GSA

GSA Administrator

AUG 16 2002

CIVILIAN AGENCY ACQUISITION COUNCIL LETTER 2002-02

MEMORANDUM FOR CIVILIAN AGENCIES OTHER THAN NASA

FROM: AL MATERA
CHAIRMAN
CIVILIAN AGENCY ACQUISITION COUNCIL (CAAC)

SUBJECT: Class Deviation from the Federal Acquisition Regulation (FAR) 12.504, 22.1003-4, and 52.212-5, concerning the applicability of the Service Contract Act (SCA) to subcontracts for the acquisition of commercial services.

This memorandum serves as consultation for the extension of the class deviation issued pursuant to CAAC letter 2001-02 dated July 26, 2001.

On July 26, 2000, the Federal Acquisition Regulation (FAR) and Department of Labor (DoL) regulations were amended concerning the Service Contract Act (SCA) and subcontracts for commercial services. The effective date of the FAR amendment is August 25, 2000 (see 65 FR 46068) and it is applicable to solicitations issued on or after August 25, 2000.

Section 8003(b) of the Federal Acquisition Streamlining Act (FASA) required that the FAR include a list of provisions of law that are inapplicable to subcontracts for commercial items. In implementing this section of FASA, the SCA was included on the list of laws inapplicable to commercial subcontracts (60 FR 48231, September 18, 1995). Subsequent to the publication of that original FAR rule, the FAR Council, in consultation with the Department of Labor (DoL), has concluded that it is not in the best interest of the Government to retain the SCA on the list of laws that are inapplicable to all subcontracts for commercial items.

The FAR Council concluded that a blanket exemption of all subcontracts for commercial items may not adequately serve the Administration's policy of supporting exemptions of the SCA only where they do not undermine the purposes for which the SCA was enacted. The FAR Council agreed that any exemption from the coverage of the SCA for subcontracts for the acquisition of commercial items or components should be accomplished under the Secretary of Labor's authority under the SCA. As a result, the FAR Council has reconsidered this issue and has removed the SCA from the list of laws inapplicable to subcontracts for commercial items and the FAR was amended accordingly (see 65 FR 46068).

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Pursuant to Section 4(b) of the McNamara-O'Hara Service Contract Act (SCA), the DoL issued a temporary exemption from coverage for certain subcontracts for commercial services (a final rule). On the same day, DoL also issued a proposed rule proposing a similar exemption for both prime contracts and subcontracts. The exemption for certain subcontracts was determined to be necessary and proper in the public interest to avoid the serious impairment of government business, and is in accord with the remedial purpose of the SCA to protect prevailing labor wages.

The temporary exemption does not apply to all commercial subcontracts that may have been exempt under the FAR prior to August 25, 2000, nor does it apply to any prime contracts. The exemption is limited solely to those subcontracts that (1) were or would have been exempt under the previous FAR and (2) would be exempt under the DoL proposed rule if that rule becomes final in its current form. The DoL exemption will be in effect for one year or until final action is taken on the proposed rule, whichever occurs first. The DoL notes that it intends to proceed expeditiously with this rulemaking and anticipates that a final rule, after review of all of the comments, will be issued within six months.

Accordingly, pending a change to the FAR, civilian agencies are encouraged to authorize a class deviation immediately in accordance with FAR 1.404(a) from the requirements of FAR 12.504, 22.1003-4, and 52.212-5 consistent with the changes stated above and the Department of Labor's final rule referenced above and effective on August 26, 2000. Pending a change to the FAR, civilian agencies may use this language as the basis for their deviations. The FAR will be amended following promulgation of a DoL final rule. This class deviation shall remain in effect until July 26, 2003, or upon issuance of an appropriate FAR change, which ever occurs first. Enclosure 1 is a sample class deviation with model coverage. This letter serves as evidence of consultation with the Chairman of the Civilian Agency Acquisition Council, as provided in 1.404.

Enclosure

Enclosure 1

TO: Agency Head or Designee

SUBJECT: Request for Class Deviation from FAR 12.504 and 52.212-5.

In accordance with Federal Acquisition Regulation (FAR) 1.404, your approval is requested to deviate from the current FAR 12.504(c)(4), 22.1003-4 and 52.212-5(c)(1).

The FAR was revised at 12.504 (a)(7) and 52.212-5(e)(5) to remove the Service Contract Act from the list of laws inapplicable to subcontracts for commercial services. The FAR rule was published July 26, 2000. The effective date is August 25, 2000 (see 65 FR 46068). The rule is applicable to solicitations issued on or after the rule's effective date (see 65 FR 46053 and FAR 1.108(d)).

On the same day, the Department of Labor (DoL) (1) pursuant to Section 4(b) of the McNamara-O'Hara Service Contract Act (SCA), issued a final rule which recognizes a temporary exemption from SCA coverage for certain subcontracts for commercial services; and (2) issued a proposed rule which proposes a similar exemption for both prime contracts and subcontracts.

The temporary exemption does not apply to all commercial subcontracts that may have been exempt under the now withdrawn FAR rule nor does it apply to any prime contracts. The exemption is limited solely to those subcontracts that (1) were or would have been exempt under the now withdrawn FAR rule and (2) would be exempt under the DoL proposed rule if that rule becomes final in its current form. The exemption will be in effect for one year or until final action is taken on the proposed rule, whichever occurs first.

This deviation is requested so that (Agency) as an agency may implement the Department of Labor's final rule of July 26, 2000, Service Contract Act; Labor Standards for Federal Service Contracts, which concerns the issuance of the temporary exemption referenced above. The exemption is considered necessary to prevent the disruption that could be caused by such changes, including the possible disruption of services if the current subcontractor does not agree to continue the subcontract services under the requirements of SCA. This class deviation shall remain in effect until July 26, 2003 or upon the effective date of a pertinent FAR change, whichever occurs first. This request has been coordinated with the Chairperson of the Civilian Agency Acquisition Council.

APPROVED: (Agency Head or Designee)
Name, Title

DRAFT CLASS DEVIATION

PART 12—ACQUISITIONS OF COMMERCIAL ITEMS

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12.504 Applicability of certain laws to subcontracts for the acquisition of commercial items.

* * * * *

(c) The applicability of the following laws has been modified in regards to subcontracts at any tier for the acquisition of commercial items or commercial components:

(1) * * *

(2) * * *

(3) * * *

[(4) 41 U.S.C. 351, Service Contract Act of 1965 (see 22.1003-4(c) and (d).]

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PART 22—APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

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22.1003-4 Administrative limitations, variations, tolerances, and exemptions.

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[(c)(1) Through July 26, 2001, the Secretary of Labor has exempted subcontracts principally for the following commercial services from all provisions of the Act if the conditions at paragraph (c)(2) of this subsection are met: the maintenance, calibration, repair, and/or installation of information technology.

(2) The exemption at paragraph (c)(1) of this subsection applies if the following conditions are met:

(i) If the subcontract includes installation services, the installation services are not subject to the Davis-Bacon Act as provided in 29 CFR 4.116(c)(2).

(ii) The items of equipment are commercial items.

(iii) The subcontract services are furnished at prices that are, or are based on, established catalog or market prices for the maintenance, calibration, repair, and/or installation of such commercial items.

(iv) The subcontractor uses the same compensation (wage and fringe benefits) plan for all service employees performing work under the contract as the subcontractor uses for these employees and equivalent employees servicing the same equipment of commercial customers.

(v) The subcontractor certifies in the subcontract that the conditions in paragraphs (c)(2)(ii) through (iv) of this subsection have been met.

(vi) Prior to subcontract award, the contractor determines that this exemption applies to the subcontract. In making a judgment that the

exemption applies, the clause at 52.212-5(c)(1) requires the contractor to consider all factors and make an affirmative determination that the conditions in paragraphs (c)(2)(ii) through (iv) of this subsection have been met, and that the condition at paragraph (c)(2)(v) of this subsection will be met.

(3) If the Department of Labor determines that any of the above requirements for exemption has not been met with respect to a subcontract, the exemption will be deemed inapplicable, and the contractor may be responsible for compliance with the Act, effective as of the date of contract award.

(d)(1) Through July 26, 2001, the Secretary of Labor has exempted subcontracts for the following commercial item services from all provisions of the Act if the conditions at paragraph (d)(2) of this subsection are met:

(i) Automated data processing (ADP) and telecommunications services, excluding ADP data entry services and ADP optical scanning services. This category includes the following:

(A) ADP facility operation and maintenance services provided at the subcontractor's facility.

(B) ADP telecommunications and transmission services.

(C) ADP teleprocessing and timesharing services.

(D) ADP systems analysis services.

(E) Information and data broadcasting or data distribution services.

(F) ADP backup and security services.

(G) ADP data conversion services.

(H) Computer aided design/computer aided manufacturing services.

(I) Digitizing services (including cartographic and geographic information).

(J) Telecommunications network management services.

(K) Automated news services.

(L) Data services or other information services (e.g., buying data, the electronic equivalent of books, periodicals, newspapers, etc.).

(M) Data storage on tapes, compact disks, etc.

(ii) Automobile or other vehicle (e.g., aircraft) maintenance services (other than subcontracts to operate a Government motor pool or similar facility).

(iii) Financial services involving the issuance and servicing of cards (including credit cards, debit cards, purchase cards, smart cards, and similar card services).

(iv) Lodging at hotels/motels and contracts with hotels/motels for conferences, including lodging and meals, that are part of the subcontract for the conference.

(v) Maintenance services for all types of specialized building or facility equipment, such as elevators, escalators, temperature control systems, security systems, smoke and/or heat detection equipment.

(vi) Maintenance, calibration, repair, or installation (where the installation is not subject to the Davis-Bacon Act, as provided in 29 CFR 4.116(c)(2)) services for all types of equipment where the services are obtained from the manufacturer or supplier of the equipment.

(vii) Transportation of persons by air, motor vehicle, rail, or marine vessel on regularly scheduled routes or via standard commercial services (not including charter services).

(viii) Real estate services, including real property appraisal services, related to housing Federal agencies or disposing of real property owned by the Government.

(ix) Relocation services, including services of real estate brokers and appraisers to assist Federal employees or military personnel in buying and selling homes.

(2) The exemption for the services in paragraph (d)(1) of this subsection apply if the following conditions are met:

(i) The services under the subcontract are commercial.

(ii) The subcontract will be awarded on a sole-source basis or the subcontractor will be selected for award based on other factors in addition to price. In such cases, price must be equal to or less important than the combination of other nonprice or cost factors in selecting the subcontractor.

(iii) The subcontract services are furnished at prices that are, or are based on, established catalog or market prices.

(iv) All of the service employees who will perform the services under the subcontract spend only a small portion of their time (a monthly average of less than 20 percent of the available hours on an annualized basis, or less than 20 percent of available hours during the contract period if the contract period is less than a month) servicing the Government subcontract.

(v) The subcontractor utilizes the same compensation (wage and fringe benefits) plan for all service employees performing work under the subcontract as the subcontractor uses for these employees and for equivalent employees servicing commercial customers.

(vi) The contractor determines in advance, based on the nature of the subcontract requirements and knowledge of the practices of likely offerors, that all or nearly all offerors will meet the above requirements. If the services are currently being performed under a contract or subcontract, the contractor is required by the clause at 52.212-5(c)(1) to consider the practices of the existing contractor or subcontractor in making a determination regarding the above requirements.

(vii) The subcontractor certifies in the subcontract that the conditions in paragraphs (d)(2)(i), and (d)(2)(iii) through (v) of this subsection apply to the subcontract. The contractor is required by the clause at 52.212-5(c)(1) to review available information concerning the subcontractor and the manner in which the subcontract will be performed. If the contractor has reason to doubt the validity of the certification, SCA stipulations must be included in the subcontract.

(viii) The subcontract are not subject to Section 4(c) of the Service Contract Act.

(3) If the Department of Labor determines that any of the above requirements for exemption has not been met with respect to a subcontract, the exemption will be deemed inapplicable for that subcontract, and the contractor might be responsible for compliance with the Act, effective as of the date of contract award.]

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PART 52 SOLICITATION PROVISIONS AND CONTRACT CLAUSES

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52.212-5 Contract Terms and Conditions Required to Implement Statutes or Executive Orders—Commercial Items.

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(c) * * *

____(1) 52.222-41, Service Contract Act of 1965, As Amended (41 U.S.C. 351, et seq.) [(Subcontracts for certain commercial services may be exempt from coverage if they meet the criteria in FAR 22.1003-4(c) or (d))]

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