



DEPARTMENT OF THE ARMY
409th CONTRACTING SUPPORT BRIGADE (EUROPE)
UNIT 23203
APO AE 09263

CCEC-EU

September 29, 2011

MEMORANDUM FOR ALL PERSONNEL

SUBJECT: Contracting Policies and Procedures (CPP) 11-002 FAR 16.601: Time-and-Material/Labor-Hour Determination and Findings

1. Purpose. This memorandum provides the policy and guidance for the 409th Contracting Support Brigade (CSB) regarding the requirement for Determination and Findings (D&Fs) for using Time-and-Material (T&M) and Labor-Hour (LH) contracts and CLINs.

2. References.

- a. FAR 16.601, 16.602, and 12.207(d)
- b. DFARS 212-207 and 216.601(d)
- c. Army Contracting Command (ACC) Command Policy Memorandum CPM-11-6 dated 29 July 2011

3. Effective Date. The effective date of this CPP is 1 October 2011.

4. Policy.

- a. Per ACC Policy, Principal Assistant Responsible for Contracting (PARC) approval is required for ALL D&Fs to utilize T&M and/or LH contracts as well as hybrid contracts that include T&M or LH CLINs.
- b. Additionally, PARC approval on the D&F is required for all solicitations, task orders under contracts that have an approved D&F, exercise of options, and modifications to obligate funds under contracts and task orders that previously have an approved D&F.
- c. For any T&M and/or LH contract or any contract with T&M or LH CLINs that exceed three years, the D&F is required to be approved by the Head of Contracting Activity (HCA).
- d. Class D&Fs: It is the 409th CSB's policy to maximize the use of class D&Fs for a particular group of actions where a class D&F is determined appropriate. Examples of situations where class D&Fs might be used are contained in Attachment 1.

e. Process:

- i. 409th CSB Contracting Officers shall use the template at Attachment 2 in creating and submitting D&Fs to the PARC and, if necessary, the HCA for review and approval.
- ii. Legal review is required for any D&F over the legal review threshold (\$100,000 for contingency and \$300,000 for non-contingency). All D&Fs that require HCA approval shall have a legal review.
- iii. All D&Fs shall be submitted to 409th CSB Mission Operations Directorate (MOD) for review and processing.
- iv. After MOD and, when required, legal review, the D&F will be submitted to PARC for approval or concurrence.
- v. When HCA approval is required, MOD will submit the D&F to the HCA for approval following PARC review and concurrence.

f. Tracking: MOD will assign a tracking number to the D&Fs when submitted.

5. If you have any questions regarding this CPP, contact Stephanie Bengner in the PARC Policy and Compliance Team at DSN 484-6312 or at e-mail DL-409CSB-HQ-CMD-PARC.Policy@eur.army.mil.

Attachments:

1. Uses of Class D&Fs
2. Template



DEBRA D. DANIELS
COL, EN
Commanding

**Examples of Appropriate and Inappropriate uses of Class D&F's
and Corresponding Rationale**

1. Examples

Below are examples of when Class D&F's are and are not appropriate. Please note that this is not an all inclusive list. The current performance period is defined as a base year, an option year, -8 option, etc. and not as the entire life of a contract.

<u>Requirements Contracts</u>	<u>Indefinite Delivery/Indefinite Quantity (IDIQ) Contracts</u>	<u>Definitive Contracts ('C' & 'P' Contracts)</u>	<u>Other Contracts</u>
APPROPRIATE: At the contract level for the current performance period to cover all orders and all modification to those orders. ¹	APPROPRIATE: At the order level for all within scope modifications for a specific performance period. ³ APPROPRIATE: At the contract level for a specific performance period, for contracts with T&M items that are: (1) incidental and integrally related to the principally FFP effort or (2) limited to travel and/or reimbursable materials.* ⁴	APPROPRIATE: For all within scope modifications for a specific performance period. ³ APPROPRIATE: For a specific performance period, for those efforts that have incidental and integrally related T&M elements to a principally FFP effort, travel, or minimal value of materials. ⁴	APPROPRIATE: For those efforts where the FAR or other regulatory guidance directs the use of T&M efforts (e.g. stevedoring services per DFARS 247.270-3(b)). ⁶
INAPPROPRIATE: When there is a change to increase the scope of the basic contract. ²	INAPPROPRIATE: At the contract level for those IDIQs that allow discretion when selecting task/delivery order type. ⁵	INAPPROPRIATE: When there is a change to increase the scope of the basic contract. ²	

** When exercising an option for these efforts, special attention should be taken when explaining the re-evaluation of the T&M elements and why they should/must continue to be T&M.*

NOTE FOR ALL: Normally the performance period covered by the D&F will correspond with the base or option period of the contract or order.

2. Rationale

¹ Appropriate: This is the only authorized source for a particular item and the basis for the T&M element(s) will remain the same for the entire performance period of the contract.

² Inappropriate: When there is a change to increase the scope of the contract a new D&F is required, as the basis for the T&M may have changed and a re-evaluation of the T&M elements must be completed and justified.

³ Appropriate: It is not expected that any in-scope modifications made to an order during a specific performance period will affect the basis for the T&M element(s). At each performance period (e.g. option year) the T&M

elements must be re-evaluated to ensure that circumstances have not changed to reasonably allow T&M elements to be converted.

⁴ Appropriate: When the predominance of the effort is FFP and T&M elements are incidental and integrally related, travel, or materials, the government's risk can reasonably be managed through contract administration activities and, by their sheer nature, it is not possible to estimate them to any degree of certainty. The ability to complete a Class D&F in these circumstances is not absolute and must be adequately justified to make the case.

⁵ Inappropriate: When an IDIQ offers the ability to make different types of awards, and when there is no distinct categorization of efforts, a choice can be made to award a specific type of effort one time as FFP and another time as T&M.

⁶ Appropriate: When there is FAR or other regulatory guidance that mandates that use of T&M elements, ensure a reference is made to the regulatory guidance that requires it in the D&F.

**D&F Guide and Template
for the use of T&M or LH contracts
or Hybrid contracts with T&M or LH CLINs
(FAR Part 12 and 16, & DFARS 212.207 and 216.601)**

- Higher level approval is required in the following instances:
 - o Head of Contracting Activity (HCA) approval is required when the effort is for a period > 3 years regardless of whether it is commercial or non-commercial
 - o Head of the Agency (for the Army, the Assistant Secretary of the Army (Acquisition, Logistics and Technology, ASA(ALT)) approval is required when the effort is for commercial services and is not for emergency repair services or does not fall within the definition provided in FAR 2.101(b) paragraph 5 under ‘commercial items’

NOTE1: A D&F shall be re-executed at the beginning of every option period, at a minimum.

NOTE2: Class D&F’s are permissible as long as they have a clear definition of what composes the class (e.g. nature of the requirement, geographic area) and stipulate the bounds of the class (e.g. expiration date). [Normally the Class D&F expiration date will coincide with the end of the performance period of the action.] Examples of appropriate and inappropriate uses of Class D&Fs are included in Appendix 1(it is not an all inclusive list).

NOTE3: This template is provided to ensure compliance with all the regulatory requirements for documenting content. It is the contracting officer’s responsibility to provide sufficient details to support the determination and findings.

NOTE4: The determination required in paragraph 10 of this template is different and distinct from the commerciality determination required in DFARS 212.102(a)(i) for acquisitions greater than \$1M.

REMINDER1: It is incumbent on the contracting office to ensure that the statements made in the completed D&F fully make the argument to support the fact that no other contract type is suitable for the procurement.

REMINDER2: The completed D&F must be included in the contract file. If a Class D&F is approved, a copy of the D&F must be included in all covered actions or a notation in the file must be made for where it can be found (e.g. “The required D&F for a T&M/LH or hybrid effort is included in the base contract file, contract number XYZ.”).

Ensure that any template areas providing sample language or instructions (e.g. italicized and/or red language) are deleted prior to submitting a completed document. Also ensure that this cover sheet is deleted.

Do not modify this template by deleting sections or signature blocks. Any sections that are deemed not applicable should be annotated as such.

Determination and Findings

In accordance with the following Individual or Class Determination and Findings (D&F), FAR 16.601, FAR 16.602, FAR 12.207(b) and DFARS 216.601(d) as applicable, use of a Time-and-Materials (T&M) OR Labor-Hour (LH)) OR Hybrid contract with T&M or LH CLINs is the only suitable acquisition method for **insert a brief description of the requirement .**

Solicitation/Contract/Order Number: **insert the applicable number. If Class D&F, insert the contract number(s) and/or order number(s) as applicable .**

Place of performance: **insert the place of performance**

Period covered by this D&F: **insert the period covered** (if a Class D&F, this D&F expires at the end of the stated period)

Total value of entire effort (base period and all option periods): \$ **insert the total value of the effort**

Total value of this action: \$ **insert the total value of the action**

Total value of this action for the T&M/LH portion: \$ **insert the value of the T&M/LH portion of the action**

This D&F supports an action for a (select all that apply):

- New Contract New Task Order/Delivery Order or BPA Call
- Modification to Obligate Funds to an Existing Contract
- Modification to Obligate Funds to an Existing Task Order/Delivery Order/BPA Call
- Modification to Exercise an Option of a Contract
- Modification to Exercise an Option of a Task Order/Delivery Order/BPA Call

Findings

1. Background:

Provide the background of the acquisition. Identify the organization, what is being procured, and any other relevant information that would help the reviewers and approvers with understanding the nature of the work and the rationale for pursuing a T&M/LH/Hybrid effort. If exercising an option or modifying an existing contract, provide the contract details such as the contract number and contractor name.

2. No other contract type is suitable because:

Explain in detail why the requirements of this acquisition preclude the use of another contract type. Specifically explain why a Fixed-Price or Cost-Reimbursable contract or CLIN type is not suitable for this effort. Provide your strongest arguments and address all other contract types. Expiring funds or the need for expeditious contract award are not acceptable explanations. If you have several arguments, indent them following this paragraph.

3. Market research, in accordance with FAR Part 10, was conducted through the following methods (select as many as applicable): **NOTE: It is not acceptable to state that no market research was performed.**

Dates market research was conducted: **provide the dates or timeframes**

Conducted by: **provide name(s)**

Results: **provide a summary of the findings**

- Contacted knowledgeable individuals in the government and/or industry regarding market capabilities to meet requirement: *state agency name(s)/company name(s) and POCs if available and date contact was made if multiple methods selected* .
 - Held meetings/discussions with other government offices and/or industry: *state agency name(s)/company name(s) and POCs if available/state company name(s) and POCs if available and date contact was made if multiple methods selected*.
 - Reviewed results of recent market research, or other similar contracts recently awarded, for similar or identical requirements: *state contract numbers as applicable, a short description of the requirement, and when the award was made*.
 - Published formal Request(s) for Information (RFI): released by *state name or organization* using *state method* , on *insert date RFI released* closing on *insert date RFI closed*.
 - Queried Government, scientific, and/or business search engines: *state the name of the search engine and date completed if multiple methods selected*.
 - Participated in interactive, on-line communications with industry: *explain scenario and provide date completed if multiple methods selected*.
 - Obtained source lists of similar items from other contracting activities, agencies, trade associations, and/or other sources: *state source(s) and what was received, and the date received if multiple methods selected* .
 - Reviewed catalogs and other generally available product literature published by manufacturers, distributors, dealers, etc.: *state what was reviewed and when if multiple methods selected*.
 - Attended trade shows, Industry Conferences, etc.: *state what was attended and date if multiple methods selected*.
 - Other: *state what type of market research was conducted and when if multiple methods selected*.
4. In this particular situation, it is not possible to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of certainty because:

Insert rationale. Describe in detail the reason(s) you cannot develop an accurate estimate of the duration of the work.

5. The requirement is structured to minimize the use of T&M/LH requirements by:
- Limiting the length of the T&M/LH portions: *provide specifics and the rationale for this approach*.
 - Limiting the value of the T&M/LH portions: *provide specifics and the rationale for this approach*.
 - Establishing Fixed-Price (FP) portions of the requirement: *provide specifics and the rationale for this approach* .
 - Other *state the mechanism used to minimize T&M/LH requirements under this effort and the rationale for the approach*.

6. Use of T&M/LH contracts on future acquisitions for the same requirements will be minimized by:

- This is a one-time buy; no future acquisitions of this type are expected.
- Sufficient information will be obtained to adequately perform this as a FP effort for the follow-on: **state how this will be accomplished.**
- Prior to each option year exercise, the contract type will be re-evaluated to determine if all or parts of the effort can be converted to FP.
- Other: **state other actions you intend to take, be specific and provide as many details as possible.**

7. There will be appropriate Government surveillance of contractor performance conducted by:

- Quality Assurance Evaluator (QAE): **insert name, title and agency of individual**
- Contracting Officer's Representative (COR): **insert name, title and agency of individual**
- Contracting Officer: **insert name, title and agency of individual**
- Other: **insert name, title and agency of individual, and why they are qualified if not evident (e.g. DCMA, GSA, etc.)**

They will use the following methods to ensure efficient methods and effective cost controls are being used:

- Quality Assurance Surveillance Plan (QASP), and it will be used in the following manner: **insert details regarding how the tool will be used and rationale for selecting this tool.**
- Other tool(s) **state what the other tool(s) is and insert details regarding how the tool will be used, and the rationale for using the tool selected .**

8. The ceiling price will be established in the contract schedule based on the customer's best estimate of the number of hours and amount of material, if applicable.

- FOR COMMERCIAL ITEMS. As required by FAR 12.207(b)(1)(ii)(B), the contract will include the FAR Clause 52.212-4, Contract Terms and Conditions-Commercial Items (Alternate I). This clause states, in paragraph (i)(3),

“Ceiling price. The Government will not be obligated to pay the Contractor any amount in excess of the ceiling price in the Schedule, and the Contractor shall not be obligated to continue performance if to do so would exceed the ceiling price set forth in the Schedule, unless and until the Contracting Officer notifies the Contractor in writing that the ceiling price has been increased and specifies in the notice a revised ceiling that shall constitute the ceiling price for performance under this contract.”

- FOR NON-COMMERCIAL ITEMS. As required by FAR 16.601(d)(2), the contract will include a ceiling price and a statement similar to the following:

“The Government will not be obligated to pay the Contractor any amount in excess of the ceiling price in the Schedule, and the Contractor shall not be obligated to continue performance if to do so would exceed the ceiling price set forth in the Schedule, unless and until the Contracting Officer notifies the Contractor in writing that the ceiling price has been increased and specifies in the notice a revised ceiling that shall constitute the ceiling price for performance under this contract.”

9. For indefinite-delivery contracts, when the basic contract authorizes issuing only T&M or LH orders, it is not practicable to issue orders on a cost-reimbursement, incentive, or FP basis because:

Not Applicable

Insert rationale. Describe in detail the reason(s) that it is not practicable to issue orders on an Incentive and FP basis.

10. ***The determination required here is different and distinct from the commerciality determination required in DFARS 212.102(a)(i) for acquisitions greater than \$1M.*** As required by DFARS 212.207(b)(iii), a commerciality determination for T&M, LH, or Hybrid contracts with T&M/LH CLINs is needed. The services covered by this acquisition have been determined to be commercial in nature based upon the following:

Not Applicable (select only when procuring non-service items e.g. commodities, supplies, cost reimbursable travel, or when procuring services that are not commercial)

Services acquired for support of a commercial item, as described in paragraph (5) of the definition of “commercial item” at FAR 2.101 (41 U.S.C. 403(12)(E)).

Emergency repair services.

NOTE: IF THIS OPTION IS SELECTED A SEPARATELY APPROVED D&F SIGNED BY THE HEAD OF THE AGENCY (Assistant Secretary of the Army (Acquisition, Logistics and Technology, ASA (ALT))) MUST ACCOMPANY THIS D&F. The services to be acquired are commercial services as defined in paragraph (6) of the definition of “commercial item” at FAR 2.101 (41 U.S.C. 403(12)(F)).

NOTE: IF THIS OPTION IS SELECTED A SEPARATELY APPROVED D&F SIGNED BY THE HEAD OF THE AGENCY (Assistant Secretary of the Army (Acquisition, Logistics and Technology, ASA (ALT))) MUST ACCOMPANY THIS D&F. The services to be acquired are subject to FAR 15.403-1(c)(3)(ii) and the offeror of the services has submitted sufficient information in accordance with that subsection.

NOTE: IF THIS OPTION IS SELECTED A SEPARATELY APPROVED D&F SIGNED BY THE HEAD OF THE AGENCY (Assistant Secretary of the Army (Acquisition, Logistics and Technology, ASA (ALT))) MUST ACCOMPANY THIS D&F. Such services are commonly sold to the general public through use of T&M or LH contracts or CLINS, and the use of a T&M or LH contract type or CLINS is in the best interest of the Government.

Per FAR 16.601(d)(1)(i), the Contracting Officer shall sign the determination prior to the execution of the base period or any option periods of the contract(s). Use this signature page only if HCA approval is not required.

Determination

Upon the basis of the findings set forth above, I hereby determine that use of a:

Time-and-Materials (T&M) Labor-Hour (LH) Hybrid contract with T&M or LH CLINs

is the only suitable acquisition method.

Signature: _____ Date: _____

Printed Name

Contracting Officer
Name of Contracting Office

Insert printed name of Contracting Officer and obtain signature and date of signature.

REVIEW:

Signature: _____ Date: _____

Printed Name

Legal Counsel
409th CSB

Insert printed name of Legal Counsel and obtain signature and date of signature.

APPROVAL:

Signature: _____ Date: _____

Printed Name

Principal Assistant Responsible
for Contracting

Insert printed name of PARC and obtain signature and date of signature.

Per FAR 16.601(d)(1)(ii), when the base period plus any option periods exceed three years, HCA approval is required. Use this signature page and the following HCA approval page.

Review and Concurrence

I have reviewed the circumstances of this acquisition, as set forth above, and concur that the use of a:

Time-and-Materials (T&M) Labor-Hour (LH) Hybrid contract with T&M or LH CLINs

is the only suitable acquisition method.

Signature: _____ Date: _____

Printed Name

Contracting Officer
Name of Contracting Office

Insert printed name of Contracting Officer and obtain signature and date of signature.

Signature: _____ Date: _____

Printed Name

Legal Counsel
409th CSB

Insert printed name of Legal Counsel and obtain signature and date of signature.

Signature: _____ Date: _____

Printed Name

Principal Assistant Responsible
for Contracting

Insert printed name of PARC and obtain signature and date of signature.

Determination

Upon the basis of the findings set forth above, I hereby determine that use of a:

Time-and-Materials (T&M) Labor-Hour (LH) Hybrid contract with T&M or LH CLINs

is the only suitable acquisition method.

Printed Name
Printed Title
Head of Contracting Activity

DATE: _____