



DEPARTMENT OF THE AIR FORCE

HQ WARNER ROBINS AIR LOGISTICS CENTER (AFMC)
ROBINS AIR FORCE BASE GEORGIA

86 28.97

1 July 1997

MEMORANDUM FOR SEE DISTRIBUTION

FROM: WR-ALC/PKP

SUBJECT: Reassessment of Using Unilateral Purchase Orders (POs)

1. There has always been some question as to whether a firm delivery schedule could ever be established under unilateral POs. FAR 13.108 leads us to believe a unilateral PO becomes binding once "substantial performance" by the contractor occurs. Recent discussions between WR-ALC/LNK, WR-ALC/JAN, and WR-ALC/PKP personnel suggest it is the government, and not the contractor, which is bound under a unilateral PO once substantial performance is begun. Attached is Brad Adams' legal opinion on this subject.

2. The enforceability problem with a unilateral PO is further compounded when it needs to be modified. The administration of a unilateral PO is simply file maintenance:

- a. Obtaining adequate consideration for delinquencies is not enforceable.
- b. Neither the changes nor the default clauses are incorporated.
- c. The authorities pursuant to which we issue modifications are irrelevant.
- d. The customers' expectations on timely delivery may be hollow.
- e. Future consideration of past performance is not an option.

3. With the increased ceiling for simplified acquisition procedures (SAP), our PO volume has substantially increased. Even when the dollars are by definition "small," the timely delivery of the supplies or services may be crucial. In today's environment, it is more important than ever to ensure every action taken adds value. We must choose the best contractual vehicle which will, in the long term, support the customer. While a unilateral PO may be a faster means of placing a requirement on contract, it may not be in the government's best interest in the long run.

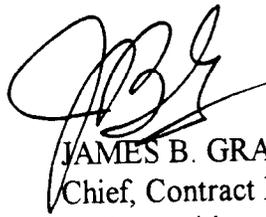
4. When the estimated value of an acquisition is near the threshold of \$100,000, a formal RFP and resulting contract should be considered up front. This would preclude having to cancel the RFQ and issue an RFP in the event the proposals exceed \$100,000. Orders under Basic Ordering Agreements (BOAs), less than \$100,000, are not considered under SAP as the order is governed by the clauses and provisions of the BOA. There are circumstances where a unilateral PO may

70-41, Atch 97-12B (FAR 13) "Post to FAR 13.108 by circling the reference and noting in the margin: "See 70-41 Atch 97-12B which reassesses the use of Unilateral Purchase Orders." Then file the atch behind the sups to FAR 13.

still be acceptable. In situations where we are buying commercial-off-the-shelf (COTS), and an oral solicitation is used, there is no need to go through a bilateral process as the item is readily available from other sources.

5. Contracting divisions are encouraged to review the current processes used in the issuance and administration of purchase orders and consider the benefits to be obtained through the issuance of a bilateral document. There is minimal additional effort in awarding a bilateral PO. Further, a bilateral PO includes all of the clauses identified at DFARS 213.507(a)(iii), and it binds both parties.

6. Point of contact on this subject is June Lee, WR-ALC/PKPB, extension 67118.



JAMES B. GRANT
Chief, Contract Policy and
Competition Advocate Division
Directorate of Contracting

Attachment:
Legal Opinion

cc:
WR-ALC/PK
WR-ALC/JA
WR-ALC/BC

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Reassessment of Using Unilateral Purchase Orders (POs)
(Legal Opinion)

“Here’s how Nash and Cibinic explain the issue (Formation of government Contracts, 2d Ed., The George Washington University, 1986 at page 170):

When acceptance is to be accomplished by performance rather than promise, such as in small purchases, Restatement, Second, Contracts, Section 45, provides that the beginning of performance binds the offeror [Government] but not the offer [Contractor]. FAR 13.108(b) attempts to avoid the application of this rule in order to permit a later Government withdrawal of its unilateral offer by defining acceptance as occurring when the contractor either furnishes the supplies or services or substantially performs the work. Although it is doubtful that this definition will be used to permit the Government to withdraw an offer after the Contractor has begun performance, the FAR definition does not address, and should not alter, the Restatement rule that the offeree is not bound. See MPT Enterprises, ASBCA 25339, 93-2 BCA paragraph 16,761 (1983), holding under prior regulations that the contractor is not bound to perform under a Government offer for a unilateral contract.

Bottom line is that FAR 13.108(b) is believed not to change the common law rule that the Contractor is never bound under a unilateral Government purchase order. Therefore, I don’t believe we have a “done deal” until delivery, acceptance, and payment.”

//signed//

BRAD ADAMS, WR-ALC/JA