PRICE ADJUSTMENTS FOR NEGLIGENT PROGRAM QUANTITY ESTIMATES

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Most Government Printing Office (GPO) annual term contracts or programs contain a section usually called "Determination of Award" which lists the government's estimated quantities for each line item priced in the contract. These estimates are multiplied by the prices bid for the corresponding line item, and the results totaled to determine the "bid price" of each printer and then reduced by the offered discount, if any, to see who will win the award on a single award program, and where the printers will fall in the Schedule of Prices on a multiple award program.

On a multiple award program, since no one is really guaranteed any particular volume, it is difficult to complain if the program volume or a particular vendor's volume does not reflect the quantity estimates. This is especially true because many multiple award programs are "general usage" programs, which give all agencies in the federal government the option—but not the requirement—to order products from that contract.

For single award programs, however, the situation is different. The winning vendors obviously has some reasonable expectation of receiving a certain amount of work on the program. An annual GPO S program (single award) might predict approximately 30,000 books per month both in the general specifications and in the Determination of Award for that particular program. The monthly orders, on the other hand, could come in at only 15,000 books per month. They might also come in at an average of 24 pages, when the specs indicated that the average would be 48 pages. Let's operate under the assumption that the winning printer—or most other printers—would have quoted the prices for the shorter page count, shorter run books which were actually being ordered at a higher rate than the longer page count, longer run books which the contract listed in the specs. If our printer in this example, calls the GPO to request a price increase, he will be told by the GPO contracting officer to carefully review the requirements clause of the specifications. The requirements clause states that the quantities ordered in the contract are only "estimates" which the GPO is not promising to buy, and the printer should not count on producing. The language provides that if the government's "requirements" for the printed products called for in the specifications fall short of the numbers listed in the Determination of Award or elsewhere in the specifications, the printer simply has to accept the reduced quantity, and the GPO will not adjust the price due to smaller quantities, page counts, etc. The GPO routinely includes this "requirements" language in its term contracts. The government and the courts call a contract with this clause in it a "requirements contract."

Usually, the government <u>does not</u> have to adjust the price if page counts or quantities, or both, fall below—even far below—estimates in the contract.

But there is an important exception to this general rule which has been recognized by the courts. However, you will not find this exception explained in the requirements clause language or anywhere else in your GPO contract. The exception is this: if it can be shown that the GPO and/or the agency acting in concert with the GPO was negligent in preparing substantially overstated quantity estimates, the printer can obtain a price adjustment, or, in the appropriate circumstance, have the contract terminated. Proving negligence, however, is not as simple as simply saying, "GPO was negligent". In order to be successful, the printer needs to show that the government knew—or if they had bothered to do their homework, they would have known—that the estimates listed in the specs or the Determination of Award were excessive or unrealistic.

One way to provide this proof is by examining the actual production on the program during the previous year. If there was substantially lower volume last year, then the contracting officer would have known that the typical volume on this program should be lowered. It can then be argued that the contracting officer or the GPO (with input from the agency) negligently utilized old or inaccurate figures without checking the most recent or available volume levels on the program in question. If the GPO (or the court, if the matter goes that far) finds that the contracting officer or the individual he assigned to produce the estimates was negligent, the printer is entitled to recover.

In cases where it appears that the agency's plans or needs changed, reducing its requirements, the general rule is that this is exactly the type of a situation which the "requirements clause" was written to cover. In other words, often the government does not know what its needs will be, and bases an admittedly inaccurate and overstated estimate on what it believes it will be. If later, something changes, the requirements clause protects the government and correspondingly harms the printer. However, even where the government's needs change, printers should not simply give up and accept the loss on a requirements contract which has dramatically reduced volume. Instead, they need to find out when the government knew or should have known that changes would result in reductions or cutbacks in program volume. If it is discovered that a particular project, legislation or funding was cut before award of the program, the government should be held negligent for not adjusting producted contract quantities before bidding, or for not canceling the program before award, and reissuing it with correct numbers or estimates.

In short, any information which shows the agency or the GPO knew, or should have known that program quantity estimates were overstated or inaccurate may give the printer sufficient grounds to obtain a price adjustment. The adjustment may be in the form of an increased price per thousand (shorter runs cost more per piece), a claim for unabsorbed overhead during open time that could not be filled and/or termination of the contract for the convenience of the government.

We are of course assuming, that the only time a problem is created is when page counts and/or run lengths drop way below the estimates, causing the printer to incur more costs for each piece produced. But what about the situation where the program begins to produce far more volume that was estimated? Sometimes, if pricing is right, program volume over the Determination of Award or the estimates in the contract is a gift from heaven! However, at other times, it places the printer in an extremely precarious position. He is not permitted to refuse an order on a single award GPO program. If he does, the penalties the GPO can impose are: (1) buying the job elsewhere, and deducting the difference between the contract price and the reprocured price from the printer's account; and/or (2) terminating the contract for default. If the orders come at a time when the printer simply did not expect them, or if the agency begins to "bomb" the printer with orders on the program, he may simply not be able to produce the work on schedule.

Rather than face potential serious consequences, a printer who notices program volume is exceeding the estimate set forth in the contract should immediately contact the contracting officer, notify him or her that volume has exceeded the estimate set forth in the contract, and request that GPO cease placing orders on the contract, or lower the number of orders that are being placed on the contract. This simple telephone call often resolves the problem. However, at times, the GPO simply responds that the estimates set forth in the contract are estimates only, and that the printer must continue to perform on the contract, producing whatever orders are issued. While this is a simple answer, it is not accurate. It is reasonable for the government to assume that anyone would allow some play in estimates set forth in a requirements contract. However, once that margin of error is exceeded, the printer should not be penalized. A good rule of them is that a contract volume fluctuation in excess of 10 percent is simply too much. If such a volume increase volume occurs, the printer should stick to his guns and demand that the orders stop, or that the program be terminated.

One of the most important things to keep in mind in requirements contract where excessive orders which the printer cannot handle are being placed is the need to be flexible. The printer's problem may be solved by simply slowing down the orders over the next few weeks or month, while he completes other GPO programs or commercial work which is in-house. The GPO can accomplish this by putting the work on other available programs, or bidding it out as a one-time job.

It is important to analyze excessive volume or print orders on both a total program basis, *and* on a monthly basis. For example, on a contract which runs from January to December, the program volume may not be close to exceeding the contract estimate in August, but the agency may place orders for that month which dramatically exceed the monthly average volume set forth in the specs (this often occurs when the agencies are trying to spend their budgets at the end of the fiscal year on September 30). If the orders being placed substantially exceed the monthly volume level—whether or not the annual volume level of the program has been exceeded—the printer should still demand relief.