



## Contract Types NES Case Study Answers

### ANSWER

#### Case Study #1

#### The Fixed-Price Proposal

- An agency may award a fixed-price contract even though the solicitation expresses a preference for a cost-type contract vehicle.
- Fixed-price contracts are preferred, but an agency can and should exercise its discretion to award a cost-type contract when it is not possible to estimate the costs at the time of award.

A fixed-price proposal generally may be considered by an agency notwithstanding that the agency otherwise indicated a preference for a cost-type award. As explained in FAR 16.103(a), the agency's objective is to select a contract type that will result in reasonable contractor risk and provide the contractor with the greatest incentive for efficient and economical performance. Thus, while the FAR calls for the use of fixed-price contracts when the risk involved is minimal or can be predicted with an acceptable degree of certainty, it states that other contract types should be considered where a reasonable basis for firm pricing does not exist, particularly in an R&D context. FAR § 35.006(b); see also FAR § 35.006(c) (the use of cost-type contracts is usually appropriate in research and development procurements).

Further, DFARS 235.006(b)(ii) prohibits the use of fixed-price contracts unless certain conditions are met:

For other than major defense acquisition programs (A) [d]o not award a fixed-price type contract for a development program effort unless—

- (1) The level of program risk permits realistic pricing;
- (2) The use of a fixed price-type contract permits an equitable and sensible allocation of program risk between the Government and the contractor; and
- (3) A written determination that the criteria . . . of this section have been met is executed.

Ultimately, selecting the appropriate contract type is the responsibility of the contracting officer. We conclude that the contracting officer had a reasonable basis to conclude that the criteria set out in DFARS 235.006(b)(ii) were not met and that a fixed-price contract therefore could not be awarded for this R&D procurement.

The solicitation for Phase II described a substantial development process leading up to at-sea demonstrations of a large-scale waterjet. During contract negotiations, ONR explained that "ONR considers sufficient uncertainties to be involved with any effort under this program to not allow for the use of a fixed-price contract." The record also includes an affidavit in which the program officer states that "[t]he work needed to do detailed design, construction, delivery, and installation of a complete large scale waterjet for at-sea testing on a candidate platform not yet constructed cannot be realistically



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priced at this time. Use of a fixed-price contract by any company for this effort would not permit an equitable and sensible allocation of program risk between the contractor and the government.”

Based on the record here, we conclude that the contracting officer reasonably determined that the conditions required for the award of a fixed-price contract under DFARS 235.006(b)(ii) were not present in this procurement and thus properly decided not to consider Wortec’s fixed-price proposal for a Phase II contract award.

*(See Matter of Wartsila Defense, Inc., B-401224, May 26, 2009)*



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### **ANSWER**

#### **Case Study #2**

##### **The Limitation of Funds Clause**

- A contractor should strictly follow notice requirements in LOF (and LOC) clauses, at the risk of not being paid for costs above the ceiling.
- If a contractor has not provided required notice under a LOF or LOC clause, do not lose all hope; if the government was aware of the cost overrun and the contractor's continuing performance it may be estopped from relying on the LOF or LOC clause.
- These decisions depend on the specific facts, and reasonable judges may differ in their decisions.

##### **Board Decision**

The board finds that from early June 1979 through January 1980, the government (the technical representative and the CO) knew that AMEC had experienced a cost growth; by July, the cost growth was believed by AMEC to be above the then contract limit. Subsequently the cost growth continued to increase and was explained by AMEC in letters, reports and conferences. During this period the government also knew that AMEC continued to perform the contract. During this period the CO never discouraged AMEC from performing and never gave AMEC any written response to the actual notice that a cost overrun had taken place.

The board also finds that as of early June AMEC knew or should have known that a cost overrun was an imminent probability. AMEC should have given notice to the CO by early June 1979, but did not actually give notice until late July. Nevertheless, AMEC never considered stopping performance, as was its right under the contract, until six months had passed. It is evident that both AMEC and the army wanted the contract to be performed, but there is no evidence that the army indicated to AMEC that additional funds were likely to be allotted to the contract above and beyond the \$900,000 disclosed to AMEC by the contract specialist.

AMEC failed to provide timely notice of the cost overrun, and the government was not estopped from invoking the LOF clause. We affirm the CO's denial of AMEC's claim for costs incurred in excess of the funds allotted to the contract.

##### **Court of Appeals Decision**

We agree with the board's factual findings on the notice issue and find that AMEC failed to provide timely notice of the cost overrun.

In certain situations, however, the government may be estopped from denying actions relied on by others to their detriment. Four elements must be present to establish an estoppel: (1) the party to be estopped must know the facts, (i.e., the government must know of the overrun); (2) the government must intend that the conduct alleged to have induced continued performance will be acted upon, or the



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contractor must have a right to believe the conduct in question was intended to induce continued performance; (3) the contractor must not be aware of the true facts, (i.e., that no implied funding of the overrun was intended); and (4) the contractor must rely on the government's conduct to its detriment.

There is no question that the first and third elements are satisfied. With regard to the first element, the board found and the government does not dispute that the CO knew of the overrun. With regard to the third element, the board found that it was not until December 20 that AMEC was aware for the first time that additional funds might not ever be available.

With regard to the fourth element, the board found that AMEC continued performance and was operating on its own funds. The clear import of the board's findings is that AMEC continued its performance because of the government's conduct. The board found there was no evidence of an indication to AMEC "that additional funds were likely to be allotted to the contract above and beyond the \$900,000 disclosed to AMEC." The necessary implication is that the government did in fact indicate that \$900,000 would be forthcoming.

The crux of this case is the second element, that is, whether the government intended that its conduct be acted on, or whether it acted in such a manner that AMEC could reasonably believe that the government so intended.

In preparation for the October 23 meeting, the contract specialist sent a memorandum to the CO that detailed the strategy to be used by the government. The board found that the aim of the government was to negotiate a contract amendment of \$900,000, and that the contract specialist expected that negotiations would result in a \$900,000 increase to the contract. In response to the memo, the CO determined that a modification to the contract was in the best interests of the government, wrote that "the contractor advises that contract funding has been exceeded and additional funding must be made available in order for the contractor to continue its efforts," and signed a document which authorized the \$900,000 modification. Clearly the government expected AMEC's continued performance.

The government argues that AMEC had no reasonable basis to believe that additional funds were or would become available. On the contrary, we can see a sufficient reason. The contractor was reassured repeatedly that the government had \$900,000 easily available; in the seven-month period from June 1979 to January 1980 "the contracting officer never discouraged AMEC from performing." The government representations were so encouraging with regard to the \$900,000 that it was not until December 20 that AMEC became aware for the first time that additional funds might not ever be available. From the time that the government first learned of the impending overrun until the time that AMEC finally stopped work, government representatives, including the CO, consistently induced AMEC to continue its performance by making representations that the government would fund the overrun.

The statements of the technical representative cannot be completely disavowed and repudiated on the grounds that he was without authority to speak for the contracting officer. When an official of the contracting agency is not the contracting officer, but has been sent by the contracting officer for the express purpose of giving guidance in connection with the contract, the contractor is justified in relying on his representations.



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The board's finding that the government expected AMEC's continued performance satisfies the second element—that the government intended that its conduct be acted on.

Thus, we find that all four elements of the estoppel test have been satisfied. Based on the board's findings of fact, we hold that the government is estopped from relying on the LOF clause, not in full, but to the extent of the \$900,000 which it held out before AMEC as an inducement for its continued performance.

*(See American Electronic Laboratories, Inc. vs. United States, 774 F.2d 1110 (Fed. Cir. 1985.)*



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### **ANSWER**

#### **Case Study #3**

#### **Faulty IDIQ Estimate**

- The Board and Court of Appeals came to different conclusions.
- The prevailing law is that the government is not responsible for faulty or negligent estimates of quantities to be ordered in an IDIQ contract.
- In an IDIQ contract, once the government meets the minimum purchase requirement it has fulfilled its purchase obligations, and the contractor will have no recourse.

#### **GSBCA Decision**

The GSBCA split two-to-one. The majority determined, “By inducing Trips ‘R Us to base its proposal on quantities that GSA knew or should have known were overstated, GSA breached its duty to deal with Trips ‘R Us fairly and in good faith.”

#### **Court of Appeals Decision**

Both requirements contracts and IDIQ contracts provide the government purchasing flexibility for requirements that it cannot accurately anticipate. A requirements contract requires the contracting government entity to fill all of its actual requirements for supplies or services that are specified in the contract, during the contract period, by purchases from the contract awardee. FAR § 16.503(a). Conversely, while an IDIQ contract provides that the government will purchase an indefinite quantity of supplies or services from a contractor during a fixed period of time, it requires the government to order only a stated minimum quantity of supplies or services. FAR § 16.504(a). Under an IDIQ contract, the government is required to purchase the minimum quantity stated in the contract, but when the government makes that purchase, its legal obligation under the contract is satisfied and it is free to purchase additional supplies or services from any other source it chooses. An IDIQ contract does not provide any exclusivity to the contractor.

Trips ‘R Us entered into a contract with GSA that explicitly stated that it was an IDIQ contract and that Trips ‘R Us was guaranteed no more than \$100 of revenue. The solicitation also stated that governmental agencies could, but were not required to, use this contract for its travel management services needs.

Regardless of the accuracy of the estimates delineated in the solicitation, based on the language of the solicitation for the IDIQ contract, Trips ‘R Us could not have had a reasonable expectation that any of the government’s needs beyond the minimum contract price would necessarily be satisfied under this contract.

When an IDIQ contract between a contracting party and the government clearly indicates that the contracting party is guaranteed no more than a non-nominal minimum amount of sales, purchases exceeding that minimum amount satisfy the government’s legal obligation under the contract. Under



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the terms of the IDIQ contract at issue, GSA was only required to purchase the minimum quantity stated in the contract—sales that would lead to \$100 in revenue. Trips 'R Us realized over \$500,000 of gross sales under the contract, which netted Trips 'R Us over \$100 of revenue. Therefore, GSA satisfied its obligation under the contract. Because GSA met the legal requirements of the contract at issue, its less than ideal contracting tactics fail to constitute a breach. Therefore, Trips 'R Us is not entitled to any legal relief.

Based on *Travel Centre v. Barram*, 236 F.3d 1316 (Fed. Cir. 2001).