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**REQUIREMENTS AND INDEFINITE QUANTITY CONTRACTS
IN GOVERNMENT PROCUREMENT**

By

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PREFACE

The author, a Major in the United States Air Force, is a judge advocate currently assigned to Headquarters, Air Force Systems Command, Andrews Air Force, Maryland. The views expressed herein are solely those of the author and do not purport to reflect the position of the Department of the Air Force, the Department of Defense, or any other agency of the United States Government.

INTRODUCTION

Frequently the Government's procurement needs cannot be fully defined at the time the contract is signed. Uncertainties in quantity and price and sometimes the exigencies of time dictate entering contracts or agreements now, with certain specifics completed during the contract period. Many contracts, commonly categorized as variable quantity or open-ended contracts,¹ have been utilized to meet these demands.²

Variable quantity contracts obligate the contractor to furnish supplies and/or services in amounts ordered by the government during a specified contract period.³ The quantity to be provided or the price per unit or both is inexact, although

¹ In his article, Government Requirements Contracts, Gavin asserts that McBride and Wachtel use the term open-ended contracts too restrictively, limiting it to those indefinite contracts which do not obligate the Government to give the contractor all its requirements. Mr. Gavin suggests using the term to include contracts which commit the Government to such an obligation as well. Perhaps a better term is that used by Professors Cibinic and Nash "variable quantity contracts". Indefinite-delivery contracts, as defined in FAR Subpart 16.5 would be a subset of these variable quantity contracts. Cibinic and Nash, Formation of Government Contracts, 2d ed, Chap 7, at 797 (1986); McBride and Wachtel, Government Contracts, Revised, Chapter 21, Sec. 21.10[1] (1985); Gavin, Government Requirements Contracts, 5 Pub. Contract L J 234 (1972); FAR Subpart 16.5 and 16.6.

² FAR 16.502 Definite-quantity contracts, FAR 16.503 Requirements contracts, FAR 16.504 Indefinite-quantity contracts, FAR 16.601 Time-and-material contracts, FAR 16.602 Labor-hour contracts, and FAR 16.603 Letter contracts are some of the types of contracts that meet the Government's need for flexibility in quantity and price.

³ FAR 16.501; FAR Subpart 16.6. Also see DFAR Subpart 216.5; GSA FAR 516.6.

minimum and maximum terms or price ceilings may be given.⁴ Further, the delivery schedule and amount per delivery may be left open.

A subcategory of variable quantity contracts is the indefinite delivery contract,⁵ which has no set quantity and/or no set delivery schedule. As used in the Federal Acquisition Regulation (FAR), this subcategory consists of the definite quantity-indefinite delivery, requirements, and indefinite quantity contracts.⁶ The line differentiating these contract types is frequently unclear; hybrids are rampant. Therefore, the parties frequently disagree on the type of contract they entered. Their disagreement gives rise to many disputes.

This paper focuses on indefinite quantity and requirements contracts,⁷ although the other leg of indefinite quantity contracts, the definite quantity-indefinite delivery contract, is referenced for comparison. One should remember that these contracts have a common theme, that is, the Government is unable

⁴ FAR 16.501.

⁵ FAR Subpart 16.5.

⁶ FAR 16.501.

⁷ For an excellent study of requirements contracts through the 1960s, see Gavin, Government Requirements Contracts, 5 Pub Cont L J 234 (1972). Much of the law concerning indefinite delivery contracts remains unchanged, but many significant events have an impact on this area: including the creation and recreation of the Cost Accounting Standards Board and promulgation of the Cost Accounting Standards; expansion and then restriction of the Government's right to terminate for convenience; and the increased use of clauses relieving the Government from what are standard contractual obligations in the commercial world.

to define how much of an item or service it requires at specific times when entering the contract.

In Fiscal Year 1988, the federal government spent almost \$195 billion in just less than 400,000 contract actions⁸, several billion of which was for indefinite delivery contracts.⁹ It is little wonder that indefinite delivery contracting continues to be a vital tool in the federal procurement process as it provides great flexibility for the Government and a shifting of much of the risk to the contractor.¹⁰ For example, indefinite delivery contracts permit the Government to maintain minimum stock levels, and allow direct shipment to users.¹¹

Indefinite delivery contracts offer several advantages to

⁸ Federal Procurement Data System Standard Report for Fiscal Year 1988, prepared by U.S. General Services Administration Federal Procurement Data Center, Executive Agent for the Office of Management and Budget, Office of Federal Procurement Policy.

⁹ Although tasked to gather and maintain Government procurement statistics for Congress, the agencies and the public, the GSA only compiles statistics needed for their fiscal year report, Federal Procurement Data System Standard Report. Personnel at the GSA Federal Procurement Data Center, explained that although they could retrieve data in ways not set out in their report, a break out of procurement by type of contract was not possible.

Several DOD departments maintain other procurement data, but it is not standardized within DOD or even within the department. One department, the Defense Logistics Agency, reports that in FY 88, it had 9,392 indefinite-delivery contract actions concerning \$1,290,080,501. This is less than 1% of their total procurement actions, but 11% of their procurement dollars. While the data maintained does not differentiate the different types of indefinite-delivery contracts, it provides an idea of the scope of these contract types in at least one Government contracting agency.

¹⁰ Pace, Negotiation and Management of Defense Contracts, at p. 232-236 (1970).

¹¹ FAR 16.501(b)(1).

the Government including: lower prices for volume purchases rather than many small definite quantity purchases; lower administrative costs for managing only one contract instead of many smaller ones; lower Government inventory as orders can be placed as needed; and direct delivery of items where needed thereby reducing depot space requirements.¹² They also offer funding flexibility, since funds generally are obligated only on a per order basis; quick obligation of year end funds, since the contracting officer need only issue an order, rather than re-compete; and simplified whole or partial termination procedures.¹³

Ironically, the Government's desire for flexibility threatens contract formation. Frequently, clauses are included allowing the Government to avoid or limit liability in situations that non-Government contracting parties could not. These clauses further cloud the enforceability issue.¹⁴ Finally, the indefiniteness of these arrangements require careful administration to ensure that Congressional mandates, particularly the Competition in Contracting Act,¹⁵ and the Truth

¹² See Pace, supra note 10.

¹³ FAR Subpart 16.5; See also Chapters 3, 4 & 5, infra.

¹⁴ See Chapter 3, Subsection C3 of this paper, infra.

¹⁵ The Competition in Contracting Act was enacted in 1984 as part of Public Law 98-369. It is codified at 10 U.S.C. Sec. 2304 and 41 U.S.C Sec. 253.

in Negotiations Act,¹⁶ are not violated.

Chapter 1 defines the contract types and distinguishes them from one another and from similar agreements. Consideration problems, which make enforcement of these contract types difficult, are discussed in Chapter 2. Chapter 3, Award Considerations, distinguishes pricing arrangements from contract types, discusses selection of contract types and terms, analyses the impact of government estimates and unbalanced bids, and explains applicable accounting thresholds. Ordering problems are analyzed in Chapter 4. Finally, in Chapter 5, terminations are reviewed.

¹⁶ 10 U.S.C. Sec. 2306a.

CHAPTER 1- DEFINING AND DISTINGUISHING TYPES OF CONTRACTS

To avoid unnecessary disputes, the parties should understand the distinctions between contract types and pricing arrangements, and the differences found among the various contract types. If the contracting officer understands how these items inter-relate, the contract most advantageous to the Government can be selected. If the offeror understands this relationship, he can prepare his offer with a full understanding of the risks involved. The first part of this chapter defines contract types and pricing arrangements, and explains the distinctions between them. The second part defines the various indefinite delivery contracts. Part three explains the differences between requirements, definite quantity, and indefinite quantity contracts. Finally, there is a discussion about how basic ordering agreements play within this little understood area.

A. Distinguishing Contract Type from Pricing Arrangements

Part 16 of the FAR, entitled Types of Contracts, causes confusion because it calls several different contract terms, contract types. Fixed-price, incentive, and cost-reimbursement contracts are referred to as contract types. At the same time, requirements, indefinite quantity, and definite quantity-

indefinite delivery contracts, as well as, letter, time-and-material, and labor hour contracts are referred to as types of contracts. Finally, indefinite delivery contracts are called a type of contract. The cases are frequently as confusing as the regulations.

Fixed-price, incentive, and cost-reimbursement are actually pricing or payment arrangements, not contract types. Variable quantity contracts is a category of contracts available for use in Government procurement; indefinite delivery contracts is a subcategory, containing several contract types: requirements, indefinite quantity with a guaranteed minimum, and definite quantity-indefinite delivery contracts.¹⁷

Each of these contract types can use either the fixed-price or incentive pricing arrangements. For example, a fixed-price with economic price adjustment may be used for requirements, indefinite quantity, and definite quantity-indefinite delivery contracts. Thus, the pricing arrangement selected does not help distinguish the type of contract used among the various types of contracts within the indefinite delivery contracts subcategory. However, selection of the pricing arrangement and the type of contract are inter-related and must be considered prior to

¹⁷ This explanation is similar to that used in the basic texts on Government procurement. Cibinic & Nash, Formation of Government Contracts, 2nd ed., Chapter 7, at 705-706 (1986); McBride & Wachtel, Government Contracts, v. 2, Sec. 18.10 (1984). Cf. Keyes, Government Contracts, Sec. 16.1 (1986) which calls fixed-price, incentive, and cost-reimbursement, types of contracts, with indefinite delivery contracts as a subcategory of fixed-price contracts.

contract formation to ensure the Government enters into a reasonably priced contract. This is discussed in more detail in Chapter 3 of this paper.

B. Defining Indefinite Delivery Contracts

The vagaries of quantity and delivery schedule, make requirements, indefinite quantity, and definite quantity-indefinite delivery contracts difficult to distinguish. To further complicate matters, all three allow firm fixed-price,¹⁸ fixed-price with economic price adjustment,¹⁹ fixed-price with prospective redetermination,²⁰ or price based on catalog or market price.²¹ However, these contract types a few distinguishing characteristics.

1. Definite quantity-indefinite delivery contracts

A definite quantity-indefinite delivery contract provides for delivery of a definite quantity of specific supplies or services for a fixed period, with deliveries to be scheduled at designated locations upon order.²² It may be used when a

¹⁸ FAR 16.202.

¹⁹ FAR 16.203-2.

²⁰ FAR 16.205-2.

²¹ FAR 16.501(c).

²² FAR 16.502(a).

definite quantity of supplies or services will be required during the contract period and the supplies or services are regularly available or will be available after a short lead time.²³ Definite quantity contracts generally offer the Government a better price than requirements or indefinite quantity contracts, since the contractor can more accurately assess his costs and risks where he knows the quantity to be ordered and what his unit price or labor rates are.²⁴

When the quantity cannot be determined prior to award, or during much of the contract period, indefinite quantity and requirements contracts may be used as they provide flexibility in quantity as well as delivery scheduling and the ordering of supplies or services after requirements materialize.²⁵

2. Requirements contracts

A requirements contract provides the Government activity with the specific supplies or services they need during the contract period.²⁶ Requirements contracts may be used for anticipated recurring requirements, where the precise quantities needed during the contract period cannot be pre-determined. It is generally used for commercial products or commercial-type

²³ FAR 16.502(b).

²⁴ But see Chapter 3, What is in a name? Indefinite Quantity versus Definite Quantity Contracts with Increased Quantity Options, *infra*.

²⁵ FAR 16.501(b)(2).

²⁶ FAR 16.503(a).

products or services.²⁷

Usually, the requirements contract states: the maximum limit of the contractor's obligation to deliver; the Government's obligation to order; the maximum and/or minimum quantities that the Government may order under each individual order; and the maximum that may be ordered during a specified period of time.²⁸ Because funds are not obligated on award of the contract, but as each order is placed,²⁹ the Government has greater funding flexibility than is available under the definite quantity contract.

Deliveries are scheduled by placing orders with the contractor.³⁰ Requirements contracts also offer faster deliveries when production lead time is involved, because contractors usually maintain limited stocks if the Government promises to obtain all of its actual purchase requirements from the contractor.³¹

Because of the increased flexibility for the Government, and some contractor reluctance to commit to providing an unknown quantity, the price of requirements contracts is generally

²⁷ FAR 16.503(b).

²⁸ FAR 16.503(a).

²⁹ FAR 16.503(b).

³⁰ id.

³¹ FAR 16.501(b)(4).

higher than a definite quantity contract.³² Further, because of the indefiniteness of the amount that will be ordered, there is a risk of unbalanced bidding on multiple item requirements contracts.³³

If the Government desires more flexibility, the indefinite quantity with a guaranteed minimum contract may be appropriate, although this flexibility often costs the Government more per item, than a similar requirements contract.

3. Indefinite quantity/guaranteed minimum contracts

An indefinite quantity with a guaranteed minimum contract provides for an indefinite quantity, with stated limits, of specific supplies or services to be furnished during the contract period.³⁴ Without a minimum guarantee in an indefinite quantity contract, the buyer's promise to buy from the seller is illusory, as the buyer is not promising to buy any quantity from the seller. Thus, the contract fails for lack of adequate consideration passing from buyer to seller.³⁵

³² But cf. National Chemical Laboratory of Pa., Inc., 55 Comp. Gen. 1226, 76-1 CPD Para. 421 (1976) (rejecting argument that the solicitation should have been for a definite quantity-fixed delivery contract, finding indirect expenditures might make a requirements contract most economically feasible).

³³ See Chapter 3, Unbalanced Bids and Award, *infra*.

³⁴ FAR 16.504.

³⁵ Willard, Sutherland and Co. v. United States, 262 U.S. 489, 43 Sup. Ct. 592 (1923); Tennessee Soap Co. v. United States, 130 Ct. Cl. 154, 126 F. Supp 439 (1954); Maxima Corp. v. United States, 847 F.2d 1549, 7 FPD Para. 60 (Fed. Cir. 1988).

As with other indefinite delivery contracts, deliveries are scheduled by placing orders with the contractor.³⁶ Under this contract, however, the Government must order, and the contractor furnish, at least a stated minimum quantity of supplies or services and, if ordered, the contractor must furnish additional quantities up to the stated maximum.³⁷ The contract may specify maximum as well as minimum quantities that the Government may order under each delivery order and the maximum that it may order during a specific period of time.³⁸

An indefinite quantity with a guaranteed minimum contract is used when the Government cannot predetermine the precise quantities of supplies or services required during the contract period and it is inadvisable to commit itself for more than a minimum quantity.³⁹ Unlike a requirements contract, an indefinite quantity with a guaranteed minimum contract should be used only for commercial or commercial-type items or services and when a recurring need is anticipated.⁴⁰ Funds for other than the stated minimum quantity are obligated by each delivery

³⁶ FAR 16.504(a).

³⁷ FAR 16.504.

³⁸ FAR 16.504(a).

³⁹ FAR 16.504.

⁴⁰ FAR 16.503(b) and 16.504(b). But see, Grey Advertising, Inc., 55 Comp. Gen. 1111, 1139, 76-1 CPD Para. 325 (1976) (the word "should" held not to place a mandatory prohibition against using indefinite quantity contracts for other than commercial-type products or services). See also Sentinel Electronics, Inc., Comp. Gen. Dec. B-221914.2, et al., 86-2 CPD Para. 166 (1986).

order, not by the contract itself.⁴¹

The minimum quantity must be more than a nominal quantity, but it should not exceed the amount that the Government is fairly certain to order.⁴² This also offers the advantage of limiting the Government's obligation to the minimum quantity specified in the contract.⁴³ As a direct consequence, the price will generally be higher than for definite quantity and requirements contracts as the contractor wants to assure recoupment of his costs and some profit.⁴⁴ This desire to receive the award, but still assure a profit, also creates significant unbalanced bidding problems, particularly in single, rather than multiple, indefinite quantity contract awards.⁴⁵

C. Distinguishing Among Types of Indefinite Delivery Contracts

Sometimes it is difficult for anyone to determine what type of indefinite delivery contract the parties entered. In part this is due to the many hybrid contracts created to meet the Government's needs in the particular situation. For example, a requirements contract may contain a guaranteed minimum quantity

⁴¹ FAR 16.504(b).

⁴² FAR 16.504; Tennessee Soap Co. v. United States, 130 Ct.Cl. 154, 126 F. Supp. 439 (1954).

⁴³ FAR 16.501(b)(3).

⁴⁴ Mason v. United States, 222 Ct. Cl. 436, 615 F.2d 1343 (1980).

⁴⁵ See Chapter 3, Unbalanced Bids and Award, *infra*.

or dollar purchase; an indefinite quantities contract may contain some line items where a definite quantity is stated; and a definite quantity contract may contain an option to increase the stated quantity by a certain amount. It is little wonder that these hybrids create disputes, requiring a medium to divine the actual intent of the parties. While, in many cases, there appears no true "meeting of the minds", as long as there is adequate consideration passing between the parties, a contract will be found, with the court or board deciding, through hindsight, which type of contract the parties entered.

1. Indefinite quantity versus definite quantity contracts

The definite quantity-indefinite delivery contract is distinguishable from its indefinite quantity brother, in that, in the former there is an established amount to be ordered under the contract; it may be for other than commercial or commercial-type supplies or services; and funding is committed upon award of the contract (assuming there is no funding availability clause), rather than upon each order beyond the minimum quantity. However, when the definite quantity contract contains an option to increase the quantity by a set percentage, the demarcation line between definite quantity and indefinite quantity contracts blurs, and the distinction between the two becomes a matter of semantics. Further discussion of this thorny problem is in Chapter 3.

2. Requirements versus indefinite quantities contracts

In its traditional usage, a requirements contract consists of a buyer agreeing to purchase all requirements from the seller and the seller agreeing to fill all of the buyer's requirements.⁴⁶ While the buyer's forbearance from buying any of its requirements from another source has tempered over the years,⁴⁷ absent significant erosion, adequate consideration passes to the seller, and a valid contract is formed. In contrast, under an indefinite quantity contract, even if the buyer has requirements, he is only obligated to purchase from the seller the minimum amount he guaranteed to purchase. He may order any further requirements from anyone. He need not order first from the seller, as long as, within the contract period, he orders the minimum quantity or price he guaranteed.

D. Distinguishing Basic Ordering Agreements

In 1923, the Supreme Court ruled that the Government's promise in indefinite quantity contracts was illusory and therefore, the contract was unenforceable due to lack of consideration.⁴⁸ From the ashes of this ruling, rose two new

⁴⁶ FAR 16.503; FAR 52.216-21(c); United States v. Brawley, 96 U.S. 168, 22 L.Ed 622 (1878); Ronald A Torncello, et al. v. United States, 231 Ct. Cl. 20, 681 F.2d 756 (1982).

⁴⁷ See Chapter 3, Multiple Awards, *infra*.

⁴⁸ Willard, Sutherland and Company v. United States, 262 U. S. 489, 43 Sup. Ct. 592 (1923).

procurement arrangements: the indefinite quantity with a guaranteed minimum contract,⁴⁹ and the basic ordering agreement.⁵⁰ While the indefinite quantity with a guaranteed minimum is an enforceable contract, the basic ordering agreement, for all practical purposes, is the old unenforceable indefinite quantity contract.

A basic ordering agreement (BOA), though not a contract, has many similarities to current indefinite delivery contracts. It is a written understanding, negotiated by the parties containing specifics on all possible terms and clauses applying to future contracts (orders) between the parties during the contract period. For example, BOAs might describe the method for determining the price for the supplies or services; include delivery terms and conditions (or specify how they will be determined); list the Government activities authorized to issue orders under the agreement; specify when each order becomes a binding contract (e.g., when an order is placed, upon acceptance in a specified manner, or failure to reject the order within a certain time); and make failure to reach agreement on price for any order issued before price is established a dispute under the Disputes clause.⁵¹ It also contains as specific a description as practicable of supplies or services needed, and methods for

⁴⁹ FAR 16.504.

⁵⁰ FAR 16.703.

⁵¹ FAR 16.703(c).

pricing, issuing, and delivering future orders. Since it is not a contract, there is no promise that the Government will place any order, so the "contractor" may withdraw from the agreement up until an order is placed.⁵² When an agency expects to order a substantial amount from the "contractor", but the specific item, quantity, and/or price is unknown at the time of making the agreement, the basic ordering agreement can speed up contracting for these uncertain requirements by setting out the known terms needed for a valid contract.⁵³ Properly used, BOAs can result in economies in ordering parts by reducing administrative lead-time and inventory obsolescence due to design changes.⁵⁴

Unlike requirements and indefinite quantity contracts, competition must be obtained before issuing each order under a basic ordering agreement.⁵⁵ However, if the Government determines competition is impracticable, i.e., only one source is available, further competition may be dispensed with. Synopsis is required, however.⁵⁶ Further, the parties are not

⁵² FAR 16.703(a).

⁵³ FAR 16.703.

⁵⁴ FAR 16.703(b).

⁵⁵ FAR 16.703.

⁵⁶ FAR 16.703(d); Steiger, Federal Contract Management: A Manual for the Contract Professional, v.1, Sec. 3.06 (1988).

bound until an order is placed against it.⁵⁷ Once the Government places an order and the contractor accepts it a definite quantity, requirements or indefinite quantity contract is created.⁵⁸ The contract may extend until the single order is fulfilled, or the parties may create a binding contract beyond the single order.⁵⁹ Because the parties may believe BOAs are contracts, they may perform as if they were valid contracts. Then when expectations are not fulfilled, a dispute arises.⁶⁰

⁵⁷ McDonnell Douglas Corporation v. Islamic Republic of Iran, 758 F.2d 341 (8th Cir 1985), cert. denied 105 Sup. Ct. 347 (1986); Russell L. Kisling, ASBCA No. 87-318-1, 88-2 BCA Para. 20,825 (1988).

⁵⁸ Western Pioneer, Inc. v. United States, 8 Cl. Ct. 291, 4 FPD Para. 10 (1985) (BOA converted into a requirements contract by a Memorandum of Understanding setting out delivery schedule and some orders); see also NI Industries, Inc. v. United States, 841 F.2d 1104, 7 FPD Para. 30 (Fed. Cir. 1988) (BOA converted into a definite quantity contract).

⁵⁹ *id.*

⁶⁰ Russell L. Kisling, ASBCA No. 87-318-1, 88-2 BCA Para. 20,825 (1988).

CHAPTER 2 - CONSIDERATION AND ENFORCEABILITY IN INDEFINITE DELIVERY CONTRACTS

Requirements and indefinite quantity contracts have greater risk of failure of consideration than definite quantity contracts. Which clauses are included in the contract documents can make or break these contracts. Unfortunately, the FAR often mandates inclusion of clauses which threaten contract enforceability.⁶¹ Finally, because there is often confusion about the type of contract the parties entered into, disputes arise, and the Comptroller, court or board must make sense out of the confusion. In so doing, they sometimes reach findings which further undermine the contract process. This chapter discusses the consideration and enforceability problems of indefinite delivery contracts.

A. Consideration and Enforceability

To constitute consideration, a performance or a return promise must be bargained for.⁶² Bargaining occurs where the performance or promise is in exchange for the other party's promise. The performance may be an act, a forbearance, or the

⁶¹ See generally, FAR Subpart 16.5 and FAR 53.317.

⁶² Restatement, Second, Contracts Sec. 71 (1981).

imposition, modification, or deletion of a legal relation.⁶³ Finally, the consideration given by each party need not be equal, merely adequate or sufficient to bind each party to the contract.⁶⁴ As will be found, what is adequate consideration is often a subjective determination.

Enforceability also affects the viability of the agreement between the parties. Although adequate consideration may pass between the parties, they may misunderstand certain terms of their agreement. Once the dispute arises, the contractor usually stops performance. Enforceability, therefore, often affects only the unexecuted portion of the agreement. However, in Government contracts, the contractor is often bound to fully perform even though there is a dispute as to the terms.⁶⁵ Where the contractor fully performs under protest, and his protest is upheld the Comptroller or court may grant relief in the form of a price adjustment. Frequently, the type of contract determines whether the contractor's protest is upheld. Finally, terms qualifying the quantity often are misunderstood, thus the issue of enforceability must be resolved by an outside party.

⁶³ id.

⁶⁴ id.

⁶⁵ FAR 33.213 and 52.216-19(d).

B. Consideration in Indefinite Quantity Contracts

1. Evolution of Consideration in indefinite quantity contracts

An indefinite quantity contract must contain a promise to purchase some quantity of the supplies or services from the contractor, or else it will fail for lack of consideration. Professor Williston stated the same rule this way:

A promise to buy such a quantity of goods as the buyer may thereafter order, or to take goods in such quantities 'as may be desired,' or as the buyer 'may want' is no consideration since the buyer may refrain from buying at his option and do so without incurring legal detriment himself or benefiting the other party.⁶⁶

For years, the Government often issued indefinite quantity contracts without a promise to purchase any quantity. However, in several "Navy coal cases" the courts revised indefinite quantity contracting.

In Willard, Sutherland & Co. v. United States⁶⁷ and Atwater & Co. v. United States⁶⁸ the Supreme Court struck down such indefinite quantity contracts as illusory. In those cases, the Navy had "contracted" for the purchase of coal from several vendors. The agreements had a set price per ton, but no definite quantity. The estimate given by the Navy was specifically disclaimed as any promise to purchase that sum.

⁶⁶ Williston on Contracts, 3rd ed., Sec. 102 et seq. (1957).

⁶⁷ 262 U.S. 489 (1923).

⁶⁸ 262 U.S. 495, 43 Sup. Ct. 595 (1923).

Finally, the Navy reserved the right to order among the different vendors as it considered in the best interests of the Government.⁶⁹ In both cases, the vendors agreed to supply a set quantity of coal, but during the contract period, the Navy notified the vendors that orders would exceed by 10% the estimated quantity. In both cases, the vendors, under protest, eventually supplied quantities in excess of what they bid. The Court held that these were not valid contracts as there was "nothing in the writing which required the Government to take, or limited its demand to, any ascertainable quantity." Thus, the Court held that "for lack of consideration and mutuality, the contract was not enforceable."⁷⁰

Finally, the Court of Claims had an opportunity to address the Government's efforts to continue the use of indefinite quantity contracts. In Updike v. United States,⁷¹ the Government argued that this Navy coal contract differed from those struck down by the Supreme Court in Willard and Atwater, in that here the amount could be ascertained and made definite, because it stated an estimated quantity of 150,000 tons. Nevertheless, this argument was rejected as there was no stated guarantee by the Government that it would order any amount.

Apparently relenting, Government agencies added the

⁶⁹ Willard, 43 Sup. Ct. 592, 594 (1923).

⁷⁰ *id.*

⁷¹ 69 Ct. Cl. 394 (1930).

Guaranteed Minimum Quantity clause, whereby the government agreed to purchase at least a minimum amount from the contractor.⁷² Thus, except on rare occasions, the Government now includes such a clause in indefinite quantity contracts.⁷³

2. Guaranteed minimum quantity clause

The Guaranteed minimum quantity clause is actually one of two forms, either: guaranteeing a minimum quantity,⁷⁴ the other guaranteeing a minimum purchase amount.⁷⁵ Both have the same goal, however, to bind the Government sufficiently to ensure an

⁷² FAR 52.216-22, Indefinite Quantity, states in part:

The Government shall order at least the quantity of supplies or services designated in the Schedule as the "minimum."

A similar clause was included in the predecessor to the FAR, the Armed Services Procurement Regulation (ASPR) at least as early as 1965 at ASPR 7.1102.3(b). It appears this limitation was used by some agencies as early as the 1950s. Tennessee Soap Co. v. United States, 130 Ct. Cl. 154, 126 F. Supp. 439 (1954).

⁷³ In Ralph Construction, Inc. v. United States, 4 Cl. Ct. 727, 2 FPD Para. 137 (1984), the court found an unenforceable indefinite quantity contract because there was no guaranteed minimum quantity.

⁷⁴ Maxima Corp. v. United States, 847 F.2d 1549, 7 FPD Para. 60 (Fed. Cir. 1988); Torncello v. United States, 231 Ct. Cl. 20, 681 F.2d 756 (1982); Mason v. United States, 222 Ct.Cl. 436, 615 F.2d 1343 (1980).

⁷⁵ ITG Corp., ASBCA No. 27285, 85-1 BCA Para. 17,935 (1985) (Government awarded an indefinite quantity contract with no guaranteed minimum quantity, but consideration found in the Government's agreement to pay a fixed monthly amount for the contractor being ready to serve meals.) This appears to satisfy the intent of Willard and Mason as the fixed monthly payment is a guaranteed minimum price. See also Hemet Valley Flying Service Co. v. United States, 7 Cl. Ct. 512, 3 FPD Para. 119 (1985) (indefinite quantity contract found as sufficient purchase requirement for "availability" of the fire fighter tanker planes to render it enforceable).

enforceable contract, while maximizing the Government's flexibility. There are two problems here: whether the minimum is adequate to constitute consideration; and the tendency for the Government agency to unnecessarily set the smallest minimum quantity/purchase possible. The first is discussed here while the latter is discussed in Chapter 3.

Where the minimum is merely a token or nominal amount, the cases find it too insignificant to constitute adequate consideration.⁷⁶ On the other hand, where there is an adequate minimum amount guaranteed, "[t]he two elements of an indefinite quantities contract are thus present -- a guaranteed minimum purchase amount ensuring mutuality of obligation to what would otherwise be an unenforceable illusory promise".⁷⁷ Thus a valid contract is formed. Unfortunately, the cases establish no guidelines on what is merely nominal and what is adequate consideration. In 1954, in one of the first cases to address this issue, Tennessee Soap Co. v. United States,⁷⁸ the Court of Claims suggested that the minimum quantity purchase of \$10.00 was too nominal to constitute adequate consideration. Opinions in the 1960s also found stated minimums of \$100.00 nominal, but

⁷⁶ Tennessee Soap Co. v. United States, 130 Ct. Cl. 154, 126 F. Supp. 439 (1954).

⁷⁷ Mason v. United States, 222 Ct. Cl. 436, 615 F.2d 1343 (1980).

⁷⁸ 130 Ct. Cl. 154 (1954).

these cases seem to be limited to their facts,⁷⁹ and some agencies still use this \$100.00 minimum in many of their indefinite quantity contracts.⁸⁰ On the other hand, 453 generator sets was found adequate, when compared to the potential maximum of 3600 sets;⁸¹ \$10,000 was found a sufficient minimum where the stated maximum was \$250,000;⁸² a \$3 million minimum was sufficient when compared to the \$12 million stated maximum.⁸³ Finally, the Comptroller did not even comment on the sufficiency of a guaranteed minimum of \$3000 worth of work and a maximum of \$350,000.⁸⁴ Thus, while no set amount constitutes adequate consideration, three points are clear. First, the opinions will usually focus on the difference between the guaranteed minimum and the estimated quantity or stated maximum. Second, the larger the stated minimum, the greater

⁷⁹ Goldwasser v. United States, 163 Ct. Cl. 450, 325 F.2d 722 (1963) (although the court found a requirements, rather than an indefinite quantity contract, it commented that a \$100.00 minimum guarantee bordered on lack of mutuality); E.H. Sales, Inc. v. United States, 169 Ct. Cl. 269, 340 F.2d 358 (1965) (in dicta, the court commented that "it would be a one-sided bargain, bordering on lack of mutuality under the facts of the case, for the Government to" be obligated only for \$100.00 while the contractor was required to keep facilities available for providing repairs up to \$5000.00).

⁸⁰ See DOD FAR Sup 252.247-7007, Indefinite Quantities-No Fixed Charges.

⁸¹ Federal Electric Corp., ASBCA No. 11726, 11918, 12161, 68-1 BCA Para. 6834 (1968).

⁸² Alta Construction Co., PSBCA No. 1345, 87-2 BCA Para. 19,720 (1987) (dicta).

⁸³ Deterline Corp., ASBCA No. 33090, 88-3 BCA Para. 21,132 (1988).

⁸⁴ Aurora Associates, Inc., Comp. Gen. Dec. B-215565, 85-1 CPD Para. 470 (1985).

likelihood it will be deemed adequate. Third, for now, adequacy of the guaranteed minimum will continue to be decided on a case by case basis.

Even if the guaranteed minimum is found inadequate, however, as in Willard, the cases will hold the contract enforceable to the extent performed.⁸⁵

C. Consideration and Enforceability in Definite Quantity and Requirements Contracts

In the early years, the courts accepted requirements type contracts either without categorizing them,⁸⁶ or placing them within the "indefinite quantity" family of contracts.⁸⁷ It was not until the 1950s that "requirements contracts" became a term of art, and clearly separated this contract type from the indefinite quantity type contract.⁸⁸

Defining and distinguishing definite quantity and requirements contracts was also a difficult chore for the courts and the Comptroller in the early years. In Brawley v. United

⁸⁵ Ralph Construction, supra note 73; Federal Electric Corp. v. United States, 202 Ct. Cl. 1028, 486 F.2d 1377 (1973), cert. denied, 419 U.S. 874 (1974).

⁸⁶ Brawley v. United States, 96 U.S. 168, 22 L.Ed 622 (1878). Carstens Packing Co. v. United States, 52 Ct. Cl. 430 (1917).

⁸⁷ Carstens Packing Co. v. United States, 52 Ct. Cl. 430 (1917);

⁸⁸ Compare Gemsco, Inc. v. United States, 115 Ct. Cl. 209 (1950) ("indefinite quantities" still used even though a requirements contract) with Shader Contractors, Inc. v. United States, 139 Ct. Cl. 535, 276 F. 2d 1 (1960) (term "requirements contract" finally used by this court).

States,⁸⁹ the Supreme Court cleared up some confusion about language which qualified the quantity to which the parties contracted. In Brawley, the contractor believed he had a contract to provide an Army post 880 cords of wood, while the Quartermaster believed the contract was for as many cords as ordered, and the 880 cord quantity was only an estimate. Thus, one party contemplated a definite quantity contract, while the other, and the Court, believed it was a requirements contract.⁹⁰

* * * The addition of the qualifying words "about", "more or less", and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure, or weight.

If, however, the qualifying words are supplemented by other stipulations or conditions, which give them broader scope or a more extensive significance, then the contract is to be governed by such added stipulations or conditions. As, if it be agreed to furnish so many bushels of wheat, more or less, according to what the party receiving it shall require for the use of his mill, then the contract is not governed by the quantity named, nor by that quantity with slight and unimportant variations, but by what the receiving party shall require for the use of his mill; and the variation from the quantity named will depend upon his discretion and requirements, so long as he acts in good faith. * * *⁹¹

Despite this decision, many subsequent cases offered a different interpretation to contract language qualifying the contract quantity.

⁸⁹ 96 U.S. 168, 22 L.Ed. 622 (1878).

⁹⁰ Although the Court called this a contract for an indefinite quantity, it is clear this is another early case where requirements contracts were not specifically recognized as a distinct contract type.

⁹¹ Brawley v. United States, 96 U.S. 168, 22 L.Ed 622 1878).

1. Definiteness in definite quantity contracts

In theory, a definite quantity contract is where the Government agrees to buy and the contractor agrees to sell a set amount of an item or service. However, because the Government wished to retain some flexibility in ordering, it inserted qualifying words such as "approximately" and "more or less" before the quantity to be acquired. This was restrictively interpreted by the courts,⁹² yet not similarly interpreted by the Comptroller, until agency excesses became too apparent.

An example of this excess was the 1929 Navy purchase of sand, gravel and concrete. The Navy argued that the word "approximately" allowed for a variance, and therefore, their ordering 75% more than the amount stated was permissible. The Comptroller, rejected this argument and recommended that future ordering on contracts should not exceed a stated maximum percentage variance of 10-20%. Although not overturning this contract, the Comptroller pointed out that "with a greater degree of definiteness as to the quantity lower bids might have been submitted" and that some bidders may have been deterred because of the unlimited quantity that could have been called for under the terms of the contract."⁹³ In 1934, the Comptroller expressed concern about the wording of a contract for gray iron castings. The contract language included an

⁹² Brawley v. United States, 96 U.S. 168, 22 L.Ed 622 (1878); United States v. Purcell Envelope Co., 249 U.S. 313 (1919).

⁹³ 8 Comp. Gen. 354 (1929).

estimate of "approximately 60,000 pounds", to be furnished "at such times and in such quantities as may be required". The Comptroller questioned whether or not it was an indefinite quantity contract and therefore of questionable legality in light of Willard and Updike, or a definite quantity contract binding the Government to pay for the approximate amount per the holding in Johnstown Coal & Coke Co. v. United States.⁹⁴ Since Congress had not funded the program, the Comptroller did not rule on the specific contract, but did request the agency take action to prevent execution of similar contracts.⁹⁵

Finally, the Comptroller attempted to limit the meaning of "approximately" and "more or less" to conform more to the interpretation given by the Supreme Court in Brawley v. United States.⁹⁶ In 1935, the Comptroller chastised the Army for exceeding the 25% variation in quantity clause set out in a definite quantity contract for the purchase of trucks. While calling this a definite quantity contract, the Comptroller found the variation clause was for making allowance for variations in manufacturing or delivery problems, not for quantity of vehicles ordered.⁹⁷ The next year, the Comptroller reaffirmed Brawley and other Supreme Court cases which held that terms like "about"

⁹⁴ 66 Ct. Cl. 616 (1929).

⁹⁵ 14 Comp. Gen. 723 (1934).

⁹⁶ 96 U.S. 168, 22 L.Ed 622 (1878).

⁹⁷ 14 Comp. Gen. 766 (1935).

and "more or less" applied to accidental, not material, variations, thus the contractor's intentional deviation of 10% in the ordered quantity justified the Government seeking reprocurement costs.⁹⁸ By 1936, then, the Comptroller had returned language qualifying quantities to the meaning intended by the Supreme Court. Simultaneously, the Comptroller was attempting to set parameters for requirements contracts.

2. Definiteness in requirements contracts

Under a requirements contract, the contractor promises to supply all the goods or services which the government needs during the contract period.⁹⁹ Usually the Government, in turn, promises to order all of the specified items or services from the contractor.¹⁰⁰ Unlike an indefinite quantity contract where there must be a guaranteed minimum, or a definite quantity contract where the amount to be supplied is stated,¹⁰¹ here the Government is not promising to order any amount. Rather, consideration is found in the Government's promise to order its requirements from the contractor, and its obligation to act in

⁹⁸ 15 Comp. Gen. 386 (1935).

⁹⁹ FAR 52.216-21(b).

¹⁰⁰ FAR 52.216-21(c).

¹⁰¹ "With contracts for a definite quantity, the promises and obligations flowing from each party to the other define both the minimum and maximum performances of each and furnish the consideration from each party that the courts require for enforceability." Torncello v. United States, 231 Ct. Cl. 20, 681 F.2d 756 at 761 (1982).

good faith.¹⁰²

In these early years, the Comptroller disfavored requirements contracts and often attempted to persuade the agencies to use definite quantity contracts.¹⁰³ However, the Comptroller also recognized that some requirements contracts were necessary. An example of this recognition was when the Postal Service sought the Comptroller's blessing to continue use of a sliding price scale requirements¹⁰⁴ contract for fuel for its vehicles, contending it was cheaper to do this than to issue a definite quantity contract. In approving the continuation of such a contract, the Comptroller acknowledged the agency's "urgent and peculiar conditions", including lack of storage facilities, inability to secure flat-price contracts for future deliveries, and that sliding-scale contracts could be secured at a cheaper rate.¹⁰⁵ However, when the Government persisted in issuing contracts with a vague quantity to be ordered and where there were no unusual circumstances, the Comptroller reaffirmed its opposition to requirements contracts, including rejecting a War Department case similar to the Postal Service Fuel case

¹⁰² id. See also Cibinic and Nash, Formation of Government Contracts, 2d ed., Chapter 2, at 195-196 (1986) and Williston on Contracts, 3d ed., v. 8, Sec. 104A (1957).

¹⁰³ 14 Comp. Gen. 446 (1934).

¹⁰⁴ Although placed under the category "indefinite quantity", as were all requirements contracts in the early years, this is clearly a "requirements" contract.

¹⁰⁵ 5 Comp. Gen. 342 (1925).

approved 9 years before.¹⁰⁶ In that case, the Comptroller found the agencies need for flexibility could be met by including an estimated quantity with a stated variance. Indicative of the confusion of the era, the Comptroller found a need to comment that the principles of Willard would be met in this way, even though these were multiple award requirements contracts, each for a specific delivery area.¹⁰⁷

D. Other Problems Affecting Consideration and Enforceability

Other complications arise where clauses, giving the Government the right to avoid traditional contract responsibilities, are included in government contracts. These clauses reserve the right to: give inaccurate estimates of work to be performed or supplies to be delivered;¹⁰⁸ perform work

¹⁰⁶ 14 Comp. Gen. 446 (1934).

¹⁰⁷ 14 Comp. Gen. 446 (1934). This appears to be a requirements contract, and should have been upheld in light of United States v. Purcell Envelope Co., 249 U.S. 313 (1919). See also 10 Comp. Gen. 340 (1931) upholding a contract to furnish all specified supplies that the Alaska Railroad Commission may need. This opinion also cited an unpublished Comptroller decision upholding a similar contract as it provided the requisite mutuality of obligation and was within the principle of Purcell, and as distinguished from Willard).

¹⁰⁸ FAR 52.216-21(a) Requirements clause states in part:

The quantities of supplies or services specified in the Schedule are estimates only and are not purchased by this contract. Except as this contract may otherwise provide, if the Government's requirements do not result in orders in the quantities described as "estimated" or "maximum" in the Schedule, that fact shall not constitute the basis for an equitable price adjustment.

with Government personnel;¹⁰⁹ or purchase supplies or services from other sources.¹¹⁰ Inclusion of these clauses: further weakens the consideration given by the Government, making enforcement of the contract more difficult; increases contract prices; and sometimes creates, rather than avoids, disputes. Each of these points are discussed further, in subsequent chapters.

¹⁰⁹ For nonpersonal services and related supplies, Alternate I to FAR 52.216-21(c) states in part:

...the Government shall order from the Contractor all of that activity's requirements for supplies and services specified in the Schedule that exceed the quantities that the activity may itself furnish within its own capabilities.

¹¹⁰ For acquiring similar items by brand-name, Alternate II to FAR 52.216-21 states in part:

Notwithstanding anything to the contrary stated in the contract, the Government may acquire similar products by brand name from other sources for resale.

For urgent needs, FAR 52.216-21(e) states:

If the Government urgently requires delivery of any quantity of an item before the earliest date that deliver may be specified under this contract, and if the Contractor will not accept an order providing for the accelerated delivery, the Government may acquire the urgently required goods or services from another source.

CHAPTER 3 - INITIAL AWARD PROCEDURES

Once a decision is made to contract out for supplies or services, the contracting officer must select which type of contract, which pricing arrangement, and which contract terms best fit the Government's needs. Selection of the appropriate combination takes into consideration several goals, including Government flexibility needs and maximizing procurement dollars. Of critical importance in selecting the proper contract type is the Government's estimate of its needs. In Part A of this chapter, the interaction of pricing arrangements to contract type is discussed. Part B analyzes the contract types as to their ability to meet the Government needs. In Part C various contract terms and their use in formulating the contract are examined. Government estimates are examined in Part D and a result of bad estimates, unbalanced bidding, is discussed in Part E. Finally, the thresholds at which accounting procedures apply to indefinite quantity and requirements contracts are explained in Part F.

A. How Pricing Arrangements Affect Contract Type Selection.

As mentioned in Chapter 1, pricing arrangements do not help distinguish the type of indefinite delivery contract the parties have selected, but they do play an important role in deciding

which type of contract should be selected. For example, a contract for fuel oil using a fixed-price with economic price adjustment is appropriate for definite quantity-indefinite delivery, requirements, or indefinite quantity with a guaranteed minimum contracts. Thus, where there is confusion as to the type of contract selected within this subcategory, generally, the pricing arrangement selected won't aid the resolution. Nevertheless, pricing arrangements must be considered when determining the appropriate type of contract.

Which pricing arrangement to use depends on whether the price of producing the item or service required can be determined at contract formation. While the fixed-price contract is preferred where the risk involved is minimal or can be predicted with an acceptable degree of certainty,¹¹¹ incentive contracts are preferred where a firm fixed-price contract is not appropriate and lower costs and other advantages can be obtained by linking the amount of profit or fee payable to the contractor to his performance.¹¹² Cost-reimbursement contracts are not to be used in indefinite delivery contracts as they are only suitable when uncertainties involved in contract performance do not permit costs to be estimated with sufficient

¹¹¹ FAR 16.103(b).

¹¹² FAR 16.401.

accuracy.¹¹³ Thus, if the price of the product or service fluctuates often, a fixed-price with economic price adjustment may be appropriate. But if funding is limited, the Government may be unwilling to offer such a pricing arrangement on a definite quantity-indefinite delivery contract for fear of running out of funds. Conversely, the contractor may be willing to accept a firm fixed-price arrangement, if the Government will order a definite quantity, but unwilling to accept such an arrangement if it is a requirements contract. Therefore, the wrong combination of pricing arrangement and contract type can have grave financial repercussions, so it is critical for the parties to understand the impact before contract award.

B. Selecting the Contract Type to Fit the Need

Selection of contract types is governed by the Federal Acquisition Regulation (FAR) which implements contract legislation and executive branch policies.¹¹⁴ It recognizes the need for a wide selection of contract types to: ensure Government flexibility in the acquisition process; provide profit incentive for the contractor; and determine just when and

¹¹³ FAR 16.301-2. FAR Subpart 16.2. See also Keyes, Government Contracts Under the Federal Acquisition Regulation, Chap 16, Sec. 16.41 (1986).

¹¹⁴ The FAR discusses contract types in Part 13 (Small Purchase and Other Simplified Purchase Procedures) and Part 16 (Types of Contracts). This paper focuses on Part 16.

the extent of the contractor's responsibility for performance costs.¹¹⁵ These factors often suggest using one of the indefinite delivery type contracts. However, because of the similarities between the indefinite delivery contracts, it is sometimes difficult to choose the appropriate contract type. These same similarities also make imperative careful explanation to the contractor of the contract type selected, to avoid later disputes. It is not uncommon, for a court or board to find a different contract type than what at least one of the parties believed to exist. All too often, the finding differs from what both parties intended.

1. Why proper contract type selection is important.

In many instances the Government's needs, logistical considerations, or contractor capabilities fluctuate. Selection of the right contract for the right situation saves everyone money and avoids disputes. Consider the example of an Army on deployment,¹¹⁶ where logistics make laundry services by one contractor difficult, but not impossible. If the Government issues a requirements contract, rather than an indefinite quantity contract, the Army may be forced to honor the contract, and suffer delays in service, and perhaps increased costs, such

¹¹⁵ FAR 16.101(a). This second criteria is not discussed in this paper.

¹¹⁶ This scenario is a modification of the example used in Tracy, Default of Indefinite Quantity Type Service Contracts, 54 Mil. L. Rev. 249 (1972).

as transportation and labor. If the Army instead terminates the contract for convenience, it pays termination costs it would not have incurred under an indefinite quantity contract. Further, if bad faith is shown in the termination, i.e., the Government knew, when it awarded the contract, that it would terminate at some point, the contractor may recover anticipated profits.

A requirements contract also may not benefit the contractor. In the same scenario, the contractor may have anticipated that as the Army moved up, it would reduce its laundry orders with the contractor, substituting a more conveniently located contractor. Thus, the contractor may have bid a lower price per unit in anticipation of low transportation costs. Now, if the Army finds the cost of similar services at a more convenient location are higher, it may be inclined to honor the contract, and continue ordering from the original contractor. The contractor may incur additional costs of transportation, and overtime, to fulfill the contract terms, which may or may not be recoverable from the Government. Only if he succeeds in showing a change would the Government be liable for an equitable adjustment.

In this fact situation then, an indefinite quantity contract would be preferable, as the Army can cease orders with one contractor and begin with another as it moves forward. This contract type may ultimately save money since several costs, i.e., termination costs, and higher transportation and labor costs could be reduced. However, even if an indefinite quantity

contract does not save money, the lack of delays, and better health, welfare and morale of the troops may be in the Government's best interests.

2. Funding considerations in selecting the contract type

Another consideration in selecting the contract type is funding availability. With rare exception, full funding is not available for Government procurement actions in time for the new fiscal year.¹¹⁷ Instead Congress passes Continuing Resolutions, which only allow budgeting the status quo. Because of this uncertainty of the amount of funding available, agencies will issue contracts subject to funding availability,¹¹⁸ or select one which limits their financial commitment.¹¹⁹ Further, agencies commonly withhold a portion of their funding from commitment until near the end of the fiscal year.¹²⁰ This ensures the agency does not violate the Anti-Deficiency Act, which prohibits expenditures or obligations in excess of amounts

¹¹⁷ Since 1970, Congress has only passed the federal budget prior to the beginning of the fiscal year 3 times -- FY 77, 78 and 89. Once Congress passes the budget and the President signs it, it still must be apportioned to the various agencies by OMB. This takes from several days to several weeks. The Comptroller has held that the agencies do not have budget authority until this occurs. 36 Comp. Gen. 699 (1957).

¹¹⁸ See FAR 52.232-18, Availability of Funds, and FAR 52.232-19, Availability of Funds for the Next Fiscal Year. These methods were approved by the Comptroller. 39 Comp. Gen. 340 (1959).

¹¹⁹ I.e., requirements or indefinite quantity contracts.

¹²⁰ Nash & Cibinic, Federal Procurement Law, 3rd ed., v. 1 Chapter 10, at 670-677 (1977).

available in existing appropriations.¹²¹ It also allows the agency to fund for "emergencies", and to readjust priorities during the year.¹²² However, it also means that excess funds are often available,¹²³ but with a very short commitment time.

The indefinite quantity and requirements contracts often meet these funding difficulties, while a definite quantity contract cannot. Under both indefinite quantity and requirements contracts the Government's funds are obligated, beyond any guaranteed minimum, only once an order is placed and then only for the price of each order,¹²⁴ therefore, with already existing requirements or indefinite quantity contracts, the agency need only place an order and the funds are committed.¹²⁵ However, definite quantity contracts are funded upon award,¹²⁶ so to commit extra funds an increase in quantity

¹²¹ Anti-Deficiency Act, Rev. Stat. Sec. 3679, 31 U.S.C. Sec. 665(a).

¹²² 31 U.S.C. Sec. 665(c)(2) gives the OMB authority to establish reserves from appropriated funds to handle contingencies or savings. Several agencies also have authority to reserve funds.

¹²³ If contingencies do not arise by the end of the fiscal year, agencies receive and disburse what is commonly termed "fall out" or "year end" money. These funds are used to fill previously unfunded needs, already under contract, but subject to funding availability, or that can be rapidly committed under new contracts.

¹²⁴ FAR 16.503 and 16.504; Deterline Corp., ASBCA No. 33090, 88-3 BCA Para. 21,132 (1988); Torncello v. United States, 231 Ct. Cl. 20, 681 F.2d 756 (1982).

¹²⁵ Competition and synopsis issues are discussed in Chapter 4, *infra*, but generally they do not prevent prompt ordering under requirements, and many indefinite quantity, contracts.

¹²⁶ FAR 16.501.

would be needed either by modification,¹²⁷ or if a large quantity, a new contract.¹²⁸

3. What is in a name? Indefinite quantity versus definite quantity with increased quantity options

It is difficult to distinguish an indefinite quantity contract that contains a stated maximum from a definite quantity contract which has an option to increase the quantity by a set percentage. In fact, indefinite quantity contracts were sometimes treated as if they were option contracts.¹²⁹

The Comptroller acknowledged this problem in 1967, noting:

[I]n ordinary usage there is no real distinction between a contract including an option for an additional quantity and an indefinite quantity contract permitting the purchaser to order quantities beyond the minimum required ¹³⁰

Nevertheless, the Comptroller then attempted to distinguish the two, pointing out that indefinite quantity contracts were limited to negotiated procurement only, while options¹³¹ could

¹²⁷ But see FAR 6.001(c) requiring modifications be within the scope of the contract to avoid further competition. Absent an increased quantity option, a modification to add a large quantity would likely require re-competing.

¹²⁸ id.

¹²⁹ 41 Comp. Gen. 682 (1962).

¹³⁰ Federal Electric Corp., 67 Comp. Gen. 155, 161 (1967).

¹³¹ Distinguish what we are discussing here, an option to buy a larger quantity, from an option extending the time period. In the former, the Government may increase the stated quantity, but must order this increased quantity within the stated contract period. In the latter, the Government orders a stated quantity during the contract period, but can then extend the option period and, depending on the contract terms, be limited to ordering up to the original stated amount, or increase the stated amount.

be for either negotiated or advertised procurement. This distinction was eliminated by CICA and the FAR, and now, either may be used for sealed bids or negotiated procurement.¹³²

In the 1960s and 1970s, the Comptroller also maintained a percentage of quantity fiction, where the definite quantity with an option to increase to the option was limited to 25% of the defined quantity.¹³³ On the other hand, the indefinite quantity contract usually had a larger indefinite quantity in relation to the guaranteed minimum.¹³⁴ However, this distinction was not adopted by the agencies, although shortly thereafter, the ASPR,¹³⁵ implemented a 50% quantity increase rule for definite quantity contracts. Today, neither the FAR nor the cases recognize this limitation,¹³⁶ and even the GAO has rejected these limits.¹³⁷

¹³² FAR Subparts 14.1, 15.1, 16.5 and 17.2.

¹³³ 41 Comp. Gen. 682 (1962).

¹³⁴ Aurora Associates, Inc., Comp. Gen. Dec. B-215565, 85-1 CPD Para. 470 (1985) (indefinite quantity contract solicitation upheld where a \$3000 minimum guaranteed, but a right to order up to \$350,000 in services).

¹³⁵ The FAR consolidated federal agency procurement, which had previously been divided into two regulations, the Armed Services Procurement Regulation (ASPR) and the Federal Procurement Regulation (FPR). The ASPR were used by the military and a few agencies, while the FPR were used by the civilian agencies.

¹³⁶ FAR Subpart 17.2, FAR 52.217-6 and 52.217-7.

¹³⁷ Schmid Laboratories, Inc., Comp. Gen. Dec. B-214333, 84-2 CPD Para. 411 (1984) (where the Comptroller cited two cases, Universal Propulsion Co., Comp. Gen. Dec. B-186845, 77-1 CPD Para. 59 (1977) and Raven Industries, Inc., Comp. Gen. Dec. B-185052, 76-1 CPD Para. 90 (1976), which allowed options doubling the original definite quantity.)

In Schmid Laboratories, Inc.,¹³⁸ the GSA intended to award a definite quantity contract for 350 million, but had the option to increase the quantity ordered by 50%. The Comptroller rejected the protester's argument that including such an option in the solicitation converted it into an indefinite quantity contract. The Comptroller then declined to apply the regulations applicable to an indefinite quantity contract. The GAO's attempt to distinguish the two types of contracts, however, is hard to comprehend, for there was nothing to distinguish the two contract types, except what the Government called them. If the Government called this an indefinite quantity contract with a guaranteed minimum, the contractor would still be assured that a certain quantity would be ordered, but have no assurance of orders for anything more. In a definite quantity contract with an increased quantity option, the contractor's "offer" is to provide more of the item in the amount the Government calls for beyond the "stated" or "guaranteed" purchase. In an indefinite quantity contract, the contractor "offers" the same thing. Both are valid contracts, enforceable only to the amount "guaranteed" or "definitized". In both, the Government may: re-compete any amount in excess of its commitment; and order up to the stated maximum. Thus, there seems no tangible distinction in this scenario.

However, the FAR does distinguish the two, limiting

¹³⁸ Comp. Gen. Dec. B-214333, 84-2 CPD Para. 411 (1984).

indefinite quantity contracts are limited to commercial or commercial-type supplies or services, while options are not. As Schmid shows, this distinction appears unimportant. Further, on at least two occasions the Comptroller has stated that the restriction of indefinite quantity contracts to commercial or commercial-type contracts is not mandatory.¹³⁹ Even if this requirement were mandatory, the lack of distinguishing characteristics between the two contract types permits an agency to circumvent the FAR prohibition by merely terming the contract a definite quantity with an increase quantity option.

C. Selecting Contract Terms

While the name given to a contract is considered in determining the type of contract the parties have entered, it is not dispositive.¹⁴⁰ Rather, more weight is given to the terms

¹³⁹ Grey Advertising, Inc., 55 Comp. Gen. 1111, 1139, 76-1 CPD Para. 325 (1976); Sentinel Electronics, Inc., B-221914.2, et al., 86-2 CPD Para. 166 (1986) (dicta).

¹⁴⁰ Maintenance Engineers v. United States, 749 F.2d 724, 3 FPD Para. 79 (Fed. Cir. 1984) (despite inclusion of a clause calling this a requirements contract, the contracting officer and the court found this an indefinite quantities contract).

included in the contract.¹⁴¹ Unfortunately, the opinions sometimes display a lack of understanding of the distinguishing characteristics between requirements and indefinite quantity contracts, and their permitted similarities.¹⁴² For example, nothing prohibits using a guaranteed minimum quantity in a requirements contract. Nevertheless, some opinions throw out the guaranteed minimum in order to call the agreement a requirements contract,¹⁴³ while other opinions find the guaranteed minimum must mean the parties entered an indefinite quantities contract.¹⁴⁴

1. Use of stated **maximums** in indefinite quantity contracts

Although the Government is not obligated to order any

¹⁴¹ Torncello v. United States, 231 Ct. Cl. 20, 681 F.2d 756 (1982) (indefinite quantity contract argument fails, and requirements contract found); Mason v. United States, 222 Ct. Cl. 436, 615 F.2d 1343 (1980) and Automated Services, Inc., DOT BCA No. 1753, 87-1 BCA Para. 19,459 (1987) (indefinite quantity contract found despite argument that it was a requirements contract); Lowell C. West Lumber Sales v. United States, 160 F. Supp 429 (N.D. Cal 1958) (ASBCA finding of a requirements contract rejected and a basic ordering agreement found), rev. and remanded, United States v. Lowell C. West Lumber Sales, 270 F. 2d 12 (9th Cir. 1959).

¹⁴² Automated Services, Inc., DOT BCA No. 1753, 87-1 BCA Para. 19,459 (1987) (interpreting Mason v. United States, 222 Ct. Cl. 436 (1980), to mean that guaranteed minimum quantity clause must make contract an indefinite quantity contract).

¹⁴³ Goldwasser v. United States, 163 Ct. Cl. 450, 325 F. 2d 722 (1963) (the court relied on the rule of construction that the specific clause prevailed over the general clause, in rejecting the minimum quantity clause).

¹⁴⁴ *id.*

amount beyond that set out in the guaranteed minimum,¹⁴⁵ inclusion of a maximum quantity provides several advantages for both parties, and several disadvantages for the Government. Some disadvantages are: the Government is limiting the amount it may order, thus reducing its contract flexibility to cover its needs for events it thought unlikely to occur; some opinions on the adequacy of the minimum as consideration use the stated maximum to aid their determination, thus, inclusion of a maximum, where the stated minimum is small, threatens enforceability of the contract; and inclusion of a stated maximum adds one more similarity to a requirements contract, which may sway a court or board when there is a dispute as to the type of contract the parties intended.

While these difficulties appear, at first blush, to be reasons not to include a maximum limit, they clearly are offset by the positive aspects of inclusion. First, it assures the contractor that there is a limit to the amount the Government will order during the contract period. Thus the contractor can more accurately assess his potential costs, and make his contract price more reasonable than if there were no maximum

¹⁴⁵ FAR 16.504 and FAR 52.216-22; Deterline Corp., ASBCA No. 33090, 88-3 BCA Para. 21,132 (1988).

limit.¹⁴⁶ Second, it helps assure both parties that the contractor will be able to fill the Government's orders. In contrast, if there is no limit, there is a greater likelihood of termination of the contract for noncompliance with the Government's needs, and payment of excess procurement costs.¹⁴⁷ Third, a stated maximum helps the Government assess the contractor's responsibility prior to award, particularly small contractors who generally have more limited resources. Fourth, if potential offerors know what their maximum commitment will be, more will likely seek the award, particularly small businesses that have limited resources. Finally, a maximum limit allows the contractor to commit excess production or service capabilities to other contracts. In short, a maximum limit reduces the risk for both parties, reduces the contract price, and improves competition.

2. Guaranteed minimums

Guaranteed minimums provide many advantages to both parties, as well as a few disadvantages. However, overall,

¹⁴⁶ This is particularly important where the price of the product fluctuates, i.e., oil or food supplies. If the price of oil drops significantly, the Government may wish to order large quantities. If there is no maximum limit, the contractor could exceed the supply he has made available for this contract and be forced to: procure more oil elsewhere (usually at less profit or even a loss to him) to meet the Government's demands; shift oil he had committed to other contracts, thereby risking contract breach on these contracts; or fail to perform and be found in default and pay excess procurement costs.

¹⁴⁷ id.

guaranteed minimums, properly used, improve the contract process, reduce prices and clarify both parties commitment.

a. Setting an appropriate guaranteed minimum

A small minimum may not allow the Government to obtain the lowest contract price, and places potential contractors in an untenable position. The Comptroller recognized this in a Navy solicitation, which set the maximum quantity at four times the minimum quantity, but told bidders to bid based on the minimum quantity. The Comptroller stated:

It seems to us that the making of purchases in such a manner as to obligate the Government for less than known quantity requirements of an item tends inevitably to result in higher unit prices than could be obtained for larger quantities of the item. An option of the character here involved is not, in our opinion, in the best interest of the Government if the known requirements exceed the minimum quantities upon which bids are solicited. The effect of such an option is to require bidders to guarantee firm prices for one year, with no guarantee that orders will be placed. Faced with such a requirement, bidders must either include a "cushion" in their prices to take care of possible increases in production cost, or gamble that additional orders will be placed and figure their bid prices on more than the minimum quantities. The first alternative results in unnecessary increased cost to the Government, and the second alternative is unfair to bidders.¹⁴⁸

Instead, the agency should set the minimum guarantee at what they reasonably believe will be the lowest quantity they will order. This provides many advantages for the Government. First, the Government should receive the lowest price possible under the particular circumstances, as it is reducing the risk

¹⁴⁸ 41 Comp. Gen. 682 (1962).

of loss being shifted to the contractor. Second, by setting a higher amount, the Government avoids the potential of having the amount found nominal, and thus the contract found unenforceable. Third, the Government avoids a later finding of bad faith, if the agency knew at time of award that it was likely to order quantities far in excess of the guaranteed minimum, even if the actual amount ordered was less than the stated maximum. Finally, the Government should see fewer disputes, and fewer contracts terminated because the contractor was unable to fill the Government's orders. The major disadvantages for the Government by setting a realistic guaranteed minimum are: the obligation of funds for the minimum, and the risk that it will not need the amount guaranteed. These disadvantages should be more than off-set by the advantages.

b. Guaranteed minimums in requirements contracts

Although not required,¹⁴⁹ use of a guaranteed minimum quantity clause is permitted in requirements contracts, and should be encouraged. At least one board has rejected this idea, however, holding that the contract had to be an indefinite quantities contract, rather than a requirements contract, since there was a guaranteed minimum quantity clause.¹⁵⁰ The board

¹⁴⁹ Stic-Adhesive Products Co., Comp. Gen. Dec. B-227162, 87-2 CPD Para. 300 (1987).

¹⁵⁰ Automated Services, Inc., DOT BCA No. 1753, 87-1 BCA Para. 19,459 (1987).

apparently misread Mason v. United States,¹⁵¹ the case it cited to support this proposition. In Mason, the Court of Claims rejected the contractor's argument that a requirements contract existed, instead finding an indefinite quantity contract. In so finding, the court stated:

A guaranteed minimum purchase amount would add nothing to enforceability of a requirements contract. A guaranteed minimum purchase amount is, however, essential to there being an enforceable indefinite quantity contract.

However, the court did not find guaranteed minimum quantity clauses impermissible for requirements contracts, merely that they were unnecessary for the issue of enforceability. No other cases misread Mason in this manner, and several cases support guaranteed minimum quantity clauses in requirements contracts.¹⁵²

In fact, a guaranteed minimum quantity clause in a requirements contract can reduce contract price, by giving the contractor some assurance of receiving orders. This could be especially helpful in a new requirement, i.e. where there is no past performance from which the Government may derive its estimate, or for the contractor to base his bid or proposal. Also, as the Comptroller explains, inclusion can reduce delivery

¹⁵¹ 222 Ct. Cl. 436, 615 F.2d 1343 (1980).

¹⁵² Honeywell Federal Systems, Inc., ASBCA No. 36227, 89-1 BCA Para. 21,258 (1988); Hardware and Industrial Tool Co., GSBCA No. 5354, 81-2 BCA Para. 15,832 (1981). (There are no court cases addressing this issue.)

time.¹⁵³

The GSA uses a clause similar to the guaranteed minimum quantity clause when necessary to shorten the delivery time for initial orders under a new contract by inducing the contractor to provide supplies in advance of receipt of actual purchase orders or where there is a short supply of the item being procured.¹⁵⁴

3. The use and misuse of "Government" clauses

"Government" clauses relieve the Government of continued performance while limiting or eliminating further monetary liability. There are often legitimate needs, such as foreign policy reasons, enhancement of social policies, geographic difficulties, changes in needs, and maximizing use of procurement dollars, which mandate inclusion of some escape routes.¹⁵⁵ However, when these clauses are misused, their

¹⁵³ National Chemical Laboratory of Pa., Inc., 55 Comp. Gen. 1226 (1976).

¹⁵⁴ *id.*

¹⁵⁵ Under OMB Circular A-76 "Policies for Acquiring Commercial or Industrial Products and Services for Government Use" (Revised 1983) it is Government policy to contract out supplies and services that can more effectively be handled by the private sector. There are exceptions to this policy. For example, where the services to be performed are essential wartime skills, the DOD frequently reserve the right to perform some or all of the work "in-house" to allow its military personnel the training necessary to maintain such skills, i.e. maintenance of aircraft or tanks, runway repair, data processing.

Treaty restrictions also may require employing local nationals in overseas installations to perform certain services, that would normally be contracted out. As the local nationals generally work for the US or the host nation government directly, no "contract" or "contractor" is involved. See Article XII of the Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of US Armed Forces in Japan (commonly called the US-Japan SOFA) (January 19, 1960); the US-Japan Master Labor Contract; and US Forces, Japan Policy Letter 40-1 (1 Mar 85), Chap 17

inclusion can threaten the adequacy of Government consideration, increase contract prices, breed padding of contractor costs, and create disputes. Thus, their value for the particular contract should be weighed against the resultant increased cost, and the overall impact on the use of indefinite-delivery contracts.

Inclusion of Government clauses increase costs, for essentially, the Government is buying an "insurance policy" from the contractor, whereby the contractor increases his contract price in return for assuming the risk that the Government may execute a clause absolving the Government from fulfilling certain contractual duties. These clauses are a sound investment where there is a high risk that the Government may have to alter its intended obligation. However, where the chance of executing the clause is low, the Government is paying for unneeded insurance. Unfortunately, several of these clauses are mandatory in Government contracts.

a. Multiple awards in requirements contracts

Multiple awards used to be one factor distinguishing indefinite quantity contracts from requirements contracts. No longer. Now, the Government need not bind itself to buy all its requirements only from one contractor, frequently entering multiple "requirements" contracts. Multiple requirements

which also discourages contracting out of work currently performed by local nationals employed under the Master Labor Contract.

Another reason for reserving an escape clause is where some units are geographically isolated and the price for contracting for the supplies or service would be excessive.

contracts are often issued: under the GSA Federal Supply Schedules;¹⁵⁶ in partial set-asides for small or disadvantaged businesses or labor surplus areas;¹⁵⁷ where encouragement of multiple sources is desired;¹⁵⁸ when the supplies or services are to be provided to different regions;¹⁵⁹ where prompt delivery of the supply or service is crucial;¹⁶⁰ where the needs exceed the amount one contractor is willing or capable to provide;¹⁶¹ or where there are multiple items, and different contractors offer the lowest price for different line items.¹⁶²

On the down side, multiple awards raise serious questions as to enforceability, can increase the price of the items or services, and create unnecessary disputes. Nevertheless, the decision whether or not to issue multiple awards is an agency decision that is rarely questioned by the boards or courts, as they are reluctant to second guess the agency's business judgement.¹⁶³ However, this means the agency policing process

¹⁵⁶ FAR 8.403-2.

¹⁵⁷ FAR 6.203, and Subparts 19.5 and 20.5.

¹⁵⁸ FAR 6.202, FAR Subparts 19.5 and 20.5. See also Stic-Adhesive Products Co., Comp. Gen. Dec. B-227162, 87-2 CPD Para. 300 (1987).

¹⁵⁹ FAR 8.403-2.

¹⁶⁰ FAR 6.302-3(b)(1) and 52.216-21(e)..

¹⁶¹ id.

¹⁶² FAR 15.407(h) and 52.215.34.

¹⁶³ American Bank Note Co., Comp. Gen. Dec. B-222589, 86-2 CPD Para. 316 (1986). But see Stic-Adhesive Products Co., supra note 149 (benefits for multiple award were outweighed by anticipated increased prices).

must be sufficient to prevent abuses. It appears that most could use more attention. Nevertheless, properly qualified with other promises, multiple award requirements contracts have been upheld.

Consider the multiple award requirements contracts, where the Government agrees to fill its needs first from the lowest priced contractor, and then from the next lowest priced contractor, and so on. As to the lowest priced contractor, adequacy of consideration seems sufficient, but what about subsequent contractors? In conjunction with the promise to order in order of price priority, a maximum order limitation, negotiated between the parties, is set, whereby the Government will not order beyond that amount from the contractor. The adequacy of consideration for subsequently higher priced contractors is found in the promise to order its needs, beyond the maximum order limitation of the preceding contractor, from this contractor.

Another variation is the GSA Federal Supply Schedule Multiple Award Schedule (MAS).¹⁶⁴ Once placed on this schedule, agencies may place orders with any of several MAS contractors. The agency is usually required to select the contractor offering the lowest price item, but need not if they can justify a more expensive one. Thus, under the MAS, several requirements contracts may be issued for products that are generically the

¹⁶⁴ FAR 38.102-2.

same (office furniture, for example) but may have varying quality or adaptations. The Government's promise then is modified to a promise to purchase from the lowest priced contractor meeting the specific needs of that agency. Protests under the MAS suggest this promise is rarely enforced, for often an agency orders from a higher-priced contractor,¹⁶⁵ or procures the product outside the GSA Federal Supply Schedule.¹⁶⁶ Nevertheless, this modified promise to procure Government needs is deemed adequate consideration.¹⁶⁷ By giving deference to the agencies to best know their needs, the GAO resolves all but the most egregious cases in favor of the Government. Unfortunately, the end result is that the contractor's expectations are not met.

On the other hand, in partial set-aside actions, consideration is easily found. Here the Government promises to order all its requirements in some proportionate share between the set-aside and non-set-aside contractors.¹⁶⁸ This promise limits the discretion of the Government in ordering and provides

¹⁶⁵ Datum Filing Systems, Inc., Comp. Gen. Dec. B-230886.2, 88-2 CPD Para. 97 (1988); Remco Business Systems, Inc., Comp. Gen. Dec. B-228400, 88-1 CPD Para. 29 (1988); Dictaphone Corp., Comp. Gen. Dec. B-228366, 88-1 CPD Para. 19 (1988).

¹⁶⁶ Engel, Inc., Comp. Gen. Dec. B-228544, 88-1 CPD Para. 13 (1988).

¹⁶⁷ Neal R. Gross and Co., Comp. Gen. Dec. B-233144, 89-1 CPD Para. 160 (1989) (although approving GSA decision to issue single awards, rather than multiple, also reaffirmed propriety of issuing multiple award schedules).

¹⁶⁸ FAR 52.216-21(c) Alternate III and IV.

each contractor an enforceable right for any disproportionate ordering.¹⁶⁹

Another requirements contract is the parallel award, a form of multiple award where an individual line item is split between the low offer for that item and the second low offer.¹⁷⁰ Parallel awards are permissible in certain circumstances, i.e., when no offeror is a responsible source for the entire quantity required by the line item,¹⁷¹ or there is an economic benefit to be gained by issuing two contracts.¹⁷²

b. In-house services or supplies

On occasion, the Government reserves the right to provide the needed supplies or services through in-house resources. There are two types of reservations possible: where the contractor provides all the Government's requirements in excess of what the Government can first supply itself;¹⁷³ and where the contractor will provide the Government's needs, but the Government can, at any time, also fill some or all of its

¹⁶⁹ id.

¹⁷⁰ Oxford Project, Inc., Comp. Gen. Dec. B-228461, B-228461.2, 88-1 CPD Para. 156 (1988).

¹⁷¹ id.; Stic-Adhesive Products Co., Comp. Gen. Dec. B-227162, 66 Comp. Gen. 680, 87-2 CPD Para. 300 (1987).

¹⁷² Stic-Adhesive Products Co., supra note 149; American Bank Note Co., Comp. Gen. Dec. B-222589, 86-2 CPD Para. 316 (1986).

¹⁷³ AGS-Genesys Corp., ASBCA No. 35302, 89-2 BCA Para. 21,702 (1989); Ralph Construction, Inc. v. United States, 4 Cl. Ct. 727, 2 FPD Para. 137 (1984).

requirements from within. The distinction can be important where the contractor will suffer a significant loss, there are fiscal cutbacks or windfalls in procurement dollars, or where Government manpower reductions or increases occur. Yet the FAR only uses the former reservation, apparently in response to a Comptroller decision disapproving of the broad discretion of the latter reservation.¹⁷⁴

Where the reservation is an excess needs requirements contract, if the Government orders greater quantities from the contractor than estimated, resulting in higher costs to the contractor, the contractor may recover an equitable adjustment by showing the Government failed to fulfill its obligation to first use its in-house resources, or to use them to full capacity. Bad faith need not be proven, merely that the Government did not comply with the contract terms.¹⁷⁵ If the Government instead increases its in-house capability, thus reducing its orders from the contractor, it is a breach of contract, as the opinions have limited the "excess needs" reservation to capabilities at time of award.¹⁷⁶

¹⁷⁴ Kleen-Rite Corp., Comp. Gen. Dec. B-182266, 75-1 CPD Para. 190 (1975).

¹⁷⁵ However, if the Government's orders change due to sovereign act, i.e. Congressionally mandated manpower cuts, or a declaration of war, the contractor may not be compensated. See Cibinic & Nash, Formation of Government Contracts, 2d ed., at 100-101 (1986).

¹⁷⁶ Acron-Pacific Contractors, ASBCA No. 25057, 82-2 BCA Para. 15,838 (1982); Alamo Automotive Services, Inc., ASBCA No. 9713, 1964 BCA Para. 4354 (1964).

By the Government reserving the right to provide the needed supplies or services in-house, the contractor's risk of less profit or even suffering a loss increases. Thus, it is anticipated that he will factor this into his bid or proposal price, thereby increasing contract price. Further, while there are legitimate reasons for such a reservation,¹⁷⁷ as the courts and boards are reluctant to question the business judgement of the agency, contractor appeals should usually fail.

Finally, the decision to use in-house resources, rather than contract out the entire needs, while criticized by the GAO,¹⁷⁸ does not appear to be an issue for protest.

c. Termination for convenience

The Termination for Convenience clause allows the Government to terminate a contract, in whole or in part, for the best interests of the Government.¹⁷⁹ It is required to be

¹⁷⁷ For example, where the services are also necessary wartime skills, the DOD frequently will take such a reservation to allow its personnel the training necessary to maintain such skills. The same reason supports reserving certain supplies. Also, treaties restrictions may require the hiring of local nationals to perform certain services. As they usually work directly for the foreign government or the US, no "contract" is concerned here. Another reason would be that the services are needed at isolated locations as well, and to require the contractor to provide the service at such locations would greatly increase the contract price.

¹⁷⁸ A significant problem in reserving the right to perform work in-house is the agencies' inability to assess the cost effectiveness of in-house work. For example, see GAO Report EMD-82-49, A Process to Determine Whether to Construct Projects In-House or By Private Contractor Is Needed by TVA, March 15, 1982.

¹⁷⁹ FAR 52.249-1, 52.249-2, 52.249-4 and 52.249-5.

included in requirements and indefinite quantity contracts.¹⁸⁰ But for this clause, the Government would risk significant liability if it terminated a contract without cause. Inclusion of the clause puts the contractor at risk of a financial bath. The ease at which the Government can avoid liability in this way raises serious questions whether the Government's promise under a requirements contract is illusory. Nevertheless, the opinions find the inclusion of the Termination for Convenience does not, of itself, make a contract illusory.¹⁸¹ However, once the contract is issued, it may still be found illusory retroactively where the Government has abused the purpose of the Termination for Convenience clause.¹⁸² This is discussed in Chapter 5.

d. Summary

Although requirements and indefinite quantity contracts have met with mass approval,¹⁸³ there continues to be a desire by the Government to include many "Government" clauses in these contract types. When these clauses are unnecessary to fulfill the Government's actual needs, the Government wastes its procurement dollars and frequently buys itself disputes that

¹⁸⁰ FAR 52.317 and 49.502.

¹⁸¹ Torncello v. United States, 231 Ct.Cl. 20, 681 F.2d 756 (1982).

¹⁸² Maxima Corporation, 847 F.2d 1549, 7 FPD Para. 60 (Fed. Cir. 1988).

¹⁸³ Maxima Corporation, 847 F.2d 1549, 7 FPD Para. 60 (Fed. Cir. 1988); Torncello v. United States, 231 Ct. Cl. 20, 681 F.2d 756 (1982); 37 Comp. Gen. 688 (1958). See also Gavin, Government Requirements Contracts, 5 Pub. L J 234 (1972).

could have been avoided. By making inclusion of these clauses mandatory, rather than optional, the Government is paying a high price for a low risk. Because the Government, like any buyer, is generally in a better position to know what its needs might be, it should consider making such clauses optional. If its agents properly analyze its needs, as is expected of any company's buyers, the Government's risk assumption in low risk cases should cost the Government much less than the cost of this "insurance". Further, because the contractor is generally not in a position to know, or even effectively guess the likelihood of the Government exercising the clause, it is inclined to hedge the contract price even higher than the actual risk. While cost or pricing controls may discourage some "profiteering", it is often difficult to prove whether a contractor is attempting to gouge the Government or merely perceives the risk much higher than the Government.

4. Specifying the Government's needs

In the solicitation, the Government often uses terms limiting the size of the contract.¹⁸⁴ A geographic boundary, such as "all offices on the West Coast", or an organizational boundary, such as "17th Air Force" helps define the rights and responsibilities of the parties, and reduces disputes.

¹⁸⁴ Ralph Construction, Inc. v. United States, 4 Cl. Ct. 727, 2 FPD Para. 137 (1984) (geographic area stated); Mason v. United States, 222 Ct. Cl. 436, 615 F.2d 1343 (1980) (geographic area specified).

When such limitations are not used, the parties risk of performance can become far more than what they had anticipated, i.e., contract prices may rise to cover potential costs, including increased transportation and manpower demands, or increased production costs, or the contractor may not be able fully perform, especially small or local contractors. Absence of such self-limiting terms can also result in less than full and open competition as smaller contractors are frozen out of the bidding on large area contracts.¹⁸⁵

However, where a need for such an expansive procurement exists, such as the Government's inability to accurately pinpoint where the services are needed, and requiring such specificity would delay the project, these detriments will not prevent issuance of such a contract. An example is International Technology Corp.,¹⁸⁶ where the GAO denied the protest of an indefinite quantities contract solicitation that the bidder alleged was so all-encompassing as to prevent smaller companies from successfully bidding. In this case, the Air Force solicited for world-wide supply of equipment and servicing of the equipment. The GAO found the government may properly impose reasonable conditions even though they may cause the

¹⁸⁵ Jewett-Cameron Lumber Corp. et al., Comp. Gen. Dec. B-229582, et. al., 88-1 CPD Para. 265 (1988); Buckeye Pacific Corp., Comp. Gen. Dec. B-229582.9, 88-1 CPD Para. 292 (1988).

¹⁸⁶ Comp. Gen. Dec. B-233742.2, 89-1 CPD Para. 497 (1989).

competition to be somewhat restricted.¹⁸⁷

Just how broadly stated the Government's needs may be has not yet been resolved, however, as long as the Government is as specific as reasonably possible, without eliminating adequate competition, a successful protest or appeal is unlikely.¹⁸⁸

D. The Impact of Government Estimates on Awards

Government estimates are critical to the success or failure of indefinite delivery contracts. Because there is no set quantity to be ordered, offerors must often rely upon the Government estimate in preparing their offer. Inaccurate estimates cause many difficulties for all interested parties, including: unbalanced bidding, price adjustments, termination actions and reprocurement costs. Further, since the Government specifically disclaims the accuracy of its estimates, and this disclaimer is given deference by the boards, courts, and Comptroller, offerors should not give great weight to Government estimates when submitting their bids or proposals. As many a poorer, but wiser, contractor can attest, one relies on a

¹⁸⁷ id. Accord, Alan Scott Industries, Comp. Gen. Dec. B-230773, 88-1 CPD Para. 555 (1988); and Jewett-Cameron Lumber Corp., et al., Comp. Gen. Dec. B-229582, et. al., 88-1 CPD Para. 265 (1988).

¹⁸⁸ Jewett-Cameron Lumber Corp., et al., supra note 185.

Government estimate at one's peril.¹⁸⁹ The Government also suffers the consequences of inaccurate estimates, as offerors adjust their price upward to compensate for the increased risk of loss they must assume.

1. Bad faith or negligent preparation of estimates

Despite the fact that the potential or successful offeror should not rely on the Government estimate, there is an obligation that the Government's estimate be made in good faith, using the best information available. Where the Government fails to meet this standard, relief will generally be granted. On the other hand, relief will be denied where the contractor cannot show this standard has been violated.

For faulty estimates made in good faith, relief is generally denied. Examples of good faith faulty estimates include: minor clerical or mathematical errors, or events unknown to the Government at the time of estimate preparation. Thus, where the faulty estimate is due to an error made in

¹⁸⁹ Victory Container Corp., GSBCA No. 5596, 81-2 BCA Para. 15,346 (1981) (contractor's argument that the Government was stockpiling under this contract because it hadn't timely sought a follow-on contract rejected, and default termination upheld). See also Carstens Packing Co. v. United States, 52 Ct. Cl. 1430 (1917)(estimate of 165,000 lbs, but actual order reached 900,000 lbs. Although the contractor fulfilled his obligation, he did so at a loss).

estimating spare parts on hand, no bad faith was found.¹⁹⁰ Also, where there was an estimated need of 880 cords of wood, but the actual orders were only for 40 cords, there was no bad faith and relief was denied.¹⁹¹ Finally, the unexplained appearance of more stock items, which caused lower orders, did not justify an equitable adjustment since there is no showing the Government lacked good faith.¹⁹²

Proving Government bad faith in preparing its estimate is very difficult for several reasons. First, the Government is presumed to have acted in good faith in preparing the estimate,¹⁹³ so close cases will be decided in favor of the Government. Second, the cases have rejected applying the doctrine of *res ipsa loquitur* to estimate preparation. Thus, a disparity between the actual and estimated quantity will not be presumed grossly negligent, nor equate to bad faith.¹⁹⁴ Third,

¹⁹⁰ Wheeler Brothers, Inc., ASBCA No. 13089, 69-2 BCA Para. 7861 (1969) (Note that the board placed great weight on the fact that the Government's estimate of spare parts in its inventory was but one step in its determination of its replacement parts needs.) But cf. Pied Piper Ice Cream, Inc., ASBCA No. 20605, 76-2 BCA Para. 12,148 (1976) (equitable adjustment given for two requirements contracts when Government did not rely on best available information in preparing estimate).

¹⁹¹ Brawley v. United States, 96 U.S. 168, 27 L.Ed. 622 (1878).

¹⁹² Machlett Laboratories, Inc., ASBCA No. 16,194, 73-1 BCA Para. 9929 (1973).

¹⁹³ Ralph Construction, Inc. v. United States, 4 Cl. Ct. 727; 2 FPD Para. 137 (1984); Torncello v. United States, supra note 182; Shader Contractors v. United States, 149 Ct. Cl. 535, 276 F.2d 1 (1960).

¹⁹⁴ McCotter Motors, Inc., ASBCA No. 30498, et al., 86-2 BCA Para. 18,784 (1986) (where the board correctly pointed out that the doctrine of *res ipsa loquitur* applied to negligence suits not contract law).

the agency is presumed to be in the best position to know its needs, so deference is given where there is a rational explanation of how the agency reached its estimate.

Pre-award, the protester must show the methods used to prepare the estimate is faulty. Since good faith preparation is presumed,¹⁹⁵ the contractor has a difficult burden to overcome before the estimate will be corrected and the contract resolicited. Even protests by several bidders or proposers that it is impossible to prepare intelligent and accurate offers due to the questionable accuracy of the Government estimate have been denied.¹⁹⁶ Further, as long as the Government provides rational support for how it reached its estimate, it should prevail. Therefore, estimates allegedly using the best available information, will be upheld, absent specific proof that the information is wrong.¹⁹⁷ Finally, slight inaccuracies do not constitute bad faith.¹⁹⁸ It is therefore unlikely that a contractor will prevail, pre-award, on a bad faith argument,

¹⁹⁵ Ralph Construction, Inc. v. United States, 4 Cl. Ct. 727; 2 FPD Para. 137 (1984); Torncello v. United States, 231 Ct. Cl. 20, 681 F.2d 756 (1982); Shader Contractors v. United States, 149 Ct. Cl. 535, 276 F.2d 1 (1960).

¹⁹⁶ Jewett-Cameron Lumber Corp., et al., Comp. Gen. Dec. B-229582, et. al., 88-1 CPD Para. 265 (1988).

¹⁹⁷ The Saxon Corp., Comp. Gen. Dec. B-232694, et al., 89-1 CPD Para. 17 (1989).

¹⁹⁸ id. (protest denied where Government showed it used best historical information available, and protester could not substantiate data); Dynalelectron Corp., 65 Comp. Gen. 92, 85-2 CPD Para. 634 (1985) aff'd on reconsid., 65 Comp. Gen. 558, 86-1 CPD Para. 452 (1986) (protest denied as no requirement that estimate be absolutely correct).

except in the most blatant circumstances.¹⁹⁹

Once performance begins, the protester's burden is easier as there are now actual orders to compare to the estimate. However, a bad faith finding requires the protester to show a significant discrepancy between the actual orders and the estimate, and that the Government failed to use the best information available.²⁰⁰ Thus, relief has been granted where there was a 25% overrun of index cards and the Government had data which conflicted with the billings to the prior contractor,²⁰¹ where meal orders only reached 80% of an estimate which was prepared without certain relevant data,²⁰² and where 36% less was ordered than estimated, due to carelessly using figures from a prior 9 month contract for the present 6

¹⁹⁹ The Saxon Corp., supra note 197; Jewett-Cameron Lumber Corp., et al., Comp. Gen. Dec. B-229582, et. al., supra note 196; Dynallectron Corp., 65 Comp. Gen. 92, 85-2 CPD Para. 634 (1985) aff'd on reconsid., 65 Comp. Gen. 558, 86-1 CPD Para. 452 (1986).

²⁰⁰ Older cases did not discuss the "best information available" part of the test, instead summarily denying the bad faith allegation despite significant actual/estimated order discrepancies. In Carstens Packing Co. v. United States, 52 Ct. Cl. 1430 (1917), a requirements contract, no bad faith was found even though the amount ordered was over 5 times the estimate. Note that the contractor filled the orders without complaint until after the contract period, thus, this may also have influenced the court's decision. In Brawley v. United States, 96 U.S. 168, 27 L.Ed. 622 (1978), the amount ordered was 22 times less than estimated, yet the Court found no bad faith in the estimate preparation. Today, it is doubtful such extreme discrepancies would survive scrutiny without a change in circumstances.

²⁰¹ Womack, Jr. & John R. Vorhies v. United States, 182 Ct. Cl. 399, 389 F.2d 798 (1968).

²⁰² Integrity Management International, Inc., ASBCA No. 18289, 75-1 BCA Para. 11,235, aff'd on reconsideration, 75-2 BCA Para. 11,602 (1975).

month contract.²⁰³ Relief has also been denied when the actual orders were only 2/3 of the estimated quantity, but the information available was used.²⁰⁴

Finally, it is not bad faith in estimating when the Government bases the estimate on anticipatory needs that do not arise. Thus, in a requirements contract where the contractor was to perform all the government's needs for various water purity tests, when the government didn't order in the amounts estimated, an equitable adjustment was denied. The board found government estimates could be based on anticipatory needs, and the fact that the needs never materialized doesn't show negligence in estimating.²⁰⁵

2. Disclaimer of the estimated quantity

Under a requirements contracts, the Government must provide a realistic estimated total quantity of its needs.²⁰⁶ In doing so, the contracting officer must act in good faith, using the

²⁰³ Comp. Gen. Dec. B-173356 (Sept. 27, 1971).

²⁰⁴ Ira Gelber II, 45 Comp. Gen. 698 (1966)(absent evidence that estimate was based on other than the best information available, no price adjustment allowed when Government ordered only 2/3 of the estimated quantity).

²⁰⁵ Chinook Research Laboratories, Inc., ASBCA No. 3428, 88-1 BCA Para. 20,283 (1988). It is indeed unfortunate that the board cavalierly stated in part, "If the Government knew with precision what its needs would be, there would be no need for such a contract." This comment further implies that the Government has license to issue sloppy estimates. Nevertheless, even using the bad faith standard, the holding in favor of the Government appears supported by the facts.

²⁰⁶ FAR 16.503(a)(1).

most current information available in arriving at the estimate.²⁰⁷ However, there is also a disclaimer²⁰⁸ required to be inserted in all solicitations for requirements contracts that the estimate does not represent the quantity will be required or ordered,²⁰⁹ or that conditions affecting requirements will be stable or normal.²¹⁰ This disclaimer is frequently relied on by the courts and boards to deny relief when the estimated quantity is not ordered²¹¹, or is exceeded.²¹² Therefore, if the Government's orders are higher or lower than estimated, the contractor often absorbs the increased cost.²¹³

Indefinite quantity contracts also occasionally contain an

²⁰⁷ FAR 16.503(a)(1); Richard M. Walsh Associates, Inc., Comp. Gen. Dec. B-216730, 85-1 CPD Para. 621 (1985); 52 Comp. Gen. 732 (1973).

²⁰⁸ FAR 16.503(d).

²⁰⁹ FAR 16.503(a)(1); FAR 52.216.-21(a).

²¹⁰ FAR 16.503(a)(1). Chinook Research Laboratories, Inc., ASBCA 34828, 88-1 BCA Para. 20,283 (1988)(government estimates could be based on anticipatory needs, and the fact that the needs never materialized doesn't show negligence in estimating).

²¹¹ Chinook Research Laboratories, Inc., supra note 205.

²¹² American Flag & Banner Co. of New Jersey, GSBCA No. 1391, 65-2 BCA Para. 4905 (1965) (requirements contract where contractor held liable for excess costs of reprocurement due to default for failing to fill Government orders which exceeded the estimated maximum by 44%).

²¹³ Ira Gelber, 37 Comp. Gen. 688 (1958); Ira Gelber II, 45 Comp. Gen. 698 (1966).

estimate of the Government's needs.²¹⁴ Although the estimate is intended to aid submission of a reasonable bid, there is invariably a disclaimer that the estimate is not a commitment to buy that quantity.²¹⁵ While the estimate still must be made in good faith, the cases place less significance on Government estimates in indefinite quantities contracts than in requirements contracts.²¹⁶ On the one hand this seems appropriate since the Government has no duty to order beyond the minimum quantity it guaranteed. However, if the contractor cannot base his contract price in expectation of orders close to the Government's estimate of its needs, the Government should expect to pay higher prices as the contractor adjusts his price to reflect his own estimate of what the actual orders will be. Thus, a Government estimate in indefinite quantity contracts is only as valuable as the offeror's perception of the accuracy of past estimates by that agency or contracting office.

3. Remedies for faulty estimates

If, prior to award, the estimate is determined to be other than a reasonably accurate representation of actual anticipated

²¹⁴ FAR 52.317 Indefinite Delivery matrix.

²¹⁵ FAR 52.216-22(a) Indefinite Quantity states in part:

The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract.

²¹⁶ Art Anderson Associates v. United States, Appeal No. 84-1469 (unpub. dec.), 3 FPD Para. 108 (Fed. Cir. 1985), citing with approval Dot Systems, Inc. v. United States, 231 Ct. Cl. 765 (1982).

needs, cancellation is required to prevent an award that won't be the lowest cost to the Government.²¹⁷

While cancellation is more difficult once bids are opened, the protester may still succeed.²¹⁸ If award is made prior to resolution of the protest, and the estimate is found faulty, the agency may terminate the contract and re-solicit.²¹⁹ Further, the successful protester may recover bid or proposal preparation costs, but if the agency takes corrective action prior to resolution of the protest, these costs are denied.²²⁰

If, during or after performance, the Government's estimate is found faulty, contractor recovery depends on whether or not there was Government bad faith. If bad faith is found, the contractor may recover for breach damages, including anticipated profits.²²¹ However, absent bad faith, the Government's breach

²¹⁷ The W.H. Smith Hardware Co., Comp. Gen. Dec. B-228127, 87-2 CPD Para. 556 (1987); Downtown Copy Center, 62 Comp. Gen. 65, 82-2 CPD Para. 503 (1982).

²¹⁸ The W.H. Smith Hardware Co., Comp. Gen. Dec. B-228127, 87-2 CPD Para. 556 (1987) (cancellation of solicitation after bid opening, but prior to award due to overstatement of estimated needs); AWD Mehle GmbH, Comp. Gen. Dec. B-225579, 87-1 CPD Para. 416 (1987) (cancellation of solicitation after bid opening, but before award, requires higher basis for cancellation than after proposals received due to public opening of bids).

²¹⁹ Associated Professional Enterprises, Inc., Comp. Gen. Dec. B-231766, 88-2 CPD Para. 343 (1982).

²²⁰ *id.*

²²¹ Viktoria Transport GmbH & Co., KG, ASBCA No. 30371, 88-3 BCA Para. 20,921 (1988) (bad faith not found in this case, however); Tramp Corp., ASBCA No. 25,692, 84-2 BCA Para. 17,460 (1984) (bad faith found); Comp. Gen. Dec. B-169037 (May 4, 1970). See also, generally Cibinic & Nash, Formation of Government Contracts, 2d ed., Chapter 7, at 813 (1986).

will only entitle the contractor to an equitable adjustment.²²² As this does not include recovery of anticipated profits, it behooves the contractor to try to prove Government bad faith, and for the Government to refute such an allegation. Bad faith estimates include those where the Government did not use information available to it, or had no reasonable basis for the estimate provided.²²³ Thus, the contractor's relief for the Government's breach will not be limited to convenience termination costs, but could include damages, including anticipated profits.²²⁴

4. Effect of changes rendering the estimate useless

In requirements and indefinite quantities contracts, the contractor may also seek an equitable adjustment where there was a change in the contract terms. If there was a change, the contractor may be entitled to the adjustment. Frequently, however, the contractor alleges a change because of the Government not ordering the estimated amount. This argument

²²² Viktoria Transport GmbH & Co., KG, supra at n. 223; Automated Services, Inc., DOT BCA No. 1753, 87-1 BCA Para. 19,459.

²²³ Crown Laundry & Dry Cleaners, Inc., ASBCA No. 28889, 85-2 BCA Para. 18,003 (1985); Lone Star Energy Co., Comp. Gen. Dec. B-199049, 80-2 CPD Para. 98 (1980). Cf. ITG Corporation, ASBCA No. 27285, 85-1 BCA Para. 17,935 (1985) (rejection of bad faith allegation in preparing estimate where Government had information thousands fewer refugees would be moved to the base than estimated).

²²⁴ Viktoria Transport GmbH and Co., KG, ASBCA No. 30371, 88-3 BCA Para. 20,921; Automated Services, Inc., DOT BCA No. 1753, 87-1 BCA Para. 19,459; Tamp Corp., ASBCA No. 25692, 84-2 BCA Para. 17,460 (1984).

usually fails. Thus, a closing of a sanatorium due to a fire, which resulted in a lower milk orders than estimated did not support recovery.²²⁵ Nor did slippage in delivery schedules justify an equitable adjustment.²²⁶ A court injunction which prevented relocation of a quantity of refugees to the contract location, also does not entitle the contractor to an equitable adjustment for lower orders for meals than estimated.²²⁷ Finally, if the event was not discussed, it may be found an assumed risk.²²⁸ These cases should be distinguished from the decision not to order from the contractor because the Government found it could get a better deal elsewhere.²²⁹ In the latter case, the Government must pay an equitable adjustment, and if the cheaper price was known prior to entering the contract, breach damages are appropriate.²³⁰

²²⁵ 16 Comp. Gen. 717 (1937).

²²⁶ Coastal States Petroleum Co., ASBCA No. 31059, 88-1 BCA Para. 20,468 (indefinite quantity contract for fuel oil, which because of an economic price adjustment clause caused a reduction in price as well when delivery slipped into another month during a decline in oil prices).

²²⁷ ITG Corp., ASBCA No. 27285, 85-1 BCA Para. 17,935 (1985).

²²⁸ Logistical Support, Inc., ASBCA No. 35578, 88-1 BCA Para. 20,469 (1988)(where box lunches which increased contractor's costs to supply lunches interpreted to be service within contract since no evidence parties discussed it)

²²⁹ Ronald A. Torncello and Soledad Enterprises, Inc. v. United States, 231 Ct. Cl. 20, 681 F.2d 756 (1982); S&W Tire Services, Inc., GSBCA No. 6376, 82-2 BCA Para. 16,048 (1982).

²³⁰ Torncello v. United States, supra note 229.

E. Unbalanced Bids and Award

Unbalanced bidding is a significant risk when using indefinite delivery contracts for multiple line items. Where the Government determines it should award the contract in the aggregate, rather than to the lowest bidder for each line item, there is an incentive for the bidders to submit unbalanced bids. This problem is further aggravated when the Government fails to provide an estimate for each line item, instead relying on an aggregate estimate.²³¹

1. Defining unbalanced bidding

In 1900, the Supreme Court, in a variable quantity contract, pointed out the problem of unbalanced bidding:

[T]he contractor will give a low price for one kind of work or materials in the same contract with the hope that the quantity of work and materials for which a low price is bid will be reduced, while the quantity of materials or work for which a high price is bid will be increased, thus making up on the high price bid sufficient to give the contractor a large profit upon the whole work.²³²

Determining whether a bid is unbalanced is a two step process. First, the bid must be found mathematically unbalanced, that is, whether the bid price on each line item equates to its share of the work cost and profit, or whether it

²³¹ Reliable Reproductions, Inc., Comp. Gen. Dec. B-201137, 81-1 CPD 100 (1981)(cancellation of IFB calling for aggregate price found proper where only Government and incumbent knew procurement history, and Government knew it would purchase significant quantities of some line items and not others).

²³² Moffit, Hodgkins and Clarke Co. v. Rochester, 178 U.S. 373 (1900).

appears to be either a nominal price or a greatly inflated price.²³³ A low bid on some items and a high bid on others does not, in itself, equate to mathematical unbalancing, rather, the price on these items must be substantially disproportionate to what one would reasonably expect to be the work cost and profit. Further, mathematical unbalancing does not occur unless there are both low bid items and high bid items.²³⁴

If it is found mathematically unbalanced, then the bid may still be accepted, unless it is also materially unbalanced. Material unbalancing is when there is a reasonable doubt that award to the bidder submitting a mathematically unbalanced bid will result in the lowest ultimate cost to the Government.²³⁵ Where the contracting officer determines that a mathematically unbalanced bid is not materially unbalanced because award will result in the lowest overall cost to the Government, award is appropriate.²³⁶

2. Unbalanced bidding in indefinite delivery contracts

Because there is no known quantity to evaluate in preparing

²³³ All Star Maintenance, Inc., Comp. Gen. Dec. B-231618, 88-2 CPD Para. 181 (1988).

²³⁴ Consolidated Photocopy Co., Comp. Gen. Dec. B-234137, 89-1 CPD Para. 386 (1989).

²³⁵ Atlas Disposal Systems, Inc., Comp. Gen. Dec. B-229714, 88-1 CPD Para. 186 (1988) (fixed-price indefinite quantity contract); Jimmy's Appliance, Comp. Gen. Dec. B-205611, 82-1 CPD Para. 542 (1982).

²³⁶ Department of the Interior-- Request for Advance Decision, Comp. Gen. Dec. B-228262, 88-1 CPD Para. 18 (1988).

a bid for an indefinite quantity or requirements contract, the bidder must usually rely on the Government estimate. If the bidder does so, however, and the estimate is inaccurate, another bidder, who does not rely on the Government estimate, may underbid and unbalance its bid, thereby getting the award. However, proving an awardee's bid is unbalanced requires a showing that the Government estimate is inaccurate. This is not an easy task.

If the agency determines that the bid is not unbalanced, this decision will usually be upheld. Thus, a protest of the award of an indefinite quantity contract alleging the awardee unbalanced his bid, will fail unless the protester shows the Government did not use the best available information in preparing its estimate.²³⁷

On the other hand, if the agency determines that a bid is unbalanced, the decision to reject the bid will also usually be upheld by the Comptroller, as long as the Government's estimate is reasonably made, using the best information available.²³⁸

While an unbalanced bid usually occurs due to the intentional act of a bidder, at least one case has held even unintentional unbalancing can support rejection, as the focus is on whether the unbalanced bid offers the lowest overall cost to

²³⁷ International Terminal Operating Co., Comp. Gen. Dec. B-229591, B-229591.2, 88-1 CPD Para. 287 (1988).

²³⁸ The Saxon Corp., Comp. Gen. Dec. B-232694, et al., 89-1 CPD Para. 17 (1989).

the Government, not the intent of the bidder.²³⁹

However, merely alleging that the awardee does not intend to perform at the bid price is not reviewable by the Comptroller, as it is considered a matter of contract administration.²⁴⁰

Finally, the fact that a bidder submits a below-cost bid, does not mean that it cannot be accepted, as that is a business judgement on his part, and as long as the Government will receive the lowest overall cost contract, it may accept such a bid.²⁴¹

F. Threshold Requirements

In an effort to keep procurement costs down, the Government requires contractors to disclose, and sometimes change, their accounting practices, provide cost or pricing data, and occasionally open their books for Government audit. Because of the high cost of contractor compliance and Government oversight, not all contracts are subject to all of these requirements. Rather, dollar threshold limits determine the extent of compliance required. The type of contract plays a significant role in whether or not the contractor and the Government must

²³⁹ Special Waste, Inc., Comp. Gen. Dec. B-230103, 88-1 CPD Para. 520 (1988), affirmed on reconsideration, B-230103.2, 88-2 CPD Para. 385 (1988).

²⁴⁰ DOD Contracts, Inc., B-227689.2, 87-2 CPD Para. 591 (1987).

²⁴¹ id.

follow these conditions for Government procurement.

At what point these dollar threshold requirements take effect in indefinite quantity and requirements contracts is confusing, since funds are not committed until orders are made, and then the Government's commitment to order under the contract is only to a guaranteed minimum or based on acts of good faith. Thus, there are several questions needing answers. For instance, is the threshold determined at award, or upon order? Does a modification or subsequent order count for determining the threshold? Should the thresholds be based on the Government's estimate, or the initial funding approval the agency receives for the items or services to be contracted? What is the impact of the reservation of the right to perform work or supply items from in-house? What impact do multiple awards have? These questions are addressed in this section.

1. Cost accounting standards

a. Historical background

In 1968, in response to an increasing number of negotiated defense procurement, and testimony that differing cost accounting practices among defense contractors could prevent cost comparisons and obtaining adequate cost information, Congress directed the GAO to study the feasibility of uniform cost accounting standards.²⁴² When the GAO reported that such

²⁴² Section 718 of the Defense Production Act of 1950, 82 Stat. 279 (July 1, 1968).

standards were possible,²⁴³ the Cost Accounting Standards Board (CASB) was created.²⁴⁴ Tasked to promulgate standards which would allow uniformity and consistency in the cost accounting principles followed by defense contractors and subcontractors, the CASB promulgated the Cost Accounting Standards (CAS).²⁴⁵ In 1980, the CAS Board shut down due to a lack of funding.

Since that time, the CAS have continued to be used by the agencies in their procurement actions. Further, they have been incorporated into the FAR.²⁴⁶ In doing so, the agencies have made some changes to the CAS, the enforceability of which are also in question.

In 1988, the CAS Board again received funding, but has yet to become operational due to conflict of interest issues of the board composition. In conjunction with the re-creation of the CASB, Congress made several changes to the CAS, including jurisdictional and dollar threshold changes. These changes were

²⁴³ GAO Report B-39995(1), January 19, 1970.

²⁴⁴ P.L. 91-379, 84 Stat. 796, August 15, 1970, created Section 719 of the Defense Production Act of 1950, 50 App USC ss 2061 et seq. In 1980 the board shut down since there were no funds appropriated for the CAS board for FY81. Funding was again appropriated for the board in FY89. During the interim period, CAS were still followed by the agencies, particularly the DOD. The CASB was re-enacted by P.L. 100-679, November 17, which also modified the CAS in Section 26 of the Office of Federal Procurement Policy Act of 1988. Revisions to the CAS are expected soon. For a historical discussion and analysis from 1970-1980 see Cibinic and Nash, Cost Reimbursement Contracting at 385-391 (1981). Also see 50 U.S.C. app Sec. 2128.

²⁴⁵ 4 CFR, Subchapter G.

²⁴⁶ FAR Part 30.

to take effect on May 19, 1989, but since the CASB has yet to become active, they have not promulgated CAS incorporating these changes. Whether the CAS is self-implementing is a matter in dispute, with some executive agencies arguing it is not. Thus, the thresholds are in dispute, and should raise some interesting issues until the CASB is active.

b. Applicability and exemptions

The Cost Accounting Standards originally applied to all negotiated²⁴⁷ Government national defense contracts and subcontracts over \$100,000, except for those with prices based on prices set by law or regulation, or catalog or market prices of commercial items sold in substantial quantities to the general public.²⁴⁸ If the contract or subcontract met this criteria, it was a "covered" contract. The contractor and/or subcontractor had to, therefore, comply with accounting practices which are acceptable under the CAS.²⁴⁹ Further,

²⁴⁷ Royal Industries, Comp. Gen. Dec. B-180530, July 10, 1974.

²⁴⁸ 4 CFR 331.20.

²⁴⁹ On September 30, 1987 the CAS were incorporated into Part 30 of the FAR.

submission of a Disclosure Statement,²⁵⁰ describing the cost accounting practices and procedures, was required if the contractor or subcontractor had more than \$10 million dollars in national defense business.

Compliance with the cost accounting standards are not required for initial defense contracts of \$500,000 or less. Thus, a contractor who obtains a \$400,000 contract initially, will go over that \$500,000 exemption if his next contract is \$100,001. This second contract and all future contracts in excess of \$100,000 will be subject to CAS.

All small businesses and educational institutions are also exempt from CAS.

Even if a contract is covered, the coverage may be only partial, requiring compliance with CAS 401 and 402, which require consistency in accounting practices, and perhaps CAS 1201 Disclosure Statement.

²⁵⁰ CAS 1201 requires a disclosure statement describing the contractor's cost accounting practices and procedures from any contractor who has: any business unit selected to receive a CAS-covered defense contract or subcontract of \$10 million or more; or any company which (with its segments) received net awards of negotiated defense prime and subcontracts subject to CAS totaling more than \$10 million in its most recent cost accounting period. The statement must be submitted before award of its first CAS-covered contract in the immediately following cost accounting period.

When a Disclosure Statement is required, a separate statement must be submitted for each segment whose costs included in the total price of any CAS-covered contract or subcontract exceed \$100,000 (unless the contract or subcontract is exempt). If the cost accounting practices are identical for more than one segment, then only one statement need be submitted. A statement is required for each corporate or group office whose allocates any of its costs to one or more segments performing CAS-covered contracts.

Submission of a new or revised Disclosure Statement is not required for any non-defense contract or from small business concerns.

Non-defense contracts generally are covered if the contractor has a CAS covered defense contract. If the contractor's defense business is small, in comparison with the rest of his business, the non-defense contracts may only need to comply with CAS 401 and 402.

Finally, all contracts of a contractor or subcontractor with defense business in excess of \$10 million in an accounting period are CAS covered. However, if the contractor or subcontractor's business is divided into acceptable business units, the \$10 million threshold is determined by the business unit's business, not the aggregate business of the company.

c. 1988 amendments

These requirements were changed by the 1988 Act (P.L. 100-679) to require mandatory use of cost accounting standards in all, not just defense-related, negotiated prime contracts in excess of \$500,000. Exceptions again include those in which price is set by law or regulation or are based on established catalog or market prices of items sold to the general public, but small business and educational institutions are not automatically exempt.

d. Determining when in contract formation and administration the CAS threshold applies

Assume the following scenario. On July 1, 1989, a requirements or indefinite quantity contract for defense-related supplies is awarded, which lists a stated maximum of \$400,000,

with an estimated quantity price of \$200,000, and a guaranteed minimum of \$95,000. At the same time as award was made, the Government placed an order for \$50,000. Shortly after award, the guaranteed minimum was modified to \$101,000. If the Government agency attempts to apply the CAS to the contract, the contractor has several arguments.

First, the contractor may argue that the threshold cannot be determined until orders are placed. Thus, the contractor should not have to comply with CAS until the orders reach the appropriate threshold limit. There are no cases which discuss when the CAS thresholds take effect in indefinite quantity and requirement contracts.²⁵¹ However, interpretations by the CASB and the DOD CAS Working Group provide some assistance. In 1972, the CASB interpreted the CAS threshold requirements to apply to contract price at award only, not to include subsequent modifications. Under this analysis, only if the initial contract award was above the CAS threshold level would the CAS apply. Subsequent modifications which might put a non-CAS covered contract over the threshold would not turn the contract into a CAS covered contract.²⁵² The DOD CAS Working Group, while not binding on other agencies, also provides some insight. In 1976, the Group extended the CASB reasoning, concluding that only initial contracts and individual orders under basic

²⁵¹ id.

²⁵² See General Comments Accompanying Promulgation of Subchapters C, E and G, 37 F.R. 4139, February 29, 1972, Comments No. 6, Para. 3856.

ordering agreements would be considered in determining CAS applicability. The DOD CAS Working Group again clarified this stance in 1977, when it found letter contracts would be measured as of the date of award, and any definitization which would raise the contract price above the threshold level (or lower it below the threshold) would be treated as if it were a modification, and therefore, inapplicable for the CAS coverage determination.²⁵³ (The Defense Contract Audit Agency has followed the above analyses in its audit manual.²⁵⁴) These interpretations make clear that indefinite quantity and requirements contracts should be treated like any other contract, that is, the contract price at award, not when orders are placed, should determine CAS threshold applicability. On the other hand, if a contract had an initial requirement which cost less than the threshold amount, but contained an option which, if executed, would combine with the initial requirement to exceed the threshold, then CAS compliance was required at the outset.²⁵⁵

The contractor may then argue that contract price at award should be determined by the guaranteed minimum, as it is the amount assured to be ordered. In lieu of this, the contractor may argue that the estimated quantity, as it is based on the

²⁵³ DOD Working Group 77-16, June 14, 1977.

²⁵⁴ DCAA Manual 7640.1, January 1, 1989 Edition, Chapter 8, Sections 8-103.2, 8-103.3, 8-103.4, and 8-103.5.

²⁵⁵ DOD Working Group 76-2, February 24, 1976.

best information available of what the Government's needs are, should apply, since it is the amount one can most reasonably infer will be ordered. In 1976, the DOD CAS Working Group addressed a related issue on options for additional quantities.²⁵⁶ The Group refused to use only the firm quantity as the contract price for CAS coverage purposes, applying instead the total quantity, including options, to determine CAS applicability. The Group concluded that, at the outset, the parties contemplated a total requirement, inclusive of optional quantities, thus this was the better method. Following this rationale then, the guaranteed minimum would clearly not be determinative as to the contract price for CAS coverage. Further, the estimated quantity would not be used, if there is a stated maximum which can be used to determine whether the contract is CAS covered. Even if there is no stated maximum, it seems the estimated quantity, rather than the guaranteed minimum should be applied, since it is supposed to represent the best estimate of what the agency will order.

Finally, under a reverse G.L. Christian²⁵⁷ Doctrine theory, the contractor may argue the new rules should apply, thus the contract is not CAS covered since the contract price at award is less than the \$500,000 threshold. It appears that this argument

²⁵⁶ id.

²⁵⁷ G. L. Christian & Associates v. United States, 160 Ct. Cl. 1, 312 F.2d 418, cert. denied, 375 U.S. 954 (1963), 170 Ct. Cl. 902, cert. denied, 382 U.S. 821 (1965).

will fail with the executive agencies, but may be successful before the Comptroller General, a board, or in the courts.

Obviously, these CASB and DOD CAS Working Group interpretations are rulings of convenience, as the parties frequently do not seriously contemplate; the exercise of the options; that the estimated quantities are an accurate representation of what will be ordered; or that stated maximums will be reached. Rather, these Government figures, like many contract terms, are included only to protect Government flexibility in the unlikely cases where the figure given may be needed. Nevertheless, for 20 years, these interpretations have successfully avoided CAS threshold disputes reaching the Comptroller General, the boards, or the courts.²⁵⁸

2. Truth in Negotiations Act requirements

Cost or pricing data has been required from Government contractors for many years, with the latest major change in 1986.²⁵⁹ The enactment of the Truth in Negotiations Act

²⁵⁸ A review of GAO, BCA and court decisions since 1970 show only three cases, two GAO and one BCA that concern indefinite-delivery contracts, none of which discuss threshold requirements. Jana, Inc., ASBCA No. 32447, 88-2 BCA Para. 20,651 (1988); Syscon Corporation, Comp. Gen. Dec. B-233478, 89-1 CPD 249 (1989); Gulf Oil Trading Co., Comp. Gen. Dec. B-184333, 76-1 CPD Para. 171 (1976).

²⁵⁹ P. L. 87-653. Also see, Congressional History, 10 U.S.C. Sec. 2306a and 41 U.S.C. Sec. 254. H.R. 12572, 86th Cong., 2d Sess., 108 Cong. Rec. 14,258 (1986).

(TINA),²⁶⁰ attempted to remedy what was perceived to be a negotiation imbalance found to exist between the contractor and the Government. TINA was implemented in the ASPR and FPR and continued in their successor, the FAR.²⁶¹ Under these dictates, the contractor or subcontractor must make cost or pricing data available if: other than sealed bid procedures are used and the contract price is expected to exceed \$100,000; or there is a modification or change and the price adjustment is expected to exceed \$100,000 (or such lesser amount as may be prescribed by the head of the agency).²⁶² Cost or pricing data is not required: when a contract or subcontract for which the price agreed upon is based on adequate price competition;²⁶³ when there are established catalog or market prices of commercial items sold in substantial quantities to the general public;²⁶⁴ when prices are set by law or regulation;²⁶⁵ or, in the exceptional case where the head of the agency determines that the requirements of this section may be waived and states in

²⁶⁰ TINA was enacted in 1962 by P.L. 87-653 and codified as 10 U.S.C. Sec. 2306(f). It has been amended several times, the last time being P.L. 100-180, December 4, 1987. Now cost or pricing data submission is required by 10 U.S.C. Sec. 2306a and 41 U.S.C. Sec. 254(d).

²⁶¹ ASPR 3-405; FPR 1-3.405; FAR Subpart 15.8.

²⁶² 10 USC 2306a(a).

²⁶³ FAR 15.804-3(b).

²⁶⁴ FAR 15.804-3(c).

²⁶⁵ FAR 15.804-3(d).

writing his reasons for such determination.²⁶⁶

Adequate price competition exists where two or more responsible vendors submit priced proposals responsive to the solicitation's mandatory requirements, and they compete independently for the contract to be awarded to the "responsible offeror submitting the lowest evaluated price."²⁶⁷ A price is based on adequate price competition if it results directly from price competition or if price analysis alone demonstrates clearly that the proposal is reasonable in comparison to current or recent prices for similar items purchased under similar circumstances.²⁶⁸

Even though cost or pricing data submission is not required, if the head of the agency determines it is necessary for the evaluation by the agency of the reasonableness of the price of the contract or subcontract, it must be submitted.²⁶⁹

There are few cases in this area concerning indefinite quantity or requirements contracts,²⁷⁰ and none concerning the dollar threshold. However, it would appear that the purpose

²⁶⁶ FAR 15.804-3(i).

²⁶⁷ FAR 15.804-3(b).

²⁶⁸ FAR 15.804-3(b)(3).

²⁶⁹ 10 U.S.C. 2306a (c).

²⁷⁰ Resource Consultants, Inc. GSBCA No. 8342-P, 86-2 BCA Para. 18,942 (1986); Serv-Air, Inc., Comp. Gen. Dec. B-109884, 78-2 CPD Para. 223 (1978), aff'd on reconsid. at 79-1 CPD 212 (1979); Minnesota Mining and Manufacturing Co., ASBCA No. 20266, 77-2 BCD Para. 12,823 (1977); Libby Welding Co., ASBCA No. 15084, 73-1 BCA Para. 9859 (1973).

behind both the CAS and TINA are essentially the same-- to ensure that the Government receives a fair price in its contract dealings. Therefore, the stated maximum, or if none, the estimated quantity, should be used to determine whether the threshold is reached.

If the contract falls within an exemption, the \$100,000 dollar threshold should be unimportant. For instance, indefinite quantity contracts are only to be used for commercial or commercial-type products,²⁷¹ so arguably the "established catalog or market price" exemption would apply.²⁷² However, unlike the CAS statute, the language of TINA suggests that the exemptions are permissive not mandatory, thus, even if the contract could be exempt, the agency can require the data if necessary to determine the reasonableness of the price.²⁷³ Therefore, many indefinite quantity contracts would still include cost or pricing data, especially where the product or service is often sold below the catalog price. An example would be computers and software products.

²⁷¹ FAR 16.504(b).

²⁷² But see

²⁷³ In Gulf Oil Trading Co., Comp. Gen. Dec. B-184333, 76-1 CPD Para. 171 (1976), the agency's failure to decide whether the protester was entitled to an "established catalog or market price" exemption under CAS was found improper. In comparing the CAS statute, 50 U.S.C. app. 2168 (1970) with TINA, the Comptroller found that unlike the CAS statute, use of exemptions under TINA are within the agency's discretion.

CHAPTER 4 - ORDERING PROCEDURES AND PROBLEMS

Problems in ordering usually arise when one of three events occur: the Government orders more than the contractor anticipated, the Government orders less than the contractor anticipated, or the Government attempts to end ordering altogether. If the Government has fulfilled its contract obligations, the contractor should recover nothing. However, if the Government has not fulfilled its obligations it may be liable for an equitable adjustment or breach damages. Indefinite-delivery contracts, because of their indefiniteness, often are subject to claims and appeals by the contractor. This chapter discusses some of the problems that arise in ordering under indefinite quantity and requirements contracts. The first part examines the Competition in Contracting Act and how it affects ordering under these contract types. Part B addresses the impact of the Government failing to order to the contractor's expectations. Other acts which affect contractor expectations are examined in Part C. Finally, in Part D, a comparison is made of how Deductive changes and Terminations for convenience affect ordering.

A. CICA Considerations

The Competition in Contracting Act (CICA) requires awards

be made after full and open competition, with certain qualifications.²⁷⁴ However, once awarded the competition requirement for placing orders under the contract depends on the contract type. Once an indefinite quantity or requirements contract is competitively awarded, orders may be placed without further competition.²⁷⁵ However, if the indefinite quantity contract was awarded by "other than competitive" procedures, orders under that contract must be re-competed, unless justification for the initial contract award adequately covers the requirements in the order.

"Competitively" means subject to "full and open" competition, that is, all responsible sources are permitted to compete.²⁷⁶ Merely because the contract was not open to everyone does not mean it violates CICA's competitive requirement.²⁷⁷ Also, specific exclusion of certain sources or categories for legitimate purposes is permitted, such as second-sourcing or for small business or labor surplus set-asides.²⁷⁸

Award by "other than competitive" procedures does not

²⁷⁴ The Competition in Contracting Act was enacted in 1984 as part of Public Law 98-369. It is codified at 10 U.S.C. Section 2304 and also at 41 U.S.C. Section 253.

²⁷⁵ FAR 6.001(d) and (e)(1).

²⁷⁶ 10 U.S.C. 2304(7); 41 U.S.C. Section 403(7).

²⁷⁷ Minowitz Manufacturing Co., Comp. Gen. Dec. B-228502, 88-1 CPD Para. 1 (1988).

²⁷⁸ 10 U.S.C. Section 2304(b)(1) and (2); 41 U.S.C. Section 253(b)(1) and (2).

require orders under a requirements contract to be re-competed, but, except for orders up to the guaranteed minimum, may require re-competition for an indefinite quantity contract.²⁷⁹ Although "other than competitive procedures" is not defined, the statute lists seven permitted uses of these procedures, including: only one source, urgency, national emergency capability, foreign policy commitments, specific statutory authority, national security, or the agency head determines it is necessary in the public interest to do so.²⁸⁰ If the indefinite quantity contract was awarded under one of these reasons, orders, beyond the guaranteed minimum, must be re-competed, unless the justification and approval (J&A) determination for the award meets the requirements in the order.²⁸¹

Synopsis is also not required for orders placed under a requirements contract,²⁸² but there is no similar exception for orders under an indefinite quantity contract.²⁸³ Although this seems conflicting, at least for orders under an indefinite quantity contract up to the guaranteed minimum, it is certainly easier to administer. Whether required or not, however, prudence dictates that before placing an order under either

²⁷⁹ Compare FAR 6.001(d) and (e)(2).

²⁸⁰ 10 U.S.C. Section 2304(c); 41 U.S.C. Section 253(c).

²⁸¹ FAR 6.001(e)(2).

²⁸² FAR 5.202(a)(6).

²⁸³ FAR 5.202.

contract type, the contracting officer should consider whether it is the most advantageous action for the Government. If not, perhaps the contracting officer can exercise one of the avoidance clauses under the contract. These are discussed in subsequent sections of this and the next chapter.

B. Failure to Order the Contractor's Expectations

When the Government fails to order the amount the contractor anticipated, disputes frequently arise. This part discusses the impact of the Government's action.

1. Failure to place orders

Under a requirements contract, the Government has no obligation to order any quantity from the contractor, if it has no needs.²⁸⁴ However, if the Government improperly fails to place orders against a valid requirements contract, the contractor's relief depends upon the extent of the impropriety. Thus, if the Government's act is improper, but not in bad faith, contractor relief is limited to that allowed under a termination for convenience action,²⁸⁵ while breach damages may be possible

²⁸⁴ Torncello v. United States, 231 Ct. Cl. 20, 681 F.2d 756 (1982).

²⁸⁵ Adams Manufacturing Co. v. United States, Unpub. Dec., Appeal Nos. 49-82, 51-82, May 12, 1983, 1 FPD Para. 125 (Fed. Cir.); Inland Containers, Inc. v. United States, 206 Ct. Cl. 478, 512 F.2d 1073 (1975).

for bad faith.²⁸⁶ The distinction is that anticipatory profits are recoverable where bad faith occurs. While the Government is only obligated to order up to the guaranteed minimum in an indefinite quantity contract, the same rules of impropriety versus bad faith apply.²⁸⁷ However, these contracts are usually not written that simply, rather, several clauses are commonly added which alter these basic rules of law. These clauses and their impact are discussed in the following subsections.

a. Failure to order the guaranteed minimum

A guaranteed minimum is a promise by the Government to order, or at least pay for, this quantity. Once this is met in indefinite quantity contracts, the Government's obligation to order further ends,²⁸⁸ but the contractor's duty to provide the supplies or services does not.²⁸⁹ However, if the Government does not order the guaranteed minimum, it must still pay the price of the minimum. Failure to do so is a breach of contract entitling the contractor to recovery of damages. Just what the measure of damages is, however, is now in question in light of

²⁸⁶ Torncello v. United States, supra note 284.

²⁸⁷ Maxima Corp. v. United States, 847 F.2d 1549, 7 FPD Para. 60 (Fed. Cir. 1988).

²⁸⁸ FAR 52.216-22(b); Deterline Corp., ASBCA No. 33090, 88-3 BCA 21,132 (1988).

²⁸⁹ FAR 52.216-22(b) states in part:
The Contractor shall furnish to the Government, when and if, ordered, the supplies or services specified in the Schedule up to and including the quantity designated in the Schedule as the "maximum."

the unusual ruling in Maxima Corp. v. United States.²⁹⁰ In that case, the Government did not place orders for typing, copying and related services up to the guaranteed price. Although the Government initially paid the balance owing on the guaranteed sum, it later sought recoupment for the unordered portion, arguing it could retroactively terminate the contract for convenience. The court disagreed, and denied recoupment. These rules apply whether the contract is one for indefinite quantity or for requirements.

The court's rejection of the Government's termination for convenience argument was proper, as was the finding of a Government breach of contract. However, the total denial of recoupment is not. The contractor was entitled to damages in the amount of the work performed plus his anticipated profits on the unordered, and unperformed, portion of the guaranteed quantity. Since he had been paid the full amount of the guaranteed minimum, even though, he did not actually perform the contract to the guaranteed minimum, the Government was entitled to recoupment of the contractor's windfall. The court should have remanded the case for a determination of the damages.

b. Failure to order stated maximums

A stated maximum is not a promise to order that quantity,

²⁹⁰ 847 F.2d 1549, 7 FPD Para. 60 (Fed. Cir. 1988).

rather it is a promise not to order beyond that quantity.²⁹¹ Thus, protests that the Government failed to order the stated maximum have been denied even where: the Government represented that orders would approach the maximum,²⁹² orders in past contracts had reached or exceeded the maximum,²⁹³ and the Government consciously decided not to order the stated maximum, although its needs clearly exceeded the maximum.²⁹⁴ In one indefinite quantity contract case, the contractor sought recovery for a breach of warranty when the Government did not order the stated maximum. The contractor alleged that since it was required to estimate its overhead costs based on the maximum rather than the minimum amount, the Government essentially warranted that it would order that amount. When it did not and the contractor lost money, due to an inability to absorb part of its general and administrative costs, the contractor sought recovery. The Court of Appeals held firm to the rule that the Government was only obligated to order the guaranteed minimum,

²⁹¹ FAR 52.216-21 and 52.216-22.

²⁹² Deterline Corp., supra note 288.

²⁹³ id.

²⁹⁴ American Processing Co., ASBCA No. 29804, 87-1 BCA Para. 19,513 (1987) (Requirements contract for removal of old underground waste storage tanks and any contaminated soil, where, during excavation, the parties learned that work required was far in excess of what was anticipated and removal costs were 10 times the contract price. When the government refilled the holes and concreted over the areas, the contractor sought compensation for costs incurred and lost profits alleging a breach of contract or partial termination for convenience. The board rejected this argument finding the contract exempted the Government from ordering even a part of any item when the requirement exceeded the maximum order limitations.)

and pointed out the Government's disclaimer of any warranty beyond ordering the minimum.²⁹⁵

c. Failure to order the estimated quantity

As discussed in the previous chapter, the Government is generally not bound to order the quantity it estimated in its solicitation.²⁹⁶ Nevertheless, contractors frequently seek relief on this basis. Absent Government bad faith, i.e., that the Government failed to use the best information available, or failed to act conscientiously in preparing the estimate, these claims will be denied.²⁹⁷

C. Other Acts which Affect Ordering expectations

1. Failure to timely issue new contract

Where the Government increases its orders beyond what the contractor anticipated because it failed to timely issue a new contract, the contractor may argue the Government acted in bad faith. However, this claim will likely only succeed where the Government attempts to exceed the stated maximum or where there is no stated maximum and the increased quantity causes the contractor significant increased costs. Where the Government

²⁹⁵ Art Anderson Associates v. United States, (Fed. Cir., Unpub. dec.), 3 FPD Para. 108 (1985).

²⁹⁶ See Chapter 3D, *supra*.

²⁹⁷ *id.*

orders are within contract limits, or only cause a moderate increase in the quantity anticipated by the parties, the contractor will be held to the contract unit price. In Victory Container Corp.,²⁹⁸ the board rejected contractor's argument that the Government was stockpiling under this contract because it hadn't timely sought a follow-on contract. The board found the Government was properly replenishing depleted stocks and since this was a requirements contract the contractor was obligated to fulfill the Government's orders. When the contractor failed to do so, the Government properly terminated the contractor for default.

2. Ordering from other contractors

An indefinite quantity contract allows the government to place orders with other contractors, as long as the Government orders the guaranteed minimum from the contractor.²⁹⁹ There is no requirement that orders first be placed under the indefinite quantity contract, before the Government places orders with others. Nor is it unusual for the Government to award several indefinite quantity contracts for the same supplies or services. Nevertheless, contractors continue to seek redress when the government orders the contracted supplies or services from

²⁹⁸ GSBCA No. 5596, 81-2 BCA Para. 15,346 (1981).

²⁹⁹ FAR 16.501(b)(3).

others. In Alta Construction Company,³⁰⁰ the PSBCA found no breach of contract where the government awarded three work orders to other firms, because the contract was an indefinite quantity one, the government had fulfilled its obligation to order the minimum work orders from the contractor, and the contract specifically reserved the government's right to procure similar work from other firms. "While diversion of requirements is a recognized concept in requirements contracts [citations], it has no relevance to an indefinite quantity contract."

On the other hand, to place orders with another contractor under a requirements contract, the Government must first have reserved such a right. Usually this reservation is limited to: an urgent need that the contractor can not or does not fill;³⁰¹ an order which exceeds the limit on total orders allowed by the contract;³⁰² permitted multiple awards, such as a partial set-aside;³⁰³ or where an item, manufactured according to Government specifications, is for Government use and resale, in which case the Government can procure similar products by brand name for resale.³⁰⁴ A breach was found when the Government diverted tire recapping service from the requirements contractor to a motor

³⁰⁰ PSBCA No. 1395, 87-2 BCA Para. 19,720 (1987).

³⁰¹ FAR 52.216-21(e).

³⁰² FAR 52.216-21(d).

³⁰³ FAR 52.216-21(c) Alternates III and IV.

³⁰⁴ FAR 52.216-21(g) Alternate II or IV.

pool contract, which included that service in its many items.³⁰⁵

3. Ordering in-house

In indefinite quantity contracts, the Government may provide the supplies or services from in-house resources, except for the amount it guaranteed to procure from the contractor.³⁰⁶ Therefore, where the Government conducts a voluntary self-help program for tenants of housing facilities that the contractor was required to maintain, breach damages are not available. However, in requirements contracts, the Government must first have reserved the right to procure its needs in-house. Failure to reserve such a right, and then using in-house resources is a breach of contract. Thus, it was a breach to perform gopher control service outside a requirements contract for pest control.³⁰⁷ Absent bad faith, the contractor's relief is an equitable adjustment, not breach damages.

4. Ordering beyond the contract period

The Government may not require the contractor to fulfill orders placed after an indefinite quantity or requirements

³⁰⁵ S&W Tire Services, Inc., GSBCA No. 6376, 82-2 BCA Para. 16,048 (1982).

³⁰⁶ Maintenance Engineers v. United States, 749 F.2d 724, 3 FPD Para. 79 (Fed. Cir. 1984).

³⁰⁷ Torncello v. United States, supra note 284.

contract period ends.³⁰⁸ However, if the contractor honors such orders, he is entitled to quantum meruit,³⁰⁹ which will generally be the contract unit price, although it may be more or less if a party can show an increase or decrease is warranted. Distinguish this from where the Government places an order during the contract period which is not or can not be filled during the contract period. Here the Government may require the contractor to fulfill the order, and the contractor's recovery is only the contract unit price.³¹⁰ To avoid misunderstanding, the parties usually set a cut off date after which the contractor is no longer required to deliver on such orders.³¹¹

5. Failure to timely award the contract

The Government occasionally does not award in a timely manner, thus, the contractor's offer expires. The Comptroller has ruled that the running of the acceptance period confers on

³⁰⁸ Cf. Appeal of Lockheed Electronics Co., ASBCA No. 16667, 72-1 BCA 9442 (1972) (order placed 18 months and one day after the contract was signed was found within the contract period since the first day didn't count as the time period was for optional orders, not the mandatory order.)

³⁰⁹ Cf. United States v. Amdahl, 786 F.2d 387, 5 FPD Para. 23 (Fed. Cir. 1986) (where the court, finding an "equitable exception", allowed recovery under a contract-implied-in-fact allowing the contractor quantum meruit or quantum valebant); Honeywell Information Systems, Inc., Comp. Gen. Dec. B-207557, July 11, 1983, Unpub. But cf. H. Landau & Co. v. United States, 16 Cl. Ct. 35, 7 FPD Para. 162 (1988) (limiting Amdahl to its facts).

³¹⁰ FAR 52.216-21(f) and 52.216-22(d); Appeal of California Export Packing Co., GSBCA No. 2168, 69-2 BCA 7956 (1969), reconsid. denied 70-1 BCA 8091 (1970); Cities Service Oil Co. v. United States, 118 Ct. Cl. 113 (1950).

³¹¹ *id.*

the contractor a right to refuse to perform a contract subsequently offered, or he may waive this right and contract anyway.³¹² The rationale is that an offeror may extend his bid period or revive it.³¹³

However, occasionally the Government does not ask for an extension or a revival, but merely "accepts" the expired offer and places an order. Once an order is placed on the expired offer, there is occasionally a dispute as to the effect when the contractor fills that order. In one indefinite quantity contract case, the contractor filled the first order but refused to fill a subsequent order. The Government's default termination for anticipatory breach was overturned, because the Board considered the Government's initial order only bound the contractor to fill that order. Subsequent Government orders were considered counter-offers which the contractor was free to accept or reject.³¹⁴ While the dissent agreed that the purported acceptance by the Government after the acceptance period, along with placing an order for the minimum quantity was a counter-offer, it argued, the counter-offer necessarily incorporated all the terms and conditions of the IFB and the

³¹² Cecile Industries, Inc., Comp. Gen. Dec. B-207277.3, 82-2 CPD Para. 299 (1982); Cf. Isometrics, Inc., Comp. Gen. Dec. B-204556, 82-1 CPD Para. 340 (1982) (bid treated as revived).

³¹³ 53 Comp. Gen. 737 (1974).

³¹⁴ A.C. Ball Company, ASBCA No. 19375, 75-1 BCA Para. 11,298 (1975); Cf. Dunrite Tool & Die Corp., ASBCA No.16708, 16885, 73-1 BCA Para. 9940 (1973) (finding a Government's late acceptance was a counter-offer, and the contractor's response, being qualified, a rejection).

contractor's bid. Therefore, since part performance may constitute an acceptance of a counter-offer, and since the contractor had filled the initial order, a contract, incorporating all the essential terms and conditions of the lapsed bid and the IFB, was entered into. Thus, the contractor was bound to fill all the Government's orders to the stated maximum.³¹⁵ The dissent's rationale was used by the majority in a requirements contract case, where the government never sought an extension of bid acceptance period, but awarded the contract anyway. In this case, the board found the contractor signed a "modification", which arguably ratified the original contract.³¹⁶

D. Distinguishing Deductive Changes from Partial Terminations for Convenience

When there is to be a reduction in supplies or services, the contracting officer must decide whether to use a change order or a partial termination for convenience. Generally, if the reduction is significant, a partial termination should occur, while if the reduction is smaller, then a deductive

³¹⁵ id.

³¹⁶ Input Data, Inc., GSBCA No. 4826, 80-2 BCA Para. 14,711 (1980); Cf. Zip-O-Log Mills, Inc., AGBCA No. 85-160-3, 85-2 BCA Para. 18,164 (1985), (an output contract for the sale of timber by the Government to the contractor where the AGBCA found an acceptance during the bid acceptance period, but, if not, at worst, the Government's acceptance was a counter-offer that the contractor accepted).

change order is best used.³¹⁷ Since the parties do not always follow this rule, however, the courts and boards will look to how the parties treat the action in determining the appropriate remedy. The major impact is on the price the Government must pay for the action.

If a deductive change is found, the contractor has his profit reduced by the amount applicable to the actual cost of work deleted,³¹⁸ while for a partial termination for convenience, the contractor only gets a reasonable profit from the work actually performed.³¹⁹ However, for a partial termination, the contractor also receives an equitable adjustment on unterminated work and settlement expenses. Thus, the financial advantages will vary depending on the profit margin, and the price bid on work to be reduced. For example, the elimination of gopher control from a pest control requirements contract could be a significant action if the contract price per gopher is high, and there are many gophers. If so, the Government will have to pay for a partial termination. On the other hand, placing an order, and then reducing the amount of the order might be considered less

³¹⁷ American Construction & Energy, Inc., ASBCA No. 34934, 88-1 BCA Para. 20,361 (1988); J.W. Bateson Co. v. United States, 308 F.2d 510, 8 CCF 71,867 (5th Cir. 1962).

³¹⁸ FAR 52.243-1.

³¹⁹ FAR 49.202 and 52.249-2(f).

significant, supporting a deductive change determination.³²⁰ If the contract price for the deleted or reduced items is low, the action will likely be a deductive change. Therefore, the contracting officer and contractor should carefully consider the actual price of any reduction in work or line items.

In requirements and indefinite quantity contracts it is difficult to determine whether a reduction is significant since the actual quantity is unknown until the end of the contract period. Therefore, the contractor may have to act before he has all facts available, since to recover for a deductive change, he must give notice of his right to an adjustment within a short time after the action, usually 30 days,³²¹ while generally for a partial termination no notice is needed.³²² Finally, because of this indefiniteness in quantity during the contract period, absent the Government ordering from another source or performing in-house, deductive changes are probably limited only to reductions in quantities already ordered or the amount guaranteed. No cases discuss this, however.

³²⁰ Ronald A. Torncello and Soledad Enterprises, Inc. v. United States, 231 Ct. Cl. 20, 681 F.2d 756 (1982).

³²¹ FAR 52.243-1 and 52.243-4.

³²² FAR 52.249-1, 52.249-2, and 52.249-4.

CHAPTER 5 - TERMINATIONS

Terminations are invaluable management tools, for they allow the Government to end all or part of a contract obligation, when necessary or desirable.³²³ The termination for default allows the Government to end all or part of the contract with a contractor who is failing to fulfill contract obligations.³²⁴ In contrast, the termination for convenience allows the Government to end a part or all of the contract whenever the contracting officer determines that it is in the Government's interest to do so.³²⁵ The contractor must then submit a termination settlement proposal to the contracting officer. Both types of terminations initially call for joint resolution by the parties.³²⁶ However, if the parties cannot agree on the settlement, the contracting officer may unilaterally determine the amount where the termination is for convenience, but such a right is not specifically stated for

³²³ Less than 1% of all Government contract actions are terminated convenience or default. In fiscal year 88 (FY 88), there were only 625 terminations for default and 1785 for convenience actions. In FY 87 there were 487 default terminations and 1521 convenience terminations. While this does not seem much, they make up a large portion of disputes, from protests to claims, in Government contracting. See Federal Procurement Data System Standard Report FY 88 and FY 87, respectively.

³²⁴ FAR 52.249-8.

³²⁵ FAR 52.249-1 through 52.249-3.

³²⁶ FAR 49.103 and 49.402.

defaults.³²⁷ In either case, the contractor still retains appeal rights under the Disputes clause.³²⁸

The Government's right to terminate for default is derived from the common law, which allows one party to terminate further performance once the other party has committed a significant breach.³²⁹ The termination for convenience clause, however, is unique to Government contracting and has no similar common law genesis.³³⁰ It allows the Government to terminate a contract even where there is no breach by the contractor. The only limiting factor stated in the clause is that there must be a finding that the termination is in the best interests of the Government.³³¹ This right is not reciprocal, and the contractor may not require the Government to exercise it.³³²

When applied to indefinite delivery contracts, these termination clauses raise questions about the enforceability of these type of contracts. They also impact on the shifting of financial risk and the termination for convenience arguably raises contract price.

³²⁷ Compare FAR 52.249-2(f) and 52.249-3(f) with 52.249-8(f).

³²⁸ FAR 52.249-1, 52.249-2(i), 52.249-3(i), FAR 52.249-8(f).

³²⁹ Keyes, Government Contracts, Chapter 49, Sec. 49.1 (1986) citing Corbin at 5A Corbin on Contracts Sec. 1237 (1964).

³³⁰ *id.*

³³¹ FAR 49.101 and 52.249-1, 52.249-2, 52.249-3.

³³² Rotair Industries, Inc., ASBCA No. 27571, 84-2 BCA Para. 17,417 (1984); Commercial Cable Co. v. United States, 170 Ct. Cl. 813, 385 F.2d 424 (1965).

In the first part of this chapter, terminations for default in requirements and indefinite quantity contracts are discussed, including the rights of the Government to default a contractor and the type of Government recovery available, and the rights of the contractor when the Government improperly terminates for default. In Part B, the more controversial termination for convenience is analyzed. Because requirements and indefinite quantity contracts are intimately tied up in the evolution of the clause, the history of the clause as it applies to these contract types is examined. Also, the rights of the contractor for improper termination are discussed.

A. Terminations for Default

The Government may terminate a supply or service contractor for default when there is a failure to: deliver the supplies or perform the services within the time specified, including any extensions granted; make progress, thus endangering contract performance; perform any other material provisions of the contract.³³³ If the termination is for one of the latter two reasons, the contractor is supposed to be given an opportunity to cure.³³⁴ If the contractor does not cure, or, an opportunity to cure is not required, the Government may re-procure the

³³³ FAR 52.249-8(a)(i)-(iii).

³³⁴ FAR 52.249-8(a)(2).

supplies or services from another,³³⁵ from in-house resources, or even from the defaulted contractor.³³⁶

If the contractor has partially performed, the Government's right to default may be restricted. For instance, if the contractor substantially completed his contract obligations, the Government may be unable to default the contractor. Also, even if there is no substantial completion, termination may still be limited to severable portions of the contract which are unsatisfactory, rather than to the entire unexecuted portion of the contract. The type of contract also affects the Government's right to default.

1. Monetary relief under a termination for default

In all fixed-price or fixed-price incentive contracts, the Government may recover from the defaulting contractor, reasonable excess costs of reprocurement incurred, as well as liquidated damages until the time of completion of the

³³⁵ Cascade Pacific International v. United States, 773 F. 2d 287, 4 FPD Para. 49 (Fed. Cir. 1985); The Chemithon Corp. v. United States, 1 Cl. Ct. 747, 1 FPD Para. 81 (1983).

³³⁶ PRB Uniforms, Inc., 56 Comp. Gen. 976 (1977) (defaulted contractor may not be automatically excluded from competition for reprocurement contract); but see, Morton Manufacturing, Inc., ASBCA No. 30716, 89-1 BCA Para. 21,326 (1989) (generally no duty to solicit defaulted contractor on reprocurement).

contract.³³⁷ However, where the Government loses its right to assess excess reprocurement costs, it may still collect any actual damages it can prove. Thus, in a case where the Government failed to offer the follow on contract to prove its excess re-procurement costs, these costs were denied. However, since there was adequate evidence to show some actual damages, albeit lower than the reprocurement costs, the Government was awarded these costs.³³⁸

2. Government's default terminations rights under indefinite delivery contracts

The Government's right to terminate for default in indefinite quantity and requirements contracts is the same as for definite quantity contracts. In fact, the same default clause is generally used for all types of fixed-price supply and service contracts.³³⁹ Further, a mandatory clause is inserted to allow for slight variations in quantity due to shipping or manufacturing processes.³⁴⁰ The extent of the variation depends upon what is the normal commercial practices of the particular

³³⁷ While liquidated damages are recoverable along with excess costs of reprocurement, actual damages, intended to be covered under the liquidated damages provisions, are not. Cibinic & Nash, Administration of Government Contracts, 2d ed., Chapter 9, at 719, 766-767, 770 (1985).

³³⁸ Cascade Pacific International v. United States, 773 F. 2d 287, 4 FPD Para. 49 (Fed. Cir. 1985).

³³⁹ FAR 49.504(a)(1) and 52.249-8.

³⁴⁰ FAR 12.401, 12.403, and 52.212-9.

industry for the particular item.³⁴¹ Thus, to terminate for default in indefinite-delivery supply and services contracts, the contractor's failure to perform must be more than de minimis, i.e. reasonably substantial. If substantial performance has occurred, default is improper.³⁴² Just what is de minimis, of course, is determined on a case by case basis, using factors, such as, the intent of the parties, the terms of the contract, and normal industry practices are used to determine whether or not default has occurred. Thus, where a requirements contract for typewriter maintenance was defaulted, the board found the default improper as the contractor had "substantially complied" with the contract's requirements.³⁴³

Where the Government improperly defaults, the termination is usually treated as one of convenience. This will be discussed further later in this chapter. Where the Government properly defaults the contractor it is entitled to recover reasonable excess procurement costs.³⁴⁴ However, it is the extent of recovery that differs depending on the contract type.

³⁴¹ FAR 12.401(b).

³⁴² Handyman Building Maintenance Co., IBCA Nos. 1335-3-80, 1411-12-80, 83-2 BCA Para 16,646 (1983)(improper default of janitorial services).

³⁴³ ITRA Coop. Assn., GSBCA No. 7974, 89-3 BCA Para. ____ (Sept 29, 1989) (where the board also concluded that the numerous deficiencies in one agency might permit a partial default termination as to that agency, but not a termination of the entire contract).

³⁴⁴ FAR 52.249-8(b). Chemithon Corp. v. United States, 1 Cl. Ct. 747, 1 FPD Para. 81 (1983).

a. Reprocurement under a requirements contract

If the contract is a requirements contract, it is clear that the Government may recover not only to the extent of any unfilled orders, but also on the entire quantity which the Government needed, limited only by any stated maximum.³⁴⁵ Where the contract is severable, the recovery is, of course, limited to the defaulted severable portions.³⁴⁶

Another problem with requirements contracts is where there is a partial small business or labor surplus area set-aside. If under the contract, the Government has agreed to order one-half of its needs from each of the contractors,³⁴⁷ what happens when one contractor defaults? It appears that the Government, absent urgent needs, must re-solicit the defaulted portion, rather than merely shifting all of its needs to the non-defaulted contractor.³⁴⁸

b. Reprocurement under an indefinite quantity contract

On the other hand, if the contract is one of indefinite quantity, reprocurement costs depend upon the sufficiency of the

³⁴⁵ Interroval Corp., GSBCA No. 5439, 83-1 BCA Para. 16,399 (1983).

³⁴⁶ ITRA Coop. Assn., GSBCA No. 7974, 89-3 BCA Para. ____ (Sept 29, 1989); Naughton Energy, Inc., ASBCA No. 33044, 88-2 BCA Para. 20,800 (1988); Chemithon Corp. v. United States, 1 Cl. Ct. 747, 1 FPD Para. 81 (1983).

³⁴⁷ FAR 52.216-21(c) Alternate III and IV.

³⁴⁸ Miltex Industries, Inc., ASBCA Nos. 19449, 20886, 77-2 BCA 12768 (1977) (labor surplus area set-aside requirements contract).

guaranteed minimum quantity.

Where the guaranteed minimum is inadequate to support sufficient consideration for a binding contract, recovery of reprocurement costs may not be recoverable. In Willard, Sutherland & Co. v. United States,³⁴⁹ the Supreme Court held that if the indefinite quantity contract is unenforceable due to an inadequate guaranteed minimum quantity, yet the parties still conduct business as if the contract is valid, then each order placed, creates a contract, enforceable to the extent executed. This suggests that there are no reprocurement costs, since the contractor's commitment ends whenever he ceases to perform.

However, in Tennessee Soap Co. v. United States,³⁵⁰ the Court of Claims seems to have gone further and held that the contractor is bound for orders placed yet not filled. In Tennessee Soap, after supplying 40,000 pounds of an estimate quantity of 120,000 pounds of soap, the contractor failed to supply a subsequent order for 10,000 pounds. The Government defaulted the contractor and re-procured 82,350 pounds of soap over the remaining contract period. The court, citing Willard, found the guaranteed minimum of \$10.00 inadequate except to the extent the contract was performed. However, the court also bound the contractor for the 10,000 pound order that the

³⁴⁹ Willard, Sutherland & Co. v. United States, 262 U.S. 489, 43 Sup. Ct. 592 (1923). Cf. Urban Data Systems, Inc. v. United States, 699 F.2d 1147, 1 FPD Para. 60 (Fed. Cir. 1983) (contract implied-in-fact entitled contractor to quantum valebant).

³⁵⁰ 130 Ct. Cl. 154, 126 F. Supp. 439 (1954).

Government placed prior to defaulting the contractor, stating "[t]his is clearly a separable contract, enforceable only to the degree that it was performed or that the soap was ordered."³⁵¹

This suggests that contractors, who no longer wish to be bound to contracts that have inadequate guaranteed minimums, must prospectively disaffirm to avoid liability for subsequently placed orders which must be reprocured. This seems appropriate since the parties believed that a binding contract existed when they signed the document, and it places the burden upon the objecting party to notify the other of his new view of his contractual obligations.³⁵²

If the indefinite quantity contract is valid, then the guaranteed minimum relates to the entire contract. Thus, when it is defaulted, the Government should be able to recover not only for unfilled orders, but for any amounts it can prove were re-procured due to the default of this contract, regardless of any objections by the contractor.³⁵³ Thus, the contractor would

³⁵¹ Tennessee Soap Co. V. United States, 130 Ct. Cl. 154; 126 F. Supp. 439 (1954). Gavin, Government Requirements Contracts, 5 Pub Cont L J 234, 266 (1972).

³⁵² Admittedly, the court in Tennessee Soap implied that the contractor would not have been bound for the unfilled 10,000 soap order had he appealed the contracting officer's adverse decision on that order. While one may wish to argue that the court meant that a contractor who promptly disavows a contract after an order is placed is not liable to fill that order, it seems clear the contractor would have escaped liability because an excuse for a condition beyond his control, not because of the prompt disavowal.

³⁵³ Hyspan Precision Products, ASBCA No. 19664, 76-2 BCA Para. 11,922 (1976).

be liable, not only up to the guaranteed minimum, but for the entire amount reasonably reprocured during the contract period.

Proving reprocurement costs in an indefinite quantity contract is difficult if the Government has several indefinite quantity contracts for the same supplies or services.³⁵⁴ If the prices with other contractors was higher, the Government should be able to show that it would have procured under the defaulted contract, as it is supposed to obtain the best overall cost in its procurement. However, if the Government's past practice has been to spread its orders around, recovery may be limited or even denied.

3. Contractor rights for wrongful default termination

If the Government acts in bad faith³⁵⁵ in defaulting a contractor, it has long been held a breach of contract, entitling the contractor to recover the full measure of common-law damages resulting from the wrongful act,³⁵⁶ including anticipated profits.³⁵⁷ In this sense, the Government is

³⁵⁴ See generally, FAR 16.504, and discussion of indefinite quantity contracts in Chapter 1, *supra*.

³⁵⁵ Sometimes the cases overturn default actions because the Government "abused its discretion". This is just another form of bad faith, and therefore is included in this discussion.

³⁵⁶ United States v. Behan, 110 U.S. 338 (1884); United States v. Spearin, 248 U.S. 132 (1918).

³⁵⁷ Northern Helix Co. V. United States, 207 Ct. Cl. 862, 524 F.2d 707 (1975); G.L. Christian and Assoc. v. United States, 160 Ct. Cl. 1, 312 F.2d 418 (1963).

treated as any private party. However, absent bad faith, erroneous default terminations are treated as terminations for convenience for assessing damages,³⁵⁸ even where the Termination for Convenience clause is left out of the contract.³⁵⁹ These damages are discussed in the following section.

B. Terminations for Convenience

Terminations for convenience have been accepted in government contracting since the Civil War.³⁶⁰ Developed to

³⁵⁸ FAR 52.249-8(g) states in part: If, after termination, it is determined that the Contractor was not in default, or that the default was excusable, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Government.

³⁵⁹ G.L. Christian & Associates v. United States, 160 Ct. Cl. 1, 312 F.2d 418 (1963), 170 Ct. Cl. 902, cert. denied, 382 U.S. 821 (1965). But Cf. Monarch Enterprises, Inc., VABCA No. 2239 & 2296, 86-3 BCA Para. 19,281 (1986) (where the Termination for Default clause, being optional, was left out of the contract. The board held that the Christian doctrine did not apply to optional clauses, thus the improper default could not be treated as a convenience for remedy purposes. Thus, the contractor was entitled to common law damages, including anticipated profits, even without a showing of bad faith.)

³⁶⁰ Although not termed a termination for convenience, the Supreme Court in United States v Corliss Steam-Engine Co., 91 U.S. 321, 23 L.Ed. 397 (1876), recognized that procuring agencies have the power to modify, suspend, and settle contracts that have been subjected to great changes. Also, see Garfield v. United States, 93 U.S. 242, 23 L.Ed 779 (1876), a requirements contract for transporting mail Alaska at least once a month, which recognized the Government's right to terminate for convenience and pay an established termination fee. Again the Court didn't call it a termination for convenience, but pointed out that the Postal Service regulation allowed the Postmaster General to discontinue the service "whenever in his judgement the public interests required it..." The Court then allowed payment only of the "indemnity agreed upon", rather than breach of contract damages. This doctrine expanded over the years to include statutory recognition of the right to terminate government contracts for convenience, and included the

settle contractual obligations arising during wartime, it was a method which allowed the Government to avoid continuing contracts for outdated or unneeded supplies or services.³⁶¹ Throughout the years, the language of the termination for convenience clauses has varied little in substance, essentially giving the Government the right to terminate contracts for its convenience or best interests.³⁶² From the Civil War through World War II, this right appears to have been limited to emergency or wartime demands, but clearly has been used in peacetime, non-emergency situations for almost 40 years.³⁶³

evolution of the termination for convenience clause. For a detailed, and fairly accurate discussion of the history of the right to terminate for convenience, see Ronald A. Torncello and Soledad Enterprises, Inc. v. United States, 231 Ct. Cl. 20, 681 F.2d 756 (1982); and Young, Limiting the Government's Ability to Terminate for Convenience Following Torncello, 52 Geo. Wash. L. Rev. 892 (1984).

³⁶¹ Ronald A. Torncello and Soledad Enterprises v. United States, (hereinafter Torncello v. United States), 231 Ct. Cl. 20, 681 F.2d 756 (1982).

³⁶² Examples of the right to terminate for convenience include: United States v. Speed, 75 U.S. 77, 19 L.Ed. 449 (1869) (Rule 1179 of the Army Regulations of 1863 required inclusion of a clause, in contracts for supply of subsistence stores, allowing the Commissary of Subsistence to terminate such contract at his discretion).

Garfield v. United States, 93 U.S. 242, 23 L.Ed. 779 (1876) (Postal Regulation 263, gave Postmaster General authority to discontinue entirely a contractor's service under a service contract whenever "in his judgement, the public interests required it").

Sylvan Crest Sand & Gravel Co. v. United States, 150 F.2d 642 (2nd Cir. 1945) (contract allowed the Procurement Division to cancel the contract at any time).

Armed Service Procurement Regulation (ASPR), Section VIII, Part 7, s 8-701 et seq. and Federal procurement Regulation (FPR) 1-8.701 through 1-8.705 (allowed termination whenever the contracting officer determined that it was in the best interest of the Government.)

³⁶³ Torncello, supra note 359 (citing Nash & Cibinic, Federal Procurement Law).

1. Unfettered discretion in the use of the termination for convenience

Under a plain reading of the language of the clause, the contracting officer has an "unfettered discretion" to exercise the Government's right to terminate for convenience, limited only by the "best interests" of the Government, and the duty not to act in bad faith, abuse the discretion, or commit an illegal act.³⁶⁴ The breadth of this right was discussed in Colonial Metals v. United States,³⁶⁵ a definite quantity supply contract, where the Court of Claims found a termination for convenience proper even though the reason for termination was to buy the product at a cheaper price elsewhere, stating:

Termination to buy elsewhere at a cheaper price is essentially such a termination as has repeatedly been approved. The added element that the contracting officer knew of the better price elsewhere when he awarded the contract to plaintiff - in the absence of some proof of malice or conspiracy against the plaintiff [citation] - means only that the contract was awarded improvidently and does not narrow the right to terminate. The clause is not designed to perpetuate error, but to permit its rectification.

Termination for convenience is as available for contracts improvident in their origin as for contracts which supervening events show to be onerous or unprofitable for the Government. Absent bad faith, therefore, or some other wrong to the plaintiff or illegal conduct such as does not here appear, the Government alone is the judge of its best interest in terminating a contract for convenience, pursuant to the discretionary power reserved by the clause to the Government's contracting officer. Accordingly, no breach took place by the termination, and the plaintiff became entitled only to the costs and profits

³⁶⁴ Librach v. United States, 147 Ct. Cl. 605, 611 (1959); Line Construction Co. v. United States, 109 Ct. Cl. 154, 187 (1947).

³⁶⁵ 204 Ct.Cl. 320, 494 F.2d 1355 (1974).

allowed on a termination for convenience.

This view was firmly rejected by the court in Torncello v. United States³⁶⁶ eight years later, and the Court of Appeals for the Federal Circuit in Maxima Corp. v. United States³⁶⁷ in 1988.

2. Constructive terminations for convenience

Another issue which threatened the enforceability of Government contracts was the expansion (or perhaps merely the recognition) of the right to allow constructive terminations for convenience.

A constructive termination for convenience may occur where the Government does not comply with its procedures for terminating for convenience, but acts in a manner which effectively terminates the contract in whole or in part. Examples include: where the Government improperly terminates for default, fails to provide notice of termination, or where it substantially reduces the supplies or services required. In John Reiner & Co. v. United States,³⁶⁸ the court held that monetary relief for any Government action preventing the contractor from further performance would be limited by that available under the Termination for Convenience clause. In

³⁶⁶ 231 Ct. Cl. 20, 681 F. 2d 756 (1982).

³⁶⁷ 847 F.2d 1549, 7 FPD Para. 60 (Fed. Cir. 1988).

³⁶⁸ 163 Ct. Cl. 381, 325 F.2d 438 (1963), cert. denied, 377 U.S. 931 (1964).

another leading case, G.L. Christian & Associates v. United States³⁶⁹, the court found a termination for convenience action proper, even though there was no termination for convenience clause in the contract. The court reasoned that the regulations, which had the force and effect of law, required inclusion of the convenience termination clause, therefore, it must be read into the contract, absent a specific finding that it was bargained out of the contract. Thus, the traditional contract law remedy for breach of contract allowing the contractor damages, which include lost profits, were now eliminated by the Termination For Convenience clause, even where the clause had not been invoked.

This broad view of the Government's right to avoid its contractual obligations was criticized by several commentators, primarily because it threatened to make the Government's contract promise illusory.³⁷⁰ These cases and their subsequent criticism generated the first comprehensive effort by the courts to analyze the evolution of the convenience clause and its purpose in government contracting.

³⁶⁹ 160 Ct. Cl. 1, 312 F.2d 418, cert. denied, 375 U.S. 954 (1963), 170 Ct. Cl. 902, cert. denied, 382 U.S. 821 (1965).

³⁷⁰ Iorncello, supra note 359 at 767.

3. Torncello and the use of convenience terminations in requirements contracts

Torncello v. United States,³⁷¹ overruled the holding of Colonial Metals,³⁷² but the court divided as to the extent of the limitations to be placed on the use of the convenience termination.³⁷³ It also, re-affirmed the right to constructively terminate for convenience.

In this case, a contract was awarded to maintain the housing facilities at six Navy sites. Since the solicitation required submission of bids on an all or none basis, the winning contractor's bid on one line item, pest control, far exceeded the cost of procuring the service locally. Nevertheless, the Navy awarded the contract to Soledad, but during the contract period, acquired the gopher extermination services from another contractor. When Soledad learned that the Navy was acquiring such services, it initially offered to reduce its unit price for that specific type of extermination from \$500.00 to \$35.00. However, it later withdrew this offer (after the Navy had not taken it up for a period of time) and demanded the Navy live up to the terms of the original contract. Soledad eventually went

³⁷¹ 231 Ct. Cl. 20, 681 F.2d 756 (1982).

³⁷² 204 Ct. Cl. 320, 494 F.2d 1355 (1974).

³⁷³ Despite the broad scope of the lead opinion, the concurring opinions specifically limited the holding to: requirements contracts only; and to prevention of the use of the constructive termination for convenience where the circumstance was known to the government prior to award. See the concurring opinions of Judges Friedman, Davis, and Nichols at 773, 773, and 774 respectively.

bankrupt and Ronald Torncello, the president of the company and successor to its rights, submitted a claim for breach of the pest control requirements of the contract. The Navy denied the claim, as did the ASBCA, and the contractor appealed to the Court of Claims.

The Navy argued that the contract was an indefinite quantities contract with no guaranteed minimum agreement, and therefore was illusory. In lieu of this the Navy argued that they had a right to partially terminate the contract for convenience. The contractor argued the contract was a requirements contract, and that the Navy was obligated to order all its needs from Soledad. Having failed to do so, the contractor argued, the Navy was liable for damages for breach of contract.

The court found the contract was indeed a requirements contract, reasoning: the parties obviously intended to contract; an indefinite quantities contract without a guaranteed minimum would fail for lack of consideration; and since no minimum was established, the only other alternative was that the parties had

entered a requirements contract.³⁷⁴ It then found the Navy in breach, as it could not constructively terminate for convenience absent a major or "constructive" change in circumstances.

The court alleged that this "changed circumstances" rule had been consistently followed through the ages, except for the aberrant decision in Colonial Metals. However, the lead opinion was not adopted by the other judges in toto. Rather, the concurring opinions make clear that the decision is limited to three points: in requirements contracts, terminations for convenience are allowed only where there are changed

³⁷⁴ This reasoning is an example of a court stretching to enforce a contract. It is by no means clear from the decision whether the parties knew an indefinite quantity contract could not exist without a guaranteed minimum. (Perhaps one can presume the Government contracting officer knew what the parties were agreeing to, however, if the contractor was new to the world of business, it is certainly a questionable assumption by the court to expect him to know the requirements for an indefinite quantity contract.)

Assuming they intended to create an indefinite quantities contract, then the court could have found, as in Willard that the contract failed for lack of mutuality of obligation. Thus, the Government would be bound only to the extent that it placed orders and the contractor accepted the orders. This would make the parties "agreement" essentially a basic ordering agreement. For some reason, the courts and boards are reluctant to accept that there are sound reasons for parties to enter into "agreements to agree".

Finally, the best conclusion may be that the parties did not really consider what type of arrangement they entered. As such, perhaps the court should have found no valid contract or agreement, and awarded quantum meruit only the amount of benefit conferred upon the Government by the work performed. Since the Government had already paid contract price for work performed, it is unlikely any further payment would result.

circumstances, or else the requisite consideration is vitiated;³⁷⁵ in any government contract, changed circumstances do not include the ability to exculpate oneself to obtain a better price, if that price was known prior to award;³⁷⁶ and the requirement for adequate consideration also requires that the right to terminate for convenience be limited.³⁷⁷

After Torncello, the boards were reluctant to accept the "changed circumstances" rule. One board specifically refused to follow Torncello stating:

VTI further argues however, that Torncello v. United States, supra establishes a rule that a convenience termination is valid only where there is a "change in circumstances", and that the Government has the burden of proving such change. In Torncello, three of the six judges en banc subscribed to the "change in circumstances" rule while the remaining three concurred in result only, one on unstated grounds and two on the grounds that the facts showed the termination was in bad faith and an abuse of discretion. We agree with the concurring opinions and will follow the bad faith/abuse of discretion rule regarding convenience-termination until the "change of circumstances" rule is adopted by a clear majority of the Court.³⁷⁸

Nevertheless, the board made a finding that there was a

³⁷⁵. The Torncello court reasoned that if the government entered into a requirements contract knowing that it wouldn't order its requirements from the contractor, it transformed the contract into an indefinite quantities contract with no guaranteed minimum. This type of contract, otherwise referred to as a want, wish, or will contract, lacked the requisite consideration and thus was illusory, and specifically found unenforceable by the Supreme Court in Willard, Sutherland, & Co. v. United States, 262 U.S. 489, 43 S.Ct. 592, 67 L.Ed. 1086 (1923).

³⁷⁶ See Torncello, supra note 359 at 770.

³⁷⁷ See Torncello, supra note 359 at 772.

³⁷⁸ Vec-Tor, Inc., ASBCA No. 25807, 26128, 85-1 BCA Para. 17,755 (1985); See Tamp Corporation, ASBCA No. 25692, 84-2 BCA Para.17,460 (1984).

sufficient change in circumstances to justify the termination. In another agency, the board based its decision on the bad faith rule, but, while not rejecting Torncello's changed circumstances rule, noted the disagreement by the ASBCA and then held that even under the Torncello "changed circumstances" rule, the termination was proper.³⁷⁹ And another agency limited Torncello to its facts stating:

We would therefore limit the principle of Torncello to similar facts as were found in that case. The United States Claims Court and other Boards have shown a similar reluctance to apply the holding in Torncello beyond the scope of the specific fact situation of that case. [citations] And this reluctance to apply Torncello broadly has been particularly true with respect to the principle appellant urges upon us, i.e., that Torncello abandoned forever the standard of bad faith or abuse of discretion as a basis for invoking the convenience-termination clause. In fact, the Claims Court and the Boards have continued to apply that standard. [citations] We find no basis for refusing to apply that standard in this case.³⁸⁰

Nevertheless, the board then adopted Torncello in part, making it applicable to indefinite quantities contracts, as well as requirements contracts.

Since it is axiomatic that every contract, to be valid, must be supported by consideration, we find that the principles enunciated in Torncello, that the Government cannot employ the termination for convenience clause to totally shield itself from a breach claim where it has, in circumstances similar to those in Torncello, vitiated the bargained for consideration, are just as applicable to ASI's indefinite quantities-type supply contract as they

³⁷⁹ Executive Airlines, Inc., PSBCA No. 1452, 87-1 BCA Para. 19, 594 (1987)(finding an indefinite quantities contract rather than a requirements contract).

³⁸⁰ Automated Services, Inc., DOTBCA No. 1753, 87-1 BCA Para. 19,459 (1987).

were to Torncello's requirements-type supply contract.

Several other cases distinguished Torncello,³⁸¹ with only one board case adopting the rule outright, perhaps because it was right on point.³⁸²

4. Extending Torncello to indefinite quantity and other contracts

With all the dissention, it took a holding by the Court of Appeals for the Federal Circuit to finally confirm the "changed circumstances" rule. In Maxima Corporation v. United States,³⁸³ the court extended the holding of Torncello to other contracts, and placed limits on the use of constructive terminations for convenience. In this case, the Government had solicited an indefinite quantity contract for typing, copying, and related services. Despite the suggestions of the contractor to change the terms to a cost plus fixed fee arrangement, the Government awarded Maxima the contract with the guaranteed minimum price. During contract performance, the contractor repeatedly warned

³⁸¹ Adams Manufacturing Co., 82-1 BCA Para. 15,740 (1982), affirmed, 714 F.2d 161 (Fed. Cir. 1983)(where the Government's breach of a requirements contract by not informing the contractor of a moratorium on equipment purchases was treated as a termination for convenience); See, Municipal Leasing Corp. v. United States, 7 Cl. Ct. 43, 3 FPD Para. 82 (1984)(definite quantity contract where Government not allowed to use constructive termination for convenience, as failure to exercise option, was in bad faith).

³⁸² S&W Tire Services, Inc., GSBGA No. 6376, 82-2 BCA Para. 16,048 (1982).

³⁸³ 847 F.2d 1549, 7 FPD Para. 60 (Fed. Cir. 1988).

the Government that it was not going to reach even its guaranteed minimum orders. Due to a delay in awarding a follow-on contract, the Government and the contractor agreed to extend the contract for another month. Upon contract completion, the Government paid the contractor the balance owing on the guaranteed minimum price. A year later the Government sought repayment of the guaranteed, but unordered sum, arguing that payment was erroneously made, as it was entitled to constructively terminate the contract for convenience. Therefore, the Government argued, it was only required to pay convenience termination costs, not the cost of the guaranteed minimum. The contractor refused and the Government filed suit.

The ASBCA held for the Government and ordered repayment, concluding that the Government always had a right to seek repayment of sums wrongfully paid out, and that the contract failed anyway for lack of consideration. On appeal, the Court of Appeals for the Federal Circuit reversed holding: this was a valid indefinite quantities contract with a guaranteed minimum; the parties had entered another contract extending the terms another month, which also had adequate consideration; and the Government only had a reasonable time to assert claims, and a year was clearly too long. Therefore, a constructive termination for convenience would not lie.³⁸⁴

³⁸⁴ Inexplicably the court did not require the contractor to refund the costs not incurred on the unfilled portion of the guaranteed minimum. This is discussed at ____ supra.

Thus, the Maxima court summarized the law on terminations for convenience as follows:

The jurisprudence makes clear that termination for convenience, whether actual or constructive, is not of unlimited availability to the government, that it is not an open license to dishonor contractual obligations.³⁸⁵

Maxima makes clear that, absent changed conditions the Government may no longer use a constructive termination for convenience for failing to order its needs under a requirements contract, or the guaranteed minimum quantity under an indefinite quantity contract. Further, retroactive application of the right to terminate for convenience will not be allowed beyond a reasonable time, i.e., it must occur before final payment and acceptance. Finally, if the Government terminates for convenience, whether actual or constructively, it must have a reasonable basis for doing so, not just because it made a bad deal.

³⁸⁵ id.

CONCLUSION

This paper attempted to explain requirements and indefinite quantity contracts, their advantages and disadvantages, and factors to consider when selecting one of these contract types. Requirements and indefinite quantity contracts have been in existence in Government procurement almost since the start of the country. It is clear that they are needed, as they provide flexibility in funding, ordering, and commitment, that definite quantity contracts cannot.

While they are not complex contracts to form or administer, misunderstandings prevail. A perusal of any index to Board of Contract Appeals, Claims Court, or Comptroller General decisions will reveal that these contract types make up a substantial part of the disputes. Yet these disputes revolve around the same recurring issues, and erode contractor, court, board, and Comptroller support, increase disputes, and raise contract prices. By defining the Government's needs as much as possible, selecting the proper contract type after considering pricing arrangement, needs, and contract terms, and finally explaining to the contractor both the needs and contract type being used, many of the problems can be avoided or reduced. Further study, including agency monitoring and re-evaluation of mandatory and optional contract terms, could also help reduce the repetitive problems in future use of these contract types.