News from the CHAIR

Michael W. Mutek, Chair

Were you surprised during the September 26 presidential candidates’ debate to hear Senator John McCain say that he would stop the use of cost-plus contracting? It certainly generated a buzz within our community, but perhaps it should not have been a surprise because it was not the first time that this has been said. I pulled my file of articles on fixed-price contracts and found a 2006 article that mentions Senator McCain’s proposal to require fixed-price contracts for research and development unless the Department of Defense deems the program so technically challenging as to make fixed-price contracting impractical.1

The House also has raised this issue. In 2007, Rep. Henry A. Waxman introduced H.R. 1362, the “Accountability in Contracting Act,” to require agencies to limit the use of what some might call “abuse-prone” contracts. It sought to minimize the use of cost-reimbursable-type contracts because “[f]ixed price type contracts provide the taxpayer the best value for the least risk in procuring items whose costs are well understood. Cost-plus contracts, the other main type of contract, leave the government vulnerable to wasteful spending since they provide the contractor with little or no incentive to control costs.”2

The reaction to the statement during the debate came from all quarters of the procurement community. One article noted that readers, “mostly current or former government employees, said it’s not that simple. Each approach has its place, and—here is the important point—neither one works if government does not develop and adhere to a clear set of requirements.”3 Some mentioned that the argument against cost-plus contracts fails to consider the reasons for selecting one contract type over another. For example, one reader said “[f]ixed price contracts are a tool that fits better in certain circumstances than fixed-price contracts. Banning cost-plus is like banning wrenches. You could still get work done using pliers and hammers, but it would be cheaper and more effective to use the right tool for the job.”4

The acquisition community has seen other attempts to control costs through the use of firm-fixed-price contracts.

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If you have been practicing in this area for awhile, you may recall that concerns about cost overruns resulted in the use of what was called “total package procurement” back in the 1970s. Total package procurement required a fixed-price-type contract for design and development work, and fixed-price options for production and spares. The concept failed. Major programs suffered losses and massive claims (continued on page 26)
resulted. One such program was the C-5A; the contract was converted to a cost-plus-fixed-loss agreement. After a few years, the total package procurement concept ended, and guidance was issued requiring the use of cost-plus-contracts for development work and prohibiting the use of fixed-price production contracts for the development of major systems.

Then, in the 1980s, there was another push for fixed-price contracting as a means to control costs on large development programs. The A-12 program remains the most significant reminder of that push. The termination of the A-12 program, and the litigation that followed, were factors that caused Congress to enact legislation to limit the use of fixed-price contracts for development efforts.3

The Federal Acquisition Regulation addresses contract types. FAR Part 16 provides the types that are available and establishes criteria for selecting a particular contract type, including limitations on the use of cost-type contracts. These limitations reflect the belief that cost-type contracts “are suitable for use only when uncertainties in contract performance do not permit costs to be estimated with sufficient accuracy to use any type of fixed-price contract.”4

In many situations, a fixed-price contract type will be preferred, but we should not ignore history. Fixed-price contracting in certain circumstances, especially where development uncertainties and risks are significant, is inappropriate. A legislated preference for fixed-price contracts regardless of the particular situation could lead to the same kinds of scenarios that we have seen before. The FY 2009 National Defense Authorization Act requires that by mid-July 2009 the FAR must provide guidance on the use of cost-type contracts. My hope is that the lessons of history will be considered, and past mistakes will not be repeated.

Fall Section Meeting in Napa
The title of the Section’s Fall Program in Napa, California, was “Uncorking the Tough Issues—How In-House and Government Attorneys Unravel Them.” We had a perfect combination of a great program, a great location, and great weather. The program focused on the toughest procurement law issues that we face today, and the timing was perfect as the long-awaited final rule imposing mandatory disclosure obligations on federal contractors and subcontractors was published the week of the program. Several panels, as well as a discussion during the Council meeting, addressed issues raised by the new rule. Among its provisions, this final rule, effective December 12, 2008, requires contractors to disclose violations of federal criminal law involving fraud, conflicts of interest, gratuities, bribery, or the civil False Claims Act when the contractor has “credible evidence” of a violation.5 Mentioned in Napa were the lack of a definition of “credible evidence,” questions that arise from the commentary accompanying the rule that discusses treatment of violations that predate the rule, and uncertainty over what “timely” means under the rule.

Also, there were some interesting comments made by speakers at the Napa meeting. For example, two members of the panel on “The Government Perspective” made notable statements. Michael Golden, managing associate general counsel, Procurement Law, Government Accountability Office, said that “protests are a window into the public procurement system.” Think about the press coverage of recent protests and how that coverage discusses the procurement process. Michael is correct.

David Drabkin, deputy chief acquisition officer, General Services Administration, made an interesting observation when talking about acquisition today. He discussed indefinite delivery, indefinite quantity (IDIQ) contracts, and said that the use of such contract vehicles for “solutions” is not easy, adding that “we may need to revisit the theory of competition as we enter into the ‘solutions world’ instead of products or administrative services.” That is a thought worthy of consideration.

Several speakers mentioned the anticipated organizational conflict of interest and personal conflict of interest (OCI/PCI) rules. As I write this, the rules have not been released, but they are expected soon. These rules and other key issues will be discussed at the 15th Annual Federal Procurement Institute in Annapolis, Maryland, on March 5-6, 2009. I hope to see you there.

Endnotes
4. Id.
5. Section 818 of the FY07 National Defense Authorization Act repealed the legislation that was the basis for this regulatory limitation.
6. FAR § 16.301-2.

PENSIVE POSER
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(2008) (from solicitation: “the closer the technical scores of the various proposals are to one another, the more important cost or price considerations become in determining the overall best-value for the Government”).
2. 48 C.F.R. §§ 15.304(d), (e), 15.305(a) (2008).
3. This is untrue. I was not on my sofa, and it was not leisure time.
5. Id. at 466-67, 496-501.
7. Id. at 761, 774-75.
8. See Blue & Gold Fleet, L.P. v. United States, 492 F.3d 1308, 1313 (Fed. Cir. 2007) (defect on face of solicitation not challenged prior to proposal due date is waived).