

# BRIEFING PAPERS<sup>®</sup> SECOND SERIES

PRACTICAL TIGHT-KNIT BRIEFINGS INCLUDING ACTION GUIDELINES ON GOVERNMENT CONTRACT TOPICS

## CONTRACT LINE ITEMS

By Vernon J. Edwards\*

A contract must identify what is to be delivered or done and designate the terms that apply to each such obligation. So how are contractual obligations—duties and rights—to be arranged in a contract document? What ties everything together? The answer is what the Federal Acquisition Regulation (FAR) refers to as *line items* or *contract line items*. Line items are the organizing component, the center of mass, of every Government contract.

Although the Department of Defense (DOD) has published rules and guidance for the use of line items since as early as 1970, the rules and guidance about line items in the FAR were scant when it took effect in 1984.<sup>1</sup> In August 2014 the FAR councils proposed to amend the FAR “to establish a uniform line item identification structure for the Federal Procurement System.”<sup>2</sup> The proposal was prompted by requirements of the Federal Funding Accountability and Transparency Act of 2006.<sup>3</sup> The goal was to improve the accuracy, traceability, and usability of procurement data.<sup>4</sup> The proposed rule appears to have been based on the rules in the Defense Federal Acquisition Regulation Supplement (DFARS). The rule was finalized by Federal Acquisition Circular 2005-95, which took effect on January 13, 2017.<sup>5</sup> Agencies were given until October 1, 2019, to fully apply the new rules.<sup>6</sup>

This BRIEFING PAPER is an introduction to the concepts, rules, and principles of contract line items and line item structuring. It explains what line items are, their contractual role, and how they may be used to the benefit of both the Government and contractors.

### The Uniform Contract Format

Every Government contract document has a format. Contracts for noncommercial items that are valued at more than the simplified acquisition threshold are organized in what is known as the Uniform Contract Format (UCF).<sup>7</sup> The UCF is described in FAR 14.201 for contracts awarded by sealed bidding and in FAR 15.204 for contracts awarded by negotiation. The UCF organizes a contract into four parts and 13 sections. See FAR 15.204-1, Table 15-1, “Uniform Contract Format”:

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**Table 15-1 - Uniform Contract Format**

<b>Part I—The Schedule</b>	
Section A	Solicitation/contract form
Section B	Supplies or services and prices/costs
Section C	Description/specifications/statement of work
Section D	Packaging and marking
Section E	Inspection and acceptance
Section F	Deliveries or performance
Section G	Contract administration data
Section H	Special contract requirements
<b>Part II—Contract Clauses</b>	
Section I	Contract clauses
<b>Part III—List of Documents, Exhibits, and Other Attachments</b>	
Section J	List of attachments
<b>Part IV—Representations and Instructions</b>	
Section K	Representations, certifications, and other statements of offerors or respondents
Section L	Instructions, conditions, and notices to offerors or respondents
Section M	Evaluation factors for award

FAR 15.204-2 through 15.204-5 contain explanations of and instructions for the preparation of each of the 13 sections of the UCF.

Part I of the UCF is the Schedule. The Schedule specifies the particulars that are unique to the contract, as distinct from standard clauses that are used in all contracts.<sup>8</sup>

The heart of the Schedule is Section B, “Supplies or services and prices/costs.” Section B describes the things that a contractor must do or deliver. FAR 15.204-2(b) instructs contracting officers as follows with respect to UCF Section B:

(b) *Section B, Supplies or services and prices/costs.* Include a brief description of the supplies or services; e.g., item number, national stock number/part number if applicable, nouns, nomenclature, and quantities. (This includes incidental deliverables such as manuals and reports.)

Each brief description is a contract “line item.” FAR 2.101 defines line item as follows:

*Line item* means the basic structural element in a procurement instrument that describes and organizes the required product or service for pricing, delivery, inspection, acceptance, invoicing, and payment. The use of the term line item includes subline item, as applicable.

A line item in a contract might look like this:

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Item No.	Description	Qty.	Unit	Total Price
0001	Professional services to support system development performed as specified in the Statement of Work in contract Section C	1	Job	\$500,000.00

## Contract Line Items

Each contract deliverable is an “item,” and its “brief description” appears in the text of the designated line item. The line item text, in addition to including the “brief description” of the deliverable, should refer to any specification or statement of work that contains a complete description. The specification or statement of work is contained in UCF Section C, is physically attached to the contract document and is listed in UCF Section J or is incorporated into the contract document by reference. The line item also states the quantity, unit of purchase measurement,<sup>9</sup> *e.g.*, each (EA) or job (JO), and the unit price and total price to be paid.

FAR Subpart 4.10, “Uniform Use of Line Items,” provides more information.<sup>10</sup> It is organized in the following sections:

- 4.1000 Scope.
- 4.1001 Policy.
- 4.1002 Applicability.
- 4.1003 Establishing line items.
- 4.1004 Establishing subline items.
- 4.1005 Data elements for line items and subline items.
- 4.1006 Modifications.
- 4.1007 Solicitation alternative line item proposal.
- 4.1008 Solicitation provision.

FAR 4.1001 states Government policy about the use of line items:

In order to improve the accuracy, traceability, and usability of procurement data, procurement instruments shall identify the supplies or services to be acquired as separately identified line items and, as needed, subline items.

(a) Line items are established to define deliverables or organize information about deliverables. Each line item describes characteristics for the item purchased, *e.g.*, pricing, delivery, and funding information.

(b) Each line item may be subdivided into separate unique subsets (called subline items) to ease administration. If a line item has deliverable subline items, the line item is informational. Subline items differentiate between or among certain characteristics of the line item, such as colors or sizes, dates of delivery, destinations, or places of performance. Subline items are established to define deliverables or organize information about deliverables.

FAR 4.1002, “Applicability,” states that the aforesaid policy applies to:

- (a) Solicitations [requests for proposals or invitations for bids];
- (b) Contracts, including, but not limited to, Government-wide acquisition contracts (GWACs), multi-agency contracts (MACs), Federal Supply Schedule (FSS) contracts, indefinite-delivery contracts, and purchase orders;
- (c) Agreements that include pre-priced supplies or services; and
- (d) Task and delivery orders.

## Criteria For Establishing Contract Line Items

FAR 4.1003 prescribes criteria for establishing contract line items:

Establish separate line items for deliverables that have the following characteristics except as provided at [FAR] 4.1005-2:

- (a) Separately identifiable.
  - (1) A supply is separately identifiable if it has its own identification (*e.g.*, national stock number (NSN), item description, manufacturer’s part number).
  - (2) Services are separately identifiable if they have no more than one statement of work or performance work statement.
  - (3) If the procurement instrument involves a first article (see [FAR] subpart 9.3), establish a separate line item for each item requiring a separate approval. If the first article consists of a lot composed of a mixture of items that will be approved as a single lot, a single line item may be used.
- (b) Single unit price or total price.
- (c) Single accounting classification citation. A single deliverable may be funded by multiple accounting clas-

sifications when the deliverable effort cannot be otherwise subdivided.

(d) Separate delivery schedule, destination, period of performance, or place of performance.

(e) Single contract pricing type (*e.g.*, fixed-price or cost-reimbursement).

The specific application of those criteria depends on what an agency wants to buy, its acquisition plan, and the nature and structure of the bargain that it wants to make. One agency might want to form a contract for the execution of a program. It might want to conduct the program and structure the contract as either a single undertaking, under one line item, or as a series of steps, phases, or stages, each to be undertaken separately and in sequence under separate line items and with separate funding. A second agency might want to buy a single product, but want different quantities delivered at different times to different places. It might want to buy a single kind of product but want different models of it delivered to different facilities for different uses. A third agency might want to hire a contractor to perform a multi-task function, but want each task performed at a separate location or at different times. Those arrangements can be made through line item structuring. To “structure” line items is to arrange the various parts of an agreement in a manner suitable to an agency’s needs and plans.

## Contract Subline Items

FAR 4.1004 permits the division of a single contract line item into subordinate subline items. There are two types of subline items—deliverable and informational.

An agency might establish deliverable subline items when it wants to buy a product of a particular type, such as  $\frac{3}{4}$ -ton pickup trucks, which comes in different configurations, and wants to buy a quantity of each configuration for delivery to different regional locations or at different times. It can, for instance, establish a contract line item for  $\frac{3}{4}$ -ton pickup trucks and a separate deliverable subline item for each of several configurations, such as single cab, extended cab, crew cab, and quad cab. Or suppose that an agency wants to contract for the performance of a service like grounds maintenance, which is composed of several separate tasks, each which is to be performed at a different time of year. It can establish a contract line item for the overall service and a separate subline item for each task. The criteria in FAR 4.1003 that apply to the establishment

of contract line items, described above, also apply to the establishment of subline items.

An agency may establish informational subline items to provide administrative details helpful in contract administration, such as lists of product components and parts and contents of kits. Defense FAR Supplement (DFARS) 204.7104(a) provides additional information about informational subline items:

(1) This type of subline item identifies information that relates directly to the contract line item and is an integral part of it (*e.g.*, parts of an assembly or parts of a kit). These subline items shall not be scheduled separately for delivery, identified separately for shipment or performance, or priced separately for payment purposes.

(2) The informational subline item may include quantities, prices, or amounts, if necessary to satisfy management requirements. However, these elements shall be included within the item description in the supplies/services column and enclosed in parentheses to prevent confusing them with quantities, prices, or amounts that have contractual significance. Do not enter these elements in the quantity and price columns.

(3) Informational subline items shall be used to identify each accounting classification citation assigned to a single contract line item number when use of multiple citations is authorized (see [DFARS] 204.7103-1(a)(4)(ii)).

## The Elements Of A Line Item

FAR 4.1005 identifies the constituent elements of a contract line item. FAR 4.1005-1 specifies “data elements” that must be included in every contract line item, as follows:

(a) Except as provided in [FAR] 4.1005-2, each line item or subline item shall include in the schedule (described at [FAR] 12.303(b)(4), 14.201-2, or 15.204-2, or in a comparable section of the procurement instrument), at a minimum, the following information as separate, distinct data elements:

(1) Line item or subline item number established in accordance with agency procedures.<sup>11</sup>

(2) Description of what is being purchased.

(3) Product or Service Code (PSC).

(4) Accounting classification citation.<sup>12</sup>

(i) Line items or deliverable subline items. If multiple accounting classifications for a single deliverable apply, include the dollar amount for each accounting classification in the schedule (or a comparable section of the procurement instrument).

(ii) Informational subline items. An accounting classification citation is not required. (See [FAR] 4.1004).

(5) (i) For fixed-price line items:

(A) Unit of measure.

(B) Quantity.

(c) Unit price.

(D) Total price.

(ii) For cost-reimbursement line items:

(A) Unit of measure.

(B) Quantity.

(c) Estimated cost.

(D) Fee (if any).

(E) Total estimated cost plus any fee.

FAR 4.1005-2 makes exceptions for indefinite-delivery contracts, as follows:

(a) *Indefinite-delivery contracts*—

(1) *General.* The following required data elements are not known at time of issuance of an indefinite-delivery contract, but shall be provided in each order at the time of issuance: accounting classification, delivery date and destination, or period and place of performance.

(2) *Indefinite-delivery indefinite-quantity (IDIQ) and requirements contracts.*

(i) IDIQ and requirements contracts may omit the quantity at the line item level for the base award provided that the total contract minimum and maximum, or the estimate, respectively, is stated.

(ii) Multiple-award IDIQ contracts awarded using the procedures at [FAR] 13.106-1(a)(2)(iv)(A) or [FAR] 15.304(c)(1)(ii)(A) may omit price or cost at the line item or subline item level for the contract award, provided that the total contract minimum and maximum is stated (see [FAR] 16.504(a)(1)).

(b) *Item description and PSC.* These data elements are not required in the line item if there are associated deliverable subline items that include the actual detailed identification. When this exception applies, use a general narrative description for the line item.

(c) *Single unit price or single total price.* The requirement for a single unit price or single total price at the line item level does not apply if any of the following conditions are present:

(1) There are associated deliverable subline items that are priced.

(2) The line item or subline item is not separately priced.

(3) The supplies or services are being acquired on a cost-reimbursement, time-and-materials, or labor-hour basis.

(4) The procurement instrument is for services and firm prices have been established for elements of the total price, but the actual number of the elements is not known until performance (e.g., a labor-hour contract for maintenance/repair). The contracting officer may structure these procurement instruments to reflect a firm or estimated total amount for each line item.

## Contract Line Item Exhibits

Sometimes a deliverable is really a collection of individual items. The classic examples are data deliverables, such as technical data, manuals, and reports, or product spare parts. Instead of establishing long lists of line items or subline items for such deliverables, an agency can list them on an exhibit—a form or spreadsheet—under a single line item. This technique is not described in the FAR, but in DFARS Procedures, Guidance, and Information (PGI) 204.7105, “Contact exhibits and attachments,” paragraph (a):

(a) *Use of exhibits.*

(1) Exhibits may be used instead of putting a long list of contract line items or subline items in the contract schedule. Exhibits are particularly useful in buying spare parts.

(2) When using exhibits, establish a contract line or subline item and refer to the exhibit.

(3) Identify exhibits individually.

(4) Each exhibit shall apply to only one contract line item or subline item.

(5) More than one exhibit may apply to a single contract line item.

(6) Data items on a DD Form 1423, Contract Data Requirements List, may be either separately priced or not separately priced.

(i) Separately priced. When data are separately priced, enter the price in Section B of the contract.

(ii) Not separately priced. Include prices in a priced contract line item or subline item.

(7) The contracting officer may append attachments to exhibits, as long as the attachment does not identify a deliverable requirement that has not been established by a contract line item or subline item or exhibit line item.

(8) Include exhibit line items and associated information in the electronically distributed contract documents identified in PGI 204.201 (3)(i)(A) and (B).

Use of a line item exhibit is a matter of convenience; each item is separately deliverable.

## Contract Line Items & Contract Terms

FAR 4.1005-1(b), (c), and (d) provide as follows:

(b) If a contract contains a combination of fixed-price, time-and-materials, labor-hour, or cost-reimbursable line items, identify the contract type for each line item in the schedule (or a comparable section of the procurement instrument) to facilitate payment.

(c) Each deliverable line item or deliverable subline item shall have its own delivery schedule, destination, period of performance, or place of performance expressly stated in the appropriate section of the procurement instrument (“as required” constitutes an expressly stated delivery term). When a line item has deliverable subline items, the delivery schedule, destination, period of performance, or place of performance shall be identified at the subline item level, rather than the line item level.

(d) Terms and conditions in other sections of the contract (such as contract clauses or payment instructions) shall also specify applicability to individual line items if not applicable to the contract as a whole.

The terms of a solicitation, contract, agreement, or order apply to particular line items. If a contract has more than one line item, each line item might share some terms with the others and have some terms of its own. For example, suppose that a contract has one firm-fixed-price line item for supplies (0001) and a time-and-materials line item for services (0002). UCF Section C, “Description/specifications/statement of work,” must contain or refer to a specification for the supplies item and a statement of work for the services item. UCF Section I, “Contract Clauses,” must contain three sets of clauses—a set of those that apply to both line items, a set of those that apply only to the firm-fixed-price line item, and a set of those that apply only to the time-and-materials line item. UCF Section I, “Contract Clauses,” must be organized accordingly:

I.1 —Clauses applicable to both Items 0001 and 0002.

I.2 —Clauses applicable only to Item 0001

I.3 —Clauses applicable only to Item 0002

An agency can create various combinations of contract pricing arrangements, allocate funding, and arrange and control contract payments and the flow of contract financing through thoughtful and creative contract line item structuring.

## Other Uses Of Line Items

Through line item structuring an agency can issue a single request for proposals (RFP) and conduct a single competition with a plan to award a separate contract for each RFP line item. It can conduct a single competition and award some line items on an unrestricted basis and set aside some line items for small businesses.

Line item structuring can affect contractor cash flow. Dividing a whole obligation in a logical way into line items or subline items can permit the contractor to discharge subordinate obligations more quickly and thereby accelerate the liquidation of progress payments based on costs. Line item structuring can also be used to delineate performance-based payments on a delivery item basis.

To facilitate effective line item structuring, FAR 4.1007, “Solicitation alternative line item proposal,” states: “Solicitations should be structured to allow offerors to propose alternative line items.” To that end it prescribes the use of the solicitation provision at FAR 52.204-22, “Alternative Line Item Proposal (JAN 2017),” which provides as follows:

### Alternative Line Item Proposal (JAN 2017)

(a) The Government recognizes that the line items established in this solicitation may not conform to the Offeror’s practices. Failure to correct these issues can result in difficulties in acceptance of deliverables and processing payments. Therefore, the Offeror is invited to propose alternative line items for which bids, proposals, or quotes are requested in this solicitation to ensure that the resulting contract is economically and administratively advantageous to the Government and the Offeror.

(b) The Offeror may submit one or more additional proposals with alternative line items, provided that alternative line items are consistent with [FAR] subpart 4.10 of the Federal Acquisition Regulation. However, acceptance of an alternative proposal is a unilateral decision made solely at the discretion of the Government. Offers that do not comply with the line items specified in this solicitation may be determined to be nonresponsive or unacceptable.

(End of provision)

Thus, offerors may propose line item structures that provide for better administration or financial management than the one in the Government’s solicitation.

## Line Items & Contract Severability (Divisibility)

When a contract contains multiple line items, each line

item is an obligation. But is each such line item an integral part of one entire, indivisible obligation, or is each line item a separate, severable obligation, independent of all others, under a single, but divisible, umbrella contract? The answer depends on the intent of the parties, the nature of each line item, and the relationships among the line items.

BLACK'S LAW DICTIONARY defines *severable contract* as follows:

A contract that includes two or more promises each of which can be enforced separately, so that failure to perform one of the promises does not necessarily put the promisor in breach of the entire contract.—Also termed *divisible contract*; *several contract*.<sup>13</sup>

For a definition of *divisible contract*, see the discussion in WILLISTON ON CONTRACTS 4th:

The doctrine of divisibility in contract law is a mitigating doctrine which reduces the risk of forfeiture by giving a party who has performed one part of the performances agreed to be exchanged by the parties the right to its agreed equivalent as if the parties had made a separate contract with regard to that pair of corresponding parts. Thus, a divisible contract has been defined as one where both the performance by each party is divided into two or more parts, and the performance of each part by one party is the agreed exchange for a corresponding part by the other party. "A contract is divisible where by its terms, 1, performance of each party is divided into two or more parts, and 2, the number of parts due from each party is the same, and, 3, the performance of each part by one party is the agreed exchange for a corresponding part by the other party." However, the concept of divisibility is not authoritatively defined; there is no precise or exact definition as to when a contract is "divisible" and no one test or rule of law to be used to ascertain whether a contract is divisible. Rather, the rule as to what constitutes a divisible contract can be stated only in general terms, subject to flexible application, each case depending largely on its own facts and circumstances. Thus, for example, it has also been said that a contract is divisible when by its terms, nature, and purpose, it is susceptible of division and apportionment, having two or more parts which are not necessarily dependent upon each other nor intended by the parties to be so. On the other hand, a contract is indivisible or "entire" when by its terms, nature, and purpose, it contemplates and intends that each and all of its parts, material provisions, and the consideration are common each to the other and interdependent. In this connection, it should be noted that while the word "entire" is often used in reference to just one contract to convey the meaning that it is not divisible, it is also sometimes used to convey the meaning that there is only one as opposed to

several, separate contracts. At the same time, the word "divisible" is sometimes used to describe independent separate contracts, and the word "indivisible" has been used to connote a single contract as opposed to several, separate contracts. However, a divisible contract, using that term properly, is always an "entire" contract in the sense of being one and not several contracts. "A contract may be entire in the sense that there is but one agreement covering all the terms and yet it may be that the performance under the contract will be divided into different groups each set embracing performances which are the agreed exchange for each other, the result being that the contract is entire but divisible."<sup>14</sup>

Some authorities treat the question as one of fact, and some as one of law. Some treat it as a mixed question.<sup>15</sup> The answer is determined by the intention of the parties, and they may express their intention through express agreement.<sup>16</sup> In *Aptus Co. v. United States*, the U.S. Court of Federal Claims stated that it is not an easy question:

Determining whether portions of the work under a single contract are divisible from the balance of the contract is not an easy question, as there is no bright line rule for determining contract severability. John Cibinic, Jr. & Ralph C. Nash, Jr., ADMINISTRATION OF GOVERNMENT CONTRACTS 963 (3d ed. 1995). "Numerous tests have been declared by the courts and text writers by which to determine whether a contract is severable or entire. In the main, they all declare the general rule that the intent of the parties, as gleaned from the four corners of the instrument, must determine the question." *Penn. Coal & Coke Corp. v. United States*, 108 Ct. Cl. 236, 250, 70 F. Supp. 136 (1947) (quoting *Franklin v. Am. Nat. Ins. Co.*, 135 F.2d 531, 533 (10th Cir.1943)).<sup>17</sup>

Generally, there is a presumption against severability (divisibility).<sup>18</sup>

In Government contracting the question of severability (divisibility) appears to have come up most frequently when a contractor challenges the default termination of an entire multiple line item contract after the contractor's failure to perform under one or only some of the line items.

The leading board of contract appeals case at present is *Bulova Technologies Ordnance Systems LLC*,<sup>19</sup> where the contractor was obligated to deliver various configurations of various types of weapons to various foreign governments at various times under separate contract subline items. Each subline item had its own delivery date and location. The contract included the clause at FAR 52.249-8, "Default (Fixed-Price Supply and Service) (APR 1984)." The Government terminated the contract for

default after repeatedly late deliveries. The contractor appealed to the Armed Services Board of Contract Appeals, raising as a basis for appeal the fact that deliveries of only one of type of weapon were late and that termination of the entire contract was improper because the contract line items were separate, and the contract thus was severable.

The board described the relevant contract line item and subline item structure as follows:

PSL sniper rifles with scope/parts (from Romania, subcontractor RomArm):

- CLIN 0004AF for 30 rifles with scope (all due 90 days “after [end use certificate (EUC)]”).
- CLIN 0004AJ for 30 spotter scopes for the PSL rifles (all due 90 days “after EUC”).
- CLIN 0005AB for 3,134 rifles with scope (970 rifles due 90 days “after EUC” and 2,164 rifles for delivery 210 days “after EUC”).

NSV heavy machine guns with mounts/parts (from Serbia, subcontractor Yugoimport), all due 270 days “after EUC”:

- CLIN 0001AA for 15 heavy machine guns.
- CLIN 0002AA for 26 heavy machine guns.
- CLIN 0003AA for 26 heavy machine guns.
- CLIN 0004AC for 27 heavy machine guns.

PKM medium machine guns with mounts/parts (from Bulgaria, subcontractor Arsenal):

- CLINs 0001AC-0003AC; 0004AE for a total of 220 medium machine guns (due 60 days “after EUC”).
- CLIN 0005AA for 9,000 medium machine guns (due in specified increments, with delivery due dates from 60-360 days “after EUC”).<sup>20</sup>

The board then analyzed the issue of severability as follows:

Bulova argues the contract was severable and that the entire contract should not have been terminated for default based on its failure to deliver the PKMs [medium machine guns] under Mod. 2 (app. br. at 14). The government asserts that the concept of severability does not apply here due to the broad scope of the supply Default clause, allowing termination “in whole or in part” for failure to deliver (gov’t br. at 23).

Much of the Board case law on contract severability relates to construction contracts, as the Default clause for construction contracts specifically allows for severability. FAR 52.249-10(a). However, the concept of severability can still be applied to supply or service contracts, and indeed has been, in at least some cases. *See Consumers Oil Co.*, ASBCA No. 24172, 86-1 BCA ¶ 18,647 at 93,709–10 (requirements under one contract to supply fuel to different military or civilian activities, paid for by those separate activities, were severable requirements); *Plum Run, Inc.*, ASBCA Nos. 46091, 49203, 05-2 BCA ¶ 32,977 at 163,365 (addressing the government’s failure to prove that a certain

service sub-CLIN was not severable from the rest of the contract).

Several factors guide the analysis of severability, such as whether the items are capable of being performed separately, and whether the conduct of the parties suggests that the requirements are “separate in character.” *Amplitronics, Inc.*, ASBCA No. 33732, 87-2 BCA ¶ 19,906 at 100,703 (addressing severability in the context of contract formation). In finding a construction contract not to be severable, the Court of Federal Claims outlined similar criteria in *Aptus Co. v. United States*, 62 Fed. Cl. 808, 812–13 (2004). These factors included: whether the contract required a single delivery date, the nature of the work, the contract’s over-arching purpose, *line item structure*, and the intent of the parties. The court concluded the requirements were not divisible due to the “interdependent nature of the several tasks, and the unified purpose to which they are a part.” *Id.*

Applying these factors here leads to the conclusion that the contract was severable. The overall contract was the result of two separate [foreign military sales] “cases,” with two different customers within Iraq (Ministry of Defense (the army) and Ministry of Interior (the police)) (finding 1). The different weapons were distinct from each other, with no interdependence, and were manufactured by different companies in different countries (finding 3). There was separate sub-CLIN structure, pricing, and delivery dates (findings 1,3). The parties’ conduct during performance confirms this interpretation. The government was planning to issue another modification, separate from Mod. 2, to address new delivery dates for the NSV heavy machine guns because of the EUC issue (finding 24). The CO indicated he might consider treating the items separately in deciding on termination, depending on Bulova’s response to the cure notice (finding 28). A line item for mortars had been terminated for convenience earlier with no impact on the rest of the contract (findings 1, 5). We conclude therefore that the contract was severable, and thus a separate analysis will follow as to the termination of the PSL sniper rifles and the NSV heavy machine guns.<sup>21</sup>

The board sustained the part of the appeal based on severability.<sup>22</sup>

## Unbalanced Line Item Pricing

When a prospective contract containing multiple line items is to be awarded competitively, one of more competitors may engage in unbalanced pricing, sometimes called “unbalanced bidding.”<sup>23</sup> FAR 15.404-1(g)(1) describes the problem as follows:

(g) Unbalanced pricing.

(1) Unbalanced pricing may increase performance risk



and could result in payment of unreasonably high prices. Unbalanced pricing exists when, despite an acceptable total evaluated price, the price of one or more line items is significantly over or understated as indicated by the application of cost or price analysis techniques. The greatest risks associated with unbalanced pricing occur when—

- (i) Startup work, mobilization, first articles, or first article testing are separate line items;
- (ii) Base quantities and option quantities are separate line items; or
- (iii) The evaluated price is the aggregate of estimated quantities to be ordered under separate line items of an indefinite-delivery contract.

Unbalanced pricing is pricing disproportionate to cost. The objective may be to “front load” payments to the contractor, so that it is paid for items of work accepted early in a project at prices disproportionately high relative to the cost of production or performance. Such pricing improves contractor cash flow but puts the Government at risk of having overpaid if the contractor performs poorly or defaults on later work. When a contract includes line items for options or indefinite quantities, a competing offeror might propose a low aggregate price by overpricing options or quantities that an offeror thinks the Government is likely to buy, while underpricing those that it thinks the Government is less likely to buy. The result could be that the Government pays too much for the things it buys.

FAR 15.404-1(g)(2) requires that contracting officers conduct an unbalanced pricing analysis when a prospective contract will include multiple separately priced line items or subline items as follows:

(2) All offers with separately priced line items or subline items shall be analyzed to determine if the prices are unbalanced. If cost or price analysis techniques indicate that an offer is unbalanced, the contracting officer shall—

- (i) Consider the risks to the Government associated with the unbalanced pricing in determining the competitive range and in making the source selection decision; and
  - (ii) Consider whether award of the contract will result in paying unreasonably high prices for contract performance.
- (3) An offer may be rejected if the contracting officer determines that the lack of balance poses an unacceptable risk to the Government.

## Guidelines

These *Guidelines* are intended to assist you in understanding the concepts discussed in this BRIEFING PAPER regarding the contractual role of contract line items and

how they may be used to the benefit of both the Government and contractors. They are not, however, a substitute for professional representation in any specific situation.

1. Contracting officers, contract specialists, program managers, and contractor personnel should thoroughly familiarize themselves and discuss among themselves the concepts, principles, and rules that govern contract line item structuring, so as to be able to apply them in useful ways.

2. Establish contract line items based on logical and reasonable application of the FAR criteria. Division of the whole contract into line items and line items into deliverable subline items should be natural and consistent with sound business practice.

3. Contracting officers should consider allowing offerors to propose alternative line items structures pursuant to FAR 4.1007 and FAR 4.1008.

4. Analysis should be applied to the question whether a contract with multiple line items is entire or severable (divisible) and whether the use of a non-severability clause would be appropriate. Contracting officers should consider whether to state the Government’s intentions in that regard in the RFP.

5. When evaluating proposals for prospective contracts with multiple line items, the contracting officer should look for indications of unbalanced pricing and document the record to reflect the analysis done and the conclusion reached.

## ENDNOTES:

<sup>1</sup>48 Fed. Reg. 42,102 (Sept. 19, 1983) (effective on Apr. 1, 1984).

<sup>2</sup>79 Fed. Reg. 45,408 (Aug. 5, 2014).

<sup>3</sup>Pub. L. No. 109-282, 120 Stat. 1186 (Sept. 26, 2006).

<sup>4</sup>79 Fed. Reg. 45,408.

<sup>5</sup>82 Fed. Reg. 4709 (Jan. 13, 2017).

<sup>6</sup>82 Fed. Ref. 4709; FAR 4.1000.

<sup>7</sup>The simplified acquisition threshold is defined in FAR 2.101. The threshold varies in amount with the purpose and circumstances of a procurement.

<sup>8</sup>Schedule, Black’s Law Dictionary (11th ed. 2019).

<sup>9</sup>Purchase units are not the same as issue or inventory units. See the DOD Unit of Issue and Purchase Unit Conversion Table: <https://dodprocurementtoolbox.com/c>

[ms/sites/default/files/resources/edi\\_docs/FED/4010/180/fl\\_issue.pdf](https://ms/sites/default/files/resources/edi_docs/FED/4010/180/fl_issue.pdf).

<sup>10</sup>The DOD developed a uniform contract line item system in the late 1960s, which is the basis for the system now described in FAR Subpart 4.10. The DOD's current version of the system described in FAR Subpart 4.10 is more elaborate than the system described in FAR. It is described in DFARS Subpart 204.71 and in DFARS PGI 204.71.

<sup>11</sup>The DOD uses an elaborate numbering system described in DFARS PGI 204.71.

<sup>12</sup>The meaning of "accounting classification" is not clear. The FAR does not define it, nor does the Government Accountability Office Glossary of Terms Used in the Federal Budget Process, GAO-05-734SP (Sept. 2005), <https://www.gao.gov/assets/gao-05-734sp.pdf>, or the DOD Financial Management Regulation, 7000.14-R, <https://comptroller.defense.gov/fmr/>. It is presumed to refer to an account number that is to be cited to support the obligation of funds and the payment of invoices.

<sup>13</sup>Contract, Black's Law Dictionary (11th ed. 2019) ("severable contract").

<sup>14</sup>15 Williston on Contracts § 45:1 (4th ed.) ("Defini-

tions and distinctions") (footnotes omitted).

<sup>15</sup>15 Williston on Contracts § 45:1 (4th ed.).

<sup>16</sup>15 Williston on Contracts § 45:6 (4th ed.) ("Intention of parties; express terms of contract—Effect of severability or cancellation clause").

<sup>17</sup>*Aptus Co. v. United States*, 62 Fed. Cl. 808, 812 (2004).

<sup>18</sup>15 Williston on Contracts § 45:4 (4th ed.).

<sup>19</sup>*Bulova Techs. Ordnance Sys. LLC*, ASBCA No. 57406, 14-1 BCA ¶ 35,521.

<sup>20</sup>*Bulova Techs. Ordnance Sys. LLC*, ASBCA No. 57406, 14-1 BCA ¶ 35,521 (footnote omitted).

<sup>21</sup>*Bulova Techs. Ordnance Sys. LLC*, ASBCA No. 57406, 14-1 BCA ¶ 35,521 (footnotes omitted) (emphasis added).

<sup>22</sup>See also *Aey, Inc.* ASBCA No. 56470, 18-1 BCA ¶ 37,076.

<sup>23</sup>See generally Nash, "Unbalanced Prices: What Must Be Analyzed?," 34 NASHCIBINIC-NL ¶ 30 (June 2020); Nash, "Postscript: Unbalanced Prices," 34 NASHCIBINIC-NL ¶ 43 (Aug. 2020).

# NOTES:

# BRIEFING PAPERS