

## **OPTIONS: UNFETTERED GOVERNMENT DISCRETION**

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Many government contractors mistakenly believe that when a contract includes options for additional years of performance or additional quantities of goods, they will receive the benefits of those options. This is misplaced faith. Although the government may exercise an option, there is also a reasonable chance it will not. The Federal Acquisition Regulation (“FAR”) defines an option as follows:

Option means a unilateral right in a contract by which, for a specified time, the government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract.

FAR 2.101. Simply stated, unless there is special language in a contract (which there normally is not), the options are *unilateral*, and the government’s discretion to exercise them is unfettered. The government has a right *not* to exercise them, just as it has a right *to exercise them*. This was recently demonstrated once again in *Sundowner 102 LLC v. United States*, No. 12-304C (Jan. 17, 2013).

Sundowner was awarded an indefinite delivery, indefinite quantity, firm fixed price contract “for long term lease” of eight jet aircraft to the Justice Department to transport prisoners and aliens. The contract had a one year base period with seven option years. The contract included standard lease language giving the government the right to extend the contract, using the options. Apparently, Sundowner based its prices on the assumption that it would receive orders for 8 years. The government ordered service for the base year plus two option years. Then the government decided to close out the contract, and did not exercise any more options.

Sundowner filed a claim for breach of contract, arguing that the government or its agents “made representations to Sundowner that the contract would last for the full seven year period,” arguing also that the term “long term lease” meant use of the options. Sundowner also claimed that government employees made oral representations “that the extension [option] periods would be exercised as long as funding was still available and the government still required the services.” Funds were available and the government still required the services, but Sundowner lost when the government moved to dismiss the case, arguing that the explicit language of the contract controlled, and that this language gave the government “unfettered discretion to choose not to exercise the option.”

The Court agreed fully with the government, noting that the “long term” lease language was merely descriptive of the overall contract. There was no language in the contract which could be construed as nullifying the option language, or creating any ambiguity—by its terms the contract clearly gave the government the option of extending the contract, or not.

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Sundowner also alleged that the government violated its contractual duty of good faith and faith dealing by not exercising the options. The court said “no,” the “government did not interfere with plaintiff’s contract rights, it merely exercised its own rights.”

Sundowner was completely out of luck.

TIPS: (1) Be careful when you price an option contract. If there is a large investment required “up front,” you should probably recover it quickly, because the government may not exercise options if you use them to amortize your investment.

(2) Always recognize that the government may not exercise options, and plan accordingly.