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November 24, 2010

General Services Administration  
Regulatory Secretariat (MVCB)  
1800 F Street, NW Room 4041  
*Attn:* Hada Flowers  
Washington, DC 20405

**Re: FAR Case 2009-043, Time-and-Materials (T&M) and Labor-Hour (LH)  
Contracts for Commercial Items**

Dear Ms. Flowers:

On behalf of The Coalition for Government Procurement, the following comments are provided on the proposed rule regarding guidance on the use of Time-and-Materials (“T&M”) and Labor-Hour (LH) task orders under the General Services Administration’s (“GSA’s”) Multiple Award Schedule (“MAS”) program. The proposed rule was published in the Federal Register on September 27, 2010.

The Coalition for Government Procurement (“CGP”) is a non-profit association of approximately 300 firms selling commercial services and products to the federal government. Our members comprise small, medium, and large businesses actively engaged in federal business. CGP members collectively account for approximately 70% of the sales generated through the GSA MAS program and about half of the commercial item sales made to the government each year. Member firms provide all types of services to the federal government through the MAS program including but not limited to information technology, organizational and management consulting, engineering, logistics, security and environmental services. We are proud to have worked *with* government decision-makers over the past 30 years towards the mutual goal of common sense acquisition.

## Comments

### **Proposed Federal Acquisition Regulation (“FAR”) 8.405-2(e)**

As a threshold matter, the CGP recommends that to the extent the Civilian Agency Acquisition Council and the Defense Acquisition Council will be issuing a proposed rule implementing Section 863 of the National Defense Authorization Act of 2009, any guidance regarding the use of T&M or LH orders be included in that proposed rule. Such an approach would provide for clarity in the process and allow for a comprehensive review by all the stakeholders rather than the current piece meal review. For example, there is some question as to whether the exceptions provided in Section 863 from following the competitive order procedures would apply to T&M or LH hours. In contrast, the proposed T&M guidance requires the contracting officers to follow the competitive ordering procedures at FAR 8.405-2(c) when placing T&M or LH orders. The following additional technical comments are provided.

Proposed FAR 8.405-2(e) essentially mirrors the guidance at the current FAR 12.207. For example, both sections include the requirement for equipment for a determination and findings (“D&F”) addressing why a fixed price order is not suitable. In reviewing both the current FAR 12.207 and the proposed rule, the CGP believes that the proposed rule should be clarified.

First, proposed FAR 8.405-2(e)(2)(i) provides that a T&M or LH order only may be used when it is not possible to accurately estimate the extent or duration of the work or anticipate costs with any degree of confidence. This provision is unnecessary. Proposed FAR 8.405-2(e)(4)(ii) addresses the contents of the D&F for use of a T&M or LH order including establishing “that it is not possible at the time of placing the order to accurately estimate the extent or duration of the work or anticipate costs with any reasonable degree of certainty.”

Second, proposed FAR 8.405-2(e)(2)(ii) would require the contracting officer to follow the competitive procedures at FAR 8.405-2(c). In contrast, FAR 12.207(b)(1)(i)(B) essentially provides that procedures for other than full and open competition may be used if the agency receives at least two offers. Consistent with this approach, an agency should have the discretion to use other than the competitive procedures at FAR 8.405-2 if at least two quotes are received for the task order. See also the comment above regarding Section 863.

Third, with regard to orders under the MAS program and indefinite delivery contracts, FAR 12.207(c)(2) references both FAR 8.4 and FAR 16.5 while FAR 12.207(c)(3) references FAR 16.5. For the sake of clarity, either FAR 12.207 solely should include all guidance regarding T&M or LH orders or guidance should be included in both FAR 8.4 and FAR 16.5.

### **Proposed FAR 16.201**

Proposed FAR 16.201(b) adds the statement that “[t]ime-and-material contracts and labor-hour contracts are not fixed price contracts.” The CGP believes that this solitary statement regarding the structure of T&M or LH contracts does not provide the necessary context for contracting officers. Moreover, it potentially leaves the impression that T&M or LH contracts are cost-reimbursement contracts. T&M or LH contracts are not cost-reimbursement contracts. Commercial T&M or LH contracts provide for a fixed rate per hour. Cost-reimbursement contracts provide for payment of all incurred expenses to the extent prescribed in the contract (FAR 16.301-1). LH rates negotiated on the MAS contracts are typically based on each offeror’s commercial pricing practices and are not structured on a cost-reimbursement basis. Even where a LH hour rate is based on a cost build up approach the resulting rate is fully burdened, including profit. To the extent FAR 16.201 may include a statement regarding what a T&M or LH contract is not, it should also include a description of the attributes of a T&M or LH contract or cross-reference to such guidance elsewhere in the FAR.

The CGP appreciates the opportunity to submit comments on this proposed rule. If there are any questions, I may be reached at (202) 331-0975 or [awoolley@thecgp.org](mailto:awoolley@thecgp.org).

Regards,



Aubrey Woolley  
Manager of Policy