Legal Insights:  
Government Decision Not to Exercise Contract Option  

By Ross Crown  

Option years are a common feature of service contracts with the federal government. Many such contracts provide for a base period of performance and then allow the Government to exercise one or more options to extend the contract term. When a contractor satisfactorily performs the contract, options are typically exercised. Yet, sometimes the contractor does everything right but the Government will still decline to exercise an option. The result can be financially painful. Does the contractor have any recourse?  

Standard  
Generally speaking, the disappointed contractor is out of luck. The Government has a broad right to decide within its own discretion whether to exercise a contract option. Aspen Helicopters, Inc. v. Department of Commerce, GSBCA No. 13258, 99-2 BCA ¶ 30, 581 (1999). The decision to trigger an option resides with the option holder; the mere existence of an option does not require the holder to exercise it. Magic Brite Janitorial v. United States, 72 Fed. Cl. 719 (2006). When the Government holds an option, it may employ whatever lawful criteria it chooses when deciding whether to exercise the option. Id. Even satisfactory performance by a contractor does not impair the Government’s right to refuse to exercise an option. Vehicle Maintenance Services v. General Services Administration, GSBCA No. 11663, 94-2 BCA ¶ 26, 893 (1994).  

A contractor has no right to assume an option will be exercised. Thus, an offeror who prices its proposal by amortizing its fixed costs on the expectation that option periods will be authorized does so at its own risk. Aspen Helicopters, supra.  

Limitations  
Limitations on the Government’s right to refuse to exercise a contract option are few. One limit is if the Government, by the terms of the contract, or by statute or regulation, restricts its own discretion. Accordingly, a contractor facing the Government’s refusal to exercise an option should first review the contract for any terms that might define the circumstances under which an option will be authorized. A similar review should be made of the legal provisions incorporated into the contract.  

The only other commonly recognized limit on the Government’s discretion to decline an option is that it must act in good faith. Like all other contracting parties, the Government is obligated to deal in good faith with its contractors. Continental Collection & Disposal, Inc. v. United States, 29 Fed. Cl. 644 (1993). Unfortunately, bad faith is difficult to prove against the Government. Government officials are presumed to act in good faith. Carolina Oil & Distributing Company, ASBCA No. 48093, 98-2 BCA ¶ 29,955 (1998). A contractor must be able to present compelling evidence that the Government’s decision not to exercise the option was the result of some specific intent to injure the contractor and not motivated by any valid reasons relating to the contractor’s performance or the Government’s future lack of requirements for the contracted services. Continental Collection & Disposal, supra. The scant case law on this subject does not provide many examples of improper motivation on the part of Government officials, but presumably it includes inappropriate purposes such as personal animus, racial or gender-based discrimination, punishment for asserting contract rights and pro or anti-union bias.  

Remedy  
If a contractor believes it possesses convincing evidence that the Government’s decision not to exercise an option is in bad faith, what is its remedy? The contractor’s recourse is a claim for breach of contract brought under the Contract Disputes Act to the contracting officer and thereafter to either the cognizant Board of Contract Appeals or the U.S. Court of Federal Claims. In such an action, unfortunately, a contractor is unlikely to obtain an injunction preventing the Government from reprocuring the requirement. Injunctive relief requires a claimant to establish, among other things, that it does not have an adequate damages remedy. In this circumstance, however, a contractor could be adequately compensated by an award of damages for any wrongful failure to exercise an option. Harris Systems International, Inc. v. United States, 5 Cl. Ct. 253 (1984). These damages would probably consist of the lost profits the contractor would otherwise have realized during the option period.  

Conclusion  
A contractor faced with a Government decision not to exercise a contract option is probably going to have to grin and bear it. Under exceptional circumstances, however, the contractor can obtain a remedy. This remedy likely will consist of damages but not include the opportunity to continue performing the contract.  

Ross is a partner with the Albuquerque office of Lewis and Roca LLP. This article is intended for general information only and should not be construed as legal advice or opinion. Any questions concerning your legal rights or obligations in any particular circumstance should be directed to your lawyer.