

THE GOVERNMENT CONTROLS THE OPTIONS

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Virtually all government contract options (for more quantities of goods, or for an extension of services), are generally priced *unilateral* options which the government may exercise or not exercise at the government's discretion. When it does exercise an option, the government must follow the requirements in the option clause, but contractors may not successfully complain about the failure of the government to exercise that option. *JRS Management v. Dept of Justice*, CBCA 3288 (May 28, 2014) is an excellent example of the government's discretion.

The *JRS* contract was for culinary arts instructor services to the Department of Justice for a base year running through Aug. 7, 2012, with four option years. The contract specified certain experience and qualification requirements for each of the instructors. The contract included the standard Federal Acquisition Regulation ("FAR") option clause, as follows:

52.217-9 Option To Extend the Term of the Contract (MAR 2000)

- (a) The Government may extend the term of this contract by written notice to the Contractor within the term of this contract; provided that the Government gives the Contractor a preliminary written notice of its intent to extend at least 60 days before the contract expires. The preliminary notice does not commit the Government to an extension.

The agency received information on the experience and qualifications of JRS's proposed instructors, but advised JRS that none of the candidates met all of the requirements of the contract. On May 31, 2012, 66 days before the end of the base year, the Agency provided JRS with written notification of its preliminary intent to exercise the first year option, expressly noting that according to the contract, the notification was *not* an actual extension or exercise of the option. The Agency never exercised the option, and the contract ended by its own terms.

Aside from its monetary claims, JRS asserted that the Agency had failed to provide notice that the option would NOT be exercised, after the initial notice of intent to exercise the option and the agency's ultimate failure to exercise the option. The Board concluded that there was no agency failure. The agency's initial notice of intent to exercise the option did not commit the agency to exercise the option, and the contract did not obligate the agency to provide notice that it would not exercise the option. The Board also held that there was no "bad faith" or arbitrary and capricious abuse of discretion by the agency in not exercising the option. That exercise was within the agency's discretion, and there was no contractual requirement to exercise the option—there was neither bad faith nor an abuse of discretion.

The next case demonstrates another way the government can control the options. It is very clear that a contractor has little to say if the Government exercises options in accordance with the terms of the contract. *Glasgow Invest. Solutions, Inc.*, ASBCA No. 58111, April 9, 2013. In *Glasgow*, a contract for guard services, the contract included priced options for a base year and

four separate (12 months each) option years. The question was simply, could the Government exercise options within the limited funding that became available to it.

The contract included the four option Contract Line Item Numbers (“CLINs”). It also included the two Federal Acquisition Regulation (“FAR”) option clauses that are typically included in service contracts, as follows:

52.217-6 Option for Increased Quantity (MAR 1989)

The Government may increase the quantity of supplies called for in the Schedule at the unit price specified. The Contracting Officer may exercise the option by written notice to the Contractor within 1 day....

[Note: this was a service contract, and arguably FAR 52.217-9, Option to Extend the Term of the Contract probably should have been used. But it was clear from the case that both parties believed that this clause applied to the four separate 12 month option CLINs discussed above].

52.217-8 Option to Extend Services (NOV 1999)

The Government may require continued performance of any services within the limits and at the rates specified in the contract. These rates may be adjusted only as a result of revisions to prevailing labor rates provided by the Secretary of Labor. The option provision may be exercised more than once, but the total extension of performance hereunder shall not exceed 6 months. The Contracting Officer may exercise the option by written notice to the Contractor within 1 day....

When the Government did not have the funds to exercise the first full option year, it exercised FAR 52.217-8 three times for a total of six months, as funds became available. Glasgow contended that 52.217-8 could *only* be used *after* all options in the CLINs had been exercised, and “could not be used to create month-to-month option periods.” The contractor stated that it was only appropriate to invoke this clause “when there is a follow-on contract and the government needs to bridge performance between the incumbent and the new contract.”

The Board rejected Glasgow’s arguments, and held that the Government may essentially use FAR 52.217-8 whenever necessary. It pointed out that Federal Acquisition Regulation (“FAR”) 37.111, which discusses the use of this clause in service contracts, explains that it can be used whenever delays are due to circumstances beyond the control of the contracting office, such as bid protests and alleged mistakes in bid. Thus, the Board concluded that “post-option extensions are not the only circumstances for use of the FAR 52.217-8 clause, and are dispositive of this issue in the [Government’s] favor.”

TAKEAWAYS: (1) The Government has a unilateral right to exercise, or not to exercise options in a contract—the contractor may not demand the exercise of options or refuse to perform them, if properly exercised. Almost all options grant the government a unilateral right to exercise (or not exercise) the option. Read your contract carefully.

(2) The Government may use the Option to Extend Services clause (FAR 52.217-8) whenever delays are due to circumstances beyond the control of the contracting office. This could include (but isn’t necessarily limited to) bid protests, alleged mistakes in bid, or delays in receipt of funding, as occurred in *Glasgow*.

(3) A preliminary notice of *intent* to exercise given by the agency does *not* commit the Government to exercise the option. The contractor must receive the written notice of option exercise as stated in the option exercise clause, including within the time limit stated therein.

(4) If the government fails to follow the option exercise clause exactly (giving both timely preliminary notice and timely final option exercise), the contractor has two possible responses:

a) refuse to perform the option, since it was not exercised in accordance with the contract
or

b) agree to perform the contract, but treat the improper exercise as a constructive change, and seek an equitable adjustment for any additional costs that the contractor has incurred or expects to incur during the option year performance.