

CONTRACTING OFFICERS: TURN OFF THE TIME AND MATERIAL DEFAULT SWITCH

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ABSTRACT. This article addresses the increased use of time and material contracts. It explores the reasons and risks of this contract type's use. Also, it makes several suggestions to pursue alternate contract types when appropriate.

INTRODUCTION

Time and material (T&M) contracts are increasingly used as the contract type of choice in federal contracting. As a contracting officer, I believe it is important that my colleagues consider the use of this instrument more carefully by considering the risks and other options available.

TIME AND MATERIAL CONTRACTS RISING

A recent Government Accountability Office (GAO) report reviewed the use of time and material contracts by the Department of Defense. The report stated that obligations under T&M contracts increased from almost \$5 billion in FY 1996 to about \$10 billion in FY 2005 with the caveat that that figure was probably even understated (U.S. Government Accountability Office, 2007). The Federal Procurement Data System (FPDS) reported obligations for all participating agencies, including both civilian and defense agencies, over the same period for T&M and labor hour contracts increased by almost \$14 billion. Also, the percent ratio of T&M dollars to all other contract type obligations indicated a steady increase through the same period, according to the FPDS database (Federal Procurement Data System,

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2007). Therefore, this means the use of T&M contracting is increasing as a greater percentage of overall obligated dollars. The General Services Administration's (GSA) Office of the Inspector General conducted a study of 523 GSA Federal Technology Service Contracts totaling \$5.4 billion, sixty percent (60%) were priced as time and material orders.³ According to regulation and sound business judgment, T&M contracts are supposed to be the least favorable of instruments, so this is a disturbing shift.

REASONS FOR INCREASED USE

The GAO report indicated the increased use of T&M contracts is for a variety of reasons, including they are faster to award and requirements don't have to be as clearly defined, making this the preferred mechanism (U.S. Government Accountability Office, 2007). The Services Acquisition Reform Act (SARA) Panel reported similar findings including a presentation by the GSA. The GSA's Office of the Inspector General reported the pressure often faced by buying offices to increase customer service which often means making fast awards using T&M contracts Federal Acquisition Advisory Panel (2005).

None of these facts should be surprising. Similar studies have demonstrated increases in contract dollars across the government to be obligated with a decreasing proportion of contracting officers. When many contracting officers are forced to work in an environment to make awards quickly and to satisfy their client's immediate demands, a T&M alternative becomes a compelling choice. In addition, many times clients prefer T&M instruments because they require less developed statements of work. The mechanics of a T&M contract give the inaccurate perception that it is very easy for program offices to direct work in a more flexible manner. However, in reality, oversight burden and the risk of unsatisfactory project completion within budget are increased. We can sympathize with contracting officers who have to succumb to the pressures of selecting a T&M instrument hastily, but they are not acceptable reasons because of the contracting officer's own set of responsibilities.

Often times T&M contracts are selected because of a simple failure to conduct thorough acquisition planning and better requirements definition, so that offerors can provide fixed prices. However, contracting officers and the whole acquisition team have a

variety of tools and mechanisms to put together the best contract, provided that the whole team thinks through what tool is best for a particular project. Rational people use neither a hammer to drive in a screw, nor a screwdriver to pound in a nail. Rational people think through which tool works best in a particular situation, just as contracting officers should balance the risk of awarding time and material contracts. Section 16.601 of the Federal Acquisition Regulation (FAR) is patently clear that the contracting officer should make a thoughtful determination before selecting this contract type and for good reason.

RISKS OF TIME AND MATERIAL CONTRACTS

Time and material contracts have the least accountability for contractors because firms are only required to give their best effort, which leaves minimal guarantee of project completion and maximum risk for the buying agency. When administered correctly, T&M contracts require far greater oversight by the government to ensure contractor resources are effectively used, including frequent monitoring and review of timesheets.

Poorly suited T&M contracts often result in a decay of project control and discipline by both the government and the contractor. Government project managers believe they have ultimate flexibility to make changes under the contract, which is true. Yet, contractors are benefited by repeated changes since they are not compensated on actual deliverables or project completion but merely their best effort. The risk of this flexibility is an increased lack of discipline exerted by government project managers and contractors where changes become much too commonplace without a serious awareness that the overall contract ceiling is eroding. The often unfortunate result is that a contractor is notifying the contracting officer that they are approaching their contract ceiling, and the client is panicked because their budget has evaporated without a completed deliverable.

Is a time and material contract always a bad choice? – Of course not. However, time and material contracts should never be the default contract type when formulating an acquisition strategy. In many cases, a time and material contract is the best, logical choice given the circumstance such as the inability to forecast demand or requirements. However, these unknowns are often an overused excuse to facilitate an easy source selection.

THOUGHTFUL APPLICATION AND SELECTION OF TIME AND MATERIAL CONTRACTS

The contracting officer is remiss in their duty if they do not persistently ask both clients and the industry community during acquisition planning why a time and material instrument is the only practical alternative. When a client submits a request that I award a time and material contract, I review the statement of work and ask why the services have to be priced as T&M. If requirements are clearly indeterminate such as for contingency needs, it is certainly reasonable to understand why a time and material contract is a rational alternative. However, if there is logical basis that the required services could be fixed price such as the predictable nature of the services, and it is simply a matter of better defining requirements, then I'm compelled to pursue a fixed price alternative further. If I continue to either encounter resistance from my client or if my client has a technical inability to re-write the requirement in a fixed price format, I will pursue the matter with the industry community. In fact, a successful approach I have adopted in many acquisitions is to release a draft or the current contract's statement of work and advise interested firms that I wish to make specific changes and solicit their feedback. Among the questions may include the feasibility of changing the contract type to firm fixed price.

I then specifically ask for input on the following points:

- (1) What specific information should the buying agency provide to potential contractors to permit a firm fixed price, such as specific activity or historical data?
- (2) If the firm believes a firm fixed price arrangement is too risky to competitively price, then I ask firms to explain why it will not work. *(I never accept the answer: "Oh, it's too risky." I want to understand precisely why to determine if I can eliminate the reason for the risk.)*

This is an extremely effective approach during pre-solicitation planning, and I have successfully changed several requirements in part or in total from time and material to firm fixed price.

Firms are very eager to demonstrate their knowledge of the industry and to demonstrate their utility to the government agency. Contracting officers should leverage this willingness of firms to help develop an improved solicitation and resultant contract.

If the industry feedback makes reasonable requests for background information or advises what are reasonable constraints to permit a firm fixed price arrangement, then the contracting officer should insist clients provide this information before releasing a formal solicitation.

CONCLUDING ANALYSIS OF TIME AND MATERIAL CONTRACTS

More legislation or regulation to further prohibit the use of time and material contracts is not needed. Current FAR guidance and good business judgment are adequate to manage this contract type's use. In fact, recent FAR changes allowing time and material contracts for commercial item contracts is commendable and long overdue since it is an appropriate mechanism in the right circumstance. This provides contracting officers with another tool that can be used to deal with the right problem. Many types of commercial like purchases are best suited on an hourly basis, and the government should have the same type of flexibility.

As customer service becomes an increased priority, it is clear more contracting officers are under increased pressure to make their clients happy by making faster awards without well-developed requirements documents, thereby encouraging time and material awards. However, I believe the contracting officer is doing their clients a disservice by conceding to an easy short-term solution. Individuals within our community often talk about the importance of raising the prestige of our occupation and becoming a greater force on the government team. I believe these are important goals too, but I ask contracting officers to truly act as business advisors by explaining the risk of time and material contracts, providing better alternatives such as fixed price contracts, and having the courage to be persistent and continue to raise opposition when appropriate. We, as contracting officers, have the duty and hopefully the desire to be concerned about the long term best interests of our clients and the obligation of public funds in a responsible way.

NOTES

The views expressed are solely those of the author and do not necessarily represent those of the US Government.

REFERENCES

- U. S. Government Accountability Office (2007, June). *Defense Contracting: Improved Insight and Controls Needed over DOD's Time-and-Materials Contracts* (GAO-07-273). Washington, DC: Author.
- Federal Procurement Data System (2007). *Next Generation*. [Online]. Available at www.fpds.gov.
- Federal Acquisition Advisory Panel (2005, May 17). *Meeting Minutes - Attachment 5*. [Online]. Available at www.acqnet.gov/comp/aap/documents/05%2017%2005%20Panel%20Meeting%20Minutes.pdf.