Chapter 1

Solicitations

1

You included ambiguous terms or conditions in the solicitation.

An ambiguity exists when a phrase, clause, condition, or section of a solicitation does not have one plain meaning, but has two reasonable interpretations.[1] Government personnel who write solicitations must do more than merely copy a previous solicitation used for similar goods or services. Government personnel must carefully read all solicitations to ensure there are no ambiguities, taking into account both the words and any previous interpretation of those words during a prior contract.

An ambiguity may be either patent or latent. A patent ambiguity in a solicitation is one that is on its face glaring and obvious (e.g., where two solicitation provisions clearly conflict).[2] A latent ambiguity, on the other hand, is not obvious on the face of the solicitation.[3] A contractor has a duty to seek a clarification from the government before submitting its bid.[4] A bidder who does not inquire into a patent ambiguity assumes the risk for any unanticipated costs incurred as a result. That is not the case with a latent ambiguity. Courts will adopt a contractor's reasonable interpretation of a latent ambiguity under the *contra proferentem* rule, construing the ambiguity against the drafter.[5] Of course, it is the government that drafts a solicitation and against whose interest the reasonable interpretation of a latent ambiguity will be construed.[6] Generally, if there is a latent ambiguity the contractor will win its claim. However, if the ambiguity is patent, unless the government had notice of the patent ambiguity (such as from an offeror's written question to the contracting officer), the plaintiff will likely not recover.[7]

No contracting official should want ambiguities of either type in a solicitation. Any ambiguity in a solicitation may be protested, and if the ambiguity is demonstrated, the protest will be sustained.

Remember also that if a contracting officer discovers an ambiguity or has a valid ambiguity brought to his or her attention, he or she should amend the solicitation to eliminate that ambiguity prior to the due date for offers.

EXERCISE:

Can you spot the latent or patent ambiguity, and identify the type of ambiguity? *Answers appear at the end of the exercise.*

1. **Construction:** The specifications in the request for proposal ("RFP") required construction on the second floors of buildings 81, 82, and 85. The drawings required construction on the second floor of only building 85. No clause in the RFP indicates whether the drawings or the specifications take precedence.

2. **Test Requirements:** "Burn-in" (power on) testing was expressly identified in the RFP solely in connection with first article testing or "FAT" of a thermal sight. Appendix 2 required that first articles be subjected to a "failure-free 24-hour minimum burn-in." Appendix 1 established a "workmanship" requirement that stated that the production units must be "repaired and retrofitted in accordance with the guidance and information contained in the equipment drawings." One of the equipment drawings contained a further reference to drawing A3060587. Paragraph 4 of drawing A3060587 identified certain production-related test requirements including a "production run-in" and "burn-in/debugging."

3. **Special Pricing clause:** Clause H.34 of the RFP read as follows: Special Pricing Provision (Applicable to Option Items): The respective unit prices stated in Section 'B' of this contract for option items apply only if the government should exercise its option for the cumulative total quantities of the respective option items.

> In the event that the government should exercise less than the full quantity of a given option item, the unit price shall be adjusted upwardly by using ninety percent (90%) cumulative average experience curve factors from 'Learning Curve Tables, Volume III' by the Rand Corporation, Santa Monica, CA, dated April 1980.

Immediately following the text previously quoted, Clause H.34 contained an example. The example explains the process of recalculating the price when less than the full quantity of a given option item is ordered. It uses a hypothetical purchase of 70 items out of a full option quantity of 84 items, where the total of 70 items is purchased in three separate buys. The example is crystal clear on how to do the calculations, and the example will work for any possible buy of less than 100 percent of the options. However, if you turn to the Rand Tables and look up the factors given in the example, they are found among the factors in the unit curve (a different curve), not the cumulative average curve. The two curves yield different mathematical results.

4. **Initial Contract Term:** On January 15, 1997, an agency entered into a contract pursuant to an RFP for towing services for a base year and four one- year options. Section 6.0 of the RFP, Fee Structure and Schedule, defines the base year as the "date of award through September 30, 1997" and each of the option years as running from October 1 through September 30 of the following year. Section 7.3 of the RFP states, "The initial term of this contract is one year."

5. **Asterisks in the Bidding Schedule:** A solicitation's bidding schedule contained 305 separate contract line item numbers (CLINs) and provided an estimated quantity for each CLIN except one. The solicitation required "[b]idders [to] bid on all items," and contained the clause at *Federal Acquisition Regulation* (*FAR*) 52.214-18 (Preparation of Bids—Construction), which states, in pertinent part, "If the solicitation requires bidding on all items, failure to do so will disqualify the bid. If bidding on all items is not required, bidders should insert the words 'no bid' in the space provided for any item on which no price is submitted."

   CLIN 0001, described as "Storm Water Pollution Prevention Plan Per Delivery Order," was the only line item without an estimated quantity. Instead, an asterisk was inserted in the estimated quantity column. In addition, CLIN 0001 contained seven asterisks (*******) under the "unit price" and "estimated amount" columns. CLIN 0001 was the only one of the 305 CLINs containing asterisks in lieu of actual numbers or blanks. The solicitation stated that payment for CLIN 0001 "will be lump sum and negotiated for each delivery order." The asterisks physically precluded an offeror from inserting a price for CLIN 0001.

6. **Surfaces:** Section 15258 ¶ 1.3 of the RFP, "Surfaces To Be Insulated," stated that the outside air and supply air ductwork in exposed locations, wherein flexible ductwork was used, required type "T-13" insulation. Section 15258 ¶ 3.1.2, "Type T-13, Rigid Fiber Glass With Jacket," provided in pertinent part, "[s]heet metal shall be covered with rectangular rigid fiber glass insulation with factory-applied vapor barrier and finished with field-applied glass-cloth jacket." The foregoing language from ¶ 3.1.2 makes it clear that the "T-13" insulation was designed for sheet metal surfaces.

   Section 15841, "Low Pressure Ductwork/ Humidifiers," ¶ 2.4, "Flexible Duct Materials," provided the specifications for the flexible ductwork. It provided in pertinent part, "[w]ire-reinforced fibrous-glass duct shall consist of a minimum one-pound-density fibrous glass bonded to and supported by corrosion-protected spring helix.... Thermal conductivity shall be not greater than 0.23 at 75 degrees F mean."

Section 15841 ¶ 2.8, "Flexible Connectors for Sheet Metal," provided further specifications for the flexible ductwork. It provided in part, "[c] onnectors shall be UL-listed, 20-ounce, fire-retardant, airtight, woven fibrous-glass cloth impregnated with chloroprene." Id. at A61 (emphasis added). Section 15841 ¶ ¶ 2.4 and 2.8 require the flexible ductwork to be made of a fiber glass material, not sheet metal.

ANSWERS:

1. **Construction:** Patent ambiguity. Two parts of the contract said very different things, and the ambiguity is obvious on its face.[8]

2. **Test Requirements:** Patent ambiguity. Testing provisions did not require burn in for all production units, but only for first articles. Drawing A3060587, however, expressly identified a burn-in requirement for all units, without any qualification. The two provisions are facially inconsistent.[9]

3. **Special Pricing Clause:** Latent ambiguity. There is no reason for comparing the factors in the example with the factors in the Rand Tables to discover that the factors come from the unit learning curve. The RFP does not say to make that comparison and neither does the example. The very presence of the factors in the example removes any necessity to go to the Rand Tables, and the example is complete. There is a latent ambiguity as to whether the correct learning curve is a cumulative average or a unit curve—and one would not discover the conflict except by comparing the example with factors in the Rand Tables, and it was not reasonable to make that comparison.[10]

4. **Initial Contract Term:** Patent ambiguity. It is abundantly clear that the two sections defining the length of the initial contract year are facially inconsistent, raising the duty of inquiry.[11]

5. **Asterisks in the Bidding Schedule:** Either unambiguous or patent ambiguity. The solicitation prohibits bidding on CLIN 0001 because of the asterisks. If it is ambiguous, the court noted there was an obvious discrepancy because CLIN 0001 is the only line item with asterisks substituted in the "unit price" and "estimated amount" columns.[12]

6. **Surfaces:** Latent ambiguity. The specifications requiring insulation of the ductwork in general and the section specifying the technical requirements of the flexible ductwork were in entirely separate parts of the contract and thus would not have been immediately associated with each other. The RFP neither explicitly stated that the flexible ductwork required insulation, nor did it make reference to the flexible ductwork in the section specifying the requirements of the "T-13" insulation. The specifications for the flexible ductwork included a thermal conductivity factor, suggesting that insulation was not required to prevent the condensation problem that the insulation was ultimately required to correct. The ambiguity was not so glaring as to raise a duty to inquire by the contractor.[13]

2

You failed to respond to questions about a solicitation and your solicitation was therefore protested.

An ambiguity in a solicitation makes it difficult, if not impossible, for a prospective offeror to prepare its bid or proposal because there are two possible interpretations; that is why it is so important to clear up ambiguities early in the solicitation process. The *Federal Acquisition Regulation* (*FAR*) explicitly requires contracting officers to review solicitations for ambiguities before they are issued.[14] The *FAR*

also requires contracting officers to correct any ambiguities that come to light, through the issuance of Standard Form 30, the Amendment of Solicitation/ Modification of Contract form.[15]

Many times, agency contracting officials do not spot solicitation ambiguities or are unaware that they exist. Offerors, on the other hand, are likely to review solicitations in considerable detail, and raise questions concerning ambiguities that can be corrected as previously described. This makes for a fair process and ensures effective competition.

Some contracting officers, however, insist on including a "cut-off" date for questions a week or two *prior* to the closing date. This poses a difficult problem for potential offerors and may generate an avoidable protest. An offeror may protest an ambiguity in a solicitation until the solicitation's closing date and time.[16] It makes no difference when the agency says that it will no longer entertain questions. Any intelligent offeror knows that it can wait until the final day or hour, and submit a question in the form of a protest of an ambiguity, which the agency, GAO, or the Court of Federal Claims must consider.

Here's a good example of where an agency stumbled, but was able to recover by backing off from the "no questions accepted" prohibition. In a procurement for management services, a few weeks after all discussions had been completed, the agency amended its solicitation to include the following statement: "Résumés submitted for contingent hires must provide current, signed Letters of Intent." Final proposal revisions were due soon thereafter.

The problem for the offerors was simple: what is "current?" One week, one month, six months, etc.? A prospective offeror submitted a question, but was told by the contracting officer, "I will not answer the question because the solicitation stated that no questions would be accepted after two weeks ago, and furthermore, all discussions have been completed." Prior to the closing date, the prospective offeror wrote a letter to the contracting officer that was an "informal agency protest." Without even calling that letter a protest, the letter conveyed an expression of dissatisfaction with the ambiguity and included a request for corrective action. GAO considers such a letter an informal agency protest[17] and of course, it was timely. The contracting officer answered the question and clarified the solicitation before the offers were due.

Contracting officials should never refuse to answer questions. Ambiguities must be clarified right up to the time for submission of the offers. If more time to prepare offers is required, the contracting officer should provide it.

3

You made improper oral representations about a solicitation.

Contractors are always advised never to rely on the verbal representations of government officials, particularly during the bidding stage,[18] and it is equally important that agencies not provide misleading or incorrect oral (or other) advice. Oral advice from an agency that is inconsistent with the unambiguous terms of the solicitation is not binding on the government,[19] and any such advice should never be given by an agency.

Contractors frequently call government officials and ask for clarifications in an RFP or invitation for bids (IFB). This is a bad practice for both government and contractors. As previously explained, if there are patent ambiguities, offerors should address their questions in writing to the contracting officer. Ambiguities or changes in a solicitation must be corrected in the form of a written amendment in order to be binding on the offerors. Oral advice alone just won't do.

Oral solicitations are permitted in some cases, but these situations are carefully circumscribed in the *FAR*. They may be used both for micropurchases as well as for those under the simplified acquisition threshold ($150,000), and the contracting officer is instructed to solicit quotations orally "to the maximum extent practicable."[20] Oral RFPs are authorized when a written solicitation would delay the procurement and notice is not required.[21]

An example of the type of problem that occurs when a contractor relies on oral advice can be found in the case of *Spacesaver Storage Systems, Inc*.[22] This was a best value procurement for weapon storage systems, where the solicitation specifically provided that high-pressure laminate end panels were not acceptable. Spacesaver, however, asserted that the agency had advised it verbally that high-pressure laminate end panels would be acceptable. Spacesaver's offer was deemed not acceptable by the government. Oral advice that conflicts with the unambiguous terms of a solicitation is not binding on the government and a contractor relies on such advice at its own risk.

One final example shows how mistakes by the government contracting officials can result in unfair results. In *Heath Construc., Inc*.[23] the solicitation provided that facsimile bids would not be considered. The solicitation also instructed offerors to contact the "contract specialist" in the event of questions. The contractor called the contract specialist and was informed that the firm could transmit its bid by facsimile transmission to the attention of the contracting officer and identified a fax number. The offeror sent its offer by facsimile, but the agency rejected the bid because it was sent by facsimile.

The GAO denied the contractor's protest, noting that the written solicitation, which had never been amended, did not provide for facsimile bids. GAO noted that even though the contract specialist was designated to receive questions, he could not and did not amend the written solicitation. In a small concession to the contractor, GAO concluded,

> "[f]inally, although this result is consistent with our prior decisions, we think that procuring agencies should ensure that the personnel designated on the face of solicitation documents to respond to prospective bidders' questions provide accurate information concerning a solicitation."[24]

Contracting agencies should ensure that communications to offerors are made by people with authority to make them, and that all rules in the *FAR* and related documents are followed. The fairness and integrity of the procurement system rests on the fairness and integrity of agency personnel.

4

You failed to identify salient characteristics in a "brand name or equal" procurement.

Any solicitation that uses a brand name description of one manufacturer does not provide for full and open competition, regardless of the number of sources that are solicited.[25] However, a solicitation that specifies a "brand name or equal" product does provide for full and open competition and eliminates the *FAR* requirement for justifications and approvals of sole source products.[26] However, the competition must be fair to ensure that all offerors know exactly what product will meet the government's requirements.

To ensure fair competition, the *FAR* states that a brand name or equal solicitation must include "a general description of those salient physical, functional, or performance characteristics of the brand name item that an 'equal' item must meet to be acceptable for award."[27] These are known as the salient characteristics. When a contractor offers an equal product, the offer or quote must demonstrate that the product conforms to the salient characteristics listed in the solicitation.[28] If the quote or offer fails to do so, the agency must reject it as technically unacceptable.[29]

Some examples of salient characteristics specified in brand name or equal procurements include:

- Environmental control units where the solicitation specified information regarding type, size, weight, power, capacity, power cord length, and paint options;[30]

- Dental chairs and equipment that required an Air Force dental evaluation and consulting service rating, certifications from safety agencies, and equipment performance requirements. The performance requirements included having the ability for the chair seat to lower to no more than 13.5 inches off the floor, and having a lock-out feature, to prevent movement of the chair when a dental instrument was in use; and[31]

- A fork lift truck, gasoline engine powered, pneumatic tires, maximum fork lift height 12 feet, capacity equals 20,000 pounds at 24 inches on forks, 80 inch minimum length of fork.[32]

When salient characteristics are not listed, offerors must guess at the desired essential qualities of the brand name item. If an agency does not include the salient characteristics, the agency may not reject a quote or offer because it fails to comply with some performance or design feature, unless the offered item is significantly different from the brand name product.[33] Making such a determination is frequently difficult. See, for example, *Elementar Americas, Inc*.[34] where the GAO concluded that the product literature the offeror submitted reasonably supported the requirements, even though no salient characteristics were specified.

Another undesirable outcome if salient characteristics are not specified is the eventual convenience termination of the contract. In *Environmental Tectonics Corp.*,[35] the Air Force sought an ethylene oxide sterilizer on a brand name or equal basis. After awarding the contract, the agency discovered certain features it required had not been listed as salient characteristics in the solicitation; these included a four-hour response maintenance source and a nickel clad (not stainless) interior to prevent corrosion. The agency canceled the solicitation and terminated the awarded contract prior to performance so it could resolicit with the missing characteristics specified.

Agencies should carefully evaluate their needs and use brand name or equal solicitations, but only after carefully specifying in them the required salient characteristics.

5

You failed to include required clauses in the solicitation.

The *FAR* includes about 700 clauses for incorporation into solicitations. Agency *FAR* supplements include hundreds more. Although some of the clauses are optional, many are mandatory for specific types of contracts. Agencies must ensure that a solicitation includes all required clauses—they cannot rely on merely copying a previous version of a contract or solicitation, or on an outdated computer printout.

The best way to ensure that required clauses are included is to comply with the "Solicitation Provisions and Contract Clauses" or simply "Contract Clauses" section that appears in the relevant subpart of the *FAR* for the particular procurement. These subparts clearly state the mandatory clauses that the "contracting officer *shall* insert" in the solicitation, as well as the optional clauses that the "contracting officer *may* insert" in the solicitation. See FAR 16.203-4 (contract clauses for fixed-price contracts) or FAR 16.307 (contract clauses for cost-reimbursement contracts).

What happens when a required clause is left out of the solicitation? Potential offerors may question the missing clause or might even protest its non-

inclusion. Unlike actual contracts, mandatory but missing clauses are never "read into" a solicitation under the Christian Doctrine, which states that if a clause expresses a deeply ingrained public procurement policy and a major government principle, it will be "read into" a contract even where it was not physically included.[36] The Christian Doctrine cannot be invoked to incorporate required but omitted clauses into solicitations before award.[37]

When an omitted but required clause is discovered after bid opening but before a contract is awarded, the agency will need to cancel the solicitation and recompete the requirement. This is precisely what happened in *Dismantlement and Environmental Management Co.*,[38] where the agency failed to include lawfully required Service Contract Act contract clauses and required wage determinations. The GAO found that these omitted clauses created potential prejudice to bidders because some companies may have assumed that the Service Contract Act applied, while others assumed it did not, and each prepared its bid on a different basis.

Finally, an agency may ask why inclusion of the required provisions in a solicitation is so critical, if the Christian Doctrine can be invoked *after the contract has been formed* to include required clauses, even though it was not physically in the document. The reason is simple: The Christian Doctrine does not always apply because not all clauses required by the *FAR* embrace a "deeply ingrained strand of public procurement policy" and a "major government principle." For example, in a case dealing with the loss of a simulator, the National Aeronautics and Space Administration (NASA) argued that a mandatory *NASA FAR Supplement clause*, 18-52.245-72, which made the contractor liable for the loss, should be read into the contract by the Christian Doctrine. The Armed Services Board disagreed, noting that although the clause was required, it did not express a significant or ingrained policy, but only a limited policy intended to shift the risk of loss in limited circumstances.[39] In another case, which involved nonappropriated fund activities, the contractor sought to have the Protest After Award clause[40] included by operation of the Christian doctrine in order to recover certain delay costs. The board ruled that although it was a mandatory clause required by the *FAR*, it did not meet the requirements for inclusion under the doctrine in a nonappropriated procurement.

Agencies should carefully ensure that all required (as well as other appropriate) clauses are included in the solicitation when it is issued, or that the solicitation is amended to include such clauses if the omission is discovered before the closing date. Agencies should never rely on the Christian Doctrine to save them from incomplete analysis or sloppy drafting of their solicitations.

6

You failed to understand the difference between an RFQ, an IFB, or an RFP, as well as the government's rights and obligations when it receives a quote rather than a proposal.

In the typical government contract formation situation, the government issues a solicitation, the contractor responds with an offer, and the government selects and signs the contractor's offer, thereby creating a binding contract. Solicitations of this sort are divided into two types: invitations for bids (IFBs) in sealed bidding and requests for proposals (RFPs) in a negotiated procurement. In either case, the contractor's response—a bid or proposal—is the offer and if accepted by the government, binds the contractor to perform the resulting contract.

There is a third type of government solicitation, however, which operates in an entirely different manner—a request for quotations (RFQ).[41] A

contractor's response to an RFQ is merely a quote and not an offer. *A quote cannot be accepted by the government to form a binding contract*.[42] If the government wants to make an award based on a quote, it must issue a "purchase order." However, this order is not a contract—it is an offer by the government to the contractor to buy certain supplies or services upon specified terms and conditions.[43] A contract is established only when the contractor accepts the order, which can be accomplished in two ways: (1) the supplier can issue a document stating that it accepts the government's order, or (2) the supplier can indicate acceptance by either furnishing the supplies or services ordered or by completing enough of the work that "substantial performance" has occurred.[44] If the government does issue an order in response to a contractor's quote, the government may, by written notice, withdraw, amend, or cancel its offer at any time before acceptance occurs.[45]

Note the stark difference in the formation of the contract. A bid or proposal, if accepted, forms a contract. A quote, if "accepted," forms nothing. Thus, in RFQs, until the contractor receives and accepts an offer from the government, either party may walk away.

There are a few words of warning concerning acceptance of a purchase order by substantial performance. If the date for performance in the purchase order arrives and the contractor fails to tender complete performance, then the purchase order lapses and the contractor bears the cost of nonperformance.[46] The government will not be liable for any costs incurred.[47]

The appeal of *Rex Systems, Inc*.[48] is a good example. Subsequent to a quote received in response to an RFQ, the government issued a purchase order for 13 rewind assemblies to be delivered to the government by May 4, 1992. Acceptance by writing was not required. However, delivery did not occur until May 14, 1992. The government returned the assemblies to Rex and denied its request for payment. Rex argued that it had substantially complied with the purchase order. The ASBCA rejected this contention, stating that the government had to keep its offer open only until May 4, 1992 by virtue of Rex's initiation of a substantial part of the performance. Thereafter, the offer represented by the purchase order lapsed and terminated.

Contractors have previously attempted to argue that FAR 13.302-4(b) affords them some measure of relief under similar circumstances.[49] This *FAR* clause states "[i]f a purchase order that has not been accepted in writing by the contractor is to be canceled, the contracting officer shall notify the contractor in writing that the purchase order has been canceled, request the contractor's written acceptance of the cancellation," and if the contractor refuses to accept the cancellation or claims it has incurred costs as a result of beginning performance, the contracting officer shall process a termination for convenience action. FAR 13.302-4(b) protects contractors only in situations where the government terminates a purchase order *before* a contractor has had an opportunity to comply with the purchase order's delivery date. Where a contractor is given the opportunity to comply with a purchase order and fails to do so, the order lapses and the contractor bears the costs of its own lack of performance.

Contracting officers must ask themselves when working with quotes if they want to obtain a valid contract, or retain the right to cancel the contract at any time prior to the delivery date if the contractor has not accepted the government's offer. Generally, the government seeks binding contracts, with all the protections inherent in them, and should insist that a contractor accept the government's offer within a short time after it is tendered. Waiting until a delivery date arises, with no delivery, hence a lapsing of the offer, makes the government's procurement system inefficient, since it requires a delayed reprocurement.

7

You included defective specifications in the solicitation.

Agencies must develop specifications that promote and provide for full and open competition.[50] This means that the solicitation must provide a common basis for preparing and pricing offers, and must allow offerors to understand what they must do during contract performance. This requires that the agency specify its true and accurate requirements using clear and nondefective specifications. If an agency discovers, after receipt of offers, that the competition was based on defective specifications, the agency should either resolicit or amend the specifications to reflect its true and accurate needs.[51] FAR 14.404-1(c) clearly states that invitations for bids should be canceled before award but after opening when the specifications cited in the solicitation were inadequate or ambiguous (i.e., defective).

For example, in a solicitation for material handling and logistics support worldwide, the Navy included 112 contract line item numbers (CLINs) of which 75 were fixed price, 26 were time and material, and 11 were direct reimbursements. The solicitation required movement of material on a fixed-price basis, but failed to provide information on the type, size, weight, and quantity of the material or the distance or location that the material was to be moved. Without this information, there was no clear or common basis for pricing the offers or a clear understanding of what the contract required. One offeror asserted that prior contracts had been awarded under similarly defective specifications, and these specifications were therefore adequate for the new contract. The GAO rejected this, noting there was no assurance that a new contractor could succeed with these defective specifications.[52]

In a Department of Transportation solicitation for ships to be used in the Ready Reserve Fleet, the solicitation required "Roll On/Roll Off vessels with port and starboard side port ramps…." During a bid protest hearing, the agency acknowledged that it only required one ramp, not two. The agency position was that it had always required only one side ramp and the protester should have known this. The GAO found the solicitation language for two ramps clear, and the specification was therefore defective.[53]

In a procurement for transport trailers, the agency was advised twice during the procurement that its specification was for tires that were too small to support the weight of the trailer and therefore defective. The agency rejected the advice, and made award anyway. GAO found that the specified tires were too small to support the required weight of the trailer and load. GAO noted that, *after the award*, the awardee came to the same conclusion regarding the defective specification and offered a no-cost contract modification providing for the larger, more expensive tires, which the agency accepted.[54]

One of the most incisive comments about defective specifications appears in *Martin Construction v. United States*,[55] a case involving the construction of a marina in a contract awarded by the Corps of Engineers. The design suffered from a critical defective specification—the requirement for a porous gravel material that made it practically impossible to dewater the marina area. Here is what the court said about this:

> The most troubling aspect of this case is the corps' adamant refusal to accept any responsibility for its defective design, even while Martin made every effort to comply with it. This relatively routine construction project did not need to end in contentious litigation. Competent procurement officials would have acknowledged the agency's obvious design mistake, made the necessary corrections, and afforded the contractor the additional time and money to complete performance. The real difficulty here is not that the corps made a serious design mistake, but that it denied the mistake throughout and steadfastly blamed the contractor instead. As all contracting personnel know,

> there are standard clauses in every federal contract to allow for changes and schedule adjustments, but these clauses are only effective when the federal agency acknowledges that they should be used.[56]

Agency officials should be willing to admit when specifications are defective and correct the specifications using the clauses in the contract.

Writing clear and adequate specifications requires not only careful draftsmanship, but also adequate review before issuance of a solicitation. Contracting officers may wish to implement a modified version of the "blue team/red team" approach used by contractors[57] where, before issuance, one team writes the solicitation, and another team reviews it and attempts to draft proposals to ensure the specifications are not defective.

8

You failed to solicit a quotation or offer from a company under simplified acquisition procedures even though the agency knew that the company was interested in competing and the agency did not have a reasonable basis to question the company's ability to perform.

When using simplified acquisition procedures, agencies are required to "promote competition to the maximum extent practicable."[58] Generally, agencies can meet this standard by soliciting at least three sources.[59] Sometimes, however, the rote solicitation of three sources will not meet the legal mandate, and the agency must do more to promote competition.

In *Solutions Lucid Group, LLC*,[60] the GAO sustained a protest of the Defense Logistics Agency's (DLA) failure to solicit one supplier on a procurement of fluorescent lamp starters used on the Eagle F-15 aircraft. (These keep the lights inside the plane from flickering and distracting the pilot). The agency had issued several prior purchase orders for the starters, but had to cancel two of them because two awardees (Solutions Lucid Group and Phoenix Trading Company) offered noncompliant products. In a new, urgent and compelling solicitation, DLA solicited three sources, *but not* Solutions Lucid Group.

In sustaining the protest, the GAO noted that an agency may not deliberately fail to solicit a responsible source that has expressed interest in competing without a reasonable basis for questioning the source's ability to meet the agency's needs.[61] In this action, the agency had failed to promote competition to the maximum extent practicable by failing to solicit the protester, whom the acquisition specialist knew to be interested in competing and whose ability to furnish the item she did not have a reasonable basis to doubt. The agency's assertions that Solutions Lucid had never previously furnished the item was an inadequate argument—especially when the successful vendor had not previously furnished it.

Therefore, when seeking maximum practicable competition, such as in the use of simplified acquisition procedures, do not overlook responsible and qualified sources, and ensure that they are solicited. Having no record of providing the product previously is an inadequate reason to exclude such a company from the competition.

9

You improperly included restrictive requirements in a solicitation beyond the extent necessary to satisfy the agency's legitimate needs (or as otherwise authorized by law).

Although contractors may sometimes be asked by an agency to assist in drafting a solicitation, the work of preparing and approving the final solicitation generally falls on the agency. A contracting agency normally has discretion in determining its needs and the best method to accommodate them.[62] However, in preparing solicitations, agencies must be compliant with the purposes of the Competition in Contracting Act (CICA) of 1984.[63] One key purpose of CICA is to encourage full and open competition and this is an important limit on the drafting of solicitations.

When preparing a solicitation, the agency must specify its needs in a manner designed to achieve full and open competition, and may include restrictive requirements only to the extent necessary to satisfy the agency's legitimate needs.[64] A specification may not be unduly restrictive. Protesters may challenge such specifications, in which case the procuring agency has the responsibility of establishing that the specification is reasonably necessary to meet its needs. The agency's justification must be reasonable and must withstand logical scrutiny.[65] The GAO looks closely at restrictions that affect competition, such as where a restriction precludes a firm from competing or works to its disadvantage in a competition.[66]

For example, in *Total Health Resources*,[67] the GAO sustained a protest of a solicitation that required the prime contractor itself to have two years of family advocacy program experience as unduly restrictive because the agency was unable to show that its needs could not be satisfied by a subcontractor with the requisite experience. Similarly, in *SMARTnet, Inc*,[68] the GAO sustained a protest of a solicitation that required that telecommunications equipment be certified by a special command at the time quotations were submitted. "We do not find that the Army's concerns here, which all relate to the agency's need to have certified equipment at the time of equipment installation, support the solicitation's requirement for certification at the time of quotation submission."[69]

Agencies must promote full and open competition by keeping unnecessary requirements and those that restrict competition out of solicitations. Everything in a solicitation must be reasonably necessary to meet the agency's legitimate needs, and agencies must be able to fully explain and defend any restrictive specifications they elect to include in a solicitation.

10

You failed to compete purchases under blanket purchase agreements or justify a sole source procurement.

A blanket purchase agreement (BPA) is a simplified method of filling repetitive needs for supplies or services under $150,000 by establishing a "charge account" with qualified sources of supply.[70] A BPA includes a description of the service(s) to be provided and methods for pricing, issuing, and delivering future orders.[71] BPAs are often used when the specific items and quantities to be covered by a contract are unknown at the time the agreement is executed. A BPA is *not* itself a contract and does not obligate the agency to enter into future contracts.[72] Rather, it is considered a "framework" for future contracts. An actual contract is formed when the agency issues a purchase order under the BPA.[73]

One common mistake is for an agency to ignore the requirements in the *FAR* that purchases under a BPA must be competed, or the agency must justify a sole source procurement. While agencies are not required to request proposals or to conduct a competition before establishing BPAs,[74] after a BPA is established, otherwise applicable competition requirements apply.[75] Moreover, the existence of a BPA does not justify purchasing from only one source.[76]

One of the most common reasons for establishing a BPA is to drive prices down under the General

Services Administration (GSA) Multiple Awards Schedule (MAS) contracts. Under these schedules, agencies may establish BPAs pursuant to FAR 8.405-3 to fill recurring needs, and holders of schedule contracts will compete for the BPAs. Agencies are permitted to use the same type of limited competition that is used for award of a schedule contract. Competing BPAs among schedule contract holders usually results in prices that are below the original schedule price for the same items.

In *Envirosolve, LLC*,[77] the GAO examined the Drug Enforcement Administration's (DEA) use of BPAs to provide hazardous waste cleanup, which were all formed without competition. Instead of competing either the delivery orders or the BPAs themselves, DEA simply awarded BPAs based on the "personal preference of the local agency personnel." Essentially, DEA held no competition whatsoever. These actions violated the simplified acquisition standard requiring agencies to obtain "maximum practicable competition." DEA was simply sole sourcing, and while sole sourcing is permitted under simplified acquisitions,[78] it may only be used if the agency's decision is reasonable. The GAO concluded that the agency had made no attempt to promote competition, which it could have done by competitively establishing BPAs with vendors for the various contract areas. If that was not possible, DEA was obligated to document and justify these sole source awards.

Remember that BPAs may be an efficient way of making purchases under $150,000 (the simplified acquisition threshold), but once established, they are not an excuse for jettisoning competition.

11

You failed to comply with the small business bundling requirements.

The Competition in Contracting Act of 1984 and the Small Business Act of 1950 both place limitations on an agency's ability to bundle, because bundled procurements combine separate and multiple requirements into one contract, and therefore have the potential for restricting competition by excluding firms (particularly small businesses) that can furnish only a portion of the requirement. Agencies should avoid unnecessary, nonbeneficial bundling.

Small Business Act

Bundling, for purposes of the Small Business Act, means "consolidating two or more requirements for goods or services previously provided or performed under separate smaller contracts into a solicitation of offers for a single contract that is likely to be unsuitable for award to a small business concern."[79] The term "separate smaller contract" is defined as "a contract that has been performed by one or more small business concerns or was suitable for award to one or more small business concerns."[80] The Small Business Act, as amended, states that "to the maximum extent practicable," each agency shall "avoid unnecessary and unjustified bundling of contract requirements that precludes small business participation in procurements as prime contractors."[81]

An agency may determine that consolidation of requirements is "necessary and justified if, as compared to the benefits that would be derived from contracting to meet those requirements if not consolidated, the federal government would derive from the consolidation measurably substantial benefits...."[82] The statute provides that such benefits must be identified, quantified, and considered by the agency, and may include cost savings, quality improvements, reductions in acquisition cycle times, better terms and conditions, or other benefits. An agency may determine bundling to be necessary and justified if it would derive measurably substantial benefits equivalent to 10 percent of the estimated contract of $94 million or less, or five percent of the estimated contract if the value exceeds $94 million.[83]

Competition in Contracting Act (CICA)

CICA generally requires that solicitations permit full and open competition and contain restrictive provisions and conditions only to the extent "necessary to satisfy the needs of the executive agency."[84] Since bundled or consolidated procurements may combine separate, multiple requirements into one contract, they have the potential for restricting competition by excluding firms that can furnish only a portion of the requirement. An allegation of bundling under CICA is based on a claim that a contract combines separate requirements beyond what is necessary to meet the agency's needs, which limits competition because an aggrieved (and likely protesting) company can furnish only a portion of the requirement. When the GAO examines such a protest, it assesses whether an agency has a reasonable basis for the contention that bundling is required, and will sustain a protest where there is no reasonable basis.

In *Sigmatech, Inc.*,[85] the Army bundled into a $130 million contract professional and engineering services with system engineering and technical assistance (SETA) for its Robotic Systems Office. For the prior 15 years, support of the Robotic Systems Office had been provided by several contracts awarded to small business concerns. The Army performed no bundling analysis. In a protest, GAO held that consolidation of the SETA services with the professional and engineering services met the definition of bundling under the Small Business Act and recommended that a bundling analysis be performed.

In *TRS Research*,[86] the GAO considered a single solicitation of the Military Traffic Management Command (MTMC) for management of the intermodal (sea, highway, rail, and air) container program. Previously, this program had been performed by nine contractors under a master leasing agreement. The GAO held that the consolidated RFP covered two or more requirements and that MTMC had never followed the procedural requirements for bundling in the Small Business Act. GAO recommended that MTMC analyze the bundling and issue a new, corrected solicitation.

In *EDP Enterprises, Inc.*,[87] the GAO held that the Army had violated CICA by bundling food services into the same RFP with base, vehicle, and aircraft maintenance services. The agency was unable to offer any meaningful efficiencies for this bundling and the GAO recommended unbundling the procurement.

Agencies should engage in bundling only when they can document thoroughly the required savings. Otherwise, leave requirements unbundled and in separate procurements.

12

You failed to recompete a requirement when there was a modification that materially relaxed contract requirements from the original solicitation.

Although it is rare to see a protest during performance of a contract, GAO will deviate from its general practice not to review protests of contract administration where a contract modification exceeds the scope of work of the underlying contract, and therefore must be competed. Protests of that nature are normally considered long after the original contract award. Far more unusual are modifications that relax the scope of work, thereby resulting in a material difference between the original and modified contracts, and requiring competition. Failure to compete such a modification is a mistake that may be protested.

The CICA, as amended, requires "full and open competition" in government procurements as obtained through the use of competitive

procedures.[88] Where a contract modification changes the work from the scope of the original contract, that work would normally be subject to the statutory requirements for competition unless there is a valid sole-source exception.[89]

In determining whether a modification triggers the competition requirements in CICA, GAO looks to whether there is a material difference between the modified contract and the contract that was originally awarded and whether the original nature or purpose of the contract is so substantially changed by the modification that the original and modified contract is essentially and materially different. Where an agency has relaxed a contract's performance requirements, GAO also looks to whether the change in requirements could reasonably have been anticipated under the solicitation, and whether the modification materially changed the field of competition for the requirement.[90]

In *Poly-Pacific Tech., Inc.*,[91] the Air Force awarded a contract for the lease and recycling of acrylic plastic media used to remove coatings from aircraft and equipment. About a year after contract award, the agency issued a modification that suspended the recycling portion of the contract as a result of an Environmental Protection Agency inspection. The Air Force still had a requirement for both lease and recycling. GAO noted that the costs of leasing plastic media with no recycling requirements was as much as 50 percent less than the cost of leasing with recycling requirements. GAO indicated that there likely would have been more competition and lower prices generally had the recycling been excluded from the original solicitation. GAO found that the modification relaxed requirements and made the resulting work fundamentally different from the work anticipated by the original solicitation. Accordingly, the modified work should have been competed on a full and open basis under CICA rules, and GAO recommended termination of the modification.

Whenever a contract needs to be modified so that the work either exceeds or relaxes the original scope of work, agencies should carefully examine the modification to determine if full and open competition is necessary. If the modification will cause the resulting work to be fundamentally different from the work envisioned in the original solicitation, the modification should not be issued, and competition (or an appropriate sole-source justification) should be pursued.

ENDNOTES

1. *Aerospace Design & Fabrication*, Inc., B-278896, May 4, 1998, 98-1 CPD ¶ 139.
2. *See Beacon Constr. Co. of Mass. v. United States*, 314 F.2d 501, 504 (Ct. Cl. 1963) (describing patent ambiguity as "an obvious omission, inconsistency, or discrepancy of significance").
3. *Triax Pac., Inc. v. West*, 130 F.3d 1469, 1475 (Fed. Cir. 1997) (describing latent ambiguity as "[m]ore subtle" than a patent ambiguity).
4. *P.R.Burke Corp. v. United States*, 277 F.3d 1346, 1355 (Fed. Cir. 2002).
5. *See Newsom v. United States*, 676 F.2d 647, 650 (Ct. Cl. 1982) (*Contra proferentem* means "against the party who proffers or puts forward a thing," i.e., the drafter of the solicitation).
6. *See Salem Eng'g & Const. Corp. v. United States*, 2 Cl. Ct. 803, 807 (1983).
7. *PCA Health Plans of Texas, Inc. v. LaChance*, 191 F.3d 1353, 1355 (Fed.Cir.1999).
8. *Newsom v. United States*, 676 F. 2d 647 (Ct. Cl. 1982).
9. *Input/Output Tecnology, Inc. v. United States*. 44 Fed. Cl. 65 (1999).
10. *ITT Defense Communications Division*, ASBCA No. 44791, 98-1 BCA 29590.
11. *A n A, Inc.*, DCCAB No. D-1022, 2000 WL 1763,327.
12. *Anderson Columbia Environmental, Inc. v. United States*, 43 Fed. Cl. 693 (1999).
13. *Metric Constructors, Inc. v. United States*, 44 Fed. Cl. 513 (1999).
14. FAR 14.202-6.
15. FAR 14.208(a).

16. *See* 4 C.F.R. § 21.2(a)(1) (Government Accountability Office (GAO)); *Blue & Gold Fleet, L.P.*, 492 F. 3d 1308 (Fed. Cir. 2007) (pertaining to the Court of Federal Claims).

17. *American Material Handling, Inc.*, B-250936, March 1, 1993, 93-1 CPD ¶ 183.

18. Indeed, all invitations for bids (IFBs) require the inclusion of FAR 52.214-6, which indicates that oral information is not binding. It states: Any prospective bidder desiring an explanation or interpretation of the solicitation, drawings, specifications, etc., must request it in writing soon enough to allow a reply to reach all prospective bidders before the submission of their bids. Oral explanations or instructions given before the award of a contract will not be binding. Any information given a prospective bidder concerning a solicitation will be furnished promptly to all other prospective bidders as an amendment to the solicitation, if that information is necessary in submitting bids or if the lack of it would be prejudicial to other prospective bidders.

19. *SW. Educ. Dev. Lab.*, B-298259, July 10, 2006, 2006 CPD ¶ 105 n.3.

20. FAR 13.106-1.

21. FAR 15.203(f).

22. B-298881, December 11, 2006, 2006 CPD ¶ 196.

23. B-403417, Sept. 1, 2010, 2010 CPD ¶ 202.

24. *Id*.

25. FAR 6.302-1(c).

26. *Id*.

27. FAR 11.104(b).

28. *CAMSS Shelters*, B-309784, Oct. 19, 2007, 2007 CPD ¶199.

29. *Id*.

30. *Nordic Air, Inc.*, B-400540, Nov. 26, 2008, 2008 WL 5071,009.

31. *Mid-America Taping & Reeling, Inc.*, B-403381, Sept. 15, 2010, 2010 CPD ¶ 216.

32. B-157857, Jan. 26, 1966, 1966 Westlaw 2950.

33. *Access Logic, Inc.*, B-274748, Jan. 3, 1997, 97-1 CPD ¶ 36.

34. B-289115, Jan. 11, 2002, 2002 CPD ¶ 20.

35. B-224104, Nov. 17, 1986, 86-2 CPD ¶ 567.

36. *G.L. Christian & Assocs, v. United States*, 312 F. 2d 418, reh'd denied, 320 F. 2d 345 (Ct. Cl. 1963), cert den. 375 U.S. 954 (1963).

37. *American Imaging Serv., Inc.-Recon*, B-250861, Jan. 5, 1993, 93-1 CPD ¶ 13; *Parsons Precision Prod., Inc.*, B-249940, Dec. 22, 1992, 92-1 CPD ¶ 431.

38. B-257632, Oct. 24, 1994, 94-2 CPD ¶ 151,

39. *Computing Application Software Technology, Inc.*, ASBCA No. 47554, 96-1 BCA ¶ 28204.

40. FAR 52.233-3

41. RFQs are primarily, but not exclusively, used for simplified acquisition procedures in Part 13 of the *FAR*, and for competitive ordering procedures in Federal Supply Schedule (Multiple Award Schedule) contracts in FAR Subpart 8.4.

42. FAR 13.004(a).

43. *Id*.

44. FAR 13.004(b).

45. FAR 13.004(c).

46. *See Smart Business Machines v. United States*, 72 Fed. Cl. 706, 708 (2006) (emphasis added).

47. *See id*.

48. ASBCA No. 45301, 93-3 BCA ¶ 26,065.

49. *See Smart Business Machines*, 72 Fed. Cl. at 708.

50. FAR 7.103(c); 10 U.S.C.§ 2305(a)(1)(A) and 41 U.S.C. § 253A(a)(1).

51. *Applied Mathematics, Inc.*, B-227930, Oct. 26, 1987, 87-2 CPD ¶ 395.

52. *New Breed Leasing Corp.*, B-274202, Nov. 26, 1996, 96-2 CPD ¶ 202.

53. *Puerto Rico Marine Management, Inc.*, B-247975, Oct. 23, 1992, 92-2 CPD ¶ 275.

54. *Reel-O-Matic Sys., Inc.*, B-232260, Dec. 21, 1988, 88-2 CPD ¶ 608.

55. COFC No. 09-236C, Dec. 20, 2011.

56. Id. at 2 (slip op.).

57. In this approach, prior to submission of the proposal, one team drafts the contractor's proposal, and another team critiques the proposal to determine if it is clear and complies with the solicitation it purports to meet.

58. 10 U.S.C. § 2304(g)(3); FAR 13.104.

59. FAR 13.104(b).

60. B-400967, Apr. 2, 2009, 2009 CPD ¶ 64.

61. *Military Agency Servs. Pty., Ltd.*, B-290414 et al., Aug. 1, 2002, 2002 CPD ¶ 130.

62. *Parcel 47C LLC*, B-286324, Dec. 26, 2000, 2001 CPD ¶ 44.

63. Title VII of division B of Public Law 98-369; 98 Stat. 1175 which enacted, among its sections, 31 U.S.C.A. §§ 3551 to 3556 and 41 U.S.C.A. §§ 253a, 253b, and 416 to 419.

64. 10 U.S.C. § 2305(a)(1) B (2000).

65. *Chadwick-Helmuth Co., Inc*., B-279621.2, Aug. 17, 1998, 98-2 CPD ¶ 44.

66. *A.T. Kearney, Inc.*, B-225708, May 7, 1987, 87-1 CPD ¶ 490.

67. B-403209, October 4, 2010, 2010 CPD ¶ 226.

68. B-400651.2, January 27, 2009, 2009 CPD ¶ 34.

69. *Id*. (Emphasis added).

70. FAR 13.303-1(a).

71. FAR 13.303-3.

72. FAR 13.303-1.

73. FAR 13.303-5; *Modern Sys. Tech. Corp. v. United States*, 24 Cl. Ct. 360, 363 (1991).

74. *Information Sys. Tech. Corp*., B-280013.2, Aug. 6, 1998, 98-2 CPD ¶ 36.

75. FAR 13.303-5(a).

76. FAR 13.303-5(c)

77. B-294974, June 8, 2005, 2005 CPD ¶ 106.

78. FAR 13.106-1(b)(1).

79. 15 U.S.C. § 632(o)(2).

80. 15 U.S.C. § 632(o)(3); FAR 2.101.

81. 15 U.S.C. § 631(j)(3).

82. 15 U.S.C. § 644(e)(2)(B).

83. FAR 7.107(b)(2).

84. 10 U.S.C. §§ 2504(a)(1)(A).

85. B-296401, August 10, 2005, 2005 CPD ¶ 156.

86. B-290644, Sept. 13, 2002, 2002 CPD ¶ 159.

87. B-284533, May 19, 2003, 2003 CPD ¶ 93.

88. 31 U.S.C. 3551-3556.

89. *MCI Telecomms. Corp.*, B-276659.2, Sept. 29, 1997, 97-2 CPD 90.

90. *Marvin J. Perry & Assoc.*, B-277684, Nov. 4, 1997, 97-2 CPD ¶ 128.

91. B-296029, June 1, 2005, 2005 CPD ¶ 105.