

Flooding source(s)	Location of referenced elevation	*Elevation in feet (NGVD) + Elevation in feet (NAVD) # Depth in feet above ground ^ Elevation in meters (MSL)		Communities affected
		Effective	Modified	

\*\*BFEs to be changed include the listed downstream and upstream BFEs, and include BFEs located on the stream reach between the referenced locations above. Please refer to the revised Flood Insurance Rate Map located at the community map repository (see below) for exact locations of all BFEs to be changed.

Send comments to Roy E. Wright, Deputy Director, Risk Analysis Division, Federal Insurance and Mitigation Administration, Federal Emergency Management Agency, 500 C Street, SW., Washington, DC 20472.

#### ADDRESSES

##### Township of Brady

Maps are available for inspection at the Brady Township Building, 141 West Liberty Road, Slipery Rock, PA 16057.

##### Township of Perry

Maps are available for inspection at the Perry Township Building, 5687 Doc Walker Road, Parker, PA 16049.

##### Township of Richland

Maps are available for inspection at the Richland Township Building, 511 Dittman Road, Emlenton, PA 16373.

##### Township of Toby

Maps are available for inspection at the Toby Township Building, 37 Simmons Road, Rimersburg, PA 16248.

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: September 13, 2010.

**Sandra K. Knight,**

*Deputy Federal Insurance and Mitigation Administrator, Mitigation, Department of Homeland Security, Federal Emergency Management Agency.*

[FR Doc. 2010-24148 Filed 9-24-10; 8:45 am]

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#### DEPARTMENT OF DEFENSE

##### GENERAL SERVICES ADMINISTRATION

##### NATIONAL AERONAUTICS AND SPACE ADMINISTRATION

##### 48 CFR Parts 8, 12, and 16

[FAR Case 2009-043; Docket 2010-0100; Sequence 1]

RIN: 9000-AL74

##### Federal Acquisition Regulation; Time-and-Materials (T&M) and Labor-Hour (LH) Contracts for Commercial Items

**AGENCY:** 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 (the Councils) are proposing to amend the Federal Acquisition Regulation (FAR) to implement recommendations of the Government Accountability Office (GAO) Report 09-579 dated June 2009

to Congressional Committees on "Minimal Compliance with New Safeguards for Time-and-Materials Contracts for Commercial Services and Safeguards Have Not Been Applied to GSA Schedules Program."

**DATES:** Interested parties should submit written comments to the Regulatory Secretariat on or before November 26, 2010 to be considered in the formulation of a final rule.

**ADDRESSES:** Submit comments identified by FAR Case 2009-043 by any of the following methods:

- *Regulations.gov:* <http://www.regulations.gov>. Submit comments via the Federal eRulemaking portal by inputting "FAR Case 2009-043" under the heading "Enter Keyword or ID" and selecting "Search". Select the link "Submit a Comment" that corresponds with "FAR Case 2009-043". Follow the instructions provided at the "Submit a Comment" screen. Please include your name, company name (if any), and "FAR Case 2009-043" on your attached document.

- *Fax:* 202-501-4067.
- *Mail:* General Services Administration, Regulatory Secretariat (MVCB), Attn: Hada Flowers, 1800 F Street, NW., Room 4041, Washington, DC 20405.

*Instructions:* Please submit comments only and cite FAR Case 2009-043, 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. Warren Blankenship, Procurement

Analyst, at (202) 501-1900, for clarification of content. For information pertaining to status or publication schedules, contact the Regulatory Secretariat at (202) 501-4755. Please cite FAR case 2009-043.

#### SUPPLEMENTARY INFORMATION:

##### A. Background

This rule proposes to amend the FAR to implement the recommendations of GAO's Report to Congressional Committees 09-579 dated June 2009 on "Minimal Compliance with New Safeguards for Time-and-Materials Contracts for Commercial Services and Safeguards Have Not Been Applied to the GSA Schedules Program." GAO was directed by the National Defense Authorization Act of Fiscal Year 2004 conference report to review the use of the new authority being authorized in section 1432 of the Act, the extent to which it had been used, the types of contracts for which the authority had been used, and the degree to which such use was in compliance with the safeguards included in section 1432 (including the requirement that time-and-material and labor-hour contracts be used only where no other contract type was suitable).

GAO reviewed contract files, interviewed contracting and procurement policy officials, and utilized legal interpretations of the applicability of the determination and findings (D&F) requirement to the GSA Schedules program. GAO believes that the evidence and findings obtained during its audit substantiates the conclusions and associated recommendations in the report. The

GAO audit revealed that, Governmentwide, contracting officers had the mistaken impression that the fixed labor rates in the time-and-material/labor-hour contracts make them fixed price type contracts. The audit further revealed that there was a general lack of awareness of the FAR part 12 determinations and findings requirement among contracting officers across all Government agencies in their review of contract actions more than two (2) years after the determinations and findings requirement was implemented in the FAR. There was a failure of management to detect the lack of compliance with these safeguards. GAO recommended that further action was required for the use of time-and-material contracts to acquire commercial services in order to help ensure that this contract type is used only when no other contract type is suitable and instill discipline in the determination of contract type with a view toward managing the risk to the Government. Therefore, GAO recommended that the following steps be taken:

- Amend FAR Subpart 16.6 (Time-and-Materials, Labor-Hour, and Letter Contracts) and FAR Subpart 16.2 (Fixed-Price Contracts) to make it clear that contracts with a fixed hourly labor rate and an estimated ceiling price are time-and-materials or labor-hour contracts, not fixed-price type contracts;
- Amend FAR Subpart 8.4 (pertaining to the Schedules program) to explicitly require the same safeguards for commercial time-and-materials services, *i.e.*, the FAR part 12 determination and findings and the justification for changes to the ceiling price, that are required in FAR 12.207; and
- Provide guidance to contracting officials on the requirements in FAR 12.207 for the detailed determination and findings for time-and-materials or labor-hour contracts for commercial services and encourage agencies to provide training regarding the determination and findings requirement.

The requirement for executing a determination and findings when acquiring commercial services on a time-and-material or labor-hour basis is not new. The FAR used to prohibit the use of any other contract type except fixed price for the acquisition of commercial items. However, in 2003, the Services Acquisition Reform Act (SARA), amended Section 8002(d) of Federal Acquisition Streamlining Act of 1994 (FASA) to explicitly provide that the FAR shall include the authority for the use of time-and-materials and labor-hour contracts for the procurement of

certain commercial services (the commercial services in such a category are “of a type” of commercial services that are commonly sold to the general public through the use of time-and-materials and labor-hour contracts). FAR Case 2003–027 was published in the **Federal Register** at 71 FR 74667 on December 12, 2006, modified FAR 12.207, FAR 16.601, and FAR 52.212–4 to include an Alternate I, to permit the use of time-and-materials and labor-hour contracts for commercial services when no other contract type is suitable. When using a time-and-materials or labor-hour contract, a ceiling price must be included in time-and-material and labor-hour contracts, it must incorporate Alternate I to payment clause FAR 52.212–4 to safeguard records and audit rights, provide insight into contractor costs, and ensure that costs are monitored by the Government due to the inherent risks associated with time-and-materials and labor-hour types of contracts. This FAR case proposes to modify FAR 8.405–2 and 12.207 to require the contracting officer, when acquiring commercial services using a time-and-materials or labor-hour order, to execute a determination and findings explaining why no other contract type is suitable for the acquisition; and FAR 16.201 and 16.600 to state explicitly that time-and-materials/labor-hour contracts are not fixed price contracts. The determination and findings is required to contain several elements, including a description of the market research performed for the acquisition and a description of the actions planned to maximize the use of fixed-price contracts on future or follow-on acquisitions. This is similar to the requirements in FAR 12.207 for a time-and-materials/labor-hour contract for commercial services. Currently, neither FAR 12.207 nor FAR subpart 8.4 explicitly mentions the requirement for the contracting officer to execute a determination and findings when placing orders against Schedules under FAR subpart 8.4. GSA establishes contracts for commercial supplies and services against which Government agencies can issue orders.

This proposed rule therefore builds on the existing Services Acquisition Reform Act (SARA) Panel recommendation to permit the use of time-and-materials and labor-hour contracts or orders when acquiring commercial services as long as a determination and findings is executed by the contracting officer consistent with FAR 12.207 and FAR 16.601 when ordering services under Schedules. Therefore, the determination and

findings requirement is proposed to be added to FAR subpart 8.4 for Schedule orders to make it clear that contracting officers must execute, prior to placing the order, a determination and findings that a fixed-price order is not suitable. The FAR is proposed to be further revised as follows:

(1) At FAR 8.405–2, Ordering procedures for services requiring a statement of work, paragraph (e), Use of time-and-materials and labor-hour orders for services, is added to incorporate the requirement for a determination and findings consistent with FAR 12.207 and 16.601(d).

(2) Section 12.207(b)(4) is added as a cross-reference to 8.405–2(e) for determination and findings when using Federal Supply Schedules.

(3) Section 16.201, which sets forth the general description of a fixed-price contract, has been modified to clarify that time-and-materials and labor-hour contracts are not fixed-price contracts.

(4) Section 16.600, which sets forth the scope of time-and-materials and labor-hour contracts, is added to clarify that time-and-materials and labor-hour contracts are not fixed price contracts. 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 the rule does not impose any additional requirements on small businesses. 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 8, 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 2009–043), 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. Chapter 35, *et seq.*

**List of Subjects in 48 CFR Parts 8, 12, and 16**

Government procurement.

Dated: September 20, 2010.

**Edward Loeb,**

*Director, Acquisition Policy Division.*

Therefore, DoD, GSA, and NASA propose amending 48 CFR parts 8, 12, and 16 as set forth below:

1. The authority citation for 48 CFR parts 8, 12, and 16 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 8—REQUIRED SOURCES OF SUPPLIES AND SERVICES**

2. Amend section 8.405–2 by redesignating paragraph (e) as paragraph (f); and adding a new paragraph (e) to read as follows:

**8.405–2 Ordering procedures for services requiring a statement of work.**

\* \* \* \* \*

(e) *Use of time-and-materials and labor-hour orders for services.* (1) Except as provided in paragraph (e)(2) of this section, agencies shall use fixed-price orders for the acquisition of commercial services to the maximum extent practicable.

(2) A time-and-materials or labor-hour order may be used for the acquisition of commercial services only when—

(i) It is not possible at the time of placing the order to estimate accurately the extent or duration of the work or to anticipate costs with any reasonable degree of confidence; and

(ii) The agency acquires the services through a competitive procedure under paragraph (c).

(3) Prior to the issuance of a time-and-materials or labor-hour order, the contracting officer shall—

(i) Execute a determination and findings (D&F) for the order, in accordance with paragraph (e)(4) of this section that a fixed price order is not suitable;

(ii) Include a ceiling price in the order that the contractor exceeds at its own risk; and

(iii) Authorize any subsequent change in the order ceiling price only upon a determination, documented in the order file, that it is in the best interest of the procuring agency to change the ceiling price, and the change does not affect the scope of the task order as awarded (see 12.207(b)(1)(ii)).

(4) The D&F required by paragraph (e)(3) of this section shall contain sufficient facts and rationale to justify that a fixed-price order is not suitable. At a minimum, the D&F shall—

(i) Include a description of the market research conducted (*see* 8.404(c), Acquisition planning, and 10.002(e));

(ii) Establish 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;

(iii) Establish that the current requirement has been structured to maximize the use of fixed-price orders (e.g., by limiting the value or length of the time-and-materials/labor-hour order; establishing fixed prices for portions of the requirement) on future acquisitions for the same or similar requirements; and

(iv) Describe actions to maximize the use of fixed-price orders on future acquisitions for the same requirements (*see* 12.207(b)(2)).

(5) Additional approval is required for orders with a total performance period, including options, of more than three years:

(i) The D&F prepared in accordance with paragraph (e)(3) of this section shall be signed by the contracting officer and approved by the head of the contracting activity prior to the execution of the base period; and

(ii) The order shall include a ceiling price that the contractor exceeds at its own risk. The contracting officer shall document the order file to justify the reasons for and amount of any subsequent change in the ceiling price.

\* \* \* \* \*

**PART 12—ACQUISITION OF COMMERCIAL ITEMS**

3. Amend section 12.207 by adding paragraph (b)(4) to read as follows:

**12.207 Contract type.**

\* \* \* \* \*

(b) \* \* \*

(4) *See* 8.405–2(e) for requirement for determination and findings when using Federal Supply Schedules.

\* \* \* \* \*

**PART 16—TYPES OF CONTRACTS**

4. Revise section 16.201 to read as follows:

**16.201 General.**

(a) Fixed-price types of contracts provide for a firm price or, in appropriate cases, an adjustable price. Fixed-price contracts providing for an adjustable price may include a ceiling price, a target price (including target cost), or both. Unless otherwise specified in the contract, the ceiling price or target price is subject to adjustment only by operation of contract clauses providing for equitable

adjustment or other revision of the contract price under stated circumstances. The contracting officer shall use firm-fixed-price or fixed-price with economic price adjustment contracts when acquiring commercial items.

(b) Time-and-materials contracts and labor-hour contracts are not fixed-price contracts.

5. Add section 16.600 to read as follows:

**16.600 Scope.**

Time-and-materials contracts and labor-hour contracts are not fixed-price contracts.

[FR Doc. 2010–24104 Filed 9–24–10; 8:45 am]

**BILLING CODE 6820-EP-P**

**DEPARTMENT OF TRANSPORTATION****Pipeline and Hazardous Materials Safety Administration****49 CFR Part 177**

[Docket No. PHMSA–2010–0221 (HM–256)]

**RIN 2137-AE63**

**Hazardous Materials: Limiting the Use of Electronic Devices by Highway**

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** Notice of proposed rulemaking (NPRM).

**SUMMARY:** The Pipeline and Hazardous Materials Safety Administration (PHMSA) proposes to prohibit texting on electronic devices by drivers during the operation of a motor vehicle containing a quantity of hazardous materials requiring placarding under part 172 of the 49 CFR or any quantity of a select agent or toxin listed in 42 CFR part 73. Additionally, in accordance with requirements published today by the Federal Motor Carrier Safety Administration (FMCSA), motor carriers are prohibited from requiring or allowing drivers of covered motor vehicles to engage in texting while driving. This rulemaking would improve health and safety on the Nation's highways by reducing the prevalence of distracted driving-related crashes, fatalities, and injuries involving drivers of commercial motor vehicles.

**DATES:** Comments must be received by October 27, 2010.

**ADDRESSES:** You may submit comments identified by the docket number PHMSA–2010–0221 by any of the following methods: