



DEPARTMENT OF THE NAVY
NAVAL FACILITIES ENGINEERING COMMAND
WASHINGTON NAVY YARD
1322 PATTERSON AVENUE SE SUITE 1000
WASHINGTON, DC 20374-5065

IN REPLY REFER TO
ACQ 021
13 Oct 00

MEMORANDUM FOR NAVFAC ACQUISITION PERSONNEL

Subj: CLASS DEVIATION—APPLICABILITY OF THE SERVICE CONTRACT ACT
TO SUBCONTRACTS FOR THE ACQUISITION OF CERTAIN COMMERCIAL
SERVICES (00-42)

Ref: (a) NAVFAC memo of 17 Aug 00 (00-34)

Encl: (1) OASN (RD&A) ABM memo of 5 Sep 00

1. Reference (a) provided notification that FAR Part 12 has been revised to require flow-down of the Service Contract Act (SCA). It also included a Proposed Rule to establish exemption from SCA for specific commercial services and an Interim Rule providing continued exemption for specific subcontracts.

2. The criteria for subcontract exemption are complex and new. Solicitations issued under the deviation furnished by enclosure (1) should clearly articulate to offerors that use of the subcontract exemption is solely at the discretion and risk of the prime contractor. If you have any questions on the application of this deviation, contact Evelyn Ortiz at (202) 685-9164.

A handwritten signature in black ink, appearing to read "M. F. Howard".

MICHAEL F. HOWARD
Director, Acquisition Strategic Programs



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2000-00006

MEMORANDUM FOR DISTRIBUTION

Subj: CLASS DEVIATION--APPLICABILITY OF THE SERVICE CONTRACT
ACT TO SUBCONTRACTS FOR THE ACQUISITION OF CERTAIN
COMMERCIAL SERVICES

Encl: (1) OUSD DP(DAR) memo dtd August 25, 2000

Enclosure (1) is forwarded for your information and immediate implementation, as appropriate. The Director of Defense Procurement (DDP) has authorized all military departments and defense contracting activities to deviate from the requirements of Federal Acquisition Regulation 12.504, 22.1003-4, and the clause at 52.212-5, when contracting for commercial services.

This class deviation is effective through August 25, 2001, or until this policy is addressed in the FAR, whichever occurs first.


M. F. Jaggard
CAPT, SC, USN
Executive Director (Acting)
Acquisition and Business
Management

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Subj: CLASS DEVIATION--APPLICABILITY OF THE SERVICE CONTRACT
ACT TO SUBCONTRACTS FOR THE ACQUISITION OF CERTAIN
COMMERCIAL SERVICES

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Info

ACQUISITION AND
TECHNOLOGY

AUGUST 25, 2000

DP (DAR)

In reply refer to
DAR Tracking Number: 2000-00006

MEMORANDUM FOR DIRECTORS OF DEFENSE AGENCIES
DEPUTY FOR ACQUISITION AND BUSINESS MANAGEMENT,
ASN (RD&A) / ABM
DEPUTY ASSISTANT SECRETARY OF THE AIR FORCE
(CONTRACTING), SAF/AQC
DEPUTY ASSISTANT SECRETARY OF THE ARMY (PROCUREMENT)

SUBJECT: Class Deviation--Applicability of the Service Contract Act
to Subcontracts for the Acquisition of Certain Commercial
Services

Effective August 25, 2000, all military departments and defense contracting activities shall deviate from the requirements of Federal Acquisition Regulation 12.504, 22.1003-4, and the clause at 52.212-5, Contract Terms and Conditions Required to Implement Statutes or Executive Orders--Commercial Items, when contracting for commercial services. Instead, contracting officers shall--

- Use the attached FAR 12.504 and 22.1003-4 language; and
- Add the parenthetical "Subcontracts for certain commercial services may be exempt from coverage if they meet the criteria in FAR 22.1103-4(c) or (d) (see DoD class deviation number 2000-00006)" after the entry for 52.222-41, Service Contract Act of 1965, As Amended (41 U.S.C. 351, et seq.), within the clause at 52.212-5(c).

On July 26, 2000, and pursuant to Section 4(b) of the McNamara-O'Hara Service Contract Act (SCA), the Secretary of Labor issued a temporary exemption that provides that the requirements of the SCA are not applicable to subcontracts for the acquisition of certain commercial services. The Secretary of Labor determined that this exemption for certain subcontracts was necessary and proper in the public interest to avoid the serious impairment of government

ENCLOSURE(1)



AUG 30 2000

business, and is in accord with the remedial purpose of the SCA to protect prevailing labor.

This class deviation implements the Secretary of Labor's temporary exemption. The class deviation is effective through August 25, 2001, or until this policy is addressed in the FAR, whichever event occurs first.



Deidre A. Lee
Director, Defense Procurement

Attachment:
As stated

cc: DSMC, Ft. Belvoir

CLASS DEVIATION
DAR Tracking Number: 2000-00006

PART 12-ACQUISITIONS OF COMMERCIAL ITEMS

* * * * *

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).)]

* * * * *

PART 22-APPLICATION OF LABOR LAWS TO GOVERNMENT ACQUISITIONS

* * * * *

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

* * * * *

[(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 type of equipment of commercial customers.

(v) The subcontractor represents 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 represents 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 representation, SCA stipulations must be included in the subcontract.

(viii) The subcontract is 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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