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Part VII

Department of Defense General Services Administration

National Aeronautics and Space Administration

48 CFR Parts 12 and 16

**Federal Acquisition Regulation; Contract
Types for Commercial Item Acquisitions;
Proposed Rule**

DEPARTMENT OF DEFENSE**GENERAL SERVICES
ADMINISTRATION****NATIONAL AERONAUTICS AND
SPACE ADMINISTRATION****48 CFR Parts 12 and 16****[FAR Case 2000-013]****RIN 9000-AJ03****Federal Acquisition Regulation;
Contract Types for Commercial Item
Acquisitions**

AGENCIES: Department of Defense (DoD), General Services Administration (GSA), and National Aeronautics and Space Administration (NASA).

ACTION: Proposed rule.

SUMMARY: The Civilian Agency Acquisition Council and the Defense Acquisition Regulations Council (Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to provide clarification on what contract types are authorized for commercial item acquisitions.

DATES: Interested parties should submit comments in writing on or before February 27, 2001 to be considered in the formulation of a final rule.

ADDRESSES: Submit written comments to: General Services Administration, FAR Secretariat (MVR), 1800 F Street, NW, Room 4035, ATTN: Laurie Duarte, Washington, DC 20405.

Submit electronic comments via the Internet to: farcase.2000_013@gsa.gov.

Please submit comments only and cite FAR case 2000-013 in all correspondence related to this case.

FOR FURTHER INFORMATION CONTACT: The FAR Secretariat, Room 4035, GS Building, Washington, DC, 20405, at (202) 501-4755 for information pertaining to status or publication schedules. For clarification of content, contact Ms. Victoria Moss, Procurement Analyst, at (202) 501-4764. Please cite FAR case 2000-013.

SUPPLEMENTARY INFORMATION:**A. Background**

This proposed rule amends FAR 12.207 and 16.2 to more closely parallel the contract-type requirements in Section 8002(d) of FASA (Pub. L. 103-355). FASA states that agencies must use firm-fixed price (FFP) contracts and fixed-price contracts with economic price adjustments (FP/EPA) to the maximum extent practicable for commercial item acquisitions. FASA also prohibits the use of cost-type contracts. The rule revises FAR 12.207 to—

- Reflect the “to the maximum extent practicable” caveat in FASA.

- Authorize the use of noncost-based incentives such as award fees and performance or delivery incentives.

- Add language that discusses pricing mechanisms for acquiring commercial services available on a time-and-material or labor-hour basis within the Part 12 contract type restrictions.

- Revise FAR 16.202 and 16.203 to indicate that noncost-based award fee and performance or delivery incentives may be used in conjunction with FFP contracts and FP/EPA without changing the FFP or FP/EPA nature of the contract.

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.

This is not a significant regulatory action and, therefore, was not subject to review under Section 6(b) of Executive Order 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

The Councils do not expect this proposed rule to have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, because changes made by the rule primarily clarify language pertaining to the contract types currently authorized by statute for commercial item acquisitions and does not change existing policy. An Initial Regulatory Flexibility Analysis has, therefore, not been performed. We invite comments from small businesses and other interested parties. The Councils will consider comments from small entities concerning the affected FAR parts 12 and 16 in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C. 601, *et seq.* (FAR case 2000-013), in correspondence.

C. Paperwork Reduction Act

The Paperwork Reduction Act does not apply because the proposed changes to the FAR do not impose information collection requirements that require the approval of the Office of Management and Budget under 44 U.S.C. 3501, *et seq.*

List of Subjects in 48 CFR Parts 12 and 16

Government procurement.

Dated: December 22, 2000.

Al Matera,

Acting Director, Federal Acquisition Policy Division.

Therefore, DoD, GSA, and NASA propose that 48 CFR parts 12 and 16 be amended as set forth below:

1. The authority citation for 48 CFR parts 12 and 16 continues to read as follows:

Authority: 40 U.S.C. 486(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

**PART 12—ACQUISITION OF
COMMERCIAL ITEMS**

2. In section 12.207, remove the undesignated paragraph.

3. Add sections 12.207-1 and 12.207-2 to read as follows:

12.207-1 Authorized contract types.

(a) Agencies must use, to the maximum extent practicable, firm-fixed-price contracts or fixed-price contracts with economic price adjustment for the acquisition of commercial items. These contract types may be used in conjunction with an award fee incentive and performance or delivery incentives when the award fee or incentive is based solely on factors other than cost (see 16.202-1 and 16.203-1).

(b) Agencies may use indefinite-delivery contracts (see 16.5) when the task or delivery orders are issued under one of the authorized contract types in paragraph (a) of this subsection. Contracting officers must follow the procedures in 16.505 when placing orders.

(c) Use of cost-type contracts or contracts with incentives based on cost is prohibited.

12.207-2 Commercial services available on a time-and-material or labor-hour basis.

Some services are available in the commercial market on a time-and-material or labor-hour basis. Contracting officers may acquire these types of services under part 12 by using the following pricing strategies when cost-effective and consistent with commercial practice:

(a) An indefinite-delivery contract with established fixed hourly rates that permit negotiating orders (including any required material) under one of the authorized contract types in 12.207-1.

(b) Sequential contract actions that acquire the requirement in modular components using the authorized contract types in 12.207-1 (*e.g.*, a preliminary firm-fixed-price “diagnostic” effort allowing the contractor to understand the scope of work sufficiently to propose the large requirement on a firm-fixed-price basis).

PART 16—TYPES OF CONTRACTS

4. In section 16.202–1, add the following sentences to the end of the paragraph to read as follows:

16.202–1 Description.

* * * The contracting officer may use a fixed-price contract in conjunction with an award-fee incentive (see 16.404) and performance or delivery incentives (see 16.402–2 and 16.402–3) when the award fee or incentive is based solely on

factors other than cost. The contract type remains firm-fixed-price when used with these incentives.

5. In section 16.203–1, redesignate the introductory text as paragraph (a), and paragraphs (a) through (c) as (1) through (3), respectively; and add paragraph (b) to read as follows:

16.203–1 Description.

* * * * *

(b) The contracting officer may use a fixed-price contract with economic

price adjustment in conjunction with an award-fee incentive (see 16.404) and performance or delivery incentives (see 16.402–2 and 16.402–3) when the award fee or incentive is based solely on factors other than cost. The contract type remains fixed-price with economic price adjustment when used with these incentives.

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