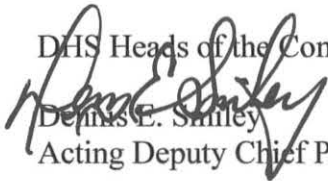


DEC 22 2014



Homeland
Security

MEMORANDUM FOR: DHS Heads of the Contracting Activities
FROM: 
Dennis E. Smiley
Acting Deputy Chief Procurement Officer
SUBJECT: Incremental Funding Fixed-Price and Time and Material or Labor
Hour Contracts During a Continuing Resolution

This memorandum provides procedures for using incremental funding for fixed-price or time and material/labor hour contracts during a period in which funds are provided to the Department of Homeland Security (DHS) under a Continuing Resolution (CR). The procedures apply to all contract actions planned to be funded in whole or in part with appropriated funds provided by a CR. The September 27, 2011 memorandum of the same subject is cancelled and superseded by this memorandum.

The Anti-Deficiency Act, 31 United States Code §1341 and The Federal Acquisition Regulation (FAR) 32.702, state that no officer or employee of the Government may create or authorize an obligation in excess of the funds available, or in advance of appropriations unless otherwise authorized by law. A CR provides funding for continuing projects or activities that were conducted in the prior fiscal year for which appropriations, funds, or other authority was previously made available.

Each CR is governed by the specific terms in that specific CR and under certain CRs, the funding amounts available to Components for award of contract actions are inadequate to fund the entire award of some contract actions, even though full funding is authorized by the CR. This creates a dilemma under which a Component may have to choose between several disadvantageous strategies to stay within the limits of the funding appropriated by the CR. For example, limited available funding might require the Component to fund only some awards to provide full funding for a small number of other actions, or award short term contracts with options, or delay awards until full funding is provided. Although use of such strategies might be administratively impractical and may increase prices and delay deliveries, there is sometimes no choice in order to support mission essential functions and comply with fiscal law.

In view of the harmful nature of many of the strategies that might otherwise have to be adopted, this memorandum provides policies in order to better ensure successful, timely and economical execution of DHS missions. The Homeland Security Acquisition Manual (HSAM 3032.702(e)) restricts use of incremental funding for fixed-price, or time and material or labor hour contracts and provides that incrementally funded cost reimbursement contract actions may be awarded as permitted by the FAR. HSAM 3032.702(e) remains in full effect except as provided in this memorandum, which grants a class deviation from HSAM 3032.702(e) only for fixed-price, or

time and material or labor hour contract actions awarded during a CR as described in the attached guidance.

Components and contracting officers may develop necessary solicitation guidance to advise offerors of these procedures. The authorities granted by this memorandum expire upon promulgation of permanent policies in either the FAR, HSAM or Homeland Security Acquisition Regulation, or upon notice by the DHS Office of the Chief Procurement Officer.

Questions or comments about these procedures may be directed to Jeremy Olson at (202) 447-5197 or jerry.olson@dhs.gov.

Attachment

Policy On Incremental Funding During A Continuing Resolution

(I) Policy

(a) A fixed-price, Time and Materials or Labor Hour contract or order for commercial or noncommercial supplies or services may be incrementally funded only if, during a Continuing Resolution (CR), the department or Component is not allocated sufficient funds to fully fund a contract action that is otherwise authorized to be awarded, if approved one level above the contracting officer and—

(i) The funds to be obligated are not restricted by a statutory prohibition against incremental funding;

(ii) The contract or order is incrementally funded using funds available, unexpired, as of the date the funds are obligated.

(iii) The contract includes requirements consistent with the information described in section II of this deviation, DHS Deviation Limitation of Government's Obligation; and

(iv) The responsible financial officer agrees in writing to provide full funding immediately after the CR is replaced by an Appropriation Act, to the extent such funds are provided to the Component.

(b) An incrementally funded fixed-price, Time and Materials or Labor Hour contract or order shall be allotted to the contract line item(s) as soon as the need for additional funds is identified and the funds are available.

(c) Incremental funding for a fixed-price, Time and Materials or Labor Hour contract or order may be limited to an individual line item(s) or a particular order(s) and may be applied to commercial or non-commercial items, severable or non-severable service, or to supplies.

(i) If applied to non-severable services or to supplies, the contracting officer shall take action to ensure the contractor fully understands how the limitations of the Government's liabilities under the contract might impact its abilities to execute the contract within the prescribed schedule; and

(ii) If applied to non-severable services, the contracting officer should take into consideration the business risk to the agency if funding does not become available to fully fund the contract. Further, this deviation does not authorize the contracting officer to fund the action with funds from a fiscal year that is not the fiscal year of the CR.

(d) Upon receipt of the contractor's notice under paragraph (c) of number II, the contracting officer shall promptly provide written notice to the contractor that the Government is—

(i) Allotting additional funds for continued performance and increasing the Government's limitation of obligation in a specified amount;

(ii) Terminating the contract; or

(iii) Considering whether to allot additional funds; and

(A) The contractor is entitled by the contract terms to stop work when the Government's limitation of obligation is reached; and

(B) Any costs expended beyond the Government's limitation of obligation are at the contractor's risk.

(e) Upon learning that the contract will receive no further funds by the date requested by the contractor, the contracting officer shall:

(i) Promptly give the contractor written notice of the Government's decision and, if the funds currently obligated on the contract are not sufficient to fund continued performance of the contract, terminate for the convenience of the Government; or

(ii) Negotiate a mutually acceptable funding schedule.

(f) The contracting officer is not authorized to add funds to a contract that is incrementally funded under the authority of this deviation if the funds are from a fiscal year other than the fiscal year of the incrementally funded amount unless there is specific statutory authority to do so.

(g) The contracting officer shall ensure that, in accordance with paragraph II (c) of HSAM Deviation, Limitation of Government's Obligation, sufficient funds are allotted to the contract to cover the total amount payable to the contractor in the event of termination for the convenience of the Government.

II. Contract Requirement of DHS Class HSAM Deviation, Limitation of Government's Obligation. The following information must be included in a contract or order when incremental funding of fixed-price, Time and Materials and Labor Hours contracts are authorized when the Component is operating under a CR.

(a) Contract line item(s) listed below are incrementally funded or fully funded as shown in the below table. For these item(s), the sum of \$*_ of the total price is presently available for payment and allotted to this contract. This funding table will be updated in each contract action that provides additional funds, if any. (*Amounts*

shown in this document are for illustration only. They must be replaced by actual amounts in each contract award.)

CLIN	CLIN Price	Currently Allotted Funding	Funds Required for Complete Funding
0001	\$1,000,000	\$550,000	\$450,000
0003	\$450,000	\$450,000	\$0
0005	\$2,250,000	\$1,200,000	\$1,050,000
Contract Totals	\$3,700,000	\$2,200,000	\$1,500,000

(b) For item(s) identified in paragraph (a) as not fully funded, the contractor agrees to perform up to the point at which the total amount payable by the Government, including reimbursement of authorized termination costs in the event of termination of those item(s) for the Government's convenience, does not exceed the total amount currently allotted to the items not fully funded under the contract. The contractor is not authorized to continue work on those item(s) beyond that point. The total amount payable by the Government in the event of such termination of those contract line item(s) identified in paragraph (a) above includes costs, profit, and estimated/negotiated termination settlement costs for those item(s). The Government will not be obligated in any event to reimburse the contractor in excess of the amount allotted to the line items of the contract regardless of anything to the contrary in any other clause, such as the clause entitled "Termination for Convenience of the Government" or paragraph (l) entitled "Termination for the Government's Convenience" of the clause at FAR 52.212-4, "Commercial Terms and Conditions-Commercial Items."

(c) Notwithstanding paragraph (i) of this requirement, the contractor will notify the contracting officer in writing at least thirty (or insert ninety or sixty) days prior to the date when, in the contractor's best judgment, the work will reach the point at which the total amount payable by the Government, including any cost for termination for convenience, will approximate 85 percent of the total amount then allotted to the contract for performance of the applicable item(s). The notification will state (1) the estimated date when that point will be reached and (2) an estimate of additional funding, if any, needed to continue performance. The notification will also advise the contracting officer of the estimated amount of additional funds that will be required for the timely performance of the item(s) funded pursuant to this contract. If after such notification additional funds are not allotted by the date identified in the contractor's notification, or by an agreed substitute date, the contracting officer will terminate any item(s) for which additional funds have not been allotted, pursuant to the clause of this contract authorizing termination for the convenience of the Government, such as the clause entitled "Termination for Convenience of the Government" or paragraph (l)

entitled "Termination for the Government's Convenience" of the clause at FAR 52.212-4, "Commercial Terms and Conditions-Commercial Items."

(d) When additional funds are allotted for continued performance of the contract line item(s) identified in paragraph (a), the parties will agree as to the period of contract performance which will be covered by the funds. The provisions of paragraphs (b) through (d) will apply in like manner to the additional allotted funds and agreed substitute date, and the contract will be modified accordingly.

(e) The Government may at any time prior to termination allot additional funds for the performance of the contract line item(s) identified in paragraph (a).

(f) The termination provisions of paragraphs (a) through (i) do not limit the rights of the Government under the clause entitled "Default" or "Termination for Cause." The provisions of this clause are limited to the work and allotment of funds for the contract line item(s) set forth in paragraph (a). This clause no longer applies once the contract is fully funded.

(g) Nothing in this clause affects the right of the Government to terminate this contract pursuant to the clause of this contract entitled "Termination for Convenience of the Government" or paragraph (l) entitled "Termination for the Government's Convenience" of the clause at FAR 52.212-4, "Commercial Terms and Conditions-Commercial Items."

(h) Nothing in this clause shall be construed as authorization of voluntary services whose acceptance is otherwise prohibited under 31 U.S.C. 1342.

(i) The parties contemplate that the Government will allot funds to this contract from time to time as the need arises and as funds become available. There is no fixed schedule for providing additional funds.

* To be inserted after negotiation.