

USING THE RIGHT CONTRACT CLAUSES CAN MAKE GPO PROGRAMS MORE ADVANTAGEOUS FOR AGENCIES

By Frederic Antoun, Jr., Esq.

For many years, GPO has done an outstanding job writing term contracts both for general government wide usage and for specific agency usage or individual agency projects. However, with cutbacks at both the GPO and the agencies, term contracts may not be getting the detailed analysis they deserve. Instead, some contracts are simply reissued in the same form from year to year.

By taking just a few minutes to review the contract language, agencies can assist GPO in revising the contract to meet their current needs.

Although there are many different provisions that can be added into a contract, some of the major ones that are commonly overlooked are listed below.

Direct Deal Provisions. A “direct deal” clause in a GPO program allows the agency to place orders directly with the printer, without having to first go through GPO on each order. The agency typically sends the print order and the copy (GFM) to the printer, and then simultaneously sends a copy of the print order and attachments to the GPO. Subsequent to the placement of the order, questions and problems can be resolved directly between the agency and the printer. Note, however, that the GPO retains the right to change any provisions of the contract or to issue change orders, or to increase the contract price. The printer invoices GPO, as on any other term contract.

The advantages of direct deal contracts are that they cut the time for placement of the order by at least one day, and they allow a direct interface with the printer, permitting dialogue that can help avoid delay, confusion and errors.

Although the GPO used to be more reluctant to convert a contract to direct deal, most contracting officers are more than willing to work with their customers where direct deal provisions would be helpful.

Contract Renewal and Extension Provisions. Many GPO programs include the standard provision for a contract extension. This provision generally provides that the parties may mutually agree to extend the term of the contract for such period as the government may request. This contract extension provision should be included in every term contract. The government is in the driver’s seat, because it not only must request the extension, but it must agree to the terms of any extension. Such a clause is very helpful when the agency wants more time to restructure the program for the next year or has budgetary issues that have not been addressed.

The second type of extension clause is an option clause which allows the government – at its option – to renew the contract for successive 12 month periods, and can include the right to extend the contract for up to 2, 3, 4 or even 5 years. This renewal clause is found in many – but not all – GPO contracts. Since the clause is at the option of the

government, there is no reason not to include it in all contracts. By including the clause, the agency that has a good vendor can elect to renew and keep that vendor, but if the vendor has not been satisfactory (but not unsatisfactory enough to default), the agency can simply opt not to renew the contract. While renewal should be an agency decision, the contract is with the GPO, so the official renewal determination comes from GPO.

Whenever an option to extend the contract for successive years is included in the contract, the contract must also include both an economic price adjustment clause and a paper price adjustment clause in order to treat both the vendor and the government fairly. These clauses adjust the original contract year base prices in the event of a renewal.

As for the contracts that do have extension or renewal clauses, it is surprising how often the GPO declines to extend or renew a contract with an excellent vendor. Apparently, this reluctance comes from the old belief that GPO's value is in continuously bidding out work to obtain the best price. In recent years, the government has recognized that the best value of a service provider like GPO may be in finding an agency an excellent vendor who provides not only good pricing, but also good quality, excellent service and on-time delivery. If an agency gets such a vendor, they should fight to exercise the renewal clause.

Pre-Award Survey and Post-Award Conference. For important projects or for contracts where a new and unknown vendor may be the low bidder, a pre-award survey clause and a post-award conference clause (both of which are written to be at the government's option) are helpful additions to the contract language. A trip to the plant can be worth a thousand words.

Press Sheet Inspection Cost Clause. This clause can be used in both GPO term contracts and in one-time purchases or jackets. The clause provides that the cost of sending a certain number of individuals to a press sheet inspection at the printer's plant will be utilized in determining the low bidder. In a close bid situation, the government can end up spending far more for the job if the low bidder is far away, and the press sheet inspection is required – unless this clause is utilized. Again, if press sheet inspections are planned, there is no reason not to use this clause, so that the agency can be assured it is receiving the overall lowest price, instead of just the low bid for production of the work.

An alternative used on some contracts to control the cost of press sheet inspections is a "restricted production area" clause. This clause, usually found on the front cover of formal jackets and programs, requires the bidder's production facilities to be within a certain number of miles from the agency location. Although these clauses have been challenged in the courts, and are not highly favored by most GPO contracting officers, they are cropping up more and more, especially in annual term contracts, which require the maintenance of a long-term relationship between agency personnel and the vendor. Before considering using mileage restriction clauses, you should discuss the matter with the GPO.

Accelerated Schedules – Premium Pricing Clauses. One of the problems with standard term contracts is that they can not identify every need of the agency over the next year. In the case of schedules, the contract provides for a specific number of days in which the product must be delivered. GPO works with the agency to make sure that this schedule is not so short as to cause prices to be unnecessarily high. However, after the contract comes out, there are often occasions where a job that would otherwise fit the contract cannot be placed on that contract, because it is needed on a schedule shorter than that provided in the contract. To resolve this problem, GPO has drafted accelerated schedule and premium pricing clauses that increase the price by a fixed percentage in situations where the schedule is shortened.

There is no reason not to include these clauses in any contract where the agency's history indicates that there are jobs that would fit on the contract but that may have a shorter schedule than the rest of the work ordered on the contract.

The exact number of these "rush" orders does not need to be determined in advance. Instead, only an estimate is given in the contract. To resolve any issue of liability on the part of the GPO, a sentence can be added indicating that the government cannot accurately predict the number of accelerated delivery orders, and that no contract price adjustment will be allowed in the event there are fewer than predicted accelerated delivery orders or no accelerated delivery orders at all.

With such a clause in place, agencies may find that they can avoid the delay in spec writing and one time bidding and simply put the rush orders on existing term contracts. The savings in time and administrative bidding costs could be substantial.

Determination of Award Numbers. Term contracts contain a determination of award section that lists the number of units of the individual line items that the government estimates it will be purchasing over the term of the contract. Unfortunately, these numbers can be inaccurate due to erroneous estimates, or due to the fact that the numbers were just copied from the prior year, without checking the actual ordering history. Despite the language in term contracts attempting to protect the government against an inaccurate estimate, court decisions have indicated that negligent or grossly negligent estimates may give rise to a claim on the part of the contractor for a contract price adjustment. As a result, agencies and the GPO must work together closely to come up with a good faith estimate for the volume of a term contract. Simply saying, "keep it the same as last year," when in fact last year's volume was only half of the contract's projections, could get the agency and the GPO into trouble. Perhaps worse yet, it is impossible to maintain good vendors when you make promises you knew or should have known were not accurate.

Copies of the clauses addressed above and others that may be of interest can be downloaded from <http://www.printlaw.com>

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