

## INCIDENTAL MATERIAL

Our support contracts are services contracts not supply contracts. These service contracts can not be used to satisfy all of our service and supply requirements. Satisfying all of our requirements for material under our support services contract would violate the stringent competition requirement imposed on the Government by the Competition in Contracting Act (CICA), 10 U.S.C. 2304. No list of material is provided under this type of contract for the offerors to bid on. Under CICA, a contracting agency must specify its needs in a manner designed to achieve full and open competition.

Many of the required material items are available in the commercial marketplace. FAR 12.207 requires that agencies use fixed price contracts to acquire commercial items. Our support service contracts are cost type contracts. A detailed list of the required material would be required for a fixed price contract. Our rationale supporting the purchase of some commercial material on a cost reimbursable basis is that it is merely incidental to the performance of cost reimbursable services. Therefore, Part 12 of the FAR does not apply. The purchase of commercial items beyond what is considered incidental under our support service contracts would violate Title VII of the Federal Acquisition Streamlining Act of 1994 (Public Law 103-355) which Part 12 of the FAR implements.

In order to be considered incidental the material must be secondary or minor in comparison to the services being purchased. The fact that the material is required for the contractor to perform services under the contract does not necessarily make it incidental. If the cost of the material is significant (over 20%) you will need the approval of the contracting officer.

Customers should not be using our support services contracts to satisfy their hardware requirements. We should not be purchasing material under these contracts to allow customers to satisfy their training requirements or to conduct exercises.

The material must be incidental to services purchased under the same contract. We can not use services purchased under other contracts to justify the purchase of material as incidental under this contract, even if the services are in support of the same overall effort or project. When the material is being purchased to establish a future capability the cost of labor purchased prior to the material can not

be used to justify it as incidental. The same labor costs can not be used repeatedly to justify the purchase of material as incidental. For example, you could not use \$1M in labor cost to justify ten separate purchases of \$100K in materials as incidental. The contracting officer will want to know how much has been spent for labor and material for the entire effort. Labor that will be purchased under the contract in the future may be used in some cases to justify the purchase of the material as incidental.

After examining the list of material to ensure that it is incidental, the task will also be reviewed to determine whether it is covered by the scope of contract. We rely upon the technical personnel to tell us where the task falls under the scope of the basic contract. The contract was awarded based on the requirement set out in the basic scope of work. The GAO will review allegations that a contract modification is beyond the scope of the original contract. When determining whether a delivery order issued under an existing contract is beyond the contract's scope of work, the GAO will look to whether there is a material difference between the contract as modified, and the original contract. Lockheed Martin Fairchild Systems, B-275035, January 17, 1997, 97-1 CPD 28; Exide Corporation, B-276988; B-276988.2, August 18, 1997, 97-2 CPD 51.

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