



GSA Federal Acquisition Service

July 27, 2011

FAS INSTRUCTIONAL LETTER 2011-18

MEMORANDUM FOR ALL FAS ACTIVITIES

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SUBJECT: Reducing High-Risk Contracting

1. **Purpose:** This Instructional Letter (IL) provides guidance to FAS acquisition activities on the best practices to reduce high risk contracting within FAS as well as guidance on the implementation of the interim changes to Federal Acquisition Regulation (FAR) as a result of Section 864, Regulations On The Use Of Cost-Reimbursement Contracts, of the Duncan Hunter National Defense Authorization Act (NDAA), for Fiscal Year (FY) 2009 (Pub. L. 110-417).
2. **Background:** The Office of Federal Procurement Policy (OFPP) issued the memorandum entitled "[Increasing Competition and Structuring Contracts for the Best Results](#) (October 27, 2009)," to establish guidelines to agencies to evaluate the effectiveness of the agencies' competition practices and processes for selecting contract types. This memorandum was issued as a result of the Office of Management and Budget (OMB) Memorandum (M-09-25), entitled "[Improving Government Acquisition](#)" (July 29, 2009), which charged agencies to reduce, by at least 10 percent, the combined share of high-risk contract dollars obligated through new contracts in FY2010 with new targets being set for FY 2011 and beyond.

OFPP defined "High-Risk Contracting" as the following:

- (1) awarded non-competitively;
- (2) received only one bid in response to a solicitation or a request for quote;
- (3) cost-reimbursement contracts or task/delivery orders; or
- (4) time-and-material (T&M)/labor hour (LH) contracts or task/delivery orders.

These contract designations were termed "high-risk contracts" because of the risk of misuse or overspending when used without proper oversight controls.

In addition, on March 16, 2011, FAR Case 2008-30, Federal Acquisition Regulation; Proper Use and Management of Cost-Reimbursement Contracts, was issued as an interim rule

amending the FAR to implement Section 864 of the NDAA for FY 2009. This rule provides regulatory guidance on the proper use and management of other than firm-fixed-price contracts (e.g., cost-reimbursement, T&M and LH). As a result, this rule provided additional guidance in determining contract type, and requires contracting activities to address and document the contract type selection in acquisition plans or contract files (if acquisition plans aren't required).

3. Effective Date: Date of signature.
4. Termination Date: This IL remains in effect until it is cancelled or incorporated into a handbook
5. Applicability. This IL applies to all GSA/FAS acquisition activities awarding and administering contracts, Blanket Purchase Agreements (BPAs), and task/ delivery orders.
6. Reference Regulations. Section 864, Regulations on the Use Of Cost-Reimbursement Contracts, of the NDAA for FY 2009 (Pub. L. 110-417), Proper Use and Management of Cost-Reimbursement Contracts, FAR [7.105](#), FAR [16.103](#) and [16.104](#).
7. Instructions/Procedures.

A. Acquisition Strategy Guidance:

- i. All FAS acquisition activities should continue to identify actions to minimize the use of high-risk contracts by selecting appropriate contract types, enhancing competition, and ensuring the effective oversight of all contracts.
- ii. To the maximum extent practicable, acquisition activities shall move requirements away from high risk contracting. To enhance competition and reduce the risk of receiving one offer/proposal, acquisition activities should allow for industry involvement early in the acquisition process. Some methods to encourage industry participation, in the requirements definition stage, are the following:
 - Release of Requests for Information (RFI) through eBuy and FedBizOpps (as appropriate);
 - Industry Days to communicate the government's requirements; and
 - Opportunities for one-on-one meetings with contractors to perform their due diligence to enhance opportunities for better proposals.

(Reference: OFPP Memorandum, ["Myth-Busting": Addressing Misconceptions to Improve Communication with Industry during the Acquisition Process](#), Feb. 2, 2011).

Additionally, to promote effective use of competition, FAS acquisition activities are encouraged to make use of e-Buy to the maximum extent practicable to enhance competition when establishing an FSS BPA or placing an order against an FAS contract vehicle, i.e. Federal Supply Schedules, Government-wide Acquisition Contract (GWACs) and FAS Multi-agency Contracts (MACs) .

- iii. Acquisition activities should also maximize opportunities to include the capability of including different contract types (i.e. shifting from cost, T&M, or LH to fixed-price at different periods of the acquisition) into awards to reduce the risk of protracted use of cost-reimbursement and/or T&M/LH contracting. For on-going procurements,

Contracting Officers should determine if it's in the Government's best interest to not exercise an option for a high risk contract and re-solicit the procurement to a better pricing arrangement (e.g. shift from cost reimbursement to FFP). In reviewing contract type decisions for both on-going and recurring requirements, if a determination is made to not transition to a fixed-price contract, Contracting Officers shall document the contract file with an explanation of the decision.

- iv. Acquisition activities shall continue to refer to FAR [16.104](#), Selecting Contract Types, prior to developing an acquisition strategy for procurements. Acquisition activities shall consult additional references such as the [Contract Pricing Reference Guides](#) to establish and manage contract type when developing acquisition strategies and completing acquisition plans. When a fixed-price contract type can't be considered, contracting activities should consider selecting a combination of contract types by breaking up the requirements to allow fixed pricing for appropriate task areas.
- v. More examples can be found in the OFPP memorandum "[Increasing Competition and Structuring Contracts for the Best Results](#)"

B. Documentation Requirements:

- i. All acquisition plans (Reference FAR [7.105\(b\)\(3\)](#), Contract type selection), if applicable, shall include the documentation found in FAR [16.103](#). A summary of the contents of FAR [16.103](#) are as follows:
 - (1) Each contract file shall include documentation to show why the particular contract type was selected. This shall be documented in the acquisition plan, or if a written acquisition plan is not required, in the contract file.

For other than a firm-fixed price contract, at a minimum the documentation should include:

- An analysis of why the use of other than a firm-fixed-price contract (e.g., cost reimbursement, T&M, LH) is appropriate;
- Rationale that detail the particular facts and circumstances (e.g., complexity of the requirements, uncertain duration of the work, contractor's technical capability and financial responsibility, or adequacy of the contractor's accounting system), and associated reasoning essential to support the contract type selection;
- An assessment regarding the adequacy of Government resources that are necessary to properly plan for, award, and administer other than firm-fixed-price contracts; and
- A discussion of the actions planned to minimize the use of other than firm-fixed-price contracts on future acquisitions for the same requirement and to transition to firm-fixed-price contracts to the maximum extent practicable.

(2) The acquisition plan should provide a discussion of the additional risks in managing the selected contract type and how it will mitigate those risks. Examples of risks can include:

- The burden of managing contractor's costs;
- Inadequate contractor's accounting system; and/or
- Weaknesses in contractor's internal control

C. Reporting Requirement:

i. The progress on the reduction of high-risk contracting will be continuously monitored. Acquisition activities with high percentages of high-risk contracting may need to develop mitigation plans with strategies to reduce their numbers.

Questions and Answers.

- Q1. The FAR always required Contracting Officers to discuss contract type selection. What is different now?
- A1. The interim FAR change restructured FAR Part 7 and created a separate paragraph for FAR [7.105\(b\)\(3\)](#) to expand the documentation requirements for contract type selection(s).
- Q2. If I'm awarding a Government-wide Acquisition Contract (GWAC), Federal Supply Schedule (FSS) contracts, or a FAS Multi-Agency Contract (MAC) does this change apply to me?
- A2. Yes. Acquisition planning is to be done for all procurements. In accordance with GSAM [507.104](#), Acquisition Planning, acquisition planning is required for all procurements. However, Acquisition Letter MV-11-04 provides clarification that written plans are only required for acquisitions above the Simplified Acquisition Threshold (SAT). For the development of Federal Supply Schedules (i.e. Schedule 36, OFFICE, IMAGING AND DOCUMENT SOLUTION), the acquisition planning is performed as part of the initial solicitation posting and updated annually and whenever the schedule's solicitation is refreshed. Subsequent contracts awarded should be covered by the same acquisition plan.
- Q3. If I'm issuing a task order under a single indefinite-delivery indefinite-quantity (IDIQ) contract or Blanket Purchase Agreement (BPA) that only allows for either T&M or LH orders; do I have to develop an acquisition plan with the above documentation?
- A3. No. In accordance with GSAM [507.104\(c\)\(1\)](#), Acquisition Planning, "When awarding a single IDIQ contract or a BPA for a specific requirement and agency, an acquisition plan will be developed for the base contract. The resulting orders should be covered by and reference the same acquisition plan."
- Q4. If I want to use eBuy to issue a RFI or a Request for Quote (RFQ), where can I go to get training on how to effectively use eBuy?
- A4. An eBuy training video can be found at www.gsa.gov/masnews. In addition, to learn more about effective use of the FSS program sign up for the Multiple Award Schedules (MAS) group at interact.gsa.gov. Another excellent resource for training on how to use eBuy is the Customer Service Directors in the CAR organization as they routinely provide this training to agencies.
- Q5. If I am doing a procurement on behalf of a Department of Defense (DOD) agency and receive only one bid are there any special procedures that apply under these

circumstances?

A5. Yes. Acquisition activities are encouraged to read the DOD, Acquisition Technology and Logistics (ATL), memorandum entitled, [Improving Competition in Defense Procurements \(November 24, 2010, supplement –“Amplifying Guidance \(April 27, 2011”\)](#) in its entirety. Below is a summary of some of the guidance from the memorandum:

- If the solicitation was advertised for fewer than 30 days and only one offer is received, then the contracting officer shall cancel and re-solicit for an additional period or at least 30 days; or
- If a solicitation allowed at least 30 days for receipt of offers and only one offer was received, the contracting officer shall not depend on the standard at FAR 15.403-1(c)(ii) in determining the price to be fair and reasonable. Rather the contracting officer shall use price or cost analysis in accordance with FAR 15.404-1 to make that determination. If the contracting officer believes that it is necessary to enter into negotiations with an offeror, the basis for these negotiations shall be either certified cost or pricing data or data other than certified cost or pricing data, as appropriate, in accordance with FAR 15.403-1(c), DFARS 215-403-1(c) and FAR 15.403-3(b). The negotiated price should not exceed the offered price.

Q6. What procedures are required when I have an acquisition plan that is either only one source or provides for a contract type that is predominately cost reimbursable, time and material and/or labor hour.

A6. [Acquisition Letter MV-11-05, Supplement 01](#), entitled, Content of Subject Line in the Acquisition Plan Mailbox- Submission of All High Risk Acquisition Plans to the Acquisition Plan Mailbox, provides that Contracting Officers provide the following information, abbreviated as necessary, in the subject line for all designated “high risk” acquisition plans:

Contract Data: American Recovery and Reinvestment Act (ARRA) (if applicable); High Risk Contract (HRC); Service name (FAS, PBS, Staff); Region number; project name identifier; location; Contracting Officer name; estimated value.

Example of Subject Line: HRC, FAS, CO, Software Development, Washington, DC, John Doe, \$5,000,000.

If an award has more than one contract type, use the contract type with greater contract value to determine if this requirement applies.

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