A UCA by Any Other Name ...

Defining Unpriced Contract Action and Undefinitized Contract Action

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We recently facilitated a learning event, and the topic of undefinitized contract actions (UCAs) became the focus of conversation and sidebars among the participants. In response to one participant’s comment regarding UCAs, one person stated confidently, “You do realize, not all unpriced contract actions are UCAs, right?” A silence fell across the classroom, and all eyes turned toward us. That simple statement inspired this article, because we believe so often, when we are talking about UCAs, not everyone is talking about the same thing. This article aims to untangle the confusion.

A UCA is an unpriced contract action, but might be an undefinitized contract action instead. For the Department of Defense (DoD), not all unpriced contract actions meet the Defense Federal Acquisition Regulation Supplement (DFARS) definition of a undefinitized contract action (UCA). Can you see why this is where the confusion sets in for some acquisition professionals?

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Pulling on the first thread, we have to dive into the regulations to get clarification and define each term. We need to start with the very foundation of what is a contract. For that definition, we check the Federal Acquisition Regulation (FAR), which states that “a contract is a mutually binding, legal relationship obligating the seller to furnish the supplies or services (including construction) and the buyer to pay for them.” The definition continues to provide further clarification, but we will leave it to you to read deeper into that definition. One key note from the definition is the last statement that, “Contracts do not include grants and cooperative agreements covered by 31 United States Code 6301, et seq.” For the purposes of this article, these definitions set the foundation for our discussion.

We have clarified the definition for a contract, so we need to look at what constitutes a contract action. According to the FAR, a contract action results in a contract, including actions taken to secure additional supplies or services outside the existing contract’s scope but not including actions that are within the scope and under the terms of the existing contract, such as contract modifications issued pursuant to the “changes” clause, or funding and other administration changes. For those acquisition professionals working for the DoD, DFARS must be referenced to determine if further definition restrictions or clarifications are outlined. The DFARS also defines contract actions as those that result in a contract. It includes contract modifications for supplies or services, task orders and delivery orders, but does not include change orders, administrative changes, funding modifications or any other contract modifications that are within the scope and under the terms of the contract such as engineering change proposals, value engineering change proposals, and over and above work requests.

The DFARS defines an undefined contract action as those contract actions for which the contract terms, specifications or price are not agreed upon prior to the beginning of contract performance. The DFARS supplements the FAR by including such actions as contract modifications for additional supplies or services, task orders and delivery orders. The DFARS specifically excludes change orders, administrative changes, funding modifications or any other contract modifications that are within the scope and under the terms of the contract.

Some of the more common examples of an undefined contract actions are letter contracts, orders under a basic ordering agreement and provisioned items orders, for which the price has not been agreed upon before performance has begun.

Yes, we just added two more definitions to the web of terminology, and we have to ask the questions, “What is definitization?” and “What is a qualifying proposal?” If you reached for your DFARS, you are on the right path. Definitization is the agreement on, or determination of, contract terms, specifications, and price, which convert the undefined contract action to a definitive contract. In order to definitize the undefined contract action, the contracting officer must get a qualifying proposal.

Our second question also is answered by the DFARS, which explains that a qualifying proposal is one that includes sufficient data to enable complete and meaningful DoD analysis and audits of the data in the proposal—and any other data that the contracting officer has determined that the DoD needs to review in connection with the contract. As a contracting officer, you must consider the risks to the government associated with these types of commitments.

Before we enter into the conversation about the various types of unpriced or undefined contract actions, we have to unravel the policy thread. For that, we again look to the DFARS to find guidance for DoD. We are instructed to use undefined contract actions when there is not enough time to negotiate a definitive contract action to meet the government’s requirements, and only when the government’s interest demands that the contractor be given a binding commitment so that contract performance can begin immediately. Notice the wording in the previous statement. The undefined contract action, in this instance, is a binding commitment in order to start contract...
The DFARS defines an undefined contract action as those contract actions for which the contract terms, specifications or price are not agreed upon prior to the beginning of contract performance. Unpriced change orders commonly are used in architect and engineering or construction contracts.

Unpriced change orders present unique opportunities as well as potential financial risks to contractors. A contractor who willingly takes on additional or more complex work may be able to make a fair profit (fair meaning within reason). The contractor and government work together and a bilateral modification is executed. The primary risk for the contractor involves how its accounting system handles and tracks the funds. Todd A. Feuerman, of Ellin & Tucker accounting firm in Baltimore, explained the accounting system in simplified detail in an article, “A Primer on Accounting for Change Orders & Claims,” in the May-June 2017 issue of the Construction Financial Management Association’s CFMA Building Profits magazine.

Over and above work, like the unpriced change orders, are within the scope of the contract. It is work discovered during overhaul, maintenance and repair efforts considered by the parties as within the general scope of contract requirements. The contractor will complete and submit a work request.

In accordance with the DFARS PGI 217.77, performance of maintenance, overhaul, modification and repair of items such as aircraft, engines, ground support equipment and ships generally include over and above work requirements. If the contract includes the over and above effort, a separate contract line item number (CLIN) is established for the work. The over and above work requires that the contractor identify needed repairs and provide a corrective action during contract performance. The contractor then submits a work request to identify the over and above work, and the contracting officer authorizes the contractor to proceed. Because the work is identified as a CLIN in Section B of the Uniform Contract Format, it is within scope of the contract.

Unpriced purchase orders (UPO) are issued under FAR Part 13. They are purchase orders for supplies and services under the simplified acquisition threshold, the prices of which are not established or negotiated at the time of issuance. Although UPOs meet the DFARS definition of an undefined contract action, they are expressly exempt from the requirements due to the small dollar value.

UPOs are used with great discretion and care. The contracting officer should have confidence in the contractors receiving the UPO. They are used when prices are known to be competitive but the exact prices are unknown. Generally, the work conducted under a UPO is for miscellaneous repair parts and maintenance agreements. The requirement often is for repairs where disassembly is required to determine the extent of the required repairs.
In this situation, you often will hear these referred to as a “tear down and quote.” The contracting officer will place a “not-to-exceed” (NTE) amount on the UPO.

- **Basic ordering agreements (BOA)** are written instruments of understanding negotiated between the government and industry. Agreements are not contracts, but the order issued against the agreement is the contractual vehicle. The BOA does not have funds obligated against it; the task or delivery order will have a fund line and monies will be obligated on the orders. A task or delivery order is an unpriced order if the price has not been agreed upon prior to issuance of the order and start of performance. These unpriced orders must contain an NTE amount in order to mitigate risks to the government of nonperformance. These orders generally are written for overhaul, repair and maintenance.

- **Unpriced delivery or task orders** issued under an indefinite delivery contract are for the purchase of supplies or services, respectively. While the contract has no established delivery or performance schedule, it will specify the schedule based on the issue of the orders. In discussing these delivery and task orders under the unpriced heading, we must remember that there are times when they may fall into the category of undefined contract action as explained in the following section.

Undefined contract actions are defined by the DFARS 217.7401(a), to mean any contract action for which the contract terms, specifications or price are not agreed upon before performance is begun under the action. Undefined contract actions are used when the negotiation of a definitive contract action is not possible in sufficient time to meet the requirements. The DFARS also requires that it is in the best interest of the government’s demands that the contractor be given a binding commitment so that contract performance can begin.

Unpriced orders under BOA meet the definition of an undefined contract action according to DFARS 217.74. The orders become the contract and monies are applied to the order. In many instances for DoD, the Defense Contract Management Agency receives, administers and definitizes the orders.

- **Provisioned item orders (PIO)** are defined as undefined orders issued under a contract that includes the government’s requirements for provisional items. The DFARS Procedures, Guidance and Information (PGI) defined provisional items as any items selected under the provisioning procedures. The procedures define the process of determining and acquiring the range and quantity of spare and repair parts, and support and test equipment necessary to operate and maintain an end item for an initial period of service. PIOs are specifically identified as an undefined contract action in the DFARS. A good example is the International Space Station Program. NASA required parts for the maintenance and upkeep of the Station. Section J of the contract contained a listing of the PIOs needed—i.e., connectors, roll wings, diodes, etc. Each part was listed with nomenclature, part number and other necessary identifiers. Simply stated, PIOs are spares—either on a large scale or a smaller scale.

- **Letter contracts** are defined in FAR Part 16 as a written preliminary contractual instrument that authorizes the contractor to immediately begin work. By definition, a letter contract is an undefined contract action. When people speak of “UCAs,” they frequently are talking about letter contracts. The use of letter contracts accounted for 6 percent of contract obligations in DoD during Fiscal Years 2010 and 2014. During this period, the Air Force obligated nearly $14 billion on undefined contract actions (letter contracts).

The contracting officer will include all pricing, terms and conditions available at the time of issuance. A letter contract is used when the government’s interest demands that the contractor be given a binding commitment so that work can begin immediately and negotiating a definitive contract is not possible in sufficient time to meet the requirement.

Performance begins before the price is established, but the negotiating schedule must be included, calling for a definitization. DFARS 217.74 provided guidance to DoD that require the undefined contract actions to be definitized within 180 days after issuance of the action or the date on which the funds obligated under the contract action equals more than 50 percent of the NTE amount.

Awarding an abundance of letter contracts for what appears to be a very large sum of money in itself is neither a problem nor illegal. The concerns stem from the recurring problem that the government faces in its lack of oversight. Simply stated, the contracting officer often allows letter contracts to remain undefined past the 180 days or the day when the obligated funds equals more than 50 percent of the award.

It is difficult when contractors and contracting officials find that they are not always speaking the same language in the acquisition world. Understanding how we use terms—in some cases interchangeably—can shed light on the contracting methodology employed. Successful communication often is skewed by the various definitions we apply to the same acronym. Remember that a UCA by any other name may or may not be a UCA.

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