Additional Commercial Contract Types and Payments Under T&M/LH Contracts

Public Meeting
October 18, 2005
Agenda

Opening
Welcome
Legislative Authority for Commercial T&M/LH
OFPP Recommendations
Non-Commercial T&M Issues
Compare Commercial and Non-Commercial T&M Requirements

Robin Schulze, DoD
Rob Burton, OMB
Mathew Blum, OMB
Mathew Blum, OMB
Dave Capitano, DoD
Dave Capitano, DoD
Robin Schulze, DoD
Ground Rules

• Purpose is to hear the views of all interested parties
• Meeting is not being held to achieve consensus or to write the rule itself
• Be respectful of other peoples views
• Please speak into microphones so all attendees can hear discussions
Dates

• Flip chart bullets from this meeting will be posted by October 28, 2005 at http://www.acq.osd.mil/dpap/dars/index.htm

• Public comment period for proposed rules closes November 25, 2005
Commercial
T&M & LH Contracts
Legislative Authority

Service Acquisition Reform Act (SARA) expressly authorized the use of time-and-materials (T&M) and labor-hour (LH) contracts for the acquisition of commercial services under specified conditions.
Specified Conditions

• Commercial services procured for support of a commercial item as described in section 4(12)(E) of the OFPP Act -
  – Installation, maintenance, repair, training, and other services if the-
    • Services are procured for support of a commercial item
    • Offeror provides similar services to the public under similar terms and conditions
Specified Conditions

• Any other category of commercial services designated by OFPP on the basis that:
  • Service is commonly sold to the general public using T&M or LH contracts
  • Best interests of the Government to authorize use of T&M or LH contracts
Use of T&M and LH Contracting by General Public

• OFPP (w/Councils’ support) reviewed information on types of services commonly acquired by the general public on a T&M/LH basis & circumstances for use
• Information considered included:
  - Public comments on ANPR
  - Oral comments at public meeting on ANPR
  - GAO survey of private sector practices
Use of T&M and LH Contracting by the General Public

• OFPP made 3 findings:
  1. T&M and LH contracts are commonly used when requirements are not sufficiently well understood & risk can be managed
  2. Commercial services sold on a T&M or LH basis are also generally offered on a FP basis
  3. A few types of services are sold predominantly on a T&M and LH basis (emergency repair services)
OFPP Recommendations on Authorized Use

• Allow agency to purchase any commercial service on a T&M or LH basis if the following conditions are met:

  1. D&F is issued w/ sufficient facts & rationale to justify that a FP arrangement is not suitable

  2. Other conditions of section 8002(d) are met
OFPP Recommendations on Authorized Use

D&F supporting use of T&M and LH contract must:

• Identify market research conducted
• Establish that it is not possible at time of placing or contract or order to accurately estimate extent or duration of work or to anticipate costs with any reasonable degree of certainty
• Establish that requirement has been structured to maximize use of FP contracts (e.g., by limiting value or length of T&M/LH contract or order)
OFPP Recommendations on Authorized Use

• D&F for contract extension or renewal of recurring need must establish why T&M or LH pricing is still required -- e.g., why knowledge gained from prior acquisition could not be used to further refine requirements & acquisition strategy to enable purchase on a FP basis
OFPP Recommendations on Authorized Use

• Contracts with both FP and T&M/LH pricing may be established but D&Fs need to be executed for orders using T&M and LH pricing

• Terms & conditions need to adequately protect the parties’ respective interests based on the risk each party is being asked to bear
Additional Statutory Conditions for Authorized Use

- Must use competitive procedures
- Contract includes ceiling price that the contractor exceeds at its own risk
- “Best interest of the Government” determination for changes in ceiling price
Additional Input Sought on Authorized Use

• Additional comment sought to inform findings and conclusions
  - Include citations, as appropriate, to relevant sources of information to substantiate basis for response
  - We are particularly interested in how prices are established when the general public uses T&M/LH contracts
Non-Commercial
T&M & L/H Contracts
Non-Commercial T&M Contracts Payment Clause

• Problems Identified with Existing Payment Clause
  – Definition of Materials
  – Reimbursement of Subcontract Costs
  – Contractor Furnished Material
  – Profit or Fee on Materials
  – Reimbursement of Interdivisional Transfers
Commercial and Non-Commercial T&M/LH Requirements
Comparison
Appropriate Use

Commercial
• Must use competitive procedures

Non-Commercial
• May be sole source

Proposed 12.207(b)(1)  Different  FAR 6.3
Appropriate Use

Commercial
- Determination and finding (D&F) no other contract type is suitable
- Contract includes ceiling price that contractor exceeds at his own risk

Proposed 12.207(b)(1)

Non-Commercial
- Same as commercial
- Same as commercial

FAR 16.601(c)
Appropriate Use

**Commercial**
- Justification for changes to ceiling price
- Requirement to document market research

*Proposed 12.207(b)(1)*

**Non-Commercial**
- Same as commercial
- Same as commercial

*FAR 16.601(c) and FAR 10.002(e)*
# Appropriate Use

<table>
<thead>
<tr>
<th>Commercial</th>
<th>Non-Commercial</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Requirement to establish appropriate conditions for use exist, i.e., not possible to-</td>
<td>• Same as commercial</td>
</tr>
<tr>
<td>– Accurately estimate the extent or duration of the work</td>
<td></td>
</tr>
<tr>
<td>– Anticipate costs with any reasonable degree of certainty</td>
<td></td>
</tr>
</tbody>
</table>

*Proposed 12.207(b)(2)*  

*FAR 16.602(b)*
Appropriate Use

Commercial
- Requirement to structure contract to maximize the use of fixed price contracts on future acquisitions

Non-Commercial
- Avoid protracted use of T&M contracts after experience provides a basis for firmer pricing

Proposed 12.207(b)(2) Different FAR 16.103(c)

Different wording but both require use of firmer pricing as soon as circumstances permit
IDIQ – D&F Level

Contract provides only for T&M and LH orders-

**Commercial**
- D&F at contract level

**Non-Commercial**
- Same as commercial

Proposed 12.207(c)  
FAR 16.601(c)
IDIQ – D&F Approval Level

Contract provides only for T&M and LH orders-

Commercial
• D&F approved one level above CO

Non-Commercial
• CO approves D&F

Proposed 12.207(c)  Different  FAR 16.601(c)
IDIQ – D&F Level

Contract provides for T&M, LH, FFP, and FFP EPA orders-

**Commercial**
- D&F for each T&M/LH order

**Non-Commercial**
- D&F at contract level

Proposed 12.207(c)  Different  FAR 16.601(c)
IDIQ – D&F Approval Level

Contract provides for T&M, LH, FFP, and FFP EPA orders-

Commercial
• No higher level approval required

Non-Commercial
• Same as commercial

*Proposed 12.207(c)*  *FAR 16.601(c)*
Inspection and Acceptance

Commercial
• Pay for replacement and reperformance, without profit, up to ceiling price

Non-Commercial
• Same as commercial

Proposed 52.212-4
Alt I paragraph (a)

FAR 52.246-6
Direct Labor

**Commercial**
- *Fractional hours payable on prorated basis*
- *Overtime must be approved in advance*

*Proposed Alt I paragraph (a)*

**Non-Commercial**
- *Same as commercial*  
  FAR 52.232-7(a)(2)
- *Same as commercial*  
  FAR 52.232-7(a)(3)  
  and Proposed 52.232-7(a)(3)*
Direct Labor

**Commercial**
- *No withhold*

**Non-Commercial**
- *COs may withhold*

*Proposed Alt I paragraph (a)*

*FAR 52.232-7(a)(2)*

Different
Materials Definition

• Direct materials, including supplies and services transferred between divisions, subsidiaries, or affiliates of the contractor under a common control;
• Subcontracts for supplies and services;
• Other direct costs (e.g., travel, computer usage charges, etc.); and
• Indirect costs specifically provided for in this clause.

*Commercial Proposed Alt I paragraph (e)*
*Non-Commercial Proposed 16.601(a)*

Same for Commercial and Non-Commercial
Three Methods for Reimbursement of Material Costs
Material Reimbursement Method 1

<table>
<thead>
<tr>
<th>Commercial</th>
<th>Non-Commercial</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Contractor’s commercial items at catalog or market price</td>
<td>• Same as commercial</td>
</tr>
<tr>
<td>– No “most favored customer” price requirement</td>
<td></td>
</tr>
</tbody>
</table>

Proposed Alt I paragraph (i)(1)(ii)  
Proposed 52.232-7(b)(3)
# Material Reimbursement Method 2

<table>
<thead>
<tr>
<th>Commercial</th>
<th>Non-Commercial</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Subcontracts at the schedule rates when listed in the contract or IDIQ order</td>
<td>• Same as commercial</td>
</tr>
</tbody>
</table>

Proposed Alt I paragraph (i)(1)(ii)  
Proposed 52.232-7(b)(4)
Material Reimbursement Method 3

Commercial

- Actual costs less rebates, refunds, or discounts

Non-Commercial

- Allowable actual cost subject to FAR 31.2

Proposed Alt I paragraph (i)(1)(ii)(D) and Proposed 52.232-7(b)(5)

Different
## Material

<table>
<thead>
<tr>
<th>Commercial</th>
<th>Non-Commercial</th>
</tr>
</thead>
<tbody>
<tr>
<td>• “Most advantageous” prices to the extent able</td>
<td>• Same as commercial</td>
</tr>
</tbody>
</table>

*Proposed Alt I paragraph (i)(1)(ii)(D)*

*52.232-7(b)(5) and Proposed 52.232-7(b)(8)*
Material

Commercial
- Credit to Government for cash and trade discounts, rebates, scrap, and commissions

Non-Commercial
- Contractor must take and give Government credit for cash and trade discounts, rebates, allowances, credits, salvage, commissions, and other benefit

Proposed Alt I paragraph (i)(1)(ii)(D)  Different  52.232-7(b)(5) and Proposed 52.232-7(b)(8)

10/18/2005
Material

Commercial
• Profit or fee only on commercial materials

Non-Commercial
• Same as commercial

Proposed Alt I paragraph (i)(1)(ii)(D)

Proposed 52.232-7(b)(8)
### Other Direct Costs

<table>
<thead>
<tr>
<th>Commercial</th>
<th>Non-Commercial</th>
</tr>
</thead>
<tbody>
<tr>
<td>• <em>Reimbursed at actual cost</em></td>
<td>• <em>Reimbursed at actual allowable cost in accordance with FAR 31.2</em></td>
</tr>
<tr>
<td>• Only for categories of ODC listed in the contract</td>
<td>• No listing</td>
</tr>
<tr>
<td></td>
<td>– In accordance with the contractor’s written or established accounting practices</td>
</tr>
</tbody>
</table>

Proposed Alt I paragraph (i)(1)(ii)(E)(1)  
Different  
FAR 52.232-7(b) and Proposed 52.232-7(b)(6)
Indirect Costs

Commercial

- Fixed negotiated amount reimbursed on pro-rata basis over period of contract performance

Non-Commercial

- Reimbursed at actual allowable cost in accordance with FAR 31.2

FAR 52.232-7(b) and Proposed FAR 52.232-7(b)

Proposed Alt I paragraph (i)(1)(ii)(E)(2)
# Total Costs

<table>
<thead>
<tr>
<th>Commercial</th>
<th>Non-Commercial</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Costs shall not exceed ceiling</td>
<td>• Same as commercial</td>
</tr>
<tr>
<td>• “Best efforts” to perform within ceiling</td>
<td></td>
</tr>
<tr>
<td>• 85% ceiling price notification required</td>
<td></td>
</tr>
</tbody>
</table>

*Proposed Alt I paragraph (i)(2)  FAR 52.232-7(c) and Proposed 52.232-7(c)*
Ceiling Price

Commercial

- Government not obligated to pay amounts in excess of ceiling
- Contractor not obligated to continue to perform over ceiling

Non-Commercial

- Same as commercial

Proposed Alt I paragraph (i)(3)

FAR 52.232-7(d) and Proposed 52.232-7(d)
Access to Records - Labor

**Commercial**

- Access specified in contract
- Timecard substantiation:
  - Original timecards
  - Records to verify employee qualifications
  - Records that show distribution of labor between jobs
- Access to employees

**Non-Commercial**

- All records and other evidence sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred directly or indirectly in performance of the contract

Proposed Alt I paragraph (i)(4)

FAR 52.215-2
Access to Records - Material

Commercial

• *Materials reimbursed at actual cost*-  
  – Invoices and subcontract agreements  
  – Documentation supporting payment of invoices

Non-Commercial

• *All records and other evidence sufficient to reflect properly all costs claimed to have been incurred or anticipated to be incurred directly or indirectly in performance of the contract*

Proposed Alt I paragraph (i)(4)  

FAR 52.215-2

Different
Termination for Convenience

**Commercial**
- Direct labor at hourly schedule rates
- Other reasonable charges

**Non-Commercial**
- Same as commercial

*Proposed Alt I paragraph (I)*

FAR 52.249-6, Alt IV
Subcontract Consent

Commercial

• Approved purchasing system, consent required only when specified in contract

Non-Commercial

• Same as commercial

Proposed Alt I paragraph (u)  
FAR 52.232-7(b)(10)  
And Proposed 52.232-7(b)(9)
Subcontract Consent

**Commercial**
- No approved purchasing system, consent required-
  - Cost reimbursement, T&M, LH
  - FFP over specified thresholds

*Proposed Alt I paragraph (u)*

**Non-Commercial**
- Same as commercial

FAR 52.232-7(b)(10)
And Proposed 52.232-7(b)(9)
Subcontract Consent

Commercial

• Reimbursement without consent at sole discretions of Government

Non-Commercial

• Same as commercial

Proposed Alt I paragraph (u)

FAR 52.232-7(b)(10)
And Proposed 52.232-7(b)(9)