But It's Only Six Months: Recent Decisions Provide Conflicting Guidance About When Agencies Can Use FAR 52.217-8, Option to Extend Services, to Deal With Budget Uncertainty During Sequestration

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The $85 billion sequester is here. No one knows for sure what this will mean for the government contracts industry in the long run, but, in the short term, contractors and government procurement personnel continue to operate in a cloud of uncertainty. Many contracting agencies are still unsure how sequestration will impact their respective budgets and programs. In addition to delaying new procurements, budget cuts also have agencies reconsidering whether they can continue to exercise options on existing contracts. In fact, in a recent memorandum to agencies providing guidance regarding the implementation of sequestration, the Office of Management and Budget instructed agencies *not* to exercise existing contract options unless the contract "support[s] high-priority initiatives" or "where failure to do so would expose the government to significantly greater costs in the future."[1]

Sequestration has thus placed many agencies in a "Catch-22" with respect to their contracts for recurring service requirements: they are unable to exercise options on existing contracts for an additional one year (or more) of performance because of budget uncertainty, but are not yet in a position to let new contracts to perform those services. One tool that agencies historically have had at their disposal in these circumstances is the clause at Federal Acquisition Regulation (FAR) 52.217-8, Option to Extend Services. Included in virtually all service contracts, the clause allows the government to require the contractor to provide "continued performance of any services within the limits and at the rates specified in the contract" for up to six months.[2] This clause would appear to be an ideal mechanism for agencies to ensure continued performance of services at current rates in the short term while they make plans for the follow-on contract.

The language of FAR 52.217-8 itself does not place any restrictions on the circumstances under which the government can use the clause to extend a service contract. However, recent decisions from the United States Court of Federal Claims (COFC) and the United States Court of Appeals for the Federal Circuit (CAFC) could be interpreted as holding that agencies may extend a contract pursuant to this clause only in those limited circumstances it was designed to address—*i.e.*, when an agency would otherwise be forced to negotiate at the mercy of the incumbent contractor to ensure continued performance of an expiring contract because the follow-on contract has been delayed for reasons outside the agency's control. The Armed Services Board of Contract Appeals (ASBCA), on the other hand, has adopted the opposite interpretation of the clause. The ASBCA's decisions, including an April 2013 case involving an agency's short-term extension of a contract using FAR 52.217-8 because of a lack of funding, would appear to sanction an agency's use of the clause in virtually any situation.

These decisions provide conflicting guidance to agencies dealing with the impact of sequestration on their recurring service requirements, and they have the potential to significantly reduce agencies' flexibility in using the clause to manage the transition from one service contract to another. These cases may also create opportunities for incumbent contractors to challenge an agency's attempt to wind-down its existing service contracts using short-term extensions pursuant to FAR 52.217-8.

Overview of the Clause

FAR 52.217-8 is relatively straightforward. The text is as follows:

> 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

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> 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 ___ [insert the period of time within which the Contracting Officer may exercise the option].[3]

The clause thus allows agencies to require the contractor to continue performing any contract services for up to six months at current rates (absent any changes to prevailing labor rates). Significantly, the language of the clause itself does not specify *when* the government may invoke this clause, nor does it identify any *particular circumstances* under which the clause may be used. Agencies historically have used the clause at the end of an expiring service contract to ensure continued performance of services in situations where the award of the follow-on contract is delayed, such as a bid protest. Although less common, agencies also have used the clause to extend performance for a short period after deciding to wind down a contract without exercising all of the "standard" option periods pursuant to FAR 52.217-9, Option to Extend the Term of the Contract.[4]

Possible Limits on the Clause's Use

In a recent decision by the COFC, *Overseas Lease Group, Inc. v. United States*, the court held that there are limits on the circumstances under which agencies can use FAR 52.217-8 to force a contractor to continue performance at current contract rates.[5] The case involved an indefinite delivery, indefinite quantity contract for the lease of vehicles to the US Army in Afghanistan. The contract provided for a one-year base period and four one-year options. The government exercised its option to extend the contract three times, but it did not exercise the fourth option.[6]

Among other claims against the government, the contractor asserted that the Army issued task orders for vehicle leases during the third option period that did not comport with the contract's 12-month minimum lease-term requirement.[7] Specifically, the contractor alleged that the government forced it to accept short-term lease renewals on 67 vehicles for terms of six months or fewer, notwithstanding that nine months of performance in the third option period and an additional option year remained on the contract.[8] The government argued that the short-term leases were permitted extensions of existing leases pursuant to FAR 52.217-8.[9]

The COFC granted summary judgment in the contractor's favor. Relying on the regulatory history of FAR 52.217-8, the court found that "[t]he purpose of the FAR clause is to protect contracting agencies from being 'forced to negotiate short extensions' to expiring contracts at potentially higher prices, particularly when performance of the follow-on contract is delayed."[10] The court also relied on a recent decision of the CAFC, *Arko Executive Services, Inc. v. United States*, which denied a contractor's claim for additional compensation when its contract was extended one month beyond the contract's expiration using FAR 52.217-8.[11] The CAFC held that because the government had exercised all of its renewal options and was preparing to award the successor contract, the one-month extension of the incumbent contract "appears to be exactly the situation FAR 52.217-8 was written to address":

> FAR 52. 217– 8 allows the government to extend services without negotiating short extensions to existing contracts in circumstances, such as those here, where the award of a successor contract is delayed. In this case, the government exercised all of its renewal options and, several months before the end of the last renewal period, the government requested offers for a successor contract; Arko did not submit an offer. This appears to be exactly the situation FAR 52. 217-8 was written to address; it would be an odd result if FAR 52. 217-8 did not allow the government to require Arko to continue its services here.[12]

In light of the CAFC's holding, the COFC concluded in *Overseas Lease Group* that because nine months of performance and one additional option year remained on the contract, "FAR 52.217-8 does not apply to the facts of this case":

> Defendant did not require 'continued performance of . . . services within the limits and at the rates specified in the contract.' The short-term leases it demanded occurred within the confines of the original contract. The Government had exercised a one-year option only three months before. Leases issued pursuant to the FAR clause would have been executed for additional twelve-month terms, the limits specified in the contract, at contract rates.[13]

The court's interpretation of the limits of FAR 52.217-8 is consistent with the regulatory purpose of the clause as described in FAR 37.111, Extension of Services:

> Award of contracts for recurring and continuing service requirements are often delayed due to circumstances beyond the control of contracting offices. Examples of circumstances causing such delays are bid protests and alleged mistakes in bid. In order to avoid negotiation of short extensions to existing contracts, the contracting officer may include an option clause (see 17.208(f)) in solicitations and contracts which will enable the Government to require continued performance of any services within the limits and at the rates specified in the contract.[14]

In short, the clause was designed to protect an agency from being charged exorbitant prices by an incumbent contractor for a short-term extension to an expiring contract when performance of the follow-on contract is delayed and the agency has no other options for continued performance of that work.

Both *Overseas Lease Group* and *Arko Executive Services* held that FAR 52.217-8 must be interpreted in light of this regulatory purpose.[15] When these decisions

are read together with the description of that purpose in FAR 37.111, one could interpret these holdings to mean that agencies can issue short-term extensions under the clause only in the narrow circumstances the clause was designed to address: when an agency would otherwise be forced to negotiate at the mercy of the incumbent contractor to ensure continued performance of an expiring contract because the follow-on contract has been delayed for reasons outside the agency's control. As the CAFC declared, this is "exactly the situation FAR 52.217-8 was written to address."[16]

The ASBCA's View

The ASBCA has adopted the opposite interpretation of the clause. Unlike the COFC, the ASBCA does not appear to view the clause's use as being limited to the purpose described in FAR 37.111. In *Glasgow Investigative Solutions, Inc.*, the agency exercised several options under the contract for less than a full year because funds were available only for the shorter periods.[17] The contractor stated that it would perform, but objected to the exercise of less than the full one-year option and filed a claim asserting that the short-term option extensions constituted constructive changes.[18] The agency moved for summary judgment, arguing that the short-term option extensions—collectively spanning a total of six months—were valid exercises of FAR 52.217-8.[19] Relying on both *Overseas Lease Group* and *Arko Executive Services*, the contractor responded that FAR 52.217-8 "is designed to extend the contract term after all options have been exercised," and "is only appropriate to invoke . . . when there is a follow-on contract and the government needs to bridge performance between the incumbent and the new contractor."[20]

The ASBCA disagreed and granted summary judgment in the government's favor, holding that the short-term extensions were a proper use of the FAR 52.217-8 clause. The ASBCA stated that it "studied carefully" the decisions cited by the contractor, including *Overseas Lease Group* and *Arko Executive Services*, and concluded that "[n]one of those decisions . . . held that the FAR 52.217-8 Option to Extend Services clause may be used *only or exclusively* when all contract options have expired and the government needs to extend the incumbent contractor's performance until a successor contract was awarded."[21] The ASBCA further reasoned that because "FAR 37.111 lists delays due to bid protests and alleged mistakes in bid as appropriate circumstances for FAR 52.217-8 extensions[,] . . . [p]ost-option extensions are not the only circumstances for use of the FAR 52.217-8 clause . . . ."[22]

The *Glasgow* decision also relied on a prior ASBCA decision that upheld an agency's use of FAR 52.217-8 to extend a contract before it had exercised all remaining options under FAR 52.217-9. In *Griffin Services, Inc.*, the agency failed to timely exercise its option under FAR 52.217-9 to extend the term of a contract for electrical operations and maintenance services.[23] When the contractor refused to waive the time limit without a price increase, the agency exercised its option to extend the contract for an additional six months pursuant to FAR 52.217-8. The contractor filed a claim, objecting to the extension on the basis that the agency's use of FAR 52.217-8 was inconsistent with FAR 37.111. The contractor argued that the clause was intended to be used when the award of a follow-on contract is delayed due to circumstances beyond the control of the contracting officer; however, the only reason that an extension was required in this case was because the contracting officer himself failed to timely extend the contract pursuant to FAR 52.217-9.[24] Although the ASBCA granted the contractor's claim on other grounds, it rejected the contractor's argument that the regulatory purpose of the FAR 52.217-8 clause as articulated in FAR 37.111 placed limits on the circumstances in which agencies could use it extend a contract:

> The appellant first argues that the "regulatory enunciated and common-sense reasons for the 'Option to Extend Services' clause" does not permit the Government to use that clause in the circumstances of this case. The appellant correctly notes that FAR 37.111 provides for the use of this clause, because the "[a]ward of contracts for recurring and continuing service requirements are often delayed due to circumstances beyond the control of contracting offices." That provision recognizes that the circumstances which cause such delays include "bid protests and alleged mistakes in bid." It then goes on to provide that "to avoid negotiation of short extensions to existing contracts" the contracting officer "may include an option clause" which will enable the Government to require continued performance of contract services.
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> Essentially, the appellant argues that the short term extension option was misused by the Government. . . .
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> [T]he appellant seems to confuse what may have motivated the Government to provide for a standard clause extending contract services, and the expression of contractual intent which the language conveyed. As the Supreme Court has recently reminded in a unanimous opinion, when the Government enters the marketplace by way of contract and does business with its citizens, its rights and duties are governed generally by the law applicable to contracts between private individuals. *Franconia Associates v. United States*, 122 S. Ct. 1993, 2001 (U.S. 2002). Thus, we look to contract rules, not regulatory rules, for the interpretation of this clause.
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> The plain, objective, language of the Option to Extend Services clause is not limited as to the reasons for its use. The "intention of a party entering into a contract is determined by an objective reading of the language of the contract, not by that party's statements in subsequent litigation." *Varilease Technology Group, Inc. v. United States*, 289 F.3d 795, 799 (Fed. Cir. 2002). The appellant's argument that the contractor "never agreed to or bargained for an option clause that was

so open-ended" is just that, mere argument. There is no evidence, by affidavit, contemporaneous writing, or otherwise, that anyone, for either the contractor or the Government, had such a limiting intention. This first contention fails for lack of proof.[25]

These two ASBCA decisions appear to be at odds with the *Overseas Lease Group* and *Arko Executive Services* cases, both of which could be interpreted to mean that FAR 52.217-8 cannot be used when the contract has additional "standard" options remaining.[26] The ASBCA was correct in *Griffin Services* that the plain language of the clause does not place limits on the circumstances under which the agency can use the clause. But as one respected government contracts commentator has noted, contractors do not reasonably expect that the government will use the 52.217-8 clause in a manner inconsistent with the purpose of the clause as described in FAR 37.111 to avoid exercising a valid, but longer and higher-priced, option pursuant to the 52.217-9 clause.[27]

Interestingly, the ASBCA in *Glasgow Investigative Solutions* appeared to agree with the COFC and CAFC that FAR 52.217-8 should be interpreted in light of its regulatory purpose as described in FAR 37.111 and its regulatory history. Unlike in *Griffin Services*, where the ASBCA refused to consider the purpose of the clause or the government's reason for using it, the ASBCA in *Glasgow Investigative Solutions* cited FAR 37.111 to justify its interpretation of the FAR 52.217-8 clause: "FAR 37.111 lists delays due to bid protests and alleged mistakes in bid as appropriate circumstances for FAR 52.217-8 extensions. Thus, post-option extensions are not the only circumstances for use of the FAR 52.217-8 clause . . . ."[28]

But the ASBCA adopted a very broad view of the purpose of the clause. It cited bid protests and alleged mistakes in a bid as examples of appropriate situations to use the clause, yet it did not appear to consider that these scenarios arise *at the end of an expiring contract*. The ASBCA also failed to address the issue that because there were additional options remaining on the contract, the agency was not stuck in a position where it would have been "forced to negotiate short extensions" with the contractor but for the FAR 52.217-8 clause—the predicament the regulatory history of the clause indicates it was designed to avoid.[29] It remains to be seen how broadly (or narrowly) future courts and boards will interpret the regulatory purpose of the clause, and whether they will place limits on the circumstances in which the clause can be used.

Potential Impact

In order to deal with continued funding uncertainty wrought by sequestration, agencies likely will continue to attempt to use FAR 52.217-8 to buy additional performance time on their expiring service contracts as they plan for follow-on procurements. Agencies may also increasingly look to use the clause to extend performance for a short period on individual task orders, or at the end of "interim" option periods, if they have decided to wind-down the contract prematurely and/or begin performing those services in-house.

Unfortunately for contracting agencies, the cases discussed above provide conflicting guidance about when it is appropriate to use FAR 52.217-8 to extend a contract. *Overseas Lease Group* and *Arko Executive Services* could be interpreted as holding that the clause can be used only in limited circumstances: when an agency would otherwise be forced to negotiate at the mercy of the incumbent contractor to ensure continued performance of an expiring contract because the follow-on contract has been delayed for reasons outside the agency's control. This interpretation would significantly limit the scenarios under which agencies could use the clause, and may or may not cover the delays caused by sequestration. Although budget uncertainty caused by the sequester would appear to qualify as "circumstances beyond the control of contracting offices," one could argue that agencies have known about (and thus had the ability to plan for) these funding restraints since the Budget Control Act was passed in August 2011.[30] On the other hand, the two ASBCA decisions, *Griffin Services* and *Glasgow Investigative Solutions*, would appear to allow agencies to use FAR 52.217-8 to extend a contract in virtually any situation, including short-term extensions required as a result of funding shortfalls (the very situation in *Glasgow*).

Until this conflict is resolved, contractors may be able to use this decisional uncertainty to their advantage. If an agency attempts to use the FAR 52.217-8 clause for a short-term extension of a task order or a contract for which one or more "standard" option periods remain, the contractor could argue that the option exercise is invalid and that the agency instead must issue a new task order and/or exercise the remaining option period(s). If the contractor is successful, this could result in additional performance time beyond the six-month period in FAR 52.217-8.

If the agency resists, this could play out in one of two ways. The contractor could refuse to perform the FAR 52.217-8 option period and attempt to force the agency's hand. While this approach could be successful in some cases, it is unlikely that many contractors that regularly do business with the government would follow through with this threat. Further, even if the contractor is correct that the exercise of the FAR 52.217-8 option was invalid, it would nevertheless have a duty to continue performance under the disputes clause, and thus could be terminated for default for failing to perform.[31] Alternatively, the contractor could agree to perform the option but reserve its rights to file a claim for increased compensation. This approach is unlikely to result in an extension of performance beyond the six-month period in FAR 52.217-8, but it could ultimately result in the contractor recovering additional compensation for the work it performs during that time.

Conclusion

Due to sequestration, agencies and contractors will be

forced to do business in an uncertain budget environment for the foreseeable future. As a result of the recent court and board decisions discussed above, the availability of one of the principal tools available to agencies for managing recurring service contract requirements during uncertain times—the FAR 52.217-8 clause—is now in question. Until the CAFC resolves the apparent conflict between the COFC and the ASBCA, agencies and contractors likely will continue to quarrel over the proper circumstances for using the clause. PL

Endnotes

1. Office of Management and Budget Memorandum M-13-05 (Feb. 27, 2013), *available at* http://tinyurl.com/apuxvla (last visited April 4, 2013).
2. 48 C.F.R. § 52.217-8.
3. *Id.*
4. 48 C.F.R. § 52.217-9.
5. *Overseas Lease Grp., Inc. v. United States*, 106 Fed. Cl. 644 (2012).
6. *See id.* at 646.
7. *See id.*
8. *See id.* at 650.
9. *See id.*
10. *Id.* at 651 (citing 54 Fed. Reg. 29278-01 (July 11, 1989)).
11. *Arko Exec. Servs., Inc. v. United States*, 553 F.3d 1375 (Fed. Cir. 2009).
12. *Id.* at 1380.
13. *Overseas Lease Grp.*, 106 Fed. Cl. at 651.
14. 48 C.F.R. § 37.111. FAR 17.208(f) instructs contracting officers to "[i]nsert a clause substantially the same as the clause at 52.217-8, Option to Extend Services, in solicitations and contracts for services when the inclusion of an option is appropriate (See 17.200, 17.202, and 37.111)."
15. *See Overseas Lease Grp.*, 106 Fed. Cl. at 651 ("The purpose of the FAR clause is to protect contracting agencies from being 'forced to negotiate short extensions' to expiring contracts at potentially higher prices, particularly when performance of the follow-on contract is delayed.") (quoting 54 Fed. Reg. 29278-01 (July 11, 1989)); *Arko Exec. Servs, Inc.*, 553 F.3d at 1380 (citing FAR 37.111 and discussing "the purpose of FAR 52.217-8").
16. *Arko Exec. Servs., Inc.*, 553 F.3d at 1380; *see also Arko Exec. Servs., Inc. v. United States*, 78 Fed. Cl. 420, 424 (2007) ("Contrary to plaintiff's claims, the situation encountered here fell squarely within the coverage of the 217–8 clause, which provides a safety valve for extending an existing contract where the award of subsequent contract is delayed. . . . Here, of course, the contracting officer was faced with circumstances beyond his control that, absent an extension of the prior contract, would have led to the suspension in guard services after March 31, 2005. That scenario fits like a glove the circumstances described in the 217–8 clause.").
17. *Glasgow Investigative Solutions, Inc.*, ASBCA No. 58111, 13-1 BCA ¶ __ (Apr. 9, 2013).
18. *See id.*
19. *See id.*
20. *Id.*
21. *Id.* (emphasis in original).
22. *Id.*
23. *Griffin Servs., Inc.*, ASBCA No. 52280, 02-2 BCA ¶ 31943.
24. *See id.*
25. *Id.*
26. *See Overseas Lease Grp.*, 106 Fed. Cl. at 650 (noting that the government issued the short-term leases "when nine months of performance and one additional option year remained on the contract").
27. Vernon J. Edwards, *When the Government Can Choose Among Options: Let the Contractor Beware*, 21 Nash & Cibinic Report ¶ 28 (June 2007).
28. *Glasgow Investigative Solutions, Inc.*, ASBCA No. 58111, 13-1 BCA ¶ __ (Apr. 9, 2013). At least one other post-*Arko* decision at the ASBCA has analyzed an agency's use of FAR 52.217-8 in light of its regulatory purpose. *See APAC-Southeast, Inc. n/k/a Oldcastle Southern Group*, ASBCA No. 58057, 12-2 BCA ¶ 35155 ("APAC has provided us with no reason to ignore the language of FAR 52.217-8, its purpose, or to no apply the precedential interpretation of this clause by the United States Court of Appeals for the Federal Circuit.").
29. 54 Fed. Reg. 29278-01 (July 11, 1989) ("Award of contracts for recurring and continuing service requirements are often delayed due to circumstances beyond the control of contracting offices. Examples of circumstances causing such delays are bid protests and alleged mistakes in bid. Pending resolution of these circumstances, contracting officers are *forced to negotiate short extensions to existing contracts*. Changes are being made to FAR 17.208, 37.111, and 52.217-8 to permit contracting offices to include an option provision which will enable the Government to require continued performance of any services within the limits and at the rates specified in the contract.") (emphasis added); *see also* 48 C.F.R. § 37.111 ("*In order to avoid negotiation of short extensions to existing contracts*, the contracting officer may include an option clause (see 17.208(f)) in solicitations and contracts which will enable the Government to require continued performance of any services within the limits and at the rates specified in the contract.") (emphasis added).
30. 48 C.F.R. § 37.111.
31. *See* FAR 52.233-1(i) ("The Contractor shall proceed diligently with performance of this contract, pending final resolution of any request for relief, claim, appeal, or action arising under the contract, and comply with any decision of the Contracting Officer."); FAR 52.212-4(d) ("The Contractor shall proceed diligently with performance of this contract, pending final resolution of any dispute arising under the contract."); *see also Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260, 1275-76 (Fed. Cir. 1999) (finding that while the government's improper exercise of an option "imposed no obligations on Alliant and that its refusal to perform the option did not constitute a breach of the option clause," Alliant breached its continuing performance obligations under the disputes clause because the contracting officer's failed attempt to exercise the option did not constitute a "'drastic change'" sufficient to establish a material breach of the contract).