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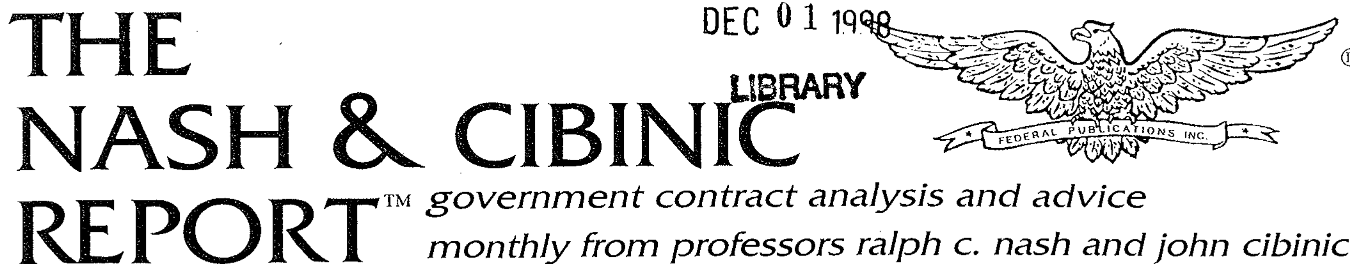

THE NASH & CIBINIC REPORT™

government contract analysis and advice
monthly from professors ralph c. nash and john cibinic

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INSIDE:

COMPETITION & AWARD
Postscript III: Multiple Award Schedules ---- ¶ 56
Late proposals: in search of a sensible rule ---- ¶ 57

COSTS & PRICING
"Cost-based" contracting: on the way out? ---- ¶ 58

PROCUREMENT MANAGEMENT
Contracting Officer authority: dollar value limits ---- ¶ 59

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DATELINE NOVEMBER 1998 • A recent audit report by the Department of Defense Office of Inspector General, *Financial and Cost Aspects of Other Transactions* (No. 98-191, Aug. 24, 1998), indicates that the OIG hasn't yet caught on to acquisition reform. See also 40 GC ¶ 447. In this report, the IG made several recommendations regarding "other transactions" that came straight out of the pre-reform thinking of the Department. The "other transactions" technique is the method used by the military services and defense agencies to carry out research and prototyping projects without having to endure all the encumbrances of more traditional procurement methods such as contracts, grants, and cooperative agreements. See *Postscript: Cooperative Agreements*, 9 N&CR ¶ 53; *Postscript III: Cooperative Agreements and "Other Transactions,"* 10 N&CR ¶ 19; and *Postscript IV: Cooperative Agreements and "Other Transactions,"* 10 N&CR ¶ 29.

The IG's first antediluvian recommendation was that the Director of Defense Research and Engineering issue guidance in the DOD Grant and Agreement Regulations requiring agencies to withhold milestone payments from research participants if reports and program plans are delinquent. In other words, hold back a full payment to coerce performance of a minor contract item. This "beat them into submission" recommendation is not only legally questionable (see *Government Withholding of Payment: Handle With Care*, 3 N&CR ¶ 51; and *Postscript III: Government Withholding of Payment*, 8 N&CR ¶ 6), it's terrible business conduct between two parties that are working together to achieve a technological breakthrough. Fortunately, the DDR&E only "partially concurr[ed]" in the IG's recommendation—a polite way of saying "that's a really dumb idea." Rather than mandating a single remedy, the DDR&E asserted that agreements officers should exercise "business judgment" to select the "most appropriate" remedy to obtain delinquent reports.

Another of the IG's outdated recommendations was that periodic business status reports be required on all "other transactions" contracts. This would entail setting up standard report requirements regardless of the size or nature of the agreement. The DDR&E's "partial concurrence" stated that such reports are not necessary in all situations.

The overall tenor of the IG report was that more regulations should be issued to ensure that "other transactions" are administered under standardized procedures. Yet, the IG conceded:

> Administering "other transactions" is different from administering traditional contracts or grants because "other transactions" have unique elements, which include cost sharing, whenever practical, and a mutual interest in the research subject by DOD and the research participants. Because of their unique elements, "other transactions" may even be different from each other.

Haven't we learned that regulations kill initiative? The key to the success of the "other transactions" contracting technique is the freedom to make unique business deals with commercial partners. If DOD permits the IG to steadily chip away at this freedom, the advantages of this technique eventually will be destroyed. Then we'll have to invent an "other, other transaction" form of contracting. Rcn JC

Notes

Competition & Award

¶ 56 • **POSTSCRIPT III: MULTIPLE AWARD SCHEDULES** • The following letter from **Steve Feldman**, Assistant Counsel of the U.S. Army Engineering and Support Center in Huntsville, Alabama, takes us to task for our suggestion that an agency spell out its source selection strategy *if* it "decides to compete MAS [Multiple Award Schedule] vendors against non-MAS vendors." He writes:

> I read with interest your comments to my letter dealing with Multiple Award Schedules (*Postscript II: Multiple Award Schedules*, 12 N&CR ¶ 23). I am intrigued by your suggestion that the agency may compete MAS vendors against non-MAS vendors (p. 62). From a taxpayer standpoint, I can see how this approach could enhance competition, improve quality, and lower costs. I also know that FAR [Federal Acquisition Regulation] 1.102(d) states that if a procurement practice is not expressly prohibited, it may be used if it is in the Government's best interest. Notwithstanding, I believe that mixing competition in this manner is implicitly prohibited by the FAR.
>
> First, I would question whether mixing the competition in this manner is consistent with FAR 8.001 and the priority for use of Government supply sources. If the agency can satisfy its needs through a non-mandatory GSA [General Services Administration] schedule, it should not be seeking offers or quotes from commercial sources, as indicated by FAR 8.001(a). How would you answer a protest against an RFQ [request for quotations] permitting mixed competition by a GSA schedule vendor, based on FAR 8.001(a)? Also, would there be any requirement to give the MAS vendor an evaluation preference, based on FAR 8.001(a)?
>
> Second, I have concerns about whether such mixed competition could meet CICA [Competition in Contracting Act] standards on full and open competition. FAR 8.404(a) states that the agency "using the procedures" in FAR Subpart 8.4 need not consider such issues as further competition, small business set-asides, synopses, etc. Nothing in FAR Subpart 8.4 discusses a procedure allowing competitions between MAS and non-MAS vendors. Therefore, a procurement using a mixed competition approach would be legally suspect if there were not separate compliance with the synopsis procedure, small business set-aside policies, and the other requirements in FAR 8.404(a).
>
> Third, if I were a MAS vendor, and the agency contemplated the possibility of placing an order against my schedule, I would protest the issuance of a *CBD* [*Commerce Business Daily*] notice allowing competition from non-MAS vendors. If my firm were a large business concern, I also would protest the making of a small business set-aside in a mixed competition situation. My argument would be that FAR 8.404(a) already states that these steps are not necessary before the placement of a MAS order. Indeed, I would argue that FAR 8.404(a) strongly discourages mixed competition procedures between MAS and non-MAS vendors. The regulation states that the agency "need not" seek further competition before placing an FSS [Federal Supply Schedule] order.
>
> Fourth, I would argue that FAR Subpart 8.4 already has the answer to the situation where the non-MAS vendor could offer a lower price for the same or a similar item. According to FAR 8.404(b)(5), if the agency becomes aware of a lower price from a non-MAS vendor, the solution is not to conduct a competition. Instead, the regulation advises agencies to seek price reductions, only, from the MAS vendor as a means of satisfying the requirement. Necessarily, the use of a competition between MAS and non-MAS vendors would appear precluded, even if the non-MAS vendor offers a better product.
>
> Fifth, I am concerned that using a mixed procedure could lengthen and complicate the procurement process. Instead of just consulting the schedules and placing an order, the agency using a mixed competition procedure would need to go through the time and expense of issuing an RFQ or RFP [request for proposals]. The agency

Notes

> could then be required to evaluate numerous quotes or offers, especially if the agency decides to publish the requirement in the *CBD*. The documentation requirements for source selections under FAR 8.404(b)(7) are less stringent than those under FAR 13.106-3 for simplified purchases or FAR 15.308 for larger purchases. The more complex the source selection, the more room for error, and the greater the potential for successful protests. Why go through these steps when the MAS vendors already provide acceptable products at reasonable prices? *Steven W. Feldman*

* The views attributed to Mr. Feldman are solely his and do not necessarily reflect those of the Department of Defense or any other Government agency.

• **OUR TURN** • Mr. Feldman raises some good points. However, they are primarily policy arguments. Nothing in the FAR *expressly* prohibits agencies from competing MAS vendors against non-MAS vendors. The "implicit" prohibition he suggests does not trump FAR 1.102(d), which he cites. Our research has not found a decision dealing with the issue. As far as legal complaints by MAS vendors, our discussion in *Multiple Award Schedules: What Are They?*, 11 N&CR ¶ 60, questioned whether MAS contracts were legally enforceable. Until the Comptroller General or a court says that it can't be done, it would appear that agencies are free to compete MAS vendors against non-MAS vendors.

Our legal analysis that agencies can go to non-MAS vendors does not mean that we are advocating that they do so. That is a policy decision of what is in the Government's best interests to be made by the Contracting Officer on the specific buy. We expect that the ease of making MAS purchases will tilt the decision against expanding the competition to non-MAS vendors. In that regard, it should be noted that the legal issues involving MAS contracts have not been fully plumbed. For example, we have found no decisions *analyzing* the legality of the FAR 8.404(a) provisions waiving synopsis requirements for MAS purchases. The closest we came was *United Communications Systems, Inc.*, Comp. Gen. Dec. B-279383, 98-1 CPD ¶ 148, 40 GC ¶ 301, where the protester contended that the failure to synopsize a MAS buy violated the procurement statutes. However, the Comptroller refused to rule on the issue because the protest was not timely. See also *CPAD Technologies, Inc.*, Comp. Gen. Dec. B-278582.2, 98-1 CPD ¶ 55; and *Midmark Corp.*, Comp. Gen. Dec. B-278298, 98-1 CPD ¶ 17 (merely citing the regulation). Stay tuned. There are sure to be more developments in this murky area. *JC*

¶ 57 • **LATE PROPOSALS: In Search Of A Sensible Rule** • The following letter from **William H. Butterfield**, an attorney with Kilcullen, Wilson and Kilcullen, suggests a "common sense" approach to dealing with the Government's consideration of late proposals and proposal modifications:

> As an avid reader of THE NASH & CIBINIC REPORT, I notice that other readers occasionally write in to suggest topics or otherwise discuss issues of the day. Due to a recent experience, I have a topic that might be of some interest.
>
> Simply put, the issue has to do with late bids or proposals. As you know, the FAR [Federal Acquisition Regulation] contains explicit rules on this subject, e.g., the bid/offer must be mailed five days before the closing and/or must be sent at least two "working days" before closing if using a commercial service etc. I have often wondered about the basic sense of these rules and GAO's [the General Accounting Office's] almost universal and mechanical application of them.
>
> Looked at logically, these late bid/proposal rules have only one obvious purpose—to protect the integrity of the competitive procurement system. It makes eminent sense for the Government to summarily reject any bid or offer when there is any chance that the integrity of the system has been compromised. It makes absolutely no sense, however, to blindly apply a rule when there is no possibility whatsoever of a compromise to the system.

Notes

The rules are most illogical as applied in negotiated procurements. Let's say an offeror proves (easily done) that it turned over its proposal to a commercial service (e.g., Federal Express) one day prior to the closing date [for receipt of proposals]. The proposal is actually delivered by the carrier, but it arrives fifteen minutes late on the due date. How could the competitive procurement system possibly be compromised by accepting this offer? What possible advantage could the offeror gain in these circumstances? The answer is obvious—none.

But the Government routinely and automatically rejects proposals in this situation. This result is not only nonsensical, it actually hurts the Government. Competition is diminished and the Government does not even consider what may have turned out to be the true "best value" proposal.

In this era of reform where more authority and discretion to use sound business judgment is being delegated to COs [Contracting Officers], the current regulation (FAR 52.215-1) stands as a mockery to that process. Any sensible rule would be clear-cut, would do away with mailing-day computations, and would give COs the discretion to apply common sense in the best interest of the Government. As a modest suggestion, a new FAR rule on this subject would go something like this:

> Any proposal received after the exact time specified will be rejected if there is any reasonable chance that acceptance of the late proposal would compromise the integrity of the competitive procurement system. The Contracting Officer may accept a late proposal that does not involve a compromise to the system or confer an unfair advantage upon the offeror.

What do you think? *William H. Butterfield*

• **OUR TURN** • Thanks to Bill for refocusing our attention on this area, for suggesting a sensible rule, and for giving me an opportunity to dine on some crow. We last dealt comprehensively with this subject in *Late Bids And Proposals: I Hear You Knocking But You Can't Come In*, 6 N&CR ¶ 16. Since then, there have been numerous proposed changes in the regulations, some of which survived and resulted in slight improvements.

Initiatives To Change The Rules

There were a number of unsuccessful attempts to give COs broader authority to consider late proposals. The reason those attempts didn't succeed wasn't due to a lack of effort by Steven Kelman, then Administrator of the Office of Federal Procurement Policy, when he was shepherding the FAR Part 15 Rewrite.

One proposed rule (issued for comment before the first phase of the proposed FAR Part 15 Rewrite) would have permitted acceptance of a late submission, even if misdirected or misdelivered by the contractor, if the submission was in the Government's sole control and out of the offeror's control at the prescribed submission time (61 Fed. Reg. 18480, Apr. 25, 1996). A later proposed rule containing Phase 1 of the FAR Part 15 Rewrite, went even further. That proposal would have allowed acceptance of a late submission upon the CO's determination that acceptance would be in the "best interests of the Government" (61 Fed. Reg. 48380, Sept. 12, 1996). The next draft of the FAR Part 15 Rewrite returned to the language stating that acceptance of a late proposal was permissible if the lateness resulted from Government action or inaction or the circumstances causing the late submission were "beyond the immediate control of the offeror" (62 Fed. Reg. 26640, May 14, 1997). However, not all members of the private bar share Bill's view and they successfully thwarted attempts to make significant improvements in the rules. In response to criticism by the Public Contract Law Section of the American Bar Association and others, the final Part 15 Rewrite provided only limited room for consideration of late submissions, Federal Acquisition Circular 97-02 (63 Fed. Reg. 51223, Sept. 30, 1997). See *The FAR Part 15 Rewrite: A Final Scorecard*, 11 N&CR ¶ 63.

Notes

The Revised Rules

The regulatory changes on late submissions actually were made in two stages. First, FAC 90-44 modified the FAR 52.215-10 "Late Submissions, Modifications, and Withdrawals of Proposals" solicitation provision to bring it in line with GAO decisions and recommendations (61 Fed. Reg. 69292, Dec. 31, 1996). Then, further changes were made as part of the FAR Part 15 Rewrite, FAC 97-02, as discussed above.

In the process, the rules on acceptance of late submissions were moved to the FAR 52.215-1 "Instructions to Offerors—Competitive Acquisition" solicitation provision, which advises offerors of the conditions for consideration of late offers. FAR 15.208 defines "late" submissions as those "that are received in the designated Government office after the exact time specified," and permits COs to consider late submissions only if they are received prior to award and the circumstances "meet the specific requirements of 52.215-1(c)(3)(i)." FAR 52.215-1(c)(3)(i) states:

> (3) *Late proposals and revisions.* (i) Any proposal received at the office designated in the solicitation after the exact time specified for receipt of offers will not be considered unless it is received before award is made and—
>
> (A) It was sent by registered or certified mail not later than the fifth calendar day before the date specified for receipt of offers (e.g., an offer submitted in response to a solicitation requiring receipt of offers by the 20th of the month must have been mailed by the 15th);
>
> (B) It was sent by mail (or telegram or facsimile, if authorized) or hand-carried (including delivery by a commercial carrier) if it is determined by the Government that the late receipt was due primarily to Government mishandling after receipt at the Government installation;
>
> (C) It was sent by U.S. Postal Service Express Mail Next Day Service-Post Office to Addressee, not later than 5:00 p.m. at the place of mailing two working days prior to the date specified for receipt of proposals. The term "working days" excludes weekends and U.S. Federal holidays;
>
> (D) It was transmitted through an electronic commerce method authorized by the solicitation and was received at the initial point of entry to the Government infrastructure not later than 5:00 p.m. one working day prior to the date specified for receipt of proposals; or
>
> (E) There is acceptable evidence to establish that it was received at the activity designated for receipt of offers and was under the Government's control prior to the time set for receipt of offers, and the Contracting Officer determines that accepting the late offer would not unduly delay the procurement; or
>
> (F) It is the only proposal received.

FAR 52.215-1(c)(3)(ii) extends the first five of these requirements (paragraphs (A)–(E), quoted above) to proposal modifications or revisions and to responses to requests for information as follows:

> Any modification or revision of a proposal or response to request for information, including any final proposal revision, is subject to the same conditions as in subparagraphs (c)(3)(i)(A) through (c)(3)(i)(E) of this provision.

Detailed rules specifying the "only acceptable evidence" for determining the date of mailing are contained in subparagraphs (c)(3)(iii) and (c)(3)(v) of FAR 52.215-1.

The FAR 15.208 policy on late submissions does not apply to commercial item procurements. Moreover, FAR Part 12 is silent with respect to late submissions in commercial item procurements. However, paragraph (f) of the FAR 52.212-1, "Instructions to Offerors—Commercial Items" solicitation clause contains the following rigid provision:

> (f) *Late offers.* Offers or modifications of offers received at the address specified for the receipt of offers after the exact time specified for receipt of offers will not be considered.

Notes

Application Of The Revised Rules

At this writing, there have been only two decisions involving the late submission provisions of FAR 52.215-1 applicable to negotiated procurements—*RGI, Inc.*, Comp. Gen. Dec. B-280005, 98-2 CPD ¶ 45; and *The Staubach Co.*, Comp. Gen. Dec. B-276486, 97-1 CPD ¶ 190. However, several decisions under the prior rules can be helpful in predicting the outcome under the new rules.

• *Registered, Certified or Next Day Express Mail*—The mechanical rules dealing with registered or certified mail (FAR 52.215-1(c)(3)(i)(A)) and U.S. Postal Service Express Mail Next Day Service (FAR 52.215-1(c)(3)(i)(C)) were not changed by FAC 90-44 or the final Part 15 Rewrite. To take advantage of these rules, the submission must be made in strict accord with the specified parameters. Thus, the (c)(3)(i)(C) exception for U.S. Postal Service Express Mail Next Day Service does *not* apply to a submission sent by the Postal Service's Two Day Priority Mail—even in locations where Next Day Mail service is unavailable, *RGI, Inc.* See also *Austin Telecommunications Electrical Inc.*, Comp. Gen. Dec. B-254425, 93-2 CPD ¶ 108.

• *Government Mishandling*—Two changes were made to this rule ((c)(3)(i)(B)) to bring it in line with Comptroller General decisions under the prior rule—the rule now specifically states that (1) it applies to *all* modes of submission (except electronic commerce) and (2) for a late submission to be considered, the lateness must be "due primarily" to Government mishandling. Under the prior rule, the "Government mishandling" had to be the "sole" cause of the late submission. For the purposes of applying this rule, the U.S. Postal Service is *not* the "Government." See *Austin Telecommunications*, where the Comptroller held that "Government mishandling" must have been by the procuring agency and the mishandling must have occurred after the proposal was received at that agency's installation.

While both the previous and current rules require the mishandling to occur "after receipt at the Government installation," the Comptroller has occasionally permitted acceptance of a late submission based on Government action *prior to* submission, e.g., *Select, Inc.*, Comp. Gen. Dec. B-245820.2, 92-1 CPD ¶ 22, 34 GC ¶ 126. There, section "L" of the solicitation specified the wrong city for delivery of hand-carried bids and the bidder had used that exact address on its United Parcel Service envelope. The Comptroller found that the Government's solicitation misdirection was the "paramount cause" (the terminology used by the Comptroller under the "sole cause" rule) of the delay. The fact that the correct address was also specified elsewhere in the solicitation did not shift the responsibility for the late submission to the bidder because it was reasonable for the bidder to believe that there would be one location for mail collection and another for bid opening. More recently, however, the Comptroller has stated that "the concept of mishandling applies *only after* there has been receipt at the government installation" (emphasis added), *The Staubach Co*. There, the Government's bid room employee advised the offeror that "everything has been received" even though a portion of the proposal had not yet been delivered. The Comptroller held that the Government has no obligation to advise offerors as to whether their offers have arrived. The Comptroller also found that the wrong information provided by the agency's bid room employee would not have been the "paramount" cause of the lateness because the delivery organizations used by the offeror did not make sufficient efforts to deliver all the portions of the offer on time. For a discussion of possible mishandling of submissions at a U.S. Post Office, see *RGI, Inc.*

• *"Exact" Time*—The "exact" time of receipt must be established by agency records, rather than solely from the records of a commercial carrier, *J.C.N. Construction Co.*, Comp. Gen. Dec. B-270068.2, 96-1 CPD ¶ 42. The Comptroller continues to enforce the "exact" time of receipt requirement. Most recently, in *Caddell Construction Co.*, Comp. Gen. Dec. B-280405, 98-2 CPD ¶ 50, he confirmed the rejection of a hand-carried proposal received two minutes after the specified time for receipt of proposals. The offeror's employees were directly outside the door of the designated room making last minute changes in the offer but were unable to enter because the Government officials locked the door, declaring that the time for proposal submission had expired. The Comptroller stated:

Notes

> We also find that the preponderance of the evidence does not show that [the protester's] proposal was at the designated location for receipt prior to the time set for closing. In this regard, [the protester's] self-serving statement that when [the protester's employee] reached the locked door to Room 821 his watch read 4:29 p.m. is counterbalanced by the observations of several [agency] employees, who the record shows were keenly interested in whether [the protester] would submit its proposal on time, that [the agency employee's] clock reached 4:30 p.m. before the door was locked and that [the protester's] employees reached the door to Room 821 at 4:32 p.m.
>
> Moreover, the record establishes that [the protester] synchronized his watch, which had an analog dial but no second hand, only to the hour and minute.... Thus, when [the protester's employee] synchronized his watch with the time on [the agency employee's] clock, his watch could have been off by almost a minute. For example, such a discrepancy could have occurred if the time on [the agency employee's] clock was actually 58 seconds into the minute of 3:13 p.m. and [the protester's employee] set his watch to the beginning of that minute. Since by [the protester's employee's] own admission, [his] watch indicated 4:29 p.m. when he and [another of the protester's employees] reached the door of Room 821, [the agency employee's] clock could very well have already reached 4:30 p.m., making the proposal late, notwithstanding that [the protester's employee's] watch still read 4:29 p.m. [Footnotes omitted.]
>
> While the [the protester's] employees claim that after they heard the voice in the hallway announce "It's 4:29" it took them no longer than 30 seconds to fill in their last prices and take their proposal to the door of Room 821 (and not the 3 minutes that would result in their arrival at Room 821 at 4:32 p.m.)...this does not mean they tendered the proposal in a timely manner. In this regard, [the protester] does not dispute that when its employees heard the voice in the hallway announcing "It's 4:29," that the time on [the agency employee's] clock had already reached 4:29 p.m. Given that it obviously took [the agency employee] some time to leave her office and issue the warning, as well as the conceivable difference described above in the synchronization between [the protester's employee] watch and the time used to determine the proposal submission deadline, it is certainly possible, if not likely, that [the agency employee's] clock, from which [the protester's employee] had synchronized his watch and which served as the basis for determining the deadline for proposal submission, could have reached 4:30 p.m. by the time the [protester's] employees reached the door to Room 821. [Footnote omitted.]

The Comptroller was not swayed by the fact that the agency had no "official" clock and that it had an "odd timekeeping procedure." As a result, only one proposal was received on time—also hand carried by that offeror's employees who were watching the proceedings with interest.

• *Information And Oral Presentations*—In *Postscript: The FAR Part 15 Rewrite*, 12 N&CR ¶ 14, Ralph discussed the "weird" provision in FAR 15.102(a) making oral presentations subject to the late submission rules. In addition, FAR 52.215-1(c)(3)(ii) makes the submission of "information" subject to the same rules. In *RGII Technologies, Inc.*, Comp. Gen. Dec. B-278352.3, 98-1 CPD ¶ 130, the solicitation called for offerors to submit the originals and seven copies of oral presentation slides with their proposals. The awardee's seven copies were submitted on time but the originals were late. The Comptroller applied sealed-bidding principles to hold that the late submission of the originals was a minor informality that could be waived since the substance of the originals was identical to the seven copies. Apparently, had the awardee failed to submit at least one complete set of the slides (information) on time, the Comptroller would have required rejection of the proposal.

• *Delivery To Installation*—An area in which the rules have been liberalized is permitting on-time delivery to the Government *activity* as opposed to the *office designated in the solicitation*, as was the case under the previous rules. Thus, delivery of a submission to any place in the activity would be acceptable so long as delivery occurred prior to the time for receipt and the submission was under the control of some Government employee. However, delivery to a U.S. Post Office would not qualify, even one at a Government base *RGI, Inc.* (USPS at Fort Bragg).

Notes

Eating Crow

In 6 N&CR ¶ 16, I supported applying the strict submission deadlines found in the sealed-bidding rules to negotiated procurement on two grounds. First, I contended that more flexible rules might give unethical offerors an opportunity to improperly attempt to obtain procurement information. Second, according more time to late offerors would give them an advantage over the offerors that managed to meet the time requirements. In his *Second Opinion*, Ralph disagreed, stating:

> I believe that a rule providing a reasonable measure of discretion to the CO in this area would benefit the process by permitting the Government to consider some proposals that it now must reject. It seems curious that we are willing to accept such great discretion in determining who is in the competitive range and who is selected as the winning competitor, but no discretion whatsoever in determining that there are extenuating circumstances which justify acceptance of a late proposal. I can only conclude that the late proposal rule is an anachronism—a copying of the late bid rule without full consideration of the merits of a different standard.

I have now seen the error of my ways and agree totally with Ralph.

The grounds that I gave in support of the rigid rules are relied on by those who oppose liberalization of the rules. In "Feature Comment—The Government's Even More In 'The Driver's Seat' Under FAR Part 15 Proposal," 38 GC ¶ 450, the authors argued that allowing consideration of late proposals would be fundamentally unfair, giving a late submitter a competitive edge by being able to take advantage of late-breaking prices or technical developments. In addition, the authors cited *Aerolease Long Beach v. U.S.*, 31 Fed. Cl. 342 (1994), 13 FPD ¶ 31, 36 GC ¶ 336, *affd.*, 39 F.3d 1198 (Fed. Cir. 1994) (table) (nonprecedential decision), for the proposition that granting COs discretion to consider late offers would be invalid and contrary to law and regulation. In that case, Government agencies had interpreted a General Services Administration Acquisition Regulation provision dealing with leasing of real property as allowing consideration of offers submitted after the deadline for submission of initial proposals so long as the offers were received before the best and final offer deadline. The court held that this was an unauthorized deviation from the FAR, which required that initial offers be submitted by the initial offer deadline. It also held that the Competition in Contracting Act (CICA) requires that a solicitation specify the date for submitting initial proposals (41 USC § 253a(b)) and that *strict compliance* with that date is a "condition precedent to a valid negotiated procurement." We do not read CICA as requiring "strict compliance" with the submission date. Neither did the U.S. Court of Appeals for the Second Circuit in *60 Key Centre Inc. v. Administrator of General Services Administration*, 47 F.3d 55 (2d Cir. 1995), 37 GC ¶ 168. The court addressed the same regulation involved in *Aerolease* and declined to adopt the Court of Federal Claims' view. It addressed the statutory and "fairness" issues as follows:

> B. Asserted Conflict with 41 U.S.C. § 253a(b)(2)(B)(ii).
>
> 41 U.S.C. § 253a(b)(2)(B)(ii) provides in pertinent part that: "[E]ach solicitation for…competitive proposals…shall at a minimum include—...the time and place for submission of proposals." 60 Key asserts, in its letter brief regarding this issue, that the specification of an initial due date and a bar of any subsequent offers is mandated by the quoted provision. [FN5] The statute's language does not require this reading, however, because Section 253a(b)(2)(B)(ii) provides only that a time and place for bid submission must be stated in the [solicitation], and does not assert any penalty for bid submissions after this date. It cannot be disputed that the GSA included a time for submission of offers in the [solicitation], thus complying with the literal requirement of § 253a(b)(2)(B)(ii).
>
> FN5. 60 Key also invokes 41 U.S.C. § 253b(a), which states that: "An executive agency shall evaluate…competitive proposals based solely on the factors specified in the solicitation." The claim is that the specified initial due date is one of these "factors." This is a transparently implausible reading of § 253b(a).

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Further, the legislative history of CICA establishes that a predominant purpose of its enactment was to augment competition....

* * *

The GSA's policy of allowing bids to be submitted up to the BAFO [best and final offer] deadline effectively enhances competition, as occurred in this case. Thus, we perceive no conflict between GSAR § 552.270-3 and either the literal requirements of 41 U.S.C. § 253a(b)(2)(B)(ii) or the underlying policy of CICA to enhance competition.

* * *

E. Fairness Concerns.

Aerolease stressed the "unfairness" of allowing a late bidder to compete with bidders who met the initial deadline for submission of bids, and undertook to keep their bids open during a period when the late bidder assumed no similar obligation. See 31 Fed. Cl. at 365–68; see also id. at 378 (denying reconsideration). All of the initial bidders in this case were or should have been aware, however, of the GSA's policy to allow late bids until the BAFO deadline. Further, parties like 60 Key who submit bids by the initial date specified in the [solicitation] have the competitive advantage of additional time to negotiate an acceptable bid by the BAFO deadline. In any event, the statutes and regulations that govern federal procurement policies "are not designed to establish private 'entitlements' to public business, but rather to produce the best possible contracts for the government in the majority of cases." *Delta Data Systems Corp. v. Webster*, 744 F.2d 197, 206 (D.C. Cir. 1984).

In sum, we perceive no innate unfairness in a procurement system that encourages early submission of proposals, but does not deprive the government or the public of the benefit of later, more advantageous offers.

Summary

The inflexible sealed-bidding rules were designed so that they could be administered by personnel who would not be required to exercise judgment. By contrast, the essence of negotiated procurement is the exercise of judgment by the CO. As Ralph has pointed out, it is long past time for the Comptroller to stop treating negotiated procurement like sealed-bidding procurement, *Unsigned Proposals: The Responsiveness Rule In Negotiated Procurements*, 12 N&CR ¶ 8. The focus in late submission cases should be on *whether* acceptance would compromise the integrity of the competitive system and on *whether* the late submission would give the late submitter an *unfair* advantage. In many of the late submission cases, any *real* competitive advantage is only a theoretical possibility. In any event, it would be more productive for the Comptroller to focus on those issues rather than to spend inordinate time and effort trying to unravel meaningless questions of clock synchronization and who said what to whom. Efforts to modify the FAR should be renewed and Bill Butterfield's suggestion would be a good alternative to the present rules. In addition, the Comptroller should keep his eye on the doughnut and not on the hole. JC

Costs & Pricing

¶ 58 • **"COST-BASED" CONTRACTING: On The Way Out?** • There are a number of initiatives underway that could sharply reduce the Government's use of "cost-based" contracting. The principal effort is within the Department of Defense. The Defense Science Board (DSB), in a June 12, 1998 Memorandum to Under Secretary of Defense (Acquisition and Technology) Jacques Gansler, recommended that price-based contracting be adopted "to the maximum extent allowed by law for all acquisitions by this Department." A subsequent Action Memorandum prepared by Under Secretary Gansler recommended creation of a study group and called for regulatory changes that would facilitate accomplishment of this goal. In an earlier

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Advance Notice of Proposed Rulemaking, the Department of Commerce likewise announced its intention to use "cost-based contracting only as a last resort" (61 Fed. Reg. 60068, Nov. 16, 1996), see 38 GC ¶ 576. What will come of these efforts? If successful, they will result in the single greatest change in contracting procedures since the advent of "best value" source selection.

What Is "Cost-Based" Contracting?

Under cost-based contracting, the amount to be paid the contractor is determined by either the estimated cost and negotiated profit or the actual cost and contractually determined profit for performing the work. By contrast, price-based contracting is concerned only with the "reasonableness" of the negotiated contract price and does not focus on the nature or amount of cost incurred or to be incurred during performance. Over the past several decades, the consideration of costs has infected all phases of contracting. Under current regulations, even though the initial award of a contract may be price- and not cost-based, the allowability and allocability of costs must be considered in virtually all aspects of contract administration—for example, in making progress payments under supply contracts, negotiating changes and other types of equitable adjustment claims, and settling convenience terminations. To achieve the benefits of price-based contracting, however, it must be practiced in both the award and administration of contracts.

The Burdens Of Cost-Based Contracting

The consideration of a contractor's estimated or actual cost of performance requires large expenditures of time and money by both contractors and the Government. Three major statutory provisions (and their implementing regulations) are the principal drivers of this effort—the Truth In Negotiations Act, 10 USC § 2306a and 41 USC § 254b (TINA) and Federal Acquisition Regulation 15.4; the Cost Accounting Standards (CAS), 41 USC § 422 and 48 CFR Parts 9903 and 9904; and the cost allowability rules, 10 USC § 2324 and 42 USC § 7256a, and FAR Part 31 (Cost Principles). Administering and complying with these requirements comprise a significant portion of the administrative cost of contracting. In a 1994 study commissioned by Secretary of Defense William J. Perry, Coopers & Lybrand identified over 120 regulatory and statutory cost drivers that it found accounted for an estimated 18% premium on defense contracts. TINA and the CAS were among the top 10 drivers. Those 10 drivers, in turn, accounted for almost half of the 18% premium, 39 GC ¶ 56.

However, the cost of administering these requirements is only part of the story. In these days of limited budgets, the time spent on unproductive effort robs agencies of resources that could be used on more meaningful activity. Another problem is that the consideration of a contractor's costs is a breeding ground for disputes that have nothing to do with contract performance. Further, cost-based contracting gives contractors no incentive to reduce costs. This was recognized in the description of the Air Force's Joint Direct Attack Munitions (JDAM) program provided by the Program Director of the JDAM program:

> We saw that being cost based for us was not a smart way to do business. It hurts us in that there are no drivers for cost reduction. We end up having a massive amount of documentation showing that it costs, for example, $1,000 to build something. The contractor gets a profit of, say, 10%. So the total cost is $1,100. Let's say the contractor, with experience, learns to do it for $900. Now the contractor makes $90 and the total cost is $990. By being efficient the contractor loses money! The contractor has no incentive to cut costs.

See *http://www.excelgov.org/acq_af.htm.*

Statutory Or Regulatory Barriers To Price-Based Contracting

There are relatively few statutory or regulatory provisions that might be construed to *require* the use of cost-based contracting, either at the time of award or during contract performance.

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• *Contract Awards*—Both the submission of cost or pricing data under TINA and the application of CAS are mandatory when the relevant statutory and/or regulatory exemptions are unavailable. This can occur, for example, in the rare instance of an initial sole-source contract award. The more likely occurrence would be the award of a noncompetitive follow-on contract. One strategy that might eliminate the need to perform cost analysis would be to maintain competitive alternatives, as was done in the JDAM program. This strategy was also recommended by the DSB. The use of multiple award task and delivery order contracts is one of the ways to maintain competition throughout a program.

However, when a sole-source or a noncompetitive follow-on award is unavoidable, the only way to escape cost-based contracting is to use the waiver authority provided by TINA to the heads of contracting activities (see FAR 15.402-1(c)(4)). This approach was recommended by the Secretary of Defense as follows:

> Contracting officers will request the use of the present waiver authority that has been granted to heads of contracting activities whenever they can determine the contract price to be fair and reasonable using pricing data, but not cost data.

The reasonableness of prices in such cases may be established with reference to prior prices, parametric data, market prices, and other price analysis techniques. While these pricing techniques have been used by some Government agencies, many procurement personnel have been so immersed in cost-based contracting that they are not competent to use these techniques.

Congress has also expressed concerns about the use of these price analysis techniques. The Strom Thurmond National Defense Authorization Act for Fiscal Year 1999, Public Law 105-261, contains the following provision:

> SEC. 803. DEFENSE COMMERCIAL PRICING MANAGEMENT IMPROVEMENT.
>
> (a) MODIFICATION OF PRICING REGULATIONS FOR CERTAIN COMMERCIAL ITEMS EXEMPT FROM COST OR PRICING DATA CERTIFICATION REQUIREMENTS.—(1) The Federal Acquisition Regulation issued in accordance with sections 6 and 25 of the Office of Federal Procurement Policy Act (41 U.S.C. 405, 421) shall be revised to clarify the procedures and methods to be used for determining the reasonableness of prices of exempt commercial items (as defined in subsection (d)).
>
> (2) The regulations shall, at a minimum, provide specific guidance on—
>
> (A) the appropriate application and precedence of such price analysis tools as catalog-based pricing, market-based pricing, historical pricing, parametric pricing, and value analysis;
>
> (B) the circumstances under which contracting officers should require offerors of exempt commercial items to provide—
>
> (i) information on prices at which the offeror has previously sold the same or similar items; or
>
> (ii) other information other than certified cost or pricing data;
>
> (C) the role and responsibility of Department of Defense support organizations in procedures for determining price reasonableness; and
>
> (D) the meaning and appropriate application of the term "purposes other than governmental purposes" in section 4(12) of the Office of Federal Procurement Policy Act (41 U.S.C. 403(12)).
>
> (3) This subsection shall cease to be effective one year after the date on which final regulations prescribed pursuant to paragraph (1) take effect.

While this statutory provision deals only with the procurement of commercial items, Congress' concerns regarding the proper use of price analysis techniques would appear to be even more applicable to the procurement of unique Government items.

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• *The CAS Problem*—Merely being exempted from TINA will not be sufficient for a contractor to escape the tentacles of the CAS. To avoid CAS coverage, the contractor cannot provide *any* cost data. If the contractor submits *cost* information (e.g., labor hours or rates or overhead rates) for price realism purposes, the CAS will apply even though TINA does not, *Aydin Corp. (West) v. Widnall*, 61 F.3d 1571 (Fed. Cir. 1995), 14 FPD ¶ 67, 37 GC ¶ 512. Thus, the CAS should be modified to eliminate this requirement. See our discussion in *Applicability of Cost Accounting Standards: Regulatory Changes Needed*, 9 N&CR ¶ 62.

• *Contract Administration*—Traditionally, costs have played a major role in the administration of Government contracts awarded on a firm, fixed-price basis. The requirements for consideration of cost are imbedded in contract clauses. For example, progress payments for fixed-price supply contracts are based on incurred cost (see FAR 52.232-16(a)(2)). The clauses dealing with price adjustments for contract changes and other types of equitable adjustments also require that contract adjustments be based on increases or decreases in cost (see, e.g., FAR 52.243-1(b); DFARS 252.243-7001). Similarly, claims for terminated work are based on the contractor's costs (see FAR 52.249-2(g)). Because these clauses are not required by statute, they could be modified by regulation to delete cost-based requirements.

Deleting cost-based requirements for progress payments and termination settlements should not pose too great a problem. In both instances, payments could be based instead upon a percentage of completion of the work. This approach was suggested by the DSB. However, negotiation of prices for changes and other claims would require different techniques. The DSB suggested that Government-ordered changes and similar adjustments be negotiated in advance on the basis of *value* to the Government, as opposed to *cost* to the contractor. For adjustments over $500,000, the DSB recommended that TINA waivers be obtained. However, much work remains to be done in this area.

Avoiding Excessive Risk

One of the major reasons for using cost-based contracts has been to avoid imposing excessive financial risk on contractors. The history of Government contracting is replete with horror stories resulting from contractors assuming undue risks. One has only to look at the infamous Pit 9 nuclear waste clean-up contract at the Idaho National Engineering and Environmental Laboratory awarded to one of the nation's largest contractors. The General Accounting Office reported that as a result of overruns on the $200,000,000 fixed-price contract, the contractor filed a claim for $257,000,000 and requested a cost-based contract for completing the work, *Nuclear Waste: Department of Energy's Pit 9 Cleanup Project Is Experiencing Problems* (RCED-97-221, 07/28/97). The report concluded that "the Pit 9 project, as originally conceived, is clearly a failure. It simply cannot be completed in the time frame or within the price agreed."

Another significant area of high risk contracting involves contracts for development of hardware or other systems. In this regard, DOD FAR Supplement 235.006(b)(i) states:

> A fixed-price type contract shall not be awarded for a development program effort unless—
>
> (A) The level of program risk permits realistic pricing;
>
> (B) The use of a fixed-price type contract permits an equitable and sensible allocation of program risk between the Government and the contractor.

A written determination that these criteria have been met is required by the USD(A&T) for higher value programs and by the Contracting Officer for those contracts not requiring such a USD(A&T) determination.

Alternatives To Cost-Reimbursement Contracts

Time-and-materials (T&M) contracts, labor-hour contracts, or variations on them could be used to reduce the risk on contractors. Don't get us wrong, we are not boosters of these types of contracts. In neither T&M nor labor-hour contracts is the contractor at cost risk for

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completing the work. Moreover, in neither of these two contract types does the contractor have an incentive to reduce costs. Cost-plus-incentive-fee and award-fee contracts likewise provide little motivation to reduce costs. However, when contrasted with cost-reimbursement contracts, T&M and labor-hour contracts may be the lesser of the evils.

The major criticism of T&M contracts is that the contractor may be motivated to be less efficient so that it can make more profit and, in that sense, T&M contracts are a type of cost-plus-a-percentage-of-cost contract. We noted this criticism in *Time-and-Materials and Labor Hour Contracts: Fixed-Price or Cost Contracts?*, 12 N&CR ¶ 1, stating:

> The down side of these types of contracts is that a contractor can increase its profit (assuming that the fixed rates are sufficiently high to ensure a profit) by purposely being inefficient. At best, they do not motivate a contractor to be efficient. However, the competitive forces impacting on the establishment of the rates and the emergence of the use of contractor past performance in source selection most likely relegate these concerns to theoretical possibilities rather than real probabilities.

With respect to the "fish-or-fowl" nature (fixed-price or cost-reimbursement) of T&M contracts which we discussed in 12 N&CR ¶ 1, see *Modern Technologies Corp. et al.*, Comp. Gen. Dec. B-278695, 98-1 CPD ¶ 81, 40 GC ¶ 222:

> As a preliminary matter, [the protester's] contention that a detailed cost analysis was required here is based on a flawed understanding of the anticipated contract type, and an incorrect reading of the requirements of the RFP. First, the contracts to be awarded here are primarily T&M contracts, not cost reimbursement contracts. RFP § B, Summary. T&M contracts are fixed in price to the extent that offerors propose fully burdened (including profit) hourly labor rates for each major labor category for each of the 3 years of performance, RFP § J, Attachment 3 at 1, but reimbursable to the extent that varying numbers of hours will be required to perform each delivery order. Accordingly, there is no *per se* requirement for a cost analysis when an agency uses a T&M contract. *Research Management Corp.*, 69 Comp. Gen. 368, 372 (1990), 90-1 CPD ¶ 352 at 5–6. Second, [the protester's] contention that cost and pricing data was required overlooks the RFP's express instruction that "[i]t is anticipated that pricing of this action will be based on adequate price competition: therefore, offerors are not required to submit cost or pricing data." RFP § L.E (setting forth the text of Air Force Material Command Federal Acquisition Regulation (FAR) Supplement clause 5352.215-9014). [Footnotes omitted.]
>
> Moreover, as we explained in *Research Management Corp., supra*, 69 Comp. Gen. at 371, 90-1 CPD ¶ 352 at 5, (and later in *Hughes Missile Sys. Co.*, B-257627.2, Dec. 21, 1994, 94-2 CPD ¶ 256 at 14–15) the requirement to perform a cost analysis is derived from the Truth in Negotiations Act, 10 U.S.C. § 2306a (1994). The Act requires submission of cost data for all negotiated contracts in excess of $500,000 except in certain circumstances. When such data is required under the Act, a contracting officer must perform a cost analysis. FAR § 15.805-1(b) (June 1997); *Research Management Corp., supra*; *Hughes Missile Sys. Co., supra*. However, the Act (and the FAR provisions implementing the Act) specifically exempt contracts awarded with "adequate price competition" from the data submission requirement. See 10 U.S.C. § 2306a(b)(1)(A); FAR § 15.804-1(a)(1)(i) (June 1997). Since multiple offerors proposed fixed labor rates in response to the RFP, this procurement falls squarely within the definition of a procurement for which an agency has received adequate price competition, and there was no requirement for the kind of analysis [the protester] claims. FAR § 15.804-1(b)(1) (June 1997); *Hughes Missile Sys. Co., supra*.
>
> Although we conclude there is no requirement for a full-blown cost analysis here, contracting agencies should conduct a review of the proposals adequate to ensure that the proposed prices are reasonable and that the government will obtain the lowest overall cost. *Research Management Corp., supra*, 69 Comp. Gen. at 372, 90-1 CPD ¶ 352 at 5–6. Our review of the evaluations, and of the challenges raised by [the protester], leads us to conclude that the analysis and review performed by the agency was, in fact, adequate to protect the government's interests, and reasonably applied.

Notes

One impediment to the use of T&M contracts for the procurement of professional and technical services is 10 USC § 2331 which states:

> (a) In general.—The Secretary of Defense shall prescribe regulations to ensure, to the maximum extent practicable, that professional and technical services are acquired on the basis of the task to be performed rather than on the basis of the number of hours of services provided.

This misguided attempt to curb the use of uncompensated overtime could be viewed as precluding the use of T&M contracts for such services. However, 10 USC § 2331 should properly be construed as favoring fixed-price completion contracts over T&M contracts, but *not* as favoring cost-reimbursement contracts over T&M contracts.

One variation on T&M contracts would be to contract for a task and to reimburse the contractor for the actual number of hours required to perform the task at fixed labor rates, with the profit and overhead for completing the contract likewise fixed in amount. This may sound like heresy to those entrenched in cost-based contracting and may not be seen as enough of an advance for those wishing to completely eradicate cost-based contracting. However, such an approach would reduce contractor risk while avoiding the need to delve into the contractor's overhead costs. Most of the current regulatory coverage is aimed at overhead costs and this is where most of the compliance and administrative costs arise. Contracting for tasks on the basis of fixed labor rates would be in line with an intriguing suggestion made by David Cooper, GAO's Director for Acquisition Policy, Technology, and Competitiveness Issues in his March 3, 1994 testimony before a congressional committee investigating unallowable costs. He suggested that innovative approaches to reimbursing contractor overhead costs be explored, including capping charges for selected types of indirect costs, increasing the purchase of commercial products as provided for in current acquisition reform proposals, and moving away from cost-based contracting towards market-determined prices. See 36 GC ¶ 145.

Summary

Reducing the Government's use of cost-based contracting will not be easy and it will take time. It will require a cultural change of immense proportions and a major cleanup of the FAR and agency FAR supplements. Substantial training of personnel will also be needed. However, the reduction in the use of cost-based contracting has started; now it's time for everybody to get on the bus. *JC*

Procurement Management

¶ 59 • CONTRACTING OFFICER AUTHORITY: Dollar Value Limits • One of the basic rules of Government contracting is that a Contracting Officer's authority to contract is circumscribed by the dollar limitations, if any, contained in the CO's delegation of authority, *Edwards v. U.S.*, 22 Cl. Ct. 411 (1991), 10 FPD ¶ 11. Moreover, it is a fact of life that very few Government contracts end up with the same dollar value as the amount awarded—the overwhelming number experience increases. There are several questions dealing with the relationship between these increases and dollar limits on a CO's authority. The concern is whether the CO is authorized to take actions in the administration of contracts that would result in the contract having an aggregate value (base contract and all modifications) greater than the dollar limit on the CO's authority.

Delegations

Federal Acquisition Regulation 1.603-3(a) requires that Standard Form (SF) 1402 be used to delegate authority to COs:

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> Contracting officers shall be appointed in writing on an SF 1402, Certificate of Appointment, which shall state any limitations on the scope of authority to be exercised, other than limitations contained in applicable law or regulation.

SF 1402 invites the delegator to specify any limitations on the CO's authority, in a space provided under the following language:

> Subject to the limitations contained in the Federal Acquisition Regulation and to the following:

If the space is left blank, there would be no limitations and the CO would have "plenary" authority (the full authority of the delegator both as to types of actions and dollar value). More often, some limitations are specified. In some cases, both the types of actions delegated and dollar limitations are spelled out in considerable detail. However, in many instances, the delegation merely contains a sparse statement such as "General Contracting–$50,000,000" or "award and administer contracts not exceeding $1,000,000 per transaction." These latter types of limitations are the subject of this piece.

Types Of Contracts And Actions

Determining how dollar limits apply to specific actions requires consideration of the type of contract and the type of action involved.

• *Task Or Delivery Order Contracts*—These contracts include indefinite delivery, indefinite quantity (IDIQ) contracts, requirements contracts, or unique arrangements (requirements-*type* contracts). Under an IDIQ contract, funds are only obligated for the guaranteed minimum at the time of award and further funds are obligated when orders are placed. In requirements contracts or unique arrangements, funds are obligated only when orders are placed. Some COs have opined that, so long as the actions obligating funds are individually within the CO's dollar authority, they are authorized to enter into a contract allowing them to place orders that, in the aggregate, would exceed their dollar authority. Although the matter has not been litigated, this conclusion appears to be incorrect.

A solicitation for a task or delivery order contract is required to contain a "maximum quantity or dollar value of the services or property to be procured under the contract," 10 USC § 2304a(b)(2) and 41 USC § 253h(b)(2), and the "maximum value" of the contract can be increased only by "modification of the contract," 10 USC § 2304a(e) and 41 USC § 253h(e). Even though the funds obligated at the time of initial award are within the CO's dollar limitation, the CO is creating an instrument that will permit orders to be placed up to the maximum value without the need for a new competition. Thus, a CO with authority to enter into contracts not exceeding $5,000,000 would not be authorized to enter into a requirements contract with a "maximum value" of $10,000,000 even though no order under the contract would exceed $2,000,000. On the other hand, assume that the maximum value of the original contract ($4,000,000) is within the CO's dollar limitation ($5,000,000) but it is to be increased through a $2,000,000 modification (sole

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STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION
(Act of Aug. 12, 1970; Sec. 3685, Title 39, U.S. Code)

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I certify that the statements made by me above are correct and complete.
Filed—September 28, 1998 (signed) Juan P. Osuna

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source, properly justified). It would appear that because the modification amount is separately within the specified dollar limitation, the CO would be authorized to execute the modification even though the aggregate value of the modified contract ($6,000,000) would exceed the $5,000,000 limitation. Here, the actions—initial award and contract modification—should be viewed as two separate contracts.

• *Options*—The question in contracts containing options is whether the CO's dollar limitation is applied to the base contract amount and the option amount individually or in the aggregate. Thus, if the CO is authorized to enter into contracts not exceeding $5,000,000, would a $4,000,000 base contract with a $2,000,000 option be authorized? Where the option amount is evaluated in making the initial contract award, it seems that the CO would not be authorized to make the basic award. This scenario would create a contractual arrangement that could result in an amount exceeding the dollar limitation, without further competition. A different result might be expected where the option is *not* evaluated at the time of the initial contract award because the exercise of the option would involve a new procurement. See *Options: They Seem To Be Many-Splendored Things*, 4 N&CR ¶ 60. However, FAR 12.203 and 13.500(a), which authorize simplified acquisition procedures for commercial items state that the procedures are available for contracts "not exceeding $5,000,000, *including options*" (emphasis added). This language could be construed as applying to both evaluated and non-evaluated options. In the past, delegations from the General Services Administration to agencies for the procurement of automated data processing equipment applied the dollar value to the base contract and "all optional quantities" over the contract life. See, *e.g., Electronic Data Systems Corp. v. Department of Energy*, GSBCA 13020-P, 95-1 BCA ¶ 27485, 1995 BPD ¶ 23.

• *Cost-Reimbursement Contract Overruns*—If funding of an overrun would result in the new contract value exceeding the limit of the CO's authority, would the CO be authorized to fund the overrun? We have not been able to find a case directly on point. However, in *J. J. Henry Co.*, ASBCA 15473, 72-2 BCA ¶ 9641, 15 GC ¶ 11, the Armed Services Board of Contract Appeals appeared to hold that the aggregate amount (base contract plus overrun) should be considered. There, a CO with a $50,000 contracting authority limit was not authorized to approve a $30,000 overrun under a $300,000 cost-reimbursement contract (awarded by a different CO) based on the Government's testimony that its practice was to consider the total contract value when determining whether a CO was authorized to fund the overrun. This ruling is questionable because the Government's policy was not a part of the delegation of authority and there was no indication that the contractor was aware of the policy.

• *Changes And Other Claims*—It can be argued that amending contracts for changes and other claims stands on a different footing than these other categories. Negotiation of changes and other claims are part of the duties of a CO and they are not considered new procurements as would be the exercise of unevaluated options or increasing the maximum value of a task or delivery order contract. In this regard, the authority to enter into contracts inherently includes the authority to modify them, *Peters v. U.S.*, 694 F.2d 687 (Fed. Cir. 1982), 1 FPD ¶ 10, 25 GC ¶ 106. Thus, absent a specific limitation in the delegation of authority, a CO with the authority to award contracts not in excess of $5,000,000 would be authorized to settle changes or claims even though the aggregate value of the contract after amendment would exceed that amount ($4,500,000 contract with a $750,000 change or other claim).

Don't Keep Them Guessing

The foregoing analysis points out the problems that might be encountered by a CO attempting to plumb the bounds of her or his authority. The boundaries of a CO's authority are also of paramount importance to a contractor, who by law is presumed to know the *actual* limits of a CO's authority, *Federal Crop Insurance Corp. v. Merrill*, 332 U.S. 380 (1947). Neither the CO nor the contractor should be kept guessing—not when it's so easy to say what you mean and spell out the CO's authority. Of course, that presupposes that those delegating the authority have thought out the process. JC