

CHANGE 96-6



Post-it* Fax Note	7671	Date	4/4/96	# of pages	2
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RCE

19 August 1993

FROM: HQ AFMC/JAS

SUBJ: Not to Exceed Options

TO: HQ AFMC/PKP

1. You requested our comments on the AFMCLC/JAN opinion of 13 Apr 93 which advises that a not to exceed (NTE) option exercise must be treated as a new procurement and supported by a J&A. You have also provided a PKB memo dated 4 Aug 93 which disagrees with the AFMCLC/JAN opinion. PKB argues that the NTE option is a priced option and where it is synopsised and considered part of the competition (or the J&A supporting the basic buy also covers the option quantity), a J&A is not required to support option exercise. Additional background documents on this subject were provided by AFMCLC/JAN, including the GAO Report (GAO/NSIAD 86-59) on The Use of Unpriced Options And Other Practices. We have also discussed AFMCLC/JAN's position with ESC/JAN, AFDTC/JAN, and SMC/JAN. As discussed below, we concur with AFMCLC/JAN's opinion that a J&A is needed (either before contract award or before exercising the option) to support additional supplies or services to be added to the contract through exercise of a NTE option.

2. In the April 1986 GAO/NSIAD Report 86-59 on The Use of Unpriced Options And Other Practices, GAO informed DOD that it disagreed with the DOD position that an option containing a ceiling price and permitting downward negotiation only meets the definition of a priced option. According to the GAO, this type of option is considered unpriced and requires execution of a J&A prior to its exercise. As noted in the AFMCLC/JAN opinion, the current version of FAR 17.207 was implemented after issuance of the aforementioned GAO/NSIAD Report.

3. The definition of a priced option, set forth in the above GAO/NSIAD Report, satisfies the requirements of full and open competition provided it is considered in the initial competition is similar to FAR 17.207(f) parameters. Specifically, GAO defined a "priced option" as a contractor's promise, made at time of basic contract award, to perform additional work for:

A specified dollar amount

An amount to be determined by applying provisions (or a formula) provided in the basic contract, but not including renegotiation of the price in the case of a firm-fixed price contract;

6-6E (FAR 17) Post to FAR 6.3, 17.207(f) and DFARS 217.74 by circling the references and noting in the margin: "See guidance on "NTE" options" at 70-41, atch filed behind the sups to FAR 17. Then file this atch behind the sups to FAR 17.

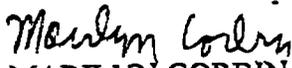
A fee to be determined by applying a formula provided in the basic contract, in the case of a cost type contract.

4. The requirements in FAR 17.207(f) addressing option exercise are consistent with the guidance in the GAO/NSIAD Report. It states that before an option is exercised, the contracting officer must include a written determination in the contract file that the requirements of full and open competition have been satisfied. In the case of a fixed-price type contract, FAR 17.207(f) states that the full and open competition requirement is satisfied if the option was evaluated as part of the initial competition and the option is exercisable at an amount to be determined by applying provisions (or a formula) in the basic contract and provided that no negotiation of the price is required. Since the NTE option requires a good faith negotiation to reach agreement on the actual option price, it does not satisfy the requirements for full and open competition as set forth in FAR 17.207(f).

5. In the case of cost-type contracts, FAR 17.207(f) also states that the full and open competition requirement is satisfied if the option is evaluated as part of the initial competition and it is exercisable at an amount specified in or reasonably determinable from the terms of the basic contract. Two examples of such options in cost-type contracts are given, both of which require that the fixed or maximum fee be determinable by applying the provisions (or formula) in the basic contract. Downward negotiation of a NTE price is not listed as an example and, in view of the GAO/NSIAD Report, this type of option, even in cost contracts will not meet the requirement for full and open competition.

6. Although GAO decisions have not specifically addressed the exercise of a NTE option, GAO has held that exercise of a contract option should not require further negotiations to establish significant terms of the agreement (Matter of Devres, Inc., B-228909, Dec 30, 1987, 87-2 CPD 644) and a sole source justification was required where the procuring agency and the contractor negotiated a downward adjustment of the original option price (Varian Associated, Inc., 83-1, Feb 16, 1983, 83-1 CPD 160).

7. In summary, it appears that both the regulations and GAO require that exercise of a NTE option be justified by an executed J&A. There is one competitive arena, however, where the regulations could authorize exercise of a NTE option consistent with CICA requirements. In competitions where the NTE option involves a down select, there are as a minimum two competitors, and the original competition clearly informed all potential offerors that only those receiving an original award would be eligible to compete for the down selection, no J&A should be required. The regulations should recognize that such competition satisfies the requirements of CICA since the only eligible sources are those under contract. A revision to DFARS would be appropriate to accomplish this. If you concur, we are available to assist you in preparing a proposed package.


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