

TOPIC 10

UNDEFINITIZED CONTRACT ACTIONS (UCAs)

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Objective

To determine whether the agency effectively awarded, executed, and managed undefinitized contract actions (UCAs).

Subobjectives

To determine whether the agency:

1. Properly justified and authorized UCAs.
2. Timely definitized UCAs.
3. Properly priced and funded UCAs.
4. Negotiated fair and reasonable prices on the definitized contracts.

UNDEFINITIZED CONTRACT ACTIONS (UCA)

INTRODUCTION

This guide provides suggested audit steps for determining whether an agency effectively managed and executed undefinitized contract actions (UCAs). The guide expands upon the researchable questions associated with UCAs (Topic 10) identified in the *Contract Audit Guide Framework* released in 2009 and updated in 2020 by the Contracting Committee of the Federal Audit Executive Council. The framework provides a construct of issues and researchable questions to consider when planning audits or reviews of contracts. It is the Contracting Committee's intention to issue audit guides for each issue identified in the framework. Audit teams are encouraged to modify the *Undefinitized Contract Actions Audit Guide* as appropriate, and to use the guide, in conjunction with other appropriate tools, to assess UCAs.

BACKGROUND

When a requirement needs to be met quickly and there is insufficient time to use normal contracting vehicles, the Federal Acquisition Regulation (FAR) permits the use of an UCA. UCA means those contract actions for which the contract terms, specifications, or price are not agreed upon before performance commences. Examples are letter contracts, orders under basic ordering agreements, and provisioned item orders, for which the price has not been agreed upon before performance has begun. The FAR governs how and when contracting officers should use UCAs. UCAs can be quickly entered into, but at a later date, the Government and contractor must agree upon the award's final price and other terms, which is referred to as definitizing the contract.

Contracting officers can issue UCAs using various contract vehicles. However, UCAs are only appropriate for requirements of an urgent and compelling nature. This type of contract action is considered risky in part because the government may incur unnecessary costs if requirements change before the contract is definitized. Under undefinitized contract actions, substantial funds may be obligated before essential questions of contract scope and system design have been settled.¹ Therefore, the head of the contracting activity should approve the use of a UCA only after determining, in writing, that no other contract is suitable. The determination should fully document the rationale and circumstances that support the UCA decision. For example, the Office of Federal Procurement Policy (OFPP) Emergency Contracting Guide includes Letter Contracts as an acquisition flexibility that can expedite the acquisition of supplies and services during emergencies such as a pandemic.

The FAR establishes requirements as to how quickly UCAs must be definitized. Specifically, the regulation requires contracting officers definitize a UCA within 180 days after the award date or before 40 percent of the work is complete, whichever occurs first. However, the FAR allows for both waivers or extensions of the 180-day requirement under extreme circumstances or when the agency is supporting a contingency or peacekeeping operation.

¹ GAO's report, *MISSILE DEFENSE, The Warfighter and Decision Makers Would Benefit from Better Communication about the System's Capabilities and Limitations*, GAO-18-324, May 2018, page 24 & 25.

UCA pricing is usually stated in terms of a “not-to-exceed” amount. The not-to-exceed price is the estimated amount necessary to cover the contractor’s requirement for funds before definitization. However, the price shall not exceed 50 percent of the estimated cost of the definitized contract, unless authorized (FAR 52.216-24). Accordingly, organizations should not obligate funds against the UCA in excess of the not-to-exceed price. Some agencies such as the Department of Defense (DoD) have additional requirements, such as the Defense Federal Acquisition Regulation Supplement (DFARS). Therefore, please also refer to agency supplemental regulations, policies and procedures.

All UCAs are essentially cost-reimbursement contracts until definitized, as the Government reimburses the contractor all incurred costs that are reasonable, allocable, and allowable during the undefinitized period. This contract type places the greatest cost risk on the Government. When the UCA is definitized, the contracting officer and contractors negotiate the ultimate contract type and price including profit or fee. Typically, the profit rate or fee is derived at definitization and then applied across the entire period of performance, including the undefinitized period. When calculating the negotiating position on profit or fee for a UCA, the FAR requires contracting officers assess the relative risk borne by the contractor versus the Government. The amount of profit or fee available to the contractor is usually determined via a structured calculation that is a function of several different factors, such as the complexity of the work, resources required to perform, independent efforts by the contractor to bring about improved performance, and contract type.

Contracting officers should consider any reduced risk on the contract portion performed before definitization and any reduced risk on the remaining portion that will be performed after definitization. Contracting officers then document in the contracting files how the shift in risk associated with the undefinitized period was accounted for in determining the profit or fee calculated for negotiations.

AUDIT STEPS

NOTES:

1. Please refer to Appendix 1: Potential Laws and Federal Acquisition Regulation (FAR) for UCA's-Not Exhaustive as guidance for UCAs
2. Some agencies like the DoD have supplemental guidance such as the DFARS governing timely definitization of UCAs. Please refer to any supplemental guidance, policies, or procedures governing UCAs that your agency may have.
3. Identifying the universe of UCAs for sample selection can be a challenge. Some universe data can be identified from the Federal Procurement Data System-Next Generation (FPDS-NG). The FPDS-NG Data Element Dictionary v1.5 specifies that element 6B² should be used for UCAs, but you will most likely have to work closely with the audit client to obtain additional UCA universe data from locally generated reports or systems. It is suggested the audit sample include definitized UCAs as well as undefinitized UCAs.

SUBOBJECTIVE 1: DETERMINE WHETHER THE AGENCY PROPERLY JUSTIFIED AND AUTHORIZED UCAS.

- A. Determine whether the contracting officer documented approval from the head of the contracting activity to use an UCA.
- B. Determine whether the statement of urgency request for approval fully explained and adequately justified the need to begin performance before definitization, including the adverse impact on the agency requirements that would result from delays in performance.
- C. Review requirement and/or deliverables specified in the UCA relative to the UCA justification to evaluate whether the UCA included any non-urgent or unnecessary items or services.

² GSA Federal Procurement Data System-Next Generation (FPDS-NG) Data Element Dictionary, Page 50, retrieved from https://www.fpds.gov/downloads/Version_1.5_specs/FPDSNG_DataDictionary_V1.5.pdf

- D. For UCAs awarded as a modification or order against an existing contract, evaluate whether the work performed under the UCA modification/order was within the scope of the contract statement of work or performance work statement.
- E. Verify the contracting officer issued the UCA prior to the contractor beginning performance.
- F. Determine whether the activity had sufficient acquisition lead-time to use normal contracting procedures. UCAs are often the result of poor acquisition planning or ineffective use of acquisition lead-time. FAR 6.301, Policy, (c)(1) states that, "Contracting without providing for full and open competition shall not be justified on the basis of- (1) A lack of advance planning.
 - 1. Identify when the requirement was first identified from contract file documentation such as the purchase request, funding document, correspondence with the contractor, etc.
 - 2. Identify the delivery or performance start date.
 - 3. Identify the normal or average contracting lead-time for the agency. Reviewing the procurement plan should identify milestones at which decisions should be made (FAR 7.105).
 - 4. Based on the normal/average agency lead-time, evaluate whether there was sufficient time between when the requirement was first identified and the delivery or performance start date to use normal contracting procedures.
- G. If the agency did not properly use and/or authorize the UCAs, discuss with the contracting officer and/or appropriate agency personnel the reasons for not doing so. Based on the results of those discussions, develop, and apply additional audit procedures to validate and support the asserted causes.

SUBJECTIVE 2: DETERMINE WHETHER THE AGENCY TIMELY DEFINITIZED UCAS.

- A. Determine whether the UCA was definitized within 180 days or prior to 40-percent completion of the work to be performed, whichever was sooner. Definitization should also be definitized prior to the end of the Period of Performance.
 - 1. For UCAs that have already been definitized, verify the time period between the date on the UCA and the date on the definitized contract were within the 180-day time limit.
 - 2. For UCAs that are not yet definitized, verify:
 - a. The time period between the date on the UCA and the current date is within the 180-day limit.
 - b. The total amount paid to and invoiced by the contractor is less than 40 percent of the estimated cost of the definitized contract.
 - c. Invoice support such as receipt and acceptance of materials documentation, approval of payment, and independent progress reports to verify that the work had been completed.

- B. For UCAs exceeding the 180-day time limit or the 40-percent definitization requirement, determine whether there is a properly approved waiver or extension.
1. Verify that the head of the contracting activity approved the waiver or extension.
 2. Evaluate the adequacy of the justification for waiving or extending the definitization period. The justifications should clearly demonstrate that extreme circumstances or contingency/peacekeeping operations that were the basis for the waiver or extension.
 3. For approved UCA extensions:
 - a. Verify the extension was for 180 days or less.
 - b. For UCA extensions that have already been definitized, verify the date on the UCA extension and the date on the definitized contract was within the approved extension period.
 - c. For UCA extensions that have not been definitized, verify the start date for the extension and the current date fall within the approved extension period.
 4. Often, the cause for not timely definitizing a UCA is the failure of the contractor to submit a qualifying proposal. To determine whether this is the case, ascertain whether the contractor has submitted a proposal. If not, determine whether the contracting officer has taken timely, appropriate and adequate actions to facilitate obtaining a proposal from the contractor.
 5. Discuss other potential causes for untimely definitization with the contracting officer and/or appropriate agency personnel. Based on the results of those discussions, develop and apply additional audit procedures to validate and support the asserted causes.

SUBJECTIVE 3: DETERMINE WHETHER THE AGENCY PROPERLY PRICED AND FUNDED UCAS.

A. Pricing

1. Verify the UCA specified a not-to-exceed price and maximum liability of the government amount.
2. Determine if the maximum liability of the government amount was based on the estimated amount to cover the contractor's costs prior to definitization. Specifically, assess whether there was a reasonable basis and adequate documentation supporting the estimated costs that the contractor is expected to incur under the UCA.
3. Assess whether there was a reasonable basis and adequate documentation supporting the estimated the cost of the definitized contract.
4. Verify that the maximum liability of the government amount does not exceed 50 percent of the estimated cost of the definitized contract.

5. If the maximum liability to the government amount exceeds 50 percent of the estimated cost of the definitized contract, verify the contracting officer obtained proper approval to exceed it.

B. Funding

1. Verify that the cumulative obligations and expenditures on the UCA are less than maximum liability to the government amount.
2. Discuss any UCA pricing or funding discrepancies with the contracting officer and/or appropriate agency personnel to identify the cause of the deficiencies. Based on the results of those discussions, develop and apply additional audit procedures to validate and support the asserted causes.

SUBOBJECTIVE 4: DETERMINE WHETHER THE AGENCY NEGOTIATED FAIR AND REASONABLE PRICES ON THE DEFINITIZED CONTRACTS.

- A. Review relevant contract pricing documentation such as the price negotiation memorandum, business clearance memorandum, certificates of cost and pricing, technical evaluations, and/or audit reports to verify the contracting officer had sufficient information to develop a negotiation objective and evaluate the reasonableness of the price on the definitized contract.
- B. Verify that when determining the profit or fee, the contracting officer considered any reduced risk on the portion of the contract performed before definitization and any reduced risk on the remaining portion to be performed after definitization. The contract files should contain documentation explaining how the shift in risk associated with the undefinitized period was accounted for in determining the profit or fee calculated for negotiations.
- C. Discuss any definitized contract pricing weaknesses with the contracting officer and/or appropriate agency personnel to identify the cause of the deficiencies. Based on the results of those discussions, develop and apply additional audit procedures to validate and support the asserted causes.

Appendix 1: Laws and Federal Acquisition Regulation (FAR) for UCAs-Not Exhaustive

NOTE: The agency/department you are auditing may have specific requirements and FAR supplements or other implementing guidance. Therefore, you will also need to identify and become familiar with the requirements and criteria in those documents.

United States Code Title 10, Section 2326, "Undefinitized Contractual Actions," provides a basic overview of UCA restrictions for DOD, such as limitations on the obligation of funds and scope modifications

FAR:

6.302 – Circumstances permitting other than full and open competition. This section states the circumstances that allow the contracting officer to award the contract without full and open competition:

6.303 Justifications. This section states when a justification to award a contract without competition is required and what the justification should include.

6.304 Approval of Justification. This section states what level of approval is required for the justification.

13.501 Special documentation requirements. This section establishes procedures for awarding sole source contracts under Simplified Acquisition Procedures.

15.4, "Contracting Pricing" provides guidance on pricing for UCAs.

15.402, "Pricing Policy." This states that contracting officer will purchase supplies and services from responsible sources at fair and reasonable prices.

15.403-1, "Prohibition on obtaining certified cost or pricing data." This states the circumstances when a contracting officer shall not require certified cost or pricing data from the contractor.

15.403-4, "Requiring certified cost or pricing data." This states that the threshold for obtaining certified cost or pricing data is \$750,000 for prime contracts awarded before July 1, 2018, and \$2 million for prime contracts awarded on or after July 1, 2018.

15.404, "Proposal analysis." This section discusses techniques that a contracting officer may use to analyze the contractor's proposed price and determine if the proposed price is fair and reasonable.

15.406-2, "Certificate of Current Cost or Pricing Data." This section states that when certified cost or pricing data are required, the contracting officer shall require the contractor to execute a Certificate of Current Cost or Pricing Data, using the format in this paragraph, and must include the executed certificate in the contract file.

16.603, "Letter Contracts," and FAR 16.703, "Basic Order Agreements," prescribe procedures and criteria for undefinitized contracting actions using these two contract vehicles.

19.804-3-c. Sole source 8(a) awards. This section discusses Small Business Administration (SBA) involvement in 8(a) sole source awards.

19.805-1 General. This section establishes when an 8(a) sole source award can be made, including establishing dollar thresholds.

19.808-1 Sole Source (Contract Negotiation). This section states that the SBA may not accept for negotiation a sole source 8(a) contract that exceeds \$22 million unless the requesting agency has completed a justification in accordance with the requirements of FAR 6.303.

52.216-23, Execution and Commencement of Work.

52.216-24, Limitation of Government Liability.

52.216-25, Contract Definitization.

52.216-26, Payments of Allowable Costs Before Definitization.

52.244-2, Subcontracts.

Clauses referencing undefinitized work or letter contracts include:

52.232-5 Payments under Fixed-Price Construction Contracts.

(i) Limitation because of undefinitized work. Notwithstanding any provision of this contract, progress payments shall not exceed 80 percent on work accomplished on undefinitized contract actions. A “contract action” is any action resulting in a contract, as defined in FAR subpart 2.1, including contract modifications for additional supplies or services, but not including contract modifications that are within the scope and under the terms of the contract, such as contract modifications issued pursuant to the Changes clause, or funding and other administrative changes.

52.232-10 Payments under Fixed-Price Architect-Engineer Contracts.

(e) Notwithstanding any other provision in this contract, and specifically paragraph (b) of this clause, progress payments shall not exceed 80 percent on work accomplished on undefinitized contract actions. A “contract action” is any action resulting in a contract, as defined in FAR subpart 2.1, including contract modifications for additional supplies or services, but not including contract modifications that are within the scope and under the terms of the contract, such as contract modifications issued pursuant to the Changes clause, or funding and other administrative changes.

52.232-16 Progress Payments.

(k) Limitations on undefinitized contract actions. Notwithstanding any other progress payment provisions in this contract, progress payments may not exceed 80 percent of costs incurred on work accomplished under undefinitized contract actions. A “contract action” is any action resulting in a contract, as defined in subpart 2.1, including contract modifications for additional supplies or services, but not including contract modifications that are within the scope and under the terms of the contract, such as contract modifications issued pursuant to the Changes clause, or funding and other administrative changes. This limitation shall apply to the costs incurred, as computed in accordance with paragraph (a) of this clause, and shall remain in effect until the contract action is definitized. Costs

incurred which are subject to this limitation shall be segregated on Contractor progress payment requests and invoices from those costs eligible for higher progress payment rates. For purposes of progress payment liquidation, as described in paragraph (b) of this clause, progress payments for undefinitized contract actions shall be liquidated at 80 percent of the amount invoiced for work performed under the undefinitized contract action as long as the contract action remains undefinitized. The amount of unliquidated progress payments for undefinitized contract actions shall not exceed 80 percent of the maximum liability of the Government under the undefinitized contract action or such lower limit specified elsewhere in the contract. Separate limits may be specified for separate actions.

Alternate II (Apr2003). If the contract is a letter contract, add paragraphs (n) and (o). The amount specified in paragraph (o) shall not exceed 80 percent of the maximum liability of the Government under the letter contract. The contracting officer may specify separate limits for separate parts of the work.

(n) The Contracting Officer will liquidate progress payments made under this letter contract, unless previously liquidated under paragraph (b) of this clause, using the following procedures:

(1) If this letter contract is superseded by a definitive contract, unliquidated progress payments made under this letter contract shall be liquidated by deducting the amount from the first progress or other payments made under the definitive contract.

(2) If this letter contract is not superseded by a definitive contract calling for the furnishing of all or part of the articles or services covered under the letter contract, unliquidated progress payments made under the letter contract shall be liquidated by deduction from the amount payable under the Termination clause.

(3) If this letter contract is partly terminated and partly superseded by a contract, the Government will allocate the unliquidated progress payments to the terminated and unterminated portions as the Government deems equitable, and will liquidate each portion under the relevant procedure in paragraphs(n)(1) and (n)(2) of this clause.

(4) If the method of liquidating progress payments provided in this clause does not result in full liquidation, the Contractor shall immediately pay the unliquidated balance to the Government on demand.

(o) The amount of unliquidated progress payments shall not exceed _____ [Contracting Officer specify dollar amount].