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DEPARTMENT OF HOMELAND SECURITY

48 CFR Parts 3016 and 3052

Docket No. DHS-2012-0050

RIN 1601-AA65

Revision of Department of Homeland Security Acquisition Regulation; Contractor Billing and Subcontractor Labor Hour Rates Under Time and Materials Contracts (HSAR Case 2010-001)

AGENCY: Office of the Chief Procurement Officer, DHS.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Department of Homeland Security (DHS) is proposing to amend its Homeland Security Acquisition Regulation to require contracts for time and material or labor hours to include separate labor hour rates for subcontractors and a description of the method that will be used to record and bill for labor hours for both contractors and subcontractors.

DATES: Comments and related material submitted electronically must be submitted to the Federal eRulemaking Portal <http://www.regulations.gov> on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

Comments and related material submitted by mail must reach the Department of Homeland Security, Office of the Chief Procurement Officer, Acquisition Policy and

Legislation Branch at the address shown below on or before [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] to be considered in the formation of the final rule.

ADDRESSES: You may submit comments identified by DHS docket number DHS-2012-0050, using any one of the following methods:

(1) Via the Internet at the Federal eRulemaking Portal:

<http://www.regulations.gov>. Follow the instructions for submitting comments and use docket number DHS-2012-0050.

(2) By mail to the Department of Homeland Security, Office of the Chief Procurement Officer, Acquisition Policy and Legislation Branch, ATTN: Jeremy Olson, 245 Murray Lane, Bldg. 410 (RDS), Washington, DC 20528.

FOR FURTHER INFORMATION CONTACT: Jeremy Olson, Department of Homeland Security, Office of the Chief Procurement Officer, Acquisition Policy and Legislation Branch, (202) 447-5197, or by e-mail at Jerry.Olson@dhs.gov.

SUPPLEMENTARY INFORMATION:

I. Request for Comments

II. Background

III. Discussion of Proposed Rule

IV. Regulatory Requirements

A. Executive Order 12866 (Regulatory Planning and Review)

B. Regulatory Flexibility Act

C. Assistance for Small Entities

D. Collection of Information

I. Request for Comments

Interested persons are invited to participate in this rulemaking by submitting comments and related materials. Comments and related materials should be organized by HSAR Part, and indicate the specific section that is being commented on. All comments received will be posted without change to <http://www.regulations.gov>, including any personal information provided. See **ADDRESSES** above for information on how to submit comments. If you submit comments by mail, please submit them in an unbound format, no larger than 8 ½ by 11 inches, suitable for copying and electronic filing. You may submit comments either by mail or via the internet as identified in the **ADDRESSES** section above; but to avoid duplication, DHS requests that you submit comments and materials by only one method. If you would like DHS to acknowledge receipt of comments submitted by mail, please enclose a self-addressed, stamped postcard or envelope. DHS will consider all comments and material received during the comment period.

Viewing comments and documents: To view comments and read background documents related to this rulemaking, go to <http://www.regulations.gov>, which contains relevant instructions under the FAQs tab on the home page.

II. Background

This proposed rule augments two existing Federal Acquisition Regulation (FAR) policies to create a consistent approach within DHS for awarding Time and Materials/Labor Hours (T&M/LH) contracts. Those two augmenting policies include the requirement for separate labor hour rates for T&M/LH subcontractors and the

requirement for consistent practices for contractor labor hour records and labor hour billing.

The first of the two existing FAR policies provides the option to require separate labor hour rates for each subcontractor under a T&M/LH contract, in addition to the labor hour rates established for the prime contractor. See FAR 16.601(e). The current FAR policy authorizes an agency either to permit individual contracting officers to decide if separate labor hour rates are necessary or to establish an agency procedure making separate rates mandatory. This rule proposes to establish a DHS-wide procedure to make the FAR option for consistent use of separate rates mandatory for DHS T&M/LH contracts.

Federal Acquisition Regulation (FAR) 16.601(e) further authorizes agencies to amend the solicitation provision at FAR 52.216-29, Time-and-Materials/Labor-Hour (T&M/LH) Proposal Requirements-Non-commercial Item Acquisitions With Adequate Price Competition, to require offerors to submit offers that include separate labor hour rates for subcontractors and affiliates. The purpose of requiring offers to include such separate rates is to ensure the resulting contract or order will have individual labor hour rate schedules for each individual subcontractor and affiliate of the prime contractor and not contain only a single set of rates applicable to the prime contractor and all subcontractors.

The second of the two augmenting Homeland Security Acquisition Regulation (HSAR) policies that are included in this proposed rule refines long-established FAR policies on consistency between contractor recordkeeping and contractor proposal and billing practices. The proposed rule establishes policies furthering those existing FAR

policies so that DHS contractors will identify their method of accounting for labor hours incurred and agree to a price adjustment if their billing practices under a T&M/LH contract they enter into with DHS results in overbilling because they had not billed consistently with their recordkeeping practices. To minimize the burden of identifying the method of recordkeeping used by a contractor, the proposed rule includes a solicitation provision in which each offeror will check one of two blocks to designate which of the two types of methods its recordkeeping system uses, record only the number of hours in a standard work period (such as a 40 hour workweek) or record all hours worked in a work period. This will apply only to hours incurred by employees who are exempt from the Fair Labor Standards Act (FLSA).

Contractors with a T&M/LH contract would be required to substantiate the number of hours billed in order to support payment of a voucher. There would be no mandatory requirement that a contractor use one method or the other; that would be the contractor's choice. However, the contractor must consistently follow its chosen practice.

III. Discussion of Proposed Rule

The proposed rule would revise 48 CFR part 3016, Types of Contracts and part 3052, Solicitation Provisions and Contract Clauses.

Fixed hourly rates – FAR 16.601(e)(1) allows for three approaches in structuring solicitations for T&M/LH contracts and orders and allows agencies to make mandatory one of the three approaches identified in the solicitation provision at FAR 52.216-29(c). The proposed rule would make the procedure at FAR 52.216-29(c)(1), separate rates for each labor category, mandatory for DHS T&M/LH contracts and orders. The proposed

rule provides procedures applicable to solicitations and awards for T&M/LH contracts and orders for non-commercial items using adequate price competition. The proposed rule would require offerors to propose separate, individual labor hour rates for each category of labor to be performed by the prime contractor, each subcontractor, and other divisions or subsidiaries or affiliates of the prime contractor under common control. The procedure would apply only to T&M/LH actions for non-commercial items to be awarded using adequate price competition.

The purpose of these procedures is to ensure appropriate labor hour rates are paid under T&M/LH contracts and orders. The procedures are intended to eliminate unintentional windfall payments to the prime contractor that might otherwise result from work performed by lower labor rate subcontracts or affiliates that is billed at a higher prime contractor labor hour rate.

Recording and billing hours under T&M/LH contracts and orders – The proposed rule would require all offerors seeking a T&M/LH contract or order to include a description of their method and their subcontractors' methods of accounting for uncompensated overtime performed by employees who are exempt from the Fair Labor Standards Act (FLSA). It also includes a requirement that billings and payments under the resulting contracts or orders be made consistent with that description. The procedure would apply to all T&M/LH contracts and orders that exceed the Simplified Acquisition Threshold (SAT).

The purpose of this procedure is to eliminate potential disputes regarding the hours that can be billed under T&M/LH contracts by clearly stating in the contract whether the contractor and each subcontractor will be reimbursed based on recording and

billing for only the number of hours worked not in excess of a standard number of hours in a standard work period (such as a 40 hour workweek) or recording all hours worked. This procedure will ensure that billings and payments under T&M/LH contracts do not result in an unintended windfall to the contractor by ensuring that the contractor does not bill the Government for all hours worked when its established practices are to record only the number of hours in a standard work period (such as a 40 hour workweek).

IV. Regulatory Requirements

A. Executive Order 12866 (Regulatory Planning and Review) and 13563 (Improving Regulation and Regulatory Review).

This proposed rule is not a significant regulatory action under section 3(f) of Executive Order 12866, as supplemented by Executive Order 13563. The Office of Management and Budget has not reviewed it under those Orders. This proposed rule is not a major rule under 5 U.S.C. 804.

B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA) (5 U.S.C. 601-612), we have considered whether this proposed rule would have a significant economic impact on a substantial number of small entities. The term "small entities" comprises small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions with populations of less than 50,000.

This proposed rule, if made final, may impact a substantial number of small entities within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601, *et seq.*, and

DHS has thus prepared an initial regulatory flexibility analysis consistent with 5 U.S.C. 604 as follows:

1. Description of the reasons why the action is being considered.

This proposed rule augments two existing Federal Acquisition Regulation (FAR) policies to create a consistent approach within DHS for awarding Time and Materials/Labor Hours (T&M/LH) contracts. Those two augmenting policies include the requirement for separate labor hour rates for T&M/LH subcontractors and the requirement for consistent practices for contractor labor hour records and labor hour billing.

The first of the two existing FAR policies provides the option to require separate labor hour rates for each subcontractor under a T&M/LH contract, in addition to the labor hour rates established for the prime contractor. See FAR 16.601(e). The current FAR policy authorizes an agency either to permit individual contracting officers to decide if separate labor hour rates are necessary or to establish an agency procedure making separate rates mandatory. This rule proposes to establish a DHS-wide procedure to make the FAR option for consistent use of separate rates mandatory for DHS T&M/LH contracts.

Federal Acquisition Regulation (FAR) 16.601(e) further authorizes agencies to amend the solicitation provision at FAR 52.216-29, Time-and-Materials/Labor-Hour (T&M/LH) Proposal Requirements-Non-commercial Item Acquisitions With Adequate Price Competition, to require offerors to submit offers that include separate labor hour rates for subcontractors and affiliates. The purpose of requiring offers to include such separate rates is to ensure the resulting contract or order will have individual labor hour

rate schedules for each individual subcontractor and affiliate of the prime contractor and not contain only a single set of rates applicable to the prime contractor and all subcontractors.

The second of the two augmenting Homeland Security Acquisition Regulation (HSAR) policies that are included in this proposed rule refines long-established FAR policies on consistency between contractor recordkeeping and contractor proposal and billing practices. The proposed rule establishes policies furthering those existing FAR policies so that DHS contractors will identify their method of accounting for labor hours incurred and agree to a price adjustment if their billing practices under a T&M/LH contract they enter into with DHS results in overbilling because they had not billed consistently with their recordkeeping practices.

2. Succinct statement of the objectives of, and legal basis for, the proposed rule.

This proposed rule would establish the DHS procedure to make the FAR option for consistent use of separate rates mandatory for DHS T&M/LH contracts. It would also establish a requirement that a contractor must consistently follow its method of record keeping for labor hours billed to a DHS contract. The legal bases for this rule are 5 U.S.C. 301-302, 41 U.S.C. 1707, 41 U.S.C. 1702, 48 CFR part 1, subpart 1.3, and DHS Delegation Number 0702.

3. Description of and, where feasible, an estimate of the number of small entities to which the rule will apply.

This proposed rule would apply to all entities seeking a DHS contract or order that would be either a Time and Material or a Labor Hour type of contract. DHS believes that this proposed rule is not likely to have a significant economic impact on a substantial

number of small entities because the rule does not require contractors or subcontractors to make any substantial changes in their normal business practices nor take any substantial actions under a contract beyond previously existing government requirements.

Below are tables showing information on FY 2010 DHS awards, based on data contained in the Federal Procurement Data System, which would have been subject to this proposed rule had it been in effect at the time. These tables give a view into the numbers of entities that would be impacted by this proposed rule if the amount of contracting done by DHS is consistent with the amount performed during FY 2010.

Numbers and Dollar Values of Awards

<u>FY 2010 DHS Awards</u>	<u>Number of Awards To Other Than Small Entities</u>	<u>Number of Awards to Small Entities</u>
<u>Labor Hours</u>	808 \$401,098,840	971 \$250,578,045
<u>Time and Materials</u>	2507 \$1,399,245,624	1653 483,677,645
<u>Grand Total</u>	3315 \$1,800,344,464	2624 \$734,255,690

Numbers of Firms

<u>FY2010 DHS T&M/LH Awards</u>	<u>Other than Small Entities</u>	<u>Small Entities</u>
	382	261
	\$1,800,344,464	\$734,255,690

4. Description of projected reporting, recordkeeping, and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

The proposed rule contains no new information collection or reporting requirements. Offerors are already required to provide information in response to DHS

solicitations and this is authorized under an existing, approved information collection. OMB Control No. 1600-0005 (Offeror submissions).

5. Identification, to the extent practicable, of all relevant Federal rules which may duplicate, overlap, or conflict with the rule.

The proposed rule would not duplicate, overlap, or conflict with any other Federal rules.

6. Description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the rule on small entities.

The requirement proposed in this rulemaking is that the prime contractor will have to calculate and propose separate rates for each such subcontractor or affiliate rather than calculating a single set of rates with all labor hours wrapped into a single set of rates covering labor provided by the prime contractor as well as labor provided by subcontractors and affiliates. The FAR provides the option to make this decision in agency procedures or to leave this decision up to the offeror or to the contracting officer. DHS has chosen to revise its agency-wide procedures and is not aware of an alternative to this proposed requirement that would accomplish the goals of the proposed requirement.

Likewise, the new requirements addressing contractors' duties to record and bill for hours under T&M/LH contracts and orders imposes no new duties or requirements on a contractor other than to identify one of two methods of record-keeping described in a solicitation provision, use its current system of recordkeeping and billing, and agree to a price adjustment if it inappropriately bills for all hours worked when it disclosed that its

normal practice is to bill only for a fixed number of hours per employee per period. The only significant alternative options DHS identified were not to issue this portion of the rule or to apply the rule to all actions, rather than applying it only to actions over the SAT. Not issuing the rule was rejected because it would forgo the benefits of the rule. Applying the rule to actions under the SAT was rejected because the benefits would likely not be substantial enough under those lower value contracts to warrant the administrative effort that DHS would have to expend to enforce the clause.

DHS invites comments from small businesses and other interested parties. DHS also will consider comments from small entities concerning the affected HSAR subparts in accordance with 5 U.S.C. 610. Such comments should be submitted separately and should cite HSAR Case 2010–001.

C. Assistance for Small Entities

Under Section 213(a) of the Small Business Regulatory Enforcement Fairness Act of 1996 (Public Law 104-121), we want to assist small entities in understanding the rule so that they can better evaluate its effects on them and participate in the rulemaking. Small businesses may send comments on the actions of Federal employees who enforce, or otherwise determine compliance with, Federal regulations to the Small Business and Agriculture Regulatory Enforcement Ombudsman and the Regional Small Business Regulatory Fairness Boards. The Ombudsman evaluates these actions annually and rates each agency's responsiveness to small business. If you wish to comment on actions by DHS employees, call 1-888-REG-FAIR (1-888-734-3247). The DHS will not retaliate against small entities that question or complain about this interim rule or any DHS policy.

D. Collection of Information

This proposed rule contains no new information collection requirements for which OMB approval is necessary under the Paperwork Reduction Act of 1995 (Pub. L. 104-13). Offerors are already required to provide information in response to DHS solicitations and the burden for this is authorized under an existing, approved information collection. OMB Control No. 1600-0005 (Offeror submissions).

List of Subjects in 48 CFR Parts 3016 and 3052.

Government procurement.

Daniel L. Clever

Deputy Chief Procurement Officer,

Department of Homeland Security.

Accordingly, DHS proposes to amend (HSAR) 48 CFR parts 3016 and 3052 as follows:

1. The authority citation for parts 3016 and 3052 are revised to read as follows:

Authority: 5 U.S.C. 301-302, 41 U.S.C. 1707, 41 U.S.C. 1702, 48 CFR part 1, subpart 1.3, and DHS Delegation Number 0702.

PART 3016 – TYPES OF CONTRACTS

2. Add section 3016.601 to subpart 3016.6 to read as follows:

3016.601 Time-and-materials and labor-hour contracts.

(c)(2)(i) *Fixed hourly rates.* Each DHS time and materials and labor hour contract and order for non-commercial items awarded with adequate price competition (FAR 15.403-1(c)(1)) must include individual, separate labor hour rates for each category of labor hours for:

- (A) the prime contractor;

(B) each subcontractor; and

(C) each division, subsidiary and affiliate of the prime contractor.

In order to require each offeror to propose these separate rates for each of those labor hour categories, the contracting officer shall insert the amended FAR solicitation provision as provided in (e)(1) of this subsection. The contracting officer shall also include such separate labor hour rates for each such category of labor hours in the resulting contract(s) or order(s).

(d)(3) *Limitations regarding recording hours under time-and-material and labor hour contracts and orders.*

(i) Definitions.

Overtime means the number of hours worked in excess of the standard number of hours in a standard work period (such as a 40 hour workweek) by a contractor employee who is exempt from the Fair Labor Standards Act (FLSA).

Standard work period means the minimum number of hours an FLSA exempt employee is required to work per week or some other defined period (e.g., 40 hours per week) in accordance with the contractor's established policies.

(ii) Policy. A time-and-materials and labor hour contract or order exceeding the Simplified Acquisition Threshold may be used only if it includes a description of the method that will be used by the prime contractor and each subcontractor to record and to bill for hours worked by employees exempt from the Fair Labor Standards Act (FLSA) under the contract or order, including overtime. The method used to record and bill for hours worked must be either to record and bill for all hours worked, or to record and bill for only the number of hours worked not in excess of a standard number of hours in a

standard work period (such as a 40 hour workweek). The description of the method of recording and billing for hours worked must be consistent with one of the two descriptions in (HSAR) 48 CFR 3016.601(d)(3)(iii)(A) or (B), and shall be incorporated into the contract or order. Whichever method the contractor states it will employ, those labor hour recording and billing practices must be consistent with the contractor's disclosed or established practices at the time of contract award.

(iii) Descriptions of acceptable and unacceptable labor hour recording and billing practices. Paragraphs (A) and (B) of this subsection provide descriptions of acceptable practices that may be incorporated into a covered action. These paragraphs (A) and (B) correspond to paragraphs (b)(i) and (b)(ii) respectively of the clause at (HSAR) 48 CFR 3052.216-76, Offeror Selection of Labor Hour Recording and Billing Practices for Time-and-Materials/Labor-Hour Contracts. Paragraph (C) of this subsection provides a description of an unacceptable practice.

(A) Record and Bill for All hours Worked. It is an acceptable practice for the contractor (subcontractor) providing labor hours of employees exempt from the Fair Labor Standards Act (FLSA) to bill the hours under its contract (or order) based on recording of all hours worked by those employees, including overtime. The contractor must state that its established accounting practice is to record all hours worked by those employees, including overtime.

(1) However, if it is found after award that the contractor's established accounting practices at the time of award were not based on recording all hours worked by employees, the Government shall be entitled to a price adjustment on all payments for labor hours under the contract or order.

(2) The amount of the price adjustment for payments shall be the difference between the number of hours billed based on recording all hours worked and the hours that would have been recorded using the contractor's established accounting practices at the time of award, multiplied by the applicable fixed hourly rates.

(B) *Record and Bill for a Standard Number of Hours per Standard Work Period (e.g., 40 hours per week).* It is an acceptable practice for the contractor (subcontractor) to bill the hours worked by employees exempt from the Fair Labor Standards Act (FLSA) under its contract based on recording and billing for only the number of hours worked not in excess of a standard number of hours in a standard work period (such as a 40 hour workweek). The contractor must state that its established accounting practice is to record only the standard number of hours in a standard work period. The contractor's (subcontractor's) method of recording hours worked must pro-rate the hours among all jobs/functions performed by an employee when an employee works overtime. For example, under a standard 40 hour work period, if an employee worked 25 hours on Contract A and 25 hours on Contract B during a work period, the contractor would pro-rate those hours to record 20 hours on Contract A and 20 hours on Contract B so that the total number of hours for the period did not exceed the number of hours in a standard work period, 40 hours.

(C) *Unacceptable accounting and billing practices.* It is not an acceptable practice for a contractor or subcontractor that accounts for only a standard number of hours worked in a standard work period for employees exempt from the Fair Labor Standards Act (FLSA) (e.g., 40 hours per week), to account for and bill for only the first 8 hours worked each day. All hours worked in excess of the standard number of hours in a standard work

period, including overtime hours, must be pro-rated based on the total hours worked for all jobs/functions performed by the employee. If an offeror indicates that this is their established accounting practice, the Contracting Officer shall not award the contract or order, but instead shall notify the Office of the Chief Procurement Officer at procurement.support@dhs.gov for guidance on how to proceed. If an offeror provides a clarification to the statement it checks within the provision at (HSAR) 48 CFR 3016.216-75, and it is not clear to the contracting officer that the clarification is consistent with the requirements of the HSAR provision, the contracting officer shall notify the Office of the Chief Procurement Officer at procurement.support@dhs.gov for guidance on how to proceed.

(e)(1) Solicitations and contracts:

(i) Insert the provision (HSAR) 48 CFR 3052.216-29, Time-and-Materials/Labor-Hour Proposal Requirements-Non-Commercial Item Acquisition With Adequate Price Competition, in the place of the provision at FAR 52.216-29, Time-and-Materials/Labor-Hour Proposal Requirements-Non-Commercial Item Acquisition With Adequate Price Competition, in all solicitations contemplating use of a time-and-materials or labor-hour type of contract for noncommercial items, if the price is expected to be based on adequate competition (FAR 15.403-1(c)(1)). This provision is authorized by Federal Acquisition Regulation (FAR) 16.601(e)(1) which authorizes agency procedures to require modification of the FAR solicitation provision at FAR 52.216-29, Time and Materials/Labor-Hour Proposal Requirements-Non-Commercial Item Acquisitions With Adequate Price Competition. Insert the HSAR provision whole text into the solicitation

to require separate proposed rates for all subcontractors and divisions, subsidiaries, and affiliates of the prime contractor.

(ii) Insert the clause (HSAR) 48 CFR 3052.216-75, Offeror Selection of Labor-Hour Recording and Billing Practices for Time-and-Materials/Labor-Hour Contracts, into each solicitation expected to result in a contract or order for (T&M/LH) exceeding the simplified acquisition threshold (SAT).

(iii) Insert the clause (HSAR) 48 CFR 3052.216-76, Time-and-Materials/Labor-Hour Overtime Recording and Billing Practices, (or a clause substantially the same as) into time and material or labor-hour solicitations, contracts and orders exceeding the SAT and include the mark or other indication made by the contractor which of the two methods (recording all hours or prorating the excess over a standard work period) it will use during the performance of the contract/order to record and bill for hours worked.

PART 3052—SOLICITATION PROVISIONS AND CONTRACT CLAUSES

3. Amend subpart 3052.2 by adding section 3052.216-29 to read as follows:

3052.216-29 Time-and-Materials/Labor-Hour Proposal Requirements-Non-Commercial Item Acquisition With Adequate Price Competition.

As prescribed in (HSAR) 48 CFR 3016.601(e)(1)(i), insert the following provision:

Time-and-Materials/Labor-Hour Proposal Requirements—Non-commercial Item Acquisition With Adequate Price Competition

(a) The Government contemplates award of a Time-and-Materials or Labor-Hour type of contract resulting from this solicitation.

(b) The offeror must specify fixed hourly rates in its offer that include wages, overhead, general and administrative expenses, and profit. The offeror must specify whether the fixed hourly rate for each labor category applies to labor performed by—

(1) The offeror;

(2) Subcontractors; and/or

(3) Divisions, subsidiaries, or affiliates of the offeror under a common control;

(c) The offeror must establish fixed hourly rates using separate rates for each category of labor to be performed by each subcontractor and for each category of labor to be performed by the offeror, and for each category of labor to be transferred between divisions, subsidiaries, or affiliates of the offeror under a common control.

(End of provision)

4. Amend subpart 3052.2 by adding section 3052.216-75 as follows:

3052.216-75. Offeror Selection of Labor Hour Recording and Billing Practices for Time-and-Materials/Labor-Hour Contracts.

As prescribed in (HSAR) 48 CFR 3016.601(e)(1)(ii), insert the following provision:

Labor hour recording and billing practices for Time-and-Materials/Labor-Hour contracts. (XX 2010)

(a) The offeror must identify the practices it intends to employ to record labor hours worked by employees exempt from the Fair Labor Standards Act (FLSA) and to bill for those hours under the prospective contract or order for which it is submitting its offer. The offeror must select one of the two available descriptions of acceptable methods as shown in HSAR 3052.216-76, Time-and-Materials/Labor-Hour Overtime Recording and

Billing Practices-Record. The two available selections are: (i) Record and Bill For All Hours Worked, or (ii) Record and Bill Based on a Standard Number of Hours Per Standard Work Period. Whichever of the two descriptions the offeror selects will be incorporated into any resulting contract or order awarded to the offeror. By making the selection, the offeror is indicating to the Government that the selected description of recording and billing practices is consistent with the contractor's established accounting practices and this same method will be used for billing hours under the contract or order.

(b) The offeror will not be eligible for award if either:

(1) The offeror fails to indicate in its offer which of the two descriptions in paragraphs

(c)(i) or (ii) below describe the offeror's method of recording and billing for labor hours to be performed under the contract or order; or

(2) The offeror submits a clarification of the clause 3052.216-76 Time-and-Materials/Labor-Hour Overtime Recording and Billing Practices, and the Contracting Officer had not agreed prior to submittal of offers that the offeror's clarification of the clause substantially meets the requirements of the clause.

(c) The offeror must select one of the two below descriptions of the offeror's system for recording and billing hours to be worked by employees exempt from the Fair Labor Standards Act (FLSA) under the contract that are included in either paragraph (i) or (ii) of the clause at HSAR 3052.216-76, Time-and-Materials/Labor-Hour Overtime Recording and Billing Practices. If a contract or order is awarded to the offeror, the selected description will be incorporated into the contract or order.

(Check if the paragraph describes the offeror's system) --- Paragraph (i)
Recording and billing Practices - Record and Bill For All Hours Worked

Check if the paragraph describes the offeror's system) - Paragraph (ii)
Record and Bill For a Standard Number of Hours Per Standard Work Period.

(End of provision)

5. Amend subpart 3052.2 by adding section 3052.216-76 as follows:

3052.216-76. Time-and-Materials/Labor-Hour Overtime Recording and Billing Practices.

As prescribed in (HSAR) 48 CFR 3016.601(e)(1)(iii), insert the following clause and designate either paragraph (i) or (ii), or insert a paragraph substantially the same as (i) or (ii), in accordance with the successful offeror's selection from (HSAR) 48 CFR 3052.216-75, Offeror Selection of Labor Hour Recording and Billing Practices for Time-and-Materials/Labor-Hour Contracts.

Time-and-Materials/Labor-Hour Overtime Recording and Billing Practices- (Insert Date)

(a) Definitions:

Overtime means the number of hours worked in excess of the number of hours in a standard work period by a contractor employee who is exempt from the Fair Labor Standards Act (FLSA).

Standard work period means the minimum number of hours a FLSA exempt employee is required to work per week or some other defined period (e.g., 40 hours per week) in accordance with the contractor's established policies.

(b) Only the designated paragraph (i) or (ii) applies.

(i) *Recording and billing Practices- Record and Bill For All Hours Worked*

The contractor (subcontractor) providing labor hours will bill the hours worked by employees exempt from the Fair Labor Standards Act (FLSA) under its contract (or order) based on recording of all hours worked by employees, including overtime. The contractor states that its established accounting practices are to record all hours worked.

(1) If it is found after award that the contractor's established accounting practices at the time of award were not based on recording all hours worked by employees, the Government shall be entitled to a price adjustment on all payments for labor hours under the contract or order.

(2) The amount of the price adjustment for payments shall be the difference between the number of hours billed based on recording all hours worked and the hours that would have been recorded using the contractor's established accounting practices at the time of award, multiplied by the applicable fixed hourly rates.

- or -

(ii) *Record and Bill For a Standard Number of Hours Per Standard Work Period.*

The contractor (subcontractor) will bill the hours worked by employees exempt from the Fair Labor Standards Act (FLSA) under this contract based on recording and billing for only the number of hours worked not in excess of a standard number of hours in a standard work period (such as a 40 hour workweek). The contractor states that its

established accounting practice is to record only the number of hours worked by such an employee not in excess of a standard number of hours in a standard work period (such as a 40 hour workweek). The contractor (subcontractor) further states that the accounting practices are based on pro-rating the hours among all jobs/functions performed by the employee when the employee works overtime. For example, under a standard 40 hour work period, if the employee worked 25 hours on Contract A and 25 hours on Contract B, the contractor would pro-rate those hours to record 20 hours on Contract A and 20 hours on Contract B so that the total number of hours recorded for the work period does not exceed the number of hours in the 40 hour standard work period.

(c) Flow down to Subcontractors. The contractor and each lower tier subcontractor shall incorporate the substance of this clause, selecting the pertinent paragraph (i) or (ii), into each subcontract that exceeds the Simplified Acquisition Threshold and is either a Time and Materials or a Labor Hour contract/order.

(End of clause)

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