

BRIEFING PAPERS[®] SECOND SERIES

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

THE GOVERNMENT'S EXERCISE OF OPTIONS

By Stuart B. Nibley and Sheila A. Armstrong

The Federal Government did not invent the concept of the unilateral option, pursuant to which a purchaser is permitted unilaterally to procure additional supplies or services that have been specifically defined in an underlying contract. Unilateral options are a familiar piece of many commercial contracts.¹ However, perhaps no purchaser of large quantities of supplies and services relies upon the unilateral option vehicle more than the Federal Government. The option vehicle is particularly useful to the Federal Government given the many constraints under which it operates in purchasing supplies and services. Not the least of these are the cumbersome appropriations process, for most purchases an annual exercise, which must be completed before the Government may make specific purchases,² and the paramount constraints of often lengthy procurement competitions imposed by

the Competition in Contracting Act.³ Accordingly, Contracting Officers frequently include options in procurement contracts that provide the Government with the unilateral right to purchase additional supplies or services without further competition if needs subsequently arise and appropriations are provided. This stands true for all types of contracts, whether fixed price or cost reimbursement, for commercial or noncommercial items, and even in indefinite-delivery, indefinite-quantity and requirements contracts.

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While the unilateral right to exercise an option is extremely beneficial to the Government, it comes with considerable constraints for the contractor. This is because the party that is to perform, the contractor under a Government contract, typically agrees one or more years before option performance will commence to perform at set prices, quantities, and/or delivery schedules. Courts and boards of contract appeals have carved very specific rules that guide the Government and contractors when the Government elects to exercise an option. The sum of these rules posits that the contractor is entitled to know *at the time it executes the underlying contract that contains one or more unilateral options* precisely what performance it will be required to deliver under each option and at what price. Since the contractor is committing to deliver its performance in the future, often for many years at set prices, the Government is required to (1) define with specificity in each option the terms under which the contractor will be required to perform and (2) exercise each option strictly in accordance with its terms, without changes or deviations. Imposition of these rules allows contractors to prepare informed proposals in response to solicitations that contain options, which in turn reduces overall procurement costs to the Government as contractors forgo inclusion of contingency pricing factors in their proposals aimed at covering uncertainties associated with performing options under ill-defined terms.

The most salient, and judicially examined, rule that flows from these legal principles is that the Government must exercise an option strictly in accordance with its terms. Accordingly, where it wishes to exercise an option, the Government is required to issue in writing an unconditional, un-

equivocal, timely exercise of the option. While a contractor can agree, or through conduct consent, to waive one or more of these requirements, the contractor is not required to do so. A contractor can refuse to perform an option that has been improperly exercised, and it is permitted to discontinue all performance where the contract has expired prior to the Government's effective exercise of an option. Where a contractor continues performance of a contract at the Government's direction following the Government's improper exercise of an option, the contractor is entitled to reimbursement of its costs and reasonable profit under the theory of constructive change to the contract.

Competition in the federal procurement market is intensifying. Contractors must sharpen their proposal pencils, and Government acquisition officials must demand more efficient use of procurement funds. Both contractor personnel and Government acquisition officials would do well to understand their rights and obligations as they agree to provisions that will govern out-year performance under a contract and, of course, when they prepare to proceed with that performance. This BRIEFING PAPER discusses (a) the use of options in Government contracts, including the Federal Acquisition Regulation clauses that govern their use and the types of options available to a CO, (b) how options can be properly, and improperly, exercised and the consequences, and (c) a contractor's alternatives in the event that it believes an option has been improperly exercised. Finally, we offer some suggested guidelines for use by contractor and Government representatives as they employ, exercise, and perform unilateral options.

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What Is An Option?

An option is a “unilateral right in a contract by which, for a specified time, the Government may elect to purchase additional supplies or services called for by the contract, or may elect to extend the term of the contract.”⁴ Inclusion of an option in a contract does not require the Government to exercise the option. Inclusion merely gives the Government the right, in its sole discretion, to purchase additional quantities of supplies or services or to extend the contract performance period; the option is unilateral.⁵ Options offer the Government flexibility to require continued contract performance when a contract is advantageous to the Government.

This is not to say that the Government has completely unfettered discretion in deciding whether or not it will exercise an option. Before exercising an option, the Government is required to determine that exercise of the option is “the most advantageous method of fulfilling the Government’s need, price and other factors...considered.”⁶ When the Government believes it can obtain better pricing or other terms more favorable than those applicable under the option, it can elect not to exercise the option and instead conduct a new procurement. Similarly, it can elect not to procure the items at all. As discussed below, because options often create an advantage for the option holder, an option must be exercised strictly in accordance with its terms.⁷ Any attempt the Government makes to change to the terms or conditions of the option upon exercise renders the attempted exercise a counteroffer that may then be accepted or rejected by the offeree (the contractor).⁸

Options In Government Contracts

■ FAR Clauses Governing Options

FAR Part 17, “Special Contracting Methods,” controls the use of options in Government contracts. FAR 17.107 informs the CO that options may be beneficial in Government contracts and states that the regulations governing use of options are available at FAR Subpart 17.2, “Options.” By its terms, FAR Subpart 17.2 does not apply to (a) services involving the construction, alteration, or repair (including dredging, excavating, and

painting) of buildings, bridges, roads, or other kinds of real property, (b) architect-engineer services, and (c) research and development services.⁹ However, this provision goes on to state that nothing in FAR Subpart 17.2 precludes the use of options in those types of contracts.¹⁰ The FAR generally allows inclusion of options in a contract when their inclusion is in the Government’s best interest.¹¹ Inclusion is not in the best interest of the Government when:¹²

(1) The foreseeable requirements involve—

(i) Minimum economic quantities (i.e., quantities large enough to permit the recovery of startup costs and the production of the required supplies at a reasonable price); and

(ii) Delivery requirements far enough into the future to permit competitive acquisition, production, and delivery.

(2) An indefinite quantity or requirements contract would be more appropriate than a contract with options. However, this does not preclude the use of an indefinite quantity contract or requirements contract with options.

The FAR also provides that the CO may not include options in a contract when:¹³

(1) The contractor will incur undue risks; e.g., the price or availability of necessary materials or labor is not reasonably foreseeable;

(2) Market prices for the supplies or services involved are likely to change substantially; or

(3) The option represents known firm requirements for which funds are available unless—

(i) The basic quantity is a learning or testing quantity; and

(ii) Competition for the option is impracticable once the initial contract is awarded.

■ Types Of Options

There are two primary types of options included in Government contracts: (1) options to increase quantities and (2) options to extend the term of the contract.¹⁴ Options for increased quantity are governed by FAR 52.217-6, “Option for Increased Quantity,” or FAR 52.217-7, “Option for Increased Quantity—Separately Priced Line Item.”¹⁵ Both of these clauses include blanks that must be filled in by the CO identifying when the CO must notify the contractor of its intent to exercise the option.¹⁶

Options to extend the term of the contract are governed by FAR 52.217-8, “Option To Extend Services,” and FAR 52.217-9, “Option To Extend the Term of the Contract.”¹⁷ FAR 52.217-8 allows the CO to extend services under the contract for a maximum of six months.¹⁸ FAR 52.217-9 is the most commonly used option clause and it allows the CO to extend the contract for the option periods identified in the contract, which generally are in one-year increments. Thus, if a contract is awarded with one base year and four one-year options, the CO would need to exercise each of the four one-year option periods by following the requirements in FAR 52.217-9. Like the FAR provisions governing options to increase quantities, these two option provisions used to extend the contract performance period include blanks for the CO to fill in with the required notice period to exercise the option, and, in the case of FAR 52.217-9, the time by which the CO must give preliminary notice to the contractor of its intent to exercise the option.¹⁹

Finally, FAR 52.237-3, “Continuity of Services,” while not truly an “option” clause, allows the CO to extend performance of services during the transition period after expiration of a contract for a period of up to 90 days.²⁰ This clause includes a requirement that the CO notify the contractor in writing that continuity of services will be required, but it does not include the same fill-in-the-blank notice requirements included in the option clauses previously discussed.²¹

■ Which Option Clause Applies?

When more than one FAR clause applies to the exercise of an option, the CO can choose which clause to use. The clause chosen by the CO can have differing effects on contract pricing. If the CO extends a contract under FAR 52.217-8, “Option To Extend Services,” or increases quantities under FAR 52.217-6 or -7, the terms of the contract govern performance and payment during the option period.²² When a CO exercises an option under FAR 52.217-9, “Option To Extend the Term of the Contract,” the contract schedule determines contract pricing.²³ When a CO extends services during a transition period under FAR 52.237-3, “Continuity of Services,” the contrac-

tor is entitled to be compensated its actual costs plus a reasonable profit.²⁴

When the CO has a temporary need to extend services at the end of a contract or while a new competition is ongoing, there are two clauses available: FAR 52.217-8, “Option To Extend Services,” and FAR 52.237-3, “Continuity of Services.” As discussed above, the contractor’s compensation under these two clauses is very different, with the former maintaining current contract pricing and the latter allowing the contractor to recover actual costs plus profit.²⁵ If the CO chooses to extend the contract under FAR 52.217-8, the contractor may be required to perform up to six additional months at the current rates under which it is performing at the time the contract expires.²⁶ If the contractor chooses to extend the contract under FAR 52.237-3, the contractor may be required to perform up to 90 days and will be paid its reasonable expenses associated with the phase-in/phase-out work performed plus a fee (profit) not to exceed a pro rata portion of the fee under the contract.²⁷ As long as the option is properly exercised, the CO generally may decide which clause to use.²⁸

In *Glasgow Investigative Solutions, Inc.*,²⁹ the Armed Services Board of Contract Appeals held that the CO properly exercised a series of consecutive options under FAR 52.217-8, which allows the CO to extend services for a period of up to six months. The contractor argued that the Government could not extend the contract under FAR 52.217-8 until all options under FAR 52.217-9 had been exercised.³⁰ The contractor further argued that the CO could not use FAR 52.217-8 to create month-to-month option periods and instead month-to-month options were only permitted under FAR 52.237-3, “Continuity of Services.”³¹ The ASBCA disagreed. Relying on *Griffin Services, Inc.*,³² the ASBCA found that the Government’s use of FAR 52.217-8 was proper, and it rejected the contractor’s claim for an equitable adjustment under FAR 52.237-3.³³

In *Griffin*, the contractor entered into a fixed-price contract for certain operation, repair, and maintenance services at the Defense Logistics Agency headquarters.³⁴ The contractor quickly learned that it had underbid the contract, and

when the Government sought to exercise the first contract option under FAR 52.217-9, “Option To Extend the Term of the Contract,” in an untimely manner, the contractor refused to accept the Government’s option exercise.³⁵ Instead, it agreed to waive the untimely option exercise if the Government would agree to an equitable adjustment of the contract price to compensate it for its losses.³⁶ The Government refused and instead decided to conduct a new competition.³⁷ While the new competition was ongoing, the CO extended Griffin’s contract under FAR 52.217-8, “Option To Extend Services.”³⁸ In fact, the CO issued three modifications under this clause extending the contract’s performance period: one on September 23, 1997, extending the contract through October 31, 1997; a second on October 24, 1997, extending the contract through December 31, 1997; and a third on December 30, 1997, extending the contract through March 31, 1998.³⁹

The parties agreed that the contractor timely received notice of the first two options, but the contractor alleged that it did not receive the December 30, 1997 notice until January 2, 1998, which was after the contract already had expired.⁴⁰ The Government did not dispute that the contractor received this third option notice after the contract had expired.⁴¹ At the direction of the Government, the contractor continued to perform through March 31, 1998, after which it filed a claim for \$123,699.70 representing the amount over the contract price that it expended while performing the option periods.⁴² The ASBCA found that the first two option notices extending performance through October 31 and December 31, 1997, respectively, were validly exercised because notice was delivered to the contractor in accordance with the terms of the contract.⁴³ However, because the third option notice was not received by the contractor until January 2, 1998, after contract expiration, the ASBCA found that option was not validly exercised.⁴⁴ Accordingly, the contractor was entitled to a claim for a constructive change for its performance from January 1, 1998, through March 31, 1998.⁴⁵

The interplay between FAR 52.217-8 and FAR 52.237-3 was discussed by the U.S. Court of Appeals for the Federal Circuit in *Arko Executive*

Services, Inc. v. United States.⁴⁶ Here, the Federal Circuit held that the Government can utilize FAR 52.217-8 to extend services beyond the originally contemplated contract term including all options.⁴⁷ In this case, the contractor performed the entire contract including the base period and all options, after which the Government resolicited the requirement and the contractor did not bid.⁴⁸ The contractor asked the Government whether it would require phase-in, phase-out services under FAR 52.237-3 and the Government said that it would not.⁴⁹ The Government then issued a modification extending contract performance under FAR 52.217-8, “Option To Extend Services.”⁵⁰ The contractor believed that use of that clause was improper and advised the Government that it was performing under protest.⁵¹

At the conclusion of contract performance, the contractor filed a claim arguing that it was entitled to reimbursement of its costs and a reasonable profit as contemplated by FAR 52.237-3.⁵² The contractor argued that the Government could not properly invoke FAR 52.217-8 to extend the contract beyond the maximum contract term specified in FAR 52.217-9(c).⁵³ Affirming the U.S. Court of Federal Claims, the Federal Circuit disagreed. The court expressly rejected the contractor’s argument that FAR 52.217-8 is limited by the language in FAR 52.217-9(c) that identifies the maximum length of the contract, in this case five years.⁵⁴ Instead, the court limited the language of FAR 52.217-9(c) to FAR 52.217-9 itself, finding it did not limit other potential options contained in the contract including FAR 52.217-8, “Option To Extend Services.”⁵⁵

Arko also is instructive in that it distinguishes the type of services that can be performed under FAR 52.217-8 from those performed under FAR 52.237-3. The Federal Circuit explained that if the contractor would be performing the same type of services during the option period that it had performed during contract performance, the Government should utilize FAR 52.217-8, “Option To Extend Services.”⁵⁶ However, if the contractor would be performing a different type of services under the phase-in, phase-out portion of the contract, the appropriate clause is FAR 52.237-3, Continuity of Services.⁵⁷ This case is silent regarding what happens when the services to be performed by the contractor

during the transition period are a combination of new and existing services.

Exercising Options

■ Strict Compliance Rule

An option must be exercised, i.e., accepted, strictly in compliance with its terms.⁵⁸ As explained by the Eighth Circuit:⁵⁹

The acceptance of an option, to be effectual, must be unqualified, absolute, unconditional, unequivocal, unambiguous, positive, without reservation, and according to the terms or conditions of the option....An acceptance of an option must be such a compliance with the conditions as to bind both parties, and if it fails to do so it binds neither.

Generally, any attempt to alter the terms or conditions of the option renders the attempted exercise ineffective.⁶⁰ The altered terms render the attempted option exercise a counteroffer that must then be accepted by the contractor before becoming effective.⁶¹ Substantial compliance with the terms of an option clause is insufficient.⁶² An unauthorized attempt by the Government to exercise an option may render the attempted exercise ineffective.⁶³ However, a restatement of terms in the option exercise that already are included in the contract will not render the option exercise ineffective.⁶⁴

For example, in *Contel Page Services, Inc.*, the CO exercised an option subject to availability of funds.⁶⁵ The contractor argued that the inclusion of the availability of funds requirement rendered the attempted option exercise ineffective.⁶⁶ The ASBCA disagreed, holding that because the availability of funds clause already was included in the contract, the option exercise was definite and effective.⁶⁷ The board distinguished this case from *Lear Siegler, Inc.*,⁶⁸ where it held that the inclusion of an availability of funds in an option exercise varied the terms and conditions of the contract and rendered the option exercise ineffective.⁶⁹ However, an important distinction in *Lear Siegler* is that, unlike in *Contel*, the availability of funds clause was not already included in the contract.⁷⁰

Any attempt to change the quantity of work under an option will generally render its at-

tempted exercise invalid.⁷¹ This principle is found in *Grumman Technical Services, Inc.*,⁷² where the ASBCA held that an attempted option exercise by the Government that eliminated a line item from the option was invalid.⁷³ However, when the contract specifically allows the Government flexibility to alter the quantity in an option period, an option exercising a different quantity than that identified in the clause may be proper.⁷⁴ In *International Transducer Corp. v. United States*,⁷⁵ for example, the Government exercised an option at quantities lower than those identified in the contract for certain items.⁷⁶ The contractor performed under protest and after completion of the option period filed a claim for its increased costs associated with performing a reduced quantity.⁷⁷ Relying on language in the option clause that allowed the Government to require the contractor to provide “all or part” of the items during the option period, the Court of Federal Claims found the option exercise by the Government proper.⁷⁸

General Dynamics Corp.,⁷⁹ is an example of how wrong things can go for the Government when it does not properly exercise its options. In this case, the contractor was awarded a contract for upgrade kits for radar units.⁸⁰ The contract included options that allowed the Government to purchase additional quantities of the kits in increments of 5-10-15-20.⁸¹ The Government sought to exercise an option under the contract for six kits.⁸² The contractor advised the Government that it could provide five kits as permitted by the option, and it offered an additional price for the sixth requested test kit.⁸³ In addition, the Government directed a delivery schedule that differed from the schedule set forth in the option clause.⁸⁴ The contractor immediately advised the Government that its proposed delivery schedule differed from that contained in the contract, and the Government told the contractor that it would correct the delivery schedule included in the option.⁸⁵ However, the contractor did not receive the written correction until the day after the notice period for the option expired.⁸⁶

Citing the well-settled rule that options must be timely exercised, the ASBCA found the Government’s attempted option exercise ineffective.⁸⁷ The expiration of the time required to exercise an option terminates the power of acceptance,

and the Government's oral statement that it would correct the option exercise did not remedy the situation.⁸⁸ The board also reiterated the general rule that notice of an option exercise is effective upon receipt by the party to be notified unless otherwise agreed.⁸⁹ This case teaches several valuable lessons related to options. Unless otherwise agreed by the parties, all of the following will render an attempted option exercise invalid: (1) order of a quantity different from that specified in the contract, (2) alterations to the delivery schedule, (3) attempted oral corrections to an otherwise invalid option, and (4) failure to ensure time delivery to the contractor of an exercised option.

■ Exceptions To The Strict Compliance Rule

There are a few exceptions to the strict compliance rule. For example, if a contractor leads the Government to believe that it can exercise the option without strictly complying with the option clause, the contractor will be estopped from asserting the strict compliance rule.⁹⁰ In *Ampex Corp.*, the GSBCA held that the contractor was estopped from challenging an option exercise as untimely when the contractor's employee had told the Government that the option notice could be sent by TWX rather than in writing, as required by the option clause.⁹¹ This was true despite the fact that neither the contractor employee nor the Government employee had actual authority to bind the respective parties to the contract.⁹²

Another exception to the strict compliance rule is an ambiguity in the contract language.⁹³ In *BMV-Combat Systems*,⁹⁴ the ASBCA found language that required the Government to exercise an option within "30 days after completion of [initial production testing]" ambiguous and held that the option was timely exercised by the Government when exercised within 30 days of the Government's final approval of the IPT report.⁹⁵

An option also may be properly exercised where the language purporting to exercise the option is not completely clear.⁹⁶ In this situation, the court or board looks at the total import of the communications from the Government to the contractor to determine whether an option is validly exercised in strict accordance with its terms regardless of whether the Government's

attempt to exercise the option is grammatically correct.⁹⁷ A similar issue exists when the contract is unclear regarding the final date for exercising the option.⁹⁸ In such cases, the boards have looked to the entire agreement to determine the date by which the option must be exercised.⁹⁹ In *TECOM, Inc.*, the IBCA interpreted a clause calling for exercise of an option "within thirty (30) calendar days of expiration date" to require exercise of the option at least 30 days *before* final date of contract performance.¹⁰⁰

■ An Option Must Be Exercised In Writing

The vast majority of option clauses require that notice of intent to exercise an option—and actual exercise of an option—must be provided by the Government in writing.¹⁰¹ When the contract requires written notice, oral notice of an option exercise generally is insufficient.¹⁰² In *Diversified Marine Tech, Inc.*,¹⁰³ for example, the Department of Transportation Board of Contract Appeals refused to compensate the contractor for work performed on an option that had been orally discussed with the captain of a ship but that had not been exercised in writing.¹⁰⁴ The board held that when the contractor "for reasons of its own, elected to commence the...work without receiving official notice of the exercise of those options... it did so at its own risk."¹⁰⁵

■ An Option Exercise Must Be Timely

An option must be exercised by the time identified in the option clause.¹⁰⁶ If there is not a time identified in the option clause, the option must be exercised during the performance period then in effect.¹⁰⁷ An option does not need to be exercised by modification to the contract in order to be timely and effective; written notice by the CO expressing unequivocal intent to exercise the option under its stated terms by the date required is sufficient for a valid option exercise.¹⁰⁸

To be effective, an option must be received by the contractor in accordance with the notice requirements in the option clause.¹⁰⁹ In *Jim Phillips Contracting, Inc.*, for example, the Government awarded a contract to the contractor to provide road work in Idaho.¹¹⁰ By the time the Government issued a task order and the contractor was able

to mobilize to the job site, winter had settled in and the contractor was unable to perform that season.¹¹¹ The CO said that she timely exercised the first option period by mailing notification to the contractor prior to the contract end date as required by the contract.¹¹² However, the modification purporting to extend contract performance was not received by the contractor until several months later.¹¹³ Having performed no work under the contract, the contractor filed a claim for \$655,000, the guaranteed minimum in the contract.¹¹⁴ The CO denied the claim, and the contractor appealed to the Department of the Interior Board of Contract Appeals.¹¹⁵ The IBCA found that the option was not properly exercised by the Government because it was not timely received by the contractor.¹¹⁶ The IBCA also found that the Government had the burden of proof to show that timely notification had been provided to the contractor and in this case it was unable to make such a showing.¹¹⁷ While the IBCA found that the contractor was entitled to compensation because of the Government's breach of the guaranteed minimum, it limited the contractor's recovery in this case to the contractor's estimated profit had it performed the contract.¹¹⁸

In another case involving timely exercise of an option, *Cessna Aircraft Co.*, the ASBCA rejected several arguments by the contractor that the Government's attempt to exercise an option was untimely where the evidence showed that notification of the option exercise was transmitted by the Government to the contractor by fax machine on a Saturday.¹¹⁹ This case involved a contentious dispute between the Government and the contractor and an option that, by the contract's terms, had to be exercised no later than October 1, 1988, a Saturday.¹²⁰ The Government exercised the option by sending a facsimile to the contractor on October 1, 1988.¹²¹ The contractor raised a variety of theories by which it deemed the option exercise ineffective including that (1) the option should have been exercised by September 30, 1988, the last day of the contract period, (2) exercise by facsimile was improper, and (3) the option was not timely exercised because there were no contractor personnel at the office on Saturday to receive the option so the option was not actually received by contrac-

tor personnel until Monday, October 3, 1988.¹²² The ASBCA rejected all of these arguments and found that delivery by fax machine on the date specified in the contract by which the option had to be exercised was valid.¹²³ The ASBCA went on to find that the contractor, which had actual knowledge that the Government intended to fax notification of the option exercise on Saturday, October 1, 1988, was estopped from contending that the option was not actually received on October 1.¹²⁴

Contractor Remedies

A contractor generally has no remedy if the Government chooses not to exercise an option.¹²⁵ There are limited exceptions to this rule such as a showing of bad faith on the part of Government personnel.¹²⁶ However, absent a bad faith showing, the decision not to exercise an option is within the sole discretion of the CO.¹²⁷ When a contractor believes that an option exercise is ineffective, it must choose whether to perform the contract as if the option were validly exercised, perform the contract under protest, or refuse performance. Each of these alternatives is discussed in further detail below.

■ Continued Performance

When faced with an improperly exercised option, the contractor can choose to continue to perform the contract as if the option were properly exercised.¹²⁸ The contractor can always choose to waive deficiencies in an exercised option.¹²⁹ In fact, if a contractor fails to timely notify the Government of alleged deficiencies in an option exercise, it later may be estopped from challenging the effectiveness of the option exercise.¹³⁰

■ Performance Under Protest

If a contractor believes that an option has been improperly exercised, it must notify the Government of the improprieties in the attempted exercise and can continue to perform the contract under protest.¹³¹ Performance under protest brings performance under the contract's "Disputes" clause, which requires continued performance through resolution of a dispute.¹³² If the contractor prevails on its

challenge to the invalid option exercise, the contractor will be entitled to an equitable adjustment for a constructive change under the “Changes” clause in the contract.¹³³ This will allow the contractor to receive compensation for all actual costs incurred in performing the invalid option plus a reasonable profit.¹³⁴

However, as discussed above, the contractor *must* notify the Government when it believes the option was improperly exercised and it is performing under protest.¹³⁵ If the contractor continues performance in silence after an ineffective option, it may be deemed to waive its request for a price adjustment under the contract.¹³⁶

■ Refusal To Perform

A third alternative for the contractor when it believes that an option is improperly exercised is to refuse to perform the contract. However, this alternative is not without risk. If the option is one to extend the term of the contract and the option is untimely or not exercised in accordance with its terms, the contractor may notify the Government of its improper option exercise and refuse to perform.¹³⁷ If the contractor is correct, it will be excused from performance.¹³⁸ An ineffective option exercise by the Government creates a right for the contractor to refuse the option, which, under an option to extend the term of the contract, would excuse performance.¹³⁹ However, if the contractor is incorrect, the Government may terminate the contract for default.¹⁴⁰ In such case, the contractor will not be permitted to convert the termination for default to a termination for convenience and the termination for default will remain on its past performance record.¹⁴¹

If the option is for an increased quantity, the contractor stops performance at its peril. In this situation, the contractor should attempt to continue to perform the contract under protest and file a claim with the CO at the conclusion of contract performance. This principle was clearly articulated by the Federal Circuit in *Alliant Technologies, Inc. v. United States*.¹⁴² Here, the contractor entered into a contract with the Government to demilitarize bombs.¹⁴³ The contract included an

option clause that allowed the Government to increase the quantity of bombs per month to be dematerialized.¹⁴⁴ The CO attempted to exercise the option in the contract to increase the number of bombs that the contractor must demilitarize but at a different rate than what was identified in the contract. The contractor objected on two grounds: (1) the CO attempted to exercise the option after the time identified in the contract, and (2) the CO attempted to exercise the option at a quantity that was not contemplated by the option clause.¹⁴⁵ The CO rejected the contractor’s challenge to his exercise of the option and ordered performance by the contractor at the increased quantity required.¹⁴⁶

The contractor sought relief from the Court of Federal Claims, which held that the option exercise was valid and the contractor was required to perform, albeit at a lower rate per month than that ordered by the CO.¹⁴⁷ Both the contractor and the Government appealed this ruling to the Federal Circuit.¹⁴⁸ The Federal Circuit held that the CO’s attempt to exercise the option was invalid.¹⁴⁹ While the court agreed with the Government that the option exercise was timely,¹⁵⁰ it agreed with the contractor that the delivery rate included in the option was inconsistent with the option’s stated terms and thus rendered the attempted exercise of the option invalid.¹⁵¹ The court then went on to find that the contractor was obligated to perform under the “Disputes” clause in the contract.¹⁵² Here, the court held that the increased quantity of bombs requested by the CO was not a “drastic modification” such that it would be construed as a cardinal change and thus the contractor was not excused from performance.¹⁵³

Conclusion

As this BRIEFING PAPER shows, while options are a routine part of Government contracts, there are nuisances to their use that must be understood by both contractors and COs. Both parties to a contract that includes options should know and understand these nuisances to understand their rights and obligations under option clauses and to reduce the likelihood of disputes that may arise through use of options.

★ GUIDELINES ★

Contractor

1. Know and understand what option clauses are in your contracts.
2. Know and understand the notification requirements in each option clause. If the CO provides a copy of the contract without the blanks in the FAR clause appropriately completed, make sure that the blanks are completed as soon as possible. If the contract is already awarded when you notice the blanks have not been filled in, request a contract modification to clarify when the Government must provide notice of intent to exercise the option(s) in the contract and when the Government actually must exercise the option(s).
3. If the Government improperly exercises an option, decide whether you wish to proceed with the contract.
4. If you wish to reject an improper option exercise, notify the Government immediately in writing that the option exercise was invalid and you are performing under protest. In the communication, identify the reasons why you believe the option exercise is invalid. Keep thorough and accurate records of all communications with the CO and follow up any oral conversations in writing.
5. If you believe that the Government has improperly exercised an option, fully understand the potential consequences before deciding how to proceed. Think twice about stopping performance when the Government is demanding performance. The more prudent decision may be to continue performance under protest and file a claim to recoup excess costs expended during performance.
6. If you are performing under protest or the Government extends contract performance under FAR 52.237-3, "Continuity of Services," make sure you keep accurate books and records of all expenses incurred during continued contract performance.
7. If the Government elects not to exercise an option, determine whether the decision was

made in bad faith or was arbitrary and capricious. Remember that it is very hard to prevail on a claim that the Government's decision not to exercise an option is improper.

Government

1. Know and understand the regulations governing options including under what circumstances option clauses should be included in a contract. Include all necessary and required option clauses in applicable contracts.
2. Make sure all blanks included in option clauses are filled in with unambiguous terms. If the clauses are not filled in at the time of contract award, modify the contract as soon as practicable to identify the dates by which options must be noticed and exercised or to correct any ambiguities.
3. If the timing of an option is tied to a performance milestone in the contract and the performance milestone is revised or the time to perform is extended, make sure the modification that revises the performance milestone clearly addresses how the modification affects the option clause in the contract.
4. Be aware of deadlines to exercise options to ensure timely exercise when it is in the Government's best interest to exercise options.
5. Make sure that option exercises are unequivocal and in strict accordance with the terms of the option unless otherwise agreed to by the contractor. Do not include any terms in the option exercise that are not already included in the underlying contract.
6. Make sure all notifications of intent to exercise options and actual exercise of options are made in writing.
7. If extended performance is necessary under FAR 52.217-8, "Option To Extend Services," or FAR 52.217-9, "Continuity of Services," be aware of the shorter maximum time limits of six months and 90 days, respectively.

★ REFERENCES ★

- 1/ Restatement (Second) of Contracts § 25.
- 2/ See generally Solomson, Miller & Demory, "Fiscal Matters: An Introduction to Federal Fiscal Law & Principles," Briefing Papers No. 10-7 (June 2010).
- 3/ 10 U.S.C.A. § 2304; 41 U.S.C.A. § 3301.
- 4/ FAR 2.101.
- 5/ *Sword & Shield Enter. Sec., Inc. v. Gen. Servs. Admin.*, CBCA No. 2118, 12-1 BCA ¶ 34,922 (the Government's decision not to exercise an option is with in its discretion and will not be disturbed absent a showing of bad faith or that the decision was so arbitrary or capricious as to constitute an abuse of discretion); *U.S. Hotel Sourcing, LLC, Comp. Gen. Dec. B-406726*, 2012 CPD ¶ 232 (GAO will not entertain a protest that the CO refused to exercise an option instead of conducting a new competition as that decision is within the CO's discretion).
- 6/ FAR 17.207(c)(3). Prior to exercising an option, the Government also must determine that funds are available and the requirement covered by the option fulfills an existing Government need, among other things. FAR 17.203(c).
- 7/ *DeMarco Durzo Dev. Co. v. United States*, 69 Fed. Cl. 262, 275 (Fed. Cl. 2005) (citing Williston on Contracts § 61D (3d ed. 1957)); see also *TECOM, Inc.*, IBCA No. 2970 A-1, 95-2 BCA ¶ 27,607, at 137,593, 37 GC ¶ 316 ("Attempts to exercise options are strictly construed, at least in part because the balance of power rests with the optionee[.]").
- 8/ *DeMarco Durzo Dev. Co.*, 69 Fed. Cl. at 275 (citing Restatement (Second) of Contracts § 58).
- 9/ FAR 17.200.
- 10/ FAR 17.200.
- 11/ FAR 17.202(a).
- 12/ FAR 17.202(b).
- 13/ FAR 17.202(c).
- 14/ See FAR 2.101.
- 15/ FAR 17.208.
- 16/ FAR 52.217-6, 52.217-7.
- 17/ FAR 17.208.
- 18/ FAR 52.217-8.
- 19/ FAR 52.217-8, 52.217-9(a).
- 20/ FAR 52.237-3(b).
- 21/ FAR 52.237-3(b).
- 22/ FAR 52.217-6, 52.217-7, 52.217-8.
- 23/ FAR 17.206 requires that options in contracts be evaluated along with the base contract award.
- 24/ FAR 52.237-3(d).
- 25/ FAR 52.217-8, 52.237-3(d).
- 26/ FAR 52.217-8.
- 27/ FAR 52.237-3(d).
- 28/ *Glasgow Investigative Solutions, Inc.*, ASBCA No. 58111, 13-1 BCA ¶ 35,286, 55 GC ¶ 143.
- 29/ *Glasgow Investigative Solutions, Inc.*, ASBCA No. 58111, 13-1 BCA ¶ 35,286, 55 GC ¶ 143.
- 30/ *Glasgow Investigative Solutions, Inc.*, ASBCA No. 58111, 13-1 BCA ¶ 35,286, at 173,173, 55 GC ¶ 143.
- 31/ *Glasgow Investigative Solutions, Inc.*, ASBCA No. 58111, 13-1 BCA ¶ 35,286, at 173,173, 55 GC ¶ 143.
- 32/ *Griffin Servs., Inc.*, ASBCA No. 52280 et al., 02-2 BCA ¶ 31,943.

- 33/ Glasgow Investigative Solutions, Inc., ASBCA No. 58111, 13-1 BCA ¶ 35,286, at 173,174, 55 GC ¶ 143.
- 34/ Griffin Servs., Inc., ASBCA No. 52280 et al., 02-2 BCA ¶ 31,943, at 157,801.
- 35/ Griffin Servs., Inc., ASBCA No. 52280 et al., 02-2 BCA ¶ 31,943, at 157,802.
- 36/ Griffin Servs., Inc., ASBCA No. 52280 et al., 02-2 BCA ¶ 31,943, at 157,802.
- 37/ Griffin Servs., Inc., ASBCA No. 52280 et al., 02-2 BCA ¶ 31,943, at 157,802.
- 38/ Griffin Servs., Inc., ASBCA No. 52280 et al., 02-2 BCA ¶ 31,943, at 157,802.
- 39/ Griffin Servs., Inc., ASBCA No. 52280 et al., 02-2 BCA ¶ 31,943, at 157,802.
- 40/ Griffin Servs., Inc., ASBCA No. 52280 et al., 02-2 BCA ¶ 31,943, at 157,802.
- 41/ Griffin Servs., Inc., ASBCA No. 52280 et al., 02-2 BCA ¶ 31,943, at 157,802. The ASBCA also clarified that since the Government was the party seeking to enforce the option, it had the burden of proof to show that notice was timely received by the contractor. Griffin Servs., Inc., ASBCA No. 52280 et al., 02-2 BCA ¶ 31,943, at 157,803.
- 42/ Griffin Servs., Inc., ASBCA No. 52280 et al., 02-2 BCA ¶ 31,943, at 157,803.
- 43/ Griffin Servs., Inc., ASBCA No. 52280 et al., 02-2 BCA ¶ 31,943, at 157,805.
- 44/ Griffin Servs., Inc., ASBCA No. 52280 et al., 02-2 BCA ¶ 31,943, at 157,805.
- 45/ Griffin Servs., Inc., ASBCA No. 52280 et al., 02-2 BCA ¶ 31,943, at 157,805.
- 46/ Arko Exec. Servs. v. United States, 553 F.3d 1375 (Fed. Cir. 2009), 51 GC ¶ 72, aff'g 78 Fed. Cl. 420 (2007).
- 47/ 553 F.3d at 1381.
- 48/ 553 F.3d at 1377.
- 49/ 553 F.3d at 1377.
- 50/ 553 F.3d at 1377.
- 51/ 553 F.3d at 1377.
- 52/ 553 F.3d at 1377.
- 53/ 553 F.3d at 1379.
- 54/ 553 F.3d at 1379–80.
- 55/ 553 F.3d at 1380. The court went on to discuss the purpose of FAR 52.217-8, quoting FAR 37.111: "Award of contracts for recurring and continuing service requirements are often delayed due to circumstances beyond the control of contracting offices. Examples of circumstances causing such delays are bid protests and alleged mistakes in bid. In order to avoid negotiation of short extensions to existing contracts, the contracting officer may include an option clause (see [FAR] 17.208(f)) in solicitations and contracts which will enable the Government to require continued performance of any services within the limits and at the rates specified in the contract." 553 F.3d at 1380.
- 56/ 553 F.3d at 1381.
- 57/ 553 F.3d at 1381.
- 58/ Alliant Techsystems, Inc. v. United States, 178 F.3d 1260, 1275 (Fed. Cir. 1999), 41 GC ¶ 308 ("[A]n attempt to exercise an option outside its terms does not constitute a valid exercise of the option."); Griffin Servs., Inc., ASBCA No. 52280 et al., 02-2 BCA ¶ 31,943, at 157,803 ("The Government's exercise of an option must be unconditional and done in strict accordance with its terms. Any attempt by the Government offeree to alter the conditions of the option will render the exercise of it ineffective."); Contel Page Servs. Inc., ASBCA No. 32100, 87-1 BCA ¶ 19,540, at 98,734 (an option must be unconditionally accepted and any attempt to alter the option terms will render exercise of the option ineffective); Holly Corp., ASBCA No. 24975, 83-1 BCA ¶ 16,327, at 81,164 ("the notice by which the power of an option holder is exercised must be unconditional and in exact accord with the terms of the option" (citing Corbin on Contracts § 264 (1963))).

- 59/ Civic Plaza Nat'l Bank v. First Nat'l Bank in Dallas, 401 F.2d 193, 197 (8th Cir. 1968) (quoting Vratis v. Baxter, 315 S.W.2d 331, 337 (Tex. Civ. App. 1958)).
- 60/ Contel Page Servs. Inc., ASBCA No. 32100, 87-1 BCA ¶ 19,540, at 98,734; Chem. Tech., Inc., ASBCA No. 21863, 80-2 BCA ¶ 14,728 (the CO's attempted exercise of a three-month option when the contract called for a six-month option was invalid); Holly Corp., ASBCA No. 24975, 83-1 BCA ¶ 16,327; see also 4737 Conner Co., L.L.C. v. United States, 65 Fed. Appx. 274 (Fed. Cir. 2003) (the Government's exercise of an option that included a condition previously removed from the contract was ineffective and the contractor was not entitled to a claim for the Government's failure to perform under the improperly exercised option).
- 61/ 4737 Conner Co., L.L.C., 65 Fed. Appx. at 276-77.
- 62/ Chem. Tech., Inc., ASBCA No. 21863, 80-2 BCA ¶ 14,728, at 72,641.
- 63/ Holly Corp., ASBCA No. 24975, 83-1 BCA ¶ 16,327 (holding that the Government's attempted exercise of an option stating that funds were available when in fact such funds were not available rendered the option exercise ineffective).
- 64/ Contel Page Servs. Inc., ASBCA No. 32100, 87-1 BCA ¶ 19,540, at 98,736.
- 65/ Contel Page Servs. Inc., ASBCA No. 32100, 87-1 BCA ¶ 19,540, at 98,736.
- 66/ Contel Page Servs. Inc., ASBCA No. 32100, 87-1 BCA ¶ 19,540, at 98,736.
- 67/ Contel Page Servs. Inc., ASBCA No. 32100, 87-1 BCA ¶ 19,540, at 98,736; see also Lockheed Elecs. Co., ASBCA No. 16667, 72-1 BCA ¶ 9,442; United Foods Servs., Inc., ASBCA No. 43711, 93-1 BCA ¶ 25,462 (language in an option exercise stating that the option is subject to availability of funds when that clause is included in the contract does not alter the option exercise by adding an additional term; it merely reminds the contractor that the option year is subject to the availability of funds clause in the contract).
- 68/ Lear Siegler Inc., ASBCA No. 30224, 86-3 BCA ¶ 19,155.
- 69/ Lear Siegler Inc., ASBCA No. 30224, 86-3 BCA ¶ 19,155, at 96,795 ("by unilaterally inserting the Availability of Funds clause in exercising its option, the Government unilaterally changed the terms of [the option]").
- 70/ Contel Page Servs. Inc., ASBCA No. 32100, 87-1 BCA ¶ 19,540, at 98,736 (distinguishing Lear Siegler Inc., ASBCA No. 30224, 86-3 BCA ¶ 19,155); see also J.E.T.S., Inc., ASBCA No. 26135, 82-2 BCA ¶ 15,986; Varo, Inc., ASBCA No. 47945, 96-1 BCA ¶ 28,161, 38 GC ¶ 571.
- 71/ Grumman Technical Servs., Inc., ASBCA No. 46040, 95-2 BCA ¶ 27,918, 37 GC ¶ 529; see also Motorola, Inc., ASBCA No. 39782, 93-3 BCA ¶ 26,081; C.M.P. Corp., ASBCA No. 36664, 89-1 BCA ¶ 21,317.
- 72/ Grumman Technical Servs., Inc., ASBCA No. 46040, 95-2 BCA ¶ 27,918, 37 GC ¶ 529.
- 73/ Grumman Technical Servs., Inc., ASBCA No. 46040, 95-2 BCA ¶ 27,918, at 139,317, 37 GC ¶ 529.
- 74/ Int'l Transducer Corp. v. United States, 30 Fed. Cl. 522 (1994) (Government properly exercised a portion of the specified quantity identified in an option clause where the clause allowed the Government to exercise "all or part" of the quantity specified); Raven Indus., Inc., Comp. Gen. Dec. B-185052, 76-1 CPD ¶ 90 (clause permitting option "up to" 100% enables Government to order partial quantity).
- 75/ Int'l Transducer Corp., 30 Fed. Cl. 522 (1994).
- 76/ 30 Fed. Cl. at 525.
- 77/ 30 Fed. Cl. at 526.
- 78/ 30 Fed. Cl. at 531.
- 79/ General Dynamics Corp., ASBCA No. 20882, 77-1 BCA ¶ 12,504.
- 80/ General Dynamics Corp., ASBCA No. 20882, 77-1 BCA ¶ 12,504, at 60,620.
- 81/ General Dynamics Corp., ASBCA No. 20882, 77-1 BCA ¶ 12,504, at 60,620.

- 82/ General Dynamics Corp., ASBCA No. 20882, 77-1 BCA ¶ 12,504, at 60,621.
- 83/ General Dynamics Corp., ASBCA No. 20882, 77-1 BCA ¶ 12,504, at 60,621.
- 84/ General Dynamics Corp., ASBCA No. 20882, 77-1 BCA ¶ 12,504, at 60,621.
- 85/ General Dynamics Corp., ASBCA No. 20882, 77-1 BCA ¶ 12,504, at 60,621.
- 86/ General Dynamics Corp., ASBCA No. 20882, 77-1 BCA ¶ 12,504, at 60,621.
- 87/ General Dynamics Corp., ASBCA No. 20882, 77-1 BCA ¶ 12,504, at 60,622; see also Holly Corp., ASBCA No. 24975, 83-1 BCA ¶ 16,327, at 81,164.
- 88/ General Dynamics Corp., ASBCA No. 20882, 77-1 BCA ¶ 12,504, at 60,622.
- 89/ General Dynamics Corp., ASBCA No. 20882, 77-1 BCA ¶ 12,504, at 60,622 (citing *Dynamics Corp. of Am. v. United States*, 182 Ct. Cl. 62, 76 (1968)).
- 90/ Ampex Corp., GSBCA No. 5913, 82-1 BCA ¶ 15,738, recons. denied, 82-2 BCA ¶ 15,858.
- 91/ Ampex Corp., GSBCA No. 5913, 82-1 BCA ¶ 15,738, at 77,860–61, recons. denied, 82-2 BCA ¶ 15,858.
- 92/ Ampex Corp., GSBCA No. 5913, 82-1 BCA ¶ 15,738, at 77,860–61, recons. denied, 82-2 BCA ¶ 15,858.
- 93/ BMY-Combat Systems, ASBCA No. 39495, 95-2 BCA ¶ 27,809; see also *Int'l Transducer Corp. v. United States*, 30 Fed. Cl. 522 (1994) (the court interpreted an option for "a part of" any line item to include an option to order parts of subline items finding that this was a patent ambiguity for which the contractor should have sought clarification).
- 94/ BMY-Combat Systems, ASBCA No. 39495, 95-2 BCA ¶ 27,809.
- 95/ BMY-Combat Systems, ASBCA No. 39495, 95-2 BCA ¶ 27,809, at 138,663–64.
- 96/ See *Technical Servs. Corp.*, ASBCA No. 36505 et al., 93-1 BCA ¶ 25,310, at 126,095–96 (option exercise was proper where a letter stated that "the Government shall exercise the second option year" and contained an incorrect line item number and an incorrect initial date for the option work); *Mills Mfg. Corp.*, ASBCA No. 10416, 66-1 BCA ¶ 5,450 (option exercise was proper where a telegram stated that "the Government proposes to exercise the option").
- 97/ *Technical Servs. Corp.*, ASBCA No. 36505 et al., 93-1 BCA ¶ 25,310, at 126,095–96.
- 98/ *TECOM, Inc.*, IBCA No. 2970 A-1, 95-2 BCA ¶ 27,607, 37 GC ¶ 316; see also *Am. Contract Servs., Inc.*, ASBCA No. 46788, 94-2 BCA ¶ 26,855, 37 GC ¶ 316 (the board held that "within 15 days" inserted in the "Option To Extend the Term of the Contract" clause in FAR 52.217-9 meant within 15 days of the expiration of the contract, not within 15 days of contract award).
- 99/ *TECOM, Inc.*, IBCA No. 2970 A-1, 95-2 BCA ¶ 27,607, 37 GC ¶ 316.
- 100/ *TECOM, Inc.*, IBCA No. 2970 A-1, 95-2 BCA ¶ 27,607, at 137,595, 37 GC ¶ 316.
- 101/ *Int'l Tel. & Tel. v. United States*, 197 Ct. Cl. 11, 453 F.2d 1283 (1972) (exercise of right to purchase quantities in a subsequent program year under multiyear procurement where the court decided the case using the legal principles applicable to options); *Maintenance, Inc., Comp. Gen. Dec. B-215619.3*, 84-2 CPD ¶ 263 (oral advice that an option will be exercised is not binding on the Government). But see *American Mach. & Foundry Co.*, ASBCA No. 8862, 65-1 BCA ¶ 4,654 (Government held bound to oral agreement extending the date on which the option could be exercised).
- 102/ *Diversified Marine Tech, Inc.*, DOTBCA No. 2455, 93-2 BCA ¶ 25,720.
- 103/ *Diversified Marine Tech, Inc.*, DOTBCA No. 2455, 93-2 BCA ¶ 25,720, at 127,991.
- 104/ *Diversified Marine Tech, Inc.*, DOTBCA No. 2455, 93-2 BCA ¶ 25,720, at 127,991.
- 105/ *Diversified Marine Tech, Inc.*, DOTBCA No. 2455, 93-2 BCA ¶ 25,720, at 127,991.

- 106/ General Dynamics Corp., ASBCA No. 20882, 77-1 BCA ¶ 12,504; see also Contel Page Servs. Inc., ASBCA No. 32100, 87-1 BCA ¶ 19,540, at 98,735 (CO's signature on a cover letter expressing intent to exercise the option was valid); cf. TECOM, Inc., IBCA No. 2970 A-1, 95-2 BCA ¶ 27,607, at 137,593, 37 GC ¶ 316 (unsigned, undated modification marked "draft" was an ineffective attempt to exercise the option).
- 107/ Contel Page Servs. Inc., ASBCA No. 32100, 87-1 BCA ¶ 19,540, at 98,735.
- 108/ Contel Page Servs. Inc., ASBCA No. 32100, 87-1 BCA ¶ 19,540, at 98,735; see also Technical Servs. Corp., ASBCA No. 36505 et al., 93-1 BCA ¶ 25,310, at 126,095–96 (a letter provided by the CO to the contractor within the time required by the option clause was a valid exercise of the option despite the typographical errors in the letter because the Government's intent to exercise the option was clear from the letter; there was no varying of terms despite the incorrect start date listed because the option letter read together with the contract made clear that the actual start date was that identified for the option period in the contract); United Foods Servs., Inc., ASBCA No. 43711, 93-1 BCA ¶ 25,462, at 126,819 (a letter from the CO to the contractor during the notice period required by the option cured a timeliness deficiency alleged by the contractor where the Government had exercised the option 31 days prior to contract expiration instead of within 30 days as required by the contract).
- 109/ Jim Phillips Contracting, Inc., ICBA No. 2000 et al., 04-1 BCA ¶ 32,416; General Dynamics Corp., ASBCA No. 20882, 77-1 BCA ¶ 12,504, at 60,622.
- 110/ Jim Phillips Contracting, Inc., ICBA No. 2000 et al., 04-1 BCA ¶ 32,416, at 160,461.
- 111/ Jim Phillips Contracting, Inc., ICBA No. 2000 et al., 04-1 BCA ¶ 32,416, at 160,461.
- 112/ Jim Phillips Contracting, Inc., ICBA No. 2000 et al., 04-1 BCA ¶ 32,416, at 160,462.
- 113/ Jim Phillips Contracting, Inc., ICBA No. 2000 et al., 04-1 BCA ¶ 32,416, at 160,462.
- 114/ Jim Phillips Contracting, Inc., ICBA No. 2000 et al., 04-1 BCA ¶ 32,416, at 160,462.
- 115/ Jim Phillips Contracting, Inc., ICBA No. 2000 et al., 04-1 BCA ¶ 32,416, at 160,462.
- 116/ Jim Phillips Contracting, Inc., ICBA No. 2000 et al., 04-1 BCA ¶ 32,416, at 160,462.
- 117/ Jim Phillips Contracting, Inc., ICBA No. 2000 et al., 04-1 BCA ¶ 32,416, at 160,462.
- 118/ Jim Phillips Contracting, Inc., ICBA No. 2000 et al., 04-1 BCA ¶ 32,416, at 160,468.
- 119/ Cessna Aircraft Co., ASBCA No. 43196, 96-1 BCA ¶ 27,966.
- 120/ Cessna Aircraft Co., ASBCA No. 43196, 96-1 BCA ¶ 27,966, at 139,695–97.
- 121/ Cessna Aircraft Co., ASBCA No. 43196, 96-1 BCA ¶ 27,966, at 139,695–97.
- 122/ Cessna Aircraft Co., ASBCA No. 43196, 96-1 BCA ¶ 27, at 139,695–97.
- 123/ Cessna Aircraft Co., ASBCA No. 43196, 96-1 BCA ¶ 27,966, at 139,697 ("We reject the notion that an optioner...can choose to frustrate an otherwise successful exercise of an option by avoiding receipt of the option modification, or, as in this case, choosing not to be physically in its offices to receive it...").
- 124/ Cessna Aircraft Co., ASBCA No. 43196, 96-1 BCA ¶ 27,966, at 139,697–98.
- 125/ See *Sword & Shield Enter. Sec., Inc. v. Gen. Servs. Admin.*, CBCA No. 2118, 12-1 BCA ¶ 34,922 (the Government's decision not to exercise an option is within its discretion and will not be disturbed absent a showing of bad faith or that the decision was so arbitrary or capricious as to constitute an abuse of discretion); *U.S. Hotel Sourcing, LLC, Comp. Gen. Dec. B-406726*, 2012 CPD ¶ 232 (GAO will not entertain a protest that the CO refused to exercise an option instead of conducting a new competition as that decision is within the CO's discretion).
- 126/ *Sword & Shield Enter. Sec., Inc. v. Gen. Servs. Admin.*, CBCA No. 2118, 12-1 BCA ¶ 34,922.

- 127/ *Sword & Shield Enter. Sec., Inc. v. Gen. Servs. Admin.*, CBCA No. 2118, 12-1 BCA ¶ 34,922.
- 128/ *Holly Corp.*, ASBCA No. 24975, 83-1 BCA ¶ 16,327, at 81,164 (citing *Williston on Contracts* § 61D (3d ed., 1957)).
- 129/ *Holly Corp.*, ASBCA No. 24975, 83-1 BCA ¶ 16,327, at 81,164 (citing *Williston on Contracts* § 61D (3d ed., 1957)).
- 130/ *USD Techs., Inc.*, ASBCA No. 31305, 87-2 BCA ¶ 19,680, at 99,618–20 (contractor estopped from claiming that it did not receive adequate notice of option exercise where it continued performance and then later signed a bilateral modification correcting the deficiency).
- 131/ *United Foods Servs., Inc.*, ASBCA No. 43711, 93-1 BCA ¶ 25,462.
- 132/ *General Dynamics Corp.*, ASBCA No. 20882, 77-1 BCA ¶ 12,504 at 60,622–23.
- 133/ *Chem. Tech., Inc.*, ASBCA No. 21863, 80-2 BCA ¶ 14,728, at 72,641–43.
- 134/ *Chem. Tech., Inc.*, ASBCA No. 21863, 80-2 BCA ¶ 14,728 at 72,641–43.
- 135/ *E. Walters & Co. v. United States*, 576 F.2d 362 (Ct. Cl. 1978).
- 136/ *E. Walters & Co. v. United States*, 576 F.2d 362 (Ct. Cl. 1978) (where the contractor performed the contract in silence for six months after the Government's exercise of an otherwise ineffective option, its silence and performance without protest after learning of the improper option exercise had waived its claim for a price adjustment and it was thereby estopped.).
- 137/ *Star Contracting Co.*, ASBCA No. 30501, 89-2 BCA ¶ 21,587.
- 138/ *Star Contracting Co.*, ASBCA No. 30501, 89-2 BCA ¶ 21,587 (Government's termination for default and associated claim for procurement costs was denied where the had contract expired due to the CO's ineffective attempt to exercise an option); see also *Jim Phillips Contracting, Inc.*, ICBA No. 2000 et al., 04-1 BCA ¶ 32,416 (the Government could not terminate the contract for convenience after it had expired by its own terms).
- 139/ *Star Contracting Co.*, ASBCA No. 30501, 89-2 BCA ¶ 21,587, at 108,700 (citing *Holly Corp.*, ASBCA No. 24975, 83-1 BCA ¶ 16,327).
- 140/ *Technical Servs. Corp.*, ASBCA No. 36505 et al., 93-1 BCA ¶ 25,310 (the ASBCA upheld a termination for default after finding that the option to extend the term of the contract was properly exercised).
- 141/ *Technical Servs. Corp.*, ASBCA No. 36505 et al., 93-1 BCA ¶ 25,310.
- 142/ *Alliant Techsystems, Inc. v. United States*, 178 F.3d 1260 (Fed. Cir. 1999), 41 GC ¶ 308.
- 143/ 178 F.3d at 1263.
- 144/ 178 F.3d at 1263
- 145/ 178 F.3d at 1264. Exercise of the option was tied to the date on which the contractor had performed 85% of the contract requirements. The contractor argued that this date was set in the original contract. However, a modification to the contract changed the date that this 85% requirement was met. The court ultimately agreed with the Government that the option date was extended by the modification that changed the date on which 85% of the contract requirements would be complete. 178 F.3d at 1272–73. But see *Damascus Hosiery Mills, Inc.*, ASBCA No. 18776, 74-2 BCA ¶ 10,961; *Int'l Harvester Co.*, Comp. Gen. Dec. B-176386, 1972 WL 6208 (Oct. 24, 1972), (contractor allowed to recover for untimely exercise of the option where a modification of the delivery schedule was the direct result of Government-caused delay).
- 146/ *Alliant Techsystems, Inc.*, 178 F.3d at 1264.
- 147/ 178 F.3d at 1264.
- 148/ 178 F.3d at 1264.
- 149/ 178 F.3d. at 1272.
- 150/ 178 F.3d at 1272–73.
- 151/ 178 F.3d at 1274.
- 152/ 178 F.3d at 1275.
- 153/ 178 F.3d at 1276.