Undefinitized Contract Actions (UCAs) are the bane of government contracting.

UCAs are government contract actions where performance is authorized to commence prior to the finalization of some aspect of the contract, such as price, terms, or specifications. In other words, the parties have entered into a binding agreement without a final contract. Examples of UCAs are letter contracts and orders under basic ordering agreements, where performance has officially started but no price has been agreed upon.

The regulations addressing UCAs are scarce. **DFARS 217.74** implements the applicable statutory requirements and provides guidance to DoD contracting officers. Among other things, it requires each UCA to contain a "definitization schedule"—i.e., a plan for coming to agreement (typically price) in accordance with a schedule. The rules regarding that schedule are that it must provide for contract definitization within either: (1) The date that is 180 days after issuance of the action or (2) The date on which the amount of funds obligated under the contract action is equal to more than 50 percent of the not-to-exceed price.

But that rarely happens. It is a rare (and happy!) event when a UCA is actually definitized within 6 months of issuance. Historically, the government has blamed delays on inadequate contractor proposals. To be clear, UCAs typically require two proposals: the first one to

develop the SOW and associated not-to-exceed price, and the second one to definitize the price. Historically, it is the second proposal that has been the perceived problem. At the point the proposal is submitted, the contractor has already incurred some (or a lot) of costs, and the government wants to see and understand those costs as part of reaching a final price. Importantly, this approach differs from the standard Part 15 solicitation/proposal/evaluation/award process, because some aspect of the proposal is no longer an estimate; some aspect is based on known historical costs. And to make matters even more interesting, the contractor continues to incur costs as the government evaluates the definitization proposal and while the parties are negotiating. Thus, the cost data submitted in the proposal is almost immediately obsolete.

The government's concern with adequate and "qualifying proposals" submitted from the contractor. In fact, the DFARS regulations are quite subjective in defining what constitutes a "qualifying proposal," requiring that a qualifying proposal is one that "a proposal containing sufficient information for the DoD to do complete and meaningful analyses and audits." The kicker is that, if the contracting officer determines that the contractor's definitization proposal is inadequate, then "the contacting officer may suspend or reduce progress payments under FAR 32.503-6, or take other appropriate action." In other words, failure to submit a qualifying proposal means that, technically, the contractor is in material breach of its contract.

We should also mention that, at many contractors, the cost of preparing and negotiating a UCA definitization proposal is a direct cost of the UCA; that cost is not treated as being B&P. Why? Because, unlike traditional FAR Part 15 proposals for new work, the submission of a UCA definitization proposal is an actual contract requirement—i.e., if the contractor doesn't submit it, then it is in a material breach of its contract. On the other hand, if you are one of the contractors that treats all proposals as being B&P (which you can do if you want), then a prolonged period of UCA negotiation may blow your B&P budget and end up impacting your G&A expense rate, which could be a problem.

Further, the contractor should expect to see a lower profit when UCAs are used, when compared to a traditional FAR Part 15 contract. The reason for this is that, since some part of the final price is based on actual costs, the contractor's risk is perceived to be lower than it otherwise would be, thus the contractor would not be entitled to a higher profit.

If the UCA contains the clause 52.216-26 ("Payments of Allowable Costs Before Definitization") then the contractor will not be receiving payment for 100% of the costs it is incurring while awaiting definitization. Generally speaking, the contractor will be reimbursed for no more than 85% of its *allowable* costs, without any profit or fee, during the time between

commencement of performance and final contract definitization. If the customer doesn't move quickly to definitize then the contractor could see some cash flow impacts.

Further, the requirement that only allowable costs be invoiced means that the UCA needs to be treated as a cost-type contract, even if the final definitized contract action will be firm, fixed-price. Contractors that are happy with FFP contracts but unprepared for cost-type contract requirements are in for a shock if they receive a UCA—and that is likely a significant cause for many inadequate or non-qualifying contractor proposals. Those contractors had proposed—and thought they were receiving—a FFP contract award, and they were unprepared for receipt of a cost-type UCA that came with audit rights. Remember, award of a cost-type contract requires a finding that the contractor has an adequate accounting system, whereas award of an FFP contract does not have that same requirement. Thus, many contractors' accounting systems may not support accounting for a UCA or developing a "qualifying" proposal suitable for fact-finding and negotiation.

For all the above reasons, we dislike UCAs. Contractors should try very hard to avoid them. That being said, often a UCA is the only way to go. If the customer tells you "take the UCA or I'll find somebody else that will" you often have little choice in the matter. Nobody likes to turn down work. So you take the UCA and try to make the best of a bad situation.

Now let's discuss the business challenge faced by L-3 Communications Integrated Systems (L-3) when it received a UCA that it could not definitize, brought to us by the U.S. Court of Federal Claims, courtesy of Judge Kaplan, in **this decision** .

L-3 entered into a UCA with the US Air Force to provide training services. To complicate matters, the UCA was for a Foreign Military Sale (FMS) to the Royal Australian Air Force. There were several CLINs in the contract, among which was reimbursement for use of an L-3 training simulator. L-3 was to be reimbursed on a per-hour basis, with separate rates for each operating period of the UCA. The UCA was awarded September 5, 2014 and the parties entered into definitization negotiations on December 18, 2014, after L-3 submitted a qualifying proposal containing a Standard Form 1411.[1] The parties reached agreement on all CLIN pricing, except for X031 and X032. After months of negotiations, the parties were very far apart regarding the per-hour simulator reimbursement rate.

Despite L-3 providing additional information to support the reasonableness of its proposed simulator prices, the Air Force refused to budge. The negotiators stated that "the government

could not justify any more movement on the prices" even though L-3 thought it had provided them with that justification. (We assume the Air Force negotiators felt some special obligation to the Australians to get for them the best deal possible.) The Air Force negotiators stated that if L-3 wouldn't agree to the lower hourly prices, then it would have "no choice" but to definitize the pricing via unilateral action.[2]

As Judge Kaplan wrote, "On October 29, 2015, the Air Force issued Amendment PZ0001 'unilaterally definitizing the UCA.' In it, the Air Force stated that the amendment was issued in accordance with 'DFARS 252.217-7027(c) 'Unilateral.'' Importantly, the unilateral contract mod clearly stated that it was being issued "subject to contractor appeal as provided in the contract's Disputes clause. So it was probably not a surprise when, nearly a year later, L-3 filed its appeal with the CoFC, alleging that the unilateral contract modification was "was arbitrary, capricious, and unreasonable in that it denied L-3 PID a reasonable rate of return on the Simulator CLINS, not covering the cost to perform these line items, let alone provide for a reason[able] profit, in violation of FAR Subpart 15.4."

Unfortunately for L-3, the company made a crucial mistake in its approach to appealing the modification: it had failed to receive a formal Contracting Officer Final Decision (COFD). It had nothing to appeal. Now, you and I might think that a unilateral contract mod that cited the Disputes clause *was* a COFD, but we would be wrong. The Disputes clause and related legal requirements, and legal precedent, establish a very formal structure to these things—and one of the required steps is for the contractor to first submit a certified claim to the contracting officer. If the CO rejects that claim, then that is a COFD that can be appealed. But L-3 never submitted that claim; it went directly to the CoFC—and that mistake caused its case to be tossed "without prejudice." Thus, L-3 is free to now submit its certified claim to the CO, have it be rejected, and to then refile its appeal with the Court.

The problem with that situation is that L-3 will be incurring double attorney fees (all of which are unallowable pursuant to the cost principle at 31.205-47). So L-3 may think twice about its next steps. We also hope that L-3 will think twice about accepting any FMS-related UCAs in the future. In fact, we hope that L-3 (and other government contractors) think twice before ever accepting a UCA, because they tend to be more trouble than they are worth.

1 The SF 1411 was cancelled in 1997. We find use of the form in 2014 to be inexplicable

and a little bizarre.

2 At this point, L-3 had been performing under the UCA for more than a year. Obviously, the USAF was under some pressure to definitize the UCA (since at that point they were likely in violation of the statutory requirements). Still, the USAF likely still had some choices about how to proceed, including escalating the matter to a higher contracting authority for resolution.