DEPARTMENT OF DEFENSE

GENERAL SERVICES ADMINISTRATION

NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

48 CFR Parts 16 and 52

[FAR Case 2011–003; Docket 2011–0003; Sequence 1]

RIN 9000–AM01

Federal Acquisition Regulation; Payments Under Time-and-Materials and Labor-Hour Contracts

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

ACTION: Proposed rule.

SUMMARY: DoD, GSA, and NASA are proposing to amend the Federal Acquisition Regulation (FAR) to make necessary revisions to accommodate the authorization to use time-and-materials and labor-hour contract payment requirements.

DATES: Interested parties should submit written comments to the Regulatory Secretariat at one of the addressees shown below on or before September 26, 2011 to be considered in the formation of the final rule.

ADDRESSES: Submit comments in response to FAR case 2011–003 by any of the following methods:

- *Regulations.gov: http://www.regulations.gov.* Submit comments via the Federal eRulemaking portal by inputting ''FAR Case 2011–003'' under the heading ''Enter Keyword or ID'' and selecting ''Search.'' Select the link ''Submit a Comment'' that corresponds with ''FAR Case 2011–003.'' Follow the instructions provided at the ''Submit a Comment'' screen. Please include your name, company name (if any), and ''FAR Case 2011–003'' on your attached document.
- *Fax:* (202) 501–4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), ATTN: Hada Flowers, 1275 First Street, NE., 7th Floor, Washington, DC 20417.

Instructions: Please submit comments only and cite FAR Case 2011–003, in all correspondence related to this case. All comments received will be posted without change to *http://www.regulations.gov,* including any personal and/or business confidential information provided.

FOR FURTHER INFORMATION CONTACT: Mr. Edward N. Chambers, Procurement Analyst, at (202) 501–3221 for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501–4755. Please cite FAR Case 2011–003.

SUPPLEMENTARY INFORMATION:

I. Background

On December 12, 2006, DoD, GSA, and NASA published two final FAR rules that made significant changes to the regulations for time-and-materials and labor-hour contracts:

(1) FAR Case 2003–027, Additional Commercial Contract Types, published in the **Federal Register** at 71 FR 74667, December 12, 2006, implemented section 1432 of the National Defense Authorization Act for Fiscal Year 2004 (Pub. L. 108–136). Title XIV of the Act, referred to as the Services Acquisition Reform Act of 2003, amended section 8002(d) of the Federal Acquisition Streamlining Act of 1994 (Pub. L. 103–355, 41 U.S.C. 3307) to expressly authorize the use of time-and-materials and labor-hour contracts for commercial services under specified conditions.

(2) FAR Case 2004–015, Payments Under Time-and-Materials and Labor-Hour Contracts, published in the **Federal Register** at 71 FR 74656, December 12, 2006, revised and clarified policies related to the award and administration of noncommercial time-and-materials and labor-hour contracts and the policies regarding payments made under those contracts.

This rule proposes to make additional changes to enable the use of appropriate payment provisions for time-and-materials and labor-hour contracts, addressing potential problems with the new time-and-materials regulations.

II. Discussion and Analysis

A. Commercial Time-and-Material (T&M) Contracts

Termination for Cause. FAR 52.212–4, Contract Terms and Conditions—Commercial Items, contains the provisions on the Government's right to terminate commercial contracts. If the Government terminates the contract for the Government's convenience, the Government pays the contractor for work performed prior to the termination, plus reasonable charges resulting from the termination. If the Government terminates the contract for cause, the Government only pays for supplies and services ''accepted by the Government.''

Alternate I of the clause establishes the termination-for-convenience provisions for commercial T&M contracts. Consistent with the basic clause, the Government pays contractors for work performed prior to the termination plus reasonable charges that result from the termination. However, Alternate I does not provide any unique termination-for-cause provisions for commercial T&M contracts. Currently, without substitute/unique provisions, the termination-for-cause provisions of the basic clause apply. Under those provisions, the Government only pays for work ''accepted by the Government.'' However, those provisions are inconsistent with the longstanding noncommercial T&M termination-for-cause provisions.

Alternate IV of FAR 52.249–6, Termination (Cost-Reimbursement), provides that the Government pays the contractor for work performed prior to the termination for cause. For labor ''not accepted by the Government,'' the Government pays for work performed, but does not pay any profit on the work.

The proposed rule establishes commercial T&M termination-for-cause provisions that are consistent with the longstanding provisions for noncommercial T&M contracts. Under the proposed rule, the contractor will be paid for work performed prior to the termination for cause, including work ''not delivered to or accepted by the Government,'' less applicable profit.

B. Payment for Nonconforming Supplies and Services

When supplies or services do not conform to contract requirements, the Government generally rejects the supplies or services. The Government ordinarily provides contractors an opportunity to correct or replace nonconforming supplies or services when correction or replacement can be accomplished within the required delivery schedule. Correction or replacement is generally made without additional cost to the Government. However, certain contract types, including T&M contracts, generally require the Government to pay additional costs for replacement or correction, but no additional fee is paid. Payment for replacement or re-performance is consistent with the ''best efforts'' nature of T&M contracts. The Government generally pays for replacement and re-performance on both commercial and noncommercial T&M contracts.

However, a subtle difference in the terminology used for payments in the commercial and noncommercial T&M clauses may be causing confusion over whether the treatment for replacement and re-performance is the same on both commercial and noncommercial contracts. For noncommercial T&M

contracts, FAR 52.232–7, Payments under Time-and-Materials and Labor-Hour Contracts, states—

''The Government will pay the Contractor as follows upon the submission of vouchers approved by the Contracting Officer or the authorized representative.''

In addition to the above coverage, paragraph (i)(1) of the commercial T&M clause (Alternate I of FAR 52.212–4, Contract Terms and Conditions—Commercial Items) states—

''Services accepted. Payment shall be made for services accepted by the Government that have been delivered to the delivery destinations(s) set forth in this contract.''

Inclusion of the additional text in the commercial T&M clause is unnecessary. Therefore, this rule proposes to delete the inappropriate text in the commercial T&M clause.

C. Commercial Item Materials

The payment provisions for commercial item materials are inconsistent in the commercial T&M clause and the noncommercial T&M clause. The noncommercial T&M clause provides that the price to be paid for commercial-item materials ''shall not exceed'' the contractor's established catalog or market price. The commercial T&M clause provides that the price to be paid for commercial-item materials ''shall be'' the contractor's established catalog or market price. Since commercial item pricing is subject to negotiation, the rule revises the commercial T&M clause to be consistent with the noncommercial clause.

D. Noncommercial Time-and-Materials

The Allowable Cost and Payment Clause, FAR 52.216–7, is a required contract clause for noncommercial time-and-materials contracts. However, a couple of the provisions of FAR 52.232–7, Payments Under Time-and-Materials and Labor-Hour Contracts, are inconsistent with provisions of the Allowable Cost and Payment FAR clause 52.216–7.

(a) *Payment.* The Allowable Cost and Payment FAR clause 52.216–7 authorizes bi-weekly invoicing for large businesses and more frequent invoicing for small businesses. However, FAR 52.232–7, Payments under Time-and-Materials Contracts and Labor-Hour Contracts, only authorizes monthly invoicing.

By authorizing bi-weekly invoicing for time-and-materials contracts under FAR clause 52.232–7, the proposed rule aligns invoicing under time-and-materials contracts with invoicing under FAR 52.216–7. However, the rule does not change the frequency of invoicing under labor-hour contracts which remains at no more than once each month under revised Alternate I.

(b) *Completion Voucher.* The Allowable Cost and Payment, FAR clause 52.216–7 requires the contractor to submit a completion voucher within 120 days after settlement of final indirect cost rates. However, Time-and-Materials and Labor-Hour Contracts, FAR clause 52.232–7, requires submission of a completion voucher within one year after the contract is completed. By requiring the submission of the completion voucher within 120 days after contract completion for time-and-materials contracts under FAR clause 52.232–7, the proposed rule aligns the submission of the completion voucher under time-and-materials contracts with that prescribed under FAR clause 52.216–7. However, the rule does not change the requirement for the submission of the completion voucher under labor-hour contracts which remains at one year.

E. Application of FAR 52.216–7 to Time-and-Materials and Labor-Hour Contracts

This rule proposes to amend FAR 16.307(a)(1) to clarify that for time-and-materials contracts FAR clause 52.216–7 is used in conjunction with FAR clause 52.232–7, and that FAR clause 52.216–7 does not apply to labor-hour contracts.

Revision of FAR 16.307(a)(1) and creation of new subparagraphs FAR 16.307(a)(3), (a)(4), and (a)(5). Creation of new Alternate clauses II, III, and IV at FAR 52.216–7.

Currently, FAR 16.307(a)(1) contains a series of prescriptions to modify FAR clause 52.216–7, Allowable Cost and Payment, by changing the particular subpart reference under part 31, Contract Cost Principles and Procedures, depending on the characterization of the business entity: educational institutions, State or local governments, or non-profit organizations. Consequently, this subparagraph is extremely busy and not reader friendly. For ease of reading and general clarity, FAR 16.307(a)(1) has been reduced significantly, and FAR subparagraphs 16.307(a)(3), (a)(4), and (a)(5) have been created. These new subparagraphs, respectively, prescribe the use of new Alternate clauses; II (educational institutions), III (state or local governments), and IV (non-profit organizations) at FAR 52.216–7. Each new alternate clause reflects the controlling subpart under part 31, *e.g.,* subpart 31.3 for Alternate II (educational institutions).

III. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is a significant regulatory action and, therefore, was 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.

IV. Regulatory Flexibility Act

DoD, GSA, and NASA 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 it merely clarifies the existing prescriptions and clause prefaces relating to service contracts.

Therefore, an Initial Regulatory Flexibility Analysis has not been performed. DoD, GSA, and NASA invite comments from small business concerns and other interested parties on the expected impact of this rule on small entities.

DoD, GSA, and NASA will also consider comments from small entities concerning the existing regulations in subparts affected by the rule in accordance with 5 U.S.C. 610. Interested parties must submit such comments separately and should cite 5 U.S.C 610 (FAR Case 2011–003), in correspondence.

V. Paperwork Reduction Act

The proposed rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 16 and 52

Government procurement.

Dated: July 15, 2011.

Laura Auletta,

Acting Director, Office of Governmentwide Acquisition Policy, Office of Acquisition Policy.

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 16 and 52 as set forth below:

1. The authority citation for 48 CFR parts 16 and 52 continues to read as follows:

Authority: 40 U.S.C. 121(c); 10 U.S.C. chapter 137; and 42 U.S.C. 2473(c).

PART 16—TYPES OF CONTRACTS

2. Amend section 16.307 by revising paragraph (a) to read as follows:

16.307 Contract Clauses.

(a)(1) The contracting officer shall insert the clause at 52.216–7, Allowable Cost and Payment, in solicitations and contracts when a cost-reimbursement contract or a time-and-materials contract (other than a contract for a commercial item) is contemplated. If the contract is a time-and-materials contract, the clause at 52.216–7 applies in conjunction with 52.232–7, but only to the portion of the contract that provides for reimbursement of materials (as defined in the clause at 52.232–7) at actual cost. Further, 52.216–7 does not apply to labor-hour contracts.

(2) If the contract is a construction contract and contains the clause at 52.232–27, Prompt Payment for Construction Contracts, the contracting officer shall use the clause at 52.216–7 with its Alternate I.

(3) If the contract is with an educational institution, the contracting officer shall use the clause at 52.216–7 with its Alternate II.

(4) If the contract is with a State or local government, the contracting officer shall use the clause at 52.216–7 with its Alternate III.

(5) If the contract is with a nonprofit organization other than an educational institution, a State or local government, or a nonprofit organization exempted under OMB Circular No. A–122, the contracting officer shall use the clause at 52.216–7 with its Alternate IV.

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PART 52—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Amend section 52.212–4 by amending Alternate I as follows:

a. Revising the introductory text;

b. Revising paragraph (i)(1) introductory text;

c. Removing from paragraph (i)(1)(ii)(A) ''be the contractor's'' and adding ''not exceed the Contractor's'' in its place; and

e. Adding paragraph (m).

The revised and added text reads as follows:

52.212–4 Contract Terms and Conditions—Commercial Items.

* * * * *

Alternate (I) (DATE) When a time-and-materials or labor-hour contract is contemplated, substitute the following paragraphs (a), (e), (i), (l), and (m) for those in the basic clause.

* * * * *

(i) * * *

(1) *Work performed.* The Government will pay the Contractor as follows upon the submission of commercial invoices approved by the Contracting Officer:

* * * * *

(m) *Termination for cause.* The Government may terminate this contract, or any part hereof, for cause in the event of any default by the Contractor, or if the Contractor fails to comply with any contract terms and conditions, or fails to provide the Government, upon written request, with adequate assurances of future performance. Subject to the terms of this contract, the Contractor shall be paid an amount computed under paragraph (i) *Payments* of this clause, but the ''hourly rate'' for labor hours expended in furnishing work not delivered to or accepted by the Government shall be reduced to exclude that portion of the rate attributable to profit. Unless otherwise specified in paragraph (a)(3) of this clause, the portion of the ''hourly rate'' attributable to profit shall be 10 percent. In the event of termination for cause, the Contractor shall be liable to the Government for any and all rights and remedies provided by law. If it is determined that the Government improperly terminated this contract for default, such termination shall be deemed a termination for convenience.

4. Amend section 52.216–7 by adding Alternates II, III, and IV. The added text reads as follows:

52.216–7 Allowable Cost and Payment.

* * * * *

Alternate II (DATE). As prescribed in 16.307(a)(3), substitute the following paragraph (a)(1) for paragraph (a)(1) of the basic clause:

(1) The Government will make payments to the Contractor when requested as work progresses, but (except for small business concerns) not more often than once every 2 weeks, in amounts determined to be allowable by the Contracting Officer in accordance with Federal Acquisition Regulation (FAR) Subpart 31.3 in effect on the date of this contract and the terms of this contract. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract.

Alternate III (DATE). As prescribed in 16.307(a)(4), substitute the following paragraph (a)(1) for paragraph (a)(1) of the basic clause:

(1) The Government will make payments to the Contractor when requested as work progresses, but (except for small business concerns) not more often than once every 2 weeks, in amounts determined to be allowable by the Contracting Officer in accordance with Federal Acquisition Regulation (FAR) Subpart 31.6 in effect on the date of this contract and the terms of this contract. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract.

Alternate IV (DATE). As prescribed in 16.307(a)(5), substitute the following paragraph (a)(1) for paragraph (a)(1) of the basic clause:

(1) The Government will make payments to the Contractor when requested as work progresses, but (except for small business concerns) not more often than once every 2 weeks, in amounts determined to be allowable by the Contracting Officer in accordance with Federal Acquisition Regulation (FAR) Subpart 31.7 in effect on the date of this contract and the terms of this contract. The Contractor may submit to an authorized representative of the Contracting Officer, in such form and reasonable detail as the representative may require, an invoice or voucher supported by a statement of the claimed allowable cost for performing this contract.

5. Amend section 52.232–7 by—

a. Revising the date of the clause;

b. Revising paragraph (a)(5) introductory text;

c. Removing from paragraph (f) ''1 year'' and adding ''120 days'' in its place; and

d. Revising Alternate I.

The revised text reads as follows:

52.232–7 Payments under Time-and-Materials and Labor-Hour Contracts.

* * * * *

Payments Under Time-and-Material and Labor-Hour Contracts (Date)

* * * * *

(a) * * *

(5) Vouchers may be submitted not more than once every two weeks to the Contracting Officer or authorized representative. A small business concern may receive more frequent payments than every two weeks. The Contractor shall substantiate vouchers (including any subcontractor hours reimbursed at the hourly rate in the

schedule) by evidence of actual payment and by—

* * * * *

Alternate I (DATE). If a labor-hour contract is contemplated, the Contracting Officer shall substitute paragraphs (a)(5) and (f) and (j) to the basic clause as follows:

(a)(5) Vouchers may be submitted not more than once each month (or at more frequent intervals, if approved by the Contracting Officer), to the Contracting Officer or authorized representative. The Contractor shall substantiate vouchers (including any subcontractor hours reimbursed at the hourly rate in the schedule) by evidence of actual payment and by—

(i) Individual daily job timekeeping records;

(ii) Records that verify the employees meet the qualifications for the labor categories specified in the contract; or

(iii) Other substantiation approved by the Contracting Officer.

(f) *Audit.* At any time before final payment under this contract, the Contracting Officer may request audit of the vouchers and supporting documentation. Each payment previously made shall be subject to reduction to the extent of amounts, on preceding vouchers, that are found by the Contracting Officer or authorized representative not to have been properly payable and shall also be subject to reduction for overpayments or to increase for underpayments. Upon receipt and approval of the voucher designated by the Contractor as the ''completion voucher'' and supporting documentation, and upon compliance by the Contractor with all terms of this contract (including, without limitation, terms relating to patents and the terms of paragraph (g) of this clause), the Government shall promptly pay any balance due the Contractor. The completion voucher, and supporting documentation, shall be submitted by the Contractor as promptly as practicable following completion of the work under this contract, but in no event later than 1 year (or such longer period as the Contracting Officer may approve in writing) from the date of completion.

(j) The terms of this clause that govern reimbursement for materials furnished are considered to have been deleted.

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