



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States Government Accountability Office
Washington, DC 20548**

Decision

Matter of: Bureau of Customs and Border Protection - Automated Commercial Environment Contract

File: B-302358

Date: December 27, 2004

DIGEST

1. Customs's Automated Commercial Environment (ACE) contract was an indefinite delivery, indefinite quantity (IDIQ) contract and therefore was not subject to the multiyear contracting requirements of 41 U.S.C. § 254c, including the termination provisions in that section.

2. Upon award of Automated Commercial Environment (ACE) contract, Customs should have obligated the contract minimum of \$25 million in accordance with 31 U.S.C. § 1501(a), the recording statute, to ensure the integrity of Customs's obligational accounting records.

DECISION

The Bureau of Customs and Border Protection (Customs)¹ and the Office of Inspector General (OIG), Department of Homeland Security, have jointly requested our decision, pursuant to 31 U.S.C. § 3529, concerning implementation of the Customs modernization program² contract (Tc-2001-025), known as the Automated

¹ The name of the Customs Service was changed to the Bureau of Customs and Border Protection by Reorganization Plan Modification for the Department of Homeland Security, effective Mar. 1, 2003, H.R. Doc. No. 108-32, 108th Congress, 1st Session, set out as a note under 6 U.S.C. § 542. We use Customs throughout for both the Customs Service and the Bureau of Customs and Border Protection.

² GAO has reviewed the Customs modernization program several times. The most recent related GAO work product is GAO-04-719, *Information Technology: Early Releases of Customs Trade System Operating, But Pattern of Cost and Schedule Problems Needs to Be Addressed*, May 14, 2004.

Commercial Environment (ACE) contract. Letter from Clark Kent Ervin, Acting Inspector General, Department of Homeland Security, and Robert C. Bonner, Commissioner, Bureau of Customs and Border Protection, to David Walker, Comptroller General, GAO, Dec. 5, 2003. Specifically, the requestors ask whether Customs should have obligated estimated termination costs pursuant to the Federal Acquisition Streamlining Act's multiyear contracting authority, codified at 41 U.S.C. § 254c. Section 254c permits an agency to enter into a contract for up to 5 years and requires the agency, at the time of contract award, to obligate the estimated costs of termination (as well as the cost of the first fiscal year in which the contract is in effect) unless the agency obligates for the full period of the contract.

OIG's position is that the ACE contract is a multiyear contract governed by the section 254c requirement to obligate termination costs and that Customs's failure to obligate estimated termination costs could result in an Antideficiency Act violation if Customs needs to terminate the contract before its expiration and there are insufficient funds to cover these costs. Customs ACE Contract Management: Deficiencies Noted With Customs Modernization Contract, OIG-03-087 at 7 (June 30, 2003) (hereinafter OIG Report). Customs maintains that the ACE contract is not subject to section 254c. Customs says that it is an indefinite delivery indefinite quantity (IDIQ) contract, funded by a no-year appropriation, and that Customs has correctly followed the rules for obligating funds for IDIQ contracts. Letter from Douglas M. Browning, Deputy Commissioner of Customs, to Jeffrey Rush, Office of Inspector General, Department of the Treasury, Dec. 20, 2002.³

As we explain below, we conclude that the ACE contract is an IDIQ contract and therefore is not subject to the requirements of section 254c, including the termination provisions of that section. Consequently, Customs did not need to obligate estimated termination costs at the time of contract award. We also conclude that Customs, at the time of contract award, incurred a legal liability of \$25 million for its minimum contractual commitment, but failed to obligate that amount. Customs did not record its \$25 million obligation until 5 months after contract award. There is no indication in the submitted record that Customs did not have sufficient funds to cover the obligation at the time of contract award. Certainly, five months later when Customs finally recorded its obligation, Customs did have sufficient budget authority to meet the contractual minimum. Consistent with 31 U.S.C. § 1501(a)(1), commonly referred to as the recording statute, Customs should have recorded an obligation against a currently available appropriation for the authorized purpose in an amount reflecting the liability incurred as a result of a binding written agreement at the time the contract was awarded.

³ In view of the disagreement between OIG and Customs, OIG has suspended the requirement for Customs to submit a corrective action plan pending our decision.

BACKGROUND

On April 27, 2001, Customs awarded its Modernization Prime Integration Contract, commonly referred to as the ACE contract, to IBM Global Services.⁴ The contract provided for an initial performance period of 5 years and included two options, each option allowing Customs to extend the contract for an additional 5 years. ACE Contract at B-1, B-5, B-8. The contract provided a minimum order amount of \$25 million and a maximum order amount of \$5 billion. In other words, at the time of contract award, Customs committed to an order of \$25 million; Customs, at its election, may order additional services and supplies up to \$5 billion through delivery and task orders under the contract.

The OIG Position

Because of the large sum that Customs can expend under the contract, OIG conducted two oversight audits of the contract. OIG Report at 2. The conclusions of OIG's second report, dated June 30, 2003, are at issue here. In that report, OIG concluded that the ACE contract is "both a multiyear and IDIQ contract."⁵ OIG Report at 4. OIG concluded further that because the ACE contract is a "multiyear contract," Customs was required to comply with section 254c and FAR Subpart 17.1, which govern multiyear contracting. *Id.* at 7-10, 12-13. OIG found that Customs had not obligated estimated termination costs for the contract. *Id.* at 3.

OIG concluded that section 254c applies primarily for two reasons.⁶ First, the base ACE contract covers a period of 5 years. Referring to the two 5-year option periods,

⁴ On December 21, 2000, the Consolidated Appropriations Act, 2001, appropriated \$258,400,000 to Customs for automation modernization "to remain available until expended," and provided that, "not less than \$130,000,000 [of that amount] shall be for the development of the Automated Commercial Environment." Pub. L. No. 106-554, 114 Stat. 2763, 2763A-131 (Dec. 21, 2000). To date, all subsequent appropriations for the Automated Commercial Environment have been enacted "to remain available until expended." Department of Homeland Security Appropriations Act, 2004, Pub. L. No. 108-90, 117 Stat. 1137, 1139 (Oct. 1, 2003); Consolidated Appropriations Resolution, 2003, Pub. L. No. 108-7, 117 Stat. 11, 434 (Feb. 20, 2003); Treasury and General Government Appropriations Act, 2002, Pub. L. No. 107-67, 115 Stat. 514, 520 (Nov. 12, 2001).

⁵ At the time of the audits, Customs was part of the Department of Treasury. The Department of Homeland Security OIG is now responsible for tracking compliance with the report's recommendations.

⁶ OIG, in its report, addressed the multiyear character of the ACE contract; OIG did not address the IDIQ character of the contract despite concluding that the contract is "both a multiyear and IDIQ contract." OIG Report at 2.

OIG concluded, “Consequently, the full term of this contract could cover a 15-year period.” *Id.* at 12, 31-32. To OIG, this is important because multiyear contracts are governed by section 254c. *Id.* at 12-13.

Second, OIG noted that Customs itself, at the time of procurement, proceeded as if this were a section 254c contract. OIG reported that upon reviewing the draft solicitation, the Customs Chief Counsel had advised the Procurement Division that a multiyear contract procurement action required a “Determination and Finding” (D&F) signed by the Commissioner. OIG Report at 30. According to OIG, a D&F is required only of section 254c contracts. *Id.* The contracting officer, on this advice, prepared a D&F. *Id.* In addition, in both its final solicitation and the awarded contract, Customs included the multiyear contract clause required by the Federal Acquisition Regulation.⁷

The Customs Position

Customs disagrees with the OIG conclusion. Letter from Douglas M. Browning, Deputy Commissioner, U.S. Customs Service, to Jeffrey Rush, Office of Inspector General, U.S. Department of the Treasury, Dec. 20, 2002. Customs contends that the contract is an IDIQ contract, and as such is not subject to the requirements of section 254c. Customs bases its position on, among other things, the plain language of the contract. *Id.* Customs maintains that because the ACE contract is not governed by section 254c, it is not required to obligate funds for estimated termination costs. *Id.*

In a letter to this Office dated February 3, 2004, the Customs Chief Counsel took the position that although “the evidence cited by the IG could conceivably lead to some confusion” as to the correct contract type, “the plain language of the contract, the underlying conflicting nature of the two contract types (IDIQ vs. Multi-Year), and the actions of the parties to the contract” support its position that the ACE contract is solely an IDIQ contract. Letter from Alfonso Robles, Chief Counsel, Customs, to Jon Barker, Senior Attorney, GAO, Feb. 3, 2004. The Chief Counsel also noted that “the parties have administered the contract as an IDIQ contract” and that Customs “has already fulfilled its contractual obligation to the ACE contractor by issuing task orders in excess of the \$25 million minimum liability stated in the contract.” *Id.*

⁷ FAR § 52.217-2 (“Cancellation Under Multiyear Contracts”), 48 C.F.R. § 52.217-2. The FAR requires agencies to include this clause “in solicitations and contracts when a multiyear contract is contemplated.” 48 C.F.R. § 17.109(a). The FAR is codified in title 48 of the Code of Federal Regulations.

ANALYSIS

It is widely accepted that the plain language of a contract, if unambiguous, is the best source to use to interpret it. *In re: Crow Winthrop Operating Partnership*, 241 F.3d 1121, 1124 (9th Cir. 2001); *In re: Cambridge Biotech Corp.*, 186 F.3d 1356, 1374 (Fed. Cir. 1999); *Kokomo Tube Co. v. Dayton Equipment Services Co.*, 123 F.3d 616, 624 (7th Cir. 1997). Not only will courts look to the terms of a contract to determine its type, but they will do so in preference to statements of the parties external to the contract itself. In *Crown Laundry and Dry Cleaners v. United States*, 29 Fed. Cl. 506, 515 (1993), the Court of Federal Claims held:

“In determining which type of contract was entered into by the parties, the court . . . is not bound by the name or label given to a contract. Rather, it must look beyond the first page of the contract to determine what were the legal rights for which the parties bargained, and only then characterize the contract. *See A-Transport Northwest Co. v. United States*, 27 Fed. Cl. 206, 214 (1993); *Ralph Constr., Inc. v. United States*, 4 Cl. Ct. 727, 731 (1984); *Mason v. United States*, 222 Ct. Cl. 436, 442, 615 F.2d 1343, 1346 (1980).”

We examined the language of the ACE contract and find it clear that the contract is an IDIQ contract. In addition, Customs has generally administered it as an IDIQ contract. The fact that the term of the ACE contract covers more than one year does not compel a conclusion that it is subject to section 254c. Apparently the multiple-year term of the ACE contract has resulted in some confusion as to the nature of the contract and the obligational consequences of the contract. In this decision, we address the fundamental difference between IDIQ contracts (such as the ACE contract), multiple-year contracts, and multiyear contracts (such as section 254c contracts).

IDIQ Contracts

An IDIQ contract is a form of an indefinite-quantity contract. An indefinite-quantity contract provides for an indefinite quantity of supplies or services, within stated limits, during a fixed period. 48 C.F.R. § 16.504(a). *See also Mason v. United States*, 442, 615 F.2d 1343, 1346, n.5 (Ct. Cl. 1980), *cert. denied* 449 U.S. 830 (1980); Cheryl Lee Sandner and Mary Ita Snyder, *Multiple Award Task and Delivery Order Contracting: A Contracting Primer*, 30 Pub. Cont. L. J. 3, 461 (2001). Although the quantity is indefinite, an IDIQ contract must require the government to order, and the contractor to furnish, at least a stated minimum quantity of supplies or services. FAR § 16.504(a). If additional amounts above the minimum are ordered, the contractor must furnish any additional quantities, but not to exceed the stated maximum. *Id.* Also, while the agency may place orders at any time during a fixed period, actual delivery dates during that period are undefined.

After award of an IDIQ contract, the government places task or delivery orders with the contractor (or contractors) as the government's needs become definite. IDIQs have been a common acquisition vehicle for several years. *See* GAO/NSIAD-00-56,

Contract Management: Few Competing Proposals for Large DOD Information Technology Orders, March 2000 at 5. In 1994, the Federal Acquisition Streamlining Act (FASA) added sections 303H through 303K to the Federal Property and Administrative Services Act of 1949, codified at 41 U.S.C. §§ 253h-253k, providing specific statutory authority for “task or delivery order” contracts. Pub. L. No. 103-355, §§ 1004, 1054, 108 Stat. 3261-3265 (Oct. 12, 1994). Section 253k of title 41 of the U.S. Code defines task and delivery order contracts as follows:

“(1) The term ‘task order contract’ means a contract for services that does not procure or specify a firm quantity of services (other than a minimum or maximum quantity) and that provides for the issuance of orders for the performance of tasks during the period of the contract.

“(2) The term ‘delivery order contract’ means a contract for property that does not procure or specify a firm quantity of property (other than a minimum or maximum quantity) and that provides for the issuance of orders for the delivery of property during the period of the contract.”

41 U.S.C. § 253k.

Task or delivery order contracts under FASA include both “requirements contracts”⁸ and indefinite quantity contracts, such as IDIQ contracts.⁹ *See, e.g.*, John A. Howell, *Governmentwide Agency Contracts: Vehicle Overcrowding on the Procurement Highway*, 27 Pub. Cont. L. J. 395, 397 (1998). The FAR implements the FASA task and delivery order contract provisions in Subpart 16.5, “Indefinite-Delivery

⁸ “A requirements contract provides for filling all actual purchase requirements of designated Government activities for supplies or services during a specified contract period, with deliveries or performance to be scheduled by placing orders with the contractor.” FAR § 16.503(a), 48 C.F.R. § 16.503(a) (2003).

⁹ *See* 48 C.F.R. § 16.501-2(a):

“There are three types of indefinite-delivery contracts: Definite-quantity contracts, requirements contracts, and indefinite-quantity contracts. The appropriate type of indefinite-delivery contract may be used to acquire supplies and/or services when the exact times and/or exact quantities of future deliveries are not known at the time of contract award. Pursuant to 10 U.S.C. 2304d and section 303K of the Federal Property and Administrative Services Act of 1949, requirements contracts and indefinite-quantity contracts are also known as delivery order contracts or task order contracts.”

Contracts,” which, in FAR §16.504, “Indefinite-quantity contracts,” establishes criteria for the use of indefinite-delivery contracts that are also indefinite-quantity contracts, i.e., IDIQ contracts:

“Contracting officers may use an indefinite-quantity contract when the Government cannot predetermine, above a specified minimum, the precise quantities of supplies or services that the Government will require during the contract period, and it is inadvisable for the Government to commit itself for more than a minimum quantity. The contracting officer should use an indefinite-quantity contract only when a recurring need is anticipated.”

48 C.F.R. § 16.504(b) (2003).

The ACE contract is a typical IDIQ contract, governed by 41 U.S.C. §§ 253h-253k and FAR §§ 16.504-16.506. The contract obligates the government to buy only a specified minimum amount of supplies and services and calls for the government to place task or delivery orders with the contractor as its requirements become definite. This is the essential nature of an IDIQ contract.

Additionally, the terms of the ACE contract, as awarded, make it clear that it is an IDIQ contract. For example, the contract in subsection I.1 incorporates FAR clause 52.216-22, which states, “This is an indefinite-quantity contract for the supplies or services specified, and effective for the period stated, in the Schedule. The quantities of supplies and services specified in the Schedule are estimates only and are not purchased by this contract.” Subsection B.4 of the contract provides that “[t]he Government shall order services/supplies worth a minimum of \$25 million (\$25,000,000) under this Contract.” Subsection H.4 includes ordering procedures typical of IDIQ contracts. Section L includes FAR clause 52.216-1, Type of Contract, which states that the government contemplates the award of an IDIQ type contract with delivery and task orders to be awarded.

When an agency executes an indefinite-quantity contract such as an IDIQ contract, the agency must record an obligation in the amount of the required minimum purchase. In an IDIQ contract, the government commits itself to purchase only a minimum amount of supplies or services. FAR § 16.501-2(b)(3). At the time of award, the government has a fixed liability for the minimum amount to which it committed itself. *See* FAR § 16.504(a)(1) (specifying that an IDIQ contract must require the agency to order a stated minimum quantity). An agency is required to record an obligation at the time it incurs a legal liability. 65 Comp. Gen. 4, 6 (1985); B-242974.6, Nov. 26, 1991. Therefore, for an IDIQ contract, an agency must record an obligation for the minimum amount at the time of contract execution.

Further obligations occur as task or delivery orders are placed and are chargeable to the fiscal year in which the order is placed. *See, e.g.*, 60 Comp. Gen. 219 (1981). This principle was explained in 63 Comp. Gen. 129 (1983), in which we discussed funding of orders placed under GSA’s Multiple Award Schedule (MAS) program:

“Thus, under the MAS agreements an agency does not actually bind the Government to make a payment unless and until it administratively determines that it has a requirement for a scheduled item and then issues a purchase order for it. Viewed as of the time FSS [Office of Federal Supply and Service] executes the agreements, no binding commitment which will necessitate the expenditure of funds is created because purchasing agencies have not ordered any scheduled items. Since the mere signing of an agreement does not result in a commitment for the payment of funds, no “obligation in advance of appropriations” prohibited by 31 U.S.C. § 1304(a)(1)(B) and in effect by 41 U.S.C. § 11 comes into being. [Footnote omitted.] Consequently, FSS would not violate those two provisions at the time MAS agreements are executed.”

63 Comp. Gen. at 131-132.

The government controls the decision to make additional purchases (through task and delivery orders), the timing of those purchases, and the amount of those purchases. We discuss the obligational consequences of IDIQ and other variable quantity contracts in *Principles of Federal Appropriations Law*. GAO, *Principles of Federal Appropriations Law*, Vol. II, ch. 7, at 7-16 to 7-19 (2d ed. 1992) (commonly known as the Red Book). See also Office of Management and Budget (OMB) Circular No. A-11, § 20.5 (c).

As indicated above, the ACE contract included a minimum order amount of \$25 million. Customs, however, did not record any obligation for the ACE contract at the time of contract award. Instead, Customs recorded a \$25 million liability five months later, on September 28, 2001, when it issued three task orders. Customs has advised us that its failure to record the \$25 million obligation at time of contract award was inadvertent. It had expected to issue the three task orders concurrently with the award of the contract. Had it done so, Customs would have recorded the obligation at that time. Because of the technical nature of the task orders, however, it took Customs more time to process them than Customs had expected. In the effort to prepare and process the task orders, Customs neglected to record its \$25 million obligation.

Customs’s failure to obligate the ACE contract’s minimum order amount of \$25 million on contract award was inconsistent with the principles for funding of IDIQ contracts, set forth above, which require that the required minimum purchase must be obligated when the contract is executed. Nonetheless, Customs has advised us that it “has already fulfilled its contractual obligation to the ACE contractor by issuing task orders in excess of the \$25 Million minimum liability stated in the contract.” Letter from Alfonso Robles, Chief Counsel, Customs, to Jon Barker, Senior Attorney, GAO, Feb. 3, 2004. There is no indication in the submitted record

that Customs did not have sufficient funds to cover the obligation at the time of its contract award. Certainly, 5 months later when Customs issued the three task orders and recorded the \$25 million obligation, it had sufficient budget authority.

As noted above, Customs failed to record the \$25 million minimum order amount as an obligation in its obligational accounting records at the time of contract award. Consistent with 31 U.S.C. § 1501(a)(1), commonly referred to as the recording statute, Customs should have recorded an obligation against a currently available appropriation for the authorized purpose in an amount reflecting the liability incurred as a result of a binding written agreement at the time the contract was awarded. To ensure the integrity of Customs's obligational accounting records needed for a variety of reasons not least of which is compliance with the Antideficiency Act, we recommend that Customs take the necessary steps to ensure timely obligation of the minimum financial liability represented by IDIQ contracts.

Multiyear Contracts Under Section 254c

Section 254c authorizes executive agencies to “enter into a multiyear contract for the acquisition of property or services” if certain conditions are met. This multiyear contracting authority provides an exception to the Antideficiency Act, which prohibits obligations or expenditures in advance of appropriations, 31 U.S.C. § 1341(a), and the time statute, which provides that an appropriation is available only to cover legitimate *bona fide* needs of an agency during the appropriation's period of availability, 31 U.S.C. § 1502(a). Section 254c permits agencies to bind the government in advance of the availability of appropriated funds.¹⁰ Subsection 254c(d) defines a multiyear contract as “a contract for the purchase of property or services for more than one, but not more than five, program years.” Under section 254c, an agency awarding a multiyear contract needs only to have funds available for “the first fiscal year in which the contract is in effect, and for the estimated costs associated with any necessary termination of such contract.” 41 U.S.C. § 254c(a)(1).

Subsections (b) and (c) of sections 254c relate to cancellation of the contract in the event that funds are not made available:

“(b) Termination clause. A multiyear contract entered into under the authority of this section shall include a clause that provides that the contract shall be terminated if funds are not made available for the continuation of such contract in any fiscal year covered by the contract. Amounts available for paying termination costs shall remain available for such purpose until the costs associated with termination of the contract are paid.

¹⁰ Other statutes in addition to section 254c authorize multiyear contracting, *e.g.*, 10 U.S.C. §§ 2306b, 2306c. For a discussion of multiyear contracting and its fiscal law implications, see GAO, *Principles of Federal Appropriations Law*, Vol. I, ch. 5, at 5-44 to 5-48. (3d ed. 2004).

”(c) Cancellation ceiling notice. Before any contract described in subsection (a) of this section that contains a clause setting forth a cancellation ceiling in excess of \$10,000,000 may be awarded, the executive agency shall give written notification of the proposed contract and of the proposed cancellation ceiling for that contract to the Congress, and such contract may not then be awarded until the end of a period of 30 days beginning on the date of such notification.”

Procedures for cancellation of contracts under section 254c are set forth in the FAR at 48 C.F.R. §§ 17.106-1, 17.108 (2003).¹¹

Section 254c was enacted by FASA, Pub. L. No. 103-355, Oct. 13, 1994, § 1072, 108 Stat. 3270. Its purpose was to “permit civilian agencies to enter into multiyear contracts where sufficient appropriations are available and obligated and the agency head determines that the need for property or services is reasonably firm and continuing and such a contract is in the best interest of the United States.” H.R. Rep. No. 103-712, at 183 (1994). Although section 254c provides agencies with the discretion to enter into multiyear contracts when certain conditions are satisfied, it does not require agencies to do so. B-292179, B-292179.2, B-292179.3, June 27, 2003.

Section 254c (and certain other multiyear contracting authorities) are implemented in Subpart 17.1 of the FAR. 48 C.F.R. Subpart 17.1 (2003). FAR § 17.104 provides in part: “Multiyear contracting is a special contracting method to acquire known requirements in quantities and total cost not over planned requirements for up to 5 years unless otherwise authorized by statute, even though the total funds ultimately to be obligated may not be available at the time of contract award.” 48 C.F.R. § 17.104(a) (2003).

It is critical in this case to distinguish between “multiyear contracting” and “multiple year contracts.” The unfortunate partial homonymy of the terms “multiyear” and “multiple year” evidently led to confusion both at Customs and at OIG and is the essential origin of the current dispute. The term “multiple year contracts” is commonly used to refer to contracts that extend beyond one year. It includes multiyear contracts, such as those authorized by section 254c, obligating the government for future years. It may also include contracts that extend for more than

¹¹ Cancellation under section 254c in the event of nonavailability of funds is distinct from “termination for convenience of the government,” which is governed by FAR Part 49. 48 C.F.R. pt. 49.

one year, but do not obligate the government beyond the initial year.¹² This distinction is explained in FAR Part 17:

“The key distinguishing difference between multiyear contracts and multiple year contracts is that multiyear contracts, defined in the statutes cited at 17.101, buy more than 1 year's requirement (of a product or service) without establishing and having to exercise an option for each program year after the first.”

48 C.F.R. § 17.103. *See, e.g.*, definition of multiple year contracts in FAR Part 22.10 (Multiple year contracts means “contracts having a term of more than 1 year regardless of fiscal year funding. The term includes multi-year contracts (see 17.103).” 48 C.F.R. § 22.1001.

A few years after the enactment of FASA, Professors Cibinic and Nash noted the “confusion” created by the failure to distinguish between “multi-year contracting” and “multiple year contracts”:

*“Multiple-Year Requirements Contracts Distinguished—*We use the term ‘multiple-year’ to distinguish such a contract from a ‘multiyear’ contract. This is not just an exercise in semantics. Considerable confusion has arisen through overly broad use of the term “multiyear.” That term should only be used when referring to the unique arrangements covered in FAR Subpart 17.1 At present, FAR Part 17 does not use the term ‘multiple-year contract.’ We use it here to refer to a contract that covers performance over a number of years but is not a multiyear contract. It could be a contract for supplies or nonseverable services that require more than one year to perform.”

Ralph C. Nash and John Cibinic, *Multiple-Year Task and Delivery Order Contracts: Can Annual Funds Be Used?*, Nash & Cibinic Report, June 1996 at ¶ 31.¹³ *See also*

¹² Using a no-year appropriation, Customs entered into a multiple year contract, covering a period of five years. As discussed above, Customs did not incur a 5-year financial obligation, however. At the time of award, Customs incurred an obligation only for the \$25 million of supplies and services that it had agreed to purchase; during the 5-year contract period, Customs would incur additional obligations whenever it might place an order for additional supplies or services, and would charge the new obligations to appropriations available at that time.

¹³ In March 1995, the Federal Acquisition Regulatory Council published in the Federal Register a proposed rule covering implementation of the “Multiyear Contracting” provisions of FASA as part of FAR Case 94-710, Special Contracting Methods. 60 Fed. Reg. 14340, 14341 (Mar. 16, 1995). The proposed rule included the following definitions in proposed FAR § 17.103:

(continued...)

W. Noel Keyes, *Keyes Encyclopedic Dictionary of Contract and Procurement Law*, 5th Ed., 1992 at 30, 32 (definitions of “multi-year contracts” and “multiple year contracts”).

We recognize that the contract file is replete with references to “multiyear contracting,” including FAR Clause 52.217-2, Cancellation Under Multiyear Contracts. Many of these references apparently result from imprecise usage and apparent confusion between “multiyear contracting” and “multiple year contracts,” discussed above. Further, at various times in the acquisition planning process, Customs’s actions appeared consistent with an intent to award a “multiyear contract.” Nonetheless, as explained above, Customs plainly awarded an IDIQ contract and not a multiyear contract.

Because the ACE contract is an IDIQ contract, it is not governed by section 254c and implementing regulations in FAR Subpart 17.2, including the contract cancellation provisions. IDIQ contracts and multiyear contracts have substantially inconsistent statutory and regulatory requirements. As discussed above, section 254c authorizes multiyear contracts when “the need for the property or services is reasonably firm and continuing over the period of the contract.” 41 U.S.C. § 254c(a)(2)(A). An IDIQ contract, on the other hand, is a contract “that does not procure or specify a firm quantity” of supplies or services, other than a minimum or maximum quantity. 41 U.S.C. § 253k(1)-(2). The FAR authorizes multiyear contracts only when “the need for the supplies or services is reasonably firm and continuing over the period of the contract.” 48 C.F.R. § 17.105-1(a)(1). The FAR authorizes an IDIQ contract, however, “when the Government cannot predetermine, above a specified minimum, the precise quantities of supplies or services that the Government will require during the contract period.” 48 C.F.R. § 16.504(b). Similarly, multiyear contracts “buy more than one year’s requirement (of a product or service),” 48 C.F.R. § 17.103, but supplies and services specified in an IDIQ contract “are estimates only and are not

(...continued)

“*Multiple year contract*, as used in this subpart, means a contract having a term of more than one year regardless of the type of funding that applies.

“*Multiyear contract* means a contract for the purchase of supplies or services for more than one, but not more than five, program years. A multiyear contract may provide that performance under the contract during the second and subsequent years of the contract is contingent upon the appropriation of funds, and (if it does so provide) may provide for a cancellation payment to be made to the contractor if appropriations are not made.”

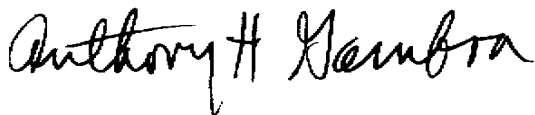
The final rule covering multiyear contracting was published in July 1996, but included no definition of “multiple year contract.” 61 Fed. Reg. 39203, July 26, 1996. However, a definition of “multiple year contract” is found at 48 C.F.R. § 22.1001.

purchased” by the contract. 48 C.F.R. § 52.216-22 (2003). A single contract cannot satisfy these wholly inconsistent sets of statutory and regulatory requirements.

It is plain, therefore, that the ACE contract is an IDIQ contract and cannot also be a “multiyear contract” governed by section 254c and Part 17 of the FAR. As set forth above, the ACE contract has all the essential indicia of an IDIQ contract and none of the indicia of a multiyear contract. It is governed by sections 253h through 253k of Title 41 of the U.S. Code and associated regulations in Part 16 of the FAR as well as general principles regarding funding of indefinite quantity contracts, discussed above.

CONCLUSION

The ACE contract is an indefinite delivery, indefinite quantity (IDIQ) contract and therefore is not subject to the requirements of section 254c, including the termination provisions in that section. Customs failed to record the \$25 million minimum order amount as an obligation in its obligational accounting records at the time of contract award. Consistent with 31 U.S.C. § 1501(a)(1), commonly referred to as the recording statute, Customs should have recorded an obligation against a currently available appropriation for the authorized purpose in an amount reflecting the liability incurred as a result of a binding written agreement at the time the contract was awarded. To ensure the integrity of Customs’s obligational accounting records needed for a variety of reasons not least of which is compliance with the Antideficiency Act, we recommend that Customs take the necessary steps to ensure timely obligation of the minimum financial liability represented by IDIQ contracts.



Anthony H. Gamboa
General Counsel