

COUNCIL OF DEFENSE AND SPACE INDUSTRY ASSOCIATIONS

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February 27, 2001

CODSIA Case No. 3-01

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

Subject: FAR Case 2000-013, Contract Types for Commercial Item Acquisitions

Dear Ms. Duarte:

The undersigned members of the Council of Defense and Space Industry Associations (CODSIA) appreciate the opportunity to offer comments on the proposed rule published in the *Federal Register* on December 29, 2000 (Volume 65, Number 251). Formed in 1964 by industry associations with common interests in the defense and space fields, CODSIA is currently composed of eight associations representing 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.

The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) proposed to amend the Federal Acquisition Regulation (FAR) in order to provide clarification on what contract types are authorized for commercial item acquisitions. The Councils' intent is to facilitate greater use of FAR Part 12 for the acquisition of commercial services by providing the contract type flexibility embodied in statute. Specifically, the Councils propose the following:

- Revise FAR Section 12.207 to (1) reflect the Federal Acquisition Streamlining Act's (FASA) "to the maximum extent practicable" caveat; (2) authorize the use of noncost-based incentives, such as award fees and performance or delivery incentives; and (3) add coverage on pricing mechanisms for acquiring commercial services available on a time-and-material (T&M) basis or labor-hour (LH) basis.
- Revise FAR Sections 16.202 and 16.203 to indicate that noncost-based award fee and performance or delivery incentives may be used in conjunction with firm-

fixed-price (FFP) and fixed-price with economic price adjustment (FP/EPA) contracts.

In a related proposed rule, the Councils previously proposed to revise the definition of "commercial item" at FAR Section 2.101 (FAR Case No. 2000-303).¹ CODSIA members provided comments to the Councils on that proposed rule on October 27, 2000.² We were concerned that the proposed phrase "purposes other than governmental purposes are those that are not unique to a government" would be misinterpreted to include foreign, state, and local governments. As the Councils know, governmental purposes have historically only meant U. S. Federal Government purposes. We were also concerned with the addition of a definition of "catalog price" and "market price" to the definition of "commercial item."

CODSIA members are pleased with the Councils' efforts to address the issue of acquiring commercial services under FAR Part 12. This has been a long-standing concern of CODSIA members since the initial implementation of FASA in 1995 under Federal Acquisition Circular 90-32. With particular regard to professional and technical services, we believe the guidance in FAR Part 12 has been a barrier to market entry that can deny the Government access to such services.

The proposed rule states that agencies may use indefinite-delivery contracts under FAR Subpart 16.5 only when the task or delivery orders are issued under one of the authorized contract types (i.e., FFP or FP/EPA). T&M and LH contracts are contained in FAR Subpart 16.6. Thus, it appears that the Councils intended to exclude T&M and LH contracts as authorized contract vehicles for acquiring commercial services.³ The proposed rule further states that commercial services available on a T&M or LH basis may be acquired under FAR Part 12 but only if an indefinite-delivery contract is used that provides for placing FFP or FP/EPA orders with established fixed hourly rates.

We generally agree with the thrust of the proposed changes to FAR Parts 12 and 16. Nonetheless, we believe that more needs to be done in order to address issues of uncertainty experienced by contracting officers and issues of contract flexibility. In our view, if market research indicates that commercial services are available on a T&M basis or LH basis, then it should be an appropriate contract vehicle for the Government to use when acquiring such services from the commercial marketplace. This is consistent with FAR 12.213, which states that these customary commercial practices should be considered for incorporation into the

¹ *Federal Register* (65 Fed. Reg. 52283), August 28, 2000.

² CODSIA letter, CODSIA Case No. 12-97, October 27, 2000.

³ This was confirmed by the Council's representative designated in the *Federal Register*.

solicitation and contract if the contracting officer considers them appropriate in concluding a satisfactory business arrangement and they are not otherwise precluded by law or regulation.

The proposed rule states, "the changes made in this rule are intended to facilitate greater use of FAR Part 12 for commercial services acquisitions by providing the contract type flexibility embodied in statute." Respectfully, we do not believe the statutes are as restrictive as interpreted by the Councils. In our view, the plain meaning of FASA authorizes use of T&M or LH contracts in purchasing commercial services as shown below:

FASA Statute

Commercial item means ... service offered and sold competitively, in substantial quantities, in the commercial marketplace based on established catalog or market prices for specific tasks performed and ***under standard commercial terms and conditions.***⁴ (emphasis added)

FASA's Joint Explanatory Statement of the Committee of Conference

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

The definition would only cover those commercial items that are sold based on established catalog prices for specific tasks performed. ***It would not include services that are sold based on hourly rates without a fixed catalog price for a specific service performed.***⁵ (emphasis added)

Since passage of FASA, CODSIA members have consistently taken the position that neither FASA nor the accompanying conference report expressly prohibited the use of T&M or LH contracts for acquiring commercial services. There is no specific statutory language in FASA, and the conference report addresses only contracts based on hourly rates without a fixed catalog price for a specific service performed. In fact, FASA provides for a broader range of contract types than permitted under the FAR.⁶ The Councils appear to have interpreted the

⁴ Federal Acquisition Streamlining Act (Public Law 103-355), Section 8001(a), as amended by Clinger-Cohen Act (Public Law 104-106), Section 4204.

⁵ Joint Explanatory Statement of the Committee of Conference, page 229.

⁶ FASA required FFP and FP/EPA be used in the acquisition of commercial items to the maximum extent practicable. Only cost-type contracts were prohibited. However, FAR 12.207 authorizes only FFP and FP/EPA contracts or indefinite-delivery contracts with FFP or FP/EPA ordering provisions. A broader range of contract types was prohibited.

conference report to mean that there must be a fixed catalog price for the total service being acquired. CODSIA members continue to favor a more practical and commercially realistic interpretation, which places the emphasis on fixed hourly prices. In the latter case, the number of hours necessary to accomplish the service would not be fixed, except as negotiated between the contracting officer and the contractor.

We understand the Government's concern as expressed in FAR 16.601(b)(1) against such contracts because they allegedly provide no positive profit incentive to the contractor for cost control or labor efficiency. However, in the commercial marketplace the opposite is more the case. T&M and LH contracts for professional and technical services is a widespread commercial practice because of the uncertain nature of the work to be performed and the difficulty in predicting the precise effort required. Consequently, it is standard commercial practice to negotiate either a fixed number of hours, a "not to exceed" number of hours, or an "estimated hours" ceiling subject to further consultations or negotiations. It is the view of the undersigned CODSIA members that it is incorrect to conclude that purchasers of commercial services (whether Government or industry) cannot control costs under T&M or LH contracts.

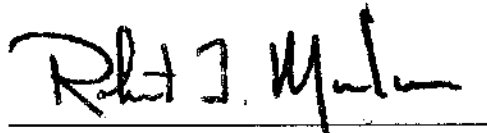
Cost control under T&M or LH contracts is typically accomplished through contract formation guidance encompassing a best value evaluation (i.e., past performance assessments, complete and thorough statement of work, appropriate payment terms, performance incentives), and professional and efficient contract administration (i.e., adequate fiscal controls). From the perspective of CODSIA members, T&M and LH contracts are clearly distinguishable from cost-type contracts because employee compensation, fringe benefits, overhead costs, general and administrative expense, and profit are included in the fixed hourly direct labor rates. By contrast, under cost-type contracts these cost elements are individually reimbursed on a cost incurred basis. Furthermore, the realization of fee is at greater risk under a T&M and LH contract than under a cost-type contract. Another distinction is measure of performance. A contractor's performance under a T&M or LH contract is measured by what was accomplished in the negotiated amount of time. Comparatively, a cost-type contract is "measured" by cost allocation issues, fee negotiations, and reporting requirements.

CODSIA members strongly believe that T&M and LH contracts should be authorized in the acquisition of commercial services, especially professional and technical services. Rather than prohibiting use of T&M and LH contracts, the acquisition leadership from the public and private sectors should explore ways of resolving the Government's concerns. For example, the Councils should consider developing under FAR Part 12 a uniform contract format for the acquisition of professional and technical services, which contains the protections sought by the Government. The Councils might also consider allowing T&M and LH contracts provided that they contain cost control measures (i.e., limited duration, fiscal control safeguards, etc.). Section 821 of the National Defense Authorization Act for FY 2001 has established a "performance-based" concept that could be used in conjunction with T&M and LH contract types to provide necessary assurances to protect the Government's interests.

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We appreciate the opportunity to comment on the proposed rule. If you have any questions, please contact Mr. Jim Serafin (703) 907-7585, or Grant Thorpe (703) 968-2246, joint Project Officers for this CODSIA case.

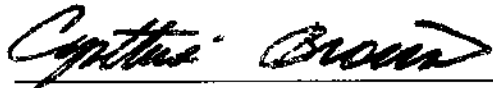
Sincerely,



Robert T. Marlow
Vice President, Government Division
Aerospace Industries Association



Lorraine M. Lavet
Chief Operating Officer
American Electronics Association



Cynthia Brown
President
American Shipbuilding Association



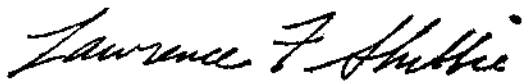
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