restrictive and does not provide the flexibility needed to acquire commercial items. When Congress passed the Federal Acquisition Streamlining Act of 1994 (FASA), P.L. 103-355, it established a preference for the acquisition of commercial items as defined in the Act. At the same time, Congress expressed a preference for the use of firm fixed-price (FFP) contracts and fixed-price contracts with economic price adjustment provisions (FP(EPA)) when acquiring commercial items. Specifically, section 8002(d)(1) of the Act required the FAR to require that such contracts "be used to the maximum extent practicable." Section 8002(d)(2) specifically prohibited the use of cost type contracts to acquire commercial items. Nowhere did FASA prohibit the use of time and materials or labor hour contracts to acquire commercial items. Moreover, no other statute prohibits the use of T&M/LH contracts for the acquisition of commercial items.

Despite the fact that there is no statutory prohibition on the use of T&M/LH contracts to acquire commercial items, the FAR Council took a very restrictive approach to implementing section 8002(d) and prohibited the use of these contract types when acquiring commercial items and only permitted agencies to use FFP and FP(EPA) contracts although Congress had only stated a preference for the use of these contract types.

Because there is no statutory prohibition against the use of T&M/LH contracts to acquire any commercial item, the FAR Council should take this opportunity to revisit this question and amend the FAR to permit the use of T&M.LH contracts to acquire any commercial items. This would expand the opportunities for agencies to acquire commercial items and would further the Congressional preference for the acquisition of commercial items over Government unique items.

FAR 12.207(b)(2)(ii) is incomplete. This provision authorizes the use of T&M/LH contracts to acquire any other category of commercial services that is identified by the Administrator of the Office of Federal Procurement Policy (OFPP). However, nothing in the proposed coverage states where this determination will be posted or communicated to agencies. Further, no guidance is provided on whether agencies may request such a determination, and if they may, how such a request is to be processed.

FAR 12.207(e) is overbroad. As discussed above in regard to FAR 12.207(a), the only type of contract that is statutorily prohibited when acquiring commercial items is a cost type contract. However, this provision prohibits the use of T&M/LH contracts when acquiring commercial items except for services in the circumstances described in proposed FAR 12.207. This provision should be narrowed to only prohibit the use of cost type contracts when acquiring commercial items.

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FAR 12.206 and FAR 52.212-4 Alt I (u) are unnecessary. These provisions address consent to subcontract. We do not believe Government consent to subcontract, or the requirement for the contractor to establish and maintain a Government- approved purchasing system, are appropriate concepts to be applied in acquiring commercial items. Most commercial item acquisitions should be conducted on a competitive basis. As such, competition should drive contractors to award subcontracts on an economical basis. Further, most contractors that provide commercial services have suppliers or vendors with which they do business on a routine basis. Accordingly, the contractor should have a high confidence level in the amounts that are proposed for materials or subcontracted labor. Further, if the proposed language of Alternate I (i)(1)(ii)(C)(2) to FAR 52.212-4 is adopted, additional protections will be afforded the Government. Finally, because the contractor will receive no profit on materials, but will only be compensated for the price it pays for material, an adequate cost control incentive exists to protect the Government in regard to subcontracts.

FAR 52.212-4 Alt I (i)(1)(ii) needs to be amended to permit contractors to recover some of their indirect costs of providing material. As proposed, contractors can only recover the direct cost of providing material to the Government. Apparently, this is being done to eliminate the need to apply the cost principles to commercial contracts through the contractor's billing rates and final indirect cost rates. However, the proposed language prevents contractors from receiving any indirect costs relating to material. We think this is unfair. Instead of using a percentage markup, which raises cost plus percentage of cost contracting concerns, we suggest that the contractor be permitted to charge the Government a fixed fee for providing material that will compensate the contractor for its indirect costs that are allocable to the contract because of the material costs incurred.

FAR 52.212-4 Alt I (i)(1)(iii) perpetuates the confusion in the current version of FAR 52.232-7. The subcontract provisions in the current version of the Payments under Time-and-Materials and Labor-Hour Contracts clause, at FAR 52.232-7, are very confusing concerning what the contractor will be reimbursed for, particularly for labor. The proposed language incorporates much of the language from FAR 52.232-7. In doing so, the proposed language perpetuates the confusion that currently exists in the current clause. Moreover, the subcontract cost provision substantially duplicates the coverage already provided regarding material costs. Thus, to that extent, it is redundant and unnecessary. The practical effect of this duplication of language is that the subcontract costs provision only covers subcontracted labor.

The proposed language states that the Government will reimburse the contractor for the actual costs of subcontract costs. However, it is common for a contractor not to have all the labor categories identified in a T&M/LH contract. Therefore, the contractor must subcontract for those labor categories. This raises the question of what the contractor is permitted to bill the Government and what the Government is required to pay the contractor. If the hourly rate provision in the contract applies, the Government would be obligated to pay the contractor the specified hourly rate for the subcontracted labor categories, regardless of what the contractor actually pays the subcontractor. On the other hand, if the subcontract cost provision applies, the Government is only obligated to reimburse the contractor for the amount the prime actually pays the subcontractor for the subcontract labor. In this situation, the prime would not be entitled to any markup, such as profit and G&A, on the subcontract labor costs. When the subcontractor

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employees are performing as if they were prime contractor personnel, which is frequently the case, the Government should pay the prime contractor's hourly rate that was negotiated and accepted – and is therefore reasonable. It is no different then when the Government pays the prime contractor GSA Schedule rates for subcontract labor hours. As indicated in the DCAA's Memorandum for Regional Directors dated April 9, 2004 (04-PAC-022(R)), there is a conflict between GSA guidance regarding FSS labor rates and FAR 52.232-7(b)(4)(ii). This issue regarding subcontract labor needs to be resolved and clear guidance must be provided on how to treat subcontract labor costs under T&M/LH contracts regardless of whether they are for commercial items or non-commercial items.

FAR 52.212-4 Alt I (i)(2)(i)(D) exceeds any audit rights the Government has under any existing contract clause or statute. The Government's contract audit rights are contained in various statutory and regulatory provisions. All of those audit rights are limited to the Government having access to books and records of the contractor. None of the statutes or FAR provisions authorize the Government to have access to contractor employees and demand that the employees provide information to the auditor. Significantly, DCAA's subpoena power, found in 10 U.S.C. §2313 is limited to books and records of the contractor. DCAA does not have authority to issue subpoenas for access to individuals. To extend the Government's audit rights to include access to individual employees is completely unwarranted in these circumstances and contrary to the concepts of acquisition streamlining and Congress' intent to eliminate barriers to the acquisition of commercial items.

Needed CAS Changes

In addition to making several substantive changes to the law in regard to acquiring commercial items, FASA also included provisions addressing the applicability of the CAS to commercial items. In this regard, P.L. 103-355, section 8301(d) stated that the CAS do not apply to "contracts or subcontracts where the price negotiated is based on established catalog or market prices of commercial items sold in substantial quantities to the general public." That provision also made the CAS inapplicable to "any other firm fixed-price contract or subcontract (without cost incentives) for commercial items."

Two years after it had enacted FASA, Congress passed the Federal Acquisition Reform Act of 1996 (FARA), P.L. 104-106. Section 4205 of FARA ("Inapplicability of Cost Accounting Standards to contracts and subcontracts for commercial items") clearly and unambiguously stated that the CAS do not apply to "contracts or subcontracts for the acquisition of commercial items." Thus, FARA broadened the category of contracts for commercial items that are not subject to the CAS by exempting all contracts for commercial items from CAS coverage.

Ostensibly, the CAS Board implemented the FASA and FARA provisions in 48 CFR 9903.201-1(b)(6). That rule exempts "firm fixed-priced and fixed-price with economic price adjustment (provided that price adjustment is not based on actual costs incurred) contracts and subcontracts for the acquisition of commercial items" from all CAS requirements. Based upon the language of this exemption, it is clear that the CAS Board did not fully implement FARA, which exempted all contracts for commercial items from CAS requirements. Instead, the CAS Board conformed its regulations to the FAR Council's restrictive implementation of section 8002(d) of FASA.

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As pointed out above, despite the ability to use any contract type, other than cost type contracts, for the acquisition of commercial items, FAR 12.207 only permits the use of FFP and FP(EPA) contracts for this purpose. Accordingly, not only does the CAS Board need to amend its regulations to bring them in line with the applicable statutory provisions, but the FAR Council needs to broaden FAR 12.207 to take advantage of the flexibilities provided in section 8002(d) of FASA and to expand the opportunities to obtain a broader spectrum of commercial items.

2003-027-21

GFP Enterprises, Inc.

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October 14, 2004

Written Comment Submittal

Subject: ANPR, FAR case 2003-027, Federal Acquisition Regulation; **Additional Commercial Contract Types**

Dear Sir, or Madam:

I am respectfully submitting the following comments in support of the proposed changes to the FAR to expressly authorize the use of T&M and LH contract for the procurement of commercial services as this would positively affect the emergency response industry, particularly with contracts with USDA - Forest Service, and FEMA for the rapid response to matters of natural or manmade events, and disasters such as wild land fire, hurricane recovery, flood, and disease relief such as have been prevalent in the United States these past several years.

Our company is a federal contractor providing such services on the National Interagency Fire Center's National firefighter contracts. In just the past three years has been deployed on over forty wildland fires, the NASA Space Shuttle Recovery mission in Texas, and is now supporting FEMA in Florida, and Alabama in the effort to help that area recover from the recent hurricanes. I myself am a retired federal contacting officer of 15 years service, retired as a GS 1102/13. These types of contacts are or have been formally negotiated per Part 15, but sometimes due to zero response times, and other exigencies demand sometimes creative contracting methods. I myself have used the LH contract to procure services for wildland fire engine services for national support of agency requirements. The following observations may be of help when

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forming contracts for these services that may facilitate greater flexibility for the CO when these types of requirements are demanded.

1. Per A: Background. "[3] The contracting officer must execute a determination and findings [D&F] that no other contract type is suitable;."

Language requiring the CO to determine if no other type of contact type is "suitable" leaves much room for interpretation. Request that suitability be defined. To one CO suitability may be a function of whether or not any other type could be used preferring to use any other type; to another suitability may be whether or not it could be used, preferring the use of CI contracts. The FAR at 12.000 Scope of part, clearly states that: "...It implements that Federal Government's *preference* for the acquisition of commercial items ....etc." The terms "suitability" therefore should be understood in light of the permissive, i.e. the latter, "whether or not any it could be used." Why? Because the Federal Government "prefers" the use of Commercial Items contracts! If it CAN be used, it SHOULD be used.

It's been my experience that by nature a federal CO is more apt to think in terms of what can't be done, rather than in terms of what is permissible, or preferred. This attitude is clearly reflected in the current language in the FAR requiring the CO to justify using the preferred method! This is known as circular logic, always ending in a negative conclusion. The problem is that as a group we federal CO's (and retired one's too) don't really understand why the federal government has that preference, and may be afraid to explore, as it were, leaning towards the familiar ground of what is safe. It may therefore be more easily entreated to change the word suitable to a phrase more like this one:

"... a determination and findings [D&F] that the use of commercial items is not suitable if it is not used"

...if indeed the intent of SARA is what it says it is, "preferred".

And:

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2. "...and [4] The contracting officer must include a ceiling price that the contractor exceeds at its own risk and that may change only upon a determination documented in the contact file that the change is in the best interest of the procuring agency."

In emergency response it is impractical to give out ceilings, or not to exceed prices as the extent of the labor needed to contain a fire is largely unknown. Request therefore an exception in having to give a ceiling price in matters of natural or man made events or disasters. The agency's watch very closely when those fiscal limits are close.

Thank You

/s/ *John M. Venaglia*

John Venaglia
Major USAR (ret)

2003-027-22

Preston|Gates|Ellis & Rouvelas|Meeds LLP

William A. Shook
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202-662-8456

November 19, 2004

VIA E-MAIL

General Services Administration
Regulatory Secretariat (VR)
1800 F Street, NW
Room 4035
Washington, DC 20405

Dear Sir/Madam:

Pursuant to the Advance Notice of Proposed Rulemaking published in the Federal Register on September 20, 2004, FAR Case 2003-027, Additional Commercial Contract Types, we respectfully submit the following comments:

Overall Comments

In enacting the Federal Acquisition Streamlining Act of 1994 ("FASA"), a principal purpose of Congress was to make it more efficient for the government to purchase commercial products and services by eliminating many of the non-commercial burdensome requirements that had been added to the federal procurement system over the past thirty years. A principal co-sponsor of FASA, then-Subcommittee Chairman Senator Jeff Bingham said it best when he stated: "...[I]n this bill we strip away statutory impediments...to efficient acquisition which cost Government and business precious dollars. It has been said by me and by others that *we are spending millions to save thousands*. This bill [FASA] tries to correct that problem." Congressional Record, June 7, 1994, S.6514. It is also clear that the Services Acquisition Reform Act ("SARA") had as its principal purpose the accomplishment of the same goal rather than its abandonment.

The reforms instituted by FASA and continued by SARA are based on the statutory principal that for contracts for commercial products and services, the "list of contract clauses to be included in contracts for the acquisition of commercial end items....shall, to the maximum extent practicable, include only those contract clauses -- (A) that are required to implement provisions of law or executive orders applicable to acquisitions of commercial items or commercial components, as the case may be; or (B) that are determined to be consistent with

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standard commercial practice." Sec. 8002, Pub. L. 103-355.

Unfortunately, the proposed regulations implementing SARA are not in compliance with this requirement. We urge the FAR council to focus its efforts on following this statutory mandate rather than seeking to weaken it. We note that the proposed regulatory language implementing the statutory requirements with regard to when a time and materials contract can be used are generally consistent with the statutory requirements. However, the inclusion of additional clauses and requirements go far beyond what the commercial marketplace provides and needs in order to cost-efficiently provide commercial services. The government, except where there are specific statutory requirements, implements specific federal policy goals, and should make every effort to acquire commercial services under the same terms and conditions as those services that are sold in the commercial marketplace–as mandated by statute.

Specific Concerns

Proposed 12.207(d)

The use of award fees and performance or delivery incentives fees should be included in contracts for commercial services only when the use of such fees are also consistent with commercial practices and commercial contracts.

Proposed 12.216

Requiring consent to subcontract for time and material contracts is entirely inconsistent with general commercial practices in most industry categories. Such an imposition, particularly where the choice is to either create and maintain an approved purchasing system or delay performance waiting for government approval only serves to increase overall costs without any clear benefits that exceed such costs. Because the use of time and material contracts is limited to contracts awarded through competition, prices can be determined to be fair and reasonable at time of award. Any further "oversight" by the government of subcontracts cannot be justified consistent with FASA's statutory mandate and cannot be justified in terms of costs and benefits.

Proposed 12.403

While many time and material contracts in the commercial marketplace have an early termination provision, there are very few if any, that provided for an immediate termination such as is contemplated in government contracts. As a result, there can be additional costs associated with an immediate termination that should be compensated that would not be if the government were allowed to simply pay for the number of hours worked. Therefore, where an immediate

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termination for convenience is imposed, the government should continue to compensate the contractor for costs associated with that termination as provided for in 12.403(d)(ii). Only when the termination clause mirrors those in the commercial marketplace, generally 30 to 90 days notice, should there be a cap on compensation.

Proposed 52.212-4

Seeking consideration for acceptance of nonconforming supplies or services is a right of the government under common law. There is no need to include such a provision in the clause and it only serves to create confusion about what rights the government might have because it is only a partial listing of those common law rights.

52.212-4(i)(1)(i)

There should never be a circumstance, unless agreed to specifically in the contract, whereby the government does not pay for work performed. As a result, rather than making the default that payment for partial hours is dependent on specific contract language allowing for such payment, the standard should be payment for time worked unless the contract provides otherwise.

52.212-4(i)(1)(i)(B)

The substantiation of invoices should be based on commercial practices rather than relying upon a time card system, as presumably identified in the Defense Contract Audit Agency manual, that is based on cost-reimbursable, non-commercial item contracts. Individual timekeeping is, of course, subject to abuse. However, it is no more subject to abuse in the government marketplace than in the commercial marketplace. Therefore validation of invoices should be consistent with statutory requirements, consistent with commercial terms and not simply a recreation of a government system.

52.212-4(i)(1)(i)(C)

Whenever regulations require contracting officer approval of an action, such as the ability to pay overtime rates, the government must be confident that such action will not delay the project and actually end up costing the government more than is potentially saved by contracting officer "approval." Commercial standards should be utilized for overtime payments.

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52.212-4(i)(1)(ii)(A)

This provision simply moves commercial item contracting to the world of cost reimbursable contracting without any effort to examine commercial practices. Furthermore, not only does this provision arbitrarily establish the method of pricing materials, it goes further and requires an accounting of "rebates, refunds or discounts" that are "received or accrued to the contractor." In the commercial world, it is likely that material being used on a government contract is similar to material being used for commercial customer and should be priced accordingly or through the original competition. To create a system that would require a commercial services provider to track all "rebates, refunds or discounts" for material and calculate the portion attributable to government work is unjustified and an effort to "spend millions to save thousands." There will be no end to the disputes that will arise about whether the government received enough of the savings thereby costing both the government and commercial services contractors significant expense for audits, disputes, and legal fees—all to track a system that is generally irrelevant to the commercial marketplace.

This provision also provides for audit of material costs that are not consistent with commercial practices. While it may be that government auditors will not approve a claim on a cost reimbursable contract for material without evidence of the price and payment, on a competitive contract, the cost of the material has already been determined or can be determined through price analysis rather than imposing further burdens on the commercial services contractor.

52.212-4(i)(1)(ii)(C)(1)

This provision introduces the requirement of "most advantageous prices" with the only other factors to be considered being prompt delivery and satisfactory materials. This again is inconsistent with commercial practices and is not even consistent with the governments own requirement for "best value." There are numerous examples of where contractors rely upon a source of materials for a variety of sound business reasons but that may not be at the lowest price which is how government auditors will no doubt interpret the term "most advantageous" price. Again, to the extent prices for material are set by the initial competition, no further government action should be taken. To the extent the government is concerned about product pricing, the government should take the responsibility of acquiring needed materials and furnishing it to the contractor as government furnished equipment. In that manner, the government, and not the contractor, will incur the unnecessary costs and risks associated with the proposed standards of "most advantageous prices."

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52.212-4(i)(1)(ii)(C)(2)

As stated above, the cost of tracking "discounts" attributable to material which may be ordered by a commercial contractor for its business and used for commercial and government customers is not justified and not consistent with commercial practices.

52.212-4(i)(1)(iii)

Subcontract costs, consistent with commercial practices, should be the responsibility of the prime contractor on a competitive contract with no government involvement.

52.212-4(i)(1)(iv)

This provision seeks to make the commercial services provider responsible for government management of the contract and requires systems and reports that are inconsistent with commercial practices. It is nothing more than a shift of responsibility and costs without justification. The risk to commercial service contractors is, of course, that the breach of this provision can result in non-payment for services rendered.

52.212-4(i)(v)

This provision would appear to violate the Anti-Deficiency Act by allowing contractors to be paid after the fact for services provided, but prior to the obligation of money. It will only encourage contractors to perform such services on the government's "promise" that the ceiling will be extended with no firm commitment thereby creating additional disputes and controversies. Existing law is quite clear that once a ceiling has been reached, contractors proceed at their own risk. The government should accept this fact and increase the ceiling on a timely basis if that is in its interest.

52.212-4(i)(2)

This provision goes way beyond any provision in the commercial marketplace regarding audit or costs. Pursuant to this provision, a commercial item contractor would have to not only keep time cards pursuant to government procedures that may not match commercial practices, but give government auditors free range with disrupting employees and subcontractor relationships. The SARA provision in no way authorizes such an extension of government rights.

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52.212-4(i)(3)

This provision provides the government with the unilateral right to dispute a payment and to withhold money—in a manner inconsistent with commercial practices. Any such disputes by the government should, of course, be subject to the Contract Disputes Act procedures.

52.212-4(i)(5)

This provision, without any basis in the commercial marketplace, creates a brand new requirement for assigning claims to the government for "refunds" etc. that, as stated above, will simply result in disputes about what is covered. This provision should simply be eliminated and the price for the contract should be determined to be fair and reasonable at time of contract award as provided for in the regulations.

52.212-4(l)

This provision has the same problems as identified above with regard to terminations for convenience.

52.212-4(u)

This provision has the same problems with regard to subcontract awards as identified above.

Respectfully submitted,

William A. Shook

2003-027-23

November 19, 2004

General Services Administration
Regulatory Secretariat (VR)
1800 F Street, NW, Room 4035
ATTN: Laurie Duarte
Washington, D.C. 20405

Via email: ANPR.2003-027@gsa.gov
Hard copy to follow

Subject: ANPR, FAR Case 2003-027

Dear Ms. Duarte:

The Project On Government Oversight ("POGO") provides the following public comment to ANPR, FAR Case 2003-027 "Federal Acquisition Regulation; Additional Commercial Contract Types." POGO investigates, exposes, and seeks to remedy systemic abuses of power, mismanagement, and subservience by the federal government to powerful special interests. POGO is not opposed to time and material ("T&M") and labor hour ("LH") contracts per se, but we oppose the proposed rule because it does not make them subject to full oversight and audit provisions.

The proposed rule will implement section 1432 of the National Defense Authorization Act for Fiscal Year 2004 (Public Law 108-136) in the Federal Acquisition Regulation ("FAR"). Section 1432 amends section 8002(d) of the Federal Acquisition Streamlining Act (FASA) to expressly authorize the use of T&M/LH contracts for the procurement of commercial services that are commonly sold to the general public and are purchased on a competitive basis. The proposed rule also requires that contracting officer execute a determination and findings ("D&F") that no other contract type is suitable and include a ceiling price that the contractor exceeds at its own risk and that may be changed only upon a written determination that the change is the procuring agency's best interest.

T&M/LH contracts have been used in both the commercial and government markets. The proposed rule, however, has less to do with commercial practices than it does with putting American taxpayer dollars at risk. The proposed rule does not include any of the protections that are in the commercial market.

For example, consideration has been given to using T&M/LH contracts for management services, automobile repairs, building trade work, cleaning services, legal services, and IT

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services. In the commercial market a consumer hires an automobile repair shop to fix his or her car. According to Maryland law, a consumer is entitled to a written estimate for all repairs costing more than $50.[1] Moreover, the consumer cannot be charged more than 10% over the written estimate without consenting.[2] When payment is rendered, the customer is provided with a detailed receipt of the work performed and is entitled to the return of any replacement parts, except when parts are required to be returned to the manufacturer.[3] If subsequent problems exist, the consumer can take the car back into the repair shop for further work. The proposed rule does not provide similar protections to the customer, in this case the taxpayer.

The main difference between the commercial market and the proposed rule is the rule's contractor- friendly threshold governed by FAR 52.212-4, stating that a contractor "agrees to use its **best efforts** to perform the work specified in the Schedule and all obligations under this contract within such ceiling price." (Emphasis added) These types of contracts pay for time or money spent, not for milestones reached or work completed. Anyone who has hired a lawyer knows what happens when you pay by the hour – the customer will pay more for less. There is no consumer in the commercial market that would blindly allow a car repair shop to work on his or her car for up to $1,000 without any guarantee that the car will be fixed. It is understood that no homeowner would allow a house painter to walk off the job after completing only 80% of the job.

For T&M/LH contracts to provide commercial benefits and protect taxpayer interests, they must be subject to full oversight and audits. Quality assurance is not sufficient to protect taxpayers. FAR 52.232-7(e) prescribes that "[a]t any time before final payment under this [T&M/LH] contract the Contracting Officer may request audit of the invoices or vouchers and substantiating material." That provision, however, contradicts other provisions for commercial items that are not subject to post- award audits. There appears to be a conflict of laws between 41 U.S.C. § 254d(a)(1) (and its defense equivalent at 10 U.S.C. § 2313(a)) and the FAR provision, which allow post-award audits and the Federal Acquisition Reform Act ("FARA"), which does not expressly allow post-award audits for commercial items.

POGO believes that post-award audits must be included in T&M/LH contracts or that the contracting officer must provide a written justification of why an audit provision was not included. In most instances, audits could be conducted when the contractor notifies the government that the contract cost will exceed 85% of the ceiling.

Additionally, POGO avers that the contract must include refund or price reduction clauses that will allow the government to recoup any overages identified in the audit.

Proponents of the rule argue that the ceiling and competitive basis provisions provided protections from abuse. The ceiling provision, however, is not new – T&M/LH contracts have never been open ended. The competitive basis provision supplies the taxpayer with an illusionary protection because many of these contracts are let from GSA schedules or task orders (which are prone to abuse) under IDIQs. Although both the Schedules and task orders are defines "competitive," in practice they are mostly awarded on a sole source basis.

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POGO is not alone in questioning the use of these high-risk contracts. Federal contract regulations state: "A time-and-materials contract provides no positive profit incentive to the contractor for cost control or labor efficiency. Therefore, appropriate Government surveillance of contractor performance is required to give reasonable assurance that efficient methods and effective cost controls are being used."[4]

Other entities also have questioned the use of T&M/LH contracts. In March 2002 testimony, the White House Office of Federal Procurement Policy Administrator expressed concerns about this provision: "A contractor has no obligation to deliver a finished product; it must only make best efforts...Given the problems inherent in time-and-material and labor-hour contracts... I am hard-pressed to see how their use will produce beneficial results...."[5]

In House Report 108-354 (National Defense Authorization Act for Fiscal Year 2004), it was noted that the Senate did not propose a T&M/LH contract provision. Moreover, the report states that the "Senate recedes with an amendment that would place additional safeguards and limitations on the use of time-and-materials and labor-hour contracts for the procurement of commercial services."[6] It can be assumed that the Senate held concerns with the use of T&M/LH contract types.

The Department of Defense Inspector General was also critical: "Time and material, and labor hour contracts are the highest risk and least preferred contract types... We believe the use of these types of contracts should be discouraged, not expanded."[7] As was the General Services Administration Inspector General: "Our audit experience has indicated certain recurring problems on time-and-materials or labor-hours type contracts. These have included contractors who have not actually expended the number of hours for which they have billed the Government."[8]

Additionally, the American Federation of Government Employees, AFL-CIO National President Bobby Harnage has stated in written testimony before Congress that: "[t]he latest incarnation of the phenomenon of contractors running away from their costs is the rapidly increasing use of [T&M/LH] contracts. These contracts place nearly all risk of cost control on the taxpayers, and substantially reduce cost visibility. T&M/LH contracts are frequently touted by contractors as an alternative to cost-reimbursement contracts. Unfortunately, T&M/LH contracts are prone to even less cost control than cost-type vehicles."[9]

In summary, absent time and material and labor hour contracts being subject to full oversight, POGO opposes their use as a contract type. As many in the government have confirmed, those contracts are high risk and they do not include adequate cost controls. Those issues can be remedied if the proposed rule would include post-award audit provisions and complete oversight.

Sincerely,

/s/

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[1] Md. Code § 14-1002(a)(1) of the Commercial Law Article.

[2] *Id.* at § 14-1002(b).

[3] *Id.* at § 14-1008(a)(2)-(3).

[4] FAR 16.601(b)(1).

[5] Statement of Angela B. Styles, Administrator for Federal Procurement Policy Before the Subcommittee on Technology and Procurement Policy, Committee on Government Reform, March 7, 2002.

[6] H.R. Rep. No. 108-354, at 777 (2003).

[7] Inspector General, Department of Defense, Comments on the Service Acquisition Reform Act (H.R. 3832), March 12, 2002.

[8] Written comments on Draft Services Acquisition Reform Act, Inspector General, U.S. General Services Administration, March 5, 2002.

[9] Written Statement by Bobby L. Harnage, National President American Federation of Government Employees, AFL-CIO before the Senate Armed Services Committee
Subcommittee on Readiness and Management Support, March 19, 2003.